



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

KATE GOERLITZ,)
)
 Appellant,)
)
 v.) WD70620
)
 CITY OF MARYVILLE,) Opinion Filed: December 8, 2009
)
 Respondent.)

**APPEAL FROM THE CIRCUIT COURT OF GENTRY COUNTY, MISSOURI
The Honorable James B. Funk, Judge**

Before Division Two: Joseph M. Ellis, Presiding Judge, Victor C. Howard, Judge
and James E. Welsh, Judge

Kate Goerlitz appeals from the Circuit Court of Gentry County's entry of summary judgment in favor of the City of Maryville in Ms. Goerlitz's action for damages and injunctive relief stemming from the City's operation of a firing range near her home. For the following reasons, the judgment is affirmed.

Ms. Goerlitz lives in a home located in an unincorporated portion of Nodaway County, Missouri. The City owns and operates a gun range on an adjacent piece of property. The City's property is located within the boundaries of Polk Township.

On November 13, 2007, Ms. Goerlitz filed a petition in the Circuit Court of Gentry County alleging that the City was negligent in its operation of the gun range and that the gun range was a nuisance. Ms. Goerlitz asked the court to award damages and to

enter an injunction prohibiting the City from operating a gun range on the property. The City filed a timely answer to the petition.

A short time later, the City filed a motion for summary judgment in which it claimed that the uncontroverted facts established that Ms. Goerlitz was precluded from recovering against the City based upon sovereign immunity and the provisions of § 537.294 prohibiting certain actions against gun ranges. Ms. Goerlitz filed a timely response. The circuit court eventually entered its order granting summary judgment to the City. Ms. Goerlitz brings three points on appeal.

Because the trial court makes its decision to grant summary judgment based upon the record submitted and the law, this Court need not defer to the trial court's determination and reviews the grant of summary judgment *de novo*. **Crow v. Kansas City Power & Light Co.**, 174 S.W.3d 523, 533 (Mo. App. W.D. 2005). In so doing, we apply the same criteria as the trial court in determining whether summary judgment was properly entered. **Bauer v. Farmers Ins. Co.**, 270 S.W.3d 491, 494 (Mo. App. W.D. 2008). Summary judgment is only proper if the moving party establishes that there is no genuine issue as to the material facts and that the movant is entitled to judgment as a matter of law. *Id.* Where a defending party has filed the motion, it may establish a right to summary judgment by demonstrating: (1) facts negating any one of the elements of the plaintiff's case; (2) that the plaintiff, after an adequate period for discovery, has not been able and will not be able to produce sufficient evidence to allow the trier of fact to find the existence of any one of the elements of the plaintiff's case; or (3) that there is no genuine dispute as to the existence of the facts necessary to support a properly pleaded

affirmative defense. ***Division Cavalry Brigade v. St. Louis County***, 269 S.W.3d 512, 516 (Mo. App. E.D. 2008). In determining whether the defendant has met this burden:

[t]he record below is reviewed in the light most favorable to the party against whom summary judgment was entered, and that party is entitled to the benefit of all reasonable inferences from the record. However, facts contained in affidavits or otherwise in support of the party's motion are accepted as true unless contradicted by the non-moving party's response to the summary judgment motion.

Hammack v. Coffelt Land Title, Inc., 284 S.W.3d 175, 177-78 (Mo. App. W.D. 2009) (internal quotations and citations omitted).

Where, as here, the circuit court does not specify its rationale for granting a motion for summary judgment, the court is presumed to have based its decision on the grounds specified in the motion. ***Central Mo. Elec. Co-op v. Balke***, 119 S.W.3d 627, 635 (Mo. App. W.D. 2003). In its motion for summary judgment, the City argued that Ms. Goerlitz's claims were barred by § 537.294¹ and by sovereign immunity as provided for in § 537.600. Ms. Goerlitz's points on appeal challenge those theories for granting summary judgment.

In her first point, Ms. Goerlitz contends that her pleadings and evidence that bullets from the firing range would ricochet and fly over and/or land on her property prevents either § 537.294 or sovereign immunity from applying to bar her claim for injunctive relief. Section 537.294.2 provides:

All owners and authorized users of firearm ranges shall be immune from any criminal or civil liability arising out of or as a consequence of noise or sound emission resulting from the use of any such firearm range. Owners and users of such firearm ranges shall not be subject to any civil

¹ All statutory references are to RSMo Cum. Supp. 2008 unless otherwise noted.

action in tort or subject to any action for public or private nuisance or trespass and no court in this state shall enjoin the use or operation of such firearm ranges on the basis of noise or sound emission resulting from the use of any such firearm range. ***Any actions by a court in this state to enjoin the use or operation of such firearm ranges and any damages awarded or imposed by a court, or assessed by a jury, in this state against any owner or user of such firearm ranges for nuisance or trespass are null and void.***

(Emphasis added.) Section 537.294.4 goes on to state: "Notwithstanding any other provision of law to the contrary, nothing in this section shall be construed to limit civil liability for compensatory damage arising from physical injury to another human, physical injury to tangible personal property, or physical injury to fixtures or structures placed on real property."

Ms. Goerlitz's claim for injunctive relief contains averments about noise emissions, nuisance, and danger from bullets invading the airspace of her property. Clearly, as Ms. Goerlitz implicitly acknowledges, any argument based upon noise or general nuisance is specifically and unequivocally barred by § 537.294.2. Ms. Goerlitz argues, however, that there is a genuine issue of fact over whether bullets are ricocheting and flying over her property and that such a claim for relief is not barred by the statute.

Ms. Goerlitz's claim, however, sounds in trespass. Trespass is the unauthorized entry upon the land of another by a person or an object as a result of a person's actions, regardless of the amount of force used or the amount of damage done. ***Rychnovsky v. Cole***, 119 S.W.3d 204, 211 (Mo. App. W.D. 2003). Ms. Goerlitz is claiming that objects

from the City's property are coming onto her property without authorization, and therefore, she is asserting a trespass claim.

As previously noted, Section 537.294 divests the courts of this state of any authority to enter an injunction or award damages against the owner of a firearm range based upon allegations of trespass. The statute expressly declares that "**[a]ny actions by a court . . . to enjoin the use or operation of such firearm ranges and any damages awarded or imposed by a court, . . . against any owner or user of such firearm ranges for nuisance or trespass are null and void.**"² § 537.294.2. There is no ambiguity in the statutory language. "If the intent of the legislature is clear and unambiguous, by giving the language used in the statute its plain and ordinary meaning, then we are bound by that intent and cannot resort to any statutory construction in interpreting the statute." **Scott v. Blue Springs Ford Sales, Inc.**, 215 S.W.3d 145, 166 (Mo. App. W.D. 2006).

As § 537.294 currently is written, Ms. Goerlitz, or any other citizen of this state for that matter, has virtually no protection from, nor remedies against, the owners or users of firearm ranges in this state unless and until she or her property is actually struck by a bullet or otherwise suffers physical injury. Ms. Goerlitz makes no claim that she has been physically injured or that her property has suffered physical injury by ricocheting bullets. Her trespass claim is, therefore, barred by the statute. While it will provide

² The parties present no arguments regarding whether § 537.294 infringes upon article I, section 14 of the Missouri Constitution (relating to open courts and "certain remedy afforded for every injury") or invades the judicial function so as to implicate the separation of powers provisions of article II, section 1 or article V, section 1.

scant comfort to Ms. Goerlitz, in light of her complaint here that bullets are indeed ricocheting onto her property, it would certainly behoove the City to make improvements to the shooting range, if necessary, to insure that neither she nor anyone else is harmed because the City has certainly been placed on notice of a potentially dangerous condition. Point denied.

In her second point, Ms. Goerlitz argues that sovereign immunity does not serve to bar her request for injunctive relief because such relief is an equitable remedy. As noted *supra*, the trial court could properly have held that Ms. Goerlitz's claim for injunctive relief was barred by § 537.294. We need not consider whether the judgment could have been affirmed on this alternative basis. Point denied.

In her final point, Ms. Goerlitz asserts that the trial court erroneously granted summary judgment on her tort claims because there is a genuine issue of material fact regarding whether the City waived sovereign immunity by purchasing liability insurance. Even were Ms. Goerlitz's tort claims not barred by § 537.294, there is no genuine issue as to material fact related to the City's insurance.

"Section 537.600 affords public entities sovereign immunity from tort actions." ***Gregg v. City of Kansas City***, 272 S.W.3d 353, 358 (Mo. App. W.D. 2008). "Liability of a political subdivision for torts is the exception to the general rule of sovereign immunity, hence it is incumbent on a party seeking to establish such liability to demonstrate an exception exists." ***Langley v. Curators of Univ. of Mo.***, 73 S.W.3d 808, 811 (Mo. App. W.D. 2002) (internal quotation omitted).

Ms. Goerlitz attempts to rely on the exception contained in § 537.610 related to insurance. "Pursuant to section 537.610, when a public entity purchases liability insurance for tort claims, sovereign immunity is waived to the extent of and for the specific purposes of the insurance purchased." **Gregg**, 272 S.W.3d at 358 (internal quotation omitted). However, "[a] public entity does not waive its sovereign immunity by maintaining an insurance policy where that policy includes a provision stating that the policy is not meant to constitute a waiver of sovereign immunity." **Langley**, 73 S.W.3d at 811.

The City specifically pleaded that, while it maintained an insurance policy, the policy expressly provided that it was not to serve as a waiver of the City's sovereign immunity. The City attached a copy of the relevant policy language to its pleadings. Ms. Goerlitz has not contradicted or otherwise challenged the validity of the language contained in the policy. Since it is uncontroverted that the City's insurance policy contained language preserving sovereign immunity, Ms. Goerlitz failed to establish a waiver of sovereign immunity on that basis. Point denied.

The judgment is affirmed.

Joseph M. Ellis, Judge

All concur.