Franklin County Legal Journal

Vol. 25, No. 33, pp. 82-88

Cordell v. Marshall

AMY CORDELL, Plaintiff, v. JAMES MARSHALL and VICKIE MARSHALL, Defendants
Court of Common Pleas of the 39th Judicial District of Pennsylvania,
Franklin County Branch
Civil Action No. 2006-3124

Requirements of Pleading; Scandalous or Impertinent Matter; Specificity; Demurrer; Strict Liability for Abnormally Dangerous Domestic Animals

1. A preliminary objection to the inclusion of scandalous or impertinent matter falls under Pa. R.C.P. 1028(a)(2).

2. Defendants' alleged insurance fraud is scandalous and immaterial to Plaintiff's claims of strict liability and negligence for injuries caused by a horse kick.

3. Pa. R.C.P. 1028(a)(3) governs a preliminary objection for insufficient specificity in a pleading and requires pleading those facts necessary to formulate the issues.

4. In analyzing a specificity objection, the Court must consider the challenged paragraph in context with all other allegations in the complaint.

5. A demurrer to a cause of action for strict liability comes under Pa. R.C.P. 1028(a)(4).

6. A demurrer challenges the legal theory upon which recovery is based as well as the sufficiency of the facts pled in the complaint.

7. Pennsylvania recognizes a cause of action for strict liability for harm done by abnormally dangerous domestic animals, a theory that parallels § 509 Restatement (Second) of Torts.

Appearances:

Mark F. Bayley, Esq., *Counsel for Plaintiff*

Shawn D. Meyers, Esq., *Counsel for Defendant*

OPINION

Walsh, J., October 24, 2007

Facts

The Court must decide the Preliminary Objections of defendants James and Vickie Marshall. The Court has reviewed the Marshalls' Preliminary Objections, and their Brief in Support, the Answer and Brief in Opposition of plaintiff Amy Cordell, the record, the arguments, and the law. The matter is ripe for decision.

Cordell's complaint alleges the following facts. On July 10, 2005, the Marshalls invited Cordell and others to ride horses on their property as part of a trail ride. The ride began without incident, and Cordell rode her

own horse. Defendant James Marshall also participated in the trail ride, and he rode a horse he owned named "Shorty." During the trail ride, Mr. Marshall backed Shorty toward Cordell in a manner that trapped her and her horse in a stationary position near a fencerow. While Cordell was held in this manner, Shorty kicked and narrowly missed her. Cordell shouted to Mr. Marshall that she was in danger, but Marshall failed to take action. About thirty seconds after the first kick, Shorty kicked again striking Cordell on her right shin and injuring her.

On October 13, 2006, Cordell sued the Marshalls by serving them with a writ of summons. Subsequently, Cordell filed her complaint on April 18, 2007, and, on May 1, 2007, the Marshalls filed the following three preliminary objections to the complaint. First, the plaintiff's complaint contained scandalous or impertinent information that should be stricken pursuant to Pa.R.C.P. 1028(a)(2). Second, under Pa.R.C.P. 1028(a)(3), the plaintiff's complaint should be stricken for failing to plead facts with sufficient specificity to show that the defendants' horse exhibited abnormally dangerous or vicious behavior that was known or should have been known to the defendant. Third, the plaintiff's complaint should be stricken for failing to state a cause of action for strict liability. This objection takes the form of a demurrer, and Pa.R.C.P. 1028(a)(4) covers it. The Court heard oral arguments on October 4, 2007 and now decides each objection in turn.

Discussion

I. Scandalous or Impertinent Matter

A preliminary objection that a pleading includes "scandalous or impertinent matter" comes under Pa.R.C.P. 1028(a)(2). A court may strike such material from the pleading that contains it. Common Cause of Pennsylvania v. Commonwealth, 710 A.2d 108, 114-115 (Pa. Commw. Ct. 1998). Allegations are scandalous or impertinent when they are "immaterial and inappropriate to the proof of the cause of action." Id. at 115. So, the court must analyze the objection with an eye towards the plaintiff's cause of action and his or her method of proving it.

Here, Cordell advances claims of negligence and strict liability. Both are founded upon Mr. Marshall's actions or the behavior of his horse on the day in question. Nonetheless, in paragraphs twenty-two and twenty-three of her complaint, Cordell alleges that the Marshalls filed a false report to their insurance company, thereby delaying her treatment and increasing her injuries.[1] The Marshalls object to these averments of fraud.

Cordell asserts that the Marshalls' alleged insurance fraud is material for the proof of damages. She argues that when the Marshalls filed a false insurance claim, their insurer denied coverage. Since Cordell could not afford to pay for her own care and she had no ready access to the Marshalls' insurance funds, she could not receive timely medical care for her injuries. Thus, her condition deteriorated, and she incurred higher damages. However, the Court finds this reasoning to be sophistic.

To begin, any insurance fraud that may have occurred is immaterial to proof of damages, since proximate cause already holds the Marshalls responsible for all harm predictably flowing from either of the two claimed causes of action. Indeed, in this circumstance, the only legitimate purpose the Court can divine for Cordell's pleading the Marshalls' insurance fraud lies in her refuting any contributory negligence defense the Marshalls may raise to some of the damages Cordell claims. But, the plaintiff can perfect any defense she may need to contributory negligence merely by pleading that through no fault of her own she lacked the funds to afford medical treatment.

Thus, the Court concludes that the Marshalls' alleged insurance fraud is immaterial because pleading insurance fraud has no bearing on the proof of the measure of the plaintiff's damages or her potential culpability in failing to limit the harm. Moreover, allegations of insurance fraud are scandalous since such charges of dishonesty will necessarily blacken the character of the defendants. Under Pa.R.C.P. 1028(a)(2), allegations of insurance fraud are simply inappropriate and immaterial to the proof of her causes of action for negligence and strict liability or even any hypothetical defense to a charge of contributory negligence. Accordingly, the Court will grant the Marshalls' preliminary objection and strike paragraphs 22 and 23 from Cordell's complaint.

II. Insufficient Specificity

Also, under Pa.R.C.P.1028(a)(3), the Marshalls lodge a preliminary objection to paragraphs 10-14 of

Cordell's complaint.[2] The Marshalls argue that the paragraphs in question contain only legal conclusions and no substantiating facts. "Pennsylvania is a fact pleading jurisdiction." Sevin v. Kelshaw, 611 A.2d 1232, 1235 (Pa. Super. Ct. 1992). Accordingly, a complaint must "not only give the defendant notice of what the plaintiff's claim is and the grounds upon which it rests, but it must also formulate the issues by summarizing those facts essential to support the claim." Id. "In determining whether a particular paragraph in a complaint has been stated with the necessary specificity, such paragraph must be read in context with all other allegations in that complaint." Rachlin v. Edmison, 813 A.2d 862, 870 (Pa. Super. Ct. 2002).

Here, in paragraphs ten and eleven of her complaint, Cordell asserts that the Marshalls knew that Shorty had abnormally dangerous propensities and was prone to kicking. These are unsubstantiated legal conclusions when read in isolation. However, the law requires the Court to read them in the context of the entire complaint. The Court finds the barest factual support for these assertions present elsewhere in the complaint. Namely, paragraphs fifteen through nineteen allege that Shorty kicked at the plaintiff, and she shouted a warning to Mr. Marshall. But, then, thirty seconds later, Shorty kicked again and injured the plaintiff. These allegations demonstrate potential constructive knowledge on the part of the Marshalls but only as of the time of the first kick and the resultant warning. Therefore, the Court finds that these paragraphs have been pled with adequate specificity.

Conversely, in paragraphs twelve and thirteen of her complaint, plaintiff asserts bald conclusions lacking a factual basis anywhere else in her complaint. In these paragraphs, Cordell inserts a temporal element to the pleading and claims that, up to and including the time that the trail ride began, Shorty had exhibited dangerous behavior to the Marshalls. No factual basis has been shown for any such displays prior to the incident involving Shorty's first kick during the trail ride. Accordingly, the Court will sustain defendants' preliminary objection as to paragraphs twelve and thirteen of the plaintiff's complaint and permit the plaintiff to amend.

Paragraph fourteen mandates separate treatment by the Court, because it is part fact and part unsubstantiated conclusion.[3] The Court finds the phrase "during the trail ride, while Shorty displayed clear warning signs of vicious behavior" to be a conclusion without factual support anywhere else in the complaint. Accordingly, as to the offending phrase, defendants' preliminary objection will be sustained and plaintiff will be permitted twenty (20) days to amend by being more specific. The Court concludes that the remaining language of paragraph fourteen constitutes a sufficiently pled fact and will be left alone.[4]

III. Failure to State a Cause of Action for Strict Liability

Additionally, the Marshalls argue that, under Pa.R.C.P. 1028(a)(4), the Court should strike count two from the complaint for failure to state a claim for strict liability. This objection constitutes a demurrer, and is composed of two facets. First, the Marshalls urge that Pennsylvania law fails to recognize a cause of action for strict liability for abnormally dangerous domestic animals. Second, the Marshalls assert that Cordell has not pled the predicate facts to establish a prima facie case for strict liability. The Court deals with each contention in turn.

Pennsylvania does, in fact, recognize a cause of action in strict liability for harm done by abnormally dangerous domestic animals. Kinley v. Bierly, 876 A.2d 419 (Pa. Super.Ct. 2005) (citing Restatement (Second) of Torts §§ 509, 518). Kinley involved a horse that bit the plaintiff, and, although the plaintiff failed on her strict liability claim, the Superior Court specifically cited § 509 of the Restatement (Second) of Torts in concluding that an action for strict liability existed in Pennsylvania.[5] Id. Thus, under Kinley, Pennsylvania law tracks the Second Restatement of Torts and recognizes a cause of action for strict liability for harm done by abnormally dangerous domestic animals.

The Court now analyzes Cordell's complaint to determine if she has pled the predicate facts necessary to establish a prima facie cause of action for strict liability for harm done by abnormally dangerous domestic animals. As noted earlier, this objection takes the form of a demurrer and falls under Pa.R.C.P. 1028(a)(4). A demurrer may be upheld only if, on the facts averred, the law absolutely bars recovery. Werner v. Plater-Zyberk, 799 A.2d 776 (Pa. Super. Ct. 2002). When deciding a demurrer, the Court must accept as true all well pleaded facts and also all inferences reasonably derived from those facts. Hess v. Fox Rothschild, LLP, 925 A.2d 798, 805 (Pa.Super. Ct. 2007).

Under the Restatement Second of Torts § 509, a plaintiff must plead several elements to satisfy a prima facie strict liability claim. First, the defendant must possess a domestic animal. Second, the animal must have dangerous propensities abnormal to its class. Third, the defendant must know of or have reason to know of these propensities. Fourth, the animal's abnormally dangerous propensities of which the possessor knows or has reason to know must cause the harm.

Here, Amy Cordell has pled all of the required facts. First, she avers that Shorty is a horse, and the Court feels safe in noting that a horse constitutes a domestic animal. Second, Cordell alleges that Shorty kicked twice. The Second Restatement of Torts §509 indicates that a horse bite or kick is considered an abnormally dangerous propensity, and, thus, Cordell has pleaded that Shorty had an abnormally dangerous propensity. This satisfies the second element of Cordell's prima facie case.

The third element under § 509 requires more explanation. In paragraphs fourteen through nineteen, Cordell pleads that Shorty kicked at her and missed and she shouted a warning to Mr. Marshall concerning the danger that Shorty presented to her. Mr. Marshall was riding Shorty at this time, and about thirty seconds after Cordell's warning shout Shorty kicked again and injured the plaintiff. Since the Court is deciding a demurrer and all reasonable inferences must be resolved in favor of the plaintiff, the Court concludes that the first kick and the attendant warning constituted one incident and the second kick constituted another incident. This resolution demonstrates that Cordell has pled facts under which Mr. Marshall had reason to know of Shorty's abnormally dangerous propensity to kick prior to Shorty unleashing the kick that actually injured the plaintiff. Accordingly, the plaintiff has pleaded facts that support element three.

Fourth, Cordell must plead facts demonstrating that Shorty's abnormally dangerous propensity of which the Marshalls had reason to know caused her injuries. She has done so in paragraphs nineteen and twenty. In those passages, she alleges that Shorty kicked her in the shin breaking her tibia and injuring her leg. Kicking is Shorty's dangerous propensity of which Mr. Marshall had reason to know, and the plaintiff has satisfied the last element of her prima facie case for strict liability under § 509. Since Amy Cordell has pled a prima facie case for strict liability for harm caused by an abnormally dangerous domestic animal, the Court overrules the demurrer as it is clear that on the facts pled, the law does not absolutely bar recovery.

Conclusion

In conclusion, the Marshalls have raised three preliminary objections to the complaint of plaintiff, Amy Cordell. The first objection concerns allegations of insurance fraud on the part of the defendants. Since this fraud is in no way related to the proof of Cordell's negligence or strict liability claims and involves averments that will blacken the character of the defendants, the Court strikes these allegations from the complaint, under Pa.R.C.P. 1028(a)(2). The second objection argued that the pleadings in paragraphs ten through fourteen lacked specificity. Since paragraphs twelve and thirteen contain unsubstantiated conclusions that Shorty had displayed dangerous behavior to the Marshalls prior to the point where Shorty kicked at the plaintiff the first time, these passages are stricken for lacking specificity under Pa.R.C.P. 1028(a)(3). However, the Court finds that paragraphs ten and eleven have the requisite specificity to plead the Marshalls' knowledge following Shorty's initial kick on the trail ride. Also, the Court strikes only the phrase in paragraph fourteen that refers to any warning signs that Shorty may have exhibited during the trail ride. Lastly, under Pa.R.C.P. 1028(a)(4), the defendants demurred to Plaintiff's strict liability count. Since Pennsylvania law permits strict liability claims for abnormally dangerous domestic animals and Amy Cordell has pled the predicate facts, the Court denies the demurrer.

ORDER OF COURT

October 24, 2007, the Court having reviewed the Preliminary Objections of the Defendants, James and Vickie Marshall, the Brief in Support of the Objections, plaintiff Amy Cordell's Answer and Brief in Opposition, the record, the arguments, and the law, it is hereby ordered that Defendant's Preliminary Objections are granted in part and denied in part, as follows.

1. The Objection to Paragraphs 22 and 23 of the Plaintiff's Complaint as containing impertinent and scandalous matter is granted.

2. The Objection to Paragraphs 10 and 11 as lacking the required specificity is denied.

3. The Objection to Paragraphs 12 and 13 as lacking the required specificity is granted.

4. The Objection to Paragraph 14 as lacking the required specificity is granted, but only with respect to the phrase asserting that "during the trail ride, while Shorty displayed clear warning signs of vicious behavior."

5. The Demurrer to Count II of the Plaintiff's Complaint concerning the cause of action for strict liability is denied.

6. Plaintiff shall have twenty (20) days from the date of entry of this order to amend her complaint consistent with the foregoing opinion.

---

[1] "Defendants subsequently made a false report to their insurance carrier. . . ECM, claiming that Plaintiff was injured by tripping and falling on a concrete object elsewhere on their property." Paragraph 22. "Said false report resulted in ECM denying coverage for, among other things, Plaintiff's extensive medical needs and expenses." Paragraph 23.

[2] "Shorty was known by Defendants to be an abnormally dangerous and vicious horse." Paragraph 10. "Shorty was known by Defendants to be prone to kicking." Paragraph 11. "Shorty had displayed dangerous and vicious behavior to the Defendants prior to July 10, 2005." Paragraph 12. "Shorty displayed dangerous and vicious behavior before and as the trail ride commenced on July 10, 2005." Paragraph 13. "During the trail ride, while Shorty displayed clear warning signs of vicious behavior, Mr. Marshall backed Shorty toward the plaintiff and her horse in a manner that pinned Plaintiff in a stationary position between other riders and a fencerow." Paragraph 14.

[3] "During the trail ride, while Shorty displayed clear warning signs of vicious behavior, Mr. Marshall backed Shorty toward the Plaintiff and her horse in a manner that pinned Plaintiff in a stationary position between other riders and a fencerow." Paragraph 14.

[4] Paragraph 14 should now read as follows: "Mr. Marshall backed Shorty toward the Plaintiff and her horse in a manner that pinned Plaintiff in a stationary position between other riders and a fencerow."

[5] "A possessor of a domestic animal that he knows or has reason to know has dangerous propensities abnormal to its class, is subject to liability for harm done by the animal to another, although he has exercised the utmost care to prevent it from doing the harm. The liability is limited to harm that results from the abnormally dangerous propensity of which the possessor knows or has reason to know." Restatement (Second) of Torts § 509.