
ED 109422

In the Missouri Court of Appeals for the Eastern District

Christopher Zang, Appellant

v.

City of Saint Charles, Missouri, Respondent

**Appeal from the Circuit Court of Saint Charles County, Missouri
11th Judicial Circuit
The Honorable Daniel G. Pelikan**

APPELLANT'S REPLY BRIEF

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ARGUMENT

I. ALL OF APPELLANT'S CLAIMS WERE PROPERLY RAISED BEFORE THE TRIAL COURT AND PROPERLY PRESERVED FOR APPEAL.

Respondent argues in its Brief (hereinafter “RB”) that “Appellant’s claim that § 12.3 conflicts with § 537.600.1(1) and/or § 537.600.1(2) was not before the trial court and is improperly raised for the first time in Appellant’s brief.” (RB at p. 9). This is an incredible argument.

To determine whether an issue has been preserved for appeal, the Court must first ascertain what issue the appellant is raising before This Court. *State Farm Mut. Auto. Ins. Co. v. Esswein*, 43 S.W.3d 833, 839 (Mo. App. E.D. 2000).

In Plaintiff’s first amended petition, as to Count II, Plaintiff alleged “Defendants are subject to liability pursuant to RSMo Section 537.600 which waives sovereign or government immunity”. (LF 2 at ¶ 42).

In its Motion to Dismiss, which was the basis of the trial court’s order that was appealed to this Court, City of St. Charles argued:

8. For the reasons stated herein, both Counts I & II must be dismissed for failure to state a claim against the City of St. Charles, in that St. Charles is entitled to sovereign immunity, Plaintiff fails to allege any exception to such immunity, and even if Plaintiff stated were to state (sic) an exception, suit is barred because he failed to give proper notice to the City of his alleged injury.

(LF 9 at p. 2, ¶8). Additionally, in its Motion to Dismiss, Respondent cited to § 537.600.1(1) and § 537.600.1(2) when explaining the exceptions to sovereign immunity that it argued did not apply to Appellant’s claim. (LF 9 at p. 4, ¶18).

Likewise, in Plaintiff’s Response to Defendant City of St. Charles’ Motion to Dismiss, Plaintiff argued “City of St. Charles is not entitled to immunity for his claim pursuant to RSMo Section 537.600, which waives sovereign immunity...”. (LF 9 at ¶ 8). Also, while the oral argument on City of St. Charles’ Motion to Dismiss was not transcribed, the parties argued extensively about § 537.600.1.

Even if based only on the pleadings, it is clear that the parties understood that they were arguing whether Respondent was entitled to sovereign immunity. This was clearly the understanding of the trial judge too. In his Order and Judgment, Hon. Daniel Pelikan ruled that Respondent “enjoyed sovereign immunity.” (LF 16 at p. 1).

Equally before the Court was whether the notice provision of City of St. Charles’ Charter (§ 12.3) is inconsistent with the Missouri Constitution or limited or denied by statute. Specifically, whether § 12.3 was either “limited, denied or in conflict” with § 516.120 and/or § 82.210. In his Order and Judgment, Hon. Daniel Pelikan specifically ruled that “[t]he St. Charles City charter provision is not inconsistent or in conflict with state law.” (LF 16 at p. 2).

Accordingly, all of Appellant's claims were properly raised before the trial court and properly preserved for appeal.

Nonetheless, even if this Court does not believe that Plaintiff properly preserved the issue of whether § 12.3 conflicts with § 537.600.1(1), this Court should still review the trial court's ruling for "plain error."

Rule 84.13(c) gives appellate courts the discretion to review plain errors if the court finds "the manifest injustice or miscarriage of justice has resulted therefrom." *Taylor v. Francis*, WD83122 at *8 (Mo. App. W.D. 2021). While appellate courts rarely grant plain error review in civil cases, they will "if there are substantial grounds for believing that the trial court committed error that is evidence, obvious and clear and where the error resulted in manifest injustice or miscarriage of justice." *Id.*; citing *Mayes v. St. Luke's Hosp. of Kansas City*, 430 S.W.3d 260, 269 (Mo. banc 2014).

Here, even if this Court does not believe that Plaintiff properly preserved the issue of whether § 12.3 conflicts with § 537.600.1(1), this Court should still review the issue because the trial court committed obvious error and said error resulted in manifest injustice. First, § 12.3 is plainly in violation of obvious jurisprudence regarding sovereign immunity that dates back over four decades. Second, refusing to find § 12.3 in violation of § 537.600.1(1) would deprive his constitutional right to trial by jury. MO Const. art. I § 22(a). Third, moving forward, all claims against

City of St. Charles effectively have a 90-day statute of limitations in violation of § 516.120. See *Heater v. Burt*, 769 S.W.2d 127, 129-30 (Mo. 1989) (there is “no distinction” between a “notice-of-claim provision and a statute of limitation.”).

Accordingly, even if this Court does not believe that Plaintiff properly preserved the issue of whether § 12.3 conflicts with § 537.600.1(1), this Court should still review the trial court’s ruling for “plain error.”

Finally, Respondent argues that Appellant’s Statement of Facts was improper pursuant to Rule 84.04(c). The purpose of Rule 84.04(c) is to avoid wasting judicial resources by forcing the appellate court to search the briefs or record to determine of clarify the appellant’s assertions. *Wilson v. Carnahan*, 25 S.W.3d 664 (Mo. App. W.D. 2000).

Certainly, the purpose of Rule 84.04(c) is implicated less when a purely legal issue is decided on the pleadings like the case at bar.

Nonetheless, this Court is able to adequately “ascertain the gist” of Appellant’s arguments despite any shortcomings in his brief. Therefore, this Court should decide this case on its merits. See *Comp & Soft, Inc. v. At &T Corp.*, 252 S.W.3d 189, 194 (Mo. App. E.D. 2008) (“As a matter of policy, the court prefers to decide cases on their merits whenever possible” and will review an appeal “*ex gratia*” even if a brief is deficient.).

CONCLUSION

For the foregoing reasons, all issues for appeal were properly preserved and Appellant's brief complies with the requirements of Rule 84.04. Therefore, this Court should decide this case on its merits.

**Certificate of Compliance with Type-Volume Limit, Typeface Requirements,
and Type-Style Requirements**

The undersigned hereby certifies that this brief complies with the formatting and typeface requirements of Mo. Sup. Ct. R. 84.06 and Local Rule 360 because this document has been prepared in a proportionally spaced typeface using Microsoft Office Word 2010 in 14 point font, Times New Roman, and that it complies with the word limit set forth in these based on a word count under Microsoft Office Word 2010, including all footnotes, contains 1,186 words, which is less than the 7,750 word limit. The undersigned further certifies that he signed the original, in compliance with Mo. Sup. Ct. R. 55.03(a).

/s/ Andrew Martin

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing document was filed with the Court's electronic filing system, on July 9th, 2021, which will send notice pursuant to Mo. Sup. Ct. R. 103.08 to all parties of record.

/s/ Andrew Martin