
NO. A10-2143

State of Minnesota
In Supreme Court

Mitchell Sawh,
Respondent/Cross-Appellant,

v.

City of Lino Lakes,
Appellant/Cross-Respondent.

**REPLY BRIEF OF
RESPONDENT/CROSS-APPELLANT MITCHELL SAWH**

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I. INTRODUCTION

Brody the dog, the pet of the family of Mitchell Sawh, does not deserve to die. This Reply Brief addresses the Cross-Appeal of Sawh that the determination of the City of Lino Lakes that Brody is “dangerous” and the order for his destruction is unreasonable, arbitrary, capricious, and constitutes an error of law. The City made numerous mistakes of law in making the “dangerous” designation and sentencing him to death. These errors warrant reversal.

II. THE CITY’S “DANGEROUS DOG” DESIGNATION WAS UNREASONABLE, ARBITRARY, CAPRICIOUS, AND CONSTITUTES AN ERROR OF LAW

Brody sits on Doggie Death Row because, in a cascade of errors, he was deemed “potentially dangerous” without opportunity for a hearing. That designation was then relied upon to declare him “dangerous” after a second incident. After that sobriquet was imposed, another incident occurred that led to his being seized and destined for destruction — unless stopped by this Court.

The “dangerous” designation was based on the constitutionally-defective, “potentially dangerous” designation. The Police Chief told the City Council that the dog was conclusively deemed “potentially dangerous,” due to the April incident and the issue was not revisited. It formed the predicate for deciding that Brody be classified as “dangerous” because of the second incident, pursuant to Lino Lakes Ordinance section 503.15 (5), which allows an animal to be classified “dangerous” if it engages in a second incident after having been declared “potentially dangerous.” Appellant Add. 7.

As the Court of Appeals found, “the record shows that the city council did not review the potentially dangerous declaration but, rather, acted as though that declaration was not up for debate.” *Sawh v. City of Lino Lakes*, 800 N.W.2d 663, 669 (Minn. Ct. App. 2011), *review granted* (Minn. Oct. 18, 2011). Appellant Add. 27. As the Appellate Court further found, the City Attorney instructed the City Council at the November 8 hearing: “the first step is . . . to determine whether the dog is declared dangerous’ without mentioning the potentially dangerous declaration.” *Id*; *see also* Tr. 32.¹

The Police Chief also explained to the City Council that because the dog is “listed as potentially dangerous . . . it reached that first threshold.” *Sawh*, 800 N.W.2d at 669.

He added:

[I]n May when the first event happened, the dog was at that point listed as potentially dangerous. So it reached that first threshold. It’s not *the first bite* here that takes it to that dangerous level, so we’re onto that next bite already. *So that’s why it obtains this dangerous level at that point.*

Tr. 49. (emphasis added); *see also Sawh*, 800 N.W.2d at 669. Appellant Add. 27.

As the Appellate Court further noted: “The ensuing discussion at the hearing focused on whether to designate the dog as dangerous. Nothing in the record suggests that the city or relator approached the hearing on November 8 with an understanding that the potentially dangerous declaration was before the city for review or reconsideration.” *Sawh*, 800 N.W.2d at 669. Appellant Add. 27.

¹ “Appellant Add.” refers to the Addendum of Appellant/Cross-Respondent. “Tr. ___” is the larger bound transcript of the City Council Meetings of November 8 and November 22, 2010 and the City Council Work Sessions of November 22 and December 6, 2010. “Tr. ___ (1/4/11)” refers to the smaller bound Transcript of the City Council Meeting of January 4, 2011.

In short, the City Council, listening to the Police Chief and City Attorney, based its determination that Brody was “dangerous” on a two-step process: (1) that the first bite, when he escaped from the broken invisible fence, made him “potentially dangerous,” and (2) it was used to bootstrap the designation of “dangerous” after the incident with the woman who, speaking to herself while waving her arms violently, was bit while crossing the Sawh’s yard, to check on smoke from someone burning leaves in a neighboring yard.

Simply put, the dog would not have been deemed “dangerous” had it not been initially declared to be “potentially dangerous.” This was an error of law because it was done without affording Sawh a Due Process hearing. The lack of a hearing violated the Sawh’s Due Process rights. Due to this error of law, the “potentially dangerous” designation was arbitrary, capricious, and cannot stand.

Without the potentially dangerous designation, the subsequent “dangerous” designation falls like a house of cards. Sawh and his dog Brody were dealt a bad hand. The dog’s life would not be at stake today without the “dangerous dog” classification, which was based upon the flawed “potentially dangerous” determination. The dog should not have been seized and ordered destroyed, and it should be released now from Doggie Death Row.

The City’s argument that Brody could have been declared “dangerous” for the subsequent bites, rather than the prior “potentially dangerous” declaration, is unrealistic and untrue. The City did not make its “dangerous” determination based upon the second (or third) bite incident.

The record reflects, as the Appellate Court correctly determined, that the City Council considered the dog to be dangerous because it, *a fortiori*, had previously been determined to be “potentially dangerous,” albeit based on an error of law due to the lack of a Due Process hearing. The record plainly shows that the City Council relied upon the “potentially dangerous” designation as a bootstrap for its subsequent “dangerous” designation, and relied on the “dangerous” designation for the order to seize and destroy Brody.

The Police Chief, as noted above, told the City Council that because the October 15 incident was a second bite, “it obtains this dangerous level at that point.” Tr. 49. The City Attorney instructed likewise. Tr. 32. After the incident in November with the furniture deliveryman, the Police Chief, responding to questions of City Council members whether there was any other option, instructed the Council that there was no choice but to destroy Brody, because of the two prior alleged bites. Tr. 119. As he told the City Council members:

If you look under 503.16 number 4 under Subsequent Offenses. Under that part: If an animal has subsequently violated the provisions, that the animal must be seized by animal control, they can – the owner may request a hearing. If it has been found to violate the provisions for which the animal was seized, in this case, that would be the bite, the animal control officer shall order the animal destroyed in the proper, humane manner.

Tr. 119.

Even if Brody might have been deemed “dangerous” after the second incident under another provision of the Ordinance, that was not the basis for the City Council’s decision. What the Council might have, could have, or even should have done, does not

detract from what it **actually** did, which was use the “potentially dangerous” designation as the predicate for the subsequent “dangerous” designation, which led to the ensuing seizure and destruction order following the third incident.

Sawh never had an “opportunity at a meaningful time” to challenge whether the first incident was a bite or scratch, whether it was an “attack” or playful, or whether it was provoked or unprovoked. This constitutes the Due Process violation, an error of law, as determined by the Court of Appeals. *Sawh*, 800 N.W.2d at 669. Appellant Add. 28.

The City makes much ado about the “implied” permission of the two individuals who were bit by Brody on the second and third occasions. According to the City, the cleaning woman who was crossing the lawn and the furniture delivery man had “implied” permission to be in harm’s way. *City Resp. Reply Br.*, pp. 12-17. However, neither one was, in fact, given permission to be where they were when bitten. Nor did any “implied” authority exist for them to be there. The cleaning woman crossed the Sawh’s lawn without permission. She was not permitted on the property and had no privilege to be there to avert “imminent disaster,” as the City contends. *Id.* at p. 14. She merely took the occasion to cut across the Sawh’s lawn, without any permission from the homeowner, in order to check on smoke she observed, which turned out to be someone burning leaves. Tr. 19-20. While she may have been attempting to be a good citizen, no one gave her authority to be on Sawh’s property when she was bit by the dog and there was no “imminent disaster” brewing, but simply some smoke from a controlled burning of leaves that she was observing.

Similarly, the furniture delivery man, while undoubtedly a nice man, was told by Mrs. Sawh to “place [the furniture] upstairs.” He nonetheless took it upon himself to walk into the basement, where he was bit. He did not have any “implied” permission to go downstairs where Brody was sleeping, but merely made the decision himself, without any instigation or urging by Mrs. Sawh. Tr. 83, 102-03.

Since neither of them was entitled to be at the place where they were when bit, neither is covered by the “dangerous” ordinance. The City’s reliance on *Engquist v. Loyas*, 803 N.W.2d 400 (Minn. 2011) is misplaced. In *Engquist*, the Court construed the defense of provocation in connection with the statute creating strict liability for dog owners for dog bites, Minnesota Statute section 347.22. *Engquist*, 803 N.W.2d at 403-06. The Court noted that this strict liability statute is an anomaly, making liability of the dog owner “absolute,” subject to the defense of provocation, and without consideration of contributory negligence. *Id.* at 405-06. Further, intent of the strict liability statute is to place upon dog owners “absolute” liability for tort damages for injuries caused by their dogs, and thus the court held that a narrow definition of provocation, which is not defined in the statute, was appropriate. *Id.* at 406.

The Lino Lakes Ordinance, unlike Minnesota Statute section 347.22, is not a strict liability statute, but rather is a regulatory provision. Moreover, the Ordinance contains a definition of provocation enacted by the City of Lino Lakes. That definition should be construed according to its plain meaning, not based on construction of an unrelated tort statute which contains no definition of its own.

Under the Ordinance, if a dog is provoked, there can be no finding of “dangerous” or “potentially dangerous” or an ensuing order to destroy. Lino Lakes Ordinance § 503.15(4), (5). Appellant Add. 7. “Unprovoked” is defined under the Ordinance as “the condition in which the animal is not purposely excited, stimulated, agitated, or disturbed.” Lino Lakes Ordinance § 503.15(3)(d). Appellant Add. 7. It is undisputed that the actions of the woman who crossed the Sawh property, with Brody in plain view, waiving her arms, and talking loudly, was “aggravated” purposeful behavior which “excited, stimulated, agitated or disturbed” Brody. She even said that “the fact of the smoke and that I was nervous aggravated the dog...” Tr. 8.

The furniture delivery man also purposefully entered the Sawh basement without notice or permission from Mrs. Sawh, exciting, stimulating, agitating or disturbing a sleeping dog. Because the actions of the woman and the deliveryman were purposeful, and “excited, stimulated, agitated or disturbed” Brody, Brody’s actions were not “unprovoked,” and under the Ordinance, cannot form the basis for a “dangerous” or “potentially dangerous” finding or an order to seize and destroy. *See* Lino Lakes Ordinance § 503.15 (3)(d)(4), (5). Appellant Add. 7.²

The City’s argument that there is “substantial evidence” in the “record” to support the “potentially dangerous” finding as a result of the April, 2010 incident is puzzling. *See City Resp. Reply Br.*, p. 10. There is no “record” of a hearing concerning the April 2010 incident because Sawh was not allowed a hearing concerning that incident. While

² The deliveryman, unlike the cleaning lady, did not acknowledge his own culpability. But he did tell the City Council that “I don’t blame the dog or wish that the dog suffer the consequences of termination.” Appellant App. 53.

Sawh's son discussed the incident in the hearing concerning the later incident, the City did not revisit that determination. As the Court of Appeals found, "[n]othing in the record suggests that the city or relator approached the hearing on November 8 with an understanding that the potentially dangerous declaration was before the city for review or reconsideration." *Sawh*, 800 N.W. 2d at 669. Appellant Add. 27.

The City's assertion the "[t]here is nothing in the record to establish that the red marks on the pedestrian's arm were caused by anything other than a dog bite, except Respondent's unsupported speculation" misstates the evidence. *See City Resp. Reply Br.*, p. 11. A picture of the "red marks" was circulated and the Mayor agreed that the picture of the injury is consistent with a "scratch." Tr. 12-13 (1/14/11). Moreover, the City misstates the Ordinance, when it argues that whether the injury occurred while the dog was being playful is irrelevant. *See City Resp. Reply Br.*, p. 11. Under the definition of "potentially dangerous" animal, the City must establish that the dog bit, chased, or approached someone "in an apparent attitude of attack," or "engaged in unprovoked attacks." Lino Lakes Ordinance § 503.15 (3)(b). Appellant Add. 6. If, as Sawh maintains, the pedestrian was scratched when Brody playfully jumped up on him, than there was no "attack" and Brody was not "potentially dangerous" as defined by the Ordinance.

Since there was no hearing on the issue, the City established nothing. However, if the facts are as Sawh's son represents, that Brody scratched the pedestrian while playfully jumping up on him, Brody could not be declared potentially dangerous if a hearing had occurred.

In sum, the record shows the City relied upon the “potentially dangerous” designation, an error of law, for the basis of finding the dog to be “dangerous,” which led to its order to seize and destroy him. There are no other grounds that the City had, or articulated at the time, to deem the dog “dangerous,” and none exists. It is unnecessary to remand the case to the City Council to give it a chance to fix the defective record that it created. *See Sawh Br.*, pp. 48-52.

The City had its chance to make a record and chose, for whatever reason, not to do so. If its complaints about administrative burdens and costs are genuine, it ought not to spend more time, money, and other resources, beating a dead horse or, more precisely, trying to make a dog dead.

III. THE CITY MISAPPLIED ITS OWN ORDINANCE

The Police Chief erroneously told members of the City Council, who presumably trusted him, that the City had no choice but to destroy the dog, even though such destruction was, as the City now agrees, not mandatory. Tr. 117-19. The City’s contention that it was “free to act in conformity” with the destruction provision, even though it was not mandatory, ignores the gravamen of this case. *City Resp. Reply Br.*, p. 19. The issue here is not whether the City was “free” to decide to destroy the dog, but the legal consequences of erroneously being told that this was its only option and it had no other alternative.

In analogous situations, when jurors are misinstructed that they have only one option, even though more alternatives exist, their determination to opt for that sole alternative is a reversible error. In *Caldwell v. Mississippi*, 472 U.S. 320 (1985), the

United States Supreme Court vacated a death sentence because of a misleading closing argument by the prosecutor. In closing argument, the prosecutor, rebuffing a plea for mercy, told the jurors that “they would have you believe that you’re going to kill this man and they know . . . that your decision is not the final decision,” and explained that the death penalty is “automatically reviewable by the Supreme Court.” *Id.* at 325. Vacating the death sentence, the Court explained: “it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant’s death rests elsewhere.” *Id.* at 328-29.

The same analysis is applicable here. The City Council was led to believe that the responsibility for Brody’s death rests elsewhere too. They were told that the Ordinance required that the death penalty was automatic for Brody in that circumstance, and they had no discretion to find otherwise, an analysis that the City now concedes was wrong.

Likewise, in *Beck v. Alabama*, 447 U.S. 625, 627 (1980), the Court reversed a capital punishment verdict because of faulty instructions in which the jury was not instructed on a possible lesser included crime that did not allow for capital punishment. The Court held “when the jury was not permitted to consider a verdict of guilt of a lesser included non-capital offense, and when the evidence would have supported such a verdict,” a “risk of an unwarranted conviction” is created because it “interjects irrelevant considerations into the factfinding process, diverting the jury’s attention from the central issue of whether the State has satisfied its burden of proving beyond a reasonable doubt that the defendant is guilty of a capital crime.” *Id.* at 627, 637, 642. The Court reasoned,

“forcing the jury to choose between conviction on the capital offense and acquittal ... may encourage the jury to convict for an impermissible reason – its belief that the defendant is guilty of some serious crime and should be punished” even if there is “some doubt with respect to an element” of the capital offense. *Id.* at 632, 637, 642.

Here, as in *Beck*, the instructions given to the City Council on how to proceed when determining whether to seize and destroy Brody were fatally flawed. The Mayor and the Chief of Police told the Council it had no choice but to destroy Brody if he was found to be “dangerous.” At the hearing, City Council Members O’Donnell and Roeser, sought clarification whether the only option was to destroy Brody. Tr. 117-18. The Mayor opined they were correct. Tr. 118. Council Member Raferty then asked for citation to the specific ordinance number that applied. Tr. 118-19. Mayor Reinert asked the Police Chief to refresh the recollection of the City Council regarding the Lino Lakes Ordinance, and Chief Strege responded:

“If you look under 503.16 number 4 under Subsequent Offenses. Under that part: If an animal has subsequently violated the provisions, that the animal must be seized by animal control, they can – the owner may request a hearing. If it has been found to violate the provisions for which the animal was seized, in this case, that would be the bite, the animal control officers shall order the animal destroyed in the proper, humane manner.”

Tr. 119. The City Attorney was present at the meeting, but did not correct the error of law. Tr. 120.

The City does not seriously contest that the Ordinance is directory and not mandatory and that the City Council could have spared Brody’s life. *City Resp. Reply Br.*, p. 19. It argues, however, that it could have reached that same decision had the

Council been properly informed of its options. However, whether the City Council might have reached the same decision had it been properly instructed on the law is not the point. The gravamen is that the City Council erred as a matter of law when it failed to exercise its discretion in deciding to seize and kill Brody because it believed it had no other option. It could not exercise its discretion because it did not know it had any. In fact, the Council was told the opposite: that it did not have any. The City Council engaged in an error of law by improperly interpreting its ordinance. Had it know that it had other options, it could have exercised them. Thus, the City Council erred as a matter of law in the interpretation of its ordinance based on the erroneous instructions given to it by the Police Chief, at the request of the Mayor, that it had no choice but to order Brody's seizure and destruction; therefore, the seizure and destruction order must be reversed.

No one knows for certain what members of the City Council would have done, had they been properly told that they had the choice to destroy Brody or let him live. But there is no uncertainty in what they did: ordered the dog to be destroyed when told that no alternatives exist except the death of the dog. Had they been told they could choose life, they may have made that choice.

Because of the flawed interpretation of the Ordinance given to members of the City Council by the Mayor and Police Chief, the Council's determination to destroy the dog was inappropriate, improper, and erroneous and should be reversed.

IV. CONCLUSION

For the above reasons, the determination by the City of Lino Lakes to declare Brody “potentially dangerous,” then “dangerous,” and subsequently to order the dog to be seized and destroyed should be reversed and the dog should be returned to his loving family.

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