THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HAMPTON COUNTY
Court of Common Pleas

Perry M. Buckner, Circuit Court Judge

Case No.: 2013-CP-25-00075

Zavan Dishawn Johnson, ...Appellant

v.

Hampton County,. . . . . Respondents,
Hampton County Sheriff's Department
Thomas "TC" Small, Hampton County Sheriff

INITIAL BRIEF OF APPELLANT

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4. Does Section 15-78-60(6) create an exception to Section 47-3-110 when the strict liability dog bite claim is brought against a sheriff's department?
5. Assuming, arguendo, that there are some situations in which Section 15-78-60(6) might provide immunity to a sheriff's department, was it error for the circuit court to decide this issue on a motion for 12(b)(6)?

Statement of the Case

Appellant Zavan Dishawn Johnson ("Appellant" or "Johnson") appeals the circuit court's Order of Dismissal, which granted Respondent Hampton County Sheriff's Department's ("Respondent" or "Hampton County Sheriff's Department") [1]Rule 12(b)(6) motion for failure to state a claim. The Order of Dismissal dismissed Appellant's strict liability claim under S.C. Code Ann. § 47-3-100 against the Hampton County Sheriff's Department for injuries which Appellant suffered after being bitten by a dog owned by the Hampton County Sheriff's Department. The action was dismissed pursuant to Rule 12(b)(6) for failure to state a claim upon which relief can be granted.

Appellant, the plaintiff below, initially filed his Complaint on March 1, 2013, alleging causes of action against Thomas "TC" Smalls, as Sheriff of Hampton County, Hampton County, and Hampton County Sheriff's Department. (Complaint, filed March 1, 2013). Appellant's amended complaint was filed April 24, 2013. (Amended Complaint, filed April 24, 2013). Appellant's amended complaint alleges a cause of action for strict liability under S.C. Code Ann. § 47-3-110. (Amended Complaint, filed April 24, 2013). The Amended Complaint was timely served upon the Defendants.

An Answer was served on behalf of all named Defendants on or about June 17, 2013. (See Answer to Amended Complaint). Defendants contemporaneously served a rule 12(b)(6) motion to dismiss on or about June 17, 2013. (See Motion to Dismiss).

A hearing was held on Defendants' motion to dismiss on August 5, 2013 before the

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[1]The Rule 12(b)(6) motion was originally filed by Defendants Thomas "TC" Smalls, as Sheriff of Hampton County, Hampton County, and Hampton County Sheriff's Department. Because the other Defendants were dismissed from this matter by the circuit court, for purposes of this appeal, Appellant refers to the motion as being Respondent's motion.

Honorable Perry M. Buckner, in Hampton, South Carolina. At the hearing, the circuit court struck Hampton County as a defendant and ruled that the only proper defendant is Hampton County Sheriff's Department. Subsequently, the circuit court issued an Order of Dismissal dated August 8, 2013, which was filed with the Hampton Clerk of Court on September 5, 2013[2]. The Order of Dismissal held that Appellant failed to state a claim under 47-3-110 based on the circuit court's holding that Appellant's claim is barred by the Tort Claims Act. Specifically, the circuit court relied upon 15-78-60(6), which the circuit court held "grants immunity to governmental entities for "the method of providing police or fire protection." (Order of Dismissal, at 3). The circuit court held that the decision "to use trained police dogs to apprehend suspects by biting them" is "a method of providing police protection" and is barred by the Tort Claims Act.

Appellant timely filed a Rule 59(e) motion to reconsider, alter or amend. Judge Buckner heard argument on this motion on October 28, 2012 and denied the motion by Form 4 Order dated October 28, 2013.

Appellant timely filed a Notice of Appeal to this Honorable Court on November 22, 2013.

Standard of Review

This matter came before the circuit court on Defendant's motion to dismiss pursuant to rule 12(b)(6). "A motion to dismiss pursuant to Rule 12(b)(6) must be based solely on the allegations set forth in the complaint and [the court] must presume all well-pled facts to be true." Gressette v. South Carolina Elec. and Gas Co., 370 S.C. 377, 378-379, 635 S.E.2d 538, 538 - 539 (2006) (citing Overcash v. South Carolina Elec. and Gas Co., 364 S.C. 569, 614 S.E.2d 619 (2005)).

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[2]The Order of Dismissal was initially filed by Defendant Hampton County Sheriff's Department with the Clerk of Court for Jasper County, and subsequently filed with the Clerk of Court for Hampton County.

"When reviewing the dismissal of an action pursuant to Rule 12(b)(6), SCRCP, the appellate court applies the same standard of review as the trial court." Doe v. Bishop of Charleston, 754 S.E.2d 494, 497 (2014) (citing Doe v. Marion, 373 S.C. 390, 395, 645 S.E.2d 245, 247 (2007). "If the facts alleged and inferences reasonably deducible from the allegations set forth in the complaint, viewed in the light most favorable to the plaintiff, entitle him to relief on any theory, dismissal under Rule 12(b)(6) is improper." Id. "The complaint should not be dismissed merely because the court doubts the plaintiff will prevail in the action." Id.

"In deciding a motion to dismiss pursuant to 12(b)(6), SCRCP, the trial court should consider only the allegations set forth on the face of the plaintiff's complaint." Plyler v. Burns, 373 S.C. 637, 645, 647 S.E.2d 188, 192 (2007) (citing Stiles v. Onorato, 318 S.C. 297, 300, 457 S.E.2d 601, 602 (1995)). A 12(b)(6) motion should not be granted if "facts alleged and inferences reasonably deducible therefrom would entitle the plaintiff to any relief on any theory of the case." Id. "The question is whether, in the light most favorable to the plaintiff, and with every doubt resolved in his behalf, the complaint states any valid claim for relief." Id. (citing Toussaint v. Ham, 292 S.C. 415, 416, 357 S.E.2d 8, 9 (1987)). "Further, the complaint should not be dismissed merely because the court doubts the plaintiff will prevail in the action." Id.

At the initial hearing on August 5, 2013, when Counsel for Appellant stood to make an objection to consideration of matters outside the four corners of the amended complaint, the circuit court instructed Appellant's Counsel to sit down. (August 5, 2013 transcript, p. 4, lines 18-22). When Appellant's counsel objected to consideration of matters outside the amended complaint because this was a 12(b)(6) motion, the Court made clear that matters outside the amended complaint would not be considered. This motion was never converted to a motion for judgment on the

pleadings or a motion for summary judgment.

Brief Statement of Facts And Summary of Argument

Because this matter is before the Court on a motion to dismiss for failure to state a claim, only the facts alleged in the amended complaint are properly before this Court for consideration. The relevant paragraphs from the amended complaint are recited herein:

> 9. At all times material herein, the Hampton County Sheriff's Department, and its their [sic] agents and/or employees, had the care, custody, and control of the of a [sic] canine that bit or attacked Plaintiff on or about March 2, 2011.
> 10. On or about March 2, 2011, while lawfully on Augusta Stage Coach Road, Plaintiff Zavan Dishawn Johnson was pursued, chased off the roadway, bitten and attacked by a canine that was owned by and in the possession, custody and control of Hampton County Defendants.[3]
> 11. Plaintiff suffered injuries as a result of being pursued, chased, and attacked by the canine.
> 12. Plaintiff did not provoke the attack. Plaintiff was moving away from the dog when the dog chased Plaintiff down and attacked Plaintiff.
> 13. Plaintiff was lawfully on the public highway and adjacent property at the time he was chased, bitten, and attacked by the Canine.
> .....
> 16. The Hampton County Defendants owned the canine that bit and attacked Johnson.
> 17. The canine that bit and attacked Johnson was in the care and keeping, and was subject to the possession, control, and custody of the Hampton County Defendants.

(Amended Complaint, pages 2-3).

The circuit court concluded that Hampton County Sheriff's Department is immune from suit because the dog that bit Appellant was providing police protection. The circuit court concluded that the "method of providing police protection" exception to the waiver of sovereign immunity provided

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[3]Appellant's amended complaint named as Defendants Thomas "TC" Smalls, as Sheriff of Hampton County, Hampton County, and Hampton County Sheriff's Department. All Defendants were represented by O. Edworth Liipfert, III. Based on arguments of Defendants' counsel, the circuit court determined that the only proper defendant is Hampton County Sheriff's Department.

immunity to Respondent from Appellant's 47-3-110 claim, and issued an Order of Dismissal granting Respondent's Rule 12(b)(6) motion.

Importantly, given the circuit court's conclusion that the "method of providing police protection" exception to the waiver of sovereign immunity in the Tort Claims Act precludes Appellant's civil action as a matter of law, it is must be noted that no where in the amended complaint did Appellant allege that the dog that bit Appellant was providing police protection. Nor did Appellant allege in the amended complaint that the civil action was based upon the Respondent's method of providing police protection. Rather, Appellant's civil action, which sounded in strict liability pursuant to Section 47-3-110, is based on the injuries Appellant received after being bitten by a dog that was owned by Respondents. There are no facts alleged in the amended complaint that establish or support a conclusion, as a matter of law, that the canine that bit Appellant was providing police protection.

It appears based on the Order of Dismissal that the circuit court considered matters which were not within Appellant's amended complaint. The Order of Dismissal references several alleged facts that are found nowhere in Appellant's amended complaint. For example, on the first page of the Order of Dismissal, the circuit court references allegations in Respondent's Answer pertaining to an arrest and subsequent guilty plea to a charge of resisting arrest, and concludes without citation to anything in the amended complaint that the dog bit occurred at the time of arrest. These allegations, which are not supported by Appellant's amended complaint, appear to have been relied upon by the circuit court, which is improper in ruling on a 12(b)(6) motion. Further, though not alleged anywhere in the amended complaint, the Order of Dismissal concludes as a factual matter that the dog that bit Appellant on March 2, 2011 was providing police protection at the time the dog

bit Appellant. This factual finding does not have any support in the allegations in the amended complaint. The only basis from which the Court could have concluded that the dog that bit Appellant was providing police protection was by consideration of matters not within the four corners of Appellant's amended complaint.

The circuit court erroneously held that the "method of providing police protection" exception to the general waiver of sovereign immunity precludes Appellant from stating a claim as upon which relief can be granted as a matter of law. (Order of Dismissal at 3). The circuit court states in the Order of Dismissal that the Hampton County Sheriff's Department is immune from this suit pursuant to § 15-78-60(6). The circuit court committed error of law in reaching this conclusion, as the decision is inconsistent with the plain language of the relevant statutes and inconsistent with the legislative intent of the statutes. Rather than applying the policy of the state as determined by the General Assembly, the circuit court undertook to make its own policy determination, a feat which is not within the purview of Judiciary. Furthermore, none of the facts alleged Appellant's amended complaint support the circuit court's factual findings that would be necessary to make the legal conclusions reached by the circuit court to support the holding that the Hampton County Sheriff's Department is immune from suit at this stage in the litigation. Thus, it was improper to for the circuit court to make these findings and conclusions on a Rule 12(b)(6) motion to dismiss.

Appellant respectfully submits that the decision was based on error of law, including application of the wrong standard for a 12(b)(6) motion, and an incorrect of determination of the interplay of the Tort Claims Act and the strict liability statute for dog bites.

Argument

I. Appellant's Amended Complaint States A Cause of Action under Section 47-3-110

Putting aside for a moment the Respondent's status as a governmental entity, it cannot be reasonably debatable that Appellant's amended complaint states a claim upon which relief can be granted under Section 47-3-110 of the South Carolina Code. To state a cause of action under Section 47-3-110, a plaintiff must allege that he was "bitten or otherwise attacked by a dog while the person is in a public place or is lawfully in a private place, including the property of the owner of the dog or other person having the dog in his care or keeping." S.C. Code Ann. § 47-3-110 (2012).[4] In addition, the plaintiff must allege that the plaintiff did not provoke the dog into attacking him. Id.; see also, Harris v. Anderson County Sheriff's Office, 381 S.C. 357, 366, 673 S.E.2d 423, 428 (2009) (recognizing that our "Legislature has made a policy decision to hold dog owners strictly liable when the dog bites or otherwise attacks a person" who is in a public place or lawfully on private premises, "except when the injured person provoked the attack") and Clea v. Odom, 394 S.C. 175, 180, 714 S.E.2d 542, 545 (2011).

The Appellant's amended complaint alleges that he was bitten by a dog that was owned by Respondent while he was lawfully on Augusta Stage Coach Road and adjacent property, and that the bite and attack was unprovoked. (Amended Complaint, at ¶¶ 7-9). Thus, Appellant's amended complaint states a cause of action upon which relief can be granted under § 47–3–110 and it was error for the circuit court to hold otherwise.

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[4]Section 47-3-110 was added to the Code of Laws as a result of 1986 Act No. 343. This statute was amended in 2013. See 2013 Act No. 62, § 1, eff June 12, 2013. The former version of the statute is controlling in this dispute.

II. The Circuit Court Holding That § 15-78-60(6) Makes Hampton County Sheriff's Department Immune From Suit Is Affected by Error of Law

Notwithstanding Appellant's well-pled cause of action pursuant to Section 47-3-110, the circuit court granted the motion to dismiss based on the circuit court's conclusion that Hampton County Sheriff's Department is immune from suit pursuant to the sixth enumerated exception to the general waiver of sovereign immunity in the Tort Claims Act. (Order of Dismissal). This exception to the waiver of immunity excepts "civil disobedience, riot, insurrection, or rebellion or the failure to provide [or][5] the method of providing police or fire protection." S.C. Code Ann. § 15-78-60(6). The circuit court's decision was error of law. The Order of Dismissal goes beyond the appropriate scope of inquiry on a Rule 12(b)(6) motion and makes findings and conclusions based on matters not alleged within the four corners of Appellant's amended complaint. Further, the circuit court's decision is inconsistent with the plain language of the relevant statutes, and ignores the legislative intent and policy of the state as established by the General Assembly.

a) Section 15-78-60(6) Does Not Create An Absolute Exception to Section 47-3-110 And Any Immunity That May Provided By Section 15-78-60(6) Cannot Be Decided On A 12(b)(6) Motion In This Case

The circuit court incorrectly determined that the Tort Claims Act excepts from the State's waiver of sovereign immunity all claims against a law enforcement agency arising from an injury sustained as a result of the acts of a police dog, based on the Court's conclusion that police dogs are a manner of providing police protection. Since the circuit court granted the Rule 12(b)(6) motion,

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[5]The South Carolina Court of Appeals has previously determined that the word "or" was omitted from the statute and was a scrivener's error. Wells v. City of Lynchburg, 331 S.C. 296, 304, 501 S.E.2d 746, 750 (Ct. App. 1998) ("omission of the word "or" in section 15-78-60(6) is apparently a scrivener's error").

such a ruling would necessarily require a rule that law enforcement agencies are immune from all claims arising from police dog bites claims pursuant to § 15-78-60(6). This is not supported by either statute or by past decisions of our Supreme Court.

In Harris v. Anderson County Sheriff's Office, 381 S.C. 357, 366, 673 S.E.2d 423, 428 (2009), the Supreme Court of South Carolina reversed a trial court's grant of summary judgment to a Sheriff's Office and remanded for trial, finding that the amended complaint stated a cause of action for injuries sustained by the plaintiff in that case as a result of being bitten by a dog owned by the Anderson County Sheriff's Office. If ¶ 15-78-60(6) The Harris case, where the Supreme Court reversed a summary judgment to a sheriff's office and allowed a strict liability dog bite claim against a sheriff's office to proceed to trial, conflicts with the rule adopted by the circuit court in this matter that Respondent is immune from all dog bite claims pursuant to ¶ 15-78-60(6). At a minimum Harris shows that dog bite claims against sheriff's office are not completely excluded by Section 15-78-60(6), which makes the question of immunity a fact sensitive question that could not have bee resolved on a 12(b)(6) motion in this case.

As set forth above, Appellant's amended complaint does not allege that the dog in question was providing police protection, and whether the dog that bit Appellant was providing police protection is a factual question that cannot be decided at the 12(b)(6) stage. There are no allegations in Appellant's amended complaint that would provide a factual basis for the findings that would be necessary to support the circuit court's decision that the Respondent is immune from suit as a matter of law in disposing of Respondent's 12(b)(6) motion. The circuit court's reliance upon allegations in Respondent's answer is error of law on a 12(b)(6) motion. The circuit court committed error of law in granting the motion to dismiss for failure to state a claim. Appellant respectfully requests that

this Court reverse the circuit court's decision and remand for further proceedings.

b. The Plain Language of the Statutes Establishes That Section 15-78-60(6) Has No Applicability To This Case.

Simply put, § 15-78-60(6) provides no immunity to law enforcement agencies in strict liability dog bite cases brought pursuant to § 47-3-110. More importantly, the Harris undermines the circuit court's conclusion that 15-78-60(6) precludes all Section 47-3-110 strict liability dog bite actions against a governmental law enforcement agency for injuries caused by police dogs. Harris supports Appellant's argument that the "method of providing police protection" exception to the waiver of immunity has no applicability to strict liability claims brought against law enforcement agencies. Further, this conclusion is supported by the plain language of both statutes. Section 47-3-110 and Section 15-78-60(6) were originally enacted during the same legislative session. The texts of the two statutes are clear, and 15-78-60(6) does not limit or provide an exception to 47-3-110 when the dog owner is a governmental entity.

"The cardinal rule of statutory construction is to ascertain and effectuate the intent of the [L]egislature." Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). The Court will give words their plain and ordinary meaning, and will not resort to a subtle or forced construction that would limit or expand the statute's operation. Auto Owners Ins. Co. v. Rollison, 378 S.C. 600, 609, 663 S.E.2d 484, 488 (2008). "A statute remedial in nature should be liberally construed in order to accomplish the object[ive] sought." Rollison, 378 S.C. at 609, 663 S.E.2d at 488 (quoting Inabinet v. Royal Exch. Assurance of London, 165 S.C. 33, 36, 162 S.E. 599, 600 (1932)).

"The Legislature unmistakably adopted a strict liability approach for injuries caused by dogs, save the situation when the injured party provoked the attack." Harris v. Anderson County Sheriff's

Office, 381 S.C. 357, 362, 673 S.E.2d 423, 425 (2009).

The Tort Claims Act provides that, subject to limitation, a governmental entity is "liable for [its] torts in the same manner and to the same extent as a private individual under like circumstances." S.C. Code Ann. § 15–78–40 (Supp.1993). "The burden of establishing a limitation upon liability or an exception to the waiver of immunity under the Tort Claims Act is upon the governmental entity asserting it as an affirmative defense." Steinke v. South Carolina Dept. of Labor, Licensing and Regulation, 336 S.C. 373, 393, 520 S.E.2d 142, 152 (1999) (citing Strange v. South Carolina Dep't of Highways and Pub. Transp., 314 S.C. 427, 445 S.E.2d 439 (1994)). "Provisions establishing limitations upon and exemptions from liability of a governmental entity must be liberally construed in favor of limiting liability." Id.; S.C. Code Ann. § 15–78–20(f) (Supp.1998).

Section 15-78-60(6) of the tort claims act is an exception to the Act's general waiver of liability. This provision exempts the following from the waiver of liability: "civil disobedience, riot, insurrection, or rebellion or the failure to provide [or] the method of providing police or fire protection." By its terms, Section 15-78-60(6) only makes "a governmental entity not liable for a loss resulting from" "the failure to provide or the method of providing police or fire protection." (emphasis added). This does not exempt all claims against all law enforcement agencies incident to policing in some form or fashion. Moreover, the second half of the sentence relates back to the first half of the sentence, and exempts from the waiver of immunity "the failure to provide or the method of providing police or fire protection" incident to "civil disobedience, riot, insurrection or rebellion."

Appellant's amended complaint does not allege that his injury was a result of the failure to provide or the method of providing police protection. Appellant's amended complaint does not allege that the dog that bit him was providing police protection. Appellant's amended complaint does

not allege that Respondent's dog bit Appellant incident to civil disobedience, riot, insurrection, or rebellion as contemplated by 15-78-60(6). Nor does Appellant allege that Appellant's injuries stem from the Respondent's method of providing police protection in response to any civil disobedience, insurrection, or rebellion. Appellant's strict liability claim is limited to the injuries he received after being bitten by a dog owned and controlled Respondent.

Even assuming, arguendo, that the first half of the sentence and the second half of the sentence are independent exceptions not related to one another, (which conflicts with the common rule of statutory construction that phrases and words should be read in isolation), Appellant has not sued Respondent for choosing to employ police dogs as a method of police protection. Rather, Appellant has sued Hampton County Sheriff's Department because Appellant sustained injuries after he was bitten by a dog owned by the Hampton County Sheriff's Department. Section 15-78-60(6) has no applicability to this action.

This strict liability dog bite action is specifically authorized and provided for by Section 47-3-110 and not precluded by any provision in Section 15-78-60. Providing immunity to the police for injuries resulting from the failure to provide or the method of providing police protection relative to civil disobedience, insurrection or rebellion does not foreclose allowing a strict liability claim against a sheriff's office for injuries sustained as a result of being bitten or attacked by a dog owned by the sheriff's office. Similarly, Providing immunity to the police for injuries resulting from the failure to provide or the method of providing police protection in general is not inconsistent with allowing a strict liability claim against a sheriff's office for injuries sustained as a result of being bitten or attacked by a police dog. Rather, the plain language of the two statutes can be read in harmony so that both stand without conflict. The circuit court's holding otherwise is error of law

and Appellant respectfully requests that this Court reverse the circuit court's decision and remand for further proceedings.

c) In Addition To Being Consistent With the Plain Language Of The Statutes, Appellant's Position Is Consistent With The Legislative History and Legislative Intent; The Circuit Court Impermissibly Fails To Apply the Policy Decisions Made by the General Assembly

The strict liability dog bite statute (Section 47-3-110) and the Tort Claims Act were both enacted during the 106th Session of the South Carolina General Assembly in 1986.[6] The strict liability dog bite statute was created by 1986 Act No. 343, and is codified at 1976 S.C. Code Ann. § 47-3-110. The Tort Claims Act was created by Section 1 of 1981 Act No. 463, and is codified at 1976 S.C. Code Ann. §§ 15-78-10, et. seq., which includes 15-78-60(6). Prior to the most recent session of the General Assembly, Section 47-3-110 and Section 15-78-60(6) have remained unchanged since their initial enactment in 1986.

As our Supreme Court explained in Harris, the "transition from the common law to the statutory setting, of course, restricts [the judiciary's] policy-making role and concomitantly requires this Court to discern legislative intent." Harris v. Anderson County Sheriff's Office, 381 S.C. 357, 361, 673 S.E.2d 423, 425 (2009). "[T]he imposition of strict liability under section 47–3–110 reflects a permissible policy determination of the Legislature." Id. at 363, 673 S.E.2d at 426. In declining an invitation by the Anderson County Sheriff's Office' for our Supreme Court to create an exception to the strict liability statute, the Harris court explained:

> Because we are confronted with a matter of statutory interpretation, such policy decisions rest exclusively in the Legislature. We are constrained therefore to decline the invitation to create a policy exception to section 47–3–110. Similarly, we

[6]As the Supreme Court noted in Harris, Section 47-3-110 was enacted in response to Hossenlopp.

> acknowledge that application of section 47–3–110's strict liability against dog owners may appear harsh and have unintended consequences. But again, such concerns now lie in the Legislature.

Id. at 364, 673 S.E.2d at 426. Just as our Supreme Court followed the will of the General Assembly in Harris and reversed and remanded a circuit court's grant of summary judgment to a Sheriff's Department, Appellant respectfully requests that this Court reverse the circuit court's order dismissing this case pursuant to Rule 12(b)(6), as Appellant's amended complaint states a claim upon which relief can be granted.

"A subsequent statutory amendment may be interpreted as clarifying original legislative intent." Stuckey v. State Budget and Control Bd., 339 S.C. 397, 401, 529 S.E.2d 706, 708 (2000) (citing Cotty v. Yartzeff, 309 S.C. 259, 422 S.E.2d 100 (1992)). "However, '[i]t will be presumed that the Legislature in adopting an amendment to a statute intended to make some change in the existing law.'" Eagle Container Co., LLC v. County of Newberry, 366 S.C. 611, 627, 622 S.E.2d 733, 741 (Ct. App. 2005) (citing Vernon v. Harleysville Mut. Cas. Co., 244 S.C. 152, 155, 135 S.E.2d 841, 844 (1964). "The Court must presume the legislature did not intend a futile act, but rather intended its statutes to accomplish something." Id. Denene, Inc. v. City of Charleston, 352 S.C. 208, 212, 574 S.E.2d 196, 198 (2002) (citing TNS Mills, Inc. v. South Carolina Dep't of Revenue, 331 S.C. 611, 503 S.E.2d 471 (1998)).

The appellate courts of South Carolina have consistently held that provocation is the only exception to the strict liability under Section 47-3-110. See, Harris. Indeed, in Harris, our Supreme Court iterated that the judiciary lacks the authority to add exceptions to the statute, notwithstanding what the judiciary may think of the legislature's policy determinations. Id.

During the most recent session of the General Assembly, members of both house and the

senate recognized that, as written, 47-3-110 imposes strict liability upon sheriff's offices and other law enforcement officers when persons are bitten by police dogs. Seeking to restrict, and not to expand, the application of strict liability against governmental law enforcement agencies, the 120th Session of General Assembly passed 2013 Act No. 62. This Act created a new, narrow exception to the strict liability statute. The new exception is for police dogs, and it only applies to protect law enforcement agencies if certain requirements are met.

As amended by 2013 Act No. 62, the statute now has provides one additional exception for police dogs if certain requirements are met. The exceptions are now set forth in Section 47-3-110(B), which reads as follows:

> (B) This section does not apply if, at the time the person is bitten or otherwise attacked:
> (1) the person who was attacked provoked or harassed the dog and that provocation was the proximate cause of the attack; or
> (2) the dog was working in a law enforcement capacity with a governmental agency and in the performance of the dog's official duties provided that:
>
> (a) the dog's attack is in direct and complete compliance with the lawful command of a duly certified canine officer;
> (b) the dog is trained and certified according to the standards adopted by the South Carolina Law Enforcement Training Council;
> (c) the governmental agency has adopted a written policy on the necessary and appropriate use of dogs in the dog's official law enforcement duties;
> (d) the actions of the dog's handler or dog do not violate the agency's written policy;
> (e) the actions of the dog's handler or dog do not constitute excessive force; and (f) the attack or bite does not occur on a third party bystander."

2013 Act No. 62; S.C. Code Ann. § 47-3-110 (2014 Supp.).

Even as amended by 2013 Act No. 62, Section 47-3-110 still provides for strict liability against law enforcement agencies if the six enumerated elements of the newly created police dog exception are not satisfied. Under the rule adopted by the circuit court, the most recent session of the

General Assembly did just the opposite of what it intended, expanding rather than restricting the situations in which law enforcement agencies might be held liable for injuries caused by police dogs. Had the General Assembly intended that 15-78-60(6) provides immunity to law enforcement agencies for claims brought under Section 47-3-110, then 2013 Act No. 62 would be futile and unnecessary.

If the circuit court's decision is correct, Act No. 62 would be expanding the application of Section 47-3-110 against governmental law enforcement agencies, despite the clear intent of the 120th Session of the General Assembly to limit the situations in which law enforcement agencies could be held strictly liable for dog bites. Indeed, if the circuit court's decision is correct, Act No. 62 would be completely futile.

The 106th Session of the General Assembly and the 120th Session of the General Assembly realized and intended that, as written prior to the enactment of 2013 Act No. 62, Section 47-3-110 imposed strict liability for dog bites and the statute did not create an exception for police dogs. Further, neither the 106th Session of the General Assembly nor the 120th Session of the General Assembly intended that Section 15-78-60(6) would limit or exempt law enforcement agencies from an action brought pursuant to Section 47-3-110.

The circuit court's conclusion that Appellant's amended complaint fails to state a claim upon which relief may be granted is error of law. Appellant respectfully requests that this Court reverse and remand this matter to the circuit court for further proceedings.

CONCLUSION

Appellant's amended complaint states a strict liability claim pursuant to Section 47-3-110, upon which relief can be granted against Respondent for the injuries Appellant suffered after he was

bitten by Respondent's dog. Regardless of how Section 15-78-60(6) is interpreted, it cannot be applied to dismiss this case at the 12(b)(6) stage, because the amended complaint does not allege that the dog that bit him was providing police protection, and there must be development of a factual record before the Court could reach that conclusion. More importantly, the circuit court's interpretation of the statutes is inconsistent with the plain language of the statute and the intent of the legislature. Because the Order of Dismissal is affected by error of law, Appellant respectfully requests that this Honorable Court reverse and remand this matter for further proceedings.

Respectfully submitted,

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