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J. OLIN McDOUGALL, II, Esquire
Million Dollar Advocates
Forum, Lifetime Member



DAVIS A. WHITFIELD-CARGILE, Esquire
Associate Attorney

JOE W. UNDERWOOD, Esquire
Of Counsel, Family Court Litigation

Tax ID#64-0953148

WWW.MCDOUGALLLAWFIRM.COM

August 11, 2014
(U.S. Mail)

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, SC 29211

RE: Zavan Dishawn Johnson v. Hampton County, et al
Appellate Case Number: 2013-002557

Dear Ms. Kitchings:

Enclosed is the Proof of Service of the Record on Appeal in regards to the above referenced case.

Should you have any questions or concerns, please do not hesitate to contact me.

Sincerely,

Davis W. Whitfield-Cargile
Post Office Box 1336
Beaufort, SC 29901-1336
(843) 379-7000
Attorney for Appellant

cc: Otto Edworth Liipfert, III, Esquire
E. Mitchell Griffith, Esquire
Griffith Sadler Sharp, P.A.
P. O. Box 570
Beaufort, SC 29901
Attorneys for Respondents
(843) 521-4242

RECEIVED

AUG 13 2014

SC Court of Appeals

Post Office Box 1336 | Beaufort SC, 29901 | 115 Lady's Island Commons | Lady's Island, SC 29907 | P 843.379.7000 | F 843.379.7007

Serious Injury and Death Claims | Motor Vehicle Accidents | Worker Compensation Claims | Nursing Home Abuse and Neglect | Medical Malpractice
Insurance Claims and Litigation | Premises Liability | Defective and Dangerous Products | School and Education Litigation | Boating and Water Accidents

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

RECORD ON APPEAL

McDougall LawFirm, LLC
J. Olin McDougall, II
Davis A. Whitfield-Cargile
115 Lady's Island Commons
Lady's Island, South Carolina 29907
P.O. Box 1336
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Attorneys for Appellant

O. Edworth Liipfert, III
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Attorneys for Respondent

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AUG 13 2014

SC Court of Appeals

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Certificate of Counsel

The undersigned certifies that the Record on Appeal contains all material proposed to be included by any of the parties and not any other material.

By: 

J. Olin McDougall, II

✓ Davis A. Whitfield-Cargile

P.O. Box 1336

Beaufort, South Carolina 29902-1336

843-379-7000

Attorneys for Appellant

Beaufort, South Carolina

August 11, 2014

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, Claimant/Appellant
v.
Hampton County, Respondents,
Hampton County Sheriff's Department
Thomas "TC" Small, Hampton County Sheriff

CERTIFICATE OF SERVICE BY MAIL
FOR RECORD ON APPEAL

I HEREBY CERTIFY that a copy of RECORD ON APPEAL was served upon all counsel of record by depositing in the United States Mail, proper postage affixed thereto, a true and accurate copy thereof, on the 11th day of August, 2014, as follows:

O. Edworth Liipfert, III, Esquire
E. Mitchell Griffith, Esquire
Griffith, Sadler & Sharp, P.A.
P.O. Box 570
Beaufort, SC 29901

McDOUGALL LAW FIRM
Michelle Hencely
Michelle Hencely
Paralegal to Davis A. Whitfield-Cargile,
P.O. Box 1336
Beaufort, SC 29901-1336
(843) 379-7000
Attorney for Plaintiff

Beaufort, South Carolina
August 11, 2014

RECEIVED

AUG 13 2014

SC Court of Appeals

STATE OF SOUTH CAROLINA
COUNTY OF HAMPTON
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2013CP2500075

FILED

2013 OCT 28 PM 3:00

MYLINDA D. HETTEL
CLERK OF COURT
HAMPTON COUNTY, S.C.

Z. Dishawn Johnson

Hampton County
Sheriff's Department
Hampton County

Thomas TC Smalls

PLAINTIFF(S) BY

DEFENDANT(S)

Submitted by: CLERK OF COURT

Attorney for: Plaintiff Defendant
 Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. See Page 2 for additional information.
- ACTION DISMISSED (CHECK REASON): Rule 12(b), SCRPC; Rule 41(a), SCRPC (Vol. Nonsuit);
 Rule 43(k), SCRPC (Settled); Other: _____
- ACTION STRICKEN (CHECK REASON): Rule 40(j) SCRPC; Bankruptcy;
 Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; Other: _____
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):
 Affirmed; Reversed; Remanded; Other:

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: See attached order; (formal order to follow) Statement of Judgment by the Court:

ORDER INFORMATION

This order ends does not end the case.

Additional Information for the Clerk: MOTION FOR RECONSIDERATION FILED 08-29-2013 IS DENIED.

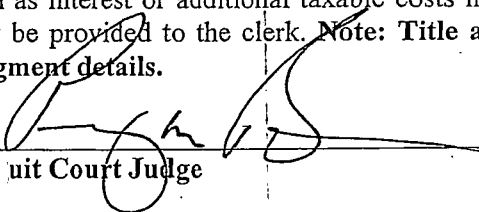
INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If here is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.


Clerk of Court Judge

0122
Judge Code

10/28/2013
Date

RECEIVED

AUG 13 2014

SC Court of Appeals

For Clerk of Court Office Use Only

This judgment was entered on , and a copy mailed first class or placed in the appropriate attorney's box on , to attorneys of record or to parties (when appearing pro se) as follows:

Davis Arjuna Whitfield-Cargile PO Box 1336 Beaufort, SC
29907

Otto Edworth Liipfert III PO Drawer 570 Beaufort, SC
29901

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter

Mylinda Nettles - Clerk of Court

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

STATE OF SOUTH CAROLINA)
COUNTY OF HAMPTON)
ZAVAN DISHAWN JOHNSON,)
))
Plaintiffs,)
))
vs.)
))
THOMAS "TC" SMALLS, AS SHERIFF OF)
HAMPTON COUNTY, HAMPTON)
COUNTY, AND HAMPTON COUNTY)
SHERIFF'S DEPARTMENT,)
))
Defendants.)

COURT OF COMMON PLEAS
CIVIL ACTION NO. 13-CP-25-0075

ORDER OF DISMISSAL

FACTUAL/PROCEDURAL BACKGROUND

#7
PAB

This matter came before me in Hampton County on August 5, 2013 on the Defendants' Motion to Dismiss the Complaint. The Plaintiff was bitten by a police dog on March 2, 2011 near Augusta Stage Coach Road in Garnett, South Carolina.¹ The dog was owned by and in the care and custody of the Hampton County Sheriff's Department at the time of the bite.² Shortly before the bite occurred, the Plaintiff was a passenger in a vehicle that was subject to a traffic stop.³ As a result of the stop on March 2, 2011, the Plaintiff was arrested and charged with resisting arrest pursuant to SC Code Ann. §16-9-320(A), and the Plaintiff pled guilty to this charge in circuit court on November 7, 2011.⁴ The Plaintiff has now sued the Defendants under the theory of strict liability pursuant to SC Code Ann. §47-3-110 ("the dog bite statute") for the bite occurring at the time of his arrest.

¹ Amended Complaint, Paragraphs 7 and 10.
² Amended Complaint, Paragraph 9.
³ Complaint, Paragraph 8.
⁴ Answer, Paragraph 12.

LEGAL STANDARD

When reviewing a motion to dismiss for failure to state a claim, the court must base its ruling solely on the allegations in the pleadings. Capital City Ins. Co. v. BP Staff, Inc., 382 S.C. 92, 99, 674 S.E.2d 524, 528 (Ct. App. 2009) (citation omitted). A court should grant a motion to dismiss under Rule 12(b)(6), SCRPC when reviewing the Complaint in the light most favorable to the plaintiff and construing every doubt in the plaintiff's favor, the complaint fails to state any valid claim for relief. Id. (citation omitted). If the court considers any matters outside the pleadings, the motion to dismiss will be treated as a motion for summary judgment. See Rule 12(b), SCRPC; Shealy v. Doe, 370 S.C. 194, 198, 634 S.E.2d 45, 47 (Ct. App. 2006).

ARGUMENTS OF COUNSEL

#2
Pr 3

At the hearing, the Defendants argued all Defendants were entitled to have the Complaint dismissed as a matter of law on three grounds. First, they are entitled to immunity for the method of providing police protection pursuant to the Tort Claims Act. Second, the Legislature could not have intended to abrogate the reasonableness standard governing police use of force by subjecting police dogs apprehending suspects to strict liability under the dog bite statute regardless of the circumstances. Third, because the Plaintiff pled guilty to resisting arrest, he was not lawfully on private property as a matter of law and so he fails to meet one element of the dog bite statute. The Defendants also argue that the Defendant TC Smalls and the Defendant Hampton County should be dismissed, as the Defendant Hampton County Sheriff's Department admitted that the dog was under its ownership and control at the time of the bite.

The Plaintiff took the position that his Complaint states a prima facie case under the dog bite statute because it alleges the Plaintiff was lawfully on Augusta Stage Coach Road and the adjoining property at the time of the incident, the dog was owned and controlled by the Defendants, and the dog bit the Plaintiff. The Plaintiff argues the Legislature failed to carve out any exception for police dogs in the statute itself, so it must apply in this case. The Plaintiff also argues the Legislature's recent amendment of the dog bite statute to specifically exclude police dogs if certain criteria are met shows that the Legislature believed that the older version of the statute applied to police dogs apprehending suspects.

ANALYSIS

#3
2mB

A. Defendants Hampton County and Thomas TC Smalls

The Complaint alleges that all three Defendants owned and controlled the dog. Hampton County Sheriff's Department admitted it owned and controlled the dog at the time of the bite, and the other two Defendants denied they owned or controlled the dog. Therefore, the Defendants Hampton County and Thomas TC Smalls should be dismissed as a matter of law.

B. Immunity pursuant to SC Code Ann. §15-78-60(6) because the use of police dogs is a method or means of providing police protection.

Hampton County Sheriff's Department ("HCSD") takes the position they are entitled to immunity from suit in this instance pursuant to §15-78-60(6) because the use of police dogs is a method or means of providing police protection, and I agree. §15-78-60(6) of the Tort Claims Act grants immunity to governmental entities for "the method of providing police or fire protection." HCSD is charged with upholding the laws of South Carolina

within its jurisdiction, and it has elected to use trained police dogs to apprehend suspects by biting them. This decision to use dogs in this manner is a method of providing police protection to the citizens of Hampton County. The Plaintiff asserts that the dog bite statute should make Hampton County strictly liable for any dog bite of a suspect, regardless of the facts surrounding the incident. That rule would subject HCSD to liability for this method of providing police protection, so it is barred by the Tort Claims Act.

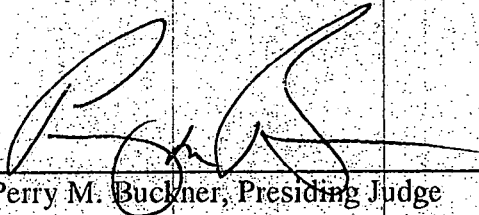
#4
P. 236
Finding that this claim is barred by the Tort Claims Act is also consistent with how other jurisdictions have handled such cases. Wyoming held that a case against the police for strict liability under the "one-bite rule" was barred pursuant to its tort claims act. See Abelseth v. City of Gillette, 752 P.2d 430 (1988). In Abelseth, the Plaintiff was walking by a police car with the window down, and a police dog inside the vehicle bit her. She sued the police department under strict liability, and the Court held that the Wyoming Governmental Claims Act prevents suits against the government for strict liability. In the case of Tate v. City of Grand Rapids, a police dog bit a suspect on the shoulder after he fled to evade arrest. The Michigan Court of Appeals ruled Grand Rapids was immune from liability under their dog bite statute, which is substantially similar to South Carolina's, because the Michigan tort claims act provided immunity arising from discharge of its law enforcement duties. Tate v. Grand Rapids, 256 Mich. App. 656, 671 N.W.2d 84 (2003).

Because I find that the HCSD is entitled to immunity from suit under § 15-78(60)(6), there is no need to reach the Defendants' remaining arguments.

ORDER

IT IS THEREFORE ORDERED that the Plaintiff's case against Thomas TC Smalls and Hampton County are DISMISSED;

IT IS FURTHER ORDERED that the claims against HCSD are dismissed because it is entitled to immunity in this instance for the method of providing police protection pursuant to SC Code Ann. §15-78-60(6);



Perry M. Buckner, Presiding Judge

Walterboro, South Carolina

August 8, 2013.

FILED

2013 APR 24 AM 10:52

2013-CP - 25- 75

vs.

MYLINDA D. NETTLES
CLERK OF COURT
HAMPTON COUNTY, S.C.

Thomas "TC" Smalls, as Sheriff of Hampton County, Hampton County, and Hampton County Sheriff's Department,

Defendant(s)

Submitted By: Davis A. Whitfield-Cargile
Address: McDougall Law Firm, P.O. Box 1336, Beaufort, South Carolina 29902

SC Bar #: 78065
Telephone #: 843-379-7000
Fax #: 843-379-7007
Other:
E-mail: dwc@mcdougalllawfirm.com

NOTE: The coversheet and information contained herein neither replaces nor supplements the filing and service of pleadings or other papers as required by law. This form is required for the use of the Clerk of Court for the purpose of docketing. It must be filled out completely, signed, and dated. A copy of this coversheet must be served on the defendant(s) along with the Summons and Complaint.

DOCKETING INFORMATION (Check all that apply)

*If Action is Judgment/Settlement do not complete

- JURY TRIAL demanded in complaint.
NON-JURY TRIAL demanded in complaint.
This case is subject to ARBITRATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
This case is subject to MEDIATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
This case is exempt from ADR. (Proof of ADR/Exemption Attached)

NATURE OF ACTION (Check One Box Below)

- Contracts: Constructions (100), Debt Collection (110), Employment (120), General (130), Breach of Contract (140), Other (199)
Torts - Professional Malpractice: Dental Malpractice (200), Legal Malpractice (210), Medical Malpractice (220), Previous Notice of Intent Case # 20-CP-..., Notice/ File Med Mal (230), Other (299)
Torts - Personal Injury: Assault/Slander/Libel (300), Conversion (310), Motor Vehicle Accident (320), Premises Liability (330), Products Liability (340), Personal Injury (350), Wrongful Death (360), Other (399)
Real Property: Claim & Delivery (400), Condemnation (410), Foreclosure (420), Mechanic's Lien (430), Partition (440), Possession (450), Building Code Violation (460), Other (499)
Inmate Petitions: PCR (500), Mandamus (520), Habeas Corpus (530), Other (599)
Administrative Law/Relief: Reinstate Drv. License (800), Judicial Review (810), Relief (820), Permanent Injunction (830), Forfeiture-Petition (840), Forfeiture-Consent Order (850), Other (899)
Judgments/Settlements: Death Settlement (700), Foreign Judgment (710), Magistrate's Judgment (720), Minor Settlement (730), Transcript Judgment (740), Lis Pendens (750), Transfer of Structured Settlement Payment Rights Application (760), Confession of Judgment (770), Petition for Workers Compensation Settlement Approval (780), Other (799)
Appeals: Arbitration (900), Magistrate-Civil (910), Magistrate-Criminal (920), Municipal (930), Probate Court (940), SCDOT (950), Worker's Comp (960), Zoning Board (970), Public Service Comm. (990), Employment Security Comm (991), Other (999)
Special/Complex /Other: Environmental (600), Automobile Arb. (610), Medical (620), Other (699), Pharmaceuticals (630), Unfair Trade Practices (640), Out-of-State Depositions (650), Motion to Quash Subpoena in an Out-of-County Action (660), Sexual Predator (510)

Submitting Party Signature: [Signature]

Date: April 23, 2013

Note: Frivolous civil proceedings may be subject to sanctions pursuant to SCRCPP, Rule 11, and the South Carolina Frivolous Civil Proceedings Sanctions Act, S.C. Code Ann. §15-36-10 et. seq.

FOR MANDATED ADR COUNTIES ONLY

Allendale, Anderson, Beaufort, Clarendon, Colleton, Florence, Greenville, Hampton, Horry, Jasper, Lee, Lexington, Pickens (Family Court Only), Richland, Sumter, Union, Williamsburg, and York

SUPREME COURT RULES REQUIRE THE SUBMISSION OF ALL CIVIL CASES TO AN ALTERNATIVE DISPUTE RESOLUTION PROCESS, UNLESS OTHERWISE EXEMPT.

You are required to take the following action(s):

1. The parties shall select a neutral and file a "Proof of ADR" form on or by the 210th day of the filing of this action. If the parties have not selected a neutral within 210 days, the Clerk of Court shall then appoint a primary and secondary mediator from the current roster on a rotating basis from among those mediators agreeing to accept cases in the county in which the action has been filed.
2. The initial ADR conference must be held within 300 days after the filing of the action.
3. Pre-suit medical malpractice mediations required by S.C. Code §15-79-125 shall be held not later than 120 days after all defendants are served with the "Notice of Intent to File Suit" or as the court directs. (Medical malpractice mediation is mandatory statewide.)
4. Cases are exempt from ADR only upon the following grounds:
 - a. Special proceeding, or actions seeking extraordinary relief such as mandamus, habeas corpus, or prohibition;
 - b. Requests for temporary relief;
 - c. Appeals
 - d. Post Conviction relief matters;
 - e. Contempt of Court proceedings;
 - f. Forfeiture proceedings brought by governmental entities;
 - g. Mortgage foreclosures; and
 - h. Cases that have been previously subjected to an ADR conference, unless otherwise required by Rule 3 or by statute.
5. In cases not subject to ADR, the Chief Judge for Administrative Purposes, upon the motion of the court or of any party, may order a case to mediation.
6. Motion of a party to be exempt from payment of neutral fees due to indigency should be filed with the Court within ten (10) days after the ADR conference has been concluded.

Please Note: You must comply with the Supreme Court Rules regarding ADR. Failure to do so may affect your case or may result in sanctions.

STATE OF SOUTH CAROLINA
COUNTY OF HAMPTON

) IN THE COURT OF COMMON PLEAS
) C/A.: 201-CP-25-075

Zavan Dishawn Johnson,

Plaintiff,

v.

Thomas "TC" Smalls, as Sheriff of Hampton
County, Hampton County, and Hampton County
Sheriff's Department,

Defendants.

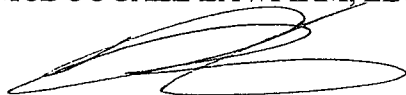
FILED
2013 APR 24 AM 10:52
HILINDA D. NETTLES
CLERK OF COURT
HAMPTON COUNTY, S.C.
BY _____

AMENDED SUMMONS

TO: DEFENDANTS NAMED ABOVE:

YOU WILL PLEASE TAKE NOTICE that you are Summoned and required to answer the Amended Complaint filed in this matter, and serve a copy of your Answer to the subscriber at his office at Post Office Box 1336, Beaufort, South Carolina 29901-1336, within thirty (30) days from the date of the service hereof, exclusive of the date of such service; and, if you fail to answer such Complaint within the time aforesaid, the Plaintiff will seek a judgment by default against you for the relief demanded in the Complaint.

MCDUGALL LAW FIRM, LLC



Davis A. Whitfield-Cargile
P.O. Box 1336
115 Lady's Island Drive
Beaufort, South Carolina 29901
(843) 379 - 7000
Attorneys for Plaintiff

Beaufort, South Carolina
April 23, 2013

STATE OF SOUTH CAROLINA)
COUNTY OF HAMPTON)
Zavan Dishawn Johnson,)
Plaintiff,)
v.)
Thomas "TC" Smalls, as Sheriff of Hampton)
County, Hampton County, and Hampton County)
Sheriff's Department,)
Defendants.)

) IN THE COURT OF COMMON PLEAS
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) C/A.: 201-CP-25-075
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FILED
2013 APR 24 AM 10:52
MELINDA D. NETTLES
CLERK OF COURT
HAMPTON COUNTY, S.C.

AMENDED COMPLAINT
(Jury Trial Demanded)

Plaintiff Zavan DiShawn Johnson ("Plaintiff" or "Johnson"), complaining of the above Defendants, would allege as follows:

1. At all times material hereto, Plaintiff was a citizen of the County of Hampton, State of South Carolina.
2. At all times material hereto, Defendants Thomas "TC" Smalls, as Sheriff of Hampton County, Hampton County, and Hampton County Sheriff's Department (collectively referred to hereinafter as the "Hampton County Defendants") were entities existing under the constitution and laws of the State of South Carolina, and subject to suit in the County of Hampton, State of South Carolina, and liable for the actions complained of herein.
3. All acts complained of herein occurred in the County of Hampton, State of South Carolina.

4. Upon Information and belief, jurisdiction and venue are proper in County of Hampton, State of South Carolina.
5. The Hampton County Defendants are each responsible for the acts and/or omissions of their agents and/or employees under the doctrine of *respondeat superior*.
6. At all times material herein, the Hampton County Defendants, and their agents and/or employees, had the care, custody, and control of the of a canine belonging to the Hampton Defendants.
7. At all times material herein, Thomas "TC" Smalls, as Sheriff of Hampton County, and his agents and/or employees, had the care, custody, and control of the of a canine that bit or attacked Plaintiff on or about March 2, 2011.
8. At all times material herein, Hampton County, and its agents and/or employees, had the care, custody, and control of the of a canine that bit or attacked Plaintiff on or about March 2, 2011.
9. At all times material herein, the Hampton County Sheriff's Department, and its their agents and/or employees, had the care, custody, and control of the of a 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.

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.

FOR A FIRST CAUSE OF ACTION
(For Strict Liability Under S.C. Code Ann. § 47-3-110)

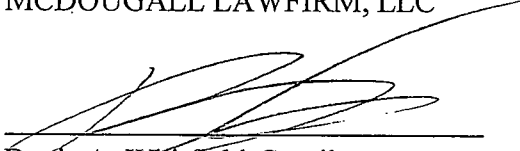
14. Plaintiff realleges each and every allegation of the Complaint as if stated within this cause of action verbatim.
15. South Carolina Code Ann. § 47-3-110 provides that when any person is bitten or otherwise attacked by a dog while the person is in a public place or is lawfully in a private place, the owner of the dog or other person having the dog in his care or keeping is liable for the damages suffered by the person bitten or otherwise attacked. This is a strict liability statute.
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.
18. The Hampton County Defendants are strictly liable for the damages suffered by Plaintiff as a result of Plaintiff having been bitten, chased and attacked by the canine on March 2, 2013, while Plaintiff was lawfully on the public street and/or lawfully in a private place.
19. As a result of the attack by the Hampton County Defendants' canine, Plaintiff sustained

physical injuries and has been caused to endure unnecessary physical pain and suffering, mental anguish, emotional distress.

20. Plaintiff requests a trial by jury to determine the amount of his actual damages, and an award of punitive damages, in an amount deemed appropriate by a jury.

WHEREFORE, Plaintiff requests a trial by jury and prays for Judgment against Defendants for actual and punitive damages, plus the cost of this action, and for any further relief to which the Court deems him entitled.

MCDUGALL LAW FIRM, LLC



Davis A. Whitfield-Cargile

P.O. Box 1336

115 Lady's Island Drive

Beaufort, South Carolina 29901

(843) 379 - 7000

Attorneys for Plaintiff

Beaufort, South Carolina

April 23, 2013

STATE OF SOUTH CAROLINA)

COUNTY OF HAMPTON)

ZAVAN DISHAWN JOHNSON)

Plaintiff(s))

vs.)

Thomas "TC" Smalls, as Sheriff of Hampton)
County, Hampton County, and Hampton County)
Sheriff's Department,)

Defendant(s))

Submitted By: Davis A. Whitfield-Cargile
Address: McDougall Law Firm, P.O. Box 1336, Beaufort,
South Carolina 29902

IN THE COURT OF COMMON PLEAS

CIVIL ACTION COVERSHEET

2013-CP - 25- 075

RECEIVED

AUG 13 2014

SC Bar #: 78065 SC Court of Appeal:
Telephone #: 843-379-7000
Fax #: 843-379-7007
Other:
E-mail: dwe@mcdougalllawfirm.com

NOTE: The coversheet and information contained herein neither replaces nor supplements the filing and service of pleadings or other papers as required by law. This form is required for the use of the Clerk of Court for the purpose of docketing. It must be filled out completely, signed, and dated. A copy of this coversheet must be served on the defendant(s) along with the Summons and Complaint.

DOCKETING INFORMATION (Check all that apply)

*If Action is Judgment/Settlement do not complete

- JURY TRIAL demanded in complaint. NON-JURY TRIAL demanded in complaint.
- This case is subject to ARBITRATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
- This case is subject to MEDIATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
- This case is exempt from ADR. (Proof of ADR/Exemption Attached)

NATURE OF ACTION (Check One Box Below)

- | | | | |
|--|--|---|--|
| <input type="checkbox"/> Contracts
<input type="checkbox"/> Constructions (100)
<input type="checkbox"/> Debt Collection (110)
<input type="checkbox"/> Employment (120)
<input type="checkbox"/> General (130)
<input type="checkbox"/> Breach of Contract (140)
<input type="checkbox"/> Other (199) | <input type="checkbox"/> Torts - Professional Malpractice
<input type="checkbox"/> Dental Malpractice (200)
<input type="checkbox"/> Legal Malpractice (210)
<input type="checkbox"/> Medical Malpractice (220)
Previous Notice of Intent Case #
20 -CP- -
<input type="checkbox"/> Notice/ File Med Mal (230)
<input type="checkbox"/> Other (299) | <input type="checkbox"/> Torts - Personal Injury
<input type="checkbox"/> Assault/Slander/Libel (300)
<input type="checkbox"/> Conversion (310)
<input type="checkbox"/> Motor Vehicle Accident (320)
<input type="checkbox"/> Premises Liability (330)
<input type="checkbox"/> Products Liability (340)
<input checked="" type="checkbox"/> Personal Injury (350)
<input type="checkbox"/> Wrongful Death (360)
<input type="checkbox"/> Other (399) | <input type="checkbox"/> Real Property
<input type="checkbox"/> Claim & Delivery (400)
<input type="checkbox"/> Contention (410)
<input type="checkbox"/> Foreclosure (420)
<input type="checkbox"/> Mechanic's Lien (430)
<input type="checkbox"/> Partition (440)
<input type="checkbox"/> Possession (450)
<input type="checkbox"/> Building Code Violation (460)
<input type="checkbox"/> Other (499) |
| <input type="checkbox"/> Inmate Petitions
<input type="checkbox"/> PCR (500)
<input type="checkbox"/> Mandamus (520)
<input type="checkbox"/> Habeas Corpus (530)
<input type="checkbox"/> Other (599) | <input type="checkbox"/> Administrative Law/Relief
<input type="checkbox"/> Reinstate Drv. License (800)
<input type="checkbox"/> Judicial Review (810)
<input type="checkbox"/> Relief (820)
<input type="checkbox"/> Permanent Injunction (830)
<input type="checkbox"/> Forfeiture-Petition (840)
<input type="checkbox"/> Forfeiture-Consent Order (850)
<input type="checkbox"/> Other (899) | <input type="checkbox"/> Judgments/Settlements
<input type="checkbox"/> Death Settlement (700)
<input type="checkbox"/> Foreign Judgment (710)
<input type="checkbox"/> Magistrate's Judgment (720)
<input type="checkbox"/> Minor Settlement (730)
<input type="checkbox"/> Transcript Judgment (740)
<input type="checkbox"/> Lis Pendens (750)
<input type="checkbox"/> Transfer of Structured Settlement Payment Rights Application (760)
<input type="checkbox"/> Confession of Judgment (770)
<input type="checkbox"/> Petition for Workers Compensation Settlement Approval (780)
<input type="checkbox"/> Other (799) | <input type="checkbox"/> Appeals
<input type="checkbox"/> Arbitration (900)
<input type="checkbox"/> Magistrate-Civil (910)
<input type="checkbox"/> Magistrate-Criminal (920)
<input type="checkbox"/> Municipal (930)
<input type="checkbox"/> Probate Court (940)
<input type="checkbox"/> SCDOT (950)
<input type="checkbox"/> Worker's Comp (960)
<input type="checkbox"/> Zoning Board (970)
<input type="checkbox"/> Public Service Comm. (990)
<input type="checkbox"/> Employment Security Comm (991)
<input type="checkbox"/> Other (999) |
| <input type="checkbox"/> Special/Complex /Other
<input type="checkbox"/> Environmental (600)
<input type="checkbox"/> Automobile Arb. (610)
<input type="checkbox"/> Medical (620)
<input type="checkbox"/> Other (699) | <input type="checkbox"/> Pharmaceuticals (630)
<input type="checkbox"/> 'Unfair Trade Practices (640)
<input type="checkbox"/> Out-of State Depositions (650)
<input type="checkbox"/> Motion to Quash Subpoena in an Out-of-County Action (660)
<input type="checkbox"/> Sexual Predator (510) | | |

FILED
2013 MAR -1 PM 3:14
MARGA D. NETTLES
CLERK OF COURT
HAMPTON COUNTY

Submitting Party Signature: _____

Date: March 1, 2013

Note: Frivolous civil proceedings may be subject to sanctions pursuant to SCRCP, Rule 11, and the South Carolina Frivolous Civil Proceedings Sanctions Act, S.C. Code Ann. §15-36-10 et. seq.

15

FOR MANDATED ADR COUNTIES ONLY

Allendale, Anderson, Beaufort, Clarendon, Colleton, Florence, Greenville, Hampton, Horry, Jasper, Lee, Lexington, Pickens (Family Court Only), Richland, Sumter, Union, Williamsburg, and York

SUPREME COURT RULES REQUIRE THE SUBMISSION OF ALL CIVIL CASES TO AN ALTERNATIVE DISPUTE RESOLUTION PROCESS, UNLESS OTHERWISE EXEMPT.

You are required to take the following action(s):

1. The parties shall select a neutral and file a "Proof of ADR" form on or by the 210th day of the filing of this action. If the parties have not selected a neutral within 210 days, the Clerk of Court shall then appoint a primary and secondary mediator from the current roster on a rotating basis from among those mediators agreeing to accept cases in the county in which the action has been filed.
2. The initial ADR conference must be held within 300 days after the filing of the action.
3. Pre-suit medical malpractice mediations required by S.C. Code §15-79-125 shall be held not later than 120 days after all defendants are served with the "Notice of Intent to File Suit" or as the court directs. (Medical malpractice mediation is mandatory statewide.)
4. Cases are exempt from ADR only upon the following grounds:
 - a. Special proceeding, or actions seeking extraordinary relief such as mandamus, habeas corpus, or prohibition;
 - b. Requests for temporary relief;
 - c. Appeals
 - d. Post Conviction relief matters;
 - e. Contempt of Court proceedings;
 - f. Forfeiture proceedings brought by governmental entities;
 - g. Mortgage foreclosures; and
 - h. Cases that have been previously subjected to an ADR conference, unless otherwise required by Rule 3 or by statute.
5. In cases not subject to ADR, the Chief Judge for Administrative Purposes, upon the motion of the court or of any party, may order a case to mediation.
6. Motion of a party to be exempt from payment of neutral fees due to indigency should be filed with the Court within ten (10) days after the ADR conference has been concluded.

Please Note: You must comply with the Supreme Court Rules regarding ADR. Failure to do so may affect your case or may result in sanctions.

16

STATE OF SOUTH CAROLINA
COUNTY OF HAMPTON

) IN THE COURT OF COMMON PLEAS
) C/A.: 201-CP-25- 075

Zavan Dishawn Johnson,

Plaintiff,

v.

Thomas "TC" Smalls, as Sheriff of Hampton
County, Hampton County, and Hampton County
Sheriff's Department,
Defendants.

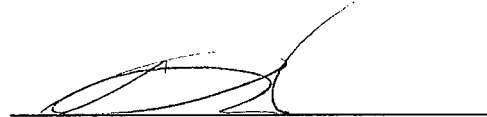
FILED
2013 MAR -1 PM 3:14
MYLINDA D. NETTLES
CLERK OF COURT
HAMPTON COUNTY
S.C.
BY _____

SUMMONS

TO: DEFENDANTS NAMED ABOVE:

YOU WILL PLEASE TAKE NOTICE that you are Summoned and required to answer the Complaint filed in this matter, and serve a copy of your Answer to the subscriber at his office at Post Office Box 1336, Beaufort, South Carolina 29901-1336, within thirty (30) days from the date of the service hereof, exclusive of the date of such service; and, if you fail to answer such Complaint within the time aforesaid, the Plaintiff will seek a judgment by default against you for the relief demanded in the Complaint.

MCDUGALL LAW FIRM, LLC



Davis A. Whitfield-Cargile
P.O. Box 1336
115 Lady's Island Drive
Beaufort, South Carolina 29901
(843) 379 - 7000
Attorneys for Plaintiff

Beaufort, South Carolina
March 1, 2013

STATE OF SOUTH CAROLINA

) IN THE COURT OF COMMON PLEAS

COUNTY OF HAMPTON

) C/A.: 201-CP-25- 075

Zavan Dishawn Johnson,

)

Plaintiff,

)

v.

)

Thomas "TC" Smalls, as Sheriff of Hampton
County, Hampton County, and Hampton County
Sheriff's Department,

)

)

)

)

Defendants.

)

FILED
2013 MAR -1 PM 3:14
MYLINDA D. NETTLES
CLERK OF COURT
HAMPTON COUNTY, S.C.
BY _____

COMPLAINT

(Jury Trial Demanded)

Plaintiff Zavan DiShawn Johnson ("Plaintiff" or "Johnson"), complaining of the above Defendants, would allege as follows:

1. At all times material hereto, Plaintiff was a citizen of the County of Beaufort, State of South Carolina.
2. At all times material hereto, Defendants Thomas "TC" Smalls, as Sheriff of Hampton County, Hampton County, and Hampton County Sheriff's Department (collectively referred to hereinafter as the "Hampton County Defendants") were entities existing under the constitution and laws of the State of South Carolina, and subject to suit in the County of Hampton, State of South Carolina, and liable for the actions complained of herein.
3. All acts complained of herein occurred in the County of Hampton, State of South Carolina.

4. Upon Information and belief, jurisdiction and venue are proper in County of Hampton, State of South Carolina.
5. The Hampton County Defendants are each responsible for the acts and/or omissions of their agents and/or employees under the doctrine of *respondeat superior*.
6. At all times material herein, the Hampton County Defendants, and their agents and/or employees, had the care, custody, and control of the of a canine belonging to the Hampton Defendants.
7. On or about March 1, 2011, while lawfully on Augusta Stage Coach Road, Plaintiff Zavan DiShawn Johnson was pursued and attacked by a canine that was owned by and in the possession, custody and control of Hampton County Defendants.
8. Shortly prior to being attacked by the canine that was owned by and in the possession, custody and control of the Hampton County Defendants, Johnson was a passenger in a vehicle being driven by another person, which vehicle had been unlawfully stopped by the Hampton County Defendants, and their agents and employees.
9. Plaintiff did nothing to provoke the attack. Plaintiff was lawfully on the public highway and adjacent property at the time he was chased, bitten, and attacked by the Canine.
10. The Hampton County Defendants failed to take any precautionary measures to protect Plaintiff Johnson from the canine that was owned by and in the possession, custody and control of the Hampton County Defendants. The Canine was not securely fenced in, the Dog was not on a leash or chain, the Dog was not subject to any vocal commands, and the Dog ran towards, charged at, bit and attacked Plaintiff, causing Plaintiff to suffer injuries as

a dangerous animal within the meaning of S.C. Code Ann. §§ 47-3-710 et seq.

36. The Hampton County Defendants allowed the Canine to be unrestrained and uncontrolled and to run at large, and as a result thereof, Plaintiff Johnson was caused to suffer injury.
37. Based on the foregoing and the allegations set forth more fully herein, Defendants violated S.C. Code Ann. §§ 47-3-10, et seq., and S. C. Code Ann. §§ 47-3-710, et. seq., and are negligent *per se*.
38. Plaintiff requests a trial by jury to determine the amount of his actual damages, and an award of punitive damages in an amount deemed appropriate by a jury.

FOR A THIRD CAUSE OF ACTION
(Negligence *per se*)

39. Plaintiff realleges each and every allegation of this Complaint as if stated verbatim herein.
40. The Hampton County Defendants and their agents and employees acting within the scope of their agency and employment, used the canine, the taser gun, and physical force to restrain Plaintiff and restrict Plaintiff's ability to move about freely.
41. Plaintiff was restrained by agents and employees of the Hampton County Defendants, acting within the scope of their employment and agency with the Hampton County Defendants, and who, at the time of the restraint, had the intent to confine and restrict the movements of Plaintiff and the restraint was unlawful.
42. At the time of the restraint, the employees and agents of the Hampton County Defendants, acted with gross negligence, recklessness, wantonness and deliberate indifference to the rights of Plaintiff, and had the intent to confine and restrict the movements of Plaintiff, and

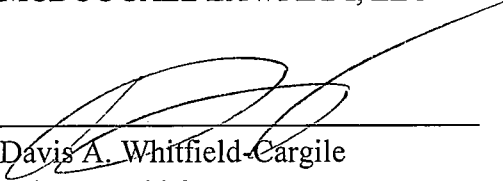
the restraint was unlawful.

43. As a result of the unlawful restraint and constriction of his movements, Plaintiff suffered damages in the form of deprivation of his liberty, as well as physical, mental, and psychological injuries and damages to include, but not limited to, emotional distress, pain and suffering, public humiliation and embarrassment, loss of enjoyment and quality of life, and additional damages.

44. As such, Plaintiff seeks a jury trial to determine all damages, actual and punitive.

WHEREFORE, Plaintiff requests a trial by jury and prays for Judgment against Defendants for actual and punitive damages, plus the cost of this action, and for any further relief to which the Court deems him entitled.

MCDUGALL LAW FIRM, LLC



Davis A. Whitfield-Cargile
P.O. Box 1336
115 Lady's Island Drive
Beaufort, South Carolina 29901
(843) 379 - 7000
Attorneys for Plaintiff

Beaufort, South Carolina
March 1, 2013

STATE OF SOUTH CAROLINA

COUNTY OF HAMPTON

ZAVAN DISHAWN JOHNSON,

Plaintiff,

vs.

THOMAS "TC" SMALLS, AS SHERIFF
OF HAMPTON COUNTY; HAMPTON
COUNTY; and HAMPTON COUNTY
SHERIFF'S DEPARTMENT,

Defendants.

IN THE COURT OF COMMON PLEAS

CIVIL ACTION NO. 2013-CP-25-0075

**ANSWER TO AMENDED
COMPLAINT**

(Jury Trial Demanded)

RECEIVED

AUG 13 2014

SC Court of Appeals

TO: DAVID WHITFIELD-CARGILE, ATTORNEY FOR THE PLAINTIFF:

The Defendants, Thomas "TC" Smalls, as Sheriff of Hampton County, Hampton County, and Hampton County Sheriff's Department (hereinafter "the Defendants"), answering the Plaintiff's Complaint would allege and show as follows:

1. The Defendants deny each and every allegation not specifically admitted hereinafter.

FOR A FIRST DEFENSE

(Failure to State a Claim)

2. The Plaintiffs' Complaint fails to state facts sufficient to constitute a cause of action against Defendants, and should be dismissed, pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure.

FOR A SECOND DEFENSE
(Lack of Service)

3. The allegations previously set forth herein are re-alleged and adopted as part of this Defense as if repeated verbatim.

4. The Defendants are informed and believe that proper service was not perfected on the Defendants as set forth in Rule 4 of the South Carolina Rules of Civil Procedure and, accordingly, service was never perfected on the Defendants. Defendants, therefore, move for a dismissal pursuant to Rule 12(b)(5) of the South Carolina Rules of Civil Procedure.

FOR A THIRD DEFENSE

5. The allegations previously set forth herein are re-alleged and adopted as part of this Defense as if repeated verbatim.

6. The Defendants lack information or knowledge sufficient to form a belief as to the truth of the matters asserted in Paragraph 1 of Plaintiff's Complaint, and therefore deny same. Further answering, the Defendants aver that the Plaintiff pled guilty to giving false information to law enforcement at the scene of this arrest.

7. The Defendants admit only so much of the allegations contained in Paragraph 2 of Plaintiff's Complaint that states that Hampton County and Hampton County Sheriff's Department were entities existing under the constitution and laws of the State of South Carolina; but the Defendants deny each and every remaining allegation of Paragraph 2 of Plaintiff's Complaint.

8. The Defendants lack information or knowledge sufficient to form a belief as to the truth of the matters asserted in Paragraph 3, including subparagraphs, and therefore deny same.

9. Paragraph 4 of Plaintiff's Complaint states a conclusion of law and, accordingly,

an answer is not required; to the extent an allegation of fact is made, the Defendants deny it.

10. The Defendants deny the allegations contained in Paragraphs 5 through 8 of Plaintiff's Complaint.

11. The Defendants admit only so much of the allegations contained in Paragraph 9 of Plaintiff's Complaint that states that at all times material herein, the Hampton County Sheriff's Department, and its agents and/or employees, had the care, custody, and control of the canine that bit the Plaintiff; but the Defendants deny each and every remaining allegation of Paragraph 9.

12. The Defendants deny the allegations contained in Paragraph 10 of Plaintiff's Complaint. Further answering, the Defendants aver that the Plaintiff was not lawfully on Stage Coach Road at the time of the incident, as he was found guilty to open container found in his possession at the time of his arrest. The Defendants aver that the Plaintiff was not chased off the roadway, as he plead guilty to assaulting an officer and resisting arrest during this incident.

13. The Defendants deny the allegations contained in Paragraph 11 of Plaintiff's Complaint. Further answering, the Defendants aver that the Plaintiff was not lawfully on Stage Coach Road at the time of the incident, as he was found guilty to open container found in his possession at the time of his arrest. The Defendants aver that the Plaintiff was not chased off the roadway, as he plead guilty to assaulting an officer and resisting arrest during this incident.

14. The Defendants deny the allegations contained in Paragraph 12 of Plaintiff's Complaint. Further answering, the Defendants aver that the Plaintiff was not lawfully on Stage Coach Road at the time of the incident, as he was found guilty to open container found in his possession at the time of his arrest. The Defendants aver that the Plaintiff was not chased off the roadway, as he plead guilty to assaulting an officer and resisting arrest during this incident.

15. The Defendants deny the allegations contained in Paragraph 13 of Plaintiff's Complaint. Further answering, the Defendants aver that the Plaintiff was not lawfully on Stage Coach Road at the time of the incident, as he was found guilty to open container found in his possession at the time of his arrest. The Defendants aver that the Plaintiff was not chased off the roadway, as he plead guilty to assaulting an officer and resisting arrest during this incident.

FOR A FIRST DEFENSE TO THE FIRST CAUSE OF ACTION
(For Strict Liability Under S.C. Code Ann. § 47-3-110)

16. The allegations previously set forth herein are re-alleged and adopted as part of this Defense as if repeated verbatim.

17. Paragraph 14 of Plaintiff's Complaint contains no allegations against the Defendants and therefore no answer is required. To the extent an allegation of fact is alleged, the Defendants deny it.

18. Responding to Paragraph 15 of Plaintiff's Complaint, the Defendants would allege that the referenced statute speaks for itself.

19. The Defendants deny the allegations contained in Paragraph 16 of Plaintiff's Complaint.

20. The Defendants deny the allegations contained in Paragraph 17 of Plaintiff's Complaint.

21. The Defendants deny the allegations contained in Paragraph 18 of Plaintiff's Complaint. Further answering, the Defendants aver that the Plaintiff was not lawfully on Stage Coach Road at the time of the incident, as he was found guilty to open container found in his possession at the time of his arrest. The Defendants aver that the Plaintiff was not chased off the roadway, as he plead guilty to assaulting an officer and resisting arrest during this incident.

22. The Defendants deny the allegations contained in Paragraph 19 of Plaintiff's Complaint.

23. Paragraph 20 of Plaintiff's Complaint contains no allegations against the Defendants and therefore no answer is required. To the extent an allegation of fact is alleged, the Defendants deny it.

FOR A FOURTH DEFENSE

24. The allegations previously set forth herein are realleged and adopted as part of this Defense as if repeated verbatim.

25. The Defendants plead the provisions of the South Carolina Tort Claims Act, South Carolina Code Section 15-78-10, *et seq.*, including all the immunities, limitations and defenses granted or preserved therein.

FOR A FIFTH DEFENSE

26. The allegations previously set forth herein are realleged and adopted as part of this Defense as if repeated verbatim.

27. The Defendants will show that the Plaintiff has failed to exhaust his administrative remedies, as required by 42 U.S.C. §1997e and, therefore, his claims are barred.

FOR A SIXTH DEFENSE

28. The allegations previously set forth herein are realleged and adopted as part of this Defense as if repeated verbatim.

29. The Defendants would show that the Plaintiff's claims are barred or subject to a reduction of recovery by his own comparative negligence.

the Defendants acted reasonably and in good faith and did not violate any clearly established right of the Plaintiff, and therefore, are qualifiedly immune from suit.

FOR AN ELEVENTH DEFENSE

38. The allegations previously set forth herein are realleged and adopted as part of this Defense as if repeated verbatim.

39. The Defendants allege that any acts which allegedly caused damages to the Plaintiff, all of which the Defendants deny, were caused by the Plaintiff and/or other known and unknown third parties and if any party should be held accountable it should be the Plaintiff, other known and unknown third parties wholly and exclusively, factually and legally.

FOR A TWELFTH DEFENSE

40. The allegations previously set forth herein are realleged and adopted as part of this Defense as if repeated verbatim.

41. The Defendants would show that the Complaint is barred by the applicable statute of limitations.

FOR A THIRTEENTH DEFENSE

42. The allegations previously set forth herein are realleged and adopted as part of this Defense as if repeated verbatim.

43. The Defendants would show that punitive damages are not recoverable against a government entity and, therefore, the Defendants moves to strike any demand for punitive or exemplary damages from the Complaint to the extent the Complaint seeks punitive damages..

FOR A FOURTEENTH DEFENSE

44. The allegations previously set forth herein are realleged and adopted as part of this Defense as if repeated verbatim.

45. The Defendants would show that the Complaint should be dismissed for insufficiency of process, pursuant to Rule 12(b)(4) of the South Carolina Rules of Civil Procedure.

FOR A FIFTEENTH DEFENSE

46. The allegations previously set forth herein are realleged and adopted as part of this Defense as if repeated verbatim.

47. The Defendants would show that any damages sought against a governmental agency are statutorily capped and the Defendants plead no recovery can exceed the statutory cap.

FOR A SIXTEENTH DEFENSE

48. The allegations previously set forth herein are realleged and adopted as part of this Defense as if repeated verbatim.

49. Under the South Carolina Frivolous Civil Proceedings Sanctions Act, S.C. Code Ann. §15-36-10 *et seq.*, the Defendants are entitled to recover their attorneys' fees and court costs incurred in litigating this matter.

FOR A SEVENTEENTH DEFENSE

50. The allegations previously set forth herein are realleged and adopted as part of this Defense as if repeated verbatim.

51. The Defendants allege the defense of estoppel.

FOR AN EIGHTEENTH DEFENSE

52. The allegations previously set forth herein are realleged and adopted as part of this Defense as if repeated verbatim.

53. The Defendants would show that the Complaint is barred by *res judicata*.

FOR A NINETEENTH DEFENSE

54. The allegations previously set forth herein are realleged and adopted as part of this Defense as if repeated verbatim.

55. The Defendants allege the defense of license.

FOR A TWENTIETH DEFENSE

56. The allegations previously set forth herein are realleged and adopted as part of this Defense as if repeated verbatim.

57. The Defendants allege the defense of fraud.

FOR A TWENTY-FIRST DEFENSE

58. The allegations previously set forth herein are realleged and adopted as part of this Defense as if repeated verbatim.

59. The Defendants would show that attorney fees are not recoverable against a government entity and, therefore, the Defendants move to strike any demand for attorney fees from the Complaint.

FOR A TWENTY-SECOND DEFENSE

60. The allegations previously set forth herein are realleged and adopted as part of this Defense as if repeated verbatim.

61. The Defendants reserve the right to timely assert any affirmative defense not currently known to the Defendants.

WHEREFORE, the Defendants having fully answered the Plaintiff's Complaint pray that this action be dismissed with costs to the Plaintiff.

GRIFFITH, SADLER & SHARP, P.A.

By:



E. Mitchell Griffith
O. Edworth Liipfert, III
600 Monson Street (29902)
PO Drawer 570
Beaufort, SC 29901
843-521-4242
843-521-4247 (fax)
mgriffith@griffithsadlersharp.com
wliipfert@griffithsadlersharp.com

ATTORNEYS FOR DEFENDANTS

Beaufort, South Carolina

June 17, 2013

STATE OF SOUTH CAROLINA
COUNTY OF HAMPTON

IN THE COURT OF COMMON PLEAS
CIVIL ACTION NO. 2013-CP-25-0075

ZAVAN DISHAWN JOHNSON,

Plaintiff,

vs.

THOMAS "TC" SMALLS, AS SHERIFF
OF HAMPTON COUNTY; HAMPTON
COUNTY; and HAMPTON COUNTY
SHERIFFS DEPARTMENT,

Defendants.

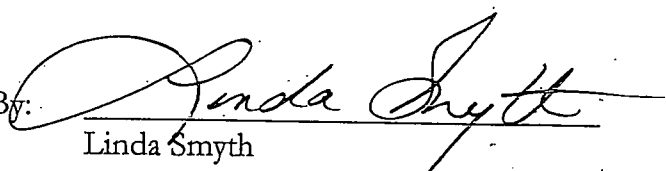
CERTIFICATE OF SERVICE

The undersigned, Linda Smyth, hereby avers that she is a Legal Assistant of GRIFFITH, SADLER & SHARP, P.A., Attorneys for the Defendants, and that on the 17th day of June 2013 a true and accurate copy of the attached *Answer to Amended Complaint, Motion to Dismiss*, and *Responses to Plaintiff's Requests to Admit* were placed in an envelope with first class postage thereon prepaid through the United States Postal Service, and mailed to the Parties as follows:

Attorneys for Plaintiff:

Davis A. Whitfield-Cargile
McDOUGALL LAW FIRM, LLC
PO Box 1336
Beaufort, SC 29901-1336

By:


Linda Smyth

Zavan Dishawn Johnson,
Plaintiff,

Thomas "TC" Smalls, Hampton County, and Hampton
County Sheriff's Department,
Defendants.

**MOTION AND ORDER INFORMATION
FORM AND COVER SHEET**

check box above indicating submitting party

name, S.C. Bar no. and address of Plaintiff's attorney
Davis Whitfield-Cargile
Post Office Box 1336
Beaufort, South Carolina 29901
(843) 379-7000 / (843) 379-7007 FAX
dwc@mcdougalllawfirm.com

name, S.C. Bar no. and address of Defendant's attorney
O. Edworth Liipfert, III
Post Office Drawer 570
Beaufort, SC 29901-0570
telephone: 843-521-4242 fax: 843-521-4247
wliipfert@griffithsadlersharp.com

RECEIVED

AUG 13 2014

1st Court of App

- MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)
- FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)
- PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)

SECTION I: Hearing Information

Nature of Motion: Motion to Dismiss

Estimate Time Needed: 10 min

Court Reporter Needed: YES NO

SECTION II: Motion Type

- Written motion attached
- Form Motion/Order -

I hereby move for relief or action by the court as set forth in the attached proposed order.

Signature of Attorney for Plaintiff Defendant _____ Date submitted _____

SECTION III: Motion Fee

PAID - AMOUNT: \$25.00

- EXEMPT:
 - Rule to Show Cause in Child or Spousal Support
 - Domestic Abuse or Abuse and Neglect
 - Indigent Status
 - Sexually Violent Predator Act
 - Motion for Stay in Bankruptcy
 - Motion for Publication
 - Proposed Order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions
- State Agency v. Indigent Party
- Post-Conviction Relief
- Motion for Execution (Rule 69, SCRPC)

Name of Court Reporter: _____

Other: _____

JUDGE'S SECTION

- Motion fee to be paid upon filing attached order.
- Other

JUDGE _____

CODE: _____

Date: _____

CLERK'S VERIFICATION

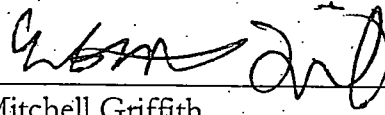
Collected by: _____
(print name)

DATE FILED _____

MOTION FEE COLLECTED: _____

CONTESTED - AMOUNT DUE: _____

By:



E. Mitchell Griffith
O. Edworth Liipfert, III
600 Monson Street (29902)
PO Drawer 570
Beaufort, SC 29901
843-521-4242
843-521-4247 (fax)
mgriffith@griffithsadlerssharp.com
wliipfert@griffithsadlerssharp.com

ATTORNEYS FOR DEFENDANTS

Beaufort, South Carolina

June 17, 2013

STATE OF SOUTH CAROLINA)
)
 COUNTY OF HAMPTON)
)
 Ivan Dishawn Johnson,)
)
 Plaintiff,)
)
 v.)
)
 Thomas "TC" Smalls, as Sheriff of Hampton,)
 County, Hampton County, and Hampton)
 County Sheriff's Department,)
)
 Defendants.)

IN THE COURT OF COMMON PLEAS


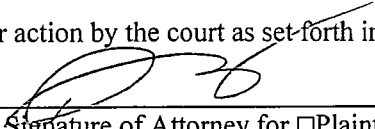
C/A No.: 2013-CP-25-075

RECEIVED

AUG 13 2014

SC Court of Appeals

2013 AUG 29 PM 4:03
 WILLIAMS D. HETTLER
 CLERK OF COURT
 HAMPTON COUNTY, S.C.

Plaintiff's Attorney: Davis A. Whitfield-Cargile, Esquire Bar No. 78065 Address: P.O. Box 1336, Beaufort, SC 29901 phone: 843-379-7000 fax: 843-379-7007 e-mail: dwc@mcdougalllawfirm.com	Defendants Attorney: E. Mitchell Griffith O. Edworth Liipfert, III Griffith Sadler Sharp P.O. Drawer 570 Beaufort, SC 29901-0570
<input type="checkbox"/> MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III) <input type="checkbox"/> FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III) <input type="checkbox"/> PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III) (Being sent to Judge Directly)	
SECTION I: Hearing Information	
Nature of Motion: <u>Motion to Reconsider</u> Estimated Time Needed: 15 minutes Court Reporter Needed: <input type="checkbox"/> YES / <input type="checkbox"/> NO	
SECTION II: Motion/Order Type	
<input checked="" type="checkbox"/> Written motion attached  <input type="checkbox"/> Form Motion/Order I hereby move for relief or action by the court as set forth in the attached proposed order being sent to directly to the Judge.	
 Signature of Attorney for <input type="checkbox"/> Plaintiff / <input type="checkbox"/> Defendant	<u>8/29</u> Date submitted
SECTION III: Motion Fee	
<input checked="" type="checkbox"/> PAID - AMOUNT: <u>25.00</u> <input type="checkbox"/> EXEMPT: <input type="checkbox"/> Rule to Show Cause in Child or Spousal Support (check reason) <input type="checkbox"/> Domestic Abuse or Abuse and Neglect <input type="checkbox"/> Indigent Status <input type="checkbox"/> State Agency v. Indigent Party <input type="checkbox"/> Sexually Violent Predator Act <input type="checkbox"/> Post-Conviction Relief <input type="checkbox"/> Motion for Stay in Bankruptcy <input type="checkbox"/> Motion for Publication <input type="checkbox"/> Motion for Execution (Rule 69, SCRPC) <input type="checkbox"/> Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions Name of Court Reporter: <input type="checkbox"/> Other:	
JUDGE'S SECTION	
<input type="checkbox"/> Motion Fee to be paid upon filing of the attached order. <input type="checkbox"/> Other:	JUDGE _____ CODE: _____ Date: _____
CLERK'S VERIFICATION	
Collected by: _____ <input type="checkbox"/> MOTION FEE COLLECTED: _____ <input type="checkbox"/> CONTESTED - AMOUNT DUE: _____	Date Filed: _____

STATE OF SOUTH CAROLINA)

COUNTY OF HAMPTON)

Zavan Dishawn Johnson,

Plaintiff,

v.

Thomas "TC" Smalls, as Sheriff of
Hampton County, Hampton County,
and Hampton County Sheriff's
Department,

Defendants.)

IN THE COURT OF COMMON PLEAS

CASE NO: 2013-CP-25-075


FILED
2013 AUG 29 PM 4:03
MELINDA B. NETTLES
CLERK OF COURT
HAMPTON COUNTY, S.C.

RULE 11 AFFIRMATION

Davis A. Whitfield-Cargile, Esquire, of McDougall Law Firm, Attorney for Plaintiff, affirms that with regard to the attached motion:

- I have communicated in writing with opposing counsel and have attempted in good faith to resolve the matter contained in the motion.
- I have communicated orally with opposing counsel and have attempted in good faith to resolve the matter contained in the motion.
- I do not feel that consultation with opposing counsel would serve any useful purpose.
- I feel that communication with opposing counsel would prevent this motion from being timely heard.
- I have not consulted with opposing counsel as this is a motion to dismiss or a motion for summary judgment.

McDOUGALL LAW FIRM



Davis A. Whitfield-Cargile, Esquire
Attorney for Plaintiff
P.O. Box 1336
Beaufort, SC 29901-1336
(843) 379-7000

August 29, 2013
Beaufort, South Carolina

STATE OF SOUTH CAROLINA)
)
COUNTY OF HAMPTON)

IN THE COURT OF COMMON PLEAS

C/A No.: 2013-CP-25-075

Zavan Dishawn Johnson,)
)
Plaintiff,)

v.)

Hampton County Sheriff's)
Department,¹)
)
Defendants.)

2013 AUG 29 PM 4:03
FILED
KAYLINDA D. NETTLES
CLERK OF COURT, S.C.
HAMPTON COUNTY, S.C.

MOTION TO RECONSIDER

TO: HONORABLE PERRY M. BUCKNER, CIRCUIT COURT JUDGE, AND
E. MITCHELL GRIFFITH & O. EDWORTH LIPPERT, III, COUNSEL FOR
DEFENDANT HAMPTON COUNTY SHERIFF'S DEPARTMENT

YOU WILL PLEASE TAKE NOTICE that Plaintiff, by and through his undersigned attorneys, will move on the tenth day after service hereof, or as soon hereafter as he may be heard, to reconsider, alter, and amend the Order signed by² Judge Buckner on August 8, 2013 (the "Order"), and issue an amended order denying Defendant's Motion to Dismiss.

an order granting summary judgment as to the issue of liability.

As grounds, Plaintiff submits the following:

¹Plaintiff is not seeking reconsideration of the dismissal of Hampton County or T.C. Smalls as parties, and therefore only names in the caption the last remaining Defendant, Hampton County Sheriff's Department.

²The Order apparently has not yet been filed with the Hampton County Clerk of Court. Pursuant to Rule 59(e), a party has ten days from receipt of written notice of the entry of the Order to file a Motion to Alter or Amend. Plaintiff received written notice of this Order on August 19, 2013. Therefore this motion is timely. A "motion to reconsider" is proper under Rule 59(e). See Elam v. South Carolina Dept. of Transp., 361 S.C. 9, 15, 602 S.E.2d 772, 775 (2004).

The Court's sole rationale for granting the Motion to Dismiss was the Court's conclusion that imposing strict liability under Section 47-3-110 is inconsistent with the sixth enumerated exception to the Tort Claims Act's waiver of the state's sovereign immunity, which excepts "civil disobedience, riot, insurrection, or rebellion or the failure to provide [or]³ the method of providing police or fire protection." S.C. Code Ann. § 15-78-60(6). Plaintiff 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.

Standard of Review

As an initial matter, this matter came before the 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)).

"In deciding a motion to dismiss pursuant to 12(b)(6), SCRPC, 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

³The 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").

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 hearing, Plaintiff objected to consideration of matters outside the face of Plaintiff’s Complaint. The Court declared from the bench that matters outside the Complaint would not be considered, and that the Court would rule based solely on the allegations contained in the complaint.

It appears based on the Order that the Court considered matters which were not within Plaintiff’s complaint, including his indictment and criminal charges stemming from the same day as the dog bite he sustained at the hands of a dog owned by Defendant Hampton County Sheriff’s Department. Further, though not alleged anywhere in the Complaint, the Order concludes as a factual matter that the dog that bit the Plaintiff on March 2, 2011 was providing police protection at the time the dog bit the Plaintiff. The Plaintiff alleges no where in his complaint that the dog that bit him was providing police protection. The only basis from which the Court could have concluded that the dog that bit Plaintiff was providing police protection was by consideration of matters not within the four corners of Plaintiff’s complaint. Therefore, Plaintiff respectfully submits that the Order should be amended, and the Motion to Dismiss denied, as Plaintiff’s complaint sets forth facts which would support a claim for relief under Section 47-3-110.

The Interplay of Section 47-3-110 and Section 15-78-60(6)

The Plaintiff further respectfully submits that the Order 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.

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 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. The Harris case, where the Supreme Court allowed a strict liability dog bite claim against the Sheriff's Office to proceed to trial, undermines the Court's grant of a 12(b)(6) dismissal of Plaintiff's claim against the Hampton County Sheriff's Office for injuries sustained as a result of being bitten and attacked by a dog admittedly owned by the Hampton County Sheriff's Office. At a minimum this shows that dog bite claims against sheriff's office are not completely excluded by Section 15-78-60(6). As set forth above, the Complaint does not allege that the dog in question was providing police protection, and whether the dog that bit plaintiff was providing police protection is a factual question that cannot be decided at the 12(b)(6) stage. This highlight's the impropriety of the Court's determination that the dog that bit Plaintiff was "performing police protection" at this stage of the litigation. Moreover, the Harris case undermines the Order's legal conclusion that 15-78-60(6) precludes actions under Section 47-3-110 against a governmental law enforcement agency.

In addition, or alternatively, and without conceding that the canine in question was providing police protection, Plaintiff respectfully submits that 15-78-60(6) (hereinafter, "the method of providing police protection exception") does not preclude strict liability claims against a Sheriff's Office under 47-3-110. The Plaintiff has not sued Hampton County Sheriff's Department for

choosing to employ police dogs as a method of police protection. Plaintiff has sued Hampton County Sheriff's Department because Plaintiff sustained injuries after he was bitten by a dog owned by the Hampton County Sheriff's Department. Providing immunity to the police for the method of providing police protection and 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 are not mutually exclusive or inconsistent.

"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 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. Section 47-3-110 is the codification of 1986 Act No. 343, and Section 15-78-10, et seq., (including 15-78-60) is the codification of Section 1 of Act 1986 Act No. 463. 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.

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 General Assembly passed 2013 Act No. 62. The appellate courts of South Carolina have consistently held that provocation is the only exception to the strict liability under Section 47-3-110. 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:

(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. It is clear that, 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 requirements are not satisfied. Had the General Assembly intended that strict liability not apply against sheriff's offices, 2013 Act No. 62, which restricts, but does not eliminate, strict liability against governmental law enforcement agencies, would be futile and unnecessary. Had the General Assembly intended that 15-78-60(6) would preclude all strict liability claims against governmental law enforcement agencies

arising out of dog bites by police canines under the theory that police canines provide police protection, there would have been no need to enact 2013 Act No. 62. Moreover, it is clear that Act No. 62 was intended to limit the application of Section 47-3-110 against governmental law enforcement agencies. Under the reasoning of the Order, Act No. 62 would be expanding the application of Section 47-3-110 against governmental law enforcement agencies, which was clearly not the intent of the 120th Session of the General Assembly.

It is clear that 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 against law enforcement agencies, and that Section 15-78-60(6) does not limit or exempt law enforcement agencies from an action brought pursuant to Section 47-3-110.

As a final argument, Plaintiff submits that, by its terms, Section 15-78-60(6) does not except all methods of police protection from the waiver of immunity, but only excepts the failure to provide or the method of providing police or fire protection incident to “civil disobedience, riot, insurrection, or rebellion.” The Plaintiff’s complaint does not allege that he was bitten by a police dog incident to civil disobedience, riot, insurrection, or rebellion, and therefore Defendant’s argument must fail.

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 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. Therefore, because the Complaint clearly states a claim for relief under Section 47-3-110, Plaintiff respectfully submits that the Motion to Dismiss should have been denied.

CONCLUSION

Therefore, Plaintiff respectfully submits that the Order granting Defendant's Motion to Dismiss pursuant to Rule 12(b)(6) is affected by error of law—both in the application of the improper standard under Rule 12(b)(6) and in the Court's determination that Section 15-78-60 precludes an action against Hampton County Sheriff's Department. Plaintiff therefore respectfully requests that the Court issue withdraw the Order previously filed and issue an amended Order (or a Form 4 Order⁴) denying the Defendant's Motion to Dismiss.

Respectfully submitted,

McDOUGALL LAW FIRM, LLC



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P.O. Box 1336
115 Lady's Island Drive
Beaufort, South Carolina 29901
(843) 379-7000
Attorneys for Plaintiff

Beaufort, South Carolina
August 29, 2013

⁴A denial of a Rule 12(b)(6) motion is generally not immediately appealable.

STATE OF SOUTH CAROLINA)

COUNTY OF HAMPTON)

Zavan Dishawn Johnson,)

Plaintiff,)

v.)

Thomas "TC" Smalls, as Sheriff of
Hampton County, Hampton County,
and Hampton County Sheriff's
Department,)

Defendants.)

IN THE COURT OF COMMON PLEAS

C/A No.: 2013-CP-25-75

CERTIFICATE OF MAIL

I HEREBY CERTIFY that a copy of Plaintiff's Motion to Reconsider, Motion Cover Sheet and Rule 11 Affidavit was served upon all counsel of record by depositing in the United States Mail, proper postage affixed thereto, a true and accurate copy thereof, on the 29th day of August, 2013, as follows:

O. Edworth Liipfert, III, Esquire
E. Mitchell Griffith, Esquire
Griffith, Sadler & Sharp, P.A.
P.O. Box 570
Beaufort, SC 29901

The Honorable Perry M. Buckner, III
Judge, Fourteenth Judicial Circuit
P.O. Drawer 470
Walterboro, SC 29488-0470

McDOUGALL LAW FIRM

Krista A. Shooltz
Krista A. Shooltz
Paralegal to J. Olin McDougall, II, Esquire
and Davis A. Whitfield-Cargile, Esquire
P.O. Box 1336
Beaufort, SC 29901-1336
(843) 379-7000
Attorney for Plaintiff

BY
KRYSTINA D. NETTLES
CLERK OF COURT
HAMPTON COUNTY, S.C.
2013 AUG 29 PM 4:03

FILED

Beaufort, South Carolina

August 29, 2013

RECEIVED

AUG 13 2014

SC Court of Appeals

STATE OF SOUTH CAROLINA)
COUNTY OF HAMPTON)
ZAVAN DÍSHAWN JOHNSON,)
Plaintiffs,)
vs.)
THOMAS "TC" SMALLS, AS SHERIFF OF)
HAMPTON COUNTY; HAMPTON)
COUNTY; AND HAMPTON COUNTY)
SHERIFF'S DEPARTMENT,)
Defendants.)

COURT OF COMMON PLEAS
CIVIL ACTION NO. 13-CP-25-0075

**MEMORANDUM OF LAW
SUPPORTING DEFENDANT'S
MOTION TO DISMISS**

RECEIVED

AUG 13 2014

SC Court of Appeals

FACTUAL/PROCEDURAL BACKGROUND

The Plaintiff was bitten by a police dog on March 2, 2011 near Augusta Stage Coach Road in Garnett, South Carolina.¹ The dog was owned by and in the care and custody of the Hampton County Sheriff's Department at the time of the bite.² Shortly before the bite occurred, the Plaintiff was a passenger in a vehicle that was subject to a traffic stop.³ As a result of the stop on March 2, 2011, the Plaintiff arrested and charged with resisting arrest pursuant to SC Code Ann. §16-9-320(A), and the Plaintiff pled guilty to this charge in circuit court on November 7, 2011.⁴ The Defendant requests that the Court take judicial notice of the Plaintiff's guilty plea attached hereto as "Exhibit A." The Plaintiff was also charged with giving false information to a police officer, having an open container in a motor vehicle, and public disorderly conduct.⁵ The Plaintiff pled guilty to giving false information to a

¹ Amended Complaint, Paragraphs 7 and 10.

² Amended Complaint, Paragraph 9.

³ Complaint, Paragraph 8.

⁴ Answer, Paragraph 12.

⁵ Answer, Paragraph 12.

police officer and was found guilty of open container and public disorderly conduct in magistrate's court on May 25, 2011. The Defendant requests that the Court take judicial notice of the Plaintiff's guilty plea to the charge of giving false information, which is attached hereto as "Exhibit B," the Plaintiff's guilty verdict in a bench trial for open container, which is attached hereto as "Exhibit C," and disorderly conduct, which is attached hereto as "Exhibit D." The Plaintiff has now sued the Defendants under the theory of strict liability pursuant to SC Code Ann. §47-3-110 ("the dog bite statute") for the bite occurring at the time of his arrest.

LEGAL STANDARD

When reviewing a motion to dismiss for failure to state a claim, the court must base its ruling solely on the allegations in the pleadings. Capital City Ins. Co. v. BP Staff, Inc., 382 S.C. 92, 99, 674 S.E.2d 524, 528 (Ct. App. 2009) (citation omitted). A court should grant a motion to dismiss under Rule 12(b)(6), SCRCPP when reviewing the Complaint in the light most favorable to the plaintiff and construing every doubt in the plaintiff's favor, the complaint fails to state any valid claim for relief. Id. (citation omitted). If the court considers any matters outside the pleadings, the motion to dismiss will be treated as a motion for summary judgment. See Rule 12(b), SCRCPP; Shealy v. Doe, 370 S.C. 194, 198, 634 S.E.2d 45, 47 (Ct. App. 2006).

ARGUMENT

- A. **The Defendants are entitled to immunity pursuant to SC Code Ann. §15-78-60(6) because the use of police dogs is a method or means of providing police protection.**

Hampton County Sheriff's Department has elected to use police dogs to physically

engage and apprehend suspects. Using trained police dogs to apprehend fleeing suspects is method of providing police protection. SC Code Ann. §15-78-60(6) provides immunity to governmental agencies for “the method of providing police or fire protection.” The Compliant stands for the proposition that any police dog bite, regardless of the facts surrounding the bite, subjects the governmental agency to strict liability pursuant to the dog bite statute. The Defendants are entitled to immunity because using trained dogs to apprehend suspects is a method of providing police protection, and allowing a Plaintiff to recover under strict liability, regardless of the facts surrounding the bite, would subject the Defendants to liability for this method of providing police protection.

Finding that this claim is barred by the tort claims act is consistent with how other jurisdiction has handled such cases. Wyoming held that a case against the police for strict liability under the “one-bite rule” was barred pursuant to its tort claims act. See Abelseth v. City of Gillette, 752 P.2d 430 (1988). The Wyoming case provides positive persuasive authority for dismissing the complaint.

B. Public policy considerations require that strict liability cannot be applied to the facts of this case as a matter of law.

Allowing the Plaintiff to pursue this claim produces an absurd result not intended by the legislature, and the court must not interpret even the plain language of a statute to produce an absurd outcome the legislature could not have intended. See CFRE, L.L.C. v. Greenville County Assessor, 395 S.C. 67, 73, 716 S.E.2d 877, 880 (2011). The US Supreme Court held in Graham v. Connor that excessive force claims are governed by the Fourth Amendment of the U.S. Constitution. South Carolina adopted this in the seminal case of

Heyward v. Christmas, holding, “Determining whether the force used to effect a particular seizure is reasonable under the Fourth Amendment requires a careful balancing of the nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing governmental interests at stake.” 357 S.C. 202 (2003). Heyward holds, “Because the test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application, however, its proper application requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether [the suspect] is resisting arrest or attempting to evade arrest by flight.” Id. This standard applies to every use of police force and instrumentality used by police, including deadly force. See Jones v. Lott, 387 S.C. 339 (2010). The legislature did not intend to abrogate this well-settled legal principle by saying that if the police use anything but a dog to apprehend a fugitive, the conduct must be judged under the Fourth Amendment, but if the police use a dog, they are strictly liable. The Legislature could easily have written a law prohibiting the use of police dogs, but they did not. To imply that from the general language of the dog bite statute yields an absurd result that the legislature did not intend.

In fact, the Legislature amended the dog bite statute in June to specifically exclude police dogs precisely because it did not intend this result. The amended statute is not retroactive, but it does provide definitive evidence that the Legislature did not intend to abrogate the reasonableness standard imposed on law enforcement for all uses of force under the 14th Amendment to the Constitution of the United States.

- C. As the Plaintiff Pled guilty to resisting arrest at the time of the bite, he cannot recover pursuant to SC Code Ann. §47-3-110 as a matter of law.

Even if this claim is not barred by the tort claims act immunity, the Plaintiff cannot recover as a matter of pursuant to SC Code Ann. §47-3-110 (“the dog bite statute”) because he plead guilty to resisting arrest and all of the other charges. The dog bite statute provides in pertinent part that the Plaintiff must be “in a public place or lawfully in a private place....” The language of the statute expressly excludes people who are bitten while unlawfully on property when the bite occurs. The Plaintiff avers in the Complaint, “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 the Hampton County Defendants.”⁶ However, the Plaintiff prove this element of his case as a matter of law. In Zurcher v. Bilton, the South Carolina Supreme Court held that a guilty plea or an *Alford* plea collaterally estops the Plaintiff from asserting a contrary position in a civil suit. See Zurcher v. Bilton, 379 S.C. 132, 666 S.E.2d 224 (2008).

In Zucher, Mr. Zurcher and Mr. Bilton engaged in a physical altercation at Bilton Ford, and two female employees jumped in to assist Mr. Bilton. The police were called and each man told the police the other was the aggressor. Apparently Mr. Bilton was not built Ford tough, and Mr. Zurcher was charged with three counts of assault and battery, to which he pled guilty in an *Alford* plea. Mr. Zurcher then sued Mr. Bilton and Bilton Ford for assault and battery, false imprisonment, abuse of process, malicious prosecution, and intentional infliction of emotional distress. Mr. Bilton cross-claimed for assault and battery,

and Mr. Zurcher averred he acted in self-defense. The Court affirmed the trial court's dismissal of Mr. Zurcher's complaint and grant of partial summary judgment on Bilton's cross-claim because Mr. Zurcher was collaterally estopped from taking a position contrary to his position in the criminal matter.

Here, the arrest warrant for resisting arrest, which is attached hereto as "Exhibit E" provides that the Plaintiff "did knowingly push Deputy Elmquist with open hands and took a swing while attempting to evade arrest." The Plaintiff pled guilty. Under Zurcher, the Plaintiff is collaterally estopped from asserting that he was lawfully on Augusta Stage Coach Road at the time he was bitten, and so his Complaint fails to state a cause of action as a matter of law.

- D. The sheriff cannot be liable for this claim as a matter of law because suits under the tort claims act must be against the agency, not the individual in his official capacity.**

TC Smalls should properly be dismissed from this case because SC Code Ann. §15-78-70(c) provides in pertinent part, "a person, when bringing an action against a governmental entity under the provisions of this chapter, shall name as a party defendant on the agency or political subdivision for which the employee was acting...." Hampton County Sheriff's Department has admitted it owned the dog who bit the Plaintiff and to the extent the Plaintiff's claim survives, Sheriff Smalls should be dismissed from this action pursuant to the tort claims act.

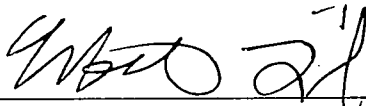
- E. Hampton County should be dismissed from this suit because it did not own or control the dog at any time.**

⁶ Amended Complaint, Paragraph 10.

The Complaint alleges that Hampton County or the Hampton County Sheriff's Department own and controlled the dog at issue at the time of the bite. Hampton County Sheriff's Department has admitted that it owned and controlled the dog, and Hampton County has denied these allegations. As Hampton County Sheriff's department was the correct owner, Hampton County should be dismissed.

· GRIFFITH, SADLER & SHARP, P.A.

BY:



O. EDWORTH LIIPFERT, III
600 Monson Street
Post Office Drawer 570
Beaufort, South Carolina 29901-0570
(803) 521-4242
Attorneys for the Defendants

Beaufort, South Carolina

August 5, 2013

EXHIBIT A

\$500-1,000 &/or up to 1yr

STATE OF SOUTH CAROLINA

IN THE COURT OF GENERAL SESSIONS

COUNTY OF Hampton

INDICTMENT/CASE# 2011-GS-25-172

STATE

AW#: N10110

Zaran vs. Johnson

Date of Offense: 3/2/2011

AKA:

S.C. Code §: 16-9-320(a)

Race: B Sex: M Age: 26

CDR Code #: 0326

DOB: 1/13/88 SS#: 251 69 1671

Address: 1425 Old Orangeburg Rd

City, State, Zip: Garnett SC

SENTENCE SHEET

DL#

SID#

*CDL Yes No CMV Yes No Hazmat Yes No

CONVICTED OF or PLEADS

In disposition of the said indictment comes now the Defendant who was

TO: resisting arrest

In violation of § 16-9-320(a) of the S.C. Code of Laws, bearing CDR Code # 0326

NON-VIOLENT VIOLENT SERIOUS MOST SERIOUS Mandatory GPS §17-25-45

The charge is: As Indicted, Lesser Included Offense, Defendant Waives Presentment to Grand Jury. (dat's initials)

The plea is: Without Negotiations or Recommendation, Negotiated Sentence, Recommendation by the State.

ATTEST:

Shan 77921
Solicitor SC Bar #

J. Johnson Sh. T. Pleas 012014
Defendant Attorney for Defendant SC Bar #

WHEREFORE, the Defendant is committed to the State Department of Corrections County Detention Center,

for a determinate term of 1 days/months/years or under the Youthful Offender Act not to exceed _____ years

and/or to pay a fine of \$ _____; provided that upon the service of _____ days/months/years and or payment

of \$ _____; plus costs and assessments as applicable*; the balance is suspended with probation for _____ months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.

CONCURRENT or CONSECUTIVE to sentence on: concurrent to time he is serving it

The Defendant is to be given credit for time served pursuant to S.C. Code §24-13-40 to be calculated and applied by the State Department of Corrections. SCDC Now.

The Defendant is to be placed on Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

Pursuant to 18 U.S.C. Section 922, It is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65 (Criminal Domestic Violence) to ship, transport, possess, or receive a firearm or ammunition.

SPECIAL CONDITIONS:

RESTITUTION: Deferred Def. Waives Hearing Ordered

PTUP _____

Total: \$ _____ plus 20% fee: \$ _____

_____ days/hours Public Service Employment

Payment Terms: _____

Obtain GED

Set by SCDPPPS

Attend Voc. Rehab. Or Job Corp. _____

Recipient: _____

May serve W/E beginning _____

Substance Abuse Counseling

*Fine:

\$14-1-206 (Assessments 107.5%)	\$	
\$14-1-211 (A)(1)(Conv. Surcharge)	\$100	
\$14-1-211 (A)(2)(DUI Surcharge)	\$100	<u>100.00</u>
\$56-5-2995 (DUI Assessment)	\$12	
\$56-1-286 (DUI Breath Test)	\$25	
Proviso 47.9 (Public Def/Prob)	\$500	
\$14-1-212 (Law Enforce. Funding)	\$25	<u>25.00</u>
\$14-1-213 (Drug Court Surcharge)	\$150	
\$50-21-114 (BUI Breath Test Fee)	\$50	
\$56-5-2942(J) (Vehicle Assessment)	\$40/ea	
Proviso 90.5 (SCCJA Surcharge)	\$5	
3% to County (if paid in installments)		<u>5.00</u>
TOTAL		<u>133.90</u>

Random Drug/Alcohol Testing:

Fine may be pd. in equal consecutive weekly/monthly

pmts. of \$ _____ Beginning _____

\$ _____ Paid to Public Defender Fund

* Other: sentence start date
Wed March 3, 2011 sen

Appointed PD or appointed other counsel, \$47.12 requires \$500 be paid to Clerk during probation.

Clerk of Court/Deputy Clerk Myrinda D. Nettles

Court Reporter: Susan Mia Perron

Presiding Judge Sh. T. Pleas
Judge Code: 2143
Sentence Date November 7, 2011

WITNESSES

Elmquest, HCSO

Shingleton ✓

P. 3

No. 0034

1 BEST WARRANT NUMBER

N101110

Date of Arrest: March 3, 2011

ACTION OF GRAND JURY

STATE SENT

Hampt... County Clerk of Court

VERDICT

Ainda S. Johnson
Foreperson APR 07 2011

4:12PM

Foreperson of Petit Jury

Date:

May 13, 2013

INDICT

DOCKET NO. 2011GS2500172

The State of South Carolina

County of Hampton

COURT OF GENERAL SESSIONS

April, Term 2011

THE STATE

vs.

Zavan Johnson

PSO 4/27/11

Indictment for

Resisting / Resisting Arrest; Oppose, resist, or
assault law enforcement officer serving
process

SC Code: 16-09-0320(A)

CDR Code: 0326

STATE OF SOUTH CAROLINA)
)
COUNTY OF HAMPTON)

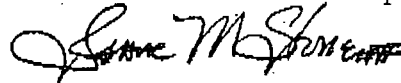
INDICTMENT
2011GS2500172

At a Court of General Sessions, convened on April 7, 2011, the Grand Jurors of Hampton County present upon their oath:

**Resisting / Resisting Arrest; Oppose, resist, or assault law enforcement officer
serving process**

That in Hampton County, South Carolina, on or about March 2, 2011, the Defendant, Zavan Johnson, knowingly and willfully did oppose or resist, the efforts of Officer Elmquist, a law enforcement officer of this State, to make lawful arrest of the Defendant when he knew or reasonably should have known that Officer Elmquist was a law enforcement officer, in violation of Section 16-9-320(a), Code of Laws of South Carolina, (1976, as amended)

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.



Isaac M. Stone, III
Solicitor, 14th Judicial Circuit

EXHIBIT B



Hampton County Fourteenth Judicial Circuit Public Index



Hampton County Home Page South Carolina Judicial Department Home Page SC.GOV Home Page

Switch View

The State of South Carolina VS Zavan Dishawn Johnson

Case Number:	38714FC	Court Agency:	Varnville Magistrate Court	Filed Date:	03/04/2011
Case Type:	Traffic	Case Sub Type:	Traffic - Bond		
Status:	Disposed	Assigned Judge:	Williams, Carolyn A.	Disposition Judge:	Williams, Carolyn A.
Disposition:	Pled Guilty				
Disposition Date:	05/27/2011	Date Received:		Arrest Date:	03/02/2011
Law Enf. Case:		True Bill Date:		No Bill Date:	
Prosecutor Case:		Indictment Number:		Waiver Date:	
Probation Case:					

Case Parties Charges Sentencing Associated Cases Actions Financials Bonds

Name	Charge Code - Charge Description	Original Charge Code - Original Charge	Disposition Date
Johnson, Zavan Dishawn	1223-Report / Giving false information to law enforcement, fire dept. or rescue dept.	1223-Report / Giving false information to law enforcement, fire dept. or rescue dept.	05/27/2011

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EXHIBIT C



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Switch View

The State of South Carolina VS Zavan Dishawn Johnson

Case Number:	38816FC	Court Agency:	Varnville Magistrate Court	Filed Date:	03/04/2011
Case Type:	Traffic	Case Sub Type:	Traffic - Bond		
Status:	Disposed	Assigned Judge:	Williams, Carolyn A.	Disposition Judge:	Williams, Carolyn A.
Disposition:	Guilty Bench Trial Credit Time Served				
Disposition Date:	05/27/2011	Date Received:		Arrest Date:	03/02/2011
Law Enf. Case:		True Bill Date:		No Bill Date:	
Prosecutor Case:		Indictment Number:		Waiver Date:	
Probation Case:					

Case Parties Charges Sentencing Associated Cases Actions Financials Bonds

Name	Charge Code - Charge Description	Original Charge Code - Original Charge	Disposition Date
Johnson, Zavan Dishawn	0660-Alcohol / Open container of beer or wine in motor vehicle	0660-Alcohol / Open container of beer or wine in motor vehicle	05/27/2011

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EXHIBIT D



Hampton County Fourteenth Judicial Circuit Public Index



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Switch View

The State of South Carolina VS Zavan Dishawn Johnson

Case Number:	38815FC	Court Agency:	Varnville Magistrate Court	Filed Date:	03/04/2011
Case Type:	Traffic	Case Sub Type:	Traffic - Bond		
Status:	Disposed	Assigned Judge:	Williams, Carolyn A.	Disposition Judge:	Williams, Carolyn A.
Disposition:	Guilty Bench Trial Credit Time Served				
Disposition Date:	05/27/2011	Date Received:		Arrest Date:	03/02/2011
Law Enf. Case:		True Bill Date:		No Bill Date:	
Prosecutor Case:		Indictment Number:		Waiver Date:	
Probation Case:					

Case Parties Charges Sentencing Associated Cases Actions Financials Bonds

Name	Charge Code - Charge Description	Original Charge Code - Original Charge	Disposition Date
Johnson, Zavan Dishawn	0622-Disorderly / Public disorderly conduct	0622-Disorderly / Public disorderly conduct	05/27/2011

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EXHIBIT E

ARREST WARRANT

N-101110

STATE OF SOUTH CAROLINA

County/ Municipality of

THE STATE SO-110071593

Zavan Johnson

against

Address: 14125 Old Orangeburg Rd

Garnett, SC 29922-6977

Phone: SSN: DL #:

Sex: M Race: B Height: 5 9 Weight: 130

DL State: SC DL #: 01526478

Agency ORI #: SC0250000

Prosecuting Agency: Hampton County Sheriff

Prosecuting Officer: Jordan Elmquist - 0095

Offense: Resisting / Resisting Arrest, Oppose, resist, or assault law enforcement officer serving process

Offense Code: 0326

Code/Ordinance Sec: 16-09-0320(A)

This warrant is CERTIFIED FOR SERVICE in the

County/ Municipality of

is to be arrested and brought before me to be dealt with according to the law.

Signature of Judge

(L.S.)

RETURN

A copy of this arrest warrant was delivered to defendant

on 3-31-11

Signature of Defendant

RETURN WARRANT TO:

General Sessions

1 Courthouse Square Blm St

P O Box 7

Hampton, SC 29924

ORIGINAL

ORIGINAL

STATE OF SOUTH CAROLINA

County/ Municipality of

AFFIDAVIT

ORIGINAL

Form Approved by S.C. Attorney General April 21, 2015 SOCA 518

Personally appeared before me the affiant Jordan Elmquist

being duly sworn deposes and says that defendant Zavan Johnson

did within this county and state on or about 03/02/2011

State of South Carolina (or ordinance of County/ Municipality of

in the following particulars: DATE RECEIVED 03/03/11

DESCRIPTION OF OFFENSE

Resisting / Resisting Arrest, Oppose, resist, or assault law enforcement officer serving process

I further state that there is probable cause to believe that the defendant named above did commit the crime set forth and that probable cause is based on the following facts:

That on March 2, 2011 in the county of Hampton, one Zavan Johnson did knowingly and willfully oppose and/or resist the lawful arrest by a law enforcement officer, or the defendant did knowingly push Deputy Elmquist with open hands and took a swing while attempting to evade arrest. This is in violation of SC Code of Laws.

HAMPTON COUNTY SHERIFFS OFFICE

TRANSMITTED TO MAGISTRATE OFFICE

RECEIVED BY DATE & TIME

ON 3/13/11

FOR SERVED

Affiant's Address Hampton County Law Enforcement Center

Affiant's Telephone Yarnville, SC 29944

Signature of Affiant

STATE OF SOUTH CAROLINA

County/ Municipality of

ARREST WARRANT

TO ANY LAW ENFORCEMENT OFFICER OF THIS STATE OR MUNICIPALITY OR ANY CONSTABLE OF THIS COUNTY

on or about 3/2/2011 it appearing from the above affidavit that there are reasonable grounds to believe

did violate the criminal laws of the State of South Carolina (or ordinance of defendant Zavan Johnson

County/ Municipality of

) as set forth below:

DESCRIPTION OF OFFENSE: Resisting / Resisting Arrest, Oppose, resist, or assault law enforcement officer serving process

Having found probable cause and the above affiant having sworn before me, you are empowered and directed to arrest the said defendant and bring him or her before me forthwith to be dealt with according to law. A copy of this Arrest Warrant shall be delivered to the defendant at the time of its execution, or as soon thereafter as is practicable. Sworn to and subscribed before me

on 03/03/2011

Signature of Issuing Judge

Carolyn A Williams

Judge Code: 5949

Judge's Address

Post Office Box 1299 Yarnville, SC 29944-1299

Judge's Telephone

(803)943-7511

Issuing Court:

Magistrate

County/ Municipality of

Circuit

ORIGINAL

ORIGINAL

ORIGINAL

ORIGINAL

ORIGINAL

May 13 2013 4:13PM

Hampt County Clerk of Court