RECEIVED
SEP 02 2014
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HAMPTON COUNTY
Perry M. Buckner, Circuit Court Judge

Civil Action No. 2013-CP-25-00075
Appellate Case No. 2013-002557

Zavan Dishawn Johnson .... Appellant

v.

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

BRIEF OF RESPONDENTS

O. Edworth Liipfert III
GRIFFITH, SADLER & SHARP, P.A.
600 Monson Street
PO Drawer 570
Beaufort, SC 29901
(843) 521-4242
(843) 521-4247 (fax)
wliipfert@griffithsadlersharp.com

Attorneys for the Respondents

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HAMPTON COUNTY
Perry M. Buckner, Circuit Court Judge

Civil Action No. 2013-CP-25-00075
Appellate Case No. 2013-002557

Zavan Dishawn Johnson .... Appellant

v.

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

BRIEF OF RESPONDENTS

O. Edworth Liipfert III
GRIFFITH, SADLER & SHARP, P.A.
600 Monson Street
PO Drawer 570
Beaufort, SC 29901
(843) 521-4242
(843) 521-4247 (fax)
wliipfert@griffithsadlersharp.com

Attorneys for the Respondents

Table of Contents

Table of Authorities iii

Statement of Issues on Appeal 1

Statement of the Case 2

Statement of the Facts 2

Standard of Review 3

Argument 4

I. The Sheriff's Department is entitled to immunity because the use of police dogs is a method of providing police protection.. 4

A. The Circuit Court properly relied upon the undisputed facts contained in the pleadings in granting the Respondents' motion to dismiss........ 4

B. The decision to use police dogs to affect arrests is a means of providing police protection, so HCSD is entitled to immunity in this case. 5

C. Finding that this claim is barred by the Tort Claims Act is consistent with how other jurisdictions have handled such cases........ 6

II. The Sheriff's Department was properly dismissed because the Legislature could not have intended the result proposed by the Plaintiff, and therefore the dog bite statute cannot apply to the facts as alleged in the pleadings in this case. 7

A. The legislature did not intend to have all officers' conduct except the use of police dogs judged by the use of force continuum, so the statute cannot be meant to apply to working police dogs. 7

B. South Carolina did not intend to waive sovereign immunity with respect to strict liability and so the Plaintiff's claim is barred. 9

Conclusion 10

Table of Authorities

Cases

Abelseth v. City of Gillette, 752 P.2d 430 (1988) 6, 9

Audette v. Commonwealth, 63 Mass. App. Ct. 727, 829 N.E.2d 248 (2005) 6, 9

Capital City Ins. Co. v. BP Staff, Inc., 382 S.C. 92, 674 S.E.2d 524 (Ct. App. 2009) 3, 4

CFRE, L.L.C. v. Greenville County Assessor, 395 S.C. 67, 73, 716 S.E.2d 877, 880 (2011) 7

Graham v. Connor, 488 U.S. 1027, 109 S.Ct. 833 (1989) 7

Heyward v. Christmas, 357 S.C. 202, 593 S.E.2d 141 (2004) 7, 8

Jones v. Lott, 387 S.C. 339, 692 S.E.2d 900 (2010) 8

Shealy v. Doe, 370 S.C. 194, 634 S.E.2d 45 (Ct. App. 2006) 3, 4

Tate v. Grand Rapids, 256 Mich. App. 656, 671 N.W.2d 84 (2003) 6

Trammell v. Thomason, 559 F.Supp.2d 11281 (2008) 8

Harris v. Anderson County Sheriff's Office, 381 S.C. 357, 673 S.E.2d 423, (2009) 10

Statutes

SC Code Ann. §15-78-30(a) 9

SC Code Ann. §15-78-30(b) 10

SC Code Ann. §15-78-30(f) 10

SC Code Ann. §15-78-30(g) 10

SC Code Ann. §15-78-60(6) 5

SC Code Ann. §16-9-320(a) 3

SC Code Ann. §47-3-110 .... 1, 2

Rules

Rule 12(b)(6), SCRCP 3

Rule 220, SCACR 10

Statement of Issues on Appeal

I. Did the trial court consider matters outside of the Pleadings and if so, was this reversible error?

II. Does SC Code section 15-78-60(6) provide immunity for the Hampton County Sheriff's Department under the facts alleged in the Pleadings from this suit in light of SC Code Section 47-3-110?

III. Does public policy prevent SC Code Section 47-3-110 from being applied to working police dogs?

Statement of the Case

On March 1, 2013, Appellant Zavan Johnson ("Johnson") filed this action in the Hampton County Court of Common Pleas against Hampton County, Hampton County Sherriff's Department, and Thomas "TC" Smalls, Hampton County Sheriff, asserting causes of action for negligence, civil assault, civil battery, intentional infliction of emotional distress, and negligent use of excessive force. (R. pp. 18-27). On April 24, 2013, prior to serving the original Complaint on the Defendants, the Appellant filed the Amended Summons and Complaint against the Respondents asserting only a cause of action for strict liability pursuant to SC Code Ann Section 47-3-110 ("the Dog Bite Statute"). (R. pp. 11-14). On June 18, 2013, the Respondents filed their Answer to the Amended Complaint and their motion to dismiss the Amended Complaint. The Respondents asserted in the Answer to the Amended Complaint that the Appellant plead guilty or was found guilty of two charges arising from the date of the incident: open container and resisting arrest. (R. p. 30, Paragraph 12).

Statement of the Facts

The Plaintiff was bitten by a police dog on March 2, 2011 near Augusta Stage Coach Road in Garnett, South Carolina. (R. p. 12,

Paragraphs 7 and 10). The dog was owned by and in the care and custody of the Hampton County Sheriff's Department at the time of the bite. (R. p. 12, Paragraph 9). Shortly before the bite occurred, the Plaintiff was a passenger in a vehicle that was subject to a traffic stop. (R. p. 19, Paragraph 8). 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. (R. p. 30, Paragraph 12). The Plaintiff was also found guilty of open container at the time of the stop. (R. p. 30, Paragraph 12).

Standard of Review

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), SCRCP 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), SCRCP; Shealy v. Doe, 370 S.C. 194, 198, 634 S.E.2d 45, 47 (Ct. App. 2006).

Argument

I. The Sheriff's Department is entitled to immunity because the use of police dogs is a method or means of providing police protection.

A. The Circuit Court properly relied upon the undisputed facts contained in the Pleadings in granting the Respondents' motion to dismiss.

The Plaintiff takes the erroneous position that the Court should look only to the four corners of the Amended Complaint to determine whether the motion to dismiss is proper. South Carolina courts have held that the court should look at the Pleadings to determine a motion to dismiss. See Capital City Ins. Co. v. BP Staff, Inc., 382 S.C. at 99, 674 S.E.2d at 528. In this case, that includes the Complaint, the Amended Complaint, and the Answer. The Defendants allege in the Answer that the Plaintiff pled guilty to resisting arrest and was found guilty of open container as a result of the stop. These are established facts in this case, and the verdicts were attached to the Respondents' memorandum of law in support of its motion to dismiss. The Plaintiff may not avoid these facts for the purposes of a motion to dismiss by simply failing to mention it in the Amended Complaint when the Defendant specifically addresses it in the Answer. To hold otherwise allows the

Plaintiff to ignore undisputed facts contrary to its position through artful pleading. The Court should not look to facts outside the pleadings themselves when ruling upon a motion to dismiss, but the Court is not limited to looking solely at the Amended Complaint, as the Plaintiff suggests. In the case at hand, the Court may look to the Answer and may use the facts that the Plaintiff pled guilty to resisting arrest and was found guilty of open container to rule upon Respondents' Motion to Dismiss.

B. The decision to use police dogs to effect arrests is a means of providing police protection, so HCSD is entitled to immunity in this case.

HCSD is entitled to immunity from suit in this instance pursuant §15-78-60(6) because the use of police dogs is a method or means of providing police protection. §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.

C. Finding that this claim is barred by the Tort Claims Act is 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). The Appeals Court of Massachusetts also reached a similar result. See Audette v. Commonwealth 63 Mass. App. Ct. 727, 829 N.E.2d 248 (2005). In Audette, a police dog sniffing for narcotics bit another policeman at the scene. The court granted the Commonwealth's Motion for Summary Judgment on the

grounds that the use of police dogs was exempted from suit based upon discretionary immunity. The Audette Court noted that allowing liability for a working police dog would "jeopardize the quality and efficiency of the governmental process as it would likely burden enforcement of the laws." Id. at 731, 253.

II. The Sheriff's Department was properly dismissed because the Legislature could not have intended the result proposed by the Plaintiff, and therefore the dog bite statute cannot apply to the facts as alleged in the Pleadings in this case.

A. The legislature did not intend to have all officers' conduct except the use of police dogs judged by the use of force continuum, so the statute cannot be meant to apply to working police dogs.

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, and South Carolina adopted this in the seminal case of Heyward v. Christmas, holding, "Determining whether the force used to affect 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." Heyward v. Christmas, 357 S.C. 202, 208, 593 S.E.2d 141, 144 (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. at 208, 144. This standard applies to every use of police force and instrumentality used by police, including deadly force. See generally Jones v. Lott, 387 S.C. 339, 692 S.E.2d 339 (2010). The legislature could not have intended 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.

Other jurisdictions have reached the same result and provide persuasive authority in this case. In the case of case of Trammell v. Thomason, the US District Court for the Middle District of Florida looked at the same issue and held, "the legislative intent behind [the Florida dog bite

statutes] makes clear that the strict liability statutes Trammell references are not meant to ensnare working police dogs." Trammell v. Thomason, 559 F.Supp.2d 11281 (2008) (reversed on other grounds).

B. South Carolina did not intend to waive sovereign immunity with respect to strict liability and so the Plaintiff's claim is barred.

The Massachusetts Court of Appeals refused to apply its strict liability statute to a working police dog in Audette. The Court held, "The dog bite statute is a strict liability statute, imposing liability without requiring misfeasance or nonfeasance by the owner or keeper, whereas these are conditions required for and action under [the Massachusetts tort claims act]." Audette, 63 Mass. App. Ct. at 735, 829 N.E.2d at 256 (2005). The Audette Court found guidance for this position from the US Tort Claims Act, which has also been held not to allow strict liability claims. Wyoming reached a similar result in Abelseth. See Abelseth v. City of Gillette, 752 P.2d 430 (1988).

The SC Code Ann. §15-78-20(a) provides in pertinent part, "Liability for acts or omissions under this chapter is based upon the traditional tort concepts of duty and the reasonably prudent person's standard of care in performance of that duty." This language shows that the legislature did not intend to waive sovereign immunity for strict liability because liability based

on a violation of the standard of care is negligence. SC Code Ann. §15-78-20(b) provides that the "General Assembly in this chapter intends to grant the State... immunity from any tort except as waived by this chapter." Strict liability is not expressly waived under the Tort Claims Act, so South Carolina has not subjected governmental entities to suit under strict liability. "Loss," as defined in SC Code Ann. §15-78-30(f), "means bodily injury...and any other element of actual damages recoverable in actions for negligence." An "occurrence," as defined by SC Code Ann. 15-78-30(g), is an "unfolding sequence of events which proximately flow from a single act of negligence." Read together, the Tort Claims Act was intended to abrogate sovereign immunity only for negligent acts or omissions by the government and its employees. Because negligence is not required under the dog bite statute, there is no occurrence for which the Plaintiff can recover. South Carolina has not waived immunity for this statute, and so the Plaintiff's claim fails as a matter of law.

The Plaintiff relies on Harris v. Anderson County Sheriff's Office for the proposition that the dog bite statute can be applied to police dogs. However, in Harris, the Defendant did not raise sovereign immunity or the Tort Claims Act as a defense, and so the court did not address the issues presented here. In fact, the Court notes in the facts that the dog in question

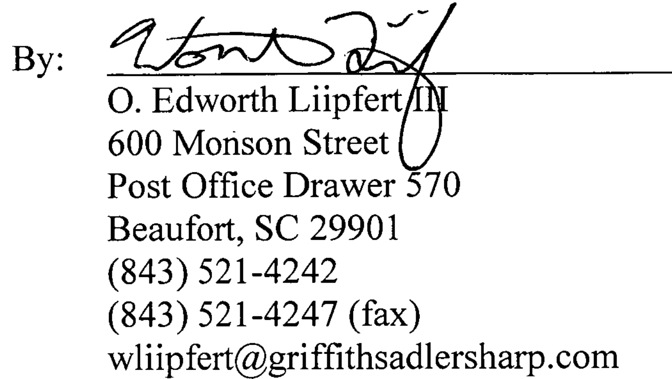
"had a recent history of unprovoked attacks, a history well-known to Deputy Canon and the sheriff's office." Harris v. Anderson County Sheriff's Office, 381 S.C. 357, 359-360, 673 S.E.2d 423, 424 (2009). The Court also notes that the trial court erred in accepting negligence principles in ruling on this case because the dog bite statute does not require negligent acts, and remanded it in part on this issue. See id. at 363, 426. The Court did not address whether South Carolina was subject to strict liability under the Tort Claims Act, so Harris is not dispositive on this issue.

Conclusion

For the reasons stated, this Court should affirm the lower court's ruling. The Sheriff's Office also respectfully requests that this Court affirm for any ground appearing in the Record on Appeal pursuant to Rule 220(c), SCACR.

[SIGNATURE PAGE FOLLOWS]

GRIFFITH, SADLER & SHARP, P.A.



By: ______________________

O. Edworth Liipfert III
600 Monson Street
Post Office Drawer 570
Beaufort, SC 29901
(843) 521-4242
(843) 521-4247 (fax)
wliipfert@griffithsadlersharp.com

Attorneys for the Respondent

August 26, 2014
Beaufort, South Carolina

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HAMPTON COUNTY
Perry M. Buckner, Circuit Court Judge

Civil Action No. 2013-CP-25-00075
Appellate Case No. 2013-002557

Zavan Dishawn Johnson .... Appellant

v.

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

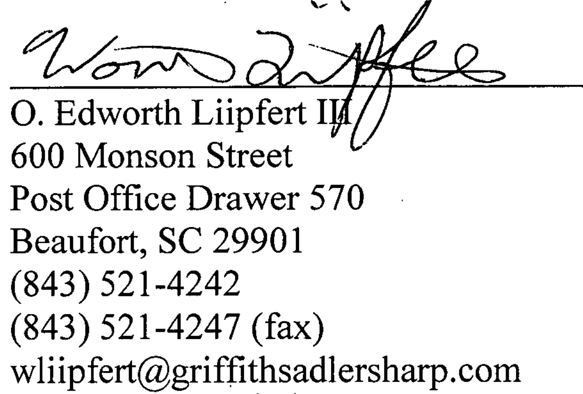
CERTIFICATE OF COUNSEL

I certify that the Brief of Respondents complies with Rule 211(b), SCACR and the South Carolina Supreme Court's Order dated August 13, 2007, regarding personal data identifiers and other sensitive information in appellate court filings.

[SIGNATURE PAGE FOLLOWS]

RECEIVED
SEP 02 2014
SC Court of Appeals

GRIFFITH, SADLER & SHARP, P.A.

By: 

O. Edworth Liipfert III
600 Monson Street
Post Office Drawer 570
Beaufort, SC 29901
(843) 521-4242
(843) 521-4247 (fax)
wliipfert@griffithsadlersharp.com

Attorneys for the Respondents

August 26, 2014
Beaufort, South Carolina

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HAMPTON COUNTY
Perry M. Buckner, Circuit Court Judge

Civil Action No. 2013-CP-25-00075
Appellate Case No. 2013-002557

Zavan Dishawn Johnson .... Appellant,

v.

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

RECEIVED
SEP 02 2014
SC Court of Appeals

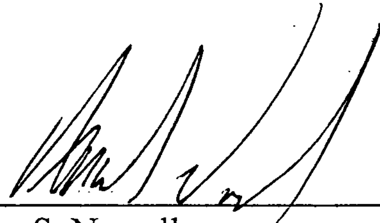
CERTIFICATE OF SERVICE

O. Edworth Liipfert III
GRIFFITH, SADLER & SHARP, P.A.
600 Monson Street (29902)
PO Drawer 570
Beaufort, SC 29901-0570
(843) 521-4242
(843) 521-4247 (fax)
wliipfert@griffithsadlersharp.com

Attorney for the Respondent

I am a Paralegal at Griffith, Sadler & Sharp, P.A., and on August 29, 2014, I placed a copy of the *Brief of Respondents and Certificate of Counsel* in the US Mail, with first-class postage prepaid, and addressed as follows:

Davis A. Whitfield-Cargile
McDougall Law Firm, LLC
PO Box 1336
Beaufort, SC 29901



Anna S. Nowell