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Washington State Supreme Court
Washington State Supreme Court

JUN 25 2015
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NO. 91761-2

Received
Washington State Supreme Court

JUN 25 2015
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Clerk

SUPREME COURT OF THE STATE OF WASHINGTON

BRYENT FINCH AND PATRICA FINCH, a marital community,

Petitioners/Plaintiffs,

v.

THURSTON COUNTY, THURSTON COUNTY SHERIFF'S OFFICE,
ROD DITRICH AND JANE DOE DITRICH, INDIVIDUALLY AND AS
HUSBAND AND WIFE AND THE MARTIAL COMMUNITY
COMPRISED THEREOF,

Respondent/Defendant.

ANSWER TO PETITION FOR REVIEW

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 ORIGINAL

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I. IDENTITY OF RESPONDENT

Respondents herein, Thurston County, Thurston County Sheriff's Office, and Rod Ditrich (hereinafter collectively referred to as "the County"), request that the Court deny review of the unpublished Court of Appeals opinion in this matter, *Finch v. Thurston County, et. al.*, Slip Op. 45792-0-II (March 24, 2015).¹ The Court of Appeals' decision correctly affirmed the trial court's partial summary judgment in favor of the County on the claim asserted by Petitioners Bryant and Patricia Finch (hereinafter "Finch") for strict liability under RCW 16.08.040.

II. ANSWER TO ISSUE PRESENTED FOR REVIEW

Finch's injuries occurred during the lawful application of a police dog during a lawful building search for burglary suspects and these facts preclude strict liability as a matter of law pursuant to RCW 16.08.040(2). The Court should decline to accept review of this case because Finch fails to shown that the interpretation of the statute applied by the trial court and the Court of Appeals was error. RCW 16.08.040(2) is unambiguous and the lower courts do not require, nor should this Court give guidance in the form of review to interpret an unambiguous statute.

¹ The Court of Appeals' unpublished decision was included as Appendix A to Finch's petition for review.

Finch advocates a reading of the statute that is not supported by the language of the statute or common sense. Finch's interpretation of the statute mischaracterizes non-binding and unpublished federal case law that was decided before RCW 16.08.040(2) was enacted. Moreover, the proper interpretation of RCW 16.08.040(2) must be decided as a matter of State law and therefore this Court need not defer to the Federal authorities cited by Finch. If however, the Court chooses to follow the Fourth Amendment analysis employed by the Federal Courts, review should still be denied because Finch concedes that no seizure or Fourth Amendment violation occurred to Finch in this case. Regardless of whether or not the Court looks to the plain meaning of the language in RCW 16.08.040(2) or applies the federal Fourth Amendment analysis, summary judgment in favor of the County was proper and review should be denied.

Additionally, Finch does not meet the criteria for discretionary review under RAP 13.4(b). Finch suggests that review is appropriate under RAP 13.4(b)(4) by claiming that a matter of substantial public interest is implicated because he and other purported "innocent bite victims of police dog bites may be left without remedy until this issue is resolved." Petition for Review, p. 11. Contrary to this assertion, Finch had common law negligence claims against the County that he voluntarily dismissed before appealing the trial court's dismissal of his strict liability

claims. Accordingly, Finch and other purported police dog bite victims had and have existing and adequate tort law remedies at common law.

III. STATEMENT OF THE CASE

A. Facts Regarding Finch's Claims

On November 14, 2010, at approximately 7:00 p.m., City of Tumwater Police Officer Bryant Finch was dispatched to investigate a burglary in progress at the abandoned Olympia Brewery located in Tumwater, Washington. CP 118. The abandoned complex consists of a brew house on the north side of Custer Way and the abandoned brewery building on the south side of Custer Way. CP 119. Officer Finch was met at the scene by fellow City of Tumwater Police Officer Hollinger. CP 118. Officers Finch and Hollinger were aware of a series of recent burglaries at the complex, wherein suspects removed copper pipes from the building for salvage. CP 127.

The Tumwater Police Department subsequently requested assistance from the Thurston County Sheriff's K-9 Unit pursuant to an interlocal agreement between the Tumwater Police Department and the Thurston County Sheriff's Department, and Thurston County Deputy Dietrich and K-9 Rex responded. CP 118; CP 144-160.

Officers Finch and Hollinger and Deputy Dietrich collaborated on the best tactical way to enter the brewery and conduct the search for

burglary suspects. CP 119. Officer Finch did not have any reservations about the search plan discussed. *Id.* Deputy Dietrich and K-9 Rex led the search for the burglary suspects, Officer Finch served as the cover officer, and Officer Hollinger remained on perimeter. CP 119. The primary responsibility of a cover officer is to protect the K-9 officer during the search. CP 117. Cover officers do not go “hands on” and effect an arrest until directed to do so by the K-9 handler. CP 126.

Visibility inside the brewery was poor. CP 120. The floor of the brewery was in poor condition and laden with large holes and pitfalls through which the officers and K-9 Rex could fall. CP 121. After clearing several poorly lit rooms, K-9 Rex signaled the location of a suspect. *Id.* Deputy Dietrich commanded K-9 Rex to return to him by stating, “Here, here, here.” CP 122. It is standard K-9 practice and training for a handler to recall the K-9 to the handler before verbally challenging a suspect or directing a fellow officer to verbally challenge or physically engage a suspect. CP 131. The purpose of recalling the K-9 is so that the handler can gain positive physical control over the K-9 prior to an arrest. *Id.* Officer Finch was fully aware of this standard procedure on November 14, 2010. CP 126. Officer Finch also admits that he never received directions from Deputy Dietrich to challenge or engage the burglary suspect. CP 125.

Notwithstanding Officer Finch's knowledge of this procedure and the absence of direction from Deputy Ditrich to challenge or engage the suspect, Officer Finch "took it on [him]self of challenge the suspect because I'm going home at night" CP 125. Officer Finch testified that he commanded the suspect "Hands, hands, show me your hands" in a command voice. CP 124.

As Officer Finch verbally challenged the suspect to show his hands, K-9 Rex was returning to the side of Deputy Ditrich. Officer Finch was approximately eight-to-ten feet to the left of Deputy Ditrich and either parallel or slightly behind Deputy Ditrich when K-9 Rex engaged. CP 123. K-9 Rex was confused by Officer Finch's actions and interpreted them as a threat to Deputy Ditrich. CP 289. K-9 Rex bit Officer Finch in the testicle, causing Officer Finch's injuries. CP 285.

B. Procedural History

On June 6, 2012, Finch filed this case against the County in Mason County Superior Court. Finch asserted claims for (1) strict liability for a dog bite pursuant to RCW 16.08.040; (2) negligence; and (3) the tort of outrage. CP 336-341. On October 11, 2013, Finch filed a motion for partial summary judgment on the issue of the County's strict liability under RCW 16.08.040. CP 318-328. Specifically, Finch asked the court to hold that RCW 16.08.040(2), a statutory amendment enacted in 2012 that

exempts lawfully used police dogs from strict liability, should be applied prospectively only and not retroactively. *Id.*

On October 28, 2013, the County filed a cross motion for partial summary judgment seeking dismissal of Finch's strict liability claim under RCW 16.08.040. CP 257-277. On November 25, 2013, the court denied Finch's motion and granted the County's cross-motion, dismissing the strict liability claim. CP 10-11. On January 13, 2014, Finch voluntarily dismissed his common law negligence and outrage claims and filed a notice of appeal of the court's summary judgment dismissal of the strict liability claim. CP 4-5; Supp. CP 4-6.

In the Court of Appeals, Finch primarily argued that subsection (2) of RCW 16.08.040 should not be applied retroactively, because the date when his lawsuit was filed preceded the effective date of that part of the statute. Reasoning that that Finch had no vested right in his strict liability claim, the Court of Appeals affirmed the trial court, holding "(1) the legislature abolished strict liability claims for injuries resulting from lawfully used police dogs and (2) the superior court properly dismissed the Finches' strict liability claim because the Finches failed to show a genuine issue of material fact as to an unlawful use of Rex, the police dog." Finch subsequently filed a motion for reconsideration, which the Court of Appeals denied on April 29, 2015.

IV. ARGUMENT

A. Finch Has Abandoned His Argument That RCW 16.08.040(2) Should Not Be Applied Retroactively

Subsection (2) of RCW 16.08.040 contains a 2012 amendment to the statute, which clearly exempts police dogs from the rule of strict liability:

(1) The owner of any dog which shall bite any person while such person is in or on a public place or lawfully in or on a private place including the property of the owner of such dog, shall be liable for such damages as may be suffered by the person bitten, regardless of the former viciousness of such dog or the owner's knowledge of such viciousness.

(2) This section does not apply to the lawful application of a police dog, as defined in RCW 4.24.410.

RCW 16.08.040 (emphasis added).² Despite emphasizing the effective date of the legislation in his petition to this Court, Finch has now abandoned the primary argument that he made in the trial court below and in the Court of Appeals: that subsection (2) of the statute should not be applied retroactively. Finch now concedes that the Court must reach subsection (2) of the statute, despite the fact that the effective date of the enacting legislation fell after the date of Finch's injury and the filing of his lawsuit.

² RCW 4.24.410, in turn, defines "police dog" to mean "a dog used by a law enforcement agency specially trained for law enforcement work and under the control of a dog handler."

B. Undisputed Facts Established That Officer Finch's Injuries Arose From The "Lawful Application of a Police Dog" Within The Plain Meaning of RCW 16.08.040(2)

Finch now argues that subsection (2) of the statute should not apply to the County and contends that his injury did not arise out of the "lawful application of a police dog." Finch's contends Deputy Ditrich never ordered K-9 Rex to bite and therefore no "lawful application" of Rex occurred. Finch's argument is without merit.

The trial court and Court of Appeals properly rejected Finch's argument because the undisputed evidence shows that Officer Finch's injuries occurred during a lawful building search for a burglary suspect. *Finch v. Thurston County, et. al.*, No. 45792-0-II (March 24, 2015), Slip. Op. at 6. The Court need not define the precise contours of the phrase "lawful application of a police dog" in order to affirm the trial court, because under *any* reasonable construction, subsection (2) of the statute applies to the County's use of K-9 Rex in the case at bar. As explained below, adding the requirement that an officer command a police dog to bite is not supported by the plain language of subsection (2) of the statute, nor is it supported by any other principle of statutory construction.

Finch also suggests that review of the Court of Appeals' opinion is necessary, because RCW 16.08.040(2) is an affirmative defense that the County bears the burden of proving were this case to proceed to trial.

Petition, pp. 11-12. Whether the County bears the burden of proof on this issue at trial is irrelevant.³ The purpose of summary judgment is to avoid a useless trial when there is no genuine issue of material fact. *Olympic Fish Products v. Lloyd*, 93 Wn.2d 596, 602, 611 P.2d 737 (1980). Regardless of whether defendant would ultimately bear the burden of proof at trial on an affirmative defense, summary judgment is appropriate if reasonable persons, from all of the evidence, could reach but one conclusion. *See, e.g., In re Estate of Hibbard*, 118 Wn.2d 737, 753, 826 P.2d 690 (1992) (summary judgment based on statute of limitations affirmative defense).

The material facts relating to the County's use of Rex are undisputed, and they establish that Finch's injury arose out of the "lawful application of a police dog," requiring the entry of summary judgment in the County's favor. The County used K-9 Rex to search for a burglary suspect at the Olympia Brewery. Finch, a law enforcement officer working along-side Deputy Ditrich, was a participant in the search. The bite occurred after Deputy Ditrich recalled K-9 Rex once the suspect had

³ The County does not concede that RCW 16.08.040(2) is an affirmative defense for which it bears the burden of proof. As explained in the Brief of Respondents previously filed by the County with the Court of Appeals, subsection (2) of the statute was a curative amendment intended to clarify the Legislature's intent regarding the scope of the cause

been located. There is no dispute that Deputy Ditrich did not intend for K-9 Rex to bite the suspect or Officer Finch. Officer Finch was an accidental victim of a dog bite that occurred during a lawful police search. As the Court of Appeals reasoned, “The fact that Finch was mistakenly bitten by Rex does not convert a lawful use of Rex to an unlawful use.” *Finch v. Thurston County, et. al.*, No. 45792-0-II (March 24, 2015), Slip. Op. at 6. Finch’s petition for review does not identify a factual basis for this Court to conclude that the application of Rex for the building search was unlawful. Likewise, Finch’s petition for review does not provide any legal authority to support his claim that the application of K-9 Rex was unlawful.

C. Finch’s Strained Interpretation of RCW 16.08.040(2) is Not Supported By The Statute’s Language and Would Lead to Absurd Results

Finch argues that there can never be a “lawful application of a police dog” within the meaning of RCW 16.08.040(2) unless an officer orders a dog to bite the plaintiff. Petition, p. 15. The plain language of the statute does not impose a requirement that an officer give a “bite” command to a police dog for the application of the dog to be lawful. The

of action that it created when it enacted subsection (1) of the statute in 1941. Brief of Respondents, pp. 6-20.

Court should not grant review to read language into the statute that is not there.

When construing a statute, the court's objective is to ascertain and carry out the Legislature's intent. *Lake v. Woodcreek Homeowners Ass'n*, 169 Wn.2d 516, 526, 243 P.3d 1283 (2010). "In the absence of a specific statutory definition, words in a statute are given their common law or ordinary meaning." *State v. Chester*, 133 Wn.2d 15, 22, 940 P.2d 1374 (1997). To determine the plain meaning of a term undefined by a statute, the court should first look to the dictionary definition. *State v. Kintz*, 169 Wn.2d 537, 547, 238 P.3d 470 (2010). The dictionary definition of "application," a term not defined in RCW 16.08.040, includes "an act of applying," "an act of putting to use," and "a use to which something is put."⁴ The plain meaning of the phrase "lawful application of a police dog" does not require a verbal command to bite. Police dogs are commonly used to search for suspects without a "bite" command. Adding this unstated requirement "would result in a strained interpretation of the statute, and the court would then be engaging in legislation." *Killian v. Atkinson*, 147 Wn.2d 16, 27, 50 P.3d 638 (2002).

⁴ Merriam-Webster Online. Retrieved April 21, 2015, from <http://www.merriam-webster.com/dictionary/application>.

Finch's reading of the statute would also lead to absurd results, which the court must avoid when undertaking statutory interpretation. *State v. J.P.*, 149 Wn.2d 444, 450, 69 P.3d 318 (2003). Police dogs are trained to pursue and bite fleeing suspects or assailants, even when not commanded to do so. For example, where an officer is assaulted, police dogs are trained to attack and bite the assailant.⁵ In this scenario an officer might be unconscious and unable to command the dog to bite. Yet, under Finch's interpretation of the statute, the assailant would have a strict liability claim against the police because the unconscious officer never gave a "bite" command. This was not the legislative intent of the statute.

The phrase "lawful application of a police dog" means that the police dog was being used for lawful police activities. The trial court's oral explanation of its decision indicates that this is how it interpreted the statute:

With regard to the argument on the lawful application of a police dog, the Court does find that where a police dog is being used in a situation such as this where the police dog is being used to aid an officer in searching an area, that's one thing, as opposed to having a police dog who normally goes home at night with their handler, getting out of the back yard and biting the neighbor. That in no way was the dog working at that point.

⁵ The Washington State Police Canine Association accreditation manual's performance standards outlines exercises related to this type of training under the heading "MASTER PROTECTION." CP 148.

RP 14 – 15. The trial court recognized that subsection (2) of the statute might not protect the police from strict liability in situations where police dogs inflict bites outside the context of lawful police-related activity. Here, the court correctly held that subsection (2) applied to preclude Finch’s strict liability claim as a matter of law. Finch cites to no authority to support his contention that the trial court and Court of Appeals’ interpretation of the statute is erroneous.

D. Federal Case Law Does Not Support Finch’s Strict Liability Claim

Finch relies on federal cases interpreting the Fourth Amendment to define “lawful application of a police dog.” Many of these cases are unpublished and almost all of them pre-date the enactment of subsection (2) of the statute.⁶ The Court need not defer to this federal case law because the interpretation of RCW 16.08.040(2) is purely a state law issue. *Mullaney v. Wilbur*, 421 U.S. 684, 691, 95 S. Ct. 1881, 44 L.Ed.2d 508 (1975)(“[S]tate courts are the ultimate expositors of state law”). However, even if the Court accepts that Fourth Amendment analysis provides the proper framework for applying RCW 16.08.040(2), Finch was never subjected to any seizure and he cannot establish a Fourth Amendment violation. Applying a proper Fourth Amendment analysis

⁶ See Petition for Review, pp. 15-19 (citing federal cases).

therefore requires that summary judgment in the County's favor be affirmed.

Finch's claim that a police officer must issue an order for a police dog to bite before subsection (2) of the statute will apply is based exclusively on a strained interpretation of language from the Ninth Circuit's opinion in *Miller v. Clark County*, 340 F.3d 959 (9th Cir. 2003). Petition, p. 15. Neither *Miller* nor the federal Fourth Amendment analysis it employs supports Finch's argument.

In *Miller*, the plaintiff brought a strict liability claim as well as a 42 U.S.C. § 1983 claim based on an alleged Fourth Amendment violation after a Sheriff's Deputy ordered a police dog to "bite and hold" the plaintiff until officers arrived at the scene. *Id.* at 960. The Ninth Circuit affirmed dismissal of the plaintiff's § 1983 claim, concluding that although the plaintiff had been subjected to a Fourth Amendment seizure, the force used was reasonable and did not violate the Fourth Amendment. *Id.* at 968. In a footnote, it also affirmed dismissal of the plaintiff's strict liability claims:

We also affirm the district court's judgment for the defendants on Miller's state-law strict liability claim under Rev. Code Wash. § 16.08.040, which makes a dog owner strictly liable for damages caused by a dog bite, because we conclude that the Washington Supreme Court would hold that a police officer is not liable under Rev. Code Wash. § 16.08.040 for a police dog's bite if the officer's ordering

the dog to bite was reasonable under the United States Constitution's Fourth Amendment.

Id. at 968, n. 14 (citing *McKinney v. City of Tukwila*, 103 Wn. App. 391, 409, 13 P.3d 631 (2000)).

Miller was decided by the Ninth Circuit in 2003, long before the 2012 amendment now codified at RCW 16.08.040(2) was ever enacted. The *Miller* court was not undertaking an analysis of the phrase “lawful application of a police dog” found in subsection (2) of the statute at the time it issued its opinion, because that part of the statute did not yet exist. Rather, in *Miller* the Ninth Circuit determined that the original strict liability cause of action provided for under subsection (1) of the statute never encompassed situations where use of a police dog did not violate the Fourth Amendment.⁷

Even if *Miller* is used as a guide for interpreting subsection (2) of the statute, it does not support Finch's argument that an officer must have ordered the police dog to bite in order for a bite injury to be exempted from strict liability. The *Miller* court's reference to an “officer's ordering the dog to bite” is simply a statement of its holding within the context of

⁷ The fact that the *Miller* court reached this conclusion prior to the enactment of subsection (2) of the statute further supports the County's argument that the statutory amendment was curative in nature. Thus, subsection (2) should not be viewed as a mere affirmative defense, but

the facts of the case before it. The focus of the *Miller* court's strict liability holding was the officer's compliance with the Fourth Amendment and not the officer's command to bite plaintiff.⁸

Miller reflects the Ninth Circuit's conclusion that even before subsection (2) of the statute was enacted, strict liability was not available against a law enforcement agency for a dog bite injury absent a Fourth Amendment violation. Because there is no Fourth Amendment violation in the case at bar, Finch's reliance on *Miller* is misplaced.

To show that an officer violated the Fourth Amendment, plaintiff must show that a search or seizure occurred and that the search or seizure was unreasonable. *See Brower v. County of Inyo*, 489 U.S. 593, 599, 109 S. Ct. 1378, 103 L.Ed. 628 (1989); *see also Carlson v. Bukovic*, 621 F.3d 610, 618 (7th Cir. 2010) ("Any Fourth Amendment inquiry necessarily begins with a determination of whether a search or seizure actually

rather as a clarification of pre-existing law that defined the scope of the original cause of action available under subsection (1) of the statute.

⁸ This is also how lower federal district courts have interpreted the holding of *Miller*. *See, e.g., Terrian v. Pierce County*, No. C08-5123BHS, 2008 SL 2019815, *1 (W.D. Wash. May 9, 2008) ("[B]ecause Plaintiff has conceded that he cannot support a claim for a violation of the Fourth Amendment or for negligence, his claim also fails to state an actionable claim under RCW § 16.08.040."); *Beecher v. City of Tacoma*, No. C10-5776 BHS, 2012 WL 1884672, *11 (W.D. Wash. May 23, 2012) ("With regard to Beecher's claim under RCW 16.08.040, the court dismisses this claim because the court concludes that the use of force was reasonable."). Copies

occurred.”). Here, Finch’s strict liability claim fails because Finch was never seized within the meaning of the Fourth Amendment:

It is clear ... that a Fourth Amendment seizure does not occur whenever there is a governmentally caused termination of an individual’s freedom of movement (the innocent passerby), nor even whenever there is a governmentally caused and governmentally *desired* termination of an individual’s freedom of movement (the fleeing felon), but only when there is a governmental termination of freedom of movement *through means intentionally applied*.

Id. at 596-97 (emphasis in original). This case is analogous to *Andrade v. City of Burlingame*, 847 F. Supp. 760 (N. D. Cal. 1994), where a federal district court applied the above *Brower* Fourth Amendment analysis in the context of an accidental bite by a police dog. As the court explained in dismissing the plaintiff’s Fourth Amendment claim:

It is not as if Officer Harman intended that the dog intimidate the plaintiffs into submission, or intended that the dog bite their pants’ legs to prevent their escape. On the contrary, Officer Harman never meant to use this particular “instrumentality” in any way to effect the seizure. The dog simply escaped from the patrol car after Officer Harman had already seized the plaintiffs.

Id. at 765.

It is undisputed that Officer Finch was bitten after K-9 Rex was recalled by Deputy Ditrich. Finch concedes that he was never subjected to

of these unpublished cases are included in Appendix B to Finch’s petition for review.

a Fourth Amendment seizure: “It is obvious that Officer Finch was not seized, but rather, was an innocent person who was mistakenly bitten.” CP 96 (emphasis added). Thus, even if the Court were to accept federal Fourth Amendment case law as the proper framework for analyzing strict liability under RCW 16.08.040, Finch’s claim fails as a matter of law.

E. Other Potential Tort Remedies Are Available To Police Dog Bite Victims

Finch asserted negligence and outrage claims against the County that were not resolved by the dismissal of his strict liability claims. Finch voluntarily dismissed those claims before appealing the trial court’s partial summary judgment of his strict liability claim. CP 6-8, 339-40; Supp. CP 4-6. Thus, even though Finch does not have a strict liability claim, he had negligence claims for the same injuries. Consequently, existing tort law provides police dog bite victims an adequate remedy and Finch’s suggestion to the contrary is specious.

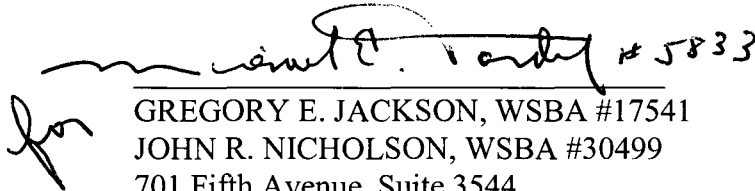
V. CONCLUSION

The trial court and Court of Appeals correctly held that the undisputed evidence established that Finch’s injuries arose out of the “lawful application of a police dog” and dismissed Finch’s strict liability claim based on RCW 16.08.040(2). Finch fails to show that the plain

meaning interpretation of the statute that the lower courts relied upon was error, and he asks this Court to adopt a strained interpretation of the statute that is supported by neither the statute's language nor the federal authorities he cites. For these and all the reasons above, Finch's petition for review should be denied.

RESPECTFULLY SUBMITTED this ^{25TH} day of June, 2015.

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DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the state of Washington, that the following is true and correct:

That on June 25, 2015, I served the foregoing Answer to Petition for Review to the Court and to the parties to this action as follows:

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DATED this 25th day of June, 2015 in Olympia, Washington.

Kath. Sisson
KATHRINE SISSON