DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

ROBERT McKINLEY,

Appellant,

v.

BOB GUALTIERI, in his official capacity as Sheriff of Pinellas County, Florida,

Appellee.

No. 2D20-3156

May 4, 2022

Appeal from the Circuit Court for Pinellas County; Thomas Ramsberger, Judge.

Samuel Alexander of Alexander Appellate Law P.A., Deland, for Appellant.

Nicole E. Durkin, Senior Associate Counsel, Pinellas County Sheriff's Office, Largo, for Appellee.

VILLANTI, Judge.

Robert McKinley challenges the dismissal with prejudice of his fourth amended complaint against the Pinellas County Sheriff. His

complaint alleged that a deputy sheriff was negligent in handling a K-9 dog that bit McKinley while he was attending an event at the Florida Auto Exchange Baseball Stadium[1] in Dunedin. Because the trial court erroneously dismissed the complaint as barred by sovereign immunity, we reverse.

I. Standard of Review

We review a trial court's decision to grant a party's motion to dismiss a complaint de novo. *Hazen v. Allstate Ins. Co.*, 952 So. 2d 531, 533 (Fla. 2d DCA 2007) (citation omitted). "[W]e must assume the factual allegations of the amended complaint to be true, and we construe them in the light most favorable to . . . the nonmoving party." *Id.* (citations omitted).

II. The Statutory and Common Law Framework

This appeal provides an opportunity to examine the interplay between Florida's "dog bite" statute, section 767.04, Florida Statutes (2017); the common-law tort approach to dog bite cases which prevailed prior to the enactment of section 767.04; and

[1] Now known as "TD Ballpark."

section 768.28, Florida Statutes (2017), which waives sovereign immunity in tort actions.

Section 767.04 states, in pertinent part:

> The owner of any dog that bites any person while such person is on or in a public place, or lawfully on or in a private place, including the property of the owner of the dog, is liable for damages suffered by persons bitten, regardless of the former viciousness of the dog or the owners' knowledge of such viciousness.

Prior to the enactment of section 767.04, dog-bite lawsuits were subject to common law negligence principles. Section 767.04 "modified the common law[] in that it makes the dog owner the insurer against damage by his dog with certain exceptions, departing from the common law doctrines grounded in negligence." *Carroll v. Moxley*, 241 So. 2d 681, 682 (Fla. 1970). Specifically, the statute "imposes absolute liability upon the dog owner when the dog-bite victim is in a public place or lawfully on or in a private place . . . ." *Belcher Yacht, Inc. v. Stickney*, 450 So. 2d 1111, 1113 (Fla. 1984)

Section 768.28, Florida's Tort Claims Act, provides, in pertinent part:

> (1) In accordance with s. 13, Art. X of the State Constitution, the state, for itself and for its agencies or subdivisions, hereby waives sovereign immunity for liability for torts, but only to the extent specified in this

> act. Actions at law against the state or any of its agencies or subdivisions to recover damages in tort for money damages against the state or its agencies or subdivisions for injury or loss of property, personal injury, or death caused by the negligent or wrongful act or omission of any employee of the agency or subdivision while acting within the scope of the employee's office or employment under circumstances in which the state or such agency or subdivision, if a private person, would be liable to the claimant, in accordance with the general laws of this state, may be prosecuted subject to the limitations specified in this act. . . .
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> . . . .
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> (9)(a) . . . The exclusive remedy for injury or damage suffered as a result of an act, event, or omission of an officer, employee, or agent of the state or any of its subdivisions or constitutional officers is by action against the governmental entity, or the head of such entity in her or his official capacity, or the constitutional officer of which the officer, employee, or agent is an employee . . . .

The effect of this statute is to allow a plaintiff to file a complaint against a government agency for property damage, personal injury or death caused by the negligent or wrongful act of any employee of any agency. The statute generally requires (apart from certain exceptions) that the complaint name the governmental entity or the head of such entity as defendant which, in this case, the complaint properly does.

However, the Florida Tort Claims Act, like the Federal Tort Claims Act,[2] "does not contemplate the imposition of strict liability of any kind upon the government." *Schick v. Fla. Dep't of Agric.*, 504 So. 2d 1318, 1322 (Fla. 1st DCA 1987) (citations omitted).

> The Act expressly provides that sovereign immunity is waived only to the extent specified in the act, that is, liability will attach to the government in the same manner and to the same extent as to a private individual under like circumstances. Thus, the removal of sovereign immunity in tort actions does not impose strict liability in its place.

Id. (citations omitted). Therefore, because section 767.04 is a strict liability statute, actions against the State of Florida or its agencies by a person who has been bitten by a dog owned by an agency of the State cannot be maintained under that statute.

However, the Florida Tort Claims Act provides that a person may bring an action in tort against the state or an agency "for injury . . . caused by the negligent or wrongful act or omission of any employee of the agency or subdivision while acting within the

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[2] "Florida's Tort Claims Act has adopted much of the language of the Federal Tort Claims Act, and in construing the extent of the waiver intended by the act, Florida courts have consulted federal decisions." *Schick v. Fla. Dep't of Agric.*, 504 So. 2d 1318, 1322 (Fla. 1st DCA 1987) (citing *Com. Carrier Corp. v. Indian River County,* 371 So. 2d 1010 (Fla. 1979).

scope of the employee's office or employment under circumstances in which the state or such agency or subdivision, if a private person, would be liable to the claimant." § 768.28(1). Accordingly, although a plaintiff may not rely on section 767.04 when suing a state agency for a dog bite, he or she may bring such a suit in common-law negligence.

Importantly, "the applicability of [sovereign] immunity does not . . . arise until it is determined that a defendant otherwise owes a duty of care to the plaintiff and thus would be liable in the absence of such immunity." *Henderson v. Bowden*, 737 So. 2d 532, 535 (Fla. 1999) (quoting *Kaisner v. Kolb*, 543 So. 2d 732, 734 (Fla. 1989)). Thus, the first question we must address in this case is whether McKinley's complaint adequately states a cause of action for negligence under common law principles.

III. Common Law Negligence

To state a cause of action for negligence, a plaintiff must allege: (1) the existence of a legal duty owed by the defendant to others, (2) breach of that duty by the defendant, (3) injury to the plaintiff proximately caused by the defendant's breach, and (4) actual loss or damages resulting from the injury. *See Jackson*

Hewitt, Inc. v. Kaman, 100 So. 3d 19, 27-28 (Fla. 2d DCA 2011) (citing *Clay Elec. Coop., Inc. v. Johnson*, 873 So. 2d 1182, 1185 (Fla. 2003)). "Florida, like other jurisdictions, recognizes that a legal duty will arise whenever a human endeavor creates a generalized and foreseeable risk of harming others." *Estate of Rotell ex rel. Rotell v. Kuehnle*, 38 So. 3d 783, 788-89 (Fla. 2d DCA 2010) (quoting *McCain v. Fla. Power Corp.*, 593 So. 2d 500, 503 (Fla. 1992)); *see also Kaisner,* 543 So. 2d at 735 ("There is a strong public policy in this state that, where reasonable men may differ, the question of foreseeability in negligence cases should be resolved by a jury." (citation omitted)).

Whether a complaint sufficiently alleges that the defendant had a duty of care is a question of law and a threshold matter that must be found to exist by the trial court before the plaintiff can place his or her case before a finder of fact. *See Henderson*, 737 So. 2d at 535 ("A threshold matter is whether the sheriff's deputies had a duty to act with care toward the decedents; for, as we have stated time and again, there can be no governmental liability unless a common law or statutory duty of care existed that would have been

applicable to an individual under similar circumstances."). Here, McKinley's fourth amended complaint alleges, in pertinent part:

- that the K-9 in question was aggressive and had a "propensity to attack or bite without cause";
- that the Sheriff owned and trained the K-9;
- that the Sheriff and the Deputy handling the K-9 knew or should have known of the K-9's aggressive tendencies;
- that the Sheriff had a duty to exercise reasonable care in handling, controlling, and supervising the K-9;
- that the Deputy who was patrolling the venue with the K-9 was acting in the scope and employment of his duties with the Pinellas County Sheriff's office;
- that the Sheriff created a foreseeable zone of risk "by placing bystanders in close proximity" to the K-9;
- that "McKinley was not warned, advised, or aware of the dangerous and vicious nature of" the K-9;
- that McKinley unknowingly entered into the zone of risk created by the Sheriff;
- that when McKinley entered the zone of risk, the K-9 "attacked [McKinley], without warning or provocation, biting his right forearm causing lacerations and punctures to his skin, with severe and permanent injury and scarring."

On appeal, the Sheriff argues that McKinley placed himself in in the zone of risk by approaching the area occupied by the deputy and the police dog, and that because "McKinley did not allege the Deputy walked or moved in proximity to him . . . his own allegations

demonstrate there was no zone of risk created by the conduct of the deputy." This argument is without merit and contradicts the waiver statute itself, which provides that a person may bring an action in tort against the state or an agency for injury caused by the "negligent or wrongful act or omission of any employee." *See* § 768.28(1). This is nothing more than a restatement of black letter law: tort law provides a remedy for a person who suffers an injury caused by the action or failure to act of another. *See Kaisner,* 543 So. 2d at 735-36 ("Where a defendant's conduct creates a foreseeable zone of risk, the law generally will recognize a duty placed upon [the] defendant either to lessen the risk or see that sufficient precautions are taken to protect others from the harm that the risk poses. We see no reason why the same analysis should not obtain in a case in which the zone of risk is created by the police." (citation omitted)); *Smith v. Fla. Power & Light Co.*, 857 So. 2d 224, 229 (Fla. 2d DCA 2003) ("[T]he zone of risk created by a defendant defines the scope of the defendant's legal duty and the scope of the zone of risk is in turn determined by the foreseeability of a risk of harm to others.").

In a similar vein, at the hearing on the Sheriff's motion to dismiss the complaint, counsel for the Sheriff argued,

> If those facts that have been alleged in the Fourth Amended Complaint were sufficient, then we would have the position of the Sheriff, and frankly every law enforcement with a K-9 . . . owing a duty of care to everyone at all times when on patrol in Pinellas County when they have a police dog with them. And that's not the case.

To the contrary, this is exactly the case. If it were not, a deputy could wander through a crowd (or stand still) with a K-9 while the K-9 attacks every person who passes by, and the Sheriff's Department would be immune from tort liability.

In the instant case, McKinley was in a public location (or, assuming the venue is privately owned, was an invitee). As such, he had the right to walk where he wanted, taking any path he chose to get from point A to point B. In fact, McKinley had every right to walk right up to the deputy if he wished, and, unless warned by the deputy to move away, McKinley had a reasonable expectation that the dog would not bite him. Thus, the argument that McKinley placed himself in the zone of risk by walking into the area where the deputy stood with the K-9 is without merit; to the contrary, the deputy created the zone of risk by patrolling the venue with his K-

9–it matters not whether the deputy was walking around or standing still.

Finally, to the extent the Sheriff's arguments on appeal may be read to assert that McKinley's complaint was not detailed or specific enough, we disagree:

> [T]he rule is well-nigh universal that in an action for negligence the plaintiff need not set out in detail the specific acts constituting the negligence complained of, as this would be pleading the evidence. Accordingly, a declaration specifying the act, the commission or omission of which caused the injury, and averring generally that it was negligently and carelessly done or omitted, will suffice.

Triay v. Seals, 100 So. 427, 428 (Fla. 1926); *see also Winsemann v. Travelodge Corp.*, 205 So. 2d 315, 316-17 (Fla. 2d DCA 1967) ("To state a cause of action for negligence plaintiff need only allege sufficient facts or omissions causing the injury and at the same time aver that they were negligently done or omitted." (citation omitted)).

Based on the above, we conclude that McKinley's fourth amended complaint adequately states a cause of action in common law negligence.

IV. Waiver of Sovereign Immunity

On appeal, the Sheriff relies heavily on *Trianon Park Condominium Ass'n v. City of Hialeah*, 468 So. 2d 912 (Fla. 1985), in which the supreme court stated:

> [F]or there to be governmental tort liability, there must be either an underlying common law or statutory duty of care with respect to the alleged negligent conduct. For certain basic judgmental or discretionary governmental functions, there has never been an applicable duty of care. Further, legislative enactments for the benefit of the general public do not automatically create an independent duty to either individual citizens or a specific class of citizens.

Id. at 917 (citations omitted). Based on this, the Sheriff argues that patrolling the baseball venue with K-9s was a discretionary function, and therefore McKinley's lawsuit is barred by sovereign immunity. The Sheriff also argues,

> Under the applicable legal tests and the public-duty doctrine, the limited activity as alleged by McKinley firmly falls under enforcement of laws and protection of public safety which has been generally owed to the public at large" and that McKinley's complaint failed "to plead facts alleging that he was owed a 'special duty of care' (i.e., to plead exceptions to the public-duty doctrine).

The Sheriff has taken *Trianon Park* out of context and as a result has misconstrued its application to the facts of this case.

As observed by the Florida Supreme Court in *Commercial Carrier Corp. v. Indian River County,* 371 So. 2d 1010, 1015 (Fla. 1979):

> [W]e believe it to be circuitous reasoning to conclude that no cause of action exists for a negligent act or omission by an agent of the state or its political subdivisions where the duty breached is said to be owed to the public at large but not to any particular person. . . . By less kind commentators, it has been characterized as a theory which results in a duty to none where there is a duty to all.

The supreme court's disdain for such faulty logic did not change between the publication of *Commercial Carrier* and *Trianon Park*; in fact, the supreme court reaffirmed the viability of *Commercial Carrier* in the latter case. In distinguishing the two cases, the court said:

> It is important to note . . . that this Court's decision in *Commercial Carrier* . . . did not discuss or consider conduct for which there would have been no underlying common law duty upon which to establish tort liability in the absence of sovereign immunity. Rather, we were dealing with a narrow factual situation in which there was a clear common law duty absent sovereign immunity.

Trianon Park, 468 So. 2d at 918 (emphasis added). The court further explained:

> The lack of a common law duty for exercising a discretionary police power function must . . . be distinguished from existing common law duties of care

> applicable to the same officials or employees in the operation of motor vehicles or the handling of firearms during the course of their employment to enforce compliance with the law. In these latter circumstances there always has been a common law duty of care and the waiver of sovereign immunity now allows actions against all governmental entities for violations of those duties of care.

Id. at 920 (emphasis added) (citing *Crawford v. Dep't of Mil. Affs.*, 412 So. 2d 449 (Fla. 5th DCA 1982); *see also City of Daytona Beach v. Palmer*, 469 So. 2d 121, 123 (Fla. 1985) (holding that "discretionary judgmental decisions" regarding how to fight a fire were distinguishable "from negligent conduct resulting in personal injury while fire equipment is being driven to the scene of a fire or personal injury to a spectator from the negligent handling of equipment at the scene").

We see no reason to differentiate between motor vehicles, firearms, firefighting equipment, or police dogs with respect to whether officials employed by or acting on behalf of a state agency owe a common law duty of care toward innocent bystanders who happen to find themselves within a foreseeable zone of risk created by those officials. "Governmental entities are clearly liable for this type of conduct as a result of the enactment of section 768.28."

Palmer, 469 So. 2d at 123; *see also Wallace v. Dean*, 3 So. 3d 1035, 1041 n.9 (Fla. 2009) ("After a governmental policy or program has been adopted, it cannot be carried out with operational impunity and in a manner with total disregard to the injuries that it may inflict upon Floridians.").

Applying the above principles to the facts in this case, we do not hesitate to conclude that although the decision to patrol the baseball venue with K-9s may have been discretionary, the act of patrolling the venue with K-9s was operational. Therefore, McKinley's lawsuit is not barred by sovereign immunity. Accordingly, we vacate the order dismissing McKinley's fourth amended complaint and remand for further proceedings.

Reversed and remanded for further proceedings.

NORTHCUTT and ROTHSTEIN-YOUAKIM, JJ., Concur.

Opinion subject to revision prior to official publication.