

ARIZONA SUPREME COURT ACCEPTS REVIEW OF POLICE DOG BITE CASE

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Ryan v. Napier

Arizona Supreme Court, March 20, 2018



A driver approaching from the opposite lane nearly hit a Pima County Sheriffs' deputy head on. The deputy activated his emergency lights and pursued the driver. After a brief pursuit the car stopped. The deputy exited his vehicle and issued commands to the driver, who did not respond. A few minutes after the stop, a K-9 handler arrived. The driver then rolled up his window and drove away. A second pursuit ensued involving several more officers. The driver hopped a curb and stopped near a major intersection. Deputies fanned out and warned the driver to "stop or [he] will be bitten." Video evidence showed the driver walking slowly toward the rear of his car, reaching out and putting his hand on the trunk of the car to steady himself, and then continuing to walk around to the passenger side of the car, resting his hands on the top of the car. At this point the K-9 deputy released his dog, which bit the driver.

The driver sued the Pima County Sheriff and the K-9 deputy alleging negligence. The trial court denied defendants' motion for summary judgment, ruling that the driver could proceed under a negligence theory even though the K-9 deputy had intentionally released the K-9. The case proceeded to a jury trial, where a jury awarded Plaintiff \$650,000.

The Court of Appeals, Division Two, affirmed. It held: (a) as a matter of first impression, that the plaintiff may sue a public entity for the negligent evaluation of the need to use intentional force; (b) that plaintiff could sue the deputy for negligence even though he intentionally released the dog; (c) that justification was not a defense to a negligence claim; (d) that the federal *Graham v. Connor* standard applicable to the use of force under the Fourth Amendment was relevant, even though the suspect had not raised a federal claim; and (e) that the state dog bite statutes, which impose strict liability on civilian dog owners, but prohibit dog bite suits against law enforcement officers acting in the course of their duties, did not apply to a negligence claim.

The dissenting judge expressed "doubts about" the conclusion that an intentional use of police force is subject to a negligence claim, but would have reversed and remanded for a new trial based on procedural irregularities in the jury instructions, and the allowance of expert *Graham v. Connor* (reasonableness of force) testimony on what the dissent believed was a legal issue.

The Arizona Supreme Court thankfully seems to disagree with just about every ruling of the Court of Appeals. On March 20, 2018, the Arizona Supreme Court granted review on four issues:

- Whether the Court of Appeals erred in concluding that Arizona recognizes a cause of action for the negligent decision to use force (commit a battery);
- Whether the deputy should have been allowed to assert a justification defense in response to the suspect's claim that the release of the dog was a negligent, unjustified, and excessive use of force;
- Whether it was error to allow the suspect's police-practices expert to testify that the deputy's use of the police dog violated the federal *Graham v. Connor* standard; and
- Whether the trial court erred in instructing that jury that the deputy bore the burden of proving justification if the deputy was entitled to assert justification as a defense.

The Supreme Court gave the parties three weeks to file simultaneous supplemental briefs, as is the usual course when review is granted. Oral argument will probably be set for a date in May, or early June. The Supreme Court will likely issue a decision in the fall.

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