

POLICE OFFICER CANNOT “NEGLIGENTLY INTENTIONALLY RELEASE” A POLICE DOG

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A Pima County Sheriff's Deputy pulled over a driver who had swerved into the opposite lane. The driver did not immediately stop, and the deputy called for assistance. Although the driver eventually stopped, he did not respond to commands to show his hands and throw his keys out the window. When the driver was warned to comply or the dog would be released, the driver rolled up his window and attempted to drive away. He came to a stop after driving over stop spikes in the roadway. The driver staggered from the car and was told to stop or he would be bitten. The dog was released and bit the driver's leg just as the driver was putting his hands on top of the car. Authorities later learned that the driver, a diabetic, was having a severe hypoglycemic event and lacked the cognitive function to understand what was happening or respond to police commands. The state did not pursue criminal charges.

The driver sued the officer for negligently releasing the dog. He did not assert claims for battery or for excessive force under 42 U.S.C. § 1983. The trial court ruled that plaintiff could assert a claim for “negligent use of force” even though the officer had intentionally decided to release the dog. The jury awarded plaintiff \$617,500 and found him 5% at fault.

The court of appeals held that there is such a thing as a claim for “negligently evaluating whether to intentionally release” a police dog, which is different from a battery claim. It also held that the defense of justification does not apply to a negligence claim. Thus, if the officer negligently released the dog, he was not privileged to do so.

The Supreme Court vacated the court of appeals decision. The negligent use of an intentionally inflicted force is not a cognizable claim. The actor's intent distinguishes a negligent act from an intentional one. If the defendant acts with the intent to (or knows with certainty that his act will) bring about the consequences of his act, he acts intentionally. If he acts without that intent or certainty, he acts negligently. They are mutually exclusive. If a defendant acts with the intent to cause a harmful or offensive touching (battery), that same act cannot constitute negligence.

Nor can the officer “negligently” evaluate whether to use force. Negligence is an act, not an internal evaluation. The act causing plaintiff's injury was the intentional release of the dog. Also, allowing this kind of negligence claim would improperly allow a plaintiff to “plead around” the requirements and legislatively mandated defenses and presumptions accompanying an intentional tort claim. Plaintiffs can, however, claim that other conduct – independent of an intentional use of force – was negligent; for example, if the officer had negligently dropped the dog's leash, resulting in the attack. But the justification defense would not apply to a negligence claim because justification protects an officer from liability if his conduct was reasonable (justified). The jury would already have considered whether the conduct was reasonable in assessing whether the officer was negligent. If justification is raised as a defense in a battery case, the defendant bears the burden of proving justification.

The court finally ruled that an expert cannot opine that the Fourth Amendment's factors for determining excessive force set the standard for the justification defense. It is the court's role to instruct the jury on the law. The expert can explain the factors he used in forming an opinion, but cannot refer to Fourth Amendment case law. The court did not address the issue of whether an expert can give an opinion on whether the officer's conduct was justified or reasonable.

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