

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2011 CA 0247

BRANDON MILLET

VERSUS

JEREMY JACQUES AND THE LIVINGSTON PARISH SHERIFF'S OFFICE

Judgment Rendered: SEP 19 2011

Appealed from
Twenty-First Judicial District Court
In and for the Parish of Livingston
State of Louisiana
Docket Number 121,347

Honorable Elizabeth P. Wolfe, Judge

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Brandon Millet

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Willie Graves, Sheriff of
Livingston Parish

Kuhn, J CONCURS WITH THE RESULT

BEFORE: WHIPPLE, KUHN, AND GUIDRY, JJ.

GUIDRY, J.

A delivery driver appeals a summary judgment dismissing his claims against a local sheriff on the grounds of immunity. For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY

On December 19, 2007, Brandon Millet went to the home of Jeremy Jacques to deliver a package. On arriving at Mr. Jacques' home, Mr. Millet went to the side door of the residence so that he could simply leave the package by the door if Mr. Jacques was not home to accept it. At the side door, Mr. Millet put down the package and knocked, then rang the door bell. After receiving no response, he proceeded to walk back to his truck, which was parked on the road in front of the house. A carport was constructed on the side of Mr. Jacques' home, and just as Mr. Millet walked from under the carport, he noticed a white pit bull racing around the corner towards him from the back of the house. As the dog lunged towards him, Mr. Millet kicked him away. Mr. Millet continued to kick the dog away from him until he arrived at and entered his delivery truck. As a result of this incident, Mr. Millet injured his back.

On September 23, 2008, Mr. Millet filed a petition for damages against Mr. Jacques and the Livingston Parish Sheriff's Office, but he later amended the petition to substitute Willie Graves, in his official capacity as sheriff of Livingston Parish, for the Livingston Parish Sheriff's Office,¹ and to add USAA General Indemnity Insurance Company as Mr. Jacques' insurer. Mr. Millet later compromised and dismissed his claims against Mr. Jacques and USAA General Indemnity Insurance Company, reserving his right to proceed against Sheriff Graves. Thereafter, Sheriff Graves filed a motion for summary judgment seeking dismissal of Mr. Millet's claims against him. Following a hearing, the trial court

¹ A sheriff's department has no legal capacity to sue or be sued. Valentine v. Bonneville Insurance Company, 96-1382, pp. 4-5 (La. 3/17/97), 691 So. 2d 665, 668.

granted the motion, finding that Sheriff Graves was immune from liability. Mr. Millet now appeals, raising three issues for review: whether the sheriff had qualified immunity for the alleged acts of negligence in this matter; whether the sheriff, through his deputies, had a duty to issue citations for the prior complaints received regarding Mr. Jacques' dogs; and whether the failure to issue citations for the prior complaints was a cause in fact of the harm suffered by Mr. Millet.

STANDARD OF REVIEW

A motion for summary judgment should be granted if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to material fact and that the mover is entitled to judgment as a matter of law. La. C.C.P. art. 966(B). On a motion for summary judgment, the burden of proof is on the mover. If the moving party will not bear the burden of proof at trial on the matter, that party's burden on a motion for summary judgment is to point out an absence of factual support for one or more essential elements of the adverse party's claim, action, or defense. Thereafter, if the adverse party fails to produce factual support sufficient to establish that he will be able to satisfy his evidentiary burden of proof at trial, there is no genuine issue of material fact, and the mover is entitled to summary judgment. La. C.C.P. art. 966C(2); Robles v. ExxonMobile, 02-0854, p. 4 (La. App. 1st Cir. 3/28/03), 844 So.2d 339, 341. An appellate court's review of a summary judgment is *de novo*, using the same criteria that govern the trial court's consideration of whether summary judgment is appropriate. R.G. Claitor's Realty v. Rigell, 06-1629, p. 4 (La. App. 1st Cir. 5/4/07), 961 So. 2d 469, 471-472, writ denied, 07-1214 (La. 9/21/07), 964 So. 2d 340.

In ruling on a motion for summary judgment, the trial court's role is not to evaluate the weight of the evidence or to determine the truth of the matter, but

instead to determine whether there is a genuine issue of triable fact. Guardia v. Lakeview Regional Medical Center, 08-1369, p. 3 (La. App. 1st Cir. 5/8/09), 13 So. 3d 625, 628. A trial court cannot make credibility decisions on a motion for summary judgment. Monterrey Center, LLC v. Education Partners, Inc., 08-0734, p. 10 (La. App. 1st Cir. 12/23/08), 5 So. 3d 225, 232. Despite the legislative mandate that summary judgments are now favored, factual inferences reasonably drawn from the evidence must be construed in favor of the party opposing the motion, and all doubt must be resolved in the opponent's favor. Willis v. Medders, 00-2507, p. 2 (La. 12/8/00), 775 So. 2d 1049, 1050 (per curiam). Because it is the applicable substantive law that determines materiality, whether a particular fact in dispute is "material" for summary judgment purposes can be seen only in light of the substantive law applicable to the case. Guardia, 08-1369 at 4, 13 So. 3d at 628.

DISCUSSION

Sheriff Graves moved for summary judgment, asserting that he had qualified immunity under La. R.S. 9:2798.1(B), and further asserting that Mr. Millet would be unable to meet his burden of proving that a duty was owed to him under the circumstances presented or that the actions of his employees were a cause in fact of Mr. Millet's harm. The trial court rendered summary judgment in favor of Sheriff Graves based on its finding that the sheriff was immune from liability under La. R.S. 9:2798.1(B).

Subsection B of La. R.S. 9:2798.1 provides that "[l]iability shall not be imposed on public entities or their officers or employees based upon the exercise or performance or the failure to exercise or perform *their policymaking or discretionary acts* when such acts are within the course and scope of their lawful powers and duties." (Emphasis added.) The Louisiana Supreme Court has held

that a court must consider the following when determining whether immunity under La. R.S. 9:2798.1 applies:

A court must first consider whether the government employee had an element of choice. ... If the employee had no discretion or choice as to appropriate conduct, there is no immunity. When discretion is involved, the court must then determine whether that discretion is the kind which is shielded by the exception, that is one grounded in social, economic or political policy. If the action is not based on public policy, the government is liable for any negligence, because the exception insulates the government from liability only if the challenged action involves the permissible exercise of a policy judgment.

Hardy v. Bowie, 98-2821, p. 11 (La. 9/8/99), 744 So. 2d 606, 613 (citing Fowler v. Roberts, 556 So. 2d 1, 15 (La. 1990)(on rehearing)); see also Wilson v. Davis, 07-1929, p. 7 (La. App. 1st Cir. 5/28/08), 991 So. 2d 1052, 1058, writs denied, 08-2011, 08-2020 (La. 11/10/08), 996 So. 2d 1070 and 1071.

It is the contention of Mr. Millet that Sheriff Graves' failure, through his deputies, to enforce applicable state and local laws led to his injury on December 19, 2007. The applicable laws include La. R.S. 3:2771, which states "[n]o person shall suffer or permit any dog in his possession, or kept by him about his premises, to run at large on any unenclosed land, or trespass upon any enclosed or unenclosed lands of another." Similarly, Section 4-1 of the Code of Ordinances of the Parish of Livingston, Louisiana provides that dogs should not be permitted to run at large and anyone who violates the ordinance "shall be fined not less than one hundred (\$100.00) dollars nor more than five hundred (\$500.00) dollars, or imprisoned for not more than thirty (30) days, both."

In opposition to the motion for summary judgment, Mr. Millet presented an incident report and excerpts from the deposition of Deputy H. Alden Thomasson, wherein Deputy Thomasson discussed several reports that had been filed by deputies describing incidents in which pit bulls coming directly from or in the vicinity of Mr. Jacques' home had attacked citizens. According to Deputy

Thomasson, the reports did not indicate that any arrests were made or summons issued relative to any of the reported incidents.

The sheriff argues, and presented the testimony of Deputy Thomasson to establish, that it is a standard, unwritten policy of his office for deputies not to issue citations (summons) or make arrests for criminal violations unless the deputy personally observed the criminal activity. Thus, the sheriff argued that since it was not shown that any of the deputies personally observed any of Mr. Jacques' dogs running loose, they were not required to take any enforcement action.

In DuBois v. McGuire, 579 So. 2d 1025 (La. App. 4th Cir.), writ denied, 587 So. 2d 696 (La. 1991), the Fourth Circuit reversed a judgment in favor of the plaintiffs upon finding that the parish government was entitled to the immunity provided under La. R.S. 9:2798.1. In that case, the appellate court found that the Parish Health Department, which entity had the power and duty under the local ordinance to catch and impound stray dogs and destroy vicious dogs, had "established an administrative procedure to facilitate the enforcement" of local ordinances to regulate and impound stray and unaccompanied dogs. DuBois, 579 So. 2d at 1029. The unwritten administrative procedure allowed animal wardens to issue confinement notices instructing dog owners to keep the dog confined in the yard or to secure the dog with a chain. The court thus held that the "determination of a procedure to enforce" the local ordinance and implementation of the procedure was a discretionary function protected by the immunity provisions of La. R.S. 9:2798.1. DuBois, 579 So. 2d at 1029.

In the matter before us, the Sheriff presented evidence of an unwritten policy whereby deputies may decline to take enforcement action under circumstances where they do not personally observe the criminal act. Furthermore, the deputies acted in accordance with this policy in responding to reports of Mr. Jacques' dogs

being found running at large. While the policy at issue was not tailored specifically for enforcement of the applicable animal statutes and ordinances at issue, the record does show that the deputies acted in accordance with the policy. As such, the deputies' actions were a valid exercise of the discretion embodied in the sheriff's policy. Moreover, the decision to issue a summons or make an arrest normally lies within the discretion of law enforcement officials, and therefore, the exercise of that discretion should not result in civil liability. See DuBois, 579 So. 2d at 1029. Accordingly, we find no error in the trial court's determination that the sheriff is immune from liability as a consequence.

CONCLUSION

Having determined that the trial court properly applied La. R.S. 9:2798.1 to find Sheriff Graves immune from liability, we affirm the summary judgment. All costs of this appeal are cast to the appellant, Brandon Millet.

AFFIRMED.