# ELEVENTH CIRCUIT GRANTS IMMUNITY IN CANINE EXCESSIVE FORCE CASE

## (and You Can't Sue a Dog in Georgia)

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On May 19, 2017, the Eleventh Circuit Court of Appeals of decided *Jones v. Fransen et al.*[i], in which the court discussed whether immunity is appropriate regarding alleged excessive force when a police canine bites a non-resistive suspect and will not release on command. The relevant facts of *Jones,* taken directly from the case, are as follows:

> [T]his case began when Jones and his girlfriend broke up. Following the split, on July 6, 2013, Jones's ex-girlfriend called 911 to report that Jones had broken into her apartment and was carrying a television to his car, which was parked at her apartment complex.
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> Two of the officers who responded to the call included Defendant-Appellants Gwinnett County Police Department Officers Brandon Towler and Richard Ross. Towler and Ross searched the apartment-complex area for Jones. Meanwhile, another officer claimed to have seen Jones carrying a bag and a television near the apartment pool.
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> At some point, Defendant Officers believed that Jones had fled to a "steep ravine pond area with high concert walls, boulders and vegetation." Defendant-Appellant Officer Scott Fransen, who worked with police-canine Draco, arrived on the scene to look for Jones and issued what are known as K-9 warnings. After hearing no response, Fransen and Draco entered the ravine to find Jones. Ross and another officer provided backup.
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> During the search for Jones, Fransen saw Jones motionless, at the bottom of the ravine. But Fransen had already released Draco, and Draco "r[a]n loose and savagely attack[ed] and t[ore]" Jones's left arm, even though Jones lay motionless during the attack. Ross, who was also present, did nothing to protect Jones from the attack.
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> After "a while" passed, which Jones described as "seem[ing] like a lifetime," Fransen tried to pull Draco from Jones's arm, but Draco refused to yield. Finally, however, Fransen was

> able to separate Draco from Jones. But unfortunately, the damage was done. This incident permanently disfigured and limited the use of Jones's arm.[ii]

Jones filed suit and alleged four counts: (1) he sued Officer Fransen, the K9 handler, for excessive force under the Fourth Amendment; (2) he sued the other officers of the other officers for failure to intervene under the Fourth Amendment to stop the alleged excessive force; he sued all defendant's under state law for negligence, including the K9, Drago; and (4) he sued Gwinnett County for inadequate training under the Fourth Amendment. The defendant's filed motions for summary judgment and qualified immunity and the district court denied the motions. The defendants appealed to the Eleventh Circuit Court of Appeals.

When government officials are acting within the scope of their employment in a discretionary capacity, they are entitled to qualified immunity from suit. In order to overcome qualified immunity, the plaintiff must establish that the government official (1) violated a federal protected right, and (2) that the right was "clearly established" such that a reasonable government official would have known that the conduct at issue was a violation. When the court of appeals reviews a decision based on qualified immunity, they can chose analyze the second factor first because either factor has the ability to dispose the case based upon a grant of qualified immunity. In other words, even if the government official violated a plaintiff's rights, if the law was not "clearly established" under the second prong of the analysis, the officer would still be entitled to qualified immunity from suit. In Jones' case, the court of appeals stated that they were starting with the second prong and determining whether the law was clearly established.

The court also examined the law related to excessive force, in general. The court stated

> **We evaluate excessive-force claims under the Fourth Amendment's "objective reasonableness" standard**. *Crenshaw v*. *Lister*, 556 F.3d 1283, 1290 (11th Cir. 2009) (per curiam) (citation omitted). **This standard directs us to ask "whether the officer's conduct is objectively reasonable in light of the facts confronting the officer."** *Id*. (quoting *Vinyard v*. *Wilson*, 311 F.3d 1340, 1347 (11th Cir. 2002)) (internal quotation marks omitted). **When we engage in our analysis, we must do so "from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight**," *id*. (quoting *Graham v*. *Connor*, 490 U.S. 386, 396 (1989)) (internal quotation marks omitted), **and we keep in mind that "the right to make an arrest or investigatory stop necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it**." *Graham*, 490 U.S. at 396 (citation omitted).
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> **The standard requires us to carefully balance "the nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing government interests at stake**." *Crenshaw*, 556 F.3d at 1290 (quoting *Graham*, 490 U.S. at 396) (internal quotation marks omitted). **Factors we account for include (1) the severity of the crime; (2) whether the individual "poses an immediate threat to the safety of the officers or others"; (3) whether the individual actively resists or tries to evade arrest by flight,** *id*. (quoting *Graham*, 490 U.S. at 396); **(4) the need for force to be applied; (5) the amount of force applied in light of the nature of the need; (6) the severity of the injury; and (7) whether officers applied force "in**

> **good faith or [rather did so] maliciously and sadistically,"** *id*. (quoting *Hadley v. Gutierrez*, 526 F.3d 1324, 1329 (11th Cir. 2008)).[iii] [emphasis added]

The court also looked at two canine specific excessive force cases from the Eleventh Circuit. The first case was *Priester v. City of Riviera Beach*[iv], in which officers pursued Priester who had stolen about $20 worth of snacks from a golf shop, which is a relatively minor crime. He was unarmed and had not been violent. Priester surrendered when he was found, but the canine handler allegedly ordered the canine to bite anyway. This attack lasted approximately two minutes and Priester suffered 14 puncture wounds. There was also an officer on scene who failed to intervene. The court stated that they "easily concluded" that the canine officer and the officer who failed to intervene violated Priester's rights under the Fourth Amendment.

The other case examined was *Crenshaw v. Lister*[v], in which Crenshaw was believed to have committed armed robbery. He fled in a car and crashed into police while trying to escape. He then fled into dense woods on foot to escape. Officers believed that he posed a significant threat to them because he was violent, and they did not know his exact location. Crenshaw eventually stated "I'm over here," and the canine officer released his canine. The canine bit Crenshaw which caused multiple wounds and the need for stiches. The court held that canine officer and the officers that did not intervene did not violate the Fourth Amendment given the violent actions of Crenshaw and the threat that he posed to officers.

The court then noted that Jones' case does not compare factually to either *Priester* or *Crenshaw*. The crime in *Jones* was more serious than that in *Priester* but less serious than *Crenshaw.* Jones did not give up his location by yelling out like in *Crenshaw* and Jones did not overtly surrender, as did *Priester*.

The court then, in light of the general constitutional principals related to excessive force, and in light of the specific Eleventh Circuit precedent, set out to analyze whether the law was "clearly established" such that a reasonable officer would have known the officer's conduct in Jones' case was unconstitutional.

The first method a plaintiff can use to show that the law is clearly established is by pointing to a factually similar case that will put the officer on notice regarding the unlawfulness of his conduct. As noted above, the only Eleventh Circuit precedent, *Priester* and *Crenshaw*, are not factually similar to Jones' case. As such they are not sufficient to show that the law is clearly established by this method.

The second method by which a plaintiff can establish that the law is clearly established is the "obvious clarity" method, based on general constitutional principles. This occurs when the law is so obviously clear "that every objectively reasonable government official facing the same circumstances would know that the official's conduct did violate" the constitution.[vi] Regarding this method, the Eleventh Circuit stated

> **[T]he Supreme Court has repeatedly instructed us that "'clearly established law' should not be defined 'at a high level of generality" and must instead be "'particularized' to the facts of the case**." *White v. Pauly*, 137 S. Ct. 548, 552 (2017) (citation omitted). **The fact that the Fourth Amendment protects against the use of excessive force during an arrest does not provide an officer with any guidance as to what constitutes an excessive use of force. So this general principle is not the**

> **type of "broader, clearly established principle [that] should control the novel facts [of the] situation" here**.[vii] [emphasis added]

The last method to show the law is clearly established occurs when the plaintiff can show "**that the Defendant's actions … lie so obviously at the very core of what the Fourth Amendment prohibits that the unlawfulness of the conduct was readily apparent to the official**" even though there is no similar case law.[viii] [emphasis added]

Thus, the court held that the law was not clearly established regarding the Fourth Amendment excessive force claims against the officer's, therefore they are entitled to qualified immunity on the claims for excessive force against the canine handler and against other officers for failure to intervene.

The court next set out to examine the negligence claims against Gwinnett County and Ayers in his official capacity. The court noted that, in Georgia, government entities have sovereign immunity from suit unless that is specifically waived by state statute. The court stated that Jones failed to cite any law in Georgia whereby sovereign immunity is waived in this type of case. As such, the Eleventh Circuit dismissed this part of the negligence claim.

The second negligence claim was against the canine officer and the officers that allegedly failed to intervene. Officers in Georgia are given "official immunity" from suit for discretionary functions when they are sued in their individual capacities as long as they did not act with "actual malice." Actual malice occurs when the officer acted with the "deliberate intention to do wrong."[ix] The Eleventh Circuit noted that Jones did not cite any facts that would support the contention that the officers acted with "actual malice" in his case. As such, the court dismissed this claim.

The final negligence claim was against Draco, the K9 himself. Under negligence law, the elements of negligence require (1) a legal duty on behalf of the defendant, (2) a breach of the duty by the defendant, (3) and the breach must cause (causation), (4) the injury. The court then looked to Georgia tort law to determine who has a legal duty. The statute states that only a "person" can be liable for breaching a legal duty. Further, the court looked at the Georgia tort statute that defines what constitutes a "person." The court stated

> O.C.G.A. § 50-21-22(4), which we use to determine the meaning of words used in Georgia's tort statutes, does not define the word "person" to include dogs. *See id*. Rather, it limits the definition of "person" to "a natural person, corporation, firm, partnership, association, or other such entity." O.C.G.A. § 50-21-22(4). A dog does not qualify as any of these things. *Cf*. *Miles v*. *City Council of Augusta*, 710 F.2d 1542, 1544 n.5 (11th Cir. 1983) (declining to hear a claim that a cat's right to free speech was infringed because a cat "cannot be considered a 'person'").[x]

Thus, they held that a Draco, a dog, cannot be sued for negligence. As such, this claim was dismissed.

Therefore, the court of appeals reversed the decision of the district court.

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[i] No. 16-10715 (11th Cir. Decided May 19, 2017)

[ii] Id. at 3-5
[iii] Id. at 14-15
[iv] 208 F.3d 919 (11th Cir. 2000)
[v] 556 F.3d 1283 (11th Cir. 2009)
[vi] Jones at 13
[vii] Id. at 19
[viii] Id.
[ix] Id. at 22
[x] Id. at 23-24