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The State of South Carolina
# OFFICE OF THE ATTORNEY GENERAL

CHARLES MOLONY CONDON
ATTORNEY GENERAL

November 4, 1997

Kathy Ward Cuttino, Esquire
Sumter County Attorney
25 North Sumter Street
Sumter, South Carolina 29150

Re: Informal Opinion

Dear Ms. Cuttino:

You have requested an opinion on behalf of Sumter County concerning the applicability of S.C. Code Ann. Sec. 44-7-110. You state the following by way of background:

> [w]hile these statutes might be interpreted to deal solely with livestock, and while a 1978 Attorney General's opinion ... has indicated that dogs are excluded from § 47-7-110, our Supreme Court appears to have later recognized the applicability of this statute to dogs.
>
> In Hossenlopp v. Cannon, 285 S.C. 367, 329 S.E.2d 438 (1985) (which changed South Carolina's common law dog-bite rule), the Court pointed to the violation of both § 47-3-50 (and a Richland County ordinance adopted pursuant to that statute) and § 47-7-110 as grounds for negligence. Id., 285 S.C. 367, 370, 329 S.E.2d 438, 440. Although the Court was obviously not dealing specifically with criminal penalties associated with the statute, it nevertheless appeared to recognize its applicability to domestic pets, including dogs. Accordingly, we are requesting that you review the 1978 opinion, in light of the 1985 Hossenlopp decision, and issue

your current opinion with respect to the applicability of § 44-7-10, et seq., to dogs and other domestic pets.

**Law / Analysis**

Article 1 of Chapter 7 of Title 47 of the Code, § 47-7-10 et seq. regulates "estrays." Section 47-7-10 provides that "[a]ny domestic or domesticated animal found wandering at large or abandoned in the public ways or on the land of any person other than its owner shall be an 'estray.'" Article 3 of Chapter 7 is entitled "Livestock Trespassing or Running at Large." Section 47-7-110, which is part of Article 3, proscribes the permitting of domestic animals to run at large. Such Section states as follows:

> [i]t shall be unlawful for the owner or manager of any domestic animal of any description wilfully or negligently to permit any such animal to run at large beyond the limits of his own land or the lands leased, occupied or controlled by him. Any owner, manager or person violating the provisions of this section shall be subject to a fine for each offense of not more than twenty-five dollars or to imprisonment for not more than twenty-five days.

Through the years, this Office has construed the foregoing statute as not applying to dogs. In an Opinion dated October 6, 1975, former Attorney General McLeod wrote in response to a letter from a State Senator inquiring as to the basis for the opinion issued by former Attorney General John M. Daniel on February 24, 1947 as follows:

> [a]copy of that opinion is enclosed herewith. You will note that it contains no citations of authority but represents General Daniel's construction of the then statute.
>
> I think that General Daniel was probably correct in excluding dogs from the statute which precludes domestic animals from running at large. The original Act was adopted on December 20, 1881, to 'provide a general stock law.' The Act, which is the predecessor of the present Section 6-311 of the 1962 Code of Laws, referred to a 'horse, mule, ass, genet, bull, ox, cow, calf or swine, sheep and goat.' Most of these animals, and perhaps all, seem to be grazing stock and I

> presume that that was the basis upon which General Daniel reached the conclusion that it was not applicable to dogs. This seems to be the construction given by the Legislature by its adoption of Section 6-132, which prohibits uninoculated dogs from running at large. It is probably a reasonable basis to conclude that the stock law did not embrace dogs but covered only those animals of the types specifically enumerated in that Act, and dogs do not appear to be of the same general type as Section 6-311.
>
> Supporting authorities seem to indicate the correctness of his conclusion.

This conclusion was reiterated in an Opinion of this Office, dated June 2, 1978.

Thus, the question here is whether the view expressed in the Opinions of this Office over the course of at least fifty years should now be changed in light of the Hossenlopp case, referenced above.

In Hossenlopp, as you indicate, the South Carolina Supreme Court altered the common law with respect to dog bites. There, the Court explained as follows:

> In 1978 in the case of McQuaig v. Brown [270 S.C. 512, 242 S.E.2d 688 (1978)] ... the court alerted the bench and bar to the fact that the dog-bite law in this state was antiquated. See dissent in McQuaig.
>
> The dog-bite law is of common law origin. It may be changed by common law mandate. The time has come when our rule must give way to the more commonly accepted rule of law indicated in other states by case law and statute.
>
> When a child, as in this case, has been injured by the dog of another, the burden of damages, medical expenses, hospital, etc. must be paid by either the owner of the dog or the parents of the child. It is common knowledge that dogs have a tendency to bite. The owners know this and should be made to respond in damages when the dogs they keep do

injuries to others regardless of whether the injury is a result of the first bite, the second or other bite. In this state, we have a paradoxical situation in that § 15-75-30 Code of Laws of South Carolina (1976) gives to an injured party the right to collect damages from parents where an unmarried minor child under the age of seventeen years does damages to the property of another; but if that same parents' dog does damage to the property of another, money may not be collected unless it is shown that he had bitten before or was known to be of a mischievous nature. In tort cases, the culpable party should be responsible for not only the second delict but the first.

California has dealt with this matter by way of statute. Out of that statute has come a jury instruction found in California Jury Instructions--Civil (1950 Supp.) We approve. It reads as follows:

> The law of California provides that the owner of any dog which bites a person while such person is on or in a public place or is lawfully on or in a private place, including the property of the owner of such dog, is liable for such damages as may be suffered by the person bitten regardless of whether or not the dog previously had been vicious, regardless of the owner's knowledge or lack of knowledge of any such viciousness, and regardless of whether or not the owner had been negligent in respect to the dog, provided, however, that if a person knowingly and voluntarily invites attack upon himself [herself], or if, when on the property of the dog owner, a person voluntarily, knowingly, and without reasonable necessity, exposes himself [herself] to the danger, the owner of the dog is not liable for the consequences....

We think the California rule is sound. It is short of the rule of strict liability for dogs.

In its opinion, the Court in Hossenlopp referenced § 47-7-110. While such reference was not crucial to the Court's decision, it is clear that the statute was cited to demonstrate that the defendants were negligent; in other words, it is clear that the court viewed § 47-7-110 as applicable to dogs because the entire issue of defendants' negligence related to a dog-bite by defendants' dog. In short, although dicta, it is evident that the Court read the statute as including a dog as a "domestic animal."

While not universally in accord, there is considerable case law in other jurisdictions which has found a dog to be a "domestic animal." It is written in one source that no animal "better fits the dictionary definition of 'domestic'" than a dog. 13 Words and Phrases, p. 408 ("Domestic") [citing various authorities]. Other cases have likewise found that a dog is a "domestic animal." See, White v. State, 249 S.W.2d 877, 878 (Tenn. 1952); Wilcox v. State, 101 Ga. 563, 28 S.E. 981 (1897); People v. Scher, 286 NYS 2d 770, 772 (1968); Boosman v. Movdy, 488 S.W.2d 917, 920 (Mo. 1972); State v. Leonard, 470 A.2d 1262, 1263 (Me. 1984). Finally, the case of Trager v. Thor, 516 N.W.2d 69 (Mich. 1994) is instructive. There, in a dog-bite case, the Supreme Court of Michigan quoted 3 Restatement Torts, 2d, § 506(2), p. 10 which states that

> [a] dog that serves as a family pet clearly falls within the definition of a domestic animal, i.e. one "devoted to the service of mankind at the time and in the place in which it is kept."

516 N.W.2d at 71, n. 3.

Of course, this Office does not overrule its previous opinions unless they are clearly erroneous. Our interpretation of § 47-7-110 has been on the books for 50 years. However, the Hossenlopp decision and the Court's apparent construction of the statute cannot be ignored either. Nor should the cases in other jurisdictions which construe the plain and ordinary meaning of the term "domestic animal" to include the dog be overlooked. Obviously, the issue of the applicability of this statute to dogs will have to be litigated in the court. However, until such time as § 47-7-110 is further construed by the judiciary, it would appear that Hossenlopp is the last word from the Court and would be controlling as to any interpretation thereof.

This letter is an informal opinion only. It has been written by a designated Assistant Deputy Attorney General and represents the position of the undersigned attorney

as to the specific questions asked. It has not, however, been personally scrutinized by the Attorney General nor officially published in the manner of a formal opinion.

With kind regards, I am

Very truly yours,

Robert D. Cook
Assistant Deputy Attorney General

RDC/an