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Howard's sentence is well within the statutory limits and is consistent with the nature of the crime and his prior criminal history. Nothing in our sentencing guidelines requires a judge to consider the sentences imposed on codefendants. The district court did not abuse its discretion in imposing Howard's sentence.

IV. CONCLUSION

Pelster had reasonable suspicion to detain the vehicle after the traffic stop, and the length of the continued detention was not unreasonable. There is sufficient evidence of Rocky's training, certification, and field accuracy in the record to support the district court's factual finding that the results of the canine sniff were admissible. The reasonable suspicion factors combined with the alert by the trained canine constituted probable cause to search the vehicles.

Howard did not enter a de facto guilty plea when he participated in the stipulated bench trial, and his trial counsel was not ineffective. There is sufficient evidence to support the convictions of both Laws and Howard, and Howard's sentence was not excessive.

We affirm the judgment of the district court in each appeal.

AFFIRMED.

HEAVICAN, C.J., not participating.

PAT BRITTON, PERSONAL REPRESENTATIVE OF THE ESTATE OF JESSE BRITTON, DECEASED, APPELLANT, V. CITY OF CRAWFORD, A NEBRASKA POLITICAL SUBDIVISION, APPELLEE.

803 N.W.2d 508

Filed September 23, 2011. No. S-10-1013.

1. **Motions to Dismiss: Rules of the Supreme Court: Pleadings.** Because a motion pursuant to Neb. Ct. R. Pldg. § 6-1112(b)(6) tests the legal sufficiency of the complaint, not the claim's substantive merits, a court may typically look only at the face of the complaint to decide a motion to dismiss.
2. **Rules of the Supreme Court: Pleadings.** Dismissal under Neb. Ct. R. Pldg. § 6-1112(b)(6) should be granted only in the unusual case in which a plaintiff

includes allegations that show on the face of the complaint that there is some insuperable bar to relief.

3. **Pleadings: Appeal and Error.** An appellate court reviews de novo a lower court's dismissal of a complaint for failure to state a claim.
4. ____: ____. When analyzing a lower court's dismissal of a complaint for failure to state a claim, an appellate court accepts the complaint's factual allegations as true and construes them in the light most favorable to the plaintiff.
5. **Summary Judgment: Motions to Dismiss: Rules of the Supreme Court: Pleadings.** When matters outside of the pleadings are presented by the parties and accepted by the trial court with respect to a motion to dismiss under Neb. Ct. R. Pldg. § 6-1112(b)(6), the motion shall be treated as a motion for summary judgment as provided in Neb. Rev. Stat. §§ 25-1330 to 25-1336 (Reissue 2008), and the parties shall be given reasonable opportunity to present all material made pertinent to such a motion by statute.
6. **Summary Judgment: Appeal and Error.** An appellate court will affirm a lower court's granting of summary judgment if the pleadings and admissible evidence offered at the hearing show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
7. **Summary Judgment: Motions to Dismiss: Notice.** When receiving evidence which converts a motion to dismiss into a motion for summary judgment, it is important that the trial court give the parties notice of the changed status of the motion and a reasonable opportunity to present all material made pertinent to such a motion by the rules governing summary judgment.
8. **Political Subdivisions Tort Claims Act: Immunity: Waiver.** The Political Subdivisions Tort Claims Act allows a limited waiver of a political subdivision's sovereign immunity. This waiver is limited by specifically delineating claims that are exempt from being brought against a political subdivision.
9. **Political Subdivisions Tort Claims Act: Public Officers and Employees.** Where a claim against a political subdivision is based upon acts or omissions of an employee occurring within the scope of employment, it is governed by the provisions of the Political Subdivisions Tort Claims Act.
10. **Statutes: Immunity: Waiver.** Statutes that purport to waive the protection of sovereign immunity of the State or its subdivisions are strictly construed in favor of the sovereign and against the waiver.
11. **Immunity: Waiver.** A waiver of sovereign immunity is found only where stated by the most express language of a statute or by such overwhelming implication from the text as will allow no other reasonable construction.

Appeal from the District Court for Dawes County: LEO DOBROVOLNY, Judge. Affirmed.

Maren Lynn Chaloupka, of Chaloupka, Holyoke, Hofmeister, Snyder & Chaloupka, for appellant.

Steven W. Olsen and John F. Simmons, of Simmons Olsen Law Firm, P.C., for appellee.

HEAVICAN, C.J., CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

MCCORMACK, J.

I. NATURE OF CASE

Pat Britton filed this action as personal representative of the estate of Jesse Britton (Jesse), deceased, against the City of Crawford (the City) under the Political Subdivisions Tort Claims Act (PSTCA), Neb. Rev. Stat. §§ 13-901 to 13-927 (Reissue 2007 & Cum. Supp. 2010). The district court for Dawes County granted the City's motion to dismiss, and Britton appealed. The issue on appeal is whether the City is immune from liability under § 13-910(7), which provides that the PSTCA shall not apply to any claim arising out of a battery. For the following reasons, we affirm the determination of the district court.

II. BACKGROUND

1. FACTUAL BACKGROUND

In 2007, Jesse was a suspect in several burglaries, including one involving a stolen firearm. He was 16 years of age. Richard Thompson, a police officer for the City, and Dan Kling, a conservation officer with the Nebraska Game and Parks Commission, investigated the burglaries. On October 3, 2007, Thompson and Kling received information that Jesse was hiding in downtown Crawford in a vacant building called the Frontier Bar. Thompson was also told that Jesse had threatened to shoot Thompson.

Thompson obtained permission to enter the bar. Thompson arrived at the bar and assigned two officers to secure the exterior of the bar at the northeast and southwest corners of the building. Thompson asked Kling to assist him in searching the interior of the bar and requested that Kling carry his state-issued shotgun. Thompson and Kling then used the Realtor's keys to enter the building. Neither party requested any additional assistance from the State Patrol or the county sheriff's office.

After entering the bar, Thompson and Kling heard footsteps on the second floor. They proceeded upstairs and saw Jesse crouched behind a piece of furniture. Thompson and Kling

shouted commands at Jesse, yelling at Jesse to show them his hands and drop the gun, but Jesse refused to comply. Jesse then "sprang up pointing his gun" at Thompson. Thompson and Kling both shouted at Jesse to drop the gun and show them his hands. After Jesse failed to comply with the commands to drop the gun, Thompson and Kling shot him. Ten to twelve minutes passed between the time Thompson and Kling entered the bar and the time shots were fired.

2. Procedural Background

(a) Criminal Trial

On November 20, 2007, Thompson was indicted for second degree assault pursuant to Neb. Rev. Stat. § 28-309(1)(b) (Reissue 2008). The criminal case was tried to the district court. The court determined that Thompson had acted in self-defense and found that Thompson was not guilty. In so finding, the court stated:

> [T]he Court must reach the conclusion that [Jesse] did, in fact, point the pistol at [Thompson], at which time the events ensued resulting in the death of Jesse . . . . The Court can only conclude that [Thompson] was acting in self-defense in the situation that presented itself. Thus, the Court cannot find that [Thompson] acted recklessly in his firing of his weapon which resulted in [Jesse's] being struck by his bullet.

(b) Federal Case

On September 11, 2008, Britton, Jesse's mother and personal representative of his estate, filed suit against the City, Thompson, and Kling in the U.S. District Court for the District of Nebraska under 42 U.S.C. § 1983 (2006) and under the Due Process and Equal Protection Clauses of the U.S. Constitution. The suit also included the state common-law negligence claim at issue in the present appeal. Britton alleged in the federal case that the defendants' actions violated Jesse's constitutional rights and that the defendants' negligence was the proximate cause of Jesse's death.

The U.S. District Court granted the defendants' motion for summary judgment on the basis of qualified immunity.

The federal claims were dismissed with prejudice. The court dismissed the common-law claims without prejudice, stating that it would not exercise ancillary jurisdiction over the claims because the federal character of the complaint had been eliminated.

(c) State Negligence Claim

On November 30, 2009, Britton filed suit against the City on the common-law negligence claims. The operative complaint alleged that negotiation, nonviolent de-escalation techniques, and conflict resolution techniques were the appropriate and reasonable means of dealing with any perceived "'standoff'" at the Frontier Bar. The complaint alleged that the shooting of Jesse was proximately caused by the City's negligence in (1) failing to seek Jesse's removal from the bar through less aggressive, less provocative means; (2) failing to follow recognized procedures for dealing with barricaded subjects; (3) failing to seek the assistance of other law enforcement resources in order to produce Jesse's removal from the bar through nonviolent means; (4) failing to seek the assistance of Jesse's family, friends, or other persons Jesse trusted in order to produce Jesse's removal from the bar through nonviolent means; and (5) otherwise selecting tactics for confronting Jesse that a reasonable law enforcement officer would recognize to be "high-risk, provocative, and likely to frighten and intimidate a barricaded teenager" such as Jesse. Britton also sought damages for Jesse's pain and suffering in the time between the beginning of the standoff and the time of his death.

The City challenged the complaint on a motion under Neb. Ct. R. Pldg. § 6-1112(b)(6) of the Nebraska Court Rules of Pleading in Civil Cases, alleging that it failed to state a cause of action upon which relief could be granted and that the statute of limitations barred Britton's claims. At the hearing on the City's motion to dismiss, Britton was allowed to offer evidence. The City argued that the complaint alleged assault and battery and that, pursuant to the PSTCA, a political subdivision cannot be held liable for such acts as a matter of law. The City offered no evidence. Britton offered the complaint, answer, and memorandum and order of the U.S. District Court from the federal case, as well as the grand jury indictment

and order from Thompson's criminal case. The court admitted the evidence offered by Britton and subsequently granted the City's motion to dismiss. The court determined that the claim was barred by the battery exception to the PSTCA.[1] The court did not rule on the statute of limitations issue, because it was not necessary to decide the case. Britton appeals.

III. ASSIGNMENT OF ERROR

Britton assigns that the district court erred in sustaining the City's motion to dismiss.

IV. STANDARD OF REVIEW

[1-4] Because a motion pursuant to § 6-1112(b)(6) tests the legal sufficiency of the complaint, not the claim's substantive merits, a court may typically look only at the face of the complaint to decide a motion to dismiss.[2] Dismissal under § 6-1112(b)(6) should be granted only in the unusual case in which a plaintiff includes allegations that show on the face of the complaint that there is some insuperable bar to relief.[3] An appellate court reviews de novo a lower court's dismissal of a complaint for failure to state a claim.[4] When analyzing a lower court's dismissal of a complaint for failure to state a claim, an appellate court accepts the complaint's factual allegations as true and construes them in the light most favorable to the plaintiff.[5]

[5,6] However, § 6-1112(b) provides that when matters outside of the pleadings are presented by the parties and accepted by the trial court with respect to a motion to dismiss under § 6-1112(b)(6), the motion "shall be treated" as a motion for summary judgment as provided in Neb. Rev. Stat. §§ 25-1330 to 25-1336 (Reissue 2008), and the parties shall be given reasonable opportunity to present all material made pertinent to such a motion by statute. Our review of an order granting a

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[1] See § 13-910(7).

[2] *Doe v. Omaha Pub. Sch. Dist.*, 273 Neb. 79, 727 N.W.2d 447 (2007).

[3] *Id.*

[4] *Id.*

[5] *Id.*

motion for summary judgment is not restricted to the allegations of the complaint, but instead requires that we determine whether the pleadings and admissible evidence offered at the hearing show that there is no genuine issue as to any material fact or the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.[6]

[7] As a threshold matter, we must determine whether we are reviewing a ruling on a motion to dismiss or a ruling on a motion for summary judgment. We have recognized that when receiving evidence which converts a motion to dismiss into a motion for summary judgment, it is important that the trial court "'give the parties notice of the changed status of the motion and a "reasonable opportunity to present all material made pertinent to such a motion"' by the rules governing summary judgment."[7]

In this case, the district court granted Britton's request to submit evidence. The City requested that the court take notice that the receiving of evidence converted the motion to dismiss to a motion for summary judgment. Britton did not object to the City's request, and the court allowed the parties a reasonable opportunity to present all material pertinent to a motion for summary judgment. Accordingly, we apply the standard of review applicable to orders granting summary judgment, as set forth above.

V. ANALYSIS

[8] The PSTCA allows a limited waiver of a political subdivision's sovereign immunity with respect to certain, but not all, types of tort actions.[8] This waiver is limited by specifically delineating claims that are exempt from being brought against a political subdivision such as the City.[9]

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[6] *Countryside Co-op v. Harry A. Koch Co.*, 280 Neb. 795, 790 N.W.2d 873 (2010).

[7] *Doe v. Omaha Pub. Sch. Dist., supra* note 2, 273 Neb. at 83, 727 N.W.2d at 452, quoting 5C Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1366 (3d ed. 2004).

[8] See *Stonacek v. City of Lincoln*, 279 Neb. 869, 782 N.W.2d 900 (2010).

[9] See § 13-910(1) through (12).

[9] Where a claim against a political subdivision is based upon acts or omissions of an employee occurring within the scope of employment, it is governed by the provisions of the PSTCA.[10] Britton does not allege, nor does she argue, that Thompson and Kling acted outside the scope of their employment at the time of the alleged negligence. Britton argues that her claim alleged that the City breached its duty of care in its handling of a "barricaded suspect situation."[11]

The district court determined that "the assault and battery exception in the [PSTCA] found at §13-910(7) applies and bars the action." This exception to the general waiver of the PSTCA, sometimes called the intentional torts exception, provides that the PSTCA shall not apply to "[a]ny claim arising out of assault, battery, false arrest, false imprisonment, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights."[12]

[10,11] Statutes that purport to waive the protection of sovereign immunity of the State or its subdivisions are strictly construed in favor of the sovereign and against its waiver.[13] A waiver of sovereign immunity is found only where stated by the most express language of a statute or by such overwhelming implication from the text as will allow no other reasonable construction.[14]

1. Battery

The City maintains that the intentional torts exception bars Britton's claims because they arise out of a battery. Britton argues that the City cannot rely on the intentional torts exception because Thompson pled not guilty to the criminal assault charge. As stated above, the district court found Thompson not guilty on the basis of self-defense.

We first address whether Thompson's and Kling's actions qualify as a battery as it is contemplated in § 13-910(7). In

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[10] See *McKenna v. Julian*, 277 Neb. 522, 763 N.W.2d 384 (2009).

[11] Brief for appellant at 11.

[12] § 13-910(7).

[13] *Johnson v. State*, 270 Neb. 316, 700 N.W.2d 620 (2005).

[14] *Id.*

Nebraska, the intentional tort of battery is defined as "'an actual infliction' of an unconsented injury upon or unconsented contact with another."[15] We have also recognized the definition of battery as "any intentional, unlawful physical violence or contact inflicted on a human being without his consent."[16] These definitions are not inconsistent. We have noted, regarding the requirement that the contact be "'unlawful,'" that such contact is "'an angry, rude, insolent, or revengeful touching of the person . . . .'"[17]

"Unlawful" is a legal term. A contact is unlawful if it is unconsented to.[18] The Restatement (Second) of Torts[19] does not use the term "unlawful" in its definition of battery and states:

> An actor is subject to liability to another for battery if
>
> (a) he acts intending to cause a harmful or offensive contact with the person of the other or a third person, or an imminent apprehension of such a contact, and
>
> (b) a harmful contact with the person of the other directly or indirectly results.

A harmful contact intentionally done is the essence of battery.[20]

In discussing the intentional torts exception to the PSTCA, we have not analyzed whether an affirmative defense would remove an intentional tort from coverage under the exception. We conclude that such an analysis is not appropriate for the determination of whether certain claims fall under the exception found in § 13-910(7). The plain language of the exception excludes an enumerated list of intentional torts. On its face, it does not contemplate whether such intentional acts are legally justified. Nor does the exception state that the waiver of

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[15] *Bergman v. Anderson*, 226 Neb. 333, 336, 411 N.W.2d 336, 339 (1987).

[16] *State v. Washington*, 232 Neb. 838, 839, 442 N.W.2d 395, 396 (1989).

[17] *Newman v. Christensen*, 149 Neb. 471, 474, 31 N.W.2d 417, 418 (1948).

[18] See, *In re Baldwin*, 245 B.R. 131 (9th Cir. 2000), *affirmed* 249 F.3d 912 (9th Cir. 2001); 6 Am. Jur. 2d *Assault and Battery* § 5 (2008).

[19] Restatement (Second) of Torts § 13 at 25 (1965).

[20] See *Newman v. Christensen, supra* note 17. See, also, *Barouh v. Haberman*, 26 Cal. App. 4th 40, 31 Cal. Rptr. 2d 259 (1994).

sovereign immunity only applies to claims based on intentional torts for which the actor could be held liable. Furthermore, we have consistently recognized that the key requirement of the intentional torts exception is that the actor intended the conduct.[21] If the conduct was unintentional or negligent, it falls outside of the scope of the exception. Accordingly, we hold that in deciding whether conduct falls within the "battery" exception of § 13-910(7), it is only necessary to determine whether the conduct "aris[es] out of" a battery. We need not determine whether the actor ultimately could be held liable for any damage resulting from the battery, based on the presence or absence of affirmative defenses.

Britton argues that Thompson defended against the criminal charges by "pleading and admitting that his actions were not intentional."[22] This is a mischaracterization of the record. Thompson did plead not guilty. However, the plea was based on self-defense. Thompson did not argue that he accidentally or unintentionally shot Jesse. By invoking the affirmative defense, Thompson admitted that he intended to shoot Jesse, but that he should not be held criminally liable for his actions because they were legally justified.[23]

The shooting at issue in this case constituted a battery as that tort is defined in Nebraska and as contemplated by § 13-910(7). Thompson's admission that his actions were intentional supports our determination that the shooting was a battery. As noted above, our previous analysis of the intentional torts contemplated in § 13-910(7) has focused on whether the actor intended the acts alleged in the claim. There is no allegation that Thompson and Kling did not intend to shoot Jesse. Thompson and Kling intended to shoot Jesse, and the shooting qualifies as a battery under Nebraska law. We therefore address whether the claims alleged by Britton arise out of the battery.

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[21] See *McKenna v. Julian, supra* note 10.

[22] Brief for appellant at 22-23 (emphasis in original).

[23] See *State v. Miller*, 281 Neb. 343, 798 N.W.2d 827 (2011).

2. "Arising Out of" Battery

In *Johnson v. State*,[24] this court addressed the intentional torts exception contained in the State Tort Claims Act,[25] which is identical to the exception articulated in § 13-910(7) of the PSTCA. *Johnson* involved a negligence claim asserted against the State of Nebraska for a failure to supervise, hire, and discipline. This court determined that the claim in *Johnson* was barred because it arose out of assault and battery and that a failure to supervise, hire, and discipline was simply a way to reframe the claim.

Britton does not contend that Jesse's death was the result of negligent supervision or hiring, and therefore, *Johnson* is distinguishable on these facts. However, in *Johnson*, we analyzed the statutory language "arising out of assault."[26] Our analysis here must similarly apply the meaning of the phrase "arising out of battery." The phrase "arising out of" battery as it is used in § 13-910(7) creates a broader exemption than that which would be created by use of the language "for a battery."[27] Britton's argument is primarily one of characterizing or framing the pleaded conduct as negligence even though the injuries suffered by Jesse were the result of a battery, an intentional tort.

In *Johnson*,[28] we adopted the reasoning of four of the eight participating justices in *United States v. Shearer*,[29] who concluded:

> "[The plaintiff] cannot avoid the reach of [the intentional torts exception] by framing her complaint in terms of negligent failure to prevent the assault and battery. [The exception] does not merely bar claims *for* assault

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[24] *Johnson v. State, supra* note 13.

[25] See Neb. Rev. Stat. § 81-8,219(4) (Reissue 2008).

[26] *Johnson v. State, supra* note 13.

[27] *Id.*; *Hammond v. Nemaha County*, 7 Neb. App. 124, 581 N.W.2d 82 (1998).

[28] *Johnson v. State, supra* note 13, 270 Neb. at 320, 700 N.W.2d at 624 (emphasis in original).

[29] *United States v. Shearer*, 473 U.S. 52, 105 S. Ct. 3039, 87 L. Ed. 2d 38 (1985).

> or battery; in sweeping language it excludes any claim *arising out of* assault or battery. We read this provision to cover claims like [the plaintiff's] that sound in negligence but stem from a battery committed by a Government employee."

And we further agreed:

> "To determine whether a claim arises from an intentional assault or battery and is therefore barred by the exception, a court must ascertain whether the alleged negligence was the breach of a duty to select or supervise the employee-tortfeasor or the breach of some separate duty independent from the employment relation. . . . If the allegation is that the Government was negligent in the supervision or selection of the employee and that the intentional tort occurred as a result, the intentional tort exception . . . bars the claim. Otherwise, litigants could avoid the substance of the exception because it is likely that many, if not all, intentional torts of Government employees plausibly could be ascribed to the negligence of the tortfeasor's supervisors. To allow such claims would frustrate the purposes of the exception."[30]

In *Westcott v. City of Omaha*,[31] the Eighth Circuit Court of Appeals addressed the intentional torts exception of the Nebraska PSTCA. The plaintiff in *Westcott* alleged that an officer was negligent in his mistaken assumption that a suspect was armed, which in fact he was not. The officer based his decision to shoot on this assumption, and the shooting resulted in the suspect's death. The Eighth Circuit determined that the allegedly negligent assumption was "inextricably linked" to battery; therefore, the suit was barred by the PSTCA.[32]

Britton alleged in her amended complaint and argues on appeal that the "barricaded suspect situation"[33] imposed a

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[30] *Johnson v. State, supra* note 13, 270 Neb. at 322, 700 N.W.2d at 625, quoting *Sheridan v. United States*, 487 U.S. 392, 108 S. Ct. 2449, 101 L. Ed. 2d 352 (1988) (Kennedy, J., concurring in judgment).

[31] *Westcott v. City of Omaha*, 901 F.2d 1486 (8th Cir. 1990).

[32] *Id.* at 1490.

[33] Brief for appellant at 11.

standard of care for law enforcement and that the present tort claim is based on the City's handling of and decisionmaking in such a situation. This court has stated that where a plaintiff's tort claim is based on the mere fact of government employment (such as a respondeat superior claim) or on the employment relationship between the intentional tort-feasor and the government (such as a negligent supervision or negligent hiring claim), the intentional torts exception applies and the political subdivision is immune from suit.[34] Britton's claims are similarly based on the mere fact of Thompson's and Kling's government employment. As the basis for her claims, Britton alleges conduct of Thompson and Kling while acting within the scope of their employment. Britton does not plead any facts that would explain how the City would be liable without the connection of the employment relationship between Thompson, Kling, and the City. Therefore, the City is protected by sovereign immunity.

While other factors may have contributed to the situation which resulted in Jesse's death, but for the battery, there would have been no claim. No semantic recasting of events can alter the fact that the shooting was the immediate cause of Jesse's death and, consequently, the basis of Britton's claim. Even if it is possible that negligence was a contributing factor to Jesse's death, the alleged negligence was inextricably linked to a battery. Britton's suit is thus barred by the PSTCA.

VI. CONCLUSION

For the foregoing reasons, we determine that the pleadings and admissible evidence offered at the hearing show that the City is immune from Britton's suit pursuant to § 13-910(7). Accordingly, we affirm the district court's determination that the City is entitled to judgment as a matter of law.

AFFIRMED.

WRIGHT, J., not participating.

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[34] *Johnson v. State, supra* note 13.