No. 17-4039

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

SEAN KENDALL,
Plaintiff and Appellant,

v.

BRETT OLSEN, LT. BRIAN PURVIS, JOSEPH ALLEN EVERETT, TOM EDMUNDSON, GEORGE S. PREGMAN, AND SALT LAKE CITY CORPORATION,
Defendants and Appellees.

On Appeal from the United States District Court
For the District of Utah No. 2:15-cv-00862-RJS
The Honorable Robert J. Shelby

BRIEF OF APPELLANT

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ORAL ARGUMENT REQUESTED

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

RELATED APPEALS

No appeal in this action was previously before any appellate court under the same or a similar title, except as noted below. No cases are known to be pending in any court that will directly affect this Court's decision in the pending appeal.

Plaintiff/Appellant Sean Kendall ("Kendall") challenged the constitutionality of Utah Code Ann. § 78B-3-104, which requires filing of a bond in an amount a court finds to be the estimated attorneys' fees and costs to be incurred by police officer defendants.[1] That case is currently on appeal. *Sean Kendall v. Brett Olsen, et al.*, Appellate Case No. 20150927-SC (Utah Supreme Court).

JURISDICTIONAL STATEMENT

Pursuant to 28 U.S.C. § 1331, the district court had original jurisdiction over Kendall's claims arising under the United States Constitution and 42 U.S.C. § 1983 and, pursuant to 28 U.S.C. § 1367, supplemental jurisdiction over all other claims.[2]

This Court has jurisdiction pursuant to 28 U.S.C. § 1291. By Memorandum Decision and Order ("Decision"), dated February 17, 2017, the district court granted summary judgment for Defendants/Appellees Salt Lake City Corporation ("the City"), Brett Olsen ("Olsen"), and Brian Purvis ("Purvis") ("the City and Officers") "on Kendall's federal constitutional claims,"[3] denied Kendall's motion for summary

[1] Aplt. App. at 82–90.
[2] *See* Aplt. App. at 14–15, ¶ 5.
[3] Aplt. App. at 1499; 1519.

judgment,[4] and remanded the case to state court for further proceedings on the state law claims.[5] That was a "final decision" under 28 U.S.C. § 1291. *See Koch v. City of Del City,* 660 F.3d 1228, 1235 (10th Cir. 2011). A Judgment in a Civil Case was entered on February 17, 2017.[6] A Notice of Appeal was timely filed by Kendall on March 10, 2017, pursuant to Fed. R. App. P. 4(a)(1)(A).[7]

STATEMENT OF THE ISSUES

Purvis instructed officers to search "everywhere" for a missing young boy. Olsen, starting at the missing boy's home, searched private properties until he reached Kendall's home, one-eighth of a mile from the boy's home. There, Olsen opened a closed latch and a closed gate, then walked into and searched the enclosed curtilage of Kendall's home. Olsen searched without (1) consent, (2) a warrant, (3) a belief or reasonable cause to believe the boy was located in the curtilage to Kendall's home, or (4) a reasonable belief the home or curtilage had any association with the missing boy or his disappearance. When Kendall's beloved companion, a Weimaraner dog, Geist, which had been safely secured in the curtilage, barked and was provoked by Olsen to run toward him, Olsen shot and killed Geist.

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[4] Although the district court never expressly "denied" Kendall's motion for summary judgment, it noted "[b]oth sides now move for summary judgment," Aplt. App. at 1499, and stated during oral argument the hearing was "on cross-motions relating to the availability of qualified immunity . . . ." Aplt. App. at 1524.
[5] Aplt. App. at 1499; 1519.
[6] Aplt. App. at 1520.
[7] Aplt. App. at 1521–22.

The following issues are presented in this appeal:

Fourth Amendment – Unreasonable Search

1. Whether, at the time of Olsen's search of Kendall's backyard and his killing of Geist, the law was clearly established that, when searching for a person who might be at risk of harm, a warrantless, non-consensual search of the curtilage of a home could be conducted only if there was a reasonable belief that (1) the person at risk was located on the curtilage and (2) the places on the curtilage to be searched were associated with the emergency?

2. Under the first prong of the clearly established legal standard governing warrantless searches of homes or curtilages in emergency aid circumstances, which requires that officers confine their searches to premises where there is a reasonable belief a person in need of aid or protection is located, did the entry into and search of the curtilage of Kendall's home violate the Fourth Amendment when there was no reasonable belief the missing child was located on those premises?

3. Under the second prong of the clearly established legal standard governing warrantless searches in emergency aid circumstances, which requires that officers confine their search to only those places where an emergency would reasonably be associated, did the entry into and search of the curtilage of Kendall's home violate the Fourth Amendment when there was no reasonable belief the curtilage had any association with the missing child or his disappearance?

Fourth Amendment – Unreasonable Seizure

4. Under the clearly established law providing that law enforcement officers cannot invoke exigent circumstances created by themselves to justify a warrantless seizure, did the killing of Geist by Olsen violate the Fourth Amendment when Olsen's justification for the killing is the response of Geist, which would not have occurred had Olsen not unconstitutionally invaded Kendall's enclosed backyard where Geist had been secured?

5. Did the district court, in its consideration of the City and Officers' motion for summary judgment, err in viewing the evidence regarding the reasonableness of Olsen's conduct in the light most favorable to the City and Officers, when substantial evidence disputed the evidence relied on by the district court?

STATEMENT OF THE CASE

Nature of the Case

Kendall seeks vindication of his Fourth Amendment rights[8] by holding Olsen accountable for his unnecessary, brutal killing of Kendall's best friend, Geist, and for the unconstitutional search by Olsen that led to the tragedy.[9]

Kendall also seeks accountability for Purvis's instructions to search "everywhere" for a missing boy, even when there was no reasonable cause to believe the boy was located in any particular home or curtilage to be searched and no reasonable cause to believe that any specific home or curtilage to be searched had any connection whatsoever with the missing boy or his disappearance.[10]

Finally, Kendall seeks accountability for the City's unconstitutional policy, practice, and custom of allowing and encouraging officers to conduct warrantless searches when someone is at risk of harm, without limiting those searches to (1) specific places where a person at risk is reasonably believed to be located and (2) where the specific property to be searched is reasonably believed to be associated with the emergency giving rise to the search.[11]

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[8] Aplt. App. at 8–28, ¶¶ 30–43. Kendall's state law claims have been remanded by the district court to state court, where they are pending. Aplt. App. at 1499; 1519.
[9] Aplt. App. at 18, ¶¶ 2–3; 22–23, ¶¶ 22–23; 24–26, ¶¶ 30–35.
[10] Aplt. App. at 22, ¶ 22; 24–26, ¶¶ 30–35.
[11] Aplt. App. at 26–28, ¶¶ 39–42.

The Course of the Proceedings and Determination of the District Court

This appeal arises from the grant of summary judgment in favor of the City and Officers and the denial of Kendall's motion for summary judgment[12] with respect to (1) Kendall's claims of Fourth Amendment violations for the unconstitutional search of the curtilage to his home, which was directed by Purvis, perpetrated by Olsen, a product of the unconstitutional policy, practice, and custom of the City, and the cause of the death of Kendall's best friend Geist[13] and (2) Kendall's claim of Olsen's unreasonable, illegal seizure of Geist, in violation of the Fourth Amendment.[14]

Disregarding the controlling law clearly articulated by this Court and the Supreme Court, the district court determined the entire area where a missing child "could have walked" in the time the child has been missing, and every home within that area, is to be viewed as "the locations where the toddler might likely be found"[15] for purposes of applying (in this instance, misapplying) the legal limits carefully defined by this Court. The district court determined that police officers, without a warrant and without consent, can search *all* curtilages—and presumably all homes,

[12] Aplt. App. at 1499–1520. A copy of the district court's Decision, Aplt. App. at 1499–1519, and the Judgment in a Civil Case, Aplt. App. 1520, from which Kendall is appealing, are attached at the end of this Brief.
[13] Aplt. App. at 22–23, ¶¶ 22–23; 24–25, ¶¶ 30, 32; 26–27, ¶¶ 39–40.
[14] Aplt. App. at 25, ¶¶ 31–32.
[15] Aplt. App. at 1507.

since curtilages are entitled to the same Fourth Amendment privacy protections afforded to private homes—accessible to a missing person and located within the *entire area* the person may have traveled, even though (1) there is *no reasonable belief the missing person is located on the particular property to be searched* and (2) there is *no reasonable belief there is any association between the property to be searched and the missing person or his disappearance.*

Statement of the Facts

On June 18, 2014, Elise Horman called 911 and reported her two- or three-year-old son, K.H., was missing.[16] As was later discovered, K.H. was asleep on the floor of a room in the basement of his family's home, behind an empty box.[17]

The Salt Lake City Police Department ("SLCPD") Watch Commander, Purvis, told officers participating in an area-wide search for K.H. they were to search "everywhere" for the boy.[18] Purvis expected that officers would enter yards if they could not see the entire yard, even though there was no warrant, no consent, and no reason to believe there was a connection between the specific property and the perceived emergency.[19] Olsen understood Purvis to be instructing them to enter

[16] Aplt. App. at 950; 969; 971; 1058–1060.
[17] Aplt. App. at 1071–74. After police officers previously failed to locate him, K.H. was found "behind the box," "lying on the floor," Aplt. App. at 456:1–7, with nothing on top of him. Aplt. App. at 456:20–22. He was not found "underneath a box," as the district court described. Aplt. App. at 1502.
[18] Aplt. App. at 345:25–346:13; 393:13–25.
[19] Aplt. App. at 504:23–505:21.

enclosed yards *and* homes without a warrant and without permission.[20] Gordon Worsencroft ("Worsencroft") also understood from Purvis's instructions that officers were to enter people's yards without a warrant and without permission.[21]

During their search of the area, Olsen and Worsencroft worked their way to Kendall's home,[22] which was approximately .133 (or over 1/8) miles (about 10 houses away) from the Horman home.[23] By the time they arrived there, about an hour had passed since the report of the missing boy.[24] No one had any belief or reasonable cause to believe K.H. was located in Kendall's backyard, or that there was any connection between Kendall's backyard and K.H. or the circumstances of his supposed disappearance.[25] Nevertheless, without a warrant and without

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[20] Aplt. App. at 345:25–346:13; 393:13–394:8.

[21] Aplt. App. at 463:19–464:4. As with Purvis's instructions, the SLCPD written policy relating to searches without warrants because of "exigent circumstances" says nothing about any requirement that there be a reason to believe a person in need of aid or protection is located on the premises to be searched or a reason to believe there is a nexus between the particular property to be searched and the emergency. Aplt. App. at 473:19–474:11; 478–79.

[22] Aplt. App. at 352:22–353:4.

[23] Aplt. App. at 588–90, ¶¶ 3–12; 593–600.

[24] Aplt. App. at 170; 400:17–401:5; 806:13–15; 807:22–24.

[25] Q: Other than the spatial proximity of the home and the yard, did you know of any connection whatsoever between that house or yard and the missing boy or the circumstances surrounding him being missing?
A: Just the accessibility and proximity. That's the only thing. I had no reason to believe that the occupants of this house were connected to them in any way.
* * *
Q: And was there any particular connection between the Kendall [property] and the missing boy or the circumstances surrounding him being missing, that

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were any different than any connections between any of the homes from where you started all the way down to the Kendall home?
A: No. They were all about the same length out.

Olsen Depo., Aplt. App. at 995:4–14, 996:20.

Q: You had no information whatsoever that that boy had ever gone to the Kendall home or the yard around the Kendall home, correct?
A: No.
Q: That is correct, correct?
A: That's correct.

Olsen Depo., Aplt. App. at 999:21–1000:1.

Q: So, other than the location of the home, there was no connection that you know of between that property and the perceived emergency?
A: No. I don't personally know anything about that property.
Q: Did you know of any particular connection between any home in the neighborhood other than the one next-door and the perceived emergency?
A: No.

Purvis Depo., Aplt. App. at 499:10–18.

Q: In fact, there was no connection whatsoever between Sean Kendall's home and the backyard and the perceived emergency, other than the fact that that home was located about an eighth of a mile from the Filmore home.
A: Correct.

Purvis Depo., Aplt. App. at 506:24–507:4.

Q: Was there, to your knowledge, any connection or any nexus between the fact that there was perceived to be a missing boy and any of the homes or yards or streets in that area?
A: No.
Q: Or anywhere else?
A: No.

Worsencroft Depo., Aplt. App. at 1081:6–12.

Q: And there was no way to know whether the boy maybe had been put in a car and driven away 10 miles by then?
A: Right. No way to know.

consent,[26] Olsen entered the yard and conducted a disastrous, unnecessary, baseless

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> Q: Did you have reason to believe that there was any connection or nexus between the Kendall residence or that yard in which Geist was shot and the missing – the supposedly missing boy?
> [Objection stated.]
> A: No.
> Q: So, to your knowledge, you and Officer Olsen were looking around that property for the same reason you were looking around any other properties?
> A: Yes.
> Q: Nothing in particular about that particular property?
> A: No.
> Q: . . . . There was nothing specific about the Kendall home or the backyard where Geist was shot and the belief that there was a missing boy?
> A: No.
> Q: No connection at all?
> A: No connection.

Worsencroft Depo., Aplt. App. at 1082:9–1083:6.

> A: . . . . Up to this point we had nothing to say that he – he wasn't, you know, not in the neighborhood, that he didn't just open the front door and, you know, wander off so I don't know. I mean, it's – it's all speculation. I mean it could be anything.
> Q: It was speculation, wasn't it?
> A: It could be anything, but we – one thing we were certain is a child's missing.

Worsencroft Depo., Aplt. App. at 477:8–16. *See also* Aplt. App. at 357:24–358:11; 360:1–361:24; 364:6–365:16; 468:6–12; 468:25–470:6; 498:5–499:18; 506:12–507:4; 566:3–16; 992:24–993:8; 999:6–1000:16; 1036:18–1037:3; 1123:12–1124:4. *See also* testimony that at least one other officer was entering backyards without any evidence that K.H. was located there and without any evidence there was any connection between those backyards and K.H. or his disappearance, Aplt. App. at 523:25–524:23, even though the backyards had the same privacy protections as a house. Aplt. App. at 1171:11–23. Other officers knew that before they could search private property without a warrant, based on exigent circumstances, they must have an objectively reasonable belief that there is a connection between the property to be searched and the emergency giving rise to the need for a search. Aplt. App. at 324:17–326:25; 343:17–24; 1068:16–1070:3; 1188:21–1189:18; 1191:6–15.

[26] Aplt. App. at 362:22–363:16; 374:15–20; 399:18–23; 576; 585–86; 592, ¶ 17.

search. Olsen's only after-the-fact explanations for engaging in a warrantless, non-consensual search of the curtilage of Kendall's home, have been that (1) when looking for a missing person, "that's not really a search"[27] and (2) K.H. might have traveled to Kendall's home and entered the backyard, just as he might have travelled to and entered any other home in the general area.[28] Olsen testified as follows:

> Q: So, in your view, any property that's accessible and within the range of what you think a three-year-old boy could walk to, given the elapsed time, is fair game for a search by a police officer?
>
> A: Provided he could get to it and it was very accessible, yes.[29]

Before Olsen unconstitutionally entered the enclosed, private curtilage to Kendall's home, he could have walked to other vantage points outside the backyard, where he could have seen the entire backyard without entering it.[30] But he did not. Instead, having likely known that Geist was in the backyard[31] and without taking measures known by Olsen to determine if a dog was present in the yard,[32] and without even waiting to see if Worsencroft—who had walked to the front door of

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[27] Aplt. App. at 321:5–22; 322:10–15.
[28] Aplt. App. at 375:4–9. *See also* Aplt. App. at 361:9–24.
[29] Aplt. App. at 375:4–9.
[30] Aplt. App. at 590, ¶ 11; 591–92, ¶ 15. This point was explicitly urged by Kendall, Aplt. App. at 236–37, ¶ 33, yet the district court described the facts in the light most favorable to Olsen, Purvis, and the City, noting simply that "[f]rom his vantage point at Gate B. Olsen could not see the entire backyard." Aplt. App. at 1501.
[31] Aplt. App. at 348:3–349:15; 351:10–352:21; 353:10–13; 367:11–368:25; 407:19–408:11; 408:19–23; 414:17–415:10; 425:12–20; 553:8–554:7; 555:5–17; 556:24–557:14; 560:24–561:24; 567:11–572:15.
[32] Aplt. App. at 327:11–329:5; 332:17–22; 372:19–21.

Kendall's home[33]—could speak with a resident and perhaps obtain consent,[34] Olsen opened the closed latch on a gate handle, which Worsencroft did *not* think the missing toddler could have opened by himself.[35] Olsen then opened and walked through the gate, explored the backyard for at least one and a half minutes,[36] and opened the door to, and looked inside, a shed in Kendall's backyard.[37] At that point, Geist barked,[38] as dogs naturally, and Weimaraners specifically, do, harmlessly.[39] Then Olsen ran.[40] Only then, *after* Olsen started running, Geist ran toward Olsen,[41] which is what dogs do.[42]

Olsen had a Taser, which he decided not to use[43] and a police baton,[44] which

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[33] Aplt. App. at 465:3–467:7.
[34] Aplt. App. at 466:3–5; 467:1–7.
[35] Aplt. App. at 472:4–20. The district court wholly ignored the evidence that K.H. could not have accessed the backyard because the gate was secured by a latch Worsencroft did not believe the toddler could have opened by himself, as noted by Kendall in the proceedings before the district court. Aplt. App. at 233, ¶ 29.
[36] Aplt. App. at 811:25–812:1. Olsen's testimony on this point was inconsistent, as with so many other material issues. Once he was sued, his testimony changed, contending he was in the backyard only 30 seconds. Aplt. App. at 1029:3–17; 154, ¶ 36; 194, ¶ 25.
[37] Aplt. App. at 365:22–24; 369:1–372:3; 394:9–10; 394:18–23; 445.
[38] Aplt. App. at 371:8–23.
[39] Aplt. App. at 617, ¶¶ 6–7; 619, ¶ 12; 620–22, ¶¶ 18–23; 709, ¶¶ 5–6; 710, ¶ 11; 796, ¶ 5.
[40] Aplt. App. at 371:18–372:5; 809:28–810:4.
[41] Aplt. App. at 371:18–372:11.
[42] Aplt. App. at 618–620, ¶¶ 9–16; 709–11, ¶¶ 7, 10, 13; 796, ¶ 7.
[43] Aplt. App. at 381:15–22; 811:12–15.
[44] Aplt. App. at 329:8–12; 805:16–20.

he "didn't think about pulling . . . out",[45] and he obviously could have blocked or pushed Geist with his motorcycle patrol boots. However, Olsen drew his gun and, unnecessarily and unreasonably, shot Geist dead.[46]

SUMMARY OF THE ARGUMENT

The district court ruled—in an unprecedented opinion that approximates an area- or regional-wide "general warrant" or "writ of assistance" from the colonial era (but without the warrant and without the writ)—that private homes (hundreds or perhaps thousands of homes), or at least the curtilages to those homes (which are afforded the same level of constitutional privacy protection as homes), that *might* be accessible to a missing young boy and are located in as large an area as the boy *may* have wandered are subject to entry and warrantless search by police officers. The district court said such a search could take place even if, in each particular instance, there was (1) no reasonable cause to believe the boy was located in the particular home or curtilage to be searched and (2) no reasonable cause to believe the particular home or curtilage to be searched had any association with the missing boy or his disappearance. That ruling flies in the face of the long-established rule of law, clearly articulated by the Supreme Court and this Court, that *each* person in his or her home

[45] Olsen said during his Internal Affairs interview on July 3, 2014, that he "didn't think about pulling" out his baton, Aplt. App. at 811:18–19, but he testified in his deposition that he did not use the baton because that would require him getting too close to the dog "to want to experiment." Aplt. App. at 381:23–382:3.
[46] Aplt. App. at 379:3–11; 382:15–19; 417:10–14; 811:2–7.

and the curtilage of the home is to be free from warrantless, non-consensual searches in emergency aid circumstances unless (1) there is reasonable cause to believe the person in need is on the particular premises to be searched and (2) the search is limited to those parts of the home or curtilage associated with the emergency.

In this case, Olsen unconstitutionally entered and searched the curtilage to Kendall's yard, leading to an encounter with Kendall's dog Geist, which, before Olsen's intrusion, was safely secluded in the backyard. Olsen, who three times in official reports or interviews simply described Geist as barking and running toward him, pulled his gun and shot Geist twice, killing him. The killing of Geist was an unreasonable, warrantless seizure, which cannot be justified by any "exigent circumstances" because any such exigency, if there were one related to the seizure of Geist, would not have occurred in the absence of Olsen's unconstitutional entry into and search of the backyard. Hence, as a matter of law, Olsen is liable to Kendall for the unconstitutional seizure of Geist.

The district court erroneously viewed much of the material evidence in the light most favorable to the movants and ignored conflicting evidence, compelling reversal of the district court's award of summary judgment to the City and Officers.

The law was clearly established that (1) Olsen's entry into and search of the backyard was a violation of the Fourth Amendment and (2) Olsen cannot justify his killing of Geist on the basis of any "exigency" because any such exigency was

created by Olsen's unconstitutional search. Hence, the City and Officers are liable to Kendall for their misconduct, unconstitutional instruction, and woefully inadequate policy leading to this tragedy, and Olsen is not entitled to qualified immunity.

ARGUMENT

Standard of Review: This Court reviews de novo grants of summary judgment based on qualified immunity. *Puller v. Baca*, 781 F.3d 1190, 1196 (10th Cir. 2015). "At the summary judgment stage in a qualified immunity case, the court may not weigh evidence and must resolve genuine disputes of material fact in favor of the nonmoving party." *Stonecipher v. Valles*, 759 F.3d 1134, 1141 (10th Cir. 2014) (quoting *Tolan v. Cotton*, 134 S. Ct. 1861, 1866 (2014)). "Summary judgment is appropriate only if 'the movant shows that there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law.' Fed.R.Civ.P. 56(a)." *Id.* This Court "review[s] the entire record to determine whether a genuine issue of material fact exists and, if not, whether the substantive law was correctly applied." *McBeth v. Himes*, 598 F.3d 708, 722 (10th Cir. 2010). "When a defendant asserts qualified immunity, . . . the burden shifts to the plaintiff to establish (1) a violation of a constitutional right (2) that was clearly established." *Puller v. Baca*, 781 F.3d at 1196. "When a plaintiff meets this heavy burden, the burden shifts back to the defendant to prove that there are no genuine disputes of material fact and that

he is entitled to judgment as a matter of law." *Id.* (citation omitted).

As to the rulings independent of the qualified immunity issue, this Court reviews a grant or denial of summary judgment de novo, and draws all reasonable inferences and resolves all factual disputes in favor of the non-moving party. *Yousuf v. Cohimia*, 741 F.3d 31, 37 (10th Cir. 2014); *Applied Genetics Int'l, Inc. v. First Affiliated Sec., Inc.*, 912 F.2d 1238, 1241 (10th Cir. 1990).

I. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT IN FAVOR OF THE CITY AND OFFICERS AND DENYING SUMMARY JUDGMENT IN FAVOR OF KENDALL BECAUSE THE LAW WAS CLEARLY ESTABLISHED THAT OLSEN'S SEARCH OF THE CURTILAGE TO KENDALL'S HOME AND OLSEN'S SEIZURE OF GEIST WERE VIOLATIONS OF THE FOURTH AMENDMENT.

A. Kendall Has Established that Olsen Violated the Fourth Amendment by Engaging in a Warrantless, Non-Consensual Search of Kendall's Backyard and by Killing Geist Without any Justification for a Warrantless Seizure.

1. Olsen's Search of Kendall's Backyard Was a Violation of the Fourth Amendment.[47]

Kendall's backyard unquestionably meets every factor in determining if an area is protected curtilage. It was adjacent to his home and entirely enclosed by the house and a tall fence that protected the backyard from observation by passersby,

[47] This issue and related facts were raised by Kendall. Aplt. App. at 211–12, ¶¶ 1–4; 216–17; 222–24; 227–45; 280–91; 303; 894–936; 1489–94. The district court ruled on this issue. Aplt. App. at 1504–11; 1519.

except those who walked up to and looked over the fence or the gates.[48] *See United States v. Dunn*, 480 U.S. 294, 301 (1987); *United States v. Dupree*, 540 Fed. App'x 884, 890 (10th Cir. 2014) (unpublished).

The Supreme Court has emphasized the fundamental right of people to be left alone in their homes, including the curtilages of their residences. *Florida v. Jardines*, 133 S. Ct. 1409, 1414 (2013) ("[W]hen it comes to the Fourth Amendment, the home is first among equals. At the Amendment's 'very core' stands 'the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.'" (citation omitted)), 1415 ("This area around the home is 'intimately linked to the home, both physically and psychologically,' and is where 'privacy expectations are most heightened.'" (citation omitted)).

Olsen's entry into and exploration of the curtilage to Kendall's backyard was a Fourth Amendment "search."[49] "When 'the Government obtains information by physically intruding' on persons, houses, papers, or effects, 'a "search" within the original meaning of the Fourth Amendment' has undoubtedly occurred." *Florida v.*

[48] Kendall's private, enclosed backyard, adjacent to his house, is described in detail in the record, which includes photographs. Aplt. App. at 588–92, ¶¶ 1–11, 15; 594, 596, 598, 602; 604; 605; 611; 612.

[49] The district court noted at oral argument that "we're in search land," Aplt. App. at 1553. Counsel for the City and Officers agreed. Aplt. App. at 1556 ("I think we are in search land, as the Court's indicated . . . ."). Yet the district court's Decision stated that "Defendants contend Olsen's entrance into Kendall's backyard was not a search." Aplt App. at 1505.

Jardines, 133 S. Ct. at 1414 (citation omitted).

In determining if a search occurred, the purpose of the search can be to look for a missing person. *State v. Beede*, 406 A.2d 125, 129 (N.H. 1979) ("The fourth amendment requirements . . . apply whether the officer conducting the search is looking for a missing person or for evidence of a crime.").

A search requires a warrant unless one of "a few specifically established and well-delineated exceptions" applies. *Arizona v. Gant*, 556 U.S. 332 (2009). "One exception to the warrant requirement is when police reasonably believe an emergency exists that makes it infeasible to obtain a warrant." *United States v. Gambino-Zavala*, 539 F.3d 1221, 1225 (10th Cir. 2008). "The government bears the burden of proving the exigency exception to the warrant requirement applies" and "[t]hat burden is especially heavy when the exception must justify the warrantless entry of a home." *United States v. Najar*, 451 F.3d 710, 717 (10th Cir. 2006). In an emergency aid situation, a warrantless search of a home requires the government to "show the officers reasonably believed a person inside the home was in immediate need of aid or protection" and "the officers 'confined the search to only those places inside the home where an emergency would reasonably be associated.'" *Gambino-Zavala*, 539 F.3d at 1225–26 (quoting *Najar, 451 F.3d at 718*).

Olsen and Purvis did not believe or have any reasonable cause to believe Kendall's property (or *any* of the particular properties to be searched, or actually

searched), had *anything* to do with the missing boy or the circumstances of his disappearance.[50] With respect to the search for K.H., nothing distinguished Kendall's home from any other home in the area. Hence, the search by Olsen of Kendall's backyard was unconstitutional. *See* subsection I.B., pages 18–22, *infra.*

2. **Olsen's Killing of Geist Was an Unconstitutional Seizure.**[51]

Because Olsen did not have a warrant for the seizure of Geist, and because there was no justifying exigency not created by Olsen that would excuse the lack of a warrant, his seizure of Geist was unconstitutional, as the law clearly provided as of the date of Olsen's killing of Geist. *See* subsection I.C., pages 22–24, *infra*.

B. At the Time of Olsen's Search of the Curtilage to Kendall's Home, the Law Was Clearly Established That a Warrantless Search of a Home or Its Curtilage in an Emergency Aid Context Is Permitted Only If There Is Reasonable Cause to Believe (1) a Person in Need of Aid Is Located on the Premises to Be Searched and (2) the Home or Curtilage Has an Association With the Emergency.[52]

If a police officer does not have reason to believe a person being searched for is on the premises of a curtilage to a home, a warrantless search of the curtilage for

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[50] *See* n. 25, *supra*.

[51] This issue and related facts were raised by Kendall. Aplt. App. at Aplt. App. at 212, ¶ 4; 218; 253–73; 291–96; 894–95; 899–900; 925–26; 936–39; 1494–98. The district court ruled on this issue. Aplt. App. at 1499; 1511–17; 1519.

[52] This issue and related facts were raised by Kendall. Aplt. App. at 22–23, ¶¶ 22–23; 24–25, ¶ 30; 26–27, ¶ 39; 28–29, ¶ 46; 30, ¶ 53; 211, ¶¶ 1–2; 212–13, ¶¶ 4–5; 215–216 and nn.16, 19; 218–219 and n.35; 223–24; 238–40, ¶¶ 3–6 and n.45; 242, ¶¶ 1–2; 244–45; 280; 285–91; 303; 894–98; 908–15; 920–24; 926–28; 931–36; 938–39; 1489–94; 1497–98; 1507–10; 1517; 1534–55; 1580–86; 1591–93. The district court ruled on this issue. Aplt. App. at 1499; 1505–11; 1519.

that person would be unreasonable and unconstitutional. *Zurcher v. Stanford Daily*, 436 U.S. 547, 556 (1978) (For any lawful search, there must be "reasonable cause to believe that the specific 'thing' to be searched for . . . [is] located on the property to which entry is sought.").[53] Where there is a "need to assist persons who are seriously injured or threatened with such injury," law enforcement officers "may enter a *home* without a warrant to render emergency assistance to an injured *occupant* or to protect *an occupant* from imminent injury." *Brigham City v. Stuart*, 547 U.S. 398, 403 (2006) (emphasis added). *See also City and County of San Francisco v. Sheehan*, 135 S. Ct. 1765, 1774 (2015); *Kentucky v. King*, 563 U.S. 452, 460 (2011) ("Under the 'emergency aid' exception, . . . 'officers may enter a home without a warrant to render emergency assistance to an injured *occupant* or to protect an *occupant* from imminent injury.'" (emphasis added) (citation omitted)). Such a search requires "an objectively reasonable basis for believing," *Michigan v. Fisher*, 558 U.S. 45, 47 (2009) (quoting *Brigham City*, 547 U.S. at 406), "that '*a person within* [*the house*] is in need of immediate aid.'" *Id.* (quoting *Mincey v. Arizona*, 437 U.S. 385, 392 (1978)) (emphasis added) (alteration in original).

For warrantless searches in an emergency aid situation, this Court provided

[53] Although Kendall's counsel repeatedly referred the district court to the clear rule described in *Zurcher*, Aplt. App. at 223; 289; 921; 934; 1538; 1582–83; 1591–92, the district court did not address it in its Decision. Aplt. App. at 1499–1519.

what the district court called a "general reasonableness requirement"[54] that "(1) the officers have an objectively reasonable basis to believe there is an immediate need to protect the lives or safety of themselves or others, and (2) the manner and scope of the search is reasonable . . . ." *United States v. Najar*, 451 F.3d 710, 718, 720 (10th Cir. 2006) (This Court found the test was met because the officer "did not attempt to search any place beyond the locations where a victim might likely be found" and "[t]he officers confined the search to only those places inside the home where an emergency would reasonably be associated.").

Providing more guidance than the rather spare rule set forth in *Najar*, this Court clearly explicated the rule in *United States v. Gambino-Zavala*,[55] as follows:

> To satisfy the first prong of the *Najar* test, the government must show the officers reasonably believed a person *inside the home* was in immediate need of aid or protection.
>
> * * *
>
> The government must also show that the manner and scope of the search was reasonable. *Najar*, 451 F.3d at 718. To satisfy this requirement, the government must show the officers "*confined the search to only those places inside the home where an emergency would reasonably be associated*." *Id. at 720*.

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[54] Aplt. App. at 1509.

[55] Curiously, the district court downplayed the significance of *Gambino-Zavala* by mischaracterizing that, "[i]n support of his proposed rule, Kendall cites **a line** from *United States v. Gambino-Zavala* . . . ." Aplt. App. at 1508 (emphasis added). Kendall cited far more than "a line" from *Gambino-Zavala*—on many instances. *See* Aplt. App. at 224; 244–45; 291; 908; 922; 932; 936; 1489–92; 1493–94 and n.17. The district court refrained from even quoting in its Decision the full relevant test laid out by this Court in *Gambino-Zavala*, resorting instead to merely the earlier, far more vague, "general requirement" of *Najar* that "the manner and scope of the search [must be] reasonable." Aplt. App. at 1509.

539 F.3d at 1225–1226 (emphasis added).[56]

This Court in *Gambino-Zavala* did not "focus[ ] on the home because in that case, the exigency was limited to one home," as the district court maintains.[57] Rather, in *Gambino-Zavala*, this Court, as in several other cases, focused on the home because it is *where the search took place*. *See also McInerney v. King*, 791 F.3d 1224, 1237–38 (10th Cir. 2015) (a police officer was held not to have qualified immunity because the law was well established that it is unlawful for an officer to enter a house without a warrant and without a reasonable belief that *someone in the house* was in immediate danger); *Dupree*, 540 Fed. App'x, at 890; *Dalcour v. City of Lakewood*, 492 Fed. App'x 924, 934 (10th Cir. 2012) (unpublished) (holding that a police officer was not entitled to qualified immunity where he placed a foot into a doorway of a home and "the facts presented do not establish an objectively reasonable basis for believing anyone in the home needed immediate aid . . . ."); *United States v. Martinez*, 643 F.3d 1292, 1296 (10th Cir. 2011) ("The emergency aid exception depends on 'an objectively reasonable basis for believing that *a person*

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[56] The district court erroneously suggests that only the second prong of the *Najar*/*Gambino-Zavala* test is in dispute. Aplt. App. at 1506–07. However, Kendall has consistently and vigorously challenged Olsen's compliance with *both* prongs of the test. Aplt. App. At 932–36; 1493–94 ("The representation that Kendall has conceded 'the first prong of the Najar test' is belied by everything Kendall has presented with respect to the unconstitutionality of Olsen's search.").

[57] Aplt. App. at 1508.

within the house is in need of immediate aid . . . ."). "[T]he police may not enter every residence that happens to be in the vicinity of an emergency." *Matalon v. O'Neill*, 2015 WL 1137808, Civil Action No. 13–10001-LTS (D. Mass. March 13, 2016), *7 (unpublished). *See also id.* at *3 ("if police sought to enter and search his home on the basis of an exception to the warrant requirement, [Plaintiff] had the right under the Fourth Amendment for his residence to be free from search unless a nexus existed between his home and the facts justifying the warrantless entry"), *4 ("Each of these exceptions [to the warrant requirement] requires a nexus between the justification for warrantless entry and the place to be entered." (Citations omitted.)).

C. At the Time of Olsen's Killing of Geist, the Law Was Well Established that Such a Warrantless, Non-Consensual Seizure of a Person's Dog Could Not Be Justified Where, as Here, Any Exigency Invoked to Justify the Seizure Was Caused by the Officer.[58]

The law was clearly established that the killing of Geist by Olsen was a seizure within the meaning of the Fourth Amendment, *Mayfield v. Bethards*, 826 F.3d 1252, at 1258–59 (10th Cir. 2016), and that such a seizure would violate the Fourth

[58] This issue and related facts were raised by Kendall. Aplt. App. at 211, ¶ 3; 218; 271–73; 292–93; 295–96; 895–96; 898–900; 919; 937–39; 1495–98. The district court seems to have partially ruled on that issue in its Decision by concluding that the search was lawful. Aplt. App. at 1514. However, the district court seems to have avoided the serious issue of fact regarding the lawfulness of the seizure by simply concluding, after construing the facts and reasonable inferences in a light most favorable to the City and Officers, that "Kendall's dog posed an imminent threat when it aggressively charged Olsen." Aplt. App. at 1513.

Amendment absent a warrant or circumstances justifying an exception to the warrant requirement. *Id. at 1259*. "The government bears the burden of proving the exigency exception to the warrant requirement applies," *Najar*, 451 F.3d at 717, and "law enforcement officers cannot create an exigency justifying their actions." *McInerney*, 791 F.3d at 1238. *See also United States v. Martin*, 613 F.3d 1295, 1304 (10th Cir. 2010); *United States v. Bonitz*, 826 F.2d 954, 957 (10th Cir. 1987).

The "exigency" claimed as providing an exception to the warrant requirement for the seizure of Geist was that Geist was "aggressive and posed an imminent threat of harm."[59] However, compelling evidence, as well as Olsen's inconsistent testimony, conflicts with, or clearly calls into question, Olsen's account. Even if Geist's actions somehow constituted an "exigent circumstance" that might otherwise justify the killing of the dog, Olsen cannot find refuge in such a circumstance because Olsen's Fourth Amendment violation of entering and searching Kendall's backyard created the situation he invokes as allowing him to shoot and kill Geist.

Just as "it is . . . an essential predicate to any valid warrantless seizure of incriminating evidence that the officer did not violate the Fourth Amendment in arriving at the place from which the evidence could be plainly viewed," *Horton v. California*, 496 U.S. 128, 136–140 (1990), so too it must be an essential predicate to the valid seizure of Geist without a warrant that Olsen did not, through

[59] Aplt. App. at 883.

unconstitutional means, place himself in the "danger" he claims as justification for the killing. "[T]he Fourth Amendment requires . . . that the steps preceding the seizure be lawful." *Kentucky v. King*, 563 U.S. at 463. "Just as exigent circumstances are an exception to the warrant requirement, a police-manufactured exigency is an exception to an exception." *United States v. Rico*, 51 F.3d 495, 502 (5th Cir. 1995).

In *United States v. Bonitz*, 826 F.2d 954 (10th Cir. 1987), government agents sought to justify their warrantless search of black powder and a hand grenade on the basis they threatened the neighborhood. However, this Court found that the gun powder and grenade could not pose a danger unless disturbed—just like Geist, who was safely secluded in Kendall's yard before Olsen's trespass into it. "Thus, the only immediate danger that existed was created by the officers themselves when they entered the secure area and began to handle these materials." *Id.* Exactly the same applies to Olsen, who unlawfully created his own purported exigent circumstance.

II. THE DISTRICT COURT ERRED IN VIEWING EVIDENCE IN THE LIGHT MOST FAVORABLE TO OLSEN, PURVIS, AND THE CITY, PARTICULARLY WHEN THERE IS ABUNDANT COMPELLING, CONTRARY EVIDENCE.[60]

[60] This issue was raised explicitly on several occasions in the proceedings before the district court and by numerous references to the facts, disclosing (1) the undisputed facts supporting Kendall's claim that Olsen unreasonably over-reacted in his dealings with Geist, acted unreasonably in searching the backyard and unnecessarily using lethal force against Geist, and recklessly created the purported exigency he claims justified his killing of Geist, and (2) the evidence that conflicts with the facts presented by the City and Officers, which, erroneously, have been construed by the district court in the light most favorable to Olsen relating to the conduct of Olsen leading to Geist's death. Aplt. App. at 21, ¶ 18; 22–23, ¶ 23; 24, ¶ 29; 24–25, ¶ 30;

"In ruling on a motion for summary judgment, '[t]he evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor.'" *Tolan v. Cotton*, 134 S. Ct. 1861, 1863 (2014) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986)). However, in its Decision granting the City and Officers' motion for summary judgment, determining that the search by Olsen and his killing of Geist were "reasonable" and not in violation of the Fourth Amendment, the district court erroneously presented and viewed the following material facts in a light most favorable to the movants:

1. **Accessibility of Backyard to K.H.** The district court held it was lawful for officers to search all "places to which a toddler could have walked" during the time K.H. had been missing and "areas a toddler could have actually have [sic] accessed, like open and unlocked backyards."[61] Based on that unprecedented ruling, the district court concluded Olsen's search of Kendall's backyard was not unconstitutional. However, the district court entirely disregarded the evidence that the backyard was *not* accessible to K.H. As Kendall pointed out to the district

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146; 211, ¶¶ 2–3; 216–18; 221; 233, ¶ 29; 234, ¶ 30; 234–36, ¶ 31; 236–37, ¶ 33; 237, ¶ 36; 242, ¶ 3; 253, ¶ 1; 254–55, ¶ 3; 256–62, ¶¶ 6–16; 259–60, ¶ 12; 262–63, ¶¶ 18–19; 263–65 , ¶¶ 21, 23; 265–67, ¶¶ 25–27; 271, ¶ 3; 272–73, ¶¶ 1–2; 295–296; 302–03; 472:4–20; 511:3–512:1; 590–91, ¶ 13; 616–17, ¶¶ 3–8; 619–24, ¶¶ 12–23, 26, 30; 709–11, ¶¶ 5–7, 10–13; 795–97, ¶¶ 2, 4–10; 797, ¶ 9; 823–24, ¶¶ 2–11; 877; 894; 898–900; 907–15; 927–28; 1223–25, ¶¶ 10–12, 14–15; 1314, ¶ 7; 1315–16, ¶ 13; 1456–57; 1589.

[61] Aplt. App. at 1507.

court,[62] Worsencroft did *not* think a toddler could have opened the latch on the gate by himself.[63] Also, the reference by the district court to an "open" backyard is contrary to the uncontroverted evidence.[64]

2. **Olsen's inability to view the entire backyard.** Had Olsen moved from his position by the gate he opened, he could have seen the entire backyard from other vantage points without unnecessarily and unconstitutionally trespassing into the backyard.[65] This point was explicitly urged by Kendall,[66] yet the district court described the facts in the light most favorable to the City and Officers, noting simply that "[f]rom his vantage point at Gate B. Olsen could not see the entire backyard."[67]

3. **Olsen's knowledge of Geist's presence and failure to check to see if a dog was in the yard.** The district court entirely ignored the evidence, overwhelmingly supported in the record,[68] that Olsen had heard Geist barking loudly and knew he was there before Olsen entered the yard.[69] Also, even though he knew how to do so, Olsen neglected to check to see if there was a dog in the yard before entering it.[70]

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[62] Aplt. App. at 233, ¶ 29.
[63] Aplt. App. at 472:4–20.
[64] Aplt. App. at 588–92, ¶¶ 1–11, 15.
[65] Aplt. App. at 590, ¶ 11; 591–92, ¶ 15.
[66] Aplt. App. at 236–37, ¶ 33.
[67] Aplt. App. at 1501.
[68] Aplt. App. at 262–63.
[69] Aplt. App. at 348:3–349:15; 351:10–352:21; 353:10–13; 367:11–368:25; 407:19–408:11; 408:19–23; 414:17–415:10; 425:12–20; 553:8–554:7; 555:5–17; 556:24–557:14; 560:24–561:24; 567:11–572:15.
[70] Aplt. App. at 327:11–329:5; 332:17–22; 372:19–21.

The district court painted the facts very differently.[71]

4. **Olsen's provocation of Geist.** In its ruling granting the City and Officers summary judgment, the district court stated as follows:

> According to Olsen, as he turned and began to leave, he heard a dog begin barking behind him. He turned back toward the shed and saw a 90-pound dog about 20–25 feet away "running toward [him] and barking loudly." . . . Olsen began retreating quickly toward the gate, but the dog rapidly closed on him.[72]

In his deposition, Olsen described the highly material chain of events very differently from the account provided by the district court. As Kendall argued at length before the district court,[73] Olsen testified that he only *heard* Geist barking, *then* Olsen started running, *then* he stopped running when Geist "*started* charging" at him. Olsen's running clearly *preceded*, and provoked, Geist's running. The district court's account describes Geist first running toward Olsen *before* "Olsen began retreating quickly."[74] The difference is stark—and crucial. Olsen's running at the mere sound of a bark was an unreasonable provocation for Geist to run toward him.[75]

5. **Geist's "imminent threat."** The district court refers to Olsen's testimony about what Geist did as being "uncontradicted evidence,"[76] holding that "a

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[71] Aplt. App. at 1501.
[72] Aplt. App. at 1501–02.
[73] Aplt. App. at 254–55, ¶ 3; 259–60, ¶ 12.
[74] Aplt. App. at 1052.
[75] Aplt. App. at 511:3–512:1; 796, ¶ 7; 1223–25, ¶¶ 10–12, 14–15; 1314, ¶ 7; 1315–16, ¶ 13; 796, ¶ 7; 797, ¶ 9.
[76] Aplt. App. at 1513.

reasonable officer in Olsen's position would conclude that Kendall's dog posed an imminent threat when it aggressively charged Olsen while simultaneously barking loudly and baring its teeth."[77] That purported "uncontradicted evidence" included Olsen's latest version that Geist's "'ears were back [which is *impossible*; Aplt. App. 1214], the tail[] w[as] straight, the teeth were bared, it was snarling, barking loudly and actually running towards [him],'"[78] and Geist "'was leaping towards him.'" [79]

Abundant contradicting evidence, presented by Kendall, [80] was ignored by the district court. When he first described the matter in his police report on the same day he killed Geist, Olsen simply said the dog was *barking and running* toward him.[81] In his interview with Internal Affairs, he only described Geist as *barking and running* toward him.[82] The Civilian Review Board report notes that Olsen simply said the dog was aggressively *barking and "charged" him*, and that he was afraid of being bitten.[83] After this lawsuit began, however, Olsen's account became the far more dramatic account of Geist growling, baring his teeth, snarling, putting his ears back, and leaping toward Olsen,[84] which the district court called "uncontradicted."

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[77] *Id.*
[78] Aplt. App. at 1513.
[79] *Id.*
[80] *See* Aplt. App. at 257–58.
[81] Aplt. App. at 435.
[82] Aplt. App. at 809:28–810:4, 14–16.
[83] Aplt. App. at 97–98.
[84] Aplt. App. at 378:4–10; 382:6–12.

The conflicts in the evidence relate directly to *what really happened*—that is, whether Olsen's latest, enhanced statement is to be believed, or whether the more believable evidence is (1) Olsen's earlier descriptions, (2) the evidence of clear opportunities Olsen had to use non-lethal force (including the impossibility of Olsen engaging in his purported non-lethal alternatives in the one second or so after he first saw Geist), and (3) the competent testimony and other evidence relating to Geist's nature, habits, and temperament, as well as the evidence about Weimaraners' and other dogs' behavior.[85] Geist was a barker and chaser, but he had not a bit of viciousness,[86] as described in Olsen's enhanced version of what happened. Simply because Olsen was the only witness to what happened does not mean his latest, self-serving, materially enhanced account can be accepted as the uncontroverted facts. Whether Geist was an "imminent threat" justifying his killing by Olsen, and whether Olsen's killing of Geist was reasonable and necessary, is for a jury to decide.[87]

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[85] Aplt. App. at 590–91, ¶ 13; 616–17, ¶¶ 3–8; 619–24, ¶¶ 12–23, 26, 30; 709–11, ¶¶ 5–7, 10–13; 795–97, ¶¶ 2, 4–10; 823–24, ¶¶ 2–11.

[86] Aplt. App. at 292–95; 1570:19–1571:6; 1571:14–1576:25.

[87] On summary judgment, the court cannot determine as a matter of law that a reasonable jury would necessarily find Officer Calhoun perceived an immediate threat of death or serious bodily injury at the time he shot Belle. Officer Calhoun is the only eyewitness. . . . The court "may not simply accept what may be a self-serving account by [Officer Calhoun]" and based on that testimony find that there is no genuine dispute of material fact. Rather the court "must also look at the circumstantial evidence that, if believed, would tend to discredit [Officer Calhoun's] story, and consider whether [that] evidence could

CONCLUSION

The district court's Decision granting summary judgment in favor of the City and Officers and denying Kendall's motion for summary judgment should be reversed and the matter remanded for entry of an order granting Kendall's motion for summary judgment and a trial on the issue of damages sustained by Kendall as a result of the constitutional violations by the City and Officers.

STATEMENT OF NECESSITY FOR ORAL ARGUMENT

Oral argument is appropriate and necessary because of the enormous public significance of the constitutional matters raised and because oral argument may be of benefit to the Court in its consideration of this matter.

> convince a rational factfinder that [Officer Calhoun] acted unreasonably.
>
> At least four people . . . agree the dogs were not aggressive and that many individuals would enter the property without any fear. . . . Because Officer Calhoun carried a Taser and a pepper spray with him, a jury could conclude Officer Calhoun acted unreasonably in shooting Belle when he had less intrusive and less destructive alternatives readily available. In viewing the evidence in the light most favorable to plaintiffs, as required, a jury could find Officer Calhoun overreacted and acted unreasonably in shooting Belle.

Gregory v. City of Vallejo, 63 F. Supp. 3d 1171, 1179 (E.D. Cal. 2014) (alterations in original) (citations omitted).

Respectfully submitted,

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Dated: July 14, 2017

CERTIFICATE OF PRIVACY REDACTIONS

I hereby certify that all required privacy redactions have been made within the foregoing **BRIEF OF APPELLANT**.

By: /s/ Shawn Parker
Legal Secretary (Digital)

CERTIFICATE OF HARD COPY

I hereby certify that the hard copies of the foregoing **BRIEF OF APPELLANT** submitted to the clerk's office are exact copies of the ECF filing.

By: /s/ Shawn Parker
Legal Secretary (Digital)

CERTIFICATE OF VIRUS SCAN

I hereby certify that the foregoing **BRIEF OF APPELLANT**, as submitted in Digital Form via the court's ECF system, was scanned for viruses with Avast Business Security, version 17.4.2520, last updated on July 14, 2017 at 11:38 AM and, according to the program, is free of viruses.

By: /s/ Shawn Parker
Legal Secretary (Digital)

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing **BRIEF OF APPELLANT** was furnished through (ECF) electronic service to the following on this the 14th day of July, 2017:

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By: /s/ Shawn Parker
Legal Secretary (Digital)

ATTACHMENT 1

Docket # 74 Memorandum Decision and Order (02/17/17)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

SEAN KENDALL, Plaintiff, v. BRETT OLSEN, LT. BRIAN PURVIS, JOSEPH ALLEN EVERETT, TOM EDMUNDSON, GEORGE S. PREGMAN, and SALT LAKE CITY CORPORATION, Defendants.	**MEMORANDUM DECISION AND ORDER** Civil No. 2:15-cv-00862-RJS-DBP Judge Robert J. Shelby Magistrate Judge Dustin B. Pead

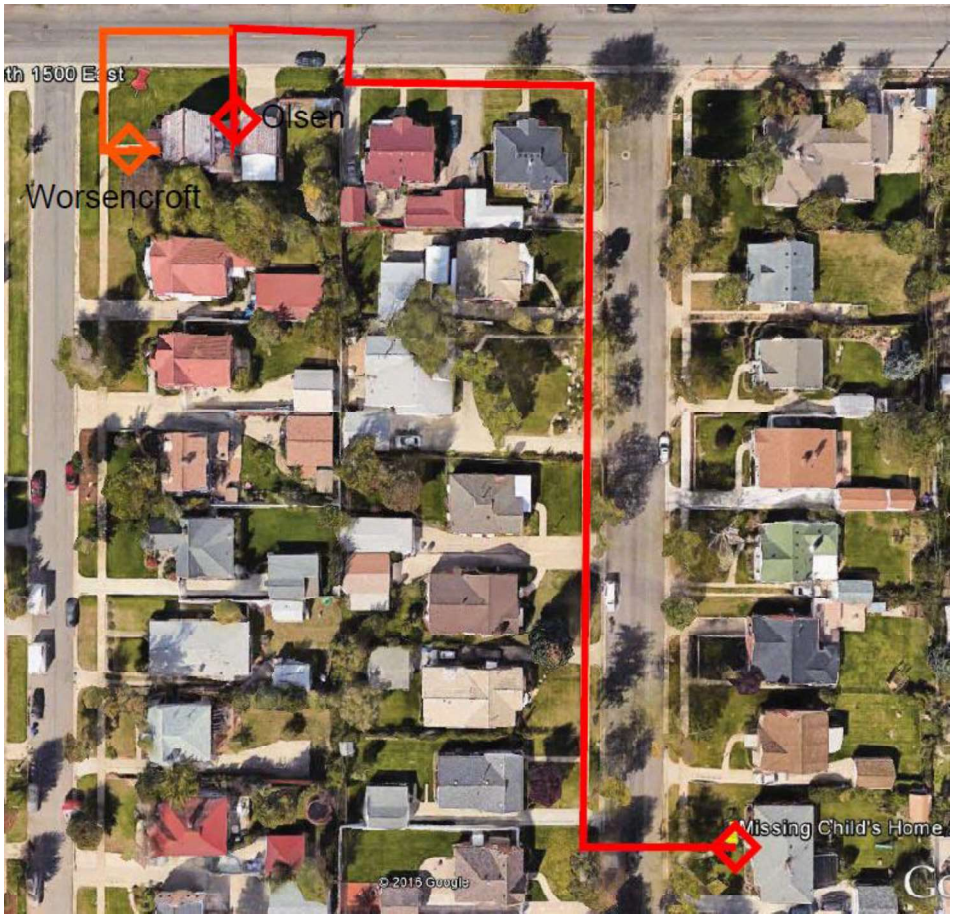
This case arises from the 2014 shooting of Sean Kendall's dog by Salt Lake City Police Officer Brett Olsen during a search for a missing toddler. After the shooting, Kendall brought various state and federal claims against Olsen, the City, and several other officers. Both sides now move for summary judgment. For the reasons below, the court grants Defendants' Motion for Summary Judgment on Kendall's federal constitutional claims and remands the case back to state court for further proceedings on Kendall's state claims.

BACKGROUND

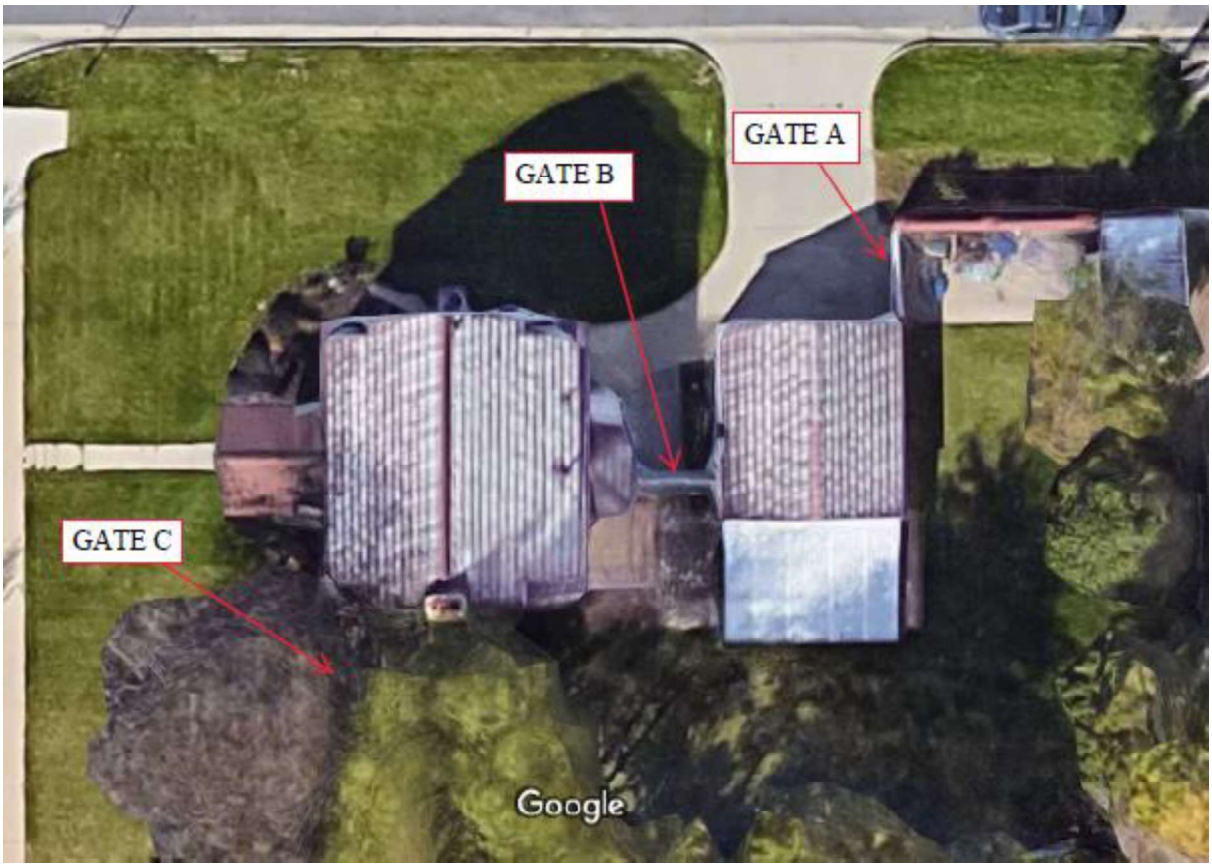
On June 18, 2014, Officer Brett Olsen was patrolling the Sugar House neighborhood of Salt Lake City by motorcycle when he received word that a mother had reported her toddler missing from their home. Olsen quickly drove to the home, where several officers were already on the scene setting up a mobile command station. A supervisor, Lieutenant Purvis, instructed Olsen to begin canvassing the neighborhood in search of the missing boy. He alerted Olsen that the boy could not communicate verbally, and instructed that Olsen should therefore search

everywhere visually. By the time Olsen began searching, it was believed the child had been missing for about an hour. This was significant, as time is generally thought to be crucial when searching for missing children, with the likelihood of positive outcomes decreasing significantly after about the first hour.

Olsen teamed up with another officer and began traveling north from the missing boy's home, as depicted in the map below. The officers went house to house knocking on doors. Some homeowners invited the officers into their homes and yards to look around. If nobody was home, the officers would briefly check the backyard if it was unfenced or if a fence gate was unlocked. The officers searched several homes in this manner.



Eventually, the officers arrived at Kendall's house, about ten homes away from the missing toddler's home. Olsen's partner went to the front door while Olsen walked to the side gate leading to Kendall's backyard, as depicted in the map above, and in greater detail in the overhead image of the home below. While his partner waited for a response, Olsen looked over the fence into the backyard at the location marked "Gate B" below.



From his vantage point at Gate B, Olsen could not see the entire backyard. He testified that after hearing no response from his partner's knocking at the front door, he tried the gate, which was unlocked, and entered the backyard. Olsen walked through the backyard to a shed in the corner of the property (top right corner in the image above), checked the shed, and found nothing. According to Olsen, as he turned and began to leave, he heard a dog begin barking

behind him. He turned back toward the shed and saw a 90-pound dog about 20–25 feet away "running toward [him] and barking loudly." Presumably, the dog had emerged from a dog house wedged between the north side of the shed and the fence. Olsen began retreating quickly toward the gate, but the dog rapidly closed on him. Realizing he would not make it to the gate before the dog reached him, Olsen stopped, turned toward the dog, took "an aggressive stance," and stomped his foot, hoping the dog would back down. He did not, and, according to Olsen, instead continued to charge, barking with teeth bared. As the dog closed in to the point where Olsen felt it was "about to attack and to latch onto [him]," Olsen withdrew his service firearm and fired twice, killing the dog a few feet from where Olsen stood. Olsen secured the area and notified his supervisor of the incident by radio.

Ultimately, the missing boy was found unharmed sleeping in his family's basement underneath a box. Just over a year later, Kendall filed a Complaint in state court alleging federal and state constitutional violations as well as various other violations of state law. Defendants removed the case to federal court. Both parties now move for summary judgment on Kendall's federal constitutional claims.[1]

ANALYSIS

Both sides contend the undisputed facts entitle them to summary judgment. Kendall argues Olsen's entrance into his backyard was an unconstitutional search and the shooting of his dog was an unconstitutional seizure under the Fourth Amendment.[2] Defendants contend Olsen's

[1] Defendants also moved for summary judgment on Kendall's state constitutional claims, but as discussed below, the court declines to rule on those claims.
[2] In addition to his Fourth Amendment claim, Kendall initially brought a Fifth Amendment claim against Defendants, but he later withdrew this claim. Dkt. 45 at 1.

entrance into Kendall's backyard was not a search, and even if it was, it was justified by exigent circumstances—namely, the urgent need to find the missing toddler. As to the seizure, Defendants argue that the shooting of Kendall's dog was reasonable because the dog acted aggressively toward Olsen. Alternatively, Defendants argue that even if the search or seizure violated the Fourth Amendment, Olsen is not liable because he is protected by qualified immunity.

I. The Qualified Immunity Doctrine

Olsen's invocation of qualified immunity changes the constitutional analysis slightly, so before delving into the constitutional claims, the court first provides a brief discussion of qualified immunity. Kendall sued the City and the officers under 42 U.S.C. § 1983, which, in essence, allows a citizen to sue a government official, like a police officer, for any constitutional violations that official commits on the job. Allowing citizens to sue police officers, however, potentially leads to the unintended consequence of deterring officers from taking action in difficult situations for fear they may ultimately be sued. Indeed, "police officers are often forced to make split-second judgments . . . in circumstances that are tense, uncertain, and rapidly evolving."[3] We rely on officers to make these difficult decisions quickly, even if it is not entirely clear exactly what the law requires in every circumstance, because "[p]eople could well die in emergencies if police tried to act with the calm deliberation associated with the judicial process."[4]

[3] *Graham v. Connor*, 490 U.S. 386, 397 (1989).
[4] *United States v. Najar*, 451 F.3d 710, 714 (10th Cir. 2006) (quoting *Wayne v. United States*, 318 F.2d 205, 212 (D.C. Cir. 1963)).

Courts have developed the doctrine of qualified immunity to balance the competing interests of vindicating citizens' important constitutional rights with affording police officers some necessary leeway to make difficult decisions. Under this doctrine, an officer is liable for violating a constitutional right only if his mistake about what the law requires is unreasonable.[5] The court determines whether an officer's mistake was reasonable based on whether it resulted in him violating a constitutional right that has been clearly established by the courts.[6] Where a constitutional right has been clearly established, an officer is expected to be aware of it and to act accordingly. But where reasonable officers could disagree about whether an action is lawful—that is, where the right has not yet been clearly established—the officer will not be liable for his mistake.

What this means for Kendall is that the law requires not only that he establish that Olsen violated the Fourth Amendment by searching his yard or seizing his dog, but also that any reasonable officer would know that the search or seizure was in violation of the Fourth Amendment in view of the specific circumstances presented. With these principles in mind, the court turns to the constitutional questions.

II. The Search

Kendall first claims that Olsen violated the Fourth Amendment by entering his backyard without a warrant. He contends that the search of a home and the surrounding area requires either a warrant or an exception to the warrant requirement, and that in this case Olsen had neither. In response, Defendants argue Olsen's limited sweep of Kendall's backyard was not a

[5] *Saucier v. Katz*, 533 U.S. 194, 205 (2001).
[6] *Id.* at 202.

"search" within the meaning of the Fourth Amendment, and even it was, the warrant requirement was excused by the exception for exigent circumstances.

The Fourth Amendment generally prohibits searching a home without a warrant.[7] And in certain circumstances, this prohibition extends to the area immediately surrounding the home, what is known as the "curtilage."[8] Here, Olsen did not enter Kendall's home, but instead entered his backyard, which, according to Kendall, is protected Fourth Amendment curtilage. Defendants disagree. They contend Kendall's backyard was not sufficiently private to constitute protected curtilage, so Olsen's entrance into the backyard was not a "search" of any Fourth Amendment-protected area.

The question of whether any particular backyard is or is not protected curtilage is not so clear cut. Indeed, it "depends upon a number of facts and factors," including how close the area is to the home, how the area is used, and what steps the homeowner has taken to ensure its privacy.[9] But the court need not answer that question today, for even assuming Kendall's backyard was protected Fourth Amendment curtilage—meaning Olsen's entrance into the backyard was a "search" for Fourth Amendment purposes—it was justified by the exigent circumstances of locating a missing child.

As discussed, the Fourth Amendment typically requires a warrant to conduct a search, especially of the home, but that requirement is excused when an officer faces exigent circumstances, such as "assist[ing] persons who are seriously injured or threatened with such

[7] *United States v. Porter*, 594 F.3d 1251, 1255 (10th Cir. 2010).
[8] *United States v. Cavely*, 318 F.3d 987, 993 (10th Cir. 2003).
[9] *Id.* at 993–94.

injury."[10] A warrant, for example, "is not required to break down a door to enter a burning home to rescue occupants or extinguish a fire, to prevent a shooting, or to bring emergency aid to an injured person."[11] Warrants take time, and in certain limited circumstances where time is of the essence, courts will not require one. To demonstrate the existence of one of these circumstances and invoke the exigency exception to the warrant requirement, an officer must demonstrate: (1) he had an objectively reasonable basis to believe there was an immediate need to protect the lives or safety of himself or others; and (2) the manner and scope of the resulting search was reasonable.[12]

As to the first prong of the test, there can be no doubt that when a toddler goes missing there is an immediate need to protect life or safety. Courts have noted that "the problem of missing children is a profoundly serious one,"[13] and Congress has recognized that "missing children are at a great risk."[14] Kendall himself "concedes that . . . there were reasonable grounds for . . . Olsen to believe there was an urgent situation" because "to [his] knowledge, a two- or three-year-old boy was missing from his home."[15] That there was an exigency does not appear to be in dispute.

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[10] *Porter*, 594 F.3d at 1256–57 (quoting *Brigham City, Utah v. Stuart*, 547 U.S. 398, 403 (2006)).
[11] *Najar*, 451 F.3d at 714 (quoting *Wayne v. United States*, 318 F.2d 205, 212 (D.C. Cir. 1963)).
[12] *Id.* at 718.
[13] *United States v. Wei Seng Phua*, No. 2:14-CR-00249-APG, 2015 WL 427862, at *17 (D. Nev. Feb. 2, 2015).
[14] *Cuevas v. City of Philadelphia*, No. CIV. A. 05-3749, 2006 WL 2345928, at *6 (E.D. Pa. Aug. 11, 2006) (citing congressional findings related to the Juvenile Justice and Delinquency Prevention Act, 42 U.S.C. § 5601).
[15] Dkt. 45 at 78.

What is in dispute is the second prong of the test—the reasonableness of the scope and manner of the search for the child.[16] On this point, Defendants argue the scope of the search was reasonable because officers confined the search to places a toddler could have accessed in a radius surrounding his home within which he could have wandered in the time that had passed. And as to manner, Defendants argue the officers reasonably knocked first to ask homeowners for permission to look around, and absent homeowner permission they conducted only a quick sweep of open backyards, not the inside of homes or other locked areas. Kendall disagrees, arguing it was unreasonable for officers to conduct a blanket search of any area within a certain radius of the missing child's home.

The scope of a search is reasonable when the search is limited to "the locations where a victim might likely be found," and the manner of searching is reasonable when the intrusion is no greater than necessary given the exigency.[17] Here, the toddler had been missing for an hour by the time Olsen began canvassing the neighborhood, and the child's mother gave officers no indication of what direction he may have wandered. Given these facts, the court finds it was reasonable for officers to confine the scope of the search to places to which a toddler could have walked in the hour or so that had passed, and within that radius to further confine the search to areas a toddler could have actually have accessed, like open and unlocked backyards. Considering the limited information officers were given, these were the locations where the toddler might likely be found. As to the manner, the court concludes that the intrusion—knocking on doors and quickly sweeping unlocked backyards—was no greater than necessary,

[16] The reasonableness of the search is a question of law for the court to resolve. *McInerney v. King*, 791 F.3d 1224, 1232 (10th Cir. 2015).
[17] *Najar*, 451 F.3d at 720.

especially considering the nature of the exigency, and, in particular, the fact that the missing boy was noncommunicative and had to be located visually.

Kendall's main area of disagreement is with the reasonableness of the scope of the search. According to Kendall, accessibility and proximity to a missing child are not enough to justify searches of neighboring yards. He contends the mere fact that a yard is accessible to a toddler and is within walking distance of the toddler's home, on its own, is insufficient to tie a search of the yard to the exigency of the missing toddler. Instead, Kendall proposes a different rule: that an exigency-based search of a yard for a missing toddler is constitutional only if there is a reasonable basis, aside from access and proximity, to believe the toddler is in that particular yard, as opposed to any other accessible yard within walking distance.

Kendall's interpretation is not borne out by the case law, nor does it comport with the realities of on-the-ground police work. In support of his proposed rule, Kendall cites a line from *United States v. Gambino-Zavala*, where the Tenth Circuit framed the exigency exception as requiring that "the government must show the officers reasonably believed a person *inside the home* was in immediate need of aid or protection."[18] Kendall seizes on this reference to the home to support his interpretation that Olsen was required to make a home-by-home determination of whether the toddler was likely to be in that particular home, rather than merely relying on the fact that a home was one of many accessible to and within walking distance of the missing child.

The court disagrees. *Gambino-Zavala* focused on the home because in that case, the exigency was limited to one home; a neighbor heard gunshots in a particular unit, and officers

[18] 539 F.3d 1221, 1225 (10th Cir. 2008) (emphasis added).

subsequently searched that unit to determine if anyone inside was injured.[19] Nothing in *Gambino-Zavala*, or in Tenth Circuit law in general, purports to require the narrow focus Kendall proposes. Indeed, the Tenth Circuit used to require something similar—a "reasonable basis, approaching probable cause, to associate the emergency with the place to be searched"—but in 2006 replaced it with the more general requirement that "the manner and scope of the search [must be] reasonable."[20]

This general reasonableness requirement reflects the reality that not all exigencies are neatly confined to one home. To be sure, in the case of a neighbor reporting gunshots from a particular home, the "locations where a victim might likely be found" may well be limited to that one home.[21] But in cases like this one, where a child has been missing for an hour, the child might likely be found anywhere within a several-block radius. The Tenth Circuit's reasonableness requirement accommodates this reality by recognizing that when a genuine and significant exigency spans a large area, a somewhat broader geographical search may be warranted.

This simple proposition is lost in Kendall's proposed rule. Indeed, Kendall's strict interpretation of the exigency exception—which would require officers to determine, at each home, whether there's reason to believe the child is actually there, as opposed to any other home—would all but end police assistance in missing child cases like this one, where officers know little more than where the child was last seen and how long he has been missing. Armed only with this information, there is no reason, for example, to believe the child is any more likely

[19] *Id.* at 1224.
[20] *Najar*, 451 F.3d at 718.
[21] *Id.* at 720.

to be in an open backyard on the north side of the child's home than he is to be in an open backyard on the south side of the home. According to Kendall, that means neither gets searched. That doesn't comport with what we expect of officers urgently looking for missing children, and is not reflected in the law.

This is not to say, as Kendall's attorney suggested at oral argument, that all Fourth Amendment rights go out the window for any home within walking distance of and accessible to the missing toddler. Quite the contrary—even after establishing the reasonable geographic scope of a search, the Fourth Amendment still demands that the *manner* of searching any home within that area also be reasonable (meaning the intrusion is no greater than necessary). This reflects the understanding that even among protected Fourth Amendment areas, the intrusiveness of a search can vary greatly. A sweep of the curtilage is less intrusive than breaking down a locked door and searching a living room, which is less intrusive than rummaging through a closet in the bedroom, and so forth. The Fourth Amendment cabins the intrusiveness of any search by demanding that the manner of the search be reasonable.

And like scope, what is reasonable in terms of manner will vary depending on the nature of the exigency. While it is reasonable for police to forcefully enter and search a home after reports of gunfire in that home,[22] nobody contends that Olsen could have barged into and searched any home within a fixed radius of the missing toddler. Given the nature of the exigency in this case—a missing, noncommunicative toddler—and the scope of the search—a several-block radius—it was reasonable to knock on doors and briefly sweep open backyards where a toddler may have ventured. Olsen was not free to break into homes and ransack bedrooms.

[22] *See Gambino-Zavala*, 539 F.3d at 1225–26.

Indeed, contrary to Kendall's contention, the court's holding does not imply that Olsen had "virtually unbounded authority to enter into and search people's private homes . . . [across] the Wasatch Front, or perhaps beyond." Rather, the court holds only that where a nonverbal toddler has been missing from his home for over an hour, it is reasonable, within walking distance of the missing toddler, for officers to knock on doors and conduct a quick sweep of open backyards into which the toddler may have wandered.

In sum, the court concludes that even if Olsen's warrantless sweep of Kendall's backyard was a Fourth Amendment search, it was not unconstitutional because it was justified by exigent circumstances. And even in the event it was an unconstitutional search, Olsen would be entitled to qualified immunity because his mistake as to what the law requires would be reasonable. On this point Kendall has the burden of pointing to Tenth Circuit or Supreme Court case law that would put a reasonable officer on notice that when a nonverbal toddler is missing, a searching officer must have a reason, aside from mere proximity, for quickly sweeping any open and accessible nearby backyard. Kendall has provided no such authority. Thus, summary judgment on Kendall's claims related to Olsen's search is granted in Defendants' favor, both on the basis that no constitutional violation occurred and that Olsen is entitled to qualified immunity.

III. The Seizure

Kendall also contends that Olsen's shooting of his dog was an unconstitutional seizure under the Fourth Amendment. The Fourth Amendment prohibits unreasonable seizures.[23] And nobody disputes that Olsen's shooting of Kendall's dog was a seizure.[24] Thus, the only question

[23] *See* U.S. Const. amend. IV; *see also Holland ex rel. Overdorff v. Harrington*, 268 F.3d 1179, 1188 (10th Cir. 2001).
[24] *See* Dkt. 35 at 34; *see also Dziekan v. Gaynor*, 376 F. Supp. 2d 267, 270 (D. Conn. 2005)

is whether the shooting was reasonable in view of the facts presented. In this context, reasonableness turns on weighing the intrusiveness of the seizure against the government's reason for doing it.[25] Put simply, the less intrusive the seizure and the more compelling the government's justification for it, the more likely it is to be constitutional.

The intrusion here was quite serious. While Fourth Amendment seizures generally involve property, this case involved a dog, and courts have recognized that most dog owners "think of dogs solely in terms of an emotional relationship, rather than a property relationship."[26] Thus, when a dog is seized—and especially, as here, where it is killed, not merely injured or detained—the intrusion on the owner weighs heavily in favor of finding the seizure unreasonable and unconstitutional.

On the other side of the equation is officer safety, also a weighty concern. Officers face a changing array of threats daily. Among these threats are dogs, some of which "may harass or attack people," and "maim or even kill."[27] Thus, while many dogs pose no serious threat to officers, some do, and because officers are often forced to make split-second judgments about the threat a particular dog poses, their ability to effectively protect themselves also weighs heavily in the legal reasonableness calculus.

Courts have found a balance between the rights of dog owners and the interests of officer safety by implementing a simple rule: an officer's killing of a dog is reasonable only if the dog

("Courts have consistently recognized that a law enforcement officer's killing of a pet dog constitutes a destruction of property and therefore a seizure under the Fourth Amendment.").
[25] *Graham v. Connor*, 490 U.S. 386, 396 (1989).
[26] *Altman v. City of High Point, N.C.*, 330 F.3d 194, 205 (4th Cir. 2003).
[27] *Id.*

poses an "imminent threat."[28] Whether a dog poses an imminent threat is judged "from the perspective of a reasonable officer at the scene, rather than with the 20/20 vision of hindsight."[29] In other words, the question is not whether the dog, in retrospect, actually posed an imminent threat, but instead whether a reasonable officer on the scene would perceive it that way.

In this case, the uncontradicted evidence demonstrates that a reasonable officer in Olsen's position would conclude that Kendall's dog posed an imminent threat when it aggressively charged Olsen while simultaneously barking loudly and baring its teeth. That evidence consists entirely of Olsen's testimony about the event, because he was the only one to witness it. In his police report, written hours after the incident, Olsen reported that he "saw a large gray dog running towards [him] and barking loudly," and that he "believed the dog was about to bite [him]."[30] In his deposition, he testified that "the dog had a very mean demeanor," its "ears were back, the tail[] w[as] straight, the teeth were bared, it was snarling, barking loudly and actually running towards [him]."[31] Olsen testified that in the moment before he pulled the trigger the dog "was leaping towards [him]."[32] Given this testimony, a reasonable officer could conclude that the 90-pound Weimaraner posed an imminent threat.

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[28] *See Branson v. Price*, No. 13-cv-03090-REB, 2015 WL 5562174, at *6–7 (D. Colo. Sept. 21, 2015) (listing cases). It does not appear that the Tenth Circuit or the Supreme Court has weighed in on the proper standard in this circumstance, but as *Branson* demonstrates, the clear consensus among courts of appeal is that an officer may reasonably kill a dog that presents an imminent threat. *Id.* (examining cases from the Third, Seventh, Eighth, and Ninth Circuits, and finding no circuit decision to the contrary).
[29] *Graham*, 490 U.S. at 396.
[30] Dkt. 46, Ex. (A)(2)(1).
[31] Dkt. 63, Ex. (A)(2) at 93.
[32] *Id.* at 97.

Kendall takes issue with this conclusion for several reasons. First, he contends that various inconsistencies in Olsen's testimony render him not credible and his testimony not believable. These inconsistencies include: (1) Olsen testified he may have heard his partner ring Kendall's doorbell, while his partner testified that he knocked on the door; (2) Olsen testified he heard a doorbell and knocking from his location at Gate B, but Kendall submits that was too far from the front door to hear knocking or a doorbell; (3) Olsen testified he waited to enter the backyard until it appeared that nobody would answer the door, but his partner testified that he heard gunshots shortly after he started knocking; and (4) Olsen at times reported that it took about thirty seconds to check the backyard and at other times testified it took about a minute and a half. The court finds that these are relatively minor inconsistencies that might be expected of a person trying to describe a dynamic and quickly evolving situation. They are not material inconsistencies sufficient to give rise to an inference that Olsen is deliberately lying or that his recollection of key events is suspect. Because no reasonable jury could find Olsen not credible based on his statements in the record before the court, Kendall has failed to raise a triable issue of fact to defeat summary judgment.

Kendall also argues that even taking Olsen's testimony at face value, a reasonable officer could not conclude based on those facts that he faced an imminent threat. Kendall first contends that "Olsen had no lawful reason to be in [the] yard in the first place."[33] That argument addresses whether the *search* was reasonable, and the court already concluded that it was. He next argues that Olsen invited the attack because he "recklessly started running as soon as he

[33] Dkt. 45 at 83.

heard [the] bark, which anyone should know would simply provoke a dog to run after him."[34] An officer's split-second decision to make a break for the gate to escape or avoid a confrontation, rather than standing his ground to face a charging 90-pound dog, is not unreasonable. Moreover, Olsen did ultimately try the tactic Kendall now suggests he should have taken: Olsen testified he first attempted to retreat, but then, realizing the dog would beat him to the fence, turned and "tried standing [his] ground and taking a more dominant stance, broadening [his] shoulders and stomping [his] foot, in an attempt to 'call [the dog's] bluff,"[35] but to no avail.

Kendall also argues that Olsen should have known that Weimaraners are typically "friendly, warm, kind dogs who do not bite without being cornered."[36] While this may well be so, it tells the court nothing about how this Weimaraner acted on this specific occasion. Just as breeds with reputations for being dangerous or aggressive may act in friendly or docile ways in many circumstances, so too can dogs typically thought to be warm and docile act aggressively at times. Regardless, officers are not charged with developing specific expertise in the nuances between breeds. To be sure, had Olsen been greeted with a 5-pound Pomeranian the analysis would be different, but he was confronted with a large, 90-pound dog, and it was reasonable to assume the charging dog posed a threat. In the same vein, Kendall argues that this particular dog was friendly and nonaggressive, as demonstrated by testimony of Kendall's sister and neighbor. This testimony may be relevant to whether Kendall's dog in fact posed a threat to Olsen, but that's not the question the court must answer; the question presented for Fourth Amendment

[34] *Id.* at 84.
[35] Dkt. 36 at 4.
[36] Dkt. 45 at 85.

purposes is whether a reasonable officer on the scene would believe the dog posed an imminent threat. A reasonable responding officer would not be expected to know anything about Kendall's dog's history, and would instead be expected to act reasonably based on the facts in front of him. Those facts—which, again, are not in dispute—are that a 90-pound dog charged Olsen while barking aggressively.[37]

Last, Kendall argues that Olsen acted unreasonably because he did not first try to use lesser force, like his baton, his boot, or his taser. But the law does not require officers to try varying degrees of nonlethal force before turning to lethal force. Indeed, "an officer need not use the least harmful alternative in dealing with a dangerous situation in which officer safety is an issue."[38] This is so even where, in retrospect, a lower degree of force may have been sufficient. The standard is not what a lawyer, or a judge, or anybody scrutinizing the situation with the benefit of retrospective deliberation would have done. The standard is what a reasonable officer on the ground in the moment would have done, an officer who is "forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation."[39] In this case, a reasonable officer could conclude that lethal force was required.

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[37] *See, e.g.*, *Williams v. Voss*, No. CIV. 10-2092 ADM/TNL, 2011 WL 4340851, at *4 (D. Minn. Sept. 15, 2011) (no genuine issue of fact about whether dog was aggressive where officer's "sworn affidavits stat[ed] that the dog charged at them aggressively" and plaintiff had "no specific evidence to refute that assertion" because other witnesses "could not see the dog at the time it was shot").

[38] *McCarthy v. Kootenai Cty.*, No. CV08-294-N-EJL, 2009 WL 3823106, at *6 (D. Idaho Nov. 12, 2009).

[39] *Graham*, 490 U.S. at 396–97.

When presented with what appears to be an imminent threat, an officer need not wait to be mauled or attacked before employing force in self-defense. Kendall has not demonstrated that Olsen's actions deviated from a what a reasonable officer would have done. And even if Olsen's actions were unreasonable—that is, even if the shooting was an unconstitutional seizure—Olsen would be entitled to qualified immunity because a reasonable officer would not be on notice that shooting a 90-pound dog that is running toward him and barking, with no time for the officer to escape, would violate the Fourth Amendment. Defendants' Motion for Summary Judgment on the Fourth Amendment claim against Olsen is granted.

IV. The Claims Against the City and Lieutenant Purvis

In addition to his claim against Olsen, Kendall brought a claim against the City alleging, in essence, that if Olsen violated the Constitution, so too did the City because it had policies or practices in place that permitted or encouraged Olsen to act unconstitutionally. Because the court has now determined that Olsen did not violate the Constitution, neither did the City. Similarly, Kendall brought a claim against Lieutenant Purvis (the officer who ordered Olsen to canvass the neighborhood) alleging that Purvis has liability for any constitutional violation Olsen committed while conducting the canvass because Purvis ordered Olsen to do it. Again, because the court determined Olsen committed no constitutional violation, neither did Purvis. The court grants Defendants' Motion for Summary Judgment on the federal constitutional claims against the City and Purvis.

V. The State Law Claims

Having dismissed all of Kendall's federal claims, the court must now decide what to do with his remaining state law claims. This is a court of limited jurisdiction, meaning it is

authorized to hear only certain types of claims.[40] Generally, state law claims are not among those the court can decide, unless certain conditions are met. The condition that allowed the state claims to initially go forward in this case was that they were related to the federal constitutional claims, over which this court does have jurisdiction.[41] As discussed above, those claims are now dismissed. The court in some instances may continue to hear associated state claims, notwithstanding dismissal of the federal claims, but this is disfavored.[42] Indeed, the Tenth Circuit has made clear that after dismissing federal claims, "the court may, and usually should, decline to exercise jurisdiction over any remaining state claims."[43] Given this guidance from the Tenth Circuit, and given Utah's interest in the remaining legal issues arising under state law, the court declines to exercise supplemental jurisdiction over Kendall's remaining state claims. Those claims are remanded back to state court.

CONCLUSION

This case is tragic on several levels. Parents feared their child missing, officers urgently responded, and Kendall lost his beloved companion animal. The court is mindful of the strong reactions this case has aroused among animal owners, parents, law enforcement, and community members. The case has exposed tensions that can arise between important competing interests, and the court has done its best to resolve these tensions while constraining its analysis to the facts presented by the parties and the established law.

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[40] *See Gad v. Kan. State Univ.*, 787 F.3d 1032, 1035 (10th Cir. 2015).
[41] *See* 28 U.S.C. § 1367.
[42] *See Koch v. City of Del City*, 660 F.3d 1228, 1248 (10th Cir. 2011).
[43] *Id.* (quoting *Smith v. City of Enid ex rel. Enid City Comm'n*, 149 F.3d 1151, 1156 (10th Cir. 1998)).

For the reasons stated above, the court concludes that Kendall has failed to establish either an unconstitutional search or seizure under the Fourth Amendment. But even if Officer Olsen's search or the shooting of Kendall's companion pet amounted to a violation of a constitutional protection, Kendall has failed on the record before the court to establish that the law concerning officer conduct at the time was clearly established—providing fair notice to reasonable officers under similar circumstances that Officer Olsen's conduct was unconstitutional. The court awards summary judgment to Olsen, Purvis, and the City on Kendall's federal constitutional claims. The case is remanded back to state court to resolve Kendall's state law claims.

DATED this 17th day of February, 2017.

BY THE COURT

Honorable Robert J. Shelby

ATTACHMENT 2

Docket # 75 Judgment in a Civil Case (02/17/17)

AO 450 (Rev.5/85) Judgment in a Civil Case

United States District Court

Central Division for the District of Utah

Sean Kendall

V.

Brett Olsen, et al.

JUDGMENT IN A CIVIL CASE

Case Number: 2:15cv00862 RJS-DBP

This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

That judgment is entered in favor of defendants on federal constitutional claims. The court declines to rule on remaining state law claims, which are remanded back to state court.

February 17, 2017
Date

D. Mark Jones
Clerk of Court

(By) Deputy Clerk