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

SEAN KENDALL, Plaintiff/Counterclaim Defendant, v. BRETT OLSEN, LT. BRIAN PURVIS, JOSEPH ALLEN EVERETT, TOM EDMUNDSON, GEORGE S. PREGMAN, and SALT LAKE CITY CORPORATION, Defendants/Counterclaim Plaintiffs.	**MOTION FOR SUMMARY JUDGMENT AND MEMORANDUM IN SUPPORT** Case No. 2:15-cv-00862 Judge Robert J. Shelby Magistrate Judge Dustin B. Pead

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INTRODUCTION

This case concerns Officer Olsen's entry into Kendall's backyard[1] pursuant to a neighborhood canvas to look for a missing three year old boy. After entering the yard and determining the boy was not in the yard, Officer Olsen encountered Kendall's large Weimaraner, Geist. Geist acted extremely aggressively, charging at Officer Olsen, growling, barking and baring his teeth. Unable to retreat from the yard, or prevent the attack by other means, Officer Olsen used his service weapon and shot Geist. Kendall claims Officer Olsen's entry into his backyard was an unreasonable search in violation of his Fourth Amendment rights and his rights under the Utah Constitution. Kendall makes separate claims that Officer Olsen's seizure of Geist was a violation of his Fourth, Fifth and Fourteenth Amendment rights and his rights under the Utah Constitution. Kendall also asserts claims of trespass, trespass to chattel, conversion, negligence and intentional infliction of emotional distress for Officer Olsen's entry into his backyard and for the seizure of Geist.

Officer Olsen is entitled to qualified immunity on Kendall's claim that entry into the backyard violated his Fourth Amendment rights. The entry did not constitute a "search" under the Fourth Amendment and the entry was justified because Officer Olsen was acting under exigent circumstances. Officer Olsen is also entitled to qualified immunity on Kendall's claims that the seizure of Geist violated his rights under the Fourth, Fifth and Fourteenth Amendments. The seizure was objectively reasonable and the Fifth and Fourteenth Amendments do not apply. Officer Olsen is entitled to qualified immunity for the additional reason that it is not clearly

[1] On June 18, 2014, Kendall was renting the property at 2465 South 1500 East. This property and the backyard to this property will be referred to hereinafter at "Kendall's property" or "Kendall's backyard."

established that the entry into the backyard or the seizure of Geist violated Kendall's Fourth Amendment rights. Kendall's claims under the Utah Constitution fail for the same reasons.

Finally, Kendall's state law claims fail because they are barred by the Government Immunity Act of Utah ("GIA") and Kendall cannot establish essential elements of those claims. Kendall's claims against Lt. Purvis and Salt Lake City fail because those claims rest entirely on a finding that Officer Olsen's conduct was a violation of federal or state law.

STATEMENT OF ELEMENTS AND MATERIAL FACTS

I. OFFICER OLSEN'S ENTRY INTO KENDALL'S BACKYARD.

A. Qualified Immunity for Kendall's Claims Under 42 U.S.C. § 1983.

1. Elements.

"Qualified immunity 'protects governmental officials from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Weise v. Casper*, 593 F.3d 1163, 1166 (10th Cir. 2010) (quoting *Pearson v. Callahan*, 555 U.S. 223, 231 (2009)). "The qualified immunity inquiry has two prongs: whether a constitutional violation occurred, and whether the violated right was 'clearly established' at the time of the violation." *Id*. at 1166-67 (citing *Pearson*, 555 U.S. at 232). "In the summary judgment setting, when a defendant raises a qualified immunity defense, a heavy two-part burden must be overcome by the plaintiff." *Phillips v. James*, 422 F.3d 1075, 1080 (10th Cir. 2005). "Plaintiff must first establish that 'the facts alleged [taken in the light most favorable to the nonmoving party] show the officer's conduct violated a constitutional right.'" *Id*. at 1080 (citing *Saucier v. Katz*, 533 U.S. 194, 201 (2001)). "Second, Plaintiff must demonstrate that the right was clearly established." *Id*. The court is free to decide

which prong to address first, but it may conserve judicial resources to address the second prong first. *Weise*, 593 F.3d at 1167 (citing *Pearson*, 555 U.S. at 235-36). *See also Mocek v. City of Albuquerque*, 3 F. Supp. 3d 1002, 1052 (D.N.M. 2014) aff'd, No. 14-2063, 2015 WL 9298662 (10th Cir. Dec. 22, 2015) (discussing circumstances where district court should proceed directly to clearly established prong of qualified immunity analysis).

With respect to the first prong of the qualified immunity test, Kendall must show that Officer Olsen's entry into his backyard to look for a missing three year old boy violated his Fourth Amendment rights. The Fourth Amendment precludes "unreasonable" searches. *United States v. Najar*, 451 F.3d 710, 712 (10th Cir. 2006) ("Honoring the clearly stated language of the amendment, the Supreme Court has repeatedly recognized that only unreasonable searches are proscribed.") "Official conduct that does not 'compromise any legitimate interest in privacy' is not a search subject to the Fourth Amendment." *Illinois v. Caballes*, 543 U.S. 405, 408 (2005). *See also Galindo v. Town of Silver City*, 127 F. App'x 459, 466 (10th Cir. 2005) ("Merely proceeding from the front to the back of a house alone, however, did not establish an invasion of the curtilage in violation of the Fourth Amendment"); *United States v. Cavely*, 318 F.3d 987, 994 n.1 (10th Cir. 2003) ("The mere fact that officers went to the front and around towards the back of appellant's house, standing alone, does not establish an invasion of the curtilage."). Likewise, the Fourth Amendment permits warrantless entry on property where there are exigent circumstances. *Najar*, 451 F.3d at 718. Exigent circumstances exist and a warrantless entry on property is permissible where "(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." *Najar*, 451 F.3d at 718.

With respect to the second prong of the qualified immunity analysis, Kendall must show Officer Olsen's entry into Kendall's backyard to look for the missing child violates clearly established law. *Weise*, 593 F.3d at 1167. "A Government official's conduct violates clearly established law when, at the time of the challenged conduct, '[t]he contours of [a] right [are] sufficiently clear' that ***every*** 'reasonable official would have understood that what he is doing violates that right.'" *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011) (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)) (emphasis added). "Clearly established" does "not require a case directly on point, but existing precedent must have placed the statutory or constitutional question beyond debate." *Ashcroft*, 563 U.S. at 741. *See also Brammer-Hoelter v. Twin Peaks Charter Acad.*, 602 F.3d 1175, 1184 (10th Cir. 2010) ("Clearly this standard does not require a precise factual analogy to pre-existing law; however, the plaintiff must demonstrate that the unlawfulness of the conduct was apparent in light of pre-existing law. . . of either a Supreme Court or Tenth Circuit decision on point, or the clearly established weight of authority from other courts") (citation and quotation marks omitted).

2. Undisputed Material Facts.

1. On June 18, 2014, the Salt Lake City Police department responded to a call that a three year old child was missing from his home. (*See* Decl. of Brett Olsen ("Olsen Decl."), July 12, 2016, ¶ 3; Amended Complaint, ¶ 1, Dkt. 2-3.)

2. The initial responding officers spoke with the family and checked the home, but did not locate the boy. (*See* Ex. 1 to Decl. of Samantha Slark ("Slark Decl."), Everett Dep. at 8:11-9:13, 10:4-11; Ex. 2 to Slark Decl., Edmundson Dep. at 17:18-25, 19:20-21:4; Ex. 3 to Slark Decl., Pregman Dep. at 5:14-6:9, 19:16-20:1.)

3. Officers also spoke with a relative that lived next door and confirmed that the child was not there. (*See* Ex. 2 to Slark Decl., Edmundson Dep. at 25:14-26:1, 29:2-30:8.)

4. Additional officers responded to the scene and began to canvas the neighborhood. (*See* Ex. 4 to Slark Decl., CAD Call; Ex. 5 to Slark Decl., Purvis Dep. at 38:4-39:15; Ex. 1 to Slark Decl., Everett Dep. at 13:5-8, 22:14-23:1; Ex. 6 to Slark Decl., Worsencroft Dep. at 18:14-20; Ex. 7 to Slark Decl., Olsen Dep. at 47:7-48:7 & 49:9-14.)

5. A canvas involves knocking on doors and talking to neighbors to see if anyone has seen the missing child. (*See* Ex. 5 to Slark Decl., Purvis Dep. at 34:11-38:3, 43:10-49:13, 58:1-10; Ex. 7 to Slark Decl., Olsen Dep. at 8:19-9:3, 52:8-22.)

6. It also involves looking in places where a child might have gone, including parks, swimming pools, and a neighbor's backyard. (Ex. 5 to Slark Decl., Purvis Dep. at 34:11-38:3, 43:10-49:13, 58:1-10; Ex. 7 to Slark Decl., Olsen Dep. at 8:19-9:3, 52:8-22.)

7. A canvas is conducted in a systematic way with officers radiating outwards from the place the child was last seen in a pattern that mirrors the rings of a tree. (Ex. 5 to Slark Decl., Purvis Dep. at 34:11-38:3, 43:10-49:13, 58:1-10; Ex. 7 to Slark Decl., Olsen Dep. at 8:19-9:3, 52:8-22.)

8. Most police officers are aware that the longer a child is missing the less likely the case will end with a positive result. (*See e.g.,* Ex. 5 to Slark Decl., Purvis Dep. at 49:14-50:16; Ex. 1 to Slark Decl., Everett Dep. at 12:14-20; Ex. 8 to Slark Decl., Davis Dep. at 15:12-15; Ex. 7 to Slark Decl., Olsen Dep. at 10:19-25; Ex. 3 to Slark Decl., Pregman Dep. at 12:5-12; Ex. 2 to Slark Decl., Edmundson Dep. at 20:20-24.)

9. Indeed, the chances of a positive outcome decrease dramatically after the first hour. (*See e.g.,* Ex. 5 to Slark Decl., Purvis Dep. at 49:14-50:16; Ex. 1 to Slark Decl., Everett Dep 12:14-20; Ex. 8 to Slark Decl., Davis Dep. at 15:12-15; Ex. 3 to Slark Decl., Pregman Dep. at 12:5-12.)

10. Officer Olsen arrived on the scene approximately thirty minutes after the family called the police and reported the child was missing.[2] (*See* Olsen Decl. ¶ 4; Ex. 7 to Slark Decl., Olsen Dep. at 120:24-121:5.)

11. Officer Olsen asked if the child's home had been searched and was told the home had been searched twice. (*See* Olsen Decl. ¶ 5; Ex. 7 to Slark Decl., Olsen Dep. at 45:22-24.)

12. Officer Olsen sent a picture of the missing boy to all members of the police department, together with information obtained from the family that the boy was "non-verbal" and would not respond if officers simply called his name. (*See* Text Message, Ex. A to Olsen Decl; *see also* Olsen Decl. ¶ 6; Ex. 7 to Slark Decl., Olsen Dep. at 51:6-19.)

13. The officers understood this meant they would have to actually look for and visually locate the missing boy. (*See* Olsen Decl. ¶ 7; Ex. 7 to Slark Decl., Olsen Dep. at 55:25-56:4, 90:10-25, 128:24-129:12; Ex. 9 to Slark Decl., Zayas Dep. at 24:14-25.)

14. Officer Olsen worked with Officer Worsencroft to assist in a neighborhood canvas for the boy. (*See* Olsen Decl. ¶ 8; Ex. 7 to Slark Decl., Olsen Dep. at 55:17-20; Ex. 6 to Slark Decl., Worsencroft Dep. at 18:9-19:21.)

15. During this canvas one officer would knock on the front door of the house in an attempt to make contact with the owner to let them know that officers were in the neighborhood

[2] The family looked for the boy for forty-five minutes before calling the police and reporting him missing. (Ex. 5 Slark Decl., Purvis Dep. 19:21-20:5.)

looking for the missing boy and ask if they had seen the child. (*See* Olsen Decl. ¶ 9; Ex. 7 to Slark Decl., Olsen Dep. at 68:14-71:19; Ex. 6 to Slark Decl., Worsencroft Dep. at 43:15-46:15.)

16. The other officer would "clear" the yard. (*See* Olsen Decl. ¶ 10; Ex. 7 to Slark Decl., Olsen Dep. at 68:14-71:19; Ex. 6 to Slark Decl., Worsencroft Dep. at 43:15-46:15.)

17. The officer would attempt to "clear" the yard by viewing from the driveway or over a fence, but if the officer could not see all areas of the yard and be comfortable the boy was not in the yard, the officer would enter and check those areas he or she could not see. (*See* Olsen Decl. ¶ 11; Ex. 7 to Slark Decl., Olsen Dep. at 68:14-71:19; Ex. 6 to Slark Decl., Worsencroft Dep. at 43:15-46:15.)

18. Officers Olsen and Worsencroft checked and "cleared" the yards of the four to six houses on the west side of Filmore Avenue. (*See* Olsen Decl. ¶ 12; Ex. 10 to Slark Decl., Diagram of Route to House; Ex. 7 to Slark Decl., Olsen Dep. at 56:17-59:14; Ex. 6 to Slark Decl., Worsencroft Dep. at 33:13-34:16, 55:5-25; Ex. 11 to Slark Decl., Google Map.)

19. They then turned west on Parkway Avenue and reached the Kendall property. (*See* Olsen Decl. ¶ 13; Ex. 10 to Slark Decl., Diagram of Route to House; Ex. 7 to Slark Decl., Olsen Dep. at 56:17-59:14; Ex. 6 to Slark Decl., Worsencroft Dep. at 33:13-34:16, 55:5-25; Ex. 11 to Slark Decl., Google Map.)

20. Kendall's property is approximately 0.2 miles[3] and a three minute walk from the missing child's residence. (Ex. 11 to Slark Decl., Google Map.)[4]

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[3] Google maps shows the distance as 0.2 miles. (Ex. 12 to Slark Decl., Google Map.) Kendall alleges it is 1/8th of a mile, which is 0.125 miles (Amended Complaint, ¶ 2, Dkt. 2-3.)

[4] A Court may take judicial notice of "a fact that is not subject to reasonable dispute because it: (1) is generally known within the trial court's territorial jurisdiction; or (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Evid 201. The distance of the Kendall property from the child's home is both "generally known within the trial court's territorial jurisdiction" and "can be

21. The Kendall property consists of a house with an enclosed backyard that may be accessed by three different gates. (Ex. 12 to Slark Decl., Photos.)

22. One gate had wood lying at the bottom, which appeared to prevent it from being opened. (*See* Ex. 12 to Slark Decl., Photos; Ex. 7 to Slark Decl., Olsen Dep. at 143:9-15.)

23. One gate was located to the south of the house and was about three feet tall. (Ex. 12 to Slark Decl., Photos.)

24. It had a simple latch and may have been open on the day of the canvas. (Ex. 12 to Slark Decl., Photos; Ex. 6 to Slark Decl., Worsencroft Dep. at 38:19-39:9.)

25. Another gate was located directly to the east of the house and was about five to six feet tall. (Ex. C to Olsen Decl., Photo of Gate; Ex. D to Olsen Decl., Diagram of Olsen's Route in Backyard; Ex. 7 to Slark Decl., Olsen Dep. at 68:14-70:6.)

26. Officer Worsencroft went to the front door and began ringing the door bell or knocking on the door. (*See* Olsen Decl. ¶ 14; Ex. 7 to Slark Decl., Olsen Dep. at 68:14-70:6; Ex. 6 to Slark Decl., Worsencroft Dep. at 37:16-38:3.)

27. Officer Olsen walked up the drive to the gate that was directly east of the house. (*See* Olsen Decl. ¶ 15; Ex. 10 to Slark Decl., Diagram of Route to House; Ex. 7 to Slark Decl., Olsen Dep. at 68:14-69:12.)

28. That gate had a latch that was positioned approximately three feet to three and a half feet from the ground. (*See* Olsen Decl. ¶ 16; Ex. 7 to Slark Decl., Olsen Dep. at 74:17-25; Ex. C to Olsen Decl., Photo of Gate.)

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accurately and readily determined" from Google maps "whose accuracy cannot reasonably be questioned." *See id.*

29. The gate was not locked and Officer Olsen recalls the gate was easy to open. (*See* Olsen Decl. ¶ 17; Ex. 7 to Slark Decl., Olsen Dep. at 74:1-7, 74:17-25; Ex. C to Olsen Decl., Photo of Gate.)

30. Officer Olsen looked over the gate, but Officer Olsen's view of the entire yard was obstructed by the house and the garage. (*See* Olsen Decl. ¶ 18; Ex. 7 to Slark Decl., Olsen Dep. at 71:6-72:6.)

31. After waiting a few seconds by the gate and hearing that Officer Worsencroft was not receiving a response, Officer Olsen entered Kendall's backyard. (*See* Olsen Decl. ¶ 19; Ex. 7 to Slark Decl., Olsen Dep. at 69:19-70:6.)

32. Officer Olsen walked to the south-west corner and checked the area behind the home. (*See* Olsen Decl. ¶ 20; Ex. D to Olsen Decl., Diagram of Olsen's Route in Backyard; Ex. 7 to Slark Decl., Olsen Dep. at 84:1-86:7.)

33. He then walked to the south-east area and checked the area obscured by the garage. (*See* Olsen Decl. ¶ 21; Ex. D to Olsen Decl., Diagram of Olsen's Route in Backyard; Ex. 7 to Slark Decl., Olsen Dep. at 84:1-86:7.)

34. He then walked over to the shed and pulled opened the shed door (that may have been slightly ajar) and checked inside. (*See* Olsen Decl. ¶ 22; Ex. D to Olsen Decl., Diagram of Olsen's Route in Backyard; Ex. 7 to Slark Decl., Olsen Dep. at 84:1-86:7, 108:16-21, 142:1-12.)

35. Finally, Officer Olsen checked the area to the north of the shed. (*See* Olsen Decl. ¶ 23; Ex. D to Olsen Decl., Diagram of Olsen's Route in Backyard; Ex. 7 to Slark Decl., Olsen Dep. at 84:1-86:7.)

36. Officer Olsen estimates it took him approximately thirty seconds to check these areas for the missing boy. (*See* Olsen Decl. ¶ 25; Ex. 7 to Slark Decl., Olsen Dep. at 112:3-17.)

B. Kendall's Utah Constitutional Claim.

1. Elements.

"Utah does not have a counterpart statute to 42 U.S.C. § 1983 and the Utah Constitution does not expressly provide damage remedies for constitutional violations." *Wood v. Farmington City*, 910 F. Supp. 2d 1315, 1328 (D. Utah 2012). "As a result, a plaintiff's remedy for state constitutional violation rests in the common law." *Id*. "In order to recover monetary damages for a constitutional violation, the Utah Supreme Court requires a plaintiff to: [D]emonstrate that the provision violated by the defendant is self-executing." *Id*. A plaintiff must then establish three elements: "(1) the plaintiff suffered a flagrant violation of his or her constitutional rights; (2) existing remedies do not redress his or her injuries; and (3) equitable relief, such as an injunction, was and is wholly inadequate to protect the plaintiff's rights or redress his or her injuries." *Id*. (citation and quotation marks omitted).

"To establish a flagrant violation of one's constitutional rights: [D]efendant must have violated clearly established constitutional rights of which a reasonable person would have known." *Id*. at 1328-29. "To be considered clearly established, the contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Id*. at 1329. "The requirement that the unconstitutional conduct be flagrant ensures that a government employee is allowed the ordinary human frailties of forgetfulness, distractibility, or misjudgment without rendering him or herself liable for a constitutional violation." *Id*.

With respect to article I, section 14 of the Utah Constitution, "[t]he Utah Supreme Court has noted that there cannot be a flagrant violation . . . if there was a reasonable basis to warrant the particular intrusion." *Id*. (citation and quotation marks omitted).

2. Undisputed Material Facts.

The same facts that apply to Kendall's claim that it was a violation of the Fourth Amendment for Officer Olsen to enter his backyard to look for the missing boy, which are set forth above, apply here. *See supra* § I, A, 2 *Undisputed Material Facts* ¶¶ 1-36.

C. Kendall's State Law Claims for Trespass and Negligence.

1. Elements.

State law claims brought against governmental entities and/or their employees are governed by the Governmental Immunity Act of Utah (the "Governmental Immunity Act" or "GIA"). *See* Utah Code § 63G-7-101 *et. seq*.[5] The GIA precludes all claims against government employees, including negligence, except claims set forth in subsection 202(3)(c). *See* Utah Code § 63G-7-202(3)(a). Section 202(3)(c) permits claims only where "the employee acted or failed to act through fraud or willful misconduct." Utah Code § 63G-7-202(3)(c)(i). "Willful misconduct" is defined as "the intentional doing of a wrongful act, or the wrongful failure to act, without just cause or excuse, where the actor is aware that the actor's conduct will probably result in injury." Utah Code § 63G-7-102(10).

[5] The Governmental Immunity Act was revised and renumbered in May 2015. Citations in this brief are to the version of the Governmental Immunity Act in effect on June 18, 2014, the date of the events that are the basis of Kendall's claims in this action. For the convenience of the Court, a copy of the Governmental Immunity Act in effect on June 18, 2014 is attached hereto.

The GIA precludes claims against a government entity, unless immunity is specifically waived. Utah Code § 63G-7-201(1). Immunity is not waived for Kendall's trespass and negligence claims. *See* Utah Code § 63G-7-301.

To establish a claim for trespass there must be a physical invasion of land that is done without legal justification or privilege. *See Walker Drug Co. v. La Sal Oil Co*., 972 P.2d 1238, 1243 (Utah 1998) ("The essential element of trespass is physical invasion of the land"); *Mueller v. Allen*, 2005 UT App 477, ¶ 35, 128 P.3d 18 ("Conduct which would otherwise constitute a trespass is not a trespass if it is privileged.")

2. Undisputed Material Facts.

The same facts that apply to Kendall's claim that it was a violation of the Fourth Amendment and a violation of article I, section 14 of the Utah Constitution for Officer Olsen to enter the backyard to look for the missing boy, which are set forth above, apply here. *See supra* § I, A, 2 *Undisputed Material Facts* ¶¶ 1-36.

II. OFFICER OLSEN'S SEIZURE OF GEIST.

A. Qualified Immunity for Kendall's Claims Under 42 U.S.C. § 1983.

1. Elements.

The elements of qualified immunity are set forth above. *See supra* § I, A, 1 *Elements*. With respect to the first prong of the qualified immunity test, Kendall must show that Officer Olsen's seizure of Geist violated the Fourth, Fifth or Fourteenth Amendments to the United States Constitution. The Fourth Amendment precludes the "unreasonable" seizure of property. *Grant v. City of Houston*, 625 F. App'x 670, 675 (5th Cir. 2015) ("[s]eizures by law-enforcement officials violate the Fourth Amendment only if they are unreasonable.") To determine whether a

seizure is unreasonable a court must "put itself into the shoes of the officer[] at the time the actions took place and to ask whether the actions taken by the officer[] were objectively unreasonable." *Altman v. City of High Point*, N.C., 330 F.3d 194, 205 (4th Cir. 2003). The inquiry is not whether it was the "best possible response." *Id.* at 207. It is, whether "under the circumstances existing at the time the officer[] took the actions and in light of the facts known by the officer[]," the actions were objectively reasonable." *Id*. The seizure of an aggressive dog is not "unreasonable" and not a violation of the Fourth Amendment. *See e.g., Powell v. Johnson*, 855 F. Supp. 2d 871, 875 (D. Minn. 2012) ("Because the government retains a strong interest in allowing law enforcement officers to protect themselves . . . from animal attacks, courts have recognized that no unreasonable seizure may be found where an officer has killed a dog that posed an imminent threat.") (citation and quotation marks omitted).

The Fifth Amendment due process clause does not apply to a local government or its employees. *See Lee v. City of Los Angeles*, 250 F.3d 668, 687 (9th Cir. 2001) ("The Due Process Clause of the Fifth Amendment . . . [applies] only to actions of the federal government — not to those of state or local governments."). The Fourteenth Amendment due process clause does not apply when a more specific constitutional provision applies. *See e.g., Dziekan v. Gaynor*, 376 F. Supp. 2d 267, 270 (D. Conn. 2005) (citing *Albright v. Oliver*, 510 U.S. 266, 273, (1994) ("Where a constitutional amendment provides an explicit textual source of protection against certain government misconduct, that amendment is the guide for analysis of the claim rather than the generalized notion of substantive due process.")). Where there is a Fourth Amendment seizure claim, the claim is analyzed under the Fourth Amendment only. *See e.g., Bateman v. Driggett*, No. 11-13142, 2012 WL 2564839, at *7 n.1 (E.D. Mich. July 2, 2012) ("To the extent Plaintiff's

complaint asserts a Fourteenth Amendment substantive due process claim based on [the officer's] shooting of his dog, that claim is dismissed because the Fourth Amendment provides an explicit source of protection against the alleged civil rights violation.").

The Fifth Amendment takings provision does not apply when property damage occurs as a result of the execution of a lawful search or seizure. *See e.g., Simmons v. Loose*, 13 A.3d 366, 389 (App. Div. 2011) ("the execution of the search warrant was not a taking . . . [b]ecause the property has not been put to any productive use by the government, the concerns that the government is acting to enrich itself at the expense of the property owner are not implicated.") (citation and quotation marks omitted).

To satisfy the second prong of the qualified immunity analysis, Kendall must show the seizure of an aggressive dog that poses an imminent threat of serious bodily harm violates a clearly established constitutional right. *See supra* § I, A, 1 *Elements* for the applicable legal standard.

2. Undisputed Material Facts.

The facts that apply to Kendall's claim that it was a violation of federal and state law for Officer Olsen to enter his backyard to look for the missing boy, set forth in § I, A, 2 *Material Facts* ¶¶ 1-36, provide context, but are not material to Kendall's claim that it was a violation of his constitutional rights for Officer Olsen to seize Geist.

1. Having "cleared" the yard, Officer Olsen went to leave. (Olsen Decl., ¶ 26; Ex. 7 to Slark Decl., Olsen Dep. at 84:24-86:23.)

2. He noticed that the shed door had swung open so he returned to the shed and shut the door firmly to ensure Kendall's property was left in a secure manner. (Olsen Decl., ¶ 27; Ex. 7 to Slark Decl., Olsen Dep. at 86:13-23.)

3. Seconds later Geist came from behind the shed charging at Officer Olsen. (Olsen Decl. ¶ 28; Ex. 7 to Slark Decl., Olsen Dep. at 86:18-87:18, 91:1-7, 92:15-93:10, 109:10-110:24.)

4. Geist was approximately 20-25 feet away from Officer Olsen when Officer Olsen first saw Geist. (Olsen Decl. ¶ 29; Ex. 7 to Slark Decl., Olsen Dep. at 134:4-7.)

5. Geist was a large Weimaraner who exceeded one hundred pounds. (Olsen Decl., ¶ 30; Ex. 13 to Slark Decl., Geist Photo; Ex. 7 to Slark Decl., Olsen Dep. at 91:6-7.)

6. Geist charged at Officer Olsen in an extremely aggressive fashion. (Olsen Decl. ¶ 31; Ex. 7 to Slark Decl., Olsen Dep. at 86:18-87:18, 91:1-7, 92:15-93:10, 109:10-110:24.)

7. He was growling and barking, his ears were back, and his teeth were bared. (Olsen Decl. ¶ 32; Ex. 7 to Slark Decl., Olsen Dep. at 86:18-87:18, 91:1-7, 92:15-93:10, 109:10-110:24.)

8. It was difficult for Officer Olsen to describe to internal affairs the demeanor of Geist when he was charging at Officer Olsen. (Olsen Decl. ¶ 33; Ex. 7 to Slark Decl., Olsen Dep. at 92:21-93:10.)

9. However, a few months ago an email was sent to all police officers relating to an award that another police officer was receiving, which attached a picture of a police officer and a police canine. (Olsen Decl. ¶ 34; Ex. 7 to Slark Decl., Olsen Dep. at 92:21-93:10.)

10. Officer Olsen saw the picture of the canine and was struck by the fact that the dog looked exactly like Geist did on the day Geist charged Officer Olsen. (Olsen Decl. ¶ 35; Ex. 7 to Slark Decl., Olsen Dep. at 92:21-93:10.)

11. Because a picture can paint a thousand words, a copy of the picture is submitted with this motion. (Ex. E to Olsen Decl., Photo.)

12. On seeing Geist aggressively charging towards him, Officer Olsen first attempted to retreat. (Olsen Decl. ¶ 37; Ex. 7 to Slark Decl., Olsen Dep. at 86:18-87:11.)

13. Realizing he did not have time to exit the yard before Geist reached him and attacked, Officer Olsen next tried standing his ground and taking a more dominant stance, broadening his shoulders and stomping his foot, in an attempt to "call Geist's bluff." (Olsen Decl. ¶ 38; Ex. 7 to Slark Decl., Olsen Dep. at 87:10-13.)

14. These actions did not deter Geist and Geist continued to charge towards Officer Olsen growling, barking and baring his teeth. (Olsen Decl. ¶ 39; Ex. 7 to Slark Decl., Olsen Dep. at 87:10-14.)

15. In the few seconds Officer Olsen had to react, he briefly considered using a taser, but he did not believe this would be effective given the small surface area of a head on charging dog. (Olsen Decl. ¶ 40; Ex. 7 to Slark Decl., Olsen Dep. at 96:15-22.)

16. When Geist was within four or five feet of Officer Olsen, believing he was in imminent danger of attack and serious bodily injury, Officer Olsen used his service weapon and fired two rounds at Geist. (Olsen Decl. ¶ 41; Ex. 7 to Slark Decl., Olsen Dep. at 87:15-18, 97:4-5.)

17. Geist came to a rest after being shot. (Olsen Decl. ¶ 42; Ex. 7 to Slark Decl., Olsen Dep. at 97:4-9.)

18. Officer Olsen did not see any signs a dog might be on the property prior to entering the yard. (Olsen Decl. ¶ 44; Ex. 7 to Slark Decl., Olsen Dep. 87:22-89:3.)

19. Indeed, the first time Officer Olsen saw anything that might indicate a dog was on the property was when he observed a plywood structure when he was checking the area to the north of the shed after entering the property, seconds before he encountered Geist. (Olsen Decl. ¶ 45; Ex. 7 to Slark Decl., Olsen Dep. at 84:24-86:12.)

20. Even then it was far from clear that the structure was a dog house. (Ex. F to Olsen Decl., Photo of Dog House; Ex. 7 to Slark Decl., Olsen Dep. at 86:3-7.)

21. Officer Olsen was the only person in the yard at the time Geist was shot and the only person to observe Geist when he attacked Officer Olsen. (Olsen Decl. ¶ 43; Ex. 7 to Slark Decl., Olsen Dep. at 80:17-21.)

22. However, other police officers that were canvassing the neighborhood and another resident recall seeing Geist shortly before he was shot. (Ex. 14 to Slark Decl., Clinch Emails; Ex. 15 to Slark Decl., Clinch Dep. at 8:20-9:20, 12:5-14:13, 26:9-15; Ex. 9 to Slark Decl., Zayas Dep. at 25:8-26:7, 32:24-33:14, 43:4-24; Ex. 16 to Slark Decl., Johnson Dep. at 25:18-26:13.)

23. They all reported Geist was extremely aggressive. (Ex. 14 to Slark Decl., Clinch Emails; Ex. 15 to Slark Decl., Clinch Dep. at 8:20-9:20, 12:5-14:13, 26:9-15; Ex. 9 to Slark Decl., Zayas Dep. at 25:8-26:7, 32:24-33:14, 43:4-24; Ex. 16 to Slark Decl., Johnson Dep. at 25:18-26:13.)

24. Specifically, Ms. Clinch lives in the neighborhood. (Ex. 14 to Slark Decl., Clinch Emails; Ex. 15 to Slark Decl., Clinch Dep. at 8:20-9:20, 12:5-14:13, 26:9-15.)

25. She contacted the police chief shortly after the incident and stated that she had walked past Kendall's backyard shortly before Geist attacked Officer Olsen. (Ex. 14 to Slark Decl., Clinch Emails; Ex. 15 to Slark Decl., Clinch Dep. at 8:20-9:20, 12:5-14:13, 26:9-15.)

26. She testified that Geist was extremely agitated and acted in an extremely aggressive manner toward her. (Ex. 14 to Slark Decl., Clinch Emails; Ex. 15 to Slark Decl., Clinch Dep. at 8:20-9:20, 12:5-14:13, 26:9-15.)

27. When asked to expand she stated that the dog had an aggressive bark, was baring its teeth, and if the fence were not there she "would have been terrified that [the] dog would have attacked her." (Ex. 14 to Slark Decl., Clinch Emails; Ex. 15 to Slark Decl., Clinch Dep. at 8:20-9:20, 12:5-14:13, 26:9-15.)

28. Ms. Clinch is a lover of dogs and until recently owned a Rottweiler. (Ex. 14 to Slark Decl., Clinch Emails; Ex. 15 to Slark Decl., Clinch Dep. at 8:20-9:20, 12:5-14:13, 26:9-15.)

29. She is not easily alarmed by dogs, but Geist alarmed her. (Ex. 14 to Slark Decl., Clinch Emails; Ex. 15 to Slark Decl., Clinch Dep. at 8:20-9:20, 12:5-14:13, 26:9-15.)

30. Officer Zayas was canvassing the neighborhood shortly before Geist was shot. (Ex. 9 to Slark Decl., Zayas Dep. at 25:8-26:7, 32:24-33:14, 43:4-24.)

31. She testified that Geist's "growl and bark did not sound like a happy I'm-happy-to see-you bark . . . it was, I'm going to, in my words, eat you bark, which was alarming to me, and

I was glad there was a fence between myself and the dog." (Ex. 9 to Slark Decl., Zayas Dep. at 25:8-26:7, 32:24-33:14, 43:4-24.)

32. Officer Zayas owns several dogs, including a large aggressive Doberman. (Ex. 9 to Slark Decl., Zayas Dep. at 25:8-26:7, 32:24-33:14, 43:4-24.)

33. She is a dog lover and is not easily scared by a dog. (Ex. 9 to Slark Decl., Zayas Dep. at 25:8-26:7, 32:24-33:14, 43:4-24.)

34. Officer Johnson also saw Geist shortly before he was shot. (Ex. 16 to Slark Decl., Johnson Dep. at 25:18-26:13.)

35. He testified that Geist "lowered its chest to the ground when he was barking or he'd jump on the fence and then he actually would show his teeth, like, his upper lip would come up and you'd see his teeth . . ." (*See* Ex. 16 to Slark Decl., Johnson Dep. at 25:18-26:13.)

36. Officer Johnson also owns a large dog, a golden retriever. (Ex. 16 to Slark Decl., Johnson Dep. at 25:18-26:13.)

B. Kendall's State Constitutional Claims.

1. Elements.

The standard for showing a right to recover monetary damages for a violation of rights protected by the Utah Constitution is set forth above and apply here. *See supra* § I, B, 1 *Elements*. In addition, with respect to article I, section 7 of the Utah Constitution, the Supreme Court of the Territory of Utah has found no violation of this provision where the destruction of a dog was otherwise authorized by law. *Jenkins v. Ballantyne*, 30 P. 760, 761 (1892). Likewise, with respect to article I, section 14 of the Utah Constitution, "[t]he Utah Supreme Court has

noted that there 'cannot be a flagrant violation . . . if there was a reasonable basis to warrant the particular intrusion.'" *Wood*, 910 F. Supp. 2d at 1329.

2. Undisputed Material Facts.

The same facts that apply to Kendall's claim that it was a violation of the Fourth, Fifth and Fourteenth Amendments for Officer Olsen to seize Geist, which are set forth above, apply here. *See supra* § II, A, 2 *Material Facts* ¶¶ 1-36.

C. Kendall's State Law Claims for Trespass to Chattel, Conversion, Negligence, and Intentional Infliction of Emotional Distress.

1. Elements.

The limitations and the elements necessary to bring a claim against a government employee or a government entity under the Governmental Immunity Act are set forth above and apply here. *See supra* § I, C, 1 *Elements*. In addition, a claim for conversion requires proof of a willful interference with property, without lawful justification. *See Jones & Trevor Mktg., Inc. v. Lowry*, 2010 UT App 113 ¶ 15, n.13, 233 P.3d 538 ("[t]o prove conversion, a party must establish an act of willful interference with property, done without lawful justification"). A claim for trespass to chattel requires the same. *See Walker v. Union Pac. R.R. Co.*, 844 P.2d 335, 343 n.9 (Utah Ct. App. 1992) (stating "the doctrine of trespass to chattels has fallen into general disuse," but requires an allegation of a "trespassatory action.").

A claim for intentional infliction of emotion distress requires proof "the defendant intentionally engaged in some conduct toward the plaintiff, (a) with the purpose of inflicting emotional distress, or, (b) where any reasonable person would have known that such would result; and his actions are of such a nature as to be considered outrageous and intolerable in that they offend against the generally accepted standards of decency and morality." *Bennett v. Jones,*

Waldo, Holbrook & McDonough, 2003 UT 9, ¶ 58, 70 P.3d 17 (citation and quotation marks omitted). Likewise, with limited exception, a claim for intentional infliction of emotional distress may only lie for conduct that occurs within the presence of the plaintiff. *See Hatch v. Davis*, 2006 UT 44, ¶ 31, 147 P.3d 383 ("it is generally a better practice to limit recovery for intentional infliction of emotional distress to plaintiffs who were present when the outrageous conduct occurred.")

2. Undisputed Material Facts.

The same facts that apply to Kendall's claim that it was a violation of the Fourth Amendment and a violation of article I, sections 7 and 14 of the Utah Constitution for Officer Olsen to seize Geist, which are set forth above, apply here. *See supra* § II, A, 2 *Material Facts* ¶¶ 1-36.

ARGUMENT

I. OFFICER OLSEN AND SALT LAKE CITY ARE ENTITLED TO ENTRY OF JUDGMENT ON KENDALL'S CLAIMS BASED ON OFFICER OLSEN'S ENTRY INTO THE BACKYARD.

A. Officer Olsen is Entitled to Qualified Immunity on Kendall's Section 1983 Claims.

Officer Olsen is entitled to qualified immunity on Kendall's claim that it was a violation of his federal constitutional rights for Officer Olsen to enter his backyard to look for the three year old missing boy. When a defendant raises a qualified immunity defense a plaintiff must satisfy a heavy two-part burden for the claim to survive. *See Phillips v. James*, 422 F.3d 1075, 1080 (10th Cir. 2005). First, plaintiff must show that the facts, viewed in the light most favorable to the plaintiff, show that the challenged conduct violated a constitutional right. *Id*. at 1080 (*citing Saucier v. Katz*, 533 U.S. 194, 201 (2001)). Second, plaintiff must demonstrate the right at issue was clearly established on the date in question. *Id.* The Court has discretion as to which of these two questions to consider first. *Weise v. Casper*, 593 F.3d 1163, 1167 (10th Cir. 2010) (citing *Pearson v. Callahan*, 555 U.S. 223, 235–36 (2009)). *See also Mocek v. City of Albuquerque*, 3 F. Supp. 3d 1002, 1052 (D.N.M. 2014) aff'd, No. 14-2063, 2015 WL 9298662 (10th Cir. Dec. 22, 2015) (discussing circumstances where district court should proceed directly to clearly established prong of qualified immunity analysis).

A failure to establish either inquiry is fatal to a plaintiff's claim. *See e.g., Holland v. Harrington*, 268 F.3d 1179, 1186 (10th Cir. 2001) ("If the plaintiff fails to satisfy either part of the two-part inquiry, the court must grant the defendant qualified immunity."). Even viewing the facts in the light most favorable to Kendall, Kendall cannot show Officer Olsen's entry into his

backyard to look for a missing three year old boy violated his constitutional rights. Likewise, Kendall cannot show Officer Olsen's entry into the backyard violates a clearly established right.

1. Officer Olsen did not violate Kendall's Fourth Amendment Rights.

a. Officer Olsen's Entry into Kendall's Backyard to Look for a Missing Boy is not a Fourth Amendment "Search."

Officer Olsen's entry into Kendall's backyard to look for a missing three year old boy was not a Fourth Amendment search. "Official conduct that does not compromise any legitimate interest in privacy is not a search subject to the Fourth Amendment." *Illinois v. Caballes*, 543 U.S. 405, 408 (2005) (citation and quotation marks omitted). Rather, officers must take some action that implicates a citizen's "legitimate expectation that information about perfectly lawful activity will remain private." *Id.* at 410 (distinguishing a dog sniff from a thermal imaging device because the latter reveals "intimate details in a home, such as at what hour each night the lady of the house takes her daily sauna and bath"). In line with this reasoning, the Tenth Circuit has held that entering onto the curtilage of a home alone does not constitute an unreasonable search in violation of the Fourth Amendment. *See Galindo v. Town of Silver City*, 127 F. App'x 459, 466 (10th Cir. 2005) ("Merely proceeding from the front to the back of a house alone, however, did not establish an invasion of the curtilage in violation of the Fourth Amendment"); *United States v. Cavely*, 318 F.3d 987, 994 n.1 (10th Cir. 2003) (same).

For example, in *Galindo* police officers were called to a home to investigate a report that minors were drinking at the property. *Galindo*, 127 F. App'x at 462-63. Getting no response to knocks on the front door and knowing that there were people in the home, the officers proceeded around to the back door, where the officer could "reasonably carry out his objectives of locating [the minor] and of checking on [the allegation of] underage drinking." *Id.* at 466. The Tenth

Circuit found no constitutional violation because the plaintiff failed to show the officer proceeding to the back door to locate the minor violated "a legitimate expectation of privacy in the curtilage." *Id.*

Similarly, Officer Olsen and Officer Worsencroft went to the Kendall residence as part of a neighborhood canvas to determine if Kendall had seen anything and to see if the child had wandered into his backyard. Receiving no response from the occupant of the home, Officer Olsen proceeded into the backyard where he could reasonably carry out the objective of checking to see if the child had wandered into the backyard. Like the plaintiffs in *Galindo*, Kendall cannot show Officer Olsen's entry into the curtilage to look for the missing child was a Fourth Amendment search that violated a legitimate expectation of privacy in the curtilage.

b. Exigent Circumstances Justify Officer Olsen's Entry into Kendall's Backyard.

Additionally, Officer Olsen's entry into Kendall's backyard and opening the shed door did not violate Kendall's Fourth Amendment rights because Officer Olsen was acting under exigent circumstances. "[W]arrants are generally required to search a person's home or his person unless the 'exigencies of the situation' make the needs of law enforcement so compelling that the warrantless search is objectively reasonable under the Fourth Amendment." *United States v. Martinez*, 643 F.3d 1292, 1295-96 (10th Cir. 2011) (*citing Mincey v. Arizona*, 437 U.S. 385, 393–94 (1978)). *See also United States v. Najar*, 451 F.3d 710, 713 (10th Cir. 2006) ("[w]hen faced with special law enforcement needs, diminished expectations of privacy, minimal intrusions, or the like, the Court has found that certain general, or individual, circumstances may render a warrantless search or seizure reasonable."). One such exigency is to "aid individuals who are in danger of physical harm [or to] assist those who cannot care for themselves." *Najar*,

451 F.3d at 715. This exception to the warrant requirement evolved from the "practical recognition [that there are] critical police functions quite apart from or only tangential to a criminal investigation." *Id.* at 715:

> "[B]y design or default, the police are also expected to reduce the opportunities for the commission of some crimes through preventative patrol and other measures, ***aid individuals who are in danger of physical harm, assist those who cannot care for themselves***, resolve conflict, create and maintain a feeling of security in the community, ***and provide other services on an emergency basis***."

Id. (*citing* 3 Wayne R. LaFave, Search and Seizure: A Treatise on the Fourth Amendment § 6.6 (4th ed.) (emphasis added)).

In this context, the Tenth Circuit has held that exigent circumstances exist and a warrantless entry on property is permissible where "(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." *Id.* at 718. Both parts of this test are easily satisfied here.

The first inquiry, determining the existence of an exigency, is essentially one of reasonable belief. *Id.* at 719 ("the inquiry determining the existence of an exigency is essentially one of reasonable belief"). Whether an exigency exists is determined based on the "realities of the situation presented by the record" from the viewpoint of a "prudent, cautious, and trained officer[]." *Id.* at 718-19. *See also United States v. Gambino–Zavala*, 539 F.3d 1221, 1225 (10th Cir. 2008) ("We evaluate whether a reasonable belief existed based on the realities of the situation presented by the record from the viewpoint of prudent, cautious, and trained officers.") "Reasonable belief does not require absolute certainty; the standard is more lenient than the probable cause standard." *United States v. Porter*, 594 F.3d 1251, 1258 (10th Cir. 2010).

Rather, the belief is reasonable, as long as the circumstances, viewed objectively, justify the action. *Brigham City, Utah v. Stuart*, 547 U.S. 398, 404 (2006) ("An action is reasonable under the Fourth Amendment, regardless of the individual officer's state of mind, as long as the circumstances, viewed *objectively*, justify [the] action.") (citation and quotation marks omitted).

The undisputed material facts show it was objectively reasonable for Officer Olsen to believe there was an immediate need to protect the life or safety of the missing three year old boy. "When a child goes missing, time is of the essence." *Hunsberger v. Wood*, 570 F.3d 546, 555 (4th Cir. 2009). A three year old child cannot care for him or herself and is in serious risk of danger of physical harm if he or she wanders off alone. For example, a child of that age can easily wander into traffic and be hit by a car, trip and fall into a window well and be seriously injured, or wander into a neighbor's backyard and fall into a swimming pool and drown. The longer the child is wandering alone, the more likely he or she is to encounter such a mishap.

By the time Officer Olsen responded to the call, the boy had been missing for well over an hour. *See* § I, A, 2 *Material Facts*, ¶ 10. The child's home had been searched and officers had confirmed he was not at the neighboring relative's house. *Id.*, ¶¶ 2-3. It was believed that the child had wandered off, although the possibility that he had been abducted was not ruled out. *Id.*, ¶¶ 4-6. In light of the "realities of the situation presented by the record" a "prudent, cautious, and trained officer" would believe there was an immediate need to protect the life or safety of the missing three year old and that an exigency existed.

The second inquiry is also easily satisfied. "While the first factor considers whether there is a reasonable basis to believe an emergency exists, the second factor necessarily deals with the manner and scope of the search." *Najar*, 451 F.3d at 720. A search is reasonable where it is

confined to places where an emergency could reasonably be associated. *Id.* ("The officers confined the search to only those places inside the home where an emergency would reasonably be associated."). Having failed to locate the boy in his home or the neighbor's house, officers began a neighborhood canvas working outwards in a concentric pattern. *Id.*, ¶¶ 2-7. Officers did not search the interior of every home in the neighborhood, but rather they confined their searches to places a three year old child could reasonably have wandered. *Id.* Kendall's backyard is less than 0.2 miles[6] (approximately half a block) from the child's home. *Id.*, ¶ 20. It takes a total of three minutes to walk the distance from the child's home to Kendall's driveway. *Id.* The gates to Kendall's backyard are not locked. *Id.*, ¶¶ 21-29. A child could easily reach the latches to any of the gates that lead to Kendall's backyard. *Id.*, ¶¶ 21-29. Likewise, the shed within Kendall's backyard was unlocked and, indeed, may in fact have been slightly open on the day of the search. *Id.*, ¶ 34. Moreover, it was reported to officers that the child was non-verbal and would not respond to officers calling his name. *Id.*, ¶¶ 12-19. Therefore, the officers would have to actually look for and visually locate the missing child, rather than just call out for him. *Id.* Thus, it was eminently reasonable for Officer Olsen to enter and briefly search Kendall's backyard in areas he could not see from looking over the fence (and look in the shed) to determine if the boy had wandered back there and was in need of aid. Indeed, Officer Olsen's "search" took a total of approximately thirty seconds. No Fourth Amendment violation is shown.

2. Officer Olsen's Entry into Kendall's Backyard did not Violate a Clearly Established Constitutional Right.

Kendall also cannot satisfy the second prong of the qualified immunity analysis and show Officer Olsen's entry into his backyard to look for the missing boy violated a clearly established

[6] *See supra*, n.2.

right. *See e.g., Medina v. Cram*, 252 F.3d 1124, 1128 (10th Cir. 2001) (stating plaintiff has the burden of demonstrating the right at issue was clearly established). "A Government official's conduct violates clearly established law when, at the time of the challenged conduct, '[t]he contours of [a] right [are] sufficiently clear' that ***every*** 'reasonable official would have understood that what he is doing violates that right.'" *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011) (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987) (emphasis added)). "Clearly established" does "not require a case directly on point, but existing precedent must have placed the statutory or constitutional question beyond debate." *Ashcroft*, 563 U.S. at 741. *Hagans v. Franklin County Sheriff's Office*, 695 F.3d 505, 508-09 (6th Cir. 2012), which the Tenth Circuit has cited with approval, is very instructive on the appropriate level of generality the Court should adopt in deciding whether a right is clearly established. It rejects applying general propositions such as "the right to be free from unreasonable seizures," directing courts to narrowly define the right at issue with appropriate facts. *Id.* at 509 ("In an excessive-force case, that might mean asking whether a disturbed felon, set on avoiding capture through vehicular flight [that placed] persons in the immediate area . . . at risk had a clearly established right not to be shot.") (citation and quotation marks omitted).

Here, the appropriate inquiry is whether Officer Olsen violated a clearly established right when he entered Kendall's backyard to look for a missing, young, non-verbal child, where it is reasonable to believe the child could have wandered into the yard. No Supreme Court or Tenth Circuit decision finds entry onto property for such a purpose violates the Fourth Amendment. To the contrary, the Tenth Circuit finds a warrantless entry on property is permissible where "(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." *Najar*, 451 F.3d at 718. Accordingly, Kendall cannot satisfy the second prong of the qualified immunity test and Officer Olsen is entitled to qualified immunity on this claim.

B. Salt Lake City is Entitled to Entry of Judgment on Kendall's section 1983 Claim.

Salt Lake City is entitled judgment on Kendall's section 1983 claim because no constitutional violation is shown. Kendall's second claim for relief asserts a claim against Salt Lake City for Officer Olsen's entry into Kendall's backyard. "A municipality may not be held liable where there was no underlying constitutional violation by any of its officers." *Hinton v. City of Elwood*, 997 F.2d 774, 782 (10th Cir. 1993) (citing *City of Los Angeles v. Heller*, 475 U.S. 769, 799 (1986)). Officer Olsen did not violate Kendall's rights when he entered the yard and judgment should be entered for Salt Lake City. *See supra* § I, A, 1-2.

C. Officer Olsen and Salt Lake City are Entitled to Entry of Judgment on Kendall's State Constitutional Claims.

Officer Olsen and Salt Lake City are entitled to entry of judgment on Kendall's state constitutional claims because Officer Olsen's entry into the backyard was not a flagrant violation of rights. "Utah does not have a counterpart statute to 42 U.S.C. § 1983 and the Utah Constitution does not expressly provide damage remedies for constitutional violations." *Wood v. Farmington City*, 910 F. Supp. 2d 1315, 1328 (D. Utah 2012). "As a result, a plaintiff's remedy for state constitutional violation rests in the common law." *Id.* "In order to recover monetary damages for a constitutional violation, the Utah Supreme Court requires a plaintiff to: [D]emonstrate that the provision violated by the defendant is self-executing." *Id.* A plaintiff must then establish three elements: "(1) the plaintiff suffered a flagrant violation of his or her

constitutional rights; (2) existing remedies do not redress his or her injuries; and (3) equitable relief, such as an injunction, was and is wholly inadequate to protect the plaintiff's rights or redress his or her injuries." *Id.* (citation and quotation marks omitted).

"To establish a flagrant violation of one's constitutional rights: [D]efendant must have violated clearly established constitutional rights of which a reasonable person would have known." *Id.* at 1328-29. "To be considered clearly established, the contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Id.* at 1329. "The requirement that the unconstitutional conduct be flagrant ensures that a government employee is allowed the ordinary human frailties of forgetfulness, distractibility, or misjudgment without rendering him or herself liable for a constitutional violation." *Id.* Moreover, "[t]he Utah Supreme Court has noted that there 'cannot be a flagrant violation . . . if there was a reasonable basis to warrant the particular intrusion.'" *Id.* (citation and quotation marks omitted).

Kendall's third, fourth, fifth and sixth claims for relief assert Officer Olsen's entry into his backyard violated his rights under the Utah Constitution, article I, section 14. Like the Fourth Amendment to the United States Constitution, article I, section 14 of the Utah Constitution proscribes only "unreasonable searches and seizures" of "persons, houses, papers and effects." Utah Const. Art. I, § 14. Utah courts "endeavor toward uniformity in the application of the search and seizure requirements of the state and federal constitutions [because] the respective provisions are practically identical." *State v. Anderson*, 910 P.2d 1229, 1235 (Utah 1996) ("Although we are obligated to provide a state law review, such an independent analysis is not necessarily a *different* analysis."). Indeed, the Utah Supreme Court noted that to

do otherwise would "lead to unfavorable results" because it would "impose two different and possibly conflicting constitutional standards on law enforcement officers." *Id.* The Utah Supreme Court has also found that there is no "flagrant violation" of article I, section 14 if there is a reasonable basis to warrant the particular intrusion. *Jensen ex rel. Jensen v. Cunningham*, 2011 UT 17, ¶ 98, 250 P.3d 465 (finding no flagrant violation of rights to be free from seizures under article I, section 14 because there was a reasonable basis to arrest plaintiff.) Indeed, where an officer's actions are consistent with and do not violate the standards set forth in the federal constitution, there is no "flagrant violation" of rights under the Utah Constitution. *See e.g., Wood*, 910 F. Supp. 2d at 1329 ("it was not objectively unreasonable for [the officer] to believe that [the plaintiff] posed a serious threat of physical harm. Accordingly, Plaintiffs have failed to establish that they suffered a flagrant violation of their Utah constitutional rights.").

Thus, Kendall cannot show Officer Olsen's entry into his backyard was a "flagrant violation" of his rights under article I, section 14 of the Utah Constitution for the same reasons he cannot show the entry was a violation of his rights under the federal constitution.

D. Officer Olsen and Salt Lake City are Entitled to Entry of Judgment on Kendall's Claims for Trespass and Negligence.

1. Kendall's Claims Against Officer Olsen for Trespass and Negligence Fail.

Officer Olsen is entitled to entry of judgment on Kendall's trespass and negligence claims because the City is immune and, regardless, Kendall cannot establish the necessary elements of a trespass or negligence claim. State law claims brought against governmental entities and/or their employees are governed by the Governmental Immunity Act. *See* Utah Code § 63G-7-101 *et. seq*. With respect to government employees, a plaintiff's claim is limited

to a claim against the government entity, unless the plaintiff can satisfy the limited exceptions set forth in Utah Code section 63G-7-202(3)(c). Utah Code § 63G-7-202(3)(a). Subsection 3(c) permits claims in certain limited circumstances, including where "the employee acted or failed to act through fraud or willful misconduct." Utah Code § 63G-7-201(3)(c)(i). "Willful misconduct" is defined by the Act as "the intentional doing of a wrongful act, or the wrongful failure to act, without just cause or excuse, where the actor is aware that the actor's conduct will probably result in injury." Utah Code § 63G-7-102(10).

Kendall cannot show any willful misconduct on the part of Officer Olsen because entering a backyard to look for a missing child is not a "wrongful act" and it was not done "without just cause or excuse." Moreover, regardless of the limitations of the GIA, Kendall cannot establish essential elements of a trespass claim. To state a claim for trespass there must be a physical invasion of land without legal justification or privilege. *See Walker Drug Co. v. La Sal Oil Co*., 972 P.2d 1238, 1243 (Utah 1998) ("The essential element of trespass is physical invasion of the land"); *Mueller v. Allen*, 2005 UT App 477, ¶ 35, 128 P.3d 18 ("Conduct which would otherwise constitute a trespass is not a trespass if it is privileged"). Officer Olsen was lawfully on Kendall's property because he was looking for a missing three year old boy. *See supra* § I, A. Thus, Kendall cannot establish a claim for trespass or a claim that Officer Olsen negligently trespassed on his property, if a negligence trespass is even a claim.

2. Any Claim Against Salt Lake City for Trespass or Negligence Fails.

To the extent Kendall asserts claims against Salt Lake City for trespass and negligence for Officer Olsen's entry into Kendall's backyard those claims also fail. When a plaintiff asserts a claim against a government entity a court must engage in the following three-step analysis to

determine if the entity is immune from suit. First, determine whether the activity involved is a governmental function entitled to blanket immunity under section 63G-7-201(1) of the Utah Code. *See e.g., Thayer v. Washington County. Sch. Dist*., 2012 UT 31, ¶ 8, 285 P.3d 1142. Second, if the activity is a governmental function, determine whether any section of the GIA waives immunity for the activity at issue. *Id*. Third, if immunity has been waived for that activity, determine whether there is an exception to the waiver that preserves immunity. *Id*.

With respect to the first inquiry, it is indisputable that the performance of police duties, including responding to the report of a missing child, is a "governmental function" for which immunity applies. *See e.g., Rocky Mountain Thrift Stores, Inc. v. Salt Lake City Corp*., 784 P.2d 459, 462 (Utah 1989) (recognizing that police protection is a uniquely governmental function); *Condemarin v. Univ. Hosp*., 775 P.2d 348, 353 (Utah 1989) (recognizing law enforcement is a "core" or "essential" function of government.). With respect to the second and third inquiries, the GIA does not waive immunity for Kendall's claims for trespass or negligence.

Specifically, the GIA does not waive immunity for claims of trespass. Utah Code § 63G-7-301. Moreover, while the GIA does waive immunity for claims "as to any injury proximately caused by a negligent act or omission of an employee committed within the scope of employment," immunity is specifically retained if the "injury arises out of, in connection with, or results from . . . intentional trespass . . . or violation of civil rights." Utah Code § 63G-7-301(4) & (5)(b). In addition, Salt Lake City cannot be liable in trespass or negligence where Officer Olsen's entry onto the property was not trespass and was permitted by the Fourth Amendment. Thus, any claims against Salt Lake City for trespass or negligence for Officer Olsen's entry into the backyard fail.

II. OFFICER OLSEN AND SALT LAKE CITY ARE ENTITLED TO ENTRY OF JUDGMENT ON KENDALL'S CLAIMS BASED ON THE SEIZURE OF GEIST.

A. Officer Olsen is Entitled to Qualified Immunity on Kendall's Section 1983 Claims.

Officer Olsen is also entitled to qualified immunity on Kendall's claims based on the seizure of Geist. *See supra* § I, A, 1 *Element* & § I. A. Kendall cannot show the seizure violated a constitutional right because the undisputable facts show Officer Olsen's seizure of Geist was objectively reasonable. Similarly, Kendall's Fifth and Fourteenth Amendment due process and takings claims also fail because a seizure of a dog must be analyzed under the Fourth Amendment. Kendall also cannot show the seizure of a dog that is aggressive and presents an imminent threat of serious bodily injury violates a clearly established right.

1. Officer Olsen did not violate Kendall's Federal Constitutional Rights when he Seized Geist.

a. Officer Olsen's Seizure of Geist was objectively reasonable.

Officer Olsen did not violate Kendall's Fourth Amendment rights when he seized Geist because the seizure was objectively reasonable. "[E]very circuit that has considered the issue has held that the killing of a companion dog constitutes a 'seizure' within the meaning of the Fourth Amendment." *Powell v. Johnson*, 855 F. Supp. 2d 871, 875 (D. Minn. 2012). However, the Fourth Amendment only proscribes *unreasonable* seizures. *See Grant v. City of Houston*, 625 F. App'x 670, 675 (5th Cir. 2015) ("[s]eizures by law-enforcement officials violate the Fourth Amendment only if they are unreasonable.") To determine whether a seizure is reasonable, courts "look to the totality of the circumstances, balancing the 'nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing

governmental interests at stake.'" *Id*. (citing *Plumhoff v. Rickard*, 134 S.Ct. 2012, 2020 (2014) and quoting *Graham v. Conner*, 490 U.S. 386, 396 (1989)). Because the government "retains a strong interest in allowing law enforcement officers to protect themselves . . . from animal attacks," courts have uniformly recognized that "no unreasonable seizure may be found where an officer has killed a dog that posed an imminent threat." *Dziekan v. Gaynor*, 376 F.Supp.2d 267, 271 (D. Conn. 2005). *See also Bailey v. Schmidt*, 239 Fed. App'x 306, 308–09 (8th Cir. 2007) (killing of dogs not unreasonable where evidence showed they "either advanced on or acted aggressively toward the officers"); *Williams v. Voss*, Civ. No. 10–2092, 2011 WL 4340851, at *5 (D. Minn. Sept. 15, 2011) ("The common denominator for all cases holding that officers may seize an aggressive dog, and those that hold that officers may not seize a non-threatening dog, is officer safety.").

"As observed by the Supreme Court, '[t]he calculus of reasonableness must embody allowance for the fact that police officers are often 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.'" *Bateman v. Driggett,* No. 11-13142, 2012 WL 2564839, at *7 (E.D. Mich. July 2, 2012) (citation omitted). Thus, a court is not charged with determining whether the officer's response was the best possible response. *See e.g., Powell*, 855 F. Supp. 2d at 876 ("While [the officer] perhaps could have reacted differently . . . the Fourth Amendment does not allow this type of 'Monday morning quarterback' approach because it only requires that the seizure fall within a range of objective reasonableness."); *Hatch v. Grosinger*, No. CIV.01-1906(RHK/AJB), 2003 WL 1610778, at *5 (D. Minn. Mar. 3, 2003) (same). Rather, a court must "put itself into the shoes of the officer[] at the time the actions took place and [] ask

whether the actions taken by the officer[] were objectively unreasonable . . . under the circumstances existing at the time the officer[] took the actions and in light of the facts known by the officer[].” *Altman v. City of High Point*, N.C., 330 F.3d 194, 205 (4th Cir. 2003). Indeed, a mistaken (but objectively reasonable) perception of a threat from a dog will not give rise to liability. *Powell*, 855 F. Supp. 2d at 876 (“Even if [an officer] misperceived the threat posed by [the dog], police officers are not liable for bad guesses in gray areas; they are liable for transgressing bright lines.”) (citation and quotation omitted).

Courts uniformly find the seizure of a dog is objectively reasonable where, as here, an officer encounters an aggressive dog. For example, in *Bateman v. Driggett*, an officer went onto a property pursuant to a complaint from a neighbor about loud fireworks coming from the direction of the neighbor’s home. 2012 WL 2564839, at *1. No fireworks were going when the officer entered the property and the officer did not notice a “beware of the dog” sign on the gate. *Id.* When the officer was on the porch a pit bull charged directly at him. *Id.* at *2. The officer retreated down the driveway with the dog chasing him and growling. *Id.* When the officer saw the dog closing in on him, lunging and trying to bite, he shot the dog. *Id.* Construing the evidence in the light most favorable to the plaintiff, the court found the seizure of the dog objectively reasonable because the events occurred in rapid succession, the officer was not familiar with the property, the officer did not see the “beware of the dog” sign posted on the gate, and the officer was not aware there was an unrestrained dog on the property. *Id.* at * 8.

Similarly, in *Esterson v. Broward Cty. Sheriff’s Dep’t*, No. 09-60280-CIV, 2010 WL 4614725 (S.D. Fla. Nov. 4, 2010) the court found an officer’s action in shooting an 80 pound Dalmatian was objectively reasonable. The officer was called to the property pursuant to an

anonymous complaint about an ongoing problem with a barking dog. *Id* at *1. After being called to the property the officer was confronted by the dog, which had "a territorial bark" and "charged" at her. *Id*. The officer felt at risk of serious injury, was unable to retreat, and shot the dog. *Id.* The court found her actions objectively reasonable because she was confronted by "an aggressive dog with a territorial bark . . . [and] [a]t that moment, felt her life was threatened." *Id.* at **3-4.

In *McCarthy v. Kootenai Cty*., No. CV08-294-N-EJL, 2009 WL 3823106 at *1 (D. Idaho Nov. 12, 2009) an officer entered the plaintiff's property to serve the plaintiff with legal process and encountered plaintiff's dogs. The dogs charged toward the officer growling and barking. *Id.* at *1. The court found the officer's actions in shooting one of the dogs, a German Shepherd, objectively reasonable because "[t]he officer indicated that he felt threatened by the two attacking dogs and his verbal commands did not cause the dogs to stop attacking." *Id.* at *6. These are just a few of the numerous cases where a court has found an officer's seizing of an aggressive dog objectively reasonable.[7]

[7] *See e.g., Warboys v. Proulx*, 303 F.Supp.2d 111, 117–18 (D. Conn. 2004) ("[a]n officer who encounters a 90 to 100 pound pit bull dog-a dog which is demonstrably not able to be restrained by its owner or guardian and which is approaching the officer at a rate of 6 feet per second and is at a distance of no more than ten feet-does not act unreasonably in shooting the dog to protect himself and his canine companion."); *Dziekan v. Gaynor*, 376 F. Supp. 2d 267, 272 (D. Conn. 2005) (holding officer could have reasonably assumed the dog posed an imminent threat to his safety because it was approaching at a fast pace and shooting dog was reasonable because "the law does not require the officer to wait until the approaching animal is within biting distance or is leaping at him before taking protective action."); *Birkes v. Tillamook Cty*., No. 09-CV-1084-AC, 2011 WL 1792135, at *6 (D. Or. May 10, 2011) (finding shooting of pit bull reasonable where owners failed to restrain him and the pit bull "came at" officer"); *Stephenson v. McClelland*, 632 F. App'x 177, 185 (5th Cir. 2015) (finding actions of officer in shooting a dog were reasonable where he was startled by a large dog showing its teeth (whether baring them aggressively or "smiling") and officer was forced to make a split-second decision and acted to protect himself); *Pettit v. New Jersey*, No. CIV. A. 09-CV-3735 N, 2011 WL 1325614, at *6 (D.N.J. Mar. 30, 2011) (finding shooting of dog reasonable when officer went onto property to talk to plaintiff about potential criminal mischief charge and was attacked by a German shepherd that ignored commands to

Officer Olsen was in Kendall's backyard when he encountered Geist. *See* § II, A, 2. *Material Facts,* ¶¶ 1-36. Geist was a large Weimariner that weighed more than 100 pounds. *Id.*, ¶ 5. Geist was approximately 20-25 feet away when Officer Olsen first saw him. *Id.*,¶ 4. Geist charged at Officer Olsen in an extremely aggressive fashion. *Id.*, ¶ 6. He was growling and barking, his ears were back, and his teeth were bared. *Id.*, ¶ 7. He had the same demeanor as the police canine in the picture submitted with this motion. *Id.,* ¶¶ 8-11. On seeing Geist, Officer Olsen first attempted to retreat. *Id.,* ¶ 12. Realizing he did not have time to exit the yard before Geist reached him and attacked, Officer Olsen tried standing his ground and taking a more dominant stance, broadening his shoulders and stomping his foot, in an attempt to "call Geist's bluff." *Id.,* ¶ 13. This did not deter Geist and he continued to charge towards Officer Olsen growling, barking and baring his teeth. *Id.,* ¶ 14. In the few seconds Officer Olsen had to react, he briefly considered using a taser, but realized this would not be effective given the small surface area of a head on charging dog. *Id.,* ¶ 15. When Geist was within four or five feet of Officer Olsen, believing he was in imminent danger of attack and serious bodily injury, Officer Olsen used his service weapon and fired two rounds at Geist. *Id.,* ¶ 16.

The testimony of Officer Olsen is the only testimony that is relevant in determining if the seizure of Geist was objectively reasonable because he was the only person present when Geist attacked. *See e.g., Bateman*, 2012 WL 2564839 at *8 (finding testimony of dog owner and

"stop" and "heel" and "leaped aggressively" at officer); *Powell v. Johnson*, 855 F. Supp. 2d 871, 876 (D. Minn. 2012) ("finding it was not unreasonable for an officer to perceive a threat to his safety from a large, unleashed pit bull 'jogging' up behind him with its teeth bared."); *Grant v. City of Houston*, 625 F. App'x 670, 672 (5th Cir. 2015) (finding it reasonable for officer to shoot dog he encountered in garage while executing search warrant because the mixed bred dog charged towards the officer's legs, "snapping its teeth and turning its head sideways so that it could bite [his] leg."); *Hatch v. Grosinger*, No. CIV.01-1906(RHK/AJB), 2003 WL 1610778, at *5 (D. Minn. Mar. 3, 2003) (finding shooting of dog reasonable where "dog, without restraint or owners in sight, made an aggressive charge which all three deputies in the yard regarded as an immediate threat to their personal safety.")

friends that "it was not in the dog's nature to be aggressive" did not create a disputed issue of fact because the owner and friends "did not see and thus could not dispute [the officer's] testimony that the dog charged and chased him in an aggressive manner"); *McCarthy*, 2009 WL 3823106, at *6 (same). It is notable, however, that Officer Olsen's testimony is corroborated by other police officers that were canvassing the neighborhood and another resident that recalls seeing Geist shortly before he was shot. They all reported that Geist was extremely aggressive. *See* § II, A, 2. *Material Facts* ¶¶ 22-36. The undisputed facts show it was reasonable for Officer Olsen to seize Geist. Kendall cannot show otherwise.

b. The Fifth and Fourteenth Amendments are not applicable.

Any claim Kendall asserts for violation of substantive due process under the Fifth or the Fourteenth amendments fails. It is well established that the due process clause of the Fifth Amendment applies only to the federal government. *See Lee v. City of Los Angeles*, 250 F.3d 668, 687 (9th Cir. 2001) ("The Due Process Clause of the Fifth Amendment . . . [applies] only to actions of the federal government — not to those of state or local governments.") It is also well established that a plaintiff may not advance a substantive due process claim under the Fourteenth amendment when a more specific constitutional provision applies. *See e.g., Dziekan*, 376 F. Supp. 2d at 270 (citing *Albright v. Oliver*, 510 U.S. 266, 273, (1994)) ("Where a constitutional amendment provides an explicit textual source of protection against certain government misconduct, that amendment is the guide for analysis of the claim rather than the generalized notion of substantive due process."). "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." *Id*. Thus, Kendall's seizure claim must be analyzed

under the Fourth Amendment only. *See e.g., Bateman*, 2012 WL 2564839, at *7 ("To the extent Plaintiff's complaint asserts a Fourteenth Amendment substantive due process claim based on [the officer's] shooting of his dog, that claim is dismissed because the Fourth Amendment provides an explicit source of protection against the alleged civil rights violation.").

Any claim that Officer Olsen's seizure of Geist amounts to a taking in violation of the Fifth Amendment fails for similar reasons. Not every invasion of private property arising from government activity gives rise to a takings claim. *See e.g., Simmons v. Loose*, 13 A.3d 366, 389 (App. Div. 2011) (holding the execution of the search warrant was not a taking because the property was not put to any productive use by the government.). Property owners, even innocent ones, are not entitled to just compensation under the Takings Clause when property damage occurs as a result of the execution of a lawful search or seizure. *See e.g., Chumley v. Miami Cty*., Ohio, No. 3:14-CV-16, 2015 WL 859570, at *10 (S.D. Ohio Feb. 27, 2015) (finding Takings Clause inapplicable to claims for compensation for damage to personal property during the course of a lawful search, and analyzing potential claim under the Fourth Amendment); *Simmons*, 13 A.3d at 389 (finding Takings Clause policies inapplicable to claims for damage during execution of search warrant); *AmeriSource Corp. v. United States*, 525 F.3d 1149, 1153 (Fed. Cir. 2008) (dismissing Fifth Amendment takings claim for government's lawful seizure of pharmaceutical drugs retained as evidence in criminal proceedings). Thus, Kendall cannot show the seizure of Geist violated his rights under the Fifth or the Fourteenth Amendments.

2. Officer Olsen's Seizure of Geist did not Violate a Clearly Established Constitutional Right.

Kendall also cannot satisfy the second prong of the qualified immunity analysis and show Officer Olsen's seizure of Geist violated a clearly established constitutional right. *See supra* § I,

A, 2 for applicable legal standard. No Supreme Court or Tenth Circuit decision finds the seizure of an aggressive dog that presents an imminent threat of harm to an officer or a third party violates the owner's constitutional rights. To the contrary, the clearly established weight of authority finds seizure of dogs in such circumstances reasonable. *See supra* § II, A, 2, i. Accordingly, Kendall cannot satisfy the second prong of the qualified immunity test and judgment should be entered for Officer Olsen on Kendall's claim that Officer Olsen violated his Fourth, Fifth and Fourteenth Amendment rights when he seized Geist.

B. Salt Lake City is Entitled to Entry of Judgment on Kendall's 1983 Claim.

Salt Lake City is also entitled judgment on Kendall's section 1983 claim against Salt Lake City for the seizure of Geist because no constitutional violation is shown. *See supra.* § I, B.

C. Officer Olsen and Salt Lake City are Entitled to Entry of Judgment on Kendall's State Constitutional Claims.

Officer Olsen and Salt Lake City are entitled to entry of judgment on Kendall's state constitutional claims because Officer Olsen's seizure of Geist was not a flagrant violation of rights. Kendall's third, fourth, fifth and sixth claims for relief assert the seizure of Geist violated his rights under the Utah Constitution, article I, sections 7 and 14. To establish these claims, Kendall must show a "flagrant violation" of constitutional rights. *See supra* § I, C, 1. *Elements* & § I, C. Like the Fifth and Fourteenth Amendments to the United States Constitution, article I, section 7 of the Utah Constitution states that "[n]o person shall be deprived of life, liberty or property, without due process of law." Utah Const. Art. I, § 7. The Supreme Court of the Territory of Utah found no violation of this provision where the destruction of a dog was otherwise authorized by law. *Jenkins v. Ballantyne*, 8 Utah 245, 30 P. 760, 761 (1892). Like the plaintiff in *Jenkins*, Kendall can show no flagrant violation of his rights because the seizure of

Geist was otherwise authorized by law. *See supra* § II, A, 1, i.

Similarly, Kendall cannot show the seizure of Geist was a flagrant violation of his rights under article I, section 14 of the Utah Constitution. As set forth in detail above, Utah courts endeavor toward uniformity in the application of article I, section 14 of the Utah Constitution and the Fourth Amendment of United States Constitution. *See supra* § I, B. Thus, Kendall cannot show the seizure of Geist was a flagrant violation of his rights under article I, section 14 of the Utah Constitution because the seizure was reasonable and did not a violate the Fourth Amendment of the United States Constitution.

D. Officer Olsen and Salt Lake City are Entitled to Entry of Judgment on Kendall's Claims for Conversion, Trespass to Chattel, Negligence and Intentional Infliction of Emotional Distress.

1. Kendall's Claims Against Officer Olsen for Trespass to Chattel, Conversion, Negligence and Intentional Infliction of Emotional Distress Fail.

Officer Olsen is entitled to entry of judgment on Kendall's trespass to chattel, conversion, negligence and intentional infliction of emotional distress claims against Officer Olsen because Kendall cannot show the seizure of Geist was willful misconduct. Claims against a government employee for actions taken in the scope of their employment are limited to claims of fraud or willful misconduct. *See supra* § I, D, 1. "Willful misconduct" is defined by the Act as "the intentional doing of a wrongful act, or the wrongful failure to act, without just cause or excuse, where the actor is aware that the actor's conduct will probably result in injury." Utah Code § 63G-7-102(10). Kendall cannot show any willful misconduct on the part of Officer Olsen because seizing Geist was not a "wrongful act" and it was not done "without just cause or excuse." Geist attacked Officer Olsen and it was reasonable for Officer Olsen to seize Geist.

See supra § II, A, 1, i.

Kendall also cannot establish necessary elements of his trespass to chattel, conversion or intentional infliction of emotion distress claims. An essential element of a conversion or trespass to chattel claim is that property was taken without legal justification. *See Walker v. Union Pac. R.R. Co*., 844 P.2d 335, 343 n.9 (Utah Ct. App. 1992) (stating "the doctrine of trespass to chattels has fallen into general disuse," but requires an allegation of a "trespassatory action."); *Jones & Trevor Mktg., Inc. v. Lowry*, 2010 UT App 113 ¶ 15, n.13, 233 P.3d 538 ("[t]o prove conversion, a party must establish an act of willful interference with property, done without lawful justification"). Kendall cannot show Officer Olsen acted without legal justification because it was reasonable for Officer Olsen to seize Geist. *See supra* § II, A.1. *See also Perez v. City of Placerville*, 2008 WL 4279386 (E.D. Cal. 2008) (dismissing claims for conversion and trespass to chattel for shooting of dog because officer was privileged on grounds of self defense.).

Likewise, to establish a claim for intentional infliction of emotional distress, Kendall must show "the defendant intentionally engaged in some conduct toward the plaintiff, (a) with the purpose of inflicting emotional distress, or, (b) where any reasonable person would have known that such would result; and his actions are of such a nature as to be considered outrageous and intolerable in that they offend against the generally accepted standards of decency and morality." *Bennett v. Jones, Waldo, Holbrook & McDonough*, 2003 UT 9, ¶ 58, 70 P.3d 17. Utah courts hold plaintiffs to a high standard in establishing such claims. *See e.g., id.*, ¶ 59 ("Due to the highly subjective and volatile nature of emotional distress and the variability of its causations, the courts have historically been wary of dangers in opening the door to recovery therefore. This is partly because such claims may easily be fabricated: or as sometimes stated,

are easy to assert and hard to defend against."). Likewise, with limited exception, a claim for intentional infliction of emotional distress may only lie for conduct that occurs within the presence of the plaintiff. *Hatch v. Davis*, 2006 UT 44, ¶ 31, 147 P.3d 383. The "presence" rule is accepted as a "prudential check on a tort that the law has rightfully singled out for strict management, because of the fear of fictitious or trivial claims, distrust of the proof offered, and the difficulty of setting up any satisfactory boundaries to liability." *Id.* at ¶ 28 (citations omitted)

Kendall's intentional infliction of emotion distress claim fails because he was not present when Geist was seized. Likewise, outrageous conduct cannot be shown where, as here, an officer shoots a dog to protect himself or others from attack by that dog. *See e.g., Perez*, 2008 WL 4279386, at *10 ("While the death of plaintiff's beloved dog was a tragedy, the undisputed evidence is that [the officer] killed [the dog] in defense of a fellow officer and police canine who were being attacked by the dog."). Finally, Kendall cannot show Officer Olsen seized Geist with the intent of causing Kendall severe emotional harm because the undisputed evidence is that Officer Olsen seized Geist to protect himself from being attacked by Geist. *See e.g., id.* (finding no evidence to support claim of severe emotional distress when officer shot dog because "[the officer] shot [the dog] in order to protect [other officers].") Kendall cannot establish a claim for intentional infliction of emotional distress.

2. Any Claim Against Salt Lake City for Trespass to Chattel, Conversion, Negligence and Intentional Infliction of Emotional Distress Fails.

To the extent Kendall asserts claims against Salt Lake City for trespass to chattel, conversion, negligence or intentional inflictions of emotional distress for Officer Olsen's seizure of Geist those claims also fail. Applying the three-step analysis (described above), Salt Lake City is immune from suit. The GIA does not waive immunity for claims of trespass to chattel,

conversion, or intentional infliction of emotional distress. Utah Code § 63G-7-301. Moreover, while the GIA does waive immunity for claims "as to any injury proximately caused by a negligent act or omission of an employee committed within the scope of employment," immunity is specifically retained if the "injury arises out of, in connection with, or results from . . . infliction of mental anguish, or violation of civil rights." Utah Code § 63G-7-301(4) & (5)(b). In addition, Salt Lake City cannot be liable in trespass to chattel, conversion, negligence or intentional infliction of emotional distress where Officer Olsen's seizure of Geist was reasonable and not a violation of the Fourth Amendment.

III. LT. PURVIS IS ENTITLED TO JUDGMENT ON KENDALL'S CLAIMS AGAINST LT. PURVIS.

Kendall's first, third, fifth, seventh, eighth, ninth and eleventh claims for relief assert claims against Lt. Purvis. All of the claims against Lt. Purvis rest entirely on a finding that Officer Olsen violated Kendall's federal or state constitutional rights or state law when he entered Kendall's backyard to look for the missing boy and when he seized Geist. As set forth in detail above, Kendall's claims against Officer Olsen fail. Accordingly, Kendall cannot establish a claim against Lt. Purvis for the same conduct.[8]

CONCLUSION

Based on the foregoing, judgment should be entered for Officer Olsen, Lt. Purvis and Salt Lake City Corporation on Kendall's first, second, third, fourth, fifth, sixth, seventh, eighth, ninth, tenth, eleventh and fourteenth claims for relief.[9]

[8] Kendall's seventh, eighth, ninth and eleventh claims for relief also fail to state a claim against Lt. Purvis and are barred by the GIA, as set forth in a Motion for Judgment on the Pleadings on file with the court. *See* Dkt. 17.

[9] *See supra* n.8. Kendall's thirteenth claim for relief against Salt Lake City and his twelfth claim for relief

DATED this 13th day of July, 2016.

/s/ Samantha J. Slark
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Attorney for Defendants

against Officers Everett, Edmundson and Pregman also fail to state claims for relief, as set forth in motions for judgment on the pleadings currently pending before the court. *See* Dkts. 18 and 19.

CERTIFICATE OF SERVICE

I hereby certify that on the 13th day of July, 2016, a true and correct copy of **MOTION FOR SUMMARY JUDGMENT AND MEMORANDUM IN SUPPORT** was electronically filed with the Court using the CM/ECF system, which sent notice to the following:

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