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

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Other Authorities

INTRODUCTION

Plaintiff Sean Kendall ("Kendall") has brought this action against Brian Purvis ("Purvis"), Brett Olsen ("Olsen"), and Salt Lake City Corporation ("the City"), *inter alia,* for their actions—and in the case of the City, its inaction—that led to the brutal, senseless killing by Olsen of Kendall's beloved, smart, playful, kind, harmless Weimaraner dog, Geist. As governmental agents involved in a search for a missing boy, Olsen and Purvis abused their power and positions with the Salt Lake City Police Department ("SLCPD") by ignoring and violating the clearly established restrictions imposed upon government and governmental agents under state and federal constitutional prohibitions against unreasonable searches and seizures—prohibitions that are fundamental to a free society.

Kendall withdraws his claims for violations of the due process clauses of the United States and Utah Constitutions and for violation of the Inherent and Inalienable Rights Clause (Article I, Section 1) of the Utah Constitution.[1] Such claims are more appropriately analyzed under the federal and state constitutional provisions forbidding unreasonable searches and seizures.[2]

Summary judgment[3] in favor of Olsen, Purvis, and the City (collectively, "Movants") under Kendall's First, Second, Third, Fourth, Seventh, Eighth, Ninth, Tenth, Eleventh, and Fourteenth claims must be denied because:

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[1] Kendall stipulates to the following deletions from his Amended Complaint: (1) Delete the second sentence of paragraph 32; (2) delete the words "and Fifth" and delete the "s" in "Amendments" in paragraph 40; (3) delete the Fifth Claim for Relief; and (4) delete the Sixth Claim for Relief.

[2] The federal constitutional prohibition against unreasonable searches and seizures is the Fourth Amendment to the United States Constitution, made applicable to the states by the Fourteenth Amendment. The similar Utah constitutional prohibition is Article I, Section 14 of the Utah Constitution.

[3] Although no motion has been filed or set forth in the document entitled "Motion for Summary Judgment and Memorandum in Support," it is apparent from the Conclusion in that document, at

1. Purvis instructed police officers, including Olsen, to engage in searches of homes and the curtilages of homes, without warrants, without consent, and without there being any belief, or reason to believe, there was any connection between the properties to be searched and the supposedly missing boy.
2. Olsen unconstitutionally entered Kendall's backyard, wandered around the yard, opened and searched a shed, and killed Geist, Kendall's beloved Weimaraner dog (a) without a warrant, (b) without consent, (c) without any belief, or reason to believe, there was any connection between the curtilage of Kendall's home and the supposedly missing boy, (d) without taking any reasonable measures to determine if a dog was in the yard, (e) without planning what could be done to deal with Geist without using unnecessary lethal force, (f) without acting reasonably upon learning Geist was in the backyard, and (g) without using reasonable non-lethal alternatives in Olsen's interaction with Geist.
3. Without a warrant, without consent, and without any reasonable justification, Olsen unconstitutionally seized Geist by unnecessarily shooting and killing him. Any exigency claimed by Olsen was a product of his own wrongful actions in (a) unconstitutionally entering the backyard where Geist lived, and (b) provoking Geist to run after him by senselessly running away from Geist simply because Geist was doing what harmless dogs do when someone behaves as Olsen did.

45, that Defendants Olsen, Purvis, and Salt Lake City Corporation are asserting entitlement to summary judgment under the First through Eleventh and Fourteenth Claims for Relief in Kendall's Amended Complaint.

4. Olsen and Purvis are not protected by qualified immunity from accountability for their unconstitutional conduct. The law was clearly established at the time of Purvis's unconstitutional instructions and Olsen's unconstitutional search and seizure that (1) regardless of the label used by police officers, a search for a missing person in a place where there is a reasonable expectation of privacy, particularly a home, is a "search" within the meaning of the constitutional prohibitions against unreasonable searches; (2) a warrant is required for a search or seizure by a police officer, except when very narrow exceptions, not applicable to this matter, apply; (3) the perception that a child is missing does not give police carte blanche to search homes and curtilages without a warrant and without consent wherever they believe the child could possibly have traveled and wherever they believe the child could possibly have had access; (4) to constitutionally search for a missing person in a home or curtilage, without a warrant and without consent, a police officer must have reasonable cause to believe there is a connection between the particular property to be searched and the emergency giving rise to the need for a search; and (5) a police officer seeking to justify a warrantless search by invoking "exigent circumstances" cannot escape liability for the unconstitutional search if he/she created the exigency, as Olsen did with respect to his brutal killing of Geist.

5. The constitutionally erroneous search policy of, and the complete absence of training with respect to police interactions with pet dogs by, the SLCPD (for which Salt Lake City Corporation is responsible) contributed to and were causal factors in the outrageous killing of Geist. One written policy of the SLCPD virtually invites police

officers to engage in warrantless, unconstitutional searches by providing that "An officer may enter a home or building without a warrant when the following exigent circumstances exist: . . . Imminent danger or risk of harm to police officers and others." That policy and direction severely misstates the exigent circumstances exception to the warrant requirement of the Fourth Amendment by omitting the crucial factor that there must be a reasonable belief that the person at risk is in or on the premises to be searched or that the particular property to be searched has a connection to the perceived emergency that would lead one to reasonably believe that an immediate, warrantless search of that specific property is necessary.

6. Article I, section 14 of the Utah Constitution, which prohibits unreasonable, warrantless searches and seizures, provides at least the same protections as the Fourth Amendment of the United States Constitution and, inasmuch as the Utah constitutional provision is self-executing, monetary damages are an appropriate remedy for a violation of it.

7. Olsen is liable to Kendall for trespass because he entered Kendall's property without legal justification. Purvis is liable to Kendall for trespass because he caused Olsen to enter Kendall's property without legal justification.

8. Olsen is liable to Kendall for trespass to chattels because Olsen knowingly and willfully dispossessed Kendall of Geist and his companionship by wrongfully shooting and killing Geist.

9. Olsen is liable to Kendall for conversion because Olsen knowingly and willfully interfered with Geist, Kendall's property, when Olsen took possession and control of

Geist by intentionally killing him, thereby depriving Kendall of the use, enjoyment, and possession of Geist.

10. Pursuant to the Governmental Immunity Act of Utah, Salt Lake City is liable for the negligence of its officers and agents, including negligence during the course of a search, negligence in the promulgation of legally erroneous policies and the failure to promulgate any policy regarding police interactions with domestic pets, and negligence in failing to adequately train officers to avoid harming or killing pet dogs.

BACKGROUND STATEMENT OF FACTS

On June 18, 2014,[4] Elise Horman called 911 and reported her son, K.H., was missing.[5] K.H., who was two or three years old,[6] was actually asleep on the floor of the family room in the basement of his family's home and would have been in full view if anyone, including police officers, had simply walked around the room and moved some of the clutter, including an empty box.[7] The negligent failure of the officers charged with searching the house to find K.H., which

[4] The search for K.H. and the killing of Geist occurred on June 18, 2014. *See* Deposition of Joseph A. Everett ("Everett Depo."), excerpts of which are Exhibit "1" to the Declaration of Ross C. Anderson ("Anderson Decl."), Exhibit "A" hereto, 6:9–14; Deposition of Brett W. Olsen ("Olsen Depo."), excerpts of which are Exhibit "2" to Anderson Decl., 47:5–9.

[5] Deposition of Elise Horman ("Horman Depo."), excerpts of which are Exhibit "3" to Anderson Decl., 18:14–19.

[6] At her deposition on July 6, 2016 (just over two years since the search for the boy and the killing of Geist), K.H.'s mother, Elise Horman, stated he was, at the time of the deposition, four years of age. Horman Depo., 3:24–4:2. Joseph Everett ("Everett") said he was two or three years old. Everett Depo., 11:8–9. Olsen said he was three years-old. Olsen Depo., 45:9; Exhibit "1" to Olsen Depo., page 3 of 18, dated June 18, 2014 ("While assisting in the search for a 3-year-old boy, I shot and killed a dog at the listed address."); Exhibit "6" to Olsen Depo. ("This is a picture of [redacted] (3 years old) who went missing from 2511 South Fillmore at 3:15 today.")

[7] Deposition of Daniel Glen Davis ("Davis Depo"), excerpts of which are Exhibit "4" to Anderson Decl., 27:19–30:21.

led to many officers being called to conduct a neighborhood search, "is a very sore subject" for Olsen.[8]

Olsen, who participated with other SLCPD officers in a neighborhood search for K.H., was told by the Watch Commander, Lieutenant Purvis[9] to look "everywhere" they could for the boy.[10] Olsen understood Purvis to mean that he and other officers were to look "inside homes" and "inside enclosed yards," "[b]ased on consent or exigency or whatever."[11] Purvis expected that the officers he supervised would enter yards if they could not see the entire yard, even though there was no warrant, no consent, and no connection between the specific property and the perceived emergency.[12]

During the course of their search of the neighborhood, Olsen, along with Officer Gordon Worsencroft ("Worsencroft"),[13] went to the home of Kendall,[14] which was approximately .133 (or

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[8] A: Yeah. I – that's what I heard after. Mr. Anderson, this is a very sore subject for me. I'm not very happy with how the search was conducted and so, yeah, I heard later and it only – sore subject with me.
Q: Because none of this happened – would have happened with Geist had it not been for the negligent search?
A: Correct.

Olsen Depo., 103:18–104:1.

[9] Olsen Depo., 48:22–49:2.

[10] Olsen Depo., 55:25–56:8.

[11] Olsen Depo., 56:2–13, 112:23–114:8. *See also* Deposition of Gordon Worsencroft ("Worsencroft Depo."), excerpts of which are Exhibit "5" to Anderson Decl., 24:19–25:4:
Q: And was it also your expectation or your understanding that you were to enter people's yards?
A: If there was access to the backyard, yes, if we could check it and clear it, yes.
Q: Even without a warrant, even without permission?
A: Correct."

[12] Deposition of Brian Purvis ("Purvis Depo."), excerpts of which are Exhibit "6" to Anderson Decl., 73:23–74:21.

[13] Worsencroft Depo., 19:20–20:5.

[14] Olsen Depo., 67:22–68:4.

over 1/8) miles (about 10 houses away) from the Horman home.[15]

Without a warrant, without consent, and without having any reason to believe there was any connection between Kendall's backyard and K.H. or the circumstances of his supposed disappearance,[16] Olsen opened the latch on a gate handle, opened and walked through the gate, walked around Kendall's backyard, and opened the door to, and looked inside, a shed in Kendall's backyard.[17] His only after-the-fact explanations for engaging in a warrantless, non-consensual search of the curtilage of Kendall's home, are that (1) when looking for a missing person, "that's not really a search"[18] and (2) K.H. could have traveled to Kendall's home and entered the backyard, just as he could have travelled to and entered every other home in the general area.[19]

After Olsen unconstitutionally entered Kendall's backyard, without a warrant, without consent, without taking measures known by Olsen[20] to see if a dog were present in the yard,[21] and

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[15] *See* Motion for Summary Judgment and Memorandum in Support ("Movants' Memorandum"), at 7 n. 3. *See also* Declaration of Sean Kendall ("Kendall Declaration") attached hereto as Exhibit "B", ¶¶ 3–12.

[16] Olsen Depo., 75:1–76:24.

[17] Olsen Depo., 80:22–24, 84:1–87:3, 114:9–10,18–23; Exhibit "12".

[18] Olsen Depo., 8:5–22, 9:10–15 ("Q: And if it's a noncriminal matter like a missing person? A: Well, that's not really a search. That's more of a canvas. . . . Q: Then tell me what you mean by 'canvas' in connection with whether you need a warrant or not. A: In relation to this particular case, a canvas meant that we were going to look anywhere a small child could reasonably be or reasonably have been taken.")

[19] 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.

Olsen Depo. 90:4–9. *See also* Olsen Depo., 76:9–24.

[20] Olsen Depo., 24:11–26:5.

[21] Olsen Depo., 29:17–22, 87:19–21.

without even waiting to see if Worsencroft could obtain consent,[22] Olsen opened the gate, walked around the yard, opened a shed door, searched the shed, then closed the shed door.[23] At that point, Geist barked, [24] as dogs generally, and Weimaraners specifically, do, naturally and harmlessly.[25] Then Olsen ran.[26] Only then, after Olsen started running, Geist ran toward Olsen.[27] Again, that is what dogs generally, and Weimaraners specifically, do, naturally and harmlessly.[28] Unless

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[22] A: And I knocked, nothing, knocked again, then I heard a growling or a bark, and then I heard two shots from a gun.

Worsencroft Depo., 38:3–5.

> Q: And you'd knocked either once or twice when you heard the dog bark and the shots fired, correct?
> A: Yes. Yes.
> Q: So Officer Olsen had actually entered the backyard before you had an opportunity to speak to someone, if someone was, in fact, in the house?
> A: Yes.

Worsencroft Depo., 57:1–7.

[23] Olsen Depo., 84:1–3, 85:6–86:18, 114:9–10, 18–23; Exhibit "12".

[24] Olsen Depo., 86:8-23.

[25] Declaration of Heather Beck ("Beck Decl."), Exhibit "C" hereto, ¶¶ 6–7, 12, 18–23; Declaration of Julianne Brooks ("Brooks Decl."), Exhibit "D" hereto, ¶¶ 5–6, 11; Declaration of Shea Kendall ("Shea Decl."), Exhibit E hereto, ¶¶ 5, 11.

[26] Olsen Depo., 86:18–87:5.

[27] A: When I pushed it closed, that's when **I started hearing Geist, and it started barking** very angrily, and so **I thought there is a dog back there and so I started going around here as fast as I could.** I wanted to get out of the backyard.
Q: Where did you go?
A: **I started running up this way**. It was kind of a sideways run because I wanted to keep an eye on what was coming, and I attempted to go through underneath this to get out of this gate.
Q: So – you were running away from the dog?
A: Yes. I started to.
Q: Did you ever learn that's a good way to keep a dog from coming after you?
A: It's just instinct. **So as he started charging at me, that's when I stopped.**

Olsen Depo., 86:18–87:11 (emphasis added).

[28] Beck Decl., ¶¶ 9–16; Brooks Decl., ¶¶ 7, 10, 13; Shea Decl., ¶ 7.

cornered or otherwise restrained in their freedom of movement, they are all bark and no bite.[29]

Only because of Olsen's unreasonable and unfounded fear, and being far too ready to draw his gun and kill Geist, he cavalierly, unnecessarily, and unreasonably pulled out his gun (even though he had a police baton,[30] which he never considered using,[31] and was presumably wearing sturdy police footwear that would have aided Olsen if he had simply blocked or kicked Geist) and shot Geist dead. Even if there were exigent circumstances for the seizure of Geist—which there were not[32]—any exigency that may have occurred was created by Olsen's own wrongful conduct. That supposed exigency—which Olsen erroneously and unreasonably thinks existed because a dog barked at him when Olsen invaded the dog's yard, ran toward Olsen after Olsen began running, and had, according to Olsen's account, a "mean demeanor,"[33]—would have been entirely avoided had Olsen not unconstitutionally entered and searched the curtilage of Kendall's home (*i.e.,* Geist's home) and had Olsen not carelessly and unreasonably started running when he first heard Geist's bark.[34]

The SLCPD written policy relating to searches without warrants because of "exigent circumstances" is woefully erroneous and dangerously misleading insofar as it says nothing about any requirement that there be reasonable cause to believe there is a nexus between the particular property to be searched and the emergency situation giving rise to the need to search without a

[29] Beck Decl., ¶ 24; Brooks Decl., ¶ 6.
[30] Olsen Depo., 26:8–12.
[31] Transcript of Internal Affairs Interview of Brett Olsen ("Olsen Interview"), Exhibit "1" to Declaration of Linda Nelford, Exhibit "F" hereto, 9:18–19.
[32] Beck Decl., ¶¶ 3–8, 12–23, 26, 30; Brooks Decl., ¶¶ 5–7, 10–13.
[33] Olsen Depo., 91:1–3, 91:22–23, 92:1–93:10.
[34] Beck Decl., ¶ 9–12, 14–16.

warrant.[35]

Also, the SLCPD had never provided any training or provided any policies to police officers regarding how to deal with dogs and refrain from harming or killing them.[36] Since Geist was killed, the training by the SLCPD includes the following teaching regarding interactions with dogs: "Always not to run, for sure, and to stand firm and see if the dog will back away from you."[37]

KENDALL'S RESPONSE TO STATEMENT OF ELEMENTS AND UNDISPUTED MATERIAL FACTS

The Rules of Practice of the United States District Court for the District of Utah ("Rules of Practice") provide standards for lawyers, many of which are to make proceedings more orderly and helpful to all concerned, including the Court, in moving matters toward an efficient resolution. The Rules of Practice under DUCivR 56-1 state specifically what is expected in memoranda in support of and opposition to motions for summary judgment. Those rules require the movant to set forth "each legal element required to prevail on the motion," DUCivR 56-1(b)(2)(A), "[c]itation to legal authority supporting each stated element (without argument)," DUCivR. 56-1(b)(2)(B), and "[u]nder *each* element, a concise statement of the material facts necessary to meet that element as to which the moving party contends no genuine issue exists." DUCivR 56-1(b)(2)(C) (emphasis added). Those rules are intended to "distil the relevant legal issues and material facts for the court while reserving arguments for the respective argument sections of the motion and opposition memorandum." Advisory Committee Note, DUCivR 56-1. They are also obviously intended to

[35] Worsencroft Depo., 81:19–83:5; Exhibit "3". Worsencroft made clear that the SLCPD written policy has misled him about the constitutional requirement of searching without a warrant on the basis of exigent circumstances. Worsencroft Depo., 84:4–85:16.
[36] Worsencroft Depo., 71:5–10; Deposition of Charles Thomas Edmundson, ("Edmundson Depo."), excerpts of which are Exhibit "7" to Anderson Decl., 8:17–20.
[37] Edmundson Depo., 10:9–11:1.

create an orderly format the parties and the Court can follow to address each element separately and the underlying facts relating to each element. Without compliance by the moving party, the requirements of DUCivR 56-1(c)(2) for the party opposing the motion for summary judgment are made extremely difficult, if not impossible, to follow.

Instead of setting forth *each* legal element required to prevail on the motion, the Movants have provided sprawling, disorderly narratives and case quotations—almost three pages for the supposed "elements" of qualified immunity alone[38]—mixing together a hodge-podge of combinations of all elements (sometimes repetitiously), various case quotations and citations that do not address the element, and argument. The manner in which the Movants have presented the "Statement of Elements and Material Facts," which is incredibly confusing, makes it extremely awkward and unnecessarily cumbersome—actually nearly impossible—for Kendall to meet his obligation to respond to "*each* legal element stated by the moving party" and the material facts necessary to meet *each* element.

The following constitutes the best effort of Kendall's counsel to ferret out *each* of the "elements" from what has been chaotically presented by the Movants and to comply with DUCivR 56-1(c)(2), following the order of presentation by the Movants.

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

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

1. Movants' Statement of Elements and Kendall's Responses

Because much of what Movants have presented as "elements" in Movants' Memorandum are not "elements" of qualified immunity, but rather helter-skelter statements, arguments, or

[38]Movants' Memorandum, 2–4.

quotations about such things as the purposes served by qualified immunity, the order in which the court is to consider the elements, and exigent circumstances justifying warrantless entries, Kendall **disagrees** with what has been stated under the section of Movants' Memorandum entitled "Elements," except as noted below.

The following appear to be "elements" presented (together, rather than delineating each one, and duplicatively) by Movants:

> "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." (Citing *Weise v. Casper*, 593 F.3d 1163, 1166–67 (10th Cir. 2010).)
>
> "In a summary judgment setting, when a defendant raises a qualified immunity defense, a heavy two-part burden must be overcome by the plaintiff. [Citation omitted.] 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." [Citation omitted.] Second, Plaintiff must demonstrate that the right was clearly established." (Citing *Phillips v. James*, 422 F.3d 1075, 1080 (10th Cir. 2005).)

Kendall **agrees** with those elements for a determination as to whether defendants are entitled to qualified immunity for their unconstitutional conduct.

Kendall **disagrees** that Movants can demonstrate that the Movants did not violate Kendall's constitutional rights and that the constitutional rights were not clearly established, particularly when the evidence is viewed in the light most favorable to Kendall.

Movants state as follows under the heading "elements" for qualified immunity (which will be treated by Kendall as additional "elements" for purposes of DUCivR 56-1(c)(2)):

> Official conduct that does not 'compromise any legitimate interest in privacy' is not a search subject to the Fourth Amendment. (Citing *Illinois v. Caballes*, 543 U.S. 405, 408 (2005).)

Kendall **disagrees** that is the correct principle of law[39] applicable to the search of a person's home or the curtilage to the home. The correct, applicable principles of law are as follows:

> It is well-settled an individual has a reasonable expectation of privacy in the interior of one's home and its curtilage. *Kyllo v. United States*, 533 U.S. 27, 34, 121 S.Ct. 2038, 150 L.Ed.2d 94 (2001); *Oliver v. United States*, 466 170, 180, 104 S.Ct. 1735, 80 L.Ed.2d 214 (1984); *see also* [*United States v.*] *Hatfield*, 333 F.3d [1189,] 1196 [(10th Cir. 2003)] ("[P]rivacy in the interior of a home and its curtilage are at the core of what the Fourth Amendment protects….").

Reeves v. Chruchich, 484 F.3d 1244, 1254 (10th Cir. 2007).

> A Fourth Amendment search occurs *either* where the government, to obtain information, trespasses on a person's property *or* where the government violates a person's subjective expectation of privacy that society recognizes as reasonable to collect information.

Ysasi v. Brown, 3 F.Supp.3d 1088, 1127 (D.N.M. 2014) (emphasis added).

> The [Fourth] Amendment establishes a simple baseline, one that for much of our history formed the exclusive basis for its protections. 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." *United States v. Jones*, 565 U.S. ----,----, n.3, 132 S.Ct. 945, 950–951, n. 3, 181 L.Ed.2d 911 (2012).
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> * * *
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> The Fourth Amendment "indicates with some precision the places and things encompassed by its protection": persons, houses, papers, and effects. *Oliver v. United States*, 466 U.S. 170, 176, 104 S.Ct. 1735, 80 L.3d.2d 214 (1984).
>
> * * *
>
> [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." *Silverman v. United States*, 365 U.S. 505, 511, 81 S.Ct. 679, 5 L.Ed.2d 734 (1961.)
>
> * * *
>
> We therefore regard the area "immediately surrounding and associated with the home"—what our cases call the curtilage—as "part of the home itself for Fourth Amendment purposes." *Oliver, supra*, at 180, 104 S.Ct. 1735.

[39] Although principles of law, instead of "elements," are out of place in the "Statement of Elements and Undisputed Material Facts" section of Movants' Memorandum, Kendall is responding to what Movants have set forth there out of concern that the lack of a response may be treated as a concurrence with the Movants' statements of legal principles.

* * *

> This area around the home is "intimately linked to the home, both physically and psychologically," and is where "privacy expectations are most heightened." *California v. Ciraolo*, 476 U.S. 207, 213, 106 S.Ct. 1809, 90 L.Ed.2d 210 (1986).

Florida v. Jardines, 133 S.Ct. 1409, 1414–15 (2013).

Movants also state as follows under the heading "elements" for qualified immunity (which will be treated by Kendall as additional "elements" for purposes of DUCivR 56-1(c)(2)):

> The Fourth Amendment permits warrantless entry on property where there are exigent circumstances. (This is Movants' paraphrase, not a direct quotation.) Citing *United States v. Najar*,451 F.3d, 710, 718 (10th Cir. 2006).

Kendall **disagrees** that is a correct statement of the applicable legal principle insofar as it is incomplete and misleading because it fails to note (1) the essential requirement that, for one to rely on an "exigent circumstances" justification for engaging in a search without a warrant or consent, there must be reasonable cause to believe there is an association between the particular property to be searched and the emergency giving rise to the perceived necessity of conducting a search; and (2) exigent circumstances cannot justify a warrantless entry on property if the officer conducting the search created the exigency. The correct statements of the applicable legal principle relative to the requirement of a reasonable belief concerning a nexus between the property to be searched and the perceived emergency if exigent circumstances are to serve as a justification for a search without a warrant or consent are as follows:

> The critical element in a reasonable search is . . . that there is reasonable cause to believe that the specific "thing" to be searched for and seized are located on the property to which entry is sought.

Zurcher v. Stanford Daily, 436 U.S. 547, 556 (1978).

> [O]ur test [for a warrantless search where circumstances pose a significant risk to the safety of an officer or third party] is now two-fold, whether (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 (a modification of our former third prong).

United States v. Najar, 451 F.3d 710, 718 (10th Cir. 2006). (The Court in *Najar* noted that "Sgt. Brown did not attempt to search **any place beyond the locations where a victim might likely be found.** The officers confined the search to only those places inside the home **where an emergency would reasonably be associated**." 451 F.3d at 720 (emphasis added).)

> 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. [Citation omitted.] 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**." [Citation omitted.]

United States v. Gambino-Zavala, 539 F.3d 1221, 1225–26 (10th Cir. 2008) (emphasis added).

> In order for a search warrant of a residence to be lawful, it must be supported by probable cause. "'Probable cause undoubtedly requires a **nexus between suspected criminal activity and the place to be searched**.'"

State of Utah v. Vasquez-Marquez, 2009 UT App 14, ¶ 5, 204 P.3d 178 (emphasis added).

Whether there had to be probable cause justifying a warrant had there been time to obtain one, or whether the "emergency aid" doctrine applied, for a warrantless, non-consensual search to have been valid, there must have been "some reasonable basis to associate the place searched with the emergency." *Salt Lake City v. Davidson*, 2000 UT App 12, ¶ 15, 994 P.2d 1283 (citation omitted).

> Because this reasonable basis must approximate probable cause and is used to justify abrogation of Fourth Amendment rights, emergency aid searches should be "'strictly circumscribed by [circumstances] which justify its initiation.'"

Id. (citing *Mincey v. Arizona*, 437 U.S. 385, 393 (1978)).

2. Movants' Statement of "Undisputed Material Facts" Under Officer Olsen's Entry Into Kendall's Backyard - Qualified Immunity for Kendall's Claims Under 42 U.S.C. § 1983[40] and Kendall's Responses[41]

1. On June 18, 2014, the SLCPD responded to a call that a three-year-old child was missing from his home.

Response: Disputed.

The mother of K.H. called 911 because she could not find her son. Horman Depo., 18:14–19:15. She did not know that he was missing "from his home". The dispatcher simply said "missing three-year-old." Edmundson Depo., 18:11–16. The first arriving police officers, Everett and Edmundson, after speaking with Ms. Horman, did not first search outside the house; rather, they initially searched part of the Horman family home for K.H. Horman Depo., 19:23–20:24; Edmundson Depo., 18:21–21:4.

K.H., the "missing" child, may have been either two or three years old. At her deposition on July 6, 2016 (just over two years since the search for the boy and the killing of Geist), K.H.'s mother, Elise Horman, stated he was, at the time of the deposition, four years of age (making him two years old on the day he went missing, unless his birthday is between June 18 and July 6.). Horman Depo., 3:24–4:2. Everett said he was two or three years old when he was reported missing. Everett Depo., 11:8–9. Olsen said he was three years old. Olsen Depo., 45:9; Exhibit "1" to Olsen

[40] Again, in utter violation of DUCivR 56-1(b)(C) ("Each asserted fact must be presented in an individually numbered paragraph . . ."), Movants have added factual assertions in footnotes to the section of their Memorandum entitled "Undisputed Material Facts." Kendall will not respond to those footnotes.

[41] Under these sections, Movant's purported undisputed facts are numbered as Movants have numbered them, then they are followed by Kendall's responses.

Depo., page 3 of 18, dated June 18, 2014 ("While assisting in the search for a 3 year-old boy, I shot and killed a dog at the listed address."); Exhibit "6" to Olsen Depo. ("This is a picture of [redacted] (3 years old) who went missing from 2511 South Fillmore at 3:15 today."); Edmundson Depo., 17:6–7 ("Q: You understood he was about three years of age? A: Yes.").

2. The initial responding officers spoke with the family and checked the home, but did not locate the boy.

Response: Disputed.

The initial responding officers, Everett and Edmundson, spoke only with the mother, Elise Horman, not "the family." Edmundson Depo., 19:25.

Also **disputed** is the assertion that the initial responding officers "checked" the home, if "checked" is taken to mean a thorough, competent, reasonable search. None of the initial responding officers thoroughly checked the home. Pregman only checked the child's bedroom then "felt it kind of important at this point [when Edmundson arrived] to kind of leave the home after doing that search of the bedroom . . . to leave the home and look for the child in the neighborhood." Deposition of George Stephen Pregman ("Pregman Depo."), excerpts of which are Exhibit "9" to Anderson Decl., 14:13–15:25. Edmundson terminated his search downstairs, where K.H. was later found sleeping on the floor, after he briefly glanced around and talked to Ms. Horman. Edmundson Depo., 27:15–29:1. Edmundson left it to Everett to determine whether the boy was still missing. Edmundson Depo., 36:13–19. Everett saw the box behind which K.H. was later found sleeping, but he did not move it. Everett Depo., 19:12–20:9. Had he moved the box or looked behind it, Everett would have found the boy. Everett Depo., 21:1–15; Edmundson Depo., 60:8–61:25, 66:2–5. Later, after Geist was killed, Detective Glen Davis readily found K.H. when he went downstairs

and moved a cushion, an empty box, and "stuff." Davis Depo., 27:21–29:4. For Olsen, the negligent search for K.H. in his home is a "very sore subject." Olsen Depo., 103:4–104:1.

3. Officers also spoke with a relative that lived next door and confirmed that the child was not there.

Response: Disputed.

One officer, Edmundson, went next door to the Horman home and spoke with someone; he doesn't know if he spoke with Ms. Horman's sister. Edmundson Depo., 29:2–13.

4. Additional officers responded to the scene and began to canvas the neighborhood.

Response: Disputed.

Defendants use the word "canvas" as if that would excuse them from liability for an unreasonable search. The word "canvass" (not "canvas," which refers to a material (albeit not to a "material fact")) means only the asking of questions to, or surveying, people in an area. *See* http://dictionary.cambridge.org/us/dictionary/english/canvass.

The record abundantly reflects that the officers "searched" an area that extended several long blocks from the Horman home, some of them entering enclosed yards without a warrant or consent.[42]

[42] For instance, Edmundson testified as follows:

> Q: And how far away from the boy's home did your search go?
> A: To the end of the block and then over one block and then over one block and then up probably half a block on Glenmare.
> Q: And did you continue to go into backyards –
> A: Yes.
> Q: -- along the way even if people weren't home?
> A: Yes.
> Q: And were those backyards enclosed?
> A: Some were, some were not.

Olsen admitted that "[f]or lack of a better term, yes, you could say search." Olsen Depo., 52:17–18.[43]

5. A canvas [sic] involves knocking on doors and talking to neighbors to see if anyone has seen the missing child.

Response: Undisputed.

6. It also involves looking in places where a child might have gone, including parks, swimming pools, and a neighbor's backyard.

Response: Disputed.

"Canvass" connotes going door-to-door to survey, hand out literature, or persuade people to support something or somebody, usually in the context of politics or marketing. *See, e.g.*, http://dictionary.cambridge.org/us/dictionary/english/canvass.

7. A canvas [sic] 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.

Response: Undisputed.

8. Most police officers are aware that the longer a child is missing the less likely the case will end with a positive result.

Q: And did you go through gates?
A: Yes.

Edmundson Depo., 43:7–19.

[43] Q: Right. And – well, the word is also searched with missing children, is it not?
A: Yes.
Q: And Elizabeth Smart was missing, and they were searching for her?
A: Yes.

Olsen Depo., 52:23–53:3.

Response: Undisputed.

9. Indeed, the chances of a positive outcome decrease dramatically after the first hour.

Response: Undisputed.

10. Officer Olsen arrived on the scene approximately thirty minutes after the family called the police and reported the child was missing.

Response: Undisputed.

11. Officer Olsen asked if the child's home had been searched and was told the home had been searched twice.

Response: Undisputed.

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.

Response: Undisputed.

13. The officers understood this meant they would have to actually look for and visually locate the missing boy.

Response: Disputed, insofar as the assertion is in terms of what "the officers" understood.

Kendall does not dispute that Olsen, who seeks to justify his killing of Geist after entering Kendall's yard, said "you actually had to look" because the boy "could not communicate," but no other officer indicated he or she had such an understanding. The Movants' citation to the Zayas deposition (24:14–25) does not support the factual assertion. In fact, Zayas said: "He didn't speak so we needed to **call out** and make sure that we searched under things, in things to make contact with the boy." Deposition of Yvette Zayas ("Zayas Depo."), excerpts of which are Exhibit "10" to Anderson Decl., 24:23–25 (emphasis added).

14. Officer Olsen worked with Officer Worsencroft to assist in a neighborhood canvas for the boy.

Response: Disputed.

Olsen and Worsencroft teamed up, but engaged in far more than a "neighborhood canvas [sic] for the boy." They engaged in a "search" within the meaning of the constitutional protections against unreasonable searches. See response to paragraph 4 above.

Olsen and Worsencroft searched inside at least two homes, Olsen Depo., 57:18–19, and went into backyards of homes as they walked along. Olsen Depo., 59:17–19. Olsen entered and searched the backyard of Kendall's home. Olsen Depo., 84:1–3, 85:19–86:23.

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 looking for the missing boy and ask if they had seen the child.

Response: Undisputed.

16. The other officer would "clear" the yard.

Response: Undisputed.

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.

Response: Disputed.

The factual assertion refers to "the officer," whereas the only record, even the statement of Olsen himself, refers solely to Olsen. ("**I** would attempt to 'clear' a yard by viewing from the driveway or over a fence, but if **I** could not see all areas of the yard and be comfortable the boy was not in the yard, **I** would enter and check those areas." Declaration of Brett Olsen, July 13, 2016 (submitted in conjunction with the Movants' Memorandum) ("Olsen Decl."), ¶ 11 (emphasis

added).) Not only has the word "I" been substituted by Movants' counsel to read "the officer," apparently to make it appear that other officers' practices were the same as Olsen's, but the words "he or she" in the factual assertion makes it extremely unclear as to whether the assertion is just about Olsen and Worsencroft (both men) or about "officers" in general, in which event the factual assertion is false. Some officers, like Pregman, recognized the constitutional prohibitions against entering into yards without a warrant or consent and the privacy concerns underlying those limits.

> Q: So you knew that, as you were searching for this young boy, you could look from where you were entitled to be –
> A: Yes.
> Q: -- to see if he was around, but you weren't entitled to go over and open a gate and walk through a backyard without consent or a warrant?
> A: Yes. I understand that.
> Q: And why is that?
> A: Why I understand it or –
> Q: No. Why – what's the reason?
> A: Well, people have an expectation of privacy, and people do things to protect their property from warrantless searches.

Pregman Depo. 34:5–18.

Olsen did not endeavor to "clear" the yard before entering it, which he could have done had he walked about 100 feet to another vantage point. Olsen Interview, 12:7–8, 139:18–140:16; Kendall Decl., ¶ 11.

18. Officers Olsen and Worsencroft checked and "cleared" the yards of the four to six houses on the west side of Filmore Avenue.

Response: Undisputed.

19. They then turned west on Parkway Avenue and reached the Kendall property.

Response: Undisputed.

20. Kendall's property is approximately 0.2 miles and a three-minute walk from the missing child's residence.

Response: Disputed.

The gate through which Olsen entered the backyard of Kendall's home is approximately 1/8 of a mile, or about 702 feet—or .132955 miles—from the front door of the Horman residence. Declaration of Sean Kendall ("Kendall Decl."), attached hereto as Exhibit "B", ¶ 12. The only reference to a "three-minute walk" is in Google Maps, without any reference to whether that is the walking time for an adult or a two-or three-year-old child. Movants make no reference to whom a "three-minute walk" refers.

21. The Kendall property consists of a house with an enclosed backyard that may be accessed by three different gates.

Response: Undisputed.

22. One gate had wood lying at the bottom, which appeared to prevent it from being opened.

Response: Disputed.

The most that can be asserted is that, according to Olsen, the wood lying at the bottom appeared to him to prevent it from being opened.

23. One gate was located to the south of the house and was about three feet tall.

Response: Disputed.

As Movants' counsel well knows, and as the photograph to which Movants refer in support of their factual assertion clearly reflects, the gate is obviously far taller than three feet. In fact, the latch is about three feet from the ground. Exhibit 12 to Slark Declaration.

24. It had a simple latch and may have been open on the day of the canvas.

Response: Disputed.

Whenever Geist was in the backyard, all three gates were closed. Kendall Decl., ¶ 11.

25. Another gate was located directly to the east of the house and was about five to six feet tall.

Response: Undisputed.

26. Officer Worsencroft went to the front door and began ringing the doorbell or knocking on the door.

Response: Disputed.

Worsencroft, the sole officer at the front door, only testified that he knocked on the door, as follows:

> A: I went to that where the front door is and walked up either the grass or the stairs to the front door and knocked, I think, two different times. And I knocked, nothing, knocked again, then I heard a growling or a bark, and then I heard two shots from a gun.

Worsencroft Depo., 37:25–38:5.

27. Officer Olsen walked up the drive to the gate that was directly east of the house.

Response: Undisputed.

28. That gate had a latch that was positioned approximately three feet to three and a half feet from the ground.

Response: Undisputed.

29. The gate was not locked and Officer Olsen recalls the gate was easy to open.

Response: Disputed.

The gate may have been easy for Olsen to open, but a toddler probably could not have gone through the gate. Worsencroft did not believe the young boy who was missing could have gone through the gate. Worsencroft Depo., 74:8–11 ("Q: Do you remember it crossing your mind that there's no way that this young toddler could have gone through that gate? A: Himself, probably not . . . ")

30. Officer Olsen looked over the gate, but Officer Olsen's view of the entire yard was obstructed by the house and the garage.

Response: Disputed.

Officer Olsen's view of the "entire" yard was not obstructed; it was only partially obstructed from where he looked over one of the three gates. Even from there, he could see "the majority of the backyard." Olsen Depo., 71:10–12.

Had Olsen looked over the other two gates, and had he also looked over the chain-link fence on the north-east corner of the Kendall backyard, he could have seen—that is, he could have "cleared"—the entire backyard without ever entering it. Kendall Decl., ¶ 15. To walk along the outside of the house and backyard from one gate, to the next, and to the next would require walking approximately one hundred feet. Kendall Decl., Exhibit "2", ¶ 11.

Even Olsen has admitted that if he had simply walked around and looked over the gates and fence, he could have seen the entire backyard. However, he chose to enter the backyard instead of walking to the various vantage points where he could have seen the entire backyard. He stated, "I guess I could have gone all the way around and looked over, but I saw that the gate was right there, and it was a very easy to open gate . . ." Olsen Interview", 12:7–8. *See* also Olsen Depo., 139:18–140:16.

Not only did Olsen not go to those places where, together, he could see the entire backyard, he did not "do anything to call for a dog or determine . . . whether a dog was present." Olsen Depo., 80:25–81:2.

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.

Response: Disputed.

Olsen's account is not credible. Despite Olsen's testimony that he may have heard a doorbell, Olsen Depo., 70:2–3, Worsencroft made it clear he had only knocked on the front door of Kendall's home. Worsencroft Depo., 37:25–38:5.

Olsen testified, inconceivably, that he could hear "either the doorbell or the knocking" from where he was standing at the gate east of the house. Olsen Depo., 69:19–71:5.

At another time, Olsen testified, inconsistently, that Worsencroft "was ringing the doorbell, knocking too." Olsen Interview, 11:28–12:1. And he said he could "hear" the doorbell ringing and knocking, *id.*, which is impossible. Kendall Decl., ¶ 14.

The doors to the house were closed, Olsen Depo., 70:13–15, and he was a long way from the front door, with the house and part of the adjoining yard in between Olsen at the gate and Worsencroft at the front door. Olsen is not telling the truth: One *cannot* stand at the gate where Olsen said he was standing and hear a person knocking, let alone pounding hard, on the front door. Kendall Decl., ¶ 14 and the referenced video.

Even according to Worsencroft, Olsen had actually entered the backyard before Worsencroft had an opportunity to speak to someone if someone had been in the house. Worsencroft Depo., 57:4–7.

If Olsen was not yet in the backyard and was, as he has testified, by the gate to the east of Kendall's home, it would have been impossible for Olsen to hear the knocking on the door, unless he was perhaps using a jackhammer. See Kendall Decl. ¶ 14.

Worsencroft had only knocked once or twice when he heard Geist bark and the shots fired. Worsencroft Depo., 57:1–3. If, as Worsencroft testified, he heard Geist barking and being shot

while he was knocking on the door, and if, as Olsen has stated twice, he had been in the yard for about 30 seconds before encountering Geist, Olsen Decl., ¶ 25, it appears impossible, and at least very unlikely, that Olsen waited to enter the property until it was evident that Worsencroft was not able to make contact with anybody in the home. That conclusion is rendered certain by the materially different testimony Olsen provided during the Internal Affairs interview, where he said he was "in that backyard checking the things before that dog noticed [him] back there" for "[a]t least a minute to a minute and a half"—"yeah it was about a minute and a half." Olsen Interview, 9:25–10:1. In other words, since Worsencroft had knocked only once or twice when he heard Geist bark and heard the gun shots, Olsen must have already been searching around the yard before Worsencroft had any chance to speak with a resident, had one been at home, to obtain consent for the search.

32. Officer Olsen walked to the south-west corner and checked the area behind the home.

Response: Undisputed.

33. He then walked to the south-east area and checked the area obscured by the garage.

Response: Disputed.

There was no area of the backyard obscured by the garage had Olsen, from outside the backyard, looked over the gates and the chain-link fence. To say that an area of Kendall's backyard was obscured by the garage is like saying a telephone pole obscures the view because one does not bother to move to see things from another perspective. Olsen actually allowed the garage to obscure his view because he did not move to a location where his view would not be obscured. Had Olsen looked over the other two gates, which would have involved walking about one hundred feet, Kendall Decl., ¶ 11, and had he also looked over the chain-link fence on the north-east corner

of the Kendall backyard, he could have seen—that is, he could have "cleared"—the entire backyard without ever entering it. Kendall Decl., ¶ 15.

34. He then walked over to the shed and pulled opened [sic] the shed door (that may have been slightly ajar) and checked inside.

Response: Undisputed, but does not establish whether the door was "ajar".

35. Finally, Officer Olsen checked the area to the north of the shed.

Response: Undisputed.

36. Officer Olsen estimates it took him approximately thirty seconds to check these areas for the missing boy.

Response: Disputed. Once again, Olsen's inconsistent testimony itself provides the disputed material facts. During his Internal Affairs interview, Olsen said it was "[a]t least about a minute to a minute and half," Olsen Interview, 9:25–27, and that "it was about a minute and a half." *Id*., 10:1.

3. Kendall's Statement of Additional Material Facts

1. Kendall's backyard was the curtilage to his home, which SLCPD policy recognizes is entitled to the same protections against unreasonable searches and seizures as a home. Olsen Depo., 115:5–12.[44]

[44] Salt Lake City Police Department written policy III-730, entitled "Search and Seizure," at all material times, provided as follows:

> **Search of Open Fields — Curtilage**
>
> Individuals maintain an expectation of privacy in the curtilage of their home or dwelling. The curtilage is treated as part of the home for 4th Amendment purposes. The same 4th Amendment protections that apply to a person's home or dwelling apply to

2. Olsen was familiar with that policy and understands that "curtilage is property that is extended the same legal rights as a home. It's basically part of the home." Olsen Depo., 115:13–15, 11:4–21, 117:12–118:16, 124:11–17. He also understood that a shed that was in the backyard would be considered part of the curtilage. Olsen Depo., 118:2–8.

3. Olsen knew that if there is no warrant or consent to search a residence, including the curtilage, there must be a reasonable belief that there is a connection between the specific property to be searched and the emergency. Olsen Depo., 11:22–12:8, 12:14–25, 13:14–25, 44:18–45:5, 53:17–21, 24. Pregman knew there must be such a connection as well. Pregman Depo., 36:6–15.

4. The SLCPD written policy relating to searches without a warrant under exigent circumstances was, and is, materially and dangerously incomplete in that it omits the vital requirement that, for a search of private property, particularly the search of a home or its curtilage, there must be reasonable cause to believe that there is an association between the property to be searched and the person believed to be at risk of harm, if such a risk is the "exigent circumstance" justifying the absence of a warrant. Worsencroft Depo., 81:19–83:5; Exhibit "3". Worsencroft made clear that the SLCPD written policy has misled him about the constitutional requirement of

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> the curtilage. In determining whether an area is within the curtilage of a home, consideration is given to the following four factors:
>
> - The area's proximity to the main dwelling;
> - Whether the area is included within an enclosure surrounding the home;
> - The nature of the uses to which the area is put; and
> - The steps taken by the resident to protect the area from observation.

Olsen Depo., 115:5–15, Exhibit "3".

searching without a warrant on the basis of exigent circumstances. Worsencroft Depo., 84:4–85:16.

5. In fact, one officer involved in the search for K.H. believes the written policy of the SLCPD relating to warrantless searches based on exigent circumstances—which omits any reference to the need for a reasonable belief that there is a connection between the property to be searched and the emergency giving rise to the need for the search or a person thought to be at risk of harm—allows police officers to walk into and rifle through homes and yards within whatever distance a missing child might have traveled. Edmundson Depo., 45:13–48:22. Olsen, Purvis, and Worsencroft had the same belief. Olsen Depo., 90:4–9; Purvis Depo., 59:23–60:10; and Worsencroft Depo., 81:19–85:16.

6. No one, including Olsen, had any reason to believe, nor was there any reason to believe, there was any connection or association between (1) Kendall's residence generally, or his backyard specifically, and (2) K.H. or any of the circumstances surrounding the perceived fact that he was missing. Rather, the only justification provided by any officer of the SLCPD for warrantless and non-consensual entries upon and searches of private properties, including Kendall's backyard, was that the properties were within a spatial proximity to the Horman house within which K.H. was thought to be able to walk, and the properties might have been accessible to K.H. Olsen Depo., 75:1–76:24, 79:6–14, 79:21–80:16, 153:12–22; Purvis Depo., 55:5–56:18, 79:24–80:4 ("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."); Worsencroft Depo., 66:6–12, 66:25–67:15; Deposition of

Christopher Johnson ("Johnson Depo."), excerpts of which are Exhibit "11" to Anderson Decl., 20:2–15.[45]

4. Kendall's Statement of Additional Elements and Material Facts

Movants have failed to set forth the elements of an unconstitutional search or the elements of Kendall's § 1983 claim that Olsen, Purvis, and SLCC violated Kendall's constitutional protections against the warrantless, non-consensual search of his backyard.

a. Elements and Material Facts for Unconstitutional Search

The following are the **elements of Kendall's claim that Olsen, Purvis, and SLCC engaged in, or are otherwise liable for, an unconstitutional search** of his backyard and the facts establishing the elements are met by Kendall:

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[45]

> Q: Did you have any particular reason to believe that that shed had anything to do with the missing boy or the circumstances surrounding him being missing?
> A: I felt that it was a very easy place for a boy to wander into. That was my – that was the – that was my assumption.

Olsen Depo., 89:9–14.

> Q: You opened up the door to the shed in the backyard, right?
> A: Yes.
> Q: And you felt you were entitled to do that without consent or a warrant?
> A: Yes.
> Q: And without cause for believing there was any connection between that shed and the young boy missing, other than the fact of spatial proximity and access?
> A: Yes.

Olsen Depo., 119:18–120:3.

A. There must have been a "search" at Kendall's home (including the curtilage) or in another place where Kendall had an expectation of privacy and where that expectation was objectively reasonable. *United States v. Jones,* 132 S.Ct. 945, 950 (2012); *Katz v. United States*, 389 U.S. 347, 351 (1967).

> A Fourth Amendment search occurs either where the government, to obtain information, trespasses on a person's property or where the government violates a person's subjective expectation of privacy that society recognizes as reasonable to collect information.

Ysasi v. Brown, 3 F.Supp.3d 1088, 1127 (D.N.M. 2014) (citing *United States v. Jones*, 132 S.Ct. 945, 947 (2012).

> 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. Jardines, 133 S.Ct. 1414 (quoting *United States v. Jones*, 132 S.Ct. at 950 n.3).

> There is no doubt, however, that a citizen has a reasonable expectation of privacy, and a particularly strong one, in his own home. The "chief evil" from which the Fourth Amendment protects citizens is unwanted police entry into the home, and the "principal protection" is "the Fourth Amendment's warrant requirement."

United States v. Christy, 785 F.Supp.2d 1004, 1025 (D.N.M. 2011) (quoting *United States v. Thompson*, 524 F.3d 1126, 1132 (10th Cir. 2008)).

> "At the very core" of the Fourth Amendment "stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion."

Kyllo v. United States, 533 U.S. 27, 31 (2001) (quoting *Silverman v. United States*, 445 U.S. 573, 586 (1980).

> Searches and seizures inside a home without a warrant are presumptively unreasonable.

Payton v. New York, 445 U.S. 573, 386 (1980).

Facts demonstrating that Kendall has met that element:

1. Purvis instructed Olsen to look "everywhere" for the supposedly missing boy. Olsen Depo., 55:25–56:8. Purvis expected that Olsen would enter yards if he could not see the entirety of the yards, even if there were no warrant, no consent, and no connection between the specific property and the perceived emergency. Purvis Depo., 73:23–74:21. Olsen understood Purvis to mean that he was to look "inside homes" and "inside enclosed yards," "[b]ased on consent or exigency or whatever." Olsen Depo., 56:2–13, 112:23–114:8. Worsencroft had the same understanding of Purvis's instruction. Worsencroft Depo., 24:19–25:4.

2. The written policy of the SLCPD regarding warrantless searches based on exigent circumstances is woefully, and dangerously, incomplete and misleading insofar as it entirely omits any reference to the requirement that before a police officer can engage in a warrantless search based on exigent circumstances he/she must have at least a reasonable cause to believe there is an association between the property to be searched and the perceived emergency giving rise to the need for a search. Worsencroft Depo., 81:19–83:5; Exhibit "3". Worsencroft was misled by the SLCPD written policy; as a result, he did not understand the restriction on his ability to search without a warrant on the basis of exigent circumstances if he did not have cause to believe there was a connection between the property to be searched and the emergency. Worsencroft Depo., 84:4–85:16.

3. Olsen opened the gate to Kendall's backyard, walked around the yard, opened and searched a shed in the yard, and then shot and killed Kendall's beloved dog Geist because he barked and ran toward Olsen after Olsen started running. Olsen Depo., 84:1–87:18.

4. Kendall's backyard was adjacent to the home where he resided. Kendall Decl., Exhibits "1" through "6"; ¶ 5. It was entirely enclosed with a tall fence, Kendall Decl., ¶ 8, and the house, with three secure gates. Kendall Decl., ¶ 6.

5. The fence of the backyard protected the backyard from observation by people passing by the residence. A portion of the fence is chain link, but opaque slats were inserted into the entire length of that portion to prevent people outside the yard from seeing into the yard. Kendall Decl., ¶ 7.

6. Kendall had an expectation of privacy in his home, his backyard, the shed in his backyard, and throughout his entire residence. He chose to move into that residence, in part, because of the tall fence and enclosed backyard. Those characteristics were important to him so he could (a) privately enjoy activities in his backyard and (b) provide an area for Geist, who had previously joined his family, that was secured from Geist getting loose and secured from anyone harassing, harming, or interfering with Geist. Kendall Decl., ¶ 9.

7. Because the backyard of Kendall's home was enclosed with a tall fence that prevented passersby from seeing into the backyard, he expected that his activities in the backyard were private at all times. He conducted himself in the backyard of his residence, and kept Geist there much of the time, in accordance with his expectation that the backyard was private. Kendall Decl., ¶ 10.

B. There must have been no warrant or consent for the search of Kendall's backyard.

> Searches conducted pursuant to consent constitute one exception to the Fourth Amendment's search-warrant and probable-cause requirements. *See Schneckloth v. Bustamonte,* 412 U.S. 218, 219, 93 S.Ct. 2014, 36 L.Ed.2d 854 (1973). When an individual consents to a police search, and the consent is "freely and voluntarily given," the search does not implicate the Fourth Amendment. *United States v. Peña,*

> 143 F.3d 1363, 1366 (10th Cir. 1998) (quoting *Schneckloth v. Bustamonte*, 412 U.S. at 219, 93 S.Ct. 2041.)

Ysasi v. Brown, 3 F.Supp.3d at 1139.

Facts demonstrating that Kendall has met that element:

1. No one, including Olsen, obtained a warrant or consent to search the curtilage of Kendall's residence. Olsen Depo., 77:22–78:16, 89:15–20, 119:18–23. City's Response to Request for Admissions No. 2, Exhibit "12" to Anderson Decl. ("The City also admits that Officer Olsen did not have a warrant to enter the backyard of the property at 2465 South 1500 East prior to entering that property.") Defendants Olsen, Purvis, Everett, Edmundson, and Pregman's Responses to Plaintiff's First Set of Requests for Admissions No. 1, Exhibit "13" to Anderson Decl. ("Officer Olsen admits that his entry into the backyard at 2465 South 1500 East was without express permission or consent of Kendall or an owner or resident of that property and without a warrant.")

C. There must have been no reasonable cause to believe there was a connection between Kendall's backyard and K.H. or the circumstances of him being missing.

A search requires a search warrant unless "a few specifically established and well-delineated exceptions" apply. *Arizona v. Gant*, 556 U.S. 332, 129 S.Ct. 1710, 1716 (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." *United States v. Najar*, 451 F.3d 710, 717 (10th Cir. 2006). "That burden is especially heavy when the exception must justify the warrantless entry of a home." *United States v. Najar*, 451 F3d at 717 (citation omitted). Generally, a warrantless entry under the exigent-circumstances exception requires probable cause and exigent circumstances. *See Kirk v. Louisiana*, 536 U.S. 635, 638, 122 S.Ct. 2458, 153 L.Ed.2d 599 (2002); *Manzanares v. Higdon*, 575 F.3d 1135, 1142–43

> (10th Cir. 2009). The Tenth Circuit, however, appears to have recognized a subset of exigent-circumstances cases—what the Court refers to as "emergency-aid" cases—that do not require probable cause. *See United States v. Najar*, No. CR 03–0735, 2004 WL 3426123, at *6 (D.N.M. Sept. 3, 2004) (Browning, J.), *aff'd*, 451 F.3d 710 (10th Cir. 2006) ("For probable cause in the usual [evidence-of-crime] sense not to be needed, the police must be responding to a true emergency rather than a crime, and the police must reasonably believe **a person inside** needs immediate assistance, and entry is needed to protect or preserve life, or to avoid serious injury.") (alteration original), *aff'd*, 451 F.3d 710 (10th Cir. 2006).

Wilson v. Jara, 866 F.Supp.2d 1270, 1294 (D.N.M. 2011) (emphasis added).

For exigent circumstances to justify a warrantless search, the officers must have "an objectively reasonable basis to believe there is an immediate need to protect the lives or safety of … others" and the manner and scope of the search must be reasonable. *United States v. Najar,* 451 F.3d 710, 718 (10th Cir. 2006). To meet that test, the following connections between the property to be searched and the perceived emergency must be shown by the government:

> [T]he government must show the officers reasonably believed a person inside the home was in immediate need of aid or protection.

United States v. Gambino-Zavala, 539 F.3d at 1225.

> [T]he government must show the officers "confined the search to only those places inside the home where an emergency would reasonably be associated."

Id. at 1226 (quoting *Najar*, 451 F.3d at 718).

Facts demonstrating that Kendall has met that element:

No one had any belief, or any reason to believe, that there was any connection between Kendall's backyard and the supposedly missing boy or the circumstances of him being missing. *See* Kendall's Additional Material Facts, ¶ 6, *supra.*

b. Elements and Material Facts for a § 1983 Claim of Unconstitutional Search

The following are the "two essential elements" to Kendall's § 1983 claim:

A. Kendall was deprived of a right secured by the Constitution or laws of the United States. *Johnson v. Rodrigues,* 293 F.3d 1196, 1202 (10th Cir. 2002).

Facts demonstrating that Kendall has met that element:

See Kendall's Statement of Additional Elements and Material Facts, *supra.*

B. Defendants deprived Kendall of the constitutional right while acting under color of state law. *Johnson v. Rodrigues,* 293 F.3d 1196, 1202 (10th Cir. 2002).

Facts demonstrating that Kendall has met that element:

1. "The City admits that Officers Olsen, Purvis, Everett, Edmundson, and Pregman were acting under color of law, and within the scope of their employment, from the beginning of the June 18, 2014, search of the "Filmore Street home" for a three-year-old boy until the shooting of Geist." Salt Lake City Corporation's Responses to Request for Admissions, ¶ 1.

B. Kendall's Utah Constitutional Claims

1. **Movants' Statement of Elements and Kendall's Responses**

Again, each element is not stated separately in Movants' Memorandum, with a "concise statement of the material facts necessary to meet that element," as contemplated by DUCivR 56-1(b) (2)(A) and (B). Kendall will strive to locate "elements" among what is set forth in pages 10–11 of Movants' Memorandum and respond.

Among the numerous quotations from various cases in Movants' Memorandum, at 10–11, the following appear to be "elements" presented (together, rather than delineating each one) by

Movants relating to entitlement to monetary relief for a violation of Article I, section 14 of the Utah Constitution:

A. Article I, section 14 of the Utah Constitution must be self-executing. (Citing *Wood v. Farmington City*, 910 F.Supp.2d 1315, 1328 (D. Utah 2012).)

Kendall **agrees** with that element. It is clearly met. *Jensen v. Cunningham*, 2011 UT 17, ¶ 63, 250 P.3d 465. ("Article I, Section 14 is also self-executing.")

B. Kendall must have suffered a flagrant violation of his constitutional rights.

> "Defendant[s] must have violated 'clearly established' constitutional rights 'of which a reasonable person would have known." To be considered clearly established, "[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Spackman ex rel. Spackman v. Bd. of Educ.*, 2000 UT 87, ¶22, 16 P.3d 533.

Kendall **agrees** with that element, so far as it is stated, and contends he has met it. There need not be "clear precedent on point that specifically recognizes the claimed right and applies it to analogous facts." There may be "instances where a defendant's conduct will be so egregious and unreasonable that it constitutes a flagrant violation of a constitutional right even in the absence of controlling precedent." *Jensen v. Cunningham*, 2011 UT 17, ¶ 67, 250 P.3d 465.

Facts demonstrating that Kendall has met that element:

The same facts demonstrate that Kendall has suffered a flagrant violation of his constitutional rights as set forth above relative to his § 1983 claim under the Fourth Amendment and relative to the unavailability of the defense of qualified immunity. *See supra*, sections I. A. 2–4.

C. Kendall must establish that existing remedies do not redress his injuries.

Kendall **agrees** with that element.

Facts demonstrating that Kendall has met that element:

There are no legislative remedies provided to Kendall for the violation of Art. I, section 14 of the Utah Constitution. As in *Bott v. Deland*, 922 P.2d 732 (Utah 1996), it is possible that there could be a no-cause-of-action verdict on Kendall's federal claims, but a verdict on the state constitutional claims. It will not be known until trial whether alternative claims will redress Kendall's injuries. Movants have not provided any facts relating to that element.

D. Kendall must establish that equitable relief, such as an injunction, was and is wholly inadequate to protect his rights or redress his injuries. *Id.* ¶ 25.

Kendall **agrees** with that element.

Facts demonstrating that Kendall has met that element:

Again, Movants have not provided any facts relating to that element. It is abundantly clear that equitable relief, such as an injunction, would be wholly inadequate to protect Kendall's rights or redress his injuries. Geist is dead as a result of Olsen's trespass into Kendall's yard and his unnecessary shooting of Geist, Olsen Depo., 26:20–23, 94:3–19; Kendall has suffered tremendous injuries, Kendall Declaration, ¶ 16; and the clock cannot be run back on the gross violations of his constitutional rights.

2. Kendall's Responses to Movants' Statement of "Undisputed Material Facts"

Movants have stated for their "undisputed material facts" relating to Kendall's claims under the Utah Constitution that "[t]he 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 . . . apply here." Movants' Memorandum at 11.

The same facts set forth by Kendall in support of his claims under the Fourth Amendment apply here, demonstrating that there are genuine issues of material facts precluding summary judgment. *See supra*, sections I. A. 2–4.

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

1. Movants' Statements of Elements and Kendall's Responses

A. Movants offer the following as the **elements of a claim for trespass**:

> [T]here must be a physical invasion of land that is done without legal justification or privilege.

Kendall **agrees** with that element, so far as it goes. However, as to Purvis, the more instructive and relevant statement of the elements is as follows:

> A person is liable for trespass when, without permission, he "intentionally 'enters land in the possession of [another], or **causes a thing or a third person to do so.**'"

Purkey v. Roberts, 2012 UT App 241, ¶ 17, 285 P.3d 1242 (quoting *Carter v. Done*, 2012 UT App 72, ¶ 17, 276 P.3d 1127) (emphasis added).

Movants do not set forth any of the **elements of a negligence claim**. Those elements are set forth in *Coates v. Wells Fargo Home Mortgage, Inc.*, 2011 WL 1232344, *3 (D. Utah 2011) (citing to *Thurston v. Workers Comp. Fund of Utah*, 2003 UT App 438, ¶ 12, 83 P.3d 391, which quoted *Hunsaker v. State*, 870 P.2d 893, 897 (Utah 1993)), as follows: "To prevail on a negligence claim, Plaintiff must establish four essential elements: (1) that Defendant owed Plaintiff a duty, (2) that Defendant breached that duty, (3) that the breach of duty was the proximate cause of Plaintiff's injury, and (4) that Plaintiff in fact suffered injuries or damages."

1. **Movants owed Kendall a duty.** Government "officials can be liable for the acts of third parties where those officials 'created the danger' that caused the harm." *Marino v. Mayger*, 118

Fed.Appx. 393, 401 (10th Cir. 2004), citing *Armijo v. Wagon Mound Pub. Schs.*, 159 F.3d 1253, 1260 (10th Cir. 1998).

"[A] duty to protect arises where a police officer takes affirmative steps that increase the risk of danger to an individual." *Munger v. City of Glasgow Police Dept*., 227 F.3d 1083, 1088 (9th Cir. 2000).

> Our cases have identified several factors relevant to determining whether a defendant owes a duty to a plaintiff, including: (1) whether the defendant's allegedly tortious conduct consists of an affirmative act or merely an omission . . . (2) the legal relationship of the parties; (3) the foreseeability or likelihood of injury; (4) "public policy as to which party can best bear the loss occasioned by the injury;" and (5) "other general policy considerations."

B.R. ex rel. Jeffs v. West, 2012 UT 11, ¶ 5, 275 P.3d 228 (citations omitted).

The facts establishing this element are set forth in detail *supra,* sections I. A. 2–4, including those facts showing that (1) Purvis instructed Olsen, Worsencroft and others to violate the constitutional prohibitions against unreasonable searches, (2) Olsen entered and searched the curtilage of Kendall's home without any belief, or reason to believe, there was any connection between the property searched and the missing boy, and (3) the SLCPD misled its officers by its negligent and unconstitutional policy that stated police could engage in warrantless searches if exigent circumstances existed, such as a risk of harm to someone, without reflecting the clearly established requirement that there must be reasonable cause to believe that there is a connection between the property to be searched and the emergency.

2. **Olsen and Purvis breached that duty**, for which the City is liable under Utah Code Ann.§ 63G-7-301(2)(i) (previously § 63G-7-301(4)), which waives immunity from suit of each governmental entity as to any injury proximately caused by a negligent act or omission of an employee committed within the scope of employment. (The pending Motion for Leave to File a

Second Amended Complaint is intended to make clear that if the individual defendants are not to be held accountable individually for their negligence, then the City should be held accountable, as contemplated by the Governmental Immunity Act of Utah.)

The facts establishing this element are set forth in detail *supra*, sections I. A. 2–4, including those facts showing that since Olsen and Purvis intended that enclosed yards of homes in the area, including Kendall's, would be searched without a warrant, without consent, and without there being any reason to believe there was a connection between the yards and the missing boy, they both owed Kendall a duty to refrain from entering, or allowing entry upon, his property and that duty was breached.

3. **It was foreseeable to Purvis and Olsen that Kendall's constitutional right to be free from a warrantless, unreasonable search would be violated** as a result of the breach of their duties owing to Kendall.

The facts establishing this element are set forth in detail *supra*, sections I. A. 2–4.

4. **Kendall suffered substantial damages and injury as a result of the breach by Purvis, Olsen, and SLCC of their duties owing to Kendall.**

The facts establishing this element are set forth in detail *supra*, sections I. A. 2–4, and *infra*, sections II. A. 2–3. Kendall has suffered significant injuries and damages as a result of the unnecessary killing of Geist. Kendall Decl., ¶ 16; Shea Decl., ¶¶ 13–14.

Movants focus on the Governmental Immunity Act of Utah ("GIA"), endeavoring to escape accountability for the trespass upon Kendall's property and negligence in creating the circumstances, through their wrongful acts, that led to the killing of Geist. However, because the

common law provided for trespass claims against governmental employees,[46] Kendall cannot be deprived by the GIA of his remedy for the trespass by Olsen and Purvis. The same holds true for Kendall's negligence claims. Since Olsen and Purvis would have been liable for their negligence under common law,[47] Kendall must have some remedy for the individual defendants' negligence– either from them individually, or from the City, pursuant to Utah Code Ann. § 63G-7-301(2)(i) (previously § 63G-7-301(4)), which can be accommodated if the Court grants Kendall's Motion for Leave to File a Second Amended Complaint.

2. Kendall's Response to Movants' Statement of "Undisputed Material Facts"

Movants have not presented the elements of a negligence claim, nor have they treated separately the trespass and negligence claims. For their "undisputed material facts" relating to the trespass and negligence claims, Movants have stated that "[t]he 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

[46] *Gillmor v. Salt Lake City*, 89 P. 714, 715 (Utah 1907) (if officers committed a trespass "willfully or maliciously, or even negligently, action should be directed against them for redress of the wrongs, and not against the City . . . "); *Spalding v. Allred*, 64 P. 1100, 1102 (Utah 1902) ("[I]f the officer assumes to levy on or sell the whole property, his act, as against the co-tenant not named in the writ, is wrongful, and he may be sued for trespass or conversion, as the co-tenant may elect.").

[47] *Ross v. Schackel*, 920 P.2d 1159, (Utah 1996) ("An examination of the cases decided by this court at or about the time of statehood reveals the general rule that public officers and employees enjoyed no official immunity for negligently performed ministerial acts . . . "). In *Day v. State ex rel. Utah Dept. of Public Safety*, 1999 UT 46, ¶ 36, 980 P.2d 1171, the Utah Supreme Court made clear that the reference point for the protection of remedies against unconstitutional abrogation was not the time of statehood, but the time of abrogation. It also noted that remedies for negligence and recklessness against government employees acting in the course and scope of their employment had been statutorily abrogated in 1983, but, "in lieu of that remedy, one injured by the negligence or recklessness of a government employee was provided a remedy against the government agency." That remedy, now provided by Utah Code Ann. § 63G-7-301(2)(i) (previously § 63G-7-301(4)), is what Kendall seeks to pursue for the individual defendants' negligence if leave is granted for him to file a Second Amended Complaint.

Utah Constitution for Officer Olsen to enter the backyard to look for the missing boy . . . apply here." Movants' Memorandum at 12.

The same facts set forth by Kendall in support of his claims under the Fourth Amendment and Article I, section 14 of the Utah Constitution for the illegal search by Olsen apply here, demonstrating genuine issues of material facts, precluding summary judgment. *See supra*, sections I. A. 2–4.

II. OFFICER OLSEN'S SEIZURE OF GEIST

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

1. Movants' Statements of Elements and Kendall's Responses

To defeat the claim of qualified immunity with respect to the killing of Geist, the parties agree that Kendall must show, with the facts viewed in the light most favorable to Kendall, that the violation of a constitutional right occurred and that the violation was clearly established at the time of the violation. *Phillips v. James*, 422 F.3d 1075, 1080 (10th Cir. 2005).

Movants assert that "[t]o 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."

Kendall **disagrees** with that statement of the applicable "element" because it ignores the fact that the claims of Movants are compellingly disputed by Kendall and, in fact, there is no basis whatsoever for the factual premises of Movants' statement. Movants have not stated an "element;" rather, they have simply begged an ultimate question. The second prong of the qualified immunity analysis is whether the constitutional right was clearly established at the time of the violation. *Mayfield v. Bethards*, 2016 WL 3397503, *2 (10th Cir. 2016).

2. Movants' Statement of "Undisputed Material Facts" Under Officer Olsen's Seizure of Geist – Qualified Immunity for Kendall's Claims Under 42 U.S.C. § 1983 and Kendall's Responses.

1. Having "cleared" the yard, Officer Olsen went to leave.

Response: Undisputed.

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.

Response: Undisputed.

3. Seconds later Geist came from behind the shed charging at Officer Olsen.

Response: Disputed.

Because of his wholly inconsistent testimony on a vital fact relating to the reasonableness of his killing Geist, Olsen himself has provided a material issue of fact. Geist did not run toward Olsen until Olsen, on "instinct," started running. Olsen Depo., 86:16–87:11. Geist simply barked, making himself known and communicating his concern that Olsen was in Geist's backyard, Beck Decl., ¶ 5, and then Olsen started running, Olsen Depo., 86:16–87:11; Olsen Interview, 8:1–4, provoking Geist to run after him, as almost any dog would do in those circumstances. Beck Decl., ¶ 9.

> Olsen: When I pushed it closed, that's **when I started hearing Geist**, and it started barking very angrily, and **so I thought there is a dog back there and so I started going around here as fast as I could**. I wanted to get out of the backyard.
> Q: Where did you go?
> A: **I started running up this way.** It was kind of a sideways run because I wanted to keep an eye on what was coming, and I attempted to go through underneath this to get out of this gate.
> Q: So you – **you were running away from the dog?**
> A: Yes. I started to.
> Q: Did you ever learn that's a good way to keep a dog from coming after you?
> A: To run away?
> Q: Uh-huh.

A: It's just instinct. **So as he started charging at me, that's when I stopped.**

Olsen Depo., 86:18–87:11 (emphasis added).[48]

Olsen's testimony could not be more clear: He heard Geist bark, then Olsen ran, then Olsen stopped running when Geist "**started** charging" at him. That was an incredibly unreasonable thing for Olsen to do. If there had actually been an exigent circumstance justifying some action against Geist (which there was not, as is shown below), that exigency was created by Olsen's reckless conduct while unconstitutionally in Kendall's backyard.

"It is a matter of common knowledge and common sense that one should not run from a barking dog. Just like with many other animals, running provokes dogs to chase." Beck Decl., ¶ 9. *See* also Beck Decl., ¶ 11, Declaration of Shea Kendall ("Shea Decl."), Exhibit "E" hereto, ¶ 7. "Running away from a dog provokes—that is, it invites—a dog to run after the person running." Shea Decl., ¶ 9.

4. Geist was approximately 20-25 feet away from Officer Olsen when Officer Olsen first saw Geist.

Response: Undisputed.

5. Geist was a large Weimaraner who exceeded one hundred pounds.

Response: Disputed.

Geist weighed about 90 pounds. Kendall Decl., ¶ 13. Male Weimaraners are commonly 75–85 pounds. http://www.hillspet.com/en/us/dog-breeds/weimaraner.

[48] See also Olsen Interview, 8:1–4 (". . . I got to about here and I started hearing barking, and um, **when I started hearing the barking**, I mean I knew it was a dog, so **I started to go a little bit quicker** to get out and I got to about here and **I looked and saw a dog that was coming back here**, and it was charging at me right here."). (Emphasis added.)

6. Geist charged at Officer Olsen in an extremely aggressive fashion.

Response: Disputed.

Geist was not being "aggressive." He had never before been "aggressive." Declaration of Haley Bowen ("Bowen Decl.", Exhibit "G" hereto, ¶¶ 4, 6–10). Kendall states as follows:

> Geist was a friendly and loveable dog his entire life. Geist was never observed to be aggressive by me, my friends, my family, or anyone involved in the care of Geist.

Kendall Decl., ¶ 13. See, also, Shea Decl., ¶ 10, 11.

"As a breed, Weimaraners are not aggressive. They are, however, recreational barkers. They will bark for any reason, and for no reason at all. They bark loudly." Brooks Decl., ¶ 5. *See also* Shea Decl., ¶ 5, 6.

Heather Beck has "handled, and worked with, many dogs who were misperceived as being 'aggressive.'" Beck Decl., ¶ 1. After reviewing many of the materials in this matter (described in Beck Decl., ¶ 2), she "can strongly say that Geist was acting with an intent to communicate to Olsen, *not* with an intent to harm Olsen." Beck Decl., ¶ 3.[49]

7. He was growling and barking, his ears were back, and his teeth were bared.

Response: Disputed (see response to prior paragraph), but even if true, it is immaterial.

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[49] Beck addresses the characterization of Geist as "aggressive" as follows:

> By the officers' and Ms. Clinch's description of the incident, Geist's intention was not to cause harm to anyone. A dog who intends to harm someone is silent. I have been mauled once by a dog, a 110-pound Doberman Pinscher. It came off leash and went straight for me, without a bark, a growl, or a snarl. This is the only truly aggressive dog I have encountered in over twenty years dealing with dogs that are inappropriately described as "aggressive." If Geist wanted to attack Olsen, Geist would have been silent and Olsen never would have heard Geist coming.

Beck Decl., ¶ 4.

Never before this lawsuit was filed—not in his police report nor during his internal affairs interview—did Olsen ever mention growling, ears being back, or teeth being bared. See response to paragraph 8 below. However, even if he had mentioned that those things happened, other than after this lawsuit was filed, it is irrelevant because a dog's barking, growling, snarling, having its ears back, and baring its teeth is not indicative whatsoever of an attack or imminent attack, particularly when the dog's movement is not restricted. Beck Decl., ¶¶ 5, 6, 7. If Geist was growling and barking, with his ears back and his teeth bared, that was "normal for a dog in those circumstances, and did not indicate Geist was going to bite Olsen." Brooks Decl., ¶ 10. "Dogs are creatures that want to make it through the day with as little conflict as possible. They use body movement, barking, and growling responses to make that possible." Beck Decl., ¶ 20. Movants do not mention in their Memorandum that Olsen, during his deposition, said, preposterously, for the first and only time, that Geist "was leaping towards him." Olsen Depo., 97:6–12, 131:25–132:5; Olsen Interview.

8. It was difficult for Officer Olsen to describe to internal affairs the demeanor of Geist when he was charging at Officer Olsen.

Response: Disputed.

Olsen had every opportunity to describe during his internal affairs interview the demeanor of Geist, yet he simply described how he "started hearing barking," Olsen Interview, 8:2, and that it "was charging" at him after Olsen "started to go a little bit quicker to get out". Olsen Interview, 8:2–4. Again, Olsen said Geist was "barking" and that "this dog was angry, it was barking and it was running towards [him]." Olsen Interview, 8:16. He also referred to his police report, in which he said he "heard a dog barking" and "saw a large grey dog running towards me and barking

loudly." Olsen Interview, 8:23. Then he said Geist was "coming with a purpose." Olsen Interview, 10:5.

He didn't mention growling, ears being back, teeth bared. He said Geist was barking and ran toward him *after* Olsen moved quickly to get out of the yard.

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.

Response: Undisputed, but immaterial.

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.

Response: Disputed.

Any comparison between Geist and the police attack dog referenced by Olsen is ludicrous. It takes years to train police attack dogs to bite because it goes against their instincts to bark and growl to resolve conflicts. Weimaraners are not chosen to be attack dogs because they are reserved, shy, and sensitive dogs. Weimaraners will always bark instead of bite.[50] Any comparison between

[50] It is silly, truly ludicrous, to compare Geist to the police K9 attack dog pictured in Exhibit E to the Declaration of Brett Olsen. . . .Police K9 attack dogs are trained for years to actually bite. It takes years to teach dogs to bite since it goes against their natural instincts of barking and growling to solve conflict. Also, specific breeds of dogs are chosen for this job because of their abilities and drives to see this activity as a game and fun. Weimaraners are *not* chosen for sport and protection work because of their reserved, shy, and sensitive nature. Weimaraners will always choose to bark instead of bite.

Beck Decl., ¶ 24.

Geist and a police attack dog, and any characterization of Geist as "aggressive," is entirely erroneous and "badly misinformed." Beck Decl., ¶ 25–26.

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.)

Response: Disputed.

Kendall does not dispute the photo is submitted by Movants; however, it has nothing to do with this case or Geist. The comparison is absurd. Because a picture is worth a thousand words, a comparison is offered between the trained police attack dog in the photo referenced by Olsen and photos of Geist in various settings and moods.[51] Exhibit 7 to Kendall's Declaration is a comparison of the photo of the K-9 attack dog referenced by Olsen and several photos of what Geist actually looked like in various circumstances and activities.

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.)

Response: Disputed.

[51] Defendant Olsen, in his Declaration dated July 13th, 2016, stated that a photo of a K-9 police dog "looked exactly like Geist did on [June 18th, 2014]." (Dkt. 36, ¶ 35.) I spent thousands of hours with Geist and never witnessed Geist appear in a way that was even remotely comparable to the K-9 police attack dog presented by Olsen. Geist had a demeanor that was relaxed, friendly curious, well-adjusted, and well-socialized. He appeared friendly and, at most, excited (a) when I would play with Geist with toys, (b) when we were running, mountain biking, hiking, or kayaking together, (c) when I would feed Geist or give him treats, (d) when people would walk into the backyard when Geist was there, (e) when he was barking loudly (including every time someone knocked on the door or rang the doorbell), and (f) every other time I observed Geist during his entire life. It was not possible on June 18, 2014, for Geist to appear similar to the K-9 police attack dog presented by Olsen. The K-9 police attack dog was obviously trained to attack; Geist was timid of strangers, loving, curious, friendly, and non-violent.

Kendall Decl., ¶13.

Geist was not "aggressively charging" toward Olsen. See responses to paragraphs 3, 6, 7, and 10 above.

Also, Olsen did not first attempt to retreat "on seeing Geist aggressively charging towards him." Olsen started running after he heard Geist barking, then stopped running after Geist was provoked to run and "started running" toward Olsen. Olsen Depo., 86:18–87:11; Olsen Interview, 8: 2–4. See response to paragraph 3 above.

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."

Response: Disputed.

Olsen's notion that Geist was going to "attack" him was not a "realization," but, rather, something he unreasonably and baselessly imagined. Geist was not going to "attack" Olsen and there was no reasonable basis for Olsen believing Geist was going to attack. Beck Decl., ¶¶ 3–8, 12–14, 18–23.

14. These actions did not deter Geist and Geist continued to charge towards Officer Olsen growling, barking and baring his teeth.

Response: Disputed.

Geist did not "continue" to "charge" towards Olsen. He started to run toward Olsen only after Olsen already unreasonably and unwisely started running after he heard Geist bark. Olsen Depo., 86:18–87:11; Olsen Interview, 8:2–4. *See* responses to paragraphs 3 and 13 above. Also, Geist simply "ran" toward Olsen, as any dog would be expected to do when a stranger is in the dog's yard and starts to run. *See id*.

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.

Response: Disputed.

In light of the material inconsistencies in Olsen's testimony—including his account of hearing a non-existent doorbell ringing and the knocking on a door when it would be impossible to hear a knock on that door from where Olsen was standing, and his changing accounts of whether Geist ran after him before or after Olsen started running—there is no reason to give credence to what Olsen said his subjective thoughts were at the time. What has been established, however, is that Olsen had a collapsible baton to use as a distraction or a bite stick and he could have kicked Geist if he had to, but he did not do either of those things or take other reasonable non-lethal measures before he unnecessarily and unreasonably pulled out his gun and shot Geist dead. Olsen Depo., 96:23–97:3; Olsen Interview, 9:10–19; Beck Decl., ¶ 17, 18.

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.)

Response: Disputed.

Under all the circumstances, as set forth in the facts cited by Kendall above, Olsen could not have had a reasonable belief he was in imminent danger of "attack" and had no justification for using lethal force and killing Geist. Beck Decl., ¶¶ 3 ("I can strongly say that Geist was acting with an intent to communicate to Olsen, *not* with an intent to harm Olsen."), 5, 6 ("A dog that is snarling, with its ears back, and barking in a threatening way is extremely unlikely to bite an intruder unless the dog is trapped, cornered, leashed, or otherwise has its freedom of movement

impaired."), 7, 8, 12, 13, 18; Brooks Decl., ¶ 6 ("Weimaraners, when confronted with an intruder in their territory, are alert, but not vicious. They *will* bark. They will sometimes run to the intruder. But they are all bark and no bite.")

17. Geist came to a rest after being shot.

Response. Undisputed.

That's what dogs do when they are brutally, unnecessarily, and unreasonably killed. Or as Olsen said, "[I]t just lost energy and fell right at my feet." Olsen Interview, 9:6–7.

18. Officer Olsen did not see any signs a dog might be on the property prior to entering the yard.

Response: Disputed.

The deposition testimony cited in support of this "fact" is actually about signs in the yard *after* Olsen entered it.

Olsen had to have heard Geist barking loudly before he entered the yard. In fact, he admits that he may have—or probably—heard Geist barking before he entered the yard. Olsen Depo., 82:11–83:4, 127:19–128:11, 128:19–23, 134:17–135:10, 145:12–20. From all the other relevant testimony, it is made clear that Olsen had heard Geist barking and knew Geist was in the backyard before Olsen entered it. Yvette Zayas, a friend of Olsen's,[52] was in the same area as Olsen,[53] and heard Geist barking loudly. Zayas Depo., 25:8–26:7, 29:5–17, 32:24–33:14, 42:24–43:24; Olsen Depo., 66:10–67:21. Officer Johnson also heard Geist barking loudly from Kendall's backyard when Olsen was nearby, between the east end of Kendall's backyard and the gate through which Olsen entered Kendall's backyard. Deposition of Christopher Johnson ("Johnson Depo."),

[52] Yvette Zayas Deposition ("Zayas Depo."), portions of which are attached to Anderson Decl. as Exhibit "10", 36:20–37:13; Olsen Depo., 65:20–23, 104:22–105:10.
[53] Zayas Depo., 44:10–14.

excerpts of which are Exhibit "11" to Anderson Decl., 23:12–28:14; Olsen Depo., 58:3–59:15, 68:10–13.

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.

Response: Disputed.

Officer Olsen was in the Kendall backyard for one or one and a half minutes. Olsen Interview, 9:25–10:1. Throughout much of the backyard were at least two dog bowls, a bright green tennis ball, and a red chew toy—which could not have been missed by someone in the Kendall backyard. Kendall Decl., ¶ 18.

20. Even then it was far from clear that the structure was a dog house.

Response: Disputed.

Olsen recognized it as a doghouse. Olsen Depo., 88:4–8, 142:16–18 (". . . and when I looked and saw that could be a doghouse . . .")

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.

Response: Disputed, as to the characterization that Geist "attacked" Olsen.

Geist never attacked Olsen. See Kendall's responses to paragraphs 3, 6, 7, 10, 12, 14, and 16 above.

22. However, other police officers that were canvassing the neighborhood and another resident recall seeing Geist shortly before he was shot.

Response: Undisputed.

23. They all reported Geist was extremely aggressive.

Response: Disputed—and Geist's behavior behind a fence is immaterial.

The term "extremely aggressive" was not used by Clinch in her email (Ex. 15 to Slark Decl.), nor in Clinch's deposition. In fact, she admitted she didn't know if Geist's bark that frightened her was any different than his normal Weimaraner bark—that "[t]here's no way for [her] to know that . . ." Deposition of Diana Clinch ("Clinch Depo."), excerpts of which are Exhibit "8" to Anderson Decl., 14:17–15:4. Clinch also admitted that she did not know if, when the owner came home and if Geist were welcoming him, that what she experienced was any different than what the owner would experience. Clinch Depo., 13:9–13. The fact is that Geist, as a large, two-and-a-half-year-old Weimaraner, would have had a very loud bark. Brooks Decl., ¶ 14.

A bark much like Geist's can be heard on a YouTube video referenced at Shea Decl., ¶ 5.

Zayas also never used the term "extremely aggressive." She referred to Geist's "aggressive manner," Zayas Depo., 26:1, but also spoke about Geist only in terms of his behavior when she was on one side of a fence and he was on the other, which is wholly irrelevant. (See discussion below.)

Neither did Johnson ever use the term "extremely aggressive." And he, too, admitted that he did not know if Geist "was acting any differently than he always acted when people walked by." Johnson Depo., 26:25–27:7.

Geist's behavior toward people on one side of a fence while he was on the other was typical and harmless—and is not indicative of what his behavior would be with someone inside the yard

with him, with no barrier between them. Beck Decl., ¶¶ 27–28.[54] "As a matter of common sense, [the descriptions of Zayas, Johnson, and Clinch] match the normal behavior of a dog when there is a commotion on the other side of the fence and do not indicate that the dog is 'aggressive'. . . . [T]hat behavior was normal for a Weimaraner and does not indicate Geist posed a threat to anyone entering the yard." Brooks Decl., ¶ 9.

24. Specifically, Ms. Clinch lives in the neighborhood.

Response: Undisputed.

But she had never walked by Kendall's home before. Clinch Depo., 15:25–16:1.

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.)

Response: Disputed.

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[54] Practically all dogs bark when confronted by strangers in the dog's territory, but this is especially true if the dog is restricted by a leash or a fence. I have witnessed thousands of instances of dogs experiencing barrier frustration with fences. This is exhibited by the behaviors of barking, growling, snarling, and charging or leaping at the fence. A dog exhibiting these behaviors is not more likely to bite a person than a dog that is quiet. In virtually all instances of barrier frustration, when the barrier is removed the dog loses its enthusiasm to bark and growl. The barrier acts to embolden dogs, making them appear more confrontational than they really are.

If Geist was barking, snarling, and charging or jumping at the fence on June 18, 2014, then that merely indicates Geist was experiencing barrier frustration. These behaviors at the fence do not indicate Geist posed a risk of harm to a person entering the yard. A person inside the yard would encounter Geist without the presence of the barrier, and therefore Geist would certainly have been *less* confrontational than he appeared at the fence.

Beck Decl., ¶¶ 27–28.

There is no evidence whatsoever that Geist ever attacked Officer Olsen. The evidence simply establishes that Geist barked and ran toward Olsen after Olsen recklessly and unreasonably started running because he merely heard Geist's bark. See responses to paragraphs 3, 6, 7, 10, 12, 14, and 16 above. From the referenced Exhibit 15 to Slark Declaration, it appears Clinch wrote to a media representative for the SLCPD, Lara Jones, not the Chief of Police. Also, neither of the last two of the Movants' citations from the Clinch Deposition relate in any way to what or to whom she wrote.

26. She testified that Geist was extremely agitated and acted in an extremely aggressive manner toward her.

Response: Disputed.

Clinch never testified using the terms "extremely aggressive" or "extremely agitated." (See the testimony cited by Movants.) Clinch testified: "It was like he was agitated. It was – it was aggressive. I'm sorry, that's the best word I can use." In fact, she admitted she didn't know if Geist's bark that frightened her was any different than his normal Weimaraner bark—that "[t]here's no way for [her] to know that . . ." Clinch Depo., 14:17–15:4. Clinch also admitted that she did not know if, when the owner came home and if Geist were welcoming him, that what she experienced was any different than what the owner would experience. Clinch Depo., 13:9–13.

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."

Response: Undisputed, but irrelevant.

Clinch was speaking about Geist's behavior on one side of a fence, while she was on the other. As noted above, in response to paragraph 23, Geist's behavior behind a fence was entirely normal and not in any way indicative of how he would behave with someone on the same side of the fence as him. One need only go on a walk around most city blocks to understand that dogs will bark, sometimes sounding like they really mean it, when they are behind a fence.

Again, Clinch has no knowledge about Weimaraners and their normal way of barking when they are friendly, Clinch Depo., 13:2–4, and she has no idea whether Geist's bark was simply the same bark he normally used to welcome home his owner. Clinch Depo., 13:9–13. The fact is that Weimaraners "bark loudly" and "can be intimidating when there is a barrier, such as a fence, between the dog and the person to whom the barking is directed." Brooks Decl., ¶5. However, "they calm down when the barrier is removed—such as by the person going into the yard." *Id.*

28. Ms. Clinch is a lover of dogs and until recently owned a Rottweiler.

Response: Disputed.

Clinch's response in this matter, without knowing or bothering to discover, anything about Weimaraners in general, Clinch Depo., 12:25–13:1, or about how Weimaraners bark even if they are friendly and greeting, *id*., 13:2–13, is hardly indicative of one who loves dogs. To justify the brutal killing of a beloved dog like Geist, and the consequent heartbreak and grief of his best friend, Shea Decl., ¶ 14, on the basis of one's uninformed attribution of "aggressiveness" to a dog with a naturally loud bark barking loudly from behind a fence, as is perfectly normal, Beck Decl., ¶¶ 27–28, is inconsistent with "loving dogs."

29. She is not easily alarmed by dogs, but Geist alarmed her.

Response: Disputed.

Clinch's response, and her letter-writing following the killing of Geist, reflects that she is, indeed, easily alarmed by dogs. Since she has had dogs, she must know they will bark behind fences when people walk by, and she must also know that a large dog like Geist will have a very loud bark. Shea Decl., ¶ 5 ("Weimaraners have a loud, alerting bark . . .") Hence, she is indeed apparently "easily alarmed by dogs"—at least those that have loud barks and about whom she has no knowledge. Clinch Depo., 12:25–13:1.

30. Officer Zayas was canvassing the neighborhood shortly before Geist was shot.

Response: Disputed.

Officer Zayas never once used the word "canvass" or "canvassing." She called it what it was: a "search." Zayas Depo., 14:24–15:4, 15:19–22, 16:1–6, 19:19–20, 19:25–20:1, 21:2–3, 24:23–25, 25:6–7, 47:17.

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."

Response: Undisputed.

However, what Geist did behind a fence is irrelevant. Beck Decl., ¶¶ 27–28.

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.)

Response: Disputed.

The last citation offered by Movants has nothing to do with the fact asserted. Also, Zayas never testified she "owns several dogs." She stated, "I have dogs," but then referred to her "dog" in the singular. ("I hear when my dog barks . . .") Zayas Depo., 33:5. She testified that she has

"owned in my life" some dogs. *Id.*, 32:5–13. She never referred to a "large aggressive Doberman." Her ownership, past or present of certain kinds of dogs is irrelevant to her clearly erroneous characterizations of Geist since she has no familiarity with Weimaraners. Zayas Depo., 26:8–11, 32:18–23 ("I don't know anything about Weimaraners.")

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.)

Response: Disputed.

Nothing in any of the testimony cited by Movants supports these factual assertions.

It would appear from Zayas's testimony that she does not love all dogs, particularly Weimaraners like Geist who do what Weimaraners naturally do, harmlessly, and that she, in fact, is easily scared of a dog who has a naturally loud bark and is exhibiting natural barrier frustration. *See* Beck Decl. ¶¶ 27–28.

34. Officer Johnson also saw Geist shortly before he was shot.

Response: Undisputed.

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 . . ."

Response: Undisputed.

What Geist did behind a fence is irrelevant. Beck Decl., ¶¶ 27–28.

36. Officer Johnson also owns a large dog, a golden retriever.

Response: Undisputed. And as irrelevant as the fact that Kendall's counsel owns a Golden Retriever, too.

3. Kendall's Statement of Additional Elements and Material Facts

Movants have failed to set forth the elements of an unconstitutional seizure or the elements of Kendall's § 1983 claim that Olsen, Purvis, and SLCC violated Kendall's constitutional protections against the warrantless, non-consensual seizure of his best friend Geist. The elements for a § 1983 claim for an unconstitutional seizure are the same as the elements set forth *supra*, section I. A. 4. b.

a. Elements and Material Facts for Unconstitutional Seizure

The following are the **elements of Kendall's claim that Olsen, Purvis, and SLCC engaged in, or are otherwise liable for, an unconstitutional seizure** of Geist and the facts establishing that the elements are met by Kendall:

A. There must have been a "seizure." "A 'seizure' of property occurs when there is some meaningful interference with an individual's possessory interests in that property." *United States v. Jacobsen*, 466 U.S. 109, 113 (1984). It was clearly established at the time of Olsen's killing of Geist that the killing of a dog by a police officer is a "seizure" under the Fourth Amendment. *Mayfield v. Bethards*, 2016 WL 3397503, *5 (10th Cir. 2016).

Facts demonstrating that Kendall has met that element:

1. Olsen killed Geist. City's Response to Request for Admissions No. 2; Olsen Depo., 26:20–23, 94:3–11.

B. The seizure must not have been pursuant to a warrant or some exception to the warrant requirement. *Mayfield v. Bethards*, 2016 WL at *3.

Facts demonstrating that Kendall has met that element:

1. There was no warrant for the seizure of Geist. Kendall Decl., ¶ 17.

2. No exception to the warrant requirement has been claimed or established by Movants.

3. The search was not "reasonable" (with all facts viewed in the light most favorable to Kendall on a motion for summary judgment). As demonstrated *supra*, there was no necessity, and no reasonable basis whatsoever, for the killing of Geist.

(a) Olsen was in the Kendall backyard unconstitutionally and otherwise illegally, *see supra*, section I;

(b) Olsen failed to check to see if a dog was present in the yard before entering it, Olsen Depo., 26:17–22, 80:25-81:2;

(c) Olsen failed to whistle or call out to see if a dog was in the yard before entering it, *id.*;

(d) Olsen ran after he heard a dog was in the yard after entering it, Olsen Depo., 86:18–87:11;

(e) Olsen failed to use non-lethal alternatives such as a baton, a Taser, or his boot, Olsen Depo., 96:23–97:3, Olsen Interview, 9:10–19;

(f) Olsen used lethal force when non-lethal force or no force at all would have sufficed, Beck Decl., ¶ 18; and

(g) Olsen's killing of Geist was completely unnecessary. Beck Decl., ¶ 23.

4. Even if exigent circumstances for the warrantless seizure of Geist had been claimed by Movants, any purported exigent circumstances asserted as a justification for the warrantless

seizure were created by Purvis and Olsen by (1) the unconstitutional and otherwise unlawful entry into Kendall's backyard by Olsen and (2) Olsen's reckless and provocative running away when he heard Geist's bark. (The facts on these points are set forth in detail above.)

C. The government agents have not met their burden of justifying a warrantless, non-consensual seizure. In order to invoke exigent circumstances to justify a warrantless, non-consensual seizure, the government agents responsible for the seizure must demonstrate they did not create the exigency. The Movants have the burden of establishing the exigent circumstances exception to the warrant requirement. "The government bears the burden of proving the exigency exception to the warrant requirement applies." *United States v. Najar*, 451 F.3d 710, 717 (10th Cir. 2006) (citing *United States v. Wicks*, 995 F.2d 964, 970 (10th Cir. 1993)).

It was "clearly established . . . that law enforcement officers cannot create an exigency justifying their actions. *McInerney v. King*, 791 F.3d 1224, 1238 (10th Cir. 2015) (citing *United States v. Martin*, 613 F.3d 1295, 1304 (10th Cir. 2010); *United States v. Bonitz*, 826 F.2d 954, 957 (10 Cir. 1987)).

Facts demonstrating that Kendall has met that element:

1. The facts, described in detail above, establish that, even if Movants had claimed "exigent circumstances" in relation to the killing of Geist (which they have not), there is powerful evidence (which must be viewed in the light most favorable to Kendall) that Olsen's killing of Geist was wholly unnecessary and unreasonable.

2. Further, the factual record, *supra*, sections I.A.2–4, II. A. 2–3, demonstrates that Movants created any "exigency" that may be asserted by them for the killing of Geist insofar as (1) Olsen was unconstitutionally and otherwise illegally in Kendall and Geist's yard, after failing

to even check to see if a dog was present (or, as the evidence indicates, after actually knowing Geist, with his loud bark, was in the yard), and (2) Olsen provoked Geist to run toward him and continue barking (albeit harmlessly, but still apparently serving as the only ground relied upon by Movants to justify Olsen's senseless killing of Geist) by inexplicably running away after simply hearing Geist bark.

B. Kendall's State Constitutional Claims

1. Movants' Statement of Elements and Kendall's Responses

As noted in the Introduction, *supra*, Kendall has withdrawn his claims under Article I, sections 1 and 7 of the Utah Constitution inasmuch as those claims are more appropriately analyzed under the constitutional protections against unreasonable searches and seizures.

Movants have offered nothing other than a bare statement that, under Article I, section 14 of the Utah Constitution, there is not a flagrant violation if there was a reasonable basis to warrant the particular intrusion. The facts set forth above demonstrate there was no reasonable basis for the seizure of Geist, particularly since there was no warrant, any "exigency" was created by Olsen, and the shooting of Geist was wholly unreasonable under the circumstances.

2. Kendall's Response to Movants' Statements of "Undisputed Material Facts"

Movants offer as their undisputed materials facts relating to Kendall's state constitutional claims a reference to the "same facts that apply to Kendall's claim that it was a violation of the Fourth Amendment . . . for Officer Olsen to seize Geist . . ." Movants' Memorandum ¶ 20.

Kendall **responds** by referring, likewise, to his responses and factual assertions relating to his claim that Olsen's seizure of Geist was a violation of the Fourth Amendment. *See supra,* sections II. A. 1–3.

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

1. Movants' Statement of Elements and Kendall's Responses

A. A claim for conversion requires proof of a willful interference with property, without lawful justification.

Kendall **disagrees** with those elements insofar as "willful" is not specifically defined. The state of mind required is as follows:

> "Although conversion results only from intentional conduct it does not however require a conscious wrongdoing, but only an intent to exercise dominion or control over the goods inconsistent with the owner's right." *Allred v. Hinkley*, 8 Utah 2d 73, 328 P.2d 726, 728 (1958). That is, a conversion requires "only an intentional interference with the true owner's rights." *Id.*

Lawrence v. Intermountain, Inc., 2010 UT App 313, ¶ 16 n.7, 243 P.3d 508.

B. A claim for trespass to chattel requires the same.

Kendall **disagrees** with that statement of elements insofar as it is unclear what is, and what is not, included in "the same." The correct statement of the elements of trespass to chattel is as follows:

> A trespass to a chattel may be committed by intentionally (a) dispossessing another of the chattel, or (b) using or intermeddling with a chattel in the possession of another.

Restatement (Second) of Torts § 217 (1965).

> One who commits a trespass to a chattel is subject to liability to the possessor of the chattel if, but only if, (a) he dispossesses the other of the chattel, or (b) the chattel is impaired as to its condition, quality, or value, or (c) the possessor is deprived of the use of the chattel for a substantial time, or (d) bodily harm is caused to the possessor, or harm is caused to some person or thing in which the possessor has a legally protected interest.

Restatement (Second) of Torts § 218 (1965).

C. A claim for intentional infliction of emotional distress requires that 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.

Kendall **agrees** with those elements and contends he has met them.

D. With limited exception, a claim for intentional infliction of emotional distress may only lie for conduct that occurs within the presence of the plaintiff.

Kendall **disagrees** with that element. There is no presence requirement for a claim of intentional infliction of emotional distress caused by the killing of a pet. *Brown v. Muhlenberg Twp.*, 269 F.3d 205, 218 (3d Cir. 2001) (analyzing recovery for shooting of dog with no presence requirement); *Richardson v. Fairbanks N. Star Borough*, 705 P.2d 454, 456 (Alaska 1985) (same) *Katsaris v. Cook*, 180 Cal. App. 3d 256, 267 (1986) (same); *Gill v. Brown*, 695 P.2d 1276, 1277 (Idaho App. 1985) (finding pet owners could recover for the shooting of their donkey with no presence requirement); *Daughen v. Fox*, 539 A.2d 858, 860 (Pa. Super. 1988) (analyzing recovery for death of a pet with no presence requirement); *Rabideau v. City of Racine*, 627 N.W.2d 795, 803 (Wis. 2001) (while owner was in fact present, analyzing recovery for shooting of dog with no presence requirement).

2. Kendall's Response to Movants' Statement of "Undisputed Material Facts"

Movants have stated for their "undisputed material facts" relating to Kendall's claims for trespass to chattel, conversion, negligence, and intentional infliction of emotional distress that "[t]he same facts that apply to Kendall's claim that it was a violation of the Fourth Amendment

and a violation of article I, section 7 and 14 of the Utah Constitution for Officer Olsen to seize Geist . . . apply here." Movants' Memorandum at 21.

The same facts set forth by Kendall in support of his claims that Olsen's seizure of Geist violated the federal and state constitutions apply here, demonstrating that there are genuine issues of material facts, precluding summary judgment.

3. Kendall's Statement of Additional Material Facts

1. On June 18, 2014, when Kendall learned that Geist had been killed, Kendall experienced shock and overwhelming emotions of anger and sadness. Kendall Decl., ¶ 16.

2. Kendall's distress increased exponentially when he arrived home and saw Geist in Kendall's backyard. *Id.*

3. The events of that day caused Kendall to experience severe symptoms of post-traumatic stress disorder, flashbacks, traumatic dreams, trouble concentrating, depression, anxiety, paranoia, fear of police officers, anger and rage, emotional numbness, and lack of interest in activities Kendall used to enjoy with Geist or that involve going to locations where police officers are present. *Id.*

4. Kendall was absolutely broken hearted, as if a member of his family or a best friend—which Geist was to Kendall—had been unnecessarily killed because of the ignorance, reckless decision to run, and trigger-happiness of the killer. Shea Declaration, ¶ 14.

4. Kendall's Statement of Additional Elements and Material Facts

Movants do not mention the elements of negligence. As discussed *supra*, section I. C. 1., the elements of negligence are "(1) that Defendant owed Plaintiff a duty, (2) that Defendant breached that duty, (3) that the breach of duty was the proximate cause of Plaintiff's injury, and

(4) that Plaintiff in fact suffered injuries or damages." *Hunsaker v. State*, 870 P.2d 803, 897 (Utah 1993).

1. **Movants owed Kendall a duty.** As discussed *supra*, section I. C. 1., the relevant factors to determine whether a defendant owes a duty to a plaintiff include: "(1) whether the defendant's allegedly tortious conduct consists of an affirmative act or merely an omission . . . (2) the legal relationship of the parties; (3) the foreseeability or likelihood of injury; (4) "public policy as to which party can best bear the loss occasioned by the injury,"; and (5) "other general policy considerations." *B.R. ex rel. Jeffs v. West*, 2012 UT 11, ¶ 5, 275 P.3d 228 (citations omitted).

The facts establishing this element are set forth in detail *supra*, sections I. A. 2–4, II. A. 1–3, including those facts showing that (1) Olsen voluntarily entered onto Kendall's residence; (2) Olsen searched the curtilage of Kendall's residence; (3) Olsen opened the shed in Kendall's backyard; (4) Olsen failed to check for a dog before he entered Kendall's backyard; and (5) Olsen failed to use reasonable alternatives to lethal force.

2. **Olsen breached that duty**, for which the City is liable under Utah Code Ann. § 63G-7-301(2)(i) (previously § 63G-7-301(4)). (As discussed above, the pending Motion for Leave to File a Second Amended Complaint is intended to make clear that if the individual defendants are not to be held accountable individually for their negligence, then the City should be held accountable, as contemplated by the Utah Governmental Immunity Act.)

The facts establishing this element are set forth in detail *supra*, including those facts showing that (1) Olsen failed to recognize that Geist, who was barking loudly at Officers Zayas and Johnson when Olsen was nearby, was in the backyard of Kendall's residence before Olsen entered into the backyard; (2) Olsen failed to call out, shake the fence, or do anything else to notify

a person or animal potentially present on the premises before entering the backyard to the Kendall residence; (3) Olsen failed to clear the backyard of the Kendall residence without entering by looking over the three gates into the yard and the chain link fence, and apparently did not even consider doing so; (4) Olsen failed, after entering the backyard of the Kendall residence, to observe the many signs that a dog was present, including multiple dog bowls, a red rubber chew toy, and a tennis ball; (5) when Olsen heard Geist barking, Olsen perplexingly decided to run away; (6) when Geist, as would any dog, followed Olsen, Olsen erroneously concluded that because Geist was running and barking that Geist was likely to bite Olsen, even though barking is a sign the dog *does not* intend to bite; (7) Olsen did not even consider using his baton or other reasonable non-lethal alternatives to deter or distract Geist; (8) Olsen chose not to simply stand still while Geist approached Olsen; (9) Olsen chose not to simply use his voice to calm or deter Geist; and (10) Olsen withdrew, aimed, and twice discharged his weapon, killing Geist.

3. **It was foreseeable to Olsen that Kendall would suffer a severe emotional injury and damage to property** as a result of the killing of Geist.

The facts establishing this element are as follows:

1. Geist was loved like a best friend by Kendall. Shea Decl., ¶ 14.
2. Geist was secured in a backyard, with toys, dog bowls, and a dog house. Kendall Decl., ¶¶ 11, 18.
3. Geist was killed in Kendall's backyard and his dead body was left there for Kendall to see when he arrived home. Kendall Decl., ¶ 16.
4. Grieving over the death of a pet dog is common and such grief can be as severe, if not more intense, than the death of a family member. Beck Decl., ¶ 31.

4. **Kendall suffered substantial damages and injury as a result of the breach by Olsen of his duty owing to Kendall.**

The facts establishing this element are set forth in the immediately preceding paragraph. Also:

1. Kendall "experienced shock and overwhelming emotions of anger and sadness" when he learned Geist had been killed. Kendall Decl., ¶ 16.
2. Kendall's "distress increased exponentially when [he] arrived home and saw Geist in [his] backyard. Kendall Decl., ¶ 16.
3. The killing of Geist caused Kendall to suffer from "severe symptoms of post-traumatic stress disorder, flashbacks, traumatic dreams, trouble concentrating, depression, anxiety, paranoia, fear of police officers, anger and rage, emotional numbness, and lack of interest in activities [he] used to enjoy with Geist or that involve going to locations where police officers are present. Kendall Decl. ¶ 16.
4. Kendall was broken-hearted, as if a member of his family or best friend had been unnecessarily killed. Shea Decl., ¶ 14.

ARGUMENT

I. OFFICER OLSEN'S ENTRY INTO AND SEARCH OF THE CURTILAGE OF KENDALL'S HOME, PURSUANT TO THE INSTRUCTIONS OF PURVIS, WAS AN UNCONSTITUTIONAL SEARCH UNDER BOTH THE UNITED STATES AND UTAH CONSTITUTIONS.

The Fourth Amendment protects the right of privacy in our "persons, houses, papers, and effects." With extremely limited exceptions, for government agents to engage in, or instruct others to engage in, searches of private homes (including curtilages), they must first obtain a warrant issued by an independent magistrate or obtain consent for the search. In contempt of that fundamental privacy protection, Purvis instructed police officers to search "everywhere"[55]—intending and communicating his intention that they enter into enclosed, private yards without a warrant and without consent[56]—and, pursuant to Purvis's instructions, Olsen entered Kendall's backyard, walked around the yard, opened and searched a shed, then ruthlessly and unnecessarily killed Geist—all without a warrant, without consent, and without any reasonable cause to believe there was any connection between Kendall's backyard and the emergency that gave rise to the perceived need for the search, all in violation of the Fourth Amendment of the United States Constitution and its Utah corollary, Article I, section 14 of the Utah Constitution.

A. The United States and Utah Constitutions Provide Essentially the Same Protections Against Unreasonable, Warrantless Searches.

In one aspect of an automobile search, Article I, section 14 of Utah Constitution was interpreted by a plurality of the Utah Supreme Court as providing greater privacy protections than

[55] Olsen Depo., 55:25–56:8.
[56] Olsen Depo., 56:2–13, 112:23–114:8, Worsencroft Depo, 24:19–25:4; Purvis Depo., 73:23–74:21.

the Fourth Amendment to the United States Constitution.[57] However, the two constitutional provisions, except in "compelling circumstances," are now to be treated uniformly.[58]

Hence, under both the Utah and United States Constitutions, searches conducted without warrants "are *per se* unreasonable . . . subject only to a few specifically established and well-delineated exceptions."[59] "One such exception to the warrant requirement recognized by both the United States Supreme Court and Utah's appellate courts is exigent circumstances."[60]

1. Just as Federal Constitutional Provisions May Be the Basis for an Award of Money Damages Against Government Agents Acting Under Color of Law, Utah Law Similarly Provides Remedies for Violations of Self-Executing State Constitutional Provisions.

In *Bott v. DeLand*,[61] the Utah Supreme Court followed the lead of the United States Supreme Court in *Bivens v. Six Unknown Federal Narcotics Agents*,[62] which "allowed a claimant to recover damages from federal narcotics agents directly under the Fourth Amendment for the

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[57] *State v. Larocco*, 794 P.2d 460 (Utah 1990).
[58] *State v. Anderson*, 910 P.2d 1229, 1235 (Utah 1996) ("[W]e have endeavored toward uniformity in the application of the search and seizure requirements of the state and federal constitutions, particularly since the respective provisions are practically identical.")
[59] *Salt Lake City v. Davidson*, 2000 UT App 12, ¶ 9, 994 P.2d 1283, (quoting *State v. Ashe*, 745 P.2d 1255, 1258 (Utah 1987) (quoting *Katz v. United States*, 389 U.S. 347, 357 (1967))) (inside quotation marks omitted).
[60] *Id.* (citing *Mincey v. Arizona*, 437 U.S. 385, 390 (1978); *State v. Genovesi*, 909 P.2d 916, 921 (Utah Ct. App. 1995)).
[61] 922 P.2d 732 (Utah 1996). West Publishing Company incorrectly reflects that *Bott v. DeLand* has been "abrogated" by *Spackman ex rel. Spackman v. Bd. of Educ.*, 2000 UT 87, 16 P.3d 533, which error is repeated in *Jensen v. Cunningham*, 2011 UT 17, ¶ 51, 250 P.3d 465 (where the Utah Supreme Court indicates *Bott* was "overruled on other grounds by *Spackman*"). *Bott* was not "abrogated" or "overruled" by *Spackman* any more than *Bivens* has been "abrogated" or "overruled" by later cases that have limited its reach. Rather, *Spackman* recognizes *Bott* as having allowed a private cause of action for the violation of self-executing constitutional provisions, then simply "clearly articulate[s] the source of [the Court's] authority to provide damages" and "clearly establish[es] an analytical framework for determining when damages would be an appropriate remedy for the violation of a self-executing constitutional provision." *Spackman* at ¶ 19.
[62] 403 U.S. 388, 407 (1971).

violation of his right against unreasonable searches and seizures."[63] *Bott* held that "self-executing constitutional provisions allow for awards of money damages."[64] In *Spackman*, the Utah Supreme Court held that "a plaintiff must establish . . . three elements before he or she may proceed with a private suit for damages" for the violation of a self-executing provision of the Utah Constitution.[65] "First, a plaintiff must establish that he or she suffered a 'flagrant' violation of his or her constitutional rights."[66] "Second, a plaintiff must establish that existing remedies do not redress his or her injuries."[67] "Third, a plaintiff must establish that equitable relief, such as an injunction, was and is wholly inadequate to protect the plaintiff's right or redress his or her injuries."[68]

In *Jensen v. Cunningham*,[69] the Utah Supreme Court held that Article I, section 14 of the Utah Constitution is self-executing, noting as follows:

> The plain language of this section directly prohibits unreasonable searches and seizures without probable cause for a warrant. Such a rule sufficiently gives effect to the underlying rights and duties without implementing legislation.[70]

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[63] *Bott*, 922 P.2d at 738.The self-executing constitutional provision at issue in *Bott* was Article I, Section 9, which provides that "[p]ersons arrested or imprisoned shall not be treated with unnecessary rigor." *Id.* at 737–738.
[64] *Id.* at 739.
[65] *Spackman*, 2000 UT 87 ¶ 22, 16 P.3d 533.
[66] *Id.* ¶ 23. In *Spackman*, the Court stated a "flagrant" violation means "a defendant must have violated 'clearly established' constitutional rights 'of which a reasonable person would have known." *Id.* That does not, however, mean that there must be "clear precedent on point that specifically recognizes the claimed right and applies it to analogous facts." There may be "instances where a defendant's conduct will be so egregious and unreasonable that it constitutes a flagrant violation of a constitutional right even in the absence of controlling precedent." *Jensen v. Cunningham*, 2011 UT 17. ¶ 67, 250 P.3d 465.
[67] *Id.* ¶ 24.
[68] *Id.* ¶ 25.
[69] 2011 UT 17, ¶ 63, 250 P.3d 465.
[70] *Id.*

Hence, Kendall is entitled to pursue his state constitutional claims for the violations of Article 1, section 14 of the Utah Constitution because (1) Purvis and Olsen's conduct constituted a "flagrant" violation of Kendall's constitutional rights; (2) other existing remedies, such as legislation, do not redress his injuries; and (3) equitable relief is wholly inadequate to protect Kendall's rights or to redress his injuries.

B. The Entry into and Search of the Curtilage of Kendall's Home Was a "Search" Within the Meaning of the Fourth Amendment of the United States Constitution and Article I, Section 14 of the Utah Constitution.

The most basic "simple baseline"[71] test for what constitutes a "search" within the meaning of the Fourth Amendment is based on the concept of trespass, particularly the intrusion upon the places and things listed in the Fourth Amendment: persons, houses, papers, and effects. "For most of our history the Fourth Amendment was understood to embody a particular concern for government trespass upon the areas ('persons, houses, papers, and effects') it enumerates."[72] "Where . . . the Government obtains information by physically intruding on a constitutionally protected area, such a search has undoubtedly occurred."[73] Although that test was expanded by *Katz v. United States,* 389 U.S. 347 (1967), broadening Fourth Amendment protections to other areas where there is an expectation of privacy, it did not alter the fundamental protection of "persons, houses, papers, and effects" against unreasonable searches and seizures. "[T]hough *Katz* may add to the baseline, it does not subtract anything from the Amendment's protections 'when the Government *does* engage in [a] physical intrusion of a constitutionally protected area.'"[74] "The

[71] *Florida v. Jardines,* 133 S.Ct. at 1414.
[72] *United States v. Jones,* 132 S.Ct. 945, 950 (2012).
[73] *United States v. Jones,* 132 S.Ct. at 950–951, n. 3.
[74] *Florida v. Jardines,* 133 S.Ct. at 1414 (quoting *United States v. Knotts,* 460 U.S. 276, 286 (1983) (Brennan, J., concurring in the judgment).

Katz reasonable-expectation-of-privacy test has been *added to*, not *substituted for*, the common-law trespassory test."[75]

Stressing the fundamental right of people to be left alone in their homes, including the curtilages of their residences, the Supreme Court has noted the following principles:

> [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.'[76]
>
> We therefore regard the area "immediately surrounding and associated with the home"—what our cases call the curtilage—as "part of the home itself for Fourth Amendment purposes."[77]
>
> This area around the home is "intimately linked to the home, both physically and psychologically," and is where "privacy expectations are most heightened."[78]

Even if a resident were required to demonstrate a "legitimate expectation of privacy in the premises searched"[79] to be afforded the constitutional protections against unreasonable searches and seizures, Kendall has abundantly demonstrated his obvious expectation of privacy in his home, including the curtilage.[80]

For purposes of determining if a search occurred by an agent of the government, the purpose of the search does not matter. It can be a search for evidence of a crime, for a suspect of a crime, to determine compliance with administrative requirements,[81] or a search for a missing

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[75] *United States v. Jones*, 132 S.Ct., at 952 (emphasis in original).
[76] *Florida v. Jardines*, 133 S.Ct. at 1414 (quoting *Silverman v. United States*, 365 U.S. 505, 511 (1961).
[77] *Id.* (quoting *Oliver v. United States*, 466 U.S. 170, 180 (1984)).
[78] *Id.*, 133 S.Ct., at 1415 (quoting *California v. Ciraolo*, 476 U.S. 207, 213 (1986)).
[79] *United States v. Jones*, 44 F.3d 860, 871 (10th Cir. 1995); *see also Illinois v. Caballes*, 543 U.S. 405, 409 (2005).
[80] Kendall Decl., ¶¶ 5–10.
[81] *Camara v. Municipal Court*, 387 U.S. 523 (1967).

person.[82]

Movants contend that when Olsen entered through the gate of Kendall's property, walked around the private property, opened and searched the shed there, and then killed Geist, there was "not a Fourth Amendment search."[83] That curious argument is based entirely on a misreading of *Galindo v. Town of Silver City*, 127 F. App'x 459 (10th Cir. 2005) (unpublished).[84] In *Galindo* there were numerous signs of illegal activity and a likelihood that a minor who had been missing for hours was in the home being searched. *Id.* at 462–63. The decision clearly did not stand for the proposition that there was not a "Fourth Amendment 'search'" of the curtilage.

C. The Law Was Clearly Established That the Warrantless Search of the Curtilage of Kendall's Home Could Not Be Justified by Exigent Circumstances Because There Was No Cause to Believe There Was Any Association Between the Kendall Property and the Perceived Emergency

Movants claim that Olsen's entry into Kendall's backyard was justified by "exigent circumstances." At the core of those purported "exigent circumstances" is the understanding (albeit incorrect, due to the negligent search of the Horman house by police officers[85]) that a two- or three-year-old boy[86] was missing from a house about 1/8 of a mile from the Kendall residence.[87]

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[82] "The fourth amendment requirements . . . apply whether the officer conducting the search is looking for a missing person or for evidence of a crime." *State v. Beede*, 406 A.2d 125, 129 (N.H. 1979) (citing C*amara v. Municipal Court*, 387 U.S. 523, 528–29 (1967)); *State v. Slade*, 362 A.2d 194, 195 (1976)). *See also State v. Yoder*, 935 P.2d 534 (Utah 1997).
[83] Movants' Memorandum at 23.
[84] That case is an "order and judgment" that "is not binding precedent" and the citation to the case "must include an appropriate parenthetical notation" signifying that it is unpublished. 10th Cir. Rule 32.1(B).
[85] Note 8, *supra.*
[86] Note 6, *supra.*
[87] Kendall Decl., ¶ 12.

There appears to be somewhat of a difference in the analysis of "exigent circumstances" under Utah case law and federal cases. Under Utah law, an exception to the warrant requirement is permitted under the "emergency aid doctrine," pursuant to which there must be "some reliable and specific indication of the probability that a person is suffering from a serious physical injury." *State v. Comer*, 2002 UT App 219, ¶ 10, 51 P.3d 55. In *Comer*, the Court held that "the emergency aid doctrine does not apply to the facts of this case because the information available to the police was insufficient to support an objectively reasonable belief that an unconscious, semi-conscious, or missing person feared injured or dead might be in the [searched] home." *Id.* ¶ 19.

Under Utah law, "[t]he difference between exigent circumstances and emergency aid situations is that in the former there is probable cause but no warrant, while in the latter there is no probable cause to justify a warrant and the purpose is not to arrest, search, or gather evidence."[88] That is consistent with the testimony of Olsen, in which he agreed that "even though there might be exigent circumstances you still needed the sort of cause that would be required in order to obtain a warrant." Olsen Depo., 6:23–7:2.

Similarly, under federal cases, "[g]enerally, a warrantless entry under the exigent-circumstances exception requires probable cause and exigent circumstances."[89] "The Tenth Circuit, however, appears to have recognized a subset of exigent-circumstances cases—what the Court refers to as 'emergency-aid' cases—that do not require probable cause."[90]

[88] *Salt Lake City v. Davidson*, 2000 UT App 12, ¶ 15, 994 P.2d 1283.
[89] *U.S. v. Christy*, 785 F.Supp.2d 1004, 1026 (D.N.M.) (citing *Kirk v. Louisiana*, 536 U.S. 635, 638 (2002); *Manzanares v. Higdon*, 575 F.3d 1135, 1142–43 (10th Cir. 2009)).
[90] *Id.*

Whatever inconsistency there might be between Utah law and federal law in the Tenth Circuit on that point can be resolved by simply equating "reasonable grounds to believe" with a "probable cause" requirement in a case involving an emergency.[91]

Kendall concedes that, notwithstanding the sloppiness of the police search of the Horman home for the missing child, there were reasonable grounds for Purvis and Olsen to believe there was an urgent situation: to their knowledge, a two- or three-year-old boy was missing from his home.

However, that is where any "reasonableness" ends in an analysis of what Purvis and Olsen did—and in the analysis by Movants of the standards setting the bounds of any reasonable search.

The belief that there is an exigent circumstance, such as the need to find a missing toddler and make sure he is not in harm's way, is not the end of the analysis as to whether a search comports with the Fourth Amendment. Such a circumstance cannot justify, for instance, an indiscriminate search of all homes or curtilages in an area within as large a circumference from a missing boy's home as he might have traveled in the time he has been missing, as Purvis and Olsen seem to think.[92]

According to Purvis and Olsen, any search of any home or curtilage (including enclosed yards) was fair game for a warrantless, non-consensual search as long as the property to be searched was within the distance the missing boy could have traveled and was accessible to him.[93]

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[91] This formulation is precisely the result reached in *Oliver v. United States*, 656 A.2d 1159, 1166 (D.C.App. 1995).

[92] Purvis Depo., 34:13–35:2, 42:13–43:4, 44:8–18, 45:16–46:8, 47:5–6, 48:19–49:2, 55:5–56:18; Olsen Depo., 90:4–16.

[93] 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?

Purvis and Olsen had no reason to believe the properties to be searched, or actually searched (including Kendall's), had *anything* to do with the missing boy or the circumstances of his disappearance. Olsen Depo., 72:24–73:11, 75:1–76:24, 79:6–80:16. The homes and yards (many of them enclosed) were simply within the distance the police officers thought he could have wandered—and, to them, that was sufficient.

As Movants put it (using the word "confined" in an incredibly expansive sense): "Officers . . . confined their searches to places a three year old child could reasonably have wandered." Movants' Memorandum at 27. Movants also make the point that "[a] child could easily reach the latches to any of the gates that lead to Kendall's backyard." *Id.* In other words, for as far away as

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A: Provided he could get to it and it was very accessible, yes.

Olsen Depo. 90:4–9.

> Q: Next sentence says, quote (as read): "We were told to check the with the residences and check the yards/property for the child and keep track of what yards we could access and clear and what neighbors we talked with in person."
> A: That does sound accurate.
> Q: And you told them to do that?
> A: Yes.
> Q: And that would have included, if they couldn't see the entire yard, to go inside the yard to make sure they saw whether the boy was somewhere in the yard?
> A: That would be my expectation.
> Q: And would it also have been your expectation that they open and search inside sheds in backyards?
> A: I hadn't, um, thought of that at the time, but it seems like a good idea.
> Q: Even without consent, without a warrant?
> A: Well, I – again, if that's where the child is, that's where we've got to go get them, yeah.
> Q: And even without any connection[,] other than proximity to the boy's home[,] between that specific property and the perceived emergency?
> A: Yes.

Purvis Depo., 73:23–74:21.

the boy could have traveled and wherever he would have had access, any private property could be searched by the police without a warrant and without consent. Since "the possibility that he had been abducted was not ruled out," *id*. at 26, Movants' logic and unique view of Fourth Amendment law would mean warrantless, non-consensual searches could constitutionally have been conducted by police anywhere an abductor might have traveled with the boy since he went missing and wherever the abductor might have gained access. Apparently no home or curtilage within the Wasatch Front, or perhaps beyond, would have been safe. That notion of virtually unbounded authority to enter into and search people's private homes and curtilages is what led to the flagrant violation by Olsen of Kendall's constitutional rights, with tragic consequences.

The law was clearly established that much more than spatial proximity and access must be established before a police officer, without a warrant and without consent, can rummage around through people's homes whenever someone is missing. Regardless of what Purvis and Olsen thought, it is not enough that a house is within reach of a missing boy and accessible to him.

The law requires that there must be reasonable cause to believe there is a connection between the property to be searched and the emergency giving rise to the need for a search.[94] In this case, there was no connection, and no reason to believe there was a connection, between Kendall's property and the missing boy. None.[95]

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[94] *See e.g. Zurcher v. Stanford Daily*, 436 U.S. 547, 556 (1978) ("The critical element in a reasonable search is . . . that there is reasonable cause to believe that the specific 'things' to be searched for and seized are located on the property to which entry is sought.").

[95] Olsen Depo., 75:1–76:24, 79:6–14, 79:21–80:16, 89:9–14, 119:18–120:3, 153:12–22; Purvis Depo., 55:5–56:18, 79:24–80:4; Worsencroft Depo., 66:6–12, 66:25–67:15; Johnson Depo., 20:2–15.

Noting that "the government bears the burden of proving the exigency exception to the warrant requirement applies," and that the "burden is especially heavy when the exception must justify the warrantless entry of a home,"[96] the United States Court of Appeals for the Tenth Circuit employs the following test for determining if non-criminal searches are reasonable: "[W]hether (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 (10th Cir. 2006). In determining the second prong of that test was met in *Najar*, the Court noted that 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**." *Id.* at 720 (emphasis added).

Those are the same requirements set forth by the Utah Court of Appeals:

> When a search is performed in an emergency situation, the area searched must have a close connection to the emergency. [*State v.*] *Yoder*, 935 P.2d [534,] 550 [(Utah Ct. App. 1997)] Specifically, there must be a nexus between the emergency situation and the area or place to be searched. *See id.* (noting defendant's behavior and demeanor and proximity of missing child's clothing to defendant's apartment justified search of defendant's apartment); *see* [*State v.*] *Prober*, 297 N.W.3d [297 N.W.2d 1] at 11 [(Wis. 1980), *rev'd in part on other grounds by State v. Weide*, 455 N.W.2d 899 (Wis. 1990)] (holding "emergency search may not extend to areas unrelated to the emergency.").[97]

[96] *United States v. Najar*, 451 F.3d 710, 717 (10th Cir. 2006). *See also Welsh v. Wisconsin*, 466 U.S. 740, 749–50 (1984).

[97] *Salt Lake City v. Davidson*, 2000 UT App 12, ¶ 35, 994 P.2d 1283. *See also State v. Comer*, 2002 UT App 219, ¶ 17, n.7, 51 P.3d 55 ("The third prong of the emergency aid doctrine, on the other hand, "asks whether there was some reasonable basis to associate the place searched with the emergency." (quoting *Salt Lake City v. Davidson*, 2000 UT App 12, ¶ 15, 994 P.2d 1283).

Since at least 2008, the law has been clearly established that, consistent with all the prior cases requiring at least reasonable cause to believe there is a connection between the property to be searched and the emergency creating the need for the search,[98] both prongs of the *Najar* test are met only if that nexus, which is so obviously missing in this case, is present:

> 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. *Najar, 451 F.3d at 718–19.*
>
> * * *
>
> 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.

United States v. Gambino-Zavala, 539 F.3d 1221, 1225–1226 (10th Cir. 2008).

II. OFFICER OLSEN'S KILLING OF GEIST WAS AN UNCONSTITUTIONAL SEIZURE UNDER THE UNITED STATES AND UTAH CONSTITUTIONS FOR WHICH PURVIS AND OLSEN CANNOT ESCAPE ACCOUNTABILITY BY MEANS OF QUALIFIED IMMUNITY

A. The Law Was Clearly Established That the Killing of Geist Was a Seizure Within the Meaning of the Constitutional Protections Against Unreasonable Seizures

> "A 'seizure' of property occurs when there is some meaningful interference with an individual's possessory interests in that property. *United States v. Jacobsen*, 466 U.S. 109, 113, 104 S.Ct. 1652, 80 L.Ed. 2d 85 (1984). Killing a dog meaningfully and permanently interferes with the owner's possessory interest. It therefore constitutes a violation of the owner's Fourth Amendment rights absent a warrant or some exception to the warrant requirement.

Mayfield v. Bethards, 2016 WL 3397503, *3 (10th Cir. 2016).

It has long been clearly established—well before June 18, 2014—that the killing of a dog

[98] *See, e.g., United States v. Smith*, 797 F.2d 836, 840 (10th Cir. 1986) ("there must be some reasonable basis, approaching probable cause, to associate an emergency with the area or place to be searched.")

is a "seizure" within the meaning of the Fourth Amendment. Not only had the U.S. Court of Appeals for the Tenth Circuit analyzed seizures of cattle and horses under the Fourth Amendment,[99] but "the clear weight of authority from other jurisdictions provided . . . adequate notice that the [killing of a pet dog] implicated . . . Fourth Amendment rights. *Mayfield v. Bethards*, 2016 WL 3397503 at *5.[100]

B. The Law Was Clearly Established That the Killing of Geist Was Unnecessary and Unreasonable and, Therefore, a Violation of the Fourth Amendment and Article I, Section 14 of the Utah Constitution.

The killing of Geist by Olsen was entirely unnecessary and, hence, unreasonable. Olsen had no lawful reason to be in Geist's yard in the first place. (See discussion of the unconstitutional search, *supra*, section I. A. 1–4.) He failed to take any precautions to determine if a dog was in the yard.[101] He had abundant notice that a dog was in the yard, having heard a dog barking in the neighborhood that "may have" been—and, of course, was[102]— Geist at the east end of the

[99] *See Campbell v. City of Spencer*, 682 F.3d 1278, 1280, 1285 (10th Cir. 2012); *Stanko v. Maher*, 419 F.3d 1107, 1112–15 (10th Cir. 2005); *DiCesare v. Stuart*, 12 F.3d 973, 977–78 (10th Cir. 1993).

[100] Indeed, seven federal circuits had addressed the issue . . ., each holding that killing a pet dog is a Fourth Amendment seizure. *See Viilo v. Eyre*, 547 F.3d 707, 710 (7th Cir. 2008) ("Every 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."); *see also Carroll v. Cty. Of Monroe*, 712 F.3d 649, 651 (2d Cir. 2013); *Maldanado v. Fontanes*, 568 F.3d 263, 270–70 (1st Cir. 2009); *Andrews v. City of W. Branch*, 454 F.3d 914, 918 (8th Cir. 2006); *San Jose Charter of Hells Angels Motorcycle Club v. City of San Jose*, 402 F.3d 962, 975 (9th Cir. 2005); *Altman v. City of High Point*, 330 F.3d 194, 203, 205 (4th Cir. 2003); *Brown v. Muhlenberg Twp.*, 269 F.3d 205, 210 (3rd Cir. 2001).

Mayfield v. Bethards, 2016 WL 3397503 at *5.

[101] Olsen Depo., 29:17–22, 80:25–81:2.

[102] Brooks Decl., ¶ 14; Zayas Depo., 25:8–26:7, 29:5–17; Johnson Depo., 25:14–26:1.

property,[103] yet did nothing to determine if a dog was in the yard[104] (which he knew how to do[105]) or plan what to do if he encountered a dog in the yard while unconstitutionally searching there. He recklessly started running as soon as he heard Geist's bark,[106] which anyone should know would simply provoke a dog to run after him.[107] Because Geist did what dogs, particularly Weimaraners,[108] do—harmlessly barking, running after an intruder in his yard, even growling, baring his teeth and putting his ears back (if in fact, in light of Olsen's many inconsistent and doubtful statements,[109] that's what happened)[110]—Olsen drew his gun, instead of taking other reasonable measures like using his baton or his boot[111] (if necessary, which it was not), and unnecessarily used lethal violence, brutally killing Geist, a beloved, gentle dog that had never threatened, attacked or bitten anyone.[112]

The law was clearly established as of June 18, 2014, that the killing of a companion dog is an unconstitutional "unreasonable seizure" if it is "unnecessary—i.e., when less intrusive, or less destructive, alternatives exist,"[113] when the pet "presented no danger and when non-lethal methods

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[103] Olsen Depo., 66:10–67:21, 81:8–83:4.
[104] Olsen Depo., 29:17–22, 80:22–81:17.
[105] Olsen Depo., 24:11–26:2.
[106] Olsen Depo., 86:18–87:11.
[107] Beck Decl., ¶¶ 9–12; Shea Decl., ¶¶ 7, 9–10; Brooks Decl., ¶ 7, 10.
[108] Brooks Decl., ¶¶ 3–7, 10–13.
[109] *see* e.g., Olsen, Depo., 105:20–106:10, 109:4–6, 109:21–110:7; Olsen Interview, 8:6, 9:25–27; Olsen Decl., ¶ 25.
[110] Brooks Decl., ¶¶ 5–7, 10–13; Bowen Decl., ¶ 9; Shea Decl., ¶ 11; Beck Decl., ¶¶ 5–7, 12.
[111] Olsen Depo., 26:8–12; Olsen Interview, 9:18–19.
[112] Haley Decl., 4, 6–11; Kendall Decl., ¶ 13; Shea Decl., ¶¶ 10–11.
[113] *Criscuolo v. Grant County*, 540 Fed. Appx. 562, 564 (9th Cir. 2013) (unpublished); *see also Viilo v. Eyre*, 547 F.3d 707, 710–11 (7th Cir. 2008) ("police officers [have] reasonable notice that unnecessarily killing a person's pet offends the Fourth Amendment"); *Flint v. City of Milwaukee*, 91 F.Supp.3d 1032, 1046 (E.D. Wis. 2015) ("the City defendants have been on notice since 2001 that unnecessarily killing a person's dog violates a constitutional right"); *Kincheloe v. Caudle*, 2009 WL 3381047, **8 (W.D. Tex. 2009) ("If the facts asserted by the Plaintiffs [that a police

of capture would have been successful,"[114] when the dog "does not pose an immediate danger and where the use of force is avoidable."[115] The "clearly established law" as of June 18, 2014, "derived from a 'robust consensus of cases of persuasive authority' in the courts of appeal" "held that it is unreasonable for law enforcement to kill a pet dog when the dog did not present an imminent threat to law enforcement or the public." *Branson v. Price*, 2015 WL 5562174, *6 (D. Colo. 2015).

Branson, id. at *5, listed several of the factors considered by courts in determining whether the "seizure" of a dog is reasonable under the totality of the circumstances. Those factors, all of which are at issue here (precluding summary judgment) or which actually establish conclusively that Geist was unreasonably killed, are: (1) whether the dog was "at-large" [here, Geist was in an enclosed, secured backyard (Kendall Decl., ¶ 11)]; (2) the breed of the dog [Weimaraners are friendly, warm, kind dogs who do not bite without being cornered (Shea Decl., ¶ 6; Brooks Decl., ¶¶ 4–6, 11–13)]; (3) whether there was time to find an alternative solution to gain control of the dog [Olsen could have acted reasonably and just stood still or used his baton or foot if the need arose (which it clearly did not) (Brooks Decl., ¶ 13; Beck Decl., ¶¶ 3, 5, 7, 9–11, 14–18, 23, 30)]; (4) whether non-lethal means were available to control the dog [many non-lethal means were available to Olsen, but he instead grabbed and used his gun, unnecessarily and cavalierly killing Geist (see the citations under the immediately preceding subparagraph (3))]; and (5) whether the

officer was not faced with exigent circumstances that necessitated the killing of the dog] are found to be true, the Court finds that a reasonable officer . . . would have known that the killing of the . . . dog . . . was unlawful.").

[114] *Andrews v. City of West Branch, Iowa*, 454 F.3d 914, 918–19 (8th Cir. 2006) (citing *Brown v. Muhlenberg Twp*., 269 F.3d 205, 211–12 (3rd Cir. 2001); *Fuller v. Vines*, 36 F.3d 65, 68 (9th Cir. 1994)).

[115] *Taylor v. City of Chicago*, 2010 WL 4877797, *2 (N.D. Ill. 2010); *see also Robinson v. Pezzat*, 818 F.3d 1, 7–8 (D.C. Cir. 2016).

dog posed a danger to the officer or the public [Geist posed no danger to the officer or the public, regardless of the irrational and uninformed fears of Olsen upon hearing Geist's loud bark (Kendall Decl., ¶13; Beck Decl., ¶¶ 3–8, 12–13, 18–23; Shea Decl., 5–6, 10–11)].

C. The Law Was Clearly Established That the Justification of Exigent Circumstances for Not Obtaining a Warrant for the Seizure of Geist Is Unavailing Because Olsen and Purvis Created the Exigency

Since Olsen did not have a warrant to seize Geist, he must be able to demonstrate "exigent circumstances" for the seizure to be constitutionally valid. Olsen, of course, claims Geist was barking, growling, and running toward him, with his ears back and his teeth bared. As demonstrated above, a dog doing what dogs do under the circumstances, naturally and harmlessly, does not constitute an "exigent circumstance" justifying the killing of the dog. However, even if it did, Olsen cannot find refuge in such an "exigent circumstance" because his unconstitutional entry, and his irrational and provocative running away from a barking dog (which he had not even seen), created the purported exigency.

At the time Olsen killed Geist, the law was clearly established that law enforcement officers cannot create the exigency they invoke to justify their Fourth Amendment search or seizure.[116] Here, Olsen's Fourth Amendment violation of entering and searching Kendall's backyard created the very 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

[116] *McInerney v. King*, 791 F.3d 1224, 1235 (10th Cir. 2015) ("law enforcement officers may not 'create' the exigency justifying their intrusion into a home.") (quoting *United States v. Martin*, 613 F.3d 1295, 1304 (10th Cir. 2010)).

viewed,"[117] so too it must be an essential predicate to the killing of Geist that Olsen did not, through unconstitutional means, place himself in the "danger" he claims as justification for the killing.

"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). Here, Purvis manufactured the purported exigency by instructing police officers to unconstitutionally enter curtilages of homes solely on the basis they were located within a distance police believed K.H. may have wandered. Then Olsen also manufactured the purported exigency (*i.e.*, Geist running toward him) by (1) being where Olsen did not lawfully belong, which provoked Geist to react as he did with others who came into his yard,[118] and (2) running in a direction away from where he first heard Geist bark, provoking Geist to run toward him.[119]

III. EITHER THE CITY OR OLSEN IS LIABLE FOR OLSEN'S NEGLIGENCE AND TRESPASS

In Utah, government employees "were personally liable for civil wrongs committed in a ministerial or operational capacity." *Lyon v. Burton*, 2000 UT 55, ¶ 45 5 P.3d 616. Hence, there must be some remedy for damages resulting from their negligence, either as at common law or pursuant to an alternative remedy. *Berry v. Beech Aircraft*, 717 P.2d 670 (Utah 1985).

The Governmental Immunity Act of Utah ("GIA") has waived the immunity of governmental entities (which includes Salt Lake City Corporation) for the negligence of employees. Utah Code Ann. § 63G-7-301(2)(i) (previously § 63G-7-301(4)). That waiver provides

[117] *Horton v. California*, 496 U.S. 128, 136–140 (1990).
[118] Haley Decl., ¶ 9 ("When guests came to our home, Geist would often initially bark loudly at and then run toward them. When he reached them, he was always friendly and harmless and never showed any aggression or threat of any harm whatsoever toward anyone."); Brooks Decl., ¶ 6.
[119] Brooks Decl., ¶ 7, 10, 13; Beck Decl., 10–13.

an alternative for the abrogated claim (with certain exceptions) against the individual employees effectuated by § 63G-7-202(3)(a) and (c) (previously § 63G-7-202(3)(c). However, the GIA claims to immunize *both* the governmental entity *and* the employees for negligent acts or omissions "if the injury arises out of or in connection with, or results from," *inter alia*, intentional trespass or violation of civil rights. § 63G-7-201(4)(b) (previously § 63G-7-301(5)(b)). That is clearly a violation of the Open Courts Clause, as argued by Kendall at greater length in connection with Defendants' Motion for Judgment on the Pleadings on Twelfth Cause of Action.

Ironically, Defendants claim in this case there has been no trespass nor violation of civil rights, yet claim the City escapes liability at this juncture for the negligence of individual defendants (all employees of the City) *because* of the exceptions from entity liability under § 63G-7-201(4)(b) for intentional trespass and violation of civil rights.

Until there is a verdict as to who is liable and for what, Kendall is entitled to pursue his claims for negligence against either the individuals or the City, pursuant to Article I, section 11 (the Open Courts Clause) of the Utah Constitution. *Berry v. Beech Aircraft*, 717 P.2d 670 (Utah 1985).

Since *someone* must be liable for the negligence of the government employees, and since Defendants claim there is no individual liability for the negligence of the individual defendants, Kendall has moved the Court to permit him to make minor amendments in his Complaint, asserting the City's liability for the individual defendants' negligence, pursuant to Utah Code Ann. § 63G-7-301(2)(i) (previously § 63G-7-301(4)).[120]

[120] Defendants have made clear they do not object to the amendment because of the timing, but solely because they assert that amendment would be futile. Opposition to Motion for Leave to File a Second Amended Complaint, 2.

Movants simply contend, without more, that "Kendall cannot establish the necessary elements of a trespass or negligence claim" against Olsen. Movants' Memorandum at 31. Movants assert, essentially, that because Olsen "was lawfully on Kendall's property because he was looking for a missing three year old boy," there could be no claim for trespass." *Id.* at 32. However, it has been abundantly demonstrated, and will be proven at trial, that Olsen and Purvis are both liable for trespass.

> A person is liable for trespass when, without permission, he "intentionally 'enters land in the possession of [another], *or causes a thing or a third person to do so*."' *Carter v. Done*, 2012 UT App 72, ¶ 17, 276 P.3d 1127 (alteration in original) (quoting Restatement (Second) of Torts, § 158(a) (1965); *see also* Restatement (Second) of Torts § 158 cmt. c (1965).

Purkey v. Roberts, 2012 UT App 241, ¶ 17, 285 P. 3d 1242 (emphasis added). Olsen was wrongfully on Kendall's property, and Purvis wrongfully instructed him to engage in the unconstitutional and otherwise illegal search.

Likewise, the record, as reflected above, abundantly supports a claim for negligence against Olsen for his failure to determine if Geist was in the yard before he entered it; entering the yard unconstitutionally and otherwise in violation of the law; failing to determine if Geist truly posed a danger; provoking Geist to run after Olsen, then using that as an excuse for claiming an "attack;" and failing to utilize non-lethal measures in dealing with Geist and, instead, unnecessarily and unreasonably shooting him dead. Summary judgment is precluded when the evidence adduced and described in detail above demonstrates "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).

IV. SALT LAKE CITY IS LIABLE FOR THE NEGLIGENCE OF THOSE WHO HAVE ACTED ON BEHALF OF THE CITY, PARTICULARLY IN REGARD TO POLICIES AND PRACTICES WHICH LED TO THE DEATH OF GEIST.

Movants assert that "[t]o 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." Movants' Memorandum at 32. However, Kendall has not asserted any claim against Salt Lake City for trespass; his only claims for trespass are against Olsen and Purvis.

As to Kendall's claims against the City for Olsen's and the other individual defendants' negligence, he will be entitled to pursue such claims pursuant to the GIA, if leave to file an amended complaint is granted, as described in the immediately preceding section.

Kendall's claims against Salt Lake City for negligence in the Thirteenth Claim for Relief are based on the negligence of its employees and agents in condoning unconstitutional searches and promulgating policies incorrectly setting forth the standard for appropriate warrantless searches, all of which led to the unconstitutional and otherwise illegal and, ultimately, tragic search of Kendall's backyard.

Those claims relate to the negligence of the City's employees, who are unknown to Kendall but for whose negligence the City is liable to Kendall pursuant to Utah Code Ann. § 63G-7-301(2)(i) ("Immunity from suit of each governmental entity is waived: (i) subject to Subsection 63G-7-201(4), as to any injury proximately caused by a negligent act or omission of an employee committed within the scope of employment.") "Entity liability is, in all circumstances, derived from the acts of its agents, whether it be under theories of respondeat superior, negligence, or other imputed conduct (civil or criminal)." *C.J.C. v. Corporation of Catholic Bishop of Yakima*, 985 P.2d 262, 268 (Wash. 1999) (en banc). Someone on behalf of the City negligently drafted and

promulgated the constitutionally infirm policy regarding exigent circumstances, without even mentioning the clearly established law that there must be reasonable cause to believe there is a connection between the property to be searched and the perceived "exigency." The failure to include that crucial element in the SLCPD policy has led police officers to erroneously believe that in cases of missing children, they have unlimited authority to search wherever a child might have wandered and wherever the child might have access. *See* Worsencroft Depo., 81:19–83:5. The City is liable for such negligence. Utah Code Ann. § 63G-7-301(2)(i).

V. KENDALL IS ENTITLED TO A TRIAL ON HIS CLAIMS AGAINST OLSEN FOR TRESPASS TO CHATTELS AND CONVERSION

Kendall will not pursue claims against Purvis on any claims for trespass to chattels or conversion (although he will continue to pursue his claims against Purvis for trespass, since he caused Olsen to unconstitutionally enter Kendall's backyard). However, Kendall is entitled to pursue his claims against Olsen for trespass to chattels and conversion, having presented compelling evidence of Olsen's wrongful trespass to chattel and conversion.

Olsen is liable to Kendall for trespass to a chattel. (1) He dispossessed Kendall of Geist; (2) Geist was impaired as to his condition, quality, and value; (3) Kendall has been deprived of the use of Geist; and (4) harm was caused by Olsen to Geist, in which Kendall had a legally protected interest. Section 218, Restatement (Second) of Torts (1965) (June 2016 update).

Olsen is also liable to Kendall for conversion. "'A conversion is an act of willful interference with a chattel, done without lawful justification by which the person entitled thereto

is deprived of its use and possession.'"[121] "One who intentionally destroys a chattel . . . is subject to liability for conversion to another who is in possession of the chattel or entitled to its immediate possession."[122] *See, e.g., Lincecum v. Smith*, 287 So.2d 625, 628 (La. App. 1974) ("When [the defendant] authorized destruction of the puppy there was a complete interference with the owner's rights, and an obvious conversion.").

VI. KENDALL IS ENTITLED TO A TRIAL ON HIS CLAIM FOR INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

Kendall has demonstrated compellingly that "any reasonable person would have known that [emotional distress] would result" from Olsen's killing of Geist and that "his actions [were] of such a nature as to be considered outrageous and intolerable in that they offend against the generally accepted standards of decency and morality."[123] Hence, Kendall is entitled to present his case for a jury's determination.

Movants would have the Court deprive Kendall of his opportunity to present his substantial claim against Olsen for intentional infliction of emotional distress because Olsen's killing of Geist did not occur in Kendall's presence.[124] However, Kendall need not have been present during the killing to recover for his emotional distress. The presence requirement invoked by Movants is triggered only when the outrageous conduct is directed toward a third "person." Movants' citation to *Hatch v. Davis*, 2006 UT 44, ¶ 31, 147 P.3d 383, is inapposite inasmuch as that case, applying subsection (2) of Restatement (Second) of Torts § 46 (1965) (which applies only to "conduct . . .

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[121] *Fibro Trust, Inc. v. Brahman Fin., Inc.*, 1999 UT 13, ¶ 20, 974 P.2d 288 (quoting *Allred v. Hinkley*, 8 Utah 2d 73, 328 P.2d 726, 728 (1958)). *See also Jones v. Salt Lake City Corporation*, 2003 UT App 355 ¶ 9, 78 P.3d 988.
[122] Restatement (Second) of Torts § 226 (1965).
[123] *Bennett v. Jones, Waldo, Holbrook & McDonough*, 2003 UT 9, ¶ 58, 70 P.3d 17.
[124] Movants' Memorandum at 44.

directed at a third person"), addressed only whether a spouse had to be present during an assault on a family member. (Even there, the court considered whether presence should be required in a particularly egregious situation. *Id.* ¶ 27.) Because this case does not involve the harm of a "third person," subsection (2) of § 46 of the Restatement has no application. The controlling standard is § 46(1), which reads, in relevant part, as follows:

> One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress . . .

Analysis under subsection (1) of Restatement § 46 is appropriate when considering claims of intentional infliction of emotional distress in connection with the killing of an animal.[125] "Emotional distress will certainly result where the owner sees or even hears about reckless or negligent behavior causing injury to or the death of a beloved animal friend." 91 A.L.R.5th 545.

VII. SUMMARY JUDGMENT MUST BE DENIED BECAUSE OF THE OVERWHELMING EVIDENCE SUPPORTING KENDALL'S CLAIMS

Summary judgment can be granted only if "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(a). Clearly, Kendall has more than met his burden of establishing that there are genuine issues of material fact. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 585 (1986). In assessing whether there are genuine issues of material fact, all inferences and all evidence must be viewed in the light most favorable to Kendall. *Id.* at 587–88. The factual record demonstrates conclusively that Olsen's entry into and search of Kendall's property was unconstitutional and otherwise illegal.

[125] *See, e.g.*, *Richardson v. Fairbanks N. Star Borough*, 705 P.2d 454, 456 (Alaska 1985); *Katsaris v. Cook*, 180 Cal. App. 3d 256, 267, 225 Cal. Rptr. 531, 537 (Ct. App. 1986) (analysis under state tort law analogous to subsection (1) with no presence requirement); *Gill v. Brown*, 695 P.2d 1276, 1277 (Idaho App. 1985); *Daughen v. Fox*, 539 A.2d 858, 860 (Pa. 1988).

And, as in *Gregory v. City of Vallejo*, 63 F.Supp.3d 1171 (E.D. Cal. 2014), there is a "genuine dispute as to whether the killing of plaintiff's dog was reasonable", *id.* at 1177–78, whether Geist was "aggressive," *id.* at 1178, whether there was an "immediate threat of death or serious bodily harm" at the time Olsen shot Geist, *id.*, and whether Olsen had alternative, non-lethal means of handling the situation. *Id.* at 1179. Because the evidence of Olsen's unconstitutional search and Purvis's instructions to engage in it is overwhelming and because there are genuine disputes of material fact as to whether the killing of Geist was reasonable, summary judgment must be denied.

CONCLUSION

The record is replete with evidence strongly, and in some instances uncontrovertibly, establishing that Purvis instructed police officers to engage in unconstitutional searches of properties having no connection to the missing child, that the City's policies and practices caused and condoned such unconstitutional conduct, and that Olsen unconstitutionally searched the curtilage of Kendall's home and unreasonably killed Kendall's beloved, gentle dog Geist. To vindicate his fundamental constitutional and other legal rights, Kendall is entitled to his day in court, to present his evidence to a jury, and to hold Purvis, Olsen, and the City accountable for the tragedy that befell Kendall as a result of the constitutional violations and other illegal conduct.

Respectfully submitted this 29th day of August, 2016.

/s/ Ross C. Anderson
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