Samantha J. Slark (#10774)
Salt Lake City Attorney's Office
451 S. State Street, Suite 505A
P.O. Box 145478
Salt Lake City, UT 84114-5478
Telephone: (801) 535-7788
Samantha.Slark@slcgov.com

Attorney for Defendants

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

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Treatises

INTRODUCTION

1. KENDALL'S CLAIMS BASED ON THE ENTRY INTO THE BACKYARD.

Officer Olsen, Lt. Purvis and Salt Lake City are entitled to entry of judgment on all Kendall's claims that are based on Officer Olsen's entry into the backyard. The claims at issue are a Fourth Amendment claim against Officer Olsen and Lt. Purvis, a *Monell* claim against Salt Lake City,[1] a state constitutional claim against Officer Olsen, Lt. Purvis and Salt Lake City, a trespass claim against Officer Olsen,[2] and a negligence claim against Salt Lake City, if Kendall is permitted to amend.[3]

Entry of judgment on the Fourth Amendment claim, the section 1983 *Monell* claim, and the state constitutional claim, is appropriate because Officer Olsen's entry into the backyard was not a Fourth Amendment search. Moreover, even if it were, exigent circumstances justified entry into the backyard and Kendall has not shown otherwise. Officer Olsen and Lt. Purvis are also entitled to qualified immunity because Kendall cannot show every reasonable officer would know that entering the backyard under the circumstances faced by Officer Olsen violated Fourth Amendment rights.

Judgement should also be entered on Kendall's trespass and negligence claims because they are precluded by provisions of the Governmental Immunity Act of Utah ("GIA"), Utah Code

---

[1] *See Monell v. Dept. of Social Servs. of City of New York*, 436 U.S. 658 (1978).

[2] Kendall clarifies he is not pursuing a trespass claim against Salt Lake City. (Dkt. 45, Pl.'s Opp'n.to Defs. Olsen, Purvis and Salt Lake City's Mot. for Summ. J. (hereinafter "Opp'n") at 90.)

[3] Kendall appears to concede that the Governmental Immunity Act of Utah, Utah Code § 63G-7-101 et. seq., precludes a negligence claim against Officer Olsen and Lt. Purvis, but contends he should be permitted to amend his Complaint to bring a negligence claim against Salt Lake City. (Dkt. 45, Opp'n at 87-91.)

§ 63G-7-101 et. seq., and application of the GIA to preclude these claims does not violate the open court's provision of the Utah Constitution.

2. KENDALL'S CLAIMS BASED ON THE SEIZURE OF GEIST.

Officer Olsen, Lt. Purvis and Salt Lake City are also entitled to entry of judgment on all Kendall's claims that are based on the seizure of Geist. Kendall expressly withdraws some of the claims alleged in the Complaint and/or concedes some claims have no merit, by failing to respond.[4] It appears the outstanding claims relating to the seizure of Geist are a Fourth Amendment claim against Officer Olsen and Lt. Purvis, a *Monell* claim against Salt Lake City, a state constitutional claim against Officer Olsen, Lt. Purvis and Salt Lake City,[5] conversion, trespass to chattel and intentional infliction of emotional distress claims against Officer Olsen,[6] and a negligence claim against Salt Lake City, if Kendall is permitted to amend his Complaint.[7]

Entry of judgment on the Fourth Amendment claim, the *Monell* claim, and the state constitutional claim is appropriate because the seizure of Geist was objectively reasonable. It is undisputed that Geist charged at Officer Olsen with his ears back, snarling, growing, barking and baring his teeth. It was reasonable for Officer Olsen to believe a dog behaving in this manner was aggressive and presented an imminent threat of harm. This conclusion is not altered by the

---

[4] Kendall did not respond to argument that the Fifth and Fourteenth Amendments to the United States Constitution are inapplicable to a claim for a seizure of a dog. (*See generally* Dkt. 45, Opp'n.)

[5] Kendall states he is withdrawing his claim under Article I, Section 7 of the Utah Constitution and pursing only his claim under Article I, Section 14 of the Utah Constitution. (Dkt. 45, Opp'n at 64.)

[6] Kendall states he is no longer pursing conversion or trespass to chattel claims against Lt. Purvis. (Dkt. 45, Opp'n at 91.)

[7] Kendall appears to concede that the GIA precludes a negligence claim against Officer Olsen and Lt. Purvis, but contends he should be permitted to amend his Complaint to bring a negligence claim against Salt Lake City. (Dkt. 45, Opp'n at 87-91.)

testimony that it was not in Geist's nature to be aggressive or Kendall's argument that Officer Olsen could have taken other actions to defend himself from Geist. Officer Olsen is also entitled to qualified immunity because Kendall cannot show every reasonable officer would know that seizing Geist under the circumstances faced by Officer Olsen violated Fourth Amendment rights.

Entry of judgment for Officer Olsen on the conversion, trespass to chattel and intentional infliction of emotional distress claims is also appropriate because these claims are precluded under the GIA.

STATEMENT OF ELEMENTS AND MATERIAL FACTS

I. STATEMENT OF ELEMENTS AND MATERIAL FACTS FOR KENDALL'S CLAIMS RELATING TO ENTRY INTO KENDALL'S BACKYARD.

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

1. Response to Kendall's Disputes of the Defendants' Statement of Elements.

Kendall does not dispute the elements of the qualified immunity inquiry or his burden under that inquiry. (Dkt. 45, Opp'n at 12.) But Kendall does dispute Defendants' statement of the elements necessary to show a Fourth Amendment violation. (Dkt. 45, Opp'n at 11-15.) First, Kendall disputes the standard for showing a Fourth Amendment search. (Dkt. 45, Opp'n at 12-14.) This is addressed in the body of this Reply. *See infra* § I, A, 1, a.

Second, Kendall claims that the exigent circumstances/emergency aid test set forth in *United States v. Najar*, 451 F.3d 710, 718 (10th Cir. 2006) is incomplete. (Dkt. 45, Opp'n at 14-15.) Kendall contends there is an additional requirement to also show "probable cause" or a "reasonable basis approaching probable cause, to associate the emergency with the place to be searched." (Dkt. 45, Opp'n at 14-15.) That is incorrect. There is no requirement to show probable cause and the requirement to show a "reasonable basis approaching probable cause, to associate

the emergency with the place to be searched" is outdated. That requirement was expressly rejected in 2006 and replaced with a requirement to show "the manner and scope of the search is reasonable."

> Prior to *Brigham City*, we used a three-part test to determine whether the risk of personal danger created exigent circumstances: "(1) the officers must have reasonable grounds to believe that there is an immediate need to protect the lives or safety of themselves or others; (2) the search must not be motivated by an intent to arrest or seize evidence; and (3) there must be some reasonable basis, approaching probable cause, to associate the emergency with the place to be searched." *Brigham City* clearly rejected the second factor, the subjective motivations of the officers. Neither did the Court require probable cause in this type of exigent circumstances. Thus, our test 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.)

Najar, 451 F.3d at 718 (citing *Brigham City v. Stuart*, 547 U.S. 398 (2006)).

> 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. We evaluate whether a reasonable belief existed based on the "realities of the situation presented by the record from the viewpoint of prudent, cautious, and trained officers." *Id.* (internal quotation marks omitted). Reasonable belief does not require absolute certainty; the Supreme Court has explained that the standard is more lenient than the more stringent probable cause standard. See id. at 718 (explaining the Supreme Court in Brigham City did not require the government to show the officers had probable cause to believe that a person inside the residence required immediate aid).

United States v. Gambino-Zavala, 539 F.3d 1221, 1225 (10th Cir. 2008) (citing *Najar*, 451 F.3d at 718-19). With the exception of *Gambino-Zavala*, the authority Kendall relies on to contest the completeness of the *Najar* test either do not discuss the exigent circumstances/emergency aid doctrine or are decisions that predate the decisions in *Brigham City* and *Najar* and discuss the

"reasonable basis approaching probable cause" prong of the old three part test.[8] *Gambino-Zavala* does not show an additional element or requirement to satisfy the *Najar* test.[9]

2. Response to Kendall's Disputes to the Defendants' Statement of Facts.

Kendall purports to dispute seventeen of the Defendants' thirty-six statement of facts, but Kendall's disputes do not raise a genuine dispute regarding any fact that is material to determining if Officer Olsen's entry into the backyard was a Fourth Amendment search and, if so, whether the entry was permissible under the exigent circumstances/emergency aid doctrine. For example, Kendall's alleged disputes include whether the child was three years old at the time he was reported missing or "two-nearly three," whether the police responded to a call that a child was missing from his home because the dispatcher only said "missing three-year-old," and whether the police officers "spoke with the family" and "spoke with a relative" because deposition testimony says the initial officers spoke with the mother of the child and another officer spoke with her sister. The alleged disputes to Fact Nos. 1, 2, 3, 4, 6, 13, 14, 17, 20, 26, 31 and 36 set forth these and other disputes that are not genuine disputes of a material fact or are simply a recitation of Kendall's legal argument or his legal conclusions that entering the backyard was in violation of the Fourth Amendment.

---

[8] *See* Dkt. 45, Opp'n at 14-15 (citing *Salt Lake City v. Davidson*, 2000 UT App. 12, ¶¶ 14-16, 994 P.2d 1283 (discussing the third prong of the now inapplicable three part test.); *Zurcher v. Stanford Daily*, 436 U.S. 547, 556 (1976) (discussing probable cause for a search warrant); *Utah v. Vasquez-Marquez*, 2009 UT App. 14, ¶ 5, 204 P.3d 178 (discussing probable cause for a search warrant)).

[9] In *Gambino-Zavala*, the Court stated that to satisfy the first part of the test the defendants must show a reasonable belief that someone inside the home was in need of aid because the case concerned a warrantless entry into a home. *Gambino-Zavala*, 539 F.3d at 1225.

Similarly, Kendall's disputes to Fact Nos. 22, 23 and 24 are disputes to the description of gates to the backyard, but the disputes do not go to issues that are material to determining the issues raised in this motion. For example, whether or not wood did or did not prevent one of the three gates on the property from being opened, the exact height of the gate to the south of the property, and whether it was open that day, are not issues that will affect the determination of whether entry into the backyard was a Fourth Amendment search and, if so, if the entry was permissible under the exigent circumstance/emergency aid doctrine. Moreover, any alleged dispute may be resolved by looking at the photographs. (Dkt. 37-13, Ex. 12 to Slark Decl., at SLCC 000128-29, 156, 158.)

Finally, Kendall's disputes to Fact Nos. 29, 30 and 33 do not raise a disputed issue of fact for the jury to resolve, as set forth below:

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

Defendants' Reply: This response does not raise a dispute of a material fact. Kendall does not challenge Officer Olsen's recollection. Rather, Kendall challenges whether it was objectively reasonable for Officer Olsen to believe a toddler could have gone through the gate. Objective reasonableness is a legal question. *See infra* § II, A, 1, a. Moreover, any dispute with regard to the height of the gate, the height of the latch, or the type of latch can be resolved by looking at the photographs submitted by the parties with their briefing on this motion. (Dkt. 37-13, Ex. 12 to Slark Decl., at SLCC 000128-29, 156, 158; *see also* Dkt. 46, Pl.'s App'x at 301-303.)

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

Plaintiff's 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.

Defendants' Reply: This response does not raise a dispute of a material fact. Kendall does not dispute Officer Olsen could not see the entire yard from where he was standing. Rather, Kendall asserts Officer Olsen could have seen all parts of the yard if he looked over three different gates and walked down the drive of the neighboring property and peered through the slats of the chain link fence. This does not show there is a dispute regarding a material fact that the jury must resolve. Rather, this is Kendall's argument that the entry into the backyard is not permitted under the exigent circumstances/emergency aid doctrine because Officer Olsen could have checked the backyard for the boy without entering. This argument is addressed in the body of this Reply. *See infra* § I, A, 1, b. Moreover, any dispute with regard to the layout of the yard and the placement

of gates, walls and fences can be resolved by looking at the photographs submitted by the parties with their briefing on this motion. (Dkt. 37-13, Ex. 12 to Slark Decl., at SLCC 000128-29, 156, 158; *see also* Dkt. 46, Pl.'s App'x at 290-303, 308-310.)

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

Defendants' Reply: This response does not raise a dispute of a material fact. Kendall does not dispute Officer Olsen checked the south-east area of the yard or that Officer Olsen could not see that area from where he was standing at the north gate. Rather, Kendall asserts Officer Olsen could have seen all parts of the yard if he looked over three different gates and walked down the drive of the neighboring property and peered through the slats of the chain link fence. This does not show there is a dispute regarding a material fact that the jury must resolve. Rather, this is Kendall's argument that the entry into the backyard is not permitted under the exigent circumstances/emergency aid doctrine because Officer Olsen could have checked the backyard for the boy without entering. This argument is addressed in the body of this Reply. *See infra* § I, A, 1, b. Moreover, any dispute with regard to the layout of the yard and the placement of gates, walls and fences can be resolved by looking at the photographs submitted by the parties with their

briefing on this motion. (Dkt. 37-13, Ex. 12 to Slark Decl., at SLCC 000128-29, 156, 158; *see also* Dkt. 46, Pl.'s App'x at 290-303, 308-310.)

3. Response to Kendall's Statement of Additional Material Facts.

Kendall set forth six additional material "facts" relating to his claim that Officer Olsen's entry into the backyard violated constitutional rights. (Dkt. 45, Opp'n at 28-31.) For brevity, the statements are not set forth verbatim with a response because they are all disputed for the same reason. Namely, the statements are not statements of fact, but rather are a recitation of Kendall's legal argument and his legal conclusion that Officer Olsen's entry into the backyard violated Kendall's Fourth Amendment rights. These legal arguments are addressed at length in the body of the opening motion and this Reply.

4. Response to Kendall's Statement of Additional Elements.

Kendall does not set forth additional elements for Defendants to satisfy to prevail on this motion for summary judgment, but rather sets forth three elements Kendall believes he must satisfy to prevail on his Fourth Amendment claim.[10] (Dkt. 45, Opp'n at 31-37.) First, Kendall asserts he must show there was a search. (Dkt. 45, Opp'n at 32.) It is not disputed that Kendall is required to show a search occurred. The parties just disagree on what is required to show a Fourth Amendment search, as discussed in the body of this Reply. *See infra* § I, A, 1, a. Second, Kendall asserts that he must show there was no warrant and no consent. (Dkt. 45, Opp'n at 34-35.) It is not disputed that Officer Olsen had no warrant or consent from Kendall or the owner of 2465 South 1500 East to enter the backyard. But a warrant or consent are not required if the entry is not a

[10] While unusual, this does make some sense in the qualified immunity context, where Kendall has the burden of showing a constitutional violation occurred. *See infra* at n.19.

Fourth Amendment search or the entry is permissible under the exigent circumstances/emergency aid doctrine. Thus, this element is not relevant to the issues raised in this motion. Third, Kendall contends there must be no "reasonable cause to believe there was a connection" between Kendall's backyard and the missing child. (Dkt. 45, Opp'n at 35-36.) This is a reference to the exigent circumstances/emergency aid doctrine and asserts the wrong standard, as set forth above. *See supra* § I, A, 1 at 4-5. Finally, Kendall asserts he must show a deprivation of constitutional rights by a person acting under color of law. (Dkt. 45, Opp'n at 37.) It is not disputed that Kendall must satisfy these elements.

5. Response to Kendall's Statement of Facts to Show he Satisfies the Elements of his Fourth Amendment Claim.

a. Response to Kendall's facts to show a Fourth Amendment search occurred.

> 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.

Defendants' Response: This statement does not set forth any fact that is specific to Officer Olsen's entry into the backyard and does not assist in determining whether Officer Olsen's entry violated Fourth Amendment rights. Rather, this appears to be a statement of Kendall's legal conclusions and a recitation of his legal arguments, which are addressed at length in the body of the opening motion and this Reply.[11]

[11] *See* Advisory Committee Note 7, DuCivR. 56-1 ("The purpose of the Statement of Elements and Undisputed Material Facts and the corresponding section in the memorandum in

> 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.

Defendants' Response: This statement is disputed because it is not a statement of fact, but rather is a statement of Kendall's legal conclusions and a recitation of his legal arguments.[12] Kendall's arguments are addressed at length in the body of the opening Motion and this Reply.

> 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.

Defendants' Response: It is not disputed that Officer Olsen entered the backyard to look for the missing child. Kendall's other characterizations and statement that Officer Olsen "killed Kendall's beloved dog Geist because he barked and ran toward Olsen after Olsen started running" is disputed and is not supported by the record cite. The details of what occurred are set forth in detail in the Declaration of Officer Olsen, on file with the Court. (Dkt. 36.) Kendall was not present and cannot dispute that testimony.

> 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.

---

opposition to a motion for summary judgment is to distill the relevant legal issues and material facts for the court while reserving arguments for the respective argument sections of the motion and opposition memorandum.").

[12] *See* Advisory Committee Note 7, DuCivR. 56-1, set forth in n.11.

Defendants' Response: Undisputed that the backyard was adjacent to the home. The Defendants refer the Court to the photographs filed by the parties in this briefing that depict the wall, house, fencing and gates that surround the yard, which show the height and nature of the wall, fence and gates. (Dkt. 37-13, Ex. 12 to Slark Decl., at SLCC 000128-29, 156, 158; *see also* Dkt. 46, Pl.'s App'x at 290-303, 308-310.)

> 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.

Defendants' Response: This statement combines statements of fact and legal conclusions. Kendall's statements of fact are not disputed for purposes of this motion. The conclusions of law and legal argument are disputed, as set forth in the opening motion and the body of this Reply.[13] The Defendants refer the Court to the photographs submitted by Kendall that depict the chain link fence. (Dkt. 46, Pl.'s App'x at 299, 303, 308.)

> 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.

Defendants' Response: This statement combines statements of fact and legal conclusions. Kendall's statements of fact are not disputed for purposes of this motion. The conclusions of law and legal argument are disputed, as set forth in the opening motion and the body of this Reply.[14]

> 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

[13] *See* Advisory Committee Note 7, DuCivR. 56-1, set forth in n.11.
[14] *See* Advisory Committee Note 7, DuCivR. 56-1, set forth in n.11.

> 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.

Defendants' Response: This statement combines statements of fact and legal conclusions. Kendall's statements of fact are not disputed for purposes of this motion. The conclusions of law and legal argument are disputed, as set forth in the opening motion and the body of this Reply.[15]

b. Response to Kendall's facts to show there was no warrant and no consent to enter the backyard.

> 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. Defendants' 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.")

Defendants' Response: This statement combines statements of fact and legal conclusions. It is undisputed that Officer Olsen did not have a warrant or consent from Kendall or the owner of 2465 South 1500 East to enter the backyard of that property. The conclusions of law and legal argument contained in this "statement of fact" are disputed, as set forth in the opening motion and the body of this Reply.[16]

c. Response to Kendall's facts to show the exigent circumstances/emergency aid doctrine does not apply.

> 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.

---

[15] *See* Advisory Committee Note 7, DuCivR. 56-1, set forth in n.11.
[16] *See* Advisory Committee Note 7, DuCivR. 56-1, set forth in n.11.

Defendants' Response: Disputed. This is not a statement of fact, but rather is a statement of Kendall's legal conclusions and a recitation of his legal arguments,[17] which are addressed in the opening Motion and this Reply.

d. Response to Kendall's facts to show "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)."

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

Defendants' Response: Disputed. This is not a statement of fact, but rather is a statement of Kendall's legal conclusions and a recitation of his legal arguments, which are addressed in the opening Motion and this Reply.[18]

e. Response to Kendall's facts to show "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)."

> 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.

Defendants' Response: Undisputed that Officer Olsen was acting under color of law and within the scope of his employment when he entered the backyard. Disputed that he violated Kendall's Fourth Amendment rights.

B. Utah Constitutional Claim.

1. Response to Kendall's Statement of Facts to Show he Satisfies the Elements of an Article I, Section 14 Claim.

The parties do not dispute the elements applicable to establishing a claim under Article I,

---

[17] *See* Advisory Committee Note 7, DuCivR. 56-1, set forth in n.11.
[18] *See* Advisory Committee Note 7, DuCivR. 56-1, set forth in n.11.

Section 14 of the Utah Constitution. (Dkt. 45, Opp'n at 37-38.) Kendall sets forth several "facts" or arguments to demonstrate Article I, Section 14 is self-executing, that exiting remedies do not address his injuries, and that equitable relief such as an injunction is not adequate to protect his right. (Dkt. 45, Opp'n at 38-39.) But satisfaction of these elements is not challenged or at issue in this motion. Rather, Defendants assert Kendall cannot show a flagrant violation of constitutional rights. Kendall does not assert any additional facts to show a flagrant violation of constitutional rights, but rather refers the Court to the facts and alleged disputes relating to the claim that Officer Olsen's entry to the backyard violated his Fourth Amendment rights.

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

1. Response to Kendall's Statement of Additional Elements to Establish State Law Claims for Negligence.

Kendall sets forth the elements of a negligence claim, but the elements of a negligence claim are not relevant to the disposition of this Motion.[19] (Dkt. 45, Opp'n at 40-44.) Rather, the issue is that the claim that is styled as a "negligence" claim is based on a claim for a violation of civil rights, which is precluded by the provisions of the GIA. This argument is discussed in the opening memorandum and this Reply.

2. Response to Kendall's Facts to Show he Satisfies the Elements of a Negligence Claim.

It is unclear why Kendall asserts "facts" or argument to demonstrate he satisfies the elements of a negligence claim where the issue raised is that the claim is precluded by the GIA. For brevity, and because these elements are not relevant to resolution of this motion, Defendants

[19] The local rule contemplates setting forth elements not identified by the moving party that preclude the moving party from prevailing on the motion, not simply setting forth the elements of the non-moving party's claims. DuCiv R. 56-1(C)(2)(D).

are not including a response to Kendall's facts to show he satisfies the elements of a negligence claim.

II. STATEMENT OF ELEMENTS AND MATERIAL FACTS FOR KENDALL'S CLAIMS RELATING TO THE SEIZURE OF GEIST.

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

1. Response to Kendall's Disputes of the Defendants' Statement of Elements.

Kendall does not dispute the elements of the qualified immunity inquiry or his burden under that inquiry, but rather argues that he has satisfied his burden under that inquiry. (Dkt. 45, Opp'n at 44.) That is argument, which is addressed by the Defendants in the opening motion and this Reply.

2. Response to Kendall's Disputes to the Defendants' Statement of Facts.

Kendall purports to dispute seventeen of the Defendants' thirty-six statement of facts, but Kendall's disputes do not show there is a disputed issue of fact for the jury to resolve, as set forth in the Defendants' replies below.

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

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.

Defendants' Reply: This response does not raise a disputed issue of fact for the jury to resolve. Kendall does not point to any "inconsistency" in Officer Olsen's testimony. Rather Kendall takes one small portion of Officer Olsen's testimony and argues Officer Olsen's response was unreasonable. The full description of what occurred is set forth in the Declaration of Officer Olsen and the opening motion, which includes citation to all Officer Olsen's testimony on this point. Regardless, this is simply a recitation of Kendall's legal argument that the seizure of Geist was not reasonable because Officer Olsen should not have attempted to exit the yard when he first

heard Geist.[20] As set forth in the body of this Reply, objective reasonableness is a question for the Court to resolve and this argument does not raise a disputed issue of fact or a question for the jury. *See infra* § II. A. 1. a & b.

> *5. Geist was a large Weimaraner who exceeded one hundred pounds. (Olsen Decl., ¶ 30; Ex. 13 to Slark Decl., Geist Photo; Ex. 7 to Slark Decl., Olsen Dep. at 91:6-7.)*
>
> Plaintiff's 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.
>
> **Defendants' Reply:** This response does not raise a disputed issue of material fact for the jury to resolve. It is indisputable that Geist was a large dog.
>
> *6. Geist charged at Officer Olsen in an extremely aggressive fashion. (Olsen Decl. ¶ 31; Ex. 7 to Slark Decl., Olsen Dep. at 86:18-87:18, 91:1-7, 92:15-93:10, 109:10-110:24.)*
>
> Plaintiff's 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.

[20] *See* Advisory Committee Note 7, DuCivR. 56-1, set forth in n.11.

Defendants' Reply: This response does not raise a disputed issue of material fact for the jury to resolve. Rather, this is a recitation of Kendall's legal argument that seizing Geist was unreasonable because Weimaraners that exhibit the behavior described by Officer Olsen do not pose a threat.[21] As set forth in the body of this Reply, objective reasonableness is a question for the Court to resolve and this argument does not raise a disputed issue of fact or a question for the jury. *See infra* § II. A. 1. a & b.

> *7. He was growling and barking, his ears were back, and his teeth were bared. (Olsen Decl. ¶ 32; Ex. 7 to Slark Decl., Olsen Dep. at 86:18-87:18, 91:1-7, 92:15-93:10, 109:10-110:24.)*
>
> Plaintiff's Response: Disputed (see response to prior paragraph), but even if true, it is immaterial.
>
> 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.

Defendants' Reply: This response does not raise a disputed issue of material fact for the jury to resolve. Officer Olsen has consistently testified that Geist was aggressive. (*See, e.g.*, Dkt. 46, Pl.'s App'x at 500-18, Olsen Interview 2:2-7, 8:16-9:9, 10:2-5,13:16-25, 14:6-19 & 16:6-8;

[21] *See* Advisory Committee Note 7, DuCivR. 56-1, set forth in n.11.

Dkt. 36, Olsen Decl. ¶¶ 31-36; Dkt. 37-8, Ex. 7 to Slark Decl., Olsen Dep. at 86:18-87:18, 91:1-7, 92:15-93:10, 109:10-110:24.) Kendall has not cited to any record evidence to show otherwise. Moreover, Officer Olsen even mentioned bared teeth at his IA interview, despite Kendall's claims that this was not mentioned before the filing of this lawsuit. (*See* Dkt. 46, Pl.'s App'x at 513, Olsen Interview 14:7-8 ("the dog coming at me the only thing I could see was these large teeth coming at me and a very aggressive bark").) Regardless, the majority of this dispute is a recitation of Kendall's legal argument that seizing Geist was unreasonable because Weimaraners that exhibit the behavior described by Officer Olsen do not pose a threat.[22] As set forth in the body of this Reply, objective reasonableness is a question for the Court to resolve and this argument does not raise a disputed issue of fact or a question for the jury. *See infra* § II. A. 1. a & b.

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

Defendants' Reply: This response does not raise a disputed issue of material fact for the jury to resolve. The dispute is not a response to the statement set forth in paragraph 8, but merely

[22] *See* Advisory Committee Note 7, DuCivR. 56-1, set forth in n.11.

Kendall's argument that Officer Olsen has provided inconsistent testimony. Officer Olsen has consistently testified that Geist was aggressive and Kendall has not cited to any record evidence to show otherwise. (*See, e.g.,* Dkt. 46, Pl.'s App'x at 500-18, Olsen Interview 2:2-7, 8:16-9:9, 10:2-5,13:16-25, 14:6-19 & 16:6-8; Dkt. 36, Olsen Decl. ¶¶ 31-36; Dkt. 37-8, Ex. 7 to Slark Decl., Olsen Dep. at 86:18-87:18, 91:1-7, 92:15-93:10, 109:10-110:24.) Notably, Officer Olsen did mentioned bared teeth at his IA interview, despite Kendall's claims to the contrary. (*See* Dkt. 46, Pl.'s App'x at 513, Olsen Interview 14:7-8 ("the dog coming at me the only thing I could see was these large teeth coming at me and a very aggressive bark").)

> *10. Officer Olsen saw the picture of the canine and was struck by the fact that the dog looked exactly like Geist did on the day Geist charged Officer Olsen. (Olsen Decl. ¶ 35; Ex. 7 to Slark Decl., Olsen Dep. at 92:21-93:10.)*
>
> Plaintiff's 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. Any comparison between Geist and a police attack dog, and any characterization of Geist as "aggressive," is entirely erroneous and "badly misinformed." Beck Decl., ¶ 25–26.

Defendants' Reply: This response does not raise a disputed issue of material fact for the jury to resolve. Rather, this is a recitation of Kendall's legal argument that seizing Geist was unreasonable because Weimaraners that exhibit the behavior described by Officer Olsen do not pose a threat.[23] As set forth in the body of this Reply, objective reasonableness is a question for the Court to resolve and this argument does not raise a disputed issue of fact or a question for the jury. *See infra* § II. A. 1. a & b.

> *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.)*

[23] *See* Advisory Committee Note 7, DuCivR. 56-1, set forth in n.11.

> Plaintiff's 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. 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.

Defendants' Reply: This response does not raise a disputed issue of material fact for the jury to resolve. Rather, this is a recitation of Kendall's legal argument that seizing Geist was unreasonable because Weimaraners that exhibit the behavior described by Officer Olsen do not pose a threat and Geist was not an aggressive dog.[24] As set forth in the body of this Reply, objective reasonableness is a question for the Court to resolve and this argument does not raise a disputed issue of fact or a question for the jury. *See infra* § II. A. 1. a & b.

> *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.)*
>
> Plaintiff's Response: Disputed. 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.

Defendants' Reply: This response does not raise a disputed issue of material fact for the jury to resolve. Rather, this is an attempt by Kendall to take Officer Olsen's testimony out of context and argue his attempt to exit the yard when he first heard Geist was unreasonable. *See supra*, Defendants' Response to Kendall's dispute to Fact No. 3. As set forth in the body of this

[24] *See* Advisory Committee Note 7, DuCivR. 56-1, set forth in n.11.

Reply, objective reasonableness is a question for the Court to resolve and this argument does not raise a disputed issue of fact or a question for the jury. *See infra* § II. A. 1. a & b.

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

Defendants' Reply: This response does not raise a disputed issue of material fact for the jury to resolve. Rather, this is a recitation of Kendall's legal argument that seizing Geist was unreasonable because Weimaraners that exhibit the behavior described by Officer Olsen do not pose a threat and Geist was not an aggressive dog.[25] As set forth in the body of this Reply, objective reasonableness is a question for the Court to resolve and this argument does not raise a disputed issue of fact or a question for the jury. *See infra* § II. A. 1. a & b.

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

Defendants' Reply: This response does not raise a disputed issue of material fact for the jury to resolve. Rather, this is a recitation of Kendall's legal argument that seizing Geist was

[25] *See* Advisory Committee Note 7, DuCivR. 56-1, set forth in n.11.

unreasonable because Weimaraners that exhibit the behavior described by Officer Olsen do not pose a threat and it was unreasonable for Officer Olsen to first attempt to exit the yard.[26] As set forth in the body of this Reply, objective reasonableness is a question for the Court to resolve and this argument does not raise a disputed issue of fact or a question for the jury. *See infra* § II. A. 1. a & b.

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

Defendants' Reply: This response does not raise a disputed issue of material fact for the jury to resolve. Rather, this is a recitation of Kendall's legal argument that seizing Geist was unreasonable because Officer Olsen could have used a baton.[27] As set forth in the body of this Reply, objective reasonableness is a question for the Court to resolve and this argument does not raise a disputed issue of fact or a question for the jury. *See infra* § II. A. 1. a & b.

> *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.)*

---

[26] *See* Advisory Committee Note 7, DuCivR. 56-1, set forth in n.11.
[27] *See* Advisory Committee Note 7, DuCivR. 56-1, set forth in n.11.

Plaintiff's 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.")

Defendants' Reply: This response does not raise a disputed issue of material fact for the jury to resolve. Rather, this is a recitation of Kendall's legal argument that seizing Geist was unreasonable because Weimaraners that exhibit the behavior described by Officer Olsen do not pose a threat and Geist was not an aggressive dog.[28] As set forth in the body of this Reply, objective reasonableness is a question for the Court to resolve and this argument does not raise a disputed issue of fact or a question for the jury. *See infra* § II. A. 1. a & b.

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

Plaintiff's 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, was in the same area as Olsen, 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

[28] *See* Advisory Committee Note 7, DuCivR. 56-1, set forth in n.11.

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

Defendants' Reply: This response does not raise a disputed issue of material fact for the jury to resolve. Kendall does not actually dispute the statement that Officer Olsen did not see any signs a dog was on the property prior to entering the property. (Olsen Decl. ¶ 44; Ex. 7 to Slark Decl; Olsen Dep.) Neither does Kendall point to any statement in the record that contradicts Officer Olsen's testimony that he did not see any signs of a dog before entering the property. To the contrary, as reflected by the deposition testimony Kendall cites, Officer Olsen repeatedly states he does not recall hearing Geist bark despite counsel's attempts to elicit a different response. Moreover, the deposition testimony Kendall seeks to rely on was objected to on the grounds it called for speculation. Kendall's argument that he "had to have heard Geist" does not raise a disputed issue of material fact. Rather, it is simply a recitation of Kendall's legal argument that the seizure of Geist was unreasonable because Officer Olsen should have known there was a dog on the property before entering the backyard.[29] As set forth in the body of this Reply, objective reasonableness is a question for the Court to resolve and this argument does not raise a disputed issue of fact or a question for the jury. *See infra* § II. A. 1. a & b.

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

Plaintiff's 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.

[29] *See* Advisory Committee Note 7, DuCivR. 56-1, set forth in n.11.

Defendants' Reply: This response does not raise a disputed issue of material fact for the jury to resolve. Kendall does not actually dispute the statement that Officer Olsen did not see anything that might indicate a dog was on the property until he observed the plywood structure to the north of the shed. (Dkt. 36, Olsen Decl. ¶ 45; Dkt. 37-8, Ex. 7 to Slark Decl., Olsen Dep. at 84:24-86:12.) Neither does Kendall point to any statement in the record that contradicts Officer Olsen's testimony. Rather, Kendall states there were two dog bowls, a bright green tennis ball, and a red chew. This fact is not disputed and these items are depicted in photographs. (*See* Dkt. 46, Pl.'s App'x at 308-10.) Kendall's argument that these items "could not have been missed by someone in the Kendall backyard" does not raise a disputed issue of material fact. Rather, it is simply a recitation of Kendall's legal argument that the seizure of Geist was unreasonable because Officer Olsen should have known there was a dog on the property before entering the backyard.[30] As set forth in the body of this Reply, objective reasonableness is a question for the Court to resolve and this argument does not raise a disputed issue of fact or a question for the jury. *See infra* § II. A. 1. a & b.

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

Defendants' Reply: This response does not raise a disputed issue of material fact for the jury to resolve. Moreover, it is clear from the testimony cited that Officer Olsen did not know at the time if it was in fact a dog house, but thought it might be and has been informed since by

[30] *See* Advisory Committee Note 7, DuCivR. 56-1, set forth in n.11.

Kendall and his counsel that it is. (Dkt. 37-8, Ex. 7 to Slark Decl., Olsen Dep. at 86:3-7, 88:4–8, 142:16–18.) Regardless, whether Officer Olsen recognized the plywood structure as a dog house does not raise a disputed issue of material fact as to whether the seizure of Geist was reasonable, as addressed in the body of this Reply. *See infra* § II. A. 1. a & b.

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

Defendants' Reply: This response does not raise a disputed issue of material fact for the jury to resolve. It is not disputed that Officer Olsen was the only person in the yard during the events that give rise to this lawsuit.

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

Defendants' Reply: This response does not raise a disputed issue of material fact for the jury to resolve. It is not disputed that Diana Clinch, Officer Zayas and Officer Johnson each testified regarding their encounters with Geist and that each described him as aggressive.

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.)

Plaintiff's Response: Disputed. 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.

Defendants' Reply: This response does not raise a disputed issue of material fact for the jury to resolve. It is undisputed that Diana Clinch contacted the police department and reported her experience with Geist.

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

Plaintiff's 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.

Defendants' Reply: This response does not raise a disputed issue of material fact for the jury to resolve. It is indisputable that Diana Clinch testified regarding her encounter with Geist and that she repeatedly described him as agitated and aggressive and also used the terms "very agitated" and "very aggressive." (Dkt. 37-15, Ex. 14 to Slark Decl., Clinch Emails; Dkt. 37-16, Ex. 15 to Slark Decl., Clinch Dep. at 8:20-9:20, 12:5-14:13, 26:9-15.)

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

Plaintiff's 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."

Defendants' Reply: This response does not raise a disputed issue of material fact for the jury to resolve. Ms. Clinch testified that she is a lover of dogs. (Dkt. 37-16, Ex. 15 to Slark Decl., Clinch Dep. at 9:3-4, 12:21-23, 14:10-13.)

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

Plaintiff's 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.

Defendants' Reply: This response does not raise a disputed issue of material fact for the jury to resolve. Ms. Clinch testified that she is not easily alarmed by dogs. (Dkt. 37-16, Ex. 15 to Slark Decl., Clinch Dep. at 9:3-4, 12:21-23, 14:10-13.)

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

Plaintiff's 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.

Defendants' Reply: This response does not raise a disputed issue of material fact for the jury to resolve. There is no dispute that Officer Zayas assisted in looking for the missing child.

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.)

Plaintiff's 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.")

Defendants' Reply: This response does not raise a disputed issue of material fact for the jury to resolve. Officer Zayas testified she has owned large dogs and currently owns at least one Doberman. (Dkt. 37-10, Ex. 9 to Slark Decl., Zayas Dep. at 32:5-17.)

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.)

Plaintiff's 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.

Defendants' Reply: This response does not raise a disputed issue of material fact for the jury to resolve. Officer Zayas testified she is a dog lover. (Dkt. 37-10, Ex. 9 to Slark Decl., Zayas Dep. at 33:13-14.)

3. Response to Kendall's Statement of Additional Elements.

Rather than setting forth additional elements for Defendants to satisfy to prevail on their motion for summary judgment, Kendall asserts that to prevail on his Fourth Amendment claim he must show there was a seizure without a warrant.[31] It is not disputed that the shooting of Geist constituted a seizure and there was no warrant. Rather, at issue in this motion is whether the seizure was "reasonable." A showing of "reasonableness" is conclusive of the Fourth Amendment inquiry, as discussed in the opening brief and this Reply. Accordingly, Kendall's additional

[31] *See* n.10.

elements and statement of facts that show he satisfies those elements are unnecessary and not relevant to disposition of this motion.

4. Response to Kendall's Statement of Facts to Show he Satisfies the Elements of his Fourth Amendment Claim.

i. Response to Kendall's facts to show a seizure.

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

Defendants' Response: Undisputed.

ii. Response to Kendall's facts to show there was no warrant for the seizure.

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

Defendants' Response: Undisputed

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

Defendants' Response: Disputed. Defendants' claim and the focus of this motion is that the seizure was reasonable because Geist was aggressive and posed an imminent threat of harm to Officer Olsen. (*See generally* Dkt. 35, Mot. for Summ. J. at 34-39; *see also infra* § II.)

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.

Defendants' Response: Disputed. This is not a statements of fact, but rather a recitation of Kendall legal argument that the seizure of Geist was not reasonable.[32] This reasonableness argument does not raise issues for the jury to resolve or show that Officer Olsen's seizure of Geist was objectively unreasonable, as addressed in the body of this Reply. *See infra* § II. A. 1. a & b.

> 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.)

Defendants' Response: Disputed. This is not a statement of fact, but rather a recitation of Kendall's legal argument that seizing Geist was unreasonable because entering the backyard violated Kendall's Fourth Amendment rights and Officer Olsen should not have attempted to exit the yard when he first heard Geist.[33] This reasonableness argument does not raise issues for the jury to resolve or show that Officer Olsen's seizure of Geist was objectively unreasonable, as addressed in the body of this Reply. *See infra* § II. A. 1. a & b.

iii. Response to Kendall's facts to show "the government agents have not met their burden of justifying a warrantless, non-consensual seizure."

> 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.

---

[32] *See* Advisory Committee Note 7, DuCivR. 56-1, set forth in n.11.
[33] *See* Advisory Committee Note 7, DuCivR. 56-1, set forth in n.11.

Defendants' Response: Disputed. This is not a statement of fact, but rather a recitation of Kendall's argument that the seizure of Geist was not reasonable.[34] This reasonableness argument does not raise issues for the jury to resolve or show that Officer Olsen's seizure of Geist was objectively unreasonable, as addressed in the body of this Reply. *See infra* § II. A. 1. a & b.

> 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.

Defendants' Response: Disputed. This is not a statement of fact, but rather a recitation of Kendall argument that the seizure of Geist was not reasonable.[35] This reasonableness argument does not raise issues for the jury to resolve or show that Officer Olsen's seizure of Geist was objectively unreasonable, as addressed in the body of this Reply. *See infra* § II. A. 1. a & b.

B. Kendall's State Constitutional Claims.

No responses are required because no additional elements or facts are proposed. Kendall merely states he is withdrawing his claims under Article I, sections 1 and 7 of the Utah Constitution. (Dkt. 45, Opp'n at 64.)

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

1. Response to Kendall's Disputes of the Elements Necessary to Establish State Law Claims for Conversion, Trespass to Chattel, Negligence and Intentional Infliction of Emotional Distress.

---

[34] *See* Advisory Committee Note 7, DuCivR. 56-1, set forth in n.11.
[35] *See* Advisory Committee Note 7, DuCivR. 56-1, set forth in n.11.

Kendall sets forth further definitions of the elements of claims for conversion and trespass to chattel, but does not appear to dispute lawful justification is a complete defense to these claims. Kendall disputes there is a presence requirement when making a claim under state law for intentional infliction of emotional distress for the shooting of a dog, but cites cases from other jurisdictions to support this claim. (Dkt. 45, Opp'n at 66.) Utah law clearly imposes a presence requirement for a claim of intentional infliction of emotional distress. *Hatch v. Davis*, 2006 UT 44, ¶ 31, 147 P.3d 383.

2. Response to 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.

Defendants' Response: Defendants do not dispute this statement of fact for purposes of this motion.

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

Defendants' Response: Defendants do not dispute this statement of fact for purposes of this motion.

> 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.

Defendants' Response: Defendants do not dispute this statement of fact for purposes of this motion.

> 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.

Defendants' Response: Defendants do not dispute the statement that "Kendall was absolutely broken hearted" for purposes of this motion. The balance of the statements of this paragraph are disputed because they are characterizations and argument, not statements of fact.[36]

3. Response to Kendall's Statement of Additional Elements to Establish State Law Claims for Conversion, Trespass to Chattel and Negligence.

Kendall sets forth the elements of a negligence claim, but the elements of a negligence claim are not relevant to the disposition of this Motion.[37] (Dkt. 45, Opp'n at 67-70.) Rather, the issue is that the claim that is styled as a "negligence" claim is based on a claim for a violation of civil rights, which is precluded by the provisions of the GIA. This argument is discussed in the opening Motion and this Reply.

4. Response to Kendall's Facts to Show he Satisfies the Elements of a Negligence Claim.

It is unclear why Kendall asserts "facts" or argument to demonstrate he satisfies the elements of a negligence claim because satisfaction of the elements of a negligence claim is not challenged by this motion. Rather, the opening Motion and this Reply assert the negligence claim fails because of the provisions of the GIA. For brevity, and because these elements are not relevant to resolution of this motion, Defendants are not including a response to Kendall's facts to show he satisfies the elements of a negligence claim.

---

[36] *See* Advisory Committee Note 7, DuCivR. 56-1, set forth in n.11.

[37] *See supra* § I, C, 1, at 15 & n.19.

ARGUMENT

I. KENDALL'S CLAIMS RELATING TO OFFICER OLSEN'S ENTRY INTO THE BACKYARD.

A. Kendall has not Satisfied his Burden Under the Qualified Immunity Analysis.

1. Kendall Has Not Satisfied His Burden Under the First Prong of the Qualified Immunity Analysis and Because He Has Not Shown Officer Olsen's Entry Into the Backyard Violated a Constitutional Right.

a. The Entry was not a Fourth Amendment Search.

A Fourth Amendment search is not shown whenever an officer sets foot on private property, as Kendall contends. *See United States v. Attson*, 900 F.2d 1427, 1429 (9th Cir. 1990) (stating the Fourth Amendment is not "triggered simply because a person is acting on behalf of the government"). Rather, "the fourth amendment will only apply to governmental conduct that can reasonably be characterized as a 'search' or a 'seizure.'" *Id.*[38] Similarly, the Fourth Amendment only precludes "unreasonable" searches. *See, e.g., United States v. Davis*, 690 F.3d 226, 241 (4th Cir. 2012) ("Even if a search has occurred without a warrant and without individualized suspicion, a Fourth Amendment violation does not necessarily occur. The Fourth Amendment does not prohibit all searches, only those that are unreasonable."). As demonstrated by the decision in *Galindo v. Town of Silver City*, 127 F. App'x 459, 466 (10th Cir. 2005) (unpublished), an

[38] "Only rarely . . . has the [Supreme] Court considered the nature of fourth amendment restrictions on the conduct of government officials in noncriminal investigations." *Attson*, 900 F.2d at 1430 (quoting *The Supreme Court, 1986 Term-Leading Cases*, 101 Harv. L. Rev. 119, 230 (1987)). When doing so "the Court has been careful to limit this expansion to governmental conduct that can reasonably be said to constitute a 'search' or a 'seizure' within the meaning of the fourth amendment." *Attson*, 900 F.2d at 1430. "The types of non-law enforcement conduct to which the Court has extended the scope of the amendment are thus typically motivated by some sort of investigatory or administrative purpose designed to elicit a benefit for the government." *Id.*

"unreasonable search" is not shown simply because an officer sets foot on private property.[39] Rather, the officer's conduct must amount to an invasion of a privacy interest that society is prepared to protect.[40] *See* *United States v. Jacobsen*, 466 U.S. 109, 113 (1984) ("A 'search' occurs when an expectation of privacy that society is prepared to consider reasonable is infringed."); *Galindo*, 127 F. App'x at 466 ("Merely proceeding from the front to the back of a house alone, however, did not establish an invasion of the curtilage in violation of the Fourth Amendment."). Here, Officer Olsen's entry into the backyard was not for the traditional law enforcement purpose of discovering evidence of a crime, but rather for the purpose of locating a missing child.[41] Moreover, if clearing the yard could have been accomplished by looking over gates and through a chain link fence, as Kendall contends, no privacy interest was implicated and entering the yard was not a Fourth Amendment search. *Kyllo v. United States*, 533 U.S. 27, 32 (2001) (recognizing "the lawfulness of warrantless visual surveillance" and stating "we have held that visual observation is no 'search' at all").

---

[39] Kendall's attempt to distinguish this case because "there were numerous signs of illegal activity . . ." is unavailing. (Dkt. 45, Opp'n at 76.) The finding that no constitutional violation occurred by proceeding to the back of the house without a warrant was based on the nature of the invasion of the property not based on "signs of illegal activity" on the property. *Galindo*, 127 F. App'x at 466.

[40] The cases Kendall relies on are of little assistance because they addressed whether the use of a police canine on a front porch to detect the presence of narcotics in the house constituted a Fourth Amendment search, *Florida v. Jardines*, 133 S. Ct. 1409, 1413-18 (2013), and whether the placement of a GPS device on a car to track defendant's movements on public streets constituted a Fourth Amendment search. *United States v. Jones*, 132 S. Ct. 945, 947-54 (2012).

[41] Notably, law enforcement officers are often called to assist in locating vulnerable persons (the elderly, those with mental health issues or young children) where no crime is suspected. *See, e.g.*, *Najar*, 451 F.3d at 715 (quoting Wayne R. LaFave, Search and Seizure: A Treatise on the Fourth Amendment §6.6 (4th ed. 1988) ("[B]y design or default, the police are also expected to . . . aid individuals who are in danger of physical harm, assist those who cannot care for themselves . . . and provide other services on an emergency basis.").

b. The Exigent Circumstances/Emergency Aid Doctrine Applies.

Assuming a Fourth Amendment search occurred, exigent circumstances justified entry into the backyard and Kendall has not shown otherwise. Exigent circumstances exist where "(1) the officers have an objectively reasonable basis to believe there is an immediate need to protect the lives or safety of themselves or others, and (2) the manner and scope of the search is reasonable." *Najar*, 451 F.3d at 713. Kendall concedes the first prong of the *Najar* test is satisfied.[42] (Dkt. 45, Opp'n at 78 ("Kendall concedes . . . 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.").) Kendall contends the second part of the *Najar* test is not met because Officer Olsen could have seen the entire yard by looking over three different gates and walking down the drive of the neighboring property and peering through gaps in the chain link fence.

Kendall misapprehends the elements of the *Najar* test. The second part of the *Najar* test does not determine if it was objectively reasonable to enter the property — that is the subject of the first part of the *Najar* test. Rather, the second part determines whether the search that was

[42] Prior to conceding this fact, Kendall claims there is some disparity between the decisions of the Utah state courts and the Tenth Circuit regarding the existence of exigent circumstances under the Fourth Amendment. It is hard to understand what the alleged disparity is, but Kendall appears to be attempting to impute a probable cause requirement into the exigent circumstance test. (Dkt. 45, Opp'n at 78 ("whatever inconsistency there might be . . . may be resolved by simply equating 'reasonable grounds to believe' with a 'probable cause requirement' in a case involving an emergency").) Kendall relies on cases that discuss an outdated test, *see supra* § I, A, 1, at 4-5, and argues for a standard that is at odds with the plain language of decisions of the United States Supreme Court and the Tenth Circuit. *See Gambino-Zavala*, 539 F.3d at 1225 ("Reasonable belief does not require absolute certainty; the Supreme Court has explained that the standard is more lenient than the more stringent probable cause standard."); *Najar*, 451 F.3d at 718 (explaining the Supreme Court in *Brigham City v. Stuart*, 547 U.S. 398 (2006) did not require the government to show the officers had probable cause to believe that a person inside the residence required immediate aid).

conducted was reasonable. Kendall's arguments concerning what alternative actions Officer Olsen could have taken are not relevant. A Fourth Amendment reasonableness inquiry requires the Court to determine whether the officer's conduct was reasonable in light of the facts known to the officer at the time. *Graham v. Connor*, 490 U.S. 386, 396 (1989) (recognizing a "standard of reasonableness at the moment" for Fourth Amendment reasonableness inquiries). A Court does not engage in an exercise of "Monday morning quarterbacking" and consider all the things the officer could have done. *Id.* Instead, the Court considers what the officer did and whether that conduct was objectively reasonable.

Here, Officer Olsen was not familiar with the backyard and the layout of the home and would not have known that he could view the entire yard without entering and certainly would not have felt comfortable that he had in fact viewed the entire yard if he had done so in this manner. Officer Olsen's entry is especially reasonable given the fact officers were checking to see if the child had fallen into a window well, had wandered into an open shed, was hiding under a bush or a shrub, or had fallen into a water feature, which are not easily viewed from the perimeter of a property. Similarly, the purpose of the canvass was to cover as many places the child could be as quickly as possible. It was reasonable for Officer Olsen to enter the yard and quickly check the areas he could not see, rather than determine if there were vantage points to view the yard without entering. Officer Olsen's entry into the backyard did not violate any constitutional rights and Kendall has not shown otherwise.

2. No Clearly Established Law Shows Entering Kendall's Backyard in these Circumstances Violated Kendall's Constitutional Rights.

Kendall has also failed to satisfy his burden under the second prong of the qualified immunity analysis. Kendall has not identified authority that makes clear the exigent

circumstances/emergency aid doctrine does not apply if a police officer is looking for a missing toddler or that looking in a yard that is within a three minute walk from the toddler's home is unreasonable. Accordingly, Kendall has not satisfied his burden to show that *every* reasonable officer would know entering the backyard yard in the circumstances faced by Officer Olsen violated constitutional rights.

B. Kendall's Section 1983 Claim Against Salt Lake City and his Claims Under the State Constitution Fail.

Kendall does not dispute that a failure to show a violation of constitutional rights precludes a section 1983 *Monell* claim against Salt Lake City for the same conduct. Kendall also concedes that claims for unreasonable searches under Article 1, Section 14 of the Utah Constitution and claims for unreasonable searches under the Fourth Amendment to the United States Constitution are treated uniformly. (Dkt. 45, Opp'n at 71-72.) Thus, Kendall's section 1983 *Monell* claim against Salt Lake City and his claims under the Utah Constitution fail because Officer Olsen's entry into the backyard did not violate Fourth Amendment rights.

C. Kendall's Trespass and Negligence Claims Also Fail.

1. Officer Olsen's Conduct was not Willful Misconduct or Trespass.

Entry of judgment is appropriate on Kendall's trespass claim against Officer Olsen and Lt. Purvis because constitutional conduct cannot be willful misconduct or trespass. To bring state law claims against Officer Olsen and Lt. Purvis, Kendall must show "willful misconduct" on the part of the officers, as defined by the GIA.[43] Entry into a backyard to look for a child is not willful misconduct and conduct that does not violate a constitutional right cannot be trespass. Kendall's

[43] *See* Dkt. 35, Mot. Summ. J. at 42-44.

only response is that he is entitled to trial on this matter because Officer Olsen and Lt. Purvis' conduct was unconstitutional.[44]

2. The GIA Precludes Kendall's Negligence against Salt Lake City.

Kendall appears to concede the GIA precludes negligence claims against individual officers, but seeks leave to amend his Complaint to bring a claim against Salt Lake City for the alleged negligence of Officer Olsen and Lt. Purvis in entering the backyard. Leave to amend should not be granted because the GIA precludes claims that are based on allegations of trespass or a violation of civil rights, but are styled as negligence claims.[45] This preclusion does not violate the open courts provision, as set forth in briefing on file with the Court.[46]

II. KENDALL'S CLAIMS RELATING TO THE SEIZURE OF GEIST.

A. Kendall has not Satisfied his Burden Under the Qualified Immunity Analysis.

1. Kendall Has Not Satisfied His Burden Under the First Prong of the Qualified Immunity Analysis Because He Has Not Shown the Seizure of Geist Violated a Constitutional Right.

a. The Reasonableness of the Seizure is a Question of Law.

Kendall does not dispute Geist charged at Officer Olsen with his ears back, snarling, growling, and baring his teeth making the reasonableness of the seizure a question of law for the Court to decide. "The objective legal reasonableness of [an officer]'s actions is a legal question." *Keylon v. City of Albuquerque*, 535 F.3d 1210, 1218 (10th Cir. 2008) (quoting *Roska v. Peterson*,

[44] *See* Dkt. 45, Opp'n at 89 ("the record . . . abundantly supports a claim for negligence against Olsen for . . . entering the yard unconstitutionally and otherwise in violation of the law.").

[45] *See* Dkt. 35, Mot. Summ. J. at 32-33 & 44-45.

[46] *See* Dkt. 28, Reply in Supp. J. Pl. 5-8; Dkt. 30, Opp'n to Mot. for Leave to Amend Compl., at 2-3.

328 F.3d 1230, 1251 (2003)).[47] Only "where the historical facts material to that issue are in dispute [is] there [ ] an issue for the jury." *Keylon*, 535 F.3d at 1219 (quoting *Roska*, 328 F.3d at 1251). For example, in cases involving the seizure of a dog, there must be a dispute regarding the events that occurred leading up to the seizure of the dog for the issue to be submitted to the jury. *See, e.g.*, *Kincheloe v. Caudle*, No. A-09-CA-010 LY, 2009 WL 3381047, at *2, 8 (W.D. Tex. Oct. 16, 2009) (denying summary judgment because the police chief said the dog charged at him and the owner, who was present, said the dog slinked away to the bushes).[48] Where there is no dispute regarding these facts there is no factual dispute for the jury to resolve. *See, e.g.*, *Keylon*, 535 F.3d at 1217-19.[49]

[47] *See also* *Maestas v. Lujan*, 351 F.3d 1001, 1010 (10th Cir. 2003) (discussing when "objective reasonableness" becomes a jury question).

[48] *See also* *Criscuolo v. Grant Cty.*, 540 F. App'x 562, 563 (9th Cir. 2013) (unpublished) (denying summary judgment because there was conflicting eye witness testimony as to whether the dog was still attacking when it was shot); *Viilo v. Eyre*, 547 F.3d 707, 710 (7th Cir. 2008) (finding summary judgment inappropriate on the issue of the reasonableness of the third shot because there was conflicting eye witness testimony – some said the dog was charging at the officers in an irrational pattern before the third shot some said the dog was crying, whimpering and slinking away).

[49] *See also* *Grant v. City of Houston*, 625 F. App'x 670, 677 (5th Cir. 2015) (rejecting argument that there was a dispute regarding the reasonableness of the officer's use of force because "the only two eyewitnesses to the shooting, [testified the dog] backed [the officer] into a corner, biting at [the officers] legs" and there was no physical evidence to support plaintiff's claim that the dog was shot from behind); *Bailey v. Schmidt*, 239 F. App'x 306, 308 (8th Cir. 2007) (unpublished) (finding "defendants did not act unreasonably in killing [ ]dogs, given the uncontested evidence that all of the dogs either advanced on or acted aggressively toward the officers"); *Williams v. Voss*, No. CIV. 10-2092 ADM/TNL, 2011 WL 4340851, at *2 (D. Minn. Sept. 15, 2011) (finding no genuine issue of material fact where officers assert a dog aggressively charged at the officers and the plaintiffs had no specific evidence to refute that testimony); *Warboys v. Proulx*, 303 F. Supp. 2d 111, 117-20 (D. Conn. 2004) (finding no question for the jury where alleged dispute was distance dog was from the officer when he was shot because, for purposes of summary judgment motion, court construes the facts in the light most favorable to the plaintiff and, even under those, no constitutional violation is shown).

b. The Seizure of Geist Was Objectively Reasonable.

Kendall has not and cannot satisfy his burden under the first prong of the qualified immunity analysis because the seizure of Geist was reasonable. *Hatch v. Grosinger*, No. CIV.01-1906(RHK/AJB), 2003 WL 1610778, at *4 (D. Minn. Mar. 3, 2003) (where seizure of a dog is at issue "[t]he first half of the qualified immunity inquiry [ ] turns on whether the seizure was unreasonable"). Every court that has been called on to consider this issue finds it is objectively reasonable for an officer to seize a dog where the undisputed testimony is that the dog was aggressive and charging at the officer. [50]

[50] *See, e.g.*, *Hatch*, 2003 WL 1610778, at *5 (finding plaintiff failed to satisfy the first prong of the qualified immunity analysis where "the undisputed facts indicate that the dog, without restraint or owners in sight, made an aggressive charge which all three deputies in the yard regarded as an immediate threat to their personal safety"); *Powell v. Johnson*, 855 F. Supp. 2d 871, 875 (D. Minn.2012) (finding the plaintiff failed to satisfy the first prong of the qualified immunity analysis and show a constitutional violation where it was undisputed that the dog was a large dog that at the very least was "jogging" directly toward the officer); *Bailey*, 239 F. App'x at 308 (findings "defendants did not act unreasonably in killing [ ]dogs, given the uncontested evidence that all of the dogs either advanced on or acted aggressively toward the officers."); *Williams*, 2011 WL 4340851, at *6) (finding no constitutional violation where seven month old pit bull terrier charged at officers); *Dziekan v. Gaynor*, 376 F. Supp. 2d 267, 271-72 (D. Conn. 2005) (finding that even construing the facts in the light most favorable to plaintiff, the shooting of a 55 to 60 pound dog that was approximately 15 feet from the officer and advancing was reasonable); *Esterson v. Broward Cty. Sheriff's Dep't*, No. 09-60280-CIV, 2010 WL 4614725, at *5-6 (S.D. Fla. Nov. 4, 2010) (finding no evidence to support a claim that there was a constitutional violation when the officer shot a dog that charged at her in an aggressive fashion); *Pettit v. New Jersey*, No. CIV. A. 09-CV-3735 N, 2011 WL 1325614, at *5-7 (D.N.J. Mar. 30, 2011) (finding decision to shoot a dog that was about to spring and on the cusp of attacking was objectively reasonable); *Warboys*, 303 F.Supp.2d at 117–18 ("An officer who encounters a 90- to 100-pound pit bull dog-a dog which is demonstrably not able to be restrained by its owner or guardian and which is approaching the officer at a rate of 6 feet per second and is at a distance of no more than ten feet-does not act unreasonably in shooting the dog to protect himself and his canine companion."); *Birkes v. Tillamook Cty.*, No. 09-CV-1084-AC, 2011 WL 1792135, at *7 (D. Or. May 10, 2011) (finding shooting of pit bull reasonable where owners failed to restrain him and the pit bull "came at" officer); *Stephenson v. McClelland*, 632 F. App'x 177, 185 (5th Cir. 2015) (finding actions of officer in shooting a dog were reasonable where he was startled by a large dog "showing its teeth (whether baring them aggressively or 'smiling')" and officer was forced to make a split-second

When considering the reasonableness of Officer Olsen's actions the court must consider his conduct in light of the facts known to him at the time. *See, e.g.*, *Altman v.City of High Point, N.C.*, 330 F.3d 194, 205-07 (4th Cir. 2003) (explaining a court must "put itself into the shoes of the officer[] at the time the actions took place and [] ask whether the actions taken by the officer[] were objectively unreasonable . . . under the circumstances existing at the time the officer[] took the actions and in light of the facts known by the officer[]"). The testimony of a dog behavior specialist and a canine handler and trainer that Weimaraners exhibiting the behavior described by Officer Olsen do not bite is irrelevant because Officer Olsen did not know this. It is not reasonable to require officers to be experts in the characteristics of every breed of dog and an officer does not violate the Fourth Amendment by misperceiving a threat from an apparently aggressive dog. *Powell*, 855 F. Supp. 2d at 876 (citing *Davis v. Hall*, 375 F.3d 703, 712 (8th Cir. 2004)) ("Even if [an officer] misperceived the threat posed by [the dog], police officers 'are not liable for bad guesses in gray areas; they are liable for transgressing bright lines.'").[51] It was objectively reasonable for Officer Olsen to believe a 90 lb. dog that was charging at him, snarling, growling, barking and baring its teeth presented an imminent threat of harm.

---

decision and acted to protect himself); *Grant*, 625 F. App'x at 672 (finding it reasonable for officer to shoot dog he encountered in garage while executing search warrant because the mixed breed dog charged towards the officer's legs, "snapping its teeth and turning its head sideways so that it could bite [his] leg").

[51] *See also Pettit*, 2011 WL 1325614, at *6 (recognizing that "no one can say for sure that [the dog] intended to attack the officer" . . . but "at the time [the officer] fired his gun, he had no way to know [the dog's] true intentions only that he appeared ready to strike"); *Warboys*, 303 F. Supp. 2d at 118 ("[T]he law did not require [the officer] to wait until the approaching animal was within biting distance or was leaping at him before taking protective action."); *Dziekan*, 376 F. Supp. 2d at 272 (finding fact that officer "had heard from plaintiff that the dog would not bite" did not show shooting dog was unreasonable because "the law does not require the officer to wait until the approaching animal is within biting distance or is leaping at him before taking protective action").

The testimony of Kendall and his family and friends that Geist often charged at people, but never bit anyone, or that Geist was a friendly loveable dog that would never hurt anyone, is also not relevant. Courts repeatedly recognize that such testimony is not relevant because the officer faced with the situation does not know anything about the person's pet.[52] *Viilo v. City of Milwaukee*, 552 F. Supp. 2d 826, 838 (E.D. Wis. 2008) ("That [the dog] was friendly to others on prior occasions is immaterial; [the officer] had to react to the events of that day."). The testimony of Kendall and his family members is simply not relevant and does not raise a question for the jury to resolve.[53]

Kendall's argument that Officer Olsen could have used "a baton or boot," rather than a gun, is also not relevant. It is well established that a court is not charged with determining whether

---

[52] *See also* *Stephenson*, 632 F. App'x at 185 ("While [plaintiff] knew his family pet to be friendly and nonaggressive, [the officer] did not."); *Warboys*, 303 F. Supp. 2d at n.13 ("Although the court assumes for purposes of this motion that [the dog] was a friendly, nonviolent dog who would not have harmed the officers or the police canine, a reasonable officer in [the officer's] position would not have known this and could reasonably have assumed the contrary."); *Bateman*, 2012 WL 2564839, at *8 (rejecting testimony of owner and his family and friends that they did not believe it was in the dog's nature to be aggressive because "they did no see and thus could not dispute [the officer's] testimony that the dog charged and chased him in an aggressive manner"); *Powell*, 855 F. Supp. 2d at 875 (rejecting plaintiff's claim that there was a disputed issue of fact as to whether the dog posed a threat to the officer because the dog had never bitten anyone); (rejecting plaintiff's claim that "the shooting of the dog was not reasonable" because "the [p]laintiffs did not observe the dogs interacting with the officer and this statement alone cannot create a genuine issue of material fact").

[53] The case Kendall relies on to support his claim to the contrary is a complete outlier. (Dkt. 45, Opp'n at 94 (citing *Gregory v. City of Vallejo*, 63 F. Supp. 3d 1171 (E.D. Cal. 2014)) (permitting question of objective reasonableness to go to jury based on testimony of friends and family members that it was not in the dog's nature to be aggressive)). That decision is at odds with fundamental principles of Fourth Amendment law, decisions of the Tenth Circuit that outline when the issue of objective reasonableness goes to the jury, and the decisions of myriad district courts on what constitutes a disputed issue of fact for the jury when seizure of a dog is at issue. *See supra* § II, A, 1, a & b, and fns. 47-55. No other court has come to a similar conclusion. *Id.* Notably, in *Gregory* the jury entered a verdict for the defendants, possibly explaining why the decision was never appealed. *See* Dkt., Case No. 2013-cv-00320-KJM-KJN.

the officer's response was the best possible response. *See, e.g.*, *McCarthy v. Kootenai Cty.*, No. CV08-294-N-EJL, 2009 WL 3823106, at *6 (D. Idaho Nov. 12, 2009) (finding shooting of dog objectively reasonable because "an officer need not use the least harmful alternative in dealing with a dangerous situation in which officer safety is an issue" because "[r]equiring the least intrusive alternative is not a realistic approach where law enforcement officers have to make split second decisions regarding their safety").[54] Rather a court is charged with determining whether an officer's conduct fell within the realm of objective reasonableness. *Id.* As set forth in the opening motion, it was eminently reasonable for Officer Olsen to use his service weapon in light of the situation, the options available to him, and the short time he had to consider those options.[55]

Kendall's next argument, that it was unreasonable for Officer Olsen to attempt to retreat and exit the yard when he first heard Geist, is contrary to reason and not supported by case law.[56]

---

[54] *See also* *Pettit*, 2011 WL 1325614, at *7 (rejecting plaintiff's argument that the officer could have chosen a different approach because "[r]easonableness is not a rigid standard that requires an officer to choose the single best possible response" and stating that officer's choice to use a gun when "confronted with an aggressive dog . . . is not for the Court to second guess because it was an objectively reasonable response to the circumstances"); *Hatch*, 2003 WL 1610778, at *5 ("While one could question [the officer's] choice to use the maximum level of force several seconds after [the dog] appeared, "the Fourth Amendment does not allow this type of 'Monday morning quarterback' approach because it only requires that the seizure fall within a range of objective reasonableness."); *Powell*, 855 F. Supp. 2d at 876 (quoting *Hatch*, 2003 WL 1610778, at *5) ("While [the officer] perhaps could have reacted differently . . . 'the Fourth Amendment does not allow this type of "Monday morning quarterback" approach because it only requires that the seizure fall within a range of objective reasonableness.'").

[55] *See, e.g.*, *Dziekan*, 376 F. Supp. 2d at 271-72 (finding shooting of dog objectively reasonable where whole incident took approximately five seconds.); *Bateman*, 2012 WL 2564839, at *8-9 (E.D. Mich. July 2, 2012) (finding shooting of dog objectively reasonable where it was dark, the officer was unfamiliar with the property, and the officer was only on the scene for 17 minutes).

[56] Kendall repeatedly takes the testimony of Officer Olsen out of context and attempts to characterize it as Officer Olsen "running away." Officer Olsen testified that he first attempted to retreat and then when he realized he did not have time to exit the yard he stood his ground, took a more dominant stance, and stomped his foot in an attempt to call Geist's bluff. (*See* Dkt. 36, Olsen

It is objectively reasonable for an officer faced with a charging aggressive dog to first attempt to exit the area and avoid the encounter. *See, e.g.*, *Bateman v. Driggett*, No. 11-13142, 2012 WL 2564839, at *2 (E.D. Mich. July 2, 2012) (finding shooting of dog was objectively reasonable where officer first attempted to avoid encounter with aggressive dog by "running down [ ] driveway toward the street.").[57] It was not unreasonable for Officer Olsen to do so.

Kendall's arguments that Officer Olsen should not have been in Kendall's backyard and that Officer Olsen should have identified there was a dog on the property, are equally unavailing. Officer Olsen was legitimately on Kendall's property for the purpose of locating the missing child.[58] Likewise, the failure to identify the presence of a dog on property prior to entry does not render a subsequent seizure unreasonable.[59] *See, e.g.*, *Bateman*, 2012 WL 2564839, at *8-9 (finding officer's seizure of dog objectively reasonable, despite the fact he did not notice the

---

Decl., ¶¶ 26-42; Dkt. 35, Mot. Summ. J. at 14-19.) When that did not work he briefly considered using his taser, but realized that would not be effective, and used his service weapon. *Id.*

[57] *See also* *Esterson*, 2010 WL 4614725, at *4-6 (finding no constitutional violation when the officer shot a dog that charged at her in an aggressive fashion and she was unable to retreat).

[58] *See* Dkt. 35, Mot. Summ. J. at 22-33 and *supra* § I.

[59] In circumstances where police officers are executing a warrant and the officers are on notice that there are dogs or other animals on the property, courts find officers are required to have a plan for handling the animals and officers are not entitled to qualified immunity if they fail to do so. *See, e.g.*, *San Jose Charter of Hells Angels Motorcycle Club v. City of San Jose*, 402 F.3d 962, 967 (9th Cir. 2005) (execution of search warrant on properties where officer knew there would be dogs at least one week in advance); *Flint v. City of Milwaukee*, 91 F. Supp. 3d 1032, 1039-40 (E.D. Wis. 2015) (execution of search warrant on house where officers knew beforehand that there was an alligator and large dogs on the property).

This principle is inapplicable where, as here, the officer has no prior knowledge of a dog and is surprised by the presence of a dog. *McCarthy*, 2009 WL 3823106, at *6 (distinguishing *Hells Angels* because "the officer did not have a week to plan the service of process and was not aware of dogs being on the property until the dogs attacked the officer"); *Grant*, 625 F. App'x at 676 (rejecting analysis to *Hells Angels* because "the officers had no advance notice that a dog was present on the premises to be searched"); *Pettit*, 2011 WL 1325614, at n.10 (distinguishing *Hells Angels* because "[t]his is not a case where [the officer] had knowledge of [the dog's] friendliness or knew whether [p]laintiffs kept dogs on their premises").

"beware of the dog" sign on the gate). Indeed, to find otherwise, would be contrary to the holding of every court that has found reasonable an officer's seizure of an aggressive dog after entering property.[60] Kendall has not satisfied his burden under the first prong of the qualified immunity analysis because it is not a violation of constitutional rights for an officer to seize a dog that is charging at an officer, growling, barking, and baring its teeth.

c. Officer Olsen did not Create an Exigency.

Kendall asserts an alternative theory that the seizure of Geist was not reasonable because Officer Olsen created the exigency. As demonstrated at length in the opening brief and this Reply, the governing standard for determining whether the seizure of a dog was reasonable is whether the dog was aggressive and posed an imminent threat of harm. Moreover, the exigency at issue in this case was the report of a missing child, which Officer Olsen did not create. Likewise, any argument that Officer Olsen created an exigency by allegedly "running away" is an argument that the seizure was not "objectively reasonable" because Officer Olsen attempted to exit the yard when he first heard Geist, which is incorrect as addressed above. *See supra* § II, A, 1, b.

2. No Clearly Established Law Shows that Seizing Geist in these Circumstances Violated Constitutional Rights.

Kendall also has not satisfied his burden under the second prong of the qualified immunity analysis. Kendall has not and cannot show *every* reasonable officer would know seizing Geist under the circumstances Officer Olsen faced was a violation of constitutional rights.[61]

---

[60] *See, e.g.*, *Hatch*, 2003 WL 1610778, at *5 (finding plaintiff failed to satisfy first prong of the qualified immunity analysis where undisputed testimony was that dog charged aggressively at officers after they entered yard); *Esterson*, 2010 WL 4614725, at *1 (officer attacked by charging dog when she walked towards the rear of the house).

[61] *Dziekan*, 376 F. Supp. 2d at 273 (finding officer entitled to qualified immunity because "reasonably competent officers could disagree as to the appropriate course of conduct when faced

B. Kendall's Section 1983 Claim Against Salt Lake City and his Claims Under the State Constitution Fail.

Kendall does not dispute that a failure to show the seizure violated Fourth Amendment rights precludes his section 1983 *Monell* claim against Salt Lake City and is fatal to his claim under the Utah Constitution. Thus, judgment should also be entered on Kendall's section 1983 *Monell* claim and his state constitutional claim.

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

1. Officer Olsen's Conduct was not Willful Misconduct and does not Satisfy the Elements of these Claims.

A finding that the seizure of Geist was objectively reasonable is fatal to Kendall's conversion and trespass to chattel claims because conduct that is constitutional does not satisfy the GIA's "willful misconduct" requirement and provides a complete defense to claims of conversion or trespass to chattel. Kendall's only response is that he is entitled to trial on this matter.[62] Similarly, Kendall's attempt to avoid the presence requirement of an intentional infliction of emotional distress claim is unavailing.[63] That requirement is not rendered inapplicable because

---

with the potential harm posed by an unleashed 55- to 60-pound dog running in circles within approximately 15 feet of an officer" and the officer was "objectively reasonable in his belief that his actions would not violate clearly established law"); *Warboys*, 303 F. Supp. 2d at n.14 (quoting *Anthony v. City of New York*, 339 F.3d 129, 137 (2nd Cir. 2003)) ("A police officer's actions are objectively unreasonable, and therefore are not entitled to immunity, when 'no officer of reasonable competence could have made the same choice in similar circumstances.'"); *Stephenson*, 632 F. App'x at 185 ("Viewing the facts in the light most favorable to the nonmovants, we conclude that Plaintiffs have not produced sufficient evidence to demonstrate that a constitutional right was clearly established such that a reasonable officer in Officer Duncan's situation would have understood that his conduct violated that right.").

[62] *See* Dkt. 45, Opp'n at 91-92.

[63] *See* Dkt. 45, Opp'n at 92 (arguing "[t]he presence requirement . . . is only triggered when the outrageous conduct is directed toward a third 'person'").

this case concerns the shooting of dog, not a person. Kendall also fails to explain how he can show Officer Olsen seized Geist with the "purpose of inflicting emotional distress,"[64] because the undisputed testimony is that Officer Olsen seized Geist to prevent harm to himself.

2. The GIA Precludes Kendall's Negligence Claim against Salt Lake City.

Kendall appears to concede the GIA precludes negligence claims against individual officers, but seeks leave to amend his Complaint to bring a claim against Salt Lake City for the alleged negligence of Officer Olsen in seizing Geist. Leave to amend should not be granted because the GIA precludes claims based on allegations of a violation of civil rights or infliction of emotional distress, as previously discussed.[65]

CONCLUSION

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

DATED this 30th day of September, 2016.

/s/ Samantha J. Slark
SAMANTHA J. SLARK
Attorney for Defendants

[64] *Bennett v. Jones, Waldo, Holbrook & McDonough*, 2003 UT 9, ¶ 58, 70 P.3d 17 (setting forth the elements of an intentional infliction of emotional distress claim).

[65] Kendall's reference to his Thirteenth Claim for Relief is curious because that claim is not at issue in this motion. (*See* Dkt. 45, Opp'n at 90-91.) Rather, Salt Lake City filed a Motion for Judgment on the Pleadings with respect to that claim, which is currently pending before the Court. (*See* Dkt. Nos. 18 & 31, Mot. J. Pl.)

CERTIFICATE OF SERVICE

I hereby certify that on the 30th day of September, 2016, a true and correct copy of **REPLY MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT** was electronically filed with the Court using the CM/ECF system, which sent notice to the following:

Ross C. "Rocky" Anderson
LEWIS HANSEN, LLC
The Judge Building
Eight East Broadway, Suite 410
Salt Lake City, Utah 84111
randerson@lewishansen.com
Attorney for Plaintiff

/s/ Heidi Medrano

HB #56013