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

SEAN KENDALL, Plaintiff/Counterclaim Defendant, v. BRETT OLSEN, BRIAN PURVIS, JOSEPH ALLEN EVERETT, TOM EDMUNDSON, GEORGE S. PREGMAN, and SALT LAKE CITY CORPORATION, Defendants/Counterclaim Plaintiffs.	**PLAINTIFF'S REPLY MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT ON (1) KENDALL'S CLAIMS OF UNCONSTITUTIONAL SEARCH AND SEIZURE BY DEFENDANT OLSEN UNDER FIRST CLAIM FOR RELIEF; AND (2) DEFENDANT OLSEN'S ASSERTED QUALIFIED IMMUNITY DEFENSE** Case No. 2:15-cv-00862 District Judge Robert J. Shelby Magistrate Judge Dustin B. Pead

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ARGUMENT

In their "Opposition" (Dkt. 66) ("Mem. in Opp."), Defendants (1) expressly admit that Kendall's statements of the applicable elements and supporting facts are not disputed; (2) incorrectly assert a general "reasonableness" standard as an element for a Fourth Amendment violation, while ignoring the controlling legal standard governing the assessment of "reasonableness," as expressly stated in *United States v. Gambino-Zavala*, 539 F.3d 1221 (10th Cir. 2008); (3) admit that statements of fact are not disputed, but then quibble with the statements as if they want to dispute them; or (4) purport to dispute the statements of facts (or dispute the source of facts) but do not, as required by DUCivR 56–1(c)(2)(B), "concisely describe and cite with particularity the evidence on which the non-moving party relies to dispute that fact."

In short, Defendants have (1) either conceded or blatantly misstated the applicable *elements* of Kendall's claims and (2) admitted the material *facts* presented in Kendall's Motion and Supporting Memorandum ("Supp. Mem."), or caused the facts to be deemed admitted, pursuant to DUCivR 56–1(c)(3), entitling Kendall to summary judgment against Olsen.

I. Kendall's Statement of the Elements of His Claims Are Entirely Accurate; Defendants' Purported Statement of the Elements Are Erroneous or Are Simply Quotations from Cases That Do Not Describe Elements.

A. Elements Required for Claims Under 42 U.S.C. § 1983

In his Supp. Mem. (Dkt. 63), at 7–8, Kendall stated the elements necessary for a claim under 42 U.S.C. § 1983. Instead of stating "agreed" as to those elements, as provided by DUCivR 56–1(c)(2)(A), Defendants hedge by stating: "Undisputed that Kendall must satisfy these elements to prevail on a claim under section 42 U.S.C. § 1983." (Mem. in Opp. (Dkt. 66), at 2.) They do not say whether they agree those are *all* the elements, yet they offer nothing more.

B. Kendall's Claim That Olsen's Search Violated the Fourth Amendment

Kendall set forth the elements for a claim that a police officer has unconstitutionally searched a home or curtilage, with a focus on what is required if "exigent circumstances" under the "emergency aid" justification are claimed.[1] Defendants ignored the controlling authority by quoting only a very general statement of the test in the 2006 case *United States v. Najar*:

> [W]hether (1) the officers have an objectively reasonable basis to believe there is an immediate need to protect the lives or safety of themselves or others, and (2) the manner and scope of the search is reasonable (a modification of our former third prong).[2]

To make matters worse, Defendants assert, erroneously, as follows:

> The standard Kendall asserts for determining if Officer Olsen's backyard entry is justified under the exigent circumstances/emergency aid doctrine is incorrect. It is based on cases that rely on a now outdated test and/or incorrect interpretations of case law . . .[3]

However, the governing standards to which Kendall referred are described in the *more recent*—and controlling—2008 Tenth Circuit Court of Appeals case *United States v. Gambino-Zavala*:

> [T]he government must show the officers reasonably believed *a person inside the home* was in immediate need of aid or protection.[4]
>
> [T]he government must show the officers "*confined the search to only those places inside the home where an emergency would reasonably be associated*."[5]

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[1] Supp. Mem. (Dkt. 63), at 10–11, 13, 14–15.
[2] 451 F.3d 710, 718 (10th Cir. 2006).
[3] Mem. in Opp. (Dkt. 66), at 5, n.1.
[4] 539 F.3d at 1225 (emphasis added).
[5] *Id.* at 1226 (quoting *Najar*, 451 F.3d at 718) (emphasis added). *See also United States v. Thomas*, 372 F.3d 1173, 1177 (10th Cir. 2004) ("there must be some reasonable basis . . . to associate the emergency with the place to be searched.")

Except for a quote on a different point in a footnote,[6] Defendants entirely disregard *Gambino-Zavala* in their Opposition, no doubt because the abundant uncontroverted record establishes that (1) no one had any reason to believe anyone in need of assistance was in Kendall's home or within the curtilage of his home and (2) no one had any reason to believe there was any connection between Kendall's home or the curtilage of his home and the perceived emergency giving rise to the search.[7]

The requirements articulated in *Gambino-Zavala* for the "emergency aid" justification for a warrantless search are found in other controlling cases. For instance, in *Minnesota v. Olson*, the United States Supreme Court agreed with the Minnesota Supreme Court's observation that "'a warrantless intrusion may be justified by . . . the **risk of danger to** the police or to other **persons inside or outside the dwelling.**'"[8]

Likewise, in *McInerney v. King*,[9] the Tenth Circuit Court of Appeals stated there must be good cause for believing someone needing emergency assistance is in the premises before a search based on the "emergency aid" exception to the warrant requirement can be conducted:

> "One exigency obviating the requirement of a warrant is the need to assist persons who are seriously injured or threatened with such injury. The need to protect or preserve life or avoid serious injury is justification for what would be otherwise illegal absent an exigency or emergency." Thus, "law enforcement officers may enter a home without a warrant to render emergency assistance to an injured *occupant* or to protect an *occupant* from imminent injury."[10]

In *McInerney*, the Court emphasized that in *Najar*, "[w]e held that, '[g]iven the totality of the

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[6] Mem. in Opp. (Dkt. 66), at 25, n.25.
[7] Supp. Mem. (Dkt. 63), at 15–22.
[8] 495 U.S. 91, 100 (1990) (quoting *State v. Olson*, 436 N.W.2d 92, 97 (Minn. 1989)) (emphasis added).
[9] 791 F.3d 1224 (10th Cir. 2015).
[10] *Id.* at 1231 (citations omitted) (emphasis added).

circumstances, the officers had reasonable grounds to believe *someone inside the trailer may have been in need of emergency aid* and immediate action was required.'"[11] The Court concluded that exigent circumstances did not justify the warrantless search because "a reasonable officer in [the defendant's] position would not believe that entry was required to take care of an immediate need to protect *inhabitants of the home*."[12]

Defendants concede that *Najar* requires that a warrantless search based on the need to render "emergency aid" must be "confined to places where an emergency could reasonably be associated."[13] However, Defendants argue that the term "places" can be read so broadly as to include the entire area the missing child might have traveled for as long as he had been missing. Nothing in the law justifies such a promiscuous disregard of Fourth Amendment and other privacy rights. "[T]he police may not enter every residence that happens to be in the vicinity of an emergency."[14] *Najar*[15] and *Gambino-Zavala*[16] refer only to "places inside the home" to be searched. And the Court in *Najar* made clear that there must be "reasonable grounds to believe someone inside the [premises to be searched] may have been in need of emergency aid and

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[11] *Id.* at 1233 (emphasis added).
[12] *Id.* at 1235 (emphasis added).
[13] Mem. in Opp. (Dkt. 66), at 26, citing *United States v. Najar*, 451 F.3d at 720. *Gambino-Zavala* cites to *Najar, id.*, for the requirement that "the government must show the officers 'confined the search to only those *places inside the home* where an emergency would reasonably be associated.'" 539 F.3d at 1226 (emphasis added).
[14] *Matalon v. O'Neill,* 2015 WL 1137808, Civil Action No. 13–10001–LTS (D. Mass. March 13, 2016), *7. *See also id.* at *3 ("if police sought to enter and search his home on the basis of an exception to the warrant requirement, [Plaintiff] had the right under the Fourth Amendment for his residence to be free from search unless a nexus existed between his home and the facts justifying the warrantless entry") and *4 ("Each of these exceptions [to the warrant requirement] requires a nexus between the justification for warrantless entry and the place to be entered." (Citations omitted.))
[15] 451 F.3d at 720.
[16] 539 F.3d at 1226.

immediate action was required."[17]

Defendants cite *Hunsberger v. Wood*, 570 F.3d 536, 555 (4th Cir. 2009), for the obvious point that "[w]hen a child goes missing, time is of the essence."[18] However, that case does not remotely support the proposition that police officers can, without a warrant, search homes and curtilages of homes in the entire area the missing child may have traveled during the time he or she was missing when there is no cause to believe the child is in a particular home or curtilage to be searched and no cause to believe there is any connection between the particular place to be searched and the perceived emergency. In fact, *Hunsberger* emphasizes, in upholding the warrantless search in that case, that "there was *evidence that a minor girl was in the home*, given that her car was parked in front of the house" and "there was reason to think she needed help."[19]

Defendants state Kendall has conceded "the first prong of the *Najar* test is satisfied."[20] For that fanciful claim, Defendants cite only Kendall's concession that Purvis and Olsen believed a young boy was missing from his home. The representation that Kendall has conceded "the first prong of the Najar test" is belied by everything Kendall has presented with respect to the unconstitutionality of Olsen's search. The "first prong of the *Najar* test" cannot have been met

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[17] *Id. Gambino-Zavala* cites to *Najar*, 451 F.3d at 718–19, for the requirement that "the government must show the officers reasonably believed *a person inside the home* was in immediate need of aid or protection." 539 F.3d at 1225 (emphasis added). *See also United States v. Yengel*, 711 F.3d 392, 397 (4th Cir. 2013) ("Under this more general emergency-as-exigency approach, in order for a warrantless search to pass constitutional muster, 'the person making entry must have had an objectively reasonable belief that an emergency existed that required immediate entry to render assistance or prevent harm *to persons or property within*.' An objectively reasonable belief must be based on specific articulable facts and reasonable inferences that have been drawn therefrom." (Citations omitted.) (Emphasis added.))

[18] Mem. in Opp. (Dkt. 66), at 25.

[19] 570 F.3d at 555 (emphasis added).

[20] Mem. in Opp. (Dkt. 66), at 27.

because, to meet that prong, "the government must show the officers reasonably believed *a person inside the home* was in immediate need of aid or protection." *Gambino-Zavala*, 539 F.3d at 1225.

Defendants baselessly assert that because "Olsen did not enter the backyard for the purpose of obtaining evidence or information *about Kendall*," his entry into and search of the backyard was not a "Fourth Amendment search." Mem. in Opp. (Dkt. 66), at 19. (Emphasis added.) Defendants erroneously contend that "to determine if a trespass or physical invasion of property is a Fourth Amendment search, the Court must consider whether the government trespassed or physically invaded property for the purpose of gaining information about *the occupant*." Mem. in Opp. (Dkt. 66) at 20, n.14 (emphasis added). That has never been the law.[21] Searching a third-party's home for another person who does not live there is a Fourth Amendment "search" and requires a warrant in the absence of exigent circumstances.[22] The same is true regardless of whether a government agent is investigating crime or performing some other function, including a search for a missing person. *See* Supp. Mem. (Dkt. 63), at 10–11. *See also Parkhurst v. Trapp*, 77 F.3d 707 (3rd Cir. 1996) (warrantless search for missing child held to be Fourth Amendment violation).

C. Kendall's Claim That Olsen's Killing of Geist Was an Unreasonable Seizure Under the Fourth Amendment

Asserting simply that "[t]o show a violation of the Fourth Amendment a plaintiff must show an unreasonable seizure of a person, house, paper, or effect,"[23] Defendants have "disputed"

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[21] *See United States v. Jones*, 132 S. Ct. 945, 951, n.5 (2012) ("an attempt to find something or to obtain information," conjoined with a trespass, constitutes a "search" for Fourth Amendment purposes.)

[22] *See, e.g., Steagald v. United States*, 451 U.S. 204, 216 (1981). *See also United States v. Jeffers*, 342 U.S. 48, 51-52 (1951) (warrantless search for contraband narcotics seized on the premises of persons without knowledge of the narcotics, which were claimed by a person who did not live there, was a Fourth Amendment violation).

[23] Mem. in Opp. (Dkt. 66), at 12.

all of the elements identified by Kendall as being necessary to establish that Olsen's seizure of Geist violated the Fourth Amendment. Defendants offer nothing more than the text of the Fourth Amendment and excerpts from various cases, along with argument, without identifying the applicable "elements". Kendall identified these elements, supported by controlling case law:

1. Kendall must show Geist was an "effect" subject to the protection of the Fourth Amendment.[24]
2. Kendall must show Geist was "seized," within the meaning of the Fourth Amendment, when Olsen killed Geist.[25]
3. Kendall must show that the seizure of Geist was unreasonable, including that (a) there was no warrant for the seizure, (b) there was no consent, and (c) there were no exigent circumstances justifying the warrantless seizure that were not created by Olsen.[26]

The Defendants' response of "[d]isputed" as to *all* of those elements, without stating what Defendants believe are the correct elements, with citations to legal authority and "without argument," is not only violative of DUCivR 56–1(c)(2)(B), but contrary to the well-established, controlling case law cited by Kendall in his Supporting Memo.

Defendants have asserted that the "exigent circumstance" justifying Olsen's warrantless seizure (*i.e.*, killing) of Geist was the fact that a young boy was missing. Mem. in Opp. (Dkt. 66), at 30.[27] However, Olsen has never claimed he killed Geist because K.H. was missing. He has, however, in various versions of his ever-changing story, claimed he killed Geist because he barked and ran toward him, baring his teeth. Before Olsen came along, Geist was secured within the enclosed backyard. Only Olsen's unconstitutional entry and search of the backyard led to Olsen's

[24] Supp. Mem. (Dkt. 63), at 23.
[25] Supp. Mem. (Dkt. 63), at 25.
[26] Supp. Mem. (Dkt. 63), at 25.
[27] *See also* Reply Mem. in Supp. of Mot. for Summ. J. (Dkt. 51), at 50 ("the exigency at issue in this case was the report of a missing child, which Officer Olsen did not create.")

encounter with Geist, which even by Olsen's most extreme account reflected what many, if not most, harmless dogs do when someone surprises them by invading their home territory.

In *United States v. Bonitz*,[28] government agents sought to justify their warrantless search of black powder and a hand grenade on the basis they threatened the neighborhood. However, the Court found that the gun powder and grenade could not pose a danger unless disturbed. "Thus, the only immediate danger that existed was created by the officers themselves when they entered the secure area and began to handle these materials." *Id.* Exactly the same applies to Olsen (except that Geist never posed a danger), who unlawfully created his own purported exigent circumstance, which, therefore, cannot be used as an excuse for his killing of Geist.[29]

D. Elements Required for Kendall to Defeat Olsen's Claim of Qualified Immunity

Once again, contrary to DUCivR 56–1(c)(2)(A), Defendants fail to state "agreed" in relation to the elements identified by Kendall for overcoming an asserted defense of qualified immunity, yet state "[i]t is not disputed" that a plaintiff has the burden of satisfying the very two-part test cited by Kendall.[30] Then, further violating that rule, Defendants launch into inappropriate

[28] 826 F.2d 954, 957 (10th Cir. 1987).

[29] Defendants seek to escape application of the rule that a government agent cannot create the exigency relied upon as justification for a warrantless search or seizure by citing the inapposite case of *Bodine v. Warwick*, 72 F.3d 393 (3d Cir. 1995). *Bodine* does not deal with an exigency justification, but merely poses a hypothetical about a *superseding cause* (a criminal suspect who—*not* as a proximate result of a Fourth Amendment violation—killed two police officers and was about to kill the officer who harmed him) that must be confronted. The analogy Defendants seek to draw between *Bodine* and the instant case fails because any threat Olsen may have felt from Geist was a direct, proximate, and natural result of Olsen's unconstitutional invasion of Kendall's backyard. The Tenth Circuit case *Bonitz*, providing a solid analogy to this case, establishes that any purported danger caused by an officer, like that caused by Olsen, cannot provide an "exigent circumstance" excuse for a warrantless seizure.

[30] Mem. in Opp. (Dkt. 66), at 15.

argument, without any statement of any elements different than what Kendall identified.[31] In short, Defendants agree with Kendall's identification of the elements.

II. The Uncontroverted Facts Establish That Kendall is Entitled to Judgment as a Matter of Law.

The Uncontroverted Facts Establish There Was No Cause to Believe (1) K.H. Was at Kendall's Home or in the Curtilage to His Home or (2) There Was Any Connection Between Kendall's Home or Backyard and the Perceived Emergency Giving Rise to the Search; Hence, Olsen's Search Was Unconstitutional and He Unlawfully Created the Purported Exigency Upon Which He Relies to Justify His Unconstitutional Killing of Geist.

Citing to the copious, uncontroverted factual record,[32] Kendall stated the following facts:

> No one, including Olsen, had any belief, or any reason to believe, that there was *any* connection or association between (1) Kendall's residence generally, or his backyard specifically, and (2) K.H. or any of the circumstances surrounding the perceived fact that he was missing. Rather, the *only* justification provided by any officer of the SLCPD for warrantless and non-consensual entries upon and searches of private properties, including Kendall's backyard, was that the properties were within a distance from the Horman house within which K.H was thought to be able to walk, and the properties might have been accessible to K.H. [33]

Supp. Mem. (Dkt. 63), at 15–16. Instead of admitting the obvious, Defendants "disputed" the statement "because it is not a statement of fact, but rather a recitation of Kendall's legal argument . . ." Mem. in Opp. (Dkt. 66), at 11.[34] Defendants do not, and could not, dispute the facts alleged.

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[31] Mem. in Opp. (Dkt. 66), at 16.
[32] Supp. Mem. (Dkt. 63), at 15–22.
[33] Supp. Mem. (Dkt. 63), at 15–16.
[34] Similar excuses for not "disputing" or conceding as "undisputed" Kendall's factual assertions are found throughout Defendants' Memorandum in Opposition. For instance:

- Defendants "disputed" "[t]he balance of this statement [that "while attempting to find the missing boy, Olsen was searching through the neighborhood of the boy's home"] because it is a recitation of Kendall's legal argument . . ." Mem. in Opp. (Dkt. 66), at 6.
- Defendants "disputed" facts, regarding which Olsen testified, because "the quoted language is just a small portion of the deposition and is taken out of context." Mem. in Opp. (Dkt. 66), at 6. However, Defendants do not provide, as required by DUCivR 56–1(c)(2)(B), any citation "with particularity" of *any* "evidence on which the [Defendants]

Hence, those facts described by Kendall, entitling him to the entry of summary judgment for Olsen's unconstitutional search, are deemed to be admitted.[35]

Because Olsen entered and searched the curtilage to Kendall's home in blatant violation of the Fourth Amendment, he unlawfully and proximately created the very circumstances he now claims justified his killing of Geist. Because the law does not permit a government agent to create the "exigent circumstances" upon which he relies for a warrantless search or seizure, Kendall is entitled to summary judgment against Olsen for his unconstitutional seizure of Geist.

Respectfully submitted this 3rd day of January, 2017:

/s/ Ross C. Anderson
Attorney for Plaintiff/Counterclaim Defendant Sean Kendall

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rel[y] to dispute that fact." They made the same claim at page 8 of the Mem. in Opp. about a factual statement being "disputed" because "the quoted language is just a small portion of the deposition and is taken out of context." They offered no evidence to dispute the fact asserted and no basis for their claim about context.

- Kendall set forth the following fact: "The police officers did not know if the missing boy had wandered away or if he had been abducted." Supp. Mem. (Dkt 63), at 12. That was based on Olsen's statement that "We didn't know" when asked, "So you had primarily in mind that he'd wandered away and not been abducted?" (Olsen Dep. 60:3–5.) Defendants did not dispute the fact or concede it was undisputed, as required by DUCivR 56–1(c)(2)(B). Rather, they simply stated, erroneously, that "[t]he deposition cite does not support this fact." Mem. in Opp. (Dkt. 66), at 7. That rings particularly hollow in light of Olsen's additional testimony: "Q: And would you say that you were equally concerned that the boy was – the boy had simply wandered away, as well as the possibility that he'd been abducted? Did you consider those equal possibilities? A: I did." Olsen Dep., 132:16–21 (Exhibit 2 to Ross Anderson Decl. (Dkt. 63–1)).

[35] DUCivR 56–1(c)(3) provides, in part, as follows:

> For the purpose of summary judgment, all material facts of record meeting the requirements of Fed. R. Civ. P. 56 that are set forth with particularity in the movant's statement of material facts will be deemed admitted unless specifically controverted by the statement of the opposing party identifying and citing to material facts of record meeting the requirements of Fed. R. Civ. P. 56.