IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

SEAN KENDALL,

PLAINTIFF/COUNTERCLAIM DEFENDANT,

VS.

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

DEFENDANTS/COUNTERCLAIM PLAINTIFFS,

CASE NO. 2:15-CV-862

SALT LAKE CITY, UTAH
FEBRURY 7, 2017

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT
BEFORE THE HONORABLE ROBERT J. SHELBY
UNITED STATES DISTRICT COURT JUDGE

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(1:36 P.M.)

THE COURT: Good afternoon, everyone. We'll call case number 2:15-CV-862. This is our Kendall versus Olsen matter.

And, counsel, you're all familiar to me, but why don't we take a moment and make our appearances for the record, please.

MR. ANDERSON: Ross Anderson representing the Plaintiff, Sean Kendall, and I'm pleased to introduce the Court to Walter Mason, a law clerk with our office who is here to help me with some of the technology as we move along.

THE COURT: Thank you. Welcome to you.

MS. SLARK: Samantha Slark on behalf of the Defendants, and here at counsel table I have Bonnie Hamp who is a paralegal with our office.

THE COURT: Very good, thank you. Welcome to both of you also. So this is the time set for hearing on cross-motions relating to the availability of qualified immunity for the law enforcement officers in this case, really focused on the federal claims after our last discussion. And we'll go one step at a time in this case, and following the recommendations of the Tenth Circuit, first figure out where we are on federal claims and then determine if -- if the federal claims fall, as I've already signaled, I think in most

instances I'm advised to allow the state courts to resolve the state claims. But if we're going to be here anyway, then we may reach the state claims.

We've reviewed a lot of paper. You didn't give us any shortage of things to read and consider. We're always grateful for that. We've reviewed it. We understand your arguments, and I think we understand the record that you're all relying on. We've had a chance to study the law. And as almost always the case before coming out here, I have formed a preliminary view about how the issues may be resolved based on your arguments and the materials you've submitted. I'll share that with you in a moment. That's always my preference. Ordinarily in my view that helps us sharpen and focus our argument.

Before I do, let me just say a word about this case more generally. It's not lost on me that this case presents in this moment some significant issues that are part of an ongoing national discussion on the one hand, for example, about officer safety and officer conduct and officer accountability. These are matters of great social importance and our nation is very focused on those issues right now.

On the other hand, we have a case that involves an animal, and not only an animal, though those cases are hard enough themselves, and there is a great deal of litigation in the courts right now as we begin -- not begin -- as we

continue to try to better understand how we're going to deal with issues involving for example speech related to animals, issues involving animal rights organizations and groups and the like.

Even more here we have a companion animal, and it is not lost on me that companion animals in particular are for a great many people very much like family members literally, and so for that reason there's a great deal of emotion aroused in a case involving harm to a companion animal.

I won't resolve any of those global issues, nor is it my place, and instead I'll be addressing the specific, discrete legal issues raised in these papers. I think I understand those issues. And as is always the case here in this trial court, I'm not a policy-making body. I'll be focused on applying the law as best I understand it to the facts that you've presented. I'll leave for other courts the policy implications. So I'm focused like a laser on the legal standards.

For the benefit of those who are here, this is a case of some interest. Let me take just a moment and talk about qualified immunity in very broad terms. Qualified immunity is a confounding legal doctrine. It's confusing. It's -- and it's unfamiliar to most lawyers. It's an interesting and specific area of law that arises in the context of constitutional claims asserted against law enforcement

officers acting in the scope of their duties. And it's a doctrine designed to strike a balance between competing interests.

On the one hand we necessarily and importantly demand from law enforcement officers who are vested with great authority and responsibility and among other things wear badges and carry guns, and have the power to direct citizens to do things, and they have the right to search places, they have -- there's a lot of authority with law enforcement officers, and we demand that they comply with the Constitution. And so there is a vehicle, a lawsuit, that is created by statute that enables citizens to bring claims against law enforcement officers for violations of constitutional duties.

But recognizing that we don't want law enforcement officers spending their day worried about the -- you know, the litigation implications of their conduct when they often have to make split second decisions, we've drawn a line, a legal line, and that is one bearing on reasonableness, the reasonableness of the officer's conduct in view of the constitutional obligations. And it's a two-part inquiry to determine whether there's a violation of some constitutional right. And then whether in the specific context in which it arose, ordinary officers under the circumstances would understand because the right that is at issue has been clearly

established in case law, objectively reasonable officers would know what's about to happen would be a violation of a constitutional right. So that focuses the Court's inquiry.

Qualified immunity means only this, that the law enforcement officers are immune from suit for their conduct. There may be other claims available, other causes of action. There may be other remedies at law. It just means that the law enforcement officers in their individual capacities cannot be held liable, in fact they can't be held to account -- they're immune from suit. They don't even belong in the lawsuit. That's the issue that is before us today on these motions.

And, counsel, I appreciated -- this is often the case and it was surely the case here. The issues during the course of our briefing narrowed I think in focus. And the Plaintiff I think correctly conceded some of the claims that were initially asserted in view of the case law that the City came forward with. I think we're not any longer proceeding under the Fourteenth Amendment claim, nor do I believe we're proceeding under a Fifth Amendment claim. I really think the focus has drawn us to the Fourth Amendment, and I think two principle questions: Whether there was an unconstitutional search here in violation of the Fourth Amendment and/or whether there was an unconstitutional seizure when officer Olsen shot and killed Geist. And I really think that those

two questions really boil down to two specific questions, one for each of those analyses.

I'm going to urge the lawyers to jump past the question about whether the canvassing was a search or not a search under the Fourth Amendment. I don't -- I don't think we're going to reach that question because even assuming that this was a search that would otherwise be governed by the Fourth Amendment when the officers came to Mr. Olsen's home and then searched his yard, I think we're going to focus on whether exigent circumstances provides an exception for that search.

And that's a two-part inquiry, whether there was an emergency -- and I'm using plain language here, but I really think at bottom there's not a disagreement about that.

I think, Mr. Anderson, in your papers I think you embrace the notion that when a toddler has gone missing, there's an emergency. I think we'll focus instead likely today on the second prong of the exigent circumstances exception to the warrant requirement, and that has to do with whether the search that follows that emergency is reasonable in its manner and scope.

And this is where I really think the parties disagree on the Fourth Amendment. My view based on your submissions and the case law is that this is a search that is reasonable in manner and scope on the facts here presented. And if we even narrow the question more specifically in light of the briefing

by the parties, I think it comes down to this question. This house, Mr. Olsen's house, roughly 10 houses away from the house where the child had purportedly gone missing, I think about a third of a mile away, it's a short distance, within 45 minutes to an hour of about a three year old child going missing, whether the proximity in space to the home where the child went missing is enough to provide a connection between the exigency, that is the emergency finding the child, and the search of this yard. And it's my view that under the case law it is enough.

If that's true, then we'll be focusing our attention next on whether it was a seizure. And actually I don't think there will be a debate about that. I think I agree with Mr. Anderson when a law enforcement officer shoots and kills an animal, that's a seizure. I think the City concedes that point.

So I think we'll again turn to the second prong of that test, and we'll be focused today on this question, whether -- and, Mr. Anderson, you'll help me understand your position more specifically. I think you agree that if a law enforcement officer is presented with a situation in which there is an imminent risk of harm to the officer or another, on those facts an officer can use deadly force to kill an animal. And I think most of the cases you cite agree with that proposition. And the question here will be whether the

City has shown, or whether the Plaintiffs have shown the opposite I suppose because we have cross-motions, that Officer Olsen's testimony is credible and on that basis provides a foundation for the conclusion that the officers -- the officer was in risk of his personal safety and that for that reason deploying that level of force was reasonable under the circumstances.

To frame it another way, I think, because it's a qualified immunity motion, the question will be whether it's clearly established in the case law on these facts that it's unconstitutional for an officer to deploy his service weapon instead of some other level of force as the Plaintiffs urge.

And the burden is with the Plaintiff on this point as it is in qualified immunity cases. And my initial conclusion before coming out here is that on these facts the only evidence that is directly relevant to this question is the officer's testimony. There is in our record that you've all submitted a great deal of information that bears on maybe inferences that could be drawn on both sides.

The City points to an interaction the neighbor had with Geist earlier in the day, and an officer who purports to have seen and interacted with Geist and descriptions of the aggressive nature of the dog during the day. The Plaintiffs point to evidence about this breed and people who know the dog and its nature. Both sides invite the Court to draw

inferences based on that information about what happened in that yard. And of course trial courts don't draw inferences, juries do ordinarily. We do sometimes on motions to dismiss, ordinarily in favor of the Plaintiff.

Here we have direct evidence and direct testimony. And the only evidence and testimony is that Officer Olsen feared for his safety, attempted to flee. When he concluded he couldn't, he tried to stand his ground to see if the dog would stand down, and in Officer Olsen's judgment, split second under the circumstances, concluded that the dog was going to attack, so he used deadly force. There's no conflicting testimony.

And, Mr. Anderson, I thought you did an expert job in your papers isolating what you view as inconsistencies in Officer Olsen's account of this interaction in the initial police report and in the internal investigation interview and in the deposition here.

It's clear there are some factual inconsistencies. And it's an interesting question in this procedural posture, but my view, and I'll be interested to hear from you on this point, those inconsistencies don't seem material to me in a way that would require me to reject the officer's testimony in whole.

It's not inconsistent in my mind that for example the disparity at one moment saying in one context it was about a

30 second delay and in another context saying it might have been about a minute and a half. In one context, you know, the other officer is knocking on the door and there's no response so I go -- and that officer is saying, well, I was knocking, and while I was knocking I heard the dog bark and then the shots. And in this context in a dynamic and fluid situation, it's not -- I don't think it's a necessary or fair inference to conclude that anyone who is giving testimony under oath is necessarily lying or committing perjury, whether it's an officer or someone else who is providing that testimony.

So on balance I think that's insufficient to overcome the direct evidence from the officer describing the exchange with the dog in the yard.

If I'm right about all of that, then the qualified immunity motion should be granted, and the officers would receive the benefit of qualified immunity. And if I'm -- if I make that ruling, then I'm already -- I've already signaled I'm inclined to have the state court resolve the state constitutional issues and the questions about the governmental immunity act and the state claims.

And as I often say when I come out, these views are just my preliminary views based on my review of the papers and the authorities, but I'm always here with an open heart and an open mind, as I say.

Mr. Anderson, since that -- it's not even a tentative

ruling, it's just an articulation of my views about the record, are not helpful to the Plaintiff, let me invite you to start the argument then today.

MR. ANDERSON: Thank you, Your Honor. I assume that we can get back to the question of whether this was a search --

THE COURT: Everything is on the table.

MR. ANDERSON: -- if that gets to that point. That was going to be the logical beginning of my remarks, but I can see that we're really honing down on whether it was or wasn't a search, was it reasonable. And, Your Honor, proximity of one's home to where somebody lived and is now missing has never been and will never be enough for a finding that a search is reasonable, unless under the standard, and it couldn't have been set forth clearer by the Tenth Circuit Court of Appeals in United States versus Gambino-Zavala case, you can show that the person requiring aid or protection is inside the home to be searched, and under the second prong of the Najar test that the government must also show that the officers confined the search to only those places inside the home where an emergency would reasonably be associated.

So this concept of a proximity --

THE COURT: Before you move on though, I'm thrilled that we're starting here because I think this is the crux of where you and I view the case law differently. The Najar, if

I'm pronouncing that correct -- how did you pronounce it?

MR. ANDERSON: I said Najar, but who knows.

THE COURT: That case is factually quite different from this case. I mean that involved the search of a residence, a specific place. It wasn't this case where we have a child who has gone missing in a community. And we're not talking here about the search of a home. We're talking about the search of a yard.

And the reason I think it is important is clearly that standard set forth by the Tenth Circuit will apply, but it depends on the nature of the search. Just as a common sense proposition, search warrants require time. And I want you to consider -- I want you to consider a hypothetical. The three year old child is in the neighbor's pool two houses away from Mr. Olsen's house, face down in the pool drowning, and every minute counts. And I think we all -- everybody will agree and be sympathetic to this scenario. A toddler has gone missing, could run in the street, could be drowning in a pool. We are not going to require officers to stop at every yard and obtain a search warrant from a court, to fill out an affidavit and sign it and submit it, wait for a court to review it, and then execute it, return it to the officer, and then enter the yard to search. If it is a place where a child could have gone, the officers are going to have the opportunity under the exigency, reasonable manner and scope, to search. Isn't that

true in proximity of where the child would be?

Now, a different question I think, to make it more similar to Najar, and then I'm interested in your response, suppose the officers here had gone to Mr. Olsen's house and the doors are locked, and nobody answers the knock or the doorbell or whatever.

One of the officers goes through the backyard. And those officers, believing that they're just searching in places where a toddler might have gone, nevertheless decide to knock down the door and go search inside the house. That seems to me to present a different question and one that might fall within the ambit of that case. Our facts seem different and our search seem different. You disagree.

MR. ANDERSON: I do disagree.

THE COURT: So how do we --

MR. ANDERSON: Adamantly, Your Honor.

THE COURT: What do we do with the toddler in the pool? You can't go in the yard that's two houses away from the house where the child is missing?

MR. ANDERSON: If you have reason to believe that there's a connection between that house and the emergency that gives rise to the search.

THE COURT: More than just its proximity to the place where the child went missing?

MR. ANDERSON: Your Honor, proximity has to do with

how mobile the person who is missing is, how much time has elapsed, and then you've got the access question as you said.

THE COURT: Yes, I agree with that.

MR. ANDERSON: And the Fourth Amendment doesn't disappear radically over time. For every minute that goes by, more and more homes in a concentric circle within the radius of where that little boy's home was, you don't wipe out Fourth Amendment rights for those homes the more time that goes by and the more quickly that child could be traveling.

What if he'd been picked up by somebody and was seen in a car? Would we say then that the entire city, the entire intermountain west over time would be without any Fourth Amendment protection? There really is no basis for saying that you look at how fast this little boy could have traveled, and over the time period that's elapsed, and the more and more time goes by everybody within that area loses their Fourth Amendment rights. There's absolutely zero authority for that.

THE COURT: I disagree with your characterization of it. I don't think anybody is saying that you lose your Fourth Amendment rights. I think, if I'm reading the case law correctly, and now I'm wondering if I'm misstating this, I think what this -- what this area of the law recognizes are competing interests. So it's not that Fourth Amendment rights

disappear. It's that there can be a limited search in the face of an exigency.

And the question that we have to apply here -- this is the argument you made in your papers -- that there be no -- there be no constraint that if the child goes missing under the government's theory here, we could search every house in the county. And this is where I think the Tenth Circuit when it revised this standard in 2006 really put it into focus. It's going to be the reasonableness under the facts and circumstances of the case.

I mean if I apply your standard here, the officers couldn't check the house next door that has a pool if there's a wooden fence and there's an open gate, but from the open gate they can't see the pool, and they could infer or conclude that the child could have gone to the next door neighbor's house and fallen in the pool. And your answer is mere proximity is not enough. You have to go get a warrant. I don't think that's what the law requires either.

MR. ANDERSON: You have to have reason to believe there's a connection. This has always been the case, from the Zurcher case, United States Supreme Court, forward. And --

THE COURT: Where can you search? Where can you search?

MR. ANDERSON: You can search wherever you have a reasonable cause to believe there is a connection, some nexus.

The courts use all sorts of different terminology. But the one thing that's invariable is you've got to be able to show a connection between the place to be searched. That doesn't mean an entire neighborhood or an entire region. It means the place to be searched, there has to be a nexus between that place and the emergency that's given rise to the need for a search.

THE COURT: So then I guess my response to you is it seems like your argument legally is there won't be a search when a child goes missing that could just walk out of a gate and disappear into a neighborhood. And let's say it's five minutes. Law enforcement is called. No concerns about abduction. The child is seen opening the gate and wandering off. Your answer is we can search public streets without more information about tying any other specific place you want to search to the -- there will never be that evidence.

MR. ANDERSON: You can do your canvassing. You can go knock door-to-door. You can ask people can we search your backyard? Can we search your home? There was an officer there that went in the other direction, and he said, no, I didn't go into people's backyards enclosed. And I said why not? And he said because people have their First Amendment rights.

THE COURT: That's the question we're going to decide. I mean what one officer did or another, we're asked

to determine the constitutionality of what Officer Olsen did. So I'm not meaning to -- I think I understand your position, and the backyards where children could -- could go are off limits to law enforcement, unless they have a specific reason, more than just the proximity, it's the next door house, but we can't even look in the backyard unless we get a warrant first. The child has gone missing.

MR. ANDERSON: You could look into it. But, Your Honor, the curtilage has every bit as much Fourth Amendment protection --

THE COURT: It's true.

MR. ANDERSON: -- as a house.

THE COURT: It does in the Tenth Circuit.

MR. ANDERSON: So under what --

THE COURT: This is why --

MR. ANDERSON: -- the Court's indicating right now --

The Court: This is why I think it's a search.

MR. ANDERSON: If somebody's front door were open to their home and nobody is home. They've just left it there to air out or they don't hear the doorbell. The logic apparently would be that the officers can just walk in, rifle through the house, look anywhere that they could find a two or three year old boy. They didn't even find him when he was asleep on his parent's basement floor, and all they would have had to do was

move a box.

THE COURT: I thought about this question. This is a closer question I think than the one we have in this case. Suppose -- suppose Officer Olsen goes into Mr. -- I've been saying Mr. Olsen. I've been confusing the two. Officer Olsen goes into Mr. Kendall's backyard, doesn't see the child, but the back door is open, and nobody is answering when the other officer is knocking on the front door. This is a closer question in my mind. Now you're entering a home, and I don't know what the answer to that question is. But a quick survey of a backyard where a child might have gone presents an easier question I think under the law.

MR. ANDERSON: I think logically they're one in the same because if the back door is open and they're saying, well, it was within this proximity where we think the child could have wandered, and he could have accessed it, maybe he could have gotten through the -- manipulated the latch and gotten into the backyard, although the gate was closed, then if he could have done that and the back door was open to the home, the logic of the City and apparently where the Court is headed here, is that they could have just walked into Mr. Kendall's home and searched throughout his home. He would have lost any Fourth Amendment protections simply because of proximity and supposed access.

Your Honor, the Fourth Amendment means a lot more than

allowing police officers to enter one's home or the curtilage, which has as much Fourth Amendment protection as the home, and saying you can go through, you can rifle through. Go ahead and go open the shed.

THE COURT: You're not going to get a disagreement from me about the importance of the Fourth Amendment today, but let's draw another analogy. It is equally compelling, the Fourth Amendment, in the context of a search for weapons when somebody is being arrested. What we're talking about are conflicting interests. That Fourth Amendment right is equally present when it's clear under the case law that when officers are making an arrest or a stop, and they have reason to think that there could be weapons in the surrounding area, they can do a search. They can do a cursory search to ensure that the area is safe. That doesn't mean the Fourth Amendment isn't robust. It means that we recognize a competing interest in a specific circumstance, and surely a child going missing is such a circumstance. It doesn't mean that the Fourth Amendment is surrendered invaluable or any less valuable, does it?

MR. ANDERSON: I think the consequence of what Your Honor is saying would be when somebody is kidnapped, everybody in the neighborhood, and the longer the person the child has been gone, the broader this free search area is going to be, where there's no Fourth Amendment protection, no right of

privacy simply because officers are saying, well, the child may have gone that far, the abductor may have taken that child that far and there could have been access.

THE COURT: What do you think is the standard that drives this question in this context? There's cross-motions for summary judgment. I'm always searching for the standard that's going to drive the Court's analysis. But it's qualified immunity at issue. The burden will rest with the Plaintiff. Doesn't the burden rest to show a clearly established constitutional right, and then that it's violated? And the trick I think -- I don't mean trick in the sense of like being tricky, I just mean the nuance here that's hard is the level of generality that you employ in defining the right I think.

MR. ANDERSON: Your Honor, I think the Matalon case, and although it's not in this circuit, I think the Court said it in the most common sensical fashion possible, and that is the police may not enter every residence that happens to be in the vicinity of an emergency. Again, hearkening back to Najar, and then as it was a elucidated by the Gambino-Zavala case, if, number one, you don't have reason -- doesn't have to be probable cause, just reason, and every one of these witnesses, every one of the defendants said, no, we didn't have reason to believe that child was in that yard or in that home, and, no, we didn't have reason, any reason to believe

that there was any connection between that home and the missing child. Our sole justification was that it was somewhere in the area that we think that a child may have been able to walk and that backyard may have been accessible to that child.

That would be an unprecedented emasculation of the Fourth Amendment, Your Honor. That would be telling everybody that their expectations of privacy in the curtilage of their homes, which are to have the same protections under the Fourth Amendment as their own homes, that once somebody is missing that's all out the window. That's not the law, Your Honor. That's never been the law.

And I know there's a lot of -- we all sensed it like, well, if it was our kid, we'd want -- we'd want it all thrown out. You go do whatever it takes to find that child, but that's why we have the rule of law, and that's what the Fourth Amendment was --

THE COURT: Not whatever it takes, which is what draws me back to the question I asked a moment ago about the standard, because the standard here is a reasonableness standard. That's baked into this -- in the Tenth Circuit today is baked into the second prong, which is great for trial courts of course because it will change -- I'm being facetious in case that's unclear on the record. But it will have to be viewed in the specific facts and circumstances of every case,

otherwise we just have the hard -- we would have the bright line rule that you suggest in the case. It wouldn't be a reasonableness standard. It would be the way you've just articulated it. But that standard is not the one that I think I've been told to employ in determining whether the exigent circumstances exception applies.

It's not for every location where you have reason to believe there's a connection to the -- it's -- what was the language I used to start? I think I had it right the first time. There does have to be a connection, I agree with you, and I think the question is does it have to be more than just proximity.

You agree that on the record before us the only place where officers could have searched then without a warrant is the next door neighbor's? Is that a family member's house next door? Is that what I remember correctly?

MR. ANDERSON: Well, there are cases that have said it was okay to go into this particular house because clothing was found there, or there was a smell of dead flesh. There were certain indications about that place. Those are the only ways the courts have justified going into any one particular residence is that there be that specific connection, that nexus, between that place, not this entire area that grows larger and larger over time and given the mode of transportation.

What if this were a 13 year old boy that had a bicycle? Does that mean that every home, every curtilage in a much greater area would be exposed to the possibility of police just dropping on through, consent or no consent?

THE COURT: Just the opposite, right? I mean say it's a 16 year old and he's last seen getting into his car. I think on those facts it would be unreasonable to start searching the neighbors' yards. There's no reason to believe that the person would be in that vicinity. But here there's every reason to believe that a three year old child may have just walked somewhere where he could walk. No? But I understand. You and I just disagree on this point.

MR. ANDERSON: And I disagree with that, Your Honor, because the record shows that although they were searching the neighborhood -- and even Officer Olsen said I was mixed. It's 50/50. Either he was abducted or he just wandered away. They were entertaining the possibility of an abduction.

THE COURT: And your answer is we're done. We can't search.

MR. ANDERSON: You can search. You can go through the neighborhood --

THE COURT: Where could they search here? One house, right? On this record -- let's not expand the record. Your position is that the only place law enforcement could search for a missing child is the next door neighbor's house.

Am I wrong that it's a family member next door?

MR. ANDERSON: It was a family member, yes.

THE COURT: Right. So there's a reason to believe that the child might be next door with the family, otherwise, we're done. On the facts here, there's no other search until we get a warrant, for what?

MR. ANDERSON: The police do exactly what they did when Elizabeth Smart went missing, when Destiny Norton went missing, and that is you go door-to-door. You search the neighborhood where you can, where there isn't this expectation of privacy in the curtilage, walking into people's homes. And if you can just see this, walking into the curtilage is the equivalent under the law of walking right through the door and searching somebody's home.

THE COURT: I understand that part, and especially the shed. Even if we're -- even if parts of the backyard are or are not, walking over and opening the -- I agree, Fourth Amendment extends that far.

MR. ANDERSON: Right. So the police have a lot they can do. They can mobilize these groups that come together now, especially after Elizabeth Smart's kidnapping, and they can go out. But they don't just walk in people's homes or in their enclosed backyards. It never happened in either of those cases.

And in fact it's probably why she was later found in I

believe it was next door, close to being next door, finally after officers did gain access to the house. But they didn't just -- they couldn't just walk through people's homes or enclosed backyards without some belief that there was reason to tie that property to the emergency giving rise to the search.

This -- your Honor, it would be the first case ever where the simple fact of somebody living in a certain area, with a backyard where the latch may have been manipulated by a child, or if a back door was open, that the police were allowed under the Fourth Amendment carte blanche to just go in and walk around and see what's happening. And one of the reasons for that, look what happened here. This was an officer. He had no idea if this child was there or not.

THE COURT: We can't --

MR. ANDERSON: He didn't do anything to clear, to see if a dog was there.

THE COURT: They're different issues in my mind.

MR. ANDERSON: But my point is there are a lot of reasons to protect the expectation of privacy, and this is Exhibit A. Sean Kendall kept his dog back there behind a secured -- behind secured gates, behind a secured fence. He had the clear expectation of privacy. Left for work that day thinking his dog was safe, and an officer invaded that space without any -- without meeting either of the two prong tests

set by the Tenth Circuit, and simply wandered in and then created the very situation that he now uses as a justification, and it's an absurd justification, to pull out his gun and kill a dog.

THE COURT: Let's not confuse the seizure with the search. I mean that's an appeal to emotion I think. It's improper. We're not Monday morning quarterbacking, and the case law is clear about this. We don't look at the result of the game and then question the play call. We're supposed to analyze the play call in view of the facts and circumstances that existed at that moment.

But let me ask you one more hypothetical about the search and then I think we should move on. I think I understand your position. But help me understand what would be the constitutional implication of this. The child goes missing from one house. Immediately next door is a house with an enclosed backyard and a gate that's open. Three year old child missing. But say it's a six foot wooden gate that you can't -- there is an expectation of privacy in this backyard. It's just cracked open. So the officer can look and see a fraction of the yard. The great majority, 95 percent of the yard, not available for view unless the officer pushes the gate open or enters. Immediately next door the gate is open. Is that the kind of thing that gives rise to belief that the child might be present? It's supposition, the same

supposition we have here. So that's unconstitutional, is it? You'd have to go and obtain a warrant first.

MR. ANDERSON: There may be some nexus. There may be some sign of connection. If the boy's trike was over there, if he customarily went over there next door. The officers in this case said nobody had any information that this child ever went to the Kendall house. It's -- that would be such an entirely different situation. But if there was some reason to believe that there was a connection between that child missing and going over there.

But you can't just walk through an entire neighborhood. One of these officers said, yeah, you could walk through every house, one door, two doors, three doors, a block away, you could walk through every house and search every closet --

THE COURT: It's the question we're answering today. I said one more. I'm going to ask one more hypothetical beyond that. Let's use -- there are populations that are known to wander, and now I'm thinking about Alzheimer's patients that walk out of senior home areas or something. There's also children I think who -- I don't think it's ASD, autism spectrum disorder. I can't think now what the specific -- but there are children or other vulnerable adults, people who have deficiencies who sometimes wander.

Suppose you have such a person who has gone missing before, and they always walk out, and they just walk in the

neighborhood, and places where they can walk in a close vicinity. Again I think you'd say without something more, you can search the public spaces and that's all, right?

MR. ANDERSON: I'm not sure. I think we'd need more information. Did that person customarily go to a certain place? Were they attracted to certain things? Some nexus, some connection between that specific place. Here there was zero. How far could this have extended? I've got to ask that. Would it have gone another block? They were already doing basically a concentric circle, so now we've got probably hundreds of homes that under the City's theory here saying that that's the place, confining the place -- rather strange use of the word confine -- to only those places in the home where an emergency would reasonably be associated. Nobody said neighborhood, nobody said area, region. And I think that the --

THE COURT: Well, but that case involves a house, so it's not surprising that we're talking about a home. Do we agree -- nobody found this case. You said this would be the first case ever where -- this case doesn't exist that I can find, this specific case. It hasn't been decided by a court, has it?

MR. ANDERSON: With these exact facts, no.

THE COURT: With a child and then a search of the immediate vicinity.

MR. ANDERSON: Yes. Well, the Matalon case is one where they said you can't search every resident in the area of an emergency. You can't just go wander through everybody's home in the area and say the First Amendment is out the window. You have no more justified expectation of privacy, not because of anything you did, but because somebody else did something wrong or there's a missing person.

So I understand that there's a lot of sympathy evoked. People want to do what they can to find somebody who is missing, whether an adult or a child. But there are the countervailing rules under the law that say before you start going through people's personal property, their homes, their curtilage to their homes, you must have reasonable belief, not probable cause, but some reasonable basis for believing that there's a nexus between that specific place to be searched and the emergency that gave rise to the search. And it's just not here, Your Honor.

THE COURT: Okay.

MR. ANDERSON: Thank you.

THE COURT: Well, did you want to touch on anything more relating to the search aspect? And then I think we'll hear from the City, and then why don't we talk about seizure. But you started this by saying you wanted to talk about the search. I don't know how helpful it will be today, but I agree -- I'm quite familiar with the case law about the

curtilage. The curtilage extends beyond the home to areas where there's a reasonable -- it's a multifactor test in the Tenth Circuit, the use that the property is put to, efforts to maintain privacy in the vicinity and the area. That clearly it applies to porches. Outbuildings on the property are included. Here there was at a minimum some exploration of a shed by opening a door or something. I mean it seems to me that we're in search land, so I don't think you have to persuade me of that, but is there anything more you wanted to say about that?

MR. ANDERSON: All I would say is the City has made a completely baseless argument that a search for a missing person is not a search under the Fourth Amendment. And I think to say that anybody's home in a certain area where this child may have gone, would it be twice the area if the child was gone for twice as long, or if he walked twice as fast as he normally did? This just isn't the case.

There have been cases. We've cited some. There are other cases holding that any search by a government official -- it doesn't matter what the purpose is. It can be for administrative compliance. It can be a search for a missing person, whether it's in a criminal context or otherwise, the intrusion by a government actor for the purpose of finding or looking for something or someone, finding information or some thing, is a search for Fourth Amendment

search purposes. And I doubt I have to go into that further with the Court. We've I think made that abundantly clear in our briefing.

And in this instance in terms of the curtilage, Your Honor is well aware this was adjacent to the house, it was enclosed, and all of the reasons that there were expectations by Sean Kendall of privacy in that area.

And also there's the Parkhurst Trapp case, the Third Circuit case, where it specifically said, in addition to the cases we've cited, that a search for a missing person is a Fourth Amendment search. So that then calls upon the courts in those kinds of searches to examine the standards for reasonableness. The Tenth Circuit has made it clear about the need for that connection, that nexus, which just absolutely is absent in this instance.

Now, I would say, if I could anticipate the Court reevaluating its initial view on this, that any seizure in this instance following this unconstitutional search was a product of the unconstitutional search.

The City says, well, the exigency that excuses getting a warrant for killing the dog, seizing the dog, was the missing child. Well, no. An exigency under the law, if you're going to use exigent circumstances as an excuse for not getting a warrant, is what necessitated the action being taken before you have time to get a warrant? And in this instance Officer

Olsen said this behavior by Geist, kind of behavior that any dog engages in under these circumstances. And, Your Honor, that justification was the product of this unconstitutional entry into the property. It was a product of what Officer Olsen did. He manufactured the exigency.

Geist was no different than the black powder or the hand grenade in the Bonitz case where the police said, hey, we found black powder and grenades so therefore we engaged in this extensive search of the area because we were afraid for the safety of the neighborhood.

And the Tenth Circuit Court of Appeals said no. That material, the black powder and the dynamite were inert. They were harmless until you went into the area, which you had no business doing, and you created the harm. If it weren't for you being there, there would have been no harm. You're the ones that started messing with the grenade and with the black powder.

That's exactly what happened here. Geist was, as it were, inert. He was harmless. He was back there secured behind the enclosure of that backyard before Officer Olsen took it upon himself, without a warrant, without consent, without knowing of any connection between that property and the supposed emergency, just walked right in.

Thank you, Your Honor.

THE COURT: Thank you. Ms. Slark, do you still hold

some firm belief that this isn't a search?

MS. SLARK: I think that we are in search land, as the Court's indicated, and I do think that there are kind of two prongs to the argument that the City was making, and maybe one of those prongs has been slightly lost in the mix here.

If we are in search land, the courts do recognize that only unreasonable searches are unconstitutional. And there is a line of cases that discusses circumstances where minimal intrusions weighed against the government's interest and balanced against the requirement of imposing a warrant are therefore not unreasonable searches.

THE COURT: You don't mean that as some separate analysis apart from exigent circumstances? You don't mean to suggest for example that Officer Olsen without the exigency of a missing child could go walking around through this neighborhood and opening gates and walking into yards, right?

MS. SLARK: Absolutely not.

THE COURT: So it's the exigency?

MS. SLARK: I really think there's kind of an interesting scenario here because there's an overlap in it and there really is the exigent circumstances/emergency aid doctrine which encompasses the scenario.

There is also another interesting line of cases where circumstances like searching bags at airports, patrol -- automatic patrol checks where those types of stops and

searches have been analyzed to determine whether those are reasonable searches. And in those circumstances courts adopt a balancing test where they look at the intrusion versus the government interest and the need for a warrant.

THE COURT: You're not saying that it's the City's position that its officers can walk around entering backyards just on a whim?

MS. SLARK: No, absolutely not. They can do it for the purpose of what they were doing it here, which was the exigency of the child that was missing.

THE COURT: So I don't mean to be stubborn about the point. I just want to make sure I understand what you're arguing. You're arguing some separate basis for a search of a space that enjoys a Fourth Amendment protection apart from the exigency of this child having gone missing?

MS. SLARK: I do think that the exigency of the child having gone missing and the emergency aid doctrine are the most appropriate analysis for the Court to look at this under.

THE COURT: It's your best argument, you agree?

MS. SLARK: I agree. However, we did include in our briefing an alternative analysis the courts have adopted when there is not an exigency and there's certain sects of searches that a court adopts a reasonable analysis and a balancing test in those circumstances. We provided argument on those in

addition to, but I do think that the exigent circumstances/emergency aid doctrine is the most appropriate analysis in this case.

THE COURT: So Mr. Anderson says this would be an unprecedented application of that doctrine because it's without boundary. If a child goes missing, we just crumple up the Constitution and throw it away, and it's anarchy, it's willy-nilly. Law enforcement is out just searching any old place. There has to be some limiting principle he says, and the limiting principle is there has to be some reason for the officers to believe, in this instance it's a missing child, would be found where they're looking.

MS. SLARK: Well --

THE COURT: That's true. You agree with that first proposition? There has to be some reason to believe the child could be in a place I want to search that would otherwise enjoy Fourth Amendment protection before I can go look?

MS. SLARK: Of course, and that's the second part of the Najar test. It's the reasonableness. It's the manner and scope of the search that was conducted was reasonable.

THE COURT: And Mr. Anderson says no court has ever found that mere proximity to a place where a person goes missing would be sufficient. There has to be more. And your response?

MS. SLARK: Well, I think that there's at least two

things going on. There's proximity and accessibility going on here. Police officers were looking in places that were proximate to where the child was last seen, and that there were places that a child of that age would likely go, and a child of that age could access, so unlocked backyards.

Adding to that, experience has shown backyards is one of the most likely places a child of that age will go. And in addition to this you have to look at the specific facts of every case, as you do in every other Fourth Amendment analysis, know something else about this child, which made looking and visually locating this child even more important than for any other three year old. The police officers were told that this child did not communicate verbally, and that they would have to actually visually see him and to engage him. They couldn't just call out his name and expect for him to respond.

THE COURT: Suppose that fact is not part of this record, does that change the result? Suppose officers are -- suppose this child was able to verbally communicate -- or maybe that was the case. Maybe it was misinformation. It doesn't matter. Suppose officers aren't told that. Now is the result different if Officer Olsen goes into a backyard instead of calling out for the child?

MS. SLARK: I actually don't think that it is. I just think that that's just an additional fact in this

scenario which made it even more important. Because the concerns that you have when a missing three year old child goes missing of that age is that the child can wander into -- obviously into a road. When it concerns backyards you're worried about the child going back there falling into a window well, maybe cracked his or her head, fallen into a water feature. Small children that fall down face forward, can't move, get up. If they're there for a period of time, they can drown.

THE COURT: So Mr. Anderson says the Matalon case from Massachusetts tells us about this. It's not enough to see accessibility and proximity. There was an open -- was it an open window in that case? And so proximity, accessibility not enough to enter the home and search.

MS. SLARK: Well, I think that the Najar case is actually more helpful because it's a Tenth Circuit case and it describes the purposes of why the exigent circumstances and emergency aid doctrine grew. And it describes that society has placed on police officers additional responsibilities which fall outside ordinary law enforcement tasks. And they specifically call out aiding individuals that are unable to care for themselves and helping other vulnerable individuals in society.

Society calls on the police officers and expects them to assist in circumstances where you have a small child that has

wandered away from a home, a mental health -- a patient that's wandered away from a mental health institution, possibly somebody with Alzheimer's that's wandered away from their home or a care home.

THE COURT: But Mr. Anderson would say that's great, and we're grateful for law enforcement serving that function within the constraints of the Constitution.

MS. SLARK: Well, Najar -- sorry to cut you off. Najar specifically recognized that there is this function, and then we have to balance between society's expectation for this help and what police officers ought to do against the intrusions that are at issue, and that's what's given rise to the second prong of the test.

THE COURT: So what happens if Mr. Kendall's -- let's go to the hypothetical I put to Mr. Anderson. Officer Olsen enters the backyard and doesn't see the child but the back door is wide open. The child could easily have walked into a house -- if the child could have managed to get into the yard, could have walked through an open door, so can law enforcement enter Mr. Kendall's house and search anywhere in the house where a three year old might be present?

MS. SLARK: Well, the task of a court in every Fourth Amendment analysis is to analyze the facts that are actually before them and whether those ones violate the Fourth Amendment.

THE COURT: Help me understand the governing principle though. What's your view about that? Could officer Olsen have walked into Mr. Kendall's house and searched anywhere in the home where a three year old might have gained access? The rationale would be the same. You could say a lot of people in Utah have firearms in their homes. Sometimes they're out. Especially if homeowners don't have young children, firearms could be out on a counter. A three year old could grab one and accidentally shoot himself. So doesn't the same rationale justify the search of a home then?

MS. SLARK: I think it's a much closer question when it comes to a home. One of the reasons that backyards are searched and are part of a standard neighborhood canvass when a child is reported missing is because it's somewhere -- experience has shown it's somewhere a child of that age will go. A child of that age does not necessarily wander into somebody else's home that they don't know.

THE COURT: So is the answer a search of the home wouldn't be justified under the case law but a search of the yard is okay? And if that's your answer, then where in the case law do we draw a distinction between the Fourth Amendment protection that's established for a residence and the curtilage? I mean I think that's considered together.

MS. SLARK: Well, I think a locked home is obviously a very easy question. Clearly you can't go into the locked

home.

THE COURT: The idea there would be access wasn't available to the three year old, so you can't expand -- you can't reasonably expand the search to a place where you couldn't expect a three year old to go, yes?

MS. SLARK: Exactly, yes.

THE COURT: Okay.

MS. SLARK: And then the next question is, okay, you have an unlocked backyard, so maybe or maybe not. You're looking at the manner and scope of it. The cases kind of go backwards and forwards on the breadth of where you -- where you can go. So you go into the backyard. These are places that a child could easily go to around the corner and over to the yard corner here, maybe over to the shed. Then you get to the open door. And then you have to ask a question -- yourself a question, are we going outside the scope of this?

So let's have a different hypothetical back to -- to present. So for example say you had an exigency to go into the home because there was a -- there was a reasonable belief that somebody within the home was injured. The scope that the officers have to go in -- so they've heard shots fired. So they go into the home to see if anybody has been injured. So the manner and scope of the search is to go in to see if the person has been injured. Doesn't give them an opportunity to go through every drawer in the house.

So here I think what we're looking at is, okay, we have the open backyard. So then we go into the backyard and we take a look around in the backyard. That's kind of step number one.

Then we have an open door to the house. So maybe it would be okay to take a look in the porch. Maybe the next -- the porch -- maybe it's an open door to a glassed patio. I think it would be okay to go and take a look in there. A child likely might go in there. Then you go to locked door, so it stops there. I mean I think it's a -- kind of a stepping analysis based on what you have. Of course you can't just go into the house and search in every cupboard and through every drawer, but it has to be kind of a reasonable scope at each stage.

So in this case we're looking at was there a reasonable scope for the officer to have walked into the yard, taken a look behind the house where he couldn't see from the gate, walked and taken a look where he couldn't have seen behind the garage, and then taken a look where he couldn't have seen in the shed, and then left. That's a very limited scope.

Under the hypothetical with the door, do we then go -- can we go take a look through the door, the open door into the kitchen? Probably. Do we then have a right to walk forward into the next part of the house? Take that analysis step by step as you would in every Fourth Amendment case.

THE COURT: This is what Mr. Anderson wants to know, what's the limiting principle if the limiting principle is proximity and accessibility?

MS. SLARK: I think the limiting principle in every case is going to be reasonableness, and you have to look at it -- at the facts of the case. It's kind of a very difficult -- there's no bright line rule. There's never a bright line rule in the Fourth Amendment. You have to look at it at the facts that you knew at the time and the facts that are kind of pendent on the case that you're deciding. There is no bright line rule for a Fourth Amendment question.

THE COURT: That's been my experience oftentimes, and it requires, as I understand it, I'm instructed to do a case by case analysis on the facts presented in every instance.

Okay. Anything more on the search element?

MS. SLARK: Unless the Court has any particular questions with regard to the search --

THE COURT: I do have one more, I'm sorry. It's Mr. Anderson's question. It's a good question. It's a fair question. We're 10 houses away. What about a thousand?

MS. SLARK: Again, you're looking at the facts of the case that you deal with. So here we have a three year old child. By the time the family had called the police the child had been missing 45 minutes. By the time Officer Olsen had

reached Mr. Kendall's house it had been about an hour.

The other important fact which the Court -- which were in the City's papers is the fact that time is of the essence when you're looking for a child. And there's something that is referred to and known by all police officers is called the golden hour. The first hour is the most important, and chances of a good outcome reduce dramatically after that first hour. And the reason for that is the very things we've been talking about today, the kind of harm a child can come to when it's wandering alone.

THE COURT: So if we were -- I didn't ask this question of Mr. Anderson very artfully but this was what I was trying to get at. We're here in two competing contexts I think, which is a little bit unusual in motion practice. We're here on summary judgment. And ordinarily on summary judgment we're looking to determine whether there are facts in dispute because I don't resolve facts. Juries resolve facts. And if there are genuine issues of material fact, then we invite the jury to tell us the answers to some of these questions.

In the context of qualified immunity I think ordinarily the burden -- I think I understand that the burden rests with the plaintiff asserting the constitutional claim to establish both the legal existence of the right that's asserted and that it's clearly established. Those are legal questions. And

then I think on summary judgment the analysis will be and then on the facts of the case there is a violation.

On summary judgment I think the legal questions the court can decide, what do we do with those facts? Are we looking to determine whether at some point there are facts from which a reasonable jury could find that the plaintiff could establish that claim? And are those facts facts like what you and I are talking about? He entered the house, or the house was a hundred houses away from the house at issue. Are those factual issues for a jury to determine or are they purely legal?

MS. SLARK: Well, actually the kind of hypotheticals that were presented are sort of more of a policy implication. The facts which go to a jury are when there's a genuine dispute about something. I mean with regard to the entry into the backyard, I guess it would be -- I can't really see a dispute here because there's no dispute that Officer Olsen went in there and what he did when he was back there. And the dispute would be, sort of in the very base term, would be if Officer Olsen said I didn't go back there and Mr. Kendall said he did, that would be a question for the jury to determine is when there's two competing versions of the facts -- of the facts.

THE COURT: The question we're dealing with on qualified immunity I think is whether there's this -- whether

every reasonable -- every objectively reasonable officer under the circumstances would understand that the conduct is unconstitutional, which is a legal question in view of the factual record. Is that how you see it?

MS. SLARK: That's correct.

THE COURT: Okay, thank you.

Mr. Anderson, shall we talk about seizure? Do you agree -- reading your papers I believed that your position is you agree that if an officer has a reasonable apprehension of physical injury, the officer can employ force. For example let me make up a hypothetical because we're doing that today. I think you wouldn't be here today if the facts were Mr. Kendall was holding a leash of a Rottweiler and then saw the officer and yelled, "go get him," and released the leash and the dog charged at the officer barking and frothing at the mouth, and the officer pulled his firearm and shot the dog, we wouldn't be here. The question is whether or not --

MR. ANDERSON: I wouldn't be here.

THE COURT: Whether or not on this record there is evidence of reasonable apprehension of physical injury that would otherwise authorize the officer to engage with this level of force. Is that the question really that we have?

MR. ANDERSON: The question on the seizure is twofold. One is the reasonableness of what Officer Olsen did, and it's an objective standard of reasonableness.

THE COURT: Right.

MR. ANDERSON: And we don't have to take his word for it, especially given all the inconsistencies in his accounts of what happened. They kept changing over time. But, secondly, we know what this breed of dog is like. We know they have a very deep bark that's going to be alarming if you don't know that they're there. We were going to play that for the Court but I don't think I need to do that.

THE COURT: I've seen it. We went and looked. It's part of the record.

MR. ANDERSON: All right. And this dog in particular wasn't unlike other Weimaraners, very friendly. They chase. They chase toys. They chase other dogs. They chase people, especially like Officer Olsen who very unwisely, very unreasonably as soon as he heard the bark started running away. Now, I think any of us know that the best way to draw a dog toward you is that.

But getting away from those questions of reasonable conduct under the circumstances, he's the only one who was there, unfortunately, but if whatever Geist did, whatever this interaction happened, regardless of how reasonable or unreasonable Officer Olsen was, there's only one way he's able to establish that this was a constitutional seizure -- well, there would be two possible ways, one, a warrant, which didn't -- wasn't going to happen. The other is that there

were exigent circumstances. The City says the exigent circumstance was the missing boy, which had no connection to killing Geist.

So the only possibility then is what happened when Officer Olsen went into that backyard and how Geist responded and how Officer Olsen responded, all of which was a direct product of Officer Olsen being there in the first place in violation of the Constitution.

THE COURT: So humor me for purposes of this argument, and just assume, at least initially, that the Court concludes exigent circumstances authorized -- permitted Officer Olsen to search that yard, the places in the yard where the officer couldn't visually see from outside the gate. If that's true, then what question are we confronted with? He's there. And if we just assume for purposes of this argument that he's there lawfully, now an interaction ensues, that's going to have to be evaluated independently then under those circumstances.

MR. ANDERSON: Yes. And that would go to the unreasonableness of his conduct. Utility meter readers don't go around shooting dogs. Postal delivery people don't go around shooting dogs. There was no reason, no reasonable basis, for this happening, even given Officer Olsen's changing testimony. Even if you took the worst of what he testified, there's no reason to pull out a gun without using a less

lethal alternative, like his baton, which he admitted he didn't even think of using, or his boot or some other means, like standing there and talking to the dog. He didn't use that alternative means. And the courts have said it's not reasonable to kill a dog if it's not necessary. Necessity is equivalent to reasonableness under Fourth Amendment analysis.

THE COURT: Right. So you cite us to case law in your papers, and what you argue is that the law was clearly established at the time of this incident that the killing of a companion dog is an unconstitutional seizure if it's unnecessary. And then you cite us to a number of decisions all in different circuits, but that can be -- it can be sufficient in some instances to meet your burden.

You say when less intrusive or less destructive alternatives exist, when the pet presented no danger, and when nonlethal methods of capture would have been successful, when the dog does not pose an immediate danger, and where the use of force is avoidable. The only evidence that's in the record before us is that Officer Olsen's testimony that the dog did present danger, posed an immediate danger, and that the use of force was unavoidable after he tried first to leave the yard and then later tried to get the dog to stop by making himself large and stomping the ground. Both of those having failed, his split second determination was that the use of force was unavoidable. Those are the only facts in the record about the

interaction between the officer and Geist. Do you agree with that?

MR. ANDERSON: No, and the reason is we all know that was not the nature of Geist. That isn't the way he responded. That's not the way Weimaraners --

THE COURT: Can I consider that evidence? I mean I thought about this. This is funny -- not funny ha-ha funny but it's odd. It reminded me of character evidence under the Rules of Evidence. And then I think it's especially complicated here because we know there are animals and breeds that are deemed to be inherently dangerous, for example, and there are dogs who never -- there are cities where Pit Bulls are banned. And there are people who swear Pit Bulls are not dangerous. And there are people who have owned them and had them around children and there have never been problems. And people might say that's an inconsistency.

Here you're making the flip argument. You want the Court to make an inference based on this animal's general nature or the general nature of the breed about what happened in a specific instance, but that's not a permissible inference to draw, is it?

MR. ANDERSON: Your Honor, you know there's testimony about the neighbor and the officers on the other side of the fence, and they say it's a really aggressive, scary dog. Well, when you gain the wisdom of learning, that's

what dogs do behind fences. When I go walk my golden retriever every morning, that happens. We all know there is a barrier frustration. That doesn't signal that the dog is aggressive or mean or dangerous because they bark at something or someone on the other side of the fence.

THE COURT: Doesn't this discussion invite me to step out of my proper role as a judge? I'm not the dog whisperer. I'm not an expert on dogs, nor should I interpose my own judgment or belief about dogs into a legal question. My job I think is to constrain my analysis to the facts in the record submitted by the parties. If I step beyond that role, then am I not assuming an improper function in the judiciary?

MR. ANDERSON: I think it would be, and that's why we're saying there is countervailing evidence here. It's contested, vigorously contested, what Geist did, what his nature was, what these dogs do under the circumstances, and you've got all the inconsistent testimony by Officer Olsen.

THE COURT: At trial how -- let's think for a moment about I mean whether anything that you're urging me to consider would be competent evidence. And the reason I'm focused on this of course is because we're here on a Rule 56 posture. The evidence I consider has to be admissible in some form at trial.

In this case, if it were to proceed to trial, could we invite Mr. Kendall and 20 people, 20 of his closest friends

and relatives who had great experiences with Geist, to take the stand and under oath talk about what a great Christmas they had in 19 -- the dog was two and a half years old -- 2013? How friendly Geist was with kids? I never witnessed him be aggressive? Could we bring in a parade of witnesses talking about Geist's general demeanor? Would that be admissible in the context of this case to prove how Geist interacted with the officer at that moment?

MR. ANDERSON: It would because it certainly brings it into question. I wouldn't bring 20 in, but we have the affidavits or declarations of a woman who lived in the home and saw Geist every day with Sean Kendall and with his brother Shay Kendall who knew Geist ever since he was a little puppy. And then you've got the testimony from the others whose declarations we've presented, Julianne and Heather Beck.

THE COURT: Let's assume that -- well, now I'm interrupting your answer. I'm willing to assume for purposes of our discussion today that Geist was the kindest, friendliest dog, the best companion. What does it tell us in a court of law about what happened in the interaction between Geist and Officer Olsen?

MR. ANDERSON: I think what it tells you is that Officer Olsen overreacted. He used lethal force when nonlethal force would have been adequate, and that makes the seizure, the killing of Geist, unconstitutional.

THE COURT: Is it because Officer Olsen what? When we think in terms of constitutional analysis, he lacked a constitutional understanding about the nature of Weimaraners? Or he misinterpreted Geist's playful demeanor as he was running toward the officer barking and interpreted it as lethal, in a split second -- I mean I don't know -- two second exchange? From a constitutional analysis, when we're -- in this context. This is really the question I'm trying to get at. I'm told when I consider the conduct of officers in the circumstances of a specific moment I can't Monday morning quarterback.

MR. ANDERSON: Right.

THE COURT: I have to consider what an objectively reasonable officer could have believed at that moment with the knowledge that they had, in recognition of these split second decisions. We see it in the taser cases, the use of force with people, animals. It's the same question. What part of this is unconstitutional in view of that deference that I'm required to give to this objective reasonable officer in the circumstances?

MR. ANDERSON: Well, it certainly isn't just buying everything an officer says and saying, oh, it must be reasonable because you say that was your perception. Your Honor, twice -- and he's got -- he's got inconsistent testimony even on this fact. But twice, at least twice in the

record, he said as soon as he heard that bark -- and they're deep, loud barks. That's how they bark, even when they're friendly, standing there, wagging their tail.

THE COURT: I saw that in the video.

MR. ANDERSON: As soon as he heard it he started running. And you've read that Weimaraners are chasing animals. Throw a ball, they chase it. Dog comes by, they run after it. A person they'll run after. It's playful. And so all I'm saying is Your Honor doesn't have to decide that now, but certainly it is an issue of fact that has been hotly controverted in the record, and no one has to just take an officer's word for it because he happens to be the only one who was present at the time.

THE COURT: What if it's a German Shepherd? I think German Shepherds statistically have more bites than any other domestic dog breed in the United States.

MR. ANDERSON: Actually I looked yesterday. It's Pit Bulls, but they're both right up there.

The Court: Pick one. And what if it's not a Weimaraner but the facts are otherwise identical?

MR. ANDERSON: Well, the Branson case out of Colorado goes through all those kinds of factors that you just reviewed, and the final one was that courts will take into account is the breed of dog. And that's something that some courts have considered.

But we don't have any issue with that here because this was a Weimaraner. In Branson they said the breed of the dog is a factor courts have taken into account in determining the reasonableness of a seizure. Now, I've got plenty on Weimaraners, and I know Your Honor doesn't want to hear all that, but --

THE COURT: I'm willing to assume for purposes of our argument that it's the finest breed of domestic animal that exists. For purposes of our argument I don't think it changes the analysis. Is every officer charged with that information? As a matter of constitutional analysis do we assume then -- I'm required to determine what an objectively reasonable officer would do at the time. No such officer would have access to any of the information you've supplied on summary judgment about this animal and how gentle this animal was and how kind this animal was. None of that is known to the officer at the moment, and I think that's this question. There is information about the breed maybe, but is the officer charged with that?

MR. ANDERSON: Well, they would know it if they were properly trained, but that's a whole different issue.

THE COURT: Would they?

MR. ANDERSON: Certainly they would. I've talked to people who have trained and want to help train officers to understand as between breeds. But the uncontroverted record

is -- we're not asking Your Honor to assume anything -- there's not one word in the record that controverts what both Julianne Brooks and Heather Beck have said about this dog in particular and about the breed itself.

THE COURT: But none of that information is known to the officer when they confront each other for the first time in Mr. Kendall's backyard, and isn't that the analysis on qualified immunity? It's the objectively reasonable officer charged with the information reasonably available to that officer at that moment? That officer has never met Geist before.

MR. ANDERSON: And I would submit --

THE COURT: Am I applying the wrong standard?

MR. ANDERSON: Well --

THE COURT: I'm focused --

MR. ANDERSON: Seeing what's going on around this country with a lot of shootings that should never happen, I would submit that an officer needs to know what the situation is in every aspect before that officer uses lethal force unless it's a clear case that he is threatened or she is threatened with substantial physical harm, and we know that's not what happened here.

THE COURT: Am I applying the wrong standard? I'm focused on the law I'm required to consider. Isn't it the information reasonably available to the objective, really,

reasonable officer in the moment? And that is all of the information you've supplied about Geist is unavailable to the officer except for the breed perhaps. My question is the standard. Am I on the right standard or am I wrong?

MR. ANDERSON: I think that's a great question, but I would submit, Your Honor, before anybody pulls a gun -- postal delivery people don't shoot dogs. Utility meter readers don't go around shooting dogs. Police should be held to no different standard. Before they use lethal force to kill somebody's best friend, they need to know what they're doing. They need to know what they're dealing with.

And in this instance it came apparently out of the blue, even though Officer Olsen said he had heard dogs barking around the neighborhood. He didn't check, as he could have, and he knows how to do, to see if there was a dog in there, all of that. You talk about totality of the circumstances. You take the totality of the circumstances in this case, everything he did was unreasonable that led this tragic result.

And if I responded to the Court on that, I'd like to go back to just one thing if I may very briefly.

THE COURT: I still don't know that you answered my question about the standard, but maybe you're not going to.

MR. ANDERSON: No, no.

THE COURT: You're stepping past it. Is that the

correct legal standard?

MR. ANDERSON: It is. And my answer though entails the whole sense of reasonableness, objective reasonableness. We've got to stop deferring to officers pulling out their guns and shooting pets and people. There's nothing -- for them just to say after the fact, oh, I was afraid, well, yeah, he heard the bark so he started running, then he turned around and saw this dog running toward him, he pulled out his gun. He makes it sound like he had all this time to like bear his chest out. And this was, what, a second, second and a half that it would have taken for Geist to cover that ground? And all he did -- he didn't pull out his baton, didn't use his shoe. He didn't use a nonlethal alternative, which must be used if it's reasonable under the circumstances. He pulled out his gun and he killed Geist.

THE COURT: You wanted to touch on another subject.

MR. ANDERSON: Yes. And given more thought and -- about the hypothetical Your Honor raised earlier about the swimming pool next door and the open gate, there are a lot of indicia there that could show there's a nexus, there's a reason for believing that there might be a connection. There's a reasonable basis for believing that there is a nexus between that property and the missing child. First of all, you've got an attractive nuisance, swimming pool. You've got

a gate that's open. And you've got this little child who just recently left and nobody knows where it is. That would probably pass muster. You've probably got a nexus, enough reasonable basis for believing that there may be some connection between that property and the emergency that gave rise to that emergency.

Your Honor, we are dealing with the -- the City would just throw out reasonableness as the second prong in Najar did.

THE COURT: Where it comes straight from the language of the Tenth Circuit I'm required to apply that standard.

MR. ANDERSON: It does. But then they put meat on it. They've told us what that means in an emergency aid case. Thank goodness for Gambino-Zavala because after Najar all we were left with was basically reasonable in scope and manner. But the City itself has even read Najar as saying so you've got to know that there's a connection between the place being searched and the emergency giving rise to it. Even they read Najar that way.

But in Gambino-Zavala they talk about those two prongs of Najar. And this is the more recent case. This is the clearly controlling case. And, Your Honor, they're saying there that if you think -- first of all you have to have reason to believe, reasonably believe that a person inside the home was

in immediate need of aid or protection. So that translates here to was there a reason to believe that this young boy was in this particular yard?

And then, secondly, the Tenth Circuit -- it wasn't enough that you -- that somewhere in the house this was happening, but that you confined your search, not to the region, not to the neighborhood, not even to the same block, you have to -- or even to the house, you have to confine your search to only those places inside the home where an emergency would reasonably be associated. So they're saying it's not just that you believe somebody was in the house, you can only go to those parts of the house that you believe -- where you believe that nexus existed.

And instead of that confinement of the search, the City is asking this Court just expand it as far as this boy may have gone and wherever he may have had access, including inside the homes and inside these curtilages, which in this instance there clearly was an expectation of privacy and it was to be treated the same as inside the home.

And that's totally consistent, Your Honor, with the Zurcher versus Stanford Daily case from the United States Supreme Court. It's been there throughout all of these -- all these differences between the Mitchell case and then the Brigham City case and then finally Najar. But the United States Supreme Court --

THE COURT: I've heard of that court.

MR. ANDERSON: -- stated expressly that the critical element in a reasonable search is that there is reasonable cause to believe that the specific things to be searched for are located on the property to which entry is sought.

So throughout this entire period, the whole evolution of law, whether there's probable cause standard or something less than that, the nexus requirement between the particular property and the emergency has been there throughout, and the Tenth Circuit has given great specific guidance in the Gambino-Zavala case.

THE COURT: How do you see, Mr. Anderson, the difference in the posture in a criminal case and in a civil case? And I'm thinking now about -- I mean these are different issues, different doctrines. You know, in criminal cases we've evolved the suppression doctrine to suppress evidence in a criminal case to provide an incentive so officers don't engage in unconstitutional searches in the interest of obtaining a conviction.

And what courts often are focused there in that context is the incentive for officers to do the unconstitutional search because they're trying to show that the person they believe committed a crime has evidence of that crime. So there's an interest for the officer to engage in improper conduct for what we think is an improper constitutional

motive.

Do we read these cases in a different light where let's assume that the officers are engaged in a wholly worthwhile and praiseworthy objective here as opposed to what we might say is a bad context. So now I'm -- now we consider the Fourth Amendment in the context of trying to do something good, save a life say. Does it make any difference?

MR. ANDERSON: Well, first of all you've got a probable cause standard in the criminal context. You don't have that in the emergency aid context anymore.

THE COURT: Right.

MR. ANDERSON: So that makes a big difference.

THE COURT: But I mean we're concerned about officer conduct in protecting our constitutional rights where they have an incentive to do something bad. Here the incentive is to try to do something good. Does that distinction matter?

MR. ANDERSON: Well, I'm not sure in the criminal case that you could say that they're necessarily trying to do something bad. They're trying to find the bad guy and solve crimes.

Let me pose this, if I may, Your Honor, in terms of the criminal aspect. And this is utterly chilling, and I pointed that out early in this case. If the police in their -- their policy that doesn't attend to the requirements of Najar and Gambino-Zavala, and we've challenged that policy in this case,

if that's what they're going to tell their officers, and in this instance the officer says, oh, I don't need a nexus. I can go through anybody's backyard. I can go through anybody's house, especially if it looks like there's access to the person who is missing, and I've got a blank check to do that. Fourth Amendment, no protection for these property owners anymore because of these circumstances.

Imagine if in this instance Officer Olsen had gone into that backyard, had found the little boy dead, found his abductor there with a bloody cleaver, it would have been absolutely tragic, it would have been unconscionable for the officer to have so cavalierly violated the Fourth Amendment to lead to the exclusion of that evidence.

There need to be clear guidelines, and there are, Your Honor, and it's not just this amorphous reasonableness where in every case people are going to come in before the court and say, well, this was reasonable because look at the countervailing considerations.

The Tenth Circuit in the emergency aid cases has said this is what you've got to show in every instance. This specific property you're going to search, you've got to show the nexus, the connection, the underlying emergency.

And I must also note, Your Honor, that the community caretaking doctrine, which is a close cousin at the very least, a lot of courts have had a tough time determining

what's emergency aid and what's community caretaking, and the Tenth Circuit community caretaking has no application outside the car search area. They've limited it to car searches.

So we're limited here to an analysis under the emergency aid doctrine, and Gambino-Zavala is absolutely dispositive, Your Honor.

THE COURT: Thank you.

MR. ANDERSON: Thank you.

THE COURT: Ms. Slark.

MS. SLARK: Would the Court like me to address any specific questions or --

THE COURT: Give me just a moment to think about that.

(BRIEF PAUSE)

What lawful use do you think the Court should make of the evidence submitted by Mr. Anderson -- it's really submitted by Mr. Kendall -- about the nature of Geist? Is there any application in the qualified immunity context?

MS. SLARK: No. Courts from other circuits have been faced with a similar question and addressed it in the same way as this Court is proposing addressing it.

THE COURT: I think one district court thought it was appropriate to defer issues about the nature of the specific animal to a trial, but that's an outlier, you agree?

MS. SLARK: I agree. There's one court in

California, I could name several others I have before me, but they're also in our briefing. Really the underlying issue is and that the question that the Court is asked to resolve is the objective reasonableness of the officer's actions given what the officer knew. And the issue with regard to testimony of dog behavior specialists, canine handlers, family and friends is that's not evidence that the officer knew.

THE COURT: So suppose on the basis of the record before us I conclude that an objectively reasonable officer under the circumstances could have believed there was an immediate risk of danger. How do we deal with the question in this context of the amount of force that the officer employs in the face of that?

MS. SLARK: Absolutely. And again other courts have been faced with the same question and the same kind of argument. As with regard to our Fourth Amendment analysis and indeed in the cases involving seizures of dogs, all of the same kind of overarching principles also apply.

The Court isn't sitting in a role of Monday morning quarterbacking. It also has to consider in light of the facts faced by the officer, is to look at the amount of time that the officer had to think about it, and also what the officer, you know, knew. It's not imputed that the officer knows the specific characteristics of every type of breed of dog.

And what the officer knew here is what he saw charging at

him, which I believe Plaintiffs have even kind of conceded that these -- this demeanor is the demeanor which is here, but the officer should have interpreted it differently. And that really falls into the realm of -- is an objective reasonable argument for the Court to decide, and you don't look at what the officer should have known but what the officer knew or reasonably should have known.

THE COURT: And I can find it, or maybe I can't remember if I separately tabbed it in the Government's briefing, the level of generality that -- how does -- the City's definition of the right at issue here seemed awfully narrow. What do you think is the right definition of the right at issue?

MS. SLARK: Well, I think the courts have warned against defining the -- the level too broadly. So a right against unconstitutional seizure would certainly be too broad. But I think that one can also define too narrowly. I think the Sixth Circuit decision Court, Hagans, describes kind of the analysis the Court needs to go to. It needs to go to an appropriate level of narrowing so that we're not talking about the, you know, don't violate constitutional rights at the very highest level or no unconstitutional seizures, but there needs to be sufficiently fact bound.

So here I think you're looking at a question of does an officer via -- constitutionally seize a dog when he sees a dog

that's charging at him, snarling, growling -- snarling, growling, barking, ears back and appears to be about to physically attack him?

THE COURT: Doesn't that definition presuppose the result though? I mean when -- those are the facts that you've argued. When you define the right as the facts in the case, you've proven the right before we even begin to ask. It's a more general question, isn't it, about whether an officer confronted with -- well, this is what I'm curious about. Do we say a reasonable apprehension of physical harm? That almost seems to presuppose too. How do we do it here?

MS. SLARK: Well, I mean as the Court's aware there are two questions in a qualified immunity analysis. First question is whether a constitutional right was violated and in the lights most -- in the light -- taken the facts in the light most favorable to Plaintiff. And I think here that question is answered in the negative as in there would be no -- the seizure was reasonable given the facts that the Court can consider under an objectively reasonable analysis.

Going to the second question, is the law clearly established? Well, clearly the law is clearly established that you can't seize a dog that doesn't present a physical threat of harm to an officer, but it is constitutional to seize a dog that does present a physical threat to an officer. So I think those are the two competing interests. And so the

question has to be fairly narrow in that context.

I don't know if the Court has any other specific questions which it would like the City to address?

THE COURT: None come to mind right now. Did you have anything more on the Fifth Amendment, Ms. Slark?

MS. SLARK: On the Fifth Amendment?

THE COURT: Excuse me, I'm so sorry. I mean on the seizure question.

MS. SLARK: Not unless the Court has questions.

THE COURT: Okay, thank you. Let's do this. We may have covered all of the ground, or maybe after during our short recess you'll all think of something more you'd like to add. This is the time to hear anything you'd like to tell us. But let's take about a 10 minute recess and come back and learn whether there's anything more. Thank you.

(RECESS TAKEN)

THE COURT: Your argument has been extremely helpful I think in focusing, helping me understand some of the nuance in the argument in your papers, and you've given me a lot to think about. I don't have any further questions for you, but I'm happy to receive any additional argument either of you might want to make.

MR. ANDERSON: If I may just make one point, and I know we've covered this.

THE COURT: I would have been gravely disappointed,

Mr. Anderson.

MR. ANDERSON: Gravely surprised probably. I just -- there just seems to be perhaps some disconnect, and I'm sorry if somehow we haven't communicated this, but the -- when the courts talk about association or nexus or connection, they're talking about something that distinguishes this place to be searched from any others that demonstrates that there's some reasonable belief that it's connected to the emergency.

So the hypothetical with the house next door, yes, it's right next door, gate is open, attractive nuisance, there's probably a lot there that would justify it. That's a long ways from this case where when the officer came up to the gate, the gate was closed, there was no sign that that boy was there, there was no trike, no clothes, he'd not had a habit of going there, all of the evidence shows that nobody knew whether he'd ever been there. No reason to think that he'd ever been there, and certainly no reason to believe that he was there at the time.

So I guess I'm just trying to reinforce this notion that the courts, since even before Zurcher but throughout all the decisions before and after Brigham City, regardless of probable cause, reasonable cause, that there has to be some distinguishing factor where you can say you reasonably believe that there's some connection, there may be some connection between this place, in this instance Kendall's home and his

curtilage, to the emergency giving rise to the search.

THE COURT: No, I understand well I think now that that's your view. And further to that point though I think another -- I think one of the factors that I'm told to consider in the reasonableness of a search of an area though is the level of intrusion on the individual who possesses the constitutional right. And I think your view is that the search -- this is different, I understand, than the reason to believe I can search a specific area, but you think there's no constitutional difference between a search of an open yard, entering a gate and searching an open yard, as opposed to a porch, as opposed to a kitchen inside a house, as opposed to the bedroom, as opposed to a closet inside the bedroom. It's all the same. If the Constitution provides an extension and coverage to the area, the intrusion is of the similar quality to the property owner. That's your position.

MR. ANDERSON: It's also the United States Supreme Court's position. But I would say though that there may be, if there were a sign that that child might be in the curtilage but no sign that he might be in the house, then there's going to be a different analysis, but that has no bearing on the level of Fourth Amendment protection.

THE COURT: And following Najar, if there's evidence that the child might be in the house but not in the basement, then you're limited to the area on the main floor for example?

MR. ANDERSON: Exactly.

THE COURT: I understand.

MR. ANDERSON: Thank you, Your Honor.

THE COURT: Thank you.

Anything more, Ms. Slark?

MS. SLARK: I don't have anything unless the Court has questions.

THE COURT: I really don't. Thank you very much, counsel, for your briefing and for your argument. We'll take the matter under advisement. We will provide a written ruling. We'll be in recess.

(HEARING CONCLUDED AT 3:43 P.M.)

* * *

Certificate of Reporter

I, Raymond P. Fenlon, Official Court Reporter for the United States District Court, District of Utah, do hereby certify that I reported in my official capacity, the proceedings had upon the hearing in the case of Sean Kendall Vs. Brett Olsen, et al., case No. 2:15-CV-862, in said court, on the 7th day of February, 2017.

I further certify that the foregoing pages constitute the official transcript of said proceedings as taken from my machine shorthand notes.

In witness whereof, I have hereto subscribed my name this 27th day of March, 2017.

/s/ Raymond P. Fenlon