NO. 45792-0-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

BRYENT FINCH and PATRICIA FINCH,
a Marital Community

Appellants,

vs.

THURSTON COUNTY, THURSTON COUNTY SHERIFF'S OFFICE, ROD DITRICH and JANE DOE DITRICH, individually and as husband and wife and the marital community comprised thereof,

Respondents.

BRIEF OF APPELLANTS BRYENT FINCH and PATRICIA FINCH

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I. INTRODUCTION

Appellant Bryent Finch, a police officer for the City of Tumwater, suffered injury when he was bit by a Thurston County Sheriff's Office police canine. On the night of November 14, 2010, Officer Finch was dispatched to investigate a burglary in progress at the abandoned Olympia Brewery located in Tumwater, Washington. Deputy Rod Ditrich and K-9 Rex of the Thurston County Sheriff's Office assisted Officer Finch with the investigation. K-9 Rex tracked the suspect, who was eventually located in a poorly lit room. Upon seeing the suspect, Officer Finch commanded the suspect to show his hands. Moments after giving this command, Officer Finch was bit in the testicle and leg by K-9 Rex causing his injuries.

On June 6, 2012, Bryent Finch, along with his wife Patricia, filed a complaint for damages against Thurston County, the Thurston County Sheriff's Office, Rod Ditrich and "Jane Doe" Ditrich. The Finches brought claims for negligence, intentional infliction of emotional distress, loss of consortium, and strict liability under RCW 16.08.040. RCW 16.08.040 provides that the owner of any dog which shall bite any person shall be strictly liable for their injuries.

On June 7, 2012, the day after the Finches' complaint was filed, an amendment to RCW 16.08.040 went into effect. The

amended statute provides that strict liability "does not apply to the lawful application of a police dog…".

Both parties filed cross-motions for partial summary judgment on the issue of whether Thurston County was strictly liable for the dog bite injuries pursuant to RCW 16.08.040. On November 25, 2013, a hearing was held and the trial court granted Thurston County's motion and denied the Finches' motion. The Finches subsequently filed a motion for voluntary dismissal of their remaining claims. A notice of appeal was filed regarding the trial court's summary judgment ruling.

At issue in this appeal is whether Thurston County is strictly liable under RCW 16.08.040 for the dog bite injuries to Officer Finch. Appellants contend that the amendment to RCW 16.08.040 applies prospectively only. Appellants rely upon a line of Washington appellate decisions that held statutory amendments are presumed to operate prospectively only, absent contrary legislative intent.

Appellants further contend that even if the amendment were applied retrospectively, the dog bite injury to Officer Finch was not the result of the "lawful application of a police dog" under RCW 16.08.040(2). As there are no Washington cases interpreting this issue, Appellants rely on a number of federal cases that have

interpreted RCW 16.08.040. These cases demonstrate that municipalities are strictly liable where an innocent person is mistakenly bitten by a police dog.

II. ASSIGNMENTS OF ERROR

1. The trial court erred in granting Respondents' motion for partial summary judgment and denying Appellants' motion for partial summary judgment.

Issue Presented: Where the amendment to RCW 16.08.040 (a) did not take effect until after the Finches filed their lawsuit and case law requires the amendment to be applied prospectively; and (b) does not shield Thurston County from liability for Officer Finch's injuries because the dog bite was not the result of the lawful application of a police dog, did the trial court err in granting Respondents' motion for partial summary judgment and denying Appellants' motion for partial summary judgment?

III. STATEMENT OF CASE

A. The Injury to Officer Finch

On November 14, 2010, at approximately 7 p.m., Officer Bryent Finch, of the City of Tumwater Police Department, was dispatched to a possible burglary in progress at the abandoned Olympia Brewery located at 100 Custer Way in Tumwater, Washington. CP 281. Officer Hollinger of the Tumwater Police

Department was also dispatched to the scene. CP 281. Several recent break-ins had occurred at the brewery where copper wire was removed from inside the building. CP 287. The abandoned brewery consists of several buildings located on the north and south sides of Custer Way. CP 119.

Officer Finch was the first to arrive on scene and made contact with a security guard employed by the owner of the property. CP 281. The security guard informed Officer Finch that a window had been broken in the large building on the south side of Custer Way, and it was unclear if anyone was still inside. CP 119, 281. Officer Finch then contacted Officer Hollinger by radio and requested permission to have a police K-9 unit brought to the scene. CP 281.

In response, Deputy Rod Ditrich of the Thurston County Sheriff's Office was subsequently dispatched to the brewery along with his police K-9 named Rex. CP 287. Pursuant to an interlocal cooperation agreement, the Tumwater Police Department and Thurston County Sheriff's Office are authorized to provide mutual aid and assistance in law enforcement operations. CP 162-69.

The officers formulated a plan whereby Officer Finch, Deputy Ditrich, and K-9 Rex would search the building while Officer Hollinger and the brewery security guard would hold a perimeter around the

exterior of the building in case someone attempted to flee the scene while the search was in progress. CP 287.

Officer Finch and Deputy Ditrich gained access into the building using a key provided by the security guard. CP 281. Upon entering the building, Deputy Ditrich gave three very loud announcements stating, "This is the Sherrif's Office, this building is going to be searched by a Police K9, announce your presence, give up or you will be bit!" CP 287. After waiting and receiving no response, the officers proceeded with searching the building. CP 287.

At the time of the search, it was dark outside and there was no electricity or lighting in the building. CP 120. The interior of the building was pitch black with zero visibility. CP 120. There were large holes in the floor where beer vats had been removed creating dangerous pitfalls of six to seven feet. CP 121. Officer Finch and Deputy Ditrich used their flashlights during the search. CP 120. Officer Finch used his flashlight intermittently to avoid "backlighting" Deputy Ditrich and giving away the Ditrich's position to a potential suspect. CP 120.

During the search K-9 Rex was not on a leash and was running in and out of rooms and between the two officers. CP 281.

Officer Finch was uncomfortable about the fact that K-9 Rex was not on a leash as he had conducted several building searches with police K-9 units before and this was the first time he could remember a police dog being off leash. CP 281. A K-9 handler is responsible for keeping his or her police canine under control at all times. WAC 139-05.915(5).

K-9 Rex eventually detected the suspect's scent and proceeded to a room at the front entryway of the building. CP 287. K-9 Rex entered the room first, followed by Deputy Ditrich, with Officer Finch entering the room last. CP 122. Consistent with his training, Officer Finch entered the room and immediately moved to his left, away from Deputy Ditrich. CP 122. The purpose of separating is to prevent a potential suspect from keying in on a single location. CP 122. Due to the darkness, Officer Finch could not see K-9 Rex. CP 122.

Shortly after entering the room, Officer Finch heard Deputy Ditrich say "here, here, here." CP 122. Officer Finch interpreted this statement to be an indication that Deputy Ditrich had located the suspect and was signaling the suspect's location to Officer Finch. CP 123. In actuality, Deputy Ditrich was commanding K-9 Rex to return to Ditrich's location. CP 287. Upon hearing the command,

Officer Finch looked to his right and spotted the suspect trying to hide in a small cubby hole approximately fifty feet away in the northeast corner of the room. CP 282. Officer Finch commanded the suspect, "Hands, show me your hands!" CP 282. While giving this command, Officer Finch was standing approximately seven to ten feet to the left of Deputy Ditrich. CP 123, 282.

Within seconds of telling the suspect to show his hands, Officer Finch was bit in the right testicle and right inner thigh by K-9 Rex. CP 282. Officer Finch dropped his gun and immediately began screaming as K-9 Rex continued to bite him. CP 282, 287. He yelled several times for Deputy Ditrich to remove the dog. CP 282, 287. Deputy Ditrich first ordered the suspect not to move, and then had to physically pull K-9 Rex off of Officer Finch to get the dog to release his bite. CP 282. Once Deputy Ditrich had gained control of K-9 Rex he proceeded to place the suspect in handcuffs and escort him out of the building. CP 287.

Officer Finch was able to walk out to his patrol car and drive himself to the Providence St. Peter Hospital emergency room in Olympia. CP 283. The urologist examined his injuries and advised Officer Finch that he would need to be treated at Harborview Medical Center in Seattle. CP 283.

Officer Finch was transported to Harborview by ambulance where the urologist there determined that scrotal surgery would be required. CP 283. The dog bite had caused the right testicle to rupture and the urologist removed approximately one quarter of the testicle. CP 283. Following the surgery, Officer Finch was discharged from Harborview five days later on November 16, 2010. CP 284.

B. History of Relevant Statutes

In 1941, the Legislature enacted a statute providing that the owner of a dog that bites another person will be strictly liable for injuries suffered. Laws of 1941, Ch. 77, § 1; *Hansen v. Sipe*, 34 Wn. App. 888, 890, 664 P.2d 1295 (1983) ("RCW 16.08.040 creates strict liability in a dog owner where the dog bite victim is 'lawfully in or on a private place including the property of the owner of such dog ...'"). This statute was codified as RCW 16.08.040 and reads as follows:

> The owner of any dog which shall bite any person while such person is in or on a public place or lawfully in or on a private place including the property of the owner of such dog, shall be liable for such damages as may be suffered by the person bitten, regardless of the former viciousness of such dog or the owner's knowledge of such viciousness.

RCW 16.08.040(1). At the time this statute was enacted, the state and municipalities were protected by the doctrine of sovereign

immunity under Article 2, § 26 of the Washington State Constitution: "[t]he legislature shall direct by law, in what manner, and in what courts, suits may be brought against the state."

However, the Legislature waived sovereign immunity for the State in 1961. When the State waived immunity and assumed liability, the immunity of its civil division, the county, vanished also. *Kelso v. City of Tacoma*, 63 Wn.2d 913, 918, 390 P.2d 2 (1964). Although effective in 1961, the abrogation of sovereign immunity for municipalities was not codified until 1967. RCW 4.96.010. RCW 4.96.010(1) provides, in part, as follows:

> All local governmental entities, whether acting in a governmental or proprietary capacity, shall be liable for damages arising out of their tortious conduct, or the tortious conduct of their past or present officers, employees, or volunteers while performing or in good faith purporting to perform their official duties, to the same extent as if they were a private person or corporation.

In 2012, RCW 16.08.040 was amended to add the following subsection: "This section does not apply to the lawful application of a police dog, as defined in RCW 4.24.410." RCW 16.08.040(2); Laws of 2012, Ch. 94, § 1. The 2012 amendment was passed as part of Substitute House Bill 2191 ("SHB 2191"), which also amended RCW 9A.76.200, a law that criminalizes the act of causing harm to a

police dog, accelerant detection dog, or police horse. CP 298-99. The amendment to RCW 9A.76.200 authorized civil penalties, in addition to criminal penalties, for harming or killing a police dog. Laws of 2012, Ch. 94, § 2.

SHB 2191 was originally sponsored by multiple members of the Legislature including Representative Ann Rivers, who was the prime sponsor of the bill and has since become a member of the Washington State Senate. CP 178, 295, 316-17. On January 18, 2012, and January 27, 2012, hearings regarding SHB 2191 were held before the House Public Safety and Emergency Preparedness Committee. CP 171-93. Two additional hearings regarding SHB 2191 were held before the Senate Judiciary Committee on February 21, 2012, and February 23, 2012. CP 194-209.

The majority of the discussion at these hearings addressed the proposed amendment to RCW 9A.76.200. *See* CP 171-209. Representative Rivers testified at the hearing on January 18, 2012, and again at the hearing on February 21, 2012. *Id.* She provided the following testimony at the hearing on February 21, 2012:

> This bill arises from the fact that in Clark County we've lost two police dogs and we're gravely concerned about that. Also concerned in – the cottage industry that's popping up where criminals can sit in jail and – write frivolous lawsuits against municipalities for –

> because dogs, police dogs, are labeled vicious animals for doing the job that we ask them to do.

CP 197.

SHB 2191 received unanimous approval from the House and the Senate and the bill was signed by the Governor on March 29, 2012. CP 297-99. The effective date of the amendment to RCW 16.08.040 was June 7, 2012. CP 297.

C. Trial Court Action

On June 6, 2012, the day before the amendment went into effect, Appellants filed their Complaint for Damages seeking relief under RCW 16.08.040, as well as alleging other causes of action not at issue in this appeal. CP 334-339. On October 11, 2013, Appellants filed a Motion for Partial Summary Judgment on the sole issue of whether Thurston County was strictly liable for Officer Finch's injuries under RCW 16.08.040. CP 316-26. On October 28, 2013, Respondents filed a cross Motion for Partial Summary Judgment on the same issue and a hearing was held on November 25, 2013. CP 10-13, 257-77.

At the commencement of the hearing, Judge Sheldon indicated her concern with citations by both parties in their briefing to unpublished cases from the Federal District Court:

> I was also concerned about quite a few unpublished cases that were cited, and I think by each side. And so, I'm – I haven't read any of those. I don't believe that they're appropriate for the Court to consider. If you have some alternative authority, I certainly would listen to that.

RP 3 at 4-9. Appellants reiterated the following footnote from their briefing explaining the applicable rules that permit citation to unpublished federal cases:

> General Rule 14.1(b) provides that "A party may cite as an authority an opinion designated 'unpublished,' 'not for publication,' 'non-precedential,' 'not precedent,' or the like that has been issued by any court from a jurisdiction other than Washington state, only if citation to that opinion is permitted under the law of the jurisdiction of the issuing court. The party citing the opinion shall file and serve a copy of the opinion with the brief or other paper in which the opinion is cited." Ninth Circuit Rule 36-3(b) provides that "Unpublished dispositions and orders of this Court issued on or after January 1, 2007 may be cited to the courts of this circuit in accordance with FRAP 32.1." "Ninth Circuit Rule 36-3 does not prohibit citation to or reliance on unpublished District Court decisions, which are, like published District Court opinions, only persuasive authority." *C.B. v. Sonora Sch. Dist.*, 691 F.Supp.2d 1123, 1138 (E.D. Cal. 2009). I also consulted with Jeanne Marie Clavere from the WSBA Ethics Line and she informed me that, so long as I was acting within the court rules, the Rules of Professional Conduct do not prohibit citation to unpublished opinions.

CP 323; RP 3 at 10-20. Despite the fact that neither GR 14.1 nor Ninth Circuit Rule 36-3 state that unpublished opinions are not to be

considered as persuasive authority, Respondents informed the trial court as follows:

> The rule that [Appellants'] Counsel claims allows for this also states that the – if they are cited, they are not persuasive authority. And so you can cite them, but it also instructs you that they're not persuasive authority, so I don't know how you consider them or what you consider them for.

RP 3 at 22-25, RP 4 at 1. Ninth Circuit Rule 36-3(a) states that "[u]npublished dispositions and orders of this Court are not precedent...". Nowhere does the rule state that unpublished decisions cannot be considered as persuasive authority.

Ultimately, the Court made the following decision regarding the unpublished cases:

> Well, as I indicated, the Court didn't review those [unpublished cases]. I was not aware of the court rule that you've cited, 14.1, which would allow that to be done from another jurisdiction. I don't find that any type of unpublished authority is persuasive, so I'm not going to go back and read them.

RP 4 at 8-13.

The parties then proceeded to present their arguments which centered on two issues: (1) whether the 2012 amendment to RCW 16.08.040 applies retrospectively or prospectively only; and (2) whether the dog bite injury to Officer Finch was the result of the "lawful application of a police dog" pursuant to RCW 16.08.040(2).

RP 4-14. At the end of argument, Judge Sheldon granted Respondents' motion and denied Appellants' motion and provided the following reasoning:

> The Court did have the opportunity to read all the materials that were provided, with the exception of what I said earlier about the unpublished cases, and now has listened to argument, counter-motions on today
>
> The Court will grant the defendants' motion for partial summary judgment, will deny the plaintiffs' motion for partial summary judgment. The Court – and I don't need to make findings because it's a summary judgment, but just to explain my ruling. When the underlying statute, 16 – that is now codified as 16.08.040 was adopted in 1941, at that time state and municipalities had sovereign immunity. And it was not until 1961 that the State waived that and 1967 that it became applicable to municipalities.
>
> The amendment that became before the legislature and was adopted in 19 – or, strike that – 2010, the Court will find, was curative and will be applied retroactively. With regard to the argument on the lawful application of a police dog, the Court does find that where a police dog is being used in a situation such as this where the police dog is being used to aid an officer in searching an area, that's one thing, as opposed to having a police dog who normally goes home at night with their handler, getting out of the back yard and biting the neighbor. That in no way was the dog working at that point.

RP 14-15.

IV. ARGUMENT

A. Standard of Review

The sole issue in this case is whether the trial court's summary judgment decision was proper. The appellate court reviews a trial court's summary judgment decision de novo, performing the same inquiry as the trial court. *Shoulberg v. Pub. Util. Dist. No. 1 of Jefferson Cnty.*, 169 Wn. App. 173, 177, 280 P.3d 491 (2012) review denied, 175 Wn.2d 1024, 291 P.3d 253 (2012).

B. The amendment to RCW 16.08.040 applies prospectively only.

The question of whether a statute operates retrospectively or prospectively is one of legislative intent. *Pape v. Dep't of Labor & Indus.*, 43 Wn.2d 736, 741, 264 P.2d 241 (1953). In determining such intent, the courts have evolved a strict rule of construction against a retrospective operation, and indulge in the presumption that the legislature intended statutes or amendments thereto to operate prospectively only. *Id.* In other words, absent contrary legislative intent, statutes are presumed to operate prospectively only. *Washington Waste Sys., Inc. v. Clark Cy.*, 115 Wn.2d 74, 78, 794 P.2d 508 (1990). A statutory amendment is like any other statute and is presumed to apply prospectively only. *Olesen v.*

State, 78 Wn. App. 910, 913, 899 P.2d 837 (1995). In construing revised statutes, courts must observe great caution to avoid giving an effect that was not contemplated by the Legislature. *Amburn v. Daily*, 81 Wn.2d 241, 245, 501 P.2d 178 (1972).

An amendment may only be retroactively applied under one of three circumstances: (1) if the Legislature intended retroactive application; (2) if the amendment is clearly curative; or (3) if the amendment is remedial. *Id.*

1. The Legislature did not intend for the amendment to RCW 16.08.040 to be applied retrospectively.

In determining legislative intent, courts may look to the express language of the statute, the purpose of the statute, and any legislative statement of strong public policy that would be served by retroactive application. *Ferndale v. Friberg*, 107 Wn.2d 602, 605, 732 P.2d 143 (1987); *In re Marriage of MacDonald*, 104 Wn.2d 745, 748, 709 P.2d 1196 (1985).

The express language of RCW 16.08.040(2) does not indicate that the amendment is to be applied retroactively. On the contrary, "[s]tatutory language couched in the present and future tenses manifests a legislative intent that the statute should apply prospectively only." *Anderson v. Pierce County*, 86 Wn. App. 290,

310, 936 P.2d 432 (1997). For example, the *Adcox* court determined that the statute at issue in that case was drafted only in the present and future tenses. *Adcox v. Children's Orthopedic Hosp. & Med. Ctr.*, 123 Wn.2d 15, 30, 864 P.2d 931 (1993). The statute at issue in that case read in the present tense as follows:

> Information and documents, including complaints and incident reports, created, collected, and maintained about health care providers arising out of the matters that are under review or have been evaluated by a review committee conducting quality assurance reviews are not subject to discovery or introduction into evidence in any civil action....

Former RCW 70.41.200(3); *Adcox*, 123 Wn.2d at 30. Likewise, RCW 16.08.040(2) is written in the present tense: "This section does not apply to the lawful application of a police dog, as defined in RCW 4.24.410."

Furthermore, the Senate Bill Report makes clear that Officer Finch's lawsuit does not come within the purview of the statute's purpose. In the Section of the Senate Bill Report titled "Staff Summary of Public Testimony" it states "[w]e should be concerned about frivolous lawsuits brought against police dog owners by convicts." CP 294. This testimony was given by then Representative Ann Rivers, who was the prime sponsor of the bill. CP 197. Officer Finch is obviously not a convict bringing a frivolous

lawsuit. Furthermore, nowhere in the House Bill Report, the Senate Bill Report, nor the Final Bill Report does the Legislature indicate that the statute is to be applied retroactively. *See* CP 290-99.

Finally, the prime sponsor of the amendment to the strict liability statute, State Senator Ann Rivers, has provided a declaration stating that "[t]o the best of [her] knowledge, the Legislature intended the amendment of RCW 16.08.040 to operate prospectively." CP 316-17. This evidence is particularly persuasive given that the Court's ultimate inquiry is to determine legislative intent. *State v. J.P.,* 149 Wn.2d 444, 450, 69 P.3d 318 (2003) ("Our primary duty in interpreting any statute is to discern and implement the intent of the legislature."). Although "one cannot rely on affidavits or comments of individual legislators to establish legislative intent[,]"*Johnson v. Continental West, Inc.*, 99 Wn.2d 555, 560-61, 663 P.2d 482 (1983), the court has looked to the statements of individual legislators as instructive in this regard. *See e.g., Johnson, 99 Wn.2d at 560-62*; *Marine Power & Equip. Co. v. Washington State Human Rights Comm'n Hearing Tribunal*, 39 Wn. App. 609, 619-20, 694 P.2d 697 (1985); *Howell v. Spokane & Inland Empire Blood Bank*, 114 Wn.2d 42, 50-51, 785 P.2d 815 (1990). Here, one of the prime sponsors of the bill has told us exactly what

the Legislature intended: for the bill to operate prospectively. Dec. of Ann Rivers. And when the intent of the Legislature is clear, "[i]t is neither the function nor the prerogative of courts to modify legislative enactments." *Anderson v. City of Seattle*, 78 Wn.2d 201, 202, 471 P.2d 87 (1970).

Respondents have also argued that a statement made by Christopher Hurst, the Chair of the House Committee on Public Safety and Emergency Preparedness, supports the conclusion that the Legislature intended retroactive application:

> I don't have a lot of problem with addressing that issue because I think that's simply something that's common sense and we don't want to spend a lot of local government's money of litigating something that probably was an oversight as – as that had – as that had occurred. ...

CP 181, 269-70. In analyzing a similar statement by a legislator, the Court refused to apply an amendment retroactively:

> This statement does not support the milk producers' position for two reasons. First, the comments of a single legislator are generally considered inadequate to establish legislative intent. *See Yakima v. International Ass'n of Fire Fighters, Local 469*, 117 Wn.2d 655, 677, 818 P.2d 1076 (1991); *Convention Ctr. Coalition v. Seattle*, 107 Wn.2d 370, 375, 730 P.2d 636 (1986). Second, the statement does not directly indicate any intent as to retroactivity. It indicates that the Legislature is correcting what was previously missing, but it does not state that the Legislature specifically intended retroactivity.

In re F.D. Processing, Inc., 119 Wn.2d 452, 461, 832 P.2d 1303, 1308 (1992). By contrast, the declaration submitted by the bill's prime sponsor, Ann Rivers, specifically addresses retroactivity. CP 317 ("To the best of my knowledge, the Legislature intended the amendment of RCW 16.08.040 to operate prospectively."). Even if the statements of Chairman Hurst are interpreted to favor retroactivity, we are left with contradicting views from two legislators. In such a case, the presumption remains that amendments operate prospectively only. *In re F.D. Processing, Inc.*, 119 Wn.2d at 460.

2. *The amendment to RCW 16.08.040 is not "clearly curative."*

An amendment is curative only if it clarifies or technically corrects an ambiguous statute. *State v. Jones*, 110 Wn.2d 74, 82, 750 P.2d 620 (1988); *see Washington Waste Sys., Inc. v. Clark Cy.*, 115 Wn.2d 74, 78, 794 P.2d 508 (1990); *Overton v. Economic Assistance Auth.*, 96 Wn.2d 552, 557, 637 P.2d 652 (1981). Under Washington law, a new legislative enactment is presumed to be an amendment rather than a clarification of existing law. *Johnson v. Morris*, 87 Wn.2d 922, 926, 557 P.2d 1299 (1976). Curative amendments will be given retroactive effect if they do not contravene any judicial construction of the statute. *Jones*, 110

Wn.2d at 82; *Washington Waste Sys.*, 115 Wn.2d at 78. The amendment must be "clearly curative" for it to be retroactively applied. *Howell*, 114 Wn.2d at 47.

RCW 16.08.040 was unambiguous prior to the 2012 amendment. Prior to its amendment, the statute read in its entirety as follows:

> The owner of any dog which shall bite any person while such person is in or on a public place or lawfully in or on a private place including the property of the owner of such dog, shall be liable for such damages as may be suffered by the person bitten, regardless of the former viciousness of such dog or the owner's knowledge of such viciousness.

Former RCW 16.08.040. The plain language of the statute provided no exception for police dogs. By its own terms, this statute clearly imposed liability upon the "owner of *any* dog which shall bite *any* person". RCW 16.08.040 (emphasis added).

The trial court ruled that the amendment to RCW 16.08.040 was clearly curative and therefore applied retroactively. RP 14 at 15-22. The trial court reasoned that RCW 16.08.040 was ambiguous prior to the amendment because the doctrine of sovereign immunity protected municipalities from police dog bite liability at the time the strict liability statute was enacted in 1941. *Id.* This argument could have merit if not for the fact that sovereign

immunity was abolished for municipalities in 1961, over fifty years before the dog bite statute was amended. RCW 4.96.010; *Kelso v. City of Tacoma*, 63 Wn.2d 913, 918, 390 P.2d 2 (1964). And if the legislature is presumed to be aware of long-standing judicial doctrine, *M.W. v. Dept. of Social and Health Services*, 149 Wn.2d 589, 596-97, 70 P.3d 954 (2003), then it must certainly be aware of its own statutory law abolishing sovereign immunity for municipalities in 1967. RCW 4.96.010.

In interpreting RCW 4.92.090, which abolished sovereign immunity for the state, the Court held that "[t]his provision operates to make the State presumptively liable in all instances in which the Legislature has *not* indicated otherwise." *Savage v. State*, 127 Wn.2d 434, 445, 899 P.2d 1270 (1995) (italics in original). Thus, the abrogation of sovereign immunity applies in all cases arising out of tortious conduct by the government, so long as the Legislature has not specifically indicated otherwise.

In 2012, the legislature amended RCW 16.08.040, and specifically indicated that strict liability no longer applied to the lawful application of a police dog. Prior to this amendment, municipalities were thus "presumptively liable" for violations of this statute. *Id.* at 445. The fact that the Legislature saw fit to amend the statute is

clear evidence that municipalities were in fact subject to strict liability for fifty plus years prior to the amendment. This conclusion is supported by the federal cases where municipalities were held liable under the statute. *See e.g., Rogers v. City of Kennewick*, CV-04-5028-EFS, 2007 WL 2055038 (E.D. Wash. July 13, 2007) aff'd, 304 Fed.Appx. 599 (9th Cir. 2008); *Peterson v. City of Fed. Way*, C06-0036 RSM, 2007 WL 2110336 (W.D. Wash. July 18, 2007).[1]

Furthermore, in 1982, the Legislature enacted RCW 4.24.410 which provided immunity for law enforcement dog handlers from civil damages. Laws of 1982, Ch. 22 § 1. The statute now reads, in relevant part, that "[a]ny dog handler who uses a police dog in the line of duty in good faith is immune from civil action for damages arising out of such use of the police dog or accelerant detection dog." RCW 4.24.410(2). The passage of this statute in 1982 demonstrates that the Legislature was aware that the potential for K-9 dog bite liability existed. Despite this fact, the Legislature chose only to provide limited immunity for the K-9 handler, and made no such provision for the K-9 owner until 2012, thirty years later. Had it been the Legislature's intent to exempt municipalities from dog

[1] Pursuant to General Rule 14.1, a copy of all unpublished federal decisions cited are included in the appendix to this brief.

bite liability prior to 2012, it would have done so.

3. The amendment to RCW 16.08.040 is not remedial.

A statute will be deemed to apply retroactively if it is remedial in nature and retroactive application would further its remedial purpose. *Macumber v. Shafer*, 96 Wn.2d 568, 570, 637 P.2d 645 (1981). "[A] remedy is a procedure prescribed by law to enforce a right." *State v. McClendon*, 131 Wn.2d 853, 861, 935 P.2d 1334 (1997). An amendment is not "remedial" simply because the affected statute concerns a remedy. *Olesen*, 78 Wn. App. at 913 (rejecting argument that because statutory scheme as a whole is remedial, all amendments to the statute are also remedial and retroactive); *State v. Humphrey*, 139 Wn.2d 53, 983 P.2d 1118 (1999) (amendment to RCW 7.68.035(1)(a) that raised the amount of the victim penalty assessment from $100 to $500 not remedial and applied prospectively only); *Johnston v. Beneficial Management Corp. Of Am.*, 85 Wn.2d 637, 642, 538 P.2d 510 (1975) ("[A] statute which creates a new liability or imposes a penalty will not be construed to apply retroactively."). Remedial amendments generally, "afford a remedy, or better or forward remedies already existing for the enforcement of rights and the redress of injuries." *Haddenham v. State*, 87 Wn.2d 145, 148, 550

P.2d 9 (1976).

RCW 16.08.040(2) affords no new remedy for dog bite victims, nor does it "better or forward remedies already existing." *Id.* On the contrary, the amendment eliminates a remedy where one previously existed. Therefore, the amendment is not "remedial" as defined by case law, and the court's decision in *Howell*, 114 Wn.2d 42, perfectly illustrates this point. In that case, the plaintiff contracted human immunodeficiency virus ("HIV") following a blood transfusion on October 4, 1984. *Id.* at 44-45. In 1985, the Legislature amended the blood shield statute, RCW 70.54.120, to bar civil liability claims where HIV was contracted as the result of a blood transfusion. *Id.* at 46-47. Prior to this amendment, civil liability claims were only barred where hepatitis or malaria were contracted. *See* Laws of 1971, ch. 56, § 1. Plaintiff did not learn of his illness until October 1986, after the statute was amended. *Howell,* 142 Wn.2d at 45. Despite the fact that the amendment eliminated a cause of action where one previously existed, as is the case here, the court held that the 1985 amendment was neither remedial nor curative in nature, and was to be applied prospectively. *Id.* at 47.

Furthermore, even if a statutory amendment is determined to be remedial, it may only be applied retroactively where legislative

intent would not be contravened. *Marine Power & Equip. Co. v. Washington State Human Rights Comm'n Hearing Tribunal*, 39 Wn. App. 609, 614, 694 P.2d 697 (1985). As discussed above, the Legislature intended for this statute to be applied prospectively.

C. The injury to Officer Finch was not caused by the lawful application of a police dog as contemplated under RCW 16.08.040(2).

Even if the amendment to RCW 16.08.040 were to be applied retrospectively, the dog bite injury to Officer Finch did not result from the "lawful application of a police dog". RCW 16.08.040(2). There are no published Washington appellate cases discussing the liability of the State or municipalities under RCW 16.08.040. However, a number of federal cases have addressed this topic. *See e.g.*, *Miller v. Clark County*, 340 F.3d 959 (9th Cir. 2003); *Rogers v. City of Kennewick*, CV-04-5028-EFS, 2007 WL 2055038 (E.D. Wash. July 13, 2007) aff'd, 304 Fed.Appx. 599 (9th Cir. 2008); *Peterson v. City of Fed. Way*, C06-0036 RSM, 2007 WL 2110336 (W.D. Wash. July 18, 2007); *Terrian v. Pierce County*, No. C08-5123 BHS, 2008 WL 2019815 (W.D. Wash. May 9, 2008); *Beecher v. City of Tacoma*, No. C10-5776 BHS, 2012 WL 1884672 (W.D. Wash. May 23, 2012); *Saldana v. City of Lakewood*, No. 11-CV-06066 RBL, 2012 WL

2568182 (W.D. Wash. July 2, 2012); *Conely v. City of Lakewood*, No. 3:11-CV-6064, 2012 WL 6148866 (W.D. Wash. Dec. 11, 2012).

1. Definition of "lawful application of a police dog" under RCW 16.08.040(2).

Prior to the amendment of RCW 16.08.040, the Ninth Circuit held that a municipality would be strictly liability for a police dog bite so long as the police officer's use of the dog was reasonable under the Fourth Amendment:

> We also affirm the district court's judgment for the defendants on Miller's state-law strict liability claim under Rev.Code Wash. § 16.08.040, which makes a dog owner strictly liable for damages caused by a dog bite, because we conclude that the Washington Supreme Court would hold that a police officer is not liable under Rev.Code Wash. § 16.08.040 for a police dog's bite if the officer's ordering the dog to bite was reasonable under the United States Constitution's Fourth Amendment. Here, Deputy Bylsma's ordering the police dog to bite and hold Miller did not constitute unreasonable force under the Fourth Amendment, so it also is not actionable under Rev.Code Wash. § 16.08.040.

Miller, 340 F.3d at 968, fn. 14 (citations omitted).

Following the amendment of RCW 16.08.040, the term "lawful application of a police dog" continued to be analyzed in federal court based upon the reasonableness of the police officer's use of the police dog under the Fourth Amendment:

> Washington federal district courts have ruled on the liability of municipalities, as owners of police dogs, under RCW § 16.08.040. If the officer's use of the dog is lawful, then the city is not liable. *Saldana*, 2012 WL 2568182, at *4. The Ninth Circuit in *Miller v. Clark County* has held that a police officer's use of a police dog is lawful if the officer's ordering the dog to bite was reasonable under the Fourth Amendment. 340 F.3d 959, 968 n. 14 (9th Cir.2003).
>
> Further, RCW § 16.08.060 states that "[p]roof of provocation of the attack by the injured person shall be a complete defense to an action for damages." Here, Plaintiff, by fleeing and locking himself inside a room, provoked the use of Astor to find where Plaintiff was located. The facts, however, do not show that Plaintiff provoked the actual bite, given Plaintiff's testimony. There is no indication of provocation in these facts that would warrant a defense.
>
> Therefore, the City's liability under RCW § 16.08.040 hinges on whether [Officer] Syler's actions were reasonable under the Fourth Amendment. Accordingly, the Court should deny summary judgment as to the strict liability claim under RCW § 16.08.040 against the City.

Conely v. City of Lakewood, No. 3:11-CV-6064, 2012 WL 6148866 (W.D. Wash. Dec. 11, 2012).

Analysis under the Fourth Amendment is applicable in cases where excessive use of force by a police officer is asserted by an arrestee. *White v. Pierce County*, 797 F.2d 812, 816 (9th Cir. 1986) ("The use of excessive force by police officers *in an arrest* violates the *arrestee's* Fourth Amendment right to be free from an

unreasonable seizure.") (emphasis added). The reasonableness of force is analyzed in light of such factors as the requirements for the officer's safety, the motivation for the arrest, and the extent of the injury inflicted. *Id.* The Court has stated that this is the test to be applied to "any arrest situation where force is used" including the use of a police dog to effectuate the arrest. *Mendoza v. Block*, 27 F.3d 1357, 1362 (9th Cir. 1994) ("We do not believe that a more particularized expression of the law is necessary for law enforcement officials using police dogs to understand that under some circumstances the use of such a 'weapon' might become unlawful.").

The bottom line is that the Fourth Amendment and Art. I, Sec. 7 of the Washington State Constitution are only implicated when a search or seizure has occurred. U.S. Const. Amend. IV ("The right of the people to be secure in their persons...*against unreasonable searches and seizures*, shall not be violated...") (emphasis added). The Washington constitutional equivalent to the Fourth Amendment confers upon a defendant a higher degree of protection than is provided by the federal constitution by clearly recognizing an individual's right to privacy with no express limitations. *State v. Cheatam*, 150 Wn.2d 626, 642, 81 P.3d 830 (2003). Here, Officer

Finch was not the arrestee and K-9 Rex was not being used to arrest Officer Finch. It is obvious that Officer Finch was not seized, but rather, was an innocent person who was mistakenly bitten.

2. Where an innocent person is mistakenly bitten by a police dog, municipalities are strictly liable.

Officer Finch was an innocent person who was mistakenly bitten. The federal courts have consistently held municipalities liable when an innocent person is mistakenly bit by a police dog. *Rogers v. City of Kennewick*, CV-04-5028-EFS, 2007 WL 2055038 (E.D. Wash. July 13, 2007) aff'd, 304 Fed.Appx. 599 (9th Cir. 2008) (directed verdict against City of Kennewick where police canine bit an innocent person who was lawfully on private property); *Peterson v. City of Fed. Way*, C06-0036 RSM, 2007 WL 2110336 (W.D. Wash. July 18, 2007) (City of Federal Way strictly liable for police canine mistakenly biting pregnant woman while searching for suspect). Although these cases were decided subsequent to *Miller v. Clark County*, 340 F.3d 959 (9th Cir. 2003), the courts did not even consider whether the use of force was reasonable under the Fourth Amendment, because no seizure occurred:

> Defendants first argue that plaintiff's unreasonable seizure claim must fail because no seizure under the Fourth Amendment actually occurred in this case. The Court agrees. In *Brower v. County of Inyo*, 489

U.S. 593, 109 S.Ct. 1378, 103 L.Ed.2d 628 (1989), the United States Supreme Court explained that:

> violation of the Fourth Amendment requires an intentional acquisition of physical control. A seizure occurs even when an unintended person or thing is the object of the detention or taking, but the detention or taking itself must be willful. This is implicit in the word "seizure," which can hardly be applied to an unknowing act.

Brower, 489 U.S. at 596 (citations omitted) (emphasis added). The court continued:

> It is clear, in other words, that a Fourth Amendment seizure does not occur whenever there is a governmentally caused termination of an individual's freedom of movement (the innocent passerby), nor even whenever there is a governmentally caused and governmentally desired termination of an individual's freedom of movement (the fleeing felon), but only when there is a governmental termination of freedom of movement through means intentionally applied.

Id. at 596-97 (emphasis in original).

In the instant case, there is no question that Officer Clary did not intend to detain plaintiff or otherwise terminate her freedom of movement. He did not command or in any way direct Dex to engage plaintiff. Upon seeing that Dex had seized plaintiff, and recognizing that plaintiff was not the suspect, Officer Clary commanded Dex to release her. Further, Dex is not a government actor and could not possess the necessary intent. *Andrade v. City of Burlingame*, 847

> F.Supp. 760, 764 (N.D.Cal.1994) (explaining that the relevant question is whether the officer intended to apprehend the plaintiff by using the dog, and finding no seizure when such intent was not present). Therefore, because Officer Clary did not intend to seize plaintiff through the use of his police dog, there can be no Fourth Amendment violation, and summary judgment in favor of Officer Clary is appropriate.

Peterson v. City of Fed. Way, C06-0036 RSM, 2007 WL 2110336 (W.D. Wash. July 18, 2007). Consistent with its finding that no seizure had occurred, the court ruled (without applying the Fourth Amendment reasonableness test) that the City was strictly liable under RCW 16.08.040 as the owner of the police dog. *Id.*

By contrast, in each and every one of the cases where the Fourth Amendment reasonableness test was implicated or the amendment to RCW 16.08.040 was applied retroactively, the dog bite victim was also the arrestee. *Miller*, 340 F.3d 959 (plaintiff wanted for felony was bit after fleeing into nearby woods); *Terrian v. Pierce County*, No. C08-5123 BHS, 2008 WL 2019815 (W.D. Wash. May 9, 2008) (plaintiff was "fleeing from pursuing officers"); *Beecher v. City of Tacoma*, No. C10-5776 BHS, 2012 WL 1884672 (W.D. Wash. May 23, 2012) ("Beecher intentionally fled from police for the express purpose of evading arrest."); *Saldana v. City of Lakewood*, No. 11-CV-06066 RBL, 2012 WL 2568182 (W.D. Wash. July 2,

2012) (plaintiff bit after being ordered by the officer to turn and drop to the ground); *Conely v. City of Lakewood*, No. 3:11-CV-6064, 2012 WL 6148866 (W.D. Wash. Dec. 11, 2012) (plaintiff wanted for no-bail felony warrant was bit after attempting to hide from officers inside residence). Because Officer Finch was not seized, RCW 16.08.040(2) does not apply, and Thurston County is, therefore, strictly liable under RCW 16.08.040(1).

V. CONCLUSION

Longstanding and well-accepted Washington law provides a presumption in favor of prospective application of statutory amendments. In this case, there is no evidence of contrary legislative intent and the prime sponsor of the amendment expressly declared her belief that the legislature intended the amendment to operate prospectively. The trial court's reliance on prior sovereign immunity as the basis for finding the amendment to be clearly curative is misplaced, as that immunity was abolished over fifty years prior to the amendment of RCW 16.08.040.

Notwithstanding that the amendment should be applied prospectively only, Officer Finch's injuries were not the result of the lawful application of a police dog pursuant to RCW 16.08.040(2). "Lawful application" requires a willful and permissible seizure under

the Fourth Amendment and Art. I, Sec. 7 of the Washington State Constitution. Officer Finch was not seized, but rather was an innocent victim who was mistakenly bitten. Federal case law makes clear that innocent victims who are mistakenly bitten by police dogs are entitled to hold municipalities strictly liable under RCW 16.08.040.

On the basis of the foregoing, Appellants respectfully request that the Court of Appeals reverse the trial court's Order Granting Defendants' Motion for Partial Summary Judgment and Denying Plaintiffs' Motion for Partial Summary Judgment and hold that Thurston County is strictly liable under RCW 16.08.040 for the dog bite injuries suffered by Officer Finch.

Respectfully submitted this 20th day of March, 2014.

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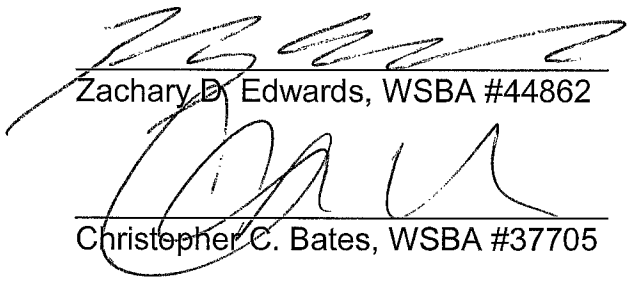

Zachary D. Edwards, WSBA #44862

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DECLARATION OF SERVICE

I declare under penalty of perjury of the laws of the State of Washington that I am over the age of 18 and not a party to the above-captioned action. On the date set forth below I served in the manner noted a true and correct copy of the foregoing Opening Brief of Appellants on the following persons:

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APPENDIX

2012 WL 1884672
Only the Westlaw citation is currently available.
United States District Court, W.D. Washington, at Tacoma.

William B. BEECHER, Plaintiff,
v.
CITY OF TACOMA, et al., Defendants.

No. C10–5776 BHS. | May 23, 2012.

Attorneys and Law Firms

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Opinion

ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

BENJAMIN H. SETTLE, District Judge.

***1** This matter comes before the Court on Defendants' motion for summary judgment (Dkt.23). The Court has considered the pleadings filed in support of and in opposition to the motion and the remainder of the file and hereby grants Defendants' motion for the reasons stated herein.

I. PROCEDURAL HISTORY

On October 21, 2010, Plaintiff William Beecher ("Beecher") filed a complaint against Defendant City of Tacoma ("City"). Dkt. 1. On October 28, 2010, Beecher filed a complaint against Defendants Russell Martin ("Officer Martin") and Jon Verone ("Officer Verone") (collectively with City, "Defendants"). Case No. 10–5796BHS, Dkt. 1. On April 11, 2011, the Court consolidated the cases under this cause number. Dkt. 13. Based upon the two complaints, Beecher alleges that (1) Officers Martin and Verone used excessive force while arresting Beecher in violation of Beecher's First and Fourteenth Amendment rights, (2) the City is liable for Beecher's injuries because the officers acted pursuant to an official policy or custom, and (3) the City is also liable because it owned the dog that inflicted Beecher's injuries.

On March 15, 2012, Defendants filed a motion for summary judgment. Dkt. 23. On April 2, 2012, Beecher responded. Dkt. 28. On April 4, 2012, Defendants replied. Dkt. 30.

II. FACTUAL BACKGROUND

During the dark, early morning hours of October 29, 2007, Tacoma police were dispatched to investigate a suspicious vehicle at a construction site on 6th Avenue in Tacoma, Washington. Dkt. 25, Affidavit of Officer Jon Verone ("Verone Aff."), Exh. 1 ("Arrest Report") at 1–2. Police dispatch also advised the officers that there was a possible theft in progress at the construction site and that the vehicle involved in the theft possibly matched the description of a stolen vehicle. *Id.* The officers' investigation revealed that there was a felony burglary in progress at the construction site. *Id.*

When officers arrived, the three occupants in the suspicious vehicle attempted to flee. Dkt. 24, Affidavit of Jean Homan ("Homan Aff."), Exh. 1, Deposition of William Beecher ("Beecher Dep.") at 8–9. Officers immediately detained one suspect. Arrest Report at 2. However, the other two suspects, including Beecher, fled the scene. Beecher Dep. at 8–9. Upon seeing headlights, Beecher testified that his two friends, the other suspects, opened their doors and "bolt[ed]." *Id.* at 8. Beecher, who was in the back seat of the vehicle, got out of the vehicle and started running because he figured the police had arrived. *Id.* at 9–10. As Beecher ran, he heard the police call after him, saying "stop, freeze." *Id.* At that point, Beecher testified that the "chase was on." *Id.* Beecher intentionally fled from police for the express purpose of evading arrest. *Id.* at 8.

When Officer Verone arrived at the scene, he saw one of the suspects fleeing up a concrete embankment underneath the SR16 overpass on Pearl Street. Verone Aff., ¶ 4. Officer Verone reported that the suspect "[r]an up the embankment on SR16 towards Pearl" and that the suspect "[s]hould be locked in the general area." Dkt. 29, Declaration of Jeffrey Boyd ("Boyd Decl."), Exh. 10. This suspect was Beecher. Beecher Dep. at 11. After Beecher climbed the embankment, he secreted himself in "a very small triangular space" which was sandy, dirt based, and had little room for more than one person. *Id.* at 12. Beecher states that he hid himself in that area for about 20 minutes. *Id.* at 14. Beecher maintains that from his position he could not hear what the police were doing

in the parking lot below or near the construction site. *Id.* at 13. Beecher also claims he could not see what was going on, unless he went back up to where he was and poked his head down. *Id.*

***2** The officers did not know where Beecher was hidden because, as Officer Verone reported, they "quickly lost sight of [Beecher] as he ran between two of the large concrete pillars that support the overpass." Arrest Report at 2. Nor did they know whether he was armed, as he had fled the crime scene before police could determine whether he carried any weapons. Verone Aff., ¶ 6. Having seen him run up to the top of the embankment, however, officers claimed Beecher was in a tactically superior position with the ability to see and ambush police, who were initially situated below him. *Id.* Officer Verone attempted to set up a containment area and called for K9 and Washington State Patrol's assistance. *Id.*, ¶ 5; Arrest Report at 2.

The K9 unit on call that night was Officer Martin and his K9 partner Bo ("K9 Unit"). Dkt. 26, Affidavit of Officer Russell Martin ("Martin Aff."), ¶ 4. Officer Tim Fredericks, Tacoma Police Department Master Canine Trainer, personally trained Officer Martin and his partner Bo, and he has the opportunity to formally evaluate Officer Martin and Bo on at least a monthly basis. Dkt. 32, Affidavit of Officer Fredericks, ¶¶ 2, 5. He also reviews Officer Martin's canine report logs twice yearly. Dkt. 31, Affidavit of Jean Homan, Exh. 1, Deposition of Officer Fredericks ("Fredericks Dep.") at 5[1]. Officer Fredericks has never found any performance deficiencies in either Officer Martin or Bo. Dkt. 32, Affidavit of Officer Fredericks, ¶ 5. Bo is trained to search for a suspect and, upon encountering the suspect, "bite onto the suspect and hold until ordered to release by the handler." *Id*. ¶ 6.

Approximately eight minutes after the first officer arrived at the scene, Officer Martin and Bo arrived. Arrest Report at 2; Dkt. 26, Affidavit of Officer Russell Martin ("Martin Aff."), ¶¶ 4–5. Officer Martin was informed "that one of the suspects had run northbound on Pearl Street and was last seen running towards the overpass embankment ...," and he 'confirmed that Tacoma officers had maintained a perimeter around [the] area so as to avoid contaminating the scene ...." *Id.*, ¶ 6. Officer Martin deployed Bo on a thirty-three-foot lead to begin tracking Beecher. *Id.* ¶¶ 6, 8. Officer Verone acted as cover for the K9 Unit, which means he followed them to watch for external threats and to assist in taking the suspect into custody. Verone Aff., ¶ 5. When Officer Martin and Bo approached the general area where Beecher was last seen, 'Bo immediately picked up the suspect's scent and began to track." Martin Aff., ¶ 8. Officer Martin asserts that 'Bo's response to the scent was immediate and definite and there was no question that he had located the suspect's scent." *Id.*

Officer Martin recounts the remainder of the search and arrest as follows:

> Once [Bo] picked up the suspect's scent, K9 Bo immediately began trying to climb the steep embankment, but he could not get any traction on the cement, so we circled to the north side of the embankment where the slope is not paved. K9 Bo immediately began working his way up the grass embankment. When he reached the top of the grass embankment, he turned to the south and worked his way under the westbound overpass and then turned up a shorter dirt embankment to the triangular area between the westbound and eastbound lanes.
>
> ***3** As soon as K9 Bo made it to the top of the embankment, I heard the suspect start yelling. I made my way up the embankment, which was very steep and made of soft dirt, so it was extremely difficult for me to climb and maintain traction. I had to essentially use K9 Bo for support to maintain my position and was almost lying on the dog's back.
>
> When I got the top of the embankment, I saw that Beecher was lying on his back in the small triangular area between the east and west bound lanes of SR 16. K9 Bo had made contact with Beecher's left leg. Beecher had his left hand on K9 Bo's head and was kicking K9 Bo with his right foot. I could not see Beecher's right hand and did not know if Beecher was armed. I ordered Beecher to show me his hands, which he did, but Beecher continued kicking K9 Bo around the head area with his right foot. As Beecher was kicking at K9 Bo's head, because of where I was positioned in relation to the dog, he was also kicking directly towards my face.
>
> I repeatedly ordered Beecher to stop kicking the dog and to stop moving, but Beecher failed to comply with my orders. As a K9 handler, I am trained not to recall the dog until the suspect is compliant and under control. The dog is also trained to maintain its hold on a suspect until the suspect stops resisting and stops all assaultive behavior. This is for officer safety reasons. Beecher continued to kick at K9 Bo and started rolling from side to side.
>
> Officer Verone was finally able to get up the embankment past me and got Beecher over onto his stomach and

> into handcuffs. Even after Beecher was handcuffed, he continued to move around and kick at K9 Bo's head. Because I was still on the steep embankment, Beecher's kicking was getting closer to my head and face. I then struck Beecher's right leg twice with my small flashlight and again ordered him to stop kicking. Beecher finally stopped kicking long enough for me to get the rest of the way up the embankment and recall K9 Bo. K9 Bo did release his hold on Beecher when commanded to do so.

Martin Aff., ¶¶ 10–14.

Officer Verone recounts a similar experience:

> I followed Officer Martin (the K9 handler) and his dog up to the nook between the eastbound and westbound lanes of SR 16, at the top of the embankment. This is where the suspect, later identified as William Beecher, had hidden himself. This "nook" is at the top of the embankment and cannot be seen from either SR 16 or Pearl Street. Additionally, we could not see Mr. Beecher in this nook until we crested the embankment. This space provided Mr. Beecher with a tactical advantage that placed my safety and Officer Martin's safety at heightened risk, as Beecher would have been able to see us coming, but we could not see him as we approached. Additionally, we did not know whether Mr. Beecher was armed, but we did know that other officers had developed probable cause to arrest Mr. Beecher for felony burglary.
>
> The K9 made contact with Mr. Beecher and Mr. Beecher was repeatedly told to "show us your hands." At that point, Mr. Beecher started flailing his legs and kicking the dog. I saw Mr. Beecher kick the K9 several times. Because of Officer Martin's position, Officer Martin was also at risk of being kicked or struck by Beecher.
>
> ***4** I gave Mr. Beecher repeated commands to get on his stomach, but Mr. Beecher was very slow to comply. Mr. Beecher finally rolled over onto his stomach, but then he slipped his right arm under his body. At this point, we still did not know whether Beecher was armed and did not know if he was trying to reach for a weapon or trying to conceal evidence. I was able to eventually pull Mr. Beecher's arm out from under his body and get him into handcuffs. Even after I got Mr. Beecher into the handcuffs, Beecher continued to kick at the dog, and again, because of Officer Martin's position, Officer Martin was also at risk of being kicked or struck by Beecher.
>
> Immediately after arrest, medical aid was requested for Mr. Beecher. Because of the steepness of the embankment, it was not safe to move Mr. Beecher down the hill. Instead, we moved him up onto SR 16, where medical aid responded and treated Mr. Beecher.

Verone Aff., ¶¶ 6–9.

Beecher provides a different account of the incident. Beecher admits that he ran from the officers and hid in the small triangular area. Beecher Dep. at 12. He states that he "had the option to run from there," but "was scared and [he] decided to stay there." *Id.* He recounts first seeing Bo as follows:

> I became aware that the police dog was there when I was trying to catch my breath and I was still just, you know, not sure what was going on. The dog seemed to run by me. He stopped and continued past me to my left, and 3 seconds go by and he's back on me. I thought he had passed me, that maybe he had sniffed me but he missed me, but then he came back within like 5 seconds after that.

Id. at 14–15. Beecher recognized the dog as a "police dog" and then was bit two or three seconds later. *Id.* at 16. Beecher contends he was thrown about, as the dog pulled him towards the embankment and "suck[ed]" on his leg. *Id.* at 17. He recalls screaming in pain and feeling like his leg was "getting ripped off." *Id.* at 18. In contrast to the officers' recollection, Beecher states that during the entire attack, he never even touched the dog; he only grabbed his own thigh. *Id.*

With regard to the amount of time that passed between Bo's initial bite and the arrival of the officers, Beecher provides inconsistent testimony. When asked if he knew whether the cops had found him, he responded that the "dog was there a little bit before they got there but, yes, I was aware that was a police dog." *Id.* at 16. Beecher then testified that, after Bo made contact, it "was a good 2 minutes before the first police officer arrived." *Id.* at 18.

Once the officers did arrive, Beecher claims that he was entirely compliant; he had not disobeyed any order of a police officer. *See* Homan Aff., Exh. 2 at 20 (Plaintiff's Responses to Defendant's First Discovery Requests). Beecher's first recollection of the officer was being asked whether he had any

weapons and then the officer "lunged" at him. Boyd Decl., Exh. 8, Deposition of William Beecher at 55–56 (deposition pagination). Then, Beecher remembers as follows:

> ***5** The dog was biting me and then the police officer appeared. He said, "Do you have any weapons on you?" I said, "No," and he started searching me. I remember him diving on top of me while the dog was still biting me. After he searched me and there were no weapons, I remember hearing, "Get the bad man. Get the bad man." Then I believe another officer had shown up, the second one on the scene, and at that point I was just waiting for them to get him off of me.

Id. at 57. Beecher asserts that he was sitting down with his "back to the back of the overpass [while] getting searched." *Id.* at 60. Beecher does not remember being rolled onto his stomach or being placed in handcuffs.

Beecher does not dispute that an officer instructed Bo to release his hold on Beecher's leg. Beecher, however, contends that:

> [A]t that point [other officers] all converged and they were trying to get the dog to let go of my leg and the dog was not responding. It seemed like when they finally got the dog's jaws open there was the handler and two other cops pull the dog towards Pearl Street. I'm still facing the same way, and finally with three of them trying to wrench his jaws open they got him off me.[2]

Dkt. 28 at 8, Dkt 29–1 at 117 and Dkt 24–2 at 16.

It is undisputed Beecher sustained injuries as a result of the arrest. Dkt. 23 at 9. According to Beecher, he has continuing pain in his leg, disfigurement, permanent scarring, partial loss of use, and psychological trauma from being mauled by the dog. Homan Aff., Exh. 4. He also has pain in his left leg nearly every day, scarring where the bite was, loss of strength and function in his leg, low back pain, and walks with a limp most of the time. *Id.*

III. DISCUSSION

Defendants have moved for summary judgment on the following grounds: (1) excessive force was not used so all claims should be dismissed; (2) Beecher cannot establish an essential element of § 1983 claim against the City; (3) the doctrine of qualified immunity renders individual officers immune from § 1983 suits; and (4) Beecher's strict liability claim under RCW 16.08.040 should be dismissed because the City did not own Bo and the use of force was reasonable.

A. Summary Judgment Standard

Summary judgment is proper only if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). The moving party is entitled to judgment as a matter of law when the nonmoving party fails to make a sufficient showing on an essential element of a claim in the case on which the nonmoving party has the burden of proof. *Celotex Corp. v. Catrett,* 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). There is no genuine issue of fact for trial where the record, taken as a whole, could not lead a rational trier of fact to find for the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 586, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986) (nonmoving party must present specific, significant probative evidence, not simply "some metaphysical doubt"). *See also* Fed.R.Civ.P. 56(e). Conversely, a genuine dispute over a material fact exists if there is sufficient evidence supporting the claimed factual dispute, requiring a judge or jury to resolve the differing versions of the truth. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 253, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n,* 809 F.2d 626, 630 (9th Cir.1987).

***6** The determination of the existence of a material fact is often a close question. The Court must consider the substantive evidentiary burden that the nonmoving party must meet at trial—e.g., a preponderance of the evidence in most civil cases. *Anderson,* 477 U.S. at 254; *T.W. Elec. Serv., Inc.,* 809 F.2d at 630. The Court must resolve any factual issues of controversy in favor of the nonmoving party only when the facts specifically attested by that party contradict facts specifically attested by the moving party. The nonmoving party may not merely state that it will discredit the moving party's evidence at trial, in the hopes that evidence can be developed at trial to support the claim. *T.W. Elec. Serv., Inc.,* 809 F.2d at 630 (relying on *Anderson,* 477 U.S. at 255). Conclusory, nonspecific statements in affidavits are not sufficient, and missing facts will not be presumed. *Lujan v.*

Nat'l Wildlife Fed'n, 497 U.S. 871, 888–89, 110 S.Ct. 3177, 111 L.Ed.2d 695 (1990).

B. 42 U.S.C. § 1983

Section 1983 is a procedural device for enforcing constitutional provisions and federal statutes; the section does not create or afford substantive rights. *Crumpton v. Gates,* 947 F.2d 1418, 1420 (9th Cir.1991). In order to state a claim under 42 U.S.C. § 1983, a plaintiff must demonstrate that (l) the conduct complained of was committed by a person acting under color of state law and that (2) the conduct deprived a person of a right, privilege, or immunity secured by the Constitution or by the laws of the United States. *Parratt v. Taylor,* 451 U.S. 527, 535, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981), *overruled on other grounds by Daniels v. Williams,* 474 U.S. 327, 106 S.Ct. 662, 88 L.Ed.2d 662 (1986).

In this case, Beecher claims that Officers Verone and Martin violated his Fourth and Fourteenth Amendment rights.

1. Fourth Amendment

The Fourth Amendment guarantees the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures. U.S. Constitution, Amend. VI. Beecher alleges a violation of his Fourth Amendment rights based on the use of unreasonable and excessive force. Dkt. 1, ¶¶ 4.1–4.4.

It is well established that Fourth Amendment excessive force claims are properly analyzed under an "objective reasonableness" standard. *Graham v. Connor,* 490 U.S. 386, 394, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989). In other words, law enforcement officers making an arrest may use only that amount of force that is objectively reasonable in light of the facts and circumstances confronting the officer, without regard to the officer's underlying intent or motivation. *Id.* at 397.

In analyzing an excessive force claim, the court must first examine the quantum of force used against the individual. *Chew v. Gates,* 27 F.3d 1432, 1440 (9th Cir.1994). Next, the court must assess the importance of the governmental interests involved. *Id.* Finally, the court must "consider the dispositive question whether the force that was applied was reasonably necessary under the circumstances." *Miller v. Clark County,* 340 F.3d 959, 966 (9th Cir.2003).

a. Intrusion on Constitutional Rights

*7 A court "assesses the gravity of the intrusion on Fourth Amendment interests by evaluating the type and amount of force inflicted." *Id.* at 964. In the instant case, the Defendants neither dispute that the force applied by Bo was significant, nor that Beecher sustained injuries as a result of the encounter. In fact, according to Beecher's uncontroverted allegations, he suffered severe injuries to his left leg, experienced intense pain at the time of the attack, was hospitalized twice following the encounter, and received treatment for the wound for the next three months. Dkts. 28 at 9 & 29–1 at 43, 44 (photographs of injuries). Moreover, Beecher claims that he has continuing pain in his leg, disfigurement, permanent scarring, partial loss of use, and psychological trauma from this incident. *Id.* Therefore, the Court concludes that the intrusion on Beecher's Fourth Amendment interests was significant.

b. Assessing the Government Interests

Next, the Court must assess the importance and legitimacy of the government's countervailing interests. The three factors pertinent to this inquiry are:

> (1) the severity of the crime the suspect is believed to have committed; whether the suspect poses an immediate threat to the safety of officers or others; and (3) whether he is actively resisting arrest or attempting to evade arrest by flight.

Chew, 27 F.3d at 1440 (citing *Graham,* 490 U.S. at 396). Additionally, the Ninth Circuit has held that whether a warning was given before the use of force is a factor that may be considered in applying the *Graham* balancing test. *Deorle v. Rutherford,* 272 F.3d 1272, 1283–84 (9th Cir.2001).

i. Severity of the Crime

"The character of the offense is often an important consideration in determining whether the use of force was justified." *Deorle,* 272 F.3d at 1280. In the instant matter, the officers believed they had probable cause to arrest Beecher for burglary and/or possession of a stolen vehicle. Verone Decl., Exh. 1. In Washington, burglary is classified as a felony. *See* RCW 9A.52.030. Under these circumstances, "[t]he government has an undeniable legitimate interest in apprehending criminal suspects ... and that interest is even stronger when the criminal is ... suspected of a felony."

Miller, 340 F.3d at 964. The Ninth Circuit, however, has also cautioned that a "wide variety of crimes, many of them nonviolent, are classified as felonies." *Chew,* 27 F.3d at 1442. In *Chew,* the court found that a suspect wanted for burglary weighed in favor of the government "only slightly." *Id.* Therefore, the Court finds that the seriousness of Beecher's suspected crime weighs slightly in favor of the government.

ii. The Threat to the Safety of the Officers & Public

"[T]he most important single element of the three specified factors [is] whether the suspect poses an immediate threat to the safety of the officers or others." *Chew,* 27 F.3d at 1441.

***8** *Chew* and *Miller* provide factual situations that sit at opposite ends of a spectrum upon which the facts of this case lie. In Chew, the court summarized the relevant facts and concluded as follows:

> Chew was initially stopped for a traffic violation. Before he fled, he was asked for his driver's license, and produced it. He also retrieved cigarettes and a lighter from his car, lit a cigarette, and engaged in a certain amount of conversation with the officer before his flight. Apparently, nothing about Chew's appearance or demeanor gave the officer reason to believe he should search the suspect. It appears from the record that after fleeing Chew hid in the scrapyard for an hour and a half before [Officer] Bunch released [KP] Volker in an effort to capture him. The defendants do not suggest that Chew engaged in any threatening behavior during this time, or that he did anything other than hide quietly. In light of these facts, a rational jury could easily find that Chew posed no *immediate* safety threat to anyone.

Chew, 27 F.3d at 1442 (emphasis in original).

In *Miller,* the suspect was "wanted by police for the felony of attempting to flee from police by driving a car with a wanton or willful disregard for the lives of others." *Miller,* 340 F.3d at 960. Before the officer approached the house he was dispatched to, he was informed that the "house's residents were not 'law enforcement friendly' and that a '10–96,' a mentally ill person, lived there." *Id.* at 960. The officer looked into the car the suspect was allegedly driving and "saw a seven or eight-inch knife ...." *Id.* The suspect fled across his property into "some dense, dark, wooded terrain." *Id.* at 960–961. The court determined that, "[g]iven the gravity of the risk to law enforcement, with [the suspect] hiding in the shadows, this second *Graham* factor weighs heavily in the government's favor." *Id.* at 965.

In this case, Beecher created a safety threat for the officers. Unlike the officers in *Chew,* neither Officer Verone nor Martin had contact with Beecher before he fled, and they had no opportunity to evaluate his appearance and/or demeanor. Moreover, neither officer knew whether Beecher was armed. Similar to the officer in *Miller,* the officers were following an unknown suspect at night into a dark, elevated and obstructed area, and the officers were approaching from a tactically inferior position. Therefore, the Court finds that Officers Verone and Martin faced objective concerns for their safety.

With regard to the issue of whether Beecher was confined to a particular area, Beecher argues that the facts of this case are similar to the facts of *Chew.* However, the facts of that case present a completely different scenario:

> Chew was trapped in the scrapyard for two uneventful hours before Volker bit and mauled him. There was time for deliberation and consultation with superiors. There was even time for the police to summon a helicopter to the scene, an airborne vehicle which apparently aided the dogs in their search.

***9** *Chew,* 27 F.3d at 1443. Although Officer Verone stated that Beecher "should" be confined to a particular area, there are no objective facts in the record that the officers knew for sure that Beecher was surrounded or confined to a certain location with no escape route. In fact, Beecher even testified that he could have continued to flee from his hiding area, but decided to stay because he was scared. The Court also notes that the third suspect evaded the officers that night, and Beecher may have as well if Officers Martin and Verone decided to track Beecher into the shadows under the overpass. Therefore, from a reasonable officer's perspective, the situation confronting Officers Martin and Verone presented significant safety concerns, and this factor weighs in favor of the government.

iii. Resisting or Evading Arrest by Flight

The third factor under *Graham* is whether the suspect actively resisted arrest or attempted to evade arrest by flight. In this case, Beecher concedes that he was evading arrest. He states that he fled the car once he knew the approaching cars were police vehicles, he heard the police yell "stop, police," and he considered "the chase [to be] on." Beecher Dep. at 8. Therefore, this factor unequivocally favors the government.

iv. Lack of Warning

"[T]he giving of a warning or failure to do so is a factor to be considered in applying the *Graham* balancing test." *Doerle,* 272 F.3d at 1284. "[W]arnings should be given, when feasible, if the use of force may result in serious injury ...." *Id.* at 1284.

In this case, it is undisputed that a warning was not given and the issue is whether it was "feasible" to give one. Beecher relies heavily on the absence of a warning as well as procedures developed when an officer uses a dog to find a suspect in a building. Dkt. 28 at 17–19. First, Beecher's reliance on procedures for searching a building is inapplicable to the situation created by Beecher. The officers did not know where Beecher was located or whether he was confined to an area, such as a confined and completely surrounded scrapyard. Moreover, Officer Fredricks testified that there exists heightened safety risks when searching for a suspect in an open area:

> We don't know if he's ahead of us or behind us or in front of us. We don't have him anywhere confined to a specific area so officer safety is highly compromised to be giving warnings out on the street.

Dkt. 29–1 at 64. Therefore, the Court finds that Beecher's reliance on procedures designed for searching confined areas is without merit.

With regard to whether it was feasible to give a warning, the officers did not know whether or when they were approaching Beecher's location. Officer Martin kept Bo on a lead and within close proximity throughout the search. Thirty-three feet is sufficient distance to communicate with Beecher if there was an opportunity to do so. However, there are no facts in the record that Officer Martin knew that Beecher was within Bo's range in order for Officer Martin to warn Beecher and/or give Beecher an opportunity to surrender without the use of force. To the contrary, only when Officer Martin was climbing the steep embankment did he hear Beecher yell. Even if the officers had known Beecher's exact location, issuance of a verbal warning could have created a heightened safety risk for the officers because a potentially armed felony suspect was positioned above them, in a tactically superior position. Therefore, from an objective standpoint, the fact that Officer Martin did not issue a warning does not weigh against the government.

c. Weighing the Conflicting Interests

***10** The Court must now consider the "dispositive question of whether the force that was applied was reasonably necessary under the circumstances." *Miller,* 340 F.3d at 966.

Under the circumstances known to Officer Martin, use of the police dog was well suited to search for and detain Beecher. There is no doubt that Bo was a significant intrusion on Beecher's constitutional rights. However, each *Graham* factor analyzed above weighed either in favor or slightly in favor of the government. From an objective standpoint, the use of a canine on a lead to search for and detain a suspected felon, who is admittedly evading police and hiding in a dark, tactically superior position, is not unreasonable. Therefore, the Court concludes that the government's interest in deploying Bo outweighs Beecher's interests, and the use of Bo was reasonable under the circumstances. These conclusions, however, do not end the analysis because Beecher presents facts that he argues could turn an otherwise lawful use of force into a constitutional violation.

"[E]xcessive duration of [a] bite and improper encouragement of a continuation of [a canine] attack by officers could constitute excessive force that would be a constitutional violation." *Watkins v. City of Oakland, Cal.,* 145 F.3d 1087, 1093 (9th Cir.1998). First, Beecher asserts that, after an officer searched him and determined he did not have a weapon, the officer instructed Bo to "Get the bad man. Get the bad man." Beecher Dep. at 57. With regard to the content of the statement, the subjective intent of an officer is beyond the scope of an excessive force analysis. In fact, "good intentions will not redeem an otherwise unreasonable use of force, nor will evil intentions transform an objectively reasonable use of force into a constitutional violation." *Chew,* 27 F.3d 1440 (*citing Graham,* 490 U.S. at 397).

With regard to the alleged timing of the statement, Beecher fails to present any facts that show the statement encouraged

an improper continuation of the use of force. Beecher states that he was searched while sitting with his back to the overpass. After that, Beecher does not remember being handcuffed or rolled over on his stomach. Even though Beecher argues that he "was on his stomach, in handcuffs, [and] the dog continued to maul him," missing facts will not be presumed. *Lujan,* 497 U.S. at 889. Although Beecher does not remember relevant aspects of the encounter, his arguments imply a situation in which the officers passively stood by and allowed Bo to inflict damage on an entirely compliant suspect after the officers searched the suspect for weapons. However, Beecher's "version of the incident cannot control on summary judgment when the record as a whole does not support that version." *Wilkinson v. Torres,* 610 F.3d 546, 551 (9th Cir.2010); *see also Scott v. Harris,* 550 U.S. 372, 378–79, 127 S.Ct. 1769, 167 L.Ed.2d 686 ("Indeed, reading the lower court's opinion, one gets the impression that respondent, rather than fleeing from police, was attempting to pass his driving test ...."). Both officers state that, once they encountered Beecher, they searched him, rolled him over on his stomach, handcuffed him, and then Officer Martin ordered Bo to release his grip. There are no facts in the record to contradict this evidence. Therefore, Beecher has failed to show that a material question of fact exists on the issue of whether the officers used Bo improperly.

***11** Second, Beecher argues that he experienced an excessive duration of force because Bo did not release upon command. This, however, is not excessive duration of a bite that would convert an otherwise lawful use of force into a constitutional violation. Even Beecher concedes that the officers immediately reacted to remove Bo from Beecher's leg and reduce the harm to Beecher. Moreover, Bo had no history of performance deficiencies. At the time when Officer Martin deployed Bo, it was reasonable to assume that Bo would release upon command. Therefore, the use of Bo was reasonable under the circumstances and the officers only used Bo to the extent necessary to effect Beecher's "arrest as safely as possible under the circumstances." *Miller,* 340 F.3d at 967. Based on this conclusion, the Court grants summary judgment in favor of Defendants on Beecher's claim for a violation of his Fourth Amendment rights.

1. Fourteenth Amendment

Beecher's Fourteenth Amendment substantive due process claim is based on the same operative facts that Beecher challenges through his Fourth Amendment claims.[3] Thus, Beecher's claims fall "squarely within the scope of the Fourth Amendment," and they must be analyzed according to its principles, and not under the generalized notion of Fourteenth Amendment substantive due process. *See County of Sacramento v. Lewis,* 523 U.S. 833, 843, 118 S.Ct. 1708, 140 L.Ed.2d 1043 (1998) (substantive due process analysis is appropriate in cases not covered by the Fourth Amendment) (*citing U.S. v. Lanier,* 520 U.S. 259, 272, 117 S.Ct. 1219, 137 L.Ed.2d 432 (1997)) (*Graham* requires that constitutional claim covered by a specific constitutional provision, such as the Fourth or Eighth Amendment, must be analyzed under the standard appropriate to that specific provision, not under the rubric of substantive due process). Therefore, the Court grants Defendants' motion for summary judgment on Beecher's Fourteenth Amendment claim.

C. *Monell* Liability and RCW 16.08.040

Because the Court concludes that Beecher's constitutional rights were not violated, the Court need not address whether the City is liable under *Monell. Miller,* 340 F.3d at 968 n. 14.

With regard to Beecher's claim under RCW 16.08.040, the Court dismisses this claim because the Court concludes that the use of force was reasonable. *Id.*

IV. ORDER

Therefore, it is hereby **ORDERED** that Defendants' Motion for Summary Judgment (Dkt.23) is **GRANTED** on all of Beecher's claims. The Clerk is directed to enter judgment for Defendants.

Footnotes

1 Even though Defendants submitted this evidence with their reply brief, the Court will consider the evidence because Beecher failed to object to the untimely submission and he is not prejudiced by evidence of Bo's training and performance history.

2 Beecher failed to submit page 62 of his deposition. In his response, Beecher cites page 62 as containing the last four lines of this statement. Dkt. 28 at 8. The Court also finds a substantially similar statement of facts in Beecher's Responses to Defendants' First

Discovery Requests. Dkt. 24–2 at 16. Thus, the Court includes the statement as cited in Beecher's response even though the entire quote is not in the record as admissible evidence.

3 Notably, Beecher fails to adequately brief how his Fourteenth Amendment substantive due process claim is applicable to the specifics of his case, citing neither relevant Fourteenth Amendment case law nor applying substantive legal analysis supporting such a claim.

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2012 WL 6148866
Only the Westlaw citation is currently available.
United States District Court, W.D. Washington,
at Tacoma.

Richard CONELY, Plaintiff,
v.
CITY OF LAKEWOOD, a municipal corporation, James Syler, in his official and individual capacity and Jane Doe Syler and their marital community, Defendants.

No. 3:11–cv–6064. | Dec. 11, 2012.

Attorneys and Law Firms

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Amanda Gabrielle Butler, Stewart Andrew Estes, Keating Bucklin & McCormack, Seattle, WA, for Defendants.

Opinion

ORDER ON DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

ROBERT J. BRYAN, District Judge.

***1** This matter comes before the Court on Defendants' Motion for Summary Judgment (Dkt.20). The Court has considered the pleadings filed in support of and in opposition to the motion and the file herein.

FACTS

The incident that is the subject of the complaint occurred on September 26, 2009, when Plaintiff was injured by police dog Astor, who was under the control of Officer James Syler ("Syler").

On September 26, 2009, at about 9:30 PM, Lakewood Police officers went to a house where Plaintiff Richard Conely was located. Dkt. 21, at 5. Plaintiff was wanted on a no-bail felony warrant for failure to report to his Department of Corrections supervisor. Dkts. 22, at 4; 24, at 1. The felony warrant read:

> You are hereby commanded to forthwith arrest the said RICHARD MILTON CONLEY, for the crime(s) of UNLAWFUL POSSESSION OF A CONTROLLED SUBSTANCE; DRIVING WHILE IN SUSPENDED OR REVOKED STATUS IN THIRD DEGREE; UNLAWFUL USE OF DRUG PARAPHERNALIA, said defendant having escaped from confinement/BTC as ordered by the court and bring said defendant into court to be dealt with according to law.

Dkt. 22, at 4.

An Incident Report written by Officer Jason Cannon, who was called to the scene of the arrest, states:

> LESA dispatch received information that Richard M. Conley 3–29–70 was at the residence and had several outstanding warrants for his arrest to include a DOC Felony Escape Warrant. The R/P also report that the suspect will run and is often armed with knives.

Dkt. 22, at 8.

Upon the officers' arrival at the residence, Syler stated in his declaration that Plaintiff fled out the back door only to see the officers guarding the back door, and ran back into the house. Dkt. 21, at 5. Syler described the encounter as follows:

> When we arrived at the residence I took K–9 Astor to the rear of the residence to watch the back while officers attempted contact at the front door. As officers made contact at the front door, I saw the suspect running through the back yard away from the residence. I identified myself as a Police Officer and ordered the suspect to stop or I would release my dog. The suspect stopped, looked at me and then turned and ran back towards the residence. I was able to identify the male as the warrant suspect from the previously viewed photograph. I

> released K–9 Astor and gave him the command to apprehend the fleeing suspect. K–9 Astor gave chase after the suspect but the suspect was able to enter the residence through a basement door and lock the door behind him before K–9 Astor to catch up [sic] to him.

Id.

Plaintiff, however, described, in his declaration, the initial contact with the officers as follows:

> [My friend and owner of the residence] has security cameras outside his house that are connected to his computer monitor. After dark that evening [my friend] noticed someone walking in near his driveway and front yard and asked that I check to see who was there. I left out the back door and walked towards the corner of the house until I could see toward the driveway. I saw several dark figures run in my direction. I was scared and I retreated back into the house. I then heard someone bang on the back door and say "open this is the police." I had a warrant for my arrest for missing an appointment with my probation officer. I did not want to be arrested.

2 Dkt. 24, at 1.

Syler stated that the last remaining occupant of the residence walked outside leaving Plaintiff alone in the structure. Dkt. 21, at 5. The police report continued:

> There were several places inside the residence for the suspect to hide and lay in wait for us. The suspect had not been searched for weapons and it was still unknown if he was armed. It was unknown if there were any firearms or other weapons inside the residence. The suspect did have access to several household items that could be used as a weapon. Due to the danger this posed to searching officers, I decided to use K–9 Astor to assist in locating the suspect.

Id.

Syler stated that he gave Plaintiff a warning and then sent the dog inside to search the basement:

> I gave a loud verbal warning at the open basement door for the suspect to come out or I would send in my dog, warning him that the dog would find and bite him. After getting no response from inside, I deployed K–9 Astor into the residence and gave him the command to locale [sic] the suspect. K–9 Astor entered through the basement door and began searching the residence.

Id.

Officer Syler stated that the dog did not locate Plaintiff in the basement; the dog then proceeded to the second level, where officers discovered a closed and locked door:

> After clearing the basement, K–9 Astor made his way to the 2nd floor and indicated on a closed door in the upstairs hallway. I checked the door and found that it was locked. Officers contacted the homeowner at the front of the residence and advised that he did not know why the door was locked and had no way to unlock it. Based on K–9 Astor's indication on the door, I believed that the suspect was inside the room.

Id.

In the arrest report, Officer Cannon described the events as follows:

> K9 Astor searched the top floor and indicated on a locked bedroom near the front door. According to [the resident] that door should not have been locked. Ofc. Syler again gave several warnings that the room was going to be searched by a K9. We received no response and

> the door was forced. K9 Astor entered to search the room and made contact with Conley. Conley was taken into custody.

Dkt. 22, at 9.

Syler stated that he knocked on the door and gave another loud verbal warning "for the suspect to come out or I would send in my dog and he would bite him." Dkt. 21, at 5. There was no response from inside the room. *Id.*

Syler forced open the door and deployed K–9 Astor into the room.

> K–9 Astor located the suspect hiding inside this room. The suspect was actively hiding, lying on the floor with all the lights off inside the room. The suspect made no attempt to give up or announce his location prior to being located by K–9 Astor. K–9 Astor contacted the suspect on the left shoulder and began trying to pull him out from hiding. I ordered the suspect to show me his hands, to make sure he was not holding a weapon. As soon as I could see the suspect's hands, I immediately recalled K–9 Astor. The suspect was then taken into custody at this location by other officers.

***3** *Id.* at 6.

Plaintiff, however, described what happened after he hid in the top floor room, as follows:

> I hid in a small room used as a home office.... It contained a small table with a computer and a dog crate. There was no bed in the room.... I heard an officer knock on the door and shout for me to come out or he would send the dog in. I was scared for my life and did not know what would happen if I open [sic] the door. Instead I decided to give up by lying face down on the floor. I lied [sic] face down, with my arms and legs spread. My feet were directly in from of the door. The officer opened the door. I had to lift my feet up so the door had room to open. Once the officer opened the door all the way, I placed my feet down on the floor, in the door way between the hall and the room. The light from the hall lit the room. The dog came in the room and began sniffing my feet, then my legs, then my torso. The dog slowing walk [sic] around me, sniffing and worked his way up towards my head. I could feel the dog's breath on my face. I did not move. I did not say a word. About 10–15 seconds after the dog enter [sic] the room, he bit me. He tore into my upper arm with extreme force and violence. He pulled and ripped at my arm for several seconds before the officer called him off.

Dkt. 24, at 2. The Court will hereafter refer to this statement as "Plaintiff's testimony."

Syler stated that, once Plaintiff had been taken into custody, medical aid was called to the scene to treat his injuries. Dkt. 21, at 6. Plaintiff stated that he was not placed under arrest or read his Miranda rights. Dkt. 24, at 2. Syler stated that Plaintiff was treated at the scene by Lakewood Fire for the K–9 bite (Dkt. 21, at 6), and was then transported to Tacoma General Hospital where Plaintiff had three surgeries to repair his arm. Dkt. 24, at 2.

PROCEDURAL HISTORY

A. Complaint

On December 5, 2011, Plaintiff filed a civil complaint against the City of Lakewood, James Syler and Jane Doe Syler, contending (1) that Syler, acting as an agent of the City of Lakewood ("City"), committed acts that constitute assault and battery; (2) that Syler and the City violated his constitutional rights under the Fourth and Fourteenth Amendments to the United States Constitution; (3) that Syler was negligent when he failed to exercise control of police dog Astor during the encounter with Plaintiff; and that the City, as employer of Syler, who was acting within the scope of his employment, is liable for the negligence of Syler and Astor, under the theory of *respondeat superior;* (4) that Syler negligently used excessive force to arrest Plaintiff; and that

the City, as employer of Syler, who was acting within the scope of his employment, is liable for the negligence of Syler and Astor, under the theory of respondeat superior; (5) that Syler's negligence and excessive force caused Plaintiff to suffer emotional distress; and that the City, as employer of Syler, who was acting within the scope of his employment, is liable for the negligence of Syler and Astor, under the theory of *respondeat superior;* and (6) that Defendants are strictly liable, pursuant to RCW 16.08.040, for the injuries inflicted by Astor. Dkt. 1–3, at 5–24.

***4** On December 28, 2011, Defendants removed the case to federal court on the basis of federal question jurisdiction under 28 U.S.C. § 1331. Dkt. 1.

On February 6, 2010, Defendants filed an answer. Dkt. 6. Defendants entered a general denial, but in their answer admit that Syler was acting within the scope of his employment. Dkt. 6, at 2.

B. Motion for Judgment on the Pleadings

On April 4, 2012, the City (not Syler) filed a Motion for Judgment on the Pleadings. Dkt. 12. On May 8, 2012, the Court granted in part and denied in part the claims against the City. Dkt. 17. The Court dismissed with prejudice the federal civil rights claims against the City and the direct liability state law claims against the City for assault and battery, negligence, negligent use of excessive force, intentional infliction of emotional distress, and negligent infliction of emotional distress. Dkt. 17, at 11. The court identified the remaining claims against the City, as follows: strict liability against the City pursuant to RCW 16.08.040; and vicarious liability claims against the City through a theory of *respondeat superior.* Dkt. 17. The Court also stated that "Plaintiff in his original complaint does not appear to make claims for liability of the City of Lakewood for the dog Astor," but "[b]ecause the City, as the moving party, does not appear to discuss these claims, any claims related to liability for the actions for the dog Astor are not before the court on the motion for judgment on the pleadings." Dkt. 17, at 9–10.

C. Motion to File Amended Complaint

On April 30, 2012, Plaintiff filed a Motion to File Amended Complaint. Dkt. 14. The proposed amended complaint eliminated the federal constitutional claim against the City (the court dismissed this claim in its May 8, 2012 order). Dkt. 14, at 2. On May 22, 2012, the Court denied the motion to file an amended complaint. Dkt. 19. Specifically, the Court stated that the amended state law claims did not clearly state "whether plaintiff is alleging liability on the basis of *respondeat superior* for Officer Syler's actions in controlling and handling Astor; whether plaintiff is alleging direct causes of action against the City of Lakewood, based upon Officer Syler's conduct (these direct causes of action were dismissed by the court's May 8, 2010 order); and/or whether plaintiff is alleging that the City of Lakewood has direct liability for Astor's conduct, independent of Officer Syler." Dkt. 19, at 4. The Court denied Plaintiff's Motion without prejudice, stating that Plaintiff should clarify his allegations if he wished to proceed with claims other than those in the original complaint. *Id.* Plaintiff did not file another motion to amend the complaint.

Neither the motion for judgment on the pleadings nor the motion to file an amended complaint affected the federal constitutional claims or the state law claims against Syler. Those claims remain a part of this case.

D. Motion for Summary Judgment

***5** On November 8, 2012, Defendants filed this Motion for Summary Judgment, requesting that all the remaining claims be dismissed. Dkt. 20. Defendants argue that (1) the City is not strictly liable for the actions of the police dog under RCW § 16.08.040 because Syler's use of the dog was lawful and Plaintiff provoked the dog by not obeying orders; (2) the City is not vicariously liable for the state law claims, on a *respondeat superior* theory, because Syler is not liable; (3) Syler is not strictly liable for the dog bite because he is not the owner of the dog; (2) Syler did not violate Plaintiff's Fourth or Fourteenth Amendment rights because he acted reasonably in using the police dog; (3) Syler is entitled to qualified immunity because he acted reasonably and was not on notice that any possible unreasonable action was unlawful; (4) Syler did not owe Plaintiff a duty of care, and therefore, was not negligent; (5) negligent use of excessive force is not a tort; and (6) Syler did not act outrageously by using a police dog to apprehend a fleeing felon. *Id.*

In response, Plaintiff argues that there are issues of material fact regarding the reasonableness of Syler's use of the dog. Specifically, Plaintiff argues that (1) the City is strictly liable under RCW § 16.08.040 because Syler's use of force was unreasonable given that Plaintiff posed no danger or ability to flee once lying down on floor in the locked room; (2) Syler violated Plaintiff's Fourth Amendment right because Syler's actions in using the dog were unreasonable; (3) Syler is not entitled to qualified immunity because he acted

unreasonably and the law concerning use of police dogs is clearly established; (4) negligent use of excessive force is a cause of action in these unique circumstances given that the injury was caused by a dog owned by one defendant and controlled by another, and therefore the City was negligent in its training of the dog; (5) the City and Syler were negligent in their training and use of the dog; (6) Syler is liable for outrage because he allowed the dog to bite Plaintiff while Plaintiff was lying on the floor consenting to arrest; (7) the Court did not dismiss the direct liability state law claims against the City deriving from the City's ownership and training of the dog in the Court's earlier rulings and Defendants did not argue these claims in the present Motion; and (8) Defendants did not address the assault and battery claim against Syler in its Motion. Dkt. 23.

In reply, Defendants first argue that the Declaration (Dkt.25) of Plaintiff's expert, Ernest Burwell, should not be considered because Plaintiff did not timely disclose this expert, and both the expert opinion disclosure deadline and discovery deadline has passed. Dkt. 26. Defendants also argue (1) that the disputed facts that Plaintiff has presented are not material facts; (2) that it was reasonable to use a dog to search the room where Plaintiff was located; (3) that the strict liability claim under RCW § 16.08.040 should be dismissed because Syler's actions were reasonable and because Plaintiff provoked the dog bite by disobeying orders; (4) that Syler is entitled to qualified immunity because he acted reasonably and the law was not clearly established; (5) that Plaintiff does not cite any case law showing that negligent use of excessive force is a cause of action; (6) that general police activities are not reachable in negligence; (7) that Plaintiff failed to provide comparative examples showing outrageous conduct; and (8) direct liability claims against the City stemming from the use of Astor and the assault and battery claims are "red herrings." Dkt. 26.

SUMMARY JUDGMENT STANDARD

***6** Summary judgment is proper only if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). The moving party is entitled to judgment as a matter of law when the nonmoving party fails to make a sufficient showing on an essential element of a claim in the case on which the nonmoving party has the burden of proof. *Celotex Corp. v. Catrett,* 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1985). There is no genuine issue of fact for trial where the record, taken as a whole, could not lead a rational trier of fact to find for the non moving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 586, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986) (nonmoving party must present specific, significant probative evidence, not simply "some metaphysical doubt."). *See also* Fed.R.Civ.P. 56(e). Conversely, a genuine dispute over a material fact exists if there is sufficient evidence supporting the claimed factual dispute, requiring a judge or jury to resolve the differing versions of the truth. *Anderson v. Liberty Lobby, Inc.,* 477. S. 242, 253 (1986); *T.W. Elec. Service Inc. v. Pacific Electrical Contractors Association,* 809 F.2d 626, 630 (9th Cir.1987).

The determination of the existence of a material fact is often a close question. The court must consider the substantive evidentiary burden that the nonmoving party must meet at trial—e.g., a preponderance of the evidence in most civil cases. *Anderson,* 477 U.S. at 254, *T.W. Elect. Service Inc.,* 809 F.2d at 630. The court must resolve any factual issues of controversy in favor of the nonmoving party only when the facts specifically attested by that party contradict facts specifically attested by the moving party. The nonmoving party may not merely state that it will discredit the moving party's evidence at trial, in the hopes that evidence can be developed at trial to support the claim. *T.W. Elect. Service Inc.,* 809 F.2d at 630 (relying on *Anderson, supra*). Conclusory, non specific statements in affidavits are not sufficient, and "missing facts" will not be "presumed." *Lujan v. National Wildlife Federation,* 497 U.S. 871, 888–89, 110 S.Ct. 3177, 111 L.Ed.2d 695 (1990).

DISCUSSION

A. Declaration of Expert Witness Ernest Burwell

Defendants argue that, because Plaintiff's expert witness, Ernest Burwell, was not disclosed to Defendants before the expert witness disclosure deadline of August 15, 2012 (Dkt.10), nor before the discovery cutoff deadline of October 15, 2012 (Dkt.10), Mr. Burwell's report (Dkt.25) containing his expert opinion on the use of police force should be excluded.

Federal Rule of Civil Procedure 37(c)(1) states

> If a party fails to provide information or identify a witness as required

> by Rule 26(a) or (e), the party is not allowed to use the information or witness to supply evidence on a motion, at a hearing, or at trial, unless the failure was substantially justified or harmless.

*7 Defendants provide argument, but no evidence, showing that Plaintiff has not properly disclosed this expert. Therefore, the Court should not grant this motion to exclude the testimony of Mr. Burwell based on Plaintiff's alleged failure to adhere to deadlines. Defendants' motion to exclude Mr. Burwell's testimony on the basis that it was not properly disclosed is denied without prejudice. Whether Mr. Burwell may testify at trial, and to what he may testify, may be determined by motion *in limine* or other motion, at a later time.

That does not end the inquiry, however. In reviewing Mr. Burwell's proposed expert opinion/evidence, the Court should determine if Mr. Burwell's opinion can be properly considered under the *Daubert* standard. In deciding whether to admit scientific testimony or evidence, the trial judge must ensure that any and all scientific testimony or evidence admitted is relevant and reliable. *Daubert v. Merrell Dow Pharmaceuticals, Inc.,* 509 U.S. 579, 589, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993). Scientific evidence is reliable if it is based on an assertion that is grounded in methods of science-the focus is on principles and methodology, not conclusions. *Id.* at 595–96. In *Daubert,* the Supreme Court listed four non-exclusive factors for consideration in the reliability analysis: (1) whether the scientific theory or technique can be and has been tested; (2) whether the theory or technique has been subjected to peer review and publication; (3) whether a particular technique has a known potential rate of error; and (4) whether the theory or technique is generally accepted in the relevant scientific community. *Id.* at 593–94.

In *Kumho Tire Co. v. Carmichael,* 526 U.S. 137, 147–48, 119 S.Ct. 1167, 143 L.Ed.2d 238 (1999), the Supreme Court extended *Daubert* 's standard of evidentiary reliability to all experts, not just scientific ones. That standard requires a valid connection to the pertinent inquiry as a precondition to admissibility. *Id.* Where such testimony's factual basis, data, principles, methods, or their application are called sufficiently into question, the trial judge must determine whether the testimony has a reliable basis in the knowledge and experience of the relevant discipline. *Id.*

Plaintiff retained the services of Mr. Burwell, who stated in his report that he is a "Police Practices Expert." Dkt. 25. Mr. Burwell concluded in general that: "It is my opinion that excessive, unreasonable, and unnecessary force was used to affect the arrest of Mr. Conley." Dkt. 25, at 3.

Mr. Burwell's opinion does not meet the standard of evidentiary reliability in this case. The theory or technique he used to reach his conclusion is unclear, and there is no showing that it has been, or can be, tested. There is no showing that the theory or technique has been subjected to peer review or publication, or whether it has a rate of error. There is no showing that the theory or technique is generally accepted in the law enforcement community. In light of *Daubert* and *Kumho Tire,* it is simply not sufficient for a qualified expert to render an opinion based on an *ipse dixit* analysis. Mr. Burwell's opinion appears to be legal argument rather than expert analysis. It is not helpful to the court on this matter, and certainly, by itself, does not raise issues of fact.

*8 For these reasons, the Court will not consider the testimony of Mr. Burwell for the purposes of this Order.

B. Contested Claims

The parties dispute which claims are being contested on summary judgment. Defendants contend that they are contesting all remaining claims. Plaintiffs argue that the Court did not dismiss the state law claims against the City for the actions of Astor, independent of Syler. Plaintiffs also argue that Defendants did not address the assault and battery claim against Syler, and therefore the Court should not address this claim on summary judgment.

In the Court's Order on Plaintiff's Motion to File Amended Complaint, the Court dismissed all claims against the City based on direct liability for the actions of Astor, except the strict liability claim under RCW § 16.08.040. The Court specifically noted that Plaintiff did not appear to make claims for liability on the part of the City for the dog Astor, and later informed Plaintiff that if he wished to allege such claims, he should allege the basis for those claims. Plaintiff was clearly on notice what he needed to do to plead any state law claims against the City for the actions of Astor, independent of Syler.

Therefore, the claims remaining against Syler are (1) violation of Plaintiff's Fourteenth Amendment right to be free of excessive force; (2) violation of Plaintiff's Fourth Amendment right to be free of excessive force; (3) negligence; (4) negligent use of excessive force; (5) negligent

infliction of emotional distress; (6) intentional infliction of emotional distress; (7) assault and battery; and (8) strict liability under RCW § 16.08.040. The claims remaining against the City are (1) vicarious liability under *respondeat superior* for the five state law claims listed above against Syler, and (2) strict liability under RCW § 16.08.040.

C. Claims against Syler

1. *Excessive Force under the Fourteenth Amendment*

In its Motion, Defendants make passing reference to Plaintiff's unspecified Fourteenth Amendment claim. Dkt. 20, at 13. Defendants state that the standard for a Fourteenth Amendment excessive force claim is higher than that under the Fourth Amendment, but decline to further address this statement in their briefing. Plaintiff does not address the Fourteenth Amendment claim in his briefing.

As best the Court can tell, Plaintiff argues that Defendants violated his due process rights under the Fourteenth Amendment. The Supreme Court in *Graham v. Connor,* 490 U.S. 386, 393–94, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989) addressed the propriety of alleging excessive force claims under the Fourteenth Amendment, ruling that these claims should be brought under the Fourth or Eighth Amendments and not under general due process standards of the Fourteenth Amendment. An excessive force claim under the Fourteenth Amendment is not cognizable.

Therefore, the Court should grant summary judgment as to the excessive force claim under the Fourteenth Amendment, and dismiss the claim.

2. *Excessive Force under the Fourth Amendment*

***9** Plaintiff alleges that Syler used excessive force when Syler failed to stop Astor from biting Plaintiff. Defendants argue that Syler's use of Astor to locate and apprehend Plaintiff was reasonable. Although the parties do not specifically argue separate instances of excessive force, it appears that there are two series of events that give rise to potential excessive force claims. The first series of events started when Syler used Astor to locate Plaintiff and ended when Astor entered the room where Plaintiff was hiding. The second series of events began when Astor entered the room and ended when Astor stopped biting Plaintiff. The Court will examine both uses of force in determining Syler's liability.

a. Qualified Immunity

Defendants argue that Syler is entitled to qualified immunity because his use of Astor was reasonable given that Plaintiff was an escaped felon, had a propensity to carry knives, evaded arrest, and hid in a dark room after repeated orders to show himself. Defendants also argue that, even if Syler violated Plaintiff's rights, Syler was reasonably mistaken because the law was not clearly established. Plaintiff argues that Syler is not entitled to qualified immunity because Syler's use of Astor was unreasonable under Plaintiff's testimony. Plaintiff also argues that the law regarding use of force with police dogs was clearly established at the time of the incident.

Defendants in a Section 1983 action are entitled to qualified immunity from damages for civil liability if their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. *Pearson v. Callahan,* 555 U.S. 223, 129 S.Ct. 808, 815, 172 L.Ed.2d 565 (2009) (quoting *Harlow v. Fitzgerald,* 457 U.S. 800, 818, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982)). The existence of qualified immunity generally turns on the objective reasonableness of the actions, without regard to the knowledge or subjective intent of the particular official. *Id.* at 819.

In analyzing an assertion of qualified immunity, the Court must determine: (1) whether a constitutional right would have been violated on the facts alleged, taken in the light most favorable to the party asserting the injury; and (2) whether the right was clearly established when viewed in the specific context of the case. *Saucier v. Katz,* 533 U.S. 194, 121 S.Ct. 2151, 2156, 150 L.Ed.2d 272 (2001). While the sequence set forth in *Saucier* is often appropriate, it should no longer be regarded as mandatory. *Pearson,* 129 S.Ct. at 811.

i. Alleged Violation of Plaintiff's Fourth Amendment Right when Syler Used Astor to Locate Plaintiff

The first question is whether a constitutional right would have been violated on the facts alleged, taken in the light most favorable to plaintiff. *Saucier v. Katz,* 533 U.S. 194, 121 S.Ct. 2151, 2156, 150 L.Ed.2d 272 (2001). The use of force implicates the Fourth Amendment protections that guarantee citizens the right to be secure in their persons against unreasonable seizures of the person. *Tennessee v. Garner,* 471 U.S. 1, 105 S.Ct. 1694, 85 L.Ed.2d 1 (1985). The reasonableness of the force used to effect a particular seizure is determined by carefully balancing the nature and quality of the intrusion on the individual's Fourth Amendment

interests against the countervailing governmental interests at stake. *Graham v. Connor,* 490 U.S. 386, 396, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989). The force applied must be balanced against the need for that force. *Liston v. County of Riverside,* 120 F.3d 965, 976 (9th Cir.1997).

***10** In determining the reasonableness of officers' actions, the court (1) assesses the severity of the intrusion on the individual's Fourth Amendment rights by considering the type and amount of force inflicted; (2) analyzes the government's interests by considering the severity of the crime, whether the suspect posed an immediate threat to the officers' or public's safety, and whether the suspect was resisting arrest or attempting to escape; and (3) balances the gravity of the intrusion on the individual against the government's need for that intrusion. *Espinosa v. City and County of San Francisco,* 598 F.3d 528, 537 (9th Cir.2010). Other factors that may be considered are: whether the officers gave a warning to the injured party, and whether there were alternative methods of capturing or subduing a suspect. *Smith v. City of Hemet,* 394 F.3d 689, 701 (9th Cir.2005); *Deorle v. Rutherford,* 272 F.3d 1272, 1283–84 (9th Cir.2001). The totality of the circumstances of each case must be considered. *Fikes v. Cleghorn,* 47 F.3d 1011, 1014 (9th Cir.1995).

The reasonableness of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight. *Graham,* 490 U.S. at 396. In addition, "[t]he calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation." *Id.* at 396–97. The question is whether the officers' actions are objectively reasonable in light of the facts and circumstances confronting them. *Id.* at 397.

In the first series of events, ending once Astor entered the room, the parties do not dispute the material facts. Taking the facts in the light most favorable to the injured party, the severity of intrusion and amount of force inflicted during the first series of events was insubstantial, and the government had a strong interest in using Astor to locate Plaintiff because he was fleeing from arrest. The evidence submitted clearly shows that Syler acted reasonably when he used Astor to locate Plaintiff, and did not violate Plaintiff's Fourth Amendment right in doing so.

The Court need not address whether the law regarding the use of Astor to locate Plaintiff was clearly established, because, on the facts alleged, Syler did not violate Plaintiff's Fourth Amendment rights in the first series of events. Therefore, the Court should grant qualified immunity for Syler when he used Astor to locate Plaintiff, and dismiss this portion of the excessive force claim.

ii. Alleged Violation of Plaintiff's Fourth Amendment Right when Astor Bit Plaintiff

In the second series of events, beginning when Astor entered the room, the parties dispute the facts. If the facts are as Plaintiff contends in Plaintiff's testimony, and applying the *Espinosa v. City and County of San Francisco and Smith v. City of Hemet* factors, a reasonable fact finder could find that Syler's use of Astor to bite Plaintiff was excessive force.

***11** For these reasons, the Court should find, for purposes of this Order only, that Syler's use of Astor after Astor entered the room, based on Plaintiff's testimony, violated Plaintiff's Fourth Amendment right to be free of excessive force.

iii. Clearly Established law

"The relevant dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Saucier v. Katz,* 533 U.S. 194, 121 S.Ct. 2151, 2156, 150 L.Ed.2d 272 (2001). "This does not mean that any official action is protected by qualified immunity unless the very action in question has previously been held unlawful, but it does require that in the light of pre-existing law the unlawfulness must be apparent. [Therefore], when the defendant's conduct is so patently violative of the constitutional right that reasonable officials would know without guidance from the courts that the action was unconstitutional, closely analogous pre-existing case law is not required to show that the law is clearly established." *Mendoza v. Block,* 27 F.3d 1357, 1361 (9th Cir.1994) (internal citations and quotations omitted). The Ninth Circuit has analogized the use of police dogs to the use of other police weapons.

> The reasonableness of force is analyzed in light of such factors as the requirements for the officer's safety, the motivation for the arrest, and the extent of the injury inflicted. This analysis applies to any arrest

> situation where force is used, whether it involves physical restraint, use of a baton, use of a gun, or use of a dog. We do not believe that a more particularized expression of the law is necessary for law enforcement officials using police dogs to understand that under some circumstances the use of such a "weapon" might become unlawful. For example, no particularized case law is necessary for a deputy to know that excessive force has been used when a deputy sics a canine on a handcuffed arrestee who has fully surrendered and is completely under control. An officer is not entitled to qualified immunity on the grounds that the law is not clearly established every time a novel method is used to inflict injury.... We therefore hold that the deputies' use of the police dog is subject to excessive force analysis, and that this law is clearly established for purposes of determining whether the officers have qualified immunity.

Mendoza v. Block, 27 F.3d 1357, 1362 (9th Cir.1994).

In reference to the *Mendoza* rule, the court in *Watkins v. City of Oakland, Cal.,* 145 F.3d 1087, 1093 (9th Cir.1998) held that "it was clearly established that excessive duration of the [dog] bite and improper encouragement of a continuation of the attack by officers could constitute excessive force that would be a constitutional violation."

Here, although the parties do not address this specific argument, the use of a police dog to apprehend a suspect is not meaningfully indistinguishable from any other method used to apprehend a suspect, such as by physical force, a baton, pepper spray, or a taser. The law is clear in stating that officers are not to use weapons when suspects are consenting to arrest. *Davis v. City of Las Vegas,* 478 F.3d 1048, 1052 (9th Cir.2007).

***12** Even when suspects do not initially consent to arrest, the law is clear regarding excessive force. *See, e.g., Chew,* 27 F.3d at 1436, 1443 (holding that, under *Graham,* the fact that the defendant officer used "severe force" to arrest a suspect who did not pose an immediate threat to the safety of police officers was sufficient to preclude summary judgment for the officer, notwithstanding the fact that the suspect had attempted to flee and was the subject of three outstanding felony warrants).

Based upon Plaintiff's testimony, Syler's use of Astor after Astor entered the room could be considered so patently violative of the Fourth Amendment that reasonable officials would know that the action was unconstitutional. The law regarding use of police dogs and dog bites is clearly established.

b. Conclusion

At this point, Syler is not entitled to qualified immunity for his use of Astor after Astor entered the room. The Court should deny summary judgment on the Fourth Amendment claim to that extent. Because the Court construed the disputed facts in favor of Plaintiff, this Order should not preclude Defendants, as the factual record develops, from raising qualified immunity at trial.

3. *Negligence*

The state law negligence claims are against Syler, and, on the basis of *respondeat superior,* against the City. Based on Plaintiff's testimony, there are issues of material fact on duty, breach, and causation. The public duty doctrine gives no relief to Defendants because any duty breached was owed to Plaintiff, not to the general public. *Garnett v. City of Bellevue,* 59 Wash.App. 281, 796 P.2d 782 (1990).

The Court should deny summary judgment as to the state law negligence claim against Syler.

4. *Negligent Use of Excessive Force*

The negligent use of excessive force claim is not a separate claim, but is an issue within the general negligence claim. Therefore, the Court should not grant summary judgment as to the negligent use of excessive force claim against Syler, but will not treat this claim as a separate claim.

5. *Negligent Infliction of Emotional Distress*

Although Defendants state in this Motion that they request summary judgment on all claims, neither party specifically addresses the negligent infliction of emotional distress claim.

Generally, a "plaintiff may recover for negligent infliction of emotional distress if she proves negligence, that is, duty, breach of the standard of care, proximate cause, and damage, and proves the additional requirement of objective symptomatology." *Strong v. Terrell,* 147 Wash.App. 376, 387, 195 P.3d 977 (2008).

This claim, also, is not truly a separate claim, but is a statement of a type of damage Plaintiff claims he suffered. Therefore, the Court should not grant summary judgment as to the negligent infliction of emotional distress claim against Syler, but will not treat this claim as a separate claim.

6. *Intentional Infliction of Emotional Distress*

***13** This is a so-called "outrage" claim. "To establish a tort of outrage claim, a plaintiff must show (1) extreme and outrageous conduct, (2) intentional or reckless infliction of emotional distress, and (3) severe emotional distress on the part of the plaintiff." *Reid v. Pierce County,* 136 Wash.2d 195, 202, 961 P.2d 333 (1998). "Liability exists only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." *Grimsby v. Samson,* 85 Wash.2d 52, 59, 530 P.2d 291 (1975).

Here, even under Plaintiff's testimony, Syler's use of Astor does not meet the high threshold of conduct that is "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." Washington courts have dismissed claims of outrage on much more egregious conduct than that which is presented in this case. *See, e.g., Babcock v. State By & Through Dept. of Soc. & Health Services,* 112 Wash.2d 83, 90, 768 P.2d 481 (1989) *reconsidered on other grounds, Babcock v. State,* 116 Wash.2d 596, 809 P.2d 143 (1991).

For this reason, the Court should grant summary judgment as to the intentional infliction of emotional distress claim against Syler, and this claim should be dismissed.

7. *Assault and Battery*

Defendants argue that the assault and battery claim is a "red herring." Plaintiff does not address this claim.

"A battery is a harmful or offensive contact with a person, resulting from an act intended to cause the plaintiff or a third person to suffer such a contact, or apprehension that such a contact is imminent. An assault is any act of such a nature that causes apprehension of a battery." *McKinney v. City of Tukwila,* 103 Wash.App. 391, 408, 13 P.3d 631 (2000) (internal citations and quotations omitted). If a police officer's use of force was unreasonable, then that officer is not entitled to qualified immunity and is liable for assault and battery. *Brooks v. City of Seattle,* 599 F.3d 1018, 1031 (9th Cir.2010) *on reh'g en banc sub nom. Mattos v. Agarano,* 661 F.3d 433 (9th Cir.2011); *Staats v. Brown,* 139 Wash.2d 757, 780, 991 P.2d 615 (2000).

The Court should deny summary judgment as to the assault and battery claim against Syler.

8. *Strict Liability under RCW § 16.08.040*

Plaintiff argues in his complaint that Syler is strictly liable for his use of Astor, but in his Response Plaintiff does not address this claim. Defendants argue that RCW § 16.08.040 does not apply to Syler because the City, not Syler, is the owner of Astor.

RCW § 16.08.040 (subsequently amended) stated, at the time of the arrest and when the complaint was filed, that

> The owner of any dog which shall bite any person while such person is in or on a public place or lawfully in or on a private place including the property of the owner of such dog, shall be liable for such damages as may be suffered by the person bitten, regardless of the former viciousness of such dog or the owner's knowledge of such viciousness.

***14** Only the owner of a dog can be liable under RCW § 16.08.040. *See Saldana v. City of Lakewood,* 11–CV–06066 RBL, 2012 WL 2568182 (W.D.Wash. July 2, 2012). Because Syler does not own Astor, Syler cannot be liable under RCW § 16.08.040.

The Court should grant summary judgment as to the strict liability claim against Syler under RCW § 16.08.040, and this claim should be dismissed.

D. Claims against the City

1. *State Law Claims under Respondeat Superior*

Under a *respondeat superior* theory, Plaintiff claims that the City is liable for assault and battery, negligence, negligent use of excessive force, intentional infliction of emotional distress, and negligent infliction of emotional distress. Because Defendants have admitted that Syler was acting within the scope of his employment, the City's liability as to these claims rise and fall on Syler's liability as to these claims.

Accordingly, the Court should deny summary judgment as to the negligence, negligent use of excessive force, negligent infliction of emotional distress, and assault and battery claims against the City. The Court should grant summary judgment as to the intentional infliction of emotional distress claim against the City.

2. Strict Liability under RCW § 16.08.040

Plaintiff argues that the City is strictly liable for Syler's unlawful use of Astor. Defendants argue that Syler's use of Astor was reasonable and that Plaintiff provoked the use of Astor.

Washington federal district courts have ruled on the liability of municipalities, as owners of police dogs, under RCW § 16.08.040. If the officer's use of the dog is lawful, then the city is not liable. *Saldana,* 2012 WL 2568182, at *4. The Ninth Circuit in *Miller v. Clark County* has held that a police officer's use of a police dog is lawful if the officer's ordering the dog to bite was reasonable under the Fourth Amendment. 340 F.3d 959, 968 n. 14 (9th Cir.2003).

Further, RCW § 16.08.060 states that "[p]roof of provocation of the attack by the injured person shall be a complete defense to an action for damages." Here, Plaintiff, by fleeing and locking himself inside a room, provoked the use of Astor to find where Plaintiff was located. The facts, however, do not show that Plaintiff provoked the actual bite, given Plaintiff's testimony. There is no indication of provocation in these facts that would warrant a defense.

Therefore, the City's liability under RCW § 16.08.040 hinges on whether Syler's actions were reasonable under the Fourth Amendment. Accordingly, the Court should deny summary judgment as to the strict liability claim under RCW § 16.08.040 against the City.

Accordingly, it is hereby **ORDERED** that

Defendants' Motion to Strike the declaration of Plaintiff's expert witness Ernest Burwell as untimely disclosed (Dkt.26) is **DENIED,** but the declaration was not considered because it did not meet evidentiary standards.

Defendants' Motion for Summary Judgment (Dkt.20) is **GRANTED IN PART** and **DENIED IN PART.**

***15** The Motion for Summary Judgment is **GRANTED** as to (1) the Fourteenth Amendment excessive force claim against Syler; (2) the Fourth Amendment excessive force claim against Syler as to Syler's use of Astor to locate Plaintiff; (3) the intentional infliction of emotional distress claims against the City and Syler; and (4) the strict liability claim under RCW § 16.08.040 against Syler. These claims are dismissed with prejudice.

The Motion for Summary Judgment is **DENIED** as to (1) the Fourth Amendment excessive force claim against Syler as to Syler's use of Astor once Astor entered the room; (2) the negligence claims against the City and Syler; (3) the negligent use of excessive force claims against the City and Syler; (4) the negligent infliction of emotional distress claims against the City and Syler; (5) the assault and battery claims against the City and Syler; and (6) the strict liability claim under RCW § 16.08.040 against the City.

The Clerk is directed to send uncertified copies of this Order to all counsel of record and to any party appearing pro se at said party's last known address.

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Only the Westlaw citation is currently available.
United States District Court, W.D. Washington,
at Seattle.

Ginger PETERSON, Plaintiff,
v.
The CITY OF FEDERAL WAY, et al., Defendants.

No. C06-0036RSM. | July 18, 2007.

Attorneys and Law Firms

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Opinion

ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

RICARDO S. MARTINEZ, United States District Judge.

I. INTRODUCTION

***1** This matter comes before the Court on plaintiff's Motion for Partial Summary Judgment on the issue of strict liability, and defendants' Motion for Summary Judgment asking for dismissal of all of plaintiff's claims. (Dkts. # 19 and # 21). In her motion, plaintiff argues that defendant City of Federal Way ("Federal Way") is strictly liable as a matter of law for the damages suffered after a police dog mistakenly bit her. Defendants respond that the strict liability statute does not apply to defendant Federal Way because the statute is superceded by another statute which grants immunity to dog handlers who are using police dogs in the line of duty. On their own motion, defendants also argue that plaintiff's § 1983 claims fail as a matter of law because there was no seizure under the Fourth Amendment, plaintiff's Fourteenth Amendment claims of excessive force is misplaced, there is no evidence supporting a municipal liability claim against Federal Way, there is no evidence supporting plaintiff's state law claims, and, even if any of these claims were viable, defendant Officer John Clary is immune from liability for both the federal and state claims.

For the reasons set forth below, the Court agrees with plaintiff that defendant is subject to strict liability under Washington law, and GRANTS her motion for partial summary judgment. The Court also agrees with defendants that all of plaintiff's remaining claims should be dismissed, and GRANTS their motion for summary judgment.

II. DISCUSSION

A. Background

This action stems from an incident occurring in the very early morning hours of November 30, 2003, when plaintiff, who was pregnant at the time, was mistakenly bitten by a police dog. The events started when Federal Way K-9 Officer John Clary heard a fellow officer advise dispatch that he had seen a reckless driver northbound on Pacific Highway South. The suspect had collided with a police car and fled the scene. The registered owner of the vehicle had been identified as Rebecca L. Armas, and her physical description on the computer matched the description of the officer's hit and run suspect. In addition, the computer check revealed that Ms. Armas was operating with a suspended license and had two outstanding arrest warrants.

Officer Clary located Ms. Armas' abandoned car at the Greystone Apartments. Officer Clary, believing he saw someone flee from a nearby apartment, decided to use his K-9, Dex, to track the person. After searching the apartment and surrounding area, Dex temporarily lost the scent, but picked it up again in the Seatac Village parking lot. Dex performed what is known as a "back track," with Officer Clary following close behind. While Dex was following the scent, he encountered plaintiff about 25 feet away from what was subsequently discovered as Ms. Armas' hiding place. Plaintiff claims that Dex was off-lead during this encounter, while defendant asserts that Dex was on his 30-foot tracking lead. Officer Clary did not see plaintiff on his initial approach to the parking lot, as he had temporarily lost sight of Dex while he tracked between cars, and plaintiff was on the opposite side of a large truck between other vehicles.

***2** Plaintiff alleges that, when Dex encountered her, he bit her on the back of the leg and held her. Officer Clary believes that when plaintiff saw Dex come around the side of the truck, she screamed and jumped backward. That action was

perceived by Dex as "furtive" which caused him to lunge and "engage" her. Officer Clary agrees that plaintiff did not "provoke" Dex in any manner. Further, there is no dispute that Officer Clary did not command or encourage Dex to bite plaintiff. Indeed, when he saw that Dex was holding plaintiff, and recognized that plaintiff was not the suspect, he commanded Dex to release her, which Dex did. Officer Clary assert that Dex released his grip "immediately" upon Officer Clary's command. Plaintiff alleges that Officer Clary commanded Dex to release her three times, and, when Dex would not let go, Officer Clary had to physically remove Dex from her leg.

Plaintiff was examined by medical personal at the scene, but she was not transported by ambulance to the hospital because her injuries were assessed to be minor in nature. While plaintiff was being examined at the scene, officers learned that Ms. Armas was hiding on the second floor nearby. Police later transported plaintiff to St. Francis Hospital, where she was treated for minor injuries and released.

Plaintiff states that she submitted an administrative claim for damages with the City of Federal Way on December 21, 2004. She subsequently filed a Complaint in King County Superior Court. Defendants then removed the action to this Court. The instant motions for summary judgment followed.

B. Summary Judgment Standard

Summary judgment is proper where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c); *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 247, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). The Court must draw all reasonable inferences in favor of the non-moving party. *See F.D.I.C. v. O'Melveny & Meyers,* 969 F.2d 744, 747 (9th Cir.1992), *rev'd on other grounds,* 512 U.S. 79, 114 S.Ct. 2048, 129 L.Ed.2d 67 (1994). The moving party has the burden of demonstrating the absence of a genuine issue of material fact for trial. *See Anderson,* 477 U.S. at 257. Mere disagreement, or the bald assertion that a genuine issue of material fact exists, no longer precludes the use of summary judgment. *See California Architectural Bldg. Prods., Inc., v. Franciscan Ceramics, Inc.,* 818 F.2d 1466, 1468 (9th Cir.1987).

Genuine factual issues are those for which the evidence is such that "a reasonable jury could return a verdict for the non-moving party." *Anderson,* 477 U.S. at 248. Material facts are those which might affect the outcome of the suit under governing law. *See id.* In ruling on summary judgment, a court does not weigh evidence to determine the truth of the matter, but "only determine[s] whether there is a genuine issue for trial." *Crane v. Conoco, Inc.,* 41 F.3d 547, 549 (9th Cir.1994) (citing *O'Melveny & Meyers,* 969 F.2d at 747). Furthermore, conclusory or speculative testimony is insufficient to raise a genuine issue of fact to defeat summary judgment. *Anheuser-Busch, Inc. v. Natural Beverage Distributors,* 60 F.3d 337, 345 (9th Cir.1995). Similarly, hearsay evidence may not be considered in deciding whether material facts are at issue in summary judgment motions. *Anheuser-Busch, Inc. v. Natural Beverage Distribs.,* 69 F.3d 337, 345 (9th Cir.1995); *Blair Foods, Inc. v. Ranchers Cotton Oil,* 610 F.2d 665, 667 (9th Cir.1980).

C. Plaintiff's Motion for Summary Judgment-Strict Liability

***3** The Court first turns to plaintiff's motion for partial summary judgment. Plaintiff asks the Court to rule, as a matter of law, that defendants are subject to strict liability for the dog bite under RCW 16.08.040, which states:

> The owner of any dog which shall bite any person while such person is in or on a public place or lawfully in or on a private place including the property of the owner of such dog, shall be liable for such damages as may be suffered by the person bitten, regardless of the former viciousness of such dog or the owner's knowledge of such viciousness.

RCW 16.08.040. Defendants respond that this statute is superceded by another, and, in any event, plaintiff's claims are time barred by the public duty doctrine. The Court is not persuaded by defendants.

In previous cases involving police dogs, this Court has ruled that RCW 16.08.040 applies to police dogs. Indeed, in *Smith v. City of Auburn,* Case No C04-1829RSM, this Court followed two recent federal cases, one in this district and one in the Eastern District of Washington, which had previously concluded that the statute applies to police dogs. *Hapke v. City of Edmonds, et al.,* C05-0046TSZ; *Rogers v. City of Kennewick, et al.,* C04-5028EFS. In addition, this Court determined that had the legislature meant to except police

dogs from the reach of the statute, it could have done so. Furthermore, this Court is not persuaded that RCW 4.24.410 supersedes the statute. Indeed, there is no conflict between the two because plaintiff does not contend that Officer Clary owns Dex, and has not pursued a strict liability claim against him. Accordingly, the Court finds that the strict liability statute imposes liability on the City as the owner of Dex. [1]

Defendants' argument that plaintiff's claims are barred by the public duty doctrine is equally unpersuasive. The public duty doctrine applies to negligence claims. On the instant motion, plaintiff seeks a strict liability determination. Such determination does not depend on whether any duty of care existed between the City and plaintiff, or whether that duty was breached. [2] Accordingly, plaintiff's motion for partial summary judgment is granted. [3]

D. Defendants' Motion for Summary Judgment

The Court now turns to defendants' motion for summary judgment, which asks the Court to dismiss all of plaintiff's claims. Defendants argue that plaintiff's federal claims against Officer Clary must fail because there was no "seizure" of plaintiff, and her Fourteenth Amendment excessive force claim is misplaced. Defendants further argue that there is no evidence supporting a municipal liability claim against defendant Federal Way. With respect to plaintiff's state law claims, defendants also argue that those claims must be dismissed as there is no evidence supporting the claims. Finally, defendants argue that Officer Clary is immune from liability for both the state and federal alleged violations in any event. The Court addresses each argument in turn below.

1. Motion to Strike

*4 As a threshold matter, the Court addresses defendants' motion to strike. Defendants ask the Court to strike portions of the declaration of plaintiff's expert witness, D.P. Van Blaricom, submitted in support of her opposition to defendants' motion. Defendants argue that portions of the declaration impermissibly opine on ultimate issues of law. The Court agrees. Paragraphs 8(g), 9 and 10 contain legal conclusions as to the amount of force typically used and approved by the Federal Way Police Department, and the amount of force used on plaintiff. Such conclusions are not permitted. *Mukhtar v. Calif. State Univ., Hayward,* 299 F.3d 1053, 1065 n. 10 (9th Cir.2002). Accordingly, the Court will disregard these statement when considering plaintiff's arguments.

2. Unlawful Seizure

Defendants first argue that plaintiff's unreasonable seizure claim must fail because no seizure under the Fourth Amendment actually occurred in this case. The Court agrees. In *Brower v. County of Inyo,* 489 U.S. 593, 109 S.Ct. 1378, 103 L.Ed.2d 628 (1989), the United States Supreme Court explained that:

> violation of the Fourth Amendment requires an intentional acquisition of physical control. A seizure occurs even when an unintended person or thing is the object of the detention or taking, *but the detention or taking itself must be willful.* This is implicit in the word "seizure," which can hardly be applied to an unknowing act.

Brower, 489 U.S. at 596 (citations omitted) (emphasis added). The court continued:

> It is clear, in other words, that a Fourth Amendment seizure does not occur whenever there is a governmentally caused termination of an individual's freedom of movement (the innocent passerby), nor even whenever there is a governmentally caused and governmentally desired termination of an individual's freedom of movement (the fleeing felon), but only when there is a governmental termination of freedom of movement *through means intentionally applied.*

Id. at 596-97 (emphasis in original).

In the instant case, there is no question that Officer Clary did not intend to detain plaintiff or otherwise terminate her freedom of movement. He did not command or in any way direct Dex to engage plaintiff. Upon seeing that Dex had seized plaintiff, and recognizing that plaintiff was not the suspect, Officer Clary commanded Dex to release her. Further, Dex is not a government actor and could not possess the necessary intent. *Andrade v. City of Burlingame,* 847 F.Supp. 760, 764 (N.D.Cal.1994) (explaining that the relevant question is whether the officer intended to apprehend the plaintiff by using the dog, and finding no seizure when such intent was not present). Therefore, because Officer Clary did

not intend to seize plaintiff through the use of his police dog, there can be no Fourth Amendment violation, and summary judgment in favor of Officer Clary is appropriate.

3. Excessive Force

Defendants next argue that plaintiff's Fourteenth Amendment excessive force claim should be dismissed because such claim is not proper. Plaintiff responds that she has not brought a Fourteenth Amendment claim, but rather seeks to have her excessive force claim analyzed under the Fourth Amendment. While the parties ultimately appear to agree that a Fourth Amendment analysis is the proper one, the Court finds such analysis unnecessary because there was no seizure. *See Robinson v. Solano County,* 278 F.3d 1007, 1018 (9th Cir.2002) (rejecting excessive force claim because there was no seizure); *Adams v. City of Auburn Hills,* 336 F.3d 515, 519-20 (6th Cir.2003) (same). Accordingly, summary judgment in favor of Officer Clary on plaintiff's excessive force claim is appropriate.

4. Municipal Liability

***5** Defendants next ask the Court to dismiss plaintiff's municipal liability claim against defendant Federal Way. The Court agrees that such action is appropriate. In order to establish municipal liability for an alleged constitutional violation, there must be a constitutional violation to begin with. *Monell v. Dept. of Social Serv's of City of New York,* 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978). In this case, the Court has dismissed plaintiff's constitutional claims. Therefore, there is no basis upon which to hold Federal Way liable. Accordingly, summary judgment in favor of Federal Way on plaintiff's municipal liability claim is appropriate.

5. State Law Claims

Finally, the Court turns to plaintiff's state law claims. Plaintiff alleges several state law claims against Officer Clary, as well as a failure to train claim against Federal Way.

a. Claims Against Officer Clary

Plaintiff alleges three claims against Officer Clary: (1) negligent infliction of emotional distress, or, alternatively, intentional infliction of emotional distress/outrage; (2) false imprisonment; and (3) assault and battery. Defendants argue that Officer Clary is immune from suit on the basis that he is entitled to qualified immunity under state law, and he is entitled to complete immunity from suit pursuant to RCW 4.24.410. The Court agrees that Officer Clary is immune under RCW 4.24.410. That statute provides:

> Dog handler using dog in line of duty-Immunity
>
> (1) As used in this section:
>
> (a) "Police dog" means a dog used by a law enforcement agency specially trained for law enforcement work and under the control of a dog handler.
>
> ...
>
> (c) "Dog handler" means a law enforcement officer who has successfully completed training as prescribed by the Washington state criminal justice training commission in police dog handling, or in the case of an accelerant detection dog, the state fire marshal's designee or an employee of the fire department authorized by the fire chief to be the dog's handler.
>
> (2) Any dog handler who uses a police dog in the line of duty in good faith is immune from civil action for damages arising out of such use of the police dog or accelerant detection dog.

RCW 4.24.410.

There is no dispute that Officer Clary is a dog handler under the statute, who was using Dex in the line of duty. However, plaintiff argues that this statute does not protect Officer Clary because he was not acting in good faith. Specifically, plaintiff argues that Officer Clary did not act in good faith when he allowed Dex to search for a suspect off lead in a public area where he knew contact with the public was likely. Plaintiff further argues that Officer Clary was not acting in good faith when he failed to announce that he was using a police dog. The Court is not persuaded.

Plaintiff has failed to produced evidence that Officer Clary was not acting in good faith. Even accepting plaintiff's assertion that Dex was off-lead and that Officer Clary, admittedly, did not announce that he was using a police dog, there is no apparent violation of Federal Way Police Department guidelines for the Canine ("K-9") Unit. *(See* Dkt. # 26, Ex. 2). With respect to on-lead requirements, the guidelines state:

> ***6** When the apprehension includes a search, the K-9 handler will consider

> the nature of the crime and likelihood of unintended or incidental contact with by-standers when deciding whether to conduct the search *on or off lead.* An announcement will be made whenever there is a likelihood that the suspect being sought is hiding. *An announcement need not be given in circumstances where doing so would endanger the safety of the K-9 Team.*

(Dkt. # 26, Ex. 2 at ¶ D. 1. a. i.) (emphasis added). In this case, Officer Clary testified that being on a dog track is one of the most dangerous times in police work because they do not know where the suspect is, and the suspect has the opportunity to choose where to hide or set up an ambush. (Dkt. # 26, Ex. 1 at 46). He further testified that there are times when it is not appropriate to warn about use of a police dog, such as when a suspect is hiding and the officer has no visual of the suspect, such as the instant case. (Dkt. # 26, Ex. 1 at 46-47). Plaintiff does not rebut that testimony. Nor has plaintiff offered any evidence that conducting the late night search off lead would have been unreasonable at the time. Accordingly, the Court finds that Officer Clary is protected from liability under RCW 4.24.410.

However, even if Officer Clary's actions were not considered reasonable, there are other reasons to dismiss plaintiff's state law claims against him. To prevail on a claim for intentional infliction of emotional distress, or outrage, under Washington law, a plaintiff must prove: (1) extreme and outrageous conduct, (2) intentional or reckless infliction of emotional distress, and (3) actual result to plaintiff of severe emotional distress. *Reid v. Pierce County,* 136 Wash.2d 195, 202, 961 P.2d 333 (1998); *Grimsby v. Samson,* 85 Wash.2d 52, 59-60, 530 P.2d 291 (1975). In *Grimsby,* the Washington Supreme Court explained that a claim for intentional infliction of emotional distress must be predicated on behavior " '*so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.*' " 85 Wash.2d at 59, 530 P.2d 291 (quoting *Restatement (Second) of Torts* § 46 cmt. d) (emphasis in original). Conduct must be that " 'which the recitation of the facts to an average member of the community would arouse his resentment against the actor and lead him to exclaim "Outrageous!" ' " *Reid,* 136 Wash.2d at 201-02, 961 P.2d 333 (quoting *Browning v. Slenderella Sys. of Seattle,* 54 Wash.2d 440, 448, 341 P.2d 859 (1959)). The question of whether conduct is sufficiently outrageous is generally a question for the jury; *see Seaman v. Karr,* 114 Wash.App. 665, 684, 59 P.3d 701 (2002); however, this Court first determines if reasonable minds could differ on whether the conduct is sufficiently extreme and outrageous to warrant such factual determination. *Pettis v. State,* 98 Wash.App. 553, 563-64, 990 P.2d 453 (1999). In this case, the Court finds that it does not.

***7** In support of her claim, plaintiff relies on conclusory allegations rather than evidence. She argues that "allowing a police dog to attack a pregnant and innocent passerby is extreme and outrageous." (Dkt. # 25 at 13). The Court notes that there is nothing in the record indicating that Officer Clary "allowed" Dex to bite plaintiff. Indeed, it is undisputed that he did not command Dex to engage plaintiff in any manner, and that he immediately directed Dex to release plaintiff when he saw that Dex had mistakenly engaged her. Further, there is no dispute that Officer Clary had probable cause to pursue a fleeing suspect with his police dog, and that he felt a sense of danger in the late-night pursuit. In addition, this Court has already determined that none of plaintiff's constitutional rights have been violated. Accordingly, the Court finds that the conduct alleged by plaintiff to be outrageous cannot be regarded as atrocious and utterly intolerable in a civilized community, and reasonable minds could not find that Officer Clary's actions constituted extreme or outrageous conduct.

Likewise, the Court finds that plaintiff's false imprisonment claim must fail. "Unlawful imprisonment is the intentional confinement of another's person, unjustified under the circumstances ." *Kellogg v. State,* 94 Wash.2d 851, 856, 621 P.2d 133 (1980). As discussed above, Officer Clary did not intend to detain or "imprison" plaintiff, nor can Dex form the requisite intent.

Further, like false imprisonment, assault and battery are intentional torts. For the same reasons as discussed above, Officer Clary did not have the intent to inflict bodily harm on plaintiff, nor can Dex form the requisite intent.

Finally, plaintiff alleges in her complaint that defendants' actions constitute negligent infliction of emotional distress. While defendants have failed to raise any specific arguments with respect to that claim, choosing only to address the alternative claim for intentional infliction of emotional distress, the Court has already determined that Officer Clary is immune from liability on all state law claims against him under RCW 4.24.410. Accordingly, that claim is also properly dismissed.

b. Claim Against Federal Way

Plaintiff alleges that defendant Federal Way failed to properly train and supervise Officer Clary, and by doing so, proximately caused her harm. To establish a *prima facie* case of negligence, plaintiff must show a duty, breach of that duty, proximate causation and resulting injury. *Hoffer v. State,* 110 Wash.2d 415, 421, 755 P.2d 781, (1988), *aff'd on rehearing,* 113 Wash.2d 148, 776 P.2d 963 (1989); *Gurno v. Laconner,* 65 Wash.App. 218, 228-29, 828 P.2d 49 (1992). In this case, plaintiff fails to present any persuasive evidence as to the standard of care for training police officers, a breach of that standard, or that such a breach proximately caused Dex to bite her. While plaintiff's expert witness opines that the Federal Way Police Department's "bite and hold" policy is unreasonable, that opinion rests primarily on the IACP National Law Enforcement Center's Model Policy for Law Enforcement Canines. (Dkt.# 27, Ex. B). That model policy, by its own language, is a mere guideline, and is not a controlling legal or law enforcement standard. Plaintiff provides no evidence of any controlling standard of care, or that Federal Way Police Department's training or supervision of Officer Clary contravened that standard of care. Further, plaintiff has not articulated what duty defendants owed to her, or how that was breached. Accordingly, the Court finds that summary judgment in favor of defendants on plaintiff's failure to train claim is appropriate.

6. Punitive Damages

***8** Plaintiff has asked for punitive damages against defendants; however, such damages are not allowed under Washington law. *Steele v. Johnson,* 76 Wash.2d 750, 753, 458 P.2d 889 (1969). The only remaining determination in this case-a calculation of damages under Washington's strict liability/dog bite statute-results from judgment in favor of plaintiff on a state law claim. As a result, punitive damages are not available to plaintiff.

7. Pre-Judgment Interest

Plaintiff has also requested relief in the form of pre-judgment interest on all special damages. Municipalities in Washington are immune from pre-judgment interest. *Sintra, Inc. V. City of Seattle,* 131 Wash.2d 640, 657, 935 P.2d 555 (1997); *Fosbre v. State,* 76 Wash.2d 255, 456 P.2d 335 (1969). Plaintiff has provided no argument to the contrary. Accordingly, as Federal Way is the only party left with a claim against it, pre-judgment interest is not available to plaintiff.

V. CONCLUSION

The Court, having reviewed the parties' motions for summary judgment, the responses thereto, the declarations and exhibits in support of those motions, and the remainder of the record, hereby ORDERS:

(1) Plaintiff's Motion for Partial Summary Judgment (Dkt.# 19) is GRANTED. Defendant City of Federal Way is strictly liable under RCW 16.08.040 for the damages caused when plaintiff was mistakenly bitten by Dex.

(2) Defendants' Motion for Summary Judgment (Dkt.# 21) is GRANTED for the reasons set forth above. With the exception of her strict liability claim, all of plaintiff's claims are DISMISSED against defendants, and defendants John Clary and Jane Doe Clary are DISMISSED as defendants to this action.

(3) This case is NOT CLOSED. The amount of damages available to plaintiff under RCW 16.08.040 remains the sole issue to be determined at trial.

(4) The Clerk shall forward a copy of this Order to all counsel of record.

Footnotes

1 Defendants attempt to convince the Court that defendant Federal Way is not the owner of Dex. However, the record makes clear that it is. Defendants admit that the city purchased the dog. Officer Clary also testified at deposition that the city owns the dog. Further, the city pays for dog food, all medical expenses, equipment and veterinarian expenses. Officer Clary is paid a three percent "on-call incentive" for keeping and handling the dog. (Dkt.# 20).

2 Although plaintiff phrases her request for relief as seeking a determination that "defendants' actions were negligent and the sole proximate cause of the plaintiff's injuries," it is clear from the motion and supporting argument that she really seeks a strict liability determination, and the Court limits its decision to such determination.

3 To the extent that defendants seek summary judgment that defendant Federal Way is not strictly liable under the statute, the Court denies that relief for the same reasons.

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2007 WL 2055038
Only the Westlaw citation is currently available.
United States District Court,
E.D. Washington.

Ken and Mary Lou ROGERS, Plaintiffs,
v.
CITY OF KENNEWICK, a municipal corporation; Benton County, Washington, a political subdivision in the State of Washington; Richard and Jane Doe Dopke, husband and wife, individually and as a marital community; Ryan and Jane Doe Bonnalie, husband and wife, individually and as a marital community; Brad and Jane Doe Kohn, husband and wife, individually and as a marital community; Jeff and Jane Doe Quackenbush, husband and wife, individually and as a marital community, Defendants.

No. CV-04-5028-EFS. | July 13, 2007.

Attorneys and Law Firms

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Opinion

ORDER DENYING DEFENDANTS' MOTIONS FOR NEW TRIAL

EDWARD F. SHEA, United States District Judge.

***1** Before the Court, without oral argument, are the Defendants' Motions for New Trial (Ct. Recs. 291 & 294), asking the Court to set aside the jury verdict and order a new trial on the grounds that the Verdict (Ct.Rec.259) is inconsistent and contrary to the clear weight of the evidence. Plaintiffs oppose the motion. After reviewing the submitted materials and relevant authority, the Court is fully informed. As is explained below, the Court **denies** Defendants' motions.

A. Background and Procedural History

In the early morning hours of a midsummer's night, Ken Rogers, a working man innocent of any wrongdoing, was lawfully sleeping in the back yard of his stepson's home when out of the darkness and without warning, a large, vicious dog attacked him. Mr. Rogers was then beaten by unknown assailants with knees, fists, and flashlight while the dog continued to bite him. The dog was a Kennewick Police Department "bite-and-hold" K-9; the assailants were law enforcement officers of the City of Kennewick and a Benton County deputy sheriff.

This misfortune was the conclusion of a chain of events that began at about 1:00 a.m. on July 13, 2003, when Sergeant Dopke of the Kennewick Police Department activated his overhead lights and followed a man riding a miniature motor scooter without a helmet or lights for a very short distance and time to a residence where the motorist entered the garage of a home in a residential neighborhood. The garage door was shut behind him by a female resident of that home. The residents of the home described the motorist as a person named "Troy", last name unknown, who happened to be walking by the house late that night, saw them outside, asked if he could take the scooter for a ride and was permitted to. One of the women explained that she closed the garage door because "Troy" asked her to. The two male residents denied being "Troy;" "Troy" was said to have run through the house and out the back door into the yard and then over the back fence. Though Sgt. Dopke repeatedly told the residents that he was only interested in issuing the man a traffic citation and leaving, the residents persisted in this story. He then called out a bite-and-hold K-9 that could only detect scent by air sniffing, not sniffing an object such as the miniature motor scooter or the floor of the house or the grass of the backyard. When the K-9 reacted to the area of the backyard adjacent to the yard where Mr. Rogers was then sleeping oblivious to these events, Officer Kohn, the K-9 officer, and two other law enforcement officers were directed by Sgt. Dopke to search for and apprehend "Troy", the traffic violator. It was in following that order that Officer Kohn later unleashed the K-9 when reacting to scent in the driveway of the backyard of the house where Mr. Rogers was lawfully sleeping with the permission of the owner, his stepson. The above-described encounter followed. Much later, "Troy" was determined to have been one of the male residents of that house.

***2** As a result of this encounter, Mr. Rogers filed suit against the officers involved, the City of Kennewick, and

Benton County. Mr. Rogers asserted constitutional violations under 42 U.S.C. § 1983 and state law claims of battery, false arrest, and false imprisonment. After hearing the evidence, the jury was read and given a set of instructions, followed by closing arguments. The closing arguments are indicative of the way the case was tried and defended, which was that this was primarily a federal constitutional lawsuit. Mr. Rettig, co-counsel for Plaintiffs, devoted the vast majority of his one-hour closing argument to the claims of constitutional violations with less than one minute in which the three state law tort claims were mentioned in passing. In his rebuttal, Mr. Rettig did not mention the three state law claims but rather devoted a good deal of his time to the issue of intentional conduct, an element of the constitutional claims, and to the use of excessive force as well as damages.

Mr. Moberg, counsel for all Defendants other than Sgt. Dopke, began his closing argument by stating that the Defendants did not violate the constitutional rights of Mr. Rogers. In his hour-long closing argument, Mr. Moberg mentioned the three state law claims only in passing, devoting no more than a couple of minutes to them, with the balance of his time focused on the constitutional claims and damages. Likewise, Mr. McFarland, counsel for Sgt. Dopke, addressed the jury in his closing by immediately focusing on the devastating effect that the allegation that he violated the constitutional rights of Mr. Rogers had on Sgt. Dopke. Mr. McFarland then spent the vast majority of his fifty-two minute closing arguing that Plaintiffs failed to prove constitutional violations.

After deliberating for approximately eleven hours, the jury returned a verdict in favor of Plaintiffs against Defendants on the 42 U.S.C. § 1983 cause of action claiming unreasonable seizure. (Ct .Rec.259.) In all other respects, the verdict was for Defendants, *i.e.* the jury found in favor of Defendants on the 42 U.S.C. § 1983 unlawful search and deprivation of medical treatment causes of action and state law causes of action for battery, false imprisonment, and false arrest. *Id.* The jury awarded economic and non-economic damages in Plaintiffs' favor, as well as awarded punitive damages against Defendants Dopke and Kohn. *Id.*

B. Whether Defendants Waived Ability to Challenge Defects in Verdict

Plaintiffs contend the Defendants waived any objections as to defects in the verdict form that were not raised before the jury retired for deliberations. The Court concludes the Defendants did not waive their current objections that were not previously raised, as such objections of Defendants pertain to the substance of the jury's answers in the Verdict, rather than to the form of the Verdict form itself. *See Los Angeles Nut House v. Holiday Hardware Corp.,* 825 F.2d 1351, 1354-56 (9th Cir.1987).

C. Whether the Verdict is Inconsistent or the Result of Passion or Prejudice

***3** Defendants contend the jury's finding that the officers unreasonably seized Mr. Rogers in violation of the Fourth Amendment cannot be reconciled with the findings that the officers did not falsely arrest Mr. Rogers and/or did not commit battery. Defendants also maintain the award of punitive damages is inconsistent with the defense verdict on the state law clams. Defendants argue these inconsistencies are the result of the jurors' passion and prejudice against police canines and that Defendants were not able to fully support their motions for new trial because the Court denied their requests to interview the jurors.

Federal Rule of Civil Procedure 59(a) provides:

> A new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States;....

See also FED.R.CIV.P. 60(b). A new civil trial is required if a verdict is inconsistent, the result of passion or prejudice, or contrary to the clear weight of the evidence. *Will v. Comprehensive Accounting Corp.,* 776 F.2d 665, 677 (7th Cir.1985). "When faced with a claim that verdicts are inconsistent, the court must search for a reasonable way to read the verdicts as expressing a coherent view of the case, and must exhaust this effort before it is free to disregard the jury's verdict and remand the case for a new trial." *Toner v. Lederle Labs, a Div. of Am. Cyanamid Co.,* 828 F.2d 510, 512 (9th Cir.1987); *Duk v. MGM Grand Hotel, Inc.,* 320 F.3d 1052, 1058 (9th Cir.2003); *Tanno v. S.S. President Madison Ves.,* 830 F.2d 991, 992 (9th Cir.1987); *Gallick v. Baltimore & Ohio R.R. Co.,* 372 U.S. 108, 199 (1963); *Stephenson v. Doe,* 332 F.3d 68, 79 (2d Cir.2003). "The consistency of the jury verdicts must be considered in light of the judge's instructions to the jury." *Toner,* 828 F.2d at 512.

First, the Court abides by its decision to deny Defendants' motion to interview the jurors and finds this denial did not prejudice Defendants' ability to support their well-reasoned motions for new trial. *See Domeracki v. Humble Oil & Refining Co.,* 443 F.2d 1245, 1247-48 (3rd Cir.1971); *Smith v. Cupp,* 457 F.2d 1098, 1100 (9th Cir.1972). Second, notwithstanding any issue as to the consistency of the verdict, the Court concludes the jury was not acting out of passion or prejudice. The questioning during voir dire did not evince any prejudicial thoughts or emotions regarding the use of police canines; further, sheer speculation that a juror may have subjective thoughts and emotions that influenced the juror's deliberations is not a basis to set aside the verdict. *See Morgan v. Woessner,* 997 F.2d 1244, 1261-62 (9th Cir.1993).

Moreover, the answers to the special interrogatories in the jury verdict demonstrate the absence of passion or prejudice. The jury found for Defendants on six of the seven claims, distinguished one constitutional claim from the others as well as from the state tort claims, awarded the modest amount of $25,000 to Mrs. Rogers for her consortium claim, awarded punitive damages against Sgt. Dopke in an amount four times greater than the award against K-9 Officer Kohn and none against the other two law enforcement Defendants, and segregated the compensatory damage awards with $500,000.00 of the $600,000.00 non-economic damage award and $100,000 of the $150,000 future economic damage award to injuries inflicted by the K-9. *See United States v. Aramony,* 88 F.3d 1369, 1378-79 (4th Cir.1996) In addition, the award for past economic damages was less than requested by Plaintiffs, and the entire verdict was approximately 25 percent of the amount requested by Plaintiffs in closing arguments. In fact, counsel for the Defendants told the jury to award damages against the City of Kennewick on the directed liability claim, with one counsel saying during closing argument that the jury should award every penny Mr. Rogers had coming to him for that liability.

***4** When analyzed as a whole, this jury verdict is an internally consistent and logical result, just the opposite of a verdict produced by passion, prejudice, or extra-judicial factors. It is consistent with the way that all counsel emphasized the constitutional claims in closing argument, an understandable approach because both punitive damages and attorney fees could be awarded for a constitutional violation but not for the state tort claims. In short, a verdict for Plaintiffs on one or more of the constitutional claims had greater economic risk for Defendants and greater recovery for Plaintiffs. Furthermore, the jurors read the instructions so closely that they asked the Court a question regarding the Instruction No. 33, the false imprisonment instruction, (Ct.Rec.255), generating substitution instructions (Ct.Rec.257).

With this backdrop, the Court turns to the specific wording of the jury instructions and verdict form to determine whether the jury's decisions were consistent. Instruction No. 24, which defined the Fourth Amendment constitutional violation of unreasonable seizure, permitted the jury to find the seizure was unreasonable if the Plaintiffs proved by a preponderance of the evidence either that the seizure was without probable cause or that excessive force was used whether or not there was probable cause. Special Verdict Question No. 2 did not ask the jury to specify whether the seizure was unreasonable because (1) the officers lacked probable cause or (2) because excessive force was used in effectuating the seizure. Presumably the jury determined the officers used excessive force. As noted above, the "trial court has a duty to attempt to harmonize seemingly inconsistent answers to special verdict interrogatories, 'if it is possible under a fair reading of them.' " *Duk,* 320 F.3d at 1058 (quoting *Gallick v. Baltimore & Ohio R.R. Co.,* 372 U.S. 108, 199 (1963)). Under this standard, the Court finds the verdict consistent.

In connection with the false arrest claim, even if the jury determined the officers lacked probable cause to believe that Mr. Rogers committed a crime, the jury could have found that "Mr. Rogers' injury, damage, loss, or harm was [not] caused by the *arrest.*" (Ct. Rec. 257: Substituted Jury Instr. No. 33 Elem. No. 4) (emphasis added). Rather, the jury reasonably could have determined Mr. Rogers' injury, damage, loss, or harm was caused by the seizure. This would harmonize the § 1983 unreasonable seizure and false arrest verdicts, which Defendants criticize as inconsistent.

The Court also finds an excessive force finding, presumably the basis of the jury's 42 U.S.C. § 1983 unreasonable seizure verdict, can be reconciled with the jury's state battery verdict in favor of Defendants. Instruction 25 defined excessive force by including seven items for the jury to consider: (1) the severity of the crime or other circumstances to which the officer were responding; (2) whether Mr. Rogers posed an immediate threat to the safety of the officers or to others; (3) whether Mr. Rogers was actively resisting arrest or attempting to evade arrest by flight; (4) the amount of time and any changing circumstances during which the officer had to determine the type and amount of force that appeared to be necessary; (5) the type and amount of force used; (6)

the availability of alternative methods to subdue Mr. Rogers and to take him into custody, and (7) the Kennewick Police Department's guidelines and policies. It is highly likely in the opinion of this Court that the jury found the conduct attributed to "Troy" was a traffic violation, or at worst, a non-violent misdemeanor; that Mr. Rogers (or "Troy") posed no threat to anyone; that at the time he was attacked by the K-9, Mr. Rogers was not attempting to evade arrest by flight or resisting arrest; that all of the Defendant law enforcement officers had more than adequate time to determine if it was necessary to use a bite-and-hold K-9 in the totality of these circumstances; that the type of force used by reference to the KPD guidelines was Impact Weapon, and that there were obvious and far less harmful methods to arrest Mr. Rogers than using a bite-and-hold K-9 to seize him. They likely concluded that Officer Kohn should have issued a loud verbal warning before unleashing the K-9 obviously strongly reacting to a scent in the driveway immediately outside the backyard fence and that he was required to do so by the KPD regulations; and had that been done, it was unlikely that the K-9 would have been released or that it would have been necessary for them to break down the fence and pummel Mr. Rogers with knees, fists, and flashlight while continuing to permit the K-9 to bite him. And there was evidence that Officer Kohn intentionally released the dog, saw him go though a hole and did not recall the K-9 or issue a loud verbal warning before doing so. This evidence supports an excessive force finding.

***5** Instruction No. 25 had what Instruction No. 30, battery, lacked: seven factors for use by the jury to determine if the force used was excessive. Defendants did not object to the absence of those factors in Instruction No. 30. In fact, neither the Defendants' proposed instruction nor the joint proposed instruction for battery contained any suggested factors for the jury to consider in determining the force used was reasonable. While both use the term "objectively reasonable" with regard to force, Instruction No. 25 gave the jury criteria which Instruction No. 30 did not.

In addition to the objectively reasonable determination, the excessive force claim required the jury to find "in seizing Mr. Rogers' person, that Defendant law enforcement officer acted intentionally." *Id.* at No. 23 Elem. 2. Instruction No. 23 defined "seizes" as when a defendant willfully "restrains the person's liberty by physical force or a show of authority." The instruction also stated "[a] person acts 'intentionally' when the person acts with a conscious objective to engage in particular conduct." These requirements are different from what the jury was asked to find under battery. Instruction No. 30 required the jury to find "intent by that Defendant law enforcement officer to bring about the unpermitted harmful or offensive contact." Thus, even though both the causes of action have an "intent" factor, the intent factors relate to different "intents." For instance, the jury sensibly could have determined the officers did not *intend* to "harm" or "offend" Mr. Rogers with the physical force that they intentionally utilized to seize him, *i.e.* the officers intended to use the force applied but did not intend the attendant harm.

Further, Instruction No. 30 stated that a law enforcement officer could be liable by using an instrumentality to *indirectly* cause harmful or offensive contact with Mr. Rogers. No one objected to the use of that adverb and it may have been that "directly" was the correct term, the absence of which permitted the jury to give Defendants a verdict on the battery claim because the instrumentality, the K-9, *directly* caused harm. In addition, Instruction No. 30 on battery focused on "an act" while Instructions Nos. 23, 24, and especially 25 included standards which enabled the jury to do a comprehensive analysis on whether the seizure was unreasonable because excessive force was used and therefore a violation of Mr. Rogers' constitutional rights. A comparison of these instructions on the two claims demonstrates sufficient differences to allow a conclusion that the verdicts are consistent.

Accordingly, the Court finds, after an examination of the instructions and evidence on the claim of unconstitutional seizure, the jury's verdict is supported and is not inconsistent with the verdict on battery. The Court finds the jury instructions appropriately set forth the legal standards for both the 42 U.S.C. § 1983 seizure and state battery causes of action. [1] It was the jury's role to determine whether facts were presented to support the legal standards. As outlined before, all counsel dwelled on the constitutional claims in closing argument, barely mentioning the state tort law claims which were practically treated throughout as tagalongs to the constitutional claims with their higher risk and reward.

***6** The jury's unconstitutional seizure decision can also be reconciled with the jury's constitutional search decision. The constitutional search claim required that Plaintiffs prove by a preponderance of evidence that the law enforcement Defendants intended to search this residence, and Instruction No. 19 so provided. A finding in favor of Defendants on this claim does not lead to the single conclusion that the police acted reasonably in conducting a search of this

residence. It was only after the K-9 attacked Mr. Rogers in the backyard that the officers broke down the fence and went into the backyard. Until that point, there was no evidence that they were searching anything but the property outside the curtilege; hence, the jury could have believed that they were not acting unreasonably at that point and that their intrusion into the backyard was not a "search" as much as a reaction to the noisy attack of the K-9 on an unsuspecting innocent victim. The search verdict is therefore consistent with the verdict on the seizure claim.

The Court also finds a jury decision that the individual Defendants acted with reckless disregard to Mr. Rogers' constitutional right to be free from unreasonable seizure consistent with the other verdict findings. The jury's award of a specific amount of punitive damages against Sgt. Dopke and Officer Kohn and not Mr. Bonnalie and Deputy Quackenbush is also not inconsistent, nor reflective of a passion or prejudice against police canines. While Officer Kohn argued that he was not required to announce release of the K-9 in these circumstances, the jury was entitled to disbelieve his story that the K-9 became entangled and release was a necessary response or that, even if release was necessary, the K-9 should have been ordered to stay at that spot-which Officer Kohn failed to do. As to Sgt. Dopke, the jury held him responsible as a supervisor who set in motion a series of acts by others that he knew or reasonably should have known would cause a deprivation of Mr. Rogers' constitutional right to be free from unreasonable seizure. Sgt. Dopke made the decision in these circumstances to direct the officers to use a bite-and-hold K-9 to search for and apprehend the suspect in a residential neighborhood. The jury held him accountable for the unconstitutional seizure of Mr. Rogers and damages caused. The jury was free to assess credibility and the different roles and responsibilities that each of these individuals had in the events. The Court finds the juror's punitive damages findings are supported by the record.

D. Whether the Verdict was Contrary to the Law

1. *Instruction No. 18*

Kennewick Defendants argue Instruction No. 18, specifying, "Deke is an instrumentality used by law enforcement," was clearly erroneous, prejudicing Defendants and confusing the jury. An erroneous jury instruction is a basis for a new trial. *Murphy v. City of Long Beach,* 914 F.2d 183, 187 (9th Cir.1990). Kennewick Defendants rely upon *Andrade v. City of Burlingame,* 847 F.Supp. 760, 764 (N.D.Cal.1994), to support their position.

*7 The Court finds *Andrade* actually supports the giving of Instruction No. 18 in this case. In *Andrade,* the police officer never gave the canine an order to search, track, or apprehend. In fact, the police officer did not get the canine out of the vehicle; rather the officer had simply partially opened the car window to give the canine fresh air. Apparently, the canine was able to "sneak" out of the vehicle and then bit the victim before the officer became aware of the canine's actions. Once the officer became aware of the canine's actions, the officer called the canine off. It was undisputed that the officer "did not intend to use his police dog to subdue the plaintiffs." *Id.* It was under this factual context, the Ninth Circuit stated:

> [t]he dog is not a defendant in this suit nor could it be. Nor is the dog a government actor. At other times in their papers, plaintiffs make a more appropriate analogy: that the dog was essentially one "weapon" in Officer Harman's arsenal. Because Officer Harman did not intend to seize plaintiffs by this means, however, there can be no fourth amendment violation. The key question is whether *Officer Harman* intended to seize plaintiffs by means of the dog and the answer is indisputably "no."

Id. at 764 (emphasis in original). Following this discussion, the Ninth Circuit used the particular term "instrumentality," stating, "Officer Harman never meant to use this particular 'instrumentality' in any way to effect the seizure. The dog simply escaped from the patrol car after Officer Harman had already seized the plaintiffs." *Id.* at 765.

The Court finds under the facts presented to the jury in this case that it was necessary to give Instruction No. 18. There was testimony that, at the time the K-9 bit Mr. Rogers, he was under a command by Officer Kohn to track and apprehend the "scented" suspect. The K-9 was not a defendant and could not be. Accordingly, the jury needed to be instructed as to which Defendant the K-9's conduct was to be attributed given that the K-9 had been "scented" and was under a command to track and apprehend. The Court finds Instruction No. 18 does such without prejudicing Defendant Kohn or the other Defendants.

2. *Strict Liability under RCW 16.08.040*

Kennewick Defendants also argue the Court erroneously directed a verdict of strict liability under the Washington dog bite statute, RCW 16.08.040, and that this ruling prejudiced Defendants as is evidenced by the excessiveness of the jury's verdict. The Court stands by its previous decision to apply RCW 16.08.040 to a police canine which bit an innocent person who was lawfully on private property. Instruction No. 35 and the form of the verdict were appropriate under these circumstances. In addition, given the evidence before the jury, the verdict was not excessive. Moreover, both Mr. Moberg and Mr. McFarland urged the jury to award the Rogers' damages for the injuries caused by the K-9 against the City whose liability the Court had directed, essentially saying to give Mr. Rogers every penny that he was entitled to.

E. Whether Plaintiffs' counsel's actions require a new trial

***8** Kennewick Defendants maintain a new trial is necessary because Plaintiffs intentionally introduced evidence that Ken Rogers turned down two promotions because of his injuries; evidence which was not previously disclosed, violating the Court's pretrial ruling excluding at trial the admission of any previously undisclosed evidence. Kennewick Defendants contend without this evidence the jury would not have awarded $100,000 more in future economic damages than Plaintiff requested.

Kennewick Defendants did not identify for the Court the portions of the transcript at which the lost promotion evidence was introduced, and also conceded that the Court gave a curative instruction. Given the record, the Court does not find the misconduct " 'sufficiently permeate[d][the] entire proceeding to provide conviction that the jury was influenced by passion and prejudice in reaching its verdict." *Doe ex rel. Rudy-Glanzer v. Glanzer,* 232 F.3d 1258, 1270-71 (9th Cir.2000) (quoting *McKinley v. City of Eloy,* 705 F.2d 1110, 1117 (9th Cir.1983) (in turn quoting *Standard Oil Co. v. Perkins,* 347 F.2d 379, 388 (9th Cir.1965) (internal quotation marks omitted)).

Defendants argue that Plaintiffs only asked for $41,400 in future economic damage. However, Plaintiffs' counsel simply offered an approach to quantifying future economic damage by pointing out that if Mr. Rogers had only a single monthly trip to the chiropractor during his life expectancy, it would total $41,400. That was not a demand for a specific amount but rather a way of quantifying future economic damage based on the testimony about that issue by various witnesses during trial.

Accordingly, the economic damages award will not be modified due to Plaintiffs' counsel's violation of the Court's pretrial order. However, the damages award must still be supported by the evidence. *See Glovatorium, Inc. v. NCR Corp.,* 684 F.2d 658, 664 (9th Cir.1982); *Maheu v. Hughes Tool Co.,* 569 F.2d 459, 476-77 (1977). The Court addresses this issue next.

F. Whether the Verdict is Against the Clear Weight of the Evidence

1. *Future Economic Damages*

Defendants argue the jury's future economic damage award of $150,000 is contrary to the evidence and evidences the jury's prejudice against Defendants given that Plaintiffs only "requested" $41,400 in closing argument. Jury Instruction No. 41 specified that the following should be considered when determining future economic damages: "[t]he reasonable value of necessary expenses and services, including chiropractic and related expenses, with reasonable probability to be required in the future." The Court finds there was such evidence before the jury on which it could have based its damages finding, without considering the lost promotions. For instance, Dr. Hamilton opined that Mr. Rogers "will continue to suffer from this condition and therefore will need to be under some level of care into the indefinite future. Mr. Rogers will also see a long term increased rate of degenerative changes within his spinal and appendicular areas." (Trial Ex. 43: Letter dated Nov. 14, 2006.) Although the Updated Special Damages illustrative chart (Trial Ex. 49) only figures a single chiropractic treatment per month at $200 each session, the jury could have determined, based on Mr. and Mrs. Rogers' testimony, that additional treatments may be necessary given Mr. Rogers' life style as he ages. Accordingly, there is not clear evidence that the damage award is not supported by the evidence; therefore, it will not be disturbed. *See Duk v. MGM Grand Hotel, Inc.,* 320 F.3d 1052, 1060 (9th Cir.2003); *Boehm v. Ame. Broad. Co., Inc.,* 929 F.2d 482, 488 (9th Cir.1991).

2. *Damages caused by the Police Canine*

***9** It was the jury's role to assess credibility and to weigh the evidence. The Court finds the damages award and apportionment of damages caused by the police canine are not against the clear weight of the evidence; plus, as noted above, counsel for Defendants told the jury to award damages against the City of Kennewick on the directed liability claim.

G. Conclusion

Accordingly, the Court concludes the verdict is not inconsistent, it is based upon evidence presented at trial, it is legally sound, and it is not the result of passion or prejudice. Furthermore, Plaintiffs' counsel's conduct does not require a new trial. For the above reasons,

IT IS HEREBY ORDERED:

1. Defendant Dopke's Motion for New Trial **(Ct.Recs.291)** is **DENIED.**

2. Kennewick Defendants' Motion for New Trial **(Ct.Rec.294)** is **DENIED.**

IT IS SO ORDERED. The District Court Executive is directed to enter this Order and provide copies to counsel.

Footnotes

1 Defendants may even be the beneficiaries of some language inconsistencies that resulted in a favorable verdict on the constitutional search claim. While Instruction No. 19 told the jury that Mr. Rogers was undisputedly a lawful guest at his stepson's residence, thereby possessing a right to be free from an unreasonable search at that residence, the special interrogatory on that claim asked for a determination of whether the Defendants had violated "Mr. Rogers' Fourth Amendment right to be free from an unreasonable search of *his* residence?" (Ct.Rec.359) (emphasis added). Perhaps, a more accurate statement-of the residence where he was lawfully sleeping-would have resulted in a verdict in his favor on that claim; this was not *his* residence but that of his stepson.

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Only the Westlaw citation is currently available.
United States District Court, W.D. Washington, at Tacoma.

Noel A. SALDANA and Jessica Saldana, husband and wife and their marital community, Plaintiffs,
v.
The CITY OF LAKEWOOD, a municipal corporation; and James Syler, in his official and individual capacity and Jane Doe Syler and their marital community, Defendants.

No. 11–CV–06066 RBL. | July 2, 2012.

Attorneys and Law Firms

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Stewart Andrew Estes, Keating Bucklin & McCormack, Seattle, WA, for Defendants.

Opinion

ORDER ON DEFENDANT CITY OF LAKEWOOD'S MOTION FOR JUDGMENT ON THE PLEADINGS AND PLAINTIFF'S MOTION FOR LEAVE TO AMEND

RONALD B. LEIGHTON, District Judge.

*1 THIS MATTER comes before the Court on Defendant City of Lakewood's Motion for Judgment on the Pleadings [Dkt. # 8]. The City argues that Mr. Saldana fails to allege facts sufficient to support his *Monell* claim and that his state-law claims fail as a matter of law. *Id.* at 1. Mr. Saldana argues that the facts alleged in the Complaint are sufficient, and discovery will further support the merits of his *Monell* and state-law claims. Further, Mr. Saldana moves to amend his Complaint. *See* Pl.'s Resp. [Dkt. # 10]. The Court grants in part the City's motion, and grants leave to amend.

I. BACKGROUND

On June 27, 2010, Plaintiff Noel Saldana was bitten by a City of Lakewood police dog named "Astor," under the supervision of Officer James Syler. According to the Complaint, Officer Syler responded to a domestic altercation at Mr. Saldana's residence, arriving just as Mr. Saldana was leaving. Officer Syler ordered Mr. Saldana to turn and drop to the ground. After Mr. Saldana complied with the officer's command, Astor allegedly attacked him until the Officer intervened.

Mr. Saldana was hospitalized and treated for injuries that required surgical debridement, staples, and a skin graft. Mr. Saldana asserts in his opposition briefing that the City knew or should have known Astor was dangerous because Astor had previously inflicted a severe and unwarranted bite-although the Complaint does not include any such allegations. *See Conely v. City of Lakewood,* No. 11–cv–06064 (W.D.Wash.2011) (Bryan, J.) (suit alleging nearly identical claims for injuries inflicted by Astor).

Mr. Saldana alleges that Officer Syler: (1) violated Mr. Saldana's fourth-amendment rights by using excessive force; (2) negligently failed to control Astor; (3) intentionally inflicted emotional distress; (4) committed assault and battery; that (5) the City of Lakewood is liable under a theory of respondeat superior; and lastly, and that (6) Officer Syler and the City are strictly liable under RCW § 16.08.040. Additionally, Mr. Saldana requests leave to amend the Complaint to include further factual support.

The City argues that judgment on the pleadings is warranted because: (1) Mr. Saldana failed to assert sufficient facts to support *Monell* liability; (2) tort claims against the City fail as a matter of law; and (3) the strict liability claims against Officer Syler should be dismissed because the City admits ownership of Astor.

II. DISCUSSION

A Rule 12(c) motion is evaluated under the same standard as a motion under Rule 12(b)(6). The complaint should be liberally construed in favor of the plaintiff, and its factual allegations taken as true. *See, e.g., Oscar v. Univ. Students Co–Operative Ass'n,* 965 F.2d 783,785 (9th Cir.1992). The Supreme Court has explained that "when allegations in a complaint, however true, could not raise a claim of entitlement to relief, this basic deficiency should be exposed at the point of minimum expenditure of time and money by the parties and the court." *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 558, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007) (internal citation and quotation omitted). A complaint must include enough facts to state a claim for relief that is "plausible on

its face" and to "raise a right to relief above the speculative level." *Id.* at 555. The complaint need not include detailed factual allegations, but it must provide more than "a formulaic recitation of the elements of a cause of action." *Id.* A claim is facially plausible when a plaintiff has alleged enough factual content for the court to draw a reasonable inference that the defendant is liable for the misconduct alleged. *Ashcroft v. Iqbal,* 556 U.S. 662, 129 S.Ct. 1937, 1949, 173 L.Ed.2d 868 (2009). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice," and a plaintiff must plead "more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Id.* (citing *Twombly*).

A. Civil Rights Claim Under § 1983

***2** The City argues that Mr. Saldana recites the elements of a *Monell* claim but fails to assert facts in support. To set forth a claim against a municipality under 42 U.S.C. § 1983, a plaintiff must show that the defendant's employees or agents acted pursuant to an official custom, pattern, or policy that violates the plaintiff's civil rights; or that the entity ratified the unlawful conduct. *See Monell v. Dep't of Soc. Servs.,* 436 U.S. 658, 690–91, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978); *Larez v. City of Los Angeles,* 946 F.2d 630, 646–47 (9th Cir.1991).

Additionally, a municipality may be liable for a "policy of inaction" where "such inaction amounts to a failure to protect constitutional rights." *Lee v. City of Los Angeles,* 250 F.3d 668, 682 (9th Cir.2000) (quoting *City of Canton v. Harris,* 489 U.S. 378, 388, 109 S.Ct. 1197, 103 L.Ed.2d 412 (1989)). Municipal liability for inaction attaches only where the policy amounts to "deliberate indifference." *Id.* Thus, a municipality may be liable for inadequate police training when "such inadequate training can justifiably be said to represent municipal policy" and the resulting harm is a "highly predictable consequence of a failure to equip law enforcement officers with specific tools to handle recurring situations." *Long v. Cnty. of Los Angeles,* 442 F.3d 1178, 1186 (9th Cir.2006); *id.* (quoting *Bd. of Cnty. Com'rs,* 520 U.S. at 409).

Accordingly, to impose liability on a local governmental entity for failing to act to preserve constitutional rights, a § 1983 plaintiff must allege that: (1) they were deprived of their constitutional rights by defendants acting under color of state law; (2) the defendants had customs or policies which "amount to deliberate indifference"; and (3) these policies are the "moving force behind constitutional violations.' " *Lee,* 250 F.3d at 682 (quoting *Oviatt By and Through Waugh v. Pearce,* 954 F.2d 1470, 1474 (9th Cir.1992)). But a municipality is not liable simply because it employs a tortfeasor. *Monell,* 436 U.S. at 691.

Here, the Court must conclude that the Complaint lacks sufficient factual allegations to sustain a *Monell* claim against the City. Whether Plaintiff's claims are framed in the positive (an affirmative policy, custom, or pattern) or in the negative (a failure to train or supervise or otherwise protect constitutional rights), the Complaint asserts only that Officer Syler failed to control Astor-nothing more. This does not meet the demands of *Monell,* and the claims are thus dismissed.

B. Mr. Saldana's State Law Claims

Mr. Saldana presents claims against both Officer Syler and the City for negligent failure to train, negligent use of excessive force, infliction of emotional distress, and assault and battery. Mr. Saldana asserts that the City is vicariously liable for Officer Syler's conduct under *respondeat superior.*

Further, Mr. Saldana asserts strict liability claims under RCW § 16.08.040 against both Officer Syler and the City.

1. State Law Negligence Claims Against the City of Lakewood

***3** Mr. Saldana advances two theories why the City should be directly liable for his injuries: (1) that the City negligently "failed to train, handle, and utilize the dog in a reasonable manner"; and (2) that the City is vicariously liable for Officer Syler's negligence because he acted within the scope of employment. Compl. ¶¶ 5.3, 6.2.

An employer is vicariously liable for the negligent acts of employees only when those acts occur within the scope of employment. *Shielee v. Hill,* 47 Wash.2d 362, 365, 287 P.2d 479 (1951). A negligent supervision claim, in contrast, lies only when an employee acts outside the scope of employment. *Id.* at 367, 287 P.2d 479; *Gilliam v. Dep't of Soc. & Health Servs.,* 89 Wash.App. 569, 585, 950 P.2d 20 (1998) (noting that where defendant admits employee acted within scope of employment, and is thus vicariously liable, an action for negligent supervision would be "redundant").

Both the City and Mr. Saldana agree that Officer Syler acted within the scope of his employment. The facts are clear: Officer Syler responded to Mrs. Saldana's domestic-altercation call, and upon arrival, Astor bit Mr. Saldana. [Dkt. # 1–1]. If Officer Syler acted negligently, then the City is

automatically liable. If Officer Syler acted reasonably, then any claim against the City for negligent supervision would fail as a matter of law. *See Gilliam,* 89 Wash.App. at 585, 950 P.2d 20 ("If [plaintiff] proves [defendant's] liability, the State will also be liable. If [plaintiff] fails to prove [defendant's] liability, the State cannot be liable even if its supervision was negligent."). (The point is common sense, of course. A city may negligently train as many incompetent employees as it likes, but there is no suit unless one of those employees negligently harmed the plaintiff.) Washington law is also clear: where the parties agree that an employee acted within the scope of employment, a negligent training, hiring, or supervision claim against the employer is "redundant." *Id.* Thus, because Mr. Saldana alleges (and the City agrees) that Officer Syler was acting within the scope of his employment, the negligence claims against the City are redundant and dismissed.

2. Strict Liability Claim Against Officer Syler

While the present motion encompasses only those claims directed at the City, the Court will address Mr. Saldana's claim for strict liability against Officer Syler. *See* Compl. ¶ 9.2. RCW § 16.08.040 imposes strict liability on the owner of any dog that bites another person:

> The owner of any dog which shall bite any person while such person is in or on a public place or lawfully in or on a private place including the property of the owner of such dog, shall be liable for such damages as may be suffered by the person bitten, regardless of the former viciousness of such dog or the owner's knowledge of such viciousness.

Because it appears undisputed that the City owns Astor (rather than Officer Syler), the strict liability claim against Officer Syler is dismissed.

3. Strict Liability Claim Against the City Under RCW § 16.08.040

4** Washington federal courts have applied RCW § 16.08.040 to police dogs and held municipalities liable. *See Smith v. City of* Auburn, *et al.,* No. 04–cv–1829–RSM, 2006 WL 1419376, at *7 (W.D.Wash. May 19, 2006) (Martinez, J.) (applying RCW § 16.08.040 to police dogs); *Rogers v. City of Kennewick, et al.,* No. 04–cv–5028–EFS, 2007 WL 2055038, at *7 (E.D.Wash. July 13, 2007) (Shea, J.) (applying RCW § 16.08.040 to police dogs). But, the strict liability claim hinges on whether the use of Astor was lawful: "[Strict liability] does not apply to the ***lawful application of a police dog...." *Id.* (emphasis added).

So, if Officer Syler's use of Astor was unlawful, the City is strictly liable; if lawful, the City is not liable. The strict-liability claim against the City thus rises and falls with Plaintiff's other claims and survives here.

C. Leave to Amend

Mr. Saldana requests leave to amend his Complaint to further plead additional facts to support his claims. "A party may amend its pleading only with the opposing party's written consent or the court's leave," and "[t]he court should freely give leave when justice so requires." Fed.R.Civ.P. 15(a)(2). "[T]he court may permit supplementation even though the original pleading is defective in stating a claim or defense." Fed.R.Civ.P. 15(d).

It is within the district court's discretion to grant or deny leave to amend. "If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits." *Foman v. Davis,* 371 U.S. 178, 182, 83 S.Ct. 227, 9 L.Ed.2d 222 (1962). If a claim is not based on a proper legal theory, the claim should be dismissed. *Keniston v. Roberts,* 717 F.2d 1295, 1300 (9th Cir.1983). "[T]he grant or denial of an opportunity to amend is within the discretion of the District Court, but outright refusal to grant the leave without any justifying reason appearing for the denial is not an exercise of discretion; it is merely abuse of that discretion and inconsistent with the spirit of the Federal Rules." *Davis,* 371 U.S. at 182. In deciding whether to grant a motion to amend, a court may consider undue delay, bad faith or dilatory motive, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to opposing parties, harm to the movant if leave is not granted, and futility of the amendment. *Id.*

Here, Mr. Saldana has not exhibited undue delay, bad faith or dilatory motive, or long standing deficiencies. Defendants are at little risk of prejudice because discovery has yet to begin. And finally, the Court cannot say conclusively that amendment would be futile. While Mr. Saldana has not proposed an amendment, he has offered some substance of the proposed amendment (a previous incident where Astor allegedly excessively injured a suspect). The Court will grant

Mr. Saldana two weeks from the filing of this order to properly amend his Complaint.

III. ORDER

*5 Plaintiff's Motion to Amend is **GRANTED.** Plaintiff has **14 days** from the date below to sufficiently amend his Complaint and cure the deficiencies discussed above. If Plaintiff fails to cure those deficiencies, the Court's order **GRANTING IN PART** the City's Motion for Judgment on the Pleadings [Dkt. # 8] will take effect as follows:

(1) The § 1983 Civil Rights Claims against the Defendant City of Lakewood are **DISMISSED.**

(2) Plaintiff's claims against the City of Lakewood for negligence, negligent use of excessive force, infliction of emotional distress, assault and battery, are **DISMISSED.**

Regardless of amendment, Mr. Saldana's strict-liability claim against Officer Syler is **DISMISSED** with prejudice.

Thus, the claims remaining against the Defendant City Of Lakewood are:

a. Strict liability pursuant to RCW § 16.08.040.

b. Vicarious liability for Officer Syler's conduct (regarding state-law claims).

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2008 WL 2019815
Only the Westlaw citation is currently available.
United States District Court, W.D. Washington,
at Tacoma.

Kevin C. TERRIAN, a single man, Plaintiff,
v.
PIERCE COUNTY, Defendant.

No. C08-5123BHS. | May 9, 2008.

Attorneys and Law Firms

Todd Russell Renda, Tacoma, WA, for Plaintiff.

Daniel R. Hamilton, Pierce County Prosecuting Attorney's Office, Tacoma, WA, for Defendant.

Opinion

ORDER GRANTING DEFENDANT'S 12(b)(6) MOTION TO DISMISS

BENJAMIN H. SETTLE, District Judge.

***1** This matter comes before the Court on Defendant's 12(b)(6) Motion to Dismiss (Dkt.4). The Court has considered the pleadings filed in support of and in opposition to the motions, the exhibits and declaration, and hereby grants Defendant's motion for the reasons stated herein.

Plaintiff asks the Court to consider this motion a motion for summary judgment under Fed.R.Civ.P. 56. Dkt. 2. However, Defendant has only submitted court documents from a criminal proceeding in which Plaintiff pled guilty to obstruction of a law enforcement officer and unlawfully operating a motor vehicle. Dkt. 4-2, Dkt. 4-3. The charges which Plaintiff pled guilty to concern the incident giving rise to the instant claims where Plaintiff attempted to flee from pursuing officers and was eventually apprehended by a K-9 Unit. Dkt. 4-2. As Defendant points out, this Court is able to take judicial notice of these court documents in a Fed.R.Civ.P. 12(b)(6) motion and therefore the Court will continue to view this motion as a motion to dismiss and not as a motion for summary judgement. *See Iacoponi v. New Amsterdam Casualty Co.,* 379 F.2d 311, 312 (3rd Cir.1967).

Plaintiff concedes that his 42 U.S.C. § 1983 and his negligence claims should be dismissed. Dkt. 5 at 1. Plaintiff contests that his claim for damages pursuant to RCW § 16.08.040 fails to state a claim upon which relief can be granted. *Id.* at 2. Plaintiff contends that the dog bite giving rise to his damages occurred while "exercising due care for his own safety." Dkt. 1 at 3. This contention, however, is not consistent with his guilty plea for obstruction related to his fleeing from pursuing officers. Furthermore, because Plaintiff has conceded that he cannot support a claim for a violation of the Fourth Amendment or for negligence, his claim also fails to state an actionable claim under RCW § 16.08.040. *Miller v. Clark County,* 340 F.3d 959, 968 n. 14 (9th Cir.2003).

Therefore, it is **ORDERED** that Defendant's 12(b)(6) Motion to Dismiss (Dkt.4) is hereby **GRANTED.** Plaintiff's claims are hereby **DISMISSED with prejudice.**

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HAGEN & BATES, P.S.

March 20, 2014 - 10:39 AM

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