

NO. 45792-0-II

**COURT OF APPEALS FOR DIVISION II
STATE OF WASHINGTON**

BRYENT FINCH and PATRICIA FINCH, a marital community,

Appellants,

v.

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 RESPONDENTS

GREGORY JACKSON, WSBA #17541
JOHN R. NICHOLSON, WSBA #30499
Freimund Jackson & Tardif, PLLC
701 5TH Avenue, Suite 3545
Seattle, WA 98104
(206) 582-6001
Attorneys for Respondents

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I. INTRODUCTION

Respondents Thurston County, Thurston County Sheriff's Office, Thurston County Deputy Rod Ditrich and Jane Doe Ditrich (hereinafter collectively referred to as "the County") ask this court to affirm the trial court's summary judgment decision in their favor below. In this appeal, Appellants Bryent and Patricia Finch (hereinafter "the Finches") request that the court take the unprecedented step of holding, for the first time in the history of Washington's state appellate courts, that a municipality is strictly liable for a dog bite inflicted by a lawfully used police dog. The trial court's decision declining to impose strict liability on the County for a police dog bite is proper because: (1) there has never been a waiver of the government's sovereign immunity to claims for strict liability; (2) the Legislature enacted RCW 16.08.040(2), expressly exempting lawfully used police dogs from the rule of strict liability; and (3) the Finches concede that use of the police dog in this case was lawful under the Fourth Amendment.

II. COUNTER-STATEMENT OF THE ISSUES

Did the trial court correctly grant summary judgment in favor of the County on the Finches' strict liability claims under RCW 16.08.040 where: (a) the Legislature has never waived sovereign immunity to claims for strict liability; (b) RCW 16.08.040(2) expressly exempts lawfully used police dogs from the rule of strict liability; and (c) no prior published Washington state court

decision has ever held a municipality strictly liable for the lawful use of a police dog?

III. STATEMENT OF THE CASE

A. FACTS REGARDING THE FINCHES' CLAIMS

On November 14, 2010, at approximately 7:00 p.m., City of Tumwater Police Officer Bryent Finch was dispatched to investigate a burglary in progress at the abandoned Olympia Brewery located in Tumwater, Washington. CP 118. The abandoned complex consists of a brew house on the north side of Custer Way and the abandoned brewery building on the south side of Custer Way. CP 119. Officer Finch was met at the scene by fellow City of Tumwater Police Officer Hollinger. CP 118. Officers Finch and Hollinger were aware of a series of recent burglaries at the complex, wherein suspects removed copper pipes from the building for salvage. CP 127.

The Tumwater Police Department subsequently requested assistance from the Thurston County Sheriff's K-9 Unit pursuant to an interlocal agreement between the Tumwater Police Department and the Thurston County Sheriff's Department, and Thurston County Deputy Dietrich and K-9 Rex responded. CP 118; CP 144-160.

Officers Finch, Hollinger, and Deputy Dietrich collaborated on the best tactical way to enter the brewery and conduct the search for burglary

suspects. CP 119. Officer Finch did not have any reservations about the search plan discussed. *Id.* Deputy Dietrich and K-9 Rex led the search for the burglary suspects, Officer Finch served as the cover officer, and Officer Hollinger remained on perimeter. CP 119. The primary responsibility of a cover officer is to protect the K-9 officer during the search. CP 117. Cover officers do not go “hands on” and effect an arrest until directed to do so by the K-9 handler. CP 126.

Visibility inside the brewery was poor. CP 120. The floor of the brewery was in poor condition and laden with large holes and pitfalls through which the officers and K-9 Rex could fall. CP 121. After clearing several poorly lit rooms, K-9 Rex signaled the location of a suspect. *Id.* Deputy Ditrich commanded K-9 Rex to return to him by stating, “Here, here, here.” CP 122. It is standard K-9 practice and training for a handler to recall the K-9 to the handler before verbally challenging a suspect or directing a fellow officer to verbally challenge or physically engage a suspect. CP 131. The purpose of recalling the K-9 is so that the handler can gain positive physical control over the K-9 prior to an arrest. *Id.* Officer Finch was fully aware of this standard procedure on November 14, 2010. CP 126. Officer Finch also admits that he never received directions from Deputy Ditrich to challenge or engage the burglary suspect. CP 125.

Notwithstanding Officer Finch's knowledge of this procedure and the absence of direction from Deputy Ditrich to challenge or engage the suspect, Officer Finch "took it on my self of challenge the suspect because I'm going home at night ..."
CP 125. Officer Finch testified that he commanded the suspect "Hands, hands, show me your hands" in a command voice. CP 124.

As Officer Finch was verbally challenging the suspect to show his hands, K-9 Rex was returning to the side of Deputy Ditrich. Officer Finch was approximately eight-to-ten feet to the left of Deputy Ditrich and either parallel or slightly behind Deputy Ditrich when K-9 Rex engaged. CP 123. K-9 Rex was confused by Officer Finch's actions and interpreted them as a threat to Deputy Ditrich. CP 289. K-9 Rex bit Officer Finch in the testicle, causing Officer Finch's injuries. CP 285.

B. PROCEDURAL HISTORY OF THIS CASE

On June 6, 2012, the Finches filed this case against the County in Mason County Superior Court. They asserted claims for (1) strict liability for a dog bite pursuant to RCW 16.08.040; (2) negligence; and (3) the tort of outrage. CP 336-341. On October 11, 2013, the Finches filed a motion for partial summary judgment on the issue of the County's strict liability under RCW 16.08.040. CP 318-328. Specifically, the Finches asked the court to hold that RCW 16.08.040(2), a statutory amendment enacted in

2012 that exempts lawfully used police dogs from strict liability, should be applied prospectively only and not retroactively. *Id.*

On October 28, 2013, the County filed a cross motion for partial summary judgment seeking dismissal of the Finches' strict liability claims under RCW 16.08.040. CP 257-277. On November 25, 2013, the court denied the Finches' motion and granted the County's cross-motion, dismissing the Finches' strict liability claims. CP 10-11. At the time, the Finches still had pending causes of action for negligence and outrage. However, on January 13, 2014, the Finches voluntarily dismissed these remaining claims and filed a notice of appeal with respect to the court's earlier summary judgment dismissal of their strict liability claims. CP 4-5.¹

IV. ARGUMENT

A. STANDARD OF REVIEW

The County agrees that this court's standard of review of the trial court's summary judgment rulings and its interpretation of relevant statutes is de novo. *Berrocal v. Fernandez*, 155 Wn.2d 585, 590, 121 P.3d 82 (2005). This court performs the same inquiry as the trial court and considers all facts and reasonable inferences in the light most favorable to the nonmoving party.

¹ The County is filing a supplemental designation of clerk's papers to include the Finches' motion to voluntarily dismiss their negligence and outrage claims along with the trial court's order granting that motion. These supplemental clerk's papers are not yet available, and consequently the County provides a copy of these documents as **Appendix A** to this brief.

Jones v. Allstate Ins. Co., 146 Wn.2d 291, 300, 45 P.3d 1068 (2002); CR 56.

When construing a statute, the court's objective is to ascertain and carry out the legislature's intent. *Lake v. Woodcreek Homeowners Ass'n*, 169 Wn.2d 516, 526, 243 P.3d 1283 (2010).

B. STRICT LIABILITY DOES NOT APPLY TO POLICE DOGS

In 1941, the Legislature enacted a statute imposing strict liability on the owners of dogs that bite other persons:

(1) The owner of any dog which shall bite any person while such person is in or on a public 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). In discerning the legislative intent of a statute, the court should consider its historical and chronological context, as well as the statute's interplay with other related statutes. *Dept. of Transportation v. State Employees' Ins. Bd.*, 97 Wn.2d 454, 461, 645 P.2d 1076 (1982). When analyzing legislative intent, the court presumes that the legislature is 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).

1. Because Sovereign Immunity Had Not Been Waived When RCW 16.08.040 (1) Was Originally Enacted In 1941, The Statute Was Not Intended to Extend To Police Dogs

Under the doctrine of sovereign immunity, the government cannot be sued without its consent. *O'Donoghue v. State*, 66 Wn.2d 787, 789, 405 P.2d 258 (1965). Only the Legislature has the power to waive sovereign immunity: “The legislature shall direct by law in what manner and in what courts suits may be brought against the State.” Wash. Const., Art. II, § 26. In 1941, the Legislature had not enacted any waiver of sovereign immunity, either for the State or for municipalities. The Legislature did not enact a statutory waiver of the State’s sovereign immunity until 1961. RCW 4.92.090. It enacted a nearly identical waiver for local governmental entities, such as Thurston County, six years later in 1967. RCW 4.96.010. Thus, when the dog bite strict liability statute was originally enacted, sovereign immunity was still the law of the land. *See* Michael Tardif and Rob McKenna, *Washington’s 45-Year Experiment in Governmental Liability*, Seattle U. Law Rev. 1, 5-6 (2005) (noting that prior to the waiver of sovereign immunity, “[t]he primary areas of municipal immunity were governmental functions, such as police, parks, and health.”).

Given that the government could not be liable under state tort law for police activities in 1941, the Legislature had no reason to exclude police

dogs from the scope of strict liability under the statute. At the time, the Legislature was aware that sovereign immunity would preclude any suit against the government, such as one for personal injuries inflicted by a police dog. Thus, the clear legislative intent of RCW 16.08.040(1) when it was enacted in 1941 was that strict liability did not extend to police dogs.

2. There Has Never Been A Waiver Of The Government's Sovereign Immunity To Strict Liability Claims

As explained above, the Legislature enacted waivers of sovereign immunity for the State of Washington and local governmental entities in Washington in 1961 and 1967 respectively. RCW 4.92.090; RCW 4.96.010. Although this statutory waiver of the sovereign immunity held by municipalities is broad, it is not unlimited:

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. Filing a claim for damages within the time allowed by law shall be a condition precedent to the commencement of any action claiming damages. The laws specifying the content of such claims shall be liberally construed so that substantial compliance will be deemed satisfactory.

RCW 4.96.010(1) (emphasis added). The waiver of liability is limited to actions for damages arising out of “tortious conduct,” a term that is not defined in the statute.

“[A] waiver of sovereign immunity must be ‘unequivocally expressed’ in statutory text.” *Harrell v. State*, 170 Wn. App. 386, 403, 285 P.3d 159 (2012) (quoting *Fed Aviation Admin. v. Cooper*, -- U.S. --, 132 S. Ct. 1441, 1448, 182 L.Ed.2d 497 (2012)), review granted, 170 Wn.2d 1011, 297 P.3d 706 (2013). “When the government consents to be sued, the waiver is strictly construed and not enlarged beyond what the language requires.” *Klickitat County v. State*, 71 Wn. App. 760, 765, 862 P.2d 629 (1993) (citing *United States v. Nordic Village, Inc.*, 503 U.S. 30, 112 S. Ct. 1011, 117 L.Ed.2d 181 (1992)). The Finches cite no authority holding that strict liability claims under RCW 16.08.040(1) qualify as claims arising out of “tortious conduct” for purposes of the above statute.

a. Strict Liability Is Not Premised On Conduct

The dictionary definition of “conduct” is “the way that a person behaves in a particular place or situation” or “the way that something is managed or directed.”² Unlike other theories of liability, such as negligence and intentional tort theories, strict liability theories are not premised on a defendant’s conduct:

² Merriam-Webster Online. Retrieved May 20, 2014, from <http://www.merriam-webster.com/dictionary/conduct>.

Negligence and strict liability are not mutually exclusive because they differ in focus: negligence focuses upon the conduct of the manufacturer while strict liability focuses upon the product and the consumer's expectation.

Davis v. Globe Mach. Mfg. Co., Inc., 102 Wn.2d 68, 73-74, 684 P.2d 692 (1984).

Even if strict liability for ownership of a dog that inflicts a bite could be construed as a tort, the Legislature has not made an unequivocal waiver of sovereign immunity to strict liability claims in RCW 16.08.040(1), because these claims are not premised on "conduct." Rather, strict liability claims under RCW 16.08.040(1) are premised on mere ownership of a dog that inflicts a bite. Under the strict liability statute, liability arises when a dog inflicts a bite, regardless of any culpable conduct by the owner. Thus, the claims that the Finches seek to assert against the County do not arise out of "tortious conduct," and there has been no waiver of the government's sovereign immunity to them.

**b. Strict Liability Under RCW 16.08.040 Is A
Special Statutory Remedy In Derogation
Of The Common Law**

Additionally, the strict liability provided for under RCW 16.08.040 does not qualify as "tortious conduct" for purposes of the government's waiver of sovereign immunity, because it is a special statutory remedy rather than one that existed at common law. Washington courts have held

repeatedly that other special statutory causes of action do not fall within the ambit of “tortious conduct” under the Legislature’s waivers of sovereign immunity. *See, e.g., Wilson v. City of Seattle*, 122 Wn.2d 814, 823, 863 P.2d 1336 (1993) (holding that claim for damages under RCW 64.40.020 caused by delay in processing permit application did not constitute “tortious conduct”); *Rains v. State*, 100 Wn.2d 660, 67-68, 674 P.2d 65 (1983) (waiver of sovereign immunity in RCW 4.92.090 was not sufficiently broad to waive the State’s sovereign immunity to suits under 42 U.S.C. § 1983); *Wright v. Terrell*, 162 Wn.2d 192, 196, 170 P.3d 570 (2007) (unfair labor practice claim under RCW 41.56 did not constitute tort claim for purposes of RCW 4.96); *Harrell*, 170 Wn. App. at 402 (State’s statutory waiver of sovereign immunity did not include claims under federal Americans with Disabilities Act); *see also Seattle Prof. Engineering Employees Assoc. v. Boeing Co.*, 139 Wn.2d 824, 838, 991 P.2d 1126(2000) (minimum wage act violations were not “tortious conduct” for purposes of statute of limitations).

In *Wilson*, the Washington Supreme Court held that a claim for damages under RCW 64.40.020 for the government’s delay in processing a permit application did not constitute “tortious conduct” for purposes of RCW 4.96, *et. seq. Wilson*, 122 Wn.2d at 823. The court’s analysis turned on the fact that the remedy was a statutory one that did not exist at common law:

RCW 64.40.020 is not merely a codification of preexisting common law tort remedies, but is a new cause of action not previously available. The statute expressly states the remedies provided are in addition to any other remedies provided by law. RCW 64.40.040. *See Pleas v. Seattle*, 49 Wn. App. 825, 841 n.3, 746 P.2d 823 (1987) (stating RCW 64.40 “is a clear break with the past”), *rev’d on other grounds*, 112 Wn.2d 794, 774 P.2d 1158 (1989).

Id.

Similarly, strict liability under RCW 16.08.040 is not simply a codification of common law tort remedies. While a common law formulation of strict liability for dog owners existed prior to the enactment of RCW 16.08.040, common law strict liability required a showing that the dog owner either knew or should have known that the dog had dangerous propensities before liability could arise. *Beeler v. Hickman*, 50 Wn. App. 746, 751, 750 P.2d 1282 (1988). RCW 16.08.040, which eliminates the need to show the owner’s knowledge of dangerous propensities, is therefore in derogation of the common law and strictly construed. *Id.* Common law strict liability remains a separate cause of action in Washington, but it must be plead separately. *Id.* at 753-54 (refusing to review summary judgment on theory of common law strict liability, because the plaintiff did not plead it in her complaint). Thus, the statutory remedy in RCW 16.08.040 is available in addition to those already existing under the common law. Given that the special statutory remedy under RCW 16.08.040 goes beyond any tort

remedies that were available at common law, it cannot be considered “tortious conduct” for purposes of RCW 4.96.010 under the Washington Supreme Court’s reasoning in *Wilson*.

c. Strict Liability Is Inconsistent With The Public Duty Doctrine

Moreover, strict liability is inconsistent with the public duty doctrine, which Washington courts have utilized to determine the scope of municipal tort liability ever since the Legislature’s limited statutory waiver of sovereign immunity: “The Washington Supreme Court has adopted the ‘public duty doctrine’ for application in tort cases against state entities.” David K. DeWolf and Keller W. Allen, 16 Wash. Prac., Tort Law and Practice § 14.7 (2012 – 2013 Supplement) (citing cases). “4.96.010, which abolished sovereign immunity, is qualified by the public duty doctrine.” *Babcock v. Mason County Fire Dist. No. 6*, 101 Wn. App. 677, 684, 5 P.3d 750 (2000), affirmed, 144 Wn.2d 774, 30 P.3d 1261 (2001) (noting that “[t]he ‘public duty doctrine’ has modified the traditional concept of sovereign immunity.”). In applying the public duty doctrine to determine the scope of the government’s liability, Washington courts have recognized that the intent of RCW 4.96.010 was to subject municipalities to “orthodox negligence principles.” See, e.g., *J & B Development Co., Inc. v. King County*, 29 Wn. App. 942, 952, 631 P.2d 1002 (1981); *Ruff v. King County*, 72 Wn. App.

289, 294, 865 P.2d 5 (1993), reversed on other grounds, 125 Wn.2d 697, 887 P.2d 886 (1995); *see also Evangelical United Brethren Church of Adna v. State*, 67 Wn.2d 246, 253, 407 P.2d 440 (1966) (“Negligent conduct, within accepted tort concepts, must be present.”).

Under the doctrine, the plaintiff must establish that the government owed him an individual duty of care rather than a duty owed to the public at large. *Munich v. Skagit Emergency Comm. Center*, 175 Wn.2d 871, 878, 288 P.3d 328 (2012) (“i.e., a duty owed to all is a duty owed to none.”). In order to state an actionable claim, a plaintiff must show that his action falls within four exceptions to the doctrine.³ Given that the public duty doctrine is grounded in the negligence concepts of duty, breach, causation, and foreseeability, strict liability is completely inconsistent with it. The fact that strict liability cannot be reconciled with the public duty doctrine is further evidence that the Legislature never intended municipalities to be subject to strict liability.

d. The Authorities The Finches Rely Upon Do Not Establish A Waiver Of Sovereign Immunity To Strict Liability Claims

Here, as in the trial court, the Finches cite *Savage v. State*, 127 Wn.2d 434, 899 P.2d 1270 (1995), to argue that the Legislature’s waiver of sovereign

³ The public duty doctrine is subject to four exceptions: (1) the legislative intent exception; (2) the failure to enforce exception; (3) the rescue doctrine; and (4) the special relationship exception. *Gorman v. Pierce County*, 176 Wn. App. 63, 75, 307 P.3d 795 (2013) (citations omitted).

immunity in RCW 4.96.010 extends to claims for strict liability. Appellants' Brief at 22-23; CP 89-91. However, because *Savage* involved only negligence claims, it does not support the Finches' argument. In *Savage* the State of Washington was sued by a woman who had been raped by a parolee, who had a history of sexual assaults and violence, and who was under supervision by the Department of Corrections at the time. *Id.* at 436-37. In rejecting an argument by the State that the personal qualified immunity of a parole officer extended to the State as his employer, the Washington Supreme Court noted the broad waiver of the State's sovereign immunity. *Id.* at 445-446. However, prior to *Savage* the court had already recognized the existence of a duty owed by the State in this context, and there was no question that the breach of this duty constituted "tortious conduct" under the State's statutory waiver of sovereign immunity. *Taggart v. State*, 118 Wn.2d 195, 219, 822 P.2d 243 (1992).

In contract, there is no negligence action before this court. The Finches chose to abandon their negligence claims against the County when they voluntarily dismissed them prior to this appeal. The sole claim pursued by the Finches in this appeal is one for strict liability. Contrary to the Finches' assertions, imposing any type of strict liability on the government is completely unprecedented in our state courts' jurisprudence.

3. The Trial Court Correctly Gave Retroactive Application To RCW 16.08.040(2), Which Expressly Exempts Police Dogs From The Rule of Strict Liability

In 2012, seventy-one years after the initial passage of RCW 16.08.040(1), the Legislature passed an amendment to the strict liability statute through SHB 2191, which was eventually codified as RCW 16.08.040(2).⁴ The 2012 bill had two components. First, it added a section to RCW 9A.76.200 that provided for civil monetary penalties against individuals who harm police dogs. More relevant to the case at bar, the amendment also expressly clarified that lawfully used police dogs were not subject to the rule of strict liability in RCW 16.08.040:

(2) 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). The amendment's effective date was June 7, 2012, one day after the Finches filed this lawsuit.

The Finches argue that this amendment should be applied prospectively only and not to this case, where the events giving rise to their claims pre-date the amendment. To make this argument, the Finches offer a conclusory declaration by Rep. Ann Rivers that "to the best of [her] knowledge, the Legislature intended the amendment of RCW 16.08.040 to

⁴ A copy of SHB 2191 is attached to this brief as **Appendix B**.

operate prospectively.” CP 278-79. The Finches rely on this declaration extensively, even though they concede that such statements by individual legislators are not admissible to establish legislative intent. Appellants’ Brief at 18 (citing *Johnson v. Continental West, Inc.*, 99 Wn.2d 555, 560-61, 663 P.3d 318 (2003)).

As a threshold matter, Rep. Rivers’ declaration does not establish that the Legislature did not intend retroactive application of the amendment. The declaration addresses only the fact that the Legislature intended the amendment to be applied prospectively. It is silent as to the Legislature’s intent with respect to whether the amendment should be applied retroactively, as well.

Even assuming that the Rep. Rivers’ declaration should be interpreted to mean that according to her the Legislature did not intend retroactive application, the declaration provides no background or other foundation as to how she could possibly divine that the entire 2012 Legislature’s intent was that RCW 16.08.040(2) be applied prospectively only. A review of her testimony and comments during the committee hearing process itself shows that she never addressed whether or not the measure would be retroactive when she testified either in the House or the Senate. CP 175-78, 197-99.

Should the court be inclined to consider statements by legislators about the intent of the statute, it should look to statements during the legislative process itself rather than conclusory declarations executed over a year later, such as the one offered by the Finches. During the House and Senate committee hearings relating to the bill, almost all testimony and discussion pertained to the criminal penalty provision in the bill. However, addressing the liability provision of the bill, the Chair of the House Committee on Public Safety and Emergency Preparedness, Christopher Hurst, made the following statement:

CHAIRMAN HURST: 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.

As Rep. Hurst's comments reflect, "common sense" would dictate that police dogs – which unlike dogs owned by private citizens are, at times, supposed to bite and attack – should not subject municipalities to strict liability. This is especially true, since when RCW 16.08.040(1) was originally enacted, there was no municipal liability. Rep. Hurst's comments that this "common sense" amendment was "an oversight" indicate that RCW 16.08.040(2) was intended to be curative and remedial in nature: if "an amendment clarifies existing law and ... does not contravene previous

constructions of the law, the amendment may be deemed curative, remedial and retroactive.” *Tomlinson v. Clarke*, 118 Wn.2d 498, 511, 825 P.2d 706 (1992). The Finches have conceded that such amendments should be applied retroactively. Appellants’ Brief at 20. In the seventy-two years since RCW 16.08.040(1) was enacted, no Washington state court has ever published a decision applying strict liability based on a police dog bite.⁵ Thus, the trial court properly gave RCW 16.08.040(2) retroactive application as a curative and remedial clarification of existing law.

As discussed in more detail below, the Finches rely on unpublished federal district court decisions to support many of their central arguments. Since the enactment of RCW 16.08.040(2) in 2012, the federal district courts have applied the statute retroactively without exception. *Saldana v. City of Lakewood*, No. 11-CV-06066 RBL, 2012 WL 2568182, *4 (W.D. Wash. July 2, 2012) (applying statute to events that occurred on June 27, 2010); *Conely v. City of Lakewood*, No. 3:11-cv-6064, 2012 WL 6148866 (W.D. Wash. Dec. 11, 2012) (applying statute to events that occurred on September

⁵ At the time of the Legislature’s enactment of RCW 16.08.040(2) in 2012, the only published decision from any court addressing the issue of whether RCW 16.08.040 could impose strict liability on a municipality was *Miller v. Clark County*, 340 F.3d 959 (9th Cir. 2003). In *Miller*, even before the 2012 amendment was passed, the Ninth Circuit declined to impose strict liability, concluding 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.” *Id.* at 968, fn. 14. Applying the amendment in RCW 16.08.040(2) retroactively here would not contravene any state judicial construction of the statute, nor would it contravene the Ninth Circuit’s holding in *Miller*.

25, 2009).⁶ Thus, the same federal courts that the Finches rely upon have completely undermined the principal argument they advance here – that the statute should be applied prospectively only. RCW 16.08.040(2) was clearly an amendment to clarify that the strict liability statute should continue to be interpreted to apply to private dog owners only and not to police dogs, just as it was clearly intended by the Legislature when originally enacted in 1941.

4. The Good Faith Immunity For Police Dog Handlers In RCW 4.24.410 Does Not Evidence Legislative Intent To Subject Municipalities To Strict Liability For Police Dogs

As they did in the trial court, the Finches argue on appeal that the Legislature’s passage of RCW 4.24.410, which establishes a good faith immunity for police dog handlers, evidences the Legislature’s intent that municipalities be subject to strict liability for police dog bites. Appellants’ Brief at 23-24; CP 91-92. Again, the fallacy of the Finches’ argument is that it makes no distinction between municipal liability for “tortious conduct,” such as negligence, and strict liability.

The immunity statute provides 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 ...” RCW 4.24.410(2). Assuming that a plaintiff could otherwise establish a duty, breach of the duty,

⁶ Copies of all federal decisions cited herein that interpret RCW 16.08.040 are attached to this brief as **Appendix C**.

causation, and damages, this statute would bar a negligence claim against a dog handler upon a showing of the dog handler's good faith. However, the Legislature's passage of an immunity statute for dog handlers by no means shows its intent for dog handlers or municipalities to be strictly liable for dog bites. The legislative history discussed above clearly shows that although the Legislature may have intended to subject municipalities to liability for "tortious conduct," such as negligence, it never intended municipalities to have strict liability.

C. THE POLICE DOG IN THIS CASE WAS USED LAWFULLY

The Finches next argue that even if RCW 16.08.040(2) is retroactively applied, strict liability still arises for the County because the use of K-9 Rex was not a "lawful application of a police dog" under the statute. Appellants' Brief at 26-33. Yet, the Finches concede that use of K-9 Rex was lawful under the Fourth Amendment and they fail to show that the County's use of K-9 Rex was unlawful in any other respect.

The Finches propose that this court should adopt a previously unrecognized rule that when "an innocent person is mistakenly bitten," a municipality is subject to strict liability regardless of whether the police dog was lawfully used. Appellants' Brief at 30-33. In doing so, the Finches rely exclusively on two unpublished federal court decisions, both of which were decided prior to the enactment of RCW 16.08.040(2).

Interpretation of the statute is a purely state law issue, and this court is not bound by these unpublished federal district court decisions. *Mullaney v. Wilbur*, 421 U.S. 684, 691, 95 S. Ct. 1881, 44 L.Ed.2d 508 (1975) (“[S]tate courts are the ultimate expositors of state law ...”). For these reasons, the trial court properly found these unpublished cases to be unpersuasive and declined to consider them.⁷

Should this court be inclined to accept the Finches’ invitation to look to federal case law on the purely state law issue of how RCW 16.08.040 should be interpreted, it should look to the Ninth Circuit’s single published decision interpreting the statute, *Miller v. Clark County*, 340 F.3d 959 (9th Cir. 2003), and possibly the federal district court decisions that have been decided after enactment of the curative amendment. Under the analysis set forth in these cases, strict liability does not arise for the County, because the Finches have admitted that Officer Finch was not subject to any Fourth Amendment seizure.

⁷ GR 14.1 allows a party to cite unpublished decisions issued by other jurisdictions if citation is permitted under the law of the jurisdiction of the issuing court. Although the Ninth Circuit rule allows citation to unpublished dispositions after January 1, 2007, it specifically provides that they “are not precedent, except when relevant to the doctrine of the law of the case or rules of claim preclusion or issue preclusion.” FRAP 36-3(a) (emphasis added). In the trial court, the Finches also improperly cited an unpublished Superior Court order as authority. The trial court granted the County’s motion to strike this citation. CP 14-15. Thus far, the Finches have not attempted to rely on this order as authority in arguing their appeal. Like the trial court, this court should disregard this improperly cited unpublished Superior Court order.

1. The Finches Concede That Use Of The Police Dog Was Lawful Under The Fourth Amendment

Even before the 2012 amendment exempting police dogs from strict liability was enacted, the Ninth Circuit determined that where use of a police dog is lawful under the Fourth Amendment, no strict liability arises under RCW 16.08.040:

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 v. Clark County, 340 F.3d 959, 968 fn.14 (9th Cir. 2003) (emphasis added).

The Finches concede that Officer Finch was not seized for purposes of the Fourth Amendment. Appellants’ Brief at 30. Given this concession, they fail to explain how the court could find that Officer Finch’s injury in this case did not result from “the lawful application of a police dog” under RCW 16.08.040(2). Under *Miller*, absent a violation of the Fourth Amendment, the use of K-9 Rex was lawful and no strict liability arises.

2. The Rule That The Finches Attempt To Carve Out For “Innocent Persons Who Are Mistakenly Bitten” Is Not Supported By Either RCW 16.08.040 Or Federal Case Law

The Finches argue that the court should completely depart from the Fourth Amendment analysis used by the Ninth Circuit in *Miller* and subsequently by the overwhelming majority of federal district courts, and instead hold that where “an innocent person is mistakenly bitten” a municipality is strictly liable for a police dog bite. Under this rule, the Finches assert, the court is not required to analyze lawfulness under the Fourth Amendment whatsoever to determine whether the County is protected from strict liability based on its “lawful application of a police dog.” There is no basis in the statute or elsewhere for this arbitrary rule, which the Finches have manufactured from whole cloth. The court should decline the Finches’ invitation to ignore both the plain language of the statute and the Ninth Circuit’s holding in *Miller*.

First, the language of RCW 16.08.040(2) makes no distinction based on “innocent” or “mistakenly bitten” plaintiffs. As a practical matter, police officers do not determine the “guilt” or “innocence” of suspects during a search, but only whether probable cause exists to conduct the search. Thus, the rule the Finches ask this court to adopt is not supported by the plain language of the statute and cannot be carried out.

Additionally, the rule the Finches propose is inconsistent with strict liability, which is not based on evidence of the defendant making a “mistake.” The notion that Officer Finch was “mistakenly bitten” begs the question of who made a mistake. The evidence in this case shows that Officer Finch bears responsibility for his own injuries. Officer Finch verbally challenged the burglary suspect prior to K-9 Rex being recalled to Deputy Ditrich, resulting in K-9 Rex being confused and interpreting Officer Finch as a threat to Deputy Ditrich. Officer Finch took this action, even though he knew doing so was contrary to standard protocol. Liability that depends on the concept of a “mistake” is more analogous to an action for negligence, where the fact finder can sort out whether the plaintiff bears comparative fault and whose acts or omissions have proximately caused the injury. Here, however, the Finches abandoned their cause of action for negligence, having chosen to voluntarily dismiss it.

Moreover, the court should reject the Finches’ request to ignore Fourth Amendment analysis in determining whether strict liability arises based on two unpublished federal district court decisions, because a robust body of published federal case law already establishes the proper framework for determining when a Fourth Amendment violation can be asserted by someone who is mistakenly or unintentionally seized as a result of police action. In *Brower v. County of Inyo*, 489 U.S. 593, 109 S. Ct.

1378, 103 L.Ed.2d 628 (1989), the Supreme Court specifically addressed the applicability of the Fourth Amendment under these circumstances:

It is clear ... 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). Contrary to the Finches' suggestion, under this rule there are circumstances where a person whose freedom is mistakenly restricted by the police is nevertheless considered to have been seized under the Fourth Amendment, so long as there were some "means intentionally applied" by an officer to effect an arrest or seizure. *See, e.g., Vaughn v. Cox*, 343 F.3d 1323, 1329 (11th Cir. 2003); *Tubar v. Clift*, 453 F.Supp.2d 1252, 1256 (W.D. Wash. 2006) (plaintiff passenger in car who was hit by police gunfire intended for driver of the car was subject to a Fourth Amendment seizure).

Even one of the two unpublished federal district court cases relied upon by the Finches conforms to the *Brower* analysis. The *Brower* analysis was explicitly utilized in *Rogers v. City of Kennewick*, No. CV-04-5028-EFS, 2007 WL 2055038 (E.D. Wash. July 13, 2007), *aff'd*, 304 Fed. Appx. 599 (9th Cir. 2008). There, a federal jury found the defendant municipality

strictly liable, but only after also finding that the plaintiff had been unlawfully seized under the Fourth Amendment *Id.* at *2. The jury found that an unlawful seizure had taken place, even though the plaintiff was not the intended target of the police dog. The Ninth Circuit upheld the verdict on appeal, citing *Brower. Rogers*, 304 Fed. Appx. at 601. Thus, while the court in *Rogers* did not discuss *Miller*, contrary to the Finches' suggestion it did engage in a Fourth Amendment analysis before imposing strict liability, specifically finding that the plaintiff had been unlawfully seized. *Id.*

Given that *Rogers* does not support the rule the Finches ask the court to adopt, they effectively rely on a single unpublished federal district court decision, *Peterson v. Federal Way*, No. C06-0036 RSM, 2007 WL 2110336 (W.D. Wash. July 18, 2007), which was decided before RCW 16.08.040(2) was enacted. The County submits that *Peterson* was simply wrong, inasmuch as it failed to cite or even attempt to distinguish *Miller*, the controlling Ninth Circuit case. The overwhelming weight of authority indicates that the Fourth Amendment analysis governs whether a strict liability claim can be asserted. *Miller*, 340 F.3d at 698; *Conely v. City of Lakewood*, No. 3:11-cv-6064, 2012 WL 6148866 (W.D. Wash. Dec. 11, 2012); *Saldana v. City of Lakewood*, No. 11-CV-06066 RBL, 2012 WL 2568182 (W.D. Wash. July 2, 2012); *Beecher v. City of Tacoma*, No. C10-

5776 BHS, 2012 WL 1884672 (W.D. Wash. May 23, 2012); *Terrian v. Pierce County*, No. C08-5123BHS, 2008 SL 2019815 (W.D. Wash. May 9, 2008).

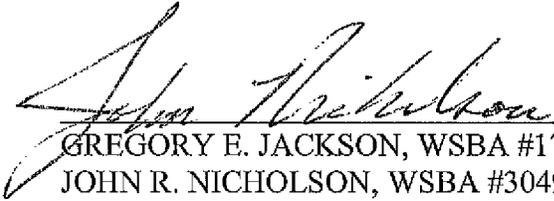
Here, there was no Fourth Amendment seizure of Officer Finch under the analysis set forth above in *Brower*. Although K-9 Rex was being used for purposes of searching for a burglary suspect, Deputy Ditrich did not intend for the dog to apprehend the suspect, much less Officer Finch. It is undisputed that K-9 Rex was being recalled to Deputy Ditrich when Officer Finch was bitten, and there was no “intentionally applied” means whatsoever, either to Officer Finch or the suspect. For the same reason, in other cases federal courts have held that under *Brower* there is no Fourth Amendment violation when a police dog spontaneously attacks someone absent intent by the officer for the dog to effectuate a seizure or arrest. *See, e.g., Dunigan v. Noble*, 390 F.3d 486, 492-93 (6th Cir. 2004); *Neal v. Melton*, 453 Fed. Appx. 572, 577-78 (6th Cir. 2011) *Andrade v. City of Burlingame*, 847 F.Supp. 760, 764 (N.D. Cal. 1994). Thus, should this court look to federal case law for its analysis of RCW 16.08.040, the Finches’ claims fail under the controlling case law.

V. CONCLUSION

The trial court correctly granted the County’s motion for summary judgment motion on the Finches’ strict liability claim, because the injury

Officer Finch experienced in this case arose out of the County's lawful use of a police dog. The Legislature has never intended to impose strict liability on municipalities for their lawful use of police dogs, as it made clear when it passed RCW 16.08.040(2) as a curative measure. The lack of strict liability is especially clear here, given that the Finches concede that no Fourth Amendment violation occurred and they offer no other basis for claiming that use of the dog was unlawful. While the Finches might have been able to pursue a negligence claim against the County, given that such a claim would qualify as "tortious conduct" under the State's waiver of sovereign immunity, strict liability is not a remedy available to them as a matter of law. The trial court should be affirmed.

RESPECTUFLY SUBMITTED this 21st day of May, 2014.

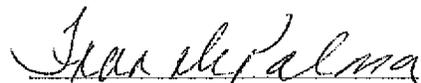

GREGORY E. JACKSON, WSBA #17541
JOHN R. NICHOLSON, WSBA #30499
Freimund Jackson & Tardif, PLLC
701 5TH Avenue, Suite 3545
Seattle, WA 98104
(206) 582-6001
Attorneys for Respondent

DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the state of Washington, that the following is true and correct:

That on May 21, 2014, I served the foregoing Brief of Respondent to the Court and to the parties to this action as follows:

Office of the Clerk Court of Appeals, Division II One Union Square 600 University Street Seattle, WA 98101-4170	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input type="checkbox"/> U.S. Mail <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Hand Delivery <input checked="" type="checkbox"/> Electronic Filing
Zachary David Edwards Hagen & Bates P.S. P.O. BOX 2016 Aberdeen, WA 98520-0330 zach@hagenlaw.net	<input checked="" type="checkbox"/> Email <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Hand Delivery


FRAN DEPALMA

APPENDIX A

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF MASON

BRYENT FINCH AND PATRICIA FINCH,
a marital community,

Plaintiffs,

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,

Defendants.

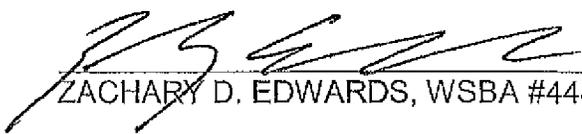
NO. 12-2-00501-3

MOTION FOR VOLUNTARY DISMISSAL

COME NOW the plaintiffs, by and through their attorneys of record, and move the court pursuant to Civil Rule 41(a)(1)(B) for an order dismissing all of Plaintiffs' remaining claims without prejudice.

DATED this 13th day of January, 2014.

HAGEN & BATES, P.S.
Attorneys for Plaintiffs


ZACHARY D. EDWARDS, WSBA #44862

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF MASON

BRYENT FINCH AND PATRICIA FINCH,
a marital community,

Plaintiffs,

vs.

THURSTON COUNTY, THURSTON
COUNTY SHERIFF'S OFFICE, ROD
DITRICH AND JANE DOE DITRICH,
individually and as husband and wife and
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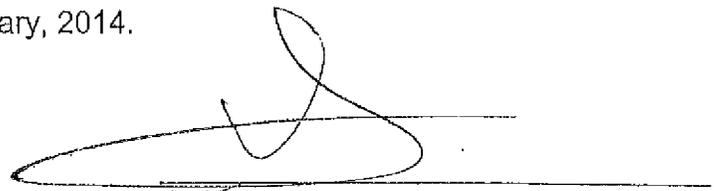
NO. 12-2-00501-3

ORDER FOR DISMISSAL

Upon consideration of the Motion for Voluntary Dismissal by Plaintiffs Bryant and Patricia Finch, and pursuant to Civil Rule 41(a)(1)(B),

IT IS HEREBY ORDERED that all of Plaintiffs' remaining claims in the above-captioned action are dismissed without prejudice:

Done this 13 day of January, 2014.

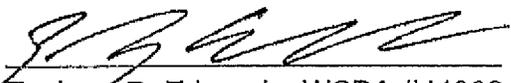


ROBERT D. SAUERLENDER
Judge

Commissioner
HAGEN & BATES, P.S.
A PROFESSIONAL SERVICE CORPORATION
ATTORNEYS AT LAW
110 W. MARKET, SUITE 202
P.O. BOX 2016
ADERDEEN, WASHINGTON 98520
TEL (360) 532-6210

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PRESENTED BY:



Zachary D. Edwards, WSBA #44862
Attorney for Plaintiffs

APPENDIX B

CERTIFICATION OF ENROLLMENT

SUBSTITUTE HOUSE BILL 2191

62nd Legislature
2012 Regular Session

Passed by the House March 3, 2012
Yeas 95 Nays 0

Speaker of the House of Representatives

Passed by the Senate February 28, 2012
Yeas 49 Nays 0

President of the Senate

Approved

Governor of the State of Washington

CERTIFICATE

I, Barbara Baker, Chief Clerk of the House of Representatives of the State of Washington, do hereby certify that the attached is **SUBSTITUTE HOUSE BILL 2191** as passed by the House of Representatives and the Senate on the dates hereon set forth.

Chief Clerk

FILED

**Secretary of State
State of Washington**

SUBSTITUTE HOUSE BILL 2191

AS AMENDED BY THE SENATE

Passed Legislature - 2012 Regular Session

State of Washington

62nd Legislature

2012 Regular Session

By House Public Safety & Emergency Preparedness (originally sponsored by Representatives Rivers, Blake, Klippert, Hurst, Haler, Takko, Alexander, Hope, Harris, and Reykdal)

READ FIRST TIME 01/31/12.

1 AN ACT Relating to police dogs; amending RCW 16.08.040 and
2 9A.76.200; and prescribing penalties.

3 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

4 **Sec. 1.** RCW 16.08.040 and 1941 c 77 s 1 are each amended to read
5 as follows:

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

12 (2) This section does not apply to the lawful application of a
13 police dog, as defined in RCW 4.24.410.

14 **Sec. 2.** RCW 9A.76.200 and 2003 c 269 s 1 are each amended to read
15 as follows:

16 (1) A person is guilty of harming a police dog, accelerant
17 detection dog, or police horse, if he or she maliciously injures,
18 disables, shoots, or kills by any means any dog or horse that the

1 person knows or has reason to know to be a police dog or accelerant
2 detection dog, as defined in RCW 4.24.410, or police horse, as defined
3 in subsection (2) of this section, whether or not the dog or horse is
4 actually engaged in police or accelerant detection work at the time of
5 the injury.

6 (2) "Police horse" means any horse used or kept for use by a law
7 enforcement officer in discharging any legal duty or power of his or
8 her office.

9 (3) Harming a police dog, accelerant detection dog, or police horse
10 is a class C felony.

11 (4)(a) In addition to the criminal penalty provided in this section
12 for harming a police dog:

13 (i) The court may impose a civil penalty of up to five thousand
14 dollars for harming a police dog.

15 (ii) The court shall impose a civil penalty of at least five
16 thousand dollars and may increase the penalty up to a maximum of ten
17 thousand dollars for killing a police dog.

18 (b) Moneys collected must be distributed to the jurisdiction that
19 owns the police dog.

--- END ---

APPENDIX C

340 F.3d 959, 03 Cal. Daily Op. Serv. 7563, 2003 Daily Journal D.A.R. 9508
(Cite as: 340 F.3d 959)

C

United States Court of Appeals,
Ninth Circuit.
James Tracey MILLER, Plaintiff–Appellant,

v.

CLARK COUNTY; Edward J. Bylsma, in his capacity
as a police officer for Clark County and as an indi-
vidual, Defendants–Appellees.

No. 02–35558.

Argued and Submitted Aug. 7, 2003.

Filed Aug. 21, 2003.

Arrestee who injured by police dog brought § 1983 suit against county and sheriff's deputy alleging that deputy's use of the police dog constituted excessive force in violation of his Fourth Amendment right to be free from unreasonable seizures. The United States District Court for the Western District of Washington, J. Kelley Arnold, United States Magistrate Judge, entered judgment in favor of defendants, and plaintiff appealed. The Court of Appeals, Gould, Circuit Judge, held that: (1) deputy's use of police dog to “bite and hold” plaintiff's arm and for up to one minute, an unusually long bite duration, did not constitute the use of deadly force, and (2) deputy's use of police dog to “bite and hold” plaintiff's arm until deputies arrived on the scene less than a minute later did not constitute excessive force in violation of the Fourth Amendment.

Affirmed.

West Headnotes

[1] Arrest 35  68.1(4)

35 Arrest

35II On Criminal Charges

35k68.1 Mode of Making Arrest

35k68.1(4) k. Use of force. Most Cited

Cases

(Formerly 35k68(2))

For purposes of Fourth Amendment's prohibition of unreasonable seizures, deputy's use of police dog to “bite and hold” suspect's arm and for up to one minute, an unusually long bite duration, did not constitute the use of deadly force, as the seizure did not pose more than a remote possibility of death. U.S.C.A. Const.Amend. 4.

[2] Arrest 35  68.1(4)

35 Arrest

35II On Criminal Charges

35k68.1 Mode of Making Arrest

35k68.1(4) k. Use of force. Most Cited

Cases

(Formerly 35k68(2))

In determining the reasonableness of a seizure effected by non-deadly force, Court of Appeals balances the nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing government interests at stake. U.S.C.A. Const.Amend. 4.

[3] Arrest 35  68.1(4)

35 Arrest

35II On Criminal Charges

35k68.1 Mode of Making Arrest

35k68.1(4) k. Use of force. Most Cited

Cases

(Formerly 35k68(2))

340 F.3d 959, 03 Cal. Daily Op. Serv. 7563, 2003 Daily Journal D.A.R. 9508

(Cite as: 340 F.3d 959)

In determining the reasonableness of a seizure effected by non-deadly force, Court of Appeals first assesses the gravity of the particular intrusion on Fourth Amendment interests by evaluating the type and amount of force inflicted. U.S.C.A. Const.Amend. 4.

[4] Arrest 35 ~~68.1~~68.1(4)

35 Arrest

35II On Criminal Charges

35k68.1 Mode of Making Arrest

35k68.1(4) k. Use of force. Most Cited

Cases

(Formerly 35k68(2))

In determining the reasonableness of a seizure effected by non-deadly force, Court of Appeals assesses the importance of the government interests at stake by evaluating: (1) the severity of the crime at issue, (2) whether the suspect posed an immediate threat to the safety of the officers or others, and (3) whether the suspect was actively resisting arrest or attempting to evade arrest by flight. U.S.C.A. Const.Amend. 4.

[5] Arrest 35 ~~68.1~~68.1(4)

35 Arrest

35II On Criminal Charges

35k68.1 Mode of Making Arrest

35k68.1(4) k. Use of force. Most Cited

Cases

(Formerly 35k68(2))

In determining the reasonableness of a seizure effected by non-deadly force, Court of Appeals balances the gravity of the intrusion on the individual against the government's need for that intrusion to determine whether it was constitutionally reasonable. U.S.C.A. Const.Amend. 4.

[6] Arrest 35 ~~68.1~~68.1(4)

35 Arrest

35II On Criminal Charges

35k68.1 Mode of Making Arrest

35k68.1(4) k. Use of force. Most Cited

Cases

(Formerly 35k68(2))

Deputy's use of police dog to "bite and hold" suspect's arm until deputies arrived on the scene less than a minute later did not constitute excessive force in violation of the Fourth Amendment, considering that suspect was hiding in woods at night, that he was wanted for felony of attempting to flee from officers by driving a car with willful disregard for the lives of others, that deputy was entitled to assume that suspect posed an immediate threat to his and to other deputy's safety, and that suspect was actively resisting arrest or attempting to evade arrest by flight. U.S.C.A. Const.Amend. 4.

*960 John R. Muenster, Muenster & Koenig, Seattle, WA, for the plaintiff-appellant.

Dennis M. Hunter, Clark County Prosecuting Attorney's Office, Vancouver, WA, for the defendant-appellee.

Appeal from the United States District Court for the Western District of Washington; J. Kelley Arnold, Magistrate Judge, Presiding, D.C. No. CV-01-05528-JKA.

Before ALARCÓN, GOULD, and CLIFTON, Circuit Judges.

GOULD, Circuit Judge.

We consider whether a sheriff's deputy violated a criminal suspect's Fourth Amendment right to be free from unreasonable seizures by ordering a trained police dog to "bite and hold" the suspect until officers

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arrived on the scene less than a minute later. Because we conclude that the officer's use of the dog here did not violate the suspect's Fourth Amendments rights, we affirm the district court's judgment.

I

A Clark County Sheriff's Deputy was on routine patrol on the night of January 21, 2001, when he became suspicious of the driver of a silver Pontiac Fiero. ^{FN1} The deputy had conducted a computerized check and discovered that the Fiero bore a license plate registered to a different vehicle. Because the switched license plate constituted a traffic infraction and was evidence that the vehicle might have been stolen, the deputy turned on his emergency overhead lights and siren to signal the driver to pull over. The driver, later determined to be James Tracey Miller (the plaintiff in this action), refused.

FN1. Our rendition of the facts is taken from the district court's factual findings after trial of the excessive force claim.

At the entrance to a long driveway, the driver slowed the Fiero, and a passenger exited. The deputy pursued the passenger, while the driver drove the Fiero up the driveway unpursued. The deputy called for backup.

Soon thereafter, one of the defendants, Sheriff's Deputy Edward Bylsma, arrived with his police dog "Kimon." Deputy Bylsma and the dog walked up the long driveway and found the Fiero, now unoccupied, in front of a house. Deputy Bylsma learned that the plaintiff Miller lived in the house with his parents and that Miller 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. Deputy Bylsma was told by other deputies that the house's residents were not "law enforcement friendly" and that a "10-96," a mentally ill person, lived there. He was told that Miller had been seen running away

from the house a few minutes earlier. Deputy Bylsma saw a seven or eight-inch knife on the Fiero's seat.

Deputy Bylsma, along with another deputy and the police dog, tracked Miller across Miller's parents' large rural property. Deputy Bylsma, the other deputy, and *961 the dog passed through underbrush, over electric fences, and across a field before arriving at some dense, dark, wooded terrain. The search party paused, and Deputy Bylsma yelled: "This is the Sheriff's Office. You have five seconds to make yourself known, or a police dog will be sent to find you." There was no response. Deputy Bylsma then let the dog off his leash and gave the dog a command that directed the dog to search for the suspect and detain him by biting his arm or leg. Deputy Bylsma watched the dog enter the woods and heard the dog breaking through the underbrush, as if "working the scent." About one minute later, Deputy Bylsma heard Miller scream. Deputy Bylsma immediately ran into the woods in the direction of the scream. Because it was dark and the woods were unfamiliar to him, it took Deputy Bylsma between forty-five and sixty seconds to arrive at a location from which he could see Miller. Deputy Bylsma saw that Miller was unarmed and that the police dog was biting Miller's upper arm. Deputy Bylsma ordered the dog to release Miller, and the dog promptly complied.

Miller was arrested and taken to the hospital with a severe injury. Miller's skin was torn in four places above the elbow, and the muscles underneath were shredded. Miller's biceps muscle was "balled up" in the antecubital space. His brachialis muscle—the muscle closest to the bone and alongside the brachialis artery—was torn. Miller's injury went as deep as the bone. He underwent surgery by an orthopedic surgeon and spent several days in the hospital. Miller continues to suffer lingering effects from the dog bite.

Deputy Bylsma's police dog is a specially trained German Shepherd. The dog is trained to "bite and hold" a suspect's arm or leg until Deputy Bylsma

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orders the dog to release. The dog bites with a force of 800 to 1,200 pounds per square inch, and the longer the dog bites, the more severely a suspect will be injured. Ordinarily, the dog bites a suspect for only about four seconds before Deputy Bylsma orders the dog to release. Here, however, the dog bit Miller for between forty-five and sixty seconds, because it took Deputy Bylsma that long to locate Miller and confirm that the dog could release him without posing a threat to officers.

Miller filed this action against Deputy Bylsma and against Clark County under 42 U.S.C. § 1983 alleging that Deputy Bylsma's use of the police dog in these circumstances constituted excessive force in violation of Miller's Fourth Amendment right to be free from unreasonable seizures. Before trial, the district court granted the defendants partial summary judgment on one Fourth Amendment issue, holding that Deputy Bylsma's use of the police dog did not constitute "deadly force." After a bench trial, the district court entered judgment in favor of both defendants, holding that Deputy Bylsma's use of the dog was not unreasonable "excessive force" under the circumstances.^{FN2} Miller appeals.

FN2. Miller also asserted two state-law tort claims, and the district court ruled for the defendants on those claims.

II

[1] The use of force to effect an arrest is subject to the Fourth Amendment's prohibition on unreasonable seizures. *Graham v. Connor*, 490 U.S. 386, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989). To determine whether Deputy Bylsma's use of the police dog to "bite and hold" Miller was an unconstitutional unreasonable seizure, we first consider whether Deputy Bylsma's use of the dog constituted "deadly force"—a category of force that is reasonable only *962 in special circumstances.^{FN3} Because we are reviewing the district court's grant of partial summary judgment to the defendants on the deadly force issue, we must determine,

viewing the evidence presented on the summary judgment motion in the light most favorable to Miller,^{FN4} if there is a genuine issue of material fact as to whether Deputy Bylsma used deadly force. See *Oliver v. Keller*, 289 F.3d 623, 626 (9th Cir.2002).

FN3. If Deputy Bylsma's use of the police dog constituted "deadly force," then his actions are judged under the standard of *Tennessee v. Garner*, 471 U.S. 1, 3, 11, 105 S.Ct. 1694, 85 L.Ed.2d 1 (1985) (holding that deadly force is appropriate only if an officer has probable cause to believe that a suspect poses a significant threat of death or serious physical injury to the officer or others). If, on the other hand, Deputy Bylsma's use of the police dog did not constitute deadly force, then his actions are judged under the less rigorous standard of *Graham*, 490 U.S. at 396, 109 S.Ct. 1865 (identifying factors relevant to whether force was excessive).

FN4. On this issue, therefore, we consider not the facts as found by the trial court after trial but rather the version of the facts presented by the parties before the court ruled on the partial summary judgment motion.

Deadly force means force reasonably likely to kill. *Vera Cruz v. City of Escondido*, 139 F.3d 659, 660 (9th Cir.1997).^{FN5} To be characterized as deadly, force must present "more than a remote possibility" of death in the circumstances under which it was used. *Id.* at 663. We have held that an officer's ordering a police dog to bite a suspect does not pose more than a remote possibility of death in most circumstances. *Brewer v. City of Napa*, 210 F.3d 1093, 1098 (9th Cir.2000) ("[T]he *Garner* analysis with respect to deadly force generally does not apply to the use of police dogs.").^{FN6} Notwithstanding this general rule, we have never before had occasion to determine whether an officer's ordering a police dog to bite a suspect's arm or leg *and permitting the dog to continue*

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biting for up to one minute, an unusually long bite duration, poses more than a remote possibility of death. Viewing the facts in the light most favorable to Miller, we conclude that such a seizure does not pose more than a remote possibility of death.

FN5. Miller urges that our *Vera Cruz* decision should be overturned and that force creating “a substantial risk of causing death or serious bodily injury” should be deemed deadly force. Even if *Vera Cruz* were wrongly decided, we still would be required to follow its holding. *See, e.g., Branch v. Tunnell*, 14 F.3d 449, 456 (9th Cir.1994).

FN6. *See also Vera Cruz*, 139 F.3d at 663 (affirming the district court's refusal to instruct the jury on deadly force when the plaintiff failed to present evidence that a trained police dog's bite posed a substantial threat of death); *Quintanilla v. City of Downey*, 84 F.3d 353, 358 (9th Cir.1996) (same); *Fikes v. Cleghorn*, 47 F.3d 1011, 1014–15 (9th Cir.1995) (same); *Chew v. Gates*, 27 F.3d 1432, 1442–43 (9th Cir.1994) (declining to decide whether an officer's ordering a police dog to bite a suspect constituted “deadly force” but noting, in dicta, that such force “at the very least approaches deadly proportions”).

Kimon, the German Shepherd that bit Miller, bites with up to 1,200 pounds per square inch of pressure—pressure roughly comparable to that exerted by a car tire running over a body part. Although Kimon is trained to bite a suspect's arms and legs, Deputy Bylsma admitted it is “possible” the dog could bite a suspect's head or neck if that body part presented itself most readily.

Even if Kimon avoids a suspect's head and neck, and bites a suspect's arm or leg, as the dog is trained to

do, his bite may pose some modest threat to a suspect's life. One of Miller's expert witnesses, Dr. Craig Eddy, a surgeon, submitted an affidavit opining that “[a] dog with the wound-inflicting capability of the dog that bit Mr. Miller is capable of lacerating arteries in *963 the arms or legs, resulting in death due to exsanguination.” This expert opined that a suspect could die in a few minutes if a dog happened to bite a suspect's arm or leg in the wrong place, severing a critical artery, and if the suspect were then permitted to bleed to death.

Deputy Bylsma testified at his deposition that the longer a dog is permitted to bite a suspect, the greater the likelihood the suspect will be injured severely.

Even if it is “possible” that Kimon could bite a suspect's head or neck, that Kimon is “capable” of lacerating arteries that could result in a suspect's bleeding to death, and that Kimon injures a suspect more seriously the longer he bites, we still conclude that Deputy Bylsma did not use deadly force when he caused Kimon to bite Miller for up to sixty seconds. Such mere “possibilities” and “capabilities” do not add up to a “reasonable probability.” Even when we credit Miller's evidence, as we must at this stage, the risk of death from a police dog bite is remote. We reiterate that the possibility that a properly trained police dog could kill a suspect under aberrant circumstances does not convert otherwise nondeadly force into deadly force. *See Vera Cruz*, 139 F.3d at 663. Miller has not presented evidence that he was subjected to “more than a remote possibility of death,” *see id.*, so we affirm the district court's partial summary judgment on the deadly force issue.^{FN7}

FN7. Dr. Eddy as an expert witness for Miller further opined in his affidavit that “[a]llowing a police dog ... to bite a human being on the extremities, without immediate restraint, constitutes the use of deadly force” and that “the force and location of the dog bite wounds[here] had a reasonable proba-

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bility of causing Mr. Miller's death." Without expressing disrespect for the genuineness of Miller's expert's opinions, we conclude that these statements do not create a genuine issue of material fact as to whether Deputy Bylsma's ordering the dog to bite Miller constituted deadly force. First, the expert's opinion that the bite constituted "deadly force" is a legal conclusion, not a medical conclusion, and we are not bound by a witness's opinions about the law. *See, e.g., Mukhtar v. Calif. State Univ.*, 299 F.3d 1053, 1066 n. 10 (9th Cir.2002). Second, the expert's opinion that the "force and location of the dog bite wounds [here] had a reasonable probability of causing Mr. Miller's death" is of limited relevance because, "[i]n judging whether force is deadly, we do not consider the result in a particular case—be it that the suspect was killed or injured—but whether the force used had a reasonable probability of causing death." *Vera Cruz*, 139 F.3d at 663. In this sense, Miller's expert Dr. Eddy addressed the wrong question. Even if Miller's wounds eventually proved severe, Deputy Bylsma's deployment of the police dog, viewed objectively from the perspective of a reasonable officer on the scene, did not have a reasonable probability of causing Miller's death.

III

Having concluded that Deputy Bylsma's use of the police dog did not constitute "deadly force," we now consider whether his use of the police dog nonetheless constituted unreasonable "excessive force" under the Fourth Amendment. The district court, after a bench trial, concluded that Deputy Bylsma's use of the police dog did not constitute excessive force. Reviewing the district court's factual findings for clear error and its legal conclusions de novo, *see Dubner v. City and County of San Francisco*, 266 F.3d 959, 964 (9th Cir.2001), we agree with

the district court's conclusions and affirm its judgment.^{FN8}

FN8. We have reviewed the record and the district court's factual findings, and we cannot say that any of the district court's factual findings are clearly erroneous. *See Easley v. Cromartie*, 532 U.S. 234, 242, 121 S.Ct. 1452, 149 L.Ed.2d 430 (2001) (holding that clear error exists only when the appeals court has a "definite and firm conviction that a mistake has been committed."). All of the district court's factual findings are amply supported by the record.

*964 [2][3][4][5] In determining the reasonableness of a seizure effected by non-deadly force, we balance "the nature and quality of the intrusion on the individual's Fourth Amendment interests" against "the countervailing government interests at stake." *See Graham*, 490 U.S. at 396, 109 S.Ct. 1865 (internal quotations omitted). Our analysis proceeds in three steps. First, we assess the gravity of the particular intrusion on Fourth Amendment interests by evaluating the type and amount of force inflicted. *Chew*, 27 F.3d at 1440. Second, we assess the importance of the government interests at stake by evaluating: (1) the severity of the crime at issue, (2) whether the suspect posed an immediate threat to the safety of the officers or others, and (3) whether the suspect was actively resisting arrest or attempting to evade arrest by flight. *See Graham*, 490 U.S. at 396, 109 S.Ct. 1865 (internal quotations omitted). Third, we balance the gravity of the intrusion on the individual against the government's need for that intrusion to determine whether it was constitutionally reasonable. *See Headwaters Forest Defense v. County of Humboldt*, 240 F.3d 1185, 1199 (9th Cir.2000) (judgment vacated and case remanded for further consideration in light of *Saucier v. Katz*, 533 U.S. 194, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001), by *County of Humboldt v. Headwaters Forest Defense*, 534 U.S. 801, 122 S.Ct. 24, 151 L.Ed.2d 1 (2001)) (judgment reaffirmed after remand

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by *Headwaters Forest Defense v. County of Humboldt*, 276 F.3d 1125, 1127 (9th Cir.2002)).

A

[6] We begin our analysis of the excessive force issue by evaluating the district court's appraisal of the type and amount of force inflicted. The district court found that the force used to seize Miller, though not deadly, was "considerable" and was "exacerbated by the duration of the bite." Although the police dog was trained to bite and hold a suspect's arm or leg, not to maul a suspect, Deputy Bylsma permitted the dog to bite and hold Miller for an unusually long time period, an action that might cause a suspect pain and bodily injury. *Cf. Watkins v. City of Oakland*, 145 F.3d 1087, 1093 (9th Cir.1998) (holding that "excessive duration of the bite ... could constitute excessive force"); *Chew*, 27 F.3d at 1441 ("By all accounts, the force used to arrest Chew was severe. Chew was apprehended by a German Shepherd taught to seize suspects by biting hard and holding."). We conclude that the intrusion on Miller's Fourth Amendment interests was a serious one.

B

We next assess the importance and legitimacy of the government's countervailing interests, mindful of the three factors the Supreme Court identified in *Graham* as pertinent to this inquiry:

First, to understand the government's interest we must consider the severity of Miller's crimes. Miller was wanted not only for a misdemeanor traffic infraction (mismatched license plates), but also for a prior felony. The government has an undeniable legitimate interest in apprehending criminal suspects, *see United States v. Hensley*, 469 U.S. 221, 229, 105 S.Ct. 675, 83 L.Ed.2d 604 (1985) (referring to "the strong government interest in solving crimes and bringing offenders to justice"), and that interest is even stronger when the criminal is, like Miller, suspected of a felony, which is by definition a crime deemed serious by the state. This factor strongly fa-

vors the government.

Second, we consider whether Miller threatened officers' safety—which we have viewed as the most important of the three *Graham* factors. From Deputy Bylsma's *965 viewpoint,^{FN9} Miller posed an immediate threat to officers' safety. Deputy Bylsma knew that Miller had defied orders to stop. Deputy Bylsma knew that Miller was a felony suspect wanted for the crime of attempting to flee from police by driving a car with "a wanton or willful disregard for the lives ... of others," Rev.Code Wash. § 46.61.024, a crime that evinces a willingness to threaten others' safety in an attempt to escape responsibility for past crimes.^{FN10} Deputy Bylsma knew that Miller had possessed a large knife moments earlier, a fact that suggests Miller had a propensity to carry a weapon (and perhaps a weapon more lethal than the one he had left behind).^{FN11} Deputy Bylsma knew that there was a chance Miller was not "law enforcement friendly." Deputy Bylsma knew that there was a chance Miller had mental health problems.

FN9. We evaluate the reasonableness of Deputy Bylsma's use of force based on his "contemporaneous knowledge of the facts." *See Deorle v. Rutherford*, 272 F.3d 1272, 1281 (9th Cir.2001).

FN10. Even if Miller were wanted only for a nondangerous felony, we still would deem it significant—though of limited significance—that Miller was a felony suspect. *See Chew*, 27 F.3d at 1442 ("[I]n view of the fact that the record does not reveal the *type* of felony for which Chew was wanted, the existence of the warrants is of limited significance.").

FN11. Miller suggests that in *Robinson v. Solano County*, 278 F.3d 1007 (9th Cir.2002) (en banc), we held that, in assessing the

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dangerousness of a fleeing suspect, a police officer may put no weight on the fact that the suspect previously possessed a weapon. Rather, we held in *Robinson* that the mere fact that a fleeing suspect had previously possessed a weapon, without more, was insufficient by itself to justify the seizure there effected. *See id.* at 1014 (“The *only* circumstances in this case favoring the use of force was the fact that plaintiff had earlier been armed with a shotgun that he used to shoot the neighbor's dogs. We conclude that Robinson's earlier use of a weapon, that he clearly no longer carried, is insufficient to justify the intrusion on Robinson's personal security.”) (emphasis added). Here, by contrast, Miller's earlier possession of the knife was one of many circumstances that favored the use of force, and, unlike in *Robinson*, officers could not see that Miller was unarmed at the time of the seizure.

Perhaps more importantly, Deputy Bylsma knew that if Miller's defiant and evasive tendencies turned violent, and Miller staged an ambush, Miller would possess a strategic advantage over the deputies. Deputy Bylsma suspected that Miller was hiding in the woods, but he did not know where within those woods Miller was hiding. Deputy Bylsma knew that it was night and that the woods were dark. He knew that the terrain was treacherous, strewn with (as the district court put it) “unseen obstacles obscured by darkness.” He knew that Miller—unlike the deputies—was familiar with the terrain and that Miller might have seized the opportunity to select a hiding place to maximize Miller's strategic advantage. Deputy Bylsma did not know whether Miller was armed. He knew that Miller remained defiant, having ignored Deputy Bylsma's warning that he was about to release a police dog. Under these objectively menacing circumstances, Deputy Bylsma was entitled to assume that Miller posed an immediate threat to his and to the other deputy's safety. *See Manuel v. City of Atlanta*, 25

F.3d 990, 995 (11th Cir.1994) (from the viewpoint of an officer confronting a dangerous suspect, “a potential arrestee who is neither physically subdued nor compliantly yielding remains capable of generating surprise, aggression, and death”). Given the gravity of the risk to law enforcement, with Miller hiding in the shadows, this second *Graham* factor weighs heavily in the government's favor.

Third, we consider whether Miller was actively resisting arrest or attempting to evade arrest by flight. Although Miller had paused while hiding in the woods at *966 the time of his arrest, Miller was still evading arrest by flight. *See Chew*, 27 F.3d at 1442. This factor favors the government. *Id.*

All three *Graham* factors favor the government. But that does not end our inquiry.

C

Mindful of both the serious intrusion on Miller's Fourth Amendment interests caused by the dog bite, and the strong countervailing government interests in safely arresting Miller, we must now consider the dispositive question whether the force that was applied was reasonably necessary under the circumstances. We conclude that it was reasonably necessary.

Although the government need not show in every case that it attempted less forceful means of apprehension before applying the force that is challenged, we think it highly relevant here that the deputies had attempted several less forceful means to arrest Miller, including: signaling to Miller with emergency lights and siren to stop his vehicle; pursuing Miller's vehicle in a police cruiser; pursuing Miller on foot; and audibly warning Miller to surrender or be chased by a police dog. Because of Miller's defiance, each of these less drastic measures failed.

Under the circumstances confronting Deputy

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Bylsma, use of the police dog was well suited to the task of safely arresting Miller. Deputy Bylsma knew that a trained police dog could be trusted to neutralize the many strategic advantages that Miller had obtained by crouching in the darkness in a remote and unbounded landscape familiar only to Miller and treacherous to others who might enter. Deputy Bylsma knew of the keen nose, acute vision, stealthy speed, natural courage, and lupine strength of the German Shepherd—qualities at the service of the dog's fine instincts and careful training. Deputy Bylsma knew that, despite the darkness, the dog was trained to find, seize, and hold Miller, careful not to hurt Miller more than necessary to disarm, disorient, and restrain him until deputies arrived on the scene seconds later. Deputy Bylsma knew that the dog, trained to obey, would release Miller as soon as Deputy Bylsma determined it was safe and gave the command.^{FN12} He knew that the dog was trained to effect Miller's arrest as safely as possible under the circumstances.^{FN13} In *968 sum, Deputy Bylsma knew that a police dog's excellent canine qualities were well suited to the important task of capturing a fleeing felon in this ominous setting, a threatening landscape that might have filled even staunch human hearts with dread.

FN12. It is important that Deputy Bylsma arrived on the scene soon after he heard Miller scream and that Deputy Bylsma commanded Kimon to release Miller as soon as Deputy Bylsma determined that Miller was unarmed. This was good police work, and it showed Deputy Bylsma's desire to minimize harm to the suspect.

FN13. Kimon's contributions as a trained police dog show that Kimon has many of the excellent qualities that have been admired in his species for centuries. These qualities of the species in general, and of Kimon in particular, are relevant because they underscore the value to human society of skilled police dogs. Many of our predecessors on the

bench, though writing in different contexts, have recognized the qualities that render reliable and reasonable the use of police dogs in such circumstances as confronted Deputy Bylsma. The words of some of our predecessor judges bear repeating here, and there is no better place to start than with the Maine Supreme Court's 1884 *Maine v. Harriman* decision, which lauded the noble hound:

He is the friend and companion of his master—accompanying him in his walks, his servant aiding him in his hunting, The playmate of his children—an inmate of his house, protecting it against all assailants.

75 Me. 562, 566, 1884 WL 2912 (1884).

Perhaps feeling that the Maine Supreme Court's words, though eloquent, did not do the dog justice, the justices of the South Carolina Supreme Court in 1899 paid tribute

to the noble Newfoundland, that braves the water to rescue the drowning child; to the Esquimaux dog, the burden bearer of the arctic regions; the sheep dog, that guards the shepherd's flocks and makes sheep raising possible in some countries; to the St. Bernard dog, trained to rescue travelers lost or buried in the snows of the Alps; to the swift and docile greyhound; to the package carrying spaniel; to the sagacious setters and pointers, through whose eager aid our tables are supplied with the game of the season; to the fleet fox hounds, whose music when opening on the fleeing fox is sweet to many ears; to the faithful watch dog, whose honest bark, as Byron says, bays "deep-mouthed welcome as we draw near home;" to the rat-exterminating terri-

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er; to the wakeful fice, which the burglar dreads more than he does the sleeping master; to even the pug, whose very ugliness inspires the adoration of the mistress; to the brag possum and coon dog, for which the owner will fight if imposed upon; and lastly, to the pet dog, the playmate of the American boy, to say nothing of the “yaller dog,” that defies legislatures.

Of all animals the dog is most domestic. Its intelligence, docility and devotion make it the servant, the companion and the faithful friend of man.

State v. Langford, 55 S.C. 322, 33 S.E. 370, 371 (1899).

The California Court of Appeals weighed in in 1919, noting that “[f]rom the building of the pyramids to the present day, from the frozen poles to the torrid zone, wherever man has wandered there has been his dog.” *Roos v. Loeser*, 41 Cal.App. 782, 784, 183 P. 204 (1919). Soon thereafter, the Georgia Supreme Court made its contribution to the judicial literature about the dog:

In metal and in stone [the dog's] noble image has been perpetuated, but the dog's chief monument is in the heart of his friend, “man.” As a house pet, a watchdog, a herder of sheep and cattle, in the field of sport, and as the motive power of transportation, especially in the ice fields of the far north as well as in the Antartics, the dog has ever been a faithful companion and helper of man.

Montgomery, 169 Ga. at 748, 151 S.E. 363.

The United States Court of Claims judges' 1950 paean to the dog is personal and heartfelt:

In our youth we always had dogs, mostly of the mongrel variety, but nevertheless dogs. We placed them just behind people, and when on rare occasions we fell out with any of our playmates, our hounds usually forged ahead.

We have very little respect and no affection for anyone who has not at some time in his life loved a dog. Throughout history the dog has been known for his loyalty and faithfulness. He has been celebrated in song and story. Even books have been written about the dog, his character, intelligence and attributes. The dog has been able to awaken affection in the hearts of every race of people. Wherever man has gone, on the frontier, in the great woods, in the frozen north, the faithful dog has been his constant companion, sharing his hardships and his poverty. When in trouble, humanity finds consolation in his company.

Alcibiades had a handsome dog.

Senator Vest described the dog as “man's best friend.”

We meet him first in Homer's verse: “The dog by the Aegean seas.”

Scott referred to him as the “companion of our pleasures and our toils,” and Mark Twain said the difference between a dog and a man is that “if you pick up a starving dog and make him prosperous, he will not

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bite you.”

It was a dog that licked the wounds of Lazarus in his rags. Rin Tin Tin was a movie star. Neither poverty nor riches, success nor failure, affects his loyalty. It was the dog that served as a test for the army of Gideon. He also performed heroic services in the

most modern and greatest of all wars. The poet said that high in the courts of Heaven the one sure welcome that awaited was a little dog angel that “sits alone at the gates,” and would not play with the others until his master arrived.

Pedersen v. United States, 115 Ct.Cl. 335, 338 (1950).

Our judicial predecessors' eloquent praise of the dog is matched in the annals of law by attorney (and, later, senator) George Graham Vest's famous closing argument to a jury in an 1872 case involving the illegal shooting of a fabulous hunting dog named “Old Drum.” The argument, once memorized by American schoolchildren (a tradition worthy of revival), is known as “Vest's Eulogy to the Dog”:

Gentlemen of the Jury: The best friend a man has in this world may turn against him and become his enemy. His son or daughter that he has reared with loving care may prove ungrateful. Those who are nearest and dearest to us, those whom we trust with our happiness and our good name, may become traitors to their faith. The money that a man has he may lose. It flies away from him, perhaps when he needs it most. A man's reputation may be sacrificed

in a moment of ill-considered action. The people who are prone to fall on their knees to do us honor when success is with us may be the first to throw the stone of malice when failure settles its cloud upon our heads. The one absolutely unselfish friend that a man can have in this selfish world, the one that never deserts him, the one that never proves ungrateful or treacherous, is his dog. Gentlemen of the jury, a man's dog stands by him in prosperity and in poverty, in health and in sickness. He will sleep on the cold ground, where the wintry winds blow and the snow drives fierce, if only he may be near his master's side. He will kiss the hand that has no food to offer; he will lick the wounds and sores that come in encounter with the roughness of the world. He guards the sleep of his pauper master as if he were a prince. When all other friends desert he remains. When all riches take wings and reputation falls to pieces, he is as constant in his love as the sun in its journey through the heavens. If fortune drives the master forth an outcast in the world, friendless and homeless, the faithful dog asks no higher privilege than that of accompanying to guard against danger, to fight against his enemies, and when the last scene of all comes, and death takes the master in his embrace and his body is laid away in the cold ground, no matter if all other friends pursue their way, there by his graveside will the noble dog be found, his head between his paws, his eyes sad but open in alert watchfulness, faithful and true even in death.

1943–44 *Official Manual*, State of Missouri 1129.

Truly, we have no finer friend than the dog.

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(Cite as: 340 F.3d 959)

By contrast, the alternative measures proposed by Miller were utterly unsuited to the task of safely arresting a suspect in this setting. If Deputy Bylsma had wandered blindly into the woods with the dog on a leash, as Miller proposes, Deputy Bylsma might have walked into an ambush. Or Deputy Bylsma might have been pulled by an eager police dog into a dangerous situation with no opportunity to react safely.

If Deputy Bylsma had ordered the dog to release Miller before Deputy Bylsma arrived on the scene, as Miller proposes, Miller might have had a chance to hide or flee anew, to recover a weapon, to harm the dog, or to prepare to launch an ambush against the deputies. Deputy Bylsma was wise not to order the dog to release Miller. Deputy Bylsma's ordering the dog to bite, and hold, Miller was reasonably necessary under the circumstances.

We decide that, under the totality of the circumstances, the government's several strong interests in effecting Miller's seizure through the means chosen outweighed Miller's legitimate interest in not being bitten by a dog. We conclude that Deputy Bylsma's use of a police dog to bite and hold Miller until deputies arrived on the scene less than a minute later was a reasonable seizure that did not violate Miller's Fourth Amendment rights. *Accord Mendoza v. Block*, 27 F.3d 1357, 1362–63 (9th Cir.1994) (holding that police did not violate a suspect's Fourth Amendment rights under the circumstances by ordering a police dog to bite him). Notwithstanding the serious injuries to Miller, there was no use of excessive force under the circumstances.^{FN14}

FN14. Because Miller's Fourth Amendment rights were not violated, we need not and do not decide whether defendant Clark County could be liable for any constitutional violation under *Monell v. Dept. of Soc. Servs.*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978).

In addition, we affirm the district court's judgment for the defendants on both of Miller's state-law claims. We affirm the district court's judgment for the defendants on Miller's assault and battery claim because it falls along with Miller's rejected federal Fourth Amendment claim. *See McKinney v. City of Tukwila*, 103 Wash.App. 391, 13 P.3d 631, 641 (2000) (holding that under Washington law a police officer is liable for assault or battery in effecting an arrest only if the officer used force unreasonable under the United States Constitution's 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. *See McKinney*, 13 P.3d at 641. 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.

AFFIRMED.

C.A.9 (Wash.),2003.

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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 mar-
ital community; Ryan and Jane Doe Bonnalie, hus-
band and wife, individually and as a marital commu-
nity; 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.

Diehl Randall Rettig, Rettig Osborne Forgette
O'Donnell Iller & Adamson LLP, Larry Wayne Zeig-
ler, Larry Zeigler Law Office, Kennewick, WA, for
Plaintiffs.

Brian A. Christensen, Jerry John Moberg, Jerry J.
Moberg & Associates, Jennifer D. Homer, Canfield
and Associates Inc., Ephrata, WA, John S. Ziobro,
Kennewick City Attorney, Kennewick, WA, Michael
E. McFarland, Jr., Evans Craven & Lackie PS, Spo-
kane, WA, for Defendants.

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 contin-
ued 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 De-
partment 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 resi-
dence 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 hap-
pened 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 ex-
plained 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

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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

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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 claims. 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

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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

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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 through 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.^{FN1} 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.

FN1. 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

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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.

*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 curtilage; 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

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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

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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**.

Not Reported in F.Supp.2d, 2007 WL 2055038 (E.D.Wash.)
(Cite as: 2007 WL 2055038 (E.D.Wash.))

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

E.D.Wash.,2007.
Rogers v. City of Kennewick
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END OF DOCUMENT

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H

This case was not selected for publication in the Federal Reporter.

Not for Publication in West's Federal Reporter See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also Ninth Circuit Rule 36-3. (Find CTA9 Rule 36-3)

United States Court of Appeals,
 Ninth Circuit.

Ken ROGERS; Mary Lou Rogers, Plaintiffs—Appellees,

v.

CITY OF KENNEWICK, a municipal corporation; Benton County, Washington, a political subdivision in the State of Washington; Ryan Bonnalie; Jane Doe Bonnalie, husband and wife individually, and as a marital community; Bradley Kohn; Jane Doe Kohn, husband and wife, individually, and as a marital community; Jeffrey Quackenbush; Jane Doe Quackenbush, husband and wife individually, and as a marital community, Defendants,

and

Richard Dopke; Jane Doe Dopke, husband and wife individually, and as a marital community, Defendants—Appellants.

Ken Rogers; Mary Lou Rogers, Plaintiffs—Appellees,
 v.

City of Kennewick, a municipal corporation; Benton County, Washington, a political subdivision in the State of Washington; Ryan Bonnalie; Jane Doe Bonnalie, husband and wife individually, and as a marital community; Bradley Kohn; Jane Doe Kohn, husband and wife, individually, and as a marital community; Jeffrey Quackenbush; Jane Doe Quackenbush, husband and wife individually, and as a marital community, Defendants—Appellants,

and

Richard Dopke; Jane Doe Dopke, husband and wife individually, and as a marital community, Defendants.

Nos. 07–35645, 07–35679.

Argued and Submitted Nov. 21, 2008.

Filed Dec. 23, 2008.

Background: Victim of police dog attack brought § 1983 action against city, county, and police officers, alleging unlawful seizure. The United States District Court for the Eastern District of Washington, Edward F. Shea, J., 2007 WL 2055038, upon jury verdict, entered judgment in favor of victim, awarded compensatory and punitive damages to victim, and granted attorney's fees and costs to victim. Defendants appealed.

Holdings: The Court of Appeals held that:

- (1) dog's biting of victim constituted seizure under Fourth Amendment;
- (2) defendants were not entitled to qualified immunity, nor was district court required to instruct jury regarding qualified immunity;
- (3) substantial evidence supported jury's award of future economic damages;
- (4) award of punitive damages was not excessive;
- (5) district court was not required to certify to Washington Supreme Court question of whether city was strictly liable under Washington's dog bite statute;
- (6) city was strictly liable under Washington's dog bite statute;
- (7) award of attorney's fees and costs was reasonable; and
- (8) victim was not entitled to sanctions.

Affirmed.

West Headnotes

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[1] Arrest 35 ⚡60.4(2)

35 Arrest

35II On Criminal Charges

35k60.4 What Constitutes a Seizure or Detention

35k60.4(2) k. Particular cases. Most Cited Cases

(Formerly 35k68(4))

Police dog's biting of plaintiff constituted seizure under Fourth Amendment, even though plaintiff was not actual suspect that police officers sought. U.S.C.A. Const.Amend. 4.

[2] Civil Rights 78 ⚡1376(6)

78 Civil Rights

78III Federal Remedies in General

78k1372 Privilege or Immunity; Good Faith and Probable Cause

78k1376 Government Agencies and Officers

78k1376(6) k. Sheriffs, police, and other peace officers. Most Cited Cases

Civil Rights 78 ⚡1440

78 Civil Rights

78III Federal Remedies in General

78k1433 Instructions

78k1440 k. Defenses; immunity and good faith. Most Cited Cases

Federal Courts 170B ⚡3794

170B Federal Courts

170BXVII Courts of Appeals

170BXVII(L) Determination and Disposition of Cause

170Bk3793 Effect of Decision in Lower Court

170Bk3794 k. In general. Most Cited Cases

(Formerly 170Bk949, 170Bk949.1)

City and police officers were not entitled to qualified immunity, nor was district court required to instruct jury regarding qualified immunity, in § 1983 action brought by victim of police dog attack; appellate court's prior ruling in case that a reasonable officer would have been aware that his conduct violated victim's rights fully resolved qualified immunity issue. 42 U.S.C.A. § 1983.

[3] Civil Rights 78 ⚡1462

78 Civil Rights

78III Federal Remedies in General

78k1458 Monetary Relief in General

78k1462 k. Grounds and subjects; compensatory damages. Most Cited Cases

Substantial evidence supported award of future economic damages to victim of police dog attack, in victim's § 1983 action against city, county, and police officers. 42 U.S.C.A. § 1983.

[4] Civil Rights 78 ⚡1465(1)

78 Civil Rights

78III Federal Remedies in General

78k1458 Monetary Relief in General

78k1465 Exemplary or Punitive Damages

78k1465(1) k. In general. Most Cited Cases

Award of punitive damages was not excessive, in § 1983 action brought by victim of police dog attack against city, county, and police officers, considering officers' conduct and amount and proportion of dam-

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 age awards. 42 U.S.C.A. § 1983.

[5] Federal Courts 170B ↪ 3107

170B Federal Courts

170BXV State or Federal Laws as Rules of Decision; Erie Doctrine

170BXV(C) Unsettled or Undecided Questions

170Bk3105 Withholding Decision; Certifying Questions

170Bk3107 k. Particular questions.
 Most Cited Cases
 (Formerly 170Bk392)

District court was not required to certify to Washington Supreme Court question of whether city was strictly liable under Washington's dog bite statute, in § 1983 action brought by victim of police dog attack. 42 U.S.C.A. § 1983; West's RCWA 16.08.040.

[6] Animals 28 ↪ 66.5(1)

28 Animals

28k66 Injuries to Persons

28k66.5 Dogs

28k66.5(1) k. Duties and liabilities in general. Most Cited Cases

City was strictly liable under Washington's dog bite statute for injuries sustained by victim of police dog attack. West's RCWA 16.08.040.

[7] Civil Rights 78 ↪ 1476

78 Civil Rights

78III Federal Remedies in General

78k1476 k. Costs. Most Cited Cases

Civil Rights 78 ↪ 1486

78 Civil Rights

78III Federal Remedies in General

78k1477 Attorney Fees

78k1486 k. Services or activities for which fees may be awarded. Most Cited Cases

Award of attorney's fees and costs to victim of police dog attack, in victim's § 1983 action against city, county, and police officers, based on work done on entire case, was reasonable, even though victim only prevailed on one claim; all claims were related, district court declined to award fees it deemed repetitive or unnecessary, and court's orders reflected "careful consideration" of billing statements and fees sought. 42 U.S.C.A. § 1983.

[8] Civil Rights 78 ↪ 1488

78 Civil Rights

78III Federal Remedies in General

78k1477 Attorney Fees

78k1488 k. Time expended; hourly rates.
 Most Cited Cases

District court acted within its discretion in setting lodestar rate for attorney's fees based on its consideration of comparable market rates for attorneys with similar experiences and clients, in § 1983 action brought by victim of police dog attack against city, county and police officers. 42 U.S.C.A. § 1983.

[9] Federal Civil Procedure 170A ↪ 2840

170A Federal Civil Procedure

170AXX Sanctions

170AXX(F) On Appeal

170Ak2837 Grounds

170Ak2840 k. Frivolousness; particular cases. Most Cited Cases

Victim of police dog attack, who brought § 1983

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action against city, county, and police officers, was not entitled to sanctions, since defendants' arguments on appeal were not wholly without merit. 42 U.S.C.A. § 1983.

*601 Brian J. Iller, Esquire, Rettig, Osborne, Forgette, O'Donnell, Iller & Adamson, LLP, Larry W. Zeigler, Esquire, Attorney at Law, Kennewick, WA, for Plaintiffs–Appellees.

Jerry J. Moberg, Esquire, Jerry Moberg & Associates, Ephrata, WA, John S. Ziobro, Esquire, Kennewick City Attorney, Kennewick, WA, for Defendants.

Michael Early McFarland, Jr., Patrick Mark Risken, Esquire, Evans, Craven & Lackie, P.S., Spokane, WA, for Defendants–Appellants.

Appeal from the United States District Court for the Eastern District of Washington, Edward F. Shea, District Judge, Presiding. D.C. No. CV–04–05028–EFS.

Before: B. FLETCHER and RAWLINSON, Circuit Judges, and EZRA ^{FN*}, District Judge.

FN* The Honorable David A. Ezra, United States District Judge for the District of Hawaii, sitting by designation.

MEMORANDUM ^{FN**}

FN** This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36–3.

**1 Defendants–Appellants the City of Kennewick, et al., and Richard and Jane Doe Dopke appeal the district court's judgment following a jury verdict of unlawful seizure, the award of compensatory and punitive damages to Plaintiffs Kenneth and

Mary Lou Rogers, and the district court's grant of attorneys fees and costs to the Rogers.

[1] 1. Although Mr. Rogers was not the actual suspect that the police officers sought, the police K–9's biting of Mr. Rogers constituted a seizure under the Fourth Amendment. *See Brower v. County of Inyo*, 489 U.S. 593, 596, 109 S.Ct. 1378, 103 L.Ed.2d 628 (1989) (“A seizure occurs even when an unintended person or thing is the object of the detention or taking ...”) (citation omitted). Substantial evidence supported the finding that excessive force was used. *See Harper v. City of Los Angeles*, 533 F.3d 1010, 1021 (9th Cir.2008).

[2] 2. The district court did not err in denying qualified immunity to the appellants. *See Torres v. City of Los Angeles*, 548 F.3d 1197, 1210–11 (9th Cir.2008). Nor did the district court err in declining to instruct the jury regarding federal qualified immunity. The jury's finding that the appellants committed an unconstitutional seizure in conjunction with this court's prior ruling in this case that a reasonable officer would have been aware that such conduct violated Plaintiffs' rights, fully resolved the qualified immunity issue. *See Rogers v. City of Kennewick*, 205 Fed.Appx. 491, 493–94 (9th Cir.2006) (unpublished disposition).

3. The district court did not err in concluding that it is possible to reconcile the jury's verdicts. *See Vaughan v. Ricketts*, 950 F.2d 1464, 1470 (9th Cir.1991). Considering the jury instructions as a whole, including the different elements for each of the claims, it is possible to reconcile the jury's verdicts, and therefore we are bound to do so. *See California v. Altus Finance S.A.*, 540 F.3d 992, 1004 (9th Cir.2008).

[3] 4. Substantial evidence supported the jury's award of future economic damages. *See Harper*, 533 F.3d at 1028 (“Unless*602 the amount is grossly excessive or monstrous, clearly not supported by the evidence, or based only on speculation or guesswork,

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we uphold the jury's award.”) (citation and internal quotation marks omitted).

F.3d 764, 784 n. 34 (9th Cir.2002), *as amended*.

AFFIRMED.

[4] 5. The jury's award of punitive damages was not excessive considering the officers' conduct and the amount and proportion of the damage awards. *See Mendez v. County of San Bernardino*, 540 F.3d 1109, 1120 (9th Cir.2008).

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[5][6] 6. The district court did not err in declining to certify to the Washington Supreme Court the question of whether the City of Kennewick was strictly liable under Washington's dog bite statute, R.C.W. § 16.08.040. *See Micomonaco v. State of Washington*, 45 F.3d 316, 322 (9th Cir.1995). Nor did the district court err in concluding that the plain language of the statute dictated that the City be held strictly liable for the K-9 bites Mr. Rogers sustained. *See McCandish Elec., Inc. v. Will Const. Co., Inc.*, 107 Wash.App. 85, 25 P.3d 1057, 1062 (Wash.App. Div. 3 2001).

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**2 [7][8] 7. The district court did not abuse its discretion in awarding attorney's fees and costs to the Rogers. Awarding fees based on work done on the entire case, even though the Rogers prevailed on only one claim, was reasonable, as Plaintiffs' claims were all related. *See Dang v. Cross*, 422 F.3d 800, 813 (9th Cir.2005). Contrary to the appellants' assertions, the district court declined to award fees it deemed repetitive or unnecessary, and its order reflects “careful consideration” of the billing statements and fees sought. *Armstrong v. Davis*, 318 F.3d 965, 975 (9th Cir.2003). Finally, the district court acted within its discretion in setting the lodestar rate for fees based on its consideration of comparable market rates for attorneys with similar experiences and clients. *See Welch v. Metropolitan Life Ins. Co.*, 480 F.3d 942, 946 (9th Cir.2007).

[9] 8. Because the appellants' arguments were not wholly without merit, we deny the Rogers' motions for sanctions. *See Orr v. Bank of America, NT & SA*, 285

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C

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.

Mark W. D. O'Halloran, Gosanko Law Firm, Mercer
Island, WA, for Plaintiff.

Robert Leslie Christie, Steven J. Dani, Thomas P.
Miller, Christie Law Group PLLC, Seattle, WA, Jen-
nifer Elizabeth Snell, Federal Way, WA, for De-
fendants.

ORDER GRANTING PLAINTIFF'S MOTION FOR
SUMMARY JUDGMENT AND GRANTING DE-
FENDANTS' MOTION FOR SUMMARY JUDG-
MENT

RICARDO S. MARTINEZ, United States District
Judge.

I. INTRODUCTION

*1 This matter comes before the Court on plain-
tiff'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 oper-
ating with a suspended license and had two outstand-
ing arrest warrants.

Officer Clary located Ms. Armas' abandoned car
at the Greystone Apartments. Officer Clary, believing

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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

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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.^{FN1}

FN1. 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).

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.^{FN2} Accordingly, plaintiff's motion for partial summary judgment is granted.^{FN3}

FN2. 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.

FN3. To the extent that defendants seek summary judgment that defendant Federal Way is not strictly liable under the statute,

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the Court denies that relief for the same reasons.

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.

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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. Dep't. 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

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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"

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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

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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.

W.D.Wash.,2007.

Peterson v. City of Federal Way

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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.

Todd Russell Renda, Tacoma, WA, for Plaintiff.

Daniel R. Hamilton, Pierce County Prosecuting At-
torney's Office, Tacoma, WA, for Defendant.

ORDER GRANTING DEFENDANT'S 12(b)(6)
MOTION TO DISMISS
BENJAMIN H. SETTLE, District Judge.

*1 This matter comes before the Court on De-
fendant'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 enforce-
ment 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 Iacononi 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 **DIS-**
MISSED with prejudice.

W.D.Wash.,2008.
Terrian v. Pierce County
Not Reported in F.Supp.2d, 2008 WL 2019815
(W.D.Wash.)

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Not Reported in F.Supp.2d, 2012 WL 1884672 (W.D.Wash.)
(Cite as: 2012 WL 1884672 (W.D.Wash.))

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.

Jeffrey D. Boyd, Nelson Boyd PLLC, Seattle, WA, for
Plaintiff.

Jean Pollis Homan, Tacoma City Attorney's Office,
Tacoma, WA, for Defendants.

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

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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^{FN1}. 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.

FN1. 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.

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

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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

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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 of-

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ficer 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.^{FN2}

FN2. 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.

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).

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*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 (1) 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,

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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

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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:

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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

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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.^{FN3} 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.

FN3. 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.

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.

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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 corpora-
tion; and James Syler, in his official and individual
capacity and Jane Doe Syler and their marital com-
munity, Defendants.

No. 11-CV-06066 RBL.
July 2, 2012.

Erik L. Bauer, Bauer & Balerud, Tacoma, WA, for
Plaintiffs.

Stewart Andrew Estes, Keating Bucklin & McCor-
mack, Seattle, WA, for Defendants.

ORDER ON DEFENDANT CITY OF LAKE-
WOOD'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

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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

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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

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*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 appear-

ing 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.

Not Reported in F.Supp.2d, 2012 WL 2568182 (W.D.Wash.)
(Cite as: 2012 WL 2568182 (W.D.Wash.))

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).

W.D.Wash.,2012.

Saldana v. City of Lakewood

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END OF DOCUMENT

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(Cite as: 2012 WL 6148866 (W.D.Wash.))

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, De-
fendants.

No. 3:11-cv-6064,

Dec. 11, 2012.

Erik Francis Ladenburg, Krilich, La Porte, West &
Lockner, Tacoma, WA, for Plaintiff.

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

ORDER ON DEFENDANTS' MOTION FOR
SUMMARY JUDGMENT

ROBERT J. BRYAN, District Judge.

*1 This matter comes before the Court on De-
fendants' Motion for Summary Judgment (Dkt.20).
The Court has considered the pleadings filed in sup-
port 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 con-
trol 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 STA-
TUS 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 de-
scribed 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

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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 locate [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.

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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

Not Reported in F.Supp.2d, 2012 WL 6148866 (W.D.Wash.)
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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

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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

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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) (non-moving 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 non-moving 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

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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

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§ 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.

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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

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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 ex-

ample, 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

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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." *Grimisby v. Samison*, 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

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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) stat-

ed, 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.

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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.

W.D.Wash.,2012.

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FREIMUND JACKSON & TARDIF PLLC

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Transmittal Letter

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