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APPENDIX A

United States Court of Appeals
for the Eighth Circuit

No. 16-4162

Morgan Hansen

Plaintiff - Appellee

v.

Thomas Black

Defendant - Appellant

Appeal from United States District Court
for the Eastern District of Missouri - St. Louis

Submitted: April 6, 2017
Filed: September 18, 2017

Before WOLLMAN and LOKEN, Circuit Judges, and

NELSON, District Judge¹.

LOKEN, Circuit Judge.

Morgan Hansen's German Shepherd, Conan, escaped from her father's back yard and ran down highway I-29 near St. Joseph, Missouri, obstructing traffic. Missouri Highway Patrol trooper Thomas Black unsuccessfully attempted to remove the dog from the roadway, then shot and killed him. Hansen filed this 42 U.S.C. § 1983 damage action against Black in his individual capacity, arguing Black unreasonably seized her dog in violation of the Fourth Amendment. Black filed a motion for summary judgment based on qualified immunity, which the district court denied. Black appeals this interlocutory order. Viewing the facts most favorably to the non-movant and reviewing the denial of qualified immunity *de novo*, we reverse. De La Rosa v. White, 852 F.3d 740, 743 (8th Cir. 2017) (standard of review).

I.

On Sunday morning, May 20, 2012, Trooper Black

¹ The Honorable Susan Richard Nelson, United States District Judge for the District of Minnesota, sitting by designation.

was dispatched to respond to calls regarding a dog on or near the I-29 roadway near busy Frederick Avenue exit ramps into St. Joseph, where the speed limit was 65 miles per hour. After accessing the southbound lanes, Trooper Black saw a collared, unleashed German Shepherd -- Conan -- running loose in the roadway. Trooper Black did not see anyone attempting to catch the dog, and southbound vehicles were swerving onto the right shoulder or rapidly changing lanes to avoid hitting the dog. To reduce the obvious traffic hazard, Trooper Black positioned his patrol car across the center stripe, shutting down both southbound lanes, while he attempted to capture the dog.

Initially, Black exited his patrol car and tried calling and running at the dog, but it ran away, down the center stripe of the southbound lanes. Black re-entered his patrol car and drove after the dog, then positioned the car to again block traffic, got out, and tried to capture the dog by "yelling, shouting, [and] running towards [him]." The dog again ran away. When Black activated his patrol car sirens to scare the dog off the road, it looped north and circled his patrol car. Black again got out and tried to scare the dog off the road by shouting and raising his hands. The dog ran away at a "full sprint," heading south on the southbound lanes of the interstate. By this time, Trooper Black could see hundreds of southbound vehicles backed up a quarter mile, which in his

experience created a serious risk of “secondary” crashes.

Trooper Black reentered his patrol car and drove as close to the running dog as he could. He exited and fired a shot at the dog from fifty to seventy feet away. The dog fell down. As Trooper Black approached from the north, the dog continued south down the center of the southbound lanes, using his front paws because his back legs were injured. Trooper Black shot the dog a second time in the torso or chest. The dog dragged itself onto the grass median between the southbound and northbound lanes. Observing the dog was now in pain and gravely wounded, Black fired two more shots “to humanely kill the dog.”²

² Trooper Black’s deposition and affidavit are the only record evidence of his attempted capture and shooting of the dog. Hansen provided no contrary evidence but denied Trooper Black’s testimony for summary judgment purposes, alleging Black’s credibility is in issue. “Once the moving party has properly supported its motion for summary judgment, the non-moving party . . . must come forward with specific facts showing that there is a genuine issue for trial.” Conseco Life Ins. Co. v. Williams, 620 F.3d 902, 910 (8th Cir. 2010) (quotation omitted). Like the district court we conclude no material fact dispute precludes our prompt determination of the qualified immunity issue, as the Supreme Court has repeatedly directed. See Pearson v. Callahan, 555 U.S. 223, 232 (2009).

II.

In this § 1983 damage action, Hansen alleges that Trooper Black's "shooting and killing Plaintiff's dog" violated her rights under the Fourth Amendment. Trooper Black appeals the district court's denial of his motion for summary judgment, arguing he is entitled to qualified immunity from Hansen's damage claim. Qualified immunity shields public officials such as Trooper Black from liability and the burdens of standing trial if their conduct did not "violate clearly established statutory or constitutional rights of which a reasonable person would have known." White v. Pauly, 137 S. Ct. 548, 551 (2017) (quotation omitted). This shields all but the "plainly incompetent" -- those whose conduct violated legal norms that existing precedent placed "beyond debate" at the time of the alleged misconduct. Ashcroft v. al-Kidd, 563 U.S. 731, 741, 744 (2011) (quotation omitted). To defeat summary judgment based on qualified immunity, Hansen must point to facts showing *both* that she suffered a violation of a constitutional or statutory right *and* that the right was clearly established at the time of Black's alleged violation.

The Fourth Amendment protects "persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. It "protects property as well as privacy." Soldal v. Cook

Cty., 506 U.S. 56, 62 (1992). “A ‘seizure’ of property occurs when there is some meaningful interference with an individual’s possessory interests in that property.” United States v. Jacobsen, 466 U.S. 109, 113 (1984). This court and other circuits that have considered the issue agree that privately-owned dogs “should be considered effects within the meaning of the Fourth Amendment.” Altman v. City of High Point, 330 F.3d 194, 202 (4th Cir. 2003); see Andrews v. City of W. Branch, 454 F.3d 914, 918 (8th Cir. 2006); Brown v. Muhlenberg Twp., 269 F.3d 205, 210-11 (3d Cir. 2001); Fuller v. Vines, 36 F.3d 65, 68 (9th Cir. 1994), *cert. denied*, 514 U.S. 1017 (1995), *overruled on other grounds by* Robinson v. Solano Cty., 278 F.3d 1007, 1013 (9th Cir. 2002); Leshner v. Reed, 12 F.3d 148, 150 (8th Cir. 1994).

A. Hansen argues that Black committed an unconstitutional seizure when he shot and killed her dog. But that over-simplifies the Fourth Amendment issue. Trooper Black unquestionably had the authority, indeed a public duty, to seize a large, unleashed dog running unrestrained down a busy high-speed interstate highway, causing vehicles to swerve, change lanes, and seek safety on the shoulder. Thus, it is not the seizure that is in question, it is the degree of force Black employed to accomplish a necessary seizure. “Determining whether the force used to effect a particular seizure is ‘reasonable’ requires balancing of the individual’s

Fourth Amendment interests against the relevant government interests.” Cty. of Los Angeles v. Mendez, 137 S. Ct. 1539, 1546 (2017) (quotation omitted). The analysis “turns on the facts and circumstances of each particular case.” Kingsley v. Hendrickson, 135 S. Ct. 2466, 2473 (2015), quoting Graham v. Connor, 490 U.S. 386, 396 (1989); see Wertish v. Krueger, 433 F.3d 1062, 1066 (8th Cir. 2006).

The district court recognized that this Fourth Amendment issue required an excessive force analysis:

A jury could find that Trooper Black’s seizure was not objectively reasonable under the circumstances.³ Although the dog may have posed a risk to motorists while it was running on the Interstate, that risk ended when Trooper Black shot the dog the first time. . . . The first shot caused the dog to drop, and by Trooper Black’s own testimony, the dog was only able to drag itself on its front paws. At this point,

³ This statement reflected a common legal error. “In determining whether a Fourth Amendment violation occurred we draw all reasonable factual inferences in favor of the jury verdict, but . . . we do not defer to the jury’s legal conclusion that those facts violate the Constitution.” Muehler v. Mena, 544 U.S. 93, 98 n.1 (2005).

Trooper Black could have picked up the dog. Instead, Trooper Black walked towards the dog and then shot it a second time. After the first shot . . . the dog had been stopped, the Interstate could be opened, and the risk to the public was over. Once the justification for a seizure ends, it is no longer reasonable for a seizure to occur.

However, although the court properly framed the Fourth Amendment issue, in our view it failed to “make this determination from the perspective of a reasonable officer on the scene.” Kingsley, 135 S. Ct. at 2473. Rather, when it appeared to the court “in the calm aftermath, that [Trooper Black] could have taken a different course” -- carrying the dog off the roadway -- it improperly held Black to that “demanding standard,” rather than limit its inquiry to the objective reasonableness of Black’s conduct. Aipperspach v. McInerney, 766 F.3d 803, 806 (8th Cir. 2014) (quotations omitted), cert. denied, 135 S. Ct. 1415 (2015).

A dog owner’s protected property interest wanes if her pet escapes. “[W]hile we do not denigrate the possessory interest a dog owner has in [her] pet, we do conclude that dog owners forfeit many of these possessory interests when they allow their dogs to run at large, unleashed, uncontrolled, and

unsupervised, for at that point the dog ceases to become simply a personal effect and takes on the nature of a public nuisance.” Altman, 330 F.3d at 205-06. Here, responding to 911 calls, Trooper Black encountered a large dog running free on a high speed interstate, causing traffic to swerve between lanes and drive onto the shoulder. Black made multiple attempts to capture the dog without using force. But his efforts were unavailing and caused a dangerous quarter-mile traffic back-up. At this point, we agree with the district court that Black’s decision to use force to clear the highway of this traffic hazard by firing the first shot was objectively reasonable. The first shot wounded the dog, but it remained in the southbound lanes, struggling to evade Black and continuing to obstruct the highway. Trooper Black decided that traffic safety, his first priority, required him to clear an interstate highway rather than continuing to hold traffic while waiting for additional help. He did not have a taser, catch, or snare pole, so he shot the dog a second time. The district court, employing hindsight, reasoned that Black could simply have carried Conan off the roadway. But we are not prepared to say that, in these circumstances, the Fourth Amendment required an officer to approach and attempt to carry a large wounded animal that his extensive efforts had failed to control. Moreover, the district court failed to explain how Black would have been able to safely reopen the

interstate after leaving this wounded animal on the median.

None of the cases on which Hansen relies involved an unleashed, unsupervised dogs that was risking public safety on a busy interstate highway and would not respond to numerous attempts at a safe, harmless seizure. In Andrews, 454 F.3d 914, an officer looking for a large black dog loose in a residential neighborhood shot another dog that was harmlessly urinating in a fenced backyard, with its owner standing a few feet away. In Brown, 269 F.3d at 209, 211-212, an officer repeatedly shot a pet “without any provocation and with knowledge that it belonged to the family who lived in the adjacent house and was available to take custody.” When a dog is “at large, uncontrolled and with no owner looking on [is] distinguishable from the Third Circuit’s decision in Brown.” Altman, 330 F.3d at 207.

An officer’s use of deadly force is always tragic, but the actions of Trooper Black were objectively reasonable under the circumstances, and he is therefore entitled to qualified immunity.

B. Even assuming a constitutional violation, Trooper Black is entitled to qualified immunity because his conduct did not violate a clearly established Fourth Amendment right. To avoid

qualified immunity, Hansen must show that existing precedent placed Trooper Black's conduct "beyond debate." al-Kidd, 563 U.S. at 741; see White, 137 S. Ct. at 552. Hansen has not cited, and we have not found, any case concluding that an officer violated the Fourth Amendment when he shot and killed an unrestrained, unsupervised dog creating a serious risk to public safety and avoiding numerous attempts to control him without force. In Andrews, 454 F.3d 914, and in Leshner, 12 F.3d 148, the dogs were under their owners' control when seized.

The district court reasoned, citing Andrews, that it was "clearly established that pets who do not pose an imminent danger cannot be shot, regardless of the specific facts that demonstrate the lack of danger," and Trooper Black's "first shot made it possible to remove the dog from Interstate through means that did not require it to be shot again." We cannot agree it was clear to a reasonable officer that the wounded dog presented no imminent danger to the motoring public when it remained in the southbound lanes, struggling to get away, while a traffic back-up created a constant risk of secondary crashes. Moreover, whether Black could have safely carried the dog off the road, and then moved his patrol car to lift the roadblock with the wounded dog still on the interstate median, is speculation that Fourth Amendment excessive force precedents do not require. Trooper Black is entitled to qualified immunity because existing precedent did not place "beyond debate" that his conduct contravened

Hansen's clearly established Fourth Amendment rights.

The Order of the district court dated October 27, 2016 denying Trooper Thomas Black's motion for summary judgment is reversed.

APPENDIX B

United States Court of Appeals
for the Eighth Circuit

No. 16-4162

Morgan Hansen

Plaintiff - Appellee

v.

Missouri State Highway Patrol; Ronald K. Replogle;
James E. McDonald

Defendants.

Thomas Black, in his individual capacity

Defendant - Appellant

Appeal from U.S. District Court for the
Western District of Missouri - St. Joseph
(5:15-cv-06058-BP)

JUDGMENT

Before WOLLMAN, LOKEN, Circuit Judges and NELSON, District Judge.

This appeal from the United States District Court was submitted on the record of the district court, briefs of the parties and was argued by counsel.

After consideration, it is hereby ordered and adjudged that the judgment of the district court in this cause is reversed and the cause is remanded to the district court for proceedings consistent with the opinion of this court.

September 18, 2017

Order Entered in Accordance with Opinion:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

APPENDIX C

**IN THE UNITED STATES
DISTRICT COURT
FOR THE WESTERN
DISTRICT OF MISSOURI
ST. JOSEPH DIVISION**

MORGAN HANSEN,	)
	)
Plaintiff,	)
	)
v.	) Case No.
	) 15-06058-CV-SJ-BP
MISSOURI STATE	)
HIGHWAY PATROL,	)
et al.,	)
	)
Defendants.	)

ORDER

This suit arises from a state trooper shooting and killing a dog on I-29 in St. Joseph, Missouri. The Complaint was filed by the dog's owner, Morgan Hansen, against various defendants. The only remaining defendant is Trooper Thomas Black who is being sued in his individual capacity. Counts II and III were previously dismissed by the Court. (Doc. 15.) Count I alleges Trooper Black violated 42 U.S.C. § 1983 and the Fourth Amendment when he shot and killed Plaintiff's dog.

Pending is Defendant's Motion for Summary Judgment. (Doc. 39.) Trooper Black argues that he is entitled to qualified immunity from Plaintiff's Fourth Amendment claim. For the following reasons, Defendant's Motion is **DENIED**. Plaintiff's related motions to strike, (Docs. 41 and 48), are **DENIED**.

I. BACKGROUND

As a preliminary matter, the Court addresses Plaintiff's two motions to strike. Plaintiff's Motion to Strike Trooper Black's Affidavit, (Doc. 41), is **DENIED**. A party is allowed to support a fact for summary judgment purposes by relying on an affidavit. Fed. R. Civ. P. 56(c)(1)(A), 56(c)(4). The Court may disregard an affidavit "where the conflicts between the deposition and affidavit raise only sham issues." *Camfield Tires, Inc., v. Michelin Tire Corp.*, 719 F.2d 1361, 1366 (8th Cir. 1983). The Eighth Circuit has ruled that the Court "may grant summary judgment where a party's sudden and unexplained revision of testimony creates an issue of fact where none existed before." *Bass v. City of Sioux Falls*, 232 F.3d 615, 618 (8th Cir. 1999) (quotation omitted). Assuming for the purposes of argument that the "sham affidavit rule" applies to an affidavit submitted by the moving party, the Plaintiff has failed to show that Trooper Black's affidavit is inconsistent with his deposition. The Eighth Circuit has repeatedly held that "a court should consider an affidavit submitted in response to a motion for summary judgment when that affidavit elaborates upon or clarifies information already submitted." *Popoalii v. Correctional Medical Services*, 512 F.3d

488, 498 (8th Cir. 2008), *see also Webb v. Garelick Manufacturing Co.*, 94 F.3d 484, 488 (8th Cir. 1996). Trooper Black's affidavit provides additional information which elaborates and clarifies his deposition rather than conflicting with it.

Plaintiff's Motion to Strike, (Doc. 48), is also **DENIED**. Plaintiff contends that Defendant's Reply Suggestions, (Doc. 47), cannot address the factual allegations contained in Plaintiff's Suggestions in Opposition. (Doc. 43.) Rule 56 states: "A party asserting that a fact cannot be . . . genuinely disputed must support the assertion by showing that the materials cited do not establish the . . . presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact." Rule 56(c)(1)(B). Thus, Defendant's Reply Suggestions appropriately respond to Plaintiff's Suggestions in Opposition.

a. The Record, Construed in Plaintiff's Favor

On the morning of Sunday, May 20, 2012 Trooper Black was dispatched to respond to a loose dog on or near I-29 in St. Joseph, Missouri. (Doc. 40-2 p. 4.)¹ When Trooper Black first saw the dog, it was in the

¹ The only evidence cited in this section comes from Trooper Black's deposition. Plaintiff attempts to cast doubt on Trooper Black's deposition. A party opposing a motion for summary judgment may not simply deny the allegations, but must point to evidence in the Record demonstrating the existence of a factual dispute. Fed. R. Civ. P. 56(c)(1); *Conseco Life Ins. Co. v. Williams*, 620 F.3d 902, 909-10 (8th Cir. 2010).

roadway on the southbound lanes of I-29. (Doc. 40-2 p. 5.) Trooper Black saw cars swerving and weaving to avoid the dog. (Doc. 40-2, p. 8.) Due to this traffic hazard, Trooper Black blocked the roadway. (Doc. 40-2, p. 8.) Trooper Black tried to capture the dog by calling it and running towards it. (Doc. 40-2 p. 5.) The dog ran away from Trooper Black south on I-29. (Doc. 40-2 p. 5.) Trooper Black then drove his patrol car south following the dog. (Doc. 40-2 p. 5.) Trooper Black again tried to capture the dog by yelling, shouting, and running towards it. (Doc. 40-2 p. 6.) The dog continued to run south, away from Trooper Black. (Doc. 40-2 p. 6.) Trooper Black got back in his patrol car and activated the sirens to try to scare the dog off the road. (Doc. 40-2 p. 6.) The dog turned back and travelled north around Trooper Black's car at which point Trooper Black exited the car and tried to scare the dog by shouting and raising his hands. (Doc. 40-2 p. 6.) The dog started running south again, away from Trooper Black. (Doc. 40-2 p. 6.)

Trooper Black followed the dog in his patrol vehicle, caught up to the dog, parked, and exited patrol car. Trooper Black then shot the dog as it was running away from him. (Doc. 40-2 p. 7.) The dog then fell down. (Doc. 40-2 p. 7.) The dog was approximately fifty to seventy feet away from Trooper Black when he shot it. The shot injured the dog, and it began using its front legs to drag itself on the roadway. (Doc. 40-2 p. 7.) Trooper Black approached the dog and observed that its back legs appeared to be wounded because they were facing back, dragging on the road as the dog propelled itself

with its front legs. (Doc. 40-2 p. 7.) Trooper Black then fired a second shot. (Doc. 40-2 p. 7.) The second shot hit the dog in the torso or chest area. The dog dragged itself off the roadway and fell into the grass median. (Doc. 40-2 p. 7.) Trooper Black walked up next to the dog and, as it appeared to be in pain, he fired two more shots, killing it. (Doc. 40-2 p. 7.)

Trooper Black reported that he shot the dog because he was concerned about a secondary crash due to the traffic being blocked. (Doc. 40-2, p. 8.) Trooper Black stated that serious physical injury or death could occur from a secondary crash. (Doc. 40-2, p. 9.) For this reason, Trooper Black said his priority was to clear the roadway as quickly as possible. (Doc. 40-2, p. 8.)

II. DISCUSSION

a. Legal Standard

Defendant seeks summary judgement based on qualified immunity. “Qualified immunity protects government officials performing discretionary functions from liability for damages so long as ‘their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.’” *Curry v. Crist*, 226 F.3d 974, 977 (8th Cir. 2000) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). “Qualified immunity gives government officials breathing room to make reasonable but mistaken judgments about open legal questions. When properly applied, it protects ‘all but

the plainly incompetent or those who knowingly violate the law.” *Ashcroft v. al-Kidd*, 563 U.S. 731, 743 (2011) (quoting *Malley v. Briggs*, 475 U.S. 335, 341 (1986)).

“Qualified immunity involves the following two-step inquiry: (1) whether the facts shown by the plaintiff make out a violation of a constitutional or statutory right, and (2) whether that right was clearly established at the time of the defendant’s alleged misconduct.” *Mitchell v. Shearrer*, 729 F.3d 1070, 1074 (8th Cir. 2013). Here, the question is whether Trooper Black violated the Plaintiff’s clearly established Fourth Amendment right by shooting and killing her dog. In evaluating the facts, the Court is guided by Rule 56. As the moving party, Defendant bears the responsibility of showing that “there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law.”² *See generally Williams v. City of St. Louis*, 783 F.2d 114, 115 (8th Cir. 1986). To do this, a movant must demonstrate that the facts are uncontroverted. In applying this standard, the Court must view the evidence in the light most favorable to the non-moving party, giving that party the benefit of all inferences that may be reasonably drawn from the evidence. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587-88 (1986); *Tyler v. Harper*, 744 F.2d 653, 655 (8th Cir. 1984), *cert. denied*, 470 U.S. 1057 (1985). A defendant’s failure to assert a crucial fact, and its corresponding absence from the

² Although the Defendant bears the burden at the summary judgement stage, the Plaintiff bears the ultimate burden at trial.

record, does mean that the fact is uncontroverted. A defendant must prove that any facts necessary to support his defense of qualified immunity are uncontroverted.

b. Violation of a Constitutional Right

The Fourth Amendment guards against unreasonable searches and seizures. *Graham v. Connor*, 490 U.S. 386, 395 (1989). A dog is considered property for Fourth Amendment purposes. *Leshner v. Reed*, 12 F.3d 148, 150-51 (8th Cir. 1994). “A seizure of property occurs when there is some meaningful interference with a person’s possessory interests in that property.” *Id.* at 150. “Destroying property meaningfully interferes with an individual’s possessory interest in that property.” *See United States v. Jacobsen*, 466 U.S. 109, 124-25 (1984). In *Andrews v. City of West Branch, Iowa*, 454 F.3d 914, 918 (8th Cir. 2006), the Eighth Circuit specifically recognized that an officer shooting and killing a dog is a seizure.

Trooper Black’s seizure of Plaintiff’s dog violated the Fourth Amendment if it was unreasonable. Fourth Amendment claims are governed by an “objective reasonableness” standard. *Plumhoff v. Rickard*, 134 S.Ct. 2012, 2020 (2014). If Trooper Black’s seizure was objectively reasonable under the circumstances, he did not violate the Fourth Amendment. “Determining whether the force used to effect a particular seizure is ‘reasonable’ under the Fourth Amendment requires a careful balancing of the nature and quality of the intrusion on the individual’s Fourth Amendment interests against the

countervailing governmental interests at stake.” *Graham*, 490 U.S. at 396. The reasonableness of the amount of force is judged from the perspective of a reasonable officer at the scene, rather than with the benefit of hindsight, giving due regard to an officer’s need to make split-second decisions based on evolving circumstances at the scene. *E.g.*, *Graham*, 490 U.S. at 396-97; *Estate of Morgan v. Cook*, 686 F.3d 494, 497 (8th Cir. 2012).

In *Andrews*, the Eighth Circuit looked to other circuits for guidance on the reasonableness standard’s application to the seizure of a pet. *Andrews*, 454 F.3d at 918-19. “[T]he state’s interest in protecting life and property may be implicated when there is reason to believe the pet poses an imminent danger.” *Id.* at 918 (citing *Brown v. Muhlenberg Twp.*, 269 F.3d 205, 210 (3rd Cir. 2001)). The Eighth Circuit agreed with other circuits that “an officer commits an unreasonable, warrantless seizure of property, in violation of the Constitution, when he shoots and kills an individual’s family pet when that pet presented no danger and when non-lethal methods of capture would have been successful.” *Id.* (citing *Brown*, 269 F.3d at 210-11; *Fuller v. Vines*, 36 F.3d 65, 68 (9th Cir. 1994)).

A jury could find that Trooper Black’s seizure was not objectively reasonable under the circumstances. Although the dog may have posed a risk to motorists while it was running on the Interstate, that risk ended when Trooper Black shot the dog the first time. According to Trooper Black, he shot the dog four times. The first shot caused the dog to drop, and by Trooper Black’s own testimony, the dog was only able to drag itself on its front paws. (Black Dep. pp.

18-21 (40-2 p. 7).) At this point, Trooper Black could have picked up the dog. Instead, Trooper Black walked towards the dog and then shot it a second time. After the first shot, it was no longer necessary to close the Interstate in order to catch the dog—the dog had been stopped, the Interstate could be opened, and the risk the public was over. Once the justification for a seizure ends, it is no longer reasonable for a seizure to occur.

The Defendant attempts to distinguish the present case from *Andrews* by contending that the Eighth Circuit applied a higher standard than what is required by the Fourth Amendment. (Doc. 40, p. 13.) The Eighth Circuit did look at a local statute and ordinance, but it also looked more broadly at Constitutional law to determine whether the officer's actions were reasonable under the Fourth Amendment. *Andrews*, 454 F.3d at 918. The Eighth Circuit made clear in *Cole v. Bone*, 993 F.2d 1328, 1334 (8th Cir. 1993), that “under section 1983 the issue is whether the government official violated the Constitution or federal law, not whether he violated the policies of a state agency. Conduct by a government official that violates some state statutory or administrative provision is not necessarily constitutionally unreasonable.” In *Andrews*, the Eighth Circuit applied the reasonableness standard under the Fourth Amendment – not the statute or ordinance – when it determined that it is unreasonable for an officer to kill a family pet when it poses no danger. Thus, the Eighth Circuit's holding in *Andrews* is controlling.

Second, the Defendant argues that the danger (or lack thereof) posed by the dog in *Andrews* is

distinguishable from the danger posed by the dog in this case. In *Andrews*, the officer shot and killed a dog while it was in a fenced back yard and posed no risk to the officer or community. *Andrews*, 454 F.3d at 919. Here, the Defendant argues that the dog was running wild and posed a risk to the motoring public and therefore the seizure was reasonable. (Doc. 40, p.14.) The first shot may have been justified by the public safety risk the dog caused to the motoring public. The third and fourth shots may have been justified by the need to put the dog out of its misery. Defendant, however, has failed to justify shooting the dog a second time. Trooper Black has not pointed to facts that support a finding that the second shot was necessary. Without any evidence of why Defendant fired the second shot, Defendant has failed to meet his burden at summary judgement. Based on the Record, a jury could find that whatever public safety risk the dog posed concluded after the first shot. The dog was no longer able to run, let alone walk. Thus a jury could find that the second shot, which led to the ultimate deprivation of property, was unnecessary.

c. Clearly Established Constitutional Right

The second step in the qualified immunity analysis is whether the right Trooper Black allegedly violated was “clearly established” at the time of the incident. The Supreme Court has instructed the Court that clearly established law should not be defined at a “high level of generality.” *Ashcroft*, 563 U.S. at 742. “This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful;

but it is to say that in the light of pre-existing law the unlawfulness must be apparent.” *Nord v. Walsh Cnty.*, 757 F.3d 734, 739 (8th Cir. 2014) (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)). The Supreme Court does “not require a case directly on point, but existing precedent must have placed the statutory or constitutional question beyond debate.” *Ashcroft*, 563 U.S. at 741. As previously discussed, the Fourth Amendment guards against unreasonable seizures. The right to not have a pet shot and killed when it poses no danger to the officer or the community was clearly established at the time of Defendant’s misconduct. *Andrews*, 454 F.3d at 918. *Andrews* follows – and is a specific application of – a long line of cases in the Eighth Circuit establishing that property may not be seized unless there is a justification.

Defendant tacitly concedes that law enforcement officers cannot shoot pets without a reason. Defendant further concedes that *Andrews* establishes that an officer may not destroy a pet who poses no imminent danger and whose owners were known, available, and desirous of assuming custody. (Doc. 40, p. 19.) Defendant argues that the fact that the dog in *Andrews* was in a backyard with its owner makes the case clearly distinguishable from the present case and concludes that it has not been clearly established that shooting and killing a dog on an Interstate is impermissible under the Fourth Amendment. The Court disagrees with Defendant’s view. First, *Andrews* did not make the physical presence of a dog’s owner dispositive. Trooper Black concedes that he believed the dog was someone’s pet, (Doc 40-1, ¶ 17), and he therefore should have known

that the owner would be desirous of retaining custody of the dog. Second, the dog being in the backyard in *Andrews* is only relevant to the issue of whether the pet posed a danger to the officer or public. The law has clearly established that pets who do not pose an imminent danger cannot be shot, regardless of the specific facts that demonstrate the lack of danger. Thus, the crucial question here is whether the dog posed an imminent danger.

Here, even if the need to remove the dog from the Interstate constituted a valid reason to shoot the dog, that justification disappeared after the first shot. The dog was no longer able to run after the first shot. The first shot made it possible to remove the dog from Interstate through means that did not require it to be shot again.³ Defendant argues that Trooper Black's non-lethal means of capture were unsuccessful, but that is incorrect. Trooper Black's first shot was successful in disabling the dog making it possible to capture it. Nonetheless, Defendant shot the dog again – but on this occasion, the public safety justification was absent.

In short, it was clearly established that Defendant required a justification before permanently depriving Plaintiff of her property. The facts – construed in Plaintiff's favor – suggest no justification existed for the shot that necessitated the dog's death.

III. CONCLUSION

Accordingly, Defendant's Motion for Summary Judgment, (Doc. 39), is **DENIED**. Plaintiff's related motions to strike, (Docs. 41 and 48), are **DENIED**.

IT IS SO ORDERED.

/s/ Beth Phillips
BETH PHILLIPS, JUDGE
UNITED STATES DISTRICT COURT

DATE: October 27, 2016

28a

APPENDIX D

United States Court of Appeals
for the Eighth Circuit

No: 16-4162

Morgan Hansen

Appellee

v.

Missouri State Highway Patrol, et al.

Thomas Black, in his individual capacity

Appellant

Appeal from U.S. District Court for the
Western District of Missouri - St. Joseph
(5:15-cv-06058-BP)

ORDER

The petition for rehearing en banc is denied.
The petition for rehearing by the panel is also
denied.

29a

November 06, 2017

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans