No. 15-_____

In The
Supreme Court of the United States

MELENE JAMES,

Petitioner,

v.

CITY OF BOISE, A POLITICAL SUBDIVISION OF THE STATE OF IDAHO, STEVEN BONAS, STEVEN BUTLER, AND TIM KUKLA,

Respondents.

On Petition For A Writ Of Certiorari To The Idaho Supreme Court

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Both 42 U.S.C. § 1988 and Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(k), authorize a court, "in its discretion," to award reasonable attorney's fees in specified proceedings. This Court interpreted those provisions, respectively, in *Hughes v. Rowe*, 449 U.S. 5 (1980), and *Christiansburg Garment Co. v. EEOC*, 434 U.S. 413 (1978), to allow awards of attorney's fees against a plaintiff only if the plaintiff's lawsuit is "frivolous, unreasonable, or without foundation."

The question presented is whether the Idaho Supreme Court correctly concluded that *Hughes* and *Christiansburg* do not bind state courts because this Court "does not have authority to limit the discretion of state courts where such limitation is not contained in the statute."

PARTIES TO THE PROCEEDINGS

Petitioner, Melene James, was the plaintiff-appellant below.

Respondents, City of Boise, Steven Bonas, Steven Butler, and Tim Kukla, were the defendants-respondents below.

Also named as a defendant in the complaint was Rodney Likes; he was voluntarily dismissed at the trial-court level, and was therefore not a party to the proceeding before the Idaho Supreme Court.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Melene James, respectfully petitions for a writ of certiorari to review the judgment of the Idaho Supreme Court in this case.

OPINIONS BELOW

The opinion of the Idaho Supreme Court (App. 1-63) is reported at 351 P.3d 1171. The order of the Idaho Supreme Court denying rehearing (App. 133, 134) is unreported. The memorandum decision and order of the Idaho District Court for the Fourth Judicial District on Defendants' Motion for Summary Judgment (App. 64-130) is also unreported.

JURISDICTION

The Idaho Supreme Court entered the judgment on May 21, 2015. It denied rehearing on July 20, 2015. (App. 133). This Court's jurisdiction rests on 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

A. The Supremacy Clause, U.S. Const., art. VI, cl. 2, states:

> This Constitution, and the Laws of the United States which shall be made in

Pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

B. 42 U.S.C. § 1988 states in relevant part:

§ 1988. Proceedings in vindication of civil rights

* * *

(b) Attorney's fees

In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, the Religious Land Use and Institutionalized Persons Act of, title VI of the Civil Rights Act of 1964, or section 13981 of this title, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity such officer shall not be held liable for any costs, including attorney's fees, unless such action was clearly in excess of such officer's jurisdiction.

* * *

INTRODUCTION

Petitioner was mauled by a police dog while she was working one Sunday afternoon in the office from which she runs a small business. The Boise (Idaho) police loosed the dog on her because they mistook her for a burglar. Petitioner sued the City of Boise and the responsible police officers in Idaho state court, asserting state-law claims as well as excessive-force claims under 42 U.S.C. § 1983. The state trial-level court dismissed her claims, and the Idaho Supreme Court affirmed the dismissal. Petitioner does not concede the correctness of that ruling, nor does petitioner seek further review of it in this Court.

Petitioner does, however, seek review of the Idaho Supreme Court's decision awarding attorney's fees on appeal against petitioner under 42 U.S.C. § 1988. In seeking those fees, respondents recognized that they had to show that petitioner's appeal from the dismissal of her § 1983 claim was "frivolous, unreasonable, or without foundation" – as established by this Court in *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412 (1978), for fee awards against Title VII plaintiffs, and as extended by this Court in *Hughes v. Rowe*, 449 U.S. 5 (1980), to fee awards against § 1983 plaintiffs. But rather than follow *Christiansburg* and *Hughes*, the Idaho Supreme Court *sua sponte* held that neither it nor any other state court is bound by them. In its view, "[a]lthough the [U.S.] Supreme Court may have the authority to limit the discretion of lower federal courts, it does not have the authority to limit the discretion of state

courts where such limitation is not contained in the statute." (App. 55). In its written opinion, the Idaho Supreme Court accordingly did not apply the *Christiansburg/Hughes* standard in awarding attorney's fees against petitioner under § 1988.

In refusing to apply the *Christiansburg/Hughes* standard, the Idaho Supreme Court not only misinterpreted important federal civil rights statutes but also fundamentally misunderstood this Court's authority over state courts. The Idaho Supreme Court's error is neither inadvertent nor innocuous. To the contrary, that court's studied disregard of the controlling precedent of this Court significantly deters plaintiffs from asserting federal rights in the Idaho state courts. The Idaho Supreme Court's decision could also have a pernicious effect in a current national climate characterized by some deeply disturbing instances of state-level resistance to the supremacy of federal law.

STATEMENT OF THE CASE

1. On December 26, 2010, petitioner Melene James was a 49-year-old resident of Boise, Idaho, and worked as a denturist. Clerk's Record on Appeal ("R.") 390, 700. She had just finished cooking a holiday meal for her family when a friend called needing emergency work on a denture. R. 394, 700. Ms. James walked half a block to the building where she leased space to run her small business, Renaissance Dental

Lab. R. 391, 394, 701. She entered the building with her key and started work on the denture. R. 394, 702. When she reached the point in her work where the repaired denture needed 15 minutes to "cure," she left the building to smoke a cigarette. R. 395, 701. Then she realized that she had locked herself out, having left her purse with her keys and phone inside the dental lab. R. 395, 701.

Ms. James did not want to leave the immediate area to call her landlord because her equipment was still running inside and posed a fire hazard. R. 396, 701. She accordingly went to a window that was usually left unlocked to ventilate the dental lab. R. 396, 397, 701, 702. While trying to open the window, her hand slipped, causing her elbow to hit the window and break it. R. 397, 702. As she started to climb through the window, a neighbor, who had heard the glass breaking, came over and asked her if she needed help. R. 397, 702. Ms. James told him that she had locked her keys inside. R. 397, 702.

The neighbor found Ms. James' behavior peculiar and called 911 at around 5:20 pm. R. 410, 703. He told the 911 operator that a woman who'd claimed to have left her keys inside the building was climbing in through a broken window. R. 410, 801, 802.[1] The

[1] Respondent, Steven Butler, was the first police officer on the scene. In his narrative report, Butler did not mention the neighbor reporting that Ms. James had left her keys inside the building. Instead, Butler's narrative said the dental office "was reportedly being burglarized." R. 414.

neighbor also reported that the woman appeared to be "lethargic" and "totally out of it." R. 410, 685. In the meantime, Ms. James finished repairing the denture. R. 397, 398, 702, 703. She planned to call her landlord after she used the bathroom. R. 398, 702, 703. It was while she was in the bathroom that she was attacked by the police dog. R. 555.

While Ms. James was inside resuming work on the denture, outside the building, police began arriving. Respondent Steven Butler was the first officer on the scene. R. 423. According to Officer Butler's later account, he spoke with the neighbor and then looked around the outside of the building. R. 425, 426, Through one of the windows, he could see Ms. James standing inside a lighted room, about six to eight feet away from the window. R. 428, 431. She was standing at a work bench, holding a can of malt liquor in one hand and dental tools in the other. R. 414, 429. Officer Butler did not call out to her or otherwise try to get her attention. R. 431.

Officer Butler was joined at the scene by several other officers, including respondent Tim Kukla. R. 410. Within ten minutes after the 911 call, the police had established a perimeter around the building and requested a K-9 unit. R. 410, 475, 705. A civilian at the scene – whom one of the officers later referred to only as the "cleaning lady" – told officers that a woman worked inside the building. R. 575. As the "cleaning lady" began to describe the woman, she was cut off by the owner of the building, who had shown up then. R. 575. The owner told the police that no one

should be in the building, especially if they had to break a window to get in. R. 555.

Respondent Steven Bonas arrived with his police dog at around 6:10 pm. R. 411, 706. About seven minutes later, Bonas made the decision to use the dog. R. 411, 708. An initial shouted warning was issued upon entry to the building and another was issued on the upstairs level while the officers searched. R. 593, 594. A few minutes after initial entry, Officer Bonas arrived at a stairwell leading to the basement where another shouted warning was given. R. 593, 594, 710. Bonas then let the dog loose to the basement where he was out of sight of the handler and on a different level of the building. R. 593, 710.[2]

The dog found Ms. James in the bathroom. R. 555. As the officers descended, it was noted that the bathroom door was initially open a few inches but then it closed, leaving Ms. James alone inside with the dog. R. 594, 711. When the officers finally got the bathroom door open, they found Ms. James lying on the ground with her pants pulled down below her knees. R. 648, 711. She was then handcuffed, searched, and taken to the emergency room. R. 594, 711.

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[2] Two officers claimed in their later accounts that, in addition to the shouted warnings that the police gave after entering the building, they also gave one or more warnings, while outside the building, through the public address system atop one of the police cars. R. 432, 708.

At the emergency room, Ms. James was found to have a broken arm and multiple puncture wounds on her cheek, arm, and hand. R. 603, 604, 596-600. Her blood alcohol content was 0.27. Ms. James later admitted at her deposition that she had been drinking while cooking the holiday meal and had drunk a beer while at the dental lab. R. 394, 398. A later medical evaluation reported that, besides the injuries noted at the emergency room, Ms. James had a fractured spine and suspected nerve damage. R. 603, 604, 712.

2. Ms. James sued the City of Boise and four police officers in the District Court for the Fourth Judicial District of Idaho. R. 6.[3] She asserted excessive-force claims against all the defendants under 42 U.S.C. § 1983, relying on the Fourth, Fifth, and Fourteenth Amendments. R. 15. She also asserted state-law claims of assault, battery, false arrest, wrongful imprisonment, negligent supervision, and intentional infliction of emotional distress. R. 14. The district court granted summary judgment for defendants and dismissed all of Ms. James' claims. (App. 64).

3.a. The Idaho Supreme Court affirmed the dismissal of petitioner's claims, including her § 1983

[3] Plaintiffs conceded to the dismissal of one original defendant, Officer Rodney Likes, when discovery revealed that his involvement was post event only. R. 653.

claims against the individual respondents and the respondent City of Boise. (App. 1-63).

The Idaho Supreme Court held that qualified immunity barred Ms. James' § 1983 claims against the individual respondents. (App. 13-34). In so holding, the court relied on three Ninth Circuit decisions rejecting excessive-force claims based on police dog attacks. (App. 34). The court admitted that, of those three Ninth Circuit cases, even the one that was "most similar to" the present case involved "some significant factual difference." (App. 34).

b. Justice Jim Jones issued a concurring opinion. He agreed that qualified immunity barred petitioner's § 1983 claims. "Had there been no qualified immunity issue," however, Justice Jones "would have voted to vacate the * * * dismissal of James' excessive force claim." (App. 57). That is because, in his view, "there were triable issues of fact that would have precluded summary judgment." (App. 57).

Specifically, Justice Jones cited the affidavit of petitioner's expert, who had an advanced degree in criminal justice and "52 years of experience in various law enforcement positions," including "work as a canine instructor and supervisor." (App. 58). His affidavit "raised questions about the existence of probable cause and the need for the use of the magnitude of force employed by the officers." (App. 58). Justice Jones concluded that the district court "had no basis for discounting" the expert's opinions. (App. 59-63).

c. In the Idaho Supreme Court, respondents requested an award of the attorney's fees that they spent on the appeal. For petitioner's § 1983 claim, respondents based their fee request on 42 U.S.C. § 1988. For petitioner's state-law claims, respondents requested fees under two Idaho statutes.

In seeking fees under § 1988, respondents recognized that they had to establish not only that they were prevailing parties but also "that the plaintiff's suit was 'totally unfounded, frivolous, or otherwise unreasonable or that the plaintiff continued to litigate after it clearly became so.'" (App. 136) (quoting *Santiago v. Municipality of Adjuntas*, 741 F. Supp. 2d 364 (D.P.R. 2010), *vacated and remanded sub nom. Torres-Santiago v. Municipality of Adjuntas*, 693 F.3d 230 (1st Cir. 2012)). The decision in *Santiago*, from which respondents drew the latter requirement, derived it, in turn, from this Court's decision in *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412 (1978), and a First Circuit decision citing *Christiansburg*. *See Santiago*, 741 F. Supp. 2d at 370 (quoting *Christiansburg*, 434 U.S. at 412, and *Casa Marie Hogar Geriatrico, Inc., et al. v. Esther Rivera-Santos, et al.*, 38 F.3d 615, 619 (1st Cir. 1994)). Respondents did not suggest in their fee request that the Idaho Supreme Court could ignore the *Christiansburg* standard in deciding whether to award fees under § 1988. (App. 136, 137).[4]

[4] *See* Plaintiff's Memorandum in Opposition to Costs and Attorney Fees at 2 n.3 (filed June 18, 2015) (noting that

(Continued on following page)

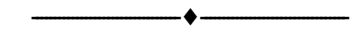
The Idaho Supreme Court awarded respondents the attorney's fees they incurred defending against petitioner's appeal of the dismissal of her § 1983 claim. (App. 55). The court acknowledged that in *Hughes v. Rowe*, 449 U.S. 5 (1980), this Court relied on *Christiansburg* to hold that "attorney fees could not be awarded to a prevailing defendant in a case brought pursuant to 42 U.S.C. section 1983 unless the plaintiff's action was frivolous, unreasonable, or without foundation." (App. 55) (quoting *Hughes*, 449 U.S. at 14). But the Idaho Supreme Court observed that both *Christiansburg* and *Hughes* "were appeals from cases in federal district courts." (App. 55). In its view, "[a]lthough the [U.S.] Supreme Court may have the authority to limit the discretion of lower federal courts, it does not have the authority to limit the discretion of state courts where such limitation is not contained in the statute." (App. 55). "Therefore," the Idaho Supreme Court concluded, "in cases filed in the Idaho state courts seeking to recover under 42 U.S.C. section 1988, the [Idaho Supreme] [C]ourt has discretion in deciding to award attorney fees to the prevailing party, whether the prevailing party is the plaintiff or the defendant." (App. 55).

"[r]espondents' stated basis for attorney's fees under 42 U.S.C. § 1988 was the standard imposed by the United States Supreme Court and federal circuits which this Court has declined to follow."); *id*. at 1 n.1 (noting that, at the time plaintiff filed its memo in opposition to costs and attorney fees, "[t]he [Idaho Supreme] Court's Order allowing attorney fees is subject to a Petition for Rehearing"). (App. 142, 143).

Based on this conclusion, the court awarded fees against petitioner under § 1988 on the ground that "[i]t was clear that her [§ 1983] claim would be barred by qualified immunity." (App. 55, 56). In contrast, the court denied fees under the Idaho statutes cited by respondents. Fees were not available under Idaho Code § 12-117, the court concluded, because it could "not find that Plaintiff brought this appeal regarding her state law claims without a reasonable basis in fact or law." (App. 56). The court further held that fees were not available under Idaho Code § 12-121 "[b]ecause the appeal regarding Plaintiff's claims under state law was not brought or pursued frivolously, unreasonably or without foundation." (App. 56).

Petitioner timely petitioned for rehearing on the court's award of fees under § 1988. (App. 138). Petitioner argued that "[u]nder the Supremacy Clause of the United States Constitution, it is a fundamental notion that the decisions of the U.S. Supreme Court interpreting federal statutes and determining congressional intent are binding upon state courts." (App. 139) (citing *Howlett v. Rose*, 496 U.S. 356 (1990)). Petitioner explained that this fundamental notion applies equally to the "construction and application of § 1988 – a federal statute." (App. 139). By failing to follow this Court's decisions interpreting § 1988, petitioner concluded, "the Idaho Supreme Court improperly nullified federal law." (App. 143).

The Idaho Supreme Court denied rehearing without opinion. (App. 133).



REASONS FOR GRANTING THE WRIT

I. The Idaho Supreme Court's Decision Conflicts with Decisions of this Court.

A. The Idaho Supreme Court's Decision Conflicts with *Hughes v. Rowe* and *Christiansburg Garment Co. v. EEOC*.

This Court held in *Christiansburg Garment Co. v. EEOC* that the prevailing defendant in a Title VII case can recover attorney's fees only "upon a finding that the plaintiff's action was frivolous, unreasonable, or without foundation." 434 U.S. 412, 421 (1978). In *Hughes v. Rowe*, this Court "could perceive no reason for applying a less stringent standard" for awarding attorney's fees to prevailing defendants in actions under 42 U.S.C. § 1983. 449 U.S. 5, 14 (1980). In this case, however, the Idaho Supreme Court did not apply the "frivolous, unreasonable, or without foundation" standard in awarding fees to the prevailing defendants on petitioner's § 1983 claim. The Idaho Supreme Court's failure to do so squarely conflicts with *Christiansburg* and *Hughes*.

The Idaho Supreme Court's failure to apply the standard established by this Court is deliberate and obvious on the face of its opinion. Its reasoning proceeded in three steps:

1. *Hughes* and *Christiansburg* "were appeals from cases in federal district courts." (App. 55).

2. Although this Court "may have authority to limit the discretion of lower federal

courts, it does not have the authority to limit the discretion of state courts where such limitation is not contained in the statute." (App. 55).

3. The "frivolous, unreasonable, or without foundation" standard "is not contained in" the text of § 1988; "[t]herefore," the Idaho Supreme Court "has discretion" to award attorney's fees to a prevailing party without regard to that standard, "whether the party is the plaintiff or the defendant." (App. 55).

The Idaho Supreme Court accordingly did *not* conclude in its opinion that petitioner's appeal of her § 1983 claim was frivolous, unreasonable, or without foundation. In contrast, the court *did* refuse fees under one of the Idaho fee-shifting statutes because it could not find that petitioner's appeal of her state-law claims was brought "frivolously, unreasonably or without foundation." (App. 56). Rather than apply that same standard to petitioner's appeal of her § 1983 claim, the court awarded fees against her on the appeal of that claim because it believed that the § 1983 claim was "clear[ly]" barred by qualified immunity. (App. 55). Although the court did not explain that determination, its reasoning – coupled with its explicit use of the "frivolous, unreasonable, or without foundation standard" for applying an Idaho fee-shifting statute – leaves no doubt that the court stopped short of finding petitioner's appeal of her § 1983 claim "meritless in the *Christiansburg* sense,"

as this Court required in *Hughes*, 449 U.S. at 15, for a fee award against a § 1983 plaintiff.

This Court, however, said nothing in *Christiansburg* or *Hughes* to suggest that its interpretation of Title VII and § 1988 applies only in lower federal courts. To the contrary, the Court's reasoning applies equally to suits in federal court and state court.

In *Christiansburg*, the Court addressed "under what circumstances an attorney's fee should be allowed when the defendant is the prevailing party in a Title VII action." 434 U.S. at 414. The Court rejected both the defendant's and the plaintiff's proffered interpretations of Title VII's fee-shifting provision. The defendant (a garment company) argued that a prevailing defendant should be entitled to an award of fees under the same standard as a prevailing plaintiff. The Court rejected that argument because of "two strong equitable considerations" that justify treating prevailing plaintiffs more favorably than prevailing defendants in Title VII suits. *Id*. at 418. First, the plaintiff "is the chosen instrument of Congress to vindicate a policy that Congress considered of the highest priority." *Id.* Second, an award in favor of a prevailing plaintiff is an award against "a violator of federal law." *Id*. Those two considerations apply regardless whether the plaintiff sues in state court or federal court.

The plaintiff EEOC argued in *Christiansburg* that fees should be awarded to a prevailing defendant only if the plaintiff's action was brought in bad faith.

The Court found this argument inconsistent with congressional intent. The Court explained that it would not lightly assume that Congress intended to "distort" the adversary process by "giving the private plaintiff substantial incentives to sue, while foreclosing to the defendant the possibility of recovering his expenses in resisting even a groundless action unless he can show that it was brought in bad faith." *Id.* at 419. The Court found no evidence of congressional intent to so distort the process. *See id.* at 420. Thus, the Court's rationale for rejecting the plaintiff EEOC's interpretation, like its rationale for rejecting the defendant garment company's interpretation, drew no distinction between suits in federal court and those in state court.

The Court in *Christiansburg* ultimately adopted a standard for awarding fees to prevailing Title VII defendants that appropriately accommodated "the competing considerations" and reflected Congress's intent as best the Court could discern it. *Id*. at 420, 421. The Court in *Hughes* adopted the same standard, on the same basis, for prevailing § 1983 defendants. *See Hughes*, 449 U.S. at 14. None of those considerations varies depending on whether a plaintiff sues in federal or state court. Nor is it tenable that Congress intended different standards for fee awards, depending on whether a plaintiff sues in federal or state court.

Although the Court in *Christiansburg* described the standard that it adopted as the one that "should inform a *district court's* discretion" (*id*. at 417

(emphasis added)), that description does not limit the applicability of the standard to lower federal courts. The Court's description simply reflected one or more of three circumstances:

(1) the case before it arose in a district court, *id.* at 415;

(2) the case presented a question "about which the federal courts ha[d] expressed divergent views," *id.* at 414;

(3) the Court addressed the standard that federal district courts should use because most Title VII actions were brought in federal courts, rather than in state courts, at the time of the Court's decision in 1978.[5]

Under these circumstances, coupled with the Court's reasoning (discussed above), the Court's holding in *Christiansburg* plainly is not limited to federal courts.

This is not a situation in which a decision of this Court does not bind a state court. Specifically, the

[5] This Court did not decide until 1990 that state and federal courts have concurrent jurisdiction over Title VII actions. *Yellow Freight System, Inc. v. Donnelly*, 494 U.S. 820, 823-826 (1990). In *Donnelly*, this Court noted that at the time of its decision, four federal courts of appeals had held that federal courts have exclusive jurisdiction over Title VII actions, and that, in 1980, the EEOC likewise had taken the position in this Court that federal courts have exclusive jurisdiction over Title VII actions. *Id*. at 822 n.2.

decisions in *Christiansburg* and *Hughes* do not interpret a federal statute that applies only in the federal courts. *Cf. Johnson v. Fankell*, 520 U.S. 911, 916 (1997). Nor do *Christiansburg* and *Hughes* rest on this Court's supervisory power over the lower federal courts. *See generally Sanchez-Llamas v. Oregon*, 548 U.S. 331, 345, 346 (2006).

Rather, *Christiansburg Garment* and *Hughes* rest on this Court's conclusion that the "frivolous, unreasonable, or without foundation" standard for fee awards to prevailing defendants reflects the "*correct*" interpretation of Title VII's fee-shifting provision and § 1988. *Christiansburg*, 434 U.S. at 421 (emphasis added); *see also Hughes*, 449 U.S. at 14. The Idaho Supreme Court was bound by that interpretation.

B. The Idaho Supreme Court's Decision Conflicts with Decisions of this Court Establishing the Supremacy of this Court's Interpretation of Federal Statutes.

The Idaho Supreme Court's decision conflicts with the many decisions in which this Court has made clear that state courts must follow this Court's interpretation of federal statutes.

The most recent such decision is *Nitro-Lift Technologies, L.L.C. v. Howard*, 133 S. Ct. 500 (2012) (per curiam). There, the Court reviewed a decision of the Oklahoma Supreme Court declaring two noncompetition agreements invalid under Oklahoma law. Although those agreements had arbitration clauses, the

Oklahoma Supreme Court decided the validity of the agreements itself, rather than leaving the issue to the arbitrator. The Oklahoma Supreme Court "chose to discount" decisions of this Court interpreting the Federal Arbitration Act (FAA) to require an *arbitrator*, not a court, to decide the validity of agreements with valid arbitration clauses. *Id.* at 502. The Oklahoma Supreme Court "acknowledged" this Court's decisions, but concluded that "its '[own] jurisprudence controls this issue.'" *Id*. at 503 (quoting Oklahoma Supreme Court's opinion; bracketed text inserted by Court in *Nitro-Lift*).

This Court vacated the Oklahoma Supreme Court's judgment. This Court observed that "the substantive law the [FAA] created [is] applicable in state and federal courts." *Id.* (internal quotation marks omitted; first bracketed text added; second bracketed text inserted by Court in *Nitro-Lift*). The Court explained that this Court's decisions interpreting the FAA are, like the FAA itself, equally applicable in and binding on the state courts:

> [T]he Oklahoma Supreme Court must abide by the FAA, which is "the supreme Law of the Land," U.S. Const., Art. VI, cl. 2, and by the opinions of this Court interpreting that law. "It is this Court's responsibility to say what a statute means, and once the Court has spoken, it is the duty of other courts to respect that understanding of the governing rule of law."

Nitro-Lift, 133 S. Ct. at 503 (quoting *Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 312 (1994)).

The reasoning of *Nitro-Lift* applies equally here. Section 1988 applies in state courts, like Idaho's, that entertain actions under § 1983. *See*, *e.g.*, *Sprague v. City of Burley*, 710 P.2d 566, 577-579 (Idaho 1985) (reversing summary judgment for police officers in action asserting excessive-force claim under § 1983). In state-court actions where § 1988 applies, the state courts must abide not only by § 1988 but also by this Court's decisions interpreting § 1988. Just as the Oklahoma Supreme Court could not disregard this Court's decisions interpreting the FAA, the Idaho Supreme Court could not ignore this Court's decisions in *Christiansburg* and *Hughes*.

Nitro-Lift accords with two centuries of precedent. By the same token, the Idaho Supreme Court's decision conflicts with that same precedent by erroneously treating this Court's interpretation of a federal statute as separate from, and of a lower status than, the statute itself. When this Court construes a federal statute, that construction reflects "the true construction" that binds all courts. *Elmendorf v. Taylor*, 23 U.S. 152, 160 (1825) (per Marshall, C.J.). State courts have no more discretion to "depart from that construction, than to depart from the words of the statute." *Id*. (making this statement with reference to a court's departure from the interpretation of another nation's laws by the courts of that nation). To the contrary, this Court's interpretation of a federal statute – like a state supreme court's

interpretation of a statute of that State – is as binding "as if written into the statute[ ]" itself. *Hebert v. Louisiana*, 272 U.S. 312, 317 (1926) (making this statement with reference to state supreme court's interpretation of state statutes).[6]

A state court cannot disregard this Court's interpretation of a federal statute just because, in the state court's estimation, this Court's interpretation "limit[s] the discretion of state courts" in a way that "is not contained in the statute." (App. 55). Were state courts free to do so, they could ignore many decisions in which this Court has interpreted 42 U.S.C. § 1988 and other federal fee-shifting statutes to constrain the "discretion" expressly granted in those statutes. For example, this Court interpreted a discretionary fee-shifting provision in the Civil Rights Act of 1964 to hold that a prevailing plaintiff "should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust." *Newman v. Piggie Park Enterprises*, 390 U.S. 400, 402 (1968) (per curiam). State courts cannot

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[6] *See also*, *e.g.*, *United States v. Gilbert Assocs.*, 345 U.S. 361, 363 n.23 (1953) ("The Supreme Court of New Hampshire freely concedes * * * , as it must, that the meaning of a federal statute is for this Court to decide."); *South Carolina v. Bailey*, 289 U.S. 412, 420 (1933) ("[I]t was the duty of [the state court] to administer the law prescribed by the Constitution and statute of the United States, as construed by this Court."); *Provident Inst. for Savings v. Massachusetts*, 73 U.S. 611, 628, 629 (1867) ("[T]he decisions of this court in cases involving Federal questions are conclusive authorities in the State courts * * * .").

ignore this interpretation – which "vindicate[s] a policy that Congress considered of the highest priority," *id*. – even though it constrains their discretion and the Court did not tie its interpretation to explicit statutory text. State courts have no more discretion to ignore this Court's decisions interpreting § 1988 and other fee-shifting statutes than they do to ignore this Court's decisions interpreting § 1983 and other rights-protecting statutes. *Cf. Howlett v. Rose*, 496 U.S. 356, 376 (1990) ("[S]ince th[is] Court has held that municipal corporations and similar governmental entities are 'persons,' a state court entertaining a § 1983 action must adhere to that interpretation.") (citations omitted).

Most fundamentally, the Idaho Supreme Court's decision conflicts with decisions of this Court establishing its power to review state court decisions that rest on federal law. Those decisions include *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816), in which the Court held that its appellate jurisdiction under Article III, § 2, clause 2, extends to cases decided by state courts. 14 U.S. at 351. The Court based this holding partly on its view of one of the motives that induced the Constitution's grant of appellate jurisdiction over the state courts' decisions:

> That motive is the importance, and even necessity of *uniformity* of decisions throughout the whole United States, upon all subject within the purview of the Constitution. Judges * * * in different states, might differently interpret a statute, or a treaty of the

> United States, or even the constitution itself: If there were no revising authority to control these jarring and discordant judgments, and harmonize them into uniformity, the laws, the treaties, and the constitution of the United States would be different in different states * * * . The public mischiefs that would attend such a state of things would be truly deplorable; and it cannot be believed that they could have escaped the enlightened convention which formed the constitution.

Id. at 347, 348 (emphasis in original).

This Court could not achieve the uniform interpretation of federal statutes if its decisions interpreting those statutes did not bind state courts. By refusing to be bound by this Court's decisions in *Christiansburg* and *Hughes*, the Idaho Supreme Court denied the premise of *Martin v. Hunter's Lessee* and this Court's tradition of reviewing, and correcting, state court decisions interpreting federal statutes.[7]

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[7] *See*, *e.g.*, *Air Wisconsin Airlines Corp. v. Hoeper*, 134 S. Ct. 852 (2014) (reversing Colorado Supreme Court decision interpreting federal Aviation and Transportation Security Act); *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552 (2013) (reversing South Carolina Supreme Court decision interpreting federal Indian Child Welfare Act); *Norfolk S. Ry. Co. v. Sorrell*, 549 U.S. 158 (2007) (vacating and remanding Missouri Court of Appeals decision interpreting Federal Employers' Liability Act).

II. The Idaho Supreme Court's Decision Conflicts with Decisions of Other Lower Courts.

A. The Idaho Supreme Court's Decision Conflicts with Decisions of Other State Supreme Courts That Follow *Hughes v. Rowe* and *Christiansburg Garment Co. v. EEOC*.

In *DeNardo v. Municipality of Anchorage*, 775 P.2d 515 (Alaska 1989), the Alaska Supreme Court recognized its obligation to follow *Hughes v. Rowe* and *Christiansburg Garment Co. v. EEOC* when it denied a defendants request for attorney fees under § 1988. The Alaska court recognized that, while the statute did not speak explicitly to the propriety of awarding attorney fees to prevailing defendants, there was little doubt as to congressional intent:

> [Plaintiffs] should not be deterred from bringing good faith actions to vindicate the fundamental rights here involved by the prospect of having to pay their opponent's counsel fees should they lose. Such a party, if unsuccessful, could be assessed his opponent's fee only when it is shown that his suit was clearly frivolous, vexatious, or brought for harassment purposes. S.Rep. No. 1011, 94th Cong., 2nd Sess. 4 (1976) (citations omitted), *reprinted in* 1976 U.S. Code Cong. & Admin. News at 5912.

DeNardo, 775 P.2d at 518 (internal quotation marks omitted). The Alaska court further noted that:

> "[t]he United States Supreme Court has enforced this intent, holding that a civil rights defendant may recover attorneys fees from the plaintiff only if the court finds 'that the plaintiff's action was frivolous, unreasonable or without foundation, even though not brought in subjective bad faith.'" *Hughes v. Rowe*, 449 U.S. 5, 15, 101 S.Ct. 173, 178, 66 L.Ed.2d 163, 172 (1980) (quoting *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 422, 98 S.Ct. 694, 700, 54 L.Ed.2d 648, 657 (1978)).

DeNardo, 775 P.2d at 518.

DeNardo is consistent with virtually every other state appellate court where a reported decision can be found. *See*, *e.g.*, *Johnson v. City of Mobile*, ___ So. 3d ___, 2015 WL 5725089, at *16-*17 (Ala. Sept. 30, 2015) (applying *Christiansburg* to fee request under Title VII by prevailing defendant); *Est. of Bohn v. Scott*, 915 P.2d 1239, 1249 (Ariz. App. 1st Div. 1996) (applying *Christiansburg* to fee request by prevailing defendant in ADA case); *California Correctional Peace Officers Assn. v. Virga*, 181 Cal. App. 4th 30, 38 n.7 (Cal. App. 1st Dist. 2010) (dicta stating that *Christiansburg* applies to fee request by prevailing defendants under § 1988); *State v. Golden's Concrete Co.*, 962 P.2d 919, 926, 927 (Colo. 1998) (holding that *Hughes* applied to fee request by prevailing defendant under § 1988); *Singhaviroj v. Bd. of Educ. of Town of Fairfield*, 17 A.3d 1013, 1022-1025 (Conn. 2011) (applying *Christiansburg* and *Hughes* to fee request under § 1988 by prevailing defendants); *Alley v.*

Taylor, 2001 Del. Super. LEXIS 119 (Del. Super. Ct. Mar. 30, 2001) (same); *Moran v. City of Lakeland*, 694 So. 2d 886, 887 (Fla. 2d Dist. App. 1997) (in analyzing prevailing defendant's fee request under § 1988, citing *Hensley v. Eckerhart*, 461 U.S. 424, 429 n.2 (1983), which cited *Christiansburg*); *LaBarre v. Payne*, 329 S.E.2d 533, 535, 536 (Ga. App. 1985) (applying *Hughes* to fee request under § 1988 by prevailing defendant); *Peraica v. Riverside-Brookfield High Sch. Dist. No. 208*, 999 N.E.2d 399, 409 (Ill. App. 1st Dist. 2013) (same); *Davidson v. Boone Cty.*, 745 N.E.2d 895, 898 n.4, 899 n.6 (Ind. Ct. App. 2001) (apparently using *Christiansburg* standard to fee request under § 1988 by prevailing defendant); *Chenevert v. Hilton*, 978 So. 2d 1078, 1086 (La. App. 3d Cir. 2008) (applying *Christiansburg* to fee request under § 1988 by prevailing defendants); *State v. Maine State Troopers Ass'n*, 491 A.2d 538, 544 (Me. 1985) (in analyzing prevailing defendant's fee request under § 1988, citing *Hensley v. Eckerhart*, 461 U.S. 424, 429 n.2 (1983), which cited *Christiansburg*); *Simonian v. Town of Hull*, 1993 Mass. Super. LEXIS 17 (Mass. Super. Ct. 1993) (applying *Hughes* to fee request under § 1988 by prevailing defendant); *Varney v. O'Brien*, 383 N.W.2d 213, 216, 217 (Mich. App. 1985) (in analyzing prevailing defendants' fee request under § 1988, citing *Hensley v. Eckerhart*, 461 U.S. 424, 429 n.2 (1983), which cited *Christiansburg*), *remanded on other grounds sub nom*. *Varney v. Genesee County Sheriff*, 393 N.W.2d 1 (Mich. 1986); *Revering v. Ackerson*, 1995 WL 130618, at *2 (Minn. App. 1995) (applying *Hughes* and *Christiansburg* to

fee request under § 1988 by prevailing defendants); *Bankston v. Pass Rd. Tire Ctr., Inc.*, 611 So. 2d 998, 1010 (Miss. 1992) (applying *Christiansburg* to fee request under § 1988 by prevailing defendants); *Shepherd v. Carbon County Bd. of Comm'rs*, 46 P.3d 634, 638 (Mont. 2002) (applying *Hughes* to fee request by defendant who prevailed on § 1983 claim); *Cuzze v. Univ. & Cmty. Coll. Sys.*, 172 P.3d 131, 136 & n.17 (Nev. 2007) (applying *Hughes* in reviewing request under § 1988 by prevailing defendants); *Studio 45 Discotheque, Inc. v. City of Union*, 2008 WL 583795, at *7-*8 (N.J. Super. Ct. App. Div. Mar. 5, 2008) (same); *Shields v. Carbone*, 952 N.Y.S.2d 649, 651 (N.Y. App. Div. 2012) (applying *Christiansburg* to fee request under § 1988 by prevailing defendants); *Rubio v. Carlsbad Mun. Sch. Dist.*, 744 P.2d 919, 923, 924 (N.M. App. 1987) (applying *Christiansburg* to fee request under § 1988 by prevailing defendants); *Miller v. Henderson*, 322 S.E.2d 594, 598 (N.C. Ct. App. 1984) (same); *Lucas v. Riverside Park Condo. Unit Owners Ass'n*, 776 N.W.2d 801, 813 (N.D. 2009) (applying *Christiansburg* standard to fee request under federal Fair Housing Act's fee-shifting provision); *Shuba v. Austintown Bd. of Educ.*, 1985 WL 10371, at *20 (Ohio Ct. App. 1985) (applying *Christiansburg* to fee request under § 1988, when both parties agreed to its applicability); *Oklahoma Personnel Serv. v. Alternate Staffing, Inc.*, 817 P.2d 1265, 1267 (Okla. 1991) (applying *Christiansburg* to fee request by prevailing defendant on Title VII claim); *Park v. Dept. of Corrections*, 307 P.3d 503, 508-510 & n.3 (Or. Ct. App. 2013) (applying *Christiansburg* to

fee request by prevailing defendant on Title VII claim, while noting, "We apply federal substantive law to federal claims brought in state court."); *McCarthy v. Oregon Freeze Dry, Inc.*, 327 Ore. 185, 189, 190 n.3, 957 P.2d 1200 (Ore. 1998); *Bitgood v. Allstate Ins. Co.*, 481 A.2d 1001, 1008 (R.I. 1984) (dicta stating *Christiansburg* governed fee request by prevailing defendant on § 1983 claim); *City of Waco v. Hester*, 805 S.W.2d 807, 817 (Tex. Ct. App. 1990) (applying *Christiansburg* to fee request under § 1988 by prevailing defendant); *Gardner v. Bd. of County Comm'rs of Wasatch County*, 178 P.3d 893, 906 (Utah 2008) (same); *Washington State Republican Party v. Washington State Pub. Disclosure Commn.*, 4 P.3d 808, 832 (Wash. 2000) (same); *Dowd v. City of New Richmond*, 405 N.W.2d 66, 78 (Wis. 1987) (same).[8]

B. The Idaho Supreme Court's Decision Conflicts with Decisions of Other State Supreme Courts That Recognize the Supremacy of this Court's Decisions Interpreting Federal Statutes.

The fundamental concept that state courts are bound by United State Supreme Court decisions construing federal law is plainly followed in virtually all states. The Idaho Supreme Court's statement that it is not bound to follow this Court's interpretation of

[8] Petitioners' research has not identified a single state court that refused to follow and apply the federal standard for an award of attorney fees under § 1988.

a federal statute conflicts with the vast majority of states who hold otherwise. *See, e.g.*, *Haywood v. Alexander*, 121 So. 3d 972, 981 (Ala. 2013); *Gates v. Discovery Commc'ns, Inc.*, 34 Cal. 4th 679, 692, 101 P.3d 552, 560 (Cal. 2004); *M.S. v. People*, 2013 CO 35, 303 P.3d 102, 106 (Colo. 2013); *Grp. Dekko Servs. LLC v. Miller*, 717 N.E.2d 967, 969 (Ind. Ct. App. 1999); *Littlefield v. State*, 480 A.2d 731, 737 (Me. 1984); *Riley v. Gibson*, 338 S.W.3d 230, 235 (Ky. 2011); *Commonwealth v. Pon*, 469 Mass. 296, 308, 14 N.E.3d 182, 194 (Mass. 2014); *Afzali v. State*, 326 P.3d 1, 3 (Nev. 2014); *State v. Coleman*, 214 A.2d 393, 402 (N.J. 1965); *Flanagan v. Prudential-Bache Sec., Inc.*, 495 N.E.2d 345, 348 (N.Y. 1986); *Shaw v. PACC Health Plan, Inc.*, 908 P.2d 308, 314 n.8 (Or. 1995); *Barstow v. State*, 742 S.W.2d 495, 501 n.2 (Tex. App. 1987); *People v. Gillam*, 479 Mich. 253, 261, 734 N.W.2d 585, 590 (Mich. 2007); *In re Fifth Third Bank, Nat. Ass'n*, 216 N.C. App. 482, 488, 716 S.E.2d 850, 855 (N.C. 2011); *Commonwealth v. Tedford*, 598 Pa. 639, 664, 960 A.2d 1, 15 (Pa. 2008); *Jaynes v. Commonwealth*, 276 Va. 443, 458, 666 S.E.2d 303, 311 (Va. 2008); *Youngbluth v. Youngbluth*, 2010 VT 40, ¶ 16, 188 Vt. 53, 65, 6 A.3d 677, 684, 685 (Vt. 2010); *State v. Radcliffe*, 164 Wash. 2d 900, 906, 194 P.3d 250, 253 (Wash. 2008); *State v. Mechtel*, 499 N.W.2d 662, 666 (Wis. 1993).

III. The Question Presented Has Surpassing Importance for the Uniform Enforcement of Federal Rights in State Courts.

In private actions to enforce federal rights, "the circumstances under which attorneys' fees are to be awarded and the range of discretion of the courts in making those awards are matters for Congress to determine." *Alyeska Pipeline Serv. Co., Inc. v. Wilderness Society, et al.*, 421 U.S. 240, 262 (1975). This Court, in turn, has often granted certiorari to ensure that the federal statutes authorizing such fees are applied uniformly and consistently with Congress's intent.[9] The decision below threatens this Court's ability to fulfill that function.

The threat stems from the Idaho court's view that a decision of this Court interpreting a federal statute cannot bind a state court if it imposes a limitation on the state court's discretion that is not in the text of the statute. On this view, for example, a state court could award fees against a § 1983 plaintiff under circumstances that would not justify a fee award in federal court. Indeed, that is what happened here, as discussed in Part IV.B, *infra*. Likewise, a state court could be less generous than federal courts to plaintiffs seeking fees under the discretionary fee-shifting provisions of Title VII and other statutes

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[9] *See*, *e.g.*, *Octane Fitness, LLC v. ICON Health & Fitness, Inc.*, 134 S. Ct. 1749 (2014); *Sebelius v. Cloer*, 133 S. Ct. 1886 (2013); *Lefemine v. Wiedman*, 133 S. Ct. 9 (2012); *Fox v. Vice*, 563 U.S. 826 (2011); *Astrue v. Ratliff*, 560 U.S. 586 (2010).

protecting federal rights.[10] State courts could thereby effectively shut their doors to all but unwitting plaintiffs asserting federal rights.

The decision below poses risks to defendants, as well as plaintiffs, in state-court actions to enforce federal rights. That is because the decision below allows state courts to be more, as well as less, generous to plaintiffs than the federal courts would be in awarding fees under § 1988 and similar federal fee-shifting statutes. For example, this Court has held that only in "rare and exceptional circumstances" can a court consider superior attorney performance when awarding a plaintiff fees under § 1988. *Perdue v. Kenny A. ex rel. Winn*, 559 U.S. 542, 554 (2010). But since that "limitation" is "not contained in" the text of § 1988 (App. 55), the decision below would allow a state court to ignore it by routinely enhancing fee awards to plaintiffs under § 1988 for their attorneys' superior performance.

In short, the decision below has great importance because it deters plaintiffs from enforcing federal rights in state courts. Perhaps its chief importance lies in its threat to this Court's ability to ensure that federal fee-shifting statutes are applied correctly and

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[10] *See*, *e.g.*, 20 U.S.C. § 1415(i)(3)(B) (discretionary fee-shifting provision in Individuals with Disabilities Education Act); 29 U.S.C. § 794a(b) (similar provision in Rehabilitation Act); 42 U.S.C. § 3613(c)(2) (similar provision in Fair Housing Amendments Act of 1988); 42 U.S.C. § 12205 (similar provision in Americans with Disabilities Act).

uniformly in the state courts as well as the federal courts. That ability has surpassing importance given the essential role that state courts play in enforcing federal rights. *Burt v. Titlow*, 134 S. Ct. 10, 15 (2013).

IV. This Case Is An Appropriate Vehicle for Review of the Question Presented.

This is an appropriate case, and this is an appropriate time, for the Court to review the question presented. The question presented was properly presented and passed upon below. The Idaho Supreme Court's erroneous ruling on that question was outcome-determinative. Finally, although the Idaho Supreme Court's error is obvious, its very obviousness begs correction, coming, as it does, in an action to enforce federal rights, and at a time of some disturbing instances of state-level defiance of federal-law supremacy.

A. The Question Presented Was Pressed and Passed Upon Below.

In seeking fees against petitioner on her § 1983 claim, respondents acknowledged that they had to satisfy the standard this Court established in *Christiansburg* and *Hughes*. (App. 136). The Idaho Supreme Court *sua sponte* determined that it was not bound by that standard. (App. 55). The court thereby injected into this case the question presented in this petition. Petitioner had no opportunity to address that question before its petition for rehearing. Under

those circumstances, petitioner timely raised the federal question in the courts below. *See*, *e.g.*, *Stop the Beach Renourishment, Inc. v. Fla. Dept. of Env. Protection*, 560 U.S. 702, 712 n.4 (2010).

Petitioner could not have foreseen that the Idaho Supreme Court would deny the binding effect of *Christiansburg* and *Hughes*. Indeed, in two earlier cases, the Idaho Supreme Court applied the federal standard in denying attorney's fees to a prevailing defendant under 42 U.S.C. § 1988. *Nation v. State, Dept. of Correction*, 158 P.3d 953, 969 (Idaho 2007); *Karr v. Bermeosolo*, 129 P.3d 88, 93 (Idaho 2005).[11] In no prior decision had the Idaho Supreme Court said or implied that the *Christiansburg/Hughes* standard was not binding on it. *Cf. Herndon v. Georgia*, 295 U.S. 441, 442-446 (1935). It is therefore no surprise that not even respondents questioned the applicability of the *Christiansburg/Hughes* standard.

Because petitioner timely sought rehearing of the Idaho Supreme Court's surprising decision on the question presented, that question is properly presented to this Court. *See* Stephen M. Shapiro, et al., Supreme Court Practice 195 (10th ed. 2013).[12]

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[11] Petitioner cited and discussed these two prior Idaho Supreme Court cases in her rehearing petition. (App. 143, 144).

[12] Review by this Court is not barred by lack of finality. The Idaho Supreme Court entered a separate order setting the amount of attorney's fees payable by petitioner under § 1988 shortly after issuing its opinion affirming the dismissal of her

(Continued on following page)

B. The Idaho Supreme Court's Ruling on the Question Presented Was Outcome-Determinative.

The Idaho Supreme Court's decision on the question presented affected the outcome. The Idaho court would not have awarded fees against petitioner under § 1988 if it had analyzed the respondents' request for fees under the *Christiansburg/Hughes* standard. Indeed, the Idaho court's own opinion proves the point. The court obviously believed that the standard mattered. Otherwise, why would it go out of its way – without benefit of briefing or argument – expressly to deny the applicability of that standard?

Moreover, while petitioner does not seek further review of the Idaho court's conclusion that her excessive-force claim was barred by qualified immunity, petitioner must highlight weaknesses in the court's qualified-immunity analysis, to show that no reasonable court could have found petitioner's excessive-force claim "meritless in the *Christiansburg* sense." *Hughes*, 449 U.S. at 15.

The Idaho Supreme Court's qualified-immunity analysis rested on three Ninth Circuit cases involving excessive-force claims arising from police dog attacks. (App. 12-34). The Idaho court thought these cases "clear[ly]" established a defense of qualified immunity

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claims and finding her eligible for those fees. (App. 131, 132); *cf. Radio Station WOW v. Johnson*, 326 U.S. 120, 127 (1945).

in this case, even if "there was some significant factual difference" between this case and *Watkins v. City of Oakland*, 145 F.3d 1087 (9th Cir. 1998), the Ninth Circuit case that was "most similar" to this case. (App. 34). The Idaho court also believed that at the time of the dog attack on petitioner in 2010, "there [was] no clearly established controlling authority" holding "that the use of a police dog to bite and hold a suspect constitutes excessive force." (App. 20).

This analysis has several defects. First, the Idaho court assumed that the merits of an excessive-force *claim* under § 1983 depends on whether the existence of a qualified-immunity *defense* is clear in hindsight. But that assumption is dubious. It implies that under § 1988 a court can award fees even against a § 1983 plaintiff who proves a constitutional violation, if the violation was far from clear under established law. Such awards, however, would punish a plaintiff for asserting a meritorious (though novel) constitutional claim, and would thus "distort" the litigation of constitutional rights in a way that Congress could not have intended. *Cf. Christiansburg*, 434 U.S. at 419.

Furthermore, the Idaho court erred in relying on the supposed absence of precedent holding "that the use of a police dog to bite and hold a suspect constitutes excessive force." (App. 20). For one thing, it is easy to imagine situations where the use of a police dog to bite and hold a suspect – a suspected jaywalker, for example – would violate clearly established law even without precedent so holding. *Cf. United States v. Lanier*, 520 U.S. 259, 271 (1997). In any event, the

Idaho court misunderstood the precedent. At the time of the dog attack in the present case, the Ninth Circuit had held that the use of a police dog to subdue a suspect can constitute constitutionally excessive force. *See Smith v. City of Hemet*, 394 F.3d 689, 700-704 (9th Cir. 2005) (en banc), *cert. denied*, 545 U.S. 1128 (2005) (reversing summary judgment against plaintiff on his claim that use of police dog involved excessive force).

If the Idaho Supreme Court had properly applied the *Christiansburg/Hughes* standard – and had properly applied it to petitioner's claim, as distinguished from respondents' defense – the court could not reasonably have awarded fees against petitioner. That is so because of the evidence discussed in Justice Jones' concurrence. (App. 57-63). That evidence came from petitioner's expert, who had extensive education and experience in law enforcement, including as a canine instructor and supervisor. As Justice Jones explained, the expert's evidence created triable issues of whether the police had probable cause to believe petitioner was a burglar, and, even if so, whether their use of the police dog to bite and hold her was excessive under the circumstances. (App. 58, 59).

In short, the question presented not only has broad importance but also was dispositive in this case.

C. The Question Presented Concerns the Supremacy of this Court's Decisions in the Fundamentally Important and Timely Context of the Enforcement of Federal Civil Rights.

At first blush, the Idaho Supreme Court's error may seem so obvious as not to warrant further review. But its very obviousness warrants correction considering the context in which it occurs.

First, the state court's refusal to be bound by decisions of this Court occurs in the context of a § 1983 action to enforce federal civil rights. As this Court said of § 1983's precursor, "[a] major factor motivating the expansion of federal jurisdiction through §§ 1 and 2 of the [Civil Rights Act of 1871] was the belief of the 1871 Congress that the state authorities had been unable or unwilling to protect the constitutional rights of individuals or to punish those who violated these rights." *Patsy v. Bd. of Regents of Florida*, 457 U.S. 496, 505 (1982). The unable or unwilling state authorities included "local courts." *Id.* (quoting legislative history). Under the Idaho Supreme Court's decision, however, state courts would have discretion to treat § 1983 plaintiffs less hospitably than their counterparts in federal court, by awarding attorney's fees against them under circumstances that would not trigger an award in federal court. This inhospitable treatment of plaintiffs asserting federal rights presents precisely the situation that Congress enacted § 1983's precursor to mitigate. *See Patsy*, 457 U.S. at 503, 506. Because

this case involves state-court adherence to this Court's decisions concerning the enforcement of federal rights, it is an auspicious case for review of the question presented.

This is also an auspicious time for review. Recently there have been several disturbing instances of state-level resistance to this Court's decision in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015). They include a state supreme court justice's declaration that state court judges are not bound by decisions of this Court that misinterpret the U.S. Constitution.[13] The incidents also include the continued refusal of many county officials to obey *Obergefell*.[14] While public debate is healthy, the outright refusal by state and local officials to abide by this Court's decisions interpreting federal law corrodes federal-law supremacy.

[13] Charles J. Dean, *Moore: Gay marriage 'not in accordance with the Constitution'* (Mobile, AL), Press-Register, July 1, 2015, at A10.

[14] Ballotpedia, *Local government responses to Obergefell v. Hodges* (Oct. 2, 2015):

> As of October 2, 2015, Ballotpedia found 99.90 percent of the U.S. population lived in a county where same-sex marriage licenses are available; 0.10 percent lived in counties where licenses were not being issued or their status was unknown. Alabama had the highest state population without access to same-sex licenses, with 5.78 percent of its residents living in counties known to be refusing to issue licenses at that time.

CONCLUSION

The petition for a writ of certiorari should be granted. Petitioner suggests that summary disposition may be appropriate.

Respectfully submitted,

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October 15, 2015

IN THE SUPREME COURT
OF THE STATE OF IDAHO

Docket No. 42053-2014

MELENE JAMES, **Plaintiff-Appellant,** **v.** **CITY OF BOISE, a political subdivision of the State of Idaho; STEVEN BONAS, STEVEN BUTLER, and TIM KUKLA,** **Defendants-Respondents.**	**Boise, April 2015 Term** **2015 Opinion No. 49** **Filed: May 21, 2015** **Stephen W. Kenyon, Clerk**

Appeal from the District Court of the Fourth Judicial District of the State of Idaho, in and for Ada County. Hon. Steven J. Hippler, District Judge.

The judgment of the district court is *affirmed.*

John A. Bush, Comstock & Bush, Boise, argued for appellant.

Kelly K. Fleming, Assistant City Attorney, Boise, argued for respondents.

EISMANN, Justice.

This is an appeal from a judgment dismissing the plaintiff's claims seeking to recover damages

resulting from being bitten by a police dog when she was mistaken for a burglar. We affirm the judgment of the district court.

I.
Factual Background.

On Sunday, December 26, 2010, at about 5:22 p.m., a citizen made a 911 telephone call to report a breaking and entering at a dental office in Boise. The citizen told the operator that he was at his family's house and heard glass breaking at the dental office across the street. When he went to investigate, he saw a woman about halfway through a window. He stated: "I talked to the lady, and she's trying to get her keys out of the building. She looks like she's, uh, under the influence of either drugs or major alcohol or something." When asked how the woman broke in, the citizen stated that he heard breaking glass, he was across the street, and she was halfway through the glass. He then said, "She's really lethargic, and I think she's probably under the influence of some alcer, uh, some drugs." Later in the conversation, he said: "I asked her if she's okay, and she kinda looked at me kinda crazy, and she's not like really anger [sic] or anything, but she's like totally out of it. She's saying she's trying to get her keys out of there." The operator asked if the woman was still in the building, and the citizen answered: "I believe so, yes. She's kind of in the down basement part, and if she was to come back out, I would be able to see her." At about

5:25 p.m., Boise police officers were dispatched to the location of the dental office.

The first to arrive was Officer Butler, who arrived at the scene at about 5:30 p.m. The building was a single story office building with a basement. The basement had windows to the outside and long window wells, each of which served multiple basement windows. There were wrought iron railings to keep people from falling into the window wells.

Officer Butler met with the citizen, who was standing on the north side of the building. He reported that he had seen a woman break the window and enter the building and that he believed she was still in the downstairs part of the building. The officer walked to the northeast corner of the building to a point where he could see that a north-facing basement window had been broken out. He then relayed that information to the other responding officers.

As Officer Butler was looking for suspects, he saw a woman through an east-facing basement window at the northeast corner of the building. She was standing with her right side toward the window, and she had a large can of a malt liquor beverage in her left hand and what appeared to be a knife with a 4-5 inch blade in her right hand. She appeared to be rummaging through things on a workbench or table.[1] He

[1] In his report, Officer Butler wrote that the woman was "holding a Steele Reserve Malt liquor can in her left hand and manipulating several sharp dental instruments including a

(Continued on following page)

observed her briefly, and she then walked out of view. The entire building was dark except the room in which he had seen her standing.

Officer Barber and Sergeant Kukla arrived a few minutes after Officer Butler. Officer Butler told them what he had seen, that the suspect was still in the building, and that she was armed with some kind of an edged weapon. After additional officers arrived, they established a perimeter around the building.

Officer Barber telephoned one of the dentists who owned the building. The dentist came to the scene, and Officer Barber heard him state that no one should be in the building, especially no one who entered by breaking a window. The cleaning lady also came to the scene, and she told Officer Barber that a woman worked in the building. When she began to describe the woman, the dentist reiterated that

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knife in her right hand." The Plaintiff testified that she did not have knives that she used or sharp instruments that look like knives. The citizen who called 911 testified in his deposition that he walked over to the window with Officer Butler when he arrived and he stood by Officer Butler at the window ten or fifteen seconds. During that time, the citizen stated that the woman was simply standing there drinking from a 24-ounce can of beer, that there was other beer on the countertop, and that he did not see anything else in her hands. The citizen said that he then walked away from the window because other officers were arriving and one had come up to Officer Butler. The citizen stated that he stood in the parking lot for about two minutes and then walked back to his grandfather's house.

anyone who had to break into the building was not supposed to be there, so the conversation ended.

At about 5:40 p.m., Sergeant Kukla requested a patrol canine. Officer Bonas, a police officer who was a canine handler, was told of that request when he came on duty at 6:00 p.m. He was informed that there was a request for a patrol canine for a burglary in progress at a dental office. He arrived at the dental office at about 6:10 p.m. and spoke with Officers Barber and Butler and Sergeant Kukla. Lieutenant Schoenborn was also there. Officer Bonas was informed that a witness had seen a woman force entry into the dental office by shattering a downstairs window. Officer Butler stated that he had seen the woman through a window and that she was armed with a knife. Sergeant Kukla and Officer Barber stated that the owner of the business was there and informed them that no one should be inside the building. Officer Bonas went to the northeast corner of the building and saw the broken window. He also observed that the entire upstairs and the majority of the downstairs were dark. He then decided that the use of a police dog was reasonable and necessary and the safest way to search for the suspect in the building.

Officer Bonas made the initial decision to use a police dog to find the suspect or suspects in the building. The factors he considered were: that the crime involved was burglary, a felony; burglaries at other local dental offices had occurred that month; one suspect had been seen armed with a knife; dental

offices contain nontraditional weapons; the suspect(s) would have the tactical advantage of concealment and could be lying in wait in the dark; Officer Butler had used the public address system in a police car to announce to the suspect inside the building that they were police officers, that if the suspect did not surrender they would use a police dog, and that they may be bitten;[2] and that using a police dog would be safer than having officers search the building, because the officers would have their guns drawn, increasing the danger to all parties involved. Lieutenant Schoenborn, as watch commander, discussed

[2] Officer Bonas testified that Officer Butler used the public address system in a patrol car to make the announcement before the entry team walked up to the front door of the building. Officer Butler testified that he made the announcement from his patrol car and that he thought he did so at least ten minutes before the dog entered the building. Officer Barber testified that he moved his patrol car from where he had initially parked it so that the public address system in the car could be used to make an announcement, but he did not specifically recall whether the announcement was made. Officer Harr testified that she thought Officer Butler made an announcement using the public address system of his patrol car prior to entry into the building. The citizen who called 911 testified that he did not hear any announcements from his grandfather's house, which was apparently across the street, but his grandfather had installed very expensive windows to decrease the sound because he lived on a very busy street. He testified that he could hear sirens inside his grandfather's house, but there was no evidence that the decibel rating of the patrol car's public address system was comparable to the decibel rating of a siren, which is required to be "a decibel rating of at least one hundred (100) at a distance of ten (10) feet." I.C. § 49-623(3).

the use of the dog with Sergeant Kukla, and then authorized Officer Bonas to deploy the dog.

Officer Bonas then took the dog out of his car and proceeded to the front door of the building, accompanied by Sergeant Kukla and Officers Barber, Rapp, Butler, and Harr. Officer Barber unlocked the door using a key that had been obtained from either the dentist or the cleaning lady. Officer Bonas announced in a loud voice through the open door: "Suspect in the building. Boise Police canine calling out. Surrender. If you do not surrender – [barking]. Heel. If you do not surrender a police dog will be sent. When he finds you, he will bite you. This is your final warning [barking]."[3] There was no response from inside the building, so the officers entered and began searching the ground floor.

After about two minutes, they stopped near the top of the stairs going to the basement. Officer Bonas then made a second announcement, stating in a loud voice: "Attention in the building. Boise Police canine calling out. Surrender. If you do not surrender, a police dog will be sent, and when he finds you he will bite you. This is your final warning." There was no response.

They then continued searching the ground floor part of the building, which took about six minutes. They again stopped at the top of the stairs going to

[3] Officer Bonas had an audio recording device on his person.

the basement. Officer Bonas made a third announcement, stating in a loud voice: "Suspect downstairs. Boise Police canine calling out. Surrender. If you do not surrender, a police dog will be sent. When he finds you, he will bite you. This is your final warning." There was no response.

Officer Bonas then decided to send the police dog down the stairs into the basement. He could tell that there was a light on downstairs and that the sides of the stairs were walled, not open, so there was a blind corner at the bottom of the stairs. He released the dog from his leash, and the dog went down the stairs. The officers remained at the top of the stairs. After a while, the dog began barking, indicating that he smelled the odor of a human. Because the human odor could be carried by air movement up a wall, across the ceiling, and down on the other side of a room, locating the odor would not mean that the person was located. Officer Bonas then gave the dog a command to bite, which would cause the dog to use his eyes and ears to find a person. After a few seconds, Officer Bonas heard a female screaming from the basement.

He headed down the stairs with the other officers following him. At the bottom of the stairs he turned to the left and saw a bathroom door that was open about seven or eight inches. The screams were coming from the bathroom, and he could see a human torso and the police dog inside the bathroom. The bathroom door then closed. Officer Rapp, who had a shield that he could use for protection, pushed the door open. The

interior of the bathroom was dark without any light on, but Officer Bonas could see that the police dog was biting the woman's right arm. She was lying on the floor. He yelled at her to show her hands, but she did not comply. He then commanded the dog to release and lie down, and he did. Once the dog released, Officer Bonas left the bathroom and moved with the dog to a hallway where he could cover the other officers.

Officer Harr, a female officer, was behind Officer Bonas when the bathroom door was opened. She saw a female lying on the floor. Her pants were pulled down past her knees, and she was wearing a T-shirt. Officer Harr helped pull the woman's pants up. She described the woman as being "completely out of it. Intoxicated." She stated that the woman "was completely lethargic, just slumped over, like completely out of it." After the woman was removed from the bathroom, Officer Harr, Officer Bonas, and other officers continued searching the remainder of the basement, but found no other suspects. The woman was taken first to paramedics who were posted nearby and then to the hospital. Testing at the hospital revealed that she had a blood alcohol content of 0.27. The woman was later identified as Melene James, the Plaintiff.

The basement of the building had been leased to a man who operated a dental laboratory making crown bridges. Beginning on January 1, 2010, the Plaintiff began using a small corner of the lab pursuant to an oral agreement with the man that she

would help him as needed in exchange for him permitting her to use the laboratory to make orthodontic appliances in her own business. The Plaintiff lived in an apartment located about one-half block from the dental building. At about 4:00 p.m. on December 26, 2010, a neighbor had called her, told her that a tooth had fallen out of his denture and that he had an important meeting the next day, and asked if she could repair the denture that day. She agreed to do so. He gave her the denture, and she walked to the dental building to make the repairs. There was a cement stairway outside the building providing access to the basement. She had a key to the door, and she walked down those stairs, unlocked the door, and entered the basement. It took her about 20 to 30 minutes to make the repairs, but she then had to let the acrylic cure for about 30 minutes. While it was curing, she walked out the basement door to have a cigarette. Once she was ready to return to her work, she realized that the door had locked behind her and her keys and cell phone were inside the building. There was a basement window that was sometimes left unlocked, so she walked up the stairs to where that window was and climbed over the wrought-iron railing and down into the window well. As she was trying to open the window, she accidently broke it. She had equipment running that could be a fire hazard, and so she decided to crawl through the broken window. While she was doing so, the citizen approached and asked if she needed any help. Once inside the building, she did not telephone the man who was permitting her to use the basement because

she was afraid he would become upset and not allow her to use the laboratory any more. She opened the refrigerator to get some water and saw the can of malt liquor. She decided to drink it in order to calm down before calling him. She also did not attempt to contact either of the dentists who owned the building.[4] She began doing the work to finish repairing the dentures, and then went to the bathroom. She closed the door, but may not have latched it. That is the last thing she remembers. She did not hear the officers, the announcements to surrender or she would be bitten by a dog, or the dog barking in the basement just before it bit her.

On October 4, 2012, the Plaintiff filed this action against Officers Bonas and Butler, and Sergeants Kukla and Likes (herein "the Police") and City of Boise. Sergeant Likes had not been at the scene and had no involvement in what occurred, but he was the patrol supervisor for the four patrol dogs. The Plaintiff alleged that the Defendants violated the Idaho Tort Claims Act by committing the torts of assault, battery, false arrest, wrongful imprisonment, and intentional infliction of emotional distress and by negligently failing to train, supervise, and control the

[4] The Plaintiff testified in her deposition that she did not know the dentists' telephone numbers, but she did not testify that she made any attempt to locate their numbers. Officer Barber testified in his deposition that he telephoned the dentist who later arrived at the scene and that he obtained the dentist's telephone number from the side of the building.

police dog, allowing him to repeatedly bite Plaintiff. She also alleged a claim under 42 U.S.C. § 1983, asserting that the Defendants violated her rights under the Fourth, Fifth, and Fourteenth Amendments to the Constitution of the United States by entering and searching the laboratory where she worked, by seizing her, and by using excessive force in arresting her.

The Defendants moved for summary judgment, and, after the motion was briefed and argued, the district court issued a memorandum decision and order granting the motion. It held that the Defendants were entitled to qualified immunity with respect to the federal claims; that pursuant to Idaho Code section 6-904 they were not liable under the Idaho Tort Claims Act for the alleged intentional torts; and that the Plaintiff had failed to present evidence showing a negligent failure to train, supervise, or control the police dog. The court entered a judgment dismissing all of the Plaintiff's claims with prejudice. She filed a motion for reconsideration and later a notice of appeal. After briefing and argument on the motion, the court entered an order denying the motion for reconsideration.

II.
Did the District Court Err in Holding that the Police Were Entitled to Qualified Immunity with respect to the Federal Claims?

The Plaintiff sued under 42 U.S.C. § 1983, which supplies a remedy for the deprivation under color of

state law of federally protected rights. By the time of the hearing on the motion for summary judgment, the Plaintiff stated that her federal claim was that the Police unconstitutionally used excessive force by using a police dog to seize her.

This case was decided by the district court granting the Defendants' motion for summary judgment. In an appeal from a summary judgment, this Court's standard of review is the same as the standard used by the trial court in ruling on a motion for summary judgment. *Infanger v. City of Salmon*, 137 Idaho 45, 46-47, 44 P.3d 1100, 1101-02 (2002). All disputed facts are to be construed liberally in favor of the non-moving party, and all reasonable inferences that can be drawn from the record are to be drawn in favor of the non-moving party. *Id.* at 47, 44 P.3d at 1102. Summary judgment is appropriate if the pleadings, depositions, 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 a judgment as a matter of law. *Id.* If the evidence reveals no disputed issues of material fact, then only a question of law remains, over which this Court exercises free review. *Id.*

The district court granted summary judgment with respect to the claim under 42 U.S.C. § 1983 on the ground that there was no constitutional violation because, under the circumstances in this case, the use of a police dog to find and seize the Plaintiff was objectively reasonable. The court also held that even if there was a constitutional violation, the Police were

entitled to qualified immunity because using a police dog to find and seize the Plaintiff did not violate a constitutional right that was clearly established on the date of this incident.

"Qualified immunity shields federal and state officials from money damages unless a plaintiff pleads facts showing (1) that the official violated a statutory or constitutional right, and (2) that the right was 'clearly established' at the time of the challenged conduct." *Ashcroft v. al-Kidd*, ___ U.S. ___, ___, 131 S.Ct. 2074, 2080 (2011). "[C]ourts have discretion to decide which of the two prongs of qualified-immunity analysis to tackle first." *Id.* Addressing the second prong first is consistent with the general rule of avoiding constitutional questions when the case can be decided on other grounds. *Pearson v. Callahan*, 555 U.S. 223, 241 (2009). Therefore, we will address the second prong.

In the district court, the Plaintiff asserted that "[t]he clearly established right at issue here is a citizen's right 'to be free from excessive use of force under the facts and circumstances presented in this case.'" She argued that "no force was necessary because had the officers evaluated the totality of circumstances it was highly likely that they would have discovered who she was and why she was there." Relying upon our decision in *Miller v. Idaho State Patrol*, 150 Idaho 856, 252 P.3d 1274 (2011), the district court held that the Plaintiff defined the clearly established law at issue too generally. As we stated in *Miller*:

> The first component of this analysis is defining the relevant legal rule at stake. The Court should not define the right too generally, as doing so would essentially vitiate the qualified-immunity doctrine. Here, for example, it would not be helpful to simply ask whether police must not execute unreasonable searches or, as Appellants suggest, whether the police can obtain bodily fluid from a person reasonably suspected of driving under the influence. Warrantless blood draws and voluntary urine samples are significantly less intrusive than warrantless forcible catheterizations. *Instead, the question should reflect the factual specifics in this case.*

Id. at 865, 252 P.3d at 1283 (citation omitted; emphasis added). The district court held that "the inquiry should be whether a reasonable police officer would have known as of December of 2010 that it was unlawful to utilize a police dog to search for and bite and seize a hidden and potentially armed suspect during a burglary in progress." Citing three decisions from the Ninth Circuit Court of Appeals, the district court held that there was no clearly established law prohibiting the use of a police dog to find and seize a burglary suspect.

The court first cited *Chew v. Gates*, 27 F.3d 1432 (9th Cir. 1994), in which, during the early afternoon on September 4, 1988, a suspect stopped for a traffic violation fled on foot into a scrapyard, where he hid. *Id.* at 1436. Upon discovering that there were three

outstanding warrants for the suspect's arrest, the officer radioed for assistance. *Id.* The police set up a perimeter around the scrapyard, and a helicopter and canine units were called to assist in the search. *Id.* About one and one-half hours after the suspect had fled, a police dog was unleashed into the scrapyard to find him. *Id.* at 1442. About thirty minutes later, the dog found and bit the suspect, but there was a factual dispute as to whether the suspect attempted to surrender prior to being bitten. *Id.* The court of appeals held that the defendants were entitled to qualified immunity with respect to the policy authorizing "the use against all concealed suspects of dogs trained to search for and apprehend persons by biting and seizing them." *Id.* at 1446. The court stated:

> When the incident that led to the filing of this lawsuit occurred [September 4, 1988], the use of police dogs to search for and apprehend fleeing or concealed suspects constituted neither a new nor a unique policy. The practice was long-standing, widespread, and well-known. No decision of which we are aware intimated that a policy of using dogs to apprehend concealed suspects, even by biting and seizing them, was unlawful. At the time of the incident in question, the only reported case which had considered the constitutionality of such a policy had upheld that practice. *See Robinette v. Barnes*, 854 F.2d 909 (6th Cir.1988) (holding that use of police dog trained to bite a suspect's arm or other available limb to apprehend a burglary

> suspect hiding in a darkened building was constitutional).

Id. at 1447.

The court next cited *Watkins v. City of Oakland*, 145 F.3d 1087 (9th Cir. 1998). In *Watkins*, on November 20, 1993, officers responding to a silent alarm at a commercial building released a police dog to find and bite the burglary suspect after announcing twice that the suspect should give up or the police dog would be released and the dog would find and bite the suspect. *Id.* at 1090. The suspect later sued, and the court of appeals held that the defendants were entitled to qualified immunity regarding the use of police dogs to bite and hold suspects.

> Following our prior decision in *Chew*, we agree with appellants that Oakland's "bite and hold" policy did not violate clearly established law concerning the use of excessive force at the time of the incident. . . . Although *Chew* was based on the law as it existed in September of 1988, there had been no change in the law that would have alerted [the canine officer] that his use of a police dog to search and bite was unconstitutional.

Id. at 1092.

The third case cited by the court was *Miller v. Clark County*, 340 F.3d 959 (9th Cir. 2003). In *Miller*, during the night of January 21, 2001, an officer used a police dog to find and bite a suspect who had fled at night from his parents' house across their large rural

property into some dense, dark, wooded terrain. *Id.* at 960-61. The suspect was wanted for the felony of fleeing from police by driving a car with a wanton or willful disregard of the lives of others. *Id.* at 960. The court of appeals held that "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. . . . Notwithstanding the serious injuries to Miller, there was no use of excessive force under the circumstances." *Id.* at 968 (citation omitted).

Based upon these opinions, the district court held that "there was no clearly established law proscribing the use of police dogs under circumstances presented to the officers here." It therefore held that the Police were entitled to qualified immunity.

On appeal, the Plaintiff argues that "[t]he district court was critical of [the Plaintiff] for failing to articulate a narrowly and clearly defined constitutional right of which objectively reasonable police officers would be aware." According to the Plaintiff, "That, of course, is a self-defeating proposition for any litigant, plaintiff or defendant, because it forces the litigant to guess what the court deems specifically narrow enough to fit whatever undefined parameter it will ultimately use." Thus, she asserts that the clearly established right at issue should be that she "had the basic and fundamental right not to be attacked by a police dog simply because she was mistaken for a burglar by overzealous police officers." This formulation of the issue is clearly wrong. It assumes that the

Police knew that the Plaintiff was "mistaken for a burglar." The circumstances are not to be judged "with the 20/20 vision of hindsight." *Graham v. Connor*, 490 U.S. 386, 396 (1989). There is no constitutional right not to be mistaken for a criminal. "The Constitution does not guarantee that only the guilty will be arrested." *Baker v. McCollan*, 443 U.S. 137, 145 (1979). "The Fourth Amendment is not violated by an arrest based on probable cause, even though the wrong person is arrested." *Graham*, 490 U.S. at 396.

The issue in this case is the use of a police dog to find and subdue by biting a suspected burglar in a dark basement after the suspect failed to respond to police announcements stating to surrender or a police dog would be sent that would find and bite him or her. The clearly defined law has to focus upon the use of the police dog under the circumstances of this case. For example, in *Watkins* the Ninth Circuit Court of Appeals stated:

> Although the use of excessive force in effecting an arrest is a clearly established violation of the Fourth Amendment, Watkins' legal right cannot be so general as to allow him to "convert the rule of qualified immunity . . . into a rule of virtually unqualified liability simply by alleging violation of extremely abstract rights."

145 F.3d at 1092.

As shown above, in *Chew* the Ninth Circuit Court of Appeals stated, "No decision of which we are aware intimated that a policy of using dogs to apprehend concealed suspects, even by biting and seizing them, was unlawful." 27 F.3d at 1447. In *Watkins*, the Ninth Circuit held, "Although *Chew* was based on the law as it existed in September of 1988, there had been no change in the law that would have alerted [the canine officer] that his use of a police dog to search and bite was unconstitutional." 145 F.3d. at 1092. Finally, in *Miller* the Ninth Circuit held that "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." 340 F.3d. at 968. The Plaintiff has not cited any authority to the contrary, and the decisions of the ninth circuit on this issue are the controlling authority unless the Supreme Court decides otherwise. It is not sufficient merely to say that the use of a police dog to bite and hold a suspect constitutes excessive force, because there is no clearly established controlling authority so holding.

The Supreme Court has made it clear that the clearly established law at issue must take into account the factual circumstances facing the officers. In *Anderson v. Creighton*, 483 U.S. 635 (1987), the defendant and other state and federal law enforcement officers conducted a warrantless search of the plaintiffs' home because they thought that a man who had committed a bank robbery earlier in the day was there. *Id.* at 637 at 528-29. The plaintiffs sued, and

the defendant moved to dismiss on the ground that the plaintiffs' claim was barred by qualified immunity. *Id.* The federal district court dismissed the case on the ground that there was probable cause to believe the bank robber was there and that exigent circumstances justified the warrantless search. *Id.* On appeal, the court of appeals reversed, holding that there were issues of fact as to whether the search was supported by probable cause and exigent circumstances and that the defendant was not entitled to qualified immunity because "the right of persons to be protected from warrantless searches of their home unless the searching officers have probable cause and there are exigent circumstances – was clearly established." *Id.* at 637-38.

The Supreme Court vacated the opinion of the court of appeals because it had misapplied the law with respect to identifying the applicable clearly established law for determining whether there was qualified immunity. The Court explained why the "clearly established law" could not be so general that it would eliminate the rule of qualified immunity. It stated:

> For example, the right to due process of law is quite clearly established by the Due Process Clause, and thus there is a sense in which any action that violates that Clause (no matter how unclear it may be that the particular action is a violation) violates a clearly established right. Much the same could be said of any other constitutional or

> statutory violation. But if the test of "clearly established law" were to be applied at this level of generality, it would bear no relationship to the "objective legal reasonableness" that is the touchstone of *Harlow* [*v. Fitzgerald*, 457 U.S. 800 (1982)]. Plaintiffs would be able to convert the rule of qualified immunity that our cases plainly establish into a rule of virtually unqualified liability simply by alleging violation of extremely abstract rights. *Harlow* would be transformed from a guarantee of immunity into a rule of pleading.

Id. at 639.

The Court explained that "the right the official is alleged to have violated must have been 'clearly established' in a more particularized, and hence more relevant, sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Id.* In deciding whether an action violated clearly established law, the focus must be whether the officials objectively reasonably believed that their action was lawful under the circumstances of the particular situation. The Court stated that the error made by the court of appeals was that it "specifically refused to consider the argument that it was not clearly established that the circumstances with which [the defendant] was confronted did not constitute probable cause and exigent circumstances." *Id.* at 640-41. The Court stated that the relevant question in the case was, for example, "the objective (albeit fact-specific) question whether a reasonable officer could have

believed [the defendant's] warrantless search to be lawful, in light of clearly established law and *the information the searching officers possessed.*" *Id.* at 641 (emphasis added).

Likewise, in *Pearson v. Callahan*, 555 U.S. 223 (2009), officers conducted a warrantless search of the plaintiff's house after an undercover informant, whom the plaintiff had voluntarily admitted into the house, signaled them that he had just purchased methamphetamine from the plaintiff. *Id.* at 227. The district court held that the officers were entitled to qualified immunity because they reasonably believed that they could lawfully enter pursuant to the "'consent-once-removed' doctrine, which permits a warrantless entry by police officers into a home when consent to enter has already been granted to an undercover officer or informant who has observed contraband in plain view." *Id.* at 229. On appeal, the court of appeals reversed, holding that the clearly established law at issue was "'the right to be free in one's home from unreasonable searches and arrests'" and that "under the clearly established precedents of [the Supreme] Court and the Tenth Circuit, 'warrantless entries into a home are per se unreasonable unless they satisfy the established exceptions.'" *Id.* at 230. The court of appeals then held that the officers could not reasonably have believed that their conduct was lawful because they knew they did not have a warrant, the plaintiff had not consented to their entry, and his consent to the informant's entry could

not reasonably be interpreted to include the officers. *Id.*

On appeal, the Supreme Court reversed, holding that the officers were entitled to qualified immunity because their conduct did not violate clearly established law. *Id.* at 243. The Court held that "[w]hen the entry at issue here occurred in 2002, the 'consent-once-removed' doctrine had gained acceptance in the lower courts," which consisted of three federal courts of appeals and two state supreme courts. *Id.* at 244. It had been accepted by each of those courts, and the seventh circuit had approved application of the doctrine in cases in which private citizens were acting as confidential informants. *Id.* The Court held that the officers were entitled to rely upon those cases even if their own federal circuit had not yet ruled upon the "consent-once-removed" doctrine. *Id.*

Whether the law is clearly established is a question of law to be resolved de novo on appeal. *Miller v. Idaho State Patrol*, 150 Idaho at 865, 252 P.3d at 1283. A plaintiff has the burden of establishing that the law was well established at the time of the violation. *Id.* "[W]hether an official protected by qualified immunity may be held personally liable for an allegedly unlawful official action generally turns on the 'objective legal reasonableness' of the action, assessed in light of the legal rules that were 'clearly established' at the time it was taken." *Anderson*, 483 U.S. at 639 (citation omitted).

The decision as to whether the facts, viewed from the standpoint of an objectively reasonable police officer, amount to probable cause is reviewed de novo on appeal. *Ornelas v. United States*, 517 U.S. 690, 696 (1996). In the instant case, the officers had probable cause to believe that there was a burglary in progress in the dental office.

A woman was seen crawling through a broken basement window into the building just after sunset on a Sunday, when the office was closed. A citizen witness stated that the woman appeared to be under the influence of alcohol or drugs and claimed to be retrieving her keys. An owner of the building arrived later and stated that no one should be in the building, especially anybody who had to break a window to enter. During the approximate forty minutes while the police were at the building, there was no indication that anyone attempted to contact the owner to report an accidental breakage of the window, and the woman inside the building did not respond to a police announcement using the public address system in a patrol car. The dental building had a ground floor and a basement. The interior of the ground level was dark, as was most of the basement. The woman had been seen in the lit portion of the basement very briefly, and then walked out of sight. Before commencing the search of the building, Officer Bonas announced in a loud voice at the open front door that they were the police, commanded the person inside to surrender, and warned that if the person did not surrender they would send in a police dog that would

find and bite the person. There was no response. After searching the ground floor for about two minutes, Officer Bonas made another similar announcement in a loud voice. When doing so, he happened to be at the top of the stairs going down to the basement. Once the officers completed their search of the ground floor, they again stopped at the top the stairs. Officer Bonas made his third announcement in a loud voice, and there was no response from the suspected burglar. The stairwell down to the basement had walls on both sides. Although the landing at the bottom of the stairs was lit, Officer Bonas could not see whether there was anyone standing out of sight at the bottom of stairs. At that point, he decided to release the police dog to find the suspected burglar. The dog went down the stairs and soon started barking, indicating that he smelled human odor. There was no sound from the basement indicating that the person down there wanted to surrender. At that point, Officer Bonas gave the command for the dog to find and bite the suspect.

The Plaintiff was not subjected to any force while the officers were searching the ground floor of the building. She was not seized until Officer Bonas gave the command for the dog to find and bite the suspect after the dog had smelled human odor while searching the basement. Therefore, the relevant issue is whether there was clearly established law that would have prohibited Officer Bonas from commanding the dog to find and bite the suspected burglar in the dark basement who had failed to respond to the calls to

surrender. The Plaintiff does not cite any authority so holding. As the Ninth Circuit Court of Appeals stated in *Chew*, in 1988 the use of police dogs to search for and apprehend fleeing or concealed suspects was a long-standing, widespread, and well-known practice. 27 F.3d at 1447. The court stated, "No decision of which we are aware intimated that a policy of using dogs to apprehend concealed suspects, even by biting and seizing them, was unlawful." *Id.* Thus, there was no clearly established law holding that the Police conduct in this case constituted the use of excessive force.

The Plaintiff alleges that the officers violated department policy by not ascertaining whether there were any tenants in the building before entering it with the police dog and by failing to give an announcement while in the basement rather than from the top of the stairs. In making this argument, she cites *Brooks v. City of Seattle*, 599 F.3d 1018 (2010). In *Brooks*, the police tased a pregnant woman driver three times (on her thigh, shoulder, and neck) within a one-minute period of time after she refused to sign a traffic citation for speeding in a school zone and resisted police attempts to remove her from her car. *Id.* at 1020-21. The district court denied dismissal on the ground of qualified immunity, and the officers appealed. *Id.* at 1021. The three-judge panel of the court of appeals held that the officers had not used excessive force. In so holding, the panel stated as a consideration: "Here, there has been no departmental determination that the Officers could have used

alternative methods. Indeed, the Officers followed the SPD's Use of Force Training Guideline, applying pain compliance techniques (of which drive-stun Taser use was one) to control an actively resisting suspect." *Id.* at 1029-30.

The *Brooks* court's consideration of whether the police followed department policy in their use of force is not relevant here for two reasons. First, that was a factor considered by the court in determining that "the Officers' behavior did not amount to a constitutional violation." *Id.* at 1031. It was not a factor in determining whether there was clearly established law that their conduct violated a constitutional right. Indeed, the policies or guidelines adopted by the Boise Police Department do not give rise to a claim under 42 U.S.C. § 1983. "[T]he statute creates no substantive rights; it merely provides remedies for deprivations of rights established elsewhere." *City of Oklahoma City v. Tuttle*, 471 U.S. 808, 816 (1985). "Section 1983 imposes liability for violations of rights protected by the Constitution, not for violations of duties of care arising out of tort law." *Baker v. McCollan*, 443 U.S. 137, 146 (1979).

Second, after the three-judge panel issued its opinion, the court of appeals heard the *Brooks* case en banc along with *Mattos v. Agarano*, another case involving the police use of a taser. In *Brooks*, the en banc panel came to a different conclusion than did the three-judge panel and held that "[a] reasonable fact-finder could conclude, taking the evidence in the light most favorable to Brooks, that the officers' use of

force was unreasonable and therefore constitutionally excessive." *Mattos v. Agarano*, 661 F.3d 433, 446 (9th Cir. 2011). In reaching that decision, the en banc panel stated that it "must examine the totality of the circumstances and consider '"whatever specific factors may be appropriate in a particular case, whether or not listed in *Graham* [*v. Connor*, 490 U.S. 386 (1989)]."'" *Id.* at 445. The appropriate factors that the en banc panel considered did not include any policies or guidelines adopted by the police department. That panel obviously did not consider them relevant in determining whether or not the officers used excessive force in violation of the Constitution.

The Plaintiff also contends that the district court failed to properly consider the affidavit of the Plaintiff's law enforcement expert.[5] The expert was critical

[5] The Plaintiff's expert assumed that the Police "learned that there was a tenant relationship where persons other than the building owner had access and the right to be in the building." Officers Butler, Barber and Bonas were asked during their depositions whether they knew the basement was a dental lab prior to entering the building, and they testified that they did not. Sergeant Kukla testified in his deposition that he did not remember being told that the person had been seen in a dental lab prior to the police dog entering the building. Lieutenant Schoenborn testified in his deposition that he knew there was a dental lab in the basement before the police dog went into the building, but he stated that he did not recall how he received that information and was not advised that the person in the basement may have worked in the dental lab. There is nothing in the record indicating that the Police knew before entering the building that the basement had been leased to a tenant. The Plaintiff's expert was also critical of not having the cleaning

(Continued on following page)

of the conduct of the police in this case, but the expert's opinion is not clearly established law, even if that opinion had been given prior to the incident in this case. The clearly established law must be "controlling authority" in the jurisdiction or "a robust 'consensus of cases of persuasive authority.'" *Ashcroft*, ___ U.S. at ___, 131 S.Ct. at 2084.

Although the *Brooks* decision did not address whether the officers violated any clearly established right when they tased Ms. Brooks, the *Mattos* decision did address that issue and held that "although Brooks has alleged an excessive force claim, the law was not sufficiently clear at the time of the incident to render the alleged violation clearly established." 661 F.3d at 448. Its analysis in arriving at that conclusion is instructive. It stated, "We begin our inquiry into whether this constitutional violation was clearly established by looking at the most analogous case law that existed when the officers tased Brooks in November 2004." *Id.* at 446.

The first case it considered was *Russo v. City of Cincinnati*, 953 F.2d 1036 (6th Cir.1992). In *Russo*, the police were called to help the family of Thomas Bubenhofer return him to a psychiatric institute. *Mattos*, 661 F.3d at 446. The call over the police radio

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lady give a description of the woman who worked in the building, but there is no evidence of what description she would have given and whether her description would have indicated that the Plaintiff may have been that woman.

described Bubenhofer as a walk-away from the psychiatric institute "'who was "suicidal, homicidal, and a hazard to police."'" *Id.* at 447. When the officers tried to get Bubenhofer out of his apartment, he threatened to kill anyone who entered his apartment and then opened the door and threatened the officers with two knives he was holding, one in each hand. *Id.* An officer tased him several times, to no avail, and he charged the officers while still holding the knives. *Id.* Ultimately, he was tased a final time while he lay at the bottom of the stairwell and posed no immediate threat to the officers. *Id.* The Sixth Circuit held that the initial use of the taser did not violate any clearly established law and that the subsequent tasings did not constitute excessive force. *Id.*

The second case that the *Mattos* court considered was *Hinton v. City of Elwood*, 997 F.2d 774, 782 (10th Cir. 1993). In that case, Hinton was initially stopped by the police for disturbing the peace, a misdemeanor, but he then pushed an officer after declining the officer's request to speak to him. *Mattos*, 661 F.3d at 447. When the officers informed Hinton that he was under arrest, he struggled by kicking his feet, flailing his arms, and biting the officers. *Id.* The officers tased him, and the Tenth Circuit held that Hinton failed to demonstrate that the officers' conduct amounted to a violation of the law. *Id.*

The third case that the *Mattos* court considered was *Draper v. Reynolds*, 369 F.3d 1270 (11th Cir. 2004). In that case, a lone officer stopped a tractor-trailer truck at night because its tag light was not properly

illuminated. *Mattos*, 661 F.3d at 447-48. During the traffic stop, the driver acted in an agitated and confrontational manner, paced back and forth, and yelled at the officer. *Id.* at 448. After refusing the officer's fifth request to produce certain documents, the officer tased him. *Id.* The Eleventh Circuit held that the use of the taser to effectuate the arrest did not constitute excessive force. *Id.*

The *Mattos* court noted that the conduct of the persons tased in those three cases was significantly different from the conduct of Ms. Brooks. It was obvious that the circumstances in those cases were so dissimilar to those in *Brooks* that the decisions authorizing the use of a taser in those cases would not justify the use of a taser on Ms. Brooks. Unlike Bubenhofer in *Russo*, Ms. Brooks was not a paranoid schizophrenic, did not make suicidal and homicidal threats to the police, and did not overcome the effects of being tased multiple times in order to approach the officers with knives in her hands. *Id.* at 447. Unlike the plaintiff in *Hinton*, Ms. Brooks did not shove, kick, and bite the officers. *Id.* Unlike the circumstances in *Draper*, Ms. Brooks was immobile in her car during daylight and was outnumbered by the officers three to one. *Id.* at 448.

Even though the circumstances in each of those three cases were clearly factually distinguishable from the circumstances in which Ms. Brooks was tased, the court of appeals held that there was no clearly established law showing that what the officers did to Ms. Brooks constituted excessive force. The

court of appeals stated, "We cannot conclude, however, in light of these existing precedents, that 'every "reasonable official would have understood" . . . beyond debate' that tasing Brooks in these circumstances constituted excessive force." *Id.* The court added, "Moreover, the violation was not so obvious that we can 'define clearly established law at a high level of generality,' finding that *Graham* [*v. Connor*, 490 U.S. 386 (1989)] alone renders the unconstitutionality of Brooks's tasing clearly established." *Id.* The court concluded "that, although Brooks has alleged an excessive force claim, the law was not sufficiently clear at the time of the incident to render the alleged violation clearly established." *Id.*

The existing case that is most similar to this case is *Watkins*, where officers responded to a silent alarm at a commercial warehouse. 145 F.3d at 1090. The officers saw someone running within the building, and they established a perimeter around the building. *Id.* There was no evidence as to whether the person was armed. *Id.* The officers decided to use a police canine to find, bite, and hold the suspect, and before doing so the canine officer twice announced: "This is the Oakland Police Department canine unit. Give yourself up or I'll release my dog who is going to find you and he is going to bite you." *Id.* When the suspect did not respond, the officer released the dog. The dog ran out of sight and then found and bit the suspect. *Id.* With respect to qualified immunity, the court of appeals held that there was no clearly established

law that the officer's "use of a police dog to search and bite was unconstitutional." *Id.* at 1092.

Even if there was some significant factual difference between *Watkins* and the present case, the *Mattos* case shows that the Police in this case were entitled to qualified immunity. In light of the Ninth Circuit decisions of *Chew, Watkins*, and *Miller*, it cannot be concluded that every reasonable official would have understood beyond debate that the conduct of the Police in this case violated a clearly established right of the Plaintiff. The Plaintiff has not cited a single case holding that the use of a police dog to find and subdue by biting a suspected burglar in a building constitutes excessive force. Absent a decision on the issue from this Court or the United States Supreme Court, the clearly established law is that of the Ninth Circuit, which holds that it does not. The district court did not err in granting summary judgment dismissing Plaintiff's claim under 42 U.S.C. § 1983 on the ground that the officers were entitled to qualified immunity.

III.
Did the District Court Err in Dismissing the Federal Claims Against City of Boise?

The district court dismissed the federal claims against City of Boise also. In *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658 (1978), the United States Supreme Court held that while a municipality could not be held liable in an action brought pursuant to 42

U.S.C. § 1983 for the actions of its employees under the doctrine of respondeat superior, a municipality could be held liable under that statute if "official municipal policy of some nature caused a constitutional tort." *Id.* at 691.

During oral argument on the Defendants' motion for summary judgment, their counsel argued, in response from a question by the district court, that the Plaintiff had not alleged a claim against City of Boise. When the district court asked the Plaintiff's counsel about that, he answered:

> Yeah. Your Honor, I heard that, and I don't know what I pled. I don't have the complaint in front of me. Actually, I didn't even draft the complaint. I will tell you that I noted that in the summary judgment that there was not a *Monell* claim argued, and I didn't really think of that question one way or the other.

In its decision granting summary judgment, the district court stated that the Plaintiff "did make one passing allegation in her Complaint that might be read to encompass a *Monell* claim," but if such a claim was made it must be dismissed because there was no constitutional violation by the Police. In a footnote in its memorandum decision, the district court stated:

> In resisting the City of Boise's motion for summary Judgment [sic], plaintiffs [sic] offered no *Monell* analysis or argument whatsoever. While James did make one passing

> allegation in her Complaint that might be read to encompass a *Monell* claim, it was so vague and devoid of factual support and context specific to that claim such that it made it virtually impossible for Boise to meaningfully prove the absence of a question of fact relative to such a claim. Neither in the complaint nor at summary judgment has James pointed to an uncorrected repeated course of conducted [sic] depriving citizens of their right to be free from excessive force, nor did James identify how Boise has "implement[ed] or execute[d] a policy, statement, ordinance, regulation, or decisions officially adopted and promulgated by that body's officer." However, because the Court has found no constitutional violation, it need not determine whether a *Monell* claim against the City otherwise survives summary judgment.

In her motion for reconsideration, the Plaintiff did not contend that she had a *Monell* claim that the district court failed to recognize or consider.

In her brief on appeal, the Plaintiff asserts, "The District Court Erred in Dismissing Plaintiff's § 1983 Excessive Force ('Monell Claim') against the City of Boise." Her entire argument on that issue is as follows:

> Even though it acknowledged that the defendant's [sic] had not moved for summary judgment as to whether there was a Monell Claim against the City of Boise, the district court granted summary judgment anyway. Whether or not Plaintiff's complaint asserted

> a Monell Claim against the City of Boise was never at issue. Parties are not required to respond to issues which are not raised by the opposing party.

The Plaintiff does not contend that her complaint alleges a *Monell* claim against the city, nor does she point to any such alleged claim in her complaint. "We will not consider assignments of error not supported by argument and authority in the opening brief." *Hogg v. Wolske*, 142 Idaho 549, 559, 130 P.3d 1087, 1097 (2006). Therefore, we will not consider this issue.

IV.
Did the District Court Err in Dismissing the State Law Claims?

The Plaintiff alleged in her complaint that the actions of the Police constituted assault, battery, false arrest, wrongful imprisonment, and intentional infliction of emotional distress. As a general rule, the Idaho Tort Claims Act provides that a governmental entity is liable for money damages arising out of the negligent or otherwise wrongful acts of its employees committed in the course and scope of their employment or duties if a private person would be liable for such acts under the laws of this state. I.C. § 6-903(1).

A. Assault, battery, false arrest, and wrongful imprisonment. A governmental entity and its employees acting within the course and scope of their employment are not liable for any claim which arises

out of assault, battery, false arrest, or false imprisonment if they were acting without malice or criminal intent. I.C. § 6-904. The district court held that the Defendants were not liable for these claims because there was no evidence that they acted with malice or criminal intent. On appeal, the Plaintiff contends that there is sufficient evidence that the Police acted with criminal intent.

The first issue to determine is the meaning of criminal intent in the Idaho Tort Claims Act. Idaho Code section 6-904(3) states:

> A governmental entity and its employees while acting within the course and scope of their employment and without malice or criminal intent shall not be liable for any claim which:
>
> . . . .
>
> 3. Arises out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights.

The Idaho Tort Claims Act applies only to tortious conduct – "negligent or otherwise wrongful acts or omissions." I.C. § 6-903(1). Therefore, Idaho Code section 6-904(3) lists types of conduct giving rise to tort liability, not criminal offenses. However, types of conduct listed in section 6-904(3) that could constitute a tort may also constitute a crime. For example,

assault, battery, and false imprisonment are also crimes. I.C. §§ 18-901, 18-903, 18-2901.[6]

The Tort Claims Act does not define the term "criminal intent," and that phrase is not a term of art. It has various meanings, including the intent to do wrong; the mens rea for a particular crime, which may include criminal negligence; and the intent to violate the law, which implies knowledge of the law violated. Black's Law Dictionary 380-81 (7th ed. 1999).

This Court first addressed the meaning of that term in *Doe v. Durtschi*, 110 Idaho 466, 716 P.2d 1238

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[6] Idaho Code section 18-901 defines the crime of assault as:

> (a) An unlawful attempt, coupled with apparent ability, to commit a violent injury on the person of another; or
>
> (b) An intentional, unlawful threat by word or act to do violence to the person of another, coupled with an apparent ability to do so, and doing some act which creates a well-founded fear in such other person that such violence is imminent.

Idaho Code section 18-903 defines the crime of battery as:

> (a) Willful and unlawful use of force or violence upon the person of another; or
>
> (b) Actual, intentional and unlawful touching or striking of another person against the will of the other; or
>
> (c) Unlawfully and intentionally causing bodily harm to an individual.

Idaho Code section 18-2901 defines the crime of false imprisonment as "the unlawful violation of the personal liberty of another."

(1986). Several female students had filed lawsuits seeking damages from Durtschi, a fourth grade teacher, and the school district. *Id.* at 468-69, 716 P.2d at 1240-41. They alleged that Durtschi had sexually molested them during school hours and while conducting or supervising school activities. *Id.* at 469, 716 P.2d at 1241. Durtschi filed a cross-claim against the school district seeking indemnification. *Id.* The school district moved for summary judgment on Durtschi's cross-claim, and the district court granted the motion and entered judgment for the school district. *Id.* Durtschi then appealed. *Id.*

On appeal, this Court upheld the dismissal of Durtschi's cross-claim on the ground that he had acted with criminal intent. *Id.* 471, 716 P.2d at 1243. In addressing the meaning of "criminal intent," we stated:

> The "criminal intent" provision "is satisfied if it is shown that the defendant knowingly performed the proscribed acts. . . ." *State v. Gowin*, 97 Idaho 766, 767-68, 554 P.2d 944, 945-46 (1976); *see also*, *e.g.*, *State v. Sisneros*, 631 P.2d 856, 858 (Utah 1981) ("A person acts with intent when it is his conscious objective or desire to engage in the conduct or to cause the result."). Ordinarily, criminal intent would be a question for the trier of fact. However, in this case Durtschi has left no doubt that he acted with criminal intent.
>
> Durtschi admitted to performing the lewd and lascivious acts on the minor plaintiffs.

> He specifically named each of the minor plaintiffs as the objects of his actions. He expressly stated that he acted intentionally. In the face of the school district's arguments that he acted with criminal intent, Durtschi made no denials. In fact, he pled guilty to related criminal charges of lewd and lascivious conduct. Every indication points to Durtschi knowingly and consciously performing criminal acts. We find nothing from which we can infer at all, much less reasonably infer, that Durtschi acted in any way but with criminal intent.

Id. at 470-71, 716 P.2d at 1242-43.

The definition of "criminal intent" stated in the above-quoted passage from *Durtschi* is not clear. First, the Court quoted the part of a sentence from *State v. Gowin*, 97 Idaho 766, 554 P.2d 944 (1976), that defines general criminal intent. The entire sentence was, "A general criminal intent requirement is satisfied if it is shown that the defendant knowingly performed the proscribed acts, but a specific intent requirement refers to that state of mind which in part defines the crime and is an element thereof." *Id.* at 767-68, 554 P.2d at 945-46 (internal citation omitted). The *Gowin* case involved a crime that required a specific intent, "fraudulent intent," and the Court held on appeal that there was insufficient evidence for the jury to find that the defendant possessed such intent.

Id. at 767, 716 P.2d at 945.[7] However, the *Durtschi* Court also quoted the Utah Supreme Court's statement from *State v. Sisneros* that "[a] person acts with intent when it is his conscious objective or desire to engage in the conduct or to cause the result." 631 P.2d at 858. The Utah court made that statement when addressing whether there was sufficient evidence for a jury to find that an intoxicated defendant had the specific intent to commit a larceny when he broke into and entered a building at night in order for him to have committed the crime of burglary. Immediately following the quoted statement, the Utah court said, "Obviously, it is difficult to prove directly what is in a defendant's mind," *id.* at 858-59, and it concluded by stating, "Although defendant was under the influence of alcohol at the time of the commission of the offense, the jury could reasonably conclude that defendant maintained the requisite intent to burglarize the premises," *id.* at 860. Thus, the *Durtschi* Court quoted statements regarding both general intent and specific intent in defining "criminal intent." Finally, it stated: "Every indication points to Durtschi knowingly and consciously performing criminal acts. We find nothing

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[7] The criminal statute at issue stated:

> Every clerk, agent or servant of any person who fraudulently appropriates to his own use, or secretes with a fraudulent intent to appropriate to his own use, any property of another which has come into his control or care by virtue of his employment as such clerk, agent, or servant, is guilty of embezzlement.

I.C. § 18-2405 (1948).

from which we can infer at all, much less reasonably infer, that Durtschi acted in any way but with criminal intent." 110 Idaho at 471, 716 P.2d at 1243. The criminal acts committed by Durtschi required a specific criminal intent – "the intent of arousing, appealing to, or gratifying the lust or passions or sexual desires of such person or of such minor or child."[8] Thus, when stating that Durtschi's conduct constituted "knowingly and consciously performing criminal acts," did the *Durtschi* Court mean that he knew that he was violating the law?

Most recently, in *Miller v. Idaho State Patrol*, 150 Idaho 856, 252 P.3d 1274 (2011), we addressed whether the Idaho Tort Claims Act afforded immunity to an officer, who had a nurse obtain a urine sample by the involuntary warrantless catheterization of a person arrested for driving under the influence of alcohol, despite the plaintiff's claim that the involuntary catheterization constituted a battery under Idaho Code section 6-904(3). In holding that it did, we

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[8] The statute provided:

> Any person who shall willfully and lewdly commit any lewd or lascivious act or acts upon or with the body or any part or member thereof of a minor or child under the age of sixteen years, with the intent of arousing, appealing to, or gratifying the lust or passions or sexual desires of such person or of such minor or child, shall be guilty of a felony and shall be imprisoned in the state prison for a term of not more than life.

Ch. 1, § 1, 1973 Idaho Sess. Laws 1, 1.

stated: "Criminal intent 'is satisfied if it is shown that the defendant knowingly performed the proscribed acts.' . . . No shred of evidence suggests that [the officer] acted with malice or criminal intent." *Id.* at 870, 252 P.3d at 1288.

There is no difference between the intent necessary to commit the tort of battery and the intent necessary to commit the crime of battery. We stated in *Miller*, "Civil battery consists of an intentional contact with another person that is either unlawful, harmful, or offensive. Lack of consent is a critical element of battery." *Id.* at 869, 252 P.3d at 1287 (internal citation omitted). The crime of battery can be committed by the "[a]ctual, intentional and unlawful touching . . . of another person against the will of the other." I.C. § 18-903(b). Our statement that there was not a shred of evidence suggesting criminal intent must have meant that criminal intent was more than the mens rea necessary to commit the crime of battery.

Holding that "criminal intent" means only the mens rea of a crime comparable to the alleged tort would not be consistent with excluding from liability the torts of assault, battery, and false imprisonment. Therefore, "criminal intent" must mean something different from the mens rea for the comparable crime. In *Anderson v. City of Pocatello*, 112 Idaho 176, 731 P.2d 171 (1986), we stated that legal malice "involves the intentional commission of a wrongful or unlawful act without legal justification or excuse, whether or not the injury was intended" and that "[c]riminal

intent closely equates to the above definition of 'legal' malice." *Id.* at 187, 731 P.2d at 182. We hold that "criminal intent" as used in the Idaho Tort Claims Act means the intentional commission of what the person knows to be a crime.

The district court correctly held that there is no evidence showing that the Police acted with criminal intent in this case. Therefore, the court did not err in dismissing the tort claims of assault, battery, false arrest, and wrongful imprisonment.

Intentional infliction of emotional distress. In order to establish a claim of intentional infliction of emotional distress, the plaintiff must prove that: (1) the defendant's conduct was intentional or reckless; (2) the defendant's conduct was extreme and outrageous; (3) there was a causal connection between the defendant's wrongful conduct and the plaintiff's emotional distress; and (4) the emotional distress was severe. *Edmondson v. Shearer Lumber Prods.*, 139 Idaho 172, 179, 75 P.3d 733, 740 (2003). The district court granted summary judgment against the Plaintiff on this claim on two alternative grounds: (1) "Nothing about Defendants' conduct could be considered extreme or outrageous in this context" and (2) "Surely the liability that James seeks to impose for intentional infliction 'arose out of' the conduct constituting the alleged false imprisonment, assault and battery. Simply 'changing the legal theory on which the claim for recovery' is based does not eviscerate the immunity otherwise provided."

On appeal, the Plaintiff challenges the first ground, but not the second. "[I]f an appellant fails to contest all of the grounds upon which a district court based its grant of summary judgment, the judgment must be affirmed." *AED, Inc. v. KDC Invs., LLC*, 155 Idaho 159, 164, 307 P.3d 176, 181 (2013). However, we note that a tort claim need only "arise out of" the type of conduct listed in Idaho Code section 6-904, which means it must originate or stem from such conduct. *Woodworth v. State ex rel. Idaho Transp. Bd.*, 154 Idaho 362, 365, 298 P.3d 1066, 1069 (2013). Immunity under the statute is not abrogated by changing the legal theory upon which a claim for recovery is sought. *Intermountain Constr., Inc. v. City of Ammon*, 122 Idaho 931, 933, 841 P.2d 1082, 1084 (1992).

Idaho Code section 25-2808. The Plaintiff also sought to recover under Idaho Code section 25-2808, which states:

> Neither the state of Idaho, nor any city or county, nor any peace officer employed by any of them, shall be criminally liable under the provisions of section 25-2805, Idaho Code, or civilly liable in damages for injury committed by a dog when: (1) the dog has been trained to assist in law enforcement; and (2) the injury occurs while the dog is reasonably and carefully being used in the apprehension, arrest or location of a suspected offender or in maintaining or controlling the public order.

The district court held that the police dog was reasonably and carefully being used in this case when the dog located and bit the Plaintiff. She contends that the district court erred in so finding under the facts in the record. Plaintiff reads this statute as holding that the State of Idaho, a city or county, or a peace officer employed by any of them, could be civilly liable for damages for injury committed by a police dog assisting law enforcement in the apprehension, arrest, or location of a suspected offender, or in maintaining or controlling public order, if the dog is not "reasonably and carefully being used." She contends that there is an issue of fact as to whether the police dog in this case was being reasonably and carefully used. We affirm the judgment of the district court, but on a different ground.

The interpretation of a statute is a question of law over which we exercise free review. *City of Pocatello v. Idaho*, 152 Idaho 830, 838, 275 P.3d 845, 853 (2012). It must begin with the literal words of the statute, giving them their plain, obvious, and rational meaning, *Thomson v. City of Lewiston*, 137 Idaho 473, 478, 50 P.3d 488, 493 (2002); those words must be given their plain, usual, and ordinary meaning; and the statute must be construed as a whole, *State v. Hart*, 135 Idaho 827, 829, 25 P.3d 850, 852 (2001). If the statute is ambiguous, then it must be construed to mean what the legislature intended for it to mean. *Miller v. State*, 110 Idaho 298, 299, 715 P.2d 968, 969 (1986). To determine that intent, we examine not only the literal words of the statute, but also the

reasonableness of proposed constructions. *Lopez v. State, Indus. Special Indem. Fund*, 136 Idaho 174, 178, 30 P.3d 952, 956 (2001).

The Plaintiff's interpretation of section 25-2808 would mean that an officer who uses a police dog to subdue a suspect in order to make the arrest would be subject to greater liability than an officer who shot the suspect in order to subdue him. The former would be subject to liability if the dog was not reasonably and carefully used, while the latter would only be subject to liability if the officer acted with malice or criminal intent. There is no logical reason why the legislature would intend that result. Likewise, the Plaintiff's interpretation would result in section 25-2808 impliedly amending the provisions in Idaho Code section 6-904(3) regarding assault and battery when a police dog is being used. One standard (malice or criminal intent) would apply to a claim based upon an alleged assault or battery by peace officers who did not use a police dog and another standard (reasonably and carefully being used) would apply if the officers had used a police dog to subdue the suspect. Amending a statute by implication is disfavored and will not be inferred absent clear legislative intent. *Wilkins v. Fireman's Fund American Life Ins. Co.*, 107 Idaho 1006, 1008, 695 P.2d 391, 393 (1985).

Idaho Code section 25-2808 expressly refers to section 25-2805, and the proper interpretation of section 25-2808 requires consideration of that section, which states:

(1) Any person, who, after complaint has been made by any person to the sheriff, who shall serve a copy of said notice upon such person complained of, willfully or negligently permits any dog owned or possessed or harbored by him to be, or run, at large without a competent and responsible attendant or master, within the limits of any city, town, or village or in the vicinity of any farm, pasture, ranch, dwelling house, or cultivated lands of another, or who willfully or negligently fails, neglects or refuses to keep any such dog securely confined within the limits of his own premises when not under the immediate care and control of a competent and responsible attendant or master, shall be guilty of an infraction punishable as provided in section 18-113A, Idaho Code.

(2) Any dog which, when not physically provoked, physically attacks, wounds, bites or otherwise injures any person who is not trespassing, is vicious. It shall be unlawful for the owner or for the owner of premises on which a vicious dog is present to harbor a vicious dog outside a secure enclosure. A secure enclosure is one from which the animal cannot escape and for which exit and entry is controlled by the owner of the premises or owner of the animal. Any vicious dog removed from the secure enclosure must be restrained by a chain sufficient to control the vicious dog. Persons guilty of a violation of this subsection, and in addition to any liability as provided in section 25-2806, Idaho Code, shall be guilty of a misdemeanor. For a

> second or subsequent violation of this subsection, the court may, in the interest of public safety, order the owner to have the vicious dog destroyed or may direct the appropriate authorities to destroy the dog.

The violation of section 25-2805 by a dog's owner or handler could possibly result in the owner or handler being held to be negligent per se, which would conclusively prove the first two elements for a cause of action in negligence, leaving only causation and damages to be proved by the injured person. *Obendorf v. Terra Hug Spray Co., Inc.*, 145 Idaho 892, 898, 188 P.3d 834, 840 (2008). A peace officer whose use of a police dog allegedly violated the statute could also risk being held negligent per se and also being held criminally liable. That is the obvious reason for the adoption of section 25-2808. It begins by stating that "[n]either the state of Idaho, nor any city or county, nor any peace officer employed by any of them, shall be criminally liable under the provisions of section 25-2805, Idaho Code." That provision eliminates the risk of criminal liability. The remainder of section 25-2808 states that the state of Idaho, any city or county, and any peace officer employed by any of them are not "civilly liable in damages for injury committed by a dog" when two conditions are met. First, the dog must have been trained to assist in law enforcement. Second, the injury must occur "while the dog is reasonably and carefully being used in the apprehension, arrest or location of a suspected offender or in maintaining or controlling the public order." I.C. § 25-2808. This provision eliminates the

application of negligence per se for a violation of section 25-2505 by the state of Idaho, any city or county, and any peace officer employed by them. "[A] statute that creates a civil cause of action cannot be the basis of a negligence per se claim. The statute creating the cause of action defines the conduct constituting the tort and the applicable standard of care." *Steed v. Grand Teton Council of the Boy Scouts of America, Inc.*, 144 Idaho 848, 853, 172 P.3d 1123, 1128 (2007).

There is no indication that the legislature intended to eliminate the use of police dogs to bite and hold suspects. Indeed, if subsection (2) of section 25-2505 were applied to police dogs, it would permit peace officers to use each dog only once to find, bite, and hold a criminal suspect. Once a police dog bit a suspect, the dog could not be released from a chain to find or pursue another suspect. Considering that the use of police dogs to search for and apprehend fleeing or concealed suspects by biting them is neither a new or unique policy and that such policy can reduce the risk of injury to police in subduing suspects in order to arrest them, the legislature would have been clear had it intended to eliminate that policy. In fact, the statute contemplates the use of police dogs. Thus, the provisions regarding civil liability were apparently intended by the legislature to apply to persons other than the suspect who may be injured by a police dog. Because the Plaintiff was the suspected offender who the Police were using the police dog to locate and apprehend so that they could arrest, Idaho Code

sections 25-2805 and 25-2808 do not apply to this case.

Negligent failure to train. In her complaint, the Plaintiff alleged that the Defendants negligently failed to train, supervise, and control the police dog. In support of their motion for summary judgment, the Defendants offered the testimony of Officer Randy Arthur, who was certified as a canine trainer for both detection dogs and patrol dogs in 2003 by Idaho Peace Officer Standards and Training (POST). Officer Arthur was POST certified as a canine trainer for both drug detection dogs and patrol dogs in 2003, and at the time of the motion for summary judgment he was certified by POST through December 31, 2014, as trainer and evaluator for both drug detection and patrol dogs. He stated that the Boise Police Department canine unit trains every Tuesday and exceeds the industry standard of four hours of training per week and that he trained Officer Bonas and his canine in the use and application of department policies and procedures, which are within industry standards. Officer Bonas and his canine were certified by POST on March 4, 2010, passing all tests. Pursuant to Idaho Code section 19-5107, POST Council has promulgated rules for certifying patrol dogs, which is how the dog in this case was trained. The dog has to be trained to apprehend a suspect without contact and with contact. IDAPA 11.11.01.223.01 & .02. For apprehension without contact, the handler must release the dog to pursue a fleeing suspect, who then stops and stands still. The dog must, as predetermined

by the handler, either return to the handler or stay and guard the suspect. IDAPA 11.11.01.223.01. For apprehension with contact, the handler must release the dog to pursue a fleeing suspect, who does not stop. The handler must send the dog to physically apprehend the suspect, and the dog must hold the suspect until verbally called off by the handlers. IDAPA 11.11.01.223.02. Officer Bonas's canine passed both tests. The district court granted summary judgment on the Plaintiff's claim of negligent training.

On appeal, the Plaintiff contends that the district court erred in rejecting the opinion of the Plaintiff's expert, who stated that in his opinion police departments should use the "bark and hold" method rather than the "bite and hold" method. POST made a policy decision to permit dogs to be trained and certified in the "bite and hold" method. The City of Boise police department made a policy decision to use only the "bite and hold" method. In answers to interrogatories, the City stated:

> The Boise Police Department Canine Unit trains its dogs and handlers under the "Handler Controlled" (HC) method, as opposed to the "Bark and Hold" (BH) method. Under the HC method, the police dogs are trained to bite or bark based on the direction of the handler. The Boise Police Department Canine Unit believes that the HC method is safer for the public, suspects, and our handler/officers.

There is a difference of opinion as to which method is the best policy. The Boise Police Department made a policy decision not to use the "bark and hold" method because it determined that the "bite and hold" method was safer for the public, suspects, and the dog handlers. Idaho Code section 6-904(1) exempts from liability any claim "based upon the exercise or performance or the failure to exercise or perform a discretionary function." "The discretionary function exception applies to governmental decisions entailing planning or policy formation." *Dorea Enterprises, Inc. v. City of Blackfoot*, 144 Idaho 422, 425, 163 P.3d 211, 214 (2007). The purpose of this exemption is "to limit judicial re-examination of basic policy decisions properly entrusted to other branches of government." *Id.* Therefore, that the Plaintiff's expert believes that the police department should have chosen the "bark and hold" method rather than the "bite and hold" method is irrelevant to the Defendants' liability in this case.

V.
Are the Defendants Entitled to an Award of Attorney Fees on Appeal?

The Defendants seek an award of attorney fees on appeal pursuant to 42 U.S.C. section 1988 and Idaho Code sections 12-117 and 12-121. We will address each statute individually.

42 U.S.C. section 1988. 42 U.S.C. section 1988 provides that in an action brought pursuant to 42

U.S.C. section 1983, "the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." The Plaintiff contends that attorney fees cannot be awarded under this statute unless the action was frivolous, unreasonable, or without foundation at the time the complaint was filed. The statute does not contain any such limitation. It permits the award of attorney fees to the prevailing party in the discretion of the court.

In *Hughes v. Rowe*, 449 U.S. 5 (1980), the Supreme Court held that attorney fees could not be awarded to a prevailing defendant in a case brought pursuant to 42 U.S.C. section 1983 unless the plaintiff's action was frivolous, unreasonable, or without foundation. *Id.* at 14. However, *Hughes* and *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412 (1978), upon which it was based, were appeals from cases in federal district courts. Although the Supreme Court may have the authority to limit the discretion of lower federal courts, it does not have the authority to limit the discretion of state courts where such limitation is not contained in the statute. Therefore, in cases filed in the Idaho state courts seeking to recover under 42 U.S.C. section 1988, the court has discretion in deciding to award attorney fees to the prevailing party, whether the prevailing party is the plaintiff or the defendant.

In this case, we will award attorney fees against the Plaintiff on her claim based upon 42 U.S.C. section 1988. It was clear that her claim would be

barred by qualified immunity under the clearly established law of the ninth circuit, and the Plaintiff did not cite any law to the contrary.

Idaho Code section 12-117. The Defendants seek an award of attorney fees under Idaho Code section 12-117(1), which provides that "in any . . . civil judicial proceeding involving as adverse parties a state agency or political subdivision and a person, . . . the court . . . shall award the prevailing party reasonable attorney's fees . . . if it finds that the nonprevailing party acted without a reasonable basis in fact or law." Because we have clarified the meaning of criminal intent under the Tort Claims Act and Idaho Code section 25-2508, we do not find that the Plaintiff brought this appeal regarding her state law claims without a reasonable basis in fact or law. Therefore, we will not award attorney fees under this section.

Idaho Code section 12-121. The Defendants seek an award of attorney fees under Idaho Code section 12-121. In normal circumstances, attorney fees will only be awarded under this statute when this court is left with the abiding belief that the appeal was brought, pursued or defended frivolously, unreasonably or without foundation. *Minich v. Gem State Developers, Inc.*, 99 Idaho 911, 918, 591 P.2d 1078, 1085 (1979). Because the appeal regarding the Plaintiff's claims under state law was not brought or pursued frivolously, unreasonably, or without foundation, we will not award attorney fees under that statute.

VI.
Conclusion.

We affirm the judgment of the district court. We award respondents costs on appeal and attorney fees in defending the claim under 42 U.S.C. § 1983.

Chief Justice BURDICK, Justice HORTON and Justice Pro Tem KIDWELL **CONCUR**.

J. JONES, Justice, specially concurring.

I concur in the Court's opinion. Because we hold that qualified immunity supported the dismissal on summary judgment of James' claim under 42 U.S.C. § 1983, it was not necessary to consider the merits of that claim. Had there been no qualified immunity issue, I would have voted to vacate the district court's dismissal of James' excessive force claim. In my view, there were triable issues of fact that would have precluded summary judgment.

In its 48 page memorandum decision, the district court did a commendable job of analyzing and deciding the issues presented, with the exception of the excessive force claim. Instead of drawing inferences in favor of James, the court essentially discounted portions of her expert's opinion testimony and expressed disagreement with other portions.

James presented the affidavit of her expert, Dan Montgomery, in opposition to the Defendants' motion for summary judgment. Montgomery set out substantial professional qualifications in his affidavit, including a bachelor's degree in law enforcement, a master's degree in criminal justice administration, 52 years of experience in various law enforcement positions including 25 years as chief of police in Westminister, Colorado, work as a canine instructor and supervisor, a law enforcement expert in 24 legal actions between 1985 and 2013, and various training and teaching sessions. Montgomery reviewed numerous documents in the preparation of his affidavit. In his affidavit, he raised questions about the existence of probable cause and the need for the use of the magnitude of force employed by the officers. Among other things, he observed and opined:

(1) "[I]t is unusual for females to commit forced entry burglaries and it is also rare that a person with the criminal intent to burglarize would continue the crime if they have been spotted and/or identified."

(2) "Nighttime burglaries into office buildings which are closed for business do not typically involve lit rooms. Burglars typically prefer to operate in the dark using darkness and stealth to their advantage."

(3) "A reasonable officer would ask themselves why this person would still be in the exact area where she was seen

entering, knowing she had been seen, and then take time to drink beer and use dental instruments (in a dental lab) if, in fact, she was intent on committing a burglary."

(4) "In my opinion, there is not any reasonable evidence to suggest that the suspect was an 'immediate' threat to the officers. The suspect was reported to be 'lethargic' and 'totally out [of] it', which does not imply that she was or would be an 'immediate' threat."

(5) "It is my opinion that the suspect was not 'actively' resisting arrest nor was she attempting to evade arrest by flight."

(6) "The International Association of Chiefs of Police, and the United States Department of Justice have, for many years, adopted the recommendation that a 'bark and hold' policy should be followed by those police departments who use canines to search for and apprehend suspects."

While one might not necessarily agree with these and other opinions expressed by Montgomery, they do not appear on their face to be unreasonable or lacking in credibility. However, the district court stated that Montgomery's "characterization of the events is conclusory and unduly favorable to James and ignores important and undisputed facts." Then, in response to Montgomery's observation that it is unusual for females to commit forced entry burglaries, the court

stated, "Montgomery has offered no statistics supporting his contention that females generally do not commit burglaries and there is no justifiable reason to believe that women are not as capable as men in doing so." While the district court might be correct in saying that women are as capable of men to commit burglaries, that does not mean they engage in that line of work as often as men. And, it is true that Montgomery did not present statistics supporting his observation, but when have we required an expert with more than 50 years' experience in the field of his expertise to produce statistics backing up an observation? Quite frankly, even though I do not consider myself an expert on the types of crime committed by women, his observation does not seem unreasonable. In light of his obvious experience, it is probably supportable.

With regard to Montgomery's observation that it is rare for a burglar to continue the crime if they have been spotted and/or identified, the district court stated, "not all burglars immediately abandon their crime and take flight from the scene when spotted entering, particularly those whose thinking is significantly impaired by alcohol and/or drugs." Both the court and Montgomery may have valid points, but why quibble with the expert's opinion, which is based upon 52 years of training and experience, when considering a summary judgment? It is not the judge's role to argue with the expert if the expert's opinion is not inherently improbable.

With regard to Montgomery's observation that burglars typically preferred to operate in the dark and that burglars don't typically drink beer and use dental instruments while on the job, the court stated: "that [James] was in a lit room drinking a beer while handling dental instruments does not reasonable [sic] suggest she is 'working.' People do not generally drink while at work in a dental lab . . . " Montgomery's observations appear quite reasonable and should not have provoked disagreement on summary judgment.

With regard to Montgomery's opinion that James, being lethargic and totally out of it, did not present an immediate threat to the officers, the court stated, "The Defendant officers were entitled to assume James posed an immediate threat because the objective factors indicated she was armed with a bladed tool, intoxicated, and hidden within the basement of a largely dark building with which the officers were unfamiliar." The word "armed" was not the word used by Officer Steven Butler, who was the first officer on the scene. He testified that he was observing James through a window, that he was 6 to 8 feet from her at the time, that she was "holding a knife, and it appeared that she was drinking from a beer can." He specifically identified the can as "Steel Reserve 211" malt liquor, so he was obviously close enough to see the print on the can. And, he indicated that James was rummaging through things on a table that included several dental instruments. Butler's testimony would not tend to support the conclusion that James was hiding or "hidden." There is nothing in the record that would

justify the rejection of Montgomery's opinion as to the potential threat James may have presented.

With respect to Montgomery's observation that the International Association of Chiefs of Police and the Justice Department have adopted the recommendation that a "bark and hold" policy should be employed for canine apprehension of suspects, the district court stated that, "He merely asserted as a conclusion, without offering proof, that the International Association of Chiefs of Police and the U.S. Department of Justice, have recommended 'bark and hold' model policies." This implies that Montgomery was obligated to offer the policies in evidence, which is something that an expert need not do. Montgomery states in the qualifications portion of his affidavit that he is a "life member" of the International Association of Chiefs of Police. He would certainly have the necessary credentials to speak to policies adopted by that organization.

While in private practice in the mid-1990's, I encountered a similar situation. My plaintiff's expert in an excessive force case under Section 1983 "was the chief of police for Bellevue, Washington for ten years, and had a total of twenty-nine years of continuous police service." *Kessler v. Barowsky*, 129 Idaho 647, 652, 931 P.2d 641, 646 (1997). He had been a recognized police expert in numerous cases and had reviewed all of the pertinent documents in the *Kessler* case. *Id.* at 652-53, 931 P.2d at 646-47. The expert testified, among other things, that the defendants in *Kessler* employed a flawed plan to seize the suspect

and continued to use deadly force when it was no longer objectively reasonable. *Id.* at 652, 931 P.2d at 646. The district court denied the defendants' motion to strike the expert's affidavit but nevertheless granted them summary judgment dismissing the complaint. *Id.* This Court held that Kessler's expert "is qualified by knowledge and experience to assist the trier of fact with specialized knowledge on this subject." *Id.* We further concluded "that the material the expert reviewed and his qualifications as a law enforcement expert provide a sufficient foundation for his expert opinion on police procedures, including the assessment of dangers." *Id.* The Court did strike certain portions of the affidavit relating to the reactions that a Vietnam combat veteran might have in an arrest situation because the expert did not state his qualifications to opine as to the possible reactions of a Vietnam combat veteran. *Id.* Nevertheless, based upon the opinions of the expert regarding excessive use of force, which were supported by his law enforcement credentials, the Court vacated the summary judgment dismissing the Section 1983 claims and remanded the case for further proceedings. *Id.* at 657, 931 P.2d at 651.

In this case, the district court had no basis for discounting or quibbling with Montgomery's opinions. Montgomery provided adequate foundation and performed a thoughtful analysis that should have been taken into account by the district court in determining whether summary judgment was appropriate on the excessive force claim.

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

MELENE JAMES, Plaintiff, vs. CITY OF BOISE CITY, a political subdivision of the State of Idaho; STEVEN BONAS, STEVEN BUTLER, TIM KUKLA, RODNEY LIKES, AND DOES I-X, unknown parties, Defendants.	Case No. CVPI 12-16734 MEMORANDUM DECISION AND ORDER ON DEFENDANTS' MOTION FOR SUMMARY JUDGMENT (Filed Mar. 4, 2014)

I. BACKGROUND

This case arises from injuries sustained by Plaintiff, Melene James ("James"), when "Ruwa," a police dog, apprehended and bit her during what police mistakenly believed to be James' burglary of a dental office building. In reality, James was performing denture work for a neighbor when, after inadvertently locking herself out of the building, she broke a basement window to gain re-entry. James is a denturist who shared leased space in the building for her denture lab. She has brought claims against the City and four police officers, alleging torts sounding in federal and state law. The defendants have moved for summary judgment on all claims.

II. FACTS

The following facts are undisputed except where noted. Dr. Carrick Brewster, D.D.S. owns a building where he has an office. It is located at 7337 Northview Street in Boise, Idaho ("Office"). The building is a single story office building with a basement. The basement has windows to the outside in large but relatively narrow window wells. The window wells have wrought iron metal railing around them. There is a dental lab in the basement of the building, which is leased by Gene Vail. Mr. Vail had an understanding with James that allowed her to use part of the space in the lab in exchange for her labor. James was working in the basement lab early on the evening of Sunday, December 26, 2010.

Mr. Jarod Hendricks was in a residence across the street from the office building when he heard shattering glass. Aff. Fleming, Exh K (911 recording); Pl's SOF ¶ 7, citing Aff. Bush, Exh B (Incident History). He walked over to investigate. According to his 911 call, made at 17:22 or 5:22 p.m., he discovered a female climbing in through a broken basement window of the office building. He asked the woman if she was okay, and she "kinda looked at [him] kinda crazy" and told him "she was trying to get her keys out of there." Mr. Hendricks commented that she "look[ed] like she [was] under the influence of drugs or major

alcohol;" "lethargic," and "totally out of it." He informed 911 that she was located in the "basement part" of the building. Id.[1]

The first officer on the scene at approximately 5:30 p.m. was Officer Steven Butler. Aff. Bush, Exh. D (Depo. Butler 21:12-14). Upon arriving, Officer Butler

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[1] James claims that she was asked by a neighbor to perform some emergency dental work that evening. She lives one block from the office. She walked to the office. She claims when she first arrived, she saw someone on the corner of the block talking to himself. Using her keys, she entered the lab through the basement door, turned on the light and got to work. After fixing the denture, she placed it in a pressure pot to cure, a process which takes 15 minutes. Plaintiffs S.O.F. at ¶ 2. She went outside to have a cigarette and the door locked behind her. She realized her purse, keys and phone were all inside the locked lab. Because the equipment she was using presented a risk of fire hazard if left unattended, she opted not to return home to call Mr. Vail to get a key. Instead, she decided to enter through one of the windows to the lab which was typically left unlocked in order to easily air out the lab. Id. at 3. As she tried to slide the window open, her hands slipped and her elbow shattered the glass. Id. at 114. Cold and upset that she had broken the window, James started to crawl through the window when she heard a voice behind her ask if she was alright or needed help. Worried that the person behind her was the same person she saw earlier talking to himself on the corner, James stated that she locked her keys in the building but did not turn around to address the person directly. Id. at ¶ 5. After she regained entry, James states that she opened a beer found in the lab refrigerator to calm down and resumed her work. After her work was done, she went to the bathroom, which is the last thing she remembered before encountering police dog Ruwa. Id. at ¶ 6. James does not explain how her blood alcohol content was .27 as a result of drinking only one fortified beer more than an hour prior to her blood alcohol content being tested.

spoke with Mr. Hendricks about what he witnessed.[2] Mr. Hendricks informed Officer Butler he believed she was still inside the basement of the building. Aff. Bush, Exh C (Narrative Report) & Depo. Butler 32:834:21. Upon investigation, Officer Butler observed the broken window and then spotted James through a different basement window, holding a 4-5 inch bladed instrument he described as a "knife" in her hand, drinking a beer, and rummaging through dental instruments on a table. Depo. Butler at 35:1-39:1; 41:9-44:23; 47:4-49:19. Officer Butler's Narrative Report states that she was "manipulating several sharp dental instruments including a knife in her right hand." Aff. Bush, Exh C. She was approximately 6-8 feet away from Officer Butler. Depo. Butler 52:15-17. The light was on. Id. at 51:24-52:5. After a few seconds, she moved out of his view. Id. at 50:2-51:5.[3]

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[2] Officer Butler wrote in his post-incident narrative report and testified in his deposition that Mr. Hendricks told him he actually saw James breaking the glass. Aff. Bush, Exh. C (Butler Narrative Report) and Exh. D (Depo. Butler 34:4-21). Hendricks told the 911 dispatcher, however, that he only heard the breaking glass. Aff. Fleming, Exh. K (911 recording). While James attempts to paint this as a disputed fact, Defendants do not assert that Hendricks ever saw James break the glass. Rather, they maintain that Hendricks heard the glass break. Further, this "dispute" is immaterial to the Court's opinion. The clear impression conveyed to police was that whoever was seen entering the basement window had broken the window glass to gain entry.

[3] Photographs of the building show that to view into the basement, one must get close to the window well rail and even then the view is quite limited. See Bush Aff. Exh. R.

Officer Barber and Sergeant Kukla were on the scene a few minutes after Officer Butler's arrival. Depo Butler 54:14-55:9. Officer Butler relayed what he saw to other officers. Id. at 51:6-10. See also, Pl's SOF ¶ 9. According to Officer Barber, Officer Butler told him that he saw James in the office area near the broken window and that she had an "edged weapon" in her hand. Aff. Bush, Exh E (Depo. Barber 19:11-19).[4]

After the additional units arrived, the officers established a perimeter around the office building to prevent escape. Depo Butler 54:4-10; Depo Kukla 17:9-14; 18-5-13. Officer Barber spoke to a cleaning lady who appeared on the scene and contacted the building's co-owner, Dr. Carrick Brewster, who soon arrived on scene. Depo. Barber 33:15-35:24 & Aff.

[4] He did not think that James had a "knife" from Officer Butler's description, but rather a "bladed tool." Id. at 42:18-43:19. Similarly, Sergeant Kukla testified that Officer Butler told him he saw James with "some kind of cutting instrument" or "some kind of edged weapon." Aff. Bush, Exh F (Depo. Kukla 9:25-10:4; 14:9-20). James testified there were no knives, or anything that looks like a knife, in the dental office. Aff. Bush, Exh. A (Depo. James 45:7-24). Any dispute as to whether the tool seen was a knife or a blade edge tool is immaterial. It is undisputed that Police believed that the "suspect" had a blade instrument that could be used as a weapon and were unaware of whether she had any other unseen weapons, conventional or otherwise. James has not disputed the Defendant's additional observation and concern that there are many objects in a dental office building or dental lab that a suspect could use as a weapon, particularly given the advantage of cover, concealment and lying in wait.

Bush, Exh. I (Barber Narrative Report). According to Defendants' discovery responses, the cleaning lady told Officer Barber there were other people who worked in the building. "She tried to describe what the lady looked like, however, Mr. Carrick Brewster reiterated that anyone who had to break into the building was not supposed to be there so the conversation ended." Aff. Bush, Exh. J (Defs' Disc. Resp. to Int. 22, p. 19); Depo Barber 60:7-62:4.[5] Sergeant Kukla personally observed the broken window and saw several pieces of glass still on the ground. Depo. Kukla 12:2-23.

At approximately 5:40 p.m., one of the officers made a K-9 request, which is "general protocol for officers responding to a scene that is a burglary and a potential suspect inside." Id. at 17:15-18; 30:17-31:19. Thereafter, several other officers arrived, including Defendant Officer Steven Bonas, the K-9 officer, and his dog, Ruwa. Officer Bonas was debriefed by the officers and told by Officer Butler that James was armed with a knife. Aff. Bush, Exh. G (Depo. Bonas 41:9-42:8) and Exh. L (Bonas Report). Bonas was

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[5] As discussed *infra*, Plaintiff asserts that if police would have continued to investigate who might be in the building by getting a description of the tenant who normally worked in the basement, James, and by noting evidence Plaintiff claims may be inconsistent with a burglary, they would not have sent in Ruwa or otherwise used force to arrest James. However any such dispute goes to the issue of the existence of probable cause to effectuate James' arrest and seizure rather than the amount of force used in actually effectuating that arrest.

aware of several recent burglaries of dental offices in the area. Depo Bonas 66:9-23. Together, Bonas, Kukla and Butler discussed whether the situation would be appropriate for canine deployment and decided it would be. They recommended deployment to Lieutenant Schoenborn, also on the scene, who approved. Depo. Kukla 44:6-46:15.

The concerns and considerations leading to the decision to use Ruwa in searching the building and apprehending the suspect included, among others:

- The fact he [sic] suspect was seen armed with a knife.
- Knowledge that dental offices may contain non-traditional weapons.
- The fact the suspect(s) would have tactical advantages (i.e. cover, concealment) and could easily be lying in wait. The interior of the building was dark. All lights appeared to be turned off except for a small portion of the southeast downstairs area.
- The suspect(s) ignored my commands to surrender despite being told a police K-9 would be used and they would be bitten.
- Officers searching the business for James and any additional suspects would have their weapons drawn for their protection, increasing the danger to all parties involved, thus making the use

> of a police dog a safer manner to locate and possibly apprehend James.

Bonas Declaration, ¶ 9.

Approximately 15 minutes after initially seeing James through the broken window, Sergeant Kukla commanded Officer Butler to make a "canine announcement" over the PA from his car, warning James to surrender or a dog would be unleashed upon her and she would be bitten. The announcement was made prior to entry into the building.[6] Depo. Butler

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[6] Since Officer Butler did not include in his report that he made the canine announcement over the PA, James asserts the fact is disputed whether he did or not. However, Sergeant Kukla also testified there were "at least two" canine announcements from the PA prior to entry into the building. Depo Kukla 50:5-16; 52:10-53:17. Officer Bonas testified that one PA announcement was made. Depo. Bonas 22:17-23:18. Lieutenant Schoenborn testified that he did not specifically recall a PA announcement but, under the circumstances, a PA announcement would have been "standard operating procedure." Aff. Bush, Exh. H (Depo. Schoenborn 32:1-10). Officer Harr likewise testified that a PA announcement was made by Officer Butler. Aff. Bush, Exh S (Depo. Harr 28:11-29:13).

James claims that the evidence is conflicting about when and if such a "car announcement" was made. The Court notes that exactly how long in advance of the entry into the building the car announcement was made is unclear, as is whether *more than one* announcement was made over the car PA. However, that at least one such an announcement was made is undisputed in the record. James asserts that evidence that an announcement was made is in dispute because it is not documented. However, James cites to no requirement that this routine warning be documented. The absence of documentation in this context is not evidence that the announcement was not made,

(Continued on following page)

56:3-63:20; 64:12-19. James did not respond. Id. at 63:23-25. The "Entry Team,"consisting of at least five officers and Ruwa, proceeded to the front door and opened it. Id. at 89:6-18; Depo. Kukla 50:11-16.[7] Officer Bonas gave another canine announcement at the front door prior to entry. Depo Bonas 82:15-20. While clearing the ground level floor, Officer Bonas gave a second announcement. Id. 83:10-84:5. After clearing the ground floor, the team arrived at the top of an enclosed staircase consisting of 10-12 stairs leading to the basement, with a blind corner at the bottom of the stairs. Depo. Bonas 84:6-87:6. Officer Bonas could see light at the bottom of the stairs, but did not proceed into the basement prior to releasing Ruwa. Id. Instead, he remained at the top of the stairs and gave a third canine announcement. Id. at 84:6-14. He explained that he did not proceed into the basement because "[w]e have a blind corner looking down the staircase, so I have no idea who could possibly be down there lying in wait." Id. at 89:22-90:3.[8] All the while, Ruwa is barking loudly

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particularly in light of the undisputed testimony of the officers on the scene that at least one such car announcement was made.

[7] The Court has listened to the belt audio of the entry into the building and the apprehension of James using Ruwa. The audio reveals three *explicit and loud* warnings to surrender or be bitten by the police dog. In addition, Ruwa can be heard barking *very loudly* after each announcement.

[8] James asserts that it was a breach of policy to not give the announcement while physically on basement floor. The policy provide [sic] that the "warning shall be repeated on each level of all multilevel structures." The policy however contains an

(Continued on following page)

immediately after each announcement. A review of the audio reveals that Officer Bonas' three announcements were spaced by 2.5 minutes and 7 minutes. Aff. Fleming, Exh. K (Bonas audio).

Approximately twenty seconds after the third announcement, Ruwa was given the command to search. Officer Bonas released Ruwa down the stairs and Ruwa went into "bark alert," indicating he located James' odor. Depo Bonas at 87:4-88:12. At that point, Bonas gave Ruwa the "bite" command to actually locate and hold James. Id. at 89:4-10. Within seconds, James was heard screaming. Id. at 91:6-16. The team proceeded down the staircase and saw James and Ruwa in a small bathroom with the door

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exception for when "tactical considerations" preclude an announcement physically on each level. *See* Bush Aff. Exh. K at p. 4. Bonas testified that he gave the canine announcement at the top of an enclosed staircase consisting of 10-12 stairs leading to the basement. He could see light at the bottom of the stairs, but did not proceed into the basement prior to releasing Ruwa. He explained he remained at the top of the stairs because "[w]e have a blind corner looking down the staircase, so I have no idea who could possibly be down there lying in wait." Instead, he released Ruwa down the stairs who went into "bark alert," indicating he located James' odor. Further, Officer Bonas did indicate in his deployment report that he made the third canine announcement at the top of the stairs leading to the bottom floor. Bonas Decl., Exh. D. James has not presented any evidence disputing the tactical concern (officer safety) with descending the stairwell with the dog and stopping to give an announcement while exposed at the bottom of the stairs rather than giving the announcement at the top of the stairs as was done in this case.

partially opened. Id. at 91:17-92:22. They opened the door and saw Ruwa biting James' right arm. Id. at 97:5-7. She was lying on the floor. Id. at 99:24-6. Because the bathroom was "pitch black," the team could not see her hands to see if she was still armed, and James initially ignored commands to show her hands. Id. at 97:5-11; 100:7-12. Seconds later, when James' hands could be seen, Officer Bonas gave Ruwa commands to release her. Though Bonas gave Ruwa multiple various commands, he testified that Ruwa immediately released James.[9] Id. at 98:1-99:5. Officer Bonas' audio reveals the attack lasted no more than 36 seconds.

James was cuffed and Officer Harr helped James pull her pants up. She noted that James "was completely out of it. Intoxicated . . . completely lethargic, just slumped over, like completely out of it." Bush Aff., Exh. S (Depo. Harr 38:5-17). She did not have a knife in her possession. Depo Bonas at 102:10-12. She was never directly interviewed by police because she was "heavily intoxicated." Aff. Bush, Exh I (Barber Report). James was immediately treated by the Ada County Paramedics and taken to St. Alphonsus. Bonas Report, p. 2.

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[9] James cannot recall the attack and has not disputed this account. While the audio reveals multiple various commands being given to Ruwa, it is not possible to understand what is going on with the dog and thus the audio does not work to dispute the officers' testimony.

At the emergency room, James was noted to have several puncture wounds to her right arm, right cheek, and left hand. She had lacerations on her jaw, a right ulnar fracture, and later developed aspiration pneumonia. Pl. SOF ¶ 29, citing Exh. N to Bush Aff. Her BAC level was .27 and she tested positive for cannabinoids. Aff. Fleming, Exh A. Subsequent medical workup revealed a fracture to her spine, and she had suspected nerve injury; also James claims PTSD and increased anxiety disorder. Id., citing Exh. O to Bush Aff.

James remembers nothing about the incident with Ruwa. The last thing she remembers about the evening is going to the bathroom. Depo. James 56:19-23.

III. SUMMARY JUDGMENT STANDARD

A motion for summary judgment "shall be rendered forthwith if the pleadings, depositions, 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 a judgment as a matter of law." *McCoy v. Lyons*, 120 Idaho 765, 769-70, 820 P.2d 360, 364-65 (1991), quoting IRCP 56(c). A fact is "material" for summary judgment purposes if it is relevant to an element of the claim or defense and if its existence might affect the outcome of the case. *Rife v. Long*, 127 Idaho 841, 849, 908 P.2d 143, 151 (1995). The burden of proving the absence of a material fact rests at all times upon

the moving party. *McCoy*, 120 Idaho at 769, 820 P.2d at 364. This burden is onerous because even "[c]ircumstantial evidence can create a genuine issue of material fact." *Id., quoting Doe v. Durtschi*, 110 Idaho 466, 470, 716 P.2d 1238, 1242 (1986).

In order to meet its burden, the moving party must challenge in its motion and establish through evidence the absence of any genuine issue of material fact on an element of the nonmoving party's case. *Smith v. Meridian Joint Sch. Dist. No. 2*, 128 Idaho 714, 719, 918 P.2d 583, 588 (1996). If the moving party is successful in this endeavor, the burden then shifts to the nonmoving party to come forward with sufficient evidence to create a genuine issue of fact. *Id.*

The standards for summary judgment further require the district court to liberally construe the facts in favor of the non-moving party and to draw all reasonable inferences from the record in favor of the non-moving party. *McCoy*, 120 Idaho at 769, 820 P.2d at 364. This means that all doubts are to be resolved against the moving party, and the motion must be denied if the evidence is such that conflicting inferences may be drawn therefrom, and if reasonable people might reach different conclusions. *Id, citing Durtschi*, *supra.*

The requirement that all reasonable inferences be construed in the light most favorable to the non-moving party is a strict one. *Id* Nevertheless, when a party moves for summary judgment the opposing

party's case must not rest on mere speculation because a mere scintilla of evidence is not enough to create a genuine issue of fact. *Id.* It is well established that a party against whom a motion for summary judgment is sought "may not merely rest on allegations contained in his pleadings, but must come forward and produce evidence by way of deposition or affidavit to contradict the assertions of the moving party and establish a genuine issue of material fact." *Id., quoting Olsen v. J.A. Freeman Co.*, 117 Idaho 706, 720, 791 P.2d 1285, 1299 (1990); IRCP 56(e).

IV. CLAIM ANALYSIS

1. The § 1983 Excessive Force Claim.

Congress has created a cause of action against private individuals who, while acting under color of law, violate the constitutional rights of private citizens. 42 U.S.C. § 1983 provides in pertinent part:

> Every person who, under color of any statute, [. . .] subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivations of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured.

In order for Ms. James to prevail on a § 1983 claim, she must show that (1) the officers who deprived her of her rights acted under color of law, and (2) that the action actually deprived her of a constitutional right. In this case, subsection (1) is not disputed

by either of the parties; police officers carrying out their duties act under color of law. Rather, it is subsection (2) which is at issue with Ms. James alleging her constitutional right to be free from excessive force was violated.

A. Excessive Force Standard

A Fourth Amendment claim of excessive force is analyzed under the framework outlined by the Supreme Court in *Graham v. Connor*, 490 U.S. 386 (1989). All claims that law enforcement officers have used excessive force – deadly or otherwise – in the course of an arrest must be analyzed under the Fourth Amendment and its "reasonableness" standard. *Id.* at 395. This requires balancing on the one hand the "nature and quality of the intrusion" on a person's liberty with the "countervailing governmental interests at stake" on the other hand to determine whether the use of force was objectively reasonable under the circumstances. *Id.* at 396.

The U.S. Supreme Court has said that "the 'reasonableness' inquiry in an excessive force case is an objective one: The question is whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them[.]" *Id.* at 397 (citations omitted); *see, e.g.*, *Jackson v. City of Bremerton*, 268 F.3d 646, 651 (9th Cir.2001). "The question is not simply whether the force was necessary to accomplish a legitimate police objective; it is whether the force used was reasonable in light of *all*

the relevant circumstances." *Hammer v. Gross*, 932 F.2d 842, 846 (9th Cir. 1991) (emphasis in original).

In *Graham*, the Supreme Court indicated that relevant factors in the Fourth Amendment reasonableness inquiry include "[1] the severity of the crime at issue, [2] whether the suspect poses an immediate threat to the safety of the officers or others, and [3] whether he is actively resisting arrest or attempting to evade arrest by flight." 490 U.S. at 396. The Court did not, however, limit the inquiry to those factors. "Because the test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application," the reasonableness of a seizure must instead be assessed by carefully considering the objective facts and circumstances that confronted the arresting officers. *Id.* "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." *Id*. "If an officer reasonably, but mistakenly, believed that a suspect was likely to fight back, . . . the officer would be justified in using more force than in fact was needed." *Saucier v. Katz*, 533 U.S. 194, 205 (2001).

"Because [the excessive force inquiry] nearly always requires a jury to sift through disputed factual contentions, and to draw inferences therefrom, [courts] have held on many occasions that summary judgment or judgment as a matter of law in excessive force cases should be granted sparingly." *Santos v. Gates*, 287 F.3d 846, 853 (9th Cir.2002); *Liston v.*

County of Riverside, 120 F.3d 965, 976 n. 10 (9th Cir.1997) (as amended) ("We have held repeatedly that the reasonableness of force used is ordinarily a question of fact for the jury.").[10] In this regard, the Idaho Supreme Court follows suit. *See, e.g.*, *Sprague v. City of Burley*, 109 Idaho 656, 668, 710 P.2d 566,

[10] Reticence in taking the excessive force inquiry away from the jury in a police dog bite cases [sic] is most pronounced in *Chew v. Gates*, 27 F.3d 1432,1440 (9th Cir. 1994) (Reinhardt, J.) (reversing summary judgment for defendants on policy governing use of police dogs; "[b]ecause questions of reasonableness are not well-suited to precise legal determination, the propriety of a particular use of force is generally an issue for the jury"). In a number of other police dog bite cases where summary judgment was not granted, key disputed issues of fact existed or are distinguishable factually from the current case. *See e.g.*, *Kopf v. Wing*, 942 F.2d 265, 268-69 (4th Cir.1991) (reversing summary judgment for defendants when armed robbery suspect was attacked by dog and beaten by officers); *Marley v. City of Allentown*, 774 F.Supp. 343, 346 (E.D.Pa.1991) (denying defendant's motion for judgment as a matter of law because release of police dog to attack unarmed suspect who "possibly" had stopped fleeing "may be objectively unreasonable"), *aff'd mem.*, 961 F.2d 1567 (3d Cir.1992); *McGovern v. Vill. of Oak Law*, 2003 WL 139506, at *7 (N.D.Ill. Jan. 17, 2003) (denying summary judgment on the plaintiff 's excessive force claim where the plaintiff was hiding under a trailer, and after attempted to surrender was then bitten by a police dog); *Vathekan v. Prince George's County*, 154 F.3d 173, 178 (4th Cir.1998) (reversing summary judgment for defendants on excessive force claim since question of whether officer gave verbal warning prior to deploying of police dog into residence was disputed); *Watkins v. City of Oakland*, 145 F.3d 1087 (9th Cir.1998) (affirming the denial of defendant's motion for summary judgment on an interlocutory appeal because plaintiff claimed that the officer allowed a police dog to bite him even though he complied with the officer's requests and was no longer a threat).

578 (1985) (whether officers used excessive force in effecting arrest "is clearly a question of fact for the jury."); *Kessler v. Barowsky*, 129 Idaho 647, 657, 931 P.2d 641, 651 (1997) (reversing district court's grant of summary judgment in officers' favor, finding that whether officers used excessive force was disputed factual question).

That said, summary judgment is appropriate if the Court "concludes, after resolving all factual disputes in favor of the plaintiff, that the officer's use of force was objectively reasonable under all circumstances." *Scott v. Henrich*, 39 F.3d 912, 915 (9th Cir.1994); *see also Graham*, 490 U.S. at 397.[11] In

[11] The following police dog bite cases are but a few that exemplify that summary judgment is appropriate in police dog bite excessive force cases where the use of the canine was objectively reasonable: *Miller v. Clark County*, 340 F.3d 959 (9th Cir. 2003) (Summary judgment appropriate because use of dog to find and hold bite of suspects arm for up to one minute was objectively reasonable where suspect was hiding in woods); *Matthews v. Jones*, 35 F.3d 1046, 1052 (6th Cir.1994) (affirming summary judgment for defense where dog first located suspect who had fled after traffic chase into dark woods, and dog then attacked when suspect moved despite police officer's order to remain still); *Lowry v. City of San Diego*, 2013 WL 2396062 (May 31, 2013) (summary judgment granted to city where officer used canine to search for and bite suspected burglar hiding in dark office building); *Reed v. Wallace*, 2013 WL 6513346 (D. Minn. 2013) (use of police dog to twice locate and bite person suspected of burglary hiding in woods was objectively reasonable such as to merit summary judgment); *Edwards v. High Point Police Dept.* 559 F.Supp.2d 653 (M.D.N.C. 2008) (Summary judgment for objectively reasonable use of police dog to find and bite suspect hiding in deep pocket of kudzu); *Robinette v. Barnes*,

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considering this question, "the Court must be cognizant that "all determinations of unreasonable force 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." *Jones v. Kootenai Cnty.*, 2011 WL 124292 (D. Idaho Jan. 13, 2011), quoting *Graham*, 490 U.S. at 396-97. The court may grant summary judgment where, "viewing the evidence in the light most favorable to [the plaintiff], the evidence compels the conclusion that [the officers'] use of force was reasonable." *Hopkins v. Andaya*, 958 F.3d 881, 885 (9th Cir. 1992).

The case before this Court is unique. Unlike most excessive force claims where the parties' accounts of the events markedly diverge, the operative facts here are undisputed.[12] The officers' observations are not in

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854 F.2d 909 (6th Cir. 1988) (summary judgment for defendants in pre *Graham* case applying similar balancing test affirmed where dog used to locate and bite a burglary suspect hiding in the dark; suspect died from bite to neck).

[12] While James disputes what conclusions the officers should have made from James' conduct and that the officers should have investigated further to be certain that a burglary was in fact occurring, these facts go ultimately to whether there was probable cause, not the force used to effectuate the arrest after determining that probable cause existed to make the arrest. *See* discussion *infra.* James does not materially dispute the facts of the arrest itself. This is significant because the excessive force analysis does not take into account the validity of the officers' probable cause conclusion. *See generally Beier v. City*

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dispute nor are the material facts of James [sic] apprehension by use of the police dog Ruwa. The question before this Court, then, is whether, in light of these undisputed facts, the only reasonable conclusion is that the use of force was objectively reasonable. For the reasons set forth herein, the Court finds it was.

B. Evaluation of Quantum of Force

First, the Court must "evaluate the type and amount of force inflicted" to "assess the gravity of a particular intrusion on Fourth Amendment rights." *Chew v. Gates*, 27 F.3d 1432, 1440 (9th Cir. 1994). The use of dogs to find, bite, and hold concealed suspects is not per se unreasonable. *Id.* at 1447 (9th Cir.1994). However, "under some circumstances the use of such a weapon' might become unlawful." *Mendoza v. Block*, 27 F.3d 1357, 1362 (9th Cir. 1994).

The general consensus of courts, particularly those within the Ninth Circuit, is that a police dog bite can constitute anything from a moderate to significant or even severe intrusion on 4th Amendment rights, depending on the duration of the bite

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of Lewiston, 354 F.3d 1058, 1064 (9th Cir. 2004) ("establishing a lack of probable cause to make an arrest does not establish an excessive force claim and vice-versa"); *Arpin v. Santa Clara Valley Transp. Agency*, 261 F.3d 912, 921-22 (9th Cir. 2001) (use of force to make arrest may be reasonable even in the absence of probable cause). James conceded at oral argument that her sole federal claim is one for excessive force only.

and the seriousness of the injuries. In *Miller v. Clark County*, the Court found that a bite lasting between 45-60 seconds which caused "severe injury" to suspect's arm was a "serious" intrusion, although not deadly force. 340 F.3d 959, 964 (9th Cir. 2003). In *Chew v. Gates*, where the dog bit the suspect three times, dragged him several feet and nearly severed his arm, the intrusion was "serious." 27 F.3d at 1441. In *Beecher v. City of Tacoma*, the court found the intrusion to be "significant" where the suspect testified he was bitten for two minutes and sustained severe leg injuries with permanent scarring and disfigurement. 2012 WL 1884672 (W.D. Wash. May 23, 2012). Finally, in *Lowry v. City of San Diego*, the court determined that where the encounter with the dog was "very quick" and required only three stiches, the intrusion was "moderate." 2013 WL 2396062 * 5 (May 31, 2013).

Here, Defendants admit that James experienced a "moderate to serious" intrusion to her 4th Amendment interests. James suggests the intrusion was "severe." Officer Bonas' audio reveals the attack lasted 36 seconds at most. Aff. Fleming, Exh. K. James does not dispute this. Pl's Memo, p. 6. Defendants contend it lasted "a matter of seconds, well under a minute." Defs' Memo, p. 5. Without question, James sustained significant and lasting injuries. In light of these undisputed facts, the intrusion was more than "moderate," but it did not arise to the level of deadly force or severe. The characterization of "significant" or "serious" seems most appropriate. The

duration of the bite and the extent of injuries are most analogous to *Miller v. Clark County*, where the court found the intrusion to be "serious." Likewise, this Court finds the intrusion upon James' rights to be a "serious" or "significant" one. The intrusion was something greater than "moderate" but less than "severe."

C. Governmental Interests at Stake

Next, James' Fourth Amendment interests must be balanced against the governmental interests at stake. Key to this inquiry are "the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of officers or others, and whether he is actively resisting or attempting to evade arrest by flight." *Graham*, 490 U.S. at 396. But this list is not exhaustive. "Instead, we examine the totality of the circumstances," including whatever factors may be relevant in a particular case. *Marquez v. City of Phoenix*, 693 F.3d 1167, 1174-75 (9th Cir. 2012).

1. Severity of Crime

The first *Graham* factor is the severity of the crime at issue. *Graham*, 490 U.S. at 396. The 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 v. Clark County*, 340 F.3d at 964. In *Miller*, the fact that the suspect, originally apprehended for a

misdemeanor, had a prior felony of fleeing from police justified the Ninth Circuit's finding of this element in the government's favor. 340 F.3d at 964. *See also*, *Coles v. Eagle*, 704 F.3d 624, 628-29 (9th Cir. 2012) (court found this factor weighed in government's favor where suspect was believed to have stolen a car, a felony).

The suspected crime at issue in this case is burglary. In Idaho, burglary is classified as a felony and defined as the unlawful entry into a building with intent to commit any theft or any felony. I.C. §18-1401; §18-1403. Punishment for burglary includes incarceration for up to ten years. I.C. § 18401 *et. seq.* However, burglary alone is not necessarily violent. *State v. Miller*, 2010 WL 2348613 at *4 (Idaho Ct. App., June 14, 2010) (stating that defendant's prior burglaries where he broke into unoccupied homes belonging to family and friends were "not violent or exceptionally egregious."). That said, "[b]urglary is dangerous because it can end in confrontation leading to violence." *Sykes v. U.S.*, ___ U.S. ___, 131 S.Ct. 2267, 2273 (2011). The Ninth Circuit has emphasized that "when officers suspect a burglary in progress, they have no idea who might be inside and may reasonably assume that the suspects will, if confronted, flee or offer armed resistance. In such exigent circumstances, the police are entitled to enter immediately, using all appropriate force." *Frunz v. City of Tacoma*, 468 F.3d 1141, 1145 (9th Cir.2006). *See also*, *Sandoval v. Las Vegas Metro. Police Dep't*, 854 F. Supp. 2d 860, 874 (D. Nev. 2012) (discussing

seriousness of burglary and holding that officers were justified in using force despite their belief that a burglary was in progress was mistaken); *Reed v. Wallace*, 2013 WL 6513346 at *3 (D. Minn. 2013) (calling burglary "an inherently dangerous felony"). Further, James concedes "the fact that burglary is a 'serious' crime." James Memo. in Opp. to Summary Judgment at p. 10.

Where a suspect is believed to be armed in committing the crime, the severity factor weighs heavily in the government's favor. *See, Mendoza*, 27 F.3d at 1362-63 (finding *Graham* factors favored police where potentially armed suspect fled arrest for a bank robbery and refused to surrender upon warning); *Crenshaw v. Lister*, 556 F.3d 1283, 1292 (11th Cir. 2009) (where suspect was believed to have committed two armed robberies and actively fled from police, the severity of crime element weighed against suspect); *Edwards v. High Point Police Dept.*, 559 F.Supp.2d 653, 660 (M.D.N.C. 2008) (no excessive force where police dog was deployed upon hiding armed robbery suspect who failed comply [sic] with officer's order to show hands).

However, even in simple burglary cases where there is no evidence that the suspected felon is armed, courts have found in the government's favor on the severity prong. For instance, *Lowry v. City of San Diego*, the court found in the government's favor on this factor where the suspected crime was a late night burglary and the suspect did not respond to warnings. 2013 WL at *5. The fact that the officer's

suspicions were incorrect – the suspect was really an intoxicated employee sleeping it off on the office couch – did not alter the court's view. *Id.* at * 4. *See also*, *Gutierrez v. Hackett*, 131 F. App'x 621, 624 (10th Cir. 2005) (where the suspect broke into and fell asleep in a car and failed to respond to warnings, the deployment of the police dog was found reasonable).

James argues that the circumstances do not reasonably suggest a burglary in progress and, therefore, the severity element weighs heavily against Defendants.[13] However, this goes to the issue of

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[13] Her expert, Dan Montgomery, states that there were several red flags which should have led the officers to question whether James was actually committing a crime:

- Females generally do not commit forced entries. Aff. Montgomery ¶ 11.
- Burglars who have been spotted generally do not continue the crime. Id. at ¶ 12.
- James communicated with Mr. Hendricks that she was retrieving her keys from inside; a statement which is consistent with someone being locked out of the building. Id.
- Burglars prefer to operate in the dark rather than a lit room. Id. at ¶ 12
- Burglars do not typically drink a beer while committing the crime. Id. at ¶ 13.
- James was seen using dental instruments in a place known to be a dental lab. Id.
- The officers learned from the cleaning lady that there was a female who worked in the building, but did not follow up after being told by the building owner that no one had a right to be in the

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whether the police had probable cause to believe a crime had taken place and thus to seize James. Courts have concluded that the question of whether probable cause to make an arrest or to seize a suspect is separate and distinct from the question of the amount of force uses [sic] in making the arrest. *See generally Beier v. City of Lewiston*, 354 F.3d 1058, 1064 (9th Cir. 2004) and *Arpin v. Santa Clara Valley Transp. Agency*, 261 F.3d 912, 921-22 (9th Cir. 2001). At oral argument James conceded that her sole federal claim is an excessive force claim. Thus the focus for summary judgment must be on the force used to effectuate the arrest. Once police determined there was probable cause that a crime was committed and the person refusing to come out of the basement (James) committed the crime, the police, for safety sake, necessarily must use the amount of force reasonably necessary to make the arrest, regardless of whether the suspect is actually guilty.

Furthermore, despite James' arguments to the contrary, the undisputed facts confronting the police

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building if they had to break a window to get in. Id. ¶ 14.

In sum, Mr. Montgomery opines that these factors should have suggested to the officers that additional follow-up should be done to identify James. Had the officers completed their interview of the cleaning lady and obtained the names and numbers of the tenants, Mr. Montgomery states "it is virtually certain that the officers would have connected the dots and figured out that [James] worked there and was in fact working that evening." Id. at ¶ 16.

the evening in question would lead any reasonable officer to conclude that a burglary was taking place. James entered the building on a Sunday evening by climbing over a wrought iron railing, dropping down into a window well, breaking a window and entering the building. She was extremely drunk (blood draws taken more than an hour after her entry through the broken window shows a BAC of .27). No reasonable police officer would have concluded that this was remotely likely to be anything other than a burglary. The totality of the circumstances and information from trustworthy sources, including the building owner and the witness who called 911 and was interviewed on scene, invariably support a reasonable officers' conclusion that a crime had taken place and that the intoxicated person seen entering the building likely committed such crime.

The police reasonably and correctly believed they had probable cause to conclude a crime was taking place and James probably committed it. The fact police were ultimately incorrect in the reasonable conclusions they drew from their investigation is immaterial. *See e.g.*, *Lowry*, *supra; Sandoval*, *supra;* and *Gutierrez*, *supra.*

Indeed, viewing the circumstances from the perspective of a reasonable officer on the scene, and not utilizing hindsight, which is what this Court is required to do, James' expert's characterization of the

events[14] is conclusory and unduly favorable to James and ignores important and undisputed facts.[15] First, Mr. Montgomery has offered no statistics supporting his contention that females generally do not commit burglaries and there is no justifiable reason to believe that women are not as capable as men in doing so. Further, women do commit burglaries and police cannot be expected to not act because of a suspect's gender. Second, James' statement to Mr. Henricks that she was retrieving her keys is entirely consistent with someone committing a crime yet feigning legitimacy to minimize the witness's suspicion (a person who locks their keys in a building generally does not break a window to regain entry). Third, that she was in a lit room drinking a beer while handling dental instruments does not reasonably suggest she is "working." People do not generally drink while at work in a dental lab, nor do they go to

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[14] *See supra*, footnote 13.

[15] James' argument appears to suggest that a summary judgment standard should be applied retroactively to determine if Police had probable cause; that is looking at each piece of evidence individually in the light most favorable to James to determine if it could possible [sic] support an inference of an innocent occurrence rather than the occurrence of a crime. Of course, this is not the correct standard. Instead, the Court must look at the totality of circumstances and the credible evidence to determine if a reasonable police officer would have concluded that a crime was likely occurring or had occurred and that James likely committed it. Once probable cause is established, no constitutional violation occurs for the decision to make an arrest or seizure of James. The question before this Court is the amount of force used to make that arrest or seizure.

work by breaking a window while "under the influence of drugs or major alcohol" as Hendricks reported her to be. Further, it is not reasonable for the officers to assume she was working considering it was a Sunday evening – an atypical schedule for a dental building – especially where there are no facts suggesting she was seen actually working on a dental appliance.

Moreover, a worker who broke a window would likely have cleaned up the shards of broken glass before proceeding with work. The fact that that one room was lit is not unheard of considering that only the basement area was lit and the suspect was thought to be significantly chemically impaired. Further, not all burglars immediately abandon their crime and take flight from the scene when spotted entering, particularly those whose thinking is significantly impaired by alcohol and/or drugs. It is apparent that James gives far too much credit to the collective intelligence and judgment of burglars.

While Mr. Montgomery finds fault with the officers not following up with the cleaning lady or obtaining more tenant information, this Court finds the officers' actions were reasonable and justified given the building owner's statement that no one should be in the building, meaning the tenant would not try to enter in this way. Coupled with the officers' unheeded and repeated warnings to surrender and the officers' knowledge that there had been recent

burglaries of local dental offices,[16] these undisputed facts lead to an inescapable objectively reasonable conclusion that James was committing a burglary, was potentially armed and under the influence. Even had the officers not seen James with a weapon, because she refused to answer the pleas to surrender, until the police could see the suspect's hands, they would have to assume James might be armed. This is necessary to ensure their own safety. These circumstances could reasonably give rise to a violent situation and put the officers' and James' safety in serious jeopardy. Therefore, this Court finds the severity of crime element to weigh heavily in favor of Defendants.

2. Immediate Threat

Whether the suspect poses an immediate threat to the safety of the officers or others has been deemed "the most important single element" of the Graham factors. *Smith v. City of Hemet*, 394 F.3d 689, 702 (9th Cir. 2005). The threat must be evidenced by objective factors rather than by a simple statement that an officer feared for his safety or the safety of others.

[16] James notes that one of the burglaries cited by Defendants occurred after the event in this case and challenges the character of some others; however, it is undisputed that police were aware that there had been some burglaries in dental offices and other medical offices prior to this event. The factual issues raised by James as to the exact nature of this history in this regard, including how much had been taken in prior crimes, are immaterial.

Bryan v. MacPherson, 630 F.3d 805, 806 (9th Cir. 2010).

The Defendant officers were entitled to assume James posed an immediate threat because the objective factors indicated she was armed with a bladed tool, intoxicated, and hidden within the basement of a largely dark building with which the officers were unfamiliar. James had the advantage of cover and concealment and could be lying in wait. The dental lab and office also likely contained numerous potential items that could be used as a weapon against the officers. *See Miller v. Clark County*, *supra.*

In *Miller*, the Ninth Circuit found in officers' favor on this element where the suspect defied orders to stop and fled into dark woods with "treacherous" terrain, ignored warnings that a police dog would be deployed, was wanted for a prior felony of fleeing from police in a manner which evinced "a willingness to threaten others' safety," potentially had mental health problems and was known to be not "law enforcement friendly." 340 F.3d at 965. Further, the officers found a large knife in the car from which the suspect fled, indicating he had a propensity to carry a weapon. *Id.*

Even more instructive is *Robinette v. Barnes*, where the Sixth Circuit found reasonable the officers' belief that a burglary suspect hidden inside a darkened building in the middle of the night who failed to

respond the officer warnings posed a threat to the safety of the officers.[17] 854 F.2d 909, 913-14 (6th Cir. 1988). In fact, the court stated that where an officer was "forced to explore an enclosed unfamiliar area in which he knew the [suspected burglar] was hiding . . . the officer was justified in using whatever force was necessary, even deadly force, to protect himself and the other officers and to apprehend the suspect." *Id.* at 914. Although the suspect died from wounds after the police dog was deployed, the court found the use of the dog to apprehend him was not only reasonable, but "can make it more likely that the officers can apprehend suspects without the risks attendant to the use of firearms in the darkness, thus, frequently enhancing the safety of the officers, bystanders and the suspect." *Id.*

Similarly, in *Lowry v. City of San Diego*, the "immediate threat" element weighed in favor of the city where the officers were searching for an unknown burglary suspect at night in an unlit building without knowledge of whether the suspect was armed or not. 2013 WL at *6. "Under these circumstances, the officers reasonably and objectively feared for their safety and any possible hostage's safety." *Id.*

Plaintiffs point to the Ninth Circuit's analysis in *Chew v. Gates* to suggest this element should be

[17] Although *Robinette* was decided prior to *Graham*, the court analyzed the excessive force claim under a reasonably objective standard.

approached with caution. In *Chew*, the suspect was initially stopped for a traffic violation. 27 F.3d at 1442. He provided his driver's license, smoked a cigarette and engaged the officer in conversation before suddenly fleeing from police. He hid in a large scrapyard for an hour and a half before the police dog was deployed and mauled him. *Id.* Analyzing the "immediate threat" prong, the court found no evidence that the suspect engaged in any threatening behavior or that he did anything other than hide quietly. *Id.* The police had time to consult with their superiors and summon a helicopter to the scene. "The officers were not forced to make 'split second judgments' in circumstances that were 'rapidly evolving.'" *Id.* at 1443. In light of these facts, the court determined that a rational jury could "easily find that Chew posed no *immediate* safety threat to anyone." *Id.* at 1442. (emphasis in original).

The opinion in *Chew* was cobbled together with two different compositions of the majority, and even the two judges who constituted the majority for constitutional analysis could not agree as to what compelled the outcome on this issue.[18] *Chew* is unique in its conclusion regarding immediacy of threat. This

[18] Two judges decided that the constitutional violation issue was a question of fact, on two differing grounds, and a different majority of two judges concluded that the individual defendants were immune. The opinion as to the issue of immediacy appears to be an aberration, and Judge Stephen Trott's dissent in the case is well taken.

court could find no other case that concludes that the threat of immediate harm analysis should be viewed such as to allow for the option to not arrest[19] the suspect or to "wait out" a hiding suspect.

Because the examination is of the arrest itself, the immediacy of the threat to the officers or public that exists *during the making of or in order to make the arrest* is what is relevant. The immediacy of the harm must be examined in connection with the police actually trying to make the arrest, not in waiting out a hiding defendant. James analysis[20] would make the arrests in *Miller, Robbinette* [sic]*, Lowry, Reed*, and

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[19] This Court's search did not include cases dealing with the use of deadly force on a fleeing or retreating unarmed suspect. In this respect, *Chew* can be reconciled if one accepts the conclusion of one judge composing part of the majority on the immediacy analysis that the use of a canine constitutes deadly force. No other case appears to reach such a conclusion regarding canines, including *Robinette*, wherein the suspect died from his injuries.

[20] James argues that the facts do not reasonably suggest the presence of any threat, let alone an immediate threat, to the officers. She states, without citing authority, that the "immediate threat" must be considered by reference to the circumstances before the officers entered the building with the dog, not while they were inside. James points out that before entering the building, which occurred approximately 50 minutes after their arrival, the officers had secured a perimeter, interviewed a cleaning lady and building owner and consulted with superiors. James asserts that from an objective perspective, there did not appear to be a sense of urgency. Further, their observations of James did not suggest outright aggression – she was seen drinking a beer and holding a "bladed tool" and reported to be "lethargic" and "totally out of it, according to James.

Edwards all excessive, as well as any other case where police did not elect to simply let the suspect be or wait until they quietly surrendered.[21] Judge Stephen Trott, in his dissent in *Chew*, aptly stated:

> Chew obviously was not going to surrender on his own initiative . . . Nightfall was approaching. It is naïve to believe Chew was not buying time until darkness became his ally. Should the police have left their dogs in their kennels and conducted a massive dumpster by dumpster search for Chew before it got dark? Is that a reasonable way to conduct this operation? Were the police required to maintain their perimeter until they starved Chew out? Should the police have given up and gone home?

Chew, 27 F.3d *at* 1124.

Indeed, it is only logical to consider the immediacy of the threat at the time the force was used. Therefore, the analysis should focus on the circumstances directly confronting Officer Bonas at the time he and the other officers entered the building and then ultimately gave Ruwa the command to apprehend James. The question is whether Bonas and the other officers faced a reasonable threat of immediate harm

[21] At oral argument, James conceded that the officers did not have to wait James out. Instead, her focus was on the investigation into whether there was a need at all to arrest James because she was lawfully in the building and if officers would have done a more thorough investigation they would have discovered this fact, according to James.

in carrying out their sworn duty to go into the building and bring James out, not if they could avoid their duty by refusing to go in at all. As in *Robinette* and *Lowry*, Officer Bonas was apprehending a burglary suspect in an unfamiliar, darkened building at night where the suspect did not respond to several warnings to surrender. He knew she was in possession of a "bladed tool" and was reported to be "under the influence of drugs or major alcohol." He did not know whether there were other accomplices inside the building or possibly even potential hostages. Upon reaching the staircase to the basement, he gave one last warning which went unanswered. He could either proceed into the basement and risk and [sic] ambush or instead he could deploy Ruwa. At that moment, Officer Bonas was forced to make "split second judgments" under circumstances that were "rapidly evolving." The threat of harm was immediate and objectively reasonable.

For these reasons, this Court finds the immediacy of threat factor, the most compelling of factors, also weighs heavily in Defendants' favor.[22]

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[22] James also tries to argue that the use of force occurred when the decision by the Boise Police Department ("BPD") was made to involve Ruwa in the search for James, which decision was made prior to entering the building, citing BPD policy and the officers' deposition testimony. However, because the use of the dog is contingent upon the suspect's failure to respond to the giving of warnings to surrender, until the last warning was given and James refused or failed to respond, and as a result the dog was unleashed and given its verbal command to find James,

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3. Resisting Arrest

The third *Graham* factor is whether the individual actively resisted arrest or attempted to evade arrest by flight. *Graham*, 490 U.S. *at* 396. Since there are no facts indicating that James attempted to evade arrest by flight, the inquiry must be whether her failure to respond to officers' warnings to come out or risk a dog bite constitutes active resistance of arrest. *Miller v. Clark County* suggests that hiding may constitute evasion of arrest. *Miller* focused on evasion of arrest by flight and hiding, not by active resistance. The court pointed out that even though the suspect paused his flight to hide, at which time he was bitten by the dog, the pause did not change the fact that he was trying to evade arrest. 340 F.3d at 965-66. The court held that the use of the dog during the hiding phase of the flight was not excessive force. Here, the dog was used while James was believed to be resisting arrest by hiding in the building and refusing to come out despite numerous warnings and commands for her to do so. In that respect, from the police's perspective, she was no different than Miller who hid in the woods.

Even more compelling is the case of *Lowry v. City of San Diego*, which confronts the precise issue of whether a burglary suspect's failure to respond to

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the decision to use Ruwa was not "made" in a final sense. Even once in the house, the decision was still contingent on James lack of response to the warnings.

police commands to exit constitutes active resistance to arrest. The court noted that the suspect's failure to respond reasonably gave rise to the officers' belief she was ignoring them and evading arrest. In reality, the suspect did not hear the warnings, but the court found her failure to hear the warnings "d[id] not contradict the evidence establishing that warnings were voiced." 2013 WL at *6. Recognizing the suspect was not "actively and physically" resisting arrest nor fleeing from the officers, the court nonetheless found this factor to weigh in the government's favor.[23]

This Court must conclude that when a suspect hides in an area that gives them the protection and advantage of concealment and cover, and places the police at risk should they pursue because of the tactical disadvantage of the cover, this must be considered "active" resistance or "evading." This is what the Defendants reasonably believed was occurring when James appeared to refuse to surrender and no less than four warnings went unheeded. To the police officer who must go into the woods or into the darkened unfamiliar building, it is no more passive or less

[23] In *Chew v. Gates*, the court found under relatively similar circumstances that the factor cut "slightly" in the government's favor. In *Chew*, the suspect initially fled from officers but, unlike the brief "pause" in *Miller*, had been hiding in a junkyard for two hours before being found and bit by the police dog. The Ninth Circuit noted that the suspect did not offer physical resistance to his arrest and, although he initially fled, he had been hiding for a considerable amount of time. 27 F.3d at 1442.

treacherous than chasing a suspect on foot or even in an automobile pursuit.

Under *Miller, Lowry* and *Chew*,[24] James' failure to respond to the officers' commands could reasonably be characterized as active resistance to arrest or evading arrest.[25]

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[24] In addition, a number of other courts have considered whether a suspect in hiding is considered to be resisting for purposes of excessive force analysis. *See e.g.*, *Samarco v. Neumann* 44 F.Supp.2d 1276, 1293-94 (S.D. Fla. 1999) (use of dog to bite suspect who was hiding in bushes, noting that the court was unaware of any cases holding use of dog to be excessive and unreasonable where suspect was "hiding or fleeing"); *Edwards v. High Point Police Dept.*, 559 F.Supp.2d 653 (M.D.N.C. 2008) (Summary judgment granted were police used bite dog to arrest suspect hiding in deep pocket of kudzu and refusing to show hands when found); *Reed v. Wallace*, 2013 WL 6513346 (D. Minn. 2013) (Summary judgment granted where police bite dog used twice to apprehend burglary suspect believed to be hiding in woods; suspect did not respond to warnings because suspect was too intoxicated by illegal drugs to respond).

[25] In her briefing, James also cited the BPD use of force policy which defines "Passive" resistance as "[a]ny type of resistance where the subject does not attempt to defeat the officer's attempt to touch or control him/her, but he/she still will not voluntarily comply with verbal and physical attempts of control (e.g., dead weight, does not react to verbal commands, etc.)." Bush Aff. Exh. P, p. 2, (Use of Force Policy, section 1.01.01). James then goes on to cite the BPD policy that a dog is considered an "Intermediate weapons" and that such weapons will not be used unless a suspect is proving physical resistance, not including passive resistance. Id at p. 6 (section 1.02.00).

The problem with this interpretation is its circular inconsistency. Under the Canine Policy, one of the explicitly approved uses of the police canine is to search a building in which a

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By all accounts, Officer Butler gave at least one PA announcement from the loudspeaker of his car. Officer Bonas then made three additional announcements; one prior to entering the building and two inside. From the perspective of a reasonable officer on the scene, it appeared James was intentionally eluding and thus evading the officers by hiding. This factor weighs in the Defendants' favor.

4. *Totality of Circumstances*

The totality of the circumstances analysis may include such factors as alternative levels of force, warnings, or the conformity of the defendant officers' actions with department guidelines. *Jones v. Kootenai County*, 2011 WL at *10, citing *Brooks v. City of Seattle*, 599 F.3d 1018, 1030 (9th Cir. 2010). Additionally, whether the suspect was emotionally disturbed or intoxicated may be relevant. *Glenn v. Washington County*, 673 F.3d 864, 872 (9th Cir. 2011).

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suspect may be located in hiding. Bush Aff. Exh. K, at p. 3. If resisting by hiding in a building is considered passive resistance such that intermediate force cannot be used, why then does the Canine Policy specifically allow the use of a dog for this purpose? The logical and only reasonable answer is that the definition of passive resistance is not intended to include a suspect in hiding. Indeed, it is clear that the term "passive" resistance is meant to have meaning only with respect to a suspect with whom the officer has actually encountered. It is meant to apply to a suspect whom the officer has physically encountered who does not resist but simply refuses to respond to the officer's commands or attempts to place the suspect in to custody.

a. Provision of Warnings

The giving or not giving of a warning before using the force in question is a factor to be considered in applying the *Graham* balancing test. *Doerle v. Rutherford*, 272 F.3d 1272, 1284 (9th Cir. 2001). "[W]arnings should be given, when feasible, if the use of force may result in serious injury. . . ." *Id.* at 1284. Here, it is undisputed that the officers gave several warnings to James, both prior to entering the building and throughout the building search. The fact that James did not hear them is immaterial to the inquiry. *Lowry*, 2013 WL at * 6; *Reed v. Wallace* 2013 WL 6513346, *supra.* However, James points out that while several warnings were given, had a warning been given at the basement level, which BPD policy allegedly requires, she may have heard it and exited the bathroom. Aff. Montgomery at ¶21.

Viewing this element from the perspective of a reasonable officer on the scene who did not know James was in the bathroom and could either not hear the warnings for this reason, or perhaps could not hear them because she was too intoxicated, the provision of at least four warnings within a maximum time period of thirty minutes is adequate. Further, as discussed previously, the policy does not require the giving of an announcement on each level if the "tactical considerations" preclude it. It is undisputed that the tactical situation did not permit the officers to safely go down the stairs and expose themselves to give an announcement. Instead, as is evident from the audio, the officers gave an announcement at the

top of the stairs and did so loud enough such that it was reasonable to believe anyone in the basement would hear it. Thus, this additional factor would weigh in the Defendants' favor. Indeed, from the officers' perspective, to avoid being bitten, all James had to do was comply with the warnings and instructions.

b. James' Mental/Emotional State

The plaintiff's mental and emotional state has been considered by courts in evaluating the totality of circumstances under the *Graham* test. *Luchtel v. Hagemann*, 623 F.3d 975, 980 (9th Cir. 2010). In *Luchtel*, the 9th Circuit observed that "[p]eople under the influence of mood-altering substances often act in an unpredictable, irrational manner. . . . They can exhibit superhuman strength and, despite their physical size, can inflict serious injuries while resisting arrest." *Id.*

This factor should be determined in Defendants' favor in light of Hendricks' 911 report that James appeared to be "under the influence of drugs or major alcohol," "lethargic," and "totally out of it," and the officers own observation of her drinking a beer. James does not contest that she was significantly under the influence of alcohol and tested positive for marijuana use. James argues that this factor could also weigh in her favor as the officers could have concluded that James' lethargy and intoxication made it unlikely that she would attack. However, the analysis must be examined from a reasonable officer's perspective, and

to ensure the officer's safety when entering a darkened and unknown environment in which a potentially armed suspect is believed to be hiding, the officers must assume that the suspect's intoxication would make her potentially aggressive and unpredictable, not passive and docile. A wrong assumption could easily result in the officers' or other's injury or even death. Therefore, this favor weighs significantly in favor of Defendants.

c. Compliance with Policies

The conformity of the officers' actions with department guidelines is another factor which may be considered by a court under the totality of circumstances prong. *Jones*, 2013 WL at *10. Defendants argue that the officers followed BPD policies and procedures in deploying Ruwa at all times. They attach a Declaration from Officer Bonas setting forth the text of the applicable policies and explaining how they were met on the evening of James' arrest. Decl. Bonas (Jan. 2, 2014). Copies of the policies are attached to his Declaration.

James argues that certain policies were violated as follows:

- Officers failed to follow up on information that the building had tenants;
- Officer Bonas failed to give a warning at the basement level of a multi-level building and allow for a reasonable period to elapse for James to respond;

- Officer Bonas and Kukla used passive resistance (i.e., failure to respond to warnings) as a basis to justify deployment.

The latter two policies have previously been discussed and dismissed as not being violated. The Standard Operating Procedure for K-9 units ("K-9 SPO") in place at the time of the incident sets forth the training and use requirements for canines'. Bonas Decl., Exh A (SPO#P3.0001.0). According to the policy, "[a] primary use of department canines is for locating suspects in buildings . . . where search by officers would create an unnecessary risk." *Id.* at BC000052. As for building searches, the K-9 SPO sets forth specific mandatory steps to be taken. *Id.* With regard to the alleged failure to follow up on information that the building had tenants, the policy only mandates that "[w]henever possible, the building's owner should be contacted to determine whether there may be tenants or others in the building and to ascertain the building's layout." *Id.* Here, the building's owner was contacted, the officers learned that tenants leased space, but the owner effectively stated that no tenant or anyone else who had a right to be there would have to enter by breaking a window. Despite James arguments to the contrary, there was no reason for responding police to believe that James, who entered by breaking the basement window in a heavily intoxicated state and was seen briefly in the basement drinking a beer, was a tenant. The *Graham* Court and its progeny have warned against using 20/20

hindsight analysis, which is exactly what James is urging this Court to use. The policy was not violated.

James' contention that Bonas did not give James a reasonable amount of time to respond is unfounded. The applicable policy states that "[b]efore beginning the search" the handler shall give the canine warning and a "reasonable amount of time shall be allowed for the suspect to respond." Bonas Decl, Exh A at BC000053. According to Officer Butler, the first announcement was made from his car's P.A. system approximately several minutes prior to entering the building. Thereafter, Officer Bonas testified to giving another canine announcement at the front door prior to entry. He cleared the top floor and gave a second announcement. At the top of the stairs leading to the basement, he gave a third announcement. All the while, Ruwa was loudly barking after each announcement. A review of the audio reveals that Officer Bonas' three announcements were spaced by 2.5 minutes and 7 minutes. Approximately twenty seconds after the final warning, Ruwa was given the command to search. James has offered no evidence or expert opinion suggesting these intervals are unreasonable other than her naked, conclusory argument.

James' argument that canine use for passive resistance constitutes a policy violation is similarly unavailing. Under the K-9 SPO, the use of canines is considered a "use of force" and, therefore, must conform with BPD's Use of Force policy. Bonas Decl., Exh A at BC00052 [sic]. The Use of Force policy in effect at the time of the incident is attached as Exhibit P to

Bush's affidavit. Section 1.02.04 is specific to canines and states that "[c]anine teams are available to conduct building searches for offenders in hiding" among other things.[26] "Canine handlers are responsible for determining whether a situation justifies canine use and the appropriate tactical measures that should be taken." *Id.* The decision to deploy a canine must be based on a consideration of the *Graham* factors. *Id.* Since the Use of Force policy specifically authorizes canine use for suspects hiding in buildings and all objective signs indicated James was hiding, no violation occurred.

Because the undisputed factual record does not reasonably support James' claims of policy violations, the Court finds this factor weighs in Defendants' favor.

d. Alternative Levels of Force

"Whether alternative levels of force were available is particularly salient." *Jones*, 2011 WL at * 10. While police officers "are not required to use the least intrusive degree of force possible" when carrying out an arrest, it is still appropriate to consider what their options were. *Id.*, quoting *Forrester v. City of San Diego*, 25 F.3d 804, 807 (9th Cir. 1994).

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[26] The canine-specific section of the Use of Force policy is also attached as Exh. B to the Bonas Decl.

Defendants argue this factor weighs in their favor since the alternate means of securing James were inadequate. Besides issuing verbal warnings, the other means available to the officers included guns, tasers and a 40 mm non-lethal gun which shoots beanbags or rubber bullets. Defs' Memo, p. 12. However, Defendants state none of these alternatives are effective in locating a potentially armed burglary suspect during a search of a darkened building while the suspect appears to be hiding.

Plaintiff's expert, Mr. Montgomery, suggests that an alternative method of canine apprehension could have been utilized. Aff. Montgomery, ¶¶ 22-23. He states that BPD trains its dogs under a "Handler Controlled" ("HC") method as opposed to the "Bark and Hold" method. Under the HC method, dogs are trained to bite or bark based on the direction of the handler. Indeed, the record here demonstrates that Bonas gave Ruwa the "search" command and released Ruwa down the stairs. When he located James' odor, he went into "bark alert." At that point, Bonas gave Ruwa the "bite" command to actually locate James herself.

Mr. Montgomery does not describe the "Bark and Hold" method or explain why it is a preferable option. He merely asserts as a conclusion, without offering proof, that the International Association of Chiefs of Police and the U.S. Department of Justice have recommended "bark and hold" model policies. Further, Montgomery offers no evidence that only the bark and hold method is constitutional. Indeed, this Court

has reviewed a large cross section of K9 excessive force cases, and it has found no consensus or even suggestion, that only the bark and hold method is constitutional. Indeed all of the dog case [sic] cited by the Court in this opinion involved policies other than the bark and hold policy, most of them the "bite and hold" method.

Meanwhile, Officer Bonas testified that the HC method used by BPD and used by him in this incident is safer for both the dog and the officer than limiting the dog's role in the apprehension to barking. Depo. Bonas 90:4-10. In light of Officer Bonas' testimony and James' lack of support for her assertion that the "bark and hold" method was a more advantageous alternative, the "alternate levels of force" factor weighs in the Defendants' favor, in light of the fact the other methods may not have been more effective in apprehending James and likely would have exposed her and the officers to greater danger.

D. Intrusion v. Governmental Interest: Reasonableness of Force

The final step in analyzing James' excessive force claim is to determine the "dispositive question of whether the force that was applied was reasonably necessary under the circumstances." *Miller v. Clark County*, 340 F.3d at 966. Under the circumstances known to the officers at the time Ruwa was released to apprehend James, the use of Ruwa was ideally suited to search for and detain her. From an objective

perspective, her actions clearly gave police probable cause to believe she was committing a burglary. While the degree of intrusion or injury was significant, each *Graham* factor as well as the totality of circumstances test overwhelmingly weighs in Defendants' favor.

There is no question that James suffered significant injuries as a result of the dog bites, and the intrusion on her constitutional right was likewise significant. However, having found the *Graham* factors significantly favor Defendants, this Court further finds that the government's interest in utilizing Ruwa under the circumstances far outweighs the intrusion on James' liberty. Indeed, James struggled to identify anything excessive about the actual seizure of her apart from the claim that a more thorough investigation prior to deciding to arrest and seize James might have led police to understand that no crime had occurred. Had James in fact been a burglar even James must concede that arrest and seizure of her was reasonable. Since the use of Ruwa was objectively reasonable under the circumstances, summary judgment in the Defendants Officers' favor on James' § 1983 claim is warranted.

2. § 1983 Excessive Force Claim Against City Of Boise ("Monell Claim")

The Court's resolution of the § 1983 claim in the Defendant Officers' favor also disposes of the claim as it applies to Defendant City of Boise. In *Monell v.*

Department of Social Services, 436 U.S. 658 (1978), the Supreme Court held that a municipality is a "person" that can be liable under § 1983 where "the action that is alleged to be unconstitutional implements or executes a policy, statement, ordinance, regulation, or decisions officially adopted and promulgated by that body's officer." *Id.* at 690. At the same time, the Court concluded that a municipality may not be found liable "unless action pursuant to official municipal policy of some nature caused a constitutional tort." *Id.* at 691. The Court did not address the full contours of municipal liability under § 1983, but established that a municipality cannot be held liable on a *respondeat superior* theory, that is, solely because it employs a tortfeasor.

Where, as here, there is no constitutional violation by the officers, there can be no municipality liability. The U.S. Supreme Court has held that no principle "authorizes the award of damages against a municipal corporation when . . . the officer inflicted no constitutional harm." *City of L.A. v. Heller*, 475 U.S. 796, 799 (1986) (stating that whether "the departmental regulations might have authorized the use of constitutionally excessive force is quite beside the point" where there is no constitutional violation). Therefore, as against the City of Boise, James' § 1983

claim fails as a matter of law because she has not suffered a constitutional injury.[27]

3. Qualified Immunity of Defendant Officers[28]

As a general matter, government officials can benefit from qualified immunity in § 1983 suits if they followed a reasonable interpretation of the law. *Miller v. Idaho State Patrol*, 150 Idaho 856, 864, 252 P.3d 1274, 1282 (2011). If a government official violates the claimant's constitutional rights, qualified immunity "generally turns on the objective

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[27] In resisting the City of Boise's motion for summary Judgment, plaintiffs offered no *Monell* analysis or argument whatsoever. While James did make one passing allegation in her Complaint that might be read to encompass a *Monell* claim, it was so vague and devoid of factual support and context specific to that claim such that it made it virtually impossible for Boise to meaningfully prove the absence of a question of fact relative to such a claim. Neither in the complaint nor at summary judgment has James pointed to an uncorrected repeated course of conducted [sic] depriving citizens of their right to be free from excessive force, nor did James identify how Boise has "implement[ed] or execute[d] a policy, statement, ordinance, regulation, or decisions officially adopted and promulgated by that body's officer." However, because the Court has found no constitutional violation, it need not determine whether a *Monell* claim against the City otherwise survives summary judgment.

[28] "[A] municipality is not entitled to the shield of qualified immunity from liability under § 1983." *Brandon v. Holt*, 469 U.S. 464, 473 (1985); *see also Chew v. Gates*, 27 F.3d 1432, 1439 (9th Cir.1994). Nonetheless, a claimant must still prove municipal liability exists under *Monell*.

reasonableness of the action assessed in light of the legal rules that were clearly established at the time it was taken." *Id.*, quoting *Anderson v. Creighton*, 483 U.S. 635, 639 (1987). Thus, courts ruling on a claim for qualified immunity are essentially confronted with two questions: (1) whether, accepting the plaintiff's assertions as true, the defendant invaded the plaintiff's constitutional rights; and (2) whether the defendant acted reasonably given the state of American law at the time. *Id.* The qualified immunity standard "gives ample room for mistaken judgments' by protecting "all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341-43 (1986).

Qualified immunity protects officers from the "hazy border between excessive and acceptable force," and ensures that before they are subjected to suit, officers are on notice their conduct is unlawful. *Saucier*, 533 U.S. at 206. Qualified immunity is "an immunity from suit rather than a mere defense to liability; and like an absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial." *Scott v. Harris*, 550 U.S. 372, 376 (2007).

As to the first inquiry – whether the facts alleged by the plaintiff show the officer's conduct violated a constitutional right – this Court has already determined as a matter of law that no constitutional violation occurred. However, even if a violation had occurred, the officers are still entitled to qualified immunity if "the officer could nevertheless have reasonably but mistakenly believed that his or her

conduct did not violate a clearly established constitutional right." *Jackson v. City of Bremerton*, 268 F.3d 646, 650 (9th Cir.2001) (citing *Saucier*, 533 U.S. at 206. The plaintiff has the burden of establishing that the law was well-established. *Miller v. ISP*, 150 Idaho at 865, 252 P.3d at 1283. If the law did not put the officer on notice that his conduct would be clearly unlawful, summary judgment based on qualified immunity is appropriate. *Saucier*, 533 U.S. at 202.

Whether the law is clearly established is a question of law. *Id.* Since the Court must determine the state of the law at the time the events took place, subsequent legal developments should only be viewed as illuminating the law as it previously existed. *Id.*

James argues that the "law" to be analyzed is whether an officer's failure to follow policy and procedure regarding use of force constitutes a constitutional violation – a law, James asserts, is well established. Pl's Memo, p. 18. However, the Idaho Supreme Court has cautioned against defining the question too broadly, which would "essentially vitiate the qualified immunity doctrine." *Miller v. ISP*, 150 Idaho at 865.[29] The question must reflect the facts of

[29] *See also Mendoza v. Block*, 27 F.3d 1357 (9th Cir. 1994) ((asserted "legal right cannot be so general as to allow a plaintiff to 'convert the rule of qualified immunity . . . into a rule of virtually unqualified liability simply by alleging [a] violation of extremely abstract rights.' ") *quoting Anderson v. Creighton* 483 U.S. 635, 639 (1987) (brackets in original)).

the case. *Id.*[30] Therefore, as Defendants urge, the inquiry should be whether a reasonable police officer would have known as of December of 2010 that it was unlawful to utilize a police dog to search for and bite and seize a hidden and potentially armed suspect during a burglary in progress for up to 36 seconds until it can be determined that the suspect is unarmed. Defs' Memo, p. 17. In 1994, the Ninth Circuit noted in *Chew v. Gates*:

> "[w]hen the incident that led to the filing of this lawsuit occurred, the use of police dogs to search for and apprehend fleeing or concealed suspects constituted neither a new nor a unique policy. The practice was long-standing, widespread, and well-known. No decision of which we are aware intimated that a policy of using dogs to apprehend concealed suspects, even by biting and seizing them, was unlawful. At the time of the incident in question, the only reported case which had considered the constitutionality of such a policy had upheld that practice."

Chew, 27 F.3d at 1447, citing *Robinette v. Barnes.*

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[30] Despite repeated attempts to allow James to annunciate a more useful, narrow and focused inquiry at oral argument that would meaningfully put officers on notice of illegal conduct in advance, James could not do so. James argued at hearing "it's a clearly established rule of law, that the least amount of force is justified when dealing with non-violent offenders who is not threatening the police, not fleeing and not actively resisting arrest." The problem with this question besides being too broad is that it relies on a hindsight analysis of James' situation.

Four years after its decision in *Chew*, the Ninth Circuit reiterated in *Watkins v. City of Oakland* that since *Chew* "there had been no change in the law that would have alerted [the defendant] that his use of a police dog to search and bite was unconstitutional." 145 F.3d 1087, 1092. In 2003, the Ninth Circuit determined in *Miller v. Clark County*, *supra*, that the use of a police dog to bite and hold a suspect until deputies arrived on the scene did not violate the suspect's constitutional rights. 340 F.3d at 968. In *Lowry v. City of San Diego*, *supra*, a California district court found no constitutional violation under facts very similar to those here. 2013 WL 2396062. In sum, as of December 2010, there was no clearly established law proscribing the use of police dogs under circumstances presented to the officers here.[31] Therefore, even if summary judgment was not proper on James' § 1983 action, the Defendant Officers would be nonetheless entitled to qualified immunity from the claim.[32]

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[31] See also *Miller v. Clark County*, *supra*, where the bite lasted just under one minute.

[32] Because this Court finds the officers are protected from the § 1983 claim by qualified immunity, there is no need to address Defendants' separate argument requesting dismissal of the claim against Defendant Rodney Likes.

4. State Law Claims

A. *Immunity under § 25-2808*

Idaho Code § 25-2808, entitled "Dogs Used in Law Enforcement," provides:

> Neither the State of Idaho, nor any city or county, nor any peace officer employed by any of them, shall be . . . civilly liable in damages for injury committed by a dog when: (1) the dog has been trained to assist in law enforcement; and (2) the injury occurs while the dog is reasonably and carefully being used in the apprehension, arrest or location of a suspected offender or in maintaining or controlling the public order.

This Court has determined that the facts here are almost entirely undisputed and, in viewing these facts in a light most favorable to James, the officers' conduct met the "objectively reasonable" standard of the 4th Amendment. Therefore, it would follow that their conduct also satisfies the "reasonably and carefully" requirement of the statute, rendering Defendants immune from civil liability for James' injuries. Unfortunately, there is little case law interpreting § 252808. However, James conceded at oral argument that if the use of the dog was constitutionally reasonable as it related to excessive force claim, then the immunity provision bars their state law claims.[33]

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[33] James, at oral argument conceded "I think if this Court finds that the use of force in this case was not – there are no

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There is simply no evidence that Ruwa was not used reasonably and carefully. As discussed later in this Memorandum Decision and Order, there is no evidence that Ruwa's training was negligent or that once a decision was made to apprehend James, that Ruwa was used in an unreasonable manner. Indeed the thrust of James' contention is that *no force*, including but not specific to a police canine, should have been used, because had the police not negligently investigated the crime, they would have concluded no crime had taken place.[34] However, the exception to the immunity provision is specific to the negligent training or the unreasonable use of the dog itself; that is some unreasonable conduct specific to the use of the dog, not the more general decision to apprehend and arrest a subject, including by the use of force. There is no evidence of unreasonableness specific to the way in which Ruwa was used in this case.

Idaho Code § 25-2808 grants immunity to Defendants. The Court also notes that James' state law claims also barred on separate grounds as discussed below.

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questions of fact as to the use of force as to whether or not it's excessive and thus constitutional, then yeah, I think the Court probably has to make the same findings on the tort claims. If I'm arguing it logically follows one way, I have to concede it logically follows the other way."

[34] A claim for negligent investigation of a crime by law enforcement has not been recognized in Idaho. See *Wimer v. State*, 122 Idaho 923 (Ct. App. 1982).

B. Assault, Battery, False Arrest, and Wrongful Imprisonment

The Idaho Code provides:

> [E]very governmental entity is subject to liability for money damages arising out of its negligent or otherwise wrongful acts or omissions and those of its employees acting within the course and scope of their employment or duties, whether arising out of a governmental or proprietary function, where the governmental entity if a private person or entity would be liable for money damages under the laws of the state of Idaho. . . .

I.C. § 6-903(a).

This rule is subject to several exceptions, including one for intentional torts. Absent "malice or criminal intent," government employees acting within the scope of their employment are not liable for claims "*arising out of* assault, battery, false imprisonment, false arrest, and others. *Miller v. ISP*, 150 Idaho at 869,252 P.3d at 1287, citing *Id.* § 6-904(3) (emphasis added). Further, [i]t shall be a rebuttable presumption that any act or omission of an employee within the time and at the place of his employment is within the course and scope of his employment and without malice or criminal intent." *Id.* § 6-903(e).

Because there is no dispute that the officers here were acting during the course and scope of their employment, the burden is on James to show some evidence that the officers acted maliciously or with

criminal intent. *Miller*, 150 Idaho at 870, 252 P.3d at 1288; I.C. § 6-903(e). Malice here means "the intentional commission of a wrongful or unlawful act, without legal justification or excuse and with ill will, whether or not injury was intended." *Id.* (*internal quotes omitted*). Criminal intent "is satisfied if it is shown that the defendant knowingly performed the proscribed acts." *Id.* (internal quotes omitted).

The record is devoid of any facts indicating the officers acted with malice or criminal intent. James concedes the record does not support a finding of malice, but asserts there is evidence to suggest criminal intent. This Court disagrees. As set forth in the excessive force analysis above, the officers' apprehension of James was not a proscribed act. The undisputed facts gave the officers a basis to reasonably believe that a burglary was in progress and the suspect was armed, or at least could be armed, was intoxicated and hiding. Under these circumstances, the officers' actions were not contrary to well-established case law governing the use of canines in apprehending potentially dangerous suspects. Therefore, this Court finds summary judgment appropriate on James' intentional tort claims, including the assault, battery, false arrest and wrongful imprisonment claims under the ITCA. The same is true with regard to the Intentional infliction of emotional distress claim as discussed below.

C. Intentional Infliction of Emotional Distress

To recover for intentional infliction of emotional distress, a plaintiff must show that (1) the defendant's conduct was intentional or reckless, (2) the conduct was extreme and outrageous, (3) there was a causal connection between the wrongful conduct and the plaintiff's emotional distress, and (4) the emotional distress was severe. *Spence v. Howell*, 126 Idaho 763, 774, 890 P.2d 714, 725 (1995); *Payne v. Wallace*, 136 Idaho 303, 306, 32 P.3d 695, 698 (Ct.App.2001); *Davis v. Gage*, 106 Idaho 735, 741, 682 P.2d 1282, 1288 (Ct.App.1984). Liability for this intentional tort is generated only by conduct that is very extreme. *Edmondson v. Shearer Lumber Products*, 139 Idaho 172, 180, 75 P.3d 733, 741 (2003). The conduct must be not merely unjustifiable; it must rise to the level of "atrocious" and "beyond all possible bounds of decency," such that it would cause an average member of the community to believe that it was outrageous.[35] *Id.*

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[35] Examples of conduct that has been deemed sufficiently extreme and outrageous by Idaho courts include: an insurance company speciously denying a grieving widower's cancer insurance claim while simultaneously impugning his character and drawing him into a prolonged dispute, *Walston v. Monumental Life Ins. Co.*, 129 Idaho 211, 219-20, 923 P.2d 456, 464-65 (1996), prolonged sexual, mental, and physical abuse inflicted upon a woman by her co-habiting boyfriend, *Curtis v. Firth*, 123 Idaho 598, 605-07, 850 P.2d 749, 756-57 (1993), recklessly shooting and killing someone else's donkey that was both a pet and a

(Continued on following page)

Here, the Court has found the Defendants' response to the incident at issue was constitutionally appropriate. Ruwa was justifiably deployed to apprehend James and the attack lasted no longer than necessary to secure her arrest. While the conduct of a private individual letting loose a dog to violently bite a person would be potentially sufficiently outrageous to support this claim, the conduct, when constitutionally undertaken by peace officers to arrest a subject under these circumstances, does not rise to the level as to be intolerable in a civilized society. Nothing about Defendants' conduct could be considered extreme or outrageous in this context and, therefore, summary judgment on this claim is warranted in Defendants' favor.

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pack animal, *Gill v. Brown*, 107 Idaho 1137, 1138-39, 695 P.2d 1276, 1277-78 (Ct.App.1985), and real estate developers swindling a family out of property that was the subject of their lifelong dream to build a Christian retreat, Spence, 126 Idaho at 773-74, 890 P.2d at 724-25. By contrast, in some cases where conduct was arguably unjustifiable, it was nevertheless held not to be sufficiently outrageous or extreme for liability. *See, e.g.*, *Brown v. Matthews Mortuary, Inc.*, 118 Idaho 830, 801 P.2d 37 (1990) (loss of corpse was not extreme or outrageous); *Hatfield v. Max Rouse & Sons Northwest*, 100 Idaho 840, 850-51, 606 P.2d 944, 954-55 (1980) (auctioneer's sale of equipment at "ruinous" price below minimum set by seller, and issuance of multi-payee settlement check that caused intra-family conflict); *Payne v. Wallace*, 136 Idaho 303, 32 P.3d 695 (belligerent yelling of profanities in presence of a child after an automobile accident); *Sadid v. Vailas*, 943 F.Supp.2d 1125 (D. Idaho 2013) (dean's allegedly defamatory comments to newspaper citing reasons for firing professor was not extreme or outrageous even if unjustifiable).

Furthermore, the Court is not convinced that the current claim is anything more than same conduct that is alleged to be an assault, battery and false imprisonment repackaged in the guise of another more general tort, called intentional infliction of emotional distress. Where the legislature has granted immunity to the Defendant's [sic] under the "intentional tort" exception to liability for the underlying assault, battery and false imprisonment, calling it by another name does not get around the immunity extended by the legislature for such conduct. Surely the liability that James seeks to impose for intentional infliction "arose out of the conduct constituting the alleged false imprisonment, assault and battery. Simply "changing the legal theory on which the claim for recovery" is based does not eviscerate the immunity otherwise provided.[36] Absent a showing of malice or illegal conduct, the defendants' [sic] are immune from the intentional infliction claim.

D. Negligent Failure to Train, Supervise and Control Ruwa

Plaintiffs alleging negligent supervision tort claims against governmental entities must present evidence

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[36] *See Intermountain Const. v. City of Ammon*, 122 Idaho 931, 933 (1992) (concluding that a claim of estoppel was subject to immunity for misrepresentation claims, holding that "immunity is not abrogated by merely changing the legal theory upon which the claim for recovery for the misrepresentation is based.").

"concerning whether those who had the duty to supervise should have reasonably anticipated that those subject to their supervision would commit a [compensable tort]." *Kessler v. Barowsky*, 129 Idaho at 654, 931 P.2d at 648, citing *Doe v. Durtschi*, 110 Idaho 466, 473, 716 P.2d 1238, 1245 (1986) (holding that state entities can be liable for negligent supervision).

This claim fails. The claim itself contemplates the existence of a compensable underlying tort, which is not present here. Even if there were, James has not presented any substantial evidence that Defendants failed to properly train, supervise and control Ruwa.[37] James has only presented the affidavit of Mr. Montgomery to buttress this claim. However, in conclusory fashion, the affidavit simply asserts that Ruwa was not trained to the "bark and hold" method and that some other agencies or some private, fraternal organizations recommend this method as a "best practice." Even assuming that this is true, the fact that another method of training or utilization apart from what Boise Police utilizes might constitute a "best practice" does not mean another practice is negligent. Further, there is no evidence that Boise Police are required to conform their practices to the standards of these private organizations. Mr. Montgomery's opinion that Ruwa should have been trained under the "Bark and Hold" method is wholly conclusory and appears to be

[37] As with the intentional tort claims, James has conceded that a finding of no constitutional violation necessarily leads to the conclusion that the negligence claims also fail.

based solely on his naked assertion that it is believed by others to be "best practice." He has not demonstrated why the handler control method is unacceptable. He does not demonstrate that the Bark and Hold method adequately eliminates the risk to the police, the dog and its handler, the public or even the suspect. He wholly fails to explain why it is a preferable option.

Meanwhile, Officer Bonas has explained that the handler control method is safer for both the dog and the officer as opposed to limiting the dog apprehension solely to barking. It is a method approved by the State of Idaho and taught as a reasonable method consistent with Idaho POST standards.

Indeed, the evidence submitted by Defendants establishes that both Bonas and Ruwa were trained consistent with and certified by the Idaho State POST pursuant to methods the State and Boise Police have determined are appropriate, including the handler control method.[38] Under this method, dogs bite or

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[38] Defendant has presented a Declaration for Officer Randy Arthur, BPD's canine trainer, attesting in to [sic] the training and certification of both Ruwa and Officer Bonas. Decl. Arthur (Jan. 2, 2014). Bonas also submitted copies of his and Ruwa's certifications and the detailed policies relative to the training and use of dogs like Ruwa, and testified that Ruwa met such training standards and his use was consistent with the department's policies. *See* Bonas Decl. and exhibits. James has presented no evidence to rebut the evidence that Ruwa and Bonas were both certified and properly trained and utilized in accordance with BPD policy.

bark based on the direction of the handler. The undisputed facts demonstrate that Bonas gave Ruwa the "search" command and released Ruwa down the stairs. When Ruwa located James' odor, he went into "bark alert." At that point, Bonas gave Ruwa the "bite" command to actually locate and secure James. By all accounts, Ruwa was acting in accordance with his training. James asserts that Officer Bonas testified he understood that Ruwa would not wait for a bite command, but that he would bite whomever he encountered in the office. This does not, however, for purpose of this case, create a question of fact. The undisputed fact is that Ruwa engaged James consistent with the handler control method. It is undisputed that Ruwa did not engage James by biting her until *after* being given a command to do so.

As James has presented no evidence of negligent training, nor evidence that Defendants should have reasonably anticipated the commission of a tort by use of Ruwa, summary judgment on this claim is proper.

V. CONCLUSION

The undisputed material evidence leads to the conclusion that any reasonable jury would find that the individual Defendants did not use constitutionally impermissible excessive force in their arrest and seizure of James. Further, while James concedes she has only asserted an excessive force claim, the evidence nonetheless shows that there was probable

cause to arrest James. Even if this Court were to conclude that the excessive force claim were subject to a question of fact, the inescapable conclusion would be that the individual Defendants are entitled to immunity.

Likewise the Defendants are immune from the state law claims under the Dogs Used in Law Enforcement Act, and under the Tort Claims Act, including the intentional infliction of emotional distress claim. This claim also fails for the additional reason that James has not made a sufficient showing as to each element of the claim. Similarly, the negligent training and supervision of Ruwa claim, in addition to being subject to immunity under the Dogs Used in Law Enforcement Act, fails as James has not demonstrated a material issue of fact as to the alleged negligence in the training or supervision of Ruwa. Accordingly, Defendants are entitled to Summary Judgment as to all claims asserted.

ORDER

Based on the foregoing facts and reasoning, and the record in this case, Defendants are entitled to Summary Judgment.

THEREFORE, IT IS HEREBY ORDERED, AND THIS DOES ORDER, that Defendants' motion for Summary Judgment is GRANTED, and all claims asserted in the complaint are DISMISSED.

IT IS SO ORDERED.

Dated this 4th day of March 2014.

/s/ Steven J. Hippler
Steven J. Hippler
District Judge

CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of March 2014, I mailed (served) a true and correct copy of the within instrument to:

David E. Comstock COMSTOCK & BUSH 199 N Capitol Blvd, Ste 500 PO Box 2774 Boise, ID 83701-2774	(x) ( ) ( ) ( )	U.S. Mail, Postage Prepaid Hand Delivered Electronic Mail Facsimile
Scott B. Muir BOISE CITY ATTORNEY'S OFFICE 150 N Capitol Blvd PO Box 500 Boise, ID 83701-0500	( ) (x) ( ) ( )	U.S. Mail, Postage Prepaid Hand Delivered Electronic Mail Facsimile

CHRISTOPHER D. RICH
Clerk of the District Court
Ada County, Idaho

By /s/ [Illegible]
Deputy Clerk

In the Supreme Court of the State of Idaho

MELENE JAMES, Plaintiff-Appellant, v. CITY OF BOISE, a political subdivision of the State of Idaho, STEVEN BONAS, STEVEN BUTLER, and TIM KUKLA, Defendants-Respondents, and RODNEY LIKES, and DOES I-X, unknown parties, Defendants.	ORDER AWARDING COSTS AND ATTORNEY FEES Supreme Court Docket No. 42053-2014 Ada County No. 2012-16734 Ref. No. 15-327

A MEMORANDUM OF COSTS AND ATTORNEY FEES with attachment and a DECLARATION OF MICHAEL W. MOORE were filed by counsel for Respondents on June 4, 2015. Thereafter, a MEMORANDUM IN OPPOSITION TO COSTS AND ATTORNEY FEES was filed by counsel for Appellant on June 18, 2015. A MEMORANDUM IN REPLY TO APPELLANT'S OPPOSITION TO COSTS AND ATTORNEY FEES was filed by counsel for Respondents on June 26, 2015. The Court is fully advised, therefore; after due consideration,

IT HEREBY IS ORDERED that Respondents' MEMORANDUM OF COSTS AND ATTORNEY FEES be, and hereby is, GRANTED and costs and attorney fees are awarded to Respondents and against Appellant as follows:

Costs:	$ 174.00
Attorney fees:	8,400.00
TOTAL	$ 8.574.00

DATED this 5th day of August, 2015.

By Order of the Supreme Court

/s/ Karel A. Lehrman
for Stephen W. Kenyon, Clerk

cc: Counsel of Record

In the Supreme Court of the State of Idaho

MELENE JAMES, Plaintiff-Appellant, v. CITY OF BOISE, a political subdivision of the State of Idaho, STEVEN BONAS, STEVEN BUTLER, and TIM KUKLA, Defendants-Respondents, and RODNEY LIKES, and DOES I-X, unknown parties, Defendants.	ORDER DENYING PETITION FOR REHEARING Supreme Court Docket No. 42053-2014; Ada County No. 2012-16734 Ref. No. 15-15

The Appellant having filed a PETITION FOR REHEARING on June 9, 2015, and supporting BRIEF on June 23, 2015, of the Court's Opinion released May 21, 2015; therefore, after due consideration,

IT IS HEREBY ORDERED that Appellant's PETITION FOR REHEARING be, and hereby is, DENIED.

DATED this 20 day of July, 2015.

By Order of the Supreme Court

/s/ Stephen Kenyon
Stephen W. Kenyon, Clerk

cc: Counsel of Record
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IN THE SUPREME COURT
OF THE STATE OF IDAHO

MELENE JAMES Plaintiff-Appellant, v. CITY OF BOISE CITY, a political subdivision of the State of Idaho; STEVEN BONAS, STEVEN BUTLER, TIM KUKLA, Defendants-Respondents RODNEY LIKES, AND DOES I-X, unknown parties, Defendants.	Case No. 42053 **RESPONDENT'S BRIEF**

APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

HONORABLE STEVEN HIPPLER PRESIDING

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* * *

ATTORNEY FEES ON APPEAL

Respondents seek an award of attorney fees and costs pursuant to 42 U.S.C. § 1988, and Idaho Code §§ 12-117 and 12-121. The standard for an award of attorney fees under these statutory provisions is similar.

A. Attorney Fees Under 42 U.S.C. § 1988

In order to be awarded attorney fees pursuant to 42 U.S.C. § 1988, a court must determine whether a party is in fact a prevailing party. *Santiago v. Municipality of Adjuntas*, 741 F.Supp.2d 364, 369 (2010). A prevailing party has been defined as one who has been awarded some relief by the court. *Buckhannon Bd. And Care Home, Inc. v. West Virginia Dept. of Health and Human Resources*, 532 U.S. 598, 603, 121 S. Ct. 1835, 1839 (2001). There is no question that Respondents are the prevailing party in this action.

In addition to being the prevailing party, a defendant must establish that the plaintiff's suit was "totally unfounded, frivolous, or otherwise unreasonable or that the plaintiff continued to litigate after it clearly became so". *Santiago*, 741 F.Supp.2d at 370. A court will determine whether frivolity exists by considering (1) whether the plaintiff established a prima facie case; (2) whether the defendant offered to settle; (3) and whether the trial court dismissed the case prior to trial or held a full-blown trial on the merits. Cases sustaining the frivolity standard include

decisions on summary judgment in a defendant's favor where plaintiffs did not offer evidence to support their claims. *Id.*

As to the instant case, the District Court granted summary judgment on the merits in favor of Respondents and dismissed the action in its entirety. (R. pp. 000732 through 000779.) The Appellant was unable to establish a *prima facie* case against Respondents sufficient to support the conclusion that Respondents impermissibly used excessive force in the arrest and seizure of Appellant. *Id.* Under 42 U.S.C. § 1988, then, Respondents are entitled to an award of reasonable attorney fees.

* * *

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IN THE SUPREME COURT
OF THE STATE OF IDAHO

MELENE JAMES, Plaintiff/Appellant, vs. CITY OF BOISE, a political subdivision of the State of Idaho; STEVEN BONAS, STEVEN BUTLER, TIM KUKLA, and DOES I-X, unknown parties, Defendants/Respondents.	Docket No. 42053 **MEMORANDUM IN SUPPORT OF PETITION FOR REHEARING** (Filed June 23, 2015)

COMES NOW, Plaintiff/Appellant, by and through her counsel of record, Comstock and Bush, and respectfully submits his Memorandum in Support of Petition for Rehearing pursuant to I.A.P. 42(b). The Petition is limited to the Court's finding that

Respondents are entitled to attorney fees on appeal pursuant to 42 U.S.C. § 1988.[1]

* * *

II.

ARGUMENT

1. This Court Erred In Dismissing U.S. Supreme Court Precedent Governing When a Court May Grant § 1988 Attorney Fees to a Prevailing Defendant.

This Court is bound to follow federal law regarding § 1988, including U.S. Supreme Court decisions interpreting that statute. Under the Supremacy Clause of the United States Constitution, it is a fundamental notion that the decisions of the U.S. Supreme Court interpreting federal statutes and determining congressional intent are binding upon state courts. *Howlett v. Rose*, 496 U.S. 356, 110 S.Ct. 2430 (1990). This notion applies equally to the "construction and application of § 1988 – a federal statute." *Id.* "The Supremacy Clause forbids state courts to dissociate themselves from federal law because [it

[1] Although Appellant does not seek a rehearing on the substantive merits, there are clarifications which should be made to the Opinion. At page 25, the Court states that "plaintiff also sought to recover under Idaho Code § 25-2808. . . ." However, that is not accurate. Plaintiff never pled nor argued that she had a claim under that statute. Rather, the statute was raised as a further immunity defense by the City of Boise and it was in that context that the issue was briefed and argued by the parties and ultimately decided by the District Court. R. 191.

disagrees] with its content or [refuses] to recognize the superior authority of its source." *Howlett*, 496 U.S. at 371, 119 S.Ct. at 2440. State Courts must follow both federal statutory law and any U.S. Supreme Court decision interpreting the federal statute at issue. *See, Nitro-Lift Technologies, LLC. V. Howard*, 133 S.Ct. 500, 503 (2012).

The fundamental principle binding state courts to federal precedent interpreting federal statutes, especially precedent set by the U.S. Supreme Court, has been cemented in the fabric of American jurisprudence since at least 1825. *See, Elmendorf v. Taylor*, 23 U.S. 152, 160 (1825) (finding that the construction given by the U.S. Supreme Court to the constitution and laws of the United States is to be accepted by all courts as the proper construction); *see also*, *State of New Jersey v. Anderson*, 203 U.S. 483, 491 (1906) (finding that the ultimate interpretation of federal statutes is a function of the federal judiciary); *see also*, *Lytle v. S. Ry.-Carolina Div.*, 171 S.E. 42, 43 (S.C. 1933) (the Supreme Court of South Carolina recognizes that state courts have a duty to seek and apply U.S. Supreme Court interpretations of federal statutes); *see also*, *U.S. v. Gilbert Associates, Inc.*, 345 U.S. 361, 363 (1953) (noting that it is the U.S. Supreme Court's role to determine the meaning of federal statutes, not state courts).

The U.S. Supreme Court has long held that federal law has the same force and effect amongst the several States as each State's own laws. *Haywood v. Drown*, 556 U.S. 729, 734-735, 129 S.Ct. 2108, 2114

(2009). In effect, we have one system of jurisprudence enveloping both federal and state law, and the Court aptly stated:

> Federal and state law "together form one system of jurisprudence, which constitutes the law of the land for the State; and the [state and federal courts] are not foreign to each other, nor to be treated by each other as such, but as courts of the same country, having jurisdiction partly different and partly concurrent."

Id. (quoting *Claflin v. Houseman*, 93 U.S. 130, 136-137, 23 L.Ed. 833 (1876). Even with this "one system of jurisprudence," the Court recognizes that States have a substantial amount of freedom to establish the parameters of their own State's judicial system. *Id.* at 736, 129 S.Ct. at 2114. However, this freedom does not give state courts the authority to "nullify [federal law] they believe is inconsistent with their local policies." *Id.*

The Idaho Supreme Court attempted to distinguish the federal case law and U.S. Supreme Court precedent governing how and when to grant § 1988 attorney fees to defendants by stating those cases were decided based on appeals from federal district courts, rather than state courts, and that the statutory language lacked the limitations on granting attorney fees to prevailing defendants. *See, James v. City of* Boise, Docket No. 42053-2014, 2015 Opinion No. 49, filed May 21, 2015, p. 30. This is a distinction without a difference.

The U.S. Supreme Court, in *Hughes* and *Christiansburg Garment Co.*, was interpreting a federal statute, and it was clear that Congress *intended* the fee shifting provisions of § 1988 to apply differently between plaintiffs and defendants. The different standards necessarily recognize that the civil rights plaintiff is the "chosen instrument of Congress to vindicate a policy that Congress considers of the highest priority. . . ." *Christiansburg Garment Co.*, 434 U.S. at 418-419. Indeed, as recognized in the Statement of Senate Bill 2278, it was intended that the standards for awarding fees be generally the same as under the fee provisions of the 1964 Civil Rights Act and that a party seeking to enforce the rights protected by the statutes covered by S. 2278, if successful, "should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust." *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 (1968).

Moreover, Congress similarly recognized that "[s]uch private attorneys general should not be deterred from bringing good faith actions to vindicate the fundamental rights here involved by the prospect of having to pay their opponent's counsel fees should they lose. *Richardson v. Hotel Corporation of America*, 332 F.Supp. 519 (E.D.La.1971), aff'd, 468 F.2d 951 (5th Cir. 1972). (A fee award to a defendant's employer, was held unjustified where a claim of racial discrimination, though meritless, was made in good faith.) Such a party, if unsuccessful, could be assessed his opponent's fee only where it is shown that his suit

was clearly frivolous, vexatious, or brought for harassment purposes. *United States Steel Corp. v. United States*, 385 F.Supp. 346 (W.D.Pa.1974), aff'd, 9 E.P.D. P 10,225 (3d Cir. 1975). *See*, Attorney's Fees Awards Act, P.L. 94-559, pp. 4, 5.

Regardless of the discretion the Idaho Supreme Court believes the federal statute § 1988 grants, the state courts are subservient to the decisions of the U.S. Supreme Court interpreting that statute. By stepping outside of the U.S. Supreme Court decisions interpreting the § 1988, the Idaho Supreme Court improperly nullified federal law.

2. Defendants are not Entitled to § 1988 Attorney Fees under Idaho State Law, because Idaho has Already Adopted and Applied the Federal Standard for Granting § 1988 Attorney Fees to a Prevailing Defendant.

The Idaho Supreme Court has already adopted and applied the federal standard for granting § 1988 attorney fees to a prevailing defendant. *See*, *Karr v. Bermeosolo*, 129 P.3d 88, 93 (Idaho 2005) (finding that defendants were not entitled to § 1988 attorney fees because the plaintiffs "claims and pursuit of appeal were not unreasonable frivolous, meritless, or vexatious"); *see also*, *Nation v. State, Dept. of Correction*, 158 P.3d 953, 969-970 (Idaho 2007) (finding that defendants were not entitled to § 1988 attorney fees because the plaintiff's appeal was not "unreasonable, frivolous, meritless, or vexatious"). If this Court is

not willing to follow federal precedent interpreting § 1988, then surely it must follow its own precedent.

In *Karr*, the Idaho Supreme Court stated that: "Prevailing defendants are entitled to attorney fees under [§ 1988] only where the action is 'unreasonable, frivolous, meritless, or vexatious.'" 129 P.3d at 93 (quoting *Legal Servs. Of N. California v. Arnett*, 114 F.3d 135, 141 (9th Cir. 1997)) (emphasis added). Two years later in *Nation*, the Idaho Supreme Court again relied on the same 9th Circuit Case, *Arnett*, and the same standard that was utilized in *Karr*. *Nation*, 158 P.3d at 969-970.

Principles of stare decisis dictate that this Court follow controlling precedent, both its own and that of the United States Supreme Court. *Reyes v. Kit Mfg. Co.*, 131 Idaho 239, 240, 953 P.2d 989, 990 (1998) (quoting *Houghland Farms, Inc. v. Johnson*, 119 Idaho 72, 77, 803 P.2d 978, 983 (1998)). While this Court has stated that it may decline to follow controlling precedent where it would be manifestly wrong, it has proven over time to be unjust or unwise, or where overruling it is necessary to vindicate plain, obvious principles of law and remedy continued injustice, no such findings were made here. *Id.* To the contrary, the Respondents have not urged that this Court overrule controlling precedent, relying instead on the standing law of the United States Supreme Court and the Ninth Circuit as the basis for their attorney fee request under section 1988.

* * *

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IN THE SUPREME COURT
OF THE STATE OF IDAHO

MELENE JAMES, Plaintiff/Appellant, vs. CITY OF BOISE, a political subdivision of the State of Idaho; STEVEN BONAS, STEVEN BUTLER, TIM KUKLA, and DOES I-X, unknown parties, Defendants/Respondents.	Docket No. 42053 **MEMORANDUM IN OPPOSITION TO COSTS AND ATTORNEY FEES** (Filed June 18, 2015)

COMES NOW, the Plaintiff, by and through her attorneys of record, David E. Comstock and John A. Bush, of the Law Offices of Comstock & Bush, and submits this *Memorandum in Opposition to Costs and Attorney Fees.*

I.

ARGUMENT

Plaintiff/Appellant objects to Defendants/Respondents' calculation of attorney fees.[1] For the reasons stated below, the Court should reduce the number of hours claimed and the hourly rate.

1. Hours Claimed

Counsel for Respondent avers that she spent 62.75 hours on the appeal of this matter. Of that, more than half, or 33.25 hours, was spent in preparing for oral argument.[2] While the Appellant appreciates the end result of this case, and that "complaining" about the time spent by opposing (and successful) counsel may seem trite, the fact is that Ms. Fleming candidly admitted that this was her first case appearing before the Idaho Supreme Court. While counsel may have felt the need to spend more than half of the total hours expended on the appeal in preparation for her first oral argument, that does not make the number of hours requested reasonable nor would it be just to impose the burden of unreasonable hours upon the Appellant. The number of hours preparing for oral argument should be reduced.

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[1] The Court's Order allowing attorney fees is subject to a Petition for Rehearing.

[2] Of those hours, counsel avers that only 20% of the preparation time was spent on the state law claims although there is no basis provided as to how she arrived as [sic] this estimate.

Respondents' counsel also notes that she spent 12.25 hours researching law applicable to excessive force claims. While not unreasonable on its face, the research should be viewed in context which reveals that very little additional research was necessary for the issues on appeal. For example, the Respondent's Table of Authorities lists 31 cases. Of those, 12 citations are new, or, not cases which were cited by the Respondents, Appellant, or District Court in the proceedings below. Of those 12 cases, 7 relate to Respondents' Request for Attorney Fees.[3] Only 5 new cases were cited in the substantive argument portion of Respondent's Brief, as it related to the civil rights claim, and 2 of those cases related to standard of review. Thus, in context, 12.25 hours

* * *

[3] Respondents sought attorney fees on the section 1983 claim and the state law claims. The Court did not award fees for the state law claims so any research hours applicable to those claims is not recoverable. Respondents' stated basis for attorney's fees under 42 U.S.C. § 1988 was the standard imposed by the United States Supreme Court and federal circuits which this Court has declined to follow. (Respondent's Brief, p. 6).