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COLORADO SUPREME COURT **2 East 14th Avenue** **Denver, Colorado 80203**	
C.A.R. 50 Certiorari to the Court of Appeals, 12CA1112 **District Court, Douglas County, 2011CV3461 and 2009CV1954**	**▲ COURT USE ONLY ▲**
Petitioner: FABIAN SEBASTIAN **v.** **Respondents:** DOUGLAS COUNTY, COLORADO; DOUGLAS COUNTY SHERIFF'S OFFICE; DAVID A. WEAVER, Douglas County Sheriff; and GREG A. BLACK, Douglas County Sheriff's Deputy	**Supreme Court Case Number**: 2013SC902
Attorneys for Respondents: Kelly Dunnaway. #31896 Douglas County Attorney's Office 100 Third Street Castle Rock, CO 80104 Phone: 303-660-7414 Fax: 303-688-6596 E-mail: attorney@douglas.co.us	

ANSWER BRIEF

COLORADO SUPREME COURT **2 East 14th Avenue, 4th Floor** **Denver, CO 80203** **C.A.R. 50 Certiorari to the Court of Appeals, 12CA1112** **District Court, Douglas County, 2011CV3461 and 2009CV1954** **Petitioner:** FABIAN SEBASTIAN, **v.** **Respondents:** DOUGLAS COUNTY, COLORADO; DOUGLAS COUNTY SHERIFF'S OFFICE; DAVID A. WEAVER, Douglas County Sheriff; and GREG A. BLACK, Douglas County Sheriff's Deputy.	▲COURT USE ONLY▲
Attorneys for Respondents: Kelly Dunnaway Office of the County Attorney 100 Third Street Castle Rock, CO 80104 Phone Number: 303-660-7414 FAX Number: 303-688-6596 E-mail: Attorney@douglas.co.us Atty. Reg. #31896	Case Number: 2013SC902
CERTIFICATE OF COMPLIANCE	

I hereby certify that this Answer Brief complies with all requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The brief complies with C.A.R. 28(g). It contains 5,503 words.

The brief complies with C.A.R. 28(k).

The brief contains, under a separate heading, a statement of whether such party agrees with the opponent's statements concerning the standard of review and preservation for appeal, and if not, why not.

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28 and C.A.R. 32.

OFFICE OF THE COUNTY ATTORNEY
DOUGLAS COUNTY, COLORADO

By: *s/ Kelly Dunnaway*
Kelly Dunnaway, Reg. No. 31896
Deputy County Attorney

Pursuant to C.A.R. 30(f), a duly signed original is on file in the Office of the County Attorney, Douglas County, Colorado

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Douglas County, Douglas County Sheriff's Office, Sheriff David Weaver, and Deputy Greg Black, by and through the Office of the Douglas County Attorney, hereby submit their Answer Brief.

I. STATEMENT OF THE ISSUE

A. Standard of Review

The Standard of Review is a much thornier issue for Mr. Sebastian than his Opening Brief suggests. Mr. Sebastian submits that a *de novo* standard applies, and otherwise treats the issue before this Court as if the decision being reviewed was a dismissal on the merits, which is not the case.

All of the parties and all of the courts have consistently agreed that Mr. Sebastian's right to appeal the Order granting the Motion to Dismiss is forever lost. (*See*, Court of Appeals' Opinion, April 14, 2011, 10CA0660, page 4:19-5:5; Petitioner's Appx. pp. 42-43). The only matter properly before this Court is the 2012 District Court Order denying Mr. Sebastian's Rule 60(b) Motion to Set Aside ("Order")(R. at p. 104; Petitioner's Appx. at p. 50).

As such, the Standard of Review is not *de novo*, but rather, abuse of discretion. The determination of a motion for relief under Colorado Rule of Civil Procedure 60(b) (hereinafter referred to as "Rule 60(b)") is committed to the sound discretion of the trial court, and its decision may not be disturbed on appellate

review absent a clear abuse of that discretion. *Blazer Elec. Supply Co. v. Bertrand*, 952 P.2d 857, 859 (Colo.App. 1998); *Colorado National Bank v. Friedman*, 846 P.2d 159 (Colo. 1993); *Front Range Partners v. Highland Hills Metropolitan Park & Recreation District*, 706 P.2d 1279 (Colo. 1985).

This distinction is tremendously important because the entirety of the Opening Brief is devoted to arguing the existence of a Fourth Amendment seizure; that is, the brief addresses one-half (the other half being "reasonableness") of the *meritorious-claim* element of a Rule 60(b) analysis. This *meritorious-claim* element is only one of three elements required to be considered in a Rule 60(b) analysis. *Goodman Assoc. LLC v. WP Mountain Props., LLC*, 222 P.3d 310, 321 (Colo. 2010).

By addressing one-half of one-third of the *Goodman* standards, the Opening Brief is wholly devoted to no more than one-sixth of the elements that would be necessary to disturb, on appeal, a decision that is left to the sound discretion of the trial court.

B. Statement of the Case

Because the Opening Brief focuses on just one of the *Goodman* standards, it omits several procedural points from its Statement of the Case. Most notably, even with respect to the meritorious claim element, the Opening Brief ignores or

misstates the more significant half of the Fourth Amendment seizure analysis.

Mr. Sebastian correctly asserts that, if a plaintiff shows a Fourth Amendment seizure, then the court turns to whether the seizure was reasonable. He goes on to say that, "[b]ecause the lower courts found that there was no seizure, they did not address the reasonableness of the force used." (Opening Br., p.8, n. 3).

This assertion could not be further from the truth. Although Mr. Sebastian's current counsel were not present, and may be unaware, reasonableness was actively debated in both the trial court and in the Court of Appeals. Neither court devoted a significant portion of its written opinion to reasonableness because, in both instances, Mr. Sebastian *conceded* that the deployment of the K-9 itself was reasonable. (*See*, e.g., Opinion, 2013COA132, p. 12, n.3, and trial transcript (Tr. 11:14-13:13)).

This omitted portion of the proceedings below is vital to a consideration of the Order because this admission demonstrates that, even if the trial court had made a mistake with respect to whether there had been a Fourth Amendment seizure[1], it would be harmless error; more specifically, even if Mr. Sebastian could

[1] It should be noted that, although the absence of a Fourth Amendment seizure was key to the Court of Appeal's opinion, it was not as important to the trial court's decision. The trial court focused more on Mr. Sebastian's allegation that the original deployment was Constitutional but that Deputy Black failed to use proper

demonstrate a seizure, he could not demonstrate that the seizure was unreasonable, having already conceded that point. Thus unable to demonstrate a meritorious claim, Mr. Sebastian would be even less capable of demonstrating that the trial court abused its discretion when it determined that the claim did not have sufficient merit to overcome the other two *Goodman* standards.

II. ARGUMENT

A. Summary of Argument

Mr. Sebastian states, originally and at its best, a negligence claim. When he was informed that his tort claim would be barred by state law (*See,* § 13-21-124(5)(c), C.R.S.; *see also*, Tr. 2:23-3:2), he amended his complaint in an effort to restate his claim as a civil rights violation. (R. at p. 7; Petitioner's Appx. at 19).

Even in his effort to state a claim under § 1983, however, Mr. Sebastian remains inexorably tied to the negligence nature of his claim. (*See* Opening Brief, p. 17, "Mr. Black did not demonstrate this level of care in deploying his K-9.") But Section 1983 was never intended as an auxiliary source of tort law. *See, Baker v. McCollan,* 443 U.S. 137, 146, 99 S. Ct. 2689, 2695, 61 L. Ed. 2d 433 (1979)

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care to prevent the unintended attack, finding that, "[n]ot only does the word 'deprive' in the Due Process Clause connote more than a negligent act, but we should not open the federal courts to lawsuits where there has been no affirmative abuse of power." *Daniels v. Williams,* 451 U.S. 527, 548 (1981). (April 9, 2012 Order, section B, R. at pp. 106-107)

(Section 1983 imposes liability for violations of rights protected by the Constitution, not for violations of duties of care arising out of tort law.)

Mr. Sebastian seeks to demonstrate such a Constitutional violation by asserting that, as a general rule, even though he was never the intended target of the K-9 deployment, his inadvertent seizure was an intentional Fourth Amendment seizure by the officer. As explained in detail below, there is neither Supreme Court nor Tenth Circuit precedent for this position. Moreover, related Tenth Circuit decisions indicate that it would not likely adopt such a rule because it would discourage the use of police dogs as a non-lethal alternative for the apprehension of criminals. Among a small handful of other federal circuits to address the issue, there is a split in authority. Whether an unintended act by a K-9 can be an intentional seizure by the officer is an issue upon which reasonable minds can differ. More importantly, it is an issue upon which reasonable courts can differ.

If Mr. Sebastian chooses to avail himself of federal law, then he must accept the entire package, including Qualified Immunity. Qualified Immunity protects Deputy Black from liability unless he violated Mr. Sebastian's "clearly established" Constitutional right. In order to be clearly established, the Constitutional right must be established by a decision of either the Supreme Court,

or the Tenth Circuit Court of Appeals, or a clear majority of circuits, at the time of the alleged Constitutional deprivation which, in this case, is 2008. *Cortez v. McCaul*ey, 478 F.3d 1108, 1114-15 (10th Cir. 2007). The mere fact that this issue is being argued to this Court is a pretty strong indicator that the matter is *not* clearly established. The fact that Mr. Sebastian is unable to find a Tenth Circuit or Supreme Court case supporting his position is likewise telling.

But even if it were clearly established that an inadvertent seizure by a K-9 is a seizure under the Fourth Amendment, Mr. Sebastian would still not state a meritorious claim because he has already conceded that the force used—the initial release of the K-9 to apprehend the fleeing suspects—was appropriate. Such judicial admissions are conclusive on the party making them. *Kempter v. Hurd*, 713 P.2d 1274, 1279-80 (Colo. 1986). Mr. Sebastian cannot save his claim simply by changing his mind and asserting that the use of the K-9 itself was unreasonable; rather, his argument is, and has been, that once deployed, Deputy Black failed to appropriately control the dog—reiterating the negligence (or, as more accurately pointed out by the trial court, strict liability) nature of his claim.

Finally, *meritorious-claim* was only one of three elements required to be considered by the trial court. Again, the fact that this matter is being argued at this level is a strong indicator that the matter is not so clear that reasonable minds could

not disagree; that is, even if this Court finds that there was a seizure, the matter is not so clear as to indicate that the trial court "abused its discretion" by reaching a different conclusion—that the claim lacked merit based upon a lack of intentional seizure, Mr. Sebastian's admission that the initial deployment was reasonable, or the conclusion that the deputy was qualifiedly immune. More importantly, the matter is not so clear as to demonstrate that the trial court abused its discretion by determining that the merits of the case were not so strong that this one prong of the *Goodman* standards should overcome the other two.

B. No Fourth Amendment Seizure

As the trial court recognized, what Mr. Sebastian is seeking is a bright line rule that a police officer is strictly liable for collateral damage any time he deploys a K-9. (Tr. 12:15-20). As Mr. Sebastian (and several court opinions) points out in his Opening Brief, once deployed, a K-9 is unable to distinguish between suspects and innocent parties. (Opening Brief, p. 9, citing *Vathekan v. Prince George's County,* 154 F.3d 173, 178 (4th Cir. 1988). That being the case, there is an inherent risk in the use of K-9s *every time* they are deployed. If officers risk personal liability every time they deploy a K-9, then they will be forced to simply stop using them, and a valuable non-lethal tool will be lost to law enforcement.

Society has deemed the value of the service that K-9s provide—as a non-lethal alternative for the apprehension of criminals—to outweigh the inherent risk of occasional unintended dog bites. This public-policy determination is demonstrated, for example, by the State legislature's adoption of § 13-21-124(5)(c), C.R.S.

Federal statutes do not appear to address the matter, but the federal courts have, in a small handful of opinions, many unpublished. Specifically on the Fourth Amendment seizure issue, the Fifth Circuit has determined that, when a police dog bites an unintended bystander, that does not constitute a willful and intentional seizure under the Fourth Amendment. *See Cochran v. City of Deer Park, Tex.*, 108 F. App'x. 129, 130 (5th Cir. 2004).

The Tenth Circuit has not specifically addressed the seizure issue in the K-9 context but, in other contexts, has held that accidentally harming bystanders by the intentional application of force in trying to apprehend criminal suspects does not constitute a seizure under the Fourth Amendment. *Childress v. City of Arapaho*, 210 F.3d 1154, 1157 (10th Cir. 2000). (Where police wounded hostages when they shot into a moving van knowing that hostages were inside — "The injuries inflicted were the unfortunate but not unconstitutional 'accidental effects of otherwise lawful conduct.' In keeping with our sister circuits, we hold that no

Fourth Amendment seizure occurred in the instant case."). *See also Landol–Rivera v. Cosme*, 906 F.2d 791 (1st Cir. 1990); *Medeiros v. O'Connell*, 150 F.3d 164, 169 (2nd Cir.1998); *Rucker v. Harford County, Md.*, 946 F.2d 278, 279 (4th Cir.1991); and *Claybrook v. Birchwell*, 199 F.3d 350, 359 (6th Cir. 2000).

And in a related context, the Tenth Circuit recognized the value of the use of police dogs and the potential problems of bright line rules that would tend to frustrate the ability to use police K-9s. In refusing to hold that the use of K-9s should always be considered the use of deadly force, the Tenth Circuit held that "[a]dopting a rule like that advanced by Plaintiffs—one that could essentially preclude the use of police dogs—would not be wise and we discern nothing that would compel us to do so." *Thomson v. Salt Lake Cnty*., 584 F.3d 1304, 1315 (10th Cir. 2009).

The distinction between these cases and the cases relied upon by Mr. Sebastian, of course, comes down to the interpretation of the words of the Supreme Court, "through means intentionally applied." *Brower v. County of Inyo***,** 489 U.S. 593, 597 (1989). *Brower* wasn't a dog-bite case, so the application of this general guidance to a dog-bite case is uncertain and subject to reasonable differences in interpretation. The stronger interpretation is that *Brower* does not support the rule that Mr. Sebastian seeks. In *Brower,* the Court hearkened back to the *writs of*

assistance that motivated the adoption of the Fourth Amendment and made clear that "the detention itself must be willful." *Id*. at 596. In this case, there is no allegation that Deputy Black willfully detained Mr. Sebastian. Mr. Sebastian readily acknowledges that he was not the object of the detention, but rather, a bystander.[2]

While the *Brower* opinion leaves room for application of the Fourth Amendment when an "unintended person" is seized, it appears that the Court was referring, not to unintended seizures, but rather, to intentional seizure of the wrong person. This point is made evident, not only by the Court's reasoning that an unintended victim would have their Fourth Amendment rights violated only if they were "the object of the detention or taking" (*Id*. at 596), but also, by the opinion upon which the *Brower* Court relied for this proposition, *Hill v. California,* 401 U.S. 797 (1971), in which police arrested the wrong person.

Accidental dog bites are pretty clearly not what the *Brower* Court was addressing. Given the context of the car chase underlying the *Brower* decision, its "unintended person" language is dicta anyway. But even in the more relevant context of *Hill*, where seizure was intended but the wrong person, it is clear that

[2] No one disputes that Axel was dispatched to apprehend the fleeing suspects and not the Petitioner, nor that the dog did initially pursue those he was intended to seize. (Opening Brief pp. 5 and 10; District Court Order, R. at pp.104 and 106).

the proposition was not stated for the purpose of supporting liability for accidental dog bites, or for otherwise creating a back door for plaintiffs to bring potential negligence claims under the label of § 1983. As the *Brower* Court summarized, "the Fourth Amendment addresses misuse of power [citation omitted] not the accidental effect of otherwise lawful government conduct." *Id.* at 596.

Against this authority, Mr. Sebastian asserts that courts have uniformly applied a rule that "an officer who intentionally deploys a police dog for the purpose of affecting a seizure intends to seize any nearby person." (Opening Brief pp. 8-10.) This broad statement of uniformity is unsupportable. Mr. Sebastian cites, and the County can find, only a handful of unpublished opinions, mostly from district courts within the 9th Circuit, that state anything approaching such a "rule." See *Youngblood v. City of Bakersfield*, No. 1:12-cv-1150, 2014 WL 1386392, at 7 (E.D. Cal. Apr. 8, 2014); *Garcia v. City of Sacramento*, No. 10CV00826JAM KJN, 2010 WL 3521954, at 2 (E.D. Cal. Sept. 8, 2010); and *Rogers v. City of Kennewick*, 205 F. App'x. 491, 492-493 (9th Cir. 2006)(*Rogers v. City of Kennewick*, is also cited at 206 F. App'x. 657 (9th Cir. 2006).[3]

[3] Petitioner also cites dicta in *Rodriguez v. City of Fresno*, but that case actually held that a bystander who was shot by police was not seized because "[a] plaintiff that is injured collaterally or incidentally to the application of force by police against a third party cannot maintain a Fourth Amendment claim." *Rodriguez v. City of Fresno*, 819 F. Supp. 2d 937, 946-8 (E.D. Cal. 2011).

Other dog bite cases, such as Mr. Sebastian's citation to *Vathekan v. Prince George's Cnty.*, 154 F.3d 173 (4th Cir. 1998), are not particularly instructive because of their factual differences. In *Vathekan*, the officer released a dog into a house to seize whoever was in the house. *Id.* at 178. ("By giving the command 'Find him!', Simms intended the dog to find anyone in the house. It is undisputed that once that command was given, the dog would bite anyone it found."); *See also, Brown v. Whitman*, 651 F. Supp. 2d 1216, 1225 (D. Colo. 2009) ("Officer Titus released his police dog into Ms. Brown's backyard to locate any suspects hiding there"); *McKay v. City of Hayward*, 949 F. Supp. 2d 971, 979 (N.D. Cal. 2013) (a dog was lowered into a yard to find and apprehend a suspect but bit the wrong person). These cases are all distinguishable because Mr. Sebastian was not the intended target of the K-9 release. Mr. Sebastian alleges, Deputy Black intended specifically to seize the fleeing suspects, and failed to control the dog after it was unable to apprehend them.

Far from the uniformity that Mr. Sebastian suggests, opinions on dog bites are as varied as the factual circumstances from which they arise. *See e.g. Dennis v. Town of Loudon*, No. 11-CV-302-JL, 2012 WL 4324932, at *5 (D.N.H. Sept. 20, 2012) (When a police dog in the course of a search attacked a bystander in the area - the court held "where, as here, a trained police dog spontaneously attacks an

individual, courts have concluded that there is no Fourth Amendment seizure."); *Melgar ex rel. Melgar v. Greene*, 593 F.3d 348, 355 (4th Cir. 2010) (use of bite dog to find a missing inebriated teenager was a seizure, but officer qualifiedly immune); *Gangstee v. Cnty. of Sacramento*, 2012 WL 112650 (E.D. Cal. Jan. 12, 2012) aff'd on other grounds, 567 F. App'x 500 (9th Cir. 2014) (despite using a "special breed of analysis" for the use of police dogs, the Court held that a dog unintentionally biting a bystander does not constitute a seizure.) [4]

It is society, and not Deputy Black, that decided that the risk of collateral damage from the use of K-9s is outweighed by the value of that use. Deputy Black is not alleged to have misused his power. He is merely alleged to have failed to control the dog once deployed. This allegation itself—failure to control—is inherently inconsistent with the notion of an intentional seizure; rather, it merely alleges negligence, which is not cognizable under § 1983.

C. Qualified Immunity

It is beyond dispute, and has been agreed, that Mr. Sebastian's only feasible claim is under 42 U.S.C. § 1983. Any state law negligence claim would be barred by the absolute immunity afforded by the state for military and law enforcement

[4] Petitioner cites the dicta of this case quoted, but they do not cite the actual holding of that court which does not support implementation of their proposed rule. Opening Brief pp. 8-9.

K-9 use, as provided in § 13-21-124(5)(c), C.R.S. (See also, trial transcript, (Tr. 2:23-3:2).

If Mr. Sebastian is to avail himself of federal law, then the full ambit of § 1983 law must apply, including Qualified Immunity; that is, "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

The right that Mr. Sebastian claims to have been violated was not clearly established at the time of the incident in 2008. As stated above, Mr. Sebastian already admitted that deploying the K-9 was reasonable. There are no facts alleged to indicate that Deputy Black had reason to believe otherwise. Under circumstances such as these, where a law enforcement officer acts within the bounds of the law as known at the time, the Tenth Circuit has held that "a civil rights defendant is entitled to fair warning that his conduct deprived his victim of a constitutional right." *Roska ex rel. Roska v. Peterson*, 328 F.3d 1230, 1247 (10th Cir.2003), *quoting, Hope v. Pelzer*, 536 U.S. 730, 740 (2002).

In order to assure this *fair warning* to civil rights defendants, courts have required that, "for a right to be clearly established, there must be a Supreme Court

or Tenth Circuit decision on point, or the clearly established weight of authority from other courts must have found the law to be as the plaintiff maintains." *Cortez v. McCauley*, 478 F.3d 1108, 1114-15 (10th Cir. 2007). "The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Casey v. City of Fed. Heights*, 509 F.3d 1278, 1283–84 (10th Cir.2007) *quoting, Saucier v. Katz*, 533 U.S. 194, 202 (2001), *overruled on other grounds, by Pearson v. Callahan*, 555 U.S. 223, 236(2009).

In 2008, when the events which give rise to this case occurred, there does not appear to be any Supreme Court or Tenth Circuit decision on point that would put a deputy on notice that any unintended seizure by the dog would be deemed an intentional seizure by the officer, or that he would otherwise be "strictly liable" for any unintended consequences of his deployment of a K-9. Certainly Mr. Sebastian has cited none.

In the absence of Supreme Court or Tenth Circuit precedent, Mr. Sebastian must demonstrate a "clearly established weight of authority" among other circuits. In his effort to demonstrate this clearly-established weight of authority, Mr. Sebastian cites only two circuit court decisions that existed in 2008—*Rogers v.*

City of Kennewick, 205 F. App'x. 491 (9th Cir. 2006) and *Vathekan v. Prince George Cnty.*, 154 F.3d 173 (4th Cir. 1988).

Two out of eleven circuits (more if we count the D.C. and Federal Circuits) is not sufficient to demonstrate a clearly established weight of authority, particularly when some of those circuits have issued contrary opinions.[5] This is especially true given the fact that one of the two cases, *Rogers*, is unpublished, was factually distinguishable, and was specifically ordered *not to be cited as precedent* by the issuing circuit, pursuant to 9th Circuit Rule 36-3. *See*, *Rogers*, *supra*,205 F. App'x. at 492, fn.

The other relevant case, *Vathekan*, is ambiguous in the context of this case because the intended target (i.e., "anyone" in the house) was seized precisely as intended. The Fourth Circuit found that this type of deployment was unreasonable. *Id.* at 178. *Vathekan* did not address a case where the K-9 failed to apprehend its target of the deployment and spontaneously turned to an unintended target.

These cases are not sufficient to demonstrate that, in 2008, there was clearly established law on this matter. In fact, another case cited by Mr. Sebastian, *Melgar ex rel. Melgar v. Greene*, 593 F.3d 348 (4th Cir. 2010), indicates that the law was

[5] *See, e.g., Cochran v. City of Deer Park, Tex.*, 108 F. App'x. 129, 130 (5th Cir. 2004).

still not established as late as 2010. In *Melgar*, although the court did find a seizure, it found that the officer was entitled to qualified immunity. In fact, the court cautioned that *Vathekan, supra*, should not be read as "providing near-strict liability on officers any time they use police dogs." *Id.* 593 F.3d at 358.

The *Melgar* court's analysis may prove especially useful in this case. Echoing the "fair warning" required by the Supreme Court and the Tenth Circuit[6], the Fourth Circuit stated that, "[t]he purpose of the immunity is to allow some discretionary judgment in what are indisputably difficult circumstances and not to have the prospect of being blind-sided in hindsight discourage officers from the constructive tasks they can in fact perform." *Id.* 593 F.3d at 357. Similarly, qualified immunity should protect Deputy Black from being "blind-sided in hindsight."

Furthermore, the general principles from the various non-dog bite cases cited by Mr. Sebastian should not be interpreted to render clearly-established an area of law that is still being developed. The Supreme Court has cautioned against interpreting clearly established law too generally for fear of allowing "plaintiffs to

[6] *See, supra, Roska*, 328 F.3d at 1247 and *Pelzer*, 536 U.S. at 740.

convert the rule of qualified immunity … into a law of virtually unqualified liability simply by alleging violations of extremely abstract rights." *Anderson v. Creighton*, 483 U.S. 635, 639 (1987).

One equivocally applicable opinion from the Fourth Circuit, and one opinion that intentionally divested itself of precedential value from the Ninth Circuit, should not be said to constitute a clear weight of authority among the circuits. In 2008, and even today for that matter, there is simply nothing that should have alerted Deputy Black that, any time he deploys a K-9, he does so at his own peril.

D. The Force Used was Reasonable.

If this Court were to find that seizure of an unintended subject is an intentional seizure under the Fourth Amendment, then Mr. Sebastian suggests that the next step, presumably on remand, would be for the trial court to consider whether the seizure was reasonable. (Opening Br., p. 8, n. 3). However, a remand to the trial court to make such a determination would be superfluous, given that the trial court has already considered and ruled on the matter.

A review of the transcript of the trial proceedings reveals a lengthy debate on precisely this topic. The trial court recognized that a negligence claim is not cognizable under state law or as a civil rights claim. Accordingly, the court

examined whether the release of the K-9 itself was Constitutional. Once Mr. Sebastian conceded that the deployment of the K-9 to apprehend the two fleeing suspects was Constitutional, but that Deputy Black had a duty to control the dog once released, the court concluded, quite reasonably, that what Mr. Sebastian was asserting was negligence, even strict liability, as follows:

> THE COURT: All right. That's my question. Are you alleging that it was Unconstitutional for the police officer to use the canine to begin with?
>
> MR. FIELD: Yes, with regard to the car, not with regard to the absconders.
>
> THE COURT: Okay. So, it was appropriate to release the canine with respect to the individuals that were running away, correct?
>
> MR. FIELD: We don't contest that it was appropriate to use the canine against the individuals running away.
>
> THE COURT: I'm sorry, it was or was not appropriate?
>
> MR. FIELD: It, for argument sake, I'll say it was, was appropriate to use them on the, on the absconding juveniles.
>
> THE COURT: All right, and was there anything that was done by the police officer that you're aware of, as alleged in the complaint, that promoted this dog to attack your client?
>
> MR. FIELD: He allowed it to attack my client.
>
> THE COURT: But, did he promote, encourage or do anything in a more affirmative manner to lead this dog to your client?

> MR. FIELD: No, and I would argue that's irrelevant, Your Honor. That the distinction—
>
> THE COURT: --But, this is a 1983 claim.
>
> MR. FIELD: Yes.
>
> THE COURT: That's strict liability.
>
> MR. FIELD: Yes, but he had a reasonable duty to have the dog, the instrumentality under his control and he did not. And, he had, my client helpless in his vehicle under his power, under the police power and unable to flee or defend himself against the police weapon, the police instrumentality, which wasn't a gun in the policeman's hand, but a dog that had to be controlled or it would do what it wanted. And, the police have a duty to keep that dog under their control. The police directed the dog against the absconders, but did not keep the dog from going into the car. And, it's a reasonableness, Your honor. I have some case law—
>
> THE COURT: --Well, not a reasonable standard, that's a negligence standard.
>
> MR. FIELD: Well, then, then, I, I'm mistaken.

(Tr. 11:14-13:13).

As stated above, Mr. Sebastian is mistaken when he asserts that the court did not address reasonableness. Both courts directly addressed the issue. (See also, Opinion, 2013COA132, p. 12, n. 3). Mr. Sebastian's concession that the original deployment of the K-9 was reasonable simply negated the need for lengthy written analysis. Furthermore, judicial admissions are conclusive on the party making them. *Kempter v. Hurd*, 713 P.2d 1274, 1279-80 (Colo. 1986). Accordingly, even

if there were a seizure under the Fourth Amendment, that seizure was reasonable and there is no Constitutional violation.

E. Even a Meritorious Claim is only One-Third of the Inquiry.

Finally, even if this Court would have reached a different conclusion on the merits of the claim on this record, the overall conclusion reached by the trial court was still a reasonable one—not an abuse of discretion. This is particularly important in light of the fact that the posture of this case is not a *de novo* review of a dismissal on the merits, but rather, a review for abuse of discretion on the denial of a Rule 60(b) motion to set aside. Under the appropriate abuse of discretion standard of review, it would be difficult to say that this decision was so bad that it was not based upon evidence in the record, was made in bad faith, or that it lacked basis in fact or law.

And this is particularly true in light of the legal standards set by this Court over its past thirty years of jurisprudence. The *Goodman* Court borrowed these factors from two prior Supreme Court cases, *Buckmiller v. Safeway*, 727 P.2d 1112 (Colo. 1982) and *Craig v. Rider*, 651 P.2d 397 (Colo. 1982). Consequently, whether referred to as the *Goodman* Standards, the *Craig* Criteria or *Buckmiller* Factors, they are the same and, as this Court held in *Buckmiller*, "[s]ince the party seeking relief has the burden of establishing the grounds for relief, a trial court may

deny a motion to set aside a default judgment for failure to satisfy **any one of the three** criteria of *Craig*." *Buckmiller, supra*, 727 P.2d at 1116 (Emphasis added).

As set forth in the District Court's Order (R. at 108; Petitioner's Appx. at p. 52), on each of the three factors, Mr. Sebastian failed to meet his heavy burden, which was a burden of "establishing the grounds for relief under C.R.C.P. 60(b)…by clear, strong, and satisfactory proof." *Centennial Bank of the West v. Taylor*, 143 P.3d 1140, 1141, 1142 (Colo. App. 2006).

The trial court found that Mr. Sebastian had not satisfied every ground for relief by clear, strong and satisfactory evidence. Mr. Sebastian simply had a very difficult burden and the finding that he did not carry that burden is based upon a solid record. Even if the accidental seizure is deemed an intentional act, such a finding would not be sufficient to undo the overall findings of the trial court.

III. CONCLUSION

The Order before this Court on appeal is a denial of a Rule 60(b) Motion to Set Aside. Such an order may be disturbed on appeal only if this Court finds that the trial court abused its discretion. The burden on Mr. Sebastian is exceedingly high. Under this Court's prior rulings over the past 30 years, Mr. Sebastian was required to prove to the trial court, by clear and convincing evidence, each of the three *Goodman* standards.

The trial court found that Mr. Sebastian failed to meet this heavy burden, and there is evidence in the record to support that finding. It would require a significant break from this Court's prior decisions to hold otherwise.

The Opening Brief makes the argument that the seizure by a K-9, while accidental, should be deemed intentional for purposes of a § 1983 claim. While the issue is debatable among the handful of circuits to have addressed it, there is clearly no mandate. In fact, what little authority exists appears fairly well split.

Accordingly, if this Court determines that such a seizure is an intentional deprivation of a Constitutional right, it would be the first court within the relevant jurisdictions to do so; it would be acting in direct contravention of the public policy recognized by the state legislature in adopting a specific immunity for the military and law enforcement use of K-9s; and it would be generating federal law in a manner arguably inconsistent with prior holdings of the relevant federal circuit.

Finally, even if the seizure is deemed intentional, it should not affect this case because: (1) the claim would still not be meritorious because: (a) Mr. Sebastian has already conceded that the deployment of the K-9 was reasonable; and (b) Deputy Black would be entitled to qualified immunity because there was no clearly established law on the matter in 2008; and (2) even if meritorious, a

meritorious claim is only one of three criteria upon which the trial court must have abused its discretion in order to overturn the Order.

Given that the matter remains unsettled among federal circuit courts in 2015, it would be unreasonable to suppose that the trial court abused its discretion—whichever side of the debate it came down on—five years ago.

DATED this 14th day of January, 2015.

Respectfully submitted,

OFFICE OF THE COUNTY ATTORNEY
DOUGLAS COUNTY, COLORADO

BY: */s/ Kelly Dunnaway*
Kelly Dunnaway, #31896
100 Third Street
Castle Rock, Colorado 80104
303-660-7414

CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of January, 2015, a true and correct copy of the foregoing **ANSWER BRIEF** was filed with the Court and served on all parties via *ICCES***.**

/s/ *Cindy Hancock*

Pursuant to C.A.R. 30(f), a duly signed original is on file in the Office of the County Attorney, Douglas County, Colorado