[Note: In the following opinion, footnotes and some foreword matter have been omitted. Sections of the opinion that deal with matters other than violation of the Fourth Amendment have also been omitted, including the Court's analysis of qualified immunity and the related dissent.]

ANN ALTMAN; ROBERT ALTMAN; KIMBERLY LARSEN; WENDY FRYE; GILBERT WALLACE, Plaintiffs-Appellees, v. CITY OF HIGH POINT, North Carolina; BOBBY RAY PERDUE, in his individual and official capacities; NELSON MOXLEY, in his individual and official capacities, Defendants-Appellants, and JONI CHASTAIN, in her individual and official capacities, Defendant.
No. 02-1178
UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
330 F.3d 194

May 20, 2003, Decided

LUTTIG, Circuit Judge:

This case arises out of several shooting incidents in the City of High Point, North Carolina (the "City" or "High Point"). In each incident, a High Point animal control officer shot and killed one or more dogs that were running at large in the city. Plaintiffs, the owners of the animals, brought suit under 42 U.S.C. § 1983, alleging that the officers' actions violated their Fourth Amendment rights. The district court denied the officers' qualified immunity defense, and the officers have appealed that ruling. Their appeal presents a question of first impression in this circuit, namely, whether a privately owned dog falls within one of the classes of property protected by the Fourth Amendment against unreasonable search and seizure. This issue, while ostensibly peripheral as a constitutional matter, is nevertheless of significant importance, and we consider it in depth. As we explain more fully below, we conclude that the dogs at issue in this case do qualify as property protected by the Fourth Amendment and that the officers seized that property. However, because in each instance the seizure involved was reasonable, we conclude that the officers did not violate the plaintiffs' Fourth Amendment rights. Accordingly, we reverse the district court's decision denying summary judgment to the officers and the City of High Point.

I.

Because this case comes before us on appeal from the denial of summary judgment, except where otherwise noted, the following facts are recounted in the light most favorable to the plaintiffs, as they are the nonmovants in this action. Defendants Nelson Moxley and Bobby Ray Perdue are and were at all times relevant to this opinion employed by High Point as animal control officers. As animal control officers, Moxley and Perdue were charged with enforcing the various High Point ordinances governing dogs. High Point Ordinance § 12-21(a) makes it unlawful for the owner of a dog to allow the animal to "run at large" in the city. The ordinance defines "at large" to mean "a dog that is not in an enclosure or otherwise confined, or is not under the control of the owner

or other person by means of a leash, cord or chain." H.P. Ordinance § 12-2-1(b). Animal control officers are tasked with impounding any animal found "at large." Id. § 12-2-6 ("It shall be the duty of the animal control specialist to capture and impound in the county animal shelter each and every unlicensed dog or any dog found unlawfully at large in the city as provided in this chapter."). Finally, city ordinance provides that "it shall be lawful for the animal control specialist or police officers of the city to tranquilize or kill any dog at large within the city which cannot safely be taken up and impounded." Id. § 12-2-16(b) (emphasis added).

Dogs must also wear tags issued by the city. H.P. Ordinance § 12-214.

It was Moxley and Perdue's efforts to enforce these ordinances that generated the four separate incidents which form the basis of this case. Each incident involves the shooting of one or more of the plaintiffs' dogs by either Moxley or Perdue. It is undisputed that in each incident, the dog or dogs were running at large within the meaning of High Point Ordinance § 12-2-16(b). We describe the incidents in chronological order.

The Larsen Incident.

Plaintiff Kimberly Larsen was the owner of "Heidi," a purebred Rottweiler. Larsen testified that Heidi always wore a collar and tags. On January 10, 1997, Larsen left Heidi in her fenced yard while she and a family member left to run some errands. That same day, Officer Perdue responded to a call about a large, vicious Rottweiler that was loose and had chased and attacked, or attempted to attack, a citizen. When Officer Perdue arrived on the scene, he spoke with Willie Sturdivant, the citizen who had reported the incident. Sturdivant told Perdue that he had been chased by the dog and had only been able to escape the attack by beating the dog off with a stick. Sturdivant was scared to walk back down the street, so Officer Perdue gave him a ride.

After dropping off Sturdivant, Officer Perdue began searching for the loose dog. A local woman told Perdue to be careful of the dog because it was dangerous and aggressive and had been in the streets chasing cars and people. She also told him where the owners of the dog lived, although she noted that they were not home. Perdue next came upon Charles Elkins, a neighbor of the Larsens, walking on the street, and he stopped to warn Elkins about the loose dog. Elkins reported that the dog lived at the Larsens' and directed Perdue to the house. Officer Perdue pulled into the Larsens' driveway, exited his vehicle with his shotgun, and began to walk toward the home.

Elkins observed what happened next from a distance of about 150 feet. He said that as Perdue walked toward the home, Heidi came walking around the corner of the house. Heidi slowly approached Perdue and jumped or lunged from the driveway up into the yard. At this point, Heidi was ten to twelve feet from Perdue. Heidi then stopped, turned around, and began walking away from Perdue toward the street. Perdue then fired, striking Heidi in the hindquarters. He fired again to end the animal's suffering. Perdue dragged Heidi's remains to the end of the driveway and called sanitation to dispose of the body. He then left the scene.

Perdue remembers things happening differently. According to Perdue, he saw the Rottweiler standing in the middle of the street. The Rottweiler was big and acting in a crazed, aggressive manner by growling and moving back and forth. The animal suddenly charged him and he used deadly force in self-defense.

The Frye Incident.

Wendy Frye owned four dogs -- "Tut-Tut," "Bandit," "Boo Boo," and "Sadie" -- that were approximately seven months old and weighed 15-20 pounds each. The dogs' mother was a Siberian Husky mixed-breed dog; it is unclear what breed their father was. The dogs wore collars but did not wear tags. They were kept in a pen in Frye's backyard but had a tendency to dig under the pen and escape.

On the morning of February 8, 1997, Officer Berman of the High Point Police Department responded to a call about a pack of dogs chasing people. According to him, when he arrived on the scene, the dogs charged his car, growling and showing their teeth. In the pack were three of Frye's dogs and two larger strays. Officer Berman remained in his car and called for Officer Perdue. While Berman waited for Perdue to arrive, the dogs ran across the street and began harassing a woman who was trying to exit her vehicle. Berman drove over and blew an air horn to disperse the dogs. The dogs ran, and the woman was able to leave her car and get to her residence. A man then came out of the residence. One of the dogs tried to bite him, but Berman again dispersed the dogs with his horn.

Shortly thereafter, Perdue arrived on the scene. The dogs aggressively rushed his truck as soon as he pulled up. One of the dogs jumped into the window of his truck and Perdue had to beat if off with his nightstick. When he exited the vehicle, the pack attacked him and Perdue fired into it with his shotgun, killing two of the dogs (Bandit and Tut-Tut). The rest of the pack disbursed.

The Wallace Incident.

Plaintiff Gilbert Wallace owned a Golden Retriever/Labrador mixed-breed dog named "Sundance." Wallace asserts that Sundance was a well-behaved, passive dog, but that he had a habit of escaping from his fenced-in yard by digging under the fence. Wallace had several other dogs, which he also kept in a fenced area. Wallace had been cited on six previous occasions for allowing his dogs to run loose, and he had been warned about the poor condition of his fence. In addition, Officer Moxley had previously told Wallace that his dogs were becoming more aggressive.

On January 25, 1999, High Point Police Officer Blue responded to a call that a dog had bitten someone. When he arrived at the scene, a dog that Officer Blue described as a "black chow-lab mix," Sundance, charged him. Blue racked his shotgun, and the animal stopped, but continued to growl. Blue radioed for animal control to respond.

Blue then interviewed the bite victim, Lonnie Baldwin. Baldwin told Blue that the dog had chased his child to the bus stop. Baldwin chased the dog to protect his child, and the dog bit him on the hand. As Baldwin and Blue were talking, Officer Moxley arrived on the scene along with Officer Perdue. At this point, Sundance had retreated to Wallace's yard and was sitting outside the fence. Moxley informed Baldwin and Blue that this dog had given him problems in the past. He then got back in his truck and drove the short distance to the Wallace house.

Moxley exited his vehicle with his shotgun and proceeded toward the rear of the truck. At this point, Sundance charged at full speed, growling and showing his teeth. Moxley raised his shotgun and fired when Sundance was about five yards away, killing the dog. He then loaded the remains into his truck so the dog could be tested for rabies. Sundance was wearing no collar or tags.

The Altman Incident.

The most recent of the four incidents involves plaintiffs Robert and Ann Altman, and their dog "Hot Rod," whose actual lineage was unknown but who the Altmans thought was at least part pit bull. According to the Altmans, Hot Rod was a nonaggressive, obedient dog, who always wore his collar and tags as required by law.
On the morning of March 24, 2000, Hot Rod was wandering the streets alone. Terry Evans, who owned a local business, saw Hot Rod following a meter reader, Roger Hendricks. Evans was familiar with Hot Rod, having seen him on the street before and having seen him behave aggressively. Fearing for Hendricks' safety, Evans called 911. When Officer Moxley arrived, Hot Rod "took off" toward the residential houses located further down the street. Moxley exited his vehicle with his shotgun and gave chase. Moxley fired between two of the houses in the direction of Hot Rod, who was about 75 yards away. Hot Rod was running behind the houses, and Moxley was running in front of the houses. He fired again between two houses in the direction of Hot Rod, who was approximately 50 to 60 yards away. Moxley fired a third shot, and Evans heard Hot Rod "hollar." Hot Rod emerged from behind the houses bleeding and dragging his hind leg, but was still running. Moxley had Hendricks retrieve more shells from his truck, and then pursued the dog. A short time later, a fourth shot was heard and Moxley emerged dragging the remains of Hot Rod.

Moxley recalls a different version of the events. According to him, when he arrived at the scene, Hot Rod was growling at Hendricks from under some bushes. Moxley got out of his truck with his shotgun and proceeded toward the back of the truck to get his catchpole. Hot Rod charged, but stopped and retreated when Moxley raised his gun. Moxley continued toward the rear of his truck when Hot Rod charged again. This time, Moxley fired, wounding but not killing the dog. Hot Rod ran, and Moxley pursued, firing twice more. Finally, after retrieving more shells, Moxley ended Hot Rod's suffering.

The plaintiffs brought suit under section 1983 against High Point, and Officers Moxley and Perdue, alleging that the officers' actions in shooting the plaintiffs' dogs constituted unreasonable seizures in violation of the Fourth Amendment. The plaintiffs also asserted

state law tort claims. All defendants moved for summary judgment, and the officers asserted qualified immunity. The district court rejected the officers' qualified immunity defense, and the defendants, both the officers and the City, timely appealed.

Plaintiffs also brought suit against Officer Chastain, the supervisor of Moxley and Perdue, on a supervisory liability theory. The district court granted summary judgment to Chastain, and the plaintiffs have not appealed that ruling.

II.

Because this appeal involves the denial of qualified immunity, we consider first whether the facts, viewed in the light most favorable to the plaintiffs, state a violation of the Fourth Amendment. See *Saucier v. Katz*, 533 U.S. 194, 201, 150 L. Ed. 2d 272, 121 S. Ct. 2151 (2001). If so, we proceed to consider whether the right was clearly established; that is, whether it would have been apparent to a reasonable officer in the respective defendants' positions that his actions violated the Fourth Amendment. Id. at 201-02. We review the district court's denial of qualified immunity de novo. See *Rogers v. Pendleton*, 249 F.3d 279, 285 (4th Cir. 2001).

The plaintiffs' complaint also claimed that the officers' actions violated the Fifth and Fourteenth Amendments insofar as they deprived the plaintiffs of property without due process of law. The plaintiffs, however, did not argue that claim below, J.A. 531 n.5, and they have not raised it on appeal. Thus, the plaintiffs have abandoned their Fifth and Fourteenth Amendment claim, and we do not consider whether any of these incidents involved a deprivation of property without due process of law.

A.

The first issue then is whether the plaintiffs' Fourth Amendment rights have been violated. To resolve this issue, we must determine whether their dogs fell within the ambit of the Fourth Amendment. The Fourth Amendment, made applicable to the states through the Fourteenth Amendment, provides that

> the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated. . . .
>
> U.S. Const. amend. IV.

Plainly, a dog is not a "person," "house," or "paper." Thus, in order for a dog to be protected by the Fourth Amendment, it must fall within the category of "effects." Neither the Supreme Court nor the Fourth Circuit has ever addressed the issue whether dogs are "effects." Three other circuits, the Third, Eighth, and Ninth, have considered whether dogs are protected by the Fourth Amendment. Those circuits have uniformly concluded, although based only on conclusory assertions, that dogs are indeed so protected. See *Brown v. Muhlenberg Township*, 269 F.3d 205, 209-10 (3d Cir. 2001)

(holding that dogs are "effects"); *Fuller v. Vines*, 36 F.3d 65, 68 (9th Cir. 1994) (same); *Lesher v. Reed*, 12 F.3d 148, 150-51 (8th Cir. 1994) (dogs are property subject to Fourth Amendment seizure requirements). The complete absence of reasoning employed by those circuits, however, renders their dispositions of only the most minimal persuasive value.

Defendants argue that the circuit authority is not uniform, pointing to the Seventh Circuit's decision in *Pfeil v. Rogers*, 757 F.2d 850 (7th Cir. 1985). In *Pfeil*, the plaintiff claimed that officers violated his son's Fourth Amendment rights by entering his property and shooting his dogs. It is true that the Pfeil court did conclude that the officers' conduct in shooting the dogs did not support a section 1983 action "because it did not violate a right guaranteed under the United States Constitution." Id. at 866. But we think that the defendants read too much into this blanket statement. It does not appear from the Seventh Circuit's opinion in *Pfeil* that the court was considering whether the officers' conduct constituted a Fourth Amendment seizure of the dogs. Indeed, the Seventh Circuit characterized the plaintiff's Fourth Amendment claim as one for warrantless entry and had dismissed that claim earlier in the opinion. See id. at 865. Because the Seventh Circuit did not consider whether the actions constituted a Fourth Amendment seizure of the dogs, it can hardly be said that its opinion included a holding with respect to that issue.

Proceeding to analyze this issue that has been assumed away by the other circuits that have considered it, our inquiry begins with the text of the Constitution. James Madison drafted what would ultimately become the Fourth Amendment. In his final draft, which he submitted to the Committee of Eleven of the House of Representatives, Madison proposed an amendment which would read: "The rights of the people to be secured in their persons, their houses, their papers, and their other property, from all unreasonable searches and seizures, shall not be violated . . . ." Annals of Cong., 1st Cong., 1st Sess., p. 452 (emphasis added); see also Nelson B. Lasson, The History and Development of the Fourth Amendment to the United States Constitution 310 & n.77 (1937). The Committee of Eleven altered Madison's draft by replacing "other property" with "effects," and it was that revised language that ultimately became part of the Constitution. Because there are no records of the Committee's deliberations, it is unclear precisely why that change was made.

The effect of that change is clear however; it narrowed the scope of the amendment. "Other property" would potentially have applied to all privately owned property, both personal and real. By contrast, "effects" referred only to personal property, and particularly to goods or moveables. See Dictionarium Britannicum (Nathan Baily ed., 1730) (defining "effects" as "the goods of a merchant, tradesman, &c"); Samuel Johnson, A Dictionary of the English Language (1755) (defining the plural of "effect" as "Goods; moveables"); 1 Noah Webster, First Edition of an American Dictionary of the English Language (1828) (defining "effect" as "in the plural, effects are goods; moveables; personal estate"). The Supreme Court has since confirmed that "the Framers would have understood the term 'effects' to be limited to personal, rather than real, property." *Oliver v. United States Maine*, 466 U.S. 170, 177 n.7, 80 L. Ed. 2d 214, 104 S. Ct. 1735 (1984);

see also id. at 177 (noting that "the term 'effects' is less inclusive than 'property'"). Thus, it appears reasonably clear that, in 1791 when the Fourth Amendment was ratified, the term "effects" meant goods and moveables.

Under the common law as it existed in 1791, see *Wyoming v. Houghton*, 526 U.S. 295, 299, 143 L. Ed. 2d 408, 119 S. Ct. 1297 (1999) ("In determining whether a particular governmental action violates [the Fourth Amendment], we inquire first whether the action was regarded as an unlawful search or seizure under the common law when the Amendment was framed."), dogs were not treated as property for most purposes. See, e.g., *Citizens' Rapid-Transit Co. v. Dew*, 100 Tenn. 317, 45 S.W. 790, 791 (Tenn. 1898) ("It is true that at common law a dog was not considered as property. . . ."); Harold W. Hannah, Animals as Property Changing Concepts, 25 S. Ill. U. L.J. 571, 575 (2001) (noting that "at common law dogs were not regarded as property"). For example, there was no commonlaw crime of larceny for taking and carrying away a dog. See *Mullaly v. People*, 86 N.Y. 365, 366 (1881). This treatment of dogs under the common law at the time appears to have been a reflection of the sentiment that dogs "were base in their nature and kept merely for whims and pleasures" and thus possessed no intrinsic value. *Dew*, 45 S.W. at 791; see *Mullaly*, 86 N.Y. at 366-67. At the same time that dogs enjoyed only a limited property status, however, an owner of a dog could bring an action of trover for conversion of a dog, and dogs would pass as assets to the executor or administrator of a deceased owner. See *Mullaly*, 86 N.Y. at 366; see also 4 William Blackstone, Commentaries *236 (stating that a dog owner possessed "a base property" in his dogs that was sufficient to "maintain a civil action for the loss of them").

Thus, at least at the federal level, the prevailing understanding through much of the nineteenth century was that dogs were "property," even if only qualifiedly so. See *Nicchia v. People of State of New York*, 254 U.S. 228, 230, 65 L. Ed. 235, 41 S. Ct. 103, 19 Ohio L. Rep. 2 (1920) ("Property in dogs is of an imperfect or qualified nature and they may be subjected to peculiar and drastic police regulations by the state without depriving their owners of any federal right."); *Sentell v. New Orleans & C.R. Co.*, 166 U.S. 698, 701, 41 L. Ed. 1169, 17 S. Ct. 693 (1897) ("Property in dogs is of an imperfect or qualified nature, and [ ] they stand, as it were, between animals ferae naturae, in which until killed or subdued, there is no property, and domestic animals, in which the right of property is perfect and complete."). As a result, at the time of the Founding, and for a period thereafter, it is unclear whether a dog would have been considered to be an "effect," i.e., a good or moveable. For, although the dog was treated as property for some purposes, it was generally valueless in the eyes of the law.

However, while dogs may not have been considered goods or moveables in every respect, their qualified status as property did render unto their owners interests similar to those asserted by the plaintiffs today. As discussed, at common law a dog owner could bring an action of trover for conversion of a dog. See *Jones v. Craddock*, 210 N.C. 429, 187 S.E. 558, 559 (N.C. 1936) ("Even in the days of Blackstone, while it was declared that property in a dog was 'base property,' it was nevertheless asserted that such property was sufficient to maintain a civil action for its loss."). The present action by the plaintiffs, though brought under a federal statute pursuant to a constitutional amendment, is not in

nature unlike a common-law action for trover based on the officers' conversion of their dogs. In this way, the plaintiffs clearly assert a right with an analog at common law, a fact which strongly suggests that, at least to this extent, dogs would have been protected as "effects" within the meaning of the Fourth Amendment at common law.

This presumptive conclusion that dogs would have been protected as "effects" as that term was used at the time of the Framing, and therefore should be considered effects within the meaning of the Fourth Amendment, is reinforced by the Supreme Court precedent by which we are bound. Reviewing the cases in which the Court has addressed the meaning of "effects," it becomes apparent that the Court has treated the term "effects" as being synonymous with personal property. In *United States v. Place*, 462 U.S. 696, 77 L. Ed. 2d 110, 103 S. Ct. 2637 (1983), the Supreme Court concluded that personal luggage was an "effect" within the meaning of the Fourth Amendment. See also *Bond v. United States*, 529 U.S. 334, 336-37, 146 L. Ed. 2d 365, 120 S. Ct. 1462 (2000). While Place obviously does not hold that the term "effects" is coterminous with the universe of personal property, the Court's discussion does suggest that all seizures of personal property are subject to the Fourth Amendment's requirements. See *Place*, 462 U.S. at 701 (stating that "the Court has viewed a seizure of personal property as per se unreasonable within the meaning of the Fourth Amendment unless it is accomplished pursuant to a judicial warrant issued upon probable cause and particularly describing the items to be seized"). In *United States v. Jacobsen*, 466 U.S. 109, 80 L. Ed. 2d 85, 104 S. Ct. 1652 (1984), the Court considered whether a wrapped parcel containing cocaine, which was intercepted during shipment, was an "effect." The Court held that "when the wrapped parcel . . . was delivered to the private freight carrier, it was unquestionably an 'effect' within the meaning of the Fourth Amendment. Letters and other sealed packages are in the general class of effects in which the public at large has a legitimate expectation of privacy. . . ." Id. at 114. As in Place, the Court's discussion in *Jacobsen* implies that it considers the term "property" to be coextensive with the term "effects." See id. at 113 (explaining that "[a] 'seizure' of property occurs when there is some meaningful [**22] interference with an individual's possessory interests in that property").

Jacobsen, and the cases which preceded it, could be read to protect certain personal property only insofar as the possessor had a legitimate privacy expectation in that property, but in *Soldal v. Cook County*, Ill., 506 U.S. 56, 121 L. Ed. 2d 450, 113 S. Ct. 538 (1992), the Court clarified that the Fourth Amendment's protections extend to property in which there is no particular privacy or liberty interest. "We thus are unconvinced that any of the Court's prior cases supports the view that the Fourth Amendment protects against unreasonable seizures of property only where privacy or liberty is also implicated." Id. at 65; see also id. at 62 (noting that "our cases unmistakably hold that the [Fourth] Amendment protects property as well as privacy"). *Soldal* thereby removed a potentially significant restriction on the types of property which the Fourth Amendment protects. The Court did state that "the [Fourth] Amendment does not protect possessory interests in all kinds of property," id. at 62 n.7, but the only example the Court gave of a case involving an unprotected possessory interest was its decision in *Oliver v. United States Maine*. In Oliver, the Court held only that open fields are not "effects" within the meaning of the Fourth Amendment,

reaffirming Justice Holmes' opinion in *Hester v. United States*, 265 U.S. 57, 68 L. Ed. 898, 44 S. Ct. 445 (1924). See *Oliver*, 466 U.S. at 176. As discussed above, the Court also stated that the Framers would have understood the term "effects" to reference personal, as opposed to real, property. Id. at 177 n.7. Thus, the Supreme Court's cases appear to treat the scope of "effects" as congruent with the scope of personal property, and, after Soldal, it is clear that there need be no nexus between a privacy or liberty interest and the possessory interest for Fourth Amendment protection to attach.

The Court also explained that the Fourth Amendment's protections do not change based on the nature of the legal context, i.e., it applies in the civil as well as a criminal context, *Soldal*, 506 U.S. at 67, or on the motive of the government actor engaging in the search or seizure, id. at 69.

These cases confirm, we believe, the conclusion that dogs merit protection under the Fourth Amendment. The common law personal property rights that attached to dogs were at least as strong as those that have been held sufficient by the Court to qualify other objects as "effects" entitled to Fourth Amendment protection. For example, the common law property interest in dogs was certainly as great as the possessory interest a person has been held by the Court to enjoy today in illegal narcotics. See *Jacobsen*, 466 U.S. at 124-25 (concluding that destruction by officer of trace amount of cocaine for testing purposes "affected respondents' possessory interest protected by the [Fourth] Amendment" and thereby constituted a seizure). And, of course, that there may be no privacy interest in dogs is no bar to their treatment as effects, since *Soldal* explains that such an interest is not an eligibility requirement for Fourth Amendment protection.

For that matter, the police officers' purpose in shooting the dogs is also irrelevant to their status under the Fourth Amendment. See *Soldal*, 506 U.S. at 69.

Accordingly, on the strength of the Constitution's text, of history, and of precedent, we hold that the plaintiffs' privately owned dogs were "effects" subject to the protections of the Fourth Amendment.

That dogs are, for Fourth Amendment purposes, "effects" under the analysis employed in the Supreme Court cases surveyed above is consistent with the fact that, as the common and statutory law in the states has developed, dogs have come to be recognized as property even under state law. While not recognized at the federal level for some time, early in the nineteenth century dogs began to gain status under state property laws, often by virtue of statutory enactment but also through the evolution of the common law. So it was that in New York, the Court of Appeals held in the 1881 case of *Mullaly v. New York* that the old common-law rule that there could be no larceny of a dog had been changed by legislation. See *Mullaly*, 86 N.Y. at 368. The Court of Appeals reasoned that "the artificial reasoning upon which these [old common-law] rules were based are wholly inapplicable to modern society. . . . Large amounts of money are now invested in dogs and they are largely the subject of trade and traffic. In many ways they are put to useful service, and so far as pertains to their ownership as personal property, they possess all the attributes of other personal property." Id. at 367-68. Of particular note, the Court of

Appeals in *Mullaly* concluded that dogs were "personal property," which was defined in New York as "'goods, chattels, effects, evidences of rights of action,' and certain written instruments." Id. at 368 (emphasis added). By 1898, the Supreme Court of Tennessee could confidently state that the old common-law rules denying treatment as property to dogs had been abandoned and that "dogs have now a distinct and well-established status in the eyes of the law." *Dew*, 45 S.W. at 791.

North Carolina is no stray when it comes to the trend in favor of treating dogs as personal property; indeed, North Carolina appears to have been at the forefront of that trend. In the case of *Dodson v. Mock*, 20 N.C. 282 (1838), the Supreme Court of North Carolina considered a civil action by a plaintiff to recover damages for the killing of his dog. The defendant contended that the dog was not property because it had no value, and therefore no action would lie for an injury to it. The Supreme Court of North Carolina rejected that argument and held that "dogs belong to that class of domiciled animals which the law recognises as objects of property, and whatever it recognises as property, it will protect from invasion by a civil action on the part of the owners." Id.; see also, e.g., *State v. Smith*, 156 N.C. 628, 72 S.E. 321, 322 (N.C. 1911) (referring to dogs as "personal property"); *Jones*, 187 S.E. at 559 ("While from the earliest times dogs have been the companions of man, for a long period their legal status was of low degree, and it was formerly held they were not property, and hence not the subjects of larceny. But in more recent times this ancient doctrine has given place to the modern view that ordinarily dogs constitute species of property, subject to all the incidents of chattels and valuable domestic animals."). Today, dogs are also treated as personal property by the statutes of North Carolina. See, e.g., N.C. Gen. Stat. § 14-81 (treating larceny of dogs as a property offense); id. § 67-4.1(a)(3) (defining "owner" as "any person or legal entity that has a possessory property right in a dog").

B.

Given our holding that the dogs at issue in this case were "effects" within the meaning of the Fourth Amendment, we must next consider whether the officers' actions in the case at bar constituted "seizures" of the dogs and, if so, whether those seizures were constitutionally permissible. Turning to the former question, we think it clear that the officers' actions constituted a seizure of the dogs. A Fourth Amendment "seizure" of personal property occurs when "there is some meaningful interference with an individual's possessory interests in that property." *Jacobsen*, 466 U.S. at 113. Destroying property meaningfully interferes with an individual's possessory interest in that property by changing a temporary deprivation into a permanent deprivation. See id. at 124-25. Thus, when the officers destroyed the dogs, they "seized" the plaintiffs' "effects." See *Brown*, 269 F.3d at 210; *Fuller*, 36 F.3d at 68.

In order for the officers' warrantless seizures of the plaintiffs' dogs to be constitutional, the seizures must have been "reasonable." A seizure of personal property conducted without a warrant is presumptively unreasonable. See *Place*, 462 U.S. at 701. Under the basic reasonableness calculus, a court must "balance the nature and quality of the intrusion on the individual's Fourth Amendment interest against the importance of the

governmental interests alleged to justify the intrusion." Id. at 703. The reasonableness calculus is objective in nature; it does not turn upon the subjective intent of the officer. Cf. *Graham v. Connor*, 490 U.S. 386, 397, 104 L. Ed. 2d 443, 109 S. Ct. 1865 (1989) (stating, in the context of a Fourth Amendment excessive force claim, that "the question is whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation"). The Supreme Court has admonished that "the calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments -- in circumstances that are tense, uncertain, and rapidly evolving -- about the amount of force that is necessary in a particular situation." Id. at 396-97.

Finally, in judging the reasonableness of the officers' actions, we assess only the reasonableness of their actions vis-a-vis the dogs; we do not consider potential harm to third parties. Cf. *Howerton v. Fletcher*, 213 F.3d 171, 175 (4th Cir. 2000) (holding that the "risk posed to third parties by the official use of force is not to be considered" in determining whether an official used excessive force as against a particular plaintiff). The task of this court is to put itself into the shoes of the officers at the time the actions took place and to ask whether the actions taken by the officers were objectively unreasonable. Engaging in that exercise in the instant case can render only the conclusion that, in every incident, the actions of Officers Moxley and Perdue were objectively reasonable. Before delving into the peculiar facts of each incident, we note the overarching interests involved. On the one hand, the public interests in this case are significant. The state of North Carolina and the City of High Point have a substantial interest in protecting their citizens from all the dangers and nuisances associated with dogs. Dogs may harass or attack people, livestock, or other pets. Dogs can maim or even kill. Dogs may also spread disease or cause property damage. On the other hand, the private Fourth Amendment interests involved are appreciable. Dogs have aptly been labeled "Man's Best Friend," and certainly the bond between a dog owner and his pet can be strong and enduring. Many consider dogs to be their most prized personal possessions, and still others think of dogs solely in terms of an emotional relationship, rather than a property relationship.

The case before us does not present both interests at their zenith, however. When a dog leaves the control of his owner and runs at large in a public space, the government interest in controlling the animal and preventing the evils mentioned above waxes dramatically, while the private interest correspondingly wanes. Put simply, while we do not denigrate the possessory interest a dog owner has in his pet, we do conclude that dog owners forfeit many of these possessory interests when they allow their dogs to run at large, unleashed, uncontrolled, and unsupervised, for at that point the dog ceases to become simply a personal effect and takes on the nature of a public nuisance. This understanding is reflected in High Point Ordinance § 12-2-16, which provides that when a dog is running at large it may be tranquilized or even killed if it cannot be safely taken up and impounded.

With that understanding, we turn to the particular facts before us. Again, it is undisputed that in each incident, the dog or dogs involved were running at large. In the Larsen Incident, Officer Perdue was confronted with a Rottweiler, a large and dangerous breed

of dog, that was loose and had been roaming the neighborhood. The dog had already attacked one person in the neighborhood, and Perdue would have understood from his conversations with people in the neighborhood that the dog was aggressive and dangerous. While the dog did not actually attack Officer Perdue, it did move back toward the road where it would once again pose a danger to the neighborhood. Perdue acted to stop the dog from escaping by the one means available to him at that instant -- a shotgun. While, in hindsight, it may appear that Perdue had other options available, we are not prepared to dispute his judgment at the moment, confronted as he was by a large, dangerous Rottweiler [**33] that had already attacked one person in the neighborhood.

Officer Perdue's actions in the Frye Incident were likewise reasonable. He was confronted not simply by a single dog, but by a pack of five dogs that had attacked persons in the neighborhood and another officer. Indeed, one of the dogs had attacked Perdue himself, attempting to jump into his truck window. When he exited his vehicle, the pack charged him. Perdue was entitled to shoot the dogs in self-defense. The only fact that weighs against the reasonableness of Perdue's actions is that three of the dogs were young and not particularly large. While that fact may be significant when an officer confronts a smaller dog one-on-one, it is of less moment when the officer is attacked by a pack of dogs. Obviously, the danger presented by a dog increases significantly when that dog joins others in a pack.

Officer Moxley's actions in the Wallace Incident were also clearly reasonable. There, the officer was confronted with a dog that had already attacked and wounded one person in the neighborhood. Moments after Moxley exited his truck, the animal attacked him. Moxley acted reasonably in defending himself using the shotgun he was carrying at the time.

The Altman Incident presents a somewhat closer case since Hot Rod had not actually attacked a person. We nevertheless conclude that Officer Moxley's actions were reasonable. Hot Rod was part pit bull, and pit bulls, like Rottweilers, are a dangerous breed of dog. While Hot Rod had not attacked anyone, his behavior toward the meter reader was sufficiently aggressive to cause Evans to call the police. Responding to that call, Officer Moxley was immediately confronted with a fleeing dog. It was not unreasonable for him to conclude, in that split second as Hot Rod sped away, that he could not safely capture the animal. Thus, as High Point Ordinance § 12-216(b) instructs him to do, Officer Moxley attempted to and succeeded in killing the animal, thereby removing, for all Moxley knew, a potentially dangerous pit bull from the public streets. Because none of the incidents involved objectively unreasonable action by the officers, we therefore hold that the officers committed no unreasonable seizure in violation of the Fourth Amendment. It is important to note that we are not saying the officers' responses in these cases were the best possible responses. We are only saying that, under the circumstances existing at the time the officers took the actions and in light of the facts known by the officers, their actions were objectively reasonable. In retrospect, it may have been preferable if the officers attempted first to use nonlethal force in every instance. Such nonlethal force may have been successful, but, tellingly, it may not have been. Even dog owners can find their pets to be unpredictable at times. How much more

so a person who is not intimately familiar with the behavior of the particular animal (as neither Officers Perdue nor Moxley were in any of these cases) and who is forced to confront the dog for the first time in an unsupervised, unenclosed environment. n9

In one incident -- the Wallace Incident -- Officer Moxley had encountered the dog, Sundance, before. However, Moxley's prior encounters with Sundance had given him the impression that the dog was aggressive. As a result, that prior experience only supports the reasonableness of Moxley's response when Sundance attacked him.

We are also not passing on the results reached by the other circuits that concluded, on the facts before them, that the destruction of pet dogs was unreasonable. The fact that all the dogs in the instant case were running at large, uncontrolled and with no owner looking on, renders this case distinguishable from the Third Circuit's decision in *Brown* and the Ninth Circuit's decision in *Fuller*. In *Brown*, the owner of the dog was looking on and willing to assert control over the animal. See *Brown*, 269 F.3d at 211 (concluding that a state may not "consistent with the Fourth Amendment, destroy a pet when it poses no immediate danger and the owner is looking on, obviously desirous of retaining custody"). In *Fuller*, the owners of the dog were standing in their front yard with the dog when it was shot. See *Fuller*, 36 F.3d at 66. The private Fourth Amendment possessory interests are obviously stronger when, although the dog is unleashed, the owner is nearby and attempting to assert control over the dog. And the public interest in control of the dog is correspondingly lessened when a private owner is available to assert control.

High Point has also appealed the denial of summary judgment. Normally, High Point's appeal would be improper because the denial of summary judgment is not a final order subject to interlocutory appeal and High Point cannot defend on the basis of qualified immunity. However, our resolution of the claims against Officers Moxley and Perdue fully resolves the claims against High Point as well, since a municipality cannot be liable in the absence of a constitutional violation by one of its agents. See *City of Los Angeles v. Heller*, 475 U.S. 796, 799, 89 L. Ed. 2d 806, 106 S. Ct. 1571 (1986). For that reason, we find that the issues raised by High Point on appeal are "inextricably intertwined" with those raised by the officers. Accordingly, we will exercise pendent appellate jurisdiction over High Point's appeal and reverse the district court's denial of summary judgment as to the City. See *Moore v. City of Wynnewood*, 57 F.3d 924, 929 (10th Cir. 1995) (concluding that pendant appellate jurisdiction was appropriate because resolution of claims against officer fully resolved the claims against the municipality).

Given our conclusion that the officers' actions did not violate the plaintiffs' Fourth Amendment rights, we need not reach the second step of the qualified immunity analysis and determine whether the right was clearly established.

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