

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. _____

FRANK AGAZIO,
JULIA AGAZIO,
MARIA AGAZIO, a minor, by and through her next friends Frank and Julia Agazio,

Plaintiffs

v.

COMMERCE CITY, COLORADO, a municipal corporation
COMMERCE CITY POLICE DEPARTMENT,
COMMERCE CITY ANIMAL CONTROL,
COMMERCE CITY POLICE OFFICER SUZANNE BARBER (CC2746), in her official
and individual capacity,
COMMERCE CITY POLICE OFFICER KENDALL GROVE (CC1088), in his official
and individual capacity,
ADAMS COUNTY COMMUNICATION CENTER, INC.

Defendants.

COMPLAINT AND JURY DEMAND

COMES NOW, Plaintiffs Frank Agazio, Julia Agazio, and Maria Agazio, by and through their counsel, The Animal Law Center, and hereby file this Complaint and Jury Demand. Plaintiffs respectfully allege as follows:

INTRODUCTION

1. Plaintiffs bring this civil rights action pursuant to 42 U.S.C. §§ 1983 and 1988 for relief through compensatory damages and attorney's fees stemming from Defendants' violations of Plaintiffs' rights guaranteed by the Fourth and

Fourteenth Amendments to the Constitution of the United States. Defendants' conduct under color of state and city law proximately caused the deprivation of Plaintiffs' federally protected rights. Plaintiffs seek relief through compensatory damages, and attorney's fees. Plaintiffs seek damages in excess of \$75,000.

JURISDICTION AND VENUE

2. This action arises under the Constitution and laws of the United States including Article III, Section 1 of the United States Constitution and 42 U.S.C. § 1983. Jurisdiction is conferred on this Court pursuant to 28 U.S.C. §§ 1331 and 1343. This Court has authority to grant the declaratory relief requested herein pursuant to 28 U.S.C. § 2201.
3. Venue is proper in the District of Colorado pursuant to 28 U.S.C. § 1391. All of the events alleged herein occurred within the state of Colorado, and all of the parties are residents of the state.
4. Jurisdiction supporting Plaintiffs' claim for attorney's fees is conferred by 42 U.S.C. § 1988.

PARTIES

5. Plaintiffs Frank Agazio, Julia Agazio, and Maria Agazio (collectively "Plaintiffs" "the Agazios" or "Plaintiffs Agazio") are individuals residing in Commerce City, Adams County, Colorado. At all times pertinent Plaintiffs resided in Commerce City, Adams County, Colorado.
6. Frank Agazio and Julia Agazio are the natural parents of Maria Agazio, a minor.

7. Defendant Commerce City is a municipality incorporated under the laws of the State of Colorado for purposes of liability under 42 U.S.C. § 1983. It carries out law enforcement activities through the Commerce City Police Department.
8. Defendant Commerce City Police Department is a department of Defendant Commerce City, a municipality incorporated under the laws of the State of Colorado for purposes of liability under 42 U.S.C. § 1983.
9. Defendant Commerce City Animal Control is a department of Defendant Commerce City, a municipality incorporated under the laws of the State of Colorado for purposes of liability under 42 U.S.C. § 1983.
10. Defendant Adams County Adams County Communication Center, Inc. (“Adcom 911” or “Dispatch”) is a Colorado non-profit corporation governed by thirteen governmental agencies in Adams County, Colorado. Adcom 911 serves thirteen police and fire emergency service agencies and is incorporated under the laws of the State of Colorado for purposes of liability under 42 U.S.C. § 1983.
11. Defendant Commerce City Police Officer Suzanne Barber (CC2746) (“Officer Barber”) was at all times relevant to this complaint duly appointed and sworn as a police officer working for the Commerce City Police Department. She is sued individually and she is also sued in her official capacity. Officer Barber acted under color of law in the course of carrying out the actions and omissions that violated Plaintiffs’ rights.
12. Defendant Commerce City Police Officer Kendall Grove (CC1088) (“Officer Grove”) was at all times relevant to this complaint duly appointed and sworn as a police officer working for the Commerce City Police Department. He is sued

individually and he is also sued in his official capacity. Officer Grove acted under color of law in the course of carrying out the actions and omissions that violated Plaintiffs' rights.

13. All Defendants acted under color of state and city law. Alternatively, or in combination, Defendants acted under color of federal law.

14. All of the events described herein occurred in Commerce City, County of Adams, and State of Colorado.

FACTUAL BACKGROUND

15. On or about February 3, 2010, at approximately 3:00pm, Plaintiff Frank Agazio accidentally misdialed 9-1-1.

16. Immediately thereafter, Plaintiff Frank Agazio received a telephone call from Dispatch and Mr. Agazio informed the dispatch officer that there was no emergency and that the 9-1-1 call was accidental.

17. Nevertheless, Dispatch still decided to send an officer to investigate and did not inform the Agazios that a police officer would be en route.

18. On or about February 3, 2010, at approximately 3:11 p.m., Officer Barber responded to Plaintiffs' home located at 8705 Rosemary Street, Commerce City, Colorado 80022.

19. Upon her arrival, Officer Barber walked through Plaintiffs' gated fence, onto Plaintiffs' property, and into Plaintiffs' yard, which was clearly marked with "NO TRESPASSING" signs, with her gun already drawn.

20. Plaintiffs' home is located on a busy street and at the time of Officer Barber's arrival, traffic was stopped on the street, including a school bus. Further, Plaintiffs' property contains a large concrete driveway.

21. After entering Plaintiffs' yard, Officer Barber observed Plaintiffs three companion animals, dogs "Zoey", "Bella" and "Daisy."

22. Officer Barber then shot and killed Plaintiffs' mixed breed dog "Zoey" without cause or due process of law.

23. Plaintiff Maria Agazio, thirteen years of age, witnessed all events and screamed and then fainted when she saw Officer Barber shoot her beloved dog "Zoey."

24. After hearing the gunshot, Plaintiff Frank Agazio went out into his yard to determine the source of the gunshot. At this time, Officer Barber pointed her weapon at Frank Agazio and demanded that he move back, again without cause, putting him in imminent fear for his life. Notably, the safety on her weapon was off and her finger was on the trigger.

25. Around the same time, two additional Commerce City Police Officers, including Officer Grove, arrived on motorcycle.

26. Plaintiff Julia Agazio, observed these events through the window of Plaintiffs' residence and then came out of the house after hearing the gunshot and seeing her husband threatened.

27. At the time, Plaintiff Julia Agazio was recovering from extensive abdominal surgery, was under a physician's care, and restricted to bed rest.

28. Officer Grove forcefully grabbed Plaintiff Julia Agazio without cause, and stretched both of her hands over her head, causing her severe pain and injury and threatened her with arrest.
29. Officer Grove also threatened to spray Plaintiffs Frank and Julia Agazio with mace.
30. Police officers failed to investigate or inspect Plaintiffs' home, after claiming that they arrived to investigate a 911 call.
31. Approximately ten to fifteen minutes after the shooting, Animal Control Officer David Nickolaus (CC3032) arrived on the scene and photographed "Zoey's" dead body.
32. No veterinary care was given to "Zoey."
33. Eventually, Officer Nickolaus removed "Zoey's" body and transported the dog for cremation. Plaintiffs had to wait weeks for information concerning "Zoey's" remains and were forced to pay out of their own pockets for the cremation.

FIRST CLAIM FOR RELIEF

(42 U.S.C. § 1983 Fourth and Fourteenth Amendments Violation)

34. Plaintiffs incorporate all other paragraphs of this Complaint for purposes of this Claim.
35. This Claim is brought against Defendant Officer Barber.
36. As described herein, Officer Barber, while acting under color of law, unlawfully and without due process of law deprived the Agazios of the securities, rights, privileges, liberties, and immunities secured by the Constitution of the United States of America, including their rights to freedom from unlawful entry of

property as guaranteed by the Fourth Amendment to the Constitution of the United States of America and 42 U.S.C. §1983 in that the police meaningfully entered onto her land.

37. Officer Barber wantonly, knowingly, recklessly, and excessively used unnecessary force without any reasonable justification or probable cause in drawing her weapon and fatally shooting “Zoey.” These actions were in violation of the Plaintiffs’ rights under the Fourth and Fourteenth Amendments to the Constitution of the United States.

38. In her official capacity as a law enforcement officer, under color of state law, and acting within the ordinary course and scope of her employment, or, alternatively, in her individual capacity, Officer Barber fatally shot “Zoey” without any legal right to do so.

39. Officer Barber’s conduct was further reckless given the higher chance of ricochet fire due to the concrete driveway close to Plaintiffs’ home and the traffic on Plaintiffs’ busy street.

40. As a direct and proximate result of Officer Barber’s conduct, the Plaintiffs have been damaged in various respects including, without limitation, being permanently deprived of the property value and companionship of their dog, “Zoey,” as well as suffering severe mental and physical anguish due to the egregious nature of their loss, all attributable to the deprivation of their constitutional and statutory rights guaranteed by the Fourth and Fourteenth Amendments of the Constitution of the United States and protected under 42 U.S.C. § 1983.

WHEREFORE, Plaintiffs pray for judgment against Defendant Barber as follows:

- a. actual damages in excess of \$150,000.00;
- b. costs and reasonable attorneys fees, and
- c. such other relief as may be awarded by the Court.

SECOND CLAIM FOR RELIEF

(42 U.S.C. § 1983 Fourth and Fourteenth Amendments Violation)

41. Plaintiffs incorporate all other paragraphs of this Complaint for purposes of this claim.

42. This Claim for Relief is being brought against Commerce City and the Commerce City Police Department.

43. Acting under color of law and pursuant to official policy, custom or widespread practice, Commerce City and its Police Department knowingly, recklessly or with deliberate indifference and callous disregard of Plaintiffs' rights, and the rights of dog owners in Commerce City, failed to instruct, supervise, control, equip, train, or discipline on a regular and continuing basis, police officers in their duties to refrain from unlawfully killing dogs and using excessive force against dogs that pose no immediate danger.

44. Defendant Commerce City had specific knowledge of said policy, custom or practice and exhibited a deliberate indifference to the unreasonable risk of property damage or loss which said policy, custom or practice posed.

45. Commerce City and its Police Department had an affirmative duty to prevent, or aid in preventing, the commission of such wrongs. Instead, knowingly,

recklessly, or with deliberate indifference and callous disregard of Plaintiffs' rights and the rights of dog owners in Commerce City, these defendants failed and refused to do so.

46. Commerce City and its Police Department directly or indirectly, under color of law, approved or ratified the unlawful, deliberate, malicious, reckless, or wanton conduct of its police officers as described above.

47. As a direct and proximate result of such conduct, Plaintiffs have been damaged in various respects including, without limitation, being permanently deprived of the property value and companionship of their dog, "Zoey" without the due process of law, as well as suffering severe mental and physical anguish due to the egregious nature of their loss, all attributable to the deprivation of their constitutional and statutory rights guaranteed by the Fourth and Fourteenth Amendments of the Constitution of the United States and protected under 42 U.S.C. § 1983.

WHEREFORE, Plaintiffs pray for judgment against Commerce City as follows:

- a. actual damages in excess of \$150,000.00, and
- b. such other relief as may be awarded by the Court.

THIRD CLAIM FOR RELIEF

(Intentional Infliction of Severe Emotional Distress)

48. Plaintiffs incorporate all other paragraphs of this Complaint for purposes of this claim.

49. This claim is being brought against Defendants Commerce City, Commerce City Police Department, Commerce City Animal Control, and Commerce City Police Officer Barber.

50. The decision to shoot a companion animal that had not been identified as vicious or aggressive and who did not injure or threaten Officer Barber or anyone else, was extreme and outrageous conduct.

51. Acting under the color of law, Commerce City and its police officers and Police Department knowingly, recklessly or with deliberate indifference and callous disregard of Plaintiffs' rights failed to instruct, supervise, train, or equip its officers in their duties to a dog that had been shot and severely wounded by one of its officers.

52. Commerce City Police Officers intentionally failed to contact Commerce City Animal Control or any veterinarians to render emergency medical care to "Zoey."

53. Further, no timely information was provided to the Plaintiffs about the status and location of "Zoey's" remains.

54. Shooting and killing Plaintiffs' companion animal "Zoey" in the presence of Plaintiff Maria Agazio, thirteen years of age, was extreme and outrageous conduct. Plaintiff Maria Agazio suffered from extreme emotional distress physical anguish and consequently required trauma counseling as a result.

55. As a direct and proximate result of such conduct, Plaintiffs have been damaged in various respects including, without limitation, suffering severe emotional distress due to the intentional actions of Commerce City, Commerce City Police

Department, Commerce City Police Officers, and Commerce City Animal Control.

WHEREFORE, Plaintiffs pray for judgment against Defendants as follows:

- a. actual damages in excess of \$150,000.00;
- b. costs and reasonable attorneys fees, and
- c. such other relief as may be awarded by the Court.

FOURTH CLAIM FOR RELIEF

(Negligent Infliction of Severe Emotional Distress)

56. Plaintiffs incorporate all other paragraphs of this Complaint for purposes of this claim.

57. This claim is being brought against Defendants Commerce City, Commerce City Police Department, Commerce City Animal Control, and Commerce City Police Officer Barber.

58. The decision to shoot a companion animal that had not been identified as a vicious or aggressive animal, and who did not injure or threaten Officer Barber or anyone else, was extreme and outrageous conduct.

59. Acting under the color of law, Commerce City, its Police Department, and officers knowingly, recklessly or with deliberate indifference and callous disregard of Plaintiffs' rights failed to instruct, supervise, train, or equip its officers in their duties to a dog that had been shot and severely wounded by one of its officers.

60. Commerce City, its Police Department, and officers involved knew or should have known that shooting and severely wounding a companion animal and then

failing to render it medical assistance in a timely fashion would cause the animal's owner severe emotional distress.

61. Shooting and killing Plaintiffs' companion animal "Zoey" in the presence of Plaintiff Maria Agazio, thirteen years of age, was extreme and outrageous conduct. Plaintiffs' daughter required trauma counseling as a result and suffered from extreme emotional and physical distress.

62. As a direct and proximate result of such conduct, Plaintiffs have been damaged in various respects including, without limitation, suffering severe emotional and physical distress due to the intentional actions of Commerce City, Commerce City Police Department, Commerce City Police Officers, and Commerce City Animal Control.

WHEREFORE, Plaintiffs pray for judgment against Defendants as follows:

- a. actual damages in excess of \$150,000.00;
- b. costs and reasonable attorneys fees, and
- c. such other relief as may be awarded by the Court.

FIFTH CLAIM FOR RELIEF

(Gross Negligence)

63. Plaintiffs incorporate all other paragraphs of this Complaint for purposes of this claim.

64. This claim is being brought against Defendant Officer Barber in her individual and official capacity.

65. Officer Barber, who fatally shot the Plaintiffs' dog, had a duty to the Plaintiffs to employ a reasonable amount of judgment, care and skill as is ordinarily possessed by members of law enforcement.
66. Officer Barber knew or should have known that shooting a family dog on the dog owner's private property, without justification, and in the presence of a thirteen year old child is not an acceptable police practice.
67. Officer Barber knew or should have known that shooting a dog in this manner would cause it to suffer great bodily injury or die.
68. Officer Barber knew or should have know that she had no legal right to enter a gated fence clearly marked with "no trespassing" signs and walk nearly 40 yards onto the Plaintiffs' property, with a drawn weapon.
69. Officer Barber knew or should have known that attempting to contact the property owners in the course of her investigation of the 9-1-1 call was the appropriate first step in determining whether an emergency existed, and there was no information that there had been, or would be any threat or use of violence at these premises.
70. The above-described actions demonstrate a deliberate intention to harm and an utter indifference to both the welfare of the Plaintiffs and their dog, "Zoey."
71. The acts and omissions of Officer Barber were the direct and proximate cause of the internal bleeding and injuries that resulted in "Zoey's" death.
72. As a direct and proximate result of such conduct, the Plaintiffs have been damaged in various respects including, without limitation, being permanently deprived of the property value and companionship of their dog, "Zoey," as well as suffering severe mental anguish due to the egregious nature of their loss.

WHEREFORE, Plaintiffs pray for judgment against Defendant Barber as follows:

- a. actual damages in excess of \$150,000.00; and
- b. such other relief as may be awarded by the Court.

SIXTH CLAIM FOR RELIEF

(28 U.S.C. § 1983 – Excessive Use of Force)

73. Plaintiffs incorporate all other paragraphs of this Complaint for purposes of this claim.

74. Officer Barber, in her individual and official capacities, and while acting under color of law, used excessive force when, as her first and only line of action, she, with her previously drawn pistol, shot Plaintiffs’ companion animal “Zoey” who was not behaving in an aggressive manner and was standing more than fifteen feet away from Officer Barber.

75. Although Officer Barber was equipped with mace and other non-lethal methods of defense, she deliberately chose not to use those methods but rather to immediately, without provocation or justification shoot and kill Plaintiffs thirty pound dog “Zoey.”

76. Defendants’ conduct proximately caused Plaintiff significant injuries, damages, and losses.

WHEREFORE, Plaintiffs pray for judgment against Defendants as follows:

- a. actual damages in excess of \$150,000.00;
- b. costs and reasonable attorneys fees, and
- c. such other relief as may be awarded by the Court.

SEVENTH CLAIM FOR RELIEF

(Battery)

77. Plaintiffs incorporate all other paragraphs of this Complaint for purposes of this claim.

78. Officer Grove, in his individual and official capacity and while acting under color of law, intended to make harmful contact with Plaintiff Julia Agazio and in fact, did, assault Plaintiff Julia Agazio when he forcefully grabbed Plaintiff Julia Agazio, without lawful cause.

79. Plaintiff Julia Agazio had recently undergone an extensive, invasive abdominal surgery and was experiencing pain and great difficulty in moving.

80. Because of Officer Grove's assault, Plaintiff Julia Agazio had increased blood output and a delayed recovery, plus severe emotional distress and physical pain.

WHEREFORE, Plaintiffs pray for judgment against Officer Grove as follows:

- a. actual damages in excess of \$150,000.00;
- b. costs and reasonable attorneys fees, and
- c. such other relief as may be awarded by the Court.

EIGHTH CLAIM FOR RELIEF

(Conversion)

81. Plaintiffs incorporate all other paragraphs of this Complaint for purposes of this claim.

82. This claim for relief is being brought against Officer Barber.

83. Plaintiffs owned a piece of animate living property in the form of their dog “Zoey.”

84. Officer Barber shot and killed “Zoey.”

85. “Zoey’s” death deprived the Plaintiffs of all further use and enjoyment of their property and destroyed their property interest in their dog, all without due process of law.

86. As a direct and proximate result of such conduct, the Plaintiffs have been damaged in various respects including, without limitation, being permanently deprived of the property value and companionship of their dog, “Zoey”, as well as suffering severe mental and emotional distress due to the egregious nature of their loss.

WHEREFORE, Plaintiffs pray for judgment against Officer Barber as follows:

- a. actual damages in excess of \$150,000.00;
- b. costs and reasonable attorneys fees, and
- c. such other relief as may be awarded by the Court.

NINTH CLAIM FOR RELIEF

(Assault)

87. Plaintiffs incorporate all other paragraphs of this Complaint for purposes of this claim.

88. This claim for relief is being brought against Officer Barber.

89. Officer Barber, in her individual and official capacity and while acting under color of law, intended to cause an offensive or harmful physical contact with

Plaintiff Frank Agazio when she pointed her weapon at him without cause, putting him in imminent fear for his life.

WHEREFORE, Plaintiffs pray for judgment against Officer Barber as follows:

- a. actual damages in excess of \$150,000.00;
- b. costs and reasonable attorneys fees, and
- c. such other relief as may be awarded by the Court.

TENTH CLAIM FOR RELIEF

(Trespass)

90. Plaintiffs incorporate all other paragraphs of this Complaint for purposes of this claim.

91. Commerce City Police officers, in their individual and official capacities, intentionally entered upon and remained upon Plaintiffs' lawfully owned property.

92. The officers had no valid or reasonable reason to remain on Plaintiffs' property and Plaintiffs, in fact, repeatedly requested the officers leave Plaintiffs' property.

93. The officers refused to leave and remained on Plaintiffs' property longer than necessary for any reasonable purpose or privilege.

WHEREFORE, Plaintiffs pray for judgment against the defendants as follows:

- a. actual damages in excess of \$150,000.00;
- b. costs and reasonable attorneys fees, and
- c. such other relief as may be awarded by the Court.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that this Court enter judgment in

their favor and against the Defendants, and grant:

- (a) Appropriate declaratory and other injunctive and/or equitable relief;
- (b) Compensatory and consequential damages, including damages for emotional distress, loss of enjoyment of life, and other pain and suffering on all claims allowed by law in an amount to be determined at trial;
- (c) All economic losses on all claims allowed by law;
- (d) Attorney's fees and the costs associated with this action, including those associated with expert witness fees, on all claims allowed by law;
- (e) Pre- and post-judgment interest at the lawful rate.
- (f) Any further relief that this court deems just and proper, and any other relief as allowed by law.

PLAINTIFFS DEMAND A TRIAL BY JURY ON ALL ISSUES TRIABLE

Respectfully submitted this 29th day of July, 2010.

*By: Original signature of Jennifer Reba Edwards, #38349,
on file and available for inspection pursuant
to C.R.C.P. 121.*

/s/ Jennifer Reba Edwards, Reg. # 38349
Jennifer Reba Edwards
The Animal Law Center, LLC
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Facsimile: (303) 322-4354
jre@theanimallawcenter.com
Attorney for Plaintiff

*By: Original signature of Jay Wayne Swearingen, #4842,
on file and available for inspection pursuant
to C.R.C.P. 121.*

/s/ Jay Wayne Swearingen, Reg. # 4842

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Attorney for Plaintiff

Plaintiffs' Address:

8705 Rosemary Street
Commerce City, Colorado 80022

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 29th day of July, 2010, a true and correct copy of the foregoing **COMPLAINT** was filed and served using _____, emailed and/or deposited in the United States mail, postage prepaid, properly addressed to:

Clerk of the Court
Alfred A. Arraj United States Courthouse
Room A-105
901 19th Street
Denver, Colorado 80294-3589

Attorney for Defendants

*By: Original signature of Jay Wayne
Swearingen, #4842,
on file and available for inspection pursuant
to C.R.C.P. 121.*

/s/ Jay Wayne Swearingen, Reg. # 4842
Attorney for Plaintiff
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