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6 IN THE UNITED STATES DISTRICT COURT
7 FOR THE DISTRICT OF ARIZONA

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9 Erin Sullivan,

10 Plaintiff,

11 v.

12 City of Phoenix, et al.,

13 Defendant.

No. CV11-01427-PHX-DGC

ORDER

14 Plaintiff Erin Sullivan brought this action against the City of Phoenix, the City of
15 Glendale, and various police officers. Doc. 1. The matter was referred to Magistrate
16 Judge David K. Duncan pursuant to Local Rules of Civil Procedure 72.1 and 72.2. *See*
17 Doc. 5. Before the Court is Magistrate Judge Duncan's Report and Recommendation
18 ("R&R") addressing the Amended Motion for Summary Judgment filed by the City of
19 Phoenix and Officer Bryan Welsh. Doc. 40, addressing Doc. 19. These Defendants
20 contend that all of Plaintiff's claims are barred by *Heck v. Humphrey*, 512 U.S. 477
21 (1994). Doc. 19. The R&R recommends granting the Amended Motion in part and
22 denying it in part. Doc. 40. The Court will accept and adopt the R&R in part.

23 **I. Standard of Review.**

24 The district judge may "accept, reject, or modify the recommended disposition;
25 receive further evidence; or return the matter to the magistrate judge with instructions."
26 Fed. R. Civ. P. 72(b)(3); 28 U.S.C. § 636(b)(1). The district judge must make a de novo
27 determination as to any portion of the report and recommendation that is properly
28 objected to by the parties. 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b); *Thomas v. Arn*,

1 474 U.S. 140, 149-50 (1985). If no objections are filed, the district court is not obligated
2 to review the report and recommendation. *Wang v. Masaitis*, 416 F.3d 992, 1000 n. 13
3 (9th Cir. 2005); *United States v. Reyna-Tapia*, 328 F.3d 1114, 1121-22 (9th Cir. 2003)
4 (en banc).

5 **II. Report and Recommendation.**

6 Plaintiff's action stems from his arrest, which occurred after a police search
7 involving the assistance of a K-9 and air unit from the Phoenix Police Department.
8 Doc. 40, at 1. Plaintiff alleges that Officer Welsh released the K-9 after Plaintiff
9 complied with instructions to "freeze" and that the K-9 bit him 3-4 times. *Id.* at 2.
10 Plaintiff states that in response, he hit and bit the dog on the nose, and then Officer Welsh
11 sprayed "OC" pepper spray on Plaintiff. *Id.* Plaintiff's claims include a negligence/gross
12 negligence claim against Officer Welsh for using or allowing others to use excessive
13 force to arrest him, and a negligence claim against the City in hiring, training, and/or
14 supervising Welsh (Count I); a claim that Officer Welsh used unreasonable force
15 (Count II); and a Fourth Amendment excessive force claim under § 1983 (Count III).

16 Plaintiff pled guilty to cruelty to animals pursuant to A.R.S. § 13-2910 and was
17 sentenced to one year in prison. Under A.R.S. § 13-2910(A)(10), "[a] person commits
18 cruelty to animals if the person . . . [i]ntentionally or knowingly interferes with, kills or
19 harms a working or service animal without either legal privilege or consent of the
20 owner." Defendants' Amended Motion for Summary Judgment argues that in light of his
21 plea and sentence, Plaintiff's claims are barred by *Heck*. "*Heck* says that 'if a criminal
22 conviction arising out of the same facts stands and is fundamentally inconsistent with the
23 unlawful behavior for which section 1983 damages are sought, the 1983 action must be
24 dismissed.'" *Smith v. City of Hemet*, 394 F.3d 689, 695 (9th Cir. 2005) (quoting *Smithart*
25 *v. Towery*, 79 F.3d 951, 952 (9th Cir. 1996)). The relevant question is whether success in
26 a subsequent § 1983 suit would "necessarily imply" or "demonstrate" the invalidity of the
27 earlier conviction or sentence. *Id.*

28 The R&R correctly concludes that *Heck* bars both the § 1983 and state law

1 excessive force claims related to Officer Welsh’s release of the K-9. Doc. 40 at 4.
2 Arizona courts have not directly addressed the application of *Heck* to state tort claims,
3 but in *Glaze v. Larsen* the Arizona Supreme Court cited *Heck* in holding that a criminal
4 defendant could bring a legal malpractice claim against his defense attorney only if he
5 first shows that his conviction has somehow terminated in his favor. *Glaze v. Larsen*, 83
6 P.3d 26, 33 (Ariz. 2004) (“The requirement that the conviction be set aside arises from
7 our respect for the finality of the judgment in the criminal case.”). The reasoning in
8 *Glaze* suggests that Arizona courts would apply *Heck* to bar Plaintiff’s state law claims in
9 the same way that his § 1983 claim is barred.

10 The R&R concludes, however, that summary judgment is not appropriate as to the
11 state law claims against Officer Welsh and the City of Phoenix for simple negligence.
12 Doc. 40, at 5-6. But if a claim for excessive force based on use of the K-9 is inconsistent
13 with Plaintiff’s prior plea and sentence, a claim for negligence/gross negligence based on
14 use of the K-9 would likewise conflict with Plaintiff’s prior plea and sentence. The Court
15 therefore finds that summary judgment is appropriate as to the state law claims for
16 negligence and gross negligence related to the K-9.

17 The R&R also correctly concludes that *Heck* applies to bar Plaintiff’s claims
18 against the City of Phoenix for negligent hiring, training, and/or supervision for those
19 claims related to use of the K-9. Doc. 40, at 4-5. See *Kuehn v. Stanley*, 91 P.3d 346, 352
20 (Ariz. App. 2004) (“If the theory of the employee’s underlying tort fails, an employer
21 cannot be negligent as a matter of law for hiring or retaining the employee.”); *Mulhern v.*
22 *City of Scottsdale*, 799 P.2d 15, 18 (Ariz. App. 1990) (“In order for the employer to be
23 held liable for negligent hiring, retention, or supervision, the employee must have
24 committed a tort.”).

25 The R&R determines that *Heck* does not bar the excessive force claim related to
26 Officer Welsh’s use of the pepper spray because there exists a question of fact as to
27 whether Officer Welsh administered the spray after the K-9 had been called off or while
28 the K-9 was still engaged. *Id.* at 5. The Court applies this correct reasoning to each of

1 Plaintiff's claims, and concludes that summary judgment is inappropriate on the claims as
2 they relate to Officer Welsh's use of the pepper spray.

3 **III. Review and Conclusion.**

4 The parties were instructed of the time in which to file written objections.
5 Doc. 40. See 28 U.S.C. § 636(b). Neither party has filed an objection. The Court has
6 reviewed the R&R and will adopt it as set forth above. *See Campbell v. U.S. Dist. Court,*
7 *501 F.2d 196, 206 (9th Cir. 1974).*

8 **IT IS ORDERED:**

9 1. The Report and Recommendation of Magistrate Judge Duncan (Doc. 40) is
10 **accepted and adopted in part.**

11 2. The City of Phoenix and Bryan Welsh's Amended Motion for Summary
12 Judgment (Doc. 19) is **granted in part and denied in part** as follows:

13 a) the motion is **granted** as to the federal and state claims against the
14 City of Phoenix and Officer Welsh that relate to the use of the K-9;

15 b) the motion is **denied** as to the federal and state claims against the
16 City of Phoenix and Officer Welch that relate to use of pepper spray.

17 3. Case management deadlines are as set forth in the Judge Duncan's
18 May 25, 2012 Order. Doc. 40.

19 Dated this 18th day of June, 2012.

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24 David G. Campbell
25 United States District Judge
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