

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

JESSICA SHELL and PHILIP SHELL,
and the marital community comprised
thereof,

 Plaintiffs,

 v.

FERRY COUNTY; FERRY COUNTY
SHERIFF’S DEPARTMENT, SHERIFF
PETE WARNER, DEPUTY TALON
VENTURO, DEPUTY PATRICK
RAINIER, DEPUTY ODEGARD,
DEPUTY WINTERS, PAMELA
STODDARD, BRAD MILLER, and
VALERIE MACINTYRE,

 Defendants.

NO. 2:16-cv-00021-SAB

**ORDER DENYING FERRY
COUNTY DEFENDANTS’
MOTION FOR SUMMARY
JUDGMENT, IN PART;
GRANTING IN PART**

Before the Court is the Ferry County Defendants’ Motion for Summary
Judgment, ECF No. 24. The motion was heard without oral argument. Plaintiffs are
represented by Douglas Phelps. Defendants are represented by Brian Christensen.

///
///

**ORDER DENYING FERRY COUNTY DEFENDANTS’ MOTION FOR
SUMMARY JUDGMENT, IN PART; GRANTING IN PART ~ 1**

1 **Motion Standard**

2 Summary judgment is appropriate if the “pleadings, depositions, answers to
3 interrogatories, and admissions on file, together with the affidavits, if any, show
4 that there is no genuine issue as to any material fact and that the moving party is
5 entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(c). There is no genuine
6 issue for trial unless there is sufficient evidence favoring the nonmoving party for a
7 jury to return a verdict in that party’s favor. *Anderson v. Liberty Lobby, Inc.*, 477
8 U.S. 242, 250 (1986). The moving party has the initial burden of showing the
9 absence of a genuine issue of fact for trial. *Celotex Corp. v. Catrett*, 477 U.S. 317,
10 325 (1986). If the moving party meets its initial burden, the non-moving party must
11 go beyond the pleadings and “set forth specific facts showing that there is a
12 genuine issue for trial.” *Id.* at 325; *Anderson*, 477 U.S. at 248.

13 In addition to showing there are no questions of material fact, the moving
14 party must also show it is entitled to judgment as a matter of law. *Smith v.*
15 *University of Washington Law School*, 233 F.3d 1188, 1193 (9th Cir. 2000). The
16 moving party is entitled to judgment as a matter of law when the non-moving party
17 fails to make a sufficient showing on an essential element of a claim on which the
18 non-moving party has the burden of proof. *Celotex*, 477 U.S. at 323. The non-
19 moving party cannot rely on conclusory allegations alone to create an issue of
20 material fact. *Hansen v. United States*, 7 F.3d 137, 138 (9th Cir. 1993).

21 When considering a motion for summary judgment, a court may neither
22 weigh the evidence nor assess credibility; instead, “the evidence of the non-movant
23 is to be believed, and all justifiable inferences are to be drawn in his favor.”
24 *Anderson*, 477 U.S. at 255.

25 **Background Facts**

26 Ferry County Sheriff Dispatch received a letter, dated January 19, 2013,
27 from Forget Me Not Animal Shelter regarding an emaciated and wounded dog.
28 The letter, written by Kim Gillen, the Executive Director of the Shelter, details the

1 receipt of a Pitbull on January 17, 2013 that was extremely thin and with possible
2 frostbite and includes the conclusion by two vets that the dog had not been lost for
3 a long time, but was instead receiving inadequate food and medical care at his
4 home. The letter goes on to explain that on January 18, 2013, the Shelter received
5 an anonymous message that said the dog's name was Brewster, that he was owned
6 by Phil "Steel" and Jessica "Shaw," who have been breeding and attempting to sell
7 Pitbulls, and there may be 14 or more dogs and puppies in similar condition. The
8 person also expressed concern about some small children that are living at the
9 residence in possibly unfit conditions.

10 Ms. Gillen provided an address that she thought was the Shell's based on a
11 previous Shelter interaction with Ms. Shell, as well as Ms. Shell's phone number.
12 The Shelter requested the Sheriff's Department conduct a welfare check on the
13 pets at the residence and also indicated that based on the condition of the Pitbull
14 currently at the Shelter, Ms. Gillen was in favor of cruelty charges being brought
15 against the owners.

16 **The Initial Search**

17 A few days later, on January 24, 2013 around 8:30 a.m., Deputy Talon
18 Venturo and another agent¹ conducted the requested welfare check. Plaintiffs'
19 residence is located at 95 Goodrich Road, or Forest Service Road 2149. While
20 attempting to drive to the residence they were unable to drive any further than the
21 intersection of the North Fork Trout Cr and Forest Service Road 2149. North Fork
22 Trout Cr was plowed to the Empire Snow Park, so the officers parked the patrol
23 vehicle at the Snow Park and rode the Sheriff's Office snowmobiles to the
24 residence. Specifically, they rode the snowmobiles about a mile up to the
25 _____

26 ¹ In their Amended Complaint, Plaintiffs allege that Defendant Rainier participated
27 in the search with Deputy Venturo. In his report, Deputy Venturo identified the
28 person assisting him as Agent Orozco.

1 driveway, which was gated. They then walked down the driveway, which was
2 approximately 250 yards to the two-story house.

3 According to Ms. Shell, there are double gates at the driveway's intersection
4 with Forest Service Road 2149, which were closed with a chain the day in
5 question. In addition to the closed gate, there were numerous signs at the gate and
6 in the surrounding area indicating no trespassing, no hunting, and no entry onto the
7 property. The house is located in a very rural, thickly forested area and the house is
8 not visible from Forest Service Road 2149.

9 While walking down the driveway, Deputy Venturo saw four puppies
10 running loose and an adult female dog on a run line. He observed rib lines on two
11 of the puppies. He then walked to the residence and knocked on the door. An 8-
12 year old boy answered the door followed by a 5-year old boy. The 5-year old boy
13 yelled at them to leave. Deputy Venturo asked if their parents were home. The 5-
14 year old said his parents went to Colville. The boys had shoulder-length hair that
15 was matted. Both children were dirty and it appeared they had not been bathed in a
16 while. Deputy Venturo saw dog feces on the concrete floor. When Deputy Venturo
17 asked the children if they were going to school, the younger one told him he
18 needed to leave.

19 Deputy Venturo and the other agent then decided to leave the residence.
20 While walking back, Deputy Venturo heard a puppy in the woodshed. He walked
21 over to the woodshed and observed a small brown puppy on a chain with no food
22 and water. They walked back to the snowmobiles and returned back to the Snow
23 Park.

24 Deputy Venturo then contacted dispatch to contact Child Protective Service.
25 He also contacted the county road department to get a grader to plow the road and
26 requested that a representative from Forget Me Not Shelter come to the residence.
27 The grader took about 1.5 hours to plow the Goodrich Road/Forest Service Road
28 2149.

1 **The Second Visit to the Shell Residence**

2 Deputy Venturo and the others present then drove up Forest Service Road
3 2149 and parked at the gate in front of Plaintiffs' residence. Deputy Venturo and
4 the CPS workers walked down to the residence while Border Patrol agents assisted
5 the animal shelter volunteers who were checking the dogs. Deputy Venturo and the
6 CPS workers contacted the children at the house and asked them if they wanted to
7 go into town and get some food. The children came outside. They were walked up
8 the driveway and placed in the CPS vehicle. At some point, the Shells returned
9 from their trip and were notified by CPS that CPS had a pick-up order for their
10 youngest child. The youngest child was also taken into protective custody by CPS.

11 **Defendant Valerie MacIntyre**

12 Dependency proceedings were initiated by CPS. Defendant Valerie
13 MacIntyre was appointed guardian ad liem for Plaintiffs' three minor children.
14 Plaintiffs felt pressured with no way out and subsequently signed relinquishment
15 papers. Throughout the dependency proceedings, Defendant MacIntyre made
16 comments to Plaintiff Jessica Shell regarding her husband, including that she
17 would never regain custody of her children if she stayed with her husband, that she
18 should come live with Ms. MacIntyre in an apartment in Colville, and that she
19 would never leave Ms. Shell alone.

20 **Conversation with Brad Miller**

21 Defendant Brad Miller is a Ferry County Commissioner. Early in January,
22 2013, Ms. Shell contacted him regarding the snow berms that the county groomer
23 had been leaving both at the intersection of her driveway with Forest Service Road
24 2149 and at the intersection of Forest Service Road 2149 and North Fork Trout
25 Creek Road. The berms were making the road nearly impassable. According to
26 Plaintiffs, they had lived in the house for six years and they never had a problem
27 until 2013 when the groomer started creating snow berms. In his declaration,
28 Mr. Miller states that Ms. Shell asked him to have her road plowed. He says he

1 explained to her that she lived on a federal forest service road that was not
2 maintained in the winter and the county would not plow her road.

3 **October 28, 2014 Visit to the Shell Residence**

4 Sometime later, Jessica and Phillip Shell were charged with attempted
5 murder that was downgraded to felony harassment.²

6 Ms. Shell was arrested and detained on these charges, but an Order for
7 Pretrial Release was entered on October 27, 2014 in Ferry County Superior Court.
8 Ms. Shell executed a \$30,000 property bond and she agreed to the following
9 conditions:

10 Defendant will surrender all her firearms to law enforcement – a
11 deputy will escort her to her residence and take possession of the guns
12 and shall be authorized to search for firearms to ensure total retrieval.

13 The next day, Deputy D. Odegaard, Deputy Gordon Winters, and
14 Corrections Officer Reese transported Ms. Shell to her residence. Her attorney,
15 M. Von Sauer, also drove to the residence. While in route, Deputy Odegaard asked
16 Ms. Shell how many guns were at her house. She stated 4 or 5 guns—a .22 caliber
17 rifle, shot gun, handgun and one or two rifles in the storage unit.

18 At the house, the deputies told her attorney that he was to stay inside the
19 vehicle for his and the officer's safety. Mr. Von Sauer said he understood. Deputy
20 Odegaard told Mr. Von Saur that if he needed the officers for something, he should
21 honk his horn and Deputy Odegaard would come outside and meet with him.

22 Deputy Winters began taking photographs of the area. Ms. Shell was
23 brought inside the house and placed on the couch. She was still in handcuffs.
24 Deputies found a handgun in a coat that was by the front door. It was loaded and
25 had an additional magazine in the other pocket.

26 The deputies proceeded upstairs and found a rifle and shotgun. The guns
27 were located on the left wall at the top of the stairwell, where Ms. Shell had said

28 ² The charges were ultimately dismissed.

1 they would be located. The deputies then proceeded to search the master bedroom.
2 They found several guns, shooting and hunting magazines, a handgun box, a
3 Shooting Times magazine, as well as several rounds under the bed. A metal style
4 lock box was also under the bed and inside the locked box were several boxes of
5 ammunition. In the top drawer of a dresser they found two 40-round AK47 black
6 polymer magazines, another magazine, and ammunition. In the second drawer they
7 found two sets of handcuffs and keys.

8 In an upstairs bathroom, there was a black bolt action receiver with a
9 stainless bull barrel. There was no stock on this gun. In another room, there were
10 multiple books explaining how to shoot and how to reload ammunition. The
11 officers took pictures of these books. A box that was full of ammunition and
12 ammunition supplies were found. Multiple reloading tools and knives were found
13 on a work bench along with a tool box with more reloading supplies and a piece of
14 wood with a rifle stock stretched on it. In another room, pistol ammunition was
15 found on a tote.

16 Although they searched the first floor of the house, they did not find any
17 firearms, but multiple knives were lying throughout the house. They then searched
18 the shipping container. Ms. Shell went outside to help the officers locate the guns.
19 At first, they could not locate them because there were totes in the way.
20 Eventually, with her help, the deputies found two rifles, coolers that were filled
21 with ammunition, and other boxes filled with ammunition.

22 They then searched the two vehicles that were on the property. They found a
23 brown leather gun holster in one of the vehicles, but they did not remove it from
24 the vehicle. They then placed all the “recovered weapons, ammunition, reloading
25 material, etc. into our patrol units and left the scene.” The search lasted three and a
26 half hours.

27 Ms. Shell stated in her declaration that she believed her attorney would be
28 present during the search. She stated that the deputies ransacked her house when

1 they conducted the search. Her cedar hope chest was broken and all her
2 possessions were strewn everywhere. The books on reloading and reloading
3 equipment were seized. Cash was removed from her TV stand, and some silver
4 coins, a watch and gemstones were also taken. When the firearms were returned to
5 her, things were missing, including over half of her ammunition.

6 **Section 1983**

7 To state a claim under § 1983, Plaintiffs must establish two essential
8 elements: (1) that a right secured by the Constitution or laws of the United States
9 was violated; and (2) that the alleged violation was committed by a person acting
10 under the color of state law. *West v. Atkins*, 487 U.S. 42, 48 (1988); *Naffe v. Frey*,
11 789 F.3d 1030, 1035 (9th Cir. 2015).

12 **Analysis**

13 **1. First Entry onto Plaintiff’s Property**

14 Defendants argue they did not violate Plaintiffs’ constitutional rights when
15 they entered their property on snowmobiles because they were authorized to do so
16 under the “knock and talk” exception to the warrant requirement, and as such, they
17 did not conduct a search of the property. They also assert they were performing
18 their community caretaking functions with respect to the welfare of the dogs.
19 Finally, Defendants maintain they are entitled to qualified immunity

20 **a. Warrentless Search**

21 At the very core of the Fourth Amendment “stands ‘the right of a man to
22 retreat into his own house and there be free from unreasonable government
23 intrusion.’” *Florida v. Jardines*, __ U.S. __, 133 S.Ct. 1409, 1414 (2013) (quoting
24 *Silverman v. United States*, 365 U.S. 505, 511 (1961)). “This right would be of
25 little practical value if the State’s agents could stand in a home’s porch or side
26 garden and trawl for evidence with impunity; the right to retreat would be
27 significantly diminished if the police could enter a man’s property to observe his
28 repose from just outside the front window.” *Id.* Thus, searches and seizures inside

1 the home without a warrant are presumptively unreasonable and because the
2 curtilage is part of the home, searches and seizures in the curtilage without a
3 warrant are also presumptively unreasonable. *Oliver v. United States*, 466 U.S.
4 170, 180 (1984).

5 A government agent conducts a “search” within the meaning of the Fourth
6 Amendment when the agent infringes “an expectation of privacy that society is
7 prepared to consider reasonable,” *United States v. Jacobsen*, 466 U.S. 109, 113,
8 (1984), or “physically occupie[s] private property for the purpose of obtaining
9 information.” *United States v. Jones*, 565 U.S. 400,406 n.3 (2012) (“Where, as
10 here, the Government obtains information by physically intruding on a
11 constitutionally protected area, such a search has undoubtedly occurred”); *United*
12 *States v. Perea-Rey*, 680 F.3d 1179, 1184 (9th Cir. 2012).

13 Here, there is no question the officers entered Plaintiffs’ private property to
14 investigate animal cruelty charges and to conduct a welfare check on the animals.
15 Their argument that they did not conduct a “search” is not supported by the case
16 law as set forth above. Because private property, including the home and its
17 curtilage, are constitutionally protected areas, the officers needed to obtain a
18 warrant to enter the property to conduct the search, or demonstrate that an
19 exception to the warrant requirement existed.

20 Defendants argue that two exceptions to the warrant requirement are present:
21 (1) the knock and talk exception; and (2) the community caretaking function.
22 Neither of these exceptions excuses the officers’ warrantless search of Plaintiffs’
23 private property.

24 **(i) Knock and Talk Exception**

25 “Law enforcement officers may encroach upon the curtilage of a home for
26 the purpose of asking questions of the occupants.” *United States v. Hammett*, 236
27 F.3d 1054, 1059 (9th Cir. 2001) (overruled on other grounds, *Perea-Rey*, 680 F.3d
28 at 1187.) The “knock and talk” exception to the warrant requirement is similar to

1 the exception for consensual searches. *United States v. Lundin*, 817 F.3d 1151,
2 1158 (9th Cir. 2016). The “consent” in a “knock and talk” case is “implied from
3 the custom of treating the ‘knocker on the front door’ as an invitation (i.e., license)
4 to approach the home and knock.” *Id.* (citing *Jardines*, 133 S.Ct. at 1415 (citation
5 omitted)). “The scope of the exception is coterminous with this implicit license.
6 Stated otherwise, to qualify for the exception, the government must demonstrate
7 that the officers conformed to ‘the habits of the country’ by doing ‘no more than
8 any private citizen might do.’” *Id.* (citations omitted). In the typical case, if the
9 police do not have a warrant they may “approach the home by the front path,
10 knock promptly, wait briefly to be received, and then (absent invitation to linger
11 longer) leave.” *Id.* (citation omitted).

12 The application of the “knock and talk” exception, then, ultimately “depends
13 upon whether the officers have an implied license to enter the curtilage, which in
14 turn depends upon the purpose for which they enter.” *Id.* (citations omitted,
15 emphasis in original). Thus, the “knock and talk” exception depends at least in part
16 on an officer’s subjective intent. *Id.* “Officers who knock on the door of a home for
17 other purposes generally exceed the scope of the customary license and therefore
18 do not qualify for the “knock and talk’ exception.” *Id.*

19 Here, the facts indicate this case is not the typical case. First, there is nothing
20 in the record to suggest the officers only wanted to talk to Plaintiffs. Rather, the
21 letter from the Shelter makes clear the officers entered Plaintiff’s property to
22 investigate potential animal cruelty charges and to conduct an animal welfare
23 check. Notably, after Deputy Ventura decided to leave the residence, he searched a
24 woodshed because he heard a puppy barking. Second, the record is clear that the
25 officers did not have an implied license to approach the home and knock. The
26 house was not visible from the road. There were numerous no trespassing signs,
27 extensive foliage surrounding the house and curtilage, and gates blocking the
28 driveway. A private citizen approaching the property would not believe that they

1 were invited to enter the property. *Jardines*, 133 S.Ct. at 1414 (holding officers
2 are not permitted to gather information “by physically entering and occupying the
3 area not explicitly or implicitly permitted by the homeowner.”); see also *State v.*
4 *Jesson*, 142 Wash.App. 852, 859 (2008) (concluding a reasonable, respectful
5 citizen would not believe he could enter the property, given the “No Trespassing”
6 signs, the closed gate, the primitive road and the secluded location of the home).

7 **(ii) Community Caretaking Function**

8 Two well-delineated and recognized exceptions to the warrant requirement
9 are exigent circumstances and emergency. *Hopkins v. Bonvicino*, 573 F.3d 752,
10 761 (9th Cir. 2009). “These exceptions are ‘narrow’ and their boundaries are
11 ‘rigorously guarded’ to prevent any expansion that would unduly interfere with the
12 sanctity of the home.” *Id.* (quotation omitted). The emergency exception stems
13 from the police officers “community caretaking function” and allows them to
14 respond to emergency situations that threaten life or limb. *Id.* That said, “a police
15 officer may not enter a home to investigate a medical emergency or other
16 immediate risk to life or limb unless he has ‘reasonable grounds’ to believe an
17 emergency is at hand and his immediate attention is required.” *Id.*

18 Here, the facts do not support a finding that exigent or emergency
19 circumstances existed that would justify the warrantless entry and search of
20 Plaintiffs’ private property. The referral letter was written on January 19, 2013. It
21 was not until several days later that the Sheriff’s Department decided to investigate
22 the animal cruelty concerns and conduct a welfare check. The cases cited by
23 Defendants in their reply do not support their arguments that they were permitted
24 to conduct a warrantless search. In those cases, at the minimum, the animals were
25 in grave danger of perishing or extreme distress. There is nothing in the record that
26 indicates the officers or Forget Me Not Shelter were concerned that the animals on
27 Plaintiffs’ property were facing immediate or life-threatening risk to life or limb.
28 Notably, none of the animals were seized at any time during the investigation.

1 Moreover, the letter provided Jessica Shell’s telephone number, but there is
2 nothing in the record indictating the officers even attempted to call Ms. Shell to
3 obtain permission to enter the property.

4 Here, a reasonable jury could find that no factual basis existed to justify the
5 officers’ warrantless entry onto Plaintiff’s private property and consequently the
6 officers violated Plaintiffs’ constitutional rights when they conducted a warrantless
7 search.

8 **2. Second Entry onto Plaintiffs’ Property**

9 If the first search of Plaintiffs’ property is unconstitutional, any subsequent
10 search based on the information gained from the illegal search cannot be used to
11 justify the second time officers entered Plaintiffs’ property without a warrant. See
12 *Walker v. King Cnty.*, 2010 WL 1513836 (9th Cir. 2010) (unpublished) (holding
13 second search of house was unlawful because it was based on information obtained
14 during unlawful entry and rejecting justification for exigent circumstances:
15 “Moreover, even if exigent circumstances justifying a warrantless search existed
16 after Defendants entered the home, Defendants learned of such circumstances only
17 as a result of this unlawful entry, questioning and arrest.”).

18 A reasonable jury could find that the officers violated Plaintiffs’ Fourth
19 Amendment rights again when they entered the property a second time without
20 first procuring a warrant. Notably, it took several hours for the snow plow to clear
21 the path for the officers and CPS to gain access to Plaintiffs’ property. There is
22 nothing in the record to explain why the officers did not use this time to procure a
23 warrant if they believed they had probable cause to reenter the property. Also,
24 although the children were unsupervised, there is nothing in the record to suggest
25 they were in immediate danger or a life threatening situation. If they were, then it
26 is likely the officers would have removed the children the first time they
27 encountered them, rather than wait a couple of hours before removing them from
28 their home.

1 **3. Third Search at Plaintiffs' Residence**

2 Plaintiff Jessica Shell alleges Defendant Venturo, Odegard, and Winters
3 violated her constitutional rights in two ways when they conducted a search
4 pursuant to the Release Order issued by Ferry County Superior Court: first, the
5 officers exceeded the scope of the warrant; and second, the officers violated her
6 constitutional rights when they brought her into the house with them when they
7 conducted the search but made her counsel wait in the car.

8 **a. Execution of the Search Warrant**

9 The Fourth Amendment prevents “general, exploratory searches and
10 indiscriminate rummaging through a person’s belongings.” *United States v. Mann*,
11 389 F.3d 869, 877 (9th Cir. 2004). If the “scope of the search exceeds that
12 permitted by the terms of a validly issued warrant ... [the search and any]
13 subsequent seizure [are] unconstitutional.” *Horton v. Calif.*, 496 U.S. 128, 140
14 (1990).

15 Also, the Fourth Amendment prohibits “unreasonable” searches and
16 seizures. *Id.*, 496 U.S. at 133. The reasonableness of a search or a seizure depends
17 “not only on when it is made, but also on how it is carried out.” *Tennessee v.*
18 *Garner*, 471 U.S. 1, 7–8, (1985). In other words, even when supported by probable
19 cause, a search or seizure may be invalid if carried out in an unreasonable fashion.
20 *Franklin v. Foxworth*, 31 F.3d 873, 876 (9th Cir. 1994).

21 Questions of material fact exist whether the officers exceeded the scope of
22 the court order authorizing the search. The undisputed evidence is that the officers
23 took photographs of Plaintiffs’ property and seized additional materials not
24 authorized by the search warrant, i.e. books, loading supplies, and ammunition.
25 Plaintiff Jessica Shell testified the officers ransacked her house and they took
26 money and gems. A jury will have to determine whether this search exceeded the
27 scope of the court order and whether the officers carried the search out in an
28 unreasonable fashion. As such, summary judgment is not appropriate on this claim.

1 **b. Sixth Amendment Right to Counsel**

2 Plaintiff Jessica Shell asserts that her Sixth Amendment Right to Counsel
3 was violated when she was brought into the house while the officers searched it,
4 but her counsel was not permitted to join her. Even assuming Plaintiff is correct
5 that the officers intruded on her attorney-client relationship, such an intrusion is
6 not, in and of itself, a violation of the Sixth Amendment. *United States v. Irwin*,
7 612 F.2d 1182, 1186 (9th Cir. 1980). Rather, the right is only violated when the
8 intrusion substantially prejudices her. *Id.* The Ninth Circuit has instructed that
9 prejudice can manifest itself in several ways, including when evidence gained
10 through the interference is used against the defendant at trial; when prosecutors use
11 confidential information obtained through the interference that pertains to the
12 defense plans and strategy; when government influence destroys the defendant’s
13 confidence in her attorney; or any other action designed to give the prosecution an
14 unfair advantage at trial. *Id.*

15 In this case, Plaintiff has not alleged or demonstrated any prejudice that
16 resulted from her sequestration from her counsel. As such, summary judgment in
17 favor of Defendants on Plaintiff’s Sixth Amendment claim is appropriate.

18 **4. Qualified Immunity**

19 Qualified immunity protects government officers from “liability for civil
20 damages insofar as their conduct does not violate clearly established statutory or
21 constitutional rights of which a reasonable person would have known.” *Harlow v.*
22 *Fitzgerald*, 457 U.S. 800, 818 (1982). To determine whether an officer is entitled
23 to qualified immunity, the court answers two questions: whether the alleged
24 misconduct violated a right and whether the right was clearly established at the
25 time of the alleged misconduct. *Pearson v. Callahan*, 555 U.S. 223, 232 (2009).
26 This inquiry “must be undertaken in light of the specific context of the case, not as
27 a broad general proposition.” *Saucier v. Katz*, 533 U.S. 194, 201 (2001). That said,
28 officers can still be on notice that their conduct violates established law even in

1 novel factual circumstances. *Hope v. Pelzer*, 536 U.S. 730, 741(2002). The salient
2 question is whether the state of the law at the time of the events (here, January,
3 2013) gave the deputies “fair warning” that their conduct was unconstitutional.
4 *Mendez v. Cnty of Los Angeles*, 815 F.3d 1178, 1186 (9th Cir. 2016).

5 Having determined that a reasonable jury could find that the officers violated
6 Plaintiffs’ constitutional rights, the Court needs to determine whether the right at
7 issue was clearly established at the time of the alleged misconduct. With respect to
8 the events taking place on January 24, 2013, it was clearly established that a
9 warrant is needed before officers can search a person’s private property, absent
10 exigent circumstances. *Kentucky v. King*, 563 U.S. 452, 459-60 (2011). In 2012,
11 the U.S. Supreme Court reiterated that for purposes of Fourth Amendment
12 analysis, a search occurs when the government physically occupies private
13 property for the purpose of obtaining information. *Jones*, 565 U.S. at 404. Thus,
14 the officers were on notice that they were required to obtain a warrant before
15 entering Plaintiffs’ private property to obtain information. Additionally, officers
16 were on notice that a constitutional violation occurs when government officers
17 violate a person’s “reasonable expectation of privacy.” *Katz v. United States*, 389
18 U.S. 347, 351 (1967); *Jones*, 565 U.S. at 406; *Mendez*, 815 F.3d at 1187 (“In 2010,
19 the law was clearly established that a ‘search’ under the Fourth Amendment occurs
20 when the government invades an area in which a person has a ‘reasonable
21 expectation of privacy. . . This includes the ‘area immediately adjacent to a home,’
22 known as the curtilage.”). The officers were on notice that they did not have an
23 implied license to enter the property, given the “No Trespassing” signs, the closed
24 gates, the secluded location of the home, and the long driveway to the house. See
25 *Jesson*, 142 Wash.App. at 859; *United States v. Johnson*, 256 F.3d 895, 903-04
26 (9th Cir. 2001) (recognizing that state law is relevant in determining the
27 reasonableness of police activities under the Fourth Amendment). The officers
28 were also on notice that the community caretaking function does not apply where

1 they enter private property to search for evidence of a crime or there is a lack of the
2 need for emergency medical assistance. See *State v. Gocken*, 71 Wash. App. 267,
3 275 (1993).

4 With respect to the October 28, 2014 search, questions of material fact
5 remain that precludes the granting of qualified immunity. Moreover, it is well-
6 established that a search or seizure may be invalid if carried out in an unreasonable
7 fashion. See *Foxworth*, 31 F.3d at 876; *Davis v. United States*, __ F.3d __ (2017
8 WL 1359462 *6 (9th Cir. Apr. 13, 2017) (holding officers are not entitled to
9 qualified immunity as a matter of law where genuine issues of material fact exist
10 regarding whether the seizure was reasonable).

11 **5. Claims against County Commissioners Pamela Stoddard and Brad**
12 **Miller**

13 The underlying basis for Plaintiffs’ claims against the County
14 Commissioners is that Plaintiffs contacted Defendants Stoddard and Miller
15 requesting that the snow blocking their driveway be cleared so they could exit their
16 property, yet the roads were never plowed. Plaintiffs argue that by allowing them
17 to be plowed in and refusing to assist in the removal of the roadblock, these
18 Defendants violated their constitutional right to use the public roadway.

19 In their response to Defendant’s Motion for Summary Judgment, Plaintiffs
20 argue that Defendants Stoddard and Miller were negligent in failing to address the
21 winter upkeep issues on Forest Service Road 2149. Negligence, however, is not the
22 standard for a constitutional violation.³ See *T.L. Baker v. McCollan*, 443 U.S. 137,
23 146 (1979) (“Section 1983 imposes liability for violations of rights protected by
24 the Constitution, not for violations of duties of care arising out of tort law).

25 Moreover, while the U.S. Supreme Court has recognized a fundamental right

26
27 ³ A review of the Amended Complaint reveals that Plaintiffs are not bringing state
28 negligence claims against Defendants.

1 to interstate travel protected by the Due Process Clause, *Shapiro v. Thompson*, 394
2 U.S. 618, 630 (1969) (“The constitutional right to travel from one State to another
3 occupies a position fundamental to the concept of our Federal Union), no court has
4 addressed whether citizens have a constitutionally protected liberty interest in
5 travel within a state or municipality. See *Fruitts v. Union Cnty.*, 2015 WL 5232722
6 (D. Or. Aug. 17, 2015) (listing district courts cases that have refused to expand the
7 constitutional liberty interest to include a right to intrastate travel). Finally, even if
8 this Court were to recognize that the failure to eliminate snow berms caused by the
9 grooming of the road is somehow a constitutional violation, Defendants Stoddard
10 and Miller are entitled to qualified immunity because such a right was not clearly
11 established at the time of the incident. See *Pearson*, 555 U.S. at 231 (holding
12 qualified immunity shields defendants from liability if their conduct did not violate
13 clearly established constitutional rights.

14 Summary judgment in favor of Defendants Stoddard and Miller is
15 appropriate.

16 **5. Monell Liability**

17 Although the term “person” as set forth in 42 U.S.C. § 1983 includes
18 municipalities, a municipality cannot be held liable under 1983 on a respondeat
19 superior theory. *Monell v. Dep’t of Soc. Servs.*, 436 U.S. 658, 690 (1978). Liability
20 may attach to a municipality only where the municipality itself causes the
21 constitutional violation through “execution of a government’s policy or custom,
22 whether made by its lawmakers or by those whose edicts or acts may fairly be said
23 to represent official policy.” *Id.* at 694.

24 “Liability for improper custom may not be predicated on isolated or sporadic
25 incidents; it must be founded upon practices of sufficient duration, frequency and
26 consistency that the conduct has become a traditional method of carrying out
27 policy.” *Trevino v. Gates*, 99 F.3d 911, 918 (9th Cir. 1996) (citation omitted).

28 ///

1 There are also limited circumstances where a municipality can be held liable
2 for inadequate training. *Connick v. Thompson*, 536 U.S. 51, 61 (2011). In such a
3 case, the municipality would be liable if a concededly valid policy is
4 unconstitutionally applied by a municipal employee who has not been adequately
5 trained and the constitutional wrong has been caused by the failure to train. *Id.*
6 Inadequacy of training may serve as a basis for § 1983 liability, however, only
7 where the failure to train amounts to deliberate indifference to the rights of persons
8 with whom the police come in contact. *City of Canton, Ohio v. Harris*, 489 U.S.
9 378, 388 (1989).

10 Plaintiffs allege that Defendant Ferry County failed to ensure the residents
11 are safe from unreasonable search and seizure, failed to properly maintain
12 roadways allowing residence access to their property and community services, and
13 failed to properly supervise guardians ad litem through the CASA program.
14 Plaintiffs also allege that Defendant Ferry County Sheriff's Department failed to
15 properly supervise law enforcement officers.

16 For the most part, Plaintiffs have not provided any evidence to support their
17 Monell claims, and as such, summary judgment is appropriate. With respect to the
18 failure to properly supervise law enforcement officers, however, Plaintiffs cite to
19 the case of *State v. Jesson*, 142 Wash. App. 852 (2008). In that case, the
20 Washington Court of Appeals concluded that a Ferry County Sheriff's officer
21 violated Mr. Jessen's constitutional rights when he entered Mr. Jessen's property to
22 investigate a crime without a warrant. *Id.* at 857. Mr. Jessen lived in a secluded,
23 rural area. *Id.* He had a closed gate that was marked with "No Trespassing" signs
24 and his house was not visible from the road. *Id.* The facts in that case are very
25 similar to the case at bar. As such, questions of material fact exists regarding
26 Plaintiffs' Monell claim based on Defendants' failure to train and supervise law
27 enforcement officers and summary judgment with respect to this claim is not
28 appropriate.

1 **6. Valerie MacIntyre**

2 Plaintiffs assert that Defendant Valerie MacIntyre improperly made
3 misrepresentations to the court and DSHS regarding Plaintiffs and attempted to
4 make improper and invalid deals with Plaintiff Jessica Shell contingent on
5 separation from her husband.

6 The United States Supreme Court has held that all persons who perform
7 functions that are an “integral part of the judicial process” are immune from
8 liability. *Briscoe v. LaHue*, 460 U.S. 325, 335 (1983). Social workers are entitled
9 to absolute quasi-judicial immunity in performing quasi-prosecutorial functions
10 connected with the initiation and pursuit of child dependency proceedings. *Meyers*
11 *v. Contra Costa Cnty. Dep’t of Soc. Serv.*, 812 F.2d 1154, 1157 (9th Cir. 1987).
12 However, only qualified, not absolute, immunity is available to the extent social
13 workers make discretionary decisions and recommendations that are not
14 functionally similar to prosecutorial or judicial decisions. *Miller v. Gammie*, 335
15 F.3d 889, 897 (9th Cir. 2003). Examples of such functions may include decisions
16 and recommendations as to the particular home where a child is to go or as to the
17 particular foster parents who are to provide care. *Id.*

18 The Ninth Circuit instructs that qualified immunity analysis with respect to
19 judicial deceptions/misrepresentation claims requires Plaintiffs to make two
20 showings: (1) substantial showing of deliberate falsehood or reckless disregard for
21 the truth and (2) establish that, but for the dishonesty, the challenged action would
22 not have occurred. *Butler v. Elle*, 281 F.3d 1014, 1024 (9th Cir. 2002); *Liston v.*
23 *Cnty. of Riverside*, 120 F.3d 965, 973 (9th Cir. 1997). This analysis intertwines the
24 qualified immunity question—whether a reasonable officer should have known
25 that she acted in violation of plaintiff’s constitutional rights—with the substantive
26 recklessness or dishonesty question. *Butler*, 281 F.3d at 1024.

27 Here, Plaintiffs have not made the required substantial showing of deliberate
28 falsehood or reckless disregard for the truth. They have not identified any specific

1 statements made by Defendant MacIntyre and thus have not made any showing
2 that any particular statement was false or untruthful. Moreover, Plaintiffs have not
3 identified any constitutional right that was infringed by Defendant MacIntyre's
4 alleged deal making. As such, summary judgment in favor of Defendant MacIntyre
5 is appropriate.

6 **7. Conclusion**

7 Because a reasonable jury could find that Defendants violated Plaintiffs'
8 Fourth Amendment rights, summary judgment on these claims is not appropriate.
9 Also, there is enough evidence in the record for Plaintiffs' Monell claim regarding
10 warrantless searches of private property to proceed to the jury. On the other hand,
11 summary judgment is appropriate on Plaintiffs' remaining Monell claims and
12 claims against Defendants Stoddard, Miller and MacIntyre.

13 Accordingly, **IT IS HEREBY ORDERED:**

14 1. Defendant's Motion for Summary Judgment, ECF No. 24, is denied, in
15 part; and granted in part.

16 **IT IS SO ORDERED.** The District Court Clerk is hereby directed to enter
17 this Order and to provide copies to counsel.

18 **DATED** this 28th day of April 2017.



22
23

A handwritten signature in blue ink that reads "Stanley A. Bastian". The signature is written in a cursive style and is positioned to the right of the court seal.

24 Stanley A. Bastian
25 United States District Judge
26
27
28