Dao 1-9-18IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF IOWA
DAVENPORT DIVISION

GABRIEL STEELE, individually, as Executor of the Estate of Autumn Steele, and as next of friend for his minor child G.S., Sean Schoff, as next of friend for his minor child K.S., and GINA COLBERT, individually. **Plaintiff,** **v.** **CITY OF BURLINGTON and OFFICER JESSE HILL** **Defendants.**	**Case No.: 3:16-cv-105** **PLAINTIFFS' BRIEF IN SUPPORT OF SUMMARY JUDGMENT ON LIABILITY**

Comes now the Plaintiffs, Gabriel Steele, the Estate of Autumn Steele, G.S., K.S. and Gina Colbert, and submit their Brief in support of their Motion for Summary Judgment on liability, as follows:

TABLE OF CONTENTS

INTRODUCTION

The uncontested facts of this case establish, as a matter of law, that Defendant Hill's conduct in firing his service weapon in the direction of Autumn Steele, Gabriel Steel and their baby, G.S., because of a perceived threat from the family pet dog, Sammy, was objectively unreasonable, as a matter of law. As a matter of public policy our society cannot tolerate police officers who fire their service weapons in close proximity to and in the direction of innocent bystanders in order to avoid an all but non-existent physical threat from a family pet.

STATEMENT OF FACTS

Defendant Burlington, Iowa, is a governmental subdivision of the State of Iowa and operates a police force, employing Defendant Jesse Hill. Defendants' Answer, para. 9. (App. 2). All acts committed by Defendants as alleged by Plaintiffs' Complaint were done under color of state law. Defendants' Answer para. 28. (App. p. 3).

On January 6, 2015, Defendant Hill responded to a 911 call reporting a domestic dispute at the Steele residence in Burlington, Iowa. Defendants' Answer para. 11. (App. p. 2). When Hill arrived on the scene he witnessed Autumn and Gabriel Steele engaged in a verbal argument and physical altercation in front of the home. Gabriel was holding the couples' child G.S. Defendants' Answer paras. 13 and 14. (App. p. 2). Hill made a radio call to dispatch, existed his patrol vehicle, activated his body camera, and ran toward Autumn, Gabriel, and G.S. Defendants' Answer para. 15 and Dep. Ex. 34, Hill's body camera video. (App. pp. 2 and 41). So, everything Hill said and did in shooting and killing Autumn Steele was captured on video. See Dep. Ex. 34, Hill's body camera video, Dep Ex. 12, a serious of screen caps from the video and Dep. Ex. the transcript of the Hill body camera video. (App. pp. 41, 25 and 4).

As Hill was approaching Autumn and Gabriel, the Steele family dog, Sammy, was clearly visible near the feuding couple. Dep. Ex. 34 and Dep. Ex. 12, p. 3. (App. pp. 41 and 26). At that point Autumn Steele was shouting at Gabriel and physically assaulting him. Defendants' Answer para. 16. (App. p. 2). As Hill was moving toward Autumn Steele, Sammy, a Collie/German Shepard mix, approached him. Defendants' Answer para. 17. (App. p. 2).

Hill stated, "Hey, hey. Hey, stop it," while separating Autumn from Gabriel and G.S. Dep. Ex. 34 and Dep. Ex. 2, p. 1:3. (App. pp. 41 and 4). Autumn replied, "He's got my kid." Dep. Ex. 34 and Dep. Ex. 2, p. 1:4. (App. pp. 41 and 4). On the video you can hear a baby crying, a dog barking and one growl. (App. p. 41). Hill states, "Get your dog." Dep. Ex. 34 and Dep. Ex. 2, p. 1:5. (App. pp. 41 and 4). Two shots are then heard on the video, and Autumn said "Ahh." Dep. Ex. 34 and Dep. Ex. 2, p. 1:6-7. (App. pp. 41 and 4).

Hill fired his service weapon two times hitting and killing Autumn Steele. Defendants' Answer paras. 20 and 21. (App. p. 3). Hill shot Autumn while back pedaling and falling backwards, and completely lost control of his gun having to search for it in the snow after the shooting. Dep. Ex. 34 and Dep. Ex. 11, p. 40 (App. pp. 41 and 24), the DCI Hill Interview ("I started backpedaling say hey, get your dog. I'm backpedaling and the dog's coming at me. . . I drew my gun. As I'm falling backwards I fire one shot. I fall on the …snow covered ground. Fall down. Take another shot."). Sammy did not knock Hill over, he "slipped or fell." Hill Dep. 64:17-25. (App. p. 49).

After the shots were fired Gabriel Steel stated, "You shot her." See Dep. Ex. 34 and Dep. Ex. 2, p. 1:16. (App. pp. 41 and 4). Hill replied, "Oh, my god. Get your dog. Where are you shot ma'am . . . get an ambulance. . . Oh my God, Tim [Merryman, a second officer who arrived on the scene]." Dep. Ex. 34 and Dep. Ex. 2, 1:17-18. (App. pp. 41 and 4). Hill explained, "The

dog attacked me. I pulled my gun and shot it and I hit her." Dep. Ex. 34 and Dep. Ex. 2, p. 1:25-2:1. (App. pp. 41 and 4-5).

Hill then stated, "Oh, my God, no. Oh, fuck, Tim . . . Shit, Tim. I'm fucking going to prison, Tim." Dep. Ex. 34 and Dep. Ex. 2, p. 2:14-18. (App. pp. 41 and 50). None of the police reports filed regarding this incident by either the Burlington Police Department or the DCI mention this admission of reckless behavior made by Hill within seconds of the shooting that he was "fucking going to prison." As a police officer Hill was familiar with Iowa law on involuntary manslaughter, an aggravated misdemeanor, which is established "when the person unintentionally causes the death of another person by the commission of an act in a manner likely to cause death or serious injury." I.C.A 707.5(1)(b). Recklessness is an implied requirement of section 707.5(2). *State v. Conner*, 292 N.W.2d 682, 684 (1980).

Hill continued by stating, "[t]hey were fighting, and as soon as I tried to grab her to get her away, the fucking dog jumped on me." Dep. Ex. 34 and Dep. Ex. 2, p. 4:16-18. (App. pp. 41 and 7). Hill was asked, "Did she shoot herself?" He replied, "No, sir. The fucking dog attacked me, and I fucking pulled and shot it. Fuck, and I think I hit her, Sergeant. I don't know where. Oh, my fucking God." Dep. Ex. 34 and Dep. Ex. 2, p. 4:20-24. (App. pp. 41 and 7). Hill was then asked, "So they were over here fighting?" He replied, "yeah, she was swinging on him. I jumped out, tried to get her away, and the fucking dog jumped on me." Dep. Ex. 34 and Dep. Ex. 2, p. 6:19-23. (App. pp. 41 and 9).

Law Officers present did not allow Gabriel Steele near Autumn. Dep Ex. 34. (App. pp. 41 and 10). Hill's body camera video ends with Hill being told to go sit in the car. Dep. Ex. 34 and Dep. Ex. 2, p. 7:4-11. (App. pp. 41 and 10). At no point on his body camera video does Hill claim Sammy bit him. Hill only claims the dog "jumped' on him exactly one time and he

describes this as an "attack." Dep. Ex. 34 and Dep. Ex. 2, p. 1-7; see also Hill's Dep. p. 23:5-8 and 24:12-17. (App. pp. 41, 4-10 and 45).

In his report filled out a couple of days after the shooting, after reviewing the body camera video and before being interviewed by the DCI, Hill does not categorically claim that Sammy bit him, but that he "felt the sensation of being bit." Dep. Ex. 9, p. 1; Hill Dep. 50:23-51:7. (App. pp. 15 and 47). In Hill's report he describes the shooting as "I heard the dog growl and immediately felt the sensation of being bit. . . [I] began to back pedal . . . The dog began advancing toward me with its teeth showing and I drew my duty weapon and pointed at a downward angle toward the dog and fired a shot. During the back pedal I lost my balance on the downward angled, snow covered sidewalk and began falling. . . Before hitting the ground my body positioned slightly lower than 45 degrees when another shot was fired at the dog, which I observed to still be advancing toward me at my feet." Dep. Ex. 9, p.1. (App. p. 15).

Three eyewitnesses saw Hill approach Autumn, Gabriel and G.S., saw how Sammy was behaving during that time period and heard and or saw the gunshots - Courtney Webb, Ed Ranck and Laura Mellinger. See Merryman body camera video. (App. p. 61). All three were interviewed by Officer Merryman after the shooting, and all three described Sammy as being non-aggressive and/or playful. See Merryman body camera video and Dep. Ex. 10, a transcript containing the portions of the interviews where the eyewitnesses describe Sammy's conduct. (App. pp. 61 and 16-19). Webb said "it looked like [the dog] was trying to play." Merryman body camera video, and Dep. Ex. 10, p. 1. (App. pp. 61 and 16). Ranck repeatedly said Sammy was not aggressive, but he did see Sammy jump on Hill noting that that "it looked no different than if my dog jumped on somebody." Merryman body camera video, and Dep. Ex. 10, p. 2. (App. pp. 61 and 17). Mellinger said the dog wasn't doing anything or being aggressive so she

thought Autumn must have had a weapon and Hill was shooting at her. Merryman body camera video, and Dep. Ex. 10, p. 3. (App. pp. 61 and 18-19). After interviewing the three eyewitnesses Officer Merryman wrote a report in which he made no mention of any of the three eyewitnesses descriptions of Sammy being non-aggressive and/or playful. See Dep. Ex. 28. (App. pp. 27-29).

Hill is "leery" of dogs and was unable to identify if his leeriness was "a cautious leery or an over-the-top leery." Dep. Ex. 11, Hill's DCI Interview, p. 34-35; and Hill Dep. p. 52:16-21 and 53:17-23. (App. pp. 22-23 and 47). Hill is now adamant that Sammy bit him even after conceding that a bite on the thigh would have to penetrate his pants to cause an injury and finding out that there was no hole in his pants as determined by the DCI. Hill Dep. p. 22:13-24, and Dep. Ex. 3, p.1. (App. pp. 45 and 11). The doctor who treated Hill at the ER, Brandon Beauchamp, states that he saw an abrasion, but no puncture wound. (App. pp. 52-53). The doctor diagnosed it as a bite because of the history he was provided, and that if he had been told only that the dog jumped on Hill, that would have changed his opinion. (App. pp. 52-53). Dr. Beauchamp also noted the abrasion was not bleeding and he did not recall even putting a band aid on the wound. (App. pp. 52-53). The alleged wound is barely, if at all, visible on a picture taken at the hospital. Hill circled the area he claimed was injured. Deposition Exhibit 5, p. 1. (App. p. 12).

Hill was carrying on his utility belt at the time of the shooting pepper spray, located on his right side just in front of his service weapon, a Taser that was holstered on his left side, and a baton. Dep. Ex. 8, p. 2, Hill Dep. 43:25-44:2 (Taser); 44:14-25 (pepper spray); and Dep. Ex. 8, p. 1 (baton - visible at the top of the photograph right under to the red pepper spray canister). (App. pp. 13-14 and 46). Hill is right handed. Dep. Ex. 11, p. 2. (App. p. 20). All these items on Hill's utility belt are "readily available" to be used in an emergency. Grimshaw Dep. 19:8-16.

(App. p. 60). The pepper spray on Hill's utility belt could be pulled out and used just as quickly as the service weapon since they are located right next to each other. Dep. Ex. 8, p. 2. (App. p. 14). Hill had previously and successfully used a Taser to handle a dog that was attacking another dog and he agreed that pepper spray was "a very effective deterrent for dogs." Dep. 44:3-13 and 45:1-3. (App. p. 46). Hill had plenty of time to consider how to handle Sammy using less than lethal force since he knew the Steele's had a dog from a previous call at the home and the dog "was in [his] mind" as he exited his patrol cruiser to approach Autumn, Gabriel and G.S. Dep. 71:2-5 and Dep. 52:2-5. (App. pp. 47 and 50).

Hill claimed during his deposition that he did absolutely nothing wrong in shooting and killing Autumn Steele and warned the pet owners of the City of Burlington that "if the same factual circumstances arose again [he] would conduct [himself] in the same manner." Hill Dep. 5:23-6:6. (App. pp. 43-44).

Training for how to handle dogs in the course of police work, although not provided to Hill, was available prior to the shooting of Autumn Steele. Vaughn Dep. 17:16-18:2. (App. pp. 55-56). That available training included the following directives:

a. More people are killed by lighting every year than dog bites. Dep. Ex. 32, p. 4 (App. p. 31);

b. The overwhelming majority of dog bites are minor, causing either no injury, or injury so minor that no medical care is required. Dep. Ex. 32, p. 4 (Hill admitted his injury was minor and the only reason he sought medical treatment was because departmental policy required him to do so. Hill Dep. 22:4-12. (App. p. 31);

c. Fatalities from dog attacks are extremely rare, and most often affect the weak, such as elderly and small children. Dep. Ex. 32, p. 4. (App. p. 31);

d. There is no documented case of a Police Officer dying as the result of a dog-bite related injury. Dep. Ex. 32, p. 4. (App. p. 31);

e. Dogs communicate by barking and some dogs will even use a growl to talk to you, this does not always mean they are being aggressive. Dep. Ex. 32, p. 11. (App. p. 32);

f. A running police officer is likely to be chased by any dog in the vicinity. Dep. Ex. 32, p. 14. (App. p. 33);

g. You cannot judge the aggressiveness of a dog by its size, shape or breed. Dep. Ex. 32, p. 18. (App. p. 34);

h. Dogs will bite the first thing they can grab so offer them you baton, flashlight, or you forearm if nothing else available. Dep. Ex. 32, p. 27. (App. p. 35);

i. Taser may be used to subdue dogs. Dep. Ex. 32, p. 32. (App. p. 36); and

j. Pepper spray can be effective if not used in confined quarters. Dep. Ex. 32, p. 33. (App. p. 36)

Additional training sponsored by the U.S. Department of Justice was available online prior to the shooting of Autumn Steele. Grimshaw Dep. 11:10-15 and 14:10-22. (App. pp. 58-59). That training included the following directives:

a. In dealing with a dog the use of force may be necessary to overcome a subject's resistance to arrest, protect officer from bodily harm, protect suspect and bystanders from injury, and prevent an escape. Dep. Ex. 33, p. 3. (App. p. 38);

b. Baton, Taser and verbal and body language may be available to control dogs. Dep. Ex. 33, p. 4. (App. p. 39);

c. Most dog bites are not full attacks, but rather a bite or bites (no violent shaking) intended to warn the person. Dep. Ex. 33, p. 5. (App. p. 40); and

d. **Only after a dog has attacked, and the attack continues for several seconds with the dog shaking the officer or individual, is lethal force an appropriate response to the threat of serious bodily injury**. Dep. Ex. 33, p. 5. (App. p. 40).

(emphasis added)

ARGUMENT

42 U.S.C. § 1983 was designed to provide a "broad remedy for violations of federally protected civil rights." *Monell v. Dep't of Soc. Servs*., 436 U.S. 658, 685, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978). §1983 provides a remedy for violations of all "rights, privileges, or

immunities secured by the Constitution and laws [of the United States]." 42 U.S.C. §1983. In a §1983 action, the plaintiff must prove: (1) that "the conduct complained of was committed by a person acting under color of state law;" and, (2) that the "conduct deprived a person of rights, privileges, or immunities secured by the Constitution of the United States." *Parratt v. Taylor*, 451 U.S. 527, 535, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981), overruled on other grounds by *Daniels v. Williams,* 474 U.S. 327, 106 S.Ct. 662, 88 L.Ed.2d 662 (1986). There is no dispute about the first element in this case - neither party contests that Defendant Hill was acting under color of state law.

I. SUMMARY JUDGEMENT STANDARD

A Motion for Summary Judgment may be granted only if, after examining all of the evidence in the light most favorable to the nonmoving party, the Court finds that no genuine issues of material fact exist and that the moving party is entitled to judgment as a matter of law. *Kegel v. Runnels*, 793 F.2d 924, 926 (8th Cir. 1986). Although "direct proof is not required to create a jury question . . . to avoid summary judgment, 'the facts and circumstances relied upon must attain the dignity of substantial evidence and must not be such as merely to create a suspicion.'" *Metge v. Baehler,* 762 F.2d 621, 625 (8th Cir. 1985) (quoting *Impro Prod., Inc. v. Herrick*, 715 F.2d 1267, 1272 (8th Cir. 1983)). "[T]he mere existence of some alleged factual dispute between the parties will not defeat a motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-8 (1986). (Emphasis added). An issue is "genuine," if the evidence is sufficient to persuade a reasonable jury to return a verdict for the nonmoving party. See *id*. at 248. "As to materiality, the substantive law will identify which facts are material. . . . Factual disputes that are irrelevant or unnecessary will not be counted." *Id*.

II. EXCESSIVE FORCE AS A MATTER OF LAW[1]

A. Fourth Amendment of the U.S. Constitution

The facts as discovered confirm the allegations of Plaintiffs' Complaint and the Court's reasoning used in denying the Defendants' Motion to Dismiss against Plaintiffs the Estate of Autumn Steel, Gabriel Steele and G.S. In close proximity to Autumn, Gabriel and G.S., "Hill drew his firearm, apparently intending to shoot the family dog, which was approaching Hill. . . The [now established] facts permit an inference that a reasonable person in Gabriel, Autumn and G.S.'s position would not feel free to leave the encounter with Hill." Order [Denying Motion to Dismiss], p. 9, Doc. 20, may 8, 2107. Hill admitted the seizure in his deposition stating that "I believe so" in response to the question, ". . . Autumn, Gabe and [G.S], isn't it true that none of those three people were free to leave that scene until you were done with your investigation." Pursuant to *U.S. v. Mendenhall*, 446 U.S. 544, 554 (1980), Hill seized Autumn, Gabriel and G.S., as a matter of law. See also, *Lesher v. Reed*, 12 F.3d 148, 150 (8th Circ. 1994)(concluding that an officers removal of a pet dog from a family home to have the animal killed did constitute a seizure under the Fourth Amendment).

The force Hill used was excessive and unreasonable by any standard especially that of the Fourth Amendment. Therefore, there is no genuine issue of material fact with respect to the use of excessive force Hill and Plaintiffs are entitled to judgment as a matter of law. The right to be free from excessive force is a clearly established right under the Fourth Amendment's prohibition against unreasonable seizures of the person. *Guite v. Wright*, 147 F.3d 747, 750 (8th Cir. 1998)

[1] This section only applies to the claims of the Estate of Autumn Steele, Gabriel Steele and G.S. since the other Plaintiffs' Fourth Amendment claims were dismissed by the Court's Order on Motion to Dismiss. Order, Doc. 20, may 8, 2017.

(citations omitted). "The violation of this right will, of course, support a § 1983 action." *Crumley v. City of St. Paul,* 324 F. 3d 1003, 1007 (8th Cir. 2003).

Hill's use of lethal force against Sammy the family pet, Autumn Steele, Gabriel Steele and their minor child G.S. was unreasonable and wholly unnecessary and unwarranted given the minimal threat he faced. Hill knew the Steele family had a dog. (App. p. 50). He saw the dog as he got out of his patrol cruiser and it "was in [his] mind" as he approached Autumn, Gabriel and G.S. (App. p. 47). Hill knew immediately after he shot Autumn that he acted not only in an objectively unreasonable manner, but recklessly. There is no other reason for a police officer, after engaging in such questionable conduct, to make the highly inculpatory admission "I'm fucking going to prison." (App. pp. 41 and 5).

In *Graham v. Connor*, the Court held that the proper application for the test of reasonableness under the Fourth Amendment requires "careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." *Id.* at 396. None of the *Graham* factors apply in this case to justify Hill's decision to use lethal force. The crime he was investigating was minor, a violation of a no contact order and/or simple assault; neither Autumn, Gabriel, G.S. or Sammy the dog posed an immediate threat to Hill, and there is no allegation of resisting or evading arrest.

This Court, in denying the Defendants' Motion to dismiss, cited *Robinson v. Pezzat,* 818 F.3d 7 (D.C. Cir. 2016) holding that "the use of deadly force against a household pet is reasonable only if the pet poses an **immediate danger** and the use of force is **unavoidable**." (Emphasis added). The undisputed facts of this case establish that Hill was not facing an

immediate and unavoidable danger. Hill's use of lethal force was entirely avoidable. First, there was no reason to use any force because Sammy was not being aggressive. Second, to the extent Sammy is found to be minimally aggressive Hill had numerous other options available to him to handle the situation including his, baton, Tazer and pepper spray.

In *Brown v. Battle Creek Police Dep't*, 844 F.3d 556, 569 (6th Cir. 2001), the Sixth Circuit held that "use of deadly force against a dog . . . is reasonable under the Fourth Amendment when, given the totality of the circumstances and viewed from the perspective of an objectively reasonable officer, the dog poses an imminent threat to the officer's safety." Sammy, by jumping on Hill once and even causing Hill to feel the "sensation of being bitten," did not pose an immediate threat to Hill sufficient to justify the use of lethal force, as a matter of law. As the training sponsored by the U.S. Department of Justice provides, the use of lethal force against a dog is only justified "**after a dog has attacked, and the attack continues for several seconds with the dog shaking the officer or individual**." (Emphasis added) (App. p. 40). A dog jumping on an officer one time, or even biting an officer one time, does not, as a matter of law, meet that standard. This standard has now been adopted by the City of Burlington and is used to train its police officers. App. pp. 58-59). Tragically, this standard and the corresponding training, available prior to Hill shooting and killing Autumn Steele, was not implemented by the City of Burlington. *Id*. Although Hill's warning to the pet owners of the City of Burlington that he will act in the same way if the same situation arises in the future would lead to the conclusion that the training was not effective. (App. pp. 43-44).

It gets worse for Hill because in none of the other cases involving officer's shooting dogs, was the officer, by shooting at the dog, placing innocent bystanders in harm's way. So, even if

the Court finds that a reasonable jury could conclude Sammy was an "imminent threat" to Hill, such that use of lethal force was justified, firing in close proximity to and in the direction of Autumn, Gabriel and G.S. was not objectively reasonable. This is particularly true given the alternatives available to Hill including his Tazer, pepper spray and baton. Under the Fourth Amendment officers are not allowed to use more force than is reasonably necessary under the circumstances. With less lethal force available to him, Hill acted objectively unreasonably, as a matter of law, in choosing lethal force over the use of less force that would have remediated any threat posed by Sammy.

Finally, this case is especially ripe for summary judgment because the entire act of Hill shooting and killing Autumn Steele was captured on his body camera video. (App. p. 41). The United States Supreme Court has made it clear that where videotaped evidence is before the court on a summary judgment motion, the videotape trumps any purported facts offered by the non-movant that differ from what can plainly be seen and heard on the videotape. *Scott v. Harris*, 550 U.S. 372, 127 (2007). *Scott* is a civil rights case in which the plaintiff alleged that the defendant used excessive force during an arrest. The Supreme Court held that the trial court erred in crediting the version of the facts alleged by the plaintiff, contradicted by video tape of the incident, in order to deny a motion for summary judgment in defendants' favor.

B. Article I, Section 8 of the Iowa Constitution

Typically Iowa Constitutional claims are analyzed using the same framework as that used in analyzing the corresponding federal right under the U.S. Constitution. That is no longer necessarily the appropriate analytical application given the Iowa Supreme Court's ruling in *Godfrey v. State*, 898 N.W.2d 844, 880 (Iowa 2017), holding that Iowans now have a private right of action for violation of their Iowa Constitutional rights similar to those allowed by 42

U.S.C. §1983 and *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971). One Federal Court in Iowa has already certified a question to the Iowa Supreme Court regarding the proper implementation of the *Godfrey* private right of action. See *Baldwin v. Esterville*, Iowa Supreme Court Certified Question of Law from the Honorable Mark W. Bennett, Case No. 17-1592, pending. In *Baldwin* the question presented involves the application, if any, of qualified immunity for police officers alleged to have violated the rights of citizens established by the Iowa Constitution.

In the context of this motion, where Plaintiffs are seeking summary judgment against a police officer Defendant on liability, Plaintiffs are not requesting the Court to apply a different analysis to their claims made under the Iowa Constitution.

III. NEGIGENCE/WRONGFUL DEATH

Under the Iowa survival act the elements applied to prove liability for wrongful death are the same as proving negligence of an injured, but surviving party. A defendant in a wrongful death claim is found liable for the failure to use ordinary care. See I.C.J.I. 700. "Negligence" means the failure to use ordinary care. *Id*. Ordinary care is the care which a reasonably careful person would use under similar circumstances. "Negligence" is doing something a reasonably careful person would not do under similar circumstances, or failing to do something a reasonably careful person would do under similar circumstances. *Bartlett v. Chebuhar*, 479 N.W.2d 321 (Iowa 1992).

In this case no reasonably careful person would have pointed and fired a gun in the direction of Autumn, Gabriel and G.S. in order to respond to a dog jumping on them, or even biting them, exactly one time. Hill admitted his wrongful and even reckless conduct

immediately after the shooting by stating, "I'm fucking going to prison." Dep. Ex. 34 and Dep. Ex. 2, p. 2:14-18.

CONCLUSION

For all the reasons stated above, the Plaintiffs' Motion for Summary Judgment on liability should be granted.

DAVE O'BRIEN LAW
1500 Center St NE
Cedar Rapids, Iowa 52402
Telephone: (319) 861-3001
Facsimile: (319) 861-3007
E-mail: dave@daveobrienlaw.com

By: /s/ *David A. O'Brien*
DAVID A. O'BRIEN, AT0005870

SHELNUTT LAW FIRM
10 9th St., Suite 101
Columbus, GA 31901
Telephone: (256) 547-4988
E-mail: jms@shelnuttlaw.com

By: /s/ *John Shelnutt*
JOHN M. SHELNUTT,

LAW OFFICES OF ADAM J. KLEIN
6 Concourse Parkway, Suite 2920
Atlanta, GA 30328
Telephone: (678) 825-5529
Facsimile: (404) 475-3091
E-mail: aklein@adamkleinlaw.com

By: /s/ *Adam J. Klein*
ADAM J. KLEIN, Ga Bar No 425032

HENKELVIG LAW
314 N. 4th St.
Burlington, IA 52601
Phone: (319) 753-5411
Fax: (866) 255-4581
TAHenkelvig@iabar.org

By: /s/ *Trent A. Henkelvig*
Trent A. Henkelvig,

ORIGINAL FILED.

COPY TO:

Martha Shaff
Betty, Neuman & McMahon, PLC
1900 East 54th St.
Davenport, IA 52807
(*Attorney for Defendants)*

PROOF OF SERVICE

The undersigned certifies that the foregoing instrument was served upon all parties to the above cause to each of the attorneys of record herein at their respective addresses disclosed on the pleadings on the 12th day of January, 2018, by:

xEDMS/ECF ☐ FAX
☐ Hand Delivered ☐ Certified Mail
☐ FedEx/Airborne Express Email

Signature: /s/ David A. O'Brien