IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
DAVENPORT DIVISION

GABRIEL STEELE, individually, and as Executor of the Estate of AUTUMN STEELE, and as next of friend for minor G.S., Sean Schoff, as next of friend for minor K.S., and GINA COLBERT, individually, Plaintiffs, vs. CITY OF BURLINGTON and JESSE HILL, Defendant.	Civil No. 3:16-cv-105 ***FILED UNDER SEAL*** **DEFENDANTS' MEMORANDUM OF AUTHORITIES IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT**

COME NOW Defendants, City of Burlington and Jesse Hill, by and through their attorneys, Betty, Neuman & McMahon, P.L.C., and for their Memorandum of Authorities in Support of Summary Judgment Pursuant to Federal Rule of Civil Procedure 56 and Southern District of Iowa Local Rule 56 state:

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II. INTRODUCTION

The incident at the heart of this litigation transpired in less than eight (8) seconds from the arrival of Burlington Police Officer Jesse Hill ("Officer Hill") to the scene of an ongoing domestic disturbance. On January 6, 2015, Officer Hill responded to a domestic disturbance between Autumn Steele and Gabriel Steele at 104 South Garfield Avenue in Burlington, Iowa. (Appendix 1-3; 9-21; 25-27). Upon his arrival to the scene, Officer Hill observed Autumn physically assaulting Gabriel while he was holding their minor child, G.S. on a snow-covered sidewalk near their residence. (Appendix 2-3; 22-24; 26). The Steeles' 80-pound German Shepherd-mix dog, Sammy, was also moving around unrestrained near the Steeles. (Appendix 26; 39). Officer Hill attempted to stop Autumn from assaulting Gabriel by issuing a verbal command to her and by attempting to physically stop her assaults. (Appendix 2, 0:04-0:05; 26). As he was attempting to restrain Autumn, Officer Hill felt the sensation of being bitten on his upper left leg by the Steeles' dog. (Appendix 26).

Upon feeling the bite from the dog Officer Hill ordered the Steeles to restrain their dog. (Appendix 2, 0:05-0:06; 26). The Steeles' dog, which was in close proximity to Officer Hill, barked, growled, bared its teeth and advanced towards Officer Hill. (Appendix 2, 0:05-0:07; 26). Officer Hill made a split-second decision to draw and discharge his service weapon to stop an impending threat of attack from the dog and to avoid bodily injury from the dog. (Appendix 2, 0:07; 26). While Officer Hill was discharging his firearm towards the dog, he slipped and fell backwards on the snow-covered sidewalk. (Appendix 2, 0:07; 26). He discharged two rounds from his service weapon within approximately a second of each other towards the dog. (Appendix 2, 0:07; 26). The dog was wounded in the right front shoulder by Officer Hill. (Appendix 39-41). Autumn was also struck and fatally wounded. (Complaint – Docket #1, ¶ 27).

Plaintiffs filed the above-captioned matter, asserting that Defendant Officer Hill unreasonably seized Autumn, Gabriel and G.S., a minor, through excessive deadly force in contravention with the Fourth Amendment of the United States Constitution and Article 1, Section 8 of the Iowa Constitution. (Complaint – Docket #1, Count I). Plaintiffs further assert Defendant City of Burlington is liable for Officer Hill's actions by failing to train and/or supervise its police officers regarding their use of deadly force. (Complaint – Docket #1, Count III). Plaintiffs further assert both Defendants are liable under state-based tort claims of wrongful death/negligence, emotional bystander distress to Gabriel and G.S., and losses of consortium to Gabriel, Autumn's minor children, G.S. and K.S., and Autumn's mother, Gina Colbert. (Complaint – Docket #1, Counts IV – IX). The Court, upon ruling on a Motion to Dismiss filed by Defendants, dismissed Count II of Plaintiffs' Complaint in its entirety and narrowed the applicable Plaintiffs able to assert constitutional claims under Counts I and III. (Ruling on Defendants' Motion to Dismiss – Docket # 20).

For the reasons set forth herein, Defendants are entitled to summary judgment of all claims asserted by Plaintiffs.

III. SUMMARY JUDGMENT STANDARD

The summary judgment standard under Federal Rule of Civil Procedure 56 is well-established:

> The Court will grant summary judgment if, viewing the evidence in the light most favor-able to the nonmoving party, no genuine issue of material fact exists, and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a); *Patel v. Bureau of Prisons*, 515 F.3d 807, 812 (8th Cir. 2008) (citing *Freeman v. Ace Tel. Ass'n*, 467 F.3d 695, 697 (8th Cir. 2006)). To preclude the entry of summary judgment, the nonmovant must make a sufficient showing on every essential element of its case for which it has the burden of proof at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317,

> 322–23 (1986); *Baye v. Diocese of Rapid City*, 630 F.3d 757, 759 (8th Cir. 2011). To show that a fact cannot be disputed, or alternatively, is genuinely disputed, a party must
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> > support the assertion by ... citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials; or ... showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.
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> Fed. R. Civ. P. 56(c)(1)(A) & (B).
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> The quantum of proof that the nonmoving party must produce is not precisely measurable, but it must be enough evidence "such that a reasonable jury could return a verdict for the nonmovant." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *see also Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986) ("opponent must do more than simply show that there is some metaphysical doubt as to the material facts"); *Williams v. City of Carl Junction*, 480 F.3d 871, 873 (8th Cir. 2007) (internal quotations omitted) ("The nonmoving party must present more than a scintilla of evidence and must advance specific facts to create a genuine issue of material fact for trial.").
> On a motion for summary judgment, the Court views all the facts in the light most favorable to the nonmoving party, and it gives that party the benefit of all reasonable inferences that can be drawn from the facts. *Lickteig v. Business Men's Assur. Co. of Am.*, 61 F.3d 579, 583 (8th Cir. 1995).

Freeman v. Chiprez, 2013 WL 12088584, at *2 (S.D. Iowa 2013), *aff'd*. 578 F. App'x 618 (8th Cir. 2014).

IV. ARGUMENT

A. PLAINTIFFS CAN NOT AS A MATTER OF LAW ESTABLISH UNREASONABLE SEIZURE CLAIMS AGAINST OFFICER HILL UNDER 42 U.S.C. § 1983 AND OFFICER HILL IS IMMUNE FROM SUIT UNDER THE DOCTRINE OF QUALIFIED IMMUNITY.

1. Applicability Of Qualified Immunity To 42 U.S.C. § 1983 Claims.

Under the doctrine of qualified immunity government officials are shielded from civil liable under 42 U.S.C. § 1983 unless "the official's conduct violates a clearly established constitutional or statutory right of which a reasonable person would have known." *Winslow v. Smith*, 696 F.3d 716, 730 (8th Cir. 2012) (internal citation omitted).

Qualified immunity applies "regardless of whether the government official's error is 'a mistake of law, mistake of fact, or a mistake based on mixed questions of law and fact.' " *Pearson v. Callahan*, 555 U.S. 223, 231 (2009) (citing *Groh v. Ramirez*, 540 U.S. 551, 567 (2004)). The United States Supreme Court has "generously construed qualified immunity protection to shield 'all but the plainly incompetent or those who knowingly violate the law.' " *Littrell v. Franklin*, 388 F.3d 578, 582 (8th Cir. 2004) (citing *Malley v. Briggs*, 475 U.S. 335, 341 (1986)). Whether qualified immunity applies is a question of law for the Court to decide. *Id.* at 584-5. "Qualified immunity 'is an *immunity from suit* rather than merely a defense to liability'…and 'is effectively lost if a case is erroneously permitted to go to trial.' " *Solomon v. Petray*, 699 F.3d 1034, 1038 (8th Cir. 2012) (emphasis original) (internal citations omitted).

To determine whether a defendant is entitled to qualified immunity requires courts to engage in a two-step inquiry: (1) whether the facts shown by the plaintiff make out a violation of a constitutional or statutory right, and (2) whether that right was clearly established at the time of the defendant's alleged misconduct. *Winslow*, 696 F.3d. at 730-31. **"[D]efendants are entitled to qualified immunity unless the answer to both of these questions is yes**." *Id.* (emphasis

added). In the context of a claim of an unreasonable seizure in violation of the Fourth Amendment, "the claimant must demonstrate a seizure occurred and the seizure was unreasonable" to support a violation of the constitutional right and satisfy the first prong of the qualified immunity analysis. *Howard v. Kansas City Police Dept.*, 570 F.3d 984, 988 (8th Cir. 2009).

2. The Undisputed Facts Do Not Establish There Were Unreasonable Seizures Of Plaintiffs In Violation Of The Fourth Amendment.

i. There Is No Evidence Officer Hill Directed The Use Of His Service Weapon Towards Autumn Steele With The Intent To Restrain Or Subdue Her To Constitute A "Seizure" Under The Fourth Amendment.

The Estate of Autumn Steele ("Estate") avers she was unlawfully seized in violation of her constitutional rights under the Fourth Amendment from the time Officer Hill arrived to her residence until the time she was fatally wounded. (Appendix 50-52). A police officer only commits a seizure for purposes of the Fourth Amendment when there is a restraint in the person's liberty that is effectuated "through means intentionally applied" by the officer towards that person. *McCoy v. City of Monticello*, 342 F.3d 842, 847 (8th Cir. 2003). The United States Supreme Court has specified "the Fourth Amendment addresses 'misuse of power,'…*not the* ***accidental*** *effects of otherwise lawful government conduct*." (emphasis added) *Id*. (quoting *Brower v. County of Inyo*, 489 U.S. 593, 596-7 (1989)). Therefore, in order to prove an unlawful seizure in violation of Autumn's Fourth Amendment rights, the Estate must establish that Officer Hill's use of his service weapon was intentionally directed at her to restrain or subdue her.

A police officer that attempts to shoot at an intended-target, misses, and instead strikes an unintended-target has not "seized" the unintended-target for purposes of the Fourth Amendment because the discharge of the weapon was not *intentionally applied to that target*. (emphasis added) *Id*. A person contending he or she was seized when struck by a police officer's bullet

must show that the officer intended to restrain or subdue him or her through the means of firing the weapon. *Id.* In *Moore v. Indehar*, the Eighth Circuit Court of Appeals specifically held "**bystanders are not seized for Fourth Amendment purposes when struck by an errant bullet**..." 514 F.3d 756, 760 (8th Cir. 2008) (emphasis added); *see also Simpson v. City of Fork Smith*, 2010 WL 3119791, at *3 (8th Cir. 2010) (granting defendants qualified immunity and rejecting plaintiff's alleged § 1983 claim where there was no evidence that plaintiff was struck by anything other than an errant bullet).

Officer Hill pulled out his firearm after he was bit and in response to the immediate and impending threat of further physical injury to himself by the dog. (Appendix 2, 0:04-0:07; 3, 5:25-5:58, 6:01-6:04, 14:30-14:58; 26; 28-30;). Officer Hill discharged his firearm the first time at a downward angle with the intention of striking the dog. (Appendix 2, 0:07; 26). As Officer Hill fired his weapon towards the dog, he lost his footing and the gun discharged a second time. (Appendix 2, 0:07; 26). Both discharges occurred within approximately one second of each other and were directed towards the advancing dog. (Appendix 2, 0:07; 26). He did not issue any verbal commands to Autumn to indicate that he intended to seize or restrain her through the use of a firearm. (Appendix 2). There is no evidence that Officer Hill intended to strike Autumn Steele at any point in time when he discharged his firearm or that he intended to use his firearm as a means of restraining or subduing her.

Officer Hill's and Gabriel's reactions after the shooting objectively support that Autumn was not Officer Hill's intended target when he fired his weapon. Even after the two rounds were discharged by Officer Hill, both Gabriel and Officer Hill were initially perplexed as to whether Autumn was even struck by any of the discharged rounds. (Appendix 2, 0:10-0:33). Gabriel did not ask Officer Hill "why" he shot Autumn; rather, he asked Officer Hill "if" he shot Autumn.

(Appendix 2, 0:10-0:33). Officer Hill was audibly distraught and in disbelief that Autumn had been struck by any rounds he fired. (Appendix 2, 0:10-0:33). Gabriel further informed Burlington police officers arriving on scene after the incident that Officer Hill drew his weapon and shot at his dog. (Appendix 3, 5:25-5:28, 6:01-6:04, 14:30-14:58).

Plaintiffs can not prove that Officer Hill intentionally shot at Autumn, a bystander, with the intent to subdue or restrain her on January 6, 2015. The undisputed evidence only supports that Officer Hill discharged his service weapon at the dog and with the intention of restraining the dog. Therefore Plaintiffs' 42 U.S.C. § 1983 claim for an unlawful seizure of Autumn in violation of her Fourth Amendment rights due to being struck by a round discharged from Officer Hill's service weapon must fail as she can not establish a seizure occurred under the law.

ii. Gabriel Steele And G.S. Were Not "Seized" For Purposes Of The Fourth Amendment At Any Time By Officer Hill On January 6, 2015.

Both Gabriel Steele and G.S. aver they were seized for purposes of the Fourth Amendment from the time that Officer Hill arrived at their location and until they were "allowed" to leave the scene by police. (Appendix 53-58). A seizure for purposes of the Fourth Amendment occurs "when an officer restrains the liberty of an individual through physical force or show of authority." *McCoy*, 342 F.3d at 846 (citing *Terry v. Ohio*, 392 U.S. 1 (1968)). "When the actions of the police do not show an unambiguous intent to restrain or when an individual's submission to a show of governmental authority takes the form of passive acquiescence…a seizure occurs if 'in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.' " *Brendlin v. California*, 551 U.S. 249, 255 (2007).

When Officer Hill arrived to the scene of the domestic disturbance incident between Autumn and Gabriel, he ordered Autumn to get away from and to stop physically assaulting her

husband, Gabriel, who was holding their minor child, G.S., in his arms. (Appendix 2-3; 26). Officer Hill did not have any weapons displayed in his hands and he was using both hands in an attempt to physically restrain Autumn. (Appendix 2, 0:04; 26). Officer Hill did not issue any verbal commands to Gabriel or G.S. when he approached them. (Appendix 2, 0:00-0:07; 31-32). It is not objectively reasonable for Gabriel or G.S. to believe they were not free to leave from interaction with Officer Hill merely because he presented to their location as a uniformed officer and when he never gave any commands to them to restrain their freedom of movement. *See U.S. v. Drayton*, 536 U.S. 194, 204-5 (2002) (noting prior instances where the United States Supreme Court has found no seizure occurred when officers approached individuals while wearing police uniforms, holstered firearms and displaying police badges.).

Officer Hill did not physically touch Gabriel or G.S. at any time during his encounter with them. (Appendix 2). Officer Hill did not state anything to Gabriel or G.S. at any time directly or indirectly indicating that they were being detained, arrested, or were not free to leave. (Appendix 2). Officer Hill drew his service weapon only after he perceived an immediate, impending threat of injury from the Steele's dog, Sammy. (Appendix 2, 0:04-0:07; 3, 5:25-5:58, 6:01-6:04, 14:30-14:58). When Officer Hill drew his service weapon he pointed it at the dog and when he discharged his firearm he pointed it at the dog. (Appendix 2, 0:07; 26). There is no evidence that he ever pointed his service weapon at Gabriel or G.S. at any point in time. Gabriel and G.S. were never struck by any rounds discharged from Officer Hill's service weapon. (Appendix 2-3).

To hold that Gabriel and G.S. were "seized" from the mere drawing of Officer Hill's service weapon in their vicinity and pointing it at their dog would be an untenably broad application of the Fourth Amendment's protection. There is no federal authority supporting such

a broad-sweeping application of the Fourth Amendment's protection and such a holding would eviscerate the very limited purpose of the Fourth Amendment. The Fourth Amendment was designed to dissuade government actors from making unreasonable seizures through ***means intentionally applied***. (emphasis added). *McCoy*, 342 F.3d at 847. There is no evidence that Officer Hill performed any action to intentionally restrain the movement or liberty of Gabriel and G.S. to constitute a seizure under the Fourth Amendment.

There was also no seizure of Gabriel and G.S. after the shooting incident. G.S. left the scene of the incident with a neighbor shortly after it occurred and had no further contact with Burlington police. (Appendix 3, 7:03-7:08; 58). Gabriel voluntarily remained near the scene of the incident. (Appendix 2-3). Burlington police officers asked Gabriel questions regarding his observations during the shooting incident as a witness and he voluntarily responded to those questions. (Appendix 2-3) *See Florida v. Bostick*, 501 U.S. 429, 434 (1991) ("Since *Terry*, we have repeatedly held that *mere police questioning* ***does not*** *constitute a seizure*.") (emphasis added). Neither Gabriel nor G.S. were told that they were not free to leave, that they were being detained or arrested, nor were either of them ever physically restrained by any Burlington police officers at any point in time. (Appendix 2-3).

Since neither Gabriel nor G.S. were seized for purposes of the Fourth Amendment, Defendants are entitled to summary judgment regarding any alleged § 1983 claims asserted by them for alleged violations of their rights protected under the Fourth Amendment.

iii. Even If The Court Were To Find There Was A Seizure Of Plaintiffs, The Undisputed Facts Support Officer Hill's Actions Do Not Amount To An Unreasonable Seizure.

Even if this Court were to find that Officer Hill "seized" any of the Plaintiffs for purposes of the Fourth Amendment or that a genuine issue of material fact exists as to whether a seizure

occurred, the Court's analysis does not stop there. Civil liability under 42 U.S.C. § 1983 is only applicable when there was an ***unreasonable*** seizure by a police officer in contravention with the protection afforded by the Fourth Amendment. (emphasis added) *See Howard*, 570 F.3d at 988..

An officer's use of force is justified and not unconstitutional if it is "***objectively reasonable in light of the facts and circumstances confronting him***, without regard to his subjective intent or motivation." *Aipperspach v. McInerney*, 766 F.3d 803, 806 (8th Cir. 2014) (emphasis added). "The 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Graham v. O'Connor*, 490 U.S. 386, 396 (1989). "The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation." *Id*. at 396-7.

The focus of the inquiry is whether the officer's level of force applied was ***within the range of objective reasonableness*** based on the circumstances presented to the officer. *Schulz v. Long*, 44 F.3d 643, 648-50 (8th Cir. 1995) (emphasis added). It is not a discussion of whether the officer's actions were the most prudent when judged in hindsight, or whether there were lesser-force/alternative options available to the officer instead of the force actually applied by the officer. *Id*.

Officer Hill responded to an emergent domestic disturbance reported by Gabriel to a 9-1-1 dispatcher. (Appendix 1-3; 19-21; 25-27). When Officer Hill arrived to the Steeles' residence, he observed Autumn physically striking Gabriel while he was holding their minor child, G.S., on the sidewalk near their residence. (Appendix 2; 22-24; 26). He exited his vehicle and approached the Steeles on foot. (Appendix 2, 0:00-0:01; 26). He ordered Autumn to stop

striking Gabriel and attempted to separate her away from Gabriel by grabbing her shoulders. (Appendix 2, 0:04; 26). To the extent that there was any seizure of any Plaintiffs up to this point, the force Officer Hill applied was objectively reasonable under the circumstances to stop the domestic assault, separate the parties and to investigate the domestic disturbance reported by Gabriel to the 9-1-1 dispatcher.

Around the same time that he attempted to physically remove Autumn away from Gabriel, Officer Hill felt the sensation of being bitten in his left thigh from the Steeles' dog, Sammy. (Appendix 26). Officer Hill was later diagnosed with and treated for injuries consistent with a dog bite to his left thigh. (Appendix 42-43; 47-49). Upon feeling the dog's bite, Officer Hill ordered the Steeles to "get their dog." (Appendix 2, 0:05-0:06; 26). Almost simultaneous with this command, the unrestrained dog barks more intensely and growls in close proximity to Officer Hill. (Appendix 2, 0:05-0:07; 26). Officer Hill then observed that the 80-pound German Shepherd-mix dog was facing him, growling and baring its teeth. (Appendix 26; 39). Officer Hill drew his service weapon based upon his observations of the dog and the dog's demeanor towards him. At that point, Officer Hill feared for his safety and well-being against a physical attack from the dog. (Appendix 2, 0:05-0:06; 26; 28-30). Any seizure of the Plaintiffs that resulted from Officer Hill's drawing of his service weapon was objectively reasonable under the circumstances. He reasonably observed an impending and immediate threat of physical harm from a dog that appeared to be acting in an aggressive manner towards him and that was in close proximity to him. He only drew his service weapon after the dog had bit him once and gave additional indicators that it had the propensity to attack him. *See Andrews v. City of West Branch, Iowa*, 454 F.3d 914, 919 (8th Cir. 2006) (holding police officers may utilize deadly force against a pet presenting a threat of imminent danger to the officer).

Given the proximity of the dog to him and the dog's demeanor at that time, Officer Hill made a split-second decision to use deadly force on the dog to prevent bodily harm to him. (Appendix 2, 0:05-0:07; 26; 28-30). Officer Hill fired two shots from his service weapon towards the dog as it was advancing towards him, striking it with at least one of the shots in the front right shoulder. (Appendix 2, 0:07; 26; 39-41). Officer Hill lost his footing while he fired the shots. (Appendix 2, 0:07; 26). As he was shooting and falling backwards, he continued to observe the dog advancing towards him. (Appendix 2, 0:07; 26). After the shooting incident Gabriel stated, in front of Burlington police officers, that his dog was "attacking" and going after Officer Hill immediately before he discharged his firearm at the dog. (Appendix 3, 5:25-5:58, 6:01-6:04, 14:30-14:58). Gabriel further testified that, to him, the phrase "attack" means a dog that is biting or mauling. (Appendix 7-8). To the extent that Officer Hill's shooting at the dog constituted a seizure of the Plaintiffs' property, it was objectively reasonable to prevent Officer Hill from being harmed by an immediate, impending threat of bodily injury from the dog. *See Andrews*, 484 F.3d at 919.

Any additional seizure by Burlington police officers of Gabriel and G.S. after the shooting incident was objectively reasonable. Gabriel and G.S. were witnesses to the shooting incident. G.S. left the scene of the shooting incident to a neighbor's shortly after it occurred. (Appendix 3, 7:03-7:08; 58). Gabriel remained on scene after the incident voluntarily, was asked questions by Burlington police officers regarding his observations during the shooting incident, and he voluntarily answered those questions. (Appendix 2-3). Neither Gabriel nor G.S. were physically restrained or commanded, directly or indirectly, by Burlington police officers to stay at the scene. (Appendix 2-3).

The evidence shows Officer Hill did not act unreasonably on January 6, 2015 and there were no unreasonable seizures of any of the Plaintiffs or their property to constitute a violation of the Fourth Amendment. Therefore, Plaintiffs can not as a matter of law prove any violation of a constitutional right under the Fourth Amendment..

3. Officer Hill Is Entitled To Qualified Immunity Because He Did Not Violate Any Clearly Established Constitutional Rights.

The second part of the qualified immunity analysis the Court must undertake, if it believes there was an unreasonable seizure, is whether the officer violated a then-existing clearly established constitutional right. Qualified immunity can only be defeated if the Court finds Officer Hill violated a constitutional right that was clearly established at the time of deprivation "such that a reasonable official would understand his conduct was unlawful in the situation he confronted.". *Moore*, 514 F.3d at 759 (emphasis added) (internal citations omitted). "This second step is a fact-intensive inquiry and ***must be undertaken in light of the specific context of the case, not as a broad general proposition***." *Id*. (emphasis added) (internal citations omitted); *see also Ashcroft v. al-Kidd*, 563 U.S. 731, 742 (2011) ("[The United States Supreme Courts] have repeatedly told courts…not to define clearly established law at a high level of generality.").

"Officials are not liable for bad guesses in gray areas; they are liable for transgressing bright lines." *Parrish v. Dingman*, 2017 WL 5560280, at *4 (N.D. Iowa 2017) (internal citations omitted). "For a right to be clearly established, '***existing precedent must have placed the statutory or constitutional question beyond debate***.' " *Ryan v. Armstrong*, 850 F.3d 419, 427 (8th Cir. 2017) (emphasis added) (internal citations omitted). Accordingly, an officer that is found, for the first time, to have committed a constitutional violation under facts and circumstances that would not have been clearly and reasonably known as "unconstitutional" at the time of the violation can not be held civilly liable for that first occurrence. *See Wilson v.*

Layne, 526 U.S. 603, 614-18 (1999) (holding, for the first time, officers violated Fourth Amendment when bringing media or third parties during execution of search warrant that are not aiding in warrant but granting qualified immunity to defendants since the constitutionality of the right was not clearly established prior to the violation).

Based on the established case law, in the specific context of this case, no reasonable officer in Officer Hill's position would have understood it was clearly unlawful and unconstitutional to use deadly force to protect himself against an impending attack from an 80-pound German Shepherd-mix dog that had already bit him in the leg and was continuing to advance towards him baring its teeth, growling and barking, resulting in an unintentional fatal injury to a bystander through the discharge of his firearm directed towards the dog.

The existing federal case law pertaining to the use of deadly force on an animal supports a constitutional violation only occurs when the animal presents **no imminent threat of danger to the officer** and when the animal's owners are "known, available, and desirious of assuming custody" of the animal. *Andrews*, 454 F.3d at 919 (emphasis added). The existing federal case law further supports that an officer does not commit a constitutional violation in discharging a firearm for a lawful purpose that unintentionally strikes a bystander/unintended target. *Moore*, 514 F.3d at 760.

Prior to drawing or discharging his service weapon at the Steeles' dog, Officer Hill was bit in the left thigh area by the dog. (Appendix 26; 42-43; 47-49). The unrestrained dog then continued to act aggressively near Officer Hill and exhibited signs that it may attack Officer Hill again by advancing towards him, growling and baring its teeth, immediately before he discharged his firearm at the dog. (Appendix 2, 0:05-0:07; 3, 5:25-5:28, 6:01-6:04, 14:30-14:58; 26; 28-30). The video confirms the dog was growling and barking in close proximity to Officer

Hill immediately before he discharged his firearm. (Appendix 2, 0:05-0:07; 26). Officer Hill recalls seeing the dog continue to advance towards him even while he was falling backwards and discharging his firearm towards the dog. (Appendix 2; 26). Shortly after the incident Gabriel admitted in front of Burlington police officers arriving to the scene that his dog went after and "attacked" Officer Hill immediately prior to his shooting at the dog. (Appendix 3, 5:25-5:28, 6:01-6:04, 14:30-14:58).

Neither Autumn, Gabriel or G.S. stated anything to Officer Hill that they would grab their dog or were desirous of taking custody of the dog before it could attack Officer Hill a second time. (Appendix 2, 0:00-0:07). There is no evidence that either Autumn, Gabriel or G.S. could effectively take control of the dog, which was already in close proximity to Officer Hill, before the dog would have an opportunity to lunge or strike at Officer Hill again.

It is further undisputed Officer Hill did not intend to strike Autumn at any point in time while discharging his firearm. There is no evidence he intentionally pointed his service weapon at her or that he intended to use his firearm on Autumn as a means of restraining or subduing her. Gabriel and Officer Hill were initially perplexed as to whether Autumn was even struck by any of the discharged rounds. (Appendix 2, 0:10-0:33). Officer Hill was audibly distraught and in disbelief that Autumn had been struck by any rounds he fired. (Appendix 2, 0:10-0:33). When recounting the incident in front of Burlington police officers, Gabriel stated Officer Hill drew his weapon and shot at their dog and did not claim Officer Hill intentionally shot Autumn. (Appendix 3, 5:25-5:28, 6:01-6:04, 14:30-14:58).

There is no federal case law, authority, or precedent supporting that Officer Hill violated any clearly established constitutional rights that would have been known to a reasonable official in his position and under the specific facts and circumstances he was presented with on January

6, 2015. In fact, the federal case law existing on January 6, 2015 supports that Officer Hill's actions were neither unlawful nor unconstitutional. Accordingly, Defendant Officer Hill is entitled to qualified immunity as a matter of law and a dismissal of Plaintiff's constitutional claims.

4. Case Law From Other Jurisdictions Supports Officer Hill Is Entitled To Qualified Immunity Under The Facts Of This Case.

In *Powell v. Johnson*, the United States District Court in Minnesota found a police officer did not unreasonably seize plaintiffs' dog by shooting and killing it as it advanced towards him. 855 F. Supp. 2d 871 (D. Minn. 2012). The police officer responded to a call about a possible shooting. *Id*. at 872. During his investigation of the call in the backyard of a residence, he turned around and saw a dog approaching him. *Id*. at 873. The officer withdrew his service revolver, fired a single shot, and killed the dog. *Id*. Although plaintiffs argued there was a genuine issue as to whether or not the dog posed a threat to the officer, the Court noted that all dogs "contain a latent threat to human safety…and can be unpredictable both in their actions and the signals they send." *Id*. at 875-6 (internal citation omitted). The Court found that the dog moving directly towards the officer with its "mouth open, teeth glaring and…[looking] extremely aggressive" made it objectively reasonable for the officer to perceive a threat to his safety and to use deadly force on the animal. *Id*. at 876. Even if the officer misperceived the actual intentions of or threat posed by the dog, it was not objectively unreasonable for the officer to perceive the dog as an imminent threat to his safety. *Id*. The officer was granted qualified immunity and summary judgment to plaintiffs' Fourth Amendment claims. *Id*.

In *Dziekan v. Gaynor*, the United States District Court in Connecticut held that a police officer did not unreasonably seize plaintiff's pet dog when he shot and killed it and was entitled to qualified immunity. 376 F. Supp. 2d 267 (D. Conn. 2005). The Court found that the 55-60

pound dog traveled from 30 feet away from the officer to 15 feet away from the officer in a 5-second time frame immediately prior to the shooting of the animal. *Id*. at 271-2. Although the dog was traveling in a circular pattern 15 feet away from the officer at the time of the shooting and the owner stated to the officer the dog wouldn't bite the officer before he discharged his weapon at the dog, the Court found that the officer reasonably assumed the unrestrained dog posed an imminent threat to his safety and had no way to ascertain whether the dog would actually bite him within the short time frame that the incident occurred. *Id*. The Court further noted "the law does not require the officer to wait until the approaching animal is within biting distance or is leaping at him before taking protective action." *Id*. (internal citation omitted). The Court found the officer's use of deadly force was not unreasonable. *Id*. at 272. The Court alternatively found that qualified immunity would still apply under these circumstances because clearly established law revealed "no Fourth Amendment violation occurs where a law enforcement officer kills a dog that has posed an imminent threat to the officer or citizenry." *Id*. at 273. *See also Chambers v. Doe*, 453 F. Supp. 2d 858, 868 (D. Del., 2006) (holding officers were justified in shooting pit bull that was "growling, aggressive, and advancing" towards an officer while he was attempting to arrest plaintiff).

The material facts of this case are not materially distinguishable from other officer-involved shooting cases presented to the federal district courts, all of which support that qualified immunity applies because the officer's actions are objectively reasonable under the circumstances and do not violate clearly established constitutional precedent. Accordingly, this Court should similarly find that Officer Hill is entitled to qualified immunity and summary judgment regarding Plaintiffs' alleged excessive force claims.

B. PLAINTIFFS' CAUSES OF ACTION UNDER ARTICLE 1, SECTION 8 OF THE IOWA CONSTITUTION ALSO FAIL AS A MATTER OF LAW.

1. <u>The Iowa Courts Do Not Recognize A Private Cause Of Action Of Monetary Damages For An Alleged Violation Of Article 1, Section 8 Of The Iowa Constitution.</u>

In *Conklin v. State*, the Iowa Court of Appeals was first presented with the question of whether a private cause of action arises from an alleged unlawful seizure by a government actor under the Iowa Constitution. 2015 WL 1332003 at *3 (Iowa Ct. App. 2015). The *Conklin* court determined that it could not "judicially imply a private cause of action for a violation of the Iowa Constitution." Id. at *5. After the *Conklin* decision was issued, the case was submitted to the Iowa Supreme Court for further review.

The Northern and Southern District of Iowa Courts hesitated to decide whether a private cause of action exists under Article 1, Section 8 of the Iowa Constitution until the Iowa Supreme Court ruled on the *Conklin* further review application. *See e.g., Wilson v. Lamp*, 142 F. Supp. 3d 793 (N.D. Iowa 2015); *Davis v. Simmons*, 100 F. Supp. 3d 723 (S.D. Iowa 2015); *Baldwin v. Estherville, Iowa*, 218 F. Supp. 3d 987 (N.D. Iowa, 2016). On June 30, 2017, the Iowa Supreme Court denied the *Conklin* application for further review. (Appendix 61-62). With the Iowa Supreme Court's denial of further review of *Conklin*, the existing status of Iowa law is that there is no private cause of action created by an alleged violation of Article 1, Section 8 of the Iowa Constitution.

Additionally, a private cause of action against state government officials for an alleged violation of the Fourth Amendment arises from statute rather than constitutional authority. *See* 42 U.S.C. § 1983; *see also Rehberg v. Paulk*, 566 U.S. 356, 361 (2012) (noting § 1983 "created" a private cause of action for alleged constitutional violations.). There is no Iowa statute similar to 42 U.S.C. § 1983 authorizing civil liability against state governmental officials or agencies for

alleged unreasonable seizures in contravention of the Iowa Constitution. For these reasons, Plaintiff's state constitutional claims against Defendant Officer Hill must be dismissed as a matter of law.

2. Even If A Private Cause Of Action Exists Under Article 1, Section 8 Of The Iowa Constitution, The Iowa Courts Would Follow The Federal Analytical Framework And Plaintiffs Claims Fail As A Matter Of Law.

The Fourth Amendment of the U.S. Constitution and Article 1, Section 8 of the Iowa Constitution are similarly worded and both prohibit unreasonable searches and seizures by government actors. *State v. Tyler*, 830 N.W.2d 288, 291 (Iowa 2013). Generally, the Iowa Supreme Court interprets the seizure provision of the Iowa Constitution using the same analytical framework outlined by the United States Supreme Court regarding seizures implicating the protections of the Fourth Amendment. *Id.* As argued herein, Officer Hill did not violate any Fourth Amendment rights held by the Plaintiffs and is entitled to qualified immunity against Plaintiff's federal constitutional claims. Under the same analytical framework, Officer Hill did not violate any Article 1, Section 8 rights held by the Plaintiffs and Defendants are entitled to summary judgment as a matter of law of Plaintiffs' constitutional claims alleged in Count I. *See Peters v. Woodbury County, Iowa*, 979 F. Supp. 2d 901, 971 (N.D. Iowa, 2013) (granting summary judgment to plaintiff's alleged Iowa constitutional claim based upon same analytical framework applied to analogous United States Constitution claim alleged).

C. PLAINTIFFS CAN NOT SUSTAIN THEIR BURDEN OF PROOF AS TO A *MONELL*/MUNICIPAL LIABILITY CLAIM AGAINST DEFENDANT CITY OF BURLINGTON.

1. Since Plaintiffs' 42 U.S.C. § 1983 And Fourth Amendment Claims Against Officer Hill Fail As A Matter Of Law, Defendant City Of Burlington Must Be Granted Summary Judgment.

In *Monell v. Department of Social Services of City of New York* the United States Supreme Court ruled that a municipality can not be liable for the torts committed by its employees under 42 U.S.C. § 1983 for respondeat superior liability, but it may be liable when an employee violates a constitutional right of a citizen pursuant to the execution of a policy or custom of the municipality authorizing the unconstitutional practices. 436 U.S. 658, 694 (1978). It is axiomatic that a municipality can not be held liable under 42 U.S.C. § 1983 or a *Monell* failure to train/supervise claim unless there is an underlying constitutional violation committed by one of its officers. *Sanders v. City of Minneapolis*, Minnesota, 474 F.3d 523, 527 (8th Cir. 2007) (citing *City of Los Angeles v. Heller*, 475 U.S. 796, 799 (1986)). As argued herein, Officer Hill did not violate any of Plaintiffs' Fourth Amendment rights and is not liable to Plaintiffs under 42 U.S.C. § 1983. Accordingly, any municipal liability claims against Defendant City of Burlington must also be dismissed as a matter of law.

2. Plaintiffs Can Not Sustain Their Burden Of Proof That Defendant City Of Burlington Had Any Official Or Unofficial Policy, Custom Or Usage Of Unconstitutional Use Of Deadly Force Practices.

i. <u>The Burlington Police Department Does Not Have A Written Policy Authorizing The Unconstitutional Use Of Deadly Force.</u>

As a result of *Monell*, even when there is an underlying constitutional violation by an employee of the municipality, "[l]iability for a constitutional violation will attach to a municipality only if the violation resulted from an official municipal policy, an unofficial custom, or a deliberately indifferent failure to train or supervise an official or employee."

Bolderson v. City of Wentzville, Missouri, 840 F.3d 982, 985 (8th Cir. 2016). "A municipal policy or practice is unconstitutional 'on its face' where the policy or practice 'itself violates federal law, or directs an employee to do so.' " *Brossart v. Janke,* 859 F.3d 616, 627 (8th Cir. 2017). Plaintiffs must prove a causal link between the municipality policy or custom and the alleged violation. *Veatch v. Bartels Lutheran Home*, 627 F.3d 1254, 1257 (8th Cir. 2010).

The Burlington Police Department does not have an official written policy that authorizes unconstitutional uses of deadly force. The department utilizes a use of force continuum that authorizes its officer to use deadly force only when reasonably necessary to prevent serious injury or death to the officer or to others. (Appendix 59-60). As previously held by the United States Supreme Court, deadly force is reasonably and constitutionally appropriate when a subject presents an immediate threat of serious physical harm either to an officer or to others. *Tennessee v. Garner*, 471 U.S. 1, 11 (1985). Similarly, deadly force is also reasonably and constitutionally appropriate when an animal presents an immediate threat of serious physical harm either to the officer or to others. *Andrews*, 454 F.3d at 919. Plaintiffs can not prove that Defendant City of Burlington has an official policy permitting unconstitutional seizures or uses of deadly force against citizens. Accordingly, any municipal liability claim against Defendant City of Burlington related to an official municipal policy must be dismissed as a matter of law.

ii. Plaintiffs Have No Evidence Supporting An Unofficial Custom Or Pervasive, Widespread Practice Of Unlawful Uses Of Deadly Force By The Burlington Police Department.

"To trigger municipal liability based on unofficial municipal custom, the custom must be so pervasive among non-policymaking employees of the municipality that it effectively has the force of law" and "[t]he custom must be demonstrated by a continuing, widespread, and persistent pattern of unconstitutional conduct." *Bolderson*, 840 F.3d at 986 (internal citations

omitted). Plaintiffs have no evidence of a pervasive, widespread unofficial policy, custom or practice of unconstitutional uses of excessive deadly force by officers of the Burlington Police Department. Accordingly, any municipal liability claim related to an unofficial custom or practice by Defendant City of Burlington must be dismissed as a matter of law.

iii. Plaintiffs Have No Evidence Burlington Police Department Failed To Train/Supervise Its Officers With Deliberate Indifference To Cause The Death Of Autumn Steele.

"A pattern of similar constitutional violations by untrained employees is 'ordinarily necessary' to demonstrate indifference for purposes of failure to train." *Connick v. Thompson*, 563 U.S. 51, 62 (2011). "Under § 1983, 'a claim for failure to supervise requires the same analysis as a claim for failure to train.' " *Atkinson v. City of Mountain View, Mo.*, 709 F.3d 1201, 1216 (8th Cir. 2013) (internal citation omitted). Neither a claim of failure to train or supervise can succeed unless there is evidence the municipality had previously been presented with notice of a pattern of unconstitutional practices by its officers. *Id*. at 1216-7. Plaintiffs have no evidence of a pattern of similar excessive use of deadly force constitutional violations by officers of the Burlington Police Department. Plaintiffs further have no evidence of complaints by citizens to the City of Burlington about alleged excessive uses of deadly force by its police officers in the context of canine encounters.

For these reasons, Plaintiffs claims against Defendant City of Burlington under a *Monell* failure to train/supervise claim under Count III must be dismissed as a matter of law.

D. DEFENDANTS ARE STATUTORILY IMMUNIZED FROM LIABILITY FOR PLAINTIFFS' STATE LAW TORT CLAIMS.

1. Application of Iowa's Municipal Tort Immunity Act.

In general, every Iowa municipality "is subject to liability for its torts and those of its officers and employees, acting within the scope of their employment or duties, whether arising

out of a governmental or proprietary function." Iowa Code § 670.2. However, the Iowa Municipal Tort Claims Act ("IMTCA") exempts municipalities from liability for certain types of claims and injuries. In particular Iowa Code § 670.4(1)(k) immunizes municipalities from:

> ***A claim based upon or arising out of an act*** or omission ***in connection with an emergency response*** including but not limited to acts or omissions in connection with emergency response communications services.

(emphasis added)

Furthermore, if the municipality is immunized from liability so are all of its employees, including police officers. Iowa Code § 670.12.

The Iowa state courts and the federal courts have previously analyzed the scope and application of Iowa Code § 670.4(1)(k), often known as the "emergency response exception." The immunity "is not limited to the emergency giving rise to the response, but to the response itself" and continues throughout all responses arising from and made in connection with the emergency. *Adams v. City of Des Moines*, 629 N.W.2d 367, 370 (Iowa 2001). A police officer's response to a 9-1-1 call is clearly an "emergency" contemplated under the statute. *Id*. In contrast, routine traffic stops by police officers are not "emergencies" immunized by the act. *See Stych v. City of Muscatine, Iowa*, 655 F. Supp. 2d 928, 935-6 (S.D. Iowa 2009). In *Harrod v. City of Council Bluffs*, the Iowa Court of Appeals held that a municipality was immune from liability under the emergency response exception after police officers responded to a 9-1-1 call regarding a physical altercation in a vehicle between two individuals and officers injured the plaintiff when firing nearly twenty times into the vehicle. 2008 WL 2200083 at *1-5 (Iowa Ct. App. 2008).

Plaintiffs' state-law claims in this matter for wrongful death, bystander emotional distress, and loss of consortium are all negligence-based tort claims subject to immunity under Iowa Code § 670.4(1)(k). It is undisputed that Officer Hill and other Burlington police officers

responded to the Steele residence on January 6, 2015 pursuant to a 9-1-1 call placed by Gabriel Steele for emergency police assistance. (Appendix 1; 19-21). During the 9-1-1 call, Gabriel requested that police officers "hurry" to his residence to provide assistance and stressed the emergent nature of his call. (Appendix 1). Officer Hill and the other Burlington police officers' actions on January 6, 2015 clearly arose out of and in connection with the domestic disturbance emergency reported by Gabriel Steele. Officer Hill further personally observed an ongoing domestic assault by Autumn against Gabriel upon his arrival to the scene, which required immediate intervention from him. (Appendix 2; 26). Any alleged negligent conduct by Officer Hill during and in connection with his emergent response is immunized from liability under the IMTCA.

Additionally, Burlington police officers' actions in gathering information on the scene after the shooting of Autumn Steele were made in connection with and arose out of the 9-1-1 emergency response and are also immunized against any state tort liability claims. *See Seymour v. City of Des Moines*, 519 F.3d 790, 801-2 (8th Cir. 2008) (applying the IMTCA's emergency response exception and holding a police officers' criminal investigation arising from a response to a child's medical emergency was immune from suit.).

Accordingly, Defendants are entitled to statutory immunity under the emergency response exception to the IMTCA, Iowa Code § 670.4(1)(k), and Plaintiffs' state tort claims against Defendants in Counts IV – IX must be dismissed as a matter of law.

V. CONCLUSION

For the reasons set forth herein, Defendants Officer Jesse Hill and City of Burlington are entitled to summary judgment of all claims alleged by Plaintiffs. There is no evidence that Officer Hill unreasonably seized any Plaintiffs in contravention of the Fourth Amendment of the

U.S. Constitution or Article 1, Section 8 of the Iowa Constitution. Any seizure of Plaintiffs by Officer Hill was objectively reasonable under the circumstances he was presented with on January 6, 2015 and he is entitled to qualified immunity. Even if there was an unreasonable seizure by Officer Hill on January 6, 2015, he did not violate any clearly established constitutional rights that would have been known to a reasonable person on January 6, 2015 and he is entitled to qualified immunity.

Since Officer Hill is not individually liable for a constitutional violation of Plaintiffs' rights, the City of Burlington is entitled to summary judgment for any constitutional violations alleged by Plaintiffs. Plaintiffs further do not have any prima facie evidence of a *Monell* failure to train/supervise claim of liability against the City of Burlington. Defendants are further statutorily immunized from all of Plaintiffs' state tort claims because their actions on January 6, 2015 were made in response to and in connection with an emergency.

WHEREFORE, Defendants, City of Burlington and Jesse Hill, respectfully request that the Court grant their Motion for Summary Judgment, enter an order dismissing all of Plaintiffs' claims against them, and for such other and further relief the Court deems equitable and just.

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CERTIFICATE OF SERVICE FOR ELECTRONIC FILINGS

I hereby certify that on January 12, 2018, I electronically filed the foregoing document with the Clerk of Court using the ECF system and a true copy of the foregoing was served either electronically or by U.S. First Class Mail upon the following:

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