IN 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 RESISTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**

Comes now the Plaintiffs, Gabriel Steele, the Estate of Autumn Steele, G.S., Sean Schoff, K.S. and Gina Colbert, and submit their Brief Resisting the Defendants' Motion for Summary Judgment, as follows:

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INTRODUCTION

The initial problem with the Defendants' Motion for Summary Judgment is that it is not based upon undisputed facts, as established by the body camera videos of Defendant Hill and Merryman, but based on after-the-fact justifications made up by the Defense in an attempt to exonerate Hill of his reckless conduct.

Our society honors police officers, as well we should, because of the important and, at times, dangerous job they perform. We provide our police officers with patrol cruisers, uniforms, guns, Tazers, pepper spray, batons and other items of authority and protection. We ask them to enforce our laws. In return we expect them to follow the basic guidelines that objectively reasonable police officers would follow and not violate citizens' constitutional rights.

The bottom line in this case is that Defendant Hill did not come close to following the basic rules for the use of lethal force and Autumn Steele is dead as a result. Defendant Hill wildly overreacted to a risk law enforcement officers across the country face dozens of times every day – a dog they think may be aggressive. As a matter of public policy our society cannot tolerate police officers who fire their service weapons in the direction of innocent bystanders in order to avoid a perceived physical threat from a family pet, particularly when less lethal force that would handle the threat is readily available.

STATEMENT OF FACTS

In this Statement of Facts the Plaintiffs will focus on those factual claims made by the Defendants in support of their summary judgment motion which are in dispute. The Defendants' motion relies on critical passages in Defendant Hill's report, written days after the shooting, about how and why he decided to shoot in the direction of Autumn, Gabriel and G.S., which are either unsupported by, or flat out contradicted by, Hill's body camera video. (Compare Defense App. p. 2 with Defense App. p. 26).

Defendant Hill first claimed he "felt the sensation of being bitten" and that Sammy was "advancing toward" him with his "teeth showing" when filling out his report a couple of days after the shooting. (Plaintiffs' App. p. 47). At the time of the shooting and its immediate aftermath, as unequivocally established by Hill's body camera video, he NEVER ONCE made any of these claims. At the scene Defendant Hill only claimed that Sammy "jumped" on him exactly one time and he described that one time jump as an "attack." (Plaintiffs' App. pp. 41, 4-10 and 45). Defendant Hill admitted in his deposition that he fired his service weapon in the direction of Sammy, Autumn, Gabriel and G.S. because he

feared for his "safety and well-being" because "Sammy jumped on [him]." (Defense App. p. 30)

Defendant Hill's firing of his service weapon was so haphazard and uncontrolled that it is not possible to clearly establish which shot hit Autumn or whether Hill fired the first shot in a downward angle, as later claimed in his report. (Defense App. p. 2). The body camera video shows Hill starting to fall backwards as he fired the first shot in the direction of Autumn, Gabriel and G.S. (Defense App. p. 2). The camera, pinned to Defendant Hill's chest, is pointed up toward the sky as both shots are fired in rapid succession. (Defense App. p. 2).

The Defense cover-up of Defendant Hill's reckless behavior is established by two critical and inculpatory pieces of evidence **not noted in any report prepared by law enforcement investigating this tragedy**, as follows:

1) Defendant Hill immediately admitted his reckless conduct by stating, "I'm fucking going to prison." (Plaintiffs' App. p. 5); and

2) All three eyewitnesses to the shooting described Sammy's behavior as playful and/or non-aggressive (Webb – "he was trying to play;" Ranck – "he wasn't being aggressive" and "it looked no different than if my dog jumped on somebody;" and Mellinger – "I saw the dog just standing by him . . . not doing anything at all."). (Plaintiffs' App. pp. 16-18).

The only way this Court, Plaintiffs and the public, may find out about this critical and inculpatory evidence is to listen to Defendant Hill's and Merryman's body camera video. Both of which, unsurprisingly enough, are claimed to be confidential and not available to anyone except Plaintiffs and this Court under a confidentiality order.

Unlike Hill's report from a couple of days later, Gabriel Steele's recitation of the facts at the scene is spontaneous and completely supported by Defendant Hill's body camera video. Merryman asked Gabriel to "tell me what happened." Gabriel replied, as follows:

> [Autumn] was trying to take the baby. She had a protection order. I don't know what the fuck happened. She got arrested for hitting me yesterday. She come over here and tried to take the baby. I come outside with the baby, she's chasing me. The dog seen the cop pull up. The dog run around here and [Hill's] like "get your dog." I reached over for [the dog]. [Hill] slid on the thing, fired two shots, my wife fucking dropped. The dog's hit. [Hill] didn't even give me a chance to get [the dog]. [Hill] could have pulled his fucking Tazer and tazed the dog."

(Defense App. p. 3).

Merryman then asked, "what was the dog doing?" Gabriel replied, "[Sammy] got out of the house, he was coming out because the baby was out here and the cop showed up and everything else." Merryman then asked, "was [Sammy] attacking the officer?" Gabriel replied, "[Sammy] was going towards him, yeah, but [Hill] didn't even give me a chance to get [Sammy]. He just drew his fucking pistol and shot her. He fired two shots. I don't know where the fuck, my baby was out here, I was out here, my wife dropped instantly." (Defense App. 3, 5:26-6:08). As the discussion between Gabriel and the officers continued, Gabriel stated, "[Hill] had no reason to shoot. He could have tazed." Another officer replied, "it's not that easy." Gabriel responded, ". . . he didn't even give me a chance to grab [Sammy]. [Hill] just fucking shot. He didn't even know where he was shooting. [Hill's] falling down pulling the trigger twice." (Defense App. 3, 6:40-6:58).

So, within minutes of the shooting Gabriel Steele came to a number of critical realizations that the Defense has yet to comprehend, or at least admit, as follows:

1) Deadly force cannot be used against a dog unless the dog is attacking and that means more than just jumping on someone. (Plaintiffs' App. p. 40);

2) Even if the dog is attacking, and the attack is more than just a single jump, deadly force cannot be used if a Tazer, pepper spray or baton will neutralize the threat. (Plaintiffs' App. pp. 38-40); and

3) Officers must have their gun under control when firing and cannot, even if being attacked by a dog regardless of how you define attack, fire in the direction of innocent bystanders. (Plaintiffs' Supplemental App. pp. 9-12);

As for Defendant Hill's alleged injury, Dr. Beauchamp testified that the abrasion "could have been" consistent with a dog bite. (Plaintiffs' App. p. 53). Dr. Beauchamp diagnosed the abrasion as a bite because of the history he was provided by Defendant Hill and testified that if he had been told the dog jumped on Hill that would have changed his causation opinion. (Plaintiffs' App. pp. 52). The alleged wound is barely, if at all, visible on a picture taken by the DCI at the hospital on the date of the tragedy. (Plaintiffs' App. p. 12). Defendant Hill circled the area he claimed was the injury caused by Sammy on Deposition Exhibit 5, p. 1. (Plaintiffs' App. p. 12). The minor nature of the alleged injury to Defendant Hill should come as no surprise given that the DCI did not even find a "rip or tear" in the fabric of Hill's uniform pants. (Plaintiffs' App. p. 11). The DCI report, dated the day of the tragedy, did note "an area located on the left thigh area where the fabric was raised slightly. This area was about the size of a BB." (Plaintiffs' App. p. 11).

The Burlington Police Department's written "Use of Force" policy is outdated, does not comply with Iowa law and does not require officers to act in an objectively reasonable manner. See I.C.A. 704.2 (Defense Appendix 59-60). The Burlington use of force policy fails to set out necessary factors that must be considered by an objectively reasonable law enforcement officer in deciding whether to use deadly force. The "Use of Force" provision of the **Dubuque Police Department** includes the following precaution not included in the Burlington provision, "Discharge of Firearms - Each officer is responsible for any discharge of a weapon under his/her control and is prohibited from discharging a firearm when it appears likely that an innocent person may be injured. (Plaintiffs' Supplement App., p. 10).

The **Dubuque** policy goes on to define "Use of Deadly Force" per Iowa law as including the "discharge of a firearm in the direction of some person with the knowledge of

the person's presence there, even though no intent to inflict serious physical injury can be shown." I.C.A. 704.2 (Plaintiffs' Supplement App., p. 11). See also the **Cedar Rapids Police Department's** "Use of Force" provision which defines "Deadly Force" using the same language as required by Iowa law. I.C.A. 704.2 (Plaintiffs' Supplement App., p. 12).

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). The available training that, if followed, would have avoided the tragic shooting of Autumn Steele is set out in Deposition Exhibits 32 and 33. (Plaintiffs' App. pp. 30-40). The training sponsored by the U.S. Department of Justice was available online prior to the shooting of Autumn Steele. (App. pp. 58-59). That training directed that "o**nly 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. (Plaintiffs' App. p. 40) (emphasis added).

ARGUMENT

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). "To preclude the entry of Summary Judgment, the non-movant must show that, on an element essential to [its] case and on which it will bear the burden of proof at trial, there are genuine issues of material fact." *Noll v. Petrovsky*, 828 F.2d 461, 462 (8th Cir. 1987) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986)). The non-moving party is entitled to all reasonable inferences that can be drawn from the evidence

without resort to speculation. *Sprenger v. Fed. Home Loan Bank of Des Moines*, 253 F.3d 1106, 1110 (8th Cir. 2001).

II. DEFENDANTS ARE NOT ENTITLED TO QUALIFIED IMMUNITY ON PLAINTIFFS' FOURTH AMENDMENT EXCESSIVE FORCE CLAIMS[1]

A. Qualified Immunity Standard

The doctrine of qualified immunity protects the Defendants from personal liability under § 1983 insofar as their conduct does not violate clearly established . . . constitutional rights of which a reasonable person would have known. *Pearson v. Callahan*, 129 S. Ct. 808, 815, 172 L. Ed. 2d 565 (2009). To overcome the defendants' qualified immunity claims, the plaintiffs must show that: (1) the facts, viewed in the light most favorable to the plaintiff[s], demonstrate the deprivation of a constitutional . . . right; and (2) the right was clearly established at the time of the deprivation. *Howard v. Kansas City Police Dep't,* 570 F.3d 984, 988 (8th Cir. 2009).

B. Fourth Amendment Excessive Force Elements

Hill intentionally fired his weapon in the direction of Sammy (the dog), Gabriel, Autumn, and G.S. thereby violating their right to be free from the use of excessive force in being detained. Excessive force claims are analyzed in the context of the Fourth Amendment. *Howard v. Kansas City Police Dep't*, 570 F.3d 984, 988 (8th Cir. 2009). "To establish a violation of the Fourth Amendment in section 1983 actions, the claimant must demonstrate a seizure occurred and the seizure was unreasonable." *Id.* (quoting *Moore v. Indehar,* 514 F.3d 756, 759 (8th Cir.2008)).

[1] It must be noted that Defendants repeatedly misstate their burden in moving for summary judgement stating that "Plaintiffs cannot as a matter of law establish . . ." Defense Brief, p. 6; "the undisputed facts do not establish there were unreasonable seizures. . . : Defense Brief, p. 7; and "Plaintiffs cannot sustain their burden of proof as to Monell/municipal liability . . ." Defense Brief, p. 22. In moving for summary judgment the Defendants have the burden of proof to establish their defense to Plaintiffs' claims as a matter of law.

C. Defendants Cite No New Evidence to Support their Lack of Seizure Claim Rejected by the Court in Denying the Motion to Dismiss

This Court already rejected the claim that Defendant Hill did not seize Autumn, Gabriel and G.S. in denying the Defendants' Motion to Dismiss. Order [Denying Motion to Dismiss], Doc. 20, May 8, 2107. The facts, as discovered, confirm the allegations of Plaintiffs' Complaint and the Defendants make no claim to the contrary. This Court's reasoning in denying the Motion to Dismiss remains unassailable. 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.

Discovery in this case revealed two important facts supporting Plaintiffs' seizure argument. First, Defendant Hill was asked, "Now, from the time you pulled up in your cruiser and [moved] toward 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." (Plaintiffs' App. p. 48). Defendant Hill responded, "I believe so." *Id*. Next, properly trained police officers know that "use of deadly force means . . . the discharge of a firearm in the direction of some person with the knowledge of the person's presence there, even though no intent to inflict serious physical injury can be shown." See the General Orders on Use of Force of both the Dubuque and Cedar Rapids Police Departments. (Plaintiffs' Supplemental App. pp. 9-12). Hill's firing his weapon in the direction of Autumn, Gabriel and G.S., even though he did not intend to hit them, is the use of deadly force upon them under Iowa law and must constitute a seizure. I.C.A. 704.2.

In *United States v. Grant*, 696 F.3d 780, 784 (8th Cir. 2012), the Eighth Circuit discussed when an encounter between law enforcement and a citizen triggers Fourth Amendment scrutiny. The *Grant* Court stated that "physical force or show of authority" constitutes a seizure. *Grant*, 696 F.3d at 784. The Eighth Circuit considers the display of a weapon a determining factor in determining a "show of authority." *United States v. Angulo-Guerrero*, 328 F.3d 449, 451 (8th Cir. 2003) (stating a show of authority did not occur because agents simply wore badges identifying themselves, and did not display their guns). See also *McCoy v. City of Monticello*, 342 F.3d 842, 847 (8th Cir. 2003). No reasonable person could believe they were free to leave while a law enforcement officer was moving towards them, grabbed the person next to them, and then drew his gun and pointed it in their direction.

Defendants misstate the holding in *Moore v. Indehar*, 514 F.3d 756 (8th Cir. 2008). Def. Brief in Support of Summary Judgment, p. 8. *Moore* is almost directly on point and found that summary judgment was **not appropriate**. In *Moore* the Defendant argued he accidently hit Moore while shooting at someone else. The Eight Circuit noted that the defendant in *Moore* "intentionally discharged his gun in the direction of *Moore*." *Id*. at 760. The *Moore* Court also noted the Supreme Court's specific admonition that if the defendant intended to shoot someone else "[a] seizure occurs even when an unintended person or thing is the object of the detention or taking, but the detention or taking itself must be willful." *Brower* at 596. In this case there is no dispute that Defendant Hill intentionally fired in the direction of Autunm, Gabriel and G.S.

The Defendants make the incredible claim at page 10 of their brief that "to hold Gabriel and G.S. were 'seized' from the **mere drawing** of Officer Hill's service weapon **in their vicinity** and pointing at their dog would be an untenably broad application of the Fourth Amendment protection." (Emphasis added). Never mind that the facts of this argument are completely

misstated, Defendant Hill **fired** his weapon **in the direction** of Autumn, Gabriel and G.S., the U.S. Supreme Court and the Eighth Circuit disagree – brandishing a gun in the vicinity of person is strong evidence of a seizure. See *United States v. Drayton*, 563 U.S. 194, 204 (2002) and *United States v. Grant*, 696 F.3d 780, 784 (8th Cir. 2012).

D. The Seizure was Objectively Unreasonable

Defendant Hill's use of lethal force against Sammy the family pet, Autumn Steele, Gabriel Steele and their minor child G.S. was unreasonable, wholly unnecessary and unwarranted given the minimal threat he faced. From a prior interaction Hill knew the Steele family had a dog. (App. p. 50). Hill 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, knowing that recklessness is an element of involuntary manslaughter, to make the highly inculpatory admission "I'm fucking going to prison." See I.C.A. 707.5(2) and *State v. Conner*, 292 N.W.2d 682, 684 (1980) (App. pp. 41 and 5).

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. All the eyewitnesses to the event describe Sammy as being playful and non-aggressive. (Plaintiffs' App. pp. 16-19 and 61). Second, to the extent Sammy is found to be aggressive Hill had numerous other options

available to him to handle the situation including his baton, Tazer and pepper spray. Third, even if the threat posed by Sammy was immediate and unavoidable, a reasonable law enforcement officer would not fire his weapon in the direction of innocent bystanders in order to avoid such a threat.

While Plaintiffs do not dispute that Defendant Hill was scared when Sammy jumped on him, his state of mind is irrelevant. As the U.S. Supreme Court has held, "[a]n officer's evil intentions will not make a Fourth Amendment violation out of an objectively reasonable use of force; nor will an officer's good intentions make an objectively unreasonable use of force constitutional. *Graham v. Connor*, 490 U.S. 386, 397 (1989)

The threat Defendant Hill faced was minimal. Defendant Hill's alleged injury was, in fact, not even a bite. Like Hill said at the scene of the tragedy, both times he described what happened, "the fucking dog jumped on me." (Plaintiffs' App. p. 7 and 9). Hill never claimed the dog bit him until later at the hospital. In his report drafted several days after the shooting Hill only claimed to have felt "the sensation of being bitten." (Plaintiffs' App. p. 15). A reasonable jury could conclude that Sammy jumped on Hill and one of the dog's paws caught on Hill's pants causing a "slight raise" in the fabric the size of a "BB," as reported by the DCI. (Plaintiff's App. p. 11). Anyone with a dog will recognize that is what happens when a dog's paw snags their pants.

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 Defendant Hill, did not pose an immediate threat to Hill sufficient to justify the

use of lethal force. (Plaintiffs' App. pp. 4-10 and 41). 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 does not come close to meeting that standard.

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.

E. The Right to be Free from Excessive Force was Clearly Established

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) (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). A law enforcement officer's obligation to avoid shooting a person "who does not pose a significant threat of death or serious physical injury to the officer or others is not permitted," has long been established. See *Moore*, 514 F.3d at 763, citing *Tennessee v. Gardner*, 471 U.S. 1, 11 (1985). The obligation not to shoot and kill a dog that does not pose an imminent threat has also long been established. *Andrews v. City of W. Branch*, 454 F.3d 914, 918-19 (8th Cir. 2006)(An officer may not "destroy a pet when it poses no immediate danger and the owner is looking on, obviously desirous of retaining custody.").

Defendants cite *Powell v. Johnson*, 855 F. Supp. 2d 871(D. Minn. 2012), *Dziekan v. Gaynor*, 376 F. Supp. 2nd 267 (D. Conn. 2005) and *Chambers v. Doe*, 453 F. Supp. 2d 858 (D.

Del. 2006), for the general proposition that it is acceptable for an officer to shoot a dog that the officer perceives as aggressive. These cases are not applicable for three reasons: First, and most importantly, none of these cases involve the officer shooting in the direction of innocent bystanders. Second, these cases do not involve the allegation that the officer had other readily available means to neutralize the threat *e.g.*, Tazer, pepper spray and/or baton. Third, these cases do not follow Eighth Circuit precedent that the dog must pose an objectively reasonable and imminent threat to the safety of the officer. A playful, non-aggressive Sammy, who at most had only jumped up on Defendant Hill one time, does not qualify as an imminent threat.

The facts of this case bring to mind the reasoning of the Tenth Circuit in *Browder v. City of Albuquerque*, 787 F.3d 1076 (10th Cir. 2015), as follows:

> After all, some things are so obviously unlawful that they don't require detailed explanation and sometimes the most obviously unlawful things happen so rarely that a case on point is itself an unusual thing. Indeed, it would be remarkable if the most obviously unconstitutional conduct should be the most immune from liability only because it is so flagrantly unlawful that few dare its attempt.

At 1082-83.

III. Plaintiffs' Claims for Violation of the Iowa Constitution are Valid

A. Iowa Does Recognize a Private Right of Action Under Article I, Section 8 of the Iowa Constitution

In support of their claim that Iowa does not recognize a private right of action for constitutional torts the Defendants cite *Conklin v. Iowa*, 2015 WL 1332003) (Iowa App. Ct. 2015), an unpublished case that is no longer good law in Iowa. The Iowa Court of Appeals ruling in *Conklin* is cited, criticized and not followed by the Iowa Supreme Court in *Godfrey v. State*, 898 N.W.2d 844, 880 (Iowa 2017). In reinstating Godfrey's constitutional claims the *Godfrey* Court noted "the district court found that a recent unpublished court of appeals decision holding there are no private causes of action for violations of the Iowa Constitution was

dispositive and dismissed Godfrey's constitutional claims. See *Conklin v. State*, 863 N.W.2d 301 (Iowa Ct. App. 2015)." *Godfrey* at 847. The *Godfrey* Court noted that "fifty years before the United States Supreme Court decided *Bivens*, we decided several cases finding that the search and seizure clause of the Iowa Constitution supported an action for damages without implementing legislation." *Godfrey* at 862. If there is any doubt about the unviability of *Conklin* after reading the majority opinion in *Godfrey* it is cleared up by the first line of Chief Justice Cady's analysis, "I concur in the opinion of the court to the extent it would recognize a tort claim under the Iowa Constitution when the legislature has not provided an adequate remedy." *Godfrey* at 880.

B. Iowa May Well Interpret a Broader Right Against Unreasonable Seizures Under the Iowa Constitution

It remains an open question if the Iowa Supreme Court will follow or differentiate Iowa constitutional protections from those afforded citizens under the U.S. Constitution. This Court only needs to address these issues at this time if it intends to dismiss all or part of Plaintiffs' pending Fourth Amendment claims. If not, this determination may be made at a later date, if necessary at all. On the other hand, if this Court intends to summarily dismiss all or part of the remaining Fourth Amendment claims, then these issues need to be addressed, but not, in Plaintiffs view, in the context of the pending summary judgment motions.

The framers of the Iowa Constitution would have been familiar with the 70 year track record of interpretation of the term "search and seizure" between the adoption of the Federal Constitution in 1787 and the Iowa Constitution in 1857. To claim that the language is similar so the interpretation should be the same is to ignore 70 years of applicable precedent. Such a perfunctory assessment would not do justice to the important issues of first impression raised.

Of note is the storied Iowa history of protecting the individual rights of the citizens of Iowa. The framers of the Iowa Constitution thought so highly of the protection of individual liberties that Iowa's Bill of Rights is Article I of its constitution, not added later as amendments. The Iowa Supreme Court, from its first reported decision, *In the Matter of Ralph (A Colored Man), on Habeas Corpus*, Iowa Reports, Morris, Vol. I, page 1 (Iowa Territory 1839), holding that a slave escaped from Missouri to Iowa was a free man and not to be returned to his alleged owner, to *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009), a unanimous Iowa Supreme Court decision upholding the right of gays to marry, has been at the forefront of protecting individual liberties.

The Defense does not address a number of issues that will have to be decided in order to determine Plaintiffs' Article I, Section 8 protections, including the application of qualified immunity. The notion of "qualified immunity" would have been unfamiliar to the framers of the Iowa Constitution having recently been adopted by the U.S. Supreme Court in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982). Even an earlier reference to "immunity [which is] is qualified, not absolute," with regard to the enforcement of Federal Constitutional protections does not appear until 1974. See *Scheuer v. Rhodes*, 416 U.S. 232, 243 (1974).

If these issues regarding the framework for the enforcement of *Godfrey* rights under the Iowa Constitution need to be addressed, then Plaintiffs would suggest following the direction of *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 alternative, the court may choose to wait for the Iowa Supreme Court to rule in the *Baldwin* case. Another alternative would be to set a

separate briefing schedule that would allow the parties the opportunity to raise and address these critical issues of first impression. Given the novelty and importance of these questions an opportunity for Amicus Curiae briefs should be allowed.[2]

IV. PLAINTIFFS' *MONELL* CLAIMS AGAINST THE CITY OF BURLINGTON ARE VIABLE

The United States Supreme Court has held that municipalities and other bodies of local government are "persons" within the meaning of 42 U.S.C. § 1983 and may be sued for constitutional violations. *Monell v. New York City Dept. of Social Services*, 436 U. S. 658, 690 (1978). The *Monell* Court rejected the use of the doctrine of *respondeat superior*[3] and concluded that municipalities could be held liable only when an injury was inflicted by a government's "lawmakers or by those whose edicts or acts may fairly be said to represent official policy." *Id*., at 694.

A. The Burlington Police Department Has an Unlawful Use of Lethal Force Policy

Burlington's use of lethal force general order, last amended 10 years prior to the shooting of Autumn Steele, is invalid on its face. (Defense App. p. 59). The Burlington use of lethal force general order provides no admonition to avoid firing in the direction of innocent bystanders as required by Iowa law. I.C.A. 704.2 (Defense App. p. 60). For example, the Burlington use of lethal force order contains no language prohibiting officers from shooting into a crowd of school children if they perceive themselves to be "in immediate danger of serious physical injury," defined in this case as being afraid a dog may jump on, or bite, them. (Defense App. p. 60). In

[2] The Iowa Association for Justice submitted an Amicus Curiae brief in *Baldwin.*

[3] This is another of the many issues the Defendants fail to address in their brief regarding the implementation of *Godfrey*. The Iowa Supreme Court has not yet decided the application of *respondeat superior* in *Godfrey* cases and may well disagree with *Monell* on this point.

contrast, both the Cities of Cedar Rapids and Dubuque have lawful general orders on the use of lethal force, last updated in 2015 and 2014, respectively, which circumscribe the discharge of guns in the direction of innocent bystanders. I.C.A. 704.2 (Plaintiffs' Supplemental App. pp. 9-12).

B. Burlington Failed to Properly Train Hill Regarding the Use of Lethal Force in Dealing with Canines

In *Pearl v. Dobbs*, 649 F.2d 608, 609 (8th Cir. 1981), the Eighth Circuit noted *Monell* liability may arise against a sheriff or other official who fails to "properly train, supervise, direct or control the actions of a subordinate who causes [an] injury." See also *Overbay v. Lilliman*, 572 F. Supp. 174, 177 (W.D. Mo. 1983) (denying County's motion to dismiss where plaintiff alleged a failure to supervise, train, or discipline officers). In this case Burlington failed to train Hill, who was "leery" of dogs in the first place, on how to deal with canines in the course of police duties until after he shot and killed Autumn Steele. (Plaintiffs' App. p. 22).

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). Available training included that the overwhelming majority of dog bites are minor; growling is not necessarily a sign of aggression; you cannot judge the aggressiveness of a dog by its size, shape or breed; and pepper spray and Tazers' are effective deterrents. (Plaintiffs' App. pp. 30-36). Additional training sponsored by the U.S. Department of Justice was available prior to the shooting of Autumn Steele. Grimshaw Dep. 11:10-15 and 14:10-22. (Plaintiffs App. p.58 and 59). That training also noted the effectiveness of Tazers and pepper spray to control canines and that "[o]nly 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." (Plaintiffs App. pp. 37-40).

C. Burlington Adopted and Ratified Hill's Reckless Conduct

In *St. Louis v. Praprotnik*, 485 U.S. 112, 127, 108 S. Ct. 915, 926 (1988), the U.S. Supreme Court noted that "when a subordinate's decision is subject to review by the municipality's authorized policymakers, they have retained the authority to measure the official's conduct for conformance with their policies. If the authorized policymakers approve a subordinate's decision and the basis for it, their ratification would be chargeable to the municipality because their decision is final."

That is precisely what happened in this case. Plaintiffs took the 30(b)(6) deposition of a chosen representative of the City of Burlington. Police Chief Douglas Beaird was designated to provide testimony on behalf of Burlington regarding whether the City "ratified and adopted" the conduct of Defendant Hill. Beaird Dep. p.4-5 (Plaintiffs' Supplemental App. pp. 16.). Beaird expressly stated that Defendant Hill "acted appropriately and pursuant to all departmental policy and procedures." Beaird Dep. p. 8:11-21 (Plaintiffs' Supplemental App. p. 17). Beaird also stated that he expected Defendant Hill "to act the same way in the future if confronted with similar circumstances." Beaird Dep. p.8:22-25 (Plaintiffs' App. p. 17). In *Livers v. Schenck*, 700 F.3d 340, 357 (8th Cir. 2012), the Eighth Circuit noted support for ratification as a basis for municipal liability while denying it as a basis for liability of an individual supervisor.

D. Burlington Participated in a Cover Up of Hill's Reckless Behavior

The City of Burlington did everything in its power to keep Plaintiffs and the general public from finding out the details of Defendant Hill's reckless behavior. Burlington has refused to release Defendant Hill's body camera video other than the first six seconds which it contends justifies Hill conduct because barking and a growl can be heard. See Defense Brief, pp. 3 and 8 citing this part of the video to justify Defendant Hill's conduct. On August 21, 2017, Chief Beaird swore under oath that as "a matter of principle" he would never release body camera

video unless ordered to do so by a judge. Beaird Dep. 63:8-18 (Plaintiffs' Supplemental App. p. 19). Beaird claimed the "Attorney General's office" released the six second snippet noted above. Beaird Dep. p. 62:3-5 (Plaintiffs' Supplemental App. p. 19).

That "principle," and Chief Beaird's credibility, lasted less than 8 weeks when it became advantageous for Burlington to publicly release a portion of body camera video from another police shooting that occurred on October 1, 2017. The released portion of that body camera video shows events leading up to the use of deadly force against an allegedly armed and fleeing suspect.[4] The video does not, however, show the key part of the shooting since reports indicate the victim discarded his gun and was unarmed at the time he was killed.[5] The shooting is alleged to be lawful because the victim "made a motion with his hands at chest level." *Id.* A skeptic would note that this is precisely the motion a suspect would make to raise their hands to surrender. The shooting officer told investigators "in his mind [the victim] was still armed." *Id.* The only "principle" Burlington follows in these matters is to release whatever evidence it thinks will assist in exonerating its officers from wrongdoing and hide anything that does not.

Burlington attempted to establish that Sammy was "vicious" and should be euthanized in an effort to justify Defendant Hill's reckless conduct. The day after the shooting officer Kramer of the Burlington Police Department filed a "supplemental" report regarding his interaction with the Steeles the day before the shooting. (Plaintiffs' Supplemental App. p. 6). Kramer saw no need to mention Sammy in his initial report, but as part of the cover-up of Hill's reckless conduct he claimed "while on the scene [of the Steele residence] I could hear what sounded like a large

[4] The video is available online at https://www.youtube.com/watch?v=kqcnfv9Qh7g.

[5] http://www.kbur.com/2017/10/12/shooting-of-marquis-jones-ruled-justified-by-iowa-attorney-general/

dog barking." (Plaintiffs' Supplemental App. p. 6). Kramer admitted he never saw the dog, but implies the dog was a problem because Sammy was not let out in his presence. (Plaintiffs' Supplemental App. p. 6). The effort to have Sammy euthanized failed because a board of Burlington citizens listened to all the "evidence" gathered by Burlington against Sammy, who had never bitten anyone, and found that Sammy was not vicious. Beaird Dep. p. 14:6-14 and Gabriel Steele Dep. p. 61:24-25 (Plaintiffs' Supplemental App. pp. 18 and 14).

In an effort to make Defendant Hill's reckless conduct appear more acceptable Burlington participated in misinforming the public regarding Hill's minimal to non-existent injury. Defendant Hill was falsely described as potentially suffering from more than one bite, and he was described, in an overstatement so vast and misleading it qualifies as an outright lie, as receiving treatment at the hospital for "non-life threatening injuries." Dep. Ex. 68 and George Dep. 58:11-59:15 (Plaintiffs' Supplemental App. pp. 4 and 21).

The cover-up of Defendant Hill's reckless behavior also includes two critical and inculpatory pieces of evidence not noted in any report prepared by law enforcement investigating this tragedy: 1) Defendant Hill's admission that he thought his reckless conduct would result in him "fucking going to prison;" (Plaintiffs' App. p. 5); and Merryman's report of his interviews with three eyewitnesses which completely fails to disclose that all the witnesses stated Sammy was not being aggressive. (Plaintiffs' App. pp. 16-18 and 27-28).

A municipality should not be able to avoid *Monell* liability by misleading the public and covering up the wrongful and reckless conduct of one of its police officers. See *Bell v. Milwaukee*, 746 F.2d 1205 (7th Cir. 1984), where a municipality was held liable for a conspiracy to cover up a wrongful police shooting. Certainly, if Burlington could be held liable for

engaging in a conspiracy to cover up a wrongful shooting it should not be able to avoid *Monell* liability for engaging in the same conduct.

V. DEFENDANTS ARE NOT IMMUNE FROMM LIABILITY FOR COMMON LAW TORT CLAIMS

Defendants' argument that Iowa Code § 670.4(1)(k) immunizes them from liability is invalid. Defendant Hill was not responding to an emergency – he created an emergency by engaging in reckless conduct. In *Kulish v. Ellsworth*, 566 N.W.2d 885 (Iowa 1997), the Iowa Supreme Court articulated the justification for the emergency response exception to the statutory waiver of sovereign immunity:

> A local government has a strong interest in providing rescue services for citizens involved in accidents and who--day or night--need immediate response. The statutory exemption from tort liability allows municipal providers of emergency care to render necessary medical aid in dire situations free from distractions or concerns over potential lawsuits.

At 890. Iowa Code Section 670.4(1)(k) was never intended to protect law enforcement officers who, in response to a minimal threat, fire a gun haphazardly in the direction of innocent bystanders.

The Defendants misstate the holding in *Adams v. City of Des Moines*, 629 N.W.2d 367, 370 (Iowa 2001), to claim that any police response to a 9-1-1 call is an emergency under the statute. Def. Brief p. 25. In *Adams* the plaintiff admitted the call, a house fire involving five emergency vehicles from the fire department, was an emergency, but argued at the time plaintiff was electrocuted the emergency was over and the statutory immunity no longer applied. *Adams* at 370-371. The Defendants also cite *Harrod v. City of Council Bluffs*, No. 07-0864, 2008 Iowa App. LEXIS 328, at *4-5 (Ct. App. May 29, 2008), in support of their argument, but *Harrod* supports the opposite conclusion. *Harrod* is an armed carjacking case in which the police responded to a "priority 1" call with emergency lights and sirens engaged. *Harrod* at *4-5.

The Defendants concede that routine police work is not covered by emergency response immunity, citing *Stych v. City of Muscatine*, 655 F. Supp. 2d 928 (S.D. Iowa 2009), but ignore the application of that admission to the facts of this case. The facts of this case establish that Hill was not engaged in an emergency response. Although Gabriel Steele called 9-1-1 and asked them to hurry, the police did not treat the call as emergency and Hill responded without using lights and/or siren. (Plaintiffs' App. p. 15). Hill's report states that he was "dispatched" to the Steele residence without noting that he engaged his emergency lights and siren. (Plaintiffs' App. p. 15). In Hill's statement to the DCI he describes receiving the dispatch, noting that he was already nearby, how he proceeded to the Steele residence while stopping at a stop sign and even "drove slower" because he did not know Merryman's location. Dep. Ex. 11 pp. 38-39 (Plaintiffs' Supplemental App. pp. 2-3).

Stych is a ruling from this Court that is right on point and holds the emergency response immunity did not apply. In *Stych* this Court thoroughly discussed all relevant precedent on this issue, distinguished cases finding the immunity applies and refused the request for summary judgment on immunity grounds. The plaintiff in *Stych* ran a stop sign, failed to immediately pull over in response to the officer's lights and siren, and traveled approximately 20 miles over the speed limit for a distance of a half mile before stopping. *Stych* at 937.

In denying the application of the emergency response immunity the *Stych* Court reasoned:

> Indeed, the Court finds that the facts as alleged by [the officer] fall far short of being comparable to any situation in Iowa case law that has supported application of the emergency response exception. While the Court does not discount the potential hazards that could arise from an individual's failure to stop at a stop sign, speeding, or failing to immediately pull over for a police officer, on the present facts, there is simply no evidence that [the officer]was attempting to provide "rescue services" or "necessary medical aid," see *Kulish*, 566 N.W.2d at 890, nor is there any evidence that Plaintiff's actions created a serious threat to life and limb or a danger to the public.

Stych at 37-38. The *Stych* Court went on to note that even "assuming that the emergency response exception could be read so broadly as to encompass the facts of this case, summary judgment would still be improper. As noted, in determining the applicability of the emergency response exception, the Court must assess whether it can be said as a matter of law that an emergency existed." *Stych* at 938.

In a recent case the Iowa Supreme Court addressed the meaning of "emergency response" in a different context and adopted reasoning similar to this Court's analysis in *Strych*. In *State v. Iowa Dist. Court for Scott Cty.*, 889 N.W.2d 467 (Iowa 2017), the Iowa Supreme Court described the facts, as follows:

> According to the minutes of testimony, Davenport Police Officer Jennifer Brewer was on overnight patrol in the early morning hours of November 1, 2014. She observed a black Mercury Mountaineer speed up and slow down several times as it drifted between lanes of traffic. Officer Brewer then saw the vehicle slowly run a red light and almost collide with another car. The officer activated the emergency lights on her squad car and pulled over the vehicle.

At 468-69. The *State v. Scott County* Court held that pulling over a drunk and dangerous driver using emergency lights was "routine law enforcement activity" that does not meet the definition of an emergency response. *State v. Scott County* at 468.

Defendant Hill was engaged in routine law enforcement activity that is not covered under the emergency response immunity. I.C.A. § 677.4(1)(k).

CONCLUSION

For all the reasons stated above, the Defendants' Motion for Summary Judgment should be denied in its entirety.

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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 2nd day of February, 2018, by:

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

Signature: /s/ David A. O'Brien