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 RESISTANCE TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT**

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

I. TABLE OF CONTENTS

II. SUMMARY JUDGMENT STANDARD

Defendants do not dispute the summary judgment standard set forth by Plaintiff.

III. ARGUMENT

A. PLAINTIFFS ARE NOT ENTITLED TO SUMMARY JUDGMENT REGARDING THEIR FEDERAL CONSTITUTIONAL CLAIMS.

1. Officer Hill Is Entitled To Qualified Immunity Against Any Constitutional Violations Asserted By Plaintiffs.

Defendants incorporate and restate the arguments set forth in their Memorandum of Authorities in Support of Summary Judgment that Officer Hill is entitled to qualified immunity against Plaintiffs' constitutional claims. (Docket # 40). Officer Hill's actions on January 6, 2015

were not unreasonable nor were his actions in violation of any clearly established federal constitutional rights existing and known to a reasonable person on January 6, 2015 under the circumstances Officer Hill was presented with that day. Qualified immunity is more than just a defense to the action; it immunizes Officer Hill against any liability and completely bars the Plaintiffs' claim for recovery. *See Pearson v. Callahan*, 555 U.S. 223, 237 (2009) ("Qualified immunity is 'an immunity from suit rather than a mere defense to liability.' "). Since the Court should find that Officer Hill is entitled to qualified immunity, Plaintiffs' federal constitutional arguments in their Motion for Summary Judgment are moot and need not be addressed.

However, should the Court find that qualified immunity does not apply, Defendants resist Plaintiffs' Motion for Summary Judgment for the additional reasons set forth herein.

2. <u>Plaintiffs Have Failed To Establish Through Undisputed, Material Evidence They Were Unreasonably Seized By Officer Hill In Violation Of Their Fourth Amendment Rights.</u>

a. Plaintiffs Were Not Seized For Purposes Of The Fourth Amendment By The Mere Arrival Of Officer Hill To Their Residence.

"To establish a violation of the Fourth Amendment in a section 1983 action, the claimant must demonstrate that a seizure occurred **and** the seizure was unreasonable." *McCoy v. City of Monticello*, 342 F.3d 842, 846 (8th Cir. 2003) (emphasis added). Plaintiffs do not point to any undisputed, objective evidence supporting that they were seized the moment Officer Hill arrived to the scene. "A police officer may make a seizure by a show of authority and without the use of physical force, ***but there is no seizure without actual submission***; otherwise there is at most an attempted seizure, so far as the Fourth Amendment is concerned." *Brendlin v. California*, 551 U.S. 249, 254 (2007) (emphasis added). At the time Officer Hill arrives to the scene, he did nothing more than approach the Steeles. (Pl. Appendix pp. 15; 41). There is no evidence any of the Plaintiffs submitted to any authority of Officer Hill from his mere arrival to the scene. In fact

Autumn was actively assaulting Gabriel when Officer Hill arrived to the scene and continued to do so as Office Hill approached. (Pl. Appendix pp. 15; 41). Officer Hill never told any of the Steeles that they were being detained, arrested, or were not free to leave the area when he arrived to the scene. (Pl. Appendix p. 41; Def. Appendix 11-12; 17-18). There is also no evidence that any of the Plaintiffs attempted to leave the scene when Officer Hill arrived but were restrained by him from doing so. (Pl. Appendix p. 41).

Plaintiffs attempt to use Officer Hill's subjective beliefs to support their summary judgment claim, but an officer's subjective beliefs are irrelevant to the seizure analysis. Whether a seizure has occurred is an objective test. *See California v. Hodari D.*, 499 U.S. 621, 628 (1991) (discussing *U.S. v. Mendenhall*, 466 U.S. 544 (1980) and holding *Mendenhall* stands for an "objective test" to determine if a reasonable person would have felt free to leave under the totality of the circumstances). The subjective intent of an officer is rarely relevant to the analysis and can only be relevant if "that intent has been conveyed to the person confronted." *Michigan v. Chestnut*, 486 U.S. 567, 574-5 n. 7 (1988); *see also U.S. v. Bloomfield*, 40 F.3d 910, 916 (8th Cir. 1994) ("The subjective intent of the seizing officer is irrelevant if not communicated to the suspect.").

Plaintiffs erroneously assert they were "seized" once Officer Hill arrived to their residence simply because Officer Hill testified *on August 2, 2017* that he didn't believe any of the Steeles would have been free to leave on January 6, 2015 until he had concluded his investigation of the domestic disturbance/assault. (Pl. Brief p. 10) (emphasis added). Officer Hill's subjective belief that the Steeles would not have been free to leave was never communicated to any of the Steeles on January 6, 2015 and therefore, is completely irrelevant to the Court's seizure analysis. (Pl. Appendix p. 41).

Plaintiffs have failed to sustain their burden of proof that a seizure occurred. Therefore Plaintiffs' summary judgment claim regarding an unreasonable seizure from the time Officer Hill arrived to the scene must be denied.

b. Even If Plaintiffs Were Seized By Officer Hill When He Arrived To The Scene, Such Seizure Was Temporary, Investigative, And Not Unreasonable.

Even if the Court finds Officer Hill seized Plaintiffs when he arrived to the scene, there is no violation of the Fourth Amendment unless Plaintiffs prove the seizure was ***objectively unreasonable*** under the circumstances. *See Brower v. County of Inyo*, 489 U.S. 593, 599 (1989) (" 'Seizure' alone is not enough for § 1983 liability; the seizure must be 'unreasonable.' ") (emphasis added). Plaintiffs concede that when Officer Hill arrived Autumn was physically striking Gabriel outside of their residence. (Pl. App. p. 2). Plaintiffs further concede Officer Hill personally observed Autumn physically assaulting Gabriel when he arrived to the scene. (Pl. App. p. 2).

It is not a violation of the Fourth Amendment for a police officer to make a temporary investigatory detention if the officer "has a reasonable suspicion supported by articulable facts that criminal activity may be afoot." *Williams v. Decker*, 767 F.3d 734, 739 (8th Cir. 2014) (internal citations omitted). There is no doubt that Autumn's physical assault against Gabriel is a crime. *See* Iowa Code § 708.1 (defining the crime of "assault"). Therefore Officer Hill had reasonable suspicion of criminal activity to support an investigatory detention of the Steeles. Any detention of the Steeles by Officer Hill when he arrived to the scene was not unreasonable nor in violation of the Fourth Amendment.

Plaintiffs have failed to sustain their burden of proof that Officer Hill *unreasonably* seized them when he arrived to the scene and witnessed an assault by Autumn against Gabriel.

(emphasis added). Therefore Plaintiffs' summary judgment claims regarding an unreasonable seizure by Officer Hill from the time he arrived to the scene must be denied.

c. Plaintiffs Were Not Seized When Officer Hill Drew And Discharged His Firearm At The Steeles' Dog.

Plaintiffs alternatively argue that they were "seized" when Officer Hill drew his weapon with the intent to shoot the family dog that was approaching him. (Pl. Brief p. 11). A seizure under the Fourth Amendment only occurs when an officer restrains a person "through means intentionally applied." *Moore v. Indehar*, 514 F.3d 756, 759-60 (8th Cir. 2008).

Officer Hill testified that he did not pull out his firearm with the intention of shooting at Autumn. (Def. Appendix 16). Gabriel told Burlington police officers after the shooting that Officer Hill drew his firearm to shoot at their dog. (Pl. Appendix p. 61). Plaintiffs' counsel further admitted during Officer Hill's deposition that "all" eyewitnesses believe he was shooting at the Steeles' dog and "nobody" is claiming that Officer Hill intentionally pointed and fired his weapon at Autumn. (Def. Appendix 16). Plaintiffs concede the purpose and intent of Officer Hill's drawing of his weapon was solely to stop **the dog** from approaching him and was not intended to restrain the movements of the Steeles. (Pl. Brief pg. 10) (emphasis added). There is no evidence that Officer Hill ever pointed his weapon at any of the Steeles or that he made any threatening movements or remarks towards them at any point after drawing his weapon to constitute a seizure of them under the Fourth Amendment. (Pl. Appendix p. 15; 41). No federal case supports a finding of a seizure of every person in the vicinity when an officer draws his weapon for a specific purpose.

The means intentionally applied by Officer Hill in this case (*i.e.* drawing and pointing the weapon) were undisputedly directed towards the Steeles' dog and not any one else in the nearby vicinity. The Iowa Department of Criminal Investigations further found that the Steeles'

dog did sustain a gunshot wound to its front right shoulder, corroborating that the dog was Officer Hill's intended target. (Def. Appendix 25-27).

Plaintiffs have failed to sustain their burden of proof that Officer Hill intentionally restricted their freedom of movement when he drew his firearm and pointed it at their dog. Therefore, Plaintiffs claim for summary judgment regarding an unreasonable seizure under the Fourth Amendment by Officer Hill from the drawing of his firearm must be denied.

d. Plaintiffs Were Not Unreasonably Seized When Officer Hill Drew And Discharged His Firearm At the Steele's Dog.

Even if the Court were to find that Officer Hill's un-holstering of his firearm was a "seizure", Plaintiffs have failed to present undisputed and material evidence that his actions were objectively unreasonable under the circumstances. Plaintiffs rely heavily upon an isolated statement from Officer Hill that he believed he was "going to prison" as a "highly inculpatory admission" that he unreasonably seized the Plaintiffs. (Pl. Brief p. 11). That statement, which occurred *one minute and forty seconds* ***after*** *the shooting*, has no bearing on whether Officer Hill's use of force at the time he applied it was objectively reasonable and justified under the circumstances. (Pl. Appendix p. 41) (emphasis added). "An 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). Instead, "the question is whether the officer's actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation." *Id*. The statement by Officer Hill that he believed he was "going to prison" offers no evidence or reasonable inference as to what his intended target was when he fired his weapon or whether he was justified in using lethal force against that intended target.

The focus of the reasonableness inquiry in this case is whether Officer Hill was objectively justified in believing he was an immediate danger of bodily injury from the Steeles' dog at the time he used deadly force against it. The evidence shows Officer Hill was bit and injured by the Steeles' unrestrained 80-pound German Shepherd-mix dog prior to pulling out his firearm. (Pl. Appendix pp. 15; 41; Def. Appendix 33-34; 25). He then ordered the Steeles to restrain their dog. (Pl. Appendix pp. 15; 41). As Officer Hill was giving that order, the dog, already in close proximity, continued to advance towards him with its teeth bared and growling. (Pl. Appendix pp. 15; 41). Plaintiffs have presented no evidence that the Steeles took any action to restrain their dog before it would have an opportunity to lunge or strike at Officer Hill, or that they would be capable of restraining the dog under the circumstances. (Pl. Appendix pp. 15; 41).

Plaintiffs try to minimize the dog's conduct on January 6, 2015 by arguing any injury Officer Hill actually sustained from the dog was minimal or that the dog was not actually being aggressive towards him. (Pl. Brief pp. 11-12). These claims are neither relevant nor material to the Court's analysis of whether an unreasonable seizure occurred. "An officer is not constitutionally required to wait until he sets his eyes upon [a suspect's] weapon before employing deadly force to protect himself…" *Thompson v. Hubbard*, 257 F.3d 896, 899 (8th Cir. 2001). Similarly, Officer Hill is not constitutionally required to wait for the dog to severely injure him, to wait until the dog lunges at him a second time, or to wait to see if the dog is playful or harmful before using deadly force to protect himself. Plaintiffs argue the United States Department of Justice's training materials indicating an officer should wait until a dog has attacked the officer for several seconds before using deadly force is the constitutional standard of when deadly force may be used. (Pl. Appendix p. 40). However, no federal court nor the United States Supreme Court has adopted that as the constitutional standard. Instead, an officer is

allowed to use deadly force against the objectively reasonable *threat of* serious physical harm to the officer without waiting for the threat to materialize into actual harm. *See Loch v. City of Litchfield*, 689 F.3d 961, 965 (8th Cir. 2012) (citing *Tennessee v. Gardner*, 471 U.S. 1, 11 (1985)) (emphasis added).

Even if Officer Hill was incorrect as to the dog's actual motive and intent towards him when he drew and fired his service weapon, it does not make his actions unreasonable and in violation of the Fourth Amendment. "[A] search or seizure may be permissible even though the justification for the action ***includes a reasonable factual mistake***." *Heien v. North Carolina*, 82 USLW 4021, 135 S.Ct. 530, 534 (2014) (emphasis added); *see also Loch*, 689 F.3d at 966 ("An act taken based on a mistaken perception or belief, if objectively reasonable, does not violate the Fourth Amendment."). The undisputed video footage supports that Officer Hill was reasonable in believing the Steeles' dog posed an immediate threat of harm to him prior to discharging his weapon. (Pl. Appendix pp. 15; 41). Other than Officer Hill, the only person in position to observe the dog during its interaction with Officer Hill immediately before the shooting was Gabriel Steele. Gabriel confirmed to and in the presence of Burlington police officers shortly after the incident that his dog was attacking and "going after" Officer Hill immediately before he pulled out and discharged his weapon at it. (Pl. Appendix p. 61, 5:25-6:04, 14:30-14:58).

Plaintiffs have no evidence that the dog was not acting aggressively or did not reasonably appear to be acting aggressively towards Officer Hill *at the time he applied lethal force*. (emphasis added). The two witnesses closest to the dog prior to the shooting, Officer Hill and Gabriel Steele, both stated on several occasions after the incident that the dog was attacking or going after Officer Hill immediately prior to the shooting. (Pl. Appendix pp. 15; 41; 61). The unrefuted video footage shows the dog was barking and growling intensely near Officer Hill

immediately before he drew and discharged his weapon. (Pl. Appendix pp. 15; 41; 61) (emphasis added). None of the other "eyewitnesses" to this incident can contradict that the Steeles' dog was acting aggressively towards Officer Hill *immediately before and at the time he fired his weapon*. (emphasis added). As noted by Plaintiff, the Court is bound by the unrefuted video footage in this case and must disregard any purported facts offered by a party that differ from what is shown or heard on the footage. *See Scott v. Harris*, 550 U.S. 372, 381 (2007). Plaintiffs base their argument on three "eyewitness" accounts of the dog's mannerisms from their perspectives and at varying points during the dog's interactions with Officer Hill. However none of these witnesses can refute how the dog acted *at the time Officer Hill drew and fired his firearm*. (emphasis added).

Courtney Webb did not witness the dog's mannerisms immediately prior to the shooting because she was driving away from the scene in her vehicle and was *a block away from the scene when the shots were fired*. (Def. Appendix 59; 63; 67; 82) (emphasis added). Laura Mellinger's view of the incident and Steeles' dog prior to the shooting, from a closed second-story window of her home 50 feet away from the incident, was obstructed by a telephone pole and she could not hear anything Officer Hill stated to the Steeles, let alone any growling or barking from the dog before Officer Hill fired his weapon. (Def. Appendix 38-52). Ed Ranck was also approximately 50 feet away from the scene, standing outside near his residence. (Def. Appendix 72-81; 90-91). He testified he didn't believe the dog was being aggressive prior to the shooting because he did not hear it growl near Officer Hill. (Def. Appendix 82; 87; 89). He further testified his opinion of the dog's mannerisms would change if the dog did actually growl because it indicates an aggressive intent. (Def. Appendix 82; 87; 89). Each of these witness's subjective beliefs about the mannerisms of the dog from their vantage points much farther removed from

the scene cannot negate the reasonableness of Officer Hill's use of deadly force against the video which shows an advancing, teeth-baring, and growling 80-pound dog.

To the extent that any of these "eyewitnesses" believed the dog wasn't acting aggressively at varying points in time *before* Officer Hill drew and discharged his weapon, those opinions are irrelevant to the court's analysis. *See Rollins v. Smith*, 106 F. Appx. 513, 2004 WL 1636933 at *1 (8th Cir. 2004) ("In this circuit, preseizure conduct is not relevant in determining whether there was a Fourth Amendment violation."). The only issue germane to the court's analysis is whether the dog was acting aggressively or reasonably appeared to be acting aggressively towards Officer Hill *at the time* he drew and discharged his weapon. (emphasis added). No witnesses in this case refute that the unrestrained, 80-pound dog advanced towards Officer Hill with teeth-bared and growling at the time he used deadly force.

Plaintiffs' argument that Officer Hill had other less-lethal types of force available at his disposal is irrelevant to the analysis of whether the use of deadly force he applied was objectively reasonable. *See Estate of Morgan v. Cook*, 686 F.3d 494, 497 (8th Cir. 2012) (rejecting estate's argument that police officer's use of deadly force was unreasonable because the officer could have waited for another officer to arrive, used a baton or pepper spray against the suspect, or retreated to a defensive position instead of using deadly force against the suspect). While the District of Columbia District Court in *Robinson v. Pezzat* opined that lethal force against an animal is "reasonable only if the pet poses an imminent danger *and* the use of force is *unavoidable*", such statement does not fully comply with the binding precedent set forth by the United States Supreme Court or the Eighth Circuit because *Robinson* supports a weighing of alternative options available to the officer. *See* 818 F.3d 1, 7 (D.D.C. 2016) (emphasis added). "The Fourth Amendment inquiry focuses **not** on what the most prudent course of action may

have been ***or*** whether there were other alternatives available, but instead whether the seizure actually effectuated **falls within a range of conduct** with is objectively 'reasonable' under the Fourth Amendment." *Schulz v. Long*, 44 F.3d 643, 649 (8th Cir. 1995) (emphasis added); *see also Cole v. Bone*, 993 F.2d 1328, 1334 (8th Cir. 1993) (citing *Graham v. Connor*, 490 U.S. 386, 396 (1989)).

The Eighth Circuit has held that an officer may reasonably use deadly force against an animal without violating the Fourth Amendment when it poses an imminent danger to the officer and the owners are not available, able, or desirous of taking control of the animal to prevent the threat of danger. *See Andrews v. City of West Branch, Iowa*, 454 F.3d 914, 919 (8th Cir. 2006). The video footage shows that the Steeles' dog was acting aggressively or reasonably appeared to be acting aggressively towards Officer Hill and none of the Steeles were desirous or able to control their dog before it would have an opportunity to attack Officer Hill a second time. (Pl. Appendix pp. 15; 41). Therefore, he was lawfully and constitutionally allowed to utilize deadly force to protect himself from further injury. *See id*. There is no case law to support Plaintiffs' theory that the presence of bystanders changes the analysis of when deadly force can be used.

The undisputed evidence confirms that Officer Hill acted within the range of reasonableness when he used deadly force on the Steeles' dog on January 6, 2015. Even if the Court were to find that qualified immunity does not apply in this case, there is ample evidence for a jury to determine that Officer Hill acted reasonably under the circumstances to negate Plaintiffs' summary judgment claims for liability. Accordingly, Plaintiffs' motion for summary judgment must be denied.

B. PLAINTIFFS ARE NOT ENTITLED TO SUMMARY JUDGMENT REGARDING THEIR STATE CONSTITUTIONAL CLAIMS AGAINST DEFENDANT HILL.

1. Plaintiffs Have Failed To Prove A Private Cause Of Action Exists For An Alleged Violation Of Article 1, Section 8 Of The Iowa Constitution.

The Iowa Supreme Court in *Godfrey v. State* held that a private cause of action for monetary damages exists for alleged violations of Article 1, Sections 6 (Equal Protection Clause) & 9 (Due Process Clause) of the Iowa Constitution. *See generally* 898 N.W.2d 844 (Iowa 2017). The Iowa Supreme Court's holding in *Godfrey* does not support that ***every*** provision of the Iowa Constitution gives rise to a private cause of action if violated. *See id*. (emphasis added). The Iowa Supreme Court was previously given the opportunity to decide whether a private cause of action exists under Article 1, Section 8 of the Iowa Constitution in *Conklin v. State*, but chose not to hear the matter on further review. *See* 863 N.W.2d 301, 2015 WL 1332003 (Iowa Ct. App. 2015); (Def. Appendix 92-93). The Iowa Supreme Court has not ruled that a private cause of action exists under Article 1, Section 8 of the Iowa Constitution.

The pending certified question of law from Honorable Mark Bennett in *Baldwin v. Estherville, Iowa* to the Iowa Supreme Court does not involve the issue of whether a private cause of action exists under Article 1, Section 8 of the Iowa Constitution. (Def. Appendix 94-99). As noted in Judge Bennett's question to the Iowa Supreme Court, the parties to that action, for purposes of their motion for summary judgment, presumed that a cause of action exists under Article 1, Section 8 and are only requesting the Iowa Supreme Court to decide whether qualified immunity as applied in similar federal constitutional claims would also be applicable to Iowa constitutional claims. (Def. Appendix 95). The Iowa Supreme Court has scheduled oral arguments for the certified question in *Baldwin* for February 14, 2018. (Def. Appendix 102-105).

Plaintiffs have failed to sustain their burden of proof that a private cause of action exists for alleged violations of Article 1, Section 8 of the Iowa Constitution. Therefore, this Court must deny Plaintiffs' summary judgment claims regarding alleged state constitutional violations.

2. Officer Hill Is Entitled To Qualified Immunity Against Plaintiffs' Alleged State Constitutional Violations.

Even if a private cause of action exists for an alleged violation of Article 1, Section 8 of the Iowa Constitution, this Court must still deny Plaintiffs' claims. Defendants incorporate and restate their arguments from their Memorandum of Authorities in Support of their Motion for Summary Judgment that qualified immunity applies to Plaintiffs' state constitutional claims in the same manner as it applies to federal constitutional claims. (Docket # 40). Officer Hill's actions on January 6, 2015 were not unreasonable nor did his actions violate any clearly established constitutional rights existing and known to a reasonable person on January 6, 2015. (Docket # 40). Qualified immunity bars any claim of recovery alleged by Plaintiffs related to violations of the Iowa Constitution. *See Pearson*, 555 U.S. at 237. Accordingly, the Court must deny Plaintiffs' summary judgment claims regarding alleged state constitutional violations.

3. Plaintiffs Do Not Advocate For A Different Analysis To Their State Constitutional Claims.

Plaintiffs admit that they are not requesting this Court to apply a different analysis to their state constitutional claims than what is applied to their federal constitutional claims. (Pl. Brief pg. 14). Therefore, for the reasons set forth herein regarding Plaintiffs' alleged federal constitution claims, the Court must deny summary judgment regarding Plaintiffs' state constitutional claims. Plaintiffs have failed to sustain their burden of proof through undisputed, material evidence that there was any unreasonable seizure of them by Officer Hill on January 6,

2015 and there is ample evidence for a jury to find Officer Hill did not act unreasonably under the circumstances on January 6, 2015.

C. PLAINTIFFS ARE NOT ENTITLED TO SUMMARY JUDGMENT REGARDING THEIR NEGLIGENCE AND WRONGFUL DEATH TORT CLAIMS AGAINST DEFENDANTS.

1. Defendants Are Immune From Suit For Plaintiffs' State Tort Claims.

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).

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. (Def. Appendix 1; Pl. Appendix pp. 15; 27-29; 41; 61). 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. (Def. Appendix 1). Officer Hill's 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. (Pl. Appendix pp. 15; 41). Any alleged negligent conduct by Officer Hill during and in connection with his emergent response is immunized from liability under the IMTCA. Therefore, the Court must deny Plaintiffs' summary judgment claim for negligence/wrongful death.

2. <u>Plaintiffs Have Failed To Prove Liability For Negligence/Wrongful Death Through Undisputed, Material Facts.</u>

Even if Defendants are not entitled to immunity regarding Plaintiffs' negligence claims, Plaintiffs have failed to prove they are entitled to summary judgment for negligence/wrongful death through undisputed, material evidence. Negligence and the reasonableness of a party's conduct is "ordinarily for the jury" to decide and can only be decided by the court "in exceptional cases." *Estate of Gottschalk by Gottschalk v. Pomeroy Development, Inc.*, 893 N.W.2d 579, 584 (Iowa 2017) (internal citations omitted). There is ample material evidence that

a reasonable jury could find to support that Officer Hill exercised ordinary and due care on January 6, 2015. Officer Hill was injured by the Steeles' dog before he drew and fired his weapon, he reasonably believed that he was in immediate danger of further bodily injury from the Steeles' dog at the time he chose to use lethal force, and he reasonably could use lethal force against the dog to extinguish the threat. (Pl. Appendix pp. 12; 15; 41; 52-53; Def. Appendix 15; 33-34). He was bitten and attacked by the dog before he drew his weapon and the unrestrained, 80-pound German Shepherd-mix dog continued to approach him with its teeth bared and growling in an aggressive manner before he fired his weapon. (Pl. Appendix pp. 12; 15; 41; Def. Appendix 25; 33-34). There is substantial evidence for a jury to find that Officer Hill utilized ordinary and reasonable care on January 6, 2015 and Plaintiffs Motion for Summary Judgment must be denied.

IV. CONCLUSION

For the reasons set forth in Defendants' Motion for Summary Judgment, Defendants should be granted summary judgment as to all counts alleged by Plaintiffs and Defendants incorporate and restate their arguments in support of their Motion for Summary judgment in support of their Resistance herein. However, even if Defendants are not granted summary judgment as to all or part of Plaintiffs' claims, Plaintiffs can not be granted summary judgment regarding their federal and state constitutional claims or their state tort claims.

Plaintiffs have failed to sustain their burden of proof they were unreasonably seized by Officer Hill in violation of their Fourth Amendment rights on January 6, 2015 through undisputed and material evidence. There is ample evidence supporting that no seizure as alleged by Plaintiffs occurred and that any alleged seizure was objectively reasonable.

Plaintiffs have failed to prove there is a recognized private cause of action under Iowa law for alleged violations of Article 1, Section 8 of the Iowa Constitution. Even if such cause of action exists, Plaintiffs do not advocate for a different analysis of their state constitutional claims than their federal constitutional claims which have not been proven through undisputed and material evidence.

Plaintiffs have also failed to prove that Officer Hill was negligent as a matter of law through undisputed and material evidence. There is ample evidence supporting that Officer Hill did not act unreasonably or without ordinary and due care on January 6, 2015. For all of these reasons, Plaintiffs' summary judgment claims must be denied.

WHEREFORE, Defendants, City of Burlington and Officer Jesse Hill, respectfully request that the Court DENY Plaintiffs' Motion for Summary Judgment for the reasons set forth herein and for such other and further relieve the Court deems equitable and just.

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CERTIFICATE OF SERVICE FOR ELECTRONIC FILINGS

I hereby certify that on February 2, 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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