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' REPLY IN SUPPORT OF THEIR 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 Reply in Support of their Motion for Summary Judgment, pursuant to Federal Rule of Civil Procedure 56 and Southern District of Iowa Local Rule 56, state:

A. PLAINTIFFS FAILED TO FILE A SEPARATELY-NUMBERED STATEMENT OF MATERIAL FACTS TO SUPPORT THEIR RESISTANCE AS REQUIRED BY LOCAL RULE 56(B)(2).

Plaintiffs did not submit an itemized statement of additional material facts as required by Local Rule 56(b)(2). Accordingly, Defendants cannot issue specific responses to any additional facts claimed by Plaintiffs pursuant to Local Rule 56(d).

B. PLAINTIFFS HAVE NOT PRESENTED ANY OBJECTIVE EVIDENCE SUPPORTING A SEIZURE OCCURRED.

In order to refute the Defendants' Motion for Summary Judgment the Plaintiffs first and foremost must prove a seizure occurred. They have failed to do so in this case. The law is clear that whether a seizure occurred in an **objective** test. *See California v. Hodari D.*, 499 U.S. 621,

628 (1991) (emphasis added) *(*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). Plaintiffs have failed to present any objective evidence to support a Fourth Amendment seizure occurred and attempt to rely on the Officer Hill's subjective beliefs about whether any of the Steeles would have been free to leave the scene. However, subjective beliefs of an officer are irrelevant to the Court's analysis. The subjective intent of an officer 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."). It is undisputed that Officer Hill never communicated any intent to arrest or stop the freedom of movement of any of the Plaintiffs. (Def. App. 2).

Further, Officer Hill's drawing and use of his firearm must have been "intentionally applied" to restrict Plaintiffs' freedom of movement to constitute a seizure. *See Brower v. County of Inyo*, 489 U.S. 593, 597 (1989). Plaintiffs have no evidence that Officer Hill ever intentionally displayed his firearm *at them* in an effort to seize them or restrict their freedom of movement. In fact, it is undisputed that Officer Hill drew his firearm and pointed it only at the dog *at a downward angle*. (Def. App. 26). Officer Hill neither pointed his gun at the Plaintiffs nor indicated he was prohibiting their freedom of movement in anyway. (Def. App. 2).

The Plaintiffs cite *Moore v. Indehar*, 514 F.3d 756 (8th Cir. 2008) for the proposition that any person in the general direction of an officer's discharge of a firearm is seized. (Docket # 46.2, pg. 10). However, the *Moore* case is distinguishable from the case at hand. In *Moore*, the officer testified that he didn't intend to shoot Moore; instead, he was aiming at another suspect running near Moore. *Id*. at 761. To defeat summary judgment, Moore presented specific

evidence to rebut the officer's claimed intent by showing: he was fleeing with another suspect, he was struck by a bullet from the officer and, after the shooting, the officer handcuffed and detained all of the people Moore was standing with before he fled. *Id*. at 761-2. The Eighth Circuit court determined this combination of factors allowed a reasonable inference that the officer was shooting at Moore to stop him from fleeing and the officer intended to seize Moore (along with everyone else Moore was with) when he arrived to the scene. *Id*.

There is no such evidence in this case. Plaintiffs' own counsel admits that "**all**" witnesses to this shooting agree Officer Hill *was not aiming at any of the Steeles* and "**nobody**" is claiming that he *intentionally shot at Autumn*. (emphasis added) (Def. Supp. App. 65). None of the Plaintiffs were handcuffed or restrained after the shooting occurred. (Def. App. 2-3). Since Plaintiffs have failed to show a seizure occurred, their state and federal claims fail as a matter of law and must be dismissed.

C. PLAINTIFFS HAVE NOT PRESENTED ANY OBJECTIVE EVIDENCE OFFICER HILL ACTED UNREASONABLY WHEN UTILIZING DEADLY FORCE AGAINST THE DOG.

Officer Hill's statement that he believed he was "going to prison" approximately one minute and forty seconds after the shooting incident offers no evidence towards why he pulled out his firearm, what he was aiming at when he fired, or whether he was justified in discharging his weapon. (Def. App. 2). As Plaintiffs concede in their brief an officer's subjective thoughts or intent, whether good or bad, are irrelevant to the issue of whether the force used was within the range of objective reasonableness. *See Graham v. Connor*, 490 U.S. 386, 397 (1989); (Docket # 46.2, pg. 12).

What the Court must decide based on objective evidence is whether the dog reasonably posed an immediate threat of bodily injury to Officer Hill *at the time* he drew and discharged his

firearm at the dog. (emphasis added). Although Officer Hill knew the Steeles had a dog before January 6, 2015, he never saw the dog before that day and he knew nothing about the dog such as its size, breed, or temperament. (Def. Supp. App. 69-72).

Plaintiffs attempt to create a fact dispute in this matter by making a generalized statement that "all the eyewitnesses" describe the dog as being playful and non-aggressive. (Docket # 46.2, pg. 11). However, this statement is not supported by any credible evidence in this record. Officer Hill and Gabriel Steele, who were within feet of the dog at the time of the shooting, both stated on the scene that the dog "attacked" and was going after Officer Hill when he drew and fired his weapon. (Def. App. 2-3). The video undisputedly depicts the Steele's dog growling in an aggressive manner near Officer Hill at the time he drew and discharged his firearm. (Def. App. 2).

All of the other "eyewitnesses" the Plaintiffs rely on were at least fifty feet away from the scene of the shooting and have no knowledge as to how the dog was acting immediately before the shots were fired. Courtney Webb was driving in her car and was a block away from the scene before the shots were fired. (Def. Supp. App. 104-105). Laura Mellinger was standing in an upstairs bedroom fifty feet away, had a telephone pole blocking her view, couldn't hear anything Officer Hill said when he arrived, and was not looking at the dog or where Officer Hill was pointing with his gun when he fired it. (Def. Supp. App. 80, 85-86). Ed Ranck, standing fifty feet away in his yard, opined the dog wasn't being aggressive solely because he never heard the dog growl at Officer Hill and agreed that if the dog had growled, he believed it would have been acting aggressively. (Def. Supp. App. 114, 120, 125-127). Any of these eyewitness opinions of how the dog was acting *before*, rather than *at the time*, Officer Hill drew his weapon are irrelevant to the Court's analysis. *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.").

Plaintiff alternatively argues that the dog didn't inflict serious injury or bite Officer Hill. (Docket # 46.2, pgs. 11-12). An officer is not required to wait until a threat materializes into actual harm before being allowed to use deadly force. *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). The threat or appearance of a threat, even if reasonably mistaken by the officer, is enough to allow for the use of deadly force. *Id*. Plaintiffs present no evidence disputing that the dog attacked Officer Hill once and then, at the time Officer Hill drew his weapon, the 80-pound dog[1] continued approaching him with its teeth-bared and growling. (Def. App. 2; 26; 39). Plaintiffs further have no evidence disputing that the dog bit Officer Hill, and in fact Officer Hill was treated for a dog bite. (Def. App. 42-49).

Finally, the fact that Officer Hill had access to other weapons on his duty belt is irrelevant to the reasonableness of the force he actually applied. *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). The focus is whether the force applied was *within the range of reasonableness*, not whether alternative-levels of force existed and could have been used instead. (emphasis added) *See Schulz v. Long*, 44 F.3d 643, 649 (8th Cir. 1995); *Cole v. Bone*, 993 F.2d 1328, 1334 (8th Cir. 1993). Since Plaintiffs have failed to prove through objective evidence that

[1] Plaintiffs misstate Gabriel Steele's testimony to claim the dog only weighed 62-pounds on January 6, 2015. (Docket # 46.1, pg. 4). Gabriel testified the dog weighed 62-pounds *when they adopted the dog* and he was unsure what the dog weighed on January 6, 2015. (emphasis added) (Pl. Supp. App. p. 14).

Officer Hill acted unreasonably in discharging his firearm at the advancing dog, their state and federal seizure claims must be dismissed.

D. SINCE PLAINTIFFS CAN NOT SHOW AN UNREASONABLE SEIZURE OCCURRED, SUMMARY JUDGMENT IS APPROPRIATE AS TO THEIR STATE CONSTITUTIONAL CLAIMS.

In the certified question presented to the Iowa Supreme Court in *Baldwin v. Estherville, Iowa* (N.D. Iowa No. C 15-3186-MWB; Iowa App. No. 17-1592), the parties to that action concede there is an underlying violation of the Iowa constitution and focus solely on whether the second-prong of the qualified immunity analysis applies to the state constitutional claim. (Def. Supp. App. 133). However, this Court does not even reach an analysis of the "clearly established right" prong of qualified immunity if the Plaintiffs cannot as a matter of law establish an unreasonable seizure occurred. *See Nord v. Walsh County*, 757 F.3d 734, 738-9 (8th Circuit 2014) (noting two-step inquiry for qualified immunity analysis and courts have the discretion as to which prong to address first). If the court finds that Officer Hill did not unreasonably seize Plaintiffs, then their Iowa constitutional claims must be dismissed, regardless of whether Plaintiffs are relying upon a *Monell*-type claim or some other form of vicarious liability. *Id*. There can simply be no liability under the Fourth Amendment or Article 1, Section 8 of the Iowa Constitution absent proof an unreasonable seizure occurred. *See* U.S. Const., 4th Amend.; Iowa Const., Art. 1, Sec. 8.

If the Court finds that the Plaintiffs have set forth evidence of an unreasonable seizure, which the Defendants deny, then the Court needs to stay its ruling on whether qualified immunity applies to Plaintiffs' state law claims. The application of qualified immunity to Iowa

constitutional violations is currently being considered by the Court in the *Baldwin* case and therefore the Court should wait for that ruling before engaging in this analysis in this matter.[2]

E. PLAINTIFFS HAVE NO EVIDENCE SUPPORTING A MUNICIPAL LIABILITY CLAIM.

1. Plaintiffs Have No Evidence Burlington's Use Of Force Policy Allows Unconstitutional Uses Of Deadly Force.

Plaintiffs misinterpret Iowa Code § 704.2 to stand for a proposition that an officer may never use deadly force if there are innocent bystanders nearby that could be struck by an errant bullet. (Docket # 46.2, pg. 17). That code section merely defines the term "deadly force" and does not state when deadly force may be used by an officer. *See* Iowa Code § 704.2. Similarly, the excerpts from the Cedar Rapids and Dubuque police department policies[3] do not state deadly force can **never** be used if there are any bystanders nearby. (Pl. Supp. App. pp. 9-12). In fact, the Cedar Rapids policy allows for the use of deadly force for an officer's self-defense from serious injury without limitation regarding the presence of bystanders.[4] (Pl. Supp. App. pp. 10-11). Even if these policies could be construed to preclude the use of deadly force if a bystander is present, it has no bearing on the *constitutionality* of an officer's use of force. (emphasis added). The federal courts and the United States Supreme Court, not police departments, determine constitutional violations. Plaintiffs cite to no federal case law supporting that an officer is constitutionally prohibited from using deadly force to protect himself if there is a chance that a bystander may be injured.

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[2] Oral arguments before the Iowa Supreme Court in *Baldwin v. Estherville, Iowa* are currently scheduled for February 14, 2018 at 1:30 p.m. (Def. Supp. App. 140-143).

[3] Defendants note these two policies were **never** provided to them in discovery. The first time Defendants have seen these policies are through Plaintiffs' Resistance pleadings, and Plaintiffs only produced excerpts of the policies which prevent Defendants from reviewing the full language of the policies and prepare a full response.

[4] It is unknown as to when the Dubuque policy allows officers to use of deadly force because Plaintiffs did not present the full policy in their supplemental appendix.

2. Plaintiffs Have No Evidence Of A Pattern Of Unconstitutional Use Of Force To Support A Deliberate Indifference Failure-To-Train Claim.

"A pattern of similar constitutional violations by untrained employees is ordinarily necessary to demonstrate indifference for purposes of failure to train" under a *Monell* claim. *S.M. v. Lincoln County*, 874 F.3d 581, 585 (8th Cir. 2017) (quoting *Connick v. Thompson*, 563 U.S. 51, 62 (2011)). Plaintiffs have presented no evidence of a pattern of constitutional violations by any Burlington police officers in this case, which is fatal to their claim.

3. Plaintiffs Have No Evidence Supporting A Ratification Of Unconstitutional Conduct.

The Eighth Circuit has not expressly adopted a post-incident "ratification" theory of liability under *Monell*, and the other jurisdictions that have require " 'something more' than a single failure to discipline or the fact that a policymaker has concluded the defendant officer's actions were in keeping with the applicable policies and procedures." *Lollie v. Johnson*, 2015 WL 3407931, at *7 (D. Minn. 2015) (citing *Maximo v. San Francisco Unified Sch. Dist.*, No. C 10-3533 JL, 2011 WL 1045292, at *7 (N.D. Cal. 2011); *Kanae v. Hodson*, 294 F. Supp. 2d 1179, 1191 (D. Hawai'I 2003)). Plaintiffs' only evidence to support "ratification" is that Officer Hill was found to have been compliant with departmental policies which is insufficient evidence to sustain their burden of proof. (Docket # 46.2, pg. 19).

4. Plaintiffs Can Not Assert A New "Cover-Up/Conspiracy" Claim To Avoid Summary Judgment.

In Count III of their Complaint, Plaintiffs did not plead a cover-up or conspiracy basis of liability against the City. (Docket # 1). The words "cover-up" or "conspiracy" were never even used in the Complaint. (Docket # 1). Since this claim/cause of action was never pled, it can not be allowed at this late stage in the litigation, after discovery has already closed and solely to

avoid summary judgment. Even if the Court were to assume that this theory was pled, there is no evidence to support such a claim.

F. PLAINTIFFS HAVE NO EVIDENCE SUPPORTING OFFICER HILL'S RESPONSE TO A 9-1-1 CALL IS NOT AN EMERGENCY IMMUNIZED BY IOWA CODE § 670.4(1)(K).

Officer Hill's use of emergency lights or sirens does not dictate whether he was responding to an ongoing emergency or merely doing "routine" police work.[5] In *Harrod v. City of Council Bluffs*, the police officers **turned off** their lights and sirens before approaching and shooting into the vehicle and the Iowa Court of Appeals found that the immunity "clearly" applied to officers' response to the 9-1-1 call. *See* 2008 WL 2200083, at *2-3 (Iowa Ct. App. 2008). Officer Hill was dispatched to provide rescue services to Gabriel and G.S. in an emergency situation—to rescue them from the ongoing physical assault by Autumn. (Def. App. 1; 26). This is not a "routine traffic stop"; rather, it is a specific response to an emergency reported by Gabriel through a 9-1-1 call. (Def. App. 1; 26). Therefore, immunity under Iowa Code § 670.4(1)(k) applies and Plaintiffs cannot recover under any of their state tort claims as a matter of law.

WHEREFORE, Defendants City of Burlington and Officer Jesse Hill respectfully request that the Court GRANT their Motion for Summary Judgment, enter an order dismissing all of Plaintiffs' causes of action with prejudice, and for such other and further relief the Court deems equitable and just.

[5] Officer Hill followed departmental protocol when responding to the domestic disturbance call by not using his emergency lights or sirens. (Def. Supp. App. 130-131).

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CERTIFICATE OF SERVICE FOR ELECTRONIC FILINGS

I hereby certify that on February 9, 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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