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

GABRIEL STEELE, Individually,)	
as Executor of the Estate of)	
Autumn Steele, and as Next)	ORIGINAL
Friend for his Minor Child,)	
G.S., SEAN SCHOFF, as Next)	CIVIL NO. 3:16-cv-105
Friend for his Minor Child,)	
K.S., and GINA COLBERT,)	
Individually,)	
)	
Plaintiffs,)	
)	
VS.)	
)	
CITY OF BURLINGTON and)	
OFFICER JESSE HILL,)	
)	
Defendants.)	

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE JAMES E. GRITZNER
Thursday, May 24, 2018; 10:38 a.m.
DAVENPORT, IOWA

LINDA FAUROTE-EGBERS, CSR 622(IA), FCRR, RMR
FEDERAL OFFICIAL COURT REPORTER
131 East Fourth Street
Davenport, Iowa 52801

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1 THE COURT: Take a seat, please. We are convened in
2 the matter of Steele versus City of Burlington, Civil No.
3 16-105, for the purposes of a hearing on Cross Motions for
4 Summary Judgment. We will proceed in the order that the Motions
5 were filed which means we will start with the Plaintiffs'
6 Motion. In a Cross Motion situation I typically hear from both
7 parties twice so that you both have an opportunity to respond to
8 each other so that's the way we will proceed.

9 Please assume that I have done my homework so you
10 don't have to take me from square one on this, you can be more
11 targeted with your arguments. Also, counsel, did you both
12 receive the Court's memorandum from yesterday?

13 MR. O'BRIEN: Yes, Your Honor.

14 MS. SHAFF: Yes, Your Honor.

15 THE COURT: Okay. Those are questions that we would
16 like you to answer in the process of the hearing today. Do it
17 however you please, you don't have to do it in any particular
18 fashion, just get it in there when you have an opportunity.

19 Mr. O'Brien?

20 MR. O'BRIEN: Thank you, Your Honor. May it please
21 the Court, counsel.

22 As you know, I am here representing Autumn Steele, her
23 estate, and her survivors, spouse and children. Judge, we move
24 for summary judgment in this case and the Defendants move for
25 summary judgment in this case and I think the briefing is pretty

1 thorough. I believe the Defendants did a good job on setting
2 out their response to our cases, I hope the Court finds that we
3 did that as well.

4 THE COURT: I agree. The briefing is very thorough.
5 Thank you.

6 MR. O'BRIEN: So I don't want to waste the Court's
7 time hitting the high points of the briefs that were already
8 filed; but when I was reviewing this material, a couple of
9 things struck me that I would like to raise with the Court to
10 emphasize and one thing is that when you are analyzing this
11 case, I don't know that I made it as clear as I should have in
12 our briefing, that we really have two different areas where
13 Officer Hill acted well outside what an objectively reasonable
14 officer would do under the circumstances and I think for the
15 most part we tend to focus on the first part of that which is
16 would a reasonable officer, when a dog jumped on him, he hears
17 one bark and growl, would a reasonable officer pull his gun out
18 and start shooting in order to kill that dog even though there
19 were innocent bystanders, Autumn, Gunner, the two-year-old son,
20 and Gabe in the same direction as the dog.

21 We think the answer to that is clearly no and that's
22 why you have to deny the Defendants' Motion for Summary
23 Judgment. An objectively reasonable officer would not fire his
24 weapon in the direction of innocent bystanders in order to
25 alleviate that minimal threat from this dog.

1 But the second part of it, and, Judge, I was thinking
2 about this on the drive over here from Cedar Rapids, I was
3 debating whether I wanted to say I wouldn't have filed a Summary
4 Judgment Motion here and I decided I am going to say it because
5 I don't think I would have. If Officer Hill had done what these
6 other officers in the case the Court has cited and the
7 Defendants have cited where he takes his gun out and stands in a
8 ready position and shoots and misses the dog and hits Autumn,
9 who is standing adjacent to the dog, that's one thing, and
10 that's the first part that I've already talked about; but that
11 is not what happened here, Judge.

12 This officer pulls his gun out, slips while he's on
13 the ice, when you watch the body camera video pinned to his
14 chest, what you see in the body camera is sky as he's firing off
15 two shots so not only was he reckless and not acting as an
16 objectively reasonable officer at the time he decided to fire
17 his weapon, he fired his weapon in an objectively unreasonable
18 manner.

19 You have to have your gun under control before you
20 pull that trigger. Anybody in a two-block radius was subject to
21 being shot by him. The gun was so out of control, the video
22 shows Officer Hill scrounging around in the snow looking for it,
23 he lost total control of the gun, it is laying on the ground, he
24 had to dig through the snow to find it. Now, that is not what
25 an objectively reasonable officer would do once they made the

1 decision to fire that weapon. They would fire that weapon only,
2 only if they had their weapon under control and they certainly,
3 going back to the first part, wouldn't fire that weapon at a dog
4 with innocent bystanders standing right behind him.

5 Now, I cited Iowa Code Section 704.2 which implies
6 intent, deadly force, if you fire a weapon in the direction of
7 innocent bystanders knowing they are there and I thought it was
8 interesting when I reread your Order on denying the Motion to
9 Dismiss for the -- on the issues we are talking about today.
10 You said, "The Complaint cannot reasonably be read to indicate
11 Hill expected to be approached by the dog on the scene."

12 Well, as it turns out, once we did the discovery,
13 Judge, that's exactly what happened. Officer Hill admitted that
14 he saw the dog as he pulled up in his cruiser and he admitted
15 that when he got out of the cruiser, the dog was on his mind.

16 Then you said, "The Court cannot infer that Hill's
17 alleged shooting of Autumn was intentional," and I agree with
18 you. I said we don't believe he intentionally shot Autumn
19 Steele; however, because of Iowa Code Section 704.2, that intent
20 is implied. You cannot shoot at something with another -- with
21 another individual directly behind them without intending to
22 shoot what is in your line of fire, that's what the law says,
23 and this morning it struck me that I might want to check the
24 Uniform Iowa Civil Criminal -- excuse me, Iowa Criminal Jury
25 Instructions on this issue and I suggest to the Court -- and I

1 did not cite this in my brief -- the Court may want to look at
2 700.12 where the jury instruction puts in place that
3 co-provision of 704.2 and it talks about unintentional murder
4 and what the Code -- what the jury instruction says is if you
5 fire a gun and hit somebody you are not intending to hit, in
6 order to be charged with murder in the state of Iowa, the jury
7 instruction is we consider your intent based on what you were
8 aiming at so applying that to this case, it doesn't matter that
9 Officer Hill didn't intend to hit Autumn, he was intending to
10 hit Sammy the dog and it is that intent that is implied under
11 the law so we do have an intentional act by him, firing in the
12 direction of people he knows are there and no reasonable officer
13 would have gauged -- have engaged in such conduct.

14 THE COURT: Let me make sure I understand your
15 argument because that seems a little bit mixed there, that he is
16 intending to fire at the dog, recognizing there are other people
17 there, but he is intending to fire at the dog and I also heard
18 you basically say that the woman was struck by an errant bullet.

19 MR. O'BRIEN: Correct.

20 THE COURT: Not the intention of the officer to fire
21 at her.

22 MR. O'BRIEN: Correct.

23 THE COURT: You are saying both of those things?

24 MR. O'BRIEN: I am.

25 THE COURT: Okay.

1 MR. O'BRIEN: But the law implies an intent under Iowa
2 criminal law. It implies intent where you shoot in the
3 direction of innocent bystanders and there's a uniform criminal
4 jury instruction right on that point.

5 THE COURT: Since you didn't bring it up before, I
6 will have to take a look at that jury instruction, but it sounds
7 to me like the jury instruction was suggesting the intent would
8 be the target, in other words, the dog.

9 MR. O'BRIEN: No, the intent -- the jury instruction,
10 maybe I didn't describe it very carefully, it is worded a little
11 weird.

12 THE COURT: I will look at it. I have not seen it
13 before because you didn't tell me about it before.

14 MR. O'BRIEN: Yes, I appreciate that, Judge, but it
15 says that the intent -- or whether your -- your intent as to
16 what you were aiming at is implied to the person you actually
17 hit under this statute, 700.12, Unintentional Murder.

18 THE COURT: What do we do with the fact that under the
19 law of the Eighth Circuit there is a pretty clear separation
20 between the person or entity in this situation that the officer
21 was aiming at and the person that is the victim of an errant
22 bullet?

23 MR. O'BRIEN: A pretty clear separation, are you
24 talking about distance?

25 THE COURT: In terms of whether or not the person hit

1 by an errant bullet has been seized.

2 MR. O'BRIEN: Oh, Judge, I don't get the whole seizure
3 argument here. I mean, Officer Hill grabbed Autumn Steele. I
4 mean, what could be more of a seizure than having an officer
5 grab her and then he pulled his gun out and pointed it in her
6 direction, Gunner's direction, and Gabe's direction and the
7 standard, as we set out in the briefs, Your Honor, is that would
8 a reasonable person under these circumstances believe they were
9 free to leave and I submit to you, Judge, that anybody that got
10 grabbed by a police officer, was standing next to somebody that
11 got grabbed by a police officer, and then had that officer pull
12 a gun out and point it at them would be far more likely to wet
13 themselves than they would to think they were free to leave at
14 that point and so there's clearly a seizure of those three
15 individuals and I know it is not subjective intent, but Officer
16 Hill admitted in his deposition that those three individuals
17 were not free to leave once he got out of that cruiser and
18 started approaching them so I believe there was a seizure in
19 this case.

20 Now, you asked us to address the Powell versus Johnson
21 case where the language was an imminent threat and I think that
22 goes to this first part of the analysis. Sammy was not an
23 imminent threat to this officer. All that happened is the dog
24 barked once, growled once, jumped on him, and then he decided to
25 use deadly force. All of the cases, Powell and all of the cases

1 cited by the Defendants, the machinations that those officers
2 went through to avoid using deadly force, this case just pales
3 in comparison.

4 THE COURT: What is the line? I mean, at what point
5 -- I assume you are not expecting the officer to wait to
6 actually be bitten before exercising some force, but maybe you
7 are.

8 MR. O'BRIEN: Some force, no. Deadly force in the
9 direction of innocent bystanders, yes. Keep in mind the Justice
10 Department's training module which was adopted, available well
11 before this incident, but adopted by the City of Burlington
12 after the fact, specifically says that in order to use deadly
13 force on a dog, it is not talking about with another person
14 standing right behind the dog, just in order to use deadly force
15 on a dog, the dog has to bite you, it has to last for several
16 seconds, and the dog needs to be shaking in order for that to be
17 considered an attack sufficient to justify the use of deadly
18 force. That's the United States Department of Justice's
19 training manual as taught to the Burlington police officers
20 unfortunately only after this incident.

21 Now, Hansen v Black, I am so glad you brought that to
22 our attention, Judge, I think the facts of that case really,
23 really help us in terms of what an officer goes through to avoid
24 even killing a dog; and again, those cases and all the others
25 that I have read are not situations where innocent bystanders

1 are standing in the vicinity of the dog, you know, in that case
2 the dog is out on the highway, unless I've got it confused with
3 Powell, the dog is out on the highway and the officer -- now, if
4 Officer Hill pulled up in that situation and acted the way he
5 did in this case, Officer Hill would have pulled up, not even
6 waited for his car to stop, jumped out while it is still moving,
7 while he is falling down, fired off a couple of shots at this
8 dog without doing anything else and unfortunately there would be
9 another car behind them and somebody would be shot and killed.
10 That's what Officer Hill's conduct would equate if you put it in
11 the context of Hansen v Black; but that is not what that officer
12 did that day.

13 He immediately recognized the danger to motorists of
14 having a dog on an interstate, 65 miles an hour. Did he pull
15 his gun out and shoot? No. He stopped traffic, he blocked both
16 lanes of traffic, and he tried to corral the dog. Then the
17 officer made a second judgment, very objectively reasonable.
18 I've got traffic backed up, now this is a secondary problem for
19 rear end collisions, I can no longer mess with this dog that I
20 am not able to corral, and he takes his gun out and he shoots
21 the dog and in that case the Court will recall that the real
22 focus was, I mean, I believe the Plaintiffs are arguing that he
23 shouldn't have done that, but the District Judge that refused to
24 grant immunity didn't find that.

25 The District Judge said that it was the second shot

1 when he decided the dog was injured and not moving fast, the
2 officer could have picked him up and taken him out of harm's way
3 and it was the second shot that took it outside of the qualified
4 immunity standards so we don't have anything close to that in
5 these factual circumstances.

6 I do want to talk about the immunity under the Iowa
7 Tort Claims for our case because I don't think that -- and the
8 case I cited in the brief, the name is escaping me, it is right
9 on point, it was a Judge Pratt decision from a few years ago on
10 this and I am sure the Court has had a chance to look at that;
11 but when you asked that question, it got me to thinking, what
12 applies under 670.4 and the introductory paragraph, we are all
13 focused on subparagraph K because it talks about emergency
14 response; but the introductory paragraph is important,
15 subparagraph one, "As any such claim -- a municipality shall be
16 liable only to the extent liability may be imposed by the
17 express -- by the express statute dealing with such claims," so
18 in other words, you have general immunity for sudden emergency
19 unless there's another statute that says you have liability for
20 violating that statute in that context.

21 Now, I did some research on that issue and I came up
22 with a Wisconsin case that basically talked about an ambulance
23 or other emergency responder that they found had sudden
24 emergency immunity; but because the ambulance driver had
25 violated one of these other rules that had been statutorily

1 placed about how to operate the ambulance or the police car,
2 that waived that ability for immunity.

3 I bring that up because I go back to Section 704.2.
4 The Iowa legislature has specifically set out that you might
5 have immunity in sudden emergency under 670, but not if you
6 point and shoot a gun in the direction of an innocent bystander
7 that you know is there.

8 They had a specific statutory provision that exempts
9 that immunity, 607 -- 604.2, so, Your Honor, this is a tragic
10 case and this officer acted in a way that was entirely
11 objectively unreasonable in the way he conducted himself in
12 deciding to use deadly force and then in the way he effectuated
13 his use of deadly force. What he did at the time is not
14 acceptable and he told me in his deposition, Your Honor, that he
15 is going to do the exact same thing again if a similar situation
16 arose again and the Burlington Police Chief told me that they
17 are going to do exactly the same thing again and that sends a
18 chill up and down my spine.

19 If I were a dog owner in the city of Burlington,
20 knowing that this is how the police are going to react to any
21 dog that they think may be a danger to them, I would certainly
22 be hesitant to call the police to come to my house for any
23 reason and I would be in great fear if any police officer showed
24 up at my house or anywhere I was where a dog was running around
25 loose because they're saying that they have a right, if they

1 believe that that dog might be some danger to them, that they
2 have the right to pull their gun out and start firing regardless
3 of whether there's a group of school children behind the dog or
4 not and they told us specifically they are going to do the same
5 thing again if the situation arises and that's why I think it is
6 so important for this Court to grant our Motion for Summary
7 Judgment.

8 The criminal justice system did not work in this case.
9 It failed Autumn Steele. We are hopeful that the civil justice
10 system will not end up in the same category. Thank you, Your
11 Honor.

12 THE COURT: Thank you, counsel.

13 Ms. Shaff?

14 MS. SHAFF: Thank you, Your Honor. May it please the
15 Court.

16 We are now at the summary judgment pleadings stage of
17 this case and we have previously filed a Motion to Dismiss which
18 the Court granted in part and denied in part, not quite as much
19 as we thought, but I will address that later in my argument.

20 However, we now have the deposition testimony, but
21 more importantly, the video evidence of this case for the Court
22 to consider and what we have learned in those facts alleged --
23 what we have learned is that the facts alleged in the Complaint
24 were not all supported by the evidence such as the claim that
25 Autumn was only four feet away from the shot, there's certain

1 things that the video just doesn't show us, and so we don't have
2 necessarily every particular piece of evidence; but yet we have
3 a lot of it and, for instance, when Mr. O'Brien argues that the
4 officer is out of control when he is shooting because the video
5 shows the sky, I can't deny that there's sky shown; but there
6 are two shots fired and one hit the dog and the dog is on the
7 ground and the dog is not the height of a human being so at the
8 time that that bullet hits the dog, the only reasonable
9 inference that can be made is that the gun is pointed down
10 toward the dog.

11 There's absolutely no evidence to indicate that the
12 bullet would have been errant, would have bounced off something
13 and come back down and hit the dog, and what's also compelling
14 is that we have to look at all of that evidence and the fact
15 that there's so much that occurs in a very, very small bit of
16 time. From the time that Officer Hill gets out of his vehicle
17 and starts his video camera to the time the shots are fired,
18 approximately eight seconds. I mean, we are just not talking a
19 long period of time; but another important fact for the Court to
20 consider in looking at whether or not his actions were
21 unreasonable is that that second bullet is almost immediate
22 after the first bullet and so the fact that it hit her has to
23 indicate that something happened to him that was unexpected and
24 he certainly -- we don't have any proof that when he went to
25 pull the gun and take the action that he did, that he did not

1 intend to hit the dog. The fact that he slips on the ice and
2 another bullet goes out doesn't show that he didn't have the
3 right intent and the right control at the time that he took the
4 action that he did.

5 Now, we have argued in our briefing that Autumn
6 Steele, Gabe Steele, and Gunner Steele were not, in fact, seized
7 at the time this event goes down. Now certainly, Gunner and
8 Gabe, because they're different I think than Autumn. When
9 Officer Hill is dispatched to this call, it is a call for 911
10 help from Gabe saying that he needs help because she is trying
11 to take his child, their child, and when Officer Hill arrives at
12 the scene, we hear on the video words towards Autumn to stop
13 because she is physically touching -- she is touching Gabe at
14 that time; but at no time are there words to Gabe or Gunner that
15 they are -- they can't leave the scene, that they need to back
16 off, he never points a gun at them, there's no evidence to prove
17 that there is a seizure of either of them.

18 Now, the thing that makes this case so unique is that
19 we have case law about officers who shoot people, officers who
20 shoot bystanders with errant bullets. We have case law where
21 officers shoot dogs because they're called for a dog issue such
22 as in the Hansen case where the dog was on the highway or we
23 have cases where there's search warrants being executed and the
24 officers having to deal with a dog.

25 What we don't have and which is unique to this case is

1 the fact that he was called for the 911 situation involving
2 Autumn and Gabe, but then the dog becomes involved. I can't
3 deny that he probably touched Autumn Steele, I think he did,
4 because he pulled her off Gabe; but there's no evidence that he
5 ever pointed his gun at her. I realize she was hit by the
6 bullet, but that doesn't mean that he intentionally pointed his
7 gun at her and so we would argue that there was never a seizure
8 of Autumn Steele for purposes of looking at the situation of
9 when he shoots the dog.

10 Now, this argument --

11 THE COURT: Let me ask you, do you have some authority
12 for this separation when you -- you have an officer responding
13 to a domestic quarrel and he gets there and arguably at the time
14 that he arrives the aggressiveness is from Autumn to Gabe; but
15 the officer is responding to a domestic dispute and when the
16 officer responds to that dispute, tries to separate the
17 individuals, and physically, actively touches at least one of
18 them, do you have some authority for separating the concept of a
19 seizure of all three of the human beings?

20 I mean, it seems to me he is responding to a domestic
21 dispute. Under those circumstances, it would seem more
22 reasonable that he is seizing all three of them unless there's
23 some legal distinction.

24 MS. SHAFF: I don't off the top of my head, but if I
25 have something, I will let you know in my rebuttal; but it would

1 seem to me that for certain the child is not involved, the child
2 was never part of the aggression. Yes, the child is in the
3 father's arms, but certainly wasn't ever a part of the domestic
4 situation and so to argue that everyone at the scene, I mean,
5 officers come and they -- at this point in time we're so barely
6 into the situation that I don't know that it necessarily starts,
7 but I understand what the Court's argument is.

8 We still have to go to the second analysis --

9 THE COURT: It is not an argument, it is a question.

10 MS. SHAFF: Excuse me.

11 THE COURT: You don't have to seize everybody at the
12 scene, it is only important that the woman is seized.

13 MS. SHAFF: Yes.

14 THE COURT: And then we have to make a separation
15 between a seizure that would occur at the time that the officer
16 intercedes in the domestic and the time of actually firing the
17 gun.

18 MS. SHAFF: Correct, and that's my argument is that
19 there has to be that separation and in this case when you apply
20 that, then they don't need the first prong of showing a seizure
21 and they certainly don't need it toward Gabe and the child and
22 the second analysis is, of course, the unreasonableness.

23 Now, the arguments today about 704.2 are new arguments
24 to me and I did not -- I don't practice criminal law to be able
25 to tell you what the jury instructions say so I can't respond to

1 his argument about the jury instruction. What I can say though
2 is that Iowa Code Section 704.2 is a definition. It is the
3 definition of what constitutes deadly force. It does not have
4 any -- nothing beyond what is deadly force, it is the
5 definition, so to argue that somehow this turns -- the fact that
6 Autumn Steele ends up getting shot into an intentional act, I
7 just don't see how we make that leap. Furthermore, throughout
8 their briefing and throughout the depositions and
9 representations by Attorney O'Brien, he's always said that they
10 never thought it was an intentional act against Autumn Steele.

11 The Department of Justice standard that he relies on
12 is something that was adopted after the fact. There's nothing
13 to show that because they decide to adopt something after the
14 fact that it makes the policy that they had at the time
15 unconstitutional and there's nothing in the case law that would
16 suggest it is unconstitutional to allow an officer to use lethal
17 force against a dog. In fact, the case law in the Eighth
18 Circuit is quite clear that that isn't. The shooting of a dog,
19 it does not -- even though they have now adopted this standard
20 doesn't make what happened at that time unconstitutional so the
21 argument is first that they haven't met the first -- their
22 criteria of proving a seizure and that it was unreasonable.

23 Second would be that even if the Court were to find
24 that we're entitled to qualified immunity and the facts, we have
25 to look at what was done and what the statute provides for,

1 there's nothing about what was done that was unconstitutional.
2 Their policies at that time conform to -- there's been nothing
3 in their arguments to show that those policies in place at the
4 time were unconstitutional. The fact that they chose to change
5 how they do things after the fact is not relevant and doesn't
6 make what was done before unconstitutional.

7 Furthermore, the Supreme Court has generously
8 distributed qualified immunity protection to shield officers
9 unless, quoting from other cases, plainly incompetent or those
10 who knowingly violate the law, and there's nothing shown here to
11 say that Officer Hill was violating the law. This is a tragic
12 accident, there's no doubt about it; but the fact that this
13 accident occurred did not turn it into a criminal violation or a
14 knowing violation by him.

15 Powell versus Johnson that the Court pointed out seems
16 to be right on point that in that case we have a dog that
17 charges at the officer, never bites the officer, never gets
18 closer than 10 feet to the officer, and the Court held that it
19 was appropriate and the Court stated, "Even if the officer
20 misperceived a threat posed by the dog, the police officers are
21 not liable for bad guesses in gray areas, they're liable for
22 transgressing bright lines," and we can't do Monday morning
23 quarterbacking and the case law also talks about the fact that
24 even though somebody may say oh, Sammy was a nice dog, dogs
25 present a latent threat, so the dog barks, the dog growls, we

1 hear it in the video, and Officer Hill's sensory perception of
2 what he heard is what he reacted on, that's what is relevant to
3 deciding if his actions were appropriate, therefore we would
4 argue that clearly they have not met their Fourth Amendment
5 burden.

6 Now, while we're talking about the Fourth Amendment, I
7 also want to talk about the Iowa constitutional claim, Article
8 I, Section 8, which is very similar, it is -- I think that the
9 Court, Iowa Courts will analyze, they have always analyzed --
10 they would analyze it the same way. In fact, in Plaintiffs'
11 Motion for Summary Judgment, they state that they're not asking
12 the Court for a different analysis in their Motion for Summary
13 Judgment for Article I, Section 8; but in their Resistance to my
14 Motion for Summary Judgment, they stated that they have not --
15 that they have asserted -- they state in their Resistance to my
16 Motion that the Court has to look and see what Iowa is going to
17 do for analysis, yet they don't suggest any other analysis, so
18 it seems reasonable that the Iowa Court is going to analyze it
19 the same way as the Federal Court, we have no reason to believe
20 it will be any different, therefore summary judgment on the
21 federal claim, summary judgment on the state claim.

22 The Plaintiffs also brought claims against the City.
23 If the Court -- I think it is undisputed that if the Court
24 grants the Motion for Summary Judgment on the constitutional
25 claim, that everyone agrees there can be no claim against the

1 City on that basis. Now, they're going to -- they argue that
2 there's -- somehow our policies were unconstitutional, yet they
3 don't produce any evidence of it. The fact that the Department
4 of Justice has these policies does not negate what the Eighth
5 Circuit said about the use of lethal force on a dog and those
6 policies were adopted after, there's no evidence that they were
7 -- that our training or anything was because there was a
8 continuous -- continued problem with this type of conduct.
9 There's absolutely no evidence.

10 In fact, we have one single isolated incident which
11 according to the Bolderson case which we cited at 840 F.3d 982,
12 you can't use a single, isolated incident for proof that somehow
13 there was a failure to train or failure to supervise on the
14 grounds of that.

15 THE COURT: Mr. O'Brien can correct me if I am
16 incorrect, it seemed to me that his argument was that there was
17 an absence of a policy; but I think there's a legal issue there
18 too, but I thought that was essentially the argument.

19 MS. SHAFF: But I think that -- they had a policy on
20 lethal force. The fact they didn't have a policy specific to
21 dogs doesn't mean that they didn't have a policy and the case
22 law is quite clear that you can use lethal force so it wouldn't
23 be any different for the dog versus the human being, that if
24 there's an imminent threat, that that same analysis would apply
25 so the fact that they didn't have one specifically stating that

1 if a dog approaches you at that time that they were doing
2 something that was inappropriate or that it wasn't defined.

3 The problem that these police departments face is that
4 different types of things come up and they can't have a rule on
5 every single thing, but it is very reasonable to look at the
6 continuum of force and think that it would apply the same for
7 this situation and the case law would support that, that you can
8 use lethal threat -- lethal force against a dog.

9 Count 2, as the Court pointed out in their ruling, we
10 did not file our Motion for Summary Judgment addressing that
11 Article I -- Article I, Section 9. The Court did, however,
12 dismiss on the Motion to Dismiss the Plaintiffs' 14th Amendment
13 claim and the Eighth Circuit Courts have held that, "Federal
14 District Courts have the power to grant summary judgment sua
15 sponte when the losing party is given sufficient advanced notice
16 and an adequate opportunity to submit evidence in opposition,"
17 and that's the Barkley versus Gabriel Brothers case at 829 F.3d
18 1030 from the Eighth Circuit, 2016.

19 Now, arguably you could say that the Court gave notice
20 yesterday, but I only missed one day; but I think what is
21 important here is that the facts that have been provided to the
22 Court, it is -- the analysis is the same because under the Iowa
23 Supreme Court case of State v Klawonn, K-l-a-w-o-n-n, which came
24 down in 2000, the Iowa Supreme Court held at that time that in
25 constitutional challenge that Article I, Section 9, provides the

1 same protections as the 14th Amendment and, quote, "Iowa
2 constitutional due process claims follow federal principles and
3 thus we do not address the state due process claims separately."

4 Again, in 2002 the Iowa Supreme Court said that,
5 quote, "The federal and state due process clauses are nearly
6 identical in scope, import, and purposes and our analysis is the
7 same and this case applies to both claims," and they further
8 utilize the federal analysis set forth by the United States
9 Supreme Court.

10 Because there's no different analysis and the Court
11 found that Motion to Dismiss was appropriate for the federal
12 claim, we would also argue that there's no prejudice to the
13 Plaintiffs by allowing the Court to sua sponte grant summary
14 judgment on that issue or in the alternative, we would have no
15 objection to the Plaintiffs submitting any case law that he
16 finds that contradicts that the Iowa Supreme Court treats that
17 any differently than the Federal Court does.

18 You also asked about the 911 call. Plaintiffs in
19 their brief state that this was just not a big deal, it was a
20 domestic situation, but it wasn't volatile, they downplayed the
21 significance of the call. In United States versus Quarterman,
22 the Eighth Circuit stated, quote, "Domestic disturbances are
23 highly volatile and involve large risks."

24 A 911 call was placed, Mr. Steele reported that he
25 needed help right away because Autumn was -- we know she was

1 violating a No-Contact Order and had had an issue the day before
2 and she is back trying to take the child. When Officer Hill
3 arrives on the scene, she is physically assaulting Gabriel
4 Steele. To argue that this isn't an important situation or a
5 situation that needs emergent attention just seems completely
6 off base. The fact that he doesn't pull up with his lights and
7 sirens on is not conclusive of stating that it is not a volatile
8 situation.

9 In fact, in the Harrod versus City of Council Bluffs
10 case, the officer had responded to the 911 call, he turned off
11 his lights and sirens before he got there, but the Court still
12 found it to be an emergent situation and the importance of
13 670.4(1)(k) is that it allows the Court to grant immunity to
14 officers and other emergency personnel when they respond to a
15 situation and the Courts have made it quite clear that you have
16 to look at the totality of the circumstances and it doesn't just
17 go away the moment that they arrive on the scene just because
18 she is pulled off of him.

19 We're eight seconds into this. To say that this
20 situation is under control when she is yelling at Officer Hill,
21 which we can hear on the video, she may not be physically
22 touching him anymore, but to say that the situation is
23 completely under control and that the emergency has gone away is
24 not what the Courts have held, they make it much broader, so
25 that we argue that all of the state claims must be dismissed

1 because of the fact that he is responding to a 911 situation.

2 THE COURT: Specific of the Court's question is that
3 both in that it is the entire circumstance, the call and the
4 response and what is happening at the scene. I think it creates
5 an emergency for purposes of the statute.

6 MS. SHAFF: Well, I think that -- I think you could
7 argue that the mere fact that a 911 call has been made and that
8 they respond to it creates the emergency; but certainly in this
9 case, when he arrives and he sees that, in fact, the 911 call
10 has given accurate information in the sense that there is a
11 domestic dispute going on, you can't then suddenly say oh, well,
12 it is not an emergent situation.

13 The 911 call is clearly valid because there is a
14 domestic situation going on and he is responding to that and he
15 is responding to it as his duty as a police officer and he has a
16 responsibility as a police officer to address that situation
17 because he observes it happening and because a citizen has
18 called for his assistance because they think they need it and
19 you could argue that he clearly needed the assistance because at
20 the time he arrives at the scene, there's a physical altercation
21 going on so I just -- under the Iowa case law I think that the
22 entire situation is covered by the emergent call and it is very
23 broadly construed under all of the Iowa cases that we cited to.

24 I mean, you look at firefighters responding to fires
25 and officers responding -- or ambulance people responding to

1 calls, it is not a situation where we can -- you look at it from
2 a very narrow scope, the Courts have always looked at it from a
3 very broad scope so, Your Honor, it is our position that this
4 entire case should be dismissed on summary judgment and that it
5 should be granted in favor of the Defendants on the Summary
6 Judgment Motion. Thank you.

7 THE COURT: All right. Thank you, counsel.

8 Mr. O'Brien, rebuttal?

9 MR. O'BRIEN: Thank you, Your Honor. Couple of points
10 I want to make about what the video showed versus what Officer
11 Hill said and described after the fact which I think are very
12 important because if you read Officer Hill's report after the
13 fact, he says that the dog was coming at him with his teeth
14 bared and approaching him; but if you listen to the video after
15 the initial occurrence, he doesn't say anything even remotely
16 close to that.

17 All he says is the dog jumped on me one time. He says
18 -- on two different occasions he says the dog jumped on me one
19 time and that's important because that's video evidence that
20 this Court can take over his later after-the-fact justifications
21 as to why he engaged in the conduct he engaged in because the
22 video doesn't show him making any claim that the dog bit him or
23 that the dog was coming at him with the teeth exposed and coming
24 to get him, never says anything of the sort immediately after
25 the incident in contrast to what he put in his report later.

1 Also we have three eyewitnesses that we haven't talked
2 about yet, three lay people. They don't -- they're not involved
3 in this, they just happened to be in the neighborhood and they
4 watched what was going on and all three of them, all three of
5 them said the dog was not aggressive. None of that is in the
6 reports that the police prepared, but that's what is in their
7 video statements. The dog was not aggressive, the dog was
8 playful.

9 In fact, Laura Mellinger, who is watching from across
10 the street, said oh, my God, when the -- words to this effect --
11 when the officer started firing, I thought Autumn Steele must
12 have had a weapon because the dog wasn't doing anything so we
13 have eyewitness testimony that is supported by video that
14 they're trying to contradict with after-the-fact justifications
15 made up a couple of days later to try to justify Defendant
16 Hill's conduct.

17 Now, it is true, and I have stated, we do not believe
18 that Officer Hill intended to shoot and kill Autumn Steele; but
19 this isn't a stray shooting case, Judge. He intended to fire
20 his weapon. He pulled the trigger. He told us in his
21 deposition he intended to shoot the dog and Autumn Steele was in
22 the same general direction and he hit her anyway so --

23 THE COURT: Well, in any stray shooting situation, the
24 individual intended to fire a weapon so I don't know -- I am not
25 sure I understand your argument.

1 MR. O'BRIEN: There is some cases, Judge, where they
2 say the weapon went off, it dropped on the floor, the bullet --
3 the weapon discharged, I did not intend to fire the weapon and
4 the weapon discharged.

5 THE COURT: Okay. But there are stray shooting cases
6 where clearly the officers intended to fire the weapon.

7 MR. O'BRIEN: Right. And in the case we cited in our
8 brief from the Eighth Circuit, if the people are standing right
9 by the person that they are shooting at, then there is liability
10 because they intended to shoot in their general direction which
11 is precisely what we are saying here.

12 Now, on the training, I don't agree with the
13 Defendants' position that after-the-fact training doesn't
14 matter. That is entirely incorrect. It is what the state of
15 the law was on the date of the incident and that training was
16 available and was the law if they had bothered to look it up.

17 In fact, the -- it helps establish City liability that
18 they hadn't updated their general use of force order, like Cedar
19 Rapids did and like Dubuque did after the law was passed under
20 4.2 where intent is considered to be implied if you shoot in the
21 direction of a person knowing their presence.

22 THE COURT: Do you have some authority with the
23 concept that there is a basis to apply for the absence of a rule
24 because it seems to me that the authority is actually to the
25 contrary.

1 MR. O'BRIEN: Judge, I think it is implied by that
2 same -- by that same -- by that same precedent that you are
3 citing. I don't think they can avoid liability by just saying
4 we didn't put anything in about that so we can do whatever we
5 want. We don't have to -- we don't have to comply with
6 generally-accepted standards within the law enforcement
7 community and that's what those training modules show, Judge.
8 This stuff was available well before, well before this incident.
9 If they had just been properly trained in that regard, we might
10 not be here today.

11 Now, I also want to address the issue regarding what
12 Iowa might do and I think it is totally unfair and inappropriate
13 to just imply that the Iowa Supreme Court is going to follow
14 directly what the United States Supreme Court does on similar
15 issues and for similar protections.

16 I would cite the Court -- I have cited this case
17 several times I know on other cases where this Court -- this has
18 been involved, but the Iowa Supreme Court issued a decision this
19 year in Case 16-1684, it is the Wickes case, Wickes case, and
20 there's a concurrence by three justices of the Iowa Supreme
21 Court and they specifically state Iowa is not bound by U.S.
22 precedent if they believe that there's a better approach and
23 they're citing in that case a -- the same constitutional
24 protection that uses the exact same wording.

25 They say protections under the federal Constitution as

1 determined by the United States tend to end up being at the
2 lowest common denominator because of issues of federalism, it
3 has to have broad application through 50 states with different
4 backgrounds and histories and common law, and when Iowa
5 interprets their constitutional protections, they are not
6 worried about that. Iowa can look at what it does for
7 constitutional protections for its state and as this Court well
8 knows, Iowa has a long history of protecting the civil rights of
9 its citizens going back to In Re Ralph where the runaway slave
10 from Missouri was told he didn't have to go back home, a case
11 that was ultimately reversed by Dred Scott, one of the worst
12 cases in the United States Supreme Court history 20 years later,
13 and so the Iowa Supreme Court should not -- we should not just
14 assume that they are going to follow federal case law on this
15 and I think that what we need to do if we get to that point is
16 simply, like was done in the case that we cited, is a certified
17 question to the Iowa Supreme Court and ask them how are we going
18 to deal with this if it gets to that point where we have to --
19 we have to make a distinction between what Iowa law will be on
20 this issue versus what the federal interpretation is. We may --
21 Iowa may not even choose, and that's one of the issues currently
22 before the Supreme Court, and I don't know when that decision is
23 going to come out, but the question is should we even apply
24 qualified immunity and there's some strong arguments to be made
25 that -- whether we should apply qualified immunity.

1 I have looked into that, Judge, and I thought
2 qualified immunity was something going way back. It first
3 appears in the law in the 1970s so we've got 200 years of
4 jurisprudence enforcing constitutional protections without any
5 qualified immunity analysis, I think it was Harlow, the Supreme
6 Court case that eventually set that out, so it is a very recent
7 provision and protection that the Iowa Supreme Court may well
8 decide that it does not want to apply which also gets into
9 whether the Iowa Supreme Court will allow respondeat superior
10 liability which clearly is not allowed under the Federal Court
11 provisions, and the last thing I will address, Judge, is the
12 notion of -- you asked the question about the emergency and it
13 is -- is it the emergency call or what happens afterwards and to
14 me it is the call and what they do in response to that and I
15 cite -- I can cite a case for you from Wisconsin that cites Iowa
16 law, but it breaks down -- actually I am going to skip that
17 because I think -- I don't think that case -- after re-reading
18 it I don't think that case is directly on point on this issue;
19 but what I want to make is an argument that gives some common
20 sense to this which is simply this, the Defendants, law
21 enforcement officers, emergency personnel that are responding
22 and otherwise may have immunity under the code section cannot
23 create an emergency by overreacting to what is placed in front
24 of them and then claim that they get immunity by the very reason
25 that they engaged in unreasonable -- objectively unreasonable

1 conduct in the first place which is what happened in this case.

2 He was called there to break up a domestic abuse
3 dispute, he grabbed Autumn, pulled them apart, it is over from
4 that standpoint; but then the dog shows up, he reacts
5 objectively unreasonably, pulls his gun out, fires in the
6 direction of Autumn, Gabe, and Gunner and here we are. He
7 doesn't get to create the emergency by acting in an objectively
8 unreasonable manner and then claim immunity for his objectively
9 unreasonable acts.

10 THE COURT: So your position is that after the 911
11 call and the officer's arrival and he sees that there's a tussle
12 going on, a domestic dispute, that at that point there is no
13 emergency, the emergency only happens after the officer reacts?

14 MR. O'BRIEN: That's right. If there's an emergency,
15 Judge, he shows up lights and sirens. I mean, all these cases
16 talk about -- the cases I read, after you -- in preparation for
17 these briefs talks about whether the emergency continues or not,
18 was the fire out. We all agree it is an emergency because
19 everyone shows up with lights and sirens blaring, although see
20 the Stych case, the Judge Pratt case, in that case they pulled
21 over a drunk driver who was swerving and they had their lights
22 and sirens on and officers said they were worried about this
23 guy, this drunk driver causing a collision, and this Court
24 ruled, Judge Pratt presiding, that there was no protection under
25 this particular code section which I believe is right on point

1 except we've got stronger facts because he doesn't show up. He
2 took his time getting over there, he stopped at a stop sign, he
3 was looking around to see where the other officer was who was
4 also responding to the call. This wasn't an emergency situation
5 to begin with so, Judge, I understand that it is easy to throw
6 out a Plaintiff's case and not so easy to say as a matter of law
7 that a Defendant is liable for the conduct that they engaged in.

8 THE COURT: The Court has a different point of view.
9 The Court never thinks it is easy to throw out a Plaintiff's
10 case. We think people are entitled to their day in court and we
11 recognize this is a tragic case. That is an inappropriate
12 comment.

13 MR. O'BRIEN: I apologize. I don't mean to suggest
14 that Courts do that without thought and analysis; but in my
15 experience, getting a Plaintiff's case thrown out on summary
16 judgment happens a lot more often than having a Plaintiff's case
17 against a Defendant ruled favorably in their favor at summary
18 judgment. It just doesn't happen very often. I have had cases
19 thrown out on summary judgment --

20 THE COURT: Well, that distinction may be true, but
21 you and I both understand there are very different legal
22 circumstances there and frequently the reason a summary judgment
23 is denied is because there are fact issues.

24 MR. O'BRIEN: I understand that completely and that's
25 why I filed the Motion for Summary Judgment in our favor in this

1 case, Judge, because the video takes many of those fact issues
2 away and the conduct was so unreasonable in the two manners that
3 we have already discussed using the deadly force in the first
4 place and then firing away while falling down, losing control of
5 the handgun in the process, that creates -- that does not create
6 a fact issue and we think the Court should find in our favor as
7 a matter of law and we should proceed to trial on the issue of
8 damages. Thank you.

9 THE COURT: Before you sit down, Mr. O'Brien, I had
10 one other question and that is the issue with the substantive
11 due process claim on Article I, Section 9, of the Iowa
12 Constitution and the issue is whether that is really before me
13 today because it was not dismissed on the Court's prior Order, I
14 think that that was a misunderstanding on the part of the
15 Defendants, they probably would have moved on that basis under
16 the circumstances, I understand that; but the question becomes
17 whether or not we have to go through another round of briefing
18 to address that or whether or not you feel that the matter is
19 adequately before the Court that it can be considered at this
20 point in time based upon not only what has been argued here now,
21 but also what was argued previously before the Court, but you
22 tell me if you don't feel that you have been able to provide an
23 adequate record in response to that. If so, we may need to go
24 through another round as to that issue.

25 MR. O'BRIEN: Judge, I think if you write your

1 decision and arrive at the point where you are going to throw
2 our case out, that I would like an opportunity to address what
3 the different factors would be involved in applying the same --
4 in applying Iowa constitutional analysis to the facts as you
5 already found them in your prior ruling.

6 If, however, you believe after reviewing the matter
7 that you are not going to throw the case out on the Fourth
8 Amendment grounds cited by the Defendants, I think we would -- I
9 wouldn't see any reason why we would need additional briefing
10 beyond what we have already submitted.

11 I am not prepared to say today that Iowa won't treat
12 substantive due process any differently because I think the
13 Supreme Court is telling us they just might; but the only
14 response to -- I mean, of course, you can make your own
15 judgments as to whether they will do that and you are entitled
16 to do that. My suggestion would be if we get to that point,
17 that we draft a certified question of law to the Iowa Supreme
18 Court and ask them.

19 THE COURT: And you did start your Motion saying we
20 would apply the same standards, you changed that position a
21 little bit in the briefing process, but your position still is
22 that the Iowa Supreme Court might do something differently, but
23 you are not suggesting what that would be?

24 MR. O'BRIEN: I think that's a fair assessment, Judge,
25 and, you know, I agree that we have moved that, but we have had

1 the case that came out from the Iowa Supreme Court, the Godfrey
2 case that set out these Constitutional rights that were never,
3 you know, we didn't previously have a right of action for Iowa
4 Constitution so it is a very breaking area of law under Iowa law
5 and I think, you know, in order to get due consideration, if we
6 get to that point, we need to lobby the Iowa Supreme Court to
7 weigh in on it.

8 THE COURT: Thank you, counsel.

9 MR. O'BRIEN: Thank you, Judge.

10 THE COURT: Ms. Shaff?

11 MS. SHAFF: Thank you, Your Honor.

12 Picking up where Mr. O'Brien left off, my
13 understanding of submitting a certified question to the Iowa
14 Supreme Court is that it is done when there's no Iowa Supreme
15 Court case on point so that the Federal Court doesn't have the
16 ability to know how Iowa would rule on something; but there is
17 Iowa case law from the Iowa Supreme Court which states that they
18 analyze Article I, Section 9, the same way that the Federal
19 Court analyzes the 14th Amendment so I don't think that a
20 certified question is necessary nor appropriate given what my
21 understanding is of the certified question.

22 In response to the argument about these three
23 eyewitnesses, I just want to address it briefly because in the
24 briefing, I think we addressed this, but those three
25 eyewitnesses didn't provide any information that was -- that --

1 it can't contradict the video. Let's just start there; but
2 first off, one witness is in a car and has driven past the scene
3 and hears the gunshots when she's already way past the scene.
4 Another witness is kitty corner from the scene and says that he
5 didn't hear the dog bark nor did he hear the dog growl, yet we
6 hear that on the video. The other witness is inside on a second
7 floor and has a pole blocking the view and never -- she didn't
8 see the actual shooting so those three eyewitnesses don't negate
9 or change anything that is shown in the video.

10 With regard to the arguments about the -- what Iowa is
11 going to say on qualified immunity, I submit to the Court that
12 there is no need to get to the qualified immunity question, that
13 this case can be resolved on the fact that Plaintiff has not
14 shown seizure nor has the Plaintiff shown it was unreasonable
15 and with regard to the arguments about the Department of Justice
16 training, there's nothing that says that the Department of
17 Justice tells -- determines what the constitutional bounds are.
18 It is only the Courts that can do that and a policy doesn't
19 affect constitutional analysis, policy has to not conflict with
20 the Constitution and the fact that after the fact the City of
21 Burlington decides to put in a policy that might have changed
22 arguably, if you take the light most favorable to the Plaintiff,
23 how this situation was reacted to doesn't make what happened in
24 this case illegal, unconstitutional, or wrong in any way and I
25 didn't hear any arguments from the Plaintiff as to why -- any

1 arguments from the Plaintiff that it is unconstitutional, for
2 instance, in the Black case and the Powell case.

3 Now, I realize that those were 2012 -- the Black case
4 occurred in 2012, but in that situation if you take the City's
5 current policy, you can argue it is a policy violation, but this
6 Court -- the Court in 2017 found that what was done with that
7 dog was appropriate and that lethal force was appropriate so
8 there's nothing in the Constitution that says you can't use
9 lethal force against an animal.

10 With regard to the 911 issue, I think what I heard Mr.
11 O'Brien argue is that because lights and sirens weren't used,
12 that somehow makes a difference. I just don't think that's
13 supported by the case law. It is clear that when someone calls,
14 there are certain reasons why you do -- the officers do things
15 or not do things.

16 There's certainly nothing in this record, nothing in
17 the evidence that suggests that Officer Hill was lollygagging on
18 his way to get to this situation and there's nothing in the
19 statute that defines what an emergency is so we have to look at
20 what the plain meaning of emergency is and it has been stated
21 that emergency is commonly defined as an unforeseen combination
22 of circumstances or the resulting state that calls for immediate
23 action or an urgent need for assistance or relief. Quite
24 clearly that's what we had here and Officer Hill responded to
25 that and he is entitled to immunity under the Iowa claims.

1 Thank you.

2 THE COURT: All right. Thank you, counsel. The
3 matter is submitted and we will get something out as quickly as
4 we can. Thank you.

5 MR. O'BRIEN: Thank you, Your Honor.

6 (Proceedings concluded at 11:37 a.m., May 24, 2018.)

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CERTIFICATE OF OFFICIAL REPORTER

I, Linda Faurote-Egbers, Federal Official Realtime Court Reporter, in and for the United States District Court for the Southern District of Iowa, do hereby certify that pursuant to Section 753, Title 28, United States Code, that the foregoing is a true and correct transcript of the stenographically reported proceedings held in the above-entitled matter and that the transcript page format is in conformance with the regulations of the Judicial Conference of the United States.

Dated this 11th day of June, 2018.

/s/ Linda Faurote-Egbers
Linda Faurote-Egbers, CSR NO. 622(IA)
FCRR, RMR, RPR, CSR (IA and IL)
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