IN THE SUPREME COURT OF IOWA

No. 23-0217

Polk County No. LACL150440

BRIAN NORRIS, et al.

Plaintiff - Appellee

v.

TRUDY PAULSON,

Defendant - Appellant

CITY OF DES MOINES,

Defendant.

APPEAL FROM THE IOWA DISTRICT COURT FOR POLK COUNTY
HON. SARAH CRANE, PRESIDING JUDGE

APPELLANT'S REPLY BRIEF

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REPLY ARGUMENT

I. THE PLAINTIFF'S IOWA CONSTITUTIONAL CLAIMS FOR MONEY DAMAGES HAVE BEEN ELIMINATED

Appellee's Assertion of Failure to Preserve Error: As Appellee's correctly state in their brief, "[t]he Iowa Supreme Court decision in *Burnett v. Smith* was not in existence at the time Appellant's motion for summary judgment was filed, argued, and decided." (Appellee Brief at 17) In other words, at the time of the Appellant's motion for summary judgment an individual could indeed sue for money damages under the Iowa Constitution. Therefore, the Appellant simply argued the law *as it existed at the time*.

But after the Appellant filed this interlocutory appeal this court overruled its prior precedent and reiterated in a series of decisions that the law in Iowa is that individuals cannot sue for money damages for violations of the Iowa Constitution. See, *Burnett v. Smith*, 990 N.W.2d 289 (Iowa 2023) overruling *Godfrey v. State*, 898 N.W.2d 844 (Iowa 2017); *White v. Harkrider*, 990 N.W.2d 647 (Iowa 2023); *Carter v. State*, 990 N.W.2d 308 (Iowa 2023); *Venckus v. City of Iowa City*, 990 N.W.2d 800, 803 (Iowa 2023).

This was a fundamental change in the law after the filing of this appeal. In such instances preservation of error is unnecessary and the decision should be applied both retroactively and prospectively. Generally, judicial decisions,

including overruling decisions, operate both retroactively and prospectively. See, *Casey's General Stores, Inc. v. Blackford,* 661 N.W.2d 515, 525 (Iowa 2003); *In re Estate of Weidman,* 476 N.W.2d 357, 361 (Iowa 1991), *cert. denied,* 503 U.S. 975, 112 S.Ct. 1596, 118 L.Ed.2d 311 (1992); *Farm Bureau Serv. v. Kohls,* 203 N.W.2d 209, 211 (Iowa 1972). This interpretation of state law is the same as the interpretation of federal law by federal courts. See, *Brown v. AFSCME*, 41 F.4th 963, 969 (8th Cir. 2022) citing *Harper v. Va. Dep't of Tax'n*, 509 U.S. 86, 97, 113 S.Ct. 2510, 125 L.Ed.2d 74 (1993)(when the Supreme court applied a rule, "that rule is the controlling interpretation of federal law and must be given full retroactive effect").

Argument:

There is now no need to argue the legal merits of the district court's decision for those claims brought for money damages under the Iowa Constitution. This Court has ruled that a private right of action for money damages for claims under the Iowa Constitution does not exist. See, *Burnett v. Smith*, 990 N.W.2d 289 (Iowa 2023) overruling *Godfrey v. State*, 898 N.W.2d 844 (Iowa 2017).

Mr. Norris's I and III claims can no longer exist under the Iowa Constitution. In *Burnett* the court directly addressed the issue:

> "we conclude that *Godfrey* was wrongly decided. We respectfully believe that *Godfrey* misinterpreted the relevant constitutional text,

> misread Iowa precedent, and overlooked important constitutional history. *Godfrey* was the break with precedent; by overruling *Godfrey*, we simply conform our law to the way it was before 2017."
>
> - See, *Burnett*, 990 N.W.2d at 298.

For this reason, the district court's summary judgment rulings on Count I and III must be vacated as the judicial decision in *Burnett* applies retroactively. *Casey's General Stores, Inc. v. Blackford,* 661 N.W.2d 515, 525 (Iowa 2003) Norris does not have a private right of action for damages under the Iowa Constitution leaving the single common law claim of assault along at issue at issue in this appeal.

II. THE COURT ERRED IN THE COURT ERRED IN DENYING SUMMARY JUDGMENT TO CITY ON COMMON LAW ASSAULT CLAIM

The district court failed to properly evaluate particular facts in viewing whether the actions of Officer Paulson were reasonable given the totality of the circumstances before she discharged her weapon. See, *State v. Dewitt*, 811 N.W.2d 460, 470 (Iowa 2012) citing *Graham v. Connor*, 490 U.S. 386, 396, 109 S.Ct. in 1872, 104 L.Ed.2d at 455– 56 (1989); *Wisham v. Rinehart*, 119 F.3d 1303, 1309 (8th Cir. 1997). The question of whether an officer has used excessive force "requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting or attempting arrest by flight" *Kisela v Hughes*, 523 U.S.

155, 138 S.Ct. 1148, 1152, 200 L.Ed.2d 449 (2018); *Iowa Code §804.8(1)*(use of deadly force justified if reasonably believed necessary by peace officer).

As stated on page 6 of the Appellant's Brief the district court erred when it stated relative to the movement of Mr. Norris, "…the movement could be interpreted as an effort to maintain his balance as he stepped near the edge of the river's embankment and rotated back around". This is not the proper analysis by which to interpret whether Officer Paulson acted reasonably. As in Federal cases interpreting §1983, the question is whether the "perception" of Officer Paulson that Norris stepped toward her was reasonable, not whether there are other reasonable interpretations. See, *Loch v. Litchfield*, 689 F.3d 961, 966 (8th Cir. 2012), see also *Graham v. Connor*, 490 U.S. 386, 396, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989).

The "perception" and its reasonableness under State law is found in the language of §804.8(1):

> A peace officer, while making a lawful arrest, is justified in the use of any force which the peace officer reasonably believes to be necessary to effect the arrest or to defend any person from bodily harm while making the arrest. However, the use of deadly force is only justified when a person cannot be captured any other way and either
>
> 1. The person has used or threatened to use deadly force in committing a felony or
>
> 2. The peace officer reasonably believes the person would use deadly force against any person unless immediately apprehended.

Officer Paulson's actions were reasonable from the totality of the circumstances of which she was aware at the time she discharged her weapon. See, *Plumhoff v. Rickard*, 134 S.Ct. 2012, 2020, 188 L.Ed.2d 1056 (2014), quoting *Graham v. Connor*, 490 U.S. 386, 396-97, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989). Police officers are expected to act reasonably, not perfectly, and those officers are to have "fair leeway for enforcing the law"." *Heien v. North Carolina*, 574 U.S. 54, 135 S.Ct. 530, 532, 190 L.Ed.2d 475 (2014) quoting *Brinegar v. United States*, 338 U.S. 160, 176, 69 S.Ct. 1302, 93 L.Ed. 1879 (1949).

Paulson's actions are to be "judged from the perspective of the officer on the scene, rather than with the 20/20 vision of hindsight." *Graham*, 490 U.S. at 396. In conducting this inquiry, the court must give "careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect pose[d] an immediate threat to the safety of the officers or others, and whether [the suspect] [was]actively resisting arrest or attempting to evade arrest by flight." *Graham v. Connor*, 490 U.S. 386, 396, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989).

In this matter, Norris had provided false information to police officers (Paulson Body Cam 6:08, App. 352), and when police did a warrant check upon

obtaining correct information, he fled. (Paulson Body Cam 35:05 to 35:13, App. 352, Isaac Body Cam 35:01 to 35:08, App. 353)

Norris then returned, initially while Officer Paulson was alone, carrying a shovel which he exchanged for a knife, after Officer Paulson had issued commands for him to drop the weapon. (Paulson Body Cam 37:14 to 37:16, App. 352) A claim that a four and a half-inch knife with a curved blade did not turn out to be a "machete" ignores the fact such a knife was certainly substantial enough to cause serious harm or death.

Mr. Norris effectively admitted to the facts immediately above in his plea bargain. (Petition to Plead Guilty, Plea/Sentencing Order, FECR331485, App. 237-38) Despite clear and repeated commands issued by Officer Paulson to "drop the knife" he did not do so. Norris ignored repeated warnings from what appeared to be at times less than twenty feet, turned toward the river briefly and then importantly turned back and took an affirmative step toward Officer Paulson just before the shots were fired. That caused Officer Paulson to shoot Mr. Norris. All of this is shown in the body camera footage. Again, Mr. Norris lied to officers, fled the scene, ignored repeated clear orders to disarm, and admitted to holding a dangerous weapon within 20 feet of a law enforcement officer.

Immunity for Paulson is supported by a long history of precedent starting with *Graham v. Connor,* 490 U.S. at 396. "…[P]olice officers are often forced to

make split-second judgments -- in circumstances that are tense, uncertain, and rapidly evolving – about the amount of force that is necessary in a particular situation." *Partlow v. Stadler*, 774 F.3d 497, 502 (8th Cir. 2014) quoting *Graham v. Connor*, 490 U.S. at 397.

The cases cited by Norris to assert that what he did was merely obstruction and not a "severe" crime, are clearly distinguished from the facts in this matter. (See, Appellee's Brief at 26).

In *Davis v. Las Vegas*, the plaintiff was found to be reading in a room he should not have been in at a casino. *Davis v. Las Vegas*, 478 F.3d 1048, 1051 (9th Cir. 2007) The plaintiff *was unarmed and handcuffed* when the defendant officer arrived. *Id*. When plaintiff refused to consent to a search the officer repeatedly slammed the plaintiff's head into a wall several times, pinned plaintiff against the floor, and punched him. At some point he broke the plaintiff's neck. *Id*.

In *Deorle v. Rutherford*, an unarmed individual was having a psychological episode, but was generally obeying commands from officers. *Deorle v. Rutherford*, 272 F.3d 1272 ant 1275-77 (9th Cir. 20011) He obeyed commands to drop the hatchet he had wielded, and obeyed commands to drop an unloaded *plastic* bow. Well after these things had occurred he was shot with a beanbag fired from a shotgun by an officer. *Id*.

In *Glenn v. Washington County*, no crime had been committed, rather the parents of a teenager had called police to attempt to calm the situation. The teenager had only threatened himself with a small pocketknife. *Glenn v. Washington County*, 673 F.3d 864, 868 (9th Cir. 2011) Police responded by drawing their guns, telling a teenager already verbally threatening to kill himself that they would kill him if he did not drop the pocket-knife he held against his own throat. *Id*. Officers fired a projectile from a shotgun followed immediately by multiple gun shots killing the teen. *Id*. at 869.

Glenn v. Washington County is also cited by Norris to indicate a 3-inch pocketknife is not a dangerous weapon. Of course, that is not actually the point of the holding. In *Glenn*, a teenager undergoing a mental episode held a pocket-knife to his own throat. *Glenn v. Washington County*, 673 F.3d 864, 875 (9th Cir. 2018). The teenage boy did not threaten anyone else, including the officers, and never fled. *Id*. Tragically, officers called to assist by parents fearful their child would commit suicide, shot the child several times causing his death. *Id*.

Norris claims that firearms alone are not considered a substantial threat citing *Cole Estate of Richards v. Hutchins*, 959 F.3d 1127 (8th Cir. 2020). However, again unmentioned is that officers in *Cole* were involved in this matter after it was clear that the situation for which they were called, a fight between two men, was de-escalating. See, *Cole Estate of Richards*, 959 F.3d at 1130. The

plaintiff/decedent was holding a "pellet" gun vertically, was walking away from the individual with whom he had a dispute, not toward officers, but toward his car in a normal walk. *Id*. It was then, without any warning, that an officer shot the decedent five times. *Id*. at 1131.

The *Lee* case cited by the Appellee is also distinguishable. The officer who fired at the plaintiff was thirty feet from the plaintiff and shielded behind his police vehicle. There was also evidence of de-escalation; the plaintiff had lowered the knife; and taken a clear sidestep. *Lee v. Russ*, 33 F.4th 860, 865 (6th Cir. 2022).

Sova, again, involved the officer-involved shooting of a teenager in distress and threatening suicide, who was a threat only to himself and who had not committed any crime, and was not fleeing. *Sova v. City of Mt. Pleasant*, 142 F.3d 898, 900-1 (6th Cir. 1998).

Ludwig, like *Lee* and *Sova* is also not particularly relevant. In *Ludwig*, the plaintiff was 150 feet away from the nearest bystander – and moving further away. No one was in fear for their own safety, including as they admitted, the officer. *Ludwig v. Anderson*, 54 F.3d 465, 473 (8th Cir. 1995).

Of more relevance to this matter and decided after is *Ching as Trustee for Jordan v. City of Minneapolis*, 73 F.4th 617 (8th Cir. 2023). There, yet again, a concerned parent phoned the police with concern over the suicidal threats of her

son. *Id*. at 619. The decedent carried a knife flat at his side, as opposed to held aggressively. *Id*. The officer commanded the teenager to drop the knife and backed away as the decedent walked toward him. *Id*. Officers continued to order the decedent to drop the knife as he walked toward them with the knife still not raised or pointed toward them but by his side. *Id* at 621. Officers shot the decedent four times until he fell to the ground. *Id*. Three more shots were then fired after the decedent had fallen. Summary judgment was granted to the officers as they had reasonable cause to believe this decedent posed a substantial threat to them. *Id*.

These cases have little to do with the facts here. Norris fled from the officers when they learned his true name and performed an outstanding warrant check. Norris clearly feared what that search would reveal. After fleeing, Norris surprisingly returned and moved toward Officer Paulson when she was alone. Norris initially carried a shovel, then picked up a knife, as he advanced toward her before at a distance of 15 to 20 feet. (Paulson Body Camera 37:23 to 37:30, App. 352) Norris was specifically and repeatedly warned by Officer Paulson, having drawn her weapon, to drop the knife or risk being shot. (Paulson Body Camera 37:17 to 37:43, App. 352) Norris then moved toward the river before turning around and taking an affirmative step toward Paulson with his knife raised at waist level. (Paulson Body Camera 37:44, App. 352) These are not the

actions of someone in retreat. Norris also pled guilty to interfering with police action while having a dangerous weapon. (Petition to Plead Guilty, Plea/Sentencing Order, FECR331485, App. 237-8)

As demonstrated in the body cam footage, Officer Paulson repeatedly commanded Norris drop his weapon and warned that failure to do so would result in her using her firearm. Norris had ample and repeated opportunities to comply yet clearly refused. See, *Malone v. Hinman*, 847 F.3d 949, 953 (8th Cir. 2017), citing *Loch* at 967.

Graham v. Connor's qualified immunity standard is the model in which to interpret Iowa Code §804.8. If Paulson was entitled to qualified immunity therefore, any claim against the municipality would also have to be ruled in favor of the City as no violation by Paulson necessarily equates to no violation by the City, and all "official capacity" claims must be ruled upon in the City's favor. See, *Moore v. City of Desloge, Mo.*, 647 F.3d 841, 849 (8th Cir. 2011), Iowa Code §670. The Court clearly erred in denying Summary Judgment to Officer Paulson on this count.

CONCLUSION

Norris fled from officers while the latter were engaged in proper law enforcement activities. Norris ignored repeated orders to comply bearing a shovel then a knife toward Officer Paulson. While ignoring Officer Paulson's

instruction to disarm, Norris did not show any indication of de-escalating and continued to pose a threat of serious injury to Officer Paulson and others.

The actions of Officer Paulson were not a violation of any clearly established law, nor were her actions in violation of any statute or common law as a police officer. Paulson's actions were reasonable. The district court's ruling should be reversed with instructions by this court to dismiss the matter upon remand.

Respectfully submitted.

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CERTIFICATE OF COMPLIANCE

1. This Reply Brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1), because this brief contains 2,984 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

2. This Reply Brief complies with the typeface requirements of Iowa R. App. P. 6.903(1)(e) and the type-style requirements of Iowa R. App. P. 6.903(1)(f), because this brief has been prepared in proportionally spaced typeface using Microsoft Office Word 2010 in 14-point Times New Roman.

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CERTIFICATE OF FILING

The undersigned counsel certifies that I did file the attached brief with the Clerk of the Iowa Court via EDMS on September 27, 2023.

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COST CERTIFICATE

I certify that as this brief was filed via EDMS the Appellant did not incur a cost in printing.

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