IN THE SUPREME COURT OF IOWA

24-0828

SANDRA K. MORMANN, individually and as Administrator of the Estate of AUGUSTIN G. MORMANN, and DANIEL J. MORMANN, individually,

Appellees/Plaintiffs

vs.

CITY OF MANCHESTER, IOWA, and JAMES LOUIS WESSELS,

Appellants/Defendants.

APPEAL FROM THE IOWA DISTRICT COURT FOR DELAWARE COUNTY, NO. LACV 8847 THE HONORABLE THOMAS A. BITTER

APPELLEES' BRIEF

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ROUTING STATEMENT

This case involves the Defendants' dissatisfaction with a jury verdict supported by overwhelming evidence and the District Court's rulings based upon the reasonable exercise of discretion and in accordance with established case precedent. The matter should be referred to the Iowa Court of Appeals for routine consideration and affirmance of the verdict.

NATURE OF THE CASE

Plaintiffs agree that Defendants James Wessels ("Wessels") and the City of Manchester ("City") (collectively "Defendants or Appellants"), appealed the March 22, 2024, jury verdict and April 4, 2024, judgment in favor of Plaintiffs Sandra K. Mormann, individually and as Administrator of the Estate of Augustin G. Mormann, and Daniel J. Mormann, individually, (collectively "Plaintiffs or Mormanns"), and the final order entered on April 24, 2024, and from all adverse rulings and orders inhering therein. D0305, Verdict at 2 (3/22/24); D0326, Judgment at 1 (4/4/2024); D0330, JNOV Order, at 3 (4/23/2024).

The Iowa Municipal Tort Claims Act ("IMTCA") does not apply here. Iowa Code §§ 670.4(1)(k), 670.12. If found to apply, Defendants are not protected by emergency response immunity provided by the IMTCA because Wessels acted with willful, wanton and reckless disregard of Gus Mormann's life, in violation of Iowa Code § 321.231(6), as found by the jury when they awarded punitive damages. D0316, Suppl. Verdict at 1 (3/22/24).

The District Court had discretion to submit the matter as an assault and battery claim after *Burnett v. Smith*, 990 N.W.2d 289 (Iowa 2023), overruled *Godfrey v. State*, 898 N.W.2d 844 (Iowa 2017). Iowa R. Civ. Pr. 1.402(4) and *Baker v. City of Iowa City*, 867 N.W.2d 44, 51 (Iowa 2015) ("amendments should be the rule and

denial should be the exception."). There was no surprise or prejudice to the Defendants because: (1) excessive force cases are the "functional equivalent" of assault and battery claims. *Greene v. Friend of Ct*., 406 N.W.2d 433, 436 (Iowa 1987); and (2) as held by the District Court,

> Throughout the pendency of this case, Plaintiffs have repeatedly asserted a belief that Mormann was assaulted by Officer Wessels when Mormann's motorcycle was allegedly run off the road by Wessels. That allegation is certainly not new, and allowing Plaintiffs to pursue such a claim at trial will not add any additional witnesses or evidence."[1]

D0245, Order at 3 (3/7/2024). Further, the District Court noted that the Defendants were specifically aware of Plaintiffs' intent to seek assault and battery instructions at least five months before trial. *Id*.

The District Court did not err in ruling that sufficient evidence supports the assault and battery claims, or that punitive damages were properly submitted to the jury. D0330 at 3. Finally, the District Court did not abuse its discretion in any of its evidentiary rulings. *Id*.

[1] In their appeal brief of just under 13,000 words, going on for over 90 pages, the Defendants make no claim that the District Court was incorrect in finding that no additional witnesses or evidence was required to submit assault and battery claims to the jury.

STATEMENT OF THE FACTS

I. Factual Background

Defendants' version of the facts does not accurately represent the evidence from which the jury concluded that Wessels acted with the intent to harm Mormann when he decided to intervene in the pursuit. Such evidence includes:

1. All law enforcement officers, except Defendant Wessels, abandoned the pursuit for safety reasons. D0344, Trial Tr. Vol. II at 153:17-21 & 210:24-212:25 (6/25/2024).

2. Just before the collisions between the two vehicles Mormann was going "around the [55 m.p.h.] speed limit" and Wessels was coming from behind at nearly double that rate of speed, 104 mph. D0342, Trial Tr. Vol. I at 129:21-24 (6/25/2024) and D0263 at 4, Plts. Exh. 1 (AVL Rpt.).

3. Despite claiming he had no idea that either collision between the vehicles occurred until after incident, Wessels remained adamant that Mormann somehow caused both of them. D0342 at 125:3-9, 127:24-128:6, 61:2-10 (showing D0325, Wessels Video Dep. at 36:14-38 and 37:23-38:6) & 61:21-62:9; and D0274, Plaintiffs' Exh. 17, at 2 (Wessels's Rpt.).

Defendants' failure to state facts supported by the evidence was a primary factor in the District Court's denial of Defendants' Motion for a New Trial. D0330 at 3. The District Court held that "[i]t's clear from the jury's findings that they believe Wessels intentionally caused his police cruiser to hit Mormann's motorcycle, causing Mormann to crash." *Id*.

Accordingly, Plaintiffs present the following facts, as supported by the record: On December 10, 2020, Mormann was operating a motorcycle on Highway

20 in a reckless manner and at a high rate of speed. Attachment to D0351, Plts. Exh. 21 (Payne cruiser video). Mormann refused to stop for law enforcement. *Id.* Multiple law enforcement officers, including four Iowa Highway Patrol officers, two Delaware County Sheriff's Department officers and one other Manchester Police Department officer, determined that continuing the pursuit of Mormann was not worth the risk. *Id*.; D0344 at 210:24-212:25 (Deputy Menard); D0342 at 163:20-164:25 (Officer Piersch). The officers followed the reasoning that pursuing Mormann, who was only known to have violated traffic laws, through downtown Manchester was not worth the risk. *Id*. As Trooper Payne succinctly put it to the jury, "the juice wasn't worth the squeeze." D0344 at 154:4.

Wessels, however, continued to pursue Mormann, causing the chase to go through downtown Manchester and putting many others at risk. D0344 at 153:17-154:15. Trooper Payne testified that, "looking into downtown Manchester, seeing a labyrinth of vehicles. This was shortly after school got out… This was not worth putting all these people or civilians or kids getting out of school, walking down Main Street…it wasn't worth all of [the] risk." *Id*. Trooper Payne also testified that, "the emergency was over" once Mormann entered downtown Manchester and he called off the chase. D0344 at 186:9-17.

Wessels continued the chase even though he understood that ending the chase would likely result in Mormann slowing down and ending all risk to others. D0342

at 72:18-19, citing D0325 at 60:1-7. Wessels traveled at speeds up to 88 mph going through the City of Manchester. D0263 at 4 (AVL Rpt.). Wessels reached a maximum speed of 128 mph going north out of Manchester. *Id*. The risk to innocent bystanders was exponentially greater from Wessels five-thousand-pound cruiser than that posed by Mormann's 800-pound motorcycle. D0343, Trial Tr. Vol. V at 8:8-9 (6/25/2024).

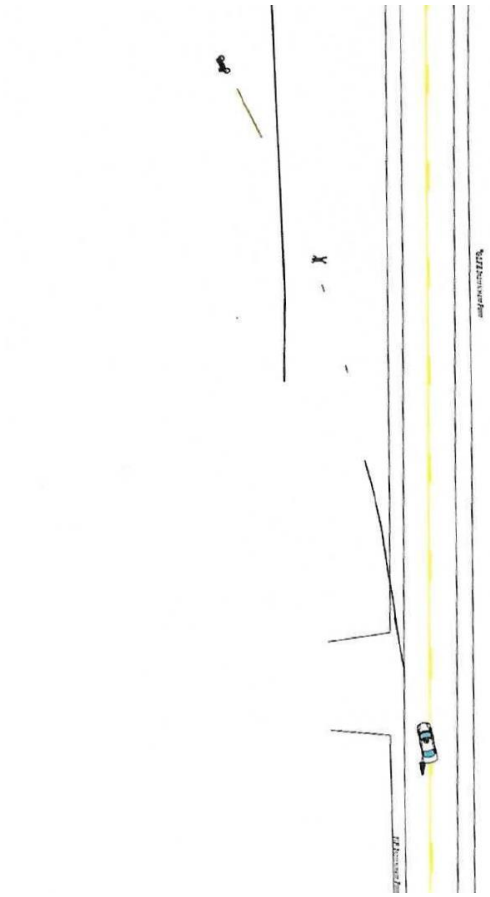
Wessels was going 104 mph when he encountered Mormann on a county blacktop and quickly swerved to the left to avoid running Mormann over. D0263 at 4; D0342 at 135:12-25 & 83:2-6 (citing D0325 at 73:9-75:2). Wessels wrote in his report that "as I crested the hill and observed the motorcycle directly ahead…approximately 150 feet[2]… I applied the brakes heavily and swerved over" into the oncoming lane of traffic. D0274, Exh. 17 at 1. Wessels claimed that the entire encounter—from when he crested the hill and saw Mormann's motorcycle to making contact with it twice—took "approximately two seconds." D0342 at 83:2-6 (citing D0325 at 73:9-75:2). Wessels then veered back to the right resulting in contact with the cruiser's passenger side mirror. D0340, Trial Tr. Vol. III at 137:7-138:10; D0343 at 242:20-243:19; See D0265, Plaintiffs Exh. 7 (side view mirror

[2] At 100 mph Wessels cruiser would travel just under 150 feet in 1 second. (100 mph x 5,280 feet in a mile = 528,000 / 60 minutes = 8,800 feet per minute / 60 seconds = 146.67 feet per second.

damage photo). Wessels admitted he was only "30 feet ahead of [Morman] when he swerved in front of him" and that

"wasn't ideal, but given the fact that there was a blind curve" ahead he had no choice. D0342 at 124:22-125:2.

After Wessels ". . . swerved in front of [Mormann]" in an unsuccessful attempted to force him to stop, Wessels looked over his left shoulder to determine Mormann's location. *Id.* and D0274 Exh. 17 at 1. Wessels wrote in his report that he then veered back to the left while greatly reducing his speed. *Id*. This maneuver causing the second collision with the driver's side rear quarter panel of Wessels cruiser, as set out by the Iowa Highway Patrol graphic of the second collision. D0340 at 127:24 -129:8; and D0268, Exh. 10, Iowa Highway Patrol ("IHP") Overhead.



The second collision caused damage to the driver's side rear quarter panel of Wessels cruiser. D0264, Exh. 6 (driver's side rear quarter panel damage).

Mormann lost control of the motorcycle as a result of Wessels' second hit and tumbled along the ground for 189 feet, causing substantial injuries that ultimately resulted in his death. D0274, Exh. 17 at 1; D0262, Jury Instr. No. 3 at 3 (3/21/2024) ("The parties stipulate that all of Gus Mormann's injuries on the date of his death were caused by the accident on December 10, 2020."). Following the collisions, Wessels claimed that he did not know that either of the collisions had occurred until after the incident, despite substantial damage to his cruiser. D0342 at 60:5-10 & 58:13-14 (citing D0325 at 34:15-25); D0274, Exh. 17 at 2.

Wessels violated numerous sections of Manchester Departmental Policy during the encounter, as follows:

a. Cameral Recording Policy. D0272, Exh. 15, Pursuit Policy at 2 ("Mobile Video Recording devices shall be activated during the entire pursuit."). It is undisputed that Wessels did not record the incident. D0342 at 95:15-96:14.

b. Pursuit Policy. D0272, Exh. 15, Pursuit Policy at 1-2 ("Officers shall not pursue and shall cease pursuit when the pursuing officer is aware of a known or obvious risk that is so great it is highly probable that serious harm will occur to citizens or officers…Secondary units shall not pass the primary unit unless this is communicated between units…A vehicle being pursued shall not be rammed unless the use of deadly force is justified, and the officer feels ramming the vehicle is immediately necessary to prevent death or serious injury to other persons." Wessels admitted use of deadly force on Mormann was not justified. D0342 at 68:10-16.

c. Use of Force Policy. D0273, Exh. 16, Use of Force Policy at 1 & 8 ("The Department's highest priority is the sanctity of human life… use of roadblocks, ramming, pit maneuvers and forcible stopping

> may constitute a use of force. These techniques will only be used [if the use of deadly force is justified]").

Wessels had ample time to follow departmental policy and log in to his cruiser recording system so that the incident was recorded. Manchester officer Piersch was in dispatch with Wessels. D0342 at 151:16-19. Piersch had time to log in and double check to make sure his cruiser recording was on. D0342 at 152:19-154:13. Piersch got to the chase before Wessels. D0342 at 157:14-25. The jury heard fellow Manchester PD officer Piersch testify that, even though Piersch arrived at the ongoing chase prior to Wessels, had the opportunity to pull a U-turn right behind Mormann and take over the chase as it headed into downtown Manchester, he declined to do so because, "it was not my chase… [and] that would have been an inappropriate thing to do." D0342 at 158:18-159:5.

Wessels first interaction with Mormann in downtown Manchester was to almost take Mormann "head on" as he pulled a U-turn starting in front of Mormann to take over the pursuit. D0344 at 156:7-20. Mormann had to swerve to avoid hitting Wessels' cruiser "head-on," as noted by Trooper Payne. D0344 at 171:5-172:15. Wessels omitted his involvement in causing this near collision in downtown Manchester only stating in his report that the "driver of the motorcycle nearly lost control swerving as he decelerated nearly striking a parked vehicle." D0274, Exh. 17 at 1.

Wessels sworn testimony includes improper speculation that maybe Mormann "could have killed someone." D0342 at 69:9 (citing D0325 at 48:3-7). Wessels claimed that Mormann was "never on [his] left side." D0342 at 61:15-16 (citing D0325 at 38:10-19). At one-point Wessels even claimed he never got in front of Mormann thereby admitting an improper pass. D0342 at 72:24-25 (citing D0325 at 67:2). The jury heard Wessels concede that "[t]here is virtually no level of force other than your presence that you can use with a motorcycle." D0342 at 69:11-12 (citing D0325 at 52:8-12). Finally, despite Wessels repeatedly and vigorously claiming he did nothing to cause the contact between the two vehicles, the jury heard Wessels ultimately concede, "I don't know exactly what I did." D0342 at 84:1-2 (citing D0325 at 84:23-25).

The jury heard Trooper Payne explain to defense counsel on cross examination that he "made sure that our dispatch told our local entities that were involved that I'm terminating [the pursuit]." D0344 at 185:8-22. Defense counsel persisted and the jury heard the following exchange:

> Q. But you had no expectation when you made that announcement with regard to what other agencies might do or not do; correct?
>
> A. Correct. It's just in my -- in my experience, it's if the State Patrol's terminating a pursuit that we've started, most others don't assume the liability of the pursuit after that fact. If it wasn't good enough for us to chase, they don't get involved.

Id.

II. Procedural History

The petition was filed as private right of action under Article I, § 8 of the Iowa Constitution for the use of excessive deadly force. D0001, Petition at 1 (5/20/21). As intentional torts, comparative fault does not apply to excessive force cases. See Iowa Code § 668.1; *Mulhern v. Catholic Health Initiatives*, 799 N.W.2d 104, 116 n.2 (Iowa 2011); and *Reilly v. Anderson*, 727 N.W.2d 102, 112 (Iowa 2006). Defendants claim they did not have time to adjust their "trial strategy which, until the District Court's March 7, 2024 ruling, was based on a classic case of comparative fault," is patently false. Defs.' App. Br. at 69. *Burnett* was not issued until May 5, 2023, two years after this case was filed, and well after discovery had closed and competing dispositive motions were submitted. D0245, Order at 3 (3/07/24).

As the District Court noted in the order denying the Defendants' effort to exclude assault and battery claims,

> In 2023, the parties had competing summary judgment motions…After those motions had been fully briefed, and after the parties had argued their motions to the Court, Defendants filed a Notice of Additional Authority on May 5, 2023, citing the *Burnett* decision that had been rendered May 5, 2023. Plaintiffs filed a response three days later, acknowledging the effect of *Burnett* on claims made under the Iowa constitution against the state, but specifically pointing out that it did not negate tort claims based on common law. In ruling on the parties' summary judgment claims, the Court noted that *Godfrey* claims are no longer permitted unless authorized by common law, an Iowa statute, or by the express terms of a Constitutional provision.
>
> Based upon the Court's summary judgment ruling, and relying again on *Burnett*, Defendants filed a second motion for summary judgment in September 2023, seeking to dismiss Count I. In the resistance brief filed

> October 17, 2023, Plaintiffs stated: 'In this case, Mormann asserts a standalone cause of action **for assault** causing a wrongful death … Ultimately, it may turn out that only one theory of recovery will be presented to the jury between Count I, a wrongful death claim protected by Article I, Section 8 of the Iowa Constitution and Count IV, Common Law Wrongful Death. However, at this time, this dispute should not be decided based upon the nomenclature used to set out the various claims asserted.'
>
> Throughout the pendency of this case, Plaintiffs have repeatedly asserted a belief that Mormann was assaulted by Officer Wessels when Mormann's motorcycle was allegedly run off the road by Wessels. That allegation is certainly not new, and allowing Plaintiffs to pursue such a claim at trial will not add any additional witnesses or evidence. At this time, the Court cannot say whether any assault and/or battery claim will ultimately be submitted to the jury, but the Court will not rule *in limine* that Plaintiffs are precluded from making such assertions.

(Emphasis in original). D0245 at 3.

The Defendants' "feigned prejudice" for having to take this case to trial on theory of recovery that was the "functional equivalent" of the cause of action upon which the case rested for the entirety of its prosecution should not be taken seriously. *Wagner v. State*, 952 N.W.2d 843, 855 (Iowa 2020). Particularly given that Defendants were made fully aware of the name change in the theory of recovery, necessitated by the reversal of case precedent, five months before trial. *Id*.

ARGUMENT

I. THE DISTRICT COURT PROPERLY REJECTED ANY CLAIM TO DISMISS THE CASE BASED UPON EMERGENCY RESPONSE IMMUNITY

A. Error Preservation

Mormanns agree that the Defendants preserved error on this issue.

B. Standard of Review

"The purpose of [JNOV] is to allow the District Court an opportunity to correct any error in failing to direct a verdict." *Easton v. Howard*, 751 N.W.2d 1, 4 (Iowa 2008). "We . . . review a District Court ruling on a motion for [JNOV] for correction of errors at law." *Thornton v. Am. Interstate Ins. Co*., 897 N.W.2d 445, 460 (Iowa 2017) (citation omitted). The appellate court's "role is to decide whether there was sufficient evidence to justify submitting the case to the jury when viewing the evidence in the light most favorable to the nonmoving party." (citation omitted).

C. Emergency Response Immunity May Not Be Applied to Negate a Constitutionally Protected Claim

The District Court was correct in holding: "I think that the immunity—there's exceptions to immunity when the conduct rises to a certain level." D0346, Trial Tr. Vol. IV at 13:3–5. Relying on *Burnett* and *White v. Harkrider*, 990 N.W.2d 647 (Iowa 2023), the District Court held, "I do think that this common law claim [for assault and battery] is permitted now under the case law. I think Plaintiff is entitled to make this common law claim." D0346 at 16:4–15.

The Defendants' appeal on this point is based on the false premise that *Burnett v. Smith*, 990 N.W.2d 289 (Iowa 2023), overruled *Godfrey v. State*, 898 N.W.2d 844 (Iowa 2017), without noting that litigants making excessive force claims against law enforcements officers have an alternative remedy under Iowa law. In *Burnett* and

White the Iowa Supreme Court made it abundantly clear that assault and battery claims against law enforcement officers remain valid, despite statutory immunities to the contrary, because those claims were recognized by the founders at the time of the adoption of the Iowa Constitution. *Burnett,* 990 N.W.2d at 306 *and White* 990 N.W.2d at 656.

In *White* the Iowa Supreme Court refused to dismiss an assault claim on statutory qualified immunity grounds even though the factual circumstances of the incident would otherwise qualify for emergency response immunity under I.C.A. 670.4(1)(k). *White* at 990 N.W.2d at 653 ("the alleged criminal conduct under investigation was serious in nature and warranted a serious response.").

While not discussing any statutory immunities, the *White* court held:

> The defendants contend they are nonetheless entitled to dismissal because their actions as peace officers were justified as a matter of law. See, *e.g.*, Iowa Code § 804.8(1). We disagree… Justification is an affirmative defense to assault that the defendants must plead and prove [based upon] an objective reasonableness standard. [Citations omitted except] … *Hill v. Rogers*, 2 Iowa (Clarke) 67, 68 (1855) (treating justification as affirmative defense and fact question for jury).

White at 656. It is no coincidence that the Iowa Supreme Court cited a case from 1855, prior to the adoption the Iowa Constitution, in support of its discussion about the applicable affirmative defense in an assault against a law enforcement officer case being justification, not qualified immunity. See *Hill v. Rogers*, 2 Iowa (Clarke) 67, 68 (1855).

Burnett discussed common law claims for damages against law enforcement officers that predated the Iowa Constitution where the claims would have violated the constitution, but noted "that wasn't the important point." 990 N.W.2d at 299. The same types of claims, *i.e.*, those recognized by the common law prior to the adoption of the Iowa constitution, remain viable post-*Burnett*. The *Burnett* court made it clear that claims for money damages against government officials who act without justification as "authorized by the common law" remain viable. *Id.* at 307. *Burnett* refers favorably to Justice McDonald's concurring opinion in *Lennette v. State*, 975 N.W.2d 380, 405 (Iowa 2022). *Id.* at 300. Justice McDonald's *Lennette* concurrence is instructive:

> I would recognize that the Iowa Constitution secures a right to assert nonconstitutional causes of action for money damages against government officials under certain circumstances. In particular, as relevant here, it appears that '[t]he right of the people to be secure in their persons, houses, papers and effects, against unreasonable seizures and searches' is a guarantee of the right to assert nonconstitutional causes of action for money damages against government officials for unlawful seizures and searches. Iowa Const. art I, § 8.

Lennette at 402-403.

Justice McDonald reasoned that the "authentic historical context in which this right was codified reveals that the nature and scope of the right was to fix in place the common law regime of rights and remedies governing seizures and searches and to prohibit legislative abrogation of the same." *Lennette* at 404. This reasoning, implicitly adopted by the majority in *Burnett*, recognizes that statutory immunities

cannot be used to protect government officials from common law torts that have a basis in constitutionally protected rights.

It is of paramount importance to understanding *Burnett* and its progeny that the Iowa Supreme Court did not even discuss the application of statutory qualified immunity. Such a discussion was not necessary because –

> Our constitution is our highest law. It supersedes ordinary legislation to the contrary. But in most areas, it does not come with a private damages remedy. And it does not need our artificial assistance, in the form of a damages remedy not contemplated by our framers, to maintain that supremacy. See *Godfrey*, 898 N.W.2d at 881 (Mansfield, J., dissenting) ("Historically the Iowa Constitution has been, and continues to be, a vital check on government encroachment of individual rights. Our courts enforce that check by invalidating and enjoining actions taken in violation of the constitution.").

Burnett at 306. Note that *Burnett* did not involve an emergency response so there was no need for any discussion of statutory immunities. The *Burnett* court did note that "justification" was a defense to assault recognized at common law at the time of the adoption of the Iowa Constitution. *Id*. at 656.

The Iowa founders would have been puzzled by the notion of qualified immunity which was first applied in the 1960s. See *Pierson v. Ray,* 386 U.S. 547 (1967) and *Harlow v. Fitzgerald,* 457 U.S. 800, 802 (1982), for its first application in civil rights cases. Justification is the defense now available to Iowa law enforcement officers accused of committing an assault/battery, not statutory qualified immunity.

In *Baldwin v. City of Estherville*, 915 N.W.2d 259, 280 (Iowa 2018) (overruled on other grounds), the Iowa Supreme Court referred to the statutory immunities contained in the Iowa Tort Claims Acts noting the "problem with these acts, though, is that they contain a grab bag of immunities reflecting certain legislative priorities. Some of those are unsuitable for constitutional torts." See also, *Wagner v. State*, 952 N.W.2d 843, 847, (Iowa 2020), where the Iowa Supreme Court answered the certified question, "[d]oes the Iowa Tort Claims Act, Iowa Code Chapter 669, apply to plaintiffs' state constitutional tort causes of action," with "[y]es, **as to the procedural requirements of that Act**." (Emphasis added).

The Iowa Supreme Court recently confirmed the distinction between qualified immunity as the applicable affirmative defense in constitutional excessive force cases and justification as the defense in assault cases. *Norris v. Paulson*, Case No. 23-0217, issued October 11, 2024 (*per curium*). The *Norris* court stated, "[the district court] identified material issues of fact concerning whether [the law enforcement officer's] actions were protected by qualified immunity under Iowa Code chapter 670 (2022) and whether they were justified, thereby providing a defense to the common law assault claim." *Norris* at *2.

II. DEFENDANTS' ARGUMENT REGARDING EMERGENCY RESPONSE IMMUNITY CONSTITUTES, AT A MINIMUM, HARMLESS ERROR BECAUSE THE JURY FOUND WESSELS ACTED WITH "WILFULL, WANTON AND RECKLESS DISREGARD FOR THE RIGHTS OR SAFETY OF [GUS MORMANN]"

A. Error Preservation

Mormanns agree that the Defendants preserved error on this issue.

B. Standard of Review

"The purpose of [JNOV] is to allow the District Court an opportunity to correct any error in failing to direct a verdict." *Easton v. Howard*, 751 N.W.2d 1, 4 (Iowa 2008). "In reviewing rulings on a motion for judgment notwithstanding the verdict, [the appellate court simply asks] whether a fact question was generated." *Royal Indem. Co. v. Factory Mut. Ins. Co*., 786 N.W.2d 839, 846, (2010).

C. Any Claim Regarding Emergency Response Immunity Amounts to Harmless Error

In Iowa, an appellee may demonstrate that a trial court's error was harmless by showing that the error did not affect the substantial rights of the appellant or the outcome of the case, or that there has not been a miscarriage of justice. *Rivera v. Woodward Res. Ctr.*, 865 N.W.2d 887, 903 (2015). This can be established through various means, such as demonstrating that the error was cured by subsequent proceedings, or that the error did not prejudice the appellant. In *Butler Mfg. Co. v. Elliott & Cox*, the Iowa Supreme Court held that the exclusion of relevant and

material evidence offered by an appellant is harmless if a review of the entire record, including the rejected evidence, reveals that the appellee was legally entitled to the judgment rendered in their favor. *Butler Mfg. Co. v. Elliott & Cox*, 233 N.W. 669, 670 (1931).

In *Everhard v. Thompson*, the court noted that any error in instructions may be deemed harmless if the jury's answers to special interrogatories demonstrate that the error did not affect the outcome. *Everhard v. Thompson*, 202 N.W.2d 58, 61 (1972). That is exactly what occurred in this case. The jury's finding that Wessels' conduct was willful, wanton and reckless dictates that emergency response immunity was not available.

Where an alleged error does not materially affect the substantial rights of the parties or the final judgment, it is considered harmless. See Iowa R. of Evid. 5.103, "[a] party may claim error in a ruling to admit or exclude evidence only if the error affects a substantial right of the party" and Iowa R. Civ. Pr. 1.1004 (a new trial may be ordered only if the alleged irregularity, "materially affected movant's substantial rights.").

The Defendants cite *Christiansen v. Eral*, 2024 Iowa App. LEXIS 30, *12-14, 4 N.W.3d 322, 2024 WL 108848, but that case supports Mormanns' position because there was no allegation of willful, wanton and/or reckless driving against the officer. In *Eral* the officer's conduct was necessary to protect "the lives of innocent

bystanders." *Id*. at *10. A federal judge ruled the officer's conduct in *Eral* was "objectively reasonable." *Id*. at *11. *Eral* turned on a post incident amendment to Iowa law regarding PIT maneuvers. *Id*. at *12-14. That law was only applicable in *Eral* because the officer's conduct was not reckless. Also, *Eral* did not involve a chase of a motorcycle. *Id*. There is no dispute in this case that a PIT maneuver cannot be used on a motorcycle unless deadly force is justified. D0342 at 68:10-16 & 69:11-12 (citing D0325 at 52:8-12). There is also no disputing the jury's finding that Wessels acted willfully, wantonly and recklessly. D0316 at 1.

D. Emergency Response Immunity Does Not Protect Reckless Driving

The IMTCA waives governmental immunity with numerous cited exceptions. Iowa Code § 670.2. Those exceptions are set out in Iowa Code § 670.4(1)(a) through (r). One of the exceptions to the waiver of immunity set out in IMTCA is § (k), for claims "based upon or arising out of an act or omission in connection with an emergency response." In such cases, "a municipality shall be liable only to the extent liability may be imposed by the express statute dealing with such claims." Iowa Code § 670.4(1).

"Iowa Code section 321.231 is an express statute dealing with claims regarding emergency response vehicles." *McClellan v. Ramirez*, 2019 Iowa App. LEXIS 543, *6-7, 928 N.W.2d 894, 2019 WL 2375244. Iowa Code § 321.231.(6) states, the "provisions of this section shall not relieve the driver of an authorized

emergency vehicle… from the duty to drive… with due regard for the safety of all persons, nor shall such provisions protect the driver… from the consequences of the driver's… reckless disregard for the safety of others." Iowa Appellate Courts have held §321.231(6) applies to limit emergency response immunity.

In *Hoffert v. Luze*, 578 N.W.2d 681, 685 (Iowa1998), the Iowa Supreme Court held "the legal standard of care applicable to the conduct of a… driver of an authorized emergency vehicle under Iowa Code section 321.231 is to drive with due regard for the safety of all persons, but the threshold for recovery for violation of that duty is recklessness." In *Penny v. City of Winterset*, 999 N.W.2d 650, 653 (Iowa 2023), the Iowa Supreme Court held, "'[a]n emergency vehicle operator who harms another person by driving with reckless disregard for the safety of others thus may be held liable for civil damages.' [Citing] *Martinez v. State*, 986 N.W.2d 121, 124 (Iowa 2023) (citing *Morris v. Leaf*, 534 N.W.2d 388, 390-91 (Iowa 1995))."

Iowa Code § 670.4(1)(k) was never intended to protect emergency responders, like Wessels, who violate the rules of the road in a reckless manner.

E. The Jury Found Wessels Acted with Willful, Wanton and Reckless Disregard for the Safety of Gus Mormann

The jury was provided supplemental jury instructions on punitive damages. D0306, Suppl. Jury Instr. at 1 (3/22/2024). The jury was instructed, as follows:

> Punitive damages may be awarded if the plaintiff has proven by a preponderance of clear, convincing, and satisfactory evidence that the conduct of Lt. Wessels was willful, wanton, and reckless by intentionally doing an act
>
> of an unreasonable character in disregard of a known or obvious risk that was so great as to make it highly probable that harm would follow, and which thus is usually accompanied by a conscious indifference to the consequences… You may award punitive damages only if the defendant's conduct warrants a penalty in addition to the amount you award to compensate for plaintiff's actual injuries.

D0306 at 1. The jury returned a verdict of punitive damages finding "the conduct of Lt. Wessels constituted willful, wanton and reckless disregard for the rights or safety of another." D0316 at 1. Regardless of any argument the Defendants choose to make, emergency response immunity cannot be applied in this case to make Wessels immune from his reckless conduct.

III. THE DISTRICT COURT PROPERLY SUBMITTED ASSAULT AND BATTERY CLAIMS TO THE JURY

A. Error Preservation

Mormanns agree Defendants preserved error on this issue.

B. Standard of Review

Appellate review of a District Court's ruling on a motion to amend is for an abuse of discretion. *Struve v. Struve*, 930 N.W.2d 368, 375 (Iowa 2019). "Denial of a motion to amend will only be reversed where a clear abuse of discretion is shown." *Daniels v. Holtz*, 794 N.W.2d 813, 817 (Iowa 2010).

C. Iowa Code § 670.4(A) Does Not Retroactively Apply

Wessels killed Mormann on December 10, 2020. D0001. New Iowa Code § 670.4(A) did not go into effective until June 17, 2021. In *Nahas v. Polk City*, 991 N.W.2d 770, 779 (Iowa 2023), the Iowa Supreme Court held:

> Application of the statutory immunity provisions to this case would be a retrospective application of new law. Every one of the alleged acts giving rise to Nahas's claims occurred before section 670.4A took effect on June 17, 2021. Application of the immunity provisions in this case would attach new legal consequences to the defendants' acts completed prior to the effective date, potentially immunizing them from liability for tortious conduct that they may otherwise be liable for at that time and impairing Nahas's ability to recover under the law for that conduct. See *Landgraf*,114 S. Ct. at 1505 (explaining HN14) a retroactive statute is one that either "impair[s] rights a party possessed when he acted, increase[s] a party's liability for past conduct, or impose[s] new duties with respect to transactions already completed").

Nahas at 778-779. The *Nahas* court concluded, "[b]ecause there is no express statement making the statutory immunity provisions retrospective, we conclude **the law can only be applied prospectively to conduct occurring after the effective date of the statute**. The qualified immunity defenses are thus not applicable in this case." *Nahas* at 779. (Emphasis added).

With regard to "the third part of the [new statutory] requirement, that the petition must state 'the law was clearly established at the time of the alleged violation,' the *Nahas* court held, "[w]ith respect to this provision, the relevant event to which a new legal consequence would attach **is not the drafting and framing of the petition**. (Emphasis added). Instead, it is the existence or nonexistence of a

historical social fact—whether the law was 'clearly established at the time of the alleged violation.' *Id*. The 'clearly established' standard is thus inherently backward looking." *Id*. The *Nahas* court concluded with –

> whether the law was clearly established is inextricably intertwined with the new qualified immunity defense and only relevant to this case to the extent the new qualified immunity defense is operative in this case, and we already have concluded that qualified immunity is not operative in this case because it would be an impermissible retrospective application of the statute. We thus conclude that application of this pleading standard to this case would in fact be a retrospective application of this particular statutory provision. Because the legislature did not expressly make this statutory provision retrospective, it cannot be applied in this case. See Iowa Code § 4.5."

Id.

The Iowa Supreme Court confirmed that Iowa Code § 670.4(A) does not apply retroactively in both *Thorington v. Scott Cnty*., 2024 Iowa Sup. LEXIS 25, *1, 3 N.W.3d 558, 2024 WL 874182 (*per curium*) and *Norris v. Paulson*, Case No. 23-0217, issued October 11, 2024 (*per curium*). In *Thorington* the court held, "the substantive qualified immunity protections of the statute did not extinguish the cause of action since it had accrued before the statute went into effect." *Thorington* at *2-3. In *Norris* the court held, "the automatic interlocutory appeal provision in Iowa Code § 670.4A(4) did not apply retroactively to conduct that predated its enactment." *Norris* at *4.

The defense turns the new pleading rules, which follow the federal standard as set out in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), on their head. The defense cites federal law in support of its claim that "magic words" are required in a pleading, but those cases hold just the opposite – legal conclusions do not matter. *Id*. In *Iqbal* the U.S. Supreme Court held:

> Two working principles underlie our decision in *Twombly*. First, the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice. *Id*., at 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929… Second, only a complaint that states a plausible claim for relief survives a motion to dismiss. *Id*., at 556, 127 S. Ct. 1955, 167 L. Ed. 2d 929. Determining whether a complaint states a plausible claim for relief will, as the Court of Appeals observed, be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense. 490 F.3d at 157-158.

At 678-679.

From a common-sense perspective, it makes no sense to retroactively apply a new heightened pleading standard to a case that survived numerous motions for summary judgement and ultimately resulted in a favorable jury verdict. The whole purpose of any pleading standard is to notify the opposing party of the claims and winnow out claims unsupported by facts or legal precedent. Iowa R. Civ. P. 1.403(1) and *Rieff v. Evans*, 630 N.W.2d 278, 292 (Iowa 2001).

D. Excessive Force Claims and Assault/Battery Claims Are "Functionally Equivalent"

Defendants cannot be prejudiced by submitting one claim that is the "functional equivalent" of another. In *Wagner v. State*, 952 N.W.2d 843, 855 (Iowa 2020), the Iowa Supreme Court held, as follows:

> Literally, of course, a claim under the Iowa Constitution and common law assault and battery are two different causes of action. Iowa Code section 669.14(4) mentions the latter but not the former. **However, some time ago this court held that the section immunized the State from suit on a federal constitutional claim that was 'the functional equivalent' of an explicit section 669.14(4) exception**. *Greene v. Friend of Ct*., 406 N.W.2d 433, 436 (Iowa 1987). *Greene* involved an individual who had been allegedly jailed without due process and then brought suit for damages. *Id*. at 434.
>
> In short, we decided that **section 669.14(4) also foreclosed claims that were the functional equivalent of the identified claims**. *Id*. We have reiterated this point in a number of cases. See, *e.g*., *Smith v. Iowa State Univ. of Sci. & Tech*., 851 N.W.2d 1, 20-21 (Iowa 2014) ("[W]e have made clear that if a claim is the functional equivalent of a section 669.14 exception to the ITCA, the State has not waived its sovereign immunity."); *Trobaugh v. Sondag*, 668 N.W.2d 577, 584 (Iowa 2003) ("[W]here '[t]he gravamen of plaintiff's claim . . . is the functional equivalent' of the causes of action listed in Iowa Code section 669.14(4), the claim cannot be pursued successfully against the State." (second alternation in original) (quoting *Greene*, 406 N.W.2d at 436)); *Hawkeye By-Prods., Inc. v. State*, 419 N.W.2d 410, 411-12 (Iowa 1988) (*en banc*) (holding that when the gravamen of plaintiffs' claims is covered by what is now section 669.14(4), "such claims will not lie against the sovereign").

(Emphasis added). *Wagner v. State*, 952 N.W.2d 843, 855 (Iowa 2020). The District Court's treatment of the facts alleged to support Mormanns' excessive force claim as an assault and battery claim is, therefore, in accord with long standing Iowa Supreme Court precedent.

As the District Court held, allowing the assault/battery claims did not "materially change the issues or substantially altered the defenses." *Beneficial Fin. Co. of Black Hawk Cty. v. Reed*, 212 N.W.2d 454, 456 (Iowa 1973). See also *W & W Livestock Enters., Inc. v. Dennler*, 179 N.W.2d 484, 488 (Iowa 1970) (finding no abuse of discretion in permitting the amendment when "[it] in no way prejudiced plaintiff."). D0245 at 2.

E. Mormanns Complied with Notice Pleading Rules

A pleading is only deficient if "the party has no right of recovery **under any state of facts**." (Emphasis added). *White v. Harkrider*, 990 N.W.2d 647, 656 (2023). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Hawkeye Foodservice Distrib. v. Iowa Educators Corp*., 812 N.W.2d 600, 607 (2012). Plaintiffs' Amended and Substituted Petition sets out sufficient facts to allow for a recovery pursuant to assault and battery. The District Court found that to be the case. D0245 at 2.

The District Court reasoned, as follows:

> Plaintiffs included a count for the alleged use of excessive force. In that count, Plaintiffs allege that Officer Wessels recklessly or intentionally caused his police vehicle to come into contact with Mormann's motorcycle twice, resulting in a collision that ultimately caused Mormann's death.

Id. The District Court concluded that Defendants cannot be surprised by the common law assault claim asserted by the Mormanns, stating that in October of 2023 –

> Plaintiffs . . . acknowledging the effect of *Burnett* on claims made under the Iowa constitution against the state, but specifically pointing out that it did not negate tort claims based on common law. In ruling on the parties' summary judgment claims, the Court noted that *Godfrey* claims are no longer permitted unless authorized by common law, an Iowa statute, or by the express terms of a Constitutional provision.

D0245 at 3.

The defense argues that magic words are required to plead assault and battery when the law and the rules clearly state just the opposite. The Iowa Supreme court has held, "we do not require a petition to allege a specific legal theory. Iowa R. Civ. P. [1.403(1)]." *Rieff v. Evans*, 630 N.W.2d 278, 292 (Iowa 2001), as amended on denial of reh'g (July 3, 2001). A "pleading 'is sufficient if it apprises of the incident out of which the claim arose and the mere general nature of action.'" *Haugland v. Schmidt*, 349 N.W.2d 121, 123 (Iowa 1984) (quoting *Northwestern Nat'l Bank v. Metro Ctr., Inc*., 303 N.W.2d 395, 401 (Iowa 1981)). "Under Rule [1.403(1)]'s requirement that the petition set forth a claim for relief, the claim is not the equivalent of a cause of action. Obviously, the claims asserted must be capable of recovery. Once that is established, a prima facie showing will suffice." *Rieff* at 292.

In *Murphy v. First Nat'l Bank*, 228 N.W.2d 372, 375, 1975 Iowa Sup. LEXIS 989, *6, the Iowa Supreme court held, "a pleading [should be dismissed] only when it appears to a certainty the pleader has failed to state a claim upon which any relief may be granted under any state of facts which could be proved in support of the claim asserted." Notice pleading requires only a "short and plain statement of the

claim" and does not require the pleading of facts. *Schmidt v. Wilkinson*, 340 N.W.2d 282, 283 (Iowa 1983). A petition provides "fair notice" to defendants if it apprises them of the incident giving rise to the claim, states the basic elements of the claim, and sets forth the general nature of the action. *Id*. at 283-84; see also Iowa Rule of Civil Procedure 1.403(1); and *Brunkhorst v. Iowa Pub. Emples. Ret. Sys*., 2008 Iowa App. LEXIS 1137, *8.

The rules even allow for amendments at the end of trial to conform to proof presented at trial. I.R.C.P. 1.402(4) ("Leave to amend, including leave to amend to conform to the proof, shall be freely given when justice so requires."). The Iowa Supreme Court has held:

> Our supreme court has long found that "**amendments should be the rule and denial should be the exception**." *Baker v. City of Iowa City*, 867 N.W.2d 44, 51 (Iowa 2015); see also *Barnes v. State*, 908 N.W.2d 882, 2017 WL 4317283, at *3-4 (Iowa Ct. App. 2017). **Amendments should be granted "so long as the amendment does not substantially change the issues in the case**" or "if the **opposing party is not prejudiced** or unfairly surprised" by the substantial change. *Baker*, 867 N.W.2d at 51. "**District Courts have considerable discretion to allow amendments at any point in the litigation**," and appellate courts should "only reverse the District Court's decision if it has abused that discretion." *Id*. (Emphasis added).

Wynn v. State, 2020 Iowa App. LEXIS 983, *4-5, 953 N.W.2d 375, 2020 WL 6157791. Since claims of excessive force are the "functional equivalent" of assault and battery, the District Court's decision to submit Mormanns' petition as an assault and battery claim to the jury was completely justified. Further, there is no surprise or prejudice when claims that are the "functional equivalent" of each other are

substituted, one for the other. Not to mention that the defense was put on notice five months before trial of Mormanns' position that assault and battery should be submitted to the jury.

Defendants' reliance upon *Klum v. City of Davenport*, 2024 U.S. Dist. LEXIS 102262, *38-39, 2024 WL 2880640, is misplaced. The federal rules of civil procedure and the Iowa rules of civil procedure set out the same standard for amendments. ("Leave to amend… shall be freely given when justice so requires."). Iowa R. Civ. Pr. 1.402 and Fed. R. Civ. Pr. 15(a)(2). The Defendants want the Iowa District Court to be reversed by citing a federal District Court exercising the same discretion, but coming to a different conclusion given the facts and circumstances of the cases. *Klum* supports Mormann's position that the trial judge has discretion to allow, or refuse to allow, an excessive force case to be submitted as an assault/battery, and that discretion should not be reversed on appeal. Note that *Klum* is on appeal to the Eighth Circuit, but not regarding Iowa common law claims. *Klum v. City of Davenport*, U.S. Court of Appeals for the Eighth Circuit, Case No. 24-2165, Appellants Br. filed 07/19/2024 Entry ID:5415324.

In dicta, after deciding not to exercise discretion to allow assault/battery claims to proceed, the *Klum* court questioned the viability of such claims given the grant of qualified immunity on the 42 U.S.C. § 1983, excessive force claim due to the finding that the officer acted in an objectively reasonable manner. No judge has

ever looked at the facts of this case and found Wessels conduct to be objectively reasonable.

Of note, another federal judge in Iowa recently faced the same issue as in *Klum*, the viability of Iowa based assault/battery claims after dismissal of federal claims on qualified immunity grounds. In *Boggess v. City of Waterloo*, 2024 U.S. Dist. LEXIS 151994, *35-36, 2024 WL 3928889, the federal judge specifically considered *Klum* and declined to follow its reasoning, as follows:

> The arguments and defenses related to plaintiffs' state law claims involve disputes over recent cases involving whether the Iowa Supreme Court would recognize such causes of actions and if so, whether certain immunities under Iowa law remain available. Given that all federal claims have been dismissed, I decline to exercise supplemental jurisdiction over plaintiffs' remaining state law claims, which are better addressed by the Iowa courts. See *Condor Corp. v. City of St. Paul*, 912 F.2d 215, 220 (8th Cir. 1990) (encouraging federal courts to exercise judicial restraint and avoid state law issues wherever possible recognizing the necessity to provide "great deference and comity to state court forums to decide issues involving state law questions."). Plaintiffs' remaining state law claims will be remanded to state court.

Boggess at *36.

IV. SUFFICIENT RECORD EVIDENCE SUPPORTS THE JURY VERDICT THAT WESSELS COMMITTED ASSAULT AND BATTERY WITHOUT JUSTIFICATION

A. Preservation of Error

Mormann’s agree that Defendants reserved error on this issue.

B. Standard of Review

"On a weight-of-the-evidence claim, appellate review is limited to a review of the exercise of discretion by the trial court, not of the underlying question of whether the verdict is against the weight of the evidence." *State v. Reeves*, 670 N.W.2d 199, 203 (Iowa 2003). "Generally, [appellate courts] are reluctant to interfere with a jury verdict and give considerable deference to a trial court's decision not to grant a new trial." *Condon Auto Sales & Serv., Inc. v. Crick*, 604 N.W.2d 587, 594 (Iowa 1999).

C. Evidence of Wessels Intentionally Running Mormann Off the Road Was Overwhelming to the Point of All But Being Unrebutted

Wessels was the only witness who testified that he did not cause the collisions. D0342 at 127:24-128:6. ("Q. Did you run into Gus Mormann? A. No."). And Wessels claim was completely contradicted by his ultimate admission that, "I don't know exactly what I did." D0342 at 84:1-2 (citing D0325 at 84:23-25).

Even the Defendants' own accident reconstruction expert refused to opine that Wessels did not cause the collision. Todd Frank testified, as follows:

> Q. …The central question in this case, whether Gus Mormann caused the accident by running into then-Lieutenant Wessels or whether Lieutenant Wessels slowed his vehicle deliberately into Gus Mormann to cause the crash and Gus Mormann to run off the side, you don't have a final opinion; is that fair?
>
> A. Yes.

D0343 at 236:24-237:7.

The District Court denied Defendants' new trial motion on this issue reasoning, as follows:

> Defendants claim that 'there was no evidence in this case that proves that Lt. Wessels engaged in any act intended to put Plaintiff in fear of physical pain or injury or that Mormann reasonably believed that the act would be carried out immediately.' As Plaintiffs have indicated, when Wessels began his pursuit of Mormann, he nearly hit Mormann head-on. Further, the undisputed evidence is that the police cruiser driven by Wessels made contact with the Mormann motorcycle twice. It is certainly plausible for the jury to have found that Wessels did an act that was intended to put Mormann in fear of contact that would cause pain or injury. It's also plausible that the jury found that Mormann reasonably believed the act by Wessels would be carried out immediately. The elements for assault and battery were properly instructed, and the jurors made their findings.

D0330 at 2.

In assessing a request for a new trial based upon a lack of evidence claim the "only inquiry is to determine whether there is sufficient evidence to justify submitting the case to the jury." *Bredberg v. Pepsico, Inc*., 551 N.W.2d 321, 326 (Iowa 1996). The record must be reviewed in the "light most favorable to the verdict and need only consider the evidence favorable to plaintiff whether it is contradicted or not." *Estate of Pearson ex. rel. Latta v. Interstate Power & Light Co*., 700 N.W.2d 333, 345 (Iowa 2005). Any "reason for granting a new trial must fairly appear in the record." *Gudenkauf v. Carly*le, 2010 Iowa App. LEXIS 835, *5-6.

The defense claims that "no evidence in this case proves… Wessels put Plaintiff in any fear of physical pain or injury or that Mormann reasonably believed that the act would be carried out immediately… nor is there any evidence in this case

tending to indicate that Wessels intentionally caused bodily contact," are all completely without merit. It was stipulated that Mormann died as the result of injuries incurred in the collisions between his motorcycle and Wessels' cruiser. D0262 at 3. There is overwhelming evidence in the record to support the jury's finding that Wessels intentionally caused those collisions and acted with willful, wanton and reckless disregard for Mormann's safety. D0316. The evidence was undisputed that Wessels' cruiser hit Mormann twice. D0265 and D0264. A reasonable jury could believe Mormanns' expert who concluded that Wessels acted intentionally because there is no other way to explain the dynamics of the two separate collisions. D0340 at 127:24-128:3, 128:15-25 and 142:3-8.

A reasonable jury could conclude that Mormann was in fear of immediate pain and injury. In determining whether a new trial should be granted the "general rule is that a jury's verdicts are to be liberally construed to give effect to the intention of the jury." *Hoffman v. National Medical Enters., Inc*., 442 N.W.2d 123, 126 (Iowa 1989). "The test is whether the verdicts can be reconciled in any reasonable manner consistent with the evidence and its fair inferences." *Id*. at 126-127. See also, *Holdsworth v. Nissly*, 520 N.W.2d 332, 337 (1994).

A reasonable jury could conclude that Wessels nearly took Mormann "head on" on Main St., as observed and testified to by Trooper Payne. D0344 at 171:5-172:15. That is an assault and the fact that Mormann swerved to avoid contact

establishes his fear and belief the act would be carried out immediately. D0344 at 171:5-172:15 and D0274, Exh. 17 at 1.

This is particularly true in light of the defense expert who did not claim that Mormann caused the collisions, but only that from the evidence "at the scene" he could not tell whether the cruiser braked into the motorcycle, or the motorcycle accelerated into the cruiser. D0343 at 237:8-24. Note that the defense expert was only able to come to this "non-conclusion" by ignoring Wessels statement in his report that he was "heavily on the brakes," and Gus Mormanns' dying declaration that "PD bumped" him off his bike. D0343 at 242:20-243:19 & 243:23-245:5, and D0274, Exh. 17 at 1.

A critical issue for the jury was Wessels credibility and the bottom line is that he was not at all credible. Wessels statements about how the collisions occurred were varied, inconsistent and contradictory. Wessels entire defense rested on the dubious claim that the motorcyclist he was chasing somehow accelerated into his cruiser even though it was undisputed that when the vehicles got to within 150 feet of each other Wessels was going over 100 mph and Mormann was traveling around 62 mph. D0342 at 129:21-24; D0263, Plts. Exh.at 4 (AVL Rpt.). The credibility of witnesses is peculiarly the responsibility of the fact finder to assess. *Estate of Hagedorn v. Peterson*, 690 N.W.2d 84, 88 (Iowa 2004). "The District Court has a better

opportunity than the appellate court to evaluate the credibility of witnesses." *Etchen v. Holiday Rambler Corp*., 574 N.W.2d 355, 360 (Iowa Ct. App. 1997).

The Defendants claim that there was "no evidence showing Wessels intended or made an offensive contact with Gus's person" is without merit. Defs.'App. Br. at 74. Mormann was wearing a black leather coat. D0343 at 8:24-25. Plaintiffs' accident reconstruction expert testified that some of the black marks on the driver's side rear quarter panel of Wessels' cruiser came from "Mormann's arm or elbow area, something on that right side of his body making contact with the vehicle." D0340 at 171:12-15; D0288, Def. Exh. GG. Wessels cruiser hit Mormann's body hard enough to cause dents in the cruiser. *Id*. You can see dents in the cruiser where the black marks are located. *Id*. Further, car to car contact is different than car to motorcycle contact in terms bodily contact. There is a reason Wessels testified that there is not much you can do to stop a fleeing motorcycle. D0342 at 72:24-25 (citing D0325 at 61:4-13). Any police cruiser contact with a moving motorcycle would likely result in severe injury or death. *Id*.

In a case right on point, except the offending officer's conduct was not nearly as egregious as Wessels in this case, a federal district judge found, as follows:

> [A] motorcycle…was clocked going 97 mph on the highway. Trooper Austin Hilzendiger activated his lights and siren to pull over the motorcycle, but it did not pull over. Defendant Travis Bateman, a McKenzie County Sheriff, responded to Trooper Hilzendiger's request for assistance. Officer Bateman drove toward the motorcycle and used his patrol car to block the lane in which the motorcycle was traveling. The motorcycle hit Deputy Bateman's

> patrol car and [Plaintiff] was 'ejected from the motorcycle and sustained serious bodily injury.'

Lyons v. Bateman, 2019 U.S. Dist. LEXIS 234005, *1-2. The *Lyons* court reasoned:

> Even if the patrol car was not moving, a jury must determine whether Defendant's actions — which appear to be a last-minute positioning of the patrol car resulting in an unavoidable collision — was a use deadly force that was objectively reasonable under the circumstances.

Lyons at *5. The *Lyons* court dispensed with any law professor argument regarding bodily contact and held that the pending "negligence, assault, and battery claims are based on the same material facts in dispute addressed above, and summary judgment is not warranted." At *7.

D. Wessels Conduct Was Not Justified

Defendants' claim that Wessels conduct was justified is without merit. Wessels literally broke every single departmental policy applicable to the subject matter incident, from failing to ensure the incident was recorded, to engaging in a chase called off by the lead officer, to bumping a motorcycle during a high-speed chase while admitting there was no probable cause to believe deadly force was justified. D0272, Exh. 15, D0273, Exh. 16, D0342 at 68:10-16. More importantly, those policies were designed to implement Iowa law, particularly with regard to the use of deadly force. See Iowa Code §§ 804.8 and 704. (I.C.A. 804.8(1) states, "the use of deadly force… is only justified when a person… has used or threatened to use deadly force in committing a felony [or] the peace officer reasonably believes the

person would use deadly force against any person unless immediately apprehended.").

Wessels violated these statutory provisions by using deadly force on someone who did not present an imminent threat of serious injury or death. Wessels chased down and ran Mormann off the road knowing death or serious injury or death would result. That is not justifiable conduct under Iowa law.

V. THE DISTRICT COURT DID NOT ERR IN ADMITTING GUS MORMANN'S DYING DECLARATION

A. Preservation of Error

Mormanns agree that Defendants preserved error on this issue.

B. Standard of Review

Appellate courts "review the District Court's evidentiary rulings for an abuse of discretion. *Hall v. Jennie Edmundson Memorial Hosp*., 812 N.W.2d 681, 685 (Iowa 2012). The Supreme court "affords the District Court wide discretion in evidentiary matters…" *Jensen v. Sattler*, 696 N.W.2d 582, 589 (Iowa 2005). An abuse of discretion occurs when a ruling is "clearly untenable or [based on] unreasonable grounds." *Id*. "A ground or reason is untenable when it is not supported by substantial evidence or when it is based on an erroneous application of the law." *Mercer v. Pittway Corp*., 616 N.W.2d 602, 612 (Iowa 2000). In conducting the review of the District Court's evidentiary rulings, "[e]rror may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the

party is affected." Iowa R. Evid. 5.103(a); *Scott v. Dutton-Lainson Co*., 774 N.W.2d 501, 503 (Iowa 2009). Thus, reversal is appropriate only where "exclusion of the evidence affected a party's substantial rights." *Scott*, 774 N.W.2d at 503.

C. Mormann's Dying Declaration Was Properly Admitted Because Iowa Law Does Not Treat His Death as a Suicide

The Defendants argue that, because Moormann chose to be removed from a ventilator, his death should be treated as the legal equivalent of a suicide — and his dying declaration should therefore not have been admitted. Defs.' App. Br. at 78-80 (arguing that "his decision to remove the ventilator" is "analogous to suicide"). That is false.

Defendants cite out-of-state authority for the proposition that a pre-suicide dying declaration is not admissible. *Id.* at 79, *citing Kincaid v. Kincaid*, 127 Cal. Rptr. 3d 863, 874–75 (2011). But they ignore the Iowa authority that says voluntary removal from a ventilator after an accident must *not* be treated as the legal equivalent of a suicide. *State v. Fox*, 810 N.W.2d 888, 894–95 (Iowa Ct. App. 2011) (holding that this analogy is "without merit").

"There is a distinction between a person suffering from a serious life-threatening . . . injury who rejects medical intervention that only prolongs but never cures the affliction and an individual who deliberately sets in motion a course of events aimed at his or her own demise and attempts to enlist the assistance of others." *Id*. *quoting, Polk Cnty. Sheriff v. Iowa Dist. Court for Polk Cnty*., 594 N.W.2d 421,

427 (Iowa 1999). Removal from a ventilator simply allows the still-extant consequences of the wrongdoer's misconduct to manifest, whereas "suicide is an act that introduces new harms, distinct from those occasioned by the original criminal behavior." *State v. Fox*, 810 N.W.2d at 895.

Here, the "parties stipulate[d] that all of Gus Mormann's injuries on the date of his death were caused by the accident on December 10, 2020." D0262 at 3. And the jury was properly instructed that Iowa law permitted Gus to let his injuries take their course rather than staying alive through artificial means. D0262 at 10. ("Under Iowa law an individual has the right not to be kept alive by artificial means."); *see* Iowa Code §§ 144A.3 ("A competent adult may execute a declaration at any time directing that life-sustaining procedures be withheld or withdrawn.").

As the U.S. and Iowa Supreme Courts have both recognized, a "competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment." *Polk Cnty. Sheriff*, 594 N.W.2d at 426, *quoting*, *Cruzan v. Director, Missouri Dep't of Health*, 497 U.S. 261, 278, 110 S.Ct. 2841, 2851, 111 L.Ed.2d 224, 241 (1990). That liberty would be impermissibly violated if the dying declarations of individuals in that position were excluded.

There can be no dispute that Gus's statements were made in anticipation of impending death. His family planned his funeral and then his ventilator was removed. D0344 at 40:22-42:2. Gus then told his mother when she asked how the

accident happened, "I got ran off the road, pushed off the road at a high rate of speed." D0344 at 52:4-22. Any claim that statements made by Gus during that time were not in anticipation of impending death is completely without merit.

D. Admission of the Dying Declaration Was Not Prejudicial Because It Established Facts That Were Otherwise in Evidence

If there were error in admitting Gus's dying declaration, that error still could not be prejudicial, because the dying declaration merely confirmed what had already been established through other means. "In the hearsay context, 'where substantially the same evidence is in the record, erroneously admitted evidence will not be considered prejudicial.'" *State v. Brown*, 656 N.W.2d 355, 361 (Iowa 2003), *quoting in part*, *State v. Sowder*, 394 N.W.2d 368, 372 (Iowa 1986).

Here, Gus stated in his dying declaration that he had been run off the road. But that fact was also established by overwhelming physical evidence and expert testimony. There cannot be any credible argument that, but for Gus's dying declaration, the jury would have found that the accident occurred differently.

VI. THE DISTRICT COURT DID NOT ERR IN ADMITTING MANCHESTER POLICE DEPARTMENT POLICIES AND DISCUSSION OF THE MISSING CRUISER VIDEO

A. Preservation of Error

Mormanns agree that Defendants preserved error on this issue.

B. Standard of Review

Appellate courts "review the District Court's evidentiary rulings for an abuse of discretion. *Hall v. Jennie Edmundson Memorial Hosp.*, 812 N.W.2d 681, 685 (Iowa 2012). The Supreme court "affords the District Court wide discretion in evidentiary matters…" *Jensen v. Sattler*, 696 N.W.2d 582, 589 (Iowa 2005). An abuse of discretion occurs when a ruling is "clearly untenable or [based on] unreasonable grounds." *Id*. "A ground or reason is untenable when it is not supported by substantial evidence or when it is based on an erroneous application of the law." *Mercer v. Pittway Corp.*, 616 N.W.2d 602, 612 (Iowa 2000). In conducting the review of the District Court's evidentiary rulings, "[e]rror may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected." Iowa R. Evid. 5.103(a); *Scott v. Dutton-Lainson Co*., 774 N.W.2d 501, 503 (Iowa 2009). Thus, reversal is appropriate only where "exclusion of the evidence affected a party's substantial rights." *Scott*, 774 N.W.2d at 503.

C. Wessels' Violation of Department Policy Was Legitimate Circumstantial Evidence of His Intent

Evidence about Wessels' failure to activate his dash cam was properly admitted as circumstantial evidence of his intent to commit assault and battery. Wessels conduct in violating departmental policy regarding pursuits and use of force are likewise evidence of his intent. Further, that evidence is relevant in determining

whether Wessels acted without justification pursuant to jury instruction number 14. D0262 at 8.

In Iowa, circumstantial evidence is entitled to as much weight as direct evidence, and sometimes more. *State v. O'Connell*, 275 N.W.2d 197, 205 (Iowa 1979). The fact that an officer fails to activate a dash or body cam is circumstantial evidence of that officer's intent to do something that he or she does not want to have recorded. *Cf. Martin v. Tovar,* 991 N.W.2d 760, 764 (Iowa 2023) (officer "turned off the camera in his police car and turned off his body microphone, testifying that 'I didn't want the police department to know what I was doing that I shouldn't have been.'").

It is common knowledge that rogue officers who commit crimes on duty often deactivate their badge or dash cameras first. Evidence of that violation of department policy is admissible in criminal trials against law-enforcement officers accused of intentional wrongdoing. *Id*. at 763. (summarizing evidence used to convict police officer of raping a civilian on duty, including proof "he didn't activate his . . . dashboard camera, all to avoid creating a recording"). Logically, it is also admissible as proof of intent in civil litigation against those officers. *Id*.

The Defendants argue that the dash camera might not even have shown the collision. Defs.'App. Br. at 85. That is untrue, since the other cruiser cam admitted

into evidence shows what is in front of the vehicle. D0351. And it is also irrelevant, because Wessels' decision to avoid recording would still be probative of his intent.

Here, the court properly instructed the jury about the legal consequences of Wessels violating departmental policy. The defense made no objection to Instruction No. 15, which stated as follows:

> You have heard testimony and received evidence of Manchester Police Department policies and procedures. Those procedures do not establish a standard of care that Defendant Wessels had to follow. The mere fact that such a policy or procedure was violated does not automatically mean that Defendant Wessels committed assault or battery. You must make findings on assault and battery based upon the standards given to you in these instructions.

D0262 at 8.

VII. SUFFICIENT RECORD EVIDENCE SUPPORTS THE JURY VERDICT THAT WESSELS' ACTED WITH WILLFUL, WANTON AND RECKLESS DISREGARD FOR THE RIGHTS OR SAFETY OF GUS MORMANN

A. Preservation of Error

Mormanns agree that Defendants preserved error on this issue.

B. Standard of Review

"On a weight-of-the-evidence claim, appellate review is limited to a review of the exercise of discretion by the trial court, not of the underlying question of whether the verdict is against the weight of the evidence." *State v. Reeves*, 670 N.W.2d 199, 203 (Iowa 2003). "Generally, [appellate courts] are reluctant to interfere with a jury verdict and give considerable deference to a trial court's decision

not to grant a new trial." *Condon Auto Sales & Serv., Inc. v. Crick*, 604 N.W.2d 587, 594 (Iowa 1999).

C. Wessels Acted with Malice

Wessels, along with all others who testified on this subject, admitted there is nothing a law enforcement officer can safely do to force a motorcyclist to stop. D0342 at 120:6-20 (Wessels), D0342 at 170:6-18 (Officer Piersch), D0344 at 191:4-21 (Trooper Payne), D0340 at 54:23-55:22 (Plts. Exp. Alpert), D0346 at 43:12-22 (Eyewitness Hempstead), D0343 at 57:6-58:11 (Police Chief Hauschild) and D0343 at 150:22-25 (Def. Exp. Stephenson). Then Wessels proceeded to chase Mormann down and intentionally run him off the road knowing the results would be catastrophic. D0340 at 127:24-128:3. Iowa does not have the death penalty, much less authorizing the summary execution of motorcyclists who refuse to stop when ordered to do so for traffic infractions. Wessels conduct was willful, wanton and reckless sufficient to establish malice, express or implied.

The record is clear that Wessels drove recklessly throughout his chase of Mormann, up to 88 mph in town and 128 mph outside of town. D0263 at 4. Wessels was repeatedly asked what he planned to do once he caught up to Mormann that justified his high-speed driving and Wessels repeatedly refused to provide an answer.

D0342 at 69:19-20 (citing D0325 at 53:25-55:22); D0342 at 72:24-25 (citing D0325 at 61:4-68:10). Eventually, the following exchanged took place:

> Q. Yes, but now you're in the lane in front of him.
> A. I'm merging over, and he is choosing to accelerate.
> Q. Yes. And you're choosing to decelerate?
> A. At that time I would say I'm coasting.
> Q. Okay. Now as you are decelerating or coasting, what did you expect would happen to the motorcyclist who was moving at a faster rate of speed behind you? Did you expect him to slow down?
> A. Yes.
> Q. So what you were really doing, sir, is you were going around him, hoping that he would see your car in front, and rather than accelerate and try to go around you, he would just begin to slow down and stop?
> A. Well, sir, as I said, this is -- was a very fluid situation. And he had a choice not to accelerate.

D0342 at 85:13-15 (citing D0325 at 87:25-88:18).

In the end, Wessels admitted doing precisely what he understood you cannot do in the pursuit of a motorcycle - force the motorcycle to stop. D0342 at 69:11-12 (citing D0325 at 52:8-12) (“Q. Did you ever form the intent to use a level of force necessary to force the motorcyclist to stop? A. There is virtually no level of force other than your presence that you can use with a motorcycle.”). See also, D0342 at 68:13-16. (“Q. So you agree that whatever crime he had committed, whatever crimes he had committed, deadly force would not have been appropriate on the road? A. Absolutely not.").

VIII. THE DECISION TO NOT SUBMIT A STATUORY RECKLESSNES CLAIM PURSUANT TO I.C.A. 321.231(6) WAS NOT A DISMISSAL WITH PREJUDICE

A. Preservation of Error

Defendants did not preserve error on this issue. The issue was never presented to the District Court. The Defendants failed to follow Iowa R. App. Pr. 6.903(2)(a)(8) (1), requiring a statement regarding how the issue was preserved. Defs.' App. Br. at 88.

B. Standard of Review

Since the District Court has not ruled on this issue, should the jury verdict be reversed on appeal for any reason, the case should be remanded to the District Court to decide this issue. The Iowa Supreme court has held that, "[w]e review a court's refusal to give an instruction for an abuse of discretion, while we review challenges to jury instructions for correction of errors at law." *Anderson v. State*, 692 N.W.2d 360, 363 (Iowa 2005).

C. The District Court Specifically held that Plaintiffs Did Not Dismiss the Statutory 321.231(6) Claim with Prejudice

The Defendants take the quote about the election not to submit a statutory 321.231(6) claim to the jury out of context. Defs.' App. Br. 88. The full quote from the court is "[t]hat's intentional on Plaintiffs' part. I won't ask you to stand up on the record today and dismiss your count related to recklessness, but you're not going to ask that it be submitted to the jury…." D0347, Trial Tr. Vol. VI at 17:9-16.

The caselaw submitted by the Defendants does not support their position. In *Mitchell v. Marriott Int'l Inc*, No. 4:17-CV-1801 RLW, 2017 WL 5633111, at *8 (E.D. Mo. Nov. 21, 2017), the court's holding of abandonment had to do with claims left out of an amended complaint. Here, the statutory 321.231(6) claim was not submitted to avoid jury confusion and the application of comparative fault to intentionally reckless conduct. If the circumstances of the case change because of a reversal on appeal, the trial court should be given an opportunity to determine the efficacy of submitting a statutory 321.231(6) claim to the jury on remand.

In *Norris v. Paulson*, Case No. 23-0217, issued October 11, 2024 (*per curium*), the Iowa Supreme Court upheld the Court of Appeals affirmance of a trial court decision denying summary judgment to an officer accused of using excessive force and assault. *Norris* at *2. The *Norris* court, however, reversed the Court of Appeals decision dismissing the excessive force claim based on *Burnett*, which was not issued until after the District Court ruled against the officer on both qualified immunity and justification grounds. *Norris* at *2-3. The *Norris* court reasoned, as follows:

> Also, as in *Thorington*, this case will continue in district court, and it is better to allow that court to decide the course of the constitutional claims in the first instance. [Citing *Thorington v. Scott Cnty*., 2024 Iowa Sup. LEXIS 25, *1, 3 N.W.3d 558, 2024 WL 874182] ("[W]e decline to decide (or to direct the district court how to decide) other requests for relief by the parties in this appeal that have not been presented to the district court, including the application of the holding in *Burnett*.").

Norris at *5. On remand, the District Court must first consider any viable alternative claims the Plaintiffs choose to make in light of this court's decision, including claims that previously were duplicative and/or would have caused jury confusion. For all the reasons set out in *Norris*, this court should decline to decide any issue related to claims pursuant to Iowa Code § 321.231(6), until after the District Court has addressed those issues on remand, as necessary.

CONCLUSION

For the reasons stated above, the jury verdict and the District Court's rulings should be affirmed on appeal.

ATTORNEY'S COST CERTIFICATE

I, David A. O'Brien, certify that there was no cost to reproduce copies of the preceding Plaintiff-Appellant's Proof Brief because the appeal is being filed exclusively in the Appellate Courts' EDMS system.
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