IN THE SUPREME COURT OF IOWA

SUPREME COURT CASE NO. 22-1625
HUMBOLDT COUNTY NO. LACV018792

KRYSTAL WAGNER, INDIVIDUALLY AND AS ADMINISTRATOR OF THE ESTATE OF SHANE JENSEN,

Plaintiff-Appellant,

vs.

STATE OF IOWA AND WILLIAM (BILL) L. SPECE,

Defendants-Appellees.

APPEAL FROM THE IOWA DISTRICT COURT
FOR HUMBOLDT COUNTY
HONORABLE KURT J. STOEBE

PLAINTIFF-APPELLANT'S APPLICATION FOR FURTHER REVIEW OF COURT OF APPEALS DECISION FILED MARCH 27, 2024

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QUESTIONS PRESENTED FOR REVIEW

I. Does the Court of Appeals decision conflict with this Court's holding in *Thorington v. Scott County*, remanding a matter to the district court for implementation of *Burnett* because the case was on appeal when the Court reversed *Godfrey*?

II. Does the Court of Appeals decision conflict with Iowa's longstanding notice pleading rules and *Wagner v. State* by failing to consider an excessive force claim the "functional equivalent" of an assault and battery claim?

III. Does the dismissal of Wagner's lawsuit constitute a due process violation by negating a vested right identified by this Court in this same dispute in *Wagner v. State*, 952 N.W.2d 843 (Iowa 2020)?

IV. Should the district court's decision on the merits be reversed for confusing subjective motivation with allegedly observed facts justifying the use of deadly force, claiming both to be irrelevant because the standard is "what a reasonable officer would have believed rather than Spece's subjective beliefs"?

V. Should the district court's decision dismissing Wagner's claim on the merits be reversed for deciding critical factual disputes in Defendants' favor, including that Jensen was "pointing the gun toward" Spece when Spece fired, even though no evidence in the record supports that claim and Spece's own description of events contradicts it?

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STATEMENT SUPPORTING FURTHER REVIEW

All four of the grounds for further review set out in the appellate rules apply and counsel that the Supreme Court should review and reverse the decision of the Court of Appeals. Iowa R. App. P. 6.1103(1)(b)(1)-(4).

The Court of the Appeals decision conflicts with this Court's decision in *Thorington v. Scott County*, Case No. 22-1194, 2024 Iowa Sup. LEXIS 25 (Mar. 1, 2024). *Thorington,* another wrongful death case raising direct constitutional claims pursuant to *Godfrey*, was on appeal at the time this Court decided *Burnett v. Smith,* 990 N.W.2d 289, 306 (2023). In both cases, the plaintiff had dismissed their common law claims, leaving only the *Godfrey* claims this Court previously endorsed. This Court denied the *Thorington* defendants' efforts to dismiss the entire case, but the Court of Appeals did the opposite in this case. The Court of Appeals should have remanded the matter to the district court for further proceedings to consider "the application of the holding in *Burnett*." *Thorington* at *3-4.

The Court of Appeals also failed to follow the decision in this very dispute from three years ago, where this Court specifically held that Wagner had a cause of action under Iowa law. *Wagner v. State*, 952 N.W.2d 843, 847 (Iowa 2020) (Wagner was "required to bring her Iowa constitutional claims in the appropriate Iowa district court under Iowa Code section 669.4."). Even recognizing the changes in the law since that time, the Court of Appeals decision fails to implement *Burnett* and *White v.*

Harkrider, 990 N.W.2d 647, 656 (Iowa 2023). Common law claims recognized at the time of the adoption of the Iowa Constitution in 1857, including specifically assault and battery claims against law enforcement officers, remain viable because "the Iowa Constitution secures a right to assert nonconstitutional causes of action for money damages against government officials under certain circumstances." *Lennette v. State*, 975 N.W.2d 380, 403 (Iowa 2022) (McDonald, J., concurring). "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 against government officials for unlawful searches and seizures." *Id.* (quoting Iowa Const. art I, § 8). The Iowa Court of Appeals failed to recognize the continuing viability of assault and battery claims under the facts of this case—claims that are the functional equivalent of the *Godfrey* claims this Court unexpectedly extinguished while this litigation progressed.

This Court held just three years ago that common law assault and battery claims against law enforcement officers are the "functional equivalent" of constitutional excessive force claims. *Wagner*, 952 N.W.2d at 855 ("a claim under the Iowa Constitution and common law assault and battery are two different causes of action. … 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") (citing *Greene v. Friend* of Ct., 406 N.W.2d 433, 436 (Iowa 1987). Therefore, the decision of the Court of Appeals violates Iowa's notice pleading standard and applicable caselaw by failing to recognize Wagner's excessive force *Godfrey* claim as a viable assault and battery claim under *Burnett* and *White*. See Iowa R. Civ. P. 1.403(1) and *Rieff v. Evans*, 630 N.W.2d 278, 292 (Iowa 2001) (A "pleading is sufficient if it apprises of the incident out of which the claim arose and the mere general nature of action… 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.").

Implementation of the Court of Appeals decision against Wagner would constitute a due process violation since she has a "vested interest in her right to pursue a remedy for the wrongful death of her son under Iowa law." See *Wagner*, 952 N.W.2d at 847 and *Thorp v. Casey's General Stores, Inc*., 446 N.W.2d 457 (Iowa 1989).

Finally, the Court should reverse the district court's grant of summary judgment because the district court improperly made factual determinations in favor of the nonmoving party and the district court erred in applying the legal standard for determining whether William Spece was justified in killing Shane Jensen.

ARGUMENT

Three years ago, this Court told Wagner that she had a private right of action

under the Iowa Constitution to assert that a DNR officer used excessive deadly force on her suicidal 19-year-old son, but that she was "required to bring her Iowa constitutional claims in the appropriate Iowa district court under Iowa Code section 669.4." *Wagner*, 952 N.W.2d at 847. Wagner followed the dictates of that decision where an Iowa District Judge dismissed her lawsuit on substantive grounds before *Godfrey v. State (Godfrey II),* 898 N.W.2d 844 (Iowa 2017) was reversed by *Burnett v. Smith,* 990 N.W.2d 289, 306 (Iowa 2023).

For reasons of judicial efficiency, Wagner agreed not to contest the dismissal of her common law claims at the district court level because under *Godfrey* those claims were subject to dismissal pursuant to statutory immunity. Iowa Code § 669.14(4).[1] There was no reason to contest dismissal because, at the time, this Court had assured Iowans that they could pursue functionally equivalent constitutional claims against government wrongdoers. This Court's abrupt about-face in *Burnett* belied those prior assurances.

The only just and equitable result is to allow *Godfrey* litigants with viable common law claims functionally equivalent to their now-defunct *Godfrey* claims to proceed with those common law claims in district court. Such a result would have narrow application to parties whose common law claims were cast aside in

[1] For reasons of *res judicata* and issue preclusion Wagner previously dismissed her federal 42 U.S.C. § 1983 case. Joint Stipulation of Dismissal Without Prejudice, No. 3:19-cv-3007, Doc. 42 (N.D. Iowa Dec. 3, 2021).

reasonable reliance on this Court's unconditional recognition of constitutional claims, and who were then were adversely affected by this Court's reversal in *Burnett*. Wagner is such a litigant, and this Court should grant further review, reverse the decision of the Court of Appeals, and allow Wagner to proceed with her common law assault and battery claims in district court.

I. THE COURT OF APPEALS DECISION CONFLICTS WITH THIS COURT'S HOLDING IN *THORINGTON V. SCOTT COUNTY* BECAUSE IT DISMISSED WAGNER'S CLAIMS INSTEAD OF REMANDING THE MATTER TO THE DISTRICT COURT FOR IMPLEMENTATION OF *BURNETT*

The Court of Appeals held as follows:

> Wagner agreed to the dismissal of her common law wrongful death claim. And she did not appeal the dismissal of that count…. We conclude any arguments based on these claims have been waived. *See* Iowa R. App. P. 6.903(2)(g)(3) ("Failure to cite authority in support of an issue may be deemed waiver of that issue.").

(Decision, 6). In *Thorington*, the defense argued for the same outcome. This Court, however, recognized the absurd unfairness in dismissing a case after a reversal of law without giving the impacted party the opportunity to recast the pleadings to comply with the new law. The Court of Appeals' decision is directly contrary to this Court's reasoning in *Thorington*:

> We note that we requested supplemental briefing from the parties pertaining to the viability of Thorington's clams under the Iowa Constitution in light of *Burnett v. Smith*, 990 N.W.2d 289 (Iowa 2023). After consideration, we do not address any such questions here. Having now affirmed the district court's order on the applicability of § 670.4A, we 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*. We remand the case for further proceedings.

Thorington, 2024 Iowa Sup. LEXIS 25 at *3-4.

The Court of Appeals reached the opposite conclusion *Thorington*. Wagner is entitled to a substantive review of the district court's decision, or to have the district court review its prior decision on remand in light of *Burnett*. Wagner should not be told that since she is not clairvoyant, she forfeited her right to have the substance of the district court's summary judgment decision reviewed on appeal. Wagner and her counsel reasonably relied on this Court's recognition and development of *Godfrey* claims over a span of years. This Court's abrupt reversal of what had become well-defined precedent should not decimate Wagner's opportunity to seek justice for the wrongful killing of her child.

II. WAGNER'S NOW-DEFUNCT *GODFREY* CLAIMS ARE THE FUNCTIONAL EQUIVALENT OF COMMON LAW ASSAULT AND BATTERY CLAIMS AND SHOULD BE ALLOWED TO PROCEED AS COMMON LAW CLAIMS

This Court previously held, in this same dispute, that common law assault and battery claims against law enforcement officers are the "functional equivalent" of excessive force claims. *Wagner*, 952 N.W.2d at 855 (citing *Greene*, 406 N.W.2d at 436). This Court has "reiterated this point in a number of cases." *Id.; see also Smith v. Iowa State Univ. of Sci. & Tech*., 851 N.W.2d 1, 20-21 (Iowa 2014); *Trobaugh v.*

Sondag, 668 N.W.2d 577, 584 (Iowa 2003); and *Hawkeye By-Prods., Inc. v. State*, 419 N.W.2d 410, 411-12 (Iowa 1988).

The same factual allegations necessary to make a constitutional excessive force claim put the Defendants on notice of Iowa common law claims of assault and battery that are protected by the Iowa Constitution. In *White v. Harkrider*, 990 N.W.2d 647, 656 (2023) this Court held, "[w]hen the plaintiff's pleading is viewed in the light most favorable to her, she has sufficiently pleaded an assault." White had alleged police "engaged in a show of force disproportionate to the offense being investigated," and that "many deputies and officers [had] their firearms trained on her." *Id.* While noting this conduct "was not beyond the bounds of all decency in a civilized society, it could put a person in fear of physical pain or injury." *Id.* Importantly, at the motion to dismiss stage, justification was not at issue. *Id.* at 656-657. This Court affirmed the dismissal of White's *Godfrey* claims based on the overruling in *Burnett* but allowed the common law assault claim to proceed. The same result should be reached here.

Assault and battery were recognized as civil claims before the adoption of the Iowa Constitution in 1857. *Scott v. United States*, 1 Morris 142, 144 (Iowa 1843). In *Mormann v. Manchester and Wessels*, Delaware County No. LACV091647 (Iowa Dist. Mar. 7, 2024), District Court Judge Thomas Bitter noted in an order, "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* at p. 3. The *Mormann* court reasoned that no formal amendment to include an assault claim was necessary because "[t]hroughout 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." *Id*. The Mormann court's reasoning was essentially that a constitutional excessive force claim is the functional equivalent of a common law assault and battery claim.

No magic words are required to plead a cause of action. Iowa R. Civ. P. 1.402(2) ("No technical forms of pleadings are required."). This Court has held, "we do not require a petition to allege a specific legal theory." *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*, 630 N.W.2d at 292.

III. THE COURT OF APPEALS DECISION VIOLATES DUE PROCESS BY TROUNCING WAGNER'S VESTED RIGHT TO PURSUE A CLAIM UNDER IOWA LAW

After Spece killed Jensen, the Jensen estate and his mother, Krystal Wagner, had vested interests in Iowa based claims recognized by this Court. *Wagner*, 952 N.W.2d at 847. Wagner exhausted administrative remedies and properly filed a lawsuit in the district court, as directed by this Court. *Id.* It is indisputable that Wagner relied upon the decision in *Godfrey II* and subsequent affirming cases, including *Wagner,* to assert a claim against Spece pursuant to Iowa law. The Court of Appeals decision, if not reversed, would completely abrogate that right.

This Court has previously held that retroactive application of an amendment to a statute constitutes a violation of a litigant's due process rights under Article I, Section 9 of the Iowa Constitution and the Fifth Amendment to the U.S. Constitution. *Thorp v. Casey's General Stores, Inc*., 446 N.W.2d 457, 463 (Iowa 1989) ("[W]e believe that plaintiff had a vested property right in her cause of action against Casey's and that the retroactive application of the 1986 amendment destroyed that right in violation of due process under both the federal and state constitutions.").

In *Thorp*, this Court reasoned:

> …a statutory amendment that takes away a cause of action "that previously existed and does not give a remedy where none or a different one existed previously" is substantive, rather than merely remedial, legislation. Substantive law is "that part of the law which creates, defines, and regulates rights."

Id. at 460-461; *see also Gacke v. Pork Xtra, L.L.C.*, 684 N.W.2d 168, 179 (Iowa 2004) ("This court has also found it important in substantive due process analysis to consider whether the effect of a statute is 'to give an injured person, in essence, no right of recovery.'").

Accordingly, Wagner had a vested property right in an Iowa based claim at the time that her son was wrongfully killed on November 11, 2017. When this Court overturned its decision in *Godfrey II*, like the substantive amendment by the legislature in *Thorp*, that act extinguished Wagner's vested property right in violation of her constitutional due process rights. That is true, of course, only if no other reasonable remedy is provided. Note that Wagner's 42 U.S.C. § 1983 was previously dismissed in reliance on this Court's decision in *Wagner.* 952 N.W.2d at 855. "[A] statutory amendment that takes away a cause of action 'that previously existed and does not give a remedy where none or a different one existed previously' is substantive, rather than merely remedial, legislation. *Thorp*, 446 N.W.2d at 461 (quoting *Vinson v. Linn-Marr Community School Dist.*, 360 N.W.2d 108, 121 (Iowa 1984)). "Even remedial statutes have been found to violate due process when applied retroactively to remove vested rights." *Thorp*, 446 N.W.2d at 462. The U.S. Supreme

Court has indicated that a legislature does not exceed its authority when it alters a remedy as long as it does not violate a vested right and "leaves the parties a substantial remedy." *Ettor v. Tacoma*, 228 U.S. 148, 156 (1913). *Burnett* abruptly took away Wagner's *Godfrey* claims, but left Wagner with a "substantial remedy"—her common law claims of assault and battery. The Court of Appeals took what was left after *Godfrey* away from Wagner and, as a result, violated her due process right. This Court should rectify the deprivation of Wagner's rights by reversing and remanding this case to the district court for further proceedings under the Iowa common law.

IV. THE COURT OF APPEALS DECISION MUST BE REVERSED BECAUSE IT FAILED TO ADDRESS IMPROPER FACTUAL DETERMINATIONS IN THE DISTRICT COURT'S SUMMARY JUDGMENT DECISION

The Court of Appeals referenced the district court's September 22, 2022, summary judgment ruling but did not review the substance of the ruling. (Decision, 4). This Court should reverse the holding of the Court of Appeals because the district court's summary judgment ruling contained serious factual errors.

The district court relied on a statement made by Deputy Kenneth Vorland, prepared for this litigation three years after the incident, which was completely contradicted by the report he prepared immediately after the incident. (App. 33, Order p. 4). The DCI created an overhead chart of the scene of the shooting showing where all the key players were located and identifying critical evidence like shell

casings. (App. 149, Dep. Ex. 9). The DCI did not even bother to locate Vorland on this overhead because he saw nothing of relevance, as set out in his report. (*Id*.; App. 149, 180, 182, Dep. Exs. 9 and 29, pp. 1 and 3 only).

In his report, prepared the night of the incident, Vorland stated he did not arrive at a position where he could see what was occurring in the backyard until just as Spece shot and killed Jensen. (App. 182, Dep. Ex. 29, p. 3.). In his deposition, Vorland admitted preparing the report the evening of the incident and that his recollection was better at that time, rather than three years later when he provided a supporting statement to the Defendants. *Id*. In his statement to Defendants' counsel, Vorland purported to see critical facts, not only left out of his report, but of which he could not have observed unless the report he completed was false because Vorland's report states that he got to the scene late, just as Spece fired and killed Jensen. (App. 180-83, Vorland Rpt., Dep. Ex. 29; App. 142-43, Vorland Dep. pp. 30:2-31:3 and 32:25-33:15).

The most egregious factual mistake by the District Court was concluding that Spece saw Jensen "point the gun toward himself and Deputy Fisher." (App. 26, Order p. 4). Spece never claimed the gun was pointing at him. In fact, given Spece's factual claim regarding why he killed Jensen, specifically that "…I watched his wrist. I could see his muscles in his hand, and I knew he was going to shoot, and I shot," the gun could not have been pointed at Spece at the time. (App. 33, Order, p.

11 and App. 167, Dep. Ex. 20, p. 10). If the gun was pointed at Spece, then Spece may have been able to see the barrel of the gun and Jensen's fingers on the handle, but not Jensen's hand or wrist. The gun would block the view. However, if the gun remained pointed at Jensen's head or up in the air, then Spece could have observe Jensen's hand and wrist, as he testified. At a minimum there is a factual dispute on this critical issue requiring reversal of the District Court's holding that the gun was pointed at Spece. (App. 26, Order p. 4).

The District Court's conclusion that it "is not left with only Officer Spece's testimony of the shooting. Rather, the record includes deposition transcripts from numerous eyewitnesses and expert testimony, video footage, and law enforcement reports," is also particularly troubling because none of that other evidence supports Spece's claim that deadly force was justified. (App. 41, Order, p. 12). We know none of the other officers used deadly force. We also know that none of the other officers claimed to have observed any justification for the use of deadly force, except for Vorland whose claim did not come until three years later and contradicted his contemporaneous report, as noted above. (App. 41, Order p. 12; App. 73, Fisher Dep. p. 26:22-27:13; App. 131, Steil Dep. p. 5:23-6:7; App. 91-92, Nielsen Dep. pp. 7:19-8:14).

The fact that the District Court referred favorably to Defendants' expert report while rejecting Plaintiff's expert report also requires reversal. (App. 32 and 34,

Order, pp. 10 and 12) (*compare* the district court's dismissal of Plaintiff's expert opinions on page 10 of the Order *with* the district court's acceptance of the Defendants' expert opinions on page 12). Choosing between competing expert reports is a factual determination for the jury to decide. *Taft v. Iowa Dist. Court for Linn County*, 828 N.W.2d 309, 315 (Iowa 2013) ("In deciding whether a fact question exists for trial at the summary judgment stage, the court does not weigh the admissible evidence tending to prove a fact against the admissible evidence opposing it in deciding whether a genuine issue of fact exists for trial.") The Court impermissibly made factual determinations in favor of the Defendants, so its grant of summary judgment must be reversed.

V. THE COURT OF APPEALS DECISION MUST BE REVERSED BECAUSE IT FAILED TO ADDRESS LEGAL ERRORS IN THE DISTRICT COURT'S SUMMARY JUDGMENT DECISION

Spece made the decision to shoot Jensen based entirely upon the following claimed factual observation:

> [The gun] wasn't pointed at anyone at the time. [Jensen] brought [the gun] full circle right towards… me, and I watched his wrist. I could see his muscles in his hand, and I knew he was going to shoot, and I shot.

(App. 167, Dep. Ex. 20). The District Court found that Spece's absurd justification for use of deadly force—that he had super eyesight at the time and could see Jensen's hand and wrist muscles move from 80 feet away through a chain link fence—was irrelevant because the "standard is one of objectivity . . . this court's focus is on what

a reasonable officer would have believed rather than Officer Spece's subjective beliefs." (App. 33, Order, p. 11).[2]

Spece's subjective intent is not relevant to the issues presented. However, Spece's stated reasons for shooting are the key to understanding whether he acted reasonably. In *Leydens v. City of Des Moines*, 484 N.W.2d 594, 597 (Iowa 1992), the Iowa Supreme Court discussed the objective versus subjective standard in § 1983 claims. The *Leyden* court held, "[t]he relevant question . . . is the objective (albeit fact-specific) question whether a reasonable officer could have believed [this officer's] warrantless search to be lawful… [The officer's] subjective beliefs about the search are irrelevant." At 484 N.W.2d at 597 (quoting *Anderson v. Creighton*, 483 U.S. 635, 641 (1987).

While an officer's subjective beliefs are irrelevant, the officer's claimed factual basis for the use of force is critical to the analysis and must be assessed pursuant to an objective test. See *Harlow v. Fitzgerald*, 457 U.S. 800, 815 (1982) ("The subjective component refers to 'permissible intentions.'"). In *Slone v.*

[2] Spece described his super eyesight as "your senses are heightened in those because your brain focuses so much on what you're looking at that you are -- people, not just -- people are able to do things that they wouldn't normally be able to do. They're able to see greater distances. They're able to lift cars off of people." (App. 119, Spece Dep. 73:3-4). Wagner's expert noted in his rebuttal report that Spece had an "adrenaline dump," and that this "physiological response may enhance an officer's strength. However, it also decreases their fine motor skills, produces 'tunnel vision,' and creates the perception that everything is moving in slow motion (Davis, 2020). However, it does not improve visual acuity." (App. 211, Exp. Reb. Rpt. p. 19).

Herman, the Eighth Circuit held that a "defendant's good faith or bad faith is irrelevant to the qualified immunity inquiry [because] the standard is one of 'objective reasonableness.'" 983 F.2d 107, 110 (8th Cir. 1993).

In this case, Spece's stated reasons for using deadly force are nothing short of absurd, but that does not make those reasons irrelevant as "subjective beliefs." Spece's stated reasons for using deadly force must be assessed for objective reasonableness. The district court ignored Iowa law allowing the use of deadly force by officers only if the officer "reasonably believes" it to be necessary "to defend any person from bodily harm." Iowa Code § 804.8. The real issue to be considered is: "Would a reasonable officer in Spece's position use deadly force based upon an alleged perception from 80 feet away, through a chain link fence, that an armed suicidal individual flexed the muscles in their hand and wrist?" Spece's factual justification is so absurd that no reasonable officer would have concluded that deadly force was justified on those facts, which is why the district court should have granted Wagner's Partial Motion for Summary Judgment and denied the Defendants' Motion for Summary Judgment.

At the summary judgment stage, any factual disputes related to justification for using deadly force must be resolved in Plaintiff's favor. *Linn*, 929 N.W.2d at 730. The district court's refusal to do so in assessing the ultimate fact in the case, *i.e.*, whether Spece could even see what he claims to have observed that caused him

to conclude deadly force was justified, mandates reversal.

The district court's Order finding that Spece's alleged observation of Jensen's "arm movements raising the handgun up and down in the direction of the officers," is relevant to the analysis, but somehow Spece's claim of seeing Jensen's hand and wrist muscles flex from 80 feet away through a chain link fence, as the justification for pulling the trigger, is not, is beyond contradictory and illogical. (App. 33 and 34, Order pp. 11 and 12). The standard to be applied is objective, but that standard must be applied to all the alleged facts, not just the ones that purport to support the Defendants' theory of the case.

The difference between a fact alleged to support the use of deadly force and a fact establishing improper motivation for the use of deadly force is made clear by the record in this case. The record is undisputed that after killing Jensen, Spece and Deputy Fisher called Jensen a "piece of shit" and a "chicken shit." (App.188-189, Tr. Stringer Body Cam). The undisputed fact that Spece was motivated to kill Jensen because he thought Jensen was a "piece of shit," is immaterial to the issues presented on this appeal. *See Leydens* at 597. All the factual observations Spece made regarding why he chose to use deadly force are, on the other hand, highly relevant and material.

In *Parkins v. Nguyen*, a federal district court held after examining the factual circumstances surrounding an arrest that "[i]t was reasonable for [] officers to

believe that Plaintiff was concealing a weapon either in his hands or in the purse he was holding. Although this belief ultimately proved incorrect." 2018 U.S. Dist. LEXIS 176262, *14-15, 2018 WL 4956516 (W.D. Ark. Oct. 12, 2018). As the Eighth Circuit held in *Dooley v. Tharp*, "[W]e must view [the officer's] mistaken-perception action for objective reasonableness. 856 F.3d 1177, 1183 (8th Cir. 2017) (citing *Loch v. City of Litchfield*, 689 F.3d 961, 966 (8th Cir. 2012) ("An act taken based on a mistaken perception or belief, if objectively reasonable, does not violate the Fourth Amendment.")). Spece's alleged perception does not pass the objectively reasonable test.

The case of *Partridge v. City of Benton* is right on point. 929 F.3d 562 (8th Cir. 2019). *Partridge* involved a suicidal armed young man who "was not suspected of a crime. He was not actively resisting arrest or attempting to flee. He was, however, armed, suicidal, and under the influence of cough syrup and possibly marijuana." *Id.* at 565. The Eighth Circuit reasoned:

> Whether a reasonable officer could conclude he posed an immediate threat depends on the circumstances at the time of the shooting. Taking the facts in the complaint as true, "[the deceased] simply began to move the gun away from his head, was shot as he began to move the gun away from his head, per [the officer's] orders to 'drop the gun,' and never pointed the gun at the officers." On these facts, no reasonable officer could conclude that a compliant individual posed an immediate threat.

Id. Note there is no indication in the *Partridge* case that the shooting officer was protected by being a sufficient distance away and behind adequate cover at the time

of the shooting. *Id*. at 564. In fact, in *Partridge* the shooting officer was close enough to the deceased to use his handgun. *Id*.

In *Partridge*, the Eighth Circuit rejected the district court's conclusion that "it would have 'been nearly impossible for [the officer] to tell whether [the deceased] was moving the gun away from his head to comply with [the officer's] order or if he was repositioning the gun to aim it at the officers.'" *Id.* at 565. The Eighth Circuit reversed the district court by holding that the deceased "had to move the gun to comply with [the officer's] commands. The complaint does not tell the direction or speed [the deceased] moved the gun, how far he moved it before [the officer] shot him, or the timing of the facts." *Id.* at 566. Here, as in *Partridge*, any movement described by Spece that Jensen made could have been in compliance with the repeated orders to "drop the gun." That is a fact issue for a jury to resolve.

In *Wilson v. City of Des Moines*, the Eighth Circuit held that factual issues about how suspect turned towards officers—whether he turned in a shooting stance—precluded qualified immunity on an excessive-force claim. 293 F.3d 447, 452-54 (8th Cir. 2002). In *Perez v. Suszczynski*, the Eleventh Circuit held that the "mere presence of a gun or other weapon is not enough to warrant the exercise of deadly force and shield an officer from suit. Where the weapon was, what type of weapon it was, and what was happening with the weapon are all inquiries crucial to the reasonableness determination." 809 F.3d 1213, 1220 (11th Cir. 2016); *see also*

Craighead v. Lee, 399 F.3d 954, 961-62 (8th Cir. 2005) (denying qualified immunity where the officer shot a suspect holding a gun "continuously over [his] head, pointed upward," while struggling with another person).

The holdings of *Partridge*, *Wilson*, *Perez* and *Craighead* are supported by Iowa law. Iowa Code § 704.1 defines reasonable deadly force as -

> that force and no more which a reasonable person, in like circumstances, would judge to be necessary to prevent an injury or loss and can include deadly force if it is reasonable to believe that such force is necessary to avoid injury or risk to one's life or safety or the life or safety of another, or it is reasonable to believe that such force is necessary to resist a like force or threat.

Iowa Code § 704.2(2) limits the justification for the use of "deadly force" stating, that it "does not include a threat to cause serious injury or death, **by the production, display, or brandishing of a deadly weapon**, as long as the actions of the person are limited to creating an expectation that the person may use deadly force to defend oneself, another, or as otherwise authorized by law." (emphasis added). The district court's order on summary judgment was contrary to Iowa Code §§ 704.1 and 704.2 because it found Spece was justified in using deadly force as a matter of law, even though a reasonable juror could conclude that Jensen was doing no more than "displaying or brandishing" a deadly weapon.

The district court's refusal to assess the ultimate fact in the case, *i.e.*, whether Spece could even see what he claims to have observed that caused him to conclude deadly force was justified, mandates reversal. Four other law enforcement officers

were present and aware of all the other facts noted by Defendants—Jensen firing the gun in the air, the refusal to drop the gun, the statements Jensen made, the location, the bystanders and Jensen's arm movements—and *none* of them concluded the use of deadly force was justified. None of them fired. At a minimum, a fact issue regarding the reasonableness of Jensen's use of deadly force remains for a jury.

CONCLUSION

For the reasons stated above, the Court of Appeals decision should be reviewed and reversed, the decision of the district court granting summary judgment to the Defendants should be reversed and the matter should be remanded for trial, or at a minimum, for the district court to assess the impact of *Burnett* on the case.

CERTIFICATE OF SERVICE

I, Nathan Borland, certify that on the 16th day of April, 2024, I electronically filed the foregoing Application for Further Review with the Clerk of the Iowa Supreme Court by using the EDMS system. Service on all parties will be accomplished through EDMS.

Certified by: *<u>/s/ Nathan Borland</u>*

CERTIFICATE OF COMPLIANCE WITH TYPEFACE REQUIREMENTS AND TYPE-VOLUME LIMITATION

This application complies with the typeface and type-volume requirements of Iowa R. App. P. 6.1103(5) because:

[X] this application has been prepared in a proportionally spaced typeface using Times New Roman in 14 point font, and contains 5,199 words, excluding the parts of the application exempted by Iowa R. App. P. 6.1103(5)(a).

/s/ David A. O'Brien — April 16, 2024

Signature — Date