

IN THE SUPREME COURT OF IOWA

SUPREME COURT NO. 23-0217

BRIAN NORRIS,

Plaintiff- Appellee

vs.

TRUDY PAULSON and CITY OF DES MOINES, IOWA,

Defendants- Appellants

APPEAL FROM THE DISTRICT COURT
FOR POLK COUNTY
THE HONORABLE SARAH CRANE

APPELLANT'S APPLICATION FOR FURTHER REVIEW OF THE
DECISION OF THE IOWA COURT OF APPEALS FILED JUNE 5, 2024

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QUESTION PRESENTED FOR REVIEW

(1) Whether the Court of Appeals may dismiss Appellee's claims for unreasonable seizure under the Iowa Constitution based upon *Burnett v. Smith*, 990 N.W.2d 289, 307 (Iowa 2023), when those issues were not raised, presented, or decided by the District Court?

TABLE OF CONTENTS

Question Presented for Review.....Page 2

Statement Supporting Further Review.....Page 5

Nature of the Case.....Page 6

Statement of Facts.....Page 7

Argument.....Page 12

**THE COURT OF APPEALS ERRED IN
DISMISSING APPELLEE’S CONSTITUTIONAL
CLAIM AS THE ISSUES RAISED IN *BURNETT V.
SMITH* WERE NOT RAISED, PRESENTED, NOR
RULED UPON BY THE DISTRICT COURT.**

Conclusion.....Page 16

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page(s)</u>
United States Supreme Court	
<i>New Jersey v. T.L.O.</i> , 468 U.S. 1214 (1984) (Stevens, J., dissenting).....	14
Iowa Supreme Court	
<i>Burnett v. Smith</i> , 990 N.W.2d 289 (Iowa 2023)	2, 5-6, 12, 14
<i>Estate of Gottschalk by Gottschalk v. Pomeroy Dev., Inc.</i> , 893N.W.2 579 (Iowa 2017)	13
<i>Estate of Cawiezell v. Coronelli</i> , 958 N.W.2d 842 (Iowa 2021)	13
<i>Godfrey v. State</i> , 898 N.W.2d 844 (Iowa 2017)	15
<i>In re Det. Of Anderson</i> , 895 N.W.2d 131 (Iowa 2017).....	13
<i>Thorington v. Scott Cnty.</i> , 3 N.W.2d 558, 2024 WL 874182, (Iowa 2024).....	5-6
<i>Meier v. Senecaut</i> , 641 N.W. 2d 532 (Iowa 2002).....	12
<i>State v. Crawford</i> , 972 N.W.2d 189 (Iowa 2002).....	13-14
<i>State v. Ambrose</i> , 861 N.W.2d 550 (Iowa 2015).....	14
<i>White v. Harkrider</i> , 990 N.W.2d 647 (Iowa 2023).....	15
<i>Carter v. State</i> , 990 N.W.2d 308 (Iowa 2023).....	15
<i>Venckus v. City of Iowa City</i> , 990 N.W.2d 800 (Iowa 2023).....	15
Iowa Court of Appeals	
<i>Christensen v. Eral</i> , no. 22-1971, 2024 WL 108848 (Iowa Ct. App., Jan 10, 2024)	15
<i>Dishman v. State</i> , No. 22-1491, 2023 WL 8068563 (Iowa Ct. App. Nov 1, 2023).....	15
<u>Court Rules</u>	
Ia.R.App.Pro 6.1103.....	5, 17

STATEMENT SUPPORTING FURTHER REVIEW

COMES NOW Plaintiff-Appellee, Brian Norris, pursuant to Iowa R. App. P. 6.1103(b)(1), and hereby requests further review of the June 5, 2024, decision of the Court of Appeals in *Norris v. Paulson*, Supreme Court No. 23-0217.

The Court of Appeals erred in dismissing Appellee’s claims for unreasonable seizure under the Iowa Constitution because that issue was not properly before it. *Norris v. Paulson and City of Des Moines*, No. 23-2017, pp 6-7 (June 5, 2024). The legal issues implicated by the Iowa Supreme Court’s decision in *Burnett v. Smith*, were never raised, presented, nor ruled upon by the district court. Consequently, the Iowa Court of Appeals committed error in dismissing Appellee’s Constitutional claim.

Appellants did not contest the viability of Appellee’s Constitutional claim for money damages under article I, section 8 of the Iowa Constitution at the district court level. *Burnett v. Smith* did not exist at the time this case was presented to the district court and none of the arguments underlying the *Burnett* decision were raised by Appellants at the district court level. The Court of Appeals exceeded their legal authority by ruling on an issue that was not properly before them. The Court of Appeals decision is also contrary to the Iowa Supreme Court decision of *Thorington v. Scott Cnty.*, 3

N.W.2d 558, 2024 WL 874182, *3 (Iowa 2024), where, even after supplemental briefing, this Court declined to decide the applicability of *Burnett v. Smith* to a constitutional claim brought under article I, section 8 as it was not first presented to the district court. *Id.* at 3-4.

NATURE OF THE CASE

Des Moines Police Officer, Trudy Paulson, shot Brian Norris when he posed no imminent threat to her or any other person. The entire incident was captured on officers' body worn cameras. Norris sued Paulson and the City of Des Moines in a three-Division Petition. Petition at Law; App. 122. Suit was brought pursuant to Article I, section 8 of the Iowa Constitution and also under Common Law and the Municipal Tort Claims Act. Petition at Law, p. 5; App. 127. *Burnett v. Smith*, 990 N.W.2d 289 (Iowa 2023), was not decided until after Appellants' Application for Interlocutory Appeal was granted and the issues raised in *Burnett* were never raised before the district court in this case. The Court of Appeals correctly affirmed the district court's denial of Appellants' motion for summary judgment on the assault claims but improperly dismissed Appellees constitutional claims because those issues were not raised at the district court level.

STATEMENT OF FACTS

On September 13, 2019, Des Moines Police Officers, Trudy Paulson (“Paulson”), Shawna Isaac (“Isaac”) and Sgt. Yanira Scarlett (“Scarlett”) were following up on complaints on a homeless camp located south of the railroad tracks by the Racoon River, south of the 2300 block of Terrace Road. Defendants Statement of Undisputed Facts “DSUF”, ¶¶ 7 & 8; App. 63-64. Norris was present at the homeless camp at this time and the entirety of Paulson’s interaction with the occupants of the homeless camp, including Norris, was captured by way of her body worn camera as well as Isaac’s body worn camera. Plaintiff’s Statement of Disputed Facts, “PSDF” ¶¶ 1-2; Paulson Depo, pp 66-67, 69; Isaac Depo. p. 59; App. 93, 313 & 342. Other than providing an incorrect name and identifying information when initially asked, Norris was calm and cooperative with the officers. PSDF ¶ 4 Paulson Depo, p. 80; App. 93 & 316. The demeanor of the individuals at the homeless camp during this time was also calm and cooperative. PSDF ¶ 5; Paulson Depo, p. 81; App. 93 & 317.

After finally obtaining Norris’ real name and identifying information, Paulson ran Norris through LENCIR and was informed that he had an outstanding arrest warrant for a Failure to Appear on a Fifth Degree Theft out of West Des Moines for stealing a bottle of alcohol. PSDF ¶ 8; Paulson Depo,

pp. 83-84; App. 94 & 317. The officers did not notify Norris of his outstanding warrant but shortly after Paulson received the information, Norris ran away from the officers and jumped into the river without making any threats or other statements toward the officers. PSDF ¶¶ 9-11, Paulson Depo, pp. 84-85; App. 94 & 317-318. The remaining occupants of the homeless camp stayed calm and cooperative with officers after Norris jumped into the river. PSDF ¶ 94; Paulson Depo, pp. 85-86; App. 104 & 318. Paulson and Scarlett handcuffed two individuals from the homeless camp who had outstanding warrants while Norris was in the river. PSDF ¶ 13; Paulson Interview Tr. p. 10; App. 94.

A short time later, Norris exited the river and climbed up the bank at which point Isaac notified Paulson and Scarlett that he was coming back in their direction. PSDF ¶ 14-15; Isaac Depo, p. 37; App. 94 & 337. Paulson headed toward the river and observed Norris walking parallel to her with a shovel in his right hand. PSDF ¶ 19; Paulson BWC @37:13; Paulson Depo, p. 87; App. 95 & 318. Norris walked directly to the orange folding chair and bicycle that he had been observed at, by Isaac when the officers initially made contact with him. PSDF ¶ 20; Paulson BWC @ 37:15; Isaac Depo p. 23; App.95 & 333. Paulson drew her service firearm, pointed it at Norris and screamed at him to put the shovel down. PSDF ¶ 21; Paulson BWC @ 37:15;

Paulson Depo, p. 87; App.95 & 318. Scarlett tapped Paulson on the back of her shoulder to let her know she had her back. PSDF ¶ 22; Paulson Depo p. 88; App.95 &318.

With her service firearm in her right hand, still pointed at Norris, Paulson radioed for backup. PSDF ¶ 23; Paulson BWC @ 37:24; App. 95. Four separate objects created barriers between Norris and Paulson including an orange folding chair, bicycles, and a downed tree branch. PSDF ¶¶ 24-26; App. 95-96. At this time Paulson took approximately five (5) steps *toward* Norris while continuing to scream at him to drop what was in his hand. PSDF ¶ 28; Paulson BWC @ 37:28; App. 96. Norris did not take a single step toward Paulson or anyone else. *Id.* Paulson screamed that she would shoot Norris, taking another two steps *toward* him. Norris did not take any steps toward Paulson. Paulson BWC @ 37:31. Paulson then screamed “put it down” and took another couple of steps *toward* Norris. PSDF ¶ 30; Paulson BWC @ 37:35; App. 96. Norris dropped the shovel and turned away from Paulson holding a knife in his right hand before taking six more steps *away* from Paulson toward the riverbank while looking over his left shoulder. *Id.*

Paulson continued to scream at Norris to “put it down” while taking a couple of additional steps *toward* him. PSDF ¶ 33; Paulson BWC @ 37:42; App. 96. Norris did not take any steps in the direction of Paulson. *Id.* Paulson

recognizes that a firearm has a greater lethal range than a knife. PSDF ¶ 34; Paulson Depo p. 92; App.96 & 319. Paulson was also aware that more space provides an officer with a greater tactical advantage. PSDF ¶ 35; Paulson Depo p. 91; App.96 & 319. Despite these facts, Paulson closed the distance toward Norris thereby reducing her tactical advantage on her own accord. PSDF ¶ 36; Paulson Depo, p. 96; App.96 & 320.

With Paulson screaming at him, Norris turned around to look at Paulson but did not make any statements or gestures toward her or anyone else. PSDF ¶¶ 37-38; Paulson BWC @ 37:42; Norris Affidavit; App. 97 & 350. Norris' hands remained down below his waste with the knife in his right hand. PSDF ¶ 39; Depo Exhibit 9; Norris Affidavit; App.97 & 350. While Norris stood still with his hands down below his waist, looking at Paulson, Paulson fired the first shot. PSDF ¶ 41; Paulson BWC @ 37:44; Depo Exhibit 9; Norris Affidavit; App.97, 327 & 350. The first shot missed and hit the river. *Id.* A second passed without Norris moving and Paulson fired a second shot. PSDF ¶ 43; Paulson BWC @ 37:45; App. 97. The second shot struck Norris, entering, and exiting his left arm before entering his left side and exiting out his lower left back. PSDF ¶ 44; App. 97.



Paulson was the only officer who fired her weapon at Norris. PSDF ¶ 45; Paulson BWC @ 37:45; App. 97. The distance between Norris and Paulson at the time she fired the shots was a minimum of 24 feet. PSDF ¶ 97; Gratias Affidavit; App. 103. The blade of the knife that Norris was holding measured 4.5 inches in length. PSDF ¶ 64; Gratias Affidavit; App. 99 & 351.

When she was interviewed following the incident, Paulson claimed that Norris “lunged” at her while holding the knife up over his head in an overhead stabbing motion. PSDF ¶¶ 56-58; Paulson Interview Transcript, p. 6, 15, 20; App. 98, 189, 198, & 203. Paulson described the knife as a “machete.” PSDF ¶ 61; Paulson Depo., p. 101; App. 99 & 321. During her interview Paulson unequivocally claimed, “if he would’ve lunge towards me he would’ve got me.” PSDF ¶ 60; Paulson Interview Transcript, p. 20; App. 99 & 203. To

this day, Paulson still claims that she perceived Norris holding a machete up over his head with the blade pointed at her in a forward stabbing motion and lunging at her immediately before she shot him. PSDF ¶ 72; Paulson Depo, pp. 77-78, 102; App. 100 & 316.

ARGUMENT

THE COURT OF APPEALS ERRED IN DISMISSING APPELLEE’S CONSTITUTIONAL CLAIMS AS THE ISSUES RAISED IN *BURNETT V. SMITH* WERE NOT RAISED, PRESENTED, NOR RULED UPON BY THE DISTRICT COURT.

“It is a fundamental doctrine of appellate review that issues must ordinarily be both raised and decided by the district court before we will decide them on appeal.” *Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002). Appellants for the first time on appeal, argued that “Plaintiffs’ Iowa Constitutional claims have been eliminated through the Iowa Supreme Court’s decision in *Burnett v. Smith*.” (Appellants’ Brief, p. 19). The Court of Appeals, contrary to well-established, fundamental rules of error preservation, accepted Appellants argument and dismissed Appellee’s Constitutional claim. *Norris v. Paulson and City of Des Moines*, No. 23-2017, pp 6-7 (June 5, 2024). Appellant’s argument regarding the applicability of *Burnett v. Smith* was never raised before the district court. As such, the application of *Burnett v. Smith* to the instant case was not

preserved for appellate review and it was blatant error for the Court of Appeals to dismiss Appellee's constitutional claim.

“[A] party has an obligation to raise an issue in the district court and obtain a decision on the issue so that an appellate court can review the merits of the decision actually rendered.” *State v. Crawford*, 972 N.W.2d 189, 198 (Iowa 2022). “Our general rule of error preservation is that we will not decide an issue presented before us on appeal that was not presented to the district court.” *Estate of Cawiezell v. Coronelli*, 958 N.W.2d 842, 847 (Iowa 2021); quoting *In re Det. Of Anderson*, 895 N.W.2d 131, 138 (Iowa 2017). The only exception in the civil arena to the general error preservation rule is when the record indicates that the grounds for a motion were obvious and understood by the trial court and counsel. *Estate of Gottschalk by Gottschalk v. Pomeroy Dev., Inc.*, 893 N.W.2 579, 585 (Iowa 2017). “Nonetheless, if the court does not actually rule on the claim asserted, a party must seek an expanded ruling to preserve it.” *Id.*

“The reason for this principle relates to the essential symmetry required of our legal system.” *Meier*, 641 N.S.2d at 537. “It is not a sensible exercise of appellate review to analyze facts of an issue without the benefit of a full record or lower court determination.” *Id.* “Error preservation is important for several reasons: (1) it affords the district court an opportunity to avoid or

correct error that may affect the future course of the trial; (2) it provides the appellate court with an adequate record for review; and (3) it disallows sandbagging – that is, it does not ‘allow a party to choose to remain silent in the trial court in the face of error, take a chance on a favorable outcome, and subsequently assert error on appeal if the outcome in the trial court is unfavorable.’” *Crawford*, 972 N.W.2d at 199; quoting *State v. Ambrose*, 861 N.W.2d 550, 555 (Iowa 2015). As Justice Waterman pointed out in his concurrence in part and dissent in part in *Crawford*, “the adversary process functions most effectively when we rely on the initiative of lawyers, rather than the activism of judges, to fashion the questions for review.” *Id.* at 203; quoting *New Jersey v. T.L.O.*, 468 U.S. 1214, 1216 (1984) (Stevens, J., dissenting).

Here, Appellants did not argue at the district court that a standalone action for money damages under the Iowa Constitution did not or should not exist. (D0024) (Def. Brief; App. 36). Not a word was mentioned even hinting at such an argument. *Id.* In fact, Appellants argued their motion consistent with existing caselaw at the time, recognizing that such a cause of action did indeed exist in Iowa. (D0024) (Def. Brief, p. 6; App. 41).

The Iowa Supreme Court decision in *Burnett v. Smith* was not in existence at the time Appellants’ motion for summary judgment was filed,

argued, and decided. In the Iowa appellate cases that have had the opportunity to apply *Burnett*, the defendants specifically raised the application of *Burnett* by way of a pre-answer motion to dismiss, see *White v. Harkrider*, 990 N.W.2d 647, 652 (Iowa 2023) and *Carter v. State*, 990 N.W.2d 308 (Iowa 2023), or specifically raised the argument by way of a motion for summary judgment. See *Venckus v. City of Iowa City*, 990 N.W.2d 800, 803 (Iowa 2023). This is also true of the unpublished Court of Appeals decisions the Panel cited in support of their disregard of the basic rules of error preservation. *Christensen v. Eral*, no. 22-1971, 2024 WL 108848 3 (Iowa Ct. App., Jan 10, 2024) (Issues raised via pre-answer Motion to Dismiss for failure to state a claim); *Dishman v. State*, No. 22-1491, 2023 WL 8068563, at *2 (Iowa Ct. App. Nov. 1, 2023) (Issues raised via pre-answer Motion to Dismiss and Motion for Summary Judgment challenging viability of *Godfrey* claim).

In the instant case, the Appellants did not raise the issue of whether an independent cause of action for money damages under the Iowa Constitution could be brought at the district court level and thus the district court never ruled on that issue. Consequently, no appellate court has legal authority to decide that issue in this case. The Court of Appeals erred in ignoring the rules of error preservation. Further review is warranted to correct the Iowa

Court of Appeals utter disregard for one of the foundational pillars of appellate jurisprudence.

CONCLUSION

For all of the reasons set forth herein, Plaintiff-Appellee, Brian Norris, respectfully argues that the Court of Appeals erred in dismissing Appellee's Iowa Constitutional claims. Therefore, Mr. Norris respectfully requests that this Court accept Further Review as to Appellees Constitutional claim only, vacate the decision of the Court of Appeals as to his Constitutional claim, and remand to the lower court for further proceedings consistent with the remainder of the Court of Appeals decision.

Respectfully Submitted,

GOURLEY, REHKEMPER &
LINDHOLM, P.L.C.



By: Robert G. Rehkemper, AT0006553
ATTORNEY FOR APPELLEE

**CERTIFICATE OF COMPLIANCE WITH TYPEFACE
REQUIREMENTS AND TYPE-VOLUME LIMITATION FOR
FURTHER REVIEW**

This application complies with the typeface and type-volume requirements of Iowa R. App. 6.1103(4) because:

[X] this application has been prepared in a proportionally spaced typeface using Times New Roman, font 14 point and contains 2,582 words, excluding parts of the application exempted by Iowa R. App. P. 6.1103(4)(a).



Robert G. Rehkemper

June 14, 2024
Date

IN THE COURT OF APPEALS OF IOWA

No. 23-0217
Filed June 5, 2024

BRYAN NORRIS,
Plaintiff-Appellee,

vs.

TRUDY PAULSON,
Defendant-Appellant,

and

CITY OF DES MOINES,
Defendant.

Appeal from the Iowa District Court for Polk County, Sarah Crane, Judge.

The city of Des Moines appeals the district court's denial of its motion for summary judgment. **AFFIRMED IN PART, REVERSED IN PART, AND REMANDED**

John O. Haraldson, Assistant City Attorney, Des Moines, for appellant.

Robert G. Rehkemper of Gourley, Rehkemper, & Lindholm, P.L.C., West Des Moines, for appellee.

Heard by Tabor, P.J., and Buller and Langholz, JJ.

TABOR, Presiding Judge.

Des Moines police responded to complaints about a homeless camp near the Raccoon River in September 2019. While there, three officers checked the unhoused individuals for outstanding warrants. During that process, Bryan Norris brandished a shovel and then a knife. Feeling threatened, Officer Trudy Paulson shot him in the arm and abdomen. Norris sued Paulson and the city alleging unreasonable seizure under the state constitution and common law assault.¹ The district court denied the city's motion for summary judgment.

After that denial, our supreme court overruled *Godfrey v. State*, 898 N.W.2d 844 (Iowa 2017), which had recognized standalone suits for damages under the Iowa Constitution. See *Burnett v. Smith*, 990 N.W.2d 289, 307 (Iowa 2023). In this interlocutory appeal, the city argues that *Burnett* eliminated Norris's constitutional claim. It also contends that Officer Paulson's use of force was reasonable under Iowa Code section 804.8 (2022). On the first issue, the city is correct that Norris's constitutional claim cannot move forward after *Burnett*. On the second issue, the district court was correct in deciding the common law assault claim was for the jury to decide. Thus, we affirm in part, reverse in part, and remand for trial on the assault claim.

I. Facts and Prior Proceedings

"Stitches, put it down!" That shout echoed through the campsite as Norris's friends urged him to obey Officer Paulson's command to drop the shovel he was wielding. Stitches was Norris's nickname at the camp because of his facial tattoo.

¹ For ease of analysis, we will refer to the defendants collectively as the city.

Paulson—along with Officer Shawna Isaac and Sergeant Yanira Scarlett—had encountered “eight to ten” people and several tents set up near the railroad tracks along the river.² The officers approached each person and asked for identification cards—and if they did not have one, their names and dates of birth. Norris gave a fake name and date of birth—telling them he was “Bradley Roberts” from Florida. Finding no results in a law enforcement database, Sergeant Scarlett told him he could give his real name or go to jail until he complied. Officer Paulson added: “If you have warrants, it’s inevitable.” So Norris provided his real name. The officers found that he had a warrant for failure to appear on a simple misdemeanor theft charge. But before officers could tell Norris about the active warrant, he took off running. The officers gave chase but before they could reach him, Norris jumped into the river.

While Officer Isaac searched for Norris, Paulson and Scarlett arrested other unhoused individuals with warrants. As Officer Paulson handcuffed another man, Norris returned. He stood on the riverbank holding a shovel. He crouched down as other unhoused individuals yelled for him to stop. Paulson warned Norris that she would shoot if he didn’t drop the shovel. Soon he dropped it but picked up a knife. In her initial interview after the shooting, Officer Paulson described the knife as a machete and estimated its length at twelve inches. She also recalled that Norris raised the knife over his head at a ninety-degree angle. As it turns out, the knife’s blade measured just four and one-half inches, and the video showed that Norris was swinging the knife by his side, not over his head.

² The incident was recorded on the officers’ body cameras.

The video shows Norris turning toward Paulson and leaning over in a crouching position. Paulson again warned that she would shoot him. Norris then appeared to step back;³ and Paulson fired once, then twice, shooting Norris in his arm and the left side of his torso. The parties debate the distance between Norris and the officer at the time of the shooting. In her interview, Officer Paulson estimated that Norris was fifteen feet away. The city took measurements after the event showing Norris was approximately twenty feet away. Norris disputes that estimate because the city measured from the officer's shell casing to "the pool of blood where Norris was dragged" for emergency care after the shooting. Norris estimated he was "a minimum of twenty-four feet away" from Paulson when she shot him. "Taking the facts in the light most favorable to Norris," the district court determined that Officer Paulson was twenty-four feet away when she shot him.

After the two shots, the officers ran to Norris as he screamed. Sergeant Scarlett started to handcuff Norris but then pulled him away from the river bank so he did not fall into the water. She also applied pressure to his wound while waiting for emergency medical care. Norris was taken to the hospital. He survived the shooting but suffered injuries to his diaphragm, ribs, and kidney, and surgeons removed his spleen.

³ The parties dispute what the video shows at this point. On the one hand, the city attorney argued that Norris "took an important step back towards her approximately one second before she fired the weapon." On the other hand, Norris's counsel argued: "When you watch the video, there were no steps that Mr. Norris made towards Paulson. None. Certainly not a lunge. Certainly not a charge. Certainly not a threatening matter. He is walking back."

The State charged Norris with two counts of assault on a peace officer and one count of interference with official acts while displaying a dangerous weapon, all class “D” felonies. He pleaded guilty to the interference charge.⁴

Norris then sued Paulson and the city of Des Moines to recover damages. The city moved for summary judgment. In December 2022, the district court denied that motion pointing to “disputed facts regarding whether Officer Paulson violated Norris’s constitutional rights.” It also found that qualified immunity did not shield Officer Paulson from Norris’s constitutional claims. The district court also reasoned that because the city did not make “any distinct arguments” in response to Norris’s common-law count, the analysis on the constitutional issue controlled that assault claim. In April 2023, our supreme court granted the city’s application for interlocutory appeal. One month later, the supreme court decided *Burnett*. In December, the supreme court transferred this appeal to us. We heard the parties in oral argument and now resolve the city’s claims.

II. Scope and Standard of Review

We review rulings on motions for summary judgment for correction of legal error. *Venckus v. City of Iowa City*, 990 N.W.2d 800, 807 (Iowa 2023). A court may grant summary judgment “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show

⁴ In its statement of undisputed facts in support of summary judgment, the city noted that Norris was also charged with first-degree murder in connection with the July 2019 death of a third person. Human remains were found in the homeless camp in October 2019. Norris later pleaded guilty to attempted murder, voluntary manslaughter, conspiracy to commit a forcible felony, and abuse of a corpse. A police report included in the summary-judgment record theorized: “This may explain some of his actions in this investigation.” But as the city explained, Officer Paulson did not know about those criminal acts at the time of the shooting.

that there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law.” Iowa R. Civ. P. 1.981(3). We view the record in the light most favorable to Norris, as the nonmoving party. See *Geisler v. City Council of Cedar Falls*, 769 N.W.2d 162, 165 (Iowa 2009). A genuine issue of material fact exists if “the evidence is such that a reasonable jury could return a verdict for the nonmoving party.” *Fees v. Mut. Fire & Auto. Ins. Co.*, 490 N.W.2d 55, 57 (Iowa 1992). As the moving party, the city must show it is entitled to prevail as a matter of law. See *Smith v. Shagnasty’s Inc.*, 688 N.W.2d 67, 71 (Iowa 2004). “If reasonable minds may differ on the resolution of an issue, a genuine issue of material fact exists.” *Id.* (citation omitted).

III. Analysis

The city raises two questions. (1) Did *Burnett* eliminate Norris’s constitutional claims? And (2) did the district court err in denying summary judgment on Norris’s claim of common law assault? We consider them in turn.

A. Unreasonable Seizure Under the Iowa Constitution

The city first contends that after *Burnett*, Norris may no longer pursue a private right of action for damages under the Iowa Constitution. It relies on *Venckus*, 990 N.W.2d at 803, *White v. Harkrider*, 990 N.W.2d 647, 652 (Iowa 2023), and *Carter v. State*, No. 21-0909, 2023 WL 3397451, at *1 (Iowa May 12, 2023) (per curiam). In those cases, the supreme court found that plaintiffs’ pending constitutional tort claims could not proceed. Norris counters that the city did not preserve error because it did not raise the issues addressed in *Burnett* at the summary judgment hearing.

The lack of error preservation does not defeat the city's position on Norris's constitutional claims. As the city argues, Norris's claims arising under *Godfrey* are no longer viable. See *Christiansen v. Eral*, No. 22-1971, 2024 WL 108848, at *3 (Iowa Ct. App. Jan. 10, 2024) (concluding constitutional claims pending at the time of *Burnett* decision were barred); *Dishman v. State*, No. 22-1491, 2023 WL 8068563, at *2 (Iowa Ct. App. Nov. 1, 2023) ("We disagree with Dishman that the question of retroactive application of *Burnett* remains unanswered."). Thus, we reverse the summary judgment ruling on Norris's constitutional claims and remand for their dismissal. See *Dishman*, 2023 WL 8068563, at *3 ("In reaching this conclusion, we mean no criticism of the district court, as the district court did not have the benefit of *Burnett*, *Venckus*, and *Carter* when it ruled on the motion for summary judgment.").

B. Common Law Assault

The city next argues that the district court erred in denying its motion for summary judgment on Norris's common law assault claim. Since it did not have the benefit of *Burnett*, the district court gave minimal attention to Norris's common law assault claim—finding that its analysis of the constitutional tort controlled the assault count. So because it was the more robust analysis, we turn to the district court's treatment of Norris's constitutional claim. The district court found a genuine issue of material fact:

A reasonable jury could find Norris did not pose an imminent and serious risk to officers or other individuals when Officer Paulson fired her weapon. . . . Officer Paulson was 24 feet from Norris. Norris did not make any verbal threats, kept the knife lowered below his waist, and had not taken any steps toward Officer Paulson. Norris had in fact retreated away from Officer Paulson by six steps prior to the shot. There is no record evidence of any other individuals closer to

Norris than Officer Paulson. The City asserts that Norris took a step toward Officer Paulson in the second before the shots. Plaintiff asserts he did not. Norris did make some movement in the seconds before he was shot. Norris rotated 180 degrees back toward Paulson and then it appears he shifted his weight back and forth between his legs. The City asserts this movement was threatening behavior, but taking the facts in the light most favorable to Norris, the movement could be interpreted as an effort to maintain his balance as he stepped near the edge of the river's embankment and rotated back around.

Transferring that factual analysis to Norris's common law assault claim, we find no error in the district court's assessment. Civil assault requires proof that the officer did "(1) an act intended to put another in fear of physical pain or injury; [or] (2) an act intended to put another in fear of physical contact which a reasonable person would deem insulting or offensive; and the victim reasonably believes that the act may be carried out immediately." *White*, 990 N.W.2d at 656 (citation omitted) (alteration in original). The city does not dispute that the shooting was an assault. Rather, the city maintains that Officer Paulson was justified in her actions.⁵ For its justification defense, the city relies on Iowa Code section 804.8(1), which states: "A peace officer, while making a lawful arrest, is justified in the use of any force which the peace officer reasonably believes to be necessary to effect the arrest or to defend any person from bodily harm while making the arrest."

Norris responds that Officer Paulson was not making a lawful arrest as none of the officers on the scene informed him "of their intention to arrest him nor of the reason for his arrest." See Iowa Code § 804.14 (listing requirements for making a

⁵ In its appellant's brief, the city discusses qualified immunity. But at oral argument, the city clarified that it was not asserting a qualified immunity defense and that "at this point we just have the issue of the common law." Thus, we will view the city's defense as one of justification.

lawful arrest). In the alternative, Norris argues that even if Paulson was attempting an arrest when she shot him, a jury question exists whether the amount of force she used was reasonable under the circumstances. See *id.* § 704.1 (defining “reasonable 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”).

Assuming without deciding that Officer Paulson was making a lawful arrest, the city failed to show that there was no genuine issue of material fact on the officer’s claim of justification. The reasonable force inquiry under section 804.8 is an objective standard. *Chelf v. Civ. Serv. Comm’n of City of Davenport*, 515 N.W.2d 353, 355 (Iowa Ct. App. 1994) (finding support for that interpretation in *Graham v. Connor*, 490 U.S. 386 (1989)). Both parties agree that *Graham* is instructive. Under *Graham*, “[t]he ‘reasonableness’ of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight.” 490 U.S. at 396. To be reasonable, the force applied must be “proportionate to the need for force raised by the circumstances.” *State v. Dewitt*, 811 N.W.2d 460, 469–70 (Iowa 2012). And deadly force is only reasonable if a suspect poses “an immediate threat of death or serious bodily injury.” *Billingsley v. City of Omaha*, 277 F.3d 990, 993 (8th Cir. 2002). The reasonableness of the officer’s use of force is usually a question of fact to be determined by the jury. See *Barlow v. Ground*, 943 F.2d 1132, 1135 (9th Cir. 1991); see also *Abraham v. Raso*, 183 F.3d 279, 290 (3rd Cir. 1999).

Viewing the facts in the light most favorable to Norris, there is a genuine dispute of material fact on which a reasonable jury could find that he did not pose an imminent threat to Paulson or bystanders. Norris can be seen in the body cam

footage swaying back and forth. This motion could be taken as lunging or as securing his balance near the riverbank. “It should be considered a rare case where video evidence leaves no room for interpretation by a fact finder.” *Kailin v. Vill. of Gurnee*, 77 F.4th 476, 481 (7th Cir. 2023). The parties also diverge on whether Norris held the shovel and the knife at the same time. Reasonable jurors could reach different conclusions from the video footage, coupled with the further evidence. And facts that can be interpreted multiple ways from a video “should be viewed in the light most favorable to the non-moving party.” *Lee v. Russ*, 33 F.4th 860, 865 (6th Cir. 2022) (citation omitted); see also *Williams v. City of Burlington*, 27 F.4th 1346, 1351 (8th Cir. 2022) (holding that whether a police officer was unreasonable in believing that a suspect was taking a firing position rather than surrendering as seen on body camera footage was a material fact issue).

We note that Officer Paulson mistakenly recalled that the knife was a machete. She also perceived Norris as having raised it over his head in a “forward stabbing motion.” She later acknowledged the video did not support her recollection. We do not make these observations to criticize Officer Paulson, but her initial beliefs could persuade a jury that her response was disproportionate to the circumstances. No other officers fired their guns. Norris was twenty-four feet away, unbalanced and swaying. Under the objective standard in *Graham*, a jury could find that a reasonable officer in Paulson’s position would not perceive Norris

as an imminent threat.⁶ These issues of fact are more appropriately decided by a jury.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

⁶ At oral argument, the city attorney conceded that the question of Paulson's reasonableness in use of force under section 804.8(1) was one of fact.



IOWA APPELLATE COURTS

State of Iowa Courts

Case Number
23-0217

Case Title
Norris v. Paulson

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