

IN THE SUPREME COURT OF IOWA

No. 21–1992

GERI L. WHITE,

Plaintiff-Appellant,

vs.

**MICHAEL HARKRIDER, CITY OF IOWA CITY, CHRIS WISMAN and
JOHNSON COUNTY,**

Defendants-Cross-Appellants

**APPEAL FROM THE IOWA DISTRICT COURT
IN AND FOR JOHNSON COUNTY
THE HONORABLE CHAD KEPROS, JUDGE**

APPELLANT’S FINAL REPLY BRIEF

**Martin Diaz AT0002000
1570 Shady Ct. NW
Swisher, IA 52338
(319) 339-4350
(319) 339-4426 Fax
marty@martindiazlawfirm.com
Attorney for Appellant**

TABLE OF CONTENTS

TABLE OF CONTENTS	2
TABLE OF AUTHORITIES	4
STATEMENT OF THE ISSUES	6
REPLY ARGUMENT	9
ISSUE I: Geri White v. Daniel White	9
ISSUE II: Municipalities and Constitutional Claims	10
CROSS APPEAL	
ISSUE III: MS. WHITE IS ENTITLED TO ASSERT HER CONSTITUTIONAL TORT CLAIMS AS THE IMMUNITY PROVISIONS OF THE IOWA MUNICIPAL TORT CLAIMS ACT CAN UNDERMINE HER RIGHT TO RELIEF. FURTHER, DEFENDANTS ARE NOT ENTITLED TO QUALIFIED IMUNITY.	11
Preservation of Error.	11
Standard of Review.	11
Merits.	11
A. The New Statutory Language Is Not Retroactive	13
B. The New Statute Relating to Qualified Immunity Is Unconstitutional	16

ISSUE IV: AT THIS STAGE OF THE CASE, THERE IS NO BASIS TO DISMISS THE COMMON LAW CLAIMS. 18

 Preservation of Error. 18

 Standard of Review. 18

 Merits. 18

CONCLUSION 21

CERTIFICATES 22

TABLE OF AUTHORITIES

Iowa Cases

<i>Baldwin v. City of Estherville</i> , 915 N.W.2d 259 (Iowa 2018) (“ <i>Baldwin I</i> ”)	11-13, 15-17
<i>Baldwin v. Waterloo</i> , 372 N.W.2d 486 (1985)	14
<i>Dutcher v. Randall Foods</i> , 546 N.W.2d 889 (Iowa 1996)	13
<i>Godfrey v. State</i> , 898 N.W.2d 844 (Iowa 2017) (<i>Godfrey II</i>)	15
<i>Jackson v. FYE Excavating, Inc.</i> , 967 N.W.2d 362 (Iowa Ct. App. 2021)	19-20
<i>Matter of Chicago, Mil., St. P. & Pac. R.R.</i> , 334 N.W.2d 290 (Iowa 1983)	14
<i>Schwarzkopf v. Sac County Bd. of Supervisors</i> , 341 N.W.2d 1 (Iowa 1983)	16
<i>State ex rel. Turner v. Limbrecht</i> , 246 N.W.2d 330 (Iowa 1976)	14
<i>State v. Wright</i> , 961 N.W.2d 396 (Iowa 2021)	9,13,16
<i>Thorp v. Casey's General Stores, Inc.</i> , 446 N.W.2d 457 (Iowa 1989)	15
<i>Wagner v. State</i> , 952 N.W.2d 843 (Iowa 2020)	11,15,17

Federal Cases:

Harlow v. Fitzgerald, 457 U.S. 800 (1982) 13,17

Iowa Statutes

Iowa Code §4.5 14

Iowa Code §80.6 14

Iowa Code § 670.1(4) 10

Iowa Code § 670.4A 11-15

Iowa Municipal Tort Claims Act (Chapter 670) (IMTCA) 11-12

Iowa Rules

Iowa R. Civ. Pro. 1.403(1) 18

Constitutional Provisions

Iowa Const. art. I, § 9 15

Iowa Const. art. III § 26 14

Iowa Const. art. X 17

U.S. Const. Amend. V (Fifth Amendment) 15

Other State Cases

Arnevik v. Univ. of Minn. Bd. of Regents, 642 N.W.2d 315, 319 (Iowa 2002). 20

Other Authorities

Cady, *A Pioneer's Constitution: How Iowa's Constitutional History Uniquely Shapes Our Pioneering Tradition in Recognizing Civil Rights and Civil Liberties*, 60 Drake L. Rev. 1133 (2012). 17

S.F. 476, Iowa Senate Floor Debate at 7:21 17

STATEMENT OF THE ISSUES

I. Geri White v. Daniel White

Iowa Cases

State v. Wright, 961 N.W.2d 396 (Iowa 2021)

II. Municipalities and Constitutional Claims

Iowa Statutes

Iowa Code § 670.1(4)

III. DOES IOWA CODE §670.4A APPLY TO MS. WHITE'S CONSTITUTIONAL TORT CLAIMS, AND ARE DEFENDANTS ENTITLED TO QUALIFIED IMMUNITY UNDER *BALDWIN I* OR IOWA CODE §670.4A?

Iowa Cases

Baldwin v. City of Estherville, 915 N.W.2d 259 (Iowa 2018) (“*Baldwin I*”)

Baldwin v. Waterloo, 372 N.W.2d 486 (1985)

Dutcher v. Randall Foods, 546 N.W.2d 889 (Iowa 1996)

Godfrey v. State, 898 N.W.2d 844 (Iowa 2017)

Matter of Chicago, Mil., St. P. & Pac. R.R., 334 N.W.2d 290 (Iowa 1983)

Schwarzkopf v. Sac County Bd. of Supervisors, 341 N.W.2d 1 (Iowa 1983)

State ex rel. Turner v. Limbrecht, 246 N.W.2d 330 (Iowa 1976)

State v. Wright, 961 N.W.2d 396 (Iowa 2021)

Thorp v. Casey's General Stores, Inc., 446 N.W.2d 457 (Iowa 1989)

Wagner v. State, 952 N.W.2d 843 (Iowa 2020)

Iowa Statutes:

Iowa Code §4.5

Iowa Code §80.6A

Iowa Code § 670.4A

Iowa Municipal Tort Claims Act (Chapter 670) (IMTCA)

Constitutional Provisions

Iowa Const. art. I, § 9

Iowa Const. art. III § 26

Iowa Const. art. X

U.S. Const. Amend. V (Fifth Amendment)

Federal Cases

Harlow v. Fitzgerald, 457 U.S. 800 (1982)

Other Authorities

Cady, *A Pioneer's Constitution: How Iowa's Constitutional History Uniquely Shapes Our Pioneering Tradition in Recognizing Civil Rights and Civil Liberties*, 60 Drake L. Rev. 1133 (2012).

S.F. 476, Iowa Senate Floor Debate at 7:21

IV. ARE MS. WHITE'S COMMON LAW CLAIMS SUBJECT TO DISMISSAL AT THIS STAGE OF THE CASE?

Iowa Cases

Jackson v. FYE Excavating, Inc., 967 N.W.2d 362 (Iowa Ct. App. 2021)

Iowa Rules

Iowa R. Civ. Pro. 1.403(1)

Other State Cases

Arnevik v. Univ. of Minn. Bd. of Regents, 642 N.W.2d 315, 319 (Iowa 2002)

REPLY ARGUMENT

ISSUE I: Geri White v. Daniel White

In their statement of facts, the defendants focus on Daniel White's criminal case and the findings made by the court in that case. However, Ms. White was not a party to that action; the ruling was premised on the consent to enter the home *after* the initial siege and *after* the police had withdrawn the show of force; and the ruling was not a final ruling because the case was ultimately dismissed without appeal. Moreover, that decision was issued before the Supreme Court decided *State v. Wright*, 961 N.W.2d 396 (Iowa 2021) (holding that "under Iowa law '[a] trespassing officer is liable for all wrong done in an illegal search or seizure. The constitutional provision is a sacred right, and one which the courts will rigidly enforce.'")

If the home is as revered as this Court stated in *Wright*, this Court's focus must be on what occurred *before* Ms. White allowed the police into her home (in the presence of an army camped outside her home). Ms. White's complaint is that law enforcement personnel had no basis to trespass upon her property in violation of the Iowa Constitution. The fact that Mr. White was unsuccessful in the criminal case in suppressing the evidence obtained *after* the siege has no bearing on what these officers were doing trespassing upon Ms. White's home.

ISSUE II: Municipalities and Constitutional Claims

In their brief, defendants contend that Ms. White “ignores the text of the Iowa Constitution and its command that the legislature be the branch to make our state’s laws.” (Defendants’ Brief, p. 30). However, the legislature has already authorized Constitutional claims against municipalities. In Iowa Code §670.1(4), the Iowa Legislature defined tort claims against municipalities to include “*denial or impairment of any right under any constitutional provision.*” Therefore, the legislature has already authorized such claims against municipalities.

CROSS APPEAL ARGUMENT

ISSUE III: MS. WHITE IS ENTITLED TO ASSERT HER CONSTITUTIONAL TORT CLAIMS AS THE IMMUNITY PROVISIONS OF THE IOWA MUNICIPAL TORT CLAIMS ACT CAN UNDERMINE HER RIGHT TO RELIEF. FURTHER, DEFENDANTS ARE NOT ENTITLED TO QUALIFIED IMMUNITY.

Preservation of Error.

Ms. White agrees that the Defendants preserved error for review.

Standard of Review.

Ms. White agrees with the defendants' statement of the standard of review.

Merits.

Defendants argue that Ms. White has adequate common law remedies, while also claiming that they are entitled to statutory (Iowa Code §670.4A) qualified immunity for those same common law remedies. That argument is contradictory. This Court has already pointed out that statutory immunities are inconsistent with constitutional protection. *Baldwin v. City of Estherville*, 915 N.W.2d 259, 279-80 (Iowa 2018) (“*Baldwin I*”) (“Iowa's tort claims acts already protect government officials in some instances when they exercise due care. ... *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.*”) (Emphasis added); see also *Wagner v. State*, 952 N.W.2d 843, 858 (Iowa 2020) (“The issue before us now is whether the procedural limits of the ITCA should

nonetheless apply to such a claim. It is logical to hold that constitutional torts, like other torts, are subject to the procedures set forth in the ITCA. *Just because the substantive barriers to liability in the ITCA do not apply*, that does not mean we should dispense with the entire ITCA.”) (Emphasis added).

In fact, the new statute, Iowa Code §670.4A, is an example of why it is necessary to retain constitutional tort claims. Finding that the Iowa Municipal Tort Claims Act provides an adequate remedy would permit the legislature to undermine constitutional tort claims by the imposition of immunities such as found in the new statute.

In order to be adequate common law remedies, there must be protection available from the mischief of the legislature. Ms. White is entitled to constitutional protection. Her home is entitled to constitutional protection. But if this Court allows the legislature to alter substantive law, it will do a disservice to Ms. White and to the Iowa Constitution.

Defendants also argue that they are entitled to qualified immunity either under the statute or under the *Baldwin I* qualified immunity standard. This argument is without merit. This Court has made qualified immunity an affirmative defense which requires the defendants to plead and prove that they acted with “all due care.” *Baldwin I* at 280-81 (“a government official whose conduct is being challenged will not be subject to damages liability if she or he pleads and proves as an affirmative

defense that she or he exercised all due care to conform to the requirements of the law.”). Affirmative defenses only apply after suit is filed and “[f]ailure to plead an affirmative defense normally results in waiver of the defense.” *Dutcher v. Randall Foods*, 546 N.W.2d 889, 893 (Iowa 1996). By definition, affirmative defenses are incompatible with alleged immunity from suit. Since the facts are accepted as true for purposes of a motion to dismiss, and the defendants have not yet plead or proved their affirmative defense, the Motion to Dismiss based on qualified immunity must be denied.

As for Iowa Code §670.4A, this statute seeks to overrule the Supreme Court’s holding in *Baldwin I* and impose a legislative definition of “qualified immunity” that mirrors the definition used in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982).

There are two problems with this statute. First, it cannot be applied retroactively since the event and filing of the lawsuit pre-dates the enactment of this statute: the incident occurred on June 1, 2019, and Ms. White filed suit on May 21, 2021. Secondly, *Harlow* immunity was rejected by the Court in *Baldwin I* and the Iowa Supreme Court is the “final arbiter of the meaning of the Iowa Constitution.” *State v. Wright*, 961 N.W.2d 396, 402 (Iowa 2021).

A. The New Statutory Language Is Not Retroactive: Iowa Code §670.4A does not have retroactive effect before its effective date of June 17, 2021. This Court has held that it “is well established that a statute is presumed to be prospective only

unless expressly made retrospective. [Citing] Iowa Code § 4.5.” *Baldwin v. Waterloo*, 372 N.W.2d 486, 491 (1985).

Acts of the general assembly, passed during a regular session, take effect on “July 1 following its passage unless a different effective date is stated in an act of the general assembly....” Iowa Const. art. III § 26. In §670.4A, the Legislature did not use language that permits retroactivity. It only establishes an effective date of June 17, 2021, and does not mandate retroactive application.¹

Moreover, even if the statute permitted retroactive application, the change in the qualified immunity standard is a substantive change in the law. The language specifically impacts Ms. White’s substantive rights. “Statutes which specifically affect substantive rights are construed to operate prospectively unless legislative intent to the contrary clearly appears from the express language or by necessary and unavoidable implication.” *Matter of Chicago, Mil., St. P. & Pac. R.R.*, 334 N.W.2d 290, 293 (Iowa 1983). “Substantive law creates, defines and regulates rights.” *State ex rel. Turner v. Limbrecht*, 246 N.W.2d 330, 332 (Iowa 1976).

¹ It is noteworthy that the legislation included changes to other and new sections. This included §22 of the legislation (§80.6A) that was given retroactive application. If the legislature could provide for retroactive application of some aspects of the legislation, it could have provided for such application to the relevant statutory provision.

This Court made qualified immunity an affirmative defense which requires the defendants to plead and prove that they acted with “all due care.” *Baldwin I* at 280-81. Iowa Code §670.4A is an attempt by the Iowa legislature to overturn the holding in *Baldwin I*. The statute alters the standard thereby affecting Ms. White’s substantive rights. *See Wagner* at 859 (“In *Baldwin I*, we shaped and refined the independent damages claim for constitutional violations we had just recognized in *Godfrey II*. *The immunity question we decided was one of substantive law.*” (Emphasis Added). In this instance, Iowa Code §670.4A, if constitutional, is prospective only and not applicable to Ms. White’s case.

Finally, Ms. White’s claims were vested at the time of the event in 2019. The application of the new statute to her tort and constitutional claims would constitute a violation of her due process rights under art. I, §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.”).

The holding in *Thorp* demonstrates that Iowa Code §670.4A cannot be applied to this case since Ms. White had a vested interest in her claims at the time of the

event. Since the legislation would impact the application of existing law to her vested property rights, the statute would be unconstitutional as applied to her. *Id.* at 462.

B. The New Statute Relating to Qualified Immunity Is Unconstitutional

The Iowa legislature acted outside the scope of its authority in attempting to define the meaning of the Iowa Constitution. “There is no question as to a legislature's power to retroactively cure defects in existing statutes or to modify them to restrict or expand their reach. The general rule is that a legislature may do anything by curative act which it could have done originally.” *Schwarzkopf v. Sac County Bd. of Supervisors*, 341 N.W.2d 1, 4 (Iowa 1983). Defining the meaning of the Iowa Constitution is not something the legislature has authority to do. That is the exclusive role of the courts, particularly this Court. This Court made that clear recently: “None of the departments of our state government are authorized—by bill, order, rule, judicial decision, or otherwise—to make law or legalize conduct infringing upon the minimum rights guaranteed in the Iowa Constitution.... This court is the final arbiter of the meaning of the Iowa Constitution. ” *Wright* at 402.

The new statute directly contradicts the holding in *Baldwin I* and that is the point of the statute. The proponents of the new legislation specifically argued that it was intended to overturn *Baldwin I*. Sen. Dawson, referring to the *Baldwin I* case, claimed “I would submit to the body here that the Supreme Court got it wrong on

that particular case, and what we are trying to do is put this genie back in the bottle." S.F. 476, Iowa Senate Floor Debate at 7:21.

The “all due care” requirement is the standard when applying the Iowa Constitution. *Baldwin I* at 280. This Court specifically rejected the *Harlow* standard for Iowa Constitutional claims. *Id.* at 279. The legislature may not amend the Iowa Constitution in a single session, or without the express consent of the people of Iowa. See Iowa Const. art. X.

In *Wagner*, the Court held that damage claims filed against state officials can only be regulated by the Iowa legislature if they do not deny Iowans an adequate remedy. *Id.* at 847. In the present case, disregarding the Supreme Court’s “all due care standard” may prevent Ms. White—and individuals like her-- from obtaining any remedy at all. The legislature’s attempt to overrule *Baldwin I* must fail as an unconstitutional intrusion into the Supreme Court’s role as the final arbiter of the Iowa Constitution.²

² The gap between what the Iowa Constitution aspires to and what the legislature can devise to undermine it is a theme explored in Cady, *A Pioneer’s Constitution: How Iowa’s Constitutional History Uniquely Shapes Our Pioneering Tradition in Recognizing Civil Rights and Civil Liberties*, 60 Drake L. Rev. 1133 (2012).

ISSUE IV: AT THIS STAGE OF THE CASE, THERE IS NO BASIS TO DISMISS THE COMMON LAW CLAIMS.

Preservation of Error.

Ms. White agrees that the Defendants preserved error for review.

Standard of Review.

Ms. White agrees with the defendants' statement of the standard of review.

Merits.

Iowa R. Civ. Pro. 1.403(1) governs notice pleading requirements and provides that a petition "shall contain a short and plain statement of the claim showing that the pleader is entitled to relief." There is no obligation to set forth all facts known at the time of the filing of the petition. Moreover, the discovery process itself can reveal additional information regarding each of the potential causes of action. For example, defendants argue that their decision-making was impacted by an outstanding warrant against Ms. White's son. However, the timeline on the videos establishes that that information was not known until after they had surrounded the house. It is for that reason that the petition makes no reference to that fact. The whole point of notice pleading is to provide an overview of the claim and not to get into the detail that one might get into as part of a motion for summary judgment. At this stage of the proceedings, Ms. White is entitled to assert "a short and plain statement

of the claim” and the facts that are outlined are deemed true for purposes of the Motion to Dismiss.

The District Court recognized this governing principle when it stated:

Plaintiff has met notice pleading standards, in that she has given Defendants fair notice of the claims asserted, including the incident giving rise [to] the claims, and of the general nature of the claims, such that Defendants can adequately answer the Petition. While these claims may, at a later stage of litigation, may appropriately be the subject of a summary judgment motion, they are not appropriate for dismissal at the motion to dismiss phase of litigation.

(App. 93).

While it is tempting to respond to Defendants’ argument about each individual cause of action, it is ultimately unnecessary as the District Court has found that there is a sufficient basis to permit the case to proceed to the next stage: “the Court cannot say with certainty that there is no set of facts under which Plaintiff may be entitled to recover against Defendants on the intentional infliction of emotional distress, assault, and trespass claims.” (App. 93).

Defendants also claim that the court ruling on the motion to suppress filed by Daniel White has some preclusive effect upon Ms. White. There is no sound legal basis for this argument.

To prove claim preclusion, the moving party must establish three elements:

(1) the parties in the first and second action are the same parties or parties in privity, (2) there was a final judgment on the merits in the

first action, and (3) the claim in the second suit could have been fully and fairly adjudicated in the prior case (i.e., both suits involve the same cause of action).

Id. at 836 (citing *Arnevik v. Univ. of Minn. Bd. of Regents*, 642 N.W.2d 315, 319 (Iowa 2002)). "A second claim is likely to be barred by claim preclusion where the acts complained of, and the recovery demanded are the same or where the same evidence will support both actions." *Id.* In essence, claim preclusion prevents a party from taking a "second bite" at litigation to recover for the same wrong. Thus, this defense is a bar "*not only to matters actually determined in an earlier action but to all relevant matters that could have been determined.*"

Jackson v. FYE Excavating, Inc., 967 N.W.2d 362 (Iowa Ct. App. 2021) (emphasis added).

First, Ms. White was not a party to the criminal case against Daniel White. Nor was she in privity, since her legal issue relates to events that occurred before the events that were the basis for the motion to suppress. Second, there was no final judgment involving the legal issue that was resolved by the motion to suppress as the charge was dismissed against Mr. White without appeal. Finally, Ms. White's claim that there was no legal basis to trespass upon her property and to engage in excessive force was not a legal issue that was litigated in the criminal charges against Mr. White. Accordingly, defendants cannot use claim preclusion against Ms. White.

CONCLUSION

Ms. White respectfully requests that the Court reverse the District Court and reinstate Ms. White's Iowa Constitutional claims. Further, that this Court affirm the

District Court's conclusion that Ms. White's common law claims can proceed to the next stage of litigation.

Respectfully submitted,

/s/ Martin A. Diaz

Martin A. Diaz AT0002000

1570 Shady Court NW

Swisher, IA 52338

Phone 319.339.4350

Facsimile 319.339.4426

marty@martindiazlawfirm.com

Attorney for Appellant

CERTIFICATE OF SERVICE AND FILING

The undersigned certifies a copy of this Final Reply Brief was filed and served through the Electronic Document Management System on all counsel of record and the Clerk of Supreme Court.

_____/s/ Martin A. Diaz_____

CERTIFICATE OF COST

I further certify that because of use of EDMS, there was no cost associated with the printing and reproduction of this Proof Brief.

_____/s/ Martin A. Diaz_____

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION

This Brief complies with the typeface requirements and type-volume limitation of Iowa Rs. App. P. 6.903(1)(d) and 6.903(1)(g)(1) or (2) because:

This brief has been prepared in a proportionally spaced typeface using Times New Roman in Font Size 14 and contains 2,716 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

_____/s/ Martin A. Diaz_____