IN THE SUPREME COURT OF IOWA

No. 22-1194

PATTY A. THORINGTON, individually and as Administrator of the Estate of ROBERT RONALD MITCHELL
Plaintiff-Appellee,

vs.

SCOTT COUNTY, IOWA and GREG HILL,
Defendants-Appellants.

APPELLANTS' REPLY BRIEF

APPEAL FROM THE IOWA DISTRICT COURT FOR SCOTT COUNTY, NO. LACE133201
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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTIONAL PROVISIONS

STATUTES

RULES

STATEMENT OF THE ISSUES

I. Hill is entitled to all due care immunity under *Baldwin I* and Iowa Code §670.4(1)(c).

Baldwin v. City of Estherville ("*Baldwin I*"), 915 N.W.2d 259 (Iowa 2018)
Baldwin v. Estherville ("*Baldwin II*"), 333 F. Supp. 3d 817 (N.D. Iowa 2018)
Graham v. Connor, 490 U.S. 386 (1989)
Molina-Gomes v. Welinski, 676 F.3d 1149 (8th Cir. 2012)
Scott v. Harris, 550 U.S. 372 (2007)
State v. DeWitt, 811 N.W.2d 460 (Iowa 2012)
State v. Oldfather, 306 N.W.2d 760 (Iowa 1981)
Tennessee v. Garner, 471 U.S. 1 (1985)
Iowa Code §670.4(1)(c)
Iowa Code §670.4A
Iowa Code §702.7
Iowa Code §708.3A
Iowa Code §719.1
Iowa Code §804.8
Iowa Code §804.11

II. Hill is entitled to qualified immunity under Iowa Code §670.4A.

Anderson Fin. Servs., LLC v. Miller, 769 N.W.2d 575 (Iowa 2009)
Baldwin v. City of Estherville ("*Baldwin I*"), 915 N.W.2d 259 (Iowa 2018)
Baldwin v. City of Waterloo, 372 N.W.2d 486 (Iowa 1995)
Cass v. City of Dayton, 770 F.3d 368 (6th Cir. 2014)
City of Tahlequah, Okla. v. Bond, 142 S. Ct. 9 (2021) (*per curiam*)
Cole v. Bone, 993 F.2d 1328 (8th Cir. 1993)
Crumley v. City of St. Paul, 324 F.3d 1003 (8th Cir. 2003)
De La Rosa v. White, 852 F.3d 740 (8th Cir. 2017)
Eberhardinger v. City of York, 782 Fed. Appx. 180 (3rd Cir. 2019)
Estate of Starks v. Enyart, 5 F.3d 230 (7th Cir. 1993)
Foster v. Patrick, 806 F.3d 883 (6th Cir. 2015)
Godawa v. Byrd, 798 F.3d 457 (6th Cir. 2015)
Graham v. Connor, 490 U.S. 386 (1989)
Guite v. Wright, 147 F.3d 747 (8th Cir. 1998)
Harmon v. City of Arlington, Tex., 16 F.4th 1159 (5th Cir. 2021)
Hermiz v. City of Southfield, 484 Fed. Appx. 13 (6th Cir. 2012)

Kellum v. Evans, No. 11-2135 (JNE/TNL), 2013 WL 4015328 (D. Minn. Aug. 16, 2013)
Kirby v. Duva, 530 F.3d 475 (6th Cir. 2008)
Kisela v. Hughes, 138 S. Ct. 1148 (2018)
Lewis v. Charter Tsp. of Flint, 660 Fed. Appx. 339 (6th Cir. 2016)
Lytle v. Bexar County, Tex., 560 F.3d 404 (5th Cir. 2009)
McCaslin v. Wilkins, 183 F.3d 775 (8th Cir. 1999)
Mitchell v. Forsyth, 472 U.S. 511 (1985)
Molina-Gomes v. Welinski, 676 F.3d 1149 (8th Cir. 2012)
Mullenix v. Luna, 577 U.S. 7 (2015) (*per curiam*)
Schulz v. Long, 44 F.3d 643 (8th Cir. 1995)
Sigley v. City of Parma Heights, 437 F.3d 527 (6th Cir. 2006)
Smith v. Cupp, 430 F.3d 766 (6th Cir. 2005)
Sok v. City of Burnsville, 960 F.3d 985 (8th Cir. 2020)
State v. Thompson, 954 N.W.2d 402 (Iowa 2012)
Tennessee v. Garner, 471 U.S. 1 (1985)
Thorp v. Casey's General Stores, Inc., 446 N.W.2d 457 (Iowa 1989)
Venckus v. City of Iowa City, 930 N.W.2d 792 (Iowa 2019)
White v. Pauly, 580 U.S. 73 (2017) (*per curiam*)
Williams v. City of Grosse Pointe Park, 496 F.3d 482 (6th Cir. 2007)
Article I, Section 8 of the Iowa Constitution
Iowa Code §670.4A
Iowa Code §708.3A
Iowa Code §719.1
Iowa Code §804.8

III. Thorington concedes that Hill's actions qualify for emergency response immunity under Iowa Code §670.4(1)(k) and she cannot overcome the presumptive constitutionality of applying that immunity to her constitutional tort claim.

Baldwin v. City of Estherville ("*Baldwin I*"), 915 N.W.2d 259 (Iowa 2018)
Baldwin v. City of Estherville ("*Baldwin III*"), 929 N.W.2d 691 (Iowa 2019)
City of West Branch v. Miller, 546 N.W.2d 598 (Iowa 1996)
Cubit v. Mahaska Cty., 677 N.W.2d 777 (Iowa 2004)
Doe v. New London Cmty. Sch. Dist., 848 N.W.2d 347 (Iowa 2014)
Harrod v. City of Council Bluffs, 753 N.W.2d 18 (Table), 2008 WL 2200083 (Iowa Ct. App. May 29, 2008)
Hollingsworth v. Schminkey, 553 N.W.2d 591 (Iowa 1996)
Kershner v. City of Burlington, 618 N.W.2d 340 (Iowa 2000)

Kulish v. Ellsworth, 566 N.W.2d 885 (Iowa 1997)
McIntyre v. Reliance Standard Life Ins. Co., 972 F.3d 955 (8th Cir. 2020)
Merchants White Line Warehousing, Inc. v. City of Des Moines, 665 N.W.2d 439 (Table), 2003 WL 1022838 (Iowa Ct. App. Mar. 12, 2003)
State v. Green, 886 N.W.2d 106 (Table), 2016 WL 4384620 (Iowa Ct. App. Aug. 17, 2016), *aff'd*, 896 N.W.2d 770 (Iowa 2017)
State v. Sanford, 814 N.W.2d 611 (Iowa 2012)
State v. Thompson, 954 N.W.2d 402 (Iowa 2012)
State v. Weiland, 202 N.W.2d 67 (Iowa 1972)
Struck v. Mercy Health Services-Iowa Corp., 973 N.W.2d 533 (Iowa 2022)
Van Orsdall v. City of Des Moines, 711 N.W.2d 732 (Table), 2006 WL 126436 (Iowa Ct. App. Jan. 19, 2006)
Venckus v. City of Iowa City, 930 N.W.2d 792 (Iowa 2019)
Victoriano v. City of Waterloo, No. 22-0293, 2023 WL 115162 (Iowa Jan. 6, 2023)
Wagner v. State, 952 N.W.2d 843 (Iowa 2020)
Article 12, Section 1 of the Iowa Constitution
Iowa Code §670.1(4)
Iowa Code §670.4(1)(k)
Iowa Code §670.7
Iowa R. App. P. 6.801

INTRODUCTION

Thorington's repeated accusations that Scott County and Hill misrepresented undisputed facts simply ignored the fact that they appropriately accepted as undisputed what the body and dash camera videos depict. *See* App. 158–61; *Scott v. Harris*, 550 U.S. 372, 381 (2007) (where a videotape of the incident exists, a court should "view[] the facts in the light depicted by the videotape"). And those unassailable depictions do not give rise to a single disputed fact requiring a trial given the various legal immunity issues Scott County and Hill have raised.[1]

First, the district court incorrectly equated the all due care immunity under *Baldwin v. City of Estherville* ("*Baldwin I*"), 915 N.W.2d 259 (Iowa 2018) and Iowa Code §670.4(1)(c) with a mere reasonableness standard. The correct standard required the district court to determine whether Hill exercised all due care *to conform to the requirements of the law*. Second, the district court incorrectly found that the qualified immunity standard in Iowa Code §670.4A cannot be applied retroactively. When so applied, Hill is plainly entitled to qualified immunity under the undisputed facts. Finally, the district court incorrectly declined to apply the emergency response immunity in

[1] Because Scott County is sued only under a *respondeat superior* theory based on Hill's actions, they will hereafter be collectively referred to as "Hill."

§670.4(1)(k) to Thorington's Iowa constitutional excessive force claim, despite §670.1(4) requiring it to do so. Application of emergency response immunity to Thorington's constitutional tort claims provides an alternative basis entitling Hill to summary judgment.

ARGUMENT

I. Hill is entitled to all due care immunity under *Baldwin I* and Iowa Code §670.4(1)(c).

Thorington's pronouncement that Hill "did not attempt to exercise all due care" (Thorington Br., pg. 39) ignored the correct standard, which required an examination of whether he exercised "all due care *to conform to the requirements of the law*" as it existed on October 23, 2018. *Baldwin I*, 915 N.W.2d at 275, 279 (emphasis added). An examination of Hill's objective good faith or lack of bad faith was further required. *Id.* at 275; *Baldwin v. Estherville* ("*Baldwin II*"), 333 F. Supp. 3d 817, 843–45 (N.D. Iowa 2018). Under the correct formulation, Hill was entitled to summary judgment based on all due care immunity.

The starting point in determining whether Hill attempted to conform to the requirements of the law when he used deadly force in response to Mitchell's reckless and dangerous acts of both physically resisting arrest and using his car as a weapon is Iowa Code §804.8. Under §804.8, a police officer

may only use deadly force when a person cannot be captured any other way and either of the following apply:

a. The person has used or threatened to use deadly force in committing a felony.

b. The peace officer reasonably believes the person would use deadly force against any person unless immediately apprehended.

Both Thorington and, respectfully, the district court, misinterpreted this statute. Specifically, Thorington's repeated characterization of the incident as a minor traffic incident that Mitchell was simply trying to leave belies the video evidence. *See Scott*, 550 U.S. at 381. It is also flatly contradicted by the lower court's own finding that the traffic stop "became an emergency when Mitchell dove into his vehicle and began moving it back and forth with Hill hanging out the open door." *See* App. 252. Moreover, Hill was arresting Mitchell for outstanding felony warrants, not a traffic violation. App. 101(106:7–25), 159 (first video at 6:30–38, 7:06–20, 15:30–16:03, second video at 0:00–10). Indeed, the initial traffic stop was long over and Mitchell had already signed the citation when Hill advised him he was under arrest for the warrants, which led Mitchell to resist Hill's efforts to handcuff him in violation of Iowa law. App. 159 (second video at 1:00–28); *see* Iowa Code §708.3A (assaulting law enforcement officer in the performance of his duties);

§719.1 (interference with official act by peace officer); §804.11 (prohibiting force to resist arrest).

Similarly, Thorington's contention that Mitchell did not use or threaten to use deadly force in committing a felony ignored the law *and* the videotapes. Mitchell's physical resistance to a lawful arrest and his assault against Hill with his car were both felonies. Mitchell knew Hill was a police officer and Iowa Code §708.3A provides that a person who assaults an officer in the performance of his duties with the intent to seriously injure him (§708.3A(1)) or who uses a dangerous weapon during the assault (§708.3A(2)) commits a class "D" felony. And Iowa Code §719.1(1)(a) provides that a person commits the Class "D" felony of "interference with official acts" when he knowingly resists or obstructs an officer from performing any act within the scope of the officer's lawful duty or authority, and in so doing inflicts or attempts to inflict serious injury, or displays a dangerous weapon §719.1(1)(f). That provision may include a vehicle. *See* Iowa Code §702.7 (dangerous weapon); *State v. Oldfather*, 306 N.W.2d 760, 763–64 (Iowa 1981) (automobile may be a dangerous weapon). The videotapes leave no doubt that Mitchell used his car as a dangerous weapon capable of causing serious injury or death. *See* App. 253 ("Mitchell was putting his and officer Messmore's lives at risk with his dangerous driving.").

The district court erred by not conducting this analysis of Iowa law in reaching its conclusion that Mitchell "was not –at least as a matter of law– using deadly force in the commission of a felony" (App. 249), as well as determining whether the requirements of the law had been met for "all due care" immunity. Instead, it relied on *State v. DeWitt*, 811 N.W.2d 460, 469–70 (Iowa 2012) for the proposition that "the [U.S.] Supreme Court has established one bright-line rule: the use of deadly force to stop an unarmed, nondangerous suspect is never constitutionally reasonable." App. 249 (citing *Tennessee v. Garner*, 471 U.S. 1, 11 (1985)). *DeWitt*, however, did not involve deadly force, 811 N.W.2d at 465–66, and the reference to *Garner*'s "bright-line" rule represents only half the equation—*Garner* also instructs:

> Where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force. Thus, if the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm, deadly force may be used if necessary to prevent escape, and if, where feasible, some warning has been given.

471 U.S. at 11–12. Additionally, while the district court found that §804.8 requires officers to use *only* the force reasonably necessary while making the arrest, (App. 249), the statute further provides that officers may also use

reasonably necessary force to "defend any person from bodily harm while make the arrest." §804.8 (emphasis added).

Further, in interpreting §804.8's requirement that "deadly force is only justified when a person cannot be captured any other way," the district court concluded "Mitchell could of have been (and was) captured in another way following a relatively short chase…." App. 249. But that finding was impermissible hindsight, and if the language of §804.8 is literally construed in that fashion it would almost *never* apply because a hindsight unraveling of all events leading to a deadly police officer/citizen encounter can almost always conjure a scenario which could have led to "capture in another way." Moreover, such statutory construction would be contrary to law—an officer confronted with "an uncooperative suspect who is attempting to flee" is justified in imposing more force. *DeWitt*, 811 N.W.2d at 470. As such, this requirement should be construed under the totality of the circumstances. The videotape indisputably evidences that Hill used verbal commands, warnings, and non-lethal physical force in an effort to arrest Mitchell before resorting to deadly force seconds after being slammed into the B-pillar of Mitchell's car when Mitchell violently crashed his vehicle into Hill's cruiser. App. 158–61. Applying §804.8 to the totality of the circumstances which reflects this rapidly unfolding chain of events, Hill had exhausted other options and Mitchell could

not be captured in any other way at the time Hill fired. Thus, Hill complied with the requirements of the law.

When the videotapes reach the moment where Hill first fired, Thorington—and the district court—engaged in impermissible hindsight in determining Hill was arguably out of danger. *See DeWitt*, 811 N.W.2d at 470 ("We view the facts from the perspective of a reasonable officer on the scene, not with the illumination of hindsight."); *Graham v. Connor*, 490 U.S. 386, 396 (1989). Thorington and the district court reached this conclusion because they knew that after Hill fired his weapon, Mitchell drove away. But Hill did not know that would happen when he fired. What he did know was that Mitchell was resisting arrest, ignoring all commands, and driving erratically and dangerously—quickly moving back and forth, and back again—with no regard for Hill partially inside his vehicle or anything around him. Hill knew only that he was facing a danger of serious injury or death if he did not stop Mitchell. App. 80(23:5–14).

Hill is mindful that all due care immunity is not the same as "objective reasonableness" under the Fourth Amendment. *See Baldwin I*, 915 N.W.2d at 278–79. However, at bottom, every police seizure of a person must be assessed under the totality of circumstances (*Graham*, 490 U.S. at 396; *Garner*, 471 U.S. at 9), which plainly reveals that Hill took all due care to

conform to the requirements of Iowa Code §804.8. The totality of circumstances confronting Hill when he fired showed that, at that moment, Mitchell could not be captured any other way. Hill exhausted all other means to stop Mitchell and reasonably believed his life was in danger. App. 89 (60:8–21). Mitchell physically resisted arrest, assaulted Hill, and used or threatened the use of deadly force against Hill by using his vehicle as a dangerous weapon in committing a felony. *See* §708.3A(1)–(2); §719.1(f). Further, Hill reasonably believed that Mitchell would continue to use deadly force against him unless immediately apprehended. App. 97(93:12–18). In light of these circumstances as depicted by the videotapes, Hill is entitled to all due care immunity under *Baldwin I* and §670.4(1)(c).

Because no Iowa case has applied Iowa Code §804.8 to a similar case, the Court can consider applicable case law from other jurisdictions, the most-analogous being *Molina-Gomes v. Welinski*, 676 F.3d 1149 (8th Cir. 2012). Hill incorporates his arguments below concerning qualified immunity under Iowa Code §670.4A which are equally applicable to a determination of all due care immunity.

II. Hill is entitled to qualified immunity under Iowa Code §670.4A.

Hill argued he was entitled to qualified immunity under Iowa Code §670.4A because no clearly established law precluded his conduct at the time

of the shooting. *See* Hill Br. at 43–50. While Thorington devoted much of her response to the argument that Hill's use of deadly force violated Article I, Section 8 of the Iowa Constitution, (*see* Thorington Br. at 23–38), Section 670.4A's plain language does not mandate such an inquiry. Rather, it focuses on whether the "law was . . . clearly established at the time of the alleged deprivation," or whether "at the time of the alleged deprivation the state of the law was . . . sufficiently clear that every reasonable employee would have understood that the conduct alleged constituted a violation of the law." §670.4A(1).

That inquiry required Thorington to identify governing case law putting Hill on notice, in October 2018, that he violated clearly established law precluding his use of deadly force in analogous circumstances. A clearly established law is one that is "sufficiently clear that every reasonable official would have understood that what he is doing violates that right." *Mullenix v. Luna*, 577 U.S. 7, 11 (2015) (*per curiam*) (citation omitted). "While [the Supreme] Court's case law do[es] not require a case directly on point for a right to be clearly established, existing precedent must have placed the statutory or constitutional question beyond debate." *White v. Pauly*, 580 U.S. 73, 79 (2017) (*per curiam*) (cleaned up). Thorington's submission does not even approach satisfying that standard.

A. Thorington's reliance on broad principles articulated in *Garner* and *Graham,* as codified in Iowa Code §804.8, are insufficient to circumvent Hill's entitlement to qualified immunity.

Thorington's attempt to define clearly established law as an unarmed, non-dangerous suspect's right not to be shot and killed by a police officer under *Garner* and *Graham*, violates the cardinal rule of qualified immunity by construing the allegedly clearly established right at issue far too broadly. Thorington Br. at 23–26. Obviously, a police officer cannot shoot "unarmed, non-dangerous" suspects. The issue for qualified immunity purposes is whether, under the facts as depicted on the video, governing case law would have alerted Hill that Mitchell was an unarmed, non-dangerous suspect when Hill fired.

The Supreme Court has "repeatedly told courts not to define clearly established law at a too high level of generality." *City of Tahlequah, Okla. v. Bond*, 142 S. Ct. 9, 11 (2021) (*per curiam*); *White*, 580 U.S. at 79. Rather, the clearly established law must be "particularized" to the facts of the case, so that it is "clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Tahlequah*, 142 S. Ct. at 11 (internal quotations omitted); *White*, 580 U.S. at 79. Indeed, the U.S. Supreme Court has unequivocally held that "the general rules set forth in *Garner* and *Graham* do not by themselves create clearly established law" and that a plaintiff must identify factually

analogous and controlling cases that condemned Hill's actions, *unless* the use of force was so "obviously" illegal that no guidance beyond *Garner* and *Graham's* broad principles was necessary. *Kisela v. Hughes*, 138 S. Ct. 1148, 1153 (2018) (internal quotations omitted).; *see also White*, 580 U.S. at 80.

Viewed against that backdrop, Thorington's cited cases of *Garner* and *Graham,* as well as *Guite v. Wright*, 147 F.3d 747, 750 (8th Cir. 1998) and *Crumley v. City of St. Paul*, 324 F.3d 1003, 1007 (8th Cir. 2003) do not advance her case. *See,* Thorington Br. at 39–40. Indeed, *Guite* and *Crumley* did not even involve the reckless and dangerous use of a vehicle to defeat a lawful arrest, let alone anything analogous to the specific facts captured by the video, as determined by the district court. (Hill Br. at 46–47). Those facts unequivocally establish that Mitchell was armed, dangerous, and posed an immediate threat to Hill. Mitchell physically resisted Hill's attempt to handcuff him, and then used his car as a dangerous weapon to further defeat arrest. App. 158–61. Nonetheless, Hill did not immediately resort to deadly force. Rather he tried to physically restrain Mitchell both outside the car and after Mitchell re-entered his car to evade arrest. Hill also used verbal commands and warned Mitchell before using deadly force consistent with *Garner*, 471 U.S. at 11–12 (deadly force permissible if, where feasible, some warning given). Ultimately, Thorington failed to identify a single factually

analogous and controlling case interpreting Iowa Code §804.8 that condemned Hill's actions as statutorily prohibited.

Nor did Thorington even arguably demonstrate that Hill's use of force was so "obviously" excessive under *Graham* that she did not need to identify analogous supportive case law. *Graham* instructs courts to give "careful attention to the facts and circumstances of each particular case, *including"* the severity of the crime; whether the suspect poses an immediate threat to the safety of officers or others; and, whether the suspect is actively resisting arrest or attempting to evade arrest by flight, to assess whether the use of force was objectively reasonable. 490 U.S. at 396–97 (emphasis added). While Thorington concedes Mitchell was actively resisting arrest and attempting to flee (Thorington Br. at 26), her portrayal of the severity of the crime as a minor vehicle equipment issue simply defies both the undisputed video evidence and the lower court's factual findings. *See* App. 158–61. Indeed, Mitchell's physical resistance to a lawful arrest on felony warrants and his assault against Hill with his car were both felonies. Iowa Code §708.3A(1)–(2); §719.1(1)(f). And his aggressive and reckless use of his car to drag Hill and slam him into his police cruiser obviously posed an immediate threat to Hill's safety. Because Hill's actions were consistent with all of the *Graham* factors, it would

not be sufficiently clear to a reasonable officer confronted with the same circumstances that his conduct violated the law.

Thorington unreasonably blames Hill's decision to hold onto Mitchell's hand, rather than just letting him go, for the subjective fear Hill harbored. (Thorington Br. at 25). But letting go was hardly an obvious, or even viable, option given the real risk of Hill being dragged underneath the moving vehicle, *see* App. 58 (Hill could have been crushed under the wheels), and in any event, such hindsight is plainly impermissible under *Graham,* 490 U.S. at 396. In sum, Thorington did not identify a single analogous case to suggest Hill's decisions violated clearly established law under those circumstances, and there is no plausible argument that his actions were so obviously illegal under *Garner* and *Graham* that no analogous case was necessary. Thus, Hill is qualifiedly immune under Iowa Code §670.4A.

B. Thorington's claim of "officer created jeopardy" did not place Hill on notice that he violated clearly established law.

Thorington again resorts to general legal principle by arguing that "[c]ourts have uniformly held that law enforcement officers cannot voluntarily place themselves in jeopardy and then use that jeopardy to justify the use of deadly force." (Thorington Br. at 26). Initially, Thorington's contention that courts have uniformly applied this broad standard is decidedly incorrect. The U.S. Supreme Court has expressly not decided whether an

officer "recklessly creating a situation that requires deadly force can itself violate the Fourth Amendment," *see Tahlequah*, 142 S. Ct. at 11, and the Eighth Circuit has not accepted the concept as a determinative factor for Fourth Amendment liability. *See Sok v. City of Burnsville*, 960 F.3d 985, 993–94 (8th Cir. 2020).

But even if this Court did decide to adopt the "officer created danger" doctrine in deadly force cases, that general proposition is meaningless here because Thorington failed to identify any cases applying the concept in analogous circumstances. The only Eighth Circuit case she cites, *McCaslin v. Wilkins*, 183 F.3d 775 (8th Cir. 1999), does not help her because the officer in that case fired at a vehicle *after* it had run off the road and into a ditch following a high-speed pursuit. *Id.* at 777. The decision makes no mention of "officer created jeopardy" and merely confirmed *Garner*'s broad general principle prohibiting use of force against an escaping subject who poses no threat of serious physical harm. *Id.* at 779.

Thorington also falls woefully short in attempting to demonstrate the "robust consensus" of analogous cases from other circuits needed to place Hill on notice for purposes of qualified immunity. *See De La Rosa v. White*, 852 F.3d 740, 745 (8th Cir. 2017) ("Absent a case that is controlling authority in our jurisdiction, we look for a robust consensus of cases of persuasive

authority.") (internal quotations omitted). Thorington leads with a Seventh Circuit case, *Estate of Starks v. Enyart*, 5 F.3d 230 (7th Cir. 1993) which, initially, is factually dissimilar—unlike here, it involved an officer who "unreasonably created the encounter that ostensibly permitted deadly force to protect him" by stepping in front of a surrounded vehicle. *Id.* at 234. But far more disturbing is Thorington's failure to alert this Court to the Eighth Circuit's decision in *Schulz v. Long*, 44 F.3d 643, 649 n.3 (8th Cir. 1995), which expressly rejected *Starks*'s conclusion that "facts prior to seizure may be considered in the reasonableness determination" as contrary to its decision in *Cole v. Bone*, 993 F.2d 1328 (8th Cir. 1993).

Thorington fares no better in other circuits. The Sixth Circuit's decision in *Lewis v. Charter Tsp. of Flint*, 660 Fed. Appx. 339, 340–41 (6th Cir. 2016), does not advance her case because in that case an officer ran in front of a suspect's car and fired as the car passed him. *Lewis* is inapposite not only because Hill never ran in front of Mitchell's car but also because the officer in *Lewis* was not struggling with a physically resisting suspect who was dragging the officer with his car while attempting to escape. Similarly, *Kirby v. Duva*, 530 F.3d 475 (6th Cir. 2008) also did not involve a physical confrontation and instead concerned an officer who was positioned in front of the suspect's truck who fired out of fear that an officer behind the truck would

be run over when the truck reversed, and fired again fearing he would be crushed between his vehicle and the truck when it briefly stopped and lurched forward. *Id.* at 477–78. While the officer in *Smith v. Cupp*, 430 F.3d 766, 769 (6th Cir. 2005) did have contact with the suspect outside his cruiser vehicle, any similarity to Hill's confrontation ends there. After the officer arrested, handcuffed, and placed the suspect in the back of his cruiser, the suspect climbed into the front seat, and drove the cruiser toward the officer and a tow truck driver. *Id.* The officer fired at the cruiser as it drove by striking the suspect. *Id.* at 770.

Similarly, Thorington's reliance on various other Sixth Circuit decisions cited by the *Lewis* court in support of her "officer created jeopardy" principle is likewise misplaced because they are not at all analogous.[2] Thorington notes the low rate of speed of the vehicles was a factor as to the

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[2] *Foster v. Patrick*, 806 F.3d 883, 885–86 (6th Cir. 2015) (officer ran to front of cruiser when suspect approached him with knife; suspect got into cruiser and officer fired when suspect shifted into gear, accelerated, and drove away); *Godawa v. Byrd*, 798 F.3d 457, 460–62 (6th Cir. 2015) (officer fired after presumably hit by forward driven car as he moved in front of it and toward passenger side); *Cass v. City of Dayton*, 770 F.3d 368, 371–73 (6th Cir. 2014) (officer approached stopped car from front at a distance, car accelerated and hit officer who could not avoid impact and then fired striking passenger); *Hermiz v. City of Southfield*, 484 Fed. Appx. 13, 14 (6th Cir. 2012) (officer positioned in front of car fired as car drove at him); *Sigley v. City of Parma Heights*, 437 F.3d 527, 529–31 (6th Cir. 2006) (officer positioned himself in front of car and fired at driver through open driver's side window as car drove toward him).

threat facing the officer under *Lewis* but fails to acknowledge that another court in the Eighth Circuit has recognized that suspects escaping at slow speeds can cause serious injuries. *Kellum v. Evans*, No. 11-2135 (JNE/TNL), 2013 WL 4015328, at *4 (D. Minn. Aug. 16, 2013). More fundamentally, Thorington cites no case and advances no argument suggesting the Eighth Circuit would be any more receptive to the Sixth Circuit's "officer created jeopardy" analysis than it was to the Seventh Circuit's same analysis in *Starks.*

Thorington's survey of Sixth Circuit decisions also fails to inform this Court of *Williams v. City of Grosse Pointe Park*, 496 F.3d 482 (6th Cir. 2007), which is far more analogous to this case and *Molina-Gomes* than any case she does cite. As here, the suspect in *Williams* sought to escape by striking a police cruiser parked behind him before accelerating forward and knocking down an officer who was running toward the suspect's car. *Id.* at 484. The officer who was parked behind the suspect's car fired several shots at the suspect's car as it moved away. *Id.* Nonetheless, and based on the totality of the circumstances (including video evidence), the court determined no constitutional violation occurred. *Id.* at 486–87.

The same factual distinctions hold true for Thorington's citations to Third and Fifth Circuit cases. *Eberhardinger v. City of York*, 782 Fed. Appx. 180, 181–82 (3rd Cir. 2019) involved the denial of qualified immunity to an

officer who shot a suspect during a high-speed chase based on a factual dispute as to the officer's location (in front of the car or to its left) when he fired the shots. *Id.* at 182. Here by contrast, Hill's location in relation to Mitchell's car is undisputed and there was no high-speed chase.

Lytle v. Bexar County, Tex., 560 F.3d 404, 407–08 (5th Cir. 2009), marks Thorington's second citation to a discredited case from another circuit but even if it were still valid law it is too dissimilar to advance her case. *Lytle* involved another high-speed pursuit in which an officer fired twice into the rear of a car and hit a back-seat passenger after the car crashed into another vehicle, came to a full stop, and began backing up towards a patrol car parked several feet behind the suspect's car. *Id.* at 407. Those facts bear almost no resemblance to the situation confronting Hill, and when reviewing excessive force cases for qualified immunity "the result depends very much on the facts of each case, and thus police officers are entitled to qualified immunity unless existing precedent squarely governs the specific facts at issue." *Kisela*, 138 S. Ct. at 1153.

In any event, Thorington again inexplicably failed to alert this Court to the Fifth Circuit's far more recent and analogous decision in *Harmon v. City of Arlington, Tex.*, 16 F.4th 1159 (5th Cir. 2021), which granted qualified immunity—and in fact found the use of force reasonable as a matter of law—

to an officer who fatally shot a driver attempting to flee a traffic stop with the officer standing on the vehicle's running board. *Id.* at 1161–62, & 1165 (citing *Graham*, 490 U.S. at 396). Rejecting as impermissible hindsight the same argument Thorington advances here—that the officer simply had to step off the running board and allow the suspect to drive away, the Fifth Circuit specifically noted that "it is dubious whether *Lytle* lives on" after cases like *Mullenix v. Luna,*" where the Supreme Court again emphasized the importance of defining clearly established law with a level of specificity that would put an officer on notice that his conduct under the circumstances confronting him was clearly illegal. *Id.* at 1167, n.8.

Thorington's inability to identify a controlling Eighth Circuit case or a "robust consensus" of the law outside the Eighth Circuit to support her "officer created jeopardy" doctrine entitles Hill to §670.4A qualified immunity.

C. Thorington failed to establish that Hill violated clearly established law based on *Molina-Gomes v. Welinski*.

By far the most analogous Eighth Circuit case is *Molina-Gomes v. Welinski,* 676 F.3d 1149 (8th Cir. 2012) where an officer's split-second decision to shoot an escaping motorist who briefly dragged another officer before shedding him, crashing into a squad car and heading for open road, did

not violate the Fourth Amendment, without even reaching the question of whether the law was clearly established. *Id.* at 1153.

Thorington vainly attempts to distinguish *Molina-Gomes* (Thorington Br. at 34–38), first by contending the case involved a dangerous undercover cocaine deal rather than a minor traffic stop. But as described above, this argument ignores the dispositive fact that when Hill fired, Mitchell, just like Campos, was indisputably an active resister and assailant wielding his vehicle as a weapon. As such, Hill was dealing with far more than a traffic stop when he fired. Thorington further notes that unlike *Molina-Gomes* Mitchell's vehicle was moving no more than 10 miles an hour, Hill was not struck with enough force shatter a car door window, Hill was not dragged off his feet, and no one in the area was at risk of serious injury. (Thorington Br. at 36). That argument also ignores both *Kellum*, 2013 WL 4015328, at *4 (recognizing that cars at slow speeds can cause serious injuries), and the loud, jarring and violent impact of Mitchell's car crashing into Hill's cruiser as depicted and heard on the videotape. App. 158–61. It cannot be seriously disputed that Mitchell's actions were fully capable of causing significant injuries or death.

Similarly, Thorington's pronouncement that Mitchell posed no danger to other officers and motorists simply ignores the fact that in both *Molina-Gomes* and this case, deadly force was warranted because of the same

danger—a motorists' dragging of officers, immediately followed by dangerously crashing into police cars before trying to escape to open road. *Molina-Gomes*, 676 F.3d at 1149. Accordingly, *Molina-Gomes* forecloses Thorington's attempt to demonstrate that it was clearly established that Hill's use of force under very similar circumstances was illegal.

D. Iowa Code §670.4A should be applied retroactively.

Thorington's position that §670.4A is a substantive statute, rather than remedial or procedural, is faulty because she incorrectly claims the statute may eliminate her right to bring an Iowa constitutional claim. Section 670.4A provides an immunity defense. It does not limit the right to sue. Nothing about the statute defines a constitutional violation or changes the elements of a constitutional claim. A plaintiff can still bring a constitutional claim, and §670.4A provides only a qualified immunity that municipal employees may assert. *See Baldwin v. City of Waterloo*, 372 N.W.2d 486, 491 (Iowa 1995) ("Substantive law creates, defines, and regulates rights."); *Mitchell v. Forsyth*, 472 U.S. 511, 527 (1985) (Qualified immunity "is conceptually distinct from the merits of the plaintiff's claim that [her] rights may have been violated.").

Thorington relies heavily on *Anderson Fin. Servs., LLC v. Miller*, 769 N.W.2d 575 (Iowa 2009) where this Court held that a statute, Iowa Code §537.2403(1), that limited the interest to be charged on certain loans, did not

afford a remedy, but created a "substantive change in the level of allowable finance charges." *Id.* at 580. The court reasoned "the statute itself clearly 'defines and regulates' lenders' right to impose finance charges and is, therefore, substantive." *Id.* at 580–81. *Anderson* is not applicable here. While the statute at issue in *Anderson* defined and restricted lenders' ability to impose finance charges, §670.4A does not define any constitutional violation, change the elements of any constitutional claim, or restrict the ability to bring a constitutional claim. Instead, it provides an immunity defense to one class of potential defendants—municipal employees—and only if its requirements are met.

E. Iowa Code §670.4A is constitutional.

Thorington must prove that §670.4A violates the Iowa Constitution beyond a reasonable doubt. *State v. Thompson*, 954 N.W.2d 402, 409–10 (Iowa 2012). Thorington ignores this burden and instead insists that §670.4A is unconstitutional merely because qualified immunity is different from all due care immunity. This argument has already been addressed extensively in Hill's Opening Brief. Nothing in *Baldwin I* or its progeny suggest that the standard in § 670.4A is unconstitutional. *See Venckus v. City of Iowa City*, 930 N.W.2d 792, 808 (Iowa 2019) ("Claims arising under the statue constitution are subject to the IMTCA."). The legislature has the right to regulate

constitutional damage claims, and nothing about §670.4A "overrules" *Baldwin I*. *See* §670.4A(5) ("This section shall apply in addition *to* any other statutory or common law immunity.").

Thorington argues that her right to bring claims against Hill were vested before §670.4A and that applying it here would violate her due process rights, citing *Thorp v. Casey's General Stores, Inc.*, 446 N.W.2d 457 (Iowa 1989). But, again, §670.4A does not limit any vested rights or rights to sue and merely provides an immunity defense to municipal employees. Thorington has not met her heavy burden to prove §670.4A is unconstitutional.

III. Thorington concedes that Hill's actions qualify for emergency response immunity under Iowa Code §670.4(1)(k) and she cannot overcome the presumptive constitutionality of applying that immunity to her constitutional tort claim.

In his Opening Brief, Hill explained how the lower court correctly afforded Hill, based on the videotape and this Court's precedent, with emergency response immunity under §670.4(1)(k) because Mitchell created an emergency by physically resisting arrest and dangerously wielding his car as a weapon, which compelled Hill to fire his weapon to protect himself from serious injury or death. Thorington's Brief does not dispute the lower court's findings that IMTCA's emergency response protection sweeps broadly, that Mitchell created an emergency, or that Hill's actions occurred in connection with an emergency response. App. 250–54. As such, she has conceded those

findings were correct. *See Hollingsworth v. Schminkey*, 553 N.W.2d 591, 596 (Iowa 1996) ("When a party, in an appellate brief, fails to state, argue, or cite to authority in support of an issue, the issue may be deemed waived.").

Rather, Thorington's response rests entirely on the faulty premise that it is unconstitutional to apply emergency response immunity or any IMTCA substantive immunity to any Iowa constitutional claim. As explained below, no Iowa court has ever determined that emergency response immunity is unconstitutional or that IMTCA immunities cannot be applied against Iowa constitutional claims. Moreover, Thorington cannot overcome the presumptive constitutionality of the statutory language of the IMTCA, which applies its immunities to any and all tort claims brought "under any constitutional provision, statute or rule of law." Iowa Code §670.1(4).

A. Iowa Code §670.1(4) applies the emergency response immunity to Iowa constitutional claims and Thorington has not carried her heavy burden of proof of establishing the statute is unconstitutional.

Thorington misses the mark in analyzing whether emergency response immunity applies to Iowa constitutional claims. The focus of her position, stemming from dicta in the *Baldwin I* line of cases, is that "[t]the Iowa Supreme Court has not extended all of the immunities contained in the IMTCA to constitutional torts." App. 254. But the legal standard necessary to determine whether emergency response immunity applies to Iowa

constitutional claims is whether Iowa Code §670.1(4) (which applies all IMTCA immunities to constitutional claims) and Iowa Code §670.4(1)(k) (the emergency response immunity) are constitutional. In determining whether a statute is unconstitutional, this Court requires litigants to "focus on the language of the statute at issue" and show "beyond a reasonable doubt" the statute is unconstitutional because it carries a "presumption of constitutionality." *Victoriano v. City of Waterloo*, No. 22-0293, 2023 WL 115162, at *2 (Iowa Jan. 6, 2023); *Thompson*, 954 N.W.2d at 409–10.

Hill unequivocally argued the IMTCA's application to Iowa constitutional claims is "cloaked with a strong presumption of constitutionality," declared that "a party challenging a statute carries a heavy burden of rebutting this presumption," and challenged Thorington "to show beyond a reasonable doubt" how §670.1(4) and §670.4(1)(k) violate the Iowa Constitution. *See* Hill Br. at 60–70. Beyond that, Hill cited firmly established Iowa caselaw from the past 25 years which (a) specifically upheld the constitutionality of emergency response immunity and (b) provided a concrete basis for why municipal employees are entitled to immunities under the IMTCA. *Id.* (citing *Kulish v. Ellsworth*, 566 N.W.2d 885, 890 (Iowa 1997); *Kershner v. City of Burlington*, 618 N.W.2d 340, 346 (Iowa 2000); *Cubit v. Mahaska Cty.*, 677 N.W.2d 777, 781 (Iowa 2004); *Harrod v. City of Council*

Bluffs, 753 N.W.2d 18 (Table), 2008 WL 2200083, at *4 (Iowa Ct. App. May 29, 2008); *Doe v. New London Cmty. Sch. Dist.,* 848 N.W.2d 347, 357 (Iowa 2014)).

Thorington's response did not challenge any precedent finding emergency response immunity constitutional nor did it even attempt to undermine the rational basis supporting the Iowa legislature's decision to provide greater immunities for Iowa municipalities and municipal employees than to private entities.[3] Given this failure, Thorington has not met the high bar necessary to overcome the emergency response immunity's strong presumption of constitutionality. Instead, Thorington cites highly generalized dicta from the *Baldwin* line of cases for support that "some" of the IMTCA immunities are "unsuitable for constitutional torts." *Baldwin I*, 915 N.W.2d at 280. But that dicta does not reference the emergency response immunity or suggest that it is a substantive immunity that is unsuitable for constitutional torts. And that omission makes sense given this Court's concrete precedent

[3] The legislature has the ability to regulate Iowa constitutional tort claims for monetary damages, and its statutory immunities in the IMTCA—specifically the emergency response immunity—is a proper exercise of the legislature's authority. *See* Iowa Const. art. XII, § 1 ("The general assembly shall pass all laws necessary to carry this Constitution into effect"). The legislature is in a better position to assess the need for immunity defenses against Iowa constitutional tort claims, especially so when police officers are relied upon to respond to emergency situations.

previously establishing that (a) emergency response immunity is constitutional and (b) there is a valid, legitimate, and rational basis for the IMTCA to provide emergency response immunity to municipal employees. *See* Hill Br. at 60–70. Furthermore, Thorington simply ignores that *Baldwin I* and its progeny have explained that claims arising under the state constitution **are** subject to both the IMTCA and the ITCA. *Baldwin v. City of Estherville* ("*Baldwin III*"), 929 N.W.2d 691, 696–98 (Iowa 2019); *Venckus*, 930 N.W.2d at 808 (Iowa 2019); and *Wagner v. State*, 952 N.W.2d 843, 858–59 (Iowa 2020).

In the end, this Court is confronted with precedent supporting the specific constitutionality of emergency response immunity versus Thorington's reliance on generalized dicta from *Baldwin I*. This Court should not be swayed by Thorington's interpretations and should instead follow its own precedent requiring Thorington to overcome the presumptive constitutionality of the emergency response immunity, which she has failed to do. *See, e.g.*, *State v. Green*, 886 N.W.2d 106 (Table), 2016 WL 4384620, at *5 (Iowa Ct. App. Aug. 17, 2016), *aff'd*, 896 N.W.2d 770 (Iowa 2017) (holding that when the court is "confronted with clear, controlling authority" it should not rely upon dicta); *McIntyre v. Reliance Standard Life Ins. Co.*, 972 F.3d 955, 963 (8th Cir. 2020) ("when an issue is not squarely addressed in

prior case law, we are not bound by precedent through *stare decisis*, and we need not follow dicta") (internal citations removed). Given Thorington's failure to meet her necessary burden, this Court should conclude Hill is entitled to emergency response immunity under Iowa Code §670.4(1)(k) from Thorington's Iowa constitutional claim for excessive force.

B. Thorington's argument that Hill waived statutory immunities by the purchase of insurance is impermissibly raised for the first time on appeal and is unsupported.

Thorington argues, for the first time on appeal, that Hill waived statutory immunities because Scott County purchased insurance pursuant to Iowa Code §670.7. Thorington never raised this issue before the district court. "Issues on appeal not raised in the district court are deemed waived." *State v. Sanford*, 814 N.W.2d 611, 620 (Iowa 2012); *see also Struck v. Mercy Health Services-Iowa Corp.*, 973 N.W.2d 533, 539 (Iowa 2022).

Thorington's new argument also fails because there is nothing in the record to support her claim that Scott County purchased insurance covering her claim. Thorington cites to documents produced by Hill in discovery. Documents produced in discovery that are not filed in the district court are not part of the record and cannot be considered by this Court. *See* Iowa R. App. P. 6.801; *State v. Weiland*, 202 N.W.2d 67, 69 (Iowa 1972). The insurance

documents that Thorington cites are nowhere in the record and the Court cannot rely on them.

If Thorington raised the insurance argument before the district court, Hill would have demonstrated it is meritless. Section 670.7(1) provides, in part, that a municipality may insure "against all or any part of liability which might be incurred by the municipality or its officers, employees, and agents" for "torts specified in section 670.4." Section 670.7(2), provides, in part, that the "[p]rocurement of this insurance constitutes a waiver of the defense of governmental immunity as to those exceptions listed in section 670.4 to the extent stated in the policy. . ."

"The language of section 670.7 makes it equally clear that—as to claims listed in section 670.4 to which governmental immunity does apply—municipalities have authority to purchase a liability insurance policy insuring against them. And governmental immunity as to those claims is waived *but only to the extent stated in such policy*." *City of West Branch v. Miller*, 546 N.W.2d 598, 603 (Iowa 1996) (emphasis in original). A municipality does not waive its §670.4 immunities by purchasing an insurance policy that does not insure the municipality for tortious acts that are subject to §670.4 immunity defenses and preserves the municipality's right to rely on §670.4 immunities. *Van Orsdall v. City of Des Moines*, 711 N.W.2d 732 (Table), 2006 WL 126436,

at *3 (Iowa Ct. App. Jan. 19, 2006); *Merchants White Line Warehousing, Inc. v. City of Des Moines*, 665 N.W.2d 439 (Table), 2003 WL 1022838, at *4 (Iowa Ct. App. Mar. 12, 2003).

Scott County acknowledges that it has procured insurance coverage, albeit its policies are not in the record. If they were in the record, those policies would reveal that they do not cover claims subject to §670.4 immunities. Thus, while the Court cannot consider Thorington's new insurance argument, it would nonetheless reject it if given the opportunity for full consideration.

CONCLUSION

For these reasons, the district court's decision denying Hill's Motion for Summary Judgment on Thorington's Iowa Constitution Article I, Section 8 excessive force claim should be reversed. This case should have been disposed of in its entirety on summary judgment.

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ATTORNEY'S CERTIFICATE OF COST

I, the undersigned, hereby certify the cost of printing Appellants' Reply Brief was $0.00.

/s/ Ian J. Russell March 16, 2023
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I hereby certify that on March 16, 2023, the foregoing **Appellants' Reply Brief** was filed electronically with the Supreme Court of Iowa. Notice of this filing will be sent through the electronic document management system to all parties who are registered filers.

/s/ Ian J. Russell March 16, 2023
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