IN THE SUPREME COURT OF IOWA

No. 22-1194

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

v.

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

APPEAL FROM THE IOWA DISTRICT
COURT FOR SCOTT COUNTY, NO. LACE 133201
THE HONORABLE MARK R. LAWSON

APPELLEE'S FINAL BRIEF

DAVE O'BRIEN LAW
1500 Center Street NE
Cedar Rapids, Iowa 52402
Telephone: (319) 861-3001
Fax: (319) 861-3007
E-mail: dave@daveobrienlaw.com

By: /s/ David A. O'Brien
David A. O'Brien, AT0005870

CROWLEY & PRILL
3012 Division Street
Burlington, Iowa 52601
Telephone: (319)753-1330
Facsimile: (319)752-3934
E-mail: amahoney@cbp-lawyers.com

By: /s/ Andrew L. Mahoney
ANDREW L. MAHONEY AT0012329

By: /s/Nicholas Rowley
Nicholas J. Rowley, Esq. AT0022407
Trial Lawyers for Justice
421 W. Water Street
Decorah, IA 52101

By: /s/Haytham Faraj
Haytham Faraj, Esq. (109372)
Law Offices of Haytham Faraj PLLC
1935 W. Belmont Avenue
Chicago, IL 60657
312-635-0800

ATTORNEYS FOR APPELLEE-PLAINTIFF

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTUTES AND RULES

OTHER AUTHORITIES

STATEMENT OF THE ISSUES

I. SUMMARY JUDGMENT STANDARD OF REVIEW

A. General Summary Judgement Standard

Bitner v. Ottumwa Cmty. Sch. Dist., 549 N.W.2d 295 (Iowa 1996)
*Dunlap v. AIG, Inc., 2019 Iowa App. LEXIS 50, *12-13, 927 N.W.2d 201, 2019 WL 141012, at *4 (citing Iowa R. Civ. P. 1.981(3))*
Lytle v. Bexar Cty., Tex., 560 F.3d 404, 407 (5th Cir. 2009), 929 N.W.2d 717 (Iowa 2019)
Mueller v. Wellmark, Inc., 818 N.W.2d 244 (Iowa 2012)
Phillips v. Covenant Clinic, 625 N.W.2d 714 (Iowa 2001)

B. Standard for Reviewing the Use of Deadly Force When Plaintiff is Killed by Law Enforcement

Estate of Robinson ex rel. Irwin v. City of Madison, 15-cv-502-jdp, 41 (W.D. Wis. Feb. 13, 2017)
Plakas v. Drinski, 19 F.3d 1143 (7th Cir. 1994)

II. DID HILL USE EXCESSIVE DEADLY FORCE IN VIOLATION OF ARTICLE I, SECTION 8 OF THE IOWA CONSTITUTION?

Cass v. City of Dayton, 770 F.3d 368, 375 (6th Cir. 2014)
Eberhardinger v. City of York, 782 F. App'x 180, 182 (3d Cir. 2019)
Estate of Starks v. Enyart, 5 F.3d 230, 232 (7th Cir. 1993)
Foster, 806 F.3d at 889
Godawa v. Byrd, 798 F.3d 457, 464 (6th Cir. 2015), 484 Fed. Appx. 13, 14, 16–17 (6th Cir. 2012)
Graham v. Connor, 490 U.S. 386, 395 (1989)
Hermiz v. City of Southfield, 484 Fed. Appx. 13, 14, 16–17 (6th Cir. 2012)
Kirby v. Duva, 530 F.3d 475, 482 (6th Cir. 2008)
Lewis v. Charter Township of Flint and Needham, 660 Fed. Appx. 339 (6th Cir. 2016)
McCaslin v. Wilkins, 183 F.3d 775, 779 (8th Cir. 1999)
Sigley v. City of Parma Heights, 437 F.3d 527, 531, 537 (6th Cir. 2006)
Smith v. Cupp, 430 F.3d 766 (6th Cir. 2005)
State v. DeWitt, 811 N.W.2d 460, 469, (2012)
Tennessee v. Garner, 471 U.S. 1, 8 (1985)

III. IS HILL ENTITLED TO QUALIFIED IMMUNITY?

A. Is Hill Entitled to Qualified Immunity Under *Baldwin v. City of Estherville*?

Baldwin v. City of Estherville, 915 N.W.2d 259, 279 (Iowa 2018)
Minor v. State, 819 N.W.2d 383, 400 (Iowa 2012)
Pearson v. Callahan, 555 U.S. 223, 231 (2009)
Victoriano v. City of Waterloo, Case No. 22-0293
I.C.A. 670.4 A

B. Is Hill Entitled to Qualified Immunity Pursuant to I.C.A. 670.4A?

Anderson Fin. Servs., LLC v. Miller, 769 N.W.2d 575, 579 (Iowa 2009)
Crumley v. City of St. Paul, 324 F. 3d 1003, 1007 (8th Cir. 2003)
Guite v. Wright, 147 F.3d 747, 750 (8th Cir. 1998)
Graham v. Connor, 490 U.S. 386, 395 (1989)
McCaslin v. Wilkins, 183 F.3d 775, 777 (8th Cir. 1999)
Molina-Gomes v. Welinski, 676 F.3d 1149 (8th Cir. 2012)
State v. DeWitt, 811 N.W.2d 460, 469, (2012)
Tennessee v. Garner, 471 U.S. 1, 8 (1985)
I.C.A. 670.4 A

I.C.A. 804.8

C. Should I.C.A. 670.4A Apply Retroactively?

Anderson Financial Services LLC v. Miller, 769 N.W.2d 575, 579 (Iowa 2009)
Baldwin v. City of Estherville, 915 N.W.2d 259, 279 (Iowa 2018)
Baldwin v. Waterloo, 372 N.W.2d 486, 491 (1985)
Carver-Kim v. Reynolds, Case No. LACV 148599, issued on December 22, 2021
City of Waterloo v. Bainbridge, 749 N.W.2d 245, 249 (Iowa 2008)
Dindinger v. Allsteel, Inc., 860 N.W.2d 557, 563
Iowa Beta Chapter of Phi Delta Theta Fraternity v. State, 763 N.W.2d 250, 266 (Iowa 2009)
Matter of Chicago, Mil., St. P. & Pac. R.R., 334 N.W.2d 290, 293 (Iowa 1983)
Nahas v. Polk County, et al., Case No. LACV 043294
Schmitt v. Jenkins Truck Lines, Inc., 260 Iowa 556, 560, 149 N.W.2d 789, 791
State ex rel. Turner v. Limbrecht, 246 N.W.2d 330, 332 (Iowa 1976)
(1967)
2007 Iowa Acts. ch. 26, §§ 2-3
I.C.A § 4.5
Iowa Code §670.4A
Iowa Const., Art. III § 26
S.F. 342, Div. III, §16

D. Is I.C.A. 670.4A Unconstitutional?

Chicago, Rock Island and Pacific Railway Co. v. Rosenbaum, 212 Iowa 227, 231, 231 N.W. 646, 648 (1930)
City of Muscatine v. Waters,251 N.W.2d 544, 548-49 (Iowa 1977)
Frink v. Clark, 285 N.W. 681, 683 (1939)
Harlow v. Fitzgerald, 457 U.S. 800, in 1982
Richardson v. Fitzgerald, 109 N.W. 866, 867 (1906)
Richman v. Supervisors Muscatine County, 77 Iowa 513, 519-20, 42 N.W. 422, 425 (1889)
Thorp v. Casey's General Stores, Inc., 446 N.W.2d 457 (Iowa 1989):
Wagner v. State of Iowa, 952 N.W.2d 843, 847 (Iowa 2020)
Windsor v. City of Des Moines, 110 Iowa 175, 179, 81 N.W. 476, 477 (1900)
Article I, §9 of the Iowa Constitution
Fourteenth Amendment to the U.S. Constitution
Iowa Code § 670. 4A

Iowa Constitution, Article X
Restatement (Second) of Torts section 874A
S.F. 476, Iowa Senate Floor Debate at 7:21

IV. DOES STATUTORY EMERGENCY RESPONSE IMMUNITY APPLY TO SHIELD HILL'S UNCONSTITUTIONAL CONDUCT?

A. Does Emergency Response Immunity Shield Conduct that Violates the Iowa Constitution?

Baldwin v. City of Estherville, 915 N.W.2d 259, 279 (Iowa 2018)
Venckus v. City of Iowa City, 930 N.W.2d 792, 808 (Iowa 2019)
Wagner v. State, 952 N.W.2d 843, 847 (Iowa 2020)
Iowa Code §670

B. Has Hill Waived Any Statutory Immunity by the Purchase of Insurance Pursuant to I.C.A. 670.7?

Merchs. White Line Warehousing v. City of Des Moines, 2003 Iowa App. LEXIS 188, *11-12

ROUTING STATEMENT

Thorington agrees that the Supreme Court should retain this case that involves Iowa Constitutional issues of first impression. Iowa R. App. Pr. 6.1101(2).

STATEMENT OF THE CASE

Defendants' Statement of the Case is unacceptable because it makes numerous factual claims that are not supported by the record. Scott County Sheriff's Deputy Greg Hill shot and killed unarmed Robert Mitchell on October 23, 2018. (App. p. 240-241 - Order Denying Def. MSJ, pp. 3 and 4). Patty A. Thorington, Mitchell's mother and the Administrator of Mitchell's Estate, filed a lawsuit against

Hill and Scott County on September 28, 2020, alleging constitutional violations and wrongful death. (App. p. 237 - Order Denying Def. MSJ, p. 1). Thorington filed a Partial Motion for Summary Judgment on Liability that was denied by the District Court in an Order issued on February 21, 2022. (App. p. 237 - Order Denying Pls. MSJ).

Defendants filed a Motion for Summary Judgement on all issues which was granted, in part, and denied, in part, on June 16, 2022. (App. pp. 259-260 - Order Denying Def. MSJ, pp. 23-24). The District Court denied Defendants' summary judgment on immunity pursuant to I.C.A. 670.4A; on "all due care" qualified immunity; and regarding Thorington's constitutional based excessive force claim pursuant to emergency response immunity. *Id*. The District Court granted Defendants' summary judgment, pursuant to emergency response immunity, with regard to Thorington's common law wrongful death claim; Thorington's substantive due process claim; and Thorington's inalienable rights claim. *Id*. The District Court also granted summary judgment on claims made directly against Defendant Scott County. *Id*.

On July 15, 2022, the Defendants filed an Interlocutory Appeal, pursuant to I.C.A. 670.4A, of the District Court's Order denying, in part, summary judgement. 07/15/2022, Notice of Appeal. On July 15, 2022, the Defendants also filed an Application for Interlocutory Appeal. 7/15/2022, Application. On December 5,

2022, the Iowa Supreme Court issued an Order allowing the appeal to proceed pursuant to I.C.A. 670.4A. 12/05/2022, Order. The Defendants' Application for Interlocutory Appeal was denied as moot. *Id*.

STATEMENT OF FACTS

Plaintiff, Patty Thorington, accepts the facts as found by the District Court in denying the Defendants Motion for Summary Judgement. (App. pp. 239-241, Order Denying Def. MSJ, pp. 3-5). In addition, for the benefit of the Appellate Review, Thorington provides evidence, exhibits and screen grabs that were part of the summary judgment record before the District Court, as noted below.

The ENTIRE subject matter incident is on video – from two different angles. (App. pp. 158 and 161 - Hill Cruiser Cam and Messmore BWC). Yet, the Defendants insist on misrepresenting facts clearly depicted on the video and now they are seeking summary judgment based upon manufactured and misrepresented facts. The Defendants have gone so far as to pay over $62,000 for an animation to try to get a judge, a jury, or anyone to believe their cartoon version of events, instead of what anyone may see on the real video.

The misrepresentation of the facts is clearly set out in Defendants' statement of facts where they falsely claim that "Hill [was] hanging out the open door" and that Defendant Hill was "dragged, "drag," or "dragging" - false claims that appear in the brief 15 times - when the video clearly shows Hill never left his feet. Def. Br.

pp. 15, 21, 24 (x2), 35, 37 (x2), 38, 39,41 (x4), 46, 47, 48 and 49 (x2); and (App. p. 161 - Messmore BWC). The Defendants do not disclose that Hill was never entangled in the vehicle and the only thing preventing him from just moving away from the vehicle was Hill's absolute refusal to just let go of Mitchell's hand. *Id*.; (App. pp. 161 and 226 - Messmore BWC and DCI Agent George Dep. p.37:10-38:2). Defendants also conveniently forget to mention that during the entire sequence of events Mitchell's vehicle never exceeds 10.4 MPH. (App. p. 218-219 - Def. Suppl. Adm. Resp., pp. 1-2).

The disingenuous nature of Defendant's argument may be appropriately summarized by reviewing a key factual summary, attributed entirely to the District Court, as establishing "undisputed facts." Def. Br. pp. 46-47. The Defendants just flat out misrepresent the District Court's factual conclusions. Here are the alleged undisputed facts attributed to the District Court by the defense:

> The lower court determined that the video evidence (in the light most favorable to Plaintiffs) illustrates that… Deputy Hill's "lower body" was being dragged on the ground; Mitchell then "slammed [the Ford 500] into the front of Hill's SUV" forcing Deputy Hill's body to be thrown into the B-Pillar; after Deputy Hill "disentangled himself from the vehicle," he got up to his feet and fired at Mitchell while standing in the "door swing" of the car. (App. pp. 240, 253, Order Denying Def. MSJ, pp. 4, 17).

Def. Br. pp. 46-47.

The defense refers to this manufactured version of events as "undisputed facts," even though the District Court never found that "Hill's 'lower body' was

being dragged on the ground," or that "Hill's body [was] thrown into the B-Pillar." Def. Br. p. 47. (App. p. 240 - Order Denying Def. MSJ. p. 4). What the District Court found in discussing the facts surround the shooting was that "Hill was out of the vehicle and on his feet, although still within the 'door-swing' area of the driver's door." *Id*. The defense ignores a later clarification of this finding by the District Court that, "Mitchell was leaving the scene when Hill fired the shots. Hill was on his feet and out of danger (other [than] minimal danger from the open driver's door) when he fired the three shots." *Id* at p. 13.

The defense also knits together a partial quote from page 4 of the order, with a taken out of context quote from page 17 of the order, to claim as uncontested that Hill was somehow entangled in the vehicle. *Id*. at 4, 17. However, the District Court specifically rejected that claim. See footnote 1, "...for purposes of summary judgment only, the defendants also concede that Mitchell was not holding Hill in the vehicle, and that Hill was not entangled in the vehicle. By implication, therefore, they concede that Hill was either holding on to Mitchell or something inside the Ford as it maneuvered back and forth." (App. pp. 241-242 - Order Denying MSJ, pp. 4-5).

Note, this "for purposes of summary judgment" concession amounts to nothing since there is no record evidence of Hill being in any way entangled in the vehicle. DCI Agent George stated, "…in terms of being like tied up within the seat

belt or being held in there, you know, I don't have any information to support that. He was certainly in the vehicle but in terms of being entangled as you're asking, I don't remember that, no, as being a factual part of this." (App. pp. 226-227 - George Dep. p. 37:10-38:6). Agent George followed that up by agreeing "that's fair to say, he could have let go had he chose to," when asked if "Deputy Hill was free to let go of Mitchell at any time."

Deposition Exhibit 1 is an overhead of the scene with markings provided by DCI investigating Agent George. The red "M" vehicle is the Mitchell vehicle, and the green "H" vehicle is Defendant Hill's cruiser. (Not drawn to scale). During the entire sequence of events Mitchell's vehicle moves back and forth completely within the tightly confined space between the red M and the green H.

(App. p. 203 - Dep. Ex. 1).

A screen grab from Messmore's BWC, shows Defendant Hill holding onto Mitchell's left hand and the Iowa State Deputy Medical Examiner autopsy report establishes an injury to Mitchell's left hand consistent with Defendant Hill holding on during the incident.

(Oval emphasis added) (App. pp. 204, 223 - Dep. Ex 7 and Pl. Suppl. Exp. Des., p. 3).

Investigating DCI Agent George reviewed Messmore's BWC and concluded that after Mitchell's vehicle came into contact with Defendant Hill's cruiser, Hill "rose to an almost standing position at Mitchell's door when the first bullet was fired. It appears the first bullet is fired when the car is stationary." (App. p. 209-209 - Dep. Ex. 18, pp. 2-3). Another screen grab from the Messmore BWC, shows Defendant

Hill standing up outside the Mitchell vehicle with both feet planted firmly on the ground while firing the first shot. (App. p. 205 - Dep. Ex. 8).

DCI Agent George concluded that "[i]t appears the next two bullets are fired as Mitchell's car began to move/was moving forward away from Deputy Hill." (App. p. 209 - Dep. Ex. 18, p. 3).

A screen grab from Defendant Hill's cruiser cam shows Deputy Messmore off to the side and never in any danger of being struck by the Mitchell vehicle as Defendant Hill is standing up outside the vehicle firing at Mitchell.

(App. p. 206 - Dep. Ex. 9). This screen grab establishes that any claim Messmore was somehow in danger as Mitchell was backing out of the parking spot and driving away is a complete fabrication. Cars do not move sideways. Messmore's BWC shows that she was never in danger from the movement of Mitchell's vehicle. (App. p. 161 - Messmore BWC).

Both Defendant Hill and Deputy Messmore falsely claimed Hill fired while still partially in the Mitchell vehicle. (App. pp. 86 - Hill Dep. 48:8-49:9 and Messmore Dep. 18:13-25). In his DCI interview, Defendant Hill falsely claimed, "I was in the car. I shot from my hip, in the car with my first round." (App. p. 232 - Hill Interview, p. 45). Deputy Messmore testified, "Q. So your belief is that the use of deadly force by Hill in this case was justified because his body was in the vehicle at the time he first fired the shot, the first shot? A. Yes, sir. That's the way I recall it. Q. And if that's true then the video's going to show that, right? A. Yes, sir." (App. p. 123 - Messmore Dep. p. 37:17-23).

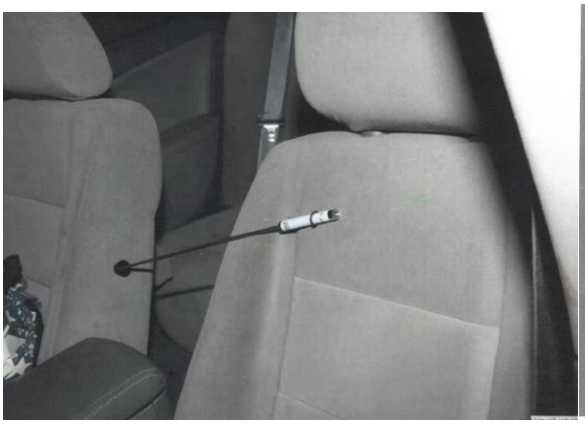
DCI Agent George disagreed stating – "Q. And so you… were aware that the version of events as relayed by both Deputy Messmore and Deputy Hill were not supported in some critical ways by the video. Isn't that true? A. Yes." (App. p. 225 - George Dep. p. 11:14-22). DCI Agent George conceded that as "part of your investigation into this matter you were able to determine that both Deputy Messmore's and Deputy Hill's claim that Hill was inside the vehicle when the first shot was fired was not supported by the video evidence; isn't that true? A. Correct." (App. p. 229, George Dep. p. 57:10-15).

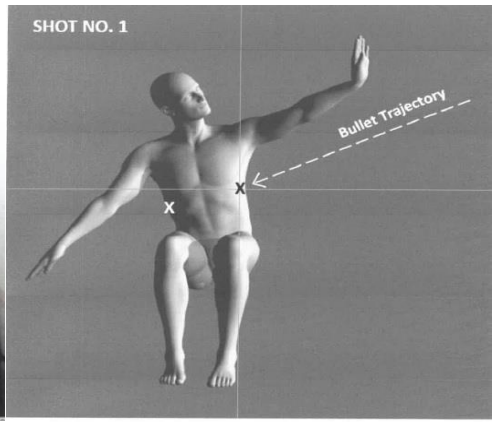
In his DCI interview, Defendant Hill never once claimed that Mitchell was trying to kill him. (App. p. 232 - Hill DCI Interview, p. 45). In that interview Defendant Hill recognized that Mitchell was just trying to "get away." (App. p. 231 - Hill DCI Interview, p. 41). Only during his deposition, more than 2.5 years after shooting and killing Mitchell, did Defendant Hill **FIRST** claim that Mitchell was using the vehicle to try to kill him. (App. p. 77 - Hill Dep. p. 10:6-7). Note that Mitchell using his vehicle in an attempt to kill Defendant Hill is the only even remotely plausible justification in these circumstances for the use of deadly force under Iowa law. See I.C.A. 804.8. Certainly, Defendant Hill's attorneys were well aware of this fact when they prepped Hill for his deposition.

The Deputy Iowa State Medical Examiner who performed the autopsy on Mitchell, Dr. Dennis Firchau, will testify that "Deputy Hill was outside the vehicle

and firing at a downward angle at Mitchell, the weapon was not fired at close range; the muzzle of the gun was roughly at least 2-3 feet from Mitchell's body at the time the gun was fired; and that there was contusions and abrasions of Mitchell's left middle finger consistent with someone grabbing and holding onto Mitchell's hand as he was attempting to flee." (App. pp. 221-223 - Plt. Suppl. Exp. Des. pp. 1-3).

The trajectory of the bullet that killed Mitchell also establishes that Hill was outside the vehicle shooting at a downward angle. Here is a photo from the DCI investigation showing the trajectory of the bullet as it passed through Mitchell's body and into the passenger front seat. Next to that photo is a graphic showing the bullet trajectory through Mitchell's torso.





(App. pp. 213, 215, 162-166, and 221-223 - Dep. Exs. 44, 48, 51 (autopsy rpt. pp. 1-5) and Plt. Suppl. Exp. Des. pp. 1-3).

ARGUMENT

I. SUMMARY JUDGMENT STANDARD OF REVIEW

A. General Summary Judgment Standard

"Summary judgment is appropriate when the pleadings, depositions, answers to interrogatories, admissions on file, and affidavits show there is no genuine issue of material fact, and the moving party is entitled to a judgment as a matter of law." *Dunlap v. AIG, Inc*., 2019 Iowa App. LEXIS 50, *12-13, 927 N.W.2d 201, 2019 WL 141012, at *4 (citing Iowa R. Civ. P. 1.981(3)); *see also Mueller v. Wellmark, Inc*., 818 N.W.2d 244, 253 (Iowa 2012). "On a motion for summary judgment, the court does not weigh the evidence. Instead, the court inquires whether a reasonable jury, faced with the evidence presented, could return a verdict for the nonmoving party." *Bitner v. Ottumwa Cmty. Sch. Dist*., 549 N.W.2d 295, 300 (Iowa 1996). "The burden is on the party moving for summary judgment to prove the facts are undisputed." *Phillips v. Covenant Clinic*, 625 N.W.2d 714, 717 (Iowa 2001). On summary judgment, the court must "view the evidence in the light most favorable to the nonmoving party." *Linn v. State*, 929 N.W.2d 717, 730 (Iowa 2019). The court must also "consider on behalf of the nonmoving party every legitimate inference that can reasonably be deducted from the record." *Phillips*, 625 N.W.2d at 718.

B. Standard for Reviewing the Use of Deadly Force When Plaintiff is Killed by Law Enforcement

Federal precedent provides a persuasive framework for assessing the use of deadly force by law enforcement officers: "where the officer defendant is the only witness left alive to testify… a court must undertake a fairly critical assessment of the forensic evidence, the officer's original reports or statements and the opinions of

experts to decide whether the officer's testimony could reasonably be rejected at a trial." *Plakas v. Drinski*, 19 F.3d 1143, 1147 (7th Cir. 1994); *see also Estate of Robinson ex rel. Irwin v. City of Madison*, 15-cv-502-jdp, 41 (W.D. Wis. Feb. 13, 2017). This admonition is particularly applicable to this case where Mitchell is not here to tell his side of the story and the version of events now being claimed by Defendant Hill is neither supported by the video taken of the incident, nor Hill's own statement to the DCI provided shortly after the incident. (App. p. 230, Hill DCI Interview, pp. 45 and 54); (App. p. 229, George Dep. p. 57:10-15); (App. p. 77, Hill Dep. pp. 10:6-7).

II. DEFENDANT HILL USED EXCESSIVE DEADLY FORCE IN VIOLATION OF ARTICLE I, SECTION 8 OF THE IOWA CONSTITUTION

Thorington concedes that the Defendant preserved alleged error on this issue.

Plaintiff accepts the analysis set out by the U.S. Supreme Court in in *Tennessee v. Garner*, 471 U.S. 1, 8 (1985), "[w]here the suspect poses no immediate threat to the officer and no threat to others, the harm resulting from failing to apprehend him does not justify the use of deadly force to do so." The *Garner* court reasoned that "[i]t is no doubt unfortunate when a suspect who is in sight escapes, but the fact that the police arrive a little late or are a little slower afoot does not always justify killing the suspect. A police officer may not seize an unarmed, non-

dangerous suspect by shooting him dead." *Id*. That is precisely what Defendant Hill did in this case – he shot an unarmed and non-dangerous Mitchell dead. The Iowa Supreme Court has recognized the *Garner* rule. See S*tate v. DeWitt*, 811 N.W.2d 460, 469, (2012) ("Finally, the [U.S.] Supreme Court has established one bright-line rule: the use of deadly force to stop an unarmed, non-dangerous suspect is never constitutionally reasonable. In general, to be reasonable, the force applied must be proportionate to the need for the force raised by the circumstances.")

Iowa law codifies the *Garner* rule and requires that deadly force may only be used by law enforcement officers to effectuate an arrest in the following very specific situations, none of which are applicable in this case:

> 804.8 Use of force by peace officer making an arrest.
>
> 1. 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. **However, the use of deadly force is only justified 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**. [Mitchell did not]
>
> b. **The peace officer reasonably believes the person would use deadly force against any person unless immediately apprehended**. [no legitimate reason to believe Mitchell wanted to anything except to get away]

(Emphasis added).

The District Court correctly applied I.C.A. §804.8, to the facts of this case,

holding as follows:

> Mitchell was leaving the scene when Hill fired the shots. Hill was on his feet and out of danger (other minimal danger from the open driver's door) when he fired the three shots. Mitchell could of have been (and was) captured in another way following a relatively short chase through Davenport. While Mitchell's conduct in moving his vehicle back and forth was reckless and dangerous, he was not – at least as a matter of law -- using deadly force in the commission of a felony. There is no evidence that Mitchell would have used deadly force against another individual if not immediately apprehended.
>
> * * *
>
> The defendants have conceded for purposes of summary judgment that Hill was standing outside the vehicle and was not being held or entangled when he fired his first shot. From this, a reasonable jury could infer that – at that point – Mitchell no longer posed a danger to Hill or Messmore, and thus Hill's use of deadly force was unreasonable. *Garner*, 471 U.S. at 11; 105 S.Ct. at 1701, 85 L.Ed.2d at 9-10 ("Where the suspect poses no immediate threat to the officer and no threat to others, the harm resulting from failing to apprehend him does not justify the use of deadly force to do so"). Under these circumstances, the defendants are not entitled to the protection of 'all due care' qualified immunity as a matter of law.

(App. pp. 250-251, Ruling on Defendants' Mot. For SJ, pp. 14-15).

The force Hill used was excessive and unreasonable by any standard, especially that of Section I, Article 8 of the Iowa Constitution. Hill's decision to hold on to the hand of a fleeing unarmed non-dangerous suspect, does not establish the justification to use deadly force. Whatever subjective fear Hill claims he felt, was solely created by his actions of grabbing an unarmed and non-dangerous suspect attempting to flee in a vehicle. The subjective fear would have dissipated by simply letting go. Instead, he pulled out a firearm and killed the suspect and then claimed self-defense.

In *Graham v. Connor*, 490 U.S. 386, 395 (1989), the U.S. Supreme Court held that the proper application for the test of reasonableness under the Fourth Amendment requires "careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." *Id.* at 396. Other than Mitchell's attempt to evade arrest, none of the *Graham* factors apply in this case to justify Hill's decision to use lethal force. The crime Hill was initially investigating was as minor as they come, a vehicle equipment violation. Hill later found out about an outstanding warrant that was for possession of meth and was extraditable; and the only threat to Defendant Hill was caused by his own panicked and incomprehensible choice to grab ahold of Mitchell's hand and refuse to let go as Mitchell attempted to maneuver his car out of a parking space.

Courts 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. In *Estate of Starks v. Enyart*, 5 F.3d 230, 232 (7th Cir. 1993), the Seventh Circuit was evaluating a case where the officer was alleged to be behind a pole until the deceased "started [driving the vehicle] forward the second time, at a high rate of speed. Then [the officer] moved out from behind the pole, jumping to a position in front of the moving cab. All three officers fired their weapons." With no video

available to conclusively show what happened, the *Starks* court held that the "key dispute for the factfinder will be whether [the officer] stepped in front of Starks' rapidly moving cab, leaving Starks no time to brake. If he did, then [the officer] would have unreasonably created the encounter that ostensibly permitted the use of deadly force to protect him." *Id*. at 234.

In this case, video and other uncontested record evidence establishes that the only jeopardy Defendant Hill faced was of his own making, which he cannot use to justify the use of deadly force. All Defendant Hill had to do to remain safe was let go of Mitchell's hand and move away from the vehicle. Defendant Hill had over ten seconds to make this decision as Mitchell was maneuvering his vehicle out of the parking space. Messmore BWC (App. p. 161). Moreover, when Defendant Hill did finally make the correct decision and let go of Mitchell's hand, he stood up out of the path of the Mitchell vehicle -- completely out of harm's way-- and fired away. The Messmore body cam video establishes this uncontroverted fact. (App. p. 161).

In *Lewis v. Charter Township of Flint and Needham*, 660 Fed. Appx. 339 (6th Cir. 2016), the dash-cam video shows Lewis climbing into the driver's seat and starting the car. The officer defendant "runs towards then across the front of the vehicle, stopping directly in front of the driver's side and appearing to have his gun drawn and pointed at Lewis. Lewis accelerates the car forward. The officer appears to scurry a few steps to his right to get out of the vehicle's path, lowering his weapon

and placing an arm on the car as he does so. The car comes very close to the officer but does not appear to hit him. As the car passes, the officer shoots into the driver's side window. Two shots can be heard on the video. The car then veers sharply left. Lewis died as a result of gunshot wounds. *Lewis* at 2-3.

The *Lewis* court held as follows:

> There is longstanding precedent holding that it is unreasonable for an officer to use deadly force against a suspect merely because he is fleeing arrest; rather, **such force is only reasonable if the fleeing suspect presents an imminent danger to the officer or others in the vicinity**. (Emphasis added). See, *e.g.*, *Garner*, 471 U.S. at 11; *Kirby*, 530 F.3d at 477. This is the case even where the suspect flees in a vehicle. See *Foster*, 806 F.3d at 889 ('[T]he flight of a felon in a police cruiser, without more, does not justify the use of deadly force'); *Cass*, 770 F.3d at 375 ('Since *Garner*, we have applied a consistent framework in assessing deadly-force claims involving vehicular flight.... [T]he critical question is typically whether the officer has "reason to believe that the [fleeing] car presents an imminent danger" to "officers and members of the public in the area."') (citation omitted); *Sigley v. City of Parma Heights*, 437 F.3d 527, 531, 537 (6th Cir. 2006); and *Cupp*, 430 F.3d at 775.

Id. at 12 (emphasis added).

The *Lewis* court noted that "we judge the reasonableness of an officer's use of force "from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight, ... allow[ing] for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation. [Citing] *Graham*, 490 U.S. at 396–97." *Id.* at 5. The *Lewis* court was not asked to assess whether the plaintiff was entitled to summary judgment on liability,

but found the defendant was not entitled to qualified immunity. Further, the video in the *Lewis* case was not clear as to whether the officer voluntarily placed himself in jeopardy. "Because [the officer] ran in front of the vehicle after Lewis had started the ignition and less than a second before he accelerated forward, it is not clear from the video that a reasonable officer would have perceived that Lewis was 'targeting' him." *Lewis* at 6-7.

Here, it is clear Defendant Hill voluntarily placed himself in jeopardy by holding onto and refusing to let go of Mitchell's hand inside the vehicle. In his brief Defendant Hill admits this critical fact. See Def. Br., p. 35 ("Deputy Hill attempted to physically restrain Mitchell as Mitchell re-entered his car and began driving it backwards and forward."). **No reasonable officer would attempt to keep a car from driving away by holding onto the hand of the driver**. The split-second decision argument does not insulate Defendant Hill from liability because he had plenty of time and opportunity to avoid any potential injury before inflicting deadly force upon Mitchell. Defendant Hill held onto Mitchell's hand for more than ten seconds while the vehicle went back and forth. (App. p. 161, Messmore BWC). Further, Defendant Hill was in panic mode during this time period and not processing new information. Hill couldn't recall any details about this time period. (App. p. 232, Dep. Ex. 5, Hill DCI Int. Tr. p.44)("I couldn't tell you what his hands were at. I couldn't tell you what [the

passenger] was doing. It literally felt like I was in a cave, like in a closed up cardboard box.").

Defendant Hill could have let go of Michell's hand at any point, but particularly when the vehicle was moving forward with no chance of coming into contact with the open car door. When Defendant Hill finally decided to let go of Mitchell's hand, he was able to stand up completely out of harm's way and instead of just allowing Mitchell to drive away, Hill fired away. And, even if Defendant Hill was not *required* to let go of Mitchell's hand, his decision to fire at Mitchell *only after* he decided to let go and stand up completely out of harm's way negates any claim that his use of deadly force was justified. As noted by the *Lewis* court, "'the fact that a situation is rapidly evolving 'does not, by itself, permit [an officer] to use deadly force,' [Citing] *Godawa v. Byrd*, 798 F.3d 457, 466 (6th Cir. 2015)(quoting *Cupp*, 430 F.3d at 775), and although the events here occurred within a matter of seconds, the video suggests Needham was already out of the way, and indeed had already lowered his gun, when he fired into the driver's side window." *Lewis* at 10.

Defendant Hill did not "exhaust[] all other means to arrest and capture Mitchell" before deploying deadly force, as alleged in his brief. Def. Br. p. 36. Defendant Hill failed to take the obvious first step that would have been taken by any reasonable law enforcement officer in the same situation – just let go of Mitchell's hand.

The *Lewis* case also considered the impact of firing while standing beside, as opposed to in front of, a vehicle, holding, "[m]oreover, the video strongly suggests—and [the officer] appears to concede—that [the officer] fired into the driver's side window. This fact and [the officer's] position at the side of the car suggest he was clear of the vehicle and not in danger when he fired his weapon. *Id.* at 7. The *Lewis* case considered speed of the vehicles involved by citing *Hermiz v. City of Southfield*, 484 Fed. Appx. 13, 14, 16–17 (6th Cir. 2012), concluding "that [the officer] lacked justification to fire at least his final shot[,]" because "[e]ven if the car appeared to head toward [the officer] at one point, its single pass at five to ten miles per hour [did] not justify the inference that Hermiz posed an ongoing threat, especially considering that Hermiz's driving prior to the traffic stop presented no cause for concern." *Lewis* at 7. In this case, both Defendant Hill and Deputy Messmore were beside the Mitchell vehicle, not in front of it, the Mitchell vehicle was traveling at a low rate of speed in the five to ten mph range, and Mitchell's driving prior to the traffic stop presented no cause for concern.

The *Lewis* case cites other case law right on point involving the use of deadly force in response to the claim of a vehicle being used as a weapon. *Id.* at 5-6. Where a person attempts to flee in a vehicle, "police officers are 'justified in using deadly force against a driver **who objectively appears ready to drive into an officer or bystander with his car**," but "**may not use deadly force once the car moves away,**

leaving the officer and bystanders in a position of safety.'" *Godawa v. Byrd*, 798 F.3d 457, 464 (6th Cir. 2015) (quoting *Cass v. City of Dayton,* 770 F.3d 368, 375 (6th Cir. 2014) (Emphasis added). Thus, "where the car no longer 'presents an imminent danger,' an officer is not entitled to use deadly force to stop a fleeing suspect." *Id*. (quoting *Smith v. Cupp*, 430 F.3d 766, 775 (6th Cir. 2005). The application of this case law to the Messmore BWC in this case leads to the inescapable conclusion that Defendant Hill used deadly force at a time when Mitchell was stopped or moving away and, if anything, should result in summary judgement on liability in Plaintiff's favor. Defendant Hill clearly violated the rule that he "may not use deadly force once the car moves away, leaving the officer and bystanders in a position of safety." *Godawa* at 464.

Just as in *Lewis*, Mitchell was "not suspected of any violent crime—was merely trying to flee a traffic stop in a vehicle, which alone is not sufficient to justify the use of deadly force. [Citing] *Cupp*, 430 F.3d at 773 (reasoning, '[a]lthough there was some danger to the public from Smith's driving off in a stolen police car, the danger presented by Smith was not so grave as to justify the use of deadly force.'"). *Lewis* at 6. In fact, in this case, it is clear that Mitchell did not "target" Hill. *Id*. Mitchell was not driving a stolen vehicle. Mitchell was just attempting to "get away" as Defendant Hill admitted in his DCI statement. (App. p. 231 - Hill DCI Interview Trans. pp. 41).

In *McCaslin v. Wilkins*, the Eighth Circuit held as follows:

> In *Garner*, the Supreme Court clarified the limitations the Fourth Amendment places on a police officer's use of deadly force to prevent the escape of a fleeing felon. Only if a '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.' *Garner*, 471 U.S. at 11-12.

McCaslin v. Wilkins, 183 F.3d 775, 779 (8th Cir. 1999).

In *Kirby v. Duva*, 530 F.3d 475, 482 (6th Cir. 2008), officers had a warrant for a suspected drug dealer who had a reputation for being armed, violent, and volatile. The suspect was pulled over on the side of the road in his car and the officers tried to block him in. The suspect would not shut off the car. The suspect began to slowly back up the truck and a police officer was pushed backwards and slipped into the ditch - fearing for his life, he opened fire shooting four times at defendant's head. When other officers heard shots, they fired too. The Sixth Circuit affirmed the district court's denial of summary judgement for police noting that even in the truck's final position, "the officer was still two feet to the truck's side, and thus not in its path." *Id*. The *Kirby* court held that where a police officer unreasonably places himself in harm's way, his use of deadly force may be deemed excessive. *Id*.

See also, *Eberhardinger v. City of York*, 782 F. App'x 180, 182 (3d Cir. 2019), involving a passenger in a car alleging excessive use of force when police shot at her at the conclusion of high-speed chase. The car struck a telephone pole and was

continuing only at a slow rate of speed when the officer chasing on foot shot four times at the vehicle. The court held that a reasonable jury could find the officer "used deadly force to stop the fleeing suspect rather than out of fear of immediate personal harm, which violated clearly established Fourth Amendment law." *Id*. One key factor in the *Eberhardinger* case was the fact the car was moving at a slow rate of speed at the time of the shooting.

In *Smith v. Cupp*, 430 F.3d 766 (6th Cir. 2005), the Sixth Circuit found the arrestee's right not to be seized by deadly force when fleeing was clearly established at the time he was killed. The deputy sheriff who shot the arrestee was not entitled to qualified immunity, although he had a short time to react, because the arrestee was not threatening lives of those around him when he was fatally shot. In *Lytle v. Bexar Cty., Tex*., 560 F.3d 404, 407 (5th Cir. 2009), the Fifth Circuit held that a police officer's exercise of force that is reasonable at one moment can become unreasonable in the next if the justification for the use of force has ceased. Therefore, even if Defendant Hill had some justification for the use of force at the start of the incident, he was not justified in using deadly force at the time he was free and clear of the Mitchell vehicle as established by the Messmore BWC. (App. p. 161).

The defense repeatedly refers to *Molina-Gomes v. Welinski*, 676 F.3d 1149 (8th Cir. 2012), but that case is easily distinguishable on the facts and factually

supports the conclusion that Hill used excessive deadly force. To start with, *Molina-Gomes* involved a dangerous undercover cocaine buy that went wrong, as opposed to a minor traffic stop for a vehicle equipment violation. *Id*. at 1151; *Molina-Gomes v. Welinski*, 2011 U.S. Dist. LEXIS 169911, *2. The facts in *Molina-Gomes* were summarized, as follows:

> [The suspect] put his car in reverse and accelerated at a high rate of speed, hitting [an officer] with the car's door. The window of the driver's door shattered and [the officer] flew backward into the vehicle of another Task Force member who was trying to block [the driver]. At the time, [another officer] believed [the struck officer] had been killed by the force of the impact.

Id. at *4-5. The *Molina-Gomes* narrative continues, "[the suspect] drove his car directly at [one officer] …[The suspect] was headed towards a busy street… where other drivers were passing the gas station." *Id*. at *4-5 and 12. "The video recording shows numerous cars passing along county road 34 just before Molina Campos moved in the direction of the roadway." *Molina-Gomes* at 1153.

The *Molina-Gomes* district court concluded, "[b]elieving [the struck officer] to be dead and himself and others to be in imminent danger, [another officer] opened fire as [the suspect] drove towards him, and continued as [the suspect] passed him. *Id*. Even more egregious and life threatening facts, the district court in Molina-Gomes found "the facts of this case also fall in that hazy border between acceptable and excessive force since [the shooting officer] reasonably believed [the suspect]

posed a substantial risk of danger to others and the record supports that belief. As a result, the Court finds qualified immunity is appropriate." *Id*. at *14-15.

For the facts of this case to come close to the Molina-Gomes facts establishing only a close call in favor of qualified immunity, the following would all have to be true: Messmore would have to be the shooter; Mitchell would have to be traveling at high rate of speed, not 10 mph;[1] Hill would actually have to be hit by the car door, with enough force for the door's window to shatter; Hill would have to be actually dragged, *i.e*., off his feet; Messmore would have to be in the path of the Mitchell vehicle; numerous other vehicles would have to be in the area; and Messmore would have to have concluded that Hill was struck so hard he was dead. None of that comes close to happening in this case, not even in the defense's fairy tale version of events.

Defendants' argument attempts to portray the subject matter incident as if Hill, Messmore, or someone else, was in the path of Mitchell's vehicle. Hill's cruiser video and Messmore's BWC establish otherwise, as found by DCI Agent George – no one was in the path of the Mitchell vehicle as he was trying to escape. (App. pp. 161, 158 and 224 - Messmore BWC, Hill cruiser video and George Dep. 64:3-16).

[1] The National Highway Traffic Safety Administration Literature Review on Vehicle Travel Speeds and Pedestrian Injuries establishes that for pedestrian contact with vehicles traveling less than 20 mph (double the maximum speed of the Mitchell vehicle) the risk of serious injury or death is minimal. (App. pp. 216-217, Dep. Ex. 85, pp. 4-5). So minimal, in fact, that data is not even kept for such incidents when the vehicle is traveling under 10 mph, the maximum speed at which Mitchell was moving. *Id*.

The holding in *Molina-Gomes* is based on the fact that the officer who shot the suspect believed that the suspect posed a danger to other officers and other motorists on the roadway. *Id*. Hill's decision to kill Mitchell was not out of concern for any other person. (App. p. 234 - Hill DCI Int. Tr. p. 47). Any claim to the contrary is a complete fabrication and not supported by any record evidence.

The decedent in *Molina-Gomes* was "a drug dealer subject to a sting operation." 676 F.3d. at 1151. Mitchell was stopped for a faulty taillight. In *Molina-Gomes*, the decedent "first reversed, dragging along the undercover officer who fell to the ground bleeding, and then attempted to drive around [a law enforcement officer's] vehicle, heading toward county road 34." *Id*. Hill, on the other hand, never fell to the ground and did not suffer so much as a scratch. The *Molina-Gomes* court noted the reckless driving and found the decedent's "attempt to escape was a danger to the arresting police officers and to any drivers on the roadway." *Id*. at 1152. Hill's speed in a confined space never exceeded 10.4 mph and put no one at risk of serious injury. The *Molina-Gomes* court found the "the video recording shows numerous cars passing along county road 34 just before [the decedent] moved in the direction of the roadway." *Id*. at 1153. The record in this case does not reflect any other traffic in the area and both Hill and Messmore were off to the side of Mitchell's vehicle and out of harm's way when Hill killed Mitchell. The *Molina-Gomes* court found that the decedent "posed a threat of serious danger to the officers as well as to other

motorists." *Id*. at 1153. The video in this case clearly establishes that all Hill had to do was allow Mitchell drive away and no one would have been injured. (App. pp. 161 and 158 - Messmore BWC and Hill cruiser cam).

III. HILL IS NOT ENTITLED TO QUALIFIED IMMUNITY

Thorington concedes that the Defendant preserved alleged error on this issue.

The Defendant argues that he is entitled to qualified immunity for his unconstitutional conduct. Hill is not entitled to qualified immunity for four reasons: 1) Hill did not conduct himself with all due care; 2) Hill violated clearly established constitutional protections by killing Mitchell; 3) I.C.A. 670.4A should not be applied retroactively; and 4) I.C.A. 670.4A is unconstitutional.

A. Hill Is Not Entitled to Qualified Immunity Under *Baldwin v. City of Estherville*

The Iowa Supreme Court recently noted, as follows:

> Qualified immunity balances two important competing interests—'the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably.' " [Citing] *Minor v. State*, 819 N.W.2d 383, 400 (Iowa 2012) (quoting *Pearson v. Callahan*, 555 U.S. 223, 231 (2009)).

Victoriano v. City of Waterloo, Case No. 22-0293, issued January 6, 2023. This case exemplifies the need to hold law enforcement officers accountable for acting irresponsibly. This case is not a form of harassment or distraction for Hill who did not perform his duties reasonably.

The defense attempt to split hairs between conduct that reflects "all due care" pursuant to *Baldwin v. City of Estherville*, 915 N.W.2d 259, 279 (Iowa 2018) and conduct that reasonably attempts to achieve all due care, but fails, is without merit. There may be a case where that distinction could make a difference, but this is not it. Hill did not attempt to exercise all due care. He panicked. Once Mitchell got into the car and started to move, Hill did not conduct himself with any care, much less all due care. Hill couldn't recall any details about this time period. (App. p. 232 - Hill DCI Int. Tr. p.44). Hill "couldn't tell you what (*sic*) [Mitchell's] hands were at." *Id*. Hill "couldn't tell you what [the passenger] was doing." *Id*. Hill said, "[i]t literally felt like I was in a cave, like in a closed up cardboard box." *Id*. Hill was not processing new information and acting upon it, as any reasonable officer would have done. While in a panic, Hill did the unfathomable, which put him in whatever jeopardy he was facing at the time, by grabbing Mitchell's hand and refusing to let go. (App. p. 161 - Messmore BWC). No reasonable officer would attempt to keep a vehicle from driving away by holding onto the hand of the driver. The District Court was correct in finding that Hill did not act with all due care.

B. Hill Is Not Entitled to Qualified Immunity Pursuant to I.C.A. 670.4A

Assuming the substance of I.C.A 670.4A applies, the right to be free from excessive deadly force was a clearly established right under the prohibition against unreasonable seizures of the person. *Guite v. Wright*, 147 F.3d 747, 750 (8th Cir.

1998) (citations omitted). "The violation of this right will, of course, support a § 1983 action." *Crumley v. City of St. Paul*, 324 F. 3d 1003, 1007 (8th Cir. 2003).

Mitchell acted recklessly and in clear violation of the law, but did not deserve to be executed. This is particularly true since Hill had Mitchell's name and address so he could have been arrested later. (App. p. 239 - Order Denying Def. MSJ, page 3). Hill was never in any real danger being adjacent to a car traveling no more than 10 mph. (App. p. 218-219 - Def. Suppl. Adm. Resp., pp. 1-2). Whatever danger Hill did face was of his own making by hanging onto Mitchell's hand and refusing to let go. (App. pp. 226-227, 204, 165 - George Dep. p. 37:10-38:6; Dep. Ex 7 and Autopsy Rpt. p. 3).

All the cases cited above were issued before the subject matter incident. See *Tennessee v. Garner*, 471 U.S. 1, 8 (1985); *Graham v. Connor*, 490 U.S. 386, 395 (1989); *State v. DeWitt*, 811 N.W.2d 460, 469, (2012); *McCaslin v. Wilkins*, 183 F.3d 775, 777 (8th Cir. 1999); and *Molina-Gomes v. Welinski*, 676 F.3d 1149 (8th Cir. 2012). The Iowa statutory standard Hill violated, I.C.A. 804.8, was enacted well before Hill shot and killed Mitchell, who posed no immediate threat of serious physical injury or death to anyone at the time. Hill violated a clearly established constitutional right by shooting and killing Mitchell under the facts of this case.

C. I.C.A. 670.4A Should Not Be Applied Retroactively

The District Court was correct in holding that the new qualified immunity standard should not be retroactively applied to this case. Iowa Code §670.4A became effective June 17, 2021. The incident in this case occurred October 23, 2018. The legislation mandated the effective date of the statute as June 17, 2021. The legislature did not expressly make the statute retroactive. The next step in the analysis is to determine whether the statute affects substantive rights, or if it relates to a remedy or procedure. The District Court concluded the statute affects substantive rights. The defendant's assertion otherwise is without merit.

"Substantive law creates, defines and regulates rights." *Baldwin,* 372 N.W.2d at 491. A substantive statute also takes away a vested right. *City of Waterloo v. Bainbridge,* 749 N.W.2d 245, 249 (Iowa 2008). As noted by the District Court, "the immunity created by §670.4A would potentially take away this accrued right by granting the defendants *ex post facto* immunity for their conduct." (App. p. 245 - Order Denying Def. MSJ p. 9). The District Court also noted "§670.4A serves to limit the right of a plaintiff to receive compensation for injuries sustained at the hands of a law enforcement official. This limitation is substantive, not procedural. Also, it is not remedial because it does not provide for the redress of any wrongs, but rather makes a policy decision to limit the redress available." *Id*. at 10.

The District Court went on to note that "'[s]ince the statute is substantive, the Court presumes it was intended to apply prospectively only, unless a legislative intent that the statute have retrospective application appears 'by necessary and unavoidable implication.'" *Id*. [quoting] *Anderson Financial Services LLC v. Miller*, 769 N.W.2d 575, 579 (Iowa 2009)). The legislature expressly stated: "This division of the Act, being of immediate importance, takes effect upon enactment." S.F. 342, Div. III, §16. As the District Court noted, "[t]he necessary and unavoidable implication here is that the statute becomes operative on that date, and not retrospectively." *Id*.

The District Court further noted, as follows:

> When the legislature enacted Iowa Code §670.4A, the amendments were 'Approved June 17, 2021.'" S.F. 342, Div. XIV, § 56. However, one section, section 80.6A, subsection 1, paragraph "'b,'" was given retroactive applicability to January 1, 2021. *Id.* at Div. VI, Sec. 26. This kind of retroactive applicability is conspicuously absent from the enactment of Iowa Code §670.4A. *Id.* at Div. III. The fact the legislature enacted retroactive applicability to one part of the code amendment, while omitting a retroactivity clause for Iowa Code §670.4A, cuts deeply against an interpretation that the legislature intended §670.4A to be applied retrospectively. The legislature clearly knew how to grant retrospective application to a portion of the same legislation, which raises the strong inference that their failure to do so with regards to Iowa Code §670.4A was intentional.

Id. at 10-11.

The District Court finally noted that "the fact that §670.4A(3) imposes a requirement that the pleadings contain certain averments is an indication that the

legislature did not intend it to apply to pending cases. This supports the conclusion the legislature intended the statute to be apply prospectively." *Id.* at 11.

Several other Iowa District Courts have already faced this issue and ruled the new qualified immunity law should not be applied retroactively. *See* Iowa District Court for Polk County, *Carver-Kim v. Reynolds*, Case No. LACV 148599, issued on December 22, 2021, and Iowa District Court for Dallas County, *Nahas v. Polk County, et al*., Case No. LACV 043294, issued on January 26, 2022.

In *Carver-Kim*, the Iowa District Court Judge examined the new qualified immunity language adopted by the legislature for both the ITCA and the IMTCA and found that the new law should not be applied retroactively. The *Carver-Kim* court reasoned a "statute is presumed to be prospective in its operation unless expressly made retrospective." [Citing Iowa Code § 4.5] Nothing in section 669.4A states it is to be applied retrospectively." At pp. 25-26. The *Carver-Kim* court concluded as follows:

> The next step is to ascertain whether 'the statute affects substantive rights or relates merely to a remedy.' [Citing, *Dindinger v. Allsteel, Inc.*, 860 N.W.2d 557, 563 (quoting *Anderson Fin. Servs., LLC v. Miller*, 769 N.W.2d 575, 579 (Iowa 2009))]. If the law is substantive, we presume it operates prospectively only. If the statute is remedial, we presume it operates retrospectively. A statute is not remedial merely because one might say, colloquially, that its purpose is to 'remedy' a defect in the law. [I]f a mere legislative purpose to remedy a perceived defect in the law made a statute remedial, very few statutes would not fall within this classification. . . When a statute creates new rights or obligations, it is substantive rather than procedural or remedial. [Citing, *Id*.]. **Newly enacted section 669.14A creates new rights for certain state employees and limits**

> **the rights of plaintiffs to bring suit against such employees by obligating them to meet a new and higher standard to prove their claim.** Therefore, as it creates new rights and obligations it is substantive in nature. Accordingly, the court concludes that because the statute does not expressly state it is to be applied retroactively and the section affects substantive rights it should not be applied retroactively.

Id. at p. 26. (Emphasis added).

In Iowa District Court for Dallas County, *Nahas v. Polk County, et al*., Case No. LACV 043294 the Iowa District Court Judge found, as follows:

> Iowa Code § 670.4A(3) became effective on June 17, 2021. 'Legislative intent determines if a court will apply a statute retrospectively or prospectively.' *Iowa Beta Chapter of Phi Delta Theta Fraternity v. State*, 763 N.W.2d 250, 266 (Iowa 2009). Pursuant to the Code, a 'statute is resumed to be prospective in its operation unless expressly made retrospective.' Iowa Code § 4.5. On the other hand, if a statute applies only to a remedy or procedure, as opposed to a substantive right, it is generally applied both prospectively and retrospectively. *Anderson Financial Services, LLC v. Miller*, 769 N.W.2d 575, 578 (Iowa 2009). Iowa Code § 670.4A(3) is silent as to whether it is to be applied retrospectively giving rise to a presumption the statute is prospective. Furthermore, it is clear the statute creates new rights and obligations and applies to substantive rights, as opposed to simply remedies or procedures. Accordingly, the Court finds the provisions of Iowa Code § 670.4A(3) do not apply to the claims being asserted by Nahas.

At p. 5-6.

The new Iowa Code Section, 670.4A, specifically states "EFFECTIVE DATE" of June 17, 2021. In *Baldwin v. Waterloo*, 372 N.W.2d 486, 491 (1985), the Iowa Supreme Court noted that the "wording of this act could hardly be clearer. It says: 'This Act, except for section 4, applies to all cases filed on or after July 1, 1984. Section 4 of this Act applies to all cases tried on or after July 1, 1984.' We decline

to attribute any other meaning to this provision in view of the clear language." In this case, the Iowa Legislature clearly intended the act to become effective as of June 17, 2021. This case was filed on September 28, 2020. Defendant Hill shot and killed Mitchell on October 23, 2018. The new legislation does not apply to this case.

The Iowa legislature is required to use express language when they elect to make an act retroactive. "A statute is presumed to be prospective unless expressly made retrospective." I.C.A § 4.5. Additionally, pursuant to the Iowa Constitution, 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. So, the effect of the language in the act only establishes an effective date prior to July 1, and has absolutely nothing to do with mandating retroactive application of the act.

New Iowa Code Section 670.4A contains no express language for retroactive application. For example, on July 1, 2007, legislation regulating the permissible interest rate on car title loans went into effect. *See* 2007 Iowa Acts. ch. 26, §§ 2-3; Iowa Const. Art. III, § 26 (providing legislation with no express effective date becomes effective on July 1 of the year of enactment). *Anderson Fin. Servs., LLC v. Miller*, 769 N.W.2d 575, 577, (Iowa 2009). The Iowa Supreme Court first looked for clear statutory intent on behalf of the Iowa legislature for retroactive application. *Id.* at 580. As in the present case, no such language existed. Iowa Code § 670.4A not

only lacks any express application of retroactive intention, but in-fact, includes the exact opposite language, stating "[t]his division of the Act, being deemed of immediate importance, **takes effect upon enactment**.") (emphasis added).

Iowa Code § 670.4A is a substantive law, affecting the rights of Plaintiff. After deciding no express retroactive language existed in *Andersen*, the Iowa Supreme Court looked to see if the law was substantive or procedural by nature. *Andersen*, 769 N.W.2d 575 at 580. The Iowa Supreme court held, "the statute itself clearly 'defines and regulates' lenders' rights to impose finance charges, and is therefore substantive." *Id.* at 580-81. "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). Iowa Code Section 670.4A is an attempt by the Iowa legislature to overturn the *Baldwin I* decision. In *Baldwin I*, the Iowa Supreme Court permitted government officials qualified immunity when they plead and prove the affirmative defense of "all due care to conform to the requirements of law." *Baldwin v. City of Estherville*, 915 N.W.2d 259, 279 (Iowa 2018). Changes made by the Iowa legislature in Iowa Code § 670.4A, attempt to

reverse the Supreme Court's all due care standard, therefore affecting Plaintiff's substantive rights.

That is what the amendments to I.C.A. 670.4A attempt to accomplish – define and regulate rights under the Iowa Constitution. Procedural law, on the other hand, "is the practice, method, procedure, or legal machinery by which the substantive law is enforced or made effective." *Id*. at 332, *quoting Schmitt v. Jenkins Truck Lines, Inc*., 260 Iowa 556, 560, 149 N.W.2d 789, 791 (1967). The new statutory language should not be applied retroactively.

D. I.C.A. 670.4A Is Unconstitutional

The Iowa legislature is acting 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." See *City of Muscatine v. Waters*, 251 N.W.2d 544, 548-49 (Iowa 1977); *Chicago, Rock Island and Pacific Railway Co. v. Rosenbaum*, 212 Iowa 227, 231, 231 N.W. 646, 648 (1930); *Windsor v. City of Des Moines*, 110 Iowa 175, 179, 81 N.W. 476, 477 (1900); and *Richman v. Supervisors Muscatine County*, 77 Iowa 513, 519-20, 42 N.W. 422, 425 (1889). However, because Iowa Code § 670.4A attempts to define not only the meaning of the Iowa Constitution, but to limit the impact of the rights guaranteed in

the very first Article of the Iowa Constitution, it invades the province of the courts, particularly the Iowa Supreme Court.

In *Frink v. Clark*, 285 N.W. 681, 683 (1939), the Iowa Supreme Court interpreted a change in service of process rules by the Iowa Legislature. "The Forty-seventh General Assembly enacted a statute known as chapter 234, which undertook to permit service of process upon a nonresident who is attending a trial as a defendant in a criminal action in the state of Iowa, and to provide that the rule should apply to cases then pending." *Id.* The defendants in *Frink* argued the amended rules were unconstitutional for various reasons, including, as follows:

> [The legislation] purports retroactively to make valid that which was originally invalid, which is beyond the legislative power; that the statute deprives appellants of vested rights which the legislature cannot take away; that the legislature is without power to invalidate a valid defense exclusively cognizable by the courts; that the act violates section 1 of the 14th Amendment to the Constitution of the United States, in that it attempts to abridge the privileges and immunities of citizens of the United States, and violates said amendment and section 9 of Article I of the Constitution of Iowa in that it attempts to deprive appellants of property without due process of law, is also unconstitutional as an attempt to interfere with the jurisdiction and process of the federal courts and because it denies equal protection of the laws and is arbitrary class legislation.

Id.

The *Frink* court noted that the "immunity from service of civil process of a witness while attending a trial in a state other than that of his residence to give evidence seems to be universally recognized. The privilege protects him in coming, in staying, and in returning, if he acts in good faith, and without unreasonable delay."

Id. at 683. The *Frink* court reasoned "this action was commenced before the curative act became effective, it is apparent, we think, that the second section thereof is unconstitutional and beyond the power of the Legislature." *Id*. at 867. The Iowa Supreme Court noted '[a]fter action is brought it is certainly beyond the power of the Legislature to declare that action void and the court in which it is pending without jurisdiction. Such matters are purely judicial, and not legislative, and under our three-department system of government it is inadvisable for one to assume the powers, duties, or responsibilities of the other." *Id.*

In the case of *Richardson v. Fitzgerald*, 109 N.W. 866, 867 (1906), the Iowa Supreme Court stated, "it is the province of the Legislature to enact, of the judiciary to expound, and of the executive to enforce, the laws, and any direction by the Legislature that the judicial function shall be performed in a particular way is a plain violation of the Constitution." In *Wagner v. State*, the Iowa Supreme Court held that *Godfrey* damage claims filed against state officials of Iowa can only be regulated by the Iowa legislature if they do not deny Iowans an adequate remedy for constitutional violations. *Wagner v. State of Iowa*, 952 N.W.2d 843, 847 (Iowa 2020).

The new code section is unconstitutional because the Iowa Supreme Court has already ruled that qualified immunity under the Iowa Constitution is based upon a standard of "all due care," as set out in the *Baldwin I* decision. The language in *Baldwin I* makes it clear the Iowa Supreme Court was interpreting the Iowa

Constitution in a manner consistent with the intent of the founders of the State of Iowa, as follows:

> We believe instead that qualified immunity should be shaped by the historical Iowa common law **as appreciated by our framers** and the principles discussed in Restatement (Second) of Torts section 874A. This means due care as the benchmark. Proof of negligence, *i.e.*, **lack of due care, was required for comparable claims at common law at the time of adoption of Iowa's constitution.**

Baldwin I at 280 (emphasis added). The framers of the Iowa Constitution would not have recognized the court created standard for federal qualified immunity first set out in *Harlow v. Fitzgerald*, 457 U.S. 800, in 1982, and adopted by the new legislation, some 125 years after the adoption of the Iowa Constitution in 1857.

The proponents of the new legislation specifically argued 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 legislature may not amend the Iowa Constitution in a single session, or without the express consent of the people of Iowa. *See* Iowa Constitution, Article X. The Iowa Supreme Court, not the Iowa legislature, decides the proper meaning and interpretation of the Iowa Constitution.

In *Baldwin I*, the Iowa Supreme Court specifically rejected the *Harlow* federal qualified immunity language, as adopted by the Iowa legislature, and for very good reason. At 279. The Iowa Supreme Court reasoned as follows:

> As we have noted, a number of states allow *Harlow* immunity for direct constitutional claims. In those jurisdictions, there cannot be liability unless the defendant violated 'clearly established . . . constitutional rights of which a reasonable person would have known.' *Harlow*, 457 U.S. at 818, 102 S. Ct. at 2738. *Harlow* examines objective reasonableness; thus, in some ways it resembles an immunity for officials who act with due care. However, it is centered on, and in our view gives undue weight to, one factor: how clear the underlying constitutional law was. Normally we think of due care or objective good faith as more nuanced and reflecting several considerations. [Citations]. Factual good faith may compensate for a legal error, and factual bad faith may override some lack of clarity in the law.

Baldwin I. The Iowa legislature has a lot of power, but it does not have the power to overturn a decision of the Iowa Supreme Court that is based upon the Supreme Court's interpretation of the Iowa Constitution.

Finally, Plaintiff's claim was vested at the time of the events (and when she filed suit) and the application of the new statute to her tort and constitutional claims would constitute a violation of her due process rights under Article I, §9 of the Iowa Constitution and the Fourteenth Amendment to the U.S. Constitution. As the Iowa Supreme Court explained in *Thorp v. Casey's General Stores, Inc*., 446 N.W.2d 457 (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 legislative power of a state can only be exerted in subordination to the fundamental principles of right and justice which the guaranty of due process in the Fourteenth Amendment is intended to preserve.' Our state due process protections also are grounded on principles of justice and fairness which preclude legislative changes that disturb the

> vested rights of its citizens. Consequently, we agree that plaintiff's contentions are supported by both the federal and state constitutions.

Thorp at 463.

The analysis and holding of the Iowa Supreme Court in *Thorp* undeniably demonstrate that this Court would be correct in ruling that "new" Iowa Code §670.4A should not be applied to this case. *Thorp* argued for the retroactive application of significant changes in the Iowa Code that, if applied, would have eliminated the Plaintiff's cause of action as to that defendant ("Casey's"). Specifically, Casey's sought to rely on changes in the Dramshop Act set forth in the Iowa Code. For the exact same reason as applies here, the Iowa Supreme Court held that the retroactive application of the statutory change at issue would have been/was unconstitutional. The *Thorp* court stated, "[w]e hold that federal and state due process protections void the retrospective application of the [statutory] amendment which acts to deprive [the] plaintiff of her vested rights in a cause of action…." against Casey's. *Id.* at 459.

IV. STATUTORY EMERGENCY RESPONSE IMMUNITY DOES NOT SHIELD HILL'S UNCONSTITUTIONAL CONDUCT

Thorington concedes that the Defendant preserved alleged error on this issue.

The Defendant argues he is entitled to immunity pursuant to I.C.A. 670.4(1)(k). That argument fails for two reasons: 1) statutory immunity cannot be

interpreted to negate constitutional protections; and 2) by purchasing insurance coverage for such losses, the Defendant has waived any statutory immunity.

A. Emergency Response Immunity Does Not Shield Unconstitutional Conduct

Emergency responders are protected against common law negligence claims within the scope of the statutory immunity, but that immunity cannot be interpreted to deprive a citizen protection afforded under the Iowa Constitution. *Godfrey* and its progeny, including *Baldwin, Venkus* and *Wagner*, all clearly hold that the legislature cannot strip Iowans of their constitutional rights via legislation.

The District Court got the analysis on this point exactly correct, reasoning as follows:

> The Iowa Supreme Court has not extended all of the immunities contained in the IMTCA to constitutional torts. *Baldwin II*, 915 N.W.2d at 280 ("'The problem with these acts, though, is that they contain a grab bag of immunities reflecting certain *legislative* priorities. Some of these are unsuitable for *constitutional* torts.'") (emphasis in original). While the supreme court acknowledged the legislature's right to regulate claims against government officials, it "'must not deny an adequate remedy to the plaintiff for constitutional violations.'" *Wagner v. State*, 952 N.W.2d 843, 847 (Iowa 2020).
>
> Juxtaposed with this language are decisions of the Iowa Supreme Court that the IMTCA applies to constitutional tort claims. *See Baldwin V*, 929 N.W.2d at 698 ("We have decided the IMTCA applies to Baldwin's Iowa constitutional tort causes of action."); *Venckus v. City of Iowa City*, 930 N.W.2d 792, 808 (Iowa 2019) ("'Claims arising under the state constitution are subject to the IMTCA.'"). However, the only immunity that has been expressly applied to constitutional tort claims is the "all due care" immunity. *Baldwin II*, 915 N.W.2d at 279; *Baldwin V*, 929 N.W.2d at 698. No other immunity spelled out in Iowa Code

> §670.4 has been deemed applicable to constitutional torts.
>
> * * *
>
> The emergency response immunity was established by the legislature, which leaves open the question of whether it is one of those immunities "'reflecting certain *legislative* priorities'" which are 'unsuitable for *constitutional* torts.' *Baldwin II,* 915 N.W.2d at 280.
>
> Finally, the Court finds *Baldwin V* helpful. The Iowa Supreme Court, in answering a certified question, held that Iowa Code §670.4(1)(c) does grant immunity, referring to it as "'the due care exemption.'" *Baldwin V*, 929 N.W.2d at 698. The Court finds it particularly noteworthy that the Iowa Supreme Court chose the phrase "'the due care exemption.'" *Id.* This choice of language comports with the Iowa Supreme Court's holding in *Baldwin II* that "'to be entitled to qualified immunity a defendant *must* plead and prove as an affirmative defense that she or he exercised all due care to comply with the law.'" 915 N.W.2d at 280 (emphasis added)…
>
> In light of *Baldwin II* and *Baldwin V*, the Court finds that the Iowa Supreme Court has thus far only extended statutory immunity to constitutional torts where it is not inconsistent with the *Baldwin* standard of due care. **A statutory immunity that provides immunity even in the face of lack of due care is inconsistent with the purpose of the constitutional tort and with supreme court precedent to this point.** (Emphasis added).

(App. pp. 255-257 - Order Denying Def. MSJ pp. 19-21).

No statutory immunity can be used as a defense to a claimed violation of Iowa Constitutional rights. If the legislature does not like the interpretation of the Iowa Constitution, as determined by the Iowa Supreme Court, the only way to change that interpretation is through the constitutional amendment process set out in Article X of the Iowa Constitution.

B. Hill Waived Any Statutory Immunity by the Purchase of Insurance Pursuant to I.C.A. 670.7

In their Initial Disclosures, as required by Iowa Rule 1.500(1)(a)(4), the Defendants disclosed "the declarations page of any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment…" See Def. Initial Disclosures, pp.4-5 ("Law Enforcement Liability Coverage" in the amount of "$1,000,000" from Travelers Insurance). That disclosure was later supplemented by providing the dec sheet for $9 million in umbrella coverage.

Under Iowa law the purchase of insurance coverage waives any immunity. *See* Iowa Code § 670.7 ("The procurement of this insurance constitutes a waiver of the defense of governmental immunity as to those exceptions listed in section 670.4."). In *Merchs. White Line Warehousing v. City of Des Moines*, the court held, that the "emergency response doctrine provided in section 670.4(11) does not provide municipalities with categorical immunity. Section 670.7 enables municipalities to purchase liability insurance to cover liability related to the torts specified in section 670.4. The consequences of purchasing such a policy of liability insurance are also addressed in section 670.7." 2003 Iowa App. LEXIS 188, *11-12.

CONCLUSION

For all the reasons stated above, the District Court's Order Denying the Defendants' Summary Judgment on "all due care" qualified immunity; on immunity

pursuant to I.C.A. 670.4A; and regarding Thorington's constitutional based excessive force claim pursuant to emergency response immunity, should be affirmed.

REQUEST FOR ORAL ARGUMENTS

Thorington respectfully requests oral arguments in this matter.

ATTORNEY'S COST CERTIFICATE

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

Certified by: /s/ David A. O'Brien

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE-STYLE REQUIREMENTS

1. This brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) or (2) because:

[x] this brief contains 11,772 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

2. This brief complies with the typeface requirements of Iowa. R. App. P. 6.903(1)(e) and the type-style requirements of Iowa R. App. P. 6.903(1)(f) because:

[x] this brief has been prepared in a proportionally spaced typeface using Microsoft Word 16.67 in 14-point font size in Times New Roman type style.

/s/David A. O'Brien — February 23, 2023
Signature — Date

CERTIFICATE OF SERVICE AND FILING

I, Julia Daugherty, certify that on the 23rd day of February, 2023, I electronically filed the foregoing Proof Brief with the Clerk of the Iowa Supreme Court by using the EDMS system. Service on all parties will be accomplished through EDMS.

Certified by: /s/*Julia Daugherty*