IN THE SUPREME COURT OF IOWA

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

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

Plaintiff-Appellant,

vs.

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

Defendants-Appellees.

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

PLAINTIFF-APPELLANT'S FINAL BRIEF

DAVE O'BRIEN LAW

/s/ David A. O'Brien
David A. O'Brien AT0005870
1500 Center Street NE
Cedar Rapids, Iowa 52402
Telephone: (319) 861-3001
Fax: (319) 861-3007
E-mail: dave@daveobrienlaw.com

TIMMER & JUDKINS, P.L.L.C.

/s/ Brooke Timmer
Brooke Timmer AT0008821
1415 28th Street, Suite 375
West Des Moines, Iowa 50266
Telephone: (515) 259-7462
Fax: (515) 361-5390
E-mail: brooke@timmerjudkins.com

ATTORNEYS FOR PLAINTIFF-APPELLANT

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ROUTING STATEMENT

The Iowa Supreme Court should retain this case. The issues involved invoke article I, section 8 of the Iowa Constitution and raise substantial issues of first impression regarding the application of qualified immunity to claims under the Iowa Constitution. *See* Iowa R. App. P. 6.1101(2)(c).

STATEMENT OF THE CASE

Shane Jensen was shot and killed by DNR Officer Bill Spece on November 11, 2017. (App. 9, 11, Amended Pet. ¶¶ 4 and 25). Wagner, individually, for loss of consortium, and as Administrator of the Estate of

Shane Jensen, filed a lawsuit in Iowa District Court against the Defendants on October 18, 2019, and an amended petition on February 3, 2021. (App. 8-20, Amended Pet.). On July 1, 2022, the Plaintiff filed a Partial Motion for Summary Judgment on Liability which was resisted by Defendants. On July 5, 2022, the Defendants filed a Motion for Summary Judgment which was resisted by the Plaintiff.

On September 22, 2022, the District Court issued its Order denying the Plaintiff's Motion for Partial Summary Judgment on Liability and granting the Defendants' Motion for Summary Judgment. (App. 30-44, Order). This appeal is from that final decision of the Iowa District Court, the Honorable Kurt J. Stoebe, Humboldt County, Iowa, in case No. LACV018792.

STATEMENT OF FACTS

The factual allegations that should have been found by the District Court to deny the Defendants' Motion for Summary Judgment are set out below.

On the morning of Saturday, November 11, 2017, Defendant Spece, an Iowa DNR officer, saw an all-points bulletin issued by Pocahontas County. (App. 63-64, Vorland Dec. ¶ 11). The bulletin stated Shane Jensen was suspected of stealing a truck, taking a 9mm handgun, being armed, dangerous, suicidal, and "had been talking of suicide by cop." (App. 52, Spece Dec. ¶ 7).

The information contained in the bulletin was the ***only*** information Defendant Spece was aware of when he chose to shoot and kill Jensen. (Def. App. in Supp. of S.J., pp. 193-200; App. 53, Spece Dec. ¶ 12). Spece did not know Jensen prior to seeing this bulletin. (App. 110, Spece Dep. p. 39:23-25).

Humboldt County Deputy Tim Fisher called Spece and asked him to assist in the search for Jensen. (App. 121, Spece Dep. p. 106:4-13). Spece and Fisher were fishing buddies. (App. 122, Spece Dep. p. 112:6-25). Spece is a rifle instructor for the State of Iowa. (App. 122, Spece Dep. pp. 110:18-111:17). Deputy Fisher recognized Spece as a "sharpshooter." (App. 77, Fisher Dep. pp. 64:19-65:8). Rifles are used in such situations because it gives officers a tactical advantage of being able to make accurate shots at much greater distances than handguns. (App. 113, Spece Dep. p. 57:11-17). The Humboldt County Sheriff's Department did not even train shooting handguns at greater than 25 yards because of the lack of accuracy at that distance. (App. 75, Fisher Dep. p. 52:4-11). A reasonable juror could conclude that Spece was brought into the search by Fisher (who described Jensen after Spece killed him, as a "piece of shit" and a "sack of shit"), not an officer skilled in dealing with emotionally distraught individuals, for Spece to do exactly what he did – look for an excuse to kill Jensen. (App. 188-90, Stringer Body Cam Tr. pp. 18:25-19:1 and 22:23).

None of the officers present followed their training by notifying a supervisor once Jensen was located. Deputy Matthew Steil conceded that nobody thought to notify a supervisor to coordinate what was going on even though that would have been the protocol. (App. 134, Steil Dep. p. 41:11-22; App. 94-95, Nielsen Dep. pp. 27:19-28:16). Fisher conceded that "no specific person [] was in charge." (App. 74, Fisher Dep. p. 49:13-17).

Despite spending hours with the other officers searching for Jensen, Spece never bothered to discuss how to handle the situation once Jensen was located. (App. 134, Steil Dep. p. 40:5-8) ("Q. When you were looking for Shane Jensen, what plan was put in place as to how to handle him once you found him? A. There was really never a plan discussed."). Sheriff Dean Kruger testified, as follows:

> Q. Now, when your officers are involved in trying to locate a suspect… that they believe might be suicidal and even have reason to believe that the person might be looking to commit suicide by cop… would you expect that they would prepare themselves, while they're looking for him, to deal with that situation once they locate him?
>
> A. I believe so, yes.

(App. 84, Kruger Dep. p. 21:8-22).

As Officer Thomas Nielsen went to the front door of the home where Jensen was located, Spece, Steil, and Fisher moved toward the backyard of the house. (App. 59-60, Steil Dec. ¶ 22; App. 55, Spece Dec. ¶ 26). All officers

were carrying rifles except Nielsen, who was armed with a handgun. (*Id.*).

"SPECE stated he looked at the house's backyard and noticed a high chain-link fence. SPECE tried to look under the deck with his binoculars, but there wasn't much clearance from the ground to the deck, so he couldn't see anything." (App. 155, Dep. Ex. 19, p. 4). Deposition Exhibit 7 shows the low deck Jensen was hiding under. (App. 148, Dep. Ex. 7). A reasonable juror could conclude that leaving Jensen under the low deck limited any threat he posed and would have given the officers time to have one officer attempt to calmly communicate with Jensen, thereby deescalating the situation. Instead, none of the officers present followed their training, and all the officers began yelling at Jensen to come out from under the deck, thereby escalating the situation. (App. 48-49, Nielsen Dec. ¶¶ 19–20; App.155, Dep. Ex. 19, p. 4).

Spece observed Nielsen walk out from the back of the home onto the deck and shine his flashlight down between the slats. (App. 55, Spece Dec. ¶ 29). He then observed Nielsen reach for the gun on his hip, fumble, get his weapon out, take a couple steps, and start yelling for Jensen to come out from under the deck. (App. 48-49, Nielsen Dec. ¶¶ 19–20; App. 155, Dep. Ex. 19, p. 4). Spece saw that Nielsen was exposed to Jensen. (App. 55, Spece Dec. ¶ 28; App. 176-79, Dep. Ex. 24). He was "mortified" because "if Jensen was under the deck, Officer Nielsen could get shot." *Id.* Jensen pointed his gun at

Nielsen, but did not fire. *Id.* A reasonable juror could conclude that Jensen's choice not to fire at Nielsen was an indication he did not want to hurt anyone else and just wanted to goad one of the officers into shooting him. Nielsen also did not fire and retreated into the house for safety. *Id.* A reasonable juror could conclude that Spece's admission that he was "mortified," is significant because ultimately his panicked response to the situation and failure to follow training caused Jensen's death.

Spece watched as Jensen complied with the yelled orders to come out from under the deck carrying the gun. (App. 119, Spece Dep. p. 87:17-19). Officers following protocol for dealing with an armed suicidal suspect would have left Jensen under the deck while they set up a perimeter at a safe distance behind adequate cover and calmly attempted to communicate with him. Sheriff Kruger testified,

> Q. And when law enforcement officers are encountering somebody that they believe might be dangerous… that means, does it not, that the longer -- the further they are away from the person and the better cover they have, the safer they're going to be and the more time they have to deal with the situation, right?
>
> A. Yeah. Yes, yes.

(App. 84-85, Kruger Dep. pp. 23-24).

* * *

> Q. And in this particular case with Shane Jensen underneath the deck and the officers' ability to take cover behind a steel dumpster or a

cement block garage or a house, time's on their side, right?

A. Yeah, could be, yes.

(App. 85, Kruger Dep. pp. 24).

* * *

Q. So they were going to shoot him no matter what?

A. No, no. Their goal was try and get him to the hospital so that we could get him the help he needed.

Q. And the best way to do that pursuant to their training, to try -- if there is opportunity to do so, to try to talk to him calmly without yelling?

A. Yeah, I believe Tom Nielsen tried to talk to him and ordered him out of the deck.

(App. 85, Kruger Dep. pp. 25-26).

* * *

Q. And when law enforcement officers are trained with dealing with suicidal individuals, they are trained that the best approach, if they can do so safely…is to approach them calmly?

A. If you can do that, yes.

Q. One officer talking to the person, not a bunch of officers giving orders, right?

A. It probably would be the best way, yeah.

Q. They're supposed to try to de-escalate the situation, not escalate it, if possible?

A. If at all possible, yes.

Q. And isn't it true that time is on their side, particularly if they have distance and cover, right?

A. That would probably help the matter, yeah.

(App. 85, Kruger Dep. pp. 26-27).

* * *

Q. And if you're behind adequate cover from 80 feet away from a person with a handgun, you're not in immediate threat of your life being taken, are you?

A. Well, I mean you got the benefit of being behind protection and stuff. But if somebody's shooting at you, I mean you gotta do something.

Q. Well, if somebody's shooting at you, you might have to do something, but… you're still not in immediate threat if you're behind cover and you're 80 feet away; isn't that true?

A. Could be, yeah. It depends what the situation is.

(App. 86-87, Kruger Dep. pp. 31-32). These admissions by the Sheriff establish that Spece violated every rule regarding how to deal with an armed and suicidal suspect and, at the very least, create a fact issue regarding whether Spece was facing an imminent threat of serious injury or death at the time he killed Jensen. (App. 84-87, Kruger Dep. pp. 23-32).

Spece then watched Jensen walk away from under the deck into the center of the fenced-in backyard. (App. 155, Dep. Ex. 19, p. 4). Spece and Steil started yelling at Jensen to drop the gun. (*Id.*). A reasonable juror could conclude Defendant Spece was treating Jensen like he was an armed robbery

suspect, not an emotionally distraught young man. The Defendants made this very argument at the summary judgment hearing: "the very first thing you do when faced with someone with a loaded firearm is you disarm the individual and secure the scene." (App. 185, Hrg. Tr. pp. 21-22). Plaintiff's counsel pointed out the problem with this argument in the context of this case, as follows:

> [The Defendants] completely failed to address [] the training that Officer Spece received for dealing with armed suicidal individuals. It's not the same as dealing with an armed bank robber… or some other armed person that's committed [a] crime. This is a mentally unstable person. [The police] have specific rules they're supposed to follow. We cited [] five of them. [Spece] knew every single one of them, but he did none of them. And that means we should get summary judgment. [What the Defendants are arguing] is the trained response for an armed robbery suspect, it is exactly the opposite of how law enforcement officers are trained to deal with armed and suicidal individuals.

(App. 186, Hrg. Tr. pp. 25-26). Spece even admitted that armed suicidal suspects must be treated differently than armed bank robbers. (App. 108, Spece Dep. p. 22:19-22.) ("Q. Are you telling us that you deal with a suicidal armed person the same way you deal with an armed bank robber? A. Absolutely not.").

"SPECE had his rifle trained on the kid. SPECE stated that was **when he saw a guy behind the kid stick his head out** around the corner of a house." (App. 155, Dep. Ex. 19, p. 4) (emphasis added). That "guy" was Jason Smith, who recorded the incident with an iPhone. (App. 192, Smith iPhone

Video). Spece claimed Smith complied with his order to "get back," but the continued video establishes that was not the case. (App. 192, Smith iPhone Video; App. 155, Dep. Ex. 19, p. 4).

Smith first found out that Spece fired right in his direction during his deposition when comparing deposition exhibits 16 with 31. (App. 102, Smith Dep. pp. 22:12-23:4). Smith recognized Spece violated one of the basic rules of gun safety by firing right at him. (App. 103-04, Smith Dep. p. 27:15-28:1). A reasonable juror could conclude that only a panicked and irresponsible officer would fire a rifle in the direction of an innocent bystander without being certain the bystander had moved to a place of safety. Also, unlike the District Court, a reasonable juror could be much more concerned about Spece shooting directly at an innocent bystander and neighborhood houses, as opposed to a bullet shot into the air by Jensen that "had to come down somewhere," with a fraction of the force of a bullet fired directly from a rifle. (App. 39, Order p. 10).

As Jensen moved from under the deck into the center of the backyard Spece realized his initial position was now directly in line with Jensen and he needed to move. (App. 119, Spece Dep. p. 87:7-19). This is further confirmation for a reasonable juror to conclude that Jensen should have been left under the deck while an attempt to calmly speak to him was undertaken.

Jensen pointed his gun at Spece and/or Steil and could have shot them at this point but did not. (App. 108, Spece Dep. p. 21:18-23). A reasonable juror could conclude that Jensen, passing up for the second time an opportunity to shoot at officers, was not going to shoot anyone and was only attempting to goad one of the officers into shooting him.

Officer Spece then moved to the west side of the garage, next to a steel dumpster. (App. 119, Spece Dep. p. 87:7-19; App. 151, Dep. Ex. 14). Spece had other available cover to choose from, including several trees, the garage, and the neighbor's house. (App. 149, Dep. Ex. 9).

Fisher determined the dumpster provided adequate distance and cover and positioned himself behind it, opposite of Spece. (App. 149, Dep. Ex. 9; App. 155, Dep. Ex. 19, p. 4). Steil was also of the opinion that the dumpster provided adequate distance and cover and positioned himself four or five feet behind it. (App. 149, Dep. Ex. 9). The garage was made of concrete block on the side facing the backyard where Jensen was located and wood siding on the front next to where the three officers were positioned behind the adjacent metal dumpster. (App. 149, 151, Dep Exs. 9 and 14).

Jensen was 80.5 feet away in the middle of the backyard. (App. 149, Dep. Ex. 9; App. 114, Spece Dep. p. 64:13-24). The yard where Jensen was standing was within a residential neighborhood surrounded by homes. (App.

120, Spece Dep. p. 98:4-8). The chain link fence surrounding the backyard was atypically tall. (App. 150, Dep. Ex. 12). Spece is 5 foot 5 inches tall. (App. 128, Spece Dep. p. 164:18-19). Spece was looking through the chain link fence at Jensen over 80 feet away when he fired his rifle and killed Jensen. (App. 32, Order, p. 3).

Jensen continued to stand in the backyard with the gun pointed at his own head. (App. 49, Nielsen Dec. ¶ 26). The other officers continued to yell at Jensen to drop his weapon. (App. 125, Spece Dep. pp. 130:23–131:1). Jensen then turned to face Spece, Fisher, and Steil. (App. 192, Smith iPhone Video at 0:27). Spece observed Jensen bring his hand up at full length, "although he did not point the gun at anyone at that time." (App. 56, Spece Dec. ¶ 42; App. 192, Smith iPhone Video at 0:36–0:38). Spece then observed Jensen bring the gun full circle toward him and Fisher. (App. 126, Spece Dep. p. 133:1–2; App. 57, Spece Dec. ¶ 43). Spece claimed to have been intensely focused on Jensen's wrist and hands, even though he was aiming center mass of Jensen's body, and thought Jensen was going to shoot. (App. 116, Spece Dep. p. 74:11-17). Spece then fired his rifle, hitting Jensen in the chest and killing him. (App. 57, Spece Dec. ¶ 43; App. 111, Spece Dep. p. 42:13-25).

Here is what Spece stated verbatim about why he killed Jensen in his statement to the DCI, made with legal representation present, two days after

the shooting:

> …Tim gave him orders to drop the gun, and I didn't give orders because I was afraid he was going to point it and shoot somebody. I remember him yelling. The kid saying, "You're going to have to kill me. You're going to have to kill me."
>
> He brought his hand up at full length and it wasn't pointed at anyone at the time. He brought it full circle right towards Tim and me, and I watched his wrist. I could see his muscles in his hand, and I knew he was going to shoot, and I shot, and I didn't know if I hit him. I didn't know….

(App. 167, Dep. Ex. 20, p. 10; App. 127, Spece Dep. p. 144:14-25). A reasonable juror could conclude that Spece's statement establishes the gun was not pointed at him. There is no way Spece could see Jensen's hand/wrist muscles if the gun was pointed at him because the gun would block the view to the hand and wrist. The only way Spece could see Jensen's hand/wrist muscles was if the gun was pointed somewhere other than right at Spece, *e.g.*, in the air or at Jensen's head.

Neither in Spece's word-for-word statement, nor in the DCI summary of that statement, is it alleged that Jensen pointed the gun at Spece. (App. 155-56, Dep. Ex. 19, pp. 4-5). The DCI took Spece's claim of observing Jensen's hand/wrist muscles to conclude that he "knew" Jensen was going to shoot, out of the realm of clairvoyance to interpret it as Spece saw Jensen's "wrist and muscles flex, so Spece shot him." (App. 155-56, Dep. Ex. p. 19, pp. 4-5). A reasonable juror could conclude that Spece's cited justifications for the use of

deadly force—that he could see Jensen's hand/wrist muscles from 80 feet away through a chain link fence—is completely absurd.

Spece was 45 years old at the time he killed Jensen and wears "cheaters" when reading. (App. 115, Spece Dep. pp. 70:2-15 and 72:13-21). During his deposition, Spece explained his alleged extraordinary eyesight at the time, being able to see the muscles in Jensen's hand flex from 80 feet away looking through a chain link fence while focusing on his target—Jensen's chest—as essentially an adrenaline rush. (App. 115-16, Spece Dep. pp. 72:22-73:15) (Spece claimed his "senses [were] heightened…because [his] brain focuses so much on what [he's] looking at that… people, not just [him]… are able to do things that they wouldn't normally be able to do. They're able to see greater distances."). Spece went on to explain his super eyesight by claiming he had "intense focus." (App. 116, Spece Dep. p. 74:1-24). A reasonable juror could easily reject Spece's super eyesight claim since adrenaline does not increase visual acuity. *See* Plaintiff's expert's report: "in a shooting situation… [an]...'adrenaline dump'… does not improve visual acuity. Therefore, an officer is highly unlikely to be able to see hand muscles tensing from 80 feet away." (App. 212, Klein Rpt. p. 19).

The Defendants also now claim the video shows Jensen pointed the gun at Spece. It does not. (App. 192, Smith iPhone Video). The District Court's

fact finding to the contrary requires reversal. (App. 33, Order p. 4). The District Court misstated record evidence to conclude Jensen was "pointing the gun toward [Spece]." *Id.* The video is not clear on this point, creating a fact issue that should have been resolved in Plaintiff's favor on summary judgment.

What is clearly depicted on the video is Jensen moving around in a circle and gesticulating with the gun in his right hand. (App. 192, Smith iPhone Video). The video shows Spece, who fired only after the third time Jensen made a similar gesture with his hand holding the gun. (App. 102, Smith Dep. p. 22:4-7) ("Q. And then the third time he makes a similar movement with his hand is when he's shot or at least he goes down. Do you recall that? A. Yes."). A reasonable juror could conclude that when Jensen made the third similar gesture with his right hand that he was going to do the same thing he did when making the first two similar gestures – not shoot.

The District Court cited record evidence of after-the-fact statements made by Deputies Steil and Fisher to the effect that Spece had to shoot to save all of them. (App. 33-34, Order, pp. 4-5). In doing so the District Court once again made critical disputed factual findings in favor of the defense. A reasonable juror could conclude that the other three officers present did not fire because they did not perceive Jensen as a threat while they were setting

up, according to their training at a safe distance and behind adequate cover, in order to deescalate the situation.

The District Court ignored all the following facts supporting a finding that Spece was the only officer present who believed deadly force was justified. Fisher testified: "Q. [I]f at any point in time during this incident you perceived Shane Jensen as an immediate threat to kill or seriously injure yourself, another officer or any other individual, [] you would not have hesitated to use deadly force to stop that threat? A. Correct." (App. 73, Fisher Dep. pp. 26:22-27:13). Fisher explained, "Q. You're trained to do that? A. We're trained to use deadly force if we have to. Q. And you would have followed that training if you were presented with an immediate threat that justified the use of deadly force, right? A. Yes." *Id.*

Fisher noted he was not looking at Jensen when Spece fired. (App. 78, Fisher Dep. p. 69:6-9). Fisher conceded that if he believed he was facing a life-or-death situation for himself, or other officers, he would have kept his focus on Jensen. (App. 78, Fisher Dep. p. 69:15-21).

Steil also testified he did not fire his weapon and that he would not have hesitated to do so if at any point he perceived Jensen as a serious threat. (App. 131, Steil Dep. p. 5:23-6:7) ("Q. Is it true that, at any point in time during this incident, if you had perceived Shane as an immediate threat to kill or seriously

injure either yourself or one of your fellow officers or another person that you would not have hesitated to use deadly force in response to that threat? A. Yes. Q. And you never did fire your weapon on that day; is that true? A. I did not.").

Nielsen conceded he was on the deck when Jensen was facing the dumpster and not in position to see where Jensen was pointing the gun at the time Spece fired. (App. 97, Nielsen Dep. pp. 50:18-51:6). Nielsen testified how he followed his training to seek cover when Jensen previously pointed the gun at him, rather than use deadly force. (App. 91, Nielsen Dep. p. 6:14-16; App. 149, Dep. Ex. 9) ("When [Jensen] was pointing the gun at me, I was attempting, as trained, to try and find and consume cover. And in the process of doing that, I stumbled backwards on the threshold of the door."). He explained his decision not to use deadly force, as follows:

> Q. Your obligation is to protect yourself and other officers and the public, right?
>
> A. Yes.
>
> Q. I assume that you take that obligation very seriously.
>
> A. I do.
>
> Q. And if you at any point in time had felt that Shane was a threat to anyone else, you would have used deadly force in response, right?
>
> A. Possibly.

Q. Of course, one of the options you do have is to get back to cover, right?

A. That is correct.

Q. And that's what you chose to do when he pointed the gun at you initially, right?

A. That is correct.

Q. And I take it you're glad you made that decision, because he didn't fire the gun at you even though he apparently had an opportunity to do so, right?

A. Yes.

(App. 91-92, Nielsen Dep. pp. 7:19-8:14).

Spece had over two hours while searching for Jensen to review the rules for engaging with armed suicidal suspects and completely failed to do so. (App. 109, Spece Dep. p. 27:6-20). After locating Jensen, Spece panicked and violated every single rule regarding how to deal with emotionally unstable and armed individuals, as follows:

1. A supervisor should be notified (App. 123, Spece Dep. p. 116:3-4);

2. One officer should calmly attempt to gain a rapport with the distraught person (App. 112, Spece Dep. p. 53:3-4);

3. No officer should yell at the distraught individual (App. 113, Spece Dep. p. 57:18-24);

4. Every officer should set up at a sufficient distance from the distraught person and behind adequate cover because distance +

cover = time and creating time to deal with the distraught person is the key [1](App. 115, Spece Dep. p. 69:6-19); and

5. All officers should avoid firing in the direction of innocent bystanders (App. 110, Spece Dep. p. 37:6-10).

The video establishes that Spece was fully prepared to hunt down and kill Jensen, but not at all prepared to apprehend him peacefully. (App. 192, Smith iPhone Video). Spece violated his training and treated Jensen like he was an armed bank robber, not a suicidal young man. There is simply no way a law enforcement officer could violate every single rule for how to deal with a given factual scenario and be found to have acted with "all due care." Spece's admission that he violated all the rules in dealing with Jensen should have led the District Court to grant summary judgment in Wagner's favor.

A reasonable juror could conclude that if Defendant Spece had just stuck to his DNR duties on November 11, 2017, Shane Jensen would be alive today. Kruger agreed that in prior similar situations in which Jensen "may have pointed a rifle at [his] deputies, the deputies were able to calmly talk to him and make time and get his mother out there so that he could be brought out safely." (App. 86, Kruger Dep. p. 30). Jensen's mother, Krystal Wagner,

[1] Wagner's position is that Spece was set up at an adequate distance (80+ feet) and behind adequate cover (double wall steel dumpster) to keep himself out of harm's way during this incident. The Defendants now argue in this litigation that Spece was not safe, but that argument does not excuse Spece's conduct because to the extent it is true, then Spece failed to follow his training to set up at a safe distance and behind safe cover.

was on her way to the scene and arrived right after the shooting, even before the ambulance. (App. 147, Wagner Dep. p. 30.).

ARGUMENT

Defendant Spece's conduct in shooting and killing Shane Jensen was objectively unreasonable, and he is not entitled to qualified immunity under the Iowa Constitution. Spece was not facing an imminent threat of serious physical injury or death and/or any jeopardy Spece faced was of his own making by failing to follow his training regarding how to deal with suicidal armed individuals. In addition, the District Court made factual findings adverse to Plaintiff in the summary judgment order, requiring reversal of that decision.

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

Federal precedent provides a persuasive framework for assessing the use of deadly force by law enforcement officers: "[W]here 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 Jensen is not here to tell his side

of the story. Spece's claimed justification for using deadly force is factually absurd and is not supported by the video of the incident, Spece's own statement to the DCI provided shortly after the incident, nor any other witness or record evidence. (App. 152-75, Dep. Exs. 19 and 20).

II. THE DISTRICT COURT RESOLVED NUMEROUS FACT DISPUTES IN FAVOR OF THE DEFENDANTS IN GRANTING THEM SUMMARY JUDGMENT

Wagner preserved error on this issue by raising it before the District Court as part of her Resistance to the Defendants' Motion for Summary Judgment. (App. 30-44, Order pp. 1-15). The Iowa Supreme Court's review of the district court's decision to grant summary judgment is for corrections of errors of law. *Pitts v. Farm Bureau Life Ins. Co*., 818 N.W.2d 91, 96 (Iowa 2012) (citing *Seneca Waste Sols., Inc. v. Sheaffer Mfg. Co.*, 791 N.W.2d 407, 410-11 (Iowa 2010)).

As noted in the Statement of Facts above, in the Order granting the Defendants' Motion for Summary Judgment, the District Court made numerous factual determinations in favor of the Defendants, requiring reversal of that order. *See Linn*, 929 N.W.2d at 730; *Phillips*, 625 N.W.2d at 717. The District Court made other additional findings of disputed facts in favor of the Defendants.

On page 1 of the Order, the court notes DNR officers are fully certified

state peace officers, which is true. *See* Order, fn 1 (App. 30). However, a reasonable juror could conclude that given the type of work typically engaged in by the DNR, as compared to local law enforcement officers, the local officers have more experience and expertise in dealing with armed suicidal suspects and particularly with Jensen. The local law enforcement officers had more experience than Spece just by dealing with a suicidal Jensen on up to four prior occasions. (App. 83, Kruger Dep. p. 12:14-19), Kruger agreed that the job of Sheriff has become more difficult because local law enforcement officers often have to deal with individuals with mental health issues. (App. 82, Kruger Dep. 5:20-23). In this case, that belief is also supported by the admission of all involved that Defendant Spece was the one officer on site who had no background, experience, or history with Jensen. (App. 73, Fisher Dep. p. 26:16-21; App. 131, Steil Dep. p. 5:16-22). Spece admitted that in his career as a DNR officer, he had only dealt with suicidal individuals a total of "three to four" times. (App. 111, Spece Dep. p. 41).

On page 2 of the Order, the court cites to the transcript of a phone call Jensen's mother had with Deputy Fisher prior to the shooting. (App. 31, Order p. 2). There is, however, no record evidence supporting the implication that Spece was aware of the discussion set out verbatim in the Order, or even the general nature of that discussion, prior to shooting and killing Jensen. Spece

read the bulletin set out at page 2 of the Order, and the only additional information he received was confirmation that Jensen may have stolen a vehicle and a 9mm handgun. (*Id.*; App. 53, Spece Dec. ¶ 12; App. 47, Nielsen Dec. ¶ 4). After the fact rationalizations cannot be used to justify the use of deadly force. *See* I.C.A. § 804.8 (stating deadly force may be used only when the officer "reasonably believes" it to be necessary); *Graham v. Connor*, 490 U.S. 386, 396-397 (1989) (holding the "'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene," rather than with the 20/20 vision of hindsight).

On page 4 of the Order, the court relies on a statement made by Deputy Kenneth Vorland, prepared for this litigation, which is completely contradicted by the report he prepared immediately after the incident. (App. 33, Order p. 4). The DCI created an overhead chart of the scene of the shooting showing where all the key players were located and identifying critical evidence, *e.g.* gun shell casings. (App. 149, Dep. Ex. 9). The DCI did not even bother to locate Vorland on this overhead because he saw nothing of relevance, as set out in his report. (*Id.*; App. 149, 180, 182, Dep. Exs. 9 and 29, pp. 1 and 3 only).

In his report, prepared the night of the incident, Vorland stated he did not arrive at a position where he could see what was occurring in the backyard

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

Also on page 4 of the Order, the court cited to Plaintiff's Response to Defendants' Statement of Material Facts for a number of key factual determinations upon which the court made the summary judgment decision. (App. 33, Order p. 4). The court cited to the allegations in paragraphs 47-52 and 54-59 of the Defendants' Statement of Material Facts as if the Plaintiff admitted them in whole, which is not the case for paragraphs 47, 48, 49, 50, 51, 58 and 59. *Id*. The actual factual responses to those allegations establish that the District Court wrongfully found disputed factual matters in favor of the Defendants. (App. 22-24, 26-27, Pl. Resp. to Def. Stmt. of Undisputed Facts).

The most egregious factual mistake by the District Court was concluding that Spece saw Jensen "point the gun toward himself and Deputy Fisher." (App. 33, Order p. 4). The actual admission was that Defendant Spece only claimed to observe Jensen bring the gun full circle **toward him and Deputy Fisher**. (App. 167, Dep. Ex. 20, p. 10). Prior to this litigation, Spece never claimed the gun was pointing at him. The District Court's conclusion to the contrary at the summary judgment stage constitutes reversible error.

The District Court's conclusion that it "is not left with only Officer Spece's testimony of the shooting. Rather, the record includes deposition transcripts from numerous eyewitnesses and expert testimony, video footage, and law enforcement reports," is also particularly troubling because none of that other evidence supports Spece's claim that deadly force was justified. (App. 41, Order, p. 12). While law enforcement officers typically "circle the wagons" to protect one of their own, that did not happen in this case. None of the three "eyewitness" officers claim to have observed any justification for the use of deadly force. (App. 41, Order p. 12; App. 73, Fisher Dep. p. 26:22-27:13; App. 131, Steil Dep. p. 5:23-6:7; App. 91-92, Nielsen Dep. pp. 7:19-8:14).

The fact that the District Court referred to Defendants' expert report while rejecting Plaintiff's expert report also requires reversal. (App. 39, 41,

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

III. THE DISTRICT COURT IMPROPERLY IGNORED SPECE'S ABSURD CLAIM THAT HE COULD SEE JENSEN'S HAND/WRIST MUSCLES FROM 80 FEET AWAY THROUGH A CHAIN LINK FENCE

Wagner preserved error on this issue by raising it before the District Court as part of her Resistance to the Defendants' Motion for Summary Judgment. (App. 30-44, Order pp. 1-15). The Iowa Supreme Court's review of the district court's decision to grant summary judgment is for corrections of errors of law. *Pitts*, 818 N.W.2d at 96 (citing *Seneca Waste Sols., Inc.v. Sheaffer Mfg. Co.*, 791 N.W.2d 407, 410-11 (Iowa 2010)).

In the most perplexing section of the order granting Defendants' summary judgment, the District Court found that Spece's absurd justification for use of deadly force—that he could see Jensen's hand/wrist muscles from 80 feet away through a chain link fence—was irrelevant. (App. 40-41, Order,

pp. 11-12). The District Court reasoned that the "question of whether Officer Spece did or did not see Mr. Jensen's wrist flex, or stated otherwise, whether Officer Spece could have seen such a physical reaction, is not one that needs answered for summary judgment to be appropriate." (App. 40, Order, p. 11). The District Court then engaged in a bit of sophistry to conclude that since the "standard is one of objectivity… this court's focus is on what a reasonable officer would have believed rather than Officer Spece's subjective beliefs. [Citing] *Leydens v. City of Des Moines*, 484 N.W.2d 594, 597 (Iowa 1992) (discussing objective versus subjective standard in § 1983 claims)." *Id.*

The District Court came to this erroneous conclusion by confusing alleged facts with subjective beliefs. In doing so, the District Court ignored Iowa law allowing the use of deadly force by officers only if the officer "reasonably believes" it to be necessary "to defend any person from bodily harm." I.C.A. § 804.8. The real issue to be considered is: "Would a reasonable officer in Spece's position use deadly force based upon an alleged perception from 80 feet away through a chain link fence that an armed suicidal individual flexed the muscles in their hand/wrist?" Spece's factual justification is so absurd that no reasonable officer would have concluded that deadly force was justified on those facts, which is why the District Court should have granted Wagner's Partial Motion for Summary Judgment.

The *Leydens* case and federal precedent make it clear that the District Court confused the facts claimed by an officer defending against an alleged constitutional violation with the test to be applied to those facts to determine if a violation occurred. As the *Leyden* court held, "The relevant question . . . is the objective (albeit fact-specific) question whether a reasonable officer could have believed [this officer's] warrantless search to be lawful…. [The officer's] subjective beliefs about the search are irrelevant." *Leydens*, 484 N.W.2d at 597 (quoting *Anderson v. Creighton*, 483 U.S. 635, 641 (1987) (alterations in original)). While the officer's subjective beliefs are irrelevant, the officer's claimed factual observations are critical and must be assessed pursuant to an objective test. *See Harlow v. Fitzgerald*, 457 U.S. 800, 815 (1982) ("The subjective component refers to 'permissible intentions.'"). In *Slone v. Herman*, the Eighth Circuit held that a "defendant's good faith or bad faith is irrelevant to the qualified immunity inquiry [because] the standard is one of 'objective reasonableness.'" 983 F.2d 107, 110 (8th Cir. 1993) (quoting *Burk v. Beene*, 948 F.2d 489, 494 (8th Cir. 1991), quoting *Malley v. Briggs*, 475 U.S. 335, 344 (1986)).

Plaintiff is not claiming that Spece acted with ill will. Rather, Plaintiff's claim is simple—Spece panicked, forgot all his training, and used deadly force when reasonable officers in the same situation (like the three other officers

present) would not have done so. At the summary judgment stage, any factual disputes raised by Spece's stated justification for using deadly force must be resolved in Plaintiff's favor. *Linn*, 929 N.W.2d at 730. The District Court's refusal to do so in assessing the ultimate fact in the case, *i.e.*, whether Spece could even see what he claims to have observed that caused him to conclude deadly force was justified, mandates reversal.

Many factual claims are subjective, but that does not make them irrelevant. For example, an officer could claim that he killed someone because he thought the person had a gun, even if that belief turned out to be false. In that situation, the subjective claim that the officer thought he saw a gun could not possibly be dismissed as irrelevant to a summary judgment analysis. The reasonableness of the belief that a gun was present would be the key issue, and all the evidence surrounding that claim would be highly relevant, *e.g.*, distance, obstructions, whether there was anything resembling a gun in the victim's hand, lighting, vision acuity of the officer, *etc*., to apply the objective test of whether a reasonable officer would have come to the same conclusion. Further, if no reasonable officer could believe the individual had a gun, because the shooting officer's claimed factual basis for perceiving a gun were objectively not worthy of belief, then summary judgment in favor of the plaintiff would be warranted.

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

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

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

Id. Note there is no indication in the *Partridge* case that the shooting officer was protected by being a sufficient distance away and behind adequate cover at the time of the shooting. *Id*. at 564. In fact, in *Partridge* the shooting officer was close enough to the deceased to use his handgun. *Id*.

In *Partridge*, the Eighth Circuit rejected the district court's conclusion that "it would have 'been nearly impossible for [the officer] to tell whether [the deceased] was moving the gun away from his head to comply with [the officer's] order or if he was repositioning the gun to aim it at the officers.'" *Id.* at 565. The Eighth Circuit reversed the district court by holding that the deceased "had to move the gun to comply with [the officer's] commands. The complaint does not tell the direction or speed [the deceased] moved the gun, how far he moved it before [the officer] shot him, or the timing of the facts." *Id.* at 566.

Note the nuanced argument the Eighth Circuit goes through in assessing the use of deadly force involving an armed suicidal suspect, as opposed to an armed criminal suspect. *Compare Partridge*, 929 F.3d 562 *with Thompson v. Hubbard,* 257 F.3d 896, 898-899 (8th Cir. 2001), involving "two suspects fleeing on foot from the scene of an armed robbery," where the Eighth Circuit held that an "officer is not constitutionally required to wait until he sets eyes upon the weapon before employing deadly force to protect himself against a

fleeing suspect who turns and moves as though to draw a gun." This is the precise difference that Spece completely missed by ignoring his training for dealing with armed suicidal suspects and instead treating Jensen like he had just robbed a bank.

In *Wilson v. City of Des Moines*, the Eighth Circuit held that factual issues about how suspect turned towards officers—whether he turned in a shooting stance—precluded qualified immunity on excessive-force claim. 293 F.3d 447, 452-54 (8th Cir. 2002). In *Perez v. Suszczynski*, the Eleventh Circuit held that the "mere presence of a gun or other weapon is not enough to warrant the exercise of deadly force and shield an officer from suit. Where the weapon was, what type of weapon it was, and what was happening with the weapon are all inquiries crucial to the reasonableness determination." 809 F.3d 1213, 1220 (11th Cir. 2016); *see also Craighead v. Lee*, 399 F.3d 954, ¶961-62 (8th Cir. 2005) (denying qualified immunity where the officer shot a suspect holding a gun "continuously over [his] head, pointed upward," while struggling with another person).

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

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

> or it is reasonable to believe that such force is necessary to resist a like force or threat.

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

IV. SPECE USED EXCESSIVE DEADLY FORCE BY KILLING JENSEN WHEN SPECE WAS NOT FACING AN IMMINENT THREAT OF SERIOUS INJURY OR DEATH

Wagner preserved error on this issue by raising it before the District Court as part of her Resistance to the Defendants' Motion for Summary Judgment. (App. 30-44, Order pp. 1-15). The Iowa Supreme Court's review of the district court's decision to grant summary judgment is for corrections of errors of law. *Pitts v. Farm Bureau Life Ins. Co*., 818 N.W.2d 91, 96 (Iowa 2012) (citing *Seneca Waste Sols., Inc.v. Sheaffer Mfg. Co.*, 791 N.W.2d 407,

410-11 (Iowa 2010)).

In *Tennessee v. Garner*, 471 U.S. 1, 8 (1985), the U.S. Supreme Court held, "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." The Iowa Supreme Court has recognized the *Garner* rule. *See State v. DeWitt*, 811 N.W.2d 460, 469 (2012).

Even though Jensen was armed in this case, he was attempting to commit suicide by cop by goading the officers present into shooting him. Three of the officers did not take the bait. Spece did by allowing himself to be goaded into killing Jensen. Spece now attempts to justify his wrongful conduct by claiming the bad choices he made in failing to follow his training for dealing with armed suicidal individuals put himself in sufficient jeopardy to justify the use of deadly force.

Iowa law codifies the *Garner* rule and requires that deadly force may only be used by law enforcement officers to effectuate an arrest under very specific situations, none of which are applicable in this case. *See* I.C.A. § 804.8 Use of force by peace officer making an arrest. ("However, the use of deadly force or a chokehold is only justified when a person cannot be captured any other way and…The peace officer reasonably believes the person would use deadly force against any person unless immediately apprehended.").

Three out of four law enforcement officers present perceived no threat from Jensen that authorized the use of deadly force. The only officer who incorrectly perceived such a threat, Defendant Spece, did so from 80 feet away claiming "super eyesight." Spece was the one officer present who had no knowledge of, or background with, Jensen, making him particularly unsuited for taking the lead in dealing with Jensen. The other officers were setting up to follow protocol and surround Jensen at sufficient distance and behind sufficient cover to deal with the threat when Defendant Spece just flat out panicked and prematurely shot and killed Jensen. Sheriff Kruger admitted a fact dispute on this issue when asked if setting up to face an armed suicidal person from 80 feet away, behind adequate cover, meant an officer is not facing an "immediate threat," responding "[c]ould be, yeah. It depends what the situation is." (App. 86-87, Kruger Dep., pp. 31-32).

V. SPECE CREATED ANY PERCEIVED JEOPARDY BY VIOLATING TRAINING REGARDING HOW TO HANDLE ARMED SUICIDAL INDIVIDUALS

Wagner preserved error on this issue by raising it before the District Court as part of her Resistance to the Defendants' Motion for Summary Judgment. (App. 30-44, Order pp. 1-15). The Iowa Supreme Court's review of the district court's decision to grant summary judgment is for corrections of errors of law. *Pitts v. Farm Bureau Life Ins. Co*., 818 N.W.2d 91, 96 (Iowa

2012) (citing *Seneca Waste Sols., Inc.v. Sheaffer Mfg. Co.*, 791 N.W.2d 407, 410-11 (Iowa 2010)).

Spece now attempts to justify his wrongful conduct by claiming the bad choices he made by failing to call in a supervisor; ordering Jensen out from under the deck causing whatever threat Jensen posed to be significantly increased; not setting up at a safe enough distance from Jensen, or setting up at a safe distance, but failing to recognize that fact; not setting up behind adequate cover, or setting up behind adequate cover, but failing to recognize that fact; yelling at Jensen; not preparing for how to deal with an armed and suicidal suspect; not allowing one officer to attempt to establish a rapport with Jensen; and shooting at Jensen with neighborhood homes and an innocent bystander directly in the line of fire; all put himself in whatever jeopardy he was facing at the time and justified his decision to use deadly force.

A. Officer Created Jeopardy Cannot Be Used to Justify the Use of Deadly Force

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*, the Seventh Circuit evaluated 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." 5 F.3d 230, 232 (7th Cir. 1993). With no video available to conclusively show what happened, the *Starks* court held that the "key dispute for the factfinder [was] 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 the present case, video and other uncontested record evidence establishes that the only jeopardy Defendant Spece faced was of his own making, and he cannot use that to justify the use of deadly force.

All Defendant Spece had to do to remain completely safe in this case was duck behind the steel dumpster. (App. 151, Dep. Ex. 14). If the Defendants want to argue it was not safe behind the dumpster, then Spece should have sought cover further away and/or behind a tree, the garage, the neighboring house, or anywhere else he would not have felt compelled to kill Jensen within a minute of his arrival on the scene. (App. 149, Dep. Ex. 9).

The District Court criticized Plaintiff's expert analysis that Defendant Spece was safe behind the two horizontal steel walls of the dumpster, by citing caselaw supporting the claim that officers sometimes must make split second decisions. (App. 39, Order, p. 10). A reasonable juror, however, could agree

with Plaintiff's expert and conclude that Defendant Spece was safe behind the dumpster.

The District Court criticized Plaintiff's case cites supporting the holding that officer created jeopardy cannot justify the use of deadly force as not involving "analogous" facts. (App. 39, Order, p. 10). *See Lewis v. Charter Township of Flint and Needham*, 660 Fed. Appx. 339 (6th Cir. 2016); *Kirby v. Duva*, 530 F.3d 475, 482 (6th Cir. 2008). The District Court missed the point of those cases that, regardless of how it comes about, officers cannot use poor tactical decisions to create scenarios where deadly force is justified. For the same reason that officers cannot step in front of moving vehicles and then claim they had to shoot, officers cannot voluntarily expose themselves to a person threatening to commit suicide by cop and then use that self-inflicted exposure to justify shooting.

"Officer-created jeopardy" refers to situations in which police officers unwisely put themselves in danger and then use force to protect themselves. As one commentator notes:

> **Officer-created jeopardy . . . includes the actions of officers who, without sound justification, willingly fail to take advantage of available tactical concepts like distance, cover, and concealment . . . willingly abandon tactically advantageous positions by moving into disadvantaged positions without justification,** or act precipitously on their own without waiting for available assistance from other officers. If an officer is charged criminally or sued civilly for his use of force and the trier of fact is limited to considering only the

> moment at which the officer used force, not prior conduct of the officer that increased the risk of a deadly confrontation, the verdict in such cases will be skewed in favor of the officer from the start.

Seth W. Stoughton, et al. *EVALUATING POLICE USES OF FORCE* (2020) (emphasis added).

For a thorough discussion of the officer created jeopardy issue *see* Cynthia Lee, *Officer-Created Jeopardy: Broadening the Time Frame for Assessing a Police Officer's Use of Deadly Force*, 89 GEO. WASH. L. REV. 1362 (2021). In the article Professor Lee notes:

> Sound police tactics, such as increasing the distance between the officers and a suspect or taking cover behind a physical object that protects an officer from a particular threat, can give officers more time to analyze the situation and thus reduce the risk to officers and the subject. In contrast, "[a] poor tactical decision, such as stepping in front of a moving vehicle, can deprive the officer of time in which to safely make a decision about how to act, forcing the officer to make a seat-of-the-pants decision about how to respond." Garrett and Stoughton argue that the training that an officer has had and the training that a reasonable officer would have received should be considered relevant circumstances in the Fourth Amendment totality of the circumstances analysis and that constitutional reasonableness should be grounded in sound police tactics.

Id. at 1390-1391 (citing Brandon Garrett & Seth Stoughton, *A Tactical Fourth Amendment*, 103 VA. L. REV. 521, 557 (2021)).

Professor Lee further explains:

> In *The Violent Police-Citizen Encounter*, Arnold Binder and Peter Scharf observe that "[a] police 'decision' to use, or not to use, deadly force in a given context might be better described as a contingent sequence of decisions and resulting behaviors—each increasing or

> decreasing the probability of an eventual use of deadly force." "The officer, who, for example, encounters an armed robber in a store and immediately takes cover while calling for backup support, will greatly alter the probability of the incident resulting in a shooting." Binder and Scharf note that "early decisions by officers may either prolong or curtail [the encounter]. For example, by seeking cover early in a confrontation, an officer can afford to engage in a more prolonged information exchange with [a suspect] than another officer without similar protection."

Id. at 1391-1392 (citing Arnold Binder & Peter Scharf, *The Violent Police-Citizen Encounter*, 452 ANNALS AM. ACAD. POL. & SOC. SCI. 111, 116 (1980)).

B. Spece Created Any Jeopardy He Faced at the Time He Killed Jensen

Defendant Spece voluntarily placed himself in jeopardy by not following any of his training for dealing with suicidal armed individuals. Any reasonable officer on the scene would be expected to *follow their training*. Failing to follow training is one of the definitions of acting unreasonably. An actionable claim of negligence requires "the existence of a duty to conform to a standard of conduct to protect others, a failure to conform to that standard, proximate cause, and damages." *Thompson v. Kaczinski*, 774 N.W.2d 829, 834, 2009 Iowa Sup. LEXIS 118, *8-9. The split-second decision argument does not insulate Spece from liability because he had hours to consider how to handle a suicidal armed individual before being put in that scenario where he panicked, forgot all of his training, and put himself in position where he

felt threatened. 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."' *" Lewis*, 660 Fed. Appx. at 10 (citing *Godawa v. Byrd*, 798 F.3d 457, 466 (6th Cir. 2015) (quoting *Smith v. Cupp*, 430 F.3d 776, 775 (6th Cir. 2005))). Although the critical events here occurred within a minute or so, it was Spece's complete failure to follow his training that put him in whatever jeopardy he faced during that time period.

Plaintiff's Rebuttal Police Practices Expert Report explains officer created jeopardy in the context of this case, as follows:

> What is being said here is that the officer is not forced to fire his or her weapon. Rather, they are goaded into firing it. In other words, the officer has a choice. In practice, the officer may not feel that he or she has a choice. However, in this case, the facts are striking. The video shows the officers taking cover behind a dumpster. Then Officer Spece appears to fire from behind the dumpster…The three officers were not in immediate danger… A photograph from the investigative report notes that the "shooting total distance" was 26.8 yards or 80.4 feet (Iowa Division of Criminal Investigation, 2019)… Mr. Jensen was not close to the three officers.
>
> And, again, we can note that the officers were not in immediate danger (see: Figure 1). Three of the other four officers were behind cover and 80 feet away. Officer Nielsen, however, had no cover and was a few feet away when Mr. Jensen pointed the gun at him. Yet, both Officer Nielsen and Mr. Jensen chose not to fire.

(App. 196, Klein Rpt. p. 3). A reasonable juror could agree with Plaintiff's expert and conclude Spece created any jeopardy he was facing at the time he killed Jensen.

C. Spece Was Not In Any Real Jeopardy at the Time He Killed Jensen

No reasonable jury could believe Spece's claim of super eyesight that allowed him to see Jensen's hand muscles from 80 feet through a chain link fence. Defendant Spece's only claimed justification for shooting and killing Jensen at the time is just flat out impossible. People may have more strength when having an adrenaline rush, but not better eyesight. (App. 212, Klein Rpt. p. 19).

Plaintiff's police practices expert analyzed the bystander video to conclude that Spece was not in imminent threat of serious injury or death, as follows:

> Let us carefully analyze the video that was shot by the neighbor. The video begins with Mr. Jensen standing in the yard with a gun to his head. Deputy Fisher and Officer Spece are standing behind the dumpster, and they are exposed. The third officer, Deputy Steil, appears to be behind the building to the right for the initial portion of the video. Mr. Jensen is seen as he fires into the air (at second 03 of the video). Mr. Jensen moves his right arm. As we mentioned before, we do not know the position of his right arm (at seconds 06 to 08 of the video). Mr. Jensen then puts the gun back to his head and turns in a circle (at seconds 08 to 14 of the video). Mr. Jensen then stops turning and stands still. The two officers duck down behind the dumpster for cover. Mr. Jensen moves his right arm again (at second 29 of the video). Officer Spece fires, and Mr. Jensen immediately collapses onto the ground (at second 30 of the video). The officers then rush towards Mr. Jensen in order to secure him and to provide aid. *Id.*
>
> There are two key points to be gleaned from the video that were not mentioned in the interviews, statements, or reports:

- The first point is that Mr. Jensen made similar movement twice with his right arm. The first time this occurred, the officers were standing and exposed. However, they did not feel threatened, and they did not fire.

- The second point is that the second time Mr. Jensen moved his right arm, the officers had already taken cover behind the dumpster. Therefore, they were not in immediate danger.

* * *

> An opportunity to engage with Mr. Jensen was lost as a result of Officer Spece's premature decision to fire (when he had adequate distance and cover.) (In fact, law enforcement agencies do not usually train officers to fire at a distance of 80 feet.) In this situation, the reason for the officers to carry rifles was to give them a tactical advantage. That is, the function of the rifle was to allow the officer to be at a distance where a round from a handgun could not reach the officer. However, when the situation became tense, Officer Spece panicked, forgot his training, and fired.
>
> * * *
>
> However, what apparently never occurred to Officer Spece is that he had the two horizontal steel walls of the dumpster between himself and Mr. Jensen. What Officer Spece should have intuitively realized was that he was safe behind the heavy steel dumpster…
>
> So, as we have said, Officer Spece panicked; that is, his anxiety overwhelmed his training. His anxiety also "blinded" him to seeing civilians directly in the line of fire. Officer Spece's behavior was reckless and egregious.

(App. 203, 208, 212, Klein Rpt. pp. 10, 15 and 19) (emphasis in original). A reasonable juror could agree with Plaintiff's expert and conclude Spece was not facing an imminent threat of serious injury or death at the time he killed Jensen.

VI. SPECE IS NOT ENTITLED TO QUALIFIED IMMUNITY UNDER THE IOWA CONSTITUTION

Wagner preserved error on this issue by raising it before the District Court as part of her Resistance to the Defendants' Motion for Summary Judgment. (App. 30-44, Order pp. 1-15). The Iowa Supreme Court's review of the district court's decision to grant summary judgment is for corrections of errors of law. *Pitts v. Farm Bureau Life Ins. Co*., 818 N.W.2d 91, 96 (Iowa 2012) (citing *Seneca Waste Sols., Inc.v. Sheaffer Mfg. Co.*, 791 N.W.2d 407, 410-11 (Iowa 2010)).

In *Baldwin v. City of Estherville* (*Baldwin I*), the Iowa Supreme Court held that law enforcement officers have qualified immunity for claims under the Iowa Constitution if they establish "all due care to comply with the law." 915 N.W.2d 259, 260-61 (Iowa 2018). The *Baldwin I* court established "due care as the benchmark. Proof of negligence, *i.e*., lack of due care," to overcome any claim of qualified immunity with the burden of proof on the officer asserting the immunity. *Id.* at 280. That is the standard for qualified immunity to be applied in this case. Of note, the right not to be shot and killed while posing no immediate threat to an officer or anyone else has been clearly established since *Tennessee v. Garner*. 471 U.S. 1, 8 (1985). As the *Garner* Court held, "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." *Id.* at 11.

In this case, Wagner asserts a claim pursuant to article I, section 8 of the Iowa Constitution. Defendant Spece is not entitled to summary judgment on liability on that claim. The Iowa Supreme Court has recognized a "tort claim under the Iowa Constitution when the legislature has not provided an adequate remedy." *Godfrey v. State*, 898 N.W. 2d 844, 880 (Iowa 2017) (Cady, J. concurring in part, dissenting in part) ("*Godfrey II*"). In *Godfrey II*, the court allowed claims for violations of article I, sections 6 and 9. *Id.* at 871-72. The court stated, "When a constitutional violation is involved, more than mere allocation of risks and compensation is implicated. The emphasis is not simply on compensating an individual who may have been harmed by illegal conduct, but also upon deterring unconstitutional conduct in the future." *Id.* at 877. "The focus in a constitutional tort is not compensation as much as ensuring effective enforcement of constitutional rights." *Id.*

In *Baldwin I* the Court found that *Godfrey II* claims applied to article I, §§1 and 8, subject to an affirmative defense of qualified immunity. 915 N.W.2d at 260-61. The Court summarized its holding and the basis for its holding as follows:

> Constitutional torts are torts, not generally strict liability cases. Accordingly, with respect to a damage claim under article I, sections 1 and 8, a government official whose conduct is being challenged will not be subject to damages liability if she or he pleads and proves as an

> affirmative defense that she or he exercised all due care to conform to the requirements of the law.

Id. at 281.

There is no way the defense can establish Spece acted with "all due care" given the admission that Defendant Spece completely failed to follow *any* of his training regarding how to handle armed suicidal individuals. Defendant Spece's Motion for Summary Judgment should be denied. In fact, the undisputed facts of this case establish that Defendant Spece, by failing to follow his training, did not act with all due care as a matter of law. Wagner's Motion for Partial Summary Judgment on Liability should have been granted.

VII. WAGNER'S CLAIM OF SUBSTANTIVE DUE PROCESS SHOULD PROCEED TO TRIAL BECAUSE SPECE'S CONDUCT SHOCKS THE CONSCIENCE

Wagner preserved error on this issue by raising it before the District Court as part of her Resistance to the Defendants' Motion for Summary Judgment. (App. 30-44, Order pp. 1-15). The Iowa Supreme Court's review of the district court's decision to grant summary judgment is for corrections of errors of law. *Pitts v. Farm Bureau Life Ins. Co*., 818 N.W.2d 91, 96 (Iowa 2012) (citing *Seneca Waste Sols., Inc.v. Sheaffer Mfg. Co.*, 791 N.W.2d 407, 410-11 (Iowa 2010)).

The Iowa Supreme Court has recognized private rights of action for violations of the due process protections afforded by the Iowa Constitution

resulting from the wrongful conduct of government agents. *Lennette v. State*, 975 N.W.2d 380, 393-394 (Iowa 2022) ("When specific government conduct (as opposed to legislation) is alleged to have violated substantive due process, we typically apply the 'shocks the conscience' standard to assess the claim."). The *Lennette* court noted that the "claim 'is reserved for the most egregious governmental abuses against liberty or property rights, abuses that shock the conscience or otherwise offend . . . judicial notions of fairness . . . [and that are] offensive to human dignity.'" *Id*. at 394. Certainly, a plausible factual basis has been established by the petition to conclude that one officer out of four present, violating all of his training and alone deciding to shoot a mentally unstable individual, could "shock the conscience" of fact finders.

Maybe it would be understandable if Defendant Spece failed to recall and implement one or two of the rules he had been taught to deal with armed suicidal individuals, but he not only failed to follow *any* of the rules, he panicked and essentially did the complete *opposite* of his training. He did not notify a supervisor. He yelled at Jensen. He ordered Jensen to come out from under the deck where more officers and others were exposed to greater potential danger. He did not try to establish a rapport with Jensen. He fired within approximately a minute of arriving on the scene, negating any opportunity to reason with Jensen. He fired right in the direction of an

innocent bystander. The record of this case should be used at the Iowa Law Enforcement Academy as a "how *not* to deal with armed suicidal individuals."

Defendant Spece's conduct was all but intentional; and that is conscience shocking. Spece was a sharpshooter and Deputy Fisher, his fishing buddy, knew of Spece's rifle skill at the time he asked him to assist in the search for Jensen. (App. 122, Spece Dep. pp. 110:18-111:17, 112:6-25; App. 77, Fisher Dep. pp. 64:19-65:8). Spece and Fisher's conduct is particularly conscience-shocking since after killing Jensen, the two of them repeatedly referred to Jensen in extremely derogatory terms. (App. 188-89, Stringer Body Cam Tr., referring to Jensen as a "chicken shit" and a "piece of shit.").

Wagner concedes that pursuing a substantive due process claim along with an article I, section 8 claim is a belt and suspender approach. To the extent Wagner's unreasonable seizure excessive force claim survives summary judgment, the substantive due process claim becomes superfluous, and she has no objection to its dismissal in that case. However, if for any reason the unreasonable seizure claim is dismissed, Wagner maintains the substantive due process claim should proceed to trial. As Federal Judge Rose noted, "[a]ccordingly, the Court sees no reason why Iowa courts would depart from federal interpretation to allow an unreasonable seizure to be pursued under article I, section 9, particularly when article I, section 8 is available."

Williams v. City of Burlington, 516 F.Supp.3d 851, 870 (S.D. Iowa 2021). *See also Young v. City of Council Bluffs*, 2021 WL 6144745, at *10 (S.D. Iowa Oct. 27, 2021).

CONCLUSION

Iowa cannot tolerate police officers who panic and use deadly force when not faced with an imminent threat of serious injury or death and/or who voluntarily put themselves in jeopardy, panic, and then use deadly force in response to the threat they created; and/or who claim super human observational powers to justify their use of deadly force. Further, the District Court's Order granting of Defendants' Motion for Summary Judgment by resolving factual disputes in the Defendants' favor requires reversal. The District Court order dismissing this case must be reversed.

REQUEST FOR ORAL SUBMISSION

Plaintiff-Appellant requests oral argument on all issues presented by this appeal.

ATTORNEY'S COST CERTIFICATE

I, Brooke Timmer, certify that there was no cost to reproduce copies of the preceding Plaintiff-Appellant's Final Brief because the appeal is being filed exclusively in the Appellate Courts' EDMS system.

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