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 REPLY BRIEF

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The Defendants' brief is well written and most likely would lead to an affirmance of a favorable *jury verdict*. However, the District Court's decision in this case was rendered on *summary judgment*. The Iowa Supreme Court will have to set aside decades of precedent holding that fact issues and all reasonable inferences must be found in favor of the non-moving party in order to affirm the District Court's decision. 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 v. Covenant Clinic*, 625 N.W.2d 714, 718 (Iowa 2001). Defendants cite numerous facts to support their position, but every single one of those facts is contested.

I. THE DEFENDANTS CONTINUE TO RELY ON HIGHLY CONTESTED FACTUAL ISSUES TO SUPPORT SUMMARY JUDGMENT

A. Spece Never Claimed Jensen "Pointed" the Gun at Anyone

The Defendants want for the facts of this case to be that Spece only fired after Jensen pointed the gun at an officer, but the evidence does not support that claim at all, much less as a matter of law. The video is not clear on this point, and no other officer was present and paying attention at the

moment Spece decided to kill Jensen. (App. 192, Jason Smith iPhone Video; App. 131, Steil Dep. pp. 5:23-6:7; App. 73, Fisher Dep. pp. 26:22-27:13; App. 91-92, Nielsen Dep. pp. 7:19-8:14; and App. 182, Dep. Ex. 29, p. 3). Yet, even relying solely on information coming from Spece, the evidence does not support the claim that Jensen pointed the gun at, toward, or in the direction of, Spece.

It would have been easy for Spece to just claim he fired because Jensen pointed the gun at him, but he never made that claim. Defendants attempt to overcome this problem by adding a word Spece never used—"pointed"—every time the immediate facts of the shooting are discussed. At numerous places in their brief, Defendants claim Jensen "pointed his gun toward officers, [or] in the direction of officers." (Def. Br. pp. 8, 20, 28, 29, 34, 35, 36, 44 and 49). Defendants even make a desperate attempt to prove the conduct by arguing the converse: "[N]o one who witnessed the the event has testified that Jensen did not point his gun at the officers." (Def. Br. p. 29). This is not a argument upon which summary judgment may be sustained in any event, but this is particularly true in this case where no one else actually witnessed the critical moment when Spece chose to use deadly force. *Supra*.

Spece's actual claim was much different than "Jensen pointed a gun toward me." Rather, Spece "observed Jensen bring the gun full circle right

toward him and Deputy Fisher." (Def. Br. p. 29); (App. 26, Pl. Res. to Defs. Statement of Facts, ¶ 58). It is undisputed that Jensen was standing in one spot, turning around in circles, and alternating between pointing the gun at his own head and to the sky. *See* (App. 192, Jason Smith iPhone video). Spece's statement should accurately be read as claiming he "observed Jensen bring the gun full circle facing him and Deputy Fisher." That is much different, in this context, than Jensen pointed the gun at, toward, or in the direction of, Spece. The District Court's faulty conclusion otherwise constitutes reversible error. (App. 33, Order, p. 4).

In their brief, Defendants attempt to gloss over this problem by claiming, as follows:

> Wagner challenges the district court's statement that Officer Spece saw Jensen "point the gun toward himself and Deputy Fisher." (Appellant Brief, at 35). But during the summary judgment proceedings, Wagner admitted the following statement was true: "Officer Spece then observed Jensen bring the gun full circle right toward him and Deputy Fisher." (App. 26, Pl. Res. to Defs. Statement of Facts, ¶ 58). Thus, the district court did not misstate a disputed fact—the parties agreed that Jensen pointed his gun toward Officer Spece and Deputy Fisher.

(Def. Br. p. 44). Defendants' own argument establishes the problem that makes summary judgment in their favor improper. If, in this context, bringing the gun "toward" Spece is the same as "pointing" the gun at Spece, then the Defendants would just use the word "toward" and not attempt to turn it into

"point." Simply put, these words are not synonymous.

The Defendants' problem is compounded by Spece's claim of super eyesight capable of seeing the muscles in Jensen's wrist flex from 80 feet away. (App. 167, Dep. Ex. 20, p. 10); (App. 127, Spece Dep. p. 144:14-25). Further, if the gun was pointed at Spece, then logically the gun would have blocked Spece's view of Jensen's wrist. The only way Spece could observe Jensen's wrist is if the gun was pointed up or at Jensen's head, not at Spece. Of course, Defendants will want to dispute this argument, but all that does is create a fact issue that should be decided by a jury – and should have been decided in Wagner's favor in denying Defendants' Motion for Summary Judgment.

Defendants claim that "Spece, Deputy Vorland, Officer Nielsen and bystander Jason Smith each observed Jensen point his gun in the direction of Officer Spece," is not supported by the record for any of those four witnesses. (Def. Br. p. 29). As noted above, Spece never claimed the gun was "pointed" in his direction. As noted below, Vorland's claim four years after-the-fact is contradicted by his failure to make any such allegation in his report created at the time of the incident. Note that for Nielsen and Smith, Defendants also cite affidavits prepared four years after the fact to support their summary judgment motion. (Def. Br. p. 20, citing Defs. S.J. App. 129, 230–31).

In his deposition, Nielsen conceded he was on the deck when Jensen was facing the dumpster and not in a position to see where Jensen was pointing the gun at the time Spece fired. (App. 97, Nielsen Dep. pp. 50:18-51:6). In his deposition Smith did not claim he saw Jensen point the gun toward Spece. Smith testified, "Q. And at some point he makes a movement in the direction towards the dumpster, right? A. Yes . . . Q. And then the third time he makes a similar movement with his hand is when [Jensen's] shot or at least he goes down. Do you recall that? A. Yes." (App. 102, Smith Dep. pp. 21:13-15 and 22:4-7).

B. Defendant's Reliance on Vorland's Discredited Affidavit Establishes the Dearth of Record Evidence Supporting Spece's Use of Deadly Force

Vorland's affidavit was prepared on October 27, 2021, four years after Jensen was killed, to support Defendants' Motion for Summary Judgment. (Def. Br. p. 18, fn 3 and Defs. S.J. App. 226). Vorland's report, on the other hand, was prepared the day of the incident. (App. 142, Vorland Dep. p. 30:5-23). Almost all the observations attributed to Vorland by Defendants are nowhere to be found in his original report or while Vorland was still in his cruiser driving past the scene. While "coming around the corner" in his cruiser, Vorland saw Spece, Fisher, and Steil standing behind the green dumpster with rifles pointed toward the adjacent backyard; heard people

yelling "put the gun down"; saw Jensen with a black handgun "pointed to the right side of his head"; and noted Jensen was "moving around and turning around." (App. 143, Vorland Dep. p. 32:1-4; App. 183, Dep. Ex. 29, p. 4). The implication from Defendants that Vorland made these observations while in a position to shoot is a blatant misrepresentation of the record. (Def. Br. p. 18, fn 3) (slyly claiming these observations were made after "Vorland arrived on the scene").

Here is what Vorland stated *verbatim* in his report about every important detail he observed once he was out of his cruiser:

> I pulled up on the street to the west of the residence and got my rifle out of the patrol car. I started to cross the street and was going towards the south side of the residence when I heard a loud bang like a gunshot. I ran over to the south of the house to take my position. As soon as I had Jensen within my rifle sights I heard another big bang and a small Bang. Jensen drop [sic] backwards to the ground. It was later found out that there was only the two shots and the lighter sounding bang was an echo. It was found out that one shot was from Jensen's handgun and one shot was from the DNR Officer Spece's rifle.

(App. 182, Dep. Ex. 29, p. 3). There is nothing in Vorland's report about bystanders; yelling at bystanders to get out of the way; seeing Jensen extend his arm toward the officers; or that Vorland was going to shoot, but Spece fired before he could drop the safety on his rifle. (Def. Br. p. 18, fn 3, pp. 20 and 31).

Defendants claim that "Vorland's testimony aligned with his report" is

absurd. (Def. Br. p. 43). In his depositon, Vorland stated "I don't know," when asked if he agreed that "Spece was the only officer present at the time who perceived Jensen as an immediate deadly threat." (App. 139, Vorland Dep. pp. 5:25-6:7). Vorland was even unsure if he would have hesitated, or not, in using deadly force on Jensen if he had perceived Jensen "as representing an immediate deadly threat either to [himself] another officer or to another member of the public." (App. 139, Vorland Dep. p. 6:13-22) (Vorland answered, "I don't know.").

It is true that for a period of time in his deposition Vorland parroted the claims he made in his affidavit. *See* (App. 140, Vorland Dep. pp. 8:11-9:14). Vorland all but got whiplash from backtracking so fast after his report was marked into evidence at his deposition. (App. 143, Vorland Dep. p. 33:6-15) ("Q. Nothing in there about seeing Jensen pointing the gun at the other officers, right? A. I guess I didn't put it in there, no. Q. That would be kind of . . . important to put in there if you saw it . . . wouldn't it? A. I guess it would be."). Earlier in his deposition, Vorland agreed how important it is to be detailed and accurate when preparing police reports. (App. 141, Vorland Dep. pp. 24:3-25:3) ("It's important to be thorough . . . accurate . . . [the] job in a lot of ways depends on the accuracy of [] reports . . . you have to put all critical details in these reports....").

Maybe a jury will ultimately let Defendants get away with making things up four years after the fact that is contradicted by a report drafted right after the incident, but certainly summary judgment cannot be sustained on not only contested, but outright manufactured, evidence.

C. Other Misstatements of the Record Cannot Be Used to Support Summary Judgment

In Defendants' brief, they claim Nielsen did not fire "because he stumbled." (Def. Br. p. 16). However, that is not what Nielsen stated under oath. ("Q. If you hadn't stumbled, could you have shot at Shane Jensen at that point in time based on your training and experience? A. Could have, yes. Q. . . .Was a reason you didn't because it wasn't safe to do so because you were stumbling? A. Yes."). (App. 98, Nielsen Dep. pp. 56:20-57:2). Changing what Nielsen said from something that he "could" have done, but for stumbling, to something he "would" have done is a material misrepresentation of the record that cannot be used to support summary judgment.

Defendants' multiple references to the presense of "children" and the *verbatim* quote from Jensen's mom to Deputy Fisher about Jensen "want[ing] a shootout," cannot support the summary judgment decision either because Spece knew none of this information at the time he shot and killed Jensen. (Def. Br. pp. 12, 15 and 17). Defendants admit this fact. *See* (Def. Br. p. 13, fn 1, "all Officer Spece knew about Jensen going into the search was that

Jensen had stolen a truck, was armed with a handgun, had prior mental health issues, was suicidal, and had expressed desire to commit suicide-by-cop. [Citing] Spece Dep. p. 11:9-24, Defs. S.J. App. 17).

Defendants claim that the steel dumpster was not adequate cover and that no adequate cover was available, is not only disputed, but factually unsupported by the record. (Def. Br. p. 17). Fisher admitted he "wouldn't expect a bullet from a handgun to travel through two sides of that steel dumpster." (App. 75, Fisher Dep. p. 54:9-12). Steil admitted he initially had cover behind a "concrete building." (App. 132, Steil Dep. p. 18:14-17). When asked why he did not seek cover other than behind the dumpster, Steil replied, "I don't know." (App. 132, Steil Dep. p. 19:6-7). In a twist of irony, Defendants deny compliance with the one rule Wagner concedes Spece may not have violated, *i.e.*, setting up at an adequate distance and behind adequate cover in order to obtain time to deal with distraught individuals.

II. FEIGNING THE INABILITY TO DISTINGUISH BETWEEN FACTS AND MOTIVATION CANNOT BE USED TO SUPPORT SUMMARY JUDGMENT

Spece made the decision to shoot Jensen based entirely upon the following claimed factual observation:

> [Jensen] brought [the gun] full circle right towards [Deputy Fisher] 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."

(App. 167, Dep. Ex. 20, p. 10). The District Court found that Spece's absurd justification for use of deadly force—that he had super eyesight at the time and could see Jensen's hand/wrist muscles move from 80 feet away through a chain link fence—was irrelevant because 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." (App. 40, Order, p. 11).

Defendants have made no effort to explain the District Court's perplexing analysis, but doubled down on the absurdity. (Def. Br. p. 22). Defendants just repeated the District Court's mistake and claimed it did not matter if Spece's factual claim regarding why he concluded the use of deadly force was justified was even possible because it was just a "subjective belief." *Id*. ("So Wagner's repeated objections to whether Officer Spece could have actually seen Jensen's wrist flex were immaterial.").

Defendants' position that Spece's alleged observation of Jensen's "arm movements raising the handgun up and down in the direction of the officers," is relevant to the analysis, but Spece's claim of seeing Jensen's hand/wrist muscles flex from 80 feet away through a chain link fence as the justification for pulling the trigger, is somehow not material, is beyond illogical. (Def. Br. pp. 22-23); (App. 39, Order p. 10). The standard to be applied is objective, but that standard must be applied to all the alleged facts,

not just the ones that purport to support Defendants.

The difference between a fact alleged to support the use of deadly force and a fact establishing improper motivation for the use of deadly force is made clear by the record in this case. The record is undisputed that after killing Jensen, both Spece and Deputy Fisher called Jensen a "chicken shit" and a "piece of shit." (App. 188-89, Stringer Body Cam Tr.). The undisputed fact that Spece was motivated to kill Jensen because he thought Jensen was a "piece of shit," is immaterial to the issues presented on this appeal. *See Leydens v. City of Des Moines*, 484 N.W.2d 594, 597 (Iowa 1992) (discussing objective versus subjective standard in § 1983 claims). All the factual observations Spece made regarding why he chose to use deadly force are, on the other hand, highly relevant and material.

The Eighth Circuit held in *Dooley v. Tharp*, "We must view [the officer's] mistaken-perception action for objective reasonableness." 856 F.3d 1177, 1183 (8th Cir. 2017) (citing *Loch v. City of Litchfield*, 689 F.3d 961, 966 (8th Cir. 2012)). The *Dooley* court held that an "act taken based on a mistaken perception or belief, if objectively reasonable, does not violate the Fourth Amendment." *Id.* (quoting *Loch*, 689 F.3d at 966) (emphasis added). Therefore, the real issue to be considered is whether Spece's decision to 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 is objectively reasonable. Spece's factual justification is so absurd that no reasonable officer would have concluded that deadly force was justified on those facts.

The District Court's refusal to assess 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. Note that four other law enforcement officers were present and aware of all the other facts noted by Defendants—Jensen firing the gun in the air, the refusal to drop the gun, the statements Jensen made, the location, the bystanders and Jensen's arm movements—and *none* of them concluded the use of deadly force was justified. At a minimum, that creates a fact issue regarding the reasonableness of Spece's use of deadly force.

III. DEFENDANTS' CLAIM THAT THERE IS A "STEP ZERO" THAT REQUIRES OFFICERS TO SECURE A WEAPON FIRST WHEN DEALING WITH SUICIDAL INDIVIDUALS IS NOTHING MORE THAN A FABRICATED EXCUSE FOR SPECE'S CONDUCT

The claim that when dealing with armed suicidal individuals there is a "step zero" that requires securing the firearm before doing anything else was made up by a DNR supervisor in this case and is only further proof that DNR officers should not be involved in dealing with suicidal individuals. (Def. Br.

p. 37). None of the other officers in this case claimed such a "step zero." *See* (App. 88, Kruger Dep. Index p. 8; App. 144, Vorland Dep. Index p. 6; App. 136, Steil Dep. Index p. 7; App. 99, Nielsen Dep. Index p. 7; App. 79, Fisher Dep. Index p. 9).

Investigating DCI agent Ray Fiedler made no claim regarding "step zero." (App. 70, Fiedler Dep. Index p. 7). Fiedler did, however, set out the exact steps law enforcement officers are trained to follow when dealing with armed sucidal individuals, including "first . . . let the supervisor know . . . get a negotiator on hand . . . try to reason with [the person]." (App. 68, Fiedler Dep. p. 22:1-8). Fiedler agreed that a "critical aspect . . . [is to] keep distance from the person and also remain under cover, which gives you time to do those things...." (App. 68, Fiedler Dep. p. 22:12-21). Fiedler noted that officers carry rifles in these situations because it allows them to control the situation from further away than a handgun. (App. 68, Fiedler Dep. pp. 22:25-23:4). Fielder conceded a handgun is inaccurate at greater than 25 yards, which is why officers do not even train on handguns from greater than 25 yards. (App. 69, Fiedler Dep. pp. 24:17-25:4). Most importantly for this analysis, Fiedler conceded that armed suicidal individuals must be treated differently than armed individuals who just committed a bank robbery or a murder. (App. 68, Fiedler Dep. p. 21:14-22).

In this case, Spece treated Jensen like he would treat an armed bank robber, and that is the bottom line for why the District Court's summary judgment must be reversed. The fact that it is apparently the policy of the DNR to treat suicidal individuals the same as armed bank robbers only serves to underscore how important this case is for making it clear to the DNR that their "shoot first" policy is unlawful when dealing with vulnerable suicidal individuals. Failure to do so will only put more vulnerable lives at risk.

IV. CASES CITED BY DEFENDANTS SUPPORT WAGNER'S CLAIM

Wagner's initial brief argued, "[t]he record of this case should be used at the Iowa Law Enforcement Academy as a 'how *not* to deal with armed suicidal individuals.'" (Appellant Brief, p. 58). The cases cited by Defendants set out how armed suicidal individuals *should* be handled. In *Johnson v. Combs*, officers followed their training by staying 21 feet away from a suicidal person with a knife, informed the suspect they were there "to help him," would "get him any help he needed" and negotiated for 13 minutes before the suspect charged within 6-8 feet away when he was shot. 2005 U.S. Dist. LEXIS 21634, at *4 (W.D. Ky. Sept. 27, 2005). The officers in *Johnson* did exactly what Spece failed to do in this case–follow his training given the facts of the situation.

The case of *Conlogue v. Hamilton* is right on point, and as a counterpart

to this case,should be used to teach law enforcement trainees what to do when faced with an armed suicidal individual. 2017 U.S. Dist. LEXIS 187170 (D. Me. Nov. 13, 2017). The suspect was isolated and not moving. *Id.* at *3. No officers yelled at the suspect or ordered him to drop the gun. *Id*. at *4-5. A perimeter was set up. *Id*. Supervisors were brought to the scene. *Id*. Crisis negotiators were called to the scene. *Id.* at *8. Because the suspect was in a stationary position, it was decided to wait for the arrival of any negotiator before attempting to communicate with him. *Id*. Since the suspect was in a position that limited his ability to put others at risk, no effort was made to order him to move. *Id.*

Only because the suspect started moving around did one officer attempt to communicate with him before the crisis negotiator arrived. *Id.* at *10. The standoff lasted for hours as the officers patiently attempted to negotiate with the suspect. *See generally id.* The officers waited patiently behind adequate cover while the suspect made repeated attempts to goad one of them into killing him. *Id.* at *10. At one point the suspect moved the gun so that one of the officers "could see down the barrel." *Id.* at *20. Even that escalation did not cause the suspect to be killed. *See id.* Eventually, only as the suspect continued to escalate the threat by repeatedly pointing the gun at a 45 degree angle over the officers heads, was he shot and killed. *Id.* at *21.

Unlike the officers in *Conlogue*, Spece panicked on the day he killed Jensen and violated all the rules he was trained to follow when dealing with armed suicidal individuals:

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 one 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 key (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).

If only Spece and the others officers present on the day Jensen was killed had followed their training like the officers in the *Conlogue* case, Shane Jensen would be alive today.

CONCLUSION

The District Court's Order granting Defendants' Motion for Summary Judgment by resolving factual disputes in the Defendants' favor requires reversal.

ATTORNEY'S COST CERTIFICATE

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

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