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 SUPPLEMENTAL BRIEF

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ARGUMENT

This Supplemental Brief is submitted pursuant to court order dated July 6, 2023, in the aftermath of the reversal of *Godfrey v. State (Godfrey II)*, 898 N.W.2d 844 (Iowa 2017), by *Burnett v. Smith,* 990 N.W.2d 289, 306-07 (Iowa 2023). Wagner's Notice of Appeal included "the final Order . . . dismissing their cause of action and each and every ruling/finding adverse to the Plaintiff inhering in that ruling."

I. RECENT DECISIONS IN *BURNETT, CARTER, WHITE, VENKUS* AND *RICHARDSON* HOLD INDIVIDUAL LAW ENFORCEMENT OFFICERS MAY BE HELD LIABLE UNDER THE COMMON LAW FOR CONDUCT THAT ALSO VIOLATES ARTICLE I, § 8 OF THE IOWA CONSTITUTION

Burnett did not specifically reverse *Wagner v. State*, 952 N.W.2d 843 (Iowa 2020), which remains the law of this case. *United Fire & Cas. Co. v. Iowa Dist. Court*, 612 N.W.2d 101, 103 (Iowa 2000) (citing *Springer v. Weeks & Leo Co*., 475 N.W.2d 630, 632 (Iowa 1991)) ("[A]n appellate decision becomes the law of the case and is controlling on both the trial court and on any further appeals in the same case."). In a prior appeal involving this exact same dispute, the Iowa Supreme Court held, "[T]he legislature has the right to regulate claims against the State and state officials, including damage claims under the Iowa Constitution, so long as it does not deny an adequate remedy to the plaintiff for constitutional violations." *Wagner*, 952 N.W.2d at

847. The District Court's dismissal of this case on the merits cannot be summarily affirmed by citing *Burnett*, to the effect that constitutional claims are no longer recognized, without violating the Iowa Supreme Court's prior decision in this case. *See id*.

Burnett held, "We no longer recognize a standalone cause of action for money damages under the Iowa Constitution <u>unless</u> authorized by the common law, an Iowa statute, or the express terms of a provision of the Iowa Constitution." 990 N.W.2d at 307 (emphasis added). This particularly worded holding was affirmed in *Richardson v. Johnson*, 2023 Iowa Sup. LEXIS 67, at *3 (Iowa June 16, 2023), citing *Burnett.* Stated in the positive, *Burnett* and *Richardson* hold that a standalone cause of action for money damages under the Iowa Constitution *is* recognized if authorized by the common law or pursuant to a statute. *Id*.

The holding in *Burnett* was affirmed in other recent cases using different language which *may* suggest that Iowa Constitutional claims for money damages are not available. *See White v. Harkrider*, 990 N.W.2d 647, 650 (Iowa, 2023); *Carter v. State*, 2023 Iowa Sup. LEXIS 53, at *1-2, 990 N.W.2d 308, 2023 WL 3397451 (Iowa, May 12, 2023); *Venckus v. City of Iowa City*, 990 N.W.2d 800, 2023 Iowa Sup. LEXIS 56, at *3, 2023 WL 3555505 (Iowa May 19, 2023). However, a careful reading of these cases

suggests otherwise.

Burnett discussed common law claims for damages against law enforcement officers that predated the Iowa Constitution where the claims would have violated the constitution but noted that "wasn't the important point." 990 N.W.2d at 299. The same types of claims, *i.e.*, those recognized by the common law prior to the adoption of the Iowa constitution, remain viable post-*Burnett*. Justice McDonald's *Lennette v. State* concurrence is instructive:

> I would recognize that the Iowa Constitution secures a right to assert nonconstitutional causes of action for money damages against government officials under certain circumstances. In particular, as relevant here, it appears that '[t]he right of the people to be secure in their persons, houses, papers and effects, against unreasonable seizures and searches' is a guarantee of the right to assert nonconstitutional causes of action for money damages against government officials for unlawful seizures and searches. Iowa Const. art. I, § 8.

975 N.W.2d 380, 402-403 (Iowa 2022) (McDonald, J., concurring).

Justice McDonald reasoned that the "authentic historical context in which this right was codified reveals that the nature and scope of the right was to fix in place the common law regime of rights and remedies governing seizures and searches and to prohibit legislative abrogation of the same." *Id.* at 404. This reasoning, implicitly adopted by the majority in *Burnett*, directs that statutory immunities cannot be used to protect government officials from common law torts that have a basis in constitutionally protected rights. Thus,

the District Court in this matter committed error in dismissing Wagner's common law wrongful death because it was "duplicative" of the Iowa constitutional claims. (App. p. 35, [MSJ] Order, p. 13).

In this case, Wagner asserted a standalone cause of action for assault causing a wrongful death, which was recognized by the common law at the time of the adoption of the Iowa Constitution in 1857. Count I of Wagner's amended petition is headed, "Use of Excessive Force in Violation of Article I, § 8 of the Iowa Constitution." Count IV of Wagner's amended petition sets out a claim for "Wrongful death, Negligence, Iowa Common Law." The District Court dismissed Count I on the merits and Count IV because it was duplicative of Count I. (App. p. 34-35, [MSJ] Order, p. 12-13). The factual basis for those two counts is duplicative. It is hard to imagine jury instructions that would set out different elements for Counts I and IV of Wagner's amended petition.

The bottom line is that this appeal should be decided on the merits and not based upon the nomenclature used to set out the various claims asserted. The Iowa Supreme Court has held, "[W]e do not require a petition to allege a specific legal theory." *Rieff v. Evans*, 630 N.W.2d 278, 292 (Iowa 2001) (citing Iowa R. Civ. P. 1.403(1)). A "pleading 'is sufficient if it apprises of the incident out of which the claim arose and the mere general nature of

action.'" *Haugland v. Schmidt*, 349 N.W.2d 121, 123 (Iowa 1984) (quoting *Northwestern Nat'l Bank v. Metro Ctr., Inc*., 303 N.W.2d 395, 401 (Iowa 1981)). "Under Rule [1.403(1)]'s requirement that the petition set forth a claim for relief, the claim is not the equivalent of a cause of action. Obviously, the claims asserted must be capable of recovery. Once that is established, a prima facie showing will suffice." *Rieff*, 630 N.W.2d at 292. Counts I and IV provide the defense with fair notice of a claim in compliance with *Burnett* because they apprise them of the incident, states the basic elements of a viable claim, and sets forth the general nature of the action. *Id.*

Wagner's son was shot and killed by Defendant Spece without justification. Her wrongful death cause of action remains viable post-*Burnett*. As Justice McDonald noted in his *Lennette* concurrence:

> By the time the citizens of Iowa ratified the Iowa Constitution in 1857, it was well established throughout the country that government officials could be, and regularly were, subject to nonconstitutional causes of action for monetary damages. With respect to seizures or searches in particular, government officials were subject to nonconstitutional causes of action for money damages for seizures and searches that were unlawful, tortious, or otherwise prohibited, subject to a defense of justification made pursuant to a valid warrant or other legal process.

975 N.W.2d at 405-406 (McDonald, J. concurring) (citations omitted).

Iowa's founders would have recognized claims for wrongful death. *Lord Campbell's Act,* adopted in England in 1846, created a wrongful death action and stated the action would be "for the benefit of the wife, husband,

parent, and child" of the decedent and damages would be apportioned among them. *See Lord Campbell's Act Chapter XCIII*, ALR, vol. 7, 584-85 (1889). The Iowa territory enacted a wrongful-death statute in 1851, prior to the ratification of the Iowa constitution. *In re Estate of Barz*, 2022 Iowa App. LEXIS 438, at *8, 986 N.W.2d 140, 2022 WL 2161430 (Iowa Ct. App. June 15, 2022).

In each of the post-*Burnett* decisions by the Iowa Supreme Court, the underlying cause of action asserted and the factual basis for the claims were critical components of the analysis. These cases establish that Wagner's cause of action asserting money damages against a law enforcement officer is valid because it is based upon the common law recognized at the time the Iowa constitution was adopted.

Although not thoroughly discussed in the decision, *Burnett* asserted a cause of action that would *not* have been recognized at common law, *i.e.*, whether passive noncooperation provided probable cause for an arrest for interference with official acts. 990 N.W.2d at 290. In *Carter* the claim made, *i.e.*, that a law enforcement officer "wrongly inserted himself into the civil case and intentionally, but wrongly, targeted Carter as his mother's killer," was also not recognized at common law. 2023 Iowa Sup. LEXIS 53, at *1-2.

White is instructive. *White* asserted state constitutional tort claims, as

well as common law claims for intentional infliction of emotional distress, trespass, and assault. 990 N.W.2d at 650. Citing *Burnett*, the Iowa Supreme Court summarily held, "White's constitutional tort claims thus cannot proceed." *Id.* at 652. The *White* court dismissed two common law claims for factual deficiencies. *Id.* at 654, 656. White's assault claim, the same theory of recovery that forms the basis of Wagner's claim in this case, was not dismissed. *Id.* at 657. The Iowa Supreme Court refused to consider the defendants' justification defenses to the assault claim because those constituted affirmative defenses that had to be pled and proved. *Id*. Statutory immunities were never discussed in *White* because statutory immunities are irrelevant to common law tort claims protected by article I, section 8 of the Iowa Constitution. *Burnett*, 990 N.W.2d at 299; *Lennette*, 975 N.W.2d at 405-06 (McDonald, J. concurring). In this case, the court should consider the affirmative defense of justification, as determined by the district court in the context of qualified immunity, *i.e*., decide the case on the merits. Wagner's position, as set out in her previous briefing, establishes that justification is not a valid defense in this case regardless of the standard applied.

In *Venckus v. City of Iowa City*, the claims pursued were limited to "continuing" malicious prosecution and constitutional tort claims. 2023 Iowa Sup. LEXIS 56, at *13. The *Venckus* court held that for "the reasons stated in

Burnett . . . we conclude that such [constitutional tort] claims are not available." 2023 Iowa Sup. LEXIS 56, at *28. The *Venckus* court thoroughly discussed the malicious prosecution claim and dismissed it for factual deficiencies, noting that probable cause was at no time lacking and that the defendant detective did not cause the case to continue because that was the prosecutor's decision. *Id.* at *20-25.

II. *BURNETT* SHOULD NOT BE APPLIED RETROACTIVELY AFTER REVERSAL OF PRIOR ESTABLISHED CASE PRECEDENT[1]

As a general rule, judicial decisions, including overruling decisions, operate both retroactively and prospectively. *Farm Bureau Service Co. v. Kohls*, 203 N.W.2d 209, 211 (Iowa 1972); Note, 46 IOWA L. REV. 600, 617 (1961); 20 Am. Jur. 2d Courts § 233 (1965); 21 C.J.S. Courts § 194 (1940). However, courts may hold that a particular overruling decision should in fairness have only prospective application. The most frequently quoted test to determine retroactive application was set out in *Chevron Oil Co. v. Huson*:

> In our cases dealing with the nonretroactivity question, we have generally considered three separate factors. First, the decision to be applied nonretroactively must establish a new principle of law, [] by overruling clear past precedent on which litigants may have relied, see, *e.g.*, *Hanover Shoe v. United Shoe Machinery Corp.*, [392 U.S. 481] at

[1] Plaintiffs/Appellants in both *Burnett* and *Richardson* filed petitions for rehearing that were summarily denied. The issue of retroactive effect of *Burnett* was therefore neither joined nor decided in the summary denial of the rehearing requests filed in those cases. *See* I.R.A.P. 6.1205(3).

> 496 . . . . Second, it has been stressed that "we must . . . weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." *Linkletter v. Walker*, [381 U.S. 618] at 629. Finally, we have weighed the inequity imposed by retroactive application, for "where a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the 'injustice or hardship' by a holding of nonretroactivity." *Cipriano v City of Houm*a, [395 U.S.] at 706.

404 U.S. 97, 106-07 (1971).

The Iowa Supreme Court applied the *Chevron* factors in *Beeck v. S.R. Smith Co.*, where the court was faced with deciding whether the statute of limitations for minors or adults applied to a case asserting a loss of parental consortium. 359 N.W.2d 482, 484 (Iowa 1984). *Weitl v. Moes*, held that a minor has an independent cause of action in Iowa for loss of parental consortium. 311 N.W.2d 259 (Iowa 1981). Two years later, after the *Beeck* lawsuit was filed, in *Audubon-Exira Ready Mix, Inc. v. Illinois Central Gulf Railroad Company*, the Iowa Supreme Court held that the injured parent was the proper party to recover the damages for the child's loss. 335 N.W.2d 148, 151-52 (Iowa 1983). *Beeck* is also instructive because the federal court allowed a relating back amended pleading to substitute the injured parent as the plaintiff after the statute of limitation had run, in light of the reversal of case precedent. 359 N.W.2d at 487.

Application of the *Chevron* factors to this case weighs heavily in favor

of *only* prospective application of *Burnett*. The first factor is a no-brainer – *Burnett* overruled prior precedent, *Godfrey II*. The second factor, looking at the purpose and effect of the rule in question, also weighs heavily against retroactive application of *Burnett*. The underlying rule at issue is of the utmost importance, protecting the right of citizens to be free of unreasonable seizures by law enforcement officers. Notwithstanding the limitations on that enforcement placed by *Burnett* going forward, *i.e.*, protecting those rights through money damages only if authorized recognized at common law, the importance of enforcing provisions of the Iowa constitution cannot be overstated.

Regarding the third factor, this case is the perfect example of the inequity that would result in retroactive application of *Burnett*. The Iowa Supreme Court previously reviewed this dispute and held Wagner had a valid state constitutional tort claim. *Wagner*, 952 N.W.2d at 865 (Wagner's "state claims can only be pursued in state court."). *Wagner* was decided with six justices affirming *Godfrey II*, including both *Godfrey II* dissenters. *Id.* at 847. In reliance on that decision, Wagner voluntarily dismissed her federal cause of action without prejudice.[2] As found in *Chevron*, "'[W]here a decision of

[2] Wagner asks the court to take judicial that a "Joint Stipulated Dismissal Without Prejudice" was filed in her federal case on 12-3-21. U.S. Dist. Ct.

this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the 'injustice or hardship' by a holding of nonretroactivity.'" 404 U.S. 97 at 107 (quoting *Cipriano v City of Houma*, 395 U.S. 701, 706 (1969)).

III. APPLYING *BURNETT* IN THIS CASE RESULTS IN THE UNLAWFUL TERMINATION OF A VESTED RIGHT

When Defendant Spece killed Shane Jensen without justification, Wagner had a vested interest in an Iowa constitutional claim recognized by the Iowa Supreme Court. Wagner, on behalf of herself and the estate, properly filed her lawsuit in Iowa District Court. It is undisputed that Wagner relied upon the decision in *Godfrey II* and subsequent affirming cases, including in her very own decision from the Iowa Supreme Court, for asserting an Iowa constitutional tort claim.

The Iowa Supreme Court has previously held that retroactive application of an amendment to a statute constitutes a violation of a litigant's due process rights under Art. I, §9 of the Iowa Constitution and the Fifth Amendment to the U.S. Constitution. *Thorp v. Casey's General Stores, Inc*.,

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Northern Dist. of Iowa, Case 3:19-cv-03007-CJW-KEM, Doc. 42. The court "[m]ust take judicial notice if a party requests it and the court is supplied with the necessary information." Iowa R. Evid. 5.201(c). "The court may take judicial notice at any stage of the proceeding," including on appeal. Iowa R. Evid. 5.201(d); *State v. Washington*, 832 N.W.2d 650, 655 (Iowa 2013).

446 N.W.2d 457, 463 (Iowa 1989) ("[W]e believe that plaintiff had a vested property right in her cause of action against Casey's and that the retroactive application of the 1986 amendment destroyed that right in violation of due process under both the federal and state constitutions.").

In *Thorp*, the Iowa Supreme Court reasoned:

> [A] statutory amendment that takes away a cause of action "that previously existed and does not give a remedy where none or a different one existed previously" is substantive, rather than merely remedial, legislation. Substantive law is "that part of the law which creates, defines, and regulates rights."

Id. at 461 (citations omitted); *see also Gacke v. Pork Xtra, L.L.C.*, 684 N.W.2d 168, 179 (Iowa 2004) ("This court has also found it important in substantive due process analysis to consider whether the effect of a statute is 'to give an injured person, in essence, no right of recovery.'").

Accordingly, Wagner had a vested property right in an Iowa constitutional claim at the time that her son was wrongfully killed. When the Iowa Supreme Court overturned its decision in *Godfrey II*, like the substantive amendment by the legislature in *Thorp*, the act extinguished her vested property right in violation of Wagner's Iowa and Federal Constitutional due process rights. Wagner is entitled to continue to assert her vested property right Iowa constitutional claim to a conclusion – win, lose, or draw.

CONCLUSION

For all the reasons stated above, the District Court's summary judgment order must be reviewed on the merits and reversed.

ATTORNEY'S COST CERTIFICATE

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

Certified by: */s/ Brooke Timmer*

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/s/ Brooke Timmer	July 31, 2023
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I, Summer Heeren, certify that on the 31st day of July, 2023, I electronically filed the foregoing Plaintiff-Appellant's Supplemental Brief with the Clerk of the Iowa Supreme Court by using the EDMS system. Service on all parties will be accomplished through EDMS.

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