

IN THE COURT OF APPEALS OF IOWA

No. 22-1625
Filed March 27, 2024

**KRYSTAL WAGNER, individually, and as Administrator of the Estate of
Shane Jensen,**
Plaintiff-Appellant,

vs.

STATE OF IOWA and WILLIAM L. SPECE,
Defendants-Appellees.

Appeal from the Iowa District Court for Humboldt County, Kurt J. Stoebe,
Judge.

Plaintiff appeals the district court decision granting summary judgment to
defendants on her constitutional tort claims. **AFFIRMED.**

David A. O'Brien, Cedar Rapids, and Brooke Timmer, West Des Moines, for
appellant.

Brenna Bird, Attorney General, and Jeffrey C. Peterzalek and Tessa M.
Register (until withdrawal), Assistant Attorneys General, for appellee State and
appellee William L. Spece.

Considered by Schumacher, P.J., and Chicchelly and Buller, JJ.
Langholz, J., takes no part.

SCHUMACHER, Presiding Judge.

Krystal Wagner, individually and as the administrator of the estate of her son, Shane Jensen, appeals the district court decision granting summary judgment to the State and Officer William Spece (together referred to as the State) on her constitutional tort claims. Following recent Iowa Supreme Court precedent, we conclude that Wagner's constitutional tort claims are no longer actionable. See *Burnett v. Smith*, 990 N.W.2d 289, 307 (Iowa 2023). And because Wagner did not appeal the dismissal of her common law wrongful death claim, we do not address such. We affirm the decision of the district court.

I. Background Facts & Proceedings

Wagner initially filed an action in federal court, alleging constitutional torts arising from the action of Officer Spece of the Iowa Department of Natural Resources when he shot her son, Jensen. The facts here were referenced in *Wagner v. State*:

According to the complaint, Shane Jensen, the son of plaintiff Krystal Wagner, was nineteen years old on Saturday, November 11, 2017. He suffered from numerous mental health issues and was understood to be suicidal. He had just broken up with his girlfriend on November 9 and destroyed some of her property. A warrant was issued for Jensen's arrest that day. On November 10, Jensen obtained a handgun at a relative's home.

952 N.W.2d 843, 848 (Iowa 2020).

Local law enforcement officials asked Officer Spece to assist in the search for Jensen, who was considered to be armed and dangerous. There were concerns that Jensen intended to "commit suicide by cop." The officers found Jensen hiding under the deck of a home in a suburban area. The officers commanded Jensen come out and drop his gun. Jensen came out from under the

deck but refused to drop his gun. He pointed the gun at his head, turned in a circle pointing the gun out towards the officers, and fired a shot into the air. As Jensen raised his gun again, Officer Spece believed Jensen was going to shoot at the officers, so he shot Jensen, who died as a result.

Wagner's action in federal court alleged "that Officer Spece had used excessive and unjustified force, that he lacked sufficient training, that he had failed to follow protocols, and that he 'failed to appropriately heed the warning he was given that Jensen was suicidal and may be seeking to commit suicide by cop.'" *Id.* The federal court certified four questions to the Iowa Supreme Court concerning claims made under the United States and Iowa constitutions. *Id.* at 847. The Iowa Supreme Court determined that claims for damages based on the Iowa constitution could only be pursued in Iowa "absent the State's consent or waiver in a specific case." *Id.* at 865. Wagner subsequently dismissed the federal action.

On October 18, 2019, Wagner filed an action against the State and Officer Spece in Iowa district court. Wagner alleged (1) the use of excessive force violated the Fourth Amendment of the federal constitution and Article I, section 8 of the Iowa constitution; (2) a substantive due process violation was in conflict with the Fourteenth Amendment of the federal constitution and Article I, section 9 of the Iowa constitution; (3) the State failed to properly train, equip, or supervise Officer Spece, contrary to the Fourth Amendment of the federal constitution and Article I, section 8 of the Iowa constitution; (4) wrongful death and negligence under Iowa common law; and (5) loss of consortium.

Wagner moved for partial summary judgment on the liability issue. She claimed the uncontested facts of the case established as a matter of law that

Officer Spece's conduct in shooting Jensen was objectively unreasonable. The State also moved for summary judgment, claiming Officer Spece's use of force was objectively reasonable to protect himself and others. In her resistance to the State's motion for summary judgment, Wagner conceded that Counts three and four of her petition, which included the common law wrongful death claim should be dismissed.

The district court entered an order in September 2022, granting the State's motion for summary judgment and denying Wagner's motion for partial summary judgment. The court found:

The undisputed evidence is sufficient to support a finding that Officer Spece's use of deadly force was objectively reasonable—Mr. Jensen's firing of the handgun into the air, Mr. Jensen's statements and his refusal to follow law enforcement's repeated demands to drop his handgun, Mr. Jensen's location in a residential neighborhood with bystanders observing the scene, and Jensen's arm movements raising the handgun up and down in the direction of the officers. This list of undisputed facts, and its application to a reasonable officer standard, does not create a genuine issue of material fact to the question of qualified immunity.

The court "found no wrong on the part of Defendants—no tort or constitutional liabilities." Based on Wagner's decision not to resist summary judgment on Counts three and four, the court granted summary judgment to the State on those claims. The court also determined the claim of loss of consortium was a derivative claim and, as there was no wrongful conduct, the court granted summary judgment on this claim as well. Wagner appealed the court's ruling.

II. Constitutional Tort Claims

In 2017, the Iowa Supreme Court decided in *Godfrey v. State* that the due process and equal protection clauses of the Iowa constitution were self-executing,

so a party could file a tort action for monetary damages based on constitutional violations. 898 N.W.2d 844, 873 (Iowa 2017). The first three counts in Wagner's petition are constitutional tort claims under *Godfrey*.

On May 5, 2023, while Wagner's appeal was pending, the Iowa Supreme Court overruled *Godfrey*, holding "we no longer recognize a standalone cause of action for money damages under the Iowa Constitution unless authorized by the common law, an Iowa statute, or the express terms of a provision of the Iowa Constitution." *Burnett*, 990 N.W.2d at 307. Burnett filed an action against the State claiming he had been unlawfully arrested and was entitled to damages based on constitutional violations. *Id.* at 292. The court determined there was no longer a cause of action for Burnett under *Godfrey*. *Id.* at 307.

Following *Burnett*, legal actions based on constitutional tort claims are no longer recognized. See *Richardson v. Johnson*, No. 22-1727, 2023 WL 4036138, at *1 (Iowa June 16, 2023) (quoting *Burnett* and finding there was no cause of action for damages based on constitutional violations); *Venckus v. City of Iowa City*, 990 N.W.2d 800, 803 (Iowa 2023) (finding that based on *Burnett*, constitutional tort claims are not available); *White v. Harkrider*, 990 N.W.2d 647, 652 (Iowa 2023) ("White's constitutional tort claims thus cannot proceed."); *Carter v. State*, No. 21-0909, 2023 WL 3397451, at *1 (Iowa May 12, 2023) ("Carter's constitutional tort claims therefore cannot proceed."); *Dishman v. State*, No. 22-1491, 2023 WL 8068563, at *2 (Iowa Ct. App. Nov. 1, 2023) ("We disagree with Dishman that the question of retroactive application of *Burnett* remains unanswered."); *Christiansen v. Eral*, No. 22-1971, 2024 WL 108848, at *3 (Iowa

Ct. App. Jan. 10, 2024) (concluding that constitutional claims pending at the time of the May 2023 ruling in *Burnett* were barred).

We conclude Wagner's constitutional tort claims are no longer recognized as a cause of action. See *Burnett*, 990 N.W.2d at 307.

III. Common Law Claims

Wagner agreed to the dismissal of her common law wrongful death claim. And she did not appeal the dismissal of that count. Additionally, she has not raised an issue concerning the grant of summary judgment to the State on her claim of loss of consortium. We conclude any arguments based on these claims have been waived. See Iowa R. App. P. 6.903(2)(g)(3) ("Failure to cite authority in support of an issue may be deemed waiver of that issue.").

We affirm the district court's decision granting summary judgment to the State.

AFFIRMED.



IOWA APPELLATE COURTS

State of Iowa Courts

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