IN THE SUPREME COURT OF IOWA

SUPREME COURT NO. 23-0217

BRIAN NORRIS,
Plaintiff- Appellee

vs.

TRUDY PAULSON and CITY OF DES MOINES, IOWA
Defendants- Appellants

APPEAL FROM THE DISTRICT COURT
FOR POLK COUNTY
THE HONORABLE SARAH CRANE

APPELLEES FINAL BRIEF
AND
REQUEST FOR ORAL ARGUMENT

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CERTIFICATE OF FILING

I, Robert G. Rehkemper, hereby certify that I filed the attached Brief with the Clerk of the Supreme Court, Judicial Branch Building, 1111 East Court Avenue, Des Moines, Iowa, on October 3, 2023, by filing it with the Court's electronic document management system.

Robert G. Rehkemper — October 3, 2023 Date

CERTIFICATE OF SERVICE

I, Robert G. Rehkemper, hereby certify that on October 3, 2023, I served a copy of the attached brief on all other parties to this appeal by filing it with the Court's electronic document management system.

Robert G. Rehkemper — October 3, 2023 Date

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STATEMENT OF THE CASE

Nature of the Case

Des Moines Police Officer, Trudy Paulson, shot Brian Norris when he posed no imminent threat to her or any other person. The entire incident was captured on officers' body worn cameras. Norris sued Paulson and the City of Des Moines in a three-Division Petition. Petition at Law; App. 122. Suit was brought pursuant to Article I, section 8 of the Iowa Constitution and also under Common Law and the Municipal Tort Claims Act. Petition at Law, p. 5; App. 127. *Burnett v. Smith*, 990 N.W.2d 289 (Iowa 2023), was not decided until after Appellants' Application for Interlocutory Appeal was granted and the issues raised in *Burnett* were never raised before the district court in this case.

Course of Proceedings

Petition and Jury Demand were filed on April 14, 2021, alleging that Des Moines Police Officer, Trudy Paulson ("Paulson"), and the City of Des Moines were liable for damages caused to Plaintiff, Bryan Norris ("Norris"), when Paulson shot Norris at a homeless camp on September 13, 2019. Petition at Law; App. 122. The Petition contained three Divisions. Divisions I was brought against Paulson, individually, pursuant to Article I, section 8 of the Iowa Constitution but also under Common Law and the Municipal Tort Claims Act. Petition at Law, pp. 4-5; App. 126-127. Division II was brought against Paulson, individually, for the common

law tort of Assault. Petition at Law, pp. 5-6; App. 127-128. Division III was brought against the City of Des Moines pursuant to Article I, section 8 of the Iowa Constitution and also under Common Law and the Municipal Tort Claims Act. Petition at Law, p. 6-8; App. 128-130.

On September 6, 2022, the City of Des Moines and Paulson filed a motion for summary judgment. In their Brief, the City of Des Moines and Paulson raised but three issues: 1) The Plaintiff has failed to demonstrate that Officer Paulson engaged in an unreasonable seizure in violation of the Iowa Constitution; 2) The Plaintiff has failed to demonstrate an assault by Officer Paulson that violates the law; and 3) Plaintiff's claim against the City of Des Moines alleging an unconstitutional policy, custom or usage should be dismissed. Def. Brief, p. 1; App. 36.

Plaintiff resisted both defendants' motions and demonstrated why a genuine issue of material fact existed on each-and-every one of the claims made. Plaintiffs Statement of Disputed Facts ("PSDF") and Plaintiffs Brief in Support of Resistance to Motion for Summary Judgment ("Plaintiff's Brief"); App. 70. Hearing was held on November 2, 2022, and the district court denied defendants' motion for summary judgment in its entirety on December 29, 2022. Order Regarding Defendants' Motion for Summary Judgment; App. 17. Defendants filed a Motion to Reconsider, Enlarge, or Amend Order of December 29, 2022, per Iowa

Rule of Civil Procedure 1.904(2), on January 11, 2023. Motion to Reconsider; App. 107. The basis of this motion was defendants' displeasure with the court's finding of facts and application of existing law. *Id.* Plaintiff resisted defendants' motion and the district court denied the substantive portion of defendants' motion in a written order entered on January 30, 2023. Order Denying Defendants' Motion to Reconsider; App. 31.

Defendants' Application for Interlocutory Appeal was filed on February 2, 2023, and was granted on April 5, 2023. Application for Interlocutory Appeal; Order: Appl for Interlocutory Review Granted; App. 5. On May 5, 2023, the Iowa Supreme Court decided *Burnett v. Smith*, which eliminated the standalone cause of action for money damages under the Iowa Constitution previously created in *Godfrey v. State*, 898 N.W.2d 844 (Iowa 2017). None of the arguments raised or addressed in *Burnett* were ever made by the City of Des Moines or Paulson at the district court level.

Statement of Facts

On September 13, 2019, Des Moines Police Officers, Trudy Paulson ("Paulson), Shawna Isaac ("Isaac") and Sgt. Yanira Scarlett ("Scarlett") were following up on complaints on a homeless camp located south of the railroad tracks by the Racoon River, south of the 2300 block of Terrace Road. Defendants Statement of Undisputed Facts "DSUF", ¶¶ 7 & 8; App. 63-64. Norris was present

at the homeless camp at this time and the entirety of Paulson's interaction with the occupants of the homeless camp, including Norris, was captured by way of her body worn camera as well as Isaac's body worn camera. Plaintiff's Statement of Disputed Facts, "PSDF" ¶¶ 1-2; Paulson Depo, pp 66-67, 69; Isaac Depo. p. 59; App. 93, 313 & 342. Other than providing an incorrect name and identifying information when initially asked, Norris was calm and cooperative with the officers. PSDF ¶ 4 Paulson Depo, p. 80; App. 93 & 316. The demeanor of the individuals at the homeless camp during this time was also calm and cooperative. PSDF ¶ 5; Paulson Depo, p. 81; App. 93 & 317.

After finally obtaining Norris' real name and identifying information, Paulson ran Norris through LENCIR and was informed that he had an outstanding arrest warrant for a Failure to Appear on a Fifth Degree Theft out of West Des Moines for stealing a bottle of alcohol. PSDF ¶ 8; Paulson Depo, pp. 83-84; App. 94 & 317. The officers did not notify Norris of his outstanding warrant but shortly after Paulson received the information, Norris ran away from the officers and jumped into the river without making any threats or other statements toward the officers. PSDF ¶¶ 9-11, Paulson Depo, pp. 84-85; App. 94 & 317-318. The remaining occupants of the homeless camp stayed calm and cooperative with officers after Norris jumped into the river. PSDF ¶ 94; Paulson Depo, pp. 85-86; App. 104 & 318. Paulson and Scarlett handcuffed two individuals from the

homeless camp who had outstanding warrants while Norris was in the river. PSDF ¶ 13; Paulson Interview Tr. p. 10; App. 94.

A short time later, Norris exited the river and climbed up the bank at which point Isaac notified Paulson and Scarlett that he was coming back in their direction. PSDF ¶ 14-15; Isaac Depo, p. 37; App. 94 & 337. Paulson headed toward the river and observed Norris walking parallel to her with a shovel in his right hand. PSDF ¶ 19; Paulson BWC @37:13; Paulson Depo, p. 87; App. 95 & 318. Norris walked directly to the orange folding chair and bicycle that he had been observed at, by Isaac when the officers initially made contact with him. PSDF ¶ 20; Paulson BWC @ 37:15; Isaac Depo p. 23; App.95 & 333. Paulson drew her service firearm, pointed it at Norris and screamed at him to put the shovel down. PSDF ¶ 21; Paulson BWC @ 37:15; Paulson Depo, p. 87; App.95 & 318. Scarlett tapped Paulson on the back of her shoulder to let her know she had her back. PSDF ¶ 22; Paulson Depo p. 88; App.95 &318.

With her service firearm in her right hand, still pointed at Norris, Paulson radioed for backup. PSDF ¶ 23; Paulson BWC @ 37:24; App. 95. Four separate objects created barriers between Norris and Paulson including an orange folding chair, bicycles, and a downed tree branch. PSDF ¶¶ 24-26; App. 95-96. At this time Paulson took approximately five (5) steps *toward* Norris while continuing to scream at him to drop what was in his hand. PSDF ¶ 28; Paulson BWC @ 37:28;

App. 96. Norris did not take a single step toward Paulson or anyone else. *Id.* Paulson screamed that she would shoot Norris, taking another two steps *toward* him. Norris did not take any steps toward Paulson. Paulson BWC @ 37:31. Paulson then screamed "put it down" and took another couple of steps *toward* Norris. PSDF ¶ 30; Paulson BWC @ 37:35; App. 96. Norris dropped the shovel and turned away from Paulson holding a knife in his right hand before taking six more steps *away* from Paulson toward the riverbank while looking over his left shoulder. *Id.*

Paulson continued to scream at Norris to "put it down" while taking a couple of additional steps *toward* him. PSDF ¶ 33; Paulson BWC @ 37:42; App. 96. Norris did not take any steps in the direction of Paulson. *Id.* Paulson recognizes that a firearm has a greater lethal range than a knife. PSDF ¶ 34; Paulson Depo p. 92; App.96 & 319. Paulson was also aware that more space provides an officer with a greater tactical advantage. PSDF ¶ 35; Paulson Depo p. 91; App.96 & 319. Despite these facts, Paulson closed the distance toward Norris thereby reducing her tactical advantage on her own accord. PSDF ¶ 36; Paulson Depo, p. 96; App.96 & 320.

With Paulson screaming at him, Norris turned around to look at Paulson but did not make any statements or gestures toward her or anyone else. PSDF ¶¶ 37-38; Paulson BWC @ 37:42; Norris Affidavit; App. 97 & 350. Norris' hands

remained down below his waste with the knife in his right hand. PSDF ¶ 39; Depo Exhibit 9; Norris Affidavit; App.97 & 350. While Norris stood still with his hands down below his waist, looking at Paulson, Paulson fired the first shot. PSDF ¶ 41; Paulson BWC @ 37:44; Depo Exhibit 9; Norris Affidavit; App.97, 327 & 350. The first shot missed and hit the river. *Id.* A second passed without Norris moving and Paulson fired a second shot. PSDF ¶ 43; Paulson BWC @ 37:45; App. 97. The second shot struck Norris, entering, and exiting his left arm before entering his left side and exiting out his lower left back. PSDF ¶ 44; App. 97.

Paulson was the only officer who fired her weapon at Norris. PSDF ¶ 45; Paulson BWC @ 37:45; App. 97. The distance between Norris and Paulson at the time she fired the shots was a minimum of 24 feet. PSDF ¶ 97; Gratias Affidavit; App. 103.

The blade of the knife that Norris was holding measured 4.5 inches in length. PSDF ¶ 64; Gratias Affidavit; App. 99 & 351.

When she was interviewed following the incident, Paulson claimed that Norris "lunged" at her while holding the knife up over his head in an overhead stabbing motion. PSDF ¶¶ 56-58; Paulson Interview Transcript, p. 6, 15, 20; App. 98, 189, 198, & 203. Paulson described the knife as a "machete." PSDF ¶ 61; Paulson Depo., p. 101; App. 99 & 321. During her interview Paulson unequivocally claimed, "if he would've lunge towards me he would've got me." PSDF ¶ 60; Paulson Interview Transcript, p. 20; App. 99 & 203. To this day, Paulson still claims that she perceived Norris holding a machete up over his head with the blade pointed at her in a forward stabbing motion and lunging at her immediately before she shot him. PSDF ¶ 72; Paulson Depo, pp. 77-78, 102; App. 100 & 316.

Routing Statement

This case involves application of well-established case-law and as such, transfer to the court of appeals is appropriate. Iowa R. App. P. 6.1101.

LEGAL ARGUMENT

I. THE DISPUTED FACTS CREATE A JURY QUESTION ON WHETHER TRUDY PAULSON WAS JUSTIFIED IN SHOOTING BRIAN NORRIS AND AS SUCH, THE DISTRICT COURT CORRECTLY DENIED DEFENDANTS' MOTION FOR SUMMARY

JUDGMENT AS TO DIVISIONS I AND III OF PLAINTIFF'S PETITION AT LAW.

Preservation of Error: Appellants for the first time on appeal, argue that "Plaintiffs' Iowa Constitutional claims have been eliminated through the Iowa Supreme Court's decision in *Burnett v. Smith*." (Appellants' Brief, p. 19). This argument was never raised before the district court and as such, the application of *Burnett v. Smith* to the instant case was not preserved for appellate review.

"[A] party has an obligation to raise an issue in the district court and obtain a decision on the issue so that an appellate court can review the merits of the decision actually rendered." *State v. Crawford*, 972 N.W.2d 189, 198 (Iowa 2022). "Our general rule of error preservation is that we will not decide an issue presented before us on appeal that was not presented to the district court." *Estate of Cawiezell v. Coronelli*, 958 N.W.2d 842, 847 (Iowa 2021); quoting *In re Det. Of Anderson*, 895 N.W.2d 131, 138 (Iowa 2017). The only exception in the civil arena to the general error preservation rule is when the record indicates that the grounds for a motion were obvious and understood by the trial court and counsel. *Estate of Gottschalk by Gottschalk v. Pomeroy Dev., Inc.*, 893 N.W.2 579, 585 (Iowa 2017). "Nonetheless, if the court does not actually rule on the claim asserted, a party must seek an expanded ruling to preserve it." *Id.*

"Error preservation is important for several reasons: (1) it affords the district court an opportunity to avoid or correct error that may affect the future course of the trial; (2) it provides the appellate court with an adequate record for review; and (3) it disallows sandbagging – that is, it does not 'allow a party to choose to remain silent in the trial court in the face of error, take a chance on a favorable outcome, and subsequently assert error on appeal if the outcome in the trial court is unfavorable." *Crawford*, 972 N.W.2d at 199; quoting *State v. Ambrose*, 861 N.W.2d 550, 555 (Iowa 2015). As Justice Waterman pointed out in his concurrence in part and dissent in part in *Crawford*, "the adversary process functions most effectively when we rely on the initiative of lawyers, rather than the activism of judges, to fashion the questions for review." *Id.* at 203; quoting *New Jersey v. T.L.O.*, 468 U.S. 1214, 1216 (1984) (Stevens, J., dissenting).

Here, Appellants did not argue at the district court that a standalone action for money damages under the Iowa Constitution did not or should not exist. Def. Brief; App. 36. Not a word was mentioned even hinting at such an argument. *Id.* In fact, Appellants argued their motion consistent with existing caselaw at the time, recognizing that such a cause of action did indeed exist in Iowa. Def. Brief, p. 6; App. 41.

The Iowa Supreme Court decision in *Burnett v. Smith* was not in existence at the time Appellants' motion for summary judgment was filed, argued, and decided.

In the Iowa appellate cases that have had the opportunity to apply *Burnett*, the defendants specifically raised the application of *Burnett* by way of a pre-answer motion to dismiss, see *White v. Harkrider*, 990 N.W.2d 647, 652 (Iowa 2023) and *Carter v. State*, 990 N.W.2d 308 (Iowa 2023), or specifically raised the argument by way of a motion for summary judgment. See *Venckus v. City of Iowa City*, 990 N.W.2d 800, 803 (Iowa 2023). Appellants did not do so in the instant case.

Without making the arguments raised in *Burnett* at the district court level, Appellants have failed to preserve those arguments for this appeal. Appellants failure to raise that issue now handcuffs the court on appellate review.

Standard of Review: The standard of review for the court's denial of a Motion for Summary Judgment is for corrections of errors at law. *A. Doe v. Cedar Rapids Community School Dist.*, 652 N.W.2d 439, 442 (Iowa 2002). Summary judgment is proper if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law." *Id.* citing Ia.R.Civ.Pro. 1.981(3). The Supreme Court reviews "the record in the light most favorable to the non-moving party." *Shatzer v. Globe American Cas. Co.*, 639 N.W.2d 1, 3 (Iowa 2001).

Argument: Appellants fail to brief or argue on appeal that the district court erred in denying their Motion for Summary Judgment related to Divisions I and III

of Norris' Petition at Law. The only argument Appellants brief on this appeal related to Divisions I and III of Norris' Petition at Law involve the application of the Iowa Supreme Court decision in *Burnett v. Smith*. The issues actually raised and ruled upon by the district court have not been briefed by Appellants. "Failure in the brief to state, to argue or to cite authority in support of an issue may be deemed waiver of that issue." Ia.R.App.Pro 14(a)(3); *State v. Cooley*, 608 N.W.2d 9, 13 (Iowa 2000).

Here, Appellants inexplicably failed to state, argue, or cite any authority or in any other way raise an allegation that the district court improperly denied their motion for summary judgment as to Divisions I and III of Plaintiff's Petition at Law. They have therefore waived any arguments originally made at the district court level contending that Paulson's conduct did not amount to an unreasonable seizure or that Norris' cause of action against the City of Des Moines should have been dismissed. As such, it is impossible for Appellee to respond to arguments not raised or briefed on this appellate record.

II. THE DISTRICT COURT CORRECTLY DENIED SUMMARY JUDGMENT ON NORRIS' CLAIM OF COMMON LAW ASSAULT.

Preservation of Error: Appellant preserved error on this limited issue.

Standard of Review: The standard of review is set forth in Division I, *supra.* Additionally, when video evidence can be characterized differently, it is an

issue for the jury to decide. See *Lee v. Russ*, 33 F.4th 860 (6th Cir. 2022) ("When facts shown in a video can be interpreted in multiple ways, those facts should be viewed in the light most favorable to the non-moving party."); see also *Williams v. City of Burlington, Iowa*, 516 F.Supp.3d 851 (S.D. Iowa 2021) (finding fact question existed on issue of whether the individual's movement just before the fatal shot was reasonably construed as taking a firing position or was an act of surrender.)

Argument: Paulson shot Norris as he was standing still, twenty-four feet away from her. PSDF ¶ 97; Gratias Affidavit; App. 103 & 351. Norris did not utter a single threatening statement or take a single step toward any officers or other individuals prior to being shot. PSDF ¶ 39; Depo Exhibit 9; Paulson BWC @ 37:15 – 37:45; Norris Affidavit; App.97, 327, & 350. All of Norris' movements were away from officers. *Id.* Paulson shot Norris because he did not comply with her orders soon enough.

Law enforcement is never justified in using deadly force to gain compliance with their orders. The law does not permit law enforcement to utilize a "comply or die" approach to policing. "An officer does not possess the unfettered authority to shoot someone because that person is carrying a weapon…." *Cole Estate of Richards v. Hutchins*, 959 F.3d 1127, 1134 (8th Cir. 2020) (quoting *Cooper v. Sheehan*, 735 F.3d 153, 159 (4th Cir. 2013). Instead, the law requires proof that the

officer or another person is actually "*threatened* with the weapon." *Id.* (emphasis original).

The intentional tort of Assault requires proof of an (1) Any act which intended to cause pain or injury to, or which is intended to result in physical contact which will be insulting or offensive to another; and (2) the apparent ability to execute the act. Iowa Code § 708.2(a). The offense is also committed by intentionally pointing any firearm toward another… Iowa Code § 708.1(2)(c).

The defense of justification may be asserted as an affirmative defense to this intentional tort. *State v. Delay*, 320 N.W.2d 831 (Iowa 1982). As an affirmative defense it must be pleaded and proved by a defendant and the plaintiff need not negate this affirmative defense unless the defendant meets her initial burden of producing sufficient evidence that the defense applies. *Id.* at 834. For summary judgment to be granted to the moving party on an asserted affirmative defense, that party must definitively establish that no genuine issue of material fact existed as to the justification of the use of force. See generally *C & J Vantage Leasing Co. v. Wolfe*, 795 N.W.2d 65, 84 (Iowa 2011).

Police officers are statutorily authorized to use force when making an arrest. Iowa law provides:

1. A peace officer, while making a lawful arrest, is justified in the use of any force which the peace officer *reasonably* believes to be necessary to

effect the arrest or to defend any person from bodily harm while making the arrest. However, the use of deadly force or a chokehold is *only justified* when a person cannot be captured any other way *and* either of the following apply:

a. The person has used or threatened to use deadly force in committing a felony.

b. The peace officer reasonably believes the person would use deadly force against any person unless immediately apprehended.

Iowa Code § 804.8 (emphasis added).

First, Norris does not concede that Paulson was attempting to make a lawful arrest of Norris at the time she shot him. For a lawful arrest to take place, "[a] person making an arrest *must inform the person to be arrested of the intention to arrest the person, the reason for arrest*, and that the person making the arrest is a peace officer, if such be the case, and require the person being arrested to submit to the person's custody, except when the person to be arrested is actually engaged in the commission of or attempt to commit an offense, or escapes, so that there is no time or opportunity to do so." Iowa Code § 804.14 (emphasis added). At no time, either prior to entering the river or exiting the river, did any officer inform Norris of their intention to arrest him nor of the reason for his arrest. Paulson was

attempting to detain, restrain or "seize" Norris but she was not arresting him under the disputed facts of this case.

Second, even if the court concludes Paulson was attempting to lawfully arrest Norris at the time she shot him, for the use of force to be an affirmative defense, it must still be objectively reasonable under the circumstances. "Reasonable force" is and has always been defined in Iowa to mean, "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." (emphasis added) Iowa Code § 704.1(1).

"In general, to be reasonable, the force applied must be proportionate to the need for the force raised by the circumstances." *State v. Dewitt*, 811 N.W.2d 460, 469-70 (Iowa 2012) citing *Lee v. Ferraro*, 284 F.3d 1188, 1198 (11th Cir. 2002). Absent probable cause of an immediate threat of death or serious bodily injury, the use of deadly force is not objectively reasonable. *Tennessee v. Garner*, 471 U.S. 1, 9 (1985). If a "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." *Garner*, 471 U.S. 1, 11 (1985); See *Tenorio v. Pitzer*, 802

F.3d 1160, 1164 (10th Cir. 2015), quoting *Sevier v. City of Lawrence*, 60 F.3d 695, 699 (10th Cir. 1995) ("The reasonableness of [an officer's] actions depends both on whether the officers were in danger at the precise moment that they used force and on whether [the officer's] own reckless or deliberate conduct during the seizure unreasonably created the need to use such force.")

In assessing the reasonableness of force used, the totality of the circumstances are viewed ***objectively*** from the perspective of a reasonable officer at the scene. *Graham*, 490 U.S. at 396. The severity of the crimes, whether the suspect is actively resisting or fleeing, and whether the suspect poses an immediate threat of serious injury to the officers or others are considered. *Loch v. City of Litchfield*, 689 F.3d 961 (8th Cir. 2012). If the objective facts would not lead a reasonable officer to believe that the use of deadly force was necessary, the affirmative defense of justification does not shield the officer from liability for an assault. See *Johnson v. Civil Serv. Comm'n of City of Clinton*, 352 N.W.2d 252, 257 (Iowa 1984).

Importantly, "[o]nly the facts that were knowable to the defendant officers" are considered to determine the reasonableness of the officer's use of force. *White v. Pauly*, 580 U.S. 73, 550 (2017). Thus, in the instant case, the focus of the reasonableness analysis must be on the objective facts confronting Paulson at the time she fired her weapon. Consequently, the pages of information Appellants litter

within their Brief and Appendix related to Norris' subsequently discovered criminal activity related to FECR332617, that were not discovered or known to the officers at the time of the shooting, are completely irrelevant to the court's determination. To be direct, the Appellants' blatant attempt to explicitly bias the court against Norris through their presentation of patently irrelevant information, highlights the lack of merit of their substantive arguments. Simply put, Paulson was not justified in shooting Norris and no amount of deflection can change the objective facts of this case.

Any reasonable person viewing the video recording of Paulson shooting Norris is surprised and shocked the moment the trigger is pulled. Undersigned counsel is willing to bet that every member of this reviewing court, as well as every one of their staff that views the video, jumps, or otherwise has an instinctive, reflexive, surprise reaction to the shots being fired. They are shocked because Norris was not an imminent threat to Paulson or anyone else at the time he was shot. He has retreated multiple times toward the river and has not taken a single step toward Paulson or anyone else from the time Paulson drew her weapon.

The information known to Paulson at the time she shot Norris was that he had a warrant for failure to appear on a Theft 5th charge involving the theft of alcohol. PSDF ¶ 9; App. 94. At worst, at the time Paulson shot Norris, he had failed to comply with a lawful order of officers to put down the knife. Indeed,

Norris pleaded guilty to the offense of Interference With Official Acts – Displaying A Weapon, in violation of Iowa Code section 719.1(f).

Obstruction of police officers is not a "severe" crime for the purpose of the *Graham* factors. See *Glenn v. Washington County*, 673 F.3d 864, 874 n. 9 (10th Cir. 2011), citing *Davis v. City of Las Vegas*, 478 F.3d 1048, 1055 (9th Cir. 2007) and *Deorle v. Rutherford*, 272 F.3d at 1277, 1282-82 (9th Cir. 2001) (noting that "the crime being committed, if any, was minor" where the suspect was charged with obstructing the police in the performance of their duties after brandishing a hatchet and crossbow at police officers and threatening to "kick [their] ass").

Even in cases with the heightened federal qualified immunity protections under 42 U.S.C. § 1983, courts have repeatedly concluded that not dropping a weapon in response to officer commands does not amount to active resistance justifying the use of deadly force. See *Glenn v. Washington County*, 673 F.3d 864, 875 (9th Cir. 2018) (Act of not dropping a pocketknife despite officer's commands to put it down did not amount to actively resisting arrest or attempting to evade arrest by flight); citing *Deordle*, 272 F.3d at 1276-77 (not active resistance when plaintiff "brandished a hatchet" and a crossbow while verbally abusing officers, threatening to "kick [their] ass", and continually roaming around property despite officers' warnings).

The most important factor of the *Graham* analysis is whether the suspect posed an immediate threat of serious harm to the officers or others. "A desire to resolve quickly a potentially dangerous situation is not the type of governmental interest that, standing alone, justifies the use of force that may cause serious injury. There must be other significant circumstances that warrant the use of such a degree of force at the time it is used." *Deorle*, 272 F.3d at 1281. "A simple statement by an officer that [s]he fears for [her] safety or the safety of others is not enough; there must be objective factors to justify such a concern." *Id.*

Even with cases involving possession of firearms, the Eighth Circuit Court of Appeals has explained: "It is clearly established that an individual does not pose an immediate threat of serious physical harm to others when, although that person is seemingly in possession of a gun, he does not raise it toward another or otherwise appear 'ready to shoot' in the moment." *Cole Estate of Richards v. Hutchins*, 959 F.3d 1127 (8th Cir. 2020). "An officer does not possess the unfettered authority to shoot someone because that person is carrying a weapon but is only entitled to do so when, based on a reasonable assessment, the officer or another person is *threatened* with the weapon." *Id.* (emphasis original).

Here, the objective evidence stands in stark contrast to Paulson's versions of the events that she claims supports a conclusion that Norris presented an imminent threat to her safety. Paulson claimed that she feared for her life because she

perceived that Norris had a machete in his hand, raised up over his head at a 90-degree angle, as he "lunged" at her. PSDF ¶¶ 58-62; App. 98-99.

First, Paulson herself concedes that her claim of Norris holding the knife of any kind, up over his head in a stabbing motion, was factually incorrect. PSDF ¶ 69; App. 100. Thus, Paulson's primary justification for shooting Norris is proven to be objectively *unreasonable* and in fact, false. PSDF ¶ 72; App. 100. It is impossible for an officer's claim of objective reasonableness to form the basis of a justification defense when that primary fact is definitively disproven by the objective evidence.

Second, the objective facts also disprove Paulson's claim that Norris "lunged" at her, thereby justifying her shooting him. PSDF ¶ 70; App. 100. Paulson understands the definition of the word "lunge" as being "a clear aggressive movement forward toward an individual." PSDF ¶¶ 57; App. 98. Paulson claims she was justified in shooting Norris because he "lunged" at her and yet the objective facts clearly establish Norris was standing still when she shot him. PSDF ¶ 68; App. 99. Paulson's claim that Norris "lunged" at her is not only objectively unreasonable, but it too is factually false. *Id.*

Finally, Paulson claimed to have perceived the knife being held by Norris to be a "machete." PSDF ¶ 72; App. 100. This claim is also objectively unreasonable and in fact, false. Even Paulson's fellow officers concede that the

knife Norris was holding would not accurately be described as a "machete." PSDF ¶ 63; App. 99. Instead, the knife in Norris' possession had a 4.5-inch blade and did not even qualify as a *per se* dangerous weapon. PSDF ¶ 64; App.99. See Iowa Code § 702.7 (knife with a blade exceeding five inches in length is a *per se* dangerous weapon). Again, every part of Paulson's attempted justification for feeling in immediate fear of death, thereby justifying her shooting Norris, are all shown to be objectively unreasonable and in fact, patently false.

The afore-stated facts immediately preceding Paulson pulling the trigger objectively prove that Paulson's perceptions and resulting use of deadly force were not objectively reasonable. Add to this the remainder of the circumstances and this conclusion becomes even more concrete. As soon as Norris returned to the land, Paulson drew her firearm, aimed it at Norris, and placed her finger on the trigger. PSDF ¶ 21; App. 95. Behind Paulson was Scarlett, who had her weapon drawn and aimed at Norris, providing Paulson with backup. PSDF ¶ 22; App. 95. Seconds before Paulson fired her weapon Isaac had also returned to the scene to provide Paulson with backup. PSDF ¶ 23; App. 95. Norris, who was at least 24 feet away from Paulson, held a 4.5-inch hunting knife, down below his waist. PSDF ¶¶ 95 64-68; App. 99 & 102.

This is not a situation where Paulson was alone and suddenly confronted with a dangerous, armed felon threatening immediate violence. While Norris keeps

the knife in his right hand, hanging at his side, he never makes any verbal threats or physical advances towards Paulson. PSDF ¶¶ 65-70; App. 99-100. Rather, Norris takes steps ***away*** from Paulson, toward the river. See *Malone v. Hinman*, 847 F.3d 949, 954 (8th Cir. 2017) (Suspect did not pose a threat of serious bodily harm to officer when he was running away). A person who is in retreat is not an imminent threat. *Id.* "Since 1985, it has been established by the Supreme Court that the use of deadly force against a fleeing suspect who does not pose a significant threat of death or serious physical injury to the officer or others is not permitted." *Moore v. Indehar*, 514 F.3d 756, 763 (8th Cir. 2008) citing *Garner*, 471 U.S. at 11.

Appellants also incorrectly attempt to argue that Norris' guilty plea somehow serves as an admission that he posed a threat of serious injury to Paulson. This argument is almost as absurd as Paulson's claim that Norris lunged at her with a machete raised over his head. The assault charges filed against Norris were dismissed. PSDF ¶ 98; App. 103. Norris simply pleaded guilty to a singular count of Interference with Official Acts – Displaying a Weapon, in violation of Iowa Code § 719.1(f). The factual basis for that offense was: "I knowingly resisted and/or obstructed Officer Trudy Paulson, whom I knew to be a peace officer while she was in performance of her lawful duty and while displaying a dangerous weapon." Petition to Plead Guilty, FECR331485; App. 246.

The word "displayed" under this code section simply means to "exhibit to the sight or mind: give evidence of: show, manifest, disclose." See *State v. Hall*, 886 N.W.2d 616 (Table), 2016 WL 4543891, *2 (Ia.Ct.App.). "Displaying" a weapons stands in stark contrast to behavior such as "brandishing" which is defined as "the display or exhibition of a danger weapon, *with the intent* to use, intimidate, or threaten another person …" (emphasis added) Iowa Code § 723A.1(1)(h)(1). (emphasis added). It is also worth noting Norris was never charged with the alternative version of 719.1(f) for committing interference with official acts "and in doing so … attempts to inflict serious injury." Appellants' argument that Norris plead guilty to "a felony of threatening Paulson" (Appellant's Brief, p. 28, fn2), is patently false, just like her claimed justification for shooting him.

Even under 42 U.S.C. section 1983 actions where a Plaintiff must prove a higher standard to overcome qualified immunity (that an officer's conduct violated clearly established law), mere possession of a weapon and refusal to drop it when commanded, does not justify the use of deadly force by law enforcement. In *Lee v. Russ*, 33 F.4th 860 (6th Cir. 2022), the Sixth Circuit denied defendants' claim of qualified immunity where the officers shot an individual who had previously unsheathed and waived a large knife at officers while telling them "Not today David" and repeatedly told the officer to shoot him. *Id.* at 862-63. The defendant

officer claimed that the individual, while still holding the knife near his waste, took another step toward him immediately prior to the shot being fired. *Id.* at 863. In denying the officer's motion for summary judgment, the court concluded "[d]irection aside, the video also offers support for the estate's view of the step as a tentative, not an aggressive, one." *Id.* at 865.

Lee relied upon two prior Sixth Circuit cases, also denying claims of qualified immunity where officers shot an individual who displayed a knife, refused to drop it but was not otherwise an imminent threat to officers or anyone. In *Sova v. City of Mounty Pleasant*, 142 F.3d 898 (6th Cir. 1988), the court denied a finding of qualified immunity where police shot a knife-wielding man who told police he wanted them to shoot him as he held a knife in his hand and pushed the screen door open to the porch where officers stood. In *Studdard v. Shelby County*, 934 F.2d 478, 480-81 (6th Cir. 2019), the court also denied officers' claims of qualified immunity where they shot a man who ignored commands to drop his knife, but instead raised it to his throat and moved in a swaying motion.

Eight Circuit cases have come to similar conclusions. In *Cole Estate of Richards*, 959 F.3d 1127, the Court denied qualified immunity when an officer shot an individual who followed another person up the steps of his home with a gun but turned away from the door toward his own vehicle prior to being shot. In *Ludwig v. Anderson*, 54 F.3rd 465 (8th Cir. 1995), the Court denied qualified

immunity when a knife-wielding individual told police they were going to have to kill him, switched the knife from hand to hand in a threatening manner, and then turned and took flight.

The facts of Norris' case more closely resemble those set forth in *Lee, Sova, Studdard, Estate of Richards,* and *Ludwig* than they do the cases relied upon by Appellants. Most importantly, the entirety of Norris' interaction with Paulson was captured by way of objective video evidence. "When facts shown in a video 'can be interpreted in multiple ways,' those facts 'should be viewed in the light most favorable to the non-moving party.'" *Reich v. City of Elizabethtown, Kentucky*, 945 F.3d 968, 973 (6th Cir. 2019)*;* quoting *Latits v. Phillips*, 878 F.3d 541, 547 (6th Cir. 2017).

Here, objective evidence by way of the officers' own body-worn camera documents what took place and specifically refutes Paulson's claimed justification. Norris was standing still with the knife down below his waste, approximately 24 feet away from Paulson when she shot him. PSDF ¶¶64-68: App. 99. No threats nor requests to be shot were made by Norris. PSDF ¶ 39; App. 97. ALL of Norris' movements had been away from Paulson. PSDF ¶¶ 33-34; App. 96. There were three officers with their guns drawn and there was no indication that Norris intended to do any harm to anyone. PSDF ¶¶ 64-70: App. 99-100. While three officers had their weapons drawn, only Paulson shot. PSDF ¶ 46; App. 97.

Again, it bears repeating. Law enforcement may not employ deadly force to compel compliance with law enforcement's directives. There is not a "you were warned" justification to the use of deadly force as argued on page 29 of Appellants' brief. Instead, the objective facts must definitively establish at the summary judgment stage that the officer was undoubtedly justified in killing the plaintiff. A simple viewing of the video itself contradicts such a conclusion. A reasonable jury could conclude that Norris did not pose an immediate threat to anyone at the time Paulson shot him. Viewing the evidence in the light most favorable to Norris, the use of deadly force by Paulson was unreasonable under the circumstances. At a minimum, a fact question exists, and the fact question is for the jury to answer under the facts of this case.

Looking at this case from a different perspective highlights the objective unreasonableness of Paulson's conduct. Assume for purposes of an alternative perspective, a civilian citizen shoots his neighbor in their front yard. The shooter goes in and makes a voluntary statement to law enforcement about what he claims occurred. He claims that his neighbor held a machete up over his head in a stabbing position, and, from between 10-15 feet away, "lunged" at him immediately before he shot. Based upon the statement, the shooter certainly has a viable justification defense. However, everything is on camera. A doorbell camera happens to capture the entirety of the incident. The crystal-clear video

footage shows that the neighbor was simply holding a hunting knife with a 4.5-inch blade down below his waste, was approximately 24 feet away, and did not take a single step toward the shooter before being shot.

In this circumstance, the shooter is not only going to be subject to civil liability, but the shooter is also likely going to be charged with numerous felonious criminal offenses that could include Attempted Murder, Willful Injury, Assault with a Deadly Weapon, to name a few. Looking at the objective facts for what they truly are, a fact question exists as to whether Paulson's conduct was objectively justifiable. As such, the district court properly denied Paulson's Motion for Summary Judgment as to Division II of plaintiff's Petition at Law.

CONCLUSION

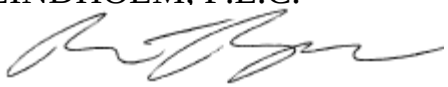
For the reasons set forth above, Appellee respectfully requests that this court affirm the district associate court's decision denying Appellants' motion for summary judgment.

REQUEST FOR ORAL ARGUMENT

Request is hereby made that upon submission of this case, counsel for Appellant requests to be heard in oral argument.

Respectfully Submitted,

GOURLEY, REHKEMPER & LINDHOLM, P.L.C.



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Robert G. Rehkemper

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