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IN THE SUPREME COURT OF IOWA

SUPREME COURT NO. 24-0828

SANDRA K. MORMANN, individually and as Administrator for the ESTATE OF AUGUSTIN G. MORMANN, and DANIEL J. MORMANN, individually,
Plaintiffs/Appellees,

v.

CITY OF MANCHESTER, IOWA and JAMES LOUIS WESSELS,
Defendants/Appellants

APPEAL FROM THE IOWA DISTRICT COURT FOR DELWARE COUNTY
CASE NUMBER: LACV008847
THE HONORABLE THOMAS BITTER

APPELLANTS' BRIEF

David T. Bower, AT0009246
Logan J. Eliasen, AT0013755
Nyemaster Goode, P.C.
700 Walnut Street, Suite 1300,
Des Moines, Iowa 50309
Telephone: (515) 283-3100
Fax: (515) 283-8045
Email: dbower@nyemaster.com
leliasen@nyemaster.com

Timothy Clausen, AT0001554
Douglas Phillips, AT0006251
Zachary Clausen, AT0013741
Klass Law Firm, L.L.P.
4280 Sergeant Rd., Suite 290
Sioux City, Iowa 51106
Telephone: (712) 252-1866
Fax: (712) 252-5822
Email: phillips@klasslaw.com
clausen@klasslaw.com
zclausen@klasslaw.com

ATTORNEYS FOR APPELLANTS

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Statement of Issues Presented for Review

I. Whether, under Iowa Code Sections 670.4(1)(k) and 670.12, Defendants are immune from Plaintiffs' claims because they are "based upon or arising out of an act or omission of a municipality in connection with an emergency response."

II. Whether the district court erred in permitting Plaintiffs to submit claims for assault and battery to the jury that were not properly pleaded.

III. Whether the district court erred in finding that Plaintiffs presented sufficient evidence to submit their assault and battery claims to the jury.

IV. Whether the district court erred by allowing admission of prejudicial hearsay in the form of a dying declaration.

V. Whether the district court erred in allowing evidence of the Manchester Police Department's policies and lack of video footage.

VI. Whether the district court erred in finding that Plaintiffs presented sufficient evidence to support their request for punitive damages.

Routing Statement

The Iowa Supreme Court should retain this appeal as it involves fundamental issues of broad public importance regarding the scope of municipal liability for assault and battery relating to emergency responses, and a request for the Court to recognize that the Iowa Constitution protects a common law right to money damages against municipal employees, both of which require ultimate determination by the Supreme Court. *See* Iowa R. App. P. 6.1101(2)(d).

Nature of the Case

Defendants James Wessels ("***Wessels***") and the City of Manchester (the "***City***") appeal the March 22, 2024 jury verdicts and April 4, 2024 judgment in favor of Plaintiffs Sandra K. Mormann, individually and as Administrator of the Estate of Augustin G. Mormann, and Daniel J. Mormann, individually, (collectively "***Plaintiffs***"), the final orders entered on April 24, 2024, and from all adverse rulings and orders inhering therein. (D0305, Verdict, 2 (3/22/24); D0316, Judgment, 1 (4/4/24); D0330, Order, JNOV, 3).

Plaintiffs' claims are "based upon or arising out of an act or omission of a municipality in connection with an emergency response" for which both the City and Wessels are statutorily immune under the Iowa Municipal Tort Claims Act ("***IMTCA***"). Iowa Code §§ 670.4(1)(k), 670.12. The district court erred in finding that Iowa Code Sections 670.4(1)(k) & 670.12 do not apply to their claims. (D0346, Tr. Vol. IV, 10:16–23:8; D0347, Tr. Vol. VI, 4:18–7:14 (06/25/24)).

Further, Plaintiffs' assault and battery claims were never pleaded. The district court erred by permitting Plaintiffs to interject those claims on the very eve of trial to avoid a jury instruction on comparative fault.

The district court further erred in finding that Plaintiffs submitted sufficient evidence to prove their claims for assault and battery and punitive damages to the jury.

Finally, the district court abused its discretion with several evidentiary rulings for which reversal is required.

Statement of the Facts

I. Factual Background.

A. Gus evades the Iowa State Patrol.

On December 10, 2020 at approximately 3:00 pm, while traveling eastbound on Highway 20 outside Manchester, Iowa, Iowa State Patrol Trooper Eric Payne observed a motorcyclist speeding westbound. (D0344, Trial Tr. Vol. II, 132:23–134:22 (06/25/24)). His radar indicated the motorcycle was travelling ninety-nine (99) miles per hour ("***mph***") in a sixty-five (65) mph zone. (D0344, 135:3–5 & 165:9–16). Its speed had increased to one hundred and seven (107) mph on another radar check shortly thereafter. (D0344, 166:1–10).

Payne activated his lights and siren to affect a traffic stop but the motorcycle did not comply, and Payne initiated a pursuit. (D0344, 135:8–9 & 139:10–14). Payne turned his vehicle around and initiated a "rundown." (D0344, 166:4–7). When Payne caught the motorcycle, it was travelling one hundred and four (104) mph. (D0344, 166:9–10).

The motorcycle took Exit 13 and began to accelerate on the ramp. (D0344, 166:8–166:25). When it reached the end of the exit ramp, the motorcycle ran the stop sign, turned left across the overpass, and re-entered Highway 20 going the opposite direction. (D0344, 166:8–166:25). During this time, Payne observed the motorcycle's rear tire "wobble" whenever it accelerated or decelerated. (D0344, 167:1-4 & 169:3–6).

The motorcycle proceeded east on Highway 20 until Exit 13, at which time it again exited, ran a stop sign, and took Highway 38 towards Manchester. (D0344, 169:3–20). At that time, additional state troopers joined the pursuit. (D0344, 142:9–11 & 176:1–4).

B. Gus's evasion continues as he enters Manchester.

As the motorcycle approached Manchester, the police department's dispatch received notice of the pursuit. (D0342, Trial Tr. Vol. I, 110:25–111:10 (06/25/24)). Wessels left the police station department in his patrol car and parked in a center turn lane on Manchester's Main Street. (D0342,

112:6–20). The overhead lights on Wessels' vehicle were activated, and it faced the direction of the pursuit. (D0342, 116:19–25).

C. Wessels observes the motorcycle and initiates pursuit.

Shortly after Wessels parked his cruiser, Gus approached Wessels at a speed in excess of seventy (70) mph. (D0342, 114:21–25). Wessels observed the motorcycle slide while navigating a turn and nearly collide with a parked vehicle. (D0342, 114:3–25).

Upon sighting the motorcycle, Wessels immediately initiated his own pursuit with sirens activated. (D0342, 117:5–18). Wessels accelerated rapidly, reaching seventy-seven (77) mph on Franklin Street, yet the motorcycle was still "pulling away." (D0342, 133:5–24).

While still in town, the motorcycle passed vehicles in the center lane at extremely high rates of speed. (D0342, 117:5–18). By the time the motorcycle left town, Wessels was travelling in excess of eighty (80) mph. (D0342, 134:6–23). After leaving Manchester, the motorcycle continued to drive in the center of the road, forcing cars and a semitrailer truck to take to

the shoulder of the road. (D0342, 119:18–21). At this time, Wessels observed the motorcycle's rear tire repeatedly "slip[] out." (D0342, 119:18–120:5).

D. Wessels' pursuit continues outside of Manchester, and the motorcycle collides with his cruiser.

Wessels continued to pursue the vehicle onto a two-lane county road, 165th Street, westbound, where he began to close the distance. (D0342, 120:21–121:21; D0288, Ex. HH, Frank Satellite Photo, 1). Wessels reached speeds as high as one hundred and twenty-eight (128) mph to catch up. (D0342, 135:19–25).

Wessels observed the motorcycle "wobble" in a "violent" manner. (D0342, 121:25–122:18). Concerned that he would run over the motorcyclist if it capsized, Wessels passed the motorcycle in the eastbound (oncoming) lane of travel. (D0342, 122:10–18). When his cruiser was at least two car lengths ahead of the motorcycle, Wessels began to merge back into the westbound lane. (D0342, 124:12–17). He heard the motorcycle accelerate, and shortly thereafter it made contact with the right mirror of Wessels' vehicle. (D0342, 125:22–126:6; D0292, Ex. JJ, Point of Contact Model—

Mirror, 1). Wessels lost sight of the motorcycle, (D0342, 125:7–9), which subsequently made contact with the left rear panel of Wessels' cruiser, lost control, and crashed. (D0342, 87:22–88:5; D0294, Ex. KK, Point of Contact, 1; D0342, 60:2–4; D0299, Ex. NN, 1; D0301, Ex. OO, Motorcycle Path Model, 1).

E. Events after the collision, on-site, and at the hospital.

When first responders arrived at the scene, the motorcyclist was conscious. (D0346, 65:17–19). They determined it was Augustin Mormann (***"Gus"***), a thirty-one-year-old male with an extensive police record. (D0346, 79:21–80:6 ("From 2017 until [Gus's] death, there were 45 either citations or criminal charges.")). At the time of the collision, Gus's license was barred due to prior offenses.[1] (D0344, 57:2–14). The smell of alcohol was on Gus's breath, and he admitted to consuming alcohol prior to the police pursuit. (D0346, 53:12–16; 57:9–13). Gus told first responders that "he

[1] Gus had, in fact, been in prison for driving while barred in early 2020. (D0340, Trial Tr. Vol. III, 40:3–11).

didn't know what happened." (D0346, 53:8–11). Prior the collision, Wessels did not know Gus. (D0342, 109:18–19; 174:6–19).

Gus was air-lifted to the University of Iowa, where he tested positive for methamphetamine. (D0282, Ex. D, UIHC Lab Results, 1). At trial, Plaintiffs argued that Gus's neck was broken during the collision and that Gus was "permanently paralyzed". (D0342, 14:21–15:1). Sandra testified that, given the extent of his injuries, Gus was placed on a ventilator. (D0344, 39:22–24). According to Sandra, Gus could speak but could not move any part of his body except his right hand, could not "have bodily functions on his own without assistance," and could not breath without the aid of the ventilator. (D0342, 40:3–7).

F. Gus requests to be taken off his ventilator and passes away on January 15, 2021.

According to Sandra, Gus requested that his ventilator be removed on or about January 14, 2021. (D0344, 40:21–24). She testified that Gus understood this decision meant that he would die. (D0344, 41:12–19). Gus

lived for approximately 35 hours after his ventilator was removed, passing away on January 15, 2021. (D0344, 53:6–19).

G. Sandra alleges that Gus made a dying declaration about which she was permitted to testify at trial.

Defendants moved in limine to exclude Sandra's testimony that, around the time Gus's decided to go off the ventilator, he told her that Wessels "ran him off the road." (D0194, Defs.' Mot. Limine, 33–35, ¶¶ 130–137). The district court denied Defendants' motion pretrial, (D0345, Tr. Hearing, 58:23–60:1 (03/06/24); D0246, Order, 5 (03/08/24)), and, over Defendants' hearsay objection, Sandra was permitted to testify about Gus's alleged statement at trial, (D0344, 42:14-19; 49:15–18, & 52:16), relaying the statement as, "I got pushed off the road at a high rate of speed." (D0344, 53:4–5).

II. Procedural History.

A. Plaintiffs' Petition.

Plaintiffs filed their Petition at Law on May 20, 2021. (D0001, Pet., 1 (05/20/24)). There, they asserted five claims against Defendants:

<u>Count I:</u> Excessive Force (Article I, Section);

<u>Count II:</u> Substantive Due Process (Article I, Section 9);

<u>Count III:</u> Deprivation of Life and Liberty, Acquiring, Possessing and Protecting Property, and Pursuing and Obtaining Safety and Happiness (Article I, Section 1);

<u>Count IV:</u> Wrongful Death – Negligence; and

<u>Count V:</u> Loss of Consortium.

(D0001, 5–9). The Petition did not assert counts alleging assault or battery or include those words. (D0001, 1–10).

On June 3, 2021, Defendants filed their Answer and Affirmative Defenses, (D0004, Answer, 1 (06/03/24)), followed by their First Amended Answer and Affirmative Defenses on June 23, 2021. (D0015, Amend. Answer, 1 (06/23/24)). In both, Defendants pleaded the defense that Plaintiffs' claims are barred, in whole or in part, on the basis of Iowa Code § 670.4 and § 670.12. (D0004, 5; D0015, 5).

B. Plaintiffs' Amended and Substituted Petition.

On April 11, 2022, Plaintiffs filed an Amended and Substituted Petition at Law ("***Amended Petition***"). (D0055, 1). There, they asserted the same five claims, but added two additional claims and a new party:

> Count VI: Conspiracy against Wessels, and Chief of Police James Hauschild.
>
> Count VII: Violation of Article I, Section 2 of the Iowa Constitution—Iowa Code Section 22—Failure to Maintain Records and Spoliation against Wessels, Hauschild, and the City.

(D0055, 7–20). Like the Petition, the Amended Petition did not assert counts alleging assault and/or battery, nor did it include any iteration of the words "assault" and "battery" or any reference to elements of these claims. (D0055, 1–21).

On April 22, 2022, Defendants filed their Answer to Plaintiffs' Amended Petition, asserting the same defenses and also that Defendants are entitled to the immunities found in Iowa Code § 321.231. (D0059, 1).

On September 2, 2022, Plaintiffs voluntarily dismissed all claims against Hauschild and Count VI. (D0092, Dismiss., 1 (09/2/22); D0093, Order (09/07/22)).

C. The Parties' Motions for Summary Judgment.

On March 6, 2023, Plaintiffs filed a motion for partial summary judgment on liability. (D0101, Part. Mot. Summ. Judg., 1 (03/06/23)).

On April 4, 2023, Defendants filed their resistance to Plaintiffs' motion, as well as their own motion for summary judgment. (D0119, Defs.' Mot. for Summ. Judg. (04/04/23); D0118, Defs.' Res. Pls.' Mot. Summ. Judg. and Br. Mot. Summ. Judg. (04/04/23)). There, Defendants argued, among other things, that Defendants are immune from liability under Iowa Code Sections 670.4(1)(k) and 670.12. (D0118, 6–14).

D. The district court denies Plaintiffs' Motion for Partial Summary Judgment and grants Defendants' Motion for Summary Judgment on all claims except negligence and wrongful death.

On May 16, 2023, the district court denied Plaintiffs' motion for partial summary judgment on liability and granted Defendants' motion

with respect to Count II, Count III, and Count VII, relying on *Burnett v. Smith*, 990 N.W.2d 289 (Iowa 2023), *reh'g denied* (May 23, 2023). D0130, Order Re: Summ. Judg., 1–3) (05/16/23)). The district court did not address Defendants' motion with respect to Count I, erroneously stating that Defendants' motion addressed only Counts II, III, and VII. (D0130, 1–4).

E. The district court dismisses Count I (Excessive Force).

On September 28, 2023, Defendants filed a motion for partial summary judgment as to Count I. (D0134, Defs.' Mot. Summ. Judg. (09/28/23)). On January 15, 2024, the district court granted Defendants' motion under *Burnett*. (D0146, Ord. Re: Summ. Judg., 2 (01/15/24)). Following this ruling, and as of January 15, 2024, only Counts IV (Wrongful Death—Negligence) and V (Consortium) remained for trial.

F. Plaintiffs seek to introduce assault and battery claims through their submission of proposed jury instructions.

In their February 19, 2024 resistance to Defendants' motion to bifurcate trial, Plaintiffs asserted they were pursuing common law claims for assault and battery, despite such claims never appearing in their

Petition or Amended Petition, and their only remaining claims being for negligence and loss of consortium. (D0152, 1, ¶ 1). This, despite the fact that deadline to amend pleadings was originally November 2, 2021, which was a full year before the original trial date of November 2, 2022. (D0014, Trial Sched. Plan, 2 (06/10/21); D0023, Ord. Setting Trial, 1 (07/13/21)).

In their proposed jury instructions, filed shortly-thereafter, Plaintiffs proposed marshalling instructions for assault, battery, and wrongful death caused by negligence, accompanied by a brief in support of the proposed assault and battery instructions. (D0203, Pls.' Jury Instr. (02/21/24); D0228, Br. Jury Instr. (2/26/24)). Defendants responded, arguing that assault and battery claims were improper given that there were "no pending claims for assault and battery," and that the only remaining claims for trial were Count IV (wrongful death) and Count V (loss of consortium). (D0233, Defs.' Obj. Pls.' Instr., 4 (02/28/24)).

G. One week before trial begins, the district court permits Plaintiffs to pursue their newly-asserted and untimely assault and battery claims.

On March 5, 2024, the district court heard argument on, among other things, "the extent to which any assault claims will be submitted." (D0229, Hearing Ord. (02/29/24). Following argument, the district court entered an order holding:

> Throughout the pendency of this case, Plaintiffs have repeatedly asserted a belief that [Gus] was assaulted by Officer Wessels when [Gus]'s motorcycle was allegedly run off the road by Wessels. That allegation is certainly not new, and allowing Plaintiffs to pursue such a claim at trial will not add any additional witnesses or evidence.

(D0245, Ord., 3).

H. Defendants' Motion for Judgment on the Pleadings.

On March 11, 2024, Defendants moved for partial judgment on the pleadings, on the ground that assault and battery claims had never been pleaded. (D0247, Defs.' Br. Mot. Judg. Plead., 2–11 (03/11/24)). However, the district court did not issue a ruling before trial.

I. Defendants' Renewed Motion for Judgment on the Pleadings.

Following the close of Plaintiffs' case-in-chief, Defendants requested the Court to rule on their pending motion for judgment on the pleadings. (D0346, 4:12–10:10). The district court held that the issue was already addressed in its March 7, 2024 ruling. (D0346, 10:1–5). However, the district court had not considered whether Plaintiffs' belated assault and battery claims were properly pleaded under Iowa Code § 670A. (D0346, 10:5–8). Following a short recess and review of *Nahas v. Polk County*, 991 N.W.2d 770 (Iowa 2023), the district court denied Defendants' motion, holding "that the application of the new statute would not be retrospective, and I think in this case that we're dealing with today, the Mormann case, all of the incidents that occurred with the Mormann case occurred prior to the change in statute creating this heightened pleading standard." (D0346, 22:16–23:3).

J. The district court denies Defendants' Motion for Directed Verdict.

On March 19, 2024, Defendants moved for directed verdict and argued several of the issues raised in their written motion, namely (1) that Defendants are entitled to emergency response immunity pursuant to Iowa Code Section 670.4(1)(k), regardless of the nature of the tort alleged; and (2) to the extent "liability may be imposed by another statute," Iowa Code § 670.4(1), Plaintiffs had never pleaded or proven such a statute or violation thereof. (D0346, 10:11–23:8; D0260, 1). Plaintiffs did not dispute that the events and circumstances at issue were part of an emergency response, instead arguing that the Iowa Constitution protects a common law right "to sue police officers for assault." (D0346, 11:15–12:6).

The district court denied Defendants' motion, holding: "I think that the immunity—there's exceptions to immunity when the conduct rises to a certain level." (D0346, 13:3–5). Relying on *Burnett* and *White v. Harkrider*, 990 N.W.2d 647 (Iowa 2023), the district court held:

> I do think that this common law claim is permitted now under the case law. I think Plaintiff is entitled to make this common law claim. . . . If I'm wrong, the appellate court will tell me I'm wrong and that that never should have been submitted.

(D0346, 16:4–15). The following exchange then occurred:

> [Defense Counsel]: Don't want to risk a contempt citation here by keeping to talk, but I'm still not hearing the words "immunity does not apply." Is that what the Court's ruling is?
>
> THE COURT: What I'm saying is I don't think immunity applies in every single situation. That's what I'm telling you.
>
> [Defense Counsel]: Okay.
>
> THE COURT: I don't think we can make the blanket statement and say it applies every – every situation across the board.
>
> [Plaintiff's Counsel]: And if I might, I would just say, you know, the problem with the immunity provision is it's just a single legislative enactment and it can't negate a constitutionally perfected right. That's what *White* says. That's what *Burnett* says.

(D0346, 16:16–17:6).

On March 21, 2024, Defendants renewed their motion for directed verdict. (D0347, 4:18–8:3). As it relates to Defendants' immunity arguments under the IMTCA, the district court held:

> Defense specifically this morning alleges that there is no assault and that assault is not proper under the law, and again, under the White case, the claim of assault was specifically addressed on appeal and that claim was allowed to stand under similar circumstances. I do think assault is appropriate when you look at the statute and you look at the elements that the plaintiff has to prove and the evidence that we've had come into this trial.

(D0345, 6:13–24).

K. Plaintiffs elect to submit only their assault and battery claims to the jury.

Plaintiffs' proposed jury instructions included marshalling instructions for assault, battery, and wrongful death caused by negligence. (D0203, 9–12). However, during the jury instruction conference, Plaintiffs advised that they "d[id]n't want to submit" their negligence/recklessness claim to the jury because they disagreed with the district court's decision to submit a comparative fault instruction along with that claim, as required under Iowa law, and believed that simply withdrawing the claim from submission would preserve the issue for appeal. (D0347, 16:7–18:22).

In response, the district court stated:

> . . . I think what you’re saying is Plaintiffs disagree that comparative fault would apply or should apply to Plaintiffs' recklessness claim, and so when we make our record about instructions and about the verdict form, we won't be including a verdict form that has anything to do with recklessness. *That’s intentional on Plaintiffs’ part*. I won’t ask you to stand up on the record today and dismiss your count related to recklessness, but you’re not going to ask that it be submitted to the jury by way of any instructions or anything on a verdict form where they would have to decide the issue of recklessness or resultingly comparative fault. Is that fair enough?

(D0347, 17:4–16) (emphasis added). Defendants requested that the negligence/recklessness claim either be dismissed or submitted, which the district court declined. (D0347, 18:11–19).

L. The jury returns a verdict in Plaintiffs’ favor.

On March 21, 2024, the court instructed the jury on Plaintiffs’ untimely assault and battery claims, and the parties proceeded with closing arguments. (D0346, 30:21–22; D0262, Instructions (03/21/24)).

On March 22, 2024 the jury returned a verdict in Plaintiffs’ favor on both their assault and battery claims, found that Wessels was not justified in his actions, and awarded a total of $4.25 million against both

Defendants. (D0305, 2). That same day, in a bifurcated trial, the jury awarded an additional $10,000 for punitive damages against Wessels. (D0316, 1). Judgment was entered on April 4, 2024. (D0326, Ord. for Judg., 1 (04/04/24)).

M. The district court denies Defendants' Motion for Judgment Notwithstanding the Verdict and Motion for New Trial.

On April 5, 2024, Defendants moved for judgment notwithstanding the verdict and a new trial, raising the same issues as at directed verdict, namely that (1) emergency response immunity barred Defendants from liability, (2) claims for assault and battery had not been properly pleaded, and (3) insufficient evidence existed to sustain the claims of assault and battery, and to warrant the submission of punitive damages; and (4) various evidentiary errors warrant a new trial. (D0327, 1–19). On April 23, 2024, the district court denied Defendants' motions, (D0330, 3), and Defendants timely appealed on May 14, 2024. (D0333, Notice Appeal, 1).

Argument

I. Under Iowa Code Sections 670.4(1)(k) and 670.12, Defendants are immune from Plaintiffs' claims.

A. Error Preservation.

On March 19, 2024, Defendants moved for directed verdict alleging statutory immunity pursuant to Iowa Code Sections 670.4(1)(k) & 670.12, (D0260, 16–21), renewed on March 21, 2024, (D0346, 12:16–17), both of which were denied. On April 5, 2024, Defendants moved for judgment notwithstanding the verdict on the same grounds, (D0327, 9–19), which was denied on April 23, 2024. (D0330, 2).

B. Standard of Review.

Denial of motions for directed verdict and judgment notwithstanding the verdict are reviewed for errors at law. *Royal Indem. Co. v. Factory Mut. Ins. Co.*, 786 N.W.2d 839, 846 (Iowa 2010). A directed verdict should be granted where there was "no substantial evidence to support the elements of the plaintiff's claim." *Pavone v. Kirke,* 801 N.W.2d 477, 487 (Iowa 2011).

C. The IMTCA governs tort liability of municipalities and their officers and employees.

The IMTCA is "a comprehensive law governing the liability of municipalities and their officers and employees." *Thomas v. Gavin*, 838 N.W.2d 518, 526 (Iowa 2013). The statute, enacted in 1968, abolished the traditional, common-law sovereign immunity enjoyed by municipalities. *See Venckus v. City of Iowa City*, 930 N.W.2d 792, 809 (Iowa 2019) ("[The IMTCA] allows people to assert claims against municipalities, their officers, and their employees that otherwise would have been barred by the doctrine of sovereign immunity.").

While the IMTCA "establishes parameters for tort liability for negligent acts and omissions by a municipality or its officers or employees," *Keystone Elec. Mfg., Co. v. City of Des Moines*, 586 N.W.2d 340, 345–46 (Iowa 1998), it "does not expand any existing cause of action or create any new cause of action against a municipality." *Venckus*, 930 N.W.2d at 809 (quotation omitted). "Instead, the Act allows people to assert claims against municipalities, their officers, and their employees that

otherwise would have been barred by the doctrine of sovereign immunity." *Id.* (citation omitted). "The substance of any legal claim asserted under the IMTCA must arise from some source—common law, statute, or constitution—independent of the IMTCA." *Id.* at 809–10.

The Iowa Supreme Court has consistently held, without distinction, that the IMTCA "is the exclusive remedy for persons who have tort claims against municipalities and their employees." *Thomas*, 838 N.W.2d at 525 (citing *Rucker v. Humboldt Cmty. Sch. Dist.*, 737 N.W.2d 292, 293 (Iowa 2007)); *Willson v. City of Des Moines*, 386 N.W.2d 76, 81 (Iowa 1986). The IMTCA requires that claims against municipalities and their officers and employees proceed within the IMTCA's framework, including the statutory immunities provided therein. *Thomas*, 838 N.W.2d at 525.

D. Tort liability under the IMTCA is broad.

The broad "[l]iability imposed" by the IMTCA is set forth in Section 670.2(1):

> Except as otherwise provided in this chapter, every municipality[2] is subject to liability for its *torts* and those of its officers and employees, acting within the scope of their employment or duties, whether arising out of a governmental or proprietary function.

Iowa Code § 670.2(1) (emphasis and footnote added). The term "torts" is defined broadly and includes "every civil wrong" resulting in personal injury, expressly including "denial or impairment of any right under any constitutional provision, statute or rule of law." Iowa Code § 670.1(4) (emphasis in original). There is no carve-out for certain "torts," such as assault or battery, or, as the district court suggested, when "the conduct rises to a certain level." (D0346, 13:3–5). *See, e.g., Cubit v. Mahaska Cnty.*, 677 N.W.2d 777, 781–82 (Iowa 2004) (stating that courts have "no power to read a limitation into the statute that is not supported by the words chosen by the general assembly").

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[2] It is undisputed that the City is a "municipality" under Iowa Code § 670.4(2).

E. Tort liability under the IMTCA is limited "as otherwise provided" in the statute, which includes express immunity for certain claims enumerated in Iowa Code Section 670.4(1).

Although liability under the IMTCA is broad, it is limited by the first sentence of its liability provision: "*Except as otherwise provided in this chapter*, every municipality is subject to liability for its torts . . ." Iowa Code § 670.2(1) (emphasis added). This "except as otherwise provided" clause refers, in part, to those "[c]laims exempted" under Section 670.4(1), unless liability "may be imposed by [an] express statute dealing with such claims". (Iowa Code § 670.4(1)). When a municipality "is subject to liability under chapter 670, fairness dictates that it also benefit[s] from the immunities listed in section 670.4." *Kulish v. Ellsworth*, 566 N.W.2d 885, 891 (Iowa 1997).

Although Section 670.4(1) speaks only of a "municipality," and not its officers and employees, the Legislature has also exempted such officers and employees from personal liability for claims exempted thereunder: "All officers and employees of municipalities are not personally liable for claims

which are exempted under section 670.4, except claims for punitive damages, and actions permitted under section 85.20." Iowa Code § 670.4. "Section 670.12 makes clear that municipal officers and employees are not personally liable for these excepted claims." *Thomas*, 838 N.W.2d at 522.

F. A high-speed pursuit of a fleeing criminal suspect constitutes an "emergency response" under Iowa Code Section 670.4(1)(k).

The immunity at issue here applies to claims "based upon or arising out of an act or omission of a municipality in connection with an *emergency response* including but not limited to acts or omissions in connection with emergency response communications services." Iowa Code § 670.4(1)(k) (emphasis added). Application of Iowa precedent to the undisputed facts of this case demonstrates that Wessels' alleged conduct occurred in connection with an emergency response. Plaintiffs have never argued otherwise.

Emergency response immunity "sweeps broadly" and encompasses "all claim[s] based upon or arising out of an act or omission in connection

with an emergency response . . . ." *Cubit*, 677 N.W.2d at 782 (internal citation omitted)). The Legislature's broad language "conveys a legislative intent to cover a wide range of situations." *Adams v. City of Des Moines*, 629 N.W.2d 367, 370 (Iowa 2001). The statute's "arising out of" clause has been interpreted broadly to require only "some causal connection between the 'claim' and 'an act of omission in connection with an emergency response.'" *Cubit*, 677 N.W.2d at 784 (quoting Iowa Code § 670A.4(1)(k)). Accordingly, "only if the plaintiff's [tort] claim . . . may be proved without reference to or reliance upon the [defendant's] acts or omissions during the emergency . . . will the plaintiff avoid the statutory immunity of section 670.4(11)." *Id.*

Christiansen v. Eral is almost directly on-point. No. 22-1971, 2024 WL 108848 (Iowa Ct. App. Jan. 10, 2024), *as amended* (Jan. 25, 2024). There, the plaintiff filed suit against Sioux City and two individuals for injuries suffered in a collision following law enforcement's use of a Pursuit Intervention Technique ("***PIT***") maneuver. *Id.* An officer observed a

mechanical issue with the plaintiff's vehicle, activated his lights and sirens, and pursued the plaintiff attempting to have him pull over. *Id.* at *1. The plaintiff did not comply, and, after a few minutes, entered Sioux City, travelling up to eighty (80) mph through residential areas. *Id.*

The officer alerted the police department "about the chase and his suspicion that [plaintiff] was operating his vehicle while intoxicated." *Id.* After evading stop sticks, the plaintiff "continued driving between fifty (50) and sixty (60) mph along a residential street and eventually sped up to over seventy mph." *Id.* The defendant officer executed a PIT maneuver "by using his patrol vehicle to collide with the rear of Christiansen's vehicle," which caused the vehicle to crash, resulting in serious injuries to the plaintiff. *Id.* He filed tort claims against the three defendants, and the district court granted the defendants' motion to dismiss based on the emergency response immunity. *Id.*

On appeal, the Court of Appeals held that an "emergency response involving a high-speed chase of a fleeing criminal suspect falls within the

. . . broad definition of an emergency response." *Id.* at * 6 (quoting *Cubit ex rel. Cubit v. Mahaska Cnty.*, No. 02-1478, 2003 WL 21920399, at *2 (Iowa Ct. App. Aug. 13, 2003). Noting that "the emergency response exemption still applies even if a municipal department fails to follow its own internal policy," the court held both the City and the two individual defendants were immune from liability pursuant to Iowa Code Sections 670.4(1)(k) and 670.12. *Id.*

Cubit ex rel. Cubit v. Mahaska County also involved a high-speed chase of a suspect fleeing in a motor vehicle. No. 02-1478, 2003 WL 21920399, at *2 (Iowa Ct. App. Aug. 13, 2003), *aff'd sub nom. Cubit v. Mahaska Cnty.*, 677 N.W.2d 777 (Iowa 2004). There, the plaintiff (a police officer) brought suit against the County for negligent supervision where he was injured at the scene of a police road block set up to apprehend a fleeing suspect. *Id*. at *1. He claimed that the radio dispatcher negligently failed to inform him of the fleeing suspect's stated intention to kill himself and the officers pursuing

him. *Id.* The district court granted the County's motion for summary judgment based on emergency response immunity. *Id.*

The Court of Appeals rejected the plaintiff's argument that scope of Section 670.4(1)(k) immunity does not include a negligent supervision claim, finding that the statute's broad language, "in connection with an emergency . . . conveys a legislative intent to cover a wide range of situations," including the one presented. *Id.* at *2 (citations omitted). As the court noted:

> *The dispositive question is whether Cubit's claim arose out of or in connection with an emergency*. We believe a high speed chase of a fleeing criminal suspect falls within the . . . broad definition of an emergency response.

Id. (emphasis added). *See also, e.g., Sero v. City of Waterloo, Iowa*, No. C08-2028, 2009 WL 2475066, at *17 (N.D. Iowa Aug. 11, 2009) ("In this case, the police officers were pursuing a fleeing suspect. Such police action constitutes an emergency response for purposes of section 670.4(11).").

See also Kulish, 566 N.W.2d at 891 (finding plaintiff's argument that a response to a two-car collision was not an emergency response "cannot be taken seriously.").

G. The acts or omissions on which Plaintiffs' claims "are based upon or arising out of" occurred "in connection with an emergency response."

The nature of the emergency presented by Gus's behavior on December 10, 2020 is apparent. He was traveling in excess of one hundred (100) mph, ignoring the flashing lights and sirens of Iowa State Patrol Officers in pursuit, running stop signs, travelling through the City of Manchester—a residential area—at speeds of at least seventy (70) mph, passing other vehicles in the center of the road, forcing cars and a semitrailer truck to take to the shoulder of the road, all with repeated observation of a slipping rear tire. (D0342, 117:5–18, 119:18–120:5, & 121:25–122:9; D0344, 139:10–16, 165:23–166:25, & 183:21–184:12). None of these facts are in dispute, and, respectfully, any claim that Wessels' pursuit of

Gus was anything other than part of an emergency response "cannot be taken seriously." *Kulish*, 566 N.W.2d at 891–92.

Further, it is undisputed that all of Wessels' acts and omissions on which Plaintiffs' claims are based occurred during the course of the emergency. Upon seeing Gus, Wessels initiated his pursuit, during which, a short while later, the collision at issue occurred. (D0342, 126:10–127:1). Plaintiffs' claims "may not be proved without reference to or reliance upon the [Defendant's] acts or omissions during the emergency . . . ." *Cubit*, 677 N.W.2d at 784. Accordingly, Plaintiffs cannot avoid the statutory immunity of Section 670.4(11)." *Id.* Defendants were entitled to immunity under Iowa Code Sections 670.4(1)(k) and 670.12 as a matter of law. The district court's judgment in Plaintiffs' favor should be reversed, and the case remanded for entry of judgment in favor of Defendants.

H. Wessels is immune from liability regardless of whether Article I, Section 8 of the Iowa Constitution protects a common law right for damages against public officials under certain circumstances.

Plaintiffs did not and, to Defendants' knowledge, do not dispute that Wessels' conduct on which their claims are based occurred in connection with an "emergency response." Rather, they argue that their assault and battery claims against Wessels were recognized at the time of Iowa's founding, and as a result, are in fact protected by Article I, Section 8 of the Iowa Constitution, and outside the scope of the IMTCA (including its express inclusion of constitutional torts). (D0346, 11:15–6; D0252, 3–4). This issue has never been squarely-addressed by the Iowa Supreme Court, but respectfully, need not be resolved here. *See Lennette v. State*, 975 N.W.2d 380, 413 (Iowa 2022) (McDonald, J., concurring) ("A strong argument can be made that such litigants need not assert constitutional causes of action for alleged violations of article I, section 8 because article I, section 8 itself preserves a constitutional right to assert nonconstitutional causes of action

against government officials.”).[3] The relevant question in this appeal is whether the State has the authority to pass legislation which modifies the common law, and specifically, legislation that provides immunity for a public official where a plaintiff’s claims arise out of conduct that occurred in connection with an emergency response. Iowa Code §§ 670.4(1)(k); 670.12. Defendants respectfully submit that it does and Wessels—like the City[4]—is immune.

1. The Legislature has the authority to modify the common law to provide additional defenses to officers and employees of a municipality.

Even if Plaintiffs’ claims against Wessels are, in fact, protected by the Constitution, they must also show that the legislative immunities set forth

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[3] Of note, this issue may be before the Iowa Supreme Court on further review in *Wagner v. State*, No. 22-1625.

[4] Defendants presume Plaintiffs’ arguments relate only to their claims against Wessels and not the City. Municipalities plainly enjoyed sovereign immunity at the time of Iowa’s founding, which has been waived by the IMTCA subject to the limitations set forth therein, including emergency response immunity.

in Iowa Code Sections 670.4(1) and 670.12 do not, and in fact, *cannot* constitutionally apply to their claims in this case. Such an argument is without merit, is contrary to Iowa law, and would create an entirely new type of quasi-constitutional claim against the officers and employees of municipalities.

First, as already discussed, the Iowa Supreme Court has consistently held, without distinction, that the IMTCA "is the exclusive remedy for persons who have tort claims against municipalities and their employees", and that "Section 670.12 makes clear that municipal officers and employees are not personally liable for these excepted claims." *Thomas*, 838 N.W.2d at 525, 522.

Second, neither of the cases Plaintiffs rely on stand for this proposition. For example, after dismissing the plaintiffs' constitutional claims, the *White v. Harkrider* court found only that the plaintiffs' assault claim, properly plead, could not be dismissed, pre-answer, based on the affirmative defense of justification under Iowa Code § 804.8(1). *White*, 990

N.W.2d at 656. It did not hold or even suggest that common law claims for assault or battery against a police officer are a "constitutionally perfected right," as Plaintiffs argued to the district court. *See Klum Est. of Klum v. City of Davenport*, No. 3:23-CV-00043-RGE-WPK, 2024 WL 2880640, at *12 n.3 (S.D. Iowa May 30, 2024) ("the case on which they rely, *White v. Harkrider*, does not support that position"). Further, *White* did not involve the IMTCA.

Turning to *Burnett v. Smith*, its holding was simple and straight-forward in overruling *Godfrey*. *Burnett*, 990 N.W.2d at 307. The Court did recognize that "[t]he common law tradition *permitted* common law claims against local law enforcement officials for tortious actions taken in excess of their authority". *Id.* at 299 (emphasis in original). However, it did not address the IMTCA, its immunities, or hold (as Plaintiffs previously argued) that there "was a common law right to sue police officers for assault in 1857 and the founders of the state of Iowa protected that right by putting Article I, Section 8 in the Iowa Constitution." (D0346, 12:2–6). Nor

did it hold the State lacked authority to modify such common law rights through appropriate legislation.[5]

Third, "[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 v. State*, 952 N.W.2d 843, 847 (Iowa 2020). The intent of the Iowa Tort Claims Act, and by extension the IMTCA, is "to serve as the gateway for all tort litigation against the State". *Id.*

Further, while "[t]he common law belongs to the courts" and statutes "are the legislature's domain", the Legislature "can enact laws that modify the common law." *Burnett*, 990 N.W.2d at 305. Even assuming the

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[5] *See also Klum*, 2024 WL 2880640, at *12 n.3 (rejecting "attempt to partially reframe their reliance on the Iowa Constitution by arguing that, under *Burnett*, common law claims recognized at the time of the adoption of the Iowa Constitution—such as assault and battery—are 'protected by the Iowa Constitution'").

constitutional protection Plaintiffs allege, that does not mean the Legislature cannot pass legislation which provides additional defenses, including immunities, for acts and omissions which occur under certain circumstances. “The common law is not frozen and it can be modified by the legislature so long as the legislation passes [constitutional muster]”. *Garrison v. New Fashion Pork LLP*, 977 N.W.2d 67, 87–88 (Iowa 2022) (legislation that affects how people use and enjoy their land permissible if it “passes the rational basis test and does not amount to a taking without just compensation”). *See also Grimm v. US W. Commc'ns, Inc.*, 644 N.W.2d 8, 16 (Iowa 2002) (“Thus, with great timidity the court must defer to the legislature to establish the parameters of our common law as well as statutory law” (quotation and alternations omitted)).

Section 670.4(1)(k) does not prevent citizens from filing suit against public officials for assault and battery. Nor does it alter justification defenses available to public officials at common law, the contours of which have been recognized and subsequently modified by statute. *See, e.g.,* Iowa

Code §§ 704.1–704.3 & 804.8. Rather, it provides an additional affirmative defense where the official's conduct occurred in connection with an emergency response.

It is the fact of an *emergency* that distinguishes Section 670.4(1)(k) from more ordinary circumstances where the traditional justification defense may apply. Implicit in the Legislature's enactment is the common-sense understanding that a public official's response (here, a law enforcement officer) to an emergency differs fundamentally from more ordinary circumstances where a traditional justification defense may otherwise apply. Decision-making is accelerated, and involves judgments that are based on the nature of the emergency, rather than a more measured "reasonable belief" that the officer's actions are "necessary to effect the arrest or to defend any person from bodily harm while making the arrest." Iowa Code § 804.8(1).

Further, as the district court instructed in this case, a justification defense requires proof that the officer's actions were "'objectively

reasonable' in light of the facts and circumstances confronting the officer, without regard to his underlying intent or motivation". (D0262, 8). Where, as here, the "emergency" is well-established, juries should not be tasked with determining whether the officer's response was "objectively reasonable," exposing municipalities and their employees to lengthy and costly litigation resulting from their response to emergencies. Respectfully, it is that scenario that the Legislature intended, and has the authority, to address.

Finally, the limitation on recovery of money damages for claims arising in connection with an emergency response does not undermine any common law right that may be protected by the Constitution. It is simply an additional limitation on such claims, enacted by the Legislature, for which it has the authority. *Garrison*, 977 N.W.2d at 87-88 ("The common law is not frozen . . . ."). Plaintiffs' claim that the Section 670.4(1)(k)'s emergency response immunity does not apply to Wessels is without merit.

2. The Court should decline to recognize a constitutional right to assert nonconstitutional causes of action against government officials.

In his *Lennette* concurrence, Justice McDonald noted that prior to "modern doctrinal developments, particularly the state action doctrine", a public official's "conduct was left to the common law and private redress". *Lennette*, 975 N.W.2d at 414 (McDonald, J., concurring). According to the concurrence, "[i]n the absence of any concept of state action, article I, section 8 would have legal effect only if it prohibited lawmakers from undermining the common law regime of rights and remedies". *Id.* at 412. *See also id.* at 413 (the extent of any constitutional guarantees and "whether the nature of the right must be reconsidered in light of subsequent doctrinal developments, such as the state action doctrine, are good questions that should be considered further"). In modern times, however, "unless acting under color of state law, [a public official] cannot commit constitutional violations. *Wagner v. State*, 952 N.W.2d 843, 853–54 (Iowa 2020). The "principal test" of state action is whether there is "a sufficiently

close nexus between the state and the challenged action" such "that the private action "may be fairly treated as that of the state itself." *Young v. Cedar Cnty. Work Activity Ctr., Inc.*, 418 N.W.2d 844, 846–47 (Iowa 1987) (quoting *Jackson v. Metropolitan Edison Co.,* 419 U.S. 345 (1974).

Here, Plaintiffs alleged that Wessels' actions or omission occurred "while acting under color of state law". (D0055, ¶¶ 8, 39). It is undisputed that Wessels' pursuit of the fleeing Gus provides "a sufficiently close nexus between the state and the challenged action" such that state action—as alleged by Plaintiffs—is at issue. *Young*, 418 N.W.2d at 846–47. Respectfully, the Court should decline to recognize that the Iowa Constitution preserves a constitutional right to assert nonconstitutional causes of action against government officials.[6]

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[6] Such a course of action may lead to *Godfrey* redux, resulting in actions alleging constitutional protections for various common law rights and remedies prior to 1857, requiring the courts to repeatedly interpret, apply, and review the State's constitutional authority to modify the State's and Municipalities' liability in response to various common law claims.

II. Plaintiffs' assault and battery claims were not properly pleaded, and the district court erred in submitting those claims to the jury.

A. Error Preservation.

Defendants objected to Plaintiffs' proposed assault and battery instructions, arguing they were improper given that there were "no pending claims for assault and battery," (D0233, 4), which was overruled by the district court. (D0245, 3).

Defendants also moved for partial judgment on the pleadings on the same grounds, both orally and in writing. (D0247, 2–11; D0346, 6:10–15). The district court denied Defendants' motion via bench ruling. (D0346, 22:12–23:3).

Further, Defendants moved for directed verdict on the same grounds, both orally and in writing. (D0260, 11–21; (D0346, 10:11–11:13). Defendants' motions were denied via bench ruling. (D0346, 12:16–17).

On April 5, 2024, Defendants moved for judgment notwithstanding the verdict on the same grounds, (D0327, 9–19), which was denied on April 23, 2024. (D0330, 2).

B. Standard of review.

A denial of a motion for judgment on the pleadings is reviewed for corrections of errors at law, and the Court "assume[s] the truth of the facts stated in the pleadings." *Est. of Farrell by Farrell v. State*, 974 N.W.2d 132, 135 (Iowa 2022) (quotation omitted). Judgment should be entered "if the pleadings, taken alone, entitle a party to judgment." *Id.* (quotation omitted). "The proper function of a motion for judgment on the pleadings is to test the sufficiency of the pleadings to present appropriate issues for trial." *Roush v. Mahaska State Bank*, 605 N.W.2d 6, 8 (Iowa 2000).

Denial of motions for directed verdict and judgment notwithstanding the verdict are also reviewed for errors at law. *Royal Indem. Co.*, 786 N.W.2d at 846.

The grant or denial of a motion for leave to amend a pleading is reviewed for abuse of discretion. *Daniels v. Holtz*, 794 N.W.2d 813, 824 (Iowa 2010).

C. Plaintiffs did not plead assault and battery, so they could not have met the IMTCA's heightened pleading standard.

1. Iowa Code Section 670.4A(3) requires dismissal of claims that are not pleaded with the requisite particularity and plausibility.

On June 17, 2021, the Iowa legislature amended the IMTCA to establish a heightened pleading standard:

> A plaintiff who brings a claim under this chapter alleging a violation of the law must state with particularity the circumstances constituting the violation . . . . Failure to plead a plausible violation . . . <u>*shall*</u> result in dismissal with prejudice.

2021 Iowa Acts ch. 183 § 14 (codified at Iowa Code § 670.4A(3) (emphasis added)). This heightened "particularity and plausibility" standard "requires the same pleading as the Federal Rules of Civil Procedure," including both the plausibility required under Federal Rule of Civil Procedure 8(a)(2), and the particularity requirement found in Rule 9(b). *Nahas*, 991 N.W.2d at 781. This heightened standard is prospective, applying only to claims pleaded after the amendment's enactment. *Id.* at 778–780.

2. Plaintiffs' assault and battery claims, asserted years after the enactment of Iowa Code Section 670.4A(3), are subject to its heightened pleading requirements.

Plaintiffs' Petition was filed on May 20, 2021, approximately four weeks before Iowa Code Section 670.4A(3)'s effective date. (D001, 1). Although Plaintiffs never moved to amend to add claims for assault and battery, the district court effectively allowed such amendment on March 7, 2024, almost three years after the amendment's effective date. (D0245, 3).

In *Carver-Kimm v. Reynolds*, the Iowa Supreme Court addressed similar, but distinguishable, circumstances. 992 N.W.2d 591 (Iowa 2023), *as amended* (Aug. 24, 2023). The plaintiff filed her lawsuit in September 2020, alleging wrongful discharge under Iowa Code Section 70A.28 against the Governor, a state employee, and the State. *Id.* at 596. On June 4, 2021, she filed a motion to amend to add two additional claims against each defendant—wrongful discharge in violation of public policy and violation of speech rights under the Iowa Constitution, which the court granted. *Id.*

However, the order was entered June 22, 2021—five days after Section 669.14A's[7] June 17, 2021 effective date. *Id.*

On July 28, 2021, plaintiff filed a motion for leave to file a second amended petition, which was granted August 11, 2021. *Id.* This second amended petition added new factual allegations in its background section and removed the recently-added claim for violation of speech rights, while, at the same time, making "no substantive change" to the recently-added claim for wrongful discharge in violation of public policy. *Id.* The district court denied defendants' motion to dismiss the wrongful discharge claim based on Section 669.14A. *Id.*

The Iowa Supreme Court declined to apply Section 669.14A's plausibility and particularity requirements to the plaintiff's wrongful discharge in violation of public policy claim "because in this peculiar circumstance[, such result] has more than an air of retroactivity to it." *Id.* at

[7] The heightened pleading requirements of Iowa Code Sections 669.14A and 670.4A(3) are identical, and became effective on the same date.

598. Those "peculiar circumstances" were that (1) the plaintiff's original petition was filed nine months before the statutory change, (2) she "included her wrongful discharge tort . . . in her first motion to amend her petition two weeks before the statute's enactment", and (3) she "made no change to count II (other than updating incorporated paragraph numbers) in her second amended petition in the weeks after the statute's enactment." *Id.* "On these facts," the Court held that plaintiff was not required to revise her post-enactment amendment to satisfy Section 669.14A' plausibility and particularity requirements. *Id.*

"[T]hese facts" in *Carver-Kimm* are very different from those presented in the case at bar. Here, Plaintiffs did not move to amend their Petition prior the enactment of Section 670.4A, as in *Carver-Kimm*. In fact, Plaintiffs <u>*never*</u> sought leave to amend to add their new claims in the two-and-a-half years after Section 670.4A's enactment, instead raising the issue only on the eve of trial.

Further, this was not a situation, like *Carver-Kimm*, where Plaintiffs made "no change" to a previously-pleaded claim. Rather, Plaintiffs introduced two entirely-new claims, with entirely-different elements, which were never pleaded. And they waited to introduce these new claims until all of their other claims—with the exception of their negligence claim—had been dismissed by the district court. There is no "air of retroactivity" here. Respectfully, under the "peculiar circumstance" of this case, Plaintiffs' belated assault and battery claims should be held to Section 670.4A(3)'s heightened pleading requirements.

3. The Amended Petition fails to plead plausible claims of assault and battery with particularity.

Plaintiffs' Amended Petition, the operative pleading at trial, asserted seven counts, none of which were counts for assault or battery. After five of the seven claims were dismissed, the only pleaded claims that remained for trial were for negligence (wrongful death) and loss of consortium. In fact, the words "assault" and "battery" are ***completely absent*** from the Amended

Petition. To the contrary, the introductory paragraph of Plaintiffs' Amended Petition states as to what this case is about:

> This is an action brought to redress the deprivation of rights secured to Plaintiff by the Constitution of the State of Iowa, Article 1, Section 1, 2, 8, and 9; and under Iowa Statutory and Common Law for intentional and/or reckless and/or negligent conduct causing a wrongful death; and for the attempted coverup of the wrongful conduct after the fact.

(D0055, ¶ 1).

At the March 5, 2024 hearing, Plaintiffs pointed to their October 17, 2023 Resistance to Defendants' Motion for Summary Judgment on Count I (Excessive Force), which included a single sentence characterizing their remaining constitutional claim as a "standalone cause of action for assault causing a wrongful death." (D0339, 8:2–16; D0142, 4). Respectfully, a single reference to a "cause of action for assault" in October 2023, in the context of a motion for summary judgment on Plaintiffs' sole remaining constitutional claim, did not adequately plead or place Defendants on notice that new assault and battery claims *might* be pursued at a later date. Plaintiffs were free to seek leave to amend their petition at any time prior

to or immediately after *Burnett* and *White*; they failed to do so. Further, the deadline to amend pleadings was originally November 2, 2021, which was a full year before the original trial date of November 2, 2022. (D0014, 2; D0023, 1).

This same issue arose in *Klum Est. of Klum v. City of Davenport*, involving the same arguments, made by the same attorneys, in the same procedural context. The plaintiffs filed suit against Davenport and one of its officers alleging "several claims collectively styled as three counts"—(1) excessive force in violation of the Fourth Amendment to the United States Constitution and Article I, Section 8 of the Iowa Constitution; (2) common law negligence; and (3) loss of consortium. *Klum,* 2024 WL 2880640 at *3. Following stipulated dismissal of the loss of consortium claim, both sides filed competing motions for summary judgment. *Id.* at *4.

In their resistance to defendants' motion for summary judgment, the "[p]laintiffs for the first time—argue[d] certain allegations asserted in the background facts of the amended petition as well as Counts I and II also

pleaded claims for 'assault, battery and for violation of express statutes on use of deadly force, [Iowa Code Sections] 804.8 and 704.'" *Id.* at *11. The court dismissed the state constitutional tort claim under *Burnett* and held that plaintiffs' pleadings "did not provide sufficient notice of an intention to assert claims of assault and battery." *Id.* at *12. It went on: "[T]his Court views Plaintiffs' newly articulated claims for assault and battery as improperly manufactured claims barred by the notice requirement of the federal pleading rules." *Id.* at *13 (internal quotation and alteration omitted). The same is true here, and the result should be the same too.

Further, Plaintiffs' prior reference to a "standalone cause of action" for assault was made in resistance to Defendants' motion for summary judgment on that ***very claim*** (Count I), which was ***granted*** by the district court, leaving only their claims for negligence and loss of consortium. (D0141, 4; D0146, 2). Under these circumstances, Defendants had no reason to know that new claims for assault and battery would be interjected into this case after Count I was dismissed.

The Amended Petition certainly did not "enable the defendant[s] to respond specifically and quickly to the [assault and battery] allegations." *Nahas*, 991 N.W.2d at 781 (quotation omitted). To the contrary, the district court allowed Plaintiffs to drop these claims on Defendants one week before trial. They were required "to allege sufficient facts to show the defendants are liable for [the] *specific* causes of action [of assault and battery]," which they failed to do entirely. *Id*. (emphasis added).

For example, civil assault requires proof of the following elements: "(1) an act intended to put another in fear of physical pain or injury; [or] (2) an act intended to put another in fear of physical contact which a reasonable person would deem insulting or offensive; and the victim reasonably believes that the act may be carried out immediately." *White*, 990 N.W.2d at 656 (quotation omitted). "Acts threatening violence to the person of another, coupled with the means, ability, and intent to commit the violence threatened, constitute an assault." *Id.* (quotation omitted). Nowhere does the Amended Petition allege that Wessels acted with intent

to put Gus in fear of anything or that Gus "reasonably believed" that Wessels' alleged conduct might be carried out immediately.[8] *White*, 990 N.W.2d at 656.

A person is subject to liability to another for battery if that person acts intending to cause a harmful contact with the person of the other and a harmful contact results. *Carter v. Carter*, 957 N.W.2d 623, 635 (Iowa 2021), *as amended* (Apr. 29, 2021). The Amended Petition alleges only that Wessels "acted intentionally to come into contact with Mormann's motorcycle and/or acted recklessly in doing so and/or was negligent in doing so" by bringing his cruiser into contact with Gus's motorcycle. (D0055, 6, ¶ 32). There is no allegation that Wessels intended to cause a harmful contact with Gus's person.

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[8] Further, other than Gus's alleged dying declaration, which was improperly admitted, no evidence was presented to show that Gus reasonably believed that Wessels' alleged conduct might be carried out immediately.

Because Plaintiffs' purported assault and battery claims fail to satisfy the IMTCA's heightened pleading standard, the district court was required to dismiss those claims. Iowa Code § 670.4A(3) (stating that failure to meet the heightened pleading standard "shall result in dismissal with prejudice"). This Court should reverse the judgment against Defendants and enter judgment in their favor, and against Plaintiffs.

D. Even if Section 670A.4(3)'s heightened pleading standard does not apply, Plaintiffs' belated assault and battery claims should not have been permitted by the district court.

Under Iowa's notice pleading standard, "The petition . . . must contain factual allegations that give the defendant 'fair notice' of the claim asserted so the defendant can adequately respond to the petition." *Rees v. City of Shenandoah*, 682 N.W.2d 77, 79 (Iowa 2004). This standard is met where a petition "informs the defendant of the incident giving rise to the claim and of the claim's general nature." *Id*. "Even our liberal notice pleading rules require a simple statement of the prima facie elements of a claim." *Biddle v. Sartori Memorial Hosp.*, 518 N.W.2d 795, 797 (Iowa 1994).

Here, neither the Petition nor the Amended Petition gave Defendants "fair notice" of claims of assault or battery, at most providing notice of the "incident giving rise to the claim" while failing to give notice of the "claim's general nature." *Id*.

Plaintiffs could have moved to amend at any time prior to or immediately after *Burnett* and *White*, which if granted, would have put Defendants on notice and permitted time for additional discovery and necessary changes to trial strategy which, until the district court's March 7, 2024 ruling, was based on a classic case of comparative fault. They failed to do so, instead waiting until all of their constitutional tort claims were dismissed, including the very claim (Count I) in which they contend their assault and battery claims were implicitly based.

It has long been the law in Iowa that a plaintiff may not proceed to trial on claims which were never pleaded. *See Miller v. Chicago, M. & St. P. Ry. Co.*, 41 N.W. 28 (Iowa 1888) ("No rule is more familiar than that one which requires a case to be tried on the issues made in the pleadings, and

will not permit matters to be considered in order to fix liability on a defendant which are not pleaded against him. This rule is too familiar to require citation of authorities in its support.”). Yet that is precisely what the district court allowed to happened in this case—to the severe prejudice of Defendants. This was error; Plaintiffs’ claims of assault and battery should not have been submitted.

III. Plaintiffs did not present sufficient evidence to submit their assault and battery claims to the jury.

A. Error Preservation.

Defendants moved for directed verdict arguing Plaintiffs could not satisfy the legal elements of their claims, (D0260, 16–21; D0346, 10:11–11:13), which were denied via bench rulings. (D0346, 12:16–17). On April 5, 2024, Defendants moved for judgment notwithstanding the verdict on the same grounds, which was denied. (D0327, 20; D0330 at 2).

B. Standard of Review.

Denial of motions for directed verdict and judgment notwithstanding the verdict are reviewed for errors at law. *Royal Indem. Co.*, 786 N.W.2d at 846.

C. Plaintiffs did not present substantial evidence to support their claim for assault.

Civil assault requires a plaintiff to prove that the defendant committed "an act intended to put another in fear of physical pain or injury" or "intended to put another in fear of physical contact which a reasonable person would deem insulting or offensive; *and the victim reasonably believes that the act may be carried out immediately*." *White*, 990 N.W.2d at 656 (emphasis added). Here, Plaintiffs did not present any admissible evidence to establish that Gus knew or believed that any offensive act was about to occur.

In fact, the only amissible evidence relating to Gus's perception of the collision was his comment to first responders, made at the scene, that "he didn't know what happened." (D0346, 53:8–11). Not only does such

evidence not establish a claim for assault, it is, in fact, evidence that an assault did not occur.

At trial, however, Sandra was permitted to offer an alleged dying declaration from Gus in which she claimed he told her: “I got ran off the road, pushed off the road at a high rate of speed.” (D0344, 52:10–15). The district court overruled Defendants’ hearsay objections, erroneously finding the alleged statement to be a dying declaration. (D0344, 42:19, 49:15–18, & 52:16). However, even if the alleged statement was admissible, it does not present “substantial evidence” that Gus “reasonably believe[d] that [an offensive act] may be carried out immediately.” *White*, 990 N.W.2d at 656.

To the contrary, if accepted as true, the statement is only evidence of what Gus believed to have happened, a month after the collision, without any reference to what he perceived or believed when the collision actually occurred. The actual testimony presented at trial was as follows:

Q. What did Gus tell you?

> A. He – [objection overruled] When you take a ventilator out, you can speak for a short period of time and you can understand his voice, and he said, "I got ran off the road, pushed off the road at a high rate of speed."

(D0344, 52:10–25). This does not establish that Gus believed, or was even aware that he was at risk or in fear of physical contact at any time ***before*** such physical contact occurred. Gus was always aware that the collision occurred a high rate of speed and that he exited the roadway as result. That he told Sandra he was "pushed off the road at a high rate of speed" is not evidence of what Gus believed or was aware of before the collision occurred.

As there was no substantial evidence to support the elements of Plaintiffs' assault claim, the district court erred in denying Defendants' motions for directed verdict and judgment notwithstanding the verdict. The judgment against Defendants should be reversed, and judgment entered in Defendants' favor, and against Plaintiffs.

D. Plaintiffs did not present substantial evidence to support their claim for battery.

To prevail on their claim for battery, Plaintiffs were required to present substantial evidence that Wessels committed an act (1) "intending to cause a harmful or offensive contact with the person of the other or a third person, or an imminent apprehension of such a contact," and (2) "an offensive contact with the person of the other directly or indirectly results." *Nelson v. Winnebago Industries, Inc.*, 619 N.W.2d 385, 388-89 (Iowa 2000) (quotation omitted). Plaintiffs provided no evidence showing that Wessels intended or made "an offensive contact with [Gus's] person." *Id*. Rather, their battery claim was premised entirely on their allegation that Wessels' cruiser made an offensive contact with Gus's motorcycle. Even if Plaintiffs could successfully make such a showing, it would not satisfy the legal elements of a battery claim.

Notably, there is no Iowa caselaw finding that a claim for battery encompasses "offensive contact" between two vehicles. Courts in other jurisdictions that have considered the issue have declined to extend the tort

of battery to such situations. *C.f. Childress v. Boeing Aerospace Operations, Inc.*, 2019 WL 1902767 (Wash. Ct. App. April 29, 2019) (holding allegation that tortfeasors struck his hand against plaintiff's vehicle failed to state a claim for battery because "[plaintiff's] vehicle cannot be regarded as part of his person"). Given that Plaintiffs did not provide evidence sufficient to show that Wessels made an offensive contact with Gus's *person*, the verdict should have been directed in Defendants' favor. The judgment against Defendants should be reversed, and judgment entered in Defendants' favor, and against Plaintiffs.

IV. The district court erred in allowing admission of prejudicial hearsay in the form of a dying declaration.

A. Error Preservation.

Defendants moved in limine to prohibit Plaintiffs from eliciting hearsay testimony regarding the alleged statement Gus made to Sandra regarding the cause of the collision. (D0194, 33–35, ¶¶ 130–137). The district court denied Defendants' motion pretrial, (D0339, 58:23–60:1; D0246, 5), and overruled Defendants' objections at trial. (D0344, 42:14-19, 49:15–18, &

52:10–25). Following the jury's verdict, Defendants moved for a new trial on the ground that admission of the alleged statement was error, which was denied by the district court. (D0327, 27–29; D0333, 1).

B. Standard of Review.

Evidentiary rulings are reviewed for abuse of discretion. *Selden v. Des Moines Area Cmty. Coll.*, 2 N.W.3d 437, 443 (Iowa 2024). However, hearsay rulings are reviewed for corrections of errors at law. *Valdez v. W. Des Moines Cmty. Sch.*, 992 N.W.2d 613, 634 (Iowa 2023), *as amended* (Aug. 31, 2023) (quotation omitted). Reversal is "required for the improper admission or exclusion of evidence only if the exclusion affected a substantial right of a party." *Id.* "In a case of nonconstitutional error," prejudice is presumed, and reversal required, "unless the record affirmatively establishes otherwise." *Id.*

C. The district court erred in finding the alleged statement was admissible under Iowa Rule of Evidence 5.804(b)(2).

Hearsay is "a statement that: (1) The declarant does not make while testifying at the current trial or hearing; and (2) A party offers into

evidence to prove the truth of the matter asserted in the statement." Iowa R. Evid. 5.801. "Hearsay is not admissible," barring application of particular exceptions. Iowa R. Evid. 5.802. The district court correctly found that the alleged statement was hearsay. (D0340, 46:10–47:7). However, it erred in holding the alleged statement was a so-called "dying declaration" admissible under Iowa Rule of Evidence 5.804(b)(2). (D0344, 49:7–49:20).

1. The alleged statement was not admissible under Iowa Rule of Evidence 5.804(b)(2).

Iowa Rule of Evidence 5.804(b)(2) excepts "[a] statement that the declarant, while believing the declarant's death to be imminent, made about its cause or circumstances" from the rule against hearsay. Iowa R. Evid. 5.804(b)(2). "In order for a statement to be admissible under this exception, it must be clear from the circumstances that the declarant's 'sense of impending death was so certain that he was without hope or expectation of recovery.'" *State v. Harper*, 770 N.W.2d 316, 320 (Iowa 2009) (dying declarations "are only admissible to show the cause and circumstances behind the declarant's death.")(citations omitted)).

Here, the collision occurred on December 10, 2020, after which Gus was hospitalized and placed on a ventilator. (D0344, 36:21–37:24 & 39:22–24; D0346, 5:23–25). During this time, Gus was able to have the ventilator removed for periods of time, and could also speak. (D0344, 39:25–40:2 & 40:6–7). Sandra testified that, on or about January 14, 2021 (approximately 35 days after the collision), Gus voluntarily decided to remove his ventilator and end his life. (D0344, 41:3; D0344, 23:16–21).

Gus could have reversed his decision at any time after he advised Sandra of his decision to remove the ventilator, but prior to his death. Based on that fact alone, any sense of impending death felt by Gus was not "so certain that he was without hope or expectation of recovery." *Harper*, 770 N.W.2d at 320.

Further, the unique circumstances presented here are analogous to suicide, for which the law applies the traditional "dying declaration" analysis differently. While courts admit suicide notes into evidence when offered to explain a person's decision to take *their own life*, the statement

was not offered for that purpose. *See. e.g. Garza v. Delta Tau Delta Fraternity Nat.*, Nos. 2005–CC–1508, 2005–CC–1527, 948 So.2d 84 (La 2006).

Regardless, courts also recognize that "the presumption that one tells the truth in his or her final moments is not as applicable when it is death by suicide." *Kincaid v. Kincaid*, 127 Cal. Rptr. 3d 863, 874–75 (2011), *as modified on denial of reh'g* (July 26, 2011) (citations omitted). That is because "a statement made prior to the commission of suicide is not made in the face of impending death because the declarant controls if and when he or she is to die." *Id.* at 874 (citations omitted). Here, Gus had control over if and when he would die.

Finally, while the injuries Gus sustained in the collision caused him to be hospitalized, the cause and circumstances behind the decedent's death was, ultimately, his decision to be taken off the ventilator. Plaintiffs did not present any medical evidence relating to Gus's condition, including medical evidence to support allegations made throughout trial that he was "paralyzed." *See, e.g.,* (D0342, 14:25–15:1). Specifically, no medical evidence

was presented relating to Gus's potential recovery, prognosis, or expected quality of life.

All of these factors, taken together, demonstrate that the alleged statement was not admissible under Rule 5.804(b)(2) and should have been excluded.

2. The hearsay statement was prejudicial.

While Plaintiffs have the burden to prove that inadmissible hearsay did *not* result in prejudice, it is apparent that Gus's alleged statement was prejudicial. Not only did the district court allow the alleged statement into evidence, it also permitted Plaintiffs' counsel to have Sandra "mimic what . . . Gus's voice sounded like." (D0344, 53:1–4). The statement also functioned as a focal point in Plaintiffs' closing arguments:

> The damage was so grave that two or three days before his death he decides remove the ventilator. That means he suffocates to death. And when you can't breathe, you suffocate. But that was less painful than the body that was no longer useful, the life that he could no longer live. And he was aware of that. He tells his parents, "I got run off the road."

(D0347, 69:6–21). Prejudice was clearly the intent of the alleged statement, as well as the result. It was targeted and used to emotionally sway the jury and leverage the excessive verdict in this case. The district court abused its discretion by admitting the statement into evidence. A new trial should be ordered.

V. The district court erred in allowing evidence of the Manchester Police Department's policies and lack of video footage.

A. Error Preservation.

Defendants moved in limine to exclude evidence of the lack of dash camera or body camera footage from Wessels. (D0194, 5–7). At the pretrial hearing, the district court held:

> I think you guys all understand I'm certainly inclined to let the plaintiff at least get into the fact that there is not video and that Officer Wessels failed or forgot to turn on his personal body cam and/or his squad camera when he started this pursuit or at any time during this pursuit.
>
> I don't know if I'm going to let Plaintiff go very much farther than that, but I think at least that far properly and fairly tells the jury you're not going to see video and here's the reason that you're not going to see it just so that they don't have some crazy idea or misunderstanding about why the plaintiff or the

> parties didn't show them officer video that would have been helpful for them making that decision.

(D0345, 36:3–16). The district court subsequently denied Defendants' motion in one-sentence written ruling. (D246, 4).

On the first day of trial, Defendants objected to the admission of Exhibit 14, the Manchester Police Department's Mobile Video/Audio Recording Equipment policy and testimony regarding the same, which was overruled by the district court. (D0342, 44:11–45:21). As a result, considerable portions of multiple days at trial were spent on cameras and related policies, over Defendants' objections.

B. Standard of Review.

Evidentiary rulings are reviewed for abuse of discretion. *Selden*, 2 N.W.3d at 443. Reversal is required if the record shows prejudice to the complaining party. *State v. Hildreth*, 582 N.W.2d 167, 170 (Iowa 1998).

C. Evidence of Wessels' alleged failures to follow the polices regarding mobile video/audio recording was irrelevant to the claims Plaintiffs submitted to the jury, and its admission was unfairly prejudicial.

The failure to follow policies may, in the appropriate case, be evidence of negligence. *See, e.g., Sorber v. Wal-Mart Stores, Inc.*, No. 99-315, 2000 WL 766123, at *3 (Iowa Ct. App. June 14, 2000). Negligence, however, was not presented to the jury. Instead, they considered assault and battery claims, which required proof that Wessels' acted with the *intent* to put Gus "in fear of physical contact which a reasonable person would deem insulting or offensive", *White*, 990 N.W.2d at 656, and/or the *intent* "to cause a harmful contact with the person of the other and a harmful contact results." *Carter*, 957 N.W.2d at 635.

The alleged failure follow the departmental policy regarding mobile video/audio recording does not make it any more or less likely that Wessels acted with required intent. Iowa R. Evid. 5.401. Nor was it relevant to any other issues in this case. Further, even if the *fact* that Wessels' video recording was not activated was marginally relevant (as the district court

suggested), Plaintiffs were allowed to take the issue and run wild, devoting not only significant time and emphasis to the issue, but also asserting that the lack of video was evidence of intent.

The district court went well-beyond its pretrial ruling that the jury could hear "the fact that there is not video and that Officer Wessels failed or forgot to turn on his personal body cam and/or his squad camera when he started this pursuit or at any time during this pursuit." (D0345, 36:3–16). The emphasis on the lack of video footage, and alleged violation of departmental policy regarding the same, became a central theme in the case, with detailed questioning of both Wessels and other law enforcement witnesses about the presence and lack thereof of video footage, and repeated emphasis during both opening statements and closing arguments. (D0342, 8:16-9:20, 18:10-15, & 95:1-97:4; D0343, 44:15-52:16; D0347, 43:8-15 & 53:5-13).

Counsel's repeated questioning, comments, argument, and emphasis regarding the lack of camera footage, Wessels' failure to turn on the dash

camera, and departmental policy significantly prejudiced the Defendants in this case and was akin to—or at least as damaging as—a spoliation instruction. *See* Iowa R. Evid. 5.401–5.403. This is especially true because there was no evidence presented that Wessels' dash camera (or body camera) would have even shown the collision. The same is even more true of the evidence and argument presented regarding disclosure of the absence of the video footage, which has no bearing on the issues in this case whatsoever. (D0346, 48:2-50:9).

None of this evidence and argument made it more or less probable that Wessels committed any ***intentional*** act on the date of the collision, was highly misleading to the jury, confused the issues at trial, and was unfairly prejudicial to Defendants. Iowa R. Evid. 5.401–5.403; *Waits v. United Fire & Cas. Co.*, 572 N.W.2d 565, 569 (Iowa 1997) ("Unfair prejudice arises when the evidence prompts the jury to make a decision on an improper basis, often an emotional one."). The district court abused its discretion by allowing this evidence, and a new trial should be ordered.

VI. Plaintiffs did not present substantial evidence to support their request for punitive damages.

A. Error Preservation.

Defendants moved for directed verdict on all of Plaintiffs' claims, (D0260, 16–21; D0346, 10:11–11:13), and judgment notwithstanding the verdict on April 5, 2024. (D0327, 9–19). The district denied Defendants' motions. (D0346, 12:16–17; D0330, 2).

B. Standard of Review.

Denial of motions for directed verdict and judgment notwithstanding the verdict are reviewed for errors at law. *Royal Indem. Co.*, 786 N.W.2d at 846. A directed verdict should be granted where there was "no substantial evidence to support the elements of the plaintiff's claim." *Pavone* , 801 N.W.2d at 487 (Iowa 2011).

C. Plaintiffs did not present substantial evidence that Wessels acted with actual malice, or willful, wanton and reckless misconduct.

An award of punitive damages requires clear and convincing evidence of "actual malice or willful, wanton and reckless misconduct."

Iowa Code § 670.12. *See also* Iowa Code § 668A.1(1)(a) (requiring proof of "willful and wanton disregard for the rights or safety of another"). As the district court instructed the jury: "Evidence is clear, convincing, and satisfactory if there is *no serious or substantial uncertainty* about the conclusion to be drawn from it." (D0306, 2) (emphasis added). Here, no such evidence was presented.

At most, the evidence at trial showed Wessels' conduct was negligent. The evidence showed that Wessels passed Gus's motorcycle because, if the motorcycle capsized, he would run over the motorcyclist. (D0342, 122:10–18). Further, Wessels waited until his cruiser was at least two car lengths ahead of the motorcycle before he began to merge back into the westbound lane. (D0342, 124:12–17). There was no alternative evidence presented to establish that Wessels' acted with "willful and wanton disregard for the rights or safety of another," and certainly not sufficient evidence to show "there is no serious or substantial uncertainty about the

conclusion to be drawn from it." The punitive damage award against Wessels should be reversed.

VII. Plaintiffs' decision to not submit their negligence/recklessness claim to the jury was voluntary and knowing, and constitutes a dismissal with prejudice.

Finally, Defendants anticipate that if the Court rules in their favor on the issues raised in this appeal, Plaintiffs will request that the Court nonetheless remand the case for trial on their previously-pleaded negligence/recklessness claim (Count IV). (D0055, 10–11). However, as the district court noted, Plaintiffs voluntarily elected not to submit that claim to the jury in order to avoid the submission of an instruction on comparative fault. (D0347, 17:4–16) (noting that this decision was "intentional on Plaintiffs' part"). That decision was strategic—nothing more, nothing less—and the claim is gone forever.[9]

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[9] *See, e.g.*, *Mitchell v. Marriott Int'l Inc*, No. 4:17-CV-1801 RLW, 2017 WL 5633111, at *2 (E.D. Mo. Nov. 21, 2017) (finding Plaintiff would be precluded from presenting claims at trial "deemed abandoned"); *Irwin Katz & Assoc., Inc. v. Concepts in Health, Inc.*, No. 13-1217 (FLW) (LHG), 2017 WL

Conclusion

For the foregoing reasons, Defendants-Appellants respectfully request that the Court reverse the district court's judgment against them, jointly and severally, and enter judgment in their favor, and against Plaintiffs-Appellees. In the alternative, Defendants-Appellants respectfully request that the Court order a new trial and remand the case for further proceedings.

Request for oral argument

Appellants respectfully request oral argument with respect to this appeal pursuant to Iowa Appellate Rule 6.903(2)(i).

593502, *34 (D.N.J. Feb. 14, 2017); *Fires v. Heber Springs Sch. Dist.*, No. 1:11CV00021 BSM, 2013 WL 12120061, at *1 (E.D. Ark. May 30, 2013), *aff'd*, 565 F. App'x 573 (8th Cir. 2014).

Dated: September 13, 2024

Respectfully submitted,

/s/ David T. Bower, AT0009246
/s/ Logan Eliasen, AT0013755
NYEMASTER GOODE, P.C.
700 Walnut, Suite 1600
Des Moines, IA 50309
Telephone: 515-283-3100
Facsimile: 515-283-8045
Email: dbower@nyemaster.com
leliasen@nyemaster.com

ATTORNEYS FOR APPELLANTS

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This brief complies with the typeface requirements and type-volume limitation of Iowa Rs. App. P. 6.903(1)(d) and 6.903(1)(g)(1) because:

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/s/ Logan Jay Eliasen

Certificate of filing and service

The undersigned certifies a copy of this Appellant's Brief was served on all parties to this appeal by e-filing it on the State of Iowa's Electronic Data Management System on September 13, 2024:

David A. O'Brien
1500 Center Street NE
Cedar Rapids, IA 52402

Haytham Faraj
Law Office of Haytham Faraj, PLLC
1935 W Belmont Ave.
Chicago, IL 60657

Nicholas C. Rowley
Trial Lawyers for Justice, P.C.
421 W. Water Street, Third Floor
Decorah, IA 52101
ATTORNEYS FOR PLAINTIFFS-APPELLEES

/s/ Logan Jay Eliasen