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' REPLY BRIEF

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Table of Contents

Table of Authorities

Cases

Statutes

Other Authorities

Argument

I. The district court erred by not dismissing Plaintiffs' claims based on the IMTCA's emergency response immunity.

Plaintiffs do not dispute that Wessels' conduct occurred "in connection with an emergency response" pursuant to Iowa Code Section 670.4 (1)(k). Accordingly, Defendants are immune from Plaintiffs' tort claims under the Iowa Municipal Tort Claims Act ("IMTCA"), absent some exception. *See* Iowa Code §§ 670.4(1)(k) & 670.12.

As it relates to their claims against Wessels,[1] Plaintiffs advance two purported exceptions: (1) emergency response immunity cannot "negate a constitutionally protected claim"; and (2) "Iowa Code Section 321.231 is an express statute dealing with claims regarding immunity response vehicles," therefore the IMTCA's immunities do not apply. As to the first asserted exception, the Court should decline to recognize constitutional protection for common-law assault and battery claims against municipal

[1] Defendants presume Plaintiffs' arguments do not relate to their claims against the City, which enjoys sovereign immunity, waived only as set forth in the IMTCA.

employees; regardless, the Legislature retains the right to modify the common law by creating immunities. As to the second asserted exception, Plaintiffs voluntarily abandoned their Section 321.231 recklessness claim at trial. That Section has no relevance to the claims ultimately submitted to the jury.

A. Common-law claims for assault and battery against municipal employees are not "constitutionally protected."

Plaintiffs' argument that their common-law claims for assault and battery against Wessel are "constitutionally protected" begs two questions:

(1) Are such claims, in fact, "constitutionally protected"?

(2) If so, does the Legislature have authority to modify the common law to provide immunities to such claims?

Defendants respectfully submit the answer to question one is "no." Thus, the Court need not reach the second question. However, if it does, the answer to question two is "yes," to which Plaintiffs provide no argument to the contrary.

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

a. The Iowa Supreme Court has never recognized such a constitutional right.

The Iowa Supreme Court has never recognized a constitutional right to assert nonconstitutional causes of action against public officials.

First, the cases upon which Plaintiffs rely do not support their argument. *White v. Harkrider* found only that the plaintiffs' properly-pleaded assault claim could not be dismissed, pre-answer, based on the affirmative defense of justification under Iowa Code Section 804.8(1), and did not hold, or even suggest, that common-law claims for assault or battery against police officers are a constitutionally perfected right, nor did it discuss IMTCA immunities. 990 N.W.2d 647, 656 (Iowa 2023). The same is true of *Burnett v. Smith*, which Plaintiffs cite for the uncontroversial proposition that "claims for money damages against government officials who act without justification as 'authorized by the common law' remain viable." (Appellees' Br., 26 (quoting *Burnett v. Smith*, 990 N.W.2d 289, 307

(Iowa 2023)). *Burnett* did not address the IMTCA or its immunities and did not recognize the constitutional right claimed here.

Neither did *Baldwin v. City of Estherville*, 915 N.W.2d 259 (Iowa 2018), or *Wagner v. State*, 952 N.W.2d 843 (Iowa 2020). *Baldwin* recognized that some immunities contained in the State Tort Claims Act ("ITCA")—Iowa Code Chapter 669—may be "unsuitable for *constitutional* torts." 915 N.W.2d at 280 ("The problem with these acts, though, is that they contain a grab bag of immunities reflecting certain *legislative* priorities. Some of those are unsuitable for *constitutional* torts."). Likewise, *Wagner* held that Chapter 669's procedural requirements applied to now-unavailable constitutional torts. 952 N.W.2d at 847. Neither case discussed constitutional protection for non-constitutional common-law torts or statutory immunity.

Finally, *Norris v. Paulson* addressed only the defendant's argument that "the district court's denial of [defendant's] summary judgment motion on the constitutional claims must be reversed in the wake of *Burnett*." No. 23-0217, 2024 WL 4469203, at *2 (Iowa Oct. 11, 2024) (declining to disturb the court of appeals' denial of summary judgment on plaintiff's common-

law assault claim). The only defense pursued by the defendant was common-law justification—not statutory immunity. *Norris v. Paulson,* No. 23-0217, 2024 WL 2842317, at *4 n.5 (Iowa Ct. App. June 5, 2024) ("[A]t oral argument, the city clarified that it was not asserting a qualified immunity defense and that 'at this point we just have the issue of the common law [defense].'"). *Norris* did not "confirm[] the distinction between qualified immunity as the applicable affirmative defense in constitutional excessive force cases and justification as the defense in assault cases," as Plaintiffs contend. (Appellees' Br., 28).

Second, the Iowa Supreme Court has "said on more than one occasion that chapter 670 is the exclusive remedy for persons who have tort claims against municipalities and their employees." *Thomas v. Gavin*, 838 N.W.2d 518, 525 (Iowa 2013). Further, in response to several decisions that "made clear that the IMTCA did not affect an injured party's preexisting common law right to sue a local official in his or her individual capacity without going through the Act," the legislature expanded the IMTCA's exclusivity provision "by eliminating the requirement that the claim be

based upon local law." *Id.* at 522. And since 1982, Section 670.12 has existed in its current form, providing that municipal "officers and employees are not personally liable for claims which are exempted under section 670.4." *Id.* at 523 (quoting Iowa Code § 670.12). *Cf. Dickerson v. Mertz*, 547 N.W.2d 208, 213 (Iowa 1996) (rejecting the argument that Section 669.23 "has no effect on preexisting causes of action which could have been and still can be levied against state employees"). The Court has never held or suggested that the legislature lacked constitutional authority to provide limited immunity to state and municipal employees, as it has done for almost 50 years.

b. The legislature has always had authority to provide limited immunity to state and municipal employees.

As discussed above, the legislature has long provided immunity to state and municipal employees for certain categories of claims which might otherwise constitute violations of Article I, Section 8. For example, under the ITCA, state employees "are not personally liable for any claim which is exempted under section 669.14," which expressly includes several

provisions that might otherwise constitute a "seizure," most notably "any claim arising out of assault, [and] battery . . . ." Iowa Code §§ 669.14(4) & 669.23. Likewise, the IMTCA includes various immunities for conduct that may otherwise constitute a "seizure," including conduct in connection with an emergency response, a discretionary function, the rescue or disposal of neglected livestock, or participation in a recreational activity. Iowa Code §§ 670.4(c), (k), (m), & (o). The legislature never understood Article I, Section 8 to protect the right to bring nonconstitutional causes of action against government officials, or restrict its power to provide immunities to state and municipal employees.

c. The Court should decline to recognize the new constitutional right advanced by Plaintiffs.

Not only does Plaintiffs' argument lack any explicit constitutional or judicial support, but it also ignores the present understanding of state action and the role that public officials—namely police officers—play in

modern society. Plaintiffs' theory should not be adopted for the following reasons.

First, recognition of this new constitutional right would implicitly hold that public officials cannot violate the Iowa Constitution. Plaintiffs' legal theory is based on a line of recent concurrences intended to "eliminate the exclusionary rule as a remedy for violations" of article I, section 8. *State v. Burns*, 988 N.W.2d 352, 381 (Iowa 2023) (McDonald, J, concurring) (citation omitted). Those concurrences would hold that "article I, section 8 is a constitutional injunction against *lawmakers* and not a direct, substantive limitation on the conduct of peace officers," who cannot violate and are not "even subject to, direct regulation under article I, section 8." *Id.* at 378 (quoting *Lennette*, 975 N.W.2d at 411). Under that reasoning, article I, section 8, then, must be read to secure "the right to bring nonconstitutional causes of action against government officials for seizures and searches conducted in violation of the law," *Lennette*, 975 N.W.2d at 409 (McDonald, J., concurring), and such officials must be limited to asserting only those common-law justification defenses that existed in 1857. *Burns*, 988 N.W.2d

at 378 (McDonald, J., concurring) (citation omitted). Such an about-face would significantly change Iowa's constitutional jurisprudence and legislative practice.

Second, and relatedly, the "state action" doctrine counsels against recognition of the new constitutional right claimed here. That doctrine came into being in the late nineteenth century and is universally followed today. *See Wagner*, 952 N.W.2d at 853–54 ("[U]nless acting under color of state law, [a public official] cannot commit constitutional violations."). It recognizes that, when acting as an agent of the state, the conduct of a public official "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) (quotation omitted). Here, there is no dispute that Wessels was acting under color of state law. (Attachment to D0055, Amended Pet., 2 [§ 8] (04/11/22); D0059, Answer to Amended Pet., 3 [§ 8] (04/22/22)).

Today, where a public official engages in "state action," his conduct may violate and be subject to direct regulation under the constitution, including article I, section 8. Thus, nonconstitutional causes of action for

money damages for conduct that might otherwise violate article I, section 8 are unnecessary to ensure "[t]he right of the people to be secure in their persons, houses, papers and effects, against unreasonable seizures and searches," and implying such a constitutional right is unwarranted. Iowa Const. art. I, § 8.

Third, as discussed above, recognition of the new constitutional right advanced by Plaintiffs would render the ITCA's and IMTCA's immunity provisions—relied on for a half-century—unconstitutional. *See, e.g.,* Iowa Code §§ 669.14; 670.4(1).

Fourth, many of the reasons relied on for overruling *Godfrey v. State* counsel the same caution with recognizing the new constitutional right advanced here. "When the framers of the 1857 Constitution wanted to provide for a right to damages against the government, they knew how to do so"—the example being Article I, Section 18, which states: "Private property shall not be taken for public use without just compensation first being made, or secured to be made to the owner thereof, as soon as the damages shall be assessed by a jury . . . ." *Burnett*, 990 N.W.2d at 299. Had

Iowa's framers wanted to constitutionally protect a right to assert nonconstitutional causes of action against public officials, they knew how to do so.

Further, *Burnett* also cited the U.S. Supreme Court's *Egbert v. Boule* decision, which noted: (1) the Court would decide *Bivens* differently today, (2) "in all but the most unusual circumstances, prescribing a cause of action is a job for Congress, not the courts," and (3) "[a]t bottom, creating a cause of action is a legislative endeavor." *Id.* at 298 (quoting *Egbert v. Boule*, 562 U.S. 482 (2002)). Just as *Burnett*, *Egbert* counsels that the Court "should carefully consider" the wisdom of going down the path advanced by Plaintiffs here. *Id.*

In addition, recognition of the constitutional right claimed by Plaintiffs "does not enable [them] to recover damages they would not otherwise be able to recover." *Id.* at 303. Their claims—self-described as the "functional equivalent" of a constitutional excessive-force claim—are available under federal law. *See* 42 U.S.C. § 1983; *Dickerson*, 547 N.W.2d at 214 .

Fifth, courts should exercise great caution when "recognizing a substantive right grounded in an ambiguous constitutional text." J. Harvie Wilkinson III, *Of Guns, Abortions, and the Unraveling Rule of Law*, 95 Va. L. Rev. 253, 257 (2009). This, among other reasons, is to avoid separation-of-powers issues, as it is "the legislature's job to pass 'all laws necessary to carry this Constitution into effect' . . . ." *Burnett*, 990 N.W.2d at 299 (quotation omitted).

For at least these reasons, the Court should decline to recognize a new constitutional right to bring nonconstitutional causes of action against public officials for conduct which might otherwise constitute violation article I, section 8.

2. The legislature retains the power to modify the common law, including immunities for state and municipal actors.

For the reasons discussed above, and in Defendants' opening brief, even if article I, section 8 secures the right to assert nonconstitutional causes of action against public officials, the legislature retains the authority to modify the common law to provide additional defenses and immunities.

See, e.g., Burnett, 990 N.W.2d at 305 ("[T]he Legislature can enact laws that modify the common law."); *Garrison v. New Fashion Pork LLP*, 977 N.W.2d 67, 87–88 (Iowa 2022) ("The common law is not frozen and it can be modified by the legislature . . . ."); *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]."). 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 defense where the public official's conduct occurred in connection with an emergency response, which is within the legislature's authority.

B. Even if emergency response immunity "does not protect reckless driving" under Iowa Code Section 321.231, there is no legal error to review, and even if there were, such error was not harmless.

Plaintiffs' "harmless error" argument presupposes the district court erred in finding their assault and battery claims were not governed by the IMTCA. Nonetheless, they point to language in the IMTCA, which provides a notable exception to its immunities:

> As to any of the following claims, a municipality shall be liable *only to the extent liability may be imposed by the express statute dealing with such claims* and, in the absence of such express statute, the municipality shall be immune from liability . . .

Iowa Code § 670.4(1) (emphasis added). Plaintiffs posit that Section 321.231 ("Authorized emergency vehicles and police bicycles") is such an "express statute" under which "liability may be imposed" upon a showing of recklessness. Thus, even though they voluntarily abandoned their recklessness claim and instead submitted assault and battery claims to the jury, Plaintiffs contend that any resulting "error" was harmless because, at the punitive damages phase of trial, the jury found that Wessels' conduct "constituted willful, wanton, and reckless disregard for the rights or safety of another"—the standard for recklessness. (D0316, Supp. Verdict, 1

(03/22/24)). The Court need not address whether, and under what circumstances, Section 321.231 applies to "reckless driving" because even if Plaintiffs are correct, the resulting "error" was not harmless.

1. The jury was not instructed on recklessness at the liability phase of trial and did not find that Wessels was reckless.

To prove recklessness, a plaintiff must show the operator of the emergency vehicle "intentionally [did] an act of an unreasonable character in disregard of a risk known to or so obvious that he must be taken to have been aware of it, and so great as to make it highly probable that harm would follow." *Penny v. City of Winterset*, 999 N.W.2d 650, 653 (Iowa 2023) (quotation omitted). Here, the instructions submitted did not require, nor did the jury find, that Wessels was reckless.

Assault, as instructed, required the jury to find that Wessels "did an act by which he intended to put Gus Mormann in fear of physical pain or injury." (D0262, Instructions, 6 (03/21/24)). Battery, as instructed, required the jury to find that Wessels "intentionally struck Mormann's motorcycle with his police cruiser." (D0262, 7). Neither claim, as submitted, required

the jury to find that Wessels' conduct was "of an unreasonable character in disregard of a risk known to or so obvious that he must be taken to have been aware of it, and so great as to make it highly probable that harm would follow."[2] *Penny*, 999 N.W.2d at 653 (quotation omitted). Further, the jury did not find that reckless conduct was a cause of Plaintiffs' damage. (D0262, 6–7). Plaintiffs offer no argument to the contrary.

2. The jury's award of punitive damages does not render any "error" harmless, nor does it resurrect an abandoned claim for a new trial.

Plaintiffs point to the jury's finding, at the punitive damages phase of trial, that Wessels' conduct "constituted willful, wanton, and reckless disregard for the rights or safety of another" and argue this was, in effect, a finding of recklessness. (D0316, 1). They contend that this finding "demonstrate[s] that the error did not affect the outcome." (Appellees' Br.,

[2] Nor did the justification instruction, which stated that "the use of deadly force is only justified when a person cannot be captured any other way and either the person has used or threatened to use deadly force in committing a felony or the peace officer reasonably believes the person would use deadly force against any person unless immediately apprehended." (D0262, 8).

30). Plaintiffs, however, overlook the very reason they elected not to pursue their recklessness claim in the first place—comparative fault. (Appellees' Br., 59) ("Here, the statutory 321.231(6) claim was not submitted to avoid jury confusion and the application of comparative fault to intentionally reckless conduct"). Further, Plaintiffs ignore that the jury was not instructed to find whether any reckless conduct was a cause of damage to Plaintiffs.

Iowa Code Chapter 668 established the policy of comparing the "fault" of all persons involved in the underlying incident, which "means one or more acts or omissions that are in any measure negligent *or reckless* toward the person or property of the actor or others . . . ." Iowa Code § 668.1(1) (emphasis added). "Unlike many comparative fault statutes which apply comparative fault concepts only in cases involving negligence, Iowa's comparative fault statute expressly states that the fault of other parties is to be compared in cases of negligence, *recklessness*, and strict liability." *Jahn v. Hyundai Motor Co.*, 773 N.W.2d 550, 560 (Iowa 2009) (emphasis added) (declining to find an exception to comparative fault

principles for enhanced injury cases because "the legislature has not provided for such an exception").

Here, Defendants were denied the opportunity to submit an affirmative defense that was plainly supported by the evidence, that could—and undoubtedly would—have affected the outcome of the trial, and to which they were entitled under Iowa law. Had Plaintiffs submitted their recklessness claim to the jury, the district court would have submitted a comparative fault instruction in accordance with Iowa law. (D0347, Trial Tr. Vol. VI, 16:16–17:16). We will never know how the jury would have allocated fault (and specifically whether such allocation would have barred Plaintiffs' recovery) because of Plaintiffs' strategic decision to submit only their assault and battery claims, for which comparative fault does not apply.

Further, the district court's supplemental jury instructions did not require the jury to find that Wessels' conduct ***caused*** Plaintiffs' harm—either that Plaintiffs' damage would have not happened except for Wessels' allegedly reckless conduct, or that Plaintiffs' harm was within the scope of

Wessels' liability. *Thompson v. Kaczinski*, 774 N.W.2d 829, 836–839 (Iowa 2009); (D0306, Supp. Instructions (03/22/24)). Nor did the jury make any such finding. (D0316, Supp. Verdict (03/22/24)).

Any "error" in the submission of claims for assault and battery, and the jury's resulting verdict, was not harmless. *See Alcala v. Marriott Int'l, Inc.*, 880 N.W.2d 699, 707 (Iowa 2016) ("Iowa law requires a court to give a requested jury instruction if it correctly states the applicable law and is not embodied in other instructions."(quotation omitted)); *State v. Paredes*, 775 N.W.2d 554, 560 (Iowa 2009) (presuming "prejudice . . . and revers[ing] unless the record affirmatively establishes otherwise" (citation omitted)).

3. Plaintiffs' conditional request for a new trial is based solely a strategic error, not a legal error, and should be dismissed.

Defendants anticipated the very argument Plaintiffs make here in their initial brief. (Appellant's Br., 88). Plaintiffs, however, claim Defendants failed to preserve error because "the issue was never presented to the district court." (Appellees' Br., 58). Yet it was Plaintiffs who voluntarily elected not to submit their recklessness claim to the jury.

Defendants were not required or permitted to request an advisory opinion from the district court as to whether emergency response immunity might apply to Plaintiffs' recklessness claim—a claim they voluntarily elected not to submit. Further, Plaintiffs' argument that the case should be remanded "so that the District Court must first consider any viable alternative claims the Plaintiffs choose to make in light of this court's decision, including claims that previously were duplicative and/or would have caused jury confusion" fails for the same reason. (Appellees' Br., 60). Because Plaintiffs abandoned their recklessness claim, the district court never considered these issues. Plaintiffs may have made a strategic error by withdrawing their recklessness claim; however, there is no legal error for this Court to review.[3]

[3] *Norris v. Paulson*, cited by Plaintiffs, has no application here. *Norris* remanded the issue of the application of *Burnett v. Smith*, decided while the case was on interlocutory appeal, to the plaintiff's *Godfrey* claims. 2024 WL 4469203 at *2. The Iowa Supreme Court expressly declined to "decide (or to direct the district court how to decide) other requests for relief by the parties in this appeal that have not been presented to the district court, including the application of the holding in *Burnett*." *Id.* at *2 (quoting *Thorington v. Scott Cnty.*, No. 22-1194, at *1 (Iowa March 1, 2024)).

C. Even if Iowa Code Section 321.231 is "an express statute dealing with" Plaintiffs' claims under which "liability may be imposed," it has no application here.

Although the interplay between Sections 670.4(1) and 321.231 is academic, for the reasons discussed above, the court of appeals recently considered that issue and held that liability could not be imposed under Section 321.231 based on the use a "pursuit intervention technique" ("PIT maneuver"), which is exactly what Plaintiffs allege here. *See* Iowa Code § 321.231(4) (defining a PIT manuever).

In *Christiansen v. Eral*, the plaintiff brought common-law negligence claims against Sioux City and two individual officers for injuries suffered in a collision following law enforcement's use of a PIT maneuver. No. 22-1971, 2024 WL 108848, at *1–*2 (Iowa Ct. App. Jan. 25, 2024). The district court granted defendants' motion to dismiss, finding Iowa Code Sections 670.4(1)(k) and 670.12 provided immunity as the officer was providing an emergency response.[4] *Id.* at *2. The court of appeals affirmed, and

[4] The plaintiff also asserted *Godfrey* claims, which the appellate court held could not proceed in light of *Burnett v. Smith. Christiansen*, 2024 WL 108848, at *3.

addressed the same argument Plaintiffs make here; namely, that Section 321.231 is an "express statue dealing with such claims" pursuant to which a municipality and its officer may be held liable. *Id.* at *5.

Assuming Section 321.231 is an "express statute dealing with" the plaintiff's claims, the court looked at its "statutory privileges" as they existed in 2019, when plaintiff's claims accrued, and noted the statute did not include what is now subsection (4) relating to PIT maneuvers. *See* Iowa Code § 321.231(4) (providing a statutory privilege to execute a PIT maneuver under certain circumstances). This subsection was added by the legislature, effective May 24, 2022, after the plaintiff's claims accrued. *Id.* *6 (citing 2022 Iowa Acts ch. 1087, § 3).

Based on that, the court affirmed the district court's finding that "because the language in section 321.231(4) (Supp. 2022) related to PIT maneuvers came after the conduct giving rise to this action—the execution of the PIT maneuver on June 2, 2019—there was not an express statute that

applied to remove the immunity provided under chapter 670."[5] *Id.* at *6 (emphasis added). As a matter of statutory construction, the court held:

> If the language of section 321.231 was to address the application of immunity for all behaviors involved during an emergency response, it would make no sense for the legislature to retain section 670.4(1)(k). And section 321.231 would expressly state that instead of setting out specific "express" actions that are applicable under the statute. Because Christiansen's claim arose from an emergency response but, in particular, from the decision to utilize the PIT maneuver, the alleged tortious action was not from the specific list of when officers are entitled to a "special privilege" under the 2019 statute, so there was no statute expressly "dealing with such claims."

Id. at *7 (quoting Iowa Code § 670.4(1)). Further, "none of those listed exceptions [as of 2019] related to the use of a PIT maneuver, and so the Defendants cannot be held liable 'to the extent liability may be imposed by' section 321.231." *Id.* Accordingly, "the Defendants were exempt from liability for a claim based upon or arising out of an act or omission in connection with an emergency response" under Sections 670.4(1)(k) and 670.12. *Id.*

[5] The *Christiansen* court also correctly held that the 2022 amendment to Section 321.231 could not be retroactively applied. *Christiansen*, 2024 WL 108848, at *6 (citing Iowa Code § 4.5).

If Section 321.231 is "an express statute" under which "liability may be imposed," the same reasoning should apply here. On appeal, Plaintiffs describe Wessels' conduct as a "PIT maneuver."[6] (Appellees' Br., 31 ("There is no dispute in this case that a PIT maneuver cannot be used on a motorcycle unless deadly force is justified."). And like *Christiansen*, Wessels' conduct giving rise to Plaintiffs' claim occurred on December 10, 2020, a year-and-a-half before the May 2022 amendment to Section 321.231 became effective. 2022 Iowa Acts ch. 1087, § 3. Because Wessels' conduct occurred in connection to an emergency response, and according to Plaintiffs, "from the decision to utilize the PIT maneuver," his conduct "was not from the specific list of when officers are entitled to a 'special privilege' under the 2019 statute, so there was no statute expressly 'dealing

[6] As a result of their strategic decisions at trial, Plaintiffs were not required to identify, with specificity, the conduct they allege was reckless. Thus, neither the district court nor the jury found that Wessels' conduct fell under any of the statutory privileges set forth in Section 321.231.

with such claims.'" *Christiansen*, 2024 WL 108848, at *7. If the Court reaches this issue here, the result should be the same.[7]

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

Plaintiffs spill considerable ink arguing that Iowa Code Section 670.4A's heightened "plausible" and "particular[]" pleading standard applies prospectively only.[8] (Appellees' Br., 34–36). Defendants have never argued otherwise. (Appellants' Br., 58) ("This heightened standard is prospective, applying only to claims pleaded after the amendment's enactment."). Rather, Defendants argue that this heightened pleading

[7] *Hoffert v. Luze* and *Penny v. City of Winterset* addressed the legal standard applicable to the driver of an emergency response vehicle, and did not hold, as Plaintiffs claim, that § 321.231(6) applies to limit emergency response immunity." (Appellees' Br., 32). 578 N.W.2d 681, 685 (Iowa 1998); 999 N.W.2d at 656.

[8] Plaintiffs discuss the prospective and/or retrospective application of Section 670.4A's qualified immunity provision and requirement that plaintiffs plead that the law was clearly established at the time of the alleged deprivation at length. The issue on appeal turns solely on the application of the "plausible" and "particular[]" pleading standard. As a result, though Plaintiff discusses the court's decisions in *Thorington v. Scott County* and *Norris v. Paulson*, those cases are inapposite.

standard, which was enacted on June 17, 2021, clearly applies to Plaintiffs' effective amendment of the petition on March 7, 2024.[9] (Appellants' Br., 59).

Plaintiffs argue that they are not required to use "magic words" to plausibly plead claims of assault and battery with particularity. Presumably, these "magic words" are "assault" and "battery," which are entirely absent from the Petition and Amended Petition. Certainly, the expectation that Plaintiffs would use the words "assault" and "battery" to plead claims for assault and battery is not an expectation that Plaintiffs use "magic words." Rather, it is the bare threshold required to inform Defendants of what claims are being asserted against them. A petition that does not even identify that it is asserting claims of "assault" and "battery"

[9] Notably, the only way that application of the heightened pleading standard would be retrospective would be if the court applied it to Plaintiffs' original Petition at law, which was filed on May 20, 2021—shortly before the heightened pleading standard's enactment. Both Plaintiffs' Amended Petition, which was filed on April 11, 2022, and the Court effective amendment of the petition on March 7, 2024 occurred long after the heightened pleading standard's enactment.

simply cannot be said to provide notice to Defendants of the claims being asserted—much less plausibly plead such claims with particularity.[10]

Rather than focus on the substance of their pleadings, which are clearly deficient, Plaintiffs argue that Defendants were not prejudiced by their deficient pleadings. However, prejudice is irrelevant to the issue of whether Plaintiffs have satisfied Section 670.4A's heightened pleading standard. Iowa Code § 670.4A(3) ("Failure to plead a plausible violation . . . ***shall*** result in dismissal with prejudice." (emphasis added)). Regardless, prejudice is *inherent* given the procedural posture of this action. On the eve of trial, Plaintiffs sprang upon Defendants two previously-unpleaded claims, for which they obtained a $4.25 million verdict. Defendants were indisputably prejudiced by Plaintiffs' belated introduction of these new claims.

In fact, Plaintiffs' strategy of introducing untimely assault and battery claims and then choosing not to submit their recklessness claim was a

[10] Furthermore, as set forth in Defendants' opening brief, Plaintiffs did not plead sufficient facts to show that they could meet the elements of claims for assault or battery. (Appellants' Br., 66–67).

calculated bait-and-switch intended to prejudice Defendants. The Southern District of Iowa recently-rejected this same strategy by Plaintiffs' counsel, holding:

> Plaintiffs' newly articulated claims for assault and battery a[re] improperly 'manufacture[d] claims' barred by the notice requirement of the federal pleading rules. . . . [T]he alleged facts that Plaintiffs now identify as supportive of purported claims of assault and battery are pulled from the background allegations and from counts expressly associated with the constitutional tort and negligence claims. Such pleadings did not provide sufficient notice of an intention to assert claims of assault and battery.

Klum v. City of Davenport. No. 3:23-cv-00043-RGE-WPK, 2024 WL 2880640, at *13 (S.D. Iowa May 30, 2024). The district court in the present action erred in permitting Plaintiffs to proceed with this improper strategy, and Defendants were severely prejudiced as a result.

Plaintiffs' argument that their previously-dismissed excessive force claim was the "functional equivalent" of assault and battery claims does nothing to mitigate this prejudice. As a preliminary matter, Plaintiffs' excessive force claim was dismissed at summary judgment. This left only their recklessness claim for trial, upon which comparative fault would be

the central issue. Plaintiffs changed the nature of trial entirely by introducing last-minute assault and battery claims. The suggestion that allowing these new claims on the eve of trial did not "materially change the issues or substantially alter[] the defenses" is simply incorrect. (Appellees' Br., 38) (quotation omitted).

Further, Plaintiffs misconstrue Iowa caselaw in arguing that Defendants were not prejudiced because excessive force is the "functional equivalent" of assault and battery. Plaintiffs cite *Wagner v. State* for this proposition, yet *Wagner* did not consider whether a plaintiff can adequately plead assault and battery by pleading a claim for excessive force. 952 N.W.2d 843 (Iowa 2020). *Wagner* regarded the scope of sovereign immunity—not the scope of pleadings. While the Court held that Iowa Code Section 669.14(4) maintained the state's sovereign immunity for excessive force claims in addition to assault and battery claims, it expressly held that "of course, a claim under the Iowa Constitution and common law assault and battery *are two different causes of action*." *Id*. at 855 (emphasis added).

That caveat is critical, and it is supported by the fact that "the elements of assault and battery are distinct from constitutional tort claims asserting excessive force." *Klum*, 2024 WL 2880640 at *13. Under Iowa law, assault requires proof that the defendant committed "(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 [plaintiff] reasonably believe[d] that the act may be carried out immediately," *White*, 990 N.W.2d at 656 (quotation omitted), whereas battery requires proof that the defendant engaged in an "act[] intending to cause a harmful contact with the person of the other and a harmful contact result[ed]." *Carter v. Carter*, 957 N.W.2d 623, 635 (Iowa 2021), *as amended* (Apr. 29, 2021). In contrast, excessive force claims apply four "guiding principles." *State v. Dewitt*, 811 N.W.2d 460, 468 (Iowa 2012). "First, the test for reasonableness of police conduct 'requires a careful balancing of the nature and quality of the intrusion on the individual's [constitutional] interests against the countervailing governmental interests at stake.'" *Id*. at 469 (quoting *Graham v. Connor*, 490 U.S. 386, 396 (1989)).

"Second, [Article I, Section 8] does not require officers to risk their lives when encountering a suspect they reasonably believe is armed and dangerous." *Id*. "Third, the force used to detain a suspect during an investigatory stop must be limited to what is necessary to accomplish the goals of the detention." *Id*. "Finally, . . . the use of deadly force to stop an unarmed, nondangerous suspect is never constitutionally reasonable." *Id*. Plaintiffs' attempt to cobble together disparate allegations from their Amended and Substituted Petition to support assault and battery claims, rather than simply referring to the excessive force claim itself, demonstrates the differences between these claims.[11]

The legal distinctions between excessive-force claims and assault and battery claims highlight the fact that Defendants were prejudiced when Plaintiffs introduced new claims with new elements at the eleventh hour. This Court should reach the same conclusion as the *Klum* court and hold that claims for assault and battery were not properly pleaded.

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[11] Plaintiffs rely on paragraphs from three separate counts, the introduction, and the background sections of their Amended and Substituted Petition. (D0055, 1, 4–10; D0228, 3–4).

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

Plaintiffs purport that "Iowa authority" mandates the finding that Gus's so-called dying declaration, which was uttered after he voluntarily removed his ventilator, was admissible. Yet the case Plaintiffs cite for this proposition has nothing to do with hearsay or dying declarations. Rather, *State v. Fox* considered whether a victim of a crime's "decision to remove life support . . .constitute[s] an intervening and superseding cause of death" precluding the actor's criminal liability for homicide. 810 N.W.2d 888, 893 (Iowa Ct. App. Nov. 9, 2011). In other words, *Fox* concerned criminal culpability while the present case concerns evidentiary reliability.

In *Fox*, the Iowa Court of Appeals determined that a victim's decision to remove life support does not break the causal chain between a criminal's actions and the resulting harm—the victim's death. *Id*. In other words, the court found that removal of life support does not "relieve the [criminal] defendant of responsibility for the victim's death." *Id*. However, the dying declaration exception to the rule against hearsay exists because statements made regarding cause of death in the imminent face of death bear indicia

of reliability. *See State v. Castaneda*, 621 N.W.2d 435, 445 (Iowa 2001). According to that reasoning, an individual facing "impending death" is unlikely to "fabricat[e]" a statement. 41 C.J.S. Homicide § 384 (database updated May 2024). Yet, when an individual voluntarily removes themselves from life support, they are not necessarily facing impending death. For example, the evidence in this case indicates that Gus lived for over a day after his ventilator was removed. (D0344, 53:6–19). During that extensive period, he had ample opportunities to revoke his decision to end his life and reinstate the ventilator. Thus, a statement made under these circumstances lacks the indicia of reliability that permits admission of dying declaration.

As an alternative argument, Plaintiffs take the bold, and untenable, position that admission of the would-be dying declaration did not prejudice Defendants because it was "established by overwhelming physical evidence and expert testimony" that Gus "had been run off the road." (Appellees' Br., 52). Yet Plaintiffs provide no citation to this

purported "overwhelming evidence," which does not exist. Therefore, defendants were prejudiced by the admission of this hearsay.

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

Plaintiffs cite a single case in support of their argument that Wessels' failure to follow departmental policy regarding video/audio recording was relevant to whether he intended to commit assault and/or battery. Yet that case, *Martin v. Tovar*, 991 N.W.2d 760 (Iowa 2023), is inapposite. In *Martin*, police officer Thomas Tovar gave Shari Martin a ride to a hotel in which Martin was staying. *Id*. at 763. Tovar was on duty at the time, and Martin was unable to drive herself due to intoxication. *Id*. Upon reaching the hotel, Tovar sexually assaulted Martin. *Id*. At issue in the case was whether Tovar's employer—the city of Muscatine—could be held vicariously liable for Tovar's conduct. *Id*. The court noted that Tovar had voluntarily turned off his camera and body microphone at the time of the sexual assault[12]—

[12] Notably, in the present case, Wessels did not actively turn off his recording devices, which were never turned on in the first place. Plaintiffs overlook this distinction. (Appellees' Br., 54) ("It is common knowledge

both of which supported the conclusion that the city was not vicariously liable because "Tovar's rape of Martin was an egregious departure from the authorized or assigned duties of his employment as a police officer." *Id*. at 764. However, *Martin* did not consider whether failure to comply with departmental policy is relevant to intent to commit assault and/or battery. For the reasons stated in Defendants' opening brief, it is not.

Conclusion

For the foregoing reasons, the court should grant the relief requested in Defendants-Appellants opening brief.

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Respectfully submitted,

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that rogue officers who commit crimes on duty often *deactivate* their badge or dash cameras first." (emphasis added)).

Certificate of Compliance

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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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 November 08, 2024:

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