IN THE SUPREME COURT OF IOWA

NO. 18–1856

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF IOWA
CENTRAL DIVISION, CASE NO. C 15-3168-MWB

GREGORY BALDWIN, Plaintiff-Appellant,

v.

CITY OF ESTHERVILLE, IOWA,
Defendant-Appellee

CERTIFIED QUESTIONS FROM THE HONORABLE MARK W. BENNETT, UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF IOWA, CENTRAL DIVISION

DEFENDANT-APPELLEE'S FINAL BRIEF AND REQUEST FOR ORAL ARGUMENT

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ROUTING STATEMENT

This case should be retained by the Supreme Court because it is a case presenting substantial issues of first impression. Rule 6.1101(2)(e).

STATEMENT OF AGREEMENT WITH APPELLANT'S STATEMENTS ON ERROR PRESERVATION, SCOPE OF REVIEW AND STANDARD OF REVIEW

Appellee agrees with the Appellant's statements on error preservation, scope of review, and standard of review.

STATEMENT OF THE CASE/FACTS AND PROCEDURAL HISTORY OF THE LITIGATION

On March 17, 1980, the City of Estherville amended Title II ("Community Protection"), Division 1 ("Law Enforcement") of its Municipal Code by enacting Chapter 7 ("Supplemental Estherville Traffic Code"). (App. 21–22).

§ E-321.1, a part of this newly created ordinance, provided:

> All sections of the state statutory law, rules of the road, Chapter 321 of the Code of Iowa the offense of which constitutes a simple misdemeanor, are hereby adopted and incorporated by this reference the same as if set forth in full herein into the Code of Ordinances of the City of Estherville, Iowa, and the violation of such applicable state statutory laws of the road shall be a violation of this chapter if the offense occurs within the territorial city limits of the City of Estherville.

(App. 21, 23).

Newly adopted § E-321.2 provided in pertinent part:

> Citations issued under this chapter shall bear the prefix letter "E" and the applicable corresponding state statutory section of Chapter 321 of the Code of Iowa.

(App. 23).

Iowa Code § 321I.10(1) provides:

> A person shall not operate an all-terrain vehicle or off-road utility vehicle upon roadways or highways except as provided in section 321.234A and this section.

(App. 24).

Iowa Code § 321I.10(3) provides:

> Cities may designate streets under the jurisdiction of cities within their respective corporate limits which may be used for the operation of registered all-terrain vehicles or registered off-road utility vehicles. In designating such streets, the city may authorize all-terrain vehicles and off-road utility vehicles to stop at service stations or convenience stores along a designated street.

(App. 24)

Iowa Code § 321.234A(1)(f) provides:

> All-terrain vehicles shall not be operated on a highway unless one or more of the following conditions apply:
>
> f. The all-terrain vehicle is operated on a county roadway in accordance with section 321I.10, subsection 2, or a city street in accordance with section 321I.10, subsection 3.

(App. 26)

Subsequent to enactment of Ordinance No. 429 but on at least 3-4 occasions prior to November 10, 2013, Estherville police officers have cited plaintiff for

violations related to operation of his ATV "in the wrong place." (App. 31, Dep. of Gregory Baldwin, p. 12, lines 11-22). In each of those instances, plaintiff paid the fine associated with the allege violation. (App. 31, Dep. of Gregory Baldwin, p. 12, lines 17-19).

On Sunday, November 10, 2013, at approximately 2:30 p.m., Officers Reineke and Hellickson were on patrol in the City of Estherville when they received a dispatch to report to the Law Enforcement Center in regard to a "4 wheeler complaint." They drove to the Law Enforcement Center. (App. 16–20). Upon their arrival, they spoke with Tenner and Patti Lilland, who live in the Estherville area. Mr. Lilland showed the officers a video of a 4 wheeler riding in the ditch on the south side of North 4th Street. The officers were able to identify the driver of the ATV as Greg Baldwin. They watched the ATV proceed along North 4th Street and turn into a ditch, using the north Joe Hoye Park entrance, after which it continued in the ditch until it reached West 14th Avenue North, where it returned to the roadway. (App. 16–20).

Officers Reineke and Hellickson reviewed Iowa Code Chapter 321I (because the City did not reproduce Chapter 321 in printed form when it was adopted; it was simply incorporated by reference). (App. 58). Officer Reineke then reviewed *The Handbook of Iowa All-Terrain Vehicle and Off-Highway Motorcycle Regulations*, a handbook frequently relied upon by police officers when determining whether off

road vehicles are operating in compliance with applicable laws. (App. 17; App. 53–57).

Based upon their reading of the State Code and the information contained in the video provided by the Lillands, Officers Reineke and Hellickson concluded that there had been a violation of Municipal Code § E-321I.10 (operating on highways). (App. 17, 20). Before issuing a citation, however, Officer Reineke conferred with his supervisor, then Captain, now Chief Brent Shatto, and then Chief Eric Milburn. Captain Shatto and Chief Milburn were in agreement that the activity shown on the video amounted to a violation of the local ordinance. (App. 17).

Matt Reineke issued a citation to Greg Baldwin for violating Estherville Municipal Code § E-321I.10 (operating on highways). The citation was issued on November 11, 2013. (App. 17, 32).

Officer Reineke went to the Baldwin residence to serve the citation on November 11, 2013. No one was home. He was scheduled to be off work in the days that followed, so he e-filed the citation with the notation: "Request Warrant." (App. 17).

On November 12, 2013, David D. Forsyth, Magistrate, Third Judicial District of Iowa, entered an Order directing that a warrant issue. (App. 33–34). On November 13, 2013, Officer Hellickson served the warrant on Plaintiff. He

was arrested and taken to jail, where he was booked. His wife came to the jail and posted bond, and he was released. (App. 20; App. 38, Dep. of Lorraine Baldwin, p. 5, lines 15-21).

On November 19, 2013, Plaintiff entered his written appearance and plea of not guilty. (App. 39–40). Later that same day, Judge Forsyth set the matter for trial on May 15, 2014. (App. 41).

In the days that followed, City Attorney Christopher Fuhrman discovered something that neither he, Chief of Police and 28 year veteran of the Department, Brent Shatto, Matt Reineke nor Matt Hellickson knew; when the City of Estherville incorporated Iowa Code Chapter 321 into its municipal ordinances, Iowa Code Chapter 321I was not included. (App. 17, 20, 58). They were operating under the mistaken belief that the adoption and incorporation of Chapter 321 by the City Council included Chapters 321A-321M. It did not.

After considering his options, Mr. Fuhrman elected to move for leave to amend the charge, to allege a violation of a different ordinance. That motion was granted. (App. 43–44). Mr. Baldwin subsequently moved for Adjudication of Law Points. He argued that his operation of the ATV did not violate the ordinance referred to in the amended charge. The City resisted. The motion was ultimately granted, and the case was dismissed. (App. 45–52).

On November 4, 2015, Mr. Baldwin filed suit against Officers Reineke and Hellickson and the City of Estherville in the Iowa District Court for Emmet County. Defendants subsequently removed the case to the United States District Court for the Northern District of Iowa, Central Division.

In his Petition, Plaintiff alleged that the officers violated his right to be free from unreasonable seizure under the 4th Amendment and that they were guilty of false arrest under the common law, and that the City violated his rights as secured by Article I, Sections 1 and 8 of the Constitution of the State of Iowa. Defendants moved for summary judgment with respect to Plaintiff's federal constitutional and state common law claims. Plaintiff filed a cross-motion for summary judgment with respect to all of his claims. On November 18, 2016, the federal court filed its Memorandum Opinion and Order regarding the parties' motions. Defendants' Motion was sustained. The Court found that the individual officers were immune under federal law and dismissed Plaintiff's federal constitutional and state common law claims. To that extent, Plaintiff's Motion was overruled. As it related to Plaintiff's state constitutional claims, however, the federal court withheld ruling, pending a decision by the Iowa Supreme Court on a Petition for Further Review in the case of State v. Conklin, No. 14-0764, 863 N.W.2d 301, 2015 WL1332003 (Iowa App. 3/25/15), a case in which the Iowa Court of Appeals upheld a trial

court's grant of summary judgment, holding that "there is no private cause of action for a violation of the Iowa Constitution." 2015 WL 1332003 at *5.

On June 30, 2017, the Iowa Supreme Court decided the case of *Godfrey v. State*, 898 N.W.2d 844 (Iowa 2017), holding in part that the due process clause of the state constitution is self-executing for purposes of a damages action. 898 N.W.2d at 871.

Following publication of the opinion in the *Godfrey* case, the City filed a second motion for summary judgment in federal court, asserting that it was entitled to qualified immunity with respect to the remaining state constitutional claims. The federal court responded by certifying the following question to the Iowa Supreme Court: "Can a defendant raise a defense of qualified immunity to an individual's claim for damages for violation of article I, § 1 and § 8 of the Iowa Constitution?" On June 29, 2018, the Iowa Supreme Court answered the certified question, holding: "A defendant who pleads and proves as an affirmative defense that he or she exercised all due care to conform with the requirements of the law is entitled to qualified immunity on an individual's claim for damages for violation of article I, sections 1 and 8 of the Iowa Constitution." *Baldwin v. City of Estherville*, 915 N.W.2d 259, 260-261 (Iowa 2018).

On September 14, 2018, following receipt of the answer to the certified question in *Baldwin*, the federal court in the instant case ruled in favor Plaintiff on

his Cross-Motion for Summary Judgment, holding that Plaintiff's rights as secured by the Constitution of the State of Iowa were violated when he was arrested.

Following entry of that Order, the federal court certified the six questions that are the subject of this appeal.

ARGUMENT

I. CAN THE CITY ASSERT QUALIFIED IMMUNITY TO A CLAIM FOR DAMAGES FOR VIOLATION OF THE IOWA CONSTITUTION BASED ON ITS OFFICERS' EXERCISE OF "ALL DUE CARE"?

In *Baldwin*, this court held that "for purposes of article I, sections 1 and 8, we are convinced that qualified immunity should be available to those defendants who plead and prove as an affirmative defense that they exercised all due care to conform to the requirements of the law." 915 N.W.2d 259, 279 (Iowa 2018). As the dissent in *Baldwin* noted, "the question of the City's liability for constitutional violations of its employees is a distinctly different question than whether the individual officers employed by the City are entitled to some form of qualified immunity for their unconstitutional conduct." *Baldwin v. City of Estherville*, 915 N.W.2d 259, 282 (Iowa 2018) (Appel, J., dissenting). Here, there is a similar distinction between the questions about a City's entitlement to all due care immunity and the City's liability for a constitutional violation by its employees. *See id.*

Though not directly certified before the court today, this question about the City's liability for the constitutional violations of its employee is prerequisite to determining the availability of the "all due care" immunity defense to the city for the constitutional violations of its officers.

A. The *Monell* Standard for Municipal Liability is the Proper Approach

The United States Supreme Court determined the standard for municipal liability in *Monell v. Department of Social Services of City of New York*. *See* 436 U.S. 658 (1978). The court held that a municipality could not be liable under a respondeat superior theory for claims brought pursuant to 42 U.S.C. § 1983 for the actions and injuries inflicted solely by the agents and employees of the municipality. *See Monell v. Department of Social Services of City of New York*, 436 U.S. 658, 694 (1978). Rather, municipalities could only be held liable for "execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury. . . ." *Id.*

The *Monell* standard of liability is the appropriate standard for municipal liability for *Godfrey* claims brought under the Iowa Constitution. While the rationale in *Monell* was based in part on specific causation language in 42 U.S.C. § 1983, the same rationale applies to tort claims brought under the Iowa Constitution. *See Monell,* 436 U.S. at 692 ("the fact that Congress did specifically

provide that A's tort became B's liability if B "caused A to subject another to a tort suggests that Congress did not intend § 1983 liability to attach where such causation was absent"). In *Baldwin*, it was reasoned that "[c]onstitutional torts are torts, not generally strict liability cases." 915 N.W.2d at 281. The court further stated in discussing the availability of qualified immunity that "due care [is] the benchmark" and "[p]roof of negligence, i.e., lack of due care, was required for comparable claims at common law . . . [a]nd it is still the basic tort standard today."

As such, liability should not be imposed vicariously on municipalities for the actions of their employees or officers, unless it was caused by an official policy or custom of a municipality. "[P]roof of negligence" of the municipality itself should be the focus of liability under Iowa constitutional claims, in adhering to the basic tort causation standard behind these constitutional claims. Rather than the individual actions of the officers imposing liability on the municipality, the requirement should be that the municipal body itself implement a "particular policy [that is] the 'moving force' behind a *constitutional* violation. *See City of Oklahoma City v. Tuttle*, 471 U.S. 808, 824 n. 8 (1985).

Plaintiff/Appellant, though not directly addressing the issue of the vicarious liability of a municipality, suggests that strict liability should be the proper approach for the availability of qualified immunity, based on the United States

Supreme Court case of *Owen v. City of Independence*, 445 U.S. 622, 641 (1980). *See* Appellant's Brief at 22. It is anticipated that the same stance will be taken with regard to the standard for vicarious municipal liability. *See Baldwin*, 915 N.W.2d at 281–83 (Appel, J., dissenting) ("The majority's approach, however, increases the pressure to reject the limitations in *Monell* and apply the strict-liability approach in *Owen* across the board to claims against municipalities").

However, it is important to note that the Plaintiff in *Owen* had sued the government for the government's own conduct in discharging Plaintiff without notice or a hearing. *See Owen*, 445 U.S. at 622, 638 n. 18 ("Only the liability of the municipality itself is at issue, not that of its officers"). Furthermore, *Owen* did not impose strict liability "across the board," but only imposed strict liability on a municipality "when a plaintiff successfully demonstrates that a municipality has a custom or policy that violated his or her constitutional rights. . . ." *Baldwin*, 915 N.W.2d at 282 (citing *Owen*, 445 U.S. at 638).

In the current case, we have a situation distinct from the claims brought in *Monell* and *Owen*, where Baldwin is attempting to hold the City of Estherville liable on the basis of a respondeat superior theory of liability. *See* Appellant's Brief at 21 ("the City is liable for the torts of its officers"). Thus, to the extent that the court finds the rationale in *Owen* persuasive, it should only impose strict liability in cases where the alleged constitutional wrong was pursuant to the policy

or custom of the decision makers in government. After all, "strict damages liability for any constitutional wrong would lead to untenable results." *See Baldwin*, 915 N.W.2d at 277.

II. IF THE CITY CAN ASSERT SUCH A DEFENSE, ON THE FACTS PRESENTED IN THIS CASE, DOES THE CITY HAVE "ALL DUE CARE" QUALIFIED IMMUNITY TO LIABILITY FOR DAMAGES FOR THE VIOLATION OF BALDWIN'S RIGHT TO BE FREE FROM AN UNREASONABLE SEARCH AND SEIZURE UNDER ARTICLE I OF THE IOWA CONSTITUTION? THIS QUESTION NECESSARILY INCLUDES QUESTIONS ABOUT THE EXTENT TO WHICH RELIANCE ON A WARRANT MAY SATISFY THE "ALL DUE CARE" STANDARD AND WHETHER THE "ALL DUE CARE" ANALYSIS CONSIDERS ALTERNATIVE BASES FOR PROBABLE CAUSE OR A WARRANT ON WHICH THE OFFICERS DID NOT RELY.

A. "All Due Care" Immunity Should Extend to a Municipality When the Constitutional Claim Against the Municipality is for the Actions of its Employees or Officers

It is acknowledged that this Court could determine that the Municipal Tort Claims act imposes vicarious liability on the city for the actions of its officers. *See* Iowa Code § 670.1 (2018) ("'Tort' means every civil wrong which results in wrongful death or injury to person or injury to property or injury to personal or property rights and includes actions based upon . . . breach of duty, whether statutory or other duty or denial or impairment of any right under any constitutional provision, statute or rule of law"). While Defendant/Appellee maintains that any standard for municipal liability should be determined according

to *Monell*, regardless of whether the court declines to address the issue, rules that chapter 670 applies, or rules that *Monell* is the appropriate standard, a municipality should be entitled to the qualified immunity defense of its employees or officers, when the municipality's liability is premised on the unconstitutional acts of the employees or officers.

Plaintiff/Appellant's primary argument is that pursuant to Iowa Code § 670.2 common law immunities have been abrogated and the city is thus strictly liable for the torts of its employees or officers under § 670.2. Appellant's Brief at 21. First, this Court expressly stated in *Baldwin* that the opinion left open a number of issues including the applicability of chapters 669 and 670 of the Iowa Code. *See Baldwin*, 915 N.W.2d at 281. Thus, there is no indication as to whether Iowa Code § 670.2 even applies to damages actions under the Iowa Constitution. *See id*. However, even if § 670.2 applies to constitutional torts recognized in *Godfrey*, there is no language preventing municipalities from asserting qualified immunity on behalf of its officers or employees. *See* Iowa Code § 670.2(1) (2018). Simply recognizing by statute that municipalities are subject to liability for the torts of its officers and employees has no bearing on whether the city is entitled to the same defenses as those employees or officers.

Furthermore, Judge Bennett correctly stated with regard to Plaintiff/Appellant's argument about the abrogation of common law immunities:

> [T]he "all due care" qualified immunity defense is not a common-law immunity "previously accorded" municipalities, as of the time of the adoption of the predecessor of Iowa Code § 670.2(1). *See Symmonds*, 242 N.W.2d at 264. Rather, as the parties are well aware, it is a qualified immunity defense just adopted by the Iowa Supreme Court and applicable specifically to tortious violations of the Iowa Constitution, which were also just recognized as the basis for claims for damages. In answering the certified question in this case, the Iowa Supreme Court recognized that Iowa courts have a role in crafting a remedy for a claim for damages for a violation of the Iowa Constitution as established in *Godfrey*. *Baldwin*, 915 N.W.2d at 276. Thus, any prior abrogation of common-law immunities is inapplicable to the Iowa Supreme Court's subsequent adoption of a qualified immunity defense to newly-recognized Iowa constitutional claims.

(App. 106). As such, the court should disregard the argument that that the Municipal Tort Claims act compels strict municipal liability simply because the act abrogates all prior common law immunities. *See Baldwin*, 915 N.W.2d at 280 (finding that "qualified immunity should be *shaped* by the historical Iowa common law as appreciated by our framers and the principles discussed in Restatement (Second) of Torts section 874A" (emphasis added)).

Additionally, as mentioned above, Plaintiff's claim against the City of Estherville is distinct from a *Monell* claim as Plaintiff is attempting to hold the City liable on a respondeat superior theory of liability by arguing for strict liability under Iowa Code § 670.2. *See* Appellant's Brief at 21 ("Pursuant to Iowa Code § 670.2, the City is liable for the torts of its officers"). This distinction is key to the availability of immunity for a municipality.

"Because under *Monell* governmental entities are liable, if at all, for their own official actions rather than for the actions of their employees, immunity enjoyed by the employee is not material as to the liability of the governmental employer." *Greene v. Friend of Court, Polk County*, 406 N.W.2d 433, 435 (Iowa 1987). However, here, where the liability sought to be imposed on the City of Estherville is liability for the actions of its employees or officers, such immunity is certainly material as to the liability of the governmental employer. *See id.* This is undoubtedly the case should the Court find that the Municipal Tort Claims Act compels liability on the city vicariously through Iowa Code § 670.2. *See Thomas v. Gavin*, 838 N.W.2d 518, 523 (Iowa 2013) (noting that "[s]ection 670.2 is an express imposition of liability" on municipalities for the torts of employees).

In *Hook v. Trevino*, this Court was faced with the question as to whether a driver's volunteer immunity precluded state liability on a theory of respondeat superior for the driver's negligence. *See* 839 N.W.2d 434, 436 (Iowa 2013). In determining whether such immunity applied the Court stated, "a defense personal to the agent, such as immunity, will not ordinarily extend to bar a claim against the principal for the agent's negligence unless the rationale for immunity also applies to the principal." *Id.* at 441; *see also Estate of Dean v. Air Exec, Inc.*, 534 N.W.2d 103, 105 (Iowa 1995) (internal citations omitted) ("unless the purpose of the immunity would be thwarted by carrying it over to others, suit against the others

will lie"). To the extent that this principal/agent immunity analysis applies to vicarious tort claims brought under the Iowa Constitution, "all due care" qualified immunity should apply to the city, due to the policies and rationale supporting such immunity.

The court rationalized the availability of immunity for a Defendant's actions in *Baldwin* by theorizing "the government officials in these cases would be reluctant to fully perform their jobs if they could be found strictly liable for actions that happened to violate someone's constitutional rights." *See* 915 N.W.2d at 277. This rationale is similar for claims brought under 42 U.S.C. § 1983 for violations of the U.S. Constitution. *See Owen*, 445 U.S. at 655–56 ("At the heart of this justification for a qualified immunity for the individual official is the concern that the threat of *personal* monetary liability will introduce an unwarranted and unconscionable consideration into the decisionmaking process, thus paralyzing the governing official's decisiveness and distorting his judgment on matters of public policy").

There are certainly cases contending that the rationale for immunity of the officers does not similarly extend to that of the municipality, including *Owen,* where the court reasoned that "the inhibiting effect is significantly reduced, if not eliminated, however, when the threat of personal liability is removed." *See id.* at 656. However, this rationale is short cited and used in a case where the liability

sought was not vicarious in nature, but rather against the municipality for the actions of its elected or appointed officials in implementing a policy or custom. *See id.* at 655–56. The contention that employees and officers will somehow modify their conduct due to the exposure of personal liability, but that they are unlikely to do so if the municipality itself remains liable, "denigrates the sense of responsibility of municipal officers," as "[r]esponsible local officials will be concerned about potential judgments against their municipalities for alleged constitutional torts." *See id.* at 668–69 (Powell, J., dissenting).

"If officials must look over their shoulders at a strict municipal liability for unknowable constitutional deprivations, the resulting degree of governmental paralysis will be little different from that caused by fear of personal liability." *Id.* at 669 (Powell, J., dissenting); *see Everitt v. General Elec. Co.*, 932 A.2d 831, 847 (N.H. 2007) ("[V]icarious immunity applies when exposing the municipality to liability would focus 'stifling attention' upon the individual official's job performance and thereby deter effective performance of the discretionary duties at issue"). While the threat of personal liability is a deterrent, equally so is the possibility of retribution from the municipality due to an officer's acts in subjecting a municipality to liability, especially in a political climate where public figures are so eager to shift the blame and retain power. *See, e.g., Tilton v. Dougherty*, 493 A.2d 442, 445–46 (N.H. 1985) (reasoning that public officials

"could not exercise independent discretion if they had to fear retribution from the government" that would be statutorily required to indemnify the employee).

Additionally, to the extent that §§ 670.8 and 670.12 of the Municipal Tort Claims Act apply, the threat of personal liability for an employee/officer is not entirely removed, should the municipality be found liable for the officer or employee's unconstitutional conduct. *See* Iowa Code §§ 670.8 and 670.12 (2018) ("[T]he duty to save harmless and indemnify does not apply to awards for punitive damages," and "[a]ll officers and employees of municipalities are not personally liable for claims which are exempted . . . except claims for punitive damages, and actions permitted under section 85.20"). Therefore, should either of these sections apply to claims brought under the Iowa Constitution, the rationale that employees or officers would be hesitant and reluctant to do their jobs for fear of personal liability applies with equal force.

Quoting the court's previous decision in *Baldwin*, "Strict Liability Would Go Too Far." *See* 915 N.W.2d 259, 275. Extending "all due care" immunity would comport with the public policies behind the all due care immunity, especially when the liability is vicarious, based solely on the unconstitutional acts of the city's officers.

B. The Contours and Availability of "All Due Care" Immunity

"A defendant who pleads and proves as an affirmative defense that he or she exercised all due care to conform with the requirements of the law is entitled to qualified immunity on an individual's claim for damages for violation of article I, sections 1 and 8 of the Iowa Constitution." *Baldwin v. City of Estherville*, 915 N.W.2d 259, 260-261 (Iowa 2018).

The question certified by Judge Bennett is whether that same immunity is available to the City of Estherville under the facts of this case. In answering this question, it is important to focus on the events giving rise to this case.

The officers involved were dispatched to the Law Enforcement Center to take a complaint from a citizen with respect to a "4 wheeler." The officers met with the citizen and reviewed a video of a 4 wheeler riding in a ditch. They were able to identify Plaintiff as the driver. (App. 16-20).

After reviewing the video, the officers consulted Iowa Code Chapter 321I (because the City did not reproduce Chapter 321 in printed form when it was adopted; it was simply incorporated by reference). After reviewing the pertinent portions of the state code, Officer Reineke then reviewed *The Handbook of Iowa All-Terrain Vehicle and Off-Highway Motorcycle Regulations*, a handbook

frequently relied upon by police officers when determining whether off road vehicles are operating in compliance with applicable laws.[1] (App. 17, 53-58).

Based upon their reading of the State Code and the information contained in the video provided by the Lillands, Officers Reineke and Hellickson concluded that there had been a violation of Municipal Code § E-321I.10 (operating on highways). Before issuing a citation, however, Officer Reineke conferred with his supervisor, then Captain, now Chief Brent Shatto, and then Chief Eric Milburn. Captain Shatto and Chief Milburn were in agreement that the activity shown on the video amounted to a violation of the local ordinance. (App. 17).

The mistake these officers made was not a failure to exercise due care to conform to the requirements of law. They took extraordinary steps to make certain their actions conformed to the law. To the contrary, their only mistake was believing that there was an identical, companion ordinance, and electing to proceed under that ordinance, rather that the state statute which they had consulted.

The citation that was issued was ultimately presented to a magistrate with a request for issuance of an arrest warrant. The magistrate issued the warrant. (App. 33-34).

[1] The officers' reliance on this Handbook has been the subject of a great deal of criticism, both by Plaintiff and by the federal court. It is worth noting that the only evidence in the record about the reasonableness of consulting this Handbook is the testimony of the officers, both of whom say that it is a reference customarily used by peace officers in Iowa.

1. Reliance on a Warrant

> "Whe[n] the alleged constitutional violation involves an arrest pursuant to a warrant, 'the fact that a neutral magistrate has issued a warrant is the clearest indication that the officers acted in an objectively reasonable manner[.]'" *Saterdalen v. Spencer*, 725 F.3d 838, 841 (8th Cir.2013) (second alteration in original) (quoting *Messerschmidt v. Millender*, —— U.S. ——, 132 S.Ct. 1235, 1245, 182 L.Ed.2d 47 (2012)).

Williams v. City of Alexander, Ark., 772 F.3d 1307, 1311 (8th Cir. 2014).

In disposing of Plaintiff's false arrest claim, the federal court stated: "[W]here, as here, the arrest was pursuant to a facially valid warrant on which it was not unreasonable for the officers to rely, the City and the officers are protected from liability." (App. 87, citing *Rife v. D.T. Corner, Inc.*, 641 N.W.2d 761, 767 (Iowa 2002).

Given the extent of the officers' research, the effort put forth to confirm their conclusion that there had been a violation of state law, and the subsequent issuance of a facially valid warrant by a magistrate, there is ample evidence from which to conclude that these officers exercised all due care to conform with the law. There is no compelling justification for visiting the consequences of their mistaken belief that there was an identical municipal ordinance on the City of Estherville. The due care exercised by these officers should apply with equal force to the City.

2. Alternative Bases for Probable Cause

It is true that "[t]he reasonableness of a police officer's belief that the illegal search is lawful does not lessen the constitutional violation." *State v. Cline*, 617

N.W.2d 277, 292 (Iowa 2000). However, "the right to recover damages for a constitutional violation does not need to be congruent with the constitutional violation itself." *Baldwin*, 915 N.W.2d at 278. In *Howe v. Mason*, the Court observed: "[i]t may be laid down as a general rule that wherever the officer has acted honestly, though mistakenly, where he supposed he was in the execution of his duty, although he had no authority to act, he is entitled to protection of the act." 12 Iowa 202, 204, 1861 WL 240 at *1 (citing *Jones v. Highes*, 5 S. & R. 301). "Logically, the threshold of proof to stop an unconstitutional course of conduct ought to be less than the proof required to recover damages for it." *Baldwin*, 915 N.W.2d at 278-279.

Consistent with these principles, Iowa has recognized the existence of alternative probable cause. *State v. Tyler*, 830 N.W.2d 288, 295 (Iowa 2013) ("We have held that the State is not limited to the reasons stated by the investigating officer in determining whether either probable cause or reasonable suspicion existed for the stop" (citing *State v. Heminover*, 619 N.W.2d 353, 357 (2000))).

In the instant case, when the City Attorney discovered that the City had not adopted Chapter 321I, he sought, and was granted leave to amend to charge Plaintiff with a violation of local ordinance 219-2(2), accusing Plaintiff of operating his ATV on publicly owned property. The District Court ultimately

dismissed that charge based on the meaning of the word "street" and the phrase "publicly - owned property" in the local ordinance.[2]

In addressing this issue in response to Defendants' Motion for Summary Judgment, the federal court found for Defendants "because probable cause was *not* lacking for Baldwin's arrest[.]" (App. 83, emphasis in original). In other words, the federal court found an alternative basis for probable cause to arrest Plaintiff.

The existence of an alternative basis for probable cause to arrest Plaintiff lends further support to the conclusion that the City of Estherville is entitled to "all due care immunity."

III. IF PUNITIVE DAMAGES ARE AN AVAILABLE REMEDY AGAINST AN INDIVIDUAL DEFENDANT FOR A VIOLATION OF A PLAINTIFF'S RIGHTS UNDER THE IOWA CONSTITUTION, CAN PUNITIVE DAMAGES BE AWARDED AGAINST A MUNICIPALITY THAT EMPLOYED THE INDIVIDUAL DEFENDANT AND, IF SO, UNDER WHAT STANDARD?

While the lead opinion in *Godfrey* suggests that punitive damages should be an available remedy for claims under the Iowa Constitution, the deciding vote and concurring opinion simply stated that "[i]n the *appropriate* case a remedy of punitive damages *may* be necessary to vindicate a plaintiff's constitutional rights." *See Godfrey v. State*, 898 N.W.2d 884, (Cady, C.J., concurring in part and

[2] As noted by the federal court in its Opinion granting Summary Judgment, the issue in the instant case was "'whether the police officers had probable cause to arrest [Baldwin] for violating [Ordinance 219-2(2)], not whether he would have been convicted…." App. 83, quoting from *United States v. Hawkins*, 830 F.3d 742, 746 (8th Cir. 2016).

dissenting in part) (emphasis added); *Id.* at 882 n.9 (Mansfield, J., dissenting) ("As I read it, the opinion concurring in part and dissenting in part takes no final position on this issue").

Though it is not conceded this is an appropriate case to levy punitive damages against an individual under the state constitutional claims, Defendant/Appellee will not linger on the prospect about whether punitive damages are an available remedy against an individual defendant for a violation of a plaintiff's rights under the Iowa Constitution. Rather, this section will focus on the availability of punitive damages against a municipality.

A. Allowing an Award of Punitive Damages against a Municipality is Contrary to Public Policy, Including the Public Policy of this State

The first certified question regarding punitive damages inquires as to whether punitive damages can be awarded against a municipality if such damages are available against an individual defendant for a violation of a Plaintiff's rights under the Iowa Constitution. (App. 162). As allowing the recovery of punitive damages against a municipality would constitute a grave departure from the public policy of this state, this court should not allow awards of punitive damages against municipalities, regardless of whether the liability arises from the unconstitutional conduct of the municipality itself, or vicariously through its officers or employees.

First, the possibility of awarding punitive damages against a municipality runs contrary to the Municipal Tort Claims Act.[3] Though the majority in *Baldwin* appears to discount the applicability of all the "grab bag of immunities" in section 670.4 of the act, that determination does not mean that the immunities contained therein do not reflect the public policy of the state. *See Baldwin*, 915 N.W.2d at 280 (noting that these immunities reflect "certain *legislative* priorities"). Nor does it mean that certain individual immunities contained in the act do not apply. The simple fact that the Municipal Tort Claims Act contains immunity from such an award manifestly conveys that it is the policy of the state to immunize municipalities from punitive damages. *See id.*

The clear expression of this public policy is found in the history of the enactment of this punitive damage bar in the Iowa Municipal Tort Claims Act, previously codified as Iowa Code § 613A.4(5), and now found in Iowa Code § 670.4(1)(e) (2018). In *Young v. City of Des Moines*, contrary to the weight of authority barring punitive damage claims against municipalities, the court determined that punitive damages could be appropriately awarded against a municipality. *See* 262 N.W.2d 612, 621–22 (Iowa 1978). Shortly thereafter, "Iowa Code section 613A.4(5) was enacted in direct response to [the] holding in *Young v.*

[3] It is again noted that this Court has not yet determined the applicability of the Iowa Municipal Tort Claims Act. *See Baldwin v. City of Estherville*, 915 N.W.2d 259, 281 (Iowa 2018) ("We leave open a number of other issues . . . includ[ing] the applicability of provisions in chapters 669 and 670 other than sections 669.14 and 670.4"). However, the provisions of the act strongly evidence the policies of the state regarding municipalities and punitive damages.

City of Des Moines . . . ." *Parks v. City of Marshalltown*, 440 N.W.2d 377, 379 (Iowa 1989). In *Parks*, the court discussed the *Young* decision and subsequent action by the legislature as follows:

> A strong argument can be made that our *Young* and *City of Cedar Rapids* holdings were flawed. It is axiomatic that punitive damages are not awarded because a plaintiff deserves them, that their only purpose is "to punish the defendant and to deter the offending party and like-minded individuals from committing similar acts." *Ryan v. Arneson*, 422 N,W.2d 491, 496 (Iowa 1988). In enacting section 613A.4(5) the legislature expressed obvious disagreement that either of these purposes could be appropriately served by exacting "smart money" from the taxpayers.

Id. at 379. The *Parks* court went on to hold that punitive damages could not be recovered against a municipality for breach of contract, even when a strict reading of the Municipal Tort Claims Act might have allowed such an award. *See id.*

This policy against awarding punitive damages against municipalities is further exemplified by the indemnity provision of the Iowa Municipal Tort Claims Act found in Iowa Code § 670.8 (2018). As mentioned above, while officers and employees are held harmless and indemnified for any tort claims within the scope of employment, this indemnification does not extend to awards for punitive damages. *See* Iowa Code § 670.8(1) (2018) ("the duty to save harmless and indemnify does not apply to awards for punitive damages"). In fact, this determination to exclude punitive damages in a statutory scheme that imposes

liability on municipalities indicates that this was a conscious determination by the legislature.

Furthermore, the framework of the court's decision in *Baldwin* provides additional support for upholding the bar of punitive damages against municipalities. *See Baldwin*, 915 N.W.2d at 276. In coming to the conclusion regarding immunity, the court stated that "in implying a constitutional (or statutory) cause of action [the court] will use a suitable existing tort action or a new cause of action analogous to an existing tort action." *Id.* (quoting Restatement (Second) of Torts § 874A) (internal quotations omitted). Here, the existing framework for tort actions against municipalities or actions against officers and employees of municipalities, is the Municipal Tort Claims Act. *See generally* Iowa Code § 670 (2018). As such, even if the court determines that the Municipal Tort Claims Act does not apply to actions arising out of the Iowa Constitution, Iowa constitutional claims are clearly analogous to tort claims against municipalities under the act, and the same immunity contained therein should be extended. *See Baldwin*, 915 N.W.2d at 218 (reasoning that "Constitutional torts are torts").

Plaintiff/Appellant even admits that awards of punitive damages are not generally allowed against municipalities. Appellant's Brief at 37. While additionally admitting that punitive damages against municipalities may not be available in future cases, Plaintiff/Appellant contends that the important interests

of punishment and deterrence found in the 5th Circuit case of *Webster v. City of Houston*, 689 F.2d 1220 (5th Cir. 1982)[4], warrant such an award in this particular case. Appellant's Brief at 37–40.

First, Plaintiff/Appellant erroneously and reprehensibly equates the culpability of the officers in this case in arresting Plaintiff and charging him with a nonexistent ordinance, to the practice of "throw downs," where the Houston police would place weapons near unarmed suspects that were killed by police officers. Appellant's Brief at 39. Clearly there is distinction between framing and depriving a deceased individual of recourse after being killed by the police, and mistakenly charging Plaintiff for an ATV violation under a nonexistent ordinance. However, regardless of the clear factual distinction, Plaintiff/Appellant's argument behind such comparison fails due to the policy behind subjecting a municipality to punitive damages. *See City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 268–271 (1981).

While the court here is certainly not bound by the United States Supreme Court case of *Fact Concerts* as it was in *Webster*, the case is certainly instructive in addressing the possibility of subjecting municipalities to punitive damage awards. *See id.* In *Fact Concerts*, the United States Supreme Court considered the prospect of awarding punitive damages against a municipality under claims brought

[4] It appears that Plaintiff/Appellant incorrectly cites this case and that the correct citation is 689 F.2d 1220 (5th Cir. 1982).

pursuant to 42 U.S.C. § 1983 for violation of respondents constitutional rights under color of state law. *See id.* In holding that punitive damages cannot be awarded against municipalities, the court reasoned that "it is far from clear that municipal officials, including those at the policymaking level, would be deterred from wrongdoing by the knowledge that large punitive awards could be assessed based on the wealth of their municipality." *Fact Concerts*, 453 U.S. at 268.

The court determined that there was a more effective means to deter such unconstitutional conduct by "allowing juries and courts to assess punitive damages in appropriate circumstances against the offending official, based on his personal financial resources, [42 U.S.C. § 1983] directly advances the public's interest in preventing repeated constitutional deprivations." *Id.* at 270. As such, Plaintiff/Appellant's argument fails for similar reasons. *See id.*

It is not for Plaintiff/Appellant to determine whether the electorate will ever punish the individuals responsible for the violation at issue. Such a claim is wholly unsupported by fact. Furthermore, even if the court here were to determine that there was some exception, where the "taxpayers are directly responsible for perpetrating an outrageous abuse of constitutional rights," the current facts to not compel such a situation, where the unconstitutional conduct being alleged occurred at the hands of the officers. *See Webster,* 689 F.2d 1220, 1229 (citing *Fact*

Concerts, 453 U.S. at 263); Appellant's Brief at 21 ("the City is liable for the torts of its officers").

The fact remains that "an award of punitive damages against a municipality 'punishes' only the taxpayers, who took no part in the commission of the tort," and that "[m]unicipalities have finite resources and a limited ability to raise more resources." *Fact Concerts, Inc.*, 453 U.S. at 267; *Doe v. New London Community School Dist.*, 848 N.W.2d 347, 357–58 (Iowa 2014). Additionally, subjecting municipalities to punitive damages would introduce the real prospect of windfall awards due to a Plaintiff's ability to present evidence of a defendant's financial condition. *See Wilson v. IBP, Inc.*, 558 N.W.2d 132, 148 (Iowa 1996) ("One of the factors . . . for assessing the imposition of punitive damages is the financial position of the parties"). This evidence could be presented as the total net assets of a municipality, or even as evidence concerning the municipality's ability to levy taxes. *See Fact Concerts, Inc.*, 453 U.S. at 270 (noting the prejudicial effect of introducing evidence of the taxing power of municipalities).

As allowing an award of punitive damages against a municipality runs contrary to public policy, including specifically the policy of the State of Iowa, this court should not allow a claim for punitive damages against a municipality in fashioning remedies for claims under the Iowa Constitution.

B. The Standard for Punitive Damages Awards

While Defendant/Appellee strictly maintains that municipalities should not be subject to the possibility of an award of punitive damages, the applicable standard for such damages, should such damages be available, should be the same standards for a punitive damage award against an individual defendant.

Iowa has a long history of awarding punitive damages if it is proven "by a preponderance of clear, convincing, and satisfactory evidence, the conduct of the defendant from which the claim arose constituted willful and wanton disregard for the rights or safety of another." Iowa Code § 668A.1 (2018). The standard for punitive damages is similarly worded under the Municipal Tort Claims Act, which states that "[a]n officer or employee of a municipality is not liable for punitive damages as a result of acts in the performance of a duty, unless actual malice or willful, wanton and reckless misconduct is proven." Iowa Code § 670.12 (2018).

For purposes of this standard, "[w]illful and wanton" means that "[t]he actor has intentionally done an act of unreasonable character in disregard of a known or obvious risk that was so great as to make it highly probable that harm would follow, and which thus is usually accompanied by a conscious indifference to the consequences." *McClure v. Walgreen Co.*, 613 N.W.2d 225, 230 (Iowa 2000) (quoting *Fell v. Kewanee Farm Equip. Co.*, 457 N.W.2d 911, 919 (Iowa 1990)). "Mere negligent conduct is not sufficient to support a claim for punitive damages."

Id. (citing *Beeman v. Manville Corp. Asbestos Disease Compensation Fund*, 496 N.W.2d 247, 256 (Iowa 1993)).

As such, if the court were to determine that punitive damages are available against a municipality, or determines that clarification as to the availability or standard for punitive damages with regard to individual defendants under Iowa constitutional claims is necessary, the appropriate standard is the standard set forth in chapter 668A of the Iowa Code and the Municipal Tort Claims Act.

IV. IF PUNITIVE DAMAGES ARE AVAILABLE IN ANSWER TO THE PREVIOUS QUESTION, WOULD A REASONABLE JURY BE ABLE TO FIND THAT THE APPLICABLE STANDARD WAS MET ON THE FACTS PRESENTED IN THIS CASE?

Once again, it is vehemently urged that a municipality should not be subject to any punitive damage award in any case, including those brought against municipalities for the actions of its employees or officers. However, for purposes of responding to certified question number four, as to whether "a reasonable jury [would] be able to find that the applicable standard was met on the facts presented in this case," the conduct of the officers in this case did not rise to the level to warrant the imposition of punitive damages.

Just as is the case when analyzing the question of whether "all due care" immunity is availability to a City, one critical component of the analysis is to focus

on what actually happened in this case, setting aside the hyperbole that has crept into the record over time.

The officers involved were dispatched to the Law Enforcement Center to take a complaint from a citizen with respect to a "4 wheeler." The officers met with the citizen and reviewed a video of a 4 wheeler riding in a ditch. They were able to identify Plaintiff as the driver. (App. 16-20).

After reviewing the video, the officers consulted Iowa Code Chapter 321I (because the City did not reproduce Chapter 321 in printed form when it was adopted; it was simply incorporated by reference). After reviewing the pertinent portions of the state code, Officer Reineke then reviewed *The Handbook of Iowa All-Terrain Vehicle and Off-Highway Motorcycle Regulations*, a handbook frequently relied upon by police officers when determining whether off road vehicles are operating in compliance with applicable laws. (App. 17, 53-58).

Based upon their reading of the State Code and the information contained in the video provided by the Lillands, Officers Reineke and Hellickson concluded that there had been a violation of Municipal Code § E-321I.10 (operating on highways). Before issuing a citation, however, Officer Reineke conferred with his supervisor, then Captain, now Chief Brent Shatto, and then Chief Eric Milburn. Captain Shatto and Chief Milburn were in agreement that the activity shown on the video amounted to a violation of the local ordinance. (App. 17).

The mistake these officers made was not a failure to exercise due care to conform to the requirements of law. They took extraordinary steps to make certain their actions conformed to the law. To the contrary, their only mistake was believing that there was an identical, companion ordinance, and electing to proceed under that ordinance, rather that the state statute which they had consulted.

The citation that was issued was ultimately presented to a magistrate with a request for issuance of an arrest warrant. The magistrate issued the warrant. (App. 33-34).

Here, "the officers believed that Chapter 321I had been incorporated by reference into the City's Code of Ordinances." (App. 93). This conduct does not rise to the level of willful or wanton conduct to warrant the imposition of punitive damages. *See Carey v. Piphus*¸ 435 U.S. 247, 257 n.11 (1978) (punitive damages were not appropriate in § 1983 claim as defendants "did not act with a malicious intention to deprive respondents of their rights or to do them other injury"). It was nothing more than proceeding on the basis of a mistaken belief that Chapter 321I had been adopted by the Council. There is no evidence in this record of malice or intent to injure.

V. IF AN AWARD OF ATTORNEY'S FEES WOULD HAVE BEEN AVAILABLE AGAINST AN INDIVIDUAL DEFENDANT FOR A PLAINTIFF WHO ATTAINS SOME DEGREE OF SUCCESS ON A CLAIM OF A VIOLATION OF A PLAINTIFF'S RIGHTS UNDER THE IOWA CONSTITUTION, WOULD THEY BE AVAILABLE AGAINST A MUNICIPALITY THAT

EMPLOYED THE INDIVIDUAL DEFENDANT AND, IF SO, UNDER WHAT STANDARD?

As Iowa has a longstanding history of not awarding attorney's fees absent statute, contract, or with a Defendant's conduct meeting the standard for common law attorney's fees, attorney's fees should not be available against an individual defendant for claims brought under the Iowa Constitution. Furthermore, even if attorney's fees are recoverable against an individual defendant for constitutional violations, they should not be available against a municipality.

"As a general rule, an award of attorney fees is not allowed unless authorized by statute or contract." *W.P. Barber Lumber Co. v. Celania*, 674 N.W.2d 62, 66 (Iowa 2003) (citing *In re Marriage of Rosenfeld*, 668 N.W. 2d 840, 848 (Iowa 2003); *see Lee v. State*, 906 N.W.2d 186, 197 (Iowa 2018) ("Absent express statutory authorization, each party to a lawsuit ordinarily bears its own attorney fees"). Here, there is certainly no allegation of a contractual relationship between Plaintiff/Appellant Gregory Baldwin and Defendant/Appellee the City of Estherville. *See* Petition. Furthermore, with regard to claims under the Iowa Constitution, which this court found to be self-executing in *Godfrey v. State*, 898 N.W.2d 844 (Iowa 2018), there is no statute authorizing attorney's fees. In fact, the Iowa legislature's inaction has expressed a clear intention not to legislate for such an award.

The inclusion of the Bill of Rights in the Iowa Constitution was adopted in 1857. *See* Iowa Const. art. I; *see also Godfrey*, 898 N.W.2d at 864 (majority opinion). Since the adoption of the Bill of Rights, the Iowa Legislature has held 81 legislative sessions spanning 162 years. *See generally*, The Iowa Legislature, https://www.legis.iowa.gov/ (noting that the legislature is currently in the 88th session and that the 7th session began in 1858). Not only has the legislature not enacted a provision for attorney's fees for claims under the Iowa Constitution, but the legislature has passed countless other statutes providing for such fees in various other contexts. *See* Iowa Code § 490.746 (2018) (providing authority for attorney's fees in derivative actions); Iowa Code § 633A.4507 (2018) (allowing attorney's fees for actions involving trust administration); Iowa Code § 572.32(1) (2018) (allowing attorney's fees in actions to enforce mechanic's liens); Iowa Code § 70A.28(5)(a) (allowing attorney fees under Iowa's whistleblower statute).

Plaintiff/Appellant appears to argue that that he prevailed as a party because this Court adopted an "all due care" defense as opposed to the federal *Harlow* standard for qualified immunity, and thus, Plaintiff is entitled to attorney fees pursuant to § 1988. Appellant's Brief at 44–45. It is unclear how Plaintiff can champion the departure from the federal standard, and then argue that he is entitled to attorney fees based on a federal statute. In pointing out that this Supreme Court

departed from the federal standard, Plaintiff/Appellant plainly indicates why fees cannot be awarded under 42 U.S.C. § 1988.

Plaintiff/Appellant goes on to contend that the Iowa State Tort Claims Act supports the viability of an award for attorney's fees in this case. Appellant's Brief at 45–47. However, the availability of attorney's fees under the State Tort Claims Act compels just the opposite result. The Iowa State Tort Claims Act in Iowa Code § 669 applies to claims against the state of Iowa and claims against employees of the State of Iowa. *See* Iowa Code §669.2(3)–(4) (2018). Here, Plaintiff has only pled causes of action under the Iowa Constitution against the City of Estherville. (Petition). As Defendant/Appellee the City of Estherville is a municipality, it is not subject to the provisions of the Iowa State Tort Claims Act. *See* Iowa Code § 669.2 (2018); *Perkins ex rel. Perkins v. Dallas Center-Grimes Community School Dist.*, 727 N.W.2d 377, 378 (Iowa 2007) ("A municipality under chapter 670 is only liable in tort as provided by that chapter").

As has been discussed, it is certainly unclear at this point whether the Iowa Municipal Tort Claims Act applies to *Godfrey* claims under the Iowa Constitution. *See Baldwin*, 915 N.W.2d at 281. However, regardless of whether the act applies to such claims, the lack of a provision providing for attorney's fees in the Municipal Tort Claims Act demonstrates that the public policy of this state is to not award attorney's fees against municipalities. In fact, the specific inclusion of a provision

for attorney fees under the State Tort Claims Act and not the Municipal Tort Claims Act, indicates that this omission was a conscious decision by the legislature.[5] *See Thomas v. Gavin*, 838 N.W.2d 518, 524 (Iowa 2013) (applying the principle of "expressio unius est exclusion alterius" to Chapter 669 and 670).

The rationale behind this court's holding in *Thomas v. Gavin*, 838 N.W.2d 518 (Iowa 2013), is instructive for this proposition. In *Gavin*, the court was presented with the question as to whether county and municipal officials were entitled to immunity under Iowa Code § 669 for claims of assault, battery, and malicious prosecution, after enforcing the criminal laws of the state of Iowa. *See* 838 N.W.2d at 519. The court held that the exceptions in Chapter 669 were inapplicable to municipalities regardless of the law being enforced, and that the provisions in chapter 670 are exclusive to municipalities. *Id.* at 524. In doing so the court reasoned, "[i]f the legislature had intended local officials to have the benefit of *other* exemptions, such as those in chapter 669, it is striking that the [chapter 670] legislation did not mention them." *Id.*

Here, the same logic follows. If the legislature had intended for municipalities to be subject to an award for attorney's fees for tort claims, including torts based on constitutional violations, it surely would have included a provision providing for such an award. *See id.* This rings especially true

[5] It should be noted that it is not Defendant/Appellant's position that attorney fees should be awarded against the state for constitutional violations pursuant to Iowa Code § 669.

considering that the Iowa Municipal Tort Claims Act was passed by the legislature after the Iowa Tort Claims Act, with full knowledge of the provision for attorney's fees therein. *See id.* at 521–22 (noting that the Iowa Municipal Tort Claims Act was passed one year after the court determined that the Iowa Tort Claims Act did not apply to political subdivisions in the case of *Graham v. Worthington*, 259 Iowa 845, 146 NW.2d 626 (1966)).

The same rationale defeats Plaintiff's claim that attorney's fees should be awarded pursuant to the Iowa Civil Rights Act. Appellant's Brief at 47. While the Iowa Civil Rights Act was certainly adopted to protect citizens' civil rights, Plaintiff has not claimed and cannot claim that the officer's conduct in unlawfully conducting a search and seizure falls within the protections of that act. *See generally* Iowa Code §§ 216.1–216.21 (2018). As the statute does not cover the alleged unconstitutional conduct at issue, it cannot be the basis for an award for attorney's fees.

Plaintiff/Appellant appears to also make an equal protection claim, arguing that there would be a gaping hole should fees not be allowed under Iowa Constitutional torts, as attorney's fees are allowed under § 1983 claims, the Iowa Tort Claims Act, and the Iowa Civil Rights Act. Appellant's Brief at 47-48. On this point, Plaintiff/Appellant appears to lack a basic understanding of constitutional law principles. *See Varnum v. Brien*, 763 N.W.2d 862, 882 (Iowa 2009) ("[E]qual

protection demands that **laws** treat alike all people who are 'similarly situated with respect to the legitimate purposes of the law'" (internal citations omitted and emphasis added)). Here, it appears that Plaintiff/Appellant is pointing to the absence of a law as the basis for the classification, while also arguing that differences between classification under federal law and state law can be the basis for an equal protection violation—both concepts which are based on fantastical interpretations of constitutional principles. *See* Appellant's Brief at 48.

However, to the extent that this argument is an equal protection challenge to the classifications made under the Municipal Tort Claims Act, this court has considered these challenges in the past. *See Farnum v. G.D. Searle & Co., Inc.*, 339 N.W.2d 392 (upholding the differential treatment of the limitation period for claims made under the Municipal Tort Claims Act compared to private torts or torts brought pursuant to the Iowa Tort Claims Act); *see also Doe v. New London Community School District*, 848 N.W.2d 347, 357 (Iowa 2014) ("[W]e believe a rational basis exists for the legislature to place, within reason, greater limits on legal claims against municipalities than on legal claims against private entities").

Furthermore, Plaintiff/Appellant relies on *Lee v. State*, 874 N.W.2d 631, 642 (Iowa 2016) and the "private attorney general rationale" for the proposition that attorney fees should be awarded in actions arising under the Iowa Constitution.

Appellant's Brief at 49–51. However, *Lee III* [6] involved an award of attorney fees and costs in an FMLA action, under a provision that the court found was mandatory. *Lee v. State,* 874 N.W. 2d at 644. In fact, the court discussed this private attorney general rationale by stating "[a]s the Supreme Court has acknowledged, Congress often enacts fee-shifting statutes 'to encourage private litigation' and use 'private enforcement to implement public policy.'" *Id.* at 642 n.9 (quoting *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 263, 95 S. Ct. 1612, 1624, 44 L.Ed. 2d 141, 156 (1975)). Here, there has been no such encouragement by the legislature, and no adoption of any fee-shifting legislation.

While the court in *Baldwin I* departed from the federal standard for qualified immunity on constitutional claims, the issue facing the court today is analogous to the situation facing the United States Supreme Court and the U.S. Congress over four decades ago. Prior to the adoption of 42 U.S.C. § 1988, the United States Supreme Court was faced with the question of whether to award fees in a suit regarding the construction of the trans-Alaska oil pipeline on the basis of the "private attorney general theory," as an exception to the "American Rule." *Alyeska Pipeline Serv. Co.*, 421 U.S. at 240. In overturning the Court of Appeals and reaffirming the "American Rule," the court considered various other statutes in which Congress had provided for attorney's fee awards with the goal of

[6] It appears that this case is commonly referred to as *Lee III. See Lee v. State*, 906 N.W.2d 186, 189 (Iowa 2018).

implementing public policy by encouraging private litigation. *See id.* at 260–64. The court stated:

> "[C]ongressional utilization of the private-attorney general concept can in no sense be construed as a grant of authority to the Judiciary to jettison the traditional rule against nonstatutory allowances to the prevailing party and to award attorneys' fees whenever the courts deem the public policy furthered by a particular statute important enough to warrant the award."

Id. at 263. Though the *Alyeska Pipeline* case did not deal with a constitutional claim under § 1983, following the reaffirmation of the "American Rule," Congress adopted 42 U.S.C. § 1988. *See* 42 U.S.C. § 1988 (2018); s*ee also Gagne v. Maher*, 594 F.2d 336, 339 ("In [*Alyeska Pipeline*] the Supreme Court held that only congress can authorize an exception to the usual American rule" and "[c]ongress thereafter amended 42 U.S.C. § 1983 in the Fees Act . . . to permit a federal court to award attorneys' fees to a prevailing party").

While Defendant/Appellee acknowledges that this court has determined that the Iowa courts have a role in crafting remedies for constitutional claims,[7] "Iowa follows the American rule." *Thorton v. American Interstate Insurance Co.*, 897 N.W.2d 445, 474 (Iowa 2017). The court should not depart from its precedent, and "not purport to adopt on their own initiative a rule awarding attorneys' fees based on the private-attorney general approach when such judicial rule will operate only

[7] *See Baldwin*, 915 N.W.2d at 276 ("[O]ur conclusion in *Godfrey* that the Iowa Constitution can sustain a damages remedy without prior action by the Iowa legislature does not mean the Iowa *courts* have no role in crafting that remedy").

against private parties and not the government." *See Alyeska Pipeline*, 421 U.S. at 269.

Even though Plaintiff might correctly point out that it is the public policy of the federal courts to award attorney's fees to vindicate a Plaintiff's civil rights, the precedent in Iowa is clear—attorney's fees shall not be awarded absent statute, contract, or the rare common law exception. *See Thorton*, 897 N.W.2d at 474.

Though Plaintiff/Appellant's brief does not take a position on the issue, Plaintiff is not entitled to the rare exception of common law attorney's fees. "[A] Plaintiff seeking common law attorney fees must prove that the culpability of the defendant's conduct exceeds the willful and wanton disregard for the rights of another; such conduct must rise to the level of oppression or connivance to harass or injure another." *Hockenberg Equipment Co. v. Hockenberg's Equipment & Supply Co. of Des Moines, Inc.*, 510 N.W.2d 153, 159 (Iowa 1993) (internal quotations omitted). This conduct must exceed the punitive damage standard, and "envisions conduct that is intentional and likely to be aggravated by cruel and tyrannical motives." *Wolf v. Wolf*, 690 N.W.2d 887, 896 (Iowa 2005) (quoting *Hockenberg Equipment Co.*, 510 N.W.2d at 159); *see also Fennelly v. A-1 Machine & Tool Co.*, 728 N.W.2d 163, 181 (Iowa 2006). While the determination as to whether a reasonable jury could determine if the standard for attorney's fees was met is not a question before the court, there has been no evidence suggesting

that the conduct of the officers in this case rises to the level of oppression or connivance to harass or injure another person.

As there is no contract or statute authorizing attorney's fees in this case, and because the officer's conduct does not give rise to the availability of common law attorney's fees, the court should follow its precedent in not authorizing such an award.

VI. IF THE ANSWER TO EITHER QUESTION NO. 3 OR QUESTION NO. 5 (OR BOTH) IS IN THE AFFIRMATIVE, WILL RETROACTIVE APPLICATION TO THE PENDING CASE BE APPROPRIATE?

A. Retroactive Application of Punitive Damages or Attorney's Fees is Not Appropriate

While Defendant/Appellee's position is that punitive damages and attorney's fees should not be allowed against a municipality for claims brought for violations of the Iowa Constitution, should this Court find that such damages are awardable, this decision should not operate retroactively. As Judge Bennett noted, "while there is Iowa precedent concerning retroactive application of new rules, there is plainly none concerning the retroactive application of a possible new rule that punitive damages are available against a municipality for a violation of an individual's rights under the Iowa Constitution, where an individual's cause of action for damages for such a violation was only recognized in *Godfrey*, 898 N.W.2d 844." (App. 160).

It is noted that, "[a]s a general rule, judicial decisions, including overruling decisions, operate both retroactively and prospectively." *Beeck v. S.R. Smith Co*., 359 N.W.2d 482, 484 (Iowa 1984) (citations omitted). However, the Court may determine that in fairness a certain judicial decision may only have prospective application. *Id.* In *Beeck,* the court adopted the three part test for determining retroactivity contained in *Chevron Oil Co. v. Huson*, 404 U.S. 97, 106–07 (1971). *See id.* The three factors are:

(1) "[T]he decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, . . . or by deciding an issue of first impression whose resolution was not clearly foreshadowed;"

(2) The Court must "weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation with further or retard its operation."

(3) "The inequity imposed by retroactive application, for where a decision of this court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the injustice or hardship by a holding of nonretroactivity."

Beeck, 359 N.W.2d at 484 (internal citations and quotations omitted); *see also Matter of Estate of Weidman*, 476 N.W.2d 357, 361–62 (Iowa 1991).

While it appears that these factors are typically weighed in a case separate from the overruling case, they are instructive for purposes of the retroactivity of punitive damages or attorney's fees in this case. Here, if the court was to determine

that punitive damages and attorney's fees are awardable against a municipality for violations of the Iowa Constitution, it is clear that such a determination would establish a new principle of law.

First, at the time of the commencement of this action on November 4, 2015, Iowa had not determined that constitutional torts for money damages could be brought under the Iowa Constitution. *See* Petition; *Godfrey v. State*, 898 N.W.2d 844 (Iowa 2017) ("filed June 30, 2017"). As such, it was not even clear at the time that Plaintiff filed this case that such a claim could be filed, and certainly not clear that a Plaintiff could be awarded punitive damages or attorney's fees against a municipality for claims brought under the Iowa Constitution, as such a decision would be rendered in the current case certified before the court.

Additionally, the determination as to whether these awards would be available is surely an issue of first impression. Defendant/Appellee as a municipality should not be retroactively punished with an award for punitive damages, as it has long been the policy of this state that municipalities are not subject to such awards. *See supra* section III; *see also* Iowa Code § 670.4(1)(e) (2018). Nor should it be punished for an award of attorney's fees due to the clear precedent of not allowing such fees absent statute, contract, or the high level of culpability required for common law fees. *See supra* section IV; *see also W.P. Barber Lumber Co.*, 674 N.W.2d at 66.

There would be substantial inequity against Defendant, the City of Estherville, should retroactive application of this decision apply. Contrary to Plaintiff/Appellant's claim that retroactivity is not an issue regarding compensatory damages, retroactivity is the foundation for this question, specifically concerning punitive damages and attorney's fees that are not compensatory in nature. The Iowa Supreme Court considered the retroactive effect of the bar for punitive damages in the Municipal Tort Claims Act in the case of *Vinson v. Linn-Mar Community School Dist. See* 360 N.W.2d 108 (Iowa 1984); *see also* App. 160. The court determined that the bar should not operate retroactively, because "the amendment is substantive rather than merely remedial" as it "takes away a right of recovery that previously existed and does not give a party a remedy where none or a different one existed previously." *See Vinson*, 360 N.W.2d at 121.

The court should use this case and the *Chevron* test as guidance in determining that any award for punitive damages or attorney's fees against a municipality cannot be retroactive. While Plaintiff/Appellee might urge that *Vinson* compels the opposite result, punitive damages are not compensatory or remedial in nature, nor are attorney's fees. *See Shepherd Components, Inc. v. Brice Petrides-Donohue & Associates, Inc.*, 473 N.W.2d 612, 619 (Iowa 1991) (noting that "punitive damages are not intended to be compensatory" and a plaintiff does not "have a vested right to punitive damages prior to the entry of a judgment"); *see*

also Lee v. State, 874 N.W.2d 631, 369 (2016) (quoting *Hutto v. Finney*, 437 U.S. 678, 695 (1978)) (noting that "[u]nlike ordinary 'retroactive' relief such as damages or restitution, an award of costs does not compensate the plaintiff for the injury that first brought him into court").

As Defendant/Appellee will be significantly prejudiced by the imposition of such awards because such awards against municipalities have not traditionally been allowed, and because the cause of action giving rise to this lawsuit was not recognized at the time it was filed, any decision regarding the availability of attorney's fees or punitive damages should be prospective only.

CONCLUSION

For the reasons expressed herein, Defendant-Appellee requests that the Court determine that any liability for claims under the Iowa Constitution are subject to *Monell* type liability, that the City can assert qualified immunity as a defense to the claim of damages, and that the City has such immunity, based on the facts as presented in this case.

Furthermore, Defendant-Appellee requests that the Court determine that neither punitive damages nor attorney fees are available for a claimed violation of the Iowa Constitution.

To the extent that the Court may determine punitive damages or attorney fees are available, Defendant-Appellee requests that the Court determine they are not available retroactively and are not available in this case.

REQUEST FOR ORAL SUBMISSION

Appellee asks to be heard on oral argument.

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) or (2) because:

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/s/ Douglas L. Phillips February 28, 2019

CERTIFICATE OF SERVICE

I, Douglas L. Phillips, hereby certify that on the 28th day of February, 2019, I served Appellant's Final Brief on all other parties to this appeal by emailing one copy thereof to the following counsel for the parties at the following addresses:

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CERTIFICATE OF FILING

I, Douglas L. Phillips, further certify that I filed Appellant's Final Brief via EDMS on the 28th day of February, 2019.

/s/ Douglas L. Phillips