IN THE SUPREME COURT OF IOWA

SUPREME COURT NO. 16-1896

KAITLYN JOHNSON,
Plaintiff/Appellant,

vs.

HUMBOLDT COUNTY, IOWA,
Defendant/Appellee; and

SANDRA BECKER, Individually
and as Executor of the Estate
of Donald E. Becker,
Defendant.

APPEAL FROM THE IOWA DISTRICT COURT FOR HUMBOLDT COUNTY, THE HONORABLE KURT J. STOEBE, PRESIDING JUDGE

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASE LAW — PAGE(S)

STATUTES & RULES PAGE(S)

OTHER AUTHORITIES PAGE(S)

STATEMENT OF ISSUES PRESENTED FOR REVIEW

I. Preliminary Issues.

Jahn v. Hyundai Motor Co., 773 N.W.2d 550, 560 (Iowa 2009)
Ramberg v. Morgan, 218 N.W. 492 (Iowa 1928)
Treanor v. B.P.E. Leasing, 158 N.W.2d 4 (Iowa 1968)
Iowa Code ch. 319 (2003)
Iowa Code § 319.1
Iowa Code § 319.12 (1971)
Iowa Code § 319.12
IOWA R. APP. P. 6.801
Humboldt County, Ia., Ordinance No. 45 (Oct. 25, 2004)

II. The PDD Should be Abandoned.

Alcala v. Marriott Int'l, Inc., 880 N.W.2d 669 (Iowa 2016)
Estate of McFarlin v. State, 881 N.W.2d 51 (Iowa 2016)
Gannon v. Bd. of Regents, 692 N.W.2d 31 (Iowa 2005)
Harryman v. Hayles, 257 N.W.2d 631 (Iowa 1977)
Hemesath v. Iowa Dep't of Transp., No. 13-621, 2014 WL 2600354 (Iowa Ct. App. June 11, 2014)
Jama v. Immigration & Customs Enf't, 543 U.S. 335 (2005)
Judy v. Nat'l State Bank, 110 N.W. 605 (Iowa 1907)
Keystone Elec. Mfg., Co. v. City of Des Moines, 586 N.W.2d 340 (Iowa 1998)
Koenig v. Koenig, 766 N.W.2d 635 (Iowa 2009)
Kolbe v. State, 625 N.W.2d 721 (Iowa 2001)
Raas v. State, 729 N.W.2d 444 (Iowa 2007)
Summy v. City of Des Moines, 708 N.W.3d 333 (Iowa 2006)
Symmonds v. Chicago, M., St. P. & P. R.R., 242 N.W.2d 262 (Iowa 1976)
Van Fossen v. MidAmerican Energy Co., 777 N.W.2d 689 (Iowa 2009)
Wicker v. State, No. LACL115081, 2011 WL 8342352 (Iowa Dist. Ct. Nov. 21, 2011)
Wilson v. Nepstad, 282 N.W.2d 664 (Iowa 1979)
Iowa Code ch. 318
Iowa Code ch. 318 (2013)
Iowa Code § 318.2 (2013)

Iowa Code § 318.4
Iowa Code § 318.5 (2013)
Iowa Code ch. 319 (1971)
Iowa Code ch. 319 (2005)
Iowa Code § 319.6 (1971)
Iowa Code § 319.6 (2005)
Iowa Code ch. 321
Iowa Code § 321.177

IOWA DEPARTMENT OF TRANSPORTATION, LANE DEPARTURE SAFETY COUNTERMEASURES: STRATEGIC ACTION PLAN FOR THE IOWA DEPARTMENT OF TRANSPORTATION (Final Report May 2011)

U.S. DEPT. OF TRANS., FED HIGHWAY ADMIN., MAINTENANCE OF DRAINAGE FEATURES FOR SAFETY: A GUIDE FOR LOCAL STREET AND HIGHWAY MAINTENANCE PERSONNEL (2009)

U.S. DEPT. OF TRANS., FED HIGHWAY ADMIN., MAINTENANCE OF DRAINAGE FEATURES FOR SAFETY: A GUIDE FOR STREET AND HIGHWAY MAINTENANCE PERSONNEL (1990)

Restatement (Second) of Torts § 288 (1965)
Restatement (Third) of Torts § 7 (or "section 7")
Restatement (Third) of Torts § 37 (or "section 37")
Restatement (Third) of Torts § 40 (or "section 40")
Restatement (Third) of Torts § 49

III. The PDD is Inconsistent with the IMTCA.

Bd. of Water Works Trustees v. Sac County, 890 N.W.2d 50, 73 (Iowa 2017)
Kolbe v. State, 625 N.W.2d 721 (Iowa 2001)
Raas v. State, 729 N.W.2d 444 (Iowa 2007)
Thompson v. Kaczinski, 774 N.W.2d 829 (Iowa 2009)
Wilson v. Nepstad, 282 N.W.2d 664 (Iowa 1979)
Iowa Code ch. 670 ("Iowa Municipal Tort Claims Act" or "IMTCA")
Iowa Code § 670.7 (2016)
Iowa Code § 670.10 (2016)
Restatement (Third) of Torts § 3

Restatement (Third) of Torts § 7 (or "section 7")
Restatement (Third) of Torts § 9

IV. The PDD is Not Applicable to This Case.

Bruning ex rel. Bruning v. Carroll Comm. School Dist., 486 F.Supp.892 ND Iowa 2007)
Estate of McFarlin v. State, 881 N.W.2d 51 (Iowa 2016)
Harryman v. Hayles, 257 N.W.2d 631 (Iowa 1977)
Mardis v. City of Des Moines, 34 N.W.2d 620 (Iowa 1949)
Summy v. City of Des Moines, 708 N.W.3d 333 (Iowa 2006)
Thompson v. Kaczinski, 774 N.W.2d 829 (Iowa 2009)
Wilson v. Nepstad, 282 N.W.2d 664 (Iowa 1979)
Iowa Code chs. 669 & 670 (the "Tort Claims Acts")
Iowa Code ch. 670 ("Iowa Municipal Tort Claims Act" or "IMTCA")
Iowa Code § 670.2 (2013)
Iowa Code § 670.4 (2016)
Restatement (Third) of Torts § 3
Restatement (Third) of Torts § 7 (or "section 7")
Restatement (Third) of Torts § 9

V. The PDD does Not Abolish all of Johnson's claims.

Harryman v. Hayles, 257 N.W.2d 631 (Iowa 1977)
Kolbe v. State, 625 N.W.2d 721 (Iowa 2001)
Waters v. State, 784 N.W.2d 24 (Iowa 2010)
Wilson v. Nepstad, 282 N.W.2d 664 (Iowa 1979)
Iowa Code ch. 318
Iowa Code ch. 319
Iowa Code chs. 669 & 670 (the "Tort Claims Acts")
Iowa Code ch. 670 ("Iowa Municipal Tort Claims Act" or "IMTCA")
Restatement (Third) of Torts § 7 (or "section 7")

VI. Legislative Action and Stare Decisis Support Plaintiff's Position.

Estate of McFarlin v. State, 881 N.W.2d 51 (Iowa 2016)
Harryman v. Hayles, 257 N.W.2d 631 (Iowa 1977)

Iseminger v. Black Hawk County, 175 N.W.2d 374, 378 (Iowa 1970)
Kolbe v. State, 625 N.W.2d 721 (Iowa 2001)
Menke Hardware, Inc. v. City of Carroll, 474 N.W.2d 579 (Iowa 1991)
Raas v. State, 729 N.W.2d 444 (Iowa 2007)
State v. Adams, 380 N.W.2d 716 (Iowa 1986)
Symmonds v. Chicago, M., St. P. & P. R.R., 242 N.W.2d 262 (Iowa 1976)
Wilson v. Nepstad, 282 N.W.2d 664 (Iowa 1979)
Iowa Code ch. 318
Iowa Code ch. 319
Iowa Code ch. 669
Iowa Code chs. 669 & 670 (the "Tort Claims Acts")
Iowa Code ch. 670 ("Iowa Municipal Tort Claims Act" or "IMTCA")

ARGUMENT

I. Preliminary Issues

Before responding to other issues in Appellee's Second Amended Proof Brief ("Brief"), Plaintiff-Appellant will address several preliminary issues. The County seeks to shift focus from itself to the driver, or to Plaintiff Johnson (a passenger), or both, as a matter of comparative fault by: (1) noting the driver fell asleep[1] and departed from his lane[2]; (2) arguing the driver must have been "too tired to drive"; and (3) concluding the driver and Plaintiff should have known better than to travel "if [he] was too tired to drive."[3] The latter two assertions are mere argument that could only be relevant amidst comparative fault. All three assertions should be ignored because they are irrelevant to the issues presented in this appeal.

Comparative fault is not at issue. Evidence of *why* the vehicle departed from its lane is not relevant to whether the County owed a duty to Plaintiff, nor to whether the County breached its duty as a matter of law. Moreover, as the injuries appear divisible[4], the County's liability is limited to the *increased* injury caused by the vehicle's impact with the concrete

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[1] Brief p. 4.
[2] *Id*. p. 15.
[3] *Id*.
[4] *See* App. 175, 176, 178 (compare ¶ 3 (Katie's injuries) with ¶ 8 (those she would have sustained had County remediated sooner)).

wall, the same as would be true in a products liability case, a medical negligence case involving a patient injured in an accident, and any other case of successive tortfeasors. *Cf. Jahn v. Hyundai Motor Co.*, 773 N.W.2d 550, 560 (Iowa 2009); *Treanor v. B.P.E. Leasing*, 158 N.W.2d 4 (Iowa 1968); *Ramberg v. Morgan*, 218 N.W. 492 (Iowa1928). As the district court observed, "Simply put, there was no injury until the vehicle hit the cattle guard." Order p.4 (11-23-15 Order). Plaintiff only seeks compensation for enhanced damages caused by the County's failure to remediate. Comparative fault arguments hinging on *why* the vehicle departed from its lane are irrelevant and unfairly prejudicial.

The Municipal Amici ("Municipalities") go further by injecting a hypothetical whereby travelers "find themselves in the rare situation of falling asleep behind the wheel while driving home from a party after a night of drinking."[5] The same principle applies as in response to the County's case-specific assertions of sleepiness: The cause of lane departure, whether ice, deer, sleepiness, or otherwise, is not at issue and is irrelevant.

Similarly, speculation whether Humboldt County "has sympathy [in its corporate heart] for Johnson,"[6] whether David Helmers is a released

[5] Municipalities' Brief p. 6.
[6] *See* Brief p. 15.

party[7], and whether Johnson has an "avenue" to recover for paraplegia and brain injury from the Beckers[8] are irrelevant, unsupported by the record, and should be ignored. *See* IOWA R. APP. P. 6.801.

The County also asserts, its "Ordinance requiring a permit was not enacted until 2006 and did not apply retroactively, therefore no permit was required." Brief p. 3. The ordinance was actually enacted in 2004. *See* Exhibit 31 pp.1-2. The effective date of the ordinance is beside the point, however, because the ordinance is not the source of the County's duty to Plaintiff.

When the concrete wall was constructed, Iowa law provided "No … obstruction *except* … devices authorized by law or *approved* by the highway authorities shall be placed upon the right of way of any public highway …." Iowa Code § 319.12 (1971). This section did not specify the procedure by which to seek County permission, such as through a permitting process, a letter of approval, or otherwise. What is important is that it was improper for anyone to place or erect the concrete wall in the County's right of way without County approval.[9]

[7] *See id.* p. 5.
[8] *See id.* p. 16.
[9] No subsequent legislation removed this requirement.

Notwithstanding this statutory proscription, Humboldt County did not establish a process for seeking such approval until 2004. *See* Exhibit 31 pp.1-2 (declaring ordinance "shall be interpreted and construed ...generally as an implementation of or in harmony with chapter 319, Code of Iowa, 2003"). In the "purpose" section of the ordinance, the County acknowledged obstructions are "hazardous" and "create potential liability to Humboldt County," thereby admitting the County understood the dangers of obstructions, its duty to remove them, and its liability if it failed to do so. *Id*. The County's delay in establishing a formal permitting process neither eliminated its ongoing duty under section 319.1 (and section 318.4, beginning in 2006), nor forgave the Beckers' construction without the approval required under section 319.12.

Before and after the collision on March 3, 2013, the County issued notices to other landowners requiring removal of right-of-way obstructions. *See* Exhibit 38, pp.1-34. Two notices pertained to walls, including the depicted wall:

App. 247-251, 268, 269. Through its notices, the County implicitly admitted that walls like the one at issue are obstructions, that the County had the duty and control to remove them, and that it could easily perform its duty by placing the onus on landowners for removal and costs.

II. The PDD should be abandoned.

A. Whether to abandon the PDD is an open question.

The County essentially argues the PDD is consistent with the Third Restatement because "the Supreme Court did indeed consider [in *McFarlin*] whether the [PDD] should be abandoned, and rejected that consideration." Brief p. 7. The County claims the PDD is "alive and well" and twice quotes the following statement from *McFarlin*: "We conclude the public-duty doctrine remains good law after our adoption of sections of the Restatement (Third) of Torts." Brief p. 7 (quoting *Estate of McFarlin v. State*, 881 N.W.2d 51, 59 (Iowa 2016)).

The County's assertions do not accurately convey the context in which the foregoing statement was made. The only issue involving the PDD in *McFarlin* was whether the facts were more similar to those in *Kolbe v. State*, 625 N.W.2d 721 (Iowa 2001), or to those in *Summy v. City of Des Moines*, 708 N.W.3d 333 (Iowa 2006), on which the *McFarlin* plaintiffs relied. It was *not* whether the PDD survived adoption of the Third

Restatement, or even whether the doctrine should be abandoned on other grounds: "The plaintiffs... do not ask us to overrule *Raas* and *Kolbe* and abandon the public-duty doctrine. We do not ordinarily overrule our precedent sua sponte." *McFarlin*, 881 N.W.2d at 59. The *McFarlin* plaintiffs never argued at the district or appellate levels that the Third Restatement undermined the PDD. *See id.* at 60 n.4. Thus, the *McFarlin* discussion about whether to abandon the PDD and the paragraph about whether it survived the Third Restatement were not in response to an issue before the court, were not necessary for the Court's decision, and were pure dicta. *See Gannon v. Bd. of Regents*, 692 N.W.2d 31, 42 (Iowa 2005) ("defining obiter dicta as 'passing expressions of the court, wholly unnecessary to the decision of the matters before the court.'" (citation omitted)). **"Dictum settles nothing, even in the court that utters it."** *Jama v. Immigration & Customs Enf't*, 543 U.S. 335, 352 n.12 (2005) (emphasis added); *accord Judy v. Nat'l State Bank*, 110 N.W. 605, 607 (Iowa 1907); *Hemesath v. Iowa Dep't of Transp.*, No. 13-621, 2014 WL 2600354, at *5 (Iowa Ct. App. June 11, 2014). Accordingly, *McFarlin's* discussion regarding abandonment of the PDD was dicta and not binding precedent.

Recognizing *McFarlin's* limits follows the Court's practice of addressing only those issues properly preserved and before it, because only then will both sides of an issue be fully explored in a manner assisting the Court to develop sound and consistent jurisprudence. *See Alcala v. Marriott Int'l, Inc.*, 880 N.W.2d 699, 712 (Iowa 2016) ("We prefer to wait to decide the issue with the benefit of a district court ruling and full adversarial briefing."). Here, unlike in *McFarlin*, the issue of whether to abandon the PDD is properly preserved, is raised on appeal, and has undergone full adversarial briefing.

B. The PDD is inconsistent with the Third Restatement.

The County argues *McFarlin* correctly reasoned the PDD survived adoption of the Third Restatement for three reasons: (1) the Third Restatement mentions the PDD (albeit in a reporter's note); (2) the Third Restatement purportedly "acknowledges that the doctrine is alive and well," (a claim attributed to the same reporter's note); and (3) "courts throughout Iowa" have allegedly considered the issue. Brief pp.7-11.

The County relies on the following excerpt from a reporter's note:

> *Deference to **discretionary** decisions of another branch of government.* The "public-duty" doctrine is often explained as preventing government **tort** liability for obligations owed generally to the public, such as providing fire or police protection. Only when the duty is narrowed to the injured victim or a prescribed class of persons does a tort duty exist.

Id. at 8 (bold emphasis added) (quoting Restatement § 7 reporter's note cmt. *g*, at 93–94). Notably, this reference to the PDD merely acknowledges what some courts did in the past (under the Second Restatement). It does not endorse the PDD or declare it "alive and well." The PDD is not even mentioned in any official comment in the Third Restatement. Surely if the Third Restatement drafters intended to *endorse* the PDD, one would expect the rule stated in section 288(b) of the Second Restatement[10] would have a counterpart in the Third Restatement, and yet it does not. *See* Appellant's Proof Brief pp.27-29.

Although the Third Restatement does not embody or discuss the PDD, it does address the same topic as the reporter's note upon which the County relies, namely, "Deference to discretionary decisions of another branch of government." Plaintiff submits the comment quoted below reveals the Third

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[10] Section 288 stated in relevant part:

> The court will not adopt as the standard of conduct of a reasonable man the requirements of a legislative enactment or an administrative regulation whose purpose is found to be exclusively
> ...
>
> (b) to secure to individuals the enjoyment of rights or privileges *to which they are entitled only as members of the public.*

Restatement (Second) of Torts § 288(b) (1965) (emphasis added).

Restatement's position on doctrines that addressed discretionary decisions of government officials prior to the Third Restatement, including the PDD. Comment *g* to section 7 states:

> *g*. *Deference to discretionary decisions of another branch of government.* Courts employ no-duty rules to defer to **discretionary** decisions made by officials from other branches of government, **especially decisions that allocate resources** or **make other policy judgments**. Courts often use the rubric of duty to hold that it is inappropriate to review these decisions in lawsuits. For example, courts often hold that police have no duty of reasonable care in deciding how to allocate police protection throughout a city. **This no-duty limitation requires analysis of whether the challenged action involves a discretionary determination of the sort insulated from review** or instead is a ministerial action that does not require deference**.** This analysis is similar to that under the "discretionary function" exception to the Federal Tort Claims Act....

Restatement § 7 at cmt. g, at 80-81 (bold emphasis added). Thus, the Third Restatement anticipates that *discretionary* decisions/functions of a branch of government may be subject to a no-duty rule in exceptional cases, but this comment in no manner suggests that duty turns on the antiquated distinction between duties owed "generally to the public" and duties owed to "a prescribed class of persons," as the PDD does.

"The primary factor in determining whether a particular activity qualifies as a discretionary function is whether the decision to act involves the evaluation of broad policy factors." *Keystone Elec. Mfg., Co. v. City of*

Des Moines, 586 N.W.2d 340, 348 (Iowa 1998). Noting "every act involves discretion," the Court held although "the City's decisions concerning where and when to expend resources to fight [a] flood involved an exercise of judgment and discretion," they did not involve a discretionary function. *Id.* Policy decisions were made when the City adopted an emergency flood plan; later decisions of the City such as when and where to sandbag were not policy-based and were not discretionary. *Id.* at 348, 349.

Similarly, the legislature evaluated broad policy factors when it *mandated* that municipalities remove or cause to be removed right-of-way obstructions. To paraphrase *Keystone*, although "the [County's] decisions concerning where and when to expend resources to [remove obstructions] involve[s] an exercise of judgment and discretion," they do not involve a discretionary function or decision. Consequently, applying the PDD here would not protect another branch's discretionary decision; it would achieve the very opposite by *overriding* the legislature's policy decision to require that municipalities remove obstructions from the highways under their control. Applying the PDD under the circumstances here would indeed be contrary to the Third Restatement.

The County's assertion that "courts throughout Iowa" have considered whether the PDD is consistent with the Third Restatement is exaggerated

and rests on only two cases: *McFarlin* and one unreported district court opinion, *Wicker v. State*, 2011 WL 8342352 (Iowa Dist. Ct. Nov. 21, 2011). As already discussed, the *McFarlin* majority's statement that the PDD remains good law after adopting the Third Restatement is nonbinding dicta, made without the benefit of elucidating briefs and arguments. Although the district court in *Wicker* ultimately held the PDD is an exception to the general duty in section 7, it observed that "the on-going vitality of [the PDD] could be questioned in light of the Court's adoption of the Restatement (Third) of Torts, thereby shifting the foreseeability analysis from the arena of duty to the area of causation." *Id.* *4. The cursory review of this issue in *McFarlin* and the application of this doctrine by one district court judge who questioned its ongoing vitality hardly supports the County's assertion that "courts throughout Iowa" have considered this issue.

It is enlightening to consider the Court's decision in *Van Fossen v. MidAmerican Energy Co.*, 777 N.W.2d 689 (Iowa 2009), quoted by the district court in *Wicker*. *See* Brief p. 10 (quoting *Wicker* (quoting *Van Fossen*)). In *Van Fossen*, the Court held the owners of a power plant owed no duty to the wife of an employee of an independent contractor hired by the owners to construct the plant. 777 N.W.2d at 691. The employee's wife contracted mesothelioma after exposure to asbestos while laundering her

husband's work clothes. *Id.* at 691-92. A significant factor in the Court's decision was the absence of any evidence showing the owners "exercised any *control* over [the independent contractors] to such extent as would support a broader duty." *Id*. at 696-97 (emphasis added). The Court noted "[t]he issue of retained control is inescapably part of the duty issue, which is necessarily and properly determined as a matter of law by the court." *Id*. The Court also observed that the one in control of the work was in the best position to manage risks arising from that work, which in *Van Fossen* was the independent contractor, not the owners. *Id*. at 698. A similar consideration was instrumental in *McFarlin*: "It is undisputed the dredge pipe and equipment were owned and operated by local entities, not the State. ...*Liability follows control*, and an owner who transfers control to others is not liable for injuries." 881 N.W.2d at 64 (emphasis added).

In contrast to the *Van Fossen* and *McFarlin* defendants, the County controlled the right of way through its easement from the Beckers. App. 202-206; App. 237-246. This control was strengthened by the County's authority over obstruction removal granted in chapter 318 and its predecessors. *See* Iowa Code ch. 318 (2013); ch. 319 (2005); ch. 319 (1971). These statutes even empowered the County to charge offending landowners

for obstruction removal costs. *See id.* §§ 318.5(3) (2013); 319.6 (2005); 319.6 (1971).

Moreover, the County was well aware of the serious risks that right-of-way obstructions pose to travelers. *See, e.g.*, App. 209-210; App. 212 ("Motor vehicles... occasionally run off the roadway," but "most drivers can recover control… and return to the roadway or come to a safe stop. ...Drainage ditches should be designed so a vehicle leaving the roadway can cross over them without …being abruptly stopped…."), App. 214 (explaining "drainage features which do not have anything to do with causing a crash can significantly contribute to the severity of the crash, such as an errant vehicle striking a culvert headwall. It is important to identify these potentially hazardous situations as soon as possible."), App. 219 (explaining the ends of ditches should be "traversable" and free of obstructions higher than four inches, which "can snag the undercarriage of a vehicle, causing it to stop abruptly"); App. 200-201 (Iowa DOT's Lane Departure Safety Countermeasures plan); App. 247-280 (enforcement documents). In short, the County's superior knowledge and control make it best suited to manage the risks of right-of-way obstructions within its jurisdiction, distinguishing the County from the *Van Fossen and McFarlin* defendants.

The County appears to perceive some significance to its contention that Katie was not an "invitee." *See* Brief, p. 11. In *Koenig v. Koenig*, 766 N.W.2d 635, 643-44 (Iowa 2009), the Court abandoned the distinction between invitees and licensees. Thereafter, *Van Fossen* noted "the well-established special duty of possessors of real estate to protect non-trespassers against dangerous conditions on real estate." 777 N.W.2d at 693. Through control of its right of way, with special responsibility for right-of-way obstructions, the County owed a duty to non-trespassers, including Katie. *See* Restatement (Third) of Torts § 49 cmt. *d* ("Possession of land may be divided among several actors.... In such cases each actor has the duty provided in this Chapter with respect to the portion of the premises *controlled by that actor*." (Emphasis added.)). "A person is in control of the land if that person has the *authority and ability to take precautions to reduce the risk of harm to entrants on the land*." *Id*. § 49 cmt. *c* (emphasis added). As already discussed, the County had the authority and ability to remove the obstruction in its right of way to reduce the risk of harm to travelers thereon. The County's control entailed a corresponding duty owed to non-trespassers, including Katie, with whom it held a special relationship for purposes of section 40(b)(3). *See id.* § 40(b)(3) (recognizing the special relationship

between possessors of land and non-trespassers that forms an exception to section 37).

The County also contends Katie and other travelers on the road cannot be members of a special class for purposes of the PDD, relying on *Kolbe v. State*, 625 N.W.2d 721, 724 (Iowa 2001). *See* Brief pp.10-11. A closer examination of *Kolbe* demonstrates why the County's reliance is misplaced.

The collision in *Kolbe* occurred on a Sac County secondary road, *see Kolbe* at 724, making Sac County the highway authority responsible for maintaining a safe right-of-way. The suit, however, was not against the highway authority, but against the State. Moreover, the suit was not based on the State's failure to remove a right-of-way obstruction or even a failure to maintain the highway in a safe condition. The Kolbes alleged the State "'negligently and without adequate investigation issued driving privileges'" to the driver who caused the accident. *Id.* at 724-25.

In response to the State's claim that the PDD precluded duty from attaching, the Kolbes claimed chapter 321, and especially section 321.177(7), created a special relationship between users of Iowa roads (of which class they claimed membership) and the State, whose function it was to issue drivers' licenses. Unlike here[11], chapter 321 did not describe for

[11] *See* Iowa Code § 318.2 (defining purpose).

whose benefit section 321.177 was enacted. The *Kolbe* Court determined the statute was part of the "highly regulated" field of motor vehicle statutes for the benefit of the public at large, including persons interested in obtaining drivers' licenses[12] who might find it "unreasonably difficult" to do so if the Court "chill[ed] the State's licensing determinations," by recognizing a tort for negligent issuance of a driver's license. *Id*. at 730.

Contrary to the *McFarlin* dicta that after *Kolbe* Iowa no longer recognizes "county-wide special classes of motorists," McFarlin, 881 N.W.2d at 61 n.6, ***Kolbe* did not articulate or even suggest such a change in the law.** In highway obstruction cases, the special relationship is between the travelers on the highway and the highway authority, whose duty is specifically focused on maintaining safe rights of way for the benefit of travelers thereon. The special relationship claimed by the *Kolbe* plaintiffs was not with the highway authority (Sac County), but with the State, who was tasked with the regulatory function of licensing drivers, a different and much broader focus than maintaining safe roadways for the protection of travelers. *Kolbe* did not overrule *Harryman v. Hayles*, 257 N.W.2d 631 (Iowa 1977), *Symmonds v. Chicago, M., St. P. & P. R.R.*, 242 N.W.2d 262

[12] The *Kolbe* Court clearly viewed license applicants as some of the persons for whose benefit the statute was enacted, because it based its decision on the impact that recognizing a special relationship could have on those persons.

(Iowa 1976), or similar cases imposing liability on highway authorities, nor did the Court imply that those decisions were wrong. In fact, it never mentioned those cases. Why? Because the issue was *not* whether travelers on the highway *ever* constitute an identifiable class sufficient to show a special relationship with *any* governmental defendant, *in any context*. *Harryman* and *Symmonds* already decided that issue in the affirmative in a more narrow context when they specifically held that travelers on the highway *are* an identifiable class, smaller than the general public, and sufficient to form a special relationship with the highway authority in the context of right-of-way obstruction cases. *Wilson v. Nepstad* supports Plaintiff's interpretation of *Harryman* and *Symmonds*. 282 N.W.2d at 671. To overrule this longstanding precedent would violate the doctrine of stare decisis.

III. The PDD is inconsistent with the IMTCA.

The County asserts *Raas* and *Kolbe* already established the PDD is consistent with the Iowa Municipal Tort Claims Act ("IMTCA"), and that nothing has changed that warrants overruling those cases. That assertion overlooks how the IMTCA and Third Restatement now combine in a way not possible before *Thompson v. Kaczinski*, 774 N.W.2d 829 (Iowa 2009).

Raas v. State, 729 N.W.2d 444 (Iowa 2007), involved two separate suits against the State alleging injuries caused by escaped inmates. *Id*. at 446. *Raas* focused on whether a special relationship existed under the Second Restatement, "'guided by the principle that the scope of the duty turns on the foreseeability of harm to the injured person.'" *Id.* at 450 (citation omtted). To survive the motion to dismiss, each *Raas* plaintiff had to show he was a foreseeable victim, because a foreseeable victim had a special relationship with the custodian (the State) that precluded the PDD. The Court reinstated the claim of one plaintiff who was a "reasonably foreseeable... victim," and dismissed the claim of a second plaintiff, who had "not alleged the status of a foreseeable victim, but only a member of the public at large." *Id*. at 450.

Thompson later adopted the Third Restatement duty analysis. 774 N.W.2d at 834. If *Raas* were decided today, the Court could not consider whether the *Raas* plaintiffs were foreseeable victims. *See id*. (stripping foreseeability from duty analysis). Rather, it would find that when the State acted to supervise prisoners, it owed both plaintiffs a section-7-duty to exercise reasonable care. *See id*. Later, the *jury* would consider foreseeability of risk when analyzing *breach of care*. *See Thompson* at 835. (lack of foreseeable risk may form basis for no-*breach* determination). The

jury might find the State breached its duty to the plaintiff in the prison parking lot, whose risk of harm was foreseeable, but find no breach in relation to the plaintiff fishing down by the river, whose risk of harm was more remote than foreseeable. The point is that the Third Restatement would find a duty owed to both *Raas* plaintiffs and would let the jury consider the foreseeable risk to each plaintiff when deciding whether the State breached its duty.

Although the ultimate *result* following trial might be the same as in *Raas* under the Second Restatement, this *method* would be consistent with the Third Restatement's framework, and with its underlying objective to "protect the traditional function of the jury as factfinder." *See* Restatement § 7 cmt. j at 83. More importantly, because the State would owe a general duty of care to the *Raas* plaintiffs under the Third Restatement, a no-duty ruling under the guise of the PDD would treat the State differently than private defendants in violation of the IMTCA. *Thompson* changed the duty analysis after *Raas* and *Kolbe*, with the result the PDD now conflicts with the IMTCA in ways never true before *Thompson*.

Alternatively, *Raas* and *Kolbe* were simply wrongly decided and should be overruled. The legislature considered the complex issue of whether to allow tort recovery from municipalities the same as from private

defendants and decided to do so. It is impossible to know all of the various factors the legislature considered. But the statute itself bears witness to one consideration raised by the County—fiscal impact.

Although a municipality can spread even an enormous judgment across its tax base so it is not meaningfully felt, *see* Iowa Code § 670.10 (2016), the legislature crafted the IMTCA to allow municipalities to procure liability insurance. *See id*. § 670.7 (2016). The legislature thereby fashioned a holistic approach that not only allows redress from municipal tortfeasors the same as from private tortfeasors, but permits municipalities to responsibly procure liability coverage the same as do private persons, all while providing incentive for municipalities to act with care. *Cf. Wilson v. Nepstad*, 282 N.W.2d 664, 673-74 (Iowa 1979)("Municipalities [won't] be motivated toward meaningful inspections while insulated from their employees' negligence with respect to these statutory duties.").

The legislature enacted the IMTCA to provide real solutions for real problems. A "fundamental principle[] of law is for remedies to be available when we discover wrongs." *Bd. of Water Works Trustees v. Sac County*, 890 N.W.2d 50, 73 (Iowa 2017) (Cady, C.J., concurring/dissenting in part). The legislature provided for a remedy here when it abolished governmental immunity. That the PDD is only "technically" distinguishable from

governmental immunity was even acknowledged in *Raas*. 729 N.W.2d at 448 ("'The [PDD] is not technically grounded in government immunity, though it achieves much the same results.'" (Citation omitted.)). The legislature's policy decision to allow remedies for victims of governmental negligence should not be overridden by a technical distinction in judicial doctrine.[13]

IV. The PDD is not applicable to this case.

Although the PDD was not discussed in *Thompson*, the County contends the Court's acknowledgement that there can be exceptions to the general duty imposed by section 7 shows "the [PDD] is still alive even after *Thompson*." Brief p. 14. The *Thompson* Court observed:

> However, in exceptional cases, the general duty to exercise reasonable care can be displaced or modified. ...An exceptional case is one in which "an articulated countervailing principle or policy warrants denying or limiting liability in a particular class of cases." ...In such an exceptional case, when the court rules as a matter of law that no duty is owed by actors in a category of cases, the ruling "should be explained and justified based on articulated policies or principles that justify exempting [such] actors from liability or modifying the ordinary duty of reasonable care." ...Reasons of policy and principle justifying a departure from the general duty to exercise reasonable care do not depend on the foreseeability of harm based on the specific facts of a case.

[13] Municipalities' suggestion Iowa should "protect *its citizens* through the [PDD]" is foolish. *See* Municipalities' Brief 21 (emphasis added). The PDD protects *governmental tortfeasors* at the expense of citizens who are their victims.

774 N.W.2d at 835 (citations omitted). Plaintiff has not ignored this discussion in *Thompson* and in fact devoted an entire section of her brief to the County's *failure* to show that this case is "an exceptional case in which an articulated principle or policy warrants denying or limiting liability in this class of cases." Because duty is the rule, the County has the burden to prove an exception applies. *Cf. Bruning ex rel. Bruning v. Carroll Comm. School Dist.*, 486 F. Supp. 892 (N.D. Iowa 2007) (stating in reference to the IMTCA, "Because liability is the rule and immunity the exception, the Iowa Supreme Court placed the burden of proof on the government entity to establish entitlement to the statute's protection."). It has failed to do so because it has not articulated a countervailing principle or policy that would warrant denying or limiting liability in this class of cases—injuries caused to travelers thereon by right-of-way obstructions—and to do so without considering foreseeability.

The closest the County comes to articulating a policy consideration is by speculating vaguely about adverse financial consequences if Humboldt County is found to owe a duty to Plaintiff. *See* Brief p. 15 (speculating about "unlimited potential liability"); *id*. at 16 ("The potential burden of this duty is substantial and unlimited."). The Municipalities' sky-is-falling argument is reminiscent of the County's, except it implies a direct correlation between

the number of right-of-way miles throughout Iowa and potential liability. They conclude through this speculative correlation that the potential for governmental liability is too great. Neither the County nor the Municipalities offer actual facts in support of their self-serving prediction of financial doom.

What we do know is that Iowa jurisprudence reports numerous cases over a period of more than 150 years wherein the Court held the government accountable for right-of-way obstructions and allowed judgments in favor of travelers thereon who were injured thereby.[14] In none of those cases did this Court deny liability on the grounds of the PDD. Yet there is no record or suggestion that the State or any municipality has become insolvent as a result of such judgments. Meanwhile, a Westlaw search yields approximately 30 cases involving the PDD; that is a small number of cases during the 47-year-period identified by the Municipalities.[15]

More importantly, the legislature already considered the financial impact of governmental liability before enacting the Tort Claims Acts, as the Court has recognized:

> We ...are unimpressed by policy arguments urged ...that failure to exempt the municipality from its negligence would have a disastrous financial impact.

[14] *See* Iowa Association for Justice's Amicus Brief ("IAJ Brief") pp.8-11.
[15] *See* Municipalities' Brief.

...

> Most important ...is the fact that *financial consequences of legislation must be the primary responsibility of the legislature and cannot weigh heavily in the court's function of interpreting statutory language.* We have no reason to believe our legislature did not weigh those factors when enacting and amending [the IMTCA]. *Allowing ...concerns over fiscal effects to control statutory interpretation will destroy carefully constructed legislation*.

Wilson, 282 N.W.2d at 674 (emphasis added). Similarly, the Court should reject the County's and Municipalities' claims of financial ruin here. If the abolition of governmental immunity has not already occasioned a disastrous financial impact, the rejection of the PDD, which applies in substantially fewer cases, will certainly have no such impact.

The Municipalities' list of examples of governmental decisions for which they would be liable if the PDD is abandoned is absurd. *See* Municipalities' Brief 18-20. The Municipalities predict that without the PDD a municipality would be liable even "when it cannot predict the circumstances leading to an event, when it may have no control over the outcome, or it is responsible for making split-second decisions." *Id.* at 20. To the contrary, a jury would consider these factors to determine whether the municipality breached its duty. *See* Third Restatement §§ 3 (Negligence) and 9 (Emergency). Abolishing the PDD will not repeal discretionary function, nor numerous other exceptions to governmental liability. *See* Iowa Code §

670.4(1) (2016). The specter of absolute liability painted by the Municipalities is simply inaccurate.

The County notes *McFarlin* discussed how "a key factor in rejecting the applicability of the [PDD] in *Summy* was that the City was operating the golf course as a business and invitees paid for the use of the course." Brief p. 15. The County then argues the PDD should apply because Plaintiff didn't pay to use the road, so formed no special relationship with Humboldt County. *Id*. Plaintiff doesn't dispute that *Summy* and *McFarlin* focused on the existence and nonexistence, respectively, of what could best be described as "proprietary" functions, as distinguished from governmental functions. *See Mardis v. City of Des Moines*, 34 N.W.2d 620, 624 (1949) (describing "governmental functions," which are "exercised by the municipalities for the benefit of the public" and from which it "derives no peculiar advantage, pecuniary or otherwise,"); *id.* (observing before enactment of the IMTCA the "well-settled general rule of nonliability for... negligence... in the exercise of public or governmental functions, from which it derives no profit or advantage, as distinguished from corporate or proprietary functions").

Under the IMTCA, however, municipalities are liable for torts "arising out of a governmental *or* proprietary function." Iowa Code § 670.2(1) (2013) (emphasis added). "[P]revious distinctions between

governmental and proprietary functions... are no longer meaningful." *Harryman v. Hayles*, 257 N.W.2d 631, 637 (Iowa 1977). Narrowly, the lesson is that it matters not whether Plaintiff paid the County to use the road. More broadly, and importantly, the PDD conflicts with the IMTCA; whereas the PDD seeks to preclude liability when the duty was owed to the public generally, rather than because of a special relationship (such as in a proprietary context), the IMTCA *expressly* subjects municipalities to liability in *both* contexts.

V. The PDD does not abolish all of Johnson's claims.

In discussing why it believes the PDD abolishes all of Plaintiff's claims, the County purports to describe "the law of Iowa," citing *Waters v. State*, 784 N.W.2d 24 (Iowa 2010). *See* Brief p. 19. The County represents that this Court in *Waters*

> specifically looked at Chapter 319 (of which 318 is the predecessor)[16] in regard to an obstruction of an abandoned vehicle sitting in the central traveled portion of the highway right-of-way. The Iowa Supreme Court looked at and *approvingly* cited the case of *Kolbe v. State*, 624 N.W.2d 721, 729 (Iowa 2001) ("We have routinely held that a breach of a duty owed to the public at large is not actionable unless the plaintiff can establish, based on the unique or particular facts of the case, a special relationship between the [government] and the injured plaintiff... ") *in determining that immunity is applicable* in a case where the trial court had dismissed some,

[16] Chapter 318 *succeeded* chapter 319.

> but not all of the claims against several governmental entities/units.

Brief p. 19 (emphasis added). The Brief gives the impression *Waters* examined the applicability of the PDD in the context of a duty claimed under chapter 319 involving a right-of-way obstruction, and that this Court "approvingly" *cited Kolbe* to apply the PDD and find the County not liable.

Waters does not hold counties are immune from lawsuits brought under chapters 318 or 319. Whether the PDD applied to such claims was neither decided, nor at issue, in *Waters*. On the contrary, *Waters* actually affirmed the district court's decision allowing the claims against the State to proceed to trial. *See Waters* at 30. More importantly, the sole issue in *Waters* was a narrow and extraneous procedural issue, carefully delineated by the Court: "We do not review the merits of the underlying summary judgment ruling, but are tasked with interpreting the judgment to determine whether the order issued in response to the motion for clarification of the judgment improperly directed the State to proceed to trial." *Waters*, 784 N.W.2d at 27-28.

The County also misrepresents *Waters'* citation to *Kolbe*. Rather than citing *Kolbe* with approval, *Waters* simply referenced *Kolbe* in the context of summarizing the State's characterization of what the trial court ruled and why. *Waters*, 784 N.W.2d at 28-29 ("The State asserts the district court...").

Waters no more supports the County's position than it serves as precedent against the PDD by allowing the plaintiffs' claim to proceed against the State for failing to remove the disabled vehicle. *See Waters* at 30 (ruling action not procedurally barred).

Finally, the County reasons that because "[a]ll of Johnson's counts against Humboldt County are either based upon the common law or Iowa Code," the PDD applies to all of her counts. Brief p. 20. The County's position would dramatically expand the application of the PDD in the area of negligence by applying it in the new context of right-of-way obstructions, thereby contradicting more than 150 years of decisions holding highway authorities liable in this very context. Moreover, the County offers no case applying the PDD in the contexts of premises liability, common law public nuisance, or statutory public nuisance. Applying the PDD to these new areas would dramatically expand an outdated, unnecessary, and unwieldy doctrine that conflicts with the trend and spirit of the law in Iowa. Recall that even the historical description of the doctrine was in the context of *"tort"* law only. *See* Restatement § 7 reporter's note cmt. g. Applying the PDD to these new areas of the law would clearly violate the IMTCA by treating municipalities differently than private litigants, in direct conflict

with this Court's prior holdings. *See Wilson*, 282 N.W.2d at 671; *Harryman*, 257 N.W.2d at 638.

VI. Legislative action and stare decisis support Plaintiff's position.

The County argues stare decisis requires adherence to its contorted descriptions of the holdings in *Raas* and *Kolbe*, as well as to the *McFarlin* dicta. Despite its purported faithfulness to precedent, the County fails to meaningfully address the 150 years of cases cited in IAJ's brief holding governmental entities responsible for damages caused by right-of-way obstructions.[17] The Municipalities similarly fail to address those cases head-on, side-stepping the IAJ citations to binding precedent with arguments similar to those of the County and by arguing stare decisis supports the defense, whereas it better supports Plaintiff.

The Municipalities argue the legislature, through inaction, acquiesced in the Court's use of the PDD. In reality, the PDD is a judicial creation that has been applied infrequently and narrowly with limited effect and insufficient reason to attract the attention of a legislature consumed with larger issues.

[17] Having to respond to the IAJ Brief was a reason County cited for needing a three-week extension, yet it responded to it only once in a footnote, thereby implicitly admitting its reasoning.

If the legislature acquiesced, it acquiesced in Plaintiff's favor by declining for more than 150 years to enact any law abrogating the cases[18] holding government responsible for damages caused by right-of-way obstructions. It didn't abrogate *Harryman*, *Symmonds*, and other right-of-way obstruction cases rejecting the PDD in that context. And when the Court first was thought to have abandoned the PDD altogether in 1986, *see State v. Adams*, 380 N.W.2d 716 (Iowa 1986), the legislature didn't supersede *Adams* by adding the PDD as an exception to the IMTCA.

More enlightening than legislative inaction is legislative action responsive to cases involving municipal liability. After more than a century of cases holding municipalities liable for injuries caused by right-of-way obstructions, the legislature enacted the Tort Claims Acts, so as to solidify responsibility not only in this area, but in other areas, as well. Ironically, it is the judicial branch that negatively reacted to the legislature's enactment of the Tort Claims Acts by creating a judicial doctrine that appears rooted in mistrust or disagreement with the legislative wisdom of breaking down the distinctions between governmental and private defendants.

All five municipal amici represent that, in *Iseminger v. Black Hawk County*, 175 N.W.2d 374, 378 (Iowa 1970), "the Iowa Supreme Court [first]

[18] *See* IAJ Brief.

utilized the public-duty doctrine to find a county was not liable, despite the recent enactment of the IMTCA." Municipalities' Brief p.12. Not true. *Iseminger* applied sovereign immunity because the cause accrued before enactment of the IMTCA. *Id.* at 378.

> "If the county ought to be liable in such a case, the remedy must be sought from the legislature." We must adhere to that pronouncement but, in passing, we note that in 1967 **the legislature did provide such a remedy by enacting [the IMTCA]**, which became effective January 1, 1968. ...Unfortunately, this legislation came too late to aid plaintiff, and **we must determine this case on the law as it stood [before] January 1, 1968**.

Id. (emphasis added) (citation omitted).

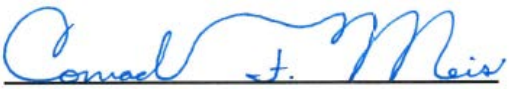
The Municipalities similarly suggest "the Judicial Branch is not the place" to abandon the PDD; let the remedy be sought from the legislature. The legislature enacted chapters 318, 319, 669 (the ITCA), and 670 (the IMTCA). This Court has held, "The legislature could not have expressed better or more consistently its intention to impose in the same manner as in the private sector municipal tort liability for negligence based on breach of a statutory duty." *Wilson*, 282 N.W.2d at 669. "Any doubts should be resolved in favor of the legislature's general provision for governmental liability...." *Menke Hardware, Inc. v. City of Carroll*, 474 N.W.2d 579, 580 (Iowa 1991).

"Now is not the time," say the Municipalities. They fail to answer the better question, namely: When *is* a good time for justice if not now? This Court's decision cannot remove municipalities' statutory duty to remove right-of-way obstructions. For over 150 years, municipalities have been held accountable for failing to exercise reasonable care in removing such obstructions, yet without financial ruin. What possible public policy can justify protecting municipalities from this liability—liability municipalities are authorized to insure? The legislature imposed a duty to remove obstructions expressly to ensure the safety of travelers. Applying the PDD would undermine this intent and would deny justice to injured travelers like Johnson.

CONCLUSION

The Court should grant the relief requested within Appellant's Proof Brief.

Respectfully submitted,



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CERTIFICATE OF FILING

The undersigned hereby certifies that he e-filed the foregoing Final Reply Brief on May 5, 2017, to the Clerk of the Iowa Supreme Court, 1111 East Court Avenue, Des Moines, Iowa 50319.

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