IN THE SUPREME COURT OF IOWA

NO. 19-0221

LAURA H. FULPS and CHARLES B. FULPS

Plaintiffs-Appellants,

vs.

CITY OF URBANDALE, IOWA,

Defendant-Appellee.

APPEAL FROM DISTRICT COURT OF POLK COUNTY
THE HONORABLE SARAH E. CRANE

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

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Geisler v. City Council of City of Cedar Falls, 769 N.W.2d 162 (Iowa 2009)
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Urbandale Mun. Code § 99.078

ROUTING STATEMENT

This case should be transferred to the Iowa Court of Appeals pursuant to Iowa R. App. P. 6.1101(3)(a) as it presents the application of existing legal principles.

STATEMENT OF THE CASE

A. Nature of the Case

At its core, this case presents a question of duty that is for the Court to decide as a matter of law. This case primarily turns on the public-duty doctrine, long-ago adopted by the Iowa courts and which the Iowa courts have repeatedly affirmed in recent decisions.

According to Plaintiffs' Petition, filed October 8, 2018, Ms. Fulps tripped and fell on the sidewalk along 86th Street in Urbandale, Iowa, causing injury. Plaintiffs brought a claim for negligence alleging "Defendant maintains the portion of uneven sidewalk" and it was negligent by:

a. Failing to properly maintain the sidewalk;

b. Failing to property repair and/or replace the uneven portion of sidewalk;

c. Failing to fix the damaged and defective portion of the sidewalk;

d. Failing to warn for a known danger;

e. Failing to exercise ordinary care under the circumstances.

(App. 5 at ¶ 15).

Urbandale filed a motion to dismiss because Plaintiffs' failed to state a claim upon which relief can be granted because Urbandale owes Plaintiffs no legal duty under the public-duty doctrine.

At the motion to dismiss stage, the district court correctly held the public-duty applied and barred the negligence and consortium claims advanced by the Plaintiffs. The district court reached its conclusion by applying ubiquitous Iowa precedent that has been repeatedly reaffirmed by recent decisions of the Iowa Supreme Court.

B. Relevant Events of the Prior Proceedings

On October 8, 2018, Plaintiffs filed their Petition at Law initiating this lawsuit. On October 29, 2018, Defendant filed its pre-answer motion to dismiss. On November 8, 2018, Plaintiffs filed their resistance. On November 15, 2018, Defendant filed its reply. On December 5, 2018, at 11:11 p.m., Plaintiffs filed a sur-reply that was served upon Defendant less than 24 hours before the hearing. Defendant moved to strike the sur-reply. A hearing before the district court was held on December 7, 2018. On January 25, 2019, the district court filed its Order Granting Motion to

Dismiss by which the court granted Defendant's motion and dismissed Plaintiffs' claims. On February 6, 2019, Plaintiffs filed a Notice of Appeal.

C. Disposition in the District Court

The district court granted Defendant's pre-answer motion to dismiss.

STATEMENT OF FACTS

In considering the motion to dismiss, the court views the well-pleaded facts of the petition in the light most favorable to the plaintiff. *Geisler v. City Council of City of Cedar Falls*, 769 N.W.2d 162, 165 (Iowa 2009). Plaintiffs filed a petition on October 8, 2018, alleging Laura H. Fulps fell "while walking along 86th Street sidewalk." (App. 5 at ¶ 8). Plaintiffs do not state specifically where she fell. (*See generally* App. 4-6). Plaintiffs allege "Defendant maintains the portion of uneven sidewalk" and did so in a negligent manner. (App. 5 at ¶ 8).

Plaintiff Charles Fulps has also brought a claim for loss of consortium. (App. 6 at Count II).

ARGUMENT

I. THE DISTRICT COURT CORRECTLY HELD THE CITY OF URBANDALE DID NOT OWE PLAINTIFFS A LEGAL DUTY.

A. Preservation of Error and Standard of Review

Defendant agrees with Plaintiffs' statement on preservation of error and scope and standard of review. The standard of review for a district court's ruling on a motion to dismiss is for correction of errors at law. *Mueller v. Wellmark, Inc.*, 818 N.W.2d 244, 253 (Iowa 2012). The grant of a motion to dismiss will be affirmed if the petition fails to state a claim upon which relief may be granted. *See King v. State*, 818 N.W.2d 1, 8 (Iowa 2012). "For purposes of reviewing a ruling on a motion to dismiss, we accept as true the petition's well-pleaded factual allegations, but not its legal conclusions." *Shumate v. Drake Univ.* 846 N.W.2d 503, 507 (Iowa 2014).

B. Discussion

Plaintiffs begin the argument portion of their brief by discussing the general cautions against unwarranted motions to dismiss. However, because the present case can and should be resolved solely based on the absence of a legal duty based on the pleaded facts and because the existence of a legal duty is always a question of law, the present case is peculiarly suitable for resolution on a motion to dismiss. *Stotts v. Eveleth*, 688 N.W.2d 803, 807 (Iowa 2004) (citing *Kolbe v. State*, 625 N.W.2d 721, 725 (Iowa 2001)). The

purpose of a motion to dismiss is "to test the legal sufficiency of the petition." *Geisler,* 769 N.W.2d at 165.

Defendant did not attack the Petition for "whether the facts are enough;" the allegation was that there cannot be such a claim based on a legal determination: the very purpose of a motion to dismiss. The district court properly did not accept Plaintiffs' legal conclusion that Urbandale owes Plaintiffs a legal duty. As such, a motion to dismiss was the proper vehicle to resolve this matter.

1. *Based on the Public-Duty Doctrine the City of Urbandale Did Not Owe a Legal Duty of Care to Plaintiffs.*

For Plaintiffs to prove their negligence claim, they must establish the following:

(1) Urbandale owed them a legal duty;

(2) Urbandale breached or violated that legal duty;

(3) This breach or violation was a proximate cause of their injuries; and

(4) Damages.

Kolbe, 625 N.W.2d at 725.

One of the basic elements of any negligence action is that Defendant owed a duty to the plaintiff. *See Thompson v. Kaczinski*, 774 N.W.2d 829 (Iowa 2009). Thus a threshold question in any negligence action is whether

a legal duty existed. *Id.* The existence of a duty is a legal question for the Court. *Sabin v. Ackerman*, 846 N.W.2d 835 (Iowa 2014). Lack of a legal duty can be decided by the Court through a motion to dismiss. *Schmidt v. Mahoney*, 659 N.W.2d 552, 556 (Iowa 2003) (citations omitted). "Whether a duty arises out of a given relationship is a matter of law for the court's determination." *Thompson*, 774 N.W.2d at 834. "[W]hether a duty exists is a policy decision based upon all relevant considerations that guide us to conclude a particular person is entitled to be protected from a particular type of harm." *Id*. (further citation omitted).

The *Thompson* decision adopted Restatement (Third) of Torts: Liab. for Physical & Emotional Harm section 7, which removed foreseeability from the duty analysis. *Id.* Nonetheless, following *Thompson*, the Iowa Supreme Court has repeatedly made clear all "previous law of duty [is] otherwise still alive and well." *McCormick v. Nikkel & Assocs.*, 819 N.W.2d 368, 371 (Iowa 2012) (citing *Van Fossen v. MidAmerican Energy Co.*, 777 N.W.2d 689, 692-93 (Iowa 2009)). Therefore, the "adoption of section 7 of the Restatement (Third) of Torts in *Thompson* did not supersede [the] precedent limiting liability based on the relationships between the parties." *Huck v. Wyeth, Inc.*, 850 N.W.2d 353, 375 (Iowa 2014).

Among the previous law of duty that is still alive and well in Iowa is the public-duty doctrine, which has been repeatedly addressed and reaffirmed by the Iowa Supreme Court in recent decisions. *See Estate of McFarlin v. State*, 881 N.W.2d 51, 59 (Iowa 2016); *Johnson v. Humboldt Cty.*, 913 N.W.2d 256, 262 (Iowa 2018).

> Under the public-duty doctrine, if a duty is owed to the public generally, there is no liability to an individual member of that group. [A] breach of 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* [*governmental entity*] *and the injured plaintiff*...."

Johnson, 913 N.W.2d at 260 (internal citations and quotation marks omitted). The rationale for the public-duty doctrine is to encourage governmental agents to carry out their obligations to the public free from the chilling effect posed by the risk of litigation. *Kolbe*, 625 N.W.2d at 730.

The case of *Summy v. City of Des Moines*, in which the Iowa Supreme Court examined the public-duty doctrine is instructive here. 708 N.W.2d 333, 344 (Iowa 2006), *overruled on other grounds by Alcala v. Marriott Int'l, Inc.*, 880 N.W.2d 699, 708 & n.3 (Iowa 2016). While the court ultimately found the public-duty doctrine did not apply in *Summy* based on the particular facts of that case, the differing facts of the present case necessarily yields a different result. In *Summy*, a golfer on a city-owned golf course was struck by an errant golf ball. *Summy*, 708 N.W.2d at 335. He

challenged the design of the golf course, alleging there was an unreasonable danger that a golfer playing the eighteenth hole would be struck by tee shots from the first hole. *Id*. at 336. The Iowa Supreme Court held the public-duty doctrine did not apply because the duty at issue "was one owed to invitees on the golf course, not to the public at large." *Id.* at 344. Golfers pay to use the Waveland Golf Course as business invitees. *Id.* The city was both landowner and proprietor operating Waveland as a business for paying customers. *Id.* Golfers proceed through the course in small groups, hole-by-hole in sequence. *Id.* Members of the general public are not allowed to wander freely around Waveland while golfers are playing. *Id*. The present case differs from *Summy* in that the public sidewalk where Ms. Fulps was injured was fully accessible to the general public and, in fact, its reason for existence was to serve the general public.

The case of *Estate of McFarlin* provides a relevant contrasting example clearly demonstrating why the public-duty doctrine must apply in the present case. *Estate of McFarlin*, 881 N.W.2d at 59. In *Estate of McFarlin* a child's estate sued the State of Iowa after the child was killed when a boat hit a dredge pipe that was part of a state-sponsored project at Storm Lake. *Id.* The Estate alleged the State's failure to follow its safety rules and duties created a special relationship because the decedent was a

boater traveling on the waters of Storm Lake which the plaintiffs claim was a public lake that is held in trust by the State. *Id.* The Court held the State's safety duties were only owed to the general public, and declined to recognize a special relationship or a particularized class of recreational boaters to avoid the public-duty doctrine. *Id.* The Supreme Court found "boaters at Storm Lake, like motorist driving on Iowa roadways, are members of the general public, not a special class of 'rightful users of the lake' for purposes of the public-duty doctrine." *Id.*

In 2018, the Iowa Supreme Court further affirmed the survival of the public-duty doctrine after the adoption of the Restatement (Third) of Torts in *Johnson v. Humboldt County*, a case which wholly disposes of this matter. *Johnson*, 913 N.W.2d at 261. In *Johnson*, a single-vehicle accident occurred when a vehicle went off a county road and into a ditch and then struck a concrete embankment in the ditch. *Id*. The passenger, who sustained serious injuries, sued the county seeking recovery. *Id.* at 259. She alleged the county should have caused the removal of the concrete embankment from the ditch. *Id.* The Iowa Supreme Court affirmed the grant of summary judgment to the county based on the public-duty doctrine. *Id.* at 266-67. The Court held: "Any duty to remove obstructions from the right-of-way corridor adjacent to the highway would be a duty owed to *all* users of this

public road. It would thus be a public duty." *Id.* (citing *Kolbe*, 625 N.W.2d at 728–30). In contrast to the Waveland Golf Course in *Summy*, public roads used by motorists are open and available for the whole public's use—as is Storm Lake where boaters may traverse the lake freely and come and go as they please. *Id.* (citing *Estate of McFarlin*, 881 N.W.2d at 61–62).

Like the motorists using public roads in *Johnson* and the boaters traveling on Storm Lake in *Estate of McFarlin*, people may traverse the sidewalks freely and come and go as they please. Urbandale owes no particularized legal duty to any individual person on a sidewalk within its borders. Plaintiffs have not alleged a special relationship exists to preclude the application of the public-duty doctrine. Therefore, the well-established supreme court precedent cited herein is wholly dispositive of the claims made by Plaintiff, and as such, Defendant does not owe Plaintiffs a legal duty. Moreover, to the extent Plaintiffs are alleging a premises liability claim rather than a straight negligence claim, the public-duty doctrine still bars the claim. *Johnson*, 913 N.W.2d at 266.

In the present case, Plaintiffs argue Defendant owed a legal duty of care to Ms. Fulps, and thus her husband through the consortium claim, and that legal duty is not avoided by the public-duty doctrine and presumably, the district court erred in finding no legal duty existed. Plaintiffs are in

error. Plaintiffs focus on the dissent of Justice Wiggins discussing Section 40(b)(3) of the Restatement (Third) providing, "A business or other possessor of land that holds its premises open to the public with those who are lawfully on the premises" owes a duty of reasonable care. *Id.* at 270 (J. Wiggins dissenting) (quoting Restatement (Third) § 40(b)(2), at 39). Of course, Justice Wiggins's dissent was noted and rejected by the majority, as this analysis would eviscerate the public-duty doctrine and is contrary to the Iowa established jurisprudence.

The public-duty doctrine plainly applies; therefore, the Defendant owed no legal duty to Plaintiffs, as a matter of law, and the district court must be affirmed.

2. *Plaintiffs' Arguments for the Non-Application of the Public-Duty Doctrine Based on the Urbandale Municipal Code Fail.*

Plaintiffs claim the statutory scheme and city ordinances relating to liability for sidewalk maintenance create a private cause of action not barred by the public duty doctrine and illustrated by *Madden v. City of Iowa City*, 848 N.W.2d 40, 42 (Iowa 2014). The district court was correct in rejecting this argument.

As analyzed by the district court, there are multiple sections of the Iowa Code and Urbandale Municipal Code that are implicated in this matter. Iowa Code section 364.12(2) provides, "A city shall keep all public grounds,

streets, sidewalks, alleys, bridges, culverts, overpasses, grade crossing separations and approaches, public ways, squared, and commons open, in repair, and free from nuisances… ." Iowa Code section 361.12(2)(c) provides "the abutting property owner may be required by ordinance to maintain all property outside the lot and property lines and inside the curb lines upon the public street… ." *Id.* at 361.12(2)(c). Many municipalities, including Urbandale, shift this duty to abutting property owners as allowed under Section 361.12(2)(c). This shift does not create a legal duty between the municipality and an injured individual.

With this statutory background, Plaintiffs rely upon *Madden v. City of Iowa City* for their position that the motion to dismiss should have been denied. However, while *Madden* is a similar factual situation in that a person was injured on a sidewalk, the dissimilar posture and legal analysis of this case and *Madden* make *Madden* inapplicable here.

The issue before the Court in *Madden v. City of Iowa City* was **not** the applicability of the public-duty doctrine to sidewalks. In *Madden*, a bicyclist was riding on the sidewalk abutting the grounds of the University of Iowa in Iowa City when she fell, sustaining an injury. *Madden*, 848 N.W.2d at 42. The City moved to add the State of Iowa as a third-party defendant, arguing it had by ordinance imposed a requirement on the abutting landowner to

maintain the sidewalk and that the ordinance was permitted under Iowa Code section 364.12(2)(c).

The State moved to dismiss on four grounds. First, the State claimed Iowa Code section 364.12(2)(c) did not expressly waive sovereign immunity and had the legislature intended to do so, it would have done so expressly. Second, the State argued the City's cross-petition did not allege a claim under the Iowa Tort Claims Act (ITCA), Iowa Code chapter 669, because the cross-petition was based upon a theory of statutory liability, not negligence and therefore immunity was not waived. Third, the State asserted that to the extent the City sought contribution from the State, the claim was fatally flawed because while section 364.12(2)(c) imposes a duty on an abutting property owner to maintain the sidewalk, it does not impose liability for failure to do so. In a reply brief, the State further asserted the Iowa City ordinance making the abutting landowner liable to the injured person for common law damages "is in effect a tax that is not authorized by the Iowa legislature." *Id.* at 43.

The district court in *Madden* denied the motion to dismiss and the Iowa Supreme Court affirmed the denial of the motion to dismiss. At **no point** did either the City or the State argue they did not owe a legal duty. The Iowa Supreme Court could not state the public-duty doctrine applied

because that was not the issue before it. There is nothing but speculation as to why Iowa City did not raise the public-duty doctrine in *Madden* rather than bringing in the State. One could speculate it chose not to do so because it knew it could not be liable regardless under its municipal code because the abutting property owner was responsible. Maybe Iowa City intended on raising the question of law regarding the existence of a legal duty under the public-duty doctrine through a motion for summary judgment. Arguing *Madden* creates or acknowledges a legal duty because it is factually similar and the parties did not raise the public-duty doctrine is not persuasive. Because *Madden* did not address the legal issue that is before this court, the decision is of no precedential value. *State v. Iowa Dist. Court for Polk Cty.*, 492 N.W.2d 666, 667 (Iowa 1992) ("To sustain a claim of binding precedent, a prior appellate opinion must be interpreted in reference to the question that necessarily had to be decided in that case."). Moreover, as noted by the district court, at the very least, *Madden* was decided before *McFarlin* in 2016 and *Johnson* in 2018. *Johnson* is the controlling precedent. The district court and Iowa Supreme Court's unequivocal acceptance of the public-duty doctrine post-dates the *Madden* decision and the doctrine must be applied.

Because *Madden* itself, contrary to Plaintiffs' position, does not address the public-duty doctrine or a lack of a legal duty to the injured party, Plaintiffs argue Urbandale Municipal Code somehow negates the public-duty doctrine or creates a special relationship with Urbandale. The District Court correctly held this is not accurate nor, as discussed above, was it the holding in *Madden*. The Urbandale Municipal Code[1] does not authorize negligence actions against the City. The Urbandale Municipal Code provides:

> It is the responsibility of the abutting property owner to repair, replace or reconstruct, or cause to be repaired, replaced or reconstructed, any damaged, defective or broken sidewalks and to maintain in a safe and hazard-free condition all sidewalks outside the lot and property lines and inside the curb lines or traveled portion of the public street.

Urbandale Mun. Code § 99.078.

The Urbandale Municipal Code further provides:

> **If** the abutting property owner does not maintain sidewalks as required and action is brought against the city for personal injuries alleged to have caused by its negligence, the city may notify in writing any person by whose negligence it claims the injury was caused. . . . A judgment obtained in the suit is conclusive in any action by the city against any person so notified as to the existence of the defect or other cause of the injury or damage as to the liability of the city to the plaintiff in

[1] Available online at http://library.amlegal.com/nxt/gateway.dll/Iowa/urbandale_ia/urbandaleiowamunicipalcode?f=templates$fn=default.htm$3.0$vid=amlegal:urbandale_ia (last accessed May 23, 2019).

> the first named action, and as to the amount of the damage or injury. The city may obtain an action against the person notified to recover the amount of the judgment together with all the expenses incurred by the city in the suit.

Urbandale Mun. Code § 99.079 (emphasis added).

Another Urbandale Municipal Code section provides "**When** action is brought against the city for personal injuries alleged to have been caused by its negligence, the city may notify in writing any person by whose negligence it claims the injury was caused." Urbandale Mun. Code § 10.05 (emphasis added). The code section requires the responsible party—the abutting property owner—to appear and defend. This is so because the city does not have a legal duty to do so. The abutting property owner has the duty to maintain, and the abutting property owner is the one to be responsible and sued in the event an injured party sues the municipality despite the fact the municipality has no legal or factual duty to maintain the sidewalk. These municipal code sections allow the city to correct the injured party's error and bring the correct party to responsibility. The district court acknowledged the above emphasized words of "*if*" and "*when*" and held: "Nothing about his structure abrogates the public duty doctrine. It simply allows for indemnification if or when a claim can be brought against the City." (App. 67).

Plaintiffs do not argue these municipal codes create a private cause of action against Urbandale for injuries that occurred on sidewalks. And it is clear the Urbandale Municipal Code does not expressly provide for a private cause of action. *See Estate of McFarlin*, 881 N.W.2d at 58 (summarizing cases declining to find an implied private right to sue under general regulatory statutes); *Kolbe*, 625 N.W.2d at 727 (finding no private right of action under driver licensing statutes and regulations). The requirement for the abutting landowner to maintain the sidewalks is for the benefit of the municipality, not the pedestrians. *Madden*, 848 N.W.2d at 45. Iowa Code section 364.12 and the municipal code do not alter the analysis. *See Johnson*, 913 N.W.2d at 261–62. Section 361.12 and the related municipal code sections would not affect the public-duty determination unless it was enacted for the benefit of a "particularized class" of individuals. *Id.* (citing *Kolbe*, 625 N.W.2d at 728–29). Users of the public sidewalks, however, are not such a class. *Id*. Moreover, a private cause of action is not consistent with the underlying purpose: the purpose is to have the person (or entity) in the best position to know the condition of the sidewalk be responsible for its maintenance. This shift of responsibility to the party with the most knowledge is not consistent with allowing a lawsuit against the municipality.

The municipal code does not create a special relationship or a private cause of action against Urbandale and, thus, the district court was correct in finding the Petition failed to state a claim for which relief can be granted as a matter of law. The district court's well-reasoned opinion should be affirmed in its entirety.

CONCLUSION

For the reasons stated herein, Defendant-Appellee's request the motion to dismiss ruling be affirmed.

CONTINGENT REQUEST FOR ORAL ARGUMENT

Defendant requests to be heard in oral argument if Plaintiffs are granted oral argument.

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The undersigned hereby certifies that the actual cost of reproducing the necessary copies of this document was $ N/A - EDMS, exclusive of sales tax, delivery, and postage.

By: */s/ Thomas M. Boes*

CERTIFICATE OF COMPLIANCE

This Brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) because this brief contains 3,851 words, excluding the parts of the Brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

This Brief complies with the typeface requirements of Iowa R. App. P. 6.903(1)(e) and the type-style requirements of Iowa R. App. P. 6.903(1)(f) because this Brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14 point, Times New Roman.

By: */s/ Thomas M. Boes*

CERTIFICATE OF FILING AND SERVICE

The undersigned certifies a copy of Defendant-Appellee's Final Brief was filed with the Clerk of the Iowa Supreme Court via EDMS and served upon the following persons by EDMS on the 4th day of September, 2019:

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