No. 20-1037

IN THE SUPREME COURT OF IOWA

THE ESTATE OF SUSAN FARRELL, by its administrator, Jesse Farrell, and as Representative for the claims of JESSE FARRELL, individually, JESSE FARRELL, as next friend of R. F., a minor, PEGGY MASCHKE, individually, and STEPHEN MICHALSKI, individually,

Plaintiffs,

v.

STATE OF IOWA; CITY OF WAUKEE; CITY OF WEST DES MOINES, IOWA; PETERSON CONTRACTORS, INC.; ROADSAFE TRAFFIC SYSTEMS, INC.; VOLTMER ELECTRIC, INC.; PAR ELECTRICAL CONTRACTORS, INC., MIDAMERICAN ENERGY COMPANY; and, KIRKHAM, MICHAEL & ASSOCIATES, INC.,

Defendants.

Appeal from the Polk County District Court, District Court No. LACL140694, the Honorable Judge Heather Lauber, presiding.

FINAL REPLY BRIEF
CITY OF WEST DES MOINES, CITY OF WAUKEE, AND STATE OF IOWA

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Plaintiffs endeavor to uphold the erroneous District Court decision on an alternative basis rejected by the District Court by advocating for considerable changes to Iowa common-law, which are necessary to substantiate their argument for abandonment of the public-duty doctrine. (Plaintiffs' Brief, Argument Point I). Plaintiffs' advocacy in this regard, should be rejected. The great weight of Iowa law counsels against making the sweeping changes to the common-law advocated by Plaintiffs. This Court has refused to abandon the public-duty doctrine and it remains "alive and well." *See Raas v. State*, 729 N.W.2d 444, 449 (Iowa 2007) (holding the doctrine "alive and well"), *accord, Breese v. City of Burlington,* 945 N.W.2d 12, 19 (Iowa 2020) (analyzing the public-duty doctrine and finding it inapplicable in that case). Iowa law supports the application of the public-duty doctrine to defeat Plaintiffs' claims against the Governmental Parties.

Plaintiffs also challenge the District Court decision by arguing for the inapplicability of the public-duty doctrine to the case at bar. (Plaintiffs' Brief, Argument Point II). Plaintiffs have waived argument on the applicability of the Rhode Island exception to the public-duty doctrine that was erroneously applied by the District Court. No

exception recognized by the Iowa Supreme Court to the public-duty doctrine applies. Officer Farrell is not part of a special, identifiable group. Further, there is no evidence of reliance by Officer Farrell upon the Governmental Parties that would permit Plaintiffs to evade the public-duty doctrine. This Court should reverse the District Court and enter judgment on the pleadings in favor of the Governmental Parties.

I. The great weight of well-reasoned Iowa law counsels against abandonment of the public-duty doctrine; Plaintiffs' efforts to save the erroneous District Court ruling in this regard fail.

In their Appeal Brief, Plaintiffs advocate for the abandonment of the public-duty doctrine as an alternative basis to sustain the District Court's ruling denying motion for judgment on the pleadings in favor of the Governmental Parties. (Plaintiffs' Brief, pp. 20-57). Their advocacy is unsupported by Iowa law.

A. The Iowa Supreme Court and the District Court properly rejected Plaintiffs' argument that the Iowa and Municipal Tort Claims Acts have eliminated the public-duty doctrine.

The Iowa Supreme Court has previously considered and repeatedly rejected arguments that the public-duty doctrine was an immunity abolished by the Iowa and Municipal Tort Claims Acts. *See, e.g., Breese,* 945 N.W.2d at 18; *Johnson v. Humboldt Cty.*, 913 N.W.2d

256, 264 (Iowa 2018); *Estate of McFarlin v. State*, 881 N.W.2d 51, 59 (Iowa 2016); *Raas,* 729 N.W.2d at 448; *and, Kolbe v. State*, 625 N.W.2d 721, 729-30 (Iowa 2001) (en banc) (all holding that the public-duty doctrine is coexistent with the Iowa and Municipal Tort Claims Acts). Plaintiffs, nevertheless, argued before the District Court that the Iowa and Municipal Tort Claims Acts abolished the public-duty doctrine. (Plaintiffs' Brief, pp. 21-53). The District Court properly rejected Plaintiffs' argument. (Order on MJP, p. 4 fn. 2) ("To the extent the plaintiffs are asking the court to overrule and discard the public duty doctrine, or at least state that the doctrine should be discarded, the court declines to do so.").

While Plaintiffs have not filed a cross-appeal, as a successful party they may assert (and have asserted in their Appeal Brief) that the District Court's order on the motion for judgment on the pleadings be sustained on a ground urged but rejected by the District Court. *See Venard v. Winter*, 534 N.W.2d 13, 16 (Iowa 1992) (Plaintiffs' Brief, pp. 20-57). In this regard, Plaintiffs place great weight on *Adam v. State* and *Wilson v. Nepstad* for the proposition that the public-duty doctrine is a governmental immunity eliminated by the Iowa and Municipal Tort Claims Acts and claim that these cases have never been

overruled. (Plaintiffs' Brief, p. 22). However, the Iowa Supreme Court has repeatedly stated otherwise. "Contrary to [Plaintiffs'] argument, *Wilson* and *Adam* did not eliminate the public-duty doctrine." *See Raas*, 729 N.W.2d at 449.

The District Court was right to reject Plaintiffs' arguments in this regard. (Order on MJP, p. 4, n. 2). This Court should hold likewise and in accordance with the well-reasoned Iowa caselaw.

B. The Iowa and Municipal Tort Claims Acts merely abrogated governmental immunity.

The Iowa and Municipal Tort Claims Acts abrogated the historical governmental sovereign immunity. *See Johnson*, 913 N.W.2d at 264 (citing *Kolbe*, 625 N.W.2d at 725), *Thomas v. Gavin*, 838 N.W.2d 581, 521 (Iowa 2013), (explaining the Iowa and Municipal Tort Claims Acts abolished governmental immunity); *accord, Wilson v. Nepstad*, 282 N.W.2d 664, 671 (Iowa 1979) (noting abrogation of governmental immunity by the Municipal Tort Claims Act), *and, Graham v. Worthington*, 146 N.W.2d 626, 630 (Iowa 1966) (prior to the Iowa Tort Claims Act, the doctrine of governmental immunity was applicable to the State and all of its political subdivisions). Prior to the Iowa and Municipal Tort Claims Acts, governmental immunity was the rule and the government had no liability for allegedly tortious conduct.

See, e.g., Genkinger v. Jefferson County, 93 N.W.2d 130, 131-132 (Iowa 1958).

In *Genkinger v. Jefferson County*, the estate of a plaintiff sued a county, the board of supervisors, and county engineer for failing to post signs or erect a protective barrier at a "T" intersection where a newly graded seven-foot-deep ditch was present. *Genkinger*, 93 N.W.2d at 131. The estate's decedent drove into the ditch and was killed. *Id.* In pertinent part, the estate sought monetary damages against the defendants. *Id.* The defendants filed a motion to dismiss, in pertinent part, on governmental immunity. *Id.* The trial court sustained the motion, the estate appealed, and the Iowa Supreme Court affirmed. *Id.* at 131-132. In so doing, the Iowa Supreme Court set out the rule for governmental immunity. *Id.* at 132. There was no liability for the county or board of supervisors for nonfeasance in the exercise of a governmental function. *Id.* The Court found that construction and maintenance of public highways was such a function, and the allegations were of nonfeasance. *Id.* As such, the county and board of supervisors were not liable under governmental immunity. *See id.*

As to the county engineer, governmental immunity worked differently. *See id.* at 131-32. Generally, a "tortious act which causes

injury to another in violation of a duty owed to the injured party makes the employee personally liable." *Id.* at 131. However, assuming the engineer was a mere employee and had a duty to erect warning signs, the engineer's "duty is one owing to the general public and not to any certain individual or this decedent, except as such individual is part of the general public." *Id.* "Under this situation, and under [other governmental immunity cases] . . . the immunity of the county extends to the employee." *Id.* (other citations omitted).

As analyzed by the Iowa Supreme Court, the engineer in *Genkinger* had governmental immunity by extension because he, like the county, was exercising a governmental function. *See id.* The *Genkinger* opinion expanded on governmental immunity for governmental employees, who would otherwise have had personal liability when committing a tortious act against a plaintiff to which he owed a duty. *See id. Genkinger* was simply a governmental immunity case and, while similar language was used as to duty to the public and nonfeasance, it had nothing to do with a no-duty determination like the public-duty doctrine. *See id., and, cf., Thompson v. Kaczinski*, 774 N.W.2d 829, 834 (Iowa 2009), *and* Restatement (Third) of Torts: *Liability for Physical and Emotional Harm*, § 7(a) at 90) (providing

for a no-duty determination as an exception to the general duty of reasonable care in exceptional circumstances where an articulated countervailing principal or policy warrants denying or limiting liability in a particular class of cases).

In *Genkinger*, like all historical governmental immunity cases relied upon by Plaintiffs in their Brief, there was no need to make a no-duty determination when governmental immunity was the rule and those cases do not employ a no-duty determination, like the public-duty doctrine. *See Genkinger*, 92 N.W.2d at 131-132. (Plaintiffs' Brief, pp. 24-28, 43-53).

C. Plaintiffs rely on infirm caselaw for the argument that the Iowa and Municipal Tort Claims Acts eliminated the public-duty doctrine.

For their argument that the public-duty doctrine is an immunity abolished by the Iowa and Municipal Tort Claims Acts, they primarily rely on *Adam v. State* and *Wilson v. Nepstad*. (Plaintiffs' Brief, pp. 28-38). The Iowa Supreme Court has already held that these two cases "did not eliminate the public-duty doctrine." *See, e.g., Raas*, 729 N.W.2d at 449. Furthermore, the holdings of *Adam* and *Wilson* rest on an infirm basis and are inconsistent with the Iowa and Municipal Tort Claims Acts.

As it relates to the issue of governmental duty to a plaintiff, *Adam* relies on *Wilson* and *Wilson* relies on *Genkinger*. *See Adam v. State*, 380 N.W.2d 716, 724 (Iowa 1986) (drawing on *Wilson*), *Wilson*, 282 N.W.2d 664, 672 (Iowa 1979) (drawing on *Genkinger*), *and, Genkinger*, 93 N.W.2d at 132. The thesis of *Adam* and *Wilson* on the issue of whether the government owes a duty to a plaintiff rests on the *Genkinger* opinion setting forth the basis for governmental immunity of a governmental employee when exercising a governmental function. *See Genkinger*, 93 N.W.2d at 131-132. Because *Genkinger* related to application of the rule of governmental immunity and did not comprise a no-duty determination, the underpinning of *Adam* and *Wilson* is suspect in the holding that the Iowa and Municipal Tort Claims Acts eliminated the public-duty doctrine. *See Adam*, 380 N.W.2d 716, 724 (Iowa 1986) (drawing on *Wilson*), *Wilson*, 282 N.W.2d 664, 672 (Iowa 1979) (drawing on *Genkinger*), *and, Genkinger*, 93 N.W.2d at 132.

Wilson and *Adam* are simply vestigial decisions erroneously holding that the Iowa and Municipal Tort Claims Acts eliminated the public-duty doctrine. *See id.* This Court should make clear what it has already held – that *Adam* and *Wilson* are overruled to the extent they hold that the Iowa and Municipal Tort Claims Acts abolished the

public-duty doctrine. *See, e.g., Breese,* 945 N.W.2d at 18; *Johnson*, 913 N.W.2d at 264; *Estate of McFarlin*, 881 N.W.2d at 59; *Raas,* 729 N.W.2d at 448; *and, Kolbe*, 625 N.W.2d at 729-30 (en banc) (all holding that the public-duty doctrine is coexistent with the Iowa and Municipal Tort Claims Acts).

Plaintiffs receive no additional support from *Symmonds v. Chicago, M., S.P. & P.R. Co.* or *Harrryman v. Hayles.* (Plaintiffs' Brief, pp. 20-38). Plaintiffs argue these cases establish that governmental entities in Iowa have a responsibility to the general-public traveling Iowa's roadways and that the Iowa and Municipal Tort Claims Acts eliminated the public-duty doctrine. (Plaintiffs' Brief, pp. 24-28). However, the actual holdings are far more constrained.

In *Symmonds v. Chicago M., S. & P. R. Co.*, there was a vehicle-train collision at a railroad crossing and the plaintiff asserted a failure to place appropriate signage at the crossing. *Symmonds v. Chicago M., S. & P. R. Co.*, 242 N.W.2d 262, 263 (Iowa 1976). The case did not involve the public-duty doctrine. *See id.* Instead, the county raised two defenses under the Municipal and Iowa Tort Claims Acts. *Symmonds*, 242 N.W.2d at 264 (citing Iowa Code §§ 613A.2 and 613A.4(3) (now Iowa Code §§ 670.2 and 670.4(1)(c)).

The county filed a motion to dismiss arguing that it was entitled to sovereign immunity retained by the Municipal Tort Claims Act for "any claim based upon an act or omission of an officer or employee, exercising due care, in the execution of a statute, ordinance, or officially adopted resolution, rule, or regulation of a governing body." *Id.* However, the county apparently did not rely on that defense in its appeal brief. Instead, the county asserted it was immune under the rationale of *Seiber v. State*. *Id.* at 364 (citing *Seiber v. State*, 211 N.W.2d 698, 701 (Iowa 1973)). The *Sieber* rationale arose from the Iowa Tort Claims Act reservation of sovereign immunity for "claims based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a state agency or employee of the state." *Id.* (citing Iowa Code §25A.14(1) now 669.14(1)). At the time, the Municipal Tort Claims Act did not identify the reservation of sovereign immunity for discretionary function as it does now. *See* Iowa Code § 613A.4 (1971) and compare to Iowa Code § 669.4(1)(c).

Nevertheless, the *Symmonds* Court did not consider the public-duty doctrine and the doctrine goes unmentioned in the opinion. *See Symmonds*, 242 N.W2d 262. Instead, the *Symmonds* court

determined that the general standard of reasonable care is applicable to governmental agencies and the reservations of sovereign immunity proffered by the county were inapplicable. *See id.* at 264-265.

In *Harryman v. Hayles,* the Iowa Supreme Court analyzed a single vehicle roll-over due to a washout in the public road. *Harryman v. Hayles*, 257 N.W.2d 631, 633 (Iowa 1977). Like *Symmonds,* the *Harryman* opinion did not address the public-duty doctrine in its analysis. *Id.* at 633-638. Instead, the Court focused on the defense asserted by defendants who were county employees and officials. *Id.* at 637. The county defendants claimed that they had governmental immunity - no liability because they were performing "a statutory duty with regard to the maintenance of highways and roads." *Id.* at 637. The cases relied on by the county defendants for governmental immunity all predated enactment of the Iowa Municipal Tort Claims Act. *Id.* at 637. "[T]hese cases, and others like them, are good authority as long as we recognize the immunity of governmental subdivisions in discharging governmental functions." *Id.* However, with the abolition of governmental immunity by the Municipal Tort Claims Act, these defenses are no longer valid. *Id.*

The *Harryman* Court did not consider the public-duty doctrine or provide any analysis on a no-duty determination. *See id.* at 633-639. That case simply stands for the proposition that sovereign immunity was waived by the Municipal Tort Claims Act and that the County had a general duty of reasonable care. *See id.* at 637-38.

Despite the inapplicability of *Symmonds* and *Harryman* to the public-duty doctrine's no-duty determination, Plaintiffs cite to these cases for the proposition that a general duty of ordinary care is applicable to persons traveling on public roads. *See id., and, Symmonds*, 242 N.W.2d at 265. Plaintiffs do not limit their application of this holding as establishing a general duty of reasonable care but argue that the Court's rationale in *Symmonds* and *Harryman* are inconsistent with the public-duty doctrine. (Plaintiffs' Brief, p. 25). As Plaintiffs' argument seemingly goes, with the existence of a general duty of reasonable care owed by governmental entities, it is the end of the analysis. The Iowa and Municipal Tort Claims Acts and Iowa common-law show otherwise.

D. The Iowa and Municipal Tort Claims Acts place the Governmental Parties on equal footing with private parties – entitled to the full panoply of Iowa's common-law tort doctrine including no-duty determinations.

The Iowa and Municipal Tort Claims Acts are designed to put government on a more equal footing with private parties. *Adam*, 380 N.W.2d at 724 (citing *Wilson*, 282 N.W.2d at 558 (other citations omitted); *accord, Rome v. Jordan*, 426 S.E.2d 861, 862 (Georgia 1993) (dispensing with the notion that Georgia's waiver of sovereign immunity waived the public-duty doctrine). Governmental entities are to be held liable to the same extent as a private individual under like circumstances. *Adam*, 380 N.W.2d at 724 (citing *Wilson*, 282 N.W.2d at 558) (other citations omitted). The Iowa Supreme Court opinions "have been consistent with the principle that public employees share the same – but not greater – liability to injured parties as other defendants under like circumstances." *Kolbe*, 625 N.W.2d at 729 (other citations omitted).

Contrary to Plaintiffs' suggestion, the Iowa and Municipal Tort Claims Acts did not expand duty on the part of the State and Iowa municipalities by abrogating governmental immunity. *See id., Adam*, 380 N.W.2d at 724, *Wilson*, 282 N.W.2d at 558; *accord, Rome*, 426

S.E.2d at 862. The Acts were to help establish parity between governmental and private individuals. *See id.*

To accept Plaintiffs' suggestion that the State and Iowa municipalities owe a general duty of care period (if that is what they are arguing) would be incongruous with the purpose to establish parity with non-governmental parties. *Cf. id.* This was addressed in a similar context regarding the Georgia tort claims act: the public duty doctrine restricts the liability of the governmental entity for the actions of a third party similarly to the way the liability of a private party is restricted. *See Rome*, 426 S.E.2d at 862-63. In other words, decreasing immunity by way of the tort claims act could not increase duty. *See* R. Perry Sentell, Jr., *Special Contributions: Georgia's Public Duty Doctrine: The Supreme Court Held Hostage,* 51 Mercer L. Rev. 73, 77 (Fall 1999); *accord, Kolbe*, 625 N.W.2d at 729 (governmental and private parties share the same liability to injured parties under like circumstances).

Plaintiffs' argument for abandoning the public-duty doctrine is a call for sweeping change in Iowa tort law with far reaching implications requiring the Court to narrow the application of *Thompson v. Kaczinski* and Restatement (Third) of Torts: *Liability for Physical and*

Emotional Harm, § 7 to private parties and except governmental entities from the general tort law. Plaintiffs' argument is inconsistent with the purpose of the Iowa and Municipal Tort Claims Acts calling for parity between governmental and private parties. Plaintiffs' argument should be rejected. If the Court accepted Plaintiffs' proposal, then the Governmental Parties would not be on equal footing with private parties under similar circumstances.

E. Like private parties, the Governmental Parties are entitled to no-duty determinations like the public-duty doctrine.

"An actor ordinarily has a duty to exercise reasonable care when the actor's conduct creates a risk of physical harm." *See Estate of McFarlin,* 881 N.W.2d at 59-60, *Thompson*, 774 N.W.2d at 834, *and* Restatement (Third) of Torts: *Liability for Physical and Emotional Harm*, § 7(a) at 90). "In exceptional cases, when an articulated countervailing principle or policy warrants denying or limiting liability in a particular class of cases, a court may decide that the defendant has no duty or that the ordinary duty of reasonable care requires modification." *See Thompson*, 774 N.W.2d at 834 (citing Restatement (Third) of Torts: *Liability for Physical and Emotional Harm*, § 7(b) at 90).

> A no-duty ruling represents a determination, a purely legal question, that no liability should be imposed on actors in a category of cases. Such a ruling should be explained and justified based on articulated policies or principles that justify exempting these actors from liability or modifying the ordinary duty of reasonable care. These reasons of policy and principle do not depend on the foreseeability of harm based on the specific facts of a case. They should be articulated directly without obscuring references to foreseeability.

Restatement (Third) of Torts: *Liability for Physical and Emotional Harm*, § 7 cmt. i. As a no-duty rule, the public-duty doctrine has been held to have continued vitality under the Restatement (Third) of Torts. *Estate of McFarlin*, 881 N.W.2d at 60.

To maintain equal footing between governmental and private parties under the Iowa and Municipal Tort Claims Act, the Governmental Parties are entitled to the full scope of Iowa's common-law tort doctrine. Private parties are entitled to no-duty determinations. *See e.g., Huck v. Wyeth, Inc.*, 850 N.W.2d 353, 376 (Iowa 2014) (making a no-duty determination for brand manufacturers to consumers of generic medications); *Patterson v. Rank*, 2010 Iowa App. LEXIS 1565, *11-14 (Iowa Ct. App. December 22, 2010) (Iowa Case Number 10-0566) (making a no-duty for landlords to third-parties who are bit by a tenant's dog); *and, Van Fossen v. MidAmerica Energy Co.*, 777 N.W.2d 689, 696-699 (Iowa

2009) (making a no-duty determination for employers of independent contractors to household member of an independent contractor). Just as private parties are entitled to no-duty determinations, so too are the Governmental Parties. The public-duty doctrine serves this role and must be upheld to co-exist with the Iowa and Municipal Tort Claims Acts.

F. To the extent necessary, this Court has the capacity to overrule *Adam v. State* and *Wilson v. Nepstad* under the common-law.

The public-duty doctrine has developed in Iowa through the litigation and appeal of many cases. As with any doctrine, it continues to mature and evolve with each case usually presenting a nuance not directly answered in existing case law. Plaintiffs criticize the Court for development of the public-duty doctrine by mischaracterizing the Court's decisions as confusing, seemingly inconsistent, and abolished by controlling precedent. (Plaintiffs' Brief, p. 54). They call for its abandonment because, in the Plaintiffs' view, the doctrine is unworkable. (Plaintiffs' Brief pp. 53-57). Plaintiffs' arguments to this end, however, equivocate two legal doctrines – blanket governmental immunity and the public-duty doctrine, which is not an immunity but

a no-duty determination that is central to Iowa's common-law tort jurisprudence.

"The genius of the common law is its flexibility and capacity for growth and adaptation." *Youngblut v. Youngblut*, 945 N.W.2d 25, 40 (Iowa 2020) (citing *Bearbower v. Merry*, 266 N.W.2d 128, 129 (Iowa 1978) (en banc) and Tyler J. Buller & Kelli A. Huser, *Stare Decisis in Iowa*, 67 Drake L. Rev. 317, 322 (2019) ("Common law cases tend to invoke moderately flexible or somewhat weak stare decisis because 'judges are more akin to lawmakers' in this context, deciding policy questions with limited or no legislative direction."). While stare decisis can provide stability and predictability in the law, it does not prohibit the Court from evolving the common-law when "persuasive reasons no longer support a discrete common-law rule." *Youngblut*, 945 N.W.2d at 40 (citing *Barreca v. Nicholas*, 683 N.W.2d 111, 122-123 (Iowa 2004).

The public-duty doctrine is a common-law rule. *See Johnson*, 913 N.W.2d at 264. As such, it is flexible and the Court possesses the capacity to adapt the doctrine to correct an unworkable practice, especially where it does violence to legal doctrine or "has been so undermined by subsequent factual or legal developments that

continued adherence to precedent is no longer tenable." *Youngblut*, 945 N.W.2d at 44 (McDonald, J. dissenting) (other citations omitted).

To the extent *Adam* and *Wilson* have not been expressly overruled, the rationale used in those cases to eliminate the public-duty doctrine is unsupported. *See Youngblut*, 945 N.W.2d at 40. To the extent *Adam* and *Wilson* hold that the Iowa and Municipal Tort Claims Acts eliminated the public-duty doctrine they do violence to Iowa's common-law tort doctrine, which otherwise establishes a general duty of reasonable care subject to a no-duty determination. Subsequent legal developments, including the adoption of Restatement (Third) of Torts: *Liability for Physical and Emotional Harm*, § 7, requires that they be overruled because adherence to *Adam* and *Wilson* is no longer tenable. *Id*. at 44.

G. As a common-law doctrine, evolution of the public-duty doctrine is expected and not basis for abandonment.

Plaintiffs decry foul with the nature of the public-duty doctrine as one of common-law, when over time, the doctrine is developed to address the issues presented in each new and different case. (Plaintiffs' Brief, p. 56). However, Plaintiffs' challenge is not to the public-duty doctrine itself, but that the common-law continues to evolve. It is submitted that the ability of the common-law to evolve is a benefit to

the development of justice. *See Youngblut*, 945 N.W.2d at 39-40 (citing *Bearbower*, 266 N.W.2d at 129) (the common law is flexible and grows and adapts). The public-duty doctrine ought not be tossed aside simply because its sophistication develops over time as with all of the common-law.

H. The public-duty doctrine should not be abandoned; as such, the District Court's decision cannot be affirmed on that basis.

As a no-duty determination, the public-duty doctrine is alive and well; this Court should not abandon the doctrine. It is improper for Plaintiffs to equate immunity with the common-law public-duty doctrine. *See Estate of McFarlin*, 881 N.W.2d at 59, *Johnson,* 913 N.W.2d at 264. "Unlike immunity, which protects a municipality from liability for breach of an otherwise enforceable duty to the plaintiff, the public duty rule asks whether there was any enforceable duty to the plaintiff in the first instance." *See Johnson,* 913 N.W.2d at 264 (citing *Estate of McFarlin*, 881 N.W.2d at 59, and *Raas*, 729 N.W.2d at 448). "Because the public duty rule is not technically grounded in government immunity, the Iowa Municipal Tort Claims Act and the public-duty doctrine may coexist without conflict." *Id.* (citing *Raas*, 729 N.W.2d at 448, and quoting 18 Eugene McQuillin, *McQuillin on*

Municipal Corporations, § 53.04.25 (3d ed. 2006) (internal punctuation omitted).

This Court should reject Plaintiffs' call for sweeping change in Iowa's common-law tort doctrine and continue to apply the public-duty doctrine. As such, Plaintiffs' challenge to the public-duty doctrine should fail and form no basis to affirm the District Court's holding.

II. The public-duty doctrine is applicable to this case; the District Court erred in failing to apply the public-duty doctrine to defeat Plaintiffs' claims against the Governmental Parties.

The District Court erred in refusing to apply the public-duty doctrine to bar Plaintiffs' claims. Plaintiffs' arguments in aid of the District Court's decision fail.

A. Plaintiffs have waived argument on the applicability of the Rhode Island exception to the public-duty doctrine.

As set out in the Brief of the Governmental Parties, the District Court erred in applying the Rhode Island exception to the public-duty doctrine for egregious conduct. (Governmental Parties Brief, pp. 72-75). The Plaintiffs elected not to state, argue, or cite authority in support of the application of the Rhode Island exception on appeal. Plaintiffs' Brief, pp. 1-74). As such, Plaintiffs have waived the argument. *See* Iowa R. App. P. 6.903(2)(g)(3) (formerly Iowa R. App.

P. 14(a)(3)), *and, Pierce v. Staley*, 587 N.W.2d 484, 486 (Iowa 1998) ("When a party, in an appellate brief, fails to state, argue, or cite authority in support of an issue, the issue may be deemed waived.") (citing *Hollingsworth v. Schminkey*, 553 N.W.2d 591, 596 (Iowa 1996)).

B. Plaintiffs should not be permitted to transform the actions of the Governmental Parties into misfeasance in order to evade the public-duty doctrine.

The District Court's Order on the motion for judgment on the pleadings committed legal error by holding that Plaintiffs have made allegations of misfeasance that defeat the public-duty doctrine. (Order on MJP, p. 9). Plaintiffs argue for affirmance of the District Court opinion claiming that, even if the public-duty doctrine remains valid in Iowa, it does not apply because the actions of the Governmental Parties constitute "misfeasance." (Plaintiffs' Brief, pp. 58-61).

The Iowa Supreme Court acknowledged that in some public-duty doctrine cases there may be a gray area where claims of negligence could be viewed as either nonfeasance for which the doctrine applies or misfeasance for which the doctrine does not apply. *See Breese*, 945 N.W.2d at 21. That potential gray area arises, however, only when viewing the potential existence of duty in a manner prohibited under

Iowa law. Sound Iowa precedent provides the proper analysis in making a no-duty determination such as with the public-duty doctrine. Adhering to this precedent when making a no-duty determination under the public-duty doctrine eliminates the potential for gray area cases by: (a) focusing on the instrumentality of harm; and, (b) refusing to permit foreseeability to cloud the no-duty determination. Plaintiffs should not be permitted to plead around the public-duty doctrine by turn of phrase – transforming the actions of the Governmental Parties from nonfeasance to misfeasance.

Plaintiffs get no traction in converting this case into one of misfeasance by analogizing to historical governmental immunity cases. Plaintiffs rely on authority pre-dating the Iowa and Municipal Tort Claims Acts in support of their position that the public-duty doctrine is inapplicable in the current situation. Plaintiffs' reliance upon *Johnson v. Baker* and *Jones v. Sioux City* are therefore misplaced. *See Johnson v. Baker*, 120 N.W.2d 502, 254 Iowa 1077 (1963) and *Jones v. Sioux City*, 170 N.W. 445, 185 Iowa 1178 (1919).

In *Johnson v. Baker*, the plaintiff owned property on the corner of an intersection where two Highway Patrol Officers set up a traffic stop. *Johnson*, 120 N.W.2d at 503. The driver of a semi-tractor trailer

lost control of his vehicle as he approached the traffic stop location when he took evasive action to avoid the patrol vehicles resulting in hot bituminous material begin dumped onto the plaintiff's property. *Id.* The Court noted the Highway Patrol Officers were sued as individuals for alleged negligent acts and the State of Iowa was not a party. *Id.* at 506. Further, the context of the discussion was based upon precedent before the enactment of the Iowa Tort Claims Act. *See id.* The Court noted that the "real fighting issue stems from the Court's ruling sustaining defendants' claim of immunity." *Id.* at 506. The Court then went through an analysis of whether the Highway Patrol Officers have immunity under the circumstances and concluded that they were not entitled to immunity. *Id.* at 506-508 (case citations omitted). As argued above in Section I of the Argument, the public-duty doctrine is not an immunity but a no-duty determination available to all persons and entities. The Court's opinion in *Johnson* is, therefore, not instructive when considering the application of the public-duty doctrine. *See id., and, Johnson,* 120 N.W.2d at 506-508.

The same is true in the 1919 *Jones* case – where the Court analyzed governmental immunity and did not make a no-duty determination. *See Jones,* 170 N.W. at 447-449. The discussion of the

Court focused on liability, including absolute immunity, based upon precedent before the enactment of the Iowa and Municipal Tort Claims Acts. *See Jones*, 170 N.W. at 447-449. Therefore, the *Jones* case has no application to the current context in applying the public-duty doctrine.

The Court has previously noted that it is erroneous to equate immunity, which was waived by the enactment Iowa and Municipal Tort Claims Acts, with common law public-duty doctrine. *See Johnson,* 913 N.W.2d at 264 (citing *Estate of McFarlin*, 881 N.W.2d at 59 and quoting *Estate of McFarlin*, 881 N.W.2d at 59) (other citations omitted) (unlike immunity, "the public duty rule asks whether there was any enforceable duty to the plaintiff in the first place"). *Id.* The Iowa and Municipal Tort Claims Acts and "the public-duty doctrine may coexist without conflict." *Id.* (quoting *Raas*, 729 N.W.2d at 448) (quoting 18 Eugene McQuillin, *McQuillin on Municipal Corporations* § 53.04.25 (3d ed. 2006)).

Taken together, Plaintiffs' allegations claim the Governmental Parties allegedly failed to protect one member of the general traveling public (Officer Farrell) from another member of the general traveling public (Mr. Beary) by failing to have basic safety features (road

markings, lighting, and signage) completed before opening the Interchange and failing to comply with then existing state-of-the art engineering safety standards, criteria, and design. (First Amended Petition, paras. 35, 36, 40, 42, 43, 46-48). These allegations speak in terms of nonfeasance. *See Breese,* 945 N.W.2d 12, 19-20 (noting distinction between affirmative conduct by the governmental entity (misfeasance) and failing to prevent another from doing harm (nonfeasance)). Such failures by the Governmental Parties are encompassed by the public-duty doctrine. *See id.*

Based on the allegations in Plaintiffs' First Amended petition, the public-duty doctrine precludes Plaintiffs from establishing that the Governmental Parties owed a duty to Officer Farrell beyond what is owed to the public in general. *See Johnson*, 913 N.W.2d at 259-267 (negligence, premises liability, and public nuisance claims for users of a public road barred by the public-duty doctrine). The gravamen of Plaintiffs' claims allege nonfeasance resulting from a failure of the Governmental Parties to protect Officer Farrell, a member of the general traveling public, from somebody else's instrumentality of harm, namely Mr. Beary. *See Breese,* 945 N.W.2d at 18 (citing *Johnson*, 913 N.W.2d at 261, *Estate of McFarlin*, 881 N.W.2d at 63,

Raas, 729 N.W.2d at 446, *Kolbe*, 625 N.W.2d at 724-25, *Sankey v. Richenberger*, 456 N.W.2d 206, 208-09 (Iowa 1990). This is the classic case where the public-duty doctrine applies because the Governmental Parties are alleged to have a common-law duty to act affirmatively, and the Governmental Parties' alleged wrongdoing is a failure to take positive action for the protection of Officer Farrell. *See Breese*, 945 N.W.2d at 19-20 (quoting 2 Dan B. Dobbs, Paul T. Hayden & Ellen M. Bublick, *The Law of Torts* § 345, at 375 (2d ed. 2011), *and, see Estate of McFarlin*, 881 N.W.2d at 58-64 (applying the public-duty doctrine to common-law duties). As such, the public-duty doctrine eliminates liability of the Governmental Parties on Plaintiffs' claims. *See id.*

C. Plaintiffs cannot establish an exception to the public-duty doctrine.

Plaintiff cannot credibly claim membership in a special identifiable group or that she relied on the contractually required safety features of the Grand Prairie Parkway. Furthermore, while the misfeasance/nonfeasance dichotomy is instructive, harmony in the public-duty doctrine is found when focusing on the instrumentality of harm. Plaintiffs cannot establish an exception to defeat the public-duty doctrine and by focusing on the instrumentality of harm, as the

Iowa Courts have previously done, the Court must reverse the District Court and enter judgment on the pleadings in favor of the Governmental Parties.

1. The "special, identifiable group" group exception is inapplicable; the District Court properly held as much.

The District Court properly concluded that Officer Farrell was not a member of a special identifiable group so as to satisfy the exception to the public-duty doctrine. (Order on MJP, pp. 6-9, App. 313-323). While Plaintiffs have not filed a cross-appeal, as a successful party they may assert on appeal that the District Court's order on the motion for judgment on the pleadings be sustained on a ground urged but rejected by the District Court. *See Venard*, 524 N.W.2d at 16. In this regard, Plaintiffs' primary but unsuccessful defense to judgment on the pleadings before the District Court was that Officer Farrell had a special relationship that would defeat the public-duty doctrine. (Resistance to MJP, p. 18; Order on MJP, p. 7-8). Plaintiffs briefly touch on that argument again on appeal. (Plaintiffs' Brief, pp. 62-63).

In order to defeat the application of the public-duty doctrine, Plaintiffs argue Officer Farrell was a member of a special identifiable group, separate from the general public, because she was a Des Moines Police Officer acting within the course and scope of her employment

with the City of Des Moines at the time of the accident on I-80. (Pl's Brief, p. 62). Plaintiffs rely upon the *Summy* decision in support of their position. *See Summy v. City of Des Moines,* 708 N.W.2d 333, 344 (Iowa 2006). In *Summy*, a golfer sued the City of Des Moines for injuries sustained when struck by a golf ball on a City-owned golf course. *Id.* at 335. The Court held a special relationship existed because the golfers paid to use the golf course and the general public had no access to it. *Id.* at 344. Therefore, the City of Des Moines did not owe a general duty to all members of the public and the injured golfer was in a special identifiable group. *Id.*

Officer Farrell's employment as a police officer does not separate her from a general user of the highway. Duties regarding highways are owed to all users of public roads and the Court has previously held users of public roads are not a specialized class that would provide an exception to the public-duty doctrine. *See Johnson*, 913 N.W.2d at 261-262. The District Court correctly determined "[a]ny duty the governmental defendants would owe in the creation and operation of the interchange is owed to every member of the public, and not only to officers acting within the course of their employment." (Order on MJP, p. 7-8 citing *Estate of McFarlin*, 881 N.W.2d at 61).

The District Court was right when it rejected Plaintiffs' special relationship argument and this Court should hold likewise, apply the public-duty doctrine, reverse the District Court, and enter judgment on the pleadings in favor of the Governmental Parties.

2. The exception to the public-duty doctrine for reliance is inapplicable; the District Court properly held as much.

The District Court properly concluded that the actions of the Governmental Parties induced Officer Farrell to rely on the "interchange's contractually required safety features." (Order on MJP, p. 7-8, App. 313-323). While Plaintiffs have not filed a cross-appeal, as a successful party they may assert on appeal that the District Court's order on the motion for judgment on the pleadings be sustained on a ground urged but rejected by the District Court. *See Venard*, 524 N.W.2d at 16. In this regard, Plaintiffs unsuccessfully argued that the public-duty doctrine is inapplicable because the Governmental Parties induced Officer Farrell to rely upon the Governmental Parties to act affirmatively and properly. (Resistance to MJP, p. 18; Order on MJP, p. 8-9). Plaintiffs raise that argument again on appeal. (Plaintiffs' Brief, pp. 63-64).

Plaintiffs argue the public-duty doctrine does not apply if the government "induces the public to rely on the government to carry out

its actions in a non-negligent manner." (Pls' Brief, p. 63). The District Court correctly pointed out that no Iowa Court has examined a public reliance exception to the public-duty doctrine. (Order on MJP, p. 8).

Plaintiffs' arguments rely solely on anticipated facts outside the petition which are improper for consideration under the standards for a Motion for Judgment on the Pleadings. *See* Iowa R. Civ. P. 1.954, *Meinders v. Dunkerton Cmty. Sch. Dist.*, 645 N.W.2d 632, 633 (Iowa 2002), and *Hurd v. Odgaard*, 297 N.W.2d 355, 365 (Iowa 1980). Additionally, even if the exception did exist in Iowa, the District Court correctly determined the Plaintiff could not show the required elements that there was (1) direct contact between the public official and plaintiff, (2) the public official provided express assurance in response to a specific inquiry by plaintiff, and (3) the plaintiff was justified in reliance upon the public official representations. *See Kent v. City of Columbia Falls*, 350 P.3d 9, 14 (Montana 2015). The anticipated facts set forth by Plaintiffs center on the Governmental Parties' promotion surrounding the Grand Prairie Parkway Interchange. (Pl's Brief, p. 64). There is no mention of: a specific inquiry by Officer Farrell, or contact with Officer Farrell by the Governmental Parties, or any justifiable reliance by Officer Farrell

regarding the Grand Prairie Parkway Interchange. Therefore, there is no special relationship exception based upon reliance to the application of the public-duty doctrine under the circumstances of this case.

D. Reliance on the misfeasance/nonfeasance dichotomy may be unworkable in Iowa's public-duty doctrine jurisprudence, but harmony in Iowa's public-duty doctrine cases is found by focusing on the instrumentality of harm.

Plaintiffs seek to convince the Court that the Governmental Parties are advocating the Court to adopt a new "instrumentality of harm" test. (Pl's Proof Brief, p. 64, Argument 4). The reality is the "instrumentality of harm" analysis already exists and is not a new test, but rather the application of existing law.

In *Breese*, the Court noted that, with regard to the public-duty doctrine, "[w]hat is clear is that we have generally applied the public-duty doctrine when the allegation is…a government failure to protect the general public from somebody else's instrumentality, as in *Johnson* and *Estate of McFarlin*." *See Breese*, 947 N.W2d at 21. Thus, the instrumentality of harm concept is not a new test or construct created by the Governmental Parties to be adopted by the Court. Rather, it is an application of the existing Court precedent. The review of prior

public-duty doctrine cases by the Court in *Breese* establishes this by applying the public-duty doctrine when a governmental entity fails to prevent another party from doing harm (nonfeasance) and not applying the doctrine when affirmative acts of the government actually cause the harm (misfeasance). *Id*. at 20.

Furthermore, consideration of the instrumentality of harm does not change the outcome in *Breese* as suggested by Plaintiffs because their reliance upon nonsensical hypothetical situations is misplaced. The Governmental Parties do not urge the Court to consider the ground was the instrumentality of harm under the *Breese* factual scenario. The only actor in *Breese* was the government. *Breese*, 945 N.W.2d at 15. Further, a situation such as the parade of horribles as suggested by Plaintiffs in their hypothetical scenario is not at issue. (Pls' Proof Brief, p. 67). Here, the Plaintiffs allege the Governmental Parties should have done more to protect Officer Farrell from a third party, Benjamin Beary, from an accident that occurred on I-80 by having specific safety measures in place on the Grand Prairie Parkway. (First Amended Petition). In the cases in which the public-duty doctrine was held to apply, the Plaintiffs' theories were that the government failed to protect the Plaintiff from the harm caused by another. *See Johnson,* 913

N.W.2d at 266-67, *Estate of McFarlin*, 881 N.W.2d at 60, *Raas*, 729 N.W.2d at 449, *Kolbe*, 625 N.W.2d at 726, and *Sankey*, 456 N.W.2d at 208. Thus, the Governmental Parties' position is in line with these cases.

Plaintiffs also allege focusing on the instrumentality of harm results in an improper focus on causation. (Pl's brief pg. 67-68). This is misplaced as foreseeability does not play a role in the application of the public-duty doctrine because the essence of the doctrine is that no duty exists. With the adoption of the Restatement (Third) of Torts in 2009 the Court noted the compelling clarification by the drafters of the Restatement (Third) that foreseeability has no role in the no-duty determination. *See Thompson*, 774 N.W.2d at 835. This removal of foreseeability in relation to the public-duty doctrine was noted in *Johnson v. Humboldt County*. *See Johnson*, 913 N.W.2d at 265. Therefore, foreseeability does not play a role in this determination. *See id.*

CONCLUSION

This Court should overrule the District Court, apply the public-duty doctrine, and enter judgment on the pleadings in favor of the Governmental Parties. The District Court erred in applying the Rhode Island egregious conduct exception, which is inconsistent with Iowa precedent. The District Court erred in finding that Plaintiffs' claims of "mis-nonfeasance" defeated the public duty doctrine without properly assessing the instrumentality of harm and injecting the concept of foreseeability into the no-duty determination. Plaintiffs' attempt to save the District Court's Order by raising rejected theories, such as calling for the abandonment of the public-duty doctrine and establishing exceptions to the doctrine, should be rejected by this Court. Officer Farrell had no special relationship with the Governmental Parties as she was simply a member of the general traveling public to which the Governmental Parties owed a general duty to all. In the end, this is a case where there is an affirmative duty of reasonable care imposed by common law on the Governmental Parties to open and operate the Grand Prairie Parkway Interchange with adequate safety mechanisms, such as lighting, signage, and road markings; and the alleged wrongdoing is the Governmental Parties'

failure to take positive action for the protection of Officer Farrell from Mr. Beary. *See Breese*, 945 N.W.2d at 19-20 (quoting 2 Dan B. Dobbs, Paul T. Hayden & Ellen M. Bublick*, The Law of Torts* § 345, at 375 (2d ed. 2011), *and, see Estate of McFarlin*, 881 N.W.2d at 58-64 (applying the public-duty doctrine to common-law duties). The case parallels the circumstances in *Johnson, Estate of McFarlin, Raas, Kolbe, and Sankey*, where the governmental entities allegedly failed to protect the plaintiff from harm caused by another. *See Johnson*, 913 N.W.2d at 266-267, *Estate of McFarlin,* 881 N.W.2d at 60, *Raas,* 729 N.W.2d at 449, *Kolbe*, 625 N.W.2d at 726, *and, Sankey,* 456 N.W.2d at 208. For these reasons, the public-duty doctrine applies and the District Court ruling denying the Governmental Parties' Motion for Judgment on the Pleadings should be overruled and the Motion granted in favor of the Governmental Parties.

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) or (2) because:

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/s/ Robert Livingston Dated: March 17, 2021

CERTIFICATE OF FILING AND SERVICE

The undersigned hereby certifies that on March 17, 2021, the foregoing Defendants' Final Reply Brief was electronically filed with the Clerk of Court for the Supreme Court of Iowa using the EDMS system, service being made by EDMS upon the following:

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