IN THE IOWA SUPREME COURT

SUPREME COURT NO. 20-1037

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-Appellees,

v.

STATE OF IOWA; CITY OF WAUKEE, IOWA; and CITY OF WEST DES MOINES, IOWA,

Defendants-Appellants,

and

PETERSON CONTRACTORS, INC.; ROADSAFE TRAFFIC SYSTEMS, INC.; VOLTMER ELECTRIC, INC.; PAR ELECTRICAL CONTRACTORS, INC.; MIDAMERICAN ENERGY COMPANY; and KIRKHAM, MICHAEL & ASSOCIATES, INC.,

Defendants.

Interlocutory Appeal from the Iowa District Court for Polk County
Case Number LACL140694
Judge Heather Lauber

PLAINTIFFS'-APPELLEES' FINAL BRIEF

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ROUTING STATEMENT

This appeal involves the question of whether this Court's current public-duty-doctrine cases should be overruled and the doctrine abandoned. This "presents substantial questions of enunciating or changing legal principles" and "issues of broad public importance requiring prompt or ultimate disposition by the supreme court," which justify this Court retaining the case. Iowa. R. App. Proc. 6.1101(2)(d) & (f).

STATEMENT OF THE CASE

Plaintiffs'/Appellees' ("Farrell") First Amended Petition seeks damages against Defendants-Appellants ("Government Defendants") for negligence, nuisance, and premises liability. (First Amended Petition). The Government Defendants sought dismissal via a Joint Motion for Judgment on the Pleadings ("MJP"), which Farrell resisted. (Res. to MJP). The Government Defendants filed a Joint Reply. (Reply to MJP). The district court held a reported hearing, after which this Court issued its decision in *Breese v. City of Burlington*, 945 N.W.2d 12 (Iowa 2020). Farrell supplemented her briefing to address *Breese*, (Mot. for Supp. Res.), to which the Government Defendants responded. (Govt.'s Joinder).

On July 12, 2020, the district court denied the MJP. (Order on MJP) (App. 313-323). The Government Defendants timely filed their Application for Interlocutory Appeal on August 11, 2020, which this Court granted on September 4, 2020.

STATEMENT OF FACTS

Susan Farrell was a Des Moines Police Officer who died in the line of duty while transporting a prisoner from Council Bluffs to Des Moines via Interstate 80. (First Amended Petition p. 6). Officer Farrell was transporting the prisoner pursuant to a State of Iowa arrest warrant for the commission of a State crime. *Id.* In executing the transport, Officer Farrell's government employer *required* her to travel via Interstate 80 in the direct vicinity of the Grand Prairie Parkway in Dallas County. *Id.*

The other vehicle involved in the fatal collision was driven by Benjamin Beary, who gained access to Interstate 80 in the wrong direction via the uncompleted, brand-new, first-of-its-kind-in-Iowa diverging-diamond interchange ("Interchange") on Grand Prairie Parkway. *Id.* at p. 3-6. The Government Defendants owned, constructed, and opened the unfinished Interchange. *Id.* Farrell alleges that the Government Defendants' construction and opening of the unfinished Interchange was negligently performed. *Id.* at p. 6-12.

In their MJP, the Government Defendants argued that the public-duty doctrine shields them from liability for any breach of duty resulting in Officer Farrell's death. (MJP). The district court denied the MJP on the basis that the public-duty doctrine does not apply to Farrell's allegations of affirmative

misconduct against the Government Defendants. (Order on MJP) (App. 313-323).

ARGUMENT

The Government Defendants' appeal is premised on the following argument: this Court should find, as a matter of law and based solely on the pleadings, that the government is shielded from all responsibility to a police officer who died in the line of duty, even if a reasonable jury could find that the government caused her death. The Government Defendants rely on the common-law public-duty doctrine, as modified with their newly-proposed "instrumentality of harm" test. As discussed below, the district court correctly denied the MJP because (1) this Court's current public-duty-doctrine cases should be overruled and the doctrine abandoned, and (2) even if the public-duty doctrine survives, it is inapplicable to this case.

I. THE COURT'S CURRENT PUBLIC-DUTY-DOCTRINE CASES SHOULD BE OVERRULED AND THE DOCTRINE ABANDONED.

A . Preservation of Error

Farrell preserved this issue by raising it in her Resistance to the MJP. (Res. to MJP at 34-36). The district court ruled on this issue, stating, "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." (Order on MJP at 4 n.2) (App. 316). This issue has been preserved for appellate review.

B. Standard of Review

Appellate courts review rulings on motions for judgment on the pleadings "for the correction of errors at law." *Griffioen v. Cedar Rapids & Iowa City Ry. Co.*, 914 N.W.2d 273, 280 (Iowa 2018).

"Judgments on the pleadings generally are not favored." *Werner's Inc. v. Grinnell Mut. Reinsurance Co.*, 477 N.W.2d 868, 869 (Iowa Ct. App. 1991). "In many respects a motion for a judgment on the pleadings is reviewed in a similar manner to a motion to dismiss…." *Stanton v. City of Des Moines*, 420 N.W.2d 480, 482 (Iowa 1988). Iowa's pleading rules have "virtually emasculated the motion to dismiss for failure to state a claim," *Unertl v. Bezanson*, 414 N.W.2d 321, 324 (Iowa 1987), and this Court has strongly counseled district courts against sustaining such motions.

> [W]e certainly do not recommend the filing of motions to dismiss in litigation, the viability of which is in any way debatable. Neither do we endorse sustaining such motions, even where the ruling is eventually affirmed. Both the filing and the sustaining are poor ideas.

Cutler v. Klass, Whicher & Mishne, 473 N.W.2d 178, 181 (Iowa 1991); *see Benskin, Inv. v. West Bank*, 2020 WL 7635833, at *1 (Iowa 2020) ("Motions to dismiss are disfavored. Iowa is a notice pleading state."); *Rees v. City of Shenandoah*, 682 N.W.2d 77, 79 (Iowa 2004) ("Under notice pleading, nearly every case will

survive a motion to dismiss…. A petition complies with the [notice pleading standard] if it informs the defendant of the incident giving rise to the claim and of the claim's general nature.").

"The proper function of a motion for judgment on the pleadings is simply to test the sufficiency of the pleadings to present an appropriate issue for trial," *Stanton*, 420 N.W.2d at 482, and courts "assume the truth of the facts stated in the pleadings." *Griffioen*, 914 N.W.2d at 278. "If there are any material facts disputed in the pleadings, a judgment on the pleadings is not appropriate." *Stanton*, 420 N.W.2d at 482. "We uphold such a dismissal only if we can conclude that no state of facts is conceivable under which a plaintiff might show a right of recovery." *Smith v. Smith*, 513 N.W.2d 728, 730 (Iowa 1994).

C. Argument

The public-duty doctrine is, at its core, a public-policy pronouncement that is the bailiwick of the political branches. The Iowa legislature has thoroughly spoken on the subject through the Iowa Tort Claims Act ("ITCA") (passed in 1965) and the Municipal Tort Claims Act ("MTCA") (passed in 1967) (collectively, "Tort Claims Acts"). In 1986, this Court recognized, in *Adam v. State*, 380 N.W.2d 716 (Iowa 1986) (en banc), that the Tort Claims Acts were the death knell of the public-duty doctrine. The *Adam* Court correctly explained that the public-duty doctrine is properly understood as a governmental "immunity," and the Tort Claims Acts eliminated such immunity without exempting the

public-duty doctrine; therefore, the Tort Claims Acts eliminated the public-duty doctrine. *See id.*

However, in *Kolbe v. State*, 625 N.W.2d 721 (Iowa 2001) (en banc), the Court resurrected the doctrine, resulting in twenty years of legal confusion as courts and lawyers alike have struggled to define and apply the amorphous "public duty" concept. The public-duty doctrine's resurrection has done violence to established legal principles, has proven unworkable, and has created variegated judicial decisions dependent on tenuous factual distinctions which, in turn, have created a vicious cycle requiring this Court's ever-increasing involvement to explain seemingly-inconsistent precedent. Experience and time have shown that judicial adherence to the doctrine is no longer tenable. The Court should extricate itself from the public-duty-doctrine morass and let the political branches wrestle with it. *See Rollins v. Petersen*, 813 P.2d 1156, 1166 (Utah 1991) (Durham, J., concurring), *overruled by Scott v. Universal Sales, Inc.*, 356 P.3d 1172 (Utah 2015).

1. There are two irreconcilable lines of public-duty-doctrine cases in Iowa.

In 2001, this Court resurrected the public-duty doctrine in *Kolbe*. To do so, the Court had to contend with a previous line of decisions, including *Wilson v. Nepstad*, 282 N.W.2d 664 (Iowa 1979) (en banc), and *Adam*, which unequivocally hold that the Tort Claims Acts eliminated the public-duty doctrine

in Iowa. *Kolbe*, however, did not overrule the *Adam* line of cases. Instead, *Kolbe* provided the following analysis as justification for a public-duty-doctrine revival despite contrary precedent:

> We agree with the State's contention that this court did not discard the public duty doctrine in *Wilson*. Although *Wilson* addressed the continued viability of that doctrine in Iowa, the court never resolved the question. Rather, the court concluded the doctrine did not bar the plaintiff's suit because the statutes and ordinances in question were not designed to protect the general public, but rather were designed to protect a "special, identifiable group of persons." *Wilson*, 282 N.W.2d at 672. We confirmed this reading of *Wilson* in *Sankey*, 456 N.W.2d at 209.
>
> However, in *Adam*, this court rejected the State's invocation of the doctrine. The court expressly concluded that the public duty doctrine was incompatible with the State Tort Claims Act. *Adam*, 380 N.W.2d at 724. However, a close reading of *Adam* shows that it was unnecessary to reach this conclusion because as in *Wilson*, the statute at issue in *Adam* was not for the benefit of the general public but rather "was for the benefit of the class to which plaintiffs belong[ed]—producers doing business with grain dealers." *Id.* at 723. Given the court's statements rejecting the public duty doctrine were not necessary to resolve the issue before it, we think those statements were dictum. Thus, in *Adam*, as in *Wilson*, we did not conclusively reject the doctrine, but rather only concluded that because of the nature of the statute in question, the doctrine did not bar plaintiffs' claim.

Id. at 729; *see Raas v. State*, 729 N.W.2d 444 (Iowa 2007) (stating that after *Kolbe*, the public-duty doctrine is "alive and well in Iowa.").

If the public-duty doctrine is "alive and well in Iowa," it has *Kolbe* to thank. *Estate of McFarlin v. State*, 881 N.W.2d 51, 59 (Iowa 2016) ("The plaintiffs . . . argue the public-duty doctrine is inapplicable to the facts of this case but do not

ask us to overrule *Raas* and *Kolbe* and abandon the public-duty doctrine. We do not ordinarily overrule our precedent sua sponte."); *Johnson v. Humboldt Cty.*, 913 N.W.2d 256, 264 (Iowa 2018) ("As Johnson concedes, we have effectively ruled on this [public duty] issue.") (citing *Kolbe*); *Breese v. City of Burlington*, 945 N.W.2d 12, 18 (Iowa 2020) (citing *Kolbe*). However, the public-duty doctrine is not alive and well in Iowa because this Court previously held otherwise in the following line of cases, none of which have been overruled: *Symmonds v. Chicago, Milwaukee, St. Paul & Pac. R.R. Co.*, 242 N.W.2d 262 (Iowa 1976), *Harryman v. Hayles*, 257 N.W.2d 631 (Iowa 1977), *overruled on non-public-duty-doctrine grounds by Miller v. Boone Cty. Hosp.*, 394 N.W.2d 776 (Iowa 1986); *Wilson*, 282 N.W.2d 664, and *Adam*, 380 N.W.2d 716. A detailed analysis of this line of cases, culminating in *Adam*, reveals that this line (1) directly addressed the public-duty doctrine, (2) was required to address the public-duty doctrine to decide the issues presented, and (3) ultimately ruled that the Tort Claims Acts discarded the doctrine. *Kolbe*'s ruling to the contrary leaves us with two lines of conflicting cases, one holding that the Tort Claims Acts eliminated the public-duty doctrine (the *Adam* line), and one holding that the Tort Claims Acts did not eliminate the public-duty doctrine (the *Kolbe* line).

a. *Symmonds* and *Harryman*

The *Kolbe* opinion does not mention *Symmonds* and *Harryman*, let alone overrule them. Yet in *McFarlin*, this Court implied that *Kolbe* had limited *Symmonds* and *Harryman*'s holdings, stating:

> Several cases before *Kolbe* allowed motorists to bring negligence claims against counties based on dangerous roadways. *Harryman v. Hayles*, 257 N.W.2d 631, 638 (Iowa 1977) (noting duties owed to "all those rightfully using the roads" in Lee County), *overruled on other grounds by Miller v. Boone Cty. Hosp.*, 394 N.W.2d 776, 781 (Iowa 1986); *Symmonds v. Chi., Milwaukee, St. Paul & Pac. R.R.*, 242 N.W.2d 262, 265 (Iowa 1976) (noting duties owed to "the traveling public" in Scott County). We no longer recognize county-wide special classes of motorists after *Kolbe*.

881 N.W.2d at 61 n.6. *McFarlin*'s "county-wide" statement is incorrect because *Kolbe* involved a lawsuit against the *State*, not against a county. In fact, the word "county" appears only twice in the *Kolbe* opinion to describe the location of the accident. *Kolbe*, 625 N.W.2d. at 724. *Kolbe* did not overrule or abrogate any county-wide special class created by *Symmonds* and *Harryman*, and even if it had attempted to do so, it would have been non-binding dicta. *See id.* at 729 ("Given the court's statements rejecting the public duty doctrine were not necessary to resolve the issue before it, we think those statements were dictum."). Therefore, *Kolbe* left *Symmonds* and *Harryman* undisturbed.

Because those two cases are still good law in Iowa, what did they hold? *Kolbe* said they "allowed motorists to bring negligence claims against counties based on dangerous roadways." 881 N.W.2d at 61 n.6. True enough, but they

stand for much more than that. They impliedly rejected the existence of the public-duty doctrine in Iowa by explicitly rejecting the doctrine's foundation.

The *Symmonds* Court framed the issue before it as "whether a county may be liable in damages for failure to place a stop sign on a secondary road at a particularly dangerous railroad crossing where no warning devices were installed by the railroad." 242 N.W.2d at 263. Scott County argued the negligence claim against it was exempted by the "due care" and "discretionary function" provisions of the MTCA. *Id.* at 264. The Court rejected these arguments and held as follows:

> We have consistently recognized that governmental units, with respect to highways or streets within their jurisdictions, have a responsibility to the traveling public…. To hold under these circumstances, as a matter of law, the county should be immune from liability for failing to post a stop sign in a situation clearly entailing foreseeable harm or damage to persons traveling on its secondary road would be against logic, sound reason, and enlightened public policy.

Id. at 265. These are broad statements holding that every governmental body has duties to the traveling public with respect to highways and streets in its jurisdiction. This holding is flatly inconsistent with the public-duty doctrine.

Though the defendant was a county, the traveling public at issue in *Symmonds* necessarily encompasses the general public traveling within the entire state and on all of its roads, streets, and highways, regardless of which governmental entity owns them, lest the *Symmonds* rule arbitrarily applies only to

county roads in Scott County. Contrary to the Court's treatment in *McFarlin*, *Symmonds* stands for much broader propositions than this Court's current public-duty-doctrine cases acknowledge, and those propositions necessarily reject the public-duty doctrine.

The *Harryman* Court's propositions lead to the same conclusion. In *Harryman*, the district court had "dismissed those counts of the petition directed against the individual members of the Board of Supervisors and the county engineer on grounds that they failed to state a claim upon which relief could be granted." 257 N.W.2d at 637. The district court "held that the acts of negligence alleged in the petition related to the performance of statutory duties by the defendants in their official capacities, and that these duties were therefore owing only to the general public, not to the plaintiffs individually." 257 N.W.2d at 637. One of the appeal issues raised by the plaintiffs was whether "[t]he trial court erred in holding no cause of action existed against the individual supervisors and the county engineer." *Id.* at 633. Additionally, "Defendants urge[d] on appeal an additional ground not relied on by the trial court that their acts constituted nonfeasance only, for which no liability can attach to public officers and employees." *Id.*

In rejecting the county's arguments, this Court analyzed the MTCA and explained:

> It is likewise true previous distinctions between governmental and proprietary functions and between nonfeasance and misfeasance are no longer meaningful. Like the principle upon which they depended, governmental immunity, they now lack any application to the liability of either governmental subdivisions or those individuals through whom those bodies necessarily act.

Id. at 637. The Court explained that its pre-MTCA rule that the "statutory duty of a county engineer to maintain roads in a safe condition was 'owing to the general public and not to any certain individual or this decedent, except as such individual is a part of the general public'" was based on governmental immunity which had been abrogated by the MTCA. *Id.* at 638 (quoting *Genkinger v. Jefferson Cty.*, 93 N.W.2d 130, 132 (Iowa 1958)). The Court ruled that "the abrogation of governmental immunity [in the MTCA] means the same principles of liability apply to officers and employees of municipalities as to any other tort defendants, except as expressly modified or limited by the provisions of Chapter 613A." *Id.* The Court concluded:

> [T]he Board of Supervisors and county engineer clearly had a duty to maintain the county roads in proper condition. §§ 309.67, 319.1, 319.7, The Code, 1971. This duty runs to all those rightfully using the roads. A breach of that duty can occur either by negligent commission or omission. Whether the duty was breached, and if so, whether it was a proximate cause of the injuries, are matters to be determined at trial.

Id. (citation omitted). Like *Symmonds*, these are broad statements holding that governmental bodies have duties to the traveling public with respect to roads in their jurisdictions.

Both *Symmonds* and *Harryman* contradict *McFarlin*'s limiting description of them, and their broad principals are directly contrary to the public-duty doctrine. They presaged *Wilson*'s and *Adam*'s elimination of the doctrine in Iowa.

b. *Wilson*

After failing even to mention the *Symmonds* and *Harryman* cases, the *Kolbe* opinion next eviscerated the impact of *Wilson*, in which this Court explicitly rejected the existence of the public-duty doctrine in Iowa after passage of the MTCA. The *Kolbe* Court addressed *Wilson* as follows:

> Although *Wilson* addressed the continued viability of [the public-duty] doctrine in Iowa, the court never resolved the question. Rather, the court concluded the doctrine did not bar the plaintiff's suit because the statutes and ordinances in question were not designed to protect the general public, but rather were designed to protect a "special, identifiable group of persons." *Wilson*, 282 N.W.2d at 672.

625 N.W.2d 729. This is an unduly restrictive reading of *Wilson*.

In *Wilson*, the plaintiffs sued the City of Des Moines for negligent inspection of a building that later burned, causing deaths and injuries. 282 N.W.2d at 666-67. The plaintiffs argued that the City's duties arose from the common law and from state and municipal statutes and ordinances related to building codes, occupancy permits, and fire regulations. *Id.* In response to the claims, the City did "not disavow its duties under the statutes and ordinances" but denied "these obligations created a duty of reasonable care." *Id.* at 667. It claimed "the applicable state and municipal inspection laws are designed to

protect the public generally and do not create a duty of care to these individual plaintiffs." *Id.* Although the context of the case was an apartment building in Des Moines, the City of Des Moines framed its argument and the issues before the Court as involving the state and municipal laws applicable to the general public. *Id.* Therefore, contrary to *Kolbe*'s description, the specific group of people protected by the statutes and regulations was the general public, any of which could become an inhabitant of an apartment building.

In driving home its "general public" argument, the City of Des Moines relied upon eight non-Iowa state-court decisions, which this Court described as follows:

> In most of these cases the sovereign was held not liable on one or both of two grounds. The first is the concept there should be no liability for failure to provide general police or fire protection. *The second is the related "public duty" doctrine the notion that if a duty is owed to the public generally there is no liability to an individual member of that group.*

Id. (italics added). A review of these eight cases reveals that they all relied upon or recognized the public-duty-doctrine argument made by the City of Des Moines. *Duran v. City of Tucson*, 509 P.2d 1059, 1061-62, 1064 (Ariz. Ct. App. 1973) ("[T]he plaintiff, in order to recover against the City must show the breach of a duty owed to him as an individual and not merely the breach of an obligation owed to the general public."); *Modlin v. City of Miami Beach*, 201 So.2d 70, 75-76 (Fla. 1967) ("[T]his duty must be something more than the duty that a public officer owes to the public generally."); *Hannon v. Counihan*, 369 N.E.2d 917, 921

(Ill. App. Ct. 1977) ("[I]n the absence of a special duty owed to plaintiffs, different from that owed to the public at large, no cause of action for negligent inspections can exist."); *Grogan v. Commonwealth*, 577 S.W.2d 4, 6 (Ky. 1979); *Dufrene v. Guarino*, 343 So.2d 1097, 1099 (La. Ct. App. 1977) ("The duty to inspect…is imposed to protect the public generally against potential hazards. There was no duty owed individually to all future patrons…."); *Hoffert v. Owatonna Inn Towne Motel, Inc.*, 199 N.W.2d 158, 160 (Minn. 1972) ("The act performed is only for public benefit, and an individual who is injured by any alleged negligent performance of the building inspector in issuing the permit does not have a cause of action."); *Motyka v. City of Amsterdam*, 204 N.E.2d 635, 637 (N.Y. 1965); *Georges v. Tudor*, 556 P.2d 564, 566 (Wash. Ct. App. 1976) ("[I]n order to recover against the city, appellant must show more than a mere breach of an obligation owed to the general public…."). Accordingly, it is evident that the public-duty-doctrine argument was explicitly raised and was squarely before the *Wilson* Court.

Immediately after summarizing the holdings of the eight cases relied upon by the City, *Wilson* concluded: "Neither factor can properly be urged in this case." 282 N.W.2d at 667. It then proceeded to address the public-duty doctrine in great detail and concluded that it did not exist in Iowa because it did not survive the MTCA.

- "Moreover, the trend in this area is toward liability. The 'public duty' doctrine has lost support in four of the eight jurisdictions relied upon by the city." *Id.*

- "Other jurisdictions have recognized the growing trend toward imposing liability upon governmental units for negligence in execution of statutory duties." *Id.* at 668.

- "'[T]he 'duty to all, duty to no-one' doctrine is in reality a form of sovereign immunity, which is a matter dealt with by statute in Alaska, and not to be amplified by court-created doctrine. An application of the public duty doctrine here would result in finding no duty owed the plaintiffs or their decedents by the state, because, although they were foreseeable victims and a private defendant would have owed such a duty, no 'special relationship' between the parties existed. Why should the establishment of duty become more difficult when the state is the defendant? Where there is no immunity, the state is to be treated like a private litigant. To allow the public duty doctrine to disturb this equality would create immunity where the legislature has not.'" *Id.* at 668-669 (quoting *Adams v. State*, 555 P.2d 235, 241-42 (Alaska 1976) (footnotes omitted)).

- "However, it is the specific and novel language of the Iowa [Tort Claims] statutes, clearly indicating a legislative intent to impose liability under these admitted circumstances, which distinguishes Iowa law from that found in the decisions relied on by the city." *Id.* at 669.

- "Read together, the above Iowa statutes plainly impose liability upon a municipality for torts committed by its employees while acting within the scope of their duties. The statutory scope covers tortious acts and omissions reasonably related to municipal business or affairs. Breach of an actionable duty created by statute is tortious conduct under chapter 613A. Only when an employee exercises due care in executing statutory duties is the municipality exempt from liability. 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." *Id.*

- "Notwithstanding the clear trend of case law and unmistakable legislation, the city argues the 'public duty' dichotomy is the law in Iowa, a proposition the special concurrence seems to accept." *Id.* at 670.

- "The special concurrence advocates an anomalous and ironic result: A duty relating to public roads open to and utilized by all citizens is actionable because it protects an identifiable class of persons, but a duty relating to private dwellings open only to and utilized only by tenants and guests is not actionable because it benefits the general public. This points up the problem of mere result-oriented application of 'duty' or 'no duty' labels." *Id.* at 672.

- "We also are unimpressed by policy arguments urged in some cases (but not here) that failure to exempt the municipality from its negligence would have a disastrous financial impact. In the first place, the municipality may be entitled to recover over against the offending property owner. Second, the potential fiscal threat here is minimal compared with the exposure which arises from our refusal in *Harryman* and *Symmonds* to immunize the municipality from its negligence in fulfilling its statutory duties relating to streets and roads. That these are cases of first impression in Iowa is some indication these situations will arise only infrequently. Third, it is not at all clear that fiscal disaster is inevitable or even likely under any of these circumstances." *Id.* at 674 (citations omitted).

- "Most important, however, 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 chapter 613A. Allowing understandable concerns over fiscal effects to control statutory interpretation will destroy carefully constructed legislation." *Id.*

Certainly, the *Wilson* Court squarely rejected the City's public-duty-doctrine argument and explained in detail the reason for the rejection. *Kolbe*'s interpretation to the contrary is incorrect, which is confirmed by the concurring opinion in *Wilson*, 282 N.W.2d at 674-677 (McCormick, J., concurring), which would have been otherwise unnecessary. The *Wilson* concurrence understood

exactly what the controlling opinion held – that the public-duty doctrine did not survive the MTCA.[1]

Kolbe's attempt to avoid and limit the breadth of *Wilson* also fails to account for the following statement in *Wilson*:

> These ordinances and statutes impose on the city and its employees the authority and duty to require correction of these defects. The purpose of this duty cannot be distinguished from those in *Harryman* and *Symmonds*. There is no greater nexus between Lee and Scott Counties and persons using their roads than the nexus between Des Moines and its citizens residing in multiple dwellings. The latter class is probably smaller.

282 N.W.2d at 672. The *Wilson* Court recognized that it was not writing on a blank slate, and that its decision was controlled by *Symmonds* and *Harryman* whose "traveling public" group was larger than the group of apartment dwellers. If counties are liable to the traveling public for failure to properly maintain their roads, then, *a fortiori*, a city is liable to apartment dwellers for failing to properly inspect buildings. *Wilson* made explicit what was implied in *Symmonds* and

[1] The Supreme Courts of Illinois, New Mexico, North Carolina, North Dakota, Rhode Island, Tennessee, and Wyoming all read *Wilson* the same way. *Coleman v. East Joliet Fire Prot. Dist.*, 46 N.E.3d 741, 754 (Ill. 2016); *Schear v. Bd. of Cty. Commissioners of Bernalillo Cty.*, 687 P.2d 728, 731 (N.M. 1984); *Thompson v. Waters*, 526 S.E.2d 650, 652 (N.C. 2000); *Ficek v. Morken*, 685 N.W.2d 98, 105 (N.D. 2004); *Catone v. Medberry*, 555 A.2d 328, 331 (R.I. 1989); *Ezell v. Cockrell*, 902 S.W.2d 394, 400 (Tenn. 1995); *Natrona Cty. v. Blake*, 81 P.3d 948, 954 (Wyo. 2003).

Harryman: the public-duty doctrine does not exist in Iowa because it did not survive the MTCA. *Kolbe*'s interpretation to the contrary is incorrect.[2]

c. *Adam*

After unduly restricting *Wilson*'s holding, the *Kolbe* Court next faced *Adam*, another case in which the Court explicitly rejected the existence of the public-duty doctrine in Iowa after the ITCA. Unable to restrict *Adam*'s holding like it did *Wilson*'s, the Court simply avoided the holding by incorrectly labelling it as dicta. The *Kolbe* Court addressed *Adam* as follows,

> [I]n *Adam*, this court rejected the State's invocation of the doctrine. The court expressly concluded that the public duty doctrine was incompatible with the State Tort Claims Act. *Adam*, 380 N.W.2d at 724. However, a close reading of *Adam* shows that it was unnecessary to reach this conclusion because as in *Wilson*, the statute at issue in *Adam* was not for the benefit of the general public but rather "was for the benefit of the class to which plaintiffs

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[2] The post-*Wilson* cases of *Sankey v. Richenberger*, 456 N.W.2d 206 (Iowa 1990) and *Leonard v. State*, 491 N.W.2d 508 (Iowa 1992) do not support *Kolbe*'s interpretation of *Wilson* because they were not public-duty-doctrine cases.

In *Sankey*, the Court rejected the plaintiffs' claims based on the Restatement (Second) of Torts Section 315's rule that there "is no duty so to control the conduct of a third person as to prevent him from causing physical harm to another" absent a special relationship between the actor and the third person or between the actor and the victim, and that police officers "share the same—but not greater—liability to injured parties as other defendants under like circumstances." 456 N.W.2d at 209. This rule has nothing to do with the public-duty doctrine's "duty to all, duty to no one" mantra, and it is consistent with Farrell's position because it confirms that the rules for governmental tort liability after the Tort Claims Acts are the same as those for private individuals' tort liability, absent specific exceptions in the Acts.

Leonard followed the same rule and cited to *Sankey* as an "analogous" case. 491 N.W.2d at 511.

> belong[ed]—producers doing business with grain dealers." *Id.* at 723. Given the court's statements rejecting the public duty doctrine were not necessary to resolve the issue before it, we think those statements were dictum. Thus, in *Adam*, as in *Wilson*, we did not conclusively reject the doctrine, but rather only concluded that because of the nature of the statute in question, the doctrine did not bar plaintiffs' claim.

625 N.W.2d at 729.

The issue in *Adam* "involve[d] the State's challenge to judgments of the district court holding the State liable for damages resulting from negligent licensing and inspecting of a grain elevator by the Iowa State Commerce Commission (ICC)." 380 N.W.2d at 717. The plaintiffs' negligence claims against the State "alleged ICC breached several duties owed them and thereby proximately caused their losses. These breaches included negligent failure to inspect as often as required, negligent inspections, and negligent failure to adopt rules." *Id.* at 718. The district court rendered a verdict against the State. *Id.* at 722. On appeal, "[t]he State challenge[d] the basic holding of liability on its part," and one of its arguments was the "assert[ion of] the 'public duty' doctrine." *Id.* at 722, 724.

The *Adam* Court explicitly addressed and rejected the State's public-duty-doctrine argument as follows:

> We rejected the doctrine in *Wilson* with regard to municipalities, as a "'form of sovereign immunity, which is a matter dealt with by statute ... and not to be amplified by court created doctrine.'" *Wilson*, 282 N.W.2d at 668, quoting *Adams v. State*, 555 P.2d 235, 241–42 (Alaska 1976). In *Wilson* we said that "[t]he 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." *Id.* at 669 (emphasis added). The state tort claims act provides that the State is liable "in the same manner, and to the same extent as a private individual under like circumstances...." § 25A.24. It clearly excludes the public duty doctrine.

Id. *Adam* acknowledged that *Wilson* was the death-knell for the public-duty doctrine under the MTCA, and it rang the same bell for the doctrine under the ITCA.[3] *Kolbe*'s announcement that this crucial holding in *Adam* was dicta is incorrect.

The *Adam* Court began its analysis of the substantive basis for the State's liability by addressing the first element of a negligence claim: duty. *Id.* at 722. The Court confirmed hornbook tort law that a "prerequisite of negligence liability is a duty owed by the actor which requires conformity to a standard of conduct for the protection of the victim," and it noted that the district court's "findings base negligence of the State on both *failing* to perform statutory duties and *performing* statutory duties with lack of due care." *Id.*

The Court rejected the first argument that the State had a duty to act under the statute because inspections by the ICC were only discretionary, not mandatory. *Id.* at 723. This meant that the *only* basis upon which the State's duty

[3] The Supreme Court of Massachusetts reads *Adam* the same way. *Jean W. v. Commonwealth*, 610 N.E.2d 305, 312-313 (Mass. 1993) (Liacos, C.J., concurring).

could arise was in performance of statutory duties. In addressing that issue, the Court stated:

> When ICC did act, however, whether in accordance with a statutory duty or under a statute conferring authority to act, it had a responsibility to act with due care. Performance of a function without due care, resulting in damages, creates liability. . . . Similarly, negligent performance under rules of governmental agencies establishes liability.

Id. (citations omitted). Having concluded the statute created duties in the State when the State chose to act, the remaining question was whether it created duties to these plaintiffs. The Court answered in the affirmative and held the "statute here was for the benefit of the class to which plaintiffs belong—producers doing business with grain dealers." *Id.* However, this holding was not part of the Court's public-duty-doctrine analysis because it did not address that issue until later in the opinion.

In response to the Court's duty finding, the State asserted four main arguments: (1) its liability was limited to negligence "which results in 'physical harm,'" (2) the public-duty doctrine, (3) the plaintiffs' claims do not fall within the ITCA's general waiver provision, and (4) the State's conduct falls within the ITCA's discretionary function exemption. *Id.* at 724. If the State prevailed on any one of these four arguments, then it would have prevailed on appeal. The *Adam* Court rejected all four arguments, and only by doing so did it affirm in part the verdict against the State. The Court's public-duty-doctrine discussion, analysis,

and holding were not obiter dicta. *See Boyles v. Cora*, 6 N.W.2d 401, 413 (Iowa 1942) (defining "obiter dicta" as "passing expressions of the court, wholly unnecessary to the decision of the matters before the court"). Even if *Kolbe*'s contrary statement was correct, at most *Adam*'s statement would have been "sound, judicial dicta and definitely declared the mind of the court," *Carlton v. Grimes*, 23 N.W.2d 883, 892 (Iowa 1946); *Honsey v. Bd. of Dir. of Des Moines Ind. Cmty. Sch. Dist.*, 2011 WL 1584121, at *8 (Iowa Ct. App. 2011), especially in light of *Symmonds*, *Harryman*, and *Wilson*.

After passage of the Tort Claims Acts, this Court explicitly rejected the public-duty doctrine and held the Tort Claims Acts eliminated the public-duty doctrine altogether. *Symmonds*, *Harryman*, *Wilson*, and *Adam* have not been overruled and they remain good law in Iowa. Accordingly, there are two conflicting lines of cases in Iowa: (1) the *Adam* line of cases that hold the public-duty doctrine did not survive the Tort Claims Acts, and (2) the *Kolbe* line of cases that hold the public-duty doctrine is "alive and well in Iowa." The Court needs to overrule one of those lines, and it should be the *Kolbe* line.

2. The Court should overrule *Kolbe* and its progeny and abandon the public-duty doctrine as the Tort Claims Acts intended.

In 1965, the Iowa legislature passed the ITCA, which waived "immunity of the state from suit and liability" such that the State was now liable "to the

same claimants, in the same manner, and to the same extent as private individuals under like circumstances," except as otherwise reserved. Iowa Code § 669.4(2)-(3) (2020). In 1967, the Iowa legislature passed the MTCA, which made "every municipality…subject to liability for its torts and those of its officers and employees, acting within the scope of their government or duties, whether arising out of a governmental or proprietary function," except as otherwise reserved. Iowa Code § 670.2(1). The Tort Claims Acts do not reserve the public-duty doctrine. *Raas*, 729 N.W.2d at 448 ("[T]he list of exceptions [to the Tort Claims Acts' waivers of sovereign immunity] does not include claims subject to the public-duty doctrine.").

As discussed, this Court held in the *Adam* line of cases that the public-duty doctrine did not survive the Tort Claims Acts. This placed Iowa in line with many states that have refused to adopt or have eliminated the public-duty doctrine. *Adams v. State*, 555 P.2d 235, 241 (Alaska 1976); *Ryan v. State*, 656 P.2d 597, 599 (Ariz. 1982); *Leake v. Cain*, 720 P.2d 152, 160 (Colo. 1986); *Commercial Carrier Corp. v. Indian River Cty.*, 371 So. 2d 1010, 1015 (Fla. 1979) (while *Commercial Carrier Corp.* rejected the public-duty doctrine, the current status of the public-duty doctrine in Florida is currently in flux as demonstrated by *Pollock v. Fla. Dep't of Highway Patrol*, 882 So. 2d 928, 941 (Fla. 2004) (Pariente. J., dissenting)); *Coleman v. E. Joliet Fire Prot. Dist.*, 46 N.E.3d 741, 756 (Ill. 2016); *Cormier v. T.H.E. Ins. Co.*, 745 So. 2d 1, 6 (La. 1999); *Jean W. v. Commonwealth*, 610

N.E.2d 305, 308 (Mass. 1993); *Beaudrie v. Henderson*, 631 N.W.2d 308, 313-14 (Mich. 2001); *Southers v. City of Farmington*, 263 S.W.3d 603, 613 (Mo. 2008); *Drake v. Drake*, 618 N.W.2d 650, 657 (Neb. 2000); *Doucette v. Town of Bristol*, 635 A.2d 1387, 1390 (N.H. 1993); *Schear v. Bd. of Cty. Comm'rs of Bernalillo Cty.*, 687 P.2d 728, 731 (N. M. 1984); *Ficek v. Morken*, 685 N.W.2d 98, 107–08 (N.D. 2004); *Wallace v. Ohio Dep't of Commerce*, 773 N.E.2d 1018, 1026–27 (Ohio 2002); *Brennen v. City of Eugene*, 591 P.2d 719, 725 (Or. 1979); *Hudson v. Town of E. Montpelier*, 638 A.2d 561, 566-68 (Vt. 1993); *Coffey v. City of Milwaukee*, 247 N.W.2d 132, 139 (Wis. 1976); *DeWald v. State*, 719 P.2d 643, 653 (Wyo. 1986).[4]

Furthermore, the Iowa legislature has impliedly approved *Wilson*'s and *Adam*'s holdings that the Tort Claims Acts eliminated the public-duty doctrine. The Court decided *Adam* on January 15, 1986. 380 N.W.2d 716. That case involved a claim against the State for allegedly inspecting grain elevators in a negligent manner. *Id.* at 717-18. In addition to holding that the ITCA "clearly excludes the public duty doctrine," the *Adam* Court held that an exemption to

[4] Of those jurisdictions that maintain a form of the public-duty doctrine, some do so because of specific legislative mandates or because of their state's decision not to waive sovereign immunity. *Gordon v. Bridgeport Hous. Auth.*, 544 A.2d 1185, 1197 (Conn. 1988) (noting that Connecticut "has not abolished governmental immunity."); *Lightfoot v. M.S.A.D. #35*, 2002 WL 1973919, at *1 (Me. Super. Ct. 2002), *aff'd sub nom. Lightfoot v. Sch. Admin. Dist.*, 816 A.2d 63 (Me. 2003) (public-duty doctrine is codified in statute); *Coty v. Washoe Cty.*, 839 P.2d 97, 101 (Nev. 1992) (sovereign immunity has not been waived); *Ezell v. Cockrell*, 902 S.W.2d 394 (Tenn. 1995) (sovereign immunity has not been waived).

liability in the grain dealer's act (at former Iowa Code § 543.38, which is now at Iowa Code § 203C.38) did not apply retrospectively to acts prior to July 1, 1978, thereby making the State potentially liable for any pre-July 1, 1978 grain inspections. *Id.* at 724-26. The Iowa legislature responded almost immediately in its 1986 session by enacting 86 Acts, chapter 1211, section 8 (now found at Iowa Code § 669.14(11)(a)) which creates an immunity for "[a]ny claim for financial loss based upon an act or omission in financial regulation, including but not limited to examinations, inspections, audits, or other financial oversight responsibilities, pursuant to . . . chapters . . . 203C. . . . " This amendment was approved on May 22, 1986 – four months after the decision in *Adam*, and it appears to be a legislative overruling of *Adam*'s holding of State liability for negligent grain-elevator inspections. In contrast, the legislature took no action to overturn *Adam*'s (and *Wilson*'s) holdings that the Tort Claims Acts "clearly exclude[] the public duty doctrine," which is strong evidence of legislative approval of their holdings. *See State v. Freeman*, 705 N.W.2d 286, 291 (Iowa 2005) ("[W]hen the legislature enacts a law, '[w]e assume the legislature knew the existing state of the law and prior judicial interpretations of similar statutory provisions.'") (citation omitted). Furthermore, for the fifteen and twenty-two year periods between *Adam*/*Wilson* and *Kolbe*, the legislature took no action to overturn those two decisions, which is evidence of tacit legislative approval of them. *State v. Ross*, 729 N.W.2d 806, 811 (Iowa 2007).

Despite this Iowa legislative approval, *Kolbe* resurrected the public-duty doctrine while barely mentioning the Tort Claims Acts.[5] The Court's first post-*Kolbe* analysis of the public-duty doctrine vis-à-vis the ITCA or MTCA was in *Raas*. The *Raas* Court said, "In *Kolbe* we recognized that the public-duty doctrine is still viable despite the enactment of the State Tort Claims Act. . . ." *Id.* at 449.[6] The Court then adopted the following rationale for reviving the doctrine in the face of the ITCA:

> In making this argument, the plaintiffs equate sovereign immunity with the lack of a duty under the public-duty doctrine. However, the principles involved are not the same. . . .
>
> > The public duty rule is not technically grounded in government immunity, though it achieves much the same results. 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 place.

Id. at 448 (quoting 18 Eugene McQuillin, *McQuillin on Municipal Corporations* § 53.04.25 (3d ed. 2006)). The *only* legal authority cited by *Raas* in its defense of *Kolbe's* decision to resurrect the public-duty doctrine is a partial quote from the *McQuillin* secondary source. These statements in *McQuillin* are directly contrary to the public-duty doctrine's fundamental origins as a principle of sovereign

[5] *Kolbe* only mentions the ITCA four times, does not mention the MTCA at all, and provides no analysis of either statute.
[6] *Cf.* footnote 5.

immunity and are inaccurate characterizations of Iowa's public-duty-doctrine jurisprudence. As such, the *Kolbe* line of cases should be overruled in favor of the *Adam* line of cases that correctly holds that the public-duty doctrine is a form of sovereign immunity that the Tort Claims Acts eliminated.

a. Immunity Versus Duty

The public-duty doctrine is properly understood as a form of sovereign immunity, and the Tort Claims Acts waived all sovereign immunity other than specifically-enumerated exceptions that do not include the public-duty doctrine. Therefore, the public-duty doctrine did not survive the Tort Claims Acts.

"The public duty rule is believed to have originated in the United States Supreme Court case of *South v. Maryland*, 59 U.S. 396 (1855)." *Coleman v. E. Joliet Fire Prot. Dist.*, 46 N.E.3d 741, 750 (Ill. 2016); *see also e.g., Bassett v. Lamentia*, 417 P.3d 299 (Mont. 2018). In *South*, the plaintiff alleged he was kidnapped and released only upon payment of a ransom, and he argued that the defendant sheriff should be civilly liable for failing to protect him because the sheriff "ought to have preserved and maintained the peace of the State of Maryland" but failed to do so. 59 U.S. at 398. The Court surveyed the history of civil actions against sheriffs and explained that at common law, "the office of sheriff could be held by none but men of large estate, who were able to support the retinue of followers which the dignity of his office required, and to answer in damages to those who were injured by his neglect of duty in the performance of his

ministerial functions." *Id.* at 402. The Court explained, "It is an undisputed principle of the common law, that for a breach of a *public duty*, an officer is punishable [only] by indictment; but where he acts *ministerially*, and is bound to render certain services to individuals, . . . he is liable for acts of misfeasance or non-feasance to the party who is injured by them." *Id.* at 402-403 (italics added). The Court defined sheriffs' "ministerial functions" as the duty "to execute all processes issuing from the courts of justice" in that "[h]e is keeper of the county jail, and answerable for the safe-keeping of prisoners . . . [and he] summons and returns juries, arrests, imprisons, and executes the sentence of the court." *Id.* at 402. The Court did not, however, explicitly define "public dut[ies]" – it merely stated that when a sheriff "act[s] as the chief magistrate of his county, wielding the executive power for the preservation of the public peace," he is acting pursuant to a "public duty." *Id.* at 403.

The *South* Court based its decision on English common law, citing English precedent stating, "No man ever heard of an action against a conservator of the peace, as such." *Id.* (quoting *Entick v. Carrington*, State Trials, vol.19, page 1062, Lord Camden). Importantly, the Court did not state that this doctrine was a "no-duty" rule, but that it was based on the sheriff's status as a "sovereign power of the State." *Id.* at 402. The Court explained that when a sheriff carried out a public duty "as conservator of the peace in his county or bailiwick, *he is the representative of the king, or sovereign power of the State for that purpose*." *Id.* (italics added). As a result,

sheriffs had both a "duty in the performance of his ministerial functions" *and* a "public duty," but the sheriff could not be held liable for breach of a public duty when acting as "representative of the king, or sovereign power of the State." *Id.* In other words, the public-duty doctrine as laid down in *South* was based on English common-law sovereign immunity rather than a separate and distinct "no-duty" rule.

A series of early Iowa Supreme Court cases analyzed common-law "public duty" issues in the same sovereign-immunity vein as *South*. The earliest public-duty-doctrine case in Iowa appears to be *Calwell v. City of Boone*, 2 N.W. 614 (Iowa 1879). In *Calwell*, the plaintiff sued a municipality based on the allegation that the city improperly hired a police officer who was not fit for the job and who subsequently committed intentional torts against the plaintiff. *Id.* at 615. The Court held that the "police regulations of a city are not made and enforced in the interest of a city in its corporate capacity, but in the interest of the public. A city is not liable, therefore, for the acts of its officers in attempting to enforce such regulations," and it explained that "police officers can in no sense be regarded as the agents or servants of a city." *Id.* While the agency statements are no longer good law today, *see e.g.*, *Baldwin v. City of Estherville*, 929 N.W.2d 691, 696 (Iowa 2019), the Court's statement that the city "is not liable" appears to be grounded in immunity as opposed to duty.

Two later cases cited to *Calwell* and repeated its "no liability" pronouncements. *Saunders v. City of Ft. Madison*, 82 N.W. 428 (Iowa 1900); *Beeks v. Dickinson Cty.*, 108 N.W. 311 (Iowa 1906). In another case, the Court cited to and approved of the *Calwell* line of cases but distinguished them to hold the City liable:

> There can be no question but that police officers, in the performance of their duties in making arrests and the like, or firemen, in the performance of their duties as such, and health officers, are not regarded as the agents or servants of the city; but their duties are rather of a public nature, and as to such acts the city is not liable.
>
> …
>
> It is equally well settled by the authorities that a city is liable for its negligence when it acts in a ministerial or corporate capacity.
>
> …
>
> Under the evidence heretofore referred to, we think the court should have submitted to the jury the issue as to the defective condition of the street. The duty of the city with reference to its streets is a corporate duty.

Jones v. Sioux City, 170 N.W. 445, 448-449 (Iowa 1919). Like *Calwell*, the Court linked its "no liability" immunity language to governmental "public" actions in contrast to governmental "ministerial" or "corporate" actions, but it also described the immunized public actions as "duties of a public nature." *Id.* Thus, the Court continued building on the *Calwell* public-duty-doctrine/immunity foundation.

In *Harris v. City of Des Moines*, 209 N.W. 454 (Iowa 1926), this Court made explicit that the public-duty doctrine was based on immunity principles. In affirming the lawsuit's dismissal, the Court held that a city was not liable because enforcing ordinances was a governmental duty, defined as a duty "involving the exercise of governmental power, and is assumed for the exclusive benefit of the public. A *sovereign act of government* cannot be submitted to the judgment of the courts, since government is not the subject of private law." *Id.* at 456 (italics added); *see also Goold v Saunders*, 194 N.W. 227 (Iowa 1923) (reversing dismissal of lawsuit because defendants did not claim official-capacity immunity).

After *Harris*, the Court continued to issue various decisions linking public duties to immunity. *See e.g.*, *Rowley v. City of Cedar Rapids*, 212 N.W. 158, 160 (Iowa 1927) (quoting *Goold*, 194 N.W. at 228) ("A public official may be guilty of negligence in the performance of official duties, for which his official character gives him no immunity."); *Leckliter v. City of Des Moines*, 233 N.W. 58, 63 (Iowa 1930) ("We think it is much more reasonable to assume that [legislation was not passed] . . . to remove the immunity then existing in favor of the municipality for the operation of such instruments in the exercise of its governmental functions."); *Wittmer v. Letts*, 80 N.W.2d 561, 562-563 (Iowa 1957) (citations omitted) ("Under the ancient common law the Sovereign, generally speaking, could not be sued and this policy has come down to us and is now found in our statutes. . . . Thus the State is immune from suit rather than from liability. . . .

Thus, unlike the State, immunity [for a county], if any, is from liability; an immunity that is court made, not legislative. . . . Thus the question is whether or not the operation of a hospital by a county constitutes a governmental or proprietary function; if the former, there is immunity; if the latter, there is none. . . . We believe that the tendency, based upon sound reasoning, is to deny immunity where injury results from negligence of officials or agents exercising powers purely ministerial in reference to matters which cannot be said to pertain to duties purely public."); *Genkinger v. Jefferson Cty.*, 93 N.W.2d 130, 132 (Iowa 1958) (referring to the public duty analysis as "governmental immunity").

By the 1960s, common-law public-duty-immunity jurisprudence became increasingly unpopular, as evidenced in *Johnson v. Baker*, 120 N.W.2d 502 (Iowa 1963). There, the plaintiffs posited two arguments: (1) the "defendants have no immunity under the existing rules as established by our decided cases," and (2) "the judicial doctrine of sovereign immunity from ordinary torts is contrary to modern concepts of responsible government and should be abrogated." *Id.* at 506. The Court agreed with the first argument, thereby avoiding the second, but noted:

> Plaintiffs' contention that the judicial doctrine of sovereign immunity from ordinary torts is contrary to modern concepts of responsible government and should be abrogated is supported by a considerable trend among courts which have abolished the doctrine. In recent years much has been written by legal scholars criticizing this doctrine. It has been abrogated by many other courts. However, our holding on plaintiffs' first contention makes

> it unnecessary to re-examine the entire doctrine of governmental immunity at this time.

Id. at 508 (citations omitted).

The public-duty immunity's unpopularity eventually reached a groundswell that led to passage of the ITCA in 1965 and the MTCA in 1967. This led to the *Adam* line of cases, all of which described the public-duty doctrine as an immunity that the Tort Claims Acts eliminated. *Symmonds*, 242 N.W.2d at 264-266; *Harryman*, 257 N.W.2d at 633-638; *Wilson*, 282 N.W.2d at 669; *Adam*, 380 N.W.2d at 724. Fifteen years after *Adam*, *Kolbe* appeared, after which *Raas* attempted to explain *Kolbe* by adopting the following statement from the *McQuillin* secondary source: "'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 place.'" 729 N.W.2d at 448.

If *McQullin* stood for the proposition quoted by *Raas*, it would be a tenuous basis upon which to reverse long-standing contrary precedent. That tenuousness becomes even flimsier because *Raas* omitted the following countervailing language from the *McQuillin* secondary source:

> [The] public duty rule has been abrogated or limited in a number of jurisdictions. Other states have never adopted the public duty rule. *The states have rejected the public duty rule because the rule is, in effect if not in theory, a continuation of the abolished governmental immunity doctrine.* The rule also creates confusion in the law and produces uneven and inequitable results in practice. Courts abrogating the rule reject the

> contention that the public duty rule is the only principle protecting municipalities from massive liabilities; these courts maintain that ordinary tort rules, such as the rule requiring foreseeability of harm, will adequately limit the scope of municipal liability. These courts also remind us that abrogation of the doctrine of municipal governmental immunity merely removes the defense of immunity and does not create any new liability for a municipality.

18 Eugene McQuillin, *McQuillin on Municipal Corporations* § 53.18 (3d ed. 2006) (italics added). This countervailing language supports the *Adam* line of cases and calls into question the foundation for *Raas*' contrary conclusion.

The *Raas* Court's *McQuillin* foundation becomes even shakier because that Court acknowledges that the "'public duty rule asks whether there was any *enforceable* duty to the plaintiff in the first place.'" 729 N.W.2d at 448 (italics added) (citation omitted). This statement acknowledges that the public-duty doctrine is not grounded in tort duty at all. The first element of a negligence cause of action simply asks whether there is "the existence of a duty to conform to a standard of conduct to protect others. . . ." *Thompson v. Kaczinski*, 774 N.W.2d 829, 834 (Iowa 2009) (citations omitted). The factors relevant to whether a duty exists are "(1) the relationship between the parties, (2) reasonable foreseeability of harm to the person who is injured, and (3) public policy considerations." *Id.* (citations omitted). Nowhere in the elements of a negligence cause of action do they ask, "If a duty exists, is it enforceable?" The reason is that the public-duty doctrine, like other immunities, is an affirmative defense. *Lee v. State*, 874 N.W.2d 631, 635 (Iowa 2016) ("The State asserted the affirmative defense of state

sovereign immunity."); *Smith v. Smith*, 646 N.W.2d 412, 415-416 (Iowa 2002); *McFarlin*, 881 N.W.2d at 62 ("In *Adam*, we rejected the State's public-duty *defense.* . . .) (second italics added); *Chase v. City of Memphis*, 971 S.W.2d 380, 385 (Tenn. 1998) ("Both the GTLA and the public duty doctrine are affirmative defenses."); *Zander v. Condon*, 1999 WL 45241, at *1 n.1 (Wash. Ct. App. 1999) ("The cities asserted the public duty doctrine as an affirmative defense…"); *Taylor v. City of Shreveport*, 653 So.2d 232, 235 (La. Ct. App. 1995) ("Defendants pled the affirmative defenses of qualified immunity, immunity, and the public duty doctrine."). In fact, the Government Defendants pleaded the public-duty doctrine as an affirmative defense in this case. (Answer to First Amended Petition by City of West Des Moines and State of Iowa; Answer to First Amended Petition by City of Waukee).

"An affirmative defense is one which rests on facts not necessary to support the plaintiff's case. Thus, any defense which would avoid liability although admitting the allegations of the petition is an affirmative defense." *Ziel v. Engery Panel Structuresd, Inc.*, 2020 WL 4498064, at *7 (Iowa Ct. App. 2020) (citation and quotation marks omitted); Iowa R. Civ. P. 1.419. Because the public-duty doctrine is an affirmative defense, the doctrine is not an attack on the elements of the plaintiff's claim (*e.g.*, whether the plaintiff can prove the existence of a duty to satisfy the first element of negligence), but is instead a defense based on something more – in this case, a defense based on sovereign

immunity. As this Court stated from 1879 until the *Raas* decision, the public-duty doctrine is a form of sovereign immunity. *Raas* defined "immunity" as follows: "'[I]mmunity, which *protects* a municipality *from liability* for breach of an otherwise enforceable duty to the plaintiff. . . .'" 729 N.W.2d at 448 (italics added) (quoting *McQuillin*). In *Johnson*, this Court acknowledged that the public-duty doctrine works the following way: "[I]f a duty is owed to the public generally, there is *no liability* to an individual member of that group." 913 N.W.2d at 260 (italics added) (quoting *McFarlin*, 881 N.W.2d at 58, which in turn quoted *Kolbe*, 625 N.W.2d at 729). This description of the doctrine is another way of saying that if the doctrine applies, it means a duty exists, but it exists to too many people, so the doctrine *immunizes* the government for breaches of the duty; this fits perfectly within *Raas*' definition of "immunity."

The public-duty doctrine, from its foundation in English common law and the early cases of *South* and *Calwell*, has been recognized as a form of governmental immunity. The Tort Claims Acts eliminated governmental immunity and did *not* exempt the public-duty doctrine from the immunity waiver. The *Kolbe* line of cases holding to the contrary should be overruled in favor of the *Adam* line of cases recognizing the public-duty doctrine's demise.

b. Adherence to the Public-Duty Doctrine Is Untenable

The doctrine of *stare decisis* poses no obstacle to this Court overruling the *Kolbe* line of cases and discarding the public-duty doctrine. In Iowa, the public-duty doctrine is a common-law rule. *Johnson*, 913 N.W.2d at 264. *Stare decisis* is at its lowest ebb in common-law cases.

> *Frohwein* and *Huffey* were based on principles of common law and judicial administration, areas where the law can evolve as courts learn from experience. Our customary reluctance to overturn precedent remains, but may have less force when we conclude the precedent was erroneous and leads to undesirable results. *See, e.g.*, *Winger v. CM Holdings, L.L.C.*, 881 N.W.2d 433, 448 (Iowa 2016) (common law); *Peoples Trust & Sav. Bank v. Sec. Sav. Bank*, 815 N.W.2d 744, 754 (Iowa 2012) (judicial administration). As we said in *Barreca v. Nickolas*,
>
> > We remain mindful of the importance of stare decisis as a force of stability and predictability in the law. Where persuasive reasons no longer support a discrete common law rule, however, we are not required to fetter ourselves to that rule simply for the sake of preserving past decisions.
>
> 683 N.W.2d 111, 122–23 (Iowa 2004). "The genius of the common law is its flexibility and capacity for growth and adaptation." *Bearbower v. Merry*, 266 N.W.2d 128, 129 (Iowa 1978) (en banc); *see also* 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.").

Youngblut v. Younblut, 945 N.W.2d 25, 39-40 (Iowa 2020); *id.* at 44 ("Wrong enough means, among other things, a precedent has proved unworkable in

practice, does violence to legal doctrine, or has been so undermined by subsequent factual and legal developments that continued adherence to the precedent is no longer tenable.") (McDonald, J., dissenting).

Experience has demonstrated that judicial adherence to the public-duty doctrine is no longer tenable because it has done violence to established legal principles, has proven unworkable, and has created confusing judicial decisions dependent on dubious factual distinctions which, in turn, have mired this Court in ever-increasing cases to explain seemingly inconsistent precedent. This Court has often been split on the continued propriety and application of the doctrine. *McFarlin*, 881 N.W.2d at 65-72 (Hecht, Wiggins, and Appel, JJ., concurring in part and dissenting in part); *Johnson*, 913 N.W.2d at 267-272 (Wiggins, Hecht, and Appel, JJ., dissenting); *Breese*, 945 N.W.2d at 25 (Appel, J., concurring). The problems are caused by the inherent difficulty of containing and consistently applying a doctrine based on the amorphous concept of a "public duty" and the nearly-unlimited situations where such a concept could rear its head:

> The question of the extent of governmental immunity from liability for torts is a difficult one. That it has perplexed this court for many years is apparent from a study of the many decisions found in our reports . . . . The briefs filed herein by the able counsel for the respective parties are replete with cases in which we have announced the rule that a city or town may not be held to respond in damages for injuries inflicted while it is performing a purely governmental function; or in which we have avoided the rule and held the municipality may be liable. The earlier cases generally seem to have stated the rule and adhered to it without much discussion

> or analysis, although even in these there are exceptions in which liability has been found.

Hall v. Town of Keota, 79 N.W.2d 784, 786 (Iowa 1956); *id.* ("[A]n attempt to analyze all of the cases bearing on this subject would necessitate an opinion of such length that its value would be lost in a welter of words.").

These difficulties lead to seemingly inconsistent or arbitrary case outcomes: counties liable for defective county bridges, but not defective roads or courthouses, *Kincaid v. Hardin Cty.*, 5 N.W. 589 (Iowa 1880); government liable for injuries "resulting from a defect in the condition of the street," but not for injuries resulting from dangerous street conditions caused by the government declaring a street closed to allow children to play in the street but then failing to actually close the street, *Harris*, 209 N.W. 454; State liable for injuries caused by escaped prisoner to a person in the prison's parking lot but not to a person outside the parking lot, *Raas*, 729 N.W.2d 444; recovery allowed for dangerous condition on government-owned golf course because person paid to use the course, *Summy v. City of Des Moines*, 708 N.W.2d 333 (Iowa 2006), but recovery denied for dangerous condition on a government-owned lake because it was free of charge to the boating public, notwithstanding boater having paid required boat registration fee, *McFarlin*, 881 N.W.2d 51.[7]

[7] Under the *Summy/McFarlin* distinction, the government would be liable for injuries suffered on a toll road but immune from those suffered on a toll-free road.

These, and other, cases involving the public-duty doctrine have unnecessarily required this Court to wrestle with sound, uncontroversial, and established legal doctrines such as tort duties, immunities, affirmative defenses, court holdings versus dicta, and statutory law (the Tort Claims Acts). When, over time, these doctrines are molded to make room for (or sense of) the public-duty doctrine, they become mere words. The resulting harm to the respect for the rule of law and blind justice is significant. This harm will grow because parties will continue to make factual and legal arguments and distinctions in an attempt to reach or avoid the doctrine's nebulous application, as shown in this case by the Government Defendants' request that the Court introduce a new "instrumentality of harm" test in applying the doctrine.

The Government Defendants also argue that without the doctrine, the government will face "the potential for limitless governmental liability." Govt. Defs' Br. at 19. This Court already rejected such "policy arguments" in *Wilson*, stating, "We also are unimpressed by policy arguments urged in some cases (but not here) that failure to exempt the municipality from its negligence would have a disastrous financial impact….It is not at all clear that fiscal disaster is inevitable or even likely under any of these circumstances. 282 N.W.2d at 674; *see also Rollins*, 813 P.2d at 1166 (Durham, J., concurring). Further, neither *Kolbe* nor its progeny indicated that resurrection of the doctrine was needed because of any real-world financial consequences to government in the almost forty years between passage

of the Tort Claims Acts and *Kolbe*. Finally, the government enjoys a large swath of statutory immunities under the Tort Claims Acts. *See* Iowa Code § 669.14 (listing sixteen statutory immunities for the state); Iowa Code § 670.4 (listing eighteen statutory immunities for municipalities). The government will continue to enjoy these widespread immunities even after the public-duty doctrine's demise.

The *Kolbe* line of cases is "wrong enough." *Stare decisis* should stand aside so the Court can untangle itself from the policy-laden public-duty doctrine that is better left to the political branches of government. The two non-judicial branches of government in Iowa are the ones tasked with creating, passing, and signing legislation. Therefore, if eliminating the common-law public-duty-doctrine immunity truly begets the sky-is-falling consequences described by the Government Defendants, they can seek redress from the legislature to include a public-duty exception in the Tort Claims Acts.

II. EVEN IF THE PUBLIC-DUTY DOCTRINE IS NOT ABANDONED, IT IS INAPPLICABLE TO THIS CASE.

A. Preservation of Error

For the reasons listed in the Government Defendants' Brief, Farrell agrees that error has been preserved on the issue of the public-duty doctrine's applicability *vel non* to this case.

B. Standard of Review

Farrell refers the Court to the standard-of-review discussion in Part I of this Brief.

C. Argument

Even if the public-duty doctrine remains valid in Iowa, it does not apply here. As demonstrated by this Court's most recent public-duty-doctrine case of *Breese*, the Government Defendants' actions constitute "misfeaseance," thereby rendering the doctrine inapplicable. Furthermore, the doctrine is inapplicable under two additional exceptions: (1) harm to members of a special, identifiable group, and (2) government actions that induce the public to rely on the government to carry out its actions properly.

The Government Defendants recognize that this Court's current public-duty-doctrine jurisprudence precludes application of the doctrine here, so they ask this Court to adopt a new "instrumentality of harm" test. Aside from being inconsistent with this Court's public-duty-doctrine jurisprudence, contrary to the doctrine's policies, and unworkable, the test is nothing more than a request that courts displace juries in causation disputes involving government defendants.

1. The Government Defendants' Actions Constitute "Misfeasance," not "Nonfeasance."

In the Court's two most recent public-duty doctrine cases, *Johnson* and *Breese*, the Court explained that the public-duty doctrine does not protect the

government for "misfeasance," that is, when the government "affirmatively acts and does so negligently." *Johnson*, 913 N.W.2d at 267; *Breese*, 945 N.W.2d at 17. In this case, Farrell's First Amended Petition alleges that the Government Defendants engaged in such "misfeasance," including the affirmative act of building a brand-new, first-of-its-kind, diverging-diamond interchange and opening it (and keeping it open) without completing contractually-required and safety-critical pavement markings, lighting, and signage. (First Amended Petition). This is the exact type of "affirmative action" that *Johnson* and *Breese* specifically exempted from the public-duty doctrine. 913 N.W.2d at 266-67; 945 N.W.2d at 21.

This Court has provided several examples of "misfeasance" that demonstrate the public-duty doctrine's inapplicability to the present case. In *Johnson*, the Court offered two examples of "misfeasance" where the public-duty doctrine would not apply: (1) "where a county negligently erects an obstacle directly in the path of motorists," and (2) where "a vehicle left a state road and traveled along a drainage ditch into an earthen headwall where the ditch was 'created by the State' and 'constituted a trap or snare.'" *Id.* at 266-67.

In *Breese*, the plaintiff was injured when she "fell approximately ten feet from the sewer box to the ground" on a public pathway that did not have "guardrails, . . . warning signs that the pathway reached dangerous heights without a safe turn-around point, . . . warning signs that the sewer box was not

part of the trail system," nor sufficient protective measures such as signs and barriers. 945 N.W.2d at 15. This Court held that the government's actions were "misfeasance" and, as such, the public-duty doctrine did not apply:

> The City erected the sewer box and the paved pathway and connected them to each other. They were not instrumentalities built, owned, operated, or controlled by anyone else. They were the City's. Here, a jury could find the City was affirmatively negligent in connecting the public pathway to the sewer box to give the sewer box the appearance that it was part of the public trail system. A jury could find that when the City connected the trail and the sewer box, it needed to take measures either to make the sewer box a safe part of the trail by adding guardrails or to warn pedestrians that the sewer box was not part of the public trail system.
>
> In summary, we hold that the public-duty doctrine does not apply to this situation . . . .

Id. at 21.

The case at bar is on point with *Breese* and the two examples in *Johnson* because in all of them, the government affirmatively undertook roadway construction projects but did so negligently and in a way that created new dangers to the traveling public that would not have been present in the absence of the government's affirmative acts of building, and opening to the public, those dangerous conditions.

Even more analogous with the present case is *Johnson v. Baker*, where the government parked vehicles in a manner that created a road hazard. 120 N.W.2d at 506. A third party driving on the road crashed, thereby causing damage to the plaintiffs' property. *Id.* The defendants argued that they were not the "proximate

cause" of the accident and should be entitled to "immunity" pursuant to the public-duty doctrine. *Id.* The Court rejected the argument, concluded that the defendants' affirmative acts created a dangerous road condition that a jury could find was a proximate cause of the plaintiffs' damages, and held that the public-duty doctrine did not immunize the defendants. *Id.* The facts in *Baker* are nearly identical to those in this case: (1) government entities, (2) created dangerous road conditions, (3) that caused third-party drivers, (4) to crash their vehicles, (5) causing damages to the plaintiffs. *Baker* is so factually similar to this case that its holding mandates affirmance of the district court. *See also Jones*, 170 N.W. at 446-49 (holding public-duty doctrine did not protect government where the plaintiff alleged that an automobile accident would "not have happened if the street had not been in . . . defective condition," including "not [being] properly lighted").

Additionally, the Government Defendants' actions were done in their capacity as construction-project owners, which historically has precluded application of the doctrine. *Calwell*, 2 N.W. 614 (distinguishing between "public" and "corporate" actions of government); *Jones*, 170 N.W. 445 (same); *see Star Equip., Ltd. v. State*, 843 N.W.2d 446, 462 (Iowa 2014) (holding that state did not act as a surety in violation of Article VII, Section 1 of the Iowa Constitution because, among other reasons, it "owns the public improvements completed under chapter 573").

2. The Doctrine Is Inapplicable Under the "Special, Identifiable Group" Exception.

The public-duty doctrine does not protect the government when its duties are to a "special, identifiable group" rather than the public at large. *Wilson*, 282 N.W.2d at 672; *Breese*, 945 N.W.2d at 20-21. Officer Farrell was a member of a "special, identifiable group" because, at the time of her death, Officer Farrell was a police officer for the Des Moines Police Department, she was executing a *State of Iowa arrest warrant* for a prisoner charged with a *State crime*, she was traveling on a *State-owned road*, and she was in a collision with another vehicle who gained access to the road via the Interchange owned, constructed, and opened by the Government Defendants. Furthermore, her government employer's policies *specifically required her* to take the fastest, most direct route to and from Pottawattamie County to effect the arrest warrant, and the fastest route to and from Pottawattamie County was via Interstate 80, directly past the Interchange. In other words, Officer Farrell's government employer *specifically required her to drive in the direct vicinity of the Interchange* at the time of her death. (First Amended Petition); *see also* (Exs. 10-18 to Pls.' Res. to Mot. Judg. Pl.) (App. 191-229).

In *Summy*, the Court recognized that golfers who pay to use a state-owned golf course constitute a "special, identifiable group" that is exempted from the public-duty doctrine. 708 N.W.2d at 344. Officer Farrell represents a far more obvious and compelling "special, identifiable group" than the one recognized in

Summy. Officer Farrell's government employer *required* her to drive past the Interchange; the golfers in *Summy* had no obligation to golf at all let alone golf at that specific course. *Id.* Additionally, the purpose of Officer Farrell's presence in the Interchange's vicinity was to enforce public criminal laws that protect all Iowans – specifically, Iowa's criminal laws prohibiting domestic abuse assault. It would be a strange policy for courts to protect injured golfers who voluntarily golf at a public golf course, but not protect police officers killed on government-owned property in the line of duty, by government negligence, after being ordered to the property by their government employers.

3. The Doctrine is Inapplicable Under the Exception for Public Reliance on Government Carrying Out Actions in a Proper Manner.

The public-duty doctrine does not protect the government when it induces the public to rely on the government to carry out its actions in a non-negligent manner. *Johnson*, 913 N.W.2d at 266 (citing 2 Dan B. Dobbs, Paul T. Hayden & Ellen M. Bublick, *The Law of Torts* § 346).

> An example of conduct that induces reliance is the case of a city that provides crossing guards for children walking to school. If such conduct induces parents to rely on such guards, the city owes a duty of reasonable care to continue the guards and is consequently subject to liability for the death of a child in an unprotected crossing when it unilaterally withdraws guards without notice.

Dobbs, Hayden & Bublick, *The Law of Torts* § 346.

Facts at trial will show that the Government Defendants advertised the Interchange as a particularly safe interchange design. The Government Defendants informed the public that the Interchange's diverging-diamond design would reduce traffic conflict points and make driving the diverging diamond even safer than other interchange designs. The Government Defendants then held numerous public ceremonies to advertise the Interchange's opening, including speeches by various politicians and a heavily-advertised ribbon cutting ceremony touting the Interchange's design and safety benefits. These actions induced the public to rely on the Government Defendants to have required safety features in place when it opened (and kept open) the Interchange; such reliance would also include the Government Defendants completing contractually-required safety features that are critical to the safety of the diverging-diamond design.[8]

4. The Government Defendants' Proposed New "Instrumentality of Harm" Test Should not be Adopted.

The Government Defendants' Brief is primarily a plea for this Court to adopt a new "instrumentality of harm" test, Govt. Defs.' Br. at 3, 31-32, 40, 45, 58-71, 75, which is effectively a concession that this Court's current jurisprudence precludes application of the public-duty doctrine here. Under the

[8] If the Court is not permitted to consider these (or other) facts asserted by Farrell because they are outside the pleadings, it reinforces that "[j]udgments on the pleadings generally are not favored." *Werner's*, 477 N.W.2d at 869.

proposed "instrumentality of harm" test, courts would no longer focus on the government's own conduct, but would focus instead on the "instrumentality of harm" (*i.e.*, the proximate cause of damages), and if the government were not the "instrumentality of harm," then the public-duty doctrine would immunize the government. The Court should reject this proposed new test because it is inconsistent with public-duty-doctrine case law and underlying policies, it is unworkable, and would invade the province of the jury's traditional role as the decision-maker on causation issues.

Section I of this Brief discusses the public-duty doctrine in detail, and Farrell refers the Court to it. For approximately 140 years, this Court's case law on the doctrine has not even intimated that an "instrumentality of harm" test or anything similar should be a relevant factor, let alone adopted as the ultimate test, when deciding if the doctrine should apply. Furthermore, such a test would be directly contrary to the decision in *Baker*, 120 N.W.2d 502, and inconsistent with the doctrine's underlying policies.

The public-duty doctrine is based, in theory, on the idea that "the limited resources of governmental entities – combined with the many demands on those entities" – justifies limiting governmental liability for "nonfeasance," but not "misfeasance." *Johnson*, 913 N.W.2d at 266; *Breese*, 945 N.W.2d at 20. The "instrumentality of harm" test has no connection to these policies because its focus – the *cause of harm* – does not concern itself with these polices in the

slightest. The proposed test is also inconsistent with this Court's misfeasance/nonfeasance test because it would create government liability for nonfeasance (*e.g.*, where a pothole in a state-owned road causes damage) but immunity for misfeasance (*e.g.*, where a police officer hands a loaded gun to a child who shoots someone). This last example also shows that the proposed test is unworkable, which is further confirmed by applying it to the facts in *Breese*.

In *Breese*, the plaintiff was injured when she "fell approximately ten feet from the sewer box to the ground" on a public pathway that did not have "guardrails, . . . warning signs that the pathway reached dangerous heights without a safe turn-around point, . . . warning signs that the sewer box was not part of the trail system," and other protective measures. 945 N.W.2d at 15. Under the Government Defendants' proposed "instrumentality of harm" test, what was the "instrumentality of harm" in *Breese*? They contend that in the case at bar, Beary was the "instrumentality of harm" simply because his vehicle made physical contact with Officer Farrell's vehicle. Gov. Def. Brief at p. 45 ("There is no question that Mr. Beary was the instrumentality of harm in that his vehicle collided head-on with the vehicle in which Officer Farrell was a passenger."). Applying the proposed new test, the "instrumentality of harm" in *Breese* would be the ground on which the plaintiff landed after falling off the public pathway. Therefore, the "instrumentality of harm" in *Breese* would be the ground, which means under the Government Defendants' proposed test the City should have

been immune from liability. A decision hinging on this factual distinction would be nonsensical.

A hypothetical further establishes the unworkability of the proposed test: (1) the government builds a concrete barrier in the middle of a road, without adequate lighting, signs, or paint markings to warn approaching drivers; (2) an adult allows a 12 year-old to drive the family car; (3) the car collides with the government's concrete barrier at ten miles per hour over the speed limit; (4) the car is missing one headlight because of a mechanic's negligent failure to install it; (5) the car's airbags do not deploy because they are defective; (6) the car's defective seatbelts tear on impact; and (7) experts testify that if either the seatbelts or airbags functioned properly, the child would have sustained no injuries. What is the "instrumentality of harm?" Are there more than one? Could a court reasonably decide this question on a motion for judgment on the pleadings? This is just one example of how an "instrumentality of harm" test would be unworkable.

Furthermore, an "instrumentality of harm" test would, at its most basic, be nothing more than a request for courts to wrest causation decisions from juries. Such a court commandeering of causation disputes would violate the longstanding rule that juries decide causation issues. *Thompson*, 774 N.W.2d at 835 (discussing the need to "protect the traditional function of the jury as factfinder."); *id.* at 832 ("It is well-settled that questions of negligence or

proximate cause are ordinarily for the jury") (internal quotation marks omitted); *Crow v. Simpson*, 871 N.W.2d 98, 105 (Iowa 2015) ("[T]he issues of negligence and causation are questions for the jury…."); *Garr v. City of Ottumwa*, 846 N.W.2d 865, 870 (Iowa 2014) ("Causation is ordinarily a jury question."). This Court has already rejected a similar court-causation-confiscation request in the public-duty-doctrine context. *Baker*, 120 N.W.2d at 505 (stating that "there may be more than one proximate cause of any action and damage," and "where the evidence shows that an injury results from the negligence of two agencies, the question of proximate cause is peculiarly one for the jury") (citation and quotation marks omitted). The Government Defendants' request that courts usurp the jury's province of deciding causation disputes would create a sea-change in Iowa's constitutional jurisprudence and legal practice that would have substantial harmful effects. *See Miller v. Mathis*, 8 N.W.2d 744, 747 (Iowa 1943) ("[T]he rights of both parties are better protected in a jury trial."); *Susie v. Family Health Care of Siouxland, P.L.C.*, 942 N.W.2d 333, 345 (Iowa 2020) ("The right to a jury trial is a bedrock of a remarkable and venerated democratic system that vests key governmental powers in everyday citizens….") (Appel, J., dissenting).

CONCLUSION

Farrell requests this Court discard the public-duty doctrine, affirm the district court's Ruling in all other respects, and remand for further proceedings.

REQUEST FOR ORAL ARGUMENT

Farrell requests oral argument.

Respectfully submitted,

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CERTIFICATE OF COST

The undersigned hereby certifies that the cost of printing the foregoing Plaintiffs-Appellee's Final Brief is $ 0.00 .

s/ Lisa R. Jones

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing Plaintiffs-Appellees' Final Brief was served upon the attorneys of record listed below by electronic filing and electronic delivery to the parties via the EDMS system on March 31, 2021, pursuant to Iowa R. App. P. 6.902(2) and Iowa R. Elec. P. 16.101(1).

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The undersigned hereby certifies that the foregoing Plaintiffs-Appellees' Final Brief was filed with the Iowa Supreme Court by electronically filing the same on March 31, 2021, pursuant to Iowa R. App. P. 6.902(2) (2013) and Iowa Ct. R. 16.1221(1).

/s/ Lisa R. Jones

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that:

This forgoing Plaintiffs-Appellees' Final Brief complies with the typeface requirements and type-volume limitation of Iowa Rules of Appellate Procedure 6.903(1)(*d*) and 6.903(1)(*g*)(1) or (2) because this brief has been prepared in a proportionally spaced typeface using Garamond 14-point font and contains 13,711 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(*g*)(1).

/s/ Lisa R. Jones March 31, 2021

Date