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.

Date of filing of the Court of Appeals Decision: November 23, 2021.

RESISTANCE TO FURTHER REVIEW BY: CITY OF WEST DES MOINES, CITY OF WAUKEE, AND STATE OF IOWA

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RESISTANCE TO APPLICATION FOR FURTHER REVIEW

Considering the recent Iowa Supreme Court case of *Fulps v. City of Urbandale,* everything that needs to be said about the public-duty doctrine (in terms of the case at bar) has already been said. The Plaintiffs do not agree, however, and seek further review[1]. For the reasons set forth in this resistance, the Court should deny Plaintiffs' Application for Further Review.

"Further review . . . is not a matter of right, but of judicial discretion." Iowa R. App. P. 6.1103(1)(b). The only benefit of further review in this case would be the opportunity for the Iowa Supreme Court to restate existing public-duty doctrine precedent and affirm the Court of Appeals decision. It is submitted that the Court should not utilize its discretion to provide another opinion restating its well-reasoned public-duty doctrine precedent. The Court of Appeals made the correct decision by applying this Court's public-duty doctrine precedent, in particular applying the recent *Fulps* decision, to the pertinent allegations of Plaintiffs' First Amended Petition. *See Est. of*

[1] "Everything that needs to be said has already been said. But since no one was listening, everything must be said again." Andre Gide

Farrell by Farrell v. State, No. 20-1037, 2021 WL 5458077, at *3 (Iowa Ct. App. Nov. 23, 2021).

"An application for further review will not be granted in normal circumstances." Iowa R. App. P. 6.1103(1)(b). The grounds set forth in Rule 6.1103(1)(b) do not substantiate the need for further review now that this Court has issued the *Fulps* decision.

I. The Rule 6.1103(1)(b) grounds do not, now, substantiate the need for further review.

The Governmental Parties have previously sought and obtained interlocutory appeal citing reasons, now claimed by Plaintiffs, to substantiate further review. (Application for Interlocutory Review; Plaintiffs' Application for Further Review, pp. 8-11). There is a meaningful difference in the posture of the pending case, now, as compared to when the Governmental Parties sought interlocutory appeal. Since the Governmental Parties initially sought interlocutory appeal, this Court decided *Fulps v. City of Urbandale,* 956 N.W.2d 469 (Iowa 2021).

As part of the interlocutory appeal, the Parties sought and obtained authority to provide supplemental briefing to address the impact of the *Fulps* decision on this case. (Motion for Leave to File Supplemental Authority, 4.5.21 Order granting same). Indeed, the

Court of Appeals relied on *Fulps* in reaching its decision and holding that the public-duty doctrine applies to defeat Plaintiffs' claims against the Governmental Parties. *Est. of Farrell by Farrell v. State*, No. 20-1037, 2021 WL 5458077, at *3 (Iowa Ct. App. Nov. 23, 2021) (slip opinion).

Now that this Court has decided *Fulps,* there is no reason to grant discretionary further review. In *Fulps*, this Court clarified and enunciated the principles of the public-duty doctrine in relation to nonfeasance and misfeasance as well as the role of the instrumentality of harm. *See id., and, Fulps v. City of Urbandale*, 956 N.W.2d at 473-474.

> [T]he public-duty doctrine generally comes into play only when there is a confluence of two factors. First, the injury to the plaintiff was directly caused or inflicted by a third party or other independent force. Second, the plaintiff alleges a governmental entity or actor breached a uniquely governmental duty, usually, but not always, imposed by statute, rule, or ordinance to protect the plaintiff from the third party or other independent force. Even then, the existence of a special relationship will negate the public-duty doctrine."

Id.

This Court has already clarified and enunciated the principles of the Public-Duty Doctrine in *Fulps,* and the Court of Appeals followed

that case and its predecessor cases when properly rationalizing its opinion in the case at bar. *See* Iowa R. App. P. 6.1103(1)(b)(1).

A. The Court of Appeals Decision is consistent with precedent set by this Court in *Fulps v. City of Urbandale* and its predecessor public-duty doctrine cases; Rule 6.1103(1)(b)(1) is not triggered.

Contrary to Plaintiffs' suggestion, the Court of Appeals did not enter a decision in conflict with existing precedent by adopting what Plaintiffs characterize as a new instrumentality of harm test. (Application for Further Review, pp. 8-9). The Court of Appeals properly followed this Court's precedent, most recently espoused in *Fulps* – that the public-duty doctrine generally applies when there is a confluence of injury to a plaintiff directly caused by a third-party and the plaintiff alleged a breach of unique governmental duty to protect the plaintiff from the third party. *Est. of Farrell by Farrell*, 2021 WL 5458077, at *3; *and, see, Fulps*, 956 N.W.2d at 473-474.

In *Fulps,* discussion at oral argument included the scope of the public-duty doctrine in terms of misfeasance or nonfeasance. For example, Justice McDonald raised the question of whether the nonfeasance/misfeasance dichotomy was helpful or whether the public-duty doctrine should focus on the government's duty to control

third-parties regardless of the characterization of the governmental conduct as misfeasance or nonfeasance. (Comments by Justice McDonald in *Fulps* oral argument, https://www.youtube.com/watch?v=arpd7EZBSUE, at timestamp 16:45-17:42). Justice Oxley also raised this issue: whether the nonfeasance/misfeasance dichotomy makes sense to the purpose of the public-duty doctrine. (Comments by Justice Oxley, https://www.youtube.com/watch?v=arpd7EZBSUE at timestamp 31:04-31:19). Following up on Justice McDonald's point, Justice Mansfield commented that the public-duty doctrine comes into play when there is third-party that causes the harm to a plaintiff that the government failed to do something about, whether the dredge operator in *Estate of McFarlin v. State*, 881 N.W.2d 51, 63 (Iowa 2016), or the property owner in *Johnson v. Humboldt Cty.*, 913 N.W.2d 256, 258-262 (Iowa 2018), or the inmates escaping Oakdale in *Raas v. State*, 729 N.W.2d 444, 446 (Iowa 2007), or the driver that doesn't see well in *Kolbe v. State,* 625 N.W.2d 721, 724-725 (Iowa 2001). According to the comments by Justice Mansfield at oral argument in *Fulps*, the public-duty doctrine never applies when the harm is caused by the government's own instrumentality, such as it was in *Breese v. City of*

Burlington, 945 N.W.3d 12, 21 (Iowa 2020), where the bicyclist fell off a municipal sewer box. (Comments by Justice Mansfield in *Fulps* oral argument, https://www.youtube.com/watch?v=arpd7EZBSUE at timestamp 21:02-22:02).

The instrumentality of harm was not a new concept to the public-duty doctrine that was applied for the first time by the Court of Appeals in the case at bar. *Breese* makes clear that the public duty doctrine applies when harm is caused by a third-party as compared to when harm is caused by the government's instrumentality. *See Breese v. City of Burlington*, 945 N.W.2d 12, 21 (Iowa 2020).

> What is clear is that we have generally applied the public-duty doctrine when the allegation is a government failure to adequately enforce criminal or regulatory laws for the benefit of the general public, as in *Raas*, *Kolbe*, and *Sankey*, or a government failure to protect the general public from somebody else's instrumentality, as in *Johnson* and *Estate of McFarlin*. *Compare Raas*, 729 N.W.2d at 446 *and Kolbe*, 625 N.W.2d at 724–25, *and Sankey*, 456 N.W.2d at 208–09, *with Johnson*, 913 N.W.2d at 261, *and Estate of McFarlin*, 881 N.W.2d at 63.

Id.

While the colloquy at oral argument in the *Fulps* case does not stand as precedent upon which the Court of Appeals could base its decision, it helps to establish that the instrumentality of harm is and has been a factor in the public-duty doctrine and consciously

considered by the Justices in rendering the *Fulps* decision. *See id.* The instrumentality of harm is simply not a creation of the Court of Appeals, as claimed by Plaintiffs, and its application is not in conflict with prior precedent. (Further Review Application, pp. 19-24). It was grounded in *Fulps* and earlier cases. *Fulps,* 956 N.W.2d at 473-474, *Breese*, 945 N.W.2d at 21. The Court of Appeals merely followed Iowa Supreme Court precedent. *See id., and, Est. of Farrell by Farrell*, 2021 WL 5458077, at *3. It applied that precedent correctly, too. *See id.* This case is the classic case where the public-duty doctrine applies. *See id.*

Plaintiffs' First Amended Petition alleges that Benjamin Beary made an incorrect turn on the Grand Prairie Parkway Interchange and traveled in a Westerly direction in the Eastbound lanes of Interstate 80 and head-on into a vehicle in which Des Moines Police Officer, Susan Farrell, was a passenger. (First Amended Petition, paras. 46-48). As the Court of Appeals found, when applying the prior appellate decisions, the instrumentality starts and ends with Mr. Beary. *Est. of Farrell by Farrell*, 2021 WL 5458077, at *3.

Plaintiffs have tried to bridge the asserted cause of Officer Farrell's injuries to allegedly deficient signage, lighting, and roadway

markings on the Grand Prairie Parkway Interchange by creatively phrasing the failure to have these safety measures as misfeasance – that the Governmental Parties chose to open and failed to close the Interchange with those safety defects in place. (First Amended Petition, paras. 36, 51, 52, 70, 71, 79). Plaintiffs alleged that the Grand Prairie Parkway Interchange failed to have basic safety features (road markings, lighting, and signage) completed before opening the Interchange and failed to comply with then existing state-of-the art engineering safety standards, criteria, and design[2]. (First Amended Petition, paras. 35, 36, 40, 42, 43). 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).

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[2] It should be noted that the Governmental Parties dispute Plaintiffs' allegations for all purposes other than for argument in this Resistance.

It is submitted that 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.*

In their Further Review Application, Plaintiffs essentially raise the same argument about misfeasance, but criticize the Court of Appeals for ignoring their efforts. (Further Review Application, pp. 12-13). The Court of Appeals, however, properly rejected Plaintiffs' effort to bridge the cause of Officer Farrell's injuries to the alleged defects in the Grand Prairie Parkway Interchange as improperly requiring a foreseeability determination. *Est. of Farrell by Farrell*, 2021 WL 5458077, at *4. In this regard, the Court of Appeals reasoned:

> Because the public-duty doctrine hinges on a no-duty determination, the legal question of its application should be based on "articulated policies or principles that justify exempting an actor from liability" and should not "depend on foreseeability of harm based on the specific facts of a case." *See* Restatement (Third) of Torts: Liab. for Physical & Emotional Harm § 7 cmts. i, j (Am. Law Inst. 2010); *cf. Thompson v. Kaczinski*, 774 N.W.2d 829, 835 (Iowa 2009) ("A goal of the Restatement (Third) was to clear away prior confusion between the duty determination and the negligence determination."). Here, [Plaintiffs'] complaints depend upon a foreseeability determination that the design

> of the Interchange lead to the collision with the drunk driver. That exercise cannot be utilized in a no-duty determination, thus the instrumentality of harm analysis is properly employed.

Id.

The Court of Appeals was right to reject Plaintiffs' efforts to interject a foreseeability determination into the analysis of the public-duty doctrine. The public-duty doctrine is an exception to the general rule that "[a]n 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 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). "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.

Plaintiffs suggest that the Court of Appeals improperly considered background facts not alleged in Plaintiffs' First Amended Petition to arrive at its decision to apply the public-duty doctrine. (Application for Further Review, pp. 12-19). The argument seems disingenuous.

Plaintiffs attempted to bolster the factual record beyond the well-pleaded facts contained in their First Amended Petition by providing the Court of Appeals with numerous exhibits contained in the Appendix. (Plaintiffs' Designation of Additional Parts of the Appendix; Appendix pp. 7-312 (20 separate exhibits). The Governmental Parties noted that effort in their Final Brief and distinguished between the additional background facts from Plaintiffs' exhibits in the Appendix

from those well-pleaded facts in the First Amended Petition. (Governmental Parties Final Brief, pp. 26-31).

The Court of Appeals noted the background facts, but wisely made its decision on the crux allegation that Benjamin Beary made an incorrect turn on the Grand Prairie Parkway Interchange and traveled in a Westerly direction in the Eastbound lanes of Interstate 80 and head-on into a vehicle in which Des Moines Police Officer, Susan Farrell, was a passenger, causing her death. (First Amended Petition, paras. 46-49). That allegation contained within Plaintiffs' First Amended Petition, alone, substantiates the Court of Appeals decision to apply the public-duty doctrine.

Whether Mr. Beary was traveling too fast or was intoxicated is inconsequential. The injury to Officer Farrell was directly caused by a third-party (Mr. Beary) and Plaintiffs alleged a breach of unique governmental duty to protect the one member of the general traveling public (Officer Farrell) from another member of the traveling public (Mr. Beary) by failing to have basic safety features (road markings, lighting, and signage) completed before opening the Grand Prairie Parkway Interchange and failing to comply with the state-of-the-art engineering safety standards, criteria, and design. (First Amended

Petition, paras. 35, 36, 42, 43, 46-48). *See Fulps*, 956 N.W.2d at 473-474. Even if the Court of Appeals considered the additional background facts pertaining to Mr. Beary's state of intoxication and vehicle speed, it amounts to nothing but harmless error because the First Amended Petition asserts that Mr. Beary collided with the vehicle in which Officer Farrell was riding and she expired at the scene. *See, e.g., Hamilton v. O'Donnell*, 367 N.W.2d 293, 295 (Iowa Ct. App. 1985) (harmless error regarding hearsay statement when other facts considered).

The well-pleaded allegations in Plaintiffs' First Amended Petition allege a failure of the Governmental Parties to protect Officer Farrell, a member of the general traveling public, from somebody else's instrumentality of harm (Mr. Beary). *See id., Breese v. City of Burlington*, 945 N.W.2d 12, 18 (Iowa 2020) (citing *Johnson v. Humboldt Cty.*, 913 N.W.2d 256, at 261 (Iowa 2018), *Estate of McFarlin*, 881 N.W.2d at 63, *Raas v.* 799 N.W.2d 444, 446 (Iowa 2007), *Kolbe v. State*, 625 N.W.2d 721, 724-25 (Iowa 2001), *Sankey v. Richenberger*, 456 N.W. 206, 208-209 (Iowa 1990). This is the classic case where the public-duty doctrine applies. *See id. and Fulps*, 956 N.W.2d at 475. "The public-duty doctrine is properly understood as a

limit on suing a governmental entity for not protecting the public from harm caused by the activities of a third party." *Fulps*, 956 N.W.2d at 475.

In their Application for Further Review, Plaintiffs improperly reframe the foreseeability issue as one of causation that should be left to the jury. (Further Review Application, e.g., pp. 11, 14-15, 21-22). However, causation of Officer Farrell's injury has been definitively pled by Plaintiffs in their First Amended Petition – Benjamin Beary collided with the vehicle in which Officer Farrell was riding. (First Amended Petition, paras. 46-48). The Court of Appeals properly rejected Plaintiffs' invitation to engage in a foreseeability analysis and consider the alleged defects in the Grand Prairie Parkway Interchange. *See id., and, Est. of Farrell by Farrell*, 2021 WL 5458077, at *4. (Plaintiffs' Final Brief, e.g., pp. 59-61). Such considerations are improper when making a no-duty determination, such as with the public-duty doctrine. *See id.*

In their Further Review Application, Plaintiffs also claim error by the Court of Appeals in holding that the Governmental Parties had a unique governmental duty. (Further Review Application, pp. 24-25). *See Fulps*, 956 N.W.3d at 473-74 (second factor of the public-duty

doctrine – that "the plaintiff alleges a governmental entity or actor breached a uniquely governmental duty, usually, but not always, imposed by statute, rule, or ordinance to protect the plaintiff from the third party or other independent force."). In this regard, the Court of Appeals succinctly and properly held:

> Then, as to the second question, is the construction of safe roadways a "uniquely governmental duty ... to protect [Officer Farrell] from the third party or other independent force," we again look to our case law precedent. In instances involving the public roadways, the state's safety-related duties are owed to the general public. *See Johnson*, 913 N.W.2d at 261 (confirming that public-duty doctrine applies even when highway safety is involved as the duty to remove obstructions from a right-of-way corridor adjacent to the highway is a duty owed to all users of the public road); *see also Estate of McFarlin v. State*, 881 N.W.2d 51, 58–63 (Iowa 2016) (holding the State's safety-related duties at the public lake open to everyone were owed to the general public and thus, "there is no liability to an individual member of that group").

Est. of Farrell by Farrell, 2021 WL 5458077, at *3. Faced with the existing precedent establishing governmental duties owed to the traveling public in general, for which the public-duty doctrine applies, Plaintiffs argue that the Governmental Parties are ineligible for the public-duty no-duty determination because they constructed the Grand Prairie Parkway Interchange in their corporate/private capacity

instead of their public/governmental capacity. (Further Review Application, pp. 24-25).

Plaintiffs' First Amended Petition does not seem to allege that the Governmental Parties acted in anything other than their public/governmental role. (First Amended Petition, paras. 7-9 (identifying the Iowa as a state in the United States and City of Waukee and City of West Des Moines as Iowa municipalities)). The First Amended Petition does not allege that the Governmental Parties acted in their corporate/private capacity. (First Amended Petition). In contrast, the First Amended Petition asserts that the other contractor defendants were named as Iowa or foreign corporations (presumably in their corporate capacity). (First Amended Petition, paras. 10-15). The First Amended Petition alleges that the Governmental Parties secured millions of dollars in funding for the Interchange from the federal government. (First Amended Petition, para. 23). It also alleged that the Interchange was opened to the public. (First Amended Petition, para. 43). In other words, the Interchange was a public improvement undertaken by a governmental entity. As held by the Court of Appeals, the public-duty doctrine has been held to apply to highway safety and safety-related duties owed to the general-public.

See Johnson, 913 N.W.2d at 261, *and, Estate of McFarlin*, 881 N.W.2d at 58-63; *Est. of Farrell by Farrell*, 2021 WL 5458077, at *3. The Governmental Parties' safety-related duties in relation to public roadways, which are owed to the general public. *See id., and, Johnson*, 913 N.W.2d at 261 (analogizing boaters on a public-lake to motorists driving on public roadways – the governmental duties for which being owed to the general public). Further review would provide no change to the law in this regard and should not be considered on this basis.

The Court of Appeals decision is not in direct conflict with or overrules the decisions of this Court. *See* Iowa R. Civ. P. 6.1103(1)(b)(1). The Court of Appeals decision is consistent with *Fulps* and its predecessor cases. *See id.* At its core, this is a straightforward case in which the well-pleaded facts in Plaintiffs' First Amended Petition contain dispositive allegations that require the application of the public-duty doctrine. (First Amended Petition, paras. 46-48). On March 26, 2016, Mr. Beary made an incorrect turn on the Grand Prairie Parkway Interchange and traveled in a Westerly direction in the Eastbound lanes of Interstate 80 and head-on into a vehicle in which Des Moines Police Officer, Susan Farrell, was a passenger. (First Amended Petition, paras. 46-48).

To the extent Plaintiffs rely on *Summy v. City of Des Moines* for the proposition that the public-duty doctrine applies even when a plaintiff's injury is from a third-party, it is overstatement. (Application for Further Review, p. 9). *Summy* resulted in the public-duty doctrine being rejected because there was a special-relationship (the plaintiff being a business invitee to a public golf course), which is an exception to the public-duty doctrine. *Summy v. City of Des Moines,* 708 N.W.2d 333, 344 (Iowa 2006), *overruled on other grounds by, Alcala v. Marriott Int'l, Inc.*, 880 N.W.2d 699 (Iowa 2016) (citing *Kolbe*, 625 N.W.2d at 729 (the public-duty doctrine is inapplicable "if there is a particular relationship between the governmental entity and the injured plaintiff that gives rise to a special duty.").

To the extent Plaintiffs posture their argument on *Johnson v. Baker* for the proposition that a governmental entity can be liable when a third-party caused or inflicted injuries on a plaintiff, the argument lacks merit. (Application for Further Review, p. 9). 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 v. Baker*, 120 N.W.2d 503, 506-508 (Iowa 1963). 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 being 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).

The analysis about immunity has no impact on the public-duty doctrine. The public-duty doctrine is a no-duty determination – a determination available to all persons and entities. *Johnson,* 913 N.W.2d at 264 (citing *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"). 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.

This 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) (other citations omitted).

Further review is inappropriate on the basis that the Court of Appeals decision is in conflict with the precedent set by this Court. *See* Iowa R. Civ. P. 6.1103(1)(b)(1). The Court of Appeals' decision is in accordance with Iowa's public-duty doctrine precedent.

B. The Court of Appeals decided a case involving legal principles already decided by this Court; Rule 6.1103(1)(b)(3) is not triggered.

Contrary to Plaintiffs' assertions, there is no "important question of changing legal principles" for the Supreme Court to address by exercising judicial discretion to accept further review. Iowa R. App. P. 6.1103(1)(b)(3). The Court of Appeals properly applied the public-duty doctrine relying, in part, on *Fulps v. City of Urbandale*. Plaintiffs characterize the decision by the Court of Appeals as adopting a new "instrumentality of harm" test. (Application for Further Review, p. 10).

However, this Court already announced that the public-duty doctrine generally applies when there is a confluence of two things – that a third-party directly caused injury to a plaintiff and that the plaintiff alleged a breach of unique governmental duty to protect the plaintiff from the third party. *See Fulps*, 956 N.W.2d at 473-474. By following this Court's precedent, the Court of Appeals did not decide an important question of changing legal principles to warrant further review. *Cf.* Iowa R. Civ. P. 6. 1103(1)(b)(3). The *Fulps* decision clarified that nonfeasance is nonfeasance in the performance of a public duty and announced when the public-duty doctrine generally applies. *See id.* at 473-474, 475-476. The Court of Appeals properly applied the public-duty doctrine following this Court's precedent, which hardly amounts to Plaintiffs' claimed "precedent-wrecking detour" resulting in "an important question of changing legal principles" to be addressed by the Iowa Supreme Court. (Application for Further Review, p. 10). Rather, the legal principles surrounding the public-duty doctrine are established.

C. The Court of Appeals decided a substantial and important question of law that has been and is settled by this Court; Rule 6.1103(1)(b)(2) is not triggered.

The Court of Appeals rejected Plaintiffs' argument requesting that the public-duty doctrine be abandoned relying upon the precedent that confirms the doctrine remains valid. Plaintiffs suggest in their Application for Further Review that their argument in this regard "presents the first opportunity for this Court to directly address and finally decide this important question." (Plaintiffs' Application for Further Review, pp. 10-11). The Governmental Parties submit that the putative novel question put forth by Plaintiffs has already been definitively resolved by this Court. Accordingly, there is no "important question of law that has not been, but should be, settled by the supreme court" as asserted by Plaintiffs. *See* Iowa R. App. P. 6.1103(1)(b)(2).

This Court has previously considered the question of the validity of the public-duty doctrine and refused to abandon it, noting the doctrine remains "alive and well." *See Raas*, 729 N.W.2d at 449 (holding the doctrine "alive and well"), *accord, Breese,* 945 N.W.2d at 19 (analyzing the public-duty doctrine and finding it inapplicable in that case), *and, Fulps,* 956 N.W.2d at 475-476 (further tailoring the

public-duty doctrine so that nonfeasance is understood to be "nonfeasance in the performance of a public duty.").

Further review is inappropriate in these circumstances to restate what has already been determined – the public-duty doctrine is alive and well. *See id.* There is no unanswered important question of law. *See* Iowa R. App. P. 6.1103(1)(b)(2).

D. The public-duty doctrine is an issue of broad public importance, but this Court has already decided the issues in *Fulps* and its predecessor public-duty doctrine cases; Rule 6.1103(1)(b)(4) is not triggered.

This Court has already decided the issues of broad public importance relating to the public-duty doctrine rendering further review unnecessary. *See* Iowa R. App. P. 6.1103(1)(b)(4). While Plaintiffs point to differences in the public-duty doctrine over the years, this Court has reconciled those cases when deciding *Fulps*. (Further Review Application, pp. 11, 26-27). "The public-duty doctrine is properly understood as a limit on suing a governmental entity for not protecting the public from harm caused by the activities of a third party." *Fulps*, 956 N.W.2d at 475. "What is clear is that we have generally applied the public-duty doctrine when the allegation is a government failure to adequately enforce criminal or regulatory laws

for the benefit of the general public, . . . or a government failure to protect the general public from somebody else's instrumentality . . . ." *Id.* Whatever the putative irreconcilable lines of public-duty doctrine cases may have been, the law is now clear as decided by this Court. *See id.* (Further Review Application, p. 26). So too is Plaintiffs' argument that the Tort Claims Acts abrogated immunity. As argued above, the public-duty doctrine is a no-duty determination, not an immunity, and therefore coexistive with the Tort Claims Acts. *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.* Furthermore, 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)).

Since *Fulps* has been decided, the case at bar does not present an issue of broad public importance that has been left unanswered by this Court. *Cf.* Iowa R. Civ. P. 1103(1)(b)(4). This Court has already issued the decisions necessary to address the concerns raised by Plaintiffs in

their Application for Further Review. *See, e.g. Breese,* 945 N.W.2d 12 (Iowa 2020), *and, Fulps,* 956 N.W.2d 469 (Iowa 2021).

CONCLUSION

This Court should deny Plaintiffs' Application for Further Review. This case does not present any threshold issue that would ordinarily be proper for further review and, regardless, the Court of Appeals did not err. Indeed, the Court of Appeals properly applied the crux allegation in Plaintiffs' First Amended Petition to hold in accordance with *Fulps* and its predecessor cases that the public-duty doctrine applies and eliminates any duty upon the Governmental Parties to protect Officer Farrell from Mr. Beary. Further review would be superfluous and unwarranted under any of the grounds set forth in Iowa Rule of Appellate Procedure 6.1103(1)(b)(1)–(4). Further review, it is respectfully submitted, should be denied.

CERTIFICATE OF COMPLIANCE

This brief complies with the typeface and type-volume limitation of Iowa Rules of Appellate Procedure 6.903(1)(d), 6.903(1)(e)(1), 6.903(1)(g)(1), and 6.1103(4)(a) because this brief has been prepared with Microsoft Word in a proportionally spaced typeface, Georgia, size 14; and contains 5,035 words, which is less than two-fifths (5,600 words) of the length limitations for a brief, excluding the parts of the brief exempted by Iowa R. App. P. 6.1103(4)(a).

/s/ Robert M. Livingston

CERTIFICATE OF FILING AND SERVICE

The undersigned hereby certifies that on December 23, 2021, the above and foregoing Resistance to Further Review 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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