IN THE SUPREME COURT OF IOWA

SUPREME COURT NO. 22-0239

DALLAS COUNTY NO. LACV043294

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JIM NAHAS,
Plaintiff-Appellee

v.

POLK COUNTY, IOWA, THOM HOCKENSMITH, ANGELA CONNOLLY, STEVE VAN OORT, ROBERT BROWNELL, AND JOHN NORRIS
Defendants-Appellants.

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APPEAL FROM THE IOWA DISTRICT COURT IN AND FOR POLK COUNTY
THE HONORABLE BRAD MCCALL

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FINAL BRIEF OF APPELLEE

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Nicholas Mauro
CARNEY & APPLEBY LAW FIRM
303 Locust St., #400
Des Moines, Iowa 50309
(515) 282-6803
mauro@carneyappleby.com

Michael Carroll
COPPOLA, MCCONVILLE, CARROLL, HOCKENBERG & FLYNN, P.C.

2100 Westown Parkway, Suite 210
West Des Moines, Iowa 50265
515-985-7571
michael@wdmlawyers.com

ATTORNEYS OF RECORD FOR APPELLEE

PROOF OF SERVICE & CERTIFICATE OF FILING

On August 12, 2022, I served this final brief on all other parties by EDMS to their respective counsel.

I further certify that I did file this final brief with the Clerk of the Iowa Supreme Court by EDMS on August 12, 2022.

Carney & Appleby Law Firm

Nicholas J. Mauro AT0005007
400 Homestead Building
303 Locust Street
Des Moines, IA 50309
515-282-6803
515-282-4700 (fax)
ATTORNEYS FOR APPELLEE

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ROUTING STATEMENT

Retention of his case before the Iowa Supreme Court is appropriate under Iowa R. App. P. 6.1101(2)(c) and (f).

STATEMENT OF THE CASE

Jim Nahas served as the Polk County human resources director for nearly seven years. (2nd Amended Petition, App. 138). On October 6, 2020, an eavesdropper claimed to have heard Supervisor Matt McCoy use offensive language during a meeting that included Nahas. (2nd Amended Petition, App. 142-143). The eavesdropper was listening through a wall from an adjacent room with the door closed. (2nd Amended Petition, App. 142-143). When asked about the meeting over three weeks later Nahas told investigators he did not recall McCoy using the language the eavesdropper claimed to have heard.

In January 2021, Defendants fired Nahas for purportedly "lying" during an investigation. (2nd Amended Petition, App. 156). Specifically, Defendants accused Nahas of lying about whether he heard one of his bosses allegedly make offensive comments about another boss. (2nd Amended Petition, App. 156). After Defendants fired Nahas, they directed County Administrator John Norris to publish a defamatory termination letter to multiple news outlets accusing Nahas of not being "honest and forthright," "lack[ing] credibility," not "participat[ing] honestly and with complete candor," "rais[ing] questions of your honesty and credibility," and "reflect[ing] a level of incompetency and unprofessionalism that is unacceptable." (2nd Amended Petition, App. 153, 156)

Nahas subsequently filed a petition and two subsequent amended petitions asserting seven causes of action: (1) libel, (2) wrongful discharge in violation of public policy, (3) civil extortion, (4) civil conspiracy, (5) intentional infliction of emotional distress, (6) injunctive relief under Chapter 21, and (7) injunctive relief under Chapter 22. Defendants moved to dismiss the entirety of the lawsuit claiming (1) the procedural and substantive changes to the Iowa Municipal Tort Claims Act (IMTCA) set forth in recently enacted Iowa Code §670.4A apply retroactively to Nahas's claims; (2) Nahas's Petition failed to comply with the pleading requirements set forth in new Iowa Code §670.4A; (3) Nahas's claims were not "clearly established" as purportedly required by §670.4A; and (4) each of Nahas's claims generally failed to state a cause of action upon which relief could be granted.

Nahas filed a timely Resistance to Defendants' Motion, asserting §670.4A does not apply retroactively to his claims, each of which vested prior to the statute's enactment. Nahas further asserted even if §670.4A applies to his claims, his two amended petitions comply with its vague pleading requirements. Nahas also asserted §670.4A is unconstitutional. On January 26, 2022, the District Court correctly entered an order denying Defendants' Motion to

Dismiss in its entirety. Defendants filed an application for interlocutory appeal, which this Court granted.

STATEMENT OF THE FACTS

Jim Nahas served as the Polk County Human Resources Director for nearly seven years, during which he maintained an exceptional performance record. (2nd Amended Petition, App. 138). Polk County Supervisor Matt McCoy is a political rival of the individually named Defendants. (2nd Amended Petition, App. 162). Upon McCoy's election to the Board, he engaged in efforts to clean up Defendants' governance of Polk County, including the manner in which Defendants conducted the County's business and the way they awarded contracts. (2nd Amended Petition, App. 144).

In 2020 an outgoing employee, Employee C, sat for an exit interview with McCoy and Nahas. (2nd Amended Petition, App. 140). During the interview Employee C reported she regularly witnessed other supervisors yelling profanities in anger and frustration, including the words "fuck", "fucking bitch", "mother-fucker", "fucking cunt", "asshole", "shit", "damn", "son of a bitch", and "god-damnit". (2nd Amended Petition, App. 140). On several occasions Employee C witnessed supervisors talking disparagingly, cursing, and gossiping about other supervisors to staff in the open waiting area. (2nd Amended Petition, App. 140). Other targets of this type of verbal attack included department heads, other county elected officials, as well as city and state elected officials. (2nd Amended Petition, App. 141).

Employee C previously reported these concerns regarding the hostile work environment to her direct supervisor, Sarah Boese. (2nd Amended Petition, App. 141).[1] Boese told Employee C to grow thicker skin, and that Boese tolerated the environment because of how much she was paid and the amount of vacation time she received. (2nd Amended Petition, App. 141). Employee C also reported that she previously confided in Boese regarding an issue Employee C had with a prior employer. (2nd Amended Petition, App. 141). Employee C reported that Boese pressured her to disclose information that she otherwise considered private. (2nd Amended Petition, App. 141). Boese immediately told Board members what she had learned from Employee C in confidence in an apparent attempt to warn the Board that Employee C was litigious. (2nd Amended Petition, App. 141). Eventually the environment was too much for Employee C, prompting her to resign. (2nd Amended Petition, App. 141). In the spring of 2020, County Labor Relations Manager Jeff Edgar recommended hiring outside counsel to conduct a formal inquiry into a variety of complaints regarding the work environment within the Board's office, including the behavior of certain Board members and the

[1] Defendants' Appeal Brief appears to take issue with Plaintiff's Petition identifying Boese by name. Prior to Plaintiff filing his Petition, Boese was publicly identified in two media articles published by City View on March 23, 2021 and the Des Moines Register on March 29, 2021. Defendants Hockensmith and Connolly voluntarily provided comments to the Des Moines Register discussing the matter, which included identifying Sarah Boese by name.

County Administrator. (2nd Amended Petition, App. 141). The Board never acted on the recommendation. (2nd Amended Petition, App. 141).

In June 2020, the Polk County Administrator at that time resigned, prompting a search for a replacement from which two candidates emerged: John Norris and Frank Marasco. (2nd Amended Petition, App. 142). Hockensmith supported hiring Norris, while McCoy supported Marasco. Supervisor Connolly provided the swing vote in favor of Norris. (2nd Amended Petition, App. 142). The decision to hire Norris was made on October 5, 2020. (2nd Amended Petition, App. 142).

On October 6, 2020, McCoy asked Nahas to meet with him and Frank Marasco following the Board's regularly scheduled meeting. (2nd Amended Petition, App. 142). McCoy wanted to discuss a change to Frank Marasco's benefits, as well as logistics for on-boarding Norris as the new County Administrator. (2nd Amended Petition, App. 142). During the meeting, Boese (who at that time was acting County Administrator) claimed she "overheard" McCoy make disparaging remarks through a wall from an adjacent room with the door closed. (2nd Amended Petition, App. 142-143).[2] Boese subjectively determined the alleged remarks were about her. (2nd Amended Petition, App. 143). Boese also claimed to have heard McCoy and Nahas discuss looking

[2] As acting County Administrator, Boese was Plaintiff's direct supervisor.

further into Employee C's allegations of a hostile work environment directed towards the Defendants and Boese herself. (2nd Amended Petition, App. 156). Boese reported these alleged remarks to Defendants. Upon receiving Boese's report of what she claims to have overheard, Defendants plotted a course of action they felt would result in maximum political damage to McCoy and ultimately result in his removal from the Board. (2nd Amended Petition, App. 144). The plot was motivated by animus related to McCoy's efforts to clean up Defendants' governance of Polk County, his inquiry into Employee C's hostile work environment claims, and Nahas's role in assisting McCoy with these efforts. (2nd Amended Petition, App. 156).

Defendants directed Assistant Polk County Attorney Ralph Marasco, the head of the Polk County Civil Division, to lead an "investigation" into McCoy and Plaintiff.[3] (2nd Amended Petition, App. 144). Ralph Marasco serves as the Board's counsel and in that regard regularly provides legal advice to McCoy in his capacity as supervisor. (2nd Amended Petition, App. 144). Likewise, Ralph Marasco regularly provided legal counsel to Nahas in his role as Human Resources Director. Defendants waited over three weeks to conduct formal interviews as part of the "investigation." (2nd Amended Petition, App. 144).

[3] Ralph Marasco has no relation to Frank Marasco.

On October 29, 2020, Ralph Marasco entered Nahas's office unannounced with an investigator from his office. (2nd Amended Petition, App. 145). Ralph Marasco announced that he and the investigator needed to interview Nahas regarding a complaint allegedly received from "a County employee", and specifically indicated that Plaintiff was a material witness to the complaint. (2nd Amended Petition, App. 144). Based on Ralph Marasco's role in providing Nahas legal counsel Nahas believed Marasco was representing him during the interview. (2nd Amended Petition, App. 146).

The County's common practice when recording interviews is for investigators to announce to the witness the fact they intended to do so, obtain the witness's permission, and place the recording device on the table. (2nd Amended Petition, App. 146). During the interview, either Ralph Marasco or the investigator hid a recording device and secretly recorded the interview. (2nd Amended Petition, App. 146). Ralph Marasco and the investigator asked Nahas questions regarding the meeting of October 6, 2020, relaying that an unidentified person claimed to have "overheard" the conversation through a wall from an adjacent room. The employee allegedly heard McCoy make vulgar comments. (2nd Amended Petition, App. 146). Based on the way Marasco and the investigator asked questions, Nahas believed the alleged comments the unidentified person reported overhearing referred to

Hockensmith and Connolly. (2nd Amended Petition, App. 146). Regardless, Nahas told the investigators that he did not recall hearing the alleged statements. (2nd Amended Petition, App. 147). In addition, the County Attorney's office had never previously demanded that an employee tell it what one of the supervisors purportedly said about another, leaving Nahas further confused as to the purpose of the "interview." Nahas answered the questions honestly based on his recollection of the meeting which by then was more than three weeks earlier. (2nd Amended Petition, App. 147). The County subsequently either lost or destroyed most of the secret recording. (2nd Amended Petition, App. 147).

On November 5, 2020, Ralph Marasco and the investigator again appeared unannounced at Nahas's office. (2nd Amended Petition, App. 147). Again, one of the two interlocutors concealed a recording device so that Nahas would not know the interview was being recorded. (2nd Amended Petition, App. 148). The purported basis for this second interview was to resolve alleged "inconsistencies" in the timeline of events leading up to and including the October 6 meeting. (2nd Amended Petition, App. 148).

On November 24, 2020, Defendants delivered to Nahas a written notice placing him on administrative leave for engaging in "dishonesty" regarding statements made in a "previous investigation". (2nd Amended Petition, App.

148). The letter did not describe in any detail the evidence supporting the allegation that Nahas had been dishonest about not remembering the comments attributed to McCoy. (2nd Amended Petition, App. 148). The decision was made by the Board of Supervisors, except Supervisor McCoy, who was specifically excluded from the decision. (2nd Amended Petition, App. 149). The suspension letter further directed Nahas not to leave his home during work hours without permission. (2nd Amended Petition, App. 149).

Defendants subsequently requested a third interview of Nahas which took place on December 3, 2020. (2nd Amended Petition, App. 149). Attending the third interview on behalf of the County were the prior interrogators (Ralph Marasco and the investigator from his office) and an attorney not employed by the County but affiliated with an outside law firm ("Outside Counsel"). (2nd Amended Petition, App. 149). There was no reason given for why Outside Counsel attended this third interview or explanation of his role in the process. (2nd Amended Petition, App. 149).

Unlike the previous two interviews, the third meeting began with the investigator placing an audio recorder on the table, announcing the interview was being recorded, and requesting each of the participants to announce themselves. (2nd Amended Petition, App. 149). Nahas's counsel asked if the prior interviews had been recorded, which forced Ralph Marasco to admit that

he and his colleague secretly recorded the prior interviews. (2nd Amended Petition, App. 149).[4] Ralph Marasco then asked a set of questions calling into question the legitimacy of the Nahas's prior performance reviews. (2nd Amended Petition, App. 150). Marasco then asked Nahas a series of questions regarding the exit interview of Employee C. (2nd Amended Petition, App. 150). Defendants were worried about McCoy and Nahas potentially looking further into Employee C's allegations against them. (2nd Amended Petition, App. 150).

The County representatives pressed Nahas in a way that suggested they wanted Nahas to state he now remembered McCoy's alleged statements in the October 6 meeting. (2nd Amended Petition, App. 150-151). The investigator asked Nahas if he was calling the alleged complainant "a liar." (2nd Amended Petition, App. 152). Nahas replied that he was not calling anyone a liar and simply confirmed he did not recall anyone making the alleged vulgar statements during the meeting. (2nd Amended Petition, App. 152). The investigator continued to press Nahas with questions such as, "If someone says the statements were made, are they lying?" and "If someone in the room

[4] When asked why they secretly recorded Nahas, Marasco and Outside Counsel responded something to the effect of "because we could." ABA Formal Opinion 01-422 (2001) states that a lawyer may not "falsely represent that a conversation is not being recorded." Marasco's intentional failure to the follow the County's well-established practice of advising witnesses when they are being recorded likely served as a false representation that the interviews were not being recorded.

says the statements were made, are they lying?" (2nd Amended Petition, App. 152). From the questions, it was obvious that investigator, Ralph Marasco, and Outside Counsel were unwilling to accept the possibility that either the eavesdropper was mistaken, she was potentially herself being untruthful, or that Plaintiff simply did not remember hearing the alleged comments. (2nd Amended Petition, App. 152).

The implication of the questions was clear: Nahas was expected to either call the eavesdropping employee a liar or change his prior answers. (2nd Amended Petition, App. 152). Because of the tone of the questions, Nahas informed the investigators that Board members regularly use such profanities on a daily basis. (2nd Amended Petition, App. 153). Nahas stated that the profanities are used so often that people within the office become numb to them. (2nd Amended Petition, App. 153). Nahas confirmed during this third interview that he felt that Board members intimidated him with respect to his prior investigation related to Hockensmith's friend. (2nd Amended Petition, App. 153). Nahas said he felt the Board was intimidating him with respect to the McCoy inquiry. (2nd Amended Petition, App. 153).

After the third interview, Outside Counsel requested an "informal" meeting with Frank Marasco and Frank Marasco's boss (the Polk County Sheriff). (2nd Amended Petition, App. 154). During the meeting, in front of

Frank Marasco's boss, Outside Counsel accused Frank Marasco of being untruthful in his previous interview. (2nd Amended Petition, App. 154). Outside Counsel told Frank Marasco that Marasco's prior interview had also been recorded without his knowledge, and that Outside Counsel had listened to the interview. (2nd Amended Petition, App. 154). Outside Counsel informed Frank Marasco at that time that Nahas had been put on administrative leave, which was not previously publicly disclosed and a fact which Outside Counsel had no authority to disclose to another county employee. (2nd Amended Petition, App. 154). Outside Counsel also told Frank Marasco that he anticipated that Nahas would recant and submit a new statement contradicting Marasco's prior interview responses. (2nd Amended Petition, App. 154). Outside Counsel's statement to Frank Marasco was knowingly and intentionally false – Nahas made clear he did not intend to change his prior answers. (2nd Amended Petition, App. 154). Likewise, Outside Counsel's discussion of a disciplinary matter involving another County employee was in violation of the County's policies and Ralph Marasco's directive that the parties do not discuss the status of the inquiry with one another. (2nd Amended Petition, App. 154).

During this meeting Outside Counsel disclosed Defendants' motivation, which included a timeline and process to remove Supervisor

McCoy from office. (2nd Amended Petition, App. 154). At the end of the meeting Outside Counsel told Frank Marasco it would be better for him to submit a new statement confirming he recalled Supervisor McCoy making vulgar comments. (2nd Amended Petition, App. 155). Outside Counsel's conduct violated the County's anti-harassment policy, which prohibits any verbal or physical conduct designed to threaten, intimidate or coerce an employee, co-worker or any person working for or on behalf of Polk County. (2nd Amended Petition, App. 155). Outside Counsel was at all times acting at the direction of Hockensmith and Connolly. (2nd Amended Petition, App. 155).

In late December 2020 Defendant John Norris called Nahas to inform him "the Board" made the decision that Nahas must resign or be fired. (2nd Amended Petition, App. 155). Norris also communicated to Supervisor McCoy that "the Board" made the decision to fire Nahas. (2nd Amended Petition, App. 155). In the days leading to the Board's decision the Board defendants met jointly or via proxy to make determinations regarding Nahas's employment and the contents of a termination letter. (2nd Amended Petition, App. 153). There is no record of a published meeting of the Polk County Board of Supervisors regarding their decision, though in order for the Board to terminate Nahas (as Norris explicitly told Plaintiff and McCoy) and to

approve the termination letter, they would had to have conducted a meeting pursuant to Chapter 21. (2nd Amended Petition, App. 168).

Around this time, the County notified Nahas that if he did not resign and release the County from all liability, an unflattering termination letter would be written and made public under the guise of Iowa Code Chapter 22. (2nd Amended Petition, App. 155). Defendants did not indicate what they intended to put into the unflattering letter. In response to this threat, on January 4, 2021, Nahas submitted a formal complaint alleging retaliation and harassment regarding the way the inquiry had been conducted. (2nd Amended Petition, App. 155).

On January 5, 2021, Defendants delivered to Plaintiff a false and defamatory termination letter. (2nd Amended Petition, App. 156). One of the reasons explicitly stated for the termination was that Plaintiff (the County Human Resources Director) offered to investigate valid complaints of a hostile work environment by Employee C towards members of the Board, the former County Administrator, Boese, and others. (2nd Amended Petition, App. 156). The letter further stated Nahas lied, lacked credibility, was incompetent, and unprofessional. (2nd Amended Petition, App. 156). The letter purports to quote statements Nahas made during his first interview, however, the County has either lost or destroyed the bulk of recording of the first interview. (2nd

Amended Petition, App. 156). Norris signed the letter in which he concluded Nahas did not participate honestly and with candor during an administrative investigation, even though Norris did not participate in the investigation in any manner. (2nd Amended Petition, App. 156). In addition, the letter states there had never been any formal allegations made by other employees or Nahas regarding the profanities regularly used in the Supervisors' office. (2nd Amended Petition, App. 157). This statement is false. The supervisors' use of profanity in the workplace was the subject of Employee C's exit interview, as well as the subject of Ralph Marasco's questions in Plaintiff's third interview. (2nd Amended Petition, App. 157). Likewise, during Nahas's third interview, he specifically asserted a complaint regarding the use of profanities by members of the Board, the hostile work environment, and the retaliatory conduct directed towards him regarding prior investigations. (2nd Amended Petition, App. 157). Nahas also submitted a written complaint to the County Attorney's office on January 4, 2021. (2nd Amended Petition, App. 153).

Defendants, or someone acting at their direction, subsequently notified members of the media of the existence of Nahas's termination letter for the purpose of eliciting a media request for a copy. (2nd Amended Petition, App. 166). Members of the press then asked Norris for a copy of the letter under Iowa Code chapter 22. (2nd Amended Petition, App. 166). Defendants

disclosed it within days, an unprecedented turn-around in Polk County. (2nd Amended Petition, App. 166). Defendants did not provide Nahas any advance notice of the media request to allow him the opportunity to seek injunctive relief or dispute whether the termination letter itself was a public document (as Chapter 22 does not require actual release of termination letters). (2nd Amended Petition, App. 158). To clear his name, Nahas voluntarily submitted to a polygraph examination regarding the substance of the false claims in the termination letter. (2nd Amended Petition, App. 159). The polygraph examiner concluded that Nahas was truthful about his memory of the October 6 meeting and other issues pertinent to the "investigation." (2nd Amended Petition, App. 159).

ARGUMENT

I. THE DISTRICT COURT CORRECTLY DENIED DEFENDANTS' MOTION TO DISMISS PURSUANT TO §670.4A

A. Preservation of Error and Standard of Review

The Court reviews a trial court's ruling on a motion to dismiss for correction of errors at law. *Weizberg v. City of Des Moines,* 92 N.W.2d 200, 211 (Iowa 2018). Plaintiff agrees generally that error on this matter has been preserved. To the extent Defendants' challenge the district court's granting of Plaintiff's pre-answer motion for leave to amend his petition, however, Defendants' brief is void of legal authority or even an argument that trial court abused its discretion. The trial court's granting of a motion for leave to amend a petition will be reversed only when there is a clear abuse of discretion. *Chao v. Waterloo*, 346 N.W.2d 822, 825 (Iowa 1984).

B. Section 670.4A's Procedural and Substantive Provisions do not Apply Retroactively to Plaintiff's Claims

Defendants acknowledge Iowa Code §670.4A makes both procedural and substantive changes to the Iowa Municipal Tort Claims Act (IMTCA). These changes do not apply retroactively to Plaintiff's claims. Moreover, applying the statute retrospectively violates his rights to due process.

1. The Substantive Changes to §670.4A do not Apply Retroactively

A statute is presumed to be prospective unless expressly made retrospective. *Dindinger v. Allsteel, Inc.*, 860 N.W.2d 557, 563 (Iowa 2015). Here, the legislature did not include express or implicit language in §670.4A to make it retroactive. To the contrary, §670.4A explicitly states the law takes effect on enactment. Notably, SF342 (which created §670.4) contains other amendments to the Iowa Code which the legislature did explicitly make retroactive. Therefore, the legislature's explicit intent to apply §670.4A prospectively should end the inquiry. Iowa Code 4.5; *Pfiffner v. Roth*, 379 N.W.2d 357, 360 (Iowa 1985).

Even if the legislature intended the amended §670.4A to apply retroactively, the next step is to ascertain whether the statute affects substantive rights or relates merely to a remedy. *Dindinger v. Allsteel, Inc.*, 860 N.W.2d 557, 563 (Iowa 2015).

> If the law is substantive, we presume it operates prospectively only. If the statute is remedial, we presume it operates retrospectively. A statute is not remedial merely because one might say, colloquially, that its purpose is to "remedy" a defect in the law. [I]f a mere legislative purpose to remedy a perceived defect in the law made a statute remedial, very few statutes would not fall within this classification. . . . When a statute creates new rights or obligations, it is substantive rather than procedural or remedial.

Id. See also Anderson Fin. Servs, LLC v. Miller, 769 N.W.2d 575, 580 (Iowa 2009)("[I]f a mere legislative purpose to remedy a perceived defect in the law made a statute remedial, very few statutes would not fall within this classification."). Here, Defendants admit §670.4A affects substantive rights. (Appellants' Brief at 24-25).

In *Dindinger*, the court considered whether an amendment to the Iowa Civil Rights Act was remedial or substantive. The amendment created a new cause of action for wage discrimination with a new strict liability standard for employers. *Dindinger v. Allsteel, Inc.*, 860 N.W.2d at 564. The Court therefore found that the ICRA amendment did not operate retrospectively. *Id.* at 566. Likewise, in *Vinson v. Linn-Mar Community School Dist.*, 360 N.W.2d 108 (Iowa 1984) the plaintiff sued the school district for libel per se under Chapter 670. The Court found that an amendment to the IMTCA adding punitive damages to the list of exemptions for municipal tort liability *after* plaintiff's

cause of action vested was substantive and, therefore, prospective only. *Id*. at 121.

To be clear, Chapter 670 eliminated *all* common law tort immunities previously available to municipalities, except those specifically exempted under §670.4. *Young v. City of Des Moines*, 262 N.W.2d 612, 622 (Iowa 1978)(overruled on other grounds); *see also Jahnke v. Inc. City of Des Moines*, 191 N.W.2d 780, 782 (Iowa 1971). Accordingly, at the time Nahas's cause of action vested the only immunities available to Defendants for claims brought under the IMTCA were those specifically exempted in §670.4. These did not include the newly created "clearly established" immunity in §670.4A.

In addition, the doctrine of qualified immunity entitles employees to immunity from suit rather than a mere defense to liability. *Dickerson v. Mertz*, 547 N.W.2d 208, 214 (Iowa 1996) (citing *Mitchell v. Forsyth*, 472 U.S. 511, 526, 105 S.Ct. 2806, 2815, 86 L.Ed.2d 411, 425 (1985)). Therefore, qualified immunity is an affirmative defense which the defendant must plead and ultimately establish. *Id.* New §670.4A requires that a plaintiff affirmatively plead the rights he seeks to secure were "clearly established" at the time of the violation. As such, not only does §670.4A create an entirely new qualified immunity not previously recognized under Chapter 670, but it effectively shifts the burden to the plaintiff to prove the qualified immunity does not apply.

Just as in *Dindinger* and *Vinson*, the qualified immunity in §670.4A creates new rights for municipal employees and limits the rights of a plaintiff. Likewise, it shifts the burden to the plaintiff to plead and prove his rights were "clearly established" and that qualified immunity does *not* apply. New §670.4A's changes to the Chapter 670 are clearly substantive and, therefore, cannot apply retroactively.

2. The Procedural/Remedial Changes to §670.4A do not Apply Retroactively

If Nahas does not need to prove his rights were "clearly established", dismissing his Petition with prejudice for failing to plead such a claim would be nonsensical. Defendants' reliance on *Hrbek v State*, 958 N.W.2d 779 (Iowa 2021), in support of their argument that the new procedural pleading requirements of §670.4A apply to Plaintiff's claims is misplaced. Defendants conflate two different issues in arguing that the conduct being regulated in *Hrbek* and this case are the same. The statute at issue in *Hrbek,* Iowa Code § 822.3A, went into effect July 1, 2019, and states in part:

> 1. An applicant seeking relief under section 822.2 who is currently represented by counsel shall not file any pro se document, including an application, brief, reply brief, or motion, in any Iowa court. The court shall not consider, and opposing counsel shall not respond to, such pro se filings.

Iowa Code §822.3A(1). Therefore, the action of legal consequence was, specifically, the pro se filing of a claim for post-conviction relief when the

claimant is represented by counsel—a filing the statute specifically prohibits. *Hrbek*, 958 N.W.2d at 783. The Court recognized that given:

> [a]ll of the events of legal consequence occur after that date. The district court's order was entered in August 2019. Hrbek filed his application for interlocutory appeal on September 20, 2019. Hrbek had his counsel file a final pro se supplemental brief and reply brief in this appeal on August 24, 2020, more than one year after the effective date of the statute.

The statute was obviously being applied prospectively. *Id.* Procedural/remedial changes to statutes, as in *Hrbek*, govern when a cause of action may be brought or conditions that must occur prior to bringing the action (e.g. exhausting administrative remedies, statutes of limitations, obtaining right to sue letters, and the like). Section 670.4A, however, does not proscribe a time period in which plaintiff must file his lawsuit, or conditions precedent to filing suit. The new pleading requirement in 670.4A addresses the *substantive* claims a plaintiff must apparently now prove under the new law (e.g. plaintiff must plead his rights were "clearly established"). The substantive changes to §670.4 creating qualified immunity for violations of the law that were not "clearly established" do not apply retroactively to Nahas's claims. Accordingly, dismissing this lawsuit with prejudice for failing to plead that his rights were "clearly established" and purportedly for failing to state with particularity how the clearly established rights were violated simply makes no sense. Nahas does not

need to prove either proposition for any of his causes of action that indisputably vested prior to the substantive changes to the law.

3. Retroactive Application of §670.4A Violates Plaintiff's Constitutional Right to Due Process

Application of §670.4A to Plaintiff's claims violates his due process rights under the Iowa Constitution. In *Thorp v. Casey's General Stores, Inc*., 446 N.W.2d 457 (Iowa 1989), this Court stated, "It is well-settled that the legislature may not extinguish a right of action which has already accrued to a claimant." *Id.* at 461. The Court also held, "There is a vested right in an accrued cause of action . . . A law can be repealed by the law giver; but the rights which have been acquired under it, while it was in force, do not thereby cease . . ." *Id.* (quoting *Gibson v. Commonwealth*, 415 A.2d 80, 83 (Pa. 1980)). "In determining when a statute of limitations begins to run, we held that the cause of action accrues when an aggrieve party has a right to institute and maintain a suit." *Id.* at 460 (citing *Connelly v. Paul Ruddy's Equip. Repair & Serv. Co.*, 200 N.W.2d 70, 72 (1972) (holding that tort actions accrue when all elements of the cause of action have occurred)).

In this instance, each of Nahas's causes of action vested before new §670.4A went into effect. At the time Nahas's claims vested, §670.4 set forth the exclusive list of immunities and exemptions for a municipality and its employees. None of these included immunities under the "clearly established"

doctrine, nor did Chapter 670 absolve a municipality of liability if the laws its employees violated were not "clearly established". Likewise, nothing within the IMTCA required Nahas to plead and prove the immunities contained therein did not apply. These new immunities and the shifting of the burden to Nahas to plead his rights were clearly established fundamentally alter his rights such that retroactive application of §670.4A violates due process.

4. Conclusion regarding §670.4A

The substantive changes to the IMTCA do not apply retroactively to Nahas's claims. The procedural changes deal solely with requiring Nahas to plead the substantive changes contained in the new provision. Lastly, application of the substantive and procedural changes to Nahas's claims would violate his constitutional rights to do due process. The district court correctly denied Defendants' Motion to Dismiss under §670.4A.

C. EVEN IF THE PROCEDURAL CHANGES TO §670.4A APPLY, PLAINTIFF COMPLIED WITH THE LAW'S PLEADING REQUIREMENTS

Defendants' motion to dismiss argued Nahas's first amended petition failed to include the magic words, "clearly established." They further asserted that despite the second amended petition fixing this purported technical error, Nahas still failed to state with particularly the circumstances of Defendants' multiple violations of the law. Lastly, they claim none of Nahas's claims were

"clearly established" at the time Defendants violated the law. Contrary to Defendants' argument, Nahas's 223 paragraph second amended petition easily satisfies §670.4A's undefined pleading requirements.

1. The Trial Court did not Abuse its Discretion in Granting Plaintiff's Motion for Leave to File his 2nd Amended Petition

Defendants' motion to dismiss asserted entitlement to dismissal due to the Nahas's failure to "even attempt to plead that the law was clearly established at the time of the allege violation in any of the seven counts he purports to bring." (Defendant MTD, App. 44). According to Defendants' Motion, "That omission alone warrants dismissal." (Defendants MTD, App. 44). Defendants virtually ignore the district court's grant of Plaintiffs' second amended petition which unequivocally includes such language with respect to each of Plaintiffs' claims. (Second Amended Petition, App. 159, 161, 164, 165, 167, 168, 170). Other than simply claiming the trial court erred in granting Plaintiffs' motion for leave to amend, Defendants fail to cite any authority in support of such a position.

To the extent Defendants' appeal challenges the trial court's order granting Plaintiff leave to file his second amended petition, the district court's grant of a motion for leave to amend will be reversed only when there is a clear abuse of discretion. *Chao v. Waterloo*, 346 N.W.2d 822, 825 (Iowa

1984). Amendments to pleadings are governed by Iowa Rule of Civil Procedure 1.402(4), which provides:

> A party may amend a pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is required and the action has not been placed upon the trial calendar, the party may so amend it at any time within 20 days after it is served. Otherwise, a party may amend a pleading only by leave of court or by written consent of the adverse party. Leave to amend, including leave to amend to conform to the proof, shall be freely given when justice so requires.

The purpose of the leave-of-court requirement is to give the other side the right to object to amendments which might affect their preparation for trial. *Norwest Bank Marion Nat'l Ass'n v. L T Enter. Inc*., 387 N.W.2d 359, 365 (Iowa App.1986). The trial court has considerable discretion in allowing amendments. *Whalen v. Connelly*, 545 N.W.2d 284, 293 (Iowa 1996). The trial court will be reversed only when there is a clear abuse of discretion. *Chao v. Waterloo*, 346 N.W.2d 822, 825 (Iowa 1984). Leave to amend shall be freely given when justice so requires. *Medco Behavioral Care Corp. v. Iowa Dep't of Human Servs.*, 553 N.W.2d 556, 563 (Iowa 1996). Amendments are the rule and denials the exception. *In re Marriage of Fields*, 508 N.W.2d 730, 732 (Iowa 1993). Allowing amendments is encouraged and denying permission to amend is discouraged. *Kitzinger v. Wesley Lumber Co*., 419 N.W.2d 739, 741 (Iowa App.1987). Furthermore, "[w]henever the claim or defense asserted in the amended pleading arose out of the conduct,

transaction, or occurrence attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading." Iowa Rule 1.402(5)

Nothing within new Iowa Code §670.4A purports to alter the long-standing practice of allowing a litigant the ability to plead over when confronted with the prospect of dismissal for failing to state a claim upon which relief can be granted. *Bennett v. Ida County*, 203 N.W.2d 228, 236 (Iowa 1972); *Nesper Sign & Neon Co. v. Nugent*, 168 N.W.2d 805, 806 (Iowa 1969). To hold otherwise would be contrary to the long-standing principle that court processes not be allowed to become a "trap for the unwary." *Smith v. Middle States Utilities of Delaware*, 275 N.W. 158, 161 (1937). The district court appropriately granted Plaintiff's Motion for Leave to file his second amended petition. Defendants have not made a plausible argument otherwise. Plaintiff's second amended petition unequivocally complies with the purported technical requirement of explicitly pleading "clearly established." Accordingly, to the extent Defendants base their motion to dismiss on the alleged failure to explicitly plead "clearly established," the motion was correctly denied.

2. Plaintiff's Second Amended Petition States with Particularity the Circumstances of Defendants' Violations of the Law

Despite the above, Defendants still claim Nahas failed to state with particularly the circumstances of Defendants' multiple violations of the law. Defendants do not say what is enough to satisfy this vague pleading requirement. Rather, they argue only that what set forth in his lawsuit somehow missed the mark.

Section 670.4A(3) states:

> A plaintiff who brings a claim under this chapter alleging a violation of the law must state with particularity the circumstances constituting the violation and that the law was clearly established at the time of the alleged violation. Failure to plead a **plausible** violation or failure to plead that the law was clearly established at the time of the alleged violation shall result in dismissal with prejudice.

Id. (emphasis added) The statute does not define what constitutes "with particularity," or what it means to "[state]…that the law was clearly established at the time of the alleged violation." The statute does state explicitly state, however, that dismissal with prejudice is only appropriate if Plaintiff fails to plead a "plausible" violation.

Looking to claims brought under 42 U.S.C.1983 as a guide, in *Johnson v. City of Shelby, Mississippi*, 135 S.Ct. 346 (2014), plaintiffs claimed they were fired for bringing to light criminal activities of an alderman, and asserted

violations of their 14th amendment right to due process. Their claims were based on §1983, although their complaint did not expressly invoke §1983. Defendants moved to dismiss the complaint for failing to expressly invoke §1983. The United States Supreme Court rejected Defendant's argument, holding:

> Petitioners stated simply, concisely, and directly events that, they alleged, entitled them to damages from the city. Having informed the city of the factual basis for their complaint, they were required to do no more to stave off threshold dismissal for want of an adequate statement of their claim.

Id. at 347.

Unlike typical §1983 claims, none of Nahas's claims are based on abstract constitutional violations. Rather, they are based on specific and clearly established statutory and common law causes of action that are well-recognized in Iowa. With respect to each individual count, Nahas states with particularity the statutory or common law claim, the elements necessary for establishing the claim and Defendants' specific conduct in violating the law. It is difficult to conceive how Nahas could have more particularly stated the circumstances constituting the violations, or that he has somehow failed to plead the violations were "plausible."

Nahas's defamation claim clearly alleges the contents of his termination letter are libelous. He further clearly alleges Defendants acted in

knowing violation of the law when they drafted the false and defamatory letter for the explicit purpose of attempting to create a public document to disparage him. Paragraph 161 of the second amended petition states, "Defendants prepared the false and defamatory termination letter and subsequently disseminated it for mass publication with malice and in wanton, intentional disregard for the truth and Plaintiff's rights, thereby precluding Defendants from relying on any purported immunities under Iowa law." (2nd Amended Petition, App. 158). Nahas's second amended easily satisfies the vague and undefined requirement that he state with particularity the circumstances of Defendants' defamatory conduct. Likewise, Nahas clearly pleads a "plausible" violation of the law, thereby precluding dismissal.

Nahas's wrongful termination claim clearly states his termination violated the public policy of the State of Iowa. He further states with particularity the protected activity in which he engaged. (Plaintiff's 2nd Amended Petition, App. 160). In addition, Nahas states with particularity that Defendants terminated him for engaging in the protected activity. (Plaintiffs' 2nd Amended Petition, App. 161). Again, Nahas clearly pleads a "plausible" violation of the law, thereby precluding dismissal with prejudice of Count II.

As to his civil extortion claim, Nahas specifically cites the statute and the Iowa Supreme Court decision on which the claim is based. (Plaintiff's 2nd

Amended Petition, App. 163). He states in detail Defendants' conduct in threatening and intimidating him to lie during the county's formal investigation. (Plaintiff's 2nd Amended Petition, App. 162). He further specifically identifies the benefit Defendants hoped to procure through their conduct. (Plaintiff's 2nd Amended Petition, App. 162). Defendants' argument Nahas failed to state with particularly the circumstances of the extortion, or that he failed to plead a "plausible" violation of the civil extortion law are entirely without merit.

With respect to Nahas's claims for civil conspiracy and intentional infliction of emotional distress, again Nahas sets forth in considerable detail Defendants' role in conducting a sham investigation in which they engaged in secret recordings, lost evidence, attempted to intimidate witnesses, authored and published a defamatory letter, and completely disregarded their own anti-retaliation and harassment policies. Nahas states the elements of each of these claims and Defendants' conduct in violating the law. Lastly, Nahas explicitly states his claims for violations of Chapter 21 and Chapter 22, including each of the specific code sections applicable to the claims and Defendants' specific conduct in violating these sections.

Nahas's detailed second amended petition sets forth both the factual and legal elements of the claims asserted, leaving very little to the

imagination. By any reasonable measure, Nahas's 223 paragraph second amended petition detailing the sum and substance of the Defendants' specific conduct, the applicable law, the elements of each law, and how Defendants' conduct violated the law, surely meets the "state with particularity the circumstances constituting the violations" standard. Likewise, each of Nahas's causes of action state a "plausible" violation of the law. Defendants fail to make a credible argument otherwise. Rather, they rely on little more than conclusory statements in support of their position. The district court correctly denied Defendants' motion to dismiss based on the procedural aspects of §670.4A.

D. EVEN IF THE SUBSTANTIVE CHANGES TO §670.4A APPLY, EACH OF PLAINTIFF'S CLAIMS WERE "CLEARY ESTABLISHED"

Defendants recognize the problem with their argument that Plaintiff failed to comply with §670.4A's technical pleading requirements. In the alternative, they argue, "[i]t is not enough for Plaintiff to assert that the claim was "clearly established," the claim actually is required to have been clearly established." Def. Br. 28. Neither Iowa Code §670.4A nor Defendants attempt to define "clearly established." Likewise, the new law requires dismissal only if a plaintiff fails to plead a "plausible" violation. Plaintiffs are left to assume the term "clearly established" means something similar to

§1983 claims in which a right is clearly established when "[t]he contours of the right [are] sufficiently clear that a reasonable official would understand that what he [or she] is doing violates that right." *Minor v. State*, 819 N.W.2d 383, 400 (Iowa 2012)(citing *Anderson v. Creighton*, 483 U.S. 635, 640, 107 S.Ct. 3034, 3039, 97 L.Ed.2d 523, 531 (1987)). To the extent §670.4A even applies and that "clearly established" means something similar to section 1983 claims, each of Plaintiff's separate counts were "clearly established" at the time Defendants violated the law.

The point is worth repeating: The "clearly established" doctrine typically deals with §1983 deprivations of constitutional rights which tend to be abstract and open to interpretation. In this case, however, none of Nahas's claims are novel or undefined. Rather, all of the claims are based on statutory and common law causes of action, the contours of which are sufficiently clear under Iowa law. To avoid duplication due the significant overlap in Defendants' motion to dismiss pursuant to §670.4A and their motion to dismiss pursuant to Rule 1.421, the specific elements and background for each of Nahas's causes of action are set forth in Section II, *infra*, and incorporated herein.

Regarding Count I – Libel: The cause of action for libel/defamation has existed in Iowa for over one hundred years. *See e.g. Hughes v. Samuels Bros.*,

159 N.W. 589 (Iowa 1916). The cause of action for libel against a municipality was unequivocally clearly established in *Vinson v. Linn-Mar Community School Dist.*, 360 N.W.2d 108 (Iowa 1984). In *Vinson* a former employee sued a school district for libel per se under the IMTCA based on the school district's memoranda accusing her of falsifying information on her time cards. *Id.* at 115. The Court held that the trial court was right in instructing the jury that the district's accusations to that effect were libelous per se. *Id.* Defendants cannot credibly argue that a reasonable official would not understand that Iowa's defamation laws prohibit them from drafting and publishing a knowingly false and defamatory termination letter in retaliation for an employee refusing to lie during a formal investigation, or in retaliation for the employee investigating credible allegations of Defendants' own wrongdoing. The fact that Defendants and the Polk County Attorney's office believe otherwise shocks the conscious.

Regarding Count II – Wrongful Discharge: Even Defendants' own Motion to Dismiss acknowledged, "Iowa courts, however, **have long recognized** a public policy exception" to that [employee at-will] doctrine. At will employees in Iowa, like Nahas, may bring a wrongful discharge claim 'when the reasons for discharge contravene public policy". (Defendants' Motion to Dismiss at 7 (*citing jasper v. H. Nizam, Inc.*, 764 N.W.2d 751, 761

(Iowa 2009))(emphasis added). Defendants cannot credibly argue that a reasonable official would not understand that terminating a public employee in retaliation for the employee's refusal to lie during a formal government inquiry into an elected official contravenes public policy. Defendants cannot credibly argue a reasonable official would fail to understand that terminating a human resources director for investigating valid complaints levied against them contravenes public policy.

Regarding Count III – Extortion: The cause of action for civil extortion is borne directly from Iowa Code §711.4, which criminalizes such conduct and gives rise to a civil cause of action for civil extortion when a person threatens to expose another to hatred, contempt, and ridicule; when a person threatens to harm another's business and professional reputation; and when a person threatens to take action as a public office and employee, and to cause some public official or employee to take or withhold action. The Iowa Supreme Court "clearly established" the law of civil extortion in *Hall v. Montgomery Ward & Co.*, 252 N.W.2d 421 (Iowa 1977). In addition, Iowa Code §66.1A provides for the removal of elected and appointment officials from office for extortion. Defendants cannot credibly argue that threatening a public employee with termination and public embarrassment if the employee

refused to lie during a formal investigation is lawful conduct despite the clear contours of §711.4 and *Hall*.

Regarding Count IV - Civil Conspiracy. Iowa law has recognized a cause of action for civil conspiracy for over one hundred years. *See e.g. De Wulf v. Dix*, 81 N.W. 779 (Iowa 1900). Likewise, Chapter 3500 of the Iowa Civil Jury Instructions dedicates an entire chapter with citations to Iowa case law to the cause of action and its elements dating back to 1942. Taking the well-pled facts of the 2nd Amended Petition as true, a cause of action for Civil Conspiracy under these circumstances was "clearly established" at the time of Defendants' conduct.

Regarding Count V - Intentional Infliction of Emotional Distress: The cause of action for intentional infliction of emotional distress has long been established under Iowa law. Chapter 2000 of the Iowa Civil Jury Instructions dedicates an entire chapter to the cause of action, with citations to case law dating back to the 1970s and the 1965 Restatement (Second) of Torts. Defendants cannot credibly argue that threatening a public employee with termination and public embarrassment if the employee refused to lie during a formal investigation, is lawful conduct.

Finally, with respect Counts VI and VII -Violations of Iowa Code Chapter 21 and Chapter 22: Plaintiff's cause of action arises specifically out

of these codified provisions within the Iowa code. Defendants cannot with a straight face argue the provisions of Chapter 21 and Chapter 22 are not "clearly established.

The term "clearly established" is not defined anywhere in the Iowa Code, nor is the term part of any case law dealing with immunities under the IMTCA. We are left to assume the term means something similar to how it is used in the context of §1983 claims. Presuming for sake of argument the term is the same, the contours of each of the well-established common law and statutory laws identified in Nahas's lawsuit were sufficiently clear that a reasonable official would understand that what he or she was doing violated those laws. As per §670.4A's requirements, each of Nahas's seven counts sets forth plausible violations of the law. The district court correctly denied Defendants' motion to dismiss.

II. THE DISTRICT COURT CORRECTLY DENIED DEFENDANTS' MOTION TO DISMISS UNDER RULE 1.421

Defendants' arguments in support of their motion to dismiss under Rule 1.421 are meritless. They are particularly problematic because the arguments

are made by the same office that conducted the sham "investigation" that started this case.

A. Preservation or Error and Standard of Review

Nahas agrees generally that error on this matter has been preserved. The Court reviews a trial court's ruling on a motion to dismiss for correction of errors at law. *Weizberg v. City of Des Moines,* 92 N.W.2d 200, 211 (Iowa 2018).

B. Applicable Legal Principles re: Rule 1.421 Motions to Dismiss

Motions to dismiss are highly disfavored. *Hawkeye Foodservice Distribution, Inc. v. Iowa Educators Corp.*, 812 N.W.2d 600, 608 (Iowa 2012). Nearly every case will survive a motion to dismiss under notice pleading. *Id.* The petition need not allege ultimate facts that support each element of the cause of action. *Smith v. Smith*, 513 N.W.2d 728, 730 (Iowa 1994). The petition, however, must contain factual allegations that give the defendant "fair notice" of the claim asserted so the defendant can adequately respond to the petition. *Schmidt v. Wilkinson*, 340 N.W.2d 282, 283 (Iowa 1983). The fair-notice requirement is satisfied if the petition informs the defendant of the general nature of the claim and the incident giving rise to it. *Young v. HealthPort Tech., Inc.*, 877 N.W.2d 124, 128 (Iowa 2016).

A motion to dismiss is proper "only if the petition shows no right to recovery *under any state of facts*." *Southard v. Visa U.S.A., Inc.*, 734 N.W.2d 192, 194 (Iowa 2007)(emphasis added). In considering such motion, the Court must accept the facts alleged in the petition as true. *McGill v. Fish*, 790 N.W.2d 113, 115 (Iowa 2010). If the viability of a claim is at all debatable, the Court should not sustain a motion to dismiss. *Southard*, 734 N.W.2d at 194. Even in the rare instance in which the Iowa Supreme Court has affirmed a motion to dismiss it cautioned against their use:

> We recognize the temptation is strong for a defendant to strike a vulnerable petition at the earliest opportunity. Experience has however taught us that vast judicial resources could be saved with the exercise of more professional patience. Under the foregoing rules dismissals of many of the weakest cases must be reversed on appeal. Two appeals often result where one would have sufficed had the defense moved by way of summary judgment, or even by way of defense at trial. From a defendant's standpoint, moreover, it is far from unknown for the flimsiest of cases to gain strength when its dismissal is reversed on appeal.

Cutler v. Klass, Whicher & Mishne, 473 N.W.2d 178, 181 (Iowa 1991).

C. Count I – Libel

Libel is the "malicious publication, expressed either in printing or in writing, or by signs and pictures, tending to injure the reputation of another person or to expose [the person] to public hatred, contempt, or ridicule or to injure [the person] in the maintenance of [the person's] business." *Plendl v.*

Beuttler, 111 N.W.2d 669, 670–71 (1961). Certain statements are libelous per se,

> which means they are actionable in and of themselves without proof of malice, falsity or damage. In actions based on language not libelous per se, all of these elements must be proved ... before recovery can be had, but when a statement is libelous per se they are presumed from the nature of the language used.

Vojak v. Jensen, 161 N.W.2d 100, 104 (Iowa 1968).

Words are libelous per se if they are of such a nature, whether true or not, that the court can presume as a matter of law that their publication will have libelous effect. *Haas v. Evening Democrat Co.,* 107 N.W.2d 444, 447 (1961). An attack on the integrity and moral character of a party is libelous per se. *Shaw Cleaners & Dyers, Inc. v. Des Moines Dress Club,* 245 N.W. 231, 234 (1932). Therefore, it is libel per se to make a published statement accusing a person of being a liar. *Prewitt v. Wilson ,* 103 N.W. 365, 367 (1905).

As noted, a cause of action for libel per se against a municipality was unequivocally recognized at the time Defendants blatantly defamed Plaintiffs. *See e.g. Vinson v. Linn-Mar Community School Dist.*, 360 N.W.2d 108 (Iowa 1984). In *Vinson* a former employee sued a school district for libel per se under the IMTCA based on the school district's memoranda accusing her of falsifying information on her time cards. *Id.* at 115. The Court found no meaningful distinction between accusing a person of being a liar and accusing

a person of falsifying information. *Id.* at 116. Therefore, the Court held that the trial court was right in instructing the jury that the district's accusations to that effect were libelous per se. *Id.*

Defendants assert Iowa Code §22.7(11) relieves them from liability because it required Defendants to release public records setting forth the reasons and rationale for the termination. Contrary to Defendants' argument, nothing within Chapter 22 required Defendants to release the actual termination letter. Even if the letter itself was a "public document", nothing within Chapter 22 allows a government entity to author and publish knowingly and intentionally false termination letter regarding an employee.

For purposes of Defendants' argument, the Court must accept as true Nahas's allegation that the contents of the termination letter were knowingly false and authored for the purpose of damaging both he and Supervisor McCoy. (2nd Amended Petition, ¶¶ 159-162). Therefore, according to Defendants' argument, they cannot be held liable for making knowingly false and defamatory statements in a letter they know will be published (and indeed authored for the explicit purpose of being published). Defendants' argument coming from the Polk County Attorney's Office is abhorrent. Defendants literally argue Chapter 22 (and apparently newly enacted §670.4A) allows them to author a termination letter that falsely accuses an employee of being

a liar, a thief, a terrorist, a pedophile, a domestic abuser – literally anything – free of consequence because Chapter 22 makes the publication of such a libelous letter mandatory. Defendants' argument actually gives away Defendants' ultimate plan for damaging Plaintiff. Defendants' brief reads more like a warning to other county employees who dare not succumb to threats and intimidation when participating in a human resources investigation: "tell us what we want to hear or we can and will defame you in your termination letter, and it will be become public."

As specifically alleged, Defendants intentionally planned to use Chapter 22 as a means to publish a false and defamatory termination letter as payback Nahas for refusing to lie about his recollection of the October 6, 2020 meeting, to politically damage Supervisor McCoy to curb his efforts to clean up Defendants' abuse of power, and to head off any further inquiry into Employee C's credible allegations of the Board's hostile work environment. (2nd Amended Petition, ¶¶60-61, 145, 156-162). Defendants admit they authored the letter knowing specifically they would make it public (even though Chapter 22 does not make the termination letter itself a public document). Contrary to the false claims set forth in the letter, Nahas did not lie in the course of the "investigation." Nahas did not lack credibility, he was

not incompetent or unprofessional, and he participated in the "investigation" honestly and with candor. (2nd Amended Petition, ¶¶142-148; 156-166).

Defendants argue Chapter 22 puts them in an "untenable" position. Remarkably, Defendants' argument fails to acknowledge their own failure conduct a legitimate inquiry into this matter so as to ensure the veracity of their "conclusions." Defendants failed to include in the termination letter the fact that at Defendants' direction, their agents surreptitiously recorded witnesses and then lost or destroyed at least one of the recordings. They unreasonably delayed interviews. They utilized outside counsel to harass and intimidate a witness into lying about what he heard during the October 6, 2020 meeting. They made false representations to witnesses. They did not conduct an actual hearing and did not obtain any testimony from the complainant or any other witness under oath and subject to penalty of perjury. Nowhere in the letter does it state the purported author verbally disavowed the decision to terminate Nahas. Defendants did not provide a draft of the letter to Nahas to allow him to attach an addendum disputing the "findings," and refused to provide Nahas with any information or evidence on which the letter is purportedly based. (2nd Amended Petition, ¶158). Indeed, other than cryptically warning Nahas an unflattering letter would be written, Defendants did not provide any details regarding the letter or their purported "findings"

until the letter was actually delivered to Nahas. These are not fantastical conspiracy theories but are the undisputed facts of this case.

Notwithstanding Defendants' claim that they had no choice but to author and publish a false and defamatory termination letter, Iowa law recognizes that "procedural due process protection must be afforded when an at-will employee is discharged for reasons of dishonesty, immorality, or illegal conduct." *Borschel v. City of Perry*, 512 N.W.2d 565, 568 (Iowa 1994). Although an employee may not have a property right to public employment, due process affords certain rights in relation to such employment. *Id.* (citing *Anderson v. Low Rent Housing Comm'n of Muscatine*, 304 N.W.2d 239, 243 (Iowa 1981). This constitutional "liberty interest" assures an employee an opportunity to refute charges "which might seriously damage standing and association in the community or impose a stigma ... that forecloses the freedom of the employee to take advantage of other employment opportunities." *Id.*

In this instance, the Board met to confer and agree on Nahas's administrative leave, termination, and the contents of the termination letter. It did so without any prior notice or opportunity for Nahas to be heard. Indeed, Nahas had no notice of the blatant falsehoods contained in the termination letter until it was too late. Defendants' argument that Chapter 22 gives them

carte blanche protection to defame public workers is outrageous. Chapter 22 does not provide Defendants with a sword publish knowingly and intentionally false libelous statements about former employees, nor does it provide a shield against liability.

D. Count II – Wrongful Discharge

Defendants take the indefensible position that a public official may lawfully discharge an employee in furtherance of their own misconduct, or to prevent the discovery of an appointive or elective officer's misconduct, maladministration, corruption, or extortion. Defendants asked the district court rhetorically, "Is Mr. Nahas suggesting that his routine activities were protected, thereby permanently preventing his termination?" (MTD, App. 49). In posing the question, Defendants suggest sitting elected public officials may lawfully discharge an employee for refusing to lie during a formal county investigation into another elected official. They suggest sitting elected public officials may discharge an employee in retaliation for that employee's investigation into allegations of their own wrongdoing (in particular Employee C's allegations of hostile work environment). They argue public officials can utilize Chapter 22 to publish a false and defamatory discharge letter for the purpose of damaging a former employee and a political rival.

Defendants' arguments underscore the public interest of Plaintiff's conduct that led to his discharge.

Nahas was an at-will employee which means he may be fired for any reason or no reason at all. *Dorshkind v. Oak Park Place of Dubuque II, L.L.C.*, 835 N.W.2d 293, 300 (Iowa 2013). The Iowa Supreme Court first recognized an exception to the at-will doctrine, the doctrine of common law wrongful discharge in violation of public policy, in *Springer v. Weeks & Leo Co.*, 429 N.W.2d 558 (Iowa 1988) (en banc). *Springer* involved an employee who was discharged for filing a workers' compensation claim. *Id.* at 560. The Iowa Supreme Court has since explored and reaffirmed the doctrine in many cases since *Springer*. In *Borschel v. City of Perry*, the Court explained that there were three primary situations when an action for wrongful discharge in violation of public policy was available. 512 N.W.2d 565, 567 (Iowa 1994). Those situations included "retaliation for performing an important and socially desirable act, exercising a statutory right, or refusing to commit an unlawful act." *Id.* (quoting 82 Am. Jur. 2d *Wrongful Discharge* § 14, at 687 (1992)). The Court observed that "[s]uch policies may be expressed in the constitution and the statutes of the state." *Id.*

An employee seeking protection under the public-policy exception in his or her wrongful-discharge claim must prove the following elements: (1)

the existence of a clearly defined and well-recognized public policy that protects the employee's activity; (2) this public policy would be undermined by the employee's discharge from employment; (3) the employee engaged in the protected activity, and this conduct was the reason the employer discharged the employee; and (4) the employer had no overriding business justification for the discharge. *Dorshkind*, 835 N.W.2d at 300 (quoting *Berry v. Liberty Holdings, Inc.*, 803 N.W.2d 106, 109–10 (Iowa 2011)). In determining whether a clear, well-recognized public policy exists for purposes of a cause of action, the Court has primarily looked to statutes, but has also indicated the Iowa Constitution to be an additional source. *Fitzgerald v. Salsbury Chemical, Inc.*, 613 N.W.2d 275, 283 (Iowa 2000). While some statutes articulate public policy by specifically prohibiting employers from discharging employees for engaging in certain conduct or other circumstance, Iowa law does not limit the public policy exception to specific statutes which mandate protection for employees. *Id.* Instead, the Iowa Supreme Court looks to statutes which not only define clear public policy, but imply a prohibition against termination from employment to avoid undermining that policy. *Id.*

The Court's ruling in *Fitzgerald* provides an example of a statute defining a clear public policy implying (without explicitly stating) a prohibition against termination. Specifically, in *Fitzgerald*, the Court held

that public policy as expressed in statutes against suborning perjury existed to prohibit the discharge of an employee for giving or intending to give truthful testimony in a legal proceeding. *Fitzgerald v. Salsbury Chemical, Inc.*, 613 N.W.2 at 286; Iowa Code §§720.2, 3, and 4. The Court further found that a reasonable employer should be aware that attempts to interfere with the process of obtaining truthful testimony, whether through intimidation or retaliation, is a violation of public policy against discharging an employee for giving or intending to give truthful testimony in a legal proceeding. *Id.*

The undisputed facts of this motion are that Defendants (each elected public leaders or public officials) terminated Nahas for his role in the following items:

- Nahas's role in investigating potentially illegal activity with respect to a sitting elected Board member and another high-ranking employee in the County General Services Department, which investigation includes the use of County employees to perform personal services while on taxpayer time.
- Nahas's role in investigating valid complaints of a hostile work environment alleged by a former County employee towards the elected public officials.

- Nahas's refusal to lie during a formal County investigation into a public official.
- As a pre-text to allow Defendants to author a knowingly false and defamatory termination letter for the explicit purpose of creating a public document to defame both Plaintiff and Supervisor McCoy.

(2nd Amended Petition, ¶¶167-171). Defendants' argument they can lawfully terminate a public employee under these undisputed facts is repugnant to the public policy and common law of the state of Iowa.

Multiple statutes imply a prohibition against termination from employment under these circumstances. These include the criminal extortion statute found in Iowa Code §711.4. Specifically, this statute prohibits a person from threatening to expose another to hatred, contempt or ridicule, threatening to harm the professional reputation of any person, and threating to take or withhold action as a public officer or employee, or to cause a public officer or employee to take or withhold action. *Id.* As was the case with the perjury statute in *Fitzgerald*, the public policy expressed in the statute against extortion implies a prohibition against the discharge of an employee for refusing to give into the threats proscribe by §711.4. The policy deals with such a clear public interest that this Court further recognized a private cause of action for civil extortion in *Hall v. Montgomery Ward & Co*, 252 N.W.2d 421 (Iowa 1977)

The well-pled facts show that Defendants not only engaged in these threats, but utilized their public offices and positions to actually follow through with them when Nahas refused lie about what he recalled hearing during the October 6, 2020 meeting. A reasonable public officer should be aware that attempts to extort a public employee into lying during a formal government investigation, whether through intimidation or retaliation, is a violation of public policy against discharging a public employee for refusing to lie during such an inquiry (among other public policies).

Iowa Code §66.1A provides another example of a statute implying prohibition against retaliatory termination. Specifically, §66.1A provides for the removal of an appointive or elective officer for (among other things) misconduct or maladministration in office, corruption, and extortion. The public policy expressed in this statute implies a prohibition against a public official's discharge of an employee as part of an extortion scheme to prevent the discovery of the appointive or elective officer's misconduct, maladministration, corruption, or extortion, or to damage a political rival. Nahas's second amended petition demonstrates that Defendants discharged him in furtherance of their conduct as proscribed in §66.1A (and §711.4). A reasonable public officer should be aware that discharging an employee in furtherance of this conduct is a violation of public policy.

As with *Fitzgerald,* Iowa Code §§720.2, 3, and 4 prohibitions against perjury and suborning perjury apply to Defendants' termination of Nahas. While the "investigation" into the October 6, 2020 meeting did not involve an actual legal proceeding, the public policy as expressed in §§720.2, 3, and 4 (both in isolation and in conjunction with §§66.1A and 711.4) exist to prohibit the discharge of an employee for giving or intending to give truthful answers during a formal inquiry conducted by the Polk County Attorney's office into allegations of misconduct against an elected official. A reasonable elected or appointed government official should be aware that attempts to interfere with the process of obtaining truthful responses to such a government-controlled inquiry into alleged malfeasance of a government official, whether through intimidation or retaliation, is a violation of public policy against discharging an employee for giving or intending to give truthful responses during the inquiry.

Lastly, Polk County recognizes and embraces the public policy articulated above with respect to its own Anti-Harassment Policy. Polk County's Anti-Harassment Policy, which is embraced by and incorporated into the Amended Petition, provides in part:

> Retaliation
> No hardship, loss, benefit or penalty may be imposed on an employee in response to:
> - Filing or responding to a bona fide complaint of discrimination or harassment.
> - Appearing as a witness in the investigation of a complaint.

- Serving as an investigator of a complaint.

(Polk County Anti-Harassment Policy, App. 124-25). The Policy is not merely an employee handbook; rather, it is the well-stated public policy of Iowa's largest municipality.

Ultimately, Iowa Code §§66.1A, 711.4, 720.2-4, and Polk County's public anti-harassment policy, taken individually or jointly, prohibit public officials from discharging an employee for providing truthful information during a formal inquiry into allegations of misconduct towards another elected official. Nahas's conduct absolutely deals with a public interest and his discharge from employment violated a fundamental, well-recognized interest that serves to protect the public.

E. Count III – Extortion

Defendants' argument that the facts as set forth in Nahas's second amended petition do not give rise to extortion is again shocking. It begs the question: Do Defendants actually believe they are authorized to threaten a public employee with termination and public humiliation if the employee refuses to lie during a formal inquiry conducted by the county attorney's office? If the employee refuses to make false statements about a political rival? If the employee, who is tasked with investigating human resource matters, investigates hostile work environment claims made against them?

The argument itself disqualifies them from continuing to hold their respective offices.

Iowa Code §711.4(1) provides:

> A person commits extortion if the person does any of the following with the purpose of obtaining for oneself or another anything of value, ***tangible or intangible***, including labor or services:
>
> a. Threatens to inflict physical injury on some person, or to commit any public offense.
> b. Threatens to accuse another of a public offense.
> c. Threatens to expose any person to hatred, contempt, or ridicule.
> d. Threatens to harm the credit or business or professional reputation of any person.
> e. Threatens to take or withhold action as a public officer or employee, or to cause some public official or employee to take or withhold action.
> f. Threatens to testify or provide information or to withhold testimony or information with respect to another's legal claim or defense.
> g. Threatens to wrongfully injure the property of another.

Iowa Code §711.4(1)(emphasis added). This Court recognized the private cause of action for civil conspiracy in *Hall v. Montgomery Ward & Co.*, 252 N.W.2d 421 (Iowa 1977). Defendants acknowledge §711.4 gives rise to a civil a civil cause of action for extortion. The crux of Defendants' Motion with respect to Nahas's civil extortion claim is that Defendants "neither gained nor sought to gain anything of value."

The Iowa Supreme Court directly addressed the issue regarding the meaning of "anything of value, tangible or intangible" in *State v. Crone*, 545 N.W.2d 267 (Iowa 1996). Specifically, the Court concluded:

> The word "value" is modified in section 711.4: "*anything* of value, tangible *or intangible.*" Iowa Code § 711.4 (1993) (emphasis added). We think this language clearly points to the broader definition of "value,"—"*relative* worth, utility, or importance," not the narrow definition—"the *monetary* worth of something."

Id. at 272. (emphasis supplied). The Court noted the previous extortion statute used the words "money or pecuniary advantage," but when the legislature amended the statute, it changed the words "money or pecuniary advantage" to "anything of value." *Id*. at 273. Therefore, the Court concluded, "the term 'value' as used in §711.4 means the particular importance attached to something by the person making the threat." Accordingly, the Court takes an extremely broad view of the term. In applying this definition in *Crone*, the Court held that engaging in the prohibited conduct simply to gain a face-to-face meeting was sufficient to satisfy the "anything of value" requirement. *Id.*

In this instance, the well-pled facts of Nahas's petition assert Defendants extorted him in order to inflict political damage on Supervisor McCoy, their political rival who was in the process of attempting to curb Defendants' previously unchecked lack of good governance and awarding of contracts. (Amended Petition, ¶¶ 60-61). Their termination letter further explicitly admits

Defendants' desire to prevent any further inquiry into Employee C's allegations of a hostile work environment in which Defendants used horrific profanities on a near day-to-day basis. (2nd Amended Petition, ¶145). Defendants invited Outside Counsel to sit in on Plaintiffs' 3rd Interview, and then sent him to intimidate Frank Marasco into implicating Supervisor McCoy. As part of Outside Counsel's intimidation tactics, he verbally told Frank Marasco that a plan was in place to remove McCoy from the Board.

Curbing Supervisor McCoy efforts in cleaning up Defendants' prior and continued governance, and from further investigating Employee C's complaints was of clear importance to Defendants. They easily satisfy the "anything of value, tangible or intangible" requirement as laid out in *Crone*. Nahas's Amended Petition adequately articulates this purpose.

F. Count IV – Civil Conspiracy

Taking the facts of Plaintiff's 2nd Amended Petition as true Nahas clearly states a valid cause action for Civil Conspiracy for purposes of surviving Rule 1.421 dismissal. Defendants had an agreement or understanding to carry-out a plan that would result in harm to or would have the effect of injuring Nahas. Defendants knowingly and voluntarily participated in a common scheme to take action against Nahas, including action to extort, wrongfully discharge him from employment, deprive him of

benefits of employment including severance, retirement, and other tangible and intangible benefits of employment, and defame him. Defendants utilized county employees and other agents of the county to help carry-out the conspiracy. As co-conspirators, Defendants are vicariously liable for each action of the other members in furtherance of the conspiracy, and are jointly and severally liable for any damages caused.

The entirety of Defendants' appeal of this claim rests on their assertion that because Nahas's other causes of action fail, his civil conspiracy claim must fail as well. As thoroughly set forth above, he has sufficiently stated valid causes of action for libel, wrongful termination, and extortion. The conduct giving rise to those claims forms the basis for a claim for civil conspiracy. To the extent Nahas states a valid cause of action with respect to Counts I, II, and III, he necessarily has stated a valid cause of action for Civil Conspiracy.

G. Count V: Intentional Infliction of Emotional Distress

The well-pled facts of Nahas's second amended petition are sufficient to defeat Defendants' Motion to Dismiss Plaintiff's claim for intentional infliction of emotional distress. The elements of this tort are: (1) Outrageous conduct by the defendant; (2) The defendant's intentional causing, or reckless disregard of the probability of causing emotional distress; (3) Plaintiff suffering severe or

extreme emotional distress; and (4) Actual and proximate causation of the emotional distress by the defendant's outrageous conduct. *Powell v. Khodari-Intergreen Co.*, 334 N.W.2d 127, 129 (Iowa 1983). For conduct to be outrageous it must be "so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." *Harsha v. State Savings Bank*, 346 N.W.2d 791, 801 (Iowa 1984) (quoting Restatement (Second) of Torts § 46, Comment d (1965)). It is for the court to determine in the first instance whether the relevant conduct may reasonably be regarded as outrageous. *Roalson v. Chaney*, 334 N.W.2d 754, 756 (Iowa 1983). In making that determination the court should consider the relationship between the parties: "The extreme and outrageous character of the conduct may arise from an abuse by the actor of a position, or a relation with the other, which gives him actual or apparent authority over the other, or power to affect his interests." Restatement (Second) of Torts § 46, comment e (1965). An employer has a duty to refrain from abusive behavior toward employees. *Vinson v. Linn Mar Community School District*, 360 N.W.2d 108, 118 (Iowa 1984)(citing *Hall v. May Department Stores Co*., 292 Or. 131, 138, 637 P.2d 126, 131 (1981)).

Typically, when evaluating claims of outrageous conduct arising out of employer-employee relationships, the Iowa Supreme Court has required a

reasonable level of tolerance. That said, the Iowa courts have found certain conduct sufficiently outrageous within the employer/employee relationship. For example, in *Blong v. Snyder*, 361 N.W.2d 312 (Iowa Ct.App. 1984), the court of appeals noted:

> the record shows that plaintiff was initially dismissed for filling out his time cards in accordance with his supervisor's instructions. After he was finally able to get his job back, plaintiff was subjected to verbal abuse on almost a daily basis. He was accused of stealing, wasting time, intentionally breaking his machine, intentionally producing inferior parts, violating fifteen company rules, and "playing with himself" in the restroom. All of these accusations were apparently groundless. Furthermore, plaintiff was assigned extra work without being given the proper patterns or tools for the job and was then berated, threatened, and disciplined for his inability to properly complete the task.

Id. at 317. The court concluded that

> [w]hile any of the individual instances alone may be no more than insulting and humiliating, the jury could properly conclude that the whole of defendant's actions over the four-month period were a course of conduct "exceeding all bounds usually tolerated by decent society."

Id. See also, Smith v. Iowa State University, 851 N.W.2d 1 (Iowa 2014)(upholding verdict in favor of plaintiff for intentional infliction of emotional distress based on confluence of several factors that crossed the line into outrageous conduct).

The limited question presented in Defendants' motion is simply whether the conduct alleged in Nahas's second amended petition sufficiently pleads that

Defendants' behavior crosses the line into conduct that is outrageous in character, and so extreme in degree as to go beyond all possible bounds of decency such that it is intolerable in a civilized society. The well-pled facts taken as true easily survive that standard at the motion to dismiss stage. *See Cutler v. Klass, Whicher & Mishne*, 473 N.W.2d 178, 181 (Iowa 1991)(urging the courts to exercise caution and patience when deciding whether to grant a motion to dismiss at the outset of a case). At the risk of being redundant, the conduct in question involves Nahas's superiors, each of whom are elected or appointed government officials. The conduct in question involves harassing and intimidating Nahas in the performance of his job with respect to inquiries into wrongdoing within the County Public Works Department and when reporting salaries of Defendants' family members. It ultimately culminated in Defendants making groundless accusations for the explicit purpose making them public as part of a scheme retaliate against Nahas and to politically damage a political rival. The conduct clearly exceeds all bounds usually tolerated by a decent society, particularly in that the conduct involves elected officials. Defendants will have ample opportunity to challenge the sufficiency of Nahas's allegations through discovery and a motion for summary judgment. For the time being, however, taking all of the facts in the Amended Petition as true, the District Court correctly denied Plaintiff's Motion to Dismiss.

H. Count VI – Violation of Iowa Code Chapter 21

Defendants argued to the District Court, "Polk County employees are terminated routinely without Board consideration or a vote." (Defendants' Motion to Dismiss at 15). While this may ordinarily be true, as per the well-pled facts of the second amended petition, the Board actually considered and agreed to terminate Plaintiff's employment. Specifically, the Board did in fact meet jointly or via proxy to make determinations regarding Nahas's employment. (2nd Amended Petition, ¶217). The Board signed and delivered Nahas's Administrative Leave letter. Though Defendant Norris signed the termination letter, he later admitted to both Nahas and McCoy that the decision to terminate Nahas was made by the Board. (2nd Amended Petition, ¶214). Pursuant to the well-plead facts, the Board in fact made the determination. Accordingly, Chapter 21 required notice and an opportunity for Plaintiff to be heard prior to the Board taking formal action. *See* Iowa Code §21.3 (mandating that meetings of governmental bodies shall be held in public session (unless closed session would be expressly permitted) and preceded by public notice).

I. Count VII – Violation of Chapter 22

Defendants' Motion to Dismiss asserted a private cause of action does not exist under the Open Records Act for the release. Defendants ignore, however, the relief requested in Count VII. Iowa Code §22.5 clearly

authorizes enforcement of the Open Records act through mandamus or injunction. The relief sought in County VII of the Amended Petition seeks precisely that. Accordingly, the District Court correctly denied Defendants' Motion to Dismiss Count VII.

III. IOWA CODE §670.4A IS UNCONSTITUTIONAL

Nahas preserved the question of the constitutionality of §670.4A in is Sur-Reply Brief and oral argument to the district court. To the extent dismissal would be warranted under §670.4A, the law is unconstitutional on its face. The Iowa Supreme Court ruled unequivocally in *Baldwin v. City of Estherville*, 915 N.W.2d 259 (Iowa 2018)(*Baldwin I*) that the Iowa Constitution does not recognize qualified immunity based on the "clearly established" doctrine. In doing so, the Court specifically rejected the Harlow federal qualified immunity language the Iowa legislature adopted on new §670.4A. Rather, qualified immunity under the Iowa Constitution is based upon a standard of "all due care." *Id.* at 279. The Iowa Supreme Court stated:

> As we have noted, a number of states allow Harlow immunity for direct constitutional claims. In those jurisdictions, there cannot be liability unless the defendant violated "clearly established . . . constitutional rights of which a reasonable person would have known." *Harlow*, 457 U.S. at 818, 102 S. Ct. at 2738. *Harlow* examines objective reasonableness; thus, in some ways it resembles an immunity for officials who act with due care. However, it is centered on, and in our view gives undue weight to, one factor: how clear the underlying constitutional law was. Normally we think of due care or objective good faith as more nuanced and reflecting

> several considerations. See, e.g., *Hetfield*, 3 Greene at 585. Factual good faith may compensate for a legal error, and factual bad faith may override some lack of clarity in the law.

Baldwin I at 279.

Likewise, the Court made clear that the legislature could not simply limit liability of government officers who commit constitutional torts through the IMTC and the Iowa Tort Claims Act:

> These statutory provisions are not of much value in determining whether there is qualified immunity for officers who commit constitutional torts. The very purpose of the Bill of Rights is to restrain the majoritarian branches of government. These provisions are distinctly antimajoritarian. It would be a fox-in-the-henhouse problem to permit the legislature to define the scope of protection available to citizens for violation of constitutional rights. As noted by Professor Amar, "When governments act ultra vires and transgress the boundaries of their charter, ... their sovereign power to immunize themselves is strictly limited by the remedial imperative." Amar, 96 Yale L.J. at 1490.

Id. at 292.

The Iowa legislature does not have the power to overturn a decision of the Iowa Supreme Court that is based upon the Court's interpretation of the Iowa Constitution. Determining the scope of constitutional rights is the province of the judiciary. *Baldwin v. City of Estherville*, 929 N.W.2d 691, 703 (Iowa 2019)(Baldwin II). To the extent the legislature seeks to regulate remedies, it cannot reduce them below a constitutionally required minimum necessary to

ensure adequate vindication of state constitutional interests. *Id.* at 703-04 (citing *Godfrey*, 898 N.W.2d 844, 873 (Iowa 2017).

Although new §670.4A applies to any claims brought under Chapter 670, the paramount purpose new §670.4A was to overturn *Baldwin*. Indeed, during the legislative debate of this new law Sen. Dawson, referring to the Baldwin I case, stated, "I would submit to the body here that the Supreme Court got it wrong on that particular case, and what we are trying to do is put this genie back in the bottle." S.F. 476, Iowa Senate Floor Debate at 7:21. New §6704.A applies to any claims brought under Chapter 670. The legislature cannot limit the scope of protection available to citizens for violations of constitutional rights, even under the IMTCA. As such, this new provision is unconstitutional on its face and no part of it can be severed to save it without literally writing new qualifications and limitations into the provision and subverting its purpose. Section 670.4A is unconstitutional in its entirety.

CONCLUSION

For the reasons cited above the district court correctly denied Defendants' Motion to dismiss in its entirety. The decision of the district court should be affirmed, accordingly.

REQUEST FOR ORAL ARGUMENT

The Appellee hereby requests to be heard in oral argument in connection with this appeal.

CERTIFICATE OF COMPLIANCE

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

[X] This brief contains 13,815 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1)

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Dated: August 12, 2022.

Carney & Appleby Law Firm

Nicholas J. Mauro AT0005007
400 Homestead Building
303 Locust Street
Des Moines, IA 50309
515-282-6803
515-282-4700 (fax)
ATTORNEYS FOR APPELLEE