IN THE SUPREME COURT OF IOWA
NO. 22-0513

JIM SUTTON AND ANGELA SUTTON,

Plaintiffs-Appellees,

vs.

COUNCIL BLUFFS WATER WORKS,

Defendant-Appellant.

APPEAL FROM THE POTTAWATTAMIE COUNTY DISTRICT COURT
THE HONORABLE GREG W. STEENSLAND

Case No. LACV122333

FINAL REPLY BRIEF OF APPELLANT

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STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Did the District Court base its reasoning on an erroneous interpretation of the Iowa Municipal Tort Claims Act, and therefore err in denying the pre-answer motion by Council Bluffs Water Works to strike the strict liability claim?

Iowa Code § 476.1(1)

Iowa Code § 476.27(1)(c)

Iowa Municipal Tort Liability Act, Iowa Code Chap. 670

Iowa Code § 670.1(4)

Iowa Code § 670.2

Iowa Code § 670.2(1)

Iowa Code § 670.4

Iowa Code § 670.4(1)(h)

Baldwin v. City of Estherville, 929 N.W.2d 691 (Iowa 2019)

Breese v. City of Burlington, 945 N.W.2d 12 (Iowa 2020)

Dolezal v. City of Cedar Rapids, 326 N.W.2d 355 (Iowa 1982)

Hansen v. City of Audubon, 378 N.W.2d 903 (Iowa 1985)

Hartman v. Merged Area VI Community College, 270 N.W.2d 822 (Iowa 1978)

Hawkeye Land Co. v. Iowa Utilities Board, 847 N.W.2d 199 (Iowa 2014)

Homan v. Branstad, 887 N.W.2d 153 (Iowa 2016)

Iowa Farm Federation v. Environmental Protection Comm'n, 850 N.W.2d 403 (Iowa 2014)

Iowa Power and Light Company v. The Board of Water Works Trustees of the City of Des Moines, 281 N.W.2d 827 (Iowa Ct. App. 1979)

Jahnke v. Incorporated City of Des Moines, 191 N.W.2d 780 (Iowa 1971)

Kellogg v. City of Albia, 908 N.W.2d 822 (Iowa 2018)

Lubin v. Iowa City, 131 N.W.2d 765 (Iowa 1964)

Maguire v. Pabst Brewing Co., 387 N.W.2d 565 (Iowa 1986)

Mall Real Estate, LLC v. City of Hamburg, 818 N.W.2d 190 (Iowa 2012)

O'Tool v. Hathaway, 461 N.W.2d 161 (Iowa 1990)

Schmitz v. City of Dubuque, 682 N.W.2d 70, 74 (Iowa 2004)

Teamsters Local union No. 421 v. City of Dubuque, 606 N.W.2d 709 (2005)

Thomas v. Gavin, 838 N.W.2d 518 (Iowa 2013)

ARGUMENT

I.

APPELLEES FAIL TO SHOW THAT THE IMTCA GIVES A REMEDY FOR STRICT LIABILITY.

The Suttons accuse CBWW of ignoring the part of the IMTCA's definition of "tort" stating that the term "includes but is not restricted to" certain enumerated categories. Final Brief of Appellees, p. 25. However, CBWW's argument fully accounts for that phrase in the definition and shows that it does not mean that strict liability is included in the definition.

In the process, CBWW refers to several cases from other states construing that same phrase or the almost identical phrase "including but not limited to." The Suttons argue that there is no need to look outside of the

state, and cite *Hawkeye Land Co. v. Iowa Utilities Board*, 847 N.W.2d 199 (Iowa 2014). However, that decision did not address the question of the exact meaning of a statutory phrase like "includes but is not restricted to."

In *Hawkeye Land* the issue was whether an independent electricity transmission company fits the statutory definition of "public utility." The statute defining "public utility" started with a reference to another definitional statute that did not fit, but then said the term "also includes" a list of specific types of entities. The list did not include independent transmission companies, and the Supreme Court cited what it said was an applicable rule of statutory construction: "'[T]he express mention of one thing implies the exclusion of other things not specifically mentioned.'" *Id*. at 215. Although that was the applicable rule to settle the matter all by itself, the Court then noted, for further support of its conclusion, that the "public utility" definition's "also includes" clause was not phrased as "includes but is not limited to," although that particular qualifier was used in a different definition of "direct expenses." *Id*. The Court said that omission of the phrase "but not limited to" showed legislative intent "to limit the entities considered public utilities to those expressly mentioned." *Id*.

The Suttons want to turn this "by the way" logic from *Hawkeye Land* around to serve as authority for the opposite situation of interpreting what

the legislature means when it does use a qualifier like "but not limited to" or "but not restricted to" in a statutory definition. However, that was not the Court's focus in *Hawkeye*. That case did not raise a question about the scope of "direct expenses" as a result of inclusion of the term "but is not limited to" in Iowa Code § 476.27(1)(c). If it had, the Court would have had to address the definition's very specific list of types of expenses closely related to public utility lines crossing a railroad right-of-way, and then decide whether some particular other type of expense not on the list was meant to be included through the "not limited to" modifier. In that context, the Court likely would have looked to the statutory interpretation tools discussed in Appellant's opening brief, and it likely would not have said that "not limited to" opens the definition of "direct expenses" to every other type of expense no matter how the type of expense in question does or does not resemble the expenses set out in the definition. The doctrines for interpretation discussed in Appellant's opening brief and touched on again below would limit the effect of that term, or the term "not restricted to," so as to bring into the definition other expenses similar to the ones specifically listed, but not to open it to things not connected with crossings between utilities and railroads.

In other words, if the Court in *Hawkeye Land* had needed to address the type of issue presented here, it would have gone about it in the same way Appellant is asking the Court to approach the current appeal: Actually analyze the words of the IMTCA, using the tools of the statutory construction trade, rather than make the kind of broad assumptions that the Suttons advocate about applying a liability theory from an old case developed in a different statutory context.

Another part of the *Hawkeye Land* case supports Appellant's reading of the "tort" definition statute in the IMTCA by serving as an example of using statutory context to limit the scope of what in isolation would be a very broad term. The "public utility" definition directly at issue in that case incorporated a definition of "public utility" from a different statute that said the term means an entity owning or operating any facilities for "furnishing gas . . . or electricity to the public for compensation." Iowa Code § 476.1(1). A party argued that "furnishing . . . electricity" is a broad term that encompassed what independent transmission companies do, but the Court said that "furnishing" had to be read with the rest of the definition that limited it to entities "furnishing . . . electricity to the public." *Id*. at 215-16. The independent transmission company involved in the case furnished electricity to public utilities, not directly to the public, and the Court

declined to read into the definition the word “indirectly,” which would be necessary to include a company that furnishes electricity to the public through supplying electricity solely to other utilities that then directly furnish it to the public. In answer to an argument that the Court’s understanding of the statute involved reading into it the term “directly,” the Court said that the statute it was applying in that case “delegates the State's power of eminent domain and must be strictly construed.” *Id*. at 216. With that constriction on the statute’s purpose in mind, the Court said that the statute “defines a business as a public utility based upon that business's relationship to the public. We will not expand the definition of public utility by allowing an indirect relationship with the public to suffice.” *Id*.

In the present case, the broad picture is a waiver of sovereign immunity that is defined by the language of the statutes that spell out the terms for waiving immunity and the exceptions to the waiver. When *Lubin v. Iowa City*, 131 N.W.2d 765 (Iowa 1964), was decided, the Court was working within the framework of common law governmental immunity or lack of immunity, depending on how the Supreme Court defined the line between the two under the facts of a case. In *Lubin*, the Court was acting without legislative guidance and saw sense in imposing liability without

fault upon a governmental water supply system for leakage onto private property.

However, the legislature then took over the task of drawing lines between government immunity and governmental liability. As the Court said more recently, the IMTCA is "viewed as abolishing traditional common law immunities." *Thomas v. Gavin*, 838 N.W.2d 518, 521 (Iowa 2013). The legislature created this new scheme for municipal liability and immunity by using words to tell when the government is liable and for what it is liable, then it carved out particular exceptions when the immunity would remain in place.

The word most central to the IMTCA's waiver of immunity is "torts." Under the Act, "every municipality is subject to liability for its torts and those of its officers, employees, and agents," except as otherwise provided. Iowa Code § 670.2(1). So there is no liability under the IMTCA unless there is a "tort." The previous section defines "tort" as a "civil wrong." Iowa Code § 670.1(4). This limits the concept to things that are "wrong" and that result in injury to person or property, and it does not encompass all things that just happen without any wrongdoing and result in injury.

There then follows the list saying that "tort" (in the context of being a "civil wrong") "includes but is not restricted to actions based upon negligence; error or omission; nuisance; breach of duty, whether statutory or other duty or denial or impairment of any right under any constitutional provision, statute or rule of law." *Id.*

The Suttons essentially argue that a "tort" is something that goes wrong from the perspective of a person who suffer a personal or property injury, and that a "tort" does not require for liability that the entity did anything wrong to cause the injury. A bad thing happened, and it started on government property, so the government is liable—that is the idea at the core of their claim that the Court should read strict liability (or, as *Lubin* put it, liability without fault) into the definition of "tort." That is exactly the purpose the Suttons had to plead a strict liability claim alongside their negligence claim: If strict liability applies, they do not have to prove how the water leak occurred or why or whether it resulted from any fault by the supplier. They would only have to prove water leaked from the main and could forget about the negligence claim.

However, the definition of "tort" begins with "civil wrong" and then lists causes of action which all depend on the commission of some wrongful act or a wrongful omission before liability may be imposed. It is significant,

during this focus on the words the legislature selected, to note that these definitional words were selected and enacted just three years after the Supreme Court used the words "liability without fault" in *Lubin* to expand the common law waiver of sovereign immunity to impose liability on a municipal supplier for water leaking from a water main without the need to prove that the supplier did anything wrong. By doing so, the legislators did not name the *Lubin* case in the new Act or specifically repudiate it, but the lawmakers did impliedly repudiate the concept of liability without fault for municipalities when it defined "tort" as a "civil wrong" and listed examples of wrongful acts and omissions that can be a "tort" under the new scheme.

Therefore, the actual lesson from the legislative history is the opposite of the Suttons' discussion at page 30 of Final Brief of Appellees. Certainly, the legislature is presumed to know the state of the law, including the case law, when it enacts a statute, as noted in *Iowa Farm Federation v. Environmental Protection Comm'n*, 850 N.W.2d 403, 434 (Iowa 2014). But what the legislature did with that knowledge here was to leave the newly minted concept of municipal strict liability for facility failures out of the statute through selection of the term "civil wrong" and use of fault-based examples of torts falling under the immunity waiver.

Appellant's original brief discussed how the courts use a specific list sharing a common nature to limit a general term for which the items on a list are given as examples. *See, e.g.*, *Teamsters Local union No. 421 v. City of Dubuque*, 606 N.W.2d 709, 715 (Iowa 2005) (the canon of *ejusdem generis* "provides that when general words follow specific words in a statute, the general words are read to embrace only objects similar to those objects of the specific words"); *Hartman v. Merged Area VI Community College*, 270 N.W.2d 822, 825 (Iowa 1978) (example of application of this canon of construction where broad term "good cause" was limited by list of grounds for termination pertaining to personal fault, so that "good cause" did not include causes unrelated to teacher's behavior that might benefit school district). Closely related are the interpretative tools saying that the meanings of particular words may be indicated or controlled by associated words, *Mall Real Estate, LLC v. City of Hamburg*, 818 N.W.2d 190, 199 (Iowa 2012), and that the express mention of one thing implies the exclusion of others not so mentioned, *Homan v. Branstad*, 887 N.W.2d 153, 166 (Iowa 2016). There are Latin names associated with these rules, but note that the Iowa cases using them stretch well into the current century.

Therefore, just on the basis of the language of the definition of "tort," the Court should hold that the IMTCA did not include liability without fault

or strict liability within the definition of "torts." As such, a claim that is not a "tort" under the Iowa Municipal Tort Claims Act has no legal basis and should have been dismissed pursuant to the Appellant's Motion to Dismiss.

In talking about the scope of the definition of "tort," we are not merely talking about water leaking from a city water main. We are talking about any kind of strict liability claim that might be asserted under the IMTCA. That is why the essential initial focus has to be on the definition. The District Court momentarily had that broad focus when it agreed that a definition of "tort" that broadly includes strict liability does not make sense when read together with waiver exception provisions involving aspects of negligence. It would be pointless to make an exception depending on a particular type of negligence when the government would just be strictly liable without ever considering negligence.

The point the District Court approached but did not spell out is that the legislature did not perceive its existing statute as allowing liability without any showing of fault when it created an exception that preserved immunity "based upon or arising out of a claim of negligent design or specification, negligent adoption of design or specification, or negligent construction or reconstruction of a . . . public facility," so long as the facility "was constructed or reconstructed in accordance with a generally recognized

engineering or safety standard, criteria, or design theory in existence at the time of the construction or reconstruction." 1983 Iowa Acts ch. 198, § 25 (codified at Iowa Code § 613A.4(8) (1985), now § 670.4(1)(*h*)). This state-of-the-art exception essentially says that it is not actionable negligence to build a public facility according to acceptable standards at the time of construction but then to fail to upgrade the construction as standards change. This kind of exception assumes that the failure to upgrade might qualify as negligence under the Act's provision allowing liability for negligence. But it makes no sense to say that upgrade failure is not negligence if the governmental unit would be strictly liable just because something went wrong.

The District Court agreed with that, but then it lost track of the big picture and bought the idea that we are talking only about leaking water mains. The judge reasoned that *Lubin* had not been specifically overturned, either in the Act through a specific exemption for strict liability or in later decisions applying the Act, so it must have remained as good law. CBWW's opening brief explains why occasional references in caselaw to *Lubin* over the years cannot be taken as reaffirmations of its continuing validity despite the subsequent passage of the IMTCA and its amendments.

CBWW's opening brief also explains how the Supreme Court just four years ago had a case that clearly presented the issue of whether strict liability is a "tort" under the Act, *Kellogg v. City of Albia*, 908 N.W.2d 822 (Iowa 2018), but decided the case by focusing on the negligence and nuisance items on the definition's list to analyze whether the claim fit as a "tort" and then to also test whether it fell outside of an exempt category. Implicit in this analysis was that the Court did not see any role for a strict liability claim that would have made its analysis pointless. The particular claim in *Kellogg* would have fit well as strict liability, as it involved water overloading a sewer system that wasn't designed for the flow. If "tort" included strict liability, it would have included this claim, and the Court could have written a much shorter and different opinion.

The Suttons argue that a broken water main was the subject of *Lubin*, while *Kellogg* involved a sewer, and so did *Hansen v. City of Audubon*, 378 N.W.2d 903 (Iowa 1985), which also paid no heed to strict liability or *Lubin*. However, if strict liability is part of the meaning of "tort," then particular municipal facilities would make no difference. Strict liability would apply to all of them, whether they involve moving water or moving vehicles or moving people along sidewalks. By deciding cases after passage of the Act without mention of *Lubin* and strict liability, the Supreme Court has been

showing through the years that strict liability is irrelevant to the definition of "tort" under the IMTCA.

Because the issue about strict liability as part of "tort" is bigger than the particular adoption of liability without fault in a particular factual setting in the pre-Act *Lubin* case, parsing cases about which ones did or did not mention *Lubin* in some context has limited relevance.

Iowa Power and Light Company v. The Board of Water Works Trustees of the City of Des Moines, 281 N.W.2d 827 (Iowa Ct. App. 1979), was, of course, a Court of Appeals decision, and so that court was not in position to say that *Lubin* was abrogated by the relatively new Act. More to the point, there is no mention of the IMTCA in the sections of the opinion discussing *Lubin* and strict liability. *Id*. at 831, 833-34. Accordingly, *Iowa Power* cannot even be consulted as a source for reasoning about how *Lubin* might hold up after passage of the Act. Accordingly, it is technically accurate but misleading to say about *Iowa Power* that "even after the enactment of the IMTCA, the doctrine of strict liability was still recognized as a viable theory of recovery against Iowa municipalities for damages caused by broken underground water mains." Final Brief of Appellees, p. 22. The Court of Appeals decision actually paid no heed whatsoever to the statutory sea change for municipal tort liability after *Lubin* when it

mechanically compared the facts of the *Iowa Power* case with *Lubin* and saw a factual resemblance without any mention of the change in the legal context.

Plaintiffs cite two other cases decided after the 1983 amendments that they claim acknowledged the strict liability holding of *Lubin*: *Maguire v. Pabst Brewing Co.*, 387 N.W.2d 565 (Iowa 1986), and *O'Tool v. Hathaway*, 461 N.W.2d 161, 164 (Iowa 1990). This entirely mischaracterizes those cases.

In *Maguire*, the plaintiff in a federal diversity case was arguing that the type of strict liability for harms caused by ultra-hazardous activities recognized in *Lubin* and in another case that involved transport of explosive cargo should be extended to impose liability on a beer maker for an injury to a traveler caused by drunk driving by a consumer of that beer. The federal court put the question to the Iowa Supreme Court. The Court cited *Lubin* only as an example the plaintiff in that case was offering, then rejected the invitation to apply strict liability to the beer maker. There was no discussion of the continued viability of *Lubin* after the IMTCA was passed and no reason to address that issue.

In *O'Tool*, one set of private landowners sued other private landowners for damages when a soil conservation terrace broke and spilled

water into the plaintiffs' basement. The Supreme Court refused to treat conservation terracing as an inherently dangerous activity that in all circumstances would subject the user to liability without fault. It then cited *Lubin* with a "cf" citator to indicate a contrary authority "imposing liability without fault on municipality because damage caused by unmaintained and bursting water mains was 'not accidental or unexpected.'" No issue was presented about whether *Lubin* would still be good law after the IMCTA passed. The issue was whether to apply *Lubin* to the terrace break, where there was no claim at all involving a municipality, and the Court refused to do so.

So neither case involved the Iowa Supreme Court endorsing *Lubin* as still applicable after the governmental immunity act passed. That issue was neither presented nor considered.

The Suttons assert that the Act's definition of "tort" is unambiguous and in need of no further analysis or construction. However, the definition fits the same structure to which the Supreme Court has applied the canons of construction discussed in Appellant's opening brief: a general legal term followed by a specific list of examples having similar elements that do not apply to the item that is not on the list. The Suttons cite *Jahnke v. Incorporated City of Des Moines*, 191 N.W.2d 780 (Iowa 1971)—and

nothing else—in arguing that "the Supreme Court has repeatedly held that Section 670.2 'imposes liability for *all* torts except those contained in [Section 670.4].'" Final Brief of Appellees, p. 24 (quoting *Jahnke*, 191 N.W.2d at 782) (emphasis by Appellees). However, *Jahnke* cannot stand as authority for strict liability being a "tort" within the new Act's definition, because that case involved a negligence claim and a nuisance claim, but the Court brushed aside nuisance and focused on whether the municipal conduct at the core of the negligence claim (failing to protect motorists from rioting protesters) fit one of the immunity exemptions that were in the Act at the time. Both negligence and nuisance are among the listed examples and no question of strict liability as a claim coming under the Act was presented, so the Court's reference to "all torts" cannot be taken as applying to strict liability or even as a holding that the provision expansively encompasses all torts, whether on the list or not.

The Suttons pepper their brief with snippets of cases making general statements about how the only exceptions to liability are in the separate exemptions statute or about how liability is the rule and immunity is the exception. *E.g.*, Final Brief of Appellees, p. 29 (citing *Thomas v. Gavin*, 838 N.W.2d 518, 523 (Iowa 2013); *Breese v. City of Burlington*, 945 N.W.2d 12, 23 (Iowa 2020); *Schmitz v. City of Dubuque*, 682 N.W.2d 70, 74 (Iowa

2004)). However, none of these cases actually addressed the issue of the breadth of "torts" to include strict liability or any other type of claim that is not a "wrong" or that does not share the fault-based features of the causes of action on the definitional list. *Thomas* involved a claim that city and county law enforcement officers wrongfully assaulted and arrested the plaintiff. *Breese* was a negligence claim about failure to provide guardrails or warning signs about a sewer box near a bike path and involved interplay with the state-of-the-art exemption. *Schmitz* also involved a negligence claim about design of a bicycle/walking trail and the discretionary immunity exemption. General statements in these quite different contexts are useless in addressing the specific issue found here concerning whether strict liability qualifies as a "tort."

At one point, the Suttons simply declare that "strict liability falls within the impairment of any right under any rule of law category contained in Section 670.1(4)," Final Brief of Appellees, p. 25, with citation to nothing but the definition provision. This snippet of the definition is from a broader part of the examples list for "denial or impairment of any right under any constitutional provision, statute or rule of law." The Supreme Court explained not long after that part of the definition was added that "[t]he clear intent of this amendment is to bring actions arising under 42 U.S.C. section

1983 within the scope of the municipal duty to defend, hold harmless, and indemnify employees sued for acts committed within the scope of employment or duties." *Dolezal v. City of Cedar Rapids*, 326 N.W.2d 355, 358 (Iowa 1982) (claim for unjust enrichment claim against city and airport commission held to be contract rather than tort claim). More recently, the Court noted when a 1974 amendment to the IMTCA added the "impairment of any right" provision language, "the legislature expanded the definition of *tort* to include violations of constitutional provisions." *Baldwin v. City of Estherville*, 929 N.W.2d 691, 697 (Iowa 2019) (answering certified questions about application of IMTCA to claim of rights violation by prosecuting a citizen for violation of a law that did not actually exist).

The Suttons misunderstand CBWW's position when they argue that CBWW prematurely asserted an affirmative defense in a motion to dismiss. CBWW is not saying in its motion to dismiss and this appeal that the state-of-the-art exemption or any other exemption is the reason to dismiss the strict liability claim. Although it may assert a defense to the negligence claim based on an exemption when that verse of the tune comes around on the guitar, CBWW's position during this opening riff is that strict liability never has been part of the Act's definition of "tort," so there is no need to actually apply any exemption. But, as discussed above, looking to

exemptions for a particular type of negligence, such as negligent failure to rebuild and redesign facilities to catch up to changes in safety or building standards, shows that when the legislature enacted those exemptions, it did not read its own term "tort" to include strict liability.

That brings us back to the District Court's original observation that the IMTCA's immunity provisions would make no sense if strict liability applies. The District Court strayed from that quite valid idea only through its misunderstanding of the timeline of cases and statutory changes and its failure to see that *Lubin* has not actually been endorsed as having continued validity in the wake of the IMTCA and its amendments. The Supreme Court should recognize that the legislature's choices of language excluded strict liability from the definition of "tort" under the IMTCA, which had the statutory effect of turning the pre-Act common law decision adopting strict liability into a legal historical artifact.

CONCLUSION

Despite the Suttons' arguments and authorities, it remains true that strict liability is not a "tort" under the Iowa Municipal Tort Liability Act, and so any claim against Council Bluffs Water Works relying on strict liability fails to state a cause of action. Therefore, the District Court erred in overruling CBWW's motion to dismiss the strict liability count of the

Suttons' Petition. The District Court's Order should be reversed and the case remanded with instructions to strike that claim and proceed with the case without strict liability as a basis for seeking recovery.

Respectfully submitted this 29th day of August 2022.

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