IN THE SUPREME COURT OF IOWA
No. 22-0513

JIM SUTTON AND ANGELA SUTTON,

Plaintiffs-Appellees,

v.

COUNCIL BLUFFS WATER WORKS,

Defendant-Appellant.

APPEAL FROM THE POTTAWATTAMIE COUNTY DISTRICT COURT
THE HONORABLE GREG W. STEENSLAND
CASE NO. LACV122333

FINAL BRIEF FOR APPELLEES

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ROUTING STATEMENT

Plaintiffs-Appellees, Jim and Angela Sutton (collectively, the "Suttons"), also believe the Supreme Court should retain this case. This case presents an issue of broad public importance and of potentially enunciating and changing legal principles which require an ultimate determination by the Supreme Court. *See* Iowa R. App. P. 6.1101(2)(d), (f). Namely, whether strict liability (or liability without fault) is still enforceable under the Iowa Municipal Tort Claims Act (the "IMTCA") for damages caused by broken underground water mains as pronounced in *Lubin v. Iowa City*, 131 N.W.2d 765 (Iowa 1964) and held in *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).

STATEMENT OF THE CASE

I. Nature of the Case.

This case involves damages to a residential property caused by a series of underground water main breaks that occurred near the residence in November and December 2020. (Appendix, p. 8). The residence is located at 302 Park Avenue, Council Bluffs, Iowa 51503 (the "Residence"). (Appendix, p. 7). Angela Sutton purchased the Residence in 2018. (Appendix, p. 7). The Suttons, husband and wife, reside in the Residence. (Appendix, p. 7).

In Count I of their Petition, the Suttons allege that the Defendant/Appellant, Council Bluffs Water Works ("CBWW"), is strictly liable to the Suttons for the damages the water main breaks caused to the Residence. (Appendix, p. 9). In Count II of their Petition, the Suttons alternatively allege that CBWW was negligent in failing to properly maintain and/or repair the underground water mains and, therefore, liable to the Suttons for the damages the water main breaks caused to the Residence. (Appendix, pp. 9-10).

II. Relevant Events of the Prior Proceedings.

The Suttons filed their Petition on November 9, 2021. (Appendix, p. 11). On December 3, 2021, CBWW filed a Pre-Answer Motion to Dismiss. (Appendix, pp. 12-13).

In its motion to dismiss, CBWW moved to strike the Suttons' strict liability claim and dismiss the Petition for failure to state a claim upon which relief could be granted. (Appendix, p. 12). The only basis CBWW provided in support of its three-sentence motion, without citing any legal authority, was that the Suttons' strict liability claim "has no legal basis in statutes or common law for imposing liability on a municipal operator of a water supply system for a loss to property owners resulting from alleged water main breaks." (Appendix, p. 12).

Pursuant to Iowa R. Civ. P. 1.431(4), the Suttons filed a resistance to CBWW's motion on December 10, 2021. (Appendix, pp. 14-18). In their resistance, the Suttons argued, in sum, that Iowa law expressly provides for strict liability claims against Iowa municipalities, such as CBWW, for damage caused by broken water mains. (Appendix, p. 15). In support of their argument, the Suttons' relied primarily on *Lubin v. Iowa City*, 131 N.W.2d 765 (Iowa 1964) and *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). (Appendix, pp. 15-16).

After the Suttons filed their resistance, CBWW filed a brief replying to the Suttons' resistance and in support of CBWW's motion to dismiss on December 17, 2021. (Appendix, pp. 19-26). For the first time in its reply brief, CBWW argued that it was immune from suit under the IMTCA. (Appendix, pp. 19-24).

On December 24, 2021, the Suttons filed a motion to strike CBWW's reply brief or, in the alternative, for leave to file a sur-reply brief. (Appendix, pp. 27-32). In their motion to strike, the Suttons argued that the manner in which CBWW was attempting raise the issue governmental immunity was procedurally improper, and that CBWW was required to plead and prove immunity as an affirmative defense. (Appendix, pp. 27-30). By Order dated January 3, 2022, the district court denied the Suttons' motion to strike, but granted the Suttons leave to file a sur-reply brief. (Appendix, p. 39).

The Suttons filed their sur-reply brief on January 21, 2022. (Appendix, pp. 41-48). In their sur-reply brief, the Suttons argued, in sum, that the tort of strict liability is still enforceable against Iowa municipalities for damages caused by broken water main under the plain language of the IMTCA, *Lubin*, and *Iowa Power*, and that CBWW was not immune from suit under the state-

of-the-art defense contained in Iowa Code § 670.4(1)(h). (Appendix, pp. 41-46).

The district court held a telephonic hearing on CBWW's motion to dismiss. *See* (Appendix, p. 49). Following the hearing, the district court entered an Order denying CBWW's motion to dismiss on March 4, 2022. (Appendix, p. 52).

III. Disposition of the Case.

In denying CBWW's motion to dismiss, the district court first noted that the general rule in examining claims of municipal immunity "is that of liability, with immunity being the exception." (Appendix, p. 51) (citing *Graber v. City of Ankeny*, 656 N.W.2d 157 (Iowa 2003)). With this general rule in mind, the district court then examined whether strict liability was enforceable under the IMTCA. (Appendix, p. 51). Before doing so, however, the district court noted that CBWW had withdrawn its motion to dismiss the Suttons' negligence claim. (Appendix, p. 51).

In examining whether strict liability was available under the IMTCA, the district court noted that CBWW was arguing that strict liability was not available because the IMTCA statutorily overruled any preexisting case law, and because the state-of-the-art defense explicitly exempts claims for "failure to upgrade, improve, or alter any aspect of an existing public improvement,"

but allows claims based on a "failure to repair, maintain, or operate." *See* (Appendix, p. 51) (quoting Iowa Code § 670.4(1)(h)). The district court then suggested that given the boundaries of immunity under Section 670.4(1)(h), "it would not logically follow to allow recovery under strict liability as well." (Appendix, p. 51).

However, the district court then stated, "it is important to note that strict liability is not specifically excluded under the IMTCA nor has it been specifically excluded by case law." (Appendix, p. 51) (citing *Jahnke v. Incorporated City of Des Moines*, 191 N.W.2d 780 (1971)). The district court then explained that "the Iowa Court of Appeals has acknowledged strict liability as a legitimate cause of action specifically for water main breaks *after* the enactment of the IMTCA." (Appendix, p. 51) (emphasis in original) (citing *Iowa Power & Light Company v. Board of Water Works Trustees of the City of Des Moines*, 281 N.W.2d 827 (Iowa Ct. App. 1979)). The district court noted that in *Iowa Power*, "the court found that water works engaged in an abnormally dangerous activity that would most likely result in the invasion of the property of another and that 'the nature of the activity engaged in by the enterprise is the crucial element in determining whether the doctrine of strict liability should be applied.'" (Appendix, pp. 51-52) (quoting *Iowa Power*, 281 N.W.2d at 831). As a result, the district court concluded that strict

liability was still enforceable under the IMTCA and denied CBWW's motion to dismiss. (Appendix, p. 52).

STATEMENT OF FACTS

This interlocutory appeal follows the denial of CBWW's Pre-Answer Motion to Dismiss. (Order Granting Interlocutory Appeal). As a result, the only facts available in this appeal are those contained in the Petition.

Angela Sutton purchased the Residence in 2018. (Appendix, p. 7). The Suttons are husband and wife, and live in the Residence. (Appendix, at p. 7).

The Residence is located at 302 Park Avenue in Council Bluffs, Iowa. (Appendix, p. 7). The Residence sits on the corner of Park Avenue and High School Avenue in Council Bluffs. (Appendix, p. 8).

From November 5, 2020, through December 30, 2020, there were a series of underground water main breaks that occurred near the Residence. (Appendix, p. 8). The Suttons contacted CBWW about the water main breaks on November 9, 2020, when they noticed water bubbling up in the intersection of Park Avenue and High School Avenue, which later developed into a large pool of standing water. (Appendix, p. 8).

CBWW is an Iowa municipality within the meaning of Iowa Code § 670.1. (Appendix, p. 7). CBWW was in exclusive control and was

responsible for maintaining and repairing the underground water main breaks that occurred near the Residence. (Appendix, p. 9).

Based on information available to the Suttons at the time they filed their Petition, CBWW had sent crews to inspect and repair the broken water mains on at least five different occasions from November 9 through December 30, 2020. (Appendix, p. 8). However, the underground water main breaks caused significant settlement damage to the Residence, including damage to the foundation and interior walls and doors. (Appendix, p. 8).

As a result of the damage the underground water main breaks caused to the Residence, the Suttons filed a Notice of Claim/Loss with CBWW on March 9, 2021. (Appendix, p. 8). The Suttons filed their Petition against CBWW on November 9, 2021. (Appendix, p. 11).

ARGUMENT

I. The district court did not err in denying CBWW's motion to dismiss after concluding that strict liability is still enforceable under the IMTCA for damages caused by broken underground water mains.

A. Preservation of Error.

The district court entered an Order denying CBWW's motion to dismiss on March 4, 2022. (Appendix, p. 49). On March 21, 2022, CBWW timely filed its Application for Interlocutory Appeal, which was granted on April 25, 2022. *See* Iowa R. App. P. 6.104(1)(b)(2); (Appendix, p. 54).

B. Scope and Standard of Review.

"A motion to dismiss ruling is reviewed for correction of errors at law." *Riley Drive Entm't I, Inc. v. Reynolds*, 970 N.W.2d 289, 295 (Iowa 2022) (citation omitted). "For purposes of reviewing a ruling on a motion to dismiss, we accept as true the petition's well-pleaded factual allegations, but not its legal conclusions." *Riley*, 970 N.W.2d at 295 (citation and quotation marks omitted); *see also Struck v. Mercy Health Services-Iowa Corp.*, 973 N.W.2d 533, 538 (Iowa 2022) (citation and internal quotation marks omitted) ("We construe the petition in its most favorable light, resolving all doubts and ambiguities in the plaintiff's favor.").

"Motions to dismiss are disfavored." *Benskin, Inc. v. West Bank*, 952 N.W.2d 292, 296 (Iowa 2020). "Iowa is a notice pleading state." *Benskin*, 952 N.W.2d at 296. "[A] court will rarely dismiss a petition for failure to state a claim upon which any relief may be granted." *Turner v. Iowa State Bank & Tr. Co.*, 743 N.W.2d 1, 3 (Iowa 2007) (citations omitted). Instead, a dismissal can only be granted "when the petition, viewed in its most favorable light, fails to present a right of recovery." *Riley*, at 295-96 (citation omitted); *see also Struck*, 973 N.W.2d at 538 (citation and internal quotation marks omitted) ("We will affirm a dismissal only if the petition shows no right of recovery under any state of facts.").

"We review rulings on statutory interpretation for correction of errors at law." *Struck*, 973 N.W.2d at 538 (citing *Goche v. WMG, L.C.*, 970 N.W.2d 860, 863 (Iowa 2022)).

C. Even after the enactment of the IMTCA, the doctrine of strict liability is still enforceable against Iowa municipalities for damage caused by broken underground water mains.

"In 1967, the legislature abrogated common law governmental tort immunity when it passed the [IMTCA]." *Kellogg v. City of Albia*, 908 N.W.2d 822, 825-26 (Iowa 2018) (citation omitted). The IMTCA provides that "[e]xcept as otherwise provided by this chapter, every municipality is subject to liability for its torts." Iowa Code § 670.2(1).

"The IMTCA 'does not expand any existing cause of action or create any new cause of action against a municipality.'" *Venckus v. City of Iowa*, 930 N.W.2d 792, 809 (Iowa 2019) (quoting Iowa Code § 670.4(3)). Instead, the IMTCA allows people to assert claims against municipalities that "otherwise would have been barred by the doctrine of sovereign immunity." *Venckus*, 930 N.W.2d at 809 (citing *Thomas v. Gavin*, 838 N.W.2d 518, 521 (Iowa 2013)). "The substance of any legal claim asserted under the IMTCA must arise from some source—**common law**, statute, or constitution—independent of the IMTCA." *Id.* at 809-10 (emphasis added).

Prior to the enactment of the IMTCA, the common law of Iowa was that municipalities could be held strictly liable in tort for damages caused by broken underground water mains. This principal was first recognized in *Lubin v. Iowa City*, 131 N.W.2d 765 (Iowa 1964).

In *Lubin*, the plaintiffs brought an action against the city for damages after a water main broke and flooded the basement of the plaintiffs' store and damaged merchandise. *Lubin v. Iowa City*, 131 N.W.2d 765, 766 (Iowa 1964). The plaintiffs in *Lubin* alleged three separate causes of action against the city. *Lubin*, 131 N.W.2d at 766. The first was based on the doctrine of strict liability (or liability without fault). *Id.* The second was based on the doctrine of res ipsa loquitur. *Id.* The third was based on negligence. *Id.*

In holding that the city could be held strictly liable for damage caused by its broken water mains, the Supreme Court explained:

> Whether we say the invasion of plaintiffs' property by water escaping from defendant's broken watermain constitutes a trespass or nuisance or results from an extra-hazardous activity as defined in the Restatement of Torts, Section 520, or is an application of the doctrine of Fletcher v. Rylands, or that the practice of leaving pipes in place until they break is negligence per se, we believe the facts in this case disclose a situation in which liability should be imposed upon by city without a showing of negligent conduct.
>
> It is neither just nor reasonable that the city engaged in a proprietary activity can deliberately and intentionally plan to leave a water main underground beyond inspection and maintenance until a break occurs and escape liability. A city or

> corporation so operating knows that eventually a break will occur, water will escape and in all probability flow onto the premises of another with resulting damage. We do not ordinarily think of water mains as being extra-hazardous but when such a practice is followed they become "inherently dangerous and likely to damage his neighbor's property" within the meaning of Pumphrey v. J.A. Jones Construction Co., supra. The risks from such a method of operation should be borne by the water supplier who is in a position to spread the cost among the consumers who are in fact the true beneficiaries of this practice and of the resulting savings in inspection and maintenance costs. When the expected and inevitable occurs, they should bear the loss and not the unfortunate individual whose property is damaged without fault of his own.

Id. at 770.

Similarly, after the enactment of the IMTCA, strict liability was still recognized as a viable theory of recovery against Iowa municipalities for damage caused by their broken water mains in actions brought under the IMTCA. In *Iowa Power*, the plaintiff brought an action against the defendant for damages caused by a broken water main under the IMTCA, which at the time was codified at Iowa Code chapter 613A. *See Iowa Power & Light Co. v. Board of Water Works Trustees of City of Des Moines*, 281 N.W.2d 827, 831 (Iowa Ct. App. 1979). "The IMTCA was moved from Iowa Code chapter 613A to Iowa Code chapter 670 by the Code editor in 1993." *Venckus*, 930 N.W.2d at 807 n.2.

In *Iowa Power*, the defendant argued on appeal that the trial court erred in finding it liable under the doctrine of strict liability (or liability without

fault) as announced in *Lubin*. *Iowa Power*, 281 N.W.2d at 831. Similar to CBWW, the defendant in *Iowa Power* argued that *Lubin* was inapplicable and that the appropriate theory to be applied was negligence. *Id.* In disagreeing with the defendant, the Court of Appeals explained:

> In this case, testimony shows that Water Works protects against broken water mains primarily by using good construction techniques and materials; mains normally are not inspected. Water Works, the party best able to prevent against damaged water mains, accepted the advantages of lower maintenance costs. . . . Consequently, as in *Lubin*, Water Works should bear the risk of loss for damage caused by those mains which leak or break, although through no fault of its own. Water Works is an enterprise engaged in an activity which will most likely result in the invasion of the property of another and, as between even those two parties which are in relatively equal economic positions, Water Works should be liable for losses caused by this activity.

Id. (citations omitted). The Court of Appeals then held that the trial court's application of strict liability was proper. *Id.* Later in the opinion, the Court of Appeals further explained:

> Because of the nature of the activity which Water Works engages in, it has been deemed strictly liable for damage that may result. Application of this theory does not make Water Works a general insurer. . . . Rather, Water Works is strictly liable to those parties who suffer a loss due to its leaking water mains since Water Works is in the better position to weigh the risk of either preventing against such leaks or of waiting until such leaks occur. . . . Water Works accepted the advantages of lower maintenance costs and now it must accept liability for the risk that it took. Consequently, defendant is a **tortfeasor since it is liable in tort under the doctrine of strict liability**.

Id. at 834 (citations omitted) (emphasis added). Thus, 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. *Id.*

On appeal, CBWW argues that district court erred in not striking the Suttons' strict liability claim because the definition of tort under the IMTCA is limited and does not give a remedy for strict liability. CBWW also argues that including strict liability as a tort under the IMTCA is inconsistent with subsequent amendments to the IMTCA's immunity provisions and that *Lubin* and *Iowa Power* have been inherently overruled or abrogated. However, CBWW's arguments are not supported by the plain language of the IMTCA, nor have *Lubin* or *Iowa Power* been inherently abrogated or overruled by subsequent amendments to the IMTCA or the case law interpreting the same.

D. Strict liability falls within definition of "tort" under the plain language of the IMTCA.

In denying CBWW's motion to dismiss, the district court did not specifically discuss the definition of tort under the IMTCA. However, on appeal CBWW argues that strict liability is not authorized under the IMTCA because the terms "strict liability" and "liability without fault" are not specifically listed in the definition of tort under Section 670.1(4). (CBWW Brief, p. 21). CBWW then resorts to certain canons of statutory construction

and claims that by not including the terms "strict liability" or "liability without fault" within the definition of tort, the legislature must have intended to exclude strict liability as a theory of recovery under the IMTCA. (CBWW Brief, pp. 21-26). CBWW's arguments are without merit based on the plain language of the IMTCA.

"In construing statutes, the court searches for the legislative intent as shown by what the legislature said, rather than what it should or might have said." Iowa. R. App. P. 6.904(3)(m). "We are required to use the plain language of the statute when construing statutes." *Warren Props. v. Stewart*, 864 N.W.2d 307 (Iowa 2015) (citation omitted). "When interpreting a statute, we look first to the statute's plain meaning." *Cox v. Iowa Dep't of Human Servs.*, 920 N.W.2d 545, 553 (Iowa 2018) (citation omitted). "When the text of a statute is plain and its meaning is clear, the court should not search for meaning beyond the express terms of the statute." *Cox*, 920 N.W.2d at 553 (citation and internal quotation marks omitted); *see also Commerce Bank v. McGowen*, 956 N.W.2d 128, 133 (Iowa 2021) (citation and internal quotation marks omitted) ("If the text of a statute is plain and its meaning is clear, we will not search for a meaning beyond the express terms of the statute or resort to rules of construction."). "If unambiguous, we will the apply the statute as written." *Cox*, 920 N.W.2d at 553 (citation omitted). "If the language of the

statute is ambiguous or vague, we may resort to other tools of statutory interpretation." *Commerce Bank*, 956 N.W.2d at 133 (citation and internal quotation marks omitted).

The IMTCA states that "[e]xcept as otherwise provided by this chapter, every municipality is subject to liability for its torts." Iowa Code § 670.2(1). The IMTCA then specifically defines torts as follows:

> "*Tort*" means **every civil wrong** which results in wrongful death or injury to person or injury to property or injury to personal property or property rights **and includes but is not restricted to** actions based on 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. § 670.1(4) (italics in original) (emphasis added).

The definition of tort under the IMTCA is not vague or ambiguous, nor does CBWW argue the same on appeal. Rather, the Supreme Court has repeatedly held that Section 670.2 "imposes liability for *all* torts except those contained in [Section 670.4]." *Jahnke v. City of Des Moines*, 191 N.W.2d 780, 782-83 (Iowa 1971) (emphasis in original). As discussed above, the rule of law in Iowa is that regardless of whether it is called nuisance, trespass, negligence per se, liability without fault, or ultrahazardous activity, Iowa municipalities have been deemed tortfeasors and strictly liable in tort for damage to property caused by water mains that are placed underground

beyond normal inspection and maintenance until they break. *See Lubin*, 131 N.W.2d at 766; *Iowa Power*, 281 N.W.2d at 831. Thus, contrary to CBWW's argument, strict liability falls within the impairment of any right under any rule of law category contained in Section 670.1(4). *See* Iowa Code § 670.1(4).

Moreover, even if strict liability (or liability without fault) does not fall within one of the enumerated categories listed in Section 670.1(4), CBWW's suggested interpretation ignores the "includes but is not restricted to" language in Section 670.1(4). And under CBWW's suggested interpretation, the phrase "includes but is not restricted to" contained in Section 670.1(4) would be rendered superfluous.

"Normally, we do not interpret statutes so they contain surplusage." *Thomas v. Gavin*, 838 N.W.2d 518, 524 (Iowa 2013) (citation omitted); *see also Iowa Auto Dealers Ass'n v. Iowa Dep't of Revenue*, 301 N.W.2d 760, 765 (Iowa 1981) (citation omitted) (stating that "a statute should not be construed so as to make any part of it superfluous unless no other construction is reasonably possible"). Instead, "[w]e seek an interpretation that does not render portions of [a statute] redundant or irrelevant." *State v. Keutla*, 798 N.W.2d 731, 734 (Iowa 2011) (citation omitted); *see also* Iowa Code § 4.4(2) ("In enacting a statute, it is presumed that . . . [t]he entire statute is intended to be effective.").

In ignoring the plain language of Section 670.1(4) and arguing certain canons of construction, CBWW claims that Iowa appellate courts have not addressed the "includes but is not restricted to" language and goes on to discuss a number of out-of-state cases. However, the Supreme Court interpreted very similar language in *Hawkeye Land Co. v. Iowa Utilities Board*, 847 N.W.2d 199 (Iowa 2014). Therefore, the non-binding cases CBWW relies upon in advancing its interpretation of the IMTCA are not applicable to the present case.

In *Hawkeye*, one of the issues the Supreme Court considered was whether an independent transmission company, ITC Midwest, was a public utility within the meaning of Iowa Code § 476.27 (the railroad crossing statute). *Hawkeye Land Co. v. Iowa Utils. Bd.*, 847 N.W.2d 199, 214 (Iowa 2014). After quoting the applicable statute and noting the rule of statutory construction that the expression of one thing implies the exclusion of others not mentioned (similar to CBWW), the Supreme Court explained as follows:

> The legislature included a list of entities that are considered public utilities for the purpose of *section 476.27*. Notably, the legislature did not state a public utility "includes *but is not limited to*" the entities explicitly listed in *section 476.27(1)(e)*. Yet, in a preceding section, "direct expenses" are defined with a list of examples introduced with the phrase "includes, *but is not limited to*, any or all of the following." . . . The use of such a phrase in one definition but not the other indicates the legislature was selective in choosing which list is a closed set.

Hawkeye, 847 N.W.2d at 215 (emphasis in original) (citations and footnotes omitted). Based on the foregoing, the Supreme Court concluded that "the legislature, by omitting the phrase 'but not limited to' in section 476.27(1)(e), intended to limit the entities considered public utilities to those expressly mentioned." *Id.*

Here, Section 670.1(4) contains the phrase "includes but is not restricted to". Iowa Code § 670.1(4). Applying the rationale of *Hawkeye*, it follows that by including the phrase "includes but is not restricted to" in Section 670.1(4), the legislature **did not** intend to limit the definition of tort under the IMTCA to the closed set of civil wrongs listed in the statute. (emphasis added). Such a construction comports with the general rule mentioned above that Section 670.2 "imposes liability for *all* torts except those contained in [Section 670.4]." *Jahnke*, 191 N.W.2d at 782-83 (emphasis in original).

Moreover, in Section 670.1 of the IMTCA, the legislature included the phrases "includes but is not limited to" and "includes but is not restricted to" in subsections (3) and (4), but omitted such phrases in subsections (1) and (2) where it defined "governing body" and "municipality". *See* Iowa Code § 670.1(1)-(4). Under the rationale of *Hawkeye*, the legislature's selective use of these particular phrases in the various subsections of Section 670.1

indicates the legislature intended to limit the definition of "governing body" and "municipality" to closed sets, but did not intend to limit the definitions of "officers" or "torts". *See id.*

In short, the IMTCA's definition of tort is analogous to an insurance policy where all losses are covered, except those specifically excepted or exempted from coverage under a different section. Under the plain language of Section 670.1(4), the definition of tort is not limited to a closed set and imposes liability for **all** torts, including strict liability, except for those that are specifically excluded or exempted in Section 670.4. *See Jahnke*, 191 N.W.2d at 782-83 (emphasis added). Therefore, because the IMTCA imposes liability for all torts except those listed in Section 670.4, the Suttons' strict liability claim falls within the definition of tort under Section 670.1(4). *See* Iowa Code § 670.1(4).

E. Strict liability has not been specifically excluded or exempted under the Section 670.4, or subsequent case law interpreting amendments to the IMTCA.

Even though the district court did not discuss the definition of tort under the IMTCA in denying CBWW's motion to dismiss, the district court did state that "it is important to note that strict liability is not specifically excluded under the IMTCA nor has it been specifically excluded by case law." (Appendix, at p. 51) (citing *Jahnke v. Incorporated City of Des Moines*, 191

N.W.2d 780 (Iowa 1971)). On appeal, CBWW claims the district court erred in this conclusion because including strict liability within the definition of tort under the IMTCA would be inconsistent with the exemption contained in Section 670.4(1)(h) (i.e., the state-of-the-art defense), which was enacted after *Lubin* and *Iowa Power*. However, the district court was correct in its analysis based on the plain language of the IMTCA.

"Section 670.2 is an express imposition of liability." *Thomas*, 838 N.W.2d at 523 (citing Iowa Code § 670.2 and *Jahnke*, 191 N.W.2d at 783). "The only potentially applicable exceptions to liability within chapter 670 are found in *section 670.4*." *Id.* (emphasis in original). In other words, liability under the IMTCA is the rule, and immunity is the exception. *Breese v. City of Burlington*, 945 N.W.2d 12, 23 (Iowa 2020); *see also Schmitz v. City of Dubuque*, 682 N.W.2d 70, 74 (Iowa 2004) (citations omitted) ("Our cases have held that liability under the tort claims acts is the rule and immunity is the exception."). The district court recognized this rule in denying CBWW's motion to dismiss. *See* (Appendix, p. 51) (citing *Graber v. City of Ankeny*, 656 N.W.2d 157 (Iowa 2003)).

Section 670.4 provides that "[t]he liability imposed by section 670.2 shall have no application to any claim enumerated in this section." Iowa Code § 670.4(1). Section 670.4 then goes on to list a number of claims under which

Iowa municipalities are exempted and immune from the liability imposed by Section 670.2, none of which include any reference to "strict liability" or "liability without fault". *See* Iowa Code § 670.4(1)(a)-(q).

"We have said in the past, [t]he legislature is presumed to know the state of the law, including case law, at the time it enacts a statute." *Iowa Farm Bureau Fed'n v. Envtl. Prot. Comm'n*, 850 N.W.2d 403, 434 (Iowa 2014) (citations and internal quotation marks omitted). And as CBWW points out, some of the exemptions contained in Section 670.4 were enacted after *Iowa Power*. Therefore, had the legislature intended to immunize claims against municipalities for "strict liability" or "liability without fault" under the IMTCA, the legislature could have added or specifically referenced such claims within the exemptions contained in Section 670.4(1). But as the district court properly recognized, "strict liability" and "liability without fault" are not specifically excluded under the plain language of Section 670.4.

In another attempt to avoid the plain language of the IMTCA, in particular the legislature's omission of "strict liability" or "liability without fault" from the exemptions contained in Section 670.4, CBWW argues that including strict liability within the definition of tort under the IMTCA does not comport with the timing of the legislature's enactment and language of the state-of-the-art defense, or the holdings of *Kellogg v. City of Albia*, 908

N.W.2d 822 (Iowa 2018) and *Hansen v. City of Audubon*, 378 N.W.2d 903, 906 (Iowa 1985). However, CBWW's reliance on the state-of-the-art defense is premature and misplaced. *Kellogg* and *Hansen* also do not inherently overrule or abrogate the holdings in *Lubin* or *Iowa Power*.

1. Strict liability under the IMTCA is not inconsistent with the state-of-the-art defense contained in Section 670.4(1)(h).

Under Section 670.4(1)(h), municipalities are immune from liability for:

> Any claim 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 improvement as defined in section 384.37, subsection 19, or other public facility that 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. A claim under this chapter shall not be allowed for failure to upgrade, improve, or alter any aspect of an existing public improvement or other public facility to new, changed, or altered design standards. This paragraph shall not apply to claims based upon gross negligence. This paragraph takes effect July 1, 1984, and applies to all cases tried or retried on or after July 1, 1984.

Iowa Code § 670.4(1)(h). "Immunity under section 670.4(1)(h), which is commonly referred to as the state-of-the-art defense, has two purposes." *Breese v. City of Burlington*, 945 N.W.2d 12, 22 (Iowa 2020). "First, the defense 'alleviate[s] municipal responsibility for design or specification defects, as judged by present state of the art standards, when the original

designs or specifications were proper at the time the public facility was constructed.'" *Breese*, 945 N.W.2d at 22 (citations omitted). "Second, it instructs courts to measure a municipality's duty to avoid nonconstitutional torts by the generally recognized engineering or safety standard, criteria, or design theory in existence at the time of the construction or reconstruction." *Id.* (internal quotation marks and citations omitted).

Governmental immunity, in particular the state-of-the-art defense, is an affirmative defense that CBWW must plead and prove. *See id.* at 23 ("We disavow any language in our past cases to the contrary and place the burden on the party invoking the state-of-the-art defense to plead and prove it as an affirmative defense going forward."). CBWW attempts to circumvent this burden and raise the affirmative defense of governmental immunity in connection with its pre-answer motion to dismiss by arguing that interpreting the IMTCA to include strict liability would be inconsistent with the timing and language of the state-of-the-art defense.

However, in the Petition, the Suttons did not allege that CBWW was negligent in its design or specification, adoption of design or specification, or construction or reconstruction of the water mains that ultimately broke and caused damage to the Residence. *See* Iowa Code § 670.4(1)(h). The Suttons also did not allege that CBWW failed to upgrade, improve, or alter any aspect

of the existing water mains to "new, changed, or altered design standards." *See id.*

Instead, in Count I of the Petition, the Suttons are claiming that CBWW is strictly liable in tort as a result of the inherent danger associated with the underground water mains that ultimately broke and caused damage to the Residence. *See* (Appendix, pp. 7-9). And as the district court recognized, it is the nature of the activity engaged in by CBWW that is the crucial element in determining whether strict liability applies under the IMTCA. (Appendix, pp. 51-52) (quoting *Iowa Power*, 281 N.W.2d at 831). Pursuant to *Lubin* and *Iowa Power*, that question has already been answered in the affirmative with respect to the potential for strict liability for damages caused by breaks in underground water mains. *Lubin*, 131 N.W.2d at 770; *Iowa Power*, 281 N.W.2d at 831. Thus, not only is the state-of-the-art defense premature and inapplicable, but the district court's conclusion that there is the potential for strict liability under the IMTCA for broken underground water mains is not inconsistent with such affirmative defense.

2. *Lubin* and *Iowa Power* have not been inherently overruled by recent case law interpreting the IMTCA.

Notwithstanding the above, CBWW argues that *Kellogg v. City of Albia*, 908 N.W.2d 822 (Iowa 2018) and *Hansen v. City of Audubon*, 378 N.W.2d 903, 906 (Iowa 1985) have inherently overruled *Lubin* and *Iowa*

Power because they contain no discussion of strict liability or liability without fault. However, just because *Kellogg* and *Hansen* do not specifically discuss strict liability, that does not mean *Kellogg* and *Hansen* inherently overrule or abrogate the holdings of *Lubin* or *Iowa Power*.

For example, in *Kellogg* the plaintiff alleged that the city was negligent in the installation of a storm sewer pipe, which flooded when it rained. *Kellogg v. City of Albia*, 908 N.W.2d 822, 826 (Iowa 2018). One key distinction between the present case and *Kellogg*, however, is that here the underground water mains at issue broke, just like the water mains in *Lubin* and *Iowa Power*. *Kellogg*, on the other hand, involved a properly functioning storm sewer that was overburdened and not beyond normal inspection and maintenance. *Id.* at 830.

Further, while it does not appear the plaintiff in *Kellogg* alleged strict liability, she did allege that the flooding constituted a nuisance. *Id.* at 826. And in its analysis, the Supreme Court explained that "a pure nuisance claim based on harm inherent in an activity falls outside the immunity statute." *Id.* at 830. Similar to district court's analysis in the present case, in *Kellogg* the Supreme Court explained that "[t]he inherent danger of a pure nuisance claim emanates from the activity engaged in by the defendant, not the activity's consequent irritants." *Id.* (citation omitted).

Again, regardless of whether it is called trespass, nuisance, negligence per se, liability without fault, or an ultrahazardous activity, a municipality's practice of leaving water mains underground beyond normal inspection and maintenance until their inevitable failure has already been deemed inherently dangerous resulting in the application of strict liability under the IMTCA. *Lubin*, 131 N.W.2d at 770; *Iowa Power*, 281 N.W.2d at 831. Given the express holdings of *Lubin* and *Iowa Power* and the facts of this case, CBWW's argument that *Kellogg* inherently overrules *Lubin* and *Iowa Power* is incorrect.

Similarly, *Hansen* involved the infiltration of storm water into the city's sanitary sewer system which caused the plaintiff's sewage lines to backup into her basement. *Hansen v. City of Audubon*, 378 N.W.2d 903, 907 (Iowa 1985). In *Hansen*, the plaintiff alleged that the sewage backup created a nuisance and that the city was negligent. *Hansen*, 378 N.W.2d at 904. CBWW argues that because *Hansen* also did not include any discussion of strict liability or liability without fault, it also inherently overrules *Lubin* and *Iowa Power*.

However, there is no indication in either *Kellogg* or *Hansen* that the plaintiffs alleged strict liability against the municipalities in those cases, presumably because they did not involve broken water mains similar to the water mains at issue in this case. Further, just because *Kellogg* and *Hansen*

do not include a discussion of strict liability, presumably because it was not alleged (as was done by the Suttons, and the plaintiffs in *Lubin* and *Iowa Power*), that does not mean those cases inherently overrule or abrogate the holdings of *Lubin* and *Iowa Power* with respect to the potential for strict liability under the IMTCA for broken underground water mains.

Again, relying on *Iowa Power*, the district court noted that strict liability has been acknowledged "as a legitimate cause of action specifically for water main breaks *after* the enactment of the IMTCA." (Appendix, p. 51) (citing *Iowa Power*, 281 N.W.2d 827) (emphasis in original). The district court also recognized that *Lubin* and *Iowa Power* have not been specifically overruled or abrogated by statute or subsequent case law. *See* (Appendix, p. 51) (citing *Jahnke*, 191 N.W.2d 780).

Additionally, after the 1983 amendments to the IMTCA, the strict liability holding of *Lubin* was acknowledged by the Supreme Court in both *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). In *Maguire*, the Supreme Court addressed the question of whether the plaintiff's complaint stated a claim for strict liability based on an alleged abnormally dangerous activity. *Maguire v. Pabst Brewing Co.*, 387 N.W.2d 565, 568 (Iowa 1986). Even though the case did not involve a municipality or broken water mains, the

Supreme Court concluded that the allegations of the plaintiff's complaint did not state a claim or cause of action "under Iowa law for the type of liability recognized in sections 519 and 520 of the Restatement or our decisions in *Lubin* . . . ." *Maguire*, 387 N.W.2d at 569.

Similarly, in *O'Tool*, the Supreme Court concluded that it that did not view conservation terracing as an inherently dangerous activity that would subject the user to strict liability. *O'Tool v. Hathaway*, 461 N.W.2d 161, 164 (Iowa 1990). The Supreme Court then cited *Lubin* as contrary authority "imposing liability without fault on municipality because damage caused by unmaintained and bursting water mains was 'not accidental or unexpected'." *O'Tool*, 461 N.W.2d at 164.

While *Maguire* and *O'Tool* did not involve municipalities, broken water mains, or specifically address the continuing enforceability of strict liability under the IMTCA, the takeaway is that those cases still cited to *Lubin* as authority on when to apply strict liability. And similar to the district court in this case, in *Maguire* and *O'Tool* the court focused on the inherent danger of the activity engaged in by the defendant in determining whether to apply strict liability. Again, that question has already been answered in the affirmative with respect to the inherent danger associated with underground water mains beyond normal maintenance and inspection that ultimately break

and cause damage, regardless of whether it is called nuisance, trespass, negligence per se, liability without fault, or an ultrahazardous activity. *Lubin*, 131 N.W.2d at 770; *Iowa Power*, 281 N.W.2d at 831.

At this stage of the proceeding, *Lubin* and *Iowa Power* are directly on point with the facts of the present case and are controlling precedent. Both cases apply the tort of strict liability to municipalities for damage caused by the inherent danger associated with broken underground water mains. In other words, at this stage of the proceeding there is a conceivable set of facts under which CBWW can be held strictly liable under the IMTCA for the damage its underground broken water mains caused to the Residence. *See Lubin*, 131 N.W.2d at 770; *Iowa Power*, 281 N.W.2d at 831.

Therefore, contrary to CBWW's arguments, the amendments to the IMTCA exemptions after *Lubin* and *Iowa Power*, specifically the state-of-the-art defense, and the holdings of *Kellogg* and *Hansen* do not effectively or inherently abrogate or overrule *Lubin* and *Iowa Power*. They are also not inconsistent with the district court's conclusion that strict liability is still enforceable under the IMTCA for damage caused by a municipality's underground water mains that ultimately break. As a result, the district court's denial of CBWW's motion to dismiss should be affirmed, and this case should be remanded for further proceedings.

CONCLUSION

In moving to strike the Suttons' strict liability claim, CBWW ignores the plain language of the IMTCA and is attempting to avoid long-standing Iowa precedent. But the plain language of the IMTCA, as well as the holdings of *Lubin* and *Iowa Power*, support the district court's ultimate conclusion that the doctrine of strict liability is still enforceable under the IMTCA for damages caused by a municipality's underground water mains that ultimately burst.

Therefore, the district court did not err in denying CBWW's motion to strike the Suttons' strict liability claim. Accordingly, the Suttons respectfully request that the district court's denial of CBWW's motion to dismiss be affirmed, and that this matter be remanded for further proceedings.

REQUEST FOR ORAL ARGUMENT

The Suttons also request that they be heard in oral argument on the issue presented in this appeal.

Dated this 26th day of August, 2022.

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CERTIFICATE OF COMPLIANCE

This brief complies with the typeface requirements and type-volume limitation of Iowa Rs. App. P. 6.903(1)(d) and 6.903(1)(g)(1) or (2) because this brief has been prepared in a proportionally spaced typeface using Times New Roman in 14-point type and contains 6,984 words, excluding parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

/s/ Nicholas F. Sullivan — August 26, 2022
Signature — Date

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I hereby certify the cost of printing the foregoing Proof Brief of Plaintiffs-Appellees was the sum of $0.00.

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The undersigned hereby certifies that on the 26th day of August, 2022, the foregoing proof brief was electronically filed with the Clerk of the Supreme Court using the Court's electronic filing system, which will send notification of such filing to the following individual(s):

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