THE SUPREME COURT OF IOWA

Supreme Court No. 22-0917

Black Hawk County No. LACV141273

RON MYERS

Plaintiff-Appellant

v.

CITY OF CEDAR FALLS, IOWA

Defendant-Appellee

APPEAL FROM THE IOWA DISTRICT COURT FOR BLACK HAWK COUNTY

THE HONORABLE JOEL DALRYMPLE

DEFENDANT-APPELLEE FINAL BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

U.S. Supreme Court

Iowa Supreme Court

Iowa Court of Appeals

Iowa Code

Iowa Legislative History

Iowa Administrative Code

STATEMENT OF ISSUES PRESENTED FOR REVIEW

ROUTING STATEMENT

We respectfully submit that this is a case that should be retained by the Iowa Supreme Court pursuant to Iowa Rule 6.1102(2)(f). We believed this is a case presenting a substantial question of enunciating principles involving Iowa Code §670.4(1)(l)(immunity of municipality for claims relating to a swimming pool); interpretation of enforcement provisions of the Iowa Department of Public Health regulations, and the application of *Sanon v. City of Pella*, 865 N.W.2d 506 (Iowa 2015)(a decision involving three dissenting justices).

STATEMENT OF THE CASE

We concur with Appellant's Statement of the Case with the exception that Appellant filed his Motion to Reconsider on May 2, 2022, not February 5, 2022 (App. 20-28).

STATEMENT OF THE FACTS

The Falls Aquatic Center and Diving Board

The City of Cedar Falls, Iowa (hereinafter the City) is an Iowa municipality that owns and operates a community swimming pool facility known as The Falls Aquatic Center (hereinafter "The Falls"), located at 3025 S. Main Street, Cedar Falls, Iowa, 50613. (App. 102 ¶¶2&3) After reviewing the submitted plans for construction of the pool, the Iowa Department of Public Health (hereinafter IDPH) approved the issuance of the permit on July 6, 2005. (App. 102 ¶1, 105)

Since its inception a 16-foot Duraflex diving board served as the Falls' three-meter diving board. (App. 102 ¶5) The original diving board was replaced after the 2012 pool season with the same 16-foot Duraflex model that was originally installed with the pool construction. The board was installed for use in the 2013 pool season and was in its seventh season of use at the time of the accident at issue in this case. As part of approving the construction of the pool and issuing the permit to operate as a public pool, the board was approved by IDPH. (App. 102 ¶5, 105-06) As both the Duraflex brochure and the Recreonics webpage denote, this is a 16-foot aluminum springboard "coated with a slip-resistant surface" that is used for recreational diving at commercial facilities. (App. 102–03 ¶6, 106-12)

The pool is inspected annually by the Black Hawk Health Department (hereinafter BHHD). The inspection report immediately preceding the accident in question was completed on June 5, 2019. (App. 103–04 ¶8, 113-15, 196 (P.28 LL.15-21)) The inspections cover the entire facility, including the diving boards. In no inspection report over the years was there any mention of any deficiency in the diving boards. If there were any deficiencies in the diving board discovered by the inspector, it would have been noted in the report and the inspector would have directed the pool to take the board out of service until the deficiency was corrected. There were no diving board safety issues discovered on the date of the inspection. (App. 103–04 ¶8, 113-16, 196 (P.28 LL.15-17), 197 (P.29 LL.5-7)) The city has

not had any inspections where the diving board was listed as defective or unsafe. (App. 103–04 ¶8)

Chris Schoentag (hereinafter Schoentag), a certified pool operator, was the recreation supervisor at the time of the accident. (App. 102 ¶1, 190 (P.3 LL.7-10), 191 (P.5 LL.18-21), 192 (P.10 L.19- P.11 L.13)) He was responsible for getting the Falls ready for opening each year, handling any issues that arise during the season, and closing the facility at the end of the year. He was responsible for maintenance of the diving board. He performs morning checks and walks through the pool area checking things out 3-4 times per day. He is the person who oversees the installing of the board at the beginning of the pool season and the removal of the board at the end of the season. Each time Schoentag will inspect the boards to see if they are cracked or have any deformities or deficiencies. When installing the board in 2019 Schoentag believed the board had sufficient friction on the surface. When asked whether there was "any way of testing or determining whether there is or is not sufficient friction on the surface" Schoentag said there was none he knew of. He just uses is best judgment. (App. 103 ¶7, 192 (P.11 LL.7-26 & P.12 LL.4-24), 194 (P.18 LL.2-6), 195 (P.22 L.24 – P.24 L.12), 198 (P.35 L.8-P.36 L.3))

No employee of the City has been charged or convicted of any criminal offense related to the operation of The Falls. (App. 104 ¶11)

The Accident

On July 19, 2019, Ron Myers (hereinafter Myers) was at The Falls with his wife and kids. On his third use of the diving board, attempting a cannonball, he "ran forward on the board and bounced near the end of the board when his left leg slipped" causing the weight to shift to the right leg. (App. 05 ¶4) His right knee over flexed as he came off the board and it caused him to suffer a complete tear of his quadriceps tendon over his right knee. (App. 117, 118, 119, 120-23, 130 (P.2 LL16-18), 131–135 (P.7 L.18 – P.22 L.23), 137 (P.29 L.18-P.31 L.11))

Claims Asserted by Myers

Myers' Petition, filed on October 23, 2020, asserted a premises liability claim alleging the City negligently failed to provide a diving board with an "adequate" slip resistant surface. (App. 06 ¶¶7-10) In his deposition, Myers complains the diving board did not have "sufficient grit as to prevent slippage." (App. 145 (P.63 LL.5-22)

The claims of negligence included:

a. Failure to provide an *adequate* slip resistant surface on the diving board;
b. Failure to warn of the hazardous conditions;
c. Failure to close the area until such time as the area could be made safe;
d. Failure to maintain the diving board in a proper condition; and
e. Failing to correct the dangerous condition from the diving board.

(App. 06 & 08, ¶¶12 & 20)(emphasis added). The focus of Myers' appeal involves his claim that the City did not provide an adequate slip resistant surface on the diving board.

Myers claims that the failure to provide an "adequate" slip resistant surface on the diving board violated 641 IAC 15.4(4)(c)(6) which states:

> 15.4: Swimming pools shall be operated in a safe, sanitary manner and shall meet the following operational standards.
>
> (4) Safety.
>
> (c) Diving areas.
>
> (6) Diving boards and platforms shall have a slip resistant surface

641 *IAC* 15.4(4)(c)(6). (App. 06 & 08, ¶¶13 & 21)

Myers also cites to 641 IAC 15.5(13)(a)(5) which states in relevant part:

> 15.5: A swimming pool constructed after May 4, 2005, shall comply with the following standards….
>
> (13) Safety.
>
> (a.) Diving areas.
>
> (5) Diving boards and platforms shall have a slip resistant surface

641 IAC 15.5(13)(a)(5) (*Id.*) There is no dispute in this case that the diving board installed upon pool construction had a slip-resistant surface, so the latter provision is not relevant to this case.

Myers' argues that an employee of the City committed a criminal offense by allowing the diving board surface to reach the point where it did not have an "adequate" slip resistant surface on the diving board. (App. 06, ¶13)[1] He alleges that, pursuant 641 IAC 15.8, such a violation constituted a simple misdemeanor. (App. 07 & 08, ¶¶14 & 22) That provision states:

> A person violating a provision of this chapter shall be guilty of a simple misdemeanor pursuant to the authority of Iowa Code section 135I.5. Each day upon which a violation occurs constitutes a separate violation.
>
> These rules are intended to implement Iowa Code chapter 135I.

641 IAC 15.8. In summary, Myers alleges that allowing the board to become inadequately slip resistant constituted a criminal offense, removing the statutory immunity provided the city under Iowa Code Section 670.4(1)(l). (App. 07 & 08, ¶¶15 & 23)[2]

In its Motion for Summary Judgment the City argued that:

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[1] Myers later amended his Petition to remove the words "adequate", but, as can be seen by his briefing, his argument is that the slip resistant diving board, through age and alleged lack of maintenance, was no longer adequately slip resistant. (*See* App. 05–10)

[2] There is no allegation being made that any officer or employee of the City committed any act or omission that would constitute actual malice under Iowa Code §670.4(1)(l). (*See* App. 05–10, 145 (P.61))

1) The City was in compliance with state pool laws and regulations pertaining to the diving board and that there is no evidence to the contrary;
2) There is no regulatory standard about what constitutes "adequate" or "inadequate" slip resistance on diving boards making Plaintiff's argument to this effect is invalid; and
3) In light of points 1 & 2, there is no evidence of a criminal offense that would remove the immunity granted by Iowa Code §670.4(1)(l) for claims based upon the City's operation of the Falls.

As such, the City argued to the district court that it was entitled to summary judgment and dismissal of the claims against it pursuant to Iowa Code §670.4(1)(l). The District Court agreed. (App. 15–19, 29–30)

The City asserts that the majority of factual claims made in Myers' Appellant Brief are not relevant to the issue of whether criminal acts were committed. They would only be relevant for a subsequent negligence claim should the matter survive summary judgment on the issue of statutory immunity.

ARGUMENT

BRIEF POINT I

SUMMARY JUDGMENT WAS PROPER BECAUSE ABSENT ANY REGULATORY CRITERIA TO DETERMINE THE REQUISITE LEVEL OF SLIP RESISTANCE OF A DIVING BOARD AND ABSENT ANY AGENCY NOTICE OF REGULATORY NON-COMPLIANCE, THERE WAS NO EVIDENCE OF A KNOWING VIOLATION OF A STATUTE OR REGULATION TO SUPPORT A FINDING OF CRIMINAL OFFENSE THAT WOULD REMOVE THE CITY OF CEDAR FALLS FROM THE STATUTORY EXEMPTION OF LIABILITY PROVIDED BY IOWA CODE 670.4(1)(l).

PRESERVATION OF ERROR AND STANDARD OF REVIEW

We do not dispute Appellant's statement regarding preservation of error and standard of review.

A. Absent Notice, Opportunity To Cure, And Failure to Cure, There Is No Misdemeanor or Crime Within the Legislative Framework of Iowa Code Chapter 135I

(i) Legislative History

(a) 89 Acts Chapter 291 - Swimming Pools and Spas

In 1989 the Iowa legislature enacted Iowa Code Chapter 135J. Chapter 135J is now Iowa Code Chapter 135I. 89 *Acts Chapter* 291 *Swimming Pools and Spas*, HF 373. The introduction to the legislation says it is "an act relating to the registration, regulation, and inspection of swimming pools and spas, and providing penalties." *Id.* What is now Iowa Code §670.4(1)(l), carving out immunity for

municipalities for claims relating to swimming pools and spas, was adopted in the same action in section 8 of the legislation. The legislation granted the same immunities to the state for claims relating to swimming pools and spas. *Id.*[3] These provisions should be viewed together in determining the purpose of the legislation as a whole and the meaning and purpose of its individual parts. *Iowa Ins. Inst. v. Core Grp. of Iowa Ass'n for Just.*, 867 N.W.2d 58, 72 (Iowa 2015) ("[W]e read statutes as a whole rather than looking at words and phrases in isolation." *Id., citing Phillips v. Chi. Cent. & Pac. R.R.,* 853 N.W.2d 636, 649 (Iowa 2014)(statutory terms are often "clarified by the remainder of the statutory scheme"); *Den Hartog v. City of Waterloo,* 847 N.W.2d 459, 462 (Iowa 2014)("We have often explained we construe statutory phrases not by assessing solely words and phrases in isolation, but instead by incorporating considerations of the structure and purpose of the statute in its entirety."); and *In re Estate of Melby,* 841 N.W.2d 867, 879 (Iowa 2014)("When construing statutes, we assess not just isolated words and phrases, but statutes in their entirety...."). *Id*

[3] Iowa Code §613A.4 was changed to Iowa Code §670.4(1)(l) by the code editor in 1993. Iowa Code §25A14 was changed to Iowa Code §669.14(13) by the code editor in 1991.

(b) Iowa Code Chapter 135I

The Falls is a swimming pool as defined by Iowa Code Chapter 135I. *Iowa Code* § 135I.1(4) It is owned and operated by the City. The City is a municipality as defined by Iowa Code §670.1(2). *Iowa Code* §670.1(2) (App. 102, ¶¶2-4) As a swimming pool owned and operated by a municipality, Iowa Code 135I applies to the Falls as does Iowa Code §670.4(1)(l). *Iowa Code* §135I.2 & §670.4(1)(l). The Falls is a pool that is registered and permitted by the IDPH in compliance with Iowa Code §135I.3. *Iowa Code* §135I.3. (App. 105)

IDPH is given responsibility under Iowa Code Chapter 135I to regulate the operation of public swimming pools. *Iowa Code* §135I.4. In addition to the list of "shalls" (like the duty to conduct seminars and training sessions and disseminating information regarding health practices, safety measures, and operating procedures to registered pool facilities), IDPH is *allowed* under the listing of "mays" to:

1. Periodically inspect swimming pools for the purpose of detecting and eliminating health or safety hazards;

2. Establish minimum safety and sanitation criteria for the operation and use of swimming pools and spas.

3. Establish minimum qualifications for swimming pools.

4. Establish and collect inspection fees to defray the cost of administering Iowa Code Chapter 135I.

5. Adopt rules in accordance with chapter 17A for the implementation and enforcement of this chapter and the establishment of fees.

6. Enter into agreements with a local board of health to implement the inspection and enforcement provisions of "this chapter" [referencing Iowa Code Chapter 135I].

Iowa Code § 135I.4. BHHD is an inspection agency for the IDPH. *Iowa Code* §135I.1(2); *Iowa Code* §137.102; and 641 *IAC* 15.3. BHHD inspects the Falls on an annual basis. (App. 103 ¶8, 113–14, 115 ¶¶3-5)

Iowa Code Chapter 135I, has a penalty provision that states in relevant part, that "a person who violates a provision of *this chapter* commits a simple misdemeanor." *Iowa Code* §135I.5 (emphasis added). "This chapter" obviously means Iowa Code Chapter 135I and not any other code chapter or administrative regulation. *See e.g.*, *Homan v. Branstad*, 887 N.W.2d 153, 166 (Iowa 2016)("Absent a statutory definition or an established meaning in law, words in a statute are given their ordinary and common meaning by considering the context within which they are used. Under the guise of construction, an interpreting body may not extend, enlarge, or otherwise change the meaning of the statute." *Id.*) Based on the statutory language, it would appear that §135I.5 violations refer to a pool or spa not being registering as required by section 135I.3, a person not paying the fees allowed by the statute pursuant to section 135I.4(4), a pool not complying with the enforcement

procedures adopted in accordance with Iowa Code Chapter 17A as allowed by the statute pursuant to section 135I.4(5), or even an unauthorized person or entity, acting outside of agreement of IDPH in violation of section 135I.4(6), who trying to do inspections and enforcement. *Iowa Code* §§135I.3 & 135I.4

The enforcement provision is the last section of the statute. *Iowa Code* §135I.6. It establishes when a misdemeanor occurs as defined in Iowa Code §135I.5. That section provides that if IDPH or a local board of health determines that a provision of Chapter 135I or a rule adopted by IDPH pursuant to this chapter has been or is being violated:

1) IDPH may withhold or revoke the registration of a swimming pool or spa;

2) IDPH or the local board of health may order that a facility or item of equipment not be used, until the necessary corrective action has been taken;

3) IDPH or the local board of health may request the county attorney to bring appropriate legal proceedings to enforce Chapter 135I, including an action to enjoin violations; and

4) IDPH may request the attorney general to institute appropriate legal proceedings. This remedy is in addition to any other legal remedy available to the department or a local board of health. *Iowa Code* §135I.6.

(c) Enforcement Provisions of 641 IAC 15.6

641 IAC 15.6 appears to have adopted its enforcement provision within the parameters of Iowa Code §135I.6. It all starts with inspections. The IDPH or county board is allowed to inspect pools and to enforce the rules created by 641 IAC Chapter 15. 641 *IAC* 15.6(1). When it believes that enforcement *is necessary* it *shall* take the following steps in order to enforce their rules:

> a. *Owner notification.* As soon as possible after the violations are noted, the inspection agency *shall provide written notification* to the owner of the facility that:
>
> (1) Cites each section of the Iowa Code or Iowa Administrative Code violated.
> (2) Specifies the manner in which the owner or operator failed to comply.
> (3) Specifies the steps required for correcting the violation.
> (4) Requests a corrective action plan, including a time schedule for completion of the plan (which the agency shall review and approve or require modification).
> (5) Sets a reasonable time limit, not to exceed 30 days from the receipt of the notice, within which the owner of the facility must respond.

641 *IAC* 15.6(2)(a & b)(emphasis added) Notification of the violation, reasonable means to correct the violation, followed by failure to correct the violation after being given notice and ability to correct, are prerequisites for the criminal enforcement of agency rules. 641 *IAC* 15.6(2)(c). The regulation states that enforcement must be in accordance with the enforcement rules of Iowa Code §135I.6. *Id.* If the department determines that the provisions of Iowa Code chapter 135I and these rules

have been or are being violated, 1) the department may withhold or revoke the registration of a swimming pool or spa, or 2) the department or the local board of health may order that a swimming pool or spa be closed until corrective action has been taken. 641 *IAC* 15.6(2)(d) Notice is an important element of enforcement. Enforcement of the decision to withhold or revoke the registration or an order to close a swimming pool *shall* be delivered by restricted certified mail, return receipt requested, or by personal service and the pool owner has the right to appeal the decision and to be heard in and administrative hearing. *Id.*

If the swimming pool or spa is operated without being registered, or in violation of the order of the department, the department or local inspection agency may also request that the county attorney or the attorney general to seek district court injunction to stop the violation or to take other action allowed by Iowa Code Chapter 135I (such as a misdemeanor prosecution). *Id.*

These are all procedures that would prevent a pool owner from unwittingly, or unknowingly violate a provision of the statute

(d) *Iowa Code §670.4(1)(l)*

Iowa Code Section 670.4(1) states:

> The liability imposed by section 670.2 shall have no application to any claim enumerated in this section. As to any of the following claims, a municipality shall be liable only to the extent liability may be imposed by the express statute dealing with such claims and, in the absence of such express statute, the municipality shall be immune from liability:

Iowa Code § 670.4(1). Subpart (l) to Iowa Code § 670.4(1) states:

> A claim relating to a swimming pool or spa as defined in section 135I.1 which has been inspected by a municipality or the state in accordance with chapter 135I, or a swimming pool or spa inspection program which has been certified by the state in accordance with that chapter, whether or not owned or operated by a municipality, unless the claim is based upon an act or omission of an officer or employee of the municipality and the act or omission constitutes actual malice or *a criminal offense.*

Iowa Code §670.4(1)(l)(emphasis added). The City has governmental immunity for claims arising out of the operation of the pool that is only lost if an officer or employee of a municipality commits an act that constitutes actual malice or a criminal offense. With actual malice not being an issue in this case, our argument only addresses the issue of what constitutes a criminal offense.

(e) Reading Iowa Code §670.4(1)(l) In Conjunction With Iowa Code Chapter 135I There Is No Misdemeanor Absent Notice And Failure to Comply

With Iowa Code §670.4 being created at the same time and as part of the same legislation as Iowa Code Chapter 135I, it is clear that the legislature intended that if a municipality has registered its pool in conformance with the statute, 2) has been given the benefit of the educational resources of the IDPH, 3) has been subject to inspection by the IDPH or local board of health, 4) is provided notice and a means of correcting any noted deficiencies through the inspection process, and 5) has complied with the directives of the department (ie: to correct the deficiency and perhaps to close or stop use of the offending item until corrected) that the

municipality is entitled to immunity for claims associated with the swimming pool. Absent the IDPH or BHHD complying with the notice and right to cure procedures of Iowa Code Chapter 135I and Iowa Administrative Code Chapter 15 there is no misdemeanor because the misdemeanor derives from not obeying the directive of the IDPH or BHHD after being given a reasonable chance to comply with the directive.

In this case there is no notice given of any deficiency, no order to correct any deficiency, no provision of reasonable time to cure the deficiency, no disobeying of and agency order, or any enforcement procedure to establish that a misdemeanor occurred. None of this was afforded the City by the IDPH or the BHHD. As such, there is no factual basis with which to establish a misdemeanor occurred within the framework of Iowa Code Chapter 135I, there is no evidence of any criminal offense, and summary judgment is appropriate under the exemption supplied by Iowa Code §670.4(1)(l). This is the substance of the district court's granting of the City's Motion for Summary Judgment and said judgment should be affirmed. (App. 15–19)

B. The Diving Board Was Not in Violation of 641 IAC 15.4(4)(c)(6) and 641 IAC 15.5(13)(a)(5)

Iowa Code Chapter 135I has no stated requirements for diving boards. Myers extrapolates his claim based on two administrative regulations established by IDPH

concerning pool operations. These administrative regulations are 641 IAC 15.4(4)(c)(6) and 641 IAC 15.5(13)(a)(5).

As is set forth in the Statement of Facts, both provisions state that "Diving boards and platforms shall have a slip-resistant surface." 641 IAC 15.4(4)(c)(6) and 641 IAC 15.5(13)(a)(5). It is an alleged violation of these provisions that Myers argues the City violated and which constituted a misdemeanor. In addition to the fact, argued above, that no misdemeanor was established within the framework of Iowa Code Chapter 135I, the City did not even violate the regulations as written.

It is noteworthy that nowhere in the Petition does Myers allege that the diving board at the Falls was not installed having a slip-resistant surface. His sole allegation, made time and time again, is that the diving board "did not have an *adequate* slip resistant surface" on July 19, 2019. (*See* App. 06, ¶¶7, 8, 9, 12(a), & 13)) (emphasis added). Neither regulation refers to "adequate" slip resistant surfaces or otherwise defines what is or is not an "adequate" slip resistant surface. *See* 641 *IAC* 15.4(4)(c)(6) & 641 *IAC* 15.5(13)(a)(5).

i) *The Diving Board Had A Slip Resistant Surface*

There is no factual dispute that the City installed a 16-foot Duraflex board cataloged by the manufacturer, Duraflex, as #66-231-326 and by retailer, Recreonics, as SKU 40-326 and by their invoice as 40326. There is no dispute that the board is manufactured and delivered with a slip-resistant surface. It is the same

model diving board that was used with the original construction of the Falls. As part of the construction and permitting process the diving board was approved by IDPH. (App. 102–112) There can be no dispute the board met the construction requirement of 641 IAC 15.5(13)(a)(5), whether it be for the installation of the original board or the same model replacement board. 641 *IAC* 15.5(13)(a)(5). The fact that it is a diving board with a slip resistant surface also makes it compliant with the identical requirement of 641 IAC 15.4(4)(c)(6). 641 *IAC* 15.4(4)(c)(6). Looking at the regulation at face value, the requirement for a slip resistant surface is met.

In complying with IDPH regulations, there is no genuine issue of material fact as to whether the City or its employees committed a misdemeanor by violating the regulation requiring diving boards have a slip resistance surface. This fact is further augmented by the fact that 1) IDPH authorized the use of the board in question and 2) BHHD, acting on behalf of IDPH, inspects the pool ever year and has never advised the City that the diving board was out of compliance or otherwise cited the City for non-conformity with this diving board requirement. (App. 102–116, 196 (P.28 LL.15-17), 197 (P.29 LL.5-7)) As such, the City is entitled to the immunity provided it pursuant to Iowa Code §670.4(1)(l) and the district court properly dismissed Myers' Petition on summary judgment.

ii) Myers' Argument Would Create A Regulation That Does Not Exist With A Standard That Would Be Speculative & Unconstitutional

Myers argues that, while the City may have installed a slip resistant diving board, the diving board became non-compliant over time because the slip resistant surface became less slip resistant than it was at the time of installation. The problem with that argument, beyond the fact that the regulation merely states that the board must have a slip resistant surface, is that there are no regulatory criteria to determine any certain measured level of slip resistance that is necessary to be compliant with the regulation. Myers appears to be is trying insert into the regulation a negligence standard that does not exist either in the regulation or under state law. Any argument that goes beyond the actual language of the regulations to say the diving board was not "adequately" slip resistant creates an argument that is not based on the language of the regulations and is without merit.

There being no standard in the Iowa Code or the IDPH regulations as to what is *adequately* slip resistant, there is no basis to have a civil jury determine what would be sufficiently slip resistant under the regulation, let alone a standard that, if not met, would make a violation of the standard a crime.

Neither IDPH nor BHHC ever gave notice to the City that they did not believe the board to be adequately slip resistant. Neither advised the City about what level would or would not be adequately slip resistant. Absent any regulatory standards

for level of slip resistance, absent dissemination of regulatory standards as is required as part of the IDPH responsibilities established by Iowa Code 135I.4, and absent any notice of perceived violation by IDPH or BHHC, how is the municipal pool operator to know there is a perceived regulatory insufficiency? *Iowa Code* 135I.4(1).

Myers cannot establish a criminal offense by asking a trier of fact what it believes a reasonable person or what the IDPH would think would be an adequately slip resistant surface. A jury may not be left to speculation or conjecture in reaching its decisions. *Easton v. Howard*, 751 N.W.2d 1, 6 (Iowa 2008)("Under our law it is just as pernicious to submit a case to a jury and permit the jury to speculate with the rights of citizens when no question for the jury is involved, as it is to deny to a citizen his trial by jury when he has the right." *Id.*) That is precisely why the regulatory system is set up as set forth in Part A of this argument. That process allows pool owners to be given notice and opportunity to correct before being subjected to a potentially arbitrary decision on the part of IDPH or its agents as to when a slip resistant surface suddenly becomes insufficiently slip resistant. This prevents a pool operator who purchased and installed a slip resistant board from unwittingly being in non-compliance with IDPH rules and from being charged with a misdemeanor violation of a vague agency rule. Otherwise, the criminal conduct would be totally unknowing and unknowable, a combination that would violate due process rights.

A statute or regulation that creates a penalty if it is not complied with is a penal statute or regulation. *Trop v. Dulles*, 356 U.S. 86, 95-97, 78 S.Ct. 590, 595-96, 2 L.Ed.2d 630 (1958). 641 IAC 15.8 states that violations of the safety provisions of Iowa Administrative Code Chapter 15 constitute a simple misdemeanor. 641 *IAC* 15.8. This makes the regulation a penal regulation.

> The applicable rule is stated in *Connally v. General Const. Co.*, 269 U.S. 385, 391, 46 S.Ct. 126, 127, 70 L.Ed. 322: 'That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law; and a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law.'

Lanzetta v. State of N.J., 306 U.S. 451, 453, 59 S.Ct. 618, 619, 83 L.Ed. 888 (1939)(Statute which stated: 'Any person not engaged in any lawful occupation, known to be a member of any gang consisting of two or more persons, who has been convicted at least three times of being a disorderly person, or who has been convicted of any crime, in this or in any other State, is declared to be a gangster..." was unconstitutionally vague. Id. at 458, 59 S.Ct. at 621.); *see also Kolender v. Lawson*, 461 U.S. 352, 103 S.Ct. 1855, 75 L.Ed.2d 903 (1983)(California statute requiring persons who loiter or wander on streets must provide "credible and reliable" identification, thus giving law enforcement complete discretion to determine

whether a suspect violated the statute, was deemed unconstitutionally vague. *Id.* at 361, 103 S.Ct. at 1860.)

> Penal statutes are construed narrowly to ensure that no individual is convicted unless 'a fair warning (has first been) given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed.'

Mourning v. Fam. Publications Serv., Inc., 411 U.S. 356, 375, 93 S. Ct. 1652, 1663–64, 36 L. Ed. 2d 318 (1973). The terms of a penal statute which create an offense must be sufficiently explicit to inform one who is subject to the statute of what conduct will render them liable. *State v. Taylor,* 260 Iowa 634, 641, 144 N.W,2d 289, 293 (1966). In the case of *State v. Baker*, 688 N.W.2d 250 (Iowa 2004), the Iowa Supreme Court stated:

> The concept of fair notice of prohibited conduct embodied in the Due Process Clause of the Fourteenth Amendment to the United States Constitution and article I, section 9 of the Iowa Constitution is the basis for the void-for-vagueness doctrine. *See State v. Osmundson,* 546 N.W.2d 907, 908 (Iowa 1996); *State v. Walker,* 506 N.W.2d 430, 432 (Iowa 1993). The United States Supreme Court has explained this doctrine as follows:
>
> > First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application. Third, but related, where a vague statute "abut[s]

> upon sensitive areas of basic First Amendment freedoms," it "operates to inhibit the exercise of [those] freedoms." Uncertain meanings inevitably lead citizens to "steer far wider of the unlawful zone ... than if the boundaries of the forbidden areas were clearly marked."
>
> *Grayned v. City of Rockford,* 408 U.S. 104, 108–09, 92 S.Ct. 2294, 2298–99, 33 L.Ed.2d 222, 227–28 (1972) (citations omitted). (In view of these considerations, we have held
>
> > "'a penal statute [must] define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.'" *Hunter,* 550 N.W.2d at 462 (quoting *Kolender v. Lawson,* 461 U.S. 352, 357, 103 S.Ct. 1855, 1858, 75 L.Ed.2d 903, 909 (1983)).

State v. Baker, 688 N.W.2d 250, 255 (Iowa 2004). The Due Process Clause of the United States Constitution prohibits the enforcement of vague statutes under the void-for vagueness doctrine. *State v. Nail*, 743 N.W2d 535, 539 (Iowa 2007)[4] A provision is too vague if it does not give a person of ordinary understanding fair notice that certain conduct is prohibited. *Id.* A statute must give the enforcing authority sufficient guidance to prevent the exercise of power in an arbitrary or

[4] "There are three generally cited underpinnings of the void-for-vagueness doctrine. First, a statute cannot be so vague that it does not give persons of ordinary understanding fair notice that certain conduct is prohibited. Second, due process requires that statutes provide those clothed with authority sufficient guidance to prevent the exercise of power in an arbitrary or discriminatory fashion. Third, a statute cannot sweep so broadly as to prohibit substantial amounts of constitutionally-protected activities, such as speech protected under the First Amendment." *State v. Nail*, 743 N.W.2d 535, 539 (Iowa 2007)

discriminatory fashion. *Id.* This doctrine applies to legislation that establishes either civil or criminal sanctions. *Id.*

Absent any standard for when a diving board with a slip resistant surface reaches a point that it is no longer sufficiently slip resistant so as to constitute a crime, the regulation is grossly arbitrary and vague leaving pool owners to speculate and guess when that point is reached. Schoentag stated that he did not know of any "any way of testing or determining whether there is or is not sufficient friction on the surface." He just used his best judgment. (App. 198 (P.36 LL.18-23))

Myers' argument would lead one to believe he wants the court to allow a civil jury to determine whether the diving board was sufficiently slip resistant by a reasonable person standard that one might apply in a regular civil negligence case. Myers would like to argue to a jury that that because he slipped on the diving board and because he has obtained an opinion of a retained expert that the diving board was not sufficiently slip resistant that this should be sufficient to establish the City committed a crime. To get past summary judgment in this case, negligence is not the standard. Myers only gets to bring this matter before a jury and talk about his negligence allegations if he can establish a waiver of the immunity of liability granted the City pursuant to Iowa Code §670.4(1)(l). That only occurs if he can establish criminal conduct occurred. All crimes are statutory in nature. There is no common law crime in Iowa. *State v. Wallace*, 259 Iowa 765, 772 145 N.W.2d 615,

620 (1966). A jury cannot create a crime based upon a common law tort "reasonable man" basis. It would inherently violate the void for vagueness doctrine stated above. *State v. Nail*, 743 N.W2d at 539.

The only way to avoid the enforcement of 641 *IAC* 15.4(4)(c)(6) & 641 *IAC* 15.5(13)(a)(5) in an unconstitutional manner is to enforce them through the procedures set forth in the regulatory scheme addressed in Part A of this argument, of providing notice of what is required, and opportunity to be heard on the issue, and the opportunity to cure the perceived violation.

iii) There is no Evidence to Establish a Criminal Offense Occurred

Chris Schoentag, the City employee charged with operating the Falls, is of the opinion that the diving board had a slip resistant surface in compliance with IDPH regulation. (App. 103 ¶7, 198 (P.36 LL.6-17)) He did not know of any way of testing the board or determining whether there was "sufficient friction on the surface." He had to use his best judgment. (App. 198 (P.36 LL.18-23)) He had not received any complaints about the surface of the diving board other than the complaint made by Myers after his accident. (App. 104 ¶10, 198 (P.34 LL.4-7)) He was never told by IDPH or by any BHHD inspection that there was any issue with the diving board. The City has never been put on notice that they were in violation of a pool safety standard. (App. 103 ¶8, 113–14, 115–16, 196–197 (P.28 L.15 – P.29 L.7))

None of the administrative or criminal due process steps were taken buy IDPH or BHHD to establish the groundwork for the City to even be in a position to have committed the criminal offense by refusing to comply with IDPH or BHHD directives as it pertains to the diving board in question. *Id.* There was no directive given the City to which they refused to comply. There was no directive given that the City had any chance to obey if, in fact, is was out of compliance. There was no directive in existence for the City to be given the chance to be heard if there were any dispute over the directive. *Id.* Based on the evidence, according to IDPH and BHHD there is no diving board violation. Absent any directive being given to the City, neither IDPH nor BHHD were in a position to even seek criminal prosecution for a misdemeanor under IDPH regulations. 641 *IAC* 15.6. There is no way a civil jury should be allowed to make such a determination based on the facts of this case.

The district court correctly determined that the City was entitled to summary judgment as a matter of law and dismissal of the Petition because of the absence of any evidence of criminal conduct that would remove the immunity of Iowa Code §670.4(1)(l).

*C. **There Is No Case Law That Would Create Grounds For A Jury To Find A Criminal Offense Occurred***

There are two Iowa cases addressing the interplay of Iowa Code Chapter 135I and Iowa Code §670.4(1)(l). Neither case addressed the issue with the analysis we

set forth above regarding the procedural steps necessary to establish a violation of an IDPH regulation under 641 IAC Chapter 15. This is because it appears the analysis presented in this case was never presented to those courts for consideration. The focus of the two cases is different from the argument in our case at hand. Unlike this case, both cases discussed below dealt with very well-defined regulations about which, under the facts of those cases, there is no question as whether one would or would not be in compliance. As a result, the decisions do not lend themselves to much guidance with the issues argued above in this brief.

The first case is an unpublished Court of Appeals decision, *Larsen v. City of Reinbeck*, 776 N.W.2d 301(Table), 2009 WL 3064658 (Iowa App. 2009). We discuss *Larsen* even though it was overruled by the second case, *Sanon v. City of Pella*, 865 N.W.2d 506 (Iowa 2015), because of the similar natures of the two cases and the foundational use of *Larsen* in the discussion of the *Sanon* decision and of its dissenting opinion.

The key issue in both the *Larsen* and *Sanon* cases was whether the swimming pool regulations created by the IDPH through the regulatory process were criminalized by Iowa Code Section 135I.5. The Court of Appeals in *Larsen* and the dissenting opinion in *Sanon* decided they were not. *Larsen v. City of Reinbeck*, 776 N.W.2d 301(Table), 2009 WL 3064658 at p.3; *Sanon v. City of Pella*, 865 N.W.2d at 519-27. The Supreme Court in *Sanon*, addressing the same issue, decided in a

split 4 to 3 decision that they did. *Sanon v. City of Pella*, 865 N.W.2d at 515. Despite the differing decisions on the same considered issue, application of both decisions to the facts of this case would lead to summary judgment. Under *Larsen* (and the dissenting opinion in *Sanon*) even if an IDPH regulation were violated, the violation would not amount to criminal conduct. Under *Sanon* the court adopted a scienter requirement. It required a knowing violation of the regulation to establish criminal conduct. As extensively argued above, it is impossible under the facts of this case to establish a knowing violation of the regulation at issue.

i) Larsen v. City of Reinbeck

The *Larson* case involved parents, who individually and as administrators of their daughter's estate, sued the City of Reinbeck after their 3-year-old daughter drowned in the city pool. The district court dismissed the case on summary judgment based upon Iowa Code §670.4(1)(l)(then known as 670.4(12)) and the Iowa Court of Appeals affirmed the decision. *Larsen v. City of Reinbeck*, 776 N.W.2d 301(Table), 2009 WL 3064658 p.1 & 3 (Iowa App. 2009).

In the *Larsen* case the regulation at issue was 641 IAC 15.4(4)(e) which deals with the number of lifeguards chairs and stations that are necessary depending upon the size of the pool. 641 *IAC* 15.4(4)(e). It also dealt with 641 IAC 15.4(4)(i)(3) which addresses the boundary requirement between the shallow and deep end of the pool. 641 *IAC* 15.4(4)(i)(3). Both rules are well defined, the requirements of which

were not subject to uncertain interpretation. Unlike our case at hand, it would be easy to determine by the facts whether the regulation was or was not violated.

Iowa Code §135I.5 states, "A person who violates a provision of *this chapter* commits a simple misdemeanor. Each day upon which a violation occurs constitutes a separate violation." *Iowa Code* §135I.5 The court of appeals agreed with the City of Reinbeck argument that Iowa Code §135I.5 only applies to violations of Iowa Code Chapter 135I, not any administrative rules promulgated under the statute. *Larsen v. City of Reinbeck*, 776 N.W.2d 301(Table), 2009 WL 3064658 p.1, *citing Iowa Code* §135I.5 (emphasis added). The court said if the legislature had intended violations of administrative regulations created to implement the chapter to be grounds for a misdemeanor, it would have said so. *Id.*

The court then continued with analysis countering the plaintiffs' argument that Iowa Code §135.38 would make violation of the rules of the IDPH created to implement Iowa Code Chapter 135I a misdemeanor. *Id.* at 2. Iowa Code §135.38, stated, "[a]ny person who *knowingly* violates any provision of this chapter, *or of the rules of the department*, or any lawful order, written or oral, of the department or of its officers, or authorized agents, shall be guilty of a simple misdemeanor." (emphasis added). The plaintiffs argued that since Iowa Code Chapter 135I is within the purview of IDPH which operates pursuant to the framework of Iowa Code

Chapter 135 that Iowa Code §135.38 would apply to Chapter 135I. The court of appeals noted that Chapter 135

> "contains general provisions applicable to the administration of the entire department and specific provisions relating to the administration of particular programs such as "lead abatement" and "newborn and infant hearing screening." *See* Iowa Code §§ 135.100–.105D, .131. The provisions relating to these specific programs do not include separate penalty mandates; the only penalty provision in the chapter is section 135.38. In contrast, certain programs that are under the purview of the department but have their own chapter in the Iowa Code also have their own penalty provisions."

Id. It noted, by example, that Iowa Code Chapter 135B, pertaining to regulation of hospitals, provides that a person who violates a provision of that chapter is guilty of a serious misdemeanor (in §136B.5) and Iowa Code Chapter 136C, which deals with radiation machines and radioactive materials, states that a violation of the chapter or rules adopted pursuant to the chapter would make one guilty of a serious misdemeanor (§136C.4(1)). *Id.* The court concluded from this organizational scheme that the penalty provision in chapter 135 was intended to apply only to the programs in that chapter and not to chapter 135I. *Id.*; c*iting McElroy v. State,* 637 N.W.2d 488, 494 (Iowa 2001) ("Typically, when a general and specific statute cover the same matter, the specific statute governs over any conflict with the general statute.")). The court affirmed the district court grant of summary judgment that the criminal offense exception to Iowa Code §670.4(1)(l). *Id.* at 3.

If we were to apply the ruling of the *Larsen* case to the case at hand, there being no allegation or evidence of any violation of any provision of Iowa Code Chapter 135I, summary judgment would be in order.

ii) *Sanon v. City of Pella*

(a) Majority Opinion

In *Sanon v. City of Pella*, 865 N.W.2d 506 (Iowa 2015), parents of two drowned children brought an action, individually and on behalf of the estates, against the City of Pella alleging that the city was negligent with conduct constituting a criminal offense that cause their child's death. *Sanon v. City of Pella*, 865 N.W.2d 506, 507-08 (Iowa 2015). Following the reasoning of the *Larsen* case, the district court granted the city summary judgment under the statutory immunity granted by Iowa Code 670.4(1)(l). *Id.* at 508. The Supreme Court, in a 4 to 3 decision, authored by now retired Justice Wiggins, reversed the decision of the district court and held there was a fact issue as to 1) whether the acts or omissions of a city employee violated an administrative rule of the IDPH that amounted to a crime and 2) whether the acts or omissions of a city employee constituted involuntary manslaughter, both of which would remove the city's liability immunity. *Id.*

We believe that the *Sanon* case, on its face, is inapplicable to this case because: 1) the administrative rule violated in that case was not only clearly discernable, but also admitted by the City of Pella and 2) that case apparently

involved question of violation of a distinct criminal statute pertaining to manslaughter, whereas this case involves only the issue of an alleged violation of a standardless administrative rule for which there is no evidence of a knowing violation.

In the *Sanon* case the operators of the Pella city pool decided that the underwater lights would not be used. *Id.* at 508-09. IDPH regulations require that there be sufficient lighting so that the bottom of the pool can be clearly seen. It directs pools to be closed if a pool is less than 8 foot deep and the grate openings on the main drain are not clearly visible from the deck. *Id.* at 508 (*citing* 641 *IAC* 15.4(4)(m)(2)(1)). This is a clearly discernable rule that requires visibility to the bottom of the pool. Despite the obvious requirement of the rules, and despite the city knowing it was in violation of these rules, the city let the pool be used at night for nighttime pool parties 20-30 times per year without doing anything to compensate for the lights in the pool not being used. *Id.* at 508-09 & 518. On the evening of July 14, 2010, two teenage boys drowned at a sports camp event held at the pool. The water became murky enough that night that the lifeguards could not see all the way down to the pool drain at the deep end of the pool from the pool deck. The lighting system, though operable, was not in use. *Id.* at 509.

The claims of the plaintiffs in that case, as amended, included a claim of 1) negligence, 2) conduct constituting a criminal offense by violation of IDPH

standards, 3) premises liability, 4) nuisance, 5) the criminal offense involuntary manslaughter, 6) constitutional due process violations, and 7) loss of consortium. *Id.* The district court granted the city partial summary judgment on the issue of the claims based upon violation of administrative regulations but denied the motion on the ground that the acts could constitute involuntary manslaughter. All parties sought interlocutory appeal, which was granted by the Court. *Id.*

For our purposes, we only address the issue of whether the violation of an administrative rule of IDPH constituted a crime that removed immunity provided by Iowa Code §670.4(1)(l) and what level of proof is necessary to remove the claim from immunity provided by Iowa Code §670.4(1)(l). *Id.* We reiterate that, because *Sanon* case did not have occasion to address the issues we have raised in this case, we argue the decision in *Sanon* is not determinative to this court's consideration of the issues before it. Regardless, applying the ruling in *Sanon* to the facts of this case, summary judgment would still be in order.

Both the majority opinion and the dissent discussed the interplay of Iowa Code chapters 135 and 135I, both of which the IDPH is tasked with implementing. In drafting its decision, the Court went all the way back to the beginning of the IDPH in 1924, before the existence of the administrative procedure act. The Court noted that the legislature gave the commissioner of the IDPH authority to, "[e]stablish, publish, and enforce rules not inconsistent with law for the enforcement of the

provisions of this title and for the enforcement of the various laws, the administration and supervision of which are imposed upon the department." *Id.* at 512. The Court ruled that the quoted provision gave the outlined authority to IDPH under all chapters of the Iowa Code that fell within the oversight of IDPH. *Id.* The Court then referenced Iowa Code §135.11(13)(now §135.11(12)) which states that the IDPH may, "Establish, publish, and enforce rules not inconsistent with law for the enforcement of the provisions of chapters 125 and 155, and Title IV, subtitle 2, excluding chapter 146 and for the enforcement of the various laws, the administration and supervision of which are imposed upon the department." *Iowa Code* §135.11(12) *Id.* at 513. The majority noted that Iowa Code Chapter 135I is part of Title IV, subtitle 2. *Id.* With this premise, the majority based its overall decision on Iowa Code §135.38, the miscellaneous provision under the IDPH title (currently Title IV) of the Code which states that "[a]ny person who *knowingly* violates any provision of this chapter, or of the rules of the department, or any lawful order, written or oral, of the department or of its officers, or authorized agents, shall be guilty of a simple misdemeanor." *Id.* at 511, *citing Iowa Code* §135.38 (emphasis added). Despite Chapter 135I having its own enforcement provisions, the Court pulled enforcement of Chapter 135I under the umbrella of the differently written enforcement provision of Iowa Code Chapter 135. *Id.* at 514-15.

It should be noted that if we applied the standard of Iowa Code §135.38 to this case, as the *Sanon* decision would lead us to do, there could be no misdemeanor committed under the facts of this case because there is no evidence of any *knowing* violation of the Chapter 135I or 641 IAC 15. To the contrary, there is no evidence of any violation being *known* to the City, IDPH, or BHHC. Our whole argument above addresses the impossibility of *knowing* whether the diving board had an "adequate" slip resistant surface, even if we were to assume, for purposes of argument, that that was a valid interpretation of the regulation to begin with. The district court in this case applied the "knowing" requirement of Iowa Code §135.38 as adopted by the Supreme Court in *Sanon*, in granting summary judgment to the City. (App. 15–19) After pointing out the procedural steps outlined above in Brief Point I, subpart A(i)(b) and noting the standardless provision of the slip resistance regulation and that neither the IDPH nor the BHHC ever gave notice to the City that the diving board had fallen below a level of adequate slip resistance or otherwise gave guidance for determining such, there was no evidence that any City employee knowingly violated the regulation. *Id.* at p.4. The district court concluded:

> The Court has had an opportunity to review Larson v. City of Reinbeck, 776 N.W.2d 301 (Table) 2009 WL 3064658 (Iowa App. 2009) and Sanon v. City of Pella, 865 N.W.2d 506 (Iowa 2015). Again, without reiterating the arguments set forth in the cases above and counsel's respective positions, the Court finds absence of any evidence showing the city, an officer, or an employee of the municipality knowingly violated either the Iowa Code or the administrative regulations set forth above. Absent the knowing violation, the city's immunity remains.

Id. Absent any knowing violation of any Chapter 135I or 641 IAC 15 provision there is no misdemeanor violation and no criminal conduct which would remove the immunity provided the City by Iowa Code §670.4(1)(l).

(b) Dissenting Opinion

The dissent opinion in *Sanon* points out that the majority reaches its conclusion by inappropriately applying Iowa Code §135.38 to Iowa Code Chapter 135I even though, as referenced by the Court of Appeals in the *Larson,* other programs created by the legislature to be under the broad overview of the department have their own separate code sections and have their own separate penalty provisions. The minority decision points out that the majority even references Iowa Code §135I.4(5) which allows the IDPH to adopt rules in accordance with chapter 17A for the implementation and enforcement "of this chapter" to shoehorn the application of §135.38 into Iowa Code Chapter 135I as an enforcement position. *Iowa Code* §135I.4(5)(As is stated above, clearly, "this chapter" must refer to Chapter 135I, not Chapter 135.). This is despite the majority opinion acknowledging that the rules of statutory construction should be construed to be consistent with each other. *Id.* at 514. The dissent points out the problem it believes the majority reasoning presents by outlining various Iowa Code chapters under the purview of IDPH which have different penalty provisions ranging from civil penalty

to serious misdemeanor. *Id.* at 520. "We are to favor interpretations that avoid conflicts between statutes. *See K & W Elec., Inc. v. State,* 712 N.W.2d 107, 114–15 (Iowa 2006)." *Id.* The dissent also points out that with these chapters having their own enforcement or penalty provisions make application of Iowa Code §135.38 redundant. The dissent noted, "We are to avoid interpretations that render statutory language superfluous. *See Thomas v. Gavin,* 838 N.W.2d 518, 524 (Iowa 2013) ("Normally we do not interpret statutes so they contain surplusage."); *see also* Iowa Code § 4.4(2) ("The entire statute is intended to be effective.")". *Id.* at 521. The dissent questions why would the legislature enact Iowa Code §135I.5 if Iowa Code Section 135.38 applied to Iowa Code Chapter 135I? The dissent points out that these problems with statutory construction do not exist if the statutory construction of the *Larsen* case is utilized. *Id.* The dissent states:

> When the legislature selectively places language in one section and avoids it in another, we presume it did so intentionally. *Id.* Here, section 135.38 includes language criminalizing violations of rules, but section 135I.5 does not. The legislature knows how to criminalize violations of the department's rules. It did so for rules promulgated under chapter 135, but not under chapter 135I.[11] I conclude section 135I.5 is the more specific penalty provision and governs this case. *See* Iowa Code § 4.7 (stating a specific provision controls over a conflicting general provision); *see also Christiansen v. Iowa Bd. of Educ. Exam'rs,* 831 N.W.2d 179, 189 (Iowa 2013) ("[T]he more specific provision controls over the general provision."). If the legislature wanted to criminalize violations of pool regulations, it would have said so in section 135I.5. It did not.

Id. at 521–22.

The dissent further points out the significance of the Iowa legislature enacting Chapter 135I in the same bill that enacted the swimming pool immunity provision to Iowa Code §670.4(1)(l). It noted that this fact should strengthen the argument that it is Iowa Code §135I.5 that applies to swimming pools and not section Iowa Code §135.38. *Id.*

> Chapter 135I of the Iowa Code specifically governs the department's regulation of swimming pools and spas. The pool regulations at issue were promulgated under chapter 135I. The penalty provision in this chapter states, "A person who violates a provision of *this chapter* commits a simple misdemeanor. Each day upon which a violation occurs constitutes a separate violation." Iowa Code § 135I.5 As the *Larsen* court observed, "this provision unambiguously criminalizes violations of the statute alone. Unlike section 135.38, the provision makes no mention of the implementing rules." *Larsen,* 2009 WL 3064658, at *3 (citation omitted). I agree. The plain language of section 135I.5 does not criminalize violations of the department's rules promulgated under that chapter.

Id. at 521–22 (emphasis added). The dissent noted that the majority failed to confront these rules of statutory analysis. *Id.*

The dissent points out that the majority opinion undermines the purpose of the immunity of section 670.4(1)(l), "which is to reduce the litigation risk inherent in aquatic recreation and thereby encourage cities, counties, and schools to open and operate swimming pools." *Id.* at 522, citing *Baker v. City of Ottumwa*, 560 N.W.2d 578, 582 (Iowa 1997)

> We have "characterized statutory immunities as having a broad scope and we have given words used in such immunity statutes a broad meaning." *Cubit v. Mahaska County,* 677 N.W.2d 777, 784 (Iowa

> 2004) (collecting cases broadly applying immunity provisions of section 670.4); *see also Walker v. Mlakar,* 489 N.W.2d 401, 405 (Iowa 1992) (interpreting narrowly statutory exception to common law immunity). "Immunity is based upon the desire to 'prevent judicial "second-guessing" of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort.'" *Graber v. City of Ankeny,* 656 N.W.2d 157, 160 (Iowa 2003) (quoting *Goodman v. City of LeClaire,* 587 N.W.2d 232, 237 (Iowa 1998)). The majority's interpretation effectively second-guesses the legislative policy choice to limit recovery rights in order to encourage aquatic recreational opportunities. That is not our court's role. The legislature's policy choice was reasonable—the immunity in section 670.4(12) is conditioned upon submission to pool safety inspections with the inspectors empowered to shut down pools operating in violation of the department's rules. *See* Iowa Code § 135I.6.

Id. at 522–23.

The dissent then argues, to the extent that the IDPH creates a rule and makes the violation of a regulation a crime beyond what the statute authorized, such provision should be considered null and void, especially where it would serve to thwart the intention of the Iowa legislature to provide municipalities immunity from liability arising out of their operation of community swimming pools. *Id.* at 526-27, *see fn.*15. "Here, the controlling statute, section 135I.5, imposes criminal liability solely for statutory violations, not rule violations. The majority's interpretation allows the department to expand criminal liability by rule beyond what the legislature authorized and thereby defeat the immunity protection the legislature intended." *Id.* at 527. In agreeing with the analysis of the *Larsen* case the *Sanon* dissent would lead to summary judgment under the facts of this case.

Neither the *Sanon* nor the *Larsen* decisions should be interpreted to allow a civil jury to determine what is considered an "adequately" slip resistant diving board surface that would constitute compliance with the administrative rule 641 IAC 15.4(4)(c)(6) or 641 IAC 15.5(13)(a)(5), as Myers appears to argue in this case. In addition to the due process issues mentioned above, such and interpretation is not supported by the case law and would greatly undermine Iowa Code §670.4(1)(l) and would ignore the relationship between Iowa Code Chapter 135I and §670.4(1)(l) which were created in the same legislation. To let a jury decide this issue with the facts of this case would make Iowa Code §670.4(1)(l) meaningless.

Absent any standard for determining when a slip resistance surface is no longer adequately slip resistant, absent the IDPH or BHHC following any of the requisite notice, right to be heard, and ability cure requirements of 641 IAC 15.6 that are necessary establish a violation of the regulation, a jury has no guidance as to what the IDPH considers to be "adequately" slip resistant. Any decision of the jury would effectively create a case specific regulation as to what constitutes adequate slip resistance. The Court cannot allow a jury to create a criminal standard based on speculation or based on a common law reasonable person standard.

Conclusion

We respectfully argue that based on the argument we set forth above, pursuant to Iowa Code §670.4(1)(l), the district court grant of summary judgment should be sustained.

Request for Oral Argument

Defendant/Appellee, The City of Cedar Falls, Iowa, respectfully requests to be heard orally via oral argument.

Respectfully Submitted,

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PROOF OF SERVICE AND CERTIFICATE OF FILING

The undersigned certifies that a copy of this Final Brief was served via electronic service on the 5th day of October 2022, upon the following attorneys and parties in this matter at their respective addresses below:

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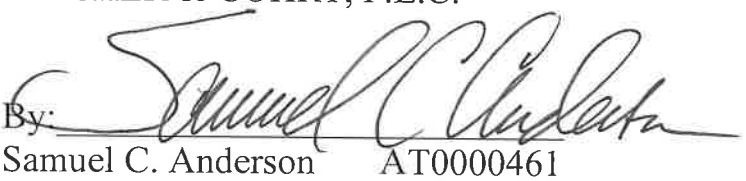
By: 

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CERTIFICATE OF COMPLIANCE

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Samuel C. Anderson

October 5, 2022