THE SUPREME COURT OF IOWA

Supreme Court No. 22-0917

Blackhawk County No. LACV141273

RON MYERS,

Petitioner-Appellant

vs.

CITY OF CEDAR FALLS, IOWA,

Respondent-Appellee

APPEAL FROM THE IOWA DISTRICT COURT FOR BLACKHAWK COUNTY

THE HONORABLE JOEL DALRYMPLE

PETITIONER-APPELLANT'S RESISTANCE TO APPLICATION FOR FURTHER REVIEW

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I. DEFENDANT FAILED TO ARTICULATE GROUNDS FOR FURTHER REVIEW AS REQUIRED BY IOWA RULE OF APPELLATE PROCEDURE 6.1103(1)(b)

Although not controlling, the rules of appellate procedure set forth the criteria for granting of an application for further review. Respondent-Appellee City of Cedar Falls, Iowa (hereinafter "the City) ignores this rule and instead urges the Court to overturn existing legal precedent without having properly preserved the issue. The factors this Court typically considers in granting an application for further review are as follows:

1. The court of appeals has entered a decision in conflict with a decision of this court or the court of appeals in an important matter. Iowa R. App. P. 6.1103(b)(1)

   The court of appeals followed and applied the logic of *Sanon v. City of Pella*, 865 N.W.2d 506 (Iowa 2015). There is no decision of this Court or the court of appeals in conflict with *Sanon*.

2. The court of appeals has decided a substantial question of constitutional law or an important question of law that has not been, but should be, settled by the supreme court. Iowa R. App. P. 6.1103(b)(2)

   The court of appeals did not decide any questions of constitutional law. Any legal questions were already settled in *Sanon* and the City articulates nothing new.

3. The court of appeals has decided a case where there is an important question of changing legal principles. Iowa R. App. P. 6.1103(b)(3)

The court of appeals followed and applied the logic of *Sanon*. There are no changing legal principles in play and, if they exist, the City failed to identify them.

4. The case presents an issue of broad public importance that the supreme court should ultimately determine. Iowa R. App. P. 6.1103(b)(4)

The issues here are narrow and case-specific and do not implicate matters of broad public importance. Moreover, this Court already decided the legal principles in *Sanon*.

In sum, the City failed to identify why this Court should exercise its discretion and grant further review. Instead, the City seeks to overturn *Sanon* despite its failure to preserve error.

II. THE CITY DID NOT PRESERVE ERROR ON WHETHER *SANON V. CITY OF PELLA* SHOULD BE OVERTURNED

In the trial court, the City argued that the majority opinion in *Sanon* was wrongly decided but never directly asks for outright reversal. While the trial court seemed to put *Larsen v. City of Reinbeck*, 776 N.W.2d 301 (Table), 2009 WL 306458 (Iowa App. 2009) on equal footing with *Sanon*, it nevertheless failed to reach the City's argument that *Sanon* should be overturned. Instead, the trial court granted summary judgment—without relying on either *Larson* or *Sanon*—by making the unsupported factual determination that there was an "absence of any evidence showing the city, an officer, or any employee of the municipality knowingly violated either the Iowa Code or the administrative regulations set forth above."

(App.000018; Order Granting MSJ at pg. 4) The City failed to file a motion asking the district court to reconsider or clarify its ruling and directly overturn *Sanon*.

In its briefing before the court of appeals, the City argued for reversal of the *Sanon* majority opinion and adoption of the rationale utilized in *Larsen* and the dissent in *Sanon*. In his Reply Brief, Myers argued that the City failed to preserve this issue for appeal. (Myers Reply Brief pgs.7-11) The court of appeals, without addressing the error preservation issue, simply noted that it was bound by existing precedent and that factual disputes exist with respect to whether the diving board had a slip-resistance surface at the time Myers was injured. (Ct. of Appeals Ruling p. 6)

This Court should decline further review because the City did not properly preserve for appeal whether *Sanon* should be overturned at the district court level. "It is a fundamental doctrine of appellate review that issues must ordinarily be both raised and decided by the district court before we will decide them on appeal." *Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002). "The reason for this principle relates to the essential symmetry required of our legal system. It is not a sensible exercise of appellate review to analyze facts or an issue without the benefit of a full record or lower court determination." *Id.* (internal quotations omitted). "When a district court

fails to rule on an issue properly raised by a party, the party who raised the issue must file a motion requesting a ruling in order to preserve error for appeal." *Id.*

As noted above, the district court declined to clearly state one way or another whether it was declining to follow the *Sanon* majority and instead dismissed the case on factual grounds, finding an "absence of evidence" to show a knowing violation. (App.000018; Order Granting MSJ at pg.4) The City now seeks outright reversal of *Sanon*, but failed to preserve the issue by filing a motion to reconsider or enlarge with the trial court. This is fatal to the City's request to now have this Court consider the important question of whether existing precedent should be overruled.

The City cannot argue that the district court necessarily decided this issue by granting the motion for summary judgment. This is not the law, and this exact situation was addressed and rejected in *Meier v. Senecaut*, 641 N.W.2d 532 (Iowa 2002). In *Meier* the defendant filed a motion to dismiss on several grounds. One of these grounds was that the district court lacked jurisdiction. *Id.* at 537. "The district court denied the motion in a lengthy written ruling, but did not specifically address the jurisdictional issue[.]" *Id.* On appeal, the defendant "claime[d] the district court necessarily decided the issue by overruling the motion to dismiss." *Id.*

The *Meier* Court rejected this argument and expressly held that the rule of error preservation "requires a party seeking to appeal an issue presented to, but not considered by, the district court to call attention to the district court its failure to decide the issue." *Id.* at 540. "The claim or issue raised does not actually need to be used as the basis for the decision to be preserved, but the record must at least reveal the court was aware of the claim or issue and litigated it." *Id.* The *Meier* Court ultimately held that the defendant "failed to call to the attention of the district court its failure to consider this issue, and to give the court an opportunity to pass upon it. Accordingly, the issue is waived." *Id.* at 541.

Meier's holding on error preservation was neither novel nor an aberration. Rather, it merely reaffirmed and expounded upon the long standing—and currently applicable—rule requiring error preservation for appellate review. *See also Nahas v. Polk County,* ___N.W.2d___, 2003 WL3906488 (Iowa 2023)(error was not preserved because the district court did not rule on the statute's constitutionality); *State Farm Mut. Auto Ins. Co. v. Pflibsen*, 350 N.W.2d 202, 206 (Iowa 1984) (refusing to consider issue that was raised by defendant but not decided by district court); *State v. Krogmann*, 804 N.W.2d 518, 524 (Iowa 2011) (stating that "when a court fails to rule on a matter, a party must request a ruling by some means");

Fennelly v. A-1 Mach. & Tool Co., 728 N.W.2d 181, 187 (Iowa 2007) (finding a claim that was not addressed in the district court's summary judgment order and not subsequently brought to the court's attention had not been preserved for appeal); *Stammeyer v. Div. of Narcotics Enforcement*, 721 N.W.2d 541, 548 (Iowa 2006) (finding an argument not preserved for appeal when there was "nothing indicating the court ruled upon or even considered [it]"); *Boyle v. Alum-Line, Inc.*, 710 N.W.2d 741, 751 n. 4 (Iowa 2006) (stating that "[w]hen a district court fails to rule on an issue properly raised by a party, the party who raised the issue must file a motion requesting a ruling in order to preserve error for appeal.").

The procedural facts of *Meier* are virtually indistinguishable from the present case. The City argued for adoption of *Larsen* and the *Sanon* dissent before the district court, but the lower court never addressed that specific legal question in either its Order granting summary judgment or the Order Re: Plaintiff's Motion pursuant to I.R.C.P. 1.904. (App. 000015-000019, 000029-000030) The City never drew the district court's attention to this important legal question thereby giving the lower court the opportunity to rule on it. Accordingly, the City did not properly preserve this issue for appeal. *Meier*, 641 N.W.2d at 541.

III. PLAINTIFF GENERATED A FACT DISPUTE REGARDING WHETHER THE DIVING BOARD LACKED A SLIP-RESISTANT SURFACE AND WHETHER THE CITY HAD KNOWLEDGE OF THIS DEFECTIVE CONDITION

Applying the *Sanon* decision to the present case, Myers must demonstrate two facts to defeat immunity. First, Myers must show that the City violated a rule or regulation and that such violation constitutes a crime; here a simple misdemeanor. Second, Myers must demonstrate a knowing violation of the rule or regulation. If a reasonable jury could conclude that Myers established both facts, the City is not entitled to immunity under Section 670.4. *Sanon*, 865 N.W.2d at 514. The court of appeals found that Myers satisfied this burden and correctly held that summary judgment was improper.

A. The City Violated a Rule/Regulation

In this case, the administrative rule in question is Iowa Admin. r. 641—15.4(4)(c)(6). The Rule states: "Diving boards and platforms shall have a slip-resistant surface." The City claims that this regulatory standard is so vague and uncertain that municipal pool owners would be forced "to speculate and guess" when a diving board is no longer in compliance. The argument is directly refuted by the testimony of Bruce Verink, the Recreation and Community Programs Manager for the City, who testified

that he knows what slip-resistant means specifically in the context of the applicable administrative rule.

> Q: And are you aware that the code requires that the diving board have a slip-resistant surface?
>
> A: Yes.
>
> Q: What does that mean- - what does that mean to you?
>
> A: That it has enough texture to keep prudent people from slipping.

(App.000175; Verink Dep. 59:12-21)

The court of appeals rejected the City's argument that a lack of a measurable standard of how slip-resistant the diving board therefore means no violation of the administrative rule occurred:

> The fact that there is no articulated level of slip resistance that must be maintained does not change the plain language of the rule—the diving board must have a slip resistant surface. Either the board had a slip-resistant surface or it didn't. Here, there was conflicting evidence of whether it did, so a factual dispute is generated that needs to be resolved through the trial process. (Ct. of Appeals Ruling pgs.4-5)

Contrary to the City's assertions, juries are frequently asked to make fact determinations concerning whether conduct violates a rule or regulation. The uniform jury instructions provide:

> You have received evidence of [applicable safety code provisions.] Conformity with [the provisions of a safety code] is evidence that (name of party) was not negligent and [violations of its provisions] is evidence that (name of party) was negligent.

> Such evidence is relevant and you should consider it, but it is not conclusive proof.

Iowa Uniform Jury Instruction 700.11 (2020).

The uniform jury instructions also permits jurors to consider code violations as negligence: "(Name of Safety Code) requires (Substance of Safety Code). A violation of this law is negligence." Iowa Uniform Jury Instruction 700.10 (2020). Both of these instructions require a jury to first determine whether a rule was violated *before* they are permitted to consider the violation to be negligence or evidence of negligence. Accordingly, the argument that a jury should not be allowed to determine whether a safety code was violated is specious.

B. The City Knowingly Violated the Rule

The City next argues that because it was not notified of or cited for violating the rule that no liability can attach. According to the City, immunity is only lost if the municipal pool owner receives notice of a rule violation from either the Iowa Department of Public Health or the Blackhawk County Health Department along with an opportunity to correct the deficiency. The court of appeals correctly rejected this argument:

> Nothing in the rule suggests that the city only violates the rule if it is informed or cited for a violation of it. Again, either the board had a slip-resistance surface, or it didn't, and the fact the city was notified about or cited for a violation of the rule does not change

> the need to resolve the underlying factual dispute whether the rule was violated. (Ct. of Appeals Ruling p. 5)

In addition, neither the majority or dissenting opinions in *Sanon* imposed such a notice requirement. Indeed, even the dissent noted: "None of the department's inspections addressed the adequacy of the overhead lighting or water clarity, or the use of underwater lighting. The City never received a citation for murky water or insufficient lighting." *Sanon*, 865 N.W.2d at 519. The lack of a citation and formal notice to the City of Pella was of no legal significance because there was ample evidence that the City knew about the condition of the board prior to the plaintiffs' injuries. In this case, there is substantial evidence that the City had both constructive and actual knowledge of the dangerous condition of the diving board and failed to correct the defect.

The City also suggests that because no one from the City has been charged with or convicted of a criminal offense regarding the diving board that the crime exception to the immunity rule does not apply. This argument is similar, if not identical, to the argument made in *Sanon* that a "criminal offense" within the meaning of section 670.4(1)(l) cannot be established absent a criminal conviction or prosecution. *Sanon*, 865 N.W.2d at 515.

The Court in Division V[1] of *Sanon* soundly rejected this argument: "We conclude no conviction is required to avoid the immunity defense." *Id*. at 516. Instead, plaintiff need only prove by a preponderance of the evidence that a city employee or officer committed a criminal act causing injury. *Id*. at 517.

IV. SANON SHOULD NOT BE OVERRULED

A. Defendant Failed to Preserve Error.

As previously argued, the district court did not address the continuing viability of *Sanon* and the City did not file a motion to reconsider or seek clarification.

B. The Legislature Acquiesced to the Majority Opinion in *Sanon*

Justice Waterman in his dissenting opinion in *Sanon* expressed concern that the majority opinion would make it costlier for cities to keep swimming pools open. *Id*. at 518 (Waterman, J., dissenting). The following statement arose out of that concern: "Some pools may close as liability insurance costs climb. I invite the legislature to take a fresh look at the scope of tort immunity for municipal swimming pools in light of today's decision." *Id*. The Iowa Legislature amended Section 670.4 multiple times

[1] All Justices concurred in Division V.

after *Sanon* was decided in June 2015, but has never amended or modified section 670.4(12) (now section 670.4(1(l)) despite the Court's invitation to do so.

The legislative amendments to section 670.4 since 2015 have expanded existing immunities and created new ones. In 2018, section 670.4(q) was added to the statute creating a completely new section immunizing any claim relating to a constructed honeybee hive. 2018 Acts, ch. 1126 § 2 (April 7, 2018). In 2019 the statute was amended to add clarifying language to section 670.4(k) by expanding the definition of "municipality." 2019 Acts, ch. 153, §1 (May 17, 2019). Section 670.4 was amended twice in 2020. First, by adding new immunities relating to equipment used in firefighting or emergency response. Iowa Code § 670.4(r); 2020 Acts, ch. 1027 § 3 (June 1, 2020). Second, by making amendments to sections 670.4(1) and 670.4(2). 2020 Acts, ch. 1063, § 371, 372 (June 17, 2020). In 2021, the legislature again amended chapter 670 by adding an entirely new section expanding the scope of qualified immunity. Iowa Code §670.4A (2021). Notably absent from the legislature's amendments and modifications to section 670.4 was any change to that portion of the statute dealing with swimming pool immunity.

Under the doctrine of legislative acquiescence, "we presume the legislature is aware of our cases that interpret its statutes." *Ackelson v. Manley Toy Direct, L.L.C.*, 832 N.W.2d 678, 688 (Iowa 2013). "When many years pass following such a case without a legislative response, we assume the legislature has acquiesced in our interpretation." *Id.* In *State v. Iowa Dist. Ct. for Jones Cnty.*, 902 N.W.2d 811, 817–18 (Iowa 2017) the Court was interpreting Iowa Code section 903A.2 titled "Earned time" which "allows inmates to reduce their sentences for good conduct." *Id*. at 815. One of the issues before the Court was whether to adhere to its previous interpretation of the statute set forth in *Holm v. State*, 767 N.W.2d 409 (Iowa 2009). *Id*. The Court noted that the legislature amended the statute five times without altering its interpretation in *Holm* and therefore concluded "that the legislature acquiesced in *Holm's* interpretation of section 903A.2." *Id*. at 818.

In this case, the legislature amended section 670.4 five times since the *Sanon* decision, but made no amendments or modifications to the section involving swimming pool immunity. Accordingly, the Court can safely conclude that the legislature has acquiesced in the *Sanon* majority's construction of section 670.4(1)(l).

V. CONCLUSION

The City failed to preserve error with respect to whether *Sanon v. City of Pella* should be overturned. The district court did not address the continuing viability of *Sanon* and no motion was ever filed seeking reconsideration, enlargement or clarification. The majority opinion in *Sanon* is the law and the statutory construction urged by the City was rejected in that case. Moreover, the Iowa legislature has amended and modified section 670.4 multiple times since the *Sanon* decision in 2015. None of those amendments or modifications involved section 670.4(1)(l) dealing with swimming pool immunity. Finally, the administrative regulation that requires a diving board to have a slip-resistant surfaces is not vague and such determination can and should be made by the finder-of-fact.

WHEREFORE, Petitioner-Appellant Ron Myers respectfully requests that the Court deny the Application for Further Review.

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CERTIFICATE OF FILING AND SERVICE

I certify that on **JUNE 23, 2023** I electronically filed this Resistance to Application for Further Review with the Clerk of Court using the ECF system, which sent notification of same to:

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that:

1. This brief complies with the type-volume limitation of Iowa R. of App. P. 6.903(1)(g)(1) because this brief contains 3,030 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1) (table of contents, table of authorities, statement of issues and certificates).

2. This brief complies with the typeface requirements of Iowa R. App. P. 6.903(1)(e) and the type-style requirements of Iowa R. App. P. 6.903(1)(f) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Times New Roman 14 pt.

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