IN THE SUPREME COURT OF IOWA

NO. 23-0917
WOODBURY COUNTY NO. LACV200008

LORI AND RONALD RANDOLPH,
Plaintiff-Appellants,

v.

AIDAN, LLC,
Defendant, Third-Party Plaintiff, and Appellee,

v.

CITY OF SIOUX CITY, IOWA,
Third-Party Defendant-Appellant.

APPEAL FROM THE IOWA DISTRICT COURT
IN AND FOR WOODBURY COUNTY
THE HONORABLE ROGER L. SAILER, JUDGE

APPELLANTS' JOINT FINAL REPLY BRIEF

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There are three points in Aidan's Brief which the City would like to discuss in this Reply.

First, Aidan cites to certain documents which are outside its Third-Party Petition and, in one case, outside the court record. The City respectfully asks this Court to disregard those documents.

Second, Aidan contends that section 670.4(1)(j) does not apply because their claim is "based on" the City's hiring decision, and not "based on" Gough's inspection, within the meaning of that statute. However, section 670.4(1)(j) immunizes the City for *all* acts and omissions, so long as the damages are caused by a third-party.

Third, Aidan's claim is one of nonfeasance rather than misfeasance, and as such is alternatively barred by the public duty doctrine.

I. THE COURT SHOULD DISREGARD THE CONTENT IN AIDAN'S BRIEF WHICH DOES NOT APPEAR IN THE PETITION.

On page 8 of their Brief, Aidan cites to an excerpt from a deposition taken of Doug Gough before the City was a party to this litigation, as well as to a document that was an exhibit therein. *See* Appellee's Br. at 8. On pages 9-11, Aidan again cites to the deposition and exhibit, as well as a purported job description for Mr. Gough's position. *See Id*. at 9-11.

The City submits that nothing in these documents would change the outcome of the questions on this appeal. Still, the Court should disregard the documents completely in its analysis of this case, as they are all external to Aidan's Third-Party Petition.

It is black-letter law that "[a] court must decide the merits of a motion to dismiss based on the facts alleged in the petition, not the facts alleged by the moving party or facts that may be developed in an evidentiary hearing." *Young v. HealthPort Technologies, Inc.*, 877 N.W.2d 124, 127 (Iowa 2016).[1]

Here, Aidan cites to three documents outside its Third-Party Petition: first, an excerpt from a deposition of Mr. Gough, *see* Appellee's Br. at 8, 10, 11; second, a job description for the City's Housing Inspector position, *id*. at 10, 11; third, an exhibit from Mr. Gough's deposition, *id*. at 8, 9-10.

These documents are clearly external to the Third-Party Petition, and in fact the deposition Exhibit #20 was also not in the record before the District Court. Accordingly, the City respectfully asks this Court to disregard these documents, as they are irrelevant to the question of whether Aidan's Third-Party Petition states a viable claim.

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[1] The City acknowledges the exception to this rule for "facts of which a court may take judicial notice," *id*. at 127 n.1, but this exception does not apply to these kinds of documents, *see, e.g., Motor Club of Iowa v. Dept. of Transp.*, 251 N.W.2d 510, 517 (Iowa 1977) ("To be capable of being judicially noticed a matter must be of common knowledge or capable of certain verification.").

II. THE HIRING/RETENTION/SUPERVISION OF MR. GOUGH IS AN "ACT OR OMISSION" OF THE CITY, AND THE STAIRS WERE UNDER THE CONTROL OF A THIRD PARTY.

Aidan devotes much of its Brief to contrasting Iowa Code section 670.4(1)(j) (third-party immunity) with subsection 670.4(1)(k) (emergency-response immunity). Aidan argues that because subsection (j) only provides immunity for "claim[s] *based upon* an act or omission of an officer or employee of the municipality," Iowa Code § 670.4(1)(j) (2023) (emphasis added), while subsection (k) provides immunity for "claim[s] *based upon or arising out of* an act or omission of a municipality," *id*. § 670.4(1)(k) (emphasis added), the third-party immunity is narrower than the emergency-response immunity, *see* Appellee's Br. at 14-20 (citing *Cubit v. Mahaska Cnty.*, 677 N.W.2d 777, 783-85 (Iowa 2004)).

However, this argument is ultimately a red herring. Aidan argues that its claim is based on the negligence of the *City* in its hiring, retention, and supervision, rather than the negligence of Mr. Gough in his inspection. *See* Appellee's Br. at 16 ("[Aidan's] lawsuit is based upon the foundation that Gough should never have been hired as a Housing Inspector in the first place, because of his insufficient qualifications."). Again, subsection (j) immunizes the City against

> [a]ny claim based upon an act or omission of an officer or employee of the municipality, whether by issuance of permit, inspection,

> investigation, *or otherwise*, . . . if the damage was caused by a third party, event, or property not under the supervision or control of the municipality . . . .

Iowa Code § 670.4(1)(j) (emphasis added). Here, the act at issue is the City's decision to hire (or retain, or supervise) Gough, and the damage was caused by a third-party's property not under the City's control (Aidan's stairs).[2] Thus, the distinction between the terms "based upon" and "arising out of" is meaningless; Aidan's claim is undoubtedly "based upon" an act of the City, to wit, hiring, retaining, and supervising Gough.

The immunity of subsection (j) becomes clear when one understands that subsection (j) is not inspection-immunity; it is third-party immunity. The immunity of subsection (j) is not limited to cases of negligent inspection; rather, it applies to *all* acts and omissions of city employees, "whether by issuance of permit, inspection, investigation, *or otherwise*," *id*. § 670.4(1)(j) (emphasis added).

If the statute stopped there, then every act of every employee or officer of a municipality would be immunized. But of course the statute does not stop there; it goes on to say that it only applies

> if the damage was caused by a third party, event, or property not under the supervision or control of the municipality, unless the act or omission of the officer or employee constitutes actual malice or a criminal offense.

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[2] *See* Appellants' Br. at 15 n.1.

Id.

Thus, since Aidan does not allege malice nor a criminal act, there are two questions under subsection 670.4(1)(j) that are relevant to this case: (1) does Aidan allege an act or omission by a City employee, and if so (2) were the Randolphs' damages caused by third-party property, not under the City's control? Based on the plain meaning of the statute and the existing case law laid out in the City's prior Brief, the answer to both questions is "yes."

The third-party element of subsection (j) is also what distinguishes this case from the cases of sexual harassment and abuse by City employees. While it is true that those cases all involved claims of negligent hiring, retention, and/or supervision, none of those cases involved a third-party element, since the perpetrator in all three cases was an employee of the municipality. *See* Appellant's Br. at 20-22.

Likewise, the other cases cited by Aidan do not change this outcome. Aidan appears to cite *McCoy v. Thomas L. Cardella & Associates* for the proposition that Iowa's workers-compensation preemption is akin to the emergency-response immunity, in that it is broader than the third-party immunity, *see* Appellees' Br. at 17 (citing *McCoy*, 992 N.W.2d 223, 229 (Iowa 2023)). This argument again misses the point that 670.4(1)(j) immunizes the City against *any* claim, even one for negligent hiring, retention,

or supervision, so long as a person or property external to the City caused the damages.

Aidan also attempts to distinguish *Schoff v. Combined Insurance Company of America*, but that is only possible if one reads that case narrowly. In *Schoff*, this Court ruled that because Schoff's underlying promissory estoppel claim failed on the facts, his negligent supervision claim against his employer must fail as well. 604 N.W.2d 43, 53 (Iowa 1999). Aidan essentially argues that Schoff's negligent supervision claim only failed because his promissory estoppel claim failed on the facts, and that the result would have been different if Schoff's employer was simply immune, *see* Appellee's Br. at 13, 17. However, the *Schoff* Court was not so narrow when stating its holding:

> We conclude, therefore, that an employer cannot be held liable for negligent supervision or training where the conduct that proper supervision and training would have avoided *is not actionable* against the employee.

604 N.W.2d at 53 (emphasis added).

Here, Aidan seems to agree that a negligence count against Gough would fail to state a claim on account of section 670.4(1)(j). Aidan presumably would argue that *Schoff* should be read close to its facts, and that it is inapplicable since it did not involve an immunity situation, *see* Appellee's Br. at 17; however, this brings us back to the legislature's purpose in enacting

the 670.4(1)(j) immunity. The purpose is to prevent the *municipality* from having to pay out money on such claims, since even if the claim is solely against a low-level employee, the municipality generally must defend and indemnify the employee, *see* Iowa Code § 670.8. Accordingly, it makes perfect sense to read and analogize *Schoff* more broadly, and to hold that where a claim against an employee is non-actionable because of immunity, a negligent supervision claim is likewise non-actionable against the employer.

Additionally, Aidan contends that the City's argument swallows up the 670.4(1)(f) immunity for latent defects, making the latent-defect immunity unnecessary and thus going against one of the canons of statutory interpretation. *See* Appellee's Br. at 22-23. To be fair, there is likely some overlap between subsections (f) and (j), given that both refer to "inspections." However, we can reconcile these statutes when we remember again that the purpose of subsection (j) is to give cities immunity for damages caused by *third parties*, while subsection (f) applies in all circumstances. Thus, if a city performs a negligent inspection on its *own* property, subsection (j) does *not* immunize the city. Alternatively, if a city correctly inspects its property but does not find a *latent* defect, subsection (j) still would not apply, but subsection (f) would come into play and provide immunity.

III. AIDAN'S CLAIM IS ONE OF NONFEASANCE, AND THERE IS NO SPECIAL RELATIONSHIP BETWEEN AIDAN AND THE CITY.

As to the City's argument based on the public duty doctrine, Aidan contends that "[the City's] act of hiring Gough and his determination that the Property complied with the Municipal Code were affirmative acts of malfeasance," taking them outside the scope of the public duty doctrine. Appellee's Br. at 27. They also argue that the City was in a "special relationship" with Aidan, *id*. Both arguments are contrary to existing case law.

A. Aidan's claim is one of nonfeasance, not misfeasance.

In *Johnson v. Humboldt County* and *Breese v. City of Burlington*, this Court interpreted the public duty doctrine to bar claims of *non*feasance, but not *mis*feasance. *Johnson*, 913 N.W.2d 256, 266-67 (Iowa 2018); *Breese*, 945 N.W.2d 12, 19-20 (Iowa 2020). The *Johnson* Court held that the public duty doctrine barred a claim for failure to remove a concrete embankment from a ditch, 913 N.W.2d at 259, 261; in contrast, the *Breese* Court held that the public duty doctrine did *not* bar a claim against the City for negligent design and construction of a city-owned sewer box, 945 N.W.2d at 21. The former was thus an example of *non*feasance, while the latter was an example of *mis*feasance. *See Johnson*, 913 N.W.2d at 266-67; *Breese*, 945 N.W.2d at 21.

Particularly relevant to the case at bar, the *Breese* Court noted that there are two broad categories in which the public duty doctrine applies: first, "when the allegation is a government failure to adequately enforce criminal or regulatory laws for the benefit of the general public . . . ," *Breese*, 945 N.W.2d at 21; second, in cases involving "a government failure to protect the general public from somebody else's instrumentality . . . ," *id*.

The *Breese* Court found that that case did not fit into either bucket, *id*.; here, Aidan's claim fits into both. Aidan's claims that the City failed to adequately enforce the relevant building codes (whether by missing the defect, failing to provide a qualified inspector, or otherwise), and also that it failed to protect a citizen from Aidan's own flight of stairs. No matter how it is framed, Aidan's claim is eminently one for *nonfeasance* under existing case law. Accordingly, the public duty doctrine applies.

B. The City did not have a special relationship with Aidan.

Finally, Aidan contends that "[b]y requiring landlords to obtain rental permits and through exercising its building code inspection and enforcement powers, the City has a special relationship with residential landlords." Appellee's Br. at 28. The existing caselaw does not support this argument.

Aidan cites *Wilson v. Nepstad* for the proposition that "a [special] relationship has been found to exist between a municipality and residential

tenants for purposes of fire code enforcement," *id*. at 27 (citing *Wilson*, 282 N.W.2d 664, 672-73 (Iowa 1979)). There are three problems with this argument.

First, as the City discussed at length in its prior Brief, this Court decided *Wilson* under the old chapter 613A, which contained due-care immunity but not the third-party immunity now contained in section 670.4(1)(j). And when it came to considering the public duty doctrine, the *Wilson* Court considered the due-care immunity statute (without an accompanying third-party immunity statute) to be an expression of the legislature's intent:

> Only when an employee exercises due care in executing statutory duties is the municipality exempt from liability. The legislature could not have expressed better or more consistently its intention to impose in the same manner as in the private sector municipal tort liability for negligence based on breach of a statutory duty.

Wilson, 282 N.W.2d at 669. Here, the times have changed and so has the Code of Iowa. We now have the exact opposite situation: The legislature has seen fit to explicitly grant immunity for the acts of third parties, even in the absence of due care on the part of the City, by enacting 670.4(1)(j). While sovereign immunity and the public duty doctrine are indeed different, *see, e.g., Raas v. State*, 729 N.W.2d 444, 449 (Iowa 2007), the Iowa Code as it currently stands no longer evinces an intent by the General Assembly to abrogate the public duty doctrine in this situation.

Second, and as to the "special relationship" issue, the City would respectfully submit that *Wilson* is at the very least an outdated case under this Court's current public duty doctrine precedent, and in fact is most likely no longer good law. True that the *Wilson* Court found that the relevant building ordinances "were designed for the protection of a special, identifiable group of persons–lawful occupants of multiple dwellings–from a particular harm, injury or death from fire." *Id*. at 672. However, the *Wilson* Court also cited cases stating that a "duty . . . ran 'to all those rightfully using the roads,' and 'to the traveling public.'" *Id*. at 671 (internal citations omitted). It is thus clear that the *Wilson* Court did not consider the public duty doctrine to exist in the same way this Court currently does, as such statements are no longer good law in light of *Kolbe*, *see Estate of McFarlin v. State*, 881 N.W.2d 51, 61 n.6 (Iowa 2016).

Third, and even if *Wilson* is still good law, the "special relationship" which that Court identified was between the state and the *tenants*, not the state and the landlords whose buildings were being inspected. *Wilson*, 282 N.W.2d at 672. Aidan argues that the City created a special relationship "[b]y requiring landlords to obtain rental permits and through exercising its building code inspection and enforcement powers," Appellee's Br. at 28, but that argument presupposes that the City's housing code exists for the benefit of

the landlords and their insurance carriers. To the contrary, the landlords are the ones being regulated; the codes exist for the safety of those who live in the buildings:

> It is the purpose of this chapter to adopt a complete housing maintenance code *to protect health, safety and welfare*; to establish regulations governing maintenance of dwellings and dwelling units, including minimum standards; permits; fees; inspections; use of licensed trades and enforcement procedures.

Sioux City Muni. Code § 20.05.030, "Purpose" (emphasis added).

IV. CONCLUSION

The City maintains that the easiest and cleanest way for this Court to resolve this case is to simply hold that the third-party immunity of section 670.4(1)(j) bars Aidan's claim. However, and in the alternative, the City would likewise respectfully ask this Court to find that the public duty doctrine is a bar to Aidan's action.

CERTIFICATE OF COMPLIANCE WITH TYPEFACE REQUIREMENTS AND TYPE-VOLUME LIMITATION

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/s/ Steven R. Postolka	January 5, 2024
Steven R. Postolka	Date

CERTIFICATE OF SERVICE

I, Steven R. Postolka, hereby certify that on the 5th day of January, 2024, I served Appellants' Final Reply Brief on all other parties to this appeal by electronic filing.

/s/ Steven R. Postolka

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Steven R. Postolka

CERTIFICATE OF FILING

I, Steven R. Postolka, further certify that I filed Appellants' Final Reply Brief via EDMS on the 5th day of January, 2024.

/s/ Steven R. Postolka

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Steven R. Postolka