

IN THE SUPREME COURT OF IOWA

No. 23-1199

Polk County Case No. EQCV088618

1000 FRIENDS OF IOWA, *et al.*,

Plaintiffs/Appellants,

-vs-

POLK COUNTY BOARD OF SUPERVISORS,

Defendant/Appellee.

**Appeal from the Iowa District for Polk County
The Hon. Jeanie Kunkle Vaudt, Judge**

APPELLANTS' FINAL REPLY BRIEF

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B. THE IMTCA AND IOWA CODE § 335.18 (2023) OPERATE INDEPENDENTLY OF EACH OTHER AND CANNOT BE "HARMONIZED".

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ARGUMENT

I. THIS COURT CAN AVOID RULING ON THE APPLICABILITY OF IOWA CODE § 670.4A (2023) ONLY BY HOLDING THAT PLAINTIFFS' PETITION FOR WRIT OF CERTIORARI AND DECLARATORY JUDGMENT PLEAD FACTS SUFFICIENT TO CONFER STANDING.

In the Routing Statement that begins its Brief, the Board submits that this case should be transferred to the Iowa Court of Appeals because resolution of the issues presented "rest[s] on existing legal principles." (Appellee's Brief, p. 8)

Had the Board not injected an issue of first impression into these proceedings, that may have been true. That the Polk County Attorney is taking the position that Iowa Code § 670.4A (2023) applies in all cases brought against governmental actors, and not just cases sounding in tort and in which money damages are claimed, changes the landscape quite dramatically, not just in this case but across the litigation spectrum.

The conclusion section of Appellee' Brief provides the starting point for this Reply Brief: "The Individual Plaintiffs may in fact have standing to bring this challenge. Unfortunately, Plaintiffs did not sufficiently plead facts and particularized interests upon which this Court could recognize their standing to sue. As a result, the above-captioned matter must be dismissed." (Appellee's Brief, p. 26) (emphasis added)

Plaintiffs submit that they did sufficiently plead facts so as to confer standing to prosecute their claim according to the provisions of Iowa Code § 335.18 (2023) and Iowa R. Civ. P. 1.1401 (2023). Assuming, *arguendo*, however, that Plaintiffs' Petition for Writ of Certiorari and Declaratory Judgment was deficient in some respect, the question becomes: should the trial court have dismissed Plaintiff's Petition with prejudice or without prejudice? The former is the correct answer if and only if the heightened pleading requirements of Iowa Code § 670.4A (2023) apply where neither tort claims are plead nor money damages sought.

In resolving the issues presented by this appeal, this Court has before it three options: (1) find that the Plaintiffs did sufficiently plead facts to establish standing such that it was error for the trial court to dismiss their Petition for Writ of Certiorari, without resolving the applicability of Iowa Code § 670.4A (2023); (2) find that the Petition is deficient in some respect but that Iowa Code § 670.4A (2023) does not apply to cases in which tort claims are not plead and/or money damages are not claimed and, therefore, that it was error for the trial court to dismiss the Petition with prejudice; or (3) hold that, as a matter of law, the heightened pleading requirements of Iowa Code § 670.4A (2023) apply in all cases in which government actors are named defendants, regardless of the nature of the claim or of the relief sought.

II. WHILE THE IOWA MUNICIPAL TORT CLAIMS ACT MANDATES CERTAIN PROCEDURAL REQUIREMENTS, THE BOARD CONCEDES THAT IOWA CODE § 670.4A (2023) — QUALIFIED IMMUNITY — APPLIES ONLY TO CLAIMS FOR MONETARY DAMAGES.

Relying on this Court's opinion in *Nahas v. Polk County, et al*, 991 N.W.2d 770 (Iowa 2023), the Board argues that the "heightened pleading requirements [set forth in Iowa Code § 670.4A (2023)] apply to all lawsuits filed after June 2021." (Appellee's Brief, p. 12) The Board cites *S.O. ex rel. J.O.Sr. v. Carlisle Sch. Dist.*, No. 07-2096, 2009 WL 605994 (Ia. App. 2009) as supporting its proposition that Iowa Code § 670.4(A) (2023) applies in all cases, not just those sounding in tort and in which money damages are claimed. (Board' Brief, p. 15 ["the IMTCA...mandates the *procedural* requirements for bringing statutory, common law, equitable ¹, and constitutional claims against municipalities and their officers and employees."])

The *Nahas v. Polk County* and *S.O. v. Carlisle Sch. Dist.* cases have two things in common: in both, the plaintiffs prosecuted tort claims for money

¹ Plaintiffs note that the Board's inclusion of "equitable" here is inconsistent with its concession, at page 16 of its Brief to this Court, that qualified immunity does not shield governmental actors cases where money damages are not at issue — for example, according to the Board, where injunctive relief is sought.

damages against the defendant[s]. And neither has any bearing on the case presented by these Plaintiffs.

As Plaintiffs discussed *Nahas* in their opening Brief to this Court, that argument will not be repeated here. But the Iowa Court of Appeals' opinion in *S.O. v. Carlisle Sch. Dist.* does merit some discussion. The core issue in that case was statute of limitations. Iowa Code § 670.5 (2023) imposes a two-year limitation period upon "[e]very person who claims damages from any municipality or any...employee...of a municipality for or on account of any loss or injury within the scope of section 670.2....Section 670.2 provides, in relevant part: '[E]very municipality is subject to liability for its torts...whether arising out of a government or proprietary function.'" *S.O. v. Carlisle Sch. Dist.*, 2009 WL 605994, **11 - 12 (emphasis added)

Nowhere in its opinion in *S.O. v. Carlisle Sch. Dist.* does the Iowa Court of Appeals so much as make reference to, let alone hold that Iowa Code Chapter 670 governs, cases other than those sounding in tort. So, for this Court to hold that the Iowa Municipal Tort Claims Act "mandates the procedural requirements" of this case — as the Board claims — this Court must necessarily hold that these Plaintiffs' claim sounds in tort and/or that the IMTCA applies in every case filed against every governing authority regardless of the substantive nature of the claim[s] plead and the type[s] of relief sought.

At page 16 of its Brief, the Board argues that "[b]y its explicit terms, 'tort' in the IMTCA is not limited to claims for monetary damages" citing *Sutton v. Council Bluff Water Works*, 990 N.W.2d 795 (Iowa 2023). The Board then writes that "the 'monetary' damages language is limited to the application of qualified immunity. See Iowa Code § 670.4(1). Such a limitation makes sense as qualified immunity would not shield government actors from other from of redress like injunctive relief." (Board's Brief, p. 16).

Such a limitation also makes sense as qualified immunity does not shield the Board from the form of redress set forth in Iowa Code § 335.18 (2023).

Consistent with well-settled pronouncements from the U.S. Supreme Court, the qualified immunity doctrine applies only in cases where money damages are claimed for alleged violations of constitutional or statutory (civil) rights.

A. QUALIFIED IMMUNITY, INCLUDING AS CODIFIED AT IOWA CODE § 670.4A (2023), APPLIES ONLY IN CASES IN WHICH PLAINTIFFS SEEK TO HOLD GOVERNMENT ACTORS LIABLE FOR MONEY DAMAGES.

It is undisputed that the doctrine of qualified immunity — including as codified at Iowa Code § 670.4A (2023) — protects state and local officials, including law enforcement personnel, from personal liability in suits for money damages unless the official violated a clearly established constitutional

or statutory right. Indeed, that is the standard announced by the U. S. Supreme Court in *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982):

We therefore hold that government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known....If the law at that time was not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to "know" that the law forbade conduct not previously identified as unlawful....By defining the limits of qualified immunity essentially in objective terms, we provide no license to lawless conduct. The public interest in deterrence of unlawful conduct and in compensation of victims remains protected by a test that focuses on the objection legal reasonableness of an official's acts.

Harlow v. Fitzgerald, 457 U.S. at 818 - 19 (emphasis added)

Since 1982, the U. S. Supreme Court has consistently applied the doctrine of qualified immunity only in cases in which plaintiffs claimed violation[s] of statutory or constitutional rights, as compensation for which monetary damages were sought. See, for example, *City of Tahlequah v. Bond*, 595 U.S. 9, 11 (2021) ["The doctrine of qualified immunity shields officers

from civil liability (under 42 U.S.C. § 1983) so long as their conduct 'does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.' *Pearson v. Callahan*, 555 U.S. 223, 231 (2009)"] (emphasis added); and *Rivas-Villegas v. Cortesluna*, 595 U.S. 1 (2021) [police officer entitled to qualified immunity defense to civil rights claim under 42 U.S.C. § 1983).

See also, most recently, *Lombardo v. St. Louis*, 600 U.S. ___ (2023), Sotomayor, J., dissenting from denial of certiorari: "The 'clearly established' prong of the qualified immunity analysis can pose a very high bar for plaintiffs seeking to vindicate their rights. Even when government officials violate the law, qualified immunity shields them from damages liability unless the 'violative nature of [the] *particular* conduct is clearly established.' *Mullenix v. Luna*, 577 U. S. 7, 12 (2015) (*per curiam*)." (emphasis added)

Protection of law enforcement personnel was the Iowa General Assembly's and the Governor's priority in passing and signing SF 342, codified at Iowa Code § 670.4(A):

Today, Gov. Reynolds signed SF 342, known as the "Back the Blue Act," into law at the Iowa Law Enforcement Academy.

The legislation makes rioting a felony offense, increases penalties on a range of other destructive behaviors, establishes qualified

immunity, and increases due process protections for law enforcement. It also holds local governments accountable that prevent local law enforcement from doing their jobs.

“I made it clear in my Condition of the State Address that Iowa’s law enforcement will always have my respect, and I will always have their back,” said Gov. Reynolds. “Today’s bill embodies that commitment in a historic way. The public peace is too important, and the safety of our officers too precious, to tolerate destructive behavior.”

The bill also bans discrimination in the enforcement of the law and establishes a process for citizens who believe their rights have been violated to file a complaint with the state Attorney General. It comes a year after Gov. Reynolds signed the More Perfect Union Act, which enacted significant reforms to policing and passed the Iowa Legislature unanimously in a single day.

“Today’s bill illustrates an important truth: there is no contradiction whatsoever between steadfast support for honorable and selfless law enforcement officers – the vast majority – and a commitment to improving law enforcement,” said Gov. Reynolds.

(<https://governor.iowa.gov/press-release/2021-06-17/flanked-iowa-law-enforcement-gov-reynolds-signs-back-blue-act-law>)

This Court has never applied the doctrine of qualified immunity outside the parameters set by the United State Supreme Court and nothing presented by this appeal compels a wholesale detour from that course.

B. THE IMTCA AND IOWA CODE § 335.18 (2023) OPERATE INDEPENDENTLY OF EACH OTHER AND CANNOT BE "HARMONIZED".

Beginning at page 17 of its Brief, the Board presents its argument regarding statutory interpretation: "Under the rules of statutory interpretation set forth by the Iowa General Assembly, the issue here is not a matter of picking which statute applies — Iowa Code section 335.18 or the IMTCA — but the parties' and the Court's duty to harmonize the statutes." The Board argues that both code sections can be harmonized and given effect because the IMTCA is a "general" statute that applies to all claims against government actors and Iowa Code § 335.18 (2023) creates a "specific cause of action." (Appellee's Brief, pp. 17 & 18)

Simply put, the IMTCA and Iowa Code § 335.18 (2023) cannot be harmonized — and there is no need to do so. The former applies to tort claims and, as concerns Iowa Code § 670.4A (2023) specifically, claims for money damages, while the latter concerns only writs of certiorari. Plaintiffs with tort claims against government actors must prosecute those claims according to the precepts of the IMTCA. Just as Iowa Code § 335.18 (2023)

does not permit a writ of certiorari against tortfeasors, the IMTCA has no application to the claim prosecuted by these Plaintiffs.

III. PLAINTIFFS' PETITION FOR WRIT OF CERTIORARI AND DECLARATORY JUDGMENT PLEADS SUFFICIENT FACTS SO AS TO CONFER STANDING.

In its Statement of the Case, the Board writes: "While the Plaintiffs set forth in great detail the challenged governmental action, the Petition is wholly devoid of factual allegations as to how the change in zoning classification specifically and particularly affects these Plaintiffs — above and beyond those of the half million other residents of Polk County, Iowa." (Appellee's Brief, p. 9).

Plaintiffs' Iowa Code § 335.18 (2023) claim is predicated on the Board's alleged violations of the Polk County Zoning Ordinance, the purpose of which "is the implementation of the Comprehensive Plan and the protection and promotion of the health, safety, and general welfare of the present and future residents of the County." (App. 17). "The provisions of [the Polk County Zoning] Ordinance...apply to the land within unincorporated Polk County." (App. 55) (emphasis added).

The Plaintiffs in this case are most certainly specifically and particularly affected by the Board's actions because — unlike the other half million residents of Polk County (including their attorney) — they reside in

unincorporated Polk County. It is their health, safety, and general welfare that the Zoning Ordinance, and the elected Board charged with implementing the Ordinance, are intended and compelled to protect and promote.

More specifically, the Board claims that Plaintiffs' Petition is deficient because they plead only their addresses and not the distance of their parcels from the one subject of the Board's actions and because "the Petition does not articulate the individual Plaintiffs' concerns about rezoning. Instead, the Petition quotes extensively from the recommendations of Polk County staff against the rezoning." (Appellee's Brief, p. 23) The Board then writes, "Plaintiffs did not explicitly adopt these statements as their own." (Appellee's Brief, p. 24).

The "Facts" section of Plaintiffs' Petition for Writ of Certiorari and Declaratory Judgment includes twenty-eight (28) paragraphs and subparagraphs spanning more than ten (10) pages. Included in these factual allegations are excerpts from the Polk County Staff report, public comments at meetings of the Board of Supervisors and comments from individual Board members. Each of the three separate Counts for relief plead in the Petition is preceded by a paragraph "adopt[ing] and incorporat[ing], as if fully set forth herein" the factual allegations set forth previously.

In their opening Brief to this Court, Plaintiffs addressed in some detail the factual allegations plead in the Petition and why and to what extent they relied upon and adopted the findings of Polk County Staff as set out in their report. (See, Appellants' Brief, pp. 47 – 50; 50 - 52); those arguments will not be repeated here. But it is clear that the facts, as plead, satisfy the four-pronged test adopted by this Iowa Court of Appeals in *Reynolds v. Dittmer*, 312 N.W.2d 75 (Ia. App. 1981). (See, Appellants' Brief, pp. 53 & 54)

Also among the factual allegations plead by the Plaintiffs are concerns regarding the property tax implications of the Board's approval of The Family Leader's Application. "[A] taxpayer can acquire 'standing by showing some link between higher taxes and the government action being challenged.'" *Brueggeman v. Osceola Cty.*, 2017 Iowa App. LEXIS 605 *14 (Ia. App. 06/07/2017), quoting, *Godfrey v. State*, 752 N.W,2d 413, 424 (Iowa 2008) [Taxpayers had standing to challenge adoption of an urban renewal resolution pursuant to which a tax increment finance district would likely be created.]

A. PLAINTIFFS' PETITION ESTABLISHES THAT THEY ARE AGGRIEVED BY THE CHALLENGED BOARD ACTION, ONE IN WHICH THEY HAVE A SPECIFIC LEGAL INTEREST.

One of the two remedies sought by Plaintiffs in their Petition (the other being a declaratory judgment) is a writ of certiorari. "Certiorari, which is an extraordinary remedy, is available to all persons who show a substantial

interest in the activity challenged. Generally, only a party to an action may obtain the writ. An exception exists, however, when the public is concerned with the subject matter of the action, in which case anyone interested may petition. In order for persons who are not parties to assert a claim, they must prove that they have been injured in a special manner, different from the of the public generally." *State v. West*, 320 N.W. 570, 573 (Iowa 1982) (citations omitted)

Neither 1000 Friends of Iowa nor the Individual Plaintiffs were a party to the proceeding before the Polk County Board of Supervisors. They are, however, members of the public specially concerned with the subject matter of the Board's action, 1000 Friends of Iowa as "the only group in the state focused solely on promoting responsible land use and sustainability in community, state, and federal development decisions" (Brief, p. 46) and the Individual Plaintiffs as owners of and residents on adjacent parcels in unincorporated Polk County, Iowa.

Iowa Code § 335.18 (2023) requires only that a plaintiff seeking a writ establish they are "aggrieved" by the challenged action. The term aggrieved, of course, operates hand-in-hand with the first prong of the two-part standing test set forth in *Citizens for Responsible Choices v. City of Shenandoah*, 686 N.W.2d 470 (Iowa 2004) — "specific legal interest in the litigation" and is

synonymous with the second "injuriously affected." This Court has consistently held that a plaintiff may be aggrieved despite not having been a party to the challenged action and despite a lack of close proximity:

In [*State v.*] *West*, [320 N.W.2d 570 (Iowa 1982)], the parties seeking certiorari alleged that they suffered pecuniary damage as result of the defendant's criminal activities in the underlying action and that when the district court denied their claims to the restitution fund their only recourse was a writ of certiorari. *Id.* Accordingly, we held the parties seeking certiorari had standing to maintain the action.

Similarly, in *Hohl [v. Bd. of Educ.*, 94 N.W.2d 787 (1959)] we considered whether individuals who questioned certain school reorganization proceedings had standing to bring a certiorari action...94 N.W.2d at 788. We noted certiorari proceedings were "available to all persons who may show a substantial interest in the matter challenged."...94 N.W.2d at 791...We held that individuals affected by the reorganization could bring a certiorari action to challenge the reorganization proceedings....94 N.W.2d at 792.

Finally, in an earlier case, *Hemmer v. Bonson*,...117 N.W. 257, 258-9 (1908)...[w]e held [a] citizen had standing [to challenge issuance of a liquor license] because the citizen could have filed an action under the

statute [which permitted direct action by any county resident] to enjoin the nuisance and because the citizen, due to the proximity of the tavern to her residence, had a special interest in the case....117 N.W. at 259.

Crowell v. State Pub. Defender, 845 N.W.2d 676, 683 (Iowa 2014)

IV. ASSUMING, ARGUENDO, THAT PLAINTIFFS' PETITION WAS SUBJECT TO DISMISSAL, THE TRIAL COURT SHOULD HAVE DISMISSED IT WITHOUT, RATHER THAN WITH, PREJUDICE.

Iowa Rule of Civil Procedure 1.943, **Voluntary Dismissal** (2023) provides, in pertinent part: "A party may, without order of court, dismiss that party's own petition...at any time up until ten days before the trial is scheduled to begin....A dismissal under this rule shall be without prejudice, unless otherwise stated...."

Litigants facing potentially fatal attacks on their initial pleading can utilize Rule 1.943 (2023) and thereafter, if they so choose, file a new Petition.

Iowa Rule of Civil Procedure 1.402 (2023) governs "general rules of pleading." Iowa R. Civ. P. 1.402(4), *Amendments* (2023) provides, in pertinent part: "A party may amend a pleading once as a matter of course at any time before a responsive pleading is served...Otherwise, a party may amend a pleading only by leave of court or by written consent of the adverse party. Leave to amend...shall be freely given when justice so requires."

Iowa R. Civ. P. 1.402(5), *Making and construing amendments* (2023) states, in part: "Whenever the claim... asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment related back to the date of the original pleading."

Even if these Plaintiffs believed that their Petition for Writ of Certiorari and Declaratory Judgment was fatally deficient in some respect, Iowa R. Civ. P. 1.943 (2023) was unavailable to them. Iowa Code § 335.18 (2023) requires that litigation be initiated within thirty (30) days of the challenged action. The Board action subject of this litigation occurred on February 7, 2023. As such, Plaintiffs had to file their Petition by no later than March 9, 2023. The Board filed its Motion to Dismiss on April 3, 2023, by which time Plaintiffs' time to file had since expired. Regardless, it is critical that dismissals under Iowa R. Civ. P. 1.943 (2023) are always without prejudice — unless the dismissing party elects otherwise.

If the trial court's determination that Plaintiffs' Petition was deficient in some respect was not error, the order of dismissal should have been without prejudice. Thereafter, Plaintiffs would have filed a motion for leave to amend, which the trial court was compelled to freely grant in the interests of justice

(Iowa R. Civ. P. 1.402(4)), and the amended petition would have related back to the timely original filing date of March 7, 2023 (Iowa R. Civ. P. 1.402(5)).

V. CONCLUSION.

Plaintiffs adopt and incorporate, as if fully set forth herein, the Conclusion section of their opening Brief to this Court.

REQUEST FOR ORAL ARGUMENT

Come now the Plaintiffs/Appellants and respectfully request this Court set this case for oral argument.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that on the 16th day of January, 2024, the foregoing Final Reply Brief was filed with the Iowa Supreme Court via EDMS and served electronically on each of the attorneys or parties of record as set forth below: _____/s/ CeCelia C. Ibson_____

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**CERTIFICATE OF COMPLIANCE WITH
I.R.A.P. 6.903(1)(e), (f) and (g)(1) (2023)**

The undersigned does hereby certify that the foregoing Proof Brief complies with I.R.A.P. 6.903(1)(e), (f) and (g)(1) (2023). It was prepared using a proportionally spaced typeface, serif, in 14 point and is comprised of 3,569 words, according to the word processing system used to prepare it (Pages for Mac, version 11.2; Word 2008 for Mac).