IN THE SUPREME COURT OF IOWA

No. 23-1617

THE ESTATE OF SHARON KAHN and
THE ESTATE OF VICKI HODGES
Plaintiffs-Appellants
vs.
CITY OF CLERMONT, IOWA, FAYETTE COUNTY, FAYETTE COUNTY CONSERVATION BOARD, and STATE OF IOWA.
Defendants-Appellees

APPEAL FROM THE IOWA DISTRICT COURT FOR FAYETTE COUNTY
NO. LACV056238

THE HONORABLE LAURA PARRISH
PRESIDING JUDGE

PLAINTIFFS'-APPELLANTS' FINAL BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES CITED

STATUTES CITED

STATEMENT OF ISSUES PRESENTED FOR REVIEW

Issue I. Whether the District Court was correct in dismissing Plaintiffs' petition against the State of Iowa, the City of Clermont, Fayette County and Fayette County Conservation Board based on the Public Duty Doctrine.

Issue II. Whether the District Court was correct in dismissing Plaintiffs' petition against the City of Clermont, Fayette County and Fayette County Conservation Board based on failure to comply with the heightened pleading requirement of Iowa Code Section 670.4A.

Issue III. Whether the District Court was correct in dismissing Plaintiffs' petition against the State of Iowa based on Sovereign Immunity.

Issue IV. Whether the District Court was correct in dismissing Plaintiffs' petition against the State of Iowa based on Qualified Immunity under *Iowa Code* Section 669.14A.

ROUTING STATEMENT

Issue No. I: This case presents issues of first impression regarding the liability between the State of Iowa and municipal defendants for misfeasance related to a dangerous low-head dam on a State designated "water trail" under *Iowa Code* §464A.11 and associated *Iowa Administrative Code* 571 – Chapter 30. Similarly, the issue of whether or not the State of Iowa can be liable for active negligence with respect to its "Sovereign Title" of a navigable river has never been decided by the Iowa Supreme Court. Lastly, the obligations of the State and each municipality in establishing a state designated "water trail" and the obligations to warn of dangerous low-head dams and the subsequent maintenance of such warnings has never been addressed by the Iowa Supreme Court. Although the court addressed liability of the State of Iowa on a meandered lake in *Estate of McFarlin v. State*, 881 N.W.2d 51 (Iowa 2016), there were no claims of misfeasance against the State and the lake at issue was not a State designated "water trail." More importantly, the cases of *Breese v. City of Burlington*, 945 N.W. 2d 12 (Iowa 2020), *Fulps v. City of Urbandale*, 956 N.W.2d 469 (Iowa 2021), and *Estate of Farrell v. State of Iowa*, 974 N.W.2d 132, 138 (Iowa 2022), decided after *Estate of McFarlin*, appear to chart a course of significantly limiting application of the public duty doctrine. Thus, *Breese*, *Fulps* and *Farrell* appear at odds with *Estate of McFarlin* and more in line with Justice

Hecht's dissent in *McFarlin*. For these reasons, Plaintiffs submit that the Iowa Supreme Court should retain this case under Iowa R. App. P. 6.1101(2)(b & c)

Issue No. II: Whether or not a pleading satisfies the "heightened pleading requirements of *Iowa Code* §670.4 was addressed by the court in *Nahas v. Polk County*, 991 N.W.2d 770, 776–777 (Iowa 2023). This issue likely does not require retention by the Iowa Supreme Court pursuant to Iowa R. App. P. 6.1101(3)(a).

Issue No. III: This case presents issues of first impression regarding whether or not the State of Iowa can escape liability for its active negligence related to its "Sovereign Title" to a "naviagable stream" that the State designates as a "water trail" under *Iowa Code* §464A.11 and associated *Iowa Administrative Code* 571 – Chapter 30. The State claims, that since it holds title "in trust for the public," that it cannot be held liable for its misfeasance. This issue has never been decided by Iowa Supreme Court and should be retained under Iowa R. App. P. 6.1101(2)(c)

STATEMENT OF THE CASE

This case is an appeal from two separate Orders dismissing Plaintiffs' claims against all Defendants in the Iowa District Court for Fayette County in the matter of case number LACV056238, *Estate of Sharon Kahn et al. v. City of Clermont et* al. The underlying case is a wrongful death case arising from the tubing drownings of Sharon Kahn (hereinafter *"Khan"*) and Vicki Hodges (hereinafter *"Hodges"*) on

6/8/20 at a low-head dam[1] located on the Turkey River Water Trail (hereinafter "*TRWT*") in Defendant Fayette County (hereinafter "*Def. County*")[2] and within the city limits of Defendant City of Clermont (hereinafter "*Def. City*").

Long before the drowning of both decedents, Defendant State of Iowa (hereinafter "*Def. State*") allowed a low-head dam to be constructed across the Turkey River. Before this incident, the low-head dam itself was deeded to and owned by *Def. City*. As time went on, the dangers of low-head dams became apparent. This resulted in published materials by *Def. State* labeling low-head dams as "drowning machines," establishing a "Low-Head Dam Public Hazard Program"[3] and making state funds available to warn of, to mitigate or to remove these dams.[4]

Plaintiffs' Petition was filed on 2/11/22 (hereinafter the "Petition"). On 5/16/22, *Def. County* filed a Motion to Dismiss Plaintiffs' claims. A Resistance was

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[1] *"Low-head dam"* means a uniform structure across a river or stream that causes an impoundment upstream, with a **recirculating current downstream**. 571 *Iowa Administrative Code*, §30.51.

[2] The reference to Fayette County will also include Defendant Fayette County Conservation Board.

[3] 571 *Iowa Administrative Code*, Chapter 30, Division II.

[4] 571 *Iowa Administrative Code* §30.53(2): "*Low-head dam public hazard program.* The department will **provide funds to dam owners**, including **counties**, **cities**, **state agencies**, cooperatives, and individuals, within Iowa to undertake projects that **warn the general public about drowning hazards related to low-head dams** or that **remove or otherwise modify low-head dams** to **create a safer experience** on Iowa's navigable waters." (Emphasis added)

filed and argument held on 6/27/22. Supplemental authorities were filed based on *Nahas v. Polk Cnty.*, 991 N.W.2d 770 (Iowa 2023).

On 10/22/22, *Def. State* filed a Motion to Dismiss Plaintiffs' claims. A Resistance was filed. A Motion for Extension of Time to Resist was also filed.

On 7/23/23, *Def. City* filed a Motion for Judgment on the Pleadings, seeking dismissal of Plaintiffs' claims. A Resistance was filed.

On 9/5/23, the District Court granted *Def. County's* Motion to Dismiss and granted *Def. City's* Motion for Judgment on the Pleadings. As to *Def. County's* and *Def City's* motions, the Court recognized **three** specific assertions being ruled on:

> Specifically, Defendants City of Clermont, Fayette County Conservation Board, and Fayette County argue that: (1) Defendants are entitled to immunity under Iowa Code Section 670.4(1)(o); (2) Plaintiffs' claims are barred by the Public Duty Doctrine; and (3) Plaintiffs' petition fails to meet the heightened pleadings standards required by Section 670.4A.

(App. 430-431- Order). The District Court ruled:

> [f]or the reasons outlined in the written arguments of Defendant Fayette County Conservation Board and Defendant Fayette County" dismissal was appropriate "due to the applicability of the ***Public Duty Doctrine*** and the Plaintiffs' failure to comply with the ***heightened pleading requirements of Section 670.4A***."

(*Id.*). The Court specifically granted *Def County's* dismissal based on the "public duty doctrine" and the "heightened pleading requirement." The Court did not grant *Def. County's* motion based on the assertion of immunity under *Iowa Code* §670.4(1)(o). No motion to reconsider was filed by *Def. County* on its *Iowa Code*

§670.4(1)(o) assertion and no cross appeal was filed. Thus, the only issues before this Court on *Def. County's* Motion to Dismiss are applicability of the "public duty doctrine" and the whether Plaintiffs satisfied the heightened pleading requirement of §670.4A.

Ruling on *Def. City's* motion, the Court ordered, "[f]or the reasons stated in the Defendant City of Clermont's brief in support of its Motion for Judgment on the Pleadings, the Court finds that the City's motion is properly granted as to Counts III, IV, VII, and VIII is properly ***granted for the same reasons***." *Id.* Since the District Court granted *Def. City's* motion to dismiss "for the same reasons" as it did *Def. County's* and no cross appeal has been filed, the issues for appeal are applicability of the "public duty doctrine" and the whether Plaintiffs satisfied the heightened pleading requirement of §670.4A.

On 9/14/23, the District Court granted *Def. State's* Motion to Dismiss Plaintiffs' claims, based on the arguments made in Defendant's written motion: (1) the public-duty doctrine; (2) sovereign immunity; (3) the discretionary-function exception; and (4) qualifiedly immune under *Iowa Code* §669.14A.

Thus, Plaintiffs summarize the bases for the District Court's rulings:

Basis of Ruling	Relevant Defendant
Public Duty Doctrine	State of Iowa City of Clermont Fayette County Fayette County Conservation Board

Heightened Pleading Requirements of *Iowa Code* §670.4A ("clearly established law" prong only)	City of Clermont Fayette County Fayette County Conservation Board
Sovereign Immunity	State of Iowa
Discretionary Function	State of Iowa
Qualified Immunity Under *Iowa Code* §669.14A	State of Iowa

On 10/2/23, Plaintiffs filed a timely Notice of Appeal. (App.435)

STATEMENT OF THE FACTS

On 6/8/20, *Kahn* and her adult daughter, *Hodges*, went river tubing on a segment of the Turkey River designated as the *TRWT* by *Def. State*.[5] In the segment chosen by *Kahn* and *Hodges*, there was a man-made low-head dam owned by *Def. City* (hereinafter "*Clermont Dam*").[6] Although the dam structure was owned by *Def. City*, sovereign title to the Turkey River riverbed was held by *Def. State* and control of the river was vested in *Def. State*.[7] See, *Iowa Code* §462A.2(45) ("waters of this state under the ***jurisdiction*** of the commission means any navigable waters within the territorial limits of this sate…"); *State V. Meyers*, 938 N.W.2d 205 (Iowa 2020)

[5] (App.6-7, *Petition*, ¶¶9, 13, 18
[6] (App.9, *Petition*, ¶32
[7] (App.7, *Petition*, ¶¶11, 12

(holding navigable waters under the jurisdiction of the Iowa Department of Natural Resources.)[8]

At the time *Def. Iowa* labeled the *Clermont Dam* as a "drowning machine," [9] the segment of Turkey River in which the low-head dam was located was not designated a public "water trail."[10]

Prior to the drownings on 6/8/20, *Def. State* and *Def. County* took affirmative steps to have the Turkey River designated as a State approved "water trail."[11] In doing so, the Defendants constructed access points along the river, inviting access by the public.[12] Defendants also took affirmative steps to promote the *TRWT* as a state sponsored water trail.[13] Such designation mandated either that "warning signage and supporting infrastructure" be used to warn the public of low-head dams or that the low-head dams be modified or removed to protect the public. 571 *Iowa*

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[8] Based on the jurisdiction and control over the Turkey River by the IDNR as a navigable stream and DNR's control over navigable streams, the Plaintiffs, noted that the *TRWT* was "promoted on Defendant State of ***Iowa's Department of Natural Resources*** website," (App. 8, *Petition*, ¶23), that Def State maintained a ***Department of Natural Resources water trail crew*** for purposes of supporting state-designated water trails, including the Turkey River Water Trail" (*Petition*, ¶25), and that the signs posted by *Def. State* on the *TRWT* "bore the logo of the ***Iowa Department of Natural Resources***" (App.12, *Petition*, ¶68.)

[9] App.10, *Petition*, ¶¶41, 42

[10] "*"Water trail"* means a point-to-point travel system on a navigable water and a **recommended route** connecting the points." [10] 571 *Iowa Administrative Code*, §30.51.

[11] App.7, *Petition*, ¶¶18-20

[12] App.8-13, *Petition*, ¶¶28-30, 64-76.

[13] App.8-11, *Petition*, ¶¶27-30, 58.

Administrative Code §30.59(2); §30.60(2); §30.61(1)(c). Thus, in an attempt to comply with the State mandated warning signage, *Def. State*, *Def. County* and *Def. City* erected warning signs on the *TRWT* upstream from the *Clermont Dam*.[14] However, these warning signs were negligently placed and negligently maintained.[15]

On 6/8/20, *Def. City* also owned the property abutting the Turkey River and *Clermont Dam* to the west; this property being the location of a portage exit from the *TRWT*.[16] No later than 2010, *Def. City* was aware of the need to remove or modify the low-head dam due to the extreme danger to river users.[17] Prior to 6/8/20, *Def. City* secured a grant from *Def. State's* Low-Head Dam Hazard program for the purpose of removing or modifying the *Clermont Dam*.[18]

At all relevant times, state-designated water trails, including the *TRWT*, were required by *Def. State* to have low-head dam warning signage installed and

[14] App.8-11, *Petition*, ¶¶21, 49-54
[15] App.13-15, *Petition*, ¶¶70-74, 77-80, 83-89
[16] App.9, *Petition*, ¶34
[17] App.10, *Petition*, ¶46
[18] App.10, *Petition*, ¶47

maintained consistent with standards[19] developed by *Def. State*.[20] *Def. State's* low-head dam warning signage criteria required multiple warning signs at various upstream positions ahead of a low-head dam.[21]

Prior to 6/8/20, *Def. State* and *Def. County* posted a sign at Access Point #71 bearing the state-designated water trail logo, the *TRWT* name and the Iowa Department of Natural Resources logo.[22] However, there were no signs at *TRWT* Access Point #71 warning users entering the *TRWT* of the downstream *Clermont Dam*, the Low-Head Dam Public Hazard, the "drowning machine," or any other risks.[23]

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[19] See *Iowa Code* §464A.11 stating:

> 464A.11 Water trails and low head dam public hazard statewide plan.
> 1. The department shall establish a water trails and low head dam public hazard program. 2. In administering the water trails and low head dam public hazard program, the department shall conduct a study of waterways for recreational purposes and develop a statewide plan by March 31, 2010. Elements of the plan **shall include** but not be limited to:
> a. Compiling an inventory of low head dams, including a listing of those low head dams, for the purposes of **publicizing hazards** through maps and **warning signage**.
> b. ***
> c. Developing standard recommendations for local communities including **signage system and placement guidelines**, boating access type, placement and construction guidelines, and volunteer recommendations for communities.
> d. Recommending design templates for **low head dams to reduce incidents of drowning**.

[20] App.8, *Petition*, ¶¶21, 22

[21] App.11, *Petition*, ¶¶51-53

[22] App.12, *Petition*, ¶¶67-68

[23] App.13, *Petition*, ¶¶70-74

After entering the *TRWT* at Access Point #71 on 6/8/20, *Kahn* and *Hodges* floated 2.5 miles and passed the next access point, *TRWT* Access Point #68. There were no signs near Access Point #68 visible to on-water *TRWT* users warning of the downstream *Clermont Dam*.[24] *Kahn* and *Hodges* floated another 4.5 miles before approaching the *Clermont Dam*.[25]

Prior to 6/8/20, *Def. State*, *Def. County* and/or *Def. City* placed five dam warning signs upstream from the *Clermont Dam*. However, the dam warning signs were not positioned to be visible to users of the *TRWT*.[26] The warning signs were not properly maintained, and on 6/8/20, four of the five dam warning signs were overgrown with weeds, brush, and/or trees and were not visible to users of the *TRWT*.[27] Moreover, *Def. State*, *Def. County* and/or *Def. City* did not place any alternative dam hazard warning or mitigation systems, such as buoys or overhanging cables to alert users of the *TRWT* of the impending and life threatening danger.[28]

In addition, on 6/8/20, the portage located on *Def. City's* property that was required to be marked and maintained so river users could get out of the river and walk around the dam, was in disrepair and concealed by overgrown weeds, brush,

[24] App.13-14, *Petition*, ¶¶75-80.
[25] App.14, *Petition*, ¶81
[26] App.14-15, *Petition*, ¶¶82-83, 88.
[27] App.15, *Petition*, ¶¶87-89.
[28] App.14-15, *Petition*, ¶¶85-86.

and/or trees.[29] There is no evidence that *Kahn* and *Hodges* were aware of the need to exit the *TRWT* and portage around the *Clermont Dam*.[30] *Kahn* and *Hodges* did not exit the *TRWT* and went over the *Clermont Dam*. *Kahn* and *Hodges* became stuck in the hydraulic created by the *Clermont Dam's* drowning machine and drowned.[31]

ANALYSIS

STANDARD OF REVIEW:

The District Court granted each Defendants' motion on the pleadings. The standard of review is set forth in *Estate of Farrell v. State*:

> "We review a district court's ruling on a motion for judgment on the pleadings for the **correction of errors at law**." (citation omitted). "The district court should only grant the motion if the pleadings, taken alone, entitle a party to judgment." *Id.* (citation omitted). "The proper function of a motion for judgment on the pleadings is to test the sufficiency of the pleadings to present appropriate issues for trial." (citation omitted).

974 N.W.2d 132, 138 (Iowa 2022) (emphasis added). When a case is resolved on a motion for judgment on the pleadings or a motion to dismiss, the appellate court assumes the truth of the facts in the pleadings. *Griffioen v. Cedar Rapids and Iowa City Railway Company*, 914 N.W.2d 273, 278 (Iowa 2018); *Hawkeye Foodservice Distribution, Inc. v. Iowa Educators Corp.*, 812 N.W.2d 600, 604 (Iowa 2012).

[29] App.15, *Petition*, ¶89.
[30] App.15, *Petition*, ¶90
[31] App.15, *Petition*, ¶¶91-93.

Here, the District Court erred as a matter of law in dismissing Plaintiffs' claims.

I. The Public Duty Doctrine Does Not Apply Where, As Here, Defendants' Affirmative Negligence Created a Dangerous Condition

A. Misfeasance Creates an Enforceable Duty and Precludes Application of the Public Duty Doctrine

The District Court erred in applying the public duty doctrine because Defendants' misfeasance created a dangerous condition on government-owned property and an enforceable duty to Plaintiffs. As expanded on below, the court in *Estate of Farrell* held:

> Under our controlling precedent, *Fulps* and *Breese*, the public-duty doctrine is inapplicable when the government defendants' affirmative negligence (misfeasance) **created a dangerous condition on government-owned property that caused the injury**. *See Fulps, 956 N.W.2d at 470, 475-76* (pedestrian injured on defective city sidewalk); *Breese, 945 N.W.2d at 15, 21* (cyclist injured on dangerous city bike path). That is, "the governmental entity is simply being **held legally responsible for its own property and work**." *Fulps, 956 N.W.2d at 470*.

Farrell, 974 N.W.2d 132, 138 (Iowa 2022) (emphasis added). For the reasons set forth below, the District Court erred in dismissing Plaintiffs' claims "due to the applicability of the Public Duty Doctrine." (App.430-433, 9/5/23 Ruling; 9/14/23 Order).

The public duty doctrine examines whether a governmental entity owes an enforceable duty. *Breese v. City of Burlington*, 945 N.W.2d 12 (2020). "Instead of protecting a governmental entity from liability for the breach of what would

otherwise be an enforceable duty to plaintiffs as immunity does, the public-duty doctrine examines whether the governmental entity owed any enforceable duty to plaintiffs to begin with." *Breese v. City of Burlington* (Iowa 2020) 945 N.W.2d 12, 18 (2020) (citing *Kolbe v. State*, 625 N.W.2d 721, 729–30 (2001)

Historically, the Iowa Supreme Court applied the public duty doctrine – finding no enforceable duty - where a plaintiff alleged the government failed to adequately enforce criminal or regulatory laws for the benefit of the general public or where the government failed to protect the general public from another party's acts. *See*, *Breese at* 21. However, in *Breese*, the Court examined its prior public duty doctrine cases where there was no special relationship between the plaintiff and the government entity. The Court noted that throughout its prior cases, the public duty doctrine did not apply in cases where the governmental entity acts affirmatively and does so negligently. *Breese v. City of Burlington*, 945 N.W.2d 12, 19–20 (Iowa 2020) (citing *Johnson v. Humboldt County,* 913 N.W.2d 256, 267 (Iowa 2018) ("This does not mean the same no-duty rule would protect that entity **when it affirmatively acts and does so negligently**." (emphasis added)

The Court noted in *Breese* that while case law prior to *Johnson v. Humboldt County* did not explicitly make the nonfeasance/misfeasance distinction, the holdings in those cases supported a nonfeasance/misfeasance distinction. *Breese v. City of Burlington* at 20 (citing *Summy v. City of Des Moines*, 708 N.W.2d 333 (Iowa

2006), where golfer was injured and the municipality held liable). *Breese* noted that "we could potentially have decided that the public-duty doctrine did not apply for the alternative reason that the municipality designed, developed, and **maintained the allegedly dangerous golf course**. **These were affirmative acts**." *Breese* at 21 (reconciling *Summy*) (emphasis added).

In *Breese*, the city erected a sewer box and a paved pathway and connected them to each other. They were built, owned, operated, or controlled by the city. The Court held the public duty doctrine was inapplicable:

> [A] jury could find the City was affirmatively negligent in connecting the public pathway to the sewer box to give the sewer box the appearance that it was part of the public trail system. A jury could find that when the City connected the trail and the sewer box, it needed to take measures either to make the sewer box **a safe part of the trail by adding guardrails or to warn pedestrians** that the sewer box was not part of the public trail system. In summary, we hold that the public-duty doctrine does not apply to this situation, and we need not address the plaintiffs' alternative claim that they had a special relationship with the City that meets an exception to the public-duty doctrine.

Breese at 21 (emphasis added).

Similarly, in the case at bar, a jury could find misfeasance because Defendants affirmatively acted and did so negligently. Like the "public trail system" in *Breese*, the Defendants' negligently added the *TRWT* to the State's water trail system without adeaquate protections and warning. A jury could find that Defendants "needed to take measures either to make the [*TRWT*] a safe part of the [State's water trails] by

[removing or modifying the low-head dam] or to warn" tubers of the danger because Defendants built, owned, operated, or controlled the *TRWT* and the dam. *Id*.

The *Breese* court therefore articulated a new, but consistent, standard based on the distinction between misfeasance and nonfeasance. In the case of misfeasance, a governmental entity performs some affirmative act and does so negligently. In the case of nonfeasance, a governmental entity fails to act and such failure allows harm to occur. After *Breese*, the Court only applies the public-duty doctrine to protect a governmental entity from liability in cases of nonfeasance. *See also*, *Fulps v. City of Urbandale*, 956 N.W.2d 469, 475 (Iowa 2021) ("We now clarify that "nonfeasance" in the context of the public-duty doctrine does not mean that the City can install a sidewalk and never worry about maintaining it."); *Estate of Farrell v. State of Iowa*, 974 N.W.2d 132, 138 Iowa 2022) ("Under our controlling precedent, *Fulps* and *Breese*, the public-duty doctrine is inapplicable when the government defendants' affirmative negligence (misfeasance) created a dangerous condition on government-owned property that caused the injury. *** That is, "the governmental entity is simply being held legally responsible for its own property and work.").

The public duty doctrine does not apply to cases alleging misfeasance.

B. Defendants Acted Negligently, Barring Application of the Public Duty Doctrine

This case, like *Breese v. City of Burlington, Johnson v. City of Humbolt, Fulps v. City of Urbandale* and *Estate of Farrell v. State of Iowa*, is a case of misfeasance. Therefore, the public duty doctrine does not apply.

Plaintiffs alleged that *Def. State*, *Def. County* and *Def. City* took the following affirmative acts, constituting misfeasance:

- ***Def. State, Def. County***:
    - Developed and obtained state designation for the Turkey River as a Water Trail under state law, giving the impression to invited users that the river trail was safe and that required precautions had been taken, including the duty to warn of the low head dam or mitigate its danger (App.7-11, *Petition*, ¶¶18-22, 27, 43-44, 49-52);
    - Promoted and invited the public to use the *TRWT* despite being aware of the danger posed by the low-head dam (App.8-9, *Petition*, ¶¶23-24, 28-30);
    - Negligently placed warning signs and failed to properly position warning signs so that they were visible to people entering the water and were visible from the water (App.11-14, *Petition*, ¶¶54, 71, 74, 77-83);
    - Negligently failed to properly maintain all warning signs regarding the concealed and dangerous Clermont Dam such that any warning signs

remained readily visible to on-water users. (App.14-15, *Petition*, ¶¶84, 87-88);

- Negligently placed warning signs instead of alternative dam hazard warning or mitigation systems such as buoys or overhanging cables (App.14, *Petition*, ¶¶85-86);

- ***Def. City***:
  - Secured a grant from the State of Iowa's Low-Head Dam Hazard program for the purpose of removing or modifying the extremely dangerous *Clermont Dam* (App.10, *Petition*, ¶47);
  - Negligently placed warning signs and failed to properly position the warning signs so that they were visible to people entering the water and were visible from the water (App.11-14, *Petition*, ¶¶54, 71, 74, 77-83);
  - Negligently failed to properly maintain all warning signs regarding the concealed and dangerous *Clermont Dam* such that any warning signs remained readily visible to on-water users. (App.14-15, *Petition*, ¶¶84, 87-88);
  - Negligently maintained the portage such that it was in a state of disrepair and concealed by overgrown weeds, brush and/or trees (App.15, *Petition*, ¶89)

- Negligently placed warning signs instead of alternative dam hazard warning or mitigation systems such as buoys or overhanging cables (App.14, *Petition*, ¶¶85-86).

Moreover, rivers designated and promoted as "water trails" are required to comply with standards established by the IDNR. IAC, 571- § 30.59 and § 30.61. Plaintiffs specifically plead that the State of Iowa "developed standards for low-head dam warning signage." (App.10, *Petition*, ¶49). Additionally, any designated water trails "were required ... to have low-head dam warning signage installed and maintained consistent with the[se] standards...." (App.11, *Petition*, ¶50). Such standards created a duty to be followed by those governmental entities involved in designating the *TRWT* as a State water trail.

Plaintiffs alleged *Def. State* breached its duty to exercise reasonable care and acted with misfeasance by:

a. Granting state-designation to its *TRWT* when it was aware of the extreme danger presented by the *Clermont Dam* which is concealed from upstream users;

b. Promoting and inviting members of the public to travel its state-designated *TRWT* when it was aware of the extreme danger presented by the concealed and dangerous low-head *Clermont Dam*;

c. Failing to remove a concealed and dangerous hazard on its state-designated *TRWT*;

d. Failing to adequately warn invited users of the state-designated *TRWT* of the concealed and dangerous *Clermont Dam*; a known and dangerous hazard of which it was aware;

e. Failing to properly place an adequate number of warning signs regarding the invisible and dangerous *Clermont Dam* visible to users entering the state-designated *TRWT* at upstream Access Points;

f. Failing to properly place adequate warning signs regarding the concealed and dangerous *Clermont Dam* visible to on-water users of the state-designated Turkey River Water Trail at upstream Access Points;

g. Failing to properly position any warning signs regarding the invisible and dangerous *Clermont Dam* in conformance with its Low-head Dam Signage Manual;

h. Failing to properly maintain all warning signs regarding the concealed and dangerous *Clermont Dam* such that any warning signs remained readily visible to on-water users of the state-designated *TRWT*;

i. Failing to properly create or maintain a well-marked and obvious portage on its state-designated *TRWT*;

j. Failing to assure its state-designated *TRWT* remained compliant with its standards and criteria for state-designation;

k. Failing to install alternative dam hazard warning or mitigation systems, such as buoys or overhanging cables; and

l. Failing to replace alternative dam hazard warning or mitigation systems previously in place, such as buoys or overhanging cables

(App.15-18, *Petition*, ¶¶97, 104).

Plaintiffs alleged *Def. State* violated common law premises liability by:

a. Failing to remove or modify the dangerous *Clermont Dam* on its state-designated *TRWT*, a hidden hazard of which it was aware;

b. Failing to adequately warn invited visitors of the state-designated *TRWT* of the dangerous *Clermont Dam*; a hidden hazard of which it was aware;

c. Failing to properly maintain all warning signs on the state-designated *TRWT* regarding dangerous *Clermont Dam*, a hidden hazard of which it was aware;

d. Failing to properly place, or replace, alternative dam hazard warning or mitigation systems, such as buoys or overhanging cables; and

e. Failing to properly create, require, or maintain a well-marked and obvious portage on its state-designated *TRWT* and in advance of the dangerous *Clermont Dam*; a hidden hazard of which it was aware; and

f. Allowing the dangerous *Clermont Dam*, which was a nuisance, to continue to exist without removing the nuisance or taking adequate precautions to adequately warn of the nuisance, which equated to a hidden danger to the public

(App.23-25, *Petition*, ¶¶126, 134).

Plaintiffs alleged *Def. County* breached its duty to exercise reasonable care and acted with misfeasance by:

a. Promoting and inviting members of the public to travel the state-designated *TRWT* when it was aware of the extreme danger presented by the invisible and dangerous low-head *Clermont Dam*;

b. Failing to adequately warn invited users of the state-designated *TRWT* of the invisible and dangerous *Clermont Dam*; a known and dangerous hazard of which it was aware;

c. Failing to properly place an adequate number of warning signs regarding the invisible and dangerous *Clermont Dam* visible to users entering the state-designated *TRWT* at upstream Access Points;

d. Failing to properly place adequate warning signs regarding the invisible and dangerous *Clermont Dam* visible to on-water users of the state-designated *TRWT* at upstream Access Points;

e. Failing to properly position any warning signs regarding the invisible and dangerous *Clermont Dam* in conformance with Defendant State of Iowa's Low-head Dam Signage Manual;

f. Failing to properly maintain all warning signs regarding the invisible and dangerous *Clermont Dam* such that any warning signs remained readily visible to on-water users of the state-designated *TRWT*;

g. Failing to properly create or maintain a well-marked and obvious portage on the state-designated *TRWT*;

h. Failing to assure the state-designated *TRWT* remained compliant with Defendant State of Iowa's standards and criteria for state-designation;

i. Failing to install alternative dam hazard warning or mitigation systems, such as buoys or overhanging cables; and

j. Failing to replace alternative dam hazard warning or mitigation systems previously in place, such as buoys or overhanging cables

(App.30-33, *Petition*, ¶¶157, 164).

Plaintiffs alleged *Def. City* breached its duty to exercise reasonable care and acted with misfeasance by:

a. Failing to remove, modify or otherwise abate the *Clermont Dam*; a concealed and dangerous hazard of which it was aware

b. Failing to adequately warn users of the state-designated *TRWT* of the *Clermont Dam*; a concealed and dangerous hazard of which it was aware;

c. Failing to properly position any warning signs regarding the invisible and dangerous *Clermont Dam* in conformance with Defendant State of Iowa's Low-head Dam Signage Manual;

d. Failing to properly maintain all warning signs regarding the invisible and dangerous *Clermont Dam* such that any warning signs remained readily visible to on-water users of Defendant State of Iowa's state-designated *TRWT*;

e. Failing to properly create or maintain a well-marked and obvious portage on its property located on the west side of Defendant State of Iowa's state-designated *TRWT*;

f. Failing to install alternative dam hazard warning or mitigation systems, such as buoys or overhanging cables; and

g. Failing to replace alternative dam hazard warning or mitigation systems previously in place, such as buoys or overhanging cables

(App.19-22, *Petition*, ¶¶111, 118). Plaintiffs alleged *Def. City* violated its common law premises liability duties by:

a. Failing to remove or modify the dangerous *Clermont Dam* on the state-designated *TRWT*, a hidden hazard of which it was aware;

b. Failing to adequately warn visitors of the dangerous *Clermont Dam*; a hidden hazard of which it was aware;

c. Failing to properly maintain all warning signs on the state-designated *TRWT* regarding the dangerous *Clermont Dam*, a hidden hazard of which it was aware;

d. Failing to properly place, or replace, alternative dam hazard warning or mitigation systems, such as buoys or overhanging cables; and

e. Failing to properly create or maintain a well-marked and obvious portage on the state-designated *TRWT* and in advance of the dangerous *Clermont Dam*; a hidden hazard of which it was aware; and

f. Allowing the dangerous *Clermont Dam*, which was a nuisance, to continue to exist without removing the nuisance or taking adequate

> precautions to adequately warn of the nuisance, which equated to a hidden danger to the public.

(App.26-28, *Petition*, ¶¶142, 150).

This is not a case where Defendants failed to act. This is a case where Defendants acted by inviting the public onto government land with a known "drowning machine" and failing to remove the danger or warn the public. The conduct of the Defendants is misfeasance, and the public duty doctrine does not apply.

C. Subsequent Iowa Supreme Court Case Law Follows the Decision in Breese v. City of Burlington and Clarifies That a Plaintiff's Allegation That The Government Entity Maintains the Property is Sufficient to Avoid Application of the Public Duty Doctrine on a Motion to Dismiss

Following the decision in *Breese v. City of Burlington*, the Iowa Supreme Court decided *Fulps v. City of Urbandale*, 956 N.W.2d 469 (Iowa 2021) (as amended 4/6/21). In *Fulps*, a pedestrian brought a negligence action against the city, seeking to recover damages for injuries she incurred from a fall on a damaged and improperly maintained sidewalk. The Court in *Fulps* held the District court was wrong when it ruled the public duty doctrine "squarely applie[d]" to a sidewalk case because plaintiffs had not alleged any malfeasance such as erecting an obstacle as opposed to nonfeasance in failing to maintain and repair. *Id.* at 475. On appeal, the city argued the allegations amounted to nonfeasance, rather than misfeasance because a series of "failures" were pled. *Id.*

Faced with this new application of facts to law, *Fulps* held:

> We now clarify that "nonfeasance" in the context of the public duty doctrine "does not mean that the City can install a sidewalk and never worry about maintaining it. Unless an exemption in Iowa Code section 670.4 applies, the City is liable for its sidewalk **to the same extent a private property owner doing the same thing would be**.
>
> The term **"nonfeasance" does not encompass ordinary neglect of the same sort of responsibilities a private party might have**. *See* Eugene McQuillin, *The Law of Municipal Corporations* § 53:18, at 114 (3d rev. ed. 2013 & Supp. 2020) (characterizing the public-duty doctrine as "a tool used by courts to ensure that governments are not saddled with **greater liability than private actors** as they conduct the people's business"). This is, after all, the "public duty" doctrine.

Fulps at 475–476 (emphasis added).

The public duty doctrine does not apply if a private party would be responsible for "ordinary neglect of the same sort." *Id.* at 475. For example, the Water Trail and Low-Head Dam program adopted by the State of Iowa and administered by the IDNR, allowed nonprofits, cooperatives, and individuals to apply for funds and to carry out the requirements of IAC 571- IAC, 571- §30.59 and §30.61. If a non-governmental entity received funds to make the water trails safe and warn of dangers and then did so negligently, it would be liable for injuries to a plaintiff. If a private entity would be liable, then Defendants are also liable.

Finally, *Fulps* clarified that where a plaintiff alleges the property was "maintained" by the defendant, that allegation is sufficient to avoid application of the public duty doctrine. *Fulps* at 476. Similarly, here, Plaintiffs allege that

Defendants cannot install warning signs for the *Clermont Dam* and "never worry about maintaining" them. *Id*. at 475.[32]

D. Like the Plaintiff in Fulps v. City of Urbandale, Plaintiffs Here Alleged That Defendants Maintained and Controlled the Property, Barring Application of the Public Duty Doctrine

Like the plaintiffs in *Fulps*, Plaintiffs in this case alleged control and maintenance by Defendants:

> 11. The Turkey River is a meandered river and the riverbed, up to the ordinary high-water mark, is land owned by Defendant State of Iowa. (App.7, *Petition* ¶14)
>
> 12. The water in the Turkey River is public water and public wealth, with control and use of the water vested in Defendant State of Iowa. (App.7, *Petition* ¶12)
>
> 20. At all relevant times, Defendants Fayette County Conservation Board and Fayette County, Iowa were local project partners responsible, in part, for developing the Turkey River Water Trial. (App.7, *Petition* ¶19)
>
> 20. At all relevant times, Defendants Fayette County Conservation Board and Fayette County, Iowa were local project partners responsible, in part, for obtaining state-designation of the Turkey River Water Trail. (App.7, *Petition* ¶20)
>
> 21. At all relevant times, state-designated water trails, including the Turkey River Water Trail, were required by Defendant State of Iowa to comply with a consistent set of standards, to include criteria for construction, maintenance, amenities, and signage. (App.8, *Petition*, ¶21)
>
> 22. At all relevant times, state-designated water trails, including the Turkey River Water Trail, were required by Defendant State of Iowa to

[32] App.15, *Petition* ¶¶87-89

have hazard warning signage installed and **maintained consistent with standards** developed by Defendant State of Iowa. (App.8, *Petition* ¶22)

25. At all relevant times, Defendant State of Iowa maintained a Department of Natural Resources water trail crew for purposes of supporting state-designated water trails, including the Turkey River Water Trail. (App.8, *Petition* ¶25)

27. At all relevant times, Defendants Fayette County Conservation Board and Fayette County, Iowa took affirmative steps, either in whole or in part, to develop, fund, and promote the state-designated Turkey River Water Trail. (App.8, *Petition* ¶27)

32. On 06/08/20, Defendant City of Clermont owned a low-head dam ("Clermont Dam") located on the segment of the Turkey River Water Trail selected by Sharon and Vicki. (App.9, *Petition* ¶32)

34. Defendant City of Clermont, Iowa owned the property directly abutting the Turkey River and Clermont Dam to the west; this property being the location of a portage exit from the Turkey River Water Trail. (App.9, *Petition* ¶34)

46. No later than 2010, dam owners, including Defendant City of Clermont, were aware of the need to remove and/or modify low-head dams due to the extreme danger to river users. (App.10, *Petition* ¶46)

47. Prior to 06/08/20, Defendant City of Clermont secured a grant from Defendant State of Iowa's Low-Head Dam Hazard program for the purpose of removing or modifying the extremely dangerous Clermont Dam. (App.10, *Petition*, ¶47)

50. At all relevant times, state-designated water trails, including the Turkey River Water Trail, were required by Defendant State of Iowa to have low-head dam warning signage installed and maintained consistent with standards developed by Defendant State of Iowa. (App.11, *Petition* ¶50)

54. Prior to 06/08/20, Defendant State of Iowa, Defendant Fayette County Conservation Board, Defendant Fayette County, Iowa and/or

> Defendant City of Clermont **placed dam hazard warning signage** upstream from the Clermont Dam. (App.11, Petition, ¶54)
>
> 82. Prior to 06/08/20, Defendant State of Iowa, Defendant Fayette County Conservation Board, Defendant Fayette County and/or Defendant City of Clermont had **placed five dam warning signs** upstream from the Clermont Dam. (App.14, *Petition* ¶82)
>
> 83. Prior to 06/08/20, the dam warning signs were **not properly positioned by Defendants** despite knowing the extreme danger presented by the Clermont Dam. (App.14, *Petition* ¶83)
>
> 84. Prior to 06/08/20, the dam warning signs **were not properly maintained by Defendants** despite knowing the extreme danger presented by the Clermont Dam. (App.14, *Petition* ¶84)
>
> 86. Prior to 06/08/20, Defendant State of Iowa, Defendant Fayette County Conservation Board, Defendant Fayette County and/or Defendant City of Clermont chose not to replace any alternative dam hazard warning or mitigation systems previously in place, such as buoys or overhanging cables. (App.14, *Petition* ¶86)
>
> 87. On 06/08/20, **four of the five dam warning signs were overgrown with weeds, brush, and/or trees**. (App.15, *Petition* ¶87)
>
> 88. On 06/08/20, **four of the five dam warning signs were not readily visible to users** of the Turkey River Water Trail, including Sharon and Vicki. (App.15, *Petition* ¶88)
>
> 89. On 06/08/20, the portage located on Defendant City of Clermont's property **was in disrepair and concealed by overgrown weeds, brush, and/or trees**. (App.15, *Petition* ¶89)

(*Petition*, filed 2/11/22 (emphasis added)).

Based on the holding in *Fulps*, the above allegations of maintenance and control alone are "sufficient to avoid application of the public-duty doctrine for motion-to-dismiss purposes." *Fulps* at 476.

E. In 2022, The Iowa Supreme Court Again Affirmed Controlling Precedent in Estate of Farrell by Farrell v. State, That Misfeasance is a Bar to Applying the Public Duty Doctrine

Following *Breese* and *Fulps*, the Iowa Supreme Court further examined the public duty doctrine in *Estate of Farrell by Farrell v. State,* 974 N.W.2d 132 (Iowa 2022). The Court held allegations of governmental misfeasance that created a dangerous condition on a government-owned highway interchange survive a facial challenge. *Id*. at 134-135.

In *Farrell*, an action was brought by the plaintiffs after a police officer was killed by a third-party driver operating his vehicle on the wrong side of the highway, causing a head-on collision. The third-party driver drove the wrong direction on the highway after passing through a confusing intersection created, constructed and maintained by the governmental defendants without the required safety features:

> When it initially opened to the public, the interchange "did not comply with contractual requirements ... or with generally recognized engineering and **safety standards**, criteria, and design theories." Safety features, such as lighting, road markings, and **signage**, were **incomplete and were not maintained** "in a safe and proper condition." "The Cities, the State, IDOT, [and contractors] continued working on, completing, and remedying these basic safety features and requirements into late 2016." However, "[t]he Interchange remained open to traffic [the] entire time."

Id. at 135 (emphasis added).

After suit was filed, all governmental defendants moved for dismissal based on the public duty doctrine. The defendants asserted "that any failure to protect

Officer Farrell against that third-party driver constituted *nonfeasance* shielded under the public-duty doctrine, *not actionable misfeasance*." *Id*. at 136. The plaintiffs claimed the "governmental defendants' actions constituted misfeasance creating a dangerous condition at the interchange they designed, built, and owned...." *Id*. The district court denied the motion for judgment on the pleadings. *Id*. In affirming the district court's decision, *Farrell* stated:

> Under our controlling precedent, *Fulps* and *Breese*, the public-duty doctrine is inapplicable when the government defendants' **affirmative negligence (misfeasance) created a dangerous condition on government-owned property that caused the injury**. *See Fulps*, 956 N.W.2d at 470, 475–76 (pedestrian injured on defective city sidewalk); *Breese*, 945 N.W.2d at 15, 21 (cyclist injured on dangerous city bike path). That is, "the governmental entity is simply being held **legally responsible for its own property** and work." *Fulps*, 956 N.W.2d at 470.

Estate of Farrell at 138. (emphasis added) The *Farrell* court further held*:*

> Thus, according to the pleadings, the government defendants' **affirmative negligence created a dangerous condition on their own property** that was a cause of the fatal accident. The district court correctly applied *Bresse* to reject the public-duty defense, and our subsequent decision in *Fulps* further supports the determination that the government defendants in this case **remain liable for their own property and work**.

Estate of Farrell at 138-139 (emphasis added).

Exactly like the plaintiffs in *Farrell*, the Plaintiffs at bar allege the Defendants committed affirmative acts of negligence on government owned property. Defendants took part in the process of getting the *TRWT* designated as a state water

trail that could be marketed to the unsuspecting public. When they did so, Defendants knew about the low-head *Clermont Dam* and its dangers to individuals using the *TRWT*. Defendants then took part in creating access points intended to invite individuals to the use the *TRWT*. Defendants undertook a duty to warn, but did so negligent by not placing appropriate signage and not remediating the danger. After failing to fulfill their duty to adequately warn of the hidden danger on the government land, Defendants failed to maintain the warning signs. Plaintiffs submit that the "governmental defendants in this case remain liable for their own property and work." *Id*.

F. A Special Relationship Between The Plaintiffs And Defendants Is Not Required In Cases Of Alleged Misfeasance

The Defendants asserted that "'[A] breach of duty owed to the public at large is not actionable unless the plaintiff can establish, based on the unique or particular facts of the case, a special relationship between the [governmental entity] and the injured plaintiff....'" (*Def. County*'s Response to Plaintiffs' Supplemental Authority filed 7/21/23, p.3). However, the relationship between the plaintiff and the government entity is irrelevant where there is misfeasance, and the Public Duty Doctrine does not apply. *Maldonado v. City of Sibley*, 58 F4th 1017, 1022-1023 (8th Cir. 2022). Citing this Court's recent decisions in *Fulps, Breese* and *Farrell*, the 8th Circuit stated:

> Because Maldonado's negligence claim is for government **misfeasance**, **the absence of a special relationship between Maldonado and the City is irrelevant**.

Id. at 1022-1023 (emphasis added).

G. The Public Duty Doctrine Does Not Apply Because There Was No Breach of a "Uniquely Governmental Duty"

In *Fulps*, *supra,* the Iowa Supreme Court further restricted the applicability of the public duty doctrine, establishing the doctrine requires the breach of a "uniquely governmental duty … to protect the plaintiff from the third party or other independent force:"

> We have colloquially explained the doctrine by saying "a duty [owed by the government] to all is a duty to none." *Breese, 945 N.W.2d at 18* (citation omitted). But the colloquialism does not get to the heart of the doctrine and may suggest a broader scope to the doctrine than our cases indicate it actually has. Often, one hopes, the government acts for the benefit of the general public. But the public-duty doctrine generally comes into play only when there is a confluence of two factors. First, the injury to the plaintiff was directly caused or inflicted by a third party or other independent force. Second, the plaintiff alleges a governmental entity or actor **breached a uniquely governmental duty**, usually, but not always, imposed by statute, rule, or ordinance to protect the plaintiff from the third party or other independent force.

Id. at 473-474. (emphasis added). Similarly, in *Estate of Farrell*, this Court noted the district court's ruling "overlook[ed] the requirement that the governmental entity must have breached a uniquely governmental duty." *Estate of Farrell* at 138.

Defendants in this case were not performing a uniquely governmental duty in erecting warning signage and maintaining a water trail. As noted above, private

citizens and entities can also receive public funds to help promote a water trail. IAC 571- IAC, 571- §30.59 and §30.61. In this situation, any property owner or possessor of land has a duty to act without negligence when remedying a dangerous condition or warning of a concealed dangerous conditions. This is not a "uniquely governmental duty."

Moreover, here, Defendants voluntarily decided to designate and become part of the *TRWT* project as provided for in *Iowa Code* §464A.11 and *Iowa Admin Code* 571 – § 30.52 and § 30.53. These laws reflect the State of Iowa's attempt to remediate the dangers associated with low-head dams and "to develop water trails eligible for designation throughout the state" and under specific parameters. With respect to the availability of public funds for "projects that warn the general public about drowning hazards related to low-head dams," the IDNR was allowed to "provide funds to **dam owners**, including **counties**, **cities**, state agencies, **cooperatives**, and **individuals**, within Iowa." IAC 571—30.53(2) (emphasis added). With respect to the development of water trails under the programs, the IDNR was allowed to "provide funds to cities, counties and **nonprofit organizations** in the state of Iowa." IAC 571—30.53(1) Although the development of water trails and the warning of the dangers of low-head dams can include governmental entities, it can also include cooperatives, non-profit organizations and individuals. Thus, the functions of creating and maintaining a water trail are not uniquely governmental

functions and do not give rise to uniquely governmental duties. Thus, the public duty doctrine is inapplicable.

Based on the foregoing, the District Court erred in finding that the public duty doctrine mandated a dismissal of Plaintiffs' claims.

II. Plaintiffs Satisfied the Heightened Pleading Requirements of *Iowa Code* Section 670.4A

Historically, Iowa was a notice pleading state under which nearly every case would survive a motion to dismiss. *Young v. HealthPort Techs., Inc.*, 877 N.W.2d 124, 127 (Iowa 2016). However, the legislature can impose heightened pleading requirements for specific types of cases. *Nahas v. Polk County*, 991 N.W.2d 770, 776–777 (Iowa 2023).

As of June 2021, the Iowa Municipal Tort Claims Act placed a heightened pleading requirement on plaintiffs bringing claims against municipal corporations. *Iowa Code* § 670.4A(3). Section 670.4A(3) required:

- Plaintiffs "must state with particularity the circumstances constituting the violation."
- Plaintiffs must plead "a plausible violation" of the law.
- Plaintiffs "must state ... that the law was clearly established at the time of the alleged violation." *Id.*

The District Court specifically granted *Def. County's* and *Def City's* motions with respect to the heightened pleading requirements of *Iowa Code* section 670.4A based on their written motions. In their written motions, neither *Def. County*, nor *Def. City*

argued that Plaintiffs failed to satisfy the "plausibility" prong of *Iowa Code* section 670.4A. *Def. County* argued that Plaintiffs failed to satisfy the "clearly established law" prong. While *Def. County* did acknowledge the "particularity" prong in their motion by citing it as part of *Iowa Code* §670.4A, *Def. County* did not argue that Plaintiff failed to satisfy the "particularity" prong. Moreover, *Def. County* did not underline or otherwise draw attention to the "particularity" prong in their briefing the way they underlined, drew attention to and argued the "clearly established law" prong of *Iowa Code* §670.4A.

Def. City stated in Footnote 1 of its motion that it "adopts the Fayette County Defendants briefing only as to the heightened pleading standards of particularity and plausibility under Iowa Code §670.4A." However, *Def. County*'s brief did not argue that Plaintiff failed to satisfy the "particularity" or "plausibility" prongs of *Iowa Code* §670.4A, as discussed above.

Therefore, the written motions upon which the District Court rulings rely for dismissal of Plaintiffs' claims against *Def. County* and *Def. City* only argue that Plaintiffs failed to satisfy the "clearly established law" prong of *Iowa Code* §670.4A.[33] As discussed *infra*, the Supreme Court has ruled that the "clearly

[33] Defendants Fayette County, Fayette County Conservation Board and City of Clermont argued in their respective motions that *Iowa Code* Section 670.4A grants qualified immunity on Plaintiffs' negligence claims. The District Court rejected that argument based on *Nahas v. Polk Cnty.* 991 N.W.2d 770 (Iowa 2023)

established law" prong is prospective and, therefore, did not apply at the time Plaintiffs' petition was filed. *Nahas v. Polk County*, 991 N.W.2d 770, 776–777 (Iowa 2023); *Carver-Kimm v. Reynolds*, 992 N.W.2d 591 (Iowa 2023).

Plaintiffs' position is the District Court erred in granting dismissal based on *Iowa Code* §670.4A as to *Def. County* and *Def. City* because neither argued particularity or plausibility and the "clearly established law" prong did not apply, as discussed below. In an abundance of caution, however, Plaintiffs address all prongs of *Iowa Code* §670.4A.

The Iowa Supreme Court recently examined the requirements of *Iowa Code* §670.4A and concluded the particularity and plausibility aspects of the statute require the same pleading as the Federal Rules of Civil Procedure: "'Particularity' and 'plausible' are established terms of art in federal civil procedure." *Nahas v. Polk County*, 991 N.W.2d 770, 781 (Iowa 2023) (citations omitted). *Nahas* further stated:

> Particularity "requires plaintiffs to **plead 'the who, what, when, where, and how: the first paragraph of any newspaper story**.'" (citation omitted) . The purpose of particularity as a pleading standard is "**to enable the defendant to respond specifically and quickly to the potentially damaging allegations**." (citations omitted.
>
> ***.
>
> By comparison, an allegation is plausible insofar as it "**allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged**." (citation omitted). Plausibility determinations are highly context-specific, and they demand "the reviewing court to draw on its judicial experience and common sense." (citation omitted). Plausibility is not a "probability requirement" because plausibility demands "more than a sheer possibility that a defendant has acted unlawfully." (citation omitted).

Nahas, 991 N.W.2d at 781-782. (emphasis added). Plaintiffs' Petition satisfied both the "particularity" and "plausibility" prongs of *Iowa Code* § 670.4A(3).

A. Plaintiffs Satisfied the Particularity Pleading Requirement

Plaintiffs pled the "the who, what, when, where, and how: the first paragraph of any newspaper story." *Nahas* at 781. Indeed, Plaintiffs' Petition contains 95 paragraphs setting forth specific, factual averments, which provided detailed facts surrounding the negligence of the Defendants and the drowning deaths of the two decedents. (App.5-15, *Petition* ¶¶1-95). Nowhere in the Defendants' motions do they assert how the Plaintiffs' Petition fell short on any of the above requirements. Any review of the *Petition* would clearly "enable the defendant[s] to respond specifically and quickly to the potentially damaging allegations." *Drobnak v. Andersen Corp.*, 561 F.3d 778, 783 (8th Cir. 2009).

Although the District Court granted *Def. County* and *Def. City's* motions based on "Plaintiffs' failure to comply with the heightened pleading requirements of Section 670.4," no where did the District Court identify where Plaintiffs fell short in their 95 factual allegations. The "who" identifying each of the Defendants and the Plaintiffs is clear. The "what" involving what happened and what the negligence of the Defendants was surrounding the low-head dam, its danger as a "drowning machine" and the specific failures of the Defendants in failing to warn of the danger was also clearly identified. The "when" and "where" was clearly identified as 6/8/20,

when *Hodges* and *Kahn* went over the low-head dam on the Turkey River Water Trail and drowned. The "how" surrounding the death of *Hodges* and *Kahn* was also clearly identified as the deaths being causally related to the Defendants inviting *Hodges* and *Kahn* onto a river with a known "drowning machine" and then negligently warning of the danger or otherwise taking appropriate actions to mitigate the dangerous condition. Plaintiffs incorporate herein all of their factual allegations from the *Petition*.

In their Memorandum Brief in Support of Motion to Dismiss, *Def. County* provided a "Statement of Facts" detailing the "the who, what, when, where, and how" of the *Petition* and the allegations. (App.45-48, *County's* Memorandum, pp.1-4). This Court only need review the *Def. County's* "Statement of Facts" to see that the Defendants were clearly made aware of the "the who, what, when, where, and how" of Plaintiffs' claims. (*Id.*). It is hard to imagine what more the Plaintiffs could have pled that would have identified any better "the who, what, when, where, and how" of Plaintiffs' common law negligence and premises liability claims against Defendants. Plaintiffs complied with *Iowa Code* §670.4A(3) by "stat[ing] with particularity the circumstances constituting" the negligence claims against Defendants. The District Court erred in finding that Plaintiffs' Petition failed to do so.

B. Plaintiffs Satisfied the Plausibility Pleading Requirement

Plaintiffs' pled facts and made allegations in their petition to "allow the court to draw the reasonable inference that the defendant[s] [are] liable for the misconduct alleged." *Nahas* at 781. As discussed above, Plaintiffs' Petition detailed how each defendant is liable to Plaintiffs under the facts set forth in the *Petition*. (App.5-33, *Petition* ¶¶1-169). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal,* 556 U.S. 662, 678 (2009) (citation omitted). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.*

Courts determine "plausibility" by " draw[ing] on their own experience and common sense."*Id.* at 663-664. Also, courts must review the plausibility of the plaintiff's claim as a whole, not the plausibility of each individual allegation. *Whitney v. Guys, Inc.,* 700 F.3d 1118, 1128 (8th Cir. 2012). The Eighth Circuit Court of Appeals has refused, at the pleading stage, "to incorporate some general and formal level of evidentiary proof into the 'plausibility' requirement *Id.* The question is not whether the Plaintiffs can prove their claims but whether they "have adequately asserted facts (as contrasted with naked legal conclusions) to support [their] claims." *Id.* at 1129

To establish a prima facie case for negligence under Iowa law, Plaintiffs must prove that Defendants owed a duty of care, Defendants breached that duty, Defendants' breach was the actual and proximate cause of Plaintiffs' injuries and Plaintiffs' suffered damages. *Walls v. Jacob N. Printing Co.*, 618 N.W.2d 282, 285 (Iowa 2000).

To establish a prima facie case for negligence under premises liability, Plaintiffs must prove that Defendants knew or should have known of a condition on the premises that involved an unreasonable risk of injury to invitees and must prove an expectation by Defendants that invites would not discover or realize the danger and would fail protect themselves against it. *Ries v. Steffensmeier*, 570 N.W.2d 111, 112 (Iowa 1997). Moreover, the duty created by the special relationship between a possessor of land and a business invitee includes "making the area reasonably safe or giving warning of the actual condition or risk involved." *Id.*

Here, Plaintiffs satisfied the plausibility prong of *Iowa Code* §670.4A by alleging each element of negligence and premises liability, along with adequate facts to allow a court to draw the reasonable inference that the Defendants are liable for the misconduct alleged.

Plaintiffs alleged that Defendants, as owners and controllers of the *TRWT* and dam, knew the risk of death posed by the low-head dam, applied for funds to remove or mitigate the low-head dam, worked to establish the section of the Turkey River

with the low-head dam as a designated State Water Trail without mitigating or removing the low-head dam, promoted the *TRWT* and invited members of the public to use the *TRWT*, negligently placed warning signs, negligently maintained warning signs, negligently failed to use alternative hazard mitigation systems like buoys or overhead hanging cables, negligently created and maintained a portage to avoid the low head dam. Plaintiffs further alleged that Plaintiffs did not know about the low-head dam and did not know they needed to exit at the concealed portage. App.7-33, *Petition* ¶¶ 19-22, 29-30, 32-54, 57-59, 67-74, 76-80, 82-93, 110-115, 117-122, 140-146, 148-154, 156-161, 163-168.

Moreover, to the extent not covered above, Plaintiffs made allegations in 95 separate paragraphs, providing context for each legal allegation. App.5-15, *Petition*, ¶¶ 1-95.

Based on Plaintiffs' allegations of fact and law, a court can draw the reasonable inference that Defendants are liable for the misconduct alleged under theories of both negligence and premises liability. Thus, Plaintiffs satisfy the plausibility prong of *Iowa Code* §670.4A.

C. The Pleading Requirement That The Law Be Clearly Established at the Time of Violation is Inapplicable

In their motions on the pleadings, *Def. County* and *Def. City* asserted that Plaintiffs were required to plead that the law was clearly established at the time of the alleged conduct. While the briefing was pending, the Iowa Supreme Court

published its decision in *Nahas*, establishing that the "clearly established law" prong only applied in the context of qualified immunity, and that this only applied prospectively.

Although Plaintiffs' *Petition* clearly states that the law violated by Defendants was "clearly established," (App.16-33, *Petition*, ¶98, 105, 112, 119, 127, 135, 143, 151, 158, 165), such requirement is inapplicable. As stated in *Nahas:*

> Further, whether the law was clearly established is inextricably intertwined with the new qualified immunity defense and only relevant to this case to the extent the new qualified immunity defense is operative in this case, and we already have concluded that qualified immunity is not operative in this case because it would be an impermissible retrospective application of the statute. We thus conclude that application of this pleading standard to this case would in fact be a retrospective application of this particular statutory provision. Because the legislature did not expressly make this statutory provision retrospective, it cannot be applied in this case. *See Iowa Code § 4.5*.

Nahas at 780 (Iowa 2023); *see also Carver-Kimm v. Reynolds*, 992 N.W.2d 591 (Iowa 2023) (discussing similar application of *Iowa Code* §669.14A(3)).

The District Court granted *Def. County's* and *Def. City's* motions based on their written briefings, which argued that Plaintiffs failed to satisfy the "clearly established law" requirement of *Iowa Code* §670.4A. To the extent that the District Court did so, it was error to grant *Def. County's* and *Def. City's* motions based on a failure to plead the law was clearly established under *Iowa Code* §670.4A because, as established in *Nahas,* the "clearly established law" prong does not apply in the absence of qualified immunity, and qualified immunity does not apply here.

III. Sovereign Immunity Does Not Insulate the State of Iowa from Liability Under the Iowa Tort Claims Act

In its Brief filed with the District Court, *Def. State* asserted, in addition to the Public Duty Doctrine, sovereign immunity because [1.] Private persons are not liable for their actions in holding sovereign rivers within the public trust, and [2] the court lacks jurisdiction based on the State's exercise of its discretionary function to manage public waters. Plaintiffs resisted and appeal was preserved. (App.317-318; Plaintiffs Resistance, pp.3-4). The District Court granted *Def. State's* motion for the "reasons set forth in the motion." (App.433; Order). Thus, Plaintiffs will address both issues raised.

A. Sovereign Immunity is Waived in This Case

The Iowa Tort Claims Act is a limited waiver of sovereign immunity and provides the state shall be liable in the same manner and to the same extent as a private individual. *Madden v. City of Iowa City*, 848 N.W.2d 40, 53 (Iowa 2014) (citing Iowa Code § 669.2(3)(a); *see also Graham v. Worthington*, 259 Iowa 845, 861, 146 N.W.2d 626, 637 (1966) (holding ITCA does not create new causes of action but creates acceptance of liability under circumstances that would bring private liability into existence)). Moreover, *Iowa Code* §669.4(3) provides sovereign immunity is waived to the extent provided in Chapter 669.

In its Brief filed with the District Court, *Def. State* asserted that even if it owed a duty to Plaintiffs, it could not be held liable for its actions because it did not own

the Turkey River and, instead "holds sovereign title *in trust for the benefit of the public* to the beds in" such rivers." (App.305; *State's* Brief, p. 6). Since "private persons are not liable for their actions in holding sovereign rivers within the public trust," *Def. State* asserted that it could not be liable under sovereign immunity. *Id*. *Def. State* concluded by asserting that "common law premise duties and liabilities are inapplicable to this case." *Id*. Plaintiffs filed a resistance and error was preserved.[34] (App.317-318; Resistance, ¶¶12-17).

1. The State of Iowa held Sovereign Title to the Turkey River and the "Public Trust" doctrine is inapplicable here.

To shield its affirmative acts of negligence, *Def. State* attempts to use the "public trust" doctrine related to the natural resources of this State to limit its liability. *Def. State* correctly points out, "the State of Iowa holds **sovereign title**" to the Turkey River. 571 Iowa Admin. Code r. 13.3. In accordance with this "sovereign title" the Plaintiffs allege that the Turkey River including "the riverbed, up to the ordinary high-water mark, is land owned by *Def. State*.[35] See, *Shortell v. Des Moines Electric*, 172 N.W. 649, 653 (Iowa 1919) (In addressing an issue involving the

[34] The District Court did not discuss the sovereign immunity assertion in its 9/14/23 Order dismissing Plaintiffs' claims against *Def. State*. The District Court simply stated: "IT IS ORDERED that the State of Iowa's Motion to Dismiss is GRANTED for these reasons set forth in the motion." Thus, assuming the District Court grant *Def. State's* Motion to Dismiss based on sovereign immunity, Plaintiffs address it here.

[35] App.005; Plaintiffs' Petition ¶ 11

rebuilding of a low-head dam across the Des Moines river, the court noted: "in so far as the **title** to the beds of meandered streams is concerned, the court has recognized it as in the state." *Id*. at 653. In recognizing legislation allowing the building of the dam, the *Shortell* court further noted "that the ***fee title*** to such bed and banks shall remain in the state." *Id*. at 479. Although Plaintiffs concede that the "Sovereign Title," is held in trust for the people of the State of Iowa, there is no other person or entity holding "fee title" to the property other than *Def. State*. Certainly, there is no other entity allowed to exercise control or authority over the Turkey River other than *Def. State*.

After becoming the "Sovereign Title" holder of the Turkey River, *Def. State* allowed a dangerous low-head dam to be constructed across the Turkey River prior to the drownings in this case. *Def. State* exercised control and authority over the Turkey River in allowing construction to take place and in continuing to allow the dam to exist. *Def State* then exercised control by designating the *TRWT* as a state designated "water trail" and allowing the public to float into a "public hazard." [36]

The low-head dam structure was owned by *Def. City*. (App.9; Petition, ¶32). However, *Def. City* has denied ownership. (App.70; Answer, ¶35).[37] Regardless of ownership, Plaintiffs assert that *Def. State* was the owner (title holder) of the Turkey

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[36] *Iowa Code* 464A.11 identifying "low-head dams" as "public hazards."

[37] Discovery will reveal whether any Defendants will accept ownership of the Clermont Dam, or if ownersship will be a factual question for the jury.

River "riverbed" in which the dangerous low-head dam was constructed. (App.7; Petition, ¶ 11).

Holding the riverbed in "public trust" does not shield *Def. State* from liability for its misfeasance. The purpose of the "narrow" public trust doctrine, is to limit the State's power to dispose of land encompassed within the public trust. *See Filippone v. Iowa Dep't of Nat. Res. (In re Filippone)*, 829 N.W.2d 589 (Iowa Ct. App. 2013) (citing *Larman v. State*, 552 N.W.2d 158, 161 (Iowa 1996); *Fencl v. City of Harpers Ferry*, 620 N.W.2d 808, 813 (Iowa 2000)). The doctrine was never intended to alleviate the State's obligations and responsibilities as a holder of the "sovereign title" to the property. Indeed, the status is "a burden, rather than a benefit," which suggests the State's effort to use the doctrine as a shield is misplaced. *State v. Sorensen*, 436 N.W.2d 358, 361 (Iowa 1989).

2. Even Trustees of Trust Property are liable for their misfeasance

Although *Def. State* asserted that "Plaintiffs' claims seek to hold the State liable in tort in a different manner, and to a different extent, than private individuals" (App.306; *State's* Memorandum, p. 7), the Plaintiffs disagree. Plaintiffs' claims focus on *Def. State* as a property owner with specific duties and as an actor committing misfeasance, regardless of its ownership of the property. Thus, Plaintiffs assert that it is the misfeasance and conduct of *Def. State* relating to the *TRWT* that should be the focus. When that becomes the focus, private individuals, corporations

and trustees of property would be held to the same standard as the Plaintiffs seek to hold *Def. State*.

For example, even if *Def. State* is right that it acts in the capacity of a trustee holding the river and its riverbed in "public trust," even trustees are held responsible for their active negligence relating to trust property. *Iowa Code* §633A.4601(2) provides that "A trustee is personally liable for obligations arising from ownership or control of trust property … if the trustee is personally at fault." Similarly, *Iowa Code* §633F.12 provides that a trustee is not liable "for an obligation arising from control of custodial trust property or for a tort committed in the course of the administration of the custodial trust unless the custodial trustee is personally at fault." As the trustee in control of the Turkey River, *Def. State* is liable "if the trustee [State] is personally at fault." This does not treat *Def. State* differently than any other trustee holding real property in this State. *Def. State* cited no legal support for its assertion that a trustee should be insulated from its tortious conduct while holding trust property.

3. Def. State ignores the misfeasance related to the TRWT alleged against it by Plaintiffs

Although *Def. State* maintained that it retained sovereign immunity because "[p]rivate persons are not liable for their actions in holding sovereign rivers within the public trust because private persons do not hold sovereign rivers in trust for the

public," (App.305; *State's* Brief, p.6), Plaintiffs again disagree with *Def. State's* focus.

As already discussed above, pursuant to *Iowa Code* 464A.11 and *Iowa Administrative Code* 571-30.52 thru 30.63, *Def. State* had the authority to partner with *Def. County*, *Def. City,* state agencies like the Iowa DNR, and "cooperatives, and individuals" in designating the Turkey River as a state sponsored "water trail" and in undertaking the associated duty to "warn the general public about drowning hazards related to low-head dams" or to "remove or otherwise modify low-head dams" to keep users of the *TRWT* safe. *See Iowa Administrative Code* 571-§30.53(2): "*Low-head dam public hazard program.* The department provides funds to dam owners, including counties, cities, state agencies, **cooperatives, and individuals**, within Iowa to undertake projects that either warn the general public about drowning hazards related to low-head dams or that remove or otherwise modify low-head dams to create a safer experience on Iowa's navigable waters." (emphasis added). There can be no doubt that "cooperatives" and "individuals" could be held personally liable for their active negligence if they partner with *Def. State* to designate a navigable stream as a state sponsored "water trail," and then fail to comply with the obligations to warn the invited public of the "drowning machine" that was hidden, but clearly present at the time of the "water trails" designation. In this case, Plaintiffs seek to hold *Def. State* to the same standard and subject to the

same liability as these private actors would be held. Therefore, since these private actors could be held liable, sovereign immunity has been waived and *Def. State's* motion to dismiss should have been denied.

B. The Discretionary Function Does Not Apply Here

Def. State moved the District Court to dismiss Plaintiffs' Petition for lack of subject matter jurisdiction based on *Def. State's* exercise of its discretionary function to manage public waters. (App.306-311; *State's* Memorandum, pp.7-12). Plaintiffs resisted and appeal was preserved. (App.318-320; Resistance, pp.5-7).

First, Plaintiffs asserted that the discretionary function immunity is an affirmative defense and the party asserting the defense "has the burden to prove the immunity." (*Id*, ¶13) (citing *Anderson v. State*, 692 N.W.2d 360, 364 (Iowa 2005)). Plaintiffs further asserted that typically, **"[a] motion to dismiss . . . is not a proper vehicle for the submission of affirmative defenses**." (*Id*, ¶14) *Harrison v. Allied Mut. Cas. Co*., 113 N.W.2d 701, 702 (Iowa 1962). *Def. State* provided no evidence to the District Court to carry its burden of proving the discretionary function immunity. Thus, the District Court erred in granting the Motion to Dismiss.

Second, Plaintiffs asserted *Def. State* was not exercising any discretionary function when it designated the Turkey River as the *TRWT* with a known public hazard and then failed to assure that the public was adequately warned or the danger on the publicly owned property was abated.

Discretionary immunity is to be construed narrowly. The mere existence of some judgment does not necessarily invoke the discretionary function defense:

> The general rule is that, [b]efore immunity attaches there must be some form of considered decision, that is, one which consciously balances risks and advantages. The duty of a governmental entity is discretionary when it devolves upon the part of an officer to determine whether or not he should perform a certain act, and, if so, in what particular manner. Performance of a discretionary function requires exercise in judgment and choice and involves what is proper and just under the circumstances. A court must look at the particular conduct alleged in order to determine whether that conduct involved the exercise of discretion. Discretionary immunity is to be construed narrowly. The mere exercise of some judgment is not necessarily sufficient to invoke the discretionary function defense.

Schmitz v. City of Dubuque, 682 N.W.2d 70, 74 (Iowa 2004).

There is a two-step analysis in determining whether discretionary function immuninty applies. The first question is whether there was an element of judgment or discretion involved in the decision. If so, the second question is whether the judgment exercised was the type the discretionary function immunity was designed to shield from liability. The general rule is for municipal liability — immunity is the exception. *Graber v. City of Ankeny*, 656 N.W.2d 157, 160–161, (Iowa 2003).

The acts at issue in this case are *Def. State's* (1) designation of the Turkey River as a state Water Trail; (2) promotion of the *TRWT* and invitation to members of the public to use the *TRWT*, knowing of the danger of the Clermont Dam; (3) failure to place signs at the entrance to *TRWT* Access Point #71 warning of the Clermont Dam danger downstream, (4) negligent placement of warning signs in

other locations along the *TRWT*, (5) failure to maintain the warning signs that were placed; (6) failure to place alternative dam hazard warning or mitigation systems, such as buoys or overhanging cables; (7) failure to clearly mark the portage exit from the *TRWT* before the dam; (8) failure to follow up on the grant funds given to *Def City* to remove or modify the Clermont Dam to ensure the dam was removed or modified before it promoted the *TRWT* as being safe for the public.

General safety considerations are not afforded immunity under the discretionary function; rather, there must be something more at the center of the government's decisions:

> All of the above considerations are based upon one priority only—the city's overarching safety concern. "[W]hether a discretionary act is policy-driven cannot be short-circuited simply by raising the specter of a general safety concern." (citation omitted). The mere existence of a sweeping safety consideration does not catapult the city's actions into the zone of immunity for decisions based upon social, economic, or political policy. (citation omitted) Though the city may have considered preordained safety policies, that is not sufficient to ascend to the level of an immune policy-based action. Almost every decision made by a public employee is done with respect to general safety considerations. However, individual decisions made under the umbrella of safety considerations are not immune. There must be something more than bald-faced assertions of safety at the center of the city's decision.

Graber v. City of Ankeny, 656 N.W.2d 157, 165–166 (Iowa 2003).

The Iowa Supreme Court has said, "Our cases have required a defendant who seeks immunity to show that some form of considered judgment and choice were brought to bear on its decision. *Schmitz v. City of Dubuque*, 682 N.W.2d 70, 74 (Iowa

2004). The failure to comply with mandatory regulations do not involve a choice and do not give rise to a discreationary function defense. *Schneider v. State*, 789 N.W.2d 138, 147-148 (Iowa 2010) (citation omitted) (stating "the discretionary function exception will not apply when a . . . statute, regulation, or policy specifically prescribes a course of action for [a government] employee to follow").

Def. State made no attempt to show that some "considered choice or judgment" was brought to bear in its failure to make sure the "public hazard" was abated or the public was properly warned. *Def. State* made no attempt to show some considered choice was made before it began promoting the *TRWT* with a known public hazard and inadequate warnings.

There is no evidence that any governmental employee was balancing priorities of competing importance when deciding whether or not the mandatory requirements of warning of the "public hazard" of low-head dams should be complied with. The same was true in *Graber v. City of Ankeny,* where the conduct at issue was the timing of a traffic light. There, as here, there were no broad-sweeping economic, political, or social considerations at the heart of the decisions of the governmental defendant:

> Other than pre-determined safety considerations, **there is no evidence that anyone of authority balanced any priorities of competing importance.** (citation omitted). The city has failed to show any broad-sweeping economic, political, or social considerations were at the heart of its decision on how to time this traffic signal. There is no evidence to suggest the city's judgment would have involved any policy-making. (citation omitted) ("[t]he more the ... judgment involved policy-making the more it is to be recognized as immune from judicial

> process"). The city's conduct was not "entwined in a layer of policy-making that **exceeded the mere application of rules to facts**." (citation omitted). The city's decision in timing these traffic signals is the same as the ordinary, day-to-day decisions faced by all municipalities in regulating their streets. The factors considered by the city here are not legitimate **policy-based considerations implicating governmental functions**. (citation omitted). A **governmental action is not afforded immunity simply because a municipality announces that the action was policy-based**. The challenged action must lend itself to a policy-based analysis. Here, the **city judgment was based on nothing more than a generic safety consideration**. As such, the city is not immune from Graber's tort action.

Graber v. City of Ankeny, 656 N.W.2d 157, 166 (Iowa 2003) (emphasis added).

Significantly, some of the allegations Plaintiffs make are not choices at all and therefore could not be discretionary acts. For example, not maintaining the existing warning signs was mere negligence. There is no evidence of a decision not to maintain the warning signs. It was a non-choice, meaning it just was not done. Another example is not following up on the grant funds awarded to *Def. City* to remove or modify the Clermont Dam. Here again, there is no evidence of a decision not to follow up on the work that was supposed to be done with the funds. It was a non-choice, meaning it just was not done due to negligence. *Def. State* presented no evidence that it made a conscious decision not to follow up on the funds given to *Def. City* and not to make sure the funds were used to complete the repair or removal of the Clermont Dam before it was promoted as the *TRWT*. See, *Shelton v. State*, 644 N.W.2d 27, 30 (Iowa 2002), for a discussion of failure to act versus non-choices.

The Supreme Court found In *Graber* that the city was not immune from tort liability based on the discretionary function:

> The facts before us show the movement of both Graber and Allen was controlled by the traffic signals that were operating according to the timing sequences the city had previously set. In setting the sequence, the city's professional judgment did not rise to the level of that of an immune discretionary function because it **was not based upon legitimate policy considerations.** We reverse and remand.

Graber v. City of Ankeny, 656 N.W.2d 157, 166 (Iowa 2003)

> The city exercised its discretion when it decided the proper timing of the traffic lights at the intersection of State Street and Oralabor. However, this choice was **not based upon any broad-sweeping policy considerations**. The city is therefore not immune from liability for its actions in timing these traffic signals. Because genuine issues of material fact existed as to the cit''s liability, the cit''s motion for summary judgment should not have been granted. We reverse and remand for further proceedings consistent with this opinion.

Graber v. City of Ankeny, 656 N.W.2d 157, 166-167 (Iowa 2003) (emphasis added). The District Court erred in granting the *Def. State's* Motion to Dismiss because there was no element of judgment or discretion involved in the decision.

Even assuming the Court reaches the second prong of the analysis, it cannot be satisfied. Failing to assure that trees and brush did not grow over warning signs is not the sort of discretionary choices the discretionary immunity exception is meant to protect. *See Shelton v. State*, 644 N.W.2d 27, 31 (Iowa 2002) (citing *Duke v. Dep't of Agric*., 131 F.3d 1407, 1412 (10th Cir. 1997) (although no rule required specific safety measures, neither would social or economic policy considerations justify

failure to warn of man-made hazard causing boulders to tumble into campsite); *Faber v. United States*, 56 F.3d 1122, 1126 (9th Cir. 1995) (no discretion involved where park service failed to follow specifically prescribed policies requiring implementation of three safety measures to prevent public from diving at waterfall))

Moreover, the discretionary function is inapplicable when a statute, regulation or policy requires a course of action. *Walker v. State*, 801 N.W.2d 548, 555 (Iowa 2011) (citation omitted)..

Here, Plaintiffs alleged, for example, *Def. State* failed to properly position warning signs regarding the concealed and dangerous Clermont Dam in conformance with its Low-head Dam Signage Manual and failed to hold its state-designated *TRWT* to the standards and criteria required for state-designation.[38] This allegation alone establishes that a required course of action existed by law and *Def. State* failed to conform to it. Given those allegations, the discretionary function could not apply.

There is a long history of the discretionary function not being applied as a defense in Iowa. In *Madden v. City of Eldridge*, 661 N.W.2d 134 (Iowa 2003), the plaintiff claimed that the city failed to properly inspect an apartment building. The court held there was no evidence to suggest the inspector engaged in any public policy analysis, weighing the advantages and disadvantages, before deciding not to

[38] App.010-015; *Petition* ¶41-44, 49-54, 64, 67-89

inspect the lath and wallboards. "No legitimate policy-making decisions involving significant judgment were involved. The record indicates the building inspector's action was nothing more than an ad hoc decision, tailored to the particular circumstances before him at the final inspection." *Id.* at 140.

In *Messerschmidt v. City of Sioux City*, 654 N.W.2d 879 (Iowa 2002), a volunteer worker at a Sioux City parade was injured when a city worker removed a traffic control barricade, allowing a drunk driver to strike and injure the plaintiff. The court held the city did not meet its burden to prove considerations based on social, economic, or political policy were involved in its decision to take the barricade down." *Id.* at 882; *see also A. Doe v. Cedar Rapids Community School Dist.*, 652 N.W.2d 439, 445 (Iowa 2005) (negligent hiring of school teacher not a discretionary function).

In *Schmitz v. City of Dubuque*, 682 N.W.2d 70 (Iowa 2004), the plaintiff was injured when the front wheel of her bicycle caught the edge of an asphalt overlay on a bicycle/walking trail in Dubuque. The court held, "In fact, the city produced no evidence that the choice it made with respect to whether the overlay should be done with or without grading of the accompanying shoulders was the sort of decision that the discretionary function immunity intends to protect, i.e., a decision weighing "social, economic, or political policies." *Id.* at 76.

The application of facts to law is no different here. The discretionary function immunity does not apply to misfeasance of *Def. State*.

IV. Qualified Immunity under *Iowa Code* Section 669.14A Does Not Insulate the State of Iowa from Liability

Def. State is not qualifiedly immune from liability.

In its briefing to the District Court, *Def. State* asserted that Plaintiffs' petition did not plead a "clearly established" right as required by *Iowa Code* §669.14A(3). (App.312; *State's* Memorandum, pp.13-14). Plaintiffs resisted, arguing that §669.14A(3) was prospectively only and, in the alternative, Plaintiffs pled that common law of negligence and premises liability were "clearly established" at the time the decedents drowned. (App.317; Resistance, p.3). Thus, error was preserved.

Def. State's qualified immunity argument fails under *Nahas*, discussed *supra,* as well as *Carver-Kimm v. Reynolds*, 992 N.W.2d 591 (Iowa 2023) (discussing similar application of *Iowa Code* §669.14A(3)). Since *Iowa Code* §669.14A(3) was prospective only, Plaintiffs were not required to plead a "clearly established" right. See arguments, *supra*.

Therefore, the District erred in holding that qualified immunity under *Iowa Code* §669.14A barred Plaintiffs' claims.

CONCLUSION

For the reasons set forth herein, the District Court erred in dismissing Plaintiffs' claims.

REQUEST FOR ORAL ARGUMENT

We request to be allowed 30 minutes for oral argument.

Respectfully submitted,

/s/ J. Russell Hixson

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PROOF OF FILING AND SERVICE

The undersigned hereby certifies that he, or a person acting on his behalf, electronically filed the Plaintiffs'-Appellants' Proof Brief on the 27th day of February, 2024, and further certifies that he, or a person acting on his behalf, served the Plaintiffs'-Appellants' Proof Brief on all other parties to this appeal via EDMS.

By: _/s/ J. Russell Hixson____

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