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' REPLY BRIEF

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I. *ESTATE OF MCFARLIN* IS NOT CONTROLLING PRECEDENT ON THE ISSUES AT BAR.

Defendants assert that *Estate of McFarlin v. State*, 881 N.W.2d 51 (Iowa 2016) is controlling precedent and bars Plaintiffs' claims. Defendants' reliance on *McFarlin* is misplaced. Although *McFarlin* addressed liability of the State of Iowa (Iowa DNR) on a meandered lake, there were no claims of misfeasance against the State, and the lake at issue was not a State designated "water trail." More importantly, the governmental entities (City of Storm Lake and Buena Vista County) involved in the dredging and the failure to warn of the dangerous condition had settled, and their negligence was not before the court.

This Court in *Fulps v. City of Urbandale* (Iowa 2021) 956 N.W.2d 469, 474*, as amended (Apr. 6, 2021)*, summarized *McFarlin*:

> In *Estate of McFarlin*, we held that the public-duty doctrine protected the state from a claim brought on behalf of a child killed when the boat he was riding in struck a dredge pipe on Storm Lake. 881 N.W.2d at 63. The dredging operation was being conducted on the lake by a third-party consortium. *Id.* at 53–54, 64 ("It is undisputed the **dredge pipe and equipment were owned and operated by local entities, not the State**."). The allegation was that the state breached statutory and common law duties to **assure the safety of this third-party operation**." *Id.* at 56–57, 64.

Fulps, at 474 *(emphasis added).* The *McFarlin* Court held:

> It is undisputed the dredge pipe and equipment were **owned and operated by local entities, not the State**. The **DNR did not place the buoys** marking the location of the submerged pipe; **city employees placed them**. The **LIC controlled day-to-day dredging** operations. **Liability follows control, and an owner who transfers control to others is not liable for injuries**. *See McCormick v. Nikkel & Assocs., Inc., 819 N.W.2d 368,374 (Iowa 2012)* ("The reason is simple: The **party in control** of the work site is best positioned to take precautions **to identify risks and take measures to improve safety**."); *Van Essen v. Farmers Coop. Exch., 599 N.W.2d 716, 720-21 (Iowa 1999)* (affirming summary judgment for property owner who transferred control of grain bin to lessee-operator); *Allison ex rel. Fox v. Page, 545 N.W.2d 281, 283 (Iowa 1996)* ("The general rule and exceptions reveal a common principle: **liability is premised upon control**.").

Estate of McFarlin v. State, 881 N.W.2d 51, 64 (Iowa 2016) (emphasis added). Importantly, *McFarlin* noted that "liability follows control" and recognizes liability for those who are in a position "to identify risks and take measures to improve safety." *Id*. Plaintiffs submit that *McFarlin* is distinguishable from the case at bar.

The State of Iowa (IDNR) did not place the warning buoys in *McFarlin.* In contrast, here, each Defendant is alleged to have erected the warning signs on the Turkey River Water Trail ("*TRWT"*) upstream from the *Clermont Dam*.[1] Moreover, these warning signs were negligently placed and negligently maintained.[2] Thus, each Defendant in the case at bar engaged in affirmative acts of misfeasance not alleged in *McFarlin*.

[1] *Petition*, ¶¶21, 49-54 (App.8-11)
[2] *Petition*, ¶¶70-74, 77-80, 83-89 (App.13-15)

Although the State's *ownership of the lake* alone was insufficient in *McFarlin* under the public duty doctrine, the Plaintiffs' claims in this case are not based solely on ownership of the Turkey River. The claims are more akin to the claims in *McFarlin* against the county and city, who improperly placed the warning buoys, i.e. whose affirmative negligence created a dangerous condition.

Def. State argues that *McFarlin* controls because the lakebed in *McFarlin* was also held by the State "in public trust, and it opened the lake for recreational use to the public at no cost." However, at the time the State opened the lake for recreational use in *McFarlin*, there were no **artificial or manmade dangers** on the lake that were relevant to the injury at issue. ***After*** the State of Iowa opened the lake to recreational activities, it gave up control over the dredging operations to the county, the city and the dredge operators. It was ***after*** the State gave away this control, that the dangerous dredge and the dangerous condition was created by the city, the county and the dredge operators. There was no evidence that the State of Iowa knew anything about the danger prior to it giving up control or that it took any affirmative action after doing so.

In contrast, in the case at bar, the Def. State and Def. County added the Turkey River as a State designated water trail **after** they were aware of the "drowning machine" created by the low-head dam. As *McFarlin* held: "The **party in control** of the work site is best positioned to take precautions **to identify risks and take**

measures to improve safety." *McFarlin*, at 64 (Iowa 2016). Here, Def. State was always "in control" of designating the Turkey River as a "water trail" and "was in the best position to take precautions to identify risks and take measures to improve safety" ***before*** allowing the "water trail" designation. Although Def. State issued funds to the City and County for the purpose of abating the danger of the low-head dam or of properly warning of it, it was the State that always maintained control over whether or not it would designate the Turkey River as a water trail and promote it as a recreational use. It was Def. State who could have withheld such designation until adequate warnings were placed or the "drowning machine" abated. Instead, it was Def. State that put up the inadequate Iowa DNR warning signs and published material promoting the Turkey River as a State water trial – thus impliedly representing to the public that the *TRWT* was safe and open for recreational use. Plaintiffs submit this active negligence[3] is similar to the State and City's actions of prematurely opening up the highway in *Estate of Farrell* before adequate or appropriate warning signs were installed. *Estate of Farrell*, 974 N.W.2d at 135 and 138 (recognizing "…the act of opening the interchange prematurely without adequate lighting and signage…" was the alleged negligence as well as the allegation

[3] As in *Farrell*, this Court must accept as true the Appellants' allegation that the State and the other defendants 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.11-33; *Petition*, ¶¶54, 71, 74, 77-89, 97, 104, 111, 118, 126, 134, 142, 150, 157 and 164.)

that “signage, were incomplete and were not maintained "in a safe and proper condition."). More, importantly, although Def. State attempts to argue that all control was given over to others in this case, Def. County rightly asserts that “Fayette County and the State’s DNR “were local project ***partners*** responsible, in part, for developing the [*TRWT*].” (County’s Proof Brief, p. 25). Thus, it is a fact issue for a jury to determine what control the State had or did not have. In this respect, *McFarlin* is distinguishable.

Even if Def. State gave away control of the *TRWT* trail to the City and County, the dangerous condition existed ***prior to*** this occurring. This was not the case in *McFarlin*. Here, Def. State had previously allowed the dangerous low-head dam to be constructed and placed in the bed of the Turkey River owned by Def. State. Def. State further allowed it to continue unabated for years. Def. State was aware of the dangerous condition on its property and had designated the Clermont low-head dam as a “drowning machine” ***before*** allegedly giving away control of the *TRWT* to Def. City and Def. County. Indeed, the very purpose in providing funds to Def. City and Def. County was to warn or abate the dangerous condition created by the Clermont Dam ***before*** designating it as a State “water trail.” Unlike *McFarlin*, this is not a case where the dangerous condition was created ***after*** the State gave over control of its navigable water.

In *McFarlin*, the court found the dredge floating under the water was an instrumentality of a third party. In this case, Def. State attempts to grab ahold of this finding by asserting that "it did not own, operate or maintain the dam" and that the dam was "a third-party instrumentality." Plaintiffs disagree for a number of reasons. First, although Plaintiffs allege that the dam was owned by the City of Clermont, Def. City has denied this allegation. *See Suzanne P. v. Joint Bd. F Dir. Of Eire-Wyoming Cnty, Soil Conserv. Dist.*, 2024 N.Y. LEXIS 62; 2024 NY Slip Op 00159; 2024 WL 156201 (where defendant argued it did not own the dam because it did not own the underlying land to which the dam was affixed – court determined this created a factual issue for a jury). Regardless of who owned the dam or who built the dam, the dam is a solid concrete wall imbedded into the bed of the Turkey River owned by the State of Iowa. This is not some dredge floating in the water. Second, Def. State controls the Turkey River, including its waterbed and, at any time, has the right to remove any manmade structure that interferes with the navigability of the river or produces a significant danger to the public's rights. *Lakeside Boating & Bathing, Inc. v. State*, 344 N.W.2d 217 (Iowa 1984) (recognizing "the dominant right of the State to improve navigation" by "changes to a lakebed when reasonably necessary in aid of navigation."). For Def. State to assert that it had no control over the Clermont Dam that was a fixture on Def. State's property is inaccurate.

As Justice Hecht noted in his dissent in *McFarlin*, "[t]he state is "liable for tortious commissions and omissions when authority and control over a particular activity has been delegated to it . . . and breach of that duty involves a foreseeable risk of injury to an identifiable class to which the victim belongs." *Id*. at 41 (citing *Wilson, 282 N.W.2d at 671*). Whether or not to designate the Turkey River as a "water trail" was solely within the State's control, but only after very specific and detailed warnings had been erected. This is no different than opening up the state highway in *Estate of Farrell* or the city bike trail in *Breese v. City of Burlington,* 945 N.W.2d 12 (Iowa 2020). Plaintiffs submit that when Def. State and Def. County undertook the act of opening up the ***TRWT*** as a State designated water trail, this created a duty upon Def. State and Def. County to do so safely. *Estate of Farrell* at 138 (*citing Johnson v. Humbolt County*, 913 N.W.2d at 266-267: "This does not mean the same no-duty rule would protect that entity **when it affirmatively acts and does so negligently**."). This case is distinguishable from *McFarlin*.

Unlike *McFarlin*, the Defendants created a dangerous state designated water trail. Before the actions of the Defendants, the dangers of the low-head Clermont Dam lay dormant as applied to tubers. That is because the navigable river had not been opened up to the public as a State designated and supported water trail. The Defendants themselves created the State designated and County supported *TRWT* that was promoted to the public. Although Def. State and Def. County may not have

created the low-head dam, they did create the *TRWT* that enticed Sharon and Vicki to float down the trail and right into the "drowning machine" that would take both of their lives. Plaintiffs submit that this is similar to *Fulps v. City of Urbandale*, where the city connected a drainage culvert to a bike trail. It was not that the drainage culvert itself was constructed negligently and was dangerous. It was that the culvert, when ***made part of the bike trail***, created a danger to the public using the trail. Similarly, it was the affirmative act of adding the Turkey River to the State designated water trail system, with a known death trap that had not be abated and without installation of proper warning signs, that gives rise to the duty in this case.

Lastly, *McFarlin* articulates the public duty doctrine's purpose of not requiring a governmental entity to act to protect the public from the acts of a ***third party***. Yet, in this case, Defendants fail to identify any act of a third party or any third-party instrumentality that caused the deaths of Sharon and Vicki. Def. State owned the river. Def. City allegedly owned the dam. The Defendants all undertook the duty to warn and to place warning signs and did so negligently. The Defendants then failed to maintain the warning signs they placed. Where is the "third party" action or instrumentality that killed these two women? There is none. That is because the Defendants, acting in concert, were responsible for creating the dangerous *TRWT* that caused the deaths in this case. For the above reasons, *McFarlin* is distinguishable and does not bar Plaintiffs' claims.

II. PLAINTIFFS' COMMON LAW CAUSE OF ACTION IS NOT BARRED BY STATUTE

Def. County argues that Plaintiffs' common law claims are precluded by statute and that Plaintiffs failed to preserve error on their common law tort claims. Plaintiffs assert that the argument of Def. County contained in its Brief at pp.33-37 is convoluted and its points unclear. Regardless, Plaintiffs will attempt to respond.

First, Plaintiffs have always asserted, both before the district court and in its Brief before this Court, that its claims against the Defendants are based on the common law (duty, breach causation and damages) and premise liability.[4] Even the 9/5/23 Ruling appealed from identifies Plaintiffs' numerous claims of "negligence" and "premises liability" against all the Defendants. (App.430). This is based on *Iowa Code* §670.2 making "every municipality [] subject to liability for its torts" with torts being defined to include "actions based on negligence, … breach of duty, whether statutory or other duty…" *See Iowa Code* §§670.1 & 2.

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[4] See Plaintiffs' Proof Brief, p.44 ("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"), and p. 63 ("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. (Plaintiffs Resistance filed 11/2/22, p.3). Thus, error was preserved"), and p. 27 ("Plaintiffs alleged *Def. County* **breached its duty to exercise reasonable care** and acted with **misfeasance** by … [listing 10 specifications of negligence]"), and p. 29 (Plaintiffs alleged *Def. City* violated its **common law premises liability duties** by: … [listing 10 specifications of negligence]").

Defendants seem to argue that *Iowa Code* §670.4 limits Plaintiffs' ability to bring common law causes of action. Defendant County misapplies §670.4.

Although Plaintiffs agree with Def. County's recitation of the preamble of §670.4(1) providing that §670.2 shall not apply ***if*** an exception (i.e. recreational activity under §670.4(1)(o)) is ***pled and proven*** by Def. County, Def. County fails to point out that if it ***fails to pled or prove*** the affirmative defense of a "recreational activity" immunity, then §670.4(1) is inapplicable. Even ***if*** Def. County **plead and proved** its affirmative defense of "recreational activity" immunity under §670.4(1)(o), Plaintiffs asserted before the District Court, as discussed more below, that application of the recreational activity immunity would run afoul of the intents and purposes behind *Iowa Code* §464A.11(2)(a) (2021) and IAC, 571 - §30.52. (App.144-146). However, as discussed in the next section, Plaintiffs disagree that Def. County pled and proved an affirmative defense of "recreational activity" immunity, and Plaintiffs assert that applicability of the "recreational activity" immunity is a fact issue that cannot be determined on Defendants' various motions to dismiss.

With respect to Def. County's assertion that Plaintiffs have failed to preserve error, Plaintiffs asserted before the District Court that *Iowa Code* §670.4(1)(o) was an affirmative defense and that "a motion to dismiss … is not a proper vehicle for the submission of affirmative defenses." (App.138-139). Plaintiffs further asserted

that Defendants did not provide any evidence suggesting that Plaintiffs knew or should have known of the dangerous Clermont Dam and the allegations in the Petition were to the contrary. (App.145). Lastly, Plaintiffs cited to the District Court *Huffman v. City of Willoughby*, 2007 Ohio App. LEXIS 6236 (Ohio App. 2007) discussed *infra*, where the court held that a drowning occurring at a low-head dam on a river was not subject to recreational immunity.. (App.142-145).

Plaintiffs appealed the 9/5/23 Ruling and "all other adverse ruling and orders inhering therein." (App.435-436). Plaintiffs preserved error.

III. RECREATION IMMUNITY DOES NOT BAR PLAINTIFFS' ACTION

A. PLAINTIFFS DID NOT WAIVE THE ISSUE OF RECREATIONAL IMMUNITY

Def. County acknowledges that the District Court "**did not** enter a ruling on the ***claims by the defendants*** that the Recreational Immunity in Iowa Code Section 670.4(1)(o) barred this action despite acknowledging its presence as an issue…" (County's Brief, p. 37). Def. City takes a different position, asserting that the District Court, in the very same Ruling, must have ruled on its §670.4(1)(o) assertion, and granted it. The Plaintiffs concur with the County's reading of the 9/5/23 Ruling, that the District Court explicitly granted both the County's and the City's motions solely "due to the applicability of the Public Duty Doctrine and the Plaintiff's failure to comply with the heightened pleading requirements of Section 670.4A." (App.431).

That is because the District Court ruled on Def. County's Motion first and then stated that it was granting Def. City's Motion "for the same reasons." *Id*. Although Def. City reads the 9/5/23 Ruling differently, it would make absolutely no sense for the District Court to have granted Def. City's Motion on §670.4(1)(o) grounds, but then to deny the identical assertion made by Def. County.

This becomes significant because Def. County submits that it can raise the issue of immunity under §670.4(1))(o) in its brief even though the District Court considered the argument and did not grant Def. County's motion on that basis. Def. City, on the other hand, asserts that the District Court must have granted its motion based on §670.4(1)(o), and because the Plaintiffs do not agree with this reading and did not address the issue in their Brief, then Plaintiffs waived the issue.

After reading Def. City's Brief, Plaintiffs can understand the ambiguity in the 9/5/23 Ruling as it relates to Def. City's 670.4(1)(o) assertion. Although the Plaintiffs disagree with Def. City's interpretation, since the issue of recreational immunity will certainly be raised at some point in this litigation, Plaintiffs will not resist Def. City's and Def. County's attempts to raise the issue in their Briefs as long as Plaintiffs are allowed to respond as they did in their Resistances before the District Court and as they do so below.

B. IT WOULD HAVE BEEN ERROR FOR THE DISTRICT COURT TO DISMISS PLAINTIFFS' PETITION BASED ON THE RECREATIONAL ACTIVITY IMMUNITY CREATED BY *IOWA CODE* §670.4(1)(O).

In order to prove an affirmative defense of recreational activity immunity under *Iowa Code* §670.4(1)(o), the Defendants would need to plead and prove that the "claimed injuries … resulted from the **normal and expected risks inherent** in the recreational activity" and that both Sharon and Vicki "knew or reasonably should have known that the recreational activity **created a substantial risk of injuries** or damages." *Id*. None of the Defendants have proven the necessary elements of the recreational activity exception and, thus, it cannot be used to support the District Court's dismissal of Plaintiffs' Petition.

1. There Are Insufficient Facts To Support Application Of The Recreational Activity Immunity At This Stage Of The Litigation.

As noted above, in order to prove an affirmative defense of recreational activity immunity, the Defendants are required to pled and prove:

1. That Sharon and Vicki's deaths "**resulted** from the **normal and expected risks inherent** in the recreational activity"; and:
2. Sharon and Vicki "knew or **reasonably should have known** that the **recreational activity** created a **substantial risk** of injuries or damages."

(*See Baldwin v. City of Estherville*, 915 N.W.2d 259, 265 (Iowa 2018) ("to be entitled to qualified immunity a defendant must plead and prove as an affirmative defense…); *Cubit v. Mahaska County*, 677 N.W.2d 777, 780 (Iowa 2004) (noting the county raised an immunity provided by Iowa Code §670.4 as an affirmative defense). The above elements of a §670.4(1)(o) defense are factual issues normally determined by a jury and are not subject to a motion to dismiss. *Lennette v. State*, 924 N.W.2d 878 (table), 2018 Iowa App. LEXIS 1040 at *9 (Iowa Ct. App. 2018). The Defendants did not bring forth any facts that would be sufficient to rule on applicability of the recreational activity immunity on motions to dismiss.

2. The Deaths In This Case Were Not Caused By "The Normal Expected Risks Inherent In The Recreational Activity."

Def. County and Def. City assert that the deaths in this case were caused by drowning and that drowning is a "normal expected risk inherent" in tubing. Of course, in making this argument, the defendants ignore the fact that Sharon and Vicki both died when they got caught in the hydraulics of the low-head dam. These dams are called "drowning machines" because even the best of swimmers cannot break free from the hydraulics caused by the water flowing over the dam. For numerous reasons, the recreational activity exception is inapplicable and certainly could not

have been decided on a motion to dismiss. First, low-head dams[5] are not an "inherent and expected risks" of river tubing. Indeed, low head dams do not occur naturally in rivers, and they are concealed. More importantly, the hydraulic effects of a low-head dam are certainly unknown to the public. Because of the concealed risk of these low-head dams and their dangerous hydraulics, Def. State published materials labeling low-head dams as "drowning machines," establishing a "Low-Head Dam Public Hazard Program"[6] and making state funds available to warn of, to mitigate or to remove these dams. Nowhere were low-head dams identified as an "inherent and expected risk" of river tubing. Low-head dams and their dangerous hydraulic effects do not exist in all rivers, and, thus, are not an "inherent and expected risk" of river tubing.

In refusing to apply recreational use immunity to a drowning death caused by a low-head dam, the court in *Huffman v. City of Willoughby*, 2007 Ohio App. LEXIS 6236 (Ohio App. 2007) stated:

> Next, appellant argues the trial court incorrectly applied the Supreme Court's decision in *Miller v. City of Dayton* (1989), 42 Ohio St.3d 113, 537 N.E.2d 1294 to this case in holding that the dam was not protected by recreational use immunity. The Court in *Miller* explained the test to be followed in determining whether **man-made improvements affect the availability of the recreational user immunity**. The Court held:

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[5] *"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.

[6] 571 *Iowa Administrative Code*, Chapter 30, Division II.

> "Generally speaking, recreational premises include elements such as land, water, trees, grass, and other vegetation. But recreational premises will often have such features as walks, fences and other improvements. The significant query is **whether such improvements change the character of the premises and put the property outside the protection of the recreational-user statute.** To consider the question from a different perspective: **Are the improvements and man-made structures consistent with the purpose envisioned by the legislature in its grant of immunity**? In other words, are the premises (viewed as a whole) those which users enter upon '*** to hunt, fish, trap, camp, hike, swim, or engage in other recreational pursuits?
>
> "***
>
> "*** [T]he inquiry should focus on the nature and scope of activity for which the premises are held open to the public. ***" *Id*. at 114-115.
>
> In considering a Civ.R. 12(B)(6) **motion to dismiss**, the only issue for the trial court to consider is whether the plaintiff's complaint states a claim, viewing the allegations as true and all inferences in a light most favorable to him. **Because the complaint alleged the premises were inherently dangerous and exposed any user to the risk of imminent death**, **appellees were entitled to the reasonable inference that the dam was not installed for recreational pursuits.**
>
> Based on the allegations of the complaint, the trial court in its judgment entry found "**the lowhead dam was clearly created for purposes other than to draw rafters *** onto the river**." It found that "the construction of the **lowhead dam changed the character of this portion of the river**, and that this improvement is not consistent with the purpose of Ohio's Recreational User statute ***." **The court found the creation of the dam was not an improvement that was made to encourage the recreational use of this part of the river. Instead, the court found it made that part of the river inherently dangerous and thus not suitable for recreational use**.

*Id. at **13-15* (emphasis added). *Huffman* is on all fours with the case at bar and is inconsistent with any application of the recreational activity exception in this case.

Similarly, in *Stone v. York Haven Power Co.*, 561 Pa. 189 (PA 2000), the court was confronted with the issue of whether immunities created by a *Recreational Use*

of Land and Water Act applied to injuries caused by a manmade dam. In discussing the risk created by the dam itself, as opposed to the general risk of any activity on the water, the court stated:

> As to the **dam structure itself**, where the decedents' boat was found, it is self-evident that RUA **immunity cannot apply**. Proper maintenance of the dam is essential to its intended use by appellants. In addition, proper maintenance of the dam is necessary for the continued, safe existence of the lake - it cannot exist but for the dam. Therefore, appellants have a duty to maintain the dam in a safe condition and are subject to suit for any harm caused by their negligent failure to do so **or to warn of dangers posed by that improvement**.

Id. at 196-197. The court did conclude that the lake, but not the dam, was subject to immunity under the recreational use act. (*Id*. 198). Finding that the issue was one of fact, the court remanded the case stating:

> Our holding that the lake, **but not the dam**, is subject to RUA immunity does not resolve the question of whether this particular action may go forward. Nor have the lower courts addressed the distinction between dam and lake. Hence, a remand is necessary. It will be for the trial court to determine, in the first instance, whether appellees have alleged **sufficient facts to proceed on a theory of negligence relating to the dam,** or a theory of wilful or malicious conduct relating to the lake, for their suit to proceed.

Id. at 198-199.

Unless this Court is willing to rule as a matter of law that low-head dams and the hydraulics they create are "normal expected risk inherent" in tubing in the State of Iowa, this should be a factual issue left for a jury. The District Court, if it did rule,

erred in finding, without any submitted evidence, that drowning in the hydraulics of a low-head dam is a "normal expected risk inherent" in tubing in the State of Iowa.

Additionally, what was the "cause" of the deaths in this case? Although the Defendants assert that it was "tubing," it remains a fact question for a jury as to the "cause" of the deaths and whether the deaths "**resulted from** the normal expected risk inherent" in tubing or whether they were "caused" by the hidden hydraulics of the low-head dam. Plaintiffs plead that the hydraulics of the low-head dam caused the deaths. (App.10). This creates a fact issue for the jury.

The District Court made no findings of fact that dying in the hidden hydraulics of a low-head dam is a normal and expected risk when tubing in the state of Iowa, and would have erred in granting immunity under any claimed recreational activities defense.

3. There Is No Evidence That Sharon And Vicki "Knew Or Reasonably Should Have Known That The Recreational Activity Created A Substantial Risk Of Injuries Or Damages."

In order to carry their burden of proving application of the recreational activity immunity, the Defendants were required to plead and prove that Sharon and Vicki "knew or reasonably should have known that the recreational activity **created a substantial risk of injuries** or damages." What the decedents knew or should have known is a fact question to be determined by a jury. *Denison v. Wiese*, 102 N.W.2d 671, 673 (Iowa 1960); *Williams v. Hampton*, 797 F.3d 276, 288 (5th Cir. 2015); *Ward*

v. Norton, 2024 U.S. Dist. LEXIS 62670 (M.D. Fla. 2024) ("a question of fact exists concerning whether Defendant had subjective knowledge of a risk of serious harm.").

In addition, whether or not the decedents' simple act of tubing "created a substantial risk of injuries" at that segment of the *TRWT* on 6/8/20 is also a question of fact for a jury. For example, many Iowans have tubed on waters and streams where there are places where an individual can stand up and walk in the water. This, of course, depends on the water level in the river as well as the particular segment of the river being travelled. There is no evidence of the water level of the *TRWT* on 6/8/20 or evidence that it created a substantial risk of injury. In addition, thousands of Iowans tube down Iowa Rivers and streams every year, many with their children. If Defendants' assertions are to be accepted, does that mean every Iowa parent knows, as a matter of law, that tubing on any Iowa river or stream "create[s] a **substantial** risk of injury," to their children, regardless of the cause the injury?

Additionally, how good at swimming were Vicki and Sharon? Certainly, their ability to swim would affect whether they believed that tubing crated a "substantial risk of injuries." Again, there is no evidence of this, and the District Court failed to make any such findings.

As alleged, the decedents lacked knowledge and familiarity with the river or the existence of the dam.[7] In *Volpe v. City of Lexington*, 708 S.E.2d 824 (S.Ct. VA 2011), the court was confronted with the death of an individual swimming in a river at a city park which included a low-head dam. *Id.* at 825. In discussing the danger created by the low-head dam and in reversing the trial court, the *Volpe* court noted:

> The Jordan's Point dam is described as "low-head" because water cascades over, rather than through, it. As the water level rises, more water flows over the top of the dam and the velocity of the flow increases. However, **the surface of the millpond remains calm and the heightened currents are not apparent to common observation**. The pooled water may not appear higher than normal even when the volume of water flowing over the dam is several times greater than the normal rate.
> When the water flow is high, it generates a **dangerous condition on the downhill side of the dam called a hydraulic**. The greater the flow of water over the dam, the more powerful the hydraulic. When a person is pulled into a powerful hydraulic, he may not be able to escape. **The presence of such a potentially deadly hydraulic may not be apparent to common observation**.
> The hydraulic created by a low-head dam is **unusually dangerous** because it is uniform and spans the entire river. By contrast, **naturally occurring hydraulics**, often formed by boulders, are **limited in size** and uneven in shape. Consequently, they usually will "kick [a person] to the left or right."

Id. at 825-826. Regarding the common law duty to warn when a dangerous condition is present the *Volpe* court stated:

> While we agree with the City that the natural, "ordinarily encountered" dangers of the Maury River at Jordan's Point were as a matter of law open and obvious to Charles, **we do not agree that a deadly, hidden hydraulic created by the unusually strong current at the low-head dam was open and obvious as a matter of law**.

[7] *Petition*, ¶¶35-61(App. pp. 9-12)

Id. at 636-637 (emphasis added). The *Volpe* Court went on to hold:

> The record in this case shows that **the hydraulic at Jordan's Point was unlike any naturally occurring feature of a river**. Specifically, the increased current above the manmade dam and the **hydraulic created below were not always visible to a swimmer** and were not always present. Unlike a natural hydraulic, the hydraulic in which Charles drowned spanned the river in a straight line, making escape exceptionally difficult.
> Therefore, **the circuit court erred in holding as a matter of law that the dam presented an open and obvious danger**. 4 See *Washabaugh 187 Va. at 773, 48 S.E.2d at 279*. This factually specific determination was an issue for the jury.

Id. at 638 (emphasis added). Even if this Court does not rule as a matter of law that the hydraulics of the Clermont Dam were not open and obvious, it at least becomes a jury question as to whether the decedents "knew or reasonably should have known that the recreational activity created a substantial risk of injuries." This could not have been decided by the District Court in ruling on Defendants' motions to dismiss.

4. Application Of The Recreational Activity Exception To Municipal Immunity Would Frustrate The Purpose Of *Iowa Code* §464A.11.

As asserted in Plaintiffs' Resistance before the District Court, the Iowa Legislature adopted *Iowa Code* §464A.11(2)(a) (2021) for the specific purpose of making sure that low-head dams were inventoried and either removed or proper warning signs placed ***before*** the river could be designated a "water trail." (App.116, 145). The specific intent of the Water Trails/Dam Program was to "enhance water trails development" and to "enhance dam ***safety*** in order to ***reduce drownings***." IAC,

571 - §30.52. As discussed in Plaintiffs' Brief, the IDNR was to allow the designation of "water trail" ***if*** certain warning signs were erected and maintained. To allow the municipal Defendants to undertake the obligation to place and maintain appropriate signage and then to claim immunity under *Iowa Code* §*670.4(1)(o)* when they failed to do so, would frustrate the legislative intent behind *Iowa Code* §464.11 and 571 I.A.C. §§30.51-30.63.

5. <u>The Out-Of-State Cases Cited By The Defendants Are Distinguishable.</u>

The Defendants cite a number of out-of-state cases that are distinguishable and would not support the granting of immunity on a motion to dismiss when a drowning was caused by a man-made low-head dam. Although Plaintiffs cite this court to *Volpe v. City of Lexington* and *Huffman v. City of Willoughby, supra,* both dealing specifically with the dangerous hidden hydraulics of low-head dams, only one Defendant cited case involved a low-head dam. The vast majority of the cases cited by Defendants involve appeals from motions for summary judgment, not motions to dismiss. *See*, *Old Second Nat'l Bank v. Aurora Twp.* 509 N.E.2d 692, 697 (Ill. App. 1987) (***appeal for summary judgment*** involving plaintiff tubing through a flooded culvert and not a river with a low head dam); *Espinoza v. Arkansas Valley Adventures* 2014 W.L 4799663, at 3 (D. Colo. 2014) (an unreported case) (***appeal from summary judgment*** when plaintiff drowned while white water rafting – not

tubing in a river with a low head dam); *White v. Georgia Power Co.* 595 S.E.2d 353, 355, 356 (Ga. App. 2004) (***appeal for summary judgment*** when two boys who could not swim drowned in a river,); *Pellham v. Let's Go Tubing* 398 P.3d 1205, 1210, 1215 (Wash. App. 2017) (***appeal for summary judgment*** when Plaintiff drowned while tubing as a result of a fallen tree in the river); *Cortes v. State of Nebraska* 218 N.W.2d 214 (Neb. 1974) (***appeal from factual findings*** by trial court where plaintiffs was not "a competent swimmer and drowned due to the dept of the lake – not involving a low-head dam).

McDowell v. Kentucky Utilities Company 2009 W.L. 350656, at 4,3 (Ky. App. 2009), cited by Defendants, was an appeal from ***summary judgment*** regarding a plaintiff who attempted to navigate a boat over a low-head dam. However, the facts were completely different from those before this court. In *McDowell,* the court decided the factual issue of whether or not there was evidence that the low-head dam was "open and obvious" to the plaintiff/decedent. In finding that the facts revealed the decedent knew or should have known of the danger, the court stated:

> As the trial court pointed out, the dam was visible from the road and **from either of the possible routes which McDowell could have taken to retrieve the boat**. In addition, the dam was also **visible from the takeout point where McDowell parked his truck that day**. Therefore, KU contends that a reasonable person in McDowell's position should have known of the dam and the hazard it presented.
> ***
> We agree with the trial court that the presence of the low-head dam was open and obvious to a reasonable person **in McDowell's position**.
> ***

> Moreover, even if KU had a duty to warn about the dam, we agree with the trial court that the estate **failed to present evidence** showing with reasonable certainty that **McDowell drowned at the dam**.

Id. at 7-8. The court decided the issue based on the facts; not as a matter of law on a motion to dismiss. In addition, unlike the allegation in the Petition before this Court, the facts in *McDowell* showed the decedent knew or should have known of the low-head dam. Lastly, the plaintiff failed to show that the decedent "drowned at the dam" – totally opposite of the allegations in the case at bar.

6. A Litany Of Cases Support A Duty To Warn Of The Dangers Of Man-Made Dams.

There are a litany of cases supporting the obligations of governmental entities to warn of the dangers associated with **manmade** dams. For the sake of brevity, one case is instructive. In 2003, the 4th Circuit found that governmental entities could be liable under common law principles for the failure to warn of dangers associated with man-made dams. *McMellon v. United States*, 338 F.3d 287 (4th Cir. 2003) (vacated on other grounds). The court applying Restatement (Second) of Torts, Section 343 and the duty of an owner of land to warn about the dangers of a dam, stated:

> In our view, the duty the plaintiffs envision--a duty to warn about the dangers **of a dam the government constructs across navigable waters**--fits easily within this general duty rubric. To state the obvious: **a dam across a navigable waterway is a dangerous thing**, in much the same way that a barricade put up by the government across an interstate highway would be a dangerous thing. In fact, a **dam across navigable waters is arguably more**

dangerous than a barricade across an interstate highway, because **dams can be less visible and because water currents can make it difficult to stop a boat or steer it away from danger**. In light of the nature and operation of a dam built across a navigable waterway, it is clearly foreseeable that those who approach too closely may be injured. Accordingly, we believe that under the general maritime law, **exercise of reasonable care in the circumstances requires the owner and operator of a dam at the very least to give adequate warnings about the existence of the dam**.

Other courts have reached the same conclusion, determining in cases involving **government-operated dams that the government has at a minimum some obligation to warn of such danger**. *See Kohl v. United States*, 712 F.2d 286, 290 (7th Cir. 1983) (concluding that government had **duty to warn of dam**); *Dye v. United States*, 210 F.2d 123, 128 (6th Cir. 1954) ("Although the dam was constructed under lawful authority, a duty rested upon the operator of the dam to **give adequate warning of a dangerous condition, when existing, and the failure to do so would impose liability upon the operator**."); *Doty v. United States*, 531 F. Supp. 1024, 1034 (N.D. Ill. 1982) ("As owner and operator of Lock and Dam 13 the Corps (and therefore the United States) had a duty to warn users of the Mississippi River that it is dangerous to approach too near to the dam."); *see also Pearce v. United States*, 261 F.3d 643, 650 (6th Cir. 2001) ("The district court determined that there was no negligence on the part of the Corps because, *while it had a* ***duty to warn boaters of the dangers around the dam***, it satisfied that duty . . . . The district court's **factual findings** were sound and, based on those findings, its conclusion that the Corps was not negligent because *it satisfied its duty to warn of danger* was not in error." (emphasis added)); *Graves v. United States*, 872 F.2d 133, 136 (6th Cir. 1989) ("The district court determined that there was no negligence on the part of the Corps *because it had met its duty to warn* of any hazards associated with the closing of the locks . . . . We believe the district court's finding of [the boater's presumed knowledge of information shown of navigational charts] coupled with the remaining warning sign *reasonably satisfies any duty to warn*." (emphasis added)).

Such a duty is similar to the duties imposed by the general maritime law on private defendants responsible for obstructions in navigable waterways. *See Smith v. Burnett*, 173 U.S. 430, 433, 43 L. Ed. 756, 19 S. Ct. 442 (1899) (noting that wharfingers must exercise reasonable diligence in determining the safety of their berths, a duty which requires them to remove any dangerous obstruction in a berth "or to give due notice of its existence to

vessels about to use the berths"); *Ranger Ins. Co. v. Exxon Pipeline Co.*, 760 F. Supp. 97, 98-99 (W.D. La. 1990) ("A prudent pipeline owner or operator should warn of the crossing of a pipeline. . . . Moreover, if [the defendant] maintains a pipeline above the mud line, it has a further duty to warn of this potential obstruction to navigation."); *Cumberland County Utilities Auth. v. The M/T Delbar*, 604 F. Supp. 383, 389 (D.N.J. 1985) ("The plaintiff, as owner of a structure which extends into a navigable waterway, **has a duty to adequately mark such structure**. Failure to do so with an appropriate warning is negligence.". *aff'd*, 930 F.2d 916 (5th Cir. 1991) (table); *see also* [**31] *Creppel v. Shell Oil Co.*, 738 F.2d 699, 701 (5th Cir. 1984) ("Our research . . . has revealed no precedent in which a private party's liability for damages resulting from collision of a boat with an obstruction in navigable waters was predicated on any basis other than the defendant's **ownership**, custody, or **placement of the obstruction in the navigable waters**.").

And while it is not dispositive on the question of the existence of a duty under the general maritime law, **we also believe the same duty would arise under common law principles**. As noted above, land-based common law principles are often incorporated into the general maritime law. *See, e.g.*, *East River S.S. Corp.*, 476 U.S. at 864 (explaining that "the general maritime law is an amalgam of traditional common-law rules, modifications of those rules, and newly created rules").

***

In tort actions, it is axiomatic that courts frequently look to the *Restatement (Second) of Torts* as a source of general common law principles that should be incorporated into the general maritime law. [citations omitted] … We agree with the plaintiffs that, under the principles set forth in the *Restatement*, **the government would have a duty to warn about the existence of the dam**.

***.

see also Stone v. York Haven Power Co., 561 Pa. 189, 749 A.2d 452, 457 (Pa. 2000) ("Appellants have a duty to maintain the dam in a safe condition and are subject to suit for any harm caused by their negligent failure to do so **or to warn of dangers posed by that improvement**."). This section sets forth essentially the same duty that we have described above. Under section 343, **the government**, as **owner of the dam**, **has a duty to warn about its existence because members of the public, absent some warnings, may not discover that a dam is there until it is too late**.

Id. at 298-300 (emphasis added). Similarly, in *Ward v. Mid-American Energy Co., 313 Ill. App.3d 258 (2000)*, the court was confronted with a motion to dismiss a negligence claim from a drowning caused by dangerous undertow currents caused by a dam. In denying the motion to dismiss based on an assertion that the condition was open and obvious, the court stated: "… while the dangers associated with the water were obvious (strong currents submerged obstacles, sudden drop-offs, etc.), the *increased* risks caused by the dangerous man-made currents were hidden beneath the surface.") *Id*. at 261. "Based on the factors discussed above, we find that defendant owed a duty to warn plaintiffs' decedents of the dangerous underwater currents allegedly produced by defendant's dam." *Id*. at 262.

Plaintiffs submit that *McMellon, Ward* and the cases cited in both reflect the obligation of governmental entities to warn of dams, which are more inherently dangerous than normally occurring conditions on public lakes and rivers.

IV. PLAINTIFFS SATISFIED THE HEIGHTENED PLEADING REQUIREMENT OF *IOWA CODE* SECTION 670.4A

The Defendants state that Plaintiffs must plead with "particularity" the "plausibility" of their claims. However, none of the Defendants discuss how the Plaintiffs fail to plead with sufficient "particularity" the facts alerting the Defendants of the who, what, when, where and how of the allegations against them. *Nahas v.*

Polk County, 991 N.W.2d 770, 781 (Iowa 2023). This is already discussed in Plaintiffs' Brief and will not be reiterated here.

Def. City additionally asserts that the Plaintiffs' facts must show that their claims are "***plausible***." Def. City cites to *Nahas v. Polk County*, 991 N.W.2d 770 (Iowa 2023). The "plaintiffs need to allege sufficient facts to show the defendants are liable for specific causes of action." *Nahas*, at 777. Stated another way, "[a] claim has facial plausibility when the [pleaded] factual content [ ] **allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged**.'" *Raup. v. Vail Summit Resorts, Inc*. 160 F.Supp 3d 1285, 1286 (D.C. CO. 2016) (*citing Jordan-Arapahoe, LLP v. Bd. of Cnty. Comm'rs*, 633 F.3d 1022, 1025 (10th Cir. 2011). A party asserting a claim "must include enough facts to 'nudge[] h[er] claims across the line from conceivable to plausible.'" *Dennis v. Watco Cos., Inc.*, 631 F.3d 1303, 1305 (10th Cir. 2011). In the context of negligence claims in Iowa, it is axiomatic that a plaintiff must establish a duty, breach, causation and damages.

Def. City does not articulate which element is not "plausible" in Plaintiffs' pleading of common law negligence. Plaintiffs submit that the elements of "breach, causation and damages" are clearly pled and "plausible." Plaintiffs further submit that the Defendants' entire argument centers on the "duty" element. If the Court finds that the Plaintiffs have adequately plead the existence of a plausible "duty" on the

part of the Defendants, then the Defendants' assertion that the Plaintiffs have failed to meet the heighten pleading standards of *Iowa Code* §670.4A(3) must fail.

V. DEF. STATE WAIVED SOVEREIGN IMMUNITY AND *IOWA CODE* CHAPTER 461C WAS NEVER RAISED AND IS INAPPLICABLE.

Def. State asserts it cannot be liable under sovereign immunity because a private landowner cannot be liable for the public use of private lands and waters for recreational purposes under *Iowa Code* Chapter 461C. Plaintiffs disagree.

A. DEF. STATE NEVER RAISED OR MENTIONED THE APPLICABILITY OF CHAPTER 461C BEFORE THE DISTRICT COURT AND SHOULD BE PRECLUDED FROM DOING SO NOW.

In its Brief filed with the District Court, Def. State asserted that it was only liable to the extent that a private person would be liable. However, the only assertion made by Def. State was that private persons cannot be liable because there "is no private corollary to the State's holding navigable beds in trust for the public." (App.305). Def. State never asserted that it could not be liable under recreational immunity provided to private landowners under *Iowa Code* Chapter 461C. *See, Jasper v. H. Nizam, Inc.*, 764 N.W.2d 751, 774 (Iowa 2009) (only issues "properly raised" before the district court can be used to support district court decision on appeal). Def. State should be precluded from raising this assertion for the first time on appeal.

B. CHAPTER 461C ONLY APPLIES TO ASSERTIONS OF "PREMISES LIABILITY," NOT ACTIVE NEGLIGENCE.

By its very terms, *Iowa Code* Chapter 461C acts as a limitation of a private property owner's duties under claims of ***premise liability***. Section 461C.3 states: "… a holder of land does not owe a duty of care to keep the ***premises*** **safe for entry** or use by others for a recreational purpose …, or to give any warning of a dangerous condition, use, structure, or activity on such premises to persons entering for such purposes." Section 461C.4 then states that a holder of land does not: "Extend any assurance that the **premises** are safe for any purpose" and does not "[c]onfer upon such person the legal status of an **invitee** or **licensee** to whom the **duty of care is owed**." *Iowa Code* §461C.3. However, Chapter 461C only applies to duties under a theory of premises liability. *See Sallee v. Stewart*, 827 N.W.2d 128, 147-148 (Iowa 2013) (" 'the language of the recreational use statute is "couched in terms of *premises liability.*"'). Chapter 461C says nothing about the active negligence of a property owner under a common law negligence theory.

The express purpose of 461C was to encourage private property owners to make suitable lands available for recreational use. *Scott v. Wright* (Iowa 1992) 486 N.W.2d 40, 42 (citing *Peterson v. Schwertley,* 460 N.W.2d 469, 471 (Iowa 1990)). Moreover, the purpose was to provide limited immunization to private landowners to make more agricultural land available for recreation: "Though focused on reducing landowner liability, the statute was also enacted to serve "a growing need

for additional recreation areas for use by our citizenry." Explanation to H.F. 151 at 3, 62nd G.A. (Iowa 1967)." *Scott v. Wright* (Iowa 1992) 486 N.W.2d 40, 42. There is no evidence that the statute was meant to immunize public entities.

Even assuming Chapter 461C applies, *Scott v. Wright,* 486 N.W.2d 40 (Iowa 1992) makes clear that 461C wasn't meant to immunize "all negligent acts" of private landowners, their agents or employees:

> **Nothing in the language of chapter 111C suggests a legislative intent to immunize *all* negligent acts of landowners, their agents, or employees**. Nor do we believe such broad application of the statute would serve the public purpose envisioned by the legislature. Though focused on reducing landowner liability, the statute was also enacted to serve "a growing need for additional recreation areas for use by our citizenry." Explanation to H.F. 151 at 3, 62nd G.A. (Iowa 1967). **The public's incentive to enter and enjoy private agricultural land would be greatly diminished if users were subject, without recourse, to *human error*** as well as natural hazards.

Id. at 42. In *Scott* the court held that the intervening negligence of the hay truck driver caused the injury, and that it wasn't a premises case but, rather, a vicarious liability case. The intervening act of negligence on part of the driver took the case outside the purview of the recreational use statute. As recognized in *Scott* and clearly articulated in *Sallee*, claims involving "***human error***" are not protected by the recreational use statute:

> In short, the inquiry after *Scott* is whether the claim is **based upon human error** or natural hazards. If the claim is based upon natural hazards, it is barred by the recreational use statute, which extinguishes premises liability claims. If, however, **the claim is based upon human error, the immunity provided by the recreational use statute has no application**.

Sallee, 827 N.W.2d at 148 (emphasis added).

In the case at bar, although Plaintiffs plead premises liability against Def. State, Plaintiffs also allege affirmative acts of negligence against all defendants. As cited by Plaintiffs at the District Court level and in their Brief, this Court has held that the "no-duty rule" for governmental entities "*does not mean the same no- duty rule would protect that entity when it* ***affirmatively acts and does so negligently***. *Estate of Farrell*, 974 N.W.2d at 138; *Breese*, 945 N.W.2d 12, 19-20; *Johnson v. Humboldt Cty*, 913 N.W.2d 256, 267 (Iowa 2018). This rule of law comes from *Restatement of the Law, Torts 2d*, §324A, which provides:

> **§324A Liability to Third Person for Negligent Performance of Undertaking:** One who **undertakes, gratuitously** or for consideration, **to render services to another** which he should recognize as **necessary for the protection of a third person** or his things, **is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to protect his undertaking**, if (a) his failure to exercise reasonable care **increases the risk of such harm**, or (b) he has undertaken to perform a duty owed by the other to the third person, or (c) the **harm is suffered because of reliance of the other or the third person** upon the undertaking.

In *Thompson v. Bohlken*, 312 N.W.2d 501 (Iowa 1981), an insurance company performed "accident prevention surveys" and a worker was subsequently injured by a dangerous condition. Holding the insurance carrier liable, this Court adopted Restatement 2nd Torts §324A:

> Application of section 324A, which we here adopt, depends on whether there was substantial evidence that the inspection was **one which Travelers should have recognized as necessary for the protection of third persons** and, if so,

> that (1) such inspection **increased the risk of harm** or (2) harm was suffered by Thompson because of reliance by him or by Farmaster on the inspection. If these elements are established, **liability may be imposed even if the inspections were voluntary**, or only a "service" to Farmaster, as Travelers asserts.

Id. at 507. (Emphasis added). *See also Huber v. Hovey*, 501 N.W.2d 53, 58 (Iowa 1993) (In applying §324A, the Court denied defendant summary judgment because it was a question of fact "if there w[as] substantial evidence that it should have recognized [defendants] inspection was necessary for the protection of third persons, and … (1) the inspection increased the risk of harm.").

As reflected in the above holdings, private individuals are liable for their ***active negligence*** when they undertake a duty to act and do so negligently. Since a private individual can be liable for active negligence (not premise liability), then Def. State can also be liable for its active negligence as alleged by Plaintiffs.

Like the Iowa State Tort Claims Act relied upon by Def. State, the Federal Tort Claims Act ("FTCA") similarly waives sovereign immunity where private individuals would be liable for the same conduct engaged in by the federal government. In the context of the FTCA, there are numerous cases where the federal courts have adopted the "voluntary undertaking" doctrine in finding a duty of care owed by the federal government. For example, in *Eagle Express Lines, Inc. v. United States*, 2023 U.S. 203561 (N.D. Ill. 2023) the court, in applying the FTCA and a claim of negligence based on a duty to warn, noted that the U.S. was only liable "to

the same extent as a private individual." *Id*. at 7-8. In applying *Restatement* §324A, the court stated:

> To find that the government has undertaken "to render services to another which he should recognize as necessary for the protection of a third party," the government need not set out to provide services to the particular people injured nor do the third parties need to be known or identifiable at the time of the undertaking. *Id.* at 1290. "**Voluntarily undertaking to do an act that if not accomplished with due care might increase the risk of harm to others . . . confers a duty of reasonable care** . . . ." *Union Park Mem'l Chapel v. Hutt*, 670 So. 2d 64, 67 (Fla. 1996).

Id. at 10-11 (emphasis added). The regulations at issue in *Eagle Express Lines* were "designed to protect the public from harm and thus, the Court accept[ed] as true for purposes of th[e] motion, that the federal agencies should have recognized the undertaking was necessary for the protection of third parties." *Id*. at 13. After finding that private individuals can also be liable under the "undertakings doctrine," the court held:

> In sum, Plaintiffs have alleged sufficient facts to establish that the **federal agencies engaged in a voluntary undertaking**. Florida law thus confers on them a duty to act with reasonable care in their handling of the investigation and removal of unqualified medical examiners. *See Hutt*, 670 So. 2d at 67 (collecting cases). Because the Florida undertaking doctrine applies here, Defendant can be held liable and therefore have waived its sovereign immunity under the FTCA.

Id. at 13-14. In the case at bar, all the Defendants engaged in a voluntary undertaking to properly warn and to maintain such warnings if the Turkey River was designated as a State water trail. "This voluntary undertaking to do an act that if not

accomplished with due care might increase the risk of harm to others ... confers a duty of reasonable care." *Id*, at 11.

In *Jefferson County School Dist. R-1 v. Justus* (Colo. 1986) 725 P.2d 767, the court denied summary judgement on the issue of whether or not the governmental entity undertook a duty. The Court stated:

> It is now well established that **when the government undertakes to perform services**, which in the absence of specific legislation would not be required, it will, nevertheless, be **liable if these activities are performed negligently**. Thus, for example, though the government may be under no obligation in the absence of statute to render medical care to discharged veterans, when it decides to provide such services and does so negligently, it has been held liable under the Tort Claims Act. United States v. Brown, 348 U.S. 110, 75 S.Ct. 141, 99 L.Ed. 139 (1954).

Id. at 771-772. In finding that a factual issue precluded summary judgment, the Court stated:

> Where, as here, a plaintiff presents some evidence of an affirmative act or promise to act sufficient to **create an inference that the defendant undertook a service that would have prevented plaintiff's injuries**, that factual question precludes summary judgment on the issue of whether the defendant undertook such a service.

Id. at 772. Likewise, in the case at bar, the Plaintiffs allege that the governmental Defendants undertook at duty to warn and did so negligently. Whether or not each Defendant undertook the duty to warn of the "drowning machine" is a question of fact precluding the grant of Defendants' various motions to dismiss.

In *Mandel v. United States*, 793 F.2d 964 (8th Cir. 1986), the plaintiff was paralyzed when he dove into a swimming hole and struck his head on submerged

rocks. The plaintiffs filed suit against a number of entities, including the United States. The court rejected defendant U.S.'s assertion of "discretionary function," finding that it "does not apply to governmental conduct that involves the execution of a previously adopted safety policy that is neither regulatory in nature nor in the nature of administrative decision-making grounded in social, economic, or political policy." *Id*. at 967. The court further stated:

> The conduct forming the basis of the Park Service's alleged negligence was not the decision to institute a policy of warning park users of the hazards of boating on and swimming in the Buffalo River, but rather was the **failure of Park Service personnel to comply with the previously adopted safety policy**.

Id. In addressing the issue of the U.S.' duty to warn even though the U.S. did not actually own the property where the swimming hole was located, the court stated:

> We agree with the district court that once the Park Service chose to furnish its patrons with information about the entire Buffalo River, it had a concomitant duty to exercise reasonable care in doing so notwithstanding the private ownership of portions of the adjoining land.

Id. at 968. In the case at bar, once the Defendants agreed to designate the TRWT as a State water trail and to provide the public "with information about the entire [TRWT], it had a concomitant duty to exercise reasonable care in doing so." *Id*. *See also, Indian Towing Co. v. United States*, 350 U.S. 61, 76 S.Ct. 122 (1995), where the government voluntarily undertook a duty to operate a lighthouse to warn of a dangerous condition, it had a duty to perform the task in a careful manner:

> The Coast Guard need not undertake the lighthouse service. But once it exercised its discretion to operate a light on Chandeleur Island and engendered reliance on the guidance afforded by the light, it was **obligated to use due care to make certain that the light was kept in good working order**; and, if the light did become extinguished, then the Coast Guard was further obligated to use due care to discover this fact and to repair the light or give warning that it was not functioning. If the Coast Guard failed in its duty and damage was thereby caused to petitioners, the United States is liable under the Tort Claims Act.

Id., 76 S.Ct. at 126-127.

Lastly, in *HNMC, Inc. v. Chan*, 683S.W.3d 373 (Tx 2024), the court stated the following in finding liability when a defendant failed to make safe a known dangerous condition:

> We next consider the duty that applies when "a person . . . agrees or contracts, either expressly or impliedly, to make safe a known, dangerous condition of real property." *Holland v. Mem'l Hermann Health Sys.*, 570 S.W.3d 887, 897 (Tex. App.—Houston [1st Dist.] 2018, no pet.). We addressed this rule in *Wilson v. Texas Parks & Wildlife Department*, holding that "a party who does not own, occupy, or control [the] premises may nevertheless owe a duty of due care **if it undertakes to make the premises safe for others**." 8 S.W.3d at 635; *see also City of Denton v. Page*, 701 S.W.2d 831, 834-35 (Tex. 1986). *Wilson* makes clear that this duty rule springs from the **common-law doctrine of negligent undertaking**, which sounds in ordinary negligence. *See* 8 S.W.3d at 635 n.4 (quoting RESTATEMENT (SECOND) OF TORTS § 323 (Am. L. Inst. 1965)); *see also Kenyon*, 644 S.W.3d at 151 (explaining the doctrine).

(*Id*. at 382). Since individuals are liable under the doctrine of negligent undertaking, so are the Defendants in the case at bar – including Def. State.

C. RECREATIONAL ACTIVITIES UNDER *IOWA CODE* §461C.2(5) DID NOT INCLUDE "TUBING."

Def. State argues that a private individual cannot be liable for injuries to a person while "tubing" on private land. Plaintiffs disagree. As cited to in Plaintiffs' Resistance filed with the District Court, the court in *Sallee v. Stewart*, 827 N.W.2d 128 (Iowa 2013), found that the term "recreational purpose" was limited to very specific activities circumscribed by the Iowa legislature:

> Over the years, the legislature has amended this definition various times. In 1971, the legislature added "horseback riding," "motorcycling," "snowmobiling," and "other summer . . . sports." 1971 Iowa Acts chs. 129-30. In 1988, the legislature amended the statute to include "trapping." 1988 Iowa Acts ch. 1216, § 46. Finally, in 2012, although subsequent to the incident giving rise to the issue in this case, the legislature amended the statute to include "all-terrain vehicle riding." 2012 Iowa Acts ch. 1100, § 58.
>
> Notably, the **legislature never added the "includes, but is not limited to" language** of the 1965 model act as roughly half of the other states have done. Similarly, **it never added a catchall provision**, such as those contained in the definitions of Arizona, Colorado, Indiana, Michigan, Montana, New Jersey, New Mexico, Ohio, and Virginia. Further, **the Iowa legislature has not adopted the expansive definition of "recreational purpose"** from the 1979 proposed model act as in North Carolina and North Dakota.
>
> Instead, Iowa's statute provides that "'[r]ecreational purpose' *means the following or any combination thereof*," just as it has since its enactment. Iowa Code § 461C.2(5) (2009) (emphasis added). By doing so, the Iowa legislature **created a closed universe of outdoor activities** that trigger the protections of the statute. The legislature has thus determined that if some other activity beyond those specifically listed is to be considered a recreational purpose, legislative action is required. This is demonstrated by the legislature's decision to add specific terms to the definition over the years.

Id. at 142 (emphasis added). The *Sallee* decision came out in 2013, and the Iowa Legislature has still not adopted a catchall provision to expand "recreational purpose." Nor does §461C.2(5) include "tubing" under the definition of

"recreational purpose." As noted in *Sallee*, ""courts have routinely ruled that persons entering land to engage in activities outside the scope of the activities outlined in the statute are not classified as recreational users." *Id*. at 144. Thus, the limitation on a duty of care as provided in §461C.3, does not apply to water "tubing." Since it does not apply, a private individual could be liable under both premise liability and active negligence. Thus, Def. State is not immune from liability.

D. WILLFUL CONDUCT ON THE PART OF DEF. STATE IS NOT PROTECTED BY *IOWA CODE* §461C.6(1)

Section 461C.6(1) makes Iowa's private landowner immunity for recreational purposes inapplicable if there is evidence that the landowner willfully failed "to guard or warn against a dangerous condition, use, structure or activity." In *Sallee*, the Iowa Supreme Court recognized that the recreational use statute did not extend to willful or malicious failure to guard against or warn of a dangerous condition. *Sallee*, 827 N.W.2d at 70-71. The Plaintiffs plead that Def. State knew of the "drowning machine," knew of the IDNR standards for properly warning of the danger, knew that the dangerous condition was not removed or remediated and nonetheless moved forward with water trail designation and promotion. It is axiomatic that the issue of willfulness is a question of fact for a jury.

CONCLUSION

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

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 13th day of June, 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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