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IN THE SUPREME COURT OF IOWA

NO. 23-1617
FAYETTE COUNTY CASE NO. LACV056238

ESTATE OF SHARON KAHN and SUZANNE L. ROWE,
as Administrator of the ESTATE OF SHARON KAHN, and
ESTATE OF VICKI HODGES and SUZANNE L. ROWE
and SIERRA D. REYES, as Co-Administrators
of the ESTATE OF VICKI HODGES,
Plaintiffs-Appellants,

vs.

CITY OF CLERMONT, IOWA,
FAYETTE COUNTY CONSERVATION BOARD,
FAYETTE COUNTY, IOWA and
STATE OF IOWA,
Defendants-Appellees.

APPEAL FROM THE IOWA DISTRICT COURT FOR FAYETTE COUNTY,
HONORABLE JUDGE LAURA PARRISH, PRESIDING

FINAL BRIEF OF APPELLEE, CITY OF CLERMONT, IOWA

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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. WHETHER THE DISTRICT COURT ERRED IN RELYING ON THE HEIGHTENED PLEADING STANDARDS UNDER IOWA CODE § 670.4A IN GRANTING JUDGMENT ON THE PLEADINGS TO THE CITY

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ROUTING STATEMENT

This case should be retained by the Supreme Court because it contains substantial issues of first impression and issues of broad public importance with respect to governmental recreational immunity under Iowa Code § 670.4(1)(o). *See* Iowa R. App. P. 6.1101(2)(c) and (d). In addition, the case concerns state and municipal liability on a navigable river within the State, the application of the public duty doctrine, and the recently enacted heightened pleading standards under Iowa Code § 670.4A(3).

NATURE OF THE CASE

The Estate of Sharon Kahn and Suzanne L. Rowe as Administrator of the Estate of Sharon Kahn and The Estate of Vicki Hodges and Suzanne L. Rowe and Sierra D. Reyes as Co-Administrators of the Estate of Vicki Hodges (collectively referred to as "Plaintiffs") filed a Petition against the City of Clermont, Iowa ("City"), Fayette County Conservation Board and Fayette County, Iowa (collectively referred to as "County"), and the State of Iowa ("State") (collectively referred to as "Defendants") on February 11, 2022. (D0001, App. 5-34, Petition, 2/11/2022). The Petition asserted negligence and premises liability claims against Defendants stemming from the drownings of decedents Sharan Kahn and Suzanne Rowe while tubing on the Turkey River in Fayette County. (*Id.*).

On May 16, 2022, the County filed a Motion to Dismiss. (D0007, Cty. Mt. Dismiss, 5/16/2022, App. 35-38). On October 20, 2022, the State filed a Motion to Dismiss. (D0045, State Mt. Dismiss 10/20/2022, App. 297-298).

On July 3, 2023, the City filed a Motion for Judgment on the Pleadings and a supporting brief. (D0060, City Mt. Judg. Pl. 7/3/2023, App. 374-375). The City urged that Plaintiffs' petition did not comply with the heightened pleading standards of Iowa Code § 670.4A(3), including specifically arguing that Defendants were entitled to immunity under the recreational immunity found in Iowa Code § 670.4(1)(o), and that Plaintiffs' claims were barred by the public duty doctrine. (D0059, City Br. Judg. Pl., 7/3/2023, App. 377-389).

On September 5, 2023, the district court granted the City's Motion for Judgment on the Pleadings on Counts III, IV, VII, and VIII of Plaintiffs' Petition for the reasons set forth in the City's Brief. (D0074, Order 9/5/2023, App. 430-432). The district court also granted the County's Motion to Dismiss. (*Id.*). On September 14, 2023, the district court granted the State's Motion to Dismiss for the reasons set forth in the State's Motion. (D0079, Order 9/14/2023, App. 433).

As it relates to the City and County, Plaintiffs have now appealed the District Court's September 5, 2023, ruling as it relates to the application of the public duty doctrine and the Court's reliance on the heightened pleading requirements under Iowa Code § 670.4A(3). Plaintiffs did not appeal the

September 5, 2023, ruling as it relates to recreational immunity under Iowa Code § 670.4(1)(o).

STATEMENT OF THE FACTS

The following facts are taken from Plaintiffs' petition[1] as is required for review of the order granting the City's motion for judgment on the pleadings.

"River tubing is a recreational activity where an individual floats on an innertube and allows a river's current to carry the individual downstream." (D0001 at ¶ 10, App. 6). On June 8, 2020, decedents Sharon Kahn and Vicki Hodges went river tubing on a segment of Turkey River in Fayette County, Iowa that is located on the Turkey River Water Trail. (D0001 at ¶¶ 9, 13, App. 6-7). "The Turkey River is a meandered river and the riverbed, up to the ordinary high-water mark, is land owned by the State." (D0001 at ¶ 11, App. 7). "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." (D0001 at ¶ 12, App. 7).

"In 2008, the State of Iowa established its Water Trail Development Program." (D0001 at ¶ 14, App. 7). "A water trail is an on-water point-to-point travel system with multiple access points and a recommended route connecting the points." (D0001 at ¶ 15, App. 7). The Turkey River Water Trail has been granted

[1] Plaintiffs' Petition is referred to throughout this brief. While there was a motion to amend with an attached amended petition filed with the district court, the motion to amend was never granted and was resolved by the Court after agreement of the parties. (Oct. 18, 2022 Order on Mt. to Amend).

state-designation by the State of Iowa because of Defendants Fayette County Conservation Board and Fayette County Iowa's work as local project partners to obtain the designation, which included receiving prioritized funding assistance managed by the State. (D0001, ¶¶ 18, 20, 26, App. 7-8). "At all times material, the State and County took affirmative steps, either in whole or in part, to develop, fund, and promote state-designated water trails . . . and to invite members of the public to use state-designated water trails[,]" including the Turkey River Water Trail. (D0001 at ¶¶ 27-30, App. 8-9). At all times material, state-designated water trails were required by the State to comply with criteria for construction, maintenance, amenities, and signage. (D0001 at ¶ 21, App. 8).

The segment of the Turkey River Trail where decedents were tubing flowed through the city limits of the City of Clermont. (D0001 at ¶ 31, App. 9). Located within the city limits and on the Turkey River is the Clermont Dam, which Plaintiffs allege is owned by the City of Clermont. (D0001 at ¶ 32, App. 9). "At all relevant times, the entire flow of the Turkey River overtopped the Clermont Dam." (D0001 at ¶ 36, App. 9). "In 2008, contemporaneous with the establishment of the Water Trails Development Program, the State established a Low-Head Dam Public Hazard program[,]" which "made funds available to dam owners for the purposes of removing or modifying low-head dams." (D0001 at ¶ 43, App. 10). Prior to June 8, 2020, dam hazard warning signage was placed upstream from the dam on

the Turkey River. (D0001 ¶¶ 54, 82, App. 11, 14). At minimum, one sign was readily visible to users of the Turkey River Water Trail, including Sharon and Vicki. (D0001 at ¶ 88, App. 15).

"Sharon and Vicki entered the state-designated Turkey River Water Trail at an access point located upstream and north of the City of Clermont and the Clermont dam." (D0001 at ¶ 62, App. 12). After entering the Turkey River Water Trail, decedents Sharon and Vicki floated approximately 2.5 miles at which time they passed the next access point. (D0001 at ¶ 75, App. 13). They then floated another 4.5 miles before approaching the dam in Clermont. (D0001 at ¶ 81, App. 14).

Despite choosing to navigate the Turkey River Trail which included the Clermont Dam, "Sharon and Vicki had not previously river tubed or otherwise navigated the selected segment of the Turkey River Water Trail in Fayette County that flows through the City of Clermont and over the Clermont Dam." (D0001 at ¶ 60, App. 12). "Sharon and Vicki were not aware of the need to exit the Turkey River Water Trail on the right bank and portage around the Clermont Dam." (D0001 at ¶ 90, App. 15). Decedents did not exit the Turkey River Water Trail, went over the dam, and drowned in the hydraulic created by the dam. (D0001 at ¶¶ 91-93, App. 15).

ARGUMENT

I. THE DISTRICT COURT CORRECTLY RELIED ON THE HEIGHTENED PLEADING STANDARDS OF IOWA CODE § 670.4A(3) IN DISMISSING PLAINTIFFS' CLAIMS

ERROR PRESERVATION

Plaintiffs' opening brief fails to set forth within the argument section "[a] statement addressing how the issue was preserved for appellate review, with references to the places in the record where the issue was raised and decided in the district court." Iowa R. App. P. 6.903(2)(g)(1) (2023). This Court "generally will not do a party's work for them, particularly if that requires us to assume a partisan role and undertake the party's research and advocacy." *Ronnfeldt v. Shelby Cnty. Chris A. Myrtue Meml. Hosp.*, 984 N.W.2d 418, 421 (Iowa 2023) (cleaned up, and quoting *Inghram v. Dairyland Mut. Ins.*, 215 N.W.2d 239, 239-40 (Iowa 1974)). "[W]here a party's failure to comply with the appellate rules requires the court to 'assume a partisan role and undertake [the party's] research and advocacy' we will dismiss the appeal." *State v. Stoen*, 596 N.W.2d 504, 507 (Iowa 1999) (quoting *Inghram*, 215 N.W.2d at 239).

Notwithstanding the failure to comply with the appellate rules being a basis for dismissal, the only issues raised and briefed on appeal by Plaintiffs against the City include (1) whether the district court erred in dismissing Plaintiffs' petition based on the public duty doctrine and (2) whether the district court erred in

dismissing Plaintiffs' petition based on failure to comply with the heightened pleading requirement of Iowa Code Section 670.4A.

Defendants do not dispute that Plaintiff preserved error as to the Court's reliance on Iowa Code § 670.4A(3) and the applicability of the heightened pleading requirements. However, as will be noted in detail in section II below, Plaintiffs failed to preserve error and waived any argument as to the City's claim of recreational immunity under Iowa Code § 670.4(1)(o), and the impact that the heightened pleading standards had on such argument.

STANDARD OF REVIEW

Defendants agree with Plaintiffs' statement regarding the standard of review, as the Court reviews "a grant of judgment on the pleadings for corrections of errors at law." *Roush v. Mahaska State Bank*, 605 N.W.2d 6, 8 (Iowa 2000).

A. The Particularity and Plausibility Prongs Were Raised in the City's Motion

Plaintiffs seem to argue in their opening brief that neither the County nor City "argued that Plaintiff failed to satisfy the 'plausibility' prong of *Iowa Code* section 670.4A." (Pl. Br. 41). Plaintiffs also claim that the City "only argue[d] that Plaintiffs failed to satisfy the 'clearly established law' prong of Iowa Code 670.4A." (*Id.*).

However, review of the City's motion and supporting brief shows that the City plainly asserted that "Plaintiffs Have Failed to Satisfy the Particularity and

Plausibility Standards[,]" and that the City with the benefit of the *Nahas* decision did not urge that the immunity and clearly established law prong of Iowa Code § 670.4A applied. (D0059 at 1, App. 377) ("The City adopts the Fayette County Defendants briefing only as to the heightened pleading standards of particularity and plausibility under Iowa Code § 670.4A. The City concedes that application of the immunity provisions of Iowa Code § 670.4A(1) are not applicable pursuant to the *Nahas* decision."); (D0059 at 7, 13, App. 383, 389) ("For these reasons, Plaintiffs have failed to satisfy the heightened pleading standard under Iowa Code § 670.4A(3).")).

Thus, contrary to Plaintiffs' claims, the particularity and plausibility aspects of Iowa Code § 670.4A(3) were properly raised in the lower court and are at issue in this appeal.

B. Plaintiffs' Petition was Required to Comply with the Heightened Pleading Standards of Iowa Code § 670.4A

Iowa Code § 670.4A, which became effective June 17, 2021, provides:

> 1. Notwithstanding any other provision of law, an employee or officer subject to a claim brought under this chapter shall not be liable for monetary damages if any of the following apply:
>
> a. The right, privilege, or immunity secured by law was not clearly established at the time of the alleged deprivation, or at the time of the alleged deprivation the state of the law was not sufficiently clear that every reasonable employee would have understood that the conduct alleged constituted a violation of law.

b. A court of competent jurisdiction has issued a final decision on the merits holding, without reversal, vacatur, or preemption, that the specific conduct alleged to be unlawful was consistent with the law.

2. A municipality shall not be liable for any claim brought under this chapter where the employee or officer was determined to be protected by qualified immunity under subsection 1.

3. A plaintiff who brings a claim under this chapter alleging a violation of the law must state with particularity the circumstances constituting the violation and that the law was clearly established at the time of the alleged violation. Failure to plead a plausible violation or failure to plead that the law was clearly established at the time of the alleged violation shall result in dismissal with prejudice.

4. Any decision by the district court denying qualified immunity shall be immediately appealable.

5. This section shall apply in addition to any other statutory or common law immunity.

Chapter 670, the Municipal Tort Claims Act, applies to torts committed by "municipalities" and their employees. Iowa Code § 670.2. Negligence is one such tort. Iowa Code § 670.1(4). The City of Clermont is a municipality. Iowa Code § 670.1(2). Thus, § 670.4A is applicable to Plaintiffs' claims against Defendant, City of Clermont, in the instant case.

In order to state a tort claim against a municipality, the Petition must state with particularity the circumstances constituting the alleged violation, and that the law was clearly established at the time of the incident giving rise to the claim. A

failure to plead either of these required allegations ***shall result in dismissal with prejudice***.

On June 9, 2023, the Iowa Supreme Court decided the case of *Nahas v. Polk County*, 991 N.W.2d 770 (Iowa 2023). The Supreme Court explained the heightened pleading standards under Iowa Code § 670.4A(3) as follows:

> The IMTCA now places a heightened pleading requirement on plaintiffs who bring claims against municipal corporations or those corporations' employees or officers. Iowa Code § 670.4A(3). This heightened pleading requirement has three features. First, plaintiffs "must state with particularity the circumstances constituting the violation." *Id.* Second, plaintiffs must plead "a plausible violation" of the law. *Id.* Third, they also "must state . . . that the law was clearly established at the time of the alleged violation." *Id.* Ultimately, section 670.4A provides that the failure to plead a plausible violation or that the law was clearly established will "result in dismissal with prejudice." *Id.*

Nahas, 991 N.W.2d at 777.

The Court concluded that the particularity and plausibility aspects of Iowa Code § 670.4A(3) "require the same pleading as the Federal Rules of Civil Procedure. *Id.* at 781. "[P]articularity requires plaintiffs to plead the who what, when, where and how: the first paragraph of any newspaper story." *Id.* (internal citations and quotations omitted). "[A]n allegation pleaded on information and belief does not satisfy the particularity standard unless the allegation 'sets forth the

source of the information and the reasons for the belief.'" *Id.* (citations omitted). The Court described the "plausibility" requirement as follows:

> 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." *Aschroft*, 556 U.S. at 678 (citing *Bell Atl. Corp.*, 550 U.S. at 556). Plausibility determinations are highly context-specific, and they demand "the reviewing court to draw on its judicial experience and common sense." *Id.* at 679. Plausibility is not a "probability requirement" because plausibility demands "more than a sheer possibility that a defendant has acted unlawfully." *Id.* at 678. For example, "a complaint [that] pleads facts that are 'merely consistent with' a defendant's liability" does not satisfy the plausibility standard. *Id.* (quoting *Bell Atl. Corp.*, 550 U.S. at 557). Likewise, a plaintiff is not entitled to relief if the court cannot "infer more than the mere possibility of misconduct." *Id.* at 679 (citing Fed. R. Civ. P. 8(a)(2)). In short, plaintiffs need to allege sufficient facts to show the defendants are liable for specific causes of action.

Id. at 782.

Failure to plead particularity and plausibility shall result in dismissal. *Id.* (dismissing five of the seven counts which did not meet the applicable pleading standard, including allegations that did not "show more than a sheer possibility" (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)).

The Court ultimately held that the qualified immunity defense did not apply retroactively, but did hold that the heightened pleading standard—"that a plaintiff

plead with particularity a plausible violation of the law"—applied as it related to the drafting of the petition. *Id.*; *see also Hedlund v. State of Iowa*, 991 N.W.2d 752, 758 (Iowa 2023) ("Because the plaintiff [in *Nahas*] filed his petition and two later amendments after the statute's enactment, we held that two of the statute's heightened pleadings requirements—to 'state with particularity the circumstances constituting the violation' and to plead 'a plausible violation' of the law—applied prospectively to those pleadings.").

In comparing these requirements to the Plaintiff's petition, the Court in *Nahas* found that five of the seven counts did not meet the applicable pleading standards in order to survive the motion to dismiss. In dismissing Plaintiff's wrongful discharge in violation of public policy claim, the Court found that Plaintiff's failure to cite an acceptable source of public policy in the petition was fatal. *Nahas*, 991 N.W.2d at 782. In dismissing Plaintiff's extortion claim, the Court examined the elements of extortion, and found that the conduct alleged does not plausibly amount to extortion, as the allegations "do not 'show more than a sheer possibility.'" *Id.* (citing *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)).

In dismissing Plaintiff's claim for intentional infliction of emotional distress the Court stated that "It is not plausible that publishing a termination letter amounts to the type of outrageous conduct the defendants would have to have committed to be held liable. The facts that Nahas alleges are not consistent with the type of

outrageous conduct that would constitute intentional infliction of emotional distress." *Id.* at 783. Finally, in dismissing the claims for violation of Iowa Code Chapter 21 and 22, the Court examined the requirements of Chapter 21 and 22 finding that the claims fail as a matter of law, also holding that that the Plaintiff did "not allege with particularity that a secret meeting ever occurred." The Court elaborated as follows:

> [Nahas] fails to state who attended the alleged meeting, when it occurred, or where it was held. He simply claims that the Board met jointly or by proxy in the days leading up to Nahas's termination. Without more specific particulars, Nahas has failed to satisfy the particularity standard of section 670.4A(3).

Here, despite the district court noting that there were three separate arguments raised by the City (*See* D0074, at 2, noting that Defendants 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."), the City concedes that it primarily urged that Plaintiffs could not satisfy the particularity and plausibility standards because of the recreational immunity under Iowa Code § 670.4(1)(o) and the public duty doctrine. These arguments, and the failure of Plaintiffs' petition to overcome the immunity and the public duty doctrine are addressed in detail in sections II and III of the City's brief.

However, even setting aside these arguments, as the Iowa Supreme Court has now made clear, the law requires much more than Plaintiffs' statement in the petition that "the law of negligence, including the Defendant's duty to exercise reasonable care, was clearly established in Iowa at the time of Defendant City of Clermont's breaches." Thus, the dismissal can be upheld under Iowa Code § 670.4A, without regard to the application of recreational immunity and the public duty doctrine.

II. THE DISTRICT COURT PROPERLY GRANTED THE CITY'S MOTION FOR JUDGMENT ON THE PLEADINGS AS TO IMMUNITY UNDER IOWA CODE § 670.4(1)(o).

A. Error Preservation and Waiver

As discussed in detail above, Plaintiffs' opening brief fails to set forth a statement about error preservation under Iowa R. App. P. 6.903(2)(g)(1) (2023). Notwithstanding this deficiency being an avenue for dismissal, Plaintiffs failed to preserve error and waived the issue of whether the City is entitled to recreational immunity under Iowa Code § 670.4(1)(o), as the only issues raised and briefed by Plaintiff on appeal are whether the district court erred in dismissing Plaintiffs' claims under the public duty doctrine and for a failure to comply with the heightened pleading requirement of Iowa Code Section 670.4A.

1. The District Court Ruled on Immunity under Iowa Code § 670.4(1)(o) in Dismissing the Claims Against the City

Plaintiffs incorrectly claim that the district court granted the City's "motion to dismiss 'for the same reasons' as it did *Def. County's*" and since "no cross appeal has been filed, the issues for appeal are applicability of the 'public duty doctrine' and whether Plaintiffs satisfied the heightened pleading requirement of § 670.4A." (Pl. Br. at 12).

An examination of the district court's ruling on the City's motion shows that the ruling is not as limited as Plaintiffs' claim. The district court's order demonstrates that the City's Motion for Judgment on the Pleadings was granted for the reasons set forth in the City's Brief:

> **For 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.**

(D0074 at 2, App. 431) (emphasis added).

Those same reasons include that the City was entitled to immunity under Iowa Code § 670.4(1)(o). (D0059 at 5-7, App. 381-383); *see also Lamasters v. State*, 821 N.W.2d 856 (Iowa 2021) (recognizing the difference between "the record or ruling on appeal contain[ing] incomplete findings or conclusions" and where "the issue was not considered by the district court" (quoting *Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2012)).

2. Plaintiffs' Failure to Appeal or Address Immunity Under Iowa Code § 670.4(1)(o) Constitutes a Waiver of the Issue on Appeal

Despite the district court order plainly stating that the City's motion was granted for the reasons stated in the City's brief, Plaintiffs have failed to address this issue on appeal beyond claiming that no motion to reconsider or cross appeal was filed by the City. *See* Pl. Br. at 11-12 (only mention of Iowa Code § 670.4(1)(o) immunity in brief). Thus, Plaintiffs have failed to preserve error and waived that argument on appeal, and the district court order as to the City of Clermont stands on the basis of immunity under Iowa Code § 670.4(1)(o) as to the City, and should be affirmed.[2] *See* Iowa R. App. P. 6.903(2)(g)(3) (2023).

As the unsuccessful party, Plaintiffs were required to appeal, preserve error, and meaningfully argue all errors of the district court on appeal. *See Johnston v. Equipment Corp. of Iowa v. Industrial Indem.*, 489 N.W.2d 13, 17 (Iowa 1992) (discussing error preservation and the difference between successful and unsuccessful parties).

The Iowa Supreme Court has "long held that an issue cannot be asserted for the first time in a reply brief." *See Young v. Gregg*, 480 N.W.2d 75, 78 (Iowa 1992); *see also* Chapter 6 — Rules of Appellate Procedure Substantive Review Task Force, *Summary of Rule Changes* at 13, (filed Sep. 29, 2023) (discussing new

[2] Even if the district court order can be viewed as not granting the City's motion as to immunity under Iowa Code § 670.4(1)(o), Plaintiffs' claim that Defendants were required to file a motion to reconsider or cross appeal is entirely without merit, as discussed in detail below.

amendment to Iowa Rule 6.903(4), which now "Provides that an issue may not be raised for the first time in a reply brief, which reflects the current state of the law." (emphasis added)). An issue that is not asserted on appeal is generally waived, even if it is raised in the lower court. *See* Iowa R. App. P. 6.903(2)(g)(3) (2023) ("Failure to cite authority in support of an issue may be deemed waiver of that issue."); *State v. Short*, 851 N.W.2d 479 (Iowa 2014).

While Plaintiffs address the heightened pleading standards under Iowa code § 670.4A(3), this is not enough to save their clear failure to address the substantive immunity under Iowa Code § 670.4(1)(o). There can be no question that Plaintiffs were aware of the issue based on the commentary provided in their statement of the case, but nevertheless, Plaintiffs neglected to brief the issue.

Plaintiffs' failure to meaningfully address the City's immunity under Iowa Code § 670.4(1)(o) operates as a waiver of that issue on appeal. *See* Iowa R. App. P. 6.903(2)(g)(3) (2023); *State v. Short*, 851 N.W.2d at 479 ("We need not consider the extent to which these arguments have had merit, as under our rules and our precedents they have been waived in this appeal."); *see also Morris v. Steffes Group, Inc.*, 924 N.W.2d 491, 498 (Iowa 2019) (finding that despite party addressing issue in brief in the district court the failure to brief the issues waives it on appeal); *State v. Seering*, 701 N.W.2d 655, 661 (Iowa 2005) (finding that Defendant's failure to present certain constitutional arguments on appeal deemed

them waived); *Bennett v. MC No. 619, Inc.*, 586 N.W.2d 512, 521 (Iowa 1998) ("On appeal, Bennett did not challenge the court's ruling on the fraudulent concealment claim in his initial brief. He assigned no error on this ruling, cited no authority and made no argument. His failure to do so constitutes a waiver of this issue."); *Hollingsworth v. Schminkey*, 553 N.W.2d 591, 596 (Iowa 1996) (finding that Plaintiff did not challenge ruling on negligence and bad faith claims against State Farm and the failure to cite authority or make arguments in his brief as to any claimed error waived the issue).

Any responses Plaintiffs may improperly attempt to provide in reply cannot save their failure to address the issue in their opening brief. As such, because of Plaintiffs' failure to appeal the immunity under Iowa Code § 670.4(1)(o), the judgment of the district court should be affirmed.

3. Even if Plaintiffs Did Not Waive the Issue, the Court Can Still Decide the Issue of Immunity Under Iowa Code § 670.4(1)(o)

While Defendants urge that the district court plainly granted the City's motion for all of the reasons stated in its brief including immunity under Iowa Code § 670.4(1)(o), should this Court somehow determine the district court did not examine the issue of immunity, and that the Plaintiffs did not waive the issue by failing to address it in their opening brief, the City is not precluded from raising and prevailing on that argument on appeal. *DeVoss v. State*, 648 N.W.2d 56, 61 (Iowa 2002) ("We have in a number of cases upheld a district court ruling on a

ground other than the one which the district court relied *provided* the ground was raised in the district court." (emphasis original)).

"It is established that a successful party in the district court may, without appealing, save the judgment in whole or in part based on grounds urged in the district court but not included in that court's ruling." *Interstate Power Co. v. Insurance Co. of North America*, 603 N.W.2d 751, 756 (Iowa 1999) (citations omitted). "When the district court dismisses a case based on one of several grounds asserted by a party, the successful party is not required to request the district court to also rule on the other grounds in order to assert those grounds in support of affirming the district court ruling on appeal." *Jasper v. H. Nizam, Inc*., 764 N.W.2d 751, 774 n.3 (Iowa 2009) (citing *Moyer v. City of Des Moines,* 505 N.W.2d 191, 193 (Iowa 1993); *State v. Cromer*, 765 N.W.2d 1, 7 n.4 (Iowa 2009) (discussing that "A successful party in district court is not required to request the district court to rule on alternative grounds raised, but not relied upon by the district court in making its ruling, in order to assert those grounds in support of affirming the ruling of the district court when appealed by the opposing party.").

Likewise, contrary to Plaintiffs' claims, "a successful party need not cross-appeal to preserve error on a ground urged but ignored or rejected in a trial court. This is because a party need not, in fact cannot, appeal from a favorable ruling." *Johnston v. Equipment Corp. of Iowa v. Industrial Indem.*, 489 N.W.2d 13, 17

(Iowa 1992) (noting that "Our cases are legion which hold that a trial court may be affirmed on grounds upon which it does not rely," and citing *Wassom v. Sac County Fair Ass'n*, 313 N.W.2d 548, 549 (Iowa 1981)). "It is well-settled law that a prevailing party can raise an alternative ground for affirmance on appeal without filing a notice of cross-appeal, as long as the prevailing party raised the alternative ground in the district court." *Duck Creek Tire Service Inc. v. Goodyear Corners, L.C.*, 796 N.W.2d 886, 893 (Iowa 2011).

Here, there is no dispute that the City raised the issue of immunity under Iowa Code § 670.4(1)(o) at the district court level. (D0059 at 5-7, App. 381-383; D0010 at 10, City's Answer 5/16/2022, App. 77). Therefore, this issue was preserved for the City to raise as "an alternative ground for affirmance" now in response to Plaintiff's appeal, even if this Court determines that the district court did not grant the City's Motion for Judgment on the Pleadings on this basis and that Plaintiffs have not waived the issue. *Duck Creek Tire Service, Inc.*, 796 N.W.2d at 893.

B. Standard of Review

Defendants agree with Plaintiffs' statement regarding the standard of review, as the Court reviews "a grant of judgment on the pleadings for corrections of errors at law." *Roush v. Mahaska State Bank*, 605 N.W.2d 6, 8 (Iowa 2000).

C. The City is Immune Under the Recreational Immunity of Iowa Code § 670.4(1)(o)

Iowa Code § 670.4(1)(o) provides that:

> As to any of the following claims, a municipality shall be liable only to the extent liability may be imposed by the express statute dealing with such claims and, in the absence of such express statute, the municipality shall be immunity from liability:
>
> o. Any claim for injuries or damages based upon or arising out of an act or omission of an officer or employee of the municipality or the municipality's governing body and arising out of a recreational activity occurring on public property where the claimed injuries or damages resulted from the normal and expected risks inherent in the recreational activity and the person engaging in the recreational activity was voluntarily on the public property where the injuries or damages occurred and knew or reasonably should have known that the recreational activity created a substantial risk of injuries or damages.

This immunity applies squarely to the facts of this case and defeats Plaintiffs' claims.

First, there can be no question that Plaintiffs have brought a claim for injuries and damages "arising out of a recreational activity occurring on public property." Plaintiffs' petition states decedents "went river tubing on a segment of the Turkey River within Fayette County, Iowa" and that "River tubing is a recreational activity wherein an individual floats on an innertube and allows a river's current to carry the rider downstream." (D0001 at ¶¶ 9-10, App. 6). They concede that the river is public property by noting that the "Turkey River is a

meandered river and the riverbed . . . is land owned by the State of Iowa[,]" also noting in detail how the State and Fayette County took steps to invite members of the public to use the river and state-designated water trails. (D0001 at ¶¶ 11, 28, 30, App. 7-9).

Second, there is no dispute that decedents were voluntarily on such property. (D0001 at ¶ 31, App. 9) ("Sharon and Vicki selected a segment of the Turkey River Water Trail that flows through the city limits of Defendant City of Clermont within Fayette County, Iowa.").

Third, the "claimed injuries or damages resulted from the normal and expected risks inherent in the recreational activity." The claimed injuries of decedents involve deaths due to drowning. By its very nature drowning is a normal and expected risk of navigating a waterway. *See e.g., Cope v. Doe*, 464 N.E.2d 1023, 1028 (Ill. 1984) (noting that a "pond was an ordinary body of water which, as any other, presented the risk of drowning."). This is especially true because the drownings occurred as a result of tubing down a river in innertubes, despite not having previously river tubed or navigated this portion of the Turkey River.

In resistance to the application of recreational immunity in the lower court, Plaintiffs claimed that the low head dam was not a normal and expected risk inherent in the recreational activity. Yet, Plaintiffs have conceded that "At all relevant times, the entire flow of the Turkey River overtopped the Clermont Dam."

(D0001 at ¶ 36, App. 9; D0001 at ¶ 90, App. 15 (noting the "need to exit the Turkey River Water Trail on the right bank and portage around the Clermont Dam.")). Thus, encountering the dam was plainly a risk that <u>all</u> users of the Turkey River faced when engaging in the recreational activity of tubing down the Turkey River through the City limits of Clermont.

Lastly, decedents "knew or reasonably should have known that the recreational activity created a substantial risk of injuries or damages." At this stage, Plaintiffs have claimed that decedents were not aware of the dam or the need to exit the river. Yet, despite the allegations about signage, Plaintiffs concede that at least one sign was "readily visible to users of the Turkey River Water Trail, including Sharon and Vicki." (D0001 at ¶ 88, App. 15). However, even assuming that decedents did not have subjective knowledge of the risk, objectively, decedents reasonably should have known that the recreational activity created a substantial risk of injuries or damages. This includes the fact that at minimum there was one sign readily visible to users on the trail, the concession that there was a "need to exit the Turkey River Water Trail on the right bank and portage around the Clermont Dam[,]" and the fact that at all relevant times the river overtopped the Clermont Dam and was part of the Turker River Water Trail. (D001 at ¶¶ 36, 88, 90, App. 9, 15).

Iowa Code § 670.4(1)(o) was in effect at the time that this incident occurred as it was enacted in 2015. (*See* MUNICIPAL TORT LIABILITY-CLAIMS ARISING FROM RECREATIONAL ACTIVITIES-EXEMPTIONS, 2015 Ia. Legis. Serv. Ch. 23 (H.F. 570) (WEST)). Plaintiffs cannot escape the immunity by demonstrating that there is an "express statute dealing with such claims" under Iowa Code § 670.4(1), because no such statute exists.

Despite their waiver of any argument, it is also anticipated that Plaintiffs will claim as they did in the district court that the recreational immunity should be viewed similarly to the recreational use immunity applicable to private landowners in Chapter 461C. However, this completely disregards the distinction between claims against private parties and those against municipalities, including the limited waiver of governmental immunity from suit. *See Thomas v. Gavin*, 838 N.W.2d 518, 523 (Iowa 2013) ("[C]hapter 670 states that it is mutually exclusive of other remedies . . . Ever since the 1974 amendment, section 670.4 has provided, 'The remedy against the municipality provided by section 670.2 shall hereafter be exclusive of any other civil action or proceeding by reason of the same subject matter against the officer, employee, or agent whose act or omission gave rise to the claim . . . .'"). Further, in contrast to the case of *Sallee v. Stewart*, which Plaintiffs relied on in the district court, and which interpreted the private recreational use statute, Plaintiffs have plainly admitted that tubing is a recreational

activity. *See* D0001 at ¶ 10, App. 6; *Sallee*, 827 N.W.2d 128, 153 (Iowa 2013) (finding the statute not applicable because the injuries did not arise out of a recreational use of the property despite Plaintiff being "there as a chaperone to serve the overall recreational purpose." Mansfield, J., dissenting).

As this Court recently made clear in the case of *White v. Harkrider*, "a plaintiff may plead himself out of court with respect to an affirmative defense." *White v. Harkrider*, 990 N.W.2d 647, 657 (Iowa 2023) (internal quotations omitted) (quoting *Benskin, Inc. v. West Bank*, 952 N.W.2d 292, 299 (Iowa 2020)). This is especially true under the particularity and plausibility standards recently adopted in Iowa Code § 670.4A(3) and *Nahas*.

As the Court in *Nahas* found with respect to the extortion claim, Plaintiffs have failed to show "more than a sheer possibility" that the Plaintiffs could recover on their claims against the City based on the immunity under Iowa Code § 670.4(1)(o), as they failed to plead any applicable statute that would impose liability or anything that would preclude the City from relying on such immunity. Rather, Plaintiffs' Petition pleads alleged facts that are "'merely consistent with' a defendant's liability." *See Nahas v. Polk County*, 991 N.W.2d 770, 782 (Iowa 2023).

The facts entitling the City to the immunity defense appear plainly on the face of Plaintiffs' petition. For these reasons, the City is immune from Plaintiffs'

claims under Iowa Code § 670.4(1)(o), and the district court's order should be affirmed.

III. THE DISTRICT COURT DID NOT ERR IN GRANTING THE CITY'S MOTION FOR JUDGMENT ON THE PLEADINGS UNDER THE PUBLIC DUTY DOCTRINE

ERROR PRESERVATION

Defendants do not dispute that Plaintiff preserved error as to the applicability of the public duty doctrine.

STANDARD OF REVIEW

Defendants continue to agree with Plaintiffs' statement regarding the standard of review which is for correction of errors at law.

A. The Public Duty Doctrine is Applicable and Bars Plaintiffs' Claims for Relief

"[T]he public-duty doctrine remains 'alive and well in Iowa' . . . [and] 'remains good law after [the Court's] adoption of the Restatement (Third) of Torts.'" *Estate of Farrell by Farrell v. State*, 974 N.W.2d 132, 137 (Iowa 2022) (quoting *Breese v. City of Burlington*, 945 N.W.2d 12, 19 (Iowa 2020) and *Estate of McFarlin v. State*, 881 N.W.2d 51, 60 (Iowa 2016)).

"Under the public-duty doctrine, 'if a duty is owed to the public generally, there is no liability to an individual member of that group.'" *Johnson v. Humboldt County*, 913 N.W.2d 256, 260 (Iowa 2018) (quoting *Estate of McFarlin*, 881 N.W.2d at 58, in turn, quoting *Kolbe v. State*, 625 N.W.2d 721, 729 (Iowa 2001)).

"'[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....'" *Johnson*, 913 N.W.2d at 260 (quoting *Kolbe*, 625 N.W.2d at 729).

"'In the classic case for invoking the public duty doctrine, the duty is imposed by a statute that requires the defendant to act affirmatively, and the defendant's wrongdoing is a *failure* to take positive action for the protection of the plaintiff.'" *Johnson*, 913 N.W.2d at 266 (quoting 2 Dan B. Dobbs, Paul T. Hayden & Ellen M. Bublick, *The Law of Torts* § 345, at 375 (2d ed. 2011) (emphasis original)).

> We believe the limited resources of governmental entities—combined with the many demands on those entities—provide a sound justification for the public-duty doctrine. *See* Restatement (Third) § 37, cmt. i.; *see also* 18 McQuillin § 53:18, at 253–54. Cities, counties, and the state have to balance numerous competing public priorities, all of which may be important to the general health, safety, and welfare. This does not mean the same no-duty rule would protect that entity when it affirmatively acts and does so negligently. *Cf. Skiff v. State*, 125 Misc.2d 791, 479 N.Y.S.2d 946, 951 (1984) (finding the state could be liable when a vehicle left a state road and traveled along a drainage ditch into an earthen headwall where the ditch was "created by the State" and "constituted a trap or snare").

Johnson, 913 N.W.2d at 266-267 (footnote omitted).

In *Kolbe v. State*, the State issued a restricted driver's license to Justin Schulte, who suffered from an eye disease that caused loss of central vision and affected his peripheral vision. Schulte was required to wear corrective lenses while driving, and he was not to operate at speeds in excess of forty-five miles per hour. Sometime after issuance of his license, Schulte struck and seriously injured a bicyclist while driving on a county road. The cyclist filed suit against the State and the DOT, alleging negligent issuance of Schulte's license. Plaintiff relied in part on Iowa Code § 321.177(7), which prohibits the DOT from issuing a license to anyone whom the director has good cause to believe would not be able to operate safely, due to a physical disability. The State moved for summary judgment, relying in part on the public duty doctrine, arguing that it owed no duty to the cyclist. The district court granted the State's motion, and plaintiff appealed. 625 N.W.2d at 724-725, 729.

On appeal, the Iowa Supreme Court rejected plaintiff's reliance on Chapter 321, holding: "We agree with the State that the licensing provisions in Iowa Code chapter 321, and more specifically Iowa Code section 321.177(7), are for the benefit of the public at large." 625 N.W.2d at 729.

In *Johnson v. Humboldt County*, a vehicle left a county road, went into the ditch and struck a concrete embankment that had been constructed in the county right-of-way by a private landowner. A passenger in the vehicle was injured, and

filed suit against the county, claiming it should have removed the embankment. The county moved for summary judgment, relying on the public duty doctrine. The district court granted the county's motion. Plaintiff appealed. *Johnson*, 913 N.W.2d at 258.

On appeal, plaintiff relied on Iowa Code § 318.4, which provides that "[t]he highway authority shall cause all obstructions in a highway right-of-way under its jurisdiction to be removed" to support her claim of actionable negligence. The Supreme Court rejected this argument, holding instead that "[a]ny duty to remove obstructions from the right-of-way corridor adjacent to the highway would be a duty owed to all users of this public road. It would thus be a public duty." *Johnson*, 913 N.W.2d at 261.

In *Estate of McFarlin v. State*, 881 N.W.2d 51 (Iowa 2016), a ten-year-old child suffered fatal injuries when the boat in which he was a passenger while boating on a public lake struck a submerged dredge pipe. The child's mother filed suit against the State of Iowa (DNR), alleging that the DNR was negligent in the performance of its regulatory duties. The district court granted summary judgment on several grounds, one of which was the application of the public duty doctrine. Plaintiff appealed. The Court of Appeals affirmed and the Supreme Court granted plaintiff's application for further review. 881 N.W.2d at 52.

In upholding application of the public duty doctrine, the Court noted: "The public-duty doctrine applies when the state's duty is owed to the general public rather than to a particularized group of persons." *Id*. at 62. "The DNR had regulatory oversight duties for dredging for the benefit of the public at large." *Id*. at 64.

Other Iowa cases in which similar results were obtained include *Donahue v. Washington County*, 641 N.W.2d 848 (Iowa Ct. App. 2002). Plaintiff's child was bitten by a dog who had a history of two previous attacks. These previous attacks were investigated by a Washington County deputy sheriff, but the deputy did not file a report, as required by a local ordinance. Plaintiff filed suit against the county, alleging negligence. The district court granted summary judgment, and plaintiff appealed. 641 N.W.2d at 850.

On appeal, the Court noted: "Every member of the public would be included in the class of those put in danger by a vicious dog." *Id*. at 852. Consequently, the Court held: "[T]he statute [Iowa Code § 351.26] does not identify plaintiffs as members of a special protected class ... [and] … we similarly find that plaintiffs had no common law special relationship with defendant that could support a finding of duty." *Id* at 851.

In *Raas v. State*, 729 N.W.2d 444 (Iowa 2007), two inmates escaped from the Iowa Medical and Classification Center. Plaintiff Mark Trunecek was fishing

at a nearby river when he was attacked by the inmates. He filed suit against the State, alleging negligence. The State moved to dismiss, alleging it had no duty to plaintiff. The district court granted the State's motion, and plaintiff appealed. The Court of Appeals reversed, and the Supreme Court granted further review. *Id*. at 446. The Supreme Court reversed the decision of the Court of Appeals, holding that because Trunecek was not on the premises, he was not a foreseeable victim. He was a member of the public at large with no special relationship "sufficient to establish a cause of action." *Id*. at 450.

In *Breese v. City of Burlington*, 945 N.W.2d 12 (Iowa 2020), the Iowa Supreme Court revisited the question of whether the public duty doctrine would operate to bar a plaintiff's common law claims against the City. In that case, plaintiff and her daughter were riding bicycles on a bike path in a public park. Without realizing what they had done, plaintiff and her daughter left the bike path and continued to travel on the top of a sewer box that was flush with the bike path, at the point of connection. There were no signs indicating that this box was not a part of the bike path. Gradually, however, the surface of the box on which they travelled began to rise above the adjacent bike path. They began to encounter low hanging tree branches, and there were no guardrails on either side of the box. At some point, plaintiff and her daughter decided to turn around. When they did,

plaintiff lost control of her bike and fell approximately ten feet to the ground, resulting in serious injuries. 945 N.W.2d at 15.

Plaintiff filed suit against the City. She alleged negligent failure to install guardrails and failure to warn. The City moved for summary judgment, asserting among other things that plaintiff's claims were barred by application of the public duty doctrine. The district court granted defendant's motion, and plaintiff appealed. On appeal, plaintiff argued that the doctrine did not apply because it does not protect a municipal entity when it acts affirmatively and does so negligently, and in the alternative, there was a special relationship between plaintiffs, as cyclists, and the City. *Id*. at 16-18.

On appeal, the Court noted that "[i]nstead 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." (Citing *Kolbe*, 625 N.W.2d at 729–30). 945 N.W.2d at 18.

In examining the applicability of the doctrine, the Court focused on the distinction between misfeasance and nonfeasance.

> 'Where the affirmative acts of a public employee actually cause the harm, the public duty doctrine does not apply.' McQuillin § 53.18. 'In practice, courts seem more likely to apply the public duty doctrine when a government employee negligently fails to act and allows harm to occur (nonfeasance) than when the employee negligently

> acts and causes harm (misfeasance).' Ryan Rich, *Seeing Through the Smoke and Fog: Applying a Consistent Public Duty Doctrine in North Carolina After* Myers v. McGrady, 85 N.C. L. Rev. 706, 723 (2007).'

945 N.W.2d at 20.

With that distinction in mind, the Court observed that the City acted affirmatively in erecting the sewer box, paving the bike path, and connecting the two. The City controlled both improvements. The City elected not to install guardrails and the City opted not to warn cyclists that the sewer box was not a part of the bike path. Thus, there was a question of fact with respect to whether the City was affirmatively negligent in causing the harm (*i.e.* malfeasance). 945 N.W.2d at 21.

1. The City's Alleged Conduct does not Constitute Misfeasance and Did Not Create a Dangerous Condition on Government-Owned Property or an Enforceable Duty to Plaintiffs

"'[N]onfeasance' refers to a failure to discharge a governmental duty for the benefit of the public . . . '[n]onfeasance,' in other words, means nonfeasance in the performance of a public duty." *Fulps v. City of Urbandale*, 956 N.W.2d 469, 475-76 (Iowa 2021). As Plaintiffs put it, "[i]n the case of misfeasance, a government entity performs some affirmative act and does so negligently. In the case of nonfeasance, a government entity fails to act and such failure allows a harm to occur." (Pl. Br. 22). "The public-duty doctrine is inapplicable when the

government defendants' affirmative negligence created a dangerous condition on government-owned property that caused the injury." *Farrell*, 974 N.W.2d at 138.

While the City of Clermont has denied ownership of the dam,[3] even assuming *arguendo* that the City did own the dam for purposes of this appeal, any alleged conduct by the City relating to the dam constitutes nonfeasance, making the public duty doctrine applicable. This is specifically true regarding the countless allegations regarding the City's alleged failure to update, remove, or modify the dam.

Importantly, there is no allegation that the City installed the dam. *See Fulps*, 956 N.W.2d at 477 ("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."[4] (emphasis added)); *Johnson*, 913 N.W.2d at 266 (discussing *Skiff v. State*, 479 N.Y.S.2d at 951 and noting that the facts in *Skiff* where the ditch was created by the State and constituted a snare or trap were not before the Court). Nor is there any allegation that there was a statutory duty requiring the City to remove the dam, like there was in *Johnson*. *See id.* at 259-262

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[3] By Plaintiffs' own admission, "sovereign title to the Turkey River riverbed was held by *Def. State* and control of the river was vested in *Def. State*[,]" and "the riverbed, up to the ordinary high water mark, is land owned by the Defendant State of Iowa." (Pl. Br. at 13; D0001 at ¶ 11, App. 7).

[4] The ruling in *Fulps* is far from the notion as asserted by Plaintiffs "that where a plaintiff alleges the property was 'maintained' by the defendant, that allegation is sufficient to avoid application of the public duty doctrine. (Pl. Br. at 31).

(noting that Iowa Code § 318.4 states that "The highway authority shall cause all obstructions in a highway right-of-way under its jurisdiction to be removed" but this does "not affect the public-duty determination unless it was enacted for the benefit of a 'particularized class.'"). At most, there are allegations that the City has not modified, removed, or replaced the dam in accordance with the State's Low-Head Dam Public Hazard Program which "made funds available to dam owners for the purposes of removing or modifying low-head dams." (D0001 at ¶ 45, App. 10). This is nonfeasance, which is protected by the doctrine. *See Johnson*, 913 N.W.2d at 261 ("Any duty to remove obstructions from the right-of-way corridor adjacent to the highway would be a duty owed to *all* users of this public road. It would thus be a public duty.").

Plaintiffs brief also alleges that the affirmative action was that "Defendants[] negligently added the [Turkey River Water Trail] to the State's water trail system without adequate protections and warning." (Pl. Br. At 21). However, the record demonstrates that the City did not add the Turkey River Water Trail ("TRWT") to the water trail system. Rather, Plaintiffs stated that "*Def. State* and *Def. County* took affirmative steps to have the Turkey River designated as a State approved 'water trail.'" (D0001, at ¶¶ 27, 29, App. 8-9; Pl. Br. at 14). Because the City did not add the TRWT to the water trail system, the City took no affirmative action. Rather, any allegations here would constitute a failure to act after the State and

County had the Turkey River added to the water trail system. Without affirmative action, there is no misfeasance on the part of the City.

Plaintiffs further claim that their allegations regarding warning, maintenance, and signage constitute misfeasance. However, in applying the principles of nonfeasance to the current case as it relates to Plaintiffs' allegations about warnings and signage, the facts play out similarly to those in the case of *Estate of McFarlin v. State*, 881 N.W.2d 51, 60 (Iowa 2016)). Contrary to Plaintiffs' claims, in *McFarlin*, the Estate's claims against the State included allegations about failing to warn of the dredge, failing to adequately mark the dredge, allowing the dredge to be concealed, and allowing placement of the dredge, all of which are similar to Plaintiffs' claims against the City. *McFarlin*, 881 N.W.2d at 55-56. In holding the public duty doctrine applied, the Court noted that "The public-duty doctrine applies notwithstanding the State's ownership of Storm Lake [as] [t]he State owns the lake in trust for the benefit of the public." *Id.* at 63.

Here, Plaintiffs have conceded that "The Turkey River is . . . owned by Defendant State of Iowa . . . [and] The water in the Turkey River is public water and public wealth" for the benefit of the public. (D0001 at ¶¶ 11-12, App. 7). "[T]he Turkey River Water Trail ha[s] been granted state-designation by Defendant State of Iowa." (D0001 at ¶ 18, App. 7). Like in *McFarlin*, because the

City's duties regarding the river, if any, "are owed to the general public, the public-duty doctrine applies." *McFarlin*, 881 N.W.2d at 64. Additionally, contrary to Plaintiffs' assertion, these claims regarding maintenance and warning are "uniquely governmental duties."

Similarly, even though there are broad conclusory allegations by the Plaintiffs about signage and the condition of such signage directed toward the City, the specifics of the Petition plainly note that such signage requirements were a requirement of the state-designated water trail program. (D0001 at ¶¶ 21-22, App. 8) ("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. . . . At all relevant times, state-designated water trails, including the Turkey River Water Trail, were required by Defendant State of Iowa to have hazard warning signage installed and maintained consistent with standards developed by Defendant State of Iowa."). As discussed, there is no allegation that the City of Clermont was a partner in this project. (D0001 at ¶¶ 17-20, App. 7) ("The Turkey River Water Trail has been granted state-designation by Defendant State of Iowa. . . Defendants Fayette County Conservation Board and Fayette County, Iowa were local project partners responsible, in part, for developing the Turkey River Water Trail."). Therefore, any requirements of the water trail

program do not apply to the City. *See* Iowa Admin Code r. 571-30.55-59 (discussing responsibilities as to the "sponsor" of the project; D0084, Mt. to Dismiss Hearing Tr. at 28:5-7, 6/27/2022 ("The county undertook the duty to warn and declaring this a recreational water trail . . . .").

Because any alleged conduct by the City is nonfeasance, the public duty doctrine remains applicable and was properly a basis for the district court's granting of the City's Motion for Judgment on the Pleadings. The judgment of the district court should be affirmed.

2. No Special Relationship Exists Between Plaintiffs and the City

Because the alleged conduct on behalf of the City constitutes nonfeasance, to find the City liable to Plaintiffs, a special relationship must exist. "The special relationship exception to the public-duty doctrine . . . renders a governmental entity liable for the violation of what would otherwise be a duty to the general public if a special relationship existed between the entity and the plaintiff that gave rise to a special duty of care toward the plaintiff." *Breese*, 945 N.W.2d at 20. "[I]f a duty is owed to the public generally, there is no liability to an individual member of that group." *Estate of McFarlin*, 881 N.W.2d at 58 (quoting *Kolbe*, 625 N.W.2d at 729).

All members of the public were free to use the river. *See id*. at 61 (opining that users of the lake, "like motorists driving on Iowa roadways, are members of

the general public, not a special class of 'rightful users of the lake' for purposes of the public duty doctrine."). Here, there does not appear to be any dispute that there is not a special relationship between Plaintiffs and the City. As such, no special relationship exists to create an exception to the public duty doctrine.

Judgment of the district court should be affirmed.

CONCLUSION

Plaintiffs have waived any argument as to the district court granting the City's motion on recreational immunity under Iowa Code § 670.4(1)(o), and the order of the district court should be affirmed on that basis. Should the Court reach the merits of the appeal as to the City, Plaintiffs have failed to demonstrate how the district court erred, and Defendant/Appellee the City of Clermont, respectfully requests that the Court affirm the judgment of the district court.

REQUEST FOR ORAL SUBMISSION

Appellee City of Clermont asks to be heard in oral argument.

CERTIFICATE OF COMPLIANCE

This brief complies with the typeface requirements and type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) or (2) and 6.903(1)(i)(1) or (2) because:

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/s/ Zachary D. Clausen June 25, 2024.

CERTIFICATE OF SERVICE

I, Zachary D. Clausen, hereby certify that on the 25th day of June, 2024 I served Appellees' Final Brief on Plaintiffs and the Clerk of the Supreme Court by EDMS.

/s/ Zachary D. Clausen

CERTIFICATE OF FILING

I, Zachary D. Clausen, further certify that I filed the Appellees' Final Brief via EDMS on the 25th day of June, 2024.

/s/ Zachary D. Clausen