IN THE SUPREME COURT OF IOWA

No. 23-1617
(Fayette County No. LACV056238)

THE ESTATE OF SHARON KAHN and
THE ESTATE OF VICKI HODGES
Plaintiffs-Appellants

v.

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

FINAL BRIEF OF DEFENDANTS-APPELLEES FAYETTE COUNTY AND FAYETTE COUNTY CONSERVATION BOARD

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ROUTING STATEMENT

This appeal involves issues of broad public importance requiring ultimate determination by this Court – specifically, the applicability of the public duty doctrine to large-scale government projects. See Iowa R. App. P. 6.1101(2)(d) (2024). This appeal also involves substantial issues of first impression concerning the recreational immunity afforded to municipalities by the General Assembly in 2015, codified at Iowa Code § 670.4 (1)(o). See Iowa R. App. P. 6.1101(2)(c) (2024). For these reasons, this case should be retained by this Court. Iowa R. App. P. 6.1101(2) (2024).

STATEMENT OF THE CASE

Nature of the Case and Course of Proceedings

This is an action at law filed on February 11, 2022, for the wrongful death of a mother and daughter who were tubing on the Turkey River in Fayette County on June 8, 2020. "River tubing is a recreational activity wherein an individual floats on an innertube and allows a river's current to carry the rider downstream." (Petition filed February 11, 2022, paragraph 10; App. 006). Both women drowned when they floated over the top of a low-head dam and were caught in the re-circulating currents below. Plaintiffs' estates sued the State of Iowa, owner of the Turkey River (Petition, ¶¶ 11-12; App. 007), Fayette County and its County Conservation Board (hereinafter Fayette), local project partners with the State in development and designation of the

Turkey River Water Trail scenic river program (Petition ¶¶ 19, 20; App. 007), and the City of Clermont, alleged owner of the dam (Petition, ¶ 32; App. 009), under various claims of negligence.

Fayette moved to dismiss the Petition under the new qualified immunity statute, Iowa Code Section 670.4A, on May 16, 2022, using thirty (30) quoted paragraphs from the Petition as judicial admissions. Plaintiffs resisted on May 27, 2022. On June 27, 2022, the Honorable Laura J. Parrish, District Judge, heard oral arguments on Fayette's Motion as resisted by Plaintiffs. On September 23, 2023, District Judge Parrish sustained Fayette's Motion. Thereafter, Plaintiffs filed their Notice of Appeal on October 2, 2023.

FACTS RELEVANT TO REVIEW

The following facts are quoted from the Petition as judicial admissions substantiating Defendants' Motion to Dismiss.[1]

[1] "Averments in a pleading are conclusive admissions of the facts pleaded…. Consequently, such motions [to dismiss] may be granted if the grounds thereof are established by the allegations of a plaintiff's petition." Citizens for Responsible Choices v. City of Shenandoah 686 N.W. 2d 470, 473 (Iowa 2004). "(A) plaintiff may plead himself out of court by alleging facts that provide the defendant with a bulletproof defense and foreclose application of…a fact intensive inquiry." White v. Harkrider, 990 N.W. 2d 647, 657 (Iowa 2023). This is because "…a party cannot subsequently take a position contradictory of, or inconsistent with, his pleadings, and the facts which are admitted by the pleadings are to be taken as true against the pleader for the purpose of the action, whether or not they are offered in evidence. So admission in the pleadings may render proof of the admitted facts unnecessary or render proof contradicting them inadmissible, and if countervailing evidence, …, is admitted, it is entitled to no consideration." Grantham v. Potthoff-Rosene Co.,131 N.W. 2d 256, 260 (Iowa 1965).

"The Turkey River is a meandered river and the riverbed, up to the ordinary high water mark, is land owned by Defendant State of Iowa." (Petition, ¶ 11; App. 007). "The water in the Turkey River is public water and public wealth, with control and use of the water vested in [the] State of Iowa." (Petition ¶ 12; App. 007). "In 2008, [the] State of Iowa established its Water Trail Development Program." (Petition ¶ 14; App. 007). "A water trail is an on-water point-to-point system with multiple access points and a recommended route connecting the points." (Petition, ¶ 15; App. 007). "[The] State of Iowa provides funds, guidelines, planning and technical assistance and enforcement to local governments and non-profit entities for the purpose of water trail development." (Petition, ¶16; App. 007). "Once completed, water trails may become state-designated water trails, as determined by [the] State of Iowa." (Petition ¶ 17; App. 007). "As of 06/08/20, the Turkey River Water Trail had been granted state-designation by [the] State of Iowa." (Petition, ¶ 18; App. 007). "At all relevant times, state-designated water trails received prioritized funding assistance managed by [the] State of Iowa." (Petition ¶ 26; App. 008).

"At all relevant times, Defendants Fayette County Conservation Board, and Fayette County, Iowa [hereinafter the County] were local project partners responsible in part, for developing and for obtaining state-designation of the Turkey River Water Trail." (Petition ¶ 19, ¶ 20; App. 007). "At all relevant times, [the] State

of Iowa… [and the] County took affirmative steps, either in whole or in part, to develop, fund and promote state-designated water trails, including the Turkey River Water Trail." (Petition ¶ 27, ¶ 28; App. 008). Similarly, "(a)t all relevant times, [the] State of Iowa… and County… took affirmative steps and actions to invite members of the public to use state-designated water trails, including the Turkey River Water Trail." (Petition, ¶¶ 28, 30; App. 008, 009).

"On 06/08/2020, Defendant City of Clermont owned a low-head dam ('Clermont Dam') located on the Turkey River Water Trail." (Petition, ¶ 32; App. 009). "The Clermont Dam is located within the city limits of Defendant City of Clermont, Iowa." (Petition, ¶ 33; App. 009). "As water flows over a low-head dam and falls into the water below, a recirculating current known as a hydraulic is created below the dam." (Petition ¶ 39; App. 010). "Prior to 06/08/2020, [the] State of Iowa, County, and/or City of Clermont placed dam hazard warning signage upstream from the Clermont Dam." (Petition, ¶ 54; App. 011). Specifically, "(p)rior to 06/08/2020, [the] State of Iowa, County and/or City of Clermont had placed five dam warning signs upstream from the Clermont Dam." (Petition, ¶ 82; App. 014).

"On 06/08/2020, [plaintiffs] Sharon and her daughter, Vicki, went river tubing on a segment of the Turkey River within Fayette County, Iowa." (Petition, ¶ 9; App. 006). "River tubing is a recreational activity wherein an individual floats on a innertube and allows a river's current to carry the rider downstream." (Petition, ¶ 10;

App. 006). "On 06/08/2020, Sharon and Vicki selected a segment of the Turkey River Water Trail that flows through the city limits of [the] City of Clermont within Fayette County, Iowa." (Petition, ¶ 31; App. 009). This segment "was also a segment of the Turkey River Water Trail." (Petition, ¶ 13; App. 007). "On 06/08/2020, 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." (Petition, ¶ 60; App. 012). "On 06/08/2020, Sharon and Vicki were not otherwise aware of the location of the Clermont Dam." (Petition, ¶ 61; App. 012). "On 06/08/2020, Sharon and Vicki entered the state-designated Turkey River Water Trail at an access point upstream and north of the City of Clermont and the Clermont Dam.", (Petition, ¶ 62; App. 012), "at an access point numbered… Access Point #71." (Petition, ¶ 64; App. 012). "06/08/2020, Sharon and Vicki intended to exit the Turkey River Water Trail at Access Point #62 located south of [the] City of Clermont and the Clermont Dam." (Petition, ¶ 66; App. 012).

"After entering the Turkey River Water Trail at Access Point #71, Sharon and Vicki floated 2.5 miles at which they passed the next access point; Turkey River Access Point #68." (Petition, ¶ 75; App. 013) "… Access Point #68 is upstream from the Clermont Dam." (Petition, ¶ 76; App. 013). "After passing Access Point #68, Sharon and Vicki floated another 4.5 miles before approaching the Clermont Dam."

(Petition, ¶ 81; App. 014). "… 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." (Petition, ¶ 90; App. 015). "Sharon and Vicki did not exit the Turkey River Water Trial and went over the Clermont Dam." (Petition, ¶ 91; App. 015). "Sharon and Vicki became stuck in the hydraulic created by the Clermont Dam", (Petition ¶ 92; App. 015), "and both drowned as a result of becoming stuck in the hydraulic created by the Clermont Dam." (Petition, ¶ 93; App. 015).

ARGUMENT

I.

MCFARLIN v. STATE OF IOWA, 881 N.W.2d 51 (IOWA 2016) BARS THIS ACTION.

SCOPE OF REVIEW

Under Iowa R. App. P. 6.907, this Court's scope of review is "for correction of errors at law." Additionally, "(w)e review a district court's ruling on a motion to dismiss for the correction of errors at law." Nahas v. Polk County, 991 N.W. 2d 770, 775 (Iowa 2023).

This section begins by addressing the demise of the long standard narrative attendant to motions to dismiss under notice pleading and the required substitution of a Scope of Review statement which captures new Iowa Code Section 670.4A.

Under the old notice – pleading regime, it was, and still is, frequently stated that the petition will be evaluated "'in its most favorable light, resolving all doubts and ambiguities in [plaintiff's] favor…We must 'accept as true the allegations in the petition' … The district court's decision to grant a motion to dismiss is proper only when the petition 'on its face shows no right to recovery under any state of facts.'" Reiff v. Evans, 630 N.W. 2d 278, 284 (Iowa 2001). These formulations, however, have been supplanted by Iowa Code section 670.4A, which "recently amended the [Iowa Municipal Tort Claims Act] to narrow the scope of municipal liability." Nahas, 991 N.W.2d, at 776. Section 670.4A, the new qualified immunity statute which became effective on June 17, 2021, Nahas, at 778, "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)." Nahas, at 777. In stating that the purpose of the statute was "to narrow the scope of municipal liability," Nahas, at 776, the Nahas Court explained,

> "Prior to the effective date of the statute, municipal officers and employees were liable for the monetary damages for conduct that resulted in a deprivation of a right, privilege, or immunity secured by law. After the effective date of the statute, municipal officers and employees are not liable for monetary damages for the same conduct unless the right, privilege, or immunity secured by law was clearly established and every reasonable employee would have understood the conduct to be in violation of the law." Nahas, at 778.

To achieve these legislative intendments, the new law imposes three (3) new heightened pleading requirements. "First, plaintiffs 'must state with particularity the

circumstances constituting the violation.'" Nahas, at 777 (quoting section 670.4(3) (emphasis added). "Second, plaintiffs must plead 'a plausible violation' of the law." Id. And, "Third, they also 'must state… that the law was clearly established at the time of the alleged violation.'" Id.[2]

The significance in applying these "particularly" and "plausibility" requirements in this case lies "'in section 670.4(A)(3)'s command that failure of these two aspects "'shall result in dismissal with prejudice.'" Nahas, at 78 (emphasis added). As this Court observed in Victoriano v. City of Waterloo, 984 N.W. 2d 178, 182 (Iowa 2023),

> "The word 'shall' limits the dispositions available to the district court, i.e., when ruling on a motion to dismiss, the district court must dismiss the case as opposed to allowing the defective pleading to stand and must do so 'with prejudice'".

In other words, the word "shall" in section 670.4A(3) must be strictly construed as a mandatory legislative instruction, given this Court's previous emphasis in Nahas and Victoriano. See, Ramirez – Trujillo v. Quality Egg, L.L.C., 878 N.W. 2d 759, 771 (Iowa 2016) (applying rules of statutory construction requiring a mandatory construction). And there is no doubt this court will accede in

[2] For cases whose causes of action accrued before June 17, 2021, the effective date of Section 670.4A, the Nahas Court determined that the third "clearly established" component of Section 670.4A could not be applied retrospectively to "attach new legal consequences to the defendants' acts completed prior to the effective date…". Nahas, at 778-79. However, "(t)he particularity and plausibility standards are thus applicable here," because they operate prospectively after the effective date. Nahas, at 780.

acceptance to section 670.4A's "dismissal" obligations, as it has before when such legislative imperatives are founded on the same stated intentions observed in the Victoriano and Nahas cases. See, *e.g.*, Thomas v. Fellows, 456 N.W. 2d 170, 172-173 (Iowa 1990) (case dismissal affirmed; Section 668.11 requires disclosure of plaintiff's medical malpractice expert witnesses within 180 days after defendant's answer: "the purpose of the statute was to deal with a wide assortment of problems relating to liability and liability insurance... Early disposition of potential nuisance cases, and those which must ultimately be dismissed for lack of expert testimony, would presumably have a positive impact on the cost and availability of medical services"); Cox v. Jones, 470 N.W. 2d 23, 25-26 (Iowa 1991) (med mal case dismissal affirmed under section 668.11: "In establishing a deadline by which both parties must have named their experts, the legislature obviously intended to provide an element of certainty in professional liability cases"… "preventing last minute dismissals when an expert cannot be found."); Hantsberger v. Coffin, 501 N.W.2d 501, 504 (Iowa 1993) (despite creating a "substantial compliance" exception which Section 668.11 did not contain and reversing Plaintiff's dismissal, "we cannot ignore the legislature's intent to provide professionals relief from nuisance suits and to avoid the costs of extended litigation in frivolous cases."), McHugh v. Smith, 966 N.W. 2d 285, 288, 291 (Iowa App. 2021) (Dismissal affirmed: dismissal with prejudice required by Section 147.140 for plaintiff's failure to have a malpractice

certificate of merit filed within 60 days after defendant's answer: certificate is '"narrowly tailored"… to show that the plaintiffs' claim at least has colorable merit,' relieving "defendants of the burden to ferret out the details of plaintiffs' malpractice claims… [and abjuring] any intention of reading "a grace period into the new statute that the legislature did not communicate through its drafting" or of requiring " defendants to show they were prejudiced by the delay.")

Simply said, legislative intent supporting Section 670.4A(3)'s dismissal requirement requires that its bright-line imperative be strictly upheld lest the statutory remedy be sacrificed as meaningless, and thus included in the "Scope of Review's" recitation at the outset of each Brief Point where Section 670.4A is at issue.

ERROR PRESERVATION

Defendants agree Plaintiffs have preserved error on their claims that the public duty doctrine is inapplicable in this case.

THE MERITS

For purposes of this Brief Point, the discussion of the McFarlin case, as it bears directly on this appeal, is divided into three (3) facets:

(1) Whether the attendant statutory scheme either expressly on impliedly granted a private right of action;

(2) Whether the public duty doctrine bars a private right of action against government authorities; and

(3) Whether Plaintiffs claims of negligence in signing and warning along the Turkey River Water Trail can survive McFarlin's secondary decision of a fundamental, but, separate part of the Public Duty Doctrine.

Estate of McFarlin v. State of Iowa, 881 N.W 2d 51 (Iowa 2016) is directly on point and controlling in this case despite later cases qualifying McFarlin in ways unimportant here. A boating accident on a state-owned lake killed a ten-year-old child when a speed boat hit a submerged dredging pipe and flipped a spinning engine's propeller into the boat hitting the child passenger. Id., at 53. Suit was brought against the State because it owned the lake, made available to the public for recreation, and the Iowa Department of Natural Resources (DNR) because it had approved annual continuation of the ongoing dredging of the lake. Id., at 53, 55. The claims against the State and DNR were largely limited to the failure to warn, to sign, and adequately place warnings of the submerged dredging pipe, thus allowing it to remain concealed to boating public. Id., at 55.

(1)

Whether the attendant statutory scheme either expressly or impliedly

granted a private right of action.

This Court in McFarlin affirmed dismissal of the suit by the district court, as affirmed by the Court of Appeals, Id., at 56, first questioning whether Iowa Code Chapter 461A, embracing state DNR duties toward dredging operations on public lakes, created a private right to sue, either expressly or impliedly. Id., at 56-58. The McFarlin Court determined that neither an express nor an implied right to sue arose from that statute.

In underscoring that "(n)ot all statutory violations give rise to a private cause of action [except] 'only when the statute explicitly or implicitly provides for such a cause of action'" Id., at 56, this Court quickly determined on review of Chapter 461A that "(n)o provision in Chapter 461A … expressly creates a private right to sue." Id., at 57 (emphasis in original). For similar reasons this Court next rejected the submission that the same statutes conferred an implied right to sue. Id., at 58. The Court adhered to its earlier conclusion, that "had the legislature intended to create a private right of action… it would have said so clearly." Id., at 58. Rather, the Court determined that

> "chapters 461A and 462A provided a detailed regulatory regime to protect the use of public lands and waters for the benefit of the general public. We have repeatedly declined to find an implied right to sue under general regulatory statutes." Id.

Here, Plaintiffs helpfully concede their claims to a right of action are not founded on Iowa Code Chapters 461A and 462A creation of express or implied

causes of action that the McFarlin court rejected in the same context appearing here. Record, Plaintiffs' Resistance to Motion to Dismiss filed May 27, 2022, at 70, Paragraph 117 ("In the case at bar, Plaintiffs have not argued that Iowa Code Chapters 461A or 462A create a private right to sue and have not stated a statutory claim pursuant to these two code chapters.").

The Court then turned to the second facet of argument here:

(2)

Whether the public duty doctrine bars

a private suit against government regulatory authorities.

The public duty doctrine holds that in the absence of a special relationship between the erstwhile tortfeasor and victim creating a duty, "if a duty is owed to the public generally there is no liability to an individual member of that group." Id., at 58-59. The application of that doctrine in McFarlin was applied because "Storm Lake is open to the public free of charge. Boaters may traverse the lake freely and come and go as they please, like motorists driving on public roads. Id., at 60-61. "Boaters at Storm Lake, like motorists driving on Iowa roadways, are members of the general public, not a class of 'rightful users of the lake' for purposes of the public duty doctrine." Id., at 61. Thus,

> "(w)e hold the State's safety related duties at Storm Lake were owed to the general public, and we decline to recognize a special relationship or a particularized class of recreational boaters to avoid the public duty doctrine." Id., at 63.

As in McFarlin, Sharon and Vicki were engaged in the recreational activity of river tubing on the Turkey River (Petition ¶¶ 9,10; App. 006), which "is a meandered river and the riverbed is land owned by the State of Iowa." (Petition ¶ 11; App. 007). Iowa Code Section 461A.18 (2019) (Conferring DNR jurisdiction); 571 I.A.C. Section 13.3 (defining "meandered sovereign river" as including the "Turkey River").[3]

"The water in the Turkey River is public water and public wealth, with control and use of the water vested in the State." (Petition ¶ 12; App. 007). Fayette Country and the State's DNR "were local project partners responsible, in part, for developing the Turkey River Water Trail." (Petition ¶¶ 19, 20; App. 007). Thus, Iowa Code Section 461.36 establishes a "local conservation partnership account" in DNR, Section 461.36(2), for "recreational purposes" and "(t)he improvement of water trails, rivers, and streams." Section 461.36 (2) (c, d), then allows DNR to cooperate with the federal government[4] and counties "to carry out the initiative." Section

[3] Judicial notice may be taken of department rules and regulations adopted pursuant to the statutory authority." State v. Berch, 222 N.W 2d 741, 745 (Iowa 1974). Such judicial notice is respectfully requested here. See Iowa R. Evid. 5.201 (c) (2).

[4] It appears the impetus for the Iowa water trail program lies in the Federal Wild and Scenic Rivers Act, 16 U.S.C. Section 1271, declaring Congressional policy "that selected rivers of the Nation… possess outstandingly remarkable scenic [and] recreational … values, shall be preserved in free-flowing condition … for the benefit and enjoyment of present and future generations.'" Of course,

461.36 (3, 4). The DNR regulations implementing the water trail program are, therefore, far more specific regarding the water trail program development. See, §§ 571 I.A.C. 30.53 (1), 30.60 (1).

The very essence of "(t)he public duty doctrine [is that] (t)he state's duty is owed to the general public rather than to a particularized group of persons." McFarlin, at 62. This doctrine "'protects municipalities from failure to adequately enforce general laws and regulations which were intended to benefit the community as a whole.'" McFarlin, at 59 (quoting McQuillen, The Law of Municipal Corporations). The "doctrine is often explained as preventing tort liability for obligations owed generally to the public, such as providing fire and police protection." Id., at 59 (quoting Restatement (Third) of Torts). The public duty doctrine thus reaches its ascendancy when the defined legislative intendments of multiple governments coalesce to achieve the same identified objectives. Application of the doctrine is thus particularly apt when those objectives can only be satisfied by governments whose arrayed powers aim in the same direction. In this way, congruent statutes whose stated intentions align for creation of large, coordinated and costly public works projects definitionally underscore the broader public at large to be served, distinct from particular individuals who may be

federal funding is available for cooperative state and local programs. Sections 1281 (e), 1282 (a, b).

somewhat affected thereby and distinguish that coordinated effort from the inability of private persons to create the same large scale beneficent public good. See, Ravenscroft v. Washington Power Co., 969 P. 2d 75, 84-86 (Wash. 1999) (En Banc) (Coordination of county, state recreation commission and private power company, under license from federal agency, to make available lake for recreational boating purposes, where public duty doctrine prevents liability under inter-related statutes, regulation and grant agreements).

In this case, the Petition clearly states that "the State of Iowa established its Water Trail Development Program … in 2008." (Petition ¶ 14; App. 007). The "State provides funds, guidelines, planning and technical assistance, and enforcement to local governments and non-profit entities for the purpose of water trail Development." (Petition, ¶ 16; App. 007) "Once completed, water trails may become state-designated water trails, as determined by the State…" (Petition ¶ 17; App. 007). "At all relevant times, [Fayette County and its Conservation Board] were local project partners responsible, in part, for developing … and for obtaining state-designation of the Turkey River Water Trail." (Petition, ¶¶ 19, 20; App. 007). "At all relevant times, the State [and Fayette] took affirmative steps, either in whole or in part, to develop, fund and promote state-designated water trails, including the Turkey River Water Trail." (Petition ¶¶ 27, 29; App. 008, 009). "At all relevant times, the state [and Fayette] took affirmative steps and actions to invite members of the public

to use state-designated water trails, including the Turkey River Water Trail." (Petition, ¶¶ 28, 30; App. 008, 009). "At all relevant times, state designated water trails received prioritized funding assistance managed by the … State of Iowa." (Petition, ¶ 26; App. 008). "As of 06/08/2020, the Turkey River Water Trail had been granted state-designation…". (Petition, ¶ 18; App. 007).

As the Supreme Court of Rhode Island declared in Catone v. Medberry, 555 A. 2d 328, 333 (R.I. 1989) related to the same inter-locking governmental relationships:

> "In every case in which we have applied the public duty doctrine, the government or its agent was engaged in an activity incapable of being performed by private individuals. In these situations, the state acts for the summum bonum of society and 'we decline to hold them liable for the consequences of performance of those functions in the absence of a duty to a specific person or class of persons.'… The primary purpose of the public duty doctrine is to encourage the effective administration of government operations by removing the threat of potential litigation. This need to protect the government's ability to perform certain functions is particularly relevant when the activity in question involves a high degree of discretion such as government planning or political decision making. The state would be unable to function if liability was imposed each time an individual was deleteriously affected by such activities."

The admissions Plaintiffs have made throughout their Petition fully explain why the Public Duty Doctrine must apply here under the just-quoted reasoning of the Rhode Island Supreme Court.

(3)

Whether Plaintiffs claims of negligence in signing and warning along the Turkey River Water Trail can survive McFarlin's secondary decision, a separate but fundamental part of the Public Duty Doctrine.

The Petition's claims against Fayette allege that Fayette had a duty to sign the Turkey River Water Trail, (Petition, ¶¶ 49-54; App. 010-011), but the warning and signing above the Clermont Dam were either absent, (Petition, ¶¶ 87, 86; App. 015, 014), not properly placed or positioned, (¶¶ 82, 83; App. 014), or not maintained, (¶¶ 84, 87, 88; App. 014, 015). These claims of negligence against Fayette are found in Counts IX and X of the Petition (Petition, ¶¶ 157, 164; App. 030, 032), and the same claims are also made against the State of Iowa, in Counts I and II. (Petition, ¶¶ 97, 104; App. 015, 017). The problem is that none of these claims is any longer viable under McFarlin, quite apart from the Public Duty Doctrine, writ large, that otherwise bars them under that decision.

In deciding that the Public Duty Doctrine applied to the prevent governmental liability, Id., at 61-62, the McFarlin court twice alluded to the freedom that boaters enjoyed in using Storm Lake free of charge, to the same right of motorists using public highways: "Boaters may traverse the lake freely and come and go as they please, like motorists using public roads."; "Boaters at Storm 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." McFarlin, at 61 (both quotes).

The flies in the ointment, however, were two older cases which had held the complete opposite: Symmonds v. Chi., Milwaukee. St. Paul and Pac. R.R. Co., 242 N.W. 2d 262, 265 (Iowa 1976) (County could be sued for two deaths for failure to erect "a stop sign at a particularly dangerous railroad crossing" under statutes creating that "duty" "when due care would require it."); Harryman v. Hayles, 257 N.W. 2d 631, 638 (Iowa 1977) (paraplegia of passenger when truck rolls over on washed out county road: The county "had a duty to maintain the country roads in proper condition [and] (t)his duty runs to all those rightfully using the roads," rejecting trial court's application of public duty doctrine.) Id. at 637.

McFarlin, at 61, n. 6, however, declared that Symmonds and Harryman had been eclipsed by the public duty doctrine declared operable in Kolbe v. State, 625 N.W. 2d 721, 725 (Iowa 2001). Of Symmonds and Harryman, the McFarlin court declared: "We no longer recognize county-wide special classes of motorists after Kolbe." Two years later, this Court decided Johnson v. Humbolt County, 913 N.W. 2d 256 (Iowa 2018), another case involving a single car going off a county road, where the county was again sued. The Johnson decision again held that the public duty doctrine, emphasizing the McFarlin decision two years earlier, barred suit against the county because the doctrine "'protects municipalities from liability for

failure to adequately enforce general laws and regulations, which were intended to benefit the community as a whole.'" Johnson, at 266. As to the Symmonds and Harryman decisions which McFarlin had determined were no longer valid after re-recognition of the public duty doctrine, Johnson likewise re-emphasized that Symmonds/Harryman did not survive that doctrine's application. Johnson, at 265, n. 2: "As we explained in Estate of McFarlin, these cases have been superseded by more recent authority…" That "more recent authority," the Farrell decision decided ten (10) months ago, declares that "(w)e have repeatedly rejected the same arguments plaintiffs raise here – that the public duty doctrine 'was supplanted by the enactment of tort claims statutes that partially abrogate sovereign immunity.'"

Here is the nub of the argument. The public duty doctrine remains good law according to this Court's most recent pronouncement on the subject. Estate of Farrell by Farrell v. State, 974 N.W. 2d 132, 137-38 (Iowa 2022) ("We decline … to abandon the public-duty doctrine – an invitation we have repeatedly rejected."). And, although the public duty doctrine itself has been refined and narrowed, in cases after McFarlin and Johnson, neither case has been overruled in the ways important to this appeal. All this means is that under the McFarlin and Johnson cases, reinforcing the determination that Symmonds cannot continue as meaningful authority under the re-instituted public duty doctrine, Plaintiffs' claims of negligence in the signing, signing placement, and warning about the dangers of the Clermont Dam go nowhere. With

the death of Symmonds upon the resurgence of the doctrine, the doctrine prevails and plaintiffs' negligence claims expire.

In this case, there is better reason under long pre-established law that Symmonds must not be resurrected. Despite admitting that the State and Fayette "placed dam hazard warning signs upstream from the Clermont Dam," (Petition, ¶ 54; App. 011), and with specific acknowledgment that the State and Fayette "had placed five dam warning signs upstream from the Clermont Dam," (Petition, ¶ 82; App. 014), the remaining claims are that there were no further signs at any other places that could have been placed. (Petition, ¶¶ 70-74, 77-80, 85-86; App. 013, 014). Yet, the DNR regulations which speak to signing on designated water trails strongly caution against a multiplicity of signing that these Plaintiffs desire:

> "For purposes of this rule, [571 I.A.C. Section 30.61(1)(c)], designated wilderness water trails, because they are located in areas of special scenic, ecological, geographical, habitat on wildlife value, shall be a type of designated water trail that encourages only low-impact human uses and keeps signage and access to a minimum, but still provides critical information and access." 571 I.A.C. Section 30.61(1)(c)(2)(emphasis added).

Though decided under the State Tort Claims Act, Shelton v. State, 644 N.W.2d 27 (Iowa 2002) is directly on point, factually and also legally, with this case. In Shelton, a hiker in a pristine State Park in Muscatine County, following a trail system operated by DNR, fell from a cliff on a trail's loose gravel suffering severe lifelong injuries. As in the Petition here, Shelton sued the State "because park authorities

were negligent in failing to maintain trails or erect guardrails in the park, failing to protect members of the public using the park, and failing to ensure that the park was safe for members of the visiting public." Id., at 29.

Reviewing several similar cases decided under the Federal Tort Claims Act, Id., at 31, this Court decided the discretionary function immunity prevented the suit:

> "The substances used in forming the trails, the placement of the trails, the omission of warning signs, and trail maintenance, were all matters for park professionals." Id., at 30.

It held, as apropos when a DNR rule emphasizes that signing should be kept to a minimum on its water trails, "(o)nly where government rules dictate nondiscretionary action based on known safety hazards have courts refused to summarily accord immunity." Id., at 31. That rationale is a compelling truth in this case, where DNR's rule here seeks to prevent the aesthetic desecration of a pristine river wilderness area to the over-proliferation of signs.

II.

PLAINTIFFS HAVE NO COMMON LAW CAUSE OF ACTION AS SUCH ACTION IS BARRED BY STATUTE.

SCOPE OF REVIEW

The scope of review remains the same as stated in Brief point I.

ERROR PRESERVATION

Plaintiffs have wholly failed to preserve error on this issue and totally failed to provide in their Brief where and how preservation occurred. See Iowa R. App. P.

6.903(2)(1) and (2). Though Plaintiffs admit understanding the argument addressed in this division, Record, Plaintiffs' Resistance to Motion to Dismiss, filed May 27, 2022, at 69, Paragraph 116, they did not address it below, nor have they here. They have waived any contrary argument.

THE MERITS

In the District Court below, Plaintiffs fully admitted their claims were not founded on a statutory right to sue emanating expressly or impliedly from the statutes which this Court in McFarlin examined and found wanting in that case:

> "The McFarlin court specifically stated: 'We hold Iowa Code chapters 461A and 462A do not create an implied private right to sue. We turn next to Plaintiffs' common law claims.' In the case at bar, Plaintiffs have not argued that Iowa Code Chapters 461A or 462A create a private right to sue and have not stated a statutory claim pursuant to these two code chapters. Like the McFarlin court, this court should 'turn next to Plaintiffs 'common law claims'…"

Record, Plaintiffs' Resistance to Motion to Dismiss, filed May 27, 2022, at 70 (single emphasis in original, double emphasis added).

With concession that no claim is made to a private cause of action arising from explicit or implicit statutory authority, Plaintiffs are thus forced to rely wholly on their claims the common law affords them a right of action. The trouble is that no common law action is afforded them.

While common law claims are clearly within the ambit of the Municipal Tort Claims Act's definition of "tort" in Section 670.4(1) — *i.e.*, ordinary "negligence"

—, and liability is imposed for "torts" in Section 670.2(1), "Except as otherwise proved in this chapter," Section 670.4(1) exhorts:

> "The liability imposed by section 670.2 shall have no application to any claim enumerated in this section. 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 immune from liability."
> …
> 3. This section does not expand any cause of action or create any new cause of action against a municipality." (emphasis added).

Before this Court's decision in Nahas v. Polk County, 991 N.W.2d 770, 778-79 (Iowa 2023) decided that application of the "clearly established law" component of the qualified immunity statute, Section 670.4A(3), could not be applied retrospectively, these Defendants' trial court Briefs argued that the requirements Plaintiffs plead a violation of the law "with particularity" and "plead a plausible violation" that the law was clearly established, Section 670.4A(3), required Plaintiffs to go about finding Iowa common law statutes or cases holding that Iowa law would permit suit for the drowning deaths under the circumstances presented here. While the Nahas decision held the "clearly established law" prong of the immunity inapplicable, Plaintiffs, nonetheless, could not find and hence did not cite any such statutes or cases, claiming their pleadings alone were enough to satisfy the immunity statute. Record, Plaintiffs' Brief in Resistance, filed May 27, 2022, pages 70-71, Paragraph 120. That means here, for purposes of satisfying Section 670.4(1)'s "express statute" showing, else absence of that disclosure results in imposition of

the immunity, that the immunity applies in full force. And it means, more importantly, that the absence of the "express statute" showing, which Plaintiffs have elsewhere expressly disclaimed, completely forecloses any further creation of a new cause of action against the municipality or expansion of any cause of action if one existed. Section 670.4(3).

Only one case has explained this statute, as if it needed explanation beyond its own words: Venckus v. City of Iowa City, 930 N.W.2d 792, 809-810 (Iowa 2019):

> The IMTCA [municipal tort claims act] 'does not expand any existing cause of action or create any new cause of action against a municipality.' Iowa Code § 670.4(3). Instead, the Act allows people to assert claims against municipalities, their officers, and their employees that otherwise would have been barred by the doctrine of sovereign immunity… The substance of any legal claim asserted under the IMTCA must arise from some source – common law, statute, or constitution – independent of the IMTCA.'"

In Burnett v. Smith, 990 N.W.2d 289, 305, 306 (Iowa 2023) this Court observed:

> "In the American legal system there have been, historically, two paths for a plaintiff to go to court and recover money damages: the common law and positive law. The common law belongs to the courts. We set standards for liability and the defenses. Statutes are the legislature's domain. They pass laws which have their own liability rules and defenses. Of course, the courts and the legislature interact. We interpret statutes, and the legislature can enact laws that modify the common law."

When the legislature has decided to amend a statute curtailing the common law and its remedies, common law precedent accordingly expires in deference to the

statute. As this court determined in Fabricius v. Montgomery Elevator Co., 121 N.W.2d 351, 366 (Iowa 1963) (overruled on statutory grounds),

> "(t)he power to deprive one of a common law action is vested in the legislature under its police power upon declared public policy of the state when new circumstances and conditions warrant such action."

And, when legislation intervenes to divest previously existing common law rights, this Court has decided that "if statutory authority has preempted a right provided by case precedent, the common law must give way." Reiff v. Evans, 630 N.W.2d 278, 285 (Iowa 2001).

This is the situation here. The statutes cited originating in the municipal tort claims act have disavowed the common law claims Plaintiffs say found this action.

III.

THE ALLEGATIONS IN PLAINTIFFS' PETITION HAVE CLEARLY ESTABLISHED THAT THE RECREATION IMMUNITY OF IOWA CODE SECTION 670.4 (1)(o) BARS THIS ACTION.

SCOPE OF REVIEW

The scope of review remains the same as stated in Brief Point I.

ERROR PRESERVATION

The District Court did not enter any ruling on the claim 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 in this case (App. 437). Both Fayette County and Plaintiffs had briefed the application of this immunity in their respective

Briefs to the District Court: Fayette's Brief, filed May 16, 2022, at 14-21; and Plaintiffs' Brief, filed May 27, 2022, at 59-70.

About this, Plaintiffs' Brief in this Court, at 11-12, states:

"The [district] Court did not grant Def. County's motion based on the assertion of immunity under Iowa Code §670.4(1)(o). No motion to reconsider was filed by Def. County on its Iowa Code §670.4(1)(o) assertion and no cross appeal was filed. Thus, the only issues before this Court on Def. County's Motion to Dismiss are applicability of the 'public duty doctrine'…"

These ruminations are wrong as a matter of law. Where a district court enters a ruling dismissing a case on certain grounds but omitting to rule on others submitted, the successful party may assert on appeal the issue which trial court failed to address to preserve judgment in its favor on appeal. Jasper v. H. Nizam, Inc., 764 N.W.2d 751, 774-75 (Iowa 2009). This means that Fayette County, successful below, need not have filed a motion to enlarge the ruling in district court, Martinek v. Belmond-Klemme Comm. Sch. Dist., 772 N.W.2d 758, 761-62 (Iowa 2009), and it means that Fayette was not required to file a cross appeal in order to preserve error on its claim of recreational immunity. Rather, "Rule 179(b) is directed at unsuccessful parties who intend to challenge the district court's ruling on issues it did not resolve…(T)he requirements of rule 179(b) are only applied to unsuccessful parties challenging the district court decision." Because Plaintiffs never filed such a Motion under now Rule 1.904(2), they have waived this issue on appeal. Iowa R. App. P. 6.903(2)(g)(3). Ritz v. Wapello County Bd. of

Supervisors, N.W.2d 786, 789 (Iowa 1999). The recreational immunity thus remains in this case for the Court to address at the behest of Fayette County.

THE MERITS (despite Plaintiffs' waiver)

The purposes behind the new immunity statute, Iowa Code Section 670.4A(3), neatly coincide with this Court's pre-existing case law allowing for truncated disposition of suits which plead themselves into an early judgment. The "particularity" standard of Section 670.4A(3) "requires plaintiffs to plead the who, what, when, where, and how: the first paragraph of any newspaper story." Nahas v. Polk County, 991 N.W.2d 770,781 (Iowa 2023) (quotations omitted). This promotes "(t)he purpose of particularity as a pleading standard… to enable the defendant to respond specifically and quickly to the potential damaging allegations.'" Id. Under compulsion in avoidance of a mandatory dismissal with prejudice, in the absence of enough specificity to demonstrate a "plausible" violation of clearly established law, the command of Section 670.4A(3) dovetails with the long existing rule that such particularized pleadings, operating as "conclusive admissions of the facts pleaded", Citizens For Responsible Choices v. City of Shenandoah, 686 N.W.2d 470, 473 (Iowa 2004), may assist in the grant of a motion to dismiss "if the grounds thereof are established by the allegations of a plaintiff's petition. Id. Thus, "(i)t is true that 'a plaintiff may plead himself out of court' with respect to an affirmative defense.", White v. Harkrider, 990 N.W.2d 647, 656 (Iowa 2023), "… by alleging facts that

provide the [defendant] with a bulletproof defense…" Id., (quoting Mormann v. Iowa Workforce Dev., 554, 575 (Iowa 2018).

When the immunity of Iowa Code Chapter 461C exempted private landowners from certain liabilities for allowing recreational use of that land by the public, lands owned by the State's "political subdivisions, or any public body or any agencies, departments, boards or commissions thereof" were excluded from these liability limitations. See, Iowa Code Section 461C.2(2) (defining "holder" of land). These omissions were rectified in the 2015 Legislative Session when a new immunity was added, which is now Iowa Code Section 670.4(1)(o)"

> "The liability imposed by section 670.2 shall have no application to any claim enumerated in this section. 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 claims and in the absence of such express statute, the municipality shall be immune 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 substantial risk of injuries or damages." (emphasis added).

First, it is immediately clear that Plaintiffs must confront, as they did, the recreational immunity of section 670.4(1)(o), raised in Fayette's motion to dismiss.

But there is an initial hurdle Plaintiffs face, aside from the text of that particular immunity. As argued in the preceding Brief Point, that hurdle is the text of the introductory language of Section 670.4(1), quoted and underscored above. Apart from the immunizing effect of the recreational immunity itself, for which no liability may be imposed, a claim that falls within the grasp of that recreational immunity may persist despite that immunity, with liability still possible, where such "liability may be imposed by the express statute dealing with such claims and in the absence of such express statute the municipality shall be immune from liability." Id.

In other words, the recreational immunity here asserted, — or any other immunity listed in Section 670.4(1) — may be eliminated, wholly or partially, where an "express statute" so declares. So, in the first instance, Plaintiffs are obligated to point to some express statutory provision, somewhere, that saves their lawsuits from doom. See, Iowa R. App. P. 6.904(3)(e) (the burden of proof is upon that party who would suffer loss if the issue was not established). Otherwise, "in the absence of such express statute, the municipality shall be immune from liability." However, here, Plaintiffs have not shown or attempted to show any preliminary statute, within the nature and scope of the recreational immunity itself, that prevents the immunity from foreclosing their claims.

Second, when our legislature amends a previously existing statute that permitted a suit to lie unimpeded, by amending the statute to disqualify suit from

being pursued against a defendant for certain newly immunized negligence claims, it becomes Plaintiffs' burden of proof to establish that such claims remain outside the grip of the new immunity and are not subsumed by it. Erikson v. Wright Welding Supply, Inc. 485 N.W.2d 82, 86 (Iowa 1992):

> "We do not believe the immunity from suit or limitation or liability provided by section 613.18 is an affirmative defense that must be raised in the pleadings and proven by the defendant… Before the adoption of section 613.18, the plaintiff need only show the defendant was a seller [for strict products liability]. Since the adoption of the statute, a plaintiff must establish the seller is not in the newly defined class of sellers immune from suit or whose liability is precluded by the statute. The plaintiff must prove the elements of its case, including proof that the seller is not immune from suit or is subject to liability.
>
> We thus conclude Iowa Code Section 613.18 is not an affirmative defense and need not be raised in responsive pleadings. Although Airco is not required to raise the statutory issue in its pleading, it is appropriate that this issue be raised by motion or pleading at the early stages of the litigation process." (emphasis added).

Plaintiffs, here, have not even attempted to show that Fayette County is not immunized in some respect by Iowa Code Section 670.4(1)(o), thus to save their case.

And third, - now addressing the immunity itself - the reason for the foregoing is that Plaintiffs have admitted all facts needed to demonstrate the recreational immunity fully captures and broadly precludes this action.

The elements of the immunity comprehend (1) the death claims of both mother and daughter; (2) based upon or arising out of claimed acts or omissions by Fayette's

employees in signing or failing to sign; (3) concerning the conceded "recreational activity" of river tubing on the public property of the Turkey River Water Trail; (4) where mother and daughter chose voluntarily to be on that Trail; (5) where drowning is a "normal and expected risk inherent" in water recreation; (6) and where plaintiffs "reasonably should have known" that river tubing "created a substantial risk of injuries or damages." Section 670.4(1)(o).

This statute is based entirely upon objective factors alone allowing a court, as a matter of law, to determine its applicability without concern for subjective considerations. The "reasonably should have known" standard of this immunity permits objective measurement, a standard this Court prefers overuse of subjective considerations, "precisely in order to 'permit the defeat of insubstantial claims without resort to trial'". Hlubek v. Pelecky, 701 N.W.2d 93, 97 (Iowa 2005) (contrasting immunity statutes dependent on subjective "good faith"). See Hobbiebruken v. G & S Enterprises, Inc., 470 N.W.2d 19, 22 (Iowa 1991) (Amendment to dramshop act requiring plaintiffs to prove dramshop's knowledge of patron's intoxication: "By using the phrase 'knew or should have known' the legislature has made it possible for such plaintiffs to use either a subjective or objective standard in establishing the defendant's knowledge.") And, although neither Plaintiff can testify to their personal subjective experience or awareness of

dangers in river tubing on June 8, 2020, their Petition substitutes in telling everyone what Plaintiffs knew and, more importantly, what they did not know.

Whether considered objective or subjective, the Petition reports that on June 8, 2020, "Sharon and Vicki had not previously tubed or otherwise navigated [their] selected segment of the … Water Trail … that flows through the City of Clermont and over the Clermont Dam." (Petition, ¶ 60; App. 012). "Thus, Sharon and Vicki were not otherwise aware of the location of the Clermont Dam." (Petition, ¶ 61; App. 012). Both women "entered the … Water Trail at an access point upstream and north of the City or Clermont and the Clermont Dam (Petition, ¶ 62; App. 012) intending to exit the… Water Trail… located south of the City of Clermont and the Clermont Dam." (Petition, ¶ 66; App. 012). Both women then floated 2.5 miles to the next access point, still to the north of the Dam (Petition, ¶¶ 75, 76; App. 013), where there were no signs posted warning of the Dam. (Petition ¶¶ 77-80; App. 013, 014). Both then continued floating another 4.5 miles before "approaching the Clermont Dam", of which they remained unaware. (Petition ¶ 81; App. 014).

In this last stretch of 4.5 miles, they passed the "dam warning signage upstream of the Clermont Dam" which had been placed by the State, County and/or City. Petition (Petition ¶ 54; App. 011). Concededly, the State, County, and/or City "had placed five dam warning signs upstream from the Clermont Dam. (Petition, ¶ 82; App. 014). Nonetheless, despite the warning signs extant, "Sharon and Vicki

were not aware of the need to exit on the right bank and portage around the Clermont Dam." (Petition, ¶ 90; App. 015), instead going over the Dam and drowning below. (Petition, ¶¶ 91-93; App. 015).

These established incontestable facts not only conclusively establish what Plaintiffs did not know and thus define what they "reasonably should have known", Section 670.4(1)(o), but merge with demonstrating the "substantial risk of injuries" for those who engage in the recreational activity of river tubing.

Plaintiffs' open with an anodyne assertion that wholly disguises the dangers faced by those who go river tubing, self-evident given a few moments of reflection:

> "River tubing is a recreational activity wherein an individual floats on an innertube and allows a river's current to carry the rider downstream." Petition, Paragraph nine (9).

Obviously, an innertube has no on-board source of propulsion independent from the force of the current that carries it, in avoidance of problems encountered on a trip. That is, the movements of the innertube and rider are fully determined by the surface and the subsurface currents over which a rider has little perception and no control. An innertube, unlike a fishing boat, canoe or kayak, has no oars or paddles for directional control forward, backward or laterally, port or starboard; nor does it have a tiller or rudder for quick course corrections. It has no means of stopping or turning in reaction to previously unknown or underappreciated travel impediments. And these characteristics are only exacerbated if the rider decides against wearing a life

jacket when anything else goes terribly wrong. Simply put, there is no way to fight the current or be saved from it.

The cases bear out that river tubing, despite appearances of either calm floating detachment or frivolous fun and excitement, is an inherently dangerous activity. Tobey v. State of Louisiana, 454 So.2d 144, 145-146 (La. App. 1984) (adult river tuber rendered paralyzed when he struck a submerged object in river while tubing. "We are of the opinion that these defendants were under no legal duty to warn Mr. Tobey, a person of full majority, of the obvious and inherent dangers of an activity such as tubing."); Old Second Nat'l Bank v. Aurora Twp. 509 N.E.2d 692, 697 (Ill. App. 1987) (teenager drowns while tubing in a flooded drainage ditch: "Certainly the danger of inner tubing on the open, rushing floodwater… presented an obvious risk which the 14 year-old decedent could not have failed to appreciate… 'A flooded river is clearly within the category of obvious risks…'"); Harmon v. United States, 532 F.2d 669, 670-71 (9th Cir. 1975) (man drowns on guided whitewater rafting trip. United States Forest Service sued for "failing to warn of hazardous high water conditions." However, "(B)ecause of the river's turbulence, there is always a danger that small boats, readily capsized in violent water, will overturn and that their passengers may drown… the dangerous condition of the river was obvious to any person of ordinary intelligence."); White v. Georgia Power Co., 595 S.E.2d 353, 355, 356 (Ga. App. 2004) (two boys drown in river four miles

downstream from dam discharging deep and swift flowing water: "(A) large body of rapidly moving water constitutes a clear and obvious dangerous condition' and 'the danger of drowning in the water is a palpable and manifest peril, the knowledge of which is chargeable to the decedent(s) in the absence of a showing of want of ordinary capacity.'… The open and obvious nature of a danger obviates the duty to warn of that danger."); Espinoza v. Arkansas Valley Adventures, 2014 W.L 4799663, at 3 (D. Colo. 2014) (guided white water rafter drowns after going down rapids, falling from raft and being caught in an entanglement of log jam. Release signed includes declared risks and dangers: "changing weather conditions, changing water conditions, cold water immersions, hidden under water obstacles, trees or other above water obstacles, … changing and unpredictable currents, drowning, exposure,… overturning,… entrapment of feet or other body parts under rocks and other objects…"); Pellham v. Let's Go Tubing, 398 P.3d 1205, 1210, 1215 (Wash. App. 2017) (innertube renter injured when swift currents pull tube into downed tree and tuber falls out: "One who engages in water sports assumes the reasonably foreseeable risks inherent in that activity… This assumption of risk includes inner tubing on water and canoe rentals… (W)e hold that Brian Pellham assumed the risks involved in river tubing, including the fallen tree. Pellham may not have precisely and subjectively known how the combination of swift current, bend in the river, and a fallen tree would produce his injury. Nevertheless, he knew of the potential of all

factors. He may not have known of the location of any fallen tree in the river, but he knew of the potential of a fallen tree somewhere in the river.") See also, Torf v. Commonwealth Edison, 644 N.E.2d 467, 469-471 (Ill. App. 1994) (drownings occur on Lake Michigan city beach due to dangerous currents of power plant discharge: "(G)enerally the danger of drowning in a body of water is considered and open and obvious risk which both minors and adults should be expected to appreciate and avoid. … 'A person who is generally experiencing reasonable care for his own safety either does not enter a body of water for recreation, or, once in it, does not drown because he has become distracted or forgetful of the otherwise obvious danger. We believe it is not reasonably foreseeable to an owner or occupier of land that a person entering a body of water for recreation would somehow be distracted from the fact that he is in the water."); Dewick v. Village of Penn Yan, 713 N.Y.S.2d 592, 593-94 (N.Y. App. 2000) (wife drowns in undertow while wading from a sandbar of city park lake where bottom drops off and husband drowns trying to rescue her: "(T)he risk of reaching a drop-off is a reasonably foreseeable risk inherent in wading into a lake as [wife] did. 'One who engages in water sports assumes the reasonably foreseeable risks inherent in the activity.'"); McDowell v. Kentucky Utilities Company, 2009 W.L. 350656, at 4,3 (Ky. App. 2009) (man towing by rope abandoned boat upstream of low head dam, drowns as boat goes over dam: "… McDowell was attempting 'to navigate a rain-swollen river with which he was

totally unfamiliar. He did not wear a life jacket and he possessed no means of propelling or maneuvering the boat'… McDowell had a duty to exercise reasonable care for his own safety, including not 'to walk blindly into dangers which are obvious, known to him, or that would be anticipated by one of ordinary prudence.'").

In Cortes v. State of Nebraska, 218 N.W.2d 214 (Neb. 1974) the Nebraska Supreme Court decided the State was not liable for the death of a teenager who drown in a state park lake after falling out of an inner tube. In explanation, that Court wrote:

> "A body of water, natural or artificial, is generally held not to constitute a concealed, dangerous condition… 'The reason for this rule is that such places to not ordinarily create a condition of unnatural, concealed, or special danger, or involve and unreasonable risk of death or obvious harm; the possible hazard of use is generally appreciated even by children…' … Mere depth of water as such is not a hazard to a person of adequate swimming ability. The depth of a body of water may be unknown to the user, but the general nature of the potential hazard is not. It can be stated as a matter of fact that the public recognizes that bodies of water vary in depth and that sharp changes in the bottom may be expected." Id., at 216-17.

And then, that Court added its own insight to the problems faced by innertubers, then and now:

> "We add the comment that the use of floatation devices such as inner tubes and air mattresses, especially by persons whose ability to swim is inadequate or absent, is generally recognized as unusually dangerous because the devices are unstable and enable to user easily and inadvertently to reach areas which require skill beyond his ability or endurance." Id., at 217.

That distant wisdom of these voluntary observations is as profoundly meaningful here, as they were written then, hopefully to be amplified in this Court's opinion.

CONCLUSION

The Turkey River Water Trail is a large, coordinated, and costly public works project for the benefit of the public at large. The public duty doctrine applies to immunize these Defendants-Appellees from any alleged liability for the accident at issue in this case. Further, these Defendants-Appellees are immune from liability under the recreational immunity set forth in the Iowa Municipal Tort Claims Act. The district court should be affirmed.

REQUEST FOR ORAL ARGUMENT

Defendant-Appellee, by and through the undersigned counsel, requests oral argument pursuant to Iowa R. Civ. P. 6.903(2)(i).

Respectfully Submitted,

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CERTIFICATE OF COSTS

The undersigned hereby certifies that the cost of printing the Final Brief of the Appellee was $00.00.

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CERTIFICATE OF COMPLIANCE WITH TYPEFACE REQUIREMENTS AND TYPE-VOLUME LIMITATION

This brief complies with the typeface requirements and the type-volume limitations of Iowa R. App. 6.093(1)(d) and 6.093(1)(g)(1).

This brief has been prepared in proportionately spaced typeface using Times New Roman in 14-point font and contains 9,790 words, excluding the part of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

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CERTIFICATE OF FILING AND SERVICE

The undersigned certifies this brief was electronically filed and served on the 25th day of June 2024 upon the following persons and upon the Clerk of the Supreme Court using the Electronic Document Management System, which will send notification of electronic filing (constituting service):

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