IN THE SUPREME COURT OF IOWA

No. 24-0727

IN RE: DAVENPORT BUILDING COLLAPSE

CITY OF DAVENPORT, TRISHNA PRADHAN, and RICHARD OSWALD, Appellants.

BRIEF OF APPELLANTS

APPEAL FROM THE IOWA DISTRICT COURT
FOR SCOTT COUNTY, NO. LACE137119
THE HONORABLE MARK R. LAWSON

Jason J. O'Rourke, AT0005963
Alexander C. Barnett, AT0012641
Jenny L. Juehring, AT0014164
LANE & WATERMAN LLP
220 N. Main Street, Suite 600
Davenport, IA 52801
Phone: 563.324.3246
Fax: 563.324.1616
Email: jorourke@l-wlaw.com
Email: abarnett@l-wlaw.com
Email: jjuehring@l-wlaw.com

ATTORNEYS FOR APPELLANTS THE CITY OF DAVENPORT, TRISHNA PRADHAN, AND RICHARD OSWALD

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Other Authorities

STATEMENT OF THE ISSUES

I. Whether the District Court erred in holding the City of Davenport and its employees are not entitled to qualified immunity under Iowa Code § 670.4A for common law claims arising out of the partial collapse of a privately owned, operated, managed, and maintained apartment building.

ROUTING STATEMENT

This appeal presents substantial issues of first impression, fundamental and urgent issues of broad public importance requiring prompt and ultimate determination by this Court, and substantial questions of enunciating or changing legal principles. Accordingly, this Court should retain the case pursuant to Iowa Rule of Appellate Procedure 6.1101(2).

NATURE OF THE CASE

This case arises out of the partial collapse of a privately owned, operated, managed, and maintained apartment building, commonly called The Davenport Hotel, in Davenport, Iowa on May 28, 2023. (D0021, Master Consolidated Petition at ¶¶1–2, 10 (12/29/2023)). After the partial collapse, individuals, including residents and the family members of deceased residents of The Davenport Hotel, filed various lawsuits. The named defendants include the City of Davenport, Trishna Pradhan (the City's former Chief Building Official), Richard Oswald (the City's Director of Development and Neighborhood Services) and Corrin Spiegel (the City's former City Administrator) (collectively "The City Defendants"). The District Court consolidated these cases into one: *In re Davenport Hotel Building Collapse*, No. LACE 137119. (D0001, Case Management Order (12/19/2023)). Plaintiffs then filed a Master Consolidated Petition asserting negligence and nuisance claims. (D0021). Although phrased in a variety of ways, Plaintiffs' claims against the City Defendants

revolve around the allegations that the City Defendants failed to: (1) recognize when inspecting The Davenport Hotel that it was in danger of collapse; and (2) order evacuation of The Davenport Hotel. (D0021 at ¶¶ 230, 231, 245).

The City Defendants moved to dismiss Counts 12–16 and 20–23 of the Master Consolidated Petition pursuant to Iowa Code § 670.4A, Iowa's qualified immunity statute. (D0116, Motion to Dismiss (2/05/2024)). On April 2, 2024, the District Court entered an order dismissing the claim against Spiegel (Count 23) but denying dismissal as to the remaining City Defendants. (D0284, Ruling on Motion to Dismiss (4/02/2024)). The City Defendants timely appealed the District Court's decision pursuant to Iowa Code § 670.4A(4).

STATEMENT OF THE FACTS

The Davenport Hotel was a six-story apartment building in downtown Davenport that was originally built in 1907. (D0021, at ¶ 32).[1] From December 20, 2019 until June 21, 2021, The Davenport Hotel was owned, operated, managed, and maintained by Defendant Waukee Investments, LLC. (*Id.* at ¶ 33). During the same time, Defendant Parkwild Properties, L.C. served as the property manager. (*Id.*).

[1] For purposes of this appeal, and this appeal only, the City Defendants accept as true all well-pleaded facts in Plaintiffs' Master Consolidated Petition, as they must. *See Shumate v. Drake Univ.*, 846 N.W.2d 503, 507 (Iowa 2014) (when ruling on a motion to dismiss, Iowa courts "accept as true the petition's well-pleaded factual allegations, but not its legal conclusions."). By doing so, the City Defendants do not waive their right to deny or contest Plaintiffs' allegations if the Court determines the City Defendants are not entitled to qualified immunity at this time.

Following a derecho storm in August 2020, Townsend Engineering, a structural engineering firm, inspected The Davenport Hotel. (*Id.* at ¶¶ 35, 37). In December 2020, Townsend Engineering issued an inspection report to Waukee Investments and/or Parkwild Properties that noted certain concerns with the building's west wall. (*Id.* at ¶ 37). Waukee Investments and/or Parkwild Properties had repairs performed to a portion of the west wall in 2021, but they did not repair all of the areas identified by Townsend Engineering. (*Id.* at ¶ 41). Instead, Waukee Investments and/or Parkwild Properties "hid and concealed the obviously dilapidated and deteriorating condition of the west wall by painting the brick façade red." (*Id.* at ¶ 43).

On June 21, 2021, Defendant Davenport Hotel, L.L.C. purchased The Davenport Hotel, and Defendant Village Property Management, LLC took over as property manager. (*Id.* at ¶ 46). On July 19, 2021, the City of Davenport issued a complaint and notice order to Davenport Hotel, L.L.C. and Village Property. (*Id.* at ¶ 47). That complaint advised a structural engineer's report was required for the building's west wall. (*Id.*). Davenport Hotel, L.L.C. "did nothing to respond" to the July 19, 2021 complaint, and on September 7, 2021 the City issued a final official notice noting the items identified in the July 19, 2021 complaint had not been corrected. (*Id.* at ¶ 48). According to Plaintiffs, Davenport Hotel, L.L.C. "did nothing to address these violations." (*Id.* at ¶ 49).

On or before February 2, 2023, MidAmerican Energy Company complained to the City about deteriorating brick on the west side of The Davenport Hotel and refused to allow its employees to do work until improvements were made. (*Id.* at ¶ 54). On February 2, 2023, Davenport Hotel, L.L.C. hired Defendant Select Structural Engineering, LLC to perform an inspection. (*Id.* at ¶55). Following its inspection, Select Structural issued a report identifying certain areas of concern and recommending certain repairs. (*Id.* at ¶¶ 56–57). In light of Select Structural's report, on February 2, 2023 the City issued an official notice and order requiring Davenport Hotel, L.L.C. to perform work per Select Structural's report and to submit an engineer's report for remediation and repair of the west wall within 10 days. (*Id.* at ¶¶ 58–59). Thereafter, Davenport Hotel, L.L.C. hired Defendant Bi-State Masonry, Inc. to do the work recommended by Select Structural's report, and Bi-State Masonry began work around February 22, 2023. (*Id.* at ¶¶ 62–64). On February 28, 2023, Select Structural issued an addendum to its earlier report identifying certain concerns with the west wall. (*Id.* at ¶64). Around the same time, Davenport Hotel, L.L.C. fired Bi-State Masonry, who had not completed the work recommended by Select Structural. (*Id.* at ¶¶ 63, 67).

On May 23, 2023, Select Structural performed another inspection and the following day issued a report to Davenport Hotel L.L.C. that again addressed concerns about the west wall. (*Id.* at ¶ 70). On May 25, 2023, City employees Trishna

Pradhan and Richard Oswald visited The Davenport Hotel for an inspection. (*Id.* at ¶ 73). Notes from the inspection reported that masons would start brick work that day, wall bracing was to be installed per the engineer's (Select Structural's) design, the engineer (Select Structural) would visit periodically to ensure work was being done per its design, and the City inspector would "stop over periodically to see progress." (*Id.* at ¶ 76). On May 28, 2023, the west side of The Davenport Hotel collapsed, leading to the partial collapse of the building. (*Id.* at ¶ 93). This lawsuit followed.

ARGUMENT

I. The District Court erred in holding the City Defendants are not entitled to qualified immunity under Iowa Code § 670.4A.

A. Error preservation.

The City Defendants' motion to dismiss asserted they were entitled to qualified immunity pursuant to Iowa Code § 670.4A(4). (D0115, Memo. Of Law in Support of Motion to Dismiss (2/05/2024); D0116). On April 2, 2024, the District Court denied that motion with respect to the City, Oswald, and Pradhan. (D0284). The City Defendants timely filed their notice of appeal on April 30, 2024. (D0328, Notice of Appeal (4/30/2024)). Accordingly, error has been preserved.

B. Scope and standard of review.

This Court reviews district court rulings on motions to dismiss for corrections of error at law. *Nahas v. Polk Cty.*, 991 N.W.2d 770, 775 (Iowa 2023); *Venckus v.*

City of Iowa City, 930 N.W.2d 792, 798 (Iowa 2019). In so doing, the Court "accept[s] as true the petition's well-pleaded factual allegations, but not its legal conclusions." *Nahas*, 991 N.W.2d 770 at 775 (quoting *Benskin, Inc. v. W. Bank*, 952 N.W.2d 292, 298 (Iowa 2020)).

C. Iowa Code § 670.4A applies to Plaintiffs' common law claims against the City Defendants.

Before passage of the Iowa Municipal Tort Claims Act ("IMTCA"), Chapter 670 of the Iowa Code, in 1967, "Iowa adhered to a policy of governmental immunity." *Harryman v. Hayles,* 257 N.W.2d 631, 633 (Iowa 1977), *abrogated on other grounds by Miller v. Boone Cty. Hosp.*, 394 N.W.2d 776 (Iowa 1986). "In abrogating that doctrine, the legislature attached certain conditions to the rights there created." *Id.; see also Johnson v. Humboldt Cty.*, 913 N.W.2d 256, 264 (Iowa 2018) (observing the IMTCA creates exceptions to municipal immunity). Because the avenue for suing municipalities was legislatively created, there is no right to sue a municipality without compliance with the IMTCA. *See Boyle v. Burt*, 179 N.W.2d 513, 514–15 (Iowa 1970) ("The legislature, having the power to create the right, may affix the conditions under which it is to be enforced, and a [sic] compliance with those conditions is essential…." (citation and internal quotation marks removed)).

In 2021, the Iowa Legislature codified qualified immunity by enacting Iowa Code § 670.4A, which provides new qualified immunity protection for municipalities and their employees. *See* IOWA CODE § 670.4A. The statute provides

qualified immunity if "[t]he right, privilege, or immunity secured by the law was not clearly established at the time of the alleged deprivation, or…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." IOWA CODE § 670.4A(1)(a). Thus, to state a claim and clear the heightened pleading hurdle, a plaintiff must: (1) "state with particularity the circumstances constituting the violation;" (2) plead "a plausible violation" of the law; and (3) "state ... that the law was clearly established at the time of the alleged violation." IOWA CODE § 670.4A(3). By enacting Iowa Code § 670.4A, Iowa's legislature "adopt[ed] a state law version of qualified immunity that tracks the qualified immunity doctrine as it exists under federal law." *Stark v. Hamelton*, No. 3:18-CV-00069-RGE-SHL, 2021 WL 4056716, at *4 (S.D. Iowa Sept. 2, 2021); *see also Wilson v. Lamp*, 901 F.2d 981, 986 (8th Cir. 2018) ("To defeat qualified immunity, the plaintiff has the burden to prove [both]: '(1) the facts, viewed in the light most favorable to the plaintiff, demonstrate the deprivation of a constitutional or statutory right; and (2) the right was clearly established at the time of the deprivation.'" (quoting *Howard v. Kansas City Police Dep't*, 570 F.3d 984, 988 (8th Cir. 2009)).

Plaintiffs may contend, as they did at the District Court level, that Iowa Code § 670.4A does not apply to their common law tort claims. That argument ignores the plain language of the statute. "On questions of statutory interpretation, '[w]e begin

with the plain language of the statute.'" *Sand v. An Unnamed Local Gov't Risk Pool*, 988 N.W.2d 705, 708 (Iowa 2023) (quoting *Little v. Davis*, 974 N.W.2d 70, 75 (Iowa 2022)). "If the text of a statute is plain and its meaning clear, we will not search for a meaning beyond the express terms of the statute or resort to rules of construction." *Id.* (quoting *Doe v. State*, 943 N.W.2d 608, 610 (Iowa 2020)).

Iowa Code § 670.4A(1) begins with: "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...." IOWA CODE § 670.4A(1) (emphasis added). The statute does not state it only affords qualified immunity to constitutional claims. It applies to claims "brought under this chapter," *i.e.*, the IMTCA, Iowa Code chapter 670. Iowa Code § 670.2(1) provides, in part: "Except as otherwise provided in this chapter, every municipality is subject to liability for its torts and those of its officers and employees...." The IMTCA defines "tort" to mean:

> *every civil wrong* which results in wrongful death or injury to person or injury to property or injury to personal or property rights and includes but is not restricted to actions based upon negligence; error or omission; nuisance; breach of duty, whether statutory or other duty or denial or impairment of any right under any constitutional provision, statute or rule of law.

IOWA CODE § 670.1(4) (emphasis added).

The plain language of Iowa Code § 670.4A(1) provides immunity to all claims brought under the IMTCA, including "every civil wrong," negligence, and nuisance.

The statute affords state employees qualified immunity from claims under the IMTCA if the claim alleges a deprivation of a "right, privilege, or immunity secured by law" that "was not clearly established at the time of the alleged deprivation" or if "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." IOWA CODE § 670.4A(1)(a). Plaintiffs' negligence and nuisance claims fall under the IMTCA and, as such, the City Defendants are entitled to seek qualified immunity under Iowa Code § 670.4A(1). *See Klum v. City of Davenport*, No. 3:23-CV-00043-RGE-WPK, 2024 WL 2880640, at *14–15 (S.D. Iowa May 30, 2024) (finding a defendant police officer was entitled to qualified immunity under Iowa Code § 670.4A because his "use of force was not negligent under Iowa law" and "it was not clearly established that [the officer's] use of force was negligent at the time [the decedent] was killed.").

D. The City Defendants' Iowa Code § 670.4A defense can be sustained on either of the two prongs of qualified immunity analysis.

Iowa Code § 670.4A provides a municipality and its employees qualified immunity if "[t]he right, privilege, or immunity secured by law was not clearly established at the time of the alleged deprivation..." IOWA CODE § 670.4A(1)(a). Of course, a "right, privilege, or immunity" cannot be clearly established if the right, privilege, or immunity does not exist in the first place. This is why there are two prongs of the qualified immunity analysis that the Court must consider: (1) whether the facts shown by the plaintiff make out a violation of a right, and (2) whether that

right was clearly established at the time of the alleged misconduct. *Thurmond v. Andrews*, 972 F.3d 1007, 1011 (8th Cir. 2020) (cleaned up). Courts "may address either question first. *If either question is answered in the negative, the public official is entitled to qualified immunity*." *Wallingford v. Olson*, 592 F.3d 888, 892 (8th Cir. 2010) (citation omitted) (emphasis added).

Under the first prong, if no "right would have been violated were the [plaintiffs'] allegations established, there is no necessity for further inquiries concerning qualified immunity." *Saucier v. Katz*, 533 U.S. 194, 201 (2001), *overruled in part on other grounds by Pearson v. Callahan*, 555 U.S. 223 (2009). The existence or non-existence of a right is, therefore, a "threshold question." *Id.*

Here, the threshold question in the qualified immunity analysis is whether the City Defendants owed a duty of care to Plaintiffs. For Plaintiffs to have had a "right, privilege, or immunity secured by law" violated by the City Defendants, they must demonstrate the City Defendants owed them a duty of care. IOWA CODE § 670.4A (1)(a); s*ee also Stotts v. Eveleth*, 688 N.W.2d 803, 807 (Iowa 2004) (an element of negligence is the existence of a duty of care).

As to the "clearly established" prong, "[t]hat inquiry 'must be undertaken in light of the specific context of the case' so that 'the rule of qualified immunity' does not become 'a rule of virtually unqualified liability simply by plaintiffs alleging violations of extremely abstract rights.'" *McVay ex rel. Estate of McVay v. Sisters of*

Mercy Health Sys., 399 F.3d 904, 908 (8th Cir. 2005) (quoting *Anderson v. Creighton*, 483 U.S. 635, 639 (1987)). The United States Supreme Court has made abundantly clear the right must be narrowly defined in the specific context of the case. In *Saucier*, for example, the United States Supreme Court stated:

> We [previously] emphasized in *Anderson* that the right the official has alleged to have violated must have been clearly established in a more particularized, and hence more relevant sense: the contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted.

533 U.S. at 202. The United States Supreme Court further clarified this rule in *Brosseau v. Haugen*:

> Qualified immunity shields an officer from suit when she makes a decision that, even if constitutionally deficient, reasonably misapprehends the law governing the circumstances she confronted. *Saucier v. Katz*, 533 U.S., at 206 (qualified immunity operates "to protect officers from the sometimes 'hazy border between excessive and acceptable force'"). Because the focus is on whether the officer had fair notice that her conduct was unlawful, reasonableness is judged against the backdrop of the law at the time of the conduct. If the law at the time did not clearly establish the officer's conduct had violated the Constitution, the officer should not be subject to liability or, indeed, even the burdens of litigation.

543 U.S. 194, 198 (2004) (internal citation omitted).

For a right to be clearly established to defeat qualified immunity, "[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson*, 483 U.S. at 640. To

satisfy this standard, a plaintiff must identify either "controlling authority" or "a robust 'consensus of cases of persuasive authority'" that "placed the statutory or constitutional question beyond debate" at the time of the alleged violation. *Ashcroft v. al-Kidd*, 563 U.S. 731, 741–42 (2011) (quoting *Wilson v. Layne*, 526 U.S. 603, 617 (1999)). "[I]f the law at the time of the alleged conduct did not clearly establish that the governmental official's conduct would violate the Constitution [or a statutory right], the government official is entitled to qualified immunity." *Minor v. State*, 819 N.W.2d 383, 400 (Iowa 2012) (citation omitted).

The "clearly established" inquiry protects governmental officials from mistaken beliefs or understanding about whether a particular action is lawful. *Pearson*, 555 U.S. at 231. Under this standard, there is "ample room for mistaken judgments," and "all but the plainly incompetent or those who knowingly violate the law" are protected by qualified immunity. *Hunter v. Bryant*, 502 U.S. 224, 229 (1991) (quotation marks and citation omitted). "Officials are not liable for bad guesses in gray areas; they are liable for transgressing bright lines." *Davis v. Hall*, 375 F.3d 703, 712 (8th Cir. 2004).

Where, as here, qualified immunity is asserted, the plaintiff bears the burden of overcoming the defense. *Cannon v. Dehner*, --- F.4th ---, 2024 WL 3768723, at *3 (8th Cir. Aug. 13, 2024). Under federal law, once a defendant pleads a defense of qualified immunity, "the judge appropriately may determine, not only the currently

applicable law, but whether that law was clearly established at the time an action occurred." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Qualified immunity issues should be resolved "at the earliest possible stage in litigation" to ensure nonactionable claims against the government and its official are resolved "prior to discovery." *Pearson*, 555 U.S. at 231–32. Deciding pure legal questions at the outset of litigation:

> permits courts expeditiously to weed out suits which fail the [qualified immunity] test without requiring a defendant who rightly claims qualified immunity to engage in expensive and time consuming preparation to defend the suit on the merits. One of the purposes of immunity, absolute or qualified, is to spare a defendant not only unwarranted liability, but unwarranted demands customarily imposed upon those defending a long drawn out lawsuit.

Siegert v. Gilley, 500 U.S. 226, 232 (1991). In *Mitchell v. Forsyth*, the United States Supreme Court recognized qualified immunity is:

> an entitlement not to stand trial or face the other burdens of litigation, conditioned on the resolution of the essentially legal question whether the conduct of which the plaintiff complains violated clearly established law. The entitlement is an *immunity from suit* rather than a mere defense to liability; and like an absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial.

472 U.S. 511, 526 (1985) (emphasis in original).

E. The City Defendants are entitled to qualified immunity because Plaintiffs cannot establish the first prong of the qualified immunity analysis, i.e., that they were deprived of any right, privilege or immunity secured by the law.

The IMTCA is the "exclusive remedy for torts against municipalities and their employees." *Venckus*, 930 N.W.2d at 808; *see also* IOWA CODE § 670.4(2). The IMTCA does not create any substantive rights; instead, it only creates procedural rights. *Venckus*, 930 N.W.2d at 809–10. Any claim under the IMTCA must be predicated upon "common law causes of action or statutory causes of action that would provide a remedy" in the absence of sovereign immunity. *Id.* at 810.

This point is important because Plaintiffs concede the ordinances, statutes, and laws cited in their Master Consolidated Petition do not create private causes of action. (D0210, Plaintiffs' Resistance to the City Defendants' Motion to Dismiss at 18 (2/16/2024) ("The City spends much of its brief arguing that the ordinances, statutes, and laws referenced in Plaintiffs' Master Consolidated Petition do not create private rights of action. Plaintiffs are not suggesting otherwise, as is apparent from the causes of action asserted, Plaintiffs' theories against the City Defendants sound in common law theories."); *see also* D0021 at ¶¶ 212–324, 370–475). According to Plaintiffs, at most, the ordinances, statutes, and laws cited in Plaintiffs' Master Consolidated Petition might provide some form of evidence the City Defendants engaged in negligent conduct. (*See* D0210 at 18–21). Whether the City Defendants engaged in negligent conduct, however, is only relevant if an enforceable duty of

care is owed in the first instance. *See Seeman v. Liberty Mut. Ins. Co.*, 322 N.W.2d 35, 37 (Iowa 1982) ("The duty or standard of care, statutory or otherwise, is merely an element of proof that comes into play *after an action has been rightfully commenced pursuant to the preexisting common-law cause of action*." (emphasis added)).

Because the ordinances, statutes, and laws cited in Plaintiffs' Master Consolidated Petition do not give rise to a private cause of action, as the Plaintiffs concede, they do not provide an independent basis to impose a statutory duty of care flowing from the City Defendants to the Plaintiffs. *See Kolbe v. State*, 625 N.W.2d 721, 726 (Iowa 2001) ("A violation of a statutory duty gives rise to a tort claim only when the statute, explicitly or implicitly, provides for such a cause of action." (citation omitted)). Accordingly, Plaintiffs must rely exclusively on their theory that the City Defendants owed them a common law duty of care to support their tort claims against the City Defendants. And, for Plaintiffs to establish the first prong of the qualified immunity analysis that the City Defendants deprived them of a right, they must establish the City Defendants owed them a common law duty of care.

If the City Defendants did not owe the Plaintiffs a common law duty of care, then their alleged negligent conduct did not violate any "right, privilege, or immunity secured by law…." IOWA CODE § 670.4A (1)(a); *compare* RIGHT, Black's Law Dictionary (12th ed. 2024) ("A legally enforceable claim that another will do or will

not do a given act; a recognized and protected interest the violation of which is a wrong.") *with* WRONG, Black's Law Dictionary (12th ed. 2024) ("Breach of one's legal duty; violation of another's legal right."). Thus, the initial question for the Court to resolve under the first prong of the qualified immunity analysis is whether Plaintiffs have a common law right that can be pursued.

i. The City Defendants did not owe Plaintiffs a common law duty of care.

In Counts 12, 13, 20, 21, and 22 of the Master Consolidated Petition, Plaintiffs allege the City Defendants had three broad common law duties with respect to maintaining The Davenport Hotel and protecting the tenants therein. (*See* D0021, Count 12 ¶ 229 ("At all relevant times, the City of Davenport had a duty to exercise ordinary care to ensure that the building was in a safe condition for those who lived there or would live there in the future."; ¶ 230 ("At all relevant times, the City of Davenport had a duty to warn the tenants of The Davenport of any unsafe conditions existing on the premises, and certainly those that exposed the tenants of The Davenport to undue risk to their lives, health, and safety."); ¶ 231 ("At all relevant times, the City of Davenport had a duty [to] evacuate The Davenport when it knew that the condition of the west exterior wall exposed its tenants to undue risk to their lives, health, and safety."); Count 13 ¶¶ 279–81 (reasserting the City had the same duties to exercise ordinary care to ensure the building was safe, warn tenants, and evacuate the building as set forth in Count 12); Count 20 ¶¶ 385–87 (alleging

Pradhan had the same duties as the City to exercise ordinary care to ensure the building was safe, warn tenants, and evacuate the building); Count 21 ¶¶ 441–43 (reasserting Pradhan had the same duties to ensure the building was safe, warn tenants, and evacuate the building as set forth in Count 20); Count 22 ¶¶ 457–59 (alleging Oswald had the same duties as the City to exercise ordinary care to ensure the building was safe, warn tenants, and evacuate the building).

"As a general rule, [Iowa] law recognizes that every person owes a duty to exercise reasonable care to avoid causing injuries to others." *Feld v. Borkowski*, 790 N.W.2d 72, 75 (Iowa 2010) "Thus, in most cases involving physical harm, courts 'need not concern themselves with the existence or content of this ordinary duty,' but instead may proceed directly to the elements of liability." *Thompson v. Kaczinski*, 774 N.W.2d 829, 834 (Iowa 2009) (quoting Restatement (Third) of Torts: Liab. For Physical Harm § 7(a), at 90) (Proposed Final Draft No. 1, 2005)). Establishing "[a] linkage of a legal duty to a particular relationship between the parties[,]…however, is required 'for most claims based on an alleged failure of a [defendant] to aid or protect another person or to control the conduct of a third party.'" *Kolbe*, 625 N.W.2d at 728 (quoting *Keller v. State*, 475 N.W.2d 174, 179 (Iowa 1991) and citing Restatement (Second) of Torts § 314 cmt. c (1965) (explaining the origin as to why alleged tortfeasors generally have no duty to protect third parties)).

The *Kolbe* Court observed that Iowa courts have relied upon Restatement (Second) of Torts section 315 "on several occasions" to determine whether an actionable duty exists, which states:

> There is no duty so to control the conduct of a third person as to prevent him from causing physical harm to another unless (a) a special relation exists between the actor and the third person which imposes a duty upon the actor to control the third person's conduct, or (b) a special relation exists between the actor and the other which gives to the other a right to protection.

Id. (quoting Restatement (Second) of Torts § 315 (1964)); *see also* Restatement (Third) of Torts: Phys. & Emot. Harm § 19 (2010) ("These cases, in which the defendant's conduct creates or increases the possibility of harm caused by third-party misconduct, can be contrasted to cases in which the defendant merely takes no action to protect the plaintiff against the possibility of third-party misconduct.").

Iowa Appellate Courts have relied on additional provisions in the Restatement (Second) of Torts to determine whether an actionable duty existed. As the Iowa Court of Appeals stated in *Lindaman v. Bode*:

> Iowa courts place weight upon the Restatement (Second) of Torts when determining whether a duty is owed and, if so, what the extent of that duty is. *See, e.g., Shaw v. Soo Line R. Co.,* 463 N.W.2d 51, 55 (Iowa 1990). Concerning one's duty to act for the protection of another, the Restatement (Second) of Torts section 314 (1965) provides "[t]he fact that the actor realizes or should realize that action on his part is necessary for another's aid or protection does not of itself impose upon him a duty to take such action." On the other hand, the existence of a special relationship may give rise to a duty on the part of one to aid or protect the other. *See* Restatement (Second) of Torts § 314A (1965).

478 N.W.2d 312, 314 (Iowa Ct. App. 1991) (affirming the trial court's ruling granting a motion to dismiss; finding there was no duty for individually named defendants to inform a criminal defendant or the court an alleged victim had broken into the defendant's home to unlawfully obtain evidence the State used against the defendant in the underlying criminal proceeding; finding further the individually named defendants had no duty to disclose to the criminal defendant they knew the prosecutors and DCI agents were intentionally concealing how the surreptitious evidence was obtained during the criminal proceeding; finding further the mere allegation that these individually named defendants had encouraged the alleged victim to break into the defendant's home to unlawfully obtain evidence in the first place was insufficient to create a special relationship or a duty of care).

These general principles apply with greater strength when a tort claim is brought against a municipality or one of its employees. Commentary to Restatement (Third) of Torts: Liab. For Physical and Emotional Harm section 37 states:

> The limitless potential liability that might be visited on government entities if affirmative duties were imposed on them for every undertaking has influenced courts in limiting the existence and scope of affirmative duties to which government entities are subject. Some courts insist on a "special relationship" between the plaintiff and a public entity that distinguishes the plaintiff from the public at large before imposing an affirmative duty.

Restatement (Third) of Torts: Liab. For Phys. and Emot. Harm § 37 cmt. i (2012); *Humboldt Cty.*, 913 N.W.2d at 265 (recognizing Iowa has adopted the duty analysis

laid out in the Restatement (Third) of Torts and therefore the concept of foreseeability is no longer a part of the no-duty determination under the public duty doctrine; observing further Section 288 of the Restatement (Second) of Torts conflated the duty determination and negligence determination and questioning the continued validity of *Wilson v. Nepstad*, 282 N.W.2d 664 (Iowa 1979) for having utilized Restatement (Second) of Torts § 288(b) in its analysis).

The above-cited principles form the bedrock of the public-duty doctrine, which is "alive and well in Iowa." *Raas v. State*, 729 N.W.2d 444, 449 (Iowa 2007). The public-duty doctrine is a form of judicially created sovereign immunity. *Id.* "Unlike immunity, [however,] which protects a municipality from liability for breach of an otherwise enforceable duty to the plaintiff, the public duty rule asks whether there was any enforceable duty to the plaintiff in the first place." *Estate of McFarlin v. State*, 881 N.W.2d 51, 59 (Iowa 2016). "Because '[t]he public duty rule is not technically grounded in government immunity,' the [IMTCA] and the public-duty doctrine may coexist without conflict." *Humboldt Cty.*, 913 N.W.2d at 264 (quoting *Raas*, 729 N.W.2d at 448); *see also Raas*, 729 N.W.2d at 448–49 ("our cases decided after the adoption of the [IMTCA] continue to recognize the public-duty doctrine, and…they…clearly upheld the continued validity of the doctrine."); *Estate of McFarlin*, 881 N.W.2d at 59 (rejecting the "argument that [Iowa] should abandon the public-duty doctrine, as some other states have done, because the doctrine was

supplanted by the enactment of tort claims statutes that partially abrogate sovereign immunity."). The public-duty doctrine prevents the recognition of a common law duty of reasonable care, and "creates immunity where the legislature has not done so." *Humboldt Cty.*, 913 N.W.2d at 271 (Wiggins, J., dissenting).

The public-duty doctrine "is properly understood as a limit on suing a governmental entity for not protecting the public from harm caused by the activities of a third party." *Fulps v. City of Urbandale*, 956 N.W.2d 469, 475 (Iowa 2021). This Court has explained that the public-duty doctrine will bar a claim when: (1) "the injury to the plaintiff was directly caused or inflicted by a third party or other independent force" and (2) "the plaintiff alleges a governmental entity or actor breached a uniquely governmental duty, usually, but not always, imposed by statute, rule, or ordinance to protect the plaintiff from the third party or other independent force." *Id.* at 473–74.

The public-duty doctrine exists because the government has limited resources and must "balance numerous competing public priorities, all of which may be important to the general health, safety, and welfare." *Id.* at 476. This Court has "colloquially explained the doctrine by saying 'a duty owed by the government to all is a duty to none.'" *Id.* at 473 (cleaned up). Under the public-duty doctrine, "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 State and the injured plaintiff.…" *Estate of McFarlin*, 881 N.W.2d at 58.

This Court recently distinguished between government misfeasance and nonfeasance when analyzing the public-duty doctrine, explaining the doctrine only applies to claims involving government nonfeasance. *See Breese v. City of Burlington*, 945 N.W.2d 12, 19–20 (Iowa 2020). Governmental misfeasance occurs "when the government defendants' affirmative negligence…created a dangerous condition on government-owned property that caused the injury." *Estate of Farrell by Farrell v. State*, 974 N.W.2d 132, 138 (Iowa 2022). Government nonfeasance, on the other hand, is a "a failure to discharge a *governmental* duty for the benefit of the public." *Fulps*, 956 N.W.2d at 475 (emphasis in original). As a benchmark, this Court has recognized governmental nonfeasance is at-issue when the underlying tort alleges the "government fail[ed] to adequately enforce criminal or regulatory laws for the benefit of the general public or…protect the general public from somebody's else's instrumentality." *Id.* at 475 (quoting *Breese*, 945 N.W.2d at 21).

The above-cited principles have a strong footing under Iowa law. This Court has recognized a municipality has no common law duty "to set and enforce rules and regulations" within its jurisdictional boundaries. *Bawek v. Kawasaki Motors Corp., U.S.A.*, 313 N.W.2d 501, 502 (Iowa 1981) (affirming municipality's motion to dismiss because there was no common law duty for the municipality to either adopt

or enforce certain rules or regulations); *see also Kolbe*, 625 N.W.2d at 727–28 (holding a common law duty of care does not arise simply because a municipal employee is alleged to have performed a government function mandated by statute or regulation in a negligent manner). This law exists for good reason. The District Court's conclusion that the City Defendants owe a common law duty of care in this case essentially transforms municipalities and their local taxpayers into insurers for any building construction defect or neglected maintenance that might occur within the City's jurisdictional limits. And, if this principle is extended to building inspections, it would have to logically be extended to include all regulated activities occurring within a municipality's jurisdictional limits, such as health department inspections, water and sewer plant inspections, fire department inspections, etc. This is not the law in Iowa, nor should it be. Rendering local governments insurers for every regulated activity within their jurisdictional limits would expose governmental entities to virtually limitless suits and their taxpayers to limitless liability. This would deter, rather than encourage, local governments to voluntarily promulgate and enforce regulations designed to protect the general public.

Overall, Plaintiffs' negligence claims fail as a matter of law because the City Defendants did not owe a common law duty of care to the Plaintiffs. This is so because Plaintiffs' common law negligence claims rest upon allegations of quintessential governmental nonfeasance, *i.e.* the City Defendants' alleged failure to

enforce laws enacted for the benefit of the general public or to identify a hazard in a privately owned and maintained building and order evacuation of the same. Under Iowa law, absent a special relationship, there is no common law duty to prevent the misconduct of third parties. The mere existence of a criminal or regulatory law does not create an actionable common law duty. *Estate of McFarlin*, 881 N.W.2d at 62–64; *Kolbe*, 625 N.W.2d at 727–28; *Bawek*, 313 N.W.2d at 502. The various statutes and ordinances cited in the Master Consolidated Petition are designed to benefit the well-being of *all* tenants, residents, and owners within the City's jurisdictional borders, not just the Plaintiffs. Plaintiffs may have been tenants in The Davenport Hotel, but that does not confer upon them a special relationship or status with the City or its officials. Indeed, Plaintiffs have made no attempt whatsoever to allege in the Master Consolidated Petition that they had a special relationship with the City or its officials, nor could they. Because the City Defendants did not owe the Plaintiffs a special duty of care, Plaintiffs' common law negligence claims against the City Defendants fail as a matter of law and must be dismissed with prejudice. *See Lindaman*, 478 N.W.2d at 314 (affirming a trial court's decision granting a motion to dismiss common law negligence claims on the basis there was no "recognized duty" under Iowa law, and noting this conclusion was further supported by the plaintiff's failure to plead a "special relationship exist[ed] between him and the [defendants].").

In holding otherwise, the District Court incorrectly determined: (1) there is a "special relationship" between the City Defendants and Plaintiffs by misinterpreting *Wilson v. Nepstad*, 282 N.W.2d 664 (Iowa 1979); (2) the City Defendants engaged in misfeasance thereby precluding application of the public duty doctrine; and (3) the IMTCA and the City's regulatory enforcement powers, together and independently, create enforceable duties that expose the City Defendants' to liability in this case.

a. *Wilson v. Nepstad* is inapplicable to this case.

In *Wilson v. Nepstad*, 282 N.W.2d 664 (Iowa 1979), this Court was asked to determine whether a municipality owed a common law duty of care to tenants in an apartment building because it performed a fire safety inspection. *Id.* at 667. Alternatively, this Court was asked in *Wilson* to determine whether the municipality owed the tenants of the apartment building a statutory duty because it performed a fire safety inspection pursuant to its local ordinances. *Id.*

The *Wilson* Court never considered or analyzed whether the municipality owed a common law duty of care; instead, it determined the statutory duty of care issue was dispositive. *Id.* at 667. The majority's analysis in *Wilson*, however, directly contradicts recent decisions from this Court analyzing the IMTCA and the public duty doctrine. *Wilson* was not just wrongly decided, it is no longer good law based on unequivocal and subsequent holdings from this Court analyzing the very issues

presented in this appeal. Moreover, *Wilson* has no bearing on this dispute because, unlike *Wilson*, Plaintiffs concede the applicable statutes and regulations before the Court fail to give rise to an actionable statutory duty of care.

Wilson was a split-decision. The three-justices comprising the *Wilson* special concurrence accurately predicted the current landscape of Iowa law with respect to tort duties and the IMTCA. *Id.* at 674–77 (McCormick, LeGrand, and McGiverin, special concurrence). Under the facts and circumstances of this case, the Justices comprising the *Wilson* special concurrence, who accurately predicted how Iowa law would develop with respect to issues presented in this appeal, would conclude the City Defendants do not owe Plaintiffs a duty of care as a matter of law.

The *Wilson* majority, on the other hand, based its ruling on a series of incorrect legal conclusions. *See id.* at 667–76. The preceding sentence is not a statement of opinion or advocacy. We now know with certainty, through the benefit of hindsight and subsequent decisions from this Court, that the *Wilson* majority relied upon a series of incorrect legal premises to conclude the municipality owed the apartment tenants a statutory duty of care in that case simply because it performed a fire safety inspection. *Id.*

The *Wilson* majority begins and ends its analysis with the mistaken premise that the enactment of the IMTCA abrogated the public-duty doctrine. *Id.* at 670 (“Notwithstanding the clear trend of case law and unmistakable legislation, the city

argues the 'public duty' dichotomy is the law in Iowa, a proposition the special concurrence seems to accept."); *cf. Raas*, 729 N.W.2d at 448–49 ("our cases decided after the adoption of the State Tort Claims Act continue to recognize the public-duty doctrine, and…they…clearly upheld the continued validity of the doctrine."). The majority in *Wilson* implicitly concedes a different result would be required if the public-duty doctrine was, as the *Raas* Court subsequently put it: "alive and well in Iowa." *Raas*, 729 N.W.2d at 449; *see Wilson*, 282 N.W.2d at 668–69.

For instance, the *Wilson* majority approvingly quoted at length the Alaska Supreme Court decision *Adams v. State*, 55 P.2d 235 (Alaska 1976). *See Wilson*, 282 N.W.2d at 668–69 (quoting *Adams*, 55 P.2d at 241–42). In *Adams*, as specifically quoted by the *Wilson* majority: "An application of the public duty here would result in finding no duty owed the plaintiffs or their decedents by the state, because, although they were foreseeable victims and a private defendant would have owed such a duty, no 'special relationship' between the parties existed." *Id.* (quoting *Adams*, 555 P.2d at 241–42).

The *Wilson* majority, after mistakenly finding the public-duty doctrine no longer exists in Iowa with the enactment of the IMTCA, compounded the error in its legal reasoning by stating the IMTCA: "created a new right of action." *Id.* at 669 (citations omitted). Again, that is not remotely accurate. *See Venckus*, 930 N.W.2d at

809 ("The IMTCA 'does not expand any existing cause of action or create any new cause of action against a municipality.'") (quoting IOWA CODE § 670.4(3)).

The flaws in the *Wilson* majority's analysis continued. After concluding the IMTCA created substantive rights and abrogated the public-duty doctrine, the *Wilson* majority concluded imposing an enforceable duty between the municipality and the apartment building tenants would be consistent with and a logical extension of *Symmonds v. Chicago, Milwaukee, St. Paul & Pacific RR.*, 242 N.W.2d 262 (Iowa 1976) and *Harryman v. Hayles*, 257 N.W.2d 631 (Iowa 1977), wherein this Court previously held motorists on a municipality's roadways constitute a special class of individuals to whom the governmental entity owes a special duty of care. *Wilson*, 282 N.W.2d at 671–72. The *Wilson* majority stated as follows with respect to *Symmonds* and *Harryman*:

> *Harryman* and *Symmonds* make it clear a municipality is liable for tortious commissions and omissions when authority and control over a particular activity has been delegated to it by statute and breach of that duty involves *a foreseeable risk of injury* to an identifiable class to which the victim belongs. The duty in those cases ran "to all those rightfully using the roads," *Harryman*, 257 N.W.2d at 638, and "to the traveling public," *Symmonds*, 242 N.W.2d at 265. A statutory duty designed to protect something larger than an identifiable class of persons is the exception, not the rule….
>
> The[] ordinances and statutes [at issue] impose on the city and its employees the authority and duty to require correction of these defects. *Symmonds*. The purpose of this duty cannot be distinguished from those in *Harryman* and *Symmonds*.

Id. (emphasis added); *cf. Humboldt Cty.*, 913 N.W.2d at 265 (recognizing foreseeability is no longer a factor in the no-duty analysis under the public duty doctrine).

Again, the *Wilson* majority erred when it reasoned a municipality owes a special duty of care to each motorist on its roadways. *Harryman* and *Symmonds* have been expressly overruled. *Cf. Humboldt Cty.*, 913 N.W.2d at 261–62 (users of public roads are not a special class); *Estate of McFarlin*, 881 N.W.2d at 61 n. 6 ("We no longer recognize county-wide special classes of motorists after *Kolbe*."). Any duty to maintain safe roadways is "a duty owed to *all* users of this public road. It would thus be a public duty." *Humboldt Cty.*, 913 N.W.2d at 261 (emphasis in original). The *Wilson* majority stating the municipality's duty owed to the apartment building tenants "cannot be distinguished from those in *Harryman* and *Symmonds*" leads to one conclusion—the City Defendants did not owe a special duty of care to the Plaintiffs by virtue of having inspected the Davenport Hotel pursuant to its local ordinances. *See Humboldt Cty.*, 913 N.W.2d at 261–62; *Estate of McFarlin*, 881 N.W.2d at 61 n. 6.

The special concurrence in *Wilson*, for its part, accurately predicted the future landscape of Iowa law. *See Wilson*, 282 N.W.2d at 674–677 (McCormick, LeGrand, and McGiverin, special concurrence). The special concurrence in *Wilson* agreed with the result from the majority's opinion only because the applicable statutes and

ordinances were not within the appellate record. *Id.* at 674. Therefore, resolving all doubts in favor of the plaintiffs and taking their pleadings as true, the special concurrence in *Wilson* agreed the municipality's motion to dismiss should not have been sustained. *Id.*

Here, unlike *Wilson*, the applicable Davenport Code provisions and Iowa statutes are cited in Plaintiffs' Master Consolidated Petition. It is clear from the plain language of those provisions and statutes that Plaintiffs do not have a private cause of action against the City Defendants. Moreover, the special concurrence in *Wilson* accurately noted important distinctions in Iowa law that the majority overlooked. Under the current landscape of Iowa law, Plaintiffs' tort claims against the City Defendants fail as a matter of law and must be dismissed with prejudice.

The Justices who wrote separately in *Wilson* unequivocally stated at the beginning of their opinion: "municipal inspection statutes and ordinances [do not] invariably create a duty to those who live in the premises inspected." *Id.* From this accurate statement of law, the special concurrence in *Wilson* proceeded to accurately predict additional important points under Iowa law: (the double-spaced bullet points below set forth relevant excerpts from the special concurrence in *Wilson*; the single-spaced bullet points that follow cite relevant Iowa Supreme precedent affirming each legal conclusion the special concurrence in *Wilson* reached):

- "I do not believe anything in our cases or in [the IMTCA] either requires or justifies a carte blanche holding that municipal inspection statutes and ordinances create a duty to individuals. Rather,…such statutes and ordinances ordinarily reflect an effort by government to require owners of private property to meet their responsibilities." *Wilson*, 282 N.W.2d at 674 (citation omitted).
    - *Kolbe*, 625 N.W.2d at 727–28 (a common law duty of care does not arise simply because a municipal employee is alleged to have performed or failed to perform a government function mandated by statute or regulation in a negligent manner); *see also Keller*, 475 N.W.2d at 180 (holding applicable statutes and regulations did not impose upon Bureau of Labor employees a duty to instruct, warn, or supervise employees during an on-site inspection who they reasonably believed were being subjected to workplace hazards. Holding state inspectors only have an obligation to "assist the employer in developing a plan to correct the hazard, affording reasonable period of time to accomplish that result." Stating further, it was "not the obligation of these [state] employees to act directly to alleviate work site hazards contemporaneously with the discovery of the same.").
- "[A]n actionable tort depends upon the existence of a duty running from the alleged wrongdoer to his victim. [The IMTCA] did not create municipal liability upon claims where a duty runs to the public at large but not to any individual plaintiff." *Wilson*, 282 N.W.2d at 675.
    - *Venckus*, 930 N.W.2d at 809 ("The IMTCA 'does not expand any existing cause of action or create any new cause of action against a municipality.'") (quoting IOWA CODE § 670.4(3) and *Raas*, 729 N.W.2d at 449 (the public-duty doctrine, which is "alive and well in Iowa.")).

- "Nothing in [the IMTCA] purports to make every breach of statutory duty by a municipal officer, employee or agent a tort. The definition of 'tort' in [the IMTCA] contains nothing unusual. It does not say all breaches of statutory duty are actionable torts….It is illogical to say that because a tort action may be based upon breaches of statutory duty all breaches of statutory duty are actionable torts." *Wilson*, 282 N.W.2d at 676.
    - The violation of a statutory duty, without more, "does not give rise to a private cause of action." *Meinders v. Duncan Cmty. Sch. Dist.*, 645 N.W.2d 632, 635 (Iowa 2002).
- "[T]he liability of the municipality for the torts of its officers, employees and agents during the course of their employment provided for in [the IMTCA] presupposes the commission of an actionable tort. It does not expand conduct which is deemed tortious….The 1974 amendment to [the IMTCA (which expanded the definition of 'tort' in the statute)] did not create duties which did not previously exist. Instead…the amendment purports to expand protection afforded municipal officers and employees, not to create municipal liability for breach of statutory inspection duties." *Wilson*, 282 N.W.2d at 676.
    - *Venckus*, 930 N.W.2d at 809–10 ("The substance of any legal claim asserted under the IMTCA must arise from some source—common law, statute, or constitution—independent of the IMTCA."); *Baldwin v. City of Estherville*, 929 N.W.2d 691, 697 (Iowa 2019) ("In 1974, the legislature amended section 613A.1. 1974 Iowa Acts ch. 1263, §§ 1–2" and in doing so "expanded the definition of *tort* to include violations of constitutional provisions" thereby expanding the protection afforded to municipalities under the IMTCA).

- "I would hold that building codes and inspection statutes and ordinances do not create a duty to individuals unless they do so in express terms or by clear implication." *Wilson*, 282 N.W.2d at 677.
    - *Shumate v. Drake Univ.*, 846 N.W.2d 503, 507 (Iowa 2014) ("Not all statutory violations give rise to a private cause of action. A private statutory cause of action exists only when the statute, explicitly or implicitly, provides for such a cause of action." (citations omitted)).

Altogether, the special concurrence in *Wilson* accurately predicted the development of Iowa law with respect to the public-duty doctrine and how tort duties intersect with the IMTCA. Moreover, the holding in *Wilson* was limited to finding the municipal defendants owed the tenants a *statutory* duty of care. Here, Plaintiffs concede the statues and ordinances cited in their Master Consolidated Petition fail to give rise to a private cause of action. Accordingly, the District Court erred relying upon *Wilson* to determine the City Defendants owed Plaintiffs an actionable duty of care under the facts and circumstances of this case.

b. This case is one of classic alleged nonfeasance, and the District Court erred holding otherwise, particularly under Iowa Code § 670.4A's heightened pleading standards.

Next, the District Court impliedly found the public duty doctrine does not apply because the City Defendants engaged in misfeasance. However, the allegations in the Master Consolidated Petition reveal the claims against the City Defendants revolve around allegations of nonfeasance.

The City Defendants acknowledge Plaintiffs allege, *inter alia*, that the City and Pradhan were negligent for having "interven[ed] in the construction-related activities and demanding that brick be used for aesthetic reasons notwithstanding the structural engineer's determination otherwise," which "halt[ed] construction-related activities at a crucial time when the structural integrity of the building was in peril." (*See* D0021, Count 12 (Against the City) ¶¶ 245(g)–(h); Count 13 (Against the City) ¶¶ 284(f)–(g); Count 20 (Against Pradhan) ¶¶ 390 (e)–(f)). Aside from these two interrelated specifications of negligence, however, all other specifications of negligence against the City Defendants relate to their alleged failure to act and/or their failure to intervene prior to the partial collapse of The Davenport Hotel. (*Id.* Count 12 ¶¶ 245(a)–(y); Count 13 ¶¶ 284(a)–(l); Count 14 ¶¶ 296(a)–(c); Count 15 ¶¶ 309(a)–(c); Count 16 ¶¶ 323(a)–(c); Count 20 ¶¶ 390 (a)–(k); Count 22 ¶¶ 462(a)–(g)). The specifications of negligence in the Master Consolidated Petition reveal Plaintiffs rely upon allegations of nonfeasance to support their negligence claims against the City Defendants.

Notwithstanding, the District Court determined Pradhan owed "a common law duty to exercise reasonable care" when she momentarily "stop[ped] construction due to aesthetic concerns in the face of a dangerously unstable west wall…." (D0284 at 17). The District Court also determined the City Defendants owed Plaintiffs a "common law duty to conduct their inspections using a reasonable degree of care."

(*Id*.). In reaching these conclusions, the District Court failed to properly consider the heightened pleading standards of Iowa Code § 670.4A and applicable case law analyzing the distinction between misfeasance and nonfeasance. *See Nahas*, 991 N.W.2d at 781–82 (recognizing the "plausibility" pleading requirement under Iowa Code § 670.4A requires a plaintiff to plead facts that demonstrate "more than a sheer possibility that a defendant acted unlawfully." (cleaned up)); *Fulps*, 956 N.W.2d at 473–74 (reaffirming a municipality is not liable for failing to prevent a risk of harm, when the risk of harm is not directly caused or created by the municipality, even if the municipality had a statutory duty to intervene and prevent the risk of harm from manifesting).

1. Plaintiffs' allegations relating to the temporary suspension of repair work on The Davenport Hotel's west exterior wall to ensure the wall was repaired with brick masonry for aesthetic purposes fails to satisfy the "plausibility" pleading requirement under Iowa Code § 670.4A.

Plaintiffs allege "Bi-State Masonry began its work on or about February 22, 2023." (D0021 at ¶ 207). On March 1, 2023, Pradhan performed a field inspection, and discovered Bi-State Masonry was using Concrete Masonry Unit ("CMU") to repair the west exterior wall, which was not allowed because The Davenport Hotel was a "historic building located in Downtown Davenport." (*Id.* ¶ 224). According to the City's official notice and order, after this on-site inspection "[e]mergency repair

work was administratively approved with the understanding that the exterior would be finished with brick to match existing." (*Id.*).

Approximately one week later, Andrew Wold fired Bi-State Masonry because he would not agree to a $10,000.00 change order request for the installation of brick masonry to match the historic fabric of The Davenport Hotel. (*Id.* ¶ 67). Notwithstanding the termination of Bi-State Masonry, Plaintiffs allege repair work on the west exterior wall of The Davenport Hotel resumed and was performed in the months of March and April 2023. (*Id.* ¶ 69). Select Structural performed another site visit at The Davenport Hotel on May 23, 2023 and issued a corresponding report one day later. (*Id.* ¶ 70). Select Structural's May 24, 2023 report mentions nothing about the temporary pause in repair work Pradhan previously ordered almost three months prior to ensure the exterior wall was repaired with brick masonry. (*Id.*). Nor is there any mention in Select Structural's May 24, 2023 report that CMU must be used to repair the west exterior wall on The Davenport Hotel, as opposed to brick masonry. (*Id.*).

While Select Structural's May 24, 2023 report mentions nothing with respect to the temporary pause in repair work Pradhan ordered almost three months prior, Plaintiffs allege the City Defendants could have, and should have, immediately vacated The Davenport Hotel based on the findings in Select Structural's May 24, 2023 report. (*Id.* ¶ 238). Plaintiffs also allege the City Defendants could have, and

should have, vacated The Davenport Hotel because of the onsite inspection Pradhan and Oswald performed at the Davenport Hotel on May 25, 2023. (*Id.* ¶¶ 238–39).

Nowhere in the Master Consolidated Petition do Plaintiffs explain how the City and Pradhan momentarily stopping repair work in the beginning of March 2023, for some unknown period of time, caused the partial collapse of The Davenport Hotel approximately 3 months later. Nor do Plaintiffs explain how the temporary pause in repair work to ensure brick masonry was used to repair the west exterior wall of The Davenport Hotel resulted in harm to Plaintiffs.

Plaintiffs' allegations that the City momentarily halted repair work on the west exterior wall to The Davenport Hotel approximately three months prior to the partial collapse relate exclusively to the City Defendants' alleged supervision and control over The Davenport Hotel. (*See* D0210 at 27). Such allegations, standing alone, do not support a negligence claim. The momentary pause in repair work the City ordered in the beginning of March 2023 would be of absolutely no consequence if the City Defendants had vacated The Davenport Hotel in May 2023, which Plaintiffs allege the City Defendants could and should have done on numerous specific dates leading up to the partial collapse of The Davenport Hotel on May 28, 2024. (*Id.* at 6–9).

Based upon Plaintiffs' allegations in the Master Consolidated Petition, including the subsequent intervening events the Plaintiffs allege should have alerted

the City Defendants to vacate The Davenport Hotel, Plaintiffs cannot satisfy the "plausibility" standard with respect to their specifications alleging the City and Pradhan were negligent for having momentarily halted repair work on the west exterior wall of The Davenport Hotel in the beginning of March 2023. The City having ordered a temporary pause in repair work to ensure brick masonry was used approximately three months before The Davenport Hotel's partial collapse is, at most, a "mere possibility of misconduct." *Nahas*, 991 N.W.2d at 781–82 (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). "[P]lausibility demands 'more than a sheer possibility that a defendant has acted unlawfully.'" *Id.* (quoting *Iqbal*, 556 U.S. at 679)). Accordingly, Plaintiffs' specifications of negligence against the City and Pradhan relating to the momentary pause in repair work in early March 2023—the only potential example of misfeasance Plaintiffs have identified to support their negligence claims against the City Defendants—fail to satisfy the "plausibility" requirement of Iowa Code § 670.4A.[2] Accordingly, the District Court erred relying upon those specifications of negligence to determine the City Defendants are potentially subject to liability under the facts and circumstances of this case.

[2] If the momentary pause in repair work in the beginning of March 2023 actually "spoke for itself" in terms of negligence, Plaintiffs would have included City and Pradhan in their res ipsa loquitur claim under Count 25—but they did not. (D0021 at 126). Instead, Plaintiffs' claims against the City Defendants are tethered to their allegations that the City Defendants breached their duties to warn the tenants of The Davenport Hotel and/or vacate it prior to its partial collapse, which are set forth under Counts 12–16 and Counts 20–23 in the Master Consolidated Petition.

2. The City Defendants do not automatically owe Plaintiffs a common law duty of care by virtue of having inspected The Davenport Hotel prior to its partial collapse.

Next, the District Court determined the City Defendants owed a common law duty of care because they inspected The Davenport Hotel leading up to its partial collapse. Plaintiffs, however, do not, and cannot, explain how the mere presence of City officials inside The Davenport Hotel caused or increased the possibility of the partial collapse of the building. *Estate of Farrell by Farrell*, 974 N.W.2d at 138 (recognizing governmental misfeasance occurs "when the government defendants' affirmative negligence…created a dangerous condition on government-owned property that caused the injury.").

Moreover, the mere knowledge of a potential hazard created by an independent force or third-party does not constitute misfeasance. This holds particularly true where, as here, the thrust of the plaintiff's negligence claim is that the governmental entity's knowledge of a potential hazard triggered a governmental duty to enforce a particular statute or ordinance to protect the plaintiff, which the plaintiff alleges the governmental entity failed to do. *See Donahue v. Washington Cty.*, 641 N.W.2d 848, 851–52 (Iowa Ct. App. 2002) (applying public duty doctrine where plaintiffs' child was bitten by a neighbor's dog who had a history of two previous attacks, which were investigated by a Washington County deputy sheriff

who failed to file reports with the county sanitarian or destroy the dog at the conclusion of the prior two investigations as required by local ordinance and statute).

The City Defendants did not have a special relationship with the Plaintiffs or owe them a special duty of care simply because the City Defendants conducted inspections at The Davenport Hotel, allegedly knew of the hazards at issue, and possessed regulatory authority over residential buildings within the City's jurisdictional limit. The District Court erred holding otherwise.

In *Estate of McFarlin*, this Court held the public-duty doctrine barred a claim against the State of Iowa relating to the placement of and lack of warnings relating to a dredge pipe in a recreational lake owned and managed by the State. 881 N.W.2d at 58. This Court reached this conclusion even though the State owned and managed the lake where the boating accident occurred, and the State was authorized to regulate, manage, and control where the dredging took place in its lake. *Id.* at 53. Specifically, the State had regulatory oversight of the dredging, the State allowed the dredging to occur on the lake, and the State authorized a Chapter 28E entity to dredge the lake. *Id.* at 52–53. As part of the dredging permitting process, the State had to ascertain whether the State's interests were being protected. *Id.* at 53. The State did not control the day-to-day dredging activities, but it had regulatory oversight that allowed it to generally manage and oversee the dredging activities on its lake. *Id.* at 64.

As a part of that oversight authority, the State had placed buoys on the lake, although not the ones specifically warning about the dredge pipe. *Id.* at 54. The State also had the authority to order the removal of the dredge. *Humboldt Cty.*, 913 N.W.2d at 265–66 (citing *Estate of McFarlin*, 881 N.W.2d at 61–62). Although the State had received reports of boaters striking the submerged dredge pipe at issue resulting in significant property damage, the State made "[n]o changes…to better identify the dredge pipe's location." *Id.* Notwithstanding this control over the dredging and the State's knowledge that the dredging had resulted in prior harm to boaters, this Court held the public-duty doctrine applied and barred the plaintiffs' wrongful-death claims. *Estate of McFarlin*, 881 N.W.2d at 62–64.

Estate of McFarlin establishes a governmental entity's mere knowledge of the existence of a hazard, including the hazard's potential for harm, does not create a duty on the part of a governmental entity to protect an individual from the hazard or a third party's conduct in having created the hazard, even if the governmental entity possesses authority to address and/or remove the hazard. *Id.* Under *Estate of McFarlin*, even accepting Plaintiffs' allegations as true that the City Defendants exercised supervision and control over The Davenport Hotel, the public-duty doctrine still bars the imposition of a common law duty of care in this case. Similarly, the fact the City Defendants inspected ongoing repair work at The Davenport Hotel at various times, permitted parties to perform repair work to the building, and had

authority to vacate it fails to give rise to an enforceable duty of care in this case. *See id.*

c. The District Court incorrectly determined the City Defendants owed a duty of care under the IMTCA and the various ordinances and statutes cited in Plaintiffs' Master Consolidated Petition.

The District Court erred determining the City Defendants owe Plaintiffs a duty of care under Iowa Code § 670.4(1)(j). Iowa Code § 670.4 does not create any duties, it only provides immunities if a duty exists in the first place. *Venckus*, 930 N.W.2d at 809–10.

The ordinances and statutes cited in Plaintiffs' Master Consolidated Petition do not change this outcome. For starters, Plaintiffs concede those legal authorities do not give rise to an enforceable statutory duty of care. Moreover, in *Estate of McFarlin* the State could regulate, manage, and control where the dredging took place in its lake under a detailed regulatory scheme. Notwithstanding, this Court held there was no special relationship between the State and boaters giving rise to a common law duty of care. *See Estate of McFarlin*, 881 N.W.2d at 59 (finding no special relationship because the "detailed regulatory regime to protect the use of public lands and waters" under "chapters 461A and 462A" was enacted "for the benefit of the general public."); *id.* at 61–62 (analogizing the DNR's role at Storm Lake to the Department of Transportation's role in *Kolbe*, stating: "The district court correctly ruled that any duty of the State to enforce statutory obligations of the

dredge operators 'was owed to the general public, just as the duty to enforce the rules of the road against dangerous drivers are owed to the public in general.'").

Here, just like the regulatory scheme in *Estate of McFarlin*, the various ordinances and statutes cited in Plaintiffs' Master Consolidated Petition were enacted for the benefit of the public at large, as opposed to Plaintiffs personally. Plaintiffs implicitly concede this point. (*See* D0210 at 3 ("If the City had a practice of never showing up or inspecting properties within the City limits, perhaps the City Defendants would have an argument that its nonfeasance to the public at large would warrant application of the public-duty doctrine.")). As Plaintiffs acknowledge, the statutes and ordinances cited in their Master Consolidated Petition were enacted to benefit the "public at large," not just themselves.

F. Even if the City Defendants owed a duty to Plaintiffs, it was not sufficiently clear so that every reasonable employee would have understood that they owed a duty of care to Plaintiffs at the time of the alleged violation.

The second prong of the qualified immunity analysis requires Plaintiffs to prove the law they accuse the City Defendants of violating was clearly established at the time of the challenged conduct. IOWA CODE § 670.4A(1)(a); *al-Kidd*, 563 U.S. at 735; *Minor*, 819 N.W.2d at 400. A right is clearly established if, "at the time of the challenged conduct, the contours of a right are sufficiently clear that every reasonable official would have understood that what he is doing violates that right." *al-Kidd*, 563 U.S. at 741 (cleaned up). A plaintiff must identify either "controlling

authority" or "a robust 'consensus of cases of persuasive authority'" that "placed the statutory or constitutional question beyond debate" at the time of the alleged violation. *Id.* at 741–42 (quoting *Layne*, 526 U.S. at 617). In recent years, the United States Supreme Court has reversed a denial of qualified immunity on several occasions because "qualified immunity is important to society as a whole, and because as an immunity from suit, qualified immunity is effectively lost if a case is erroneously permitted to go to trial." *White v. Pauly*, 580 U.S. 73, 79 (2017) (cleaned up).

When framing the constitutional right at issue, the Supreme Court has "repeatedly told courts . . . not to define clearly established law at a high level of generality." *al-Kidd*, 563 U.S. at 742. Rather, a court must frame the right at issue with "a high 'degree of specificity,'" *Dist. of Columbia v. Wesby*, 583 U.S. 48, 63 (2018) (citation omitted), accounting for both the "specific facts at issue," *Kisela v. Hughes*, 584 U.S. 100, 104 (2018), and the "specific context" of the situation. *Spady v. Bethlehem Area Sch. Dist.*, 800 F.3d 633, 638 (3rd Cir. 2015). Framing the issue with the required high degree of specificity here requires Plaintiffs to prove a city employee's alleged failure to determine a privately-owned building was in imminent danger of collapse and failure to order evacuation of the building as a result thereof was a violation of clearly established law.

The District Court failed to consider the facts and circumstances of this case when analyzing the second prong of qualified immunity. The District Court tersely concluded that it is "clearly established" the City Defendants may be exposed to liability in this case by citing: (i) *Wilson v. Nepstad*; (ii) general ordinances and statutes relating to the City's policing authority; and (iii) Iowa Code § 670.4(1)(j). The District Court's reasoning is the type of generalized analysis courts condemn when analyzing qualified immunity. "[C]learly established law should not be defined at a high level of generality. …[I]t must be particularized to the facts of the case." *White*, 580 U.S. at 79 (quotations omitted).

First, the District Court failed to compare the specific facts of this case with the facts of *Wilson*. *Wilson* does not categorically expose city officials who inspect buildings under local ordinances to liability. Instead, *Wilson* held dismissal was improper because the appellate record "disclose[d] nothing which indicates the statutes and ordinances do not create actionable duties." 282 N.W.2d at 673. *Wilson* does not apply to this case because the parties agree the City Defendants do not owe Plaintiffs a statutory duty of care under the various ordinances and statues cited in the Master Consolidated Petition. *Wilson* did not resolve or even address whether the municipal defendants in that case owed the plaintiffs a common law duty of care. Accordingly, *Wilson* is not firmly established authority demonstrating the City Defendants owed Plaintiffs a duty of care.

The District Court's superficial reference to ordinances and statutes relating to the City's general policing powers fares no better. Plaintiffs concede the ordinances and statutes cited in their Master Consolidated Petition do not give rise to a private cause of action. Therefore, those ordinances and statutes are not "clearly established law" that expose the City Defendants to potential liability under the facts and circumstances of this case.

The District Court also mistakenly relied on Iowa Code § 670.4(1)(j) when analyzing the second prong of qualified immunity. The City Defendants' Motion to Dismiss repeatedly reiterated it was not related to the immunity found in Iowa Code § 670.4(1)(j) or Plaintiffs' allegations relating to supervision and control and alleged criminal offenses. Iowa Code § 670.4(1)(j) does not create a duty of care. It therefore does not constitute "clearly established" law under which the City Defendants might be held liable. *See* IOWA CODE § 670.4A(1)(a). The immunity found in Iowa Code § 670.4(1)(j), and exceptions thereto, only come into play if the City Defendants owed a duty of care to Plaintiffs in the first place.

The sparse cases from Iowa Appellate Courts that have considered whether a municipality and its officials are liable for an alleged negligent inspection of a building under a local ordinance have found such claims fail as a matter of law. *See generally Madden v. City of Eldridge*, 661 N.W.2d 134 (Iowa 2003) *Williams v. Bayers*, 452 N.W.2d 624 (Iowa Ct. App. 1990); *First Sierra Equities, L.L.C. v.*

Signature Partners-Des Moines, Ltd., No. 04-1068, 2006 WL 927749 (Iowa Ct. App. April 12, 2006).

Iowa is not an outlier on this issue. Indeed, legal authorities abound have concluded a municipality and its employees are not liable for having allegedly performed a building inspection under local ordinance or statute in a negligent manner or otherwise allegedly violated local building ordinances or statutes: *Fodness v. City of Sioux Falls*, 947 N.W.2d 619, 630 (S.D. 2020) (issuance of a building permit does not create a duty to a private individual injured in a building collapse); *Pierce v. Yakima County*, 251 P.3d 270, 273–74 (Wash. Ct. App. 2011) (public duty doctrine precluded negligence claim based on alleged negligent inspection conducted by building inspector); *Jones v. Wilcox*, 476 N.W.2d 473, 476 (Mich. Ct. App. 1991) (city building inspectors had no special relationship with occupants of apartment building who died in fire, inspection of buildings for code violations is duty owed to public at large and not to individuals); *Gooch v. Bethel A.M.E. Church*, 792 P.2d 993, 1004 (Kan. 1990) (city engineer who inspected church owed no duty to warn neighbors who were killed when church collapsed onto their residence); *Benson v. Kutsch*, 380 S.E.2d 36, 42–43 (W.Va. 1989) (in action brought by occupants of apartments who were injured in a fire, held that the city could not be held liable based on failure to inspect premises to determine if there were violations of fire or building codes); *Trianon Park Condominium Ass'n, Inc. v. City*

of Hialeah, 468 So.2d 912, 915 (Fla. 1985) (there is no common law duty to individual citizens for the enforcement of police power functions and no statutory duty for the benefit of individual citizens is created by a city's building code); *Hoffert v. Owatonna Inn Towne Motel, Inc.*, 199 N.W.2d 158, 223 (Minn. 1972) (individuals injured in a building fire could not recover from the city on a negligence theory because building code did not create a specific duty towards plaintiffs but rather designed to protect the public).

The above-cited cases make abundantly clear that the City Defendants did not violate a "clearly established" right owed to the Plaintiffs on account of their alleged failure to enforce criminal and regulatory laws that were enacted to protect the public at large. Plaintiffs have failed to cite a single case that would lead every municipality or a municipal employee to believe the specific acts of the City Defendants, under the facts and circumstances of this particular case, could give rise to civil liability for the causes of actions Plaintiffs have asserted against the City Defendants.

CONCLUSION

For all of these reasons, the District Court's decision denying the City Defendants' Motion to Dismiss should be reversed and the City Defendants should be granted qualified immunity on all of Plaintiffs' claims.

ORAL ARGUMENT STATEMENT

The City Defendants respectfully request oral argument in this matter.

Dated: August 30, 2024

LANE & WATERMAN LLP

By */s/ Jason J. O'Rourke*

Jason J. O'Rourke, AT0005963
Alexander C. Barnett, AT0012641
Jenny L. Juehring, AT0014164
220 North Main Street, Suite 600
Davenport, IA 52801
Telephone: 563-324-3246
Facsimile: 563-324-1616
Email: jorourke@l-wlaw.com
abarnett@l-wlaw.com
jjuehring@l-wlaw.com

ATTORNEYS FOR APPELLANTS THE CITY OF DAVENPORT, TRISHNA PRADHAN, AND RICHARD OSWALD

CERTIFICATE OF COMPLIANCE WITH TYPEFACE REQUIREMENTS AND TYPE-VOLUME LIMITATION

This brief complies with the typeface requirements and type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) and 6.903(1)(i)(1) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word in Times New Roman in 14 point font and contains approximately 12,434 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(i)(1).

By: */s/ Jason J. O'Rourke*

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on August 30, 2024, I electronically filed the foregoing with the Supreme Court Clerk of Court using the Iowa Courts E-Filing system which will provide notification of such filing to all counsel of record.

By: */s/ Jason J. O'Rourke*