IN THE SUPREME COURT OF IOWA

No. 24-0727

IN RE: DAVENPORT BUILDING COLLAPSE

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

AMENDED REPLY 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

Other Authorities

INTRODUCTION

Plaintiffs' brief brings to mind the adage "desperate times call for desperate measures." Plaintiffs try to avoid dismissal by weaving a misleading and false statement of "facts," ignoring the plain language of Iowa Code Section 670.4A, and relying on inapplicable case law. Despite their Herculean efforts, Plaintiffs cannot escape the conclusion the City Defendants did not owe them a duty of care, are entitled to qualified immunity, and dismissal is required under Iowa Code section 670.4A.

ARGUMENT

This appeal presents two inextricably intertwined legal issues; namely, whether the City Defendants: (1) owed a duty to Plaintiffs; and (2) are entitled to qualified immunity under Iowa Code section 670.4A. These are discrete questions of law ripe for adjudication.

Plaintiffs suggest "this appeal involves only the question whether section 670.4A applies to common-law negligence claims and, if so, whether the petition alleges facts that show a 'clearly established' act of negligence." (Pl. Br. at 24). Plaintiffs put the cart before the horse. An actionable negligence claim requires a violation of a duty care. *See DeSousa v. Iowa Realty Co.*, 975 N.W.2d 416, 420 (Iowa 2022). Interlocutory appellate jurisdiction extends to each element a plaintiff "must plead and prove in order to win" if the element of the plaintiff's claim is "directly

implicated by the defense of qualified immunity…." *Hartman v. Moore*, 547 U.S. 250, 257 n.5 (2006) (citations omitted). While the District Court correctly held section 670.4A applies to Plaintiffs' claims, it erred in holding the City Defendants were not entitled to qualified immunity.

I. Iowa Code Section 670.4A applies to common law negligence claims.

A. Section 670.4A is plain and unambiguous.

Plaintiffs concede section 670.4A "makes clear its protections are available to all public employees who are sued under" Chapter 670. (Pl. Br. at 25). Despite this concession, Plaintiffs argue, without citation to authority, that Section 670.4A applies only to constitutional tort claims. In making this argument, Plaintiffs fail to discuss the most important thing: the plain language of the statute.

Iowa's rules of construction were eloquently articulated by the late Justice King Thompson: "Ours not to reason why, ours but to read and apply. It is our duty to accept the law as the . . . body enacts it." *Holland v. State,* 115 N.W.2d 161, 164 (Iowa 1962); *see also Estate of Butterfield by Butterfield v. Chautauqua Guest Home, Inc.*, 987 N.W.2d 834, 838 (Iowa 2023) (accord). When interpreting a statute, Iowa courts give plain meaning to words, phrases, and punctuation, and presume no part of a statute is superfluous. *Thompson v. Kaczinski*, 774 N.W.2d 829, 833 (Iowa 2009). Iowa courts look at what the legislature said, not what it might or should have said. *Hawkins v. Grinnell Reg'l Med. Ctr.*, 929 N.W.2d 261, 269 (Iowa 2019)

("Legislative intent is expressed by what the legislature has said, not what it could or might have said. Intent may be expressed by the omission, as well as the inclusion, of statutory terms." (cleaned up)). "Under the guise of construction, an interpreting body may not extend, enlarge, or otherwise change the meaning of a statute." *Homan v. Branstad*, 887 N.W.2d 153, 166 (Iowa 2016).

Plaintiffs do not argue section 670.4A is ambiguous, nor could they given the plain language of the statute. Absent ambiguity, the Court does not consider legislative history. *Chautauqua Guest Home*, 987 N.W.2d at 839–40; *Northern States Power Co. v. United States*, 73 F.3d 764, 766 (8th Cir. 1996), *cert. denied*, 519 U.S. 862 (1996). Instead, the Court must follow the rules of statutory construction cited above and in Iowa Code Chapter 4. Thus, the starting point in any case involving the interpretation of a statute is the statute itself.

Section 670.4A states, in pertinent part:

> 1. Notwithstanding any other provision of law, *an employee or officer subject to a claim brought under this chapter* shall not be liable for monetary damages if any of the following apply:
>
> a. The right, privilege, or immunity secured by law was not clearly established at the time of the alleged deprivation, or at the time of the alleged deprivation the state of the law was not sufficiently clear that every reasonable employee would have understood that the conduct alleged constituted a violation of law.
>
> b. A court of competent jurisdiction has issued a final decision on the merits holding, without reversal, vacatur, or preemption,

> that the specific conduct alleged to be unlawful was consistent with the law.

IOWA CODE § 670.4A (emphasis added). Thus, section 670.4A applies to "a claim brought under" Chapter 670, which is the "exclusive remedy for torts against municipalities and their employees." *Venckus v. City of Iowa City*, 930 N.W.2d 792, 808 (Iowa 2019); *see also* IOWA CODE § 670.4(2) ("The remedy against the municipality provided by section 670.2 shall be exclusive of any other civil action or proceeding by reason of the same subject matter against the officer, employee or agent whose act or omission gave rise to the claim, or the officer's, employee's, or agent's estate."). Because the only claim available against a municipality or its employees is under Chapter 670, the phrase "*an employee or officer subject to a claim brought under this chapter*" can only mean section 670.4A applies to *all* claims brought under Chapter 670.

This conclusion is supported by the definitions provided in Chapter 670. The Iowa Legislature broadly defines "tort" for purposes of Chapter 670:

> 'Tort' means *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 Section 670.1(4) (emphasis added). Iowa courts are bound by legislative definitions. *Jorgensen v. Smith*, 2 N.W.2d 868, 873 (Iowa 2024). Plaintiffs assert

negligence and nuisance claims, both of which fall squarely under the definition of "tort" in section 670.1(4), as do the injuries they allege. (*See, e.g.*, Pl. Br. at 7 ("people were killed, one woman was catastrophically injured . . . , many others suffered from emotional distress . . . and forever lost their personal belongings.")). Finally, the Legislature's use of the phrase "every civil wrong" is dispositive. "Every" is construed very broadly to include even claims that are not specifically identified in section 670.1(4). *See Sutton v. Council Bluffs Water Works*, 990 N.W.2d 795, 797–98 (Iowa 2023) (interpreting section 670.1(4) and holding "[t]he adjective *every* that precedes 'every civil wrong' also suggests the broadest conception of the term—all species of civil wrongs that aren't exempted elsewhere in the statute are included."). Because the statutory language in section 670.4A clearly and unambiguously applies to all claims, the Court's analysis ends there.

Plaintiffs wholly fail to analyze the plain language of section 670.4A, instead arguing public policy considerations preclude application of section 670.4A to negligence claims. Public policy considerations, however, "are not relevant when [the Court] interpret[s] unambiguous statutes." *Wallace v. Wildensee*, 990 N.W.2d 637, 646 (Iowa 2023). As the Court explained in *Wallace*, "we cannot refuse to follow Iowa statutes for the sake of public policy because we sit on a court of law, not a court of public policy." *Id*. Instead, "[i]f Iowa law in its current form offends a

particular public policy, it is the legislature's prerogative and duty to correct the offense." *Id*.

Iowa courts must interpret statutes as written, not inquire what the Legislature meant, replace the Legislature's language with unenacted legislative intent or rewrite the statute, even if doing so "would mitigate the hardship of a consequence or if [the Court] question[s] the statute's wisdom." *Doe v. State*, 943 N.W.2d 608, 610 (Iowa 2020); *Reg'l Util. Serv. Sys. v. City of Mount Union*, 874 N.W.2d 120, 124 (Iowa 2016). Here, the Legislature could have chosen to limit section 670.4A's application to constitutional tort claims, but it did not. The statute, as written, undeniably applies to all claims brought under Chapter 670, including Plaintiffs' claims.

B. Plaintiffs allege the City Defendants deprived them of "rights and privileges" secured by law.

"42 U.S.C. section 1983 gives individuals a cause of action for damages and injunctive relief for deprivations of federally protected rights caused by persons acting under color of state law." *Wilson v. City of Des Moines*, 386 N.W.2d 76, 79 (Iowa 1986) (citing *Carey v. Piphus*, 435 U.S. 247, 253 (1978)). Section 1983 provides redress for three different categories of federal due process protections under the United States Constitution:

> (1) Specific protections defined in the Bill of Rights, such as protection from unreasonable searches and seizures under the fourth amendment; (2) substantive due process, which prohibits certain arbitrary government actions regardless of the fairness of the procedures; and (3)

> procedural due process, sometimes referred to as the guarantee of fair procedure.

Bailey v. Lancaster, 470 N.W.2d 351, 356 (Iowa 1991) (citing *Wilson*, 386 N.W.2d at 80).

Section 1983 does not federalize tort law. *Daniels v. Williams*, 474 U.S. 327, 329–30 (1986). In *Daniels*, the Supreme Court held the "mere lack of due care by a state official" generally does not "'deprive' an individual of life, liberty, or property under the Fourteenth Amendment." *Id.* at 330–31 (partially overruling *Parratt v. Taylor*, 451 U.S. 527 (1981)); *id* at 330 ("But in any given § 1983 suit, the plaintiff must still prove a violation of the underlying constitutional right; and *depending on the right*, merely negligent conduct *may* not be enough to state a claim." (emphasis added)). A section 1983 plaintiff must typically allege more than mere negligence because the Federal Due Process clause has historically been applied to "deliberate decisions of government officials to deprive a person of life, liberty or property." *Id.* at 331. When only simple negligence is involved, there is typically no governmental abuse of power. *See id.* at 332 (noting section 1983 "serves to prevent governmental power from being used for purposes of oppression." (cleaned up)).

That is not to say individuals lack a "'liberty' interest in freedom from bodily injury" under the United States Constitution. *Id.* at 329 (citing *Ingraham v. Wright*, 430 U.S. 651, 673 (1977)). Instead, when a government official negligently causes injury to life, liberty, or property, individuals must generally seek redress under state

law. *Id.* at 333 ("That injuries inflicted by governmental negligence are not addressed by the United States Constitution is not to say that they may not raise significant legal concerns and lead to the creation of protectible legal interests. The enactment of tort claim statutes, for example, reflects the view that injuries caused by such negligence should generally be redressed."). The Fourteenth Amendment to the United States Constitution, however, is not a "font of tort law to be superimposed upon whatever systems *may already be administered by the States*." *Id.* (emphasis added).

As recognized by the *Daniels* Court, Iowa Code Chapter 670 creates "protectible legal interests" when a state actor engages in negligent conduct. *Id.* Plaintiffs are seeking redress for the alleged deprivation of their "rights and privileges" secured under Iowa law. Plaintiffs must concede this point. Plaintiffs do not plead any constitutional claims in this case, however, they specifically argued below the City Defendants' actions "undoubtedly" deprived them of "clearly established rights and privileges" under the Iowa Constitution. (*See* D0210, Plaintiffs' Resistance to the City Defendant's Motion to Dismiss at 26 (2/16/2024) (citing Iowa Const., Art. 1, § 1, § 9)).

Further, Plaintiffs do not allege the City Defendants were merely negligent. Plaintiffs allege the City Defendants acted with deliberate indifference to their rights. (*See* D0021, Master Consolidated Petition at ¶ 61 (12/29/2023) ("These defendants'

collective inaction during this time is inexplicable and shows an utter indifference to or conscious disregard of the health, safety, and well-being of the Davenport tenants.")). Plaintiffs also allege the City Defendants' conduct "shocks the conscious." (*See* D0021 at ¶ 75 ("Shockingly, the City of Davenport and its employees, Pradhan and Oswald, did not even comment on the flimsy, deceitful, and contrived effort to brace the wall."); Pl Br. at 47 ("Yet, in a move that shocks the conscience, [the City Defendants] did not tell the residents—as required by municipal code and common sense—*to vacate the building* (emphasis in original))).

Federal courts recognize a substantive due process violation occurs under the Fourteenth Amendment when "municipal action [is] taken with 'deliberate indifference' as to its known or obvious consequences." *Bd. of Cnty. Comm'rs of Bryan Cnty. Okl. v. Brown*, 520 U.S. 397, 406–07 (1997). Federal courts also recognize a substantive due process violation occurs when an individual is injured by governmental "conduct that shocks the conscience." *Rochin v. California*, 342 U.S. 165, 172 (1952). Plaintiffs' allegations and briefing establish they are claiming the City Defendants deprived them of "rights and privileges" secured by law.

C. The sky is not falling.

Contrary to Plaintiffs' arguments, Iowa will not return to an era of sovereign immunity if the Court applies section 670.4A as written. Section 670.4A does not prohibit a negligence claim against a governmental entity or employee. Consider a

routine negligence case: a municipal employee during a regular day runs a stoplight, crashes into a pedestrian and injures her. A duty was owed and section 670.4A would not bar this claim. The plaintiff had a right not to have a motorist run a red light and injure her, that right is well-established by Iowa law, and she would have a claim. In that case, the linkage of a legal duty already exists, and Iowa courts would "proceed directly to the elements of liability." *Thompson*, 774 N.W.2d at 834.

Similarly, if a municipality owned property and a patron was injured by a hazardous condition created by the municipality, the patron would have a claim. This is exemplified by the Iowa Court of Appeals' recent decision *Blanchard v. City of Des Moines*, No. 23-1953, 2024 WL 4965865 (Iowa Ct. App. Dec. 4, 2024). In *Blanchard*, the plaintiff alleged the city negligently created a hazard by "planting or allowing to grow oversize vegetation in boxes in the median" and "erected a warning sign in the street" preventing drivers from seeing oncoming traffic. *Id.* at *1. The Court of Appeals reversed the district court's dismissal, holding the petition met the heightened pleading requirements of section 670.4A(3) because the plaintiff "directly alleged negligence[,]" and "[i]t is hard to conceive of a more clearly established law than that of a common law negligence claim." *Id.* at *3.

However, when a governmental entity or employee is not directly responsible for the alleged harm, Iowa Code section 670.4A serves as a gatekeeper because there is generally no duty "to protect another person or to control the conduct of a third

party." *Kolbe v. State*, 625 N.W.2d 721, 728 (Iowa 2001) (citations omitted). Whether a duty of care is owed is a question of law governed by precedent. *See, e.g.*, *S.C. by next friend Chafa v. City of Greenfield*, No. 22-0039, 2022 WL 17826913, at **1–3 (Iowa Ct. App. Dec. 21, 2022) (affirming dismissal under the public-duty doctrine where the thrust of the plaintiff's claim was a municipality knew a hazard existed and failed to enforce a statute designed to remove the hazard. Stating: "we recognize the limitations on a granting a motion to dismiss under notice pleading. But a dismissal is a foregone conclusion when the petition fails to state a claim upon which relief can be granted. This is such a case.").

Like the municipality in *Chafa*, the City Defendants are not asking the Court to weigh the parties' evidence or make a factual determination. Instead, the City Defendants seek dismissal because the allegations in Plaintiffs' Petition establish the City Defendants did not owe the Plaintiffs a duty of care. Without a duty of care, Plaintiffs fail to state a claim upon which any relief may be granted.

II. The City Defendants are entitled to qualified immunity under Iowa Code Section 670.4A.

A. Plaintiffs rely upon inapplicable cases to Attempt to overcome qualified immunity.

There are two prongs of the qualified immunity analysis: (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. For Plaintiffs to have had

a "right, privilege, or immunity secured by law" violated by the City Defendants, they must prove 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). If there is no duty, there was no violation of a right or privilege. Accordingly, the threshold question is whether the City Defendants owed a duty of care to Plaintiffs.

Plaintiffs rely on *Wilson v. Nepstad*, 282 N.W.2d 664 (Iowa 1979), *Johnson v. Humboldt County*, 913 N.W.2d 256 (Iowa 2018) and *Breese v. City of Burlington*, 945 N.W.2d 12 (Iowa 2020) to argue against application of the public-duty doctrine. In doing so, Plaintiffs ignore the fact *Wilson* never considered whether the municipality owed a common law duty of care; instead, it determined the statutory duty of care was dispositive. *Wilson*, 282 N.W.2d. at 667. Here, Plaintiffs concede no statutory duty of care exists, which alone makes *Wilson* inapplicable. Plaintiffs' reliance on *Johnson* and *Breese* is also misplaced, as both cases support the City Defendants.

In *Johnson*, plaintiffs were injured when their car left the road and struck a concrete embankment that had been built in the ditch by a private landowner. *Johnson*, 913 N.W.2d at 259. Plaintiffs alleged the County was negligent for not removing the embankment. *Id*. The Supreme Court disagreed, holding the public-duty doctrine barred the plaintiffs' claims.

The *Johnson* Court recognized "[u]nlike immunity, 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." *Id.* at 264. The Court also called into question the viability of *Wilson*. It noted a "majority of the Court signaled a potential shift away from the public-duty doctrine" in *Wilson*. *Id*. It further noted only five members joined the majority, and three specially concurred because the statutes and ordinances were not in the record, even though "statutes and ordinances normally do not establish a legal duty on the part of the municipality." *Id*. Finally, the *Johnson* Court noted *Wilson* was "decided nearly four decades ago" and subsequent decisions "have confirmed that the public-duty doctrine is alive and well in Iowa." *Id* at 265.

Plaintiffs cite *Johnson* to support their argument a duty exists here. (*See* Pl. Br. at 48) ("this Court suggested that a city owes a duty of due care when it 'affirmatively acts and does so negligently.'"). Plaintiffs seemingly rely upon dicta in *Johnson* that states: "This does not mean the same no-duty rule would protect that entity when it affirmatively acts and does so negligently." 913 N.W.2d at 267. Plaintiffs ignore the fact the New York case the *Johnson* Court cited for that proposition involved an earthen headwall in a drainage ditch that was "created by the State" and "constituted a trap or snare." *Id.* Here, there is no allegation the City Defendants created the condition of The Davenport Hotel's west wall. Indeed,

Plaintiffs allege The Davenport Hotel and its owner were responsible for the condition of the west wall. (D0021 at ¶ 53 (alleging the owners "consciously chose to prioritize corporate profits over the safety of the tenants by refusing to spend the money necessary to repair The Davenport and maintain it in a safe condition"); *id.* at ¶ 68 (*accord*)). With respect to the City Defendants, Plaintiffs focus on their alleged failures to act, which is exactly what *Johnson* says the public-duty doctrine prohibits. 913 N.W.2d at 266.

Plaintiffs' reliance on *Breese* is equally misplaced. In *Breese*, the plaintiff was injured while riding her bike across a sewer box connected to a bike path. *Breese*, 945 N.W.2d at 15. The district court held the public-duty doctrine barred the plaintiff's claims, and the plaintiff appealed. On appeal, the plaintiff relied on *Johnson* arguing the public-duty doctrine did not protect the city when it "affirmatively acts and does so negligently." *Id.* at 17. This Court agreed, holding the doctrine "does not apply to protect the City from its affirmative acts." *Id.* at 17–18. *Breese* does not assist Plaintiffs.

The *Breese* Court emphasized the city took affirmative steps to connect the bike path to the sewer box, thus creating the alleged hazard it failed to warn of. *Id.* at 18. The *Breese* Court cited *Johnson* noting the continued validity of the public-duty doctrine in cases involving claims against a governmental entity for failing to fulfill safety-related duties. *Id.* The *Breese* Court similarly cited *Estate of McFarlin*

v. State, 881 N.W.2d 51 (Iowa 2016) as precedent for the public-duty doctrine precluding claims involving "'safety-related duties' owed to the general public." 945 N.W.2d at 18.

The *Breese* Court then discussed the difference between nonfeasance and misfeasance and noted "the 'classic' public-duty doctrine case occurs when 'the duty is imposed by a statute that requires the defendant to act affirmatively, and the defendant's wrongdoing is a *failure* to take positive action for the protection of the plaintiff.'" *Id*. at 19–20 (emphasis in original) (citations omitted). The *Breese* Court continued:

> This distinction between affirmative conduct by the governmental entity and failing to prevent another party from doing harm is not unique to our caselaw or the Dobbs treatise. "Where the affirmative acts of a public employee actually cause the harm, the public duty doctrine does not apply." "In practice, courts seem more likely to apply the public duty doctrine when a government employee negligently fails to act and allows harm to occur (nonfeasance) than when the employee negligently acts and causes harm (misfeasance)." For example, "Washington cases rarely apply the public duty doctrine to protect affirmative acts by regulators and police." Similarly, based on a line of cases decided by the [Massachusetts] Supreme Judicial Court, § 10(j) [of the Massachusetts Tort Claims Act] is founded upon a misfeasance/nonfeasance distinction: a public employer will be held liable for actively creating a risk of harm that comes to pass, but will not be held liable for failing to prevent a risk of harm "not originally caused by the public employee," even where the employee has a statutory or contractual employment duty to act.

Id. at 20 (brackets in original) (internal citations omitted). Thus, it "is clear that [Iowa courts] generally appl[y] the public-duty doctrine when the allegation is a

government failure to adequately enforce criminal or regulatory laws for the benefit of the general public . . . or a government failure to protect the general public from somebody else's instrumentality." *Id.* at 21 (internal citations omitted). The *Breese* Court ultimately concluded the public-duty doctrine did not apply because the sewer box and bike path were built, owned, operated and controlled by the city. *Id.*

Johnson and *Breese* establish the public-duty doctrine applies here. As noted, *Johnson* seriously questioned the viability of *Wilson*. At a minimum, *Wilson* is inapplicable because Plaintiffs concede the City Defendants did not owe them a statutory duty of care. However, given this Court's recent decisions articulating the standards for the public-duty doctrine, overruling *Wilson* is appropriate. *See Meyers v. City of Cedar Falls*, 8 N.W.3d 171, 180–81 (Iowa 2024) ("[S]tare decisis does not prevent the court from reconsidering, repairing, correcting or abandoning past judicial announcements when error is manifest, including error in the interpretation of statutory enactments," because where, as here, a prior decision ""proceed[ed] upon a wrong principle, [was] built upon a false premise, and arriv[ed] at an erroneous conclusion," "stare decisis does not prevent us from overturning this clearly erroneous precedent.").

Under *Johnson* and *Breese*, the public-duty doctrine bars a claim predicated on a municipality's alleged failure to protect citizens from a private landowner's actions. Plaintiffs try to distract the Court by claiming the City Defendants stopped

work and prevented the owner from conducting necessary repairs. Yet, Plaintiffs' own assertions demonstrate this is untrue.

Plaintiffs allege Bi-State began its work around February 22, 2023. (D0021 at ¶¶ 63, 207). Select Structural inspected the building and Bi-State's work on February 23. (D0021 at ¶ 64). Select issued a report on February 28 in which it noted Bi-State was performing the repairs it previously recommended. (D0021 at ¶ 65). The City Defendants' alleged "work stoppage" occurred on March 9 when it was determined constructing the wall with concrete masonry unit ("CMU") did not match the aesthetic requirements for historic buildings. (D0021 at ¶¶ 223–25). Thereafter, according to Plaintiffs, Wold fired Bi-State "because he would not agree to the $10,000 additional expense associated with Bi-State Masonry's change order request for installing brick to match the historic fabric of the building." (D0021 at ¶ 67).

Wold then approached another contractor who "quoted Wold approximately $50,000 to do the work, which included shoring and bracing of the exterior west wall." (D0021 at ¶ 68). Plaintiffs allege "Wold/Davenport Hotel, L.L.C. refused to pay that amount of money" and "[m]oney, not safety, was the motivation for Wold's decision." (D0021 at ¶ 68). However, Plaintiffs assert that "*some additional work was done on the building during the months of March and April*, but the necessary shoring and bracing was never done." (D0021 at ¶ 69) (emphasis added).

The work continued in May, as evidenced by Plaintiffs' allegations. Select performed another site visit on May 23 and issued a report the following day. (D0021 at ¶ 70). That report shows work was being performed, as do photos purportedly taken on May 25 that Plaintiffs include in their Petition. (D0021 at ¶¶ 70, 73–74). Similarly, the screenshots of a May 25 report in Paragraphs 76 and 77 of Plaintiffs' Petition specifically note: "CMU is being completed per engineer's report with rebar & grout", "[o]ne opening has been completed the other is being filled with CMU", "[b]rick work will start today", and "wall bracing will be installed per engineer's design". (D0021 at ¶ 76). Plaintiffs further allege workers were on site on May 26—two days before the collapse, and on May 27—the day before the collapse. (D0021 at ¶¶ 90, 91).

Thus, Plaintiffs' Petition demonstrates work was not stopped and the City Defendants did not prevent The Davenport Hotel from making repairs. Rather, Plaintiffs' own allegations demonstrate the work resumed shortly after the notice that CMU could not be used, and repair work was actively ongoing until the collapse. Where, as here, parties allege their claims with particularity, including making allegations that refer to and rely upon documents beyond the four-corners of the Petition, they create a self-inflicted risk of pleading themselves out of court. *White v. Harkrider*, 990 N.W.2d 647, 656 (Iowa 2023) ("It is true that 'a plaintiff may plead himself out of court' with respect to an affirmative defense.") (citation

omitted); *Struck v. Mercy Health Servs-Iowa Corp.*, 973 N.W.2d 533, 538 (Iowa 2022) ("[W]e recognize that plaintiffs may effectively plead themselves out of court.") (citation omitted); *Benskin, Inc. v. West Bank*, 952 N.W.2d 292, 306 (Iowa 2020) (affirming grant of motion to dismiss because "Benskin effectively pled itself out of court") (citation omitted).

The thrust of Plaintiffs' complaint against the City Defendants is that they failed to warn the residents and vacate the building. This is demonstrated not only by Plaintiffs' Petition, but Plaintiffs' appellate brief:

- "neither Pradhan nor anyone else from the City posted the notice as required by the ordinance or otherwise alerted The Davenport residents that they needed to leave their homes" (Pl. Br. at 14);

- "the City sent the notice to the building's owner, Davenport Hotel LLC, but did not post the notice (per city code) on the building's exits (or anywhere else) and did not notify The Davenport residents that the building was so dangerous that they were legally required to vacate the premises" (Pl. Br. at 18);

- "Despite seeing the condition of the wall as shown in the photographs, despite having twice issued an order to vacate the building, and despite having stopped the emergency repairs that Pradhan knew were needed, neither Pradhan nor Oswald took action to warn the residents of The Davenport" (Pl. Br. at 20);

- "The next day, May 28, the western façade wall—the one that had been the focal point of the inspections and City orders—collapsed, killing three people and injuring several others, none of whom had ever been warned to vacate" (Pl. Br. at 20–21);

- And it wasn't that the City Defendants missed this open defect; they saw it, documented it, and (twice) ordered that the building be

> vacated. Yet, in a move that shocks the conscience, they did not tell the residents—as required by municipal code and common sense—*to vacate the building.* (Pl. Br. at 47) (emphasis in original).

Plaintiffs' allegations confirm this is the quintessential case where the public-duty doctrine applies.

B. Plaintiffs cannot meet their burden of proof to overcome qualified immunity.

Plaintiffs acknowledge that "[f]or a right to be 'clearly established,' the law must have been sufficiently clear that every reasonable official would have understood that his actions violated that right," that the question cannot "be examined at a high level of generality," and there must be "controlling authority" or "a robust consensus of cases of persuasive authority" that puts the question "beyond debate." (Pl. Br. at 33–34). Thus, the question here is whether there is any controlling authority that would make "every reasonable official" believe an official is liable for failing to vacate a privately-owned building that was being repaired by a contractor hired by the private landowner, where the City/official did not own the property or create the condition. Plaintiffs have cited no such case law because none exists.

Plaintiffs bear the burden of proving "a right was clearly established at the time of the alleged violation." *Graham v. Barnette,* 5 F.4th 872, 887 (8th Cir. 2021). This requires Plaintiffs to point to existing precedent that involves sufficiently "similar facts" to "squarely govern" the conduct in the specific circumstances at issue, or, in the absence of binding precedent, to present "a robust consensus of cases

of persuasive authority" constituting settled law. *Id* at 887 (internal citations omitted). Plaintiffs rely exclusively on *Wilson* and *Breese* to try to meet this burden. (Pl. Br. at 44). Plaintiffs' reliance on those cases is misplaced. Because "[r]easonable jurists may debate" whether *Wilson* remains good law, it cannot constitute "clearly established law" for purposes of qualified immunity. *See Sessler v. City of Davenport*, 102 F.4th 876, 883–84 (8th Cir. 2024). Further, *Breese* analyzed governmental misfeasance, which is not at issue in this case. *Wilson* and *Breese* are inapplicable because Plaintiffs allege the City Defendants *failed* to take actions to protect them from harm, which the City Defendants did not directly cause or create.

Overall, Plaintiffs allege the City Defendants had a governmental duty to warn tenants and/or vacate The Davenport Hotel under various ordinances and statutes, which Plaintiffs claim the City Defendants *failed* to enforce. The City Defendants' inspections at The Davenport Hotel only caused Plaintiffs harm to the extent 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. These are quintessential acts of nonfeasance for which no duty of care was owed under clearly established Iowa law. Accordingly, Plaintiffs' claims against the City Defendants fail as a matter of law.

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.

Dated: January 31, 2025

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 5,308 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 January 31, 2025, 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*