ELECTRONICALLY FILED APR 30, 2021 CLERK OF SUPREME COURT

IN THE IOWA SUPREME COURT

SUPREME COURT NO. 20-1037

THE ESTATE OF SUSAN FARRELL, by its administrator, JESSE FARRELL, and as Representative for the claims of JESSE FARRELL, individually, JESSE FARRELL, as next friend of R.F., a minor, PEGGY MASCHKE, individually, and STEPHEN MICHALSKI, individually,

Plaintiffs-Appellees,

v.

STATE OF IOWA; CITY OF WAUKEE, IOWA; and CITY OF WEST DES MOINES, IOWA,

Defendants-Appellants,

and

PETERSON CONTRACTORS, INC.; ROADSAFE TRAFFIC SYSTEMS, INC.; VOLTMER ELECTRIC, INC.; PAR ELECTRICAL CONTRACTORS, INC.; MIDAMERICAN ENERGY COMPANY; and KIRKHAM, MICHAEL & ASSOCIATES, INC.,

Defendants.

Interlocutory Appeal from the Iowa District Court for Polk County
Case Number LACL140694,
Judge Heather Lauber

PLAINTIFFS'-APPELLEES' SUPPLEMENTAL BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules and Statutes

Other Authorities

STATEMENT OF ISSUES PRESENTED FOR REVIEW

I. *FULPS C*ONFIRMS THAT THE PUBLIC-DUTY DOCTRINE IS INAPPLICABLE TO THIS CASE

Cases

Breese v. City of Burlington, 945 N.W.2d 12 (Iowa 2020)
Estate of McFarlin v. State, 881 N.W.2d 51 (Iowa 2016)
Fulps v. City of Urbandale, 956 N.W.2d 469 (Iowa 2021)
Johnson v. Humboldt Cty., 913 N.W.2d 256 (Iowa 2018)
Kolbe v. State, 625 N.W.2d 721 (Iowa 2001)
Raas v. State, 729 N.W.2d 444 (Iowa 2007)
Sankey v. Richenberger, 456 N.W.2d 206 (Iowa 1990)
Star Equip., Ltd. v. State, 843 N.W.2d 446 (Iowa 2014)

Rules/Statutes

The Constitution of the State of Iowa, Article VII, Section 1

II. *FULPS* DOES NOT SUPPORT THE GOVERNMENT DEFENDANTS' "INSTRUMENTALITY OF HARM" TEST

Cases

Fulps v. City of Urbandale, 956 N.W.2d 469 (Iowa 2021)
McNally & Nimergood v. Neumann-Kiewit Constructors, Inc., 648 N.W.2d 564 (Iowa 2002)
Werner's Inc. v. Grinnell Mut. Reinsurance Co., 477 N.W.2d 868 (Iowa Ct. App. 1991)

Rules/Statutes

Iowa Code § 26.3(2)
Iowa Code § 26.12
Iowa Code § 537A.5

III. THE *FULPS* CONCURRENCE IS CORRECT

Cases

Adam v. State, 380 N.W.2d 716 (Iowa 1986)
Breese v. City of Burlington, 945 N.W.2d 12 (Iowa 2020)
Fulps v. City of Urbandale, 956 N.W.2d 469 (Iowa 2021)

Harryman v. Hayles, 257 N.W.2d 631 (Iowa 1977)
Johnson v. Humboldt Cty., 913 N.W.2d 256 (Iowa 2018)
Kolbe v. State, 625 N.W.2d 721 (Iowa 2001)
Miller v. Boone Cty. Hosp., 394 N.W.2d 776 (Iowa 1986)
Raas v. State, 729 N.W.2d 444 (Iowa 2007)
Symmonds v. Chicago, Milwaukee, St. Paul & Pac. R.R. Co., 242 N.W.2d (Iowa 1976)
Wilson v. Nepstad, 282 N.W.2d 664 (Iowa 1979)

Rules/Statutes

Iowa Code § 669.4(2)
Iowa Code § 669.4(3)
Iowa Code § 670.2(1)

Other Authorities

18 Eugene McQuillin, *McQuillin on Municipal Corporations* §§ 53.04.25 & 53.18 (3d ed. 2006)

ARGUMENT

I. *FULPS* CONFIRMS THAT THE PUBLIC-DUTY DOCTRINE IS INAPPLICABLE TO THIS CASE.

> This case requires us again to address the scope of the public-duty doctrine. Cities in Iowa have a statutory and common law *duty to build and maintain the public sidewalks in safe condition and for breach of that duty have historically been subject to suit*. This historic rule is not at odds with the public-duty doctrine. Generally, that doctrine comes into play when a governmental entity fails to take action (nonfeasance) with respect to a third party—typically by failing to exercise statutory authority with respect to the third party's activity. Such a failure to enforce a statute enacted for the public benefit is considered a breach of a "public duty" and not enough to give rise to a tort action. *But defectively constructed or poorly maintained sidewalks are a different matter. There, the governmental entity is simply being held legally responsible for its own property and work.*

Fulps v. City of Urbandale, 956 N.W.2d 469, 470 (Iowa 2021) (emphasis added). This paragraph, the first in the *Fulps* decision, summarizes exactly Farrell's claims: seeking to hold the Government Defendants liable for their own property and work, specifically their property at and work on the Interchange. Farrell's case is an even stronger candidate than *Fulps* for non-application of the public-duty doctrine because the Government Defendants' conduct occurred in their role as owner of an ongoing public-construction project. *See Star Equip., Ltd. v. State*, 843 N.W.2d 446, 462 (Iowa 2014) (holding that the State did not act as a surety in violation of Article VII, Section 1 of the Iowa Constitution because, among other reasons, it "owns the public improvements completed under chapter 573").

Fulps' first paragraph, alone, is a sufficient basis upon which to affirm the district court. Further analysis of the decision strengthens that conclusion.

In *Fulps*, this Court addressed claims against the City of Urbandale for failing to "properly maintain, repair, and warn about [a] dangerous, defective, and uneven sidewalk." 956 N.W.2d at 471. The Fulpses alleged these sidewalk defects caused Laura Fulps to fall and sustain injuries. *Id.* The City argued for application of the public-duty doctrine, with which the district court agreed because "[a]ny duty to maintain the sidewalk imposed by Iowa Code section 364.12 is a general duty to the public" and "Plaintiffs have not alleged any malfeasance such as erecting an obstacle as opposed to nonfeasance in failing to maintain and repair." *Id.* at 475. On appeal, this Court reversed and concluded that the doctrine did not apply because the Fulpses alleged that "the section of uneven sidewalk along 86th Street was maintained by the Defendant City of Urbandale," and the City's breach of its maintenance duties, even if true, did not amount to "nonfeasance." *Id.* at 476.

In explaining its conclusion, the *Fulps* Court distilled from its precedent a "principle of municipal liability" for hazardous sidewalks, which "ma[de] sense given that the city owns the sidewalk." *Id.* at 472. The Court then squared this established principle with the public-duty doctrine by clarifying a narrow definition of "nonfeasance" under the doctrine's jurisprudence. *Id.* at 473.

In explaining its clarification, the Court stated that the reach of public-duty doctrine is limited to situations involving the

> confluence of two factors. First, the injury to the plaintiff was directly caused or inflicted by a third party or other independent force. Second, 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. Five examples of such situations are: "the visually impaired driver in *Kolbe* [*v. State*, 625 N.W.2d 721 (Iowa 2001)], the inmates after they got away from the prison in *Raas* [*v. State*, 729 N.W.2d 444, 446 (Iowa 2007)], the dredge operator in *Estate of McFarlin* [*v. State*, 881 N.W.2d 51 (Iowa 2016)], the private property owner who put up the concrete embankment in *Johnson* [*v. Humboldt County*, 913 N.W.2d 256 (Iowa 2018)], and the shooter in *Sankey* [*v. Richenberger*, 456 N.W.2d 206 (Iowa 1990)]."[1] 956 N.W.2d at 474.

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[1] Farrell disagrees that *Sankey* is a public-duty-doctrine case. As discussed in Farrell's initial brief, *Sankey* barred the plaintiffs' claims under Restatement (Second) of Torts § 315, applicable to private and public actors alike, which provides "There is no duty so to control the conduct of a third person as to prevent him from causing physical harm to another." 456 N.W.2d at 209. In fact, the *Sankey* Court recognized that, under the Restatement, private parties had no duty under the facts alleged in that case, which necessarily meant that the police chief had no duty either. *Id.* ("On numerous occasions since *Wilson*, the court has applied the Restatement rule to immunize police officers from liability consistent with the principle that public employees share the same—but not greater—liability to injured parties as other defendants under like circumstances.").

If *Sankey* were a public-duty-doctrine case, the exculpation of the police chief would not have been grounded on a Restatement Section applicable to

The Court contrasted these five cases with *Breese v. City of Burlington*, 945 N.W.2d 12 (Iowa 2020), and explained that *Breese* "involved the city's negligence with respect to the city's own bike path, as opposed to [the other five cases that involved] a failure to address a third-party hazard." 956 N.W.2d at 474. According to the Court, *Breese* "clarifies why the public-duty doctrine and suits against municipalities over hazardous sidewalks can coexist. 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." *Id.*

The *Fulps* Court did recognize the existence of confusion wrought by its nonfeasance/misfeasance precedent, which led some to an erroneous "broad view of the public-duty doctrine." *Id.* at 475. But it remedied that confusion by making clear "that 'nonfeasance' in the context of the public-duty doctrine does not mean that the City can install a sidewalk and never worry about maintaining it. . . . [Rather], the City is liable for its sidewalk to the same extent a private property owner doing the same thing would be." *Id.* The Court explained that "nonfeasance" "does not encompass ordinary neglect of the same sort of responsibilities a private party might have" but rather "a failure to discharge a *governmental* duty for the benefit of the public—typically, 'a government failure to

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private parties because, as *Fulps* explains, the public-duty doctrine only applies to cases involving the government's breach of "a uniquely governmental duty." 956 N.W.2d at 473-74

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 475-76 (italics in original) (quoting *Breese*, 945 N.W.2d at 21). "'Nonfeasance,' in other words, means nonfeasance in the performance of a public duty." *Id.*

Three important take-aways from *Fulps* are:

- The public-duty doctrine does not apply to cases where government property or work are a cause of the injury. *Id.* at 470 (stating that "defectively constructed or poorly maintained sidewalks" do not constitute "nonfeasance" because "the governmental entity is simply being held legally responsible for its own property and work."). The Court distinguished *McFarlin* and *Johnson* by noting that in *McFarlin* "the dredge pipe and equipment were owned and operated by local entities, not the State," and in *Johnson*, the concrete embankment was "privately owned." *Id.* at 474.

- The public-duty doctrine only applies to cases involving the government's breach of "a uniquely governmental duty." *Id.* at 473-74. The Court explained that a government's breach of duties that would be owed by private parties engaging in similar actions are outside the scope of the doctrine. *Id.* at 475 ("The term 'nonfeasance' does not encompass ordinary neglect of the same sort of responsibilities a private party might have."); *id.* ("[T]he City is liable for its sidewalk to the same extent a private property owner doing the same thing would be.").

- The public-duty doctrine only applies to claims that the government failed "to protect the plaintiff from [a] third party or other independent force." *Id.* at 473-74. The Court synthesized *Kolbe, Raas, McFarlin, Johnson,* and *Sankey* as involving "a failure to address a third-party hazard," thereby rendering the doctrine inapplicable. *Id.* at 474 ("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.").[2]

All three take-aways support Farrell.

First, this case not only involves the Government Defendants' own property like in *Fulps*, but also the Government Defendants' own work under their own ongoing public-construction project. This makes an even stronger case for non-application of the doctrine than in *Fulps*. Second, the Government Defendants' role as owner of their own construction project does not give rise to "uniquely governmental duties." Construction projects are not unique to governments, as evidenced by the innumerable private construction projects that exist every year in Iowa (and across the country). Finally, Farrell's claims against the Government Defendants are not based on allegations that they failed to protect Farrell from Benjamin Beary, such as, for example, improperly issuing him a driver's license (i.e., *Kolbe*), or failing to use spike strips to disable his vehicle as he drove on I-80 (*Sankey*). Rather, they are based on the Government Defendants' own conduct with respect to their own property and work, specifically their property at and work on the Interchange. (First Amended

[2] The Court also confirmed the continued vitality of the "special relationship" exception to the doctrine, 956 N.W.2d at 474, upon which Farrell relies as discussed in her initial Brief.

Petition ¶¶18-46, 51-56, 70-75, 77-82). This case is on all fours with *Fulps*, so the district court should be affirmed.[3]

II. *FULPS* DOES NOT SUPPORT THE GOVERNMENT DEFENDANTS' "INSTRUMENTALITY OF HARM" TEST.

The Government Defendants argue that, after *Fulps*, "the nonfeasance/misfeasance dichotomy is not exclusively determinative of whether the public-duty doctrine applies" so the Court should instead use the Government Defendants' proposed "instrumentality of harm" test. Govt. Defs.' Supp. Br. p. 14. This argument is incorrect.

The *Fulps* Court did not abandon (or emasculate) the misfeasance/nonfeasance distinction. Instead, as discussed above, it clarified the narrow breadth of "nonfeasance" with the necessary result being fewer claims

[3] The indemnity factor discussed by *Fulps* also favors Farrell because commercial construction contracts typically contain indemnity provisions. *See McNally & Nimergood v. Neumann-Kiewit Constructors, Inc.*, 648 N.W.2d 564 (Iowa 2002). This is especially so for public owners' contracts because public owners completely control the contents of their contracts. Iowa Code Sections 26.3(2) & 26.12. Indemnity provisions are so prevalent in construction contracts that the Iowa legislature limited their breadth at Iowa Code Section 537A.5. Notable for this case, Section 537A.5 exempts from its scope construction contracts "relating to highways, roads, and streets" (colloquially known as the "IDOT exemption"), thereby permitting broad-form and intermediate-form indemnity contract provisions on such projects. Therefore, the Government Defendants may have very favorable contractual indemnity terms with some or all of the Defendants (and others) for any liability they have to Farrell. At the pleading stage, such facts have not been developed, which reinforces that "[j]udgments on the pleadings generally are not favored." *Werner's Inc. v. Grinnell Mut. Reinsurance Co.,* 477 N.W.2d 868, 869 (Iowa Ct. App. 1991).

barred by the public-duty doctrine. Instead of limiting the scope of the doctrine as *Fulps* intended, the Government Defendants' proposed "instrumentality of harm" test would broaden it and lead to an increasing number of claims against the government being barred. It would also lead to absurd results.

As Farrell understands it, the Government Defendants' proposed "instrumentality of harm" test would apply the doctrine any time the physical impact causing the physical injury is by a third-party. For example, if Laura Fulps had tripped on the uneven sidewalk but fell onto (and was injured by) a tricycle being ridden by a toddler, the doctrine would apply because the "instrumentality of harm" was the tricycle and not the sidewalk; but if the tricycle were absent and she fell onto and was injured by the sidewalk (as happened in the *Fulps* case), then the doctrine would not apply. The *Fulps* case does not adopt this test or countenance its arbitrary and unjust results. So, what really is the Government Defendants' proposed test? As Farrell explained in her initial Brief, it is nothing more than a request for courts to wrest causation decisions from juries. In both of the above hypotheticals, the sidewalk is a proximate cause of the injuries. The only difference is that in one of them there may be a causation dispute a jury needs to resolve. The Government Defendants ask this Court to displace the jury's causation-deciding province via the public-duty doctrine. *Fulps* does not support such a coup.

III. THE *FULPS* CONCURRENCE IS CORRECT.

As discussed in Farrell's initial brief, upon passage in 1965 and 1967, the Iowa Tort Claims Act (ITCA) and the Municipal Torts Claim Act (MTCA) waived governmental immunity and made the State and every municipality subject to liability for their torts to the same extent as private individuals under similar circumstances. Iowa Code §§ 669.4(2)-(3), 670.2(1). This Court initially recognized and held that these statutes applied even in the face of the public-duty doctrine, meaning that they had abrogated the governmental immunity previously provided by the doctrine. *Symmonds v. Chicago, Milwaukee, St. Paul & Pac. R.R. Co.*, 242 N.W.2d 262 (Iowa 1976), *Harryman v. Hayles*, 257 N.W.2d 631 (Iowa 1977), overruled on non-public-duty-doctrine grounds by *Miller v. Boone Cty. Hosp.*, 394 N.W.2d 776 (Iowa 1986); *Wilson v. Nepstad*, 282 N.W.2d 664 (Iowa 1979); *Adam v. State*, 380 N.W.2d 716 (Iowa 1986).

But over thirty years after the passage of the Acts, this Court, for the first time, in contravention of the *Symmonds/Harryman* line of cases and without citing any authority, described the public-duty doctrine as something distinct from governmental immunity and unaffected by the Acts. *Kolbe*, 625 N.W.2d 721. The *Raas* Court attempted to shore up support for *Kolbe*, but could only muster a single treatise for support. 729 N.W.2d at 448 (quoting 18 Eugene McQuillin, *McQuillin on Municipal Corporations* § 53.04.25 (3d ed. 2006)). Over the following decade, the Court has continued to apply and revise the doctrine, with the slender

reed of *Kolbe* as its foundation. The *Fulps* Court continues this post-*Kolbe* trend by citing, discussing, relying on, and, in some cases, distinguishing, *Kolbe*, *Raas*, *McFarlin*, *Johnson*, and *Breese*.

Justice Apple's concurrence in *Fulps* correctly describes the true effect of the *Kolbe* line of cases: "a judicially created sixteenth exception" to the waiver of sovereign immunity under the Tort Claims Acts. 956 N.W.2d at 478 (Appel, J., concurring). The accuracy of this description is buttressed by the fact that it is supported by cites to and quotes from the very same treatise which *Raas* used as the sole authority to justify *Kolbe*'s resurrection of the doctrine twenty years ago. *Id.* (citing 18 Eugene McQuillin, *McQuillin Municipal Corporations*, § 53.18 n.44, at 268–69 (3d. ed. 2013)). This further reveals the tenuous basis upon which the *Raas* decision rests.

For the reasons addressed in Farrell's initial brief and Justice Appel's concurrence in *Fulps*, the Court should return to its historic treatment of the public-duty doctrine as a form of governmental immunity. Because the legislature waived such immunity through the Tort Claims Acts without a public-duty-doctrine exemption, the Court should discard the public-duty doctrine.

CONCLUSION

Farrell requests that this Court discard the public-duty doctrine, affirm the district court's Ruling in all other respects, and remand for further proceedings.

Respectfully submitted,

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CERTIFICATE OF COST

The undersigned hereby certifies that the cost of printing the foregoing Plaintiffs-Appellee's Supplemental Brief is $ 0.00 .

s/ Lisa R. Jones

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing Plaintiffs-Appellees' Supplemental Brief was served upon the attorneys of record listed below by electronic filing and electronic delivery to the parties via the EDMS system on April 30, 2021, pursuant to Iowa R. App. P. 6.902(2) and Iowa R. Elec. P. 16.101(1).

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CERTIFICATE OF FILING

The undersigned hereby certifies that the foregoing Plaintiffs-Appellees' Supplemental Brief was filed with the Iowa Supreme Court by electronically filing the same on April 30, 2021, pursuant to Iowa R. App. P. 6.902(2) (2013) and Iowa Ct. R. 16.1221(1).

/s/ Lisa R. Jones

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that:

This forgoing Plaintiffs-Appellees' Supplemental Brief complies with the typeface requirements and type-volume limitation of Iowa Rules of Appellate Procedure 6.903(1)(*d*) and 6.903(1)(*g*)(1) or (2) because this brief has been prepared in a proportionally spaced typeface using Garamond 14-point font and contains 2,620 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(*g*)(1).

/s/ Lisa R. Jones April 30, 2021
Date