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**IN THE SUPREME COURT OF IOWA**

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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,

v.

STATE OF IOWA; CITY OF WAUKEE; CITY OF WEST DES MOINES, IOWA; PETERSON CONTRACTORS, INC.; ROADS SAFE TRAFFIC SYSTEMS, INC.; VOLTMER ELECTRIC, INC.; PAR ELECTRICAL CONTRACTORS, INC., MIDAMERICAN ENERGY COMPANY; and, KIRKHAM, MICHAEL & ASSOCIATES, INC.,

Defendants.

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Appeal from the Polk County District Court, District Court No. LACL140694, the Honorable Judge Heather Lauber, presiding.

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**SUPPLEMENTAL BRIEF**

**CITY OF WEST DES MOINES, CITY OF WAUKEE, AND STATE OF IOWA**

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## STATEMENT OF THE ISSUES

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Whether the rationale of *Fulps v. City of Urbandale* establishes that the public-duty doctrine bars Plaintiffs' claims against the Governmental Parties?

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**STATEMENT OF THE CASE – IN REGARD TO  
SUPPLEMENTAL BRIEFING**

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On March 17-18, 2021, the City of West Des Moines, City of Waukee, and State of Iowa (hereinafter “Governmental Parties”) filed their Final Brief and Final Reply in this matter. On March 19, 2021, the Iowa Supreme Court issued its most recent public-duty doctrine decision in the case, *Fulps v. City of Urbandale*, Case Number 19-0221. *See Fulps v. City of Urbandale*, 2021 Iowa Sup. LEXIS 29, 2021 WL 1044414 (Iowa 2021). On March 31, 2021, Plaintiffs filed their Final Brief in this case. On the same date, the Governmental Parties filed an unresisted motion for leave to submit additional authority to address the *Fulps* decision. On April 5, 2021, the Iowa Supreme Court granted that motion permitting supplemental briefs to be filed to address the *Fulps* decision.

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**ARGUMENT:  
LIKE ITS PREDECESSOR CASES, THE RATIONALE OF  
*FULPS V. CITY OF URBANDALE* ESTABLISHES THAT THE  
PUBLIC-DUTY DOCTRINE BARS PLAINTIFFS’ CLAIMS  
AGAINST THE GOVERNMENTAL PARTIES.**

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The recent public-duty doctrine case of *Fulps v. City of Urbandale* articulates the doctrine in three ways important to the disposition of the issues on appeal in case at bar. *See Fulps v. City of Urbandale*, 2021 Iowa Sup. LEXIS 29, \*1-17, 2021 WL 1044414, at \*1-

6 (Iowa 2021). First, *Fulps* confirmed that the instrumentality of harm plays a central role in determining whether the public-duty doctrine applies. *See id.* 2021 Iowa Sup. LEXIS 29, \*1-2, 10-15, 2021 WL 1044414, at \*1, 4-6. Second, *Fulps* utilized an articulated policy or principle that is consistent with the policy-based reasoning advocated by the American Law Institute in making no-duty determinations, such as the public-duty doctrine, and avoided utilizing the concept of foreseeability in this analysis. *See id.* 2021 Iowa Sup. LEXIS 29, \*1-16, 10-15, 2021 WL 1044414, at \*1-6. Third, *Fulps* provided guidance on the gray area where governmental misconduct could be phrased as nonfeasance or misfeasance and reduced the importance of such phrasing on the applicability of the public-duty doctrine. *See id.* 2021 Iowa Sup. LEXIS 29, \*14-16, 2021 WL 1044414, at \*5-6. The lessons from *Fulps* help to show why the public-duty doctrine bars Plaintiffs' claims against the Governmental Parties.

**A. *Fulps v. City of Urbandale* confirms that the instrumentality of harm plays a central role in determining whether the public-duty doctrine applies.**

In *Fulps v. City of Urbandale*, the plaintiff was walking on an uneven, damaged, and improperly maintained sidewalk owned by the City of Urbandale. *Id.* 2021 Iowa Sup. LEXIS 29, \*2, 2021 WL 1044414,

\*1. The plaintiff fell because of the condition of the city’s sidewalk and was injured. *Id.* The Iowa Supreme Court held that the City of Urbandale had a common-law and statutory duty to use reasonable care to maintain its sidewalk and the public-duty doctrine did not apply. *Id.* at 2021 Iowa Sup. LEXIS 29, at \*1-16, 2021 WL 1044414, at \*1-6. Ultimately, in *Fulps*, the public-duty doctrine did not apply because the plaintiff was injured by an instrumentality of the City of Urbandale. *See id.* 2021 Iowa Sup. LEXIS 29, at \*1, 10-15, 2021 WL 1044414, at \*1, 4-5.

This was not a ground-breaking holding, but in line with prior decisions where the public-duty doctrine was held to be inapplicable when the governmental entity’s instrumentality caused the harm. *See, e.g., Breese v. City of Burlington*, 945 N.W.2d 12, 21 (Iowa 2020). The holding in *Fulps* is akin to *Breese v. City of Burlington*, where the public-duty doctrine was held inapplicable because “it involved the city’s negligence with respect to the city’s own bike path, as opposed to a failure to address a third-party hazard.” *See Fulps*, 2021 Iowa Sup. LEXIS 29, at \*13, 2021 WL 1044414, at\*5 (referring to *Breese*, 945 N.W.2d at 19-20).

As previously briefed by the Governmental Parties, the instrumentality of harm is an important factor in establishing the applicability of the public-duty doctrine to bar Plaintiffs' claims. (Governmental Parties' Brief, pp. 60-70). What separates the case at bar from those like *Fulps* and *Breese* is that Officer Farrell was harmed by the actions of Benjamin Beary. (First Amended Petition, paras. 45-48). The case at bar is one where the Governmental Parties have allegedly failed to protect one member of the general traveling public (Officer Farrell) from another member of the general traveling public (Mr. Beary) who was the instrumentality of harm. *Cf. Fulps*, 2021 Iowa Sup. LEXIS 29, at \*1, 10-15, 2021 WL 1044414, at \*1, 4-5, and *Breese*, 945 N.W.2d at 21.

The case at bar is meaningfully different from *Fulps* and *Breese* because the plaintiffs in *Fulps* and *Breese* were harmed by the governmentally designed and controlled property. *Cf. id.* In *Fulps*, the instrumentality of harm was the city sidewalk and not another member of the general public. *See Fulps*, 2021 Iowa Sup. LEXIS 29, at \*1-2, 2021 WL 1044414, at \*1. In *Breese*, the instrumentality of harm was the sewer box and not another member of the general public. *See Breese*, 945 N.W.2d at 21.



Based on the rationale of *Fulps* and *Breese* the public-duty doctrine should apply to bar Plaintiffs' claims against the Governmental Parties because, unlike those cases, a third-party (Mr. Beary) was the instrumentality of harm. *Cf. Fulps*, 2021 Iowa Sup. LEXIS 29, at \*1, 10-15, 2021 WL 1044414, at \*1, 4-5, and *Breese*, 945 N.W.2d at 21. Furthermore, in contrast to *Fulps* and *Breese*, the case at bar parallels *Johnson v. Humboldt County*, *Sankey v. Richenberger*, *Kolbe v. State*, *Raas v. State*, and *Estate of McFarlin v. State* in that Plaintiffs allege that the Governmental Parties should have done more to protect Officer Farrell from the instrumentality of harm, Mr. Beary, by having adequate safety measures in place. *See Johnson v. Humboldt Cty.*, 913 N.W.2d 256, 266-267 (Iowa 2018), *Sankey v. Richenberger*, 456 N.W.2d 206, 208 (Iowa 1990), *Kolbe v. State*, 625 N.W.2d 721, 726 (Iowa 2001), *Raas v. State*, 729 N.W.2d 444, 449 (Iowa 2007), and *Estate of McFarlin v. State*, 881 N.W.2d 51, 60 (Iowa 2016).

All these cases stand for the proposition that the public-duty doctrine applies, in part, when the alleged failure of the government is to protect the plaintiff from somebody else's instrumentality of harm, just like the case at bar. *See id.* Accordingly, the public-duty doctrine

operates to bar Plaintiffs' claims against the Governmental Parties. *See id.* The District Court erred in failing to enter judgment on the pleadings in favor of the Governmental Parties.

**B. The *Fulps* decision utilized an articulated policy or principal that is consistent with the policy-based reasoning advocated by the American Law Institute and avoided foreseeability in the Court's analysis.**

By employing an articulated policy or principal in line with the policy-based reasoning advocated for by the American Law Institute, the Iowa Supreme Court distinguished *Fulps* from other cases where the public-duty doctrine was applicable. *See Fulps*, 2021, 2021 Iowa Sup. LEXIS 29, at \*10-11, 13, 2021 WL 1044414, at \*4-5, and, Restatement (Third) of Torts: *Liability for Physical and Emotional Harm*, § 7 (b) at 90 (the ordinary duty of reasonable care can be modified in exceptional cases where there is an articulated countervailing principle or policy warranting denial or limits of liability in particular cases), *accord Thompson v. Kaczinski*, 774 N.W.2d 824, 834 (Iowa 2009) (citing Restatement (Third) of Torts: *Liability for Physical and Emotional Harm*, § 7(b) at 90).

A no-duty ruling represents a determination, a purely legal question, that no liability should be imposed on actors in a category of cases. Such a ruling should be explained and justified based on articulated policies or principles that justify exempting these actors from liability or modifying

the ordinary duty of reasonable care. These reasons of policy and principle do not depend on the foreseeability of harm based on the specific facts of a case. They should be articulated directly without obscuring references to foreseeability.

Restatement (Third) of Torts: *Liability for Physical and Emotional Harm*, § 7 cmt. i.

The analysis in the *Fulps* decision follows the guidance from the American Law Institute by establishing a category of cases in which the public-duty doctrine applies or does not apply. *See id, and, Fulps*, 2021 Iowa Sup. LEXIS 29, at \*10-11, 13, 2021 WL 1044414, \*4-5. In this regard, the *Fulps* decision observed that the public-duty doctrine generally applies when the injury to a plaintiff was directly caused or inflicted by a third-party and the plaintiff alleges a governmental entity breached a governmental duty to protect the plaintiff from the third-party or other independent force. *See id.* This is precisely the articulated rationale that is recommended by the American Law Institute – a ruling based on articulated policies or principles that justify exempting governmental entities from liability. *See id.*

It is also important to note that the *Fulps* decision was based on policy and principle that did not depend on foreseeability. *See id.* In comparison, Plaintiffs advance the theory of “mis-nonfeasance” –

actively opening and operating the Interchange by failing to have adequate safety measures for the protection of Officer Farrell. As such, Plaintiffs try to improperly inject the concept of foreseeability into the no-duty determination. *See Thompson*, 774 N.W.2d at 834 (citing Restatement (Third) of Torts: *Liability for Physical and Emotional Harm*, § 7(b) at 90). The Court should not be persuaded by Plaintiffs' argument and, instead, maintain adherence to the established policy and principle based rationale for determining the applicability of the public-duty doctrine. *See id.*, *See Fulps*, 2021 Iowa Sup. LEXIS 29, at \*10-11, 13, 2021 WL 1044414, at \*4-5. Following the established policy or principle based rationale behind the public-duty doctrine, the Court must overrule the District Court and enter judgment on the pleadings in favor of the Governmental Parties.

**C. *Fulps* clarified the gray area where claims of wrongful conduct can be phrased as nonfeasance or misfeasance and reduced the role such phrasing has on the applicability of the public-duty doctrine.**

Relying on the guidance of the Iowa Supreme Court from *Breese v. City of Burlington*, the Governmental Parties raised in their Final Appeal Brief, the Court's concern that there can be a gray area involving allegations of nonfeasance and misfeasance. (Governmental Parties' Final Brief, pp. 58-69). The *Fulps* decision provides further

guidance on this issue by clarifying the scope of nonfeasance in the public-duty doctrine. *Fulps*, 2021 Iowa Sup. LEXIS 29, at \*15-16, 2021 WL 1044414, at \*5-6.

In *Fulps*, the Iowa Supreme Court noted that the District Court held that the public-duty doctrine applied because the plaintiff alleged only nonfeasance. *Id.* 2021 Iowa Sup. LEXIS 29, at \*15 2021 WL 1044414, at \*5-6. Under earlier public-duty doctrine cases, the Court discussed a dichotomy where the doctrine applied in cases where nonfeasance was alleged but rejected the doctrine when there were allegations of governmental misfeasance. *See, e.g. Johnson*, 913 N.W.2d at 266.

In *Fulps*, the Iowa Supreme Court provided clarification on the dichotomy between misfeasance and nonfeasance to help eliminate the gray area identified in *Johnson v. Humboldt County* and *Breese v. City of Burlington* – where the phrasing of wrongdoing was questioned as a basis for applying the public duty doctrine. *See Fulps*, 2021 Iowa Sup. LEXIS 29, at \*15-16, 2021 WL 1044414, at \*5-6 (citing *Johnson*, 913 N.W.2d at 266, and *Breese*, 945 N.W.2d at 20-21. “In the law, words are king, but their reign is not absolute. At least without context.” *Id.* 2021 Iowa Sup. LEXIS 29, at \*15, 2021 WL 1044414, at \*5-6. In other

words, the nonfeasance / misfeasance dichotomy is not exclusively determinative of whether the public-duty doctrine applies. *See id.*

Furthermore, the Iowa Supreme Court clarified that nonfeasance in terms of the public-duty doctrine “means nonfeasance in the performance of a public [governmental] duty.” *Id.* 2021 Iowa Sup. LEXIS 29, at \*15-16, 2021 WL 1044414, at \*6.

Regardless of Plaintiffs’ allegations of the misconduct by Governmental Parties being nonfeasance or misfeasance, the public-duty doctrine typically applies when there is “a governmental failure to adequately enforce criminal or regulatory laws for the benefit of the general public . . . or a governmental failure to protect the general public from somebody’s else’s instrumentality.” *See id.* 2021 Iowa Sup. LEXIS 29, at \*16, 2021 WL 1044414, at \*6 (citing *Breese*, 945 N.W.2d at 21). Because the context behind Plaintiffs’ allegations of misconduct by the Governmental Parties reveals that they challenge alleged failure of the Governmental Parties to protect Officer Farrell from somebody else’s instrumentality of harm (Mr. Beary), the public-duty doctrine applies as it has in similar past cases. *See id.*, *Johnson*, 913 N.W.2d at 266-267, *Sankey*, 456 N.W.2d at 208, *Kolbe*, 625 N.W.2d at 726, *Raas*, 729 N.W.2d at 449, and *Estate of McFarlin*, 881 N.W.2d at 60. This

remains true even if Plaintiffs made allegations of misfeasance by the Governmental Parties. *See Fulps*, 2021 Iowa Sup. LEXIS 29, at \*15-16, 2021 WL 1044414, at \*5-6. After all, in *Fulps*, the plaintiff solely made allegations of nonfeasance, but the Iowa Supreme Court took those in context and held the public-duty doctrine inapplicable. *See id.* Plaintiffs' allegations in the case at bar must be taken into context and, in context, they challenge conduct encompassed by the public-duty doctrine. *See id.*, *Johnson*, 913 N.W.2d at 266-267, *Sankey*, 456 N.W.2d at 208, *Kolbe*, 625 N.W.2d at 726, *Raas*, 729 N.W.2d at 449, and *Estate of McFarlin*, 881 N.W.2d at 60.

The public-duty doctrine should operate in the case at bar to eliminate Plaintiffs' claims against the Governmental Parties. *See id.* The District Court erred in failing to enter judgment on the pleadings in favor of the Governmental Parties.

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## CONCLUSION

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This Court should overrule the District Court and enter judgment on the pleadings in favor of the Governmental Parties applying the public-duty doctrine. The recent decision in *Fulps* continues the common-law development of the public-duty doctrine to better articulate its applicability. *Fulps* confirms that the public-duty

doctrine applies in situations such as the one before the Court in this appeal – where the context behind the Plaintiffs’ allegations of wrongdoing is the Governmental Parties’ failure to take positive action for the protection of Officer Farrell from Mr. Beary’s instrumentality of harm. *See Fulps*, 2021 Iowa Sup. LEXIS 29, at \*15-16, 2021 WL 1044414, at \*6, *Breese*, 945 N.W.2d at 19-20 (quoting 2 Dan B. Dobbs, Paul T. Hayden & Ellen M. Bublick, *The Law of Torts* § 345, at 375 (2d ed. 2011), and, *see Estate of McFarlin*, 881 N.W.2d at 58-64 (applying the public-duty doctrine to common-law duties). The case parallels the circumstances in *Johnson*, *Estate of McFarlin*, *Raas*, *Kolbe*, and *Sankey*, where the governmental entities allegedly failed to protect the plaintiff from harm caused by another. *See Johnson*, 913 N.W.2d at 266-267, *Estate of McFarlin*, 881 N.W.2d at 60, *Raas*, 729 N.W.2d at 449, *Kolbe*, 625 N.W.2d at 726, and, *Sankey*, 456 N.W.2d at 208.



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*/s/ Robert Livingston*

Dated: April 16, 2021

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Dated: April 16, 2021

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The undersigned hereby certifies that on April 16, 2021, the foregoing Supplemental Brief by the City of West Des Moines, City of Waukee, and State of Iowa was electronically filed with the Clerk of Court for the Supreme Court of Iowa using the EDMS system, service being made by EDMS upon the following:

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