ELECTRONICALLY FILED JUL 06, 2022 CLERK OF SUPREME COURT

IN THE SUPREME COURT OF IOWA

NO. 22-0239

JIM NAHAS,

Plaintiff-Appellee,

v.

POLK COUNTY, IOWA, TOM HOCKENSMITH (individually and in his official capacity), ANGELA CONNOLLY (individually and in her official capacity), STEVE VAN OORT (individually and in his official capacity), ROBERT BROWNELL (individually and in his official capacity), and JOHN NORRIS (individually and in his official capacity),

Defendants-Appellants.

APPEAL FROM THE IOWA DISTRICT COURT FOR
DALLAS COUNTY CASE NO. LACV043294
THE HONORABLE BRAD MCCALL, PRESIDING

BRIEF OF AMICUS CURIAE HEARTLAND INSURANCE RISK POOL

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CONCISE STATEMENT OF AMICUS CURIAE AND ITS INTEREST IN THE CASE (pursuant to Iowa R. App. P. 6.906(4)(c))

The Heartland Insurance Risk Pool, as Amicus Curiae, is a self-insured Risk Pool authorized under Iowa Code Sections 331.301(11) and 670.7(1) (2022). It is composed under Iowa Code Chapter 28E of ten (10) Iowa counties. Chickasaw, Hardin, Benton, Fayette, Mitchell, Cedar, Decatur, Mahaska, Tama and Van Buren. The purpose of the Risk Pool is to provide self-insurance coverages for the officers and employees of the foregoing counties when, inter alia, they are sued under the municipal tort claims act, Iowa Code Chapter 670.

The interest of the Risk Pool in this case is the proper construction and application of Iowa Code Section 670.4A, a new statute creating a qualified immunity for the counties' officers and employees. There are presently pending two (2) such lawsuits arising in Hardin County and Fayette County where Section 670.4A is at issue concerning whether it operates prospectively, retrospectively, or both.

STATEMENT OF AMICUS CURIAE'S
COUNSEL CONCERNING AUTHORSHIP
OF AMICUS CURIAE'S BRIEF
(pursuant to Iowa R. App. P. 6.906(4)(d))

The submitted Amicus Curiae Brief has been authored solely by the undersigned counsel following his own personal research and writing. The undersigned is hereby paid solely by the Heartland Insurance Risk Pool for his labors in this Brief.

No other person or party has assisted me in the research or writing of the Amicus Brief and no other person has offered or contributed any money to me in connection with the preparation and submission of this Brief.

Carlton G. Salmons 7/6/2022

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I.
ARGUMENT
THE NEW STATUTE

Iowa Governor Kim Reynolds signed into effect on June 17, 2021 Senate File 342, Division III, Section 14, a new statute now codified at Iowa Code Section 670.4A entitled "Qualified Immunity". Under Section 16 of Senate File 342, an "Effective Date" was provided stating "This division of this Act, being deemed of immediate importance, takes effect upon enactment."; that is, on June 17, 2021. Because this new statute is the focus of this Brief, it is quoted here verbatim.

> 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.
>
> 2. A municipality shall not be liable for any claim brought under this chapter where the employee or officer was determined to be protected by qualified immunity under subsection 1.

> 3. A plaintiff who brings a claim under this chapter alleging a violation of the law must state with particularity the circumstances constituting the violation and that the law was clearly established at the time of the alleged violation. Failure to plead a plausible violation or failure to plead that the law was clearly established at the time of the alleged violation shall result in dismissal with prejudice.
>
> 4. Any decision by the district court denying qualified immunity shall be immediately appealable.
>
> 5. This section shall apply in addition to any other statutory or common law immunity.

AMICUS' PRELIMINARY SUMMARY OF ARGUMENT

First, that there is no provision in the Iowa Constitution that prohibits legislation which is deemed retrospective in character or effect, unless those laws otherwise violate the Iowa or Federal Constitutions. State ex. rel. Turner v. Limbrecht, 246 N.W.2d 330, 334 (Iowa 1976); Baldwin v. City of Waterloo, 372 N.W.2d 486, 491-92 (Iowa 1985).

Second, no litigant, plaintiff or defendant, "can claim to have any vested right in any particular mode of procedure for an enforcement or defense of his rights." Schultz v. Gosselink, 148 N.W.2d 434, 436 (Iowa 1967). New Section 670.4A is a procedural law which, *per se*, may properly be applied retrospectively. E.g. Schultz, N.W.2d at 436 (" . . . we believe our prior holdings

establish the pleading and proof of contributory negligence in a tort action relates to remedy and procedure.")

Third, Even if Section 670.4A is considered as "substantive", it applies retrospectively because no litigant has a claim to continuation of the previous state of the law that neither creates vested rights nor cancels or eliminates such rights. Baldwin v. City of Waterloo, 372 N.W.2d 486, 492 (Iowa 1985).

Fourth, Because the Legislature has unequivocally stated Section 670.4A is to be applied retrospectively to this case, as will be demonstrated, that legislative intent prevails over standard rules of statutory construction otherwise applicable as no vested rights are impaired, eliminated, or extinguished.

Fifth, There is no violation of a Plaintiff's federal constitutional rights in application of Section 670.4A, when that Plaintiff continues to possess and proceed on their claims and causes of action in this case. Baldwin, 372 N.W.2d, at 492; Iowa Dept. of Transp., 587 N.W.2d, at 792 ("In Baldwin, . . ., our court considered a new statute which discontinued unlimited joint and several liability in tort cases. We found the new statute was not a substantive change in the law because the plaintiffs still had a cause of action.").

II.
UNDER ACCEPTED RULES OF STATUTORY CONSTRUCTION, SECTION 670.4A APPLIES AS A DEFENSE IN THIS ACTION THOUGH PASSED LATER IN TIME

Under the standard rubric by which these issues are usually decided, whether a statute is deemed to act prospectively only in application to a matter or is decided to act both prospectively and retrospectively, at the same time, toward a matter is dependent on characterizing whether the statute is substantive or procedural; and by examining how that statute in its application acts upon the matter in question. Hrbek v. State, 958 N.W.2d 779, 782-83 (Iowa 2021) ("In other words, to determine whether the statutory amendment should apply, a court must understand what event or conduct the statute will control.'").

The matter in question here concerns the nature of the Nahas' tort lawsuit against Polk County. Ordinarily, these actions for personal injuries are thought to have accrued on January 5, 2021. "The word 'accrue' is defined as 'to come into existence as an enforceable claim: vest as a right.'" Iowa Dep't of Transp. v. Iowa District Court, 587 N.W.2d 774, 776 (Iowa 1998) ("'They are vested when the right to enjoyment, present or prospective, has become the property of some particular person or persons as a present interest.'" Id., at 777). "A cause of action accrues when an aggrieved party has a right to institute

and maintain a lawsuit. When a cause of action has accrued, the party owning the action has a vested interest in it." Thorp v. Casey's Gen. Stores, 496 N.W.2d 457, 460 (Iowa 1989). Under standard analysis it is unarguable that Nahas' rights accrued and became vested in the potential claims he asserts arose from the January 5, 2021 termination. However, upon conclusion that rights become vested at an earlier time, the conclusion is too quickly, and wrongly, reached that retrospective application of the new law is forbidden or unconstitutional.

To begin the proper sequence of analysis, the statute in question, Section 670.4A, must first be assessed for the legislative intent behind it. "Legislative intent determines if a court will apply a statute retrospectively or prospectively." Iowa Beta Chapter, etc. v. State of Iowa, 763 N.W.2d 250, 266 (Iowa 2009):

> "The first step in determining if a statute applies retrospectively, prospectively, or both is to determine whether the legislature expressly stated its intention."

Id. (emphasis added). The word "expressly" quoted in the last sentence is, however, deceiving. The rule is, instead, that

> "The legislature's failure to expressly state in the amendment whether it was to have retrospective or prospective application is not determinative . . . The determination instead boils down to whether the legislature intended

> to give the amendment here retrospective or prospective application."

Emmet County State Bank v. Reutter, 439 N.W.2d 651, 654 (Iowa 1989). Rather, the true rule of statutory construction is properly stated that

> "Statutes which specifically affect substantive rights are construed to operate prospectively unless legislative intent to the contrary clearly appears from the express language or by necessary and unavoidable implication." (emphasis added).

Baldwin v. City of Waterloo, 372 N.W.2d 486, 491 (Iowa 1985); Anderson Financial Services, LLC v. Miller, 769 N.W.2d 575, 578 (Iowa 2009) (same). The operation of Section 670.4A is expressly stated in that statute in two ways: First, the statute is made instantly applicable, i.e., "expressly", by Section 16 of Senate File 342, announcing that "being deemed of immediate importance, . . . this Act . . . takes effect upon enactment." That is, it clearly applies to a Petition filed after the law became effective. Second, as discussed in much greater detail in Brief Point II, below, the Legislature's use of the introductory phrase in Section 640.4A(1) — "Notwithstanding any other provision of law" — expressly makes its immediate effect readily apparent in practical application to this suit which had accrued on January 5, 2021. In other words, Section 670.4A expressly and "by necessary and unavoidable implication" makes that law operate

prospectively for actions that accrue after June 17, 2021 as well as retrospectively for actions that accrued before that date.

Confirmation of the legislative intent for this result is achieved by consulting the ordinary rule of statutory construction that the Legislature knows how to say what it means.[1] See, Frideres v. Schiltz, 540 N.W.2d 261, 265 (Iowa 1995)(acknowledging that a statute stating "This Act is applicable to all actions filed on or after the effective date of the Act" is plainly operational only prospectively, citing First National Bank v. Diers, 430 N.W.2d 412, 414 (Iowa 1988) (and holding the same) and Compare, Barad v. Jefferson County, 178 N.W.2d 376, 378 (Iowa 1970), considering the delay of implementation of the municipal tort claims act where the Legislature denied the new statute retrospective effect stating: "This Act shall have no application to any occurrence or injury claim or action arising prior to its effective date". Obviously, the Legislature did not, as it could have, limit the effect of Section 670.4A as it did in Frideres and Barad. Thus, Section 670.4A applies retrospectively in this case to Plaintiffs' lawsuits.

[1] "The legislature is presumed to know the state of the law, including case law, at the time it enacts a statute." Roberts Dairy v. Billick, 861 N.W.2d 814, 821 (Iowa 2015)

A.
SUBSTANTIVE LEGISLATION

Another way of looking at this matter, and which confirms this conclusion of retrospectivity, involves a deeper examination of other rules of construction pertaining to these issues. It is obvious, by now,

> "that all statutes the Legislature enacts are to apply prospectively, that is they are to apply only to actions which arise after the effective date of the statute . . ."

Frideres, 540 N.W.2d, at 264. On the other hand, some laws are construed to operate both prospectively and retrospectively. These are statutes that "relate() solely to remedy or procedure." Iowa Beta Chapter, 763 N.W.2d, at 266. Then, laws which are categorized as "substantive" are usually and presumed to apply prospectively only, "unless legislative intent to the contrary clearly appears from the express language or by necessary and unavoidable implication." Baldwin, 372 N.W.2d, at 491. "A substantive statute is one that "creates, defines and regulates rights". Iowa Beta Chapter, supra, at 263. A finer definition of "substantive" statutes is however elusive without consideration of the cases where that holding results.

Consider the following cases to demonstrate. Iowa Beta Chapter, 763 N.W.2d 250 (Iowa 2009) considered a statute which relieved a state employee of personal liability upon certification by the Attorney General that the state

employee was such and had been acting within the scope of his duties; whereupon the State would be substituted for the named employee. See, id, at 265-66 (quoting statute). Challenge was made to this law by a plaintiff who sued a state employee personally one year before the new statute was effective. Id., at 266. This statute was held to be substantive which could not be retrospectively applied because the "statute eliminates or limits a remedy" of suit against the state employee relieved of liability. Id., at 267.

Iowa Beta Chapter cited Moose v. Rich, 253 N.W.2d 565 (Iowa 1977) which involved an employee (Moose) suing a fellow employee (Rich) for workplace negligence which occurred on September 29, 1971. Id., at 567. Rich defended against that claim asserting that a statute passed in 1974 operated retrospectively. The 1974 statute provided an immunity from suit to a co-employee unless the plaintiff proved the co-employee's gross negligence. Id., at 571-72. The Court found the later passed statute was substantive if applied retrospectively, because the earlier injured employee would lose a right of action, by the immunity, which had accrued long beforehand. Id., at 572.

In Thorp v. Casey's General Stores, 446 N.W.2d 457 (Iowa 1989), a dram shop lawsuit, was brought against Casey's for a vehicle related death which occurred in 1985. The statute in effect at that time permitted action against any licensee which "sold or gave" alcohol to a person if the person was intoxicated.

A 1986 amendment to the statute scrapped the "sold and gave" language, requiring instead that plaintiff prove the licensee had 'sold and served' the alcohol. Id., at 459 (emphasis added). Because the amendment would destroy Thorp's claim — Casey's did not serve the alcohol it sold — the issue was whether the amendment could properly apply retrospectively. Finding that Thorp's rights had vested under the 1985 statute requiring only proof of "sold or gave" , Id., at 460, "a statutory amendment that takes away a cause of action 'that previously existed and does not give a remedy where none or a different one existed previously' is substantive", Id., at 461 and could not be given retrospective effect, Id., at 461-62, because plaintiff would be "deprived . . . of all redress." Id., at 462.

In Pfiffner v. Roth, 379 N.W.2d 357 (Iowa 1985) liability against the City of Dubuque for anti-competition violations had been upheld by the Iowa Supreme Court in an earlier case. Id., at 358. However, a 1984 amendment to the Competition statute created an exemption from liability for cities. Id., at 359. Dubuque argued the 1984 amendment should apply in exempting the previously established liability. Id. This Court was not impressed:

> "As a general observation, a change such as this, which provided an exemption where none existed before, would have to be considered a substantive change . . .

> Even assuming the 1984 amendment created new law, the issue remains whether it should have retrospective effect as claimed by the city. We summarily dispose of this issue. The amendment does not say it is to be given retrospective application. It is therefore presumed to be prospective only. Iowa Code §4.5. Moreover, this plaintiff had a right of recovery against the city under the old law but would have none under the new one. Ordinarily, we will not give retrospective effect to an amendment when it has that effect."

Id., at 360-61.

Veasely v. CRST Intern., Inc., 553 N.W.2d 896 (Iowa 1996) arose from a truck accident in Arizona where a relief driver was injured when the main driver overturned the truck. Id., at 897. Under Section 321.493 (1993), the truck was owned by Rapid Leasing and titled in its name. Id. Veasely sued Rapid Leasing for the negligence of the co-employee driver because it was the titled owner. Id. In the meantime, in 1995, the Legislature amended Section 321.493 adding that a leased vehicle was not owned by the person named in the title but was, rather, the person who had leased the vehicle. Id., at 900-901. Rapid Leasing urged that it was not the owner under this 1995 amendment. The Supreme Court disagreed. Because Plaintiff's cause of action was fully matured under the 1993 statute making Rapid Leasing the truck's owner, "(i)f the [1995] amendment is given retroactive effect, it will completely eliminate [Veasely's] claim or any remedy pursuant thereto [and] . . . may not be

retroactively applied so as to affect Veasely's rights in the present case." Id., at 901.

As seen, the vice of a statute determined to be and described as "substantive" is that

> "'takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability in respect to transactions or considerations already past.'"

Smith v. Korf, Diehl et. al., 302 N.W.2d 137, 138 (Iowa 1981). Hence, "(a) statutory amendment that takes away a cause of action 'that previously existed and does not give a remedy where none or a different one existed previously' is substantive . . ." Thorp, 446 N.W.2d at 461. Because

> "(a) cause of action accrues when an aggrieved party has a right to institute and maintain a lawsuit . . . [giving] the party owning the action . . . a vested right in it . . . substantive legislation cannot extinguish vested rights [and] such legislation can only operate prospectively."

Dolezal v. Bockes, 602 N.W.2d 348, 351 (Iowa 1999) ("The legislature may not extinguish a right of action that has already accrued to a claimant." — Id.).

However, to restate the rule, a substantive statute is not necessarily defective merely because it operates retrospectively where it does not negate or extinguish the accrued, vested rights of a litigant acquired before the statute or amendment becomes effective. This is why, despite the presumption a

substantive statute operates only prospectively, the Legislature in appropriate cases can signal its intent expressly or impliedly that it intends the amendment to operate retrospectively, and such laws will be respected by the courts. As this Court observed in State ex. rel. Turner v. Limbrecht, 246 N.W.2d 330, 334 (Iowa 1976)

> "'In the absence of an express constitutional inhibition retrospective laws are not prohibited as such. Moreover, the Constitution of the United States does not in terms prohibit the enactment by the states of retrospective laws which do not impair the obligation of contracts or partake of the character of ex post facto laws . . . In many of the states there are constitutional provisions expressly prohibiting, not only the passage of any ex post facto law or law impairing the obligation of contracts, but any statute retrospective in operation.
>
> Iowa has no such constitutional prohibition."

B.
PROCEDURAL/REMEDIAL STATUTES

Baldwin v. City of Waterloo, 372 N.W.2d 486, 491 (Iowa 1985) said that procedural law, as distinguished from substantive law,

> "'is the practice, method, procedure, or legal machinery by which the substantive law is enforced or made effective.' . . . (A) remedial statute is one that tends to afford a private remedy to a person injured by a wrongful act. It is generally designed to correct an existing law or redress an existing grievance."

In other words, "(r)emedial laws pertain to or affect a remedy as opposed to affecting or modifying a right." Anderson Financial Services, LLC v. Miller, 769 N.W.2d 575, 580 (Iowa 2009).

"In contrast to substantive legislation, procedural legislation applies to all actions — those that have occurred or are pending and future actions . . . The rationale for the rule that procedural legislation applies to all actions is that no one can claim to have a vested right in any particular mode of procedure for the enforcement or defense of the party's rights." Dolezal, 602 N.W.2d, at 351. Further explanation of this rule is found in Denton v. Moser, 241 N.W.2d 28, 31-32 (Iowa 1976) where the Court said:

> "'No one can claim to have a vested right in any particular mode of procedure for an enforcement or defense of his rights. When a new statute deals with procedure only, prima facie, it applies to all actions, — those which are accrued or are pending, and future actions. If before final decision a new law as to procedure is erected and goes into effect, it must from that time govern and regulate the proceeding.'"

Hence, ". . . if the statute relates solely to a remedy or procedure, it is ordinarily applied both prospectively and retrospectively." Baldwin, 372 N.W.2d, at 491. "In other words, a change in the statute which merely affects the remedy or the procedural law can constitutionally apply retroactively to causes of action which vested before their enactment." Thorp, 446 N.W.2d, at 461. A statute

which is remedial then, encompasses "legislation which is intended to cure defects in prior law", Matter of Parson's Estate, 272 N.W.2d 16, 22 (Iowa 1978), and "legislation which regulates conduct for the public good . . .", Iowa Comprehensive Petroleum Underground Storage Tank Fund Bd. v. Shell Oil Co., 606 N.W.2d 370, 375 (Iowa 2000).

Conclusion that a law is remedial or procedural, and therefore operates retrospectively can have the same devastating consequences to a litigant as a law which is deemed substantive in effect. Again, cases presented show the effect of such determinations, compared to the "substantive" cases discussed above, for a clearer analysis confirming that Section 670.4A, the qualified immunity statute at issue here (and effective in the interim), applies retrospectively to the lawsuit which Nahas filed after the statute became law but with an accrual date five (5) months earlier.

It would seem self-evident that rules of civil procedure and rules of appellate procedure are procedural and, hence, capture and apply to actions that accrued before those rules became effective, i.e., retrospectively. This intuition proves absolutely true. Walker State Bank v. Chipokas, 228 N.W.2d 49, 51 (Iowa 1975) (amendment to Iowa R. Civ. P. 55, relating to defectively served original notices, "deals solely with procedural or remedial matters", where prior rule's application would have resulted in a dismissal with

prejudice.); Dolezal v. Bockes, 602 N.W.2d 348, 351-52 (Iowa 1999) (new rule of civil procedure, requiring notice to defaulting party before default judgment is entered, where notice was not given results in reversal of default judgment. HELD: The rule was procedural not substantive: "The rule neither takes away causes of action that previously existed nor creates new rights."); Smith v. Korf, Diehl, et. al., 302 N.W.2d 137, 139 (Iowa 1981) (Rule of appellate procedure modified to permit discretion in accepting premature appeals applies to presently pending appeal, where otherwise appellate jurisdiction would have been declined, because rule is "procedural"). The same remedial/procedural dichotomy applies to matters of venue. Bascom v. District Court, 1 N.W.2d 220, 221-22 (Iowa 1941) (auto death on May 7, 1941 in Cerro Gordo County, place of decedent's residence, properly commenced in that county on August 22, 1941. On July 4, 1941, new venue statute becomes effective permitting action to have been brought in Floyd County, residence of defendant. HELD: Though widow's action accrued prior to new venue statute, statute was procedural and thus applied retrospectively). Though one might think otherwise, the same rules apply to determining the measure of damages. Schmitt v. Jenkins Truck Lines, 149 N.W.2d 789, 793 (Iowa 1967) (statute equalizing the measure of damages for women to those of men applied retrospectively to deaths occurring prior thereto since law was remedial: " . . . this court has on several

occasions held the measure of damages for tortious wrong pertains to remedy rather than substantive law." —, at 792).

Bearing more closely to consideration of Section 670.4A are three cases. In Schultz v. Gosselink, 148 N.W.2d 434 (Iowa 1967) the Court considered a new statute which relieved a plaintiff from proving the absence of his contributory negligence in order to recover in tort and re-assigned to the defendant the burden of pleading and proof of the contributory negligence of plaintiff, if that was to be a defense. Id., at 435. Defendant urged the new statute was substantive and applied only prospectively. Id. This Court disagreed concluding

> "While the distinction between remedial procedures and impairment of vested right is often difficult to draw we believe our prior holdings establish the pleading and proof of contributory negligence in a tort action relates to remedy and procedure." Id., at 436.

Jones v. Bowers, 256 N.W.2d 233 (Iowa 1977) dealt with a new statute, effective July 1, 1975, that required suits against a state employee to be first submitted through an administrative remedy — the state appeal board — where otherwise the suit would be barred completely. Id. at 234-35. Because suit against the state trooper had been commenced after the effective date of the new administrative remedy (and where no claim had been filed administratively), the issue became whether the statute applied to causes of

action that accrued before July 1, 1975. Id., at 235. The Supreme Court held simply the statute operated retrospectively:

> "Legislation which gives a party a different remedy from one he previously had is generally held to be applicable to rights of action which arose before its enactment in the absence of expression of a contrary legislative intent . . . The creation of an administrative remedy and the requirement of prior resort to this procedure is remedial. Moreover, the legislature did not make the new procedure prospective only."

Id.

In Baldwin v. City of Waterloo, 372 N.W.2d 486 (Iowa 1985) the Court dealt with application of the new Comparative Fault Act, Iowa Code Chapter 668, which barred joint and several liability where a defendant was found to be less than 50% negligent. Id., at 491.

> "The issue is whether this section applies to this case, which was filed before July 4, 1984, the effective date of chapter 668 . . . [where] section 668.4 specifically applies to all cases tried on or after July 1, 1984." Id. (emphasis in original).

Plaintiff, injured in a motorcycle accident in May, 1978, claimed application of the new statute would amount to a taking of his vested right to application of the Court's earlier pure comparative fault rule. This would violate his substantive due process rights. Id. The Court disagreed:

> "Plaintiff had no vested right in a particular result of this litigation or in the continuation of the principle of

> unlimited joint and several liability [under earlier pure comparative fault] . . . We have noted that 'a right is not "vested" unless it is something more than a mere expectation, based on an anticipated continuance of the present laws. It must be some right or interest in property that has become fixed or established, and is not open to doubt or controversy' . . . Any interest that these defendants (sic: plaintiff) might have in the continued state of the law concerning joint and several liability was not a 'vested' right entitled to constitutional protection. We believe the trial court correctly ruled that section 668.1(4) is applicable in this case."

Id., at 492.

C.

CONSIDERATION OF NEW IOWA CODE SECTION 670.4A, AS "SUBSTANTIVE" OR AS PROCEDURAL/REMEDIAL

For present purposes, Section 640.4A(1)(a, b) may be put aside momentarily as creating only the definitional boundaries of the qualified immunity intended. Section 670.4A(3), on the other hand, can easily be seen as creating a pleading requirement for those suing as plaintiffs under Chapter 670A. That is, it applies to all claims under Chapter 670, not just the qualified immunity described in Section 670.4A. Necessarily, the pleading provisions of Section 670.4A(3), earlier effective, apply to Nahas' later filed Petition. But, as just seen, a change in a pleading requirement is procedural and remedial and therefore works retrospectively in any event. Schultz v. Gosselink, supra. As a new pleading requirement, where plaintiff must "state with particularity" both

the "circumstances constituting the violation" and that "the law was clearly established" when the violation occurred, these new thresholds are exceptions to the standard long established notice-pleading regime, currently under Iowa R. Civ. P. 1.403, where a petition is sufficient if it "apprises a defendant of the incident giving rise to the claim and the general nature of the action." Soike v. Evan Matthew, etc., 302 N.W.2d 841, 842 (Iowa 1981). Instead, the new rule obligating a plaintiff to "state with particularity" the "circumstances" acts in rejection of notice pleading. So does the language requiring a statement "constituting the violation" and the "clearly established law" element. To the contrary, notice pleading "does not require the pleading of ultimate facts that support the elements of the cause of action." Schmidt v. Wilkinson, 340 N.W.2d 282, 283 (Iowa 1983). Indeed, by requiring a statement of the "clearly established law" in the petition, notice-pleading is again rejected as it does not "require the plaintiffs to go further and identify the specific legal theory underlying the claim." Soike, supra. The point of all this is that these matters pertain to pleading requirements under Section 670.4A(3) and pleading requirements are definitionally prospective here and procedural and remedial in nature, thus retrospective in application anyway. Walker State Bank, supra; and Dolezal v. Bockes, supra. And, indeed, it cannot pass notice that Section 670.4A(4) — "Any decision by the district court denying qualified immunity

shall be immediately appealable." — is *per se* remedial under Smith v. Korf, Diehl, supra, establishing a basis for new interlocutory appellate jurisdiction.

Now, consider the same matters through the prism of "substantive" law addressed above. Section 670.4A obviously does not facially eliminate Nahas' lawsuit by its own terms. Compare, Iowa Beta Chapter, supra, (eliminating suit against state employee); nor does it confer an automatic immunity negating plaintiff's suit against a co-employee. See, Moose v. Rich, supra. This Section does not "take away", or destroy any cause of action either of Plaintiff, as in Thorp and Veasely. In application, Section 670.4A applies very much like Baldwin, supra, where retrospective overruling of the judicially created pure comparative fault rule was displaced by the modified comparative fault statute of Section 668.4 and, here, where defendant still must plead and prove entitlement of the qualified immunity in order to avoid the threat of liability posed by a properly pleaded petition asserting that defendant's violation of law was "clearly established" when it happened such that "every reasonable employee" would have known his conduct to be illegal. As in Baldwin, and here, there has been no taking of plaintiffs' vested rights to future continuation of their suits without the presence of the qualified immunity statute.

In fact, in Iowa Dept. of Transp v. Iowa Dist. Court, 587 N.W.2d 781, 792 (Iowa 1998), Justice Snell, dissenting, emphasized this very distinction between Thorp and Baldwin. He wrote:

> "In Thorp we considered the issue of retroactivity after concluding that the plaintiff had a vested right in her cause of action. We noted that the legislature can apply retroactively changes in statutes which 'merely affect [ ] the remedy or procedural law . . .' Such changes can apply retroactively even to causes of action which vest before this enactment. In distinguishing between changes which merely affect the remedy or procedure and substantive changes, we discussed several prior cases. In Baldwin, . . ., our court considered a new statute which discontinued unlimited joint and several liability in tort cases. We found that the new statute was not a substantive change in the law because the plaintiffs still had a cause of action."

(emphasis added). As Nahas still has a viable lawsuit despite claiming prohibited retrospectivity of Section 670.4A, those claims collapse instantly.

III.
EXPRESS LEGISLATIVE INTENT THAT SECTION 670.4A APPLIES RETROSPECTIVELY IS CONCLUSIVELY DEMONSTRATED BY ITS INTRODUCTORY LANGUAGE: "NOTWITHSTANDING ANY OTHER PROVISION OF LAW"

Section 670.4A(1) introduces its new qualified immunity rules by a phrase which has received virtually no judicial construction in Iowa cases.[2]

[2] Justice Lavorato provided a strong clue to understanding the "Notwithstanding any other provision of law" introductory phrase, as it is intended to apply in Section 670.4A, in Emmet County State Bank v. Reutter, 439 N.W.2d 651, 654 (Iowa 1989). That case dealt with a statutory amendment generating the question whether it worked prospectively only or

That phrase is: "Notwithstanding any other provision of law . . ." This phrase is, in fact, an overarching statement of law that subordinates every other rule of statutory construction contending against it. It is pre-eminent and surpasses all other common law and statutory norms of analyzing legislative intent. It is decisive in this case rendering unnecessary any other reasoning behind the applied meaning of Section 670.4A. There is only one other corollary in rank to this phrase and that is the very first rule of statutory construction: when a statute is plain and its meaning is clear, there is no need to resort to other rules of construction.

It is astounding that this Court has never thoroughly considered this phrase — "Notwithstanding any other provision of law" — or that it has failed to receive any attention. Especially so, when understanding the phrase's true meaning provides it with an amplified power to cut through and thereby wholly avoid the constructional analysis employed in the first Brief Point, above. In a

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retrospectively. The Court decided that the language of the amendment "implies retrospective application." Id. As support for that premise, the Court relied upon a decision from 1920. That attribution is quoted here for the strength of its import in this case:

[2](cont'd) "Aetna Ins. Co. v. Chicago G.W.R. Co., 190 Iowa 487, 489, 180 N.W. 649, 651 (1920) (the language 'any provision in any lease or contract to the contrary notwithstanding' in newly enacted statute implied retrospective application to all leases containing a provision in conflict with the statute)."

Emmet County State Bank, 439 N.W.2d, at 654.

word, the phrase "Notwithstanding any other provision of law"[3] is a force majeure clause which is transcendent among other rules of statutory construction.

Without inordinately prolonging the discussion, the United States Supreme Court has at least thrice addressed the NAOPL phrase in the last 60 years. In Shomberg v. United States, 348 U.S. 540, 547-48 (1955) the Court adverted to the intent behind usage of the phrase:

> "In using the 'notwithstanding' language in these sections, Congress clearly manifested its intent that certain policies should override the otherwise broad and pervasive principle of the savings clause . . . We would be lax in our duty if we did not give recognition also to congressional purpose to override the savings clause when other considerations were thought more compelling than the preservation of the status quo."

To the same more broadly stated purpose, the Court in Cisneros v. Alpine Ridge Group, 508 U.S. 10, 18 (1993) (construing contract provisions) said:

> "As we have noted previously in construing statutes, the use of such a 'notwithstanding' clause clearly signals the drafter's intention that the provisions of the 'notwithstanding' section override conflicting provisions of any other section . . . Likewise, the Courts of Appeals generally have 'interpreted similar "notwithstanding" language . . . to supersede all other laws, stating that '(a) clearer statement is difficult to imagine.'"'

[3] For ease of the reader, the phrase "Notwithstanding any other provision of law" is compressed to the acronym NAOPL.

See, Patchak v. Zinke, 138 S. Ct. 897, 905 (2018) (NAOPL applies to overcome a general grant of jurisdiction otherwise operative except for NAOPL statute). Accord, Shoshone Indian Tribe v. United States, 364 F.3d 1339, 1346 (Fed. Cir. 2004) ("The introductory phrase 'NAOPL' connotes a legislative intent to displace any other provision of law that is contrary to the Act . . .").

The same intent in use of the NAOPL phrase is likewise attributed by state appellate courts. It is recognized that the NAOPL phrase acts as an express legislative directive to any court construing a statute where this phrase appears. In State of California v. Thomas, 1 Cal. Rptr. 3d 233, 242 (Cal. App. 2003) (rev'd on other grounds) that Court described the overarching effect of the NAOPL phrase:

> "'Notwithstanding any other provision of law' is a term of art that is emblematic of an express legislative intent to have the specific statute control despite the existence of other law which might otherwise govern.' . . . 'This phrase has a special legal connotation; it is considered an express legislative intent that the specific statute in which it is contained controls in the circumstances covered by that statute, despite the existence of some other law which might otherwise apply to require a different or contrary outcome.'"

"The statutory phrase 'NAOPL' has been called a 'term of art' . . . that declares the legislative intent to override all contrary law." Arias v. Superior Court, 209

P.3d 923, 931 (Cal. 2009) (emphasis in original). See, Doe v. Hinsdale Tp. High School, 905 N.E.2d 343, 348-49 (Ill. App. 2009):

> "In using this language, the legislature clearly intended section ___ to control over other provisions of law, such as section ___ which would otherwise bar plaintiff's action . . . To hold otherwise would render meaningless the phrase 'NAOPL'. Accordingly, based on the legislature's use of the unambiguous language 'NAOPL', we apply section ___ as written without resorting to other aids of construction."

See also, City of Phoenix v. Glenayre Electronics, 393 P.3d 919, 924 (Ariz. 2017):

> "Section 'X''s introductory phrase 'NAOPL' makes clear that the statute of repose controls over other, potentially conflicting state laws. By using that phrase in §'X', the legislature 'has expressly and definitely declared' that the statute of repose controls over §'Y''s general exemption of governmental entities from statutes of limitations."

Two cases bear closer observance here as they address government immunity statutes. Paulson v. County of DeKalb, 644 N.E.2d 37 (Ill. App. 1994) involved a tort claims act which exempted municipalities from awards of punitive damages: "notwithstanding any other provision of law, a local public entity is not liable to pay punitive or exemplary damages in any action brought . . . against it by the injured party." Id., at 80. Rejecting plaintiff's challenge to this immunity under another statute, the Court easily determined:

> "(t)his prefatory phrase [NAOPL] 'was intended . . . to clarify the relationship between the Tort Immunity

> Act, which prohibits the assessment of punitive damages against a local public entity, and all other statutes or common law actions which may allow the assessment of punitive damages in certain circumstances.'" Id., at 40.

Likewise, in Mayor and City Council of Baltimore v. Chase, 756 A.2d 987 (Md. App. 2000) a tort immunity statute stated: "Notwithstanding any other provision of law, . . . a fire company or rescue company [and their personnel] are immune from civil liability for any act or omission in the course of performing their duties." Id., 988, n.1. Plaintiffs argued against the new immunity, but the Court upheld it explaining:

> "By using the phrase 'notwithstanding any other provision of law', §5-604 clearly and unambiguously states its relationship to § . . . and other statutes or laws on the same subject, prescribing different requirements, that the immunity it provides takes precedence over and prevails as against restrictions made applicable to fire and rescue companies by those other statutes, including § . . . It is difficult to imagine how that legislative intent could have been stated any clearer. Even more difficult to imagine is a more reasonable interpretation."

Id., at 992-93. Commenting further on the clarity of the NAOPL phrase, the Court said

> "that its language is crystal clear. As already pointed out, §5-604's relationship to pre-existing law and statutes bearing on the immunity of fire and rescue companies is addressed head-on and without equivocation — whatever their provisions in that

> regard, i.e. 'Notwithstanding any other provision of law', they do not affect, or survive, the immunity accorded fire and rescue companies by the provision of §5-604." Id., at 993.

To restate the matter in simpler terms, the NAOPL phrase means "in spite of" where "that section control(s) over other conflicting sections . . ." Walizek v. Retirement Board, 741 N.E.2d 272, 276 (Ill. App. 2000). "(T)he word 'notwithstanding' means 'without prevention or obstruction from or by; in spite of.'" City of Phoenix, 393 P.3d, at 924. "'(T)he legislature has often used such language such as 'NAOPL' . . . to indicate that a particular provision will trump any conflicting statutes.'" Id. "'NAOPL' 'signals a broad application overriding all other code sections.'" Caliber Bodyworks v. Superior Court, 134 Cal. App. 4th 365, 383, n. 17 (Cal. App. 2005); "The phrase 'NAOPL' 'clearly supersedes any inconsistent provisions of state law.'" State v. Zimmer, 880 N.Y.S.2d 813, 814 (App. Div. 2009); "The meaning of the statute's 'notwithstanding' clearly superseded any inconsistent provisions of state law.'" New York v. John S., 15 N.E.3d 287, 297 (N.Y. 2014) (emphasis in original); "Statutory 'NAOPL' clauses broadly sweep aside potentially conflicting laws." United States v. Novak, 476 F.3d 1041, 1046 (9th Cir. 2007).

As the Missouri Supreme Court has concluded:

> "When two already adopted statutes are at issue, this [NAOPL] rule of construction applies. In such a case, if

> the later-adopted statute contains the ['NAOPL'] language, it clearly indicates an intent for the later-adopted to prevail to the extent that the two statutes are inconsistent . . . As noted in Riley, 'to say that a statute applies 'notwithstanding any other provisions of the law' is to say that no other provisions of law can be held in conflict with it . . . The 'Notwithstanding' clause does not create a conflict, but eliminates the conflict that would have occurred in the absence of the clause.'"

Earth Island Institute v. Union Electric, 456 S.W.3d 27, 33-34 (Mo. 2015) (en banc).

A.

APPLICATION OF 'NAOPL' LANGUAGE TO THIS CASE

The legislative objective behind Section 670.4A is easy to understand: The Legislature desired to provide a qualified immunity to employees and officers of municipalities that was dominant among other defenses and immunities in Section 670.4 of the Tort Claims Act. While some jurists and litigators could extensively debate whether Section 670.4A applied prospectively or retrospectively or under the common law or statutory rules of construction in Iowa Code Chapter 4, myriad case decisions always leave some legal doubt about what was "substantive" or "remedial" necessary to determine whether a statute or amendment works retrospectively or prospectively. These "provisions of law" — statutory and common law rules of construction — are rendered totally irrelevant and are wholly subordinated when, as here,

the NAOPL phrase definitionally supersedes every other "provision of law" that would be inconsistent with and render powerless the pre-eminent qualities attributed to the phrase. By disregarding every other provision of law that conflicts with an amendment introduced by the NAOPL phrase, legislative intent becomes realized with certainty, clarity and celerity.

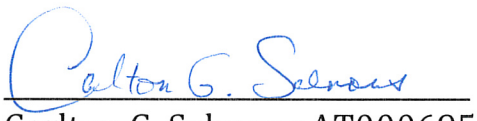
Respectfully, this means here that even if Section 670.4A is deemed "substantive", rather than "procedural", its retrospective operation is assured by the "Notwithstanding" clause of that statute that sweeps away any other provision of common or statutory law of construction dictating a contrary result.

CONCLUSION

Iowa Code Section 670.4A is a procedural statute and, hence, can operate prospectively and retrospectively under ordinary rules of construction. If, however, it is deemed substantive in operation and effect, it still operates retrospectively under its introductory phrase, "Notwithstanding any other provision of law." Because Nahas remains possessed of his lawsuit, despite the foregoing, his earlier accrued claims are unaffected by the statute, even if it operates retrospectively.

Respectfully Submitted,

MACRO & KOZLOWSKI, L.L.P.

By: 

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