IN THE SUPREME COURT OF IOWA
NO. 22-0513

JIM SUTTON AND ANGELA SUTTON,

Plaintiffs-Appellees,

vs.

COUNCIL BLUFFS WATER WORKS,

Defendant-Appellant.

APPEAL FROM THE POTTAWATTAMIE COUNTY DISTRICT COURT
THE HONORABLE GREG W. STEENSLAND

Case No. LACV122333

FINAL BRIEF OF APPELLANT

Michael T. Gibbons, AT0002906
Raymond E. Walden, pro hac vice
WOODKE & GIBBONS, P.C., L.L.O.
619 N. 90th Street
Omaha, Nebraska 68114
Telephone: (402) 391-6000
Facsimile: (402) 391-6200
Email Address: mgibbons@woglaw.com
rwalden@woglaw.com
ATTORNEYS FOR APPELLANT/DEFENDANT

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STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Did the District Court base its reasoning on an erroneous interpretation of the Iowa Municipal Tort Claims Act, and therefore err in denying the pre-answer motion by Council Bluffs Water Works to strike the strict liability claim?

Iowa Code Chap. 670

Iowa Code §§ 670.1, 670.1(4), 670.4(1)(h), 670.4(2).670.4(3)

Chevron U.S.A. Inc. v. Echazabal, 536 U.S. 73 (2002)

Hansen v. City of Audubon, 378 N.W.2d 903 (Iowa 1985)

Hartman v. Merged Area VI Community College, 270 N.W.2d 822 (Iowa 1978)

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Iowa Power and Light Company v. The Board of Water Works Trustees of the City of Des Moines, 281 N.W.2d 827 (Iowa Ct. App. 1979)

Jahnke v. Incorporated City of Des Moines, 191 N.W.2d 780 (Iowa 1971)

Kellogg v. City of Albia, 908 N.W.2d 822 (Iowa 2018)

Lubin v. Iowa City, 131 N.W.2d 765 (Iowa 1964)

Mall Real Estate, LLC v. City of Hamburg, 818 N.W.2d 190 (Iowa 2012)

Marcus v. Young, 538 N.W.2d 285 (Iowa 1995)

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Rolfe State Bank v. Gunderson, 794 N.W.2d 561 (Iowa 2011)

Rucker v. Humboldt Cmty. Sch. Dist., 737 N.W.2d 292 (Iowa 2007)

ROUTING STATEMENT

The Appellant/Defendant believes the Supreme Court should retain the case. This case presents a question of first impression having significant public importance involving the effects of intervening enactment of the Iowa Municipal Tort Claims Act ("IMTCA" or "Act") and subsequent amendments on pre-Act caselaw involving the scope of a municipality's liability for escape of water from its water system. The issues are purely questions of law based on statutory language and the timeline of statutory enactments in the context of the Supreme Court's decisions applying the IMTCA. A definitive ruling by the Supreme Court on whether the IMTCA allows the Plaintiffs' strict liability claim will not only focus development of the present case through discovery and trial, but also will set an important precedent in other cases that may arise involving Iowa municipalities.

STATEMENT OF THE CASE

A. Nature of the Case

Plaintiff Angela Sutton owns a residential property she shares with her husband Plaintiff Jim Sutton in Council Bluffs, Iowa, and sued Defendant Council Bluffs Water Works ("CBWW"), an Iowa municipality as defined in Iowa Code § 670.1, for alleged damage to their property from a series of underground water main breaks near their residence. Appendix pp. 7-8, ¶¶ 1, 2, 4-6, 8, 11. Count I asserts a claim for strict liability based on the allegations of the water main breaks and the resulting property damage. Appendix p. 9, ¶¶ 14-16. Count II asserts an alternative claim for negligence in failing to properly maintain and/or repair the water mains. Appendix p. 10, ¶¶ 18-19.

The Suttons allege having filed a Notice of Claim/Loss with CBWW. Appendix p. 8, ¶ 12.

B. Relevant Events of the Prior Proceedings

Defendant CBWW filed a Pre-Answer Motion to Dismiss asking the district court to strike Count I of the Petition for strict liability and dismissing the Petition for failure to state a claim upon which relief can be granted. Appendix p. 12.

Plaintiffs filed a Resistance to the Pre-Answer Motion and argued that CBWW could be sued under a strict liability theory because of an Iowa Supreme Court case from 1964, *Lubin v. Iowa City*, 131 N.W.2d 765 (Iowa 1964), and a Court of Appeals case from 1979, *Iowa Power and Light Company v. The Board of Water Works Trustees of the City of Des Moines*, 281 N.W.2d 827 (Iowa Ct. App. 1979). Appendix pp. 14-17

Defendant filed a Brief Replying to Plaintiff's Resistance and Supporting Defendant's Pre-Answer Motion to Dismiss, in which it pointed out that the 1964 case preceded enactment of the Iowa Municipal Tort Claims Act in 1967 with provisions inconsistent with strict liability, and the 1979 case preceded an amendment of the IMTCA in 1983 that adopted an immunity provision relevant to the scope of the Act with respect to strict liability. Appendix pp. 19-24. The Reply also explained the basis for the Motion's request for dismissal for failure to state a claim, pointing out the lack of allegations of negligence on CBWW's part. Appendix pp. 24-25.

After further briefing by both sides, Appendix pp. 27-37, 41-47, the district court conducted a hearing on Defendant's Motion (not recorded) and heard arguments. Appendix p. 49. During the hearing, CBWW withdrew the part of its pre-answer motion involving the Plaintiffs' negligence claim. Appendix p. 51. That left as the sole issue the motion to strike the strict

liability claim. On that claim, Defendant asserted that the prior case law was overruled and preempted by the Iowa Municipal Tort Claims Act (IMTCA) enacted in 1967 and its subsequent amendments.

C. Disposition of the Case in the District Court

In its Order on March 4, 2022, denying Defendant's Motion, the District Court began by agreeing with the logic of Defendant's statutory argument that, based on the Act's language, the IMTCA (passed in 1967) would statutorily overrule any preexisting case law, and that because of explicit exceptions for certain claims setting boundaries on immunity, "it would not logically follow to allow recovery under strict liability as well." Appendix p. 51. Although not cited in the Order, the pre-existing case law was *Lubin v. Iowa City*, 131 N.W.2d 765 (Iowa 1964), which had recognized a strict liability claim under pre-IMTCA common law.

However, the district court then reasoned that "strict liability is not specifically excluded under the IMTCA nor has it been specifically excluded by case law," and cited *Jahnke v. Incorporated City of Des Moines*, 191 N.W.2d 780 (Iowa 1971), and *Iowa Power and Light Company v. The Board of Water Works Trustees of the City of Des Moines*, 281 N.W.2d 827 (Iowa Ct. App. 1979). The district court concluded that strict liability could be imposed if the facts show the Defendant engaged in an abnormally

dangerous activity. Appendix p. 51-52. Essentially, the district court said the statute itself would not seem to allow a strict liability claim, but the Iowa appellate courts kept recognizing it after the Act, so the district court's hands were tied. The district court did not take into account the fact that an immunity provision it cited as part of the reason why the Defendant's statutory argument makes sense was enacted in 1983 and took effect in 1984—after the 1971 and 1979 cases the judge perceived as tying his hands. Defendant applied for this interlocutory appeal on March 21, 2022.

STATEMENT OF THE FACTS

The alleged facts related to the appeal are all set out in the Petition:

1. Plaintiffs Jim and Angela Sutton allege that Angela owns a residential property at 302 Park Avenue, Council Bluffs, Iowa, on the corner of Park Avenue and High School Avenue, where the couple reside. Appendix pp. 7-8, ¶¶ 1, 4, 5, 7.
2. Defendant Council Bluffs Water Works is an Iowa municipality as defined in Iowa Code § 670.1. Appendix p. 7, ¶ 2.
3. From about November 5 to December 30, 2020, a series of

underground water main breaks occurred near the intersection, causing settlement issues and damages to the residence. Appendix p. 8, ¶¶ 6, 8.

4. The Suttons contacted CBWW about November 9, 2020, when they noticed water bubbling up, which developed into standing water. Appendix p. 8, ¶ 9.
5. CBWW sent crews to inspect and repair the water main breaks on five dates from November 9 to December 30, 2020. Appendix p. 8, ¶ 10.
6. The water main breaks allegedly caused significant settlement damage, basement flooding, and damage to the foundation, interior walls, and doors. Appendix p. 8, ¶ 11.
7. Angela Sutton filed a Notice of Claim/Loss with CBWW on March 9, 2021. Appendix p. 8, ¶ 12.
8. CBWW was in exclusive control and was responsible for maintaining and repairing the underground water mains near the intersection where the Sutton home was located. Appendix p. 9, ¶ 14.

ARGUMENT

PRESERVATION OF ERROR

Plaintiff/Appellant preserved its claim of error by the District Court as to the motion to strike the strict liability claim by presenting the motion with written and oral arguments to the Court for decision at the hearing on the motion and, after the District Court's Order on March 4, 2022, by timely filing its Application for Interlocutory Appeal on March 21, 2022. Appendix, p. 54-65.

STANDARD OF REVIEW

The purpose of a motion to dismiss is to test the legal sufficiency of the petition. *Turner v. Iowa State Bank & Tr. Co. of Fairfield*, 743 N.W.2d 1, 2-3 (Iowa 2007). The Supreme Court reviews rulings on motions to dismiss for the correction of legal error. *Godfrey v. State*, 898 N.W.2d 844, 847 (Iowa 2017). Under the well-established standard for a motion to dismiss for failure to state a claim upon which any relief may be granted under rule Iowa R. Civ. Pro. 1.421(1)(*f*), a motion to dismiss admits the well-pleaded facts in the petition, but not the conclusions. *Benskin, Inc. v. West Bank*, 952 N.W.2d 292, 298 (Iowa 2020); *Hawkeye Foodservice Distribution, Inc. v. Iowa Educators Corp.*, 812 N.W.2d 600, 608-09 (Iowa

2012); *Kingsway Cathedral v. Iowa Dep't of Transp.*, 711 N.W.2d 6, 8 (Iowa 2006); *Rieff v. Evans*, 630 N.W.2d 278, 284 (Iowa 2001).

When considering the effect of a statute, the Court begins by considering the wording of the relevant statutes as applied to the present case. *Thomas v. Gavin*, 838 N.W.2d 518, 523 (Iowa 2013). "Our goal, when interpreting a statute, is to give effect to the intent of the legislature." *Jacobson Transp. Co. v. Harris*, 778 N.W.2d 192, 197 (Iowa 2010). "To determine the intent of the legislature, we look first to the words of the statute itself as well as the context of the language at issue." *Id.*

ARGUMENT

I.

THE IMTCA DOES NOT GIVE A REMEDY FOR STRICT LIABILITY.

This interlocutory appeal asks, as a matter of first impression, whether a private property owner may recover damages from a municipal operator of a water supply system on the basis of strict liability for water escaping from a broken water main after the 1967 enactment of the Iowa Municipal Tort Claims Act and subsequent amendments, Iowa Code Chap. 670. The Act became law in 1967. *Thomas v. Gavin*, 838 N.W.2d 518, 521 (Iowa 2013) (citing 1967 Iowa Acts ch. 405). Originally set out in Iowa Code chapter

613A, the Act was moved to Iowa Code chapter 670 by the Code editor in 1993. *Venckus v. City of Iowa City*, 930 N.W.2d 792, 807 n.3 (Iowa 2019).

In its Pre-Answer Motion to Dismiss, Council Bluffs Water Works asserted that prior case law was abrogated and preempted by the Act and its amendments. In resisting the Motion, the Plaintiffs Jim and Angela Sutton argued that their strict liability claim continues to be controlled by the Supreme Court's pre-Act decision in *Lubin v. Iowa City*, 131 N.W.2d 765 (Iowa 1964) (recognizing municipal strict liability for damage from water main breaks). The district court sided with the Plaintiffs, but on grounds that do not hold up under scrutiny, including the statutory language that the court acknowledged as being inconsistent with strict liability.

In explaining the reasoning for denying CBWW's motion, the district court began by agreeing with the logic of Defendant's statutory argument:

> Defendant argues that the IMTCA does not recognize strict liability given that the IMTCA would statutorily overrule any preexisting case law (the IMTCA was first passed in 1967) and the statute itself explicitly excepts claims for "failure to upgrade, improve, or alter any aspect of an existing public improvement," but allows for claims based on a municipality's "failure to repair, maintain, or operate." Iowa Code § 670.4(1)(h). Given the boundaries of immunity in this section, it would not logically follow to allow recovery under strict liability as well.

Appendix p. 51. However, the district court then reasoned that "strict liability is not specifically excluded under the IMTCA nor has it been

specifically excluded by case law." Appendix p. 51. The judge then cited *Jahnke v. Incorporated City of Des Moines*, 191 N.W.2d 780 (Iowa 1971), and *Iowa Power and Light Company v. The Board of Water Works Trustees of the City of Des Moines*, 281 N.W.2d 827 (Iowa Ct. App. 1979). From *Jahnke*, the judge cited a statement that "the MTCA prescribed municipal liability for all municipal torts except those specifically excluded by this section." Appendix p. 51. He described *Iowa Power* as finding "that the water works engaged in an abnormally dangerous activity that would most likely result in the invasion of the property of another and that 'the nature of the activity engaged in by the enterprise is the crucial element in determining whether the doctrine of strict liability should be applied.'" Appendix p. 51-52 (quoting 281 N.W.2d at 831).

The district court treated these cases as establishing that strict liability remains available as a theory against a municipal water system operator if it "engaged in an abnormally dangerous activity." Appendix p. 52.

However, the cases cited do no such thing, and the case creating the "abnormally dangerous activity" basis for strict liability under the common law, *Lubin v. Iowa City*, 131 N.W.2d 765 (Iowa 1964), should be found to have no application following passage of the IMTCA and amendments.

In *Lubin v. Iowa City*, 131 N.W.2d 765 (Iowa 1964), the Court held that liability without fault was proper because the city there, as part of a proprietary activity, put the water mains in the ground and just left them there without doing anything to prevent their eventual and inevitable failure, so the city was better able to bear the consequence of that choice. At the time, sovereign immunity from tort liability and any exceptions to it for certain types of tort liability were common law concepts. *Hansen v. City of Audubon*, 378 N.W.2d 903, 905 (Iowa 1985). The IMTCA abolished sovereign immunity. *Thomas v. Gavin*, 838 N.W.2d 518, 521 (Iowa 2013). Since passage of the IMTCA, "Iowa Code chapter 670 is the exclusive remedy for torts against municipalities and their employees." *Rucker v. Humboldt Cmty. Sch. Dist.*, 737 N.W.2d 292, 293 (Iowa 2007). *Accord Venckus v. City of Iowa City*, 930 N.W.2d 792, 808 (Iowa 2019) (noting that § 670.4(2) provides the statutory remedies shall be exclusive). As the Court said in *Venckus*, the IMTCA "'does not expand any existing cause of action or create any new cause of action against a municipality.'" Iowa Code § 670.4(3). Instead, the Act allows people to assert claims against municipalities, their officers, and their employees that otherwise would have been barred by the doctrine of sovereign immunity." 930 N.W.2d at 809.

Significantly, in a much more recent case, *Kellogg v. City of Albia*, 908 N.W.2d 822 (Iowa 2018), the Supreme Court made no mention of *Lubin* when it applied the intervening governmental immunity statutes to a property owner's claim about damage from water discharged from a city storm sewer. The Court explained how the statutory backdrop for such a claim against a city had changed:

> In 1967, the legislature abrogated common law governmental tort immunity when it passed the Iowa Municipal Tort Claims Act. 1967 Iowa Acts ch. 405, § 2 (originally codified at Iowa Code § 613A.2 (1971), now § 670.2). Under the Act, "every municipality is subject to liability for its torts and those of its officers, employees, and agents." *Id.* The Act defined torts to mean all civil wrongs, including actions based on negligence and nuisance. *Id.* at § 1(3). However, the Act retained sovereign immunity for several enumerated tort claims, and additional enumerated claims were subsequently added. *See* Iowa Code § 670.4(1)(*a*)–(*o*) (2015).
>
> In 1983, the legislature immunized municipalities from claims "based upon or arising out of a claim of negligent design or specification, negligent adoption of design or specification, or negligent construction or reconstruction of a ... public facility," so long as the facility "was constructed or reconstructed in accordance with a generally recognized engineering or safety standard, criteria, or design theory in existence at the time of the construction or reconstruction." 1983 Iowa Acts ch. 198, § 25 (codified at Iowa Code § 613A.4(8) (1985), now § 670.4(1)(*h*)). Further, the legislature excepted municipalities from tort claims for "failure to upgrade, improve, or alter any aspect of an existing public improvement or other public facility to new, changed, or altered design standards." *Id.* Thus, cities are immune under the statute from claims for the negligent design and construction of facilities built pursuant to the accepted standards in existence at the time

> and for claims based on the failure to upgrade facilities to new design standards.
>
> The purpose of section 670.4(1)(*h*) immunity—often referred to as the state-of-the-art defense—is twofold. First, it "alleviate[s] municipal responsibility for design or specification defects, as judged by present state of the art standards, when the original designs or specifications were proper at the time the public facility was constructed." *Hansen v. City of Audubon*, 378 N.W.2d 903, 906 (Iowa 1985). Second, the statute instructs courts to measure a municipality's duty to avoid nonconstitutional torts "by the 'generally recognized engineering or safety standard, criteria, or design theory' in existence at the time of the construction or reconstruction." *Connolly v. Dallas County*, 465 N.W.2d 875, 877 (Iowa 1991).

Id. at 825-26.

The District Court did not mention *Kellogg* in its Order, and also seemed to misunderstand the significance of the timing of the amendment creating § 670.4(1)(*h*) that was discussed in *Kellogg* and in the district court's own Order.

Both *Jahnke* in 1971 and *Iowa Power* in 1979 preceded the 1983 amendment that created the immunities the district court cited and quoted when it said, "Given the boundaries of immunity in this section, it would not logically follow to allow recovery under strict liability as well." Essentially, the district court said the statute itself would not seem to allow a strict liability claim, but the Iowa appellate courts kept recognizing strict liability after the Act, so the district court's hands were tied. The trouble with using

the 1971 and 1979 cases to push aside the logic the district court correctly saw in the statutory immunity provision is that the immunity provision was not enacted until 1983. The immunity provision the District Court cites, § 670.4(1)(h), has an effective date embedded in its text: "This paragraph takes effect July 1, 1984, and applies to all cases tried or retried on or after July 1, 1984.

A.

THE DEFINITION OF "TORTS" IS LIMITED TO FAULT-RELATED CAUSES OF ACTION.

The logic of the statutory scheme that precludes strict liability starts with the definitions. A city and a city's board handling its water system are within the definition of "municipality" and "governing body" covered by the IMTCA. Iowa Code § 670.1. An important definition in the same provision is that "'Tort' means every civil wrong which results in . . . injury to property . . . 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." § 670.1(4). The meaning of "tort" is central to the Act because its core provision says, ""Except as otherwise provided in this chapter, every municipality is subject to liability for its torts and those of its officers and employees, acting within the scope of their

employment or duties....” Iowa Code § 670.2. Rather than just rely on existing legal principles to define “tort” for purposes of the Act, the Legislature set out the list in § 670.1(4).

Significantly missing from the “tort” definition’s list of included causes of action is strict liability or, as it was also termed in *Lubin*, “liability without fault.” *Lubin* was on the books for just three years when the Legislature enacted the IMTCA, but it did not include within the definition of “tort” either “strict liability” or “liability without fault” from *Lubin*.

A way to exclude something from the scope of a statute is to define what is included through a list of the included items while leaving out something else that might seem to fit the list. Three related canons of statutory construction address this.

One is *ejusdem generis*, which is used when a general term in a statute is included with specific terms which all relate to a single class, character or nature. *See Yates v. U.S.*, 574 U.S. 528, 549-50 (2015) (the canon of *ejusdem generis* “teaches that general words following a list of specific words should usually be read in light of those specific words to mean something similar”). This interpretive aid “provides that when general words follow specific words in a statute, the general words are read to embrace only objects similar to those objects of the specific words.”

Teamsters Local union No. 421 v. City of Dubuque, 606 N.W.2d 709, 715 (2005). *E.g.*, *Hartman v. Merged Area VI Community College*, 270 N.W.2d 822, 825 (Iowa 1978) (applying principle to find that because term "or any good cause" followed list of grounds for immediate teacher termination pertaining to teacher's personal faults, statute did not include causes related to the school's declining enrollment and resources). In *Teamsters*, the Court said that it is important to identify the class that the specific terms fit, and the "the key to unlocking the true value of the doctrine is to ensure that the identified class has some objective relationship to the aim of the statute." 706 N.W.2d at 715-16. In that case, "other critical municipal employees" related to the class including police officers and fire fighters through the need for them to respond quickly to emergencies from their homes, because the statute's aim was to allow cities to restrict the distance where employees were allowed to live, so that snowplow drivers were "critical."

A second canon of construction is *noscitur a sociis*, which literally translates to "it is known from its associates." *Wright v. State Bd. Of Engineering Examiners*, 250 N.W.2d 412, 414 (1977). The "'canon of construction *noscitur a sociis* . . . summarizes the rule of both language and law that the meanings of particular words may be indicated or controlled by associated words.'" *Mall Real Estate, LLC v. City of Hamburg*, 818 N.W.2d

190, 199 (Iowa 2012) (quoting *Peak v. Adams*, 799 N.W.2d 535, 547 (Iowa 2011)).

> Consistent with our canon of construction *noscitur a sociis*, we read words in context rather than in isolation. *Peak v. Adams*, 799 N.W.2d 535, 547 (Iowa 2011). This canon "summarizes the rule of both language and law that the meanings of particular words may be indicated or controlled by associated words." *Id.* (quoting 11 Richard A. Lord, *Williston on Contracts* § 32:6, at 432 (4th ed. 1999)). Simply put, "words of a feather flock together." Hugh Pattison Macmillan, Rt. Hon. Lord, *Law and Language*, Presidential Address to the Holdsworth Club (May 15, 1931).

State v. Ross, 941 N.W.2d 341, 348 (Iowa 2020) (finding from context of definition of "theft detection device" that "other device" attached to merchandise was limited to devices for detecting theft).

A third canon is the principle of *expressio unius est exclusio alterius*, which the Supreme Court used in interpreting the IMTCA on another subject. *Thomas v. Gavin*, 838 N.W.2d 518, 524 (Iowa 2013) (citing *Rolfe State Bank v. Gunderson*, 794 N.W.2d 561, 568 (Iowa 2011), as a case applying the principle). This statutory interpretative canon means that by expressing one item of an associated group or series, the statutory term excludes another left unmentioned. *NLRB v. SW General, Inc.*, 137 S. Ct. 929, 940 (2017); *Homan v. Branstad*, 887 N.W.2d 153, 166 (Iowa 2016). "It is an established rule of statutory construction that 'legislative intent is expressed by omission as well as by inclusion, and the express mention of

one thing implies the exclusion of others not so mentioned.'" *Id.* (quoting *Marcus v. Young*, 538 N.W.2d 285, 289 (Iowa 1995). The "force of any negative implication . . . depends on context," and the canon applies when "'"circumstances support[ ] a sensible inference that the term left out must have been meant to be excluded.'" *SW General*, 137 S. Ct. at 940 (quoting *Chevron U.S.A. Inc. v. Echazabal*, 536 U.S. 73, 81 (2002)).

The general term here is "includes but is not restricted to." This follows "every civil wrong which results in . . . injury to property" and is just ahead of "negligence; error or omission; nuisance; breach of duty." The trio of interpretive canons lead to the conclusion that strict liability or, as *Lubin* called it, "liability without fault," is not one of the civil wrongs included in the definition of "tort," because the specific causes of action on the list all relate to fault.

Iowa appellate courts have not addressed this particular mix of general and specific terms. However, other courts applying the construction principles to statutory terms that are "not restricted to" a specific list of examples have found the overall scope of the provision to be limited to the category fitting the list. For example, in *State v. Nick R.*, 2009-NMSC-050, 147 N.M. 182, 218 P.3d 868, the court ruled that a small pocketknife did not fit a law banning "any weapon which is capable of producing death or great

bodily harm, including but not restricted to any types of daggers, brass knuckles, switchblade knives, . . . and all such weapons with which dangerous cuts can be given." In *Taxpayers for Michigan Constitutional Government v. Dept. of Technology, Management and Budget*, 608 Mich. 48, 872 N.W.2d 738, 750 (2021), the court held that a public school academy, which was not included in a statutory list, was not a "political subdivision," although it supplied educational service like a school district (on the list), because PSAs did not fit other central characteristics of entities on the list. In *Mayo v. City of Sarasota*, 503 So. 2d 347 (Fla. Ct. App. 1987), Interpreting an equivalent term, the court in *People v. Craig*, 131 Mich. App. 42, 346 N.W.2d 66, 67-68 (1983), held that boxes on buses for deposit of coins as fares did not fit a statute "relating to coin operated devices, including but not limited to parking meters, coin telephones and vending machines," because the specific examples all are machines operated by insertion of coins, while the bus box merely collects payment for the service without activating the bus through depositing the coin.

B.

INCLUDING STRICT LIABILITY AS A "TORT" IS INCONSISTENT WITH EXPRESS EXEMPTIONS FROM THE IMMUNITY WAIVER.

As discussed, strict liability is not included in the definition of "tort," and so the IMTCA's waiver of immunity for municipal "torts" does not include claims for strict liability or "liability without fault." An additional reason for reading the Act to leave strict liability outside of the waiver is that the Legislature did put some remedies for negligence outside of the waiver of sovereign immunity, and it would be inconsistent with these express exemptions from the waiver of sovereign immunity to treat strict liability as coming under the Act's immunity waiver.

As discussed above, *Kellogg* described how the 1983 amendment carved out and preserved immunity "based upon or arising out of a claim of negligent design or specification, negligent adoption of design or specification, or negligent construction or reconstruction of a . . . public facility," so long as the facility "was constructed or reconstructed in accordance with a generally recognized engineering or safety standard, criteria, or design theory in existence at the time of the construction or reconstruction." 1983 Iowa Acts ch. 198, § 25 (codified at Iowa Code § 613A.4(8) (1985), now § 670.4(1)(*h*)). An express carve-out for this

particular immunity was necessary because the definition of "tort" broadly included "negligence" and "error or omission," so the form of negligence described in § 670.4(1)(*h*) otherwise would be included in the waiver of sovereign immunity for municipal "torts."

It is implicit in the *Kellogg* result and reasoning that by the time all of the relevant parts of the IMTCA were in place by 2018, the Court did not see strict liability as an available theory under the Act. *Kellogg* held that a claim against a city for damage from water leakage from a city's water system must both satisfy one of the tort categories exempted from sovereign immunity and also fall outside of a category that is exempted from the Act's waiver of sovereign immunity. Implicit in this holding is that a pre-Act strict liability claim does not any longer qualify as a ground for municipal liability.

In *Kellogg*, a homeowner brought a nuisance claim stemming from recurring flooding in the basement of her home due to the discharge of rainwater from a storm sewer located near the home. Nuisance is one of the civil wrongs that is expressly included in the Act's definition of "tort," and so is negligence. § 670.1(4). The Supreme Court affirmed a summary judgment for the city. In doing so, it explained how negligence and nuisance theories differed or overlapped, and how a nuisance claim could lead to

liability only if it fell outside the exempt category for negligent design and construction of facilities built pursuant to the accepted standards in existence at the time and for claims based on the failure to upgrade facilities to new design standards.

Quite notably absent from the *Kellogg* case is any idea that the city could be strictly liable under the pre-IMTCA *Lubin* case simply because the sewer system discharged water into the homeowner's basement. The Court spent much analytic energy in examining how the particular conduct of the City did or did not fit the kind of negligence coming under the Act's immunity provisions. That analysis would have been pointless if the city were strictly liable merely because the water leaked from the system.

Similarly and much more closely after adoption of the immunity provisions, the Court engaged in an analysis of different types of negligence by a city water system that would have been pointless had the Court viewed strict liability as an available theory under the IMTCA. In *Hansen v. City of Audubon*, 378 N.W.2d 903 (Iowa 1985), the waters in the city's storm sewer system were infiltrating its sanitary sewer system and had caused a homeowner's sewer lines to back up into his house. Although it is a short step from *Lubin*'s notion that operating a water main is an abnormally dangerous activity for which the city is liable for leakage without need to

prove fault, on the one hand, to saying the same thing about operating sewer systems, on the other, the *Hansen* opinion made no mention of *Lubin* or strict liability. Instead, the Court examined whether the kind of negligence involved in that case was in repair or maintenance of the system, which lay outside any immunity, or failure to upgrade the system, which would enjoy immunity under the exemption. *Id*. at 906-07. The Court held that the case fit the non-immune maintenance category of negligence rather than the immune upgrade category. But the relevant point here is that the homeowner had to prove that the failure to repair constituted negligence, which she had done during the trial that preceded the city's appeal from the district court's award of damages.

CONCLUSION

Here the Plaintiffs want to be able to simply show that the water main leaked and caused damage, without having to prove any of the other elements of negligence. That approach to establishing liability is not supported by the Act or the case law applying the Act.

Therefore, the district court's original perception was correct that the IMTCA's immunity provisions would make no sense if strict liability applies. Instead, the IMTCA itself and the case law applying it fully support ruling that strict liability or liability without fault is not an available theory

of recovery, and ruling that the Plaintiffs may recover only through proving negligence (subject to Defendant's other applicable defenses).

Respectfully submitted this 29th day of Auguast 2020.

COUNCIL BLUFFS WATER WORKS, Defendant/Appellant

By: */s/Michael T. Gibbons*

Michael T. Gibbons, #AT0002906
Raymond E. Walden, pro hac vice
Woodke & Gibbons, PC, LLO
619 N. 90th Street
Omaha NE 68114
Phone: (402) 391-6000
Fax: (402) 391-6200
mgibbons@woglaw.com
rwalden@woglaw.com
Attorneys for Defendant/Appellant

CONDITIONAL NOTICE OF ORAL ARGUMENT

Notice is hereby given that upon submission of this cause, counsel for the Defendant/Appellant desires to be heard in oral argument.

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This brief complies with the type-volume limitation of *Iowa R. App. P*. 6.903(1)(g)(1) because the brief contains approximately 5,178 words, excluding the parts of the brief exempted by *Iowa R. App. P*. 6.903(1)(g)(1).

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nsullivan@ddlawgroup.com
tboutcher@ddlawgroup.com

/s/Michael T. Gibbons