THE SUPREME COURT OF IOWA

Supreme Court No. 22-0917

Black Hawk County No. LACV141273

RON MYERS

Plaintiff-Appellant

v.

CITY OF CEDAR FALLS, IOWA

Defendant-Appellee

APPEAL FROM THE IOWA DISTRICT COURT FOR BLACK HAWK COUNTY

THE HONORABLE JOEL DALRYMPLE

APPLICATION FOR FURTHER REVIEW FROM COURT OF APPEALS DECISION DATED MAY 24, 2023

SAMUEL C. ANDERSON
SWISHER & COHRT, P.L.C.
528 West 4th Street
P. O. Box 1200
Waterloo, IA 50704-1200
Telephone: (319) 232-6555
Facsimile: (319) 232-4835
E-mail: sanderson@s-c-law.com
ATTORNEYS FOR DEFENDANT-APPELLEE

QUESTIONS PRESENTED FOR FURTHER REVIEW

QUESTION 1: Absent regulatory or statutory criteria concerning the requisite level of diving board slip resistance and absent any governmental or agency notice of non-compliance, does the case of *Sanon v. City of Pella*, 865 N.W.2d 506 (Iowa 2015) apply to this case and allow a jury to determine whether a criminal offense occurred using tort negligence standards and, if so, should the *Sanon* majority opinion be overturned in favor of the dissenting opinion?

QUESTION 2: Absent regulatory or statutory criteria concerning the requisite level of diving board slip resistance and absent any governmental or agency notice of non-compliance, is there evidence of a knowing violation required by *Sanon v. City of Pella*, 865 N.W.2d 506 (Iowa 2015), supporting a finding by a trier of fact that a diving board is not sufficiently slip resistant creating a "criminal offense" that would remove the statutory immunity afforded municipalities by Iowa Code 670.4(1)(l)?

TABLE OF CONTENTS

STATEMENT SUPPORTING FURTHER REVIEW

We respectfully argue that the Court of Appeals' reliance on *Sanon v. City of Pella*, 865 N.W.2d 506 (Iowa 2015), in reaching its decision in this case was misapplied and does not support overturning the grant of summary judgment in this case. If reliance on *Sanon* was not misapplied, the 4-3 split decision of *Sanon* should be overturned and the Court should follow the reasoning set forth in *Sanon's* dissenting opinion and as set forth in *Larsen v. City of Reinbeck*, 776 N.W.2nd 301 (Table), 2009 WL 3064658 (Iowa App. 2009).

As it stands, we argue that the majority decision in *Sanon* is not supported by the statutory language of Iowa Code Chapter 135I and its application it does the following:

1) It makes a violation of a pool safety regulation a criminal offense – an offense not supported by statutory language;
2) In the context of determining whether criminal conduct has occurred, it allows a jury arbitrarily, on a case-by-case basis, to determine the meaning of a vague standardless safety regulation as a question of fact, using negligence standards, rather than having the court determine the regulatory meaning as a matter of law;

3) It allows standardless safety requirements to become the basis of a finding criminal conduct in violation of the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution void for vagueness doctrine;

4) It allows for the violation of the rule of lenity which requires that ambiguous statutes imposing criminal liability be strictly construed in favor of the defendant;

5) It creates the potential to lead to illogical and arbitrary results both legally and procedurally; and

6) It makes meaningless the legislatively preserved immunity from liability afforded municipalities under Iowa Code section 670.4(1)(l) – an immunity created in tandem with Iowa Code chapter 135I.

The Court of Appeals decision, relying on *Sanon*, has broad constitutional implications under the void for vagueness doctrine as it pertains to deciding the meaning of vague and standardless agency regulations for purposes of determining whether a crime has occurred and makes meaningless Iowa Code section 670.4(1)(l). We respectfully argue that the questions presented herein meet all the grounds justifying further review outlined in Iowa Rule of Appellate Procedure 6.1103(1)(b).

TABLE OF AUTHORITIES

U.S. Supreme Court

Iowa Supreme Court

Iowa Court of Appeals

Iowa Code

Iowa Legislative History

Iowa Administrative Code

BRIEF POINT I

THE CASE OF *SANON V. CITY OF PELLA*, 865 N.W.2D 506 (IOWA 2015) WAS EITHER MISAPPLIED TO THE FACTS OF THIS CASE OR SHOULD BE OVERRULED IN FAVOR OF ITS DISSENTING OPINION.

The Standardless Regulation at Issue: 641 IAC 15.4(4)(c)(6)

Ron Myers (hereinafter Plaintiff) alleges that his July 19, 2019 fall from a diving board at the Cedar Falls, Iowa (hereinafter the City) municipal swimming pool was the result of the City's violation of an Iowa Department of Public Health (hereinafter IDPH) regulation, 641 IAC 15.4(4)(c)(6), which states: "Swimming pools shall be operated in a safe, sanitary manner and shall meet the following operational standards. "Diving boards and platforms shall have a slip resistant surface." 641 *IAC* 15.4(4)(c)(6). (App. 06 & 08, ¶¶13 & 21) There is no dispute in the record that the City had installed an IDPH approved 16-foot Duraflex diving board commonly used for recreation diving at commercial facilities and that it was coated with a slip resistant surface. (App. 102 ¶P1-3, 5, & 6; 105-112) Plaintiff argues that the City allowed the diving board to become worn such that the slip resistant surface was no longer sufficiently slip resistant. (App. 06 PP7-10; 08 ¶¶12-13 & 20-21; 145 (P.63 LL.5-22)

The pool is inspected annually by the Black Hawk County Health Department (hereinafter BHHD). The inspection report immediately preceding the July 19, 2019 accident was completed on June 5, 2019. (App. 103–04 ¶8, 113-15, 196 (P.28 LL.15-21)) There were no diving board safety issues discovered during the inspection. There is no mention of any deficiency in the safety of the diving boards in any prior inspection reports. (App. 103–04 ¶8, 113-16, 196 (P.28 LL.15-17), 197 (P.29 LL.5-7)) The City's recreation supervisor, responsible for the opening, maintenance, and closing of the municipal pool each year, was of the opinion that the diving board had a sufficiently slip resistant surface. (App. 102 ¶1; 103 ¶7; 190 (P.3 LL.7-10); 191 (P.5 LL.18-21); 192 (P.10 L.19- P.11 L.13 & P. 12 LL.4-24); 194 (P.18 LL.2-6), 195 (P.22 L.24 – P.24 L.12), 198 (P.35 L.8-P.36 L.3)) No employee of the City has been charged or convicted of any criminal offense related to the operation of the municipal pool. (App. 104 ¶11)

The problem presented by 641 IAC 15.4(4)(c)(6) in the context of the case of *Sanon v. City of Pella*, 865 N.W.2D 506 (Iowa 2015) is that the requirement that a diving board have a slip resistant surface has no supporting standards to assist a pool operator in knowing whether a diving board's slip resistant surface has worn to the point that the IDPH would consider it insufficiently slip resistant and in violation of the regulation. As it stands,

opinions could vary greatly as to what makes a diving board sufficiently slip resistant.

The facts of this case expose the problems caused by the decision of the majority in the 4-3 decision of *Sanon,* holding that any knowing violation of a regulation created by IDPH pursuant to its authority under Iowa Code chapter 135I would constitute a misdemeanor and thus be criminal conduct that would void the immunity preserved for municipalities by Iowa Code section 670.4(1)(l). *Sanon v. City of Pella*, 865 N.W.2D at 515. We agree with the dissenting opinion in the *Sanon* case that this holding is based on incorrect application of statutory interpretation that can lead to illogical results and make meaningless the application of Iowa Code section 670.4(1)(l). *Id.* at 518. We add to the argument that, as interpreted by the Iowa Court of Appeals in this case, the *Sanon* opinion leads to an unconstitutional result.

Sanon Requires a "Knowing" Violation Justifying Summary Judgment

The majority in *Sanon* co-opts Iowa Code section 135.38 from chapter 135 and applies it to the separate Code chapter 135I in order to justify its decision. Iowa Code §135.38 states:

> Any person who *knowingly* violates any provision of *this chapter*, or of the rules of the department, or any lawful order, written or oral, of the department or of its officers, or authorized agents, shall be guilty of a simple misdemeanor.

Iowa Code §135.8 (emphasis added). Section 135.8 does not mention that anyone who accidentally, or negligently violates a provision of the chapter shall be guilty of a misdemeanor. To this end, even if the Court decides that the *Sanon* decision should stand, the Court of Appeals should have affirmed the district court grant of summary judgment in this case. The district court in this case applied the "knowing" requirement of Iowa Code §135.38 adopted by the Supreme Court in *Sanon* in its opinion granting summary judgment to the City. (App. 15–19) The district court concluded:

> The Court has had an opportunity to review Larson v. City of Reinbeck, 776 N.W.2d 301 (Table) 2009 WL 3064658 (Iowa App. 2009) and Sanon v. City of Pella, 865 N.W.2d 506 (Iowa 2015). Again, without reiterating the arguments set forth in the cases above and counsel's respective positions, the Court finds absence of any evidence showing the city, an officer, or an employee of the municipality knowingly violated either the Iowa Code or the administrative regulations set forth above. Absent the knowing violation, the city's immunity remains.

Id. In this case there is no evidence of any violation being known to the City, to the IDPH, or to the BHHC. Absent admission by the City or notice of violation from the IDPH or BHHC it would not be possible for a trier of fact to determine a violation absent standards for an adequately slip resistant diving board surface. In fact, as discussed below, agency regulations entitle the City to notice and opportunity to cure and opportunity to be heard and subsequent failure to comply before any simple misdemeanor can be found.

None of that occurred in this case. For these reasons, we respectfully argue that, should the Court wish to apply *Sanon* majority rationale to the facts of this case, the summary judgment entered into by the district court should be affirmed.

The Need To Overrule *Sanon*

We urge the Court to consider overruling the *Sanon* decision. We believe the dissenting opinion was correctly decided. The dissent points out that the majority opinion undermines the purpose of the immunity of section 670.4(1)(l), which states:

> 1. The liability imposed by section 670.2 shall have no application to any claim enumerated in this section. As to any of the following claims, a municipality shall be liable only to the extent liability may be imposed by the express statute dealing with such claims and, in the absence of such express statute, the municipality shall be immune from liability:
>
> l. A claim relating to a swimming pool or spa as defined in section 135I.1 which has been inspected by a municipality or the state in accordance with chapter 135I, or a swimming pool or spa inspection program which has been certified by the state in accordance with that chapter, whether or not owned or operated by a municipality, unless the claim is based upon an act or omission of an officer or employee of the municipality and the act or omission constitutes actual malice or a criminal offense.

Iowa Code § 670.4(1)(l) The dissent in *Sanon* points out the purpose of this immunity "is to reduce the litigation risk inherent in aquatic recreation and

thereby encourage cities, counties, and schools to open and operate swimming pools." *Id.* at 522, *citing Baker v. City of Ottumwa*, 560 N.W.2d 578, 582 (Iowa 1997).

In legislative interpretation it is significant that the Iowa legislature enacted what is now Iowa Code Chapter 135I (formerly 135J) in the same Act as Iowa Code §670.4(1)(l). 89 *Acts Chapter* 291 *Swimming Pools and Spas*, HF 373. These provisions should be viewed together in determining the purpose of the legislation as a whole and the meaning and purpose of its individual parts. *Iowa Ins. Inst. v. Core Grp. of Iowa Ass'n for Just.*, 867 N.W.2d 58, 72 (Iowa 2015).

> We have "characterized statutory immunities as having a broad scope and we have given words used in such immunity statutes a broad meaning." *Cubit v. Mahaska County,* 677 N.W.2d 777, 784 (Iowa 2004) (collecting cases broadly applying immunity provisions of section 670.4); *see also Walker v. Mlakar,* 489 N.W.2d 401, 405 (Iowa 1992) (interpreting narrowly statutory exception to common law immunity). "Immunity is based upon the desire to 'prevent judicial "second-guessing" of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort.'" *Graber v. City of Ankeny,* 656 N.W.2d 157, 160 (Iowa 2003) (quoting *Goodman v. City of LeClaire,* 587 N.W.2d 232, 237 (Iowa 1998)). The majority's interpretation effectively second-guesses the legislative policy choice to limit recovery rights in order to encourage aquatic recreational opportunities. That is not our court's role. The legislature's policy choice was reasonable—the immunity in section 670.4(12) is conditioned upon submission to pool safety inspections with the inspectors empowered to shut down pools operating in violation of the department's rules. *See* Iowa Code § 135I.6.

Sanon v. City of Pella 865 N.W.2d at 522–23 (dissent).

The dissent argues that to the extent that the IDPH creates a rule and makes the violation of a regulation a crime beyond what the statute authorized, such provision should be considered null and void, especially where it would serve to thwart the intention of the Iowa legislature to provide municipalities immunity from liability arising out of their operation of community swimming pools. *Id.* at 526-27, *see fn.*15. "Here, the controlling statute, section 135I.5, imposes criminal liability solely for statutory violations, not rule violations. The majority's interpretation allows the department to expand criminal liability by rule beyond what the legislature authorized and thereby defeat the immunity protection the legislature intended." *Id.* at 527.

The Correct Interpretation of Iowa Code Chapter 135I

Enforcement Provisions of 641 IAC 15.6

The IDPH is given responsibility under Iowa Code chapter 135I to register and regulate the operation of public swimming pools. *Iowa Code* §135I.4. In addition to the list of "shalls" (like the duty to conduct seminars and training sessions and disseminating information regarding health practices, safety measures, and operating procedures to registered pool facilities), IDPH is *allowed* under the listing of "mays" to:

1. Inspect swimming pools for the purpose of detecting and eliminating health or safety hazards;

2. Establish minimum safety and sanitation criteria for pool operation;

3. Establish minimum pool qualifications;

4. Establish and collect inspection fees to defray the cost of administering chapter 135I;

5. Adopt rules in accordance with chapter 17A for the implementation and enforcement of chapter 135I; and

6. Enter agreements with a local board of health [such as BHHC] to implement the inspection and enforcement provisions of chapter 135I.

Iowa Code § 135I.4.

The enforcement provision is the last section of the statute. *Iowa Code* §135I.6. According to section 135I.6, the power of enforcement granted to the IDPH to carry out its powers and duties outlined in section 135I.4 is limited to allowing it (or contracted local boards of health such as BHHC) to 1) withhold or revoke a registration or 2) order that a facility or item of equipment not be used until necessary corrective action is taken. *Iowa Code* §§135I.4 & 135I.6. A violation of the chapter would appear to be 1) operating

a pool without a valid registration or 2) operating the facility or using an item of equipment after being told not to use the facility or equipment until the necessary corrective action has been taken. *Id.* Use of the county attorney or attorney general is allowed when necessary to enforce such an order. *Iowa Code* §135I.6. A person violating a provision of chapter 135I such that it would constitute a simple misdemeanor, would be a person who resisted an IDPH order. *Iowa Code* §§135I.5 & 135I.6

Nowhere in this Iowa Code chapter is there listed an ability for the IDPH to deem mere violation of its pool safety or sanitary standards a simple misdemeanor. Iowa Code §135I.5 only states that a person who violated a *provision of this chapter* commits a simple misdemeanor. Within the structure of chapter 135I, a municipality cannot accidentally commit a misdemeanor by having a condition that some third person might later argue is in violation of a standardless, vague agency pool regulation. The misdemeanor occurs by knowingly disobeying an agency directive or order. Any other reading does not fit within the statutory framework.

The rules adopted by the IDPH for the implementation and enforcement of chapter 135I, are in 641 IAC 15.6. Enforcement starts with inspections. The IDPH or county board is allowed to inspect pools and to enforce the regulations created to establish the minimum safety and sanitary criteria as is

allowed by Iowa Code §135I.4(1 & 2). 641 *IAC* 15.6(1). When the IDPH or county board believes that enforcement *is necessary* the regulation states that it *shall* take the following steps in order to enforce their rules:

> *Owner notification.* As soon as possible after the violations are noted, the inspection agency *shall provide written notification* to the owner of the facility that:
>
> (1) Cites each section of the Iowa Code or Iowa Administrative Code violated.
> (2) Specifies the manner in which the owner or operator failed to comply.
> (3) Specifies the steps required for correcting the violation.
> (4) Requests a corrective action plan, including a time schedule for completion of the plan (which the agency shall review and approve or require modification).
> (5) Sets a reasonable time limit, not to exceed 30 days from *the* receipt of the notice, within which the owner of the facility must respond.

641 *IAC* 15.6(2)(a & b)(emphasis added) Notification of the violation, reasonable means to correct or challenge the violation, followed by failure to correct the violation after being given notice and ability to correct or challenge, are prerequisites for the enforcement of IDPH pool safety regulations. 641 *IAC* 15.6(2)(c).

The regulation states that enforcement must be in accordance with Iowa Code §135I.6. *Id.* If, through this process, the IDPH determines its regulations have been violated it may: 1) withhold or revoke the registration of a swimming pool or spa, or 2) order that a swimming pool or spa be closed

until corrective action has been taken. 641 *IAC* 15.6(2)(d) Enforcement of the decision to withhold or revoke the registration or an order to close a swimming pool *shall* be delivered by restricted certified mail, return receipt requested, or by personal service and the pool owner has the right to appeal the decision and to be heard in and administrative hearing. *Id.* Notice is essential.

If the swimming pool or spa is operated without being registered, or in violation of the IDPH or local board order they may request that the county attorney or the attorney general to seek district court injunction to stop the violation or to take other action allowed by chapter 135I. *Id.* This is within the scope of what they are allowed to do by Iowa Code §135I.6. *Iowa Code* §135I.6.

These regulatory procedures are within a statutory framework that would prevent a pool operator from committing a criminal offense by unwittingly, or unknowingly violating a provision of a standardless, vague safety regulation. The criminal offense occurs only after notice of the required corrective action is given to the operator and the operator fails to take corrective action. None of these criteria occurred in this case. Iowa Code chapter 135I and the regulations created by the IDPH within its framework seem to be clear and in sync with each other.

It is unclear why the majority in *Sanon* decided to reach out to another chapter of the Iowa Code to find a provision which simply makes *any* "knowing" violation of a pool safety or sanitary regulation criminal conduct in the form of a simple misdemeanor. The majority opinion does this outside the confines of Iowa Code chapter 135I

Sanon's Reliance on the Wrong Statute

We agree with the dissenting opinion statement that the majority reached the wrong conclusions by relying on the wrong statute, Iowa Code §135.38, "and a tortured analysis of ancient legislative history." *Sanon v. City of Pella,* 865 N.W.2d at 518. The majority opinion ignores important rules of statutory construction and interpretation in determining that Iowa Code §135.38, a miscellaneous provision of chapter 135, would apply to chapter 135I. Interpretation of a statute or regulation requires assessment of the statute or regulation in its entirety, not piecemeal. *State v. Gonzalez*, 718 N.W.2d 304, 308 (Iowa 2006) It should be interpreted in a way that best achieves its purpose, avoids making any portion redundant or irrelevant, and avoids absurd results.

The majority opinion ignores the fact that chapter 135I was created in the same legislative action as Iowa Code section 670.4(1)(l), many years after the creation of chapter 135. Where section 135.38 makes knowing violations

of "this chapter" (presumably Chapter 135) a misdemeanor crime, section 135I.5 only makes violations of Iowa Code Chapter 135I a simple misdemeanor. The silence of 135I.5 on violations of IDPH pool safety or sanitary regulations becoming a simple misdemeanor has to mean something. Presumably, the Iowa legislature could have worded section 135I.5 the same as section 135.38 or it could have simply referred to section 135.38 had it so desired. Its decision not to include identical language or refer to the section, must not be considered unintentional or an oversight. "Legislative intent is expressed by omission as well as inclusion of statutory terms.... When the legislature selectively places language in one section and avoids in in another, we presume it do so intentionally." *Sanon v. City of Pella,* 865 N.W.2d at 522

The dissent agreed with the court decision in *Larsen*, that section 135I.5 only criminalizes violations of the statute, not regulations or lawful orders of the IDPH. *Id.* at 519-20. "As the *Larsen* court observed, 'this provision [135I.5] unambiguously criminalizes violations of the statute alone. ...The plain language of 135I.5 does not criminalized violation of the department's rules promulgated under that chapter.'" *Id.* at 521. If the legislature had wanted to criminalize violations of pool safety regulations, it would have said so in section 135I.5. *Id.* at 522.

When interpreting statutes or regulations a court will resort to rules of statutory construction only when the terms are ambiguous. *State v. Wiederien*, 709 N.W. 538, 541 (Iowa 2006) There is no ambiguity in the terms of Iowa Code chapter 135I, when all of its provisions are examined, that would justify looking to Iowa Code chapter 135 for guidance in its enforcement.

The dissent points out the problem of co-opting section 135.38 into chapter 135I by outlining various code chapters under the purview of IDPH which have different purposes and thus different penalty provisions ranging from civil penalty to serious misdemeanor. *Sanon v. City of Pella,* 865 N.W.2d. at 520-21. The majority opinion acknowledges that statutes should be construed as consistent with each other (*Id.* at 514) and yet its interpretation results in conflicts and redundancies between the statutes. *Id.* at 520. The Court is to favor interpretations that avoid conflicts between statutes. *See K & W Elec., Inc. v. State,* 712 N.W.2d 107, 114–15 (Iowa 2006). "We are to avoid interpretations that render statutory language superfluous. *See Thomas v. Gavin,* 838 N.W.2d 518, 524 (Iowa 2013); *see also* Iowa Code § 4.4(2) ("The entire statute is intended to be effective.")". *Sanon v. City of Pella,* 865 N.W.2d. at 521. Contrastingly, the *Larson* decision, and the dissenting opinion in *Sanon*, harmonized the statutes without any redundancy or conflict.

The dissenting opinion also correctly argues that the majority opinion in *Sanon* undermines the purpose of the immunity preserved for municipalities under Iowa Code §670.4(1)(l). *Sanon v. City of Pella,* 865 N.W.2d at 523. The purpose of section 670.4(1)(l) was "to reduce the litigation risk inherent in aquatic recreation and thereby encourage cities, counties, and schools to open and operate swimming pools." *Id.* at 522, citing *Baker v. City of Ottumwa*, 560 N.W.2d 578, 582 (Iowa 1997). "We are to interpret statutes to effectuate, not undermine, the legislative objective." *Id. citing McCracken v. Iowa Dep't of Human Services*, 595 N.W.2d 779, 784 (Iowa 1999)

> We have "characterized statutory immunities as having a broad scope and we have given words used in such immunity statutes a broad meaning." *Cubit v. Mahaska County,* 677 N.W.2d 777, 784 (Iowa 2004) (collecting cases broadly applying immunity provisions of section 670.4); *see also Walker v. Mlakar,* 489 N.W.2d 401, 405 (Iowa 1992) (interpreting narrowly statutory exception to common law immunity). "Immunity is based upon the desire to 'prevent judicial "second-guessing" of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort.'" *Graber v. City of Ankeny,* 656 N.W.2d 157, 160 (Iowa 2003) (quoting *Goodman v. City of LeClaire,* 587 N.W.2d 232, 237 (Iowa 1998)). The majority's interpretation effectively second-guesses the legislative policy choice to limit recovery rights in order to encourage aquatic recreational opportunities. That is not our court's role. The legislature's policy choice was reasonable—the immunity in section 670.4(12) is conditioned upon submission to pool safety inspections with the inspectors empowered to shut down pools operating in violation of the department's rules. *See* Iowa Code §135I.6.

Sanon v. City of Pella, 865 N.W.2d at 522–23.

The dissenting opinion acknowledged the concern of municipalities regarding the criminalizing of departmental rules regulating swimming pools. Interestingly, the dissent used diving boards as an example noting the disappearance of three-meter diving boards. *Id.* at 523.

Pointing out the absurdity of criminalizing departmental rules, the dissent opinion pointed out in footnote 12, a smattering of exemplary rules that would be criminalized if the majority opinion were to be maintained such as: "Soap shall be available at each lavatory and at each indoor shower fixture." 641 IAC 15.4(5)(*e*)(135I). "Should pool administrators face criminal charges and lose tort immunity for failure to provide soap?" *Sanon v. City of Pella,* 865 N.W.2d at 523 fn12.

The dissent recognized that exceptions to statutory immunity provisions are narrowly construed. *Id.* at 524. Citing to *Baker v. City of Ottumwa*, 560 N.W.2d 578, 582 (Iowa 1997), the Court pointed out that section 670.4(1)(l) applies broadly to *all* "claims relating to a swimming pool or spa" except a claim based upon an act of an officer or employee of a municipality that constituted actual malice or a criminal offense. *Id.* In ruling on the constitutionality of the immunity provision the Court noted, "Suits against the government may be maintained only to the extent immunity has

been expressly waived by the legislature. *Builders Transp., Inc. v. State,* 421 N.W.2d 539, 542 (Iowa 1988)." *Baker v. City of Ottumwa*, 560 N.W.2d at 583. The dissent points out that making any violation of a pool regulation a criminal offense would "eviscerate" the broad liability protection professed by the Court in the *Baker* case. *Id.* The legislatively granted immunity becomes largely meaningless.

Lastly, the dissenting opinion points out, the *Sanon* majority's interpretation would subject municipal lifeguards and managers to criminal charges for violations of any, even trivial, IDPH departmental pool regulation. This would be in the form of a simple misdemeanor falling under Iowa Code §903.1(1)(a) which could encompass imprisonment of up to 30 days. The dissent noted that the Court's interpretation of Iowa Code 135.38 would violate the rule of lenity. *Sanon v. City of Pella*, 865 N.W.2d at 524, *citing State v. Hearn*, 797 N.W.2d 577, 585 (Iowa 2011)("The rule of lenity requires that ambiguous statutes imposing criminal liability be strictly construed in favor of the defendant. ...[T]he modern purposes of the rule of lenity include providing fair notice that conduct is subject to criminal sanction, preventing inconsistent and arbitrary enforcement of the criminal law, and promoting separation of powers by ensuring that crimes are created by the legislature, not the courts." *Id.*)

Due Process Consequences

More importantly, the interpretation of *Sanon,* as applied to this case by the Court of Appeals decision, would cause constitutional issues with standardless vague safety requirements such as 641 IAC 15.4(4)(c)(6). The Due Process Clause of the Fourteenth Amendment to the U.S. Constitution prohibits vague statutes that lack clearly defined prohibitions. *State v. Wiederien*, 709 N.W. 538, 542 (Iowa 2006)(citing *State v. Reed*, 618 N.W.2d 327, 332 (Iowa 2000).

> Under the Due Process Clause of the Fourteenth Amendment to the Federal Constitution, "'the void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.

State v. Reed, 618 N.W.2d 327, 332 (Iowa 2000)

The non-slip surface requirement of 641 IAC 15.4(4)(c)(6) has no standard for determining compliance and is inherently vague. When interpreting statutes or regulations a court will resort to rules of statutory construction only when the terms are ambiguous. *State v. Wiederien*, 709 N.W. 538, 541 (Iowa 2006)

> When we find an ambiguity, we have stated:
>
> To resolve the ambiguity and ultimately determine legislative intent, we consider (1) the language of the statute; (2) the objects sought to be accomplished; (3) the evils sought to be remedied;

> and (4) a reasonable construction that will effectuate the statute's purpose rather than one that will defeat it.
>
> *State v. Green,* 470 N.W.2d 15, 18 (Iowa 1991). We do not interpret a statute so broadly that our interpretation "threaten[s] the constitutional due process prohibitions against vagueness and uncertainty." *State v. Pace,* 602 N.W.2d 764, 771 (Iowa 1999).

Id. at 541–42 Any doubts in criminal statutes are resolved in the accused's favor. *Id., citing State v. Schultz,* 604 N.W.2d 60, 62 (Iowa 1999).

> "There are three generally cited underpinnings of the void-for-vagueness doctrine. First, a statute cannot be so vague that it does not give persons of ordinary understanding fair notice that certain conduct is prohibited. Second, due process requires that statutes provide those clothed with authority sufficient guidance to prevent the exercise of power in an arbitrary or discriminatory fashion. Third, a statute cannot sweep so broadly as to prohibit substantial amounts of constitutionally-protected activities, such as speech protected under the First Amendment."

State v. Nail, 743 N.W.2d 535, 539 (Iowa 2007) This doctrine applies to legislation that establishes either civil or criminal sanctions. *Id.* Where a state "statute 'can be made constitutionally definite by a reasonable construction or interpretation the Court is under a duty to give the statute that construction. *Id.* at 540, *citing State v. Williams,* 238 N.W.2d 302, 306 (Iowa 1976) (quoting *United States. v. Harriss,* 347 U.S. 612, 618, 74 S.Ct. 808, 812, 98 L.Ed. 989, 996–97 (1954)).

A statute or regulation that creates a penalty if it is not complied with is a penal statute or regulation. *Trop v. Dulles*, 356 U.S. 86, 95-97, 78 S.Ct.

590, 595-96, 2 L.Ed.2d 630 (1958). The *Sanon* majority decision would make a violation of 641 IAC 15.4(4)(c)(6) a penal regulation. Because 641 IAC 15.4(4)(c)(6) has no standard for one to know whether one is in compliance or not, it does not give persons of ordinary understanding fair notice that certain conduct is prohibited. Absent proper notice, as is legislatively prescribed in Iowa Code chapter 135I and administratively in 641 IAC 15.6, it would make enforcement of the provision inherently unconstitutional.

In addition, due process requires that statutes provide those clothed with authority sufficient guidance to prevent the exercise of power in an arbitrary or discriminatory fashion. The ruling in *Sanon*, as applied by the Court of Appeals in this case, would have a jury determine whether or not the City complied with the standardless requirement of slip resistant diving boards. A jury would be applying tort negligence standards to determine, on a case-by-case basis, what the required standard of slip resistance is necessary to avoid committing a misdemeanor. This creates a moving target as to what the standard is and whether one has committed a crime or not. Under the light of *Sanon*, 641 IAC 15.4(4)(c)(6) would provide a jury insufficient guidance to prevent it from exercising its power in an arbitrary or discriminatory fashion. It inherently runs afoul of the void for vagueness doctrine.

Procedural Conundrums

Focus cannot be lost on the fact that, at this stage, the question is not whether the City is negligent, it is whether its employee committed criminal conduct that would remove the immunity which would subsequently *allow* the jury to determine this case on a tort basis. The decision of the Court of Appeals, interpreting *Sanon* in this case, dramatically blurs the line on what the jury is to consider on each issue. Trying the case under the current status of the Court of Appeals ruling would create a procedural conundrum for the court and litigants.

To avoid unconstitutional outcomes and future confusion and unnecessary litigation created by the majority decision in the *Sanon* case, we respectfully argue that the decision should be overturned in favor of the rationale used by the Court of Appeals in the *Larsen* case and the dissenting opinion of *Sanon*.

Conclusion

We respectfully request that the Court take this opportunity to overrule *Sanon* and affirm the summary judgment granted by the district court. Regardless of whether the Court overturns *Sanon* or not, we ask the Court to overrule the Court of Appeals decision and affirm the decision of the district

court to grant summary judgment to the City of Cedar Falls, Iowa on the basis of statutory immunity.

Attachment of Court of Appeals Decision

IN THE COURT OF APPEALS OF IOWA

No. 22-0917
Filed May 24, 2023

RON MYERS,
Plaintiff-Appellant,

vs.

CITY OF CEDAR FALLS,
Defendant-Appellee.

Appeal from the Iowa District Court for Black Hawk County, Joel Dalrymple, Judge.

Ron Myers appeals the district court's order granting summary judgment in his personal-injury action. **REVERSED AND REMANDED.**

Thomas J. Duff and Jim Duff of Duff Law Firm, P.L.C., West Des Moines, for appellant.

Samuel C. Anderson of Swisher & Cohrt, P.L.C., Waterloo, for appellee.

Considered by Vaitheswaran, P.J., and Ahlers and Buller, JJ.

AHLERS, Judge.

Ron Myers slipped on the end of a diving board at a swimming pool owned and operated by the City of Cedar Falls. Myers sued the city seeking to recover damages for injuries he alleges he suffered, claiming the slip was caused by the city's failure to ensure the diving board had a slip-resistant surface as required by state administrative rules. The city moved for summary judgment on the basis that it has qualified immunity under Iowa Code section 670.4(1)(*l*) (2020). The district court granted summary judgment on that basis. Myers appeals.

We review summary judgment rulings for legal error. *Garrison v. New Fashion Pork LLP*, 977 N.W.2d 67, 76 (Iowa 2022). In so doing, we "(1) view the facts in the light most favorable to the nonmoving party, and (2) consider on behalf of the nonmoving party every legitimate inference reasonably deduced from the record." *Id.* (citation omitted). Summary judgment is only proper when there is no issue of material fact "and the moving party is entitled to judgment as a matter of law." *Id.* (citation omitted).

Myers argues the district court erred by granting summary judgment because there was a genuine issue of material fact as to "whether the diving board lacked a slip-resistant surface and whether the [city] had knowledge of this defective condition." Essentially, Myers contends that if the city failed to ensure the diving board had a slip-resistant surface, then it triggers a domino chain reaction of statutes and administrative rules that ultimately precludes the city from receiving qualified immunity. That chain goes like this:

- Iowa Administrative Code rule 641-15.4(4)(c)(6) provides, "Diving boards and platforms shall have a slip-resistant surface."

- Violation of any Iowa Department of Public Health (the department)[1] administrative rule or provision of Iowa Code chapter 135 amounts to a simple misdemeanor, *see* Iowa Code § 135.38, so the city's possible failure to ensure the diving board had a slip-resistant surface would be a simple misdemeanor. *See Sanon v. City of Pella*, 865 N.W.2d 506, 514 (Iowa 2015) ("[A] violation of the department rules relied upon by the [plaintiffs] is a misdemeanor under section 135.38.").
- A simple misdemeanor is a criminal act. *See* Iowa Code § 701.8; *see also Sanon*, 865 N.W.2d at 515 ("A misdemeanor is a 'criminal offense.'" (citation omitted)).
- Section 670.4(1)(*l*), which would otherwise grant the city qualified immunity, does not apply when the underlying "claim is based upon an act or omission of an officer or employee of the municipality and the act or omission constitutes actual malice or a *criminal act*."[2] (Emphasis added.)

---

[1] The Iowa Department of Public Health merged with the Iowa Department of Human Services in 2022. Because this case deals with events that occurred prior to that time, we reference the Iowa Department of Public Health.

[2] Iowa Code section 670.4(1)(*l*) provides immunity to a municipality for:

> A claim relating to a swimming pool or spa as defined in section 135I.1 which has been inspected by a municipality or the state in accordance with chapter 135I, or a swimming pool or spa inspection program which has been certified by the state in accordance with that chapter, whether or not owned or operated by a municipality, unless the claim is based upon an act or omission of an officer or employee of the municipality and the act or omission constitutes actual malice or a criminal offense.

Following this logic, Myers contends that whether the diving board had a slip-resistant surface is a critical fact upon which qualified immunity hinges. Myers contends there is a genuine issue of material fact whether the diving board had a slip-resistance surface, so summary judgment cannot be granted.

Myers's logic follows—and is based on—the logic used by the supreme court in *Sanon*. In *Sanon*, the supreme court considered whether "a violation of an administrative rule promulgated by the Iowa Department of Public Health constitute[d] a crime and remove[d] the immunity under Iowa Code section 670.4(12)[3]" and answered in the affirmative. 865 N.W.2d at 510, 515. So, if *Sanon* applies, Myers's logic holds up and summary judgment should not have been granted.

The city launches a multi-pronged attack against applying *Sanon* here. First, the city argues that rule 641-15.4(4)(c)(6) only requires a diving board to have a slip-resistant surface, but the rule does not include any standard to measure the adequacy of the slip resistance. So, the argument goes, as it is uncontested that the diving board originally had a slip-resistant surface, and there is no measurable standard of how much slip-resistant material needs to remain, there can be no violation of the administrative rule and *Sanon* does not apply. We disagree. The fact that there is no articulated level of slip resistance that must be maintained does not change the plain language of the rule—the diving board must have a slip-resistant surface. Either the board had a slip-resistant surface or it didn't. Here, there was conflicting evidence of whether it did, so a factual dispute is generated

[3] In 2013, after *Sanon* was filed, Iowa Code section 670.4 was renumbered and section 670.4(12) is now section 670.4(1)(*l*). *See* 2013 Iowa Acts ch. 30, § 196.

that needs to be resolved through the trial process. *See, e.g., Smith v. Cedar Rapids Country Club*, 124 N.W.2d 557, 563 (Iowa 1963) (finding a jury question generated by conflicting evidence of whether a waxed dance floor was slippery); *Doty v. Olson*, No. 09-1852, 2010 WL 5050565, at *4 (Iowa Ct. App. Dec. 8, 2010) (finding the trial court should have instructed on an alleged regulation violation to allow the jury to decide whether the regulation was violated).

Second, the city argues that the department conducted inspections and never notified the city that the diving board did not comply with the rule requiring a slip-resistant surface. The city suggests that since it was never advised about or cited for violating the rule requiring the board to have a slip-resistant surface, there can be no violation of the rule and therefore *Sanon* doesn't apply. Again, we disagree. The administrative rule imposes an obligation on the city to have a slip-resistant surface on any diving board it chooses to provide. Nothing in the rule suggests that the city only violates the rule if it is informed of or cited for a violation of it. Again, either the board had a slip-resistant surface, or it didn't, and the fact the city was not notified about or cited for a violation of the rule does not change the need to resolve that underlying factual dispute of whether the rule was violated. As there is a factual dispute, a jury question has been generated that precludes summary judgment.

Third, the city tries to distinguish *Sanon* on its facts. We are not persuaded by the city's arguments. The claimed factual distinctions do not change the fact that, in a four justice to three part of the *Sanon* ruling, the court followed the same logic being asserted by Myers in this case—namely that, if Myers can establish the diving board did not have a slip-resistant surface, Myers will establish that the city

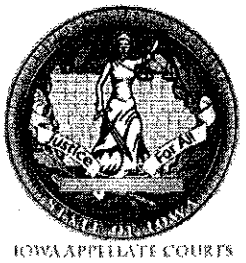
violated an administrative rule, which would be a simple misdemeanor, which would be a criminal act that negates the city's immunity as the *Sanon* majority interpreted the applicable rules and statutes. *See Sanon*, 865 N.W.2d at 508 ("[W]e conclude the [plaintiffs] have alleged the city violated administrative rules constituting criminal offenses under the Iowa Code. Thus, if the city violated these rules, the city is not entitled to immunity under Iowa Code section 670.4[(1)(*l*)].").

Finally, the city suggests that "agreeing with the analysis of . . . the *Sanon* dissent would lead to summary judgment under the facts of this case." But, regardless of how persuaded we may or may not be by the *Sanon* dissent, we are bound by our supreme court's majority opinions, not its dissents. *See In re Marriage of Korn*, No. 15-2014, 2016 WL 4803960, at *5 (Iowa Ct. App. Sept. 14, 2016); *D & W Dev., Inc. v. City of Milford*, No. 12-0579, 2013 WL 2145735, at *3 (Iowa Ct. App. May 15, 2013); *see also State v. Sisco*, 169 N.W.2d 542, 554 (Iowa 1969) (LeGrand, J., concurring specially) ("Much as I agree with the *Boykin* dissent, it is of course the majority opinion which we are bound to observe."). *Sanon* remains good law. This court cannot overturn supreme court precedent. *Nationwide Agribusiness Ins. Co. v. PGI Int'l*, 882 N.W.2d 512, 518 n.4 (Iowa Ct. App. 2016) ("We are not, however, at liberty to overturn Iowa Supreme Court precedent.").

Because we are bound by the *Sanon* majority and a factual dispute remains as to whether the diving board was equipped with a slip-resistant surface, we conclude the district court erred by concluding section 670.4(1)(*l*) provided the city with qualified immunity as a matter of law and granting summary judgment in favor of the city. A trial will be needed to resolve the factual dispute of whether the

administrative rule was violated. The resolution of that factual dispute by trial will determine whether the city is entitled to qualified immunity. We remand for further proceedings.

REVERSED AND REMANDED.



State of Iowa Courts

Case Number	Case Title
22-0917	Myers v. City of Cedar Falls

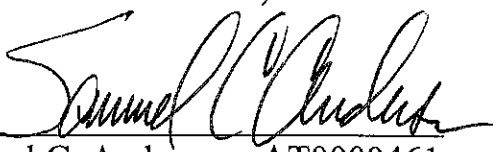
Electronically signed on 2023-05-24 08:26:14

Request for Oral Argument

Defendant/Appellee, The City of Cedar Falls, Iowa, respectfully requests to be heard orally via oral argument.

Respectfully Submitted,

SWISHER & COHRT, P.L.C.

By: 

Samuel C. Anderson AT0000461
528 West 4th Street
P. O. Box 1200
Waterloo, IA 50704-1200
Telephone: (319) 232-6555
Facsimile: (319) 232-4835
E-mail: sanderson@s-c-law.com
Attorneys for Defendant/Appellee,
City of Cedar Falls, Iowa

PROOF OF SERVICE AND CERTIFICATE OF FILING

The undersigned certifies that a copy of this Application for Further Review was served via electronic service on the 13th day of June 2023, upon the following attorneys and parties in this matter at their respective addresses below:

Tom Duff
Duff Law Firm, PLC
The Galleria
4090 Westown Parkway, Suite 102
West Des Moines, IA 50266
515-224-4999
515-327-5401
tom@tdufflaw.com
Attorney for Plaintiff/Appellant, Ron Myers

I further certify that on the 13th day of June, 2023, I filed this document by uploading to the ECF System to the Clerk of the Supreme Court.

SWISHER & COHRT, P.L.C.

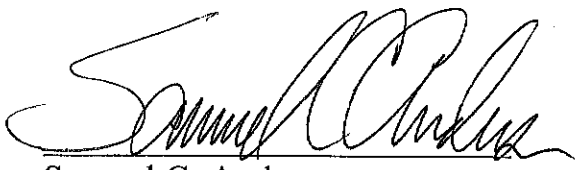
By: _____

Samuel C. Anderson AT0000461
528 West 4th Street
P. O. Box 1200
Waterloo, IA 50704-1200
Telephone: (319) 232-6555
Facsimile: (319) 232-4835
E-mail: sanderson@s-c-law.com
Attorneys for Defendant/Appellee, City of Cedar Falls, Iowa

CERTIFICATE OF COMPLIANCE

This Application for Further Review complies with the typeface requirements and type-volume requirements of Iowa R. App. P. 6.1103(4) because:

This Application for Further Review has been prepared in proportionally spaced typeface using Times New Roman in 14 font size and contains 5,580 words excluding the parts of the brief exempted by Iowa R. App.P. 6. 6.1103(4)



Samuel C. Anderson

June 13, 2023