IN THE SUPREME COURT OF IOWA
Case No. 15-2143

WILMA KELLOGG,

Plaintiff-Appellant,

vs.

CITY OF ALBIA, IOWA

Defendant-Appellee.

APPEAL FROM THE IOWA DISTRICT COURT
FOR MONROE COUNTY
THE HONORABLE RANDY S. DEGEEST

APPELLEES' FINAL BRIEF

Michael C. Richards, AT0010828
Sarah E. Crane, AT0010225
Davis, Brown, Koehn, Shors & Roberts, P.C.
The Davis Brown Tower
215 10th Street, Ste. 1300
Des Moines, IA 50309
Telephone: 515-288-2500
Facsimile: 515-243-0654
Email: MikeRichards@davisbrownlaw.com
SarahCrane@davisbrownlaw.com

ATTORNEYS FOR DEFENDANT/APPELLEE

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Case Law

Statutes & Rules

Other Authorities

STATEMENT OF ISSUES PRESENTED FOR REVIEW

I. The District Court Correctly Granted Summary Judgment and Applied the State-of-the-Art Defense to Plaintiff's Claims Pursuant to Iowa Code § 670.4(1)(h).

Cases:

Connolly v. Dallas County, 465 N.W.2d 875, 877 (Iowa 1991)
Cubit v. Mahaska County, 677 N.W.2d 777, 783-84 (Iowa 2004)
Guzman v. Des Moines Hotel Partners, Ltd. P'ship., 489 N.W.2d 7, 11 (Iowa 1992)
K & W Electric, Inc. v. State, 712 N.W.2d 107 (Iowa 2006)
Ryan v. City of Emmetsburg, 232 Iowa 600, 4 N.W.2d 435 (1942)
Schneider v. State, 789 N.W.2d 138 (Iowa 2010)
Sparks v. City of Pella, 258 Iowa 187, 137 N.W.2d 909 (Iowa 1965)
Tracy v. Peter M. Soble, P.C., 800 N.W.2d 755 (Iowa Ct. App. 2011)

Statutes & Rules:

Iowa Code § 314.7
Iowa Code § 384.37(19)(a) and (b)
Iowa Code § 455B.275(1)
Iowa Code § 613A.4
Iowa Code § 670.1(4)
Iowa Code § 670.2
Iowa Code § 670.4(1)(h)
Iowa Code § 670.4(11)

Other Authorities:

58 Am. Jur. 2d Nuisances § 176

II. The District Court Correctly Granted Summary Judgment and Applied the Two-Year Statute of Limitations Pursuant to Iowa Code § 670.5.

Cases:

Bell v. The City of Dyersville, Iowa, 2003 WL 25510081 (Iowa Dist. 2003)
Cedar v. Cherokee Cmty. Sch. Dist., 780 N.W.2d 248, 2010 WL 446534 (Iowa Ct. App. 2010)
Christy v. Miulli, 692 N.W.2d 694, 702 (Iowa 2005)
City of Ottumwa v. Nicholson, 143 N.W. 439, 440 (Iowa 1913)
Eppling v. Seuntjens, 117 N.W.2d 820, 825 (Iowa 1962
Gemini Capital Group v. New, 807 N.W.2d 157, 2011 WL 3925723 (Iowa Ct. App. 2011)
Grant v. Cedar Falls Oil Co., 480 N.W.2d 863, 865-66 (Iowa 1992)
Hager v. City of Devils Lake, 773 N.W.2d 420, 430, 2009 ND 180, ¶ 23 (N.D. 2009)
Hartzler v. Town of Kalona, 218 N.W.2d 608 (Iowa 1974
Hegg v. Hawkeye Tri-County REC, 512 N.W.2d 558, 560 (Iowa 1994)
Hollenbeck v. City of Marion 89 N. W. 210 (1902)
Hook v. Lippolt, 755 N.W.2d. 514, 521 (Iowa 2008)
K & W Electric, Inc. v. State, 712 N.W.2d 107 (Iowa 2006)
Kuhns v. Marco, 620 N.W.2d 488, 491 n.1 (Iowa 2000)
LeBeau v. Dimig, 446 N.W.2d 800 (Iowa 1989
Leonard v. Woltman, 777 N.W.2d 128, 2009 WL 3775144 (Iowa Ct. App. 2009)
Meier v. Alfa-Laval, Inc. 454 N.W.2d 576, 578-79 (Iowa 1990).
Minch Family LLLP v. Estate of Norby, 652 F.3d 851, 858 (8th Cir. 2011)
Nall v. Iowa Elec. Co., 69 N.W.2d 529 (Iowa 1955)
Ryan v. City of Emmetsburg, 232 Iowa 600, 4 N.W.2d 435 (1942)
Van Den Boom v. City of Eldora, 829 N.W.2d 589, 2013 WL 988632
Vogt v. Grinnell, 98 N.W. 782 (Iowa 1904)
Weinhold v. Wolff, 555 N.W.2d 454, 463-64 (Iowa 1996)

Statutes & Rules:

Iowa Code §670.1(4)
Iowa Code § 670.2
Iowa Code § 670.5

Other Authorities:

51 Am.Jur.2d Limitation of Actions § 387

ROUTING STATEMENT

Plaintiff-Appellant Wilma Kellogg ("Kellogg") sued the City of Albia alleging damages caused by flooding from a storm sewer near her house. The District Court granted summary judgment, holding the Plaintiff's claims are barred by the state-of-the-art defense in the Municipal Tort Claims Act at Iowa Code section 670.4(1)(h) and by the applicable two year statute of limitations at Iowa Code section 670.5. Kellogg's appeal is governed by established legal principles set forth in Iowa's Municipal Tort Claims Act and recently addressed in K & W Electric, Inc. v. State, 712 N.W.2d 107 (Iowa 2006). Therefore, this case is properly routed to the Iowa Court of Appeals because it requires application of existing legal principles pursuant to Iowa Rule of Appellate Procedure 6.1101(3)(a).

STATEMENT OF THE CASE

Plaintiff-Appellant Wilma Kellogg ("Plaintiff" or "Kellogg") owns property located at 321 4th Avenue E, in Albia, Iowa. She asserts that a storm sewer running along the western edge of her property is causing flooding at her home. Kellogg purchased the home in 2008 and asserts that there was flooding at her home in 2009, 2010, 2012, and most recently in 2015.

The District Court dismissed Kellogg's claims on summary judgment based on the state-of-the-art defense. This defense is an exemption in the Iowa Municipal Tort Claims Act that immunizes local governments from tort suits based on public improvements that were "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." Iowa Code § 670.4(1)(h). The storm sewer about which Kellogg complains was built in 1972 according to the then-recognized engineering standards. Therefore, the District Court properly granted summary judgment. Kellogg argues that the state-of-the-art defense is not applicable to her nuisance claim. However, the Iowa Supreme Court has repeatedly applied the broad language of the state-of-the-art defense and it is applicable here.

The District Court also granted summary judgment to the City based on the applicable two year statute of limitations. See Iowa Code § 670.5. The Court correctly held that Kellogg had discovered the alleged act or omission that caused her damages. It is undisputed that Kellogg claims that her home flooded in 2009, 2010, and 2012, all of which are outside of two years from when she filed suit in February of 2015. In addition, it is undisputed that Kellogg was aware of the alleged cause, as she had

complained to the City in 2010 and 2012 about the storm sewers. Kellogg seeks to avoid the statute of limitations on her nuisance claim by asserting that her nuisance claim is for a temporary, and not permanent, nuisance, however, this argument does not excuse Kellogg from the statute of limitations under the undisputed facts of this case.

STATEMENT OF THE FACTS

Kellogg is the owner of the property and house located at 321 4th Avenue E, in Albia, Iowa and lives there with Edward Dean Glenn. (Defendant's Statement of Material Facts in Support of Summary Judgment ("Def. SMF") ¶¶ 1-2; App. 16). The house was originally built in 1983. (Def. SMF ¶ 3; App. 16).

Kellogg's property has a storm sewer along the western edge of the property. (Def. SMF ¶ 4; App. 16). The storm sewer at issue was constructed by the City of Albia during a 1972 paving project (the "Project"). (Def. SMF ¶ 5; App. 16). The Project included road paving and construction and improvement of a storm sewer system near 4th Avenue E, in Albia, Iowa. (Def. SMF ¶ 6; App. 16).

Prior to the Project, there existed a corrugated metal pipe that crossed 4th Avenue E. (Def. SMF ¶ 7; App. 17). The pipe intercepted overland flow and conveyed it southerly to a natural discharge on the south side of 4th

Avenue E. (Def. SMF ¶ 7; App. 17). As a part of the Project, a 12 inch storm sewer was constructed from the existing storm sewer. (Def. SMF ¶ 8; App. 17). Intakes were constructed on both the north curb line and south curb line of 4th Avenue E. (Def. SMF ¶ 8; App. 17). One of the intakes for the 12 inch storm sewer is on the western edge of Plaintiff's property. (Def. SMF ¶ 9; App. 17). The Project's storm sewer was intended to intercept overland flow in the block bounded by 4th Avenue E, S 3rd Street, 3rd Avenue E and S 4th Street. (Def. SMF ¶ 10; App. 17). The storm sewer constructed in the Project is the one to which the graded swale on the western part of the Plaintiff's property discharges. (Def. SMF ¶ 11; App. 17). The Project's storm sewer was designed to accommodate a two (2) year recurrence interval storm. (Def. SMF ¶ 12; App. 17). The accepted practice for sizing storm sewers in 1972 was a two year recurrence interval storm. (Def. SMF ¶ 13; App. 17). The Project, including the storm sewer, was constructed in accordance with the generally recognized engineering standards, criteria, and design theory in 1972. (Def. SMF ¶ 14; App. 17).

Kellogg purchased her home in 2008. (Def. SMF ¶ 15; App. 17). When she purchased her home in 2008, the prior owner disclosed prior flooding from sewage backup. (Def. SMF ¶ 16; App. 18). Kellog's house flooded in the spring of 2009. (Def. SMF ¶ 17; App. 18). In 2010,

Plaintiff's house flooded again and Kellogg and Glenn met with City officials to ask if there was anything they could do to fix the storm sewer so that it would stop the flooding. (Def. SMF ¶ 18; App. 18). In 2012, Plaintiff's house flooded again and she again spoke to the City and asked them if there was anything they could do to fix the storm sewer so that it would stop the flooding. (Def. SMF ¶ 19; App. 18).

Kellogg filed the present cause of action on February 15, 2015, asserting three property damage tort claims against the City: nuisance, abatement of nuisance, and negligence. (Def. SMF ¶¶ 20, 21; App. 18). The City moved for summary judgment on two grounds. First, the City argued Kellogg's claims are barred because they stem from allegations of negligent design or failure to upgrade a storm sewer public improvement that was designed and constructed in accordance with generally accepted standards at the time, also known as the "state-of-the-art" defense. Second, the City moved for summary judgment based on the applicable two-year statute of limitations because Kellogg was aware of flooding on multiple occasions prior to two years before the filing of this Petition. The District Court granted summary judgment to the City on both grounds. (Ruling on Defendant's Motion for Summary Judgment "MSJ Ruling"; App. 73).

Kellogg appeals only the District Court's determination that her nuisance claims are barred by both the state-of-the-art defense and the statute of limitations. Kellogg does not appeal the dismissal of her negligence claim on summary judgment. (Plaintiff's Appellate Brief at 8, 12-13).

ARGUMENT

Scope of Review. The District Court granted summary judgment, finding that Plaintiffs' claims are barred by the state-of-the-art defense and the applicable statute of limitations as a matter of law. Iowa's appellate courts review a district court ruling on a motion for summary judgment for correction of errors at law. Otterberg v. Farm Bureau Mut. Ins. Co., 696 N.W.2d 24, 27 (Iowa 2005); Estate of Kuhns v. Marco, 620 N.W.2d 488, 490 (Iowa 2000).

I. The District Court Correctly Granted Summary Judgment and Applied the State-of-the-Art Defense to Plaintiff's Claims Pursuant to Iowa Code § 670.4(1)(h).

Preservation of Error. Defendant acknowledges that Plaintiff preserved error on her argument that a claim for nuisance does not fall within the state-of-the-art defense located in Iowa Code section 670.4(h).

Argument. Plaintiff Kellogg has sued a municipality - the City of Albia - in this matter. Therefore, this case is governed by the Municipal

Tort Claims Act located at Iowa Code chapter 670. Iowa Code section 670.2 generally allows suit against a municipality for its torts. See Iowa Code § 670.2. However, the act provides a number of exemptions, under which municipalities are immune from suit.

Iowa Code Section 670.4(1)(h) exempts municipalities from liability for:

> Any claim 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 improvement as defined in section 384.37, subsection 19[1], or other public facility that 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. A claim under this chapter shall not be allowed 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. This paragraph shall not apply to claims based upon gross negligence. This paragraph takes effect July 1, 1984, and applies to all cases tried or retried on or after July 1, 1984.

Iowa Code § 670.4(1)(h). This exemption is known as the "state-of-the-art" defense for design and construction of public improvements. Connolly v. Dallas County, 465 N.W.2d 875, 877 (Iowa 1991) (formerly codified at Iowa Code § 613A.4). The Iowa Supreme Court has explained that this

[1] The term "public improvement" as defined in Iowa Code section 384.37, subsection 19 includes "principle structures, works, component parts and accessories" of "sanitary, storm and combined sewers." Iowa Code § 384.37(19)(a) and (b).

exemption serves two purposes. First, it "provide[s] a state-of-the-art defense with respect to design and construction of public improvements." Id. Second, it "establishes that the extent of the public agency's duty for purposes of establishing nonconstitutional torts is measured by the generally recognized engineering or safety standard, criteria, or design theory in existence at the time of the construction or reconstruction." Id.

The City moved for summary judgment on all three of Kellogg's claims based on the state-of-the-art defense and the District Court properly awarded summary judgment. Kellogg's claims are based on complaints regarding a storm sewer intake on the western edge of her property. (Def. SMF ¶ 9; App. 17). The public improvement storm sewer at issue was designed and constructed in 1972.[2] (Def. SMF ¶¶ 5-11; App. 16-17). The storm sewer was designed to accommodate a two (2) year recurrence interval storm. (Def. SMF ¶ 12; App. 17). The accepted practice in 1972 was to design and construct a storm sewer that would accommodate a two (2) year recurrence interval storm. (Def. SMF ¶ 13; App. 17). Therefore, the storm sewer at issue was constructed in accordance with the generally recognized engineering standards, criteria, and design theory in 1972. (Def. SMF ¶ 14; App. 17).

[2] Plaintiff's residence was built by the original owner in 1983, ten years after the storm sewer was constructed. (Def. SMF ¶ 3; App. 16).

The District Court determined that the undisputed facts supported that "the storm sewer was built in accordance with the then accepted and generally recognized engineering standards criteria and design." (12/03/2015 Ruling on Summary Judgment ("MSJ Ruling") at 2; App. 74). Kellogg did not submit an expert opinion to contradict the City's expert evidence that the storm sewer at issue was designed and constructed according to the generally recognized engineering standards, criteria and design theory in 1972. Further, Kellogg does not appeal or raise this finding in her appellate brief.

The District Court correctly concluded that each of Kellogg's claims are, therefore, barred by the state-of-the-art defense. Because the storm sewer at issue was designed and constructed in accordance with recognized engineering standards, criteria and design theory in 1972, the City of Albia is immune from any allegations by the Plaintiff of improper or negligent construction or failure to upgrade, improve or alter the storm sewer. Iowa Code § 670.4(1)(h).

On appeal, Kellogg challenges the District Court's decision to grant summary judgment on her nuisance claim[3]. Kellogg asserts that the state-of-

[3] Kellogg's Count I asserted a claim of "private nuisance" and Count II asserted a claim of "abatement of the nuisance." (Petition at 2). Kellogg's appellate brief refers generally to a nuisance claim and does not specify

the-art defense located in Iowa Code section 670.4(1)(h) does not extend to nuisance claims. Kellogg is incorrect.

First, the straightforward language of the statute at issue does not limit its application to negligence claims. The statute applies to "[a]ny claim 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 improvement …" that was designed and constructed in accordance with generally recognized criteria in existence at the time. Iowa Code §670.4(1)(h) (emphasis added). In addition, this statutory exemption applies to any claim 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. Kellogg's alleged nuisance claim falls within both iterations of this exemption.

Kellogg asserts that the City "must prove that the Plaintiff's cause of action is for negligence" in order for the statutory exemption to apply. (Plaintiff's Appellate Brief at 9). This statement is inaccurate and not consistent with the statutory text. The statutory language does not limit its

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whether she appeals both Counts I and II. The question is likely irrelevant, however, because abatement of a nuisance is one potential remedy for a nuisance claim and not a separate claim. See e.g. 58 Am. Jur. 2d Nuisances § 176 ("Remedies for nuisance include damages, injunctions, and abatement.").

application only to claims of negligence. Instead, the exemption applies to claims "**based upon**" or "**arising out of**" a claim of negligent design or construction. The Iowa Supreme Court has examined what the phrase "arising out of" means with respect to section 670.4. In Cubit v. Mahaska County, 677 N.W.2d 777, 783-84 (Iowa 2004), the Iowa Supreme Court confirmed that the term "arising out of" "sweeps broadly," requiring only "some causal connection" between the claim and the acts alleged. Id. (examining Iowa Code section 670.4(11)). The essence of Kellogg's nuisance claim is that the sewer system was negligently designed or constructed and that damages are repeatedly occurring on Kellogg's property as a result thereof. The basis of Kellogg's claim is that the City installed a storm sewer that causes flooding on Kellogg's property. (Petition at ¶¶ 4-5; App. 8). Kellogg's claim therefore has a causal connection to the allegedly negligent design or construction of the storm sewer. Further, Kellogg's Petition specifically seeks the remedy of abatement of the alleged nuisance, which would require an upgrade, improvement, or other alteration to the storm sewer. (Petition at ¶¶ 11-13; App. 9).

Notably, the Iowa Municipal Tort Claims Act treats nuisance claims as torts within the meaning of the act. Iowa Code section 670.1(4) defines a "tort" as: "every civil wrong which results in wrongful death or injury to

person or injury to property or injury to personal or property rights and includes but is not restricted to actions based upon negligence; error or omission; **nuisance** …" Iowa Code § 670.1(4)(emphasis added) Therefore, in reading the statute as a whole, nuisance claims arising out of allegations of negligent design or construction or failure to upgrade or alter a public improvement must be immune under Iowa Code section 670.4(1)(h). To adopt Kellogg's reading would essentially remove the state-of-the-art defense for purposes of nuisance claims, which would have broad-reaching effect. Every claim relating to property damage could be re-styled as a nuisance claim and the legislative intent to create immunity for cities and municipalities that conduct public improvements according to the state of the art at the time would be lost.

The purpose of the statutory language in the state-of-the-art defense has been explained by the Iowa Supreme Court as follows: "the extent of the public agency's duty for purposes of establishing nonconstitutional torts is measured 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). Here, the extent of the City's duty to its citizens was to construct the storm sewer to the generally recognized engineering or safety standard,

criteria, or design theory in existence in 1972. It did so. It cannot now be held liable for torts based on public improvement construction that met the state of the art at the time.

Kellogg cites two cases that relate to the distinction between a nuisance and a negligence claim. These cases do not, however, prevent the application of the state-of-the-art defense in this case. The two cases cited by Kellogg in support of her nuisance claim are Sparks v. City of Pella, 258 Iowa 187, 137 N.W.2d 909 (Iowa 1965) and Ryan v. City of Emmetsburg, 232 Iowa 600, 4 N.W.2d 435 (1942). Each of these cases pre-dates the enactment of the Iowa Municipal Torts Claim Act, enacted as Chapter 613A[4] in 1967, which first created the state-of-the-art defense. Neither Sparks nor Ryan addressed whether the state-of-the-art defense applied to claims styled as nuisance because that defense did not exist at the time. Instead, Sparks addressed common law immunity for the exercise of governmental functions. Sparks, 137 N.W.2d at 911. Governmental function immunity is not at issue in this summary judgment ruling.

Further, the labeling of a claim as a nuisance claim cannot be read to exempt the claim from application of Iowa Code section 670.4(1)(h). The Iowa Supreme Court has repeatedly instructed courts to examine the

[4] Transferred to Iowa Code Chapter 670 in 1993.

foundation of a claim in determining what the claim actually is, not just the label placed on it. See e.g. Tracy v. Peter M. Soble, P.C., 800 N.W.2d 755 (Iowa Ct. App. 2011) (noting that in determining the appropriate statute of limitations for a specific claim, the court must examine the foundation of the action by characterizing the actual nature of the action). When an alleged "nuisance" claim is simply a condition created by a defendant through alleged negligence, other negligence principles will apply. Guzman v. Des Moines Hotel Partners, Ltd. P'ship., 489 N.W.2d 7, 11 (Iowa 1992) (holding that comparative fault principles under chapter 668 must be applied to nuisance claims that are based in negligence).

Two recent Iowa Supreme Court cases demonstrate application of the state-of-the-art defense in lawsuits against governmental entities. In K & W Electric, Inc. v. State, a state highway construction project involving the interchanges between highways 218, 58, and 57 over and near the Cedar River resulted in increased flooding to plaintiff's land. The flood modeling available at the time demonstrated the project would not increase the 100 year flood level by more than a foot, which was within acceptable parameters for flood plain improvements. Id. at 114. Later-developed flood modeling demonstrated that the project had, in fact, increased the 100 year flood level by 1.9 feet, an unacceptable amount under federal standards. Id.

The Court dismissed the plaintiff's claims for damage due to a flood based on the state-of-the-art defense contained in the corollary state tort claims act. Id. The Court re-iterated that the state-of-the-art defense establishes:

> that the extent of the public agency's duty for purposes of establishing nonconstitutional torts is measured by the generally recognized engineering or safety standard, criterion, or design theory in existence at the time of the construction or reconstruction.

Id. at 113. The Court rejected the "absurd" result that the DOT would be required to redesign an improvement after the work was substantially completed due to improved standards, a costly and complex proposition. Id. at 114.

In Schneider v. State, 789 N.W.2d 138, 142 (Iowa 2010) plaintiffs filed suit challenging a highway bypass project and the later reconstruction as a bridge that was part of the project. The Court affirmed summary judgment for claims relating to the bridge reconstruction project based on the state-of-the-art defense. Notably, the Court explained that: "Whether the plaintiffs' negligence claims are based on an alleged breach of a common-law duty to exercise reasonable care in the design and construction of the bridge, or an alleged breach of Iowa Code section 455B.275(1) and related state or federal regulations proscribing the erection of obstructions in

floodways, they are based upon or arise out of the design or construction of a highway." Id. at 149.

Although K & W Electric and Schneider did not involve a nuisance claim, the Court did apply the state-of-the-art defense to a non-negligence claim in both cases: a claim brought under Iowa Code section 314.7. Iowa Code section 314.7 prohibits those conducting maintenance or improvement of public highways from "turn[ing] the natural drainage of the surface water to the injury of adjoining owners." Iowa Code § 314.7. The Iowa Supreme Court explained that section 314.7 imposes "strict diligence" on those undertaking highway improvements. Schneider, 789 N.W.2d at 150. Regardless of the strict diligence imposed, however, the Iowa Supreme Court has twice held that section 314.7 claims are equally barred by the state-of-the-art defense in addition to negligence claims. K & W Electric, 712 N.W.2d at 115 ("The district court properly dismissed the plaintiff's negligence and section 314.7 theories on the [the state-of-the-art] ground"); Schneider, 789 N.W.2d at 150 ("Accordingly, the district court's ruling granting the State's summary judgment motion on the plaintiffs' other negligence theories applies coextensively to their claims for permanent property devaluation based on the alleged violation of section 314.7.").

Therefore, both cases extended state-of-the-art immunity beyond general negligence claims.

Just as in K & W Electric and Schneider, the City observed the design standards in existence at the time and, therefore, met its duty under the municipal tort claims act. Just as in these other cases, Kellogg's claims are "based upon or arise out of the design or construction" that is granted immunity. Here it is a public improvement and in these other cases it was a highway project. Regardless, these cases illustrate that the immunity is not limited to negligence claims. To carve out an exception for nuisance claims would materially impact a public agency's duty. Plaintiffs could simply rename their negligence claims as nuisance claims and avoid the statutory immunity provided by the Iowa legislature. Such result would be contradictory to the statutory language and Iowa Supreme Court precedent.

II. The District Court Correctly Granted Summary Judgment and Applied the Two-Year Statute of Limitations Pursuant to Iowa Code § 670.5.

Preservation of Error. Defendant acknowledges that Plaintiff preserved error on her argument that her claim for nuisance is not barred by the applicable statute of limitations.

Argument. There is no dispute between the parties that this case is governed by a two year statute of limitations. (See Kellogg Appellate Brief

at 12). According to the Iowa Municipal Tort Claims Act, Iowa Code sections 670.5 and 670.2 provide for a two year statute of limitations for claims asserting torts against Iowa municipalities. As noted above, Iowa statute defines "tort" for purposes of the act to expressly include nuisance[5], see Iowa Code §670.1(4), and, therefore, section 670.5 establishes a two year statute of limitations for nuisance claims against a municipality.

A. Plaintiff's Claims are Barred by the Statute of Limitations.

Statutes of limitations are routinely enforced in Iowa. See e.g. Grant v. Cedar Falls Oil Co., 480 N.W.2d 863, 865-66 (Iowa 1992) (affirming grant of motion to dismiss based on statute of limitations); Van Den Boom v. City of Eldora, 829 N.W.2d 589, 2013 WL 988632, at *5 (Iowa Ct. App. 2013) (Table) (enforcing 15 day statute of limitations); Gemini Capital Group v. New, 807 N.W.2d 157, 2011 WL 3925723 (Iowa Ct. App. 2011) (Table) (reversing judgment in plaintiff's favor and holding claim was barred by the statute of limitations); Cedar v. Cherokee Cmty. Sch. Dist., 780 N.W.2d 248, 2010 WL 446534 (Iowa Ct. App. 2010) (Table) (affirming district court's dismissal of action based on statute of limitations); Leonard

[5] The statute of limitations equally applies to Plaintiffs negligence claim, however, Plaintiff does not appeal the District Court's determination that the negligence claim is properly dismissed under the state-of-the-art doctrine or the statute of limitations. Instead, Plaintiff appeals only the nuisance claim. (Plaintiff's Appellate Brief at 8, 13). Therefore, this brief focuses on the nuisance claim.

v. Woltman, 777 N.W.2d 128, 2009 WL 3775144 (Iowa Ct. App. 2009) (Table) (same). Such enforcement ensures that defendants will receive timely notice of potential claims so that they do not have to defend against stale claims, frees defendants from worry of the fear of litigation, and removes the uncertainty of unsettled claims from the marketplace. Kuhns v. Marco, 620 N.W.2d 488, 491 n.1 (Iowa 2000).

The District Court granted summary judgment in the City's favor based on the statute of limitations, correctly holding that the statute of limitations began to run when Kellogg discovered the alleged act or omission that caused damages, which was well before two years prior to her suit. (MSJ Ruling at 4; App. 74). The District Court correctly rejected Kellogg's argument that the statute of limitations would re-start each time her property experienced a flood. Kellogg's claims are time-barred by the two year statute of limitations. (Id.).

The statute of limitations begins to run when a party sustaining damages discovers the alleged causative act or omission, or should have discovered it through a reasonably diligent investigation. Hook v. Lippolt, 755 N.W.2d. 514, 521 (Iowa 2008). According to Plaintiffs' own admissions and evidence, she had notice of the tort claims related to the alleged flooding of her property beginning as early as 2009 and raised those

complaints with the City after additional flooding in 2010 and 2012. (Def. SMF ¶¶ 17-19; App. 18).

Here, the undisputed facts demonstrate that Kellogg was well-aware of the alleged issues relating to the storm sewer prior to two years before the date of her petition. It is undisputed that Kellogg's property flooded to some extent in 2009, 2010, and 2012, each of which is greater than two years prior to Kellogg's filing of a petition on February 15, 2015. (Def. SMF ¶¶ 16-19; App. 18). Kellogg not only had knowledge of the flooding, it is also undisputed that she had knowledge of the alleged cause, the storm sewer, and, therefore, had knowledge of her potential claims. After the flooding in 2010, Kellogg contacted the City and asked them to do something about the storm sewer flooding her house. (Def. SMF ¶ 18; App. 18). After another incidence of flooding in 2012, Kellogg again spoke with the City about fixing the storm sewer. (Def. SMF ¶ 19; App. 18). Based on these facts, there can be no legitimate dispute that Kellogg affirmatively knew what she believed was causing the flooding at her property since at least 2010 and 2012, or should have discovered it through a reasonably diligent investigation, both of which are outside of the two-year statute of limitations. Because this cause of action was not filed until February 15,

2015, the claims are barred by the two (2) year statute of limitations. Iowa Code § 670.5.

Kellogg argues that the statute of limitation restarts every time the property floods. This argument fails as a matter of law based on the undisputed facts at issue in this case. In K & W Electric v. State of Iowa, 712 N.W.2d 107 (Iowa 2006), the Iowa Supreme Court distinguished prior case law and addressed application of the statute of limitations to flooding claims against government entities. In K & W Electric, the State of Iowa performed a highway construction project in the early 1990s that caused the plaintiff's property to flood for the first time in 1993. Id. at 110-11. The property flooded again in 1999, and the plaintiff filed suit against the State of Iowa for damages. Id. at 111-12. The Supreme Court upheld a grant of summary judgment to the State, finding that the plaintiff's inverse condemnation claim for intermittent flooding was barred by the statute of limitations because the plaintiff was aware of the potential for increased flooding since the first flood event in 1993.[6] Id. The court explained that the inverse taking claim was analogous to a permanent easement claim caused by a government project. See Id. at 116 ("Thus when flooding

[6] The applicable statute of limitations at issue in K & W Electric was five (5) years, not the two (2) year limitation period that applies to municipalities pursuant to Iowa Code section 670.5.

results from a government project, the flooding has been held compensable as a taking if there is a permanent condition of continual overflow or a permanent liability to intermittent but inevitably recurring overflows.") (internal quotes and citations omitted). The Supreme Court explained that because the damages could not be brought in successive cases, the statute of limitations did not restart in 1999, but instead began to run in 1993 when the property flooded the first time after the government project and the plaintiff had constructive knowledge of the claim. Id. at 119. Application of K & W Electric here provides that the claim is barred, as prior flooding took place outside the statute of limitations period and Kellogg had actual knowledge of the claim.

Kellogg argues that she pursues only a theory of intermittent or temporary nuisance and, therefore, is entitled to bring suit based on the most recent flooding incident at her home, which she asserts occurred on July 7, 2015. (Plaintiff's Appellate Brief at 13-14). Kellogg relies on examples of nuisance cases in which the Court treated the nuisance at issue as temporary and abatable and, therefore, allowed recovery of temporary damages from the most recent occurrence. Each of these cases is distinguishable and fails to accurately reflect the Iowa caselaw related to nuisance, which dictates that Kellogg's claims are barred under the undisputed facts of this case.

First, Kellogg cites to Eppling v. Seuntjens, 117 N.W.2d 820, 825 (Iowa 1962). Eppling did not, however, consider the issue at hand. In Eppling, the defendant sought to exclude damages for a flood that occurred outside the statute of limitations and did not appear to raise a question of whether the entire suit was barred by the statute of limitations due to prior knowledge of flooding and its cause.

Second, Kellogg relies on Hartzler v. Town of Kalona, 218 N.W.2d 608 (Iowa 1974) for the proposition that whether a nuisance is temporary or permanent is a question of fact. However, in the instant case, the City and the District Court's Ruling Granting Summary Judgment relied on the undisputed fact that Kellogg was repeatedly aware of flooding and aware of its alleged cause well before two years prior to file suit. Therefore, Hartzler cannot prevent summary judgment.

Finally, Kellogg relies on Ryan v. City of Emmetsburg, 4 N.W.2d 435, 441 (Iowa 1942). Although the quoted language in Ryan appears to support Kellogg's claim on first glance, a more comprehensive read of the case establishes that not only does it not support Kellogg, it supports the City. Ryan discusses whether a nuisance is "abatable" and the relationship of that fact to whether the nuisance is permanent or temporary. Ryan identifies a distinction between effects that result from "active operation" of

a nuisance versus the effects of a "passive nuisance in which the structure will continue to produce injury irrespective of any subsequent wrongful act." Id, at 443. The alleged nuisance complained up by Kellogg is a passive and permanent condition—a storm sewer built decades ago based on the then-appropriate engineering standards—allegedly causing intermittent flooding. The City is not alleged to be currently taking wrongful actions that could be abated.

Kellogg relies on citations within Ryan noting that the permanency of city storm sewers is not alone determinative of whether a nuisance is permanent. Review of the cited cases illustrates that the District Court's decision was correct in this case. The cases cited within Ryan largely[7] relate to the odors and fumes associated with a storm sewer and not with regular flooding caused by a storm sewer. Ryan, Vogt v. Grinnell, 98 N.W. 782 (Iowa 1904), and Hollenbeck v. City of Marion 89 N. W. 210 (1902), each

[7] Ryan also cites to City of Ottumwa v. Nicholson, 143 N.W. 439, 440 (Iowa 1913). City of Ottumwa involved an unusual set of facts in which a water culvert was allegedly poorly constructed and washed out a hole at the end of the culvert, causing ponding water. The suit was filed within two years of the washed out hole. The Court characterized this as a "distinct and separate" injury. This was not a case of recurrent flooding, but of a significant event—the washing out of a hole—that caused injury and created a cause of action. Kellogg's lawsuit is not the result of a sudden and first injury to her property from a previously constructed structure. Instead, Kellogg sues based on recurring flooding that she admittedly was aware of prior to the statute of limitations.

address the ability to disinfect, deodorize or otherwise abate the noxious smells and gases resulting from sewage. Therefore, "while the system may be said to be permanent, it does not appear that the nuisance created thereby [noxious smells] may not at any time be abated …" Ryan, 4 N.W.2d at 441 (citing Hollenbeck). These cases are not directly applicable. Kellogg complains of flooding caused by the permanent structure, not a smell or sewage that could be abated through water treatment. See also Weinhold v. Wolff, 555 N.W.2d 454, 463-64 (Iowa 1996) (hog confinement facility constituted permanent nuisance because it would have to be shut down to abate nuisance, which was not practicable).

Contrary to Plaintiffs' assertions, the caselaw relating to application of the statute of limitations dictates and supports the District Court's conclusion here granting summary judgment. In Nall v. Iowa Elec. Co., 69 N.W.2d 529 (Iowa 1955), the Court held that complaints of floods caused by a dam were barred by the statute of limitations. Nall involved a dam owned by Iowa Electric Company that caused over-flow flooding of the plaintiffs' properties at flood time. Id. at 529. The Court emphasized that the pleadings illustrated a permanent nuisance and that flooding had occurred well before the time period of the statute of limitations and, therefore, judgment in favor of the defendant on the pleadings was correct. Id. at 533-

34. When a permanent structure causes damage, of which a plaintiff is aware, the statute of limitations begins to run. Id.

One Iowa District Court recently enforced the two year statute of limitations against a city on claims for repeated damage from flooding. In Bell v. The City of Dyersville, Iowa, 2003 WL 25510081 (Iowa Dist. 2003), the city inspector advised the plaintiff Bell that the property he purchased was not in the flood plain. Based on that advice, Bell built a house that was constructed below the 100 year flood plain elevation. In 1999 the river flooded and Bell's house was submerged in water, and thus Bell learned that the house was actually in the flood plain. Three years later, in June 2002, Bell's property flooded again. Bell filed suit against the city for negligence, nuisance and other property damage claims in October 2002. The district court correctly concluded Bell's suit was barred by the two (2) year statute of limitations found in Iowa Code § 670.5. In finding so, the court disregarded Bell's argument that the statute of limitations restarted each time the property flooded:

> The plaintiffs, on the other hand, claim that the statute of limitations runs from the date of the second flooding in 2002. This is equally unpersuasive. The city correctly points out that in LeBeau v. Dimig, 446 N.W.2d 800 (Iowa 1989) **the Supreme Court established that the statute of limitations does not restart with additional injuries. It begins to run from one date only, and that is the date when all of the elements are known, or in the existence of reasonable care**

> **should have been known, to plaintiff.** LeBeau at 802. In the current case the statute of limitations ran from the first time the plaintiffs' home flooded in the summer of 1999. At that point they had reason to know of every element of their claim against the defendant. It was then that their statute of limitations began to run. The statute of limitations for the current claims against the city expired in 2001, a full year before the suit was filed. Thus the plaintiffs' claim must properly be dismissed.

Bell, 2003 WL 25510081.

K & W Electric, Nall, and Bell each enforced the applicable statute of limitations based on the plaintiff's knowledge of prior flooding and ability to determine the cause. Here, the application of the statute of limitations is even more clear, as Kellogg not only was aware of the flooding well before the applicable two year time frame, she was also aware of the alleged cause, as she had repeatedly complained about her belief that the storm sewer at issue was the cause. (Def. SMF ¶¶ 16-19; App. 18).

Other jurisdictions also apply the statute of limitations to bar suit under similar facts where the plaintiff is aware of both the intermittent injuries and the alleged cause from a public improvement. See e.g. Minch Family LLLP v. Estate of Norby, 652 F.3d 851, 858 (8th Cir. 2011) ("Here, the record reflects that the Minch Family experienced flooding as a result of the field dike as early as November 27, 2000, when the Minch Family first complained to the [Buffalo Red River Watershed District]. The Minch Family argues that the limitations period did not begin until 2004, when it

sustained "significant and calculable crop damage." This argument, however, relates to the extent of the Minch Family's injuries—not the fact of the injury. Even viewed in a light most favorable to the Minch Family, the record shows that the Minch Family first discovered its injury no later than November 27, 2000. The Minch Family did not file this suit until September 7, 2007. Thus, absent an exception to, or tolling of, the statute of limitations, the Minch Family's complaint is time-barred."); Hager v. City of Devils Lake, 773 N.W.2d 420, 430, 2009 ND 180, ¶ 23 (N.D. 2009) ("In this case, the alleged dispersal of water upon the Hagers' property is caused by a permanent storm sewer system which has been in place for nearly thirty years and which was built at the Hagers' request. While it may be logical to allow recurring causes of action for temporary conditions which can be remedied or removed through injunctive relief, . . . it would be wholly illogical to allow repeated causes of action when the instrumentality causing the flooding is a permanent structure which provides substantial, continuous benefits to the general public, as in this case. When the cause of the injury is a permanent structure and injunctive relief is not appropriate or practical, the injury gives rise to only one cause of action, not a series of actions.").

There is no dispute that the flooding injuries about which Kellogg complains were allegedly caused by a permanent storm sewer, that Kellogg

experienced flooding in 2009, 2010, and 2012, and that she complained to the City about the storm sewer in 2010 and 2012. While the field of nuisance law may be complex, this case is a straightforward application of general principles that require a plaintiff to act when they have knowledge of both their injuries and the cause. Hook v. Lippolt, 755 N.W.2d 514 ("Hook knew she had been injured and knew who caused her injury. Therefore, she was on inquiry notice and had a duty to make a reasonable investigation to ascertain eh exact parameters of her claim."). The District Court decision dismissing Kellogg's claims on the statute of limitations should be affirmed.

B. In the Alternative, Plaintiff's Claims for Damages Are Limited to Two Years Prior to the Filing of the Lawsuit and Cannot Include Permanent Damages.

While Defendant asserts that all of the claims are barred by the statute of limitations, if the Court believes that the statute of limitation begins anew each time the flooding occurs in this case, any claim for damages caused by flooding prior to two years before the filing of the lawsuit are barred. Hegg v. Hawkeye Tri-County REC, 512 N.W.2d 558, 560 (Iowa 1994) (in continuing torts, damages are only available for those claims within the limitations period). In addition, Kellogg is limited to actual damages from flooding within the time period and is not entitled to any damages for alleged diminution in property value, as is available only on a permanent

nuisance claim. See Ryan, 4 N.W.2d at 442-43 (holding plaintiff could not seek permanent damages for depreciated value because the damage would cease with abatement of the nuisance).

C. Plaintiff's Assertion of Equitable Estoppel Fails as a Matter of Law.

Kelllog briefly argues that the statute of limitations should not bar this suit because of the doctrine of equitable estoppel. (Plaintiff's Appellate Brief p. 16). Equitable estoppel is a recognized defense to the statute of limitations in Iowa, but it is rarely available. The party seeking an exception to the expiration of the limitations period has the burden of proving by clear and convincing evidence: (1) the defendant has made a false representation or has concealed material facts; (2) the plaintiff lacks knowledge of the true facts; (3) the defendant intended the plaintiff to act upon such representations; and (4) the plaintiff did in fact rely upon such representations to their prejudice. Meier v. Alfa-Laval, Inc., 454 N.W.2d 576, 578-79 (Iowa 1990). "With respect to the first element, a party relying on the doctrine of fraudulent concealment must prove the defendant did some affirmative act to conceal the plaintiff's cause of action independent of and subsequent to the liability-producing conduct." Christy v. Miulli, 692 N.W.2d 694, 702 (Iowa 2005) citing 51 Am.Jur.2d Limitation of Actions §

387, at 694–95. "Furthermore, the plaintiff's reliance must be reasonable." Id.

In Meier, 454 N.W.2d at 580, the Iowa Supreme Court held that in the situation of a repair by a defendant or even a repair accompanied by assertions that the repair would cure the defect, it would not amount to a false misrepresentation that would give rise to equitable estoppel on a statute of limitations defense. Instead, "there must be some evidence that such repairs and assertions were not only made to conceal the true condition of the product, but also with the intent to mislead the injured party into the trap of the time bar." Id.

Kellogg's own testimony demonstrates the exception does not apply. There is no evidence of an affirmative act by the City to conceal Kellogg's cause of action, so the first element fails. Instead, Kellogg was aware of both the flooding and what she believed to be the cause well before the two year time period of the statute of limitations. The second element also fails because, even taking the evidence in the light most favorable to her, Kellogg's testimony clearly establishes that she knew the City only stated they would look into her complaint and that the City did not do anything to modify the culvert after she told the City about the problem. (Kellogg Dep. 32:12 - 37:23, MSJ APP 7-8; App. 81-82). This is not a situation where the

City made repairs and assurances that those repairs would work for the purpose of concealing the true nature of a problem. Because the first two elements fail, the third element (intent to rely) and fourth element (actual reliance) also fail as a matter of law. Further, any reliance by Kellogg would not be reasonable, as Kellogg admits she knew the City had not taken action. The doctrine of equitable estoppel provides no relief to Kellogg.

CONCLUSION

For the reasons set forth above, this Court should affirm the District Court's ruling granting summary judgment in full on both the state-of-the-art defense located in Iowa Code section 670.4(1)(h) and the applicable two year statute of limitations located in Iowa Code section 670.5.

/s/ Sarah E. Crane
Michael C. Richards, AT0010828
Sarah E. Crane, AT0010225
Davis, Brown, Koehn, Shors & Roberts, P.C.
The Davis Brown Tower
215 10th Street, Ste. 1300
Des Moines, IA 50309
Telephone: 515-288-2500
Facsimile: 515-243-0654
Email: MikeRichards@davisbrownlaw.com
SarahCrane@davisbrownlaw.com

ATTORNEYS FOR
DEFENDANTS/APPELLEES

REQUEST FOR ORAL ARGUMENT

Counsel for Appellee respectfully requests to be heard in oral argument upon submission of this case.

/s/ Sarah E. Crane
Michael C. Richards, AT0010828
Sarah E. Crane, AT0010225
Davis, Brown, Koehn, Shors & Roberts, P.C.
The Davis Brown Tower
215 10th Street, Ste. 1300
Des Moines, IA 50309
Telephone: 515-288-2500
Facsimile: 515-243-0654
Email: MikeRichards@davisbrownlaw.com
SarahCrane@davisbrownlaw.com

ATTORNEYS FOR
DEFENDANTS/APPELLEES

CERTIFICATE OF FILING

The undersigned hereby certifies that on the 27th day of May, 2016, the Appellee's Final Brief was filed with the Clerk of the Iowa Supreme Court, 1111 E. Court Ave., Des Moines, Iowa 50319 by electronically filing the brief through the EDMS system.

/s/ Sarah E. Crane

Michael C. Richards, AT0010828
Sarah E. Crane, AT0010225
Davis, Brown, Koehn, Shors & Roberts, P.C.
The Davis Brown Tower
215 10th Street, Ste. 1300
Des Moines, IA 50309
Telephone: 515-288-2500
Facsimile: 515-243-0654
Email: MikeRichards@davisbrownlaw.com
SarahCrane@davisbrownlaw.com

ATTORNEYS FOR DEFENDANT/APPELLEE

CERTIFICATE OF SERVICE

The undersigned certifies that on the 27th day of May, 2016, one copy of the Appellee's Final Brief was served upon all parties to the above cause through the Court's EDMS system to the parties of record herein as follows:

Jeff Carter
Zachary C. Priebe
Jeff Carter Law Offices, P.C.
300 Walnut Street, Suite 260
Des Moines, IA 50309

Attorney for Plaintiff/Appellant

/s/ Sarah E. Crane

Michael C. Richards, AT0010828
Sarah E. Crane, AT0010225
Davis, Brown, Koehn, Shors & Roberts, P.C.
The Davis Brown Tower
215 10th Street, Ste. 1300
Des Moines, IA 50309
Telephone: 515-288-2500
Facsimile: 515-243-0654
Email: MikeRichards@davisbrownlaw.com
SarahCrane@davisbrownlaw.com

ATTORNEYS FOR DEFENDANT/APPELLEE

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Date: May 27, 2016.

/s/ Sarah E. Crane

Michael C. Richards, AT0010828
Sarah E. Crane, AT0010225
Davis, Brown, Koehn, Shors & Roberts, P.C.
The Davis Brown Tower
215 10th Street, Ste. 1300
Des Moines, IA 50309
Telephone: 515-288-2500
Facsimile: 515-243-0654
Email: MikeRichards@davisbrownlaw.com
SarahCrane@davisbrownlaw.com

ATTORNEYS FOR DEFENDANT/APPELLEE

ATTORNEY'S COST CERTIFICATE

I hereby certify that the cost of printing the foregoing Appellee's Final Brief was the sum of $0.

/s/ Sarah E. Crane

Michael C. Richards, AT0010828
Sarah E. Crane, AT0010225
Davis, Brown, Koehn, Shors & Roberts, P.C.
The Davis Brown Tower
215 10th Street, Ste. 1300
Des Moines, IA 50309
Telephone: 515-288-2500
Facsimile: 515-243-0654
Email: MikeRichards@davisbrownlaw.com
SarahCrane@davisbrownlaw.com

ATTORNEYS FOR DEFENDANT/APPELLEE