IN THE SUPREME COURT OF IOWA

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, JUDGE

DEFENDANT-APPELLEE'S APPLICATION FOR FURTHER REVIEW FROM THE DECISION OF THE IOWA COURT OF APPEALS DATED FEBRUARY 8, 2017

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QUESTIONS PRESENTED FOR FURTHER REVIEW

1. Can the Plaintiff Wilma Kellogg, who has alleged a nuisance claim based on a storm sewer drainage pipe that was admittedly built to the state-of-the-art at the time it was built in 1972, avoid the statutory state-of-the-art defense at Iowa Code § 670.4(1)(h) in the municipal tort claims act in her claim against the City of Albia, despite the failure to allege any ongoing act or omission by the City?

2. Is the Plaintiff, Wilma Kellogg's claim barred by the two year statute of limitations in the Municipal Tort Claims Act given her knowledge and specific complaints about the storm sewer she alleges has caused occasionally flooding at her home greater than two years prior to her lawsuit?

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STATEMENT SUPPORTING FURTHER REVIEW

Pursuant to Iowa Rule of Appellate Procedure 6.1103 Defendant-Appellee, the City of Albia (hereinafter the "City"), requests that the Iowa Supreme Court grant its application for further review of the Iowa Court of Appeals decision filed on February 8, 2017. The Court of Appeals erred in failing to find the City immune from Plaintiff-Appellant, Wilma Kellogg's (hereinafter "Kellogg") nuisance/abatement claims under Iowa Code § 670.4(1)(h). The Court of Appeals' Decision on this issue has broad public policy implications, in that the Court of Appeals has essentially created an exception to the well-settled "state-of-the art" defense for design and construction of public improvements that will allow plaintiffs to avoid the defense by masking a negligence claim with a claim for nuisance. Additionally, further review is warranted because the Court of Appeals erred in failing to find that Kellogg's nuisance/abatement claims were barred by the relevant two-year statute of limitations contained in Iowa Code § 670.5.

STATEMENT OF THE CASE

This case involves Kellogg's appeal from the District Court's Order granting summary judgment in favor of the City. At the District Court, Kellogg alleged that a storm sewer, installed by the City and running along the edge of her property, was causing flooding of her home. She purchased

the home in 2008, and she makes claims of flooding in 2009, 2010, 2012 and 2015.

On December 3, 2015, the District Court granted summary judgment in favor of the City on two bases: (1) the "state-of-the-art" defense" gave the City immunity from Kellogg's suit; and (2) the statute of limitations had run prior to Kellogg filing suit. The Iowa Court of Appeals heard oral arguments, and on February 8, 2017, the Court of Appeals entered its decision, affirming in part and reversing in part the District Court's Ruling. The Court of Appeals found a genuine issue of material fact existed and the District Court erred in granting summary judgment on the basis of the "state-of-the-art" defense, as provided for in section 670.4(1)(h). Under the "state-of-the-art" defense, codified at Iowa Code section 670.4(1)(h), municipalities are immune from tort suits based on public improvements constructed in accordance engineering and safety standards in place at the time of construction. Though Kellogg argues that the "state-of-the-art" defense is not applicable to her nuisance claim, principles of statutory interpretation, along with previous interpretation of this statute by this Court, dictate that the immunity defense is applicable.

The Court of Appeals also reversed the District Court on the issue of the statute of limitations, finding that each instance of flooding alleged by

Kellogg started the statute of limitations anew. Iowa Code section 670.5 provides for a two-year statute of limitations for tort claims against municipalities, expressly including nuisance claims. The facts of this case, as well as relevant case law, demonstrate that Kellogg suffered from an alleged permanent nuisance for which her cause of action began accruing at the time she alleges she first became aware of the flooding in 2009. Accordingly, her action, filed in 2015, is time-barred.

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). Kellogg'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 appealed 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 did not appeal the dismissal of her negligence claim on summary judgment. (Plaintiff's Appellate Brief at 8, 12-13).

ARGUMENT

I. THE COURT OF APPEALS' DECISION INCORRECTLY CREATES AN EXCEPTION TO THE STATUTORY STATE-OF-THE-ART DEFENSE AND, THEREFORE, IMPLICATES BROAD PUBLIC ISSUES, AND SHOULD BE REVERSED ON FURTHER REVIEW.

Iowa Rule of Appellate Procedure 6.1103 allows for further review where "the court of appeals has entered a decision in conflict with a decision of this court or the court of appeals on an important matter;" "the court of appeals has decided a substantial question of constitutional law or an important question of law that has not been, but should be, settled by the supreme court;" or "the case presents an issue of broad public importance that the supreme court should ultimately determine." Iowa R. App. Pro. 6.1103(1), (3), (4) (2016).

Further review is appropriate under Rule 6.1103(1), (3), (4) because this case and the Court of Appeals' Decision presents an important question of law and issues of broad public importance upon which the Iowa Supreme Court should ultimately rule and that the Court of Appeals has decided

inconsistently with Iowa statute and supreme court precedent. The Iowa Municipal Tort Claims Act was enacted in 1967 for the purpose of refining governmental immunity for municipalities in Iowa. Terrence A. Hopkins, Municipal Tort Liability in Iowa, 31 Drake L. Rev. 855, 855 (1982). Though chapter 670 of the Iowa Code provides for certain causes of action against municipalities, section 670.4 also provides a list of exceptions to the general rule, including the "state-of-the art" defense, protecting municipalities from liability based on public improvements constructed to the state of the art at the time of their construction. See Iowa Code §§ 670.2, 670.4. To adopt Court of Appeals' reading of Iowa Code section 670.4(1)(h), however, would essentially remove the "state-of-the-art" defense for purposes of nuisance claims. In effect, the Court of Appeals' Decision would allow parties to rephrase property damage claims as nuisance claims, thereby avoiding the "state-of-the-art" defense. Cities and municipalities would then be exposed to more expansive liability than was intended by the Iowa legislature.

Further review is also appropriate given the implications of the Court of Appeals' Decision on the applicable statute of limitations at Iowa Code section 670.5. The Iowa legislature has crafted a two-year statute of limitations for actions seeking damages for loss or injury against

municipalities. See Iowa Code § 670.5. However, the Court of Appeals' decision categorizing Kellogg's claim as a claim for a temporary and recurring nuisance, despite her knowledge of the claim and belief that it is caused by a permanent structure, would eviscerate the protection afforded to municipalities under the statute of limitations and allow plaintiffs to sit on their causes of action contrary to the principles underlying the statute of limitations.

Given the significance of the Court of Appeals' Decision and its bearing on issues of broad public importance, this Court should exercise its discretion and grant further review of this case under Iowa Rule of Appellate Procedure 6.1103.

II. THE COURT OF APPEALS ERRED IN FAILING TO FIND THE CITY IMMUNE FROM KELLOGG'S NUISANCE/ ABATEMENT CLAIMS UNDER IOWA CODE § 670.4(1)(h).

Under Iowa Code Section 670.4(1)(h) cities and municipalities are immune from liability for public improvements. See Iowa Code § 670.4(1)(h). Kellogg contends that this immunity does not apply to nuisance claims. In the alternative, she argues even if section 670.4(1)(h) is applicable to nuisance claims generally, Kellogg's specific nuisance claim is exempt from 670.4(1)(h)'s reach. The Court of Appeals correctly found that nuisance claims are not automatically exempt from application of section

670.4(1)(h). However, the Court of Appeals incorrectly applied section 670.4(1)(h) to find that it would not bar Kellogg's nuisance claim, thereby creating an end-run around the state-of-the-art defense codified by the Iowa legislature. Accordingly, the Court of Appeals erred in failing to find the City immune from Kellogg's nuisance/abatement claims under Iowa Code section 670.4(1)(h).

A. The Court of Appeals' Decision dismisses well-recognized rules of statutory interpretation in failing to find the City immune from Kellogg's nuisance/abatement claims.

The Court of Appeals correctly acknowledged that Iowa Code section 670.1(4) expressly includes nuisance actions under chapter 670, and held that nuisance claims arising out of a claim of negligent design or construction or failure to upgrade, improve or alter a public improvement would be barred by Iowa Code section 670.1(4). (Court of Appeals Decision at pp. 5-6).

Iowa Code Section 670.4(1)(h) (the "state-of-the-art" defense), 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

[1] The term "public improvement" as defined in Iowa Code section 384.37, subsection 19 includes "principle structures, works, component parts and

> 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) (emphasis added). Importantly, and as recognized by the Court of Appeals, section 670.1(4) specifically defines a "tort" as "every civil wrong which results in wrongful death or injury to person on 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* . . . ." Id. § 670.1(4) (emphasis added). Accordingly, section 670.1(4) demonstrates specific legislative intent to bring claims of nuisance under the purview of chapter 670, and therefore, section 670.4(1)(h) is correctly read to prohibit liability for nuisance claims that fall under the statutory language.

The Court of Appeals incorrectly held, however, that Kellogg created a genuine issue of material fact regarding whether her nuisance claim does not rely upon negligence and therefore cannot be "based upon" or have "aris[en] out of" a claim of negligence so as to fall within the purview of

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accessories" of "sanitary, storm and combined sewers." Iowa Code § 384.37(19)(a) and (b).

section 670.4(1)(h). The Court of Appeals erred because the undisputed facts and summary judgment proceedings demonstrate that Kellogg's nuisance claim is inextricably linked to her claim of negligent design. The Court of Appeals' ruling expanded Kellogg's claim beyond anything alleged by Kellogg to preserve her claim, creating a loophole that would allow plaintiffs to avoid the state-of-the-art defense by simply pleading nuisance in the alternative to negligence.

As noted by the Court of Appeals, at oral argument Kellogg disavowed reliance on her expert's opinion that the water problem related to whether the storm sewer, as constructed in 1972, was of adequate capacity and up to current standards. Notably, however, Kellogg brought forward at summary judgment no other theory of liability or City actions for which she can base her nuisance claim. It was incumbent on Kellogg to either come forward with disputed facts or evidence that would support an argument that there was an ongoing City action, as opposed to simply the existence of a storm-sewer drain, causing the flooding at issue. Instead, the Court of Appeals' ruling relies on generic language alleging that the City should be liable for the "creation of a condition", (Court of Appeals Decision at p. 6), instead of the required factual evidence. See, e.g. Wilson v. Darr, 553 N.W.2d 579, 582 (Iowa 1996) (noting that if the "resisting party has no

evidence to factually support an outcome determinative element of that party's claim, the moving party will prevail on summary judgment."); Fogel v. Trustees of Iowa College, 446 N.W.2d 451, 454 (Iowa 1989) (noting the party resisting the motion may not rest on its pleading alone but "must set forth specific facts which constitute competent evidence showing a prima facie claim.").

In Kellogg's Petition, the basis of both her negligence and nuisance claims is one alleged action taken by the City—the installation of a storm sewer beneath Kellogg's property—which happened in 1972 and was admittedly to the state of the art. (Kellogg Petition at ¶ 4; App. 8). Although the Court of Appeals asserts that "nuisance itself simply refers to the result" and "[n]egligence may or may not be the cause of the result" (Court of Appeals Decision at p. 8), Kellogg specifically pled that "Defendant's actions constitute a nuisance"[2] and the only action that has been asserted by Kellogg in her petition or at summary judgment is the installation of the storm sewer. The Court of Appeals suggested that a failure to repair or maintain a storm sewer or to operate one in an unlawful manner could cause a nuisance. Notably, however, those are suggestions made by the Court of Appeals and not allegations made by Kellogg with any factual support at

[2] Kellogg Petition at ¶ 9; App. 9 (emphasis added).

summary judgment. Kellogg presented no factual statement or evidence in resistance to summary judgment alleging that the City of Albia has failed to repair or maintain the storm sewer. Kellogg presented no factual statement or evidence in resistance to summary judgment alleging that the City of Albia was operating the storm sewer in an abatable way, such as the issues that existed in the cases relied upon by the Court of Appeals where local governments were dumping untreated sewage into natural waterways or otherwise refusing to disinfect, deodorize or abate noxious smells. See, e.g. Ryan v. City of Emmetsburg, 232 Iowa 600, 4 N.W.2d 435, 441 (1942); Vogt v. Grinnell, 98 N.W. 782 (Iowa 1904); Hollenbeck v. City of Marion 89 N. W. 210 (1902).

The Court of Appeals also incorrectly cited Hansen v. City of Audubon, 378 N.W2d 903, 906-07 (Iowa 1985), for the proposition that "A nuisance claim can escape the application of section 670.4(1)(h) if it relates to the repair, maintenance, or operation of a storm sewer system such that it creates a dangerous condition and is an unreasonable interference with an owner's use and enjoyment of property." (Court of Appeals Decision at p. 9). In Hansen, this Court found that a failure to repair or maintain a sewer system was distinct from a failure to upgrade and, therefore, outside the purview of the state-of-the-art defense. Hansen did not, however, generally

state that the mere operation of a storm sewer will exempt a claim from the state-of-the-art defense. In Hansen the Court of Appeals analyzed the City of Audubon's decision not to repair a sanitary sewer system as an "operational" decision, such that discretionary function immunity did not apply. See Hansen, 378 N.W.2d at 906-07. Hansen did not address a nuisance claim. See id. The Court of Appeals in the instant case improperly expanded the scope of Hansen by broadening the "operational" distinction in discretionary function immunity to create an exception to the state-of-the-art defense. Further, the Hansen case is factually distinct, in that "[t]he evidence presented at trial shows that the City [of Audubon]'s existing sanitary sewer system was in need of repair." Id. at 907. Here, Kellogg has introduced no evidence that the City of Albia's storm sewer system required repair. Accordingly, there is no genuine issue of material fact regarding whether Kellogg can survive summary judgment.

The essence of Kellogg's nuisance claim relates to the City's installation the sewer system in 1972, making her nuisance claim a negligent design or construction claim with regard to the storm sewer installed by the City. The Court of Appeals should not be allowed to save Kellogg's claim by suggesting alternative factual scenarios that were not presented or supported at summary judgment. The Court of Appeals ruling essentially

creates an exception for nuisance claims, despite their basis on an alleged negligent design. Accordingly, Iowa Code section 670.4(1)(h) applies to Kellogg's claim and, on further review, this Court should reverse the Court of Appeals' Decision.

B. The Court of Appeals' reliance on Thoeming's distinction between negligence and nuisance actions is not persuasive.

In addressing Kellogg's argument that even if, in general, Iowa Code section 670.4(1)(h) applied to nuisance actions, Kellogg's nuisance action was different, the Court of Appeals relied heavily on the case of Thoeming v. City of Davenport, No. 15-1113, 2016 WL 3275239 (Iowa Ct. App. June 15, 2016). In Thoeming, the Iowa Court of Appeals decided the issue of whether an action resulting from damage caused by a city sewer system was truly an action for negligence or an action for nuisance. Thoeming, No. 15-1113, 2016 WL 3275239 at *3. The Thoeming Court determined "a nuisance action requires an allegation and proof of a degree of danger, likely to result in damage, surpassing the mere failure to exercise ordinary care." Id. at *4. Because the plaintiffs failed to show that the sewer system of which they complained was inherently dangerous, the court held that no evidence in the record could support a nuisance action. Id.

The Court of Appeals attempted to distinguish Thoeming and argue that Kellogg had made a claim of a dangerous condition, which Kellogg had

never made. To the contrary, the instant case presents a factually indistinguishable scenario from Thoeming and, therefore, the City of Albia should be granted summary judgment. In the instant case, the Court of Appeals claimed that "[u]nlike Thoeming . . . [Kellogg] has experienced reoccurring flooding near electrical appliances, standing water, and resulting mold." (Court of Appeals Decision at p. 11). However, Kellogg has put forth no evidence of these new allegations of a dangerous condition. Although there is some limited deposition testimony regarding mold, there is no argument or evidence of a dangerous condition in the record[3], and therefore, it is improper for the Court of Appeals to have entertained, considered, and relied upon the mere possibility in making its decision. Further, even if there were allegations of a dangerous condition, they could not overcome the fact that the nuisance claim is based upon allegations of negligent design not up to the current standards, instead of the state-of-the-art at the time, and, therefore, are directly barred by the statutory language of Iowa Code section

[3] This argument also was not made at summary judgment before the District Court and, therefore, has not been preserved for appeal. See, e.g., Myers v. Crawford Heating & Cooling, 791 N.W.2d 710 (Iowa Ct. App. 2010) ("Myers presents the argument for the first time on appeal and, consequently, she did not properly preserve this issue.")

670.4(1)(h). On further review, this Court should reverse the Court of Appeals' Decision.

III. THE COURT OF APPEALS ERRED IN FAILING TO FIND THAT KELLOGG'S NUISANCE/ABATEMENT CLAIMS ARE BARRED UNDER THE RELEVANT STATUTE OF LIMITATIONS CONTAINED IN IOWA CODE § 670.5.

Neither party to this action disputes that a two-year statute of limitation would apply to Kellogg's claim. The remaining issue is whether Kellogg's cause of action began to accrue outside the two year statute of limitations. Statutes of limitation are strictly enforced under Iowa law. See e.g. Grant v. Cedar Falls Oil Co., 480 N.W.2d 863, 865-66 (Iowa 1992); Van Den Boom v. City of Eldora, 829 N.W.2d 589, 2013 WL 988632, at *5 (Iowa Ct. App. 2013) (Table); Gemini Capital Group v. New, 807 N.W.2d 157, 2011 WL 3925723 (Iowa Ct. App. 2011) (Table); Cedar v. Cherokee Cmty. Sch. Dist., 780 N.W.2d 248, 2010 WL 446534 (Iowa Ct. App. 2010) (Table); Leonard v. Woltman, 777 N.W.2d 128, 2009 WL 3775144 (Iowa Ct. App. 2009) (Table). Though the limitations period begins to run when the "wrongful act" produces injury to the claimant, the limitations period is generally delayed "until the plaintiff knows or in the exercise of reasonable care should have known both the fact of the injury and its cause." K & W Elec., Inc., 712 N.W.2d at 116 (internal citations omitted).

Here, the Court of Appeals found that "the flooding of Kellogg's property is recurring and successive actions will lie" thereby concluding that "the two-year statute of limitations began to run from the occurrence of each intermittent flood." (Court of Appeals Decision at p. 14). In reaching this conclusion, the Court of Appeals relies on the cases of Hegg v. Hawkeye Tri-County REC, 512 N.W.2d 558 (Iowa 1994) and Anderson v. Yearous, 249 N.W.2d 855 (Iowa 1977). (Court of Appeals Decision at pp. 12-14). However, these cases are distinguishable from the instant case.

First, in Hegg the plaintiffs filed suit against an electric utility for negligent delivery of electricity to a dairy farm, damaging Plaintiffs' dairy herd. Hegg, 512 N.W.2d at 559. The court concluded that stray voltages delivered to the dairy farm by the electric utility were separate and recurring such that a new action could lie from each event. Id. at 560. Hegg is inapplicable, as it did not involve flooding and instead involved a unique factual situation. In addition, Hegg notes "We agree that where the wrongful act is continuous or repeated, so that separate and successive actions for damages arise, the statute of limitations runs as to these latter actions at the date of their accrual, not from the date of the first wrong in the series. Id. (citing Anderson, 249 N.W.2d 855, 860 (Iowa 1977)). Here there is no continuous wrongful act and, therefore, these cases are inapplicable.

The Anderson case does involve flooding, but it is distinguishable from the fact pattern here. In Anderson, the court discussed whether the statute of limitations on a nuisance action began to run from the date a levee was erected, which subsequently caused flooding affecting adjoining landowners. Anderson, 249 N.W.2d at 857. The plaintiffs in Anderson commenced their action after the first instance of flooding and the question was whether the claim would begin with the construction of the levee or the first instance of flooding. Id. By contrast, there is no question that Kellogg did not bring her lawsuit when she first became aware of flooding. Further, the instant case presents an issue of permanent damage, where the flooding alleged is "a permanent liability to intermittent but inevitably recurring overflows." See K & W Elec., Inc., 712 N.W.2d at 115. Kellogg experienced flooding as early as 2009, and she complained to the City regarding the flooding caused by the storm sewer in 2010. Not only did Kellogg have knowledge of the flooding, but she had knowledge of the alleged cause, within the two-year statute of limitations. Therefore, this case is akin to K & W Elec., Inc.[4] and Nall v. Iowa Elec. Co.[5], where Kellogg's injuries were

[4] In K & W Elec., Inc., 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. K & W Elec., Inc., 712 N.W.2d at 111-12.

caused by a permanent structure, and Kellogg had ample time after the first alleged instance of flooding in 2009 to file an action against the City. Rather, as a result of the Decision by the Court of Appeals, the City of Albia will face ongoing liability from plaintiffs who are aware of a cause of action but fail to act. This is contrary to the purpose and historical application of statutes of limitations and is particularly notable in the context of the Municipal Tort Claims Act, where the legislature has set forth a clear two year statute of limitation. Accordingly, this Court should grant further review and reverse the Court of Appeals' Decision.

CONCLUSION

This court should grant the City of Albia, Iowa's Application for Further Review and thereafter reverse the decision of the Court of Appeals and find that the is City immune from Plaintiff-Appellant, Wilma Kellogg's nuisance/abatement claims under Iowa Code § 670.4(1)(h). This court should further find that Plaintiff-Appellant, Wilma Kellogg's nuisance/abatement claims were barred by the relevant statute of limitations contained in Iowa Code § 670.5.

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[5] In Nall v. Iowa Elec. Co., a dam owned by Iowa Electric Company caused over-flow flooding of the plaintiffs' properties. Nall v. Iowa Elec. Co., 69 N.W.2d 529 (Iowa 1955). The Court specified the existence of a permanent nuisance, and because flooding occurred long before the time period of the statute of limitations, any claim for damages was time-barred. Id. at 529.

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ATTORNEY COST CERTIFICATE

This is to certify that the true and actual cost of printing the foregoing Application for Further Review was the sum of $_____.

/s/ Sarah E. Crane

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CERTIFICATE OF COMPLIANCE

This Application complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) because this Application for Further Review contains 4,832 words, excluding the parts of the Application exempted by Iowa R. App. P. 6.903(1)(g)(1). This Application complies with the typeface requirements of Iowa R. App. P. 6.903(1)(e) and the type-style requirements of Iowa R. App. R. 6.903(1)(f) because this Application has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in font size 14 and Times New Roman type.

/s/ Sarah E. Crane

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on the 28th day of February 2017, the attached Application for Further Review was filed via the Electronic Document Management System with the Clerk of the Iowa Supreme Court.

I further certify that the attached Application for Further Review was served upon the following counsel for Plaintiff-Appellant via the Electronic Document Management System:

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