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IN THE SUPREME COURT OF IOWA

No. 23-0917

LORI AND RONALD RANDOLPH
Plaintiff-Appellants

vs.

AIDAN, LLC
Defendant/Third-Party Plaintiff-Appellees

vs.

CITY OF SIOUX CITY, IOWA,
Third-Party Defendant-Appellant.

APPEAL FROM THE WOODBURY COUNTY DISTRICT COURT CASE NO. LACV200008

THE HONORABLE ROGER L. SAILER
PRESIDING JUDGE

DEFENDANT/THIRD-PARTY PLAINTIFF-APPELLEES' FINAL BRIEF

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STATEMENT OF ISSUES PRESENTED FOR REVIEW

I. Whether the district court correctly determined that the immunities provided in the IMTCA do not preclude Aidan's negligent hiring, retention, and/or supervision claim against the City.

A. Doe v. Cedar Rapids Cmty. Sch. Dist., 652 N.W.2d 439 (Iowa 2002)
Cubit v. Mahaska Cnty., 677 N.W.2d 777 (Iowa 2004)
Iowa Code § 670.4

II. Whether the district court correctly determined that the public duty doctrine does not preclude Aidan's negligent hiring, retention, and/or supervision claim against the City.

Breese v. City of Burlington, 945 N.W.2d 12 (Iowa 2020)
Wilson v. Nepstad, 282 N.W.2d 664 (Iowa 1979)

ROUTING STATEMENT

This Court has had multiple opportunities to address the scope of the immunities afforded to municipalities under the Iowa Municipal Tort Claims Act ("IMTCA"), specifically with respect to negligent hiring, retention, or supervision claims and claims relating to inspections. *See, e.g.*, *Madden v. City of Eldridge*, 661 N.W.2d 134, 140–41 (Iowa 2003); *A. Doe v. Cedar Rapids Cmty. Sch. Dist.*, 652 N.W.2d 439, 444–47 (Iowa 2002). In addition, the contours of the public duty doctrine are well-defined. *See Est. of Farrell by Farrell v. State*, 974 N.W.2d 132, 137–40 (Iowa 2022). Because this case presents the application of existing legal principles, it is appropriate for transfer to the Iowa Court of Appeals. *See* Iowa R. Civ. P. 6.1101(3)(a).

STATEMENT OF THE CASE

Plaintiffs, Lori Randolph ("Lori") and Ronald Randolph ("Ronald") (collectively "Randolphs"), filed suit against Defendant/Third-Party Plaintiff, Aidan, LLC ("Aidan"), on November 8, 2021. App. 4. Plaintiffs alleged that Lori suffered injuries when tripping down the stairs at the two-floor residential property occupied by her and Ronald and owned by Aidan. App. 5. Ronald brought a loss of consortium claim. App. 5.

Plaintiffs' Petition alleged that Lori's trip and fall down the stairs was the result of the stairs failing to comply with the Municipal Code of Third-Party

Defendant, City of Sioux City ("City"). App. 4. Specifically, Plaintiffs alleged that the stairs failed to have "uniform risers and uniform treads, which, pursuant to said municipal code, is defined as a variation of no more than 3/8 of an inch." App. 4. Aidan answered Plaintiffs' lawsuit on December 7, 2021.

During discovery, Aidan secured the deposition of Doug Gough ("Gough"). App. 33. Gough is employed by the City as a Housing Inspector. App. 34 at lines 4:9–19. Gough had previously inspected the Randolphs' residence and determined it passed inspection and was in compliance with the Municipal Code.

After taking Gough's deposition, Aidan moved to assert a third-party claim against the City. Aidan alleged that the City was negligent for hiring Gough despite his unfitness to perform the job of Housing Inspector.[1] *See* App. 9–10.

Plaintiffs resisted Aidan's Motion to Amend Answer and File Third-Party Petition. Plaintiffs asserted that Aidan's claim was barred by the immunity provisions of the Iowa Municipal Tort Claims Act ("IMTCA") and the public duty doctrine. On January 28, 2023, the district court granted Aidan's Motion.

On February 3, 2023, Aidan filed its Third-Party Petition. *See* App. 7–11 In response to Aidan's claim, the City filed a pre-Answer Motion to Dismiss on February 24, 2023. App. 12–13. The City's Motion, and Plaintiffs' joinder therein,

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[1] In its Proposed Third-Party Petition, Aidan incorrectly referred to Gough as a "Building Inspector" and not a "Housing Inspector."

argued statutory immunity under the IMTCA or preclusion of Aidan's claim by the public duty doctrine. App. 12–13; App. 40–41. On May 31, 2023, the district court again rejected these arguments, finding that Aidan's negligent employment claim against the City survived at the pre-Answer Motion to Dismiss stage. App. 85.

On June 7, 2023, Plaintiffs filed an Application for Interlocutory Appeal. Pls.' The City filed a Joinder in Plaintiffs' Application on June 9, 2023. Aidan resisted on June 20, 2023. Aidan's Resistance. On July 27, 2023, the Court granted the Application.

STATEMENT OF THE FACTS

Aidan is the owner of the residential property located at 3213 13th Street, Sioux City, Iowa ("Property"). App. 1. At all times material hereto, Plaintiffs resided as tenants at the Property. *Id.* In a letter dated April 29, 2019, Gough, a Housing Inspector employed by the City, verified that the Property "has passed inspection on April 29, 2019, and is in compliance with the Housing Maintenance Code, Municipal Code Chapter 20.05, City of Sioux City, Iowa."

Plaintiffs allege, notwithstanding the approval of the City inspector, that the stairs do no comply with provisions of Municipal Code which required that stairs have "uniform risers and uniform treads, which, pursuant to said municipal code, is defined as a variation of no more than 3/8 of an inch." SIOUX CITY, IA., MUN. CODE § 20.05.130(2). The City, by way of Gough's passing inspection, did not find a

violation of this provision with respect to the flight of stairs leading to the basement of the two-story rental Property. The Municipal Code provides that the City is responsible for its administration and enforcement. SIOUX CITY, IA., MUN. CODE § 20.05.050(1).

The "required qualifications/experience/training" for Housing Inspectors employed by the City for purposes of Municipal Code enforcement include "[s]ignificant experience in work requiring considerable public contact, including some experience in building construction at a journeyman level." App. 39. Gough's sworn testimony confirms that he did not have the required experience in building construction needed for a Housing Inspector at the time he was hired by the City. App. 34 at lines 4:20–5:19. Rather, Gough drove a potato chip delivery truck for the fourteen (14) years preceding his employment by the City and had previously worked as a butcher in a grocery store. *See id.*

On or around February 14, 2020, Lori tripped down the stairs leading to the basement of the Property. App. 2. Plaintiffs allege that Lori's fall was the result of the stairs failing to comply with Municipal Code. App. 1–2. Plaintiffs brought suit against Aidan on November 8, 2021, claiming damages for Lori's injuries and Ronald's loss of consortium. App. 2–3.

Upon taking Gough's deposition in connection with Plaintiffs' lawsuit on September 19, 2022, Aidan learned of his lack of qualifications for the first time.

Compare App. 34 at lines 4:20–5:19 *with* App. 39. On October 25, 2022, Aidan requested leave to amend and assert a third-party claim against the City. Aidan's Third-Party Petition, filed February 3, 2023, alleges that the City was negligent in hiring, retaining, and/or supervising Gough, based on his unfitness as a Housing Inspector. App. 8–10.

ARGUMENT

I. The City is not Immune from Aidan's Claim Under the IMTCA.

A. Preservation of error.

Aidan does not dispute that error was preserved here by Plaintiffs filing a timely Application for Interlocutory Appeal.

B. Scope of review.

Aidan does not dispute that the standard for review on a motion to dismiss is for corrections of errors at law. *Weizberg v. City of Des Moines*, 923 N.W.2d 200, 211 (Iowa 2018). A reviewing court is under a duty to "accept as true the petition's well-pleaded factual allegations" and must "construe the petition in its most favorable light, resolving all doubts and ambiguities in the plaintiff's favor." *Benskin, Inc. v. W. Bank*, 952 N.W.2d 292, 298 (Iowa 2020).

C. Aidan's negligent hiring/retention/supervision claim against the City does not require an actionable claim against the City's employee.

Prior to the enactment of the IMTCA, municipalities in the State of Iowa enjoyed absolute sovereign immunity. *See Godfrey v. State*, 847 N.W.2d 578, 582–83 (Iowa 2014) (citing Iowa Code Chapter 670). The IMTCA provides that, subject to its exceptions, "every municipality is subject to liability for its torts and those of its officers and employees, acting within the scope of their employment or duties, whether arising out of a governmental or proprietary function." Iowa Code § 670.2(1). Among those claims exempted are claims "based upon the exercise or performance or the failure to exercise or perform a discretionary function." Iowa Code § 670.4(1)(c).

Municipalities are not immune from negligent hiring, retention, or supervision claims under the IMTCA's discretionary function exemption. *Kiesau v. Bantz*, 686 N.W.2d 164, 171–73 (Iowa 2004), *overruled on other grounds by Alcala v. Marriott Int'l, Inc.*, 880 N.W.2d 699 (Iowa 2016); *A. Doe v. Cedar Rapids Cmty. Sch. Dist.*, 652 N.W.2d 439, 444–47 (Iowa 2002). *A. Doe* rejected Cedar Rapids' argument that the immunity applied to a negligent hiring, retention, or supervision claim asserted against it. *A. Doe*, 652 N.W.2d at 447. "Applying traditional tort principles, the courts are perfectly capable of adjudicating the reasonableness of hiring, retaining, and supervising a particular [municipal employee]." *Id.*

To succeed on a negligent hiring, retention, or supervision claim, a plaintiff must show that:

> (1) the employer knew, or in the exercise of ordinary care should have known, of its employee's unfitness at the time of hiring;
>
> (2) through the negligent hiring of the employee, the employee's incompetence, unfitness, or dangerous characteristics proximately caused the resulting injuries; and
>
> (3) there is some employment or agency relationship between the tortfeasor and the defendant employer.

Godar v. Edwards, 588 N.W.2d 701, 708–09 (Iowa 1999). An employer's direct liability for negligence related to hiring is "separate and distinct from liability under the doctrine of respondeat superior." *Id.* at 707 n.3. Any negligent hiring, retention, or supervision claim must also include, as an element, "an underlying tort or wrongful act committed by the employee." *Schoff v. Combined Ins. Co. of Am.*, 604 N.W.2d 43, 53 (Iowa 1999).

In response to Aidan's argument that negligent hiring, retention, and/or supervision is a separate and independent basis for liability against the City, not immunized by the IMTCA, the City argued that Aidan's claim is instead "based upon . . . issuance of a permit, inspection, investigation, or otherwise," rendering the exemption at Iowa Code section 670.4(1)(j) applicable. *See* Iowa Code § 670.4(1)(j).

Denying the City's pre-Answer Motion to Dismiss, the district court determined that presuming Gough's underlying conduct was immune:

> The Court finds no authority for the proposition that immunity for a predicate tortious act by an employee forecloses an action for negligent hiring, retention, or supervision, and the Court finds that it does not.

App. 82.

In its Brief, the City again argues that the immunity under subsection (1)(j) precludes Aidan's claim, now claiming this result is supported by the language that the inspection immunity applies whenever "*the damage was caused by a third party, event, or property* not under the supervision or control of the municipality." City's Br. at 15 (emphasis in the original) (quoting Iowa Code § 670.4(1)(j)). However, the cases applying subsection (1)(j) and relied on by the City involve only vicarious liability claims related to allegedly negligent inspection or failure to inspect. *See Madden*, 661 N.W.2d at 135–36; *Williams v. Bayers*, 452 N.W.2d 624, 625 (Iowa Ct. App. 1990). Any reliance on the immunity of section 670.4(1)(j) still fails to address the issue noted by the district court—the City points to no authority supporting its argument that "if a Defendant is immune from liability for a tortious act, then no tortious or wrongful act occurred at all" for purposes of the underlying wrongful conduct required to prove a negligent hiring, retention, or supervision claim. *See* App. 81.

The Amicus Brief relies upon *Cubit v. Mahaska Cnty.*, 677 N.W.2d 777 (Iowa 2004). That decision held that a claim of negligent supervision against the county arose out of supervisory acts and omissions during an emergency, and thus, the emergency response immunity applied. *Id.* at 784–85. However, a key distinction between the emergency response immunity and the immunity under subsection (1)(j) is that while (1)(j) immunizes claims "based upon . . . inspection," the emergency response immunity applies to claims both "based upon *or arising out of* an act or omission of a municipality in connection with an emergency response." *Compare* Iowa Code § 670.4(1)(j) *with* (1)(k) (emphasis added). It was pursuant to a "broad[] interpretation of the phrase 'arising out of'" that the Court held the negligent supervision claim in *Cubit* was precluded by the IMTCA. *See Cubit*, 677 N.W.2d at 783–85.

"[W]hen the legislature includes certain language in one section of a statute but omits it in another section of the same statute, [Courts] generally presume the omission is intentional." *Chavez v. MS Tech. LLC*, 972 N.W.2d 662, 668 (Iowa 2022). This canon of construction applies to section 670.4 of the IMTCA, which variably immunizes "any claim," "any claim based upon," and "any claim based upon or arising out of" certain conduct. *Compare* Iowa Code § 670.4(1)(f) *with* (1)(j) *and* (1)(k).

"Arising out of" relates to the impetus of an action, meaning "to begin to occur or to exist : to come into being or to attention." *Arise*, MERRIAM-WEBSTER.COM DICTIONARY, https://www.merriam-webster.com/dictionary/arise (last visited Dec. 1, 2023). The "foundation or basis for" an action is what is it "based upon." *Base*, MERRIAM-WEBSTER.COM DICTIONARY, https://www.merriam-webster.com/dictionary/base#h2 (last visited Dec. 1, 2023) ("usually used with on or upon").

Though Aidan's claim may have come into being or arose out of Gough's negligent inspection and the plaintiff's subsequent fall, the lawsuit is based upon the foundation that Gough should never have been hired as a Housing Inspector in the first place, because of his insufficient qualifications. *See* Third-Party Pet. The legislature's omission of "arising out of" from subsection (1)(j) suggests this immunity has less broad of a sweep than the emergency response immunity. The broader language of the exception which applied in *Cubit* is not found in subsection (1)(j), thus the analysis in *Cubit* is not controlling here. *Compare* Iowa Code § 670.4(1)(j) *with* (1)(k); *see also Cubit*, 677 N.W.2d at 785 ("the negligent supervision claim is one 'arising out of an act or omission in connection with an emergency response'").

If the Court determines that *Cubit* is persuasive, it—and other cases finding negligent employment claims failed when the underlying claim against the employee

also failed—are distinct from the facts at issue here. *See e.g.*, *McCoy v. Thomas L. Cardella & Assocs.*, 992 N.W.2d 223, 228–32 (Iowa 2023); *Cubit*, 677 N.W.2d at 783–85; *Schoff*, 604 N.W.2d at 53. In those cases, either the plaintiff had no tort claim against the employee or the employer itself enjoyed immunity for acts related to the hiring, retention, or supervision of the employee at issue. *See id.* Where only the conduct of the employee is immune, *Cubit* indicates that a municipal employer remains directly liable for negligently supervising the employee, unless immunity under the IMTCA applies to the allegedly negligent acts or omissions related to supervising the employee. *See Cubit*, 677 N.W.2d at 785 n.3.

In *Schoff*, the plaintiff's negligent supervision claim against the defendant failed because its employee was not in the business of supplying information and therefore could not be liable for negligent misrepresentation. *Schoff*, 604 N.W.2d at 53. In *McCoy*, the employer itself enjoyed immunity under the Iowa Workers Compensation Act ("IWCA"), precluding the former-employee plaintiff's common law negligent hiring, retention, or supervision claim. *McCoy*, 992 N.W.2d at 232. The exclusivity provisions of the IWCA also applied to any vicarious liability the employer had to its former employee for the tortious conduct of her supervisor. *See id.* at 229.

Cubit, like *McCoy*, is an example where statutory immunity applied both to the underlying actions of the employees *and* the supervisory acts of the employer.

Compare id. at 228–232 *with Cubit*, 677 N.W.2d at 784–85. The plaintiff, a trooper for the Iowa State Patrol, was injured when a fleeing driver intentionally crashed into his patrol car. *Id.* at 779–80. The plaintiff sued the county, alleging that: (i) a trainee dispatcher was negligent for failing to relay information that the suspect intended to crash his vehicle into law enforcement officers; and (ii) the county was negligent in its supervision of the trainee dispatcher. *Id.* at 780.

The Court found that the actions of the trainee dispatcher undisputedly occurred during an emergency response, triggering the emergency response exemption for purposes of a vicarious liability claim against the county for her conduct. *Id.* at 785. Even after making this determination, the Court went on to specifically analyze the applicability of the emergency response exemption to the claim that the county negligently supervised the dispatcher:

> [T]here is no dispute that the dispatchers' allegedly negligent actions occurred during an emergency response. *The issue is whether the negligent supervision claim also arose out of these acts taken "in connection with an emergency response"* so as to fall within the statutory immunity.
>
> …
>
> *If this decision was not made during an emergency, there would have been no "act or omission in connection with an emergency response" that could trigger the immunity.*

Cubit, 677 N.W.2d at 785 n.3 (emphasis added) (citing *Keystone Electrical Manufacturing, Co. v. City of Des Moines*, 586 N.W.2d 340, 350 (Iowa 1998)).

Neither *Cubit*—nor any other case city by the City or in the Amicus Brief—have addressed a public or private employer's liability in situations where the employer itself is not immune from liability for negligently employing an individual, but the employee's tortious conduct which underlies the negligent employment claim is subject to immunity. *Compare id. and McCoy*, 992 N.W.2d at 228 (quoting *Schoff*, 604 N.W.2d at 53) *with* App. 81–82. To the contrary, *Cubit* states that unless immunity applies to the decision related to hiring, retention, or supervision, a municipality may still be liable for negligent hiring, retention, or supervision, even if "there is no dispute that the [employees'] allegedly negligent actions" are immune. *Id.*

The district court properly recognized this distinction between the City's direct liability for employing Gough and any vicarious liability based upon his acts or omissions, noting:

> [T]he problem with the City's argument is that it focuses on whether a Plaintiff could ultimately recover for a negligence claim rather than on the pertinent point, which is whether a tortious or wrongful act was committed by the employee. In other words, to accept the City's argument would be to find that if a Defendant is immune from liability for a tortious act, then no tortious or wrongful act occurred at all.

App. 81; *see also id.* ("a necessary element of a claim for negligent hiring, supervision, or retention is an underlying tort or wrongful act committed by the employee") (citing *Schoff*, 604 N.W.2d at 53). The district court's conclusion that it

could find no authority supporting "the proposition that immunity for a predicate tortious act by an employee forecloses an action for negligent hiring, retention, or supervision" was the correct one. App. 82.

This is not a case where the City's acts or omissions related to hiring, retaining, or supervising Gough themselves were based upon conduct for which an immunity applies. *Compare* App. 81–82 *with Cubit*, 677 N.W.2d at 785 n.3. The decision to hire Gough was not "based upon an . . . inspection" nor otherwise immunized by subsection (1)(j). *See* Iowa Code § 670.4(1)(j). No other immunity in section 670.4 applies to negligent hiring, retention, or supervision claims. *See* Iowa Code § 670.4(1)(c); *A. Doe*, 652 N.W.2d at 447. The district court properly denied the City's pre-Answer Motion to Dismiss because whatever underlying liability Gough enjoys does not preclude Aidan's claim against the City.

D. The immunity under section 670.4(1)(f) does not apply to Aidan's claim.

Assuming *arguendo* Aidan must show it could recover on an underlying tort claim against Gough to succeed on its claim against the City, the City has failed to demonstrate that there are no conceivable facts under which Aidan is entitled to relief. *See White v. Harkrider*, 990 N.W.2d 647, 657 (Iowa 2023). Two exemptions under the IMTCA relate to inspections and immunize municipalities from:

> f. Any claim for damages caused by a municipality's failure to discover a latent defect in the course of an inspection.

> j. Any claim based upon an act or omission of an officer or employee of the municipality, whether by issuance of permit, inspection, investigation, or otherwise, and whether the statute, ordinance, or regulation is valid, if the damage was caused by a third party, event, or property not under the supervision or control of the municipality, unless the act or omission of the officer or employee constitutes actual malice or a criminal offense.

Iowa Code § 670.4(1)(f), (j).

Subsection (1)(f) precludes claims arising out of a failure to discover a latent defect. Iowa Code § 670.4(1)(f). For purposes of Iowa law, a "latent defect" is one which is "hidden or concealed." *Est. of Vazquez v. Hepner*, 564 N.W.2d 426, 430 (Iowa 1997). A defect is hidden or concealed if it cannot be discovered by reasonable and customary observation or inspection or is otherwise not apparent on its face. *Roher v. Veterans Mem'l Hosp.*, 2000 WL 145045, at *5 (Iowa Ct. App. 2000) (citing *Vazquez*, 564 N.W.2d at 430). Where the allegedly defective condition could have been discovered by reasonable observation or inspection, it is not a "latent defect" and the immunity in subsection (1)(f) does not apply. *Id.*

It is undisputed here that the allegedly defective condition of the stairs was not "latent," such that it could not have been discovered by reasonable observation or inspection. Plaintiffs claim to have discovered this condition after Lori's trip and fall and before filing suit. *See* App. 1. The non-latent nature of the alleged defect

results in any underlying claim against Gough not being subject to the immunity provided by subsection (1)(f). *See* Iowa Code § 670.4(1)(f).

E. The City's interpretation of the immunity under section 670.4(1)(j) is too broad and would read section 670.4(1)(f) out of the statute.

The City and Plaintiffs will no doubt argue that, even if the immunity under subsection (1)(f) is inapplicable, the immunity provided under subsection (1)(j) nevertheless precludes Aidan's claim. *See* Iowa Code § 670.4(1)(j). If interpreted as the City suggests, the immunity for "any claim based upon an . . . inspection" would provide municipalities and their employees immunity for damages caused by failure to discover *any defect* in the course of an inspection. *See id.* This result is inconsistent with and would render a nullity the prior exemption in section 670.4 for "a municipality's failure to discover *a latent defect* in the course of an inspection." *See* Iowa Code § 670.4(1)(f) (emphasis added). The City's proposed interpretation, contraindicated by the canons of statutory interpretation, should be rejected.

"In enacting a statute, it is presumed that . . . [t]he entire statute is intended to be effective." Iowa Code § 4.4(2). Accordingly, courts will avoid reading a statute in a way that would make any portion of it redundant or irrelevant. *Petition of Chapman*, 890 N.W.2d 853, 857 (Iowa 2017). Rather, whenever possible, the various statutes and subsections within a statutory scheme will be interpreted in a way that the provisions do not conflict, no language is rendered mere surplusage,

and effect is given to all provisions. *Rojas v. Pine Ridge Farms, L.L.C.*, 779 N.W.2d 223, 231–32 (Iowa 2010).

Were subsection (1)(j) broad enough to exempt all conduct arising out of inspections, there would be no reason for the legislature to have included a prior subsection specifically exempting the failure to discover a "latent defect in the course of an inspection" Iowa Code § 670.4(1)(f). An interpretation which renders subsection (1)(f) superfluous is disfavored. *See* Iowa Code § 4.4(2); *Chapman*, 890 N.W.2d at 857. If Aidan is required to show a non-immunized underlying tort claim against Gough, the exemptions of the IMTCA should be found non-applicable, as a result of the non-latent nature of the allegedly defective stairs. *See* Iowa Code § 670.4(1)(f), (j).

F. Aidan's claim is not inconsistent with the public policy goals of the IMTCA generally or its inspection-related provisions specifically.

In addition to arguments related to the relevant textual provisions of section 670.4, the Amicus Brief asserts the broader proposition that Aidan's claim would "undermine[] the public policy goals of the IMTCA." *See* League's Br. at p. 14. While the City does not specifically refer to it as a 'public policy' argument, it similarly claims that Aidan's interpretation of section 670.4 would improperly result in municipalities becoming "general liability insurers." City's Br. at pp. 11, 25. It is Aidan's position, not that of the City, which is consistent with the public policy goals of the IMTCA. *See Hildenbrand v. Cox*, 369 N.W.2d 411, 416 (Iowa 1985) ("[t]he

abrogation of governmental immunity means that the same principles of tort liability apply to municipalities and their employees as to other tort defendants *except as limited by [the IMTCA]*"). The district court's denial of the City's pre-Answer Motion to Dismiss should be affirmed.

The purpose of the IMTCA was to eliminate sovereign immunity and treat municipalities like any other entity, except for those specific exemptions provided. *See id.*; Iowa Code § 670.2, 670.4. To that end, courts will not "insert other ameliorative language" into an exemption where such language is not expressly contained within the subsection. *Montgomery v. Polk Cnty.*, 278 N.W.2d 911, 917–18 (Iowa 1979). "Presumably the legislature wrote the statute as it desires the law to be; our responsibility is to apply the statute as enacted." *Id.*

The City's interpretation of the limited exemptions in section 670.4 would improperly insert language into and broaden the immunities provided by the IMTCA. *See id.* This interpretation cannot be arrived at or supported simply based on the supposed purpose emerging from the 'spirit' of these exemptions. *See Ronnfeldt v. Shelby Cnty. Chris A. Myrtue Mem'l Hosp.*, 984 N.W.2d 418, 426 (Iowa 2023) (quoting *Chicago Pro. Sports Ltd. P'ship v. Nat'l Basketball Ass'n*, 961 F.2d 667, 671 (7th Cir. 1992).[2] To the extent the Amicus Brief lobbies to expand the

[2] "When special interests claim that they have obtained favors from Congress, a court should ask to see the bill of sale. Special interest laws do not have 'spirits,' and it is inappropriate to extend them to achieve more of the objective the lobbyists wanted.

exemptions to the liability imposed by the IMTCA, such efforts should be directed towards the legislature. *See id.* As presently written, the plain language of section 670.4 and the policy choices and counterbalances reflected therein do not foreclose Aidan's claim against the City. Iowa Code § 670.4; *see also Hildenbrand*, 369 N.W.2d at 416.

II. The Public Duty Doctrine Does Not Preclude Aidan's Claim.

A. Preservation of error.

Aidan does not dispute that error was preserved here by Plaintiffs filing a timely Application for Interlocutory Appeal.

B. Scope of review.

Aidan does not dispute that the standard for review on a motion to dismiss is for corrections of errors at law. *Weizberg v. City of Des Moines*, 923 N.W.2d 200, 211 (Iowa 2018). A reviewing court is under a duty to "accept as true the petition's well-pleaded factual allegations" and must "construe the petition in its most favorable light, resolving all doubts and ambiguities in the plaintiff's favor." *Benskin, Inc. v. W. Bank*, 952 N.W.2d 292, 298 (Iowa 2020).

What the industry obtained, the courts enforce; what it did not obtain from the legislature—even if similar to something within the exception—a court should not bestow." *Id.*

C. The public duty doctrine is inapplicable to Aidan's claim.

The City also argues that Aidan's claim is precluded by the public duty doctrine. *See* City's Br. at pp. 26–30. The district court rejected this argument, finding that the allegations against the City and Gough—when read in the light most favorable to Aidan—alleged malfeasance rather than nonfeasance, rendering the public duty doctrine inapplicable. *See* App. 83–85. The district court's determination was correct and should be affirmed.

Pursuant to the public duty doctrine, "a duty to all is a duty to none." *Breese v. City of Burlington*, 945 N.W.2d 12, 18 (Iowa 2020). This means that "if a duty is owed to the public generally, there is no liability to an individual member of that group." *Id.* (internal alterations omitted) (quoting *Johnson v. Humboldt Cnty.*, 913 N.W.2d 256, 260 (Iowa 2018)).

However, "the public-duty doctrine does not apply to protect the City from its affirmative acts." *Id.* at 17–18. Instead, the public duty doctrine shields municipalities from liability only for nonfeasance (i.e., the failure to act) and not when the governmental entity affirmatively acts and does so negligently. *See id.* at 19–21. Another exception to the public duty doctrine applies where the duty the municipality owes is not to the public at large, but rather, to a subsection of the public. *See, e.g.*, *Summy v. City of Des Moines*, 708 N.W.2d 333, 344 (Iowa 2006),

overruled on other grounds by Alcala v. Marriott Int'l, Inc., 880 N.W.2d 699 (Iowa 2016).

The City's Brief does not address the malfeasance/nonfeasance distinction, arguing solely that Aidan's claim is precluded by a lack of special relationship between it and the City. *See* City's Br. at pp. 28–29. However, the exception to the public duty doctrine for malfeasance is its own exception which does not require showing a special relationship. *See Breese*, 945 N.W.2d at 20–21 (addressing malfeasance and special relationship exceptions separately and noting that Court need not decide special relationship issue upon determining malfeasance exception applied). The City offers no refutation of the district court's conclusion that its act of hiring Gough and his determination that the Property complied with the Municipal Code were affirmative acts of malfeasance. *See*App. 83–85.; City's Br. at pp. 26–30. Therefore, the public duty doctrine does not apply. *See id.*

Even if Aidan were required to prove a special relationship between it and the City, such a relationship has been found to exist between a municipality and residential tenants for purposes of fire code enforcement. *See Wilson v. Nepstad*, 282 N.W.2d 664, 672–73 (Iowa 1979). *Wilson* rejected the City of Des Moines' public duty doctrine argument by noting that the provisions of the fire code "obviously were designed for the protection of a special, identifiable group of persons lawful occupants of multiple dwellings from a particular harm, injury or death from fire."

Id. at 672. The special relationship exception applies when a statutory duty is "designed to protect a particular albeit large segment of the general public." *Id.* at 670.

For purposes of the Municipal Code, the City identifies landlords and tenants as specific subsegments of the general public. SIOUX CITY, IA., MUN. CODE § 20.05.035. By requiring landlords to obtain rental permits and through exercising its building code inspection and enforcement powers, the City has a special relationship with residential landlords. *See* SIOUX CITY, IA., MUN. CODE § 20.05.180(1). The nature of this relationship is inconsistent with the City's assertion that Aidan is a mere disinterested citizen arguing "only that the City should have done a better job of enforcing its laws." City's Br. at p. 28. This special relationship, in addition to the City's acts of malfeasance, creates a duty and precludes the application of the public duty doctrine. *See Breese*, 945 N.W.2d at 20–21.

CONCLUSION

The IMTCA does not preclude negligent hiring, retention, or supervision claims against municipalities. *See A. Doe*, 652 N.W.2d at 447; Iowa Code § 670.4(1)(c). The authorities relied on by the City and in the Amicus Brief do not support the proposition that this claim fails whenever immunity applies to the underlying conduct of the employee. *See Cubit*, 677 N.W.2d at 785, n.3; Iowa Code § 670.4(1)(j). If Aidan must prove it could recover from Gough, the language in

section 670.4(1)(f) and operation of the whole text canon support finding that such a claim is not precluded under the IMTCA. *See* Iowa Code § 670.4(1)(f); *Rojas*, 779 N.W.2d at 231–32. Similarly, the public duty doctrine does not foreclose Aidan's Third-Party Petition against the City. *See Breese*, 945 N.W.2d at 20–21.

WHEREFORE Defendant/Third-Party Plaintiff-Appellee, Aidan, LLC respectfully requests that this Court affirm the decision of the district court and provide any and all further relief which is just and equitable under the circumstances.

REQUEST FOR ORAL ARGUMENT

The Defendant/Third-Party Plaintiff-Appellee requests that this case be submitted with oral argument.

DATED this 2nd day of January, 2024.

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CERTIFICATE OF COMPLIANCE

Defendant/Third-Party Plaintiff-Appellee, Aidan, LLC, pursuant to Iowa Rules of Appellant Procedure 6.903(1)(g)(1), hereby certifies that this brief contains 5,239 words of a 14-point proportionally spaced Times New Roman font and it complies with the 14,000-word maximum permitted length of the brief.

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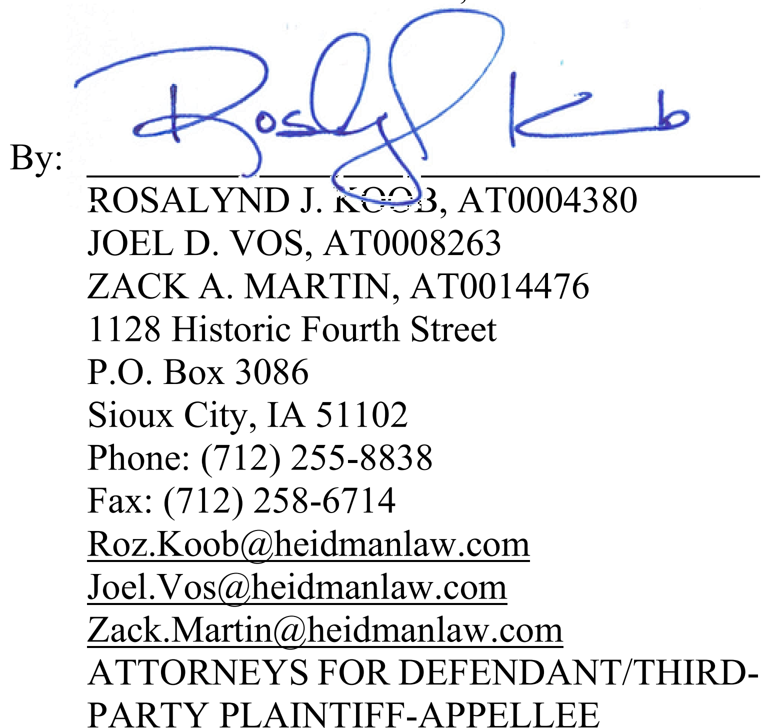

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CERTIFICATE OF FILING

I, the undersigned, hereby certify that I will electronically file the attached Defendant/Third-Party Plaintiff-Appellee's Final Brief with the Clerk of the Supreme Court by using the EDMS filing system.

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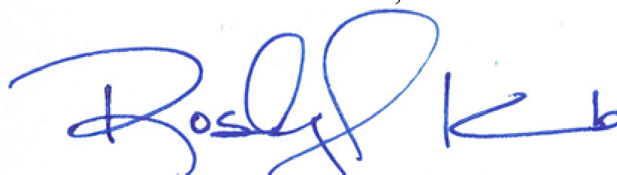

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PROOF OF SERVICE

I, the undersigned, hereby certify that I did serve the Defendant/Third-Party Plaintiff-Appellee's Final Brief on all other parties electronically utilizing the EDMS filing system, which will provide notice to:

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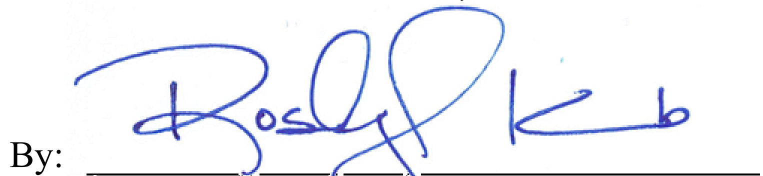

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The undersigned attorney does hereby certify that the actual cost of preparing the foregoing Defendant/Third-Party Plaintiff-Appellee's Final Brief was the sum of $0.00 exclusive of service tax, postage, and delivery charges.

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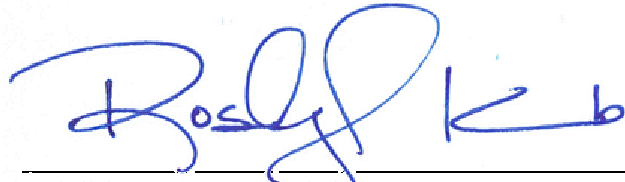

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