IN THE SUPREME COURT OF IOWA

SUPREME COURT NO. 23–0917
Woodbury County No. LACV200008

LORI RANDOLPH and RONALD RANDOLPH,
Plaintiffs-Appellants,
v.
AIDAN, LLC,
Defendant-Appellee.

AIDAN, LLC,
Third-Party Plaintiff-Appellee,
v.
CITY OF SIOUX CITY,
Third-Party Defendant-Appellant.

APPEAL FROM THE IOWA DISTRICT COURT
FOR WOODBURY COUNTY
HONORABLE ROGER SAILER, DISTRICT COURT JUDGE

BRIEF OF AMICUS CURIAE IOWA LEAGUE OF CITIES IN SUPPORT OF APPELLANTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

STATEMENT OF IDENTITY OF AMICUS CURIAE

The Iowa League of Cities ("League") is a voluntary membership organization composed of more than 850 cities in Iowa. Founded in 1898, the League's mission is to serve as a unified voice of cities, providing advocacy, training, and guidance to strengthen Iowa's communities. The League advocates for its members by promoting effective public policy and municipal home rule authority.

This case presents the issue of whether a party may bring a negligent hiring, retention, and supervision claim against a municipality to circumvent the immunities afforded under the Iowa Municipal Tort Claims Act ("IMTCA"), Iowa Code chapter 670, for the underlying actions of a municipal employee. In ruling on the City of Sioux City's ("City") motion to dismiss the third-party claim of negligent hiring, retention, and supervision, the district court erroneously concluded there is "no authority for the proposition that immunity for a predicate tortious act by an employee forecloses an action for negligent hiring, retention, or supervision" against a municipal employer. May 31, 2023 Order at 10. The League's members have an interest in ensuring that cities—and their taxpayers—are afforded the immunities made available by the Iowa Legislature in Iowa Code chapter

670. The League wishes to impress upon this Court the broader implications of the issues raised by the parties which impact all cities in Iowa.

STATEMENT REQUIRED BY IOWA R. APP. P. 6.906(4)(d)

Pursuant to Iowa Rule of Appellate Procedure 6.906(4)(d), the undersigned counsel certifies that no party's counsel authored this brief in whole or in part, and no party or party's counsel, or any other person other than amicus curiae Iowa League of Cities, contributed money that was intended to fund the preparation or submission of this brief.

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ARGUMENT

The district court erred when it did not dismiss the third-party petition against the City for three primary reasons: (1) the plain language of the IMTCA, coupled with Iowa Supreme Court precedent, prohibits a claim for negligent hiring under the facts alleged in the petition; (2) a negligent hiring claim is preempted by the IMTCA; and (3) the policy underlying the IMTCA's permitting and inspection immunity is intended to encourage, rather than inhibit, building and housing code inspections in Iowa. As a result, the League respectfully requests the Court reverse the district court's ruling and dismiss the third-party petition.

I. THE PLAIN LANGUAGE OF THE IMTCA AND APPLICABLE IOWA CASELAW PROHIBITS THE CLAIM OF NEGLIGENT HIRING

A. Background on the IMTCA

Tort liability of municipalities was first included in the Iowa Code in 1967. *See* 1967 Iowa Acts ch. 405. The IMTCA was adopted for the purpose of abolishing traditional common law immunities enjoyed by the government. *Thomas v. Gavin*, 838 N.W.2d 518, 521 (Iowa 2013) (citations omitted). The Act provides, "[e]xcept as otherwise provided in this chapter, every municipality is subject to liability for its torts and those of its officers and employees, acting within the scope of their employment or duties,

whether arising out of a governmental or proprietary function." Iowa Code § 670.2 (2023).

When it was first adopted, the IMTCA only provided immunity from tort liability in the following cases:

> 1. Any claim by an employee of the municipality which is covered by the Iowa workmen's compensation law.
> 2. Any claim in connection with the assessment or collection of taxes.
> 3. Any claim based upon an act or omission of an officer or employee, exercising due care, in the execution of a statute, ordinance, or officially adopted resolution, rule, or regulation of a governing body.
> 4. Any claim against a municipality as to which the municipality is immune from liability by the provisions of any other statute or where the action based upon such claim has been barred or abated by operation of statute or rule of civil procedure.

1967 Iowa Acts ch. 405. The immunity provision related to inspections was added in 1986. Laws of the 71st Gen. Assemb., Chapter 1211 (S.F. 2265) (Iowa 1986). At the time, the exception was located at Iowa Code § 613A.4. The language stated "the liability imposed by [the IMTCA] shall have no application to …

> 10. 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."

Id.

The language was introduced in the Iowa legislature as Senate File 2265. The preamble to this bill provided, in part: "An Act relating to civil liability by exempting claims based upon regulatory functions or license action from coverage under the state tort claims Act…." S.F. 2265, 71st Gen. Assemb. (Iowa 1986) (now codified at Iowa Code § 670.4(1)(j)). From the time the bill was introduced in the Iowa Senate until its enactment into law, its only expressed purpose relevant to this case was to limit claims related to regulatory functions of local permitting authorities. This section was added by amendment to the bill on April 8, 1986, and has remained unchanged since its adoption over 37 years ago. Compare S.F. 2265, Amendment H-5747, 71st Gen. Assemb. (Iowa 1986), with Iowa Code § 670.4(1)(j) (2023).

Iowa's comprehensive statute was not adopted in a vacuum. "The breakdown in sovereign immunity during the 1960s and 1970s resulted in a dramatic increase in the number of lawsuits against local governments for personal injuries and property loss allegedly due to a municipality's negligence in the conduct of its safety inspections and ordinance enforcement activities." Deborah L. Markowitz, Esq., *Municipal Liability*

for Negligent Inspection and Failure to Enforce Safety Codes, 15 Hamline J. Pub. L. & Pol'y 181 (1994). In response, in the 1980s, many states, including Iowa, adopted legislation "providing immunity for particular types of governmental duties or for liability arising out of the discretionary acts of its agents, officers, and employees." *Id.*, n.2 (citing statutes and related authorities).

There is no indication in the legislative history or express language of Iowa's statute that the legislature intended that local permitting authorities would be liable for employee inspections clothed as a negligent hiring claim. Allowing a negligent hiring claim premised on a city employee's issuance of a permit would, therefore, be contrary to the legislature's express intent.

B. Iowa Caselaw Supports Dismissal of Negligent Hiring Claims for Alleged Negligent Inspections Under the IMTCA

The Iowa Court of Appeals has upheld the application of the immunity provision related to inspections in an analogous case to the case at bar, involving a woman's fall on a set of stairs in a commercial building. *Wiliams v. Bayers*, 452 N.W.2d 624 (Iowa App. 1990). In the case, the City of Davenport was held totally immune from liability where "[t]he only involvement the City had was through its inspection and issuance of permits." *Id.* at 626.

The *Williams* decision was relied upon by the Iowa Supreme Court in a case involving the ceiling collapse in an apartment building. *Madden v. City of Eldridge*, 661 N.W.2d 134 (Iowa 2003). Again, the City of Eldridge was held totally immune from liability where "[t]he extent of the city's involvement in the building was strictly limited to conducting an inspection and issuing a permit." *Id*. at 141 (citing to *Williams,* 452 N.W.2d at 626). The Court found immunity applied in *Madden* because, "[n]either the city's inspection nor its findings the building complied with the building code constitute supervision or control over the person or premises as contemplated by section 670.4(10)." *Madden*, 661 N.W.2d at 141.

The injury in this case stems from a fall from stairs that were not compliant with local building code. Chapter 20 of the City's municipal code establishes a permitting and inspection scheme for all residential rental properties within the City. Sioux City Municipal Code §§ 20.05.160 – 20.05.230. The City's only involvement with the stairs, as alleged in the third-party petition, was through the City inspector's inspection of the property in 2016 and 2019. Third-Party Petition ¶ 7. Pursuant to the express language and stated purpose of Iowa Code § 670.4(1)(j), and appellate precedent in *Williams* and *Madden*, the City is immune from liability for its

involvement in inspecting the stairs and the third-party petition must be dismissed.

II. THE THIRD-PARTY PETITION'S NEGLIGENT HIRING, SUPERVISION, AND RETENTION CLAIM IS PREEMPTED BY THE IMTCA

In Iowa, "[a]n employer can be liable for the tortious actions of its employees under a common law theory of negligent hiring, supervision, or retention when its employee injures a third party." *McCoy v. Thomas L. Cardella & Assoc.,* 992 N.W.2d 223, 228 (Iowa 2023) (citing to *Godar v. Edwards*, 588 N.W.2d 701, 708-10 (Iowa 1999)). "The claim is premised on agency principles and imposes on an employer the 'duty to exercise reasonable care in hiring[, supervising, or retaining] individuals, who, because of their employment, may pose a threat of injury to members of the public.'" *Id.* (quoting *Godar*, 588 N.W.2d at 708-09). However, when the negligent hiring, supervision, and retention claim arises from a tort by a city employee for which immunity applies, the claim is preempted by the IMTCA and dismissal is proper. *Cubit v. Mahaska County*, 677 N.W.2d 777, 784-85 (Iowa 2004).

In *McCoy v. Thomas L. Cardella & Assoc.*, the Iowa Supreme Court concluded that a negligent hiring, supervision and retention claim was preempted by the Iowa Workers' Compensation Act ("IWCA") when an

employee brought the claim against her employer for failing to prevent an assault and battery in the workplace. 992 N.W.2d at 232. The Court explained that the Plaintiff was seeking recovery for mental health injuries, which "are compensable under the IWCA as physical injuries," and the exclusivity provision of the IWCA, therefore, preempted the tort claim. *Id.*

The exclusivity provision of the IWCA provides:

> The rights and remedies provided in this chapter ... for an employee ... on account of injury ... for which benefits under this chapter ... are recoverable, shall be the exclusive and only rights and remedies of the employee[,] ... at common law or otherwise, on account of such injury ... [a]gainst the employee's employer.

Iowa Code § 85.20.

Similarly, the IMTCA includes an exclusivity provision. It states:

> The remedy against the municipality provided by section 670.2 shall be exclusive of any other civil action or proceeding by reason of the same subject matter against the officer, employee or agent whose act or omission gave rise to the claim, or the officer's, employee's, or agent's estate.

Iowa Code § 670.4(2). The Iowa Supreme Court has confirmed that "Iowa Code chapter 670 is the exclusive remedy for torts against municipalities and their employees." *Rucker v. Humboldt Comm. Sch. Dist.,* 737 N.W.2d 292, 293 (Iowa 2007). Therefore, there can be no claim based on agency against the City for actions of its employees expressly exempted from liability under Chapter 670.

Because the IMTCA directly addresses municipal liability for negligent inspections, and because that is the underlying basis of the claim against the City, the negligent hiring, retention or supervision claim is preempted by the IMTCA and the third-party petition must be dismissed.

III. NEGLIGENT HIRING CLAIMS ALLEGING NEGLIGENT INSPECTION UNDERMINE THE PUBLIC POLICY GOALS OF THE IMTCA

There are strong public policy reasons municipalities should not be subject to claims related to negligent building inspections. Without such immunity, "[t]he municipality is placed in the difficult position of balancing its obligation to set safety standards to protect the health and welfare of its citizens, and its compelling need to control the municipality's exposure to potentially staggering liability." Markowitz, 15 Hamline J. Pub. L. & Pol'y at 183. "Overall welfare is increased, the thinking goes, by not discouraging municipalities to undertake safety inspections." McQuillin The Law of Municipal Corporations § 53:37 (3d ed.).

The Minnesota Supreme Court has likened fire code inspections to the issuance of drivers' licenses—neither of these government functions is intended to protect the public from the actions of the private owner.

> [S]uch inspections are required for the purpose of protecting the interests of the municipality as a whole against the fire hazards of the person inspected. The inspections are not undertaken for

> the purpose of assuring either the person inspected or third persons that the building is free from all fire hazards, just as the state's issuance of a driver's license is no assurance that the licensed person will be a safe driver.

Cracraft v. City of St. Louis Park, 279 N.W.2d 801, 805 (Minn. 1979).

If cities are held liable for code violations that are missed during routine building inspections simply by virtue of employing the inspector, the risk of such liability would seriously deter cities from performing the inspections at all or the inspections would need to be so thorough and time consuming that very few inspections would actually be able to be performed. Fewer inspections would make cities less safe, and would be detrimental to the safety and welfare of the community as a whole as "[t]he work of local inspectors in administering building regulations, such as examining structures and issuing or withholding permits, helps prevent urban blight and improves the quality of life for all citizens." Thomas M. Fleming, J.D., *Municipal Liability for Negligent Performance of Building Inspector's Duties,* 24 A.L.R. 5th 200 (1994).

Private property owners are required to follow local building codes when constructing, maintaining and remodeling buildings or structures within a city. If cities are liable for an inspector's failure to identify each and every code violation at a particular building, local taxpayers essentially

become an insurance policy for the private property owners. Taxpayers would be on the hook for damages related to any undiscovered code violation. This is an untenable proposition.

Further, abolishing immunity for municipal building inspections may encourage cities to utilize outside private parties to conduct the inspections, in an attempt to limit the potential liability to the municipality. This would significantly increase costs associated with such inspections, as the municipality would need to pay for the costs of the private inspector as well as for the expense associated with the private inspector taking on the risk of liability through an indemnification obligation. These increased costs will necessarily be passed on to the citizens of the community, which again requires the local community to serve as the insurer of the safety of private buildings.

Additionally, by privatizing the inspection process, cities lose the knowledge and ability to make adjustments to their local policies and regulations to address issues of local concern. "Citizen engagement is one of the most important aspects of municipal governance as a successful city will keep its public informed while also encouraging feedback to help shape policies and programs." Iowa League of Cities, *Citizen Engagement*,

https://iowaleague.org/resource/citizen-engagement/ (last visited Nov. 3, 2023).

> As regulators implement and enforce regulations, they collect information and experiences that can be used to improve the next iteration of that regulation or related regulations. Under outsourcing, information or experience gained during the performance of an activity will accrue to private parties, rather than public employees. While some of this information or experience might be transferred to public agencies … it is likely that some—perhaps most—will not be. This loss of information and experience could interfere with the optimal evolution of policy and could also undermine the future performance of government agencies. A similar concern is that outsourcing may have serious implications for maintaining institutional knowledge within the government.

Sarah L. Stafford, *Outsourcing Enforcement: Principles to Guide Self-Policing Regimes,* 32 CDZLR 2293, 2295-96 (2011). Building and housing codes are revised periodically to address new building technologies and safety standards. If cities are not involved in the inspection process, they lose the ability to understand how effective the regulations are within the local community. Again, communities become less safe because local government is less able to respond to the particular needs of their housing and building stock.

Code enforcement activities in any particular city must be flexible and tailored to the specific circumstances in that community. For example, during the 2008 economic crisis, throughout the United States, code

enforcement officials were strained as cities responded to an unprecedented number of properties with significant code violations due to mortgage foreclosures and property vacancies. *See* Harry M. Hipler, *Do Code Enforcement Violations "Run with the Land"? Competing Interests of Local Governments and Private Parties and Their Constitutional Considerations in Code Enforcement Proceedings*, 43 Stetson L. Rev. 257, 258 (2014).

> The 2008 economic meltdown in Florida and elsewhere in the United States facilitated the financial crisis, substantially increased mortgage foreclosures, and placed a great deal of pressure on code enforcement departments, which are tasked with keeping neighborhoods and communities free from becoming blighted, unsafe, and depreciated in value….From 2008 and thereafter, there has been a marked uptick in code violations for overgrown vegetation and landscaping, failure to clean away trash and debris, maintenance of real property, illegal dumping, lot clearing, junk and abandoned vehicles, real property upkeep, fire code violations, construction without a building permit, and other building code violations….

Id. The mortgage crisis resulted in more vacant, abandoned properties, which necessarily required adjustments to local code enforcement activities.

Providing immunity for municipal inspections encourages responsiveness in local inspection policies and procedures. A rural community in Iowa may be facing a housing crisis related to old, dilapidated, vacant housing stock, while a more suburban Iowa community may be overwhelmed with a boom in new residential development. Each

city should have the flexibility to create an inspection and enforcement scheme that addresses their specific needs. Inspectors in each community should be permitted to specialize and train in those code enforcement areas that are most important to their citizens. The immunity provision in the IMTCA encourages this type of local control.

Because there is good reason to hold cities immune from liability associated with building inspections, there is also good reason to prevent an end-run around such liability through a negligent hiring, supervision or retention claim. If a building inspector is immune from liability in conducting a building inspection, the City, as employer, is also immune.

CONCLUSION

For the forgoing reasons, amicus curiae Iowa League of Cities respectfully requests the Court reverse the ruling of the district court.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE-STYLE REQUIREMENTS

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CERTIFICATE OF SERVICE AND FILING

The undersigned hereby certifies that on November 20, 2023, the foregoing Brief of Amicus Curiae was electronically filed with the Iowa Supreme Court by using the EDMS system. I further certify that all parties or their counsel of record are registered as EDMS filers and will be served by the EDMS system.

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