ELECTRONICALLY FILED MAY 05, 2017 CLERK OF SUPREME COURT

IN THE SUPREME COURT OF IOWA

SUPREME COURT NO. 16-1896

KAITLYN JOHNSON,
Plaintiff-Appellant,

vs.

HUMBOLDT COUNTY, IOWA,
Defendant-Appellee; and

SANDRA BECKER, Individually
and as Executor of the Estate
of Donald E. Becker,
Defendant.

APPEAL FROM THE IOWA DISTRICT COURT FOR HUMBOLDT COUNTY, THE HONORABLE KURT J. STOEBE, PRESIDING JUDGE

APPELLANT'S FINAL BRIEF AND REQUEST FOR ORAL ARGUMENT

Conrad F. Meis
Buchanan, Bibler,
Gabor & Meis
111 North Dodge Street
P.O. Box 617
Algona, Iowa 50511
Telephone: 515-295-3565
Facsimile: 515-295-2158
E-mail: cfm@buchlaw.com

Michael K. Bush
John C. Bush
Bush, Motto, Creen, Koury &
Halligan, P.L.C.
5505 Victoria Ave., Suite 100
Davenport, IA 52807
Telephone: 563-344-4900
Facsimile: 563-344-8961
E-mail: mbushlaw@bmcklaw.com

ATTORNEYS FOR APPELLANT

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ROUTING STATEMENT

This case should be retained by the Iowa Supreme Court. IOWA R. APP. P. 6.1101(2)(b), (c), (d), and (f). Whether the public duty doctrine should be discarded or, on the other hand, expanded to claims beyond those based on common-law negligence are issues of broad public importance that require resolution by the Supreme Court and present substantial questions of changing legal principles, some of which are issues of first impression. Even if this doctrine is retained, the question of whether it applies to travelers on the road finds conflicting answers in Supreme Court cases and presents a substantial question of enunciating legal principles.

STATEMENT OF THE CASE

Nature of the Case. This tort action is for personal injuries sustained by Kaitlyn Johnson ("Katie" or "Plaintiff") when the vehicle in which she was a passenger hit a concrete wall in the right of way of a county highway. (App. 141, 142) Katie alleged her injuries in this accident were catastrophic due to the fault of Sandra Becker and her late husband, Donald Becker, in placing and maintaining the concrete wall in the public right of way as well as the fault of Defendant Humboldt County, Iowa ("the County"), in failing to perform its functions with care and in failing to remove this obstruction from the right of way. (*See Id.* pp.1-15)

Katie appeals from a final order granting the County's motion for summary judgment, denying her motion for partial summary judgment, and dismissing all claims against the County, all on the basis of the public duty doctrine. (App. 326-339; App. 342-343; App. 345-347)

Course of Proceedings and Disposition in the District Court. Katie filed her Petition seeking damages from the County and Defendant Sandra Becker, individually and as the executor of her deceased husband's estate. (App. 001-006)(Katie's claims against Becker are not the subject of this appeal.) With respect to the County, Katie alleged theories of negligence. (App. 004-006) Her petition was amended to add theories of premises liability, common law public nuisance, and public nuisance under Iowa Code chapter 657. (App. 055-059) Her petition was again amended to add a claim based on an implied private cause of action arising out of statute. (App. 151-154)

The County filed a motion for summary judgment seeking dismissal of Katie's claims based on the applicability of the public duty doctrine. (App. 066-067) Katie then filed a motion for partial summary judgment against the County. (App. 113-119) Therein, she asked the court to find as a matter of law that the County had a statutory duty to cause all obstructions in a highway under its jurisdiction to be removed, and that the County breached

its duty by failing to cause the concrete obstruction to be removed. (App. 113-119)[1]

After hearing the summary judgment motions (App. 321-324), the district court entered its ruling. (App. 326-339) The court denied Katie's motion for partial summary judgment and granted the County's motion, ruling that Katie's claims are barred, all on the basis of the public duty doctrine. (App. 326-334; App. 338-339)

Katie timely filed a motion seeking clarification whether the district court intended to dismiss *all* of Katie's pending counts against the County. (App. 340-341) The district court clarified that its ruling granting the County's Motion for Summary Judgment pertains to all counts of the second amended petition relating to Humboldt County. (App. 342)

Katie timely filed her Notice of Appeal on November 4, 2016. (App. 345-347)

STATEMENT OF FACTS

A. Construction of Concrete Wall.

This civil action arises out of events set in motion when a concrete wall was constructed in a roadside ditch in 1972 or 1973. At all material times, Donald Becker, now deceased, and his wife, Sandra Becker, resided

[1] Defendant Becker also filed a summary judgment motion, but that is not at issue in this appeal.

at 1673 270th Street, Humboldt, Humboldt County, Iowa. (App. 294; 166) The Beckers lived adjacent to county highway C-49, also known as 270th Street. (*Id*.) When the concrete wall was built, Dale and Lenora Weber, Sandra Becker's parents, owned the land where the Beckers lived as tenants. (App. 186 (Answer to No. 13)) By the time of accident in which Katie was injured, the Beckers owned the property. (App. 186; App. 326)

In 1961, the Webers granted a right-of-way easement in the property to the County. (App. 126-129) The easement ran north from the centerline of the highway 45 feet onto the south side of the Webers' land. (App. 126-129) The easement granted the County a right to possess and control the right of way over the Webers', and later the Beckers', ownership interest. (*See* App. 126-129); *Schwartz v. Grossman*, 173 N.W.3d 57, 59-60 (Iowa 1969) (explaining the rights of a dominant estate in a right-of-way easement are not exclusive, and one who holds the rights of the servient estate may use the easement strip for any purpose not inconsistent with the easement).

In 1972 or 1973, Donald Becker and his father-in-law, Dale Weber, constructed a cattle guard supported by a concrete wall. (App. 186; App. 291 (¶ 15); App. 230). The photograph below shows the concrete wall and cattle guard.

As illustrated in the following image showing the structure from above, the concrete wall was located primarily within the area subject to the County's right-of-way easement. (App. 223 (admitting blue line in the following photo "truly and accurately marks the location of the north boundary of the County's right of way"); *accord* App. 230-234)

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By reason of the easement, construction within the right of way was prohibited unless preapproved by the County. *See* Iowa Code § 319.12 (1971)("No... obstruction except signs or devices authorized by law or approved by the highway authorities shall be placed or erected upon the right of way of any public highway."). Nonetheless, the Beckers did not obtain approval for construction in the County's right of way. (App. 011 (stating "The Beckers never sought any permits to install or maintain the cattle grid."); *id.* (stating, "There is no evidence that anybody ever obtained

permission from the County to install the cattle grid."); App. 187; App. 295 (¶ 19))

The county highway was "blacktopped" in 1970, 1977, and 1996. (App. 189) Despite the obviousness of the concrete obstruction and the hazard it posed to travelers experiencing a lane departure,[2] the County never required the Beckers to remove this obstruction until after the collision.[3]

[2] Statistically, it is not so much a question of whether a roadside obstruction will cause harm, but when. The government has long known that while no one plans to go into the ditch, it happens every day. "A lane-departure fatality occurs every 21 minutes."(App. 199 ("DRIVING DOWN LANE-DEPARTURE CRASHES")(2008)). "Lane departure crashes are the single largest category of fatal and major injury crashes in Iowa. The Iowa Department of Transportation (DOT) estimates that 60 percent of roadway-related fatal crashes are lane departures and that 39 percent of Iowa's fatal crashes are SVROR [single-vehicle run-off-road] crashes (Iowa DOT 2006)." (App. 201 (citing Iowa DOT, Iowa Comprehensive Highway Safety Plan, September 2006, http://www.iowadot.gov/traffic/chsp/lanedepartures.html)). The statistics regarding lane departure injuries are even higher than the statistics above regarding deaths, at least when not running into concrete walls.

[3] Manuals for maintenance crews instruct on the necessity of removing hazardous right-of-way obstructions:

Eliminating or Improving Hazardous Drainage Headwalls

Headwalls are common features on many local roadways. The headwalls are often used to support the shoulder and maintain the roadway edge, prevent the end of the pipe from being crushed or broken when overridden, collect and disperse water flows and occasionally delineate the ditch or channel. Headwalls, by their nature, are generally rigid structures capable of abruptly stopping a motor vehicle if hit. When they are

This culvert headwall is a roadside hazard.

(App. 217)

This headwall is a roadside obstacle and should be replaced as soon as possible.

The headwall is sticking up almost a foot in a relatively flat recoverable area. It can snag a vehicle and bring it to an abrupt stop or cause it to overturn.

(App. 213) Although the concrete wall no longer served any useful purpose (App. 236:5-9), ongoing advances in technology would have allowed the County to protect travelers from harm even if the obstruction could not have been removed immediately. For example, the Fitch Barrier system has saved 17,000 lives since first used in the 1960's.

(App. 133 (admitting that "[b]etween July 1, 2006 and March 3, 2013, the County did not undertake any action to remove the concrete wall")) That the County had a statutory obligation to do so is not subject to dispute. *See* Iowa Code § 318.4 ("The highway authority shall cause all obstructions in a highway right-of-way under its jurisdiction to be removed."); App. 333 ("Humboldt had a general duty to remove the concrete wall because it was clearly an obstruction in a highway right-of-way.").

After the March 2013 accident, the Humboldt County Engineer contacted the Beckers and caused them to remove the concrete wall. (App. 190; App. 296)

B. The Collision.

On March 3, 2013, a 2006 Chevrolet Silverado pickup driven by Katie's then husband, departed from its lane adjacent to the Becker's home, entered the ditch subject to the County's right-of-way easement, and

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See https://en.wikipedia.org/wiki/John_Fitch_(racing_driver) (citing http://www.racesafety.com/pdf/saltlaketribune.pdf).

collided with the concrete obstruction. (App. 295) The concrete obstruction did not budge, but instantly stopped the pickup. (App. 295; App. 292 (admitting "upon impact, the cattle grid did not move"); App. 175, 178-179 (§§ 2, 9))

As noted above, Katie was a passenger in the vehicle. (App. 295) The instantaneous loss of forward motion caused by the concrete wall resulted in a sudden change in velocity, known as a "delta V," of -49.3 miles per hour. (App. 176, 178) (§§ 5, 8) Had the County caused the Beckers to remediate before the collision, the truck would have lost speed more slowly while ramping up the ditch wall, and Katie's injuries, "[i]f they occurred at all, would have been limited to very minor soft tissue injuries, which would not have been permanent." (App. 178) As it was, the sudden change in velocity caused a "violent forward motion on the occupant relevant to the suddenly stopped vehicle, followed by an abrupt restraining of the pelvis and torso by the restraint webbing... [before being] thrown violently back into the seat." (App. 178-179) In short, the concrete wall caused a more sudden change in velocity that enhanced Katie's damages, resulting in her paralysis, a brain injury, multiple broken bones, and other serious injuries. (App. 175-176, 178, 179) (§§ 3, 5, 8, 9)

Additional facts will be discussed below as necessary.

ARGUMENT

I. Introduction

This case presents issues of profound importance to the protection of travelers on public roads and the accountability of governmental entities responsible for the safety of those travelers. Lest there be any doubt about the role the County plays in the maintenance of the right of way and the safety of travelers on that right of way, a brief review of that role is appropriate to set a context for Plaintiff's discussion of the significant issues raised in this appeal.

At least as early as 1913, the Iowa Code gave counties the "power to remove all obstructions in the highways under their jurisdiction."[4] Iowa Code § 1527-s17 (1913). By 1924, with the introduction of fast-moving automobiles, the legislature became aware that right-of-way obstructions unnecessarily exposed travelers to danger, and so it supplemented the counties' power to remove obstructions with a *requirement* that counties clear obstructions from their rights of way. *See* Iowa Code § 4834 (1924) ("The board of supervisors and township trustees *shall* cause all obstructions in highways under their jurisdiction to be removed." (emphasis added)), now codified at Iowa Code § 318.4 ("The highway authority shall cause all

[4] The County admits that "the concrete wall constituted an 'obstruction' as... defined in Iowa Code Section 318.1(4)." (App. 224)

obstructions in a highway right-of-way under its jurisdiction to be removed.").[5] *See also Stewart v. Wild*, 195 N.W. 266, 269 (Iowa **1923**) (discussing how advances in modes of travel had increased the danger posed by obstructions). While the safety purpose underlying these statutes should be apparent, in 2006, the legislature removed any doubt about its objective in requiring counties to remove right-of-way obstructions by adding the following statement of legislative intent to section 318.2: "The purpose of this chapter is to enhance public safety for those traveling the public roads...." Iowa Code § 318.2 (2007).

As early as 1864, the duty of counties and other municipalities towards travelers was recognized by the Iowa Supreme Court: "Travelers... have a right to hold liable the [municipal] corporation, whose duty it is, by law, to attend to the repair and safe condition of the public highway and every part thereof." *Brown v. Jefferson County*, 16 Iowa 339, 344 (1864) (upholding judgment against county for injuries sustained by driver of team of horses when bridge forming part of county road fell); *accord Clark v. Sioux County*, 159 N.W. 664, 666–67 (Iowa 1916). With the exception of recent dicta in *Estate of McFarlin v. State*, 881 N.W.2d 51, 61 n.6 (Iowa 2016), that view has prevailed through modern times: "We have consistently

[5] *Contrast Hildebrand v. Cox*, 369 N.W.2d 411, 417 (Iowa 1985)(amending from "shall" to "may" indicated "permissive rather than mandatory action").

recognized that governmental units, with respect to highways or streets within their jurisdictions, have a responsibility to the traveling public." *Symmonds v. Chicago, M., St. P. & P. R.R.*, 242 N.W.2d 262, 265 (Iowa 1976); *see also Ehlinger v. State*, 237 N.W.2d 784 (Iowa 1976) (holding State liable to automobile passenger injured when State failed to remove hazard on public road within State's jurisdiction).

Against this backdrop of long-standing Iowa statutory and common law, the district court dismissed *all* of Plaintiff's claims against the County on the basis of the public duty doctrine, extending that doctrine for the first time to travelers injured through the negligence of a county that had failed to maintain a public road and to claims beyond common-law negligence. In the lower court, Plaintiff reasoned, among other things, that the public duty doctrine has no continuing validity after the legislature's abrogation of governmental immunity and the Court's adoption of the Restatement (Third) of Torts. The district court rejected these arguments in reliance on this Court's decision in *McFarlin*. (App. 328-334, 338)

Plaintiff contended below that even if the public duty doctrine has survived other developments in Iowa law, that doctrine does not prevent the imposition of a duty of reasonable care on the County to persons traveling on its highways. The district court held, however, that the County owed a

duty only to the general public, and that under the public duty doctrine, the breach of that duty was not actionable by highway travelers injured by the County's negligence. (App. 329-334)

The issues presented by this appeal require a probing examination of the purpose of the public duty doctrine, its consistency with the legislatively established public policy of municipal tort liability, and its compatibility with the principles and analytical framework of the Restatement (Third) of Torts adopted by this Court. Such an examination reveals that the public duty doctrine cannot be justified as sound policy serving any useful purpose. That this doctrine is no longer fair and sensible public policy is underscored by the fact that the doctrine is at odds with this State's laws requiring that municipalities be held accountable for their negligence in the same manner as individuals and with the analytical framework and legal principles found in the Third Restatement.

II. The public duty doctrine should be abandoned.

Before discussing the specific reasons that demonstrate the public duty doctrine is no longer viable in Iowa, Plaintiff points out that the issue

raised here—whether the public duty doctrine should be abandoned—was *not* considered in *McFarlin.* The *McFarlin* majority stated:

> The plaintiffs, relying on *Summy*, argue the public-duty doctrine is inapplicable to the facts of this case *but do not ask us to overrule* Raas *and* Kolbe *and abandon the public-duty doctrine.* We do not ordinarily overrule our precedent sua sponte.

McFarlin, 881 N.W.2d at 59 (referring to *Summy v. City of Des Moines*, 708 N.W.3d 333 (Iowa 2006), *Raas v. State*, 729 N.W.2d 444 (Iowa 2007) and *Kolbe v. State*, 625 N.W.2d 721 (Iowa 2001))(emphasis added). *Compare Feld v. Borkowski*, 790 N.W.2d 72, 78 n.4 (Iowa 2010)(Cady, C.J.)("[I]n the absence of the most cogent circumstances, we do not create issues or unnecessarily overturn existing law sua sponte when the parties have not advocated for such a change."). *McFarlin* is not dispositive of this issue, and Plaintiff requests this Court to consider with an open mind whether the public duty doctrine has been rendered obsolete for the reasons discussed below.

A. The public duty doctrine is inconsistent with the Restatement (Third) of Torts: Liability for Physical & Emotional Harm.

Although the *McFarlin* majority did not determine whether the public duty doctrine should be abandoned, the majority did state that "the doctrine

continues under the Restatement (Third)." *Id.* at 60 n.4. Interestingly, the majority addressed this question even though the plaintiffs in *McFarlin* had not argued in the district court or on appeal that the Third Restatement undermined the public duty doctrine. *Id.* In a decision issued one week before *McFarlin*, the same four members of the Court that constituted the *McFarlin* majority refused to consider a party's contention that the continuing-storm doctrine was no longer good law under the Third Restatement, noting the plaintiff had not raised this argument until her application for further review. *Alcala v. Marriott Int'l, Inc.*, 880 N.W.2d 699, 712 (Iowa 2016). The four-member majority stated: "We prefer to wait to decide the issue with the benefit of a district court ruling and full adversarial briefing." *Id.*

What was lacking in *McFarlin*—full adversarial briefing of the impact of the Third Restatement on the public duty doctrine—is present here. This case presents an opportunity for the Court to fully examine this question in the context of the larger issue not raised in *McFarlin*, namely, whether the public duty doctrine should be abandoned. Plaintiff starts her discussion of these issues by reviewing Iowa case law on this doctrine.

The Iowa Supreme Court's fifteen-year-old *Kolbe* decision formed the foundation for the majority's decision in *McFarlin* that the public duty

doctrine precluded recovery in that case. 881 N.W.2d at 58 (stating the "controlling decision is *Kolbe*, which precludes liability to individuals based on breach of a duty the state owes to the public at large"). In *Kolbe*, this Court described the doctrine as follows: "The public duty doctrine provides that 'if a duty is owed to the public generally, there is no liability to an individual member of that group.'" *Kolbe*, 625 N.W.2d at 729 (citing *Wilson v. Nepstad*, 282 N.W.2d 664, 667 (Iowa 1979)). To appreciate the obsoleteness of this doctrine, it is helpful to examine the underpinnings of the Court's holding in *Kolbe*.

In *Wilson*, the authority cited in *Kolbe* for the public duty doctrine, the defendant city argued the doctrine was still the law in Iowa. *Wilson*, 282 N.W.2d at 670. Although the Court did not abandon the doctrine in *Wilson*, instead finding it inapplicable under the facts of the case, the Court certainly did not endorse the doctrine. The Court noted in its 1979 *Wilson* decision that even then "the clear trend of case law and unmistakable legislation" was away from the public duty doctrine, that "the trend in this area is toward liability," that the doctrine was losing support in other jurisdictions, and that "[o]ther jurisdictions have [also] recognized the growing trend toward imposing liability upon governmental units for negligence in execution of statutory duties." *Id.* at 667, 668, 670. The Court also dismissed the

defendant city's reliance on *Jahnke v. Incorporated City of Des Moines*, 191 N.W.2d 780 (Iowa 1971), noting that case, which applied the public duty doctrine, "addressed and was limited to an esoteric area of law," namely, "municipal liability for injuries caused by mob violence." *Id*. at 670.

It is crucial to note that at the time of these decisions, the Restatement (Second) of Torts was still in vogue. In fact, in both *Wilson* and *Kolbe*, the Iowa Supreme Court cited the Second Restatement, sections 288 and 315, respectively, as authority for the public duty doctrine. *See Wilson*, 282 N.W.2d at 671 (discussing and subsequently applying section 288 of the Second Restatement); *Kolbe*, 625 N.W.2d at 729 (citing section 315 of the Second Restatement). In *Wilson*, the Court relied on section 288 of the Second Restatement[6] to capture the scope of the public duty doctrine, noting that to avoid the public duty doctrine under this section a plaintiff need only

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[6] Section 288 states in relevant part:

> The court will not adopt as the standard of conduct of a reasonable man the requirements of a legislative enactment or an administrative regulation whose purpose is found to be exclusively
> ...
>
> (b) to secure to individuals the enjoyment of rights or privileges *to which they are entitled only as members of the public.*

Restatement (Second) of Torts § 288(b)(1965)(emphasis added).

"show the purpose of the statutory duty is to benefit an identifiable class of persons." *Wilson*, 282 N.W.2d at 671. In *Kolbe*, the Court noted that it had narrowed the public duty doctrine by applying the special-relationship rules of section 315:

> Since *Wilson* and *Adam*, we have not expressly abolished the public duty doctrine, although we have narrowed its application. We have routinely held that a breach of duty owed to the public at large is not actionable unless the plaintiff can establish, based on the unique or particular facts of the case, a special relationship between the State and the injured plaintiff consistent with the rules of Restatement (Second) of Torts section 315.

Kolbe, 625 N.W.2d at 729.

Plaintiff submits that the public duty doctrine is a vestige of outdated common law that has no continuing utility under the Third Restatement. In *Thompson v. Kaczinski*, the Iowa Supreme Court adopted the duty rules set forth in the Third Restatement. 774 N.W.2d 829, 834 (Iowa 2009); *accord Hoyt v. Gutterz Bowl & Lounge L.L.C.*, 829 N.W.2d 772, 776, 776 n.4 (Iowa 2013)(applying duty principles of various sections of the Third Restatement, including an analysis of section 37, which replaced section 315 of the Second Restatement); *see* Restatement (Third) of Torts: Liab. for Physical & Emotional Harm § 37 cmt. *a* (Am. Law Inst. 2010)("This Section replaces both § 314 and § 315 of the Second Restatement.").

To avoid redundancy, the mechanics of the Third Restatement duty analysis will be discussed below[7] in the context of demonstrating the County owed a duty under the Third Restatement that is not affected by the public duty doctrine. For the present purpose of demonstrating that the doctrine is unnecessary under the Third Restatement, however, it is important to note that under the Third Restatement "the general duty of reasonable care will apply in most cases" and only in "exceptional cases" will "the general duty of reasonable care be displaced or modified." *Thompson*, 774 N.W.2d at 834-35. As this Court noted, "no-duty rulings should be limited to exceptional cases in which '"an articulated countervailing principle or policy warrants denying or limiting liability in a particular class of cases."'" *Hoyt*, 829 N.W.2d at 775 (citations omitted). These principles of Iowa law dovetail with the general trend in Iowa and elsewhere to limit or deny application of the public duty doctrine and with the move away from governmental immunity following passage of the Iowa Tort Claims Act and the Iowa Municipal Tort Claims Act. *See Kolbe*, 625 N.W.2d at 729; *Wilson*, 282 N.W.2d at 667, 668, 670.

As noted earlier, the *McFarlin* majority briefly considered the impact of the adoption of the Third Restatement on the public duty doctrine and

[7] *See* Argument III. A.

concluded "the public-duty doctrine remains good law after [the Court's] adoption of sections of the Restatement (Third) of Torts." *McFarlin*, 881 N.W.2d at 59-60 & n.4. Without the benefit of adversarial briefing and a full analysis, the majority first stated that "[t]he reporter's note to section 7 acknowledges the continued vitality of the public-duty doctrine." *Id.* at 59. The reporter's note offered in support of the majority's conclusion reads:

> *Deference to* ***discretionary***[8] *decisions of another branch of government.* The "public-duty" doctrine is often explained as preventing government tort liability for obligations owed generally to the public, such as providing fire or police protection. Only when the duty is narrowed to the injured victim or a prescribed class of persons does a tort duty exist.

Id. at 59-60 (emphasis in bold added)(quoting Restatement (Third) of Torts § 7 reporter's note cmt. *g*, at 93–94). Contrary to the majority's suggestion, this note does not confirm the "continued vitality" of the public duty doctrine. The reporter's note simply explains practices of the past.[9]

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[8] Significantly, there is nothing *discretionary* about the County's duty. *See* Argument I.

[9] Although not mentioned by the *McFarlin* majority, a comment to section 37 of the Third Restatement also refers to courts' *historical* application of the public duty doctrine. *See* Restatement (Third) of Torts § 37, cmt. *i*. This comment acknowledges the *historical* reluctance of courts to impose affirmative duties on public entities, but like the comment to section 7, it does not advocate that this doctrine be retained. Notably, a list of cases invoking the public duty doctrine to limit the affirmative duties of governmental entities contained in the reporter's notes to this section all pre-date the Third Restatement, with the most recent case decided in 2004, more than twelve years ago. *See id.* reporter's note to cmt. *i*.

More pertinent to the question whether the public duty doctrine, as defined and applied in Iowa, survived adoption of the Third Restatement is section 288 of the Second Restatement, which the Court relied upon in the "public duty doctrine" context. (*See* Argument II.A.) Importantly, section 288 was superseded by section 14 of the Third Restatement. Restatement (Third) of Torts, Table 2. Section 14 states:

> An actor is negligent if, without excuse, the actor violates a statute that is designed to protect against the type of accident the actor's conduct causes, and if the accident victim is within the class of persons the statute is designed to protect.

Id. § 14.[10] Section 14 preserves none of the language from section 288 of the Second Restatement that formed a basis for the public duty doctrine.[11] Moreover, a comment in the Third Restatement makes it clear that section 14 addresses negligence, not duty. *Id.* cmt. *i.* The comment observes that duty is now determined under section 7, referring to the general duty of reasonable care incorporated into Iowa law in *Thompson*. As discussed below[12], with rare exception, a duty of reasonable care exists under section 7

[10] Recall the Code requires counties to clear right-of-way obstructions. *See* Iowa Code § 318.4. The purpose "is to enhance public safety for those traveling the public roads." *Id.* § 318.2.

[11] *Compare* with language of section 288, Argument II.A. n.6).

[12] *See* Argument III.A. *See also Feld v. Borkowski*, 790 N.W.2d 72, 76 (Iowa 2010)("In most all cases involving physical harm, we have adopted the view that a duty of reasonable care exists, and it is for the fact finder to consider the specific facts and circumstances to determine if the actor breached the duty.") (citing *Thompson*, 774 N.W.2d at 834-35).

in cases involving physical harm. Significantly, however, the comment also notes that even if there would be a no-duty determination under section 7 absent the statute alleged to have been violated, then a court should *reconsider* the no-duty conclusion in light of the defendant's violation of "a statute that seeks to protect the plaintiff against a certain type of accident." *Id.* In addition, section 38 of the Third Restatement provides: "When a statute requires an actor to act for the protection of another, the court may rely on the statute to decide that an affirmative duty exists and to determine the scope of the duty." Restatement (Third) of Torts § 38. "This Section does not address whether an implied right of action[, such as that pled in count VI of Plaintiff's Petition,] should be found in a statute... . [Rather, it] concerns judicial adoption of an affirmative duty in tort based on a statute." *Id.* § 38, reporter's note cmt. *c*. In short, the Third Restatement abandons the doctrine's foundational language in section 288 of the Second Restatement and treats statutory violations very differently than did the Second Restatement.

Thus, the Third Restatement contains a mechanism and an analytical framework to determine when a defendant, including a governmental entity that has violated a statutory obligation, owes a duty to an injured plaintiff. Logically, once a jurisdiction has opted for the Third Restatement's duty

analysis, provisions of the Second Restatement—including section 288 and the corresponding public duty doctrine—should be left in the past to ensure a cohesive body of legal principles governing tort liability going forward. To adopt the Third Restatement, yet continue to apply the public duty doctrine, which includes vestiges of the Second Restatement, will only result in confusion and inconsistency in the law.

The only other rationale offered by the *McFarlin* majority in support of the conclusion that the public duty doctrine survived adoption of the Third Restatement is that "Section 37 provides that '[a]n actor whose conduct has not created a risk of physical... harm to another has no duty of care to the other unless a court determines that one of the affirmative duties provided in §§ 38-44 is applicable,'" and that section 40 "provides that '[a]n actor in a special relationship with another owes the other a duty of reasonable care with regard to risks that arise within the scope of the relationship.'" *McFarlin*, 881 N.W.2d at 60 (quoting Restatement (Third) of Torts § 40(a), at 39). The implicit rationale in *McFarlin* is that because section 40 requires a special relationship for duty to attach, and because this principle sounds similar to the special relationship rules Iowa law required to avoid application of the public duty doctrine, *see Kolbe*, 625 N.W.2d at 729,

the public duty doctrine apparently does not conflict with the Third Restatement and must have survived its adoption.

This rationale is a misunderstanding of the Third Restatement. A comment to section 37 points out that the special relationships described in sections 40 and 41 are to be distinguished from the so-called special relationship "that distinguishes the plaintiff from the public at large."[13] Restatement (Third) of Torts § 37, cmt. *i* ("Some courts insist on a 'special relationship' between the plaintiff and a public entity that distinguishes the plaintiff from the public at large before imposing an affirmative duty. The 'special relationship' invoked by these courts should be distinguished from the special relationships described in §§ 40 and 41."). Accordingly, the existence of sections 37 and 40 do *not* suggest the public duty doctrine has continuing viability under the Third Restatement.

To the extent sections 37 and 40 have any bearing whatsoever on the County's liability here, these sections merely require a special relationship before the government can be liable for the actions of a third party, *the same*

[13] While it appears the drafters of the Restatement did not intend to define special relationships for purposes of the public duty doctrine, because Iowa courts have traditionally looked to the Restatement to define the special relationships that create a duty as exceptions to the public duty doctrine, Plaintiff will discuss later in this brief those sections of the Third Restatement that create a special relationship under the facts of this case. For purposes of the current discussion, what is important is that the Third Restatement's inclusion of sections defining "special relationships" cannot be held out as proof that the Third Restatement embraced and preserved the public duty doctrine. It did not.

as would be true for any private tortfeasor. Imposing any additional requirement beyond section 40 because the defendant is a municipality would be duplicative and confusing. In reality, the inclusion of the special-relationship rules in the Third Restatement demonstrates there is no lingering need for the public duty doctrine and that it should be abandoned as a relic that has outlived any useful purpose.

The *McFarlin* majority did not even consider section 38, discussed above, and its intersection with the public duty doctrine. Section 38 provides an analytical framework for determining when a statute that requires an actor to act for the protection of another gives rise to an affirmative duty. It is difficult to justify continued adherence to the public duty doctrine and its Second Restatement roots in the face of provisions in the Third Restatement, including section 38, that address the same questions using the Third Restatement's approach to duty to which Iowa now adheres.

For these reasons, *McFarlin's* cursory rationale for continuing the public duty doctrine under the Third Restatement does not hold up under closer scrutiny. The Third Restatement did not preserve the public duty doctrine. Issues of duty, including that of governmental entities, can be adequately addressed and more consistently addressed under the principles set out in the Third Restatement. Stated succinctly, the public duty doctrine

has been eclipsed by the Iowa Supreme Court's adoption of the Third Restatement and should be abandoned.

B. The public duty doctrine is inconsistent with the Iowa Municipal Tort Claims Act, and to the extent *Kolbe*, *Raas*, and *McFarlin* contradict this conclusion, they should be overruled.

The Iowa Municipal Tort Claims Act ("IMTCA"), enacted in 1967, provides that "every municipality[14] 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 (2013).

> "Tort" means *every* civil wrong which results in... *injury to person* or injury to property... and includes but is not restricted to actions based upon *negligence*; *error or omission*; *nuisance*; *breach of duty, whether statutory or other duty* or denial or impairment of any right under any constitutional provision, statute or rule of law.

Id. § 670.1(4)(2013) (emphasis added). As the Iowa Supreme Court has recognized repeatedly, "[a]ny common-law immunity in tort previously accorded governmental subdivisions was eliminated [by the IMTCA] except those torts specifically excluded by § 613A.4 [now section 670.4]." *Symmonds v. Chicago, M., St. P. & P. R.R.*, 242 N.W.2d 262, 264 (Iowa 1976); *accord Thomas v. Gavin*, 838 N.W.2d 518, 521 (Iowa 2013); *Jahnke*

[14] Humboldt County is a "municipality." *See Thomas v. Gavin*, 838 N.W.2d 518, 522 (Iowa 2013).

v. Inc. City of Des Moines, 191 N.W.2d 780, 783 (Iowa 1971); *Strong v. Town of Lansing*, 179 N.W.2d 365, 367 (Iowa 1970). "[C]ourts 'are not at liberty to create an exception where [the legislature] has declined to do so.'" *Freytag v. C.I.R.*, 501 U.S. 868, 874 (1991)(citation omitted). Thus, in the absence of one of the statutory exceptions, the same principles of liability apply to municipalities as to any other tort defendants. *See Harryman v. Hayles*, 257 N.W.2d 631, 638 (Iowa 1977) *overruled on other grounds by Miller v. Boone Cty. Hosp.*, 394 N.W.2d 776, 781 (Iowa 1986); *accord Wilson*, 282 N.W.2d at 671. In explaining the expansion of municipal tort liability, the Iowa Supreme Court stated in a case involving a county's failure to install a stop sign at a dangerous intersection that "the obligation of the county to [the] plaintiffs is not required to be specifically mandated by a statute, nor is its potential liability grounded upon an overt act rather than omission." *Symmonds*, 242 N.W.2d at 264.

It would seem from these consistent statements of the Iowa Supreme Court interpreting the IMTCA—and spanning more than forty years—that the Act clearly abrogated the public duty doctrine. In fact, that was the holding of this Court in the *Harryman* case. In *Harryman*, the trial court had refused to impose liability on the county's board members and employees, ruling "the acts of negligence alleged in the petition related to the

performance of statutory duties by the defendants in their official capacities, and that these duties were therefore owing only to the general public, not to the plaintiffs individually." 257 N.W.2d at 637. The Iowa Supreme Court reviewed the district court's ruling in light of the IMTCA and held the Act imposed liability notwithstanding the distinction previously made between duties owed to the general public and duties owed to individuals.[15] *Id.* at 638. The Court noted that the cases refusing to impose liability when a statutory duty was owed to the general public were "no longer persuasive." *Id.* at 637. The Court stated:

> We hold the abrogation of governmental immunity means the same principles of liability apply to officers and employees of municipalities as to any other tort defendants, except as expressly modified or limited by the provisions of Chapter 613A. In that regard we take § 613A.4(3) to mean simply that there is no liability for the acts of an officer or employee unless there is negligence. ...
>
> ...
>
> In this case, the Board of Supervisors and county engineer clearly had a duty to maintain the county roads in proper condition. §§ 309.67, 319.1, 319.7, The Code, 1971. This duty runs to all those rightfully using the roads. Cf. Conrad v. Board of Supervisors, 199 N.W.2d 139, 144 (1972). A breach of that duty can occur either by negligent commission or omission. Whether the duty was breached, and if so, whether it

[15] Although the court in *Harryman* stated the rule that duties owed only to the general public were not actionable when Iowa law "immunized counties," 257 N.W.2d at 637, it is clear that the rule or principle the court considered in that case was the same rule reflected in the public duty doctrine, namely, that any duties owed to the general public and not to the individual plaintiffs, did not subject the county to liability.

> was a proximate cause of the injuries, are matters to be determined at trial. The trial court erred in deciding plaintiffs had not stated a cause of action, and we reverse that portion of the order....

Id. at 638.

In contrast to *Harryman*, in *Raas v. State*, 729 N.W.2d 444 (Iowa 2007), this Court held that the public duty doctrine "was alive and well in Iowa." 729 N.W.2d at 449. The Court did not distinguish or even mention its *Harryman* decision. The *Raas* court's rationale for concluding the doctrine survived the abrogation of sovereign immunity was that the doctrine was distinguishable from statutory tort immunity: "Unlike immunity, which protects a municipality from liability for breach of an otherwise enforceable duty to the plaintiff, the public duty rule asks whether there was any enforceable duty to the plaintiff in the first place." *Raas*, 729 N.W.2d at 448 (quoted with apparent approval in *McFarlin*, 881 N.W.2d at 59).

While the doctrine prevents a general duty from arising, whereas sovereign immunity bars recovery once duty attaches, both principles effectively preclude recovery from municipalities. Pointing out that they reach the same point from different directions does nothing to address the incompatibility of the public duty doctrine and the IMTCA from the viewpoint of public policy. "The law can stitch together legal theories…,

but the underlying public policy ultimately drives the creation of a duty of care. …Courts normally seek to find remedies for wrongs….” Huck v. Wyeth, Inc., 850 N.W.2d 353, 381–82 (Iowa 2014)(Cady, C.J., concurring specially). The legislature clearly expressed its intent in the IMTCA to make “every municipality… subject to liability for its torts.” Iowa Code § 670.4. It cannot credibly be argued that this Court’s continued application of the public duty doctrine to *restrict* municipal tort liability is compatible with this legislative intent. As the *McFarlin* dissent accurately observed:

“If the state is to be treated like a private litigant, the public-duty doctrine must give way because its practical effect is to ‘create immunity where the legislature has not.’” 881 N.W.2d at 66 (citation omitted).

The incompatibility of the public duty doctrine and the IMTCA is particularly apparent here. The district court ruled that although the individual defendant—Becker—could be held liable for the obstruction in the County’s right of way, the public duty doctrine precluded any recovery from the County for the very same obstruction. That result defies legislative intent that municipalities be held responsible the same as other tort defendants.

Three dissenting justices in *McFarlin* were prepared to abandon the public duty doctrine, and they offered the following compelling statutory analysis for doing so:

> The phrase "the state shall be liable" in section 669.4 is susceptible to two reasonable interpretations. It might mean only that the legislature intended to remove the immunity the state previously enjoyed when it otherwise owed a duty. But it might also mean the legislature intended to lift the state's immunity with certain enumerated exceptions and put the state and private individuals on equal footing with respect to tort liability. I believe the second interpretation is correct because it gives meaning to the related phrase "to the same claimants, in the same manner, and to the same extent as private individuals." Iowa Code § 669.4; *see id.* § 4.4(2)("The entire statute is intended to be effective."); *Neal v. Annett Holdings, Inc.*, 814 N.W.2d 512, 520 (Iowa 2012)(noting we interpret statutes to give all words and phrases meaning while assuming no provision is superfluous). We must give meaning to the legislature's clear expression of the principle of sameness in this tort liability context.

McFarlin, 881 N.W.2d at 65 (Hecht, J., dissenting). The dissenters concluded, "In short, the public-duty doctrine is an anachronistic common law framework that we often avoid—and we should finally cut bait and abandon it altogether." *Id*. at 67.

The cogent analysis employed by the *McFarlin* dissent is equally applicable to the IMTCA. Indeed, this Court has made the following observation regarding the legislature's intent in enacting the IMTCA: "The legislature could not have expressed better or more consistently its intention

to impose—*in the same manner as in the private sector*—municipal tort liability for negligence based on breach of a statutory duty." *Wilson*, 282 N.W.2d at 669 (emphasis added). Section 670.2 states that "[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*." (Emphasis added.) This statute, like section 669.4, is all encompassing and allows exceptions *only* as specified in chapter 670. Chapter 670 does not include the public duty doctrine as an exception to municipal tort liability. *See* Iowa Code § 670.4. Thus, to give meaning to all words and phrases in the IMTCA, the public duty doctrine cannot legitimately serve as serve as a roadblock to municipal tort liability.

The failure to give full meaning to the IMTCA appears to stem from a fear that the legislature may have opened up the State and its subdivisions to a multitude of suits. This reasoning interferes with the powers given to the legislature, a co-equal branch of government entrusted with making those decisions. As the Iowa Supreme Court noted,

> We also are unimpressed by policy arguments urged in some cases...that failure to exempt the municipality from its negligence would have a disastrous financial impact....
>
> Most important...is the fact that *financial consequences of legislation must be the primary responsibility of the legislature*

> *and cannot weigh heavily in the court's function of interpreting statutory language*. We have no reason to believe our legislature did not weigh those factors when enacting and amending chapter 613A [now chapter 670]. Allowing understandable concerns over fiscal effects to control statutory interpretation will destroy carefully constructed legislation.

Wilson, 282 N.W.2d at 674 (emphasis added). Put simply, "[t]he judicial branch of government has no power to determine whether legislative Acts are wise or unwise." *Strong*, 179 N.W.2d at 367. Rather, this Court must construe chapters 318 and 670 "liberally… with a view to promote [their] objects[16] and assist the parties in obtaining justice." Iowa Code § 4.2. When the legislature has determined to permit seriously injured persons, often the most weak and vulnerable in society, to bring claims against the government that harmed them, the same as against other defendants, it behooves the Court not to obstruct this legislative avenue of justice by stitching together judicial doctrine contrary to clear legislative intent.

For the reasons discussed, the public duty doctrine is patently inconsistent with the IMTCA. This case presents an opportunity to abandon this anachronistic doctrine, which no longer serves a useful purpose. Plaintiff requests that this court rule the public duty doctrine is no longer

[16] Respectively, the removal of right-of-way obstructions for the "safety [of] those traveling the public roads," and municipal liability for torts arising from the County's failure to do so, as already discussed.

viable. To the extent *Kolbe*, *Raas*, and *McFarlin* contradict this conclusion, those cases should be overruled.

III. Even if not abandoned, the public duty doctrine does not apply in this case.

A. The public duty doctrine does not apply because this case is not an exceptional case in which an articulated principle or policy warrants denying or limiting liability in this class of cases.

"'[T]he existence of a duty to conform to a standard of conduct to protect others'" is a required element of actionable claims for negligence. *Thompson*, 774 N.W.2d at 834 (citations omitted). The County claimed the public duty doctrine prevented any duty from flowing to Plaintiff: "'[A] breach of a duty owed to the public at large is not actionable unless the plaintiff can establish, based on the unique or particular facts of the case, a special relationship between the [County] and the injured plaintiff' consistent with the rules of Restatement (Second) of Torts 315." (County's Brief p.6 (quoting *Kolbe*, 625 N.W.2d at 729).) The district court erroneously agreed with this argument. Plaintiff contends that even if the public duty doctrine is still viable in Iowa, it does not apply in this case because the duty at issue here was not "owed to the public at large."

Before focusing on the public duty doctrine, it is helpful to put that discussion in context. In the landmark *Thompson* decision, the Iowa

Supreme Court adopted section 7 of the Third Restatement. 774 N.W.2d at 835. Section 7(a) provides: "An actor ordinarily has a duty to exercise reasonable care when the actor's conduct creates a risk of physical harm." Restatement (Third) of Torts § 7(a). An actor's conduct can create a risk of harm "by exposing another to the improper conduct of third parties." *Id.* § 7 cmt. *o*.

Section 7(b) permits very limited exceptions to this general rule of duty:

> In exceptional cases, when an articulated countervailing principle or policy warrants denying or limiting liability in a particular class of cases, a court may decide that the defendant has no duty or that the ordinary duty of reasonable care requires modification.

Id. § 7(b). Because the general duty of reasonable care usually applies, "in most cases involving physical harm, courts 'need not concern themselves with the existence or content of this ordinary duty.'" *Thompson*, 774 N.W.2d at 834 (quoting Restatement (Third) of Torts § 6 cmt. *f*, at 81). "Thus, the duty of reasonable care is the norm and courts are to depart from that norm only when public policy justifies an exception to the general rule." 10 Ia. Prac., Civil Practice Forms ch. 68 Introduction; *accord Hoyt*, 829 N.W.2d at 775 ("[N]o-duty rulings should be limited to exceptional cases in which '"an articulated countervailing principle or policy warrants denying or limiting

liability in a particular class of cases."'" (citations omitted)). Moreover, when courts depart from the normative duty of reasonable care, judges should "justify in explicit terms any reasons for declining to impose a duty in a given scenario." *Hoyt*, 829 N.W.2d at 776 (citing *Thompson*, 774 N.W.2d at 835 (citing Restatement (Third) of Torts § 7 cmt. *j*, at 82)).

The County apparently believes the present case is "exceptional" and the public duty doctrine is an articulated policy that warrants denying liability when a municipality is sued for its negligence in roadway safety. Plaintiff submits that a no-duty decision in this case cannot be justified, particularly when duty is the norm under *Thompson* and liability is the norm under chapter 670. The County has a high mountain to climb.

The public duty doctrine was a creature of common law. It arose in the context of protecting municipalities from liability for negligence related to fire or police protection. *See* Restatement (Third) of Torts § 37, cmt. *i* ("The 'public duty' doctrine... denies a tort-law duty to provide police, fire, and other protective services to members of the public generally...."). Here, Katie was not injured by the County's failure to provide police protection, fire protection or similar *protective services* to the public generally. She was injured by the County's failure to remove from its right of way an

obstruction posing a grave danger to travelers thereon. The question, then, is what are the "reasons for declining to impose a duty in [this] scenario"?

Right-of-way obstructions are so common and expected that the government has long understood the need to anticipate them and to delegate to highway authorities the duty to remove them. *See* Iowa Code § 318.4 (2007); *id*. § 319.1 (1971); *id*. § 4834 (1924). By its very nature, an obstruction "impedes, opposes, or interferes with the free passage along the highway right-of-way." Iowa Code § 318.1(6)(defining "obstruction"). Imagine the chaos and inevitable harm if highways were constructed and opened to travelers, but no one had any power or responsibility to prevent third parties from placing obstructions in the right of way. The fact that a third party created the obstruction does not shield the County from a duty to act when it holds the right of way open to travelers. *See* Restatement (Third) of Torts § 7 cmt. *o* ("Conduct may also create risk by exposing another to the improper conduct of third parties."); *cf. id*. § 19 ("The conduct of a defendant can lack reasonable care insofar as it foreseeably combines with or permits the improper conduct of the plaintiff or a third party.")[17]; *id.* § 37 cmt. *c* ("The proper question is not whether an actor's failure to exercise

[17] To the extent Iowa may not yet have formally adopted section 19 of the Restatement (Third) of Torts: Liability for Physical and Emotional Harm, Plaintiff now urges the Court to do so expressly.

reasonable care entails the commission or omission of a specific act. Instead, it is whether the actor's entire conduct created a risk of harm."). Without the County opening its highway and choosing to keep it open[18] notwithstanding its failure to have the obstruction removed, Katie could not have been exposed to the improper conduct of the Beckers.

In *Symmonds*, this Court recognized the danger in applying the public duty rule to a case involving highway safety: "To hold under these circumstances, as a matter of law, the county should be immune from liability for failing to post a stop sign in a situation clearly entailing foreseeable harm or damage to persons traveling on its secondary road would be against logic, sound reason, and enlightened public policy." 242 N.W.2d at 265. Nonetheless, the County apparently urges that it has the right to open a right of way to travelers without any corresponding duty to those travelers to exercise reasonable care in the maintenance of the right of way, absent a special relationship consistent with section 315 of the Second Restatement. The County's logic would lead to preposterous results. If a

[18] Unlike *McFarlane*, where dredging was useful, permissible, and necessarily ongoing, the obstruction here was useless, illegal, and subject to immediate removal. The County's power to remove the obstruction, vacate or temporarily close its right-of-way, utilize a detour, or a Fitch Barrier, distinguishes this case from *McFarlane*, where restricting lake usage was impossible due to both the public trust doctrine applicable to state-owned natural resources and practical realities. *See also Schaller v. State*, 537 N.W.2d 738, 743 (Iowa 1995).

collision occurred killing both drivers and leaving their mangled vehicles in the right of way, then under the County's position, the County owes no enforceable duty to remove the vehicles, now or ever, regardless of how many travelers are harmed by the abandoned obstructions, absent a special relationship that the County denies. If an essential stop sign were removed by vandals, the County apparently believes it could go more than 40 years without ever owing travelers a duty to replace it, regardless of how many subsequent deaths result, absent a special relationship that the County denies. If a river takes out a bridge or, over the years, persistent heavy rainfall erodes a 100-foot-deep gully in the right of way next to the roadway, the County apparently owes no duty to travelers to fix the death trap or even warn about it—ever—absent a special relationship consistent with section 315 of the Second Restatement that the County denies. **What policy is advanced or problem addressed by applying the public duty doctrine under these facts?** Certainly not government accountability and certainly not public safety. What makes this case "exceptional" so as to allow the County to avoid its general duty of reasonable care? The County fails to answer these critical questions required under the framework of the Third Restatement.

Even if the public duty doctrine survived Iowa's adoption of the Third Restatement, the County still must justify application of that doctrine within the framework of the Third Restatement. When no-duty rulings are limited to "exceptional problems of policy or principle," as they are under the Third Restatement, courts should "justify in explicit terms any reasons for declining to impose a duty in a given scenario." *Hoyt*, 829 N.W.2d at 776; *accord Thompson*, 774 N.W.2d at 83. Here, the County has not shown an exceptional problem of policy or principle and has not justified in explicit terms why the court should decline to impose a duty in this scenario. It simply relies on the traditional rules governing application of the public duty doctrine espoused in *Kolbe*, a distinguishable decision[19] that predated Iowa's adoption of the Third Restatement: (1) "'if a duty is owed to the public generally, there is no liability to an individual member of the group'"; and (2) "'[A] breach of duty owed to the public at large is not actionable unless the plaintiff can establish... a special relationship... consistent with the rules of Restatement (Second) of Torts section 315.'" (County's Brief p.6 (quoting *Kolbe*, 625 N.W.2d at 729)). These statements from *Kolbe* fail to reveal any exceptional problem of policy or principle warranting a no-duty finding *in this class of cases involving highway safety*. Rather, the County's

[19] *See* Argument III.B.

position leads to dangerous and preposterous results, as exemplified above. Additionally, for the reasons stated, the County's reliance on the public duty doctrine in this case is at odds with *Thompson*, the Third Restatement, and chapter 670 imposing liability on municipalities for their torts. For all these reasons, the County has failed to meet its burden to demonstrate that the public duty doctrine justifies an exception to the general duty rule of the Third Restatement so as to deny claims by travelers using public roads in this class of cases involving highway safety.

B. The duty of the County in this case is owed to a class of citizens—travelers using the public road—and not simply to the public in general.

In addition to the County's failure to articulate cogent reasons for a no-duty rule in this class of cases, the County also fails to make a convincing argument that the duty owed in this case is owed to the public in general. The County states Plaintiff was "one of the 'general users of the road.'" (County's Brief p.7.) The Iowa Supreme Court *already* recognized traveling citizens as an identifiable group to which a governmental entity owes a duty of reasonable care, *notwithstanding* the public duty doctrine.

In *Harryman*, this Court held the county's "duty to maintain the county roads in proper condition" ran "to all those rightfully using the roads." 257 N.W.2d at 638. Although the district court had held "these

duties were... owing only to the general public, not to the plaintiffs individually," *id.* at 637, the Iowa Supreme Court rejected that position and held the trial court "erred in deciding plaintiffs had not stated a cause of action." *Id.* at 638. In *Symmonds*, a county was sued for failing to erect a stop sign at a dangerous intersection. 242 N.W.2d at 263. The Court determined the county was not immune from liability, stating: "We have consistently recognized that governmental units, with respect to highways or streets within their jurisdictions, have a responsibility *to the traveling public*." *Id.* at 265 (emphasis added). The Court in *Wilson* explained the significance of these decisions:

> *Harryman* and *Symmonds* make it clear a municipality is liable for tortious commissions and omissions when authority and control over a particular activity has been delegated to it by statute and breach of that duty involves a foreseeable risk of injury to an identifiable class to which the victim belongs. The duty in those cases ran "to all those rightfully using the roads," *Harryman*, 257 N.W.2d at 638, and "to the traveling public," *Symmonds*, 242 N.W.2d at 265.

282 N.W.2d at 671.

These decisions followed more than 100 years of Iowa precedent[20] recognizing the government owes a duty to travelers using the public roads, and they remained good law for another 40 years before *McFarlin*. In a footnote, the *McFarlin* majority concluded, with no analysis, "We no longer

[20] *See* Argument I.

recognize county-wide special classes of motorists after *Kolbe.*" *McFarlin*, 881 N.W.2d at 62 n.6 (referring to *Harryman* and *Symmonds*). The County seized on this dicta below, asserting "[t]ravelers on the road are not a specific group or specialized class." (County's Brief p.7.)

This Court should disavow the ill-advised dicta in *McFarlin* and should instead follow binding precedent articulated in *Harryman* and *Symmonds* to hold the County owed a duty of reasonable care to the travelers using its road, and not simply to the general public. Contrary to the *McFarlin* dicta that after *Kolbe* Iowa no longer recognizes "county-wide special classes of motorists," ***Kolbe* did not articulate or even suggest such a change in the law.** In *Kolbe*, the Court simply said that *the licensing statute* at issue in that case was "for the benefit of the public at large." 625 N.W.2d at 729. The Court in *Kolbe* did not overrule *Harryman* or *Symmonds*, nor did the Court imply that those decisions were wrong.

Moreover, there is a qualitative difference between the regulatory licensing statute at issue in *Kolbe*, and the statutory duties regarding the safety of public roads under the counties' control at issue in *Harryman*, *Symmonds*, and the present case. This difference is illustrated by the Court's rationale in *Kolbe*. The *Kolbe* Court offered the following public policy consideration in support of its decision: "A recognition of the tort for

'negligent issuance of a driver's license' would likely chill the State's licensing determinations, making it unreasonably difficult for [senior citizens] to secure a driver's license." *Id*. at 730. This consideration simply does not exist when it comes to removing obstructions from Iowa's roadways. There is no downside to recognizing that a county has a duty to travelers on its highways to maintain its right of way; to the contrary, tort liability will encourage governmental accountability and thereby roadway safety, which as noted earlier is the legislative purpose underlying the County's duty to remove obstructions. Paraphrasing from *Symmonds*, "To hold under these circumstances, as a matter of law, the County [owed no duty to travelers on the highway] for failing to [remove obstructions in the right of way] in a situation clearly entailing foreseeable harm or damage to persons traveling on its secondary road would be against logic, sound reason, and enlightened public policy." 242 N.W.2d at 265.

C. The public duty doctrine is not applicable because the County has a special relationship with travelers using the public road, because *McFarlin* is distinguishable, and because the County's argument fails under the provisions of the Second Restatement on which the doctrine is based.

The County claimed Plaintiff had to establish a special relationship with the County to successfully show that the County owed her a duty of

reasonable care. (County's Brief p.6.) The County cites section 315(b) of the Second Restatement to define that duty. *Id.* Section 315 provides:

> There is no duty so to control the conduct of a third person as to prevent him from causing physical harm to another unless ...
>
> (b) a special relationship exists between the actor and the other which gives to the other a right of protection.

Section 315 of the Second Restatement was replaced by section 37 of the Third Restatement. *See* Restatement (Third) of Torts § 37 cmt. *a* ("This Section replaces both § 314 and § 315 of the Second Restatement."). *Cf. Hoyt*, 829 N.W.2d at 776, 776 n.4 (examining duty principles of various sections of the Third Restatement, including section 37). Section 37, entitled "No Duty of Care with Respect to Risks Not Created by Actor," states: "An actor whose conduct has not created a risk of physical or emotional harm to another has no duty of care to the other unless a court determines that one of the affirmative duties provided in §§ 38-44 is applicable." By virtue of the exceptions referenced in section 37, consideration must also be given to sections 38 through 44.[21]

[21] To the extent the Court may perceive that Iowa has not yet formally adopted sections 37 through 44 of the Restatement (Third) of Torts: Liability for Physical and Emotional Harm, Plaintiff suggests the Supreme Court's adoption of the analytical framework of the Third Restatement in *Thompson* necessarily carries with it all components of that analytical framework, including sections 37 through 44. All sections of the Third Restatement clearly interrelate. Hence, it

Before considering whether any of these sections establish an affirmative duty, Plaintiff submits a general duty already attaches under section 7 of the Third Restatement, which requires no special relationship. Following *Thompson*, the common law duty analysis is this simple: "An actor ordinarily has a duty to exercise reasonable care when the actor's conduct creates a risk of physical harm." Restatement (Third) of Torts § 7(a). Importantly, an actor's conduct can create a risk of harm within the meaning of section 7 "by exposing another to the improper conduct of third parties." *Id.* § 7 cmt. *o*. After quoting section 7(a), and observing that foreseeability is now eliminated from duty determinations, the Iowa Supreme Court concluded in *Thompson* that "in most cases involving physical harm, courts 'need not concern themselves with the existence or content of this ordinary duty,' but instead may proceed directly to the elements of liability set forth in section 6." *Thompson*, 774 N.W.2d at 834 (citing Restatement (Third) § 6 cmt. f). Applying the public duty doctrine to common law claims based on the County's failure to exercise reasonable care in performing its functions, such as in the course of opening its right of way to travelers or keeping it open to travelers, would conflict with the duty framework in section 7 of the Third Restatement adopted in *Thompson*.

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would be illogical to adopt and apply some portions but not others. Therefore, Plaintiff asks the Court to apply the Third Restatement principles in their entirety.

Yet even if this Court requires Plaintiff to show a special relationship, she can do so. Most pertinent of those sections referenced in section 37 is section 38, entitled "Affirmative Duty Based on Statutory Provisions Imposing Obligations to Protect Another," and section 40, entitled "Duty Based on Special Relationship with Another." Both sections support the existence of a special duty in this context.

Section 38. Section 38 quite simply provides: "When a statute requires an actor to act for the protection of another, the court may rely on the statute to decide that an affirmative duty exists and to determine the scope of the duty." Here, Iowa Code section 318.4 requires the County to "cause all obstructions in a highway right-of-way under its jurisdiction to be removed." The express purpose of this statute is "to enhance public safety for those traveling the public roads." Iowa Code § 318.2. The County was well aware of its duty to act for the safety of travelers when it enacted Humboldt County Ordinance No. 45, wherein it declared that the creation of an obstruction is a public nuisance and that the ordinance's purpose included restricting "farming, fencing or *otherwise abusing such right-of-way*, which will... cause *hazardous* obstructions [and] *create potential liability to*

Humboldt County." (Ordinance p.1)[22] The statutory requirement to remove obstructions from the County's right of way was expressly intended to protect travelers using the roads from harm, including the very type of harm sustained by Plaintiff. As such, section 318.4 supports the imposition of an affirmative duty of reasonable care that satisfies the public duty doctrine's special-relationship exception, if one is required.

Section 40(b)(3). Turning to section 40 of the Third Restatement, that section provides in pertinent part:

> (a) An actor in a special relationship with another owes the other a duty of reasonable care with regard to risks that arise within the scope of the relationship.
>
> (b) Special relationships giving rise to the duty provided in Subsection (a) include:
>
> ...
>
> (3) a business *or other possessor of land that holds its premises open to the public with those who are lawfully on the premises*,
>
> ....

Restatement (Third) of Torts § 40 (emphasis added). "Section 40 thus modifies the general proposition of section 37 that actors typically owe no duty to protect victims from the conduct of third parties," and it "clarifies that a duty of reasonable care applies as a result of these special relationships." *Hoyt*, 829 N.W.2d at 776.

[22] This ordinance references Iowa Code chapter 319, which contained the predecessor to section 318.4.

Section 40(b)(3) in particular makes clear that possessors of land owe a duty to exercise reasonable care in the maintenance of their premises for the protection of lawful visitors.[23] This duty encompasses "a pure affirmative duty" of reasonable care even when "the actor had no role in creating the risk of harm to the other." Restatement (Third) of Torts § 40 cmt. *c*. "Thus, it applies to risks created by the individual at risk as well as those created by a third party's conduct, whether innocent, negligent, or intentional." *Id.* § 40 cmt. *g*. This duty also includes conduct that merely results in an enhanced injury to a lawful visitor. *Id.* § 40 cmt. *f*, illus. 1 & 3. With respect to subsection (b)(3) in particular, section 40 imposes a duty of reasonable care on "possessors of land who hold their land open to the public... to persons lawfully on their land who become... endangered by risks created by third parties." *Id.* § 40 cmt. *j*; *accord id*. § 51 ("A land possessor has a duty to identify risks that exist on the land.").

[23] The County is a possessor of land under the Third Restatement. *See* Restatement (Third) of Torts § 49 cmt. *d* ("Possession of land may be divided among several actors.... In such cases each actor has the duty provided in this Chapter with respect to the portion of the premises *controlled by that actor*." (Emphasis added.)). "A person is in control of the land if that person has the authority and ability to take precautions to reduce the risk of harm to entrants on the land, which is the reason for imposing the duties contained in this Chapter on land possessors." *Id*. § 49 cmt. *c*. As already discussed, the County had the authority and ability to remove the obstruction in its right of way. Therefore, it controlled the premises to that extent and had the corresponding duties that attach to possessors of land.

Plaintiff was lawfully using the County's right of way at the time of her injury. Although the County's duty does not extend to trespassers or other persons who are not lawful visitors, *Koenig v. Koenig*, 766 N.W.2d 635, 645-46 (Iowa 2009), Katie was not a trespasser. For example, if the County closes its right of way for purposes of resurfacing, then the County owes no duty to the trespasser who gains unauthorized access by driving around the roadblocks and who runs into road maintenance equipment or even into the concrete wall that the County has not yet had time to remove before completing its project.

Here, however, the County chose to keep its right of way open for forty years (excluding any time closed for maintenance) even though the right of way contained a dangerous obstruction. The highway was under the jurisdiction of the County by virtue of its right-of-way easement. (App. 294; 166 (admitting "[a]t all times material hereto, the public highway has been, and remains, under the jurisdiction of the County.")) The County kept its right of way open to travelers, like Katie, who was a lawful visitor. Accordingly, the County owed Katie "a duty of reasonable care with regard to risks that [arose] within the scope of [their] relationship." It cannot be disputed that the danger of a concrete obstruction to travelers using this road was a risk that arose within the context of the relationship between the

County, who possessed and controlled the right of way, and Katie, who lawfully used the right of way. Accordingly, Katie had a special relationship not only under section 38, but also as a lawful visitor under section 40(b)(3).

***McFarlin* distinguished.** The County's duty to travelers is fair and just when considering the County controlled the highway within its jurisdiction, held authority to remove the obstruction as statutorily required, and was better positioned to remove obstructions within its own right of way than were travelers. The County's control and affirmative duty to remove obstructions easily distinguishes this case from *McFarlin* in ways beyond those discussed elsewhere herein.

The *McFarlin* majority pointed out that the defendant State's DNR merely had "regulatory oversight duties... akin to a police officer or park ranger." *McFarlin*, 881 N.W.2d at 64. In contrast, the County's role here was broader than mere regulation; the County was charged with the affirmative obligation to remove right-of-way obstructions for safety purposes. *See* Iowa Code § 318.4. The *McFarlin* majority also noted that the State did not have control of the dredge pipe struck by the boat in which the decedent was riding. As the majority observed, "Liability follows control." *McFarlin*, 881 N.W.2d at 64; *accord Symmonds*, 242 N.W.2d at 265 (noting city was liable in tort "because authority and control over a

particular activity had been delegated to it"). The rule that "liability follows control" should prevail here where the County indisputably retained control of its own right of way and held ongoing authority to cause obstructions to be removed.

Adding support to the conclusion that liability follows control is a comment to section 40, which states, "some relationships necessarily compromise a person's ability to self-protect, while leaving the actor in a superior position to protect that person." Restatement (Third) of Torts § 40, cmt. *h*. Any traveler, especially one in Katie's position as a sleeping passenger, would have been similarly unable to protect herself. The speed at which travel is intended on highways not only makes right-of-way obstructions more dangerous than at slower speeds; modern travel diminishes travelers' ability to self-protect by seeing obstructions sufficiently in advance of hitting them such that the traveler can avoid or remove the obstructions themselves. Travelers rely on counties to follow the law and remove obstructions for travelers' protection. Clearly, the County was in a superior position to protect travelers by removing obstructions. Therefore, acknowledging the special relationship between highway travelers and the entities having control and responsibility for the safety of

those highways is entirely consistent with the legal principles set out in sections 38 and 40 of the Third Restatement and in *McFarlin*.

Additional special relationships. Although the special relationship inherent in Iowa premises liability law and expressly recognized in section 40(b)(3) fits nicely, the list of relationships identified in section 40(b) is not exclusive. *See* Restatement (Third) of Torts § 40 cmt. *o* (explaining nonexclusive). "Courts may, as they have since the Second Restatement, identify additional relationships that justify exceptions to the no-duty rule contained in § 37." *Id*. Iowa case law has historically recognized the special relationship between a county and travelers on county roads.

In *Harryman*, the Iowa Supreme Court held

> the Board of Supervisors and county engineer clearly had a duty to maintain the county roads in proper condition. §§ 309.67, 319.1, 319.7, The Code, 1971. *This duty runs to all those rightfully using the roads. Cf. Conrad v. Board of Supervisors*, 199 N.W.2d 139, 144 (1972). A breach of that duty can occur either by negligent commission or omission.

257 N.W.2d at 638 (emphasis added). Similarly, in *Symmonds*, the Court stated:

> *We have consistently recognized that governmental units, with respect to highways or streets within their jurisdictions, have a responsibility to the traveling public.* Ehlinger v. State, 237 N.W.2d 784, 788-789 (Iowa 1976); Anderson v. Lyon County, 206 N.W.2d 719, 721-722 (Iowa 1973); Stanley v. State, 197 N.W.2d 599, 602-604 (Iowa 1972).

> Applying the law as it existed prior to enactment of chapter 613A, *we held a city's liability in tort arose because authority and control over a particular activity had been delegated to it.* We applied the same rule with respect to a county's obligation to maintain bridges until we extended it the State's immunity cloak in Post v. Davis County, 196 Iowa 183, 191 N.W. 129 (1923). *Since abrogation of immunity in chapter 613A the same concept should apply to counties.*
>
> Scott County had jurisdiction of this secondary road, § 306.4, The Code, 1971. It was authorized to place traffic control devices upon the road to warn traffic, § 321.255, The Code 1971, including a stop sign at a particularly dangerous railroad crossing, § 321.342, The Code, 1971. *This jurisdiction and authority, under long-standing case law, supra, affords a basis for imposing an affirmative obligation to act where due care would require it.*

Symmonds, 242 N.W.2d at 265 (emphasis added and citations omitted); *see Wilson*, 292 N.W.2d at 671 ("*Harryman* and *Symmonds* make it clear a municipality is liable for tortious commissions and omissions when authority and control over a particular activity has been delegated to it by statute and breach of that duty involves a foreseeable risk of injury to an identifiable class to which the victim belongs."). Whereas, in *McFarlin*, the State delegated control of day-to-day operations to a local entity, 881 N.W.2d at 64, Humboldt County retained control over its own right of way, as demonstrated by the County's removal of other right-of-way obstructions, including concrete block walls abutting other driveways. (App. 247-280.)

Recognizing the County's affirmative duty under section 40 is consistent with the legislature's determination counties should be delegated the responsibility for protecting travelers by removing obstructions. *See* Iowa Code § 318.4. Based on these authorities, it is appropriate, just, and legally sound to recognize the special relationship between counties and travelers and the County's corresponding affirmative duty under section 40.

The Second Restatement. Without otherwise abandoning or limiting the duty established under the Third Restatement, the County's position even fails under the Second Restatement under the facts of this case. Section 314 of the Second Restatement provides:

> § 314. Duty To Act For Protection Of Others
>
> The fact that the actor realizes or should realize that action on his part is necessary for another's aid or protection does not of itself impose upon him a duty to take such action.

Restatement (Second) of Torts § 314 (1965). Section 315 clarifies the broader rule set forth in Section 314. *See Lamb v. Hopkins*, 492 A.2d 1297, 1300 (Md. Ct. App. 1985)("Section 315 is a special application of the general rule set forth in § 314.").

> "There is no duty so to control the conduct of a third person as to prevent him from causing physical harm to another unless

> (a) a special relation exists between the actor and the third person which imposes a duty upon the actor to control the third person's conduct, or
>
> (b) a special relation exists between the actor and the other which gives to the other a right to protection."

Kolbe, 625 N.W.2d at 728 (quoting Restatement (Second) of Torts § 315).

The element of control is key.

> *d*. The rule stated in this Section [314] applies only where the peril in which the actor knows that the other is placed is not due to any active force which is under the actor's control. *If a force is within the actor's control, his failure to control it is treated as though he were actively directing it and not as a breach of duty to take affirmative steps to prevent its continuance* (see § 302, Comments *a* and *c*).
>
> **Illustrations:**
>
> 2. A, a factory owner, sees B, a young child or a blind man who has wandered into his factory, about to approach a piece of moving machinery. A is negligent if he permits the machinery to continue in motion when by the exercise of reasonable care he could stop it before B comes in contact with it.
>
> 3. A, a trespasser in the freight yard of the B Railroad Company, falls in the path of a slowly moving train. The conductor of the train sees A, and by signaling the engineer could readily stop the train in time to prevent its running over A, but does not do so. While a bystander would not be liable to A for refusing to give such a signal, the B Railroad is subject to liability for permitting the train to continue in motion with knowledge of A's peril.

Restatement (Second) of Torts § 314 cmt. *d* (emphasis added).

The County is akin to the factory owner and the railroad in these illustrations. Whereas another traveler on the road who passively observes the Beckers construct and maintain their concrete wall, but who has no control over them, would have no duty to intervene, nor authority to remove the wall, the County was positioned to do so. The County held a right-of-way easement that by its nature restricted the Beckers' use of the property. *Schwartz v. Grossman*, 173 N.W.2d 57, 61 (Iowa 1969)(although dominant owner's rights in right-of-way easement are not exclusive, a serviant estate may only use "the easement strip for any purpose not inconsistent with [such] easement"). Beyond the County's statutory duty, the County's right-of-way easement empowered the County to control the right of way and to *control* and prohibit the Beckers' construction and maintenance of an obstruction therein. Because the Beckers' actions constructing and maintaining the right-of-way obstruction were within the County's control, the Restatement (Second) treats *the County's failure to control as though the County were actively directing the Beckers and not as a breach of duty to take affirmative steps to prevent its continuance***.** *See* Restatement (Second) § 314 cmt. *d*. Even if the Second Restatement continued to apply and the public duty doctrine were not abandoned, the County's right to control the

Beckers' actions satisfies the special relationship requirement advanced by the County.

IV. Even if the public duty doctrine applies, the doctrine does not impact Plaintiff's claims based on premises liability, nuisance or implied private cause of action arising out of statute.

The County asked that the district court apply the public duty doctrine to support dismissal of Counts II, III, IV, and V. The district court committed clear error by dismissing all of Plaintiff's claims against the County (including Count VI)[24], because the doctrine has limited application and can only prevent the recognition of a common law duty of reasonable care.

> The public duty doctrine... *does not apply where the government's duty is defined by other generally applicable principles of law*.

Kent v. City of Columbia Falls, 350 P.3d 9, 16 (Mont. 2015)(emphasis added)(citing *Gatlin-Johnson v. City of Miles City*, 291 P.3d 1129 (Mont. 2012)(finding public duty doctrine inapplicable to premises liability)). For example, the doctrine would not protect the government from premises liability claims. *See id.* Similarly, there is no authority the doctrine protects the government from liability for public nuisance. *See, e.g., Ryan v. City of Emmetsburg*, 4 N.W.2d 435, 439 (Iowa 1942) ("'Nuisance is a condition,

[24] Added in Second Amended Petition.

and not an act or failure to act on part of the person responsible for the condition. ...[One may be liable therefor,] though he may have used the highest possible degree of care to prevent or minimize the deleterious effects.'" (Citation omitted.)). Similarly, the doctrine would not preclude implied private causes of action arising out of statute. *See McFarlin*, 881 N.W.2d at 57-59 (engaging in analysis of whether statutory provisions offered a private right to sue separate from subsequent analysis of plaintiffs' common law negligence claim that was determined to be precluded by the doctrine). *Cf. Florey v. City of Burlington*, 73 N.W.2d 770, 774 (Iowa 1955)("That the legislature has entrusted to municipality to maintain parks located within their borders is sufficient to make them liable if their failure to perform the duty of safe maintenance results in 'unsafe and dangerous' conditions, causing injury to one exercising due care in availing [herself] of the facilities offered."). Even if this Court concludes that the public duty doctrine precludes Plaintiff's common law negligence claim, that decision would justify dismissal of Count II only, leaving for trial the remaining counts alleging premises liability, common law public nuisance, public nuisance under Iowa Code chapter 657, and violation of statutes creating private right to sue.[25]

[25] The County did not claim as a basis for summary judgment that Plaintiff

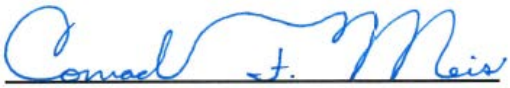
CONCLUSION

The District Court's ruling dismissing Plaintiff's claims against the County should be reversed and the case remanded for trial on all issues. For the same reasons, the district court's ruling denying Plaintiff's motion for partial summary judgment against the County should be reversed, and Plaintiff's motion granted to find the County owed Plaintiff a duty per Code section 318.4 to cause all obstructions in a highway right-of-way under its jurisdiction to be removed, which duty it breached.

REQUEST FOR ORAL ARGUMENT

Counsel for Appellant respectfully requests to be heard in oral argument.

Respectfully submitted,



Conrad F. Meis AT0005319
Buchanan, Bibler, Gabor & Meis
111 North Dodge Street
P.O. Box 617
Algona, Iowa 50511
Telephone: 515-295-3565
Facsimile: 515-295-2158
cfm@buchlaw.com

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cannot establish a private right of action under the factors in *Seeman v. Liberty Mutual Insurance Co.*, 322 N.W.2d 35 (Iowa 1982). The County's motion was based solely on the public duty doctrine.

Michael K. Bush
John C. Bush
Bush, Motto, Creen, Koury & Halligan, P.L.C.
5505 Victoria Ave., Suite 100
Davenport, IA 52807
Telephone: 563-344-4900
Facsimile: 563-344-8961
mbushlaw@bmcklaw.com

ATTORNEYS FOR APPELLANT

CERTIFICATE OF FILING

The undersigned hereby certifies that he e-filed the foregoing Final Brief and Request for Oral Argument on May 5, 2017, to the Clerk of the Iowa Supreme Court, 1111 East Court Avenue, Des Moines, Iowa 50319.

/ Conrad F. Meis /
Conrad F. Meis

CERTIFICATE OF SERVICE

The undersigned certifies a copy of this Final Brief was served on the 5th day of May, 2017, upon the following persons and upon the Clerk of the Supreme Court via EDMS:

Rene Charles Lapierre
Mayfair Center, Upper Level
4280 Sergeant Road Suite 290
Sioux City, Iowa 51106
ATTORNEY FOR DEFENDANT/APPELLEE
HUMBOLDT COUNTY, IOWA

Joel J. Yunek Law Firm, P.L.C.
10 North Washington, Suite 204
P.O. Box 270
Mason City, Iowa 50402
ATTORNEY FOR DEFENDANT SANDRA BECKER

Thomas M. Boes
801 Grand Avenue, Suite 3700
Des Moines, IA 50309-2727

Catherine M. Lucas
801 Grand Avenue, Suite 3700
Des Moines, IA 50309-2727
ATTORNEYS FOR AMICI CURIAE IOWA LEAGUE OF CITIES, IOWA DEFENSE COUNSEL ASSOCIATION, IOWA STATE ASSOCATION OF COUNTIES, IOWA STATE ASSOCIATION OF COUNTY SUPERVISORS, and IOWA MUNICIPAL UTILITIES ASSOCIATION

Jessica Ann Zupp
1919 4th Ave. S., Suite 2
Denison, IA 51442

Joel Fenton
541 31st Street, Suite C
Des Moines, IA 50312
ATTORNEYS FOR AMICUS CURIAE
IOWA ASSOCIATION OF JUSTICE

/ Conrad F. Meis /
Conrad F. Meis

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/Conrad F. Meis /
Conrad F. Meis

May 5, 2017
Date

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I hereby certify that the cost of printing the foregoing Final Brief was the sum of $ 0.00.

/ Conrad F. Meis /
Conrad F. Meis