IN THE SUPREME COURT OF IOWA

Supreme Court No. 16-1896
Humboldt County Case No. LACV018347

KAITLYN JOHNSON f/k/a KAITLYN HELMERS
Plaintiff/Appellant

v.

HUMBOLDT COUNTY, IOWA and SANDRA BECKER, individually and as executor of the ESTATE OF DONALD E. BECKER
Defendants/Appellees

APPEAL FROM THE IOWA DISTRICT COURT OF HUMBOLDT COUNTY
HONORABLE KURT J. STOEBE

FINAL AMICUS BRIEF of the IOWA DEFENSE COUNSEL ASSOCIATION, IOWA LEAGUE OF CITIES, IOWA STATE ASSOCIATION OF COUNTIES, IOWA STATE ASSOCIATION OF COUNTY SUPERVISORS, and IOWA MUNICIPAL UTILITIES ASSOCIATION

Thomas M. Boes AT0001048
Catherine M. Lucas AT0010893
801 Grand Avenue, Suite 3700
Des Moines, IA 50309-2727
Phone: (515) 243-4191
Fax: (515) 246-5808
E-Mail: boes.thomas@bradshawlaw.com
E-Mail: lucas.catherine@bradshawlaw.com

ATTORNEYS FOR AMICI CURIAE

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

STATEMENT OF THE IDENTITY OF THE AMICI CURIAE

The Iowa League of Cities is the unified voice of more than 870 municipalities in the State. Since its founding in 1898, the League has acted as a key resource for Iowa's cities by providing advocacy, training, and guidance to strengthen Iowa's communities. The Iowa State Association of Counties (ISAC) is a private, nonprofit corporation whose members are county officials from Iowa's 99 counties. ISAC's mission is to promote effective and responsible county government for the people of Iowa. The Iowa State Association of County Supervisors is a statewide organization made up of the county supervisors in all 99 counties with a mission to secure cooperation among the several counties of the State of Iowa with a goal to procure efficient methods of local government. The Iowa Defense Counsel Association is a group of more than 330 lawyers and insurance claims professionals who are actively engaged in the practice of law or in work relating to the handling of claims and the defense of legal actions. The Iowa Municipal Utilities Association represents 755 municipal broadband, electric, gas, and water utilities statewide and represents the interests of municipal utilities before the legislatures as well as creates model plans, rules, and ordinances to assist its members in compliance with state and federal requirements.

The defendant in this case is a County, but the issue here is much broader. Whether the municipalities will have a legal duty to prevent harm to an unascertainable and vast amount of individuals is relevant to every Iowan who is served by local governments across the State. Together, these five entities (collectively referred to as the "Municipal Amici") represent the stakeholders on the defense side of municipal liability cases. Contrary to the Iowa Association of Justice's Identity and Interest statement in its brief, that states IAJ is compelled to participate in the debate because the outcome of this case "results in the government no longer being responsible for the safety of its roads," these Municipal Amici endeavor to promote the safety of all persons. A priority of the Municipal Amici is to use their resources to best meet this wide-reaching goal that is in the interest of all Iowa residents, rather than seeking to promote the interests of those who find themselves in the rare situation of falling asleep behind the wheel while driving home from a party after a night of drinking. Thus, together, the Municipal Amici submit this amicus brief in response to the Iowa Association for Justice's request that the Court abandon the longstanding and important public-duty doctrine.

ARGUMENT

Abandoning the public-duty doctrine is not an action the Court should take lightly. Among the important considerations that must be taken into account by this Court in adjudicating the present case are: (1) considerations of *stare decisis*, in that the Iowa Supreme Court has repeatedly and very recently ruled the public-duty doctrine persists and coexists with the Iowa Tort Claims Act and the supreme court has ruled the public-duty doctrine remains good law following adoption the Restatement (Third) of Torts; and (2) sound and essential public policy reasons support the continued viability of the public-duty doctrine in Iowa.

Importantly, if the reasons proffered by the Appellant and the IAJ are sufficient to justify a departure from *stare decisis* in this case, then the doctrine of *stare decisis* ought to be abandoned altogether. Because if the reasoning proffered for abandonment of the public-duty doctrine by these parties is sufficient, then *stare decisis* has plainly become meaningless.

Moreover, a majority of jurisdictions continue to adhere to the public-duty doctrine despite abolition of sovereign immunity and passage of immunity statutes, "concluding that, in both law and policy, the rule is sound and necessary." *Coleman v. E. Joliet Fire Prot. Dist.*, 46 N.E.3d 741, 754 (Ill. 2016) (quoting *Ezell v. Cockrell*, 902 S.W.2d 394, 399 (Tenn. 1995)).

In fact, only seven jurisdictions do not embrace the public-duty doctrine, but rather expose their municipalities to potential liability from an endless and unidentifiable population of claimants. *Id*. at 754–55. Nothing in Iowa has occurred warranting a dramatic departure from the long-standing rule, and as such, abandonment of the doctrine is unjustified and would remove all stability and predictability Iowans deserve. In short, now is not the time and the Judicial Branch is not the place.

I. THE COURT ALREADY DETERMINED THE PUBLIC-DUTY DOCTRINE IS VIABLE SUBSEQUENT TO ENACTMENT OF THE STATE TORT CLAIMS ACT AND THE DOCTRINES OF *STARE DECISIS* AND PRECEDENT SHOULD NOT BE ABANDONED.

The IAJ argues the public-duty doctrine undermines the purpose of the tort claims act. This argument is flawed for several reasons. First, the argument has already been rejected in the context of the Iowa Torts Claims Act (chapter 669) in *Raas v. State*, and thus, should be equally rejected in regards to the Municipal Tort Claims Act (chapter 670),[1] because it is an

[1] One significant difference between the ITCA and the IMTCA is the codification of the "sameness principle" in the ITCA and the omission of that requirement in the IMTCA. Iowa Code section 669.4 provides the state shall be liable "to the same claimants, in the same manner, and to the same extent as private individuals." Chapter 670 has no such requirement. This "sameness principle" was significant in Justice Hecht's dissent reasoning in *Estate of McFarlin v. State*, 881 N.W.2d 51, 65 (Iowa 2016) (J. Hecht dissenting).

improper merger of the duty analysis (and thus the public-duty doctrine) and a breach analysis (and thus the statutory immunity provisions). Second, there is no compelling reason the doctrine of *stare decisis* should be abandoned.

In *Raas v. State* the Iowa Supreme Court squarely rejected the argument that the public-duty doctrine undermines the purpose of the Iowa Torts Claims Act. 729 N.W.2d 444, 448 (Iowa 2007) ("We must first decide whether the public-duty doctrine is still viable in Iowa in view of our adoption of the State Tort Claims Act, Iowa Code chapter 669."). The Court in *Raas* directly found the flaw in the IAJ's argument by concluding the principles involved in sovereign immunity and the lack of a duty under the public-duty doctrine are not the same. *Id.* at 448. The Supreme Court held in *Raas*:

> The public duty rule is not technically grounded in government immunity, though it achieves much the same results. Unlike immunity, which protects a municipality from liability for beach 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.

Id. (quoting Eugene McQuillin, *McQuilin on Municipal Corporation*, § 53.04.25 (3d ed. 2006)). When there is no duty under the public-duty doctrine, there is no need to address the immunity issue. *Id.* at 449 (citing *Kolbe v. State*, 625 N.W.2d 721, 725 (Iowa 2001)).

Essentially, in order to hold in Plaintiff's favor in the present case, the Iowa Supreme Court must overturn many of its own opinions (not even counting the multiple unpublished Iowa Court of Appeals decisions) upholding the validity of the public-duty doctrine after the enactment of the ITCA and IMTCA. *See Estate of McFarlin v. State*, 881 N.W.2d 51 (Iowa 2016), *Summy v. City of Des Moines*, 708 N.W.2d 333, 344 (Iowa 2006); *Kolbe*, 625 N.W.2d at 729*; Sankey v. Richenberger*, 456 N.W.2d 206, 209 (Iowa 1990); *Bockelman v. State*, 366 N.W.2d 550, 554 (Iowa 1985); *Donahue v. Washington Cnty*., 641 N.W.2d 848, 851 (Iowa Ct. App. 2002); *Allen v. Anderson*, 490 N.W.2d 848, 856 (Iowa Ct. App. 1992).

This request to overturn decades of case law leads to the next key point, which is that there is no compelling reason to disregard the doctrine of *stare decisis* in the present case. The threshold for refusing to follow decades of precedent was recently outlined by the Iowa Supreme Court in *Ackelson v. Manley Toy Direct, L.L.C.*, another case in which the IAJ argued via an amicus brief that the law should be as it wants regardless of well-reasoned and established precedent that has prevailed for years. 832 N.W.2d 687 (Iowa 2013). In *Ackelson*, the plaintiff-appellant employees (and the IAJ) argued the Iowa Civil Rights Act permitted a district court to award punitive damages even though the Iowa Supreme Court twenty-seven years

prior had already ruled the ICRA does not permit an award of punitive damages. *Id.* at 679, 681 (citing *Chauffeurs, Teamsters & Helpers, Local Union No 238 v. Iowa Civil Rights Comm'n*, 394 N.W.2d 375, 384 (Iowa 1986)). The supreme court rejected the employees and IAJ's request.

The Iowa Supreme Court reasoned it must be "slow to depart from *stare decisis* and only do so under the most cogent circumstances." *Id.* at 688 (citing *State v. Liddell*, 672 N.W.2d 805, 813 (Iowa 2003)). An important factor in refusing to depart from *stare decisis* was the time frame that the case law stood without any action to the contrary by the legislature. The court elaborated:

> [W]e presume the legislature is aware of our cases that interpret its statutes. *Baumler v. Hemesath*, 534 N.W.2d 650, 655 (Iowa 1995). When many years pass following such a case without a legislative response, we assume the legislature has acquiesced in our interpretation. *Gen. Mortg. Corp. of Iowa v. Campbell*, 258 Iowa 143, 152, 138 N.W.2d 416, 421 (1965).
>
> We have clearly and repeatedly stated our conclusion that the ICRA does not implicitly permit an award of punitive damages. This message has been a reoccurring pronouncement over the last twenty-seven years. No significant legislative changes have been made since our first pronouncement in 1986 that would even hint at a shift in legislative intent since that time.

Id.

Looking to the present case, the ITCA was enacted in 1965 and the IMTCA was enacted 1968. Reported case shows that within two years after

the enactment of the IMTCA, the Iowa Supreme Court utilized the public-duty doctrine to find a county was not liable, despite the recent enactment of the IMTCA. *Iseminger v. Black Hawk Cnty.*, 175 N.W.2d 374, 378 (Iowa 1970) ("Political divisions such as counties, school districts, etc. which are established without any express charter or act of incorporation and clothed with but limited powers we have said, are called quasi corporations, and no action can be maintained against corporations of this class by a private person for their neglect of public duty, unless such right of action is expressly given by statute.") (emphasis added). In forty-seven years of the court applying the public-duty doctrine since the enactment of the IMTCA the Iowa legislature has taken no action alter the judicial interpretation or adjudication of such cases. Moreover, Plaintiff-Appellant and the IAJ point to no legislative history showing the legislature disagreed with the application of the IMTCA and the public-duty doctrine. Forty-seven years is ample time for the legislature to act if it thought judicial decisions applying the public-duty doctrine were contrary to or inconsistent with the ITCA and the IMTCA.

The Court in *Ackelson* also factored in that the issue of punitive damages in civil rights claims has received broad national attention, making it very likely the Iowa legislature would have taken action to alter the law if

it disapproved of the judicial interpretation, particularly in light of the fact the issue is injected with public policy considerations and thus keenly appropriate for legislative consideration. *Id.* (citing *Jensen v. Sattler*, 696 N.W.2d 582, 586 (Iowa 2005) ("The scope of the statute is a matter of public policy and therefore within the province of the legislature."); *cf. Robinson v. Bognanno*, 213 N.W.2d 530, 532 (Iowa 1973) ("[A]n amendment [to enlarge the class protected by the Dram Shop Act] would be the exclusive province of the legislature."), *overruled on other grounds by Lewis v. State*, 256 N.W.2d 181, 192 (Iowa 1977)). Here, the public-duty doctrine has been the subject of national news, particularly in light of Iowa's neighbor to the east abandoning the doctrine by a (very) divided court. *See Coleman v. E. Joliet Fire Prot. Dist.*, 46 N.E.3d 741 (Ill. 2016); S.B. 3070, 99th Gen. Assemb., (Ill. 2016) (specifically referencing *Coleman* and proposing the codification of the public-duty doctrine after its judicial abolishment).[2]

Similar to the reasoning in *Ackelson*, it is apparent the legislature would be "quite surprised to learn [the court] decided to reverse course and take a different position. . . [the Court] did [its] job [forty-seven] years ago

[2] Available online at http://www.ilga.gov/legislation/fulltext.asp?DocName=&SessionId=88&GA=99&DocTypeId=SB&DocNum=3070&GAID=13&LegID=96409&SpecSess=&Session=

and [it should] leave it to the legislature to take any different approach." *Ackelson*, 832 N.W.2d at 688 (quotation changed as noted). Thus, the court should be "confident that our legislature has acquiesced in our position after [forty-seven] years" and find the legislature did not intend to abolish the public-duty doctrine when it created the ITCA and IMTCA. *Id.*

II. THE IOWA SUPREME COURT HAS ALREADY DETERMINED THE PUBLIC DUTY DOCTRINE DOES NOT CONFLICT WITH *THOMPSON V. KACZINSKI*

The IAJ next argues the public-duty doctrine conflicts with *Thompson v. Kaczinski* and the Court's adoption of section 7 of the Restatement (Third) of Torts: Liability for Physical and Emotional Harm. A glance at the IAJ's table of authorities shows one noteworthy and glaring omission: the Supreme Court's less than one-year old opinion of *Estate of McFarlin v. State*, directly rejecting this argument. 881 N.W.2d 51 (2016). In *Estate of McFarlin*, the Court held "**We conclude the public-duty doctrine remains good law after our adoption of sections of the Restatement (Third) of Torts.**" *Id.* at 60 (emphasis added). Even the dissent in *McFarlin* does "not suggest no-duty rules are completely incompatible with the Restatement (Third)." *Id.* at 69 (J. Hecht dissenting). While the IAJ may not agree with *McFarlin*, it cannot be ignored and the argument *Thompson* changed the legal landscape as it relates to the public-duty doctrine by adopting the

section 7 of the Restatement (Third) was already addressed and rejected less than one year ago.

III. POLICY REASONS STRONGLY SUPPORT THE PURPOSE AND CONTINUATION OF THE PUBLIC DUTY DOCTRINE

Lastly, the IAJ argues the municipalities have a broad duty to make roads safe. However, abandoning the public-duty doctrine would actually have a deleterious effect on the services received by all Iowans to their great detriment.

According to the Iowa Department of Transportation,[3] Iowa's roadways consist of:

2014 Public Road Length - Miles by Ownership

Ownership	Miles
Iowa DOT	8,871*
Counties	89,818
Municipalities	15,037
Parks and institutions	622
Federal agencies	138
Total miles	114,486*

*Totals exclude ramps. The Iowa DOT maintains 9,403 miles of roadway, including 532 miles of ramps.

Also according to the IDOT's website, there are more public road miles in Iowa than interstate miles in the entire 50 states and Iowa ranks 14th in the nation in number of miles of roadway, averaging approximately 38 miles of

road for every 1,000 people. The roads of Iowa are not a place that every part can be observed every day. It is a vast area serving an unidentifiable amount of individuals who are using them for an equally vast array of purposes. Avoidance of imposition of a legal duty obligation to all individuals on this vast road system is one of the exact reasons the public-duty doctrine is necessary.

The dissent in *McFarlin* reasoned in an alternative theory that even if the public-duty doctrine was not abandoned, a duty should be owed to the boaters on Storm Lake who were exposed to a risk from the submerged dredge pipe because it was a limited universe of people rather than the "inchoate and generalized risk to any motorist or pedestrian traversing an unspecified roadway that could be literally anywhere." *Estate of McFarland,* 881 N.W.2d at 68 (J. Hecht dissenting). The public-duty doctrine protects municipalities from second-guessing of how they use their resources for the 454 miles of roadway from Larchwood to Keokuk and the 417 miles of roadway from Hamburg to New Albin—and all areas in between. This is the broad duty of care owed by municipalities to members of the general public that the public-duty doctrine is intended to address.

---

[3] Available online at http://www.iowadot.gov/about/Roads,Streets,andBridges.html

The majority opinion of the Illinois case rejecting the public-duty doctrine was cited with disapproval by the Supreme Court in *McFarlin.* 881 N.W.2d at 59 (citing but declining to follow the Illinois Supreme Court's majority opinion in *Coleman*). And the dissent in *Coleman* provides an excellent explanation of why the public-duty doctrine is vital to the proper-functioning government. The dissent reasoned:

> The public duty rule "serves the important purpose of preventing excessive court intervention into the governmental process by protecting the exercise of law enforcement discretion." *Ezell v. Cockrell*, 902 S.W.2d 394, 400–01 (Tenn. 1995). For example, when a local public entity lacks sufficient resources to meet every need of its community, police, fire, rescue ambulance, and other emergency responders "must be able to prioritize and create responses without the benefit of hindsight." *Sawicki v. Village of Ottawa Hills*, 37 Ohio St.3d 222, 525 N.E.2d 468, 477 (1988). Emergency first responders must often react in the midst of unfolding emergency situations when every decision they make is fraught with uncertainty and their own safety may be at risk. See *Morgan v. District of Columbia*, 468 A.2d 1306, 1311 (D.C.1983).

Coleman, 46 N.E.3d at 767–68 (J. Thomas dissenting).

The dissent in *Coleman* relied upon *Cope v. Utah Valley State College* (also relied upon by the Court in *McFarlin*) in finding the public-duty doctrine is necessary to prevent the municipality from becoming "mired hopelessly in civil lawsuits . . . for every infraction of the law" and the local public entities often provide necessary services for their communities where the risk of potential liability to individuals would discourage them from

doing so. *Id.* at 768 (citing *Cope v. Utah Valley State College*, 342 P.3d 243, 248 (Utah 2014) (in turn quoting *Prosser v. Kennedy Enter., Inc.*, 179 P.3d 1178, 1183 (Mont. 2008)).

An analysis of the appellate cases in which Iowa courts have upheld the application of the public-duty doctrine show the wide range of conduct (often conduct outside the municipality's control) that a municipality would now become liable for if this court were to turn its back on the longstanding public-duty doctrine. Abandoning the public-duty doctrine would allow second-guessing of not only decisions regarding how resources are spent on roads, but also:

- law enforcement officers in their decisions investigating domestic abuse, *Ashton v. Brock*, No. 14-1257, 2015 WL 3524387 (Iowa Ct. App. June 10, 2015);
- deciding how to initiate a traffic stop of an intoxicated driver who was traveling greater than 100 miles per hours through traffic on a highway, *Dooley v. City of Cedar Rapids*, No. 09-1926, 2011 WL 1135794 (Iowa Ct. App. Mar. 30, 2011);
- determining whether to seize a family's dog that was aggressive just in case it would be aggressive again against some unknown member

of the public, *Donahue v. Washington Cnty.*, 641 N.W.2d 848, 851–52 (Iowa Ct. App. 2002);

- determining whether an individual should have a driver's license in case he would later cause an accident with some unknown individual, *Kolbe v. State*, 625 N.W.2d 721 (Iowa 2001);
- the timing of responding to a deputy sheriff's radio call for assistance, *Allen v. Anderson*, 490 N.W.2d 848, 856 (Iowa Ct. App. 1992);
- determining whether to arrest a person for operating while intoxicated when the person performed field sobriety tests without any errors, *Hildenbrand v. Cox*, 369 N.W.2d 411 (Iowa 1985);
- failing to prevent the robbery of a jewelry store, *Mastbergen v. City of Sheldon*, 515 N.W.2d 3, 4-5 (Iowa 1994);
- failing to prevent a crazed gunman from opening fire at a meeting, *Sankey v. Richenberger*, 456 N.W.2d 206, 209-10 (Iowa 1990),
- decisions made during the investigation of a crime that result in charging a person with a crime that he is eventually acquitted of, *Smith v. State*, 324 N.W.2d 299, 302 (Iowa 1982);
- failing to prevent a person from murdering his ex-girlfriend after the police officer comforted a citizen by telling her he would keep special

watch, *Hawkeye Bank & Trust Co. v. Spencer*, 487 N.W.2d 94, 96-97 (Iowa Ct. App. 1992);

- decisions in engaging in a high speed chance because the driver eluding police could cause injury to another, *Morris v. Leaf*, 534 N.W.2d 388, 390 (Iowa 1995).

As demonstrated by the preceding list of examples, the public-duty doctrine protects from second-guessing the multiple vital areas to the safety and well-being of Iowans served by government. Allowing a municipality to be liable when it cannot predict the circumstances leading to an event, when it may have no control over the outcome, or it is responsible for making split-second decisions would force all municipalities to question whether and if it will provide services (and to what extent) when it is constantly under the threat of a lawsuit for something that is not within its control. This is the very reason for the public-duty doctrine.

The public-duty doctrine is in place to prevent second-guessing of important work done by the government and under constraints that non-government individuals would not have. All government decisions come with a balancing test of how to spend limited resources to best provide for its citizens. The public-duty doctrine serves all Iowans by allowing municipalities to do their job. It must not be abandoned.

CONCLUSION

Abandoning the public-duty doctrine is not an action the Court should take lightly. Iowa should not leave the majority of jurisdictions that protect its citizens through the public-duty doctrine. The Iowa Supreme Court has previously rejected the argument against the public-duty doctrine, and it is time the last vestige of arguments against it should be squarely rejected.

Nothing in Iowa has occurred to justify a dramatic departure from the long-standing rule, and as such, abandonment of the doctrine is unwarranted and would remove all stability and predictability Iowans deserve. Now is not the time and the Judicial Branch is not the place. The district court's decision finding this case is barred by the public-duty doctrine should be affirmed.

Respectfully submitted,

/s/ Thomas M. Boes
Thomas M. Boes AT0001048
Catherine M. Lucas AT0010893
BRADSHAW, FOWLER, PROCTOR & FAIRGRAVE, P.C.
801 Grand Avenue, Suite 3700
Des Moines, IA 50309-8004
Tel: (515) 243-4191
Fax: (515) 246-5808
E-Mail: boes.thomas@bradshawlaw.com
E-Mail: lucas.catherine@bradshawlaw.com

CERTIFICATE OF COMPLIANCE

1. This Brief complies with the type-volume limitation of Iowa R. App. P. 6.906(3), P. 6.903(1)(g)(1) or (2) because this Brief contains 3,610 words, excluding the parts of the Brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

2. This Brief complies with the typeface requirements of Iowa R. App. P. 6.903(1)(e) and the type-style requirements of Iowa R. App. P. 6.903(1)(f) because this Brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14 point, Times New Roman.

/s/ Thomas M. Boes
Thomas M. Boes AT0001048

CERTIFICATE OF FILING AND SERVICE

The undersigned certifies a copy of Amicus Brief was filed with the Clerk of the Iowa Supreme Court via EDMS and served upon the following persons by EDMS on the 19th day of April, 2017.

/s/ Thomas M. Boes
Thomas M. Boes AT0001048

Conrad Meis,
111 North Dodge Street,
PO Box 617
Algona, IA 50511

Michael Bush
John Bush
5505 Victoria Ave, Suite 100
Davenport, IA 52807
ATTORNEYS FOR PLAINTIFF-APPELLEE

Renee Charles Lapierre
Ryland Deinert
Mayfair Center, Upper Level
4280 Sergeant Road, Suite 290
Sioux City, IA 51106
ATTORNEYS FOR DEFENDANT/APPELLEE

Joel J. Yunek
10 North Washing, Suite 204
PO Box 270
Mason City, IA 50402
ATTORNEYS FOR DEFENDANT SANDRA BECKER

Jessica A. Zupp
1919 4th Ave, S., Ste. 2
Denison, IA 51442

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

ATTORNEY'S COST CERTIFICATE

The undersigned certifies that no costs for printing the foregoing Brief were incurred.

/s/ Thomas M. Boes
Thomas M. Boes AT0001048