IN THE COURT OF APPEALS OF IOWA

No. 8-917 / 07-2096
Filed March 11, 2009

S.O., J.O., and E.O., by and through their father, J.O. Sr.,
Plaintiffs-Appellants,

vs.

CARLISLE SCHOOL DISTRICT, VALERIE McCHAUGHEY and DR. TOM LANE,
Defendants-Appellees.

Appeal from the Iowa District Court for Warren County, Peter A. Keller, Judge.

Plaintiffs appeal the district court's ruling granting defendants' motion for summary judgment on the ground that plaintiffs' action was barred by the statute of limitations. **REVERSED AND REMANDED.**

Ron Danks and Phillip H. Myers of Myers, Myers & Danks, Pleasantville, and Brett J. Beattie of Beattie Law Firm, P.C., Des Moines, for appellant.

Amy R. Teas and Patrick D. Smith of Bradshaw, Fowler, Proctor & Fairgrave, P.C., Des Moines, for appellee.

Heard by Mahan, P.J., and Miller and Doyle, JJ.

DOYLE, J.

Plaintiffs appeal the district court's ruling granting defendants' motion for summary judgment on the ground that plaintiffs' action was barred by the statute of limitations. Plaintiffs contend the district court erred in holding that: (1) plaintiffs' claims premised upon the civil liability provisions of Iowa Code section 232.75(2) (2005) were barred by the limitations period set forth in chapter 670; (2) the continuing tort doctrine did not apply to defendants McChaughey and Lane's alleged failure to report; and (3) chapter 670 does not violate the Iowa and United States equal protection clauses when read to omit the minor tolling provision of section 614.8(2). Upon our review, we reverse the judgment of the district court and remand for further proceedings.

***I. Background Facts and Proceedings*.**

On November 30, 2006, plaintiffs S.O., J.O., and E.O., minors and siblings (collectively hereinafter "plaintiffs"), filed suit by and through their father, J.O. Sr., against the Carlisle School District ("School District") and two of its employees: Valerie McChaughey, a licensed teacher, and Dr. Tom Lane, a principal and licensed administrator (collectively hereinafter "defendants"). Plaintiffs' petition alleged the following facts: During the 2001-02 school year, plaintiff S.O. was a kindergartner in McChaughey's class in the school district. While under McChaughey's supervision, S.O. was repeatedly involved in improper sexual contact with another kindergartner during naptime. The improper sexual contact was reported to Lane by the foster mother of the other student involved in the contact, and McChaughey subsequently learned of the report. Lane and McChaughey failed to investigate the improper sexual contact and failed to report

the contact to S.O.'s parents. S.O. did not disclose the improper sexual conduct he was subjected to in kindergarten until approximately eighteen months after Lane and McChaughey learned of the contact (approximately September 2003). As a result of the sexual activity engaged in while S.O. was a student in McChaughey's classroom, S.O. experienced severe emotional, social, and educational difficulties.

Based upon these alleged facts, plaintiffs' petition specifically asserted claims for breach of fiduciary duty (Count I) and intentional infliction of emotional distress (Count III) against defendants, and a claim of negligent supervision (Count II) against the School District. Plaintiffs sought punitive damages for each of these claims. Additionally, plaintiffs alleged McChaughey and Lane were civilly liable pursuant to Iowa Code section 232.75(2) for damages proximately caused by their failure to report the alleged abuse as required under chapter 232.[1]

On September 13, 2007, defendants filed their motion for summary judgment. Defendants argued that plaintiffs' claims were governed by Iowa Code chapter 670 and its corresponding statute of limitations, as clarified by the Iowa

[1] Although plaintiffs did not expressly assert a claim under section 232.75 or even reference chapter 232 in their petition, the district court determined in its ruling that plaintiffs' petition "[laid] out the elements required" of a chapter 232 claim because plaintiffs' petition alleged that McChaughey and Lane "failed to investigate" and "failed to report" the alleged sexual conduct. However, we question whether those alleged facts are enough to set forth a chapter 232 claim, particularly since plaintiffs' petition did not assert that the improper sexual conduct was child abuse within the definition contained in chapter 232, plaintiffs' petition did not assert that McChaughey and Lane were mandatory reporters, and plaintiffs' petition asserted that McChaughey and Lane failed to report the abuse to S.O.'s parents and not the Department of Human Services as required by chapter 232. *See* Iowa Code §§ 232.68-.70, .75. Nevertheless, McChaughey and Lane do not challenge this determination on appeal and we therefore do not consider it.

Supreme Court in *Rucker v. Humboldt Community School District*, 737 N.W.2d 292, 293 (Iowa 2007). Because plaintiffs did not provide timely written notice of their claims, defendants argued that plaintiffs had two years from the date of S.O.'s injury to file their suit. Since plaintiffs alleged S.O.'s injuries occurred during the 2001-02 school year, but did not file suit until 2006, defendants asserted that plaintiffs' suit was barred by the statute of limitations.

On September 28, 2007, plaintiffs filed their resistance, arguing that their suit was not barred by the statute of limitations. Regarding their section 232.75 claims, plaintiffs first asserted that the statute of limitations provisions of chapter 670 were not applicable to chapter 232. Plaintiffs further argued that even if chapter 670 applied to their section 232.75 claims, McChaughey's and Lane's failure to report the alleged sexual conduct constituted a continuing wrongful tort, and consequently, the statute of limitations would not begin to run until McChaughey and Lane reported the conduct. Additionally, plaintiffs maintained that the School District was vicariously liable for its employees' failure to meet their duties under Chapter 232 under the doctrine of respondeat superior. Regarding all of their claims, plaintiffs argued that chapter 670 violated the Equal Protection Clauses of the Iowa and United States Constitutions unless it was interpreted to include the minor tolling provision of Iowa Code section 614.8(2).

On November 14, 2007, the district court granted defendants' motion for summary judgment. The court concluded chapter 670 governed actions against a school district and its employees brought under chapter 232, and therefore chapter 670 provided the requisite statute of limitations, as interpreted by case law. The court determined defendants' failure to report the alleged conduct was

not a continuous tort. The court further held the minor tolling provisions of chapter 614 did not apply to plaintiffs' claims and such holding was constitutional. The court concluded that because plaintiffs' alleged injury occurred sometime during 2001-02 and plaintiffs became aware of the injury sometime in 2003, yet did not file their action until 2006, their action was barred by the statute of limitations.

Plaintiffs appeal.

II. Scope and Standards of Review.

We review the district court's summary judgment rulings for the correction of errors at law. Iowa R. App. P. 6.4; *Alliant Energy-Interstate Power & Light Co. v. Duckett*, 732 N.W.2d 869, 873 (Iowa 2007). Summary judgment is appropriate when the pleadings, depositions, answers to interrogatories, admissions on file, and affidavits show there is no genuine issue of material fact, and the moving party is entitled to a judgment as a matter of law. Iowa R. Civ. P. 1.981(3); *Walderbach v. Archdiocese of Dubuque, Inc*., 730 N.W.2d 198, 199 (Iowa 2007). A fact question arises if reasonable minds can differ on how the issue should be resolved. *Walderbach*, 730 N.W.2d at 199. "No fact question exists if the only dispute concerns the legal consequences flowing from undisputed facts." *McNertney v. Kahler*, 710 N.W.2d 209, 210 (Iowa 2006) (citation omitted).

III. Discussion.

A. Chapter 670's Applicability to chapter 232 Claims.

Plaintiffs first argue that the district court erred in holding that their claims against McChaughey and Lane premised upon the civil liability provisions of Iowa Code section 232.75(2) were barred by the limitations period set forth in chapter

670. Plaintiffs maintain chapter 670 is inapplicable to their section 232.75 claims because McChaughey and Lane are personally liable for failure to report the alleged abuse. Plaintiffs further argue that their chapter 232 claims are outside the scope of chapter 670. For the following reasons, we disagree.

***1. "Personal" Liability*.**

"Iowa Code chapter 670 is the exclusive remedy for torts against municipalities *and their employees*." *Rucker*, 737 N.W.2d at 293 (citing Iowa Code § 670.4; *City of Cedar Falls v. Cedar Falls Cmty. Sch. Dist.*, 617 N.W.2d 11, 18 (Iowa 2000)) (emphasis added). The School District is a "municipality" as defined by Iowa Code section 670.1(2). Claims asserted against School District employees acting in their capacity as School District employees are subject to Iowa Code chapter 670. *See id*. (citing Iowa Code § 670.2).

Section 670.12 provides that employees can be personally liable for claims that are not exempted by section 670.4.[2] However, as stated above, if the employee is acting within the scope of his or her employment or duties, the claim is subject to chapter 670. *Rucker*, 737 N.W.2d at 293 (citing Iowa Code § 670.2). There is no provision in chapter 670 that removes claims asserted personally against municipal employees from the scope of chapter 670, if the employee was acting within the scope of his or her employment. Thus, if the employee is acting within the scope of his or her employment or duties, the claim is subject to chapter 670, even if the employee can be personally liable. The relevant question here is not whether the claims were personal to McChaughey and Lane.

[2] However, employees of municipalities are "not liable for punitive damages as a result of acts in the performance of a duty, unless actual malice or willful, wanton and reckless misconduct is proven." Iowa Code § 670.12.

Rather, the question is whether McChaughey and Lane were acting within the scope of their employment when they allegedly failed to report the alleged sexual abuse.

To protect children from abuse, chapter 232 sets forth requirements for child abuse reporting, assessment, and rehabilitation. *See* Iowa Code § 232.67; *McCracken v. Iowa Dep't of Human Servs*., 595 N.W.2d 779, 784 (Iowa 1999). "[T]he provisions relating to child abuse reporting, investigation, and rehabilitation—sections 232.67 through 232.77—are remedial in nature and deserve from us a liberal construction." *McCracken*, 595 N.W.2d at 784.

> Section 232.69 sets forth mandatory reporting requirements for:
>
> > Any of the following persons who, *in the scope of professional practice or in their employment responsibilities*, examines, attends, counsels, or treats a child and reasonably believes a child has suffered abuse:
> >
> > . . . .
> >
> > (4) A licensed school employee, certified para-educator, holder of a coaching authorization issued under section 272.31, or an instructor employed by a community college.

Id. § 232.69(1)(b)(4) (emphasis added). These "mandatory reporters" are required to make a report in cases of child abuse, as provided in the procedures set forth in section 232.70, within twenty-four hours. *Id*. § 232.69(1). "Any *person, official, . . . or institution* required by section 232.69 to report a suspected case of child abuse who knowingly fails to do so . . . is civilly liable for the damages proximately caused by such failure . . . ." *Id*. § 232.75(2) (emphasis added).

Licensed school employees, such as McChaughey and Lane, are mandatory reporters by virtue of their employment. *Id*. § 232.69(1)(b)(4). Given

the language of section 232.69, it is clear that a licensed school employee's reporting duty arises within the scope of his or her employment. Although plaintiffs maintain here that McChaughey and Lane's duties under chapter 232 are separable from their traditional functions as a supervisor and teacher of students, plaintiffs, in their resistance to defendants' motion for summary judgment, seemingly acknowledged that McChaughey and Lane were acting within the scope of their employment when they allegedly failed to report the alleged abuse.[3] McChaughey and Lane were acting within the scope of their employment when they allegedly failed to report the alleged child abuse.

***2. Scope of chapter 670*.**

Plaintiffs next contend their chapter 232 claims are outside the scope of chapter 670, because they are not within the scope of section 670.2, among other things. Plaintiffs therefore argue chapter 670's applicable statute of limitations do not apply to their claims. We disagree.

Iowa Code section 670.5, entitled "Limitation of actions," provides, in relevant part: "*Every person* who claims damages from any municipality or *any . . . employee* . . . of a municipality for or on account of any . . . loss or injury *within the scope of section 670.2 . . .* shall commence an action . . . ." (Emphasis added). Section 670.2 provides, in relevant part: "[E]very 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*

[3] In their resistance, plaintiffs sought to hold the School District vicariously liable for McChaughey and Lane's failure to report, stating that, "Under the doctrine of respondeat superior, an employer, in this case [the School District], is liable for the wrongful conduct of its employee *if the conduct occurs in the scope of the employment relationship*." (Emphasis added).

proprietary function. (Emphasis added.) Reading section 670.5 in conjunction with section 670.2, it is clear section 670.5 applies to plaintiffs' chapter 232 claims asserted against McChaughey and Lane because McChaughey and Lane, municipality employees, were acting within the scope of their employment when they allegedly failed to report the alleged abuse. We conclude the district court did not err in holding that chapter 670 is applicable to plaintiffs' chapter 232 claims.

***B. Continuing Tort Doctrine*.**

Plaintiffs next contend that the district court erred in holding that the continuing tort doctrine did not apply to McChaughey and Lane's alleged failure to report the alleged child abuse. Again, we disagree.

> The "continuing tort doctrine" provides that, in certain tort cases involving continuous or repeated injuries, the statute of limitations accrues upon the date of the last injury and that the plaintiff may recover for the entire period of the defendant's negligence, provided that an act contributing to the claim occurs within the filing period.

54 C.J.S. *Limitations of Actions* § 194, at 257 (2005). Thus, "[w]here the wrongful act is continuous or repeated, so separate and successive actions for damages arise, the statute of limitations runs as to these later actions at the date of their accrual." *Riniker v. Wilson*, 623 N.W.2d 220, 228 (Iowa Ct. App. 2000) (citing *Hegg v. Hawkeye Tri-County REC*, 512 N.W.2d 558, 559 (Iowa 1994)). However:

> A continuing violation or tort is occasioned by continuing unlawful acts and conduct, not by continual ill effects from an initial violation. Thus, where there is a *single overt act* from which subsequent damages may flow, *the statute begins to run on the date the defendant invaded the plaintiff's interest and inflicted injury, and this is so despite the continuing nature of the injury*.

54 C.J.S. *Limitations of Actions* § 194, at 257 (emphasis added).

The district court found:

> Under section 232.75, a person is civilly liable if they fail to report suspected child abuse within twenty-four hours. If child abuse is suspected, the wrongful act occurs after that twenty-four hour period has passed and no report is made. While one may continue not to report, as soon as twenty-four hours have passed the failure to report has become actionable. This is not a continuous wrong; once that time period has passed, the wrong has been committed.

We agree. Although plaintiffs rely upon *Farmland Foods, Inc. v. Dubuque Human Rights Commission*, 672 N.W.2d 733 (Iowa 2003), and *Twyman v. Twyman*, 790 S.W.2d 819 (Tex. Ct. App. 1990), as establishing that the continuous tort doctrine can be applied where there is a continuous injury, their reliance is misplaced. Both *Farmland Foods, Inc.* and *Twyman* involved situations where there were multiple acts by the defendants. *See Farmland Foods, Inc.*, 672 N.W.2d at 741 (applying the "continuing violation" doctrine to hostile work environment claims involving "repeated conduct" and "acts"); *Twyman*, 790 S.W.2d at 821 (applying continuing tort doctrine to extend the statute of limitations period where husband's actions constituted a continuing course of conduct.) Here, there is a single act of omission, even if plaintiffs' injury is continuing in nature. We conclude the district court did not err in holding that the continuing tort doctrine did not apply to McChaughey and Lane's alleged failure to report the alleged child abuse.

***C. Equal Protection*.**

Finally, plaintiffs contend the district court erred in finding chapter 670 does not violate the Iowa and United States equal protection clauses when read

to omit the minor tolling provision of section 614.8(2). For the following reasons, we agree.

At the time this action was filed, Iowa Code section 670.5 provided, in its entirety:

> Every person who claims damages from any municipality or any officer, employee or agent of a municipality for or on account of any wrongful death, loss or injury within the scope of section 670.2 or section 670.8 or under common law shall commence an action therefor within *six months*, unless said person shall cause to be presented to the governing body of the municipality within *sixty days* after the alleged wrongful death, loss or injury a written notice stating the time, place, and circumstances thereof and the amount of compensation or other relief demanded. Failure to state time or place or circumstances or the amount of compensation or other relief demanded shall not invalidate the notice; providing, the claimant shall furnish full information within fifteen days after demand by the municipality. No action therefor shall be maintained unless such notice has been given and unless the action is commenced within *two years after such notice*. The time for giving such notice shall include a reasonable length of time, not to exceed *ninety days*, during which the person injured is incapacitated by his injury from giving such notice.

Iowa Code § 670.5 (2005) (transferred from Iowa Code § 613A.5 by the editor for Code of Iowa 1993) (emphasis added).[4] By its terms, section 670.5 provides for methods of enforcing liability of municipalities and its employees. *Id*. Furthermore, section 670.5 fixes the time within which an action for recovery may

[4] Section 670.5, amended in 2007, now provides:

> Except as provided in section 614.8, a person who claims damages from any municipality or any officer, employee or agent of a municipality for or on account of any wrongful death, loss, or injury within the scope of section 670.2 or section 670.8 or under common law shall commence an action therefor within two years after the alleged wrongful death, loss, or injury.

However, this amended section only applies to "claims 'arising out of an alleged death, loss, or injury occurring on or after July 1, 2007.'" *Rucker*, 737 N.W.2d at 295 (citing 2007 Iowa Acts, S.F. 384, § 6). Consequently, because plaintiffs' claims arise out of acts that occurred in the 2001-02 school year, the amendments do not change the outcome in this case.

be commenced. *Id*. At the time this action was filed, Iowa Code section 614.8(2) provided:

> Except as provided in section 614.1, subsection 9, the times limited for actions in this chapter, except those brought for penalties and forfeitures, are extended in favor of minors, so that they shall have one year from and after attainment of majority within which to commence an action.

Iowa Code § 614.8(2) (2005).

The constitutionality of Iowa Code section 670.5 and its predecessor, section 613A.5, has been addressed by the Iowa Supreme Court multiple times on the basis of equal protection of the law.[5] The court first considered the constitutionality of section 670.5 in *Lunday v. Vogelmann*, 213 N.W.2d 904 (Iowa 1973). There, a minor student brought a negligence action against a school district, one of its employees, and the city of Denison, Iowa. *Lunday*, 213 N.W.2d. at 905-06. The student admitted he did not serve notice of his claim on either the school district or the city within sixty days after his injury, and the school district and the city asserted the student's claims were barred by section 670.5. *Id*. at 906. The student argued that the notice requirement of section 670.5 denied him equal protection because it unreasonably put "victims of governmental torts in a different class than victims of private torts." *Id*. at 907. The district court rejected this argument, and the Iowa Supreme Court affirmed on appeal. *Id*. at 906-08. The court explained:

> The purpose of the notice requirement of [section 670.5] is to provide a method for prompt communication of time, place and circumstances of injury so the municipality can investigate while facts are fresh. *Norland v. Mason City*, 199 N.W.2d 316, 318 (Iowa

[5] All references to chapter 613A and section 613A.5 will be referred to hereinafter as chapter 670 and section 670.5, respectively.

> 1972). The basis for disparate classification of victims of governmental and private torts is explained in *Sprung v. Ramussen*, 180 N.W.2d 430, 433 (Iowa 1970) as a condition placed by the legislature upon its abolition of sovereign immunity:
> "Where, as here, the legislature has created a new right of action, it made a legislative judgment that the cause should be brought within a specified time. This difference doubtlessly arises from the fact the statute we are here interpreting is in derogation of sovereign immunity and that the legislature might, and did, properly restrict and limit the application of the statute."
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> We recognized the same legislative prerogative in relation to its abrogation of state tort immunity in *Graham v. Worthington*, 259 Iowa 845, 863-864, 146 N.W.2d 626, 638 (1966).
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> The fundamental motivation attributed to legislatures which have enacted such notice requirements is that where a governmental subdivision is involved the public has an interest it does not have as to claims against private persons in seeing prompt and thorough investigation of claims is made. This protects the public treasury from stale claims. *Thomann v. City of Rochester*, 230 App. Div. 612, 245 N.Y.S. 680 (1930). It permits prompt settlement of meritorious claims and facilitates planning of municipal budgets. *King v. Johnson*, 47 Ill.2d 247, 265 N.E.2d 874 (1970). The notice requirement also ensures that notices reach the public officers with responsibility to deal with them and in many instances should enable such officers to remedy defects in far-flung municipal property before other persons are injured.
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> We are unable and unwilling to say [section 670.5] is patently arbitrary and bears no rational relationship to a legitimate governmental interest. [The student] has not met his burden to prove the statute is unconstitutional.

Id. at 907-08. The Iowa Supreme Court affirmed its holding in *Lunday* in *Shearer v. Perry Community School District*, 236 N.W.2d 688, 693 (Iowa 1975) ("We believe that reasoning to be sound and dispositive of the identical issue in the instant case.").

The constitutionality of section 670.5 was again raised in *Harryman v. Hayles*, 257 N.W.2d 631 (Iowa 1977). In *Harryman*, a minor car passenger was severely injured when the truck in which he was riding overturned after striking a washed-out portion of a county road. *Harryman*, 257 N.W.2d at 633. The minor

and his parents brought suit against the county and various county employees; however, their suit was not brought within three months nor was notice given the defendants within sixty days of the minor's injury as required by section 670.5. *Id*. at 634. The defendants moved for dismissal based upon the statute of limitations, and the plaintiffs in turn asserted that section 670.5 was unconstitutional. *See id*. at 633-34. The district court granted the defendants' motion and dismissed plaintiffs' petition. *Id*. at 633.

On appeal, the Iowa Supreme Court immediately rejected plaintiffs' argument that section 670.5 was unconstitutional on its face, finding *Lunday* and *Shearer* to be dispositive of that issue. *Id*. at 634. However, the minor also argued that section 670.5 was unconstitutional as applied to him, because he was incapacitated from filing suit or giving notice due to his severe injuries, and the court agreed. *Id*. Although the court had previously upheld the statute against general constitutional attacks, it found a new constitutional issue was presented by the minor's argument, whether:

> The statute offends both the equal protection and due process clauses because it denies to some incapacitated claimants (those whose incapacity extends beyond [ninety] days) the same consideration it gives to other incapacitated claimants (those whose incapacity is less than [ninety] days).

Id. Based upon this issue, the court determined that:

> [T]his provision cannot withstand an equal protection challenge. While there is no requirement all must be treated alike in order to satisfy equal protection standards under the 14th Amendment, the differences in classification must be reasonable and bear some relationship to a legitimate state interest. We have considered every possible hypothesis under which this statute might be sustained. We are unable to save a provision under which some injured claimants are allowed to recover from their incapacity before being required to give notice of claim while others identically

> situated except as to the severity of their injuries are denied that same right. The statute now creates two classes of incapacitated persons solely on the basis of how badly they have been hurt.
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> If incapacitated claimants are to be allowed a "reasonable" extension of time to give notice, all incapacitated claimants must be treated the same. This statute is fatally bad because it fails to satisfy this requirement.
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> We believe a proper result can be obtained by excising from [section 670.5] the words "not to exceed [ninety] days." This would eliminate the offensive part of the section, leaving intact the main purpose of the statute and giving effect to the clear intention of the legislature that incapacitated claimants be given a reasonable time to notify the governmental defendant of the injury.

Id. at 634-35. The court found section 670.5 to be "a valid and enforceable statute except for the words 'not to exceed [ninety] days,'" and then struck those words from the statute. *Id*. at 635. Thus, the effect of *Harryman* was to reform the last sentence of section 670.5 so it essentially read: "The time for giving such notice shall include a reasonable length of time during which the person injured is incapacitated by his injury from giving such notice and sixty days following termination of such incapacitation." *Enochs v. City of Des Moines*, 314 N.W.2d 378, 380 (Iowa 1982).

The Iowa Supreme Court again visited the constitutionality of 670.5 in *Franks v. Kohl*, 286 N.W.2d 663 (Iowa 1979). The plaintiff, an employee of the city, was injured while riding on one of its garbage trucks driven by co-employee when the driver allegedly drove to the left side of a street, bringing the plaintiff into collision with a street sign that was allegedly negligently placed by another city employee. *Franks*, 286 N.W.2d at 664. The plaintiff brought suit against the city and the two city employees, however, the plaintiff did not give the written notice prescribed by section 670.5 to the defendants. *Id*. The defendants moved for summary judgment, and the district court granted their motion. *Id*. On

appeal, the plaintiff argued that section 670.5 was unconstitutional on the basis of equal protection of the law, among other things. *Id*. at 664-67.

Regarding the plaintiff's claims against the city, the court found that section 670.5, when applied to the plaintiff, did not deny him equal protection, relying upon its decisions in *Lunday* and *Shearer*. *Id*. at 666 ("We thoroughly considered the constitutional issues in those decisions. We adhere to those pronouncements and find no necessity to repeat the analysis."). The court also rejected the plaintiff's equal protection challenge to section 670.5 as applied to his claims against the city's employees, concluding the plaintiff had "not established that section [670.5] in the context of claims against municipal employees acting in the course of employment is capricious, patently arbitrary, or without rational relationship to a legitimate governmental interest." *Id*. at 670-71.

In *Miller v. Boone County Hospital*, 394 N.W.2d 776 (Iowa 1986), the Iowa Supreme Court again visited the constitutionality of section 670.5 on the basis that it "violates equal protection because it creates an impermissible class: plaintiffs injured by local governments vis-à-vis plaintiffs injured by private [tortfeasors]." *Miller*, 394 N.W.2d at 776-77. In *Miller*, a mother filed a negligence action against the Boone County Hospital individually and on behalf of her minor son. *Id*. at 777. Because the plaintiffs did not comply with the notice provision of section 670.5, the district court granted the hospital's motion for summary judgment. *Id*.

On appeal, the plaintiffs argued that section 670.5 was unconstitutional on the basis of a violation of equal protection. *Id*. In a five-to-four decision, the Iowa Supreme Court reversed and remanded. *Id*. The court first noted:

> The court in *Sprung v. Rasmussen*, 180 N.W.2d 430, 433 (Iowa 1970) incorrectly characterized [section 670.5] as a statute of creation rather than a statute of limitations. With the greater power to create a right of action, it was thought, comes the lesser power to condition it:
>
> > "Where, as here, the legislature has created a new right of action, it made a legislative judgment that the cause should be brought within a specified time. This difference doubtlessly arises from the fact the statute . . . is in derogation of sovereign immunity and that the legislature might, and did, properly restrict and limit the application of the statute."
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> 180 N.W.2d at 433; *accord Harryman*, 257 N.W.2d at 636; *Dan Dugan Transport Co. v. Worth County*, 243 N.W.2d 655, 657 (Iowa 1976); *Lunday*, 213 N.W.2d at 907.
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> Whether or not a right of action was created in chapter [670] is irrelevant to the constitutionality of its notice requirement. *See Turner v. Staggs*, 89 Nev. 230, 239, 510 P.2d 879, 885 (1973) (Zenoff, J., concurring); Note, 60 Cornell L. Rev. [417, 440 (1975)]. *Cf*. *Turner v. Turner*, 304 N.W.2d 786, 787 (Iowa 1981) ("to the extent [parental] immunity is abrogated it does not create a new liability . . . [but] merely removes a judicially imposed barrier to recovery"). We should not conclusively presume, as *Lunday* implied by quoting *Sprung*, 213 N.W.2d at 907, the provisions of chapter [670] are constitutional merely because they resulted from legislative enactment. With one justice changing his vote, the court in *Boyer* [*v. Iowa High School Athletic Association*, 256 Iowa 337, 349, 127 N.W.2d 606, 613 (1964)] would have abrogated immunity of local governments three years earlier than did the legislature. Thus, "there is no sanctity" to the notice requirement. *O'Neil v. City of Parkersburg*, 237 S.E.2d 504, 507 (W. Va. 1977).
>
> To defer to the legislature because it has provided liability for the negligence of the State's political subdivisions is to say every condition imposed, no matter how harsh, may never be questioned. The analysis in *Sprung* and its progeny begs the question of constitutionality.

Id. at 778. The court then asked, "[i]n light of present day conditions, does the classification in issue bear any rational relationship to the interests underlying section [670.5]?" *Id*. at 779. To determine the answer, the court looked at the four interests mentioned in *Lunday*: stale claims, planning of budgets, settling of

valid claims, and repair of defective conditions. *Id*. at 779-80. Ultimately, the court concluded:

> [T]hese interests no longer furnish any rational basis justifying the classification resulting from section [670.5]. Failure to commence an action within six months unless a notice is given within [sixty] days arbitrarily bars victims of governmental torts while victims of private torts suffer no such bar. We conclude such arbitrary treatment violates the equal protection guarantees of our federal and state constitutions. In reaching this conclusion, we have not lost sight of the fact that statutes carry a strong presumption of constitutionality. On the other hand, rather than furthering a legitimate governmental interest, the statute has proved to be a trap for the unwary. *See Lunday*, 213 N.W.2d at 911-12 (Reynoldson, J., dissenting).
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> We are also mindful that we are rejecting reasoning that has supported the constitutionality of section [670.5] for thirteen years. . . . In our quest to seek the ill-defined parameters of the equal protection clause, we have reexamined the traditional interests put forth as justification for section [670.5], and have found them totally lacking in substance in today's circumstances. We therefore join those jurisdictions that have likewise concluded there is no rational basis for legislation like section [670.5]. *See Reich v. State Highway* [*Dept.*], 386 Mich. 617, 623-24, 194 N.W.2d 700, 702 (1972); *Turner v. Staggs*, 89 Nev. 230, 235, 510 P.2d 879, 882 (1973), cert. denied, 414 U.S. 1079, 94 S. Ct. 598, 38 L. Ed. 2d 486 (1973); [*Hunter v. North Mason High Sch.*, 85 Wash. 2d 810, 818-19, 539 P.2d 845, 850 (1975)]; [*O'Neil*, 237 S.E.2d at 508].

Id. at 780-81. The court then held that to the extent that *Franks*, *Harryman*, *Shearer*, *Lunday*, and other cases concerning the constitutionality of section 670.5 were inconsistent with its opinion, they were overruled. *Id*. at 781. Additionally, the court stated: "[B]ecause section [670.5] is unconstitutional, we hold that Iowa Code chapter 614 is the applicable statute of limitations for all actions arising under chapter [670]." *Id*.

In 1993 the Iowa Supreme Court revisited its decision in *Miller* regarding the constitutionality of section 670.5 in *Clark v. Miller*, 503 N.W.2d 422 (Iowa 1993). In *Clark*, plaintiffs filed suit against a municipality and various municipality

employees on March 13, 1992, based upon injuries that allegedly occurred on or about March 10, 1990. *Clark*, 503 N.W.2d at 424. The plaintiffs had given timely notice of the claim to defendants on March 14, 1990. *Id*. Thus, the plaintiffs filed their action within two years after sufficient and timely notice of the claim had been given, but not within two years of the date of injury. *Id*. The defendants argued that plaintiffs' claims were barred by the statute of limitations, and the district court agreed and dismissed plaintiffs' petition. *Id*. The district court reasoned:

> Because [section 670.5] of the Iowa Code was declared unconstitutional by the Iowa Supreme Court in the case of [*Miller*], and because the *Miller* case held that Chapter 614 of the Iowa Code applies to actions commenced under Chapter [670], . . . and because the cause of action here accrued no later than March 10th, 1990, two years have elapsed and the plaintiffs are time barred under Section 614.1(2) of the Iowa Code.

Id.

On appeal, the plaintiffs argued they had two years after giving timely notice to commence their action pursuant to section 670.5, and the Iowa Supreme Court agreed. *Id*. at 423-24. The court found *Clark* to be distinguishable from *Miller*, explaining:

> We stated [in *Miller* that] the "[f]ailure to commence an action within six months unless a notice is given within [sixty] days arbitrarily bars victims of governmental torts while victims of private torts suffer no such bar." We concluded the six-month statute of limitation, in which no notice is given, had proved to be a trap for the unwary. In *Miller*, the issue of severability was not presented or discussed. Notice had not been given to the local government. The validity of the provision of section [670.5] prohibiting actions that are not commenced within two years after giving notice was not addressed.

Id. at 424-25 (internal citations omitted). The court then held:

> We find the provisions of section [670.5] can be severed to exclude the unconstitutional portion of the statute while retaining the remaining portion. Allowing the statute of limitations to be extended so as to permit a filing of an action within two years after timely notice of the claim has been given does not violate equal protection guarantees. To allow a person to commence a tort action against a unit of local government within two years after giving timely notice is not patently arbitrary. Such a provision bears a rational relationship to a legitimate governmental interest. The objective of such an extension is not to bar stale claims, but to encourage prompt reporting of claims. We find the remaining portion of section [670.5] fulfills an apparent legislative intent.

Id. at 425.

Recently, in *Perkins v. Dallas Center-Grimes Community School District*, 727 N.W.2d 377 (Iowa 2007), and *Rucker v. Humboldt Community School District*, 737 N.W.2d 292 (Iowa 2007), the Iowa Supreme Court addressed whether the minor tolling provision of section 614.8(2) applies to chapter 670 claims. In *Perkins*, a minor student was injured while participating in a school event. *Perkins*, 727 N.W.2d at 378. The student gave the school district notice of her intent to file a claim against the school more than a year after the injury was sustained. *Id*. The student then filed suit more than three years after the injury was sustained, and more than two years after notice was provided. *Id*. The school district moved for summary judgment, asserting the student's claim was untimely and barred by section 670.5. *Id*. The district court agreed and granted the school district's motion. *Id*.

On appeal, the student argued that she was entitled to the benefit of section 614.8(2) because of language in *Miller* stating that, because the sixty-day notice requirement was invalid, "Iowa Code chapter 614 is the applicable statute of limitations for all actions arising under chapter [670]." *Id*. at 380 (quoting

Miller, 394 N.W.2d at 781). The supreme court rejected the argument, determining that nothing in *Miller* or any of its other cases had "indicated that the tolling provision was intended to be read into section 670.5." *Id*. Furthermore, the court stated that our legislature had "never indicated any intent to incorporate a tolling provision in chapter 670, and we decline to do so by relying on the broad language of *Miller*. *Miller* did not even involve a claim by a minor." *Id*. at 381. The court held that "*Miller* did not invalidate section 670.5 in any respect except its requirement for the sixty-day notice. The two-year limitation in that statute remains intact." *Id*. As such, the court concluded that the student's claim was "not rendered timely by the tolling provision of section 614.8(2)." *Id*.

In *Rucker*, a minor student was injured while participating in a parade with the high school marching band. *Rucker*, 737 N.W.2d at 292-93. She brought a negligence action against her high school and high school band director two-and-a-half years after she sustained her injuries, and had never provided notice to the defendants. *Id*. at 292, 294. The defendants filed a motion for summary judgment arguing the student's claim was untimely because she was required to file her claim within two years of her injury. *Id*. at 292. The student maintained that Iowa Code section 614.8, the tolling provision for minors, extended the time to file her claim, and was therefore timely filed. *Id*. at 292-93. The district court granted summary judgment in favor of the defendants, ruling that section 614.8 did not apply to claims against municipalities under chapter 670. *Id*. at 293.

On appeal, the student in *Rucker* argued that the Iowa Supreme Court's "holding in *Miller* incorporated chapter 614's tolling provision for minors with respect to claims against municipalities." *Id*. at 294. The court again rejected

this argument in a four-to-three decision, holding that "[t]he tolling provision for minors found in section 614.8 does not apply to claims brought under chapter 670 for injuries occurring before July 1, 2007." *Id*. at 295.

In the present case, plaintiffs admit they did not provide the School District timely notice. Plaintiffs' suit was not filed within two years of the alleged improper sexual contact or discovery thereof. Nevertheless, plaintiffs maintain their claims are subject to the minor tolling provision contained in section 614.8(2), and therefore timely filed.

Plaintiffs argue that section 670.5, when read to omit the minor tolling provision of section 614.8(2), is unconstitutional as applied because it creates "two separate and irrational classes in violation of the federal and state Equal Protection clauses: minor litigants in cases against local government vis-à-vis minor litigants in cases involving purely private persons. The School District maintains that *Perkins* and *Rucker* are dispositive of the issue. Although we recognize, as stated above, that our supreme court in *Perkins* and *Rucker* determined that the minor tolling provision found in section 614.8 does not apply to claims brought under chapter 670, the court was not presented with and did not address the equal protection argument asserted in this case. We therefore must determine, based upon the argument presented, whether chapter 670 violates the Iowa and United States equal protection clauses when read to omit the minor tolling provision of section 614.8(2).

Plaintiffs concede that the rational basis test must be applied to determine whether the statute is constitutional. "Under the rational basis analysis, a statute is constitutional unless it is patently arbitrary and bears no rational relationship to

a legitimate governmental interest." *Ruden v. Parker*, 462 N.W.2d 674, 676 (Iowa 1990) (quoting *Bennett v. City of Redfield*, 446 N.W.2d 467, 474 (Iowa 1989)). To survive this constitutional test (1) the statute must serve a legitimate governmental interest and (2) the means employed by the statute must bear a rational relationship to that governmental interest. *Glowacki v. Board of Med. Exam'rs*, 501 N.W.2d 539, 541 (Iowa 1993). "The party attacking the classification has the heavy burden of proving the action unconstitutional, and must negate every reasonable basis upon which the action may be sustained." *Miller*, 394 N.W.2d at 778-79 (citation omitted). Furthermore, there is "a strong presumption in favor of the constitutionality of any legislative enactment." *Id*.

The *Miller* court held Iowa Code section 670.5 is unconstitutional because it treats persons injured by municipal tortfeasors different from those injured by private tortfeasors without a rational basis for doing so. *Miller*, 394 N.W.2d at 780. *Miller* declared that chapter 614 shall apply all applicable limitation periods under the Municipal Tort Claims Act (MTCA). *Id*. at 781. Although *Clark* held section 670.5 did not violate equal protection guarantees where timely notice of MTCA claims is given as provided for in section 670.5, 503 N.W.2d at 425, it did not reverse the *Miller* holding requiring an application of chapter 614 to MTCA claims where no notice is given, as a means of avoiding the statute's equal protection infirmity. As noted above, neither *Perkins* nor *Rucker* addressed the equal protection argument currently before us.[6]

[6] We recognize that our supreme court has concluded "the tolling provisions of section 614.8 do not apply to statutes of limitation outside of chapter 614." *Harden v. State*, 434 N.W.2d 881, 884 (Iowa 1989). That conclusion was reached with reference to the State

For the reasons stated in *Miller*, we find that section 670.5 violates the equal protection clause when read to omit the minor tolling provision of section 614.8(2). *Miller*, 394 N.W.2d at 780-81. We find no rational basis justifying the classification resulting from claims filed by minors against a municipality and claims filed by minors against private tortfeasors. Although it is true that "[t]he Iowa legislature has never indicated any intent to incorporate a tolling provision in chapter 670" (until the 2007 amendments), *Perkins*, 727 N.W.2d at 381, neither has the legislature indicated any dissatisfaction with *Miller's* holding that chapter 614 supplies applicable limitation periods under the MTCA. Application of chapter 614 to plaintiffs' claims is consistent with present legislative intent. Subsequent to the *Perkins* decision, the legislature amended section 670.5 to extend a claimant's statute of limitations for one year from and after the attainment of majority. 2007 Iowa Acts, S.F. 384 §§ 2, 5.

In this case where no notice was given, we conclude the district court erred in holding that chapter 670 does not violate the Iowa and United States equal protection clauses when read to omit the minor tolling provision of section 614.8(2). Accordingly, we reverse the judgment of the district court and remand for further proceedings.

***IV. Conclusion*.**

We conclude that the district court did not err in holding that the plaintiffs' claims premised upon the civil liability provisions of Iowa Code section 232.75(2) (2005) were subject to the provisions of chapter 670, and that the continuing tort

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Tort Claims Act, a statute that is distinguishable from the MTCA insofar as its limitation period is concerned.

doctrine did not apply to defendants McChaughey and Lane's alleged failure to report. We conclude, in a case where no notice is given, section 670.5 (2005) violates the Iowa and United States equal protection clauses when read to omit the minor tolling provision of section 614.8(2), so we therefore reverse the judgment of the district court and remand for further proceedings.

REVERSED AND REMANDED.

Mahan, P.J., concurs; Miller, J., concurs specially.

MILLER, J. (concurring specially)

I write separate only to explain my reasons for concurring in the majority's reversal on the equal protection issue.

Iowa Code section 670.5 clearly treats minors with claims against governmental entities differently than it treats minors with claims against others, as it does not allow the extended time to bring suit that section 614.8(2) allows to minors with claims against others. We apply the rational basis test, rather than a higher level of scrutiny, to such a denial of equal protection claim. *Miller v. Boone County Hosp.*, 394 N.W.2d 776, 778 (Iowa 1986).

> The Equal Protection Clause essentially requires that similarly situated persons be treated alike. If people are not similarly situated, their dissimilar treatment does not violate equal protection. To meet constitutional standards, it is sufficient if all members of the same class be treated the same.

In re Morrow, 616 N.W.2d 544, 548 (Iowa 2000) (citations omitted).

> The general principles applicable to the determination of the constitutionality of the challenged statutory provision are well established. All presumptions are in favor of the constitutionality of the statute and it will not be held invalid unless it is clear, plain and palpable that such decision is required. The legislature may pass any kind of legislation it sees fit so long as it does not infringe the state or federal constitutions. Courts do not pass on the policy, wisdom, advisability or justice of a statute. The remedy for those who contend legislation which is within constitutional bounds is unwise or oppressive is with the legislature. The burden is not upon [a party opposing a claim of unconstitutionality] to prove the act is constitutional. [A party claiming unconstitutionality has] the burden to demonstrate beyond a reasonable doubt the act violates the constitutional provision invoked and to point out with particularity the details of the alleged invalidity. To sustain this burden [the party claiming unconstitutionality] must negative every reasonable basis which may support the statute. Every reasonable doubt is resolved in favor of constitutionality.

City of Waterloo v. Selden, 251 N.W.2d 506, 508 (Iowa 1977) (citations omitted).

The party claiming unconstitutionality "must show the classification bears no rational relationship to a legitimate government interest." *State v. Mitchell*, 757 N.W.2d 431, 438 (Iowa 2008).

Although some of our cases suggest that a classification will be upheld if *we*, the court, can reasonably conceive of any state of facts to justify it, *see, e.g., Bowers v. Polk County Bd. of Supervisors*, 638 N.W.2d 682, 689 (Iowa 2002), I believe the more appropriate formulation is that the classification will be upheld if the *legislature* could reasonably conceive of any state of facts to justify it. *See, e.g., Mitchell*, 747 N.W.2d at 438 ("The legislature could have reasonably determined its chosen classification scheme . . . would rationally advance the government objective.").

Several potential governmental interests in what is now section 670.5 were identified in *Miller*, 394 N.W.2d at 779-80. The majority in that case, in a five-to-four decision rejected those interests, holding that they "no longer furnish any rational basis justifying the classification resulting from [the predecessor of current section 670.5]." *Id.* at 780. The dissent pointed out that the record was woefully lacking in evidentiary support for the reasons relied on by the majority in its rejection, *id.* at 782-84 (Wolle, J., dissenting), and the majority made no claim to the contrary.

By its enactment of section 670.5 our legislature has implicitly found that legitimate governmental interests support the classification thereby created. Under the authority cited above section 670.5 enjoys a presumption of constitutionality and the burden is on the party claiming unconstitutionality to demonstrate beyond a reasonable doubt that it denies equal protection of the

law. In this case, similar to the lack of evidentiary support pointed out by the dissent in *Miller*, the plaintiffs have provided no evidentiary basis for rejecting the governmental interests discussed in *Miller*.

If we were writing on a clean slate I would affirm the district court on the equal protection issue, believing that section 670.5 could not and should not be found to deny equal protection unless and until an appropriate record demonstrated that the classification in question does not bear a rational relationship to any one or more of the governmental interests discussed in *Miller*. I believe, however, that the holding in *Miller* compels the result reached on this issue in the detailed and thorough majority opinion, and therefore concur, if somewhat reluctantly, in its reversal on that issue. I fully concur in all other parts of the majority opinion.