

IN THE SUPREME COURT  
OF THE STATE OF SOUTH DAKOTA

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Appeal No. 29251

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**JULIE GODBE and  
DAVID GODBE**

*Plaintiffs/Appellants,*

vs.

**CITY OF RAPID CITY, SOUTH DAKOTA,**

*Defendant, Appellee.*

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APPEAL FROM THE CIRCUIT COURT  
SEVENTH JUDICIAL CIRCUIT  
PENNINGTON COUNTY, SOUTH DAKOTA

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THE HONORABLE MATTHEW BROWN  
Circuit Court Judge

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**APPELLANT'S BRIEF**

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### **PRELIMINARY STATEMENT**

Plaintiffs/Appellants Julie and David Godbe will be collectively referred to as “Godbe” or their individual first names of “Julie” or “David.” Defendant/Appellee City of Rapid City, South Dakota, will be referred to as the “City.” References to the record as reflected by the clerk’s index are referenced by “R” following by the page number. Documents in the Appendix are referenced by “APP” followed by the number designation. Citations to the hearing transcript are referenced by “T” followed by the page number and line.

### **JURISDICTIONAL STATEMENT**

Julie and David Godbe appeal from the Order Granting the City of Rapid City’s Motion for Summary Judgment. (R: 2624) The Order Granting the City’s Motion for Summary Judgment and Judgment of Dismissal was signed and filed on January 13,



2020. (R: 2634.) The City served a Notice of entry of Order and Judgment on January 16, 2020. (R: 2636.) Godbe filed a Notice of Appeal on February 13, 2020. (R: 2660.) The court reporter submitted the hearing transcript on April 8, 2020. Jurisdiction in this Court is proper pursuant to SDCL 15-26A-3.

### **STATEMENT OF THE LEGAL ISSUES**

*ISSUE I:* Whether the circuit court erred in granting the City's motion for summary judgment.

- A. The circuit court erred in finding no disputed material facts exist as it relates to notice of damage to the roadway pursuant to SDCL 31-32-10.

#### **Legal Authority**

*Fritz v. Howard Township*, 1997 S.D. 122, 570 N.W.2d 240

*State v. Engesser*, 2003 S.D. 47, 661 N.W.2d 739

*Zahn v. Musick*, 2000 S.D. 26, 605 N.W.2d 823

SDCL 31-32-10

- B. The circuit court erred in interpreting SDCL 31-32-10 by finding the statute requires actual notice and that the damage is not to the highway, but to the specific instrumentality causing injury.

#### **Legal Authority:**

*Fritz v. Howard Township*, 1997 S.D. 122, 570 N.W.2d 240

*Hohm v. City of Rapid City*, 2008 S.D. 65, 753 N.W.2d 895

SDCL 31-32-10

SDCL 17-1-4

### **STATEMENT OF THE CASE**

As a result of the failures by the City after repeated notice of dangerous grates and the need for ongoing maintenance, Julie Godbe suffered debilitating injuries on July 27, 2015, when her front bicycle tire entered a storm grate on East St. Patrick Street in Rapid City, South Dakota. She is now an incomplete quadriplegic and will never recover. Julie

and her husband have brought an action against for its failure to repair and maintain the dangerous grates along East St. Patrick Street. Godbe brought a negligence claim against the City pursuant to SDCL 31-32-10 in the Seventh Circuit Court, County of Pennington, State of South Dakota before the Honorable Matthew Brown.

The City then moved for summary judgment on a rationale that they did not have notice of damage to the specific grate that caused Julie's injuries. The circuit court granted the City's motion for summary judgment based on that same rationale. However, as argued below, Godbe has provided disputed material facts to defeat summary judgment on whether the City had notice to the damage of the specific grate that caused Julie's injuries. Further, the circuit court was incorrect in its interpretation of SDCL 31-32-10 as the statute only requires constructive notice of the damage to the highway, has been established. Therefore, the circuit court's grant of summary judgment for the City was in error, and this Court should reverse and remand for a trial on the merits.

### **STATEMENT OF THE FACTS**

#### **A. Incident**

On July 27, 2015, Julie Godbe was riding her bicycle on East St. Patrick Street in Rapid City, South Dakota. (R: 163. Plaintiff's Amended Complaint ("Complaint") at ¶ 3.) While traveling adjacent to the right-hand curb of East St. Patrick Street, as mandated by law, Julie's front tire of her bicycle fell into a storm drain grate causing her to catapult over the handle bars and land on her face. (R: 772, No. 1.) Julie became an incomplete quadriplegic as a result of the actions of the City. (R: 163 at ¶ 5.)

The storm drain grate that caused Julie's injuries had steel bars that ran parallel to the curb, allowing a bicycle tire to get lodged between the bars. (R: 772, No. 2.) The

City's temporary fix of the defective grates failed, causing this catastrophic injury. The following picture is of the accident scene and grate that caused Julie's injuries:



(R: 163 at ¶ 8.)

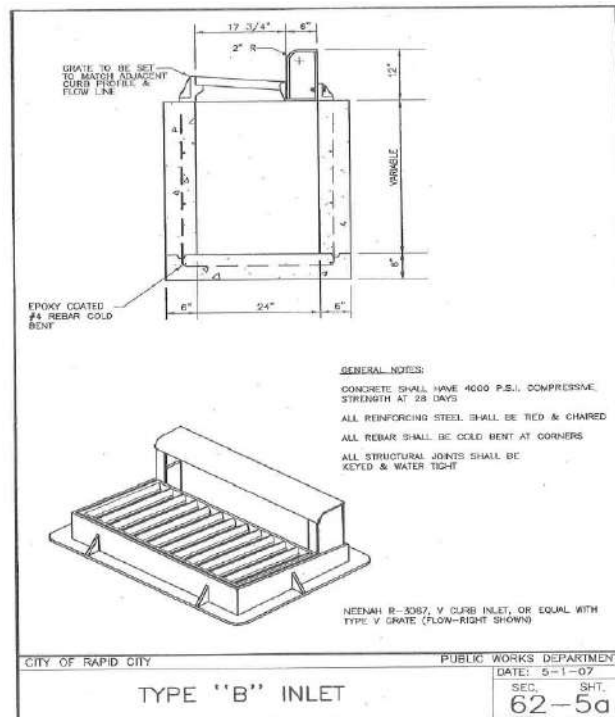
Julie and David were proceeding in single file along East St. Patrick Street near the right-hand curb, as required by both City of Rapid City Ordinance and South Dakota State law. (R: 772, No. 3.) Her bike tire entered the parallel grate causing her to topple head over heels, breaking her neck, and requiring the need for emergency surgery by Dr. Johnathan Wilson. Dr. Wilson saved her life and then she was transferred to Craig Rehabilitation Hospital in Denver to deal with her paralysis.

**B. Notice to the City of the Damage**

In 2004, the City assumed responsibility from the State of South Dakota for the

operation and maintenance of East St. Patrick Street.<sup>1</sup> (APP 13-14.) From 2004 on, the City had full control and duty to maintain East St. Patrick Street, free of all defects and unsafe road hazards. (APP 24.)

In 2007, the Standard Specifications for the City required the use of Type B inlets with the “V” grates for protection of bikers in Rapid City. (APP 34)



These proper grates run perpendicular to traffic on the highway. Type V grates prevent someone riding parallel to the traffic from entering the grate when riding a bicycle. (APP 18; APP 39.) In fact, the proper grate was put in place by the City directly across the street from the dangerous grate that caused Julie’s injuries.

<sup>1</sup> East St. Patrick Street was formally South Dakota Highway 238, and the City took ownership in 2004 of approximately 1.3 miles from its junction with Campbell Street to its junction with South Dakota Highway 44. (See APP 13.)



(APP 078.)

### **1. History Regarding Bike Lanes in Rapid City**

The bike lane in Rapid City is the right 4 feet of any street or road in Rapid City, other than the interstate highway. (APP 45; APP 48.) In June of 2006, the Rapid City Metropolitan Planning Organization prepared a Bikeway/Walkway Plan. As far back as 1992, the City adopted the recommendations of the Bike Safety task force that all streets and roads, with the exception of I-90 and I-190, are considered part of the Bikeway system, as bicycles are considered vehicles and may legally travel on any roads which do not have a minimum speed requirement. The City is responsible for the streets to be safe for bicycle traffic. (APP 48; APP 19.)

It was in 2007 that the City adopted the perpendicular grates as shown above. (APP 28.) This was done for safety purposes. Donald Brumbaugh, the City's 30(b)(6) witness, agreed that the grate in question was not in compliance with the 2007 specification adopted by the City:

Q: Okay. As of the 2007 specifications, the grate That was involved with Julie Godbe in that incident in July of 2007 -- 2015 was not in compliance with what is specified in 2007 Exhibit 3, correct?

A: If it had parallel -- if it had a parallel grate, that's correct.

(APP 21.) Brumbaugh agreed that it is dangerous to have grates that run parallel to the traffic:

Q: And you would agree with me that it's dangerous to have grates that allow bicyclists that are traveling with the traffic to fall into the grate because they might topple over and get injured, correct?

A: If they're riding in the gutter section, yes.

Q: And one way to rectify the dangerous situation is to replace the grates that are parallel with ones that are perpendicular? That's one way to do it?

A: Yes.

(APP 21.)

Another way to prevent tires from going into the grates would be to weld cross bars onto present grates, which was done by the City:

Q: Another way to do it is to weld cross bars onto the present grates to prevent tires from going into the grates?

A: It would have that effect, yes.

(APP 21.) Brumbaugh then acknowledges that a number of the grates on East St. Patrick Street had welded straps on them prior to the incident in 2015:

Q: (By Mr. Steven Beardsley) In any event, prior to this incident in 2015, a number of these grates on this city road had welded straps, you called them, on the grates?

A: Yes, they did.

(APP 21.) He agreed these welded straps needed to be maintained or it could create a hazard:

Q: And you understand that if there are welded straps on them, that they need to be maintained?

A: Typically.

Q: And that's because if you don't maintain them, it may create a hazard?

A: It could.

(APP 21.) A number of the photographs depict mangled or torn off welded straps.

Brumbaugh testified that the snow plows and maintenance equipment tear up inlet grates:

Q: And typically the equipment that you could think of that would tear metal straps off a metal grate would be a snowplow, correct?

A: If they were to hit them, yes.

(APP 22.)

Brumbaugh testified that he has seen various grates with welded straps and that they need to be maintained. (APP 21.) More importantly, Brumbaugh testified that once the straps are torn off, the grate is damaged:

Q: Once you weld the straps on there it becomes part of the grate, correct?

A: Okay, it's part of the grate.

Q: Yeah, it's part of the grate because the concept of the strap being part of the grate is to prevent people from falling in and hurting themselves, correct?

A: Correct.

Q: So once the straps are torn off, the grate in its configuration now with the straps has been damaged, correct?

A: Correct.

(APP 25.)

In July 2011, the City then introduced the Rapid City Area Bicycle and Pedestrian Master Plan. (APP 42.) The Master Plan directs that the City should continue the efforts to retrofit existing drainage grates as older grates can create slippery conditions for bicyclists and catch a bike wheel if the grates are parallel to the direction of travel.<sup>2</sup> (APP: 57; APP 22.) The City, through Risk Manager Trevor Schmelz, agrees that if parallel grates are left in the streets, it is not safe for bikers:

Q: If the parallel grates are in there, it's not safe for bikers, is it?

A: No.

(APP 43.)

Therefore, going back 20 years prior to Julie's accident, the City of Rapid City had "notice" of a dangerous condition or disrepair of its roadways and recognized that these grates can trap wheels causing injury to bicyclists. (APP 40.) At the very least, the City recognized the need to provide a safe alternative to the parallel grates in 2007. (APP 34; *see also* R: 163 at ¶¶9-10.) Various pictures of the grates along East St. Patrick Street are provided below:

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<sup>2</sup> The City also received federal aid for construction on East St. Patrick Street. (*See* APP 40-41.) In receiving federal aid, the City must comply with mandates of the Federal Highway Administration involving grates and would receive various materials involving such from the Federal Highway Administration. (APP 23; APP 27.) The Federal Highway Administration's recommendation for grates as it relates to bicycles is that "[w]hen bicycle traffic exists, grates should prevent the tires of a bicycle from slipping into and being caught in the grate." (APP 59.)













(R:163 at ¶ 21; *see also* APP 26; APP 29.) However, due to snowplows scraping across the grates in the winter, the crossbars became damaged or removed completely. (APP 52.)



## **2. 30(b)(6) Witness Donald Brumbaugh.**

On November 9, 2017, Plaintiffs noticed a Rule 30(b)(6) deposition. In response, the City produced Donald Brumbaugh. The Courts have established that the 30(b)(6) witnesses' testimony will bind the organization. In fact, it has been held that an organization appears vicariously through its 30(b)(6) witness. *United States v. Taylor*, 166 F.R.D. 356, 361 (M.D.N.C. 1996) (citations omitted). Most importantly, the organization, and in this case the City, is bound by the testimony of its 30(b)(6) witness. The City cannot submit new or different allegations that could have been made at the time of the 30(b)(6) deposition. *Rainey v. Am. Forest and Paper Ass'n, Inc.*, 26 F.2d 82, 94 (D.D.C. 1998) (citations omitted.) Pursuant to the Rule, Donald Brumbaugh's testimony constitutes evidentiary admissions, which bind the City.

Brumbaugh, the City's 30(b)(6) witness, admitted that the specification is a safety specification and that the City must comply with it. (APP 23.) Mr. Brumbaugh further testified that the City must maintain the streets in a safe manner.

Q: No, that's not what I asked. I didn't couch this with a complaint.  
If the city is taking over the maintenance, they're supposed to  
maintain things safely, correct?

A: Correct.

(APP 24.)

Brumbaugh also agreed that if the straps are torn off, or partially torn off, that the grate may be unsafe for bicyclists:

Q: And when they take it over, if the straps are torn  
off or in the process of being torn off or partially  
torn off, it may make the grates in the streets  
unsafe for bicycle travel, correct?

A: Correct.

(APP 24.) Brumbaugh acknowledged that once the straps are torn off, the grate becomes damaged and in disrepair:

Q: Once you weld the straps on there it becomes part of the grate, correct?

A: Okay, it's part of the grate.

Q: Yeah, it's part of the grate because the concept of the strap being part of the grate is to prevent people from falling in and hurting themselves, correct?

A: Correct.

Q: So once the straps are torn off, the grate in its configuration now with the straps has been damaged, correct?

A: Correct.

(APP 25.) The 30(b)(6) witness acknowledged that the City had notice of the traps created by parallel grates and that they are dangerous. (APP 28.)

**3. The City admitted that the grate in question had crossbars welded across it, which proves “damage” as a matter of law.**

The City admitted in its Answer that there was a weld of crossbars on the grate in question:

8. As is concerns paragraphs 21, 25, 26, and 28, the Defendant denies that the “crossbars” as alleged by Plaintiffs were welded onto the storm grate on or before July 27, 2015; further, Defendant affirmatively alleges that the *placement of “crossbars” on the storm grate* was a subsequent remedial measure which does not constitute “damage” as the same is identified in SDCL § 31-32-10 and is inadmissible in any event under SDCL § 19-19-407.

(R:172 ¶ 8.) Brumbaugh, the 30(b)(6) witness, also testified it is not possible that the welds were torn off after this incident occurred since the snow plows were not used between the date of the incident and the date of the photos taken in October. (APP 30.)

The incident occurred on July 27, 2015. Photos were taken of the grates on East St. Patrick Street on October 13, 2015. The snow plow records confirm there were no snow plow days between July and the end of October in Rapid City in 2015. (APP 36.) As a result, Brumbaugh agreed that the welds were not put on the grates after the incident—it had to be before the incident:

Q: And we have the temperatures for October. They're all in the 50s to the '80s. It's not a time in which the snowplow would be out, correct?

A: That's correct.

Q: And you would agree with me that if you look at Exhibit (sic) 10 and Exhibit (sic) 11, it's dangerous because a bike tire could fit in the gaps, correct?

A: It could, yes.

Q: So you're not contending that somebody welded straps on in early October and then got them scraped off so they end up like Exhibit 11, numbers 10 and 11, are you?

A: No, I'm not.

Q: Okay. That wouldn't make sense, would it?

A: Not really, no.

(APP 30.)

It is the City's failure to repair the damaged or removed crossbars on the grates that caused Julie's injuries. (R: 163 at ¶ 25.) This was a failure of the City's statutory duty under SDCL 31-32-10, and the circuit court erred in not allowing Julie's case to proceed to a jury. The circuit court granted summary judgement for the City; however, the basis for the circuit court's ruling was grounded on the issue of notice to the City of the damage. The following facts show that disputed material facts exist as to the notice the City had in order to bring its liability within the confines of SDCL 31-32-10:

- (1) Whether the City welded or repaired the grate;
- (2) Whether the City welded straps on the grates before or after the incident;
- (3) Whether the City destroyed the evidence after receiving notice of the lawsuit to prevent Julie from examining the grate to determine when welding on the grate occurred;
- (4) Whether the City had actual notice that the highway was damaged;
- (5) Whether the City had actual notice that the specific grate was damaged;
- (6) Whether the City had constructive notice to the damage of the highway;
- (7) Whether the City had constructive notice to the damage of the specific grate;
- (8) Whether the City had notice as a matter of law given its admissions; and
- (9) Whether the City created its own disputed fact through its 30(b)(6) witness by giving contradictory statements in his deposition and subsequent affidavit as to when the welding on the grate occurred.

Thus, the circuit court erred in granting summary judgment in favor of the City because the City did have notice of the damage and questions of disputed material fact remain.

#### **STANDARD OF REVIEW**

“[T]he focus in summary judgment hearings centers on the existence of admissible and probative evidence to support the challenged claim or defense.” *Stern Oil Co., Inc. v. Brown*, 2012 S.D. 56, ¶ 16, 817 N.W.2d 395, 401 (citing *Chem–Age Indus., Inc. v. Glover*, 2002 S.D. 122, ¶ 18, 652 N.W.2d 756, 765).

This Court has repeatedly provided the following as the standard for summary judgment:

Summary judgment is authorized “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law.” We will affirm only when there are no genuine issues of material fact and the legal questions have been correctly decided. All reasonable inferences drawn from the facts must be



viewed in favor of the non-moving party. The burden is on the moving party to clearly show an absence of any genuine issue of material fact and an entitlement to judgment as a matter of law.

*Discover Bank v. Stanley*, 2008 S.D. 111, ¶ 16, 757 N.W.2d 756, 761-62 (quoting *Mueller v. Cedar Shore Resort, Inc.*, 2002 S.D. 38, ¶ 10, 643 N.W.2d 56, 62); *see also* SDCL 15–6–56(c).

Defendants are not without their own burden as well. “Entry of summary judgment is mandated against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.” *Hass v. Wentzlaff*, 2012 S.D. 50, ¶ 11, 816 N.W.2d 96, 101 (quoting *W. Consol. Coop. v. Pew*, 2011 S.D. 9, ¶ 19, 795 N.W.2d 390, 396). “A sufficient showing requires that “[t]he party challenging summary judgment . . . substantiate his allegations with sufficient probative evidence that would permit a finding in his favor on more than mere speculation, conjecture, or fantasy.” *Quinn v. Farmers Ins. Exch.*, 2014 S.D. 14, ¶ 20, 844 N.W.2d 619, 624–25 (quoting *Stern Oil Co. v. Brown*, 2012 S.D. 56, ¶ 8, 817 N.W.2d 395, 398.)

### **ARGUMENT AND AUTHORITIES**

#### **I. The circuit court erred in granting the City’s motion for summary judgment.**

The circuit court granted the City’s motion for summary judgement on the false basis that Godbe did not show a disputed material fact as it related to notice of the damage to the grate that caused Julie’s injury. The statute that imposes liability on the City for its failure to prevent an injury like the one at bar is found in SDCL 31-32-10.

That statute states:

If any *highway, culvert, or bridge is damaged* by flood, fire or other cause, to the extent that it endangers the safety of public

travel, the governing body responsible for the maintenance of such highway, culvert, or bridge, shall within forty-eight hours of *receiving notice of such danger*, erect guards over such defect or across such highway of sufficient height, width, and strength to guard the public from accident or injury and *shall repair the damage* or provide an alternative means of crossing within a reasonable time after receiving notice of the danger. The governing body shall erect a similar guard across any abandoned public highway, culvert, or bridge. Any officer who violates any of the provisions of this section commits a petty offense.

SDCL 31-32-10 (emphasis added). Pursuant to the above, Godbe had to show damage to the highway and that the City received notice of the danger to hold the City liable. *See id.* The circuit court, however, found that the City did not receive notice of the damage to the specific grate. The circuit court's rationale and grant of summary judgment for the City was in error.

First, Julie presented multiple instances of notice that were ultimately disputed by the City. For approximately 20 years, the City was aware that the grates along East St. Patrick Street were dangerous and in disrepair. The City's own specifications found that the grates were not safe for bicycle traffic. As a temporary fix, the City attempted to remedy the non-compliant grates by welding crossbars across the parallel grates; however, these crossbars would be torn off, damaged, or become mangled as a result of the City's snowplows. The City cannot turn a blind eye as it relates to notice for something so plainly damaged. Further, the City has admitted to welding on the specific grate that caused Julie's injury. But before any welding analysis could be done to confirm the City's notice in terms of welding on the specific grate, the City had all the grates and evidence of its wrongdoing destroyed.

Second, the circuit court interpreted the statute too narrowly in ruling that Godbe had to show the City had notice to the damage of the specific grate that caused the

injuries. Such a narrow reading is not found when interpreting the statutory history of SDCL 31-21-10 or case precedent interpreting the same. The City had to be on notice to the damage of the highway. Further, the notice required under the statute is one of implied or constructive notice and is not actual notice as stated by the circuit court. Specifically, this Court has stated that implied or constructive notice is all that is required under SDCL 31-21-10. See *Fritz v. Howard Township*, 1997 S.D. 122, ¶ 21, 570 N.W.2d 240, 244-45. Thus, when interpreting the statute according to its plain text, Godbe presented ample disputed facts that would put the City on constructive notice.

***A. The circuit court erred in finding no disputed material facts exist as it relates to notice of damage to the roadway pursuant to SDCL 31-32-10.***

Indeed, 20 years prior to Julie’s accident, in 1992, the City of Rapid City had “notice” of a dangerous condition or disrepair of its roadways and recognized that these grates can trap wheels causing injury to bicyclists. (APP 40-41.) Then, in 2007, the City Public Works Department identified and implemented “Type B” inlets with “Type V” perpendicular grates as a safe design for City storm drains. (APP 34.) The “Type V” grates prevent someone riding parallel to the traffic from entering the grate when riding a bicycle. (APP 18; APP 39.)

In July 2011, the City then introduced the Rapid City Area Bicycle and Pedestrian Master Plan directing the City to continue the efforts in replacing the dangerous grates. (APP 57; APP 42-43.) Recognizing the hazardous condition the grates posed, and attempting to abide by the adoption of not only the 2011 Master Plan, but the realization in 2007 that grates perpendicular to the highway is safer, the City attempted to remedy their existing dangerous grates by welding crossbars or straps on the grates as a

temporary fix, even though snowplows would remove the crossbars and leave the grates damaged. (APP 26; APP 29; APP 52.)

In fact, the City has admitted to welding on the specific grate that caused Julie's injuries:

8. As is concerns paragraphs 21, 25, 26, and 28, the Defendant denies that the "crossbars" as alleged by Plaintiffs were welded onto the storm grate on or before July 27, 2015; further, Defendant affirmatively alleges that the *placement of "crossbars" on the storm grate* was a subsequent remedial measure which does not constitute "damage" as the same is identified in SDCL § 31-32-10 and is inadmissible in any event under SDCL § 19-19-407.

(R: 172 at ¶ 8.) But while the City claims the crossbars were placed as a remedial measure, this cannot be the case. A handful of photos were taken of the grates on East St. Patrick Street both by the City's Risk Manager Trevor Schmelz and counsel for Plaintiff. Trevor Schmelz took pictures of the grates on October 1, 2015, and counsel for Julie took pictures on the grates on October 5, 2015. (APP 37.)

The facts are clear that the City did weld on the grates on East St. Patrick Street. There were no snowplows operating between the date of Julie's injury on July 27, 2015, and October of 2015 when the photos were taken that show the mangled crossbars or welds on the grate. (APP 30.) The welds that were visible on the grates in the photographs were old and were done prior to July 2015. (APP 32.) Also, City employees Trevor Schmelz, Donald Brumbaugh, Dale Tech, and Dale Pfeifle all agree that the City would not weld crossbars on a few grates and skip others. (APP 43; APP 31; APP 51; APP 55.) Further, all agreed that the welding took place before the incident. (APP 30.)

The City has admitted to welding on the specific grate that caused Julie's injuries. (R: 172 at ¶ 8.) This admission by the City's counsel, combined with the evidence that the grate was in fact welded on, should relieve Godbe of the duty to present evidence on that issue—or at the very least raise an issue of disputed material fact. “An attorney can make an admission that is binding upon his client and relieves the opposing party of the duty to present evidence on that issue.” *Zahn v. Musick*, 2000 S.D. 26, ¶ 26, 605 N.W.2d 823, 829 (quoting *Rosen's Inc. v. Juhnke*, 513 N.W.2d 575, 577 (S.D. 1994)). While not related to opinions or legal theories, “[a]n admission is limited to matters of fact which would otherwise require evidentiary proof[.]” *Id.* (quoting *Tunender v. Minnaert*, 1007 S.D. 62, ¶ 21, 563 N.W.2d 849, 853).

However, the City is claiming that it welded on the grates on East St. Patrick Street on October 21, 23, 26, and 27 in 2015. (R: 1815, p. 14.) The City cites to the employee time cards during this time. But the employee time cards say nothing of welding, placing crossbars, or repairing damaged grates. (APP 60-75.) The time card of employee David Green makes clear that the storm grates were replaced on East St. Patrick Street during the time the City is claiming that they were welded on. (APP. 73.) Indeed, the City replaced the grates on East St. Patrick Street as a response to Plaintiffs' counsel's letter dated October 16, 2015, to the City's attorney. (APP 76-77.) Even Dale Tech, the City's engineer, admitted that he ordered the grates removed after counsel's letter.

Q: That's what Dale Pfeifle indicated, too.  
So you're consistent with that. So you  
delegated to Sarah measuring and observing  
the various grates. And then after she did that,  
then you ordered the street department to remove  
the grates and put in the V inlet Grates?

A: Correct.

Q: And when they removed the grates, did you tell them - - strike that. When they removed the grates you did not indicate to anyone to designate the grate that was in question regarding Julie Godbe - -

A: No.

(APP 50.) It was after counsel for Plaintiff sent the October 16, 2015, letter that the City destroyed and made unidentifiable for inspection the removed grates on East St. Patrick Street as indicated by the City's own engineer Dale Tech.

Even if counsel for Julie wanted to test the specific grate to prove that it had been welded and that the City had notice, the grates in the photographs were destroyed after the City was notified of Julie's injury in September 2015 by counsel. (APP 16-17; APP 20; APP 53; APP 37.) "Intentional destruction of evidence, a form of obstruction of justice, is called 'spoliation.'" *State v. Engesser*, 2003 S.D. 47, ¶ 44, 661 N.W.2d 739, 753 (quoting McCormick on Evidence § 273 660-61 (2nd ed. 1972)). When a party intentionally destroys the evidence and spoliation is established, the "fact finder may infer that the evidence destroyed was unfavorable to the party responsible for its destruction." *Red Bear v. SESDAC, Inc.*, 2007 S.D. 27, ¶ 32, 896 N.W.2d 270, 279 (quoting *Engesser*, 2003 S.D. 47, ¶ 44, 661 N.W.2d at 753).

Here, the City did intentionally destroy the evidence, and the inference should be made against them. The City knew that there was a claim against them related the injuries Plaintiff suffered on July 27, 2015. (APP 16-17.) The City has admitted, through their 30(b)(6) witness, that they did nothing to preserve the specific grate that caused Julies injuries. (APP 17.)

Q: Okay. And the city did nothing to preserve this evidence that's the grate itself, correct?

A: Apparently not.

...

Q: ... As far as you know as you sit here today, you can't put your hands on this grate so we can examine it, correct?

A: It - - if I had 20 of those grates sitting here in this room, I couldn't tell you which inlets - - or which grate came out of what inlet. So once they're together, there wouldn't be any way for me to tell anyway, so no.

Q: So it's gone for purposes of inspection?

A: Yes

Q: And it's gone based on the city removing it and disposing of it?

A: Yes.

(APP 17.) The inference should be made against the City because they destroyed the evidence.

Julie was abiding by the law and the City's own ordinance when she was riding her bicycle on East St. Patrick Street on July 27, 2015. *See* SDCL 32-20B-5;<sup>3</sup> Rapid City Code of Ordinances 10.64.170.<sup>4</sup> Julie had no other choice but to encounter the damaged highway and dangerous grate. She was abiding by her duty as a bicyclist, and the City had a duty to repair and maintain the dangerous highway. Due to the City's admission of welding on the grate that caused Julie's injuries, the absence of evidentiary support for the City's position that the grate was not maintained, and the fact that the evidence is now

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<sup>3</sup> SDCL 32-20B-5 states:

Any person operating a bicycle upon a roadway at less than the normal speed of traffic . . . shall ride as close as practicable to the right-hand curb or edge of the roadway.

<sup>4</sup> Rapid City Code of Ordinances 10.64.170 states:

[A]ny person operating a bicycle upon a roadway at less than the normal speed of traffic at the time and place and under the conditions then existing shall ride in the right 4 feet of roadway near the right-hand curb or edge of the roadway.

destroyed, which eliminates Julie's ability to support the City's notice of the dangerous grate and subsequent remedy prior to July 27, 2015, the City's liability falls squarely within SDCL 31-32-10. Simply, the City failed to adequately repair and maintain the damaged grate of which it had notice. Godbe has presented ample evidence that raises questions of disputed material facts as to the City's notice to the damage and the highway, and a South Dakota jury should be able to determine the City's liability.

***B. The circuit court erred in interpreting SDCL 31-32-10 by finding the statute requires actual notice and that the damage is not to the highway, but to the specific instrumentality causing injury.***

The City continually protests that Godbe has failed to prove that the City welded on the grate on East St. Patrick Street that caused Julie's injuries, and the circuit court wrongly agreed. It is Godbe's position that such proof has been adequately presented in this matter as it relates to the specific grate, at the very least enough evidence is present to raise a disputed material fact. Even so, the City has subsequently destroyed and made unidentifiable the specific grate in question to secure direct proof upon adequate testing that the City has welded on the grate prior to Julie's injuries, knew that the specific grate was damaged, and thus, failed to maintain the specific grate when snowplows scraped off the welded straps.

Regardless, the circuit court is contending that SDCL 31-32-10 is to be read as narrow as possible and relieve the City of liability. The circuit court claims that the statute requires that Godbe must prove that they received notice of the damage *to the specific grate* that caused Julie's injuries. However, the circuit court provided no authority for such a narrow reading and ignores the history of the statute itself, which it was made aware of. (See R: 24 pp. 5-14; R: 286 p. 3.)



Again, and for ease of the Court, the statute at hand that imposes a duty on the City to protect the public from injury states:

If any *highway*, culvert, or bridge *is damaged* by flood, fire or other cause, to the extent that it endangers the safety of public travel, the governing body responsible for the maintenance of such highway, culvert, or bridge, shall within forty-eight hours of *receiving notice of such danger*, erect guards over such defect or across such highway of sufficient height, width, and strength to guard the public from accident or injury and *shall repair the damage* or provide an alternative means of crossing within a reasonable time after receiving notice of the danger. The governing body shall erect a similar guard across any abandoned public highway, culvert, or bridge. Any officer who violates any of the provisions of this section commits a petty offense.

SDCL 31-32-10 (emphasis added).

The statute plainly states, as noted by the above emphasized language, that the City would be responsible for damage that endangers the safety of public travel to “any highway.” SDCL 31-32-10. East St. Patrick Street is a “highway” for purposes of the statute. *See* SDCL 31-1-1 (“Every way or place of whatever nature open to the public, as a matter of right, for purposes of vehicular travel, is a highway.”). Of note, there is no limiting language in the statute that would delegate the “notice” or “damage” to the specific situs of the injury sustained by a Plaintiff. Rather, it does just the opposite and clearly defines the damage and notice of such to *any* highway. A narrower interpretation would obstruct the plain language used by the Legislature in SDCL 31-32-10. *See Farm Bureau Life Ins. Co. v. Dolly*, 2018 S.D. 28, ¶ 9, 910 N.W.2d 196, 199 (“This Court assumes that statutes mean what they say and that legislators have said what they mean.”) It would be a rather obtuse result in allowing the City to escape liability in a circumstance where the City was put on notice and repaired two damaged bridges wiped out by a flood on a highway, but failed to maintain or repair a middle bridge that succumbed to the same

fate as the other two and someone gets injured as a result. *See Fritz v. Howard Twp.*, 1997 S.D. 122, ¶ 21, 570 N.W.2d 240, 244-45 (stating implied or constructive notice is all that is required under SDCL 31-32-10). Such a narrow reading of the statute would produce absurd results. *See Schafer v. Shopko Stores, Inc.*, 2007 S.D. 116, ¶ 7, 741 N.W.2d 758, 761 (stating that a presumption exists in interpreting statutes “that the Legislature intended no absurd or unreasonable result[s]”); *see also City of Deadwood v. M.R. Gustafson Family Trust*, 2010 S.D. 5, ¶ 9, 777 N.W.2d 628, 632 (“A court is not at liberty to read into the statute provisions which the Legislature did not incorporate.”).

Even if it was assumed that an ambiguity existed in the statute, which Appellants do not contend, turning to principles of statutory construction make clear that the Legislature did not intend such a narrow interpretation of SDCL 31-32-10. Before 1915, no statute existed imposing liability on townships or counties, and they were not liable under the common law for injuries sustained for highway defects. *Hohm v. City of Rapid City*, 2008 S.D. 65, ¶ 8, 753 N.W.2d 895, 900. However, in 1915, the Legislature enacted chapter 210, which made townships and counties liable for injuries sustained in certain circumstances due to highway defects. *Id.* The 1915 act provided in part:

§ 1. Guards Erected—Repairs made. It should be the duty of the road supervisors of any township, town or city, and the county commissioners of any county . . . to keep all public roads and highways, culverts and bridges in such condition as to render them safe and passable and free from danger of accidents or injury to persons or property, while in the lawful use thereof, and in case such roads, *highways*, culverts or bridges *shall become in whole or in part destroyed or out of repair* by reason of floods, fires or any other cause, to such an extent as to endanger the safety of public travel, it shall be their duty upon receiving notice thereof to cause to be erected, for the protection of travel and public safety, within twenty-four hours thereafter, substantial guards over such defects, or across such roads or highways, of sufficient height, width and strength to warn and guard the public from accident or injury to the

person or property thereof, and it shall also be their duty to repair the same within a reasonable time thereafter. . . .

1915 S.D. Sess. L. ch. 210. (emphasis added.) As noted above, the 1915 statute specifically references that the damage to the highway can be “in whole or in part.” *Id.* This same language was retained when the session law was codified in 1919. *See* S.D. Rev. Code 1919, § 8589; *see also Hohm*, 2008 S.D. 65, ¶ 10, 753 N.W.2d at 901 (quoting § 8589 of 1919 enactment of statute).

After revisions were made in 1939, the same “in whole or in part” language was retained in the statute as it relates to the damage of any highway.

In case any highway, culvert, or bridge shall become *in whole or in part destroyed* or out of repair by reason of flood, fires or other cause to such an extent as to endanger the safety of public travel, it shall be the duty of the governing body or board . . . to repair the same within a reasonable time . . . .

1939 SDC § 28.0913 (emphasis added; *see also Hohm*, 2008 S.D. 65, ¶ 11, 753 N.W.2d at 900-02 (quoting the same). The successor to 1939 SDC § 28.0913 is now SDCL 31-32-10, which the “in whole or in part” language is absent from. *See* SDCL 31-32-10, *supra*.

The only logical interpretation of the Legislature’s intent to remove such language is that it deemed the “in whole or in part” language to be mere surplusage. *See Nat’l Farmers Union Prop. & Cas. Co. v. Universal Underwriters Ins. Co.*, 534 N.W.2d 63, 65 (S.D. 1995) (“The legislature does not intend to insert surplusage in its enactments.”). With SDCL 31-32-10 stating that “any highway” that becomes damaged must be repaired, the removed “in whole or in part” language would add nothing to the statute’s

meaning as “damage” is referencing “any highway.”<sup>5</sup> In reviewing the history of the statute, the Legislature’s intent cannot be determined to mean that the City must be put on notice of the specific thing that caused the injury on the highway like the circuit court employed in its holding. Rather, the statute only requires notice of damage on any highway. It is couched in general rather than specific terms. Thus, even assuming ambiguity with the statute, the intent of the Legislature as gleaned from the historical versions of SDCL 31-32-10, make clear that the damage to the highway, whether it be “in whole or in part,” is enough to attach liability to the governing body responsible for its maintenance.

However, this does not end the inquiry as the circuit court also misinterpreted what type of notice under SDCL 31-32-10 is required. The circuit court implied that the City had to be on actual notice of the damage. This was in error as constructive or implied notice is all that is required under SDCL 31-32-10.

As recognized by the South Dakota Supreme Court in *Fritz v. Howard Township*:

Our statute [forerunner to SDCL 31-32-10] does not expressly require actual notice [of defect in highway], and by the great weight of authority it is held that unless actual notice is required by the statute constructive or implied notice is sufficient.

1997 S.D. 122, ¶ 21, 570 N.W.2d at 244-45 (quoting *Clementson v. Union Cty*, 63 S.D.

104, 108, 256 N.W. 794, 796 (1934)); *see also* SDCL 17-1-4.<sup>6</sup> In *Fritz*, the Court was

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<sup>5</sup> It should be also noted that in comparing the 1939 statute with SDCL 31-32-10, the “in whole or in part” language is modifying “destroyed.” The Legislature’s removal of “destroyed” and replacement with “damaged” is in and of itself clarifying the issue. A thing “in part destroyed” is also damaged and keeping the language would be unnecessary. It can also be argued that the Legislature’s enactment of SDCL 31-32-10 and its subsequent revision from “destroyed” to “damaged” broadens the statute’s reach with respect to the City’s liability as no longer does a highway need to be “in whole or in part destroyed” but merely “damaged.”

<sup>6</sup> SDCL 17-1-4 states:

tasked with the exact question presented in the case at bar: whether actual notice required under SDCL 31-32-10. *Id.*

In that case, a township resident notified the clerk for Township by telephone to inform her that a section of the township road was washed out. *Id.* ¶ 2, 570 N.W.2d at 241. Unable to reach any of the township board members, the clerk erected home-made signs on steel fence posted stating the road was closed. *Id.* The signs were placed on the east and west ends of the mile-long road in the center of the road. *Id.* The clerk eventually informed the township board, but repairs to the road were futile given the frozen nature of the gravel pits. *Id.* ¶ 3. Approximately a month later, the plaintiff was traveling on the damaged township road and struck the washout and suffered serious injury. *Id.* ¶ 4. The sign that was warning of the damaged road was apparently knocked over by other traffic. *Id.* ¶ 6. The plaintiff then sued the township for negligence for failing to properly sign the road and for failing to place a guard over the damaged section of the road pursuant to SDCL 31-32-10. *See id.* ¶ 7.

Pertinent to the present case, the circuit court then awarded summary judgment to the Township stating that it did not have actual notice of the missing or damaged sign, and therefore, the township was not liable to the plaintiff under the statute. *Id.* ¶ 1, 570 N.W.2d at 240-41; *see also id.* ¶ 20, 570 N.W.2d at 244 (stating that once sign is erected it becomes part of the highway and the county had a duty to maintain for the safety of public travel). However, the South Dakota Supreme Court reversed the lower court's determination and stated that SDCL 31-32-10 only provides that implied or constructive

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Every person who has actual notice of circumstances sufficient to put a prudent man upon inquiry as to a particular fact, and who omits to make such inquiry with reasonable diligence, is deemed to have constructive notice of the fact itself.

notice is required to bring the county's liability within the purview of the statute. *Id.* ¶ 21, 570 N.W.2d at 244-45. The Court stated that it was a jury question of "whether Township, in the exercise of ordinary care should have discovered that the sign was missing in time to replace it before this accident." *Id.* ¶ 22, 570 N.W.2d at 245.

Here, and as provided above, the City had ample notice of the damage to the highway. For 20 years, the City knew that the storm grates were unsafe for bicycle travel. The City attempted to remedy the unsafe and dangerous grates by welding metal straps across the parallel grates. Snowplows would then clear the streets and remove or mangle the grates, which is clearly visible for any passerby. These facts present "circumstances sufficient to put a prudent man upon inquiry as to [the damage]," and thus, is considered constructive notice of the damage itself. *See* SDCL 17-1-4. Godbe has presented sufficient facts that show a genuine, material issue exists for trial. The jury should be allowed to determine whether the facts presented was sufficient to put the City on notice. Therefore, the circuit court erred in interpreting SDCL 31-32-10 so narrowly as it related to the object of the damage: the highway, rather than the specific grate. The Circuit court also erred in implying that actual notice was required pursuant to the statute as Godbe has presented sufficient fact to have a jury determine whether it had constructive notice of the damage.

The City of Rapid City had notice of unsafe grates for more than 20 years. The City, through their designated witness Donald Brumbaugh, admitted that the grate in question had been welded on. The City then acknowledges that the grates were damaged prior to the date of Julie Godbe's injury: July 27, 2015. That was established through the snowplow records and Donald Brumbaugh's acknowledgement that no snowplows were

used between July 27, 2015, and the date of the photos in October 2015. Brumbaugh, the City representative, admitted that the grates were damaged and improperly maintained. He further admitted that they were traps and unsafe for bikers.

However, once the City was aware that litigation was eminent, the City destroyed the evidence. This prevented Godbe from examining the grates on East St. Patrick Street to determine if welding occurred and when. The fact that the City destroyed the grates, which includes removing all the grates and making them unidentifiable from each other, is a fact that must be interpreted against them. *See Red Bear*, 2007 S.D. 27, ¶ 32, 896 N.W.2d at 279 (stating the “fact finder may infer that the evidence destroyed was unfavorable to the party responsible for its destruction”). Thus, a factfinder may infer that the City did weld on the specific grate, as well as all the grates on the highway, and that this constituted notice that the highway or the specific grate was damaged. A disputed material fact that a jury has to determine.

With these facts, the circuit court misapplied the law as it relates to the City’s liability under SDCL 31-32-10. Godbe has presented disputed material facts that the City was on notice to the damage of the specific grate that caused Julie’s injuries. Even so, damage to the specific grate that caused the injury is not contemplated by the statutory language of SDCL 31-32-10. Rather, notice of the damage to the highway as a whole is all that is required. Further, the City only has to have constructive notice of the damage, rather than actual notice as implied by the circuit court. Because the circuit court erred, Godbe moves this Court to reverse the lower court’s grant of summary judgment for the City and allow for Julie to present her case to a South Dakota jury.

## **CONCLUSION**

Based on the foregoing, Godbe respectfully asks that the Court reverse the trial court's order granting summary judgment in favor of the City and remand this case for a trial on the merits.

Respectfully submitted this 2<sup>nd</sup> day of June, 2020.

BEARDSLEY, JENSEN & LEE,  
PROF. L.L.C.

By: /s/ Steven C. Beardsley

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ORAL ARGUMENT IS RESPECTFULLY REQUESTED



### **CERTIFICATE OF COMPLIANCE**

Pursuant to S.D.C.L. §15-26A-66(b)(4), I certify that Appellant's Brief complies with the type volume limitation provided for in the South Dakota Codified Laws. This Brief contains 9154 words and 43,877 characters. I have relied on the word and character count of our processing system used to prepare this Brief. The original Appellant's brief and all copies are in compliance with this rule.

Dated this 2<sup>nd</sup> day of June, 2020.

BEARDSLEY, JENSEN & LEE,  
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### **CERTIFICATE OF SERVICE**

I hereby certify that on the 2<sup>nd</sup> day of June, 2020, I emailed the foregoing Appellants Brief and sent two copies of it by U.S. Mail, first-class postage prepaid to:

John Nooney  
Robert Galbraith  
Nooney & Solay  
632 Main Street  
Rapid City, SD 57709

I further certify that on 2<sup>nd</sup> day of June, 2020, I emailed the foregoing Appellants' Brief and sent the original and two copies of it by U.S. Mail, first-class postage prepaid to:

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BEARDSLEY, JENSEN & LEE,  
PROF. L.L.C.

By: /s/ Steven C. Beardsley  
Steven C. Beardsley

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## Seventh Judicial Circuit Court

P.O. Box 230  
Rapid City SD 57709-0230  
(605) 394-2571

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### CIRCUIT JUDGES

Craig A. Pfeifle, Presiding Judge  
Matthew M. Brown  
Joshua Hendrickson  
Jeff Connelly  
Robert Gusinsky  
Heidi L. Linngren  
Robert A. Mandel  
Jane Wipf Pfeifle

### MAGISTRATE JUDGES

Scott M. Bogue  
Todd J. Hyronimus  
Sarah Morrison  
Marya V. Tellinghuisen

### COURT ADMINISTRATOR

Kristi W. Erdman

December 28, 2019

John Nooney  
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Steven and Michael Beardsley  
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**RE: *Godbe & Godbe v. City of Rapid City, SD*; Civil No. 16-744; Motion for Summary Judgment**

Counsel:

Both parties filed motions for Summary Judgment in the case cited above. The Court considered the record, briefs and the arguments of counsel, and being fully advised as to all matters pertinent hereto, for the reasons set forth below, the Defendant's motion for Summary Judgment is **GRANTED**. Conversely, the Plaintiff's Motion for Summary Judgment is **DENIED**.

On July 27, 2015, Julie Godbe was riding her bicycle on East St. Patrick Street in Rapid City, South Dakota. While traveling next to the right-hand curb of East St. Patrick Street, between Campbell Street and Creek Drive, the front tire of her bicycle fell into a storm drain causing serious and life-altering injuries. The storm drain grate, described as "Grate 4" in the

submissions to the Court, had steel bars that ran parallel to the curb, such a design allowed a bike tire to get lodged between the bars.

A summons and complaint was filed May 2, 2016. A Motion to Dismiss was filed by the Defendant, City, on June 9, 2016. On October 25, 2016, this Court entered a Memorandum Decision granting the City's Motion to Dismiss. That Memorandum Decision is hereby fully incorporated into the ruling(s) on the pending Summary Judgment motions from both parties.

The Plaintiffs then filed a Motion to Amend Complaint. The Amended Complaint re-alleged Count I: Negligence *without any amendments to the original complaint* that the Court had dismissed pursuant to its Memorandum Decision of October 25, 2016. The allegation in Count 2: Negligent Maintenance and Repair added a singular paragraph (Paragraph 25) alleging:

25. Defendant knew or should have known the welded cross bars on the grate in question were ripped off and therefore damaged, thereby allowing the Plaintiffs bicycle tire to fall into the drain grate causing bodily injury. Defendant after being put on notice of the damage prior to the accident, failed to timely repair or replace the welded metal pieces allowing bicycle tires to fall down into the grate causing loss of control of the bicycle and resulting in serious personal injury, all in violation of SDCL 31-32-10.

The final allegation in Count 3: Loss of Consortium is a derivative claim which arises from either Counts 1 or 2. This allegation in the Amended Complaint was not modified from the original Complaint.

Both sides subsequently filed motions for Summary Judgment. The Court will now address these motions.

Summary judgment is authorized where the pleadings, depositions, answers to interrogatories on file, together with the affidavits, if any, show there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. SDCL 15-6-56(c). All

reasonable inferences drawn from the facts must be viewed in favor of the non-moving party. *Morgan v. Baldwin*, 450 N.W.2d 783, 785 (S.D. 1990). The burden is on the moving party to show the absence of any genuine issue of material fact and entitlement to judgment as a matter of law. *Wilson v. Great N. Ry. Co.*, 83 S.D. 207, 212, 157 N.W.2d 19, 21 (1968).

However, in order to defeat summary judgment, the non-moving party may not rest on mere allegations or his pleadings, but must set forth, by affidavit or other evidence, specific facts showing the existence of genuine issues of material fact for trial. *Plato v. State Bank of Alcester*, 555 N.W.2d 365, 366 (S.D.1996). When the moving party shows that no genuine issue of material fact is present, “[t]he non-moving party...must present specific facts showing that a genuine, material issue for trial exists.” *Waddell v. Dewey County Bank*, 471 N.W.2d 591, 593 (S.D. 1991). The existence of some fact, however, is not sufficiently established by “proof of a mere possibility.” *Estate of Elliot v. A&B Welding Supply Company, Inc.*, 1999 S.D. 57, ¶ 16, 594 N.W.2d 707.

In order to prevail on a negligence based claim in South Dakota, the Plaintiff must prove the basic elements of negligence: (1) duty, (2) breach, (3) cause, (4) damages. Determining whether a duty exists and ‘defining its limitations remain a function of the courts.’” *Bordeaux v. Shannon Cty. Sch.*, 2005 S.D. 117 ¶ 11, 707 N.W. 2d 123, 126 (further citations omitted).

The duty of a governmental agency, such as the City, as it concerns damages or defects on a public roadway is controlled entirely by statute. In this case statutory liability is controlled by SDCL 31-32-10. The Plaintiff has argued throughout this matter that in 2007 the City of Rapid City adopted Standard Specifications for the use of Type B inlets which had grates that were not parallel to the roadway, that Don Brumbaugh, the City’s 30(b)(6) witness “admitted” that the specification is a safety specification and that the City must comply with it. (Brumbaugh Dep.

74:16-75:9). That Brumbaugh “acknowledged” that once straps are torn off, the grate becomes damaged and in disrepair (Brumbaugh Dep. 81:5-16). And that the city had “notice of the traps created by parallel grates and that they are dangerous.” (Brumbaugh Dep. 109:17-23). In summary, the City realized it had a design problem in 2007, adopted a plan to rectify the problem in 2007, and negligently administered that plan, which led to Julie Godbe’s accident and injury.

None of these arguments are in any way different than what the Court has previously ruled on in its Memorandum Decision of October 25, 2016.

To clarify, the allegations in the Amended Complaint in paragraphs 1-24 (and including the *entirety* of the cause of action in Count 1: Negligence) are *exactly the same* as what this Court had previously ruled on and specifically dismissed. Any further reference to Count 1: Negligence is unnecessary as it has been previously addressed by this Court and dismissed with prejudice in its current “Amended”, but unaltered, form. Having disposed of Count 1 of the Amended Complaint, the Court now addresses Counts 2 and 3.

In order to prevail on a motion for Summary Judgment, the moving party must show there is an absence of a genuine issue of material fact. Both the Plaintiffs and the Defendant have filed Motion(s) for Summary Judgment. Critical to this case, given the alleged damages and defects to grate on East Saint Patrick Street is the issue of whether the City had notice of damage to the grate that Julie Godbe drove her bicycle into. The Court concludes there has been no showing of a dispute of material fact as to that issue, and that the Plaintiff has not alleged any *material* fact that shows the City had notice of damage to the grate Julie Godbe fell into.

The Plaintiffs have pled in paragraphs 18, 19, 20, 21, 22, 23, 24, 27, and 28 in their Amended Complaint (which notably are no different than the paragraphs included in the original

Complaint, which the Court has previously dismissed) allege essentially that the City was aware they had a design problem in 2007 in that the type “B” inlet drains were parallel to the road which was not safe, adopted a plan and policy to change the road, and that the plan was negligently executed and/or the grate cross straps were negligently maintained. Lost in all this creative lawyering is any indication the City had notice of damage (by flood, fire, snowplow, etc.) to Grate 4, or for that matter, *any* of the other grates.

The pleadings allege the City was aware (aka notice) of an unsafe roadway, including East Saint Patrick Street. The roadway was unsafe because it was created with parallel grates, which are dangerous to pedestrian and bicycle traffic. The City undertook steps in 2007 through adoption of various policies and plans to rectify that unsafe roadway. Plaintiffs further allege that prior to Julie Godbe’s accident that Grate 4 had been welded on to temporarily rectify the poor design and that those welds had been torn off, likely by a snowplow sometime before the accident. The key element for liability to the City is still missing. Paragraph 25 in the Amended Complaint states the City “knew or should have known the welded crossbars were ripped off and thereby damaged...” but never put forward any material facts that support that conclusion. How and when did the city know a snowplow (Plaintiff’s theory) damaged Grate 4 prior to the accident? Plaintiffs keep returning to notice of a design defect and negligent maintenance starting in 2007. This continued argument wholly misses the point. East Saint Patrick Street was built with a wildly dangerous grate system. The City realized it had problems with the grates they had even back in 2007. The City may have welded on Grate 4 before the accident and those welds may have failed. But there has been absolutely no offering from the Plaintiff that the City had notice about the post-welding damage to the Grate. Without support of this key fact which



must be shown to be contested in some way to survive the Defendant's Motion for Summary Judgment, the entire case fails.

Going back to the controlling statute, SDCL 31-32-10 requires that:

If any highway, culvert, or bridge is **damaged** by flood, fire or other cause, to the extent that it endangers the safety of public travel, the governing body responsible for the maintenance of such highway, culvert, or bridge, shall within forty-eight hours of **receiving notice of such danger**, erect guards over such defect or across such highway at sufficient height....and shall repair the damage....

This Court keeps circling back to the issue of notice, but specifically, notice of *what*? Notice of a design flaw that was birthed with the road? A self-realized belief that parallel grates are a horrible idea because of the inherent dangers they pose to bicycles riding on the road? The review of the relevant case law, *Holm v. City of Rapid City*, 2008 S.D. 65, 753 N.W.2d 895, *Bailey v. Lawrence County*, 5 S.D. 393, 59 N.W. 219 (1894), *Gulbranson v. Flandreau Twp.*, 458 N.W.2d 361 (S.D. 1990), *Reaney v. Union County*, 69 S.D. 392 10 N.W.2d 762 (1943), *Dohrman v. Lawrence County*, 82 S.D. 207, 143 N.W.2d 865 (1966), *Zens v. Chicago*, *Milwaukee St. Paul & Pac. R. Co.*, 386 N.W.2d 475 (S.D. 1986) and *Wilson v. Hogan*, 473 N.W.2d 492 (S.D. 1991), leads this Court to conclude material/relevant notice does not relate to notice or knowledge of defects in the highway that were birthed with the road. A defective design, no matter how egregious or even obvious, cannot be the basis for municipal liability. Even assuming the Plaintiff's other factual allegations are grounded, specifically that the cross bars were welded upon before Godbe's accident, that the cross bars were ripped off by a snowplow before the accident and that Julie Godbe fell into Grate 4 and suffered horrible injury, a critical fact is missing. There has been absolutely no deposition testimony, affidavit, argument or other submission that the City had notice a snowplow tore the cross bars off. Brumbaugh's

testimony conceded that “if” the crossbars were torn off the grate would be damaged (Brumbaugh 81:5-16), *but he never stated he had notice that was in fact the case.* Agreeing to an “if/then” question is not the same as admitting knowledge of the specific damage that is being asked about. There is no evidence in Brumbaugh’s testimony that he had notice of damage to the grate Julie Godbe rode her bike into. In fact, there is nothing in the established record that anyone from the city had notice of damage (from snowplows, or otherwise) of damage to *any* of the grates on East Saint Patrick Street. The grate Julie Godbe fell into might very well have been damaged by having cross welds torn off, *but the city must be noticed about that damage before an affirmative duty exists to correct the damage.* The record is completely void of any reference to this critical point.

The Plaintiffs have stressed the deposition testimony of the City’s designated 30(b)(6) witness Donald Brumbaugh and his statements regarding “damage” and “disrepair” (See Plaintiff’s Statement of Undisputed Material Facts ¶ 6, 8, 9, 10, 12-20). In summary Plaintiffs allege Brumbaugh testified/admitted/agreed that the City had adopted in 2007 the Standard Specifications which required the use of Type B (non-parallel) grates. That the adoption of those specifications *created a duty* to keep the city streets safe for bicycles. That if grates were welded on with cross-straps to avoid bicycle tires going into them then the straps would become part of the grate. That *because the city took steps to change the type of grates they needed because of a poor original design, the City “had notice”* of the dangers of parallel grates, hence the 2007 plan – in other words the 2007 plan was a *reaction* to “notice” or knowledge of a problem with original grate design. That Grate 4 was not in compliance with the 2007 specifications adopted by the City. That the City welded cross bars on Grate 4 prior to Julie Godbe’s accident. That if those cross straps were damaged or removed by snowplows the grates could become a hazard.

And finally, that if the straps are torn off, the grate is *damaged*. It is concluded that, “Therefore, going back 20 years prior to Julie’s accident, the City of Rapid City had “notice” of a dangerous condition or disrepair of its roadways and recognized that these grates can trap wheels causing injury to bicyclists.” (Plaintiffs’ Statement of Undisputed Material Facts ¶ 23).

As the City’s 30(b)(6) witness, the City is tied to Brumbaugh’s deposition answers, but those answers do not fulfill the legal requirements amounting to “notice” of “damage” to Grate 4 or any of the grates on East Saint Patrick Street prior to Julie Godbe’s accident. The Plaintiff ties the adoption of the 2007 specifications by the City to both the elements of notice and duty. It may very well be that the City knew the parallel grates it had on city streets were birthed in a dangerous condition, but that knowledge does not create a duty to fix a roadway. “The existence of a duty in a negligence action is a question of law[.]. *Hohm* at ¶3. Plaintiffs argue Brumbaugh admitted the City had a duty to properly repair the grate system given the adoption of the 2007 specifications (which, argue the Plaintiffs, were adopted in response to a realization the roadway was unsafe), however, this testimony, even if offered at trial, *does not create a duty where one does not otherwise exist*. The sole duty arising out of roadway liability exists only under SDCL 31-32-10. (See also Court’s Memorandum Decision of October 25, 2016 citing *Hohm* at ¶20.) The Plaintiff must allege material facts that address the issue of *notice of damage* to the roadway in order to create a further duty to act by the municipality. Absent such a material allegation of fact, the Plaintiffs’ case fails.

The fatal flaw for the Plaintiffs in this case rests on the issue of notice. Assuming for a moment that the facts bear out that Grate 4 was welded on prior to Julie Godbe’s accident, that the winter season before July of 2015 a snowplow tore off the welds, and that Julie Godbe rode her bicycle into the dangerous grate and was gravely injured. In order to prevail the Plaintiffs

*must show the City had notice the cross bars on Grate 4 were welded on prior to the accident (to avoid the issue of non-liability if the roadway was still in its birthed condition), that they were torn off prior to the accident, and that the City had notice of this specific damage to Grate 4.*

There is absolutely no evidence presented by the Plaintiffs that asserts such specific notice was given to the City prior to the accident. See Defendant's Statement of Undisputed Material Facts ¶8-10. It is the lack of a dispute as to this specific and critical material fact that leads this Court to grant Summary Judgment to the Defendant as to Count 2.


In summary, Count 1 in the Amended Complaint has already been dismissed by the Court in its Memorandum Decision on October 25, 2016 as it is the exact same allegation with the same language as the original complaint. Count 2 in the Amended Complaint alleges notice to the City and further outlines how notice was given or received by the City in paragraph 25 of the Amended Complaint and the arguments in the Plaintiff's Statement of Undisputed Material Facts, but fails to assert any *material* fact(s) as to notice of damage to Grate 4 (e.g. that the welds, even if they were there, had been torn off or otherwise removed prior to the accident). Count 3 of the Amended Complaint is a derivative count and fails because both Count 1 and Count 2 have failed. Because there is no *material* factual allegation regarding notice to the

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Defendant that there was damage to Grate 4 that Julie Godbe fell into as contemplated by SDCL  
31-32-10, Defendant's Motion for Summary Judgment is GRANTED.

Dated this 28th day of December, 2019.

FOR THE COURT,

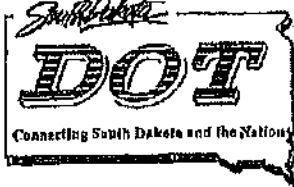
  
\_\_\_\_\_  
Honorable Matthew M. Brown  
Circuit Court Judge  
Seventh Judicial Circuit

ATTEST:

RANAE TRUMAN,  
CLERK OF COURTS

By: \_\_\_\_\_  
Deputy

(SEAL)



*ROAD SWAP AGREEMENT*  
**Department of Transportation**

*Ted*

Division of Fiscal and Public Assistance  
700 E. Broadway Avenue  
Pierre, SD 57501-2586  
FAX: 605/773-3921

605/773-3284

**RECEIVED**

SEP 16 2004

Rapid City Growth  
Management Department

September 14, 2004

Ms. Marsha Elkins  
City of Rapid City  
300 6<sup>th</sup> Street  
Rapid City, SD 57701-2724

Dear Ms. Elkins,

I am enclosing a copy of the signed and executed agreement (# 612978) between your city and the SDDOT regarding financial and jurisdictional responsibilities for various SD/US Highways and city streets

Sincerely,

Mary M. Collins  
DOT Finance

Enclosure (1)

CITY 000355

**APP 011**

RECEIVED  
APR 20 2004  
ENGINEERING DIVISION

FINANCIAL AND ROAD TRANSFER AGREEMENT  
BETWEEN THE CITY OF RAPID CITY AND THE STATE OF  
SOUTH DAKOTA

Agreement No. **612978**

**SECTION I - PURPOSE**

An agreement for the purpose of funding transportation improvements and transferring segments of roads between the State of South Dakota and the City of Rapid City.

WHEREAS, the State of South Dakota hereinafter referred to as STATE and the City of Rapid City, hereinafter referred to as CITY, have agreed to the transfer of several segments of highways from the STATE to the CITY, and

WHEREAS, STATE and CITY mutually agree that in consideration for the above transfer, STATE will provide funding for improvements to the segments to be transferred and for improvements to the CITY'S transportation system, and

WHEREAS, STATE and CITY agree that improvements to the STATE and CITY transportation systems are vital to the development and business growth of western South Dakota,

WHEREAS, STATE and CITY agree that the highway segments listed in Section II of this AGREEMENT, and depicted in the attached map, will be transferred from STATE to CITY jurisdiction:

**SECTION II - HIGHWAY SEGMENTS**

US 16 B (Cambell St./East North Street) from 500 feet south of the centerline of Minnesota Street north to its junction with I-90, a distance of approximately 4.6 miles, including the St. Joseph Street ramps; except the structure over the railroad located approximately 0.3 miles south of St. Patrick Street.

SD 230 (Eglin Street) from its present junction with US 16B to its present junction with the Southeast Connector, a distance of approximately 2.1 miles, and the proposed new connection with Cheyenne Boulevard.

SD 238 (East St. Patrick Street) from its junction with US 16B (Cambell Street) to its junction with SD 44, a distance of approximately 1.3 miles.

SD 437 (Elk Vale Road) from its new junction with Concourse Drive to just north of SD 44, a distance of approximately 0.3 miles. (Previously agreed to on SE Connector Agreement 612802.)

Beale Street from Dyess Avenue to SD 230 (Eglin Street), a distance of 0.8 miles.

US 16B west Frontage Roads from Oregon Street south to approximately 400' south of Richland Drive, a distance of approximately 0.3 miles.

Dyess Avenue from Eglin Street to Beale Street, a distance of approximately 0.1 miles.

September 11, 2003

1

CITY 000356

**APP 012**

A8. Realign Eglin Street from Lowry Lane to the southeast across the railroad (approximately total length of 1000 feet). STATE to pay for planning, design, right-of-way, and construction of this section. Remainder of relocated Eglin Street to Cheyenne Boulevard connection is to be performed by others as development occurs.

*DOE IN  
2006*

A9. Fund 50% of the construction costs for work within the US 16B right-of-way to resolve a potential drainage issue on US 16B near Dodgetown.

*Talk to  
Rick & Co.  
State has  
Plan*

A10. Obliterate Offutt Street from Exit 60 to Exit 61 after completion of Mall Drive from East North Street to Elk Vale Road.

A11. Resurface Beale Street with asphalt concrete from Dyess Avenue to Eglin Street.

*2008*

A12. Initiate legislation for the South Dakota Legislature which will remove the above segments from the state maintained highway system and transfer them to the CITY.

A13. Transfer the absolute ownership of right-of-way and continuing maintenance for US 16B, SD 230, SD 238, SD 437, Beale Street, Dyess Avenue, and the US 16B west frontage roads described in Section II of this AGREEMENT to the CITY. Timing of the transfer will be in accordance with Section IV of this AGREEMENT.

**B. CITY will perform the following:**

B1. Submit periodic billings to the STATE for the construction of Mall Drive up to the maximum of \$4.9 million.

B2. Support legislation before the South Dakota Legislature as described in Section A12 of this AGREEMENT.

B3. Accept absolute ownership and continuing maintenance of US 16B, SD 230, SD 238, SD 437, Beale Street, Dyess Avenue and the US 16B frontage roads described in Section II of this AGREEMENT. The CITY also agrees to accept jurisdiction for these routes in accordance with the timing detailed in Section IV of this AGREEMENT.

B4. Provide routine maintenance of the structure over the railroad on US 16B (Cambell St.) including items such as snow and ice removal, guardrail repairs, and approach repairs or replacement.

B5. Participate in negotiations between the CITY, City of Box Elder, and Pennington County that produces a jurisdictional agreement for Elk Vale Road from Exit 61 to Mall Drive.



B6. Be the lead agency and provide funding for planning, design, and right-of-way costs associated with resolution of a potential drainage issue on US16B (Cambell St.) near Dodgetown. The CITY also agrees to provide funding for the construction cost over and above the STATE funding provided in Section III A9.

B7. Provide services in compliance with the Americans with Disabilities Act of 1990.

B8. Require an internal street network as development occurs within the property north of Interstate 90 and east of Dyess Street that will allow removal of Offutt Street once Mall Drive is completed to Elk Vale Road.

#### SECTION IV – SEGMENT TRANSFER TIMING

The CITY will assume absolute responsibility for operation and maintenance of the highway segments listed in Section II of this AGREEMENT upon completion of Phase 2 of the SE Connector except as noted below:

US 16B (Cambell Street) - The STATE shall maintain each of the roadway surfaces from Minnesota Street to St. Patrick Street and from east of East North Street intersection to I-90 until the proposed reconstruction of each these sections of US 16B are completed.

SD 230 (Eglin Street) - The STATE shall maintain the roadway surface until reconstruction of Exit 60 & Exit 61 is complete and the proposed resurfacing work is complete.

SD 238 (St. Patrick Street) - The STATE shall maintain the roadway surface until the proposed resurfacing work is complete.

SD 437 (Elk Vale Road) - The STATE shall maintain the roadway surface until the proposed resurfacing work is complete.

Beale Street - The STATE shall maintain the roadway surface until the proposed resurfacing work is complete.

US 16B west Frontage Roads - The STATE shall maintain the roadway surface until US 16B from St. Patrick Street to Minnesota Street is reconstructed.

#### SECTION V – CONTRACTUAL

This AGREEMENT is binding upon the signatories hereto not as individuals but solely in their capacities as officials of their respective organizations and acknowledges proper action of STATE and CITY to enter the same.

Neither this AGREEMENT nor any interest therein shall be assigned, sublet or transferred unless written permission to do so is granted by the STATE.

This AGREEMENT shall be effective on the date of signature by the Secretary of Transportation.

In the event the AGREEMENT is terminated by the STATE for fault on the part of the CITY; the AGREEMENT shall be null and void.

September 11, 2003

4

CITY 000359

**APP 014**



<p style="text-align: right;">45</p> <p>1 came in we went out and made a project out of 2 replacing them.</p> <p>3 Q Okay. Can you give me -- you were the street 4 superintendent when this happened?</p> <p>5 A Correct.</p> <p>6 Q So we know it was before the end of December 2016?</p> <p>7 A Correct.</p> <p>8 Q Correct?</p> <p>9 A Correct.</p> <p>10 Q Do you know when this directive came down from Dale?</p> <p>11 A I don't recall the exact dates.</p> <p>12 Q When you get a directive, is it in written form?</p> <p>13 A Typically it's verbal.</p> <p>14 Q So as you sit here today, you don't know if it was 15 verbal or if it was written?</p> <p>16 A No, I could tell you it's verbal. I received very 17 few written directives.</p> <p>18 Q And you believe you got an oral directive from Dale 19 Tech to remove the B inlets?</p> <p>20 A Not the inlets, the grates.</p> <p>21 Q I'm sorry, you're right. The grates meaning that 22 the grate is put in the inlet, correct?</p> <p>23 A Correct.</p> <p>24 Q So to remove, and I wrote down "inlets" but maybe 25 you said it differently or I wrote it down</p>	<p style="text-align: right;">47</p> <p>1 in "Victor" grates. Are you aware of that spec?</p> <p>2 A I don't recall a "V" designation.</p> <p>3 Q So as we sit here, and I'll show it to you in a 4 little bit, but as we sit here you don't recall a 5 spec that referred to a V grate?</p> <p>6 A No, I don't.</p> <p>7 Q So when you had this directive from Dale Tech and 8 it's verbal, is it possible he said to remove the B 9 grates and replace them with the V as in "Victor" 10 grates but you didn't hear it right?</p> <p>11 A I don't know that he designated a V grate versus a 12 B grate versus a C grate.</p> <p>13 Q Okay. So when you got this directive, you were 14 already aware that there was a claim at least and 15 perhaps a lawsuit by Julie Godbe regarding this 16 particular grate, right?</p> <p>17 A I knew there had been an accident out there. I 18 didn't know there was a claim against the city, I 19 don't think, at that time.</p> <p>20 Q I'm going to show you what's been marked as 21 Exhibit 2 so we have a time frame on this. It's a 22 letter from me to the city dated September 28th, 23 2015 indicating the grate involved and the injury 24 that occurred to Julie Godbe. Do you see that?</p> <p>25 A Yes, I see it.</p>
<p style="text-align: right;">46</p> <p>1 differently, but in any event the directive was from 2 Dale Tech to remove the B grates?</p> <p>3 A Correct.</p> <p>4 Q And to replace them with grates that prevent bicycle 5 tires from entering them, correct?</p> <p>6 A No. The directive was to replace them with the new 7 style B inlet grate.</p> <p>8 (Ms. Godbe left the room.)</p> <p>9 Q (By Mr. Steven Beardsley) And I don't mean to be a 10 pain, Don, but it seems interesting to me, and I'm 11 going to let you explain this, that you would get a 12 directive from the city engineer or public works 13 director Dale Tech that says to remove B grates and 14 put B grates back in. Does that seem interesting to 15 you?</p> <p>16 A It still does.</p> <p>17 Q Okay. So the reason I say that is if you have a 18 different letter on the grate, one could understand 19 it easier than to remove a B grate and replace it 20 with a B grate as opposed to remove a B grate and 21 replace it with a different letter grate, right?</p> <p>22 A Not necessarily. I mean, they're making changes 23 like that all the time.</p> <p>24 Q Okay. And I mentioned that in 2007 the specs for 25 the city indicate that they're supposed to use V as</p>	<p style="text-align: right;">48</p> <p>1 Q So after this date can you tell me why the city 2 destroyed the evidence that was the grate itself 3 when they were just put on notice that there's a 4 problem with this grate?</p> <p>5 A From the standard of the street department, there's 6 no point in -- I don't recall the number of these 7 type of grates. There was several different types 8 of grates that were replaced. But there would be 9 numerous grates. And to have them all sitting 10 around in the yard if you don't plan on using them 11 again doesn't make sense, so you haul them to 12 salvage.</p> <p>13 Q I understand that that could occur. You understand 14 this grate is about 3 feet in length?</p> <p>15 A Uh-huh.</p> <p>16 Q And about 2 feet wide?</p> <p>17 A Yes.</p> <p>18 Q And there's certainly enough storage in the City of 19 Rapid City to cover that size grate and hold it, 20 right?</p> <p>21 A Yeah.</p> <p>22 Q And when Dale Tech -- at the time that Dale Tech 23 gave a directive, the city knew that there was a 24 claim regarding this particular grate, right?</p> <p>25 MR. NOONEY: Objection, beyond the scope of</p>



1 this witness, his knowledge.  
 2 Subject to that, you can answer.  
 3 A He may -- well, I'm sure he did.  
 4 Q (By Mr. Steven Beardsley) Okay. And the city did  
 5 nothing to preserve this evidence that's the grate  
 6 itself, correct?  
 7 A Apparently not.  
 8 Q And it either is at a junkyard -- and I may say this  
 9 wrong. It's either at a junkyard or it's been sold  
 10 and melted, but it's gone, right?  
 11 A Could be.  
 12 Q Okay. Typical lawyer follow-up to that, Don, is  
 13 that "could be" means a lot of things. As far as  
 14 you know as you sit here today, you can't put your  
 15 hands on this grate so we can examine it, correct?  
 16 A It -- if I had 20 of those grates sitting here in  
 17 this room, I couldn't tell you which inlets -- or  
 18 which grate came out of what inlet. So once they're  
 19 together, there wouldn't be any way for me to tell  
 20 anyway, so no.  
 21 Q So it's gone for purposes of inspection?  
 22 A Yes.  
 23 Q And it's gone based on the city removing it and  
 24 disposing of it?  
 25 A Yes.

1 Q And you didn't examine that grate at any time?  
 2 A Nope.  
 3 Q And as far as you know, no one on behalf of the city  
 4 examined that grate either?  
 5 A Field crews could have very well. If we got a  
 6 call --  
 7 Q As you sit here today, Don --  
 8 A As I sit here today, no.  
 9 Q -- you don't know of one person that examined this  
 10 particular grate?  
 11 A No, I don't.  
 12 Q And besides the notice that was sent to the city in  
 13 2015 regarding this grate that indicates the grate  
 14 on St. Patrick Street between Cambell Street and  
 15 Creek Drive, no one, as far as you know, went out  
 16 and marked that grate so we could ever find it again  
 17 when they took it out?  
 18 A Not to my knowledge.  
 19 Q And this complaint was filed in May of 2016, summons  
 20 and complaint for this lawsuit. You don't know if  
 21 the grates were removed after the complaint was  
 22 filed either?  
 23 A No.  
 24 Q And since you're the designee, I have to ask these  
 25 questions.

1 MR. NOONEY: Well, you don't have to. You're  
 2 choosing to, Steve. No one has a gun to your head  
 3 to ask these questions.  
 4 Q (By Mr. Steven Beardsley) You understand because  
 5 you've been involved in lawsuits that evidence is  
 6 important, right?  
 7 A Certainly.  
 8 Q And in this case we have a bicycle and we have a  
 9 grate that are critical pieces of evidence for this  
 10 claim, right?  
 11 A Could be.  
 12 Q And not only did the city, through either Dale Tech  
 13 or you or the assistant superintendent fail to  
 14 preserve the evidence, you, for the city, have  
 15 destroyed the evidence, right?  
 16 A Very possibly.  
 17 Q As we sit here today, that's what you think  
 18 occurred, it's been destroyed?  
 19 A That would be my guess, yes.  
 20 Q And that's based on your experience and years as a  
 21 street superintendent, it's your belief that that  
 22 evidence is destroyed?  
 23 A The physical evidence, yes.  
 24 Q And I take it you don't have any explanation of why  
 25 the evidence is destroyed?

1 MR. STEVEN BEARDSLEY: Mike, just wait a second  
 2 because we're going to take a break here in a  
 3 minute.  
 4 MR. MICHAEL BEARDSLEY: Okay.  
 5 Q (By Mr. Steven Beardsley) Do you remember the  
 6 question?  
 7 A Can you repeat it, please?  
 8 MR. STEVEN BEARDSLEY: Would you repeat it,  
 9 please?  
 10 (Question read back.)  
 11 A The only explanation I would have is that we don't  
 12 stockpile frames, grates or anything else that we're  
 13 not going to use in the future, so it would have  
 14 been destroyed, along with all the rest of them.  
 15 (Ms. Gobe returned to the deposition room.)  
 16 Q (By Mr. Steven Beardsley) But it's simple to keep  
 17 one, isn't it?  
 18 A Certainly.  
 19 Q And if you had a claim against the city because they  
 20 had a grate that wasn't properly maintained, you  
 21 wouldn't want the city to go out and destroy the  
 22 grate, would you?  
 23 A If I felt that it wasn't properly maintained,  
 24 obviously I'd probably want to have the physical  
 25 evidence there.

<p style="text-align: right;">53</p> <p>1 Q Thank you.</p> <p>2 MR. STEVEN BEARDSLEY: Why don't we take a</p> <p>3 break for a few minutes.</p> <p>4 (Recess taken from 10:34 a.m. to 10:49 a.m.,</p> <p>5 after which Ms. Godbe was not present.)</p> <p>6 Q (By Mr. Steven Beardsley) In an off-the-record</p> <p>7 discussion you guys came up with the name of I</p> <p>8 believe the public works director, and I may be</p> <p>9 wrong on the date in 2015, and that was a gentleman</p> <p>10 named Terry Wolterstorff?</p> <p>11 A And I may be a little off on the date, too, but his</p> <p>12 name is Terry Wolterstorff that currently resides in</p> <p>13 Belle Fourche, South Dakota.</p> <p>14 MR. NOONEY: And that spelling, for the record,</p> <p>15 is W-O-L-T-E-R-S-T-O-R-F-F.</p> <p>16 MR. STEVEN BEARDSLEY: Thank you for that.</p> <p>17 Q (By Mr. Steven Beardsley) But the directive we're</p> <p>18 talking about concerning replacing the B inlets came</p> <p>19 from Dale Tech not Terry Wolterstorff?</p> <p>20 A That's my recollection.</p> <p>21 Q Now, I just want to make sure we're clear on this:</p> <p>22 The directive to change the grates out was given</p> <p>23 after this letter of September 28, 2015, correct?</p> <p>24 A Correct.</p> <p>25 Q And it may have been after the lawsuit started in</p>	<p style="text-align: right;">55</p> <p>1 and the height varies. The "B" inlet refers to the</p> <p>2 type of inlet.</p> <p>3 And then the designation you gave, the Neenah</p> <p>4 R-3067 is a -- Neenah is the manufacturer of the</p> <p>5 grate, and that's Neenah's designation of what type</p> <p>6 of grate it is. And I assume the V then refers to</p> <p>7 the perpendicular grate sections.</p> <p>8 Q Perpendicular, in other words it's running against</p> <p>9 the way the traffic is going?</p> <p>10 A It's running perpendicular to the traffic.</p> <p>11 Q Okay. And the type of grate that was in at the time</p> <p>12 of Julie Godbe's injury was running parallel to the</p> <p>13 traffic?</p> <p>14 A Correct.</p> <p>15 Q And the Type V grate would prevent someone riding</p> <p>16 parallel to the traffic from entering the grate,</p> <p>17 correct?</p> <p>18 A Yes, that's correct.</p> <p>19 Q Okay. And you are aware of the city ordinance that</p> <p>20 indicates that people riding bicycles are supposed</p> <p>21 to ride next to the curb parallel to the traffic?</p> <p>22 A I guess I'm not familiar with city ordinance</p> <p>23 relative to where bicycles should be in a roadway.</p> <p>24 Q Okay. Well, I'll show you the city ordinance that</p> <p>25 addresses that. You don't have any reason to</p>
<p style="text-align: right;">54</p> <p>1 May of 2016?</p> <p>2 A Yes, it may have.</p> <p>3 Q I want to turn now to Exhibit 3 which is labeled on</p> <p>4 the front "Standard Specifications for Public Works</p> <p>5 Construction, 2007 Edition." Do you see that?</p> <p>6 A Yes, I do.</p> <p>7 Q And if you turn to the fourth page -- excuse me, I</p> <p>8 think it's the fifth page of Exhibit 3, there's a</p> <p>9 grate on the bottom. Do you see that?</p> <p>10 A Yes, I do.</p> <p>11 Q And it says next to it, "Neenah R-3067, V curb</p> <p>12 inlet, or equal with Type V grate." Do you see</p> <p>13 that?</p> <p>14 A Yes, I do.</p> <p>15 Q And then for some reason down at the bottom of the</p> <p>16 page in bold letters it says "Type B inlet,"</p> <p>17 correct?</p> <p>18 A Yes, I see that.</p> <p>19 Q Okay. So right next to the grate it looks like the</p> <p>20 spec calls for a V grate, V like "Victor"?</p> <p>21 A That's correct.</p> <p>22 Q Okay. Is this the kind of grate that was put in in</p> <p>23 replacing the B grate?</p> <p>24 A For clarification, the "B" refers to the style of</p> <p>25 inlet, which is a, whatever size that is, 24-by --</p>	<p style="text-align: right;">56</p> <p>1 dispute that?</p> <p>2 A No, I don't.</p> <p>3 Q And are you aware, too, that the city does not want</p> <p>4 bicycle riders riding on the sidewalks; they want</p> <p>5 them riding next to the curb parallel to the</p> <p>6 traffic?</p> <p>7 A I guess I'm not aware of that either.</p> <p>8 Q Okay. But you are aware that bike riders, bicycle</p> <p>9 riders ride next to the traffic in what's commonly</p> <p>10 referred to as the gutter area?</p> <p>11 A I have seen them do it, yes.</p> <p>12 Q And it's the gutter area that the grates are placed?</p> <p>13 A That's correct.</p> <p>14 Q And it's well known to the city that bicycle riders</p> <p>15 use the gutter or use the gutter area for riding</p> <p>16 their bicycles, common knowledge?</p> <p>17 A It's common knowledge I guess that they could.</p> <p>18 Q Well --</p> <p>19 MR. NOONEY: Just for the record, Steve, this</p> <p>20 whole line of questioning is outside the scope of</p> <p>21 the Notice of Deposition. As long as I have a</p> <p>22 standing objection I'm fine.</p> <p>23 Q (By Mr. Steven Beardsley) I'm going to show you</p> <p>24 what's been marked as Exhibit 8. And I'm looking at</p> <p>25 Page 4 of -- first of all, identify that document.</p>



<p style="text-align: right;">57</p> <p>1 It is Chapter 10.64 of Rapid City, South Dakota's</p> <p>2 Code of Ordinances regarding bicycles, correct?</p> <p>3 <b>A Yes, I see that.</b></p> <p>4 <b>Q</b> And as the street superintendent, it's important for</p> <p>5 you to make sure that the roads are providing a safe</p> <p>6 place for bicyclists pursuant to the code of</p> <p>7 ordinances, correct?</p> <p>8 <b>A I don't know that that's been my direction.</b></p> <p>9 <b>Q</b> Okay. But given the fact that we know that streets</p> <p>10 are not only used for motor vehicle traffic but are</p> <p>11 also used for bicycle traffic, it would be important</p> <p>12 as the street superintendent that it be safe for all</p> <p>13 that are using the streets?</p> <p>14 <b>A Yes.</b></p> <p>15 <b>Q</b> And it sounds redundant, Don, but that includes</p> <p>16 bicyclists then?</p> <p>17 <b>A In this case I guess yes.</b></p> <p>18 <b>Q</b> Okay. So you as the street superintendent needed to</p> <p>19 factor in what's safe for bicyclists, correct?</p> <p>20 <b>A</b> For clarification, are we talking maintenance or are</p> <p>21 we talking construction?</p> <p>22 <b>Q</b> Talking about anything to do with the streets that</p> <p>23 your duty as the street superintendent was to make</p> <p>24 it safe for all that are using the streets.</p> <p>25 <b>A</b> From a maintenance standpoint, we did everything we</p>	<p style="text-align: right;">59</p> <p>1 <b>A</b> There's a front and a back, so...</p> <p>2 <b>Q</b> Front of the curb.</p> <p>3 <b>A</b> In my world they measure everything from back of</p> <p>4 curb, so ...</p> <p>5 <b>Q</b> Okay, tell me what the front of the curb is versus</p> <p>6 the back of the curb.</p> <p>7 <b>A</b> 6 inches.</p> <p>8 <b>Q</b> Okay. The front of the curb is what is adjacent to</p> <p>9 the roadway?</p> <p>10 <b>A</b> That's correct.</p> <p>11 <b>Q</b> Okay.</p> <p>12 <b>A</b> Commonly referred to as the face of the curb.</p> <p>13 <b>Q</b> Perfect. Let's call it the face of the curb. So we</p> <p>14 have the face of the curb. And then it says they</p> <p>15 "shall ride," bicyclists, "in the right 4 feet of</p> <p>16 the roadway." So from the curb out 4 feet is where</p> <p>17 bicyclists are supposed to ride, correct?</p> <p>18 <b>A</b> No.</p> <p>19 <b>Q</b> Explain.</p> <p>20 <b>A</b> The roadway is the point from the lip of the curb</p> <p>21 which is typically 2 feet from the flow line of the</p> <p>22 curb. So it's my understanding that the roadway is</p> <p>23 where the vehicles actually travel. They don't</p> <p>24 travel in the gutter section.</p> <p>25 So that curb section is 2 and a half feet wide,</p>
<p style="text-align: right;">58</p> <p>1 could to keep the streets as safe as we could for</p> <p>2 all the users.</p> <p>3 <b>Q</b> That would include bicyclists?</p> <p>4 <b>A</b> That would include bicyclists.</p> <p>5 <b>Q</b> Let's turn to Page 4 of 7 of Exhibit 8, and I'm</p> <p>6 looking at Section 10.64.170. Do you see that?</p> <p>7 <b>A</b> Yes.</p> <p>8 <b>Q</b> And it talks about bicyclists operating on the</p> <p>9 roadway, correct?</p> <p>10 <b>A</b> Yes.</p> <p>11 <b>Q</b> And it says that bicyclists shall ride in the right</p> <p>12 4 feet of roadway near the right-hand curb or edge</p> <p>13 of the roadway. Do you see that?</p> <p>14 <b>A</b> Yes.</p> <p>15 <b>Q</b> Okay. So contained in the 4 feet from the curb on</p> <p>16 the right-hand side would be the gutter area,</p> <p>17 correct?</p> <p>18 <b>A</b> Not in my opinion.</p> <p>19 <b>Q</b> Within the 4 feet from the curb includes the gutter</p> <p>20 area and that includes part of the roadway, right?</p> <p>21 <b>A</b> In the 4 feet from the -- I need to clarify.</p> <p>22 <b>Q</b> Let me ask it another way. If my line I'm showing</p> <p>23 in the tablet is the curb --</p> <p>24 <b>A</b> The front of the curb?</p> <p>25 <b>Q</b> Edge of the curb.</p>	<p style="text-align: right;">60</p> <p>1 and then the roadway starts. And you typically have</p> <p>2 8- to 12-foot driving lanes. That's what's</p> <p>3 considered the roadway.</p> <p>4 So as I read this, if you're asking for my</p> <p>5 interpretation, I would say that you've got 4 feet</p> <p>6 from the lip of the curb where the bicycle is</p> <p>7 supposed to be.</p> <p>8 <b>Q</b> Well, that's not what this says, is it?</p> <p>9 <b>A</b> That's what it says to me.</p> <p>10 <b>Q</b> Well, but let's just look at the words, okay?</p> <p>11 <b>A</b> That's what I'm looking at. Excuse me, go ahead.</p> <p>12 <b>Q</b> Okay. Let's look at the words. It says, "Any</p> <p>13 person operating a bicycle upon a roadway at less</p> <p>14 than the normal speed of traffic at the time and</p> <p>15 place and under the conditions then existing shall</p> <p>16 ride in the right 4 feet of roadway near the</p> <p>17 right-hand curb or edge of the roadway," correct?</p> <p>18 <b>A</b> Uh-huh.</p> <p>19 <b>Q</b> That's what it says?</p> <p>20 <b>A</b> Yes.</p> <p>21 <b>Q</b> And so do you know of any definition that excludes</p> <p>22 the right-hand curb when describing where the 4 feet</p> <p>23 is?</p> <p>24 <b>A</b> No.</p> <p>25 <b>Q</b> This specifically talks about the right-hand curb,</p>

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1 and from there you have 4 feet?

2 MR. NOONEY: Objection, misstatement of the

3 document.

4 Subject to that, you can answer.

5 Q (By Mr. Steven Beardsley) Right?

6 A It says "near the right-hand curb."

7 Q Right. So you're factoring in the curb, correct?

8 A The curb section is 2 and a half feet wide, so near

9 the right-hand side of the curb tells me to be on

10 the right-hand side of the road near the right-hand

11 curb, but that curb starts at the lip of the curb.

12 Q Yeah, but, you know, when reading these documents,

13 like city ordinances, you understand that most

14 people believe the curb is the part that is raised

15 up and that is concrete?

16 MR. NOONEY: Objection, foundation, outside the

17 scope of this witness' knowledge.

18 Subject to that, you can answer.

19 A I believe you're asking for my opinion, sir, and my

20 opinion is the edge of the roadway is the lip of the

21 curb.

22 Q (By Mr. Steven Beardsley) And you're contending that

23 the lip of the curb is 2 and a half feet out from

24 the actual curb itself?

25 A From the back of the curb, yes.

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1 Q And the curb, in general parlance, is the part that

2 is raised up that is concrete? Most people believe

3 that's the curb, right?

4 A I can't -- I can't testify to most people.

5 Q Okay.

6 A I know what the curb is.

7 Q Well, and I know what a curb is, too, and a curb --

8 you will agree with me that part of the curb is a

9 raised-up portion next to the roadway?

10 A It's adjacent to the roadway, correct.

11 Q And it's raised 6 inches or so generally?

12 A 2 feet back from the edge of the roadway to the face

13 of the curb.

14 Q I'm just talking about the raised portion. The

15 raised portion is raised about 6 inches?

16 A That's correct.

17 Q Okay. And there's no sign anywhere in this entire

18 city that says, Do not ride your bicycle next to the

19 curb, is there?

20 A Not to my knowledge.

21 Q Not ever been proposed, not ever been signed, not a

22 part of an ordinance, not a part of a rule anywhere,

23 is it?

24 A Not that I'm aware of.

25 Q The grates can be traps for bicyclists as they drive

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1 down the road, correct?

2 A They very well could be.

3 Q Okay. And if they're not maintained properly,

4 people could fall into the grate, correct?

5 A It's possible.

6 Q And in this particular instance, this grate has been

7 destroyed so it cannot be determined whether or not

8 there were welded cross bars on it at the time of

9 the incident, correct?

10 A Not unless somebody was taking pictures of a

11 particular grate and can identify it.

12 Q Well, taking pictures doesn't necessarily show the

13 remnants of cross bars that were scraped off, does

14 it?

15 A Depends on how they were put on, but in most cases

16 they do.

17 Q But as you sit here today, because you don't know

18 where the grate is, you can't examine it and tell me

19 whether or not cross bars were scraped off this

20 particular grate?

21 A No, I can't.

22 Q Then if you turn to the next page, 5 of 7 of

23 Exhibit 8, it indicates that no person shall operate

24 a bicycle upon a sidewalk within a central business

25 district. Do you see that?

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1 A Yes, I do.

2 Q Okay. And that's for safety purposes?

3 A Yes.

4 Q And you would agree with me that when the city

5 maintains grates, they're supposed to keep safety in

6 mind?

7 A Correct.

8 Q And that includes safety for bicyclists, correct?

9 A Correct.

10 Q And you would agree with me that the Type V inlet

11 that I showed you --

12 A Yes, I'm familiar with it.

13 Q -- is safer for bicyclists than the other grate that

14 runs parallel to the traffic?

15 A Yes.

16 Q And the grate that was involved in this matter, if

17 it ran parallel to the traffic was not in

18 compliance with the spec we just talked about that

19 indicates the grate is supposed to be a Type V as in

20 "Victor" grate?

21 MR. NOONEY: Objection to the extent it calls

22 for a legal conclusion.

23 Subject to that, you can answer, Don.

24 A Well, the grate we were talking about is out of a

25 document, number, wherever it went, number 3.



1 Q (By Mr. Steven Beardsley) Yes.

2 A Which is a 2007 edition, which indicates it was

3 updated in 2007. What it was prior to that I have

4 no knowledge, I guess.

5 Q Okay. As of the 2007 specifications, the grate that

6 was involved with Julie Godbe in that incident in

7 July of 2007 -- 2015 was not in compliance with what

8 is specified in 2007 Exhibit 3, correct?

9 A If it had parallel -- if it had a parallel grate,

10 that's correct.

11 Q Okay. And if I asked this, Don, I'm sorry, but

12 sometimes I forget what I asked.

13 A I'm good.

14 Q This particular V grate is safer for bicyclists

15 traveling with the traffic than the parallel grates,

16 correct?

17 A Still a rough ride but safer.

18 Q "Rough ride" meaning you might bounce a little bit

19 but you're not going to fall into it?

20 MR. NOONEY: Objection, foundation.

21 But subject to that, you can answer.

22 Q (By Mr. Steven Beardsley) Correct?

23 A Not through those louvers, no.

24 Q And you would agree with me that it's dangerous to

25 have grates that allow bicyclists that are traveling

1 with the traffic to fall into the grate because they

2 might topple over and get injured, correct?

3 A If they're riding in the gutter section, yes.

4 Q And one way to rectify the dangerous situation is to

5 replace the grates that are parallel with ones that

6 are perpendicular? That's one way to do it?

7 A Yes.

8 Q There are other grates, too, in which the openings

9 are smaller and would prevent a bicycle tire from

10 going in? That's another way to do it?

11 A Yes.

12 Q Another way to do it is to weld cross bars onto the

13 present grates to prevent tires from going into the

14 grates?

15 A It would have that effect, yes.

16 Q You are aware that many years prior to this incident

17 the city began welding cross bars on grates?

18 A I guess as I sit here, I can't testify it was the

19 city that welded grates or welded straps onto

20 grates, but there were some inlets out there I guess

21 that had welded straps on them.

22 Q Okay. And when you said you're not aware of the

23 city doing that, who else would be doing that?

24 A That stretch of roadway used to be state highway,

25 state DOT, and the city acquired it in a road swap

1 some years ago and I don't recall those dates.

2 Q The road swap was in the '90s, right?

3 A Okay.

4 Q You don't have any reason to dispute the '90s?

5 A No, I don't. I don't recall when it was.

6 Q It might have even been before that?

7 A It was swapped. It was part of a larger deal.

8 MR. NOONEY: 2004.

9 Q (By Mr. Steven Beardsley) In any event, prior to

10 this incident in 2015, a number of these grates on

11 this city road had welded straps, you called them,

12 on the grates?

13 A Yes, they did.

14 Q Okay. And the welded straps, as far as you know,

15 Don, were an effort to make the grates safer for

16 bicyclists, correct?

17 A I don't have any knowledge of why the straps were

18 welded on there. It was done prior to my day.

19 Q Well, you don't know the date it was done, correct?

20 A No, I don't.

21 Q So you don't know -- you can't give us a date?

22 A No, I can't.

23 Q And when you say prior to your day, there may have

24 been welding on these particular grates while you

25 were the street superintendent?

1 A Not to my knowledge there wasn't.

2 Q But there may have been?

3 A No.

4 Q Why do you say that?

5 A That would have been a project that had we done

6 something like that that I would have directed the

7 street maintenance supervisor to go out and take a

8 look at and do, and it's not something that I recall

9 having him do.

10 Q Okay. When you say you recall, you just don't

11 recall one way or another?

12 A I don't recall doing it.

13 Q And so I understand that, but when somebody says

14 they don't recall, they're sort of tentative and

15 they may have but they don't remember because it

16 covers such a long period of time?

17 A I would say I did not direct the street maintenance

18 supervisor to go weld straps at that time.

19 Q And you have seen various grates with welded straps

20 on them?

21 A Yes, I have.

22 Q And you understand that if there are welded straps

23 on them, that they need to be maintained?

24 A Typically.

25 Q And that's because if you don't maintain them, it



1 may create a hazard?

2 A It could.

3 Q And as far as the equipment on the city, the only

4 equipment that's going to tear them off is probably

5 a snowplow, isn't it?

6 A That's a tough one. There's a lot of equipment that

7 could tear up inlet grates.

8 Q Generally the maintenance of the city is done by

9 brushes and operations like that to clean the

10 streets?

11 A Correct.

12 Q The brushes are not the kind of equipment that would

13 tear off a welded strap, correct?

14 A Typically not. I mean, steel broom, but it's not

15 that kind of strength I guess.

16 Q And typically the equipment that you could think of

17 that would tear metal straps off a metal grate would

18 be a snowplow, correct?

19 A If they were to hit them, yes.

20 Q And have you seen photos of the grates that had

21 metal straps that were ripped off in pieces or

22 partially?

23 A Clarify that, please.

24 Q Have you seen photographs of metal straps partially

25 torn off the metal grates?

1 A Yes, I have.

2 Q And when you saw that, can you tell me of any other

3 equipment you can think of that the city would use

4 that would destroy the metal straps in that manner?

5 A It would be isolated instances but, you know, you

6 could have a water break in an area, for instance,

7 and dirt all over the road; they scrape it up with a

8 backhoe front bucket. I mean, they could get at it

9 with most anything. But generally speaking snow

10 removal equipment would generally be the cause.

11 Q Okay. And the city has gone out and repaired metal

12 straps that have been torn off of grates, correct?

13 A If we received a complaint on them.

14 Q And that would show the knowledge that the city

15 would have that sometimes equipment may tear off the

16 straps?

17 A It could be the cause, yes. I mean, there's any

18 number of reasons.

19 Q So once the straps are being torn off, then the

20 city, when they hear about it or know about it,

21 would go out and repair the straps?

22 A If we received a complaint and a request to repair,

23 we would certainly take care of it right away.

24 Q And that means go fix it?

25 A Yes.

1 Q That means either take it out completely or at least

2 weld straps back on?

3 A Yes, depending on the condition of the grate.

4 Q If the rest of the grate is still in good shape, you

5 would just weld the straps back on?

6 A Correct.

7 Q This is going to sound really stupid, Don, because

8 attorneys ask stupid questions, but how do you do

9 that? How does the welding work?

10 A I am not a professional welder, but --

11 Q You probably know more about it than I do though.

12 A You set up a crew with traffic control with

13 obviously the number of people you need and the

14 materials you need. You go out with a portable

15 welder. In this case you heat up the cast iron and

16 you weld the strap to it with a wire-feed welder.

17 Q You heat up the cast iron. The cast iron is the

18 grate?

19 A Correct.

20 Q And then once you heat that up, then you take a

21 piece of welding equipment and melt this strap onto

22 the cast iron, right?

23 A You -- yes. In effect that's what you're doing is

24 trying to melt two different materials together to

25 hold.

1 Q And as we sit here today, you don't know whether or

2 not the grate in question had straps melted on it

3 that were just torn off by snowplows or some other

4 equipment?

5 MR. NOONEY: Steve, can you give him a time

6 frame?

7 MR. STEVEN BEARDSLEY: Any time prior to this

8 incident.

9 MR. NOONEY: Prior to July of '15?

10 MR. STEVEN BEARDSLEY: Yes.

11 A No.

12 Q (By Mr. Steven Beardsley) Okay.

13 You indicated if somebody complained, you'd go

14 out there. Was there a process used by the city to

15 check these particular grates to make sure they were

16 safe generally?

17 A Part of the city's, or the street department's

18 responsibility at that time was to clean the storm

19 sewer system. So inlet grates and the condition of

20 inlets and so on was checked at the time of

21 cleaning. We tried to get through every one in town

22 every year. Sometimes it happened; sometimes it

23 didn't. But there wasn't a specific project or

24 process for going out every day and checking inlet

25 grates.

<p style="text-align: right;">73</p> <p>1 Q Okay. But when you're cleaning them, you could</p> <p>2 notice whether the metal straps were torn off and</p> <p>3 then someone could go out and then just fix it?</p> <p>4 A It would be probably noted, but --</p> <p>5 Q But if it's unsafe, the process is if somebody in</p> <p>6 the street department sees something unsafe, they</p> <p>7 should either report it or fix it?</p> <p>8 A That's correct.</p> <p>9 Q Okay. That was the process basically if --</p> <p>10 complaints were one way. The second way is if</p> <p>11 you're cleaning or if somebody is out there around</p> <p>12 the grates, then they would fix it if they saw</p> <p>13 something that was unsafe?</p> <p>14 A It would be reported, and then if it's something</p> <p>15 that needs to be repaired immediately it would be</p> <p>16 taken care of. If it's something that could wait,</p> <p>17 depending on the severity or whatever, it could be</p> <p>18 put together at a different date.</p> <p>19 Q And did you have a written policy or was it just an</p> <p>20 oral policy that if the grates were in disrepair</p> <p>21 that they should be fixed?</p> <p>22 A No policy. It's just the way we did business.</p> <p>23 Q It's a verbal policy, not a written policy?</p> <p>24 A It's not a policy. It's just the way we did things.</p> <p>25 Q Okay, the way you do things kind of becomes a</p>	<p style="text-align: right;">75</p> <p>1 Q And the city must comply with the mandates of the</p> <p>2 Federal Highway Administration, correct?</p> <p>3 A Correct.</p> <p>4 Q And that's partly because we receive federal funds,</p> <p>5 correct?</p> <p>6 A Correct.</p> <p>7 Q When I say "we," I'm referring to the city.</p> <p>8 Correct? You understood that?</p> <p>9 A Yes, I did.</p> <p>10 Q In fact, in some of the discovery we received, we</p> <p>11 received a Rapid City Area Bicycle &amp; Pedestrian</p> <p>12 Master Plan, and we got that from John Nooney. Are</p> <p>13 you familiar with that?</p> <p>14 A No, I'm not.</p> <p>15 Q I'm going to show you what we received in some of</p> <p>16 the interrogatory answers.</p> <p>17 MR. STEVEN BEARDSLEY: John, I didn't make a</p> <p>18 copy of this. Do you have a copy of this?</p> <p>19 MR. NOONEY: I have a copy on my desk. I have</p> <p>20 a copy right here, in fact.</p> <p>21 MR. STEVEN BEARDSLEY: Do you want to mark</p> <p>22 yours or mark mine?</p> <p>23 MR. NOONEY: Well, why don't we do this, Steve:</p> <p>24 Why don't we just get a clean copy? I'll just run</p> <p>25 up to the copier. How does that sound?</p>
<p style="text-align: right;">74</p> <p>1 policy, doesn't it?</p> <p>2 A Okay. Let's call it an unwritten policy.</p> <p>3 Q And the unwritten policy is to repair grates, for</p> <p>4 instance, that are in disrepair?</p> <p>5 A Remove or repair as necessary, yes.</p> <p>6 Q For the safety of all users?</p> <p>7 A Correct.</p> <p>8 Q Because safety is paramount, isn't it?</p> <p>9 A Correct.</p> <p>10 Q And it's your understanding when the specs require</p> <p>11 something, that it's the duty of the city to comply</p> <p>12 with that?</p> <p>13 A Forgive me, we need to get it in better context than</p> <p>14 that. During new construction you comply with the</p> <p>15 existing specifications or plan sheets.</p> <p>16 Q And once it's determined by the city that a</p> <p>17 particular spec which is a safety concern, then at</p> <p>18 that point the city tries to comply with the spec?</p> <p>19 A Certainly.</p> <p>20 Q And that's because you don't want people injured?</p> <p>21 A Correct.</p> <p>22 Q And there are federal funds that come in, correct?</p> <p>23 A On some projects, yes. Typically what's referred to</p> <p>24 as urban system projects or projects in conjunction</p> <p>25 with DOT.</p>	<p style="text-align: right;">76</p> <p>1 MR. STEVEN BEARDSLEY: Perfect.</p> <p>2 MR. NOONEY: Who says I'm not easy to work</p> <p>3 with. Steve, what's the Bates number?</p> <p>4 MR. STEVEN BEARDSLEY: Off the record.</p> <p>5 (Discussion off the record)</p> <p>6 (Recess taken from 11:26 a.m. to 11:38 a.m.)</p> <p>7 (Exhibits 17-18 marked for identification.)</p> <p>8 Q (By Mr. Steven Beardsley) Showing you what's been</p> <p>9 marked as Exhibit 18, we were given this in</p> <p>10 discovery, and it was Bates stamped CITY 98 through</p> <p>11 CITY 173. Do you know what that is?</p> <p>12 A It's labeled as "Rapid City Area Bicycle and</p> <p>13 Pedestrian [ ] Plan."</p> <p>14 Q I agree. Have you ever seen it before?</p> <p>15 A I have not had any dealings with this pedestrian</p> <p>16 master plan -- or bicycle/pedestrian master plan.</p> <p>17 Q Okay. Within the context of this document, there's</p> <p>18 reference to the federal funding of, for bicycle and</p> <p>19 pedestrian facilities. I'm assuming that was normal</p> <p>20 that at times the city got federal funding for</p> <p>21 bicycles and pedestrian paths?</p> <p>22 A I would assume that's correct, but my knowledge of</p> <p>23 federal funding or any project funding for that</p> <p>24 matter is limited.</p> <p>25 Q Okay. And when there's federal funding, you agree</p>



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1 that they need to comply with what the Federal  
 2 Government is saying regarding safety and how to be  
 3 safe?  
 4 A That would be correct.  
 5 Q I'm going to show you what has been marked as  
 6 Exhibit 17.  
 7 A If I could clarify --  
 8 Q Yes.  
 9 A -- are we talking new construction, old  
 10 construction, existing structure?  
 11 Q Everything that --  
 12 A My comments are relative to new construction.  
 13 Q Okay.  
 14 I'm going to show you what's been given to us  
 15 this morning that's been marked as Exhibit 17. And  
 16 it indicates that the DOT is sending this to Marsha  
 17 Elkins of the City of Rapid City, correct?  
 18 A Correct.  
 19 Q Dated September of 2004, correct?  
 20 A Correct.  
 21 Q And it -- we were talking about whether it happened  
 22 in the '90s or when it happened that it got changed  
 23 from a state highway to a city road, but it was 2004  
 24 at least by this document?  
 25 A Yes, that's the date -- that's when they received

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1 it.  
 2 Q Okay. And if you turn to the next page, Section II,  
 3 it refers to US 16 B, which then became St. Patrick  
 4 Street, correct?  
 5 A What I'm looking at is 16 B says Canbell Street to  
 6 East North Street. Or -- Canbell Street to East  
 7 North, yeah.  
 8 Q Okay. If you turn to Page 4, it makes reference to  
 9 St. Patrick Street. If you look at "Segment  
 10 Transfer Timing," you see the second paragraph?  
 11 A Yes. Yes, I do.  
 12 Q And that includes St. Patrick Street, correct? I'm  
 13 just trying to establish what John gave us is  
 14 relevant.  
 15 A Yes.  
 16 Q Okay. So we're talking about St. Patrick Street  
 17 where the incident occurred, correct?  
 18 A It appears like it, yes.  
 19 Q Okay. So in the Segment Transfer Timing, Section 4  
 20 it states, "The CITY will assume [ ] responsibility  
 21 for operation and maintenance of the highway  
 22 segments listed"... Do you see that?  
 23 A Yes, I do.  
 24 Q And that includes St. Patrick, correct?  
 25 A Correct.

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1 Q So when the transfer occurred, the city was in  
 2 charge of the maintenance of this whole street after  
 3 this point?  
 4 A Correct.  
 5 Q And the street includes the curb and gutter and  
 6 street, right?  
 7 A Correct.  
 8 Q And from this time forward the state was not in  
 9 charge of the maintenance of these segments; the  
 10 city was in charge of the maintenance of these  
 11 segments?  
 12 A That's correct.  
 13 Q And you understand that as the entity in charge of  
 14 the maintenance, the idea is to maintain them in a  
 15 safe fashion, correct?  
 16 A Correct.  
 17 Q And if there are straps welded on these grates in  
 18 order to protect people from falling in the grates,  
 19 you would anticipate that the city needs to maintain  
 20 those straps on the grates or replace the grates to  
 21 make them safe, correct?  
 22 A If we received a complaint, yes.  
 23 Q No, that's not what I asked. I didn't couch this  
 24 with a complaint. If the city is taking over the  
 25 maintenance, they're supposed to maintain things

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1 safely, correct?  
 2 A Correct.  
 3 Q And when they take it over, if the straps are torn  
 4 off or in the process of being torn off or partially  
 5 torn off, it may make the grates in the streets  
 6 unsafe for bicycle travel, correct?  
 7 A Correct.  
 8 Q Because vehicles, cars aren't going to fall in these  
 9 grates but bicycles may?  
 10 A Correct.  
 11 Q So the straps that were welded on at some point were  
 12 there for safety purposes, correct?  
 13 A We're making that assumption.  
 14 Q That makes sense to you, doesn't it?  
 15 A It makes sense.  
 16 Q So you have two ways to make that street safe or  
 17 maintain it in a safe manner, and that is to replace  
 18 the grates with ones that are perpendicular or  
 19 maintain the straps that are on the grates, correct?  
 20 A Correct.  
 21 Q And if the strap is torn off, you would agree with  
 22 me that the grate in the safe fashion has been  
 23 damaged when the straps are torn off?  
 24 MR. NOONEY: Objection to the extent you're  
 25 calling for a legal conclusion.

1 Subject to that, you can answer.

2 A I don't believe the grate itself is damaged.

3 Q (By Mr. Steven Beardsley) But the safety portion,

4 once the strap is on there -- strike that.

5 Once you weld the straps on there it becomes

6 part of the grate, correct?

7 A Okay, it's part of the grate.

8 Q Yeah, it's part of the grate because the concept of

9 the strap being part of the grate is to prevent

10 people from falling in and hurting themselves,

11 correct?

12 A Correct.

13 Q So once the straps are torn off, the grate in its

14 configuration now with the straps has been damaged,

15 correct?

16 A Correct.

17 Q And once it's damaged, now it's hazardous for

18 bicycles that are riding along that area, correct?

19 A If they're riding in the gutter, yes.

20 Q And it's certainly reasonable that people would ride

21 their bicycles in the gutter because traffic is

22 going in the traffic asphalt lanes?

23 MR. NOONEY: Objection, foundation.

24 Subject to that, you can answer.

25 Q (By Mr. Steven Beardsley) Right?

1 A Right.

2 Q And if you're riding a bike in Rapid City, you know

3 that if you ride in the middle of the lane you might

4 get run over by some car or truck or semi, right?

5 A Very possible.

6 Q So in order to be as safe as you can, and according

7 to the ordinance, you want to be over to the right

8 side of the lane going with the traffic, correct?

9 A Of the roadway I believe it says.

10 Q And if you're on the right side and there are grates

11 that allow your tires to go in, you certainly could

12 be injured, correct?

13 A Again, if you're riding in the gutter section, you

14 could fall into an inlet grate.

15 Q And there's no warning that, by the way, this grate

16 ahead of you has been damaged to the point where the

17 straps are torn off, right?

18 A Correct.

19 Q And so a bicyclist would have no idea this grate has

20 been damaged to that extent and basically there's a

21 trap out ahead of them without some sign or

22 something, correct?

23 A Correct.

24 Q So -- do you ever ride a bicycle, Don?

25 A Not in this town.

1 Q Let me be more general. Have you ever ridden a

2 bicycle?

3 A Yes, I have.

4 Q And you know as you ride a bicycle you can't

5 necessarily stop on a dime, fair? It takes you a

6 little while to stop?

7 A Fair.

8 Q And without some warning that there's grates that

9 have been damaged and that bicycle tires can go

10 inside the grates, there would be almost no time to

11 react to that, would there?

12 MR. NOONEY: Objection, inappropriate

13 hypothetical, lack of foundation.

14 Subject to that, you can answer.

15 A I don't know that I want to get into the

16 hypothetical of what could or couldn't happen.

17 Q (By Mr. Steven Beardsley) You also know, Don, that

18 in this area where Julie Godbe went into this grate

19 and became paralyzed, that right across the street

20 in fact there are V type grates that are

21 perpendicular to the road?

22 MR. NOONEY: Objection, foundation. When,

23 Steve?

24 MR. STEVEN BEARDSLEY: Time of the incident.

25 A I guess I don't know that.

1 Q (By Mr. Steven Beardsley) And one way that the city

2 could maintain the safety of the road is to actually

3 have a process in which they check for unsafe spots

4 in the road, correct? They actually look for them?

5 A Yes.

6 Q Another way is to have employees that actually see

7 there's unsafe spots to report them, right?

8 A That's correct.

9 Q And there were times in which state employees and

10 city employees actually called in to the city to say

11 that there was a damaged grate, correct?

12 A I mean, that could have happened certainly.

13 Q But without a process of inspection of highways, the

14 city is not maintaining the highway appropriately,

15 correct?

16 A It's a matter of opinion, I guess.

17 Q I know, but I'm asking you as a former street

18 superintendent, the best process would be to have

19 inspections to make sure there aren't traps for

20 people out there, correct?

21 A Those inspections have occurred and do occur.

22 Q Okay. And when they inspect they should be able to

23 see that on a grate that runs parallel if the straps

24 are torn off that it's in disrepair?

25 A If it's part of the criteria for the inspection.



<p style="text-align: right;">93</p> <p>1 A In my office I have a Neenah catalog where I can 2 pretty much order whatever grate we need or pieces. 3 Q And then turn to Exhibit 6. 4 Before we go on to Exhibit 6, Don, I'm sure 5 that during the time when you were working for the 6 city, you realized that metal straps that were 7 welded on could be ripped off, correct? 8 A Yes. 9 Q And at that point can you tell me why, if you're 10 going to maintain the street safely, you wouldn't 11 just replace grates that the metal straps can be 12 ripped off of with these kind, the L type or the V 13 type? 14 A Well, depending on availability, I mean, to fix it, 15 what the straps typically do is a temporary fix to 16 alleviate any perceived problem at that location. 17 Q And they're temporary because it's your knowledge as 18 a street guy that if you weld something on, it can 19 be torn off? 20 A That's correct. 21 Q And you indicated there was no process to check 22 these grates to make sure they were maintained 23 properly. And you indicated that if somebody 24 complains, then you'd go out and take care of it? 25 A That's correct.</p>	<p style="text-align: right;">95</p> <p>1 have been any injury to Julie Godbe, would there? 2 MR. NOONEY: Objection, foundation, 3 inappropriate hypothetical. 4 Subject to that you can answer. 5 A Not necessarily. I mean, you don't have any control 6 on when they come off. So depending on when they 7 were put on, they could fall off within ten minutes 8 of you leaving. There's no way of knowing that. 9 Q (By Mr. Steven Beardsley) But you're in control of 10 checking or maintaining them, these grates? 11 A Uh-huh. 12 Q Correct? 13 A Correct. 14 Q And if you check, then you can maintain them on a 15 regular basis if they're checked on a regular basis, 16 correct? 17 A Correct. 18 Q And if you don't check, then you're not maintaining 19 them properly such as on a regular basis? 20 MR. NOONEY: Objection, form. 21 Subject to that you can answer. 22 A In the real world, Rapid City is full of hundreds of 23 grates. Say you have a system that you're regularly 24 checking them, it could be weeks, months, days, 25 whatever, between checks that any number of things</p>
<p style="text-align: right;">94</p> <p>1 Q Well, you understand that if a bicyclist is lucky, 2 they can go over this grate without hitting the 3 gaps? You know what I'm saying? 4 A Yeah. 5 Q And the grate would still not be maintained properly 6 because the straps aren't there but the person might 7 get lucky and make it over them, correct? 8 A Correct. 9 Q It would still be unsafe even though somebody hasn't 10 called in to say, I had a problem with this grate? 11 A That's correct. 12 Q And it would still be hazardous, too, for the next 13 bicyclist even though the first one might make it 14 over it, correct? 15 A Correct. 16 Q And the best maintenance would be to either replace 17 it with either honeycomb, L shaped, V shaped or weld 18 the straps back on if they're missing? 19 A Ideally. 20 Q And if you had a process at the city wherein you 21 were checking the straps on the inlets, then there 22 would be an opportunity to replace the straps, 23 correct? 24 A Correct. 25 Q And if they'd replaced the straps, there wouldn't</p>	<p style="text-align: right;">96</p> <p>1 could happen to grates. So to answer your question, 2 yes, if you check them, you fix them if they're bad 3 or need repair, but -- 4 Q (By Mr. Steven Beardsley) And if you saw that the 5 maintenance through the straps wasn't working well, 6 then you simply could just throw another grate in 7 that's an L shape or V shape and that rectifies the 8 problem? 9 A You could. 10 Q So a temporary fix doesn't mean that you're no 11 longer maintaining it, correct? 12 A Correct. 13 Q In fact, if you have a temporary fix out there that 14 you know is temporary, there needs to be a system to 15 check it to keep it safe, correct? 16 A There are temporary fixes out there that have been 17 in there for years, so typically a temporary fix 18 takes it off the immediate radar and you're moving 19 on to bigger and better things. 20 Q And then you need to follow up to make sure you're 21 maintaining the road properly? 22 A In an ideal world, yes. 23 Q Okay. In the real world, too, right? Because 24 that's what Julie Godbe is living in. In the real 25 world it needs to be done, correct?</p>

1 A Yes.  
 2 Q Okay.  
 3 Looking at Exhibit 6, do you have that in front  
 4 of you? You got it.  
 5 A Yep.  
 6 Q That is entitled, "Implementing Bicycle Improvements  
 7 at the Local Level." Do you see that?  
 8 A Yes, I do.  
 9 Q And these kinds of publications are something that  
 10 would be available to the city in order to maintain  
 11 the streets and the grates, correct?  
 12 A Yes.  
 13 Q And I think this publication was 1998. So those  
 14 kinds of publications might come to the city so they  
 15 can rely on them, correct?  
 16 A Yes. They use them for reference material, I would  
 17 imagine.  
 18 Q And it looks like it says in the introduction on  
 19 Page V, Roman Numeral V, "The goal of bicycle  
 20 planning at the local level is to provide for  
 21 bicycle travel within the community. The purpose of  
 22 doing so is to encourage more bicycling and to  
 23 reduce the number of serious bicycling crashes,"  
 24 correct?  
 25 A I see that.

1 Q And the concern on that same page is that, "Regional  
 2 plans tend to overlook issues of most concern to  
 3 bicyclists...the drain grate that can catch a  
 4 wheel." Do you see that?  
 5 A Yes, I do.  
 6 Q In the 20 years that you were the street  
 7 superintendent you were aware that a drain grate can  
 8 catch a wheel?  
 9 A It can, yes.  
 10 Q All right. Let's look at Exhibit 7. Exhibit 7 is  
 11 from the Federal Highway Administration University  
 12 Course on Bicycle and Pedestrian Transportation,  
 13 correct?  
 14 A Yes.  
 15 Q And it's dated July of 2006?  
 16 A Yes.  
 17 Q Is this something that the city would receive from  
 18 the Federal Highway Administration at various times,  
 19 pamphlets like this?  
 20 A Yes.  
 21 Q And the idea is, from this is to make the streets as  
 22 safe as possible for all that use them, correct?  
 23 MR. NOONEY: Objection, foundation.  
 24 Subject to that you can answer.  
 25 A Yes, it would make people aware of current standards

1 and so on.  
 2 Q (By Mr. Steven Beardsley) Okay. Could you turn to  
 3 Page 15, please?  
 4 A (Deponent complied.)  
 5 Q It has a section on drainage grates. Do you see  
 6 that?  
 7 A Yes, I do.  
 8 Q They talk about various kinds of grates on that  
 9 page, correct?  
 10 A Yes, they do.  
 11 Q In fact, Figure 14-14 says, "Examples of  
 12 bicycle-safe drainage grates." Do you see that  
 13 section?  
 14 A Yes.  
 15 Q It has a honeycomb, and then it has like a V grate,  
 16 and then it has something that looks like it's got  
 17 straps on it?  
 18 A Correct.  
 19 Q And then up a little higher it says, in reference to  
 20 the straps it says, "These should be checked  
 21 periodically to ensure that the straps remain in  
 22 place." You would agree with that, correct?  
 23 A Yes.  
 24 Q And if there are grates that have straps and  
 25 bicyclists go over them after you've gone over those

1 with straps that are safe, don't you think  
 2 bicyclists would get a false sense of security that  
 3 they're all maintained in the same fashion?  
 4 MR. NOONEY: Objection, foundation.  
 5 Subject to that you can answer.  
 6 A I can't testify to that. I don't know how people  
 7 think.  
 8 Q (By Mr. Steven Beardsley) Does it make sense,  
 9 though?  
 10 A I guess if you were a bicycle rider, yeah, it could.  
 11 Q And it sounds to me like your explanation -- and if  
 12 I've misinterpreted it you tell me, but your  
 13 explanation for not replacing these grates that run  
 14 parallel is a cost analysis?  
 15 MR. NOONEY: Objection, misstatement of the  
 16 testimony.  
 17 Subject to that you can answer.  
 18 Q (By Mr. Steven Beardsley) Is that correct?  
 19 A No. It's what was installed at the time of  
 20 construction, so --  
 21 Q No, I understand that. But once it was determined  
 22 that these are dangerous, people can go into them  
 23 and metal straps are on there, I thought you said to  
 24 me in an ideal world they could replace them but in  
 25 the real world you've got cost of expense of



1 they talked about a meeting. It says, "In early  
2 1992, the City of Rapid City and the Executive  
3 Policy Committee of the Rapid City Area Metropolitan  
4 Planning Organization recognized the formation of a  
5 Bike Walk [ ] Task Force. The purpose of the task  
6 force is to improve, expand and promote the safe use  
7 of the community's bikeway/walkway facilities,"  
8 correct?  
9 A I see that.  
10 Q And I can't remember what you told me, but what was  
11 your position in 1992?  
12 A Street superin- -- or, no. '92? I would have been  
13 in engineering services as an inspector.  
14 Q Okay. Do you recall back then a task force that was  
15 created because of bikes and walkway safety?  
16 A I didn't deal with that kind of stuff at the time.  
17 Q Then turn to Page 9, please, of Exhibit 9. The last  
18 paragraph says, "Storm water grates with vents which  
19 are parallel with the curb and the direction of [ ]  
20 travel can trap wheels, causing damage to the  
21 bicycle and injury to the rider." Do you agree with  
22 that?  
23 A Yes.  
24 Q And then it says, "Grates with vents that are  
25 transverse to the curb and the direction of bicycle

1 travel are recommended to address this problem." Do  
2 you see that?  
3 A I see that.  
4 Q Transverse means opposite of how they're traveling?  
5 A Perpendicular, yes.  
6 Q Like the V vents -- V grates?  
7 A Correct.  
8 Q So the city at least recognized in this plan that  
9 the grates, in order to maintain them safely, the  
10 road safely, they need to have grates that are  
11 perpendicular or transverse to the curb, correct?  
12 A They recognized it would be a safer situation, yes.  
13 Q And in 2007 by Exhibit 3 that was adopted by the  
14 city, correct?  
15 A I'm sorry, let me get to 3. Meaning those grates  
16 were adopted?  
17 Q Yes.  
18 A Yes.  
19 Q Okay.  
20 All right. I gave you the interrogatory  
21 answers early on, and I think they're Exhibit 15.  
22 Let me hand you those.  
23 We just went through this task force. We went  
24 through the 2007 spec. Obviously during this time  
25 it was recognized that grates running parallel to

1 the road create a problem for bicyclists, correct?  
2 A Correct.  
3 Q And were there incidents in which people were  
4 falling into these grates when they were on  
5 bicycles?  
6 MR. NOONEY: Objection, relevance.  
7 Subject to that you can answer.  
8 A I guess not that I recall right off the top of my  
9 head.  
10 Q (By Mr. Steven Beardsley) But obviously it was  
11 recognized that those kind of grates can create a  
12 dangerous problem?  
13 MR. NOONEY: Objection, misstatement of the  
14 record.  
15 Subject to that you can answer.  
16 A It could create an issue for bicycles, yes.  
17 Q (By Mr. Steven Beardsley) And the issue is danger or  
18 injury?  
19 A Correct.  
20 Q And you indicated earlier that at times people from  
21 the city would go out and repair or check grates  
22 that the straps were coming off of, correct?  
23 A If we received a phone call or a complaint, then  
24 yes, we'd go check them.  
25 Q Sure. And that was done prior to this incident with

1 Julie Godbe, not just subsequent to it?  
2 MR. NOONEY: Objection, foundation.  
3 Subject to that you can answer.  
4 Q (By Mr. Steven Beardsley) Correct?  
5 A Yes.  
6 Q In the answers to interrogatories, specifically  
7 number 13, the city has indicated --  
8 MR. NOONEY: 15, Steve?  
9 MR. STEVEN BEARDSLEY: Yeah.  
10 MR. MICHAEL BEARDSLEY: 13.  
11 MR. STEVEN BEARDSLEY: I said 13. I'm sorry.  
12 Q (By Mr. Steven Beardsley) I'm going to go to 19. I  
13 apologize. There's reference to, at the bottom of  
14 the -- go to the next page, the answer. The answer  
15 is in dark. It says, "Information regarding the  
16 specific date of the work or the employee that  
17 completed the work is not kept or tracked, but the  
18 work was completed sometime after October 1, 2015."  
19 You agreed that there was some welding of these  
20 straps done prior to this incident. And prior to  
21 the incident is -- the incident is dated July 27,  
22 2015. Correct?  
23 A Yes.  
24 Q So there would have been work done to these grates  
25 prior to the incident of July 27th, correct?

<p style="text-align: right;">113</p> <p>1 MR. NOONEY: For the record, Steve, to make</p> <p>2 sure the question is clear: What grates are you</p> <p>3 talking about? The ones on East St. Patrick Street</p> <p>4 or some other location in Rapid City?</p> <p>5 MR. STEVEN BEARDSLEY: Let's do East St.</p> <p>6 Patrick Street.</p> <p>7 A I guess I can't say whether there was work done on</p> <p>8 these grates.</p> <p>9 Q (By Mr. Steven Beardsley) There was work done on</p> <p>10 grates in the city with the straps on them?</p> <p>11 A I would say yes.</p> <p>12 Q Okay. So when it says that work was completed</p> <p>13 sometime after October 1, 2015, we're not talking</p> <p>14 about welds on the grates, are we?</p> <p>15 A Can I ask you to repeat the question now?</p> <p>16 Q Sure. Here's what they're claiming in their answers</p> <p>17 to interrogatories, Don: It says, "Photographs of</p> <p>18 the storm grates were taken on October 1, 2015</p> <p>19 showing no crossbars, no welds and no damage to the</p> <p>20 [ ] drain grates." And then it says down later in</p> <p>21 the paragraph that the work was completed after</p> <p>22 October 1, 2015. There was work done prior to this</p> <p>23 incident of July 2015 on the welds. You're aware of</p> <p>24 that, correct? We talked about that.</p> <p>25 MR. NOONEY: What grates are we talking about,</p>	<p style="text-align: right;">115</p> <p>1 would be located in time cards, et cetera, that the</p> <p>2 guys would fill out on a daily basis, so ...</p> <p>3 Q Can you tell me who decided to weld cross bars on</p> <p>4 these particular grates let's say in the East St.</p> <p>5 Patrick area? Is that something you decide, Don, or</p> <p>6 somebody else?</p> <p>7 A If -- well, that would have come out of city hall.</p> <p>8 Q Okay. And so what involvement did you have in</p> <p>9 making the decision to weld straps?</p> <p>10 A The involvement I had was scheduling the crews to do</p> <p>11 it, so directing that it be scheduled.</p> <p>12 Q And this welding of the straps was an attempt to</p> <p>13 make the grate safer?</p> <p>14 A Correct.</p> <p>15 Q And the welding of the straps that were damaged was</p> <p>16 also an attempt to make it safer? In other words,</p> <p>17 if they're scraped off --</p> <p>18 A I would assume so, yes.</p> <p>19 Q And you can't tell us the dates that was done</p> <p>20 because there are no records?</p> <p>21 A That's correct.</p> <p>22 MR. STEVEN BEARDSLEY: We'll take a break.</p> <p>23 (Recess taken from 1:51 p.m. to 2:00 p.m.)</p> <p>24 Q (By Mr. Steven Beardsley) Showing you what's been</p> <p>25 marked as Exhibit 10, it is a Google Earth with</p>
<p style="text-align: right;">114</p> <p>1 Steve? The ones on East St. Patrick Street?</p> <p>2 MR. STEVEN BEARDSLEY: Yes.</p> <p>3 MR. NOONEY: Okay.</p> <p>4 A I'm sure there was work done prior to that. Who did</p> <p>5 that work, I don't know.</p> <p>6 Q (By Mr. Steven Beardsley) Okay. So when it makes</p> <p>7 reference to the work was completed sometime after</p> <p>8 October 1, 2015, when they make reference to that,</p> <p>9 are they talking about replacement of the grates?</p> <p>10 MR. NOONEY: Objection, foundation. He's not</p> <p>11 the person to answer these questions. It's outside</p> <p>12 the scope of his knowledge.</p> <p>13 Subject to that, if you know, you can answer,</p> <p>14 Don.</p> <p>15 A I guess I'm not sure what they're referring to here.</p> <p>16 Q (By Mr. Steven Beardsley) And so there are several</p> <p>17 times in these records, the interrogatories, sworn</p> <p>18 interrogatory answers that indicates the work was</p> <p>19 done sometime after October 1, 2015. You can't</p> <p>20 testify that there was any work done as far as the</p> <p>21 welds after October 1, 2015?</p> <p>22 A There was work done on the welding straps. I</p> <p>23 believe it was after this October 1 date.</p> <p>24 Q But you have no record of that?</p> <p>25 A There again, it would be -- if there is a record, it</p>	<p style="text-align: right;">116</p> <p>1 letters and numbers on it. Okay?</p> <p>2 A Okay.</p> <p>3 Q And I'm showing you this because I'm going to show</p> <p>4 you the, some of the photos that were taken of the</p> <p>5 grates that correspond with the numbers 1, 2, 3</p> <p>6 through 15 and the letters A through O, okay? So</p> <p>7 keep that in front of you while I give you various</p> <p>8 photographs, all right? You with me?</p> <p>9 A I believe so, yeah.</p> <p>10 MR. NOONEY: And just for the record, Steve,</p> <p>11 the photos that you're going to show him were photos</p> <p>12 that your office took; is that right? Just so I</p> <p>13 know which ones we're talking about.</p> <p>14 MR. STEVEN BEARDSLEY: Yes. They were taken by</p> <p>15 an errand person that's no longer employed by us.</p> <p>16 MR. MICHAEL BEARDSLEY: On October 12 and 13 of</p> <p>17 2015.</p> <p>18 MR. NOONEY: Of 2015. And they are Bates</p> <p>19 stamped. If you'd do me a favor just so I can</p> <p>20 track, and I'm sure you will because you're really</p> <p>21 good at what you do, if you will reference the Bates</p> <p>22 number and tie it to a number on the map. Can you</p> <p>23 do that for us just so we can track it?</p> <p>24 MR. MICHAEL BEARDSLEY: The Bates are on all of</p> <p>25 the exhibits.</p>



1 MR. NOONEY: Super. Thank you.

2 Q (By Mr. Steven Beardsley) So now that we have the

3 guide, and I want to show you first number, in

4 number 10 there's St. Patrick Street. Can you see

5 that with your glasses on? St. Patrick Street runs

6 left to right.

7 A Yes, I see that.

8 Q And then there's Creek Drive that runs north and

9 south.

10 A Okay.

11 Q Do you see that?

12 A It's clear over here. Okay, I'm with you.

13 Q Do you see number 4?

14 A I think part of it is upside down here. Yes, I see

15 it.

16 Q It intersects St. Patrick and Creek Drive. That's

17 where the grate in question was when Julie Godbe

18 went down, okay?

19 A Okay.

20 Q That will give you a point of reference, all right?

21 And I'm going to show you, and I'm going to

22 start with number 10 and we're going to come back.

23 But number 10 is on St. Patrick Street and --

24 A Between Sodiwy and Creek Drive?

25 Q Yes.

1 A Okay.

2 Q And you'll see the reference on Exhibit 10 to

3 number 10, correct?

4 A I see that.

5 Q Okay. So -- and it's Bates No. 10 as well in the

6 right corner.

7 A I see that.

8 Q So we're going to mark this all as Exhibit 11. I'm

9 going to have you turn to, out of Exhibit 11, to

10 number 10, okay? Do you see that?

11 A Yes, I do.

12 Q Do you see where there are weld marks on this

13 particular grate?

14 MR. NOONEY: Steve, for the record, and I

15 appreciate what you've done, your office had

16 previously produced a set of photos that were Bates

17 Beardsley 1 through 29, or perhaps my office Bates

18 them 1 through 29.

19 MR. MICHAEL BEARDSLEY: I don't think we

20 Bates'd them, John.

21 MR. NOONEY: You didn't?

22 MR. MICHAEL BEARDSLEY: That's why we Bates'd

23 these.

24 MR. NOONEY: 1 through 30. I apologize.

25 So these -- you guys provided us 30 photos but

1 they were unBates'd. Okay. I just want to make

2 sure where the Bates came from.

3 MR. STEVEN BEARDSLEY: Now we've Bates'd this

4 exhibit. And for the record, it's Exhibit 11, and

5 then it has a red Bates on each one. The ones you

6 have and the previous ones didn't have a red Bates.

7 MR. NOONEY: That is correct, yeah.

8 Q (By Mr. Steven Beardsley) So I just want to turn to

9 10 because I'm not going to cover all of these, but

10 10 is on your Google map and it's on St. Patrick

11 Street and it's to the east of the grate in

12 question, number 4, correct?

13 A Correct.

14 Q And on this particular grate, it looks like weld

15 marks. Do you see that?

16 A Yes.

17 Q Turn to number 11, Exhibit 11, number 11. That has

18 some bars on it, straps on it and some that are

19 missing, correct?

20 A Yes.

21 Q And you testified that you believe people were out

22 for the city after October 1, 2015 welding straps on

23 grates? Do you remember saying that?

24 A Yes.

25 Q Well, they wouldn't go out there and leave it after

1 October 1 without straps, would they?

2 A Typically not.

3 Q And we have the temperatures for October. They're

4 all in the 50s to the '80s. It's not a time in

5 which the snowplow would be out, correct?

6 A That's correct.

7 Q And you would agree with me that if you look at

8 Exhibit (sic) 10 and Exhibit (sic) 11, it's

9 dangerous because a bike tire could fit in the gaps,

10 correct?

11 A It could, yes.

12 Q So you're not contending that somebody welded straps

13 on in early October and then got them scraped off so

14 they end up like Exhibit 11, numbers 10 and 11, are

15 you?

16 A No, I'm not.

17 Q Okay. That wouldn't make sense, would it?

18 A Not really, no.

19 Q And then if you turn to number 12 of Exhibit 11,

20 that's moving in a more easterly fashion on

21 Exhibit 10?

22 A You said 12?

23 Q Yeah. But 12 is farther east than 11 and 10, right?

24 A Yes.

25 Q And 12 is a V grate, correct?

- 1 A To address whatever the perceived problem was. But  
2 in this case I would assume that's what it was for,  
3 yes.
- 4 Q And in order to make the road safer, you're going to  
5 want to put straps on all of those that would allow  
6 a tire to go into them as opposed to every once in a  
7 while, correct?
- 8 A Correct.
- 9 Q Because it wouldn't make sense, Don, for you to send  
10 people out to say, Well, just pick out a few and put  
11 straps on. If you sent people out to make grates  
12 safer or roads safer, you would want to cover each  
13 one that had gaps?
- 14 A If we were sending out people to address a grate, we  
15 would address that grate. If we were going out to  
16 do a, four different sections of road, we'd do them  
17 all.
- 18 Q And if you were inspecting and checking them and you  
19 saw that there were a series of grates that were  
20 dangerous, you'd put straps on them?
- 21 A We would definitely do it at some point in time.  
22 It's a question of when you had the time to do it.
- 23 Q Right. And when you address them, we're talking  
24 about putting straps on them or pulling them out and  
25 putting the other kind in?

- 1 A Correct.
- 2 Q And you don't know who was out doing the welds on  
3 these grates, which worker?
- 4 A At what time?
- 5 Q 2015, 2014, any of those times because there's no  
6 record to indicate.
- 7 MR. NOONEY: Steve, are you talking post  
8 accident or pre accident?
- 9 MR. STEVEN BEARDSLEY: Pre accident.
- 10 A Pre accident I don't know.
- 11 Q (By Mr. Steven Beardsley) Okay. Post accident do  
12 you know?
- 13 A There was a time when we went out and actually did a  
14 project doing this stuff, so yes, there would be a  
15 record of that. It would be on time cards.
- 16 Q Prior to this on July 27, 2015 there's no time  
17 records that show when people were out welding these  
18 straps?
- 19 A I don't know that we had any projects in that time  
20 period doing that type of work.
- 21 Q And you didn't have any inspections? We covered  
22 that.
- 23 A We covered that.
- 24 Q I'm correct?
- 25 A Correct.

- 1 Q Do you have any photographs of the grates prior, in  
2 this area prior to July 27, 2015?
- 3 A Not that I'm aware of.
- 4 Q Do you have any photographs of the grates after  
5 July 27, 2015?
- 6 A I personally don't, no.
- 7 Q Does the city? I'm not talking about you. I'm  
8 talking about the city, Don.
- 9 A I believe Trevor Schmelz has some photos, yes. The  
10 risk manager Trevor Schmelz would probably have  
11 some.
- 12 MR. STEVEN BEARDSLEY: John, do you have those?
- 13 MR. NOONEY: Yeah, I have photos.
- 14 MR. STEVEN BEARDSLEY: Could I have copies of  
15 those?
- 16 MR. MICHAEL BEARDSLEY: They're produced.
- 17 MR. NOONEY: I'd already produced them, I  
18 thought.
- 19 MR. STEVEN BEARDSLEY: Well, we got paper  
20 copies.
- 21 MR. NOONEY: You want digital ones?
- 22 MR. STEVEN BEARDSLEY: Whatever we can actually  
23 reproduce.
- 24 MR. NOONEY: We'll send you the digital version  
25 of them.

- 1 MR. STEVEN BEARDSLEY: They're the same ones as  
2 you produced in the photocopies?
- 3 MR. NOONEY: Yeah. We can give you the same  
4 photos. We can give you the JPEG or whatever it's  
5 called. That's beyond my pay grade.
- 6 MR. STEVEN BEARDSLEY: Perfect. It's beyond  
7 mine, too.
- 8 MR. NOONEY: Polaroids, remember those?
- 9 MR. STEVEN BEARDSLEY: I do remember those. We  
10 seemed to get by.
- 11 Q (By Mr. Steven Beardsley) You're not an expert on  
12 analyzing photographs?
- 13 A No, I am not.
- 14 Q You're not an expert on analyzing welds?
- 15 A No, I am not.
- 16 Q You're -- you don't have a certificate on welds?
- 17 A No, I'm not a certified welder.
- 18 Q And in regards to the grate that she fell into,  
19 11-4, since you're not an expert on photographs and  
20 you're not an expert on welding, you can't tell us  
21 whether or not straps were welded on that particular  
22 grate?
- 23 A All I can do is give you my opinion on what I think  
24 I see.
- 25 Q I understand that, but you're not an expert in that



1 cover them all.

2 Q And as long as we tie it to people that have welded

3 on the streets, then we'd cover it?

4 A Yes.

5 Q Okay.

6 Do you know a gentleman named Mark Brown?

7 A Mark Brown?

8 Q Uh-huh, yes.

9 A It doesn't ring a bell. I'm better with faces than

10 I am names.

11 Q He used to weld on the grates back in I think the

12 early 2000s. It doesn't ring a bell?

13 A It doesn't.

14 Q Okay. Do you know who Dan Staton is?

15 A Yes, I do.

16 Q And how do you know Dan Staton?

17 A Dan Staton, well, I've known him for years. He used

18 to be the regional South Dakota DOT traffic

19 engineer.

20 Q And then he at some point also worked for the city,

21 right?

22 A I don't know if Dan Staton did.

23 Q Maybe just consulted for the city?

24 A He may have done that, yes.

25 Q And your association with Dan was that he was

1 involved with the DOT, in other words the streets

2 and highways around Rapid City?

3 A Yes, as it relates to DOT construction or traffic

4 signaling, that sort of thing. He worked more with

5 the traffic engineering operation.

6 Q And was he involved with safety as well?

7 A I believe he has something to do with safety or did

8 with the state as far as traffic control, that sort

9 of thing.

10 Q When there's an authorization to purchase grates, is

11 that something there would be invoices on?

12 A Invoices on the grates themselves?

13 Q Yeah. You know, we went through a number of these

14 that showed V grates and L grates. If you're going

15 to buy L grates or V grates, would there be an

16 invoice for that?

17 A Yes.

18 Q Would it be labeled V grates or L grates?

19 A Quite possibly, yes, or there would be possibly --

20 that's something for finance, but there may be an

21 invoice from whoever you're ordering it from

22 attached to say a purchase order.

23 Q So if we ask for the purchase orders in let's say

24 2010 through 2015 that were for V grates or

25 L grates, that could be provided to us?

1 A That would be a question for the city finance

2 office, so --

3 Q You don't know?

4 A -- it doesn't hurt to ask the question, I guess.

5 Q Okay. Well, we'll make it formal. But I just want

6 to be able to figure out how the invoice would be

7 labeled so we can get those. It would be labeled

8 with a V grate or an L grate?

9 A Typically the purchase order would be made out to

10 whatever company is providing the service or

11 product, and then in the description it would

12 describe what you're buying from them and a dollar

13 amount or unit cost.

14 Q And would it be under the street maintenance

15 section?

16 A If the street department bought them. In the case

17 of the project where we went through and replaced

18 all of these grates on a section of St. Pat, those

19 were ordered through the Engineering Services

20 Division. They may have very well been charged to

21 streets, but they were ordered by the engineer that

22 we were working with over in engineering.

23 MR. STEVEN BEARDSLEY: Let's take a break.

24 (Recess taken from 2:47 p.m. to 2:58 p.m.)

25 Q (By Mr. Steven Beardsley) There's reference in

1 Interrogatory No. 19, in the answer they're claiming

2 that crossbars were welded onto the storm grates

3 after October 1, 2015. That's not accurate, is it,

4 as far as you know?

5 A It very well may be. I'd have to look at the

6 records we would have, too, because there was a

7 project at one time to go through and weld

8 crossbars in an area out there, but I'm not sure

9 which one it was.

10 Q Well, the welds we're looking at on Exhibit 11 which

11 were taken in mid October, 2015 are not new welds,

12 are they?

13 A No. Those appear to be old to me.

14 Q And so the photographs, and you can look through all

15 of them, all of them are old welds that we're

16 looking at, not new welds, correct?

17 A That's correct.

18 Q So if they're out welding somewhere, it's not on

19 East St. Patrick because we've got photos

20 mid October 2015. So you're not contending that any

21 of the welds that you see on these photographs,

22 whether it's Exhibit 11 or Exhibit 12, were done in

23 October of 2015, are you?

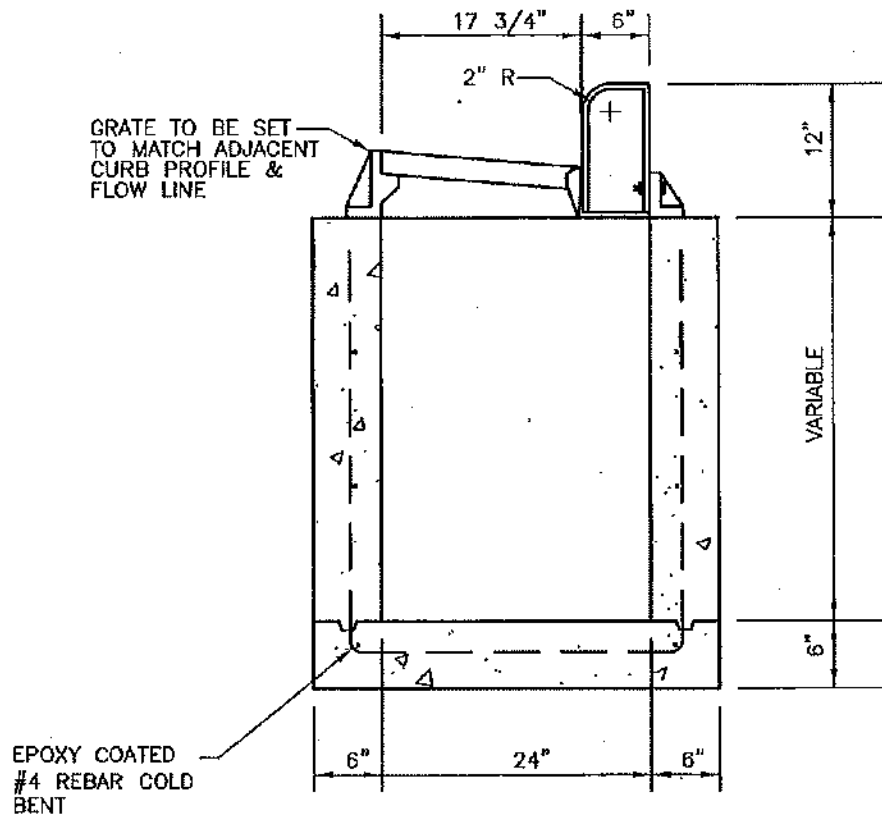
24 A No, I'm not.

25 Q That's all I have. I wish I had more for you, Don.

# City of Rapid City

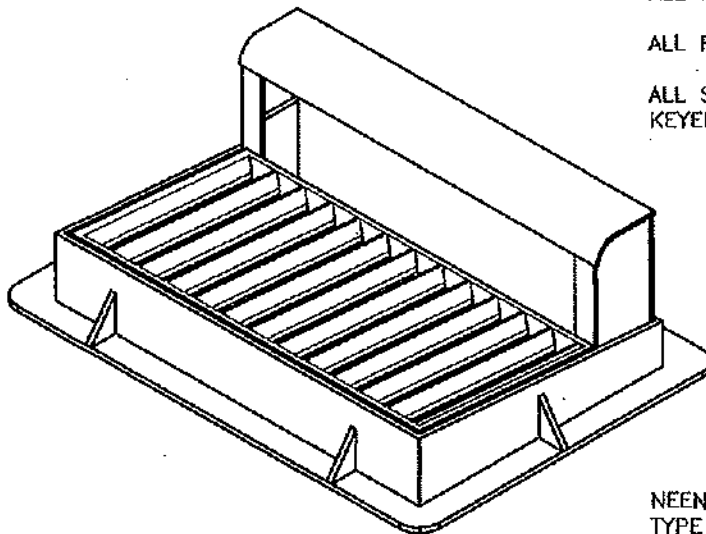


## Standard Specifications for Public Works Construction 2007 Edition



GENERAL NOTES:

- CONCRETE SHALL HAVE 4000 P.S.I. COMPRESSIVE STRENGTH AT 28 DAYS
- ALL REINFORCING STEEL SHALL BE TIED & CHAIRED
- ALL REBAR SHALL BE COLD BENT AT CORNERS
- ALL STRUCTURAL JOINTS SHALL BE KEYED & WATER TIGHT



NEENAH R-3067, V CURB INLET, OR EQUAL WITH TYPE V GRATE (FLOW-RIGHT SHOWN)

CITY OF RAPID CITY

PUBLIC WORKS DEPARTMENT

TYPE "B" INLET

DATE: 5-1-07

SEC. SHT.  
62-5a

APP 034

1 STATE OF SOUTH DAKOTA ) IN CIRCUIT COURT  
 2 COUNTY OF PENNINGTON ) SS.  
 3 ) SEVENTH JUDICIAL CIRCUIT  
 4 JULIE GODBE and )  
 5 DAVID GODBE, )  
 6 Plaintiff, ) Civ. No. 51CIV16-000744  
 7 vs. ) DEPOSITION OF:  
 8 CITY OF RAPID CITY, ) TREVOR SCHMELZ  
 9 Defendant. )  
 10 DATE: December 11, 2018 at 10:04 a.m.  
 11 PLACE: Nooney & Solay  
 12 326 Founders Park Drive  
 13 Rapid City, SD 57702  
 14 APPEARANCES:  
 15 Representing the Plaintiffs:  
 16 MR. STEVEN C. BEARDSLEY  
 17 Beardsley, Jensen & Lee  
 18 Attorneys at Law  
 19 4200 Beach Drive, Suite 3  
 20 Rapid City, SD 57702  
 21 Representing the Defendant:  
 22 MR. ROBERT J. GALBRAITH  
 23 Nooney & Solay  
 24 Attorneys at Law  
 25 326 Founders Park Drive  
 26 Rapid City, SD 57702  
 27 Reported By: Jacqueline K. Weller  
 28 Registered Professional Reporter  
 29 Black Hills Reporting  
 30 1601 Mt. Rushmore Rd., Ste. 3280  
 31 Rapid City, SD 57701  
 32 605.721.2600

1

1 MR. BEARDSLEY: Rob, may it be agreed that  
 2 this is the time and place for the deposition of  
 3 Trevor Schmelz to be used for all purposes under  
 4 the Rules of Civil Procedure for the State of  
 5 South Dakota.  
 6 MR. GALBRAITH: Absolutely.  
 7 TREVOR SCHMELZ,  
 8 called as a witness herein, having been first duly  
 9 sworn, was examined and testified as follows:  
 10 EXAMINATION BY MR. BEARDSLEY:  
 11 Q Would you state your name and address for the  
 12 record, please.  
 13 A Trevor Schmelz. I live at 2505 Reed —  
 14 R-E-E-D — Court, Rapid City, South Dakota,  
 15 57703.  
 16 Q Trevor, what do you do for a living?  
 17 A I am the Safety Management System Analyst for  
 18 Black Hills Energy.  
 19 Q What does that mean?  
 20 A Data. I data dive with all the safety data, put  
 21 out safety metrics that help prevent injuries.  
 22 Q And how long have you been doing that?  
 23 A About six months now.  
 24 Q And before that, what did you do?  
 25 A Risk Manager for the City of Rapid City, for

3

1 INDEX  
 2 WITNESS PAGE  
 3 TREVOR SCHMELZ  
 4 EXAMINATION BY MR. BEARDSLEY 3  
 5 EXHIBITS  
 6 EXH. NO. DESCRIPTION PAGE  
 7 19 12-4-18 letter to Mr. Beardsley 25  
 8 from Ms. Volk, with attached photos  
 9 of grates  
 10 REQUESTS OF COUNSEL: PAGE 54, LINE 1

2

1 about four years, almost.  
 2 Q And what did you do before that?  
 3 A I was the Safety Manager for the South Dakota  
 4 School of Mines and Technology. I was there for  
 5 almost five years.  
 6 Q Okay. What's your educational background,  
 7 Trevor?  
 8 A I have a master's in occupational health and  
 9 safety from Columbia Southern University, online  
 10 program.  
 11 And my undergrad is in industrial  
 12 engineering from the South Dakota School of  
 13 Mines and Technology.  
 14 Q Okay. So in order to get the time frame kind of  
 15 ball parked, when did you graduate from Tech,  
 16 undergrad?  
 17 A May of 2006, I believe. Yeah, I had to go back  
 18 and think. I think May of 2006.  
 19 Q And just so you know, if I ask a question you  
 20 don't understand, tell me and we'll fix it.  
 21 Okay?  
 22 A Sure.  
 23 Q And if you need a break, tell me. We'll take a  
 24 break.  
 25 A Will do.

4



1 A Other than that, I only saw the letter from you  
2 and verified that they were — afterwards we  
3 verified that they were removed. And pretty  
4 much, I guess, an e-mail from Don Brunbaugh —  
5 or, would have been Dale Pfeifle at that time.  
6 Q Dale Pfeifle gave the order to remove them?  
7 A I believe so, yes.  
8 Q Okay.  
9 A Because Don was retired by then.  
10 Q So you're aware that we have photos of the  
11 grates in October of 2015 that show that there  
12 were old welds on the grates as you proceeded  
13 down the road; correct?  
14 MR. GALBRAITH: Objection. You've got to be  
15 more specific as to grate. I mean, there were  
16 some grates, Steve, and not others. If you want  
17 to show him the photos of the grates, we can get  
18 to those.  
19 MR. BEARDSLEY: Yeah.  
20 Q (BY MR. BEARDSLEY:) And so you understand, we  
21 have photos of various grates that are — that  
22 have a number on them that show some welds.  
23 A Yes.  
24 Q Correct?  
25 A I've seen those.

21

1 Q You didn't do the welding?  
2 A No.  
3 Q You didn't order the welding?  
4 A No.  
5 Q You don't know who ordered the welding?  
6 A No.  
7 Q You don't know when the welding was done?  
8 A No.  
9 Q And we have received a letter from either Rob or  
10 John that said October that year there weren't  
11 any snowplows out doing anything that would  
12 scrape the welding off. You don't have any  
13 reason to dispute that?  
14 A No, I don't.  
15 Q And so you are not here, Trevor, testifying when  
16 the welds were done, what year, what month,  
17 anything, are you?  
18 A No, I am not.  
19 Q Okay. And you don't have any record that would  
20 show even what year these welds were done?  
21 A No, I do not.  
22 Q And you were not involved with assigning people  
23 to do any welding?  
24 A No, I was not.  
25 Q So if these welds were done in 2012 or '13

22

1 or '14, you wouldn't have any knowledge of that?  
2 A I do not.  
3 Q After the letter was sent — and I can show you  
4 Exhibit 2, but I assume you remember them. But  
5 I've got them right here. I'll show you  
6 anything you want to see. All right?  
7 A Okay.  
8 Q Did — strike that.  
9 After September 28, 2015, I think — and I  
10 can't remember exactly, but I think Don  
11 Brunbaugh said he wasn't sure, but he thought he  
12 might have had a conference with you regarding  
13 this incident; do you remember that?  
14 A I would have contacted him letting him know  
15 there was an issue, that there was an incident  
16 around someone being injured with the grates at  
17 that time, just to advise him because he's  
18 responsible for that.  
19 Q Sure. And that's because Don's position at that  
20 time was street superintendent?  
21 A Street superintendent, yes.  
22 Q And so the way it went was, this letter went  
23 out, went to Joel Landeen, and Joel Landeen got  
24 ahold of you.  
25 A Uh-huh.

23

1 Q You saw the letter?  
2 A Yep.  
3 Q Then you would have talked to Don Brunbaugh  
4 about the issue?  
5 A Yes.  
6 Q Is — did you sit down and have a meeting with  
7 him?  
8 A No.  
9 Q Did you send the letter to him?  
10 A I don't believe so. I don't believe I did.  
11 Q Okay.  
12 A He probably seen it through potentially e-mail,  
13 but I don't believe I did. This would have been  
14 something I wouldn't have sent. It was more  
15 knowledge than what he had needed.  
16 Q Okay. And then can you tell me anything else  
17 about that conference other than you were  
18 advising him of the incident?  
19 A Just advising of the incident until we received  
20 a letter later on from him.  
21 Q Okay. And you also may have had a conference  
22 with Dale Pfeifle?  
23 A After — yes. After Don had left, Dale was in  
24 charge of continuing to remove the grates to  
25 replace them as they are today.

24

1 Brunbaugh.  
2 A Yep, it's on there. Yes.  
3 Q And as far as your conversation with either Don  
4 Brunbaugh or Dale Pfeifle or Dale Tech regarding  
5 the streets or the grates, you don't have any  
6 memos of those conversations —  
7 A No, I do not.  
8 Q — or e-mails that would go back and forth?  
9 A I do not. If there was one, it would have just  
10 been the notification e-mail, the same as Don  
11 Brunbaugh, just letting him know but I don't —  
12 of course, I'm no longer there so I don't have  
13 those.  
14 Q I understand. And I'm just trying to get your  
15 knowledge. I can ask for the e-mails, but you  
16 know, I don't want to waste anybody's time. It  
17 was just an enclosure deal saying Beardsley sent  
18 this letter, look at this.  
19 A Yeah, it wouldn't have been this one. It would  
20 have been the one after the fix. I would have  
21 put on — just letting them know that this  
22 happened, very basically.  
23 And then the next letter when you had  
24 requested something to be done for the grates,  
25 that's the one I would have possibly CC'd him

29

1 on.  
2 Q Okay. And then when there was a suit started,  
3 would you have gotten a copy of that?  
4 A I believe so, yes.  
5 Q And that might have been forwarded on to him?  
6 A I believe so. Or else the city attorney would  
7 have copied him on that, Joel Landeen.  
8 Q Joel Landeen?  
9 A Yes.  
10 Q The directive to remove the grates on St. Pat  
11 Street, did that come from you or someone else?  
12 He made reference to it on page 44 of his  
13 deposition, and I don't know if he knew who gave  
14 the directive. That's what I'm asking.  
15 A It did not come from me. I know there was a  
16 project within engineering to inventory all the  
17 grates and to get them replaced.  
18 Q So then can you — do you know who would have  
19 given the directive to remove the grates?  
20 A It would have been possibly coming down from  
21 Dale Tech and then to Dale Pfeifle, ultimately  
22 to remove the grates.  
23 Q I'm sorry, you trailed off. Ultimately what?  
24 A Dale Pfeifle at the end. I mean, he would have  
25 been directed probably by Dale Tech to get them

30

1 replaced.  
2 Q Okay. So as the risk manager, you were aware  
3 that sometimes claims are made and you need the  
4 evidence?  
5 A Yes.  
6 Q And I'm not — I'm not trying to point at  
7 anybody. But once the grate was removed from  
8 the spot where Julie Godbe went down and got  
9 injured —  
10 A Uh-huh.  
11 Q — and there's no identification of what grate,  
12 it destroys some evidence that would indicate  
13 what was there?  
14 A Uh-huh.  
15 Q Correct?  
16 A Correct.  
17 MR. GALBRAITH: Going to object. The grate  
18 you looked at the other day, Steve, didn't  
19 destroy evidence. You may not know which one it  
20 is, but it's there.  
21 Q (BY MR. BEARDSLEY:) Well so, part of the  
22 evidence is determining what was there at the  
23 spot; right?  
24 A Yes.  
25 Q And since they've been removed and there are 115

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1 splayed out on a lot and no one identified the  
2 grate, the determination of what grate was at  
3 that spot, that evidence may have been destroyed  
4 by removal; correct?  
5 A I mean, they've been removed. I couldn't tell  
6 you which one it is, and I don't — can't tell  
7 you if it's been destroyed. I mean, I wasn't  
8 involved in that process.  
9 Q And you can't go out and identify what grate was  
10 at that spot, can you?  
11 A I cannot identify the exact one. I can compare  
12 it to a picture and tell you if — I can rule  
13 out all the ones with the crossbars on them.  
14 Q Okay. And rule out some of those that the  
15 crossbars are torn off of?  
16 A Yeah, um — yeah.  
17 Q Partially torn off?  
18 A If there's any — I took pictures at the scene  
19 October 1st, I believe. So I have pictures of  
20 those, and I can compare — that would be the  
21 only thing I could do, but I couldn't identify  
22 the exact grate.  
23 MR. BEARDSLEY: Rob, I don't think we have  
24 the October 1, 2015 photos of the grates.  
25 MR. GALBRAITH: You do. I can get them to

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1 you again. Because Mike and I even sat down and  
2 compared with the dates and the origination  
3 dates of the photographs.  
4 I think Mike's photos were October 5th, and  
5 Trevor's were October 1st. But I'll have my  
6 office verify the Bates numbers right now. I  
7 know they've been provided, but I'll get that  
8 information for you, Steve.

9 Q (BY MR. BEARDSLEY:) Okay. What did you use to  
10 take photos of the grates?  
11 A A department camera. That was...  
12 Q And did you take photos of all the grates along  
13 East St. Pat?  
14 A I went off this letter. I did not know exactly  
15 which one, so it stated between Canbell Street  
16 and Creek Drive. So I started down by the TMA  
17 on — the Family — that Family — it was Family  
18 Thrift, Family Fair side, and I went around up  
19 to Creek Drive over to the Four Seasons along  
20 that route and came back down to Campbell.

21 I took them — I took a picture of each  
22 grate. Then I measured the gap with a tape  
23 measure.

24 Q From the intersection, that's six lanes or  
25 whatever to —

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1 A Five.  
2 Q Five lanes?  
3 A Yep.  
4 Q To the east?  
5 A Yes.  
6 Q And on the south side of the road?  
7 A Yes.  
8 Q And you went all the way to Creek Drive?  
9 A To Creek Drive, yep.  
10 Q Then you turned right at Creek Drive?  
11 A Right at Creek Drive.  
12 Q Heading south?  
13 A Yeah, south to the Four Seasons or whatever the  
14 sports, ATV, whatever it is, store.  
15 Q Let me stop you a second. Four Seasons is short  
16 of Creek Drive if you're heading east.  
17 A I crossed at the crosswalk at the light.  
18 Q I'm sorry?  
19 A I crossed at the crosswalk at the light all the  
20 way.  
21 Q Right. The light is at Creek Drive?  
22 A Yes.  
23 Q So if I'm wrong, either way, you went all the  
24 way to Creek Drive at the light?  
25 A Correct.

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1 Q Before you turned right?  
2 A Correct.  
3 Q And then did you take photographs of the grates  
4 beyond Creek Drive?  
5 A I did not.  
6 Q And did you take photographs on St. Pat on the  
7 north side from Creek Drive back to the  
8 five-lane highway light?  
9 A To Campbell?  
10 Q Yes.  
11 A Yes, I did. Yep.  
12 Q So both sides of the street from Campbell to  
13 Creek Drive?  
14 A Correct.  
15 Q Correct? Okay.  
16 A And I later did take a picture further down. I  
17 mean, I don't know if we want to talk about just  
18 the October 1st date.  
19 Q No. Sure.  
20 A But later on, down —  
21 Q Let me clarify. Farther down, you meant farther  
22 to the east?  
23 A Farther to the east. I reviewed a picture —  
24 THE WITNESS: Is that okay to talk about it?  
25 MR. GALBRAITH: Uh-huh.

35

1 A I reviewed a picture that was shown to me by  
2 Rob, and it had some weld marks on it. And he  
3 asked if this was the grate in question, or if I  
4 saw any of that grate, and I said I did not.  
5 I later went out with that photo and found  
6 the grate according to the markings on the road  
7 in front of the Open Bible Church on St. Patrick  
8 Street.  
9 MR. GALBRAITH: Steve, I showed him one of  
10 Mike's photographs and asked if he knew where  
11 that grate was.  
12 Q (BY MR. BEARDSLEY:) Okay. And one of the  
13 grates you went farther to the east?  
14 A Yes.  
15 Q Near the Open Bible Church?  
16 A Yes.  
17 Q Which is about a half a mile farther down the  
18 road?  
19 A Yes. That was at a later date. I don't  
20 remember the date.  
21 Q And you took more photographs then?  
22 A Just that one.  
23 Q Okay. Just the one by the Open Bible Church?  
24 A Yes.  
25 Q And that was a grate that —

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1 A The grate had been replaced at that point in  
2 time already. I was just taking more of an  
3 aerial, aerial view of the location with the  
4 street markings, to compare it to the old  
5 picture with the grate that had crossbars on it.  
6 Q Okay. So there's a gentleman named Terry  
7 Walterstorff that was also a city employee?  
8 A Yes.  
9 Q What is his position?  
10 A He was the city — he was the director of public  
11 works, and I do not remember his — when he  
12 left, what date.  
13 Q And what does it mean to be the director of  
14 public works?  
15 A He's in charge of — you know, he's the, I  
16 guess, sort of the — short of the mayor and  
17 city council, he's director over city  
18 engineering, streets, solid waste, the water  
19 department, wastewater, just all the —  
20 Q So he's a step above the —  
21 A Streets.  
22 Q — street superintendent?  
23 A Correct, yes.  
24 Q Okay. So if you'd look at Exhibit 3, please.  
25 This is the *Standard Specifications for Public*

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1 *Works Construction, 2007 Edition.*  
2 Do you see that?  
3 A Yes.  
4 Q And if you go to the last page of Exhibit 3, on  
5 the bottom it shows a V curb inlet. V as in  
6 Victor. Do you see that?  
7 A Yes.  
8 Q And this was the standard in 2007 as indicated  
9 by the date on Exhibit 3; correct?  
10 MR. GALBRAITH: Steve, I suppose this is  
11 probably the more appropriate place for me to  
12 interpose my objection related to design  
13 standards.  
14 MR. BEARDSLEY: You can call it whatever you  
15 want, Rob, that's — I'm just going to the  
16 specs.  
17 MR. GALBRAITH: Calling it what Judge Brown  
18 has called it. So I'll —  
19 MR. BEARDSLEY: Well, I'm going —  
20 MR. GALBRAITH: I'm going to interpose a  
21 standing objection related to the specifications  
22 because those are design issues.  
23 MR. BEARDSLEY: Well, I'm going to object to  
24 the speaking objection. And I have no problem  
25 with you having a continuing objection to what

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1 you think is design. That's not my question.  
2 Q (BY MR. BEARDSLEY:) My question is, this was  
3 the grate in 2007 as set forth in the specs,  
4 right, Kirk — or, right, Trevor?  
5 A I couldn't tell you. It doesn't state standard  
6 on here, that I'm aware of.  
7 Q Okay. So if you look on the first page —  
8 A *Standard Specifications for Public Works*  
9 *Construction.*  
10 Q *2007 Edition; correct?*  
11 A Yes.  
12 Q And then on that page it says V grate; correct?  
13 A Yes.  
14 Q And the V grate is perpendicular, as it's shown  
15 here, to the travel that a bike would be riding  
16 if riding with the traffic?  
17 A Yes. Yes.  
18 Q And if it's perpendicular, the V grate would  
19 prevent a bike from — the wheel from entering  
20 the grate and causing a fall; correct?  
21 A I would assume so, yes.  
22 Q The reason I'm talking about this is that, in  
23 the deposition, Don first referred to it as a B  
24 grate, replacing a B grate.  
25 And then I took him to the specification and

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1 he said, yeah, it is a V curb inlet. So is that  
2 your understanding, that the 2007 spec is type V  
3 grate, as in Victor?  
4 A It appears so on the paper.  
5 Q Okay. And are you aware of the fact that the  
6 Rapid City ordinance at the time this occurred  
7 indicated that bicyclists on bikes were to ride  
8 on the right four feet of the street?  
9 A I believe I've seen that ordinance.  
10 Q Sure.  
11 A I think I have.  
12 Q Turn to Exhibit 8.  
13 A Okay.  
14 Q And then if you look at page 4 of 7, and it says  
15 on Section 10.64.170, Lane position. It says:  
16 Any person operating a bicycle upon a roadway at  
17 less than the normal speed of traffic at the  
18 time and place and under the conditions then  
19 existing shall ride in the right four feet of  
20 roadway near the right-hand curb or edge of the  
21 roadway, except under the following conditions.  
22 You see that?  
23 A Yes, I do.  
24 Q So were you aware of that ordinance when you  
25 were the risk manager, that a bicyclist is

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1 A No. I had the document.  
 2 Q Okay. And in 2004, the city assumed the  
 3 responsibility to maintain East St. Pat once  
 4 they took it over in 2004?  
 5 A Yes, from my understanding, once construction  
 6 was completed.  
 7 Q If the straps are torn off, you would agree that  
 8 it makes it unsafe for bicyclists traveling in  
 9 the same direction if the grates are parallel?  
 10 A Yes.  
 11 Q And you would — Don indicated that it is not  
 12 proper maintenance on the street if there's no  
 13 process of inspection of grates to make sure  
 14 they are maintained properly. Would you agree  
 15 with that?  
 16 A Yes.  
 17 Q And you read the deposition, so if there's  
 18 something I say that's incorrect, either you or  
 19 Rob will correct me.  
 20 A Yep.  
 21 Q But he acknowledged that the federal government,  
 22 through these monies for the streets, required  
 23 that there be safe streets, which included safe  
 24 grates. You would agree with that?  
 25 A Yes. I mean, that was what was in the

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1 deposition.  
 2 Q And temporary fixes need to be maintained;  
 3 correct?  
 4 A Yes.  
 5 Q And part of the maintenance is recognizing  
 6 hazards for users and properly maintaining the  
 7 streets so there aren't hazards; correct?  
 8 A Correct.  
 9 Q In other words, when you recognize there's a  
 10 hazard to bicyclists, it is necessary to do  
 11 something about it so it's not hazardous;  
 12 correct?  
 13 A Correct.  
 14 MR. GALBRAITH: Objection; calls for a legal  
 15 conclusion. Subject to that, he's answered.  
 16 Q (BY MR. BEARDSLEY:) And then once you recognize  
 17 it, you need to maintain it so it's not  
 18 hazardous; correct?  
 19 A Yes.  
 20 Q In other words, you recognize a hazard, you put  
 21 a fix in?  
 22 A Uh-huh.  
 23 Q Temporary or not, but you have a duty then to  
 24 maintain it so it's not hazardous; right?  
 25 A Yes.

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1 Q I'm going backwards to Exhibit 9, if you would,  
 2 please. At the top of Exhibit 9 it's the City  
 3 of Rapid City Bikeway/Walkway Plan; correct?  
 4 A Yes.  
 5 Q And it indicated, if you look down to the  
 6 yellowed area, in early 1992, the City of Rapid  
 7 City and Executive Policy Committee of the  
 8 Rapid City Area Metropolitan Planning  
 9 Organization recognized the formation of a Bike  
 10 Walk Run Task Force.  
 11 The purpose of the task force is to improve,  
 12 expand, and promote the safe use of the  
 13 community's bikeway, walkway facilities; right?  
 14 A Yes.  
 15 Q And then if you turn to page 9 of Exhibit 9,  
 16 you'll see at the bottom of the page it says:  
 17 Stormwater grates with vents which are parallel  
 18 to the curb and the direction of the bicycle  
 19 travel can trap wheels, causing damage to the  
 20 bicycle and injury to the rider.  
 21 Correct?  
 22 A Yes.  
 23 Q So if you go back to this page of 1992, start of  
 24 Exhibit 9, as far back as 1992, the City of  
 25 Rapid City was aware that the stormwater grates

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1 with vents parallel to the curb can trap wheels;  
 2 right?  
 3 A Correct.  
 4 Q So you know, over 20 years prior to Julie  
 5 Goble's trapping of her wheel in the parallel  
 6 grate, it was recognized by the City of Rapid  
 7 City that these grates can trap wheels causing  
 8 damage and injury to riders?  
 9 A Yes.  
 10 Q Then it says: Grates with vents that are  
 11 transverse to the curb — page 9.  
 12 A I got it. Go ahead.  
 13 Q And the directions of the bicycle travel are  
 14 recommended to address the problem.  
 15 Correct?  
 16 A Yes.  
 17 Q Transverse means perpendicular, so that the  
 18 wheel doesn't go in the grate; correct?  
 19 A Correct.  
 20 Q And the only way you would get a wheel in the  
 21 grate is if somebody is crossing somewhere other  
 22 than a crosswalk and is going in a direction  
 23 contrary to the travel direction of the traffic?  
 24 A Correct.  
 25 Q If you look at Exhibit 16, there's a federal aid

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1 project that involved roads; correct? Just in  
2 general?  
3 A Yes.  
4 Q That's what it's called?  
5 A Yes.  
6 Q Okay. And it says East St. Patrick Street,  
7 Pennington County. So they were getting federal  
8 aide for East St. Pat; correct?  
9 A Uh-huh.  
10 Q Is that "yes"?  
11 A Yes.  
12 Q Okay. And that confirms what we talked about  
13 earlier, that the feds give money and they tell  
14 you how you're supposed to do things; correct?  
15 A Correct.  
16 Q And in this Exhibit 16, there are photos of  
17 grates that are to be used. Had you ever seen  
18 the photos that were in here regarding the  
19 grates that should be used?  
20 A I have not, no.  
21 Q Okay. Nobody at the city ever gave you, as the  
22 risk manager, what the feds basically were  
23 requiring?  
24 A Correct.  
25 Q And the feds generally are trying to make things

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1 safer for people, including bicyclists; correct?  
2 A I would agree, yes.  
3 Q Okay. So now let's look at Exhibit 18.  
4 A Okay.  
5 Q Just in general, before we go to specific pages,  
6 once 1992 there was a meeting of Rapid City and  
7 they adopted this plan that I went over,  
8 Exhibit 9?  
9 A Uh-huh.  
10 Q Then there was notice to the city that grates  
11 that run parallel are dangerous to bikes;  
12 correct?  
13 MR. GALBRAITH: Objection; calls for a legal  
14 conclusion.  
15 Subject to that, you can answer.  
16 Q (BY MR. BEARDSLEY:) Correct?  
17 A Yes.  
18 Q And in fact, they not only said it was  
19 dangerous, but it said, notice that traps occur  
20 for bikes. That word was used in there;  
21 correct?  
22 A Yes.  
23 Q So that's notice to the city that the city is  
24 acknowledging parallel grates create traps for  
25 bikes; correct?

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1 A Correct.  
2 Q And that the reference they were making, they  
3 were talking about that it was dangerous for  
4 bikers if the grates are running parallel;  
5 correct?  
6 A Correct.  
7 Q It was a risk of injury to those bikers;  
8 correct?  
9 A Yes. Yes.  
10 Q If there was a study in Rapid City that said the  
11 stop signs are too small, they need to be  
12 corrected, or the words on the stop sign aren't  
13 illuminated and they were saying it was a risk  
14 to people, that would be something that the city  
15 needed to address and maintain; correct?  
16 MR. GALBRAITH: Objection; calls for a legal  
17 conclusion.  
18 Subject to that, you can answer.  
19 A Yes.  
20 Q (BY MR. BEARDSLEY:) Okay. So for instance, if  
21 you had a real small stop sign, people weren't  
22 seeing it, it was causing accidents, people were  
23 getting hurt, that would be something that  
24 needed to, once it was fixed, needed to be  
25 maintained; correct?

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1 A Yes.  
2 Q And it needed to be addressed so people didn't  
3 get hurt?  
4 A Yes.  
5 Q Correct?  
6 A Yep.  
7 Q Just like these straps. If you put straps on  
8 the parallel grates, you need to maintain them  
9 and keep them on there so people don't get hurt?  
10 A Yes.  
11 Q I'll give you another example, Trevor. Let's  
12 say there's striping on the roads. Okay? And  
13 the striping over time either gets worn off or  
14 redirected. You know how some of them are not  
15 paint, they are actually some sort of a fabric  
16 and it gets redirected and it's a dangerous  
17 deal.  
18 And the city has a meeting, and they say the  
19 striping has got a problem, we need to fix it.  
20 You can't just fix it once. You have to  
21 maintain it so that it's not dangerous, and  
22 continue to maintain it; correct?  
23 MR. GALBRAITH: Objection; calls for a legal  
24 conclusion.  
25 Subject to that, he can answer.

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1 Q (BY MR. BEARDSLEY:) Correct?

2 A Yes.

3 Q And as the risk manager, you would be interested

4 in that because, if there is some recognition

5 there's a dangerous area and people are getting

6 hurt or could get hurt, you, as the risk manager

7 for the City of Rapid City, would be interested

8 in making sure that you continued to maintain it

9 so people didn't get hurt; correct?

10 A Correct.

11 Q Okay. In Exhibit 18, it's called a Master Plan

12 for the — Rapid City Area Bicycle and

13 Pedestrian Master Plan. I'm repeating myself,

14 but that's what it says; right?

15 A Yep.

16 Q And it's dated July 2011; correct?

17 A Correct.

18 Q Were you familiar — strike that.

19 I know you didn't get trained. I know

20 nobody gave you anything to look at. I know you

21 did the best job you could. But in doing that,

22 no one ever showed you this master plan

23 regarding the bicycle area, did they?

24 A Not prior to the incident. After the incident,

25 I was made aware of it.

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1 Q Okay. Since we talked about bicyclists using

2 the streets, it's part of the street safety

3 program to make sure the bicyclists are safe,

4 too, isn't it?

5 A Yes.

6 Q And if there's a master plan, if there are

7 meetings with the Rapid City powers that be, the

8 government, they are planning, and it's adopted

9 by the City of Rapid City, they better follow

10 what they said; correct?

11 A Yes.

12 Q If you turn to the Introduction, Chapter 1, I

13 think it's Bates started down at the bottom,

14 106.

15 A Yes.

16 Q You see that? It says that, the opening

17 sentence: The Rapid City Bicycle and Pedestrian

18 Master Plan, and it has parenthesis, Bicycle and

19 Pedestrian Master Plan, parenthesis, builds on

20 past and ongoing efforts by the Rapid City Area

21 Metropolitan Planning Organization and the City

22 of Rapid City to enhance transportation options

23 and improve the quality of life in the

24 Rapid City area.

25 Do you see that?

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1 A Yes.

2 Q And it says this plan will guide the development

3 of a network of bicycle and pedestrian routes

4 that link activity centers, and it goes on;

5 correct?

6 A Yes.

7 Q If you turn to 116.

8 A (Witness complied.)

9 Q Down at the bottom it says: Currently,

10 Rapid City only has a few formalized ongoing

11 bikeways.

12 Then you go to the next paragraph: Bicycles

13 are not prohibited on any roads in Rapid City

14 including I-90 and I-190. As such, the city's

15 entire street network is effectively the bicycle

16 network.

17 Do you see that?

18 A Uh-huh.

19 Q Is that "yes"?

20 A Yes. Sorry.

21 Q Were you aware of that when you became the risk

22 manager even though you didn't get any training

23 by anybody?

24 A I was not.

25 Q If you had known that as the risk manager, would

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1 you have done your job differently knowing that

2 the streets need to be coordinated with

3 bicyclists as well as vehicles?

4 A I would have had a better knowledge. Would I

5 have done anything about it, I don't — I can't

6 say that I would.

7 Q You just don't know?

8 A Because the street department is the one that

9 are out there more than I would. I haven't seen

10 some of the roads in Rapid City, so.

11 Q That's fair. But the street department should

12 be aware of the fact that it's not just for

13 vehicles, it's for bicyclists, too?

14 A Correct.

15 Q And the street department, if they are trying to

16 make sure that it's not hazardous for vehicle

17 travel, has to include to make sure it's not

18 hazardous for bicycle travel?

19 A Yes.

20 Q And the duty to maintain the streets is for not

21 just vehicles, but the duty to maintain is also

22 for bicyclists?

23 A Yes.

24 Q In this Exhibit 18 from 2011, if you look at

25 121, there's a reference to the challenges, and

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1 it includes in the middle of the page there,  
 2 maintenance issues. Do you see that?  
 3 A Yes.  
 4 Q Then if you turn to 124, it says, Bicycle and  
 5 Pedestrian Safety. And there's a section  
 6 regarding safety for bicyclists and pedestrians;  
 7 correct?  
 8 A Correct.  
 9 Q That was part of the Rapid City plan; correct?  
 10 A Yes.  
 11 Q In fact, if you turn to 154, there's a section,  
 12 Drainage Grate Retrofits; correct?  
 13 A Let me get there.  
 14 Q Sure.  
 15 A Yes.  
 16 Q And it talks about the drainage grates and it  
 17 says: The city should continue its efforts to  
 18 retrofit existing drainage grates as roads are  
 19 being resurfaced. Some older drainage grates  
 20 can create slippery conditions for bicyclists  
 21 and/or catch bike wheel if they have metal  
 22 grates that are parallel to the direction of  
 23 travel.  
 24 You see that?  
 25 A Yes.

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1 Q You would agree with that?  
 2 A Yes.  
 3 Q And then, it should establish a goal to change  
 4 out the grates to retrofit for perpendicular  
 5 grates; correct?  
 6 A Yes.  
 7 Q And they need to continue to maintain the  
 8 streets so they are safe for people; correct?  
 9 A Yes, that's what —  
 10 Q If the parallel grates are in there, it's not  
 11 safe for bikers, is it?  
 12 A No.  
 13 Q Now, I know you weren't out there welding  
 14 straps.  
 15 A No.  
 16 Q But it wouldn't make sense to weld a couple  
 17 three and then skip three or four and then weld  
 18 a couple three more, would it?  
 19 A No.  
 20 Q The plan normally would be, we'll just weld as  
 21 we go if we're welding straps on to make sure  
 22 that all of them are safe, not some of them;  
 23 correct?  
 24 A Correct.  
 25 Q And we've seen where sometimes straps get torn

70

1 off; correct?  
 2 A Correct.  
 3 Q So after you've welded them all in a row, then  
 4 you need to maintain them by keeping track of  
 5 the welds to make sure it's safe; correct?  
 6 A Yes.  
 7 Q And that's part of the maintenance procedure;  
 8 correct?  
 9 A Should be, yes.  
 10 Q Should be. You've never ordered grates;  
 11 correct?  
 12 A I have not, no.  
 13 Q And you're not a welding expert?  
 14 A No.  
 15 Q And you're not a photo expert?  
 16 A No.  
 17 Q And so you're not an expert to tell us whether  
 18 or not there were welds on each and every one of  
 19 these grates, are you?  
 20 A I am not.  
 21 Q And as an industrial engineer, you would  
 22 recognize that welds can fail for lots of  
 23 reasons —  
 24 A Correct.  
 25 Q — correct?

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1 And that if welds are being used, as an  
 2 industrial engineer, you would know you need to  
 3 check on them, because we all know from  
 4 experience that welds fail.  
 5 And then if they do fail on grates like  
 6 this, the result can be that a wheel of a bike  
 7 can enter and people can be hurt?  
 8 A Yes.  
 9 Q And as the risk manager, I'm assuming you  
 10 discovered the same thing Don Brumbaugh  
 11 discovered, and that was there was no process by  
 12 the city to check these welds to make sure that  
 13 they were holding; correct?  
 14 A Correct.  
 15 Q And did you ask anyone whether or not there was  
 16 a process?  
 17 A I did not.  
 18 Q Okay.  
 19 A No.  
 20 Q I'm going to show you — in front of you number  
 21 84, it's Exhibit 19, and it's got a number on  
 22 there, 84.  
 23 A Okay. Got it.  
 24 Q You see it? And you can see where there's some  
 25 welds there, but on number 84 on the right side

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## Rapid City, SD Code of Ordinances

**CHAPTER 10.64: BICYCLES**

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## Section

- 10.64.010 Definitions.
- 10.64.020 Applicability of provisions.
- 10.64.030 Repealed.
- 10.64.040 Repealed.
- 10.64.050 Repealed.
- 10.64.060 Repealed.
- 10.64.070 Repealed.
- 10.64.080 Repealed.
- 10.64.090 Brake.
- 10.64.100 Lights and reflectors.
- 10.64.110 Applicability of traffic regulations.
- 10.64.120 Compliance with traffic control devices required.
- 10.64.130 Use of permanent seat required.
- 10.64.140 Carrying excess passengers.
- 10.64.150 Clinging to moving vehicles.
- 10.64.160 Carrying articles.
- 10.64.170 Lane position—When riding at less than normal speed of traffic.
- 10.64.180 Lane position—1-way streets.
- 10.64.190 Passing vehicles on the right.
- 10.64.200 Riding 2 or more abreast.
- 10.64.210 Operation on sidewalk or crosswalk.
- 10.64.220 Parking on sidewalk.
- 10.64.230 Emerging from alley, driveway or building.
- 10.64.240 Signaling requirements.



**10.64.140 Carrying excess passengers.**

No bicycle shall be used to carry more persons at one time than the number for which it is designed or equipped, except that an adult rider may carry a child securely attached to his or her person in a backpack or sling.

(Prior code § 8-10(b))

**10.64.150 Clinging to moving vehicles.**

No person riding any bicycle shall attach the bicycle or himself or herself to any other moving vehicle upon any street. This section shall not prohibit attaching a bicycle trailer or bicycle semitrailer to a bicycle if that trailer or semitrailer has been designed for the attachment.

(Prior code § 8-11)

**10.64.160 Carrying articles.**

No person operating a bicycle shall carry any package, bundle or article which prevents the use of both hands in the control and operation of the bicycle. A person operating a bicycle shall keep at least 1 hand on the handlebars at all times.

(Prior code § 8-12)

**10.64.170 Lane position--When riding at less than normal speed of traffic.**

Any person operating a bicycle upon a roadway at less than the normal speed of traffic at the time and place and under the conditions then existing shall ride in the right 4 feet of roadway near the right-hand curb or edge of the roadway, except under any of the following conditions:

- A. When overtaking and passing another bicycle or vehicle proceeding in the same direction;
- B. When preparing for a left turn at an intersection or into a private road or driveway; and
- C. When reasonably necessary to avoid conditions including, but not limited to fixed or moving objects, parked or moving vehicles, bicycles, pedestrians, animals, surface hazards or **substandard width lanes that make it unsafe to continue along the righthand curb or edge.** For purposes of this section, a **SUBSTANDARD WIDTH LANE** is a lane that is too narrow for a bicycle and vehicle to travel safely side by side within the lane.

(Prior code § 8-13 (a))

**10.64.180 Lane position--1-way streets.**

Any person operating a bicycle upon a 1-way street or highway with 2 or more marked traffic lanes may ride as near the left-hand curb or edge of the roadway as practicable. Cyclists should



## City of Rapid City Bikeway / Walkway Plan

### Introduction

The City of Rapid City Bikeway / Walkway Plan is a component of the Transportation Element of the Comprehensive Plan for the City of Rapid City and the Long Range Transportation Plan for the Rapid City Area Metropolitan Planning Organization. Its purpose is to facilitate alternative transportation modes through an evaluation of the current Bikeway / Walkway System, review of the needs of system users, adoption of standards for system improvements, and identification of proposed extensions and additions to the system.

Bikeway planning is not new to Rapid City. As a result of the 1972 flood, a greenway was created along Rapid Creek and a bikepath was planned and constructed. Additions to the initial bikepath occurred in the late 1970's and early 1980's.

In 1979, the transportation planning process became more formalized, and bikeway planning was a component of that process. In 1982, the initial bikeway planning effort was expanded with the adoption of the Bikeway Plan which addressed the results of a user survey, discussed design standards, and offered general goals and objectives.

Throughout the 1980's, a core group of bicyclists met periodically to address specific bicycle and pedestrian issues such as school crossings, dangerous storm drain grates, feeder routes, and bikeway signage. In early 1992, the City of Rapid City and the Executive Policy Committee of the Rapid City Area Metropolitan Planning Organization recognized the formation of a Bike Walk Run Task Force. The purpose of the task force is to improve, expand, and promote the safe use of the community's bikeway / walkway facilities.

### Goals and Objectives

- 1) Promote bicycling and walking as a means of reducing traffic congestion and pollutants from automobile emissions.
  - a) Support accommodations for bicyclists at places of employment.
- 2) Relieve vehicle movement and parking congestion in the Central Business District.
  - a) Support a downtown bicycle storage facility.
- 3) Promote a bikeway / walkway system which serves all major trip generators.
  - a) Complete sections of the bikeway / walkway system to achieve system continuity.
  - b) Develop walkways between neighborhoods to improve circulation and reduce pedestrian traffic along major roadways.
  - c) Map out a corridor bikeway system that links schools with neighborhoods, parks, the greenway, major employers, and shopping centers.
- 4) Promote bicycle and pedestrian safety.
  - a) Identify hazardous locations on roadways and the bikeway / walkway system and work to mitigate the problems.

- b) Assist with the Rapid City Police Department bicycle safety programs.
- c) Promote the use of bicycle helmets.
- d) Increase motorist awareness of the needs and rights of bicyclists and pedestrians.
- 5) Integrate the transit and bikeway systems.
  - a) Evaluate the use of bicycle racks on Rapid Transit buses.
  - b) Develop bicycle storage facilities at the Milo Barber Transportation Center and at key transit stops.
- 6) Enhance the transit / pedestrian interface.
  - a) Assure all transit stops are lit and secure.
  - b) Provide benches / shelters at key transit stops.
- 7) Assist with the formulation and adoption of design standards.
  - a) Promote the adoption of road design standards which encourage bicycling.
  - b) Assist with the design of major road intersections to ensure safe crossing for bicyclists and pedestrians.
  - c) Review all project plats and plans for compatibility with a comprehensive bikeway / walkway system.
- 8) Adopt the role of an advocacy group for bicycling and walking.
  - a) Work with bicycle groups across the state on favorable legislation and SDDOT policies on bikeway development and funding.
  - b) Participate in local, state, regional, and national conferences on bicycling and intermodal travel.
- 9) Establish a program to conduct traffic counts and surveys of bicycle and pedestrian activity at key locations throughout the community.
- 10) Inventory and catalog funding sources and methods for bikeway planning and system improvements.
- 11) Promote the use of alternative easements and right of ways, such as drainageways, for bikeway / walkway corridors.
- 12) Promote the construction of sidewalks along school routes, commercial activity centers, and high volume and high speed roadways.

#### Definitions

**BICYCLE.** A vehicle having two tandem wheels, either of which is more than 16" in diameter, or having three wheels in contact with the ground, any of which is more than 16" in diameter, propelled solely by human power, upon which any person or persons may ride.

**BICYCLE FACILITIES.** A general term denoting improvements and provisions made by public agencies to accommodate or encourage bicycling, including parking facilities, all bikeways, and shared roadways not specifically designed for bicycle use.

**BICYCLE LANE.** A portion of the roadway which has been designated by striping, signing, or pavement markings for the preferential or exclusive use of bicyclists.

**BICYCLE PATH.** A bikeway physically separated from motorized vehicle traffic by an open space or barrier, either within the highway right of way or within an independent right of way.

**BICYCLE ROUTE.** A segment of a system of bikeways designated by the jurisdiction having authority with appropriate directional and informational markers, with or without a specific bicycle route number.

**BIKEWAY.** Any road, path, or way which in some manner is specifically designated as being open to bicycle travel, regardless of whether such facilities are designated for the exclusive use of bicycles or are to be shared with other transportation modes.

**HIGHWAY.** A general term denoting a public way for purposes of vehicular travel, including the entire area within the right of way.

**RIGHT OF WAY.** A general term denoting land, property, or interest therein, usually in a strip, acquired for or devoted to transportation purposes.

**RIGHT OF WAY.** The right of one vehicle or pedestrian to proceed in a lawful manner in preference to another vehicle or pedestrian.

**ROADWAY.** The portion of the highway, including shoulders, for vehicle use.

**SHARED ROADWAY.** Any roadway upon which a bicycle lane is not designated and which may be legally used by bicycles regardless of whether such facility is specifically designated as a bikeway.

**SIDEWALK.** The portion of a highway designated for preferential or exclusive use by pedestrians.

#### System Components

The Rapid City Bikeway / Walkway System is made up of all bike paths, sidewalks, and roadways within the community. While bike lanes are considered a bikeway component, there are no designated bike lanes in Rapid City at this time.

All streets and roads in Rapid City, with the exception of Interstate 90 and Interstate 190, are considered part of the Bikeway System, as bicycles are considered vehicles and may legally travel on any roads which do not have a minimum speed requirement. However, most streets and roads do not represent a reasonable option for all bicyclists. Many young, elderly, or inexperienced riders need an extensive network of sidewalks and bikepaths to enable them to travel about the community.

All sidewalks within Rapid City are a part of the Walkway System. Sidewalks within the Central Business District may not be used by bicyclists. Only those sidewalks outside of the Central Business District can be considered a part of the Bikeway System.

1 STATE OF SOUTH DAKOTA ) IN CIRCUIT COURT  
 2 COUNTY OF PENNINGTON ) SS.  
 3 )  
 4 JULIE GOODE and )  
 5 DAVID GOODE, )  
 6 ) Civ. No. 51CIV16-000744  
 7 Plaintiff, )  
 8 vs. ) DEPOSITION OF:  
 9 ) DALE TECH  
 10 )  
 11 CITY OF RAPID CITY, )  
 12 SOUTH DAKOTA, )  
 13 Defendant. )

10 DATE: December 12, 2018 at 1:55 p.m.

11 PLACE: Nooney & Solay  
 12 326 Founders Park Drive  
 13 Rapid City, SD 57702

13 APPEARANCES:

14 Representing the Plaintiffs:  
 15 MR. STEVEN C. BEARDSLEY  
 16 Beardsley, Jensen & Lee  
 17 Attorneys at Law  
 18 4200 Beach Drive, Suite 3  
 19 Rapid City, SD 57702

17 Representing the Defendant:  
 18 MR. ROBERT J. GALERATH  
 19 Nooney & Solay  
 20 Attorneys at Law  
 21 326 Founders Park Drive  
 22 Rapid City, SD 57702

22 Reported By: Jacqueline K. Weller  
 23 Registered Professional Reporter  
 24 Black Hills Reporting  
 25 1601 Mt. Rushmore Rd., Ste. 3280  
 Rapid City, SD 57701  
 605.721.2600

1

1 MR. BEARDSLEY: Same stipulation, Rob?  
 2 MR. GALERATH: You got it, Steve.  
 3 DALE TECH,  
 4 called as a witness herein, having been first duly  
 5 sworn, was examined and testified as follows:  
 6 EXAMINATION BY MR. BEARDSLEY:  
 7 Q Okay. Would you state your name and address for  
 8 the record, please.  
 9 A Yes. My name is Dale Tech. And my address is  
 10 4772 Ridgecrest Court in Rapid City.  
 11 Q And Dale, what do you do for a living?  
 12 A I'm Public Works Director for the City of Rapid  
 13 City.  
 14 Q And before you were the — before you were the  
 15 public works director, what was your position?  
 16 A I was the City Engineer for the City of Rapid  
 17 City.  
 18 Q I'm going to quickly go through your background,  
 19 and we'll end up at the public works director  
 20 position. Okay?  
 21 A Yes.  
 22 Q Have you ever had your deposition taken before?  
 23 A Yes.  
 24 Q And you understand that you have to answer out  
 25 loud, and you have to wait until I'm finished

3

1 INDEX  
 2 WITNESS PAGE  
 3 DALE TECH  
 4 EXAMINATION BY MR. BEARDSLEY 3  
 5 REQUESTS OF COUNSEL: PAGE 22, LINE 14  
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 11  
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2

1 and then give an answer; correct?  
 2 A Yes.  
 3 Q And if there's something that you don't  
 4 understand, you'll tell me. Otherwise, I'm  
 5 going to assume you understood the question.  
 6 Okay?  
 7 A Yes.  
 8 Q Where did you go to high school?  
 9 A Sturgis Brown High School.  
 10 Q When did you graduate?  
 11 A 1984.  
 12 Q Where did you go to school after that?  
 13 A I attended the South Dakota School of Mines in  
 14 Rapid City from 1984 to 1987, and then I  
 15 attended the University of Nebraska at Omaha  
 16 from 1990 to 1996 where I received a degree in  
 17 civil engineering.  
 18 Q Okay. So probably doesn't matter, but what  
 19 happened between '87 and '90?  
 20 A I worked for a local contractor in Rapid City.  
 21 Q And well, who was that?  
 22 A The name of the contractor was Caliche  
 23 Construction and Asphalt Company.  
 24 Q And you said you went to Nebraska at Omaha from  
 25 1990 to '96; correct?

4



1 was a designation of where the particular grates  
2 were located when they were removed?  
3 A Correct.  
4 Q And so the grate in question was not identified,  
5 designated, it was just part of the group being  
6 pulled up; correct?  
7 A To my knowledge. I was not involved in the  
8 actual physical removal of the grates, so I'm  
9 not certain what process they used. But I don't  
10 believe that they catalogued or inventoried  
11 which grates came from where.  
12 Q That's what Dale Pfeifle indicated, too. So  
13 you're consistent with that.  
14 So you delegated to Sarah measuring and  
15 observing the various grates. And then after  
16 she did that, then you ordered the street  
17 department to remove the grates and put in the V  
18 inlet grates?  
19 A Correct.  
20 Q And then when they removed the grates, did you  
21 tell them — strike that.  
22 When they removed the grates, you did not  
23 indicate to anyone to designate the grate that  
24 was in question regarding Julie Goble —  
25 A No.

17

1 Q — correct?  
2 Is that correct?  
3 A That's correct.  
4 Q And then when they were removed, did you give an  
5 order of where they were supposed to go?  
6 A I did not.  
7 Q And it's been subsequently learned that, at  
8 least most of them or some of them went to the  
9 city yard. Are you aware of that?  
10 A Yes.  
11 Q And when Don Brunbaugh took his deposition, he  
12 was the street superintendent at the time they  
13 were removed, but he was not aware that they  
14 were even kept. Are you aware of that?  
15 A I am aware of that, yes.  
16 Q So, just so I can get this hierarchy — and I  
17 apologize for belaboring it — but you order it,  
18 remove them, put new — put the perpendicular  
19 grates in; correct?  
20 A Yes.  
21 Q After that, then Don Brunbaugh would have  
22 somebody from the street department actually  
23 extricate the grates and either get rid of them  
24 or collect them at the city yard?  
25 A Yes.

18

1 Q But there was no order from you to keep them?  
2 A No.  
3 Q And we don't know who extracted them, the  
4 particular persons that did it; correct?  
5 A I don't personally know.  
6 Q Okay. And Don said he didn't know either, and I  
7 don't — and Trevor Schmelz said he didn't know  
8 either. So the options after removal are either  
9 take them to the yard or, as Don said, just  
10 dispose of them; correct?  
11 A Correct. I would anticipate that the realistic  
12 way of disposal would be, they would return to  
13 the yard one way or the other. They may have  
14 been then loaded up and sent for scrap.  
15 Apparently, that did not happen.  
16 Q Well, you anticipate this, if they go to the  
17 yard — even though the street superintendent  
18 couldn't testify that they went to the yard,  
19 you're telling me that you as the city engineer  
20 anticipate they would go to the yard, even  
21 though the street superintendent doesn't know?  
22 Really?  
23 A Yes.  
24 Q And you anticipate that— strike that.  
25 Street superintendent was the 30(b) (6)

19

1 witness on this case. Do you know what that  
2 means?  
3 A I do not.  
4 Q He was designated by the attorneys to be the  
5 person that has the answers that the city is  
6 committed to. Okay?  
7 A Okay.  
8 Q He was the person they nominated for this.  
9 Wouldn't the street superintendent have a better  
10 idea of where particular grates would go over  
11 the city engineer?  
12 A I don't know that I can answer that.  
13 Q Well, if you as the city engineer wanted to  
14 preserve something, you could make an order that  
15 says preserve it; correct?  
16 A Yes.  
17 Q And there was no order here to preserve this  
18 particular grate —  
19 A No.  
20 Q — correct? Am I correct?  
21 A You are correct.  
22 Q And if Don doesn't know, Don Brunbaugh, doesn't  
23 know whether it made it to the yard or not, you  
24 don't have the specific knowledge to know  
25 whether this particular grate made it to the

20

1 call them, then bikes may go right into the  
2 slots; correct?  
3 A Certainly.  
4 Q And as I talked to Don about, they become —  
5 those parallel grates become basically traps for  
6 bicycles; correct?  
7 A Bicycle wheels, certainly.  
8 Q Sure. Well, if they are a trap for a bicycle  
9 wheel, it's a trap for the bicycle. It's a trap  
10 for the bicycle rider; correct?  
11 A Yes.  
12 Q In fact, back in 1992, the City of Rapid City  
13 had a commission in which they determined that  
14 parallel grates were traps for bicycles;  
15 correct?  
16 A I have no knowledge of that.  
17 Q Okay. If you'd turn to Exhibit 9. This is a  
18 Bikeway, Walkway Plan for the City of Rapid  
19 City, and we're going to get to the part about  
20 the grates. But I want to start on the first  
21 page, Dale. Have you ever seen this at all?  
22 A I don't recall ever seeing it, no.  
23 Q It says in the fourth paragraph on page 1:  
24 Early in 1992, the City of Rapid City and  
25 Executive Policy Committee of the Rapid City

29

1 Area Metropolitan Planning Organization  
2 recognized the formation of a Bike, Walk, Run,  
3 Task Force. The purpose of the task force is to  
4 improve, expand, and promote the safe use of the  
5 community's bikeway and walkway facilities.  
6 Do you see that?  
7 A Yes.  
8 Q Page 9 of the same exhibit, 1992 is a discussion  
9 of stormwater grates with vents. It's the last  
10 paragraph on the page; do you see that?  
11 A Yes.  
12 Q It says: Stormwater grates with vents which are  
13 parallel with the curb and the direction of  
14 bicycle travel can trap wheels.  
15 You agree with that?  
16 A Yes.  
17 Q Then it says: Causing damage to the bicycle and  
18 injury to the rider.  
19 Do you see that?  
20 A Yes.  
21 Q So back in 1992 after this bikeway plan put  
22 together by the City of Rapid City, the City of  
23 Rapid City recognized the danger of having  
24 parallel grates because they could trap wheels  
25 and injure the rider; correct?

30

1 A Yes.  
2 Q So our ordinance directs these people using the  
3 bicycles to four feet from the curb, which  
4 includes this area where the grates are;  
5 correct?  
6 A Yes.  
7 Q And if — strike that.  
8 The next sentence says: Grates with vents  
9 that are transverse to the curb in the direction  
10 of bicycle travel are recommended to address  
11 this problem.  
12 And you agree with that?  
13 A Yes.  
14 Q And one way to address the problem is to move —  
15 pull out the parallel grates; right?  
16 A Certainly.  
17 Q Put in honeycomb grates, that's an option?  
18 I'll show you the federal guidelines showing  
19 the honeycomb grates.  
20 A I'm not familiar with a honeycomb grate.  
21 Q Okay. And transverse or V inlet grates?  
22 A Yes.  
23 Q Or they could weld straps or bars on the grates;  
24 correct?  
25 A Certainly.

31

1 Q But if they weld straps or bars on the grates,  
2 they need to maintain them?  
3 A Certainly. Just as any maintenance on any grate  
4 is required.  
5 Q So if you maintain the grates and you keep the  
6 straps on there, or the bars, they may be safe  
7 and won't trap people on bikes; correct?  
8 A Certainly.  
9 Q If you don't maintain them, then you actually  
10 can trap people and injure them; correct?  
11 A If there's a failure, yes.  
12 Q Okay. And everybody I've had testify, Don  
13 Brunbaugh, Trevor Schmelz, and Dale Pfeifle, all  
14 said they wouldn't go and put straps on a few  
15 grates and then skip a few, and then do a few  
16 more. They'd do it in order; right? You don't  
17 have any reason to disagree with that?  
18 A I don't have any reason to disagree with that,  
19 no.  
20 Q Makes sense, too; doesn't it?  
21 A Absolutely.  
22 Q If you're going to make some grate safe for  
23 bikers, you're not going to do a halfway job;  
24 correct?  
25 A Correct.

32



1 involved somebody's safety; correct?  
 2 A Yes.  
 3 Q Whether you were the city engineer or the public  
 4 works director or the interim public works  
 5 director, safety mattered to you?  
 6 A Absolutely.  
 7 Q And in 2011, there was a reiteration of the  
 8 issues concerning parallel grates. That was  
 9 addressed in 1992; correct? I'll show it to  
 10 you, if you don't know for sure.  
 11 A I trust that that information is in this plan.  
 12 Q Okay. If you go to 154, there's a section on  
 13 drainage grate retrofits?  
 14 A Yes.  
 15 Q In fact, it says: Some older drainage grates  
 16 can create slippery conditions for bicyclists  
 17 and/or catch a bike wheel if they have metal  
 18 grates that are parallel to the direction of the  
 19 travel.  
 20 You see that?  
 21 A I do.  
 22 Q And then this is the picture of the various  
 23 grates off to the left where you see the, looks  
 24 like honeycomb perpendicular, and then those  
 25 that have crossbars both ways. Do you see that

41

1 in the — in the diagram A, B, C?  
 2 A I do.  
 3 Q Okay. So if I'm understanding this, Dale, you  
 4 didn't — you didn't know back in 1992 there was  
 5 a bicycle plan that addressed the parallel  
 6 grates?  
 7 A No, I didn't.  
 8 Q But when you — because you weren't even here in  
 9 Rapid City then?  
 10 A Correct.  
 11 Q But when you came to town, and became the city  
 12 engineer, that was something that needed to be  
 13 addressed and was addressed in July of 2011?  
 14 A Correct.  
 15 Q And they talk about removing the grates to put  
 16 in these kinds of grates that are diagrammed on  
 17 page Bates stamp 154; correct?  
 18 A Correct.  
 19 Q So there was a recognition of a safety problem  
 20 both in 1992 and again in 2011 for bicyclists in  
 21 Rapid City?  
 22 A Yes.  
 23 Q And you understood that if they are going to  
 24 weld straps on, that it's a temporary fix;  
 25 correct?

42

1 A Could be a permanent fix if the straps had  
 2 longevity.  
 3 Q Okay. And I don't — I don't want to argue with  
 4 you, but Don Brunbaugh testified he thought it  
 5 was a temporary fix. You're not disagreeing  
 6 with that?  
 7 A No, I'm not.  
 8 Q And the reason it's a temporary fix is they can  
 9 be scraped off; correct?  
 10 A Certainly.  
 11 Q Snowplows can scrape them off?  
 12 A Certainly.  
 13 Q Other equipment for the city can scrape them  
 14 off?  
 15 A Certainly.  
 16 Q And as a result, if you're going to have a  
 17 temporary fix, that can become dangerous.  
 18 Again, there needs to be a process whereby  
 19 there's a check on these welds; correct?  
 20 A Ongoing maintenance.  
 21 Q Right. And the ongoing maintenance would be  
 22 something done by the street department?  
 23 A Correct.  
 24 Q And if the street department allowed the welds  
 25 to be torn off, then there's a failure of the

43

1 maintenance if it becomes a dangerous situation  
 2 because the welds are torn off; correct?  
 3 A Certainly.  
 4 Q And as you sit here today, Dale, you don't know  
 5 when the welds were torn off, partially or  
 6 completely, on these grates on St. Pat?  
 7 A I have no idea.  
 8 Q And you don't know of anyone that knows when  
 9 that occurred because there was no system to  
 10 check them?  
 11 A Not to my knowledge.  
 12 Q And you agree with me that if the welds are torn  
 13 off, that then the grates are damaged?  
 14 A I don't agree with that statement. The grates  
 15 are the grates, the bars are the bars. They are  
 16 two different —  
 17 Q The intended safety mechanism that became  
 18 attached to the grates?  
 19 A Is no longer in place.  
 20 Q Right. And as a result, the grate intended to  
 21 be safe now has been damaged to become unsafe?  
 22 A Correct.  
 23 Q And they are, in addition to being damaged, are  
 24 out of repair; correct?  
 25 A Certainly.

44



1 telling the people that are running the Vac-All  
2 to turn it in when they see problems with the  
3 grates that have straps; right?  
4 A Not that I'm aware of.  
5 Q In fact, is there a process in any regard, by  
6 any employee at the city, to turn in problems  
7 with the grates to anybody?  
8 A Not that I'm aware of.  
9 Q And there's no process after the snowplows have  
10 their season and they are plowing, to check the  
11 grates and see how badly damaged they are?  
12 A Not to my knowledge.  
13 Q And you would agree with me that if there are  
14 metal straps welded on these grates and they can  
15 be torn off by snowplows, that a safer process  
16 would be to check after the snow season to see  
17 how much damage there was?  
18 A Potentially, yes.  
19 Q I know you're not a lawyer, but I have to ask  
20 this question anyway. Once you got notice from  
21 me as Julie Goble's attorney that she had been  
22 injured, why wasn't this grate that was involved  
23 identified so that the evidence could be  
24 preserved?  
25 A I don't know that I can answer that.

53

1 Q You gave the order to remove them?  
2 A Correct.  
3 Q And you knew that I had made a claim on Julie  
4 Goble's behalf because she was terribly injured;  
5 correct?  
6 A Yes.  
7 Q And you knew that the issue involved this grate;  
8 correct?  
9 A I knew it involved a grate. As I testified  
10 earlier, I still to this day have no idea which  
11 grate it was.  
12 Q Whether you know which grate it is or not,  
13 you've been around the horn long enough to know  
14 that the particular grate that was being removed  
15 would be evidence in this case?  
16 A That never occurred to me.  
17 Q Okay. I believe that, Dale. But you know as we  
18 sit here today that is evidence in the case;  
19 correct?  
20 A Certainly.  
21 Q And you know now as we sit here, it's been  
22 either taken and gone, or at the city yard  
23 amongst all the other grates; correct?  
24 A Correct.  
25 Q And there's no identifying feature on it so that

54

1 we can tell which grate actually was in this  
2 spot?  
3 A Correct.  
4 Q You didn't intend to destroy evidence or be part  
5 of the destruction of evidence but it has become  
6 that; correct?  
7 MR. GALBRAITH: Objection. Steve, the  
8 evidence has been made available to you. You've  
9 seen the grates.  
10 Q (BY MR. BEARDSLEY:) You can answer the  
11 question, then I'll make a record.  
12 A Can you repeat that?  
13 Q You became part of the fact that the evidence of  
14 what grate was in what spot now has been  
15 destroyed based on an order to remove?  
16 A I don't believe the evidence has been destroyed.  
17 Q Okay. Well, the location of the particular  
18 grate that was in that spot has been removed so  
19 no one can testify to which grate was in that  
20 spot because of the order to remove; correct?  
21 A Correct.  
22 Q And for the record, it has been destroyed  
23 because it's not in its spot and it's not been  
24 identified by anybody. It was removed and  
25 either has been thrown away or it's at the city

55

1 lot. Okay.  
2 So in retrospect, you would agree with me  
3 that evidence of a case, in a case, should not  
4 be destroyed by whomever orders it; correct?  
5 MR. GALBRAITH: Objection; calls for a legal  
6 conclusion, assures fact not in evidence.  
7 Subject to that, answer if you can.  
8 A I have no idea.  
9 Q (BY MR. BEARDSLEY:) Well, you would agree with  
10 me if something happened to you, and you were  
11 injured, you'd want all of the evidence so you  
12 could review it or have your attorney review it;  
13 correct?  
14 A Yes.  
15 Q Did you say "yes"?  
16 A I said "yes."  
17 MR. BEARDSLEY: Dale, I don't think I have  
18 anything further. Thank you for visiting with  
19 me about this matter.  
20 You have the right to read and sign the  
21 deposition, or you can waive that right and rely  
22 on the accuracy of the court reporter. Will you  
23 waive the reading and signing?  
24 THE WITNESS: I will not.  
25 MR. BEARDSLEY: Okay. Then you need to make

56

<p>1 STATE OF SOUTH DAKOTA ) IN CIRCUIT COURT</p> <p>2 COUNTY OF PENNINGTON ) SS.</p> <p>3 )</p> <p>4 JULIE GODRE and )</p> <p>5 DAVID GODRE, )</p> <p>6 Plaintiff, ) Civ. No. 51CIV16-000744</p> <p>7 vs. ) DEPOSITION OF:</p> <p>8 ) DALE PFEIFLE</p> <p>9 CITY OF RAPID CITY, )</p> <p>10 SOUTH DAKOTA, )</p> <p>11 Defendant. )</p> <p>12</p> <p>13 DATE: December 11, 2018 at 2:05 p.m.</p> <p>14 PLACE: Nooney &amp; Solay</p> <p>15 326 Founders Park Drive</p> <p>16 Rapid City, SD 57702</p> <p>17 APPEARANCES:</p> <p>18 Representing the Plaintiffs:</p> <p>19 MR. STEVEN C. BEARDSLEY</p> <p>20 Beardsley, Jensen &amp; Lee</p> <p>21 Attorneys at Law</p> <p>22 4200 Beach Drive, Suite 3</p> <p>23 Rapid City, SD 57702</p> <p>24 Representing the Defendant:</p> <p>25 MR. ROBERT J. GALERATH</p> <p>Nooney &amp; Solay</p> <p>Attorneys at Law</p> <p>326 Founders Park Drive</p> <p>Rapid City, SD 57702</p> <p>Reported By: Jacqueline K. Weller</p> <p>Registered Professional Reporter</p> <p>Black Hills Reporting</p> <p>1601 Mt. Rushmore Rd., Ste. 3280</p> <p>Rapid City, SD 57701</p> <p>605.721.2600</p>	<p>1 MR. BEARDSLEY: Same stipulation, Rob?</p> <p>2 MR. GALERATH: Yes, sir.</p> <p>3 DALE PFEIFLE,</p> <p>4 called as a witness herein, having been first duly</p> <p>5 sworn, was examined and testified as follows:</p> <p>6 EXAMINATION BY MR. BEARDSLEY:</p> <p>7 Q Would you state your name and address for the</p> <p>8 record, please.</p> <p>9 A Dale Pfeifle, 2525 Oak Drive.</p> <p>10 Q What do you do for a living?</p> <p>11 A I am currently the Street Superintendent for</p> <p>12 Rapid City Street Department.</p> <p>13 Q And I'm going to go through your background, and</p> <p>14 let's start with this. Dale, have you ever had</p> <p>15 your deposition taken before?</p> <p>16 A No, sir.</p> <p>17 Q I can call you Dale?</p> <p>18 A That's fine.</p> <p>19 Q Okay. If there's something you don't</p> <p>20 understand, tell me and we'll straighten it out.</p> <p>21 A Okay.</p> <p>22 Q Okay. Because I'm going to assume if you answer</p> <p>23 the question you understood it; fair?</p> <p>24 A (No audible response - Witness nodded.)</p> <p>25 Q Fair?</p>
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3

<p>1 INDEX</p> <p>2 WITNESS PAGE</p> <p>3 DALE PFEIFLE</p> <p>4 EXAMINATION BY MR. BEARDSLEY 3</p> <p>5 REQUESTS OF COUNSEL: PAGE 47, LINE 4</p> <p>6</p> <p>7</p> <p>8</p> <p>9</p> <p>10</p> <p>11</p> <p>12</p> <p>13</p> <p>14</p> <p>15</p> <p>16</p> <p>17</p> <p>18</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p>	<p>1 A Yes.</p> <p>2 Q That's the other —</p> <p>3 A I apologize.</p> <p>4 Q — is, you do have to answer —</p> <p>5 A Yes. I apologize —</p> <p>6 Q Right.</p> <p>7 A — for —</p> <p>8 Q You don't need to apologize. Here's the deal.</p> <p>9 And it's difficult because in common</p> <p>10 conversation, we interrupt one another.</p> <p>11 But Jacque isn't going to like it very much</p> <p>12 and the record doesn't look very good. So I've</p> <p>13 got to finish my question, and then you have to</p> <p>14 give an audible answer. Okay?</p> <p>15 A Yes.</p> <p>16 Q Okay. What is your educational background,</p> <p>17 Dale?</p> <p>18 A I have a 12th grade education.</p> <p>19 Q Okay. And where did you go to high school?</p> <p>20 A Timber Lake, South Dakota.</p> <p>21 Q And when did you grad- — did you graduate from</p> <p>22 high school?</p> <p>23 A I did not. I passed a GED.</p> <p>24 Q Okay. So when did you leave high school, what</p> <p>25 grade?</p>
--	--

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4



1 correct?  
 2 A Correct.  
 3 Q And those are the kinds of retrofits that were  
 4 called for in 2011, based on this master plan;  
 5 correct?  
 6 A I'm assuming.  
 7 Q Okay. Then it says that one of the dangers is  
 8 that you can have metal grates that are parallel  
 9 to the direction of travel and it affects  
 10 someone's safety because the wheels can get  
 11 trapped in the grate; correct?  
 12 A Correct.  
 13 Q And it says, Figure 24, which were the three  
 14 grates I was talking about, are examples of  
 15 bicycle safe drainage grate coverings; correct?  
 16 A Correct.  
 17 Q Then it says: Rapid City should establish a  
 18 goal for a number of drainage grates to retrofit  
 19 each year.  
 20 Do you see that?  
 21 A Yes.  
 22 Q So there's an indication that the city knew that  
 23 there was a problem in 2011 with parallel  
 24 running grates; correct?  
 25 A That I don't — I — I don't know. I can't say

53

1 that.  
 2 Q Okay. And that the goal is to put in safe  
 3 grates; correct?  
 4 A Correct.  
 5 Q And even — so if these grates are out of  
 6 repair, whether the welds are coming off or they  
 7 are parallel, then they need to be retrofitted  
 8 to have safe grates; right?  
 9 MR. GALBRAITH: Objection, again. The use  
 10 of "out of repair" based on damage versus  
 11 design.  
 12 Subject to that, you can answer if you can.  
 13 Q (BY MR. BEARDSLEY:) Do you remember the  
 14 question?  
 15 A Repeat it for me.  
 16 (The previous question was read.)  
 17 MR. BEARDSLEY: Go ahead.  
 18 MR. GALBRAITH: If you can, answer.  
 19 A If we know they are there.  
 20 Q (BY MR. BEARDSLEY:) Okay. Well, I understand.  
 21 But I'm using 2011.  
 22 A Yep.  
 23 Q And I'm using 1992. So the city knew in 1992,  
 24 and then again confirmed in 2011 by documents  
 25 the city adopted and became part of their plans,

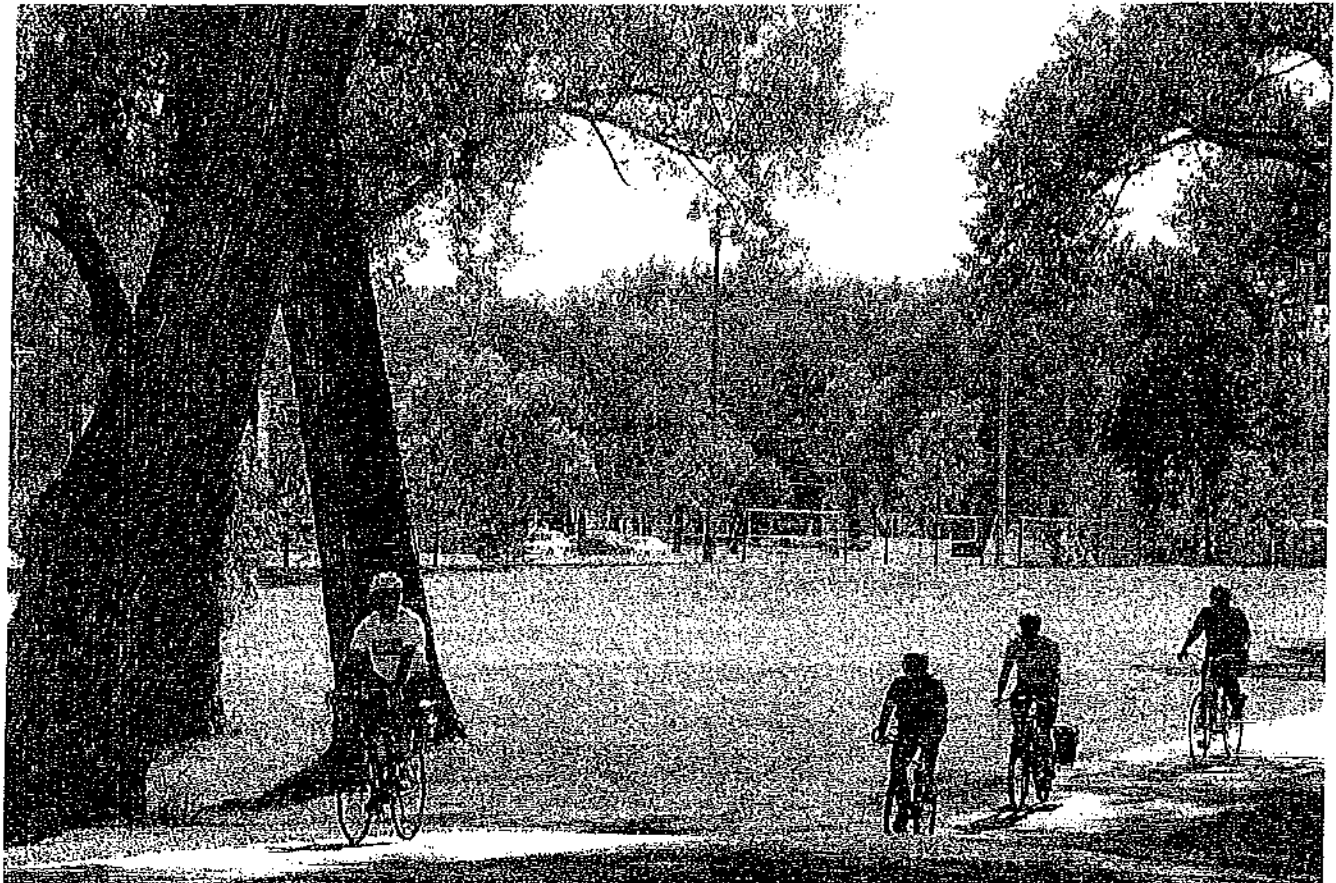
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1 that parallel grates were hazardous; correct?  
 2 A Correct.  
 3 Q So the city recognized the problem with grates  
 4 that were not perpendicular or not honeycombed  
 5 or not in some way keeping wheels out of the  
 6 grate itself?  
 7 A Correct.  
 8 Q And the city knew because in 1992 they saw it  
 9 and that's what they discussed, and in 2011 they  
 10 saw it, and that's what they discussed; correct?  
 11 A It mentioned it, I don't know that they saw it,  
 12 but.  
 13 Q But that's — there's reference and language in  
 14 here to a problem in Rapid City with these  
 15 parallel grates. That would be notice that they  
 16 knew there was a problem with parallel grates;  
 17 right?  
 18 A I can't speak for that — I — I can't speak for  
 19 them, but I...  
 20 Q Makes sense, doesn't it?  
 21 A Possibly.  
 22 Q And if the welds are not kept on these grates  
 23 that have not been replaced, then a dangerous  
 24 situation is created if a bicyclist goes over  
 25 it; correct?

55

1 A Correct.  
 2 Q And from reviewing this master plan and talking  
 3 about it, the parallel grate needed to be fixed  
 4 so that wheels wouldn't go in them; right?  
 5 A Correct.  
 6 Q And they needed to be maintained beyond that  
 7 fixed basis so wheels wouldn't go in there;  
 8 correct?  
 9 A Correct.  
 10 Q Now, I asked Trevor Schmelz if somebody is going  
 11 out to put weld straps on the grates, they  
 12 wouldn't weld a few and then skip a few and then  
 13 weld a few and skip a few. And he said no, they  
 14 wouldn't do it that way. Would you agree with  
 15 that?  
 16 A Correct.  
 17 Q Because that doesn't make sense, does it? Make  
 18 some of them safe and not others?  
 19 A Right. Correct.  
 20 Q And we don't know from the records you looked at  
 21 who was out there doing the welds or checking  
 22 the welds or cleaning the grates, we don't know  
 23 any of that?  
 24 A No.  
 25 Q But you certainly wouldn't want a crew out there

56



# Rapid City Area Bicycle and Pedestrian Master Plan

PREPARED BY  
Alta Planning + Design

July 2011



Kadmas  
Lee &  
Jackson  
Urban Systems  
Planners

CITY 000098



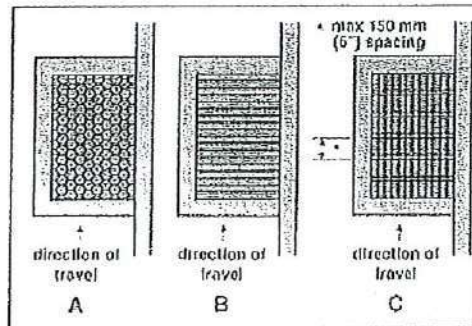


Figure 24. Examples of bicycle-safe drainage grates.

### Drainage Grate Retrofits

The City should continue its efforts to retrofit existing drainage grates as roads are being resurfaced. Some older drainage grates can create slippery conditions for bicyclists and/or catch a bike wheel if they have metal grates that are parallel to the direction of travel. Newer grate styles have grates that are perpendicular to the travel lane or in a grid or mesh pattern. These newer grate types are much safer for bicyclists. Figure 24 demonstrates examples of bicycle-safe drainage grate coverings.

Rapid City should establish a goal for the number of drainage grates to retrofit each year. Retrofitting and replacing existing drainage grates will facilitate safe bicycle crossing movements and can reduce the City's liability exposure.

### Bicycle Parking

Bicycle parking is an essential element of the bikeway network; without an adequate place to park, people may decide not to take a trip via bicycle. Improperly locked bicycles can crowd the sidewalk and restrict pedestrian movement.

Rapid City should consider linking bicycle parking requirements to land uses. Sample bicycle parking requirements recommended by the Association of Pedestrian and Bicycle Professionals (APBP) in the 2010 *Bicycle Parking Guidelines* are provided in Appendix G.

### Street Design Criteria Manual Update

The City of Rapid City's Street Design Criteria Manual contains minimum street width standards by street classification but does not include bicycle accommodations as part of street design cross-sections. The City should revisit its Manual using the bicycle and pedestrian design guidelines provided in Appendix F to provide guidance for bicycle accommodation by level of street. The Manual should be modified to require bike lanes on all new arterial and collector streets, and revised cross-sections should be added to illustrate the new street designs. Figure 25 through Figure 27 show alternatives for how bicycles could be accommodated on arterial, collector, and local streets, respectively.

While shared lane markings are technically allowed on arterial roadways with posted speeds of 35 mph, this treatment is not comfortable for the majority of bicyclists and other treatments such as bike lanes and side paths are recommended. However, some bicyclists prefer riding on the street and



U.S. Department of Transportation

**Federal Highway Administration**

1200 New Jersey Avenue, SE

Washington, DC 20590

202-366-4000

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**Safety**

**Maintenance of Drainage Features for Safety**

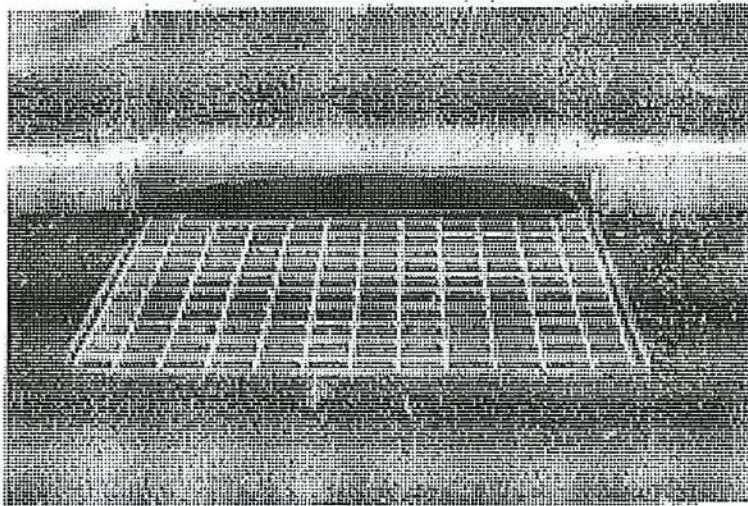
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**PDF [9.16 MB]**

## Maintaining and Improving the Safety Characteristics of Inlets

Drop inlets and catch basins in and adjacent to roadways are one of the most common drainage features especially in urban and suburban areas where curb and gutter design is used. Inlets are designed to carry surface run-off from the road and roadside away from the roadway. Inlets can be of varying design, including curb openings, grates, or a combination of these. Many local agencies use a standard design for most of their drop inlets on and adjacent to low-speed, low-volume roads. Inlets on higher level highways are often specially designed or selected to meet the conditions of greater but less frequent storms.

Drop inlets located in or adjacent to the path of motor vehicles, pedestrians and bicycles require grates that can accommodate run-off while preventing vehicles, bicycles and pedestrians from falling into the inlet. When bicycle traffic exists, grates should prevent the tires of a bicycle from slipping into and being caught in the grate. Therefore, bicycle safe grates should be used whenever bicycle traffic is expected. The photo below shows a preferred treatment for a drop inlet located on or near a bicycle travel way. With a flush bicycle-safe grate, a bicycle tire cannot get caught in the grate because of the cross pattern of supports which results in only small openings.



*Bicycle safe grate with drop inlet.*

Drop inlets should not be in the path of pedestrians. To avoid run-off across a pedestrian crosswalk it is desirable to locate the catch basin and inlet before the crosswalk as depicted on next page.

**CITY OF RAPID CITY  
EMPLOYEE WEEKLY TIME CARD**

STREET — MAINTENANCE SHOP — STREET CLEANING

EMPLOYEE NAME NATE BERDAUETE

EMPLOYEE NUMBER 109196

DATE 18 19 20 21 22 23 24

Date 10-24-2015

Work Code	Project Number	Equip. Number	Dept.	Work Description	S	M	T	W	Th	F	S	OC	Total Hours	Rate	Time In	Time Out	Time In	Time Out
2	27990	5048	7012	365 TEXAS		1/2									7:00	12:30	12:30	5:30
2	16900	5048	7012	PARLOW ADAMS			1/2											
2	16610	5048	7012	ADAMS & ALLEN			1/2											
2	8752	5048	7500	KARWIEDGE				1/2										
2	17910	5048	7500	730 WATER TOWN				1/2										
2	24002	5048	7500	906 ST CHARLES				1/2										
2	17050	5048	7500	914 WILKIE				1/2										
2	25970	5048	312	CLEVELAND				1/2										
1	10230	5048	301	W. FLOREMAN				1/2										
29	5012		301	SUDEN BRANKS						1/2								

Signature Nate Berdauete

Approved \_\_\_\_\_  
Form and Supervisor's initials

Show hours of work and out of city location on separate lines by project



CITY 000374

**APP 060**

STREET - MAINTENANCE SHOP - STREET CLEANING



## STREET - MAINTENANCE SHOP - STREET CLEANING

EMPLOYEE NUMBER 102970

DATE 18 19 20 21 22 23 24

Date 10-18 to 10-24 2015

**Total Weekly Hours** (If used more than 1 card  
add on Card 1 only)

**Signature**

Approved: \_\_\_\_\_ 20\_\_\_\_  
Foraminist/Supervisor/Concort \_\_\_\_\_

5. how points of interest and out of classification on separate lines by project

STREET — MAINTENANCE SHOP — STREET CLEANING

DATE 10/18 10/19 10/20 10/21 10/22 10/23 10/24

Signature: \_\_\_\_\_  
 Show hours of overtime and out of the station on separate lines by project.

Appendix 20  
Form 1041-10/1/10

**CITY OF RAPID CITY**  
**EMPLOYEE WEEKLY TIME CARD**  
 STREET -- MAINTENANCE SHOP -- STREET CLEANING

EMPLOYEE NAME Bruce Fisk  
 EMPLOYEE NUMBER 28111

DATE 18 19 20 21 22 23 24

Date 10-18 10-24 2015

Work Code	Project Number	Equip. Number	Dept.	Work Description	S	M	T	W	Th	F	S	OC	Total Hours	Rate	Time In	Time Out	Time In	Time Out	
2	27990	5032	7012	365 TEXAS		2										7:00	12:00	7:30	12:30
2	27990	5032	7012	365 TEXAS		3													
2	16900	5032	7012	PARLOW / Adams			4												
2	16900	5032	7012	PARLOW / Adams			1												
2	16610	5032	7012	Allen / Adams			3												
2	8752	5032	7500	5213 Knowledge				2											
2	8752	5032	7500	5213 Knowledge				1											
2	17910	5032	7500	730 WHITE TOWN				2											
2	17910	5032	7500	730 WHITE TOWN				1											
2	2400	5032	7500	906 ST CHARLES				2											
2	17050	5032	7500	914 WILLSIE					1										
2	17050	5032	7500	914 WILLSIE					1										
2	25770	5032	7500	812 CLEVELAND					1										
2	25770	5032	7500	812 CLEVELAND					1										
1	10230	5032	301	W. FLORENCE				2											
1	10230	5032	301	W. FLORENCE				3											
24	3016	5032	301	CATCH BASINS						4									
				On-Call Base Rate															
				Vehicle Usage															
				OT/Premium Time															

Signature Bruce Fisk

Approved \_\_\_\_\_  
 Foreman/Supervisor

Show hours of overtime and/or disbursement on separate line by project

STREET → MAINTENANCE SHOP → STREET CLEANING

EMPLOYEE NUMBER 102976

DATE 10/18 10/19 10/20 10/21 10/22 10/23 10/24

Date 10/18/15 - 10/24/15

Signature \_\_\_\_\_  
Show hours of overtime by date of classification on separate lines by project.

Approved \_\_\_\_\_ 20\_\_\_\_  
For Foreign Superintendent



STREET - MAINTENANCE SHOP - STREET CLEANING

## STREET - MAINTENANCE SHOP - STREET CLEANING

EMPLOYEE NUMBER 105599

DATE 1918 1919 1920 1921 1922 1923 1924

Date 10/18 - 10/24 - 2015

Signature: Wayne J. Hollenhorst  
 Show hours of overtime and out of designation categories lines by project.

Approved \_\_\_\_\_ 20\_\_\_\_  
Foreman/Supervisor/Chief



## CITY OF RAPID CITY

**EMPLOYEE WEEKLY TIME CARD**

**SYREET — MAINTENANCE SHOP — STREET CLEANING**

EMPLOYEE NUMBER 108664

DATE 28 29 30 31 32 33 34 35  
Date 3-5-2016

[illegible]

signature *Peter L. Lio*

Approved \_\_\_\_\_ 20\_\_\_\_  
 For the President



## STREET MAINTENANCE SHOP — STREET CLEANING

EMPLOYEE NUMBER 30225

Date 4-2-16

DATE 3/27 3/28 3/29 3/30 3/31 4/1 4/2

[illegible]

Signature \_\_\_\_\_

Approved \_\_\_\_\_ 20\_\_\_\_  
 For the President

Share hours of overtime and out of classification on separate lines by project.

CITY 000384

## CITY OF RAPID CITY

## EMPLOYEE WEEKLY TIME CARD

**STREET --- MAINTENANCE SHOP --- STREET CLEANING**

EMPLOYEE NAME Kirk Hanson  
EMPLOYEE NUMBER 103442

Date 4-2-16

DATE	3/27	3/28	3/29	3/30	3/31	4/1	4/2
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[illegible]

Signature Kirk H. ...

Approved \_\_\_\_\_ 20\_\_\_\_  
Foraman Superintendent

CITY 000385

**STREET — MAINTENANCE SHOP — STREET CLEANING**

EMPLOYEE NAME Wayne L. Baldsberry

EMPLOYEE NUMBER 105503Date 3/27-4/2-2016[illegible]

Signature Wanda H. Johnson  
 Show hours of events and out of classification on separate lines by project.

Approved \_\_\_\_\_ 20\_\_\_\_  
For Mayor/Supervisor/President

CITY 000386

STREET — MAINTENANCE SHOP — STREET CLEANING

EMPLOYEE NUMBER 103470

Date 3-27-40 4-2-120

Approved \_\_\_\_\_  
 Foreman/Supervisor/Officer

Show hours of overtime and out of classification on separate lines by project.

CITY 000387



EMPLOYEE WEEKLY TIME CARD  
STREET — MAINTENANCE SHOP — STREET CLEANING

EMPLOYEE NAME Bob Mayer  
EMPLOYEE NUMBER 1011501

Date 4-27-66[illegible]

Approved \_\_\_\_\_ 20\_\_\_\_  
 Foreman Superintendent

Signature Lebanah Meyer  
Show rules of motions and out of classification on separate sheet by project.

CITY 000388

## CITY OF RAPID CITY

EMPLOYEE WEEKLY TIME CARD

**STREET — MAINTENANCE SHOP — STREET CLEANING**

EMPLOYEE NAME Philip Reiser

EMPLOYEE NUMBER 100758

Date 3-27-16 - 4.2.16

DATE 3/27 38 30 31 2

[illegible]

Signature \_\_\_\_\_

Approved \_\_\_\_\_  
Foreman/Supervisor

29

CITY 000389



# Beardsley Jensen & Lee

ATTORNEYS AT LAW

PROF. L.L.C.

STEVEN C. BEARDSLEY  
GARY D. JENSEN  
BRAD J. LEE\*

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Phone: (605) 721-2800 ♦ Fax: (605) 721-2801  
WWW.BLACKHILLSLAW.COM

JESSICA L. LARSON  
BRETT A. POPPEN  
MICHAEL S. BEARDSLEY

\*Licensed in NE, ND, MN, WY

email  
sbeards@blackhillslaw.com

October 16, 2015

Mr. Joel Landeen  
City Attorney's Office  
300 6<sup>th</sup> St.  
Rapid City, SD 57701

Re: The grates on E. St. Patrick & Creek Drive  
Julie Godbe

Dear Joel:

As I am sure you are aware I represent Davie & Julie Godbe regarding the catastrophic injury to Julie Godbe. As I am sure you are aware by now Julie's bike tire fell down into the storm grate on East St. Patrick Street adjacent to Creek Drive. I am also sure that you understand that the maintenance on these grates has been horrible. The city ordinance calls for the grates to be perpendicular to the curb, not parallel to the curb. Obviously that was not heeded at this spot. In fact, along the entire E. St. Patrick roadway a number of grates had metal tabs welded onto the grates. Those metal tabs have been scraped off and as a result these dangerous grates are sitting there without protection to the public.

You do not need to comment on liability or damages or anything about this lawsuit. I have been in contact and have had nice conversations with the adjuster from One Beacon. The reason for my call to you, when I was fortunate enough to talk to Allison Creelman, is so that no other persons will be injured by these dangerous grates in the road.

I could not sleep at night if someone else was injured while we are litigating this matter. My client, Julie Godbe, is extremely concerned that someone else will be injured on these grates.

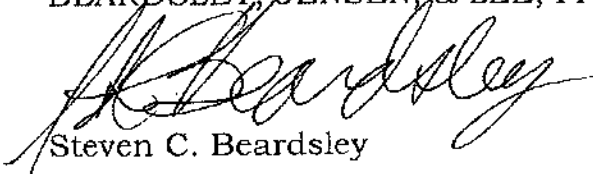
**APP 076**

We are asking that the City immediately rectify these dangerous grates. We do not want anybody, adults or children, to ride in the gutter and have their bicycle tires go into the grates so that they are seriously injured.

The catastrophic injury to Julie Godbe is bad enough. We do not need another one. Please let us know that the city is out there immediately rectifying this dangerous situation. If you have questions please feel free to contact me.

Sincerely yours,

BEARDSLEY, JENSEN, & LEE, Prof. L.L.C.



Steven C. Beardsley

SCB:jdy

cc: Client  
Mayor of Rapid City  
City Council members



W NEENAH FOUNDRY CO. USA 1 FLOW

NEENAH FOUNDRY CO. NEENAH WIS.

APP 078



**IN THE SUPREME COURT  
OF THE  
STATE OF SOUTH DAKOTA**

---

APPEAL NO. 29251

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**JULIE GODBE and DAVID GODBE**  
Plaintiffs/Appellants,

vs.

**CITY OF RAPID CITY, SOUTH DAKOTA**  
Defendant/Appellee.

---

ON APPEAL FROM THE CIRCUIT COURT  
SEVENTH JUDICIAL CIRCUIT  
PENNINGTON COUNTY, SOUTH DAKOTA

The Honorable Matthew Brown  
Circuit Court Judge

---

**APPELLEE'S BRIEF**

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NOTICE OF APPEAL FILED FEBRUARY 14, 2020

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## **PRELIMINARY STATEMENT**

For ease of reference, citations to the pleadings will be referred to as Settled Record (“SR”) and the numbers assigned by the Clerk, and the pleading and any further designation as appropriate, e.g. “SR 0283, Defendant’s Motion for Summary Judgment.” References to the documents in the Appellants’ Appendix will be referred to by the specified document and designation to the Appellants’ Appendix, e.g. “Memorandum Decision, Appellants’ App. 001.” References to the documents in the Appellee’s Appendix will be referred to by the specified document and designation to the Appellee’ Appendix, e.g. “Photographs of Grates, Appellee’s App. at C-004.” Citations to transcripts will be designated by transcript, date of hearing, and page and line number, e.g. “Transcript (11/22/19), p. 3:9 – 3:12.”

The Appellants, Julie Godbe and David Godbe will be referred to by name or collectively as “Godbes.” The Appellee, the City of Rapid City, South Dakota, will be referred to as “City.”

## **JURISDICTIONAL STATEMENT**

The City does not dispute the recitation of the Jurisdictional Statement contained in the Appellants’ Brief or that this Court has jurisdiction of this appeal pursuant to SDCL § 15-26A-3.

## STATEMENT OF ISSUES

- I. Whether Godbes presented any evidence to establish that Julie Godbe's accident was caused by "damage" to the roadway where Julie Godbe fell.**

The trial court held in the negative.

### MOST RELEVANT AUTHORITIES

SDCL § 31-32-10

*Hohm v. City of Rapid City*,  
2008 S.D. 65, 753 N.W.2d 895

- II. Whether Godbes must show that the City had notice of the alleged "damage" that caused Julie Godbe's injuries.**

The trial court held in the affirmative.

### MOST RELEVANT AUTHORITIES

SDCL § 31-32-10

*Hohm v. City of Rapid City*,  
2008 S.D. 65, 753 N.W.2d 895

- III. Whether Godbes presented any evidence to establish that there was "damage" to the storm drain grate where Julie Godbe fell, and that the City had notice of that damage.**

The Trial Court held in the negative.

### MOST RELEVANT AUTHORITIES

SDCL § 31-32-10

*Hohm v. City of Rapid City*,  
2008 S.D. 65, 753 N.W.2d 895



## **REQUEST FOR ORAL ARGUMENT**

The Appellee, the City of Rapid City, is of the belief that oral argument would assist the Court in this matter and respectfully requests the same.

### **STATEMENT OF THE CASE AND THE FACTS**

#### **I. SUMMARY OF THE CASE AND THE FACTS**

While this counsel has not historically included a summary of the facts in prior submissions to this Court, a short and concise summary of the actual, undisputed facts of this case is provided here for clarity, as Godbes' attempt, both at the trial court level and in their submission to this Court, to mislead the Court and obfuscate the facts, is astonishing.

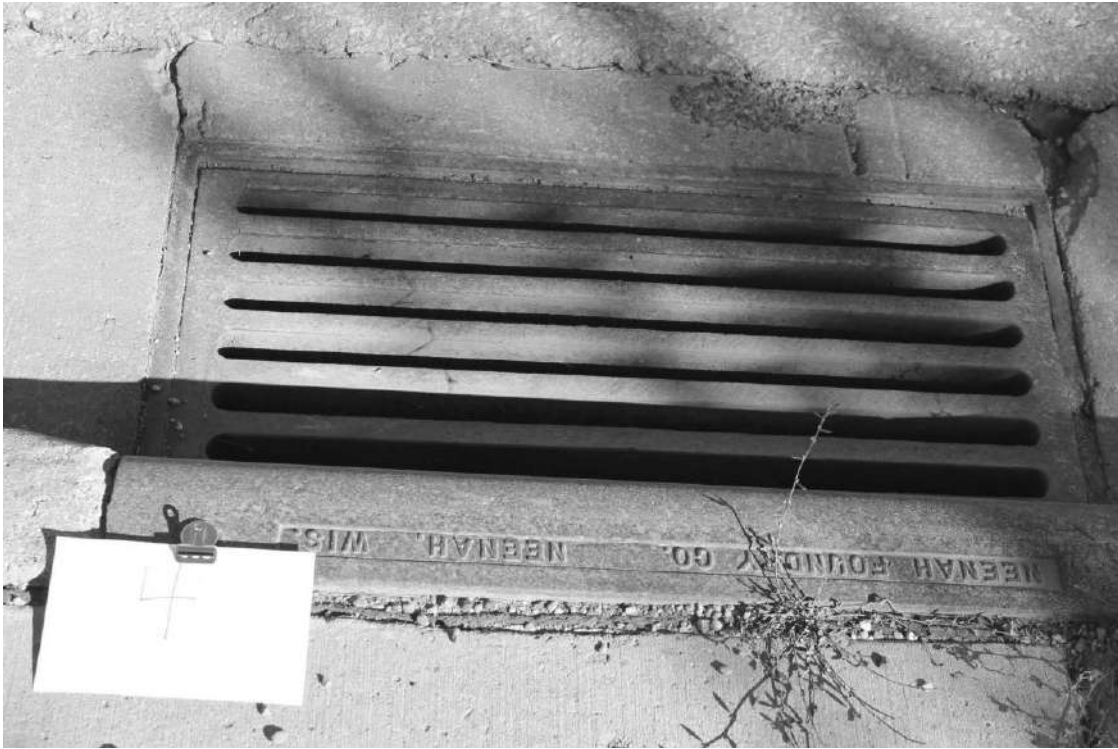
On July 27, 2015, Julie Godbe was riding her bicycle on E. St. Patrick Street in Rapid City. Julie Godbe rode over a storm drain grate, which has been referred to as Grate 4 in this litigation. When she rode over Grate 4, Julie Godbe's front tire fell into the storm drain grate and she was injured. The Godbes allege that the City had been aware of a "dangerous condition" in the roadway for at least 20 years prior to the accident because the storm drain grate had bars that ran parallel to the curb instead of perpendicular. Since the inception of this litigation, the parties have disputed whether the Godbes' allegations about the parallel vs. perpendicular bars in the storm drain grate constitute a "design" defect, for which the parties agree the City cannot be held liable.

Initially, the trial court dismissed the Godbes' Complaint on a Motion to Dismiss because the trial court agreed with the City that the Complaint alleged a design defect. The Godbes have not addressed or appealed the trial court's Memorandum Decision and Order on the Motion to Dismiss.

The Godbe's amended their Complaint to assert that straps or crossbars were welded on Grate 4 prior to Julie Godbe's accident, and that the crossbars had become damaged. The sole change in the Amended Complaint is paragraph 25. SR 0163, Amended Complaint, ¶ 25.

The parties agree that the City was not responsible for the construction of this portion of E. St. Patrick Street, but that the City took over ownership and maintenance from the State of South Dakota in 2004. It is undisputed that there were crossbars welded onto certain storm drain grates on E. St. Patrick Street, prior to the State transferring this roadway to the City. The Godbes continuously provided photographs to the trial court, and have continued that practice in their submission to this Court, which depicted grates where Julie Godbe's accident DID NOT occur. The undisputable photographic evidence provided to the trial court (which consisted of photographs that were taken by Godbes' counsel) was that the crossbars were welded onto the storm drain grates which lied East of Rapid Creek, and the subject grate, Grate 4 was located West of Rapid Creek and did not have any crossbars

welded on it prior to the accident. While Godbes have neglected to provide the photograph to this Court, below is a picture of Grate 4, taken by Godbes' counsel, where the parties agree Julie Godbe fell:



Appellee's App. at C-4. The parties agree that this was the condition of Grate 4 at the time of Julie Godbe's fall.

When Godbes were confronted with the task of providing evidence that there was damage to Grate 4 prior to Julie Godbe's fall, the Godbes continuously point the Court to grates found East of Rapid Creek, even though that is not where Julie Godbe's accident occurred. Godbes asked the trial court, and now ask this Court, to misconstrue the testimony of City officials. Godbes' counsel provided City officials with photographs of grates lying East of Rapid Creek (Grates 10-15 and A-G; Appellee's App.

at C 10-22) and asked them to confirm that those grates had been welded on, that the welds were not new welds, and that someone wouldn't weld crossbars on one grate and skip the next. City officials confirm all of these facts. Yet, even though these grates, and the City officials' testimony regarding these grates concerns the grates lying East of Rapid Creek, where Julie Godbe's accident did not occur, Godbes present this testimony to the Court as though the City officials were testifying specifically about Grate 4, a grate which is West of Rapid Creek. A photograph of each of the grates is included in the Appellee's Appendix, as well as a map of where each of those grates is located.



App. at D 1-3.

Godbes continuously allege that the City destroyed the grates, despite the fact that Godbes' counsel has personally seen the grates which still exist today. Godbes argue that the City's counsel admitted that the grate where Julie Godbe fell was welded on prior to Julie Godbe's accident, despite that fact that the language relied upon by Godbes specifically provides that the City "denies that the 'crossbars' as



alleged by the Plaintiffs were welded onto the storm drain grate on or before July 27, 2015.”

In the end, Godbes allege a design defect, for which the City cannot be held liable under SDCL § 31-32-10, and damage to the grates on E. St. Patrick Street, with absolutely no evidence of any damage to Grate 4, where Julie Godbe fell. For these reasons, the Court should affirm the trial court’s dismissal of Godbes’ claims.

## II. PROCEDURAL HISTORY

The Godbes filed this case via a Summons (SR 0001) and Complaint (SR 0003), both dated May 2, 2016. The Godbes alleged that on July 27, 2015, Julie Godbe was riding her bicycle on E. St. Patrick Street in Rapid City when the front tire of Julie Godbe’s bicycle fell into a storm drain grate. SR 0003, Complaint, ¶ 3. The Godbes alleged that the “cause of the accident was the presence of a hazardous storm drain grate, which was at all times relevant hereto in control of the city” and that “[t]he storm drain grate that caused the accident had steel bars that ran parallel to the curb, thereby allowing a bicycle tire to get lodged between the bars.” SR 0003, Complaint, ¶¶ 6-7. Godbes alleged the City was negligent for:

- a. Failure to adhere to City specifications requiring type “B” inlet storm drain grates [perpendicular bars];
- b. Failure to maintain City stormwater drainage system through the Stormwater Drainage Utility Fund as required by City of Rapid City ordinance, Chapter 13;

- c. Failure to warn of the dangerous condition presented by the faulty storm drain grate; and
- d. Failure to exercise its duty of care owed to people traveling on the road.

SR 0003, Complaint, ¶ 14. The Complaint also discussed the welding of crossbars onto the storm drain grates on E. St. Patrick Street in the “Negligent Maintenance and Repair” claim, but the Godbes provided a photo of a different grate and alleged that the City should have “maintain[ed] or repair[ed] the inlet drain in question by welding adequate crossbars across the inlet drain parallel to the curb.” SR 0003, Complaint, ¶ 25. The Godbes again alleged that the City “recognized the inherent dangers with the type of inlet drain seen in Ex. A” and “failed to replace the inlet drain in question with the safer alternative type ‘B’ inlet.” SR 0003, Complaint, ¶¶ 23-24.

The City filed a Motion to Dismiss, arguing that the Godbes’ Complaint, which focused on the City’s failure to use a Type “B” inlet alleged a “design” flaw, for which the City does not have liability under SDCL § 31-32-10. SR 0013. Godbes opposed the City’s Motion to Dismiss. SR 0041. Godbes attempted to characterize the City’s failure to use a Type “B” inlet as “damage” or “disrepair” instead of “design.” Despite those attempts, Godbes’ own opposition was replete with allegations related to the “safe design” of storm drain grates. Godbes argued that “[a]s alleged in Plaintiffs’ Complaint and Ex. B, no later than

May 1, 2007, the City Public Works Department identified and implemented “Type B” inlets with “Type V” *perpendicular grates* as a safe design for City Storm drains.” SR 0041, Plaintiffs’ Response to Motion to Dismiss, p. 5 (first emphasis in original, second emphasis added). See also SR 0041 Plaintiffs’ Response to Motion to Dismiss, pp. 2 and 10 (arguing “According to Ex. B, no later than May 1, 2007, the City Public Works Department identified and implemented “Type B” inlets with “Type V” perpendicular grates as a safe design for City storm drains” and that “the City of Rapid City had utilized its discretion in recognizing and implementing ‘Type V’ perpendicular drain grates as a safe design for City storm drains.”).

In opposing the Motion to Dismiss, the Godbes relied upon the City of Rapid City Infrastructure Design Criteria Manual and the City of Rapid City Standard Specifications for Public Works Construction. SR 0041 Plaintiffs’ Response to Motion to Dismiss, p. 6. As the Godbes pointed out, the Design Criteria Manual contains the following statement:

The criteria apply to the comprehensive design and construction of all public improvements associated with developing, redeveloping and subdividing lands and provides necessary criteria for all drainage, right-of-way, transportation, and utility services design within the City of Rapid City.

SR 0041 Plaintiffs’ Response to Motion to Dismiss, p. 6 (emphasis added) (citing City of Rapid City Infrastructure Design Criteria, 2012 Edition).

On October 25, 2016, the trial court entered a Memorandum Decision granting the City's Motion to Dismiss. Appellee's App. at A 1-8.

The trial court held:

The Court agrees with the Defendant that the pleadings fail on the allegation of both triggers for the existence of a duty by the City. There is no factual allegation the City had received notice, or was otherwise aware of *damage* to the storm drain grate where Julie Godbe fell. As importantly, the Plaintiffs do not allege the storm drain grate in question is in some way damaged or in different shape or condition than it was when the roadway was "birthed". If the pleadings, taken as fact, are true, the City was aware of a *design defect* in the grates and roadway that existed in 2007 but they were not "damaged" as contemplated by the statute in question. The fact the City was aware of a design defect in the road does not equate to "damage" under SDCL 31-32-10.

To broaden the definition of design defects in roadways as the Plaintiffs ask this Court to do, would fly in the face of *Hohm*. Such a liberal interpretation of "damage" under SDCL 31-32-10 would undermine the legislative purpose and judicial holdings of what necessary prerequisites must exist (and be pled) before a claim of breach of duty (and negligence) can proceed under the statute. Again, assuming the pleadings as fact for purposes of the Motion to Dismiss, the Court finds the "damage" and "notice" requirements of SDCL 31-32-10 have not been met.

Appellee's App. at A-6. After the trial court's Memorandum Decision, but before the court entered an Order, the Godbes filed a motion to amend their Complaint in order to allege "damage" to the storm drain grate where Julie Godbe fell. SR 0102. The Godbes' proposed Amended Complaint, which was ultimately filed with the trial court added only one paragraph, paragraph 25. That paragraph provided:

Defendant knew or should have known that the welded cross bars on the grate in question were ripped off and therefore damaged, thereby allowing the Plaintiffs bicycle tire to fall

into the drain grate causing bodily injury. Defendant after being put on notice of the damage prior to the accident, failed to timely repair or replace the welded metal pieces allowing bicycle tires to fall down into the grate causing loss of control of the bicycle and resulting in serious personal injury, all in violation of SDCL 31-32-10.

SR 0163, ¶ 25 (emphasis added).

In addressing both the City's Motion to Dismiss and the Plaintiffs' Motion to Amend Complaint, the Court entered the following Order:

ORDERED that the Defendant's Motion to Dismiss is hereby GRANTED, without prejudice; and it is further

ORDERED that the Plaintiffs' Motion to Amend Complaint is hereby GRANTED, and that this matter shall proceed on those allegations in the Plaintiffs' proposed Amended Complaint, which allege damage to the storm drain grate, which is subject to this litigation; and it is further

ORDERED that the Court incorporates the Memorandum Decision, dated October 25, 2016, attached hereto as Exhibit 1 and incorporated herein by this reference, and that any and all allegations related to the design of the storm drain grate, which is subject to this litigation, are hereby dismissed, with prejudice, consistent with the Memorandum Decision.

Appellee's App. at B 1-2. (emphasis added).

It must be noted, in light of the Godbes' argument in this appeal (that they don't need to establish damage to the storm drain grate where Julie Godbe fell), that both the Godbes and the Court restricted any further analysis in this case to "damage" to the "grate in question." The Amended Complaint alleged that the "Defendant knew or should have known that the welded cross bars on the grate in question were ripped off and therefore damaged[.]" SR 0163, Amended Complaint, ¶ 25. The trial



court held that “this matter shall proceed on those allegations in the Plaintiffs’ proposed Amended Complaint, which allege damage to the storm drain grate, which is subject to this litigation[.]” Appellee’s App. at B-1.

After discovery, the City filed a Motion for Summary Judgment asserting that the Godbes had not provided or obtained any facts to suggest that there was damage to the “grate in question,” or that the City had notice of any such damage. SR 0283. Godbes responded to the City’s Motion for Summary Judgment (SR 1319) and filed the Plaintiffs’ Motion for Partial Summary Judgment (SR 0739). As they have consistently done throughout this case, the Godbes responded with the argument that the City was aware of the design issue, asserting that “[i]n 2007, the Standard Specifications for the City of Rapid City required the use of Type B inlets with the ‘V’ grates for protection of bikers in Rapid City.” SR 1319, Plaintiff’s Response to Defendant’s Motion for Summary Judgment, pp. 4-5.

However, in arguing that there was damage to the “grates” (“grates” is specifically used here instead of “Grate 4” or the “grate in question” because this is where the Godbes changed their theory to rely upon damage to grates other than “Grate 4” or the “grate in question”), the Godbes attempted to direct the trial court’s attention to eight grates, all of which were not the grate that Julie Godbe alleges caused her accident.

SR 1319, Plaintiff's Response to Defendant's Motion for Summary Judgment, pp. 11-15.

In granting the City's Motion for Summary Judgment, the trial court held:

The duty of a governmental agency, such as the City, as it concerns damages or defects on a public roadway is controlled entirely by statute. In this case statutory liability is controlled by SDCL 31-32-10. The Plaintiff has argued throughout this matter that in 2007 the City of Rapid City adopted Standard Specifications of the use of Type B inlets which had grates that were not parallel to the roadway, that Don Brumbaugh, the City's 30(b)(6) witness "admitted" that the specification is a safety specification and that the City must comply with it. (Brumbaugh Dep. 74:16-75:9). That Brumbaugh "acknowledged" that once straps are torn off, the grate becomes damaged and in disrepair (Brumbaugh Dep. 81:5-16). And that the city had "notice of the traps created by parallel grates and that they are dangerous." (Brumbaugh Dep. 109:17-23). In summary, the City realized it had a design problem in 2007, adopted a plan to rectify the problem in 2007, and negligently administered that plan, which led to Julie Godbe's accident and injury.

None of these arguments are in any way different than what the Court has previously ruled on in its Memorandum Decision of October 25, 2016.

Appellants' App. at 003-004.

With respect to the Godbes' claim that the grates were damaged, the Court held:

In order to prevail on a motion for Summary Judgment, the moving party must show there is an absence of a genuine issue of material fact...Critical to this case, given the alleged damages and defects to grate on East St. Patrick Street is the issue of whether the City had notice of damage to the grate that Julie Godbe drove her bicycle into. The Court concludes there has been no showing of a dispute of material fact as to that issue, and that the Plaintiff has not alleged

any *material* fact that shows the City had notice of damage to the grate Julie Godbe fell into.

The Plaintiffs have pled in paragraphs 18, 19, 20, 21, 22, 23, 24, 27, and 28 in their Amended Complaint (which notably are no different than the paragraphs included in the original Complaint, which the Court has previously dismissed) allege essentially that the City was aware they had a design problem in 2007 in that the type “B” inlet drains were parallel to the road which was not safe, adopted a plan and policy to change the road, and that the plan was negligently executed and or the grate cross straps were negligently maintained. Lost in all this creative lawyering is any indication the City had notice of damage (by flood, fire, snowplow, etc.) to Grate 4, or for that matter, *any* of the other grates.

...Paragraph 25 in the Amended Complaint states the City “knew or should have known the welded crossbars were ripped off and thereby damaged...” but never put forward any material facts that support that conclusion. How and when did the city know of a snowplow (Plaintiff’s theory) damaged Grate 4 prior to the accident? Plaintiffs keep returning to notice of a design defect and negligent maintenance starting in 2007. This continued argument wholly misses the point. East Saint Patrick Street was built with a wildly dangerous grate system. The City realized it had problems with the grates they had even back in 2007. The City may have welded on Grate 4 before the accident and those wells may have failed. But there has been absolutely no offering from the Plaintiff that the City had notice about the post-welding damage to the Grate...

This Court keep circling back to the issue of notice, but specifically, notice of *what*? Notice of a design flaw that was birthed with the road? A self-realized belief that parallel grates are a horrible idea because of the inherent dangers they posed to bicycles riding on the road? The review of the relevant case law... leads this Court to conclude material/relevant notice does not relate to notice or knowledge of defects in the highway that were birthed with the road. A defective design, no matter how egregious or even obvious, cannot be the basis for municipal liability.

Appellants’ App. at 004-006 (emphasis added).

Leading up to its conclusion, the trial court notes that “[i]n order to prevail the Plaintiffs must show *the City had notice the crossbars on Grate 4 **were welded on prior** to the accident (to avoid the issue of non-liability if the roadway was still in its birth condition), that **they were torn off prior** to the accident, and **that the city had notice of this specific damage to Grate 4.***” Appellants’ App. at 008-009 (emphasis in original). While the trial court ultimately focused on the issue of notice, the trial court’s recitation of what the Godbes must prove is correct:

1. That there were crossbars welded on Grate 4 prior to Julie Godbe’s accident (to avoid the issue of non-liability if the roadway was still in its birthed condition);
2. That the crossbars were torn off of Grate 4 prior to the accident; and
3. That the City had notice of damage to Grate 4.

Godbes’ claims fail as a result of their inability to provide any actual evidence (other than Godbes’ counsel’s arguments) to satisfy all three of these requirements.

### III. STATEMENT OF THE FACTS

Julie Godbe fell while riding her bicycle over a storm drain grate on E. St. Patrick Street in Rapid City. Godbes continuously suggest that for more than 20 years, the City has had “notice” of a “dangerous condition” on the roadway, in that the storm drain grates on E. St. Patrick Street had bars that ran parallel to the curb instead of perpendicular, allowing a bicycle tire to fall into the grate. *Appellants’ Brief*, pp. 13, 23, 24, 35.

This argument was rejected in the trial court's Memorandum Decision (Appellee's App. at A 1-8) and Order granting the City's Motion to Dismiss (Appellee's App. at B 1-10), which Godbes do not appeal to this Court.

As set forth above, both the trial court and the Godbes' Amended Complaint restricted further proceedings in this case to the "grate in question," Grate 4. Yet, the photographs the Godbes provided to this Court in their Appellants' Brief consist of grates: 11, 14, 15, C, D, F, and G. *Appellant's' Brief*, pp. 14-17; Appellee's App. at C 11, 14, 15, 18, 19, 21, 22. All of the grates referenced by Godbes lie East of Rapid Creek, whereas the "grate in question," Grate 4 is West of Rapid Creek.

In providing the mapping, the trial court had the benefit of a blown-up map of Appellee's App. at D 1-3. So as to provide this Court with the best depiction, the City has provided the map both as a whole, and in two parts, one lying primarily West of Rapid Creek (with no crossbars) and one lying primarily East of Rapid Creek, where all the crossbars are found.



## West of Rapid Creek



## East of Rapid Creek



Because there is no evidence that there were any crossbars or straps welded onto Grate 4 prior to Julie Godbe's accident, Godbes cannot establish damage, as is their burden under SDCL § 31-32-10, or that the City had notice of the non-existent damage. Such is fatal to the Godbes' claims.

## **ARGUMENT**

### **I. THE TRIAL COURT CORRECTLY DETERMINED THAT THE GODBES' CLAIMS AGAINST THE CITY MUST FAIL, AS THE GODBES DID NOT ESTABLISH TWO FUNDAMENTAL PREREQUISITES TO THEIR CLAIM: (1) THAT JULIE GODBE'S ACCIDENT WAS CAUSED BY "DAMAGE" TO THE ROADWAY, AND (2) THAT THE CITY HAD KNOWLEDGE OF THE ALLEGED "DAMAGE" THAT CAUSED JULIE GODBE'S ACCIDENT**

#### **A. STANDARD OF REVIEW**

This Court's standard of review for summary judgment is well settled:

In reviewing a grant or a denial of summary judgment under SDCL 15-5-56(c), [the Court] must determine whether the moving party demonstrated the absence of any genuine issue of material fact and showed entitlement to judgment on the merits as a matter of law. The evidence must be viewed most favorably to the nonmoving party and reasonable doubts should be resolved against the moving party. The nonmoving party, however, must present specific facts showing that a genuine, material issue for trial exists. [The Court's] task on appeal is to determine only whether a genuine issue of material fact exists and whether the law was correctly applied. If there exists any basis which supports the ruling of the trial court, affirmance of a summary judgment is proper.

*Hanna v. Landsman*, 2020 S.D. 33, ¶ 21 (citations omitted). In this case, the Court must also deal with the existence of a duty in a negligence case

under SDCL § 31-32-10. “The existence of a duty in a negligence action is a question of law subject to de novo review by this Court.” *Hohm v. City of Rapid City*, 2008 S.D. 65, ¶ 3, 753 N.W.2d 895, 898 (citing *State Auto Ins. Companies v. B.N.C.*, 2005 SD 89, ¶ 20, 702 N.W.2d 379, 386).

#### B. THE HISTORY OF GOVERNMENTAL HIGHWAY LIABILITY

As early as 1894, this Court has held that counties are not liable for defects in highways absent legislation to the contrary. *Hohm*, 2008 S.D. 65, ¶ 5 (citing *Bailey v. Lawrence County*, 5 S.D. 393, 59 N.W. 219 (1894)). In *Bailey*, this Court affirmed a demurrer granted by the trial court dismissing the claims brought against Lawrence County. The plaintiff alleged, among other facts, that “the bridge upon which the injury occurred was erected and constructed by, and under the direction of, the defendant county” and that “by reason of the negligence of the defendant, and disregard of its said duty, [the bridge] had become unsafe, fallen out of repair, and was dangerous and unfit to be used, to the knowledge of the defendant, at the time of the injury complained of.” *Bailey*, 59 N.W. at 219–20. The defendant county alleged only that “no county is liable for injuries from a defective bridge on a public highway, without regard to the fact of whether or not the county, or its agents and servants, had knowledge of such defect.” *Id.* at 220. The Court agreed, holding that “while it is true that the legislature has imposed upon counties the duty of keeping in repair the bridges on the public

highways, and provided the method for raising revenue by taxation requisite for such purpose, [] to hold that the counties are thereby made liable for injuries caused by defects in such bridges, in the absence of legislation making them so liable, would be a species of judicial legislation.” *Id.* at 221. “The legislature not having, in terms, imposed this liability upon counties, we must, under the great weight of authority hold that no such liability exists in this state.” *Id.* at 222. Thus, *Bailey* started the progeny of authority in South Dakota related to governmental liability for defects in a roadway.

As the law has developed since 1894, the simple analysis is as follows, there is no common law duty of municipalities with regard to streets or highways. *Hohm*, 2008 S.D. 65, ¶ 20. The enactment of SDCL § 31-32-10 (and its predecessors) abrogated any such duty and a municipality can only be found liable if there is a violation of that statute. *Id.*

In 1915, the South Dakota Legislature first enacted legislation which has evolved into the present-day statute. The rule provided:

§ 1. Guards Erected—Repairs made. It shall be the duty of the road supervisors of any *township, town or city*, and the county commissioners *of any county* not fully organized into civil townships, to keep all public roads and highways, culverts and bridges in such condition as to render them safe and passable and free from danger of accidents or injury to persons or property, while in the lawful use thereof, and in case such roads, highways, culverts or bridges shall become in whole or in part destroyed or out of repair by reason of floods, fires or any other cause, to such an extent as to endanger the safety of public travel, it shall be their

duty upon receiving notice thereof to cause to be erected, for the protection of travel and public safety, within twenty-four hours thereafter, substantial guards over such defects, or across such roads or highways, of sufficient height, width and strength to warn and guard the public from accident or injury to the person or property thereof, and it shall also be their duty to repair the same within a reasonable time thereafter. It shall also be the duty of any such supervisors to protect any abandoned public road or highway with substantial guards as provided in this act.

...

§ 3. Damages. Any person shall have a cause of action against such *city, town, township or county* for injury to persons or property sustained by reason of any violation of the provisions of this act...

*Hohm*, 2008 S.D. 65, ¶ 9 (emphasis in original) (citing 1915 S.D.Sess.L. ch. 210).

In 1939, the code was replaced by SDC § 28.0913, a statute similar to today's version of SDCL § 31-32-10. SDC § 28.0913 provided:

In case any highway, culvert, or bridge shall become in whole or in part destroyed or out of repair by reason of floods, fires, or other cause to such an extent as to endanger the safety of public travel, it shall be the duty of the governing body or board under statutory duty to maintain such highway, culvert, or bridge upon receiving notice thereof to cause to be erected for the protection of travel and public safety, within twenty-four hours thereafter, substantial guards over such defect or across such highway of sufficient height, width, and strength to guard the public from accident or injury and to repair the same within a reasonable time thereafter. It shall also be the duty of such governing body or board to guard any abandoned public highway, culvert, or bridge in like manner.

Any person who shall sustain injury to person or property by reason of any violation of this section shall have a cause of action against the *county, township, city, or town* as the case may be for such damages as he may have sustained.



*Hohm*, 2008 S.D. 65, ¶ 11 (citing SDC § 28.0913). As this Court noted in *Hohm*, the changes in SDC § 28.0913 were significant for two reasons:

- (1) SDC § 28.0913 “removed the broad duty imposed by § 8589 to keep public highways safe and free from danger, retaining only the limited duty to guard and repair highways that were destroyed or out of repair;” and
- (2) “the change applied not only to counties and townships, *but also to cities and towns.*”

*Id.* at ¶¶ 12-13 (emphasis in original) (citations omitted). The present day version of SDCL § 31-32-10 (which was also the version in existence on the date of Julie Godbe’s accident) provides as follows:

If any highway, culvert, or bridge *is damaged* by flood, fire or other cause, to the extent that it endangers the safety of public travel, the governing body responsible for the maintenance of such highway, culvert, or bridge, shall within forty-eight hours of receiving notice of such danger, erect guards over such defect or across such highway of sufficient height, width, and strength to guard the public from accident or injury and shall repair the damage or provide an alternative means of crossing within a reasonable time after receiving notice of the danger. The governing body shall erect a similar guard across any abandoned public highway, culvert, or bridge. Any officer who violates any of the provisions of this section commits a petty offense.

(emphasis added).<sup>1</sup>

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<sup>1</sup> Godbes allege that the change in language from “shall become in whole or in part destroyed” to “is damaged” somehow evidences a determination by the Legislature that the “in whole or in part” language was surplusage. Godbes have provided no support for this assertion, nor would this assertion, even if true, impact the Court’s decision. In fact, Godbes’ entire analysis is, itself, flawed as Godbe’s argue that the “in whole or in part” language would add nothing to the meaning of “damage.” But, the Legislature never used the “in whole or in part” language to modify “damage.” The Legislature used the “in whole or in part” language to modify “destroyed.” But, the Legislature chose to get rid of this language and insert “is damaged.” The “in whole or in part destroyed” language became obsolete and has no impact on this case.

After the enactment of SDC § 28.0913 in 1939, this Court has identified and analyzed the duties of governmental agencies as it concerns roadway maintenance on numerous occasions. In *Gulbranson v. Flandreau Twp.*, the Court held that “the source of a public entity's liability for damages resulting from a defective highway is statutory.” 458 N.W.2d 361, 362 (S.D. 1990) (citing *Dohrman v. Lawrence Co.*, 82 S.D. 207, 209, 143 N.W.2d 865, 867 (1966)). The Court went on to state that “this Court has long held that SDCL 31-32-10 and 31-32-11<sup>2</sup> are the statutes which prescribe the nature and extent of the duty imposed upon public entities to protect the public from injury occasioned by defective roads.” *Id.* (citing *Dohrman*, 143 N.W.2d at 867 (1966); *Lipp v. Corson Co.*, 76 S.D. 343, 346, 78 N.W.2d 172, 174 (1956)).

In *Reaney v. Union County*, the Court analyzed the 1939 change to SDC § 28.0913. 69 S.D. 392, 395, 10 N.W.2d 762, 763, *adhered to on reh'g*, 69 S.D. 488, 12 N.W.2d 14 (1943). In *Reaney*, the plaintiff was a passenger in an automobile who drove through the guardrail of an approach to a bridge. *Id.* at 762. The plaintiff was injured and sued the

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It is assumed that Godbes make this argument, however thin, to argue that Godbes need not prove damage to Grate 4, but rather any grate or any portion of the roadway. Such an argument is barred under the cases interpreting SDCL § 31-32-10 and the Godbes' requirement to establish causation. Godbes' argument that damage to a different portion of the roadway than where Julie Godbe's injury occurred contains such a tenuous and strained nexus (if any nexus at all) between the damage and the injury such that reasonable minds cannot differ that the damage to others grates did not cause Julie Godbe's injuries.

<sup>2</sup> SDCL § 31-32-11 was repealed in 1986.

county, alleging that “an insubstantial guardrail and a sharp left-hand curve leading immediately to a narrow wooden approach to the bridge rendered the highway dangerous and unsafe.” *Id.* The trial court directed a verdict in favor of the county. On appeal, the issue addressed by this Court was “[w]hether, in enacting SDC 28.0913, the legislature intended to abridge the liability of counties for injuries resulting from defects in the county highway system.” *Id.* The Court noted that “the revision [to SDC § 28.0913] omits the provision of § 8589, *supra*, charging the county with the duty ‘to keep the public highways, culverts and bridges in such condition as to render them safe, passable and free from danger of accident or injury to persons or property while in the lawful use thereof;’ and retains the provisions charging it with the duty to guard and repair highways which become in whole or in part destroyed or out of repair by reason of floods, fires, or other causes, and with the duty to guard abandoned highways.” *Id.* at 763. The Court held:

The revised text is not a mere rearrangement of the substance of the old statutes. We are not dealing with a change of phraseology and punctuation. It is not just a case of the omission of words; meaning has been obliterated. The broad general duty to maintain a reasonably safe highway has been eliminated, and the specific duty to guard and repair a damaged or destroyed highway has been retained. To read the more extensive duty, out of language which clearly and plainly but describes the lesser duty, would be to distort the words employed by the legislature. This we are not at liberty to do. The conclusion is unavoidable that the liability of the county has been abridged by revision.

*Id.* at 764. The Court determined that even assuming “that the county had been derelict in its duties,” “these derelictions on the part of the county cannot, by legitimate construction, be brought within the embrace of the language of SDC 28.0913. The highway did not become defective in the described respects because it had ‘become \*\*\* destroyed or out of repair by reason’ of any cause. These defects were inherent in the design or plan of the highway the county provided the public, and we conclude that the present statute does not afford plaintiff a remedy for injuries proximately caused thereby.” *Id.*

In *Dohrman v. Lawrence County*, the plaintiff, as special administrator of an estate, sued the county and highway superintendent for the wrongful death of his decedent, who was killed when he drove off a steep hill on a sharp curve. 82 S.D. 207, 143 N.W.2d 865, 866 (1966). Plaintiff’s theory of liability was that defendants were negligent in failing to keep and maintain the road in a reasonably safe condition and in not posting it with warning signs. *Id.* Plaintiff also alleged that defendants had notice and knowledge of the condition of the road for several years before the accident. *Id.* On a Motion to Dismiss filed by the county, the trial court dismissed plaintiff’s claims, and this Court affirmed. In doing so, the Court reaffirmed that there is no common law right of action against a public entity for damages resulting from a defective highway,

but instead, the sole basis for governmental liability is found in SDC 28.0913 (now SDCL § 31-32-10). The Court held:

The statute provides the nature and extent of the duty imposed upon the county to protect the public from injury occasioned by defective highways and bridges and consequently the standard of care cannot be predicated on principles of common law negligence. The county's liability must be determined from the standard of conduct imposed by the statute and not the standard of a reasonably prudent person.

*Id.* at 867 (emphasis added). Citing the repeal from the statute of a public entity's duty to keep roads safe, the Court found that their duty is confined to "the specific duty to guard and repair a damaged or destroyed highway." *Id.* (citing *Reaney, supra*). "A failure to install adequate signs warning of danger incident to a sharp curve or a steep hill is not a violation of duty under the statute." *Id.*

This Court has repeatedly affirmed this interpretation and application of the statute. In *Zens v. Chicago, Milwaukee, St. Paul & Pac. R. Co.*, the plaintiff was injured when the bus in which he was riding hit the soft shoulder of the defendant township's road, went down the steep grade of the adjacent drainage ditch, and rolled partially on its side. 386 N.W.2d 475, 476 (S.D. 1986). Plaintiff sued the township, alleging negligent construction and maintenance of the road, and alleging the road was "out of repair" by reason of the location and construction of the drainage ditch. *Id.* at 477. Affirming its prior holdings, this Court stated:



Township's liability, if any, is thus determined by applying the standard of conduct imposed by SDCL 31-32-10, rather than the standard of conduct of a reasonably prudent person because there is no common law right of action against a county or township for recovery of damages resulting from a defective highway.

*Id.* at 478 (citations omitted). “No liability arises from inherent defects in the design or plan of the highway provided the public.” *Id.* at 478. “This is because statutory liability arises only in case a highway becomes out of repair and does not arise when a highway is defectively birthed.” Thus, no liability is imposed for failure to install adequate signs warning of highway dangers, and no liability is imposed for failure to install adequate guardrails because these are inherent defects in the highway.” *Id.* (internal citations omitted) (emphasis added).

In *Wilson v. Hogan*, the Court held that “the duty [identified in SDCL § 31-32-10] is only to warn of danger and to make reasonably timely repairs *upon notice that a damaged roadway is creating a safety hazard.*” 473 N.W.2d 492, 496 (S.D. 1991) (emphasis added). “The statute creates no duty to design or construct a roadway safely in the first place.” *Id.* (emphasis added) (citing *Gulbranson*, 458 N.W.2d at 362; *Zens*, 386 N.W.2d at 478). “Beyond this narrow statutory duty, there is no common law duty that would permit a ‘right of action against a [public entity] for recovery of damages resulting from a defective highway.’” *Id.* (citing *Zens*, *supra*).

In *Hohm*, the Court conducted a detailed analysis of SDC § 28.0913, SDCL § 31-32-10, and all of the prior caselaw analyzing the statutes. 2008 S.D. 65. The Court expanded the prior holdings related to SDC § 28.0913 and SDCL § 31-32-10 to municipalities and specifically the City of Rapid City. *Id.* at ¶ 20. The Court analyzed the development of statutory liability as follows:

Applying these principles to the original 1915 legislation on liability for negligence in highway maintenance, we observe that chapter 210 imposed duties on the road supervisors of “any township, town or city,” and on county commissioners to keep highways safe, passable and free from danger; to erect guards over substantial defects; and to complete repairs when such highways were destroyed or fell out of repair. 1915 SDSessL ch 210, § 1 (emphasis added)...

Clearly, the detailed provisions of chapter 210 express legislative intent to design a complete scheme of responsibility and liability for highway maintenance such that its requirements should be the only ones that were obligatory. *Robinson v. Minnehaha County*, 65 S.D. 628, 277 N.W. 324 (1938)...

Consequently, chapter 210 did not merely restate the common-law duty of municipalities as to maintenance of streets, it prescribed the new statutory duties for cities, towns, counties and townships, enacted criminal penalties, and created a civil cause of action for violation of those duties. To paraphrase the Court's conclusion in *Burnett*, it is clear from the degree of minuteness with which the legislature went into the whole subject, that the act was intended to be exclusive, and that it was the intent of the legislature to repeal any other acts or provisions of common law pertaining to the same subject.

Even if we were to determine that some vestige of the common-law liability of municipalities survived the enactment of chapter 210 in 1915, we hold that it was fully abrogated by the 1939 statutory revisions that eliminated the broad duty to maintain reasonably safe highways and confined counties and townships, as well as cities and towns, to the more limited duty to guard and repair highways that are damaged or destroyed. See 1939 SDC §

28.0913; *Reaney*, 69 S.D. at 396–97, 10 N.W.2d at 764; *Dohrman*, 82 S.D. at 210, 143 N.W.2d at 867.

*Id.* at ¶¶ 16-20.

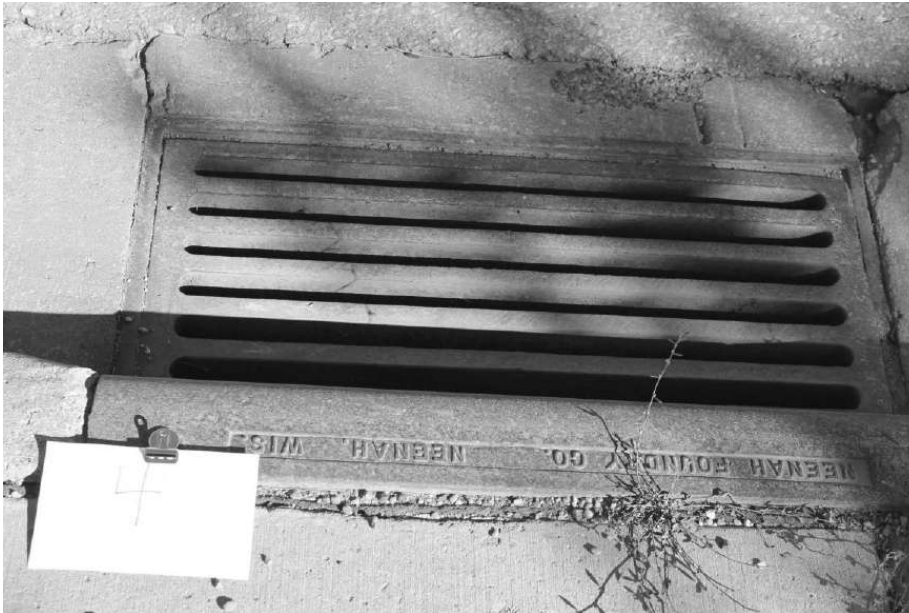
Time and time again, this Court has been clear. The City’s liability in this case stems solely and entirely from SDCL § 31-32-10. In order to establish such a duty, Godbes must prove both that there was damage to the roadway that caused Julie Godbe’s accident, and that the City had notice of such damage.

Although the trial court has twice told the Godbes that their argument related to the City’s lack of use of type “B” inlet or “Type V” grate is a design issue for which there is no liability (one of which times was in a decision not addressed or appealed by Godbes), the Godbes again point this Court to the City’s “design specifications” for new construction. *Appellants’ Brief*, p. 9. Godbes allege that the City has been aware of this “dangerous condition” for more than 20 years. *Appellants’ Brief*, pp. 13, 23, 24, 35. Yet, this is the exact same argument squarely rejected by this Court in *Dohrman*, 143 N.W.2d at 866-67. Godbes’ claim related to the City’s use of parallel bars, a design issue, must be put to rest.

C. THE GODBES DID NOT PROVIDE ANY FACTS TO ESTABLISH THAT JULIE GODBE’S ACCIDENT WAS CAUSED BY “DAMAGE” TO THE ROADWAY

Godbes attempt to establish “damage” to Grate 4 by providing the Court with evidence of damage to other grates. On a basic level, Godbes

would have this Court believe that because there may have been damage to other grates, there must have also been damage to Grate 4. While still questionable, this argument may have been more persuasive if there wasn't specific evidence related to Grate 4, which Godbes choose to ignore. Godbes' own submission of photographs of other grates clearly shows that if those grates had welded crossbars, evidence of those crossbars remains. *Appellants' Brief*, pp. 14-17. Yet, there is absolutely no evidence of crossbars on Grate 4.



Appellee's App. at C 4.

Godbes' expert witness testified that he believed that every grate that had parallel bars was "in a state of damage and disrepair."

Q: So, Carter, am I to understand you correctly that it's your opinion that every grate is parallel – meaning the grates that run parallel with the curb – that you believe those grates are what?

A: They are – as of the date of – the photo was taken, they were in a state of damage and disrepair.

SR 1349, Plaintiffs' Response to Defendant's Statement of Undisputed Material Facts, p. 6, Response to SMF 16. The only "damage" noted by Godbes' expert was that the grates were "not protected." SR 0320, Affidavit of Robert J. Galbraith, Exhibit 10, p. 2. Godbes' expert was not a welding expert and could not offer an opinion on whether Grate 4 had been welded on, but did testify that "I don't think there is enough evidence to show that every grate had bars welded across it." SR 0320, Affidavit of Robert J. Galbraith, Exhibit 10, p. 4.

The City's expert was a "Qualified Welding Inspector" through the American Welding Society and a current welding instructor at Western Dakota Technical Institute. SR 0309, Affidavit of Charles Leeper, ¶ 1; Exhibit 1. Mr. Leeper concluded that "[c]onsistent with my findings, by relying on my skill, knowledge, experience, education, and training in welding, along with my qualification in welding and upon thorough analysis, the grate in question subject to this litigation had never been welded on before Ms. Godbe's accident[.]" SR 0309, Affidavit of Charles Leeper, ¶ 4.<sup>3</sup> Mr. Leeper specifically identified the "evidence of fillet weld penetration on the grates to the East of Rapid Creek, compared to the lack thereof on Grate 4.

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<sup>3</sup> While Godbes challenged the qualifications of Mr. Leeper, it is clear from the record itself that Mr. Leeper is more than qualified and the Godbes failed to obtain or appeal any determination related to Mr. Leeper's qualifications.





SR 1854, Affidavit of Robert J. Galbraith, Exhibit 18.

There simply is no evidence of any “damage” to Grate 4 prior to Julie Godbe’s accident, other than perhaps the speculative assumptions and leaps made by Godbes’ counsel. But, this Court has consistently held non-movants to a higher standard. “The nonmoving party...must

present specific facts showing that a genuine, material issue for trial exists.” *Hanna, supra*.

Godbes next argue that Godbes are not required to show damage to Grate 4, only damage to the E. St. Patrick Street roadway. Godbes disagree that SDCL § 31-32-10 “requires that Godbe must prove that they received notice of the damage to the specific grate that caused Julie’s injuries.” *Appellants’ Brief, p. 29*. Godbes ignore both the language of SDCL § 31-32-10 and the elements of negligence in general. SDCL § 31-32-10 provides that “[i]f any highway, culvert, or bridge is damaged by flood, fire or other cause, to the extent that it endangers the safety of public travel, the governing body responsible for the maintenance of such highway, culvert, or bridge, shall within forty-eight hours of receiving notice of such danger, erect guards over such defect or across such highway of sufficient height, width, and strength to guard the public from accident or injury and shall repair the damage or provide an alternative means of crossing within a reasonable time after receiving notice of the danger[.]” (emphasis added). SDCL § 31-32-10, by its very language, absolutely requires the governing body to protect from the damage for which it has notice in that the governing body must “erect guards over such defect,” but no such requirement is included that requires the governing body to erect guards over defects for which the body was not provided notice.

The slippery slope of the Godbes' request to this Court to expand the governmental liability in SDCL § 31-32-10 would be astronomical. Under Godbes' theory, notice of damage to a storm drain grate on Omaha Street/Highway 44 in downtown Rapid City would place all of Highway 44 in a state of "damage" or "disrepair." Under Godbes' theory, that damage in downtown Rapid City would create governmental liability for damage to a storm drain grate in Rapid Valley (on Highway 44) 5 miles away, a bridge failure near the Rapid City Regional Airport (on Highway 44) 10 miles away, or elsewhere on Highway 44 which traverses the entire length of the State of South Dakota, through Lennox and into Interstate 29.

This Court has addressed this issue. In *Kiel v. DeSmet Twp.*, this Court held that "[o]bviously, the main obligation [] under this statute (SDCL 31-32-10) is to repair all defects in a [] highway which endanger the safety of public travel. Incidentally the statute also imposes a secondary duty [] to erect temporary guards over defects, where needed, until repairs are made." 90 S.D. 492, 496, 242 N.W.2d 153, 155 (1976). There is a distinction, however, between warning signs (or grates) that have been erected (or welded) and warning signs (or grates) that have not been erected (or welded). As the Court holds:

‘Significantly, the warning signs involved in the Reaney and Dohrman cases had never been in existence so their absence could not be considered a defect which damaged, destroyed, or caused the highway to be out of repair. In the present action it is alleged a

warning sign incident to the dangerous curve had originally been installed and maintained. During some road construction the warning sign was removed and never replaced.

‘Unless the dangerous curve was eliminated by the road construction the county was under a duty to replace the warning sign as directed in SDC 1960 Supp. 28.0901 (now SDCL 31-28-6):

...

‘It may be assumed that public authorities in the discharge of their duties under this statute have a measure of discretion in determining what curves, crossings, and other points of danger require a warning sign and failure to erect or install one is not ordinarily actionable, Reaney v. Union County and Dohrman v. Lawrence County, *supra*.

*Id.* at 496 (emphasis added). Godbes’ argument that they must prove damage to the “roadway” and not the specific grate flies in the face of *Kiel*. Even if the City had installed crossbars on the grates East of Rapid Creek (it did not), the failure to install or erect grates West of Rapid Creek is not actionable. Because crossbars West of Rapid Creek “had never been in existence...their absence could not be considered a defect which damaged, destroyed, or caused the highway to be out of repair.” *Kiel, supra*.

The general principles/elements of negligence itself similarly preclude such a result. “The three necessary elements of actionable negligence are (1) a duty on the part of the defendant; (2) a failure to perform that duty; and (3) an injury to the plaintiff resulting from such a failure.” such a result.” *Kuehl v. Horner (J.W.) Lumber Co.*, 2004 S.D. 48, ¶ 10, 678 N.W.2d 809, 812. While causation is generally a question

reserved for the jury, where reasonable minds cannot differ, the question is for the Court. *Howard v. Bennett*, 2017 S.D. 17, ¶ 8, 894 N.W.2d 391, 395. On this issue, reasonable minds cannot differ - if the City had notice of damage to Grate 15, under no set of facts could it be alleged or proven that Grate 15 caused Julie Godbe's injury when all parties agree Julie Godbe fell at Grate 4.

Godbes make several additional arguments to attempt to "muddy the water" in hopes that they can create enough confusion for the Court to state there must be a fact question which precludes summary judgment. None of these arguments have any bearing on the analysis set forth above, nor are they even factually accurate. Godbes argue throughout their brief that the City "destroyed" the grates and "evidence of its wrongdoing." *Appellants' Brief*, pp. 23, 27, 28, 29, 36. Godbes' suggestion that the City destroyed the grates is baffling in light of the fact that the City's counsel, Mr. Galbraith, and Godbes' counsel, Mr. Beardsley, looked at the grates together on November 28, 2018. SR 2049, Affidavit of Robert J. Galbraith, ¶¶ 6-8.

Godbes then argue that the City admitted in its Answer that the City had welded crossbars on Grate 4 prior to Julie Godbe's accident. *Appellants' Brief*, pp. 25-26. Godbes cite the Court to paragraph 8 of the Answer to Amended Complaint. *Appellants' Brief*, p. 25. Paragraph 8 provides:



As it concerns paragraphs 21, 25, 26, and 28, the Defendant **denies** that the “crossbars” as alleged by the Plaintiffs were welded onto the storm drain grate on or before July 27, 2015; further, Defendant affirmatively alleges that the placement of “crossbars” on the storm drain grate was a subsequent remedial measure which does not constitute “damage” as the same is identified in SDCL § 31-32-10 and is inadmissible in any event under SDCL § 19-19-407.

(emphasis added). SR 0172, ¶ 8. Godbes then argue that “[b]ut while the City claims the crossbars were placed as a remedial measure, this cannot be the case.” *Appellants’ Brief*, p. 25. The creativity in Godbes’ argument, while interesting, is entirely flawed. Godbes argue that “[a]n attorney can make an admission that is binding upon his client and relieves the opposing party of the duty to present evidence on that issue.” *Appellant’s Brief*, p. 26. And yet, somehow, Godbes attempt to persuade this Court that an Answer that specifically **denies** the allegation Godbes seek to allege, somehow constitutes an admission of that allegation. It is true that after Julie Godbe’s accident, Godbes’ counsel (who she clearly hired after her accident) sent numerous letters to the City demanding that the City do something about the grates, and the City welded straps on E. St. Patrick Street after the photographs were taken in October of 2015. SR 1854, Affidavit of Robert J. Galbraith, ¶¶ 4-5, Exhibits 3 and 4; SR 2049, Affidavit of Robert J. Galbraith, ¶¶ 2-8; Exhibits 1 through 5. In any event, as alleged in paragraph 8 of the Answer to Amended Complaint, a subsequent remedial measure is “[w]hen measures are taken that would have made an earlier injury or harm less likely to occur,

evidence of the subsequent measures is not admissible ...” SDCL § 19-19-407.

Finally, Godbes allege that all of the City employees agree that the “City would not weld crossbars on a few grates and skip others” and that “all agreed that the welding took place before the incident.” *Appellants’ Brief*, p. 25. Essentially, Godbes’ counsel asked the city employees to look at the same photographs Godbes have now provided to this Court of the grates East of Rapid Creek. While Godbes provide the Court with a citation to the Appellants’ Appendix, Godbes don’t provide the Court with the actual testimony. A portion of the questioning of Don Brumbaugh, the City’s 30(b)(6) designee is included below:

Q: And I’m going to show you, and I’m going to start with number 10 and we’re going to come back. But number 10 is on St. Patrick Street and –

A: Between Sedivy and Creek Drive?

Q: Yes.

A: Okay.

Q: And you’ll see the reference on Exhibit 10 to number 10 [which is Grate 10], correct?

A: I see that.

...

Q: So I just want to turn to 10 because I’m not going to cover all of these, but 10 is on your Google map and it’s on St. Patrick Street and it’s to the east of the grate in question, number 4, correct?

A: Correct.

Q: And on this particular grate, it looks like weld marks. Do you see that?

A: Yes.

Q: Turn to number 11, Exhibit 11, number 11. That has some bars on it, straps on it and some that are missing, correct?

A: Yes.

Appellants' App. at 30. Grates 10 and 11 are included here for the Court's convenience.



Appellee's App. at C 10.



Appellee's App. at C 11.

Indeed, Brumbaugh did testify that the weld on Grate 11 appeared to be old:

Q: Well, then the welds we're looking at on Exhibit 11 which were taken in mid October, 2015, are not new welds, are then?

A: No. Those appear to be old to me.

Appellants' App. at 032. But, as set forth throughout this brief, as well as the numerous briefs to the trial court, Godbes attempt to use Don Brumbaugh, or other City employees' testimony related to grates 10, 11, 13, 14, 15, A, C, D, F, and G to somehow suggest that Grate 4 was in the same condition or underwent the same fate is misleading and contrary to the actual evidence involving Grate 4, which Godbes chose not to provide

to this Court. As Don Brumbaugh identified, from those grates that did have crossbars on them (East of Rapid Creek), those crossbars were welded by someone other than the City. SR 1849, Affidavit of Don Brumbaugh, ¶ 3. At no time between 2004 (when the City acquired E. St. Patrick Street from the South Dakota Department of Transportation) and July 27, 2015 (the date of Julie Godbe's accident), was Mr. Brumbaugh (the Superintendent of Streets for the City), aware of the City ever welding bars or straps across those grates. SR 1849, Affidavit of Don Brumbaugh, ¶¶ 4-5.

D. THE GODBES DID NOT PROVIDE ANY FACTS TO ESTABLISH THAT THE CITY HAD KNOWLEDGE OF THE ALLEGED "DAMAGE" THAT CAUSED JULIE GODBE'S ACCIDENT

As a fundamental principle, the City could not have notice of damage that does not exist. The trial court pondered this very question:

This Court keep circling back to the issue of notice, but specifically, notice of what? Notice of a design flaw that was birthed with the road? A self-realized belief that parallel grates are a horrible idea because of the inherent dangers they posed to bicycles riding on the road? The review of the relevant case law... leads this Court to conclude material/relevant notice does not relate to notice or knowledge of defects in the highway that were birthed with the road. A defective design, no matter how egregious or even obvious, cannot be the basis for municipal liability.

Appellants' App. at 006. Even in their submission to this Court, Godbes still have not answered this basic question, or otherwise asserted the City had notice (actual or constructive) of anything other than design standards of storm drain grates. The City's knowledge of a better design,



even if the City has not yet implemented that knowledge (the design standards applied to new construction which hadn't been completed on E. St. Patrick Street), simply cannot lead to municipal liability.

Godbes now, for the first time, assert that the City's knowledge can be actual or constructive. As this Court has held, "[o]rdinarily an issue not raised before the trial court will not be reviewed at the appellate level." *Ronan v. Sanford Health*, 2012 S.D. 6, ¶ 14, 809 N.W.2d 834, 837 (citing *State v. Gard*, 2007 S.D. 117, ¶ 15, 742 N.W.2d 257, 261). "The trial court must be given an opportunity to correct any claimed error before we will review it on appeal." *Id.* The term, "constructive notice" does not appear in the record below. In any event, even if the Court considers the argument, Godbes claim still fails as Godbes still must answer the basic question: what evidence exists in the record that the City had actual or constructive notice of damage to Grate 4? Godbes have not, and cannot, provide an answer to that question without referring to the design standards, for which the City has no liability pursuant to SDCL § 31-32-10.

Because the Godbes did not provide any evidence of "damage" to Grate 4, the storm drain grate where Julie Godbe's accident occurred, and because the Godbes did not provide any evidence that the City had notice, actual or constructive of any such damage, the trial court's Order

of Dismissal related to the Godbes' claims against the City must be affirmed.

### **CONCLUSION**

For the foregoing arguments and authority set forth herein, the Appellee, the City of Rapid City, respectfully requests that this Court affirm the trial court's entry of summary judgment in favor of the City of Rapid City and Order of Dismissal.

Dated this 17<sup>th</sup> day of July, 2020.

NOONEY & SOLAY, LLP

/s/ Robert J. Galbraith  
JOHN K. NOONEY  
ROBERT J. GALBRAITH  
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### **CERTIFICATE OF COMPLIANCE**

Pursuant to SDCL § 15-26A-66(b)(4), I certify that this Appellee's Brief complies with the type volume limitation provided for in the South Dakota Codified Laws. This brief contains 9,978 words and 48,533 characters ***with no spaces***. I have relied on the word and character count of our word processing system used to prepare this Brief.

Dated this 17<sup>th</sup> day of July, 2020.

NOONEY & SOLAY, LLP

/s/ Robert J. Galbraith

ROBERT J. GALBRAITH

Attorneys for Appellee, City of Rapid City  
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robert@nooneysolay.com

IN THE SUPREME COURT  
OF THE STATE OF SOUTH DAKOTA

<p>JULIE GODBE and DAVID GODBE,</p> <p style="text-align:center">Plaintiffs/Appellants,</p> <p style="text-align:center">vs.</p> <p>CITY OF RAPID CITY, SOUTH DAKOTA,</p> <p style="text-align:center">Defendant/Appellee.</p>	<p style="text-align:right">Appeal No. 29251</p> <p style="text-align:center"><b>CERTIFICATE OF SERVICE</b></p>
--	---

I, Robert J. Galbraith, attorney for the Appellee, City of Rapid City, South Dakota, hereby certify that a true and correct copy of the foregoing *Appellee's Brief* was served by email on the 17<sup>th</sup> day of July, 2020 to:

STEVEN C. BEARDSLEY  
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NOONEY & SOLAY, LLP

/s/ Robert J. Galbraith  
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**APPELLEE’S APPENDIX**

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## **Seventh Judicial Circuit Court**

P.O. Box 230  
Rapid City SD 57709-0230  
(605) 394-2571

---

### **CIRCUIT JUDGES**

Craig A. Pfeifle, Presiding Judge  
Matthew M. Brown  
Jeff W. Davis  
Wally Eklund  
Robert Gusinsky  
Heidi L. Linnagren  
Robert A. Mandel  
Jane Wipf Pfeifle

### **MAGISTRATE JUDGES**

Scott M. Bogue  
Todd J. Hyronimus  
Bernard Schuchmann  
Marya V. Tellinghuisen

### **COURT ADMINISTRATOR**

Kristi W. Erdman

October 25, 2016

John Nooney  
632 Main Street  
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Steven and Michael Beardsley  
4200 Beach Drive, Suite 3  
Rapid City, SD 57709

**RE: *Godbe & Godbe v. City of Rapid City, SD*; Civil No. 16-744; Motion to Dismiss**

Counsel:

Defendant motioned this Court to dismiss the complaint pursuant to South Dakota Codified Laws ("S.D.C.L.") § 15-6-12(b)(5), claiming that Plaintiffs have not alleged facts to sustain a claim for either negligence or loss of consortium. The Court considered the record, briefs and the arguments of counsel, and being fully advised as to all matters pertinent hereto, for the reasons set forth below, the Defendant's motion to dismiss is **GRANTED**.

### **Background**

This action arose after Plaintiff, Julie Godbe, fell while riding her bicycle on East Saint Patrick Street in Rapid City, SD on July 27, 2015. The fall occurred because the front tire of her bicycle fell into a storm drain grate. The

roadway where the fall occurred was on a public roadway within the city. Godbe suffered serious physical and emotional injuries as a result of the accident. Plaintiffs Julie and David Godbe filed suit claiming Negligence and Negligent Maintenance and Repair by the City of Rapid City, and Loss of Consortium. Defendant filed a motion to dismiss based on Plaintiffs' failure to state a claim upon which relief may be granted.

### **Analysis**

A motion to dismiss for failure to state a claim upon which relief can be granted, pursuant to S.D.C.L. § 15-6-12(b)(5), “tests the law of a plaintiff’s claim, not the facts which support it.” *Brooks v. Milbank Ins. Co.*, 2000 S.D. 16, ¶ 14, 605 N.W.2d 173, 177 (quoting *Thompson v. Summers*, 1997 S.D. 103, ¶ 5, 567 N.W.2d 387, 390). When considering a motion to dismiss, the court must accept as true all facts properly pleaded in the complaint and any conclusions that the court can reasonably draw from those facts. *N. Am. Truck & Trailer, Inc. v. M.C.I. Commc’n Servs., Inc.*, 2008 S.D. 45, ¶ 6, 751 N.W.2d 710, 712. The court should not dismiss the action if “in the light most favorable to the plaintiff, and with doubt resolved in his or her behalf, the complaint states any valid claim of relief.” *Brooks*, 2000 S.D. 16, ¶ 14, 605 N.W.2d at 177 (quoting *Schlosser v. Norwest Bank South Dakota*, 506 N.W.2d 416, 418 (S.D. 1993)). While the Court must accept factual allegations as true, “the court is free to ignore legal conclusions, unsupported conclusions, unwarranted

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When ruling on a motion to dismiss, a court generally may not consider materials outside the pleadings. *Noble Sys. Corp. v. Alorica Cent., LLC*, 543 F.3d 978, 982 (8th Cir. 2008)<sup>1</sup>. However, the United States Supreme Court noted that while the court must consider the complaint in its entirety, it must also consider “documents incorporated into the complaint by reference” *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007). This court may “consider some public records, materials that do not contradict the complaint or materials that are ‘necessarily embraced by the pleadings.’” *Noble Sys. Corp., LLC*, 543 F.3d at 982 (court considered financing statement on file with the state of Minnesota) *See also Porous Media Corp. v. Pall Corp.*, 186 F.3d 1077, 1079 (8th Cir. 1999) (court reviewed transcript from hearing before Judge Davis); 5A Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure: Civil 2d* § 1357, at 299 (1990) (court may consider “matters of public record, orders, items appearing in the record of the case, and exhibits attached to the complaint”). A motion to dismiss should not survive simply because a plaintiff deliberately omits references to documents upon which their claims are based. *Pension Benefit Guaranty Corp. v. White Consol. Indus.*, 998 F.2d 1192, 1196 (3d Circ. 1993).

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<sup>1</sup> A motion to dismiss pursuant to S.D.C.L. § 15-6-12(b)(5) is similar to its federal counterpart (Federal Rules of Civil Procedure 12(b)(6)). *Janklow v. Viking Press*, 378 N.W.2d 875, 877 (S.D. 1985).

On July 27, 2015, the Plaintiff Julie Godbe was riding her bicycle on East St. Patrick Street near the right-hand curb of the roadway as permitted by Rapid City Ordinance. Her front tire fell into a storm drain grate causing her to catapult over the handlebars and land on her face, causing serious physical and emotional trauma. The storm drain grate had steel bars that ran parallel to the curb, wide enough to allow a bicycle tire to get lodged between the bars.

On May 1, 2007 the City Public Works Department identified and implemented "Type B" drain grates with "Type V" perpendicular grates as a safer design for City storm drains. It has not been alleged that anyone outside of the City management brought this issue to the attention of the City, instead the City realized it may have a safety problem on its own.

After May 1, 2007 only storm drains with "Type V" perpendicular drain grates met City Infrastructure Design Criteria. Any drain grates which were not "Type V" were "out of repair" as established under and by City specifications.

Plaintiffs claim the City had notice of issues of the drain system on or after May 1, 2007, that the failure of the City to replace the drain system with a "Type V" drain breached the statutory duty to repair under SDCL 31-32-10 and that failure to erect a warning sign approaching the point of danger was a further breach of duty under SDCL 31-28-6. Alternatively, Plaintiffs argue the City is liable under the "ministerial function" doctrine outlined in *Norberg v. Hagna*, 46 S.D. 568, 195 N.W. 438, 440 (1923). Essentially the argument boils down to the fact the City started the process of replacing the parallel grates

(like the one Julie Godbe drove her bicycle into) but didn't fix all of them, leading to the scenario where Julie Godbe had her accident.

In support of Defendant's motion to dismiss, the Defendant relies on a long line and history of cases in South Dakota outlining the duty of the State, counties and municipalities as it relates to roadway maintenance and repair. The main thrust of the Defendant's argument is that such a duty arises only out of statute, and the controlling statute is SDCL 31-32-10. Upon a plain reading of the statute, the Defendant argues, there was no "notice" or "damage" to the storm grate in question, but that the grate was "birthed with the road" and if anything is a result of an improper, faulty, and unsafe design upon its original installation.

### **NEGLIGENCE CLAIMS**

The Plaintiffs have alleged two negligence claims. "The existence of a duty in a negligence action is a question of law[.]" *Hohm v. City of Rapid City*, 2008 S.D. 65 ¶3, 753 N.W.2d 895, 898 (citing *State Auto Ins. Companies v. B.N.C.*, 2005 SD 89, ¶20 702 N.W.2d 379, 386). In this case, both parties have stated that the applicable statutory law in question is SDCL 31-32-10. Two elements of 31-32-10 are "damage" and the "receiving [of] notice [of damage]". The Plaintiff argues that in 2007 the City was put on notice because an internal audit of the grates being used were deemed to be unsafe and were to be replaced by Type V drain grates. Substitution of Type V drain grates did not occur at the location of the accident in this case.



The Court agrees with the Defendant that the pleadings fail on the allegation of both triggers for the existence of a duty by the City. There is no factual allegation the City had received notice, or was otherwise aware of *damage* to the storm drain grate where Julie Godbe fell. As importantly, the Plaintiffs do not allege the storm drain grate in question is in some way damaged or in different shape or condition than it was when the roadway was “birthed”. If the pleadings, taken as fact, are true, the City was aware of a *design defect* in the grates and roadway that existed in 2007 but they were not “damaged” as contemplated by the statute in question. The fact the City was aware of a design defect in the road does not equate to “damage” under SDCL 31-32-10.

To broaden the definition of design defects in roadways as the Plaintiffs ask this Court to do, would fly in the face of *Hohm*. Such a liberal interpretation of “damage” under SDCL 31-32-10 would undermine the legislative purpose and judicial holdings of what necessary prerequisites must exist (and be pled) before a claim of breach of duty (and negligence) can proceed under the statute. Again, assuming the pleadings as fact for purposes of the Motion to Dismiss, the Court finds the “damage” and “notice” requirements of SDCL 31-32-10 have not been met.

Given this finding by the Court, the secondary negligence claim that the Defendants were under a duty under SDCL 31-28-6 to erect “a substantial and conspicuous warning sign....approaching a point of danger,” also fails. Since

the Court has found the City had no duty to design or construct a roadway safely in the first place, and that the facts alleged in the Complaint, taken as true, do not outline a breach of duty under SDCL 31-32-10, there is no continuing breach of duty to install warning signs.

The Plaintiff's claim that the failure to follow its own specifications and failure to maintain and repair the grate in question is a "ministerial function" allowing liability under a negligence claim also fails. The sole duty arising out of *roadway liability* exists only in SDCL 31-32-10. *Hohm*, 2008 S.D. 65 ¶20. The attempt to bootstrap a "ministerial duty" under SDCL 31-32-10 will not be allowed to proceed.

### **LOSS OF CONSORTIUM**

The final claim of the Plaintiffs, for loss of consortium is a derivative claim to the negligence claims. *Titze v. Miller*, 337 N.W.2d 176, 177 (S.D. 1983). The Court has found that the negligence claims of the Plaintiffs have failed. Therefore, the derivative claim of loss of consortium as a result of the accident also fails.

### **CONCLUSION**

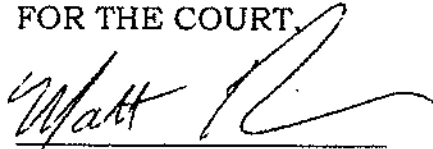
The Plaintiffs failed to state a claim for negligence under both theories, their remaining claims are derivative and therefore the entire claim is dismissed.

For the reasons set forth above, the Court **GRANTS** Defendant's motion to

dismiss.

Dated this 25 day of October, 2016.

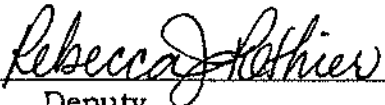
FOR THE COURT,



Honorable Matthew M. Brown  
Circuit Court Judge  
Seventh Judicial Circuit

ATTEST:

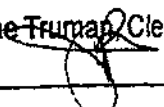
RANAE TRUMAN,  
CLERK OF COURTS

By:   
Deputy



Pennington County, SD  
FILED  
IN CIRCUIT COURT

OCT 26 2016

Ranae Truman, Clerk of Courts  
By:  Deputy

STATE OF SOUTH DAKOTA )  
 ) SS  
COUNTY OF PENNINGTON )

IN CIRCUIT COURT  
  
SEVENTH JUDICIAL CIRCUIT

JULIE GODBE,  
DAVID GODBE

51CIV16-000744

Plaintiffs,

**ORDER**

vs.

CITY OF RAPID CITY, SOUTH  
DAKOTA,

Defendant.

THIS MATTER having come before the Court on the Defendant's Motion to Dismiss on October 4, 2016, and on the Plaintiffs' Motion to Amend Complaint on December 9, 2016, the Plaintiffs, Julie Godbe and David Godbe, appearing through their counsel of record, Steven C. Beardsley and Michael S. Beardsley, the Defendant, the City of Rapid City, appearing through its counsel of record, John K. Nooney and Robert J. Galbraith, the Court having had an opportunity to consider the submissions of the parties, as well as the content of the file herein, and hear argument of counsel, it is hereby


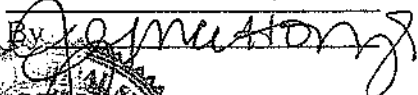
ORDERED that the Defendant's Motion to Dismiss is hereby GRANTED, without prejudice; and it is further

ORDERED that the Plaintiffs' Motion to Amend Complaint is hereby GRANTED, and that this matter shall proceed on those allegations in the Plaintiffs' proposed Amended Complaint, which allege damage to the storm drain grate, which is subject to this litigation; and it is further

ORDERED that the Court incorporates the Memorandum Decision, dated October 25, 2016, attached hereto as Exhibit 1 and incorporated herein by this reference, and that any and all allegations related to the design of the storm drain grate, which is subject to this litigation, are hereby dismissed, with prejudice, consistent with the Memorandum Decision.

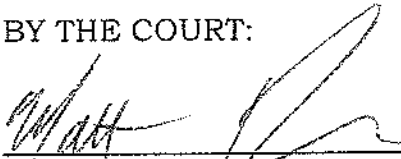
Dated this 17 day of January, 2017.

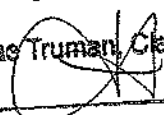
ATTEST:  
Rena Trueman  
Clerk of Courts

  
By 



BY THE COURT:

  
HONORABLE MATTHEW M. BROWN  
Circuit Court Judge

Pennington County, SD  
FILED  
IN CIRCUIT COURT  
JAN 17 2017  
Rena Trueman, Clerk of Courts  
By  Deputy



## Seventh Judicial Circuit Court

P.O. Box 230  
Rapid City SD 57709-0230  
(605) 394-2571

### CIRCUIT JUDGES

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Scott M. Bogue  
Todd J. Hyronimus  
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Marya V. Tellinghuisen

### COURT ADMINISTRATOR

Kristi W. Erdman

October 25, 2016

John Nooney  
632 Main Street  
Rapid City, SD, 57709

Steven and Michael Beardsley  
4200 Beach Drive, Suite 3  
Rapid City, SD 57709

**RE: *Godbe & Godbe v. City of Rapid City, SD*; Civil No. 16-744; Motion to Dismiss**

Counsel:

Defendant motioned this Court to dismiss the complaint pursuant to South Dakota Codified Laws ("S.D.C.L.") § 15-6-12(b)(5), claiming that Plaintiffs have not alleged facts to sustain a claim for either negligence or loss of consortium. The Court considered the record, briefs and the arguments of counsel, and being fully advised as to all matters pertinent hereto, for the reasons set forth below, the Defendant's motion to dismiss is **GRANTED**.

### Background

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roadway where the fall occurred was on a public roadway within the city. Godbe suffered serious physical and emotional injuries as a result of the accident. Plaintiffs Julie and David Godbe filed suit claiming Negligence and Negligent Maintenance and Repair by the City of Rapid City, and Loss of Consortium. Defendant filed a motion to dismiss based on Plaintiffs' failure to state a claim upon which relief may be granted.

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To broaden the definition of design defects in roadways as the Plaintiffs ask this Court to do, would fly in the face of *Hohm*. Such a liberal interpretation of “damage” under SDCL 31-32-10 would undermine the legislative purpose and judicial holdings of what necessary prerequisites must exist (and be pled) before a claim of breach of duty (and negligence) can proceed under the statute. Again, assuming the pleadings as fact for purposes of the Motion to Dismiss, the Court finds the “damage” and “notice” requirements of SDCL 31-32-10 have not been met.

Given this finding by the Court, the secondary negligence claim that the Defendants were under a duty under SDCL 31-28-6 to erect “a substantial and conspicuous warning sign....approaching a point of danger,” also fails. Since

the Court has found the City had no duty to design or construct a roadway safely in the first place, and that the facts alleged in the Complaint, taken as true, do not outline a breach of duty under SDCL 31-32-10, there is no continuing breach of duty to install warning signs.

The Plaintiff's claim that the failure to follow its own specifications and failure to maintain and repair the grate in question is a "ministerial function" allowing liability under a negligence claim also fails. The sole duty arising out of *roadway liability* exists only in SDCL 31-32-10. *Hohm*, 2008 S.D. 65 ¶20. The attempt to bootstrap a "ministerial duty" under SDCL 31-32-10 will not be allowed to proceed.

### LOSS OF CONSORTIUM

The final claim of the Plaintiffs, for loss of consortium is a derivative claim to the negligence claims. *Titze v. Miller*, 337 N.W.2d 176, 177 (S.D. 1983). The Court has found that the negligence claims of the Plaintiffs have failed. Therefore, the derivative claim of loss of consortium as a result of the accident also fails.

### CONCLUSION

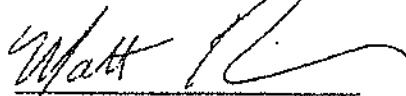
The Plaintiffs failed to state a claim for negligence under both theories, their remaining claims are derivative and therefore the entire claim is dismissed.

For the reasons set forth above, the Court **GRANTS** Defendant's motion to

dismiss.

Dated this 25 day of October, 2016.

FOR THE COURT.



Honorable Matthew M. Brown  
Circuit Court Judge  
Seventh Judicial Circuit

ATTEST:

RANAE TRUMAN,  
CLERK OF COURTS

By:   
Deputy



Pennington County, SD  
FILED  
IN CIRCUIT COURT

OCT 26 2016

Ranae Truman, Clerk of Courts  
By:  Deputy







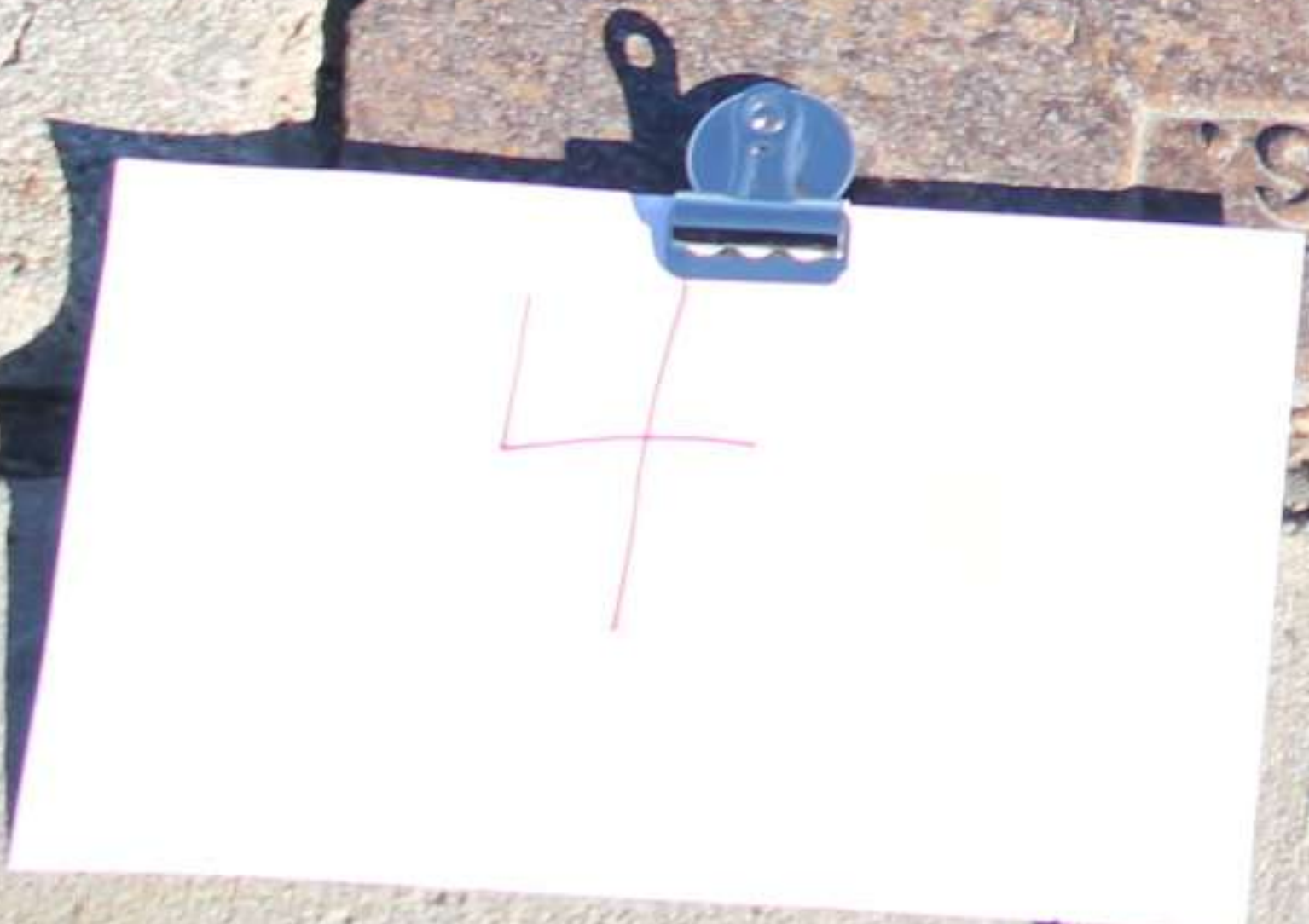






NEENAH FOUNDRY CO. NEENAH, WIS.







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NEENAH FOUNDRY CO. NEENAH, WIS.





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Appellee's App. C 011

PLF.000011



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NEENAH FOUNDRY CO.  
NEENAH, WI





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- Appellee's App. C 020

**PLF.000020**









NEENAH FOUNDRY CO. NEENAH, WIS.

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NEENAH FOUNDRY CO. NEENAH, WIS.

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Appellee's App. C 028

PLF.000028









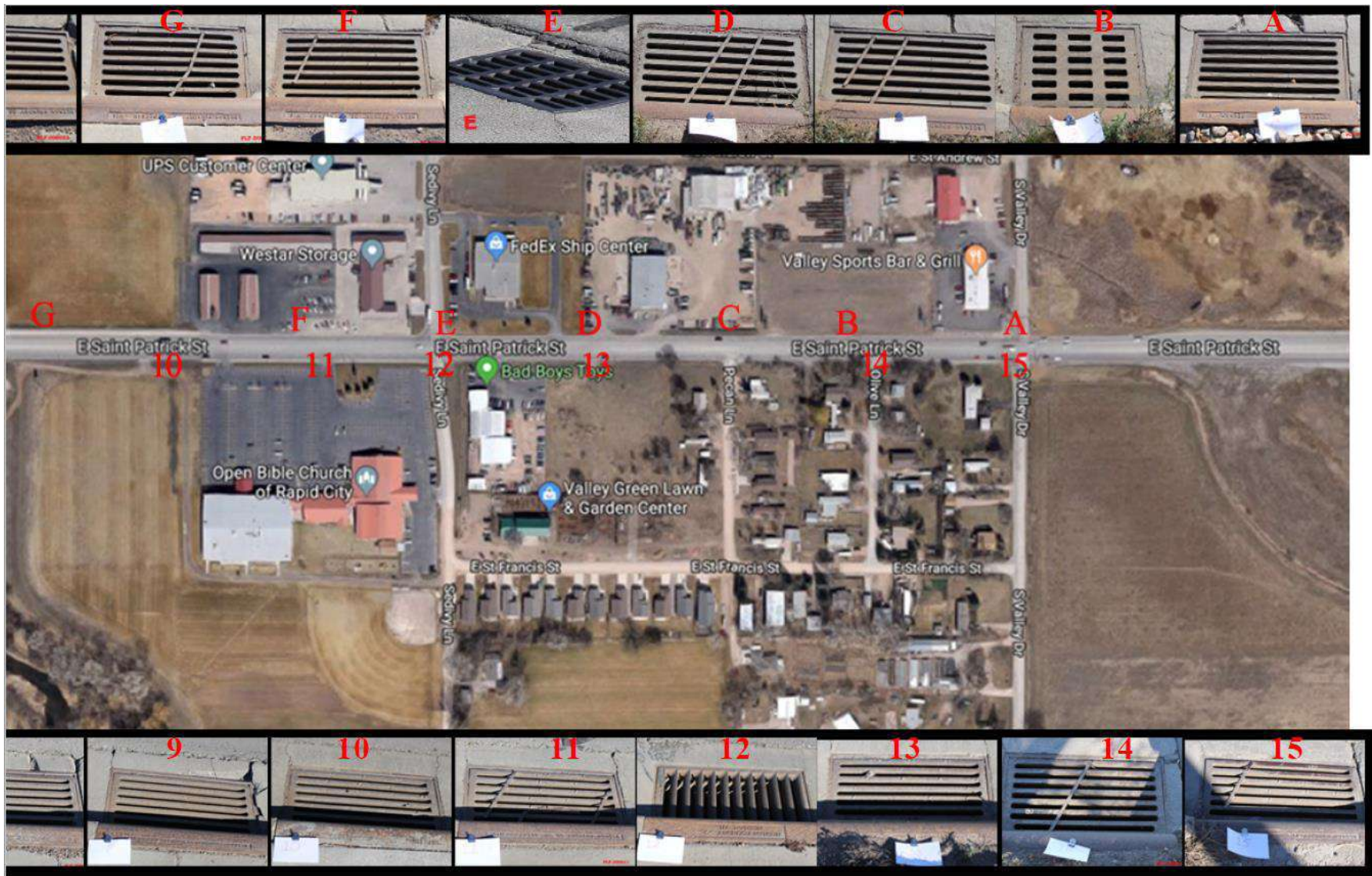














IN THE SUPREME COURT  
OF THE STATE OF SOUTH DAKOTA

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Appeal No. 29251

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**JULIE GODBE and  
DAVID GODBE**

*Plaintiffs/Appellants,*

vs.

**CITY OF RAPID CITY, SOUTH DAKOTA,**

*Defendant, Appellee.*

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APPEAL FROM THE CIRCUIT COURT  
SEVENTH JUDICIAL CIRCUIT  
PENNINGTON COUNTY, SOUTH DAKOTA

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THE HONORABLE MATTHEW BROWN  
Circuit Court Judge

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**APPELLANTS' REPLY BRIEF**

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### **PRELIMINARY STATEMENT**

Plaintiffs/Appellants Julie and David Godbe will be collectively referred to as “Godbe” or their individual first names of “Julie” or “David.” Defendant/Appellee City of Rapid City, South Dakota, will be referred to as the “City.” References to the record as reflected by the clerk’s index are referenced by “R” following by the page number. Documents in the Appendix are referenced by “APP” followed by the number designation. Citations to the hearing transcript are referenced by “T” followed by the page number and line.

### **STATEMENT OF THE LEGAL ISSUES**

*ISSUE I:*        Whether the circuit court erred in granting the City’s motion for summary judgment.



- A. The circuit court erred in finding no disputed material facts exist as it relates to notice of damage to the roadway pursuant to SDCL 31-32-10.
- B. The circuit court erred in interpreting SDCL 31-32-10 by finding the statute requires actual notice and that the damage is not to the highway, but to the specific instrumentality causing injury.

### **ARGUMENT**

#### **I. Whether the circuit court erred in granting the City’s motion for summary judgment.**

The City first gives the Court a twisted version of certain facts that do not have support in the record—hence a lack of citation. The Godbes must point out these inconsistencies because most of the facts the City are claiming as undisputed are disputed. First, the City states that “[i]t is undisputed that there were crossbars welded onto certain storm drain grates on E. St. Patrick Street, prior to the State transferring this roadway to the City.” (*See* Appellee’s Brief, at p. 4.) However, the City does not cite to the record for this proposition. Assumedly, the City is taking the affidavit of its 30(b)(6) witness, Donald Brumbaugh, where he states that “[t]hose inlet grates between Campbell Street on the west to South Valley Drive on the east that had straps welded across the parallel grates prior to July 27, 2015, those straps were welded by someone other than the City.” (R: 1849, at ¶ 3.) However, this is not the testimony he gave during his deposition. The City is bound by its 30(b)(6) witness testimony and cannot submit new or different allegations that could have been made at the time of the 30(b)(6) deposition. *Rainey v. Am Forest and Paper Association, Inc.*, 26 F. Supp. 2d 87, 94 (D.D.C. 1998). First, Mr. Brumbaugh testified:

Q: (By Mr. Steven Beardsley) In any event, prior to this incident in 2015, a number of these grates on this city road had welded straps, you called them,



on the grates?

A: Yes, they did.

(APP 21.) Next, Mr. Brumbaugh agrees that the welds on the grates on East St. Patrick

Street are old welds, and were not a subsequent remedial measure.

Q: Well, the welds we're looking at on Exhibit 11 which were taken in mid-October, 2015 are not new welds, are they?

A: No. Those appear to be old to me.

Q: And so the photographs, and you can look through all of them, all of them are old welds that we're looking at, not new welds, correct?

A: That's correct.

Q: So if they're out welding somewhere, it's not on East St. Patrick because we've got photos mid October 2015. So you're not contending that any of the welds that you see on these photographs, whether it's Exhibit 11 or Exhibit 12, were done in October of 2015, are you?

A: No, I'm not.

(APP 32.)

Mr. Brumbaugh testifies multiple times that he does not know who welded on grates prior to 2015 because no records exist.

Q: . . . There was work done prior to this incident of July 2015 on the welds. You aware of that, correct? We talked about that.

Mr. Nooney: What grates are we talking about, Steve? The ones on East St. Patrick Street?

Mr. Steven Beardsley: Yes.

Mr. Nooney: Okay.

A: I'm sure there was work done prior to that. Who did that work, I don't know.

(APP 29.) Mr. Brumbaugh again states he does not know who welded on the grates prior to 2015.

Q: And you don't know who was out doing the welds on these grates, which worker?

A: At what time?



Q: 2015, 2015, any of those times because there's no record to indicate.

Mr. Nooney: Steve, are you talking post accident or pre accident?

Mr. Steven Beardsley: Pre accident.

A: Pre accident I don't know.

(APP 31.) As Mr. Brumbaugh stated multiple times, he does not know who welded on the grates prior to the accident. He only now attempts to say that it was not the City—without any evidence or explanation to his change in testimony. He states that if any work was done, it would be noted in the time cards. (*See* APP 29.) But yet again, the City has produced no records to indicate an absence of welding on the grates prior to 2015 because records of such repair were not kept.

Next, the City states that the Godbes never provided a picture to the Court of the grate that caused Julie's injuries. This statement is incorrect. The Godbes provided a picture of the accident scene that included a clear picture of grate 4. (*See* Appellants' Brief, at p. 7.) Further, the City argues that it does not matter what happened on the other side of the street involving the grates and that its employees were only stating facts related to the street east of Rapid Creek when asked in their depositions. The testimony of the City's employees that they would not weld some grates and skip others goes directly to the disputed question of fact of whether grate 4 was welded, even though this cannot be confirmed given the City's destruction of the grates along East St. Patrick Street. The City's own chart depicts that grates on the same side of the street that Julie sustained her injuries were welded on, and given that the City's own employees would



not weld on some grates and skip others, there is a clear question of fact as to whether grate 4 was welded on and damaged.

Finally, the City attempts to argue that the Godbes are restricted from arguing certain aspects of notice and damage because of the rulings of the circuit court. While the City will continue to stand behind the conclusions of the circuit court, the Godbes have a right to appeal those conclusions that the court relied on in its grant of summary judgment to the City. Every aspect of notice and damage that the Godbes argue on appeal was argued and briefed to the circuit court. Here, and below, the Godbes have been consistent in their claim that notice of damage to the specific grate is not required under SDCL 31-32-10. The Godbes' allegation that "Defendant knew or should have known that the welded cross bars on the grate in question were ripped off and therefore damaged" holds true under the correct interpretation of the statute that the City had notice, actual or implied, of the damaged highway. (R: 163, at ¶ 25.) The City had notice of the damaged highway, including grate 4, as all the grates along East St. Patrick Street were dangerous, out of compliance to the City's own correct specifications, and welded on.<sup>1</sup>

The City continues to frame the Godbes' case as one that is claiming a design flaw. The Godbes have made clear this is not a design case, as the City had the correct design of safe grates in place since 2007. (*See* APP. 34.) Rather than a wrong design, the Godbes contend that the City was on constructive notice of the damage to the grates along East St. Patrick Street, including grate 4, because they were out of compliance to

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<sup>1</sup> It should be noted that 2 out of the 30 grates along East St. Patrick Street were in compliance to the City's specifications to make the grates safe for bicycle travel. (*See* APP. 34; *see also* Appellee's Brief, at p. 6.)



the City's specification and therefore, dangerous. (*See* APP. 23.) Even further, and knowing that the grates were not in compliance, the grates were welded on to remedy the dangerous condition. (*See* APP. 21.) These welded straps would get ripped off by snowplows, leaving them mangled and hazardous. (*See id*; APP. 22.) After the straps get torn off, the grate is damaged. (*See* APP. 25.) Because the City admits that the straps were put on the grates before Julie's accident, (APP. 30.), and that the City would not weld crossbars on a few grates and skip others, (APP. 43; APP 31; APP. 51; APP 55), multiple questions of fact exist as to the notice the City had to the damaged of the highway and grate 4. As set out in Godbes' original brief, the following is a list of the questions of fact that remain to be determined:

- (1) Whether the City welded or repaired the grate;
- (2) Whether the City welded straps on the grates before or after the incident;
- (3) Whether the City destroyed the evidence after receiving notice of the lawsuit to prevent Julie from examining the grate to determine when welding on the grate occurred;
- (4) Whether the City had actual notice that the highway was damaged;
- (5) Whether the City had actual notice that the specific grate was damaged;
- (6) Whether the City had constructive notice to the damage of the highway;
- (7) Whether the City had constructive notice to the damage of the specific grate;
- (8) Whether the City had notice as a matter of law given its admissions; and
- (9) Whether the City created its own disputed fact through its 30(b)(6) witness by giving contradictory statements in his deposition and subsequent affidavit as to when the welding on the grate occurred.



While the answers to these disputed material facts has been shown by Godbes to be in the affirmative, it further proves that the circuit court erred in granting summary judgment in favor of the City.

**A. *The circuit court erred in finding no disputed material facts exist as it relates to notice of damage to the roadway pursuant to SDCL 31-32-10.***

In its brief, the City cites a multitude of cases for a proposition that has never been disputed—the applicability of SDCL 31-32-10 to this case. The history of the statute as the City points out, and what this Court has made clear, is that notice of damage to the highway is all that is required, not the specific grate at issue. The City admits as much. (*See* Appellees Brief, at p. 29 (“In order to establish such a duty, Godbes must prove both that there was damage to the roadway that caused Julie Godbe’s accident, and that the City had notice of such damage.”).) In the case at bar, Godbes have presented multiple instances that put the City on notice that the highway was damaged:

1. The City was aware that the grates along East St. Patrick Street were dangerous and in disrepair for approximately 20 years pursuant to their own specifications that found that the grates were not safe for bicycles.
2. As a temporary fix, the City attempted to remedy the non-compliant grates by welding crossbars across the parallel grates.
3. These crossbars would be torn off, damaged, or become mangled as a result of the City’s snowplows.
4. The mangled and damages grates along East St. Patrick Street were plainly visible, and the City cannot turn a blind eye.

Once the City welded straps on the grates in an attempt to rectify their noncompliance, it became an integral part of the highway. (*See* APP. 25.) “As an appurtenant part of the highway [the City] had a continuing duty to maintain and keep [the welded grates] in reasonable repair for the safety of public travel.” *Fritz v. Howard Tp.*, 1997 S.D. 122, ¶ 20, 570 N.W.2d 240, 244 (quoting *Kiel v. DeSmet Tp.*, 90 S.D. 492, 497, 242 N.W.2d 153, 155 (1976)). All that is required for notice to the City in this case



is that of constructive or implied notice. *Id.* ¶ 21, 570 N.W.2d at 244-45. Therefore “[i]t is a question of fact for the jury to determine whether [the City], in the exercise of ordinary care, should have discovered that the [welded grates were damaged] in time to replace it before this accident.” *Id.* ¶ 22, 570 N.W.2d at 245.

The City attempts to misdirect from the fact that they received constructive, or actual (as they have admitted to welding on grate 4) of the damage by conveniently relying on just the photograph of the grate 4 and their challenged expert, Charles Leeper’s, opinion.<sup>2</sup> Even though the circuit court did not rule on the Godbes’ motion to exclude the City’s expert, the City’s own expert’s opinions are highly flawed.

Leeper’s proffered opinion and testimony is summarized to primarily state that after looking at photographs, that grate 4 was not welded. However, Leeper never looked at the physical grate itself:

Q: But you Didn’t look at the grates, though? You looked at photos?

A: Looked at pictures, yes.

Q: Okay. And so when you say pictures, we’re talking about Photographs, correct?

A: Photographs, yes.

Q: And you didn’t ever look at the grates themselves?

A: No.

(R: 795, Leeper Dep. 4:22-5:4.) The City parades Leeper’s welding qualifications but fails to recognize that the relevant field of expertise in this case is not welding. This is due to the City’s destruction of the evidence. If the grates were not destroyed, surely the

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<sup>2</sup> The City claims that the Godbes’ failed to appeal any determination related to Leeper’s qualifications. (See Appellee’s Brief, at p. 31 n. 3.) To clarify, the circuit court never ruled on the Godbes’ motion to exclude the testimony of Charles Leeper, and thus, there was no appealable order. The Godbes still contend that Leeper is unqualified to testify as an expert in this case.



City would have had Leeper test the grates and would also allow the Godbes to actually test the grates. Instead, a person with zero experience or expertise in photography simply looked at pictures.

Leeper is not an expert in photography and does not even require his own students to analyze welds from a photograph. (*Id.* at 51:24-52:2; 49:4-6.) Leeper did not even know that the grates on East St. Patrick Street were removed and never looked at any of the welds on any of the grates. (*Id.* at 44:2-4, 9-10; 44:21-25.) He also does not know whether rust or grease was on the grates to prevent welds from holding. (*Id.* at 58:9-15, 62:20-63:5.) He also doesn't know the weather conditions or any of the other factors that can affect the efficacy of a weld on the day the grates were welded. (*Id.* at 72:11-74:19, 91:19-92:5.) Leeper did not know why the straps were welded on the grates in the first place. (*Id.* at 65:11-16.)

Further, Leeper never used a reliable method to base his opinion on. (*Id.* at 41:7-14; 42:3-8.) Rather, Leeper just looked at photos and made his determination with no methodology. (*Id.* at 43:17-44:1.) Leeper admits that from a photograph, he cannot tell whether there was a bad weld, like that which could have occurred on grate 4, and then it subsequently got ripped off.

Q: And on number 4, which was where Julie Godbe went into, you can't tell where there was a bad weld on that particular grate, can you?

Mr. John Nooney: Objection.

A: My *estimation* there was no welding on that grate.

Q: Okay. But you can't tell whether there was a bad weld and then things happened?

Mr. Jon Nooney: Objection, asked and answered.

Q: Can you?

A: No.



(*Id.* at 100:5-14. (emphasis added).)

Despite the City's characterization of the Godbes' expert, Carter Kerk, he did identify that the grates were "damaged and in a state of disrepair." (R: 1357, Kerk Dep. 22:6-17.) The statement that the City uses is taken out of context. In referencing his "damaged and in state of disrepair" language, Kerk made clear that there was notice of damage as soon as straps were welded on the grates.

Q. Okay. Carter, as you look at Exhibit 4—pardon me—page 4 of Exhibit 11, can you tell me when that grate became damaged?

A. In my opinion, it became damaged and in a state of disrepair on the same day as the first strap got welded on any of those similar-type grates in the city.

(*Id.* at 31:20-32:1.)<sup>3</sup> As to grate 4, Kerk admitted that without viewing the grate, he could not tell from a photograph whether it had ever been welded on. (*Id.* at Kerk Dep. 28:3-17; 29:20-25.)

Having the ability to examine grate 4 today would have allowed for testing and analysis to be conducted as both the City's and the Godbes' expert indicated they would benefit from. However, the City destroyed grate 4, along with all the grates on East St. Patrick Street, after this litigation commenced. There is no way to test what grates were welded on. In its brief, the City conveniently and summarily dismisses the fact that the grates were destroyed as indicated by dedicating just a short paragraph in response. (*See* Appellee's Brief, at p. 36.) While counsel for the City and the Godbes were able to take

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<sup>3</sup> The Godbes pointed out in their original brief that the City was receiving federal aid for construction on East St. Patrick Street and the requirements to follow Federal Highway Administration mandates. (*See* Appellants' Brief, at p. 13 n. 2.) As Kerk points out in his report, the Federal Highway Administration declared "if perpendicular straps are welded on unsafe grates, they should be checked periodically." (*See* R: 1357, Kerk Report, at p. 3.)



pictures after the accident, nothing was done to preserve the grates afterwards. The City has admitted this through its 30(b)(6) witness that it did nothing to preserve the specific grate. (APP 17.) Instead, they threw all the grates from East St. Patrick Street in a pile, making the grates unidentifiable and destroyed. Because the City destroyed the grates, along with grate 4, this fact should be interpreted against them. *See Red Bear v. SESDAC, Inc.*, 2007 S.D. 27, ¶ 32, 896 N.W.2d 270, 279 (quoting *State v. Engesser*, 2003 S.D. 47, ¶ 44, 661 N.W.2d 739, 753) (stating that when a party destroys evidence, the “fact finder may infer that the evidence destroyed was unfavorable to the party responsible for its destruction”).

However, the City also claims that they welded on the grates after the accident. (See Appellee’s Brief, at p. 37.) Welding on the grates alone after the accident is not preserving the evidence and is in of itself destructive as the City has now admitted. But the fact is that the City did not weld on the grates after the accident as indicated by its own employees. Dale Tech, the City’s engineer, admitted that he ordered the grates removed after counsel’s letter.

Q: That’s what Dale Pfeifle indicated, too. So you’re consistent with that. So you delegated to Sarah measuring and observing the various grates. And then after she did that, then you ordered the street department to remove the grates and put in the V inlet Grates?

A: Correct.

Q: And when they removed the grates, did you tell them - - strike that. When they removed the grates you did not indicate to anyone to designate the grate that was in question regarding Julie Godbe - -

A: No.

(APP 50.) None of the employee time cards indicate that welding was done on the grates after the accident—only removal. (See APP. 60-75.) It was after counsel for Plaintiff sent the



October 16, 2015, letter that the City destroyed and made unidentifiable for inspection the removed grates on East St. Patrick Street as indicated by the City's own engineer Dale Tech.

As a result of the City's false assertion that the grates were welded on after the accident, its claim that it was a subsequent remedial measure also fails. (*See* Appellee's Brief, at p. 37.) All the City's employees agree that welding on the grates took place before the accident. (APP. 30.) Therefore, the City's did admit that the storm grate, grate 4, was in fact welded on. (*See* R. 172, at ¶8.)

The Godbes have provided facts necessary to raise a dispute as to the City's notice of the damage to East St. Patrick Street. The City has admitted to welding on the specific grate. The City destroyed the evidence to prevent any testing to prove grate 4 was welded on. The City has had notice of the dangerous roadway since at least 2007. To fix its noncompliance with the City's own specification, the City welded straps on the grates. After this occurred, the City had a duty to maintain the straps, and the grates, in a safe condition for bicycles. Because constructive notice is all that is required, and because Godbe has presented ample evidence that raises questions of disputed material facts as to the City's notice to the damage of the highway, a South Dakota jury should be able to determine the City's liability.

***B. The circuit court erred in interpreting SDCL 31-32-10 by finding the statute requires actual notice and that the damage is not to the highway, but to the specific instrumentality causing injury.***

The City attempts to state that the Godbes did not argue that SDCL 31-32-10 only requires constructive or implied notice of the damage to the highway to the circuit court. (*See* Appellee's Brief, at p. 42.) This is incorrect and untrue. The Godbes argued that constructive notice is all that is required under the statute on numerous occasions. (*See*



R: 104, at p.5; R: 741, at p. 18.) As recognized by the South Dakota Supreme Court in *Fritz v. Howard Township*:

Our statute [forerunner to SDCL 31-32-10] does not expressly require actual notice [of defect in highway], and by the great weight of authority it is held that unless actual notice is required by the statute constructive or implied notice is sufficient.

1997 S.D. 122, ¶ 21, 570 N.W.2d at 244-45 (quoting *Clementson v. Union Cty*, 63 S.D. 104, 108, 256 N.W. 794, 796 (1934)).

As implied or constructive notice of the damage is sufficient, the next argument the City attempts to make is that the notice of the damage has to be to the specific grate.

This is not what the statute provides. SDCL 31-32-10 states:

If any *highway*, culvert, or bridge *is damaged* by flood, fire or other cause, to the extent that it endangers the safety of public travel, the governing body responsible for the maintenance of such highway, culvert, or bridge, shall within forty-eight hours of *receiving notice of such danger*, erect guards over such defect or across such highway of sufficient height, width, and strength to guard the public from accident or injury and *shall repair the damage* or provide an alternative means of crossing within a reasonable time after receiving notice of the danger. The governing body shall erect a similar guard across any abandoned public highway, culvert, or bridge. Any officer who violates any of the provisions of this section commits a petty offense.

(Emphasis added.) The statute is clear, as noted by the emphasized language, that notice of the damage to the highway is all that is required—not the specific grate. At the case at bar, the City was aware that East St. Patrick Street was damaged, as they attempted to weld straps on the grates and failed to maintain them. The City attempts to point to “erect guards over such defect” in the statute for the proposition that the notice needs to be to the specific instrumentality that caused the injury. The City conveniently does not highlight the next phrase “or across such highway.” Regardless, the language the City



relies on is the action that the City must take to maintain safe travel for the public after notice of the damage. It is not the language that establishes liability, that being notice of the damage to the highway. *See* SDCL 31-32-10 (“If any highway . . . is damaged . . . within forty-eight hours of receiving notice of the such danger . . . .”) The City admits that notice of damage to the highway is all that is required for liability. (*See* Appellees Brief, at p. 29.)

The City next states that such an interpretation of SDCL 31-32-10 would produce absurd results. The City unreasonably states that the plain language of the statute would expand the liability of the City for damage that it had notice of to Omaha Street or Highway 44, 10 miles away from the injury site. (*See* Appellee’s Brief, at p. 34.) However, we are not talking about the City’s notice of damage to grates on Omaha or Highway 44. This case involves an approximate 1-mile stretch of highway where the City welded on the grates in attempt to make them safe for bicycles.<sup>4</sup> A question of fact remains on whether each grate along this 1-mile stretch of East St. Patrick Street was welded on; however, the Godbes claim that each grate was in fact welded on. The City was aware of the damage along this whole 1-mile stretch, if not actually on notice, it had constructive notice.

The City states that this Court has already addressed the issue in *Kiel v. DeSmet Township*, 90 S.D. at 496, 242 N.W.2d at 155. However, the decision in *Kiel*

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<sup>4</sup> If any ambiguity exists as to the meaning of “highway” in the statute and the bounds to which the danger needs to be applied, the Godbes suggest a reasonable approach given the totality of the circumstances. Here, all grates along the 1-mile stretch of highway were damaged and in disrepair. Most of the grates along East St. Patrick Street were welded on and a question of fact remains as to whether the remaining grates contained welds. The statute is clear that where damage is present on a highway, and if the City had notice of such damage, then liability will attach.



corresponds to what Godbes stated above. That the statute requires the repair of damage to a highway that the City would be on notice of. The secondary duty required in the statute applies to erecting guards over the defects until such repairs are made. *Kiel*, 90 S.D. at 496, 242 N.W.2d at 155 (“Obviously, the main obligation of [a city] under this statute (SDCL 31-32-10) is to repair all defects in a [city] highway which endanger the safety of public travel. Incidentally the statute also imposes a secondary duty upon the [city] to erect temporary guards over defects, where needed, until repairs are made.”). The jury needs to determine not only whether the City was on constructive notice, but after hearing from the witnesses, whether straps were welded on all of the grates along East St. Patrick Street to provide sufficient guards over the defects.

The Godbes have made clear through the language of the statute and using statutory construction that notice of the damage to the highway is all that is required under SDCL 31-32-10. The notice may be constructive or implied notice “circumstances sufficient to put a prudent man upon inquiry as to a particular fact.” SDCL 17-1-4. The City was aware that the highway was damaged for 20 years, knowing it was unsafe for bicycle travel. To remedy this, the City attempted a quick-fix solution by welding straps across the grates on East St. Patrick Street, but snowplows would remove the straps, causing the grates to become even more dangerous and mangled. The City admits, through its 30(b)(6) witness, that the grates were damaged and improperly maintained. But, as litigation commenced, the City destroyed the grates and now cannot make them available for testing to prove that welding occurred on all the grates. Thus, a factfinder may infer that the City welded on every grate along East St. Patrick Street and that the City had notice of the damage.



The Godbes have presented material facts that are in dispute that the City was on notice to the damage of the highway and the specific grate that caused Julie's injuries. The circuit court misapplied the law as it relates to the City's liability under SDCL 31-32-10 and therefore should be reversed.

### **CONCLUSION**

Based on the foregoing, Godbe respectfully asks that the Court reverse the trial court's order granting summary judgment in favor of the City and remand this case for a trial on the merits.

Respectfully submitted this 14<sup>th</sup> day of August, 2020.

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ORAL ARGUMENT IS RESPECTFULLY REQUESTED



### **CERTIFICATE OF COMPLIANCE**

Pursuant to S.D.C.L. §15-26A-66(b)(4), I certify that Appellant's Reply Brief complies with the type volume limitation provided for in the South Dakota Codified Laws. This Brief contains 4,764 words and 22,480 characters. I have relied on the word and character count of our processing system used to prepare this Brief. The original Appellants' Reply Brief and all copies are in compliance with this rule.

Dated this 14<sup>th</sup> day of August, 2020.

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**CERTIFICATE OF SERVICE**

I hereby certify that on the 14<sup>th</sup> day of August, 2020, I emailed the foregoing Appellants' Reply Brief and sent two copies of it by U.S. Mail, first-class postage prepaid to:

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I further certify that on 14<sup>th</sup> day of August, 2020, I emailed the foregoing Appellants' Reply Brief and sent the original and two copies of it by U.S. Mail, first-class postage prepaid to:

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