IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

EMILY FODNESS, CHRISTINE FODNESS, and MICHAEL FODNESS, Plaintiffs and Appellants,

v.

CITY OF SIOUX FALLS, Defendant and Appellee.

App. No. 28965
49CIV18-003031

Appeal from the Circuit Court, Second Judicial Circuit,
Minnehaha County, South Dakota

The Honorable Camela Theeler

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The Notice of Appeal was filed on April 17, 2019

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JURISDICTIONAL STATEMENT

The Plaintiffs/Appellants Emily Fodness, Michael Fodness, and Christine Fodness (collectively, "the Fodness family") appeal the Second Judicial Circuit Court's ("Circuit Court") Memorandum Opinion and Order Granting Defendant's Motion to Dismiss and Denying Plaintiffs' Motion to Amend, which was filed on March 19, 2019. The Fodness family timely filed Notice of Appeal on April 17, 2019.

STATEMENT OF THE ISSUES

I. WHETHER THE FODNESS FAMILY SUFFICIENTLY PLED FACTS THAT WOULD SUPPORT THEIR CLAIM THAT THE CITY OWED THEM A DUTY OF CARE?

The Circuit Court ruled in the negative.

Relevant Law:

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

Tipton v. Town of Tabor, 1997 S.D. 96, ¶ 1, 567 N.W.2d 351.

Tipton v. Town of Tabor, 538 N.W.2d 783 (S.D. 1995).

Cloud v. United States, No. CIV 06-3024, 2008 U.S. Dis. LEXIS 57333 (D.S.D. July 28, 2008)

II. WHETHER THE FODNESS FAMILY SHOULD HAVE BEEN ALLOWED TO AMEND THEIR COMPLAINT TO CURE TECHNICAL DEFECTS?

The Circuit Court ruled in the negative.

Relevant Law:

Sixth Camden Corp. v. Evesham, 420 F. Supp. 709, 720 (D.N.J. 1976)

SDCL § 15-6-15(a)

STATEMENT OF THE CASE

This action was brought by the Fodness family against the City of Sioux Falls ("the City"), alleging one count of negligence against the City for its involvement in the

Copper Lounge building collapse. Complaint ¶¶ 26-30. The action was brought in the Second Judicial Circuit, Minnehaha County. On October 25, 2018, the City filed a Motion to Dismiss the Complaint for failing to state a claim under SDCL § 15-6-12(b)(5), arguing that the City owed no duty to the Fodness family. On December 12, 2018, the Fodness family filed a brief in opposition to the City's Motion to Dismiss and contemporaneously filed a Motion to Amend as a safeguard to cure any technical defects the Circuit Court found in the Complaint.

On March 19, 20019, the Honorable Camela Theeler entered an Order Granting the City's Motion to Dismiss and Denying the Fodness family's Motion to Amend finding that the Complaint failed to allege sufficient facts to establish that the City owed the Fodness family a duty in this matter. The Order also denied the Fodness family's Motion to Amend finding that the Circuit Court could not determine if any amendment could cure the defects in the Complaint. The Fodness family appeals.

STATEMENT OF FACTS

From approximately February 2013 to September 2016, the City issued Hultgren Construction LLC ("Hultgren") approximately 33 building permits. Complaint ¶ 6. The City was aware of repeated instances in which Hultgren failed to comply with work permits. *Id*. ¶ 7. The City received complaints from businesses and citizens about Hultgren's work, including the belief that the City dispensed with usual protocols concerning building permits for Hultgren. *Id*. ¶ 8. The City failed to take any adverse action against Hultgren for its violations and, instead, entered into discussions with Hultgren and its agents regarding a major construction protect involving the renovation of buildings in downtown Sioux Falls located at and adjacent to 136 South Phillips Avenue (the "Property"). *Id*. ¶¶ 9-10.

Sioux Falls Municipal Code title 15, § 150.302-107.1 and Section 3303.1 of the 2015 International Building Code, which the City has adopted, require that a party requesting a demolition permit must first submit architectural or structural plans from a registered design professional for the proposed demolition work ("Demolition Plans"). Complaint ¶¶ 11-12; Transcript from Motion Hearing, p. 15:1-18. The City knew that the work Hultgren intended to complete at the Property required the submittal of Demolition Plans to mitigate inherent risks and dangers involved in the proposed work. *Id.* ¶ 12. The City further knew that the issuance of demolition permits for the buildings in which the Fodness family was known to reside, without Demolition Plans, and to a contractor who explicitly intended to remove portions of an interior load bearing wall and was known to be in violation of its past and current permits, would substantially increase the risk of injury or death to the Fodness family. *Id.* ¶ 14.

The City agreed to issue to Hultgren the demolition permits, notwithstanding Hultgren's failure to provide Demolition Plans for its proposed work and Hultgren's history of violating and exceeding the scope of its permits. *Id.* ¶¶ 16-17. By permitting Hultgren to perform its demolition work under the circumstances, the City substantially increased the risk of injury or death to the Fodness family, including the risk of structural collapse. *Id.* ¶ 17. The City failed to notify the Fodness family that the permits the City issued for the work on the building in which they resided were issued under such improper and dangerous circumstances. *Id.* Had the Fodness family known of such dangerous circumstances, they would not have continued to reside in the Property during the demolition work. *Id.* ¶ 18. Pursuant to the permission granted to it by the City,

Hultgren performed demolition work that caused the Property to collapse and harm the Fodness family. *Id.* ¶ 19.

The Complaint specifically alleges that the City breached its special duties to the Fodness family by exposing them to known, dangerous, and life-threatening conditions that would not have occurred except for the City's acts. *Id*. ¶ 28. The Fodness family relied on the City's acts and representations regarding the demolition permit for the Property. *Id.* ¶ 29.

In reaching its decision to dismiss the Fodness family's Complaint, the Circuit Court analyzed the four factors that may create a special duty: 1) the City's actual knowledge of the dangerous condition; 2) reasonable reliance by the Fodness family on the City's representations and conduct; 3) an ordinance or statute that sets forth mandatory acts clearly for the protection of a particular class of persons rather than the public as a whole; and 4) failure by the City to use due care to avoid increasing the risk of harm. Memorandum Opinion, p. 8. The Circuit Court found that the Fodness family failed to establish any of these four factors. *See generally, Id.*

As to Factor 1 (actual knowledge), the Circuit Court did not address the City's alleged knowledge that it issued a demolition permit to Hultgren without Demolition Plans. *Id*. at 9. The Circuit Court did consider the City's knowledge of Hultgren's previous violations but applied such knowledge to a violation that was not pled in the Complaint "…that Hultgren was violating the permit issued by the City for the Property where [the Fodness family] resided." *Id*. Based on this analysis, the Circuit Court concluded that the Fodness family has "not pled sufficient facts to establish the City had actual knowledge of the dangerous condition." *Id.*

As to Factor 2 (reliance), the Circuit Court found that the Fodness family's reliance on a building permit posted on the Property where they resided was insufficient. *Id.* at 10. The Circuit Court concluded that such a representation by the City was not a direct promise or personal assurance. *Id.*

As to Factor 3 (specific ordinance), the Circuit Court found that the Fodness family did not allege facts sufficient to establish this factor. *Id.* at 11.

As to Factor 4 (increased risk), the Circuit Court found that the Fodness family alleged that issuing the building permit to Hultgren under the circumstances increased the risk of harm to them. *Id*. at 11-12. The Circuit Court concluded, however, that such an issuance of a building permit was not "some affirmative action that increased the risk of harm…" *Id*. at 12. Then the Circuit Court noted, "while [the Fodness family claims] the submission of [Demolition Plans] is a prerequisite for the issuance of building permit, they cite to no authority stating that the City was required to receive [Demotion Plans] before it could issue a building permit to Hultgren." *Id.* Finally on Factor 4, the Circuit Court concluded that the factual allegations pled by the Fodness family were "not enough to prove" the City engaged in some affirmative action that increased the risk of harm. *Id.*

I. STANDARD OF REVIEW

This Court has set out the standard of review applicable to the appeal of the Circuit Court's granting of the City's Motion to Dismiss as follows.

A motion to dismiss under Rule 12(b)(5) tests the law of a plaintiff's claim, not the facts which support it. *Stumes v. Bloomberg*, 1996 S.D. 93, ¶ 6, 551 N.W.2d 590, 592; *Schlosser v. Norwest Bank South Dakota*, 506 N.W.2d 416, 418 (S.D. 1993)

(citations omitted). The motion is viewed with disfavor and is rarely granted. *Schlosser* directs the Circuit Court to consider:

> …the complaint's allegations and any exhibits which are attached. The court accepts the pleader's description of what happened along with any conclusions reasonably drawn therefrom. . . . " In appraising the sufficiency of the complaint we follow, of course, the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." [quoting *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S. Ct. 99, 102, 2 L. Ed. 2d 80, 84 (1957)]. The question is whether 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. The court must go beyond the allegations for relief and "examine the complaint to determine if the allegations provide for relief on any possible theory." [quoting 5 C. Wright & A. Miller, Federal Practice and Procedure § 1357 (1971)].

506 N.W.2d at 418.

A complaint that states a plausible claim for relief survives a motion to dismiss. *Ashcroft v. Iqbal*, 556 U.S. 662, 679, 129 S. Ct. 1937, 1950 (2009). Determining whether a complaint states a plausible claim for relief is a context-specific task that requires the reviewing court to draw on its judicial experience and common sense. *Id.*

As the appeal relative to the Motion to Dismiss presents a question of law, this Court's review is de novo, with no deference given to the Circuit Court's legal conclusions. *City of Colton v. Schwebach*, 1997 S.D. 4, 557 N.W.2d 769, ¶ 8, 557 N.W.2d 769, 771.

As for the appeal of the Circuit Court's denial of the Fodness family's Motion for Leave to Amend, this Court's review of such decision is conducted under the abuse of discretion standard of review. *Sejnoha v. City of Yankton*, 2001 S.D. 22, ¶ 5, 622 N.W.2d 735, 737 (citing *Tesch v. Tesch*, 399 N.W.2d 880, 882 (S.D. 1987))." An abuse of discretion occurs when 'discretion [is] exercised to an end or purpose not justified by, and

clearly against, reason and evidence.'" *In re Name Change of L.M.G.*, 2007 S.D. 83, ¶ 6, 738 NW2d 71, 73-74 (quoting *Miller v. Jacobsen*, 2006 S.D. 33, ¶ 18, 714 N.W.2d 69, 76).

II. ARGUMENT

A. THE FODNESS FAMILY SUFFICIENTLY PLED A CAUSE OF ACTION AGAINST THE CITY, INCLUDING THE EXISTENCE OF A DUTY OF CARE OWED TO THEM BY THE CITY AND, THEREBY, THE CIRCUIT COURT'S DIMISSAL OF SUCH CLAIMS WAS IN ERROR.

1. Public Duty and Special Duty Exception

The South Dakota Legislature recognized the need for redress when local government torts result in injury and promulgated SDCL § 21-32A-1 to address such a need. *Tipton v. Town of Tabor*, 1997 S.D. 96, ¶ 4, 567 N.W.2d 351, 355 (*Tipton II*). Prior to such promulgation, tort claims against public entities were barred by the common law doctrine of sovereign immunity. *Id*. SDCL § 21-32A-1 provides that, to the extent a public entity participates in a risk sharing pool or purchases liability insurance, the public entity shall be deemed to have waived the sovereign immunity. Notwithstanding the statutory waiver of sovereign immunity, South Dakota continues to observe the public duty rule, which "[e]ssentially…declares government owes a duty of protection of the public, not to particular persons or classes." *Tipton II*, 1997 S.D. 96, ¶ 10, 567 N.W.2d 351 at 356.

In regard to the public policy rationale for the public duty rule:

> Courts give several reasons for the rule. First, it is impractical to require a public official charged with enforcement or inspection duties to be responsible for every infraction of the law. Second, government should be able to enact laws for the protection of the public without exposing the taxpayers to open-ended and potentially crushing liability from its attempts to enforce them. Third, exposure to liability for failure to adequately enforce laws designed to protect everyone will discourage municipalities from passing such laws in the first place. Fourth, exposure

> to liability would make avoidance of liability rather than promotion of the general welfare the prime concern for municipal planners and policymakers. Fifth, the public duty rule, in conjunction with the special relationship exception, is a useful analytical tool to determine whether the government owed an enforceable duty to an individual claimant.

Cloud v. United States, No. CIV 06-3024, 2008 U.S. Dist. LEXIS 57333, at *17-18 (D.S.D. July 28, 2008) (quoting 18 E. McQuillin, The Law of Municipal Corporations § 53.04.25, at p. 199 (3rd ed. 2003) (internal citations omitted). This Court also found that sound reasons support this doctrine, noting:

> Furnishing public safety always involves allocating limited resources. Law enforcement entails more than simply reacting to violations; it encompasses the art of keeping the peace. Deploying finite resources to achieve these goals is a legislative and executive policy function. To allow individuals to influence through private litigation how resources must be disposed would render government administration chaotic and enfeebled. Unrestricted liability might discourage communities from acting at all or encourage action merely to avoid suit, without regard to the common good. The rule promotes accountability for offenders, rather than police who through mistake fail to thwart offenses. Otherwise, lawbreaker culpability becomes increasingly irrelevant with liability focused not on the true malefactors, but on local governments. A "public duty" conception acknowledges that many "enactments and regulations are intended only for the purpose of securing to individuals the enjoyment of rights and privileges to which they are entitled as members of the public, rather than for the purpose of protecting any individual from harm." *Restatement (Second) of Torts* § 288 cmt b (1965).

Tipton II, 1997 S.D. 96, ¶ 10, 567 N.W.2d 351 at 356.

South Dakota recognizes an exception to the public duty rule in instances in which a government entity owes a special duty to particular persons or classes. *Tipton v. Town of Tabor*, 538 N.W.2d 783, 785 (S.D. 1995) ("*Tipton I*"). Prior to *Tipton I*, determining whether a special duty existed was solely an exercise of statutory construction. *Hagen v. Sioux Falls*, 464 N.W.2d 396, 398 (S.D. 1990) (citing *Hoffert v. Owatonna Inn Towne Motel, Inc.*, 199 N.W.2d 158, 160 (Minn. 1972). Courts would

examine a statute or ordinance as to whether the law concerned the public at large or whether it only concerned certain people or classes of people. *Hagen v. Sioux Falls,* 464 N.W.2d 396 at 399. If it concerned the public at large, no special duty could arise from a violation. *Id*. If it concerned certain people or classes of people, a special duty may exist. *Id*.

In 1979, the Minnesota Supreme Court found that the traditional bright-line test to be insufficient in determining whether a special duty exists. *Cracraft v. St. Louis Park,* 279 N.W.2d 801 (Minn. 1979). In 1995, this Court agreed and found that "[s]ole reliance on statutory language in determining whether a duty exists is needlessly restrictive and arbitrary." *Tipton I,* 538 N.W.2d 783 at 787. As a more practical alternative, Minnesota and South Dakota expanded a court's consideration to factors that tend to "pose a duty of care on the municipality." *Cracraft* at 807. Without intending to be exhaustive, *Cracraft* set forth a least four such factors that to be considered as follows:

1) the government entity's actual knowledge of the dangerous condition;

2) reasonable reliance by persons on the government entity's representations and conduct;

3) an ordinance or statute that sets forth mandatory acts clearly for the protection of a particular class of persons rather than the public as a whole; and

4) the government entity must use due care to avoid increasing the risk of harm.

Cracraft at 806-07. "Strong evidence concerning any combination of these factors may be sufficient to impose liability on a government entity. *Tipton I* at 787. In adopting *Cracraft's* factor-based approach, this Court noted that such an approach allows "consideration of a broader range of relevant facts." *Id.*

In regard to Factor 1, "actual knowledge" means knowledge of a violation of law constituting a dangerous condition. *Tipton II* at 358. An inference of actual knowledge is permitted in circumstances where the defendant "must have known" of the dangerous condition. *Id*. at 359. Actual knowledge denotes a foreseeable plaintiff with foreseeable injuries. Municipalities must have subjective knowledge of a violation, but "'knowledge of facts constituting the statutory violation, rather than knowledge of the statutory violation itself, is all that is required.'" *Id.* (quoting *Coffel v. Clallam Cty.*, 794 P.2d 513, 517 (Wash. Ct. App. 1990). It is presumed that a municipality has knowledge of its own ordinances. *Tipton II* at 359.

In regards to Factor 2, reliance may be found when a municipality's "voluntary undertaking has lulled the injured party into a false sense of security and has thereby induced the injured party to either relax his or her own vigilance or to forego other available avenues of protection." *Id*. (quoting 18 McQuillin, *supra*, § 53.04.50, at 179). In *Cracraft*, determining whether reasonable reliance existed, the courts looked to whether it was based on "specific actions or representations which caused the persons to forego other alternatives of protecting themselves." *Cracraft v. St. Louis Park*, 279 N.W.2d 801 at 807. This Court narrowed this factor in *Tipton II* in holding that "[r]eliance must be based on personal assurances" and noted that under the facts in that case, "no direct promises were given." *Tipton II* 1997 S.D. 96, ¶ 32, 567 N.W.2d at 365.

In regards to Factor 4, official action must either cause harm itself or expose plaintiffs to new or greater risks, leaving them in a worse position than they were before official action. *Pray v. Whiteskunk*, 2011 S.D. 43, ¶ 14, 801 N.W.2d 451, 455-56. The

action must be an affirmative action as merely failing to diminish potential harm is not enough. *Id.*; *Gleason v. Peters*, 1997 S.D. 102, ¶ 23, 568 N.W.2d 482, 487.

2. The Fodness Family has Sufficiently Pled Facts to Show that the Existence of a Special Duty Owed by the City.

Under the pre-*Cracraft* test, it was not necessary to consider the facts and circumstances of a case to determine whether a special duty existed as such a determination was purely a question of statutory interpretation. As such, no amount of discovery or evidence would affect a court's determination as to whether a special duty existed. Without the need for discovery or evidence, courts had the ability to dismiss special duty claims at the pleading stage of litigation and often did as such. *See Hoffert v. Owatonna Inn Towne Motel, Inc.*, 199 N.W.2d 158, 159 (Minn. 1972); *Hitchcock v. Sherburne Cty.*, 34 N.W.2d 342, 343 (Minn. 1948); *Stevens v. N. States Motor, Inc.*, 201 N.W. 435, 435 (Minn. 1925).

Upon the adoption of the *Cracraft/Tipton* test, Minnesota and South Dakota courts were no longer able to dismiss a special duty negligence claim without first examining the record for evidence supporting the *Cracraft/Tipton* factors. *See Cracraft* at 807; *Tipton I* at 787; *Pray v. Whiteskunk*, 2011 S.D. 43, ¶ 14, 801 N.W.2d 451, 455. The Court's role in assessing whether the special duty doctrine applies becomes a fact finding exercise. The necessity of such examination all but eliminated a court's ability to dismiss a special duty claim based on a review of the complaint alone. With the exception of one outlier case[1], no such recorded case in Minnesota or South Dakota

[1]*Sorace v. United States*, is a quintessential public duty case in which the allegation of negligence arises from the police's failure to catch a drunk driver before he hurt someone. No. CIV 13-3021-RAL, 2014 U.S. Dist. LEXIS 67979, at *16-18 (D.S.D. May 16, 2014). While noting that, under a Rule 12 motion, it was in "no position to delve into

exists. Such cases have proceeded to determinations based on the merits of their special duty allegations. *See Tipton II*; *Gleason v. Peters*, 1997 S.D. 102, 568 N.W.2d 482, 487; *Walther v. KPKA Meadowlands Ltd. Pshp.*, 1998 S.D. 78, 581 N.W.2d 527, 529; *E.P. v. Riley*, 1999 S.D. 163, 604 N.W.2d 7; *Cloud v. United States*, No. CIV 06-3024, 2008 U.S. Dist. LEXIS 57333; *Pray v. Whiteskunk*, 2011 S.D. 43, 801 N.W.2d 451; *McDowell v. Sapienza*, 2018 S.D. 1, 906 N.W.2d 399; *Maher v. City of Box Elder*, 2019 S.D. 15, 925 N.W.2d 482; *Hage v. Stade*, 304 N.W.2d 283 (Minn. 1981); *Andrade v. Ellefson*, 391 N.W.2d 836 (Minn. 1986); *In re Norwest Bank Fire Cases*, 410 N.W.2d 875 (Minn. Ct. App. 1987); *Dahlheimer v. Dayton*, 441 N.W.2d 534 (Minn. Ct. App. 1989); *Danielson v. City of Brooklyn Park*, 516 N.W.2d 203 (Minn. Ct. App. 1994); *McNamara v. McLean*, 531 N.W.2d 911 (Minn. Ct. App. 1995); *Radke v. Cty. of Freeborn*, 694 N.W.2d 788 (Minn. 2005); *Blaine v. City of Sartell*, 865 N.W.2d 723 (Minn. Ct. App. 2015).

In *Radke v. Cty of Freeborn*, the defendant city unsuccessfully moved the court to dismiss a special duty negligence claim for failing to state a claim. 694 N.W.2d 788. The court there found that it could not determine whether the *Cracraft* factors were established based on the facts pled in the complaint alone. *Id.* at 797 (noting that "three of the *Cracraft* factors require an analysis of the facts of the case…" and the court only had "the facts in the complaint before [them] and are thus limited in [their] analysis of the remaining *Cracraft* factors"). As such, and because it was required to accept the facts in the complaint as true and draw all inferences in favor of the non-moving party, the

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[the merits of the facts pled]", the court there granted a Rule 12 motion because the plaintiff did not plead reliance (factor 2) or that the police department "took affirmative action" that increased risk. Thus, the plaintiff could not establish a combination of *Tipton* factors. *Id.* at *19, 27.

Minnesota Supreme Court denied the city's motion to dismiss, holding that it will not uphold a Rule 12 dismissal "'if it is possible [that] any evidence which might be produced" is "consistent with the pleader's theory.'" *Id*. at 793 (quoting *N. States Power Co. v. Franklin*, 122 N.W.2d 26, 29 (Minn. 1963)).

Here, while the Circuit Court identified the correct standard for reviewing a motion to dismiss, it erred in the application of the same. Rather than testing the law of the Fodness family's negligence claim, the Circuit Court examined the facts which support such claim. That is not the proper exercise here. Under the proper standard for a Rule 12 motion, the Circuit Court should have asked whether it appears beyond doubt that the Fodness family can prove no set of facts in support of their claim which would entitle them to relief, not whether the Fodness family was able to "establish" or "prove" the *Tipton* factors.

In regards to the Factor 1 (actual knowledge), the Circuit Court here did what no other court in Minnesota or South Dakota was able to do since *Tipton/Cracraft*. The Circuit Court found that, beyond doubt, the Fodness family can prove no set of facts that support their claim that the City had knowledge of the dangerous conditions. All of the other cases analyzing this factor first gave plaintiffs the opportunity to perform discovery which would include being able to ask City officials the nature and extent of their knowledge of the dangerous conditions which gave rise to the building collapse and resulting injuries to the Fodness family.

Again, the question that should be asked is whether it is plausible that the City had knowledge of Hultgren's propensities and that by giving Hultgren a permit for dangerous demolition work on a major construction project without Demolition Plans, it

was foreseeable that harm would result to the Fodness family. By finding that this factor was not met, the Circuit Court must have concluded that, beyond doubt, the Fodness family would not be able to discover testimony, communications, or other evidence from the City and its representatives showing that they knew of Hultgren's dangerous propensities, knew that the City allowed Hultgren to continue to operate despite its dangerous propensities without any adverse action from the City, and/or knew that it was dangerous to give Hultgren the permit for the major demolition work at the Property without the required Demolition Plans. Such a conclusion is erroneous. In fact, in light of the Circuit Court's inappropriate concerns about whether the Fodness family could factually support their allegation of the knowledge, their counsel attempted to introduce an email that would have provided such support. The Circuit Court denied counsel this opportunity. So, Plaintiffs were unfairly placed in the position of having the Circuit Court inappropriately questioning the factual support for Plaintiffs' allegations yet not allowing them to demonstrate such support. Plaintiffs have factual support for every allegation contained in their Complaint and are entitled to perform discovery to uncover further support. They were wrongfully denied that opportunity.

In regards to Factor 2 (reliance), it is apparent on its face that one of the purposes of posting a building permit on the building where the construction work is taking place is to assure those in eyeshot of the permit that plans for the construction work have been reviewed by the City in a manner consistent with its own ordinances. It is likely and certainly more than possible that a representative of the City would testify to the same or that other documents might be discovered in that regard. If it is possible that any such evidence could be discovered supporting the same, the claim must survive. Likewise in

regard to Factor 4 (increased risk), its apparent on its face that the City's affirmative action of issuing Hultgren the demolition permit under the circumstances increased the risk of harm to the Fodness family. Plaintiffs have pled as much and have factual support for such allegation. Plaintiffs have sufficiently alleged the existence of at least three of the four factors to be considered in determining whether the special duty exception to the public duty doctrine applies. While an examination of the factual support for such allegations is inappropriate at this stage, Plaintiffs have such factual support and are simply seeking the opportunity to conduct discovery to obtain further support for these allegations. However, this is not the time for an examination of whether there is sufficient factual support for the allegations which give rise to the special duty exception.

All of the cases relied upon by the Circuit Court in its decision were cases which were decided on the merits at summary judgment, and it is clear that the Circuit Court applied the same analysis here. This was improper because the motion at issue here was not for summary judgment but for dismissal under Rule 12. If the Circuit Court had applied the correct standard, it would have found that the Complaint stated a claim upon which relief could be granted. Therefore, the Circuit Court's ruling should be reversed.

3. The Dangerous Condition Here is Not One of Building Code or Permit Noncompliance by a Third Party.

The underlying error permeating the Circuit Court's decision is that the dangerous condition in this case arose from Hultgren's violation of the permit issued to Hultgren for interior demolition of the Property. (Memorandum Opinion, pp. 9, 11, 12). The Complaint, however, makes no such an allegation. Here, the affirmative action undertaken by the City that created the dangerous condition subject to this lawsuit is the City's issuance of an interior demolition permit to Hultgren without Demolition Plans, in

violation of the City's own ordinance and code. Such an affirmative action creates an assumed and special duty and is distinguishable from cases involving dangerous conditions created by third-party contractors violating building permits or codes. As such, a special duty exists here.

The Circuit Court is correct in finding that when a municipality carries out its duties in issuing permits or inspecting buildings, the municipalities do not necessarily assume special duties to protect individuals from negligent work performed by third parties under such permits or subject to such inspections. *See Hagen v. Sioux Falls*, 464 N.W.2d 396, 399 (S.D. 1990). In other words, a special duty does not arise from a municipality's attempts to ensure third-parties comply with building permits or applicable codes. *McDowell v. Sapienza*, 2018 S.D. 1, ¶ 38, 906 N.W.2d 399 at 410.

When the action undertaken by the municipality, however, is not one of ensuring compliance but, rather, an action outside of or in violation of statutes or ordinances, such an action is not undertaken for the public as a whole. *See Cloud v. United States*, No. CIV 06-3024, 2008 U.S. Dist. LEXIS 57333 at *22-23; *Lorshbough v. Buzzle*, 258 N.W.2d 96, 102 (Minn. 1977); *Louttit v. City of Deadwood*, 2007 U.S. Dist. LEXIS 4518, at *6 (D.S.D. Jan. 19, 2007). In deciding to deviate from or act outside of the standards of care set forth in applicable statutes and ordinances, municipalities assume special and distinct duties of care for such actions and stand in the same shoes as private litigants in that regard. *See Lorshbough v. Buzzle*, 258 N.W.2d 96, 101-102 (citing *Adams v. State*, 555 P.2d 235, 236 (Alaska 1976)).

This distinction between an "assumed duty" and a "public duty" is at the heart of the *Cracraft* factors. *Cracraft* at 806. When applying the *Cracraft/Tipton* factors to

instances in which a municipality assumes a duty of care by disregarding the standard of care set forth in applicable enactments, Factors 1 (actual knowledge) and 4 (increased risk) are, on their face, established. *See Cloud v. United States*, No. CIV 06-3024, 2008 U.S. Dist. LEXIS 57333 at *22-23. If a municipality chooses to act in a manner that violates the standard of care set forth in an enactment, the municipality must know of the dangerous condition arising from such violation. If compliance with an enactment was intended to reduce risk of harm, then it follows that noncompliance increases the risk of harm.

In *Cloud v. United States*, a police officer took a drunk driver into custody but left her vehicle in a traffic lane of a public highway, in violation of the standard of care set forth in a South Dakota statute. No. CIV 06-3024, 2008 U.S. Dist. LEXIS 57333. The plaintiffs were injured when they struck the abandoned car. *Id*. at *8. The court there found, that by not following the statutory standard of care for protecting highway drivers from stalled cars, the police officer assumed a special duty to protect such drivers. *Id.* at *22. The police officer knew of the dangerous condition created by his decision to leave the abandoned car in the traffic lane and, as such, Factor 1 was established. *Id.* The statute requiring removal of stalled vehicles from traffic lanes was intended to reduce the risk of harm of drivers crashing into stalled vehicles. *Id.* By violating the statute and leaving the car in a traffic lane, the police officer increased the risk of harm. *Id.* As such, Factor 4 was established. *Id*.

Here, the City has an ordinance and building code that provide a standard of care for demolition work. Sioux Falls Municipal Code title 15, § 150.302-107.1; 2015 International Building Code § 3303.1. The same require Demolition Plans be submitted

before such demolition work can be performed. *Id.* Those plans much be approved by a registered design professional. *Id*. The Complaint alleges that the City did not follow such ordinance and code and, thereby, deviated from the standard of care set forth by the same when the City issued a demolition permit to Hultgren without the required plans. By so acting, the City assumed a duty of care for demolition work at the Property in the place of the standard of care set forth in the ordinance and code.

4. Plaintiffs Have Sufficiently Pled a Special Duty.

The Circuit Court erred in granting the City's Motion because the Complaint alleged sufficient facts supporting the three fact-based *Tipton* factors. Such factual allegations make it more than plausible that the Fodness family will be able to establish a combination of the *Tipton* factors with sufficient evidence. Importantly, the Fodness family need not "establish" or "prove" the factors at this stage of litigation. Therefore, the Circuit Court's dismissal should be reversed.

i. Actual knowledge

To meet the pleading threshold for this factor, the Fodness Family need only plead plausible factual allegations that a municipality knew or must have known of a violation of law that constitutes a dangerous condition. The Fodness family has done just that and the Circuit Court's finding to the contrary was erroneous.

The Complaint specifically alleged that when the City issued the demolition permit to Hultgren, it had knowledge of two dangerous conditions that made harm to the Fodness family foreseeable: 1) Hultgren Construction itself; and 2) demolition work without Demolition Plans. As discussed above, however, the Circuit Court erroneously ignored the two pled dangerous conditions and applied (some of) the pled facts to an

unpled dangerous condition – that Hultgren was committing permit violations while doing demolition on the Property. Such an application, of course, led the Circuit Court to an erroneous conclusion.

As to the first dangerous condition, the Complaint pled that the City knew of "repeated instances" in which Hultgren failed to comply with and performed work beyond the scope of permits and that the City received complaints from citizens and businesses in that regard. Furthermore, such complaints included the belief that the City dispenses of the usual protocols regarding the issuance and enforcement of building permits when it came to Hultgren. The Complaint additionally alleged that the City failed to take any adverse action against Hultgren for Hultgren's known violations and, despite such violations, entered into discussions about the renovation of the Property. In short, the Fodness family alleged that the City knew that Hultgren repeatedly deviated from the standards of care set forth in building permits, and the City constructively authorized the same by not taking any adverse action to deter Hultgren from future deviations and by issuing to Hultgren the permit that paved the way for Hultgren to recklessly conduct the work that caused the building collapse and, correspondingly, the Fodness family's injuries.

It can be logically inferred that deviations from the standards of care set forth in building permits can be dangerous, and building contractors that repeatedly deviate as such are dangerous. If a municipality does nothing to deter or correct dangerous contractors and constructively authorizes their dangerous work, such work will continue. Accepting these facts as true and drawing the logical inferences therefrom in the Fodness

family's favor, the City knew that, by continuing to issue permits to Hultgren without any affirmative corrective action, the City created a dangerous condition in Hultgren itself.

In concluding that the Fodness family did not plead sufficient facts to establish the City had actual knowledge of the dangerous condition, the Circuit Court relied on this Court's opinion in *Tipton II's* holding that a "reason to know" does not establish actual knowledge. But, again, this "reason to know" standard was erroneously applied by the Circuit Court to an unpled allegation of Hultgren violating permits while doing demolition work inside the Property. Such a finding by the Circuit Court not only completely ignores the dangerous condition that was Hultgren Construction itself but also misses the thrust of the analysis in *Tipton II* - that dangerous propensities alone can constitute a dangerous condition that gives rise to a special duty.

In *Tipton II*, this Court carefully examined whether the town had actual knowledge of the wolfdog hybrids' "dangerous propensities." *Tipton II*, 1997 S.D. 96, ¶ 19, 567 N.W.2d 351, 359. This Court ultimately found that the town did not have such knowledge and distinguished the facts there from those in *Livingston v. Everett*, 751 P.2d 1199 (Wash. Ct. App. 1988) (finding that the town knew of the dangerous propensities of a dog because it had received reports of the same from citizens). *Id.* Importantly, in both cases, actual knowledge of the dangerous propensities of the dogs was alone sufficient to establish the knowledge requirement. In other words, the plaintiffs in those cases were only required to show that the municipalities knew that the dogs were dangerous and not that the municipalities had knowledge of the particular instances in which the dangerous dogs harmed the particular plaintiffs.

Here, the dangerous actor giving rise to a special duty from the City is not a dog but a building contractor. The Circuit Court erred in requiring that the Fodness family establish that the City, not only had knowledge of Hultgren's dangerous propensities, but that the City also had specific firsthand knowledge of Hultgren's negligent demolition at the Property in or around the time the building collapsed. Such a requirement, however, finds no support in any legal authority on the issue and runs contrary to this Court's finding in *Tipton II*.

Moreover, the City helped to create the dangerous propensities in Hultgren by not taking adverse action against it for violations and continually issuing it building permits despite the same. The City was in the best position to prevent Hultgren's dangerous propensities and not only failed to act in that regard but took an affirmative step to expose the Fodness family to such propensities by issuing the demolition permit for the Property. As the Fodness family has clearly alleged, a special duty arises from this conduct.

As to the second dangerous condition pled (the issuance of demolition permit without the required Demolition Plans), the City recognizes that demolition without plans approved by a licensed design professional creates a dangerous condition. To prevent such a dangerous condition, the City established a standard of care for demolition by promulgating a code and ordinance that require that Demolition Plans be submitted and approved before demolition permits are issued. As such, issuing a building permit without Demolition Plans violates such code and ordinance. Therefore, such a violation creates a dangerous condition.

The Complaint here alleged that the City violated its own standard of care set forth in its code and ordinance by issuing a demolition permit to Hultgren without the

required Demolition Plans. By violating its own standard of care, the City created a dangerous condition. Because it was the City's own decision to commit such a violation that created the dangerous condition, the City must have known the dangerous condition existed. The Circuit Court failed to address such knowledge entirely and, thereby, erred in its finding that the Complaint fails to allege sufficient facts to establish the actual knowledge factor.

ii. Reliance

The Complaint alleges that the City issued Hultgren building permits, including a permit for interior demolition. Such permits are required to be posted on the building in which the work was to be performed. The posting of the permit on the Property personally assured the only occupant of the Property, the Fodness family, that the plans for such construction work were first reviewed by the City in light of the standard of care for such work. Had the Fodness family known that the permits were issued in violation of City ordinance, the Fodness family would have not continued to occupy the Property throughout construction.

The Circuit Court concluded that the permit posted on the Property was not a personal assurance by the City to the Fodness family that it was safe for them to continue to live in the Property during construction. The Circuit Court provides little insight or rationale as to how it arrived at such a conclusion. Regardless of how it arrived there, the conclusion is wrong.

If a posting on a building is not personal or direct to the occupants of that building, then no posted notice by the City can be a sufficient representation to satisfy Factor 2. If this is true and Factor 2 is so narrow, then the only assurances left it seems

are those made in the form of a direct conversation or correspondence between a representative of a municipality and a plaintiff. And if this factor is indeed so narrow, this Court should expressly state as such and replace "representations and conduct" with "direct conversations or correspondence."

Such a narrowing of the reliance factor would nearly render the factor a nugatory. It would essentially require the plaintiff to have an opportunity to discuss a dangerous condition with a municipality before being injured by the same. This direct conversation or correspondence standard would not only be very difficult to establish but would also discourage direct conversations between municipalities and their citizens on issues of public safety. The Court should decline to follow the Circuit Court's narrow reading of the reliance factor and find the same to be in error.

iii. Increased Risk of Harm

The Complaint alleges that the City's affirmative action of issuing the permit to Hultgren under the circumstances increased the risk of harm to the Fodness family. Such an affirmative action is sufficient to establish the increased risk factor. The Circuit Court erred in finding to the contrary.

The Circuit Court concluded that "the factual allegations pled by [the Fodness family] are not enough to *prove* the City engaged in some affirmative action that contributed to, increased, or changed the risk which would have otherwise existed." The Fodness family, however, is not required to *prove* anything in the facts they alleged in their Complaint. They are only required to allege sufficient facts that make a cause of action plausible. The Fodness family has done that here and should be given the opportunity to prove the alleged facts.

The Circuit Court also found that the Fodness family "cite[s] to no authority stating that the City was required to receive an architectural and/or a structural plan before it could issue a building permit to Hultgren." To the extent this finding can be understood, it has no bearing on whether a municipality increased the risk of harm to a plaintiff. "Citing to authority" is not a requirement to establish the increased risk factor.

The only authority cited by the Circuit Court regarding its erroneous conclusion that the affirmative action of issuing a building permit cannot increase the risk of harm is *McDowell v. Sapienza*, 2018 S.D. 1, ¶ 38, 906 N.W.2d 399 at 410. The problem with citing to this case here in support of such position is that this Court did not address the increased risk factor in deciding *McDowell*. *See Id.* While the decision in *McDowell* discussed the issuance of building permits concerning the special duty exception, the only such discussions were in the context of the building permit being issued after an allegedly negligent inspection. *See Id.* (citing *Taylor v. Stevens Cty.*, 759 P.2d 447, 452 (Wash. 1988)).

Here, the negligence alleged does not arise from the violation of a third-party or a municipality's failure to discover the same. The affirmative act that created the dangerous condition and, thereby, increased the risk of harm to the Fodness family, was the City's decision to issue a demolition permit to Hultgren despite its dangerous propensities and without the required Demolition Plans. The Complaint alleges that Hultgren waited to begin the interior demolition work until after receiving the permit for such work from the City. Had the City required Hultgren to wait a little longer and come back with the required Demolition Plans, it is likely that Hultgren would have a better idea about how to safely demolish a load bearing wall and done its work accordingly. On the other hand,

by deciding not to require Hultgren to obtain Demolition Plans prior to issuing the demolition permit, it became less likely that such work was to be performed safely and, thereby, increased the risk of harm to the Fodness family. Such factual allegations, if true are sufficient to establish this factor.

The Fodness family has alleged sufficient facts to show that they can establish a combination of the *Tipton* factors. Therefore, dismissal of the Complaint was in error.

B. THE CIRCUIT COURT ERRED IN DENYING THE FODNESS FAMIY'S MOTION FOR LEAVE TO AMEND COMPLAINT

The Circuit Court erred in denying the Fodness family's Motion for Leave to Amend Complaint.

If not as a matter of course, a party may amend his pleading only by leave of court, and such leave shall be freely given when justice so requires. SDCL § 15-6-15(a). the Fodness family should be granted "every opportunity to cure defects in its pleadings by amendment…" *Sixth Camden Corp. v. Evesham*, 420 F. Supp. 709, 720 (D.N.J. 1976).

The Fodness family are confident that the allegations contained in the Complaint sufficiently state a claim against the City and, as such, the Motion to Amend is unnecessary. The Motion to Amend was filed as a precautionary measure taken in the event that the Circuit Court felt that the Complaint was missing certain technical language that could be added with a simple amendment. Such a result would be favored in the law over the harsh consequence of dismissing the claims in the Complaint particularly in light of the fact that the statute of limitations period for such claims has elapsed.

The Circuit Court erred in denying the Motion to Amend and depriving The Fodness family the opportunity to address the Court's concerns with their Complaint.

Leave to amend is to be freely granted because the law recognizes that it is better to err on the side of allowing a case to move forward beyond the initial pleadings stage than to deprive a party the opportunity to even perform discovery. And, yet, at the outset of this case and with no showing of any prejudice to the City, the Circuit Court exacted an extremely harsh result upon the Fodness family by dismissing their claims with no opportunity to avail themselves of discovery.

The Fodness family have plead viable claims against the City and will have the burden of producing evidence to support the same. Unfortunately, the Fodness family will not be allowed that opportunity if the Circuit Court's decisions are allowed to stand. This injustice can be corrected by reversing the Circuit Court's dismissal of the Fodness family' claim or by allowing the Fodness family the leave that was to be freely granted to them to amend their Complaint.

III. CONCLUSION

For the reasons stated herein,, the Fodness family respectfully requests that the Court reverse the Circuit Court's ruling granting the City's Motion to Dismiss and denying their Motion to Amend.

IV. REQUEST FOR ORAL ARGUMENT

The Fodness family respectfully requests oral argument in this matter.

Dated this 16th day of July, 2019.

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CERTIFICATE PURSUANT TO SDCL 15-26A-66 and 15-26A-14

I, Daniel R. Fritz, hereby certify that the *Appellants' Brief* in the above-entitled matter complies with the typeface specifications of SDCL § 15-26A-66 and the length specifications in SDCL § 15-26A-14. The *Appellants' Brief* contains 40,092 characters not including spaces or 7,842 words and that said *Appellants' Brief* does not exceed thirty-two (32) pages and was typed in Times New Roman font, 12 point.

Ballard Spahr LLP

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 16th day of July, 2019, two (2) true and correct copies of the foregoing *Appellants' Brief* were served by prepaid U.S. Mail and electronic mail upon the following:

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APPENDIX

STATE OF SOUTH DAKOTA) :SS COUNTY OF MINNEHAHA)	IN CIRCUIT COURT SECOND JUDICIAL CIRCUIT
EMILY FODNESS, CHRISTINE FODNESS, AND MICHAEL FODNESS, Plaintiffs, vs. CITY OF SIOUX FALLS, Defendant.	CIV 18-3031 **MEMORANDUM OPINION AND ORDER GRANTING DEFENDANT'S MOTION TO DISMISS AND DENYING PLAINTIFFS' MOTION TO AMEND**

On December 2, 2016, a building in downtown Sioux Falls collapsed during a construction project. Plaintiff Emily Fodness was in the building when it collapsed and suffered injuries. One of the construction workers in the building was killed. A number of lawsuits have been filed related to the incident. This particular case deals with the Fodness family's claim for negligence against the City of Sioux Falls. The family claims the City was negligent in issuing a building permit to Hultgren Construction, LLC, which had not provided adequate plans for its proposed work, and was known to perform work beyond the scope of its building permits. The City filed a motion to dismiss the lawsuit, asserting that under the public duty doctrine, it cannot be sued for negligently issuing a building permit. Further, the City argued that no special duty to the family existed, as the City did not have any actual knowledge of a dangerous condition, had not made any assurances to the family, had done nothing to increase the risk of harm to the family, and because no

ordinance or statute created a special duty of care to the family. The Fodness family moved for leave to amend its complaint, as an alternative to dismissal.

The matter came before the Court for hearing on December 18, 2018. Attorney Daniel Fritz appeared on behalf of Plaintiffs Emily, Christine and Michael Fodness. Attorney James Moore appeared on behalf of Defendant City of Sioux Falls. After considering the parties' written submissions, the applicable authorities, the record and oral arguments, the Court GRANTS Defendant City of Sioux Falls' motion to dismiss and DENIES Plaintiffs' motion for leave to amend their complaint.

FACTUAL BACKGROUND

In April 2016, Defendant City of Sioux Falls ("City") entered into discussions with Hultgren Construction, LLC ("Hultgren") regarding the renovation of buildings located at, and adjacent to, 136 South Phillips Avenue, Sioux Falls, South Dakota ("Property"). Following those discussions, the City issued Hultgren a building permit for the interior demolition of the Property.

On December 2, 2016, the Property collapsed, allegedly due to Hultgren's demolition of certain portions of the load bearing wall separating the interior of the buildings. Plaintiffs Emily Fodness, Christine Fodness, and Michael Fodness (collectively "Plaintiffs") were residents of the Property. At the time of the collapse, Plaintiff Emily Fodness was in the building and sustained extensive injuries.

Following the collapse, Plaintiffs filed suit against the City for negligence claiming the City negligently issued a building permit to Hultgren even though

Hultgren had not provided the City with adequate architectural or structural plans for its proposed work prior to the issuance of the permit. Plaintiffs also asserted that the City was uniquely aware of the particular dangers and risks the Plaintiffs would be exposed to by allowing Hultgren to demolish an interior load bearing wall without plans, approvals or supervision. Plaintiffs claim the City was familiar with Hultgren and its practices, as the City had issued Hultgren approximately 33 building permits from February 2013 to September 2016. From the City's experience with those permits, and complaints received from citizens and businesses, Plaintiffs assert the City was aware of repeated instances where Hultgren had failed to comply with issued building permits. Plaintiffs claim that if the City had notified Plaintiffs of the dangers it knew existed, Plaintiffs would not have continued to reside on the Property during Hultgren's construction work. Accordingly, Plaintiffs assert the City breached its special duties to Plaintiffs by exposing them to known, dangerous, and life-threatening conditions that would not have occurred except for the City's acts and omissions.

In response, the City argues it owed no duty to Plaintiffs under the public duty doctrine, as municipalities are not subject to liability for negligently issuing a building permit. Further, the City argues it had no special duty to plaintiffs, as it had no actual knowledge of any dangerous condition, that it had not made any personal assurances to Plaintiffs, that no ordinances or statutes created a special duty of care to Plaintiffs, and that the City had not done anything to increase the risk of harm to the Plaintiffs.

ANALYSIS

I. Motion to Dismiss

A motion to dismiss for failure to state a claim "tests the legal sufficiency of the pleading, not the facts which support it." *Guthmiller v. Deloitte & Touche, LLP,* 2005 S.D. 77, ¶ 4, 699 N.W.2d 493, 496. For a pleading to survive a motion to dismiss, the "complaint need only contain a short plain statement of the claim showing the pleader is entitled to relief and a demand for judgment for the relief to which the pleader deems himself entitled." *Nooney v. StubHub, Inc.*, 2015 S.D. 102, ¶ 9, 873 N.W.2d 497, 499.

"A court must deny the motion unless it appears beyond doubt that the plaintiff cannot recover under any facts provable in support of the claim." *Elkjer v. City of Rapid City*, 2005 S.D. 45, ¶ 6, 695 N.W.2d 235, 238 (citations omitted). When ruling on this motion, the court must treat all facts properly plead in the complaint as true and resolve all doubts in favor of the pleader. *Mordhorst v. Dakota Truck Underwriters & Risk Admin. Servs.*, 2016 S.D. 70, ¶ 8, 886 N.W.2d 322, 323 (citation omitted). However, "the court is free to ignore legal conclusions, unsupported conclusions, unwarranted inferences and sweeping legal conclusions cast in the form of factual allegations." *Id.* (citations omitted).

The only document the court considers when ruling on a motion to dismiss is the complaint, unless the pleader effectively incorporates another document into the pleading. *See Nooney*, 2015 S.D. 102, ¶¶ 7-8, 873 N.W.2d at 499 (citations omitted).

When "matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment." SDCL § 15-6-12(b).

A. Public Duty Doctrine

The City contends that under the public duty doctrine, it owed no duty to Plaintiffs to ensure the Property would be built in compliance with the building codes. Plaintiffs disagree, arguing the City's issuance of a building permit to Hultgren, despite the company's previous violations of building permits and building codes and its failure to submit adequate architectural or structural plans, imposed a duty upon the City to Plaintiffs.[1] To recover on a negligence claim in South Dakota, a plaintiff must establish, among other things, that the defendant owed her a duty and breached that duty. *Hewitt v. Felderman*, 841 N.W.2d 258, 263 (S.D. 2013) (quoting *Highmark Fed. Credit Union v. Hunter*, 814 N.W.2d 413, 415 (S.D. 2012)).

Under the "public duty doctrine," government entities are generally determined to owe governmental duties on matters of law enforcement and public safety to the public at large rather than to any specific individuals. *McDowell v.*

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[1] Plaintiffs also contend the City owed them a duty of care and protection as building occupants pursuant to the housing codes. Plaintiffs rely on *Halvorson v. Dahl* for support, where the Washington Supreme Court held when a municipality breaches a duty to keep occupants safe, tort claims may lie and are not precluded by the public duty doctrine because the housing codes were enacted for the benefit of a particular class of persons as well as the general public. *See* 574 P.2d 1190, 1192 (Wash. 1978). However, the broad view of the public duty doctrine applied by the court in *Halvorson*, which permitted the court to find that governmental entities owe a duty to keep occupants safe under local ordinance housing codes, has been specifically rejected by the South Dakota Supreme Court in *Tipton II. Tipton v. Town of Tabor* (*Tipton II*) , 1997 S.D. 96, ¶ 35, 567 N.W.2d 351, 366 (citation omitted).

Sapienza, 2018 S.D. 1, ¶ 36, 906 N.W.2d 399, 409 reh'g denied (Feb. 16, 2018); *E.P. v. Riley*, 1999 S.D. 163, ¶ 22, 604 N.W.2d 7, 14. The doctrine "acknowledges that many 'enactments and regulations are intended only for the purpose of securing to individuals the enjoyment of rights and privileges to which they are entitled as members of the public, rather than for the purpose of protecting any individual from harm.' " *E.P*, 1999 S.D. 163, ¶ 15, 604 N.W.2d at 12 (quoting *Tipton II*, 1997 S.D. 96, ¶ 13, 567 N.W.2d at 357). "Because such duties exist only for the protection of the public, they cannot be the basis for liability to a particular class of persons." *McDowell*, 2018 S.D. 1, ¶ 36, 906 N.W.2d at 409.

Within the last year, the South Dakota Supreme Court addressed the public duty doctrine in a "building permit" case and noted that its purpose is to prevent an overwhelming burden of liability on local governments with limited resources to "bear the burden of ensuring that every single building constructed within its jurisdiction fully complies with applicable codes." *McDowell*, 2018 S.D. 1, ¶ 39, 906 N.W.2d at 410 (citations omitted). The Court specifically held a municipality is not subject to liability for negligently issuing a building permit. *Id.* In so holding, the Court reversed the decision of the trial court and reaffirmed its established precedent that "building codes do not create a duty of care that will support a negligence claim." *Id.*; *see Hagen v. City of Sioux Falls*, 464 N.W.2d 396, 400 (S.D. 1990) (holding municipalities owe no duty to individual property owners to properly inspect buildings or to ensure compliance with building codes because building codes "only [implicate a] general duty to the public as a community, rather than an

obligation to a specific class of individual members of the public"). The Court further expressed:

> [B]y issuing a permit, municipalities do not imply that the plans submitted are in compliance with all applicable codes. Local governments should not, for the particular benefit of individual persons, bear the burden of ensuring that every single building constructed within its jurisdiction fully complies with applicable codes. The duty to ensure compliance rests with the individuals responsible for construction. Permit applicants, builders and developers are in a better position to prevent harm to a foreseeable plaintiff than are local governments.

McDowell, 2018 S.D. 1, ¶ 39, 906 N.W.2d at 410 (internal quotation marks and citations omitted).

B. Special Duty Doctrine

When the public duty rule is implicated, "a breach of a public duty will not give rise to liability to an individual unless there exists a special duty owed to that individual." *Maher v. City of Box Elder*, 2019 S.D. 15, ¶ 9 (*citing Tipton II*, 1997 S.D. 96, ¶ 13, 567 N.W.2d at 358); *see also Hagen*, 464 N.W.2d at 399 (stating the special duty doctrine provides that "a government entity is liable for failure to enforce its laws only when it assumes a special, rather than a public, duty."). "A special duty of care 'arises only when there are additional indicia that the municipality has undertaken the responsibility of not only protecting itself, but also undertaken the responsibility of protecting a particular class of persons[.]' " *Tipton v. Town of Tabor* (*Tipton I*), 538 N.W.2d 783, 786 (S.D. 1995) (quoting *Cracraft v. City of St. Louis Park*, 279 N.W.2d 801, 806 (Minn. 1979)). "To establish liability under [the special

duty doctrine], plaintiffs must show a breach of some duty owed to them as individuals." *Tipton II*, 1997 S.D. 96, ¶ 13, 567 N.W.2d at 358.[2]

In *Tipton I*, the South Dakota Supreme Court adopted a four-part test to determine whether the governmental entity owed a particular person or class of persons a special duty. *Tipton I*, 538 N.W.2d at 787 (adopting test from *Cracraft*, 279 N.W.2d at 806-07). The Court has established that "any *combination*" of the following four factors may create a special duty:

> 1) the [governmental entity's] actual knowledge of the dangerous condition;
>
> 2) reasonable reliance by persons on the [governmental entity's] representations and conduct;
>
> 3) an ordinance or statute that sets forth mandatory acts clearly for the protection of a particular class of persons rather than the public as a whole; and
>
> 4) failure by the [governmental entity] to use due care to avoid increasing the risk of harm.

Id. (citing *Cracraft*, 279 N.W.2d at 806–07) (citation omitted).

i. The City had no actual knowledge of a dangerous condition.

Actual knowledge of a dangerous condition is required to create a special duty. *Tipton II*, 1997 S.D. 96, ¶ 17, 567 N.W.2d at 358 (additional citation and internal quotation marks omitted). "Constructive knowledge is insufficient: a public

[2] Notably, "[w]hile many plaintiffs have invoked the special duty rule to support claims against public entities, most courts have found no liability for matters such as failure to adequately inspect a structure for violations of fire and building codes, or failure to apprehend drunk drivers who later injure others." *Tipton I*, 538 N.W.2d at 787 (internal quotations and citations omitted).

entity must be uniquely aware of the particular danger or risk to which a plaintiff is exposed. It means knowing inaction could lead to harm." *Id.* (internal citation omitted). "[A]ctual knowledge denotes a foreseeable plaintiff with a foreseeable injury." *Id.* at 359. "Only where the circumstances are such that the defendant 'must have known' and not 'should have known' will an inference of actual knowledge be permitted." *Id.*

In this case, Plaintiffs allege the City knew that issuing a building permit to Hultgren for the interior demolition of the Property would substantially increase the risk of injury or death because the City was aware of past instances where Hultgren was not compliant with work permits issued by the City. Even if the City was aware of Hultgren's past violations of building permits and building codes, it does not establish the City had actual knowledge that Hultgren was violating the permit issued by the City for the Property where Plaintiffs resided. *See Tipton II*, 1997 S.D. 96, ¶ 17, 567 N.W.2d at 359 ("actual knowledge imports 'knowing' rather than 'reason for knowing' "). Therefore, Plaintiffs have not pled sufficient facts to establish the City had actual knowledge of the dangerous condition.

ii. Plaintiffs' general reliance on the City's representations and conduct is insufficient to establish liability.

To establish their claim of reasonable reliance on the City's representations and conduct, Plaintiff must have depended "on specific actions or representations which [caused them] to forgo other alternatives of protecting themselves." *Tipton II*, 1997 S.D. 96, ¶ 32, 567 N.W.2d at 365. The South Dakota Supreme Court has refused to find reasonable reliance absent "personal assurances" made by the

governmental entity to the plaintiff. *Id.* Implicit assurance is not enough. *Walther v. KPKA Meadowlands Ltd. Partnership*, 1998 SD 78, ¶ 18, 581 N.W.2d 527, 533. *See McDowell*, 2018 S.D. 1, ¶ 39, 906 N.W.2d at 410 ("by issuing a permit, municipalities do not imply that the plans submitted are in compliance with all applicable codes").

In the present case, Plaintiffs allege the permits issued by the City to Hultgren were public and posted representations by the City to the occupants of the Property that work performed in the building was being done within the standard of care for such work. These factual allegations, however, do not allege that any direct promise or personal assurances made by the City caused Plaintiffs to forego other alternatives to protect themselves. *Tipton II*, 1997 S.D. 96, ¶¶ 32-33, 567 N.W.2d at 365 (holding there was not reasonable reliance by the plaintiff because no direct promises were made). Thus, accepting Plaintiffs' factual allegations as true, Plaintiffs have failed to show that any personal assurances were made by the City to Plaintiffs.

iii. There is no applicable ordinance mandating a special duty of care to Plaintiffs.

The third factor of the special duty doctrine "permits recovery against a government entity for negligent failure to enforce its laws only when there is language in a statute or ordinance which shows an intent to protect a particular and circumscribed class of persons." *Tipton II*, 567 N.W.2d at 365–66 (quoting *Tipton I*, 538 N.W.2d at 786) (internal quotation marks omitted).

In this case, Plaintiffs acknowledge they have not identified any statute or ordinance that mandates a special duty of care. Furthermore, South Dakota precedent has established that building codes, zoning ordinances, and the issuance of building permits protect the public at large and not any special class of persons. *See Hagen*, 464 N.W.2d at 399 (finding that building codes were "aimed only at public safety or general welfare"). Accordingly, Plaintiffs have not pled factual allegations sufficient to satisfy this factor.

iv. The City did nothing to increase the risk of harm to Plaintiff.

"Under this factor, official action must either cause harm itself or expose plaintiffs to new or greater risks, leaving them in a worse position than they were before official action." *Tipton II*, 997 S.D. 96, ¶ 38, 567 N.W.2d at 366.

> This element ... does not ask whether the city simply failed to act, but whether the city failed to use due care to avoid increasing the risk of harm. The city has to be more than negligent. A failure to diminish potential harm is not enough. The city's actions must either cause the harm itself or have exposed [the plaintiff] to new or greater risks, leaving [the plaintiff] in a worse position than she would have been before the city's actions.

Pray v. City of Flandreau, 2011 S.D. 43, ¶ 14, 801 N.W.2d 451, 455–56. Thus, the governmental entity must have taken some affirmative action that "contributed to, increased, or changed the risk which would have otherwise existed." *Gleason v. Peters*, 1997 S.D. 102, ¶ 25, 568 N.W.2d 482, 487 (citations and internal quotations marks omitted).

Plaintiffs allege the City's issuance of a building permit to Hultgren for the interior demolition of the Property where Plaintiffs were known to reside

substantially increased the risk of injury or death to Plaintiffs because the City knew Hultgren did not submit adequate architectural or structural plans, and because the City was aware of past instances in which Hultgren violated building permits and building codes. However, even accepting those factual allegations as true, Plaintiffs cannot show the City engaged in some affirmative action that increased the risk of harm to Plaintiffs.

While Plaintiffs claim the submission of an architectural and/or a structural plan is a prerequisite for the issuance of a building permit, they cite to no authority stating that the City was required to receive an architectural and/or a structural plan before it could issue a building permit to Hultgren.

Even if the City knew of prior instances where Hultgren violated building permits and building codes before it granted the building permit at issue in this case, the factual allegations pled by Plaintiffs are not enough to prove the City engaged in some affirmative action that contributed to, increased, or changed the risk which would have otherwise existed. The City's issuance of a building permit is not an affirmative action by the City that increases the risk of harm to Plaintiffs. *See McDowell*, 2018 S.D. 1, ¶ 39, 906 N.W.2d at 410 (stating that such conduct is insufficient, even if negligently performed, to hold a governmental entity liable). Therefore, Plaintiffs have not pled factual allegations adequate to show the City performed some affirmative action that increased the risk of harm to Plaintiffs.

II. Motion to Amend

Plaintiffs filed a motion to amend their complaint four days before the hearing on the City's motion to dismiss. While Plaintiffs assert they have sufficiently pled negligence against the City, they ask that if the Court finds any defects in the complaint, that Plaintiffs be allowed to amend their complaint as an alternative to dismissal. No proposed amended complaint was attached to Plaintiffs' motion,[3] nor did Plaintiffs include any proposed language in their briefing, so it is not apparent what language or additional allegations Plaintiffs would add to the complaint, if allowed to amend.

"A trial court may permit the amendment of pleadings before, during, and after trial without the adverse party's consent." *Klutman v. Sioux Falls Storm*, 2009 S.D. 55, ¶ 14, 769 N.W.2d 440, 446, quoting *Burhenn v. Dennis Supply Co.*, 2004 SD 91, ¶ 20, 685 N.W.2d 778, 783. (additional citations omitted). "SDCL 15–6–15(a) provides in relevant part that leave to amend shall be freely given when justice so requires." *Prairie Lakes Health Care Sys., Inc. v. Wookey,* 1998 SD 99, ¶ 28, 583 N.W.2d 405, 417. However, a court "may appropriately deny leave to amend 'where there are compelling reasons such as ... futility of the amendment,' even when doing so will necessarily prevent resolution on the merits." *In re Wintersteen Revocable Tr. Agreement*, 2018 S.D. 12, ¶ 11, 907 N.W.2d 785, 789 citing *Ash v. Anderson Merchandisers, LLC*, 799 F.3d 957, 963 (8th Cir. 2015) (quoting *Horras v. Am.*

[3] Although Federal Rules of Civil Procedure require that a proposed amended pleading be attached to a motion to amend, South Dakota law does not contain this requirement. See Fed. R. Civ. P. 15.

Capital Strategies, Ltd., 729 F.3d 798, 804 (8th Cir. 2013)); *see Foman v. Davis*, 371 U.S. 178, 182, 83 S.Ct. 227, 230, 9 L.Ed.2d 222 (1962).

The City argues the motion to amend should be denied because Plaintiffs have not established how an amended complaint would remedy the defects in the complaint as pled. *See Sherman v. Winco Fireworks, Inc.*, 532 F.3d 709, 715 (8th Cir. 2008) (stating that a proposed amendment that is clearly futile or fails to include allegations to cure defects in the original pleading should be denied (quoting *Moses.com Sec, Inc. v. Comprehensive Software Sys., Inc.*, 406 F.3d 1052, 1065 (8th Circ. 2005)).

The Court agrees that Plaintiffs have merely relied on their general and conclusory allegations in their original complaint. Those allegations, as noted above, cannot withstand dismissal. Plaintiffs' vague request to amend is an effort to survive dismissal, conduct additional discovery, and have the case resolved on its merits. However, the Court's task at this point in the proceedings is to determine if the proposed pleading can withstand a motion to dismiss for failure to state a claim. *See Wheeler v. Hruza*, No. CIV 08-4087, 2010 WL 2231959, at 2 (D.S.D. June 2, 2010) (stating the test for futility in a motion to amend complaint does not depend on whether the proposed amendment could potentially be dismissed on a motion for summary judgment, but whether the proposed pleading can withstand a motion to dismiss for failure to state a claim (*citing Peoples v. Sebring Capital Corp.*, 209 F.R.D. 428, 430 (N.D. Ill. 2002)). Based on the pleadings and arguments submitted by Plaintiffs, the Court cannot determine if an amendment could cure the defects in

the original complaint or change the outcome of the Court's analysis. Even though the Court favors resolution on the merits, it is not in the interest of justice to allow Plaintiffs leave to amend their complaint when they have not identified how amending would cure the defects in their original complaint. Thus, the Court denies Plaintiffs' motion for leave to amend their complaint.

CONCLUSION

The City's issuance of a building permit to Hultgren did not create a duty of care to support a negligence claim, and Plaintiffs cannot establish the City owed them a special duty of care. In the absence of any special duty owed by the City to the Plaintiffs, the negligence claim against the City fails as a matter of law and dismissal is appropriate. Plaintiffs' motion for leave to amend their complaint is denied as the Court cannot determine if Plaintiffs' amendment could cure the defects in their original complaint.

ORDER

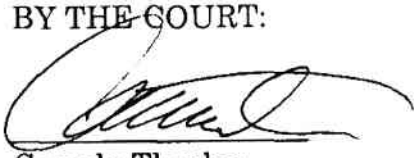
Based upon the foregoing, it is hereby ordered that:

City of Sioux Falls' Motion to Dismiss is GRANTED.

Plaintiffs' Motion to Amend is DENIED.

Dated this 18th day of March, 2019

BY THE COURT:



Camela Theeler
Circuit Court Judge

Filed: 3/19/2019 3:30 PM CST Minnehaha County, South Dakota 49CIV18-003031

ATTEST:
Angelia M. Gries, Clerk of Court

By: _____
Deputy Clerk

FILED
MAR 19 2019
Minnehaha County, S.D.
Clerk Circuit Court

STATE OF SOUTH DAKOTA) IN CIRCUIT COURT
:SS
COUNTY OF MINNEHAHA) SECOND JUDICIAL DISTRICT

****

EMILY FODNESS, MICHAEL FODNESS and
CHRISTINE FODNESS

Plaintiffs,

CASE NO. 49CIV18-003031

vs. MOTIONS HEARING

CITY OF SIOUX FALLS,

Defendant.

****

BEFORE: The Honorable Camela C. Theeler
Circuit Court Judge
in and for the Second Judicial Circuit
State of South Dakota
Sioux Falls, South Dakota

APPEARANCES:
Daniel R. Fritz, Esq.
Ballard Spahr
101 South Reid Street, Suite 302
Sioux Falls, South Dakota 57103
appearing on behalf of the Plaintiff;

James E. Moore, Esq. and
Alexis A. Warner, Esq.
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Sioux Falls, South Dakota 57104
appearing on behalf of the Defendant.

PROCEEDINGS: The above-entitled proceeding commenced at 10:00 a.m. on the 18th day of December, 2018 in Courtroom 4A of the Minnehaha County Courthouse, Sioux Falls, South Dakota.

REPORTED BY: Lisa M. Kull, Official Court Reporter
425 North Dakota Avenue
Sioux Falls, South Dakota 57104

ordinance.

So what's alleged in this complaint is the City who failed my clients. They have a contractor coming to them for a permit who they know violates permits. They know that if he removes that load-bearing wall in an unsafe manner, the risk to my clients is significantly increased. They know that he did not present adequate plans as required by ordinance and as required by the building code, they know he didn't do that and they know they issued that permit in violation of that code and of that ordinance.

And, yet, they say they have no duty, no specific duty to my clients. If there isn't a duty here, then I fail to see where there would ever be a duty on behalf of the City to protect anyone. And if there is no duty in this case, then I'm not sure what the purpose of the permitting process is. It is a sham. And the public should be warned that when the City issues a permit, it is absolutely of no significance whatsoever.

So knowledge, actual knowledge, the first factor. Did the City have actual knowledge, with all of that alleged, did they have actual knowledge of a dangerous condition. Absolutely.

Actual knowledge of a violation. They violated -- they violated their own ordinance, they violated their own building code in issuing that permit without the submission of

adequate architectural and engineering plans.

The building code, Your Honor, which is adopted by ordinance, the 2015 International Building Code, Section 3303.1, states, "Construction documents and a schedule for demolition shall be submitted where required by the building official. In that case no work shall be done until such construction documents or schedule or both are approved." There weren't any plans submitted.

Sioux Falls City Ordinance 107.1 under the building code, "Submittal documents consisting of one complete set of hard copy plans with an additional hard copy site submittal and an electronic submittal in .pdf format along with other construction documents, statement of special inspections, geotechnical report, on and on, and other data, shall be submitted with each permit application. The construction documents shall be prepared by a registered design professional where required by the statutes of the jurisdiction in which the property is to be constructed." That wasn't done.

So did they have actual knowledge of violation of law? They committed a violation of law. Did they have a violation that Hultgren Construction was exceeding its own permit? I would say there was reason to conclude that they must have. And must have is good enough according to the South Dakota Supreme Court. Because of the circumstances

IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

Appeal No. 28965

EMILY FODNESS, CHRISTINE FODNESS, and MICHAEL FODNESS,

Plaintiffs/Appellants,

vs.

CITY OF SIOUX FALLS,

Defendant/Appellee.

Appeal from the Circuit Court
Second Judicial Circuit
Minnehaha County, South Dakota

THE HONORABLE CAMELA THEELER, CIRCUIT COURT JUDGE

BRIEF OF APPELLEE CITY OF SIOUX FALLS

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Notice of Appeal filed April 17, 2019

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Jurisdictional Statement

The memorandum opinion and order dismissing their complaint from which Emily, Christine, and Michael Fodness appeal was filed on March 19, 2019 by the Honorable Camela Theeler. (SR at 45-60.) Notice of entry was filed the same day. (*Id.* at 61-78.) The notice of appeal was filed on April 17, 2019. (*Id.* at 79-81.)

Request for Oral Argument

The City of Sioux Falls disagrees that oral argument is necessary. The appeal is not factually complicated and can be decided on existing precedent.

Statement of the Issues

1. Based on the public-duty doctrine, this Court has held that building codes, including issuing building permits, implicate a general duty to the community, not a specific duty to individuals, and do not support a negligence claim. The complaint alleges that the City negligently issued a building permit to Hultgren Construction LLC. Did the complaint fail to state a claim under the public-duty doctrine?

   The circuit court held that that the City's issuance of a building permit to Hultgren Construction LLC did not create a duty of care to support a negligence claim.

   Hagen v. City of Sioux Falls, 464 N.W.2d 396 (S.D. 1990)
   Tipton v. Town of Tabor, 1997 S.D. 96, 567 N.W.2d 351
   E.P. v. Riley, 1999 S.D. 163, 604 N.W.2d 7
   McDowell v. Sapienza, 2018 S.D. 1, 906 N.W.2d 399

2. If a public entity has actual knowledge of a dangerous condition, takes some action on which a plaintiff reasonably relies, is mandated by ordinance or statute to act for the benefit of a particular person or class, or fails to avoid increasing the risk of harm, the entity may be liable under the special-duty rule. The complaint refers to special duties, reliance, increased risk of harm, and awareness of particular dangers, but does not allege any facts that the City did anything actionable apart from issuing and failing to enforce building permits. Did the complaint fail to state a claim based on a special duty?

   The circuit court held that the complaint did not allege facts that, assuming them to be true, would establish any of the four factors that create a special duty.

Tipton v. Town of Tabor, 1997 S.D. 96, 567 N.W.2d 351
Walther v. KPKA Meadowlands Ltd. P'ship., 1998 S.D. 78, 581 N.W.2d 527

3. Leave to amend a complaint should be freely given, but may be denied if it would be futile. In response to the City's motion for summary judgment, the Fodness family moved to amend the complaint, but did not offer any different facts that would be alleged to cure the legal deficiencies in the complaint. Would leave to amend have been futile?

   The circuit court denied leave to amend as futile because the Fodness family did not show how amendment would cure the defects in the complaint.

   In re Wintersteen Revocable Tr. Agreement, 2018 S.D. 12, 907 N.W.2d 785

Statement of the Case

Emily Fodness, Christine Fodness, and Michael Fodness (collectively "the Fodness family") started this lawsuit against the City of Sioux Falls ("the City") on September 27, 2018. (SR at 1-7.) On October 25, 2018, the City filed a motion to dismiss under SDCL § 15-6-(b)(5) for failure to state a claim. (*Id.* at 13-23, 38-44.) In its motion, the City argued that a negligence claim based on its issuance of a building permit is barred by the public-duty doctrine, and that the complaint did not allege facts sufficient to establish a special duty. (*Id.*) The Fodness family resisted the motion and moved to amend. (*Id.* at 26-37.)

On December 18, 2018, the circuit court heard argument on the motions. The court issued a memorandum opinion and order dated March 19, 2019, granting the motion to dismiss and denying leave to amend. (*Id.* at 45-60.)[1] In its decision, the court held that: (1) based on the public-duty doctrine, the City did not owe any duty to the Fodness family based on issuing a building permit; (2) the complaint failed to allege facts

[1] The memorandum opinion and order is included in Appellants' Appendix, so subsequent citations to the memorandum opinion and order in this brief will be to that appendix.

sufficient to establish a special duty as an exception to the public-duty doctrine; and (3) leave to amend would have been futile because the motion did not explain how amendment would cure the deficiencies in the complaint. (Appellants' App. at 5-15.) This appeal followed.

Statement of the Facts

As required by the standard governing a motion to dismiss, this statement of facts assumes that the facts stated in the complaint are true.

In April 2016, the City and Hultgren Construction LLC ("Hultgren") began discussions about renovating two buildings located at, and adjacent to, 136 South Phillips Avenue in downtown Sioux Falls. (SR at 3, ¶ 10.)[2] Hultgren applied to the City for a building permit, the City issued a permit for interior demolition, and Hultgren began work. (Appellee's App. at 3, ¶ 16.) The Fodness family lived in an upstairs apartment in one of the buildings. (*Id.* at 4, ¶¶ 20-22.)

On December 2, 2016, the building in which the apartment was located collapsed due to Hultgren's demolition of certain portions of a load-bearing wall separating the two buildings. (*Id.* at 3-4, ¶ 19.) Emily Fodness was asleep in her room at the time and was trapped in the debris. (*Id.* at 4, ¶ 20.) Michael Fodness was on the ground level and escaped before the building collapsed. (*Id.* ¶ 21.) Christine Fodness was at work and not in the building. (*Id.* ¶ 22.) First responders employed by the City rescued Emily Fodness from the debris approximately four hours later. (*Id.* ¶ 23.) Emily and her parents allege resulting physical and emotional injury. (*Id.* at 5, ¶¶ 24-25.)

[2] A copy of the complaint is included in the appendix to this brief. All subsequent citations to the complaint are to the appendix.

Standard of Review

This Court reviews a circuit court's decision to grant a motion to dismiss de novo, drawing all reasonable inferences of fact in favor of the pleader and giving no deference to the circuit court's conclusions of law. *Thompson v. Summers*, 1997 S.D. 103, ¶ 5, 567 N.W.2d 387, 390 ("As this appeal presents a question of law, our review is de novo, with no deference given to the trial court's legal conclusions."); *Mordhorst v. Dakota Truck Underwriters and Risk Admin. Serv's.*, 2016 S.D. 70, ¶ 9, 886 N.W.2d 322, 324. Whether certain facts create a legal duty of care is a question of law, subject to de novo review. *Janis v. Nash Finch Co.*, 2010 S.D. 27, ¶ 8, 780 N.W.2d 497, 500.

This Court reviews an order denying leave to amend for an abuse of discretion. *McDowell v. Citicorp Inc.*, 2008 S.D. 50, ¶ 7, 752 N.W.2d 209, 212 (citing *Sejnoha v. City of Yankton*, 2001 S.D. 22, ¶ 5, 622 N.W.2d 735, 737). "An abuse of discretion occurs when 'discretion [is] exercised to an end or purpose not justified by, and clearly against, reason and evidence.'" *Miller v. Jacobsen*, 2006 S.D. 33, ¶ 18, 714 N.W.2d 69, 76 (quoting *Watson-Wojewski v. Wojewski*, 2000 S.D. 132, ¶ 14, 617 N.W.2d 666, 670).

Argument

1. The standard for deciding a motion to dismiss is not dispositive.

Scattered throughout the Fodness family's brief is an argument that motions to dismiss should rarely be granted; that no South Dakota case involving the public-duty doctrine or the special-duty exception has been decided on a motion to dismiss; and that the circuit court tested the facts, not the law, when granting the City's motion to dismiss. (Appellants' Br. at 5-6, 11-13, 15, 23.) This procedural argument does not support reversal.

The standard for deciding a motion to dismiss under SDCL § 15-6-12(b)(5) is well-settled:

> A motion to dismiss under SDCL 15-6-12(b) tests the legal sufficiency of the pleading, not the facts which support it. For purposes of the pleading, *the court must treat as true all facts properly pled in the complaint* and resolve all doubts in favor of the pleader.

North Am. Truck & Trailer, Inc., v. M.C.I. Commc'n Serv's., Inc., 2008 S.D. 45, ¶ 6, 751 N.W.2d 710, 712 (emphasis added). Encompassed within this standard is an assumption that the Fodness family can prove their allegations. The circuit court did not, as the Fodness family alleges, fail to accept the allegations as true, but instead held, with respect to each factor necessary to create a special duty, that the allegations were legally insufficient. (Appellants' App. at 9) ("Plaintiffs have not pled sufficient facts to establish the City had actual knowledge of the dangerous condition"); (*id.* at 10) ("accepting Plaintiff's factual allegations as true, Plaintiffs have failed to show that any personal assurances were made by the City to Plaintiffs"); (*id.* at 11) (with respect to the third factor, "Plaintiffs have not pled factual allegations sufficient to satisfy this factor"); (*id.* at 12) ("Plaintiffs have not pled factual allegations adequate to show the City performed some affirmative action that increased the risk of harm to Plaintiffs.") The circuit court properly recognized that except for allegations that the City issued a building permit despite knowledge of Hultgren's past violations of previous building permits, the complaint is devoid of any specific factual allegations that would create a special duty. Moreover, the complaint is full of vague and conclusory allegations, which are legally insufficient. *See Nygaard v. Sioux Valley Hospitals & Health Sys.*, 2007 S.D. 34, ¶ 39, 731 N.W.2d 184, 198 (quoting Moore's Federal Practice, § 12.34(1)(b) (3d ed. 2006))

("'conclusory allegations or legal conclusions masquerading as factual conclusions will not suffice to prevent a motion to dismiss'''). Thus, there was no procedural irregularity in the circuit court's analysis.

While the City concedes that the standard for granting a motion to dismiss is stringent, it is not impossible to meet. This Court has affirmed dismissal under SDCL § 15-6-12(b) many times. *See, e.g., Nygaard v. Sioux Valley Hosps. & Health Sys.*, 2007 S.D. 34, ¶ 42, 731 N.W.2d 184, 199; *Fenske Media Corp. v. Banta Corp.*, 2004 S.D. 23, ¶ 18, 676 N.W.2d 390, 395; *Hernandez v. Avera Queen of Peace Hosp.*, 2016 S.D. 68, ¶ 30, 886 N.W.2d 338, 348; *Wojewski v. Rapid City Reg'l Hosp., Inc.*, 2007 S.D. 33, ¶ 33, 730 N.W.2d 626, 637; *Hansen v. S.D. Dep't of Transp.*, 1998 S.D. 109, ¶ 36, 584 N.W.2d 881, 889; *Upell v. Dewey Cty. Comm'n*, 2016 S.D. 42, ¶ 21, 880 N.W.2d 69, 76.

The Fodness family argues more specifically that any case involving an alleged special duty of care by a governmental entity to protect individuals is inappropriate for decision based on a motion to dismiss. (Appellants' Br. at 8-9, 11.) That is, a court must analyze four factors to determine whether a special duty exists, as opposed to merely construing a statute under a bright-line test as was the case before the 1995 decision in *Tipton v. Town of Tabor*, 538 N.W.2d 783 (S.D. 1995) (*Tipton I*). (*Id.* at 9.) Since this decision, a court must consider a "broader range of relevant facts." *Tipton I*, 538 N.W.2d at 787. Thus, the Fodness family argues that "[t]he necessity of such examination all but eliminated a court's ability to dismiss a special duty claim based on a review of the complaint alone." (Appellants' Br. at 11.)

This argument is disproved by a decision the Fodness family cites. In *Sorace v. United States*, 2014 WL 2033149 (D.S.D. May 16, 2014), the court granted the Government's motion to dismiss under Rule 12(b) for failure to state a claim finding that the Government did not owe a duty of care to plaintiffs under the public-duty or special duty doctrines. *Id.* at *10. In *Sorace*, plaintiff alleged in her complaint that the Rosebud Sioux Tribe Police Department was negligent for failing to locate and stop a vehicle driven by a drunk driver before it collided with another vehicle, killing two people and injuring two others. *Id.* at *1. The Government filed a 12(b)(6) motion to dismiss and argued, in part, that under South Dakota's public-duty rule, the Rosebud Sioux Tribe Police Department owed no duty to plaintiff. *Id.* at *4. The district court agreed and held that "to establish liability under the public-duty rule in South Dakota, a plaintiff must demonstrate that the police owed her a 'special duty.'" *Id.* at *5. The district court then analyzed the allegations in plaintiff's complaint in combination with this Court's four-part test to determine the existence of a special duty. *Id.* at *5-9. The district court found that while plaintiff was able to establish actual knowledge (first factor), plaintiff could not establish any of the other factors and therefore "failed to allege sufficient facts to indicate that the Rosebud Sioux Tribe Police Department owed Melanie or the children a special duty." *Id.* at *10.

A motion to dismiss tests the law of a claim. *See North Am. Truck & Trailer, Inc.*, 2008 S.D. 45, ¶ 6, 751 N.W.2d at 712. If, assuming all the facts in the complaint are true, a complaint cannot state a legally cognizable claim, the proper—and preferred—resolution is to dismiss the action to prevent the unnecessary expense of discovery,

motions, trial, and more. Based on the facts alleged in the complaint, the circuit court properly concluded that the public-duty doctrine bars the Fodness family's negligence claim against the City based on the City's issuance of building permits, and that the Fodness family failed to establish a special duty owed to them by the City.

2. Because issuing a building permit cannot create a duty of care, the public-duty doctrine barred the Fodness family's negligence claim.

The complaint contains a single claim for negligence. (Appellee's App. at 5.) Although the complaint does not refer to the public-duty doctrine, the allegations in paragraphs 27-30, relating to the City's knowledge of particular dangers, its breach of "special duties," and its claim of reliance suggest that counsel pleaded a claim under the special-duty exception. Nevertheless, the Fodness family argued to the circuit court that the public-duty doctrine did not bar their lawsuit, and that the City was negligent in issuing a building permit to Hultgren that allowed interior demolition of the building where they resided. The circuit court properly held under this Court's decisions in *McDowell v. Sapienza*, 2018 S.D. 1, 906 N.W.2d 399, and *Hagen v. City of Sioux Falls*, 464 N.W.2d 396 (S.D. 1990), that "building codes do not create a duty of care that will support a negligence claim." *Sapienza*, 2018 S.D. 1, ¶ 39, 906 N.W.2d at 410. (Appellants' App. at 5-7.) On appeal, the Fodness family does not challenge this ruling. Thus, the starting point for considering the validity of their claim is recognizing that the City's building code cannot itself create a duty of care and that issuance or enforcement of a building permit alone is insufficient to create a duty of care.

3. The facts alleged in the complaint do not establish a special duty of care.

South Dakota law recognizes the special-duty rule as an exception to the public-duty doctrine. *Maher v. City of Box Elder*, 2019 S.D. 15, ¶ 9, 925 N.W.2d 482, 485 ("When the [public duty] rule is implicated, a breach of a public duty will not give rise to liability to an individual unless there exists a special duty owed to that individual."); *Tipton v. Town of Tabor*, 1997 S.D. 96, ¶ 13, 567 N.W.2d 351, 358 (*Tipton II*) ("A widely accepted corollary to the public duty doctrine is the 'special duty' or 'special relationship' rule."). A special duty "'arises only when there are additional indicia that the municipality has undertaken the responsibility of not only protecting itself, but also undertaken the responsibility of protecting a particular class of persons[.]'" *Tipton I*, 538 N.W.2d at 786 (quoting *Cracraft v. City of St. Louis Park*, 279 N.W.2d 801, 806) (Minn. 1979)). If the public entity's own conduct indicates "a policy decision to deploy its resources to protect [an] individual," then the exception acknowledges, in essence, an assumed duty. *Tipton II*, 1997 S.D. 96, ¶ 13, 567 N.W.2d at 358. Thus, "a government entity is liable for failure to enforce its laws . . . when it assumes a special, rather than a public, duty." *Pray v. City of Flandreau*, 2011 S.D. 43, ¶ 3, 801 N.W.2d 451, 453. The exception is based in general tort principles that when an actor chooses to assist another, the actor, "once having acted, must proceed without negligence." *Tipton II*, 1997 S.D. 96, ¶ 13, 567 N.W.2d at 358.

This Court has adopted a four-part test to determine if a special duty exists:

1) Actual knowledge of the dangerous condition;

2) Reasonable reliance by persons on official representations and conduct;

3) An ordinance or statute that sets forth mandatory acts clearly for the protection of a particular class of persons rather than the public as a whole; and

4) Failure to use due care to avoid increasing the risk of harm.

Tipton II, 1997 S.D. 96, ¶ 6, 567 N.W.2d at 355 (citing *Tipton I*, 538 N.W.2d at 787). "Strong evidence concerning any combination of these factors may be sufficient to impose liability on a government entity." *Tipton I*, 538 N.W.2d at 787; *see also Tipton II*, 1997 S.D. 96, ¶ 29, 567 N.W.2d at 364 n.21 ("'Although the *Cracraft* court did not specify the weight to be given each of the four factors, a close reading of *Lorshbough* and *Cracraft* indicates that the single most important factor is that of actual knowledge on the part of the municipality.'").

Before discussing each factor, the Fodness family repeats its argument that the circuit court required it to prove facts sufficient to create a duty rather than merely allege them. (Appellant's Br. at 18) ("The Circuit Court erred . . . because the Complaint alleged sufficient facts supporting the three fact-based *Tipton* factors. . . . Importantly, the Fodness family need not 'establish' or 'prove' the factors at this stage of litigation."). While the distinction between alleging and proving facts is a non-issue in the context of a motion to dismiss (because the facts must be accepted as true), the problem, as discussed in more detail below, is that the complaint contains conclusions, not facts that would allow the Court to conclude that the factors were satisfied. It is well-settled that "'conclusory allegations or legal conclusions masquerading as factual conclusions will not suffice to prevent a motion to dismiss.'" *Nygaard*, 2007 S.D. 34, ¶ 39, 731 N.W.2d at 198 (quoting Moore's Federal Practice, § 12.34(1)(b) (3d ed. 2006)). Because the

Fodness family did not allege specific facts establishing even one of the single special duty factors, their negligence claim fails as a matter of law.

a. The complaint does not allege facts establishing actual knowledge.

This Court has defined "actual knowledge" as "knowledge of 'a violation of law constituting a dangerous condition.'" *Tipton II*, 1997 S.D. 96, ¶ 17, 567 N.W.2d at 358 (quoting *Hage v. Stade*, 304 N.W.2d 283, 288 n.2 (Minn. 1981)). "Constructive knowledge is insufficient: a public entity must be uniquely aware of the particular danger or risk to which a plaintiff is exposed." *Id.* "Although actual knowledge may be shown by both direct and circumstantial evidence, it may not be established through speculation." *Id.* ¶ 18, 567 N.W.2d at 359. "Only where the circumstances are such that the defendant 'must have known' and not 'should have known' will an inference of actual knowledge be permitted." *Id.* "In sum, actual knowledge imports 'knowing' rather than 'reason for knowing.'" *Id.*

The Fodness family discusses this factor at pages 13-14 of their brief. Missing from the discussion are any facts from the complaint that would establish actual knowledge of a violation of law constituting a dangerous condition. The complaint alleges that the City was aware of Hultgren's failure to comply with other building permits (Appellee's App. at 2, ¶ 7.); that the City was aware of complaints about Hultgren's previous work (*id.* ¶ 8); that the City failed to issue any citations to Hultgren concerning previous projects or permits (*id.* ¶ 9); that the City issued a demolition permit to Hultgren, but did not tell the Fodness family that Hultgren did not have a building

permit (*id.* ¶¶ 10-14); and that the City issued a demolition permit notwithstanding Hultgren's previous failures (*id.* at 3, ¶¶ 15-16).

Several things are clear from these allegations. First, as the circuit court aptly noted in its opinion, "actual knowledge imports 'knowing' rather than 'reason for knowing.'" (Appellants' App. at 9) (citing *Tipton II*, 1997 S.D. 96, ¶ 17, 567 N.W.2d at 359). Knowledge of past instances of alleged misconduct cannot form the basis for actual knowledge of a dangerous condition in the building on Phillips Avenue at the time it collapsed. The City must have been "uniquely aware" of a dangerous condition. The complaint alleges no facts that the City had any more knowledge than anyone else that Hulgren was removing a structural wall in a way that threatened collapse of the building. Those are the facts required to satisfy the first factor, and they are not alleged.

Second, the Fodness family continues to argue that which is specifically barred by the public-duty doctrine—the issuance and enforcement of building permits. "Here, the affirmative action undertaken by the City that creates the dangerous condition subject to this lawsuit is the City's issuance of an interior demolition permit to Hultgren without Demolition Plans, in violation of City's own ordinance and code." (Appellant's Br. At 15-16.) This argument is a fatal admission. As previously argued, this Court's decisions in both *Hagen* and *McDowell* leave no question that municipal liability based on the issuance and enforcement of building permits is specifically barred under the public-duty doctrine.

Third, the allegations are mostly conclusions, not facts. Numerous allegations contained in the complaint allege that the City "was aware" or "knew that" Hultgren was not in compliance with the permits issued by the City:

> 7. Defendant was aware of repeated instances in which Hultgren failed to comply with and performed work beyond the scope of work allowed by permits issued by Defendant.
>
> 8. Defendant was aware of complaint from citizen and businesses about Hultgren's work and permits.
>
> 14. Upon information and belief, Defendant knew that the issuance of demolition permits for a structure in which Plaintiffs were known to reside, without adequate architectural or structural plans, and to a contractor who explicitly intended to remove portions of an interior load bearing wall and was known to be in violation of its past and current permits, would substantially increase the risk of injury or death to Plaintiffs.

(Appellee's App. at 2-3, ¶¶ 7-8, 14.) These allegations are nothing more than sweeping legal conclusions cast in the form of factual allegations. As previously argued, such conclusions will not suffice to prevent a motion to dismiss. *See Nygaard,* 2007 S.D. 34, ¶ 39, 731 N.W.2d at 198 (quoting Moore's Federal Practice, § 12.34(1)(b) (3d ed. 2006)); *see also Fenske Media Corp. v. Banta Corp*, 2004 S.D. 23, ¶ 17, 676 N.W.2d 390, 395 (affirming motion to dismiss based, in part, upon a finding that "Fenske has not specifically alleged facts to show that it was induced into signing the release by fraudulent behavior."); *Hernandez v. Avera Queen of Peace Hosp.*, 2016 S.D. 68, ¶ 21, 886 N.W.2d 338, 346 (affirming the circuit court's dismissal of Dr. Hernandez's defamation claim because the second amended complaint did not include "a statement of circumstances, occurrences, and events in support of the claim presented" or "allege facts, which, when taken as true, raise more than a speculative right to relief.").

Even if the Court were to find actual knowledge, satisfaction of more than one factor is necessary for a special duty. *See Tipton II*, 1997 S.D. 96, ¶ 28, 567 N.W.2d at 364 ("No matter the proof on actual knowledge, however, alone it is inadequate to establish a private duty. . . . Only when actual knowledge is coupled with one or more of the other factors, can we uphold both the spirit and substance of the private duty exception."); *Pray*, 2011 S.D. 43, ¶ 12, 801 N.W.2d at 455 (upholding *Tipton II's* findings that evidence of actual knowledge alone is insufficient to establish a special duty because "[t]o conclude otherwise would impose liability against a government entity for simple negligence, and would 'judicially intrude[] upon resource allocation decisions belonging to policy makers.'"); *Sorace*, 2014 WL 2033149 (granting defendant's motion to dismiss for failure to state a claim upon a finding that plaintiff could only establish the actual knowledge factor).

b. The complaint does not allege facts establishing reliance.

The second factor is reasonable reliance on official representations and conduct. For reasonable reliance to occur, the Fodness family must have depended on "specific actions or representation which [caused them] to forgo other alternatives of protecting themselves." *Tipton II*, 1997 S.D. 96, ¶ 31, 567 N.W.2d at 364-65. Reasonable reliance requires more than just licensing, permitting or investigating; rather, "[r]eliance must be based on personal assurances." *Id.* ¶ 32, 567 N.W.2d at 365; *McDowell*, 2018 S.D. 1, ¶ 39, 906 N.W.2d at 410 ("by issuing a permit, municipalities do not imply that the plans submitted are in compliance with all applicable codes.").

The complaint alleges the opposite of personal assurances. In paragraph 17, the complaint alleges that the City failed to notify the Fodness family of Hultgren's work and, in paragraph 18, that the Fodness family would not have stayed in the apartment if the City "had notified [them] of the dangers it knew existed." (Appellee's App. at 3, ¶ 17.) The circuit court properly rejected these allegations because they were not "any direct promise or personal assurances made by the City [that] caused Plaintiffs to forego other alternatives to protect themselves." (Appellants' App. at 9-10.)

On appeal, as before the circuit court, the Fodness family argues that the posting of the permit on the property was a personal assurance that work was being done on the property within the standard of care, thus satisfying the "reasonable reliance" factor. (Appellants' Br. at 22.) But the complaint contains no allegations that the City posted any kind of building permit on the property or that the Fodness family saw the permit and relied on it. This argument is not based on facts alleged in the complaint.

Even if it were, posting a building permit (something the contractor or owner does after the City issues the permit) would not constitute a direct promise or a personal assurance made by the City to the Fodness family that caused them to forego other alternatives to protect themselves. In *Tipton II*, this Court explained what qualifies as reliance based on personal assurances:

> Instructive of this axiom is Champagne v. Spokane Humane Society, 47 Wash.App. 887, 737 P.2d 1279 (1987), where a child was attacked by pit bulldogs. Over a five-month period, people complained about these dogs "running loose and threatening the neighborhood." Id., 737 P.2d at 1283. In response, the Humane Society, regarded as a government agency under the public duty rule, "assured [complainants it] would patrol the area and apprehend any stray dogs." Id. at 1284. On the day before the attack, the Society assured the parent of the child later injured that the area would be

> patrolled. Consequently, a material issue of fact arose over whether the Society breached a private duty after creating reliance upon assurances of protection. Id.; see Meaney v. Dodd, 111 Wash.2d 174, 759 P.2d 455 (1988) (overruling earlier cases and holding a governmental duty cannot arise from implied assurances). Similar types of direct assurances have created reasonable reliance. See, e.g., De Long, supra (911 caller assured of help coming "right away").

Tipton II, 1997 S.D. 96, ¶ 32, 567 N.W.2d at 365. The complaint alleges no direct promises or personal assurances that were given by the City; in fact, it alleges the opposite—that the City failed to notify the Fodness family of the work being done. (Appellee's App. at 3, ¶ 17.) The complaint does not state sufficient facts to establish reasonable reliance.

c. There is no ordinance or statute mandating a special duty.

The third factor "'permits recovery against a government entity for negligent failure to enforce its laws only when there is language in a statute or ordinance which shows an intent to protect a particular and circumscribed class of persons." *Walther v. KPKA Meadowlands Ltd. P'ship.*, 1998 S.D. 78, ¶ 29, 581 N.W.2d 527, 533. The Fodness family conceded below and concede by omission on appeal that there is no statute or ordinance mandating a special duty of care. Further, the law is clear that building codes, permitting, and zoning ordinances are "aimed only at public safety and general welfare." *E.P. v. Riley*, 1999 S.D. 163, ¶ 16, 604 N.W.2d 7, 12 (citing *Hagen*, 464 N.W.2d at 399).

d. The complaint does not sufficiently allege an increased risk of harm.

Under the final special-duty factor, "official action must either cause harm itself or expose plaintiffs to new or greater risk, leaving them in a worse position that they were

before official action." *Tipton II*, 1997 S.D. 96, ¶ 38, 567 N.W.2d at 366. "The city has to be more than negligent." *Pray*, 2011 S.D. 43, ¶ 14, 801 N.W.2d at 455-56. "Failure to diminish harm is not enough." *Tipton II*, 1997 S.D. 96, ¶ 38, 567 N.W.2d at 366.

As with the second factor, the Fodness family again bases its argument on the issuance and enforcement of building permits:

> The affirmative act that created the dangerous condition and, thereby, increased the risk of harm to the Fodness family, was the City's decision to issue a demolition permit to Hultgren despite its dangerous propensities and without the required Demolition Plans.

(Appellants' Br. at 24.) Not only is this argument barred under the public-duty doctrine,[3] but it is the same argument the Fodness family makes with respect to the first factor, actual knowledge of a dangerous condition. Missing from the argument and the complaint are facts demonstrating any affirmative action by the City that "contributed to, increased, or changed the risk which would have otherwise existed." *Gleason v. Peters*, 1997 S.D. 102, ¶ 25, 568 N.W.2d 482, 487. The Fodness family's argument is nothing more than a claim that the City was negligent, which is barred by the public-duty doctrine.

4. The circuit court properly denied leave to amend as futile.

Determining whether to allow a plaintiff to amend a complaint is left to the sound discretion of the court. SDCL § 15-6-15(a) ("leave shall be freely given when justice so

[3] The Fodness family criticizes the circuit court's reliance on *Sapienza* in this context, given that the Court without cause did not discuss the fourth factor concerning increased risk. (Appellants' Br. at 24.) While that is true, the argument fails to come to terms with the statement of law on which the circuit court relied, that "building codes do not create a duty of care that will support a negligence claim." *Sapienza*, 2018 S.D. 1, ¶ 39, 906 N.W.2d at 410. It is impossible to square that proposition with a conclusion that issuing a building permit creates an increased risk of harm sufficient to establish a special duty.

requires."). Although leave to amend is freely granted, leave is not automatic and may be appropriately denied when there are compelling reasons to do so, including undue delay, bad faith or dilatory motive, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the non-moving party, or futility of the amendment. *In re Wintersteen Revocable Tr. Agreement*, 2018 S.D. 12, 907 N.W.2d 785, 789 (citing *Ash v. Anderson Merchandisers, LLC*, 799 F.3d 957, 963 (8th Cir. 2015)).

Here, the circuit court properly denied leave to amend based on futility of the amendment. (Appellants' App. at 13-15.) In an attempt to use the motion to amend as an (admittedly) "belt and suspenders motion" to avoid outright dismissal, the Fodness family states in their brief that:

> [We] are confident that the allegations contained in the Complaint sufficiently state a claim against the City and, as such the Motion to Amend is unnecessary. The Motion to Amend was filed as a precautionary measure taken in the event that the Circuit Court felt that the Complaint was missing certain technical language that could be added with a simple amendment.

(Appellants' Brief at 25.) A similar argument was also made at the hearing:

> I think the complaint states the cause of action very clearly for the reasons I will get to in a minute. But, in the event the Court sees any type of technical deficiency, any type of magic language missing, we'd like the opportunity to correct that.

(Hearing Transcript at 10 (Appellee's App. at 7).) These arguments make clear that an amended complaint would not have contained any new or different facts, but only missing "magic language." As the circuit court's decision demonstrates, the flaws in the complaint are not technical in nature, and would not be cured by using different words. Thus, the Fodness family fails to indicate how an amendment would cure the deficiencies

in their original Complaint, especially given that they admitted to putting their "best facts" in the original Complaint. (Hearing Transcript at 24-25 (Appellee's App. at 8-9).) Leave to amend would have been futile and was properly denied.

Conclusion

The complaint alleges negligence in issuing and enforcing building permits. Under well-established South Dakota law, the sole duty owed by the City in issuing and enforcing building permits is to the public as a whole. In the absence of any special duty owed by the City to the Fodness family, their negligence claim against the City is barred by the public-duty doctrine.

The complaint fails to state a claim based on a special duty because the only facts pleaded relate to building permits and do not satisfy any of the four factors that govern whether a special duty exists. To reach any different conclusion on the facts pleaded in the complaint would either require this Court to reconsider its understanding of the public-duty and special-duty doctrines, or would hopelessly confuse the holdings in *McDowell*, *Hagen*, and *Tipton.*

The City respectfully requests that the judgment of the circuit court be affirmed.

Dated this 12th day of September, 2019.

WOODS, FULLER, SHULTZ & SMITH P.C.

By _____

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Certificate of Compliance

In accordance with SDCL § 15-26A-66(b)(4), I certify that this brief complies with the requirements set forth in the South Dakota Codified Laws. This brief was prepared using Microsoft Word 2010, Times New Roman (12 point) and contains 5,687 words, excluding the table of contents, table of authorities, jurisdictional statement, statement of legal issues and certificates of counsel. I have relied on the word and character count of the word-processing program to prepare this certificate.

Dated this 12th day of September, 2019.

WOODS, FULLER, SHULTZ & SMITH P.C.

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Certificate of Service

I hereby certify that on the 12th day of September, 2019, I served a true and correct copy of the foregoing *Brief of Appellee City of Sioux Falls* via electronic mail on the following:

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_____
One of the attorneys for Defendant/Appellee City of Sioux Falls

APPENDIX

APPENDIX

STATE OF SOUTH DAKOTA	) :SS	IN CIRCUIT COURT
COUNTY OF MINNEHAHA	)	SECOND JUDICIAL CIRCUIT

EMILY FODNESS, MICHAEL FODNESS, and CHRISTINE FODNESS, Plaintiffs, v. CITY OF SIOUX FALLS, Defendant.	49CIV18-_____ **COMPLAINT**

COMES NOW Plaintiffs, Emily Fodness, Michael Fodness, and Christine Fodness, and for their Complaint against Defendant, City of Sioux Falls, state and allege as follows:

PARTIES

1. Plaintiff Emily Fodness ("Emily") is an adult residing in Tarrant County, Texas. Plaintiffs Michael Fodness ("Michael") and Christine Fodness ("Christine") are adults residing in Minnehaha County, South Dakota.

2. Defendant City of Sioux Falls is a first-class municipal corporation and a home-rule municipality in the State of South Dakota.

JURISDICTION

3. This Court has jurisdiction over this matter pursuant to SDCL 15-7-2.

4. Venue is proper in this Court pursuant to SDCL 15-5-6 and 15-5-8.

FACTS

5. Defendant approves, issues, and ensures compliance with building permits within the City of Sioux Falls.

6. From approximately February of 2013 to September of 2016, Defendant issued to Hultgren Construction LLC ("Hultgren") approximately 33 building permits for the construction, repair, remodel, or demolition of certain properties.

7. Defendant was aware of repeated instances in which Hultgren failed to comply with and performed work beyond the scope of work allowed by permits issued by Defendant.

8. Defendant was aware of complaints from citizens and businesses about Hultgren's work and permits. Such complaints included the belief that Defendant dispensed with the usual protocols for approving, issuing, or ensuring compliance with building permits issued to Hultgren.

9. Upon information and belief, Defendant failed to issue Hultgren citations, revoke its building permits, or take any other adverse action against Hultgren for its known and repeated violations and complaints.

10. In April of 2016, Defendant entered into discussions with Hultgren and its agents regarding the renovation of buildings located at and adjacent to 136 South Phillips Avenue within the City of Sioux Falls (the "Property").

11. Defendant knew that Hultgren intended to combine parts of the buildings into a single, open space for commercial development by removing certain portions of a load bearing wall separating the interiors of the Property.

12. Defendant knew that the work that Hultgren intended to complete required the assistance and approval of certain qualified persons, including an architect and/or structural engineer, to mitigate inherent risks and dangers involved in the proposed work.

13. Upon information and belief, Defendant advised Hultgren that Defendant could not issue a building permit for the Property due to Hultgren's failure to submit adequate architectural or structural plans.

14. Upon information and belief, Defendant knew that the issuance of demolition permits for a structure in which Plaintiffs were known to reside, without adequate architectural or structural plans, and to a contractor who explicitly intended to remove portions of an interior load bearing wall and was known to be in violation of its past and current permits, would substantially increase the risk of injury or death to Plaintiffs.

15. Upon information and belief, Hultgren asked Defendant to issue a permit allowing Hultgren to proceed with the demolition of the interior of the Property.

16. Defendant agreed to issue to Hultgren permits for the interior demolition of the Property, notwithstanding Hultgren's failure to provide adequate architectural or structural plans for its proposed work.

17. Defendant failed to notify Plaintiffs of the work it authorized Hultgren to perform on the Property, which, without adequate plans and supervision, and given Hultgren's history of violating and exceeding the scope of its permits, substantially increased the risk of injury or death to Plaintiffs, including the risk of structural collapse and exposure to asbestos and other harmful substances.

18. If Defendant had notified Plaintiffs of the dangers it knew existed, Plaintiffs would not have continued to reside in the Property during Hultgren's work.

19. On the morning of December 2, 2016, the Property collapsed due to Hultgren's demolition of certain portions of the load bearing wall separating the interiors of the buildings.

20. On the morning of the collapse, Emily was asleep in her upper floor apartment when the floor beneath her disappeared, causing her to plummet to the story below. Simultaneously, the building above Emily collapsed and trapped her under the crushing weight of the building's rubble. Miraculously, Emily found her cellphone within the rubble, which allowed her to communicate her condition to family and first responders. Emily feared for her life as she faced the very real possibility that the debris above could shift, resulting in her being crushed or suffocated.

21. On the morning of the collapse, Michael Fodness was on the ground level of the Property when he heard a cracking sound and felt the building shift. Fearing for his safety, Michael ran from the building and, through a haze, saw that the building collapsed. At that time, Michael was unsure if Emily was in the building. Michael called Christine, and she informed him that Emily was asleep in her bedroom. Given the destruction he saw before him, Michael believed that his daughter had been killed in the collapse.

22. On the morning of the collapse, Christine was at work when she received a phone call from Michael that their building collapsed. Christine ran to her car and drove toward home, knowing that her daughter was in the building at the time of the collapse and facing the inescapable conclusion that her daughter had just been killed.

23. Emily sustained extensive injuries that she had to endure, unaided, for several hours while first responders attempted to extricate her from the building debris. Michael and Christine likewise spent those hours fearing that their daughter would be killed prior to her rescue. After nearly four hours, first responders extricated Emily from the debris and immediately rushed her to the emergency room at Avera McKennan Hospital, where she received urgent medical attention.

24. Emily sustained, and continues to suffer from, severe physical and psychological injuries that result in physical manifestations as the result of the building collapse. Such injuries are permanent and have caused, and will continue to cause, pain, suffering, loss of enjoyment of life, medical expense, wage loss, property loss, and other damage.

25. Michael and Christine sustained, and continue to suffer from, severe psychological injuries resulting in physical manifestations as a result of the building collapse. Such injuries are permanent and have caused, and will continue to cause, pain, suffering, loss of enjoyment of life, medical expense, wage loss, property loss, and other damage.

COUNT ONE: NEGLIGENCE

26. Plaintiffs reallege the above-stated paragraphs as if fully set forth herein.

27. Defendant was uniquely aware of the particular dangers and risks to which Plaintiffs would be exposed by allowing Hultgren, who was known to violate and work beyond the scope of permits issued by Defendant, to proceed with its intended plans to demolish an interior load bearing wall without plans, approvals, or supervision.

28. Defendant breached its special duties to Plaintiffs by exposing them to known, dangerous, and life-threatening conditions that would not have occurred except for Defendant's acts and omissions.

29. Plaintiffs relied on Defendant's acts and omissions, and such reliance substantially increased the risk of harm to Plaintiffs.

30. Plaintiffs suffered, and will continue to suffer, damages as a result of Defendant's breach of its special duties to Plaintiffs.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that this Court grant the following relief:

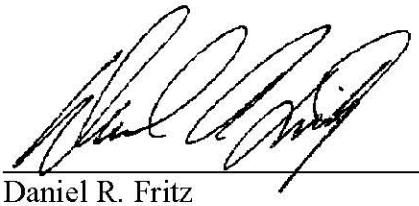
1. Judgment against Defendant on all Counts alleged herein in an amount of past and/or future damages to be proven during trial, plus interest, costs, and attorneys' fees; and

2. For such other and further relief, including equitable relief, as the Court deems just and equitable.

PLAINTIFFS DEMAND A JURY TRIAL AS TO ALL CLAIMS ASSERTED HEREIN.

Dated this 27th day of September, 2018.

BALLARD SPAHR LLP

By: 

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STATE OF SOUTH DAKOTA) IN CIRCUIT COURT
:SS
COUNTY OF MINNEHAHA) SECOND JUDICIAL DISTRICT

****

EMILY FODNESS, MICHAEL FODNESS and
CHRISTINE FODNESS

Plaintiffs,

CASE NO. 49CIV18-003031

vs. MOTIONS HEARING

CITY OF SIOUX FALLS,

Defendant.

****

BEFORE: The Honorable Camela C. Theeler
Circuit Court Judge
in and for the Second Judicial Circuit
State of South Dakota
Sioux Falls, South Dakota

APPEARANCES:
Daniel R. Fritz, Esq.
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appearing on behalf of the Plaintiff;

James E. Moore, Esq. and
Alexis A. Warner, Esq.
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appearing on behalf of the Defendant.

PROCEEDINGS: The above-entitled proceeding commenced at 10:00 a.m. on the 18th day of December, 2018 in Courtroom 4A of the Minnehaha County Courthouse, Sioux Falls, South Dakota.

REPORTED BY: Lisa M. Kull, Official Court Reporter
425 North Dakota Avenue
Sioux Falls, South Dakota 57104

still in the pleading state, the pleading requirements are not intended to be a trap for the unwary. We are not here to, if you don't say the right magic words, if you don't technically say everything's that is required, that we're going to dismiss your case. The Supreme Court has been clear about that.

So, even if this -- that is the purpose of the motion to amend, Your Honor. If there is something technically deficient about it, if there is some magic language that should be in there that isn't, that we can plead in good faith, I am not going to plead anything if I don't have a good faith basis for it, if we can plead it in good faith, and the Court determines that that is missing from this, we would ask the Court to allow us to amend, to include that technicality and go forward rather than dismissing. They know the statute of limitations, they know the harsh result that would come from that. And that's what they would like to see happen.

But, that's not what the Supreme Court has said should happen in the case of a technical deficiency. We don't believe there is any. I think the complaint states the cause of action very clearly for the reasons I will get to in a minute. But, in the event the Court sees any type of technical deficiency, any type of magic language missing, we'd like the opportunity to correct that.

So the question becomes, does the complaint state a duty on behalf of the City. And, more specifically, does it

Cracraft, it was a legal question. Does the statute create a duty as to a specific statute.

Cracraft/Tipton changed the landscape. It became a factual inquiry at that point before. The four factors are fact specific. They depend on the facts of every case. Reliance, actual knowledge, those are things that just scream factual inquiry. And that's what this is. And we're entitled to have the facts discovered and have the Court decide the case on the merits, or the jury, whatever the fact finder is. But, I think that's a critical dividing point that demonstrates our point why this motion should be denied.

THE COURT: Okay. Mr. Fritz, when I was looking at the briefing, and I want to make sure I understand, it appeared that first you were saying the public-duty doctrine doesn't apply, this is just negligence, but then it does apply, you think the exception, special duty exception, can be met. Is that fair?

MR. FRITZ: That's fair.

THE COURT: Okay. And I guess I had some questions about the amended complaint, too. I know the state system is different from a federal system where you have to provide an amended complaint. It appears in this case that you're asking for it, but then asking the Court to identify what deficiencies might exist. I'm assuming that you put your best facts in the complaint that you already filed.

MR. FRITZ: We did, yes. It is a bit of a belts and suspenders motion, I'll admit that. We believe the complaint is more than adequate to stay the duty on behalf of the City. What we didn't want is to get here and say, well, you didn't allege these words or this kind of magic language that you need to have in a complaint that sometimes you will hear. And in most cases that wouldn't matter. We go back to the motion to amend and fix it all.

In this case where the statute of limitations has run, if it is something we have to plead that I can't plead, then so be it, that takes care of it. But, if there is some technical deficiency, some magic language that the Court feels should have been in there, we don't know what it would be. It is just a mechanism to avoid a harsh result that might happen in that circumstance.

THE COURT: Okay. Mr. Fritz, in Mr. Moore's argument with regard to that second element under the special duty exception, he talked about reasonable reliance and argued that there have to be personal assurances made. Do you agree with him? Do you think that personal assurances were made to the Fodness family? What's your response on that one?

MR. FRITZ: I don't believe they are required. I don't think personal assurance is required to meet the reliance element. And I don't see in the case law where that is the case.

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

EMILY FODNESS, CHRISTINE FODNESS, and MICHAEL FODNESS, Plaintiffs and Appellants,

v.

CITY OF SIOUX FALLS, Defendant and Appellee.

App. No. 28965
49CIV18-003031

Appeal from the Circuit Court, Second Judicial Circuit,
Minnehaha County, South Dakota

The Honorable Camela Theeler

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The Notice of Appeal was filed on April 17, 2019

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I. ARGUMENT

The Fodness family submits this reply brief to correct the City's mischaracterizations as to what this Court has said regarding building permits and the public duty doctrine. This Court made it clear that building codes and permits fall under the public duty doctrine but has not entertained the illogical circular reasoning that the City puts forth in its Appellee Brief. The public duty doctrine triggers an inquiry into the special duty factors and such factors cannot be unmet by looking backward to the same grounds that made the public duty doctrine applicable in the first place. Any finding to the contrary is erroneous.

This Court ruled in *Hagen* that the issuance of a building permit is a public duty and a negligence claim cannot be maintained on such a duty. *Hagen v. Sioux Falls*, 464 N.W.2d 396, 400 (S.D. 1990). Because *Hagen* was pre-*Tipton v. Town of Tabor*, 538 N.W.2d 783 (S.D. 1995), its inquiry regarding a special duty was limited to whether the building code was written for particular persons or a class of persons. *Hagen v. Sioux Falls*, 464 N.W.2d at 400. In *McDowell v. Sapienza*, 2018 S.D. 1, 906 N.W.2d 399, this Court did not retreat in its finding that the issuance of a building permit is a public duty. *McDowell v. Sapienza*, 2018 S.D. 1, ¶ 38, 906 N.W.2d 399 at 410. But, importantly, such a finding did not prevent the Court from a separate inquiry as to whether a special duty existed. *McDowell v. Sapienza*, 2018 S.D. 1, ¶ 40, 906 N.W.2d 399 at 410. The Court analyzed the *Tipton* factors without looking backward to the Court's separate finding that building codes and permits fall under the public duty doctrine. *Id.*

The City, however, improperly attempts to extract this Court's language in *Hagen* and *McDowell* regarding building codes and public duty and carefully insert such language into the separate analysis of the *Tipton* factors. In regard to the knowledge

factor, the City incorrectly argues that the City's knowledge of the dangerous circumstances on which it issued a permit to Hultgren cannot establish the factor because the public duty doctrine applies to building codes and permits. (Appellee's Brief, p. 12). Likewise in regard to the increased risk factor, the City incorrectly argues that the increased risk of harm resulting from its issuance of a building permit under such dangerous circumstances cannot establish the factor because the public duty doctrine applies to building codes and permits. (Appellee's Brief, p. 17). So, in summary, the City argues, in circles, that the public duty doctrine applies to building codes and permits, and a special duty cannot be found because the public duty doctrine applies to building codes and permits. This Court has never engaged in such flawed and illogical circular reasoning in its analysis of the public and special duty doctrines. If it was true that the special duty factors could be unmet by the initial determination that the public duty doctrine applies, then the public duty doctrine would swallow the special duty exception in all instances.

Here, while the public duty doctrine applies, the City assumed a special duty to the Fodness family when it made the conscious decision to violate its own ordinance in issuing Hultgren a demolition permit without the required demolition plans. The City further assumed a special duty by electing to have Hultgren do the work despite the City's knowledge of Hultgren's dangerous propensities. As set forth at length in Appellants' Brief, the issuance of a building permit under these circumstances satisfies the *Tipton* factors. Such factors cannot be unmet by circling backward to the initial determination that the public duty doctrine applies to building codes and permits.

Unlike the circumstances in *Hagen* and *McDowell*, the City assumed a special duty here. The Fodness family has sufficiently alleged facts in that regard and, as such, dismissal of this suit was in error. The Court should reverse.

II. CONCLUSION

For the reasons stated herein and in the Appellants' Brief, the Fodness family respectfully requests that the Court reverse the Circuit Court's ruling granting the City's Motion to Dismiss and denying their Motion to Amend.

Dated this 27th day of September, 2019.

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CERTIFICATE PURSUANT TO SDCL 15-26A-66 and 15-26A-14

I, Daniel R. Fritz, hereby certify that the *Appellants' Reply Brief* in the above-entitled matter complies with the typeface specifications of SDCL § 15-26A-66 and the length specifications in SDCL § 15-26A-14. The *Appellants' Reply Brief* contains 6,060 characters not including spaces or 1,069 words and that said *Appellants' Reply Brief* does not exceed thirty-two (32) pages and was typed in Times New Roman font, 12 point.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 27th day of September, 2019, two (2) true and correct copies of the foregoing *Appellants' Reply Brief* were served by prepaid U.S. Mail and electronic mail upon the following:

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