IN SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

Appeal No. 3074

HAMIDEH MAHMOUDI,

Appellant,

vs.

CITY OF SPEARFISH,

Appellee,

APPEAL FROM THE CIRCUIT COURT
FOURTH JUDICIAL CIRCUIT
LAWRENCE COUNTY, SOUTH DAKOTA

THE HONORABLE ERIC J. STRAWN

NOTICE OF APPEAL FILED JULY 1, 2024

APPELLANT'S BRIEF

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JURISDICTIONAL STATEMENT

The Order appealed from, attached hereto as Appendix 1; SR 182, was dated and filed June 6, 2024, incorporating by reference the Memorandum Decision granting summary judgment to Appellee, dated May 24, 2024, Appendix 2-9; SR 174, with Notice of Entry of such being given June 13, 2024, and the Notice of Appeal being filed July 1, 2024. If not contained in the Appendix, references to the record will be designated as "SR" for Settled Record.

STATEMENT OF THE LEGAL ISSUES

1. Whether the City of Spearfish had a duty to Appellant Mahmoudi and whether the City breached that duty?

The circuit court held in the negative.

Boe v. Healy, 168 N.W.2d 710, 713 (S.D. 1969).

Fritz v. Howard Twp., 1997 S.D. 122, ¶8, 570 N.W.2d 240, 241.

Godbe v. City of Rapid City, 2022 SD 1, 969 N.W.2d 1.

Twin Med LLC v. Skyline Healthcare LLC, 2024 U.S. App. LEXIS 4177 (8th Cir.)

SDCL §§ 31-32-10, 31-28-6.

2. Whether SDCL § 21-10-2 bars an action for nuisance against the City of Spearfish?

The circuit court held in the affirmative.

Exports, Inc. v. Black Hills Power, 2008 U.S. Dist. LEXIS 134482, *15 (D.S.D. 2008).

Green v. City of Lennox, 107 N.W.2d 337, 339 (S.D. 1961).

SDCL §§ 21-10-1, 21-10-2.

SDCL § 9-54-3.

3. Whether the City of Spearfish failed to affirmatively plead immunity?

The circuit court failed to address this issue.

Gabriel v. Bauman, 2014 S.D. 30, ¶21, 847 N.W.2d 537.

Olesen v. Town of Hurley, 2004 S.D. 136, ¶13, 691 N.W.2d 136.

Twin Med LLC v. Skyline Healthcare LLC, 2024 U.S. App. LEXIS 4177 (8th Cir.)

Schoenrock v. Sisseton, 103 N.W.2d 649, 652 (S.D. 1960).

4. Whether the jury must decide whether the City of Spearfish's failures constituted gross negligence?

The circuit court held in the negative.

Fischer v. City of Sioux Falls, 2018 S.D. 71, 919 N.W.2d 211.

Melby v. Anderson, 266 N.W. 135 (S.D. 1936).

STATEMENT OF THE CASE AND THE FACTS

This case was brought in the Fourth Judicial Circuit Court, Lawrence County, before the Honorable Eric J. Strawn. The circuit court granted summary judgment in favor of Appellee City of Spearfish [hereinafter "the City" or "the City of Spearfish"]. Appendix 2-9; SR 174.

Appellant Mahideh Mahmoudi [hereinafter Mahmoudi], an ultra-marathon runner, was on a run on Dahl Street in Spearfish, SD on December 4, 2016. As there was no sidewalk or path available to Mahmoudi, she was running on the paved road opposite

to traffic.[1] Appendix 10; Settled Record [hereinafter SR] 106. When a car was driving towards her, she stepped off the side of the road, as is typical for runners/walkers. Id. 109. Mahmoudi's foot and leg then became lodged in an uncapped, exposed, damaged culvert.[2] Id. SR 121; Appendix 11.

Although the City of Spearfish admitted to the culvert being damaged throughout this litigation, in its reply brief in the circuit court and during oral arguments, the City argued that it was disputed as to whether there was damage to the culvert. SR 161. At the hearing, counsel for the City stated, "there has been no damage. There is no damage shown." SR 206. The City admitted in its Answer, however, that, after a construction project was completed, a pipe was left in the public right of way, uncapped, and partially exposed. Appendix 12; SR 11. In addition to this admission, the City responded to a discovery request, stating that "the culvert was inspected, the end was exposed and the *damaged* portion was cut off." Appendix 17; SR 72 (emphasis added). Again, the City disclosed in response to a discovery request an email from a representative of the City, stating, "It appears that the culvert has been *damaged* and has a split in the corrugated top section."[3] SR 210 (emphasis added). This portion of the email was read to the circuit court during the hearing. Id. The representative went on to state in the email, "The culvert condition indicates that [Mahmoudi's] right foot was on a solid section and that her left slipped through the split in the top section and was pinned against the sharp edge of the

[1] The copy of the photograph in the Settled Record is unclear. The copy attached to the Appendix is a file-stamped version of the same scene. Appendix 10.
[2] The copy of the photograph in the Settled Record is unclear. The copy attached to the Appendix is a file-stamped version of the same scene. Appendix 11.
[3] While not attached to the City's submissions to the trial court, the discovery response was read to the trial court. SR 210.

culvert pipe, resulting in a severe cut to her left front shin." Even in its initial brief to the circuit court, the City admitted that the culvert was damaged. SR 32. Similarly, in its list of undisputed, material facts submitted to the circuit court, the City admitted that the culvert was "left in the public right of way, uncapped, and partially exposed." Appendix 20; SR 44.

Yet, inexplicably, in its reply brief to the circuit court, the City *first* made an issue of there being no showing that the culvert was damaged, despite the evidence and admissions to the contrary. Appendix 23; SR 161. The City claimed, "But other than Mahmoudi's say-so, there is no evidence that the culvert was damaged at the time of Mahmoudi's alleged injury." Id. Further, the City alleged there was not "a single piece of evidence that shows the culvert was damages." Id.; SR 163. These are clear misrepresentation to the court of the facts and evidence available to the City at the time the statement was made, as well as multiple admissions on the part of the City. For these reasons, the City's latest representations about whether the culvert was damaged should be summarily rejected by this Court.

The history shows that the culvert/pipe was installed by the City of Spearfish during a project that was completed in August of 1996. SR 124. Though the City of Spearfish was responsible for maintenance of the culvert, no inspections were performed, as inspections were "complaint driven" and the City asserts there were no complaints prior to Mahmoudi's injury. Appendix 17; SR 72. In fact, the culvert had not been inspected or maintained at all until Mahmoudi's injury in December of 2016, twenty years after it was built. Appendix 32; SR 76; 132-33.

In addition, the City did not have any written policies for inspecting, installing or maintaining the culvert. Appendix 17; SR 72. While the City conducted snow removal, weed control and mowing in the area of the culvert, there was no policy for the City's employees to easily inspect the culvert while in the vicinity. Appendix 32; SR 76. Had even a cursory review of the area of the culvert been completed, the City's agents would have noticed the damaged culvert. Moreover, common sense dictated that the City's agents did see the damaged culvert while plowing, weeding and mowing, but ignored the same.

There was also issue as to signage. Contrary to the City's assertions, the uncapped culvert was not clearly marked. The pipe did not have any clearly identifying marks, such as a flag or cone, advising of the hazard. Appendix 35; SR 156. Nearby was simply a small post with a diamond at the top, appearing to be more of a mile marker. Id.

Mahmoudi's injuries from falling in the uncapped pipe have been extensive. In addition to spraining her ankle, she received a 5 cm v-shaped laceration on her right shin. The cut was so deep that it cut a vein. The laceration became infected, causing additional complications. The cut would break open and bleed from time to time for 3 years after her initial injury. SR 114. Mahmoudi also was unable to work at her hair salon for almost three months. When she was able to return, she worked part time for another two months. SR 113-14. Mahmoudi also suffered from depression as a result of not being able to run, her life's passion. SR 114.

Mahmoudi filed suit in November of 2017, alleging nuisance, negligence and recklessness on behalf of the City of Spearfish. In its Answer, the City denied the allegations and affirmatively pled contributory negligence, assumption of the risk,

unforeseeable facts, and intervening cause. Appendix 12-15; SR 11-13. Notably, in addition to admitting that the culvert was damaged, the City *admitted* the following:

- The City had a duty to exercise ordinary care in maintaining its property.
- Under SDCL § 21-10-1 and common law, no one may act or omit to perform a duty which act or omission in any way renders other persons insecure in life or in the use of property.
- The City was responsible for maintaining public right of ways inside the City limits, including roadways and ditches.
- The City had a duty to use reasonable and ordinary care to keep public right of ways safe for those who might be expected to use those areas.
- The City is responsible for maintaining safe roadways and right of ways for the public; the City owes the general public who use their roadways, including Mahmoudi, a duty of reasonable and ordinary care, including:
    - Duty to provide safe public spaces.
    - Duty to make reasonable and timely inspections of the public areas within the City and to detect and fix conditions that may pose a risk to those who come upon said conditions.
    - Duty to take reasonable steps to eliminate hazards from the public areas.
    - Duty to train City employees in pedestrian safety issues including making inspections, cleanups, and the posting of signs and warnings of potential hazards.
    - Duty to post signs and warning in a conspicuous and meaningful way in areas that may be hazardous to the public.
- The City and its agents, servants, and employees were responsible for the care and maintenance of the roadway.

Id. In addition, nowhere in the City's Answer was there an assertion that it was entitled to any form of immunity. Id.

The record is clear that either 1) there were disputed facts, preventing summary judgment or 2) when viewing the facts more favorably to Mahmoudi (as must be done), summary judgment is improper.

ARGUMENT

I. Summary Judgment Standard

As stated by this Court in Fisher v. Kahler, 2002 S.D. 30, ¶5, 641 N.W.2d 122, 124-25, "Summary judgment is appropriate under SDCL § 15-6-56 when the *entire*

record reveals that there is no genuine issue on any material fact and that the moving party is entitled to a judgment as a matter of law." (emphasis added) (citing Meyer v. Santema, 1997 S.D. 21, ¶8, 559 N.W.2d 251, 254). "If there are genuine issues of material fact, then summary judgment is improper." Id. at 125 (citing Farmers Feed & Seed, Inc. v. Magnum Enterprises, Inc., 344 N.W.2d 699, 701 (SD 1984)). Importantly, this Court noted, "Disputed facts become material if they affect the outcome of a case under the law, 'that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.'" Id. (citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 2510, 91 L. Ed. 2d 202, 212 (1986)).

Of course, the "evidence must be viewed most favorably to the nonmoving party and reasonable doubts should be resolved against the moving party." Fritz v. Howard Twp., 1997 S.D. 122, ¶8, 570 N.W.2d 240, 241 (quoting Walz v. Fireman's Fund Ins. Co., 1996 S.D. 135, 556 N.W.2d 68, 70). The burden of showing there are no disputes of material fact and entitlement to judgment as a matter of law rests with the moving party. Id. The City of Spearfish did not meet this burden and the circuit court should be reversed.

II. The City of Spearfish Breached its Duty to Mahmoudi

The City asserts immunity, claiming that there is no common law right of action against it, as it is a municipality, however, the City repeatedly admitted that it had such a duty. In its Answer, the City admitted a multitude of duties as set forth hereinabove, including exercising ordinary care in maintaining its property; no one may act or omit to perform a duty which act or omission in any way renders other persons insecure in life or in the use of property; responsibility for maintaining public right of ways inside the City

limits, including roadways and ditches; use reasonable and ordinary care to keep public right of ways safe for those who might be expected to use those areas; responsibility for maintaining safe roadways and right of ways for the public; exercising reasonable and ordinary care to the general public who use their roadways; providing safe public spaces; making reasonable and timely inspections of the public areas within the City and detecting and fixing conditions that may pose a risk to those who come upon said conditions; taking reasonable steps to eliminate hazards from the public areas; training City employees in pedestrian safety issues, including making inspections, cleanups, and the posting of signs and warnings of potential hazards; posting signs and warning in a conspicuous and meaningful way in areas that may be hazardous to the public; responsibility for the care and maintenance of the roadway. Appendix 12-15; 11-13.

Further, in its Statement of Undisputed Material Facts at ¶ 8, the City admitted that "[t]he culvert was installed and maintained by [the City]" and that statutory liability arises when a highway "becomes out of repair[.]" Appendix 21; SR 45, 35. That is exactly the scenario at hand – the culvert that was to be maintained by the City became out of repair, resulting directly in an injury to Mahmoudi. The City is, thus, liable for failing to maintain and repair the subject culvert/pipe.

"[A]dmissions contained in pleadings are binding[.]" Twin Med LLC v. Skyline Healthcare LLC, 2024 U.S. App. LEXIS 4177 (quoting Mo. Hous. Dev. Comm'n v. Brice, 919 F.2d 1306, 1314 (8th Cir. 1990)) (citing Nat'l Sur. Corp. v. Ranger Ins., 260 F.3d 881, 886 (8th Cir. 2001) ("Factual statements in a party's pleadings are generally binding on that party unless the pleading is amended."). Thus, the City's admissions as to its duties are binding on the City, despite its recent denial of the same.

In fact, the City's admissions in its Answer mirror the requirements of SDCL § 31-32-10, stating that the City has a duty to warn of danger and to make reasonably timely repairs upon notice that a damaged roadway is creating a safety hazard. While SDCL § 31-32-10 may have abrogated municipalities' common law duty to properly maintain a roadway (although the City admitted in its Answer that common law applied), this Court held that the combination of SDCL § 31-32-10[4] and SDCL § 31-28-6[5] provide certain obligations to a City. Fritz, 1997 S.D. 122 at ¶15. SDCL § 31-32-10 requires that if a culvert is damaged, the governing body responsible for the maintenance of the culvert (the City) must erect guards "of sufficient height, width, and strength" over the defect and repair the damage "to guard the public from accident or injury[.]" In addition, SDCL § 31-28-6 requires the responsible party (the City) to erect a "substantial and conspicuous warning sign" at points of danger on public highways. "Whether [the City] breached a duty under either of these statutes constitutes a question for the fact finder." Fritz, 1997 S.D. 122 at ¶17. And, "[w]hether the sign conformed to the standards provided in these

[4] SDCL § 31-32-10 provides: If any highway, culvert, or bridge is damaged by flood, fire or other cause, to the extent that it endangers the safety of public travel, the governing body responsible for the maintenance of such highway, culvert, or bridge, shall within forty-eight hours of receiving notice of such danger, erect guards over such defect or across such highway of sufficient height, width, and strength to guard the public from accident or injury and shall repair the damage or provide an alternative means of crossing within a reasonable time after receiving notice of the danger. The governing body shall erect a similar guard across any abandoned public highway, culvert, or bridge….

[5] SDCL § 31-28-6 provides: The public board or officer whose duty it is to repair or maintain any public highway shall erect and maintain at points in conformity with standard uniform traffic control practices on each side of any sharp turn, blind crossing, or other point of danger on such highway, except railway crossings marked as required in § 31-28-7, a substantial and conspicuous warning sign. The sign shall be on the right-hand side of the highway approaching such point of danger….

statutes presents a question for the jury." Id. (citing Kiel v. DeSmet Twp., 90 S.D. 492, 242 N.W.2d 153, 156 (1976)).

Although the City failed to mention Godbe v. City of Rapid City, 2022 SD 1, 969 N.W.2d 1, it its briefing to the circuit court, the court inquired of the City its position on whether the case applied to the facts of this case. SR 208. In its memorandum decision, the circuit court cited to Godbe when stating that there was no common law right of action against the City of Spearfish. Appendix 2-9; SR 176. The holding in Godbe for summary judgment in favor of the City was because there was no evidence that the street grate (allegedly causing injury) was damaged. Godbe, 2022 SD 1, ¶ 23-32. This Court held that the plaintiff must first demonstrate that the grate was damaged in order to establish that the City of Rapid City had a duty under SDCL § 31-32-10. Id. ¶ 23.

Here, of course, the City admitted in multiple pleadings and responses to discovery that the culvert was damaged. Despite these binding omissions, the circuit court held that "the evidence does not show that the culvert [was] damaged." Appendix 2-9; SR 177. The circuit court stated that "the evidence is wholly insufficient to show there is a genuine dispute about whether the culvert was damaged." Id. These findings are without question erroneous and contrary to the City's admissions and evidence submitted by Mahmoudi. Thus, Godbe is unquestionably inapplicable here to the extent that summary judgment is proper when there is no evidence of damage, but the case is applicable to establish that there can be a duty of a municipality pursuant to statute.

Therefore, under clear, settled law by this Court, Mahmoudi is entitled to have a jury consider whether the City met the requirements of SDCL § 31-32-10 and SDCL § 31-28-6, *i.e.*, whether the City erected an adequate warning sign and repaired the damage

to the culvert. Whether there was signage that is considered a "substantial and conspicuous warning sign" and "of sufficient height, width, and strength . . . to guard the public from accident or injury" are jury questions, pursuant to the Fritz case.

Any signage erected by the City was not intended to warn of any danger, as the City has taken the position that it received no complaints about the culvert, admitted that it failed to inspect the area for 20 years, and was apparently oblivious to the hazard. Certainly, the City cannot make an argument that the culvert was properly repaired, as it *admits* that the culvert could have been damaged for up to 20 years, despite the City's obligation to maintain the culvert.

Further, actual notice of the hazardous culvert is not required. See, e.g., Fritz, supra. Constructive notice is adequate. Id. at ¶21. "It is a question of fact for the jury to determine whether [the City], in the exercise of ordinary care, should have discovered [the hazard] in time to [remedy it] before this accident." Id. at ¶22. The Court in Fritz held that the City argued only lack of actual notice in its motion for summary judgment and, as such, it was not entitled to a judgment as a matter of law. Id. at ¶23. Here, the City admits that there was snow removal on Dahl Road. Appendix 31-34; SR 76. The City also conducted weed control and mowed the area. Id. Even given the extensive activities consistently performed on Dahl Road, there is no evidence to support that the City ever inspected the subject culvert or, *if* the area had been inspected and the damaged culvert was noticed, it was flatly ignored.

Similarly, the Court in Boe v. Healy, 168 N.W.2d 710, 713 (S.D. 1969) (cited in Fritz, supra), held that whether the hazard "had existed for such a length of time that defendant in the exercise of due care should have discovered it" created an inference in

the plaintiff's favor with respect to constructive notice. It is a "question of fact for the jury to determine whether the defendant in the exercise of ordinary care should have discovered the hazardous . . . condition and the risk involved in time to make reasonable repairs for the [public's] safety[.]" Id. at 714.

While the circuit court found that there was "no dispute that the culvert would have been observable by a City employee (e.g., weed controller sees the culvert), mere observation of the culvert does not show that the City had notice that the culvert was damaged." SR 178. This finding takes a leap that is outside the court's discretion. The court must view the facts more favorably to Mahmoudi when considering summary judgment. If the facts were viewed in her favor, there is no question that, for example, a person weeding the area surrounding the culvert, exercising ordinary care, would have seen that it was damaged.

In addition, other statutes cannot be ignored, as they demonstrate the importance of protecting the public by inspecting, maintaining and repairing culverts. SDCL § 9-45-3 provides that municipalities "shall have power to construct and keep in repair . . . culverts[.]" To the extent that the culvert/pipe in question is considered a drain, municipalities regulate the same. SDCL § 9-45-5. Likewise, SDCL § 31-14-33 provides that the "township board of supervisors shall have each culvert on the secondary highways within the township annually inspected and, if necessary, repaired." In Knodel v. Kassel Twp., 1998 SD 73, ¶14,581 N.W.2d 584, this Court referenced this statute, stating that the Township had a "statutory duty to monitor and repair its culverts." Id. Simply because a damaged culvert was allegedly "undiscovered for many years will not alter those responsibilities." Id.

For these reasons, Mahmoudi should be permitted to proceed with her negligence claim against the City of Spearfish.

III. SDCL § 21-10-2 Does Not Bar Mahmoudi's Nuisance Action

A cause of action for nuisance is permitted pursuant to SDCL§ 21-1-1. While SDCL § 21-1-2 provides for an exception to proceeding with a nuisance action relating to acts done under the express authority of a statute, it is clear that a nuisance cause of action may proceed when the negligent conduct is "outside the realm of its statutory authority." Exports, Inc. v. Black Hills Power, 2008 U.S. Dist. LEXIS 134482, *15 (D.S.D. 2008). The Court stated, "the immunity conferred upon a public utility is not unlimited, and such an entity may be liable for nuisance if its conduct substantially or unreasonably invade[s] or interfere[s] with another's use and enjoyment of his property." Id. Further, the "Court does not believe that statutory authorization extends so far as to permit public utilities to *negligently create a nuisance and then avoid any liability* to parties who can make a claim for nuisance[.]" Id. (emphasis added).

In Exports, Inc., the Defendant argued that it was not responsible for damages resulting from a fire pursuant to SDCL § 21-10-2, because it was a public entity acting under statutory authority. 2008 U.S. Dist. LEXIS 134482, *14. The Plaintiff argued that the nuisance was not the power lines themselves, but the overgrown vegetation around the power lines. Id. The District Court of South Dakota agreed, holding that the "maintenance of its easements fall outside of its authority as a public utility." Id. *16.

Similarly, in Green v. City of Lennox, 107 N.W.2d 337, 339 (S.D. 1961) (cited in Exports, Inc.), the South Dakota Supreme Court held that although the City's "legislative authority to create and maintain a public dump its authority was 'limited by the duty

resting upon the city to exercise its authority in a reasonable manner and to take all reasonable precautions against damaging private property.'" (Citing Messer v. City of Dickinson, 3 N.W.2d 241, 246 (N.D. 1942)). "When a city *fails to perform that duty* its public dump may become a private nuisance, unprotected by governmental immunity." Id. (emphasis added).

The exact situation occurred here in that the City *failed to perform the duty to maintain the* culvert as directed by statute. While SDCL § 9-45-3 gives the City the power to maintain culverts, evidence supports that the City failed to maintain the culverts at all. The City had no policy for inspecting the culverts. Appendix 17; SR 72. The City failed to inspect the subject culvert for up to 20 years between when the culvert was constructed and Mahmoudi's injury. Appendix 32, 17; SR 76, 72. Even though the City's employees had repeated open views of the culvert while mowing, weeding, and plowing, none apparently reported the damage to the City. Appendix 32; SR 76. Due to its admitted failure to inspect and maintain the culvert, the culvert was damaged and resulted in injury to Mahmoudi.

This is not a situation in which the City made mistakes with its maintenance of the culvert. Rather, the City completely failed to maintain the culvert at all. This is precisely the type of failure that is *not* protected by SDCL § 21-10-2 which provides: "Nothing which is done or maintained under the express authority of a statute can be deemed a nuisance."

Moreover, immunity is "not unlimited" to the point of permitting the City to create a nuisance by failing to adhere to its power under SDCL § 9-45-3 to maintain the culverts and escape liability from injury resulting from the damaged culvert. See, e.g.

Exports, Inc. and Green, supra. Without protection under SDCL § 21-10-2, Mahmoudi's action for nuisance must be allowed to proceed under SDCL § 21-10-1. Contrary to the circuit court's holding with respect to a nuisance claim that Mahmoudi "cannot show that the City has been negligent," negligence is not relevant to SDCL § 21-10-1. Our statute requires only a showing of failing to perform a duty that, among other things, injures a person. SDCL § 21-10-1. That duty, as set forth above, was admitted by the City in its Answer to which the City is bound.

Based on settled law and the facts set forth herein, Mahmoudi should be permitted to proceed with her nuisance claim.

IV. The City Failed to Plead Immunity

The City failed to affirmatively plead immunity in its Answer. Appendix 12-15; SR 11-13. As stated hereinabove, the City raised various affirmative defenses, but immunity was not one of them. This Court has stated that immunity from liability must be timely asserted and conclusory allegations are not substitutes for specific facts. Gabriel v. Bauman, 2014 S.D. 30, ¶21, 847 N.W.2d 537 (although involving a different statute, affirms the requirement of affirmatively pleading immunity); see also Olesen v. Town of Hurley, 2004 S.D. 136, ¶13, 691 N.W.2d 136 (stating, "[S]overeign immunity is an affirmative defense."). "[T]he defense of immunity to be availed of must be pleaded." Schoenrock v. Sisseton, 103 N.W.2d 649, 652 (S.D. 1960).

Rather, the City made various admissions in its Answer, as set forth herein, relating to its duties and responsibilities toward Mahmoudi, but never affirmatively pled immunity. "[A]dmissions contained in pleadings are binding[.]" Twin Med LLC v. Skyline Healthcare LLC, 2024 U.S. App. LEXIS 4177 (quoting Mo. Hous. Dev. Comm'n

v. Brice, 919 F.2d 1306, 1314 (8th Cir. 1990)) (citing Nat'l Sur. Corp. v. Ranger Ins., 260 F.3d 881, 886 (8th Cir. 2001) ("Factual statements in a party's pleadings are generally binding on that party unless the pleading is amended.")). By not even mentioning "immunity" in any form in its Answer and instead making admissions as to its duty, summary judgment in its favor was not appropriate.

V. A Jury Must Determine Whether the City was Grossly Negligent

SDCL § 20-9-22 provides that there is no limit against liability against a political subdivision of the State when there is "gross negligence or willful or wanton misconduct" and for injuries resulting from a violation of municipal ordinance or state law. First, as set forth hereinabove, liability is fully proven by establishing the City's duty to Mahmoudi, breach thereof, and resulting harm to her. To the extent necessary, however, there are facts that support the City's gross negligence and violation of state law. Evidence dictates that the City failed to inspect or maintain the subject culvert for up to 20 years, despite requirements that it do so. In fact, the City failed to even institute a policy setting forth the procedure for inspecting culverts as required by law. Moreover, common sense dictates that the employees mowing, weeding and plowing in the area around the culvert would have noticed damage to the same, yet flatly ignored the culvert.

Further, Mahmoudi alleged in her complaint that the City *recklessly* breached the following duties:

- Failing to provide safe running surfaces;
- Failing to make timely inspections of the roadway;
- Failing to train employees in pedestrian safety issues;
- Failing to inspect the roadway for trip hazards;
- Failing to ascertain the trip risk;
- Failing to take reasonable steps to eliminate hazards; and
- Failing to post signs and warning of the hazard.

Mahmoudi sufficiently pled gross negligence in her Complaint. See also Melby v. Anderson, 266 N.W. 135 (S.D. 1936) (stating that gross negligence "amounts to willful, wanton, *or reckless* misconduct.") (emphasis added.)

As to recklessness, Mahmoudi stated in her answers to interrogatories that "[a]t the very least, a flag or cone could have reasonably alerted passerby to the possible hazard." SR 108. In truth, had the City made reasonable inspections over the course of 20 years, it would have known that an unmarked, uncapped pipe existed and would cause substantial damage to a person walking or running in that area. Worse yet, if an employee of the City noticed the damaged culvert during those 20 years while plowing snow, weeding, or mowing, he/she utterly ignored the hazard, most certainly constituting gross misconduct. Fischer v. City of Sioux Falls, 2018 SD 71, ¶ 9, 919 N.W.2d 211 (stating that the "defendant must know *or have reason to know of the risk* and must in addition proceed without concern for the safety of others[.]") (citation omitted)(emphasis added).

There is no question that Mahmoudi sufficiently pled gross negligence on the part of the City and that there is sufficient evidence of gross negligence to submit the issue to a jury. Summary judgment must be reversed.

CONCLUSION

Under clear South Dakota law, the circuit court's decision to grant summary judgment must be reversed. The record before this Court is clear that either 1) there were disputed facts, preventing summary judgment or 2) when viewing the facts more favorably to Mahmoudi (as must be done), summary judgment in favor of the City was improper.

Dated this 2nd day of October, 2024.

COSTELLO, PORTER, HILL, HEISTERKAMP, BUSHNELL & CARPENTER, LLP

By: _____

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that pursuant to SDCL § 15-26C-3 she served an electronic copy, and two hard copies of the above and foregoing **APPELLANT'S BRIEF** on the following individual, by depositing the same this date in the United States mail, postage prepaid, at Rapid City, South Dakota, addressed as follows:

Cassidy M. Stalley
909 St. Joseph St., Ste. 800
Rapid City, SD 57701

Clerk of the Supreme Court
South Dakota Supreme Court
500 East Capitol Avenue
Pierre, SD 57501-5070

Dated this 2nd day of October, 2024.

COSTELLO, PORTER, HILL, HEISTERKAMP, BUSHNELL & CARPENTER, LLP

By: _____

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CERTIFICATE OF COMPLIANCE

The undersigned, counsel for Appellant, certifies pursuant to SDCL § 25-26A-66 that the brief contains 3,527 words and 17,669 characters without spaces, exclusive of the Table of Contents, Table of Authorities, Jurisdictional Statement, Statement of Legal Issues, Appendix and Certificates of Counsel, and certifies that the name and the version

of the word processing software used to prepare the brief is Microsoft Word 10 using Times New Roman font 12 and left justification.

Dated this 2nd day of October, 2024.

COSTELLO, PORTER, HILL, HEISTERKAMP, BUSHNELL & CARPENTER, LLP

By: _____

Heather Lammers Bogard
Attorneys for Appellant
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Rapid City, SD 57709
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hbogard@costelloporter.com

CERTIFICATE OF PROOF OF FILING

The undersigned hereby certifies that pursuant to SDCL § 15-26C-3 she served an electronic copy in Word format and an original and two hard copies of the above and foregoing **APPELLANT'S BRIEF** on the Clerk of the Supreme Court by depositing the same this date in the United States mail, postage prepaid, at Rapid City, South Dakota, addressed as follows:

Clerk of the Supreme Court
State Capitol Building
500 East Capitol Avenue
Pierre, SD 57501-5070
Email address: scclerkbriefs@ujs.state.sd.us

Dated this 2nd day of October, 2024.

COSTELLO, PORTER, HILL, HEISTERKAMP, BUSHNELL & CARPENTER, LLP

By: _____

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APPENDIX

PAGE

APPENDIX

STATE OF SOUTH DAKOTA	:	IN CIRCUIT COURT
	SS	
COUNTY OF LAWRENCE	:	FOURTH JUDICIAL CIRCUIT
HAMIDEH MAHMOUDI,	)	40CIV17-000362
Plaintiff,	)	
vs.	)	**ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**
CITY OF SPEARFISH,	)	
Defendant.	)	

This matter having come on for hearing on Wednesday, May 8, 2024, before the Honorable Eric J. Strawn on Defendant's Motion For Summary Judgment; and the Plaintiff appearing by and through his attorney of record, Heather Lammers Bogard of Costello, Porter, Hill, Heisterkamp, Bushnell & Carpenter, LLP; and Defendant appearing by and through their attorney of record, Cassidy M. Stalley of Lynn, Jackson, Shultz & Lebrun, P.C.; and the Court having reviewed the records and files herein, having heard and considered the arguments of counsel, and issued a Memorandum of Decision, dated May 24, 2024, which is incorporated by this reference as though fully set forth herein; now it is hereby:

ORDERED that Defendant's Motion for Summary Judgment against Plaintiff is GRANTED; it is further

ORDERED that Plaintiff's Complaint, as it relates to Defendant, is dismissed, with prejudice.

BY THE COURT:

6/6/2024 10:11:00 AM

Honorable Eric J. Strawn
Circuit Court Judge

Attest: CAROL LATUSECK, CLERK
Lewis, Bree
Deputy

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	) SS.	
COUNTY OF LAWRENCE	)	FOURTH JUDICIAL CIRCUIT

HAMIDEH ZAKIPOUR MAHMOUDI, Plaintiff, v. **CITY OF SPEARFISH,** Defendant.	**40CIV17-362** **MEMORANDUM OF DECISION**

This matter came on for hearing before The Honorable Eric J. Strawn on May 8, 2024, at 2:30PM, Defendant having moved for summary judgment and the Plaintiff having resisted the motion, the parties were heard, Plaintiff was represented by Heather Lammers Bogard of Costello, Porter, Hill, Heisterkamp, Bushnell & Carpenter, LLP and the Defendant represented by Cassidy M. Stalley of Lynn, Jackson, Shultz, Lebrun, P.C. The Court, having heard the arguments of the parties, read the briefs, reviewed the attachments, hereby, issues this memorandum of decision.

Undisputed Factual Background

On or about December 4, 2016, Hamideh Zakipour Mahmoudi ("Mahmoudi") was running along the north side of Dahl Road in the City of Spearfish towards oncoming traffic when she stepped off the side of the road to avoid oncoming traffic. Mahmoudi alleges she stepped into a culvert pipe that was partially exposed resulting in physical injury.

At some point prior to the alleged injury, the City of Spearfish undertook a construction, maintenance, or repair project on or along Dahl Road which included the subject culvert. The City of Spearfish has never received any actual notice of an issue with the subject culvert prior to the

alleged injury. The subject culvert is a pipe which is situated under Dahl Road perpendicular to traffic which likely carries water under the road.

Mahmoudi brings two causes of action against the City of Spearfish: (1) nuisance and (2) negligence. The nuisance action is brought under SDCL § 21-10-1 and the negligence action is brought under the common law.

Summary Judgment Standard

"[S]ummary judgment is appropriate when there is no genuine issue of material fact[, and] ... there must be no genuine issue on the inferences to be drawn from those facts." *A-G-E Corp. v. State*, 2006 S.D. 66, ¶ 17, 719 N.W.2d 780, 786. "[S]ummary judgment is not a substitute for trial; a belief that the non-moving party will not prevail at trial is not an appropriate basis for granting the motion on issues not shown to be a sham, frivolous or unsubstantiated ...." *Toben v. Jeske*, 2006 S.D. 57, ¶ 16, 718 N.W.2d 32, 37 (citation omitted). "[The Court views] all reasonable inferences drawn from the facts in the light most favorable to the non-moving party." *Luther v. City of Winner*, 2004 S.D. 1, ¶ 6, 674 N.W.2d 339, 343 (citation omitted).

"We require those resisting summary judgment to show that they will be able to place sufficient evidence in the record at trial to support findings on all the elements on which they have the burden of proof." *Foster-Naser v. Aurora Cnty.*, 2016 S.D. 6, ¶ 11, 874 N.W.2d 505, 508 (citation omitted). "A sufficient showing requires that '[t]he party challenging summary judgment ... substantiate his allegations with sufficient probative evidence that would permit a finding in his favor on more than mere speculation, conjecture, or fantasy.' " *Nationwide Mut. Ins. Co. v. Barton Solvents Inc.*, 2014 S.D. 70, ¶ 10, 855 N.W.2d 145, 149 (citation omitted). "Mere speculation and general assertions, without some concrete evidence, are not enough to avoid summary judgment." *N. Star Mut. Ins. v. Korzan*, 2015 S.D. 97, ¶ 21, 873 N.W.2d 57, 63

Issues

1. Whether the City of Spearfish owes a duty to Mahmoudi.
2. Whether SDCL § 21-10-2 bars an action for nuisance against the City of Spearfish because the culvert was installed and/or maintained under statutory authority.
3. Whether the City could be held liable for recklessness.

Duty

Mahmoudi brings a claim of negligence against the City of Spearfish. She is claiming that the City failed to maintain, construct, warn, and/or inspect the culvert and that was a breach of the duty the City owed Mahmoudi. Finally, Mahmoudi claims that breach was the cause of her damages. At first glance, a majority of Mahmoudi's claim appears to be based in a common law duty of care, not SDCL § 31-32-10. This Court considers the claim's common law approach first, then addresses application of SDCL § 31-32-10.

Common Law Duty of Municipality

"There is no common law right of action against the City with regard to streets to highways." *Godbe v. City of Rapid*, 969 N.W.2d 208, 213 (2022) (citing *Hohm v. City of Rapid* City, 752 N.W.2d 895, 905 (2008)). "The existence of a duty in a negligence action is a question of law." *Hohm*, 753 N.W.2d at 898 (citing *State Auto Ins. Companies v. B.N.C.*, 702 N.W.2d 379, 386).

Here, Mahmoudi is making a claim contrary to settled South Dakota law. South Dakota law sets out that a public entity does not owe a common law duty of care. Since the law does not support a negligence claim because it is impossible for Mahmoudi to satisfy all four elements of common law negligence, which means that a dispute in material facts isn't necessary as there is no law from which facts may be applied. As such Plaintiff's claim arising from common law isn't

permitted based on well settled law and as a result Defendant is entitled to judgment as a matter of law for Plaintiff's claims arising directly from common law duty.

Application of SDCL § 31-32-10

Mahmoudi attempts to tether her claim of duty under SDCL § 31-32-10. Pursuant to SDCL § 31-32-10, the City "only [has a duty] to warn of danger and to make reasonably timely repairs upon notice that a damaged roadway is creating a safety hazard." *Godbe*, 969 N.W.2d at 214 (citing *Wilson v. Hogan*, 473 N.W.2d 492, 496 (S.D. 1991)). "To establish that [the] City had a duty under SDCL 31-32-10 to warn of, or to repair a dangerous condition on the street, [Mahmoudi] must first demonstrate that [the culvert] was in a damaged condition at the time of the accident." *Id.* The requirement imposed here is such that Mahmoudi must sufficiently show that the culvert was damaged and not merely a design defect. See generally *Id.* If the culvert was merely designed in such a way that it posed a danger to Mahmoudi, SDCL § 31-32-10 does not impose a duty. *Id.*

While it is undisputed that Mahmoudi's body made physical contact with some part of the culvert and she was subsequently severely injured, the evidence does not show that the culvert is damaged. Unlike in *Godbe*, where Justice Kern dissented and argued the evidence which creates a factual dispute has been sufficiently presented, the evidence here is wholly insufficient to show there is a genuine dispute about whether the culvert was damaged. Mahmoudi argues that the culvert was uncapped but does not present evidence of how being uncapped was anything other than a design defect. Furthermore, there was no analysis as to the impact of a culvert being "uncapped" and how being uncapped demonstrates the culvert was damaged. Essentially, this Court would be required to presuppose the culvert was damaged which is beyond summary judgment.

Even after Mahmoudi became injured, she does not provide evidence beyond pixelated photos of the culvert. Said photos do not show that the culvert is anything other than a tube sticking out from under a roadway and anything possibly wrong with said culvert would require the Court to speculate, something contrary to summary judgment. Aside from the photos there was no evidence of damage. Furthermore, she merely asserts a conclusory statement about the condition of the culvert. Mahmoudi claims the inadmissible evidence of a subsequent remedial measure taken by the City shows damage, however, she does not show how the damage was not merely a design defect.

Additionally, it is undisputed that the City did not have actual notice of the condition of the culvert. The City and Plaintiff admitted there were no complaints regarding the culvert. However, Mahmoudi argues that since the area presumably would have been mowed by City employees, or that snow removal may have been performed on Dahl Road, and/or the City performed weed control, therefore the City *must* have had constructive notice of the culvert's condition. Harkening back to damage, there is no dispute that the culvert would have been observable by a City employee (e.g., weed controller sees the culvert), mere observation of the culvert does not show that the City had notice that the culvert was damaged. Therefore, because there is a lack of notice to the City and Mahmoudi has not shown evidence of actual damage to the culvert, summary judgment as to negligence is granted.

Nuisance Action

Mahmoudi claims that the City's failure to maintain the culvert is the result of its negligence and thereby creating a nuisance. In general, a municipality is immune from nuisance actions when the nuisance is the result of conduct done under express statutory authority. See SDCL 21-10-2. The City is statutorily authorized to build and maintain the culvert. See SDCL §

9-45-3. However, Mahmoudi is not claiming that the culvert itself is a nuisance, as that would clearly be without authority. Mahmoudi is claiming that the negligent care of the culvert has created a nuisance to which she is a victim of said nuisance.

The problem with Mahmoudi's reasoning is that she cannot show that the City has been negligent. As discussed previously, the City does not owe a duty to Mahmoudi to maintain the culvert under these circumstances which means that Mahmoudi can only claim the culvert itself is the nuisance. Therefore, summary judgment as to nuisance is granted.

Recklessness

Recklessness is not a cause of action. Rather, recklessness is a degree of conduct. However, even if recklessness is considered a cause of action, it would be akin to gross negligence. A failure to take precautions or repair a known *possible* hazard is not gross negligence. See generally *Fischer v. City of Sioux Falls*, 919 N.W.2d 211. Therefore, summary judgment as to recklessness is granted.

Conclusion

Summary judgment is **GRANTED**, and this case is forthwith **DISMISSED**. Defendant shall prepare the appropriate judgment incorporating this Memorandum of Decision.

Dated this 24th day of May, 2024.

BY THE COURT:

Honorable Eric J. Strawn
Circuit Court Judge

ATTEST
Clerk of Court:
By:
Deputy

CERTIFICATE OF SERVICE

The undersigned hereby certifies that she served a true and correct copy of the MEMORANDUM OF DECISION in the case of HAMIDEH ZAKIPOUR MAHMOUDI vs CITY OF SPEARFISH 40CIV17-000362 upon the persons herein next designated all on the date below shown, by emailing a copy thereof to the parties and receiving a delivery receipt for the same confirming the email was delivered to the recipients' mailboxes.

Ms. Heather Bogard
Attorney at Law
hlammers@costelloporter.com

Ms. Cassidy Stalley
Attorney at Law
cstalley@lynnjackson.com

which addresses are the last addresses of the addresses known to the subscriber.

Dated this 24th day of May 2024.

Carol Latuseck
Lawrence County Clerk of Courts

Latuseck, Carol

From:	Microsoft Outlook <MicrosoftExchange329e71ec88ae4615bbc36ab6ce41109e@k12.sd.us>
To:	hlammers@costelloporter.com; Cassidy Stalley
Sent:	Friday, May 24, 2024 3:37 PM
Subject:	Relayed: MEMORANDUM DECISION 40CIV17-362 MAHMOUDI vs CITY OF SPEARFISH

Delivery to these recipients or groups is complete, but no delivery notification was sent by the destination server:

hlammers@costelloporter.com (hlammers@costelloporter.com)

Cassidy Stalley (CStalley@lynnjackson.com)

Subject: MEMORANDUM DECISION 40CIV17-362 MAHMOUDI vs CITY OF SPEARFISH

MEMORANDUM DECISION 40CIV...

EXHIBIT

A

EXHIBIT
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C

STATE OF SOUTH DAKOTA : SS	IN CIRCUIT COURT
COUNTY OF LAWRENCE :	FOURTH JUDICIAL CIRCUIT
HAMIDEH MAHMOUDI,	40CIV17-000362
Plaintiff,	
vs.	**ANSWER TO PLAINTIFF'S COMPLAINT**
CITY OF SPEARFISH,	
Defendant.	

Comes now the Defendant, City of Spearfish, by and through its attorneys of record, Thomas E. Brady and Kassie McKie Shiffermiller, and for its Answer to Plaintiff's Complaint, states and alleges as follows:

1. Defendant denies each and every allegation, matter and claim of Plaintiff, except for those matters which are herein specifically admitted or qualified.

2. Defendant admits the allegations contained in Paragraphs 1, 2, 10, 12, 14, 15, 19, 23, of Plaintiff's Complaint.

3. Defendant is without sufficient knowledge, information or belief to admit the allegations contained in Paragraphs 3, 4, 5, 6, and 7 of Plaintiff's Complaint, and therefore denies and puts Plaintiff to its strict proof of the same.

4. Defendant denies the allegations contained in Paragraphs 8, 11, 13, 16, 17, 18, 20, 21, 22, 24, 25, and 26.

5. With respect to Paragraph 9, Defendant admits that it has a duty to exercise ordinary care in maintaining its property. Defendant affirmatively states that it used ordinary care in maintaining the subject property.

AFFIRMATIVE DEFENSES

6. Defendant incorporates the foregoing paragraphs by reference as if fully set forth herein.

7. Plaintiff's Complaint fails to state a claim for relief against this Defendant and should therefore be dismissed.

8. Defendant moves to dismiss the Complaint on the grounds that Plaintiff has failed to allege facts or legal grounds sufficient under applicable law to support a recovery for the claimed damages.

9. As an affirmative defense, Defendant alleges that if the Plaintiff was injured as a result of any negligence of Defendant, which negligence is specifically denied, Plaintiff was contributorily negligent and that such contributory negligence of Plaintiff was more than slight, thus barring Plaintiff's recovery in this action.

10. As an affirmative defense, Defendant alleges that Plaintiff, as a result of her acts and/or omissions, assumed any and all risks, thus barring Plaintiff's recovery in this action.

11. As an affirmative defense, the facts and circumstances surrounding Plaintiff's allegations were not foreseeable, and therefore, Defendant did not breach a duty, if any, and was not negligent.

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12. As an affirmative defense, Defendant alleges that if Plaintiff was injured, which injury is specifically denied, that Plaintiff was injured as the result of intervening events and/or pre-existing incidents for which Defendant is not liable.

13. Defendant preserves the right to raise any additional affirmative defenses that may result following discovery.

WHEREFORE, Defendant prays for judgment as follows:

1. For a dismissal of the Plaintiff's Complaint and that the Plaintiff take nothing by its Complaint;

2. For Defendant's costs, expenses, disbursements and reasonable attorney's fees incurred herein; and

3. For such other and further relief as the Court deems just and equitable.

Dated December 28, 2017.

LYNN, JACKSON, SHULTZ & LEBRUN, P.C.

By: */s/ Thomas E. Brady*

Thomas E. Brady
Kassie McKie Shiffermiller
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135 East Colorado Boulevard
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Filed: 12/28/2017 1:18:42 PM CST Lawrence County, South Dakota 40CIV17-000362

CERTIFICATE OF SERVICE

I hereby certify that on December 28, 2017, I sent to:

Mr. Liam M. Culhane
Turbak Law Office
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Watertown, SD 57201
liam@turbaklaw.com

Ms. Nancy J. Turbak Berry
Turbak Law Office, PC
26 South Broadway, Suite 100
Watertown, SD 57201-3670
nancy@turbaklaw.com

by Notice of Electronic Filing generated by the Odyssey File & Serve system, a true and correct copy of **Answer To Plaintiff's Complaint** relative to the above-entitled matter.

/s/ Thomas E. Brady
Thomas E. Brady

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EXHIBIT 3

STATE OF SOUTH DAKOTA : SS		IN CIRCUIT COURT
COUNTY OF LAWRENCE :		FOURTH JUDICIAL CIRCUIT
HAMIDEH MAHMOUDI,	)	40CIV17-000362
Plaintiff,	)	
vs.	)	**CITY OF SPEARFISH'S ANSWERS AND RESPONSES TO PLAINTIFF'S INTERROGATORIES AND REQUESTS FOR PRODUCTION OF DOCUMENTS (SECOND SET)**
CITY OF SPEARFISH,	)	
Defendant.	)	

City of Spearfish, Defendant herein, being first duly sworn on oath, submits the following answers:

INTERROGATORIES

11. For each occasion on which inspection, construction, maintenance, or repair work occurred on or in the immediate vicinity of the surface drainage culvert, including (but not limited to) removal of any exposed portion of the culvert, state:

a. the date(s) the work occurred;

b. a specific description of the work;

c. the name, address, employer, and job title of the person who decided that the work would be done;

d. the name, address, employer, and job title of each person who participated in performing the work, including a specific description of each person's role in the work;

e. the name, address, employer, and job title of each person who supervised the work;

f. the name, address, employer, and job title of every other person present at any time during the work;

g. the name of the entity that paid for the work;

h. the total cost of the work and identify each bill, invoice, and other item documenting the cost of the work; and

i. whether any photographs, video recordings, or other records were made of the work, the condition of the site before the work, or the condition of the site after the work, and the name and address of each person having possession of any photographs, video recordings, or other records that were made.

ANSWER:

a. Approximately mid-December 2016.

b. City staff exposed the pipe and cut off the damaged end section.

c. Cheryl Johnson, Spearfish Public Works Administrator.

d. Beau Riopel, Spearfish Street Department Superintendent, scheduled and oversaw street department staff to perform the work. Tyler Fortin, Spearfish Street Technician, performed the work.

e. Beau Riopel.

f. Tyler Fortin.

g. City of Spearfish employees.

h. None.

i. No photographs were taken in regard to the work performed. See photos taken post accident. The culvert as modified can be viewed.

12. State the name, address, and job title of each person who directed that an exposed end of the surface drainage culvert should be cut off removed sometime after December 4, 2016.

ANSWER: Cheryl Johnson, Spearfish Street Department Superintendent, directed that the end of the culvert be removed.

13. Identify and describe each policy and procedure the City of Spearfish has for inspecting, installing, or maintaining, culverts within the City limits.

ANSWER: There are no written policies. Maintenance/inspection of surface drainage culverts such as this culvert is primarily complaint driven. Just as in this case, when the City was notified of this event, the culvert was inspected, the end was exposed and the damaged portion was cut off.

REQUESTS FOR PRODUCTION

10. The original or a clearly legible copy of all items identified in your response to any of the above interrogatories.

RESPONSE: None.

11. The original or a clearly legible copy of all documents that support any of your responses to the above interrogatories.

RESPONSE: None other than photos previously provided.

12. The original or a clearly legible copy of all correspondence (including, but not limited to: letters, emails, text messages, notes, and memoranda), both internal and external, except confidential correspondence with legal counsel, regarding Plaintiff, information contained in the *Complaint* or *Answer*, the surface drainage culvert, or removal of any portion of the surface drainage culvert.

RESPONSE: None other than documents and information previously provided.

13. The original or a clearly legible copy of all work orders, change orders, invoices, receipts, and financial documents related to work identified in your answer to Interrogatory No. 11.

RESPONSE: None.

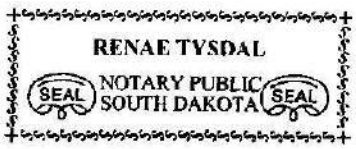
14. The original or a copy of all photographs and video recordings taken of the surface drainage culvert or its immediate vicinity at any time since the surface drainage culvert was installed.

RESPONSE: Photos that were taken by City staff after being notified of the accident have been provided.

Dated this 1st day of June, 2018.

Dana Boke, Mayor of the City of Spearfish

Subscribed and sworn to before me this 1st day of June, 2018.



(SEAL)

Notary Public, State of South Dakota

My Commission expires:

CERTIFICATE OF SERVICE

I hereby certify that on June 1, 2018, I sent to:

Mr. Liam M. Culhane
Ms. Nancy J. Turbak Berry
Turbak Law Office, PC
26 South Broadway, Suite 100
Watertown, SD 57201-3670
liam@turbaklaw.com
nancy@turbaklaw.com

by Notice of Electronic Filing generated by the Odyssey File & Serve system, a true and correct copy of **City of Spearfish's Answers and Responses to Plaintiff's Interrogatories and Requests for Production of Documents (Second Set)** relative to the above-entitled matter.

/s/ Thomas E. Brady
Thomas E. Brady

STATE OF SOUTH DAKOTA : SS COUNTY OF LAWRENCE :		IN CIRCUIT COURT FOURTH JUDICIAL CIRCUIT
HAMIDEH MAHMOUDI, Plaintiff, vs. CITY OF SPEARFISH, Defendant.	)	40CIV17-000362 **DEFENDANT'S STATEMENT OF UNDISPUTED MATERIAL FACTS**

COMES NOW the Defendant, by and through its undersigned attorneys, and pursuant to SDCL 15-6-56(c)(1), submits this Statement of Undisputed Material Facts in support of its Motion for Summary Judgment.

1. Sometime prior to December 4, 2016, the City of Spearfish ("Spearfish"), or its agents, undertook a construction, maintenance, or repair project on Dahl Road near Silver Spur mobile home court in the Spearfish city limits. Complaint ¶ 1.

2. After Spearfish, or its agents, completed the project, a road drain culvert was left in the public right of way, uncapped, and partially exposed. Complaint ¶ 2.

3. Prior to December 4, 2016, Plaintiff Hamideh Mahmoudi ("Mahmoudi") was a ultra-marathon runner, living in Spearfish. Complaint ¶ 3.

4. On December 4, 2016, Mahmoudi went for a run along Dahl Street in Spearfish, SD. Complaint ¶ 4.

5. As Mahmoudi made her way along Dahl Road, a car approached, which prompted Mahmoudi to step off the road surface as the car passed. Exhibit 1[1], Plaintiff's Answers to Interrogatories No. 8 and 9.

6. In doing so, Mahmoudi stepped into a culvert. Complaint ¶ 5; Exhibit 1, Plaintiff's Answers to Interrogatory No. 9.

7. Mahmoudi alleges to have stained lacerations on the front of her right lower leg and sprained her right ankle. Exhibit 1, Plaintiff's Answers to Interrogatory No. 18.

8. The culvert was installed and maintained by Spearfish. Exhibit 2, Defendant's Answers to Interrogatories (First Set) No. 3-5; Exhibit 3, Defendant's Answers to Interrogatories (Second Set) No. 11-13; Exhibit 4, Defendant's Answers to Interrogatories (Third Set) No. 19.

9. The culvert was marked with a marker post. Exhibit 5, Defendant's Answers to Requests for Admissions; Exhibit 6, Hammie 1239.

10. Prior to the December 4, 2016, incident, there were no known complaints, concerns, comments or the like made to Spearfish or any of its employees, representatives, officers, or council members concerning the subject culvert. Exhibit 4.

[1] Exhibits identified herein are attached to the Affidavit of Cassidy M. Stalley filed herewith.

Dated February 29, 2024.

LYNN, JACKSON, SHULTZ & LEBRUN, P.C.

By: */s/ Cassidy M. Stalley*
Cassidy M. Stalley
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909 St. Joseph Street, Suite 800
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CERTIFICATE OF SERVICE

I hereby certify that on February 29, 2024, I sent to:

Ms. Heather Lammers Bogard
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704 St. Joseph Street
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hbogard@costelloporter.com

by Notice of Electronic Filing generated by the Odyssey File & Serve system, a true and correct copy of **Defendant's Statement of Undisputed Material Facts** relative to the above-entitled matter.

/s/ Cassidy M. Stalley
Cassidy M. Stalley

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STATE OF SOUTH DAKOTA : SS COUNTY OF LAWRENCE :	IN CIRCUIT COURT FOURTH JUDICIAL CIRCUIT
HAMIDEH MAHMOUDI, Plaintiff, vs. CITY OF SPEARFISH, Defendant.	40CIV17-000362 **DEFENDANT'S REPLY BRIEF IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT**

COMES NOW the Defendant City of Spearfish ("Spearfish"), by and through its attorneys of record, and respectfully submits this Reply Brief in Support of its Motion for Summary Judgment.

INTRODUCTION

Spearfish moved for summary judgment because – as a matter of law – it owed no duty to Mahmoudi. And rather than providing this Court with authority to refute that legal argument, let alone specific facts to show there are genuine issues for trial, Mahmoudi responded by providing this Court with speculation, conjecture, and fantasy. Indeed, the entire thrust of Mahmoudi's argument is that, due to Spearfish's failure to inspect and maintain the culvert, the culvert was damaged and resulted in injury to Mahmoudi. But other than Mahmoudi's say-so, there is no evidence that the culvert was damaged at the time of Mahmoudi's alleged injury.

As this Court is aware, "summary judgment is proper when the party opposing provides only conclusory statements and fails to present specific facts showing that a

genuine issue exists for trial." *U.S. Bank Nat. Ass'n v. Scott*, 2003 S.D. 149, ¶ 39, 673 N.W.2d 646, 657. And "[e]ntry of summary judgment is mandated against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Godbe v. City of Rapid City*, 2022 S.D. 1, ¶ 23, 969 N.W.2d at 214 (citation omitted) (cleaned up).

This case is ripe for summary judgment. The material facts are not in dispute. There is no question for a jury to determine. The only issue is a purely legal question: Does Spearfish owe a duty to Mahmoudi? Based on the undisputed material facts, this Court can but only arrive at one conclusion. Spearfish does not owe a duty to Mahmoudi. Summary judgment is warranted.

ARGUMENTS AND AUTHORITY

I. Spearfish Is Not Claiming Sovereign Immunity

To be clear, and contrary to Mahmoudi's assertion, Spearfish is not asserting it is immune from suit based on a claim of sovereign immunity. *See* Plaintiff's Brief in Opposition, pg. 3-4 and cases cited within. Spearfish, relying on well-established South Dakota Law, is asserting that it owed no duty to Mahmoudi. *See Godbe v. City of Rapid City*, 2022 S.D. 1, ¶ 22, 969 N.W.2d 208, 213. "Duty is a question of law and summary judgment is proper in negligence cases if no duty exists." *Foster-Naser v. Aurora Cnty.*, 2016 S.D. 6, ¶ 10, 874 N.W.2d 505, 508 (citation omitted) (cleaned up).

II. Mahmoudi Has Not Established the Culvert Was Damaged

While Mahmoudi acknowledges that SDCL 31-32-10 abrogated municipalities' common law duty regarding streets or highways, she seems to gloss over the clear statutory language to establish duty. Indeed, SDCL 31-32-10 provides:

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

(Emphasis added). Thus, to establish Spearfish had a duty under SDCL 31-32-10 to warn of or to repair a dangerous condition, Mahmoudi must first demonstrate that the culvert was in a damaged condition at the time of the accident.

But while Mahmoudi argues that "the culvert was damaged," the culvert "became out of repair," and it was "uncapped, exposed, [and] damaged," she fails to put forth a single piece of evidence that shows the culvert was damaged. And in fact, based on the pictures submitted by Mahmoudi herself, there is no apparent damage to the culvert, such as a gaping hole in the top, a piece of metal sticking up, or otherwise. *See* Affidavit of Bogard, Exhibits A and C.

In resisting summary judgment, Mahmoudi is required to "show that [she] will be able to place sufficient evidence in the record at trial to support findings on all elements on which [she] has the burden of proof." *Redlin v. First Interstate Bank as Co-Tr. of Helene M. Redlin Tr., u/t/d December 14, 2004*, 2024 S.D. 5, ¶ 24, 2 N.W.3d 729, 736–37. "Mere speculation and general assertions, without some concrete evidence, are not enough to avoid summary judgment." *Id.* (citation omitted). "Proof of a mere possibility is never sufficient to establish a fact." *Foster-Naser*, 2016 S.D. 6, ¶ 11, 874 N.W.2d at 508. Yet Mahmoudi asks this Court to indulge in pure speculation, conjecture, and fantasy in finding that the culvert was damaged – when in fact, the undisputed evidence shows otherwise. Summary judgment is warranted on this basis alone.

III. Mahmoudi Has Failed to Demonstrate Gross Negligence or a Violation of State Law

In response to Spearfish pointing out that Mahmoudi's allegations of "recklessness" fail to establish a duty under SDCL 20-9-22, Mahmoudi asserts "there are facts that support [Spearfish's] gross negligence and violation of state law." Mahmoudi's argument is misplaced and lacks specific supporting facts.

First, Mahmoudi claims that Spearfish is required by law to inspect the culvert annually, as well as institute a policy setting forth the procedure for inspecting culverts. Plaintiff's Brief, pg. 11. Mahmoudi is apparently relying on SDCL 31-14-33 for this assertion. But SDCL 31-14-33 applies to townships, not municipalities.[1] Spearfish is not a township, thus SDCL 31-14-33 does not apply.

Next, Mahmoudi claims that "common sense dictates that the employees mowing, weeding, and plowing in the area around the culvert would have noticed damage to the same, yet flatly ignored the culvert." Plaintiff's Brief, pg. 11; *see also* pg. 12. But Mahmoudi offers no evidence, by way of deposition testimony, affidavits, incident reports, or photographs that support this bold conjecture. Again, "proof of a mere possibility is never sufficient to establish a fact." *Foster-Naser*, 2016 S.D. 6, ¶ 11, 874 N.W.2d at 508 (citation omitted). Mahmoudi has failed to put forth sufficient, specific facts to demonstrate she would be able to support a finding of gross negligence at trial. Summary judgment is appropriate on this issue as well.

---

[1] SDCL 31-14-33 states: "The township board of supervisors shall have each culvert on the secondary highways within the township annually inspected and, if necessary, repaired."

IV. Mahmoudi Has Offered No Evidence That Spearfish's Failure to Inspect the Culvert Caused Her Injury

Relying on *Exports, Inc. v. Black Hills Power, Inc.*, 2008 WL 11505971, (D.S.D. 2008) and *Greer v. City of Lennox*, 107 N.W.2d 337, 339 (S.D. 1961), Mahmoudi attempts to argue that "a nuisance cause of action may proceed [against a municipality] when the negligent conduct is 'outside the realm of its statutory authority." Plaintiff's Brief, pg. 5-6. However, both of those cases are factually distinguishable, and again, Plaintiff has put forth no evidence that the culvert was indeed damaged.

In both *Exports, Inc.* and *Greer*, the Supreme Court of South Dakota allowed for a nuisance cause of action against a public entity because the negligent conduct alleged extended outside the realm of its statutory authority. For example, in *Exports, Inc.*, the negligent conduct was the utility allowing overgrown vegetation around the power lines, not the power lines themselves. Likewise, in *Greer*, it was the City allowing offensive odors and a rat and fly infestation from the dump, not the dump itself. In other words, a nuisance claim can go forward if the conduct "substantially or unreasonably invade[s] or interfere[s] with another's use and enjoyment of his property." *Greer*, 107 N.W.2d at 339.

But here, Mahmoudi is arguing the culvert itself was the nuisance. And she has failed to provided evidence that by not annually inspecting the culvert (which it was not statutorily required to do), Spearfish substantially or unreasonably invaded or interfered with her use and enjoyment of the property, let alone that such conduct was the proximate cause of her injury. Again, there is no evidence that the culvert was damaged. And the

law "excludes the idea of legal liability based on mere speculative possibilities or circumstances and conditions remotely connected to the events leading up to an injury." *Musch v. H-D Co-op., Inc.*, 487 N.W.2d 623, 625 (S.D. 1992). "A proximate or legal cause is a cause that produces a result in a natural and probable sequence and without which the result would not have occurred." *Estate of Gaspar v. Vogt, Brown & Merry*, 2003 S.D. 126, ¶ 6, 670 N.W.2d 918, 921.

To be sure, what is undisputed before the Court is:

1. A culvert existed;
2. Mahmoudi stepped in the culvert; and
3. Mahmoudi cut her leg and sprained her ankle on the culvert.

See Plaintiff's Response to Defendant's Statement of Undisputed Material Facts, ¶¶ 6 and 7. Unlike in *Greer* and *Exports, Inc.*, Mahmoudi has failed to put forth any evidence that Spearfish created a nuisance by failing to adhere to its statutory authorized power. Mahmoudi's argument is simply that a culvert existed, and she stepped on it. But Spearfish's conduct clearly falls within the scope of those activities authorized by statute, and "although [Mahmoudi] may perceive the [culvert] as a nuisance, the law disallows a cause of action based on nuisance." *Hedel-Ostrowski*, 2004 S.D. 55, ¶ 13, 697 N.W.2d 491, 497. As such, summary judgment should be granted.

CONCLUSION

For all the reasons stated above, Spearfish respectfully requests that this Court grant its Motion for Summary Judgment.

Dated May 1, 2024.

LYNN, JACKSON, SHULTZ & LEBRUN, P.C.

By: */s/ Cassidy M. Stalley*
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CERTIFICATE OF SERVICE

I hereby certify that on May 1, 2024, I sent to:

Ms. Heather Lammers Bogard
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PO Box 290
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by Notice of Electronic Filing generated by the Odyssey File & Serve system, a true and correct copy of **Defendant's Reply Brief in Support of Its Motion for Summary Judgment** relative to the above-entitled matter.

/s/ Cassidy M. Stalley
Cassidy M. Stalley

EXHIBIT 4

STATE OF SOUTH DAKOTA : SS		IN CIRCUIT COURT
COUNTY OF LAWRENCE :		FOURTH JUDICIAL CIRCUIT
HAMIDEH MAHMOUDI,	)	40CIV17-000362
Plaintiff,	)	
vs.	)	**CITY OF SPEARFISH'S ANSWERS AND RESPONSES TO PLAINTIFF'S INTERROGATORIES AND REQUESTS FOR PRODUCTION OF DOCUMENTS (THIRD SET)**
CITY OF SPEARFISH,	)	
Defendant.	)	

City of Spearfish, Defendant herein, being first duly sworn on oath, submits the following answers:

INTERROGATORIES

14. Do you, your agents, employees, attorneys, or any other persons known to you or any of your agents, employees, or attorneys, have or did cause to be taken, any photographs or motion pictures which were taken of the subject culvert and/or as a result of the subject incident? If so, state:

a. The names, addresses, and last known whereabouts of all persons making, taking, or giving said photographs or motion pictures;
b. The names, addresses and last known whereabouts of all persons having present custody and control of said photographs or motion pictures;
c. How many photographs or motion pictures were taken or obtained;
d. When the photographs or motion pictures were taken or obtained;
e. Where the photographs or motion pictures were taken or obtained;
f. The objects or scenes depicted by the photographs or motion pictures.

ANSWER: a.-f. Known photographs were previously produced (see Dft007-Dft010).

15. Has there been at any time prior to December 4, 2016, any complaints, concerns, comments or the like made to Defendant or any of its employees, representatives, officers or council members concerning the subject culvert? If so, state the following:

a. The date of the comment;
b. Name, address and phone number of the complainant;
c. Description of the comment;
d. To whom the comment was made;

18. Was the subject area inspected at any time from 1996 to December 15, 2021? If so, state the following:

a. By whom the area was inspected;
b. Purpose of the inspection;
c. Date of the inspection;
d. Actions taken as a result of the inspection.

ANSWER: Prior to the incident, there is no known information that the subject area and subject culvert were inspected at any time. Upon information and belief from the records reviewed and information provided, shortly after Plaintiff's report of the incident, the subject culvert and subject area were inspected by City staff and personnel. See Answers to prior Interrogatories and Responses to Requests for Production. Currently, HDR Engineering of Rapid City, South Dakota, has prepared plans for the 2022 sewer replacement and Dahl Road reconstruction project which will replace the sewer line that was installed on Dahl Road in 1996 and reconstruct the road. Upon information and belief, personnel of HDR Engineering may have surveyed the subject culvert and the subject area. On September 21, 2021, Kyle Mathis viewed the subject culvert and determined that additional repair work may be performed at this time pending the replacement to occur at the time of the 2022 street project and that the west marker post at the culvert outlet is to be replaced.

19. Was the subject area maintained for a specific purpose at any time from 1996 to December 15, 2021? If so, state the following:

a. By whom the area was maintained;
b. Purpose of the maintenance;
c. Date maintenance was performed.

ANSWER: The specific purpose of the subject area is a road. The subject area or portions thereof would be periodically maintained from 1996 to December 15, 2021, and thereafter for the purposes of snow removal, weed control and mowing. There are no specific records maintained as to when snow removal occurred, when weed control occurred or when mowing occurred. To the extent any such records may exist, the volume of records is so immense, such have not been reviewed to determine if there is a possibility of some reference to Dahl Road in regard to snow removal, weed control or mowing. All municipal records are available for inspection. The City of Spearfish has numerous people employed every year and different people in most years who may have been involved in snow removal, weed control or mowing, which records of employees are also available for inspection. Also, see Answer to Interrogatory 17.

20. Did Defendant or any of its employees, representatives, officers, council members, or insurers investigate the incident involving Plaintiff? If so, state the following:

a. Date of the investigation;
b. Names and positions of those investigating;
c. Description of what each person did in terms of investigating;

Dated this 28 day of September, 2021.

Dana Boke

Dana Boke, Mayor of the City of Spearfish

Subscribed and sworn to before me this 28 day of September, 2021.

Michelle DeNeui

Notary Public, State of South Dakota

My Commission expires: 9-13-2025

(SEAL)

MICHELLE DENEUI
Notary Public • South Dakota
Lawrence County
My Commission Expires Sept. 13, 2025

MICHELLE DENEUI NOTARY Seal PUBLIC STATE OF SOUTH DAKOTA

As to objections:

Dated September 27, 2021.

LYNN, JACKSON, SHULTZ & LEBRUN, P.C.

By: */s/ Thomas E. Brady*
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CERTIFICATE OF SERVICE

I hereby certify that on September 27, 2021, I sent to:

Heather Lammers Bogard
Costello Porter Law Firm
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Rapid City, SD 57709-0290
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Email: hbogard@costelloporter.com

by Notice of Electronic Filing generated by the Odyssey File & Serve system, a true and correct copy of **City of Spearfish's Answers and Responses to Plaintiff's Interrogatories and Requests for Production of Documents (Third Set)** relative to the above-entitled matter.

LYNN, JACKSON, SHULTZ & LEBRUN, P.C.

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EXHIBIT
F

9-45-3. Bridges, culverts and sluiceways.

Every municipality shall have power to construct and keep in repair bridges, culverts, and sluiceways.

Source: SL 1895, ch 182, § 14; RPolC 1903, § 1441; SL 1913, ch 111, § 1; RC 1919, § 6169 (7); SDC 1939, § 45.0201 (91).

20-9-22. Limits of political subdivision's liability.

Nothing in §§ 20-9-19 to 20-9-23, inclusive, limits in any way any liability which otherwise exists:

(1) For gross negligence or willful or wanton misconduct of the political subdivision of South Dakota, or its employees; and

(2) For injury suffered in any case where the political subdivision of South Dakota, or its employees, have violated a county or municipal ordinance or state law which violation is a proximate cause of the injury.

Source: SL 1996, ch 147, § 4.

21-10-1. Acts and omissions constituting nuisances.

A nuisance consists in unlawfully doing an act, or omitting to perform a duty, which act or omission either:

(1) Annoys, injures, or endangers the comfort, repose, health, or safety of others;
(2) Offends decency;
(3) Unlawfully interferes with, obstructs, or tends to obstruct, or renders dangerous for passage, any lake or navigable river, bay, stream, canal, or basin, or any public park, square, sidewalk, street, or highway;
(4) In any way renders other persons insecure in life, or in the use of property.

Source: CivC 1877, § 2047; CL 1887, § 4681; RCivC 1903, § 2393; RC 1919, § 2066; SDC 1939 & Supp 1960, § 37.4701; SL 2020, ch 30, § 14.

21-10-2. Acts under statutory authority not deemed nuisance.

Nothing which is done or maintained under the express authority of a statute can be deemed a nuisance.

Source: CivC 1877, § 2050; CL 1887, § 4684; RCivC 1903, § 2396; RC 1919, § 2069; SDC 1939 & Supp 1960, § 37.4703.

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

Appeal No. 30742

HAMIDEH MAHMOUDI,

Plaintiff/Appellant,

vs.

CITY OF SPEARFISH,

Defendant/Appellee.

Appeal from the Circuit Court
Fourth Judicial Circuit
Lawrence County, South Dakota

The Honorable Eric J. Strawn, Presiding Judge

BRIEF OF APPELLEE

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Notice of Appeal filed June 28, 2024

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PRELIMINARY STATEMENT

This brief is in response to Plaintiff Hamideh Mahmoudi's Appellant Brief. Plaintiff-Appellant will be referred to as "Mahmoudi." Defendant-Appellee will be referred to as "City of Spearfish." Reference to the record shall be designated as "SR," followed by the appropriate page number. Reference to Mahmoudi's Appellant Brief will be referred to as "Mahmoudi Br." followed by the appropriate page number.

JURISDICTIONAL STATEMENT

Mahmoudi appeals from the Order Granting Defendant's Motion for Summary Judgment, dated June 6, 2024, incorporating by reference the Memorandum Decision granting summary judgment, dated May 24, 2024. SR 174-182. Notice of Entry was served on June 13, 2024. SR 183. The City of Spearfish agrees that the Notice of Appeal was timely filed, that this Court has jurisdiction, and the Order is appealable under SDCL 15-26A-3.

STATEMENT OF THE ISSUES

I. Whether the City of Spearfish had a common law duty or a duty under SDCL 31-32-10 or 31-28-6 to warn of or to repair the culvert.

The circuit court held the City of Spearfish had neither a common law duty or a duty under SDCL 31-32-10 or 31-28-6.

Zens v. Chicago, Milwaukee, St. Paul & Pac. R. Co., 386 N.W.2d 475 (S.D. 1986)

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

Godbe v. City of Rapid City, 2022 S.D. 1, 969 N.W.2d 208

SDCL 31-32-10

SDCL 31-28-6

II. Whether SDCL 21-10-2 bars an action of nuisance against the City of Spearfish.

The circuit court held that Mahmoudi had no evidence that the City of Spearfish negligently created a nuisance by failing to maintain the culvert.

Kuper v. Lincoln-Union Elec. Co., 1996 S.D. 145, 557 N.W.2d 748

Hedel-Ostrowski v. City of Spearfish, 2004 S.D. 55, 679 N.W.2d 491

SDCL 21-20-2

SDCL 9-45-3

III. Whether Mahmoudi put forth sufficient probative facts to demonstrate she would be able to support a finding of gross negligence at trial.

The circuit court determined that viewing the evidence in the light most favorable to Mahmoudi, a failure to take precautions or repair a known possible hazard is not gross negligence.

Fischer v. City of Sioux Falls, 2018 S.D. 71, 919 N.W.2d 211

SDCL 20-9-20

SDCL 31-14-33

IV. Whether sovereign immunity is in issue.

The circuit court did not address this issue because the City of Spearfish was not asserting it was immune from suit based on a claim of sovereign immunity.

STATEMENT OF THE CASE

This civil case was brought in the Fourth Judicial Circuit Court, Lawrence County, State of South Dakota, the Honorable Eric J. Strawn presiding. The City of Spearfish moved for summary judgment on February 29, 2024. SR 29.

A hearing on the motion for summary judgment was held on May 8, 2024. SR 205. On May 24, 2024, after having reviewed the record and heard argument of counsel, the circuit court issued a Memorandum Decision, granting summary judgment for the City of Spearfish. SR 174-79.

STATEMENT OF THE CASE AND FACTS

In 1995 and 1996, the City of Spearfish began two projects, known as the 1995 Consolidated Street Improvement Project and the 1996 Dahl Road Sewer Improvement Project on Dahl Road, in Spearfish, South Dakota. SR 2, 66. As part of these projects, a road drain culvert was placed in a ditch and partially exposed. SR 2. It is undisputed that, prior to December 4, 2016, the City of Spearfish had not been notified at any time of any damage to this culvert. SR 72, 75-6.

On or about December 4, 2016, Mahmoudi was running along the north side of Dahl Road, toward oncoming traffic. SR 2. As a car approached, Mahmoudi stepped off the road with her left foot. SR 51. When she took another stride with her right foot, Mahmoudi stepped on the culvert. *Id.*; SR 2. Mahmoudi alleges to have sustained lacerations on the front of her right lower leg and sprained her right ankle. SR 56.

Mahmoudi filed a Complaint against Spearfish, alleging "nuisance" and "negligence and recklessness." SR 2-7. Notably, Mahmoudi merely alleged a

common law duty to maintain, repair, and make the roadway she was running on safe, asserting the City of Spearfish:

> owes the general public … a duty of reasonable and ordinary care including, but not limited to, the following:
>
> a. The duty to provide safe public spaces.
>
> b. The duty to make reasonable and timely inspections of the public areas within the city of Spearfish and to detect and fix conditions that may pose a risk to those who come upon said conditions.
>
> c. The duty to take reasonable steps to eliminate hazards from the public areas.
>
> d. The duty to train city employees in pedestrian safety issues including, but not limited to, making inspections, cleanups, and the posting of signs and warnings of potential hazards.
>
> e. The duty to post signs and warning in a conspicuous and meaningful way in any areas that may be hazardous to the public.

SR 4.

Significantly, the word "damage," as it relates to the culvert, is not in the Complaint. SR 2-7. In fact, at no time prior to responding to summary judgment did Mahmoudi allege the culvert was damaged at the time of the incident, nor that the City of Spearfish had notice – constructive or otherwise – of such damage. SR 2-7, 50. Before summary judgment, Mahmoudi simply claimed "her foot and leg became lodged in an uncapped pipe." SR 2. Even more critically, when asked in discovery to state, in detail, the facts of the incident, Mahmoudi responded: "See Complaint, which has been served upon you and is in your possession.

Defendant or its agents failed to maintain safe public right of ways by leaving a pipe uncapped,[1] unmarked, and covered in overgrown grass." SR 50.

Likewise, prior to responding to summary judgment Mahmoudi had never alleged a violation of SDCL 31-32-10 or SDCL 31-28-6. SR 2-7, 50. To be sure, neither of those statutes are in her Complaint, nor is there any allegation of notice. SR 2-7. Mahmoudi was even directly asked in discovery whether she claimed the City of Spearfish had violated a statute, ordinance, or other public rule or regulation. And despite this explicit question, Mahmoudi did not mention SDCL 31-32-10 or SDCL 31-28-6. Instead she responded:

a. See Complaint.
b. SDCL § 21-10-1.
c. Defendant or it's [sic] agent endangered the health and safety of Ms. Mahmoudi when it failed to keep the right of way clear of hazards.

SR 50. Again, there was no mention of SDCL 31-32-10 or SDCL 31-28-6 in her Complaint, and SDCL 21-10-1 addresses nuisances, not the issue at hand.

As a result, the City of Spearfish moved for summary judgment on the negligence claim, arguing that, under this Court's controlling decision in *Hohm v. City of Rapid City*, 2008 S.D. 65, 753 N.W.2d 895, there is no common law right of action against the City of Spearfish as a matter of law. SR 35-36. In a single, passing sentence – almost as an afterthought – the City of Spearfish noted that

[1] Notably, one would not "cap" a drain culvert, otherwise water would be unable to run through it as it was designed to do.

because "without dispute, Mahmoudi had not alleged a violation of SDCL 31-32-10," summary judgment was warranted on the issue of negligence. SR 36.

Seizing on this single, passing reference in the City of Spearfish's brief, Mahmoudi responded by asserting – for the first time – that she was "entitled to have a jury consider whether Defendant met the requirements of SDCL 31-32-10 and 31-28-6." SR 94. Yet beyond her newfound assertion that the culvert was damaged, Mahmoudi did not provide a single piece of evidence demonstrating that the culvert was, in fact, damaged at the time of the incident. SR 87-160. She failed to even assert the culvert was damaged in her own "separate, short, and concise statement of material facts," as required under SDCL 15-6-56(c)(2). SR 101-102. Equally problematic to Mahmoudi's response, she failed to put forth any evidence or assert in her own statement of material facts that the City of Spearfish had notice, actual or constructive, of such damage. SR 87-160.

For this reason, and contrary to Mahmoudi's claims of "misrepresentation to the court," the City of Spearfish in its reply brief and during oral argument argued:

> In resisting summary judgment, Mahmoudi is required to "show that [she] will be able to place sufficient evidence in the record at trial to support findings on all elements on which [she] has the burden of proof." *Redlin v. First Interstate Bank as Co-Tr. of Helene M. Redlin Tr., u/t/d December 14, 2004*, 2024 S.D. 5, ¶ 24, 2 N.W.3d 729, 736–37. "Mere speculation and general assertions, without some concrete evidence, are not enough to avoid summary judgment." *Id.* (citation omitted). "Proof of a mere possibility is never sufficient to establish a fact." *Foster-Naser*, 2016 S.D. 6, ¶ 11, 874 N.W.2d at 508. Yet Mahmoudi asks this Court to indulge in pure speculation, conjecture, and fantasy in finding that the culvert was damaged –

> when in fact, the undisputed evidence shows otherwise. Summary judgment is warranted on this basis alone.

SR 164; *see also* SR 206-07.[2]

Rather than request to supplement the record or seek a continuance to submit or obtain evidence to back up her conclusory allegations, Mahmoudi instead chose to wait until the summary judgment hearing to improperly read portions of discovery and an email into the record. SR 209-210, 215. Again, she did not even submit a disputed fact that the culvert was damaged or that the City of Spearfish had notice as required by SDCL 15-6-56(c)(2). And other than reading these documents into the record, Mahmoudi offered no concrete evidence to support the same.

The circuit court held Mahmoudi had failed to put forth sufficient probative evidence and granted the City of Spearfish summary judgment. SR 178-79.

---

[2] It is important to note at this point that that, prior to responding to summary judgment, Mahmoudi continually referred to the culvert's condition as being "uncapped," "unmarked," "covered in overgrown grass" and "exposed." SR 2, 50. It was only in her responsive brief that Mahmoudi added, for the first time, the word "damaged," claiming her "leg then became lodged in an uncapped, exposed, damaged culvert." SR 87.

Therefore, it is misleading for Mahmoudi to claim the City of Spearfish admitted "to the culvert being damaged throughout this litigation." Mahmoudi Br. at 3. It is equally inaccurate for Mahmoudi to assert that the City of Spearfish admitted "that the culvert was damaged" in "its initial brief to the circuit court," or admitted "that the culvert was damaged" in its Answer. Mahmoudi Br. at 4 (citing SR 32, which only refers to the culvert as being "left in the public right of way and partially exposed." The word "damaged" does not appear); *see also* Mahmoudi Br. at 6 (claiming the City of Spearfish admitted to damage in its Answer. But since the word "damage" was not included in Mahmoudi's Complaint, how could the City of Spearfish admit to damage?).

STANDARD OF REVIEW

In reviewing a grant of summary judgment, this Court's standard of review is well established:

> We review grants of summary judgment under the de novo standard of review. Summary judgment is only appropriate when the court determines that the pleadings, depositions, answers to interrogatories, and admissions on file, together with any affidavits of the parties, reveal that there are no genuine issues of material fact and that the moving party is entitled to judgment as a matter of law.

Betty Jean Strom Tr. v. SCS Carbon Transp., LLC, 2024 S.D. 48, ¶ 21, 11 N.W.3d 71, 81–82, reh'g denied (Oct. 9, 2024) (citations omitted) (cleaned up).

Although it is further well-settled that this Court views the evidence in the light most favorable to the nonmoving party and resolves reasonable doubts against the moving party, the Court also requires those opposing summary judgment to diligently demonstrate that they can present sufficient evidence at trial. Specifically, those opposing summary judgment must show:

> they will be able to place sufficient evidence in the record at trial to support findings on all the elements on which they have the burden of proof. A sufficient showing requires that the party challenging summary judgment substantiate his allegations with sufficient probative evidence that would permit a finding in his favor on more than mere speculation, conjecture, or fantasy. Mere speculation and general assertions, without some concrete evidence, are not enough to avoid summary judgment.

Godbe v. City of Rapid City, 2022 S.D. 1, ¶ 21, 969 N.W.2d 208, 213 (citations omitted) (cleaned up).

This Court has made clear that "when no genuine issue of fact exists, summary judgment is looked upon with favor and is particularly adaptable to

expose sham claims and defenses." *Clauson v. Kempffer*, 477 N.W.2d 257, 258 (S.D. 1991). This Court's "task on appeal is to determine only whether a genuine issue of material fact exists and whether the law was correctly applied. If there exists any basis which supports the ruling of a trial court," summary judgment should be affirmed. *Id.*

ARGUMENT

I. THE CIRCUIT COURT PROPERLY HELD THE CITY OF SPEARFISH OWES NO DUTY TO MAHMOUDI.

A. The Existence of a Duty Is a Question of Law to Be Determined by the Court.

As early as 1894, this Court has held that municipalities are not liable for defects in highways absent legislation to the contrary. *Hohm v. City of Rapid City*, 2008 S.D. 65, ¶ 5 753 N.W.2d 895 (citing *Bailey v. Lawrence Cnty.*, 5 S.D. 393, 59 N.W. 219 (1894)). And as the law has developed since 1894, the simple analysis is as follows: there is no common law duty of municipalities regarding streets or highways. *Godbe v. City of Rapid City*, 2022 S.D. 1, ¶ 22, 969 N.W.2d 208, 213 (citing *Hohm*, 2008 S.D. 65, ¶ 20, 753 N.W.2d at 905). *See, e.g., Zens v. Chicago, Milwaukee, St. Paul & Pac. R.R. Co.*, 386 N.W.2d 475, 476-78 (S.D. 1986) ("No liability arises from inherent defects in the design or plan of the highway provided the public. This is because statutory liability arises only in case a highway becomes out of repair and does not arise when a highways is defectively birthed. Thus, no liability is imposed for failure to install adequate signs warning of highway dangers, and no liability is imposed for failure to install

adequate guardrails because these are inherent defects in the highway."). *Id.* (cleaned up). This Court has made clear that the enactment of SDCL 31-32-10 abrogated any such common law duty, and a municipality can only be found liable if there is a violation of that statute. *Id.*

Yet, Mahmoudi claims that because the City of Spearfish admitted in its Answer that it had a common law duty to maintain, repair, and make the roadway safe, such an admission is binding on the City of Spearfish and somehow abrogates this Court's long established principals of law. Mahmoudi Br. at 7-8. Mahmoudi does so by citing to two Eighth Circuit Court of Appeals cases which address judicial admissions. Mahmoudi Br. at 8 (citing *Twin Med LLC v. Skyline Healthcare LLC*, 2004 WL 748775 (8th Cir. 2004) (quoting *Mo. House. Dev. Comm'n v. Brice*, 919 F.2d 1306, 1314 (8th Cir. 1990)) (citing *Nat'l Sur. Corp. v. Ranger Ins.*, 260 F.3d 881, 886 (8th Cir. 2001). Mahmoudi's argument is misguided.

"A judicial admission is a formal act of a party or his attorney in court, dispensing with proof of a *fact* claimed to be true, and is used as a substitute for legal evidence at the trial." *Tunender v. Minnaert*, 1997 S.D. 62, ¶ 21, 563 N.W.2d 849, 853 (citation omitted) (emphasis added). It "*is limited to matters of fact* which would otherwise require evidentiary proof, and *cannot be based upon* personal opinion or *legal theory*." *Id.* (citation omitted) (cleaned up) (emphasis added). *See also Judicial Admission*, Black's Law Dictionary (11th ed. 2019) ("A

formal waiver of proof that relieves an opposing party from having to prove the admitted fact and bars the party who made the admission from disputing it.").

Duty is not a matter of fact but a question of law to be determined by the circuit court. *Bozied v. City of Brookings*, 2001 S.D. 150, ¶ 8, 638 N.W.2d 264, 268; *Erickson v. Lavielle*, 368 N.W.2d 624, 627 (S.D. 1985). Indeed, this Court has stated that "the determination of whether a defendant owes a duty to a plaintiff does not require an examination of the facts; it is a question of law and summary judgment is appropriate when the trial judge resolves the duty question in the defendant's favor." *Clauson v. Kempffer*, 477 N.W.2d 257, 258–59 (S.D. 1991) (citation omitted).

As such, the City of Spearfish cannot admit, waive, or dispense with proof by admitting to general allegations of duty in its Answer. The determination of duty rests solely with the circuit court. *Id.; Erickson v. Lavielle*, 368 N.W.2d 624, 627 (S.D. 1985). *See also Parr v. Breeden*, 489 S.W.3d 774, 779–80 (Mo. 2016) (explaining the existence of a duty is purely a question of law and courts are not bound by stipulations or concession as to questions of law). Under this Court's long standing precedent, the circuit court correctly held that the City of Spearfish was entitled to judgment as a matter of law on claims arising directly from a municipality's common law duty. Summary judgment should be affirmed.

B. There Is No Evidence That the Culvert Was Damaged.

As noted above, prior to responding to the City of Spearfish's motion for summary judgment, Mahmoudi had never alleged a violation of SDCL 31-32-10

or SDCL 31-28-6, let alone that the culvert was damaged. In her responsive brief, however, Mahmoudi suddenly asserted that the "culvert was damaged," the culvert "became out of repair," and that it was "uncapped, exposed, [and] damaged," in an attempt, as a the circuit court eloquently put, "to tether her claim of duty under SDCL 31-32-10" and save her claim. SR 177; *see also* SR 87, 92-94. But like the plaintiff in *Godbe v. City of Rapid City*, Mahmoudi did so without putting forth a single piece of evidence that showed the culvert was damaged at the time of the accident. 2022 S.D. 1, ¶¶ 23 & 25-32, 969 N.W.2d 208, 214.

SDCL 31-32-10 provides:

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

(Emphasis added). SDCL 31-28-6 states:

> The public board or officer whose duty it is to repair or maintain any public highway shall erect and maintain at points in conformity with standard uniform traffic control practices on each side of any sharp turn, blind crossing, or other point of danger on such highway, except railway crossings marked as required in § 31-28-7, a substantial and conspicuous warning sign. The sign shall be on the right-hand side of the highway approaching such point of danger. Failure to comply with the provisions of this section is a Class 1 misdemeanor.

Thus, to establish Spearfish had a duty under SDCL 31-32-10 to warn of or to repair a dangerous condition, or under SDCL 31-28-6 to erect and maintain a

warning sign, Mahmoudi had to first demonstrate that the culvert was in a damaged condition or a point of danger at the time of the incident. *Godbe v. City of Rapid City*, 2022 S.D. 1, ¶¶ 23 & 25, 969 N.W.2d 208, 214; SDCL 31-32-10 and SDCL 31-28-6. Mahmoudi failed to do so.

Indeed, other than Mahmoudi baldly asserting the culvert was damaged, Mahmoudi placed no evidence of damage or danger into the record. In fact, Mahmoudi did not even submit in her statement of material facts that the culvert was damaged or a danger, as required by SDCL 15-6-56(c)(2). SR 100-103; *see also* 171. The picture of the culvert that was submitted by Mahmoudi showed no damage or danger, such as a gaping hole in the top, a piece of metal sticking up, or otherwise. SR 121.[3] Instead, it showed exactly what she had alleged in her Complaint and answers to discovery: "a pipe uncapped, unmarked, and covered in overgrown grass." SR 50; *see also* SR 2 ("uncapped pipe"). Moreover, Mahmoudi submitted no affidavits or deposition testimony from any witness claiming the culvert was damaged or a danger at the time of the incident – including from herself or her own son, who was allegedly running with her at the time of the incident. SR 52.

Even on appeal, Mahmoudi does not direct this Court to any evidence in the record that shows the culvert was damaged or a danger at the time of the incident. Nor does she provide this Court with any reason excusing her failure to produce

[3] The picture is upside down.

specific factual allegations. SDCL 15-6-56(f). Instead, Mahmoudi inaccurately claims that the "City admitted in multiple pleadings and responses to discovery that the culvert was damaged." Mahmoudi Br. at 10. Of course there is no citation to the record because the City of Spearfish has never admitted in any pleading that the culvert was damaged at the time of the incident.

The City of Spearfish does acknowledge it answered in discovery that *after* Mahmoudi's incident, City staff exposed the culvert and cut off "the damaged end section." SR 72 (answer to Interrogatory No. 11(b); *see also* answer to Interrogatory No. 13). But Mahmoudi did not even cite to this statement until it was read in open court at the summary judgment hearing. SR 100-103; *see also* SR 209. It certainly was not included in her own statement of material facts. SR 101-102.

It is Mahmoudi's burden to "substantiate [her] allegations with sufficient probative evidence that would permit a finding in [her] favor on more than mere speculation, conjecture, or fantasy." *Estate of Olsen v. Agtegra Coop.*, 2024 S.D. 39, ¶ 17, 9 N.W.3d 763, 769 (citation omitted) (cleaned up). "SDCL 15-6-56(e) requires the opposing party to be diligent in resisting a motion for summary judgment," *Bordeaux v. Shannon Cnty. Sch.*, 2005 S.D. 117, ¶ 14, 707 N.W.2d 123, 127, and "mere speculation and general assertions, without some concrete evidence, are not enough to avoid summary judgment." *N. Star Mut. Ins. v. Korzan*, 2015 S.D. 97, ¶ 21, 873 N.W.2d 57, 63.

Without more, this statement – that the "damaged end section" was cut off *after* the incident – is nothing more than an unsupported conclusion, far from concrete evidence. "Facts must be met by facts, not by mere conclusions or denials." *Home Fed. Sav. & Loan Ass'n of Sioux Falls v. First Nat'l Bank in Sioux Falls*, 405 N.W.2d 655, 659 (S.D. 1987) (citation omitted). Mahmoudi offered no concrete evidence such as photographs, affidavits, or testimony that the cut off "damaged end section" was damaged prior to the incident. Why did she not ask to supplement the record and take deposition testimony of the city worker who cut off the end section of the culvert? Why were no affidavits submitted from Mahmoudi or her son attesting the culvert was damaged when she stepped on it?

Certainly, this Court is required to "draw all reasonable inferences in favor of the non-moving party," but "there must be some evidence from which a favorable inference may be drawn." *Redlin v. First Interstate Bank as Co-Tr. of Helene M. Redlin Tr., u/t/d December 14*, 2004, 2024 S.D. 5, ¶ 28, 2 N.W.3d 729, 737. And this statement – as the only evidence in the record – would require this Court to indulge in pure speculation to draw a favorable inference. Indeed, was the culvert damaged prior to the incident or as a result of Mahmoudi stepping on it? Without dispute, the City of Spearfish had never received a complaint or notice that the culvert was damaged prior to Mahmoudi stepping in it. To allow this to "raise genuine issues against uncontradicted facts would nullify the utility of the summary judgment rule." *Home Fed. Sav. & Loan Ass'n of Sioux Falls v. First Nat'l Bank in Sioux Falls*, 405 N.W.2d 655, 658 (S.D. 1987) (citation omitted).

The circuit court properly granted summary judgment on this issue.

C. Mahmoudi Has Failed to Put Forth Sufficient Probative Facts That the City of Spearfish Had Constructive Knowledge of the Condition of the Culvert at the Time of the Incident.

Should this Court infer from this speculative statement that the culvert was damaged *at the time of the incident* – it should not – there is no evidence that the City of Spearfish had actual or constructive knowledge that the culvert was damaged at the time of the incident.

"Actual notice consists in express information of a fact." SDCL 17-1-2. Without dispute, the City of Spearfish did not have actual notice that the culvert was damaged prior to or at the time of Mahmoudi's incident. SR 45, 101, 178; *see also* SR 211.

However, Mahmoudi asserts – again without any probative evidence – that the City of Spearfish had constructive notice that the culvert was damaged at the time of the incident by way of employees being in the area to mow, weed, and remove snow. Mahmoudi Br. at 11-12.

"Constructive notice is deemed to exist for 'every person who has actual notice of *circumstances* sufficient to put a prudent man upon inquiry as to a particular fact, and who omits to make such inquiry with reasonable diligence.'" *Inst. of Range & the Am. Mustang v. Nature Conservancy*, 2018 S.D. 88, ¶ 14, 922 N.W.2d 1, 6 (quoting SDCL 17-1-4) (emphasis added). This Court's

discussion of constructive notice in *Fritz v. Howard Tp.*, 1997 S.D. 122, 570 N.W.2d 420, is instructive here.

In *Fritz*, the clerk for Howard Township was telephoned at home and informed that a section of the township road had washed out. *Id.* ¶ 2. The clerk and her family constructed two "Road Closed" signs, mounted the signs on steel posts, and placed them into the center of the road at the east and west ends of road with the washout. *Id.* The township board attempted to have the road repaired, but no repairs were possible until the gravel pits thawed, so the road remained washed out for several months. *Id.* ¶ 3. The township board did not post any other signs. *Id.* About a month after being alerted to the washout, the plaintiff struck the washout and was seriously injured. *Id.* ¶ 4. It was undisputed that the sign placed by the clerk was not present when the plaintiff struck the washout. *Id.* Howard Township did not take any measures to ensure the signs were still present. *Id.* ¶ 24. The circuit court granted Howard Township summary judgment, holding that in the absence of actual knowledge that the sign was knocked down, Howard Township owed no further duty. *Id.* ¶ 7.

On appeal, the *Fritz* Court held genuine issues of material fact existed as to whether Howard Township breached its statutory duty to sign and guard the washout. *Id.* ¶ 25. In doing so, this Court detailed how the plaintiff had met her burden of presenting specific facts which showed that a genuine, material issue existed for trial. *Id.* ¶ 24. These specific facts included an affidavit of a witness saying the sign was down a few days before plaintiff hit it, as well as testimony of

the clerk that the board knew large equipment would be coming down the washout road, that no measures were undertaken to ensure the signs were still present, and no trips were made by the board or others to check on the signs. *Id.* ¶ 24. This Court noted of particular significance: "whether the knowledge of heavy equipment traffic constituted circumstances sufficient to put Township on notice that the homemade sign might be knocked over is a question for a jury." *Id.* This Court reached a similar conclusion in *Boe v. Healy*, 84 S.D. 155, 161, 168 N.W.2d 710, 713-14 (1969), holding that comparable evidence submitted by the plaintiff raised a jury question as to constructive notice.

Unlike in *Fritz* and *Boe,* Mahmoudi has failed to put forth any facts that constitute a "circumstance sufficient" to put the City of Spearfish on notice that the culvert was damaged. SDCL 17-1-4. She has not put into the record deposition testimony, affidavits, incident reports, or photographs of any circumstance, such as a mower, plow, or vehicle running it over, snow or ice causing it to crack, or otherwise, that would have alerted the City of Spearfish to an issue with the culvert. In fact, in responding to summary judgment Mahmoudi merely claimed that "*common sense* dictates that the employees mowing, weeding, and plowing in the area around the culvert would have noticed damage to the same, yet flatly ignored the culvert." SR 97 (emphasis added). Common sense, or more aptly "proof of a mere possibility[,]" "is never sufficient to establish a fact." *Foster-Naser v. Aurora Cnty.*, 2016 S.D. 6, ¶ 11, 874 N.W.2d 505, 508.

Mahmoudi failed to meet her burden and put forth sufficient, probative facts to show she would be able to place sufficient evidence in the record at trial to support findings on all the elements on which she has the burden of proof. There is simply no evidence in the record, other than pure speculation, of a circumstance that would have put the City of Spearfish on notice. Summary judgment was warranted.

D. SDCL 31-14-33 Does Not Apply to the City of Spearfish.

As she did below, Mahmoudi claims that Spearfish is required by law to inspect the culvert annually, as well as institute a policy setting forth the procedure for inspecting culverts. Mahmoudi Br. at 12; *see also* SR 97. Mahmoudi relies on SDCL 31-14-33 for this assertion. But SDCL 31-14-33 applies to townships, not municipalities.[4] Spearfish is not a township, thus SDCL 31-14-33 does not apply.

II. THE CIRCUIT COURT PROPERLY HELD THAT THERE WAS NO EVIDENCE THAT THE CITY OF SPEARFISH NEGLIGENTLY CREATED A NUISANCE.

While acknowledging that South Dakota law specifically exempts statutorily authorized actions or maintenance from being considered a nuisance, Mahmoudi argues that "a nuisance cause of action may proceed when the negligent conduct is 'outside the realm of its statutory authority." Mahmoudi Br. at 13. Mahmoudi does so by citing to *Exports, Inc. v. Black Hills Power, Inc.*, 2008 WL 11505971, (D.S.D. 2008) and *Greer v. City of Lennox*, 107 N.W.2d 337,

[4] SDCL 31-14-33 states: "The township board of supervisors shall have each culvert on the secondary highways within the township annually inspected and, if necessary, repaired."

339 (S.D. 1961). However, both of those cases are factually distinguishable. And perhaps more importantly, unlike the plaintiffs in those cases, Mahmoudi has failed to submit any evidence that the City of Spearfish negligently created a nuisance.

In both *Exports, Inc.* and *Greer*, the United States District Court, District of South Dakota, and the Supreme Court of South Dakota allowed for a nuisance cause of action against a public entity because the negligent conduct alleged extended outside the realm of its statutory authority. For example, in *Exports, Inc.* , the negligent conduct was the utility allowing overgrown vegetation around the power lines, which caused a fire, not the power lines themselves. *Exports*, 2008 WL 11505971, at *6. Likewise, in *Greer*, it was the City negligently allowing offensive odors and a rat and fly infestation from the dump, not the dump itself. 107 N.W.2d at 339. In other words, a nuisance claim can go forward under South Dakota law if the conduct "substantially or unreasonably invade[s] or interfere[s] with another's use and enjoyment of his property." *Id.*

In this case, Mahmoudi only offers the conclusory statement that "the City failed to perform the duty to maintain the culvert as directed by statute." Mahmoudi Br. at 14. This statement stands unsupported. There is no evidence offered by Mahmoudi indicating that the City of Spearfish's lack of annual inspections (which it was not legally obligated to conduct) resulted in a substantial or unreasonable interference with her use and enjoyment of the property. Furthermore, Mahmoudi offered no evidence (even on appeal) establishing that

any alleged lack of maintenance was the proximate cause of her injury, particularly given the absence of evidence showing that the culvert was damaged in a way that necessitated maintenance.

The law "excludes the idea of legal liability based on mere speculative possibilities or circumstances and conditions remotely connected to the events leading up to an injury." *Musch v. H-D Co-op., Inc.*, 487 N.W.2d 623, 625 (S.D. 1992). "A proximate or legal cause is a cause that produces a result in a natural and probable sequence and without which the result would not have occurred." *Estate of Gaspar v. Vogt, Brown & Merry*, 2003 S.D. 126, ¶ 6, 670 N.W.2d 918, 921. Unlike in *Greer* and *Exports, Inc.*, Mahmoudi has failed to put forth any evidence that the City of Spearfish created a nuisance by negligently, or otherwise, failing to adhere to its statutory authorized power to construct and maintain a culvert.

Viewing the facts in the light most favorable to Mahmoudi, what is before the Court is that a culvert existed, Mahmoudi stepped on it, and was injured. Similar nuisance claims have been dismissed by this Court. For example, in a nuisance action against a rural electric cooperative for stray voltage, this Court determined that such was not allowed. *Kuper v. Lincoln-Union Elec. Co.*, 1996 S.D. 145, 557 N.W.2d 748. In writing for the majority, Justice Konenkamp stated,

> In granting an exemption from nuisance actions to statutorily authorized activities, our legislature obviously adopted a public policy that private interests

> must endure some inconvenience for the general populace to receive the benefits of utilities. Other jurisdictions have also recognized that utilities and businesses of a public nature and having legislative sanction should not be declared nuisances.

Id., 1996 S.D. 145, 557 N.W.2d 748 (internal citations omitted). In a later decision, this Court determined that the same reasoning applied to a city park when a plaintiff sued under a nuisance theory after using a swing that broke under her weight. *Hedel-Ostrowski v. City of Spearfish*, 2004 S.D. 55, ¶ 13, 679 N.W.2d 491, 497. The *Hedel-Ostrowski* Court determined that the legislature authorized cities to establish public parks for the benefit of the public and that swings and playground equipment are facilities in connection therewith. *Id.* "Although some of the general public may perceive the park as a nuisance, the law disallows a cause of action based on nuisance." *Id.*

As with *Hedel-Ostrowski*, Justice Konenkamp's reasoning from *Kuper* applies here. The South Dakota legislature adopted a public policy benefiting the public when it determined that municipalities have the power to construct and maintain culverts. *See* SDCL 9-45-3. And the City of Spearfish's conduct clearly falls within the scope of those activities authorized by statute, and "although [Mahmoudi] may perceive the [culvert] as a nuisance, the law disallows a cause of action based on nuisance." *Hedel-Ostrowski*, 2004 S.D. 55, ¶ 13, 697 N.W.2d 491, 497. As such, summary judgment was properly granted on Mahmoudi's nuisance claim.

III. THE CIRCUIT COURT CORRECTLY DETERMINED THERE WAS NO EVIDENCE OF GROSS NEGLIGENCE.

In her Complaint, Mahmoudi asserted a claim for "negligence and recklessness." SR 4. In moving for summary judgment, the City of Spearfish presumed that her "recklessness" claim was made in an attempt to create liability under SDCL 20-9-22 for gross negligence. Mahmoudi adopted that presumption at summary judgment, and now on appeal, asserting that a jury must determine whether the City of Spearfish was "grossly negligent." SR 96-98; Mahmoudi Br. at 16-17. But again, Mahmoudi offers no concrete evidence to meet her burden on summary judgment.

Under SDCL 20-9-20, unless the City of Spearfish was grossly negligent, engaged in willful or wanton misconduct, or violated a country or municipal ordinance or state law which caused her injury, the City of Spearfish owes no duty of care to Mahmoudi:

> Except as provided in § 20-9-22,[5] any political subdivision of South Dakota, and its employees acting within the scope of their duties owe no duty of care to keep the land safe for entry or use by others for outdoor recreational purposes, or to give any warning

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[5] SDCL 20-9-22 provides:

> Nothing in §§ 20-9-19 to 20-9-23, inclusive, limits in any way any liability which otherwise exists:
> (1) For gross negligence or willful or wanton misconduct of the political subdivision of South Dakota, or its employees; and
> (2) For injury suffered in any case where the political subdivision of South Dakota, or its employees, have violated a county or municipal ordinance or state law which violation is a proximate cause of the injury.

> of a dangerous condition, use, structure, or activity on the land to persons entering the land for outdoor recreational purposes.

The phrase "gross negligence" is, for all practical purposes, substantially synonymous with the phrase "willful and wanton misconduct." *Granflaten v. Rohde*, 66 S.D. 335, 339, 283 N.W. 153, 155 (1938); *Holscher v. Valley Queen Cheese Factory*, 2006 S.D. 35, ¶ 48 n.2, 713 N.W.2d 555, 568 n.2; *Fischer v. City of Sioux Falls*, 2018 S.D. 71, ¶ 8, 919 N.W.2d 211, 215. "These phrases refer to a category of tort that is different in kind and characteristics than negligence." *Fischer*, 2018 S.D. 71, ¶ 8, 919 N.W.2d at 211 (internal quotations omitted). Negligence involves an unreasonable risk of harm to another (*id.* (citing W. Page Keeton et al., *Prosser and Keeton on the Law of Torts*, § 34 at 212 (5th ed. 1984))), while willful and wanton misconduct requires an "affirmatively reckless state of mind establishing indifference, disregard of consequences and the like[.]" *Minick v. Englert*, 84 S.D.73, 77, 167 N.W.2d 551, 554. "For conduct to be willful or wanton, the risk involved must be substantially greater than that which is necessary to make the conduct negligent." *Fischer*, 2018 S.D. 71, ¶ 8, 919 N.W.2d at 215 (citation omitted). The harm threatened must be "an easily perceptible danger of death or substantial physical harm." *Id.*

Here, Mahmoudi asserts, without substantiation, that "there are facts that support the City's gross negligence and violation of state law." SR 87. These so-called "facts" consist solely of the following conclusory statements – without any citation to the record: (1) "Evidence dictates that the City failed to inspect or

maintain the subject culvert for up to 20 years, despite requirements that it do so"; (2) "the City failed to even institute a policy setting forth the procedures for inspecting the culverts as required by law"; and (3) "common sense dictates that the employees mowing, weeding, and plowing in the area around the culvert would have noticed the damage to the same, yet flatly ignored the culvert." SR 87. These statements remain unsupported, and, in fact, two of them are incorrect as a matter of law.

Although nothing is cited, Mahmoudi is apparently relying on SDCL 31-14-33 for her assertion that the City of Spearfish was required by law to inspect the culvert annually, as well as institute procedures for inspecting the culvert. But, as noted above, SDCL 31-14-33 applies to townships, not municipalities. Spearfish is not a township, thus SDCL 31-14-33 does not apply. Even if it did, Mahmoudi has set forth no probative evidence that this alleged failure to take precautions shows "indifference, disregard of consequences and the like" to constitute gross negligence. *Minick*, 84 S.D. at 77, 167 N.W.2d at 554.

Similarly, Mahmoudi's "common sense" statement amounts to mere speculation. Mahmoudi offers no evidence – such as deposition testimony, affidavits, incident reports, or photographs – to support this bold conjecture. As established, "proof of a mere possibility is never sufficient to establish a fact." *Foster-Naser*, 2016 S.D. 6, ¶ 11, 874 N.W.2d at 508 (citation omitted).

Mahmoudi has failed to put forth sufficient, specific facts to demonstrate she would be able to support a finding of gross negligence at trial. Summary judgment was appropriate on this issue as well.

IV. THE CITY OF SPEARFISH DID NOT CLAIM IT WAS IMMUNE FROM SUIT BASED ON A CLAIM OF SOVEREIGN IMMUNITY.

Contrary to Mahmoudi's incorrect assertion, the City of Spearfish never claimed it was immune from suit based on a claim of sovereign immunity. Mahmoudi Br. 15-16. The City of Spearfish, relying on well-established South Dakota law, asserted it was "immune" from suit based on owing no duty to Mahmoudi. SR 35-36 (citing *Hohm v. City of Rapid City,* 2008 S.D. 65, 753 N.W.2d. 895; *Godbe v. City of Rapid City*, 2022 S.D. 1, 969 N.W.2d 208). The cases cited and relied on by Mahmoudi all address sovereign immunity, not duty. "Duty is a question of law," the determination of which rests solely with the circuit court. *Clauson*, 477 N.W.2d at 258–59. And Mahmoudi fails to provide this Court with any authority to the contrary. SDCL 15-26A-60(6); *see also Pellegrin v. Pellegrin*, 1998 S.D. 19, ¶ 19, 574 N.W.2d 644, 648, and cases cited within.

CONCLUSION

For all the reasons stated above, the City of Spearfish respectfully submits that the circuit court's judgment must be affirmed.

Dated November 13, 2024.

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ORAL ARGUMENT IS HEREBY RESPECTFULLY REQUESTED.

CERTIFICATE OF COMPLIANCE

Pursuant to SDCL 15-26A-66, Cassidy M. Stalley, counsel for the Appellee, does hereby submit the following:

The foregoing brief is 27 pages in length. It is typed in proportionally spaced typeface in Times New Roman 13 point. The word-processing system used to prepare this brief indicates that there are a total of 6,936 words and 34,496 characters (no spaces) in the body of the brief.

/s/ Cassidy M. Stalley
Cassidy M. Stalley

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the Brief of Appellee in the above-entitled action was duly served by serving a true copy thereof by Notice of Electronic Filing generated by the Odyssey File & Serve System, on November 13, 2024, to the following named persons at their last known email addresses as follows:

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The undersigned further certifies that pursuant to SDCL 15-26A-79, the original of the Brief of Appellee in the above-entitled action was mailed to Ms. Shirley A. Jameson-Fergel, Clerk of the Supreme Court, State Capitol, 500 East Capitol, Pierre, SD 57501, by United States mail, first class postage thereon prepaid, on the date above written.

/s/ Cassidy M. Stalley
Cassidy M. Stalley

IN SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

Appeal No. 30742

HAMIDEH MAHMOUDI,

Appellant,

vs.

CITY OF SPEARFISH,

Appellee,

APPEAL FROM THE CIRCUIT COURT
FOURTH JUDICIAL CIRCUIT
LAWRENCE COUNTY, SOUTH DAKOTA

THE HONORABLE ERIC J. STRAWN

NOTICE OF APPEAL FILED JULY 1, 2024

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INTRODUCTION

The entirety of the City of Spearfish's [hereinafter City] Brief attempts to distract from the real issues in this case. The City raises procedural arguments that were never presented to the trial court. The City repeatedly misrepresents Hamideh Mahmoudi [hereinafter Mahmoudi] not having evidence which, to the contrary, is without question contained in the record. And the City continues to ignore its own significant admissions which preclude summary judgment in its favor. A review of the entire record, as well as statutory and case law set forth herein, supports that there are disputes of fact that prevent the City from securing a judgment as a matter of law.

HIGHLIGHT OF SIGNIFICANT FACTS AND ADMISSIONS BY THE CITY

First, the City of Spearfish claims that "at no time prior to responding to summary judgment did Mahmoudi allege the culvert was damaged at the time of the incident[.]" City's Brief at p4; see also p7 (alleging that Mahmoudi did not "submit a disputed fact that the culvert was damaged[]") and p12 (stating Mahmoudi "suddenly asserted" the culvert was damaged). Of course, Mahmoudi has consistently alleged that the pipe was left in the public right of way, uncapped, and partially exposed. She alleged this in her Complaint.[1] SR 2. And while the City claims that, when responding to an Interrogatory, Mahmoudi only referred to her Complaint and merely said that the City "failed to maintain a safe public right of ways [sic] by leaving a pipe uncapped, unmarked, and covered in overgrown grass[,]" City's Brief at p4-5, Mahmoudi actually stated that the City:

[1] The Complaint was filed prior to Mahmoudi's current counsel being retained.

> *failed to maintain the public right of way so as to not endanger others, by leaving the pipe uncovered, unmarked, and hidden beneath overgrown grass.*

SR 108 (emphasis added). This is one example of many of the City's misrepresentations to this Court. Mahmoudi also responded that the pipe was left in such a condition that resulted in her suffering a 5 cm v-shaped laceration on the front of her right shin. SR 114.

Despite unequivocally admitting in discovery that the uncapped, exposed pipe was "damaged," the City, for the first time, in its Reply Brief to the trial court (to which Mahmoudi has no opportunity to respond), claimed that the pipe in that condition was not, in fact, "damaged." SR 163-64. Referencing this new argument at the hearing, counsel for Mahmoudi stated, "First of all, the damaged culvert, I'm a little shocked that we're event addressing this matter[.]" SR 209. Counsel then pointed to the City's admission *in the record* that when it was notified of Mahmoudi's injury, the City inspected the culvert and noted that "the damaged portion was cut off." Id. Counsel also stated, "I would have submitted this to the Court had I thought this was an issue, but in Defendant's responses to requests for production," the City again admitted that "the culvert has been damaged and has a split in the corrugated top section." SR 210. Acknowledging this misrepresentation, counsel for the City stated, "this was not my case. I inherited it from Mr. Brady, who had this case for a long time. So if I misrepresented anything to the Court, that was not my intention at all." SR 215. Despite admitting this inaccurate representation to the trial court, the City continues to argue to this Court that it never admitted the culvert was damaged.[2]

[2] The City goes so far as to point to Mahmoudi, claiming she should have asked to supplement the record or sought a continuance. SR 215; City's Brief at 7. This, of course, begs the question: when the City clearly, on the record, admitted the culvert was

To be unmistakably clear, the City's written admissions submitted to the circuit court demonstrate that the culvert was damaged. The City, responding to a discovery request, stated that

> *the culvert was inspected, the end was exposed and the damaged portion was cut off.*

Appendix 17; SR 72 (emphasis added).[3] This admission alone precludes the City from making any argument that the pipe was not damaged.

Yet another admission as to the condition of the pipe was made by the City in an email from a representative of the City, stating,

> *It appears that the culvert has been damaged and has a split in the corrugated top section.*

SR 210 (emphasis added).

These admissions also resolve any issue as to the timing of the pipe being damaged. The City's claim that there is no evidence that the pipe was damaged at the time Mahmoudi fell is baseless. City's Brief at p14. Referring back to the Answer to Interrogatory wherein the City admitted the pipe was damaged, the City stated,

> [W]hen the City was notified of this event, the culvert was inspected, the end was exposed and the damaged portion was cut off.

SR 72 (emphasis added). Likewise, the aforementioned email referencing the damaged culvert from a City employee was dated December 13, 2016, just nine days after

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damaged, why would a continuance or supplement to the record be necessary? The City is clearly attempting to distract this Court from its own misrepresentations and admissions.

[3] The City's claim that Mahmoudi failed to cite in her Brief to the trial court this admission is misleading. City's Brief at p14. Mahmoudi's Brief responded to all of the arguments made by the City in its initial Brief which failed to make an issue with whether the pipe was damaged. SR 31. The City first made this meritless claim in its Reply Brief.

Mahmoudi's fall. SR 210; SR 2. Moreover, this timing issue was never presented to the trial court and is being raised for the first time on this appeal. As such, it must be rejected. Wyman v. Bruckner, 2018 S.D. 17, ¶16, 908 N.W.2d 170, 176.

The City cannot escape its admissions and representations made under oath. As this Court has stated countless times, the City "cannot now claim a better version of the facts" than those provided under oath and cannot now claim a version of facts that "assumes a conclusion contrary to" their prior statements. Petersen v. Dacy, 1996 S.D. 72, ¶ 16, 550 N.W.2d 91, 95 (citing Lalley v. Safeway Steel Scaffolds, Inc. 364 N.W.2d 139, 141 (S.D. 1985)).

Beyond the City's admissions, the photograph of the culvert taken shortly after Mahmoudi's fall undeniably demonstrates its damaged, jagged-edged condition and that it was left with a vertical hole hazardously exposed. Appendix 12. The City, throughout its Brief, fails to acknowledge the existence of this photograph and, in fact, makes claims the photograph does not exist. This evidence, in addition to Mahmoudi's sworn statements and the City's admissions, prohibit the City from being awarded summary judgment.

ARGUMENT

I. The City of Spearfish Breached its Duty to Mahmoudi

A. The City Had a Duty to Mahmoudi.

As to whether the City had a duty to Mahmoudi, the City argues only that "there is no common law duty of municipalities regarding streets or highways[,]" City's Brief at p9, *unless* "there is a violation of [SDCL § 31-32-10]." Id. at 10. This is the precise situation at hand –the City had the duty under SDCL § 31-32-10 to repair the damaged

culvert and breached that duty. Second to that, under SDCL § 31-28-6, the City had a duty to erect a warning sign as to the dangerous, jagged edged, exposed culvert.

In an attempt to avoid the clear application of these statutes, the City claims that Mahmoudi cannot rely on the statutes, because they were not referenced in her Complaint. City's Brief at p5. Again, this argument is made for the first time on appeal and, therefore, must be rejected. Wyman, 2018 S.D. 17, at ¶16. Addressing the merits, however, it is clear that Mahmoudi need not specifically reference the statutes in her Complaint. She need only "put a 'person of common understanding' on notice, 'with reasonable certainty of the accusations against them[.]" Kaiser Trucking v. Liberty Mut. Fire Ins. Co., 2022 S.D. 64, ¶ 14, 981 N.W.2d 645, 651 (quoting Hallberg v. South Dakota Bd. of Regents, 2019 S.D. 67, ¶ 28, 937 N.W.2d 568, 577). There is no requirement that statutes such as SDCL § 31-32-10 or § 31-28-6 be specifically referenced in the Complaint – and the City cites no authority for this position. SDCL § 15-6-8(a) merely requires a "short and plain statement of the claim showing that the pleader is entitled to relief" and a "demand for judgment for the relief to which [she] deems himself entitled." Given that Mahmoudi set forth exactly how she was injured and made claims for Nuisance (Count I) and Negligence and Recklessness (Count II) in her Complaint, the requirement of SDCL § 15-6-8(a) was unequivocally met. Complaint SR 2-7.

In addition, the City fails to make any persuasive argument in support of there being no duty to Mahmoudi. While the City claims that Fritz v. Howard Twp., 1997 S.D. 122, ¶ 17, 570 N.W.2d 240, 243, is supportive of its position, it ignores that this Court held that it is a question of fact as to whether the City breached a duty under either SDCL

§ 31-32-10 or SDCL § 31-28-6. Instead, the City goes to great lengths to minimize that the City admitted it had all five duties that Mahmoudi alleged in her Complaint and Statement of Undisputed Facts. City's Brief at p10-11. The City attempts to controvert the admissions by arguing that only factual admissions are binding on a party. There are, however, other admissions by parties that are binding. In Dziadek v. Charter Oak Fire Ins. Co., 2016 U.S. Dist. LEXIS 54031 (D.S.D.), for example, the Court held that the defendant admitted in its answer that the plaintiff was an "insured" under the insurance policy and that the admission was binding on the defendant. Interpretations of insurance policies are questions of law, including the definition of words used in the policy. Owners Ins. Co. v. Tibke Constr., Inc., 2017 S.D. 51, ¶¶ 9, 32, 901 N.W.2d 80, 83, 89.

Moreover, the standard for summary judgment is when the "pleadings, depositions, answers to interrogatories and admissions on file" show that a party is entitled to judgment as a matter of law. SDCL § 15-6-56(c); Nationwide Agribusiness Ins. Co. v. Fitch, 2022 S.D. 36, ¶ 10, 976 N.W.2d 783, 786. Clearly, here the *pleadings* and *admissions* do not support that the City is entitled to judgment as a matter of law.

B. The Culvert was Damaged.

The admissions by the City set forth above cannot be ignored and unquestionably support that the culvert was damaged. By choice, the City used the exact word, "damaged," when describing the condition of the pipe. Appendix 17; SR 72. Moreover, the City admitted in numerous pleadings that the pipe was left in the public right of way, uncapped, and partially exposed, including in its Answer, Appendix 12; SR 11, initial

Brief, SR 32, and undisputed, material facts submitted to the trial court, Appendix 20; SR 44.[4]

Even a basic review of the Merriam-Webster Dictionary supports that the condition of the subject pipe was "damaged." Synonyms to "damaged" include "imperfect," "impaired," "flawed," "broken," etc. An uncovered pipe with a split in the top section through which a person's foot could slip and result in a severe cut to the leg can most certainly be described as "imperfect," "flawed," etc.

When discussing whether the grate was damaged in Godbe v. City of Rapid City, 2022 S.D. 1, ¶ 25, 969 N.W.2d 1, 14, this Court stated that the grate would not be damaged if the defects were "inherent defects in the design or plan of the highway." This Court ultimately held that there was no evidence to support that the grate was damaged, because there were only unreasonable inferences that could be drawn from evidence. Id. ¶ 29. Here, of course, not only has Mahmoudi shown that the pipe and/or culvert was damaged and not inherently defective, but the City has also admitted it was damaged. Contrary to the City's claim that Mahmoudi did not set forth "a single piece of evidence" as to damage, City's Brief at p6, she set forth the City's admissions, as well as a her sworn statements and photograph of the pipe taken almost immediately after she was injured, clearly showing an open vertical hole with jagged edges.[5] Appendix 11. And, again, to the City's inquiries as to why Mahmoudi did not seek to supplement the record

[4] The City claims that Mahmoudi failed to cite to the record as to the City's admissions in pleadings concerning the damaged pipe. City's Brief at p14. The citations set forth herein were also cited in Mahmoudi's initial Brief at p4.

[5] This photograph is further contrary to the City's allegation that Mahmoudi "offered no concrete evidence such a photographs[.]" City's Brief at p15; see also p18, 25.

with deposition testimony or affidavits, City's Brief at p15, no such supplements are needed when the record is replete with sworn statements, admissions, and photographs.

Given the City's admissions, as well as the photographs and Mahmoudi's responses to discovery requests, there is at the very least a question of fact as to whether the culvert was damaged at the time Mahmoudi fell.

C. The City Breached its Duty.

There is no question that the combination of SDCL § 31-32-10 and SDCL § 31-28-6 provide certain obligations to a City. Fritz, 1997 S.D. 122 at ¶15. SDCL § 31-32-10 requires that if a culvert is damaged, the governing body responsible for the maintenance of the culvert (the City) must erect guards "of sufficient height, width, and strength" over the defect and repair the damage "to guard the public from accident or injury[.]" SDCL § 31-28-6 requires the responsible party (the City) to erect a "substantial and conspicuous warning sign" at points of danger on public highways. "Whether [the City] breached a duty under either of these statutes constitutes a question for the fact finder." Fritz, 1997 S.D. 122 at ¶17.

Therefore, under clear, settled law by this Court, Mahmoudi is entitled to have a jury consider whether the City met the requirements of SDCL § 31-32-10 and SDCL § 31-28-6, *i.e.*, whether the City erected an adequate guard and repaired the damage to the culvert and whether there was signage that is considered a "substantial and conspicuous warning sign[.]"Fritz, supra. Clearly, the City did neither, as it is undisputed that the City failed to inspect or maintain the culvert for 20 years. Appendix 32; SR 76, 132-33.

D. The City Had Constructive Notice.

The City argues that Mahmoudi's lack of reference to notice, actual or constructive, in her Complaint somehow supports its motion for summary judgment. City's Brief at p5. Once again, this argument is made for the first time on appeal and should be rejected. Wyman, supra. In any event, the City never claimed that pleading notice in this situation fits within any subsection of SDCL § 15-6-9, concerning special matters. The likely reason is that notice does not, in fact, need to be pled. See, e.g., Kaiser Trucking, 2022 S.D. 64 at ¶ 27 (adopting the "middle ground approach" to SDCL § 15-6-9 and holding that notice need not be pled, as it was not an element of the claim and, therefore, not a condition precedent).

In addition, actual notice of the hazardous culvert is not required; constructive notice is adequate. See, e.g., Fritz, supra, at ¶ 21. While the City apparently argues that Fritz is supportive of its case, City's Brief at p17-18, this Court specifically held in Fritz that there were questions of fact for the jury as to whether the hazard, in the exercise of ordinary care, should have been discovered. Fritz, supra, at ¶ 22. Beyond that, the City incorrectly represents that Mahmoudi did not set forth evidence to support constructive notice. City's Brief at p18. Again, the City ignores the evidence in the record, including its own admissions that the City performed snow removal, weed control, and mowing in the exact area where Mahmoudi fell. Appendix 31-34; SR 76. The City's own employees working in the area surrounding the culvert is consistent with this Court's reference in Fritz that traffic in the relevant area can put the Township on notice of the potential hazard. Fritz, supra, at ¶ 24. Moreover, the photographs show the area surrounding the culvert consisted of heavy grass where the City would have mowed and sprayed the weeds. Appendix 10.

The City even cites to Boe v. Healy, 168 N.W.2d 710, 713 (S.D. 1969), as support for its position, City's Brief at p18, yet the holding in Boe is directly supportive of Mahmoudi's stance. This Court again held that it was a jury question as to whether the defendant should have discovered the hazardous condition. Boe, supra, at 714. The City also failed to acknowledge that the Boe decision is further beneficial to Mahmoudi in that the length of time that the defendant had to discover the hazard created an inference in the plaintiff's favor. Id. Here, as admitted by the City, the culvert had not been inspected or maintained at all until Mahmoudi's injury in December of 2016, twenty years after it was built. Appendix 32; SR 76; 132-33. This evidence, viewed most favorably to Mahmoudi, creates an issue of fact for the jury to consider.

The City also points to Mahmoudi's Brief wherein she addresses the City's gross negligence and misapplies the same to its section on notice. City's Brief at p18. As to notice, Mahmoudi states that common sense dictates that employees of the City doing work in that area would have seen the damaged culvert, but ignored it. The City claims that common sense is "proof of a mere possibility," and "is never sufficient to establish a fact." Id. (citing Foster-Naser v. Aurora Cnty., 2016 S.D. 6, ¶ 11, 874 N.W.2d 505, 508). However, a review of the Foster-Naser case reveals that this Court actually stated, "General allegations without specific supporting facts are insufficient. And proof of a mere possibility is never sufficient to establish a fact." Id. at ¶ 11 (quotations and citations omitted). There is no reference whatsoever to "common sense." The reality is that this Court has held that juries are "reminded to use common sense in determining" issues. State v. Soldier, 2023 S.D. 37, ¶ 13, 994 N.W.2d 212, 216 (relating to determining

the elements of a crime). Likewise, a jury is to use common sense when assessing damages. Bucher v. Staley, 297 N.W.2d 802, 806 (S.D. 1980).

Even South Dakota's civil pattern jury instruction supports that juries should use their common sense. Pattern Instruction 1-10-30 explicitly states,

> In weighing the evidence, you may consider the common knowledge you all possess. You may also use *common sense* gained from your life experiences in evaluating what you see and hear during the trial.

(Emphasis added.)

Applying one's common sense, along with the evidence in the record, the jury most certainly could determine that the City had constructive notice of the damaged culvert. Mahmoudi is entitled to have the jury make that determination. Fritz, supra; see also East Side Lutheran Church v. Next, Inc., 2014 S.D. 9, ¶ 15, 852 N.W.2d 434, 440.

II. Mahmoudi's Nuisance Action Must Proceed

The City fails to discuss or even cite to SDCL§ 21-1-1 and SDCL § 21-1-2 in its Brief. City's Brief at p19-22. Rather, the City tries to distinguish Exports, Inc. v. Black Hills Power, 2008 U.S. Dist. LEXIS 134482, *15 (D.S.D. 2008) and Greer v. City of Lennox, 107 N.W.2d 337, 339 (S.D. 1961). While the City alleges that these cases are "factually distinguishable," City's Brief at p20, the City never explains the differences. Instead, the City refers again to Mahmoudi's lack of evidence which has been dispelled throughout this Brief.

Exports, Inc. is directly applicable to the case at hand, in part because the case involved overgrown vegetation causing the nuisance. 2008 U.S. Dist. LEXIS 134482, * 14. Again, the photographs in the record show that the pipe was hidden by grass on Dahl Road. Appendix 10 and 11. Moreover, as in Exports, Inc., the nuisance involved not only

the failure to maintain the culvert, but also the failure to maintain the surrounding area which was an easement outside the authority of the public entity. Id. at * 16. Furthermore, the Court did not "believe that statutory authorization extends so far as to permit public utilities to *negligently create a nuisance and then avoid any liability* to parties who can make a claim for nuisance[.]" Id. * 15 (emphasis added). Likewise, the City here failed to inspect, repair or maintain the subject pipe for 20 years; it cannot escape liability based on its own wrongdoing.

As to Greer, the City claims that this Court allowed the case to proceed, because the City "negligently allow[ed] offensive odors and a rat and fly infestation from the dump[.]" City's Brief at p20. This Court specifically stated, however, that "negligence *is not* involved in nuisance actions or proceedings, and is not essential to the cause of action." 107 N.W.2d at 339 (emphasis added). Furthermore, Greer stands for the proposition that when a City fails to perform a statutory duty, it may create a "private nuisance, unprotected by governmental immunity." Id. Here, of course, SDCL § 9-45-3 provides the City with the power to maintain culverts, yet the City never maintained them. Appendix 32, 17; SR 76, 72. The failure of the City to do so created a nuisance in the form of an exposed, damaged culvert in overgrown grass.

Perhaps more importantly, these cases reference the immunity provided to municipalities under SDCL § 21-10-2. As set forth in Section III, infra, the City cannot rely on general immunity and simultaneously argue that SDCL § 31-32-10 applies, which protects the City's acts by sovereign immunity, a claim that was not pled in its Answer.

Curiously, the City cites to Musch v. H-D Co-op, Inc., 487 N.W.2d 623, 625 (S.D. 1992) and Estate of Gaspar v. Vogt, Brown, & Merry, 2003 S.D. 126, 6, 670

N.W.2d 918, 921, to support its claim that Mahmoudi did not set forth evidence to support that the City created a nuisance. City's Brief at p21. Neither of these cases involve a nuisance. Musch involves a negligence claim by a horseback rider and Estate of Gaspar pertains to a malpractice claim. Nevertheless, Mahmoudi has set forth evidence of a nuisance created by the City, including that it failed to maintain and inspect the culvert for 20 years.

The City goes on to cite to Kuper v. Lincoln-Union Elec. Co., 1996 S.D. 145, 557 N.W.2d 748, City's Brief at p21-22, however, its connection to the case at hand is unclear. The quote from Kuper relates to private interests enduring inconvenience in order for others to receive benefits from utilities. Kuper, supra, at ¶ 48. Further, the holding was specific to nuisance in cases involving stray voltage and ground current, causing annoyance that is unknown by the utility company and/or out of the company's control. The facts of Kuper are clearly distinguishable from the facts at hand.

The other case cited by the City, Hedel-Ostrowski v. City of Spearfish, 2004 S.D. 55, ¶ 13, 679 N.W.2d 491, 497, is also inapposite. In Hedel-Ostrowski, this Court specifically held that the nuisance action could not go to the jury, because the City had statutory authority to build a swing and, pursuant to SDCL § 21-10-2, there could be no action for nuisance as a result of building the swing incorrectly. In the case at hand, however, Mahmoudi is not claiming that the City had authority to build and maintain the culvert and did so incorrectly. Rather, Mahmoudi's position is that the City failed to do any maintenance or take any steps whatsoever to keep the culvert in repair for 20 years per SDCL § 9-45-3.

The City has failed to present any authority to this Court supporting that it is entitled to summary judgment on Mahmoudi's nuisance claim.

III. The City Failed to Plead Immunity

The City argues that it "never claimed it was immune from suit based on a claim of sovereign immunity[,]" but rather relies on being "immune" because it owed no duty to Mahmoudi. City's Brief at p26. Yet, the City claims that the enactment of SDCL § 31-32-10 "abrogated any such common law duty, and a municipality can only be found liable if there is a violation of that statute." City's Brief at p10. As such, the City relies on SDCL 31-32-10 to support its lack of duty and, in doing so, the City claims sovereign immunity.

This Court has ruled that both SDCL § 31-32-10 and SDCL § 31-28-6 are discretionary and, thus, are protected by sovereign immunity. See Hansen v South Dak. DOT, 1998 S.D. 109, ¶ 32, 584 N.W.2d 881, 889 (holding that acts performed under SDCL § 31-32-10 were not ministerial duties, but were discretionary); Bickner v Raymond Twp., 2008 SD 27, ¶ 14, 747 N.S.2d 668, 672 (holding that decisions under SDCL § 31-28-6 were discretionary; did not address SDCL § 31-32-10). Thus, if the City is claiming immunity and that SDCL §§ 31-32-10 and 31-28-6 apply, it is effectually arguing sovereign immunity.

The City, however, failed to affirmatively plead immunity in its Answer. Appendix 12-15; SR 11-13. This Court has stated that immunity from liability must be timely asserted and conclusory allegations are not substitutes for specific facts. Gabriel v. Bauman, 2014 S.D. 30, ¶21, 847 N.W.2d 537 (although involving a different statute, affirms the requirement of affirmatively pleading immunity); see also Olesen v. Town of

Hurley, 2004 S.D. 136, ¶13, 691 N.W.2d 136 (stating, "[S]overeign immunity is an affirmative defense."). "[T]he defense of immunity to be availed of must be pleaded." Schoenrock v. Sisseton, 103 N.W.2d 649, 652 (S.D. 1960).

Not only did the City not plead immunity, but it also admitted every duty Mahmoudi pled in her Complaint. SR 11. The City cannot have it both ways. By arguing common law duty being abrogated by SDCL § 31-32-10, the City is effectively arguing sovereign immunity applies, but the same must be affirmatively pled. Having failed to do so, the City cannot reap the benefit of immunity.

IV. A Jury Must Determine Whether the City was Grossly Negligent

The City argues only that Mahmoudi has no "concrete evidence" to support gross negligence. City's Brief at p23. Once again, however, the City falsely represents in its Brief Mahmoudi's citations to the record. The City claims that Mahmoudi's "so-called 'facts'" to support gross negligence were conclusory statements with no citation to the record. City's Brief at p24.[6] First, the City points to Mahmoudi's statement that the City did not inspect or maintain the culvert for up to 20 years and claims there was no citation to the record. City's Brief at p24. Mahmoudi's actual statement in her Brief:

> In fact, the culvert had not been inspected or maintained at all until Mahmoudi's injury in December of 2016, twenty years after it was built. *Appendix 32; SR 76; 132-33.*

Mahmoudi's Brief at 4 (emphasis added) (citing to the City's own Answers to Interrogatories).[7] Second, claiming lack of citations to the record, the City references

[6] For the City's claim that Mahmoudi failed to cite to the record, it cites to SR 87, however, SR 87 is the first page of Mahmoudi's Brief submitted to the trial court.
[7] Having cited to the record at page 4, there was no need to cite to the same again at page 16 of Mahmourid's Brief.

Mahmoudi's statement that the City failed to institute a policy or procedure for inspecting the culverts. City's Brief at p25. Mahmoudi's Brief, in fact, states:

> In addition, the City did not have any written policies for inspecting, installing or maintaining the culvert. *Appendix 17; SR 72.*

Mahmoudi's Brief at p5 (emphasis added) (citing to the City's own Answers to Interrogatories).[8] Third, the City points to Mahmoudi's aforementioned statement about common sense dictating that employees working in the area would have noticed the damaged culvert. City's Brief at p25. In addition to the reference to common sense, Mahmoudi stated:

> While the City conducted snow removal, weed control and mowing in the area of the culvert, there was no policy for the City's employees to easily inspect the culvert while in the vicinity. *Appendix 32; SR 76.*

Mahmoudi's Brief a p5 (emphasis added) (citing to the City's Answers to Interrogatories).[9]

Moreover, for a second time, the City misrepresents this Court's holding in Foster-Naser, 2016 S.D. 6, ¶ 11, 874 N.W.2d at 508. City's Brief at p25. The City claims the case Foster-Naser supports its statement that Mahmoudi's "common sense" reference is mere speculation, that she has no evidence such as depositions, photographs, etc. to support "this bold conjecture," and proof of a possibility is not sufficient to establish a fact. Id. Again, Foster-Naser merely states that general allegations are insufficient without supporting facts. 2016 S.D. 6 at ¶ 11. In the case at hand, Mahmoudi presented facts in the form of admissions by the City that it never inspected or maintained the

[8] Having cited to the record at page 5, there was no need to cite to the same again at page 16 of Mahmoudi's Brief.

[9] Having cited to the record at page 5, there was no need to cite to the same again at page 16 of Mahmoudi's Brief.

culvert and had no policy or procedure for inspecting the culverts. There is no "bold conjecture" or "possibility."

The City goes on to argue that "gross negligence" is the same as "willful and wanton misconduct." City's Brief at p24. This is a distinction without a difference. Melby v. Anderson, 266 N.W. 135, 137 (S.D. 1936) (stating that gross negligence "amounts to willful, wanton, *or reckless* misconduct.") (emphasis added.)[10] Whether the conduct is willful and wanton or reckless, Mahmoudi is entitled to have the jury consider the aforementioned evidence, as well as consider the egregiousness of an employee of the City who likely noticed the damaged culvert during the past 20 years while plowing snow, weeding, or mowing, and utterly ignored the hazard. See Fischer v. City of Sioux Falls, 2018 SD 71, ¶ 9, 919 N.W.2d 211, 215 (stating that the "defendant must know *or have reason to know of the risk* and must in addition proceed without concern for the safety of others[.]") (citation omitted)(emphasis added). "Whether one acts willfully, wantonly, or recklessly is, like negligence, normally a jury question." Gabriel v. Bauman, 2014 S.D. 30, ¶ 15, 847 N.W.2d 537, 542 (citing State v. Tammi, 520 N.W.2d 619, 622 (S.D. 1994); Campbell v. Massucci, 944 N.E.2d 245, 251 (Ohio Ct. App. 2010)).

As such, Mahmoudi is entitled to have a jury determine whether the facts at hand establish gross negligence.

CONCLUSION

The City is not entitled to judgment as a matter of law. Given the City's blatant admissions as set forth herein, there are questions of fact for the jury as to whether the

[10] Mahmoudi's initial Brief addresses that gross negligence included "reckless" conduct, because the City argued that Mahmoudi failed to properly plead gross negligence in her Complaint. The City has apparently abandoned this argument.

City had a duty to Mahmoudi and breached that duty. A just must also decide whether the City had constructive notice of the damaged culvert and whether the City's actions or inactions created a nuisance. Moreover, the City cannot show it is entitled to summary judgment when it is effectively arguing sovereign immunity, but failed to plead the same. And finally, whether the City's conduct constitutes gross negligence is a question of fact for the jury. For these reasons, the City's motion should be denied.

Dated this 13th day of December, 2024.

COSTELLO, PORTER, HILL, HEISTERKAMP, BUSHNELL & CARPENTER, LLP

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that pursuant to SDCL § 15-26C-3 she served an electronic copy, and two hard copies of the above and foregoing **APPELLANT'S REPLY BRIEF** on the following individual, by depositing the same this date in the United States mail, postage prepaid, at Rapid City, South Dakota, addressed as follows:

Cassidy M. Stalley
909 St. Joseph St., Ste. 800
Rapid City, SD 57701

Clerk of the Supreme Court
South Dakota Supreme Court
500 East Capitol Avenue
Pierre, SD 57501-5070

Dated this 13th day of December, 2024.

COSTELLO, PORTER, HILL, HEISTERKAMP, BUSHNELL & CARPENTER, LLP

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CERTIFICATE OF COMPLIANCE

The undersigned, counsel for Appellant, certifies pursuant to SDCL § 25-26A-66 that the brief contains 5,317 words and 26,274 characters without spaces, exclusive of the Table of Contents, Table of Authorities, Jurisdictional Statement, Statement of Legal Issues, Appendix and Certificates of Counsel, and certifies that the name and the version of the word processing software used to prepare the brief is Microsoft Word 10 using Times New Roman font 12 and left justification.

Dated this 13th day of December, 2024.

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CERTIFICATE OF PROOF OF FILING

The undersigned hereby certifies that pursuant to SDCL § 15-26C-3 she served an electronic copy in Word format and an original and two hard copies of the above and foregoing **APPELLANT'S REPLY BRIEF** on the Clerk of the Supreme Court by depositing the same this date in the United States mail, postage prepaid, at Rapid City, South Dakota, addressed as follows:

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Dated this 13th day of December, 2024.

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