IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

APPEAL NO. 28205

CITY OF RAPID CITY,
Plaintiff/Appellant,

vs.

BIG SKY, LLC and DOYLE ESTES
Defendants/Appellees.

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

The Honorable Warren Johnson
Circuit Court Judge

APPELLANT'S BRIEF

JOHN K. NOONEY
ROBERT J. GALBRAITH
NOONEY & SOLAY, LLP
632 Main Street, 2nd Floor
P.O. Box 8030
Rapid City, SD 57709-8030
Attorneys for Appellant, City of Rapid City

DONALD A. PORTER
JESS M. PEKARSKI
CHRISTOPHER A. CHRISTIANSON
COSTELLO PORTER LAW FIRM
P.O. Box 290
Rapid City, SD 57709-0290
Attorneys for Appellees, Big Sky, LLC and Doyle Estes

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PRELIMINARY STATEMENT

For ease of reference, citations to the pleadings will be referred to as Settled Record ("SR") with the numbers assigned by the Clerk, and the pleading and any further designation as appropriate, e.g. "SR 02, Complaint, ¶ 5." References to the documents in the Appendix will be referred to as, "Document" and Appendix ("App.") with the appropriate page number or paragraph assigned, e.g. "Judgment, App. at A-1," or "Jury Instructions, App. at B-13." References to the trial transcript will be designated as "TT" with reference to the appropriate page and line, e.g. "TT: 303:24 – 304:15."

The Appellant, the City of Rapid City will be referred to as "City." The Appellees, Big Sky, LLC and Doyle Estes will be referred to as "Big Sky" and "Estes," respectively.

JURISDICTIONAL STATEMENT

This is an appeal from the Judgment entered by the Trial Court on February 9, 2017 (App. at A-1), along with the jury instructions (App. at B-1-25) and rulings made by the Trial Court during trial, as well as the Order on December 21, 2016 Hearing denying the City's Motion for Partial Summary Judgment Related to Developers' Liability (App. at C-1-3) and Order on Doyle Estes' Motion for Judgment as a Matter of Law (App. at D-1). The Judgment was filed on February 9, 2017. App. at A-1. Notice of Entry of Judgment was filed on February 13, 2017. SR 5002. The City filed a Motion for New Trial on February 28, 2017. SR

5079. The Trial Court entered an Order on Motion for New Trial on March 17, 2017. SR 5146. The City timely filed a Notice of Appeal on April 3, 2017. SR 20. This Court has jurisdiction over this action pursuant to SDCL § 15-26A-3.

STATEMENT OF ISSUES

I. Whether the City of Rapid City's cause of action against Big Sky, LLC and Doyle Estes accrued when the City became aware of "any deficiencies in the improvements in any development" or when the City knew or should have known that Big Sky, LLC and Doyle Estes would not fulfill their obligations under City Ordinances and Specifications.

The Trial Court held that the cause of action accrued when the City became aware of "any deficiencies in the improvements in any development."

MOST RELEVANT AUTHORITIES

Huron Ctr., Inc. v. Henry Carlson Co., 2002 S.D. 103, 650 N.W.2d 544

Strassburg v. Citizens State Bank, 1998 S.D. 72, 581 N.W.2d 510

SDCL § 15-2-13

II. Whether the City of Rapid City can waive a law established for a public reason.

The Trial Court held in the affirmative.

MOST RELEVANT AUTHORITIES

Lucero v. Van Wie, 1999 S.D. 109, 598 N.W.2d 893

Vetter v. Cam Wal Elec. Co-op., Inc., 2006 S.D. 21, 711 N.W.2d 612

III. Whether there was any evidence at trial to support a jury instruction for waiver.

The Trial Court held in the affirmative.

MOST RELEVANT AUTHORITIES

Granite Buick GMC, Inc. v. Ray,
2015 S.D. 93, 872 N.W.2d 810

Carlson v. Constr. Co.,
2009 S.D. 6, 761 N.W.2d 595

IV. Whether there was any evidence at trial to support a jury instruction for estoppel.

The Trial Court held in the affirmative.

MOST RELEVANT AUTHORITIES

Even v. City of Parker,
1999 S.D. 72, 597 N.W.2d 670

Carlson v. Constr. Co.,
2009 S.D. 6, 761 N.W.2d 595

V. Whether the jury should have been provided with instructions related to the City of Rapid City's claim for public nuisance.

The Trial Court held in the negative.

MOST RELEVANT AUTHORITIES

Sundt Corp. v. State By & Through S. Dakota Dep't of Transp.,
1997 S.D. 91, 566 N.W.2d 476

SDCL § 21-10-1

VI. Whether evidence of Big Sky, LLC's litigation and settlement of claims against J. Scull Construction Service, Inc. and R.C.S. Construction, Inc. should have been admitted at trial.

The Trial Court held in the negative.

MOST RELEVANT AUTHORITIES

SDCL § 19-19-402

SDCL § 19-19-408

First Premier Bank v. Kolcraft Enterprises, Inc.,
2004 S.D. 92, 686 N.W.2d 430

Towerridge, Inc. v. T.A.O., Inc.,
111 F.3d 758 (10th Cir. 1997)

VII. Whether Big Sky, LLC and Doyle Estes were liable to the City of Rapid City, as a matter of law.

The Trial Court held in the negative.

MOST RELEVANT AUTHORITIES

City of Rapid City v. Estes,
2011 S.D. 75, 805 N.W.2d 714

VIII. Whether any question of fact existed to prevent the dismissal of Doyle Estes as a party to this litigation.

The Trial Court held in the negative.

MOST RELEVANT AUTHORITIES

SDCL § 19-19-408

First Premier Bank v. Kolcraft Enterprises, Inc.,
2004 S.D. 92, 686 N.W.2d 430

Towerridge, Inc. v. T.A.O., Inc.,
111 F.3d 758 (10th Cir. 1997)

STATEMENT OF THE CASE

The City initiated this action against Big Sky and Estes on January 31, 2008. After the Trial Court dismissed the City's claim, this Court entered a Decision in *City of Rapid City v. Estes*, 2011 S.D. 75, 805 N.W.2d 714. Upon remand, Big Sky and Estes filed a Third-Party Complaint against Rapid Construction, LLC, formally a General Partnership Known as Rapid Construction Co. and Steve Van Houten and Robert Van Houten, General Partners of Rapid Construction Co. ("Rapid Construction"). Rapid Construction, in turn, filed a Fourth-Party Complaint against Dream Design International, Inc. This case was then consolidated with that action initiated by Big Sky against R.C.S. Construction, Inc. ("RCS"). Prior to trial, Big Sky and/or Estes' claims against Rapid Construction and RCS and Rapid Construction's claim against Dream Design International, Inc. were resolved.

At the start of trial, the parties again were the City, Big Sky, and Estes. This matter was tried to a jury on January 23, 2017 through January 27, 2017. The Trial Court granted Estes' Motion for Judgment as a Matter of Law, dismissing Estes as a party to this litigation. App. at D-1. Although the Trial Court held there were factual issues precluding the dismissal of the City's claim for public nuisance, the Trial Court refused to provide the jury with any instructions related to that claim. The jury returned a general verdict in favor of Big Sky on the City's claim

for breach of Big Sky's obligations under the City Specifications and Ordinances.

STATEMENT OF THE FACTS

This case involves the development of real property in the jurisdictional limits of the City. Estes, through Big Sky or some other entity owned by Estes or his wife, acquired certain land within the jurisdictional limits of the City for purposes of development. TT: 189:9 – 189:19. This case involved Phases 1 through 4 of the Big Sky Development as identified in Trial Exhibit 3. For Phases 1 through 3, Big Sky and Estes retained J. Scull Construction Service, Inc. ("Scull") to complete the public improvements required to develop the real property. TT: 289:12 – 289:16. RCS was hired to complete the public improvements on Phase 4. TT: 289:24 – 290:1.

On May 2, 2000, the City provided Big Sky and Estes with a "punch list" of deficiencies or other items that needed to be corrected before the public improvements would be "accepted" by the City. *Trial Exhibit 100.* Thereafter, there were a number of additional or modified "punch lists" exchanged. *Trial Exhibits 101, 103, 104, 105, and 133.* To date, it is undisputed that the public improvements have never been accepted by the City. It is also undisputed that there were deficiencies in the construction of the public improvements which prevented its acceptance. Big Sky and Estes' own expert in this case identified "substantial distress" caused by a "lack of compaction control by the

contractor during street and utility construction." *Trial Exhibit 192.* Finally, it is undisputed that Big Sky and Estes did not complete, or attempt to complete, the remediation work necessary to bring the public improvements in compliance with City Specifications, despite continuous representations that Big Sky and Estes would repair the same. *Trial Exhibits 112, 113, 115, 122, 125, 126.*

While this basic background is provided here, additional facts related to the specific arguments are provided and discussed below.

ARGUMENT

I. THE CITY OF RAPID CITY'S CAUSE OF ACTION AGAINST BIG SKY, LLC AND DOYLE ESTES ACCRUED WHEN THE CITY OF RAPID CITY KNEW OR SHOULD HAVE KNOWN THAT BIG SKY, LLC AND DOYLE ESTES WOULD NOT FULFILL THEIR OBLIGATIONS UNDER CITY ORDINANCES AND SPECIFICATIONS

A. STANDARD OF REVIEW

The standard of review for jury instructions is as follows:

> A trial court has discretion in the wording and arrangement of its jury instructions, and therefore we generally review a trial court's decision to grant or deny a particular instruction under the abuse of discretion standard. However, no court has discretion to give incorrect, misleading, conflicting, or confusing instructions: to do so constitutes reversible error if it is shown not only that the instructions were erroneous, but also that they were prejudicial. Erroneous instructions are prejudicial under SDCL 15–6–61 when in all probability they produced some effect upon the verdict and were harmful to the substantial rights of a party. Accordingly, when the question is whether a jury was properly instructed overall, that issue becomes a question of law reviewable de novo. Under this de novo standard, "we construe jury instructions as a whole to learn if they provided a full and correct statement of the law."

Vetter v. Cam Wal Elec. Co-op., Inc., 2006 S.D. 21, ¶ 10, 711 N.W.2d 612, 615 (internal citations omitted).

"[D]eciding what constitutes accrual of a cause of action is a question of law and reviewed de novo." *Brandt v. Cty. of Pennington*, 2013 S.D. 22, ¶ 8, 827 N.W.2d 871,874.

B. THE CITY OF RAPID CITY'S CAUSE OF ACTION AGAINST BIG SKY, LLC AND DOYLE ESTES DID NOT ACCRUE UNTIL THE CITY HAD A COMPLETE AND PRESENT CAUSE OF ACTION

One of the defenses identified by Big Sky and Estes in this case was the statute of limitations. However, the Trial Court's jury instruction related to the statute of limitations was an incorrect statement of the law.

As it concerns the allegation that Big Sky and Estes did not comply with City Ordinances and Specifications, the parties were in agreement that SDCL § 15-2-13(2), identifying that the cause of action for a liability created by statute is six years, is controlling. However, the parties disputed what constitutes the accrual of the cause of action.

Under South Dakota law, "[a] cause of action accrues when 'the plaintiff either has actual notice of a cause of action or is charged with notice.'" *Huron Ctr., Inc. v. Henry Carlson Co.*, 2002 S.D. 103, ¶ 12, 650 N.W.2d 544, 548 (citing *Strassburg v. Citizens State Bank,* 1998 S.D. 72, ¶ 10, 581 N.W.2d 510, 514 (citing SDCL 17-1-2, SDCL 17-1-3)). The Court did not hold that accrual occurs upon notice of the damage or deficiency, but "notice of a cause of action." "A limitations period ordinarily does not begin to run until the plaintiff has a 'complete and

present cause of action.'" *Strassburg*, 1998 S.D. 72, ¶ 9 (citing *Rawlings v. Ray,* 312 U.S. 96, 98, 61 S.Ct. 473, 474, 85 L.Ed. 605 (1941)). "A cause of action does not become 'complete and present' until the plaintiff can file suit and obtain relief." *Id.* (citing *Reiter v. Cooper,* 507 U.S. 258, 267, 113 S.Ct. 1213, 1219, 122 L.Ed.2d 604 (1993)).

The issue that arises in this case concerns the testing and remediation requirements identified in City Specifications. The Trial Court made a determination that the cause of action accrued when the City "was aware of any deficiencies in this improvements in any development[.]" Specifically, Instruction No. 12 to the jury provided as follows:

> SDCL 15-2-13(2) provides that liabilities created by a statute may only be brought within six years of accrual of the action. If you find that the City of Rapid City was aware of any deficiencies in the improvements in any development more than six years before the City of Rapid City initiated this action against Big Sky, LLC, you must dismiss the City of Rapid City's claims and award it no damage as to each development it had knowledge of prior to six years before filing of this lawsuit.

Jury Instructions, App. at B-13. In other words, the Trial Court held that the City had notice of a "complete and present cause of action" for which the City could "file suit and obtain relief" when the City became aware of any deficiencies in the improvements in any development. This holding runs contrary to the City Ordinances and Specifications in this case, as well as this Court's prior Decision related to an interpretation of the Ordinances and Specifications. As this Court has previously identified, City Specification § 7.65 controls the substantial completion,

testing, and acceptable of public improvements. Specifically, City Specification § 7.65 provides as follows:

> Final acceptance of the project by the Owner [City] will be documented by the issuance of an acceptance letter, which is issued according to the following criteria:
>
> 1) Construction has been substantially completed and the facilities can be put to their intended use.
> 2) All testing has been completed, and the required results have been met.
>
> The date of the acceptance letter documents the start of the two-year warranty period, during which the Contractor shall be notified in writing of any defects in the project and shall correct the defects at his expense…

Estes, 2011 S.D. 75, ¶ 5; *See also Trial Exhibit 250*.

Under the Ordinances and Specifications relevant to this case, the City did not and could not have a "complete and present cause of action" when the City became aware of "any deficiencies in the improvements in any development" because Specification § 7.65 provides that after substantial completion, the City is required to provide a "punch list" of deficiencies and allow Big Sky and Estes to repair the same so as to obtain final acceptance.

In *Estes*, this Court previously conducted an analysis of statutory and ordinance construction. 2011 S.D. 75, ¶ 12. After an analysis of the same, this Court held that "under the ordinances and specifications, developers remain liable until the City accepts the improvements by a final acceptance letter." *Id.* at ¶ 15. As the Court also identified, "the City conducted final inspections of the required public improvements for

some of the properties. After the inspections, the City provided a 'punch list' identifying deficiencies. The areas marked as deficient needed to be corrected before the City would formally accept ownership and maintenance of the public improvements." *Id.* at ¶ 7. Just as those "punch lists" were provided to this Court prior to its earlier Decision, those "punch lists" were also provided to the jury. *Trial Exhibits 100, 101, 103, 104, 105, and 133.*

Under the Trial Court's instructions, the "punch list" identification of deficiencies by the City constituted the accrual of the City's cause of action. However, this does not coincide with the language of City Specification § 7.65. Under City Ordinances and Specifications, the City could not "file suit and obtain relief" upon discovery of those issues identified in the "punch list." To the contrary, the City was required to submit the "punch list" to Big Sky and Estes to allow Big Sky and Estes to complete their work on the project to obtain acceptance. As this Court previously held in interpreting the City Ordinances and Specifications, "the engineer cannot examine and test the work if the developer never completes the improvements." *Estes*, 2011 S.D. 75, ¶ 14.

Until such time as the City has provided a "punch list" and allowed a developer an opportunity to meet all testing requirements, the City has not complied with Specification § 7.65, and cannot file a suit and obtain relief.

It is undisputed that the City sent a "punch list" as contemplated by the testing requirement in § 7.65. *Trial Exhibit 100*, the subject of a great deal of testimony at the time of trial, was a May 2, 2000 letter from City Project Engineer Rodney Johnson to Doyle Estes that was specifically titled "RE: Punch List for the Big Sky Subdivision." That letter provided, in part:

> …I am providing you with the following punch list for the Big Sky Subdivision. The following items will need to be finished or repaired and a schedule provided to the City as when to when you anticipate to have the items completed. This letter shall serve as notification that the following items will need to be addressed and brought into compliance with subdivision regulations.

Trial Exhibit 100. Thereafter, eight "punch list" categories were provided of items that needed to be completed by Estes to comply with City Specifications. This letter was not just permitted under § 7.65, it was required. Without providing the "punch list" and allowing the developer an opportunity to comply with that "punch list," the City could not file suit and obtain relief. The May 2, 2000 letter was not a notice of a breach of Big Sky and Estes' obligations, but rather a step in the statutory process to complete public improvements under the City Ordinances and Specifications.

All of the evidence introduced at trial supports the argument that the "punch list" did not constitute accrual of the cause of action, but rather a standard procedure under City Specification § 7.65. Even Estes agreed. Estes testified as follows:

Q: Mr. Estes, Exhibit 100 is a letter you received from the City of Rapid City on May 2nd and it would be a punch list of certain defects in the Big Sky Subdivision Phases 1, 2, and 3; is that correct?

A: Now, you keep using the word defects, and the second sentence of this says, "The following items will need to be finished or repaired…" So to me the word finished does not say there was a deficiency. It means that it needs to be completed.

TT: 301:10 – 301:18. Under Estes' own testimony, the issues identified in the "punch list" did not provide the City a cause of action, but rather were items that Big Sky and Estes were required to complete before obtaining acceptance under City Ordinances and Specifications. Thus, it flies in the face of reason to suggest that the City's identification of deficiencies in a "punch list" constitutes an accrual of the City's cause of action. Until such time as the City knew, or should have known, that Big Sky and Estes did not intend to complete the items identified in the "punch list," the City did not have a "complete and present cause of action" against Big Sky and Estes.

The evidence is also undisputed that Big Sky and Estes did not cease their efforts to comply with the "punch list" provided by the City until after this litigation was commenced on January 31, 2008. On April 30, 2002, Estes and Hani Shafai ("Shafai"), the engineer hired by Big Sky and Estes, attended a meeting of the Big Sky Homeowner's Association and reported that "after the street stops settling, the road dips and bumps will be repaired." *Trial Exhibit 115.* Estes exchanged multiple e-mails and correspondence related to the cause of the problems and the

party responsible for fixing the same. *Trial Exhibits 120, 122, 123, 124, 125, 126, 127, and 129.* At trial, Estes testified:

Q:Shortly after you received the punch list from the City of Rapid City on the ea

A:.....That's what is appears.

Q:And this would be probably, Mr. Estes, fair to say, the first time you said, Thi

A:I was inquiring in this letter. I'm inquiring which of those items Mr. – Scull C

Q:And you knew at the time you received the letter marked as Exhibit 100 that

A:I think I said several times that I haven't ever received a letter of acceptance.

TT: 303:24 – 304:15. Exhibit 105 included a "punch list" with hand-written notes. Estes testified regarding the notes as follows:

Q:And as you look at Exhibit 105, it was your understanding after meeting with

A:.....I would guess we may have done that, yes.

TT: 307:25 – 308:5.

Big Sky commenced litigation against Scull on May 21, 2003. In that litigation, Big Sky alleged that Big Sky "will be caused and required to incur additional costs for engineering and other consulting services in the future and will be caused and required to incur additional costs for remedial work in the future necessary to further correct the defective and unworkmanlike performance of [Scull] and its excavation subcontractor on the Big Sky Subdivision Project in an amount to be determined by the

trier of fact." App. at E-6. It is clear that as of May 21, 2003, Big Sky intended to complete those items identified in the "punch list."

On August 10, 2005, Shafai completed a spreadsheet identifying the estimated repair costs for Avenue A and Hanson Streets, which were elements of damage in the litigation against Scull. *Trial Exhibit 159.* On March 23, 2007, Shafai updated the material costs for that same calculation. *Trial Exhibit 160.* Shafai also prepared a document with estimated costs to repair DeGeest Street (Phase IV) for Big Sky's litigation against RCS. *Trial Exhibit 161.*

What is entirely non-existent in the record is any evidence that Big Sky and Estes did not intend to comply with City Ordinances and Specifications, including § 7.65, or any evidence or facts that the City was aware that Big Sky and Estes did not intend to comply with their statutory obligations. This raises the rhetorical question: how could the City be aware of a "complete and present cause of action" for a statutory violation if the parties continued to operate under the process identified by statute.

On March 30, 2007, Big Sky commenced litigation against RCS. Within that litigation Big Sky, again, alleged that Big Sky "has been caused and required to incur, or will be caused and required in the future to incur, costs of additional engineering and other consulting services necessary to determine the causes of subsidence in settling of the soils underlying certain of the streets constructed by Defendant…and

has been caused and required to incur, or will be caused and required in the future to incur, costs of consulting services and remedial work necessary to correct the defective and unworkmanlike performance of Defendant[.]" App. at F-3-4. As of March 30, 2007, Big Sky and Estes acknowledged a continuing obligation to repair the public improvements that are the subject of this litigation. At that time, the City had not commenced litigation, nor threatened the same. Big Sky's actions in pursuing a claim against RCS came solely as a result of Big Sky's obligation to meet testing requirements under City Specification § 7.65. Until Big Sky failed or refused to meet its obligation under City Specification § 7.65, the City's cause of action could not accrue.

In fact, even after this action was commenced, Big Sky and Estes requested a "final inspection walk-through of the Big Sky Subdivision." *Trial Exhibit 133.* On September 30, 2008, Estes was provided with a letter titled "Re: Big Sky Subdivision, Phases 1, 2, 3, 4, 5, 5B, 6, 7, 8, & 9 Final Walk-through." *Trial Exhibit 133.* That letter identifies that "[a]s requested a final inspection walk-through of the Big Sky Subdivision, Phases 1-9 was held on September 4, 2008 and September 12, 2008." Interestingly enough, this letter fits squarely within subsection (2) of § 7.65 requiring that "[a]ll testing has been completed, and the required results have been met."

The City's cause of action "accrues" and the six-year statute of limitations begins to run when the City has a "complete and present

cause of action." A complete and present cause of action exists when the City has notice, or constructive notice, that Big Sky and Estes did not intend to comply with § 7.65 and complete the items contained on the "punch list" provided by the City.

The Trial Court's Instruction No. 12 was an erroneous Instruction that had the effect of directing a verdict against the City as a result of the City's compliance with City Ordinances and Specifications by providing a "punch list."

II. THE CITY OF RAPID CITY CANNOT WAIVE A LAW ESTABLISHED FOR A PUBLIC REASON

A. STANDARD OF REVIEW

As set forth above, "no court has discretion to give incorrect, misleading, conflicting, or confusing instructions: to do so constitutes reversible error if it is shown not only that the instructions were erroneous, but also that they were prejudicial." *Vetter, supra.*

B. THE CITY ORDINANCES AND SPECIFICATIONS RELATED TO THE DEVELOPMENT OF PROPERTY WITHIN THE CITY'S JURISDICTION ARE LAWS ESTABLISHED FOR A PUBLIC REASON AND CANNOT BE WAIVED

At trial, Big Sky proffered and the Trial Court provided the jury with an instruction on the affirmative defense of waiver. Jury Instructions, App. at B-11. However, neither the City, nor any other person or entity may waive a statute designed for a public reason. As this Court has previously held, "[a]nyone may waive the advantage of a law intended solely for his benefit. But a law established for a public

reason cannot be contravened by a private agreement." *Lucero v. Van Wie*, 1999 S.D. 109, ¶ 11, 598 N.W.2d 893, 897 (citing *Loughrin v. Superior Court,* 15 Cal.App.4th 1188, 1193, 19 Cal.Rptr.2d 161, 163 (1993) (quoting Cal. Civ.Code § 3513 (West 1998); *Tunkl v. Regents of University of California,* 60 Cal.2d 92, 32 Cal.Rptr. 33, 39, 383 P.2d 441 (1963); *Kobbeman v. Oleson,* 1998 SD 20, ¶ 22, 574 N.W.2d 633, 640 (concluding statute of limitations could not be waived because of the combined private and public interests involved))).

In *Lucero,* this Court held that the South Dakota statutes dealing with real estate disclosure statements are not statutes for the public benefit. The Court stated that "the purpose of the statute is to facilitate private transactions rather than impose regulations for the general public benefit." *Id.* at ¶ 14 (citations omitted). In this case, however, there simply can be no argument that the City Ordinances and Specifications related to the construction and development of public improvements are not laws created "for the general public benefit." As the Court held*:*

> A transaction involving the public interest is one…which exhibits some or all of the following characteristics:
>
> > It concerns a business of a type generally thought suitable for public regulation. The party seeking exculpation is engaged in performing a service of great importance to the public, which is often a matter of practical necessity for some members of the public. The party holds himself out as willing to perform this service for any member of the public who seeks it, or at least for any member coming within certain established standards. As a result of the essential

> nature of the service, in the economic setting of the transaction, the party invoking exculpation possesses a decisive advantage of bargaining strength against any member of the public who seeks his services. In exercising a superior bargaining power the party confronts the public with a standardized adhesion contract of exculpation, and makes no provision whereby a purchaser may pay additional reasonable fees and obtain protection against negligence. Finally as a result of the transaction, the person or property of the purchaser is placed under the control of the seller, subject to the risk of carelessness by the seller or his agents. *Tunkl v. Regents of University of California,* 60 Cal.2d 92, 32 Cal.Rptr. 33, 37–38, 383 P.2d 441 (1963).

1999 S.D. 109, ¶ 12.

In this case, the development and construction of public improvements is business of a type generally thought suitable for public regulation; the public improvements are a necessity and of great importance to the public; the City Specifications allow any member of the public to develop and construct public improvements in accordance with the City Specifications; and, the City Specifications are non-negotiable. As set forth above, where laws are "established for a public reason," there cannot be a waiver. *Lucero*, 1999 S.D. 109, ¶ 11.

The fact that the Trial Court provided the jury with an instruction on waiver, when the issue cannot be waived, is, itself, an incorrect statement of the law.

III. THERE WAS NO EVIDENCE ADMITTED AT TRIAL TO SUPPORT A JURY INSTRUCTION FOR WAIVER

A. STANDARD OF REVIEW

"A trial court is to present only those issues to the jury by way of instruction which find support by competent evidence in the record."

Van Zee v. Sioux Valley Hosp., 315 N.W.2d 489, 492 (S.D. 1982) (citing *Wolf v. Graber*, 303 N.W.2d 364 (S.D.1981); *Olesen v. Snyder*, 277 N.W.2d 729 (S.D.1979)). As set forth above, a trial court's decision to grant or deny a particular instruction under the abuse of discretion standard. *Vetter, supra.*

B. BIG SKY, LLC AND DOYLE ESTES DID NOT PROVIDE ANY EVIDENCE TO SUPPORT THEIR CLAIM THAT THE CITY WAIVED COMPLIANCE WITH THE CITY ORDINANCES AND SPECIFICATIONS

A "[w]aiver is a volitional relinquishment, by act or word, of a known, existing right conferred in law or contract." *Granite Buick GMC, Inc. v. Ray*, 2015 S.D. 93, ¶ 11, 872 N.W.2d 810, 815 (citing *Auto–Owners Ins. v. Hansen Hous., Inc.,* 2000 S.D. 13, ¶ 30, 604 N.W.2d 504, 512 (quoting *Harms v. Northland Ford Dealers,* 1999 S.D. 143, ¶ 17, 602 N.W.2d 58, 62)). "A waiver exists where one in possession of any right, whether conferred by law or by contract, and of full knowledge of the material facts, does or forbears the doing of something inconsistent with the existence of the right or of his or her intention to rely upon it." *Id.* (citing *Wehrkamp v. Wehrkamp,* 2009 S.D. 84, ¶ 8, 773 N.W.2d 212, 215 (quoting *W. Cas. & Sur. Co. v. Am. Nat'l Fire Ins.,* 318 N.W.2d 126, 128 (S.D.1982))).

In this case, there was absolutely no evidence that the City did anything, or took any action, inconsistent with its right to require Big Sky and Estes to complete the public improvements consistent with City

Specifications. The City provided numerous "punch lists" consistent with City Specifications. *Trial Exhibits 100, 101, 103, 104, 105, and 133.* Estes exchanged multiple e-mails and correspondence related to the cause of the problem and the party responsible for fixing the same, all while providing no suggestion to the City (or anyone else) that Big Sky and Estes would not complete the public improvements. *Trial Exhibits 120, 122, 123, 124, 125, 126, 127, and 129.* Even after this action was commenced, Big Sky and Estes requested a "final inspection walk-through of the Big Sky Subdivision," which request was granted by the City. *Trial Exhibit 133.* If the City had waived its right to enforcement of City Ordinances and Specifications, why were the City, Big Sky, and Estes still attempting to comply with those very Specifications eight months after this litigation was commenced.

IV. THERE WAS NO EVIDENCE ADMITTED AT TRIAL TO SUPPORT A JURY INSTRUCTION FOR ESTOPPEL

A. STANDARD OF REVIEW

See Section III(A).

B. BIG SKY, LLC AND DOYLE ESTES DID NOT PROVIDE ANY EVIDENCE TO SUPPORT THEIR CLAIM THAT THE CITY SHOULD BE ESTOPPED FROM ASSERTING A CLAIM AGAINST BIG SKY, LLC AND DOYLE ESTES

At trial, Big Sky proffered an instruction on and the Court instructed the jury on the affirmative defense of estoppel. Jury

Instructions, App. at B-12. Estoppel is only applied "against public entities in 'exceptional circumstances to prevent manifest injustice.'" *Even v. City of Parker*, 1999 S.D. 72, ¶¶ 11-12, 597 N.W.2d 670, 674 (citations omitted).

The Court "do[es] not favor estoppel against a public entity and will apply it only in extreme cases. *Id.* "When applying the doctrine to 'municipal corporations in matters pertaining to their governmental functions ... [t]he basis of its application ... is ... municipal officers ... have taken some affirmative action influencing another which renders it inequitable for the municipality to assert a different set of facts.' More than municipal acquiescence ... should be required to give rise to an estoppel. The conduct must have induced the other party to alter his position or do that which he would not otherwise have done to his prejudice." *Id.* (internal citations omitted).

There was no evidence presented at trial that Big Sky in any manner altered its position or did something it would not have otherwise done to its prejudice. To the contrary, not only did Big Sky not alter its position to its prejudice, Big Sky actually benefited from the City's case. Big Sky's only claim against Scull and RCS was that Big Sky "will be caused and required in the future to incur, costs of consulting services and remedial work necessary to correct the defective and unworkmanlike performance of [Scull and RCS]." App. at E-6; F-3-4. Big Sky settled its claims against Scull and RCS for a total payment in the amount of

$300,000. Thus, while Big Sky and Estes failed to allege any "prejudice" as required for an estoppel instruction, in fact Big Sky and Estes benefited when they were paid to fix roads that they never fixed. If any party altered their position based upon representations made by the other, the City altered its position based on the continuous representations made by Big Sky and Estes that they would repair the public improvements in the Big Sky Development. There was no evidence to suggest estoppel. There certainly was no evidence to suggest that this was the "extreme case" wherein estoppel could be applied to the City.

V. THE JURY SHOULD HAVE BEEN INSTRUCTED ON THE CITY OF RAPID CITY'S CLAIM FOR PUBLIC NUISANCE

A. STANDARD OF REVIEW

"It is elementary that a party to an action is entitled to have the jury instructed with reference to his theory of the case where such theory is supported by competent evidence and the instruction is properly requested, and this although such theory may be controverted by evidence of the opposing party." *Zakrzewski v. Hyronimus*, 81 S.D. 428, 431, 136 N.W.2d 572, 574 (1965). "Failure to give a requested instruction that correctly sets forth the law is prejudicial error." *Sundt Corp. v. State By & Through S. Dakota Dep't of Transp.*, 1997 S.D. 91, ¶ 19, 566 N.W.2d 476, 480.

B. THE TRIAL COURT ERRED IN FAILING TO INSTRUCT THE JURY ON A CLAIM FOR WHICH

THE TRIAL COURT FOUND THERE WAS FACTUAL SUPPORT AT TRIAL

The City's Amended Complaint alleged a cause of action against Big Sky for creating or maintaining a public nuisance. SR 814, ¶¶ *49-54.* The City's claim for public nuisance was in existence at the time of trial and the City proffered instructions related to the public nuisance claim. SR 4414. The City renewed its request for these instructions at trial. The Court rejected each of the City's instructions dealing with public nuisance. TT: 834:16 – 834:25; 842:11 – 842:14.

"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, street, or highway;

(4) In any way renders other persons insecure in life, or in the use of property.

SDCL § 21-10-1. There was ample evidence submitted at trial that Big Sky and Estes failed to perform their obligations under City Ordinances and Specifications which resulted in a violation of SDCL § 21-10-1. Big Sky and Estes' own engineer, Shafai, testified that there were areas that were "unsafe to travel." TT: 596:13 – 596:23.

The Trial Court's failure to instruct the jury, in any manner, related to one of the City's claims can be seen as nothing other than taking from the City an "elementary" and fundamental right of the City to present its claims and theory of the case to the jury. The "[f]ailure to give a requested instruction that correctly sets forth the law is prejudicial error." *Sundt Corp.*, *supra.*

VI. THE TRIAL COURT'S JURY INSTRUCTIONS PREJUDICED THE CITY OF RAPID CITY

A. STANDARD OF REVIEW

"Erroneous instructions are prejudicial under SDCL 15–6–61 when in all probability they produced some effect upon the verdict and were harmful to the substantial rights of a party." *Vetter, supra.* "A court's failure to give a requested instruction that properly sets forth the law constitutes error." *Carlson v. Constr. Co.*, 2009 S.D. 6, ¶ 13, 761 N.W.2d 595, 599 (citing *Kuper v. Lincoln-Union Elec. Co.,* 1996 SD 145, ¶ 32, 557 N.W.2d 748, 758 (citing *Bauman v. Auch,* 539 N.W.2d 320, 323 (S.D.1995))).

B. THE CITY OF RAPID CITY WAS PREJUDICED BY THE TRIAL COURT'S JURY INSTRUCTIONS

The Trial Court failed to give a requested instruction identifying the City's cause of action for public nuisance. The requested instructions properly set forth the law related to a claim in this case. The Court's refusal to give those instructions took from the City a cause of action. There can be no question that the failure to give the City's requested

public nuisance instructions, in-and-of-itself, constitutes prejudicial error.

However, as set forth above, the City alleges numerous other errors in the Trial Court's jury instructions, specifically the Trial Court's instructions related to waiver, estoppel, and the statute of limitations. Jury Instructions, App. at B-11-13. This is not a case where the injury alleged by the City was in dispute. Big Sky and Estes' own expert prepared a report identifying the deficiencies in the public improvements constructed by Big Sky and Estes. *Trial Exhibit 192.* He wrote, in part:

> …the streets have not performed well with several areas exhibiting substantial distress due to movement and/or pavement breakup.
>
> …The underlying cause of the movements is most likely a lack of compaction control by the contractor during street and utility construction. Our review of the quality control testing by the project geotechnical engineering firm shows substantial inconsistencies in process, non-compliance with ASTM Standards and an inadequate frequency of testing to ensure successful project completion.

Trial Exhibit 192.

The only defenses to Big Sky's liability in this case were the affirmative defenses identified in Instruction Nos. 10, 11, and 12. As such, there can be no question that these instructions were prejudicial to the City.

As set forth above, the City provided Estes with a "punch list" on May 2, 2000. *Trial Exhibit 100.* The Trial Court's Instruction No. 12, instructing the jury that the City's cause of action accrued when the "City was aware of any deficiencies in the improvements in any

development" had the effect of directing a verdict against the City because the City complied with City Specifications by providing a "punch list." Given that deficiencies were identified in the May 2, 2000 letter and the City did not commence this action until January 31, 2008, there was no finding the jury could make but that the action was not commenced within six years. However, the Trial Court's instruction related to the accrual of the cause of action was an incorrect statement of the law. Until such time as the City knew, or should have known, that Big Sky and Estes would not comply with the requirement to complete the punch list, the City's cause of action had not accrued. Big Sky sued RCS in March of 2007 alleging a continuing obligation to repair the roads. App. at F-1-4. The City commenced this action less than two years later. There can be no question but that the Trial Court's instructions were prejudicial to the City.

VII. EVIDENCE OF BIG SKY, LLC'S LITIGATION AND SETTLEMENT OF CLAIMS AGAINST J. SCULL CONSTRUCTION SERVICE, INC. AND R.C.S. CONSTRUCTION, INC. SHOULD HAVE BEEN ADMITTED AT TRIAL

A. STANDARD OF REVIEW

"A trial court's evidentiary rulings are presumed correct and will not be reversed unless there is a clear abuse of discretion." *Wilcox v. Vermeulen,* 2010 SD 29, ¶ 7, 781 N.W.2d 464, 467 (citing *Thompson v. Mehlhaff,* 2005 SD 69, ¶ 21, 698 N.W.2d 512, 519-20; *Stormo v. Strong,*

469 N.W.2d 816, 820 (S.D.1991)). "With regard to the rules of evidence, abuse of discretion occurs when a trial court misapplies a rule of evidence, not when it merely allows or refuses questionable evidence." *Id.* (citations omitted).

B. THE TRIAL COURT ERRED IN REFUSING TO ADMIT EVIDENCE OF BIG SKY, LLC'S LITIGATION AGAINST J. SCULL CONSTRUCTION SERVICE, INC. AND R.C.S CONSTRUCTION, INC.

There can be no question that the fact that Big Sky asserted a claim against Scull in 2003 and a claim against RCS in 2007 is relevant to this case. As set forth above, Big Sky's claim against both Scull and RCS was that Big Sky "will be caused and required in the future to incur, costs of consulting services and remedial work necessary to correct the defective and unworkmanlike performance of [Scull and RCS]." App. at E-6; F-3-4.

Big Sky's allegations against Scull and RCS go straight to the heart of the City's claim that Big Sky and Estes had not communicated any intent not to comply with the City Specifications. Big Sky was pursuing litigation for the specific purpose of completing the "punch list" provided by the City. Big Sky's allegations in that litigation are direct admissions by Big Sky of continuing obligations to the City. "A judicial admission is a formal act of a party or his attorney in court, dispensing with proof of the fact claimed to be true, and is used as a substitute for legal evidence at the trial." *Rosen's Inc. v. Juhnke*, 513 N.W.2d 575, 577 (S.D. 1994). "A judicial admission is binding on the party who makes it and an

admission of fact by an attorney is also binding on that party." *Tunender v. Minnaert*, 1997 S.D. 62, ¶ 35, 563 N.W.2d 849, 856 (citing *Stemper v. Stemper,* 415 N.W.2d 159, 160 (S.D.1987); *Kohne v. Yost,* 250 Mont. 109, 818 P.2d 360, 362 (1991)). As identified by Justice Sabers in his dissent in *Tunender,* "[t]his court has found that statements made in pleadings constituted judicial admissions. 1997 S.D. 62, ¶ 35 (citing *Standard Cas. Co. v. Boyd,* 75 S.D. 617, 71 N.W.2d 450 (1955); *Goff v. Goff,* 72 S.D. 534, 37 N.W.2d 251 (1949); *Englund v. Berg,* 69 S.D. 211, 8 N.W.2d 861 (1943)). "Judicial admissions may occur at any point during the litigation process. They may arise during discovery, pleadings, opening statements, direct and cross-examination, as well as closing arguments." *Id.* (citing *Kohne,* 818 P.2d at 362 (citing *Lowe v. Kang,* 167 Ill.App.3d 772, 118 Ill.Dec. 552, 555, 521 N.E.2d 1245, 1248 (1988)).

"[P]leadings from another case are admissible as admissions, although they are not conclusive." *Hagerman v. Yukon Energy Corp.*, 839 F.2d 407, 411 (8th Cir. 1988) (citing *Enquip, Inc. v. Smith–McDonald Corp.,* 655 F.2d 115, 118 (7th Cir.1981)). In this case, the City did not request that this Court hold Big Sky's admissions as binding fact, the City simply requested to introduce those admissions to the jury, providing Big Sky and Estes full opportunity to explain the same.

Until the eve of trial, the City's case against Big Sky and Estes was set to be tried with Big Sky's case against RCS. The Trial Court went

from trying the cases together, to the same jury, to not allowing any evidence whatsoever that another case existed.

Quite frankly, without regard to whether or not the allegations made by Big Sky in that litigation were judicial admissions, the fact that those cases were filed was relevant and not protected or excluded by any privilege or rule of evidence. Under the Rules of Evidence, "[a]ll relevant evidence is admissible, except as otherwise provided by constitution or statute or by this chapter or other rules promulgated by the Supreme Court of this state." SDCL § 19-19-402. Both Big Sky and the Trial Court urged that somehow SDCL § 19-19-408 prohibited evidence of Big Sky's cases against Scull and RCS. SDCL § 19-19-408 prohibits evidence of offers to compromise that are used to prove or disprove a claim. There is absolutely no argument that Big Sky's allegations against Scull and RCS were offers to compromise.

As Estes testified during the City's offer of proof, the lawsuits against Scull and RCS were filed to seek the recovery of monies to fix the public improvements at issue in this case. Specifically, Estes testified:

> Q: After the correspondence that was exchanged beginning in the spring of 2000 up until the spring of 2003, after you were unable to satisfy or come to some resolution with J. Scull Construction, did Big Sky, LLC initiate litigation against J. Scull Construction in May of 2003?
>
> A: Yes.
>
> Q: Okay. And in that litigation, did you make claims against J. Scull Construction as identified in the Complaint as to the nature and extent of the defects and deficiencies which existed in Phases 1, 2, and 3 of the Big Sky Subdivision?

A: Me, being Big Sky, LLC.

Q: Of course. That's – all my questions are postulated on that premise. I apologize.

A: Yes, Big Sky made claims.

Q: And does that Complaint identify the nature of the claim and causes of action that Big Sky, LLC had against J. Scull Construction Services as it concerned the work done on Phases 1, 2, and 3?

A: Yes.

Q: And as part of that claim, in addition to seeking the recovery of damages, you also sought the recovery of damages necessary to fix the roads in Phases 1, 2, and 3; is that correct?

A: Yes.

Q: And as part of that litigation, you anticipated as one of the Prayers For Relief that you were going to incur additional costs and expenses for engineering, consulting services, and work necessary to perform remediation work to repair the streets in Phases 1, 2, and 3; is that correct?

A: Whatever the Complaint says.

Q: Paragraph 33 identified one of the Prayers For Relief that you were seeking in that case, right?

A: Yes.

TT: 400:2 – 401:11.

Under SDCL § 19-19-402, there can be no question that the fact that Big Sky filed litigation against Scull and RCS for the very same deficiencies alleged by the City is relevant to the City's claims against Big Sky and Estes. Because there is no rule that excludes this otherwise

relevant evidence, the Trial Court abused its discretion in refusing to allow any evidence or testimony of Big Sky's other litigation at trial.

C. THE TRIAL COURT ERRED IN REFUSING TO ADMIT EVIDENCE OF BIG SKY, LLC'S SETTLEMENT OF ITS CLAIMS AGAINST J. SCULL CONSTRUCTION, INC. AND R.C.S. CONSTRUCTION, INC.

Also before the Court is the issue of whether Big Sky's settlement of its claims against Scull and RCS should have been admitted at trial. The analysis starts with SDCL § 19-19-408. SDCL § 19-19-408 provides as follows:

> **(a) Prohibited uses.** Evidence of the following is not admissible--on behalf of any party--either to prove or disprove the validity or amount of a disputed claim or to impeach by a prior inconsistent statement or a contradiction:
>
> (1) Furnishing, promising, or offering--or accepting, promising to accept, or offering to accept--a valuable consideration in compromising or attempting to compromise the claim; and
>
> (2) Conduct or a statement made during compromise negotiations about the claim--except when offered in a criminal case and when the negotiations related to a claim by a public office in the exercise of its regulatory, investigative, or enforcement authority.
>
> **(b) Exceptions.** The court may admit this evidence for another purpose, such as proving a witness's bias or prejudice, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

The settlement between Big Sky, Estes, and Scull and the settlement between Big Sky and RCS is not being used "to prove or disprove the validity or amount of a disputed claim or to impeach by a prior inconsistent statement or a contradiction." The settlements were offered

by the City to show that Big Sky and Estes knew the public improvements had not been accepted; that the deficiencies were related to Scull and RCS's actions in failing to construct the improvements to City specifications; to explain the factual background of the case, including the absence of adversary vigor; and, to explain the liability of Estes who personally received funds from the settlement of the Scull litigation. As set forth below, the settlements should have been admissible, not to prove liability, but for each those reasons set forth above.

The City does not dispute that amount of the settlement is not admissible. SDCL § 19-19-408 expressly provides that settlement agreements cannot be used to prove "the validity *or amount*" of a claim. In *Degen v. Bayman,* the South Dakota Supreme Court held that "[w]e can visualize no circumstances where the amount involved in a release or covenant need be disclosed to the jury." 86 S.D. 598, 607, 200 N.W.2d 134, 139 (1972). This holding was re-affirmed in *First Premier Bank v. Kolcraft Enterprises, Inc.*, 2004 S.D. 92, ¶ 20, 686 N.W.2d 430, 442.

Both SDCL § 19-19-408 and *Kolcraft* acknowledge that settlements cannot be used to "either to prove or disprove the validity or amount of a disputed claim or to impeach by a prior inconsistent statement or a contradiction," but that settlements, if admissible, can be used for any other purpose. As the *Kolcraft* decision held:

> Compromises may be admissible for "another purpose," however, such as proving the bias or prejudice of a witness, or negativing a contention of undue delay. SDCL 19-12-10 (Rule 408); *see Corn Exchange Bank v. Tri-State Livestock Auction Co., Inc.* 368 N.W.2d 596 (S.D.1985) (if defendant stands to gain financially from plaintiff's verdict by increasing liability of codefendant, jury may be informed of settlement agreement); *Degen,* 200 N.W.2d at 139 (settlement cannot be used for collusive advantage); *Roso v. Henning,* 1997 SD 82, ¶ 13, 566 N.W.2d 136 n3 (S.D.1997) (settlement discussions admitted to show defendant had made an appearance and had not defaulted).

2004 S.D. 92, ¶ 22.

In *Corn Exchange Bank,* one of the issues before this Court was was the discoverability of a settlement. The Court held:

> …we have previously held that under certain circumstances the jury should be made aware of settlements between some of the parties. *Degen v. Bayman,* 86 S.D. 598, 200 N.W.2d 134 (1972). *Otherwise, the jury "[n]ot knowing the motive for the evaporation of adversary vigor" between some of the litigants may become misled or confused. Degen,* 86 S.D. at 608, 200 N.W.2d at 139.

368 N.W.2d 596, 599–600 (S.D. 1985) (emphasis added).

This Court's analysis in *First Nat. Bank v. Harvey*, 29 S.D. 284, 137 N.W. 365 (1912), while more than 100 years old, falls in line with the decision in *Corn Exchange Bank.* In *Harvey,* the plaintiff bank sued on two notes purporting to be signed by the defendant, Harvey. *Id.* at 366. Harvey alleged that she never made, gave or executed either of said notes or that if the signature is hers, it was procured by fraud. *Id.* at 367. Harvey and Lund had previously entered into a real estate contract and, as a result of the same, entered into a written settlement. Plaintiff bank objected to the introduction of any evidence of Harvey's conversations with Lund or the settlement of the real estate transaction. The Court

held that "[t]he facts and circumstances of said real estate transaction between Mrs. Harvey and Lund from start to finish were material and a part of the res gestae of the surrounding facts and circumstances of the giving of said notes, which included said final settlement as the final completion of said transactions. The said statement of Lund to Mrs. Harvey, concerning said note for $700, at the time said settlement was in progress, was more than a mere declaration or admission against interest, but was a verbal act constituting a part of the transaction itself." *Id.* at 370 (citing Wigmore, Ev. §§ 1745-1776). Big Sky's litigation against and settlement of claims against Scull and RCS is so intrinsically intertwined with the facts of this case, it must be admitted to avoid confusion of the jury.

In *Towerridge, Inc. v. T.A.O., Inc.*, the Tenth Circuit Court of Appeals dealt with the admissibility of settlement issues on a government construction project. 111 F.3d 758 (10th Cir. 1997). A subcontractor brought an action against the "prime contractor" to recover for money due and owing under the subcontract. *Id.* at 760. Like this case, the parties agreed as to certain issues that arose during construction, but the parties disagreed over who was to blame for any delays or defects in performance. *Id.* at 761. At trial, the court "allowed testimony establishing that T.A.O. [prime contractor] submitted claims to the government for damages caused by governmental delay and disruption of the construction project, and that the government paid T.A.O. an

undisclosed sum of money in settlement of these claims. It also allowed testimony implying the government's delay and disruption of the project caused delay in Towerridge's [subcontractor] work." *Id.* On appeal, the prime contractor argued that the claim and settlement was not relevant under Rule 402, unfairly prejudicial under Rule 403, and barred as a settlement negotiation under Rule 408. The Court rejected each of these arguments. The Court held as follows:

> Rule 402
>
> T.A.O. asserted during the trial that Towerridge's performance was inadequate because it was untimely, and that delay by Towerridge was one of the reasons it hired supplemental contractors to complete the work originally subcontracted to Towerridge. Thus, the evidence was relevant to show delay in Towerridge's performance was the fault of the government rather than Towerridge.
>
> Rule 403
>
> Fed.R.Evid. 403 bars the admission of relevant evidence if its probative value is substantially outweighed by a danger of unfair prejudice. After thorough review of the record, we cannot say the district court abused its discretion in failing to hold Rule 403 prevented admission of the controverted evidence.
>
> Rule 408
>
> Rule 408 does not require the exclusion of evidence regarding the settlement of a claim different from the one litigated, *see Broadcort Capital,* 972 F.2d at 1194, though admission of such evidence may nonetheless implicate the same concerns of prejudice and deterrence of settlements which underlie Rule 408, *see Orth v. Emerson Elec. Co.,* 980 F.2d 632, 639 (10th Cir.1992). *In any event, Rule 408 only bars admission of evidence relating to settlement discussions if that evidence is offered to prove "liability for or invalidity of the claim or its amount," and the evidence at issue here was not offered for that forbidden purpose. Rather, Towerridge offered the evidence to show it was not at fault for any delay and to show T.A.O. acted in bad faith.* Accordingly, the

> district court did not abuse its discretion in allowing the testimony at issue, nor did it abuse its discretion in refusing T.A.O.'s request for a mistrial.

Id. at 769-70 770 (emphasis added).

The analysis in *Towerridge* is identical to the analysis that must be completed in this case. Big Sky and Estes argued that the City was at fault for the deficiencies as a result of the City's inspection process. Big Sky and Estes' settlements are relevant to show that the deficiencies were the result of, at least in part, Scull and RCS's defective and unworkmanlike construction of the improvements, not the City's inspection process. Additionally, under Rule 408 Big Sky and Estes' settlements were not offered to prove Big Sky and Estes are liable, but instead that the City was not at fault for the deficiencies in the public improvements.

In *Zurich Am. Ins. Co. v. Watts Indus., Inc.*, the Seventh Circuit Court of Appeals conducted an analysis of situations wherein a settlement would be admissible:

> We assume for the purposes of this analysis that Watts's September 6 letter is in fact a settlement communication subject to Rule 408. By its terms, the rule forbids admission of evidence only when it is offered to prove "liability for or invalidity of the claim or its amount."…The district court has broad discretion to admit evidence for a purpose other than proving liability…Evidence coming out of settlement negotiations is obviously admissible to show bias or prejudice of a witness….It has also been admitted by courts for additional purposes other than establishing liability, including for purposes of rebuttal, for purposes of impeachment, to show knowledge and intent, to show a continuing course of reckless conduct, and to prove estoppel…The balance is especially likely to tip in favor of admitting evidence when the settlement

> communications at issue arise out of a dispute distinct from the one for which the evidence is being offered.

417 F.3d 682, 689-90 (7th Cir. 2005) (internal citations omitted).

In this case, the "[e]vidence coming out of settlement negotiations is obviously admissible to show bias or prejudice of a witness." The exclusion of the settlements allowed Estes to downplay the fault of Scull and RCS and focus on the fault of the City. Second, Big Sky and Estes' argument that the City's cause of action accrued in 2000 is rebutted by Big Sky's litigation against and ultimate settlement with Scull and RCS. Big Sky's initiation, maintenance, and settlement of the litigation against Scull and RCS are evidence of Big Sky and Estes' knowledge that the improvements had not been accepted by the City. Indeed, if the improvements had been accepted and Big Sky and Estes had no liability to the City, Big Sky and Estes perpetuated a fraud on Scull, RCS, and the Court in each of those actions, and Big Sky and Estes were paid $300,000 in cases for which Big Sky and Estes had no damages.

Finally, as set forth in Section IX below, Estes' personal receipt of funds from Scull must be admitted to show Estes' liability. Estes, individually, signed the Release in Full of All Claims in the Scull litigation and received funds from Scull in that litigation. As Estes testified:

> Q: And as a result of that litigation, Big Sky, LLC in April of 2007 entered into a settlement with J. Scull wherein Big Sky, LLC and Doyle Estes personally released any claims or causes of action they had against J. Scull Construction Services; is that correct?
>
> A: Yes.

TT: 401:12 – 401:17

As the South Dakota Supreme Court held in *Corn Exchange Bank,* "[i]n determining whether the jury should know of the agreement, the following criteria should be used. If an agreeing defendant stands to gain financially from a plaintiff's verdict or if the agreeing defendant's maximum liability will be reduced by increasing the liability of his co-defendant, the jury must be informed of the contents of the agreement." 368 N.W.2d at 600. While the analysis in this case is different, the result is the same. Estes and Big Sky (who have no "damages") stand to gain financially and receive a wind fall if the Judgment is not reversed. Estes and Big Sky received $300,000 to fix the roads that are subject to this litigation and ultimately have fixed nothing. This is not the purpose for which SDCL § 19-19-408 stands.

VIII. UNDER THE LAW OF THE CASE, BIG SKY, LLC AND DOYLE ESTES WERE LIABLE TO THE CITY OF RAPID CITY, AS A MATTER OF LAW

A. STANDARD OF REVIEW

"The doctrine of the law of the case is a discretionary policy practiced by the courts in which they will generally refuse to reconsider a matter which has already been decided in earlier stages of the litigation." *In re Estate of Jetter*, 1999 S.D. 33, ¶ 20, 590 N.W.2d 254, 258. "Generally, the [law of the case] rule is applied to issues litigated in the same case by the same parties." *Id.* at ¶ 21.

B. THE TRIAL COURT ERRED IN FAILING TO HOLD THAT BIG SKY, LLC AND DOYLE ESTES WERE LIABLE TO THE CITY OF RAPID CITY UNTIL THE CITY ACCEPTS THE PUBLIC IMPROVEMENTS BY A FINAL ACCEPTANCE LETTER

Many of the very same issues tried to the jury were previously before this Court. As set forth in Section VI above, the only defenses to liability in this case were the affirmative defenses of waiver, estoppel, and the statute of limitations. Because those defenses are not applicable, and because this Court has already held that "[u]nder the ordinances and specifications, Developers remain liable until the City accepts the improvements by a final acceptance letter,"[1] the Trial Court erred in failing to hold Big Sky and Estes liable, as a matter of law, and instructing the jury regarding the same.

"It is undisputed that the City never issued any final acceptance letters as referenced in the Specifications." *Id.* at ¶ 13. Estes testified at trial that "I think I said several times that I haven't ever received a letter of acceptance." TT: 304:15 – 304:16.

"The utility of the [law of the case] policy is '(1) to protect settled expectations of the parties; (2) to insure uniformity of decisions; (3) to maintain consistency during the course of a single case; (4) to effectuate the proper and streamlined administration of justice; and (5) to bring litigation to an end.'" *Jetter*, 1999 S.D. 33, ¶ 20 (citations omitted).

[1] *Estes*, 2011 S.D. 75, ¶ 15.

This Court's decision in *Estes* was meant to "settle the expectations of the parties." The fact that there are deficiencies that need to be remedied is not disputed by Big Sky or Estes. The fact that an acceptance letter has not been received is not disputed by Big Sky or Estes. "Under the ordinances and specifications, Developers remain liable until the City accepts the improvements by a final acceptance letter." *Estes,* 2011 S.D. 75, ¶ 15. Under this language, Big Sky and Estes remain liable today.

IX. QUESTION OF FACT PRECLUDED THE DISMISSAL OF DOYLE ESTES FROM THIS LITIGATION

A. STANDARD OF REVIEW

"[T]he appropriate standard of review on a court's decision to grant or deny a motion for a judgment as a matter of law is de novo." *Hernandez v. Avera Queen of Peace Hosp.*, 2016 S.D. 68, ¶ 28, 886 N.W.2d 338, 348 (citation omitted).

B. THE TRIAL COURT ERRED IN DISMISSING DOYLE ESTES FROM THIS LITIGATION

The largest issue in dealing with the Motion for Judgment as a Matter of Law against Estes is Estes' receipt of funds from the settlement with Scull addressed in Section VII(C) above. When the litigation with Scull was settled, both Big Sky and Estes provided a release for the receipt of funds in that case. As Estes testified:

> Q: And as a result of that litigation, Big Sky, LLC in April of 2007 entered into a settlement with J. Scull wherein Big Sky, LLC and Doyle Estes personally released any claims or

causes of action they had against J. Scull Construction Services; is that correct?

A: Yes.

TT: 401:12 – 401:17. Estes' receipt of funds in litigation brought for the sole purpose of fixing the roads creates liability, or at the very least, a jury question for Estes. The Trial Court excluded the evidence that Estes was a party to the settlement with Scull and received funds. As set forth above, that evidence should have been admitted. If that evidence is admitted, a jury should decide if Estes is liable in this case.

CONCLUSION

For the foregoing arguments and authority set forth herein, the Appellant, the City of Rapid City, respectfully requests that this Court reverse the Judgment entered by the Trial Court and remand for further proceedings consistent with the arguments identified in the Brief.

Dated this 16th day of August, 2017.

/s/ Robert J. Galbraith
JOHN K. NOONEY (john@nooneysolay.com)
ROBERT J. GALBRAITH (robert@nooneysolay.com)
Attorneys for Appellants
NOONEY & SOLAY, LLP
632 Main Street, 2nd Floor
P.O. Box 8030
Rapid City, SD 57709-8030
(605) 721-5846

CERTIFICATE OF COMLIANCE

Pursuant to SDCL § 15-26A-66(b)(4), I certify that this Appellant's Brief complies with the type volume limitation provided for in the South Dakota Codified Laws. This brief contains 9,893 words and 48,993 characters ***with no spaces***. I have relied on the word and character count of our word processing system used to prepare this Brief.

Dated this 16th day of August, 2017.

/s/ Robert J. Galbraith

JOHN K. NOONEY (john@nooneysolay.com)
ROBERT J. GALBRAITH (robert@nooneysolay.com)
Attorneys for Appellants
NOONEY & SOLAY, LLP
632 Main Street, 2nd Floor
P.O. Box 8030
Rapid City, SD 57709-8030
(605) 721-5846

IN THE SUPREME COURT
OF THE STATE OF SOUTH DAKOTA

CITY OF RAPID CITY, Plaintiff/Appellant, v. BIG SKY, LLC and DOYLE ESTES, Defendants/Appellees.	Appeal No. 28205 **CERTIFICATE OF SERVICE**

I, Robert J. Galbraith, attorney for the Appellant, hereby certify that a true and correct copy of the foregoing *Appellant's Brief* was served via electronic service on:

Don Porter
Jess M. Pekarski
Chris Christianson
Costello, Porter, Hill, Heisterkamp,
Bushnell & Carpenter, LLP
P.O. Box 290
Rapid City, SD 57709-0290

Steven J. Oberg
Barbara Anderson Lewis
Lynn, Jackson, Shultz & Lebrun, P.C.
P. O. Box 8250
Rapid City, SD 57709
Attorneys for RCS Construction, Inc.

Ron Schmidt
Gunderson, Palmer, Nelson & Ashmore
506 6th Street
Rapid City, SD 57701
Attorneys for Third Party Defendants and
Fourth Party Plaintiffs, Steve Van Houten,
and Robert Van Houten

Roger A. Sudbeck
Paul W. Tschetter
Boyce, Greenfield, Pashby & Welk, L.L.P.
P. O. Box 5015
Sioux Falls, SD 57117-5015
Attorneys for Third Party Defendant and

Fourth Party Plaintiff, Rapid
Construction, LLC,

Scott Sumner
Sumner Law Office
P. O. Box 2553
Rapid City, SD 57709
Attorney for Fourth Party Defendant,
Dream Design International, Inc.

on this 16th day of August, 2017.

/s/ Robert J. Galbraith

JOHN K. NOONEY (john@nooneysolay.com)
ROBERT J. GALBRAITH (robert@nooneysolay.com)
Attorneys for Appellants
NOONEY & SOLAY, LLP
632 Main Street, 2nd Floor
P.O. Box 8030
Rapid City, SD 57709-8030
(605) 721-5846

APPENDIX

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STATE OF SOUTH DAKOTA)
) SS.
COUNTY OF PENNINGTON)

IN CIRCUIT COURT

SEVENTH JUDICIAL CIRCUIT

CIVIL NO. 51CIV07-000599

CITY OF RAPID CITY, a municipal corporation,

Plaintiff,

vs.

BIG SKY, LLC,

Defendant.

JUDGMENT

THIS COURT having presided over a jury trial on the above captioned matter, between the City of Rapid City, as plaintiff and Big Sky LLC as defendant; and further

THAT the jury trial having commenced on January 23 and concluded on January 27 at the Pennington County Courthouse in the 7th Circuit in Rapid City, SD; the Hon Warren Johnson presiding; and further

THAT after witnesses testified and evidence taken; and both parties having rested, the case was submitted to jury of twelve jurors; and further

THAT the jury returned a verdict for Big Sky LLC and against the City of Rapid City on all claims on January 27, 2017 through its foreperson; and it is therefore

ORDERED, ADJUDGED AND DECREED that the above action be dismissed on the merits with prejudice based on the jury verdict returned; and that Big Sky LLC be entitled to taxable costs assessed in the amount of _____ to be inserted later by the Court, such costs to become a judgment against the City of Rapid City until paid.

Dated this 9th day of February, 2017

BY THE COURT:

Honorable Warren G. Johnson
Circuit Court Judge

ATTEST:

Clerk of Courts

BY: _____ Deputy Clerk

(SEAL)

State of South Dakota) Seventh Judicial
County of Pennington) Circuit Court
I hereby certify that the foregoing instrument is a true and correct copy of the original as the same appears on record in my office this

FEB 13 2017

RANAE L. TRUMAN
Clerk of Courts, Pennington County

By _____ Deputy

11:04 AM

Pennington County, SD
FILED
IN CIRCUIT COURT

FEB - 9 2017

Ranae Truman, Clerk of Courts

By _____ Deputy

STATE OF SOUTH DAKOTA) SS. COUNTY OF PENNINGTON	)	IN CIRCUIT COURT SEVENTH JUDICIAL CIRCUIT CIVIL NO. 51CIV07-000599
CITY OF RAPID CITY, a municipal corporation, Plaintiff, vs. **BIG SKY, LLC,** Defendant.	)	**JURY INSTRUCTIONS**

INSTRUCTION NO. 1

Both sides having rested, it is now the duty of the Court to give you the instructions that are to guide and govern you in arriving at a verdict. The law that applies to this case is contained in these instructions, and it is your duty to follow them.

You must consider these instructions as a whole and not single out one instruction and disregard others. The order in which the instructions are given has no significance as to their relative importance.

By the language of these instructions, the Court does not intend to imply what any of the disputed facts in this case are, or what your verdict in this case should be.

Each of you must faithfully perform your duties as jurors. You must carefully and honestly consider this case with due regard for the rights and interests of the parties. Neither sympathy nor prejudice should influence you.Your verdict must be based on the evidence and not upon speculation, guess, or conjecture.

Dated this 27th day of January, 2017.

Warren Johnson

The Honorable Warren Johnson

Pennington County, SD
FILED
IN CIRCUIT COURT
JAN 27 2017
Ranae Truman, Clerk of Courts
By _____ Deputy

INSTRUCTION NO. 2

It is your duty as a jury to determine the facts, and you must do this from the evidence that has been produced here in open court. This consists of the testimony of the witnesses and the exhibits which have been received. This evidence is governed by various rules of law. Under these rules, it has been my duty as judge to rule on the admissibility of the evidence from time to time. You must not concern yourselves with the reasons for these rulings, and you must not consider any exhibit which was not received in evidence or any testimony which has been ordered stricken. Such things you must put out of your mind. And you must not consider anything you may have heard or read about this case other than the evidence which has been properly admitted herein.

INSTRUCTION NO. 3

In weighing the evidence in this case, you have a right to consider the common knowledge possessed by all of you, together with the ordinary experiences and observations in your daily affairs of life.

INSTRUCTION NO. 4

You are the sole judges of all facts and credibility of witnesses. In deciding what testimony to believe, you may consider:

(1) the witnesses' ability and opportunity to observe;

(2) their intelligence;

(3) their memories;

(4) their manner while testifying;

(5) whether they said or did something different at an earlier time;

(6) their qualifications and experience;

(7) any apparent interest, bias, or prejudice they may have; and

(8) the reasonableness of their testimony in light of all the evidence in the case.

INSTRUCTION NO. 5

If you believe that any witness testifying in this case has knowingly sworn falsely to any material matter in this case, then you may reject all of the testimony of the witness.

INSTRUCTION NO. 6

The attorneys for the respective parties will present their arguments of the case for your assistance in coming to a decision. The order of their appearance and the length of the time of their arguments are regulated by the court. While the final argument of counsel is intended to help you in understanding the evidence and applying the law as set forth in these instructions, final argument is not evidence. You should disregard any argument, statement, or remark of counsel which has no basis in the evidence. However, an admission of fact by an attorney for a party is binding on that party.

INSTRUCTION NO. 7

The fact that one or more of the parties to this action is a municipal corporation or a limited liability company is immaterial. Under the law of this state, the municipal corporation or limited liability company is an individual party to the lawsuit, and all parties are entitled to the same impartial treatment.

INSTRUCTION NO. 8

A witness may qualify as an expert and give an opinion on a matter at issue if the witness has special knowledge, skill, experience, training or education concerning the matter on which the expert testifies. In deciding the weight to give to the opinion, you should consider the expert's qualifications, credibility, and reasons for the opinion. You are not bound by the opinion. If you decide that the reasons for the expert's opinion are unsound, or that the evidence outweighs the opinion, you may disregard the opinion entirely.

INSTRUCTION NO. 9

In civil actions, the party who has the burden of proving an issue must prove that issue by greater convincing force of the evidence.

Greater convincing force means that after weighing the evidence on both sides there is enough evidence to convince you that something is more likely true than not true. In the event that the evidence is evenly balanced so that you are unable to say that the evidence on either side of an issue has the greater convincing force, then your finding upon the issue must be against the party who has the burden of proving it.

In this action, the City of Rapid City has the burden of proving the following issues:

1. That Big Sky LLC failed to complete or repair the public improvements in Phases 1, 2, 3, and 4 of the Big Sky Subdivision so the public improvements are approved for acceptance by the City of Rapid City.
2. The amount of money necessary to fix or repair the public improvements in Phases 1, 2, 3, and 4 of the Big Sky Subdivision, so the public improvements are approved for acceptance by the City of Rapid City.

In this action, Big Sky LLC has the burden of proving the following issues:

1. That City of Rapid City has waived portions of the city ordinance, specifications or agreement between the parties.
2. That the City of Rapid City should be estopped from asserting noncompliance with City specifications if the City through its conduct and policy communicated that such compliance was not necessary and that reasonable persons would so perceive the conduct.
3. That the City of Rapid City failed to bring the claim within the Statute of Limitations.

In determining whether or not an issue has been proved by greater convincing force of the evidence, you should consider all of the evidence bearing upon that issue, regardless of who produced it.

INSTRUCTION NO. 10

A waiver occurs when one in possession of a right, whether obtained by law or by agreement, who with full knowledge of the facts, voluntarily and intentionally does or fails to do something inconsistent with the enforcement of that right. To support a defense of waiver, there must be a showing of a clear, unequivocal and decisive act or acts showing an intention to give up the existing right. There can be no waiver unless so intended by one party and so understood by the other. A person who has waived a right cannot recover damages based on that right.

Big Sky, LLC has the burden of proof to establish a waiver occurred by the City of Rapid City.

INSTRUCTION NO. 11

An estoppel occurs when there are acts or omissions by the party to be estopped, which have misled the party in whose favor the estoppel is sought and has caused the party seeking the estoppel to part with something of value or do some other act relying upon the conduct of the party to be estopped.

This creates a situation where it would be unfair to allow the misleading party to claim what would otherwise be his or her legal rights.

The burden of proof to establish an estoppel is on Big Sky, LLC to show they relied upon the City of Rapid City.

INSTRUCTION NO. 12

SDCL 15-2-13(2) provides that liabilities created by a statute may only be brought within six years of the accrual of the action. If you find that the City of Rapid City was aware of any deficiencies in the improvements in any development more than six years before the City of Rapid City initiated this action against Big Sky, LLC, you must dismiss the City of Rapid City's claims and award it no damage as to each development it had knowledge of prior to six years before filing of this lawsuit.

INSTRUCTION NO. 13

In this case, the Court has already determined certain facts or evidence to guide you in your decision. For purposes of this case, these are facts you must accept as true. Those facts are as follows:

Big Sky, LLC was involved in developing the Big Sky subdivision in Rapid City, South Dakota, including Phases 1, 2, 3, and 4 which are the subject of this litigation. Under South Dakota law, a municipality has extraterritorial jurisdiction to regulate the subdivision of all land within three miles of the municipality's corporate limits. Chapter 16 of Rapid City Municipal Code (RCMC) establishes regulations governing the subdivision of land within the City's jurisdiction.

RCMC 16.16.010 requires subdividers to install or construct certain public improvements:

1. The subdivider is required to install or construct the improvements hereinafter described prior to receiving approval of his or her final plat or prior to having released bond or other securities which guarantee the required improvements.

2. All improvements required under these regulations shall be constructed in accordance with City Specifications and under the inspection of the City Engineer or his or her duly authorized representative.

"Improvements" include streets, curbs, gutters, property markers, sidewalks, street lights, traffic signs, water mains, sanitary sewers, and storm sewers. The City adopted Standard Specifications for Public Works Construction (Specifications) that improvements were required to meet.

After improvements are completed, the City's Specifications, and specifically § 7.65 (Exhibit 250), address project acceptance:

> Final acceptance of the project by the Owner [City] will be documented by the issuance of an acceptance letter, which is issued according to the following criteria:

1) Construction has been substantially completed and the facilities can be put to their intended use.
2) All testing has been completed, and the required results have been met.

The date of the acceptance letter documents the start of the two-year warranty period, during which the Contractor shall be notified in writing of any defects in the project and shall correct the defects at his expense.

The City has never formally accepted ownership or maintenance responsibility for any of the public improvements on the properties. No "acceptance letter" was sent to Big Sky, LLC as indicated in Specifications § 7.65. Specifications § 7.65 clearly states that "final acceptance of the project by the Owner [City] will be documented by the issuance of an acceptance letter." It is undisputed that the City never issued any final acceptance letters as referenced in the Specifications.

Under the ordinances and specifications, Big Sky, LLC remains liable until the City accepts the improvements by a final acceptance letter, or unless the City waived the requirement of a formal acceptance letter.

INSTRUCTION NO. 14

Regardless of how or when plat approval is obtained, the improvements must be built according to the Specifications and accepted by the City.

INSTRUCTION NO. 15

Under Specifications § 7.65 (Exhibit 250), Big Sky, LLC is a contractor who engaged sub-contractors to complete various improvements.

INSTRUCTION NO. 16

Agency is the representation of one called the principal by another called the agent in dealing with third persons.

INSTRUCTION NO. 17

Big Sky, LLC, as a contractor, is liable for the actions or inactions of its subcontractors, within the scope of that agency.

INSTRUCTION NO. 18

Centerline (Lawrence Kostaneski), Dream Design International, Inc. (Hani Shafai), J. Scull Construction Service, Inc., R.C.S. Construction, Inc., American Technical Services, Inc., and American Engineering Testing, Inc. were agents of Big Sky, LLC in dealing with the development of Phases 1, 2, 3, and 4 of the Big Sky Subdivision. Therefore, any act or omission of the agents, within the scope of that agency, at that time are considered the act or omission of Big Sky, LLC.

INSTRUCTION NO. 19

If there is a recovery by the City in this case, it will be used to fix the roads in Phases 1, 2, 3, and 4 of the Big Sky Subdivision.

INSTRUCTION NO. 20

If you find that Big Sky LLC failed to properly complete the project, you must fix the amount of money which will reasonably and fairly compensate the City of Rapid City for any of the following elements of loss or harm suffered in person or property proved by the evidence to have been legally caused by Big Sky, LLC's conduct, taking into consideration the nature, extent, and duration of the injury, whether such loss or harm could have been anticipated or not, namely:

The amount of money necessary to fix or repair the public improvements in Phases 1, 2, 3, and 4 of the Big Sky Subdivision, such that the public improvements are approved for acceptance by the City of Rapid City.

Whether damages have been proved by the evidence is for you to determine. Your verdict must be based on evidence and not upon speculation, guesswork, or conjecture.

INSTRUCTION NO. 21

The legal cause need not be the only cause, nor the last or nearest cause. It is sufficient if it concurs with some other cause acting at the same time, which in combination with it causes the injury. However, for legal cause to exist, you must find that the conduct complained of was a substantial factor in bringing about the harm.

INSTRUCTION NO. 22

There are certain rules you must follow as you deliberate and return your verdict. I will list those rules for you now.

First, when you go to the jury room, you must select one of your jurors as foreperson. That person will preside over your discussions and speak for the jury here in court.

Second, in order to reach a verdict in this case, ten or more jurors must agree with that verdict. It is your duty to discuss this case with one another in the jury room. Each of you must make your own conscientious decision, but only after you have considered all the evidence, discussed it fully with your fellow jurors and listened to the views of your fellow jurors. Do not be afraid to change your opinions if the discussion persuades you, but do not come to a decision simply because other jurors think it is right, or simply to reach a verdict. Remember at all times that you are judges of the facts. Your sole interest is to seek the truth from the evidence in the case.

Third, if you need to communicate with me during your deliberations, you may send a note to me through the bailiff, signed by one or more jurors. I will respond as soon as possible either in writing or in open court. Remember that you should not tell anyone, including me, how your vote stands numerically or otherwise, until after you have reached a verdict and reported the same into court.

Fourth, your verdict must be based solely on the evidence and on the law which I have given to you in my instructions. You will be provided a copy of these instructions. You will return these instructions to me with your verdict and the exhibits in this case. Nothing I have said or done is intended to suggest what your verdict should be. That is entirely for you to decide.

Finally, if your verdict is for the plaintiff, use the verdict entitled VERDICT FOR PLAINTIFF. If your verdict is for the defendant, use the verdict entitled VERDICT FOR DEFENDANT. When you have reached your verdict and have completed, dated, and your foreperson has signed the appropriate verdict form, you will report to the bailiff that you have reached a verdict.

You will then be conducted into court where your verdict will be received and announced.

COUNTY OF PENNINGTON) :ss STATE OF SOUTH DAKOTA)	IN CIRCUIT COURT SEVENTH JUDICIAL CIRCUIT
CITY OF RAPID CITY, a municipal corporation, Plaintiff, vs. DOYLE ESTES, individually, and BIG SKY, LLC, Defendants, and BIG SKY, LLC Plaintiff, vs. R.C.S. CONSTRUCTION, INC., Defendant.	Civil No. 51CIV07-000599 **ORDER ON DECEMBER 21, 2016 HEARING**

THIS MATTER having come before the Court on the 21st day of December, 2016 on numerous Motions filed by the parties, the Plaintiff, the City of Rapid City, appearing by and through its counsel, John K. Nooney and Robert J. Galbraith, the Defendants, Doyle Estes and Big Sky, LLC, appearing by and through their counsel, Don Porter and Christopher A. Christianson, and the Defendant, R.C.S. Construction, Inc., appearing by and through its counsel, Steven J. Oberg and Barbara Anderson Lewis, the Court having had

an opportunity to consider the submissions of the parties and hear argument of counsel, and good cause appearing, it is hereby

ORDERED that the Motion for Summary Judgment by Big Sky LLC Re: Violation of South Dakota Constitution is hereby DENIED on the merits, without regard to whether or not the appropriate pleadings have been served on the South Dakota Attorney General's Office consistent with SDCL § 21-24-8; and it is further

ORDERED that the Defendant Doyle Estes' Motion for Partial Summary Judgment Re: Individual Liability on Claims against Big Sky LLC is hereby DENIED; and it is further

ORDERED that the Defendant R.C.S. Construction, Inc.'s Motion for Summary Judgment is hereby DENIED; and it is further

ORDERED that the Motion by Big Sky LLC for Summary Judgment as to Paragraphs 14-17 of the Amended Complaint is hereby DENIED; and it is further

ORDERED that the Plaintiff's Motion for Partial Summary Judgment Related to Developer's Liability is hereby DENIED; and it is further

ORDERED that the Defendants' Motion to Quash Subpoena and Subpoena Duces Tecum for Scott Sumner is hereby GRANTED, without prejudice, to the Plaintiff's ability to serve an amended subpoena narrowing the scope of the information sought, which subpoena shall be served upon counsel for the Defendants in this matter.

Dated this 5th day of January, 2016.2017.

BY THE COURT:

HONORABLE WARREN JOHNSON
Circuit Court Judge

ATTEST:
Ranae Truman
Clerk of Courts

By: Deputy Clerk

Pennington County, SD
FILED
IN CIRCUIT COURT
JAN - 5 2017
Ranae Truman, Clerk of Courts
By Deputy

COUNTY OF PENNINGTON)
:ss
STATE OF SOUTH DAKOTA)

IN CIRCUIT COURT

SEVENTH JUDICIAL CIRCUIT

CITY OF RAPID CITY, a municipal corporation, Plaintiff, vs. BIG SKY, LLC, Defendants,	Civil No. 51CIV07-000599 **ORDER ON DOYLE ESTES' MOTION FOR JUDGMENT AS A MATTER OF LAW**

THIS MATTER having come on for a jury trial before the Court on the 23rd day of January, 2017, through the 27th day of January, 2017; the Court having heard the evidence in this case, including testimony and exhibits, and the Defendant, Doyle Estes, having moved for Judgment as a Matter of Law at the close of Plaintiff's case pursuant to SDCL § 15-6-50(a), it is hereby

ORDERED, ADJUDGED AND DECREED that Doyle Estes' Motion for Judgment as a Matter of Law is hereby GRANTED and Doyle Estes is dismissed from the above-captioned case with prejudice.

Dated this 17th day of March, 2017, nunc pro tunc January 26, 2017

BY THE COURT:

HONORABLE WARREN JOHNSON
Circuit Court Judge

ATTEST:
Ranae Truman
Clerk of Courts

By: Deputy Clerk
(SEAL)

Pennington County, SD
FILED
IN CIRCUIT COURT
MAR 17 2017
Ranae Truman, Clerk of Courts
By_____Deputy

STATE OF SOUTH DAKOTA COUNTY OF PENNINGTON	) SS)	IN CIRCUIT COURT SEVENTH JUDICIAL CIRCUIT

BIG SKY, LLC, Plaintiff, vs. J. SCULL CONSTRUCTION SERVICE, INC., Defendant.	FILE NO. _____ COMPLAINT

Plaintiff Big Sky, LLC, through its undersigned attorneys, for its Complaint against Defendant J. Scull Construction Service, Inc., states as follows:

GENERAL ALLEGATIONS

1. Plaintiff Big Sky, LLC, is, and at all times here material was, a South Dakota Limited Liability Company formed, operating under, and governed by the laws of the State of South Dakota with its principal place of business at 3220 West Main Street, Rapid City, Pennington County, South Dakota.

2. Defendant J. Scull Construction Service, Inc., is, and at all times here material, was a South Dakota Corporation formed, operating under, and governed by the laws of the State of South Dakota with its principal place of business in Rapid City, Pennington County, South

Dakota.

3. Plaintiff, as Owner, and Defendant, as Contractor, entered into a series of construction contracts for a project identified as the Big Sky Subdivision with work to be performed on that project in three phases identified as Big Sky Phase I, Big Sky Phase II, and Big Sky Phase III. (Contracts for these three phases of work on the Big Sky Subdivision will be referred to as "the Subject Contract." The overall project will be referred to as the "Big Sky Subdivision Project.")

4. Pursuant to the terms of the Subject Contract, Defendant agreed to complete the work described in the Contract Documents referenced in the Subject Contract on the Big Sky Subdivision Project, including installation of certain buried utilities, placement and compaction of engineered backfill, and construction of certain streets to be completed with an asphalt finish.

5. The specifications called for in the Subject Contract included the City of Rapid City Standard Specification for Public Works Construction, Rapid Valley Water or Sanitary District Standards, and private utility company standards.

6. Pursuant to the provisions of the Subject Contract, Defendant agreed to construct each phase of the Big Sky Subdivision Project in a good and workmanlike manner, consistent and in accordance with the plans, designs and specifications incorporated therein by reference.

7. The General Conditions of the Subject Contract required that Defendant supervise and direct the work performed on the project and further required that Defendant be solely responsible for and have control over construction means, methods, techniques, sequences and procedures and for coordinating all portions of the work under the Subject Contract.

8. The Subject Contract between the parties further provided that Defendant was responsible to the Plaintiff for acts and omissions of Defendant's employees, subcontractors and

their agents and employees and other persons performing portions of the work under the Subject Contract.

9. The Subject Contract further provided that Defendant was responsible for inspection of portions of the work already performed under the Subject Contract to determine that such portions are in proper condition to receive subsequent work.

10. The Subject Contract further provided that Defendant warranted to Plaintiff that the work performed by Defendant under the Subject Contract would be free from defects and that the work will conform to the requirements of the contract documents.

11. The Subject Contract provided that work not conforming to these requirements may be considered defective.

DEFENDANT'S BREACH OF DUTY

12. The foregoing allegations are incorporated herein by reference.

13. Defendant performed certain portions of its work under the Subject Contract in a negligent, unworkmanlike, defective, and faulty manner.

14. Without limiting the generality of the foregoing, Defendant specifically breached its duties owed to Plaintiff under the provisions of the Subject Contract by having failed to properly compact the soils underlying portions of the project in a good and workmanlike manner and in accord with the plans and specifications for the Big Sky Subdivision Project.

15. Defendant also breached the provisions of the Subject Contract in that Defendant failed to correct the construction deficiencies with regard to improper compaction of the soils underlying portions of the project when called upon to do so.

16. Defendant has also failed to respond to the warranty demands for the remedial work

necessitated by its negligent, unworkmanlike, defective, and faulty workmanship and failure to meet specification requirements.

17. Defendant's breach of these duties, as alleged, is the direct and proximate cause of Plaintiff's damages as alleged below.

BREACH OF DUTY BY DEFENDANT'S EXCAVATION SUBCONTRACTOR

18. The foregoing allegations are incorporated herein by reference.

19. To the best of Plaintiff's knowledge, information and belief, Defendant utilized the services of a subcontractors to perform portions of the work on the Big Sky Subdivision Project including but not limited to use of a subcontractor for the purpose of excavation, backfill, and compaction of the subsurface underlying the asphalt roadways. (Hereafter referred to as "Defendant's excavation subcontractor.")

20. To the best of Plaintiff's knowledge, information and belief, Defendant utilized the services of a subcontractor for the purpose of placement of the asphalt surface on street surfaces as called for in the Subject Contract and the related Contract Documents. The asphalt placed by this asphalt paving subcontractor was placed over the work of the Defendant's excavation subcontractor.

21. Defendant's excavation subcontractor performed the excavation, backfill and compaction on the Big Sky Subdivision Project in a negligent, unworkmanlike, defective, and faulty manner in breach of the duties and obligations owed to Plaintiff by Defendant pursuant to the Subject Contract.

22. The damages caused to Plaintiff, in significant part, arose out of the negligent, unworkmanlike, defective, and faulty performance of Defendant's excavation subcontractor.

23. Defendant is legally responsible to Plaintiff for the negligent, unworkmanlike, defective, and faulty performance of its excavation subcontractor on the Big Sky Subdivision Project.

24. The fact that Defendant and its subcontractors performed their work in a negligent, unworkmanlike, defective, and faulty manner on the Big Sky Project was first made known to Plaintiff when subsidence or settlement occurred on that project after Defendant and its subcontractors had completed their operations on the project.

25. The negligent, defective, and unworkmanlike performance by Defendant's excavation subcontractor was the direct and proximate cause of damage to work performed on the Big Sky Subdivision project by other subcontractors of Defendant, including but not limited to the asphalt paving subcontractor, and to work performed by Defendant itself.

26. The negligent, unworkmanlike, defective, and faulty performance by Defendant's excavation subcontractor, for which Defendant is legally responsible to Plaintiff, is a direct and proximate cause of the damages to Plaintiff as alleged below.

NEGLIGENT SUPERVISION OF SUBCONTRACTOR

27. The foregoing allegations are incorporated herein by reference.

28. Defendant was negligent in its supervision of Defendant's excavation subcontractor in the performance of its work on the Big Sky Development project.

29. Defendant's negligent supervision of Defendant's excavation subcontractor is a direct and proximate cause of damages to Plaintiff as alleged below.

PLAINTIFF'S DAMAGES

30. The foregoing allegations are incorporated herein by reference.

31. As the direct and proximate result of the foregoing alleged breaches of duty by Defendant and its excavation subcontractor, Plaintiff has been caused and required to incur costs of additional engineering and other consulting services necessary to determine the causes of subsidence and settling of the soils underlying certain of the streets constructed by Defendant on the Big Sky Subdivision project and has been caused and required to incur costs of consulting services and remedial work necessary to correct the defective and unworkmanlike performance of Defendant and its excavation subcontractor, all to Plaintiff's damage to date in the amount of Fifty Five Thousand Five Hundred Seventeen Dollars and 12/100 ($55,517.12).

32. Defendant is entitled to prejudgment interest on its damages incurred to date.

33. As the direct and proximate result of the foregoing alleged breaches of duty by Defendant and its excavation subcontractor, Plaintiff will be caused and required to incur additional costs for engineering and other consulting services in the future and will be caused and required to incur additional costs for remedial work in the future necessary to further correct the defective and unworkmanlike performance of Defendant and its excavation subcontractor on the Big Sky Subdivision Project in an amount to be determined by the trier of fact.

WHEREFORE, Plaintiff demands judgment against Defendant as follows:

1. For a Judgment in favor of Plaintiff and against Defendant in the amount of Fifty-Five Thousand Five Hundred Seventeen Dollars and 12/100 ($55,517.12) for damages incurred by Plaintiff to date, together with interest thereon pursuant to the laws in such cases made and provided;

2. For a Judgment in favor of Plaintiff and against Defendant in an amount to be determined by the trier of fact for future costs and damages that Plaintiff will incur to further

correct the defective and unworkmanlike performance of Defendant and its excavation subcontractor;

3. For Plaintiff's costs and disbursements herein; and

4. For such other and affirmative relief as the Court deems just and equitable in the premises.

Dated this 21st day of May, 2003.

BANKS, JOHNSON, COLBATH,
SUMNER & KAPPELMAN, PROF.L.L.C.

By _____
Scott Sumner
Attorneys for Plaintiff

731 St. Joseph St., Suite 300
P.O. Box 9007
Rapid City, SD 57709-9007
Telephone: (605) 341-2400
Facsimile: (605) 342-3616

PLAINTIFF DEMANDS TRIAL BY JURY ON ALL ISSUES OF FACT

Pennington County, SD
FILED
IN CIRCUIT COURT
MAY 22 2003
Ranae Truman, Clerk of Courts
By _____ Deputy

CENTERLINE 0200

STATE OF SOUTH DAKOTA	) SS	IN CIRCUIT COURT
COUNTY OF PENNINGTON	)	SEVENTH JUDICIAL CIRCUIT

BIG SKY, LLC, Plaintiff, vs. R.C.S. CONSTRUCTION, INC., Defendant.	FILE NO. Civ 07-599 COMPLAINT

Plaintiff Big Sky, LLC, through its undersigned attorneys, for its Complaint against Defendant R.C.S. Construction, Inc., states as follows:

GENERAL ALLEGATIONS

1. Plaintiff Big Sky, LLC, is, and at all times here material was, a South Dakota Limited Liability Company formed, operating under, and governed by the laws of the State of South Dakota with its principal place of business at 3220 West Main Street, Rapid City, Pennington County, South Dakota.

2. Defendant R.C.S. Construction, Inc., is, and at all times here material, was a South Dakota Corporation formed, operating under, and governed by the laws of the State of South Dakota with its principal place of business in Rapid City, Pennington County, South Dakota.

3. Plaintiff, as Owner, and Defendant, as Contractor, entered into a construction contract for a project identified as the Big Sky Subdivision Phase IV (the Subject Contract).

4. Pursuant to the terms of the Subject Contract, Defendant agreed to complete the work described in the Contract Documents referenced therein on the Big Sky Subdivision Phase IV

Project, including installation of certain buried utilities, placement and compaction of backfill, and construction of certain streets to be completed with an asphalt finish.

5. The specifications called for in the Subject Contract included the City of Rapid City Standard Specification for Public Works Construction.

6. Pursuant to the provisions of the Subject Contract, Defendant agreed to construct each phase of the Big Sky Phase IV Subdivision Project in a good and workmanlike manner, consistent and in accordance with the plans, designs and specifications incorporated therein by reference.

7. The General Conditions of the Subject Contract required that Defendant supervise and direct the work performed on the project and further required that Defendant be solely responsible for and have control over construction means, methods, techniques, sequences and procedures and for coordinating all portions of the work under the Subject Contract.

8. The Subject Contract between the parties further provided that Defendant was responsible to the Plaintiff for acts and omissions of Defendant's employees, subcontractors and their agents and employees and other persons performing portions of the work under the Subject Contract.

9. The Subject Contract further provided that Defendant was responsible for inspection of portions of the work already performed under the Subject Contract to determine that such portions are in proper condition to receive subsequent work.

10. The Subject Contract further provided that Defendant warranted to Plaintiff that the work performed by Defendant under the Subject Contract would be free from defects and that the work will conform to the requirements of the contract documents.

11. The Subject Contract provided that work not conforming to these requirements may be considered defective.

DEFENDANT'S BREACH OF DUTY

12. The foregoing allegations are incorporated herein by reference.

13. Defendant performed certain portions of its work under the Subject Contract in a negligent, unworkmanlike, defective, and faulty manner.

14. Without limiting the generality of the foregoing, Defendant specifically breached its duties owed to Plaintiff under the provisions of the Subject Contract by having failed to properly compact the soils underlying portions of the project in a good and workmanlike manner and in accord with the plans and specifications for the Big Sky Subdivision Phase IV Project.

15. Defendant also breached the provisions of the Subject Contract in that Defendant failed to correct the construction deficiencies with regard to improper compaction of the soils underlying portions of the project when called upon to do so.

16. Defendant has also failed to respond to the warranty demands for the remedial work necessitated by its negligent, unworkmanlike, defective, and faulty workmanship and failure to meet specification requirements.

17. Defendant's breach of these duties, as alleged, is the direct and proximate cause of Plaintiff's damages as alleged below.

18. As the direct and proximate result of the foregoing alleged breaches of duty by Defendant, Plaintiff has been caused and required to incur, or will be caused and required in the future to incur, costs of additional engineering and other consulting services necessary to determine the causes of subsidence and settling of the soils underlying certain of the streets

constructed by Defendant on the Big Sky Subdivision Phase IV Project and has been caused and required to incur, or will be caused and required in the future to incur, costs of consulting services and remedial work necessary to correct the defective and unworkmanlike performance of Defendant, all to Plaintiff's damage in an amount to be determined by the trier of fact.

19. Plaintiff is entitled to prejudgment interest on its damages.

WHEREFORE, Plaintiff demands judgment against Defendant as follows:

1. For a Judgment in favor of Plaintiff and against Defendant in an amount to be determined by the trier of fact for damages incurred by Plaintiff to date, and that will be incurred by Plaintiff in the future, together with interest thereon pursuant to the laws in such cases made and provided;

3. For Plaintiff's costs and disbursements herein; and

3. For such other and affirmative relief as the Court deems just and equitable in the premises.

Dated this 30th day of March, 2007.

BANKS, JOHNSON, COLBATH,
SUMNER & KAPPELMAN, PROF. L.L.C.

By _____
Scott Sumner
Attorneys for Plaintiff

731 St. Joseph St., Suite 300
P.O. Box 9007
Rapid City, SD 57709-9007
Telephone: (605) 341-2400
Facsimile: (605) 342-3616

PLAINTIFF DEMANDS TRIAL BY JURY ON ALL ISSUES OF FACT.

STATE OF SOUTH DAKOTA)		IN CIRCUIT COURT
)SS		
COUNTY OF PENNINGTON)		SEVENTH JUDICIAL CIRCUIT

* *

CITY OF RAPID CITY, a municipal corporation,	FILE NO.51CIV07-000599
Plaintiff,	
vs.	
DOYLE ESTES, individually, and BIG SKY, LLC,	JURY TRIAL VOLUME 3 of 6 (Pages 176 - 415)
Defendants.	

* *

DATE: January 24, 2017

PLACE: Pennington County Courthouse
Rapid City, South Dakota

BEFORE: THE HONORABLE WARREN G. JOHNSON
Circuit Court Judge
Rapid City, South Dakota

A P P E A R A N C E S

FOR THE PLAINTIFF: MR. JOHN K. NOONEY and
MR. ROBERT J. GALBRAITH
Attorneys at Law
632 Main Street
Rapid City, South Dakota

FOR THE DEFENDANTS: MR. DONALD A. PORTER and
MR. CHRISTOPHER A. CHRISTIANSON
Attorneys at Law
PO Box 290
Rapid City, South Dakota

STATE OF SOUTH DAKOTA)		IN CIRCUIT COURT
)SS		
COUNTY OF PENNINGTON)		SEVENTH JUDICIAL CIRCUIT

* *

CITY OF RAPID CITY, a municipal corporation,	FILE NO.51CIV07-000599
Plaintiff,	
vs.	
DOYLE ESTES, individually, and BIG SKY, LLC,	JURY TRIAL Volume 4 of 6 (Pages 416 - 620)
Defendants.	

* *

DATE: January 25, 2017

PLACE: Pennington County Courthouse
Rapid City, South Dakota

BEFORE: THE HONORABLE WARREN G. JOHNSON
Circuit Court Judge
Rapid City, South Dakota

A P P E A R A N C E S

FOR THE PLAINTIFF: MR. JOHN K. NOONEY and
MR. ROBERT J. GALBRAITH
Attorneys at Law
632 Main Street
Rapid City, South Dakota

FOR THE DEFENDANTS: MR. DONALD A. PORTER and
MR. CHRISTOPHER A. CHRISTIANSON
Attorneys at Law
PO Box 290
Rapid City, South Dakota

that's true.
Q Things that were incomplete or had not been done correctly. Can you think of anything else that would go on a punch list?
A No.
Q I then, Mr. Estes, draw your attention to Exhibit 100.
MR. NOONEY: I offer Exhibit 100, please.
MR. PORTER: No objection.
THE COURT: Exhibit 100 is received.
Q (By Mr. Nooney) Mr. Estes, Exhibit 100 is a letter you received from the City of Rapid City on May 2nd and it would be a punch list of certain defects in the Big Sky Subdivision Phases 1, 2, and 3; is that correct?
A Now, you keep using the word defects, and the second sentence of this says, "The following items will need to be finished or repaired..." So to me the word finished does not say there was a deficiency. It means that it needs to be completed.
Q Well, let's look at the first subparagraph, Mr. Estes, if we can, the first enumerated paragraph where the City wrote you and told you that there had been asphalt failure and settling had been noticed on Avenue A and Hansen. Do you see that?
A I do.
Q You also see the failures include asphalt stress marks,

that certain things were going to have to be done as it concerned the construction of Degeest Street; isn't that true?

A Would you say that again, John?

Q Yes. As you received this letter, Mr. Estes, it came to your attention that as it concerned your anticipated development in Phase 4, Degeest Street, that you were going to have to make certain changes in how the streets were being constructed because of the unstable soils in that area. You understood that correctly?

A Yeah, I think in the earlier documents we looked at before lunch, that there was handwritten notes about a 5-inch asphalt and 12-inch course. I think there was some handwritten notes on that perhaps from Shafai.

Q And that was a change from what had been done on the earlier Phases 1, 2, and 3, correct?

A I couldn't tell you.

Q I would ask you then to take a look at Exhibit 101, if you would, please. Pardon me. Let's go to 102, Doyle, if we could, please.

MR. NOONEY: I would offer Exhibit 102.

MR. PORTER: No objection.

THE COURT: Exhibit 102 is received.

Q (By Mr. Nooney) Shortly after you received the punch list from the City of Rapid City on the earlier phases of

Big Sky, one of the first things you did, sir, was you sent a facsimile and an accompanying letter off to Scull Construction telling them of the problems, didn't you?

A That's what it appears.

Q And this would be probably, Mr. Estes, fair to say, the first time you said, This isn't my fault, it's someone else's fault. That's what you were doing.

A I was inquiring in this letter. I'm inquiring which of those items Mr. -- Scull Construction Services, Inc., would be intending to take care of.

Q And you knew at the time you received the letter marked as Exhibit 100 that Big Sky Development nor anyone acting on its behalf had yet received a letter of acceptance from the City. You understood that correctly?

A I think I said several times that I haven't ever received a letter of acceptance.

Q Okay. Next to the last paragraph in Exhibit 102, you reference that you had a meeting with the homeowners. Were you having a meeting with the homeowners in the Big Sky Subdivision to talk to them about the failure of the roads?

A I don't remember what the discussion subjects were, but there would be regular -- irregular meetings of the homeowners out there.

Q Well, you have invited Mr. Scull or Danney Wagner on his

A It was a letter addressed to me.
Q And then after you received the letter, did you circulate that with any of the contractors or engineers that had done the work for you on the project?
A I may well have.
Q Okay. Do you know whose writing it is who identifies the various names on the left-hand margins of Exhibit 105?
A Do I know for sure?
Q Well, who do you think they are, Doyle?
A I think it might be Jim Scull.
Q Okay. Because you would have asked Mr. Scull to take a look at items 1 through 11 and you would have met with individuals like Mr. Scull and discussed this letter; isn't that correct?
A I may have.
Q And the reason you would have met with Mr. Scull is, you would have met with him for purposes of understanding who was going to address the various items identified as 1 through 11 on Exhibit 105; isn't that correct?
A It would be a logical thing for me to have done, yeah.
Q Okay.
MR. NOONEY: I'll offer Exhibit 105 again, Your Honor.
MR. PORTER: No objection.
THE COURT: Exhibit 105 is received.
Q (By Mr. Nooney) And as you look at Exhibit 105, it was

your understanding after meeting with Mr. Scull and perhaps others, you were working through identifying who was going to address the various items identified in that letter; is that right?

A I would guess we may have done that, yes.

Q For instance, under the first category where it talks about asphalt failures and it provides further detail about alligator cracking and things such as that, at this point in time did you go out to the subdivision and take a look at the condition of the roads in Phases 1, 2, and 3?

A I probably did.

Q Okay. And when you went out and looked at the roads, did you notice that, in fact, there was stress marks and alligator cracking in the pavement?

A I don't know exactly what those words mean, but I could see there were some problems with the pavement.

Q Okay. So when you were out there, although you're not an engineer, you could observe the asphalt and it was apparent to you as a layperson that the asphalt had already begun to fail.

MR. PORTER: Objection, Your Honor. Mr. Nooney is pointing to something, but — or it's — the question is ambiguous as to what he's talking about. Is it all the roads? Is it a section of road? I mean, I think it

visual observation, though, right?
A Yes, sir.
Q And is that, Mr. Shafai, what you would expect some other like engineer or engineering technician to do? To walk the area and make a visual observation as to what needs to be taken care of?
MR. PORTER: Objection; foundation.
THE COURT: Overruled.
A To come up with a more accurate estimate than mine? I would have, actually, a geotechnical engineer drill some holes to see what -- which -- which trenches needed to be recompacted more and how far down.
Q (By Mr. Nooney) But you had -- I should say Big Sky had had that done earlier, hadn't they? Because we had talked about some geotechnical testing that had been done in Exhibit 132 back in November of 2006. That had been done before, right?
A What was done was limited just to try to really place, if you want to call it cosmetics. Like there were a few manholes sticking out of the ground about 12 inches and it was unsafe to travel, so we put an edge drain to try to minimize the rate of settlement and also make those manholes in some of the areas safer, I believe.
Q Mr. Shafai, that's all I have for you. Thank you very much.

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

Appeal No. 28205
Notice of Review No. 28227

CITY OF RAPID CITY,
a Municipal Corporation,

Appellant,

vs.

BIG SKY, LLC and
DOYLE ESTES,

Appellees.

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

The Honorable Warren E. Johnson
Circuit Court Judge

Notice of Appeal filed April 3, 2017
Notice of Review filed April 20, 2017

APPELLEES' BRIEF

Donald A. Porter
Jess M. Pekarski
Christopher A. Christianson
COSTELLO, PORTER, HILL,
BUSHNELL & CARPENTER LLP
PO Box 290
Rapid City, SD 57709
605-343-2410
Attorneys for Appellees

John K. Nooney
Robert J. Galbraith
NOONEY & SOLAY
632 Main Street, 2nd Floor
PO Box 8030
Rapid City, SD 57709
605-721-5846
Attorneys for Appellant

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JURISDICTIONAL STATEMENT

Judgment on the jury verdict was filed February 9, 2017, with notice of entry of that judgment filed February 13, 2017. Appellant [hereinafter City] filed its motion for new trial on February 28, 2017, which was denied on March 17, 2017. City's notice of appeal was filed April 3, 2017, and Appellees [hereinafter Big Sky and Estes] filed their Notice of Review on April 20, 2017.

STATEMENT OF THE LEGAL ISSUES

1. Whether the trial court's waiver instructions were proper and supported by the evidence?

The trial court held in the affirmative.

Subsurfco, Inc. v. B-Y Water Dist., 337 N.W.2d 448 (S.D. 1983)

Reif v. Smith, 319 N.W.2d 815 (S.D. 1982)

CJP Contractors, Inc., v. U.S., 45 Fed. Cl. 343 (Fed. Cl. 1999)

City of Gering v. Patricia G. Smith Co., 337 N.W.2d 747 (Neb. 1983)

2. Whether the trial court's estoppel instruction was proper?

The trial court held in the affirmative.

Northern Imp. Co., Inc. v. South Dakota State Highway Commission, 267 N.W.2d 208 (S.D. 1978)

Randolph County v. Post, 93 U.S. 502 (1876)

Missouri River Tel. Co. v. Mitchell, 116 N.W. 67 (S.D. 1908)

City Street Imp. Co. v. City of Marysville, 101 P. 308 (Cal. 1909)

3. Whether the trial court's instruction on limitations was proper and the jury could find City's claim accrued when it had notice of defects?

The trial court held in the affirmative.

Kobbeman v. Oleson, 1988 SD 20, 574 N.W.2d 633

Deutsche Bank Nat. Trust Co. v. Flagstar Capital Markets Corp., 36 N.Y.S.3d 135 (N.Y. App. Div. 2016)

Huron Center, Inc. v. Henry Carlson Co., 2002 SD 103, 650 N.W.2d 554

Corner Const. Co. v. U.S.F.&G. Co., 2002 SD 5, 638 N.W.2d 887

4. Whether the trial court should have given City's nuisance instructions?

The trial court held in the negative.

Clauson v. Kempffer, 477 NW2d 257 (S.D. 1991)

Jordan v. Com., 549 S.E.2d 621 (Va. App. 2001)

Aberdeen Cable TV Service, Inc. v. City of Aberdeen, 176 N.W.2d 738 (S.D. 1970)

Tibbitts v. Anthem Holdings Corp., 2005 SD 26, 694 N.W.2d 41

5. Whether the trial should have held Big Sky liable as a matter of law?

The trial court held in the negative.

City of Rapid City v. Estes, 2011 SD 75, 805 N.W.2d 714

Weekly v. Wagner, 2012 SD 10, 810 N.W.2d 340

Samson Exploration, LLC v. T.S. Reed Properties, Inc., 521 S.W.3d 26 (Tex.App. 2015)

6. Whether all evidence of Big Sky's settled claims against contractors should have been excluded?

The trial court held in the affirmative.

First Premier Bank v. Kolcraft Enterprises, Inc., 2004 SD 94, 686 N.W.2d 430

Cleere v. United Parcel Service, 669 P.2d 785 (Okl. 1983)

Whaley v. Lawing, 352 So.2d 1090 (Ala. 1977)

Estate of Spinosa, 621 F.2d 1154 (1st Cir. 1980)

7. Whether Estes should have been dismissed in his individual capacity?

The trial court held in the affirmative.

American Home Assurance Co. v. Phineas Corp., 347 F.Supp.2d 1231 (M.D. Fla. 2004)

Dakota Fire Ins. Co. v. J & J McNeil, LLC, 2014 SD 37, 849 N.W.2d 648

SDCL 47-34A-303(a)

SDCL 47-34A-201

8. Whether City's ordinance violates South Dakota Constitution Article III, §26?

The trial court held in the negative.

City of Chamberlain v. R.E. Lien, Inc., 521 N.W.2d 130 (S.D. 1994)

Lighton v. Township of Abington, 9 A.2d 609 (Pa. 1939)

Peters v. City of Morehead, 98 S.W.2d 41 (Ky. App. 1936)

Specht v. City of Sioux Falls, 526 N.W.2d 727 (S.D. 1995)

South Dakota Constitution Article III, §26

SDCL 9-45-15

STATEMENT OF THE CASE AND FACTS

This case was tried in the Seventh Judicial Circuit Court, Pennington County, before the Honorable Warren Johnson, retired Circuit Court judge. This Court stated the

background of this case in the prior appeal, City of Rapid City v. Estes, 2011 SD 75, 805 N.W.2d 714, (Estes I) and it will not be repeated. After long inactivity upon remand, in 2016 City amended its complaint, which originally sought injunctive relief, to add damage claims and a nuisance claim. (App. 1) The trial court allowed discovery and scheduled a jury trial. Claims related to most subdivision phases at issue were settled, and all that remained for trial were subdivision phases as to which Big Sky had been the developer. The court retained Estes as a party, although the surviving counts made no allegations against him, until the end of City's case at trial when the court dismissed Estes (App. 16); found that injunctive relief was not appropriate because City had a claim for damages; and declined to instruct on nuisance (TT 825-26). The jury returned a general verdict in favor of Big Sky.

As City's brief indicates, the streets in Phases I, II, III and IV of the Big Sky subdivision outside the municipal limits of Rapid City settled significantly following construction due to inadequate compaction on streets and utility trenches by Big Sky's contractors, J. Scull Construction Service on Phases I, II and III, and RCS on Phase IV. City's Brief at 6-7. In the spirit of avoiding "needless repetition," SDCL 15-26A-60, Big Sky follows City's lead and provide "additional facts related to the specific arguments," City's Brief at 7, as those facts become relevant.

1.

THE TRIAL COURT'S WAIVER INSTRUCTIONS WERE PROPER AND SUPPORTED BY THE EVIDENCE

The trial court addressed the issue of waiver in three instructions. Instruction No. 9 (App. 2) told the jury Big Sky had the burden to show City "waived portions of the city ordinance, specifications or agreement between the parties." Instruction No. 10 (App. 3)

covered the elements of waiver. Instruction No. 13 (App. 4) gave the jury the substance of City's ordinance requiring subdivision improvements to be built pursuant to City specifications; quoted City Specification §7.65 regarding the need for the "documentation" of project acceptance by an "acceptance letter" and that the warranty period commenced after acceptance; and informed the jury that the City never "formally accepted" the improvements at issue or issued any "final acceptance letters as referenced in the specifications." This instruction largely quoted Estes I, supra, 2011 SD 75, ¶13, 805 N.W.2d at 719.[1] City did not attack Instruction No. 13 in its motion for new trial, although it objected at trial to the final phrase of Instruction No. 13: "Big Sky, LLC remains liable until the City accepts the improvements by a final acceptance letter, or unless the City waived the requirement of a formal acceptance letter." (Emphasis supplied.)

City implies that the specifications at the heart of this case are purely an enactment to regulate the construction of improvements by subdivision developers. In fact the specifications, made a part of the record by Affidavit of Jess M. Pekarski dated June 7, 2016, govern the administration of contracts for City projects put out for public bids. These define "contractor" as a person "contracting with the City of Rapid City for performance of the prescribed work covered by the Contract," and includes the "Standard Specifications" themselves within the terms "'Contract' or 'Contract Documents'" in the "written agreement between the Owner at the Contractor." City defined "Owner" to

[1] Instruction No. 13 adopted Estes I as the "law of the case," (TT at 729). Big Sky and Estes have raised this issue in Paragraphs 7 and 13 of their Notice of Review, and should this case be remanded for a second trial, this Court should make it clear that this instruction was error for the reasons stated in the section addressing City's argument that Big Sky was liable as a matter of law, infra.

mean City. Standard Specification 7.1. The evidence showed that the job of City's "inspectors," whose role is established by Standard Specification 7.7, is to enforce compliance with these same specifications on both "city-let jobs, the ones that involved the city money [and the] subdivisions, the ones that the developers were building." (TT 758, 765, 800.)

City's argument that these specifications constitute a statutory enactment for a public purpose that cannot be waived cites no authorities involving the administration of municipal construction contracts. City's cases involve attempts by parties to real estate contracts to waive legislatively mandated disclosure requirements, Lucero v. Van Wie, 1999 SD 109, 598 N.W.2d 893; Loughrin v. Superior Court, 19 Cal.Rptr.2d 161 (Cal. App. 1993); an attempt by a hospital to obtain a release for future negligence in violation of a statute; Tunkl v. Regents of the University of California, 383 P.2d 441 (Cal. 1963); and an attempt by a tortfeasor to waive a statute of limitations to artificially perpetuate insurance coverage. Kobbeman v. Oleson, 1998 S.D. 20, 574 N.W.2d 633. As to the construction of public improvements, however, it is settled that a "contractor can use the government's unprotesting observation or acceptance of non-contractual performance to demonstrate that the government has constructively waived a contract requirement." 64 Am.Jur.2d Public Works and Contracts §104. It is "widely recognized that…[municipal] contracts are subject to the general substantive law relating to contracts'… [including] the general principle of contract law permitting a party to waive a beneficial contract provision." Riggins v. City of Kansas City, 351 S.W.2d 742, 751-752 (Mo. App. 2011) (emphasis in original). See also Atlantic City v. Warren Bros. Co., 226 F. 372, 382 (3rd Cir. 1915).

This Court, in Subsurfco, Inc. v. B-Y Water Dist., 337 N.W.2d 448 (S.D. 1983), held that a public entity, the B-Y Water District (B-Y), in a lawsuit with contractors, was subject to the doctrine of waiver where, among other things, "B-Y had employee-inspectors present during construction who observed all aspects of the pipeline construction" and had an "engineer" with the authority to "reject work for failure to comply with the contract," but who rejected essentially no work at the time it was performed. 337 N.W.2d 451, 455. Subsurfco quoted Reif v. Smith, 319 N.W.2d 815, 817 (S.D. 1982) for the proposition that "repeated or entire disregard for contract provisions will operate as a waiver" and held that it was error to refuse the contractors' "proposed jury instructions regarding waiver." 337 N.W.2d at 456. The relationship between Big Sky and City created by City's Specifications is no different than that between the B-Y Water District and its contractor. City Specification 7.6 required that "[a]ll the work shall be done under the direct observation of the Engineer," (emphasis supplied), with "Engineer" defined to include the Engineer's "duly authorized agents," Specification 7.1. Specification 7.7 deemed City inspectors to be "representatives of the Engineer" with the duty to report "any and all deviations from the … specifications" and with the power to order work stopped in the event of violations. See also Northern Imp. Co., Inc. v. South Dakota State Highway Commission, 267 N.W.2d 208, 214 (S.D. 1978) (given state engineer's actions under his broad powers under a state construction contract, the State itself "may be held to have waived [the] provisions" of that contract.)

There can thus be no doubt that if City had directly contracted with a private builder for the construction of these improvements and thereafter sued him for noncompliance with City specifications, that private contractor could raise waiver as a

defense by showing that City "inspectors observed all aspects of the … operation [and] no work was rejected by the [City] 'engineer' or inspectors at the time it was performed." Subsurfco, supra, 337 N.W.2d at 451. Where the City merely acted "'to require [a] subdivider to do the original work of placing the streets in a proper condition…and to relieve the public to this extent of the burden that would otherwise exist'" to construct those streets, Evola v. Wendt Const. Co., 338 P.2d 498, 501 (Cal. App. 1959), and the City exercised the same sort of conduct constituting "repeated or entire disregard" for the same specifications, the City is subject to the same defense of waiver.

"When considering whether there is evidentiary support for an instruction, a reviewing court must give the evidence the most favorable treatment it will reasonably bear." Robbins v. Buntrock, 1996 S.D. 84,¶ 14, 550 N.W.2d 422, 427. There was abundant evidence to support these instructions on waiver. "A constructive waiver of specifications occurs…where the government 'has administered an initially unambiguous contract in such a way as to give a reasonably intelligent and alert opposite party the impression that a [specification] has been suspended or waived.'" CJP Contractors, Inc. v. U.S., 45 Fed. Cl. 343, 376 (Fed.Cl. 1999). A city was found to have waived its claim that street pavement settled due to noncompliance with the specified thickness of the concrete in City of Wanwatosa v. Jacobus & Winding Concrete Const. Co., 271 N.W. 21, 25 (Wis. 1937): the "concrete was laid upon grades furnished by the city engineer. The work was under the supervision of the city engineer and was from time to time inspected by either him or his assistants or representatives. That the concrete was not as thick as it should have been in certain places was at all times easily discoverable and could have been promptly remedied with little additional effort or expense."

The jury heard evidence from Lawrence Kostaneski, the former manager of City's engineering division (TT 431-432), that each phase of a subdivision had an assigned City engineer, and that each engineer had at least one City inspector "tied into" him for that phase. (TT 521.) These inspectors, for a fee consisting of 1 ½ percent of the development cost paid by the developer (TT 522), "monitored" the work to observe compliance with City Specifications. (TT 710-711, 811-813; Trial Exhibit 525.) Estes testified that he had understood that his payment of these fees meant City would inspect the work of Big Sky's contractor. (TT 332-33).

Ron Eikenberry, City inspector on all four Big Sky phases (TT 579), testified that his role was "to observe the construction that's going on…you work with the contractor, make sure that they are, in general, following the specifications of the City of Rapid City, make sure they're doing it properly." (TT 758) His visits were recorded on a daily basis in journals (TT 579). Exhibit 509 reflected Eikenberry's notes for Phase I, with the observation that the compaction tests for sewer main trenches and subgrade for this phase "passed." (TT 761-762; Exhibit 509 at Scull 0384, 0391.) Exhibit 514, Eikenberry's notes for Phase II, recorded the fact that the sewer main trenches and the subgrade compaction and other infrastructure tests "passed." (TT 766-769; Exhibit 514 at Scull 0375, 0380.) Eikenberry and another City inspector, Kelvin Bucholz, split duties as to Phase III, and Exhibits 522 and 520 reflect their notes (TT 770, 802) on the "passing" status of the sewer main trenches and subgrade compaction and other testing. (TT 772-774; Exhibit 522 at Scull 0362-0363.) Kostaneski admitted that "[c]ompaction test failures are readily apparent to everyone," and agreed that if there was any failure, "the City would see it and have an opportunity to take action." (TT 524.)

The compaction test results, which had to show "passing" status before asphalt could be applied (TT 762, 783-84) were sent to the responsible City engineer (TT 763, 779), as were the City inspector's project diaries (TT 763). The evidence showed that the City engineer relied on inspectors "to relay to him that the work was done and that would be it," and that no contractor would be able to "get to the point of paving the streets… without meeting all City Specifications." (TT 783-784.) As to Phases I, II, and III, Eikenberry's logs established that these specifications had been met and that, as Eikenberry put it, the roads were "drivable, in good shape," and the projects were "normal." (TT 774.)

For Phase IV, the City documentation was even more direct than Eikenberry's logs, in a newly-adopted form (TT 776) dated March 18, 2000, a "Construction Close-Out Checklist," Exhibit 545 (App. 8), that listed "acceptance dates" for "tasks that were completed during the course of construction and then completed and okayed…by the City," (TT 777), including compaction tests. (TT 779-780.) David Johnson, the City "project engineer" for Phase IV (TT 806-807), testified that on August 30, 2000, he "determined that the work [on this phase] was substantially complete," all required testing was done, and the phase was open to traffic. (TT 819-820.)

The record is thus no different than that in Subsurfco, supra, where this Court held that a jury issue on waiver was presented where the water district's "inspectors observed all aspects of the pipeline operation…With a few minor exceptions, no work was rejected by the "engineer" or inspectors at the time it was performed." 337 N.W.2d at 451. The jury could therefore infer that if there had been any noncompliance with City Specifications, City's daily monitoring, with no objections voiced, would have given

"'a reasonably intelligent and alert [developer] the impression that [any specifications that had been violated had] been suspended or waived.'" CJP Contractors, Inc., supra.

The jury also received evidence that City at least impliedly "accepted" the work. The "law is clear and generally without dispute that 'An…implied acceptance of work as in compliance with a building contract operates as a waiver of defective performance.'" City of Gering v. Patricia G. Smith Co., 337 N.W.2d 747, 750 (Neb. 1983). There is no doubt that "formal acceptance can be waived," Housing Authority of City of Pittsburgh v. Sanctis Const., 43 A.2d 581, 583 (Pa. Super. 1945), and acceptance "may be implied from conduct." Woolfolk v. Jack Kennedy Chevrolet Co., 296 S.W.2d 511, 515 (Mo. App. 1957). The record showed that during the time at issue here, "acceptance" would have to be "implied," because there was no formal policy on acceptance when these phases were constructed, and that no "acceptance" letters were being sent. (TT 530, 750-751, 822.) In spite of the lack of such letters, developments were being accepted. A former City project engineer, Hani Shafai (TT 551-552), testified that when he left the City and began to be involved in private developments in 1999, no City letters of acceptance were sent, even though the projects were "finished" and the City had opened the roads. (TT 608).

Kostaneski testified that when he was manager of City's engineering department, the engineers below him were accepting projects on behalf of the City. (TT at 487) This is borne out by City Specification 7:55, which, as this Court noted in Estes I, supra, 2011 SD 75, ¶14, 805 N.W.2d 719, provides that the "'Engineer, upon completion of the contract work, shall satisfy himself by examination and test that the work has been finally and fully completed in accordance with the Specifications and Contract, and report such

completion to the Owner.'" The record shows that Eikenberry, as the Engineer's "representative," documented detailed findings with regard to testing and completion as to Big Sky Phases I, II and III in his log books, and that David Johnson, as project engineer, documented similar findings as to testing and completion as to Big Sky Phase IV in his "Construction Close-Out Checklist." The "broad authority" given these individuals under the Specifications is as great as that allowed the engineer in Northern Imp. Co., Inc., supra, 267 N.W.2d at 214, to waive a requirement that acts under a state contract be in writing. Plainly, the jury could find that City either waived or was estopped from raising any objection that the "acceptances" made by Eikenberry and Johnson were insufficiently formal to constitute an implied "acceptance" under Specification 7.65.

Indeed, City's actions demonstrate City considered that it had "accepted" Big Sky Phases I, II and III. Exhibit 100 (App. 9) stated in Paragraph 1 that "'Due to these premature failure the City is requiring an additional 2-year extended warranty on these streets once the repairs are completed to the City's satisfaction." (Emphasis supplied.) Specification 7.65 provides that

> The date of the acceptance letter documents the start of the two-year warranty period, during which the Contractor shall be notified in writing of any defects in the project and shall correct the defects at his expense...The Owner reserves the right to extend the warranty period if excessive problems are apparent during the initial two-year period.

(Emphasis supplied.) This Court specifically noted, and supplied emphasis to, this provision in Estes I, supra, 2011 SD 75, ¶5, 805 N.W.2d at 76. City's warranties could not have commenced without an "acceptance," as City's former engineer Shafai testified

(TT 615), and likewise could not have been "extended" unless the warranties were already in place.

As to Phase IV, Exhibit 545 explicitly states that there was "acceptance" of testing and substantial completion of that phase. This document thus "substantially complied" with Specification 7.65, since it satisfied the "substance essential to every reasonable objective" of the Specification. Wagner v. Truesdell, 1998 SD 9, ¶7, 574 N.W.2d 627, 629. The objective of Specification 7.65 is to "document" that:

> 1) Construction has been substantially completed and the facilities can be put to their intended use.
>
> 2) All testing has been completed, and the required results have been met.

See Estes I, supra, 2011 SD 75, ¶5, 805 N.W.2d at 716. Exhibit 545 "actually complies" with this "essential objective,' and if it is not a formal "acceptance letter," it is certainly an implied acceptance.[2]

The jury thus could infer from the evidence that City either "accepted" these phases, or waived formal acceptance through its course of conduct, Reif, supra, 319 N.W.2d at 817, and that in so doing, waived any non-compliance with City Specifications in the construction of those phases. City's argument that Exhibit 133, a post-suit "walk-through," (TT 585) that can best be described as settlement discussions between Big Sky

[2] These issues were presented to the trial court by the Motion by Big Sky LLC for Summary Judgment as to Paragraphs 14-17 of the Amended Complaint dated December 7, 2016, and it is clear that the trial court erred in denying that motion by its order dated January 2, 2017 and not ruling that City had accepted these phases as a matter of law. See Nicolay v. Stukel, 217 SD 45, §8 n.3, 609 N.W.2d at 757 n.3. Big Sky and Estes have raised the trial court's error in this regard by Notice of Review Paragraph 3, and this Court should reverse the trial court and hold that City accepted these phases as a matter of law.

and City, is scarcely inconsistent with waiver, since it is no admission of anything. See SDCL 19-19-408. This "Court will uphold a jury verdict 'if the jury's verdict can be explained with reference to the evidence, 'viewing the evidence in a light most favorable to the verdict,'" Hewitt v. Felderman, 2013 SD 91, ¶14, 841 N.W.2d 258, 262.

Finally, even if the waiver instructions were error, City failed to show that the instructions as a whole were erroneous, Behrens v. Wedmore, 2005 SD 79, ¶37, 698 N.W.2d 555, 570, and that the "'jury probably would have returned a different verdict if the faulty instruction had not been given.'" Welch v. Hasse, 2003 SD 141, ¶34, 672 N.W.2d 689, 700. City's brief never challenges, or even mentions, the trial court's reasons for rejecting City's jury instruction arguments and denying City's motion for a new trial. In alluding to Big Sky's argument that "the City hadn't spent any money on the property," the trial court held that the "jury could have properly found that the City wasn't damaged or had not been damaged. I'm going to deny the motion for new trial." (March 17, 2017 Hearing at 15-16). The record unequivocally showed that City had spent no money to fix these roads, and as a matter of policy would not spend money on improvements beyond its municipal limits (TT 683-684). Big Sky, without objection, urged the jury to use that as a basis to find that, even if Big Sky was liable, City had suffered no damages (TT 868). A denial of a motion for new trial will not be reversed "unless it appears affirmatively from the record there has been an abuse of discretion." Robbins, supra, 1996 S.D. 84,¶ 16, 550 N.W.2d 422, 427 City, which has not even addressed the trial court's ruling on the motion for new trial, has failed to show that ruling was an abuse of discretion and it must be affirmed. Moreover, "[b]ecause the jury returned a general verdict, we are precluded from reviewing [City's] liability issues. '[I]n

a civil case, if a general verdict is handed down and the jury could have decided the case on two theories, one proper and one improper, the reviewing court will assume that it was decided on the proper theory'…[when] a general verdict form [is] used, 'we have no way of knowing whether the jury' based its decision" on the issue of liability or damages." Lenards v. DeBoer, 2015 SD 49, ¶ 14, 865 NW2d 867, 871. As in Lenards, "even if the circuit court erred in submitting the case to the jury on liability and in giving an [improper waiver] instruction, the jury verdict must be presumed to be supported because of the disputed damages" and this Court must "affirm without reaching [City's] liability issues." Id., 2015 SD 49, ¶ 15, 865 NW2d 867, 871.

2.

THE TRIAL COURT'S ESTOPPEL INSTRUCTION WAS PROPER

City's estoppel arguments fail for much the same reasons as its contentions on waiver. While there is a rule in South Dakota that estoppel should only be applied against public entities in exceptional circumstances in situations involving the enforcement of zoning ordinances, Even v. City of Parker, 1999 SD 72, ¶11, 597 N.W.2d 670, 674, this Court has imposed no such limitation when a public entity contracts for the construction of public improvements. Northern Imp. Co., Inc., supra, 267 N.W.2d at 214. As noted above, municipal "contracts are subject to the general substantive law relating to contracts," Riggins, supra, 351 S.W.3d at 751-752, and it has long been held that it would "unreasonably restrict the rights and powers of a municipal corporation [to] hold that it…could not estop itself, like other parties to a contract." Randolph County v. Post, 93 U.S. 502, 513 (1876). When a city has appeared to give its consent to private construction work in the city, the city "may estop itself by its conduct, as well as a natural

person." Missouri River Tel. Co. v. Mitchell, 116 N.W. 67, 70 (S.D. 1908). As with the waiver issue, the transaction between City and Big Sky, involving the same Specifications employed by City when it contracts for the construction of public improvements, is surely subject to the same defenses that could be raised as a defense by a private contractor.

The same facts demonstrating waiver also demonstrate estoppel:

> the approval of the work by the city engineer under whose supervision a contract for public improvement is to be performed will…estop the municipality from contesting the contractor's right to the contract price because of failure to perform the work according to the specifications, so far as defects are concerned which were discoverable by reasonable attention to the duties of inspection.

City of Wanwatosa, supra, 271 N.W. at 23, citing, inter alia, McGuire v. Rapid City, 43 N.W. 706 (Dak. 1889). City's suggestion that Big Sky did not alter its position based on City's acts ignores the evidence that Big Sky could only have paved over the ground that City now says was improperly compacted if a City inspector, the agent of City's Engineer, had agreed that the compaction tests met Specifications. (TT 783-784.) Such circumstances estop a city from later claims of defective performance:

> The defects now alleged in regard to the work…were matters which…should have been observed by the engineer, through his representatives, at the time the work was being done, and when they could have easily been remedied. No portion of the work could be properly covered with earth until it had been inspected and found in proper shape, and there is no pretense that any of it was so covered prior to such inspection as was desired or requested by the inspectors. When it was allowed to be so covered, there was a practical approval and acceptance of the work by the engineer, through his representatives.

City Street Imp. Co. v. City of Marysville, 101 P. 308, 312-313 (Cal. 1909) (emphasis supplied). The jury could infer that any compaction defects were, due to the presence of City inspectors during the testing, "easily discoverable and could have been promptly remedied with little additional effort or expense," City of Wanwatosa, supra, 271 N.W. at 25. Because City inspectors allowed the paving to be installed, making any compaction repair much more expensive, the jury could legitimately find City was estopped from its complaints. The giving of this instruction was proper and supported by the evidence.

Even if this estoppel instruction was error, City again failed to show that the instructions as a whole were erroneous or that the "'jury probably would have returned a different verdict if the faulty instruction had not been given.'" Welch, supra. The jury might have found that City suffered no damages, and held for Big Sky on that basis; the use of the general verdict means this Court has no way to know whether the jury decision was based on liability or damages. Lenards, supra. City's arguments regarding the estoppel instruction are without merit and the judgment should be affirmed.[3]

3.

THE TRIAL COURT'S INSTRUCTION ON LIMITATIONS WAS PROPER AND THE JURY COULD FIND THAT CITY'S CLAIM ACCRUED WHEN IT HAD NOTICE OF DEFECTS

City engages in a baffling argument that its claim for non-compliance with its Specifications accrued only when it had "notice, or constructive notice, that Big Sky and Estes did not intend to comply with §7.65 and complete the items contained on the

[3] City's efforts to show that Big Sky's settlements with third parties bars an estoppel defense necessarily fails since that evidence was inadmissible, as shown in the appropriate section of this brief.

'punch list' provided by the City." City Brief at 17. City identifies this "punch list" as its May 2, 2000, letter, Exhibit 100. City Brief at 12. In other words, City argues that Specification 7.65, governing contracts for the installation of public improvements, creates a condition precedent that City make a demand and that a contractor refuse that demand before litigation can occur. City's authority for this argument is non-existent, and for good reason: there is no such language in Specification 7.65, and City's attempts to imply such a condition, which hypothetically means City's claims might never accrue and a limitations period would never run, must fail.

This Court found, in a case City itself cites, that "[a]greements extending a limitations period to an indefinite future date have…been held void." Kobbeman, supra, 1998 SD 20, ¶20, 574 N.W.2d at 640. Moreover, "conditions precedent are not favored by courts" and will not be found "[i]n the absence of plain, unambiguous language or necessary implication." Weitzel v. Sioux Valley Heart Partners, 2006 SD 45, ¶38, 714 N.W.2d 884, 895. Conditions precedent are not found "when the intent of the parties is doubtful or when a condition would impose an absurd or impossible result," Clear Lake City Water Authority v. Kirby Lake Development, Ltd., 123 S.W.2d 735, 745 (Tex. App. 2003), and "'language…not clearly identified as a condition precedent is presumed not to be one.'" Bombardier Corp. v. Nat. R.R. Passenger Corp., 298 F.Supp.2d 1, 4 (D.D.C. 2002). "[C]onditions precedent are usually introduced by conditional language such as 'provided that' or 'on condition,'" James E. Brady & Co., Inc. v. Eno, 992 F.2d 864, 896 (8th Cir. 1993). No such language is present in Specification 7.65, and City does not even attempt to explain how this specification creates plain, unambiguous conditions that must be followed before City can commence suit. Worse, City never identifies what in fact

triggered this alleged condition precedent in January 2008 when City finally filed suit. According to City, Big Sky's "refusal to repair" was not even clear in September 2008. City's Brief at 16-17.

The ill-defined condition precedent that City pretends to see in Specification 7.65 would violate the "'societal interest or public policy of giving repose to human affairs…Because of the combined private and public interests involved, individual parties are not entirely free to waive or modify the statutory defense.'" Kobbeman, supra, 1998 SD 20, ¶22, 574 N.W.2d at 640, citing with approval Kassner & Co. Inc. v. City of New York, 389 N.E.2d 99, 103 (N.Y.Ct. App. 1979). This rule extends to attempts to privately define "accrual" under the statute of limitations, as Deutsche Bank Nat. Trust Co. v. Flagstar Capital Markets Corp., 36 N.Y.S.3d 135, 139-140 (NY App. Div. 2016), following Kassner & Co., held: when a privately-imposed "accrual provision's set of conditions creates an imprecisely ascertainable accrual date – possibly occurring decades in the future," such a provision "runs afoul" of the "public policies of 'finality, certainty and predictability'" embodied by statutes of limitations. Where City does not even try to explain what it was that caused this claim to accrue, allowing City to bring its action in 2008, City's attempt to create a hopelessly indefinite test for "accrual" under Specification 7.65 must be rejected.

Moreover, if City felt the evidence did not show its claim had accrued because of Big Sky's alleged representations that it would remediate the conditions – although City fails to show that any of these representations were directed to City – City should have argued that issue to the jury. The "question of when accrual occurred is one of fact generally reserved for trial," Huron Center, Inc. v. Henry Carlson Co., 2002 SD 103, ¶11,

650 N.W.2d 554, 548, and "[w]hether the plaintiff can demonstrate that the defendant's misrepresentations tolled the statute of limitation is a question of fact for the trier of fact." Corner Const. Co. v. U.S.F.& G. Co., 2002 SD 5, ¶35 n.2, 638 N.W.2d 887, 896 n.2. But City's only jury argument on limitations was a vague suggestion that the parties had to "go through the punch list," (TT 877-878), without asserting that City had to also wait for Big Sky to refuse to fix anything. City can scarcely attack a verdict adverse to City on a point City did not even argue. Given City's admissions that it had notice of these conditions by the time it sent its May 2000 letter, City's Brief at 12, a letter that raised City's concerns not only about Phases, I, II and III, but also Phase IV, TT 301-303, the jury had evidence from which to find that City had "'an awareness either that [it had] suffered an injury or that another person [had] committed a legal wrong which ultimately may result in harm'" to City in 2000, Spencer v. Estate of Spencer, 2008 SD 129, ¶16, 759 N.W.2d 539, 544. Because City did not commence its action until 2008, (TT 683), City's claim was barred by the six-year statute of limitations. SDCL 15-2-13(2).

City also fails to show that, even if this instruction was error, a different verdict would have been returned without it. Welch, supra. Instruction No. 13 essentially told the jury it could only consider limitations if City had waived acceptance: "Big Sky, LLC remains liable until the City accepts the improvements by a final acceptance letter, or unless the City waived the requirement of a formal acceptance letter." This Court presumes that juries follow instructions, Hossle v. Fountain, 1999 SD 104, ¶9, 598 N.W.2d 877, 879, and since the jury presumably either found waiver, itself a proper basis for the general verdict in favor of Big Sky, or found that City suffered no damages, the verdict must be affirmed. Lenards, supra.

4.

THE TRIAL COURT PROPERLY REFUSED CITY'S NUISANCE INSTRUCTIONS

Throughout the trial, the court expressed its doubts about City's nuisance claim, noting that the court had a "terrible time conceptually with it because we're talking about public road[s], and they're outside the control of the contractor at this point, or the developer." (TT 825.) The trial court's ultimate decision to not submit this claim to the jury thus finally accepted Big Sky's arguments, made by its brief in support of its June 8, 2016, motion to dismiss, an issue raised by Paragraph 2 of Big Sky's Notice of Review, that public nuisance claims may only be brought against the owner of the property at issue. This is reflected both by the specific language of SDCL 21-10-16, which states that if an "unsafe" nuisance arises "from the condition of the property, the municipality… may commence a civil action against the owner of the real property" (emphasis supplied), and the common law. As Jordan v. Com., 549 S.E.2d 621, 623 (Va. App. 2001), held, "[w]hen placed in its ancient common law context, [a statutory claim to abate a public nuisance] can only be understood to authorize prosecution of the person or entity that holds actual title to the property on which a nuisance continues." Accord, City of Worthington v. New Vision Coop, 2009 WL 5089248**3-4 (Minn. App. 2009)("Nothing in the ordinance suggests that in a civil proceeding the ordinance is designed to impose the cost of abatement on or compel abatement by former property owners…the city cannot require abatement by or recover the cost of abatement from [a former owner].") See also Clauson v. Kempffer, 477 NW2d 257, 259 (SD 1991) (liability arising out of defects in property "is based on possession and control.")

City's nuisance allegations made no claim that Big Sky was the "owner" of these streets at the time the nuisance action was brought in 2016 in City's Amended Complaint. The evidence at trial showed that all the lots on either side of these disputed streets had long been sold and houses built upon them, see Exhibits 1, 3, 133, 133A; TT 244, 257-258, 391-392, 421-425; addresses assigned by City (TT 738); and that Big Sky no longer had any property interest in the subdivision. (TT 743-744, 746.) This is because, of course, under South Dakota law, abutting property owners hold "fee title to the center of the street," Aberdeen Cable TV Service, Inc. v. City of Aberdeen, 176 N.W.2d 738, 740 (S.D. 1970) (emphasis supplied). See also, e.g., Tibbitts v. Anthem Holdings Corp., 2005 SD 26, ¶8, 694 N.W.2d 41, 44; Plumier v. City of Belle Fourche, 1996 SD 65, ¶13, 549 N.W.2d 202, 205. As such, "the duty and responsibility for maintaining these subdivision streets and roads is upon the abutting landowners," 1981 S.D. Op. Att. Gen. 78, 1981 WL 157041 (emphasis supplied), see TT 251, 264, at least until a public entity like City undertakes that duty. Big Sky, with no ownership interest in these streets, could not be held liable in nuisance for any defects in them, which surely explains the utter paucity of reported decisions finding a developer or contractor liable for nuisance so many years after the completion of the streets in a subdivision. Further, the jury's verdict found that Big Sky no longer owed City any duties under City Specifications, so that City's vague argument that Big Sky still had enough "control" over the streets to be liable in nuisance (TT 825) is without a legal basis. Indeed, it is clear that since Big Sky's only obligation to install these improvements arose from the Specifications, City's only remedy was to bring suit under those Specifications, and Big Sky had no "independent duty" that could support any tort claim, including nuisance, Schipporeit v. Khan, 2009

S.D. 96, ¶ 15, 775 NW2d 503, 507-509, as Big Sky argued in its motion to dismiss. Since City's nuisance claim thus failed as a matter of law, the trial court properly refused to instruct the jury on this claim.

Moreover, City can show no prejudice from the failure to instruct the jury on this claim. City never showed that the damages to "fix or repair" this alleged nuisance were any different than the "amount of money necessary to fix or repair the public improvements…such that the public improvements are approved for acceptance by the City." City's Proposed Instruction No. 6 (App. 7). Given the fact the court instructed the jury that any recovery by City would be used to "fix" the roads, Instruction No. 19 (App. 5) but the jury awarded no damages on the claim that Big Sky "failed to properly complete the project," Court's Instruction No. 20 (App. 6), a clear basis for the jury's general verdict was that it found City entitled to no damages to "fix or repair" the improvements beyond its limits. Lenards, supra. The City would have thus received no damages even had the nuisance instructions been given, the outcome of the case would have been the same, and City was not prejudiced by the omission of these instructions.

5.

THE TRIAL COURT PROPERLY REFUSED TO HOLD BIG SKY LIABLE AS A MATTER OF LAW

City's argument that the trial court, beyond adopting Estes I as the "law of the case" (TT 729), should have also held Big Sky liable as a matter of law, has no legal merit. The doctrine of "law of the case" applies only "when the facts and the questions of law presented are substantially the same." Weekly v. Wagner, 2012 SD 10, ¶15, 810 N.W.2d 340, 343. The doctrine "does not apply at a 'later stage of litigation that

presents…different issues, or more fully developed facts.'" Samson Exploration, LLC v. T.S. Reed Properties, Inc., 521 S.W.3d 26, 43 n. 17 (Tex. App. 2015). The issue before this Court in 2011 was solely whether, in an action brought exclusively for injunctive relief, the expiration of sureties had released Big Sky and Estes from their obligations, and this Court ruled that summary judgment on this point had been improper. By the time this case finally went to trial in 2017, its nature had changed almost completely. City now sought damages, see, e.g., In re Kenval Marketing Corp., 69 B.R. 922, 926 (E.D. Pa. 1987) ("law of the case" not applied where there was "very different relief" sought in later proceedings), and instead of the essentially non-existent factual record before this Court in 2011, extensive discovery meant the trial was on "more fully developed facts."

In particular, while this Court agreed in 2011 that developers remained obligated until a final acceptance letter was issued, this Court did not have before it the extensive evidence, set forth supra in the waiver section of this brief, that City never issued such letters, and that the actions of inspectors and engineers waived that requirement here. Nor, in 2011 when this Court emphasized that the issuance of the acceptance letter documented the start of the warranty, Estes I, supra, 2011 SD 75,¶ 5, 805 NW2d at 716, was this Court considering Exhibit 100 (App. 9), City's 2000 letter that stated that the warranties as to Phases I, II and III were extended, necessarily meaning that the warranty had previously commenced even without the issuance of a "formal" acceptance letter. The "law of the case is the law made on a given set of facts, not law yet to be made on different facts," Jackson v. State of Alabama State Tenure Com'n., 405 F.3d 1276, 1283 (11th Cir. 2005) (emphasis supplied), so that when there is "[d]ifferent evidence [and]

different issues" in later proceedings, a judgment cannot be entered against a party "based on the record as it stood" when the earlier judicial decision was rendered. Id. at 1285. The "law of the case" had no place in the trial below, and just as the trial court was correct in refusing to hold Big Sky liable as a matter of law, so too it erred when it applied the doctrine in its Instruction No. 13. City's arguments should be rejected.

In any event, City fails to address the fact that the jury's general verdict in favor of Big Sky could have been on a finding that City had suffered no damages, so that even had the trial court held Big Sky liable as a matter of law, the result would have been the same. Lenards, supra. City has shown no prejudicial error in the trial court's ruling, and the judgment should be affirmed.

6.

THE TRIAL COURT PROPERLY EXCLUDED ALL EVIDENCE OF BIG SKY'S SETTLED CLAIMS AGAINST CONTRACTORS

"'Evidentiary rulings made by the trial court are presumed correct and are reviewed under an abuse of discretion standard'…[and] 'will not be overturned unless error is demonstrated and…in all probability it produced some effect upon the final result.'" Hein v. Zoss, 2016 SD 73, ¶ 7, 887 N.W.2d 62, 65. Here, although Estes freely admitted that he felt that his contractors, J. Scull Construction and RCS Construction, had failed to compact the soils; had not corrected the deficiencies; and that as a result there would be additional costs to fix the roads (TT 381-382), City argues that the trial court should have also received evidence that Big Sky had commenced actions against these contractors and had settled those actions. The trial court, excluding that evidence, found it was cumulative and would confuse the jury (TT 403, 405, 410-414); a trial court

plainly "has broad discretion in balancing the probative value of evidence against its prejudicial effect." Alvine v. Mercedes-Benz of North America, 2001 SD 3, ¶11, 620 N.W.2d 608, 611.

The trial court's rulings were correct. Under SDCL 19-19-408, "a plaintiff may [not] show a defendant's liability by proof of a defendant's settlement with a third person." First Premier Bank v. Kolcraft Enterprises, Inc., 2004 SD 92, ¶21, 686 N.W.2d 430, 443 (emphasis supplied), citing Cleere v. United Parcel Service, 669 P.2d 785 (Okl. 1983). The cited portion of Cleere unequivocally holds that:

> An exclusionary rule which reached only the compromise negotiations between the very parties who subsequently litigate the underlying claim would fall far short of providing the needed protection to the settlement process, and would in fact leave unprotected the very situation which poses the greatest needs. The very terms of Rule 408 leave no doubt that…a defendant cannot provide the invalidity or amount of a plaintiff's claim by proof of plaintiff's settlement with a third person, nor can plaintiff show the defendant's liability or extent of liability, by proof of defendant's settlement with a third person.

669 P.2d at 790 (emphasis supplied). The fact and terms of Big Sky's settlement with these contractors were clearly inadmissible under SDCL 19-19-408.

Given the fact the cases against these contractors were settled, any references to the allegations made in the pleadings of those cases were likewise inadmissible. As First Premier Bank v. Kolcraft Enterprises, Inc., supra, put it, "admission of pleadings in [a] settle case would swallow the rule excluding evidence of [a] settlement." 2004 SD 92, ¶24, 686 N.W.2d at 443, citing Pounds v. Holy Rosary Medical Center, 872 P.2d 437, 439 n.3 (Or. App. 1994). "[A]ttempts to introduce the pleadings into evidence [would be] in reality an attempt to allude to the settlement agreements which were inadmissible."

Haderlie v. Sondergoth, 866 P.2d 703, 714 (Wyo. 1993). City essentially concedes as much with its astounding assertion that the actions against the contractors amounted to a "fraud on…the Court" so that the fact Estes received money from the settlement of those actions "must be admitted to show Estes' liability." City's Brief at 38-39, 42 (emphasis supplied). How this is consistent with the express language of SDCL 19-19-408 excluding settlements "to prove…the validity… of a disputed claim," City does not explain.

While the traditional view is that under some circumstances prior pleadings can be admitted as "an admission against the interest of the pleader," Raverty v. Goetz, 143 N.W.2d 859, 962 (S.D. 1966)[4] this is subject to the requirement that the "prior pleadings…must be inconsistent with the present contentions of the party in order to be introduced as an admission against interest." Whaley v. Lawing, 352 So.2d 1090, 1091 (Ala. 1977). Allowing pleadings to be admitted as an admission against interest is only permissible where there are "inconsistent remedies or demands; and to make them inconsistent one action must allege what the other denies, or the allegations in one action must necessarily repudiate or be repugnant to the other." Texaco, Inc. v. Pursley, 527 S.W.2d 236, 240 (Tex. App. 1975). City fails to show any inconsistencies between Big Sky's actions against its contractors and Big Sky's defense here. City's open-ended extension of its warranty in 2000, Exhibit 100, required Big Sky to seek redress from its contractors to satisfy those warranty demands. And the fact City made warranty demands

[4] The modern view is that because the primary purpose of a complaint is to merely "give notice," pleadings in separate actions against separate defendants should not be used as an admission by the pleader. Suege v. Mercedes-Benz Credit Corp., 329 F.Supp.2d 285-287 (D. Conn. 2004).

proves Big Sky's consistently-held position that City had already accepted those improvements. There is nothing inconsistent between Big Sky alternatively blaming the acts of City's inspectors and Scull for any defects that might have occurred in the construction. The fact the contractors made mistakes that City inspectors were obligated to detect, but failed to do so, could both be causes of deficiencies in the improvements. "It is not inconsistent for [claims] to be [made] against [two separate parties], since both can have a role in [an] … injury. Without such inconsistency, and since pleadings in prior lawsuits are not evidence of the facts in any particular suit," such pleadings must be excluded. Estate of Spinosa, 621 F.2d 1154, 1157 (1st Cir. 1980). Accord, e.g., Mitchell v. Fruehauf Corp., 568 F.2d 1139, 1147 (5th Cir. 1978).

City's other arguments for the admission of the settlements and pleadings are even less meritorious. The jury scarcely needed to be shown why there was no "adversary vigor" between litigants, Corn Exchange Bank v. Tri-State Livestock Auction Co., Inc., 368 N.W.2d 596, 599 (S.D. 1985), where the contractors were not litigants in front of this jury. Nor was this a situation in which "an agreeing defendant [stood] to gain financially from a plaintiff's verdict or…the agreeing defendant's maximum liability [would] be reduced by increasing the liability of his co-defendant." Id. at 600. And City's reliance on Towerridge, Inc., v. T.A.O., Inc., 111 F.3d 758 (10th Cir. 1997) is wholly misplaced. Towerridge's ruling under Rule 408 was based on the view that "Rule 408 does not require the exclusion of evidence regarding the settlement of a claim different from the one litigated." 111 F.3d at 770 (emphasis supplied). City itself insists that "Big Sky's litigation against [the contractors] is…intrinsically intertwined with the facts of this case," City's Brief at 35, so the exception to Rule 408 utilized by Towerridge

to justify its holdings is not present here. Likewise, Zurich A. Ins. Co. v. Watts Indus., Inc., 417 F.3d 682 (7th Cir. 2005) was based on the view that settlements with other parties are more likely to be admitted "when the settlement communications at issue arise out of a dispute distinct from the one for which the evidence is being offered." 417 F.3d at 689 (emphasis supplied). Given City's own allegation that these cases were all "intrinsically intertwined," Zurich has no relevance.

City accordingly fails to show the trial court abused its discretion in excluding this evidence, and the judgment below must be affirmed.

7.

THE TRIAL COURT CORRECTLY DISMISSED ESTES IN HIS INDIVIDUAL CAPACITY

By the time of trial, there were only four claims left in City's Amended Complaint: Paragraphs 14, 15, 16 and 17. As to each of the plats set forth in those paragraphs, City alleged only that Big Sky LLC had "received approval" for the plat, thus making Big Sky, LLC, the platting party, subject to City's requirements that public improvements be installed in the platted subdivision. It is fundamental, of course, that only the owner of real estate can apply for a plat, SDCL 11-3-4, and the Amended Complaint made no claim for relief from Doyle Estes as to these claims. The trial court was thus obliged to dismiss Estes from the complaint. SDCL 15-6-8(a)(2) requires that a complaint must make a "demand for judgment for the relief to which [the plaintiff] deems himself entitled," and "when one does not plead a specific claim for relief against a specific party in compliance with" this rule, no judgment can be entered against that party. American Home Assurance Co. v. Phineas Corp., 347 F.Supp.2d 1231, 1239-40 (M.D. Fla. 2004).

Big Sky, LLC was organized under South Dakota law in January 1997, Exhibit 4, and SDCL 47-34A-303(a) provides that "the debts, obligations, and liabilities of a limited liability company…are solely the debts, obligations, and liabilities of the company." (Emphasis supplied.) The "LLC 'is a legal entity distinct from its members.'" Dakota Fire Ins. Co. v. J&J McNeil, LLC, 2014 SD 37, ¶14 n.3, 849 N.W.2d 648, 652 n.3, citing SDCL 47-34A-201. City disclaimed any attempt to pierce Big Sky's corporate veil (TT 119). Instead, skipping past the undisputed evidence that Big Sky was the owner of the real estate and developer of the improvements; had hired the contractors; got the building permits; and paid the inspection fees (TT 332-3), City suggests Estes should be liable because Exhibit 21, the contract with J. Scull Construction, appears to have originally identified Estes as "owner" of Phase I before it was amended to instead specify Big Sky (TT 119); that the bills and correspondence from the contractors were addressed to Estes (TT 715); and that Estes signed a release as part of the settlement with Scull. City's Brief at 42. The problem with this "theory" is that City is not suing on behalf of J. Scull Construction to enforce J. Scull's contract, or to collect the bills from Big Sky's contractors, or on behalf of J. Scull or RCS regarding the "fraud" City asserts to have existed in Big Sky's settlements[5] with those parties. City's claim here was for breach of

[5] It should be noted that, despite City's loose claims that Estes and Big Sky "pocketed" $300,000 from these settlements, what little record there is shows that part of the Scull settlement compensated Big Sky for remediation work performed (TT 317), and another substantial portion went to pay legal fees. (TT 122-123.) Likewise, the settlement from RCS went to pay a fraction of the enormous legal fees Big Sky has incurred during City's nearly decade-long pursuit of a claim the jury found to be without merit. (March 17, 2017 Motions Hearing at 20.) There is essentially no record evidence regarding the actual disposition of these funds, or whether Estes might not have in fact attempted to provide City with a portion of the Scull settlement. City's arguments are thus improper as an attempt to prejudice this Court against Estes.

the obligation to City to install improvements in subdivisions, and City's Municipal Code 16.16.010(A) is clear as to who held that obligation: the "subdivider is required to install or construct the improvements." (Emphasis supplied.) There is no question that the "subdivider" on these disputed phases was Big Sky, LLC, and Estes could not be individually liable for that obligation. SDCL 47-34A-303(a). The trial court's dismissal of Estes at the close of evidence (TT 717) should be affirmed.

8.

CITY'S ORDINANCE IS UNCONSTITUTIONAL

This issue was presented to the trial court by a motion for summary judgment dated December 7, 2016, and denied by its written order dated January 2, 2017. It is here under Paragraph 3 of the Notice of Review, and the South Dakota Attorney General has been given notice of the issue but has declined to intervene. (App. 15) City's claims were based on its Municipal Code section 16.16.010 that requires subdividers to "install or construct" public improvements, including streets, street lights, sanitary sewers and water mains. On its face, this scheme violates South Dakota Constitution Article III, §26:

> The Legislature shall not delegate to any special commission, private corporation or association, any power to make, supervise or interfere with any municipal improvements, money, property, effects, whether held in trust or otherwise, or levy taxes, or to select a capital site, or to perform any municipal functions whatever.

(Emphasis supplied.) Otherwise known as a "ripper clause," this provision appears in the state constitution of a small number of jurisdictions, Specht v. City of Sioux Falls, 526 N.W.2d 727, 730 (S.D. 1995), and the South Dakota version was "deliberately copied" from that in Pennsylvania. City of Sioux Falls v. Sioux Falls Firefighters, 234 N.W.2d 35,

37 (S.D. 1975). Pennsylvania has construed its identical version to bar attempts by municipalities to delegate their own functions:

> We think the township, as government agent of the state, is subject to the same prohibition to which the state is subject…As the constitution specifically deprives the state of power to delegate the management of the municipal property to a private corporation, certainly the agent, the township, cannot make such a delegation; the effect of the litigation on the principal would be destroyed if the agent could do what was prohibited.

Lighton v. Township of Abington, 9 A.2d 609, 612 (Pa. 1939). Municipalities are likewise agents of the state in South Dakota, Blue Fox Bar, Inc. v. City of Yankton, 424 N.W.2d 915, 917 (S.D. 1988), and City of Chamberlain v. R.E. Lien, Inc., 521 N.W.2d 130, 132-13 (S.D. 1994), held that a municipal ordinance violates Article III, §26, if "it delegates to private persons…[a municipal function] and thus constitutes an unlawful delegation of legislative power." (Emphasis supplied.) There can be no doubt that "the erection and maintenance of local improvements…are purely municipal functions." State ex rel. Brooks v. Cook, 276 P. 958, 961 (Mont. 1929).

South Dakota law fixes the responsibility for the establishment of street grades on the municipality, SDCL §9-45-15, and a municipality may not delegate this function. As Peters v. City of Morehead, 98 S.W.2d 41, 42 (Ky. App. 1936), held:

> There is no more important feature connected with the work of street construction than that of fixing the original grades, for not only must the matter of present economic propriety of a particular grade be determined, but as respects the future, it may enter into the question of the liability of the city for damages to property resulting from work upon or change in the grade of the street. Hence the establishment of the grade involving, as it does, the exercise of the municipal discretion or judgment, is regarded as a legislative function and a power limited to the

> council. It is a responsibility that cannot be abdicated and a power that cannot be delegated.

(Emphasis supplied.) Accord, Gidley v. City of Colorado Springs, 418 P.2d 291, 294 (Colo. 1966). Yet the undisputed record shows that it is the "developer's consultant" who establishes street grades under City's ordinance requiring developers to install public improvements. (TT 736.) Likewise, although state statutes squarely fix the responsibility on City for erecting street lights, SDCL 9-30-1, and laying water and sewer connections to lot lines, SDCL 9-47-6, SDCL 9-48-7, the record shows that these legislative functions are delegated by City to private developers like Big Sky. (TT 736-37.) City's delegation of those purely municipal functions to a "private association" like Big Sky was in clear violation of those statutes and by extension South Dakota Constitution Article III, §26.

It makes no difference, as City has argued, that City purported to have "standards" to guide these unlawful delegations. Like the establishment of street grades, Peters, supra, Gidley, supra, these activities are legislative powers, and "a purely legislative power cannot be constitutionally delegated." Schryer v. Schirmer, 171 N.W.2d 634, 635 (S.D. 1969). The clear purpose of Article III, §26 is to preserve "'the ability of the [municipality's citizens] to control through their elected officials the substantive policies that affect them uniquely.'" Specht, supra, 526 N.W.2d at 731. As Greeley Police Union v. City Council of Greeley, 553 P.2d 790, 792 (Col. 1976), put it, such a prohibition is directed "against delegating legislative power to politically unaccountable persons" and to uphold a "fundamental tenet" of "representative government" that those "engaged in government decision-making…must be accountable to the citizens they represent." Accord, e.g., State ex rel. Fire Fighters Local v. City of Laramie, 437 P.2d 295, 299-300 (Wyo. 1968). Like all constitutional provisions, it must

be construed in such a way as to effectuate its purpose, keeping "in mind the object sought to be accomplished by its adoption and the evils…sought to be prevented or remedied." State v. Reeves, 184 N.W.2d 993, 996 (S.D. 1921). Town of Holyoke v. Smith, 226 P. 158, 160 (Col. 1924), held, construing the Colorado version,

> The evils to be avoided being such as have been above mentioned, we should, in applying this provision, give it a broad and reasonable, rather than a technical meaning, so as to accomplish its evident purpose. That the purpose was to prevent – generally speaking – any organization being authorized by law to control or interfere with municipal matters, whether it be the making of local improvements, the management of property, or the levying of taxes, is clear.

(Emphasis supplied.) The specific direction of City's ordinance that private subdividers "install or construct the improvements" in subdivisions effectively made a private association, Big Sky, responsible for these municipal and legislative functions, even though Big Sky was not an elected official, and not subject to any political control by any voters in the subdivisions at issue. Because City's claims against Big Sky were based on an unconstitutional ordinance, those claims had no lawful basis and this Court should remand this action with directions that a judgment of dismissal be entered.

CONCLUSION

For all the reasons stated, Big Sky and Estes urge this Court to affirm the judgment below. In the alternative, Big Sky urges this Court to hold that Big Sky's motion for summary judgment on acceptance should have been granted; Big Sky's motion to dismiss the nuisance claim should have been granted; and the trial court should have found City's ordinance unconstitutional, and to remand this action with directions that it be dismissed. In the event this case is remanded for a new trial, however, Big Sky

and Estes urge that this Court direct that the ruling in Estes I is not the law of the case in any future proceedings.

Big Sky and Estes Request Oral Argument

Dated this 28th day of September, 2017.

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

/s/ Donald A. Porter
Donald A. Porter
Jess M. Pekarski
Christopher A. Christianson
Attorneys for Appellees
P.O. Box 290
Rapid City, SD 57709
(605) 343-2410

CERTIFICATE OF SERVICE

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

John K. Nooney	[x]	U.S. Mail
Robert J. Galbraith	[ ]	hand delivery
Nooney & Solay	[ ]	Facsimile
632 Main Street, 2nd Floor	[ ]	Federal Express
P.O. Box 8030	[x]	electronic copy
Rapid City, SD 57709		
john@nooneysolay.com		
Robert@nooneysolay.com		
Attorneys for Plaintiff/ Appellant City of Rapid City		

Steven J. Oberg	[x]	U.S. Mail
Barbara Anderson Lewis	[ ]	hand delivery
Lynn, Jackson, Shultz & Lebrun, P.C.	[ ]	facsimile
P.O. Box 8250	[ ]	Federal Express
Rapid City, SD 57709	[x]	electronic copy

soberg@lynnjackson.com
blewis@lynnjackson.com
Attorneys for RCS Construction, Inc.

Ronald G. Schmidt	[x]	U.S. Mail
Gunderson, Palmer, Nelson & Ashmore	[ ]	Hand Delivery
506 6th Street	[ ]	Facsimile
Rapid City, SD 57701	[ ]	Federal Express
rchmidt@gpnalaw.com	[x]	electronic copy
Attorneys for Third Party Defendants and Fourth Party Plaintiffs, Steve Van Houten and Robert Van Houten		

Roger A. Sudbeck	[x]	U.S. Mail
Paul W. Tschetter	[ ]	hand delivery
Boyce, Greenfield, Pashby & Welk, LLP	[ ]	facsimile
P.O. Box 5015	[ ]	Federal Express
Sioux Falls, SD 57117	[x]	electronic copy
rasudbeck@boycelaw.com pwtschetter@boycelaw.com		
Attorneys for Third Party Defendant and Fourth Party Plaintiff, Rapid Construction, LLC		

Scott Sumner	[x]	U.S. Mail
Sumner Law Office	[ ]	Hand Delivery
P.O. Box 2553	[ ]	Facsimile
Rapid City, SD 57709	[ ]	Federal Express
scott@sumnerlawoffice.com	[x]	electronic copy
Attorney for Fourth Party Defendant, Dream Design International, Inc.		

Marty Jackley	[x]	U.S. Mail
South Dakota Attorney General	[ ]	Hand Delivery
Office of the Attorney General	[ ]	Facsimile
1302 E. Highway 14, Suite 1	[ ]	Federal Express
Pierre, SD 57501	[x]	electronic copy

Dated this 28th day of September, 2017.

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

/s/ Donald A. Porter
Donald A. Porter
Jess M. Pekarski
Christopher A. Christianson
Attorneys for Appellants

P.O. Box 290
Rapid City, SD 57709
(605) 343-2410

CERTIFICATE OF COMPLIANCE

The undersigned, counsel for Appellants, certifies pursuant to SDCL § 25-26A-66 that the brief contains 9,785 words and 49,968 characters, exclusive of the Table of Contents, Table of Authorities, Jurisdictional Statement, Statement of Legal Issues, Appendix and Certificates of Counsel. 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 28th day of September, 2017.

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

/s/ Donald A. Porter
Donald A. Porter
Jess M. Pekarski
Christopher A. Christianson
Attorneys for Appellants
P.O. Box 290
Rapid City, SD 57709

(605) 343-2410

CERTIFICATE OF PROOF OF FILING

The undersigned hereby certifies that pursuant to SDCL § 15-26C-3 he served an electronic copy in Word format and an original and two hard copies of the above and foregoing **APPELLEES' 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: sdclerkbriefs@ujs.state.sd.us

Dated this 28th day of September, 2017.

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

/s/ Donald A. Porter
Donald A. Porter
Jess M. Pekarski
Christopher A. Christianson
Attorneys for Appellants

APPENDICES

COUNTY OF PENNINGTON):ss STATE OF SOUTH DAKOTA)	IN CIRCUIT COURT SEVENTH JUDICIAL CIRCUIT
CITY OF RAPID CITY, a municipal corporation, Plaintiff, vs. DOYLE ESTES, individually, and BIG SKY, LLC, Defendants and Third Party Plaintiffs, vs. RAPID CONSTRUCTION, LLC, formerly a general partnership known as Rapid Construction Co. and STEVE VAN HOUTEN and ROBERT VAN HOUTEN, general partners of Rapid Construction Co., Third Party Defendants and Fourth Party Plaintiffs, vs. DREAM DESIGN INTERNATIONAL, INC., Fourth Party Defendant, and BIG SKY, LLC Plaintiff, vs. R.C.S. CONSTRUCTION, INC., Defendant.	Civil No.: 51CIV07-000599 **AMENDED COMPLAINT**

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COMES NOW the Plaintiff, the City of Rapid City ("City"), by and through its undersigned counsel, and for its Amended Complaint against the Defendants, Doyle Estes and Big Sky, LLC, states and alleges as follows:

1. The City is a municipal corporation located in Pennington County, South Dakota.

2. The City is of information and belief that the Defendant, Doyle Estes, is an individual currently residing in Pennington County, South Dakota.

3. The City is of information and belief that the Defendant, Big Sky, LLC, is a limited liability company organized under the laws of the State of South Dakota and currently in good standing.

4. The City has adopted comprehensive regulations for the use and development of the land within the City.

5. Pursuant to SDCL § 11-6-26, the City has extra-territorial jurisdiction to regulate the subdivision of all land within three miles of the City's corporate limits.

6. Pursuant to SDCL § 11-6-27, the City has adopted Chapter 16 of the Rapid City Municipal Code ("RCMC"), which establishes regulations governing the subdivision of land within the City and its extra-territorial jurisdiction.

7. Section 16.16.010 of the RCMC requires a developer of land within the jurisdiction of the City to install certain public improvements prior to the City approving a final plat.

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8. Section 16.20.060 of the RCMC allows the City to approve a final plat without actual construction of the required public improvements upon the developer providing to the City a security bond in an amount equal to the estimated cost of installing the required public improvements.

9. Among the public improvements, a developer is required to install all streets, curbs, gutters, street lights, traffic signs, water mains, sanitary sewers and storm sewers.

10. Section 16.16.010(B) of the RCMC requires that all public improvements a developer is responsible for be constructed in accordance with City specifications.

11. Upon completion of the required public improvements, a developer must request the City conduct a final inspection to ensure that the improvements have been properly constructed in accordance with the City's Standard Specifications for Public Works Construction and design criteria manuals.

12. If deficiencies with the public improvements are evident at the time of the final inspection, the City provides the developer with a "punch list" of items that need to be corrected prior to the City formally accepting ownership and maintenance of the public improvements.

13. Once the developer has corrected any deficiencies and the City has confirmed that the public improvements have been constructed in conformity with the City's Standard Specifications for Public Works Construction and

design criteria manuals, the City formally accepts ownership and maintenance responsibility for the public improvements.

14. On September 8, 1998, Big Sky, LLC received approval of a Final Plat for property legally described as:

> Lots 1 and 2 of Block 1, Lots 1 through 7 of Block 2, Lots 1-8 of Block 3, Lots 1 through 3 of Block 4 and dedicated right-of-way in Big Sky Subdivision, located in the NW1/4 of the SE1/4 of Section 3, T1N, R8E, BHM, Pennington County, South Dakota.

("Phase 1").

15. On May 3, 1999, Big Sky, LLC received approval of a Final Plat for property legally described as:

> Lots 4, 5 and 6 of Block 4, Lots 1 through 7 of Block 5, Lots 1 through 7 of Block 6 and dedicated right-of-way in Big Sky Subdivision and a portion of the unplatted portion of the NW1/4 of the SE1/4 of Section 3, T1N, R8E, BHM, Pennington County, South Dakota.

("Phase 2").

16. On December 6, 1999, Big Sky, LLC received approval of a Final Plat for property legally described as:

> Lots 3, 4 and 5 of Block 1, Lots 8 through 14 of Block 2, Lots 9 through 13 of Block 3, Lots 8 through 12 of Block 5, Lots 8 through 12 of Block 6, Lots 1 through 5 of Block 7, Lots 1, 2 and 3 of Block 8, Lot 1 of Block 9, Lot 1 of Block 10, and dedicated right-of-way in Big Sky Subdivision, located in the unplatted portions of the NW1/4 of the SE1/4 and the S1/2 of the N1/2 of the SW1/4 of Section 3, T1N, R8E, BHM, Pennington County, South Dakota.

("Phase 3").

17. On May 15, 2000, Big Sky, LLC received approval of a Final Plat for property legally described as:

> Lots 1 through 15 of Block 11, Lots 1 through 15 of Block 12, Lot 1 of Block 13, and Lot 1 of Block 14 and dedicated public right-of-way all of Big Sky Subdivision located in the NE ¼ of the SW1/4 and the SE1/4 of the NW1/4 of Section 3, T1N, R8E, BHM, Pennington County, South Dakota.

("Phase 4").

18. On June 3, 20002, Big Sky, LLC received approval of a Final Plat for property legally described as:

> Lots 7 through 9 of Block 4, Lots 13 through 23 of Block 6, Lot 6 of Block 7, Lots 1 through 11of Block 15, Lots 1 through 2 of Block 16, of Big Sky Subdivision and dedicated South Pitch Drive, Aurora Drive, Carl Avenue and Major Drainage Easements all located in the NW1/4 of the SE1/4 of Section 3, T1N, R8E, BHM, Pennington County, South Dakota.

("Phase 6")

19. On October 21, 2002, as corrected on November 4, 2002, Big Sky, LLC received approval of a Final Plat for property legally described as:

> Lots 2 and 8 of Block 13, Lots 2 through 5 of Block 14, and dedicated streets of Big Sky Subdivision located in the SE1/4 of the NW1/4 of Section 3, T1N, R8E, BHM, Pennington County, South Dakota.

("Phase 5")

20. On December 2, 2002, Big Sky, LLC received approval of a Final Plat for property legally described as:

> Tract A and dedicated streets of Big Sky Subdivision located in the SE1/4 of the NW1/4 and the NE1/4 of the NW1/4 of Section 3, T1N, R8E, BHM, Pennington County, South Dakota.

("Phase 7")

21. On August 4, 2003, Doyle Estes received approval of a Final Plat for property legally described as:

> Lots 3 through 7 of Block 13, and dedicated streets of Big Sky Subdivision, located in the SE1/4 of the NW1/4 of Section 3, T1N, R8E, BHM, Rapid City, Pennington County, South Dakota.

("Phase 5B")

22. On November 3, 2003, Doyle Estes received approval of a Final Plat for property legally described as:

> Lots 10, 11 and 12 of Block 4, Lots 1 through 11 of Block 17, Lots 12 through 22 of Block 15, Lots 3, 4 and 5 of Block 16, of Big Sky Subdivision and dedicated Elmer Street, Aurora Drive, Carl Avenue and Major Drainage Easements located in the N1/2 of the NW1/4 of the SE1/4 of Section 3, T1N, R8E, BHM, Rapid City, Pennington County, South Dakota.

("Phase 8")

23. On June 7, 2004, Doyle Estes received approval of a Final Plat for property legally described as:

> Lot 13 and Tract A of Block 4, Lots 6 through 12 of Block 16, Lots 12 through 22 of Block 17, Lots 1A through 12A and Lots 1B through 12B and Tract B of Block 18, Tract C and dedicated streets of Big Sky Subdivision, located in the N1/2 of the NW1/4 of the SE1/4 and the SW1/4 of the NE1/4 of Section 3, T1N, R8E, BHM, Rapid City, Pennington County, South Dakota.

("Phase 9")

24. On September 7, 2004, Doyle Estes received approval of a Final Plat for property legally described as:

> Lot 1 of Block 1, Lots 1 and 2 of Block 3, Lot 3 of Block 4, and dedicated streets of Big Sky Business Park, located in the S1/2 of the NW1/4 and the S1/2 of Government Lot 3 and the S1/2 of Government Lot 4 of Section 3, T1N, R8E, BHM, Rapid City, Pennington County, State of South Dakota.

("Big Sky Business Park")

25. The Defendants, as developers of the property identified in paragraphs 14-24 provided surety to secure completion of the required public improvements in lieu of actually completing them.

26. The sureties provided by the Defendants have expired.

27. All of the property listed in paragraphs 14-24 are within the corporate limits of the City or within its three mile extra-territorial platting jurisdiction.

28. The City conducted inspections of the required public improvements for the property identified in Phase 3, Phase 4, Phase 5, Phase 5B, Phase 6 and Phase 7.

29. Upon completing these inspection of those Phases identified in the preceding paragraph, the City provided the Defendants with a "punch list" identifying numerous deficiencies with the required public improvements as constructed.

30. The Defendants have never requested the City re-inspect these public improvements to confirm the corrections have been made. The City is of information and belief the Defendants have never completed the corrections which were identified in the "punch list."

31. The Defendants have not requested an inspection for the balance of the Phases not otherwise identified above.

32. The City has never issued any final acceptance letters for any of the required public improvements for the properties identified in paragraphs 14-24.

33. Phase 5, Phase 5B, Phase 7, Phase 8, Phase 9 and the Big Sky Business Park are within the corporate limits of the City.

34. Phase 1, Phase 2, Phase 3, Phase 4 and Phase 6 are outside of the corporate limits of the City, but within the three mile platting jurisdiction of the City.

35. Although the City never issued any final acceptance letters for the property identified herein, the City is, and has been, aware of major deficiencies with the quality of the public improvements constructed by the developers, which would preclude them being formally accepted.

36. The City has remedied those deficiencies within the corporate limits of the City in Phase 5, Phase 5B, Phase 7, Phase 8, Phase 9 and the Big Sky Business Park.

37. The City has not remedied those deficiencies outside of the corporate limits of the City, but within the City's platting jurisdiction in Phase 1, Phase 2, Phase 3, Phase 4 and Phase 6.

38. The Defendants have, and have had, a duty to construct the public improvements required under the City's subdivision ordinances so they are in conformity with the City's standard specifications for public works construction and design criteria manuals.

39. The Defendants have breached their duty to properly construct the required public improvements and have further breached their duty to correct readily apparent deficiencies in the quality of public improvements which have been constructed.

40. The South Dakota Supreme Court has already held with respect to the properties identified herein that "[u]nder the ordinance and specifications, Developers [Defendants] remain liable until the City accepts the improvements by final acceptance letter." *City of Rapid City v. Estes*, 2011 S.D. 75, ¶ 15, 805 N.W.2d 714, 719.

41. The South Dakota Supreme Court further held that "[i]t is undisputed that the City never issued any final acceptance letters as referenced in the Specifications." *City of Rapid City v. Estes*, 2011 S.D. 75, ¶ 13, 805 N.W.2d 714, 719.

42. Under the ordinance and specifications, as well as the Decision of the South Dakota Supreme Court, the Defendants remain liable to complete the improvements for Phase 1, Phase 2, Phase 3, Phase 4 and Phase 6 until such time as a final acceptance letter is received from the City.

43. As a result of the Defendants' failure to comply with the ordinance and specifications, as well as the City's standard specification for public works construction and design criteria manuals, the City has suffered damages in an amount to be determined at the time of trial for

the remediation work on Phase 5, Phase 5B, Phase 7, Phase 8, Phase 9 and the Big Sky Business Park.

COUNT I
BREACH OF CITY ORDINANCE AND SPECIFICATIONS

44. Plaintiff re-alleges paragraphs 1-43 as set forth in their entirety.

45. The Defendants have failed to comply with the City ordinance and specifications related to the development of the real property identified above.

46. As a result of the Defendants' breach of the City ordinances and specifications, the City seeks specific performance of the Defendants' obligations as it concerns Phase 1, Phase 2, Phase 3, Phase 4 and Phase 6.

47. In the alternative or in the event Defendants fail to complete Phase 1, Phase 2, Phase 3, Phase 4 and Phase 6 to City specifications, the City seeks damages in an amount to be determined at the time of trial.

48. As a result of the Defendants' breach of the City ordinances and specifications, the City seeks damages in an amount to be determined at the time of trial as it concerns Phase 5, Phase 5B, Phase 7, Phase 8, Phase 9 and the Big Sky Business Park.

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COUNT II
PUBLIC NUISANCE

49. Plaintiff re-alleges paragraphs 1-48 as set forth in their entirety.

50. Defendants remain liable for the public improvements until the City accepts the improvements by a final acceptance letter.

51. The Plaintiff has never issued a final acceptance letter for any of the real property identified above.

52. The real property identified above constitutes a public nuisance as the same is defined in SDCL § 21-10-1.

53. As a result of the actions of the Defendants in creating a public nuisance, the Plaintiff has been damaged in an amount to be determined at the time of trial.

54. The Plaintiff is further entitled to an abatement of the public nuisance by the developer.

WHEREFORE, the Plaintiff, the City of Rapid City respectfully requests a judgment against the Defendants, and each of them, as follows:

1. That the Court issue an injunction requiring the Defendants to: (a) properly complete the required public improvements on Phase 1, Phase 2, Phase 3, Phase 4 and Phase 6; (b) repair any deficiencies in the public improvements, which have already been constructed on Phase 1, Phase 2, Phase 3, Phase 4 and Phase 6; (c) request the City conduct a final inspection of all public improvements on Phase 1, Phase 2, Phase 3,

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Phase 4 and Phase 6; and, (d) repair any deficiencies identified by the City after the final inspection so the City may formally accept ownership and maintenance of the improvements by a formal acceptance letter;

2. In the alternative or in the event the Defendants do not comply with those requests identified above, for compensatory damages in an amount to be determined at the time of trial for the work completed by the City or which needs to be completed by the City on Phase 1, Phase 2, Phase 3, Phase 4 and Phase 6;

3. For compensatory damages in an amount to be determined at the time of trial for the work completed by the City on Phase 5, Phase 5B, Phase 7, Phase 8, Phase 9 and the Big Sky Business Park;

4. That the Court determine the public improvements constructed by the Defendants are a public nuisance as the same is defined in SDCL § 21-10-1;

5. That the Court award the Plaintiff compensatory damages as a result of the public nuisance created by the Defendants;

6. That the Court order the abatement of the public nuisance created by the Defendants;

7. For recovery of the City's costs and disbursements associated with this action; and

8. For such other and further relief as the Court deems just and equitable under the circumstances.

Dated this 15th day of April, 2016.

/s/ Robert J. Galbraith

JOHN K. NOONEY
(john@nooneysolay.com)
ROBERT J. GALBRAITH
(robert@nooneysolay.com)
NOONEY & SOLAY, LLP
Attorneys for Plaintiff
632 Main Street, 2nd Floor / P.O. Box 8030
Rapid City, SD 57709-8030
(605) 721-5846

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CERTIFICATE OF SERVICE

I, Robert J. Galbraith, attorney for Plaintiff, City of Rapid City, hereby certify that a true and correct copy of the foregoing was served on this 15th day of April, 2016, by electronic service through Odyssey File & Serve, to:

Edward C. Carpenter
Jess M. Pekarski
Phillip R. Stiles
Costello, Porter, Hill, Heisterkamp,
Bushnell & Carpenter, LLP
P.O. Box 290
Rapid City, SD 57709-0290

Steven J. Oberg
Barbara Anderson Lewis
Lynn, Jackson, Shultz & Lebrun, P.C.
P. O. Box 8250
Rapid City, SD 57709
Attorneys for RCS Construction, Inc.

Ron Schmidt
Gunderson, Palmer, Nelson & Ashmore
506 6th Street
Rapid City, SD 57701
Attorneys for Third Party Defendants
and Fourth Party Plaintiffs, Steve Van
Houten, and Robert Van Houten

Roger A. Sudbeck
Paul W. Tschetter
Boyce, Greenfield, Pashby & Welk,
L.L.P.
P. O. Box 5015
Sioux Falls, SD 57117-5015
Attorneys for Third Party Defendant
and Fourth Party Plaintiff, Rapid
Construction, LLC,

Scott Sumner
Sumner Law Office
P. O. Box 2553
Rapid City, SD 57709
Attorney for Fourth Party Defendant,
Dream Design International, Inc.

/s/ Robert J. Galbraith
ROBERT J. GALBRAITH

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INSTRUCTION NO. 9

In civil actions, the party who has the burden of proving an issue must prove that issue by greater convincing force of the evidence.

Greater convincing force means that after weighing the evidence on both sides there is enough evidence to convince you that something is more likely true than not true. In the event that the evidence is evenly balanced so that you are unable to say that the evidence on either side of an issue has the greater convincing force, then your finding upon the issue must be against the party who has the burden of proving it.

In this action, the City of Rapid City has the burden of proving the following issues:

1. That Big Sky LLC failed to complete or repair the public improvements in Phases 1, 2, 3, and 4 of the Big Sky Subdivision so the public improvements are approved for acceptance by the City of Rapid City.
2. The amount of money necessary to fix or repair the public improvements in Phases 1, 2, 3, and 4 of the Big Sky Subdivision, so the public improvements are approved for acceptance by the City of Rapid City.

In this action, Big Sky LLC has the burden of proving the following issues:

1. That City of Rapid City has waived portions of the city ordinance, specifications or agreement between the parties.
2. That the City of Rapid City should be estopped from asserting noncompliance with City specifications if the City through its conduct and policy communicated that such compliance was not necessary and that reasonable persons would so perceive the conduct.
3. That the City of Rapid City failed to bring the claim within the Statute of Limitations.

In determining whether or not an issue has been proved by greater convincing force of the evidence, you should consider all of the evidence bearing upon that issue, regardless of who produced it.

INSTRUCTION NO. 10

A waiver occurs when one in possession of a right, whether obtained by law or by agreement, who with full knowledge of the facts, voluntarily and intentionally does or fails to do something inconsistent with the enforcement of that right. To support a defense of waiver, there must be a showing of a clear, unequivocal and decisive act or acts showing an intention to give up the existing right. There can be no waiver unless so intended by one party and so understood by the other. A person who has waived a right cannot recover damages based on that right.

Big Sky, LLC has the burden of proof to establish a waiver occurred by the City of Rapid City.

INSTRUCTION NO. 13

In this case, the Court has already determined certain facts or evidence to guide you in your decision. For purposes of this case, these are facts you must accept as true. Those facts are as follows:

Big Sky, LLC was involved in developing the Big Sky subdivision in Rapid City, South Dakota, including Phases 1, 2, 3, and 4 which are the subject of this litigation. Under South Dakota law, a municipality has extraterritorial jurisdiction to regulate the subdivision of all land within three miles of the municipality's corporate limits. Chapter 16 of Rapid City Municipal Code (RCMC) establishes regulations governing the subdivision of land within the City's jurisdiction.

RCMC 16.16.010 requires subdividers to install or construct certain public improvements:

1. The subdivider is required to install or construct the improvements hereinafter described prior to receiving approval of his or her final plat or prior to having released bond or other securities which guarantee the required improvements.

2. All improvements required under these regulations shall be constructed in accordance with City Specifications and under the inspection of the City Engineer or his or her duly authorized representative.

"Improvements" include streets, curbs, gutters, property markers, sidewalks, street lights, traffic signs, water mains, sanitary sewers, and storm sewers. The City adopted Standard Specifications for Public Works Construction (Specifications) that improvements were required to meet.

After improvements are completed, the City's Specifications, and specifically § 7.65 (Exhibit 250), address project acceptance:

> Final acceptance of the project by the Owner [City] will be documented by the issuance of an acceptance letter, which is issued according to the following criteria:

1) Construction has been substantially completed and the facilities can be put to their intended use.
2) All testing has been completed, and the required results have been met.

The date of the acceptance letter documents the start of the two-year warranty period, during which the Contractor shall be notified in writing of any defects in the project and shall correct the defects at his expense.

The City has never formally accepted ownership or maintenance responsibility for any of the public improvements on the properties. No "acceptance letter" was sent to Big Sky, LLC as indicated in Specifications § 7.65. Specifications § 7.65 clearly states that "final acceptance of the project by the Owner [City] will be documented by the issuance of an acceptance letter." It is undisputed that the City never issued any final acceptance letters as referenced in the Specifications.

Under the ordinances and specifications, Big Sky, LLC remains liable until the City accepts the improvements by a final acceptance letter, or unless the City waived the requirement of a formal acceptance letter.

INSTRUCTION NO. 19

If there is a recovery by the City in this case, it will be used to fix the roads in Phases 1, 2, 3, and 4 of the Big Sky Subdivision.

INSTRUCTION NO. 20

If you find that Big Sky LLC failed to properly complete the project, you must fix the amount of money which will reasonably and fairly compensate the City of Rapid City for any of the following elements of loss or harm suffered in person or property proved by the evidence to have been legally caused by Big Sky, LLC's conduct, taking into consideration the nature, extent, and duration of the injury, whether such loss or harm could have been anticipated or not, namely:

The amount of money necessary to fix or repair the public improvements in Phases 1, 2, 3, and 4 of the Big Sky Subdivision, such that the public improvements are approved for acceptance by the City of Rapid City.

Whether damages have been proved by the evidence is for you to determine. Your verdict must be based on evidence and not upon speculation, guesswork, or conjecture.

INSTRUCTION NO. 6

You must fix the amount of money which will reasonably and fairly compensate the City of Rapid City for any of the following elements of loss or harm suffered in person or property proved by the evidence to have been legally caused by Big Sky, LLC's conduct, taking into consideration the nature, extent, and duration of the injury, whether such loss or harm could have been anticipated or not, namely:

1. The amount of money necessary to fix or repair the public improvements in Phases 1, 2, 3, and 4 of the Big Sky Subdivision, such that the public improvements are approved for acceptance by the City of Rapid City.
2. The amount of money necessary to fix or repair the public nuisance created or maintained by Big Sky, LLC.

Whether damages have been proved by the evidence is for you to determine. Your verdict must be based on evidence and not upon speculation, guesswork, or conjecture.

South Dakota Pattern Jury Instruction Number 50-00-10 (modified)

Refused 1/27/17

Pennington County, SD
FILED
IN CIRCUIT COURT
JAN 27 2017
Ranae Truman, Clerk of Courts
By _____ Deputy

CIV07-599

Construction Close-out Checklist

for Public Infrastructure in Subdivisions & Site Developments
City of Rapid City Engineering Division

Project Number: DEV 00-389 Project Name: BIG SKY IV

Inspector: DJohnson/R. Eichenberger Substantial Completion Date: Aug 30, 2000

	Acceptance Dates	
	Engineering Div.	Operation Div.
GENERAL		
Grading:		
Full width of ROW	8/30	
Fill sections: lift thickness & compaction testing	8/30	
Erosion Control:		
Required structures/features in place	Needed	
Revegetation: topsoil, seeding, mulching, irrigation	pending Homeowner	
Private Utilities:		
Trenches tested for compaction	ok	
Sight triangles unobstructed	ok	
Above-grade locations relative to sidewalk & property lines	ok Need markings	
SEWER SYSTEM		
Sewer Mains:		
Tested for watertightness	RVSD ok	
TV'ed for debris & defects		*
Manholes:		
Tested for watertightness	RVSD ✓	
Chimnies: straight & watertight	✓	*
Frame & covers: watertight & adjusted to grade	✓	
Inverts: channel depth, shape, & smoothness	✓	*
Tie-ins: watertight, inverts smooth & clean	✓	
Sewer Services: locations marked at property line	NO (Most one)	
Trench Backfill tested for compaction	Am. Engineering Testing	
WATER SYSTEM		
Water Mains:		
Pressure tested	RVWD ✓	
Leak tested	RVWD ✓	
Disinfected & flushed	RVWD ✓	
Tracing wire: intact & terminated in valve boxes	RVWD ✓	*
Valves operate properly	RVWD ✓	*
Valve Boxes straight, clean & adjusted to grade	RVWD ✓	*
Hydrants:		
Nozzle height & orientation	RVWD	
Location relative to sidewalks, landscaping, poles, etc.	✓	
Curb Stops		
Boxes straight, clean & adjusted to grade	RVWD ✓	*
Location relative to sidewalks & property line	✓	
Trench Backfill tested for compaction	Am. Testing Testing	

	Acceptance Dates	
	Engineering Div.	Operation Div.
STREETS		
Subgrade: scarified & tested for compaction	Am. Eng. Testing ✓	
Base Course:	✓	
Plans thickness & trimmed	✓	
Tested for compaction	Am. Eng. Testing ✓	
Curb & Gutter:	✓	
Finish, jointing, curing	✓	
Dimensions	✓	
Tilt & slope — Poor slope @ inlet	✓	
Concrete testing: air, 28-day compressive strength	Am. Eng. Test ✓	
Pavement, AC & PCC:		
Mix design	✓	
Total thickness per plans	✓	
Environmental conditions during placement	✓	
Ride	✓	
AC Pavement:		
Compaction test results	Am. Eng. Testing ✓	
Surface seal	✓	
Lift thicknesses	✓	
PCC Pavement:		
Doweling & jointing	N/A	
Finishing & curing		
28-day compressive strength		
STORM WATER SYSTEM		
General: all components clean & free of debris	remove Wood forms	
Storm Sewers:		
Inlets: grates, openings, sizes	✓	
Flared ends & rip-rap — weed rip-rap	✓	
Frame & covers: adjusted to grade	Needs grout	
Open Channels:		
Cross section geometry & flow-line slope	N/A	
Checks, drops, & armoring		
Topsoil, seeding, mulching		
Interim erosion control measures	Needed @ Planeland Ditches	
Maintenance accesses: grades, widths, & surfacing	✓	
Trench Backfill & Embankment Fill tested for compaction		
SIGNS, PAVEMENT MARKING & LIGHTING		
Regulatory Signs: MUTCD-compliant, posts, placement	None	*
Street Signs: names & spelling per approved plat, placement	Needed	
Striping & Pavement Markings: MUTCD-compliant		*
Street Lighting: locations, conduit	Needed	*
SIDEWALKS		
Locations & widths (on all 4 intersections quadrants, minimum)	on plan - not built	
Handicap ramps: locations, ADA-compliant	ok	
Finishing, jointing, curing	ok	

CIV07-599

CITY OF RAPID CITY

Engineering Division
300 Sixth Street
Rapid City, SD 57701-2724
Telephone: 605-394-5377 ext. 214
FAX: 605-394-6636
rod.johnson2@cl.rapid-city.sd.us

May 2, 2000

Mr. Doyle Estes
3220 W. Main
Rapid City, SD 57702

RE: Punch List for the Big Sky Subdivision

Dear Mr. Estes.

Per our discussion at last weeks meeting, I am providing you with the following punch list for the Big Sky Subdivision. The following items will need to be finished or repaired and a schedule provided to the City as when to when you anticipate to have the items completed. This letter shall serve as notification that the following items will need to be addressed and brought into compliance with the subdivision regulations.

The following items were reviewed by Ron Eikenberry (City Inspector for this subdivision), Randy Nelson (Engineering Div. Manager) and myself (Subdivision Engineer).

1) Asphalt failure and settling has been noticed on Avenue A and on Hansen. These failures include asphalt stress marks, alligator cracking and utility trench settlement. At this time we request you address this situation and inform us on your plan and schedule for the needed problem analysis and repair. We require, as part of your investigation that an engineering analysis (by a Professional Engineer) and recommendation is submitted outlining the source of the problem and the technical/soil information that will be needed for the repair process. This process will need to be reviewed and approved by the City Engineering Department. Due to these premature failures the City is requiring an additional 2-year extended warranty on these streets once the repairs are completed to the City's satisfaction.

EQUAL HOUSING OPPORTUNITY

EQUAL OPPORTUNITY EMPLOYER

SCULL 0001

2) Remove secondary driveway approaches. Each lot is only allowed one (1ea) approach. These will be marked by the inspector for removal.
3) There are several locations throughout the subdivision where the sidewalks and handi-cap ramps are not to "City or ADA Code". These areas will need to be removed, re-graded and re-installed. The inspector will mark these areas.
4) All dead end or non-continuous streets will need a temporary gravel surface turn-a-round installed. These will need a 50-foot radius, 6" thick base course surfacing, 3ea red diamonds installed at the end and a dead end sign installed at the closest intersection.
5) Provide and place street signs at the corner of Hansen Lane and Carl Ave. and regulatory signs per the information recently provided to your engineer.
6) Seal cracks in the curb and gutter that have appeared in the recent phase 3 expansion of this subdivision. These will be marked by the inspector.
7) Finish grading to the right-of-way line on phase 3.
8) As a side note. Per our meeting last week. If you plan to deviate from your technical report on the section of Degeest Street that is requiring 5" thick asphalt over 12" thick base course, due to the unstable soils in this area, your technical consultant (American Engineering Testing, Inc.) will need to submit a recommendation of the over-excavation and import fill requirements to allow the 5" thick asphalt over 6" thick base course pavement design.

The above items will need to be addressed and completed within a reasonable time frame this season.

Please do not hesitate to call me at 394-5377 ext. 214 if you have any questions.

Sincerely,

CITY OF RAPID CITY

Rodney K. Johnson
Project Engineer

cc: File
Randy Nelson, Engineering Manager
Dan Bjerke, Public Works Director
Bob Jackson, City Attorney

(File Name)

SCULL 0002

EX 100 - 002

STATE OF SOUTH DAKOTA)
) SS.
COUNTY OF PENNINGTON)

IN CIRCUIT COURT

SEVENTH JUDICIAL CIRCUIT
CIVIL NO. 51CIV07-000599

CITY OF RAPID CITY, a municipal corporation,

Plaintiff,

vs.

DOYLE ESTES, individually, and **BIG SKY, LLC,**

Defendants and Third Party Plaintiffs,

vs.

RAPID CONSTRUCTION, LLC, Formerly A general partnership known Rapid Construction Co. and **STEVE VAN HOUTEN** and **ROBERT VAN HOUTEN,** General Partners of **RAPID CONSTRUCTION CO.,**

Third Party Defendants and Fourth Party Plaintiffs,

vs.

DREAM DESIGN INTERNATIONAL, INC.,

Fourth Party Defendant,

and

BIG SKY, LLC,

Plaintiff,

vs.

R.C.S. CONSTRUCTION, INC.,
Defendant.

STATEMENT OF MATERIAL FACTS NOT IN DISPUTE RE: MOTION BY BIG SKY LLC FOR SUMMARY JUDGMENT AS TO PARAGRAPHS 14-17 OF THE AMENDED COMPLAINT

Comes now Big Sky, LLC and, pursuant to SDCL § 15-6-56(c)(1), makes this statement, for purposes of this motion only, of the material facts as to which there is no genuine issue to be tried:

1. City has made claims that Big Sky, LLC is liable for the defective construction of public improvements from 1998 through 2000 in Phases I, II, III and IV of a development known generically as "Big Sky." Amended Complaint, Paragraphs 14-17.

2. The head of the City department with oversight of this development process during this time frame was Marcia Elkins. (Elkins depo. at 6-8).[1]

3. Section 7.65 of the City "Standard Specifications" in effect from 1998 through 2000 provided that final acceptance by City of such improvements was to be documented by the issuance of an acceptance letter when improvements were substantially complete and could be put to their intended use, and all testing was complete and results were met.[2]

4. Elkins testified that City never issued letters of acceptance of subdivision improvements during this time frame, and that strict application of City's acceptance process was not done routinely. (Elkins depo. at 27, 66).

5. Ron Eikenberry, the City inspector for Big Sky Phases I, II, III, and IV, testified that it was not standard City practice to perform formal final inspections on subdivision improvements prior to 2000, and that no final inspections were performed on Big Sky Phases I, II and III. (Eikenberry depo. at 16, 55, 194).[3]

6. As City Inspector on Big Sky Phases I, II, III and IV, Eikenberry conducted

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1 Pertinent excerpts from the deposition of Marcia Elkins are attached as Exhibit 1 to the Affidavit of Donald A. Porter.

2 The General Conditions of these Specifications have previously been filed with this Court as an attachment to the Affidavit of Jess M. Pekarski dated June 7, 2016.

3 Pertinent excerpts from the deposition of Ron Eikenberry are attached as Exhibit 2 to the Affidavit of Donald A. Porter.

inspections on a daily basis, and was almost invariably present when compaction testing was done on the subgrade or base course of the streets. He always noted in his logs that there was adequate compaction. (Eikenberry depo. at 12, 14-15, 162, 176).

7. Eikenberry testified it was City's obligation to make certain that the subgrade and everything below it was properly compacted and prepared before the asphalt was placed on the streets. (Eikenberry depo. at 158).

8. Dave Johnson, City project engineer for Big Sky Phase IV, also testified that City inspectors were present at subdivision construction on a daily basis, and that the City was responsible for testing and evaluating compaction testing. (Johnson depo. at 11-12, 21-24, 71)[4]

9. Johnson testified that the City inspector's role was to monitor the quality of the work on subdivision improvements and whether it complied with City specifications, and if the work was not in compliance, to bring it to the attention of City. (Johnson depo. at 160).

10. Johnson and Bob Dominicak, a City project manager from 2004 on, testified that if an inspector or project engineer found that subdivision improvements were not being built in compliance with City specifications, City had authority to stop work on the project. (Johnson depo. at 176-177; Domincak depo. at 7, 110).[5]

11. Eikenberry recorded in the copious log notes that he made of Big Sky Phases I, II and III that these projects had adequate compaction, and he felt that at the end of construction of these projects the streets were "perfect." (Eikenberry depo. at 30, 162).

12. Eikenberry's log reflects the completion and favorable results for testing throughout Big Sky Phase I and states that Big Sky Phase I was complete on February 2, 1999.

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4 Pertinent excerpts from the deposition of David Johnson are attached as Exhibit 3 to the Affidavit of Donald A. Porter.

5 Pertinent excerpts from the deposition of Bob Dominicak are attached as Exhibit 4 to the Affidavit of Donald A. Porter.

(Eikenberry depo. at 200-201; Eikenberry Deposition Exhibit 70).[6]

13. Eikenberry's log reflects the completion and favorable results for testing throughout Big Sky Phase II and states that Big Sky Phase II was complete on July 14, 1999. (Eikenberry depo. at 201-202; Eikenberry Deposition Exhibit 71).[7]

14. Eikenberry's log reflects the completion and favorable results for testing throughout Big Sky Phase III and states that Big Sky Phase III was completed on December 8, 1999. (Eikenberry depo. at 203-204; Eikenberry Deposition Exhibit 72).[8]

15. "Completion," as used by City employees in this context meant "completed in an acceptable manner," and also meant that the streets could be driven on and the water and the sewer used. (Johnson depo. at 35; Dominicak depo. at 83).

16. By the time Big Sky Phase IV construction was underway, City utilized a "Construction Close-Out Checklist." (Eikenberry depo. at 120-130).

17. Dave Johnson, acting as City Project Engineer for Big Sky Phase IV, completed a "Construction Close-Out Checklist" for Phase IV that showed the City's acceptance of tests for utility trench compaction; for the sewer system; for the water system; and for compaction of the subgrades, base course and pavement of the streets. (Johnson depo. at 71, 98-100; Johnson deposition exhibit 9.)[9]

18. The "Construction Close-Out Checklist" for Big Sky Phase IV shows a "substantial completion date" of Phase IV of August 30, 2000, which Johnson testified meant Phase IV was "substantially complete" as of that date. (Johnson deposition exhibit 9; Johnson depo. at 116, 134).

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6 Eikenberry Deposition Exhibit 70 is attached as Exhibit 5 to the Affidavit of Donald A. Porter.
7 Eikenberry Deposition Exhibit 71 is attached as Exhibit 6 to the Affidavit of Donald A. Porter.
8 Eikenberry Deposition Exhibit 72 is attached as Exhibit 7 to the Affidavit of Donald A. Porter.
9 Johnson Deposition Exhibit 9 is attached as Exhibit 8 to the Affidavit of Donald A. Porter.

19. Big Sky Phase IV streets were put to use after August 30, 2000. (Eikenberry depo. at 138; Dominicak depo. at 68).

20. Under City Standard Specifications, the official with the primary responsibility for the determination of substantial completion and adequate testing was the Director of Public Works, acting directly or through his duly authorized agents. (City Standard Specification § 7.55; Definition of "Engineer" in City Standard Specifications).

21. Since the Director of Public Works was not responsible for private developments, in practice "letters of acceptance" were drafted by the subdivision project engineer. (Elkins depo. at 88; Dominicak depo. at 49, 69-70, 207)

22. Eikenberry, as City inspector of private developments, reported to the project engineer of each subdivision that Eikenberry inspected and was the duly authorized agent of that project engineer. (Eikenberry depo. at 44).

23. Eikenberry substantially complied with City Specification § 7.65 in documenting City's acceptance of Big Sky Phases I, II, and III in Eikenberry's log books for those Phases. (Eikenberry deposition exhibits 70, 71, and 72).

24. Johnson substantially complied with City Specification § 7.65 in documenting City's acceptance of Big Sky Phase IV in his "Construction Close-Out Checklist" for that phase. (Johnson deposition exhibit 9).

Dated this 7th day of December, 2016.

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

BY: /s/ *Donald A. Porter*
Donald A. Porter
Jess M. Pekarski
Attorneys for Defendants Doyle

Estes and Big Sky, LLC
P.O. Box 290
Rapid City, SD 57709

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he served a copy of the foregoing document, **Statement of Material Facts not in Dispute Re: Motion by Big Sky LLC for Summary Judgment as to Paragraphs 14-17 of the Amended Complaint** upon the persons herein next designated, on the date below shown, by placing the same in the service indicated, as follows:

John K. Nooney Nooney & Solay 632 Main Street, 2nd Floor P.O. Box 8030 Rapid City, SD 57709 john@nooneysolay.com	[ ] [ ] [ ] [ ] [X]	U.S. Mail Hand Delivery Facsimile Federal Express Odyssey File & Serve
Robert J. Galbraith Nooney & Solay 632 Main Street, 2nd Floor P.O. Box 8030 Rapid City, SD 57709 robert@nooneysolay.com	[ ] [ ] [ ] [ ] [X]	U.S. Mail Hand Delivery Facsimile Federal Express Odyssey File & Serve
Steven J. Oberg Lynn, Jackson, Shultz & Lebrun, P.C. P.O. Box 8250 Rapid City, SD 57709 soberg@lynnjackson.com	[ ] [ ] [ ] [ ] [x]	U.S. Mail Hand Delivery Facsimile Federal Express Odyssey File & Serve
Barbara Anderson Lewis Lynn, Jackson, Shultz & Lebrun, P.C. P.O. Box 8250 Rapid City, SD 57709 blewis@lynnjackson.com	[ ] [ ] [ ] [ ] [x]	U.S. Mail Hand Delivery Facsimile Federal Express Odyssey File & Serve
Ronald G. Schmidt Gunderson, Palmer, Nelson & Ashmore 506 6th Street Rapid City, SD 57701 rchmidt@gpnalaw.com	[ ] [ ] [ ] [ ] [x]	U.S. Mail Hand Delivery Facsimile Federal Express Odyssey File & Serve
Roger A. Sudbeck Boyce, Greenfield, Pashby & Welk, LLP P.O. Box 5015	[ ] [ ] [ ]	U.S. Mail Hand Delivery Facsimile

Sioux Falls, SD 57117 rasudbeck@boycelaw.com	[ ] [x]	Federal Express Odyssey File & Serve
Paul W. Tschetter Boyce, Greenfield, Pashby & Welk, LLP P.O. Box 5015 Sioux Falls, SD 57117 pwtschetter@boycelaw.com	[ ] [ ] [ ] [ ] [x]	U.S. Mail Hand Delivery Facsimile Federal Express Odyssey File & Serve
Scott Sumner Sumner Law Office P.O. Box 2553 Rapid City, SD 57709 scott@sumnerlawoffice.com	[ ] [ ] [ ] [ ] [x]	U.S. Mail Hand Delivery Facsimile Federal Express Odyssey File & Serve

Dated the 7th day of December, 2016.

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

By: */s/ Donald A. Porter*
Donald A. Porter
Jess M. Pekarski

COUNTY OF PENNINGTON) :ss STATE OF SOUTH DAKOTA)	IN CIRCUIT COURT SEVENTH JUDICIAL CIRCUIT
CITY OF RAPID CITY, a municipal corporation, Plaintiff, vs. *DOYLE ESTES, individually, and BIG SKY, LLC,* Defendants and Third Party Plaintiffs, vs. RAPID CONSTRUCTION, LLC, formerly a general partnership known as Rapid Construction Co. and STEVE VAN HOUTEN and ROBERT VAN HOUTEN, *general partners of Rapid Construction Co.*, Third Party Defendants and Fourth Party Plaintiffs, vs. DREAM DESIGN INTERNATIONAL, INC., Fourth Party Defendant, and BIG SKY, LLC Plaintiff, vs. R.C.S. CONSTRUCTION, INC., Defendant.	Civil No.: 51CIV07-000599 **ORDER ON MOTION TO AMEND PLEADINGS AND MOTION TO DISMISS**

THIS MATTER having come before the Court on the 20th day of June, 2016 on the Plaintiff's Motion to Amend Pleadings, and on the 28th day of June, 2016 on the Motion to Dismiss by Estes and Big Sky, the Plaintiff, City of Rapid City, appearing through its counsel, John K. Nooney and Robert J. Galbraith; the Defendants and Third-Party Plaintiffs, Doyle Estes and Big Sky, LLC, appearing through their counsel, Donald A. Porter and Christopher A. Christianson; the Third-Party Defendants and Fourth-Party Plaintiffs, Rapid Construction, LLC, Steve Van Houten and Robert Van Houten, appearing through their counsel, Paul W. Tschetter; the Fourth-Party Defendant, Dream Design International, Inc., appearing through its counsel, Scott Sumner; and the Defendant, R.C.S. Construction, Inc., appearing through its counsel, Steven Oberg and Barbara Anderson Lewis; the Court having had an opportunity to consider the submission of the parties, as well as argument of counsel; it is hereby

ORDERED that the Plaintiff's Motion to Amend Pleadings is hereby GRANTED; and it is further

ORDERED that the Motion to Dismiss by Estes and Big Sky is hereby DENIED.

Dated this 21 day of July, 2016.

BY THE COURT:

HONORABLE WARREN JOHNSON
Circuit Court Judge

ATTEST:
Ranae Truman
Clerk of Courts
By: Deputy Clerk

STATE OF SOUTH DAKOTA)
) SS.
COUNTY OF PENNINGTON)

IN CIRCUIT COURT

SEVENTH JUDICIAL CIRCUIT
CIVIL NO. 51CIV07-000599

CITY OF RAPID CITY, a municipal corporation,

Plaintiff,

vs.

DOYLE ESTES, individually, and **BIG SKY, LLC,**

Defendants and Third Party Plaintiffs,

vs.

RAPID CONSTRUCTION, LLC, Formerly A general partnership known Rapid Construction Co. and **STEVE VAN HOUTEN** and **ROBERT VAN HOUTEN**, General Partners of **RAPID CONSTRUCTION CO.,**

Third Party Defendants and Fourth Party Plaintiffs,

vs.

DREAM DESIGN INTERNATIONAL, INC.,

Fourth Party Defendant,

and

BIG SKY, LLC,

Plaintiff,

vs.

R.C.S. CONSTRUCTION, INC.,
Defendant.

STATEMENT OF MATERIAL FACTS NOT IN DISPUTE RE: MOTION FOR SUMMARY JUDGMENT BY BIG SKY LLC RE: VIOLATION OF SOUTH DAKOTA CONSTITUTION

Comes now Defendant Big Sky, LLC and, pursuant to SDCL § 15-6-56(c)(1), makes this statement, for purposes of this motion only, of the material facts as to which there is no genuine issue to be tried:

1. At the time of the approval of the Final Plats that are the subject of Paragraphs 14 through 24 of the Amended Complaint, City had in effect Section 16.16.010 of the Rapid City Municipal Code, which provided in pertinent part:

> A. The subdivider is required to install or construct the improvements hereinafter described prior to receiving approval of his or her final plat or prior to having released bond or other securities which guarantee the required improvements.
>
> B. All improvements required under these regulations shall be constructed in accordance with City Specifications and under the inspection of the City Engineer or his or her duly authorized representative

City of Rapid City v. Estes, 805 N.W.2d 714, 715-716 (S.D. 2011); Amended Complaint, Paragraph 7.

2. At the time of the approval of the Final Plats that are the subject of Paragraphs 14 through 17 of the Amended Complaint, City included streets among the public improvements that it required subdividers to install under Section 16.16.010 of the Rapid City Municipal Code. City of Rapid City v. Estes, 805 N.W.2d 714, 716 (S.D. 2011), citing Rapid City Municipal Code 16.16.020-.090; Amended Complaint, Paragraph 9.

3. City alleges that Defendant Big Sky, LLC, a private association, was subject to the requirements of Rapid City Municipal Code Section 16.16.010 with regard to the installation of public improvements, including streets, in subdivisions that were the subject of Paragraphs 14 through 17 of the Amended Complaint. Amended Complaint, Paragraphs 38, 43.

4. Marcia Elkins was head of the City planning department, the name of which

changed on a number of occasions over time, that oversaw the process of constructing private developments. (Elkins depo. at 6-8).[1]

5. Marcia Elkins testified that:

> Q When a developer of a subdivision installs a street as a condition of the approval of the subdivision, who establishes the grade of the street?
> A It was part of the engineering design plans that was submitted by the developer's engineer and reviewed by the Public Works engineering staff, engineering staff – subdivision reviewer, whoever it was, whichever engineer it was.

(Elkins depo. at 16).

6. David Johnson was City project engineer with oversight responsibility for private developments from 2000 through 2010. (Johnson depo. at 6, 10-11).[2]

7. David Johnson testified:

> Q So other than for naming the streets and deciding how big the lots were along the streets, can you give me some idea of just what design flexibility that the developer and the developer's engineer had in putting together the set of plans for subdivision improvements in a subdivision?
> ***
> A They have – I mean, there's flexibility in terms of how the overall sewer system is going to be laid out in a subdivision or whatever. There's different ways to handle water flow to maintain adequate water pressure to the fire hydrants to get enough delivery for fire flow there, the sizing pipes different sizes in different locations to handle that; fire hydrant spacing; manhole locations. There's how the street is laid out in terms of the grades and curves and how much grading they want to do. There's a substantial amount that's still – that the developer and his engineer determine.

(Johnson depo. at 154-155).

---

1 Pertinent excerpts from the deposition of Marcia Elkins are attached as Exhibit 1 to the Affidavit of Donald A. Porter.

2 Pertinent excerpts from the deposition of David Johnson are attached as Exhibit 3 to the Affidavit of Donald A. Porter.

Dated this 7th day of December, 2016.

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

by: /s/*Donald A. Porter*
Donald A. Porter
Jess M. Pekarski
P.O. Box 290
Rapid City, SD 57709
(605) 343-2410

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he served a copy of the foregoing document, **Statement of Material Facts Not in Dispute Re: Motion for Summary Judgment by Big Sky LLC Re: Violation of South Dakota Constitution** upon the persons herein next designated, on the date below shown, by placing the same in the service indicated, as follows:

John K. Nooney Nooney & Solay 632 Main Street, 2nd Floor P.O. Box 8030 Rapid City, SD 57709 john@nooneysolay.com	[ ] [ ] [ ] [ ] [X]	U.S. Mail Hand Delivery Facsimile Federal Express Odyssey File & Serve
Robert J. Galbraith Nooney & Solay 632 Main Street, 2nd Floor P.O. Box 8030 Rapid City, SD 57709 robert@nooneysolay.com	[ ] [ ] [ ] [ ] [X]	U.S. Mail Hand Delivery Facsimile Federal Express Odyssey File & Serve
Steven J. Oberg Lynn, Jackson, Shultz & Lebrun, P.C. P.O. Box 8250 Rapid City, SD 57709 soberg@lynnjackson.com	[ ] [ ] [ ] [ ] [x]	U.S. Mail Hand Delivery Facsimile Federal Express Odyssey File & Serve
Barbara Anderson Lewis Lynn, Jackson, Shultz & Lebrun, P.C. P.O. Box 8250 Rapid City, SD 57709 blewis@lynnjackson.com	[ ] [ ] [ ] [ ] [x]	U.S. Mail Hand Delivery Facsimile Federal Express Odyssey File & Serve

Ronald G. Schmidt	[ ]	U.S. Mail
Gunderson, Palmer, Nelson & Ashmore	[ ]	Hand Delivery
506 6th Street	[ ]	Facsimile
Rapid City, SD 57701	[ ]	Federal Express
rchmidt@gpnalaw.com	[x]	Odyssey File & Serve
Roger A. Sudbeck	[ ]	U.S. Mail
Boyce, Greenfield, Pashby & Welk, LLP	[ ]	Hand Delivery
P.O. Box 5015	[ ]	Facsimile
Sioux Falls, SD 57117	[ ]	Federal Express
rasudbeck@boycelaw.com	[x]	Odyssey File & Serve
Paul W. Tschetter	[ ]	U.S. Mail
Boyce, Greenfield, Pashby & Welk, LLP	[ ]	Hand Delivery
P.O. Box 5015	[ ]	Facsimile
Sioux Falls, SD 57117	[ ]	Federal Express
pwtschetter@boycelaw.com	[x]	Odyssey File & Serve
Scott Sumner	[ ]	U.S. Mail
Sumner Law Office	[ ]	Hand Delivery
P.O. Box 2553	[ ]	Facsimile
Rapid City, SD 57709	[ ]	Federal Express
scott@sumnerlawoffice.com	[x]	Odyssey File & Serve

Dated the 7th day of December, 2016.

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

By: */s/ Donald A. Porter*
Donald A. Porter
Jess M. Pekarski

COUNTY OF PENNINGTON) :ss STATE OF SOUTH DAKOTA)	IN CIRCUIT COURT SEVENTH JUDICIAL CIRCUIT
CITY OF RAPID CITY, a municipal corporation, Plaintiff, vs. DOYLE ESTES, individually, and BIG SKY, LLC, Defendants and Third Party Plaintiffs, vs. RAPID CONSTRUCTION, LLC, formerly a general partnership known as Rapid Construction Co. and STEVE VAN HOUTEN and ROBERT VAN HOUTEN, general partners of Rapid Construction Co., Third Party Defendants and Fourth Party Plaintiffs, vs. DREAM DESIGN INTERNATIONAL, INC., Fourth Party Defendant, and BIG SKY, LLC Plaintiff, vs. R.C.S. CONSTRUCTION, INC., Defendant.	Civil No. 51CIV07-000599 **PLAINTIFF'S RESPONSE TO STATEMENT OF MATERIAL FACTS NOT IN DISPUTE RE: MOTION FOR SUMMARY JUDGMENT BY BIG SKY LLC RE: VIOLATION OF SOUTH DAKOTA CONSTITUTION**

COMES NOW the Plaintiff, City of Rapid City, by and through its undersigned counsel, and consistent with SDCL § 15-6-56(c)(2), respectfully submits this Plaintiff's Response to Statement of Material Facts Not in Dispute Re: Motion for Summary Judgment by Big Sky LLC Re: Violation of South Dakota Constitution.

1. No objection.

2. No objection.

3. It is unknown what is meant by a "private association." No objection that developers, including Big Sky, LLC and Doyle Estes, were subject to the requirements of Rapid City Municipal Code Section 16.16.010.

4. No objection.

5. No objection.

6. No objection.

7. No objection.

Dated this 14th day of December, 2016.

/s/ Robert J. Galbraith
JOHN K. NOONEY
ROBERT J. GALBRAITH
NOONEY & SOLAY, LLP
Attorneys for Plaintiff, City of Rapid City
632 Main Street, 2nd Floor/P.O. Box 8030
Rapid City, SD 57709-8030
(605) 721-5846
john@nooneysolay.com
robert@nooneysolay.com

CERTIFICATE OF SERVICE

I, Robert J. Galbraith, attorney for Plaintiff, City of Rapid City, hereby certify that a true and correct copy of the foregoing was served on this 14th day of December, 2016, by electronic service through Odyssey File & Serve, to:

Don Porter
Jess M. Pekarski
Chris Christianson
Costello, Porter, Hill, Heisterkamp,
Bushnell & Carpenter, LLP
P.O. Box 290
Rapid City, SD 57709-0290

Steven J. Oberg
Barbara Anderson Lewis
Lynn, Jackson, Shultz & Lebrun, P.C.
P. O. Box 8250
Rapid City, SD 57709
Attorneys for RCS Construction, Inc.

Ron Schmidt
Gunderson, Palmer, Nelson & Ashmore
506 6th Street
Rapid City, SD 57701
Attorneys for Third Party Defendants and
Fourth Party Plaintiffs, Steve Van Houten,
and Robert Van Houten

Roger A. Sudbeck
Paul W. Tschetter
Boyce, Greenfield, Pashby & Welk, L.L.P.
P. O. Box 5015
Sioux Falls, SD 57117-5015
Attorneys for Third Party Defendant and
Fourth Party Plaintiff, Rapid
Construction, LLC,

Scott Sumner
Sumner Law Office
P. O. Box 2553
Rapid City, SD 57709
Attorney for Fourth Party Defendant,
Dream Design International, Inc.

/s/ Robert J. Galbraith
ROBERT J. GALBRAITH

COUNTY OF PENNINGTON)
:ss
STATE OF SOUTH DAKOTA)

IN CIRCUIT COURT

SEVENTH JUDICIAL CIRCUIT

CITY OF RAPID CITY, a municipal corporation, Plaintiff, vs. DOYLE ESTES, individually, and BIG SKY, LLC, Defendants, and BIG SKY, LLC Plaintiff, vs. R.C.S. CONSTRUCTION, INC., Defendant.	Civil No. 51CIV07-000599 **ORDER ON DECEMBER 21, 2016 HEARING**

THIS MATTER having come before the Court on the 21st day of December, 2016 on numerous Motions filed by the parties, the Plaintiff, the City of Rapid City, appearing by and through its counsel, John K. Nooney and Robert J. Galbraith, the Defendants, Doyle Estes and Big Sky, LLC, appearing by and through their counsel, Don Porter and Christopher A. Christianson, and the Defendant, R.C.S. Construction, Inc., appearing by and through its counsel, Steven J. Oberg and Barbara Anderson Lewis, the Court having had

an opportunity to consider the submissions of the parties and hear argument of counsel, and good cause appearing, it is hereby

ORDERED that the Motion for Summary Judgment by Big Sky LLC Re: Violation of South Dakota Constitution is hereby DENIED on the merits, without regard to whether or not the appropriate pleadings have been served on the South Dakota Attorney General's Office consistent with SDCL § 21-24-8; and it is further

ORDERED that the Defendant Doyle Estes' Motion for Partial Summary Judgment Re: Individual Liability on Claims against Big Sky LLC is hereby DENIED; and it is further

ORDERED that the Defendant R.C.S. Construction, Inc.'s Motion for Summary Judgment is hereby DENIED; and it is further

ORDERED that the Motion by Big Sky LLC for Summary Judgment as to Paragraphs 14-17 of the Amended Complaint is hereby DENIED; and it is further

ORDERED that the Plaintiff's Motion for Partial Summary Judgment Related to Developer's Liability is hereby DENIED; and it is further

ORDERED that the Defendants' Motion to Quash Subpoena and Subpoena Duces Tecum for Scott Sumner is hereby GRANTED, without prejudice, to the Plaintiff's ability to serve an amended subpoena narrowing the scope of the information sought, which subpoena shall be served upon counsel for the Defendants in this matter.

Dated this 5th day of January, 2016.2017.

BY THE COURT:

Warren G. Johnson

HONORABLE WARREN JOHNSON
Circuit Court Judge

ATTEST:
Ranae Truman
Clerk of Courts

By: Deputy Clerk

SEAL

Pennington County, SD
FILED
IN CIRCUIT COURT
JAN - 5 2017
Ranae Truman, Clerk of Courts
By _____ Deputy

STATE OF SOUTH DAKOTA

OFFICE OF ATTORNEY GENERAL
1302 East Highway 14, Suite 1
Pierre, South Dakota 57501-8501
Phone (605) 773-3215
Fax (605) 773-4106
TTY (605) 773-6585
http://atg.sd.gov/

MARTY J. JACKLEY
ATTORNEY GENERAL

CHARLES D. McGUIGAN
CHIEF DEPUTY ATTORNEY GENERAL

May 9, 2017

Donald A. Porter
Christopher A. Christianson
Costello, Porter, Hill, Heisterkamp, Bushnell & Carpenter, LLP
P.O. Box 290
Rapid City, SD 57709

Re: *City of Rapid City v. Big Sky, LLC and Doyle Estes*
Supreme Court Appeal No. 28205

Dear Mr. Porter:

The Office of Attorney General has received your Notice of Review regarding the constitutional challenge under SDCL 21-24-8 in the above-entitled matter. Please be advised that the Office of Attorney General will not be intervening in this proceeding, as counsel for the parties in the case are able to adequately present the constitutional issues to the Court.

A copy of this letter is being provided to all counsel in the case.

Sincerely,

Philip D. Carlson
Assistant Attorney General

PDC/rar

cc: John K. Nooney
Robert J. Galbraith
Steven J. Oberg
Barbara Anderson Lewis
Ronald G. Schmidt
Roger A. Sudbeck
Paul W. Tschetter
Scott Sumner

COUNTY OF PENNINGTON)
:ss
STATE OF SOUTH DAKOTA)

IN CIRCUIT COURT

SEVENTH JUDICIAL CIRCUIT

CITY OF RAPID CITY, a municipal corporation, Plaintiff, vs. BIG SKY, LLC, Defendants,	Civil No. 51CIV07-000599 **ORDER ON DOYLE ESTES' MOTION FOR JUDGMENT AS A MATTER OF LAW**

THIS MATTER having come on for a jury trial before the Court on the 23rd day of January, 2017, through the 27th day of January, 2017; the Court having heard the evidence in this case, including testimony and exhibits, and the Defendant, Doyle Estes, having moved for Judgment as a Matter of Law at the close of Plaintiff's case pursuant to SDCL § 15-6-50(a), it is hereby

ORDERED, ADJUDGED AND DECREED that Doyle Estes' Motion for Judgment as a Matter of Law is hereby GRANTED and Doyle Estes is dismissed from the above-captioned case with prejudice.

Dated this 17th day of March, 2017, nunc pro tunc January 26, 2017

BY THE COURT:

HONORABLE WARREN JOHNSON
Circuit Court Judge

ATTEST:
Ranae Truman
Clerk of Courts

By: Deputy Clerk
(SEAL)

Pennington County, SD
FILED
IN CIRCUIT COURT
MAR 17 2017
Ranae Truman, Clerk of Courts
By _____ Deputy

STATE OF SOUTH DAKOTA)
) SS.
COUNTY OF PENNINGTON)

IN CIRCUIT COURT

SEVENTH JUDICIAL CIRCUIT

CIVIL NO. 51CIV07-000599

CITY OF RAPID CITY, a municipal corporation,

Plaintiff,

vs.

BIG SKY, LLC,

Defendant.

JUDGMENT

THIS COURT having presided over a jury trial on the above captioned matter, between the City of Rapid City, as plaintiff and Big Sky LLC as defendant; and further

THAT the jury trial having commenced on January 23 and concluded on January 27 at the Pennington County Courthouse in the 7th Circuit in Rapid City, SD; the Hon Warren Johnson presiding; and further

THAT after witnesses testified and evidence taken; and both parties having rested, the case was submitted to jury of twelve jurors; and further

THAT the jury returned a verdict for Big Sky LLC and against the City of Rapid City on all claims on January 27, 2017 through its foreperson; and it is therefore

ORDERED, ADJUDGED AND DECREED that the above action be dismissed on the merits with prejudice based on the jury verdict returned; and that Big Sky LLC be entitled to taxable costs assessed in the amount of 12,848.73 to be inserted later by the Court, such costs to become a judgment against the City of Rapid City until paid.

Dated this 9th day of February, 2017

BY THE COURT:

Warren G. Johnson

Honorable Warren G. Johnson
Circuit Court Judge

ATTEST:

Clerk of Courts

BY: Deputy Clerk

SEAL

11:04 AM
Pennington County, SD
FILED
IN CIRCUIT COURT
FEB - 9 2017
Ranae Truman, Clerk of Courts
By Deputy

COUNTY OF PENNINGTON) :ss STATE OF SOUTH DAKOTA)	IN CIRCUIT COURT SEVENTH JUDICIAL CIRCUIT
CITY OF RAPID CITY, a municipal corporation, Plaintiff, vs. DOYLE ESTES, individually, and BIG SKY, LLC, Defendants and Third Party Plaintiffs, vs. RAPID CONSTRUCTION, LLC, formerly a general partnership known as Rapid Construction Co. and STEVE VAN HOUTEN and ROBERT VAN HOUTEN, general partners of Rapid Construction Co., Third Party Defendants and Fourth Party Plaintiffs, vs. DREAM DESIGN INTERNATIONAL, INC., Fourth Party Defendant, and BIG SKY, LLC Plaintiff, vs. R.C.S. CONSTRUCTION, INC., Defendant.	Civil No.: 51CIV07-000599 **ORDER ON MOTION TO AMEND PLEADINGS AND MOTION TO DISMISS**

THIS MATTER having come before the Court on the 20th day of June, 2016 on the Plaintiff's Motion to Amend Pleadings, and on the 28th day of June, 2016 on the Motion to Dismiss by Estes and Big Sky, the Plaintiff, City of Rapid City, appearing through its counsel, John K. Nooney and Robert J. Galbraith; the Defendants and Third-Party Plaintiffs, Doyle Estes and Big Sky, LLC, appearing through their counsel, Donald A. Porter and Christopher A. Christianson; the Third-Party Defendants and Fourth-Party Plaintiffs, Rapid Construction, LLC, Steve Van Houten and Robert Van Houten, appearing through their counsel, Paul W. Tschetter; the Fourth-Party Defendant, Dream Design International, Inc., appearing through its counsel, Scott Sumner; and the Defendant, R.C.S. Construction, Inc., appearing through its counsel, Steven Oberg and Barbara Anderson Lewis; the Court having had an opportunity to consider the submission of the parties, as well as argument of counsel; it is hereby

ORDERED that the Plaintiff's Motion to Amend Pleadings is hereby GRANTED; and it is further

ORDERED that the Motion to Dismiss by Estes and Big Sky is hereby DENIED.

Dated this 21 day of July, 2016.

BY THE COURT:

Warren Johnson

HONORABLE WARREN JOHNSON
Circuit Court Judge

ATTEST:
Ranae Truman
Clerk of Courts

By: Deputy Clerk

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

APPEAL NO. 28205, 28227

CITY OF RAPID CITY,
Plaintiff/Appellant,

vs.

BIG SKY, LLC and DOYLE ESTES
Defendants/Appellees.

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

The Honorable Warren Johnson
Circuit Court Judge

APPELLANT'S REPLY BRIEF

JOHN K. NOONEY
ROBERT J. GALBRAITH
NOONEY & SOLAY, LLP
632 Main Street, 2nd Floor
P.O. Box 8030
Rapid City, SD 57709-8030
Attorneys for Appellant, City of Rapid City

DONALD A. PORTER
JESS M. PEKARSKI
CHRISTOPHER A. CHRISTIANSON
COSTELLO PORTER LAW FIRM
P.O. Box 290
Rapid City, SD 57709-0290
Attorneys for Appellees, Big Sky, LLC and Doyle Estes

NOTICE OF APPEAL FILED APRIL 3, 2017

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TABLE OF AUTHORITIES

CASES

STATUTES

SECONDARY AUTHORITY

STATEMENT OF THE FACTS

This case involves Big Sky and Estes' development of Phases 1 through 4 of the Big Sky Subdivision. J. Scull Construction Service, Inc. ("Scull") was hired to complete the public improvements in Phases 1 through 3. R.C.S. Construction, Inc. ("RCS") was hired to complete the public improvements on Phase 4. "[T]he streets in Phases I, II, III and IV…settled significantly following construction due to inadequate compaction on streets and utility trenches by Big Sky's contractors, J. Scull Construction Service on Phases I, II and III, and RCS on Phase IV." *See Appellees' Brief, p. 4.*

The parties agree that no letter of acceptance was received from the City for the public improvements in Phases 1, 2, 3, or 4, but that the City provided a number of punch lists to Big Sky and Estes related to issues that needed to be addressed before the public improvements would be accepted. *Trial Exhibits 100,101, 103, 104, 105, and 133.* Estes testified:

> Q: And the purpose of the e-mail was, you were – if we start down at the bottom of this, if we can, please, you wrote an e-mail and said, "Jim, please let me know when I can expect the punch list from the city – amended – will be handled."
>
> You understood there were issues that had not been accepted. There were problems with the road, and they needed to be fixed, right?
>
> A: Yeah, we just a few minutes ago, Mr. Nooney, went through that amended punch list.
>
> Q: Yeah.
>
> A: That's the one I'm referring to.

TT 310:7 – 310:24. Estes also agreed that until the public improvements are accepted, they remained the responsibility of Big Sky:

> Q: Okay. And you understood that the roads would have to be built consistent with City standards, and that until such time as they were accepted, they would remain the responsibility of you as the owner, being Big Sky, LLC. You understood that, right?
>
> A: When you say me as the owner, you mean Big Sky, LLC.
>
> Q: That's what I qualified my question with, yes.
>
> A: Yes.

TT 249:16 – 249:23. Estes testified that as of the summer of 2001, the City was not maintaining the public improvements because the City had not accepted the public improvements. TT 324:8 – 324:15. Estes further acknowledged that at no time did he inform the City that he believed the roads had been accepted and he no longer had any responsibility for them. TT 315:19 – 315:24.

ARGUMENT

The arguments in this Reply Brief will be addressed in the same order they appear in the Appellees' Brief.

I. WAIVER

Big Sky and Estes argue that "municipal contracts are subject to the general substantive law relating to contracts including the general principle of contract law permitting a party to waive a beneficial contract provision." *See Appellees' Brief, p. 6.* Big Sky and Estes fail, entirely, to address the City's argument. Big Sky and Estes do not provide any

contrary authority to the City's argument that "[a]nyone may waive the advantage of a law intended solely for his benefit. But a law established for a public reason cannot be contravened by a private agreement." *Lucero v. Van Wie*, 1999 S.D. 109, ¶ 11, 598 N.W.2d 893, 897 (citations omitted). Big Sky and Estes completely ignore that there are ordinances (laws) in place specifically dealing with the development of public improvements and rely entirely on contract principles. Big Sky and Estes rely almost entirely on this Courts' decisions in *Subsurfco, Inc. v. B-Y Water Dist.*, 337 N.W.2d 448 (S.D. 1983) and *N. Imp. Co. v. S. Dakota State Highway Comm'n*, 267 N.W.2d 208 (S.D. 1978). However, both *Subsurfco* and *N. Imp. Co.* dealt with breach of contract claims against government entities, wherein the plaintiff sued under a contract entered into with the government entity. 337 N.W.2d at 450; 267 N.W.2d at 209.

However, the City did not sue Big Sky or Estes for breach of contract (SR 002, Complaint; SR 814, Amended Complaint) and not a single jury instruction was provided related to a claim for breach of contract (SR 4949, Jury Instructions). The City did not enter into a contract with Big Sky or Estes for construction of public improvements. Big Sky and Estes undertook the development of public improvements (so Big Sky and Estes could sell land and profit therefrom) pursuant to City Ordinances and Specifications. The Specifications are set and predetermined prior to any submissions to the City. So long as a developer complies with the Specifications, the City cannot stop a

developer from constructing the public improvements. This situation is different than if the City decides to enter into a contract with a construction company for the construction of public improvements. Big Sky and Estes came to the City seeking to construct public improvements so that Big Sky and Estes could make a profit off their land, not the other way around.

Further, Big Sky and Estes' argument that the City waived compliance with Specification § 7.65 or that acceptance was "implied" was previously rejected by this Court in *Estes*, 2011 S.D. 75. During the 2011 appeal, Big Sky and Estes argued that "[i]t is also undisputed that, prior to 2006, in spite of the ordinance requirements, projects like those involved with the Big Sky subdivisions routinely 'were not finally inspected] [by the City]…Numerous projects were never accepted by the city they just kind of faded away." *Appellees' Brief, p. 4.* Big Sky and Estes asserted that "[a]cceptance can be shown 'where the public authorities assume jurisdiction and dominion over the property. There need be but little affirmative action to indicate an intention to accept a dedication." *Appellees' Brief, p. 18.* This Court rejected Big Sky and Estes' arguments.[1]

[1] The facts relied upon by this Court in *Estes,* 2011 S.D. 75 did not change. As the Court noted in that decision, "[t]his is a case of statutory and ordinance construction." *Id.* at ¶ 12. The Court further noted that "[t]he City does not argue that there are any genuine issues of material fact." *Id.* at ¶ 11, n. 7. The law of the case doctrine as more fully identified in *In re Estate of Jetter*, 1999 S.D. 33, ¶ 20, 590 N.W.2d 254, 258, should apply. Estes, during his trial testimony, went so far as to argue that this Court's holding with respect to the expiration of the sureties was incorrect. Estes testified:

Big Sky and Estes do not dispute that Big Sky and Estes agreed to comply with City Ordinances and Specifications related to the construction of public improvements when Phases 1 through 4 were developed. Nor do Big Sky and Estes dispute the "general public benefit" of the Ordinances and Specifications under this Court's decision in *Lucero.* 1999 S.D. 109, ¶¶ 12-14.

Further, there was no evidence that the City did not have an acceptance policy. Big Sky's own engineers testified that acceptance was "less formal," but that acceptance was still accomplished. Lawrence Kostaneski worked on Phases 1 through 3 and testified as follows:

> Q: When you were employed by the City – from '84 to '94?
>
> A: Yes.

> Q: Well, the plat might be finalized, Mr. Estes, but you're not suggesting to us, are you, that once a plat's finalized, that without regard to whether the improvements have been completed, that the improvements have been accepted? Is that what you're telling us?
>
> A: The City has either the improvements completed, or they've got a surety posted for the unfinished portion.
>
> Q: Okay.
>
> A: And to me, that – that is acceptance by the City.

TT 261:5 – 262:7. This Court has already rejected that argument:

> Under the ordinances and specifications, Developers remain liable until the City accepts the improvements by a final acceptance letter. The sureties made it possible for Developers to obtain plat approval from the City Council without first constructing the improvements. But it does not relieve Developers from constructing the improvements as required by the Specifications. Neither do the sureties release Developers from this obligation until they receive a final acceptance letter. Obtaining plat approval and receiving a final acceptance of the required improvements are distinct, separate actions.

Estes, 2011 S.D. 75, ¶ 15.

Q: -- would you have had any involvement in the acceptance process of a development project akin to the Big Sky project? Did you understand how it worked?

A: I did understand how it worked and I relied on my professional staff to do the fine points. We all knew what needed to be done. I had other Professional Engineers working in the Engineering Division and I had no reason not to believe that they also understood and could fulfill those responsibilities without my guidance or direction. *If there was an issue, we would discuss it. Otherwise, they were accepting projects on behalf of the City.*

TT 487:2 – 487:15 (emphasis added). Kostaneski testified that even if there's just a "glitch" with the road, that any problem identified would preclude City acceptance:

Q: If you comply with the City requirements, theoretically the job should be accepted –

A: That is correct.

Q: -- should it not?

A: That is correct.

Q: Okay. Even if there's some problem with the work – I mean, not with the work, but even if there's some glitch with the road.

A: Typical glitches that are discovered prior to the City's final acceptance would make their final acceptance impossible until those glitches, as you say, were corrected to their satisfaction. So that's just part of the normal process.

TT 531:20 – 532:7. Kostaneski further testified that he would not have accepted, or expected the roads in Phases 1 or 2 to be accepted:

Q: Prior to – or I should say after you had left the project in '99 and you went out to observe Phases 1 and 2 –

A: Yes.

Q: -- were the improvements in Phases 1 and 2 in a condition that you would have expected that they would have been acceptable to the City of Rapid City?

A: At the time I looked at them after?

Q: Yeah.

A: Well, no.

Q: Okay. And they weren't acceptable why?

A: Well, because they had large expanses of distress or whatever it was that you quoted from that. They were definitely distressed.

TT 498:12 – 498:25. Hani Shafai worked on Phases 3 and 4 and testified as follows:

Q: After Phase 3 was completed, because you would have been the engineer that would have completed the design of Phase 3 and then would have monitored the construction of it, did you, on behalf of Big Sky, LLC ever receive a letter of acceptance form the City for Phase 3?

A: I believe the only thing we got from the City is a punch list and that was the standard practice. There was no official letter of acceptance, so…

TT 582:18 – 582:25.

Q: How did you end the project? How did you close it out?

A: We – we do a final inspection with the City, and we do create a punch list and then we address the punch list items and, you know, the City opens the roads or sometimes the roads are already opened, and once the punch list is, you know, is basically done, really nobody talked about it.

Q: It's done.

A: The City verifies that the punch list is done, is complete, and if it isn't, they will bring it up and we get – make sure that it is done.

Q: Okay. So both the City and the representative of the owner, or maybe it's the contractor, know that the work is finished and the punch list is dealt with.

A: Yes. That's at that time. Now the City is – the process is more formalized, you know.

TT 608:16 – 609:6.

The testimony was undisputed that there was an acceptance process. There was no evidence that the City did anything, or took any action, inconsistent with its right to require Big Sky and Estes to complete the public improvements consistent with City Specifications. The City provided numerous "punch lists." *Trial Exhibits 100, 101, 103, 104, 105, and 133.* Thereafter, Estes continuously represented that he would complete the punch lists. *Trial Exhibits 120, 122, 123, 124, 125, 126, 127, and 129.*

The Trial Court's waiver instructions misapplied South Dakota law and were not supported by the evidence.

II. ESTOPPEL

Big Sky and Estes assert that this Court's prior decision in *Even v. City of Parker* applies only to enforcement of zoning ordinances and should not be applied to "contracts for the construction of public improvements." *See Appellees' Brief, p. 15.* There is no such limitation in *Even,* 1999 S.D. 72, 597 N.W.2d 670. Further, Big Sky and Estes again assert that general contract law applies. Again, this is not a case for breach of contract, but rather Big Sky and Estes' violation of the City

Ordinances and Specifications that Big Sky and Estes choose to avail themselves of when they choose to develop their property.

The Court "do[es] not favor estoppel against a public entity and will apply it only in extreme cases. *Even*, 1999 S.D. 72, ¶¶ 11-12. Big Sky and Estes suggest that the Court should ignore the $300,000 received by Big Sky and Estes from Scull and RCS because that evidence was deemed inadmissible. Again, Big Sky and Estes seek to use the exclusion of evidence to shield itself from liability. Big Sky and Estes do not dispute that Big Sky brought claims against Scull and RCS for the specific purpose of repairing the public improvements in Phases 1 through 4, that Big Sky and Estes recovered $300,000 from Scull and RCS, and that Big Sky and Estes did not repair the public improvements in Phases 1 through 4.

However, notwithstanding any of Big Sky and Estes' arguments related to how they were prejudiced, there is absolutely no evidence that the City actively misled or deceived Big Sky or Estes. "In application of this doctrine to public entities, equitable estoppel may only be used when an entity actively misled or deceived an individual with the intent to have the individual…alter their position to his detriment." *Dakota Truck Underwriters v. S. Dakota Subsequent Injury Fund*. 2004 S.D. 120, ¶ 32, 689 N.W.2d 196.

There was no evidence to suggest that this was the "extreme case" wherein estoppel could be applied to the City.

III. STATUTE OF LIMITATIONS

Big Sky and Estes assert that the City's interpretation provides for an indefinite limitations period. The City does not contend that the limitations period was indefinite. The City contends that the statutory process in Specification § 7.65, which requires completion of construction, testing (and the providing of a punch list), and confirmation that the required results have been met (acceptance), should be followed.[2] As quoted above, the testimony at trial was undisputed that although the acceptance process was "less formal" when Phases 1 through 4 were completed, the process did exist. Kostaneski Testimony, TT 487:2 – 487:15, 531:20 – 532:7; *see also* TT 529:15 – 530:3; Shafai Testimony, TT 582:18 – 582:25, 608:16 – 609:6.

Even Estes acknowledged that he had not received an acceptance from the City (TT 304:11 – 304:16), that he received a punch list and contacted his contractors to have the punch list completed (TT 310:7 – 310:24), and that Big Sky was responsible for the public improvements until they were accepted by the City (TT 249:16 – 249:23). Big Sky sued Scull and RCS alleging that Big Sky "will be caused and required in the future to incur, costs of consulting services and remedial work necessary

[2] Big Sky and Estes further argue that the "question of when accrual occurred is one of fact generally reserved for trial. *See Appellees' Brief, p. 19.* The City does not appeal then "when" but rather the Trial Court's definition of what constitutes the accrual. "[D]eciding what constitutes accrual of a cause of action is a question of law and reviewed de novo." *Brandt v. Cty. of Pennington*, 2013 S.D. 22, ¶ 8, 827 N.W.2d 871,874.

to correct the defective and unworkmanlike performance of [Scull and RCS]" in Phases 1 through 4 of the Big Sky Subdivision. App. at E-6; F-3-4.

There is no question that up until the lawsuit against RCS in 2007, Big Sky and Estes maintained the appearance that the punch lists would be completed and acceptance obtained. Big Sky and Estes cannot argue that the City should have been aware of a cause of action against Big Sky and Estes when Big Sky, Estes, and the City were still working to fulfill the obligations of Specification § 7.65.

Finally, Big Sky and Estes assert that there was nothing to "trigger" the City's suit in January of 2008. While the Trial Court excluded evidence of Big Sky's claim against Scull, there is an easy answer to Big Sky and Estes' question: the City became aware that Big Sky and Estes did not intend to follow through with their requirement to complete the punch list after Big Sky and Estes settled their claim against Scull in April of 2007 (TT: 401:12 – 401:17) and took no action to repair the public improvements in the Big Sky Subdivision.

Because the City's cause of action against Big Sky and Estes did not accrue until the City had notice, or construction notice, that Big Sky and Estes would not fulfill their obligations under City Ordinances and Specifications, the Trial Court's jury instruction was a misstatement of the law.

IV. DAMAGES

Big Sky and Estes do not dispute the City's argument that the only defenses to Big Sky's liability in this case were the affirmative defenses identified in Instruction Nos. 10, 11, and 12. As stated above, it was undisputed that Big Sky was responsible for construction of public improvements on Phases 1 through 4, that Big Sky was provided with a punch list of issues that needed to be addressed prior to acceptance of Phases 1 through 4, that Big Sky never completed the punch list and never received any acceptance from the City, and that the roadways in Phases 1 through 4 settled significantly following construction due to inadequate compaction on streets and utility trenches by Big Sky's contractors.

Big Sky and Estes argue only that the jury could have found the City does not have any damages because the City had not fixed the public improvements which Big Sky and Estes left in shambles. Jury Instruction No. 20 provided as follows:

> If you find that Big Sky LLC failed to properly complete the project, you must fix the amount of money which will reasonably and fairly compensate the City of Rapid City for any of the following elements of loss or harm suffered in person or property proved by the evidence to have been legally caused by Big Sky, LLC's conduct, taking into consideration the nature, extent, and duration of the injury, whether such loss or harm could have been anticipated or not, namely:
>
> > The amount of money necessary to fix or repair the public improvements in Phases 1, 2, 3, and 4 of the Big Sky Subdivision, such that the public improvements are approved for acceptance by the City of Rapid City.

> Whether damages have been proved by the evidence is for you to determine. Your verdict must be based on evidence and not upon speculation, guesswork, or conjecture.

Jury Instruction No. 20, App. at B-022. Big Sky and Estes did not object to Jury Instruction No. 20. TT 845:12.

Big Sky and Estes' own expert identified "substantial distress" in the roadways. Trial Exhibit 192. There was no evidence whatsoever that contradicted the City's damage calculation, Trial Exhibit 163. In fact, Big Sky and Estes' own engineers estimates to repair the roads in Phases 1 through 4 totaled hundreds of thousands of dollars. *See Trial Exhibits 159, 160, 161.* There is no argument that there were no damages in this case.

V. NUISANCE

Big Sky and Estes allege that nuisance does not apply because Big Sky and Estes were not owners of the property. Big Sky and Estes rely on a municipality's right to abate a nuisance "without civil action" under SDCL § 21-10-16. This process is wholly inapplicable to this case.

The statute applicable to this case is SDCL § 21-10-1. There is no ownership requirement in SDCL § 21-10-1. "Generally, one who creates a nuisance is liable for the resulting damages, and such person's liability continues as long as the nuisance continues." 58 Am. Jur. 2d Nuisances § 90. "Liability for a nuisance may be based upon *either* creating *or* maintaining a nuisance." *Id.* (emphasis added). "[I]f the defendant causes the creation of a physical condition that is of itself harmful, even

after the activity that created it has ceased, a person who carried on the activity that created the condition is subject to continuing liability for nuisance." *Id.* "No lapse of time can legalize a public nuisance, amounting to an actual obstruction of public right." SDCL § 21-10-4. The City was entitled to have its claim for public nuisance heard.

VI. LIABILITY OF BIG SKY AND ESTES

Big Sky and Estes argue that the law of the case does not apply because this appeal presents different issues or more fully developed facts. Big Sky and Estes argue that "this Court did not have before it the extensive evidence…that City never issued [acceptance] letters, and that the actions of inspectors and engineers waived that requirement[.]" *See Appellees' Brief, p. 24.* However, as set forth above, this is the exact argument made by Big Sky and Estes in 2011. This Court considered those arguments and held that "[u]nder the ordinances and specifications, Developers remain liable until the City accepts the improvements by a final acceptance letter." *Estes*, 2011 S.D. 75, ¶ 15. Big Sky and Estes have provided no other reason why the Court should not hold that the Big Sky and Estes remain liable until the City accepts the improvements by a final acceptance letter.

VII. EVIDENCE OF BIG SKY'S LITIGATION AND SETTLEMENT OF CLAIMS AGAINST SCULL AND RCS

In arguing that evidence of Big Sky's claims against Scull and RCS were properly excluded by the Court, Big Sky and Estes rely on SDCL § 19-19-408. SDCL § 19-19-408 excludes only evidence of settlements

(not the existence of litigation) and applies only where the settlement is used to prove liability or the amount of damages. Big Sky's litigation and settlement of claims against Scull and RCS were not suggested to be used for that reason. The City sought to use the litigation against Scull and RCS to show that it was Big Sky and Estes, or their contractors, who were at fault for the deficiencies in Phases 1 through 4, to rebut and impeach Estes' argument that Phases 1 through 4 were impliedly accepted by the City, and to show Big Sky and Estes' knowledge that Phases 1 through 4 had not been accepted.

This case is nearly identical to the decision in *Towerridge, Inc. v. T.A.O., Inc.*, 111 F.3d 758 (10th Cir. 1997). Big Sky and Estes argue that *Towerridge* is distinguishable because it dealt with "settlement of a claim different from the one litigated." *See Appellees' Brief, p. 28.* That argument does not make *Towerridge* distinguishable, but, in fact, identical to this case. In fact, *Towerridge* dealt with almost an identical fact pattern involving a government entity, a contractor, and a subcontractor. *Id.* at 760-61. The only difference in *Towerridge* is that the subcontractor (in this case Scull or RCS) brought a claim against the contractor (Big Sky and Estes); the Court allowed the subcontractor to introduce evidence that the contractor settled claims with the government entity (City). *Id.* While Big Sky and Estes argue that *Towerridge* is distinguishable, the facts could not be more similar.

Finally, Big Sky and Estes argue that pleadings in other cases are only admissible when they are inconsistent with the present contentions of the parties. The Court need look no further than the Appellees' Brief to reject this argument. During the trial and on appeal, the record is replete with arguments by Big Sky and Estes that the City impliedly accepted the public improvements in Phases 1 through 4 or waived acceptance of the same. If the City had accepted the public improvements or waived acceptance as argued by Big Sky and Estes, there would have been absolutely no reason for Big Sky to commence suit against Scull in 2003 or RCS in 2007. App. at E-001-007; App. at F-001-004. Big Sky and Estes clearly took a position inconsistent with Big Sky's claims against Scull and RCS.

The Trial Court should have allowed evidence of Big Sky's litigation and settlement of claims against Scull and RCS.

VIII. DOYLE ESTES, INDIVIDUALLY

Estes relies upon the corporate structure of Big Sky to shield him from liability. However, Estes does not dispute that he was personally a signator on the Release in the Scull litigation or that Estes received funds as a result of either the Scull or RCS settlement. Estes states only that "[t]here is essentially no record evidence regarding the actual disposition of these funds, or whether Estes might not have in fact attempted to provide City with a portion of the Scull settlement." *See Appellees' Brief, p. 30, n. 5.* Again, Estes seeks to use the Court's decision not to allow

evidence of the settlement of those claims against Scull and RCS to his advantage. Estes put money into his pocket as a result of litigation where the only alleged damages were those monies required to repair the roadways in Phases 1 through 4. Instead of repairing the roads, Estes did nothing. At the very least, this creates a question of fact for the jury.

IX. THE CITY'S ORDINANCE IS NOT UNCONSTITUTIONAL

Big Sky and Estes' constitutional argument is so bold it would curtail almost all development in the State of South Dakota. Big Sky and Estes allege that the City cannot delegate the installation and construction of public improvements under Article III, § 26 of the South Dakota Constitution.

Article III, § 26 provides that "*the Legislature*" shall not delegate certain powers reserved for municipalities. With respect to the purpose of Article III, § 26, this Court held that the "framers of our Constitution saw a need to 'cure the evil' of *interference with municipal functions by the legislature* in this state." *City of Chamberlain v. R.E. Lien, Inc.*, 521 N.W.2d 130, 132 (S.D. 1994) (citation omitted).

This, clearly, is not a case wherein the "interference with municipal functions by the legislature" is at issue. However, this Court has also analyzed Article III, § 26 with respect to a municipal ordinance. In *Schryver v. Schirmer,* the Court held that a wage law requiring salaries to be set in accordance with trade scales "is unconstitutional because it delegates to private persons and agencies the absolute power to fix

salaries and thus constitutes an unlawful delegation of legislative power." 84 S.D. 352, 171 N.W.2d 634, 637 (1969). The City has not delegated "absolute power" to design and construct public improvements. The City has enacted Specifications, specifically controlled by the City, to identify the acceptable parameters of public improvement construction. So long as developers fit within those parameters and meet the Specifications, their improvements are "accepted" by the City. The City maintains the ability to change or modify the Specifications and the City ultimately has the power to reject the improvements until such time as the Specifications are met. Indeed, SDCL § 11-6-28 provides municipalities with the power to enact subdivision regulations controlling the construction of streets and utilities. Big Sky and Estes have not challenged SDCL § 11-6-28.

Under Big Sky and Estes' argument, not only would any municipality be prevented from allowing developers to construct public improvements, the municipality would not even be able to hire a construction company to build or repair those improvements, as any such contract would also be a delegation of the government entity's power to install or construct public improvements. Big Sky and Estes' interpretation would seemingly have every municipality employ a full-time construction crew capable of handling all of its infrastructure needs. This was not, and cannot be, the intention of Article III, § 26.

Further, Big Sky failed to timely serve the Attorney General with notice of its Motion for Summary Judgment.[3] Big Sky filed its Motion for Summary Judgment on December 7, 2016. SR 1576. When constitutionality is at issue, the Attorney General must have an opportunity to be heard. *In re Estate of Holan,* 2001 S.D. 6, ¶¶ 11-14, 621 N.W.2d 588. After the City objected to Big Sky's motion on the basis that the Attorney General was not provided notice, Big Sky filed a Summons directed to the Attorney General on December 15, 2016. SR 3100. There is nothing in the record to indicate that the Summons was actually served, but even so, the Attorney General's Office was not provided with sufficient notice of the hearing on December 21, 2016. As this Court held in *Holan,* providing the Attorney General with a copy of a Notice of Appeal (or in this case Notice of Review), transcript order, and appellate brief "do[es] not constitute notice of a constitutional challenge contemplated under SDCL 15-6-24(c) [SDCL § 15-6-24(c) deals with constitutional challenges to a state statute; SDCL § 21-24-8 deals with constitutional challenges to a city ordinance]. The Attorney General's Office was not presented with an opportunity to be heard as contemplated by South Dakota law.

Big Sky and Estes' claim that the City Ordinances and Specifications are unconstitutional should be rejected.

[3] SDCL § 21-24-8 requires any party challenging the constitutionality of a municipal ordinance to serve a copy of the pleadings on the Attorney General.

CONCLUSION

For the foregoing arguments and authority set forth herein, the Appellant, the City of Rapid City, respectfully requests that this Court reverse the Judgment entered by the Trial Court and remand for further proceedings consistent with the arguments identified in the Brief.

Dated this 16th day of October, 2017.

/s/ Robert J. Galbraith
JOHN K. NOONEY (john@nooneysolay.com)
ROBERT J. GALBRAITH (robert@nooneysolay.com)
Attorneys for Appellants
NOONEY & SOLAY, LLP
632 Main Street, 2nd Floor
P.O. Box 8030
Rapid City, SD 57709-8030
(605) 721-5846

CERTIFICATE OF COMPLIANCE

Pursuant to SDCL § 15-26A-66(b)(4), I certify that this Appellant's Brief complies with the type volume limitation provided for in the South Dakota Codified Laws. This brief contains 4,992 words and 24,501 characters ***with no spaces***. I have relied on the word and character count of our word processing system used to prepare this Brief.

Dated this 16th day of October, 2017.

/s/ Robert J. Galbraith

JOHN K. NOONEY (john@nooneysolay.com)
ROBERT J. GALBRAITH (robert@nooneysolay.com)
Attorneys for Appellants
NOONEY & SOLAY, LLP
632 Main Street, 2nd Floor
P.O. Box 8030
Rapid City, SD 57709-8030
(605) 721-5846

IN THE SUPREME COURT
OF THE STATE OF SOUTH DAKOTA

CITY OF RAPID CITY, Plaintiff/Appellant, v. BIG SKY, LLC and DOYLE ESTES, Defendants/Appellees.	Appeal No. 28205 **CERTIFICATE OF SERVICE**

I, Robert J. Galbraith, attorney for the Appellant, hereby certify that a true and correct copy of the foregoing *Appellant's Reply Brief* was served via electronic service on:

Don Porter
Jess M. Pekarski
Chris Christianson
Costello, Porter, Hill, Heisterkamp,
Bushnell & Carpenter, LLP
P.O. Box 290
Rapid City, SD 57709-0290

Steven J. Oberg
Barbara Anderson Lewis
Lynn, Jackson, Shultz & Lebrun, P.C.
P. O. Box 8250
Rapid City, SD 57709
Attorneys for RCS Construction, Inc.

Ron Schmidt
Gunderson, Palmer, Nelson & Ashmore
506 6th Street
Rapid City, SD 57701
Attorneys for Third Party Defendants and
Fourth Party Plaintiffs, Steve Van Houten,
and Robert Van Houten

Roger A. Sudbeck
Paul W. Tschetter
Boyce, Greenfield, Pashby & Welk, L.L.P.
P. O. Box 5015
Sioux Falls, SD 57117-5015

Attorneys for Third Party Defendant and
Fourth Party Plaintiff, Rapid
Construction, LLC,

Scott Sumner
Sumner Law Office
P. O. Box 2553
Rapid City, SD 57709
Attorney for Fourth Party Defendant,
Dream Design International, Inc.

Marty Jackley
South Dakota Attorney General
Office of the Attorney General
1302 E. Highway 14, Suite 1
Pierre, SD 57501

on this 16th day of October, 2017.

/s/ Robert J. Galbraith

JOHN K. NOONEY (john@nooneysolay.com)
ROBERT J. GALBRAITH (robert@nooneysolay.com)
Attorneys for Appellants
NOONEY & SOLAY, LLP
632 Main Street, 2nd Floor
P.O. Box 8030
Rapid City, SD 57709-8030
(605) 721-5846