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IN THE SUPREME COURT OF IOWA
Case No. 19-0484

KATHRYN MARIE BREESE and E.K.B.
Born in 2005, a minor child, by and
through her mother and next friend
Kathryn Marie Breese,

Appellants/Plaintiffs,

vs.

CITY OF BURLINGTON,

Appellees/Defendant.

Appeal from Des Moines
County District Court
Judge Michael J. Schilling

APPELLANTS' FINAL REPLY BRIEF

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ARGUMENT

1. THE TRIAL COURT ERRED IN ITS APPLICATION OF THE PUBLIC USE DOCTRINE WHEN THE CITY CONNECTED THE PEDESTRIAN/BICYCLE PATHS IN DANKWARDT PARK TO THE BOX SEWER.

The City of Burlington repeatedly refers to the pedestrian bicycle path as a sidewalk in its brief and completely ignores the Supreme Court's holding in ***Johnson vs. Humboldt County***, 913, N.W. 2d. 256, 267 where this court pointed out the distinction between a positive act of negligence and non-action. The public duty rule is intended to protect municipalities from liability for failure to adequately enforce general laws and regulations which were intended to benefit the community as a whole. However, the public duty rule does not protect an entity when it affirmatively acts and does so negligently. Id.

The city argues that the connection of the sewer box into its recreation trail leading out of Dankwardt Park to it is nonfeasance. It is not. Its action created a continuous recreational trail over the top of the box sewer, without safety protection and without warning intended users of the vertical drop off danger. The city improperly did this act, and if it had not connected the sewer box to the recreational trail there would be no need for railings, warning signs or barricades preventing the public from using the portion of the sewer box.

The City of Burlington between 1980 and 1992 connected the sewer box to the sidewalk/bicycle pathways in Dankwardt Park and in so doing had an affirmative duty to comply with the existing engineering safety standards for such pathways. Plaintiff's presented those facts at pages 1, 2 and 7 of their memorandum of law. App. 95, 96, 102. The city converted a non-pathway, the sewer box, into a pathway that connected to the Dankwardt Park pathway. When it did so, it was required to redesign or upgrade a portion of the sewer box that was now being used as a recreational pathway through the north end of Dankwardt Park. ***Johnson***, supra, at 267.

2. THE TRIAL COURT ERRED IN HOLDING THE CITY WAS IMMUNE UNDER THE STATE OF THE ART DEFENSE WHEN IT CONVERTED/RECONSTRUCTED THE SEWER BOX INTO A PEDESTRIAN BICYCLE PATH.

In its argument the city completely ignores the fact that the box sewer when it was first designed, it was not a public facility designed for recreational activities. It was a public sewer structure that moved waste water through its pipes. Pedestrians and bicyclists had no access to it.

The city relies on **Iowa Code §384.37(19)(a)(b) and (g)** to define what constitutes public improvements and argues that the sewer box is either a sanitary storm or combined sewer or drainage conduit and that the recreational trail which

includes and goes over the sewer box is a sidewalk or a pedestrian underpass or overpass. The Supreme Court in ***Hoskinson vs. City of Iowa City***, 620 N.W. 2d. 425, 428-29 (IA 2001) has held that a trail or pathway through a park is not a sidewalk since it is not adjacent to a street. Therefore, defendant's reliance on **Iowa Code §384.37(19)(g)** to describe it as public improvement with respect to this recreational trail is misplaced and inapplicable.

In addition, under **Iowa Code §384.37(19)(22)** a " " sewer" becomes a structure designed, constructed and used for the purposes of carrying off streams surface waters waste or sanitary sewage." This is exactly what the box sewer was originally designed for and did as a public improvement from prior to 1930 to 1980. **Iowa Code §670.4(1)(h).** The conversion of the box sewer into a recreational trail use sometime between 1980 and 1992 created a new use namely a pedestrian bicyclist pathway. The city has not established that between 1980 to 1992 this recreational trail was designed constructed or reconstructed in good faith in accordance with generally recognized engineering or safety standards or design theories in existence at the time of its construction or reconstruction. The city has its burden to establish its immunity ***Doe vs. Cedar Rapids, Comty. Sch. Dist.***, 654 N.W. 2d. 439, 446 (IA 2002). Liability under the Iowa Tort Claim Act and the Iowa Municipal Tort Claim Act is the rule and immunity is its exception. ***Doe***, supra at 443, ***Graber vs. City of Ankeny***, 656 N.W. 2d. 157, 161 (IA 2003). If the

City of Burlington had not connected the sewer box to its recreational pathways in Dankwardt Park **Iowa Code §670.4(1)(h)** would provide it with immunity. However, when the city did make the conversion/upgrade improvement and reuse of the sewer box into a recreational pathway it did not do so in compliance with applicable Iowa Department of Transportation and American Association of State Highway and Transportation Officials Engineering Standards. It was not the state of the art under engineering safety standards applicable between 1980 and 1992 to redesign and reconstruct a park pathway that has no shoulders, guardrails and fails to warn the intended users of the vertical drop hazards. The city took affirmative action in negligently connecting Dankwardt Park pedestrian/bicycle pathways to this sewer.

The city argues that plaintiff, failed to prevent evidence that the design standards in 1980 or 1992 required the erection of guardrails on the vertical drops and/or barricading or warning users of the drop off. Plaintiffs expert Tom Rush testified in his affidavit that the Dankwardt Park pedestrian bicycle path was connected to the box sewer sometime between 1980 and 1992 according to the City of Burlington, and that under Iowa Department of Transportation and American Association of State Highway and Transportation Official standards applicable at that time there were at least three transportation safety and engineering treatment options which would have prevented the incident: namely

providing guardrails to protect the users from vertical drop off adjacent to the trail; signage warning trail users of the hazardous conditions; closing the trial with signage or barriers in order to prohibit access by park users. App. 59-60, 62, 81, 82.

The city alleges that Mr. Rush relied on the standard from 2000, but his report shows that at the time of the connection between 1980 and 1992 the engineering standards at that time called for either guardrails at the vertical drops or warning signs or blockades. (Id.) This court must construe the facts in the light most favorable to the non-moving party and Kathryn and E.K.B. have presented sufficient facts to show that the standard at the time in which the sewer box was converted and reconstructed into a recreational bike trail required either guardrails, warning signs or blocking park users from the area.

There were no facts established by the City of Burlington that indicated that a recreational trail with vertical drop offs would not require guardrails. Mr. Rush through affidavit referencing the time in frame in which the reconstruction of the recreational trail was done, coupled with his affirmative statements that both the Iowa Department of Transportation and American Association of State Highway and Transportation officials required either protective barriers or warning of the danger establishes that the reconstruction of box sewer into a recreational trail did

not comply did not comply with the existing safety standards in between 1980 and 1992. App. 62, 63, 64, 81, 82.

When the City of Burlington did make the conversion and reconstruction of the sewer into a recreational use pathway the reconstruction did not comply with then applicable Iowa Department of Transportation and American Association of State Highway and Transportation officials engineering and safety standards as established by plaintiffs expert. Kathryn and E.K.B. have created a material issue of fact on the issue of whether the City of Burlington is immune when it took affirmative action to connect the sewer to the Dankwardt Park pathways. The city's reliance on ***Fuhe vs. City of Cedar Rapids***, 139 N.W. 2d. 903, 904-905 (IA 1913) for the definition of what constitutes reconstruction is misplaced. A close reading of that case shows that the word reconstruction in the context of the then existing Iowa Code statute, Section 792, for allowing cities the power to make and reconstruct street improvements specifically defined reconstruction set forth in the statute itself. Nowhere does the city cite authority that this statute's definition of reconstruction applies under **Iowa Code §670.4**.

3. A MUNICIPALITY IS LIABLE FOR THE NEGLIGENT DESIGN OR MAINTENANCE OF THE PEDESTRIAN BICYCLE PATH.

At page 39 of its brief the city claims that the decision of the Iowa Supreme Court in ***Schmitz vs. City of Dubuque***, 682 N.W. 2d. 70 (IA 2004) is inapplicable

in light of the state of art defense under **Iowa Code §670.4(1)(h)**. As shown in the prior section the city changed its intended use of the box sewer from a sewer to also including it as part of a recreational trail. In so doing the state of the art defense no longer applies. In ***Schmitz vs. City of Dubuque***, 682 N.W. 2d. 70 (IA 2004) the Iowa Supreme Court held that the City of Dubuque was not entitled to invoke discretionary function of immunity protection when it negligently ***reconstructed*** a bicycle path owned by it. In ***Schmitz*** the city failed to describe any whether its choice by govern namely to resurface the asphalt without raising the adjacent shoulders were choices that the government made weighing on the social economical policies of government.

Here in the case at bar the City of Burlington between 1980 and 1992 converted a non-pathway public utility, a sewer, into a public facility designed for recreational activities namely the recreational trail connected to the recreational trails of Dankwardt Park and in so doing the city failed to show any facts which would indicate that its failure to put up guardrails or signs warning pedestrians or bicyclists of the danger of the vertical drop off was the type of decision that the discretionary function immunity intended to protected to protect. ***Schmitz*** at 76. The record here is void as to any facts to establish why the City of Burlington decided to convert a sewer into a recreational pedestrian bike path without applying applicable safety design and maintenance standards and requirements. As

in ***Schmitz*** the City of Burlington's negligence in failing to warn its intended users of the path of the trail or protect them from the vertical drop off constitutes negligence and the issue should have been determined by the trier of fact and not the court as matter of law.

CONCLUSION

The trial court erred when it granted the City of Burlington's motion for summary judgment. When the facts are viewed in a light most favorable to the non-moving parties, there is substantial evidence that established that the city converted a non-recreational structure, a sewer box, into a recreational structure sometime between 1980's and 1992's for use by pedestrians and bicyclists.

In doing so, it had a duty to make safety improvements that provided its intended users safe passage. Alternatively, it had a duty to warn its park users, such as the appellants, of the lack guardrails and the vertical drop off, and that it was not an intended recreational pathway. The public use rule does not apply when the city, as owner of the land, designs or reconstructs a non-pathway, the box sewer into and as part of a recreational pedestrian/bicycle path seamlessly connected to the pathways of Dankwardt Park. It was not the state of the art in the 1980's and 1990's to have a recreational pathway with no shoulders or guardrails to protect lawful park users, who the city held the land open to the public. As held in ***Schmitz vs. City of Dubuque***, 682 N.W. 2d. 70 (Iowa 2004) the city's choice not

to follow recognized engineering standards for the protection of its intended users did not provide the City of Burlington protection under the discretionary function immunity doctrine.

Kathryn and E.K.B. hereby request this court enter an order reversing and vacating the District Court's Summary Judgment Order of March 10, 2019 and remand this case for trial on merits.

Statement of Costs

I hereby certify that the amount actually paid for printing or duplicating the necessary copies of the brief in final form is $_____.

Respectfully submitted,

Kathryn Marie Breese and E.K.B.
a minor, by and through her mother
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CERTIFICATE OF COMPLIANCE

The undersigned certifies that this Proof Brief complies with the type-volume limitation, typeface, and the type-style requirements of Iowa Rule of Appellate Procedure 6.903. This Final Reply Proof Brief was prepared in Microsoft Word using Times New Roman style font, size 14. The number of words is 2,462 excluding the parts of the brief exempted by Iowa Rule of Appellate Procedure 6.903(1)(g)(1).

Dated: September 4, 2019.

/s/ Stephen T. Fieweger

CERTIFICATE OF SERVICE

I hereby certify that on September 4, 2019 I electronically filed the forgoing document with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following:

/s/ Stephen T. Fieweger

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