IN THE SUPREME COURT OF IOWA

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, v. CITY OF BURLINGTON, Appellees/Defendant.	SUPREME COURT NO. 19-0484

APPEAL FROM THE IOWA DISTRICT COURT FOR DES MOINES COUNTY

CASE NO. LALA004888

HONORABLE MICHEL J. SCHILLING

APPELLEE CITY OF BURLINGTON'S FINAL BRIEF

J. Scott Bardole AT0009140
ANDERSEN & ASSOCIATES
1089 Jordan Creek Parkway, Suite 360
West Des Moines, IA 50266
515-221-3660
855-229-9701 Facsimile
sbardole@travelers.com
ATTORNEY FOR APPELLEE CITY OF BURLINGTON

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SUPREME COURT RULE 6.1101 ROUTING STATEMENT

This case involves questions relating to existing legal principles and should, therefore, be transferred to the Court of Appeals. Iowa R. App. P. 6.1101(3)(a).

STATEMENT OF THE CASE

The Petition in this case was filed plaintiffs in Des Moines County, Iowa on August 29, 2017. (Plaintiffs' Petition, App. 4-11). Defendant filed a Motion for Summary Judgment on January 16, 2019. (Defendant's Motion for Summary Judgment, App. 16-18. On July 17, 2019, the Court entered an Order setting a hearing on the motion for summary judgment without hearing for February 11, 2019. Plaintiffs' Resistance to Defendant's Motion for Summary Judgment was filed on February 1, 2019. (Plaintiffs' Resistance to Defendant's Motion for Summary Judgment, App. 51-52). On February 6, 2019, Defendant's Reply to Plaintiff's Resistance to Motion for Summary Judgment was filed. (Defendant's Reply to Plaintiff's Resistance to Motion for Summary Judgment, App. 104-115). An Order Granting Defendant's Motion for Summary Judgment was entered on March 10, 2019. (Order Granting Defendant's Motion for Summary Judgment, App. 116-135). Plaintiffs filed their Notice of Appeal on March 21, 2019. (Notice of Appeal, App. 136).

STATEMENT OF RELEVANT FACTS

Prior to 1930 a box sewer was constructed through the north side of what is now Dankwardt Park in Burlington, Iowa. The box sewer drains east from Burlington to the Mississippi River. Since it was constructed, the box sewer has not been upgraded, or improved. When the box sewer was originally constructed it did not have any guardrails on areas that protruded above ground.

According to defendant's expert Robert Plichta, the sewer box was constructed in accordance with the generally recognized engineering and safety standards for box sewers and sidewalks in existence when it was constructed circa 1930. (App. 29-50, Defendant's Statement of Summary Judgment Facts and Exhibit List, page 16). Mr. Plichta also stated that when the box sewer was constructed there were no applicable safety standards that required guardrails to be installed on parts of the surface of either a box sewer or a sidewalk that protruded above the ground. (App. 29-50, Defendant's Statement of Summary Judgment Facts and Exhibit List, page 16). No guardrails were subsequently added to the box sewer and none were in place on the date of the incident. The box sewer has never been officially designated as a hike or bike trail by the city of Burlington. (App. 29-50, Defendant's Statement of Summary Judgment Facts and Exhibit List, page 5).

On August 20, 2014 plaintiffs were bike riding in Dankwardt Park. At some point they began riding on the top of the box sewer. In their Petition, plaintiffs allege that they had been riding their bikes on the box sewer for approximately five minutes when they were confronted with low hanging branches and decided to turn around. At the point where they stopped plaintiffs allege that the surface of the box sewer was ten feet above ground. According to the Petition, plaintiff Kathryn Breese "carefully supervised her 9-year-old daughter stopping and turning her bicycle around so they could return safely." Plaintiff Kathryn Breese then inexplicably drove her bike off the top of the box sewer and fell to the ground, allegedly suffering serious injuries.

Plaintiffs filed this suit alleging the following claims of negligence against the defendant:

1. Defendant had a duty but failed to install guard rails on the box sewer/walkway anywhere that the box sewer/walkway "became dangerously high such that severe injuries could result from falling off."

2. Defendant had a duty to warn pedestrians and cyclists that the box sewer/walkway "reached hazardous heights and had no safe turn around points."

3. Defendant had a duty to post signs indicating whether or not the box sewer/walkway was part of Dankwardt Park.

Defendant answered denying all allegations of negligence asserted by the plaintiffs.

ARGUMENT

I. THE TRIAL COURT DID NOT ERR IN GRANTING SUMMARY JUDGMENT ON THE BASIS THAT THE PLAINTIFFS' CLAIMS WERE BARRED BY THE PUBLIC DUTY DOCTRINE.

A. Standard of Review.

The Court reviews a trial court's order granting summary judgment for correction of errors at law. ***Pecenka v. Fareway Stores, Inc.,*** 672 N.W.2d 800, 802 (Iowa 2003). The Court reviews all factual issues in a light most favorable to the resisting party and giving the nonmoving party all reasonable inferences. ***Id.*** (citing ***Garofalo v. Lambda Chi Alpha Fraternity,*** 616 N.W.2d 647, 649 (Iowa 2000)). Summary judgment is only proper when there is no issue of material fact and the moving party is entitled to judgment as a matter of law. ***Id.;*** Iowa R. Civ. P. 1981(3). If the case involves only the legal consequences flowing from undisputed facts, the matter is properly decided by summary judgment. ***Id.*** (citing ***City of Akron v. Akron Westfield Cmty. Sch. Dist.,*** 659 N.W.2d 223, 225 (Iowa 2003)).

B. The public duty doctrine applies to the facts in this case.

The plaintiffs assert that the trial court erred in ruling that the public duty doctrine applies to the facts in this case. The plaintiffs' assertion is false. The

public duty doctrine bars plaintiffs' claims against the City providing that "[I]f a duty is owed to the public generally, there is no liability to an individual member of the group." *Johnson v. Humboldt County*, 913 N.W.2d 256, 260 (Iowa 2018); *Estate of McFarlin v. State*, 891 N.W2d 51, 59 (Iowa 2016). "[A] breach of a duty owed to the public at large is not actionable unless the plaintiff can establish, based on the unique or particular facts of the case, a special relationship between the [governmental entity] and the injured plaintiff…" *Johnson v. Humboldt County*, 913 N.W.2d at 260.

Plaintiffs assert that the defendant had a duty to plaintiffs to 1) install guard rails on the box sewer/walkway anywhere that the box sewer/walkway "became dangerously high such that severe injuries could result from falling off."; 2) warn pedestrians and cyclists that the box sewer/walkway "reached hazardous heights and had no safe turn around points."; and 3) to post signs indicating whether or not the box sewer/walkway was part of Dankwardt Park. (App. 4-11 Plaintiffs' Petition). All of the plaintiffs' allegations involve duties that would be owed to the general public.

It is undisputed that the plaintiffs were riding their bikes in a public park and did not pay an admission to enter the park. Cyclists and pedestrians using Dankwardt Park, like those persons using the state's highways and lakes are

members of the general public for purposes of the public-duty doctrine. *Johnson v. Humboldt County*, 913 N.W.2d at 260; *Estate of McFarlin v. State*, 891 N.W2d at 61. In *Estate of McFarlin*, plaintiffs were injured when the boat in which they were riding struck a submerged dredge pipe on Storm Lake, a state-owned and state-managed lake. Among several allegations, the *McFarlin* plaintiffs argued that the state allowed the dredging equipment to endanger plaintiffs, failed to warn boaters of the concealed dredge pipe, and failed to properly establish warnings in the vicinity of the dredge pipe. *Estate of McFarlin v. State*, 891 N.W2d at 55. Several of the allegations in *Estate of McFarlin* are basically the same failure to warn allegations made by plaintiffs against the City in this case only they involve a box sewer instead of a lake.

in *Estate of McFarlin,* the Iowa Supreme Court affirmed the trial court's granting of defendant's motion for summary judgment, holding that the public duty doctrine applied to plaintiffs' claims. The *McFarlin* court further held that plaintiffs were not a specialized class but were merely members of the general public since "Boaters at Storm Lake, like motorists driving on Iowa roadways, are members of the general public, not a special class of 'rightful users of the lake' for purposes of the public-duty doctrine." *Estate of McFarlin v. State*, 891 N.W2d at 61. "We hold the State's safety-related duties at Storm Lake were owed to the

general public, and we decline to recognize a special relationship or particularized class of recreational boaters to avoid the public-duty doctrine." *Id.* at 63.

The same rationale applies to the present case. Plaintiffs are alleging that the City was negligent for allowing a condition that endangered the plaintiffs: failing to warn the plaintiffs of the lack of guard rails, and failing to properly post warnings of the lack of guard rails. *Estate of McFarlin* held that each of those types of allegations involved alleged safety related duties owed to the general public making the public duty doctrine applicable to this case. As in *Estate of McFarlin*, the plaintiffs were unquestionably members of the general public utilizing city owned property open to the general public and had no specialized relationship with the City which would nullify the public duty doctrine.

In *Johnson v. Humboldt County*, the Iowa Supreme Court upheld the trial court's order granting summary judgment holding that the public duty doctrine controlled the case because, "Any duty to remove obstructions from the right-of-way corridor adjacent to the highway would be a duty owed to *all* users of this public road. It would thus be a public duty." *Id.*, at 261 (emphasis supplied). The court specifically held that users of public roads are not a particularized class that would nullify the public duty doctrine. *Id*. at 262.

Like boaters on Storm Lake or motorists using the state's highways, the

plaintiffs in this case were clearly members of the general public using the park. As in *Johnson* and *Estate of McFarlin*, any duty allegedly owed to the plaintiffs by the City in this case would be a duty owed to all members of the general public using Dankwardt Park. Therefore, the only way plaintiffs can defeat application of the pubic duty doctrine is to prove that they had particular relationship with the City that gave rise to a special duty. *Summy v. City of Des Moines*, 708 N.W.2d 333, 344 (Iowa 2006), Kolbe v. State, 624 N.W.2d 721, 729 (Iowa 2001).

The holding and reasoning in *McFarlin* demonstrate that the plaintiffs cannot prove that they have a special relationship with the City or that they are members or a particularized class. In the present case, plaintiffs were bicycling in a public park. In *McFarlin,* the plaintiffs were boating on a public lake. The *McFarlin* court held that "recreational boaters" do not have a special relationship and are not members of a particularized class, which meant that the public duty doctrine applied and barred plaintiffs' claims. *Estate of McFarlin v. State*, 891 N.W2d at 61. There is no difference between recreational boaters or recreational bicyclists. The Plaintiffs are merely members of the public and had no special relationship with the City which would preempt the application of the public duty doctrine.

Nowhere in their Resistance to Motion for Summary Judgment did the

plaintiffs assert that they had a special relationship with the City. (App. 51-52 Resistance to Motion for Summary Judgment). Now on appeal, plaintiffs are apparently claiming that a special relationship exists because the City owned Dankwardt Park. This defense is without merit and is addressed below. Because the plaintiffs cannot establish, based on the unique or particular facts of this case, a special relationship with the City, the public duty doctrine bars their claims in this case and summary judgment was properly granted.

C. Plaintiffs' arguments against the application of the public duty doctrine are without merit.

1. Because the City owned Dankwardt Park it created a special relationship with the plaintiffs and the public duty doctrine would not apply.

In their brief plaintiffs assert that Restatement of Torts (Third) § 40 applies to this case and renders the public duty doctrine inapplicable because it sets out a special relationship between plaintiffs and the City based on premises liability. (Appellants' Final Brief, pgs. 19-20). The relevant sections of Restatement of Torts (Third) § 40 provide as follows:

(a) An actor in a special relationship with another owes the other a duty of reasonable care with regard to risks that arise within the scope of the relationship.

(b) Special relationships giving rise to the duty provided in Subsection (a) include:

***

3. a business or other possessor of land that holds its premises open to the public with those who are lawfully on the premises,

Plaintiffs argue that because the City owned Dankwardt Park and it was open to the general public, a special relationship was created pursuant to Restatement of Torts (Third) § 40 rendering the public duty doctrine inapplicable in this case. (Appellants' Final Brief, pgs. 17-18). While Iowa has adopted section 7 of the Restatement (Third) of Torts in 2009, the public duty doctrine remains good law. *Estate of McFarlin v. State,* N.W.2d at 60. Section 7 of Restatement of Torts (Third) "acknowledges the continued vitality of the public-duty doctrine" even after Iowa's adoption of section 7 of Restatement of Torts (Third). *Estate of McFarlin v. State,* N.W.2d at 59-60. In addition, Restatement of Torts (Third) § 37, comment *k.* specifically notes that the special relationship with a possessor of land created by Restatement of Torts (Third) § 40, is to be distinguished from the special relationship required to nullify the public duty doctrine.

> Some courts insist on a "special relationship" between the plaintiff and a public entity that distinguishes the plaintiff from the public at large before imposing an affirmative duty. The "special relationship" invoked by these courts should be distinguished from the special relationships described in §§ 40 and 41.
>
> Restatement of Torts (Third) § 40, comment *k*

The Iowa Supreme Court has unequivocally held that there is no special relationship created by the mere governmental ownership of the property on which the tort occurred and that in those situations the public duty doctrine is still applicable. "The public-duty doctrine applies notwithstanding the State's ownership of Storm Lake." *Estate of McFarlin v. State*, 891 N.W2d at 63. in *Johnson*, the Iowa Supreme Court unambiguously rejected Plaintiffs' argument that the public duty doctrine does not apply to premises liability claims:

> Johnson urges that the district court erred in dismissing her nuisance and premises-liability claims against the County because the public-duty doctrine only prevents the recognition of a common law duty of reasonable care. Our cases applying this doctrine belie Johnson's contention. We said in *Kolbe*, "[I]f a duty is owed to the public generally, there is no liability to an individual member of that group." 625 N.W.2d at 729 (quoting *Wilson*, 282 N.W.2d at 667). ***"No liability" includes these other tort claims.*** In fact, the plaintiffs had alleged a premises-liability claim against the state in *Estate of Estate of McFarlin v. State*, No. 14-1180, 2015 WL 5292154, at *6 (Iowa Ct. App. Sept. 10, 2015).

Johnson v. Humboldt County, 913 N.W.2d at 266. (Emphasis added).

Summy v. City of Des Moines, firmly established that a special relationship was not created because the municipality owned the property where the tort occurred. 708 N.W.2d 333 (Iowa 2006). In *Summy*, plaintiff was golfing at Waveland Golf Course in Des Moines when he was struck by an errant shot. *Id*., at 335. Waveland is a public course owned by the City of Des Moines. Plaintiff

alleged that the City had designed the course in a manner that created an unreasonably dangerous condition by failing to have a sufficient protective barrier between the first and eighteenth fairways. *Id.*, at 336. The City alleged it owed no duty to the plaintiff under the public duty doctrine arguing that since the course was open to the public there was no special relationship between the City and the plaintiff. *Id.*, at 344.

The Iowa Supreme Court rejected the City's attempted use of the public duty doctrine, holding that there was a special relationship between the plaintiff and the City. The language used by the court is important in establishing that the public duty doctrine applies to municipally owned property:

> The City also relies on the public duty doctrine: if the government owes a duty to the general public, it has no liability to any one individual when it fails to perform this public duty. *See Kolbe v. State,* 625 N.W.2d 721, 729 (Iowa 2001). *This doctrine is inapplicable here because the City's duty was one owed to invitees on the golf course,* ***not to the public at large****. See id.* (stating doctrine does not apply if there is a particular relationship between the governmental entity and the injured plaintiff that gives rise to a special duty). We conclude, therefore, that the trial court did not err in refusing to direct a verdict in favor of the City.
>
> *Id.* at 344 (Emphasis added)

If the public duty doctrine did not apply to property owned by the municipality, the court would have merely ruled that since plaintiff was on a public golf course the public duty doctrine was inapplicable. But the court specifically held

that the reason the public duty doctrine did not apply in *Summy* was because the City owed a duty to a special class of persons--golfers who paid to use the course, not the general public.

This holding from *Summy* was addressed and endorsed in *Estate of McFarlin,* where the Court rejected the argument that, like golfers in *Summy*, boaters on Storm Lake had a special relationship with the State:

> Golfers pay to use the Waveland Golf Course as business invitees. The city was both landowner and proprietor operating Waveland as a business for paying customers. Golfers proceed through the course in small groups, hole-by-hole in sequence. Members of the general public are not allowed to wander freely around Waveland while golfers are playing. By contrast, Storm Lake is open to the public free of charge.

Estate of McFarlin v. State, 881 N.W.2d at 60-61.

Like Storm Lake, Dankwardt Park is open to the public free of charge. The Plaintiffs did not pay to use their bicycles in the park. Plaintiffs' argument that a premises liability claim based on Restatement of Torts (Third) § 40 created a special relationship with the City is without merit. A special relationship necessary to nullify the public duty doctrine was not created because the City owned Dankwardt Park. Consequently, it was not error for the trial court to grant summary judgment in this case.

2. The public duty doctrine is not applicable in cases where the City acted with misfeasance.

In their brief, plaintiffs assert that the public duty doctrine does not apply because the City negligently performed an affirmative action by abutting a sidewalk to the box sewer. (Appellants' Final Brief). Plaintiffs' mistakenly rely on *Johnson v. Humboldt County* as support for this defense.

The plaintiff in Johnson argued that the public duty doctrine "would eliminate plaintiff's ability to pursue a claim where a county negligently erects an obstacle directly in the path of motorists." *Johnson v. Humboldt County*, 913 N.W.2d at 266. The Johnson court was "not persuaded" with that argument and noted:

> In the classic case for invoking the public duty doctrine, the duty is imposed by a statute that requires the defendant to act *affirmatively*, and the defendant's wrongdoing is a *failure* to take positive action for the protection of the plaintiff.
>
> *Johnson v. Humboldt County*, 913 N.W.2d at 266. (emphasis supplied)

The plaintiffs' allegations mirror the "classic case" for invoking the public duty doctrine defined in *Johnson*. The plaintiffs argue that the City acted affirmatively by connecting the sidewalk to the box sewer. (Appellants' Final Brief, page 16). They contend that when the sidewalk was connected to the box sewer between 1980 and 1992 the City had a duty to act affirmatively to meet the required engineering safety standards in existence at that time, which they identify as

installing guardrails and/or warning signs or taking other steps to "prevent park users from access to the box sewer," (Appellants' Final Brief, page 20). Thus, based on the plaintiffs' allegations, the City's alleged "wrongdoing is a failure to take positive action for the protection of the plaintiff" which *Johnson* held is a classic case for invoking the public duty doctrine. *Id*, at 266.

The issue presented in *Johnson* was whether the public duty doctrine would eliminate a plaintiff's ability to pursue a claim where "a county negligently erects an obstacle directly in the path of motorists." *Id*, at 266. The *Johnson* Court clearly held that cases of misfeasance could render the pubic duty doctrine inapplicable, but that the public duty doctrine remained applicable to cases involving nonfeasance. *Id.*, at 266. Nonfeasance is defined as "the omission of an act which a person ought to do" and misfeasance is defined as "the improper doing of an act which a person might lawfully do." *Proksch v. Bettendorf*, 257 N.W. 383, 384 (Iowa 1934). Since this case involves the failure of the City to install railing on the box sewer, the actions were omissions and constituted nonfeasance, and the public duty doctrine would apply to bar plaintiffs' claims.

II. THE TRIAL COURT DID NOT ERR IN HOLDING THAT THE CITY WAS IMMUNE FROM LIABLITY UNDER THE STATE-OF-THE-ART DEFENSE, PURSUANT TO IOWA CODE § 670.4(1)

A. Standard of Review.

The Court reviews a trial court's order granting summary judgment for correction of errors at law. ***Pecenka v. Fareway Stores, Inc.,*** 672 N.W.2d 800, 802 (Iowa 2003).

B. The City is immune from liability under the state-of-the-art defense.

The trial court held that the abutment of the sidewalk to the box sewer was not a construction or reconstruction, therefore, the City was entitled to design immunity (state-of-the-art defense) pursuant to Code § 670.4(1). (App. 116-135, Order Granting Defendant's Motion for Summary Judgment, page 17). The entire nexus of plaintiffs' claims is that the box sewer should have had guardrails in areas where the structure surface became dangerously high to prevent persons like plaintiff Kathryn Breese from riding their bicycles of the edge. The duty to warn allegations are based on the premise that the City had a duty to warn plaintiffs of the lack of guardrails. They assert that when the sidewalk was extended to abut the box sewer between 1980 and 1992, the City failed to make sure that it conformed to engineering and safety standards in existence at that time. They assert that the trial court erred in holding that the City was immune from liability pursuant to the state-of-the-art defense found in Iowa Code § 670.4(1).

The Municipal Tort Claims Act, Iowa Code § 670.2, provides that "Except as otherwise provided in this chapter, every municipality is subject to liability for

its torts and those of its officers and employees, acting within the scope of their employment or duties, whether arising out of a governmental or proprietary function." One such exception applicable to this case is found in Iowa Code § 670.4(1) which provides that the liability imposed by § 670.2 shall not apply to the following:

> h. Any claim based upon or arising out of a claim of negligent design or specification, negligent adoption of design or specification, or negligent construction or reconstruction of a public improvement as defined in section 384.37, subsection 19, or other public facility that was constructed or reconstructed in accordance with a generally recognized engineering or safety standard, criteria, or design theory in existence at the time of the construction or reconstruction. ***A claim under this chapter shall not be allowed for failure to upgrade, improve, or alter any aspect of an existing public improvement or other public facility to new, changed, or altered design standards.*** This paragraph shall not apply to claims based upon gross negligence. This paragraph takes effect July 1, 1984, and applies to all cases tried or retried on or after July 1, 1984.

Iowa Code § 670.4(1)(h) (Emphasis added).

Iowa Code § 384.37 (19)(a)(b) and (g) defines the following as public improvements:

a. Sanitary, storm and combined sewers

b. Drainage conduits, channels and levees.

* * *

g. Sidewalks and pedestrian underpasses or overpasses.

The structure in question is undoubtedly a sewer or drainage conduit, which

would be considered a public improvement pursuant to Iowa Code § 670.4(1)(h) and Iowa Code § 384.37 (19)(a)(b). Assuming, arguendo, that the structure is a sidewalk, it would also be considered a public improvement pursuant to Iowa Code § 670.4(1)(h) and Iowa Code § 384.37 (19)(g).

Since either a box sewer or a sidewalk is a public improvement, the City is immune from liability for any "failure to upgrade, improve, or alter any aspect of an existing public improvement or other public facility to new, changed, or altered design standards." Iowa Code § 670.4(1)(h). This is commonly referred to as the "state-of-the art defense." *K & W Elec., Inc., v. State*, 712 N.W.2d 107, 113 (Iowa 2006); *Connolly v. Dallas County*, 465 N.W.2d 875, 877 (Iowa 1991). The state-of-the-art defense provides:

> "The extent of the public agency's duty for purposes of establishing nonconstitutional torts is measured by the 'generally recognized engineering or safety standard, criteri[on], or design theory' in existence ***at the time of the construction or reconstruction."***
>
> *Id*., at 877. (Emphasis added).

It is undisputed that the box sewer was constructed sometime before 1930. It is also undisputed that a sidewalk abutting the box sewer was constructed sometime between 1980 and 1992. In this case the plaintiffs, not the City, bear the burden of establishing that that the City did not construct or reconstruct the

sidewalk/box sewer in accordance with a generally recognized engineering or safety standard, criteria, or design theory in existence at the time of construction or reconstruction. *Felderman v. City of Maquoketa*, 731 N.W.2d 676, 678-679 (Iowa 2007).

The plaintiffs allege that the state-of-the-art defense does not apply because when the sidewalk was lengthened and extended to the edge of the box sewer between 1980 and 1992, it converted the box sewer into a recreational pathway. (Appellant's Final Brief, page 21). They allege that when the box sewer was converted into a recreational parkway the City was required to make sure that the box sewer conformed to engineering and safety standards in effect at the time the sidewalk abutted to the box sewer between 1980 and 1992. It is undisputed that the box sewer itself has never been reconstructed.

The trial court rejected plaintiffs argument because the sidewalk connection was not a "reconstruction" as required by the plain language of Iowa Code § 670.4(1)(h). Therefore, the engineering and safety standards in effect that the time of construction in circa 1930 were applicable. (App. 116-135, Order Granting Defendant's Motion for Summary Judgment, page 17). Since the undisputed evidence was that the box sewer and sidewalk met engineering and safety standards at the time of construction in circa 1930, the trial court found that the

City had no duty under Iowa Code § 670.4(1) to update the box sewer to bring it into compliance with engineering and safety standards that arose after it was constructed circa 1930. (App. 116-135, Order Granting Defendant's Motion for Summary Judgment, page 17).

The plaintiffs in this case carried the burden of proving that the state-of-the-art defense was not applicable to this case. *Felderman v. City of Maquoketa*, 731 N.W.2d at 678-679. The City was not required to, but did, submit ample summary judgment evidence establishing that the box sewer/sidewalk was constructed in accordance with safety and engineering standards in existence at the time of its construction circa 1930. The affidavit of the City's expert Robert Plichta, stated that at the time the box sewer was constructed, circa 1930, there were no engineering or safety standards which required that it have guardrails installed in areas where the box sewer extended above ground. (App. 29-50, Defendant's Statement of Summary Judgment Facts and Exhibit List, page 16). Plichta also stated that at the time the box sewer was constructed, circa 1930, there were no engineering or safety standards which required that a sidewalk have guardrails installed in areas where it protruded above ground (App. 29-50, Defendant's Statement of Summary Judgment Facts and Exhibit List, page 16). Eric Tysland, the Director of Parks for the city of Burlington has also submitted an affidavit

stating that the box sewer has not been upgraded, improved, or altered since it was constructed circa 1930 and was not designated as a trail by the City. (App. 29-50, Defendant's Statement of Summary Judgment Facts and Exhibit List, page 5). These facts were not disputed by the plaintiffs in their motion for summary judgment. The plaintiffs offered no summary judgment evidence that the box sewer/sidewalk was not constructed according to the engineering and safety standards of circa 1930. (App.53-94 Plaintiffs' Response to Statement of Summary Judgment Facts and Additional Statement of Facts and Exhibit List, pages 7-32).

C. Plaintiffs have not met their burden of proving that the City did not utilize generally recognized engineering or safety standards in existence between 1980 and 1992.

The Plaintiffs have failed to present evidence that the box sewer did not meet generally recognized engineering or safety standard, criteria, or design theory in existence at the time it was completed circa 1930 or between 1980 and 1992 and thus, they have failed to carry their burden of proof. The City is immune from liability for the "failure to upgrade, improve, or alter any aspect of an existing public improvement or other public facility to new, changed, or altered design standards" unless the plaintiff can prove that the box sewer was reconstructed after

1930. Iowa Code § 670.4(1)(h). In order to avoid summary judgment in this case, the plaintiffs bore the burden of proving that the extension of the sidewalk to abut the box sewer between 1980 and 1992 was a construction or reconstruction and that it did not comply with generally recognized engineering and safety standards in effect between 1980 and 1992. *Felderman v. City of Maquoketa*, 731 N.W.2d at 678-679 (Iowa 2007); Iowa Code § 670.4(1)(h). They failed to meet their burden of proof on both counts and the trial court properly granted summary judgment.

1. **Plaintiffs presented no summary judgment evidence that the box sewer did not meet generally recognized engineering or safety standards in existence at the time of construction between 1980 and 1992.**

No summary judgment evidence was presented by the plaintiffs that the box sewer did not meet generally recognized engineering or safety standard, criteria, or design theory in existence at the time it was completed circa 1930. Thus, the plaintiff were required to prove that the sidewalk connection between 1980 and 1992 constituted a reconstruction pursuant to Iowa Code § 670.4(1)(h), which required the City to update the box sewer to meet generally recognized engineering and safety standards in effect at the time of completion. Assuming, arguendo, that the sidewalk completion was a reconstruction, which is denied and addressed at greater length below, the plaintiffs bore the burden of proving that the box sewer failed to meet generally recognized engineering and safety standards in effect when

it was completed between 1980 and 1992. *Felderman v. City of Maquoketa*, 731 N.W.2d at 678-679. "The person making a negligent design or construction claim holds the burden to establish the city did not construct or reconstruct the public facility in accordance with a generally recognized engineering or safety standard, criteria, or design theory in existence at the time of the construction or reconstruction." *Felderman v. City of Maquoketa*, 731 N.W.2d at 678-679; *Fischer v. City of Sioux City,* 695 N.W.2d 31, 34 (Iowa 2005).

To meet that burden, plaintiffs needed to present evidence that the box sewer did not comply with generally recognized engineering or safety standards in existence at the time of completion of the sidewalk between 1980 and 1992. *Felderman v. City of Maquoketa*, 731 N.W.2d at 679. However, the plaintiffs did not submit any summary judgment evidence as to what generally recognized engineering or safety standards existed and were not followed at the time of the completion of the sidewalk between 1980 and 1992. Instead they presented the affidavit of their expert, Thomas Rush, who never identified the generally recognized engineering or safety standards from 1980 to 1992 but relied on the 'Iowa Trails 2000' publication by the Iowa Department of Transportation (Iowa DOT), and an undated Guide for the Planning Design, and Operation of Pedestrian Facilities published by the American Association of State Highway and

Transportation Officials (AASHTO) in reaching his opinions. (App. 53-94 Plaintiffs' Response to Statement of Summary Judgment Facts and Additional Statement of Facts and Exhibit List, page 12). Nowhere in his affidavit does Rush state that the box sewer did not comply with the generally recognized engineering or safety standards from 1980 to 1992. (App. 53-94 Plaintiffs' Response to Statement of Summary Judgment Facts and Additional Statement of Facts and Exhibit List, pages 7-12) Nor does he even identify what generally recognized engineering or safety standards were in existence between 1980 to 1992. (App. 53-94 Plaintiffs' Response to Statement of Summary Judgment Facts and Additional Statement of Facts and Exhibit List, pages 7-12). As the trial court noted, "the Plaintiffs have not provided authority that, even if the Court considers the connection to be an upgrade, such upgrade would require the City to meet new design/safety standards under section 670.4(1)(h)." (App. 116-135, Order Granting Defendant's Motion for Summary Judgment, page 16).

The affidavit presented by Rush creates an issue identical to that found in *Felderman v. City of Maquoketa,* 731 N.W. 2d at 678. In *Felderman,* the plaintiff was injured while trying to use a door to enter the Maquoketa Community Center, which was constructed in 1967. Plaintiff sued, alleging that the City was negligent in the design and construction of the Center. *Id.* The City filed a motion for

summary judgment asserting it was immune from liability for negligent design or construction pursuant to Iowa Code § 670.4(8). *Id*. Plaintiff submitted evidence from an expert as to generally recognized engineering or safety standards for the door that were present in 1994, based on the 1994 edition of ADA Standards for Accessible Design . *Id.* (This date was presumably used because an interrogatory answer, that was not part of the record, indicated that the doors in question were replaced in 1992. Since the interrogatory answer was not part of the record it was not considered in deciding the appeal. *Id.*). Based on Iowa Code § 670.4(8), the Iowa Supreme Court held that the plaintiff "offered no proof of the City's failure to adhere to a generally recognized engineering or safety standard, criteria, or design theory ***in existence in 1967 when the center was constructed***. Consequently, the estate's claims based on negligent design and construction must fail." *Id*. at 678-679. (Emphasis added).

The plaintiff in *Felderman* did not present evidence of a failure to adhere to a generally recognized engineering or safety standard in 1967 when the Center was constructed. Evidence that the Center's door did not comply with generally recognized engineering or safety standards in 1994, was insufficient to prove what generally recognized engineering or safety standards existed in 1967 so summary judgment was granted. *Id.,* at 679.

The plaintiffs in the instant case have the same problem as the plaintiff In *Felderman.* The only difference is that in *Felderman* the plaintiff failed to establish the generally recognized engineering or safety standards in existence at the time of construction and the plaintiffs in the instant case have failed to establish the generally recognized engineering or safety standards at the time of the alleged ***re***construction.

Regardless of whether the design involves construction or reconstruction the plaintiffs' burden remains the same. In this case the box sewer was constructed in circa 1930 and the plaintiffs claim it was reconstructed sometime between 1980 and 1992. Assuming, arguendo, that the box sewer was reconstructed between 1980 and 1992, plaintiffs were required to offer proof that the City failed to adhere to generally recognized engineering or safety standards existing ***at the time of reconstruction between 1980 and 1992***. *Id.* Yet, the only evidence offered as to generally recognized engineering or safety standards was from, at best, 2000—eight years after the latest date the sidewalk could have been completed.

In reading Rush's affidavit, it seems clear that he is identifying changes that should be made to the box sewer to bring it into compliance with present day standards. However, the design immunity provided in Iowa Code § 670.4(1)(h) specifically provides that the City had no obligation to update, improve, or alter

any aspect of the box sewer to new, changed, or altered design standards not in effect at the time of construction or reconstruction. Thus, Rush's testimony as to what updates or changes needed to be made to the box sewer to bring it into compliance with generally recognized engineering or safety standards in 2000 is irrelevant to this case. Since the plaintiffs did not provide evidence that when the box sewer was "reconstructed" between 1980 and 1992 it failed to comply with recognized engineering or safety standard on any of those dates, they cannot meet the burden of proof necessary to defeat the design immunity afforded to the City in this case. Therefore, the trial court did not err in granting summary judgment in favor of the City.

2. The City was not required to update, improve, or alter the box sewer since the sidewalk completed between 1980 and 1992 was not a construction or reconstruction of the box sewer.

Since the box sewer was a public improvement constructed circa 1930, the City was not required to upgrade or improve it to make sure that it complied with applicable engineering and safety standards arising any time after that date. Iowa Code § 670.4(1)(h). It is undisputed that the box sewer has not been updated, improved, or altered since it was constructed before 1930. (App. 29-50, Defendant's Statement of Summary Judgment Facts and Exhibit List, page 5). The only way that the City would be required to upgrade the box sewer to comply with

applicable engineering and safety standards after 1930 would be if it reconstructed the box sewer. Iowa Code § 670.4(1)(h). The plaintiffs argue that the sidewalk abutment was a reconstruction that required the City to upgrade the box sewer to recognized engineering and safety standards from 1980 to 1992.

The plaintiffs have not offered any summary judgment evidence that the box sewer was reconstructed or physically altered after 1930. Nor have the plaintiffs cited to a single case that holds that running the sidewalk into the box sewer would constitute a reconstruction. (App. 116-135, Order Granting Defendant's Motion for Summary Judgment, page 16). Clearly, the work completed in this case does not constitute a reconstruction.

> Reconstruction presupposes the nonexistence of the thing to be reconstructed, as an entity; that the thing, before existing, has lost its entity; and "reconstruction" is defined as follows: "To construct again; to rebuild; to restore again as an entity the thing which was lost or destroyed…"
>
> *Fuche v. City of Cedar Rapids*, 139 N.W. 903, 904-905 (Iowa 1913).

Based on the summary judgment evidence, the work performed between 1980 and 1992 was not a reconstruction because the box sewer was not destroyed or rebuilt. *Id.* Since the box sewer was not reconstructed after 1930, the City was not required to update the box sewer to comply with recognized engineering and safety standards that came into effect after 1930.

3. The trial court properly rejected plaintiffs' reliance on Schmitz v. City of Dubuque in granting summary judgment.

Plaintiffs mistakenly assert that the trial court should have applied the case of *Schmitz v. City of Dubuque*, 682 N.W2d 70 (Iowa 2004). However, plaintiffs' reliance on *Schmitz* is entirely misplaced. *Schmitz* is a case dealing only with discretionary immunity—Iowa Code § 670.4(1)(h) and state-of-the-art immunity were not raised or mentioned in the *Schmitz* decision. The state-of-the-art defense is a specific immunity granted to the City so the discretionary immunity argument raised in *Schmitz* and made by the plaintiffs in their resistance is not relevant to this case and the trial court properly rebuffed plaintiffs' arguments that it applied in this case.

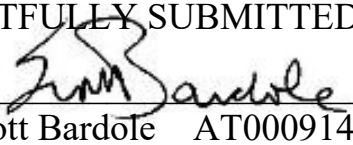
CONCLUSION

Based on the arguments presented, defendant respectfully requests that the Court affirm the District Court's granting of Defendant's Motion for Summary Judgment.

REQUEST FOR ORAL ARGUMENT

Appellee respectfully requests oral argument.

RESPECTFULLY SUBMITTED,

BY: 

J. Scott Bardole AT0009140
ANDERSEN & ASSOCIATES
1089 Jordan Creek Parkway, Suite 360
West Des Moines, IA 50266
515-221-3660
855-229-9701 Facsimile
sbardole@travelers.com
ATTORNEY FOR APPELLEE CITY OF BURLINGTON

CERTIFICATE OF FILING

The undersigned hereby certifies that the foregoing Final Brief of Appellants was filed with the Iowa Supreme Court by electronically filing the same on September 5, 2019, pursuant to Iowa R. App. P. 6.902(2) (2013) and Iowa Ct. R. 16.1221(1).

BY: 

J. Scott Bardole AT0009140
ANDERSEN & ASSOCIATES
1089 Jordan Creek Parkway, Suite 360
West Des Moines, IA 50266
515-221-3660
855-229-9701 Facsimile
sbardole@travelers.com
ATTORNEY FOR APPELLEE CITY OF BURLINGTON

CERTIFICATE OF SERVICE

This Final Brief was served upon the attorneys of record for the Appellee by electronic filing and electronic delivery via EDMS on September 5, 2019.

Stephen T. Fieweger
Stephen T. Fieweger Law
5157 Utica Ridge Road
Davenport, IA 52807
sfieweger@fiewegerlaw.com
ATTORNEYS FOR APPELLANT

BY: 

J. Scott Bardole AT0009140
ANDERSEN & ASSOCIATES
1089 Jordan Creek Parkway, Suite 360
West Des Moines, IA 50266
515-221-3660
855-229-9701 Facsimile
sbardole@travelers.com
ATTORNEY FOR APPELLEE CITY OF BURLINGTON

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS AND TYPE-STYLE REQUIREMENTS

This brief complies with the type-volume limitation and typeface requirements of Iowa R. App. P. 6.903(1)(e) and Iowa R. App. P. 6.903(1)(f) of Iowa R. App. P. 6.903(1)(g)(1) or (2) because this brief contains 6,667 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g) and because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14 point Times New Roman.

J. Scott Bardole AT0009140

09/05/2019
Date