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 BRIEF

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ROUTING STATEMENT

Appellants' request that Supreme Court retain jurisdiction to consider this appeal in that this case presents substantial issues of first impression as to what duty a municipality owes to intended pathway users when a non-recreational structure, a box sewer, is converted into a pathway connected to the municipality's recreational trails.

STATEMENT OF THE CASE

Plaintiffs Kathryn Breese and her daughter E.K.B. commenced their personal injury negligence lawsuit against the City of Burlington, as answer of the public pathway/bike path on August 29, 2019. App. 4-11. Kathryn verified under oath the facts contained in the petition as true and correct. App. 11. Kathryn Breese sustained severe and permanent injuries when her bicycle went over the edge of the sewer trail and she fell more than 10 feet on August 30, 2015. App. 7.

Originally, before 1930 the City of Burlington constructed a box sewer. App. 53. At the time of its construction, the box sewer was not connected in any manner to any pathways in the city owned park, Dankwardt Park. App. 56. Sometime between 1980 and 1982 the City of Burlington designed and constructed a pathway connecting the box sewer to its pedestrian/bicycle trails in Dankwardt Park thereby creating a connected trailway across the top of the sewer box. App. 56, 91.

The undisputed facts show that there were no guardrails installed to prevent users from being exposed to the vertical drop existing on top of the sewer box, there were no warning signs posted notifying pedestrians and bicyclists that there was a severe vertical drop if they were to proceed further along the pathway to the top of the sewer box and the city failed to barricade access to the top of the sewer box or otherwise warn pedestrians and bicyclists using the sewer trail that it was

not meant to be used as a pathway, until after Kathryn fell and was severely injured. App. 55, 56, 57, 61-63, 68, 82-84.

The City of Burlington on its own web site has created a map designating the pathway as the sewer trail. App. 61, 63, 72, 73, Plaintiff's expert Thomas N. Rush testified by virtue of affidavit and supporting documents that at the time in which the sewer box was converted and reconstructed into a pedestrian/bicyclist's pathway, it did not meet the safety engineering standards at the time. App. 59, 60, 62, 81, 82. Specifically, the pathway was too narrow, there were no guardrails nor was there any warning signs or barricades informing pedestrians and bicyclists of the severe drop off that existed on the sewer trail. Id.

Despite this, the trial court on March 10, 2019 granted the City of Burlington's motion for summary judgment. In doing so it held that the sewer trail was subject to the public use rule (App. 121-126) and that it the city was immune based on the state of the art defense under **Iowa Code §670.4(1)(h)**. (App. 126-131). The District Court ignored plaintiffs' argument that this case was governed by the Supreme Court's decision in ***Schmitz vs. City of Dubuque***, 682 N.E. 2d. 770 (Iowa 2004) where a municipality was not entitled to immunity when it negligently designed and maintained a bike trail path. App. 129. Plaintiff's appeal was timely filed on March 21, 2019. App. 136.

STATEMENT OF FACTS

Kathryn Breese and her daughter E.K.B. were bicyclists on riding the pedestrian/bike trail in Dankwardt Park on August 30, 2015. App. 5. They rode to an area adjacent to the northern side of Dankwardt Park onto a sidewalk/walkway/bike path that extended in an easterly direction into the wooded area. Id. This path had no signs saying that this path was part of Dankwardt Park or warning signs for pedestrians or people on bicyclists stating that there were hazards ahead or that it was not part of the Dankwardt Park trail. (App 67, 68, 70). As they entered the wooded area Kathryn and E.K.B. began riding on the sewer box which was at a grade level to the surrounding land. App. 54. (Plaintiffs' response to defendant's material facts paragraph 4). As it connected to the Dankwardt Park pedestrian/bike path, the sewer trail had all the appearance and characteristics of a trail including width, grade, pavement type and the absence of any barriers or signage. App. 56. (Plaintiffs' material facts page 4, paragraph 16).

After riding on the sewer box for approximately five minutes Kathryn and E.K.B. were confronted with low hanging branches over the sewer box and Kathryn decided they should turn back. App. 54. (Plaintiffs' response to defendant's material facts number 5). At the point where they stopped the sewer box was over ten feet above ground App. 54. (Plaintiffs' response to defendant's undisputed material fact 6).

That Kathryn supervised E.K.B. stopping and turning her bicycle around so that they could turn safely App. 54. (Plaintiffs' response paragraph 7 of defendant's statement of facts). While Kathryn turned her bicycle around, the front wheel struck a branch and went over the edge of the paved top of the sewer box and she plunged more than ten feet to the ground. App. 54, 55. (Plaintiffs' response to defendant's material facts paragraph 8, Petition page 3 paragraph 11).

Sometime between 1980 and 1992 the Dankwardt Park sidewalk/pathway was connected to the sewer box. App. 56. (Plaintiffs' statement of facts page 4, paragraph 14). There is no indication by appearance or signage to a pedestrian or bicyclist on Dankwardt Park sidewalk/pathway is distinct or different from the sewer box. App. 56. (Plaintiffs' statement of facts paragraph 15). At the time of the incident the sewer trail, as part of the Dankwardt Memorial Park Trail System had all the appearance characteristics of a trail including width, grade, pavement type and the absence of any barriers or signage. App. 56. (Plaintiffs' Statement of fact number 16). The City of Burlington designed this portion of the pedestrian/bicycle pathway on the Northern border of Dankwardt Park as the sewer trail. App. 53, 54. (Plaintiffs' response to defendants' material fact paragraph 3).

According to the Iowa Department of Transportation and American Association of State Highway and Transportation Officials (AASHTO) standards applicable, there were at least three different transportation safety engineering

options available between 1980 and 1992 which could have prevented Ms. Breese from plunging off of the sewer box namely:

a. Providing a trail site guardrail to protect for the vertical drop off adjacent to the trail;

b. Warning trail users of hazardous conditions on the sewer trail;

c. Closing the trail with signage and/or barriers in order to prohibit access. App. 56, 57. (Plaintiffs' material facts, pages 4-5, paragraph 17).

At the time Kathryn Breese used the bicycle/pedestrian trail connecting to the sewer box there were no warning signs informing her that the sewer box was not a trail or pathway. App. 57. (Plaintiffs' material facts page 5, paragraph 18).

The entrance to the subject trail from the corner of the park seamlessly connected to Dankwardt Memorial Park's trail system. Similar to the park's trail system the sewer trail at the time of this incidence had all the appearance and characteristics of a trail including width, grade, pavement type and absence of any barriers or signage. App. 61, 65-76. (Plaintiffs' response to material facts pages 9, 13 to 24).

At the beginning of the trail the trail side was flush without any adjacent vertical drop offs. App. 62, 66-71. (Plaintiffs' response to material facts pages 10, 14 to 19). Approximately 1,800 feet into the wooded trail where Kathryn fell, the trail side surface of soil and vegetation was vertically approximately ten feet below

the trail itself. App. 62-65, 77-80. (Plaintiffs' response to material facts pages 10, 25-28, Exhibit A). This trail side vertical elevation drop off was entirely unprotected without any guardrail. (Id.)

The City of Burlington has erected a sign informing potential users that the sewer box is not a trail and that there are no guardrails. The sign was not present on the day of the incident. App. 62, 63, 68. (Plaintiffs' response to material facts page 10, Exhibit A).

Kathryn and E.K.B. alleged in their Petition at law that when the City of Burlington connected the sewer to its other public sidewalk in Dankwardt Park that it had a duty to install guardrails at any point where it became dangerously high such that severe injuries could occur. (App. 8 paragraph 18). It is undisputed that when the sewer box was connected to the pedestrian/bicyclist pathways leading from Dankwardt Park that no guardrails were installed, nor were there any warning signs that this was not part of the trail from Dankwardt Park or that the plaintiffs were leaving Dankwardt Park at that point. (App. 57 paragraphs 19, 20).

It is also undisputed that Dankwardt Park and the adjacent sewer box/sewer trail were property owned by the City of Burlington, Iowa. (App. 29 paragraph 1).

ARGUMENT

Introduction: Summary Judgment Standards.

This court will review the district court ruling on summary judgment for corrections of errors at law. In Re ***Estate of McFarlin vs. State***, 881 N.W. 2d. at 51, 56 (Iowa 2016). The evidence is viewed in a light most favorable to the non-moving party ***Mueller vs. Wellmark Inc.***, 818 N.W. 2d. 244, 253 (Iowa 2002). The moving party has the burden to show the nonexistence of a genuine issue of fact. ***Schlueter vs. Grinnell Mutual Reinsurance Company***, 553 N.W. 2d. 614, 615 (Iowa App. 1996).

The party resisting the motion for summary judgment should be afforded every legitimate inference that can be reasonably deduced from the evidence. ***Clinksdale vs. Nelson Securities Inc.***, 697 N.W. 2d. 836, 841 (Iowa 2005). On the three issues presented Kathryn and K.K.B. have preserved error on the District Court's ruling through their resistance to the motion for summary judgment and the raising of the arguments in support of their resistance in this appeal.

I. Did the trial court err in applying the public use rule when the City of Burlington affirmatively acted to connect the pedestrian/bicycle paths in Dankwardt Park to the box sewer?

The district court in granting summary judgment held that the public use rule, most recently addressed in the Supreme Court's 2018 decision in ***Johnson vs. Humboldt County***, 913 N.W. 2d. 256 (Iowa 2018) controlled, and that the City of Burlington did not owe a duty of care generally to bicyclists and pedestrians along this pathway. In ***Johnson***, this Court pointed out the distinction between positive acts of negligence and non-action. The public duty rule was 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. ***Johnson*** Id. at 267.

Here, in the case a bar plaintiff established facts and set forth those facts at pages 1, 2 and 7 of their memorandum of law that the City of Burlington, when it between 1980 and 1992 connected the sewer box to the sidewalk/bicycle pathways in Dankwardt Park had an affirmative duty to comply with the existing engineering safety standards for such pathways. App. 95, 96, 102. They also presented facts from their engineering expert, Thomas Rush as to why the redesign and conversion of the sewer box into a recreational trail did not comply with existing safety engineering standards existing at the time of the conversion for construction. App. 59-80, 81-84.

In determining whether a defendant has a legal duty to the plaintiff three factors usually govern the court's analysis:

1. The relationship of the parties;

2. The reasonable foreseeability of harm to the person who is injured; and

3. Public policy considerations. ***Kolbe vs. State***, 625 N.W. 2d. 721, 728 (Iowa 2001).

However, a linkage of the legal duty is not required when the direct consequence of a negligent acts causes harm to another. Id.

Here, the City of Burlington as owner of the land containing Dankwardt Park and the sewer box, had an affirmative duty to connect the walkway/bike trails from Dankwardt Park to the sewer box in a manner that met the required engineering safety standards applicable between 1980 and 1992, not when the sewer box was constructed before and used solely as a sewer box more than 50 years earlier.

When the Dankwardt pedestrian bike trail was connected to the sewer box this was a positive act of negligence by the city.[1] It converted a non-pathway, the sewer box, into a pathway when it joined the Dankwardt Park pathway to the sewer box. When it did so, it was required to redesign or upgrade the portion of the

[1] This trail or pathway is not a sidewalk since it is not adjacent to a street. ***Hoskinson vs. City of Iowa City***, 621 N.W. 2d. 425, 428-29 (Iowa 2001).

sewer box that was now being used as a recreational pathway through the North end of Dankwardt Park.

This Court in ***Johnson*** held that there was a distinction between non-feasence versus misfeasance. When the public rule would be inapplicable to action done negligently. Id. at 267. This does not mean that the same no-duty rule would protect that entity when it affirmatively acts and does so negligently ***Johnson*** at page 267 citing ***Skiff vs. State***, 123 Misc. 2d. 791, 479 N.Y.S. 2d. 946, 951 (Ct. Cl. 1984). In ***Johnson***, there was no issue of fact that Humboldt County owned the property where the motor vehicle collision occurred and therefore the ***Skiff*** decision was inapplicable. Id. Therefore, the County's misfeasance was not at issue for the court to decide in ***Johnson***.

In this case at the bar, the City of Burlington is the owner of the land, and its misfeasance when it negligently converted and reconstructed the sewer box into a recreational pedestrian bicycle pathway more than fifty years after its original construction subjects the city to liability.

Under the Reinstatement of Torts (Third) Section 40 an actor in a special relationship with another owes the other the duty of reasonable care with regard with the risks that arise in the scope of the relationship.[2] In defining special relationships, subparagraph (b)(3) include a business or other possessor of land that

[2] In ***Johnson***, the county was not the owner of the land, so the Reinstatement of Torts (Third) Section 40(b)(3) was held inapplicable. ***Johnson***, supra at p. 263.

holds a premise open to the public with those who are lawfully on the premises. Restatement of Torts (Third) Section 40(b)(c). Here in the case at bar, the City of Burlington as owner of Dankwardt Park and the north end of the park where the designated sewer trail path were located owed a duty of care to Kathryn and E.K.B. who were as park users lawfully on the premises. Under **Iowa Code §364.12(2)** "A City shall keep all public grounds… open, in repair, and free from nuisance." Burlington's failure to guardrail, barricade or warn of the hazard that exists on the sewer trail is an affirmative duty owed by the city, as the park owner, to its lawful users of the public parkway.

Further, under **Iowa Code §670.4(1)(h)** it specifically states as follows:

> "Any claim based upon or arising out of the claim of negligent design or specification, negligent adoption of design or specification, or negligent construction or **reconstruction of a public facility designed for recreational activities**, that was constructed or **reconstructed in good faith**, in accordance with generally recognized engineering or safety standards or design theories in existence at the time of construction or **reconstruction** immunity if such compliance had occurred." (emphasis added)

Here, plaintiffs' presented material issues of fact establish that the sewer box was not public facility designed for recreational activities when it was first built by the city prior to 1930. It was a public sewer structure that moved waste water through its pipes. Pedestrians and bicyclists had no access to it.

When the pathway to connect to the sewer box it did not do so the city constructed reasonably and in good faith a public facility designed for recreational activities. When the reconstruction, connection or conversion of the sewer box into a recreational pathway intended for use by pedestrians and bicyclists using the city owned Dankwardt Park pathways was done between 1980 and 1992, the city was required to do so using generally recognized engineering or safety standards or design theories in existence at that time. Tom Rush testified that the connection of the sewer box to the Dankwardt Park pathway did not meet Iowa Department of Transportation and American Association of State Highway and Transportation Officials (ASSHTO) engineering safety standards in existence fifty plus years after the sewer box's original construction. App. 56-57, 63-64, 81, 82.

The facts in this case, likewise are distinguishable from those existing in the ***Estate of McFarlin vs. State,*** 881 N.W. 2d. 51 (Iowa 2016). In ***McFarlin*** the public duty rule barred the claim against the State of Iowa relating to the placement and lack of warnings on a dredge pipe in a recreational lake owned and managed by the State. The State of Iowa did not own the dredge pipe and was not responsible for its day to day operations nor did it construct or reconstruct the privately owned pipe that ran across the bottom of the state owned lake.

Here, however, the City of Burlington did own all of the land on which the Dankwardt Park pathway was later connected by the municipality to the sewer box.

There is no dispute that the City of Burlington controls Dankwardt Park and the sewer trail. As such it is held that the premises open to the public and thereby creates a duty to exercise reasonable care to protect its park users from being exposed to vertical drop offs along its pathways under Restatement of Torts (Third) Section 40.

The district court's ruling ignores this issue. The city converted or reconstructed the box sewer to become a public facility designed for recreational activities when it connected it to the Dankwardt Park pathway.

The facts when viewed in a light most favorable to Kathryn and E.K.B. show that the engineering standards at the time in which the conversion of the sewer box to a recreational pathway was made between 1980 and 1992 that engineering standards required either the installation of guardrails, warning signs informing the pathway users of the steep vertical drop offs existed in the section of the pathway or barricading or preventing park users from access to the pathway.

While in ***Johnson*** the Court held under the facts of that case the public case rule applied, it also noted that the no duty rule would not protect a public entity when it affirmatively acts and does so negligently, that issue was not before the Supreme Court. Here, this case, those facts are now before this Court, because the affirmative acts of the City of Burlington in connecting the pedestrian/bicycle pathways in Dankwardt Park to the sewer box more than 50 years after its original

construction occurred, and in doing so, the city was required to either make improvements under updated engineering standards or alternatively warn users of the hazard.

II. Did the trial court err in applying the state of the art defense under Iowa Code §670.4(1)(h) when it connected/reconstructed the sewer box into a pedestrian bicycle path?

Immunity Under **Iowa Code §670.4(1)(h)** is not applicable to the City of Burlington under the facts of this case. The City has a burden to establish its immunity. ***Doe vs. Cedar Rapids Comty. Sch. Dist.***, 654 N.W. 2d. 439, 446 (Iowa 2002). And Iowa cases have held that 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 (Iowa 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. The original public utility, was the sewer box, was never designed or constructed as a public facility for recreational use. No evidence established that between 1930 and 1980 the top of the sewer box was used as a recreational pathway. However, when the City of Burlington did make the upgrade/improvement, conversion and reconstruction of the box sewer into a recreational use pathway, in doing so, the reconstruction did not comply with

applicable Iowa Department of Transportation and American Association of State Highway and Transportation Officials engineering safety standards. The failure to provide the guardrails to protect users from the vertical drop off, the failure to use warning signs and tell the trail users of hazardous conditions due to the drop off, and the failure to close the trail with signage or barriers to prohibit access to the area where the vertical drop off occurred were recognized engineering and safety standards applicable at the time of the modification. (Exhibits A and B to Exhibit 1 to plaintiff's resistance to motion for summary judgment).

The City and the District Court distinguished the holding in ***Schmitz*** at page 15 of its opinion and order by stating that it was inapplicable because of the state of the art defense. The problem with the district court's ruling on this issue is that between 1980 and 1992 it was not the state of the art under engineering safety standards applicable at that time to redesign and reconstruct a park pathway that has no shoulders, guardrails or fails to warn intended users of the existing hazard. The city took and affirmative action, connecting Dankwardt Park pedestrian/bicycle pathways to the sewer box. 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 undertook affirmative action to connect the sewer box to the Dankwardt Park pathways. As such summary judgment was improper on this issue and the district court's distinction of ***Schmitz*** is inapplicable.

III. Did the trial court err in ignoring in holding of *Schmitz vs. City of Dubuque*, 682 N.W. 2d. 70 (Iowa 2004), where a municipality is liable for the negligent, design or maintenance of the pedestrian/bicycle path?

In the case of ***Schmitz vs. City of Dubuque***, 682 N.W. 2d. 70 (Iowa 2004) the Iowa Supreme Court held that the City of Dubuque was not entitled to envoke the discretionary function immunity protection when it negligently reconstructed a bicycle path owned by it. In ***Schmitz***, the plaintiff and three other bicyclists were bicycling on a six foot wide asphalt trial in Dubuque when they met two joggers coming toward them. Ms. Schmitz steered her bike of the bike trail in order to make way for the joggers and when she attempted to get back on the trail she snagged her front wheel on the asphalt overlay resulting in her fall and sustaining serious ankle injuries ***Schmitz*** Id. at page 71. The evidence showed that the trail was built in 1973 or 1974 by the city on the crest of the Army Corps of Engineers flood wall. In 1991 the city overlaid the bike trail with another layer of asphalt but did not raise the adjoining shoulders of the trial resulting in a one and one-half inch higher asphalt trail compared with the shoulder. Id.

In applying the two part discretionary function test the court held in ***Schmitz*** that under the first part, namely whether the action constituted a matter of choice by government (namely the choice to resurface the asphalt without raising the

adjacent shoulders) was satisfied. The second part of the test, whether the choices at issue were the sort intended for the protection of government under discretionary function immunity, the City of Dubuque produced no evidence that the choice it made with respect to the overlayment should be done with or without grading of the adjacent shoulders, was the sort of decision that the discretionary function immunity intends to protect, i.e. a decision weighing on the social, economic or political policies of city government. ***Graber vs. City of Ankeny***, 656 N.W. 2d. 157, 165 (Iowa 2003).

Likewise, here in the case at bar when the City of Burlington between 1980 and 1992 connected a non-pathway public utility, sewer box into a public facility designed for recreational activities, the pedestrian/bicycle pathways of Dankwardt Park the city failed to show any facts which would indicate that its failure to put up guardrails or signs warning pedestrians and bicyclists of the danger was the type of decision that the discretionary function immunity intended to protect. ***Schmitz*** at 76. There was no testimony or record from any city employee or official that in the case at bar as to what conscious balances, risks and advantages existed in deciding not to place guardrails or warning signs on the sewer trail when the city connected it to the Dankwardt Park pedestrian/bicycle paths.

In ***Schmitz*** the Supreme Court recognized that in order to allow the municipality immunity the defendants who seeks the immunity is required to show

some form of considered judgment and choice would be brought to bear on the decision. ***Schmitz*** supra at page 74, 75 citing ***Madden vs. City of Eldridge***, 661 N.W. 2d. 134 (Iowa 2003) 140, ***Messerschmidt vs. City of Sioux City***, 654 N.W. 2d. 879, 882 (Iowa 2002) and ***Doe vs. Cedar Rapids Cmty. Sch. Dist.***, 652 N.W. 2d. 439, 445 (Iowa 2002). The record here is devoid of any facts to establish why the City of Burlington decided to convert a box sewer into a recreational pedestrian/bicycle path without applying then applicable safety design and maintenance requirements. The city made the choice to connect the sewer box to Dankwardt Park's pathways but has failed to state what social, economic or political policies it considered when it failed to follow the established engineering and safety standards in place during the 1980's and 1990's with respect to the reconstruction and maintenance of such pathways.

This case is distinguishable from that the holding by the Supreme Court in ***Shelton vs. State***, 664 N.W. 2d. 27, (Iowa 2002) because in ***Shelton*** the state introduced evidence of its choice not to put guardrails or warning signs up on the trail in Wild Cat Den State Park in Muscatine County was made because one of the concerns of state officials was the preservation of the pristine character of the Wild Cat Den State Park. Unlike in ***Shelton***, there was no evidence introduced into the record by the city that indicated why it made the decision not to use guardrails or

otherwise warn pedestrians and bicyclists of the imminent danger of the more than ten foot vertical drop off on its pathway.

This exposure to the vertical drop on the sewer box would not have occurred between 1930 and 1980 for intended users of Dankwardt Park. Between those years the sewer box was not connected to Dankwardt Park's recreational pathways. It was only after the city altered, redesigned and reconstructed the sewer box into a facility designed for recreational use, a pathway connected to its Dankwardt Park pathways, that then its intended public users of Dankwardt Park were exposed to this hazard. Stated another way, bicyclists such as Kathryn and E.K.B. would never have biked on top of the sewer box if the city had never connected it to its pathways existing in Dankwardt Park in a negligent manner. This act constitutes malfeasance and the city is liable and not immune from suit.

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 of shoulders, or guardrails and that it was not a 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 Brief was prepared in Microsoft Word using Times New Roman style font, size 14. The number of words is 5,671 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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