STATE OF SOUTH DAKOTA) :SS COUNTY OF MINNEHAHA)	IN CIRCUIT COURT SECOND JUDICIAL CIRCUIT
EMILY FODNESS, CHRISTINE FODNESS, AND MICHAEL FODNESS, Plaintiffs, vs. CITY OF SIOUX FALLS, Defendant.	CIV 18-3031 **MEMORANDUM OPINION AND ORDER GRANTING DEFENDANT'S MOTION TO DISMISS AND DENYING PLAINTIFFS' MOTION TO AMEND**

On December 2, 2016, a building in downtown Sioux Falls collapsed during a construction project. Plaintiff Emily Fodness was in the building when it collapsed and suffered injuries. One of the construction workers in the building was killed. A number of lawsuits have been filed related to the incident. This particular case deals with the Fodness family's claim for negligence against the City of Sioux Falls. The family claims the City was negligent in issuing a building permit to Hultgren Construction, LLC, which had not provided adequate plans for its proposed work, and was known to perform work beyond the scope of its building permits. The City filed a motion to dismiss the lawsuit, asserting that under the public duty doctrine, it cannot be sued for negligently issuing a building permit. Further, the City argued that no special duty to the family existed, as the City did not have any actual knowledge of a dangerous condition, had not made any assurances to the family, had done nothing to increase the risk of harm to the family, and because no

ordinance or statute created a special duty of care to the family. The Fodness family moved for leave to amend its complaint, as an alternative to dismissal.

The matter came before the Court for hearing on December 18, 2018. Attorney Daniel Fritz appeared on behalf of Plaintiffs Emily, Christine and Michael Fodness. Attorney James Moore appeared on behalf of Defendant City of Sioux Falls. After considering the parties' written submissions, the applicable authorities, the record and oral arguments, the Court GRANTS Defendant City of Sioux Falls' motion to dismiss and DENIES Plaintiffs' motion for leave to amend their complaint.

FACTUAL BACKGROUND

In April 2016, Defendant City of Sioux Falls ("City") entered into discussions with Hultgren Construction, LLC ("Hultgren") regarding the renovation of buildings located at, and adjacent to, 136 South Phillips Avenue, Sioux Falls, South Dakota ("Property"). Following those discussions, the City issued Hultgren a building permit for the interior demolition of the Property.

On December 2, 2016, the Property collapsed, allegedly due to Hultgren's demolition of certain portions of the load bearing wall separating the interior of the buildings. Plaintiffs Emily Fodness, Christine Fodness, and Michael Fodness (collectively "Plaintiffs") were residents of the Property. At the time of the collapse, Plaintiff Emily Fodness was in the building and sustained extensive injuries.

Following the collapse, Plaintiffs filed suit against the City for negligence claiming the City negligently issued a building permit to Hultgren even though

Hultgren had not provided the City with adequate architectural or structural plans for its proposed work prior to the issuance of the permit. Plaintiffs also asserted that the City was uniquely aware of the particular dangers and risks the Plaintiffs would be exposed to by allowing Hultgren to demolish an interior load bearing wall without plans, approvals or supervision. Plaintiffs claim the City was familiar with Hultgren and its practices, as the City had issued Hultgren approximately 33 building permits from February 2013 to September 2016. From the City's experience with those permits, and complaints received from citizens and businesses, Plaintiffs assert the City was aware of repeated instances where Hultgren had failed to comply with issued building permits. Plaintiffs claim that if the City had notified Plaintiffs of the dangers it knew existed, Plaintiffs would not have continued to reside on the Property during Hultgren's construction work. Accordingly, Plaintiffs assert the City breached its special duties to Plaintiffs by exposing them to known, dangerous, and life-threatening conditions that would not have occurred except for the City's acts and omissions.

In response, the City argues it owed no duty to Plaintiffs under the public duty doctrine, as municipalities are not subject to liability for negligently issuing a building permit. Further, the City argues it had no special duty to plaintiffs, as it had no actual knowledge of any dangerous condition, that it had not made any personal assurances to Plaintiffs, that no ordinances or statutes created a special duty of care to Plaintiffs, and that the City had not done anything to increase the risk of harm to the Plaintiffs.

ANALYSIS

I. Motion to Dismiss

A motion to dismiss for failure to state a claim "tests the legal sufficiency of the pleading, not the facts which support it." *Guthmiller v. Deloitte & Touche, LLP,* 2005 S.D. 77, ¶ 4, 699 N.W.2d 493, 496. For a pleading to survive a motion to dismiss, the "complaint need only contain a short plain statement of the claim showing the pleader is entitled to relief and a demand for judgment for the relief to which the pleader deems himself entitled." *Nooney v. StubHub, Inc.,* 2015 S.D. 102, ¶ 9, 873 N.W.2d 497, 499.

"A court must deny the motion unless it appears beyond doubt that the plaintiff cannot recover under any facts provable in support of the claim." *Elkjer v. City of Rapid City*, 2005 S.D. 45, ¶ 6, 695 N.W.2d 235, 238 (citations omitted). When ruling on this motion, the court must treat all facts properly plead in the complaint as true and resolve all doubts in favor of the pleader. *Mordhorst v. Dakota Truck Underwriters & Risk Admin. Servs.*, 2016 S.D. 70, ¶ 8, 886 N.W.2d 322, 323 (citation omitted). However, "the court is free to ignore legal conclusions, unsupported conclusions, unwarranted inferences and sweeping legal conclusions cast in the form of factual allegations." *Id.* (citations omitted).

The only document the court considers when ruling on a motion to dismiss is the complaint, unless the pleader effectively incorporates another document into the pleading. *See Nooney*, 2015 S.D. 102, ¶¶ 7-8, 873 N.W.2d at 499 (citations omitted).

When "matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment." SDCL § 15-6-12(b).

A. Public Duty Doctrine

The City contends that under the public duty doctrine, it owed no duty to Plaintiffs to ensure the Property would be built in compliance with the building codes. Plaintiffs disagree, arguing the City's issuance of a building permit to Hultgren, despite the company's previous violations of building permits and building codes and its failure to submit adequate architectural or structural plans, imposed a duty upon the City to Plaintiffs.[1] To recover on a negligence claim in South Dakota, a plaintiff must establish, among other things, that the defendant owed her a duty and breached that duty. *Hewitt v. Felderman*, 841 N.W.2d 258, 263 (S.D. 2013) (quoting *Highmark Fed. Credit Union v. Hunter*, 814 N.W.2d 413, 415 (S.D. 2012)).

Under the "public duty doctrine," government entities are generally determined to owe governmental duties on matters of law enforcement and public safety to the public at large rather than to any specific individuals. *McDowell v.*

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[1] Plaintiffs also contend the City owed them a duty of care and protection as building occupants pursuant to the housing codes. Plaintiffs rely on *Halvorson v. Dahl* for support, where the Washington Supreme Court held when a municipality breaches a duty to keep occupants safe, tort claims may lie and are not precluded by the public duty doctrine because the housing codes were enacted for the benefit of a particular class of persons as well as the general public. *See* 574 P.2d 1190, 1192 (Wash. 1978). However, the broad view of the public duty doctrine applied by the court in *Halvorson*, which permitted the court to find that governmental entities owe a duty to keep occupants safe under local ordinance housing codes, has been specifically rejected by the South Dakota Supreme Court in *Tipton II. Tipton v. Town of Tabor* (*Tipton II*) , 1997 S.D. 96, ¶ 35, 567 N.W.2d 351, 366 (citation omitted).

Sapienza, 2018 S.D. 1, ¶ 36, 906 N.W.2d 399, 409 reh'g denied (Feb. 16, 2018); *E.P. v. Riley*, 1999 S.D. 163, ¶ 22, 604 N.W.2d 7, 14. The doctrine "acknowledges that many 'enactments and regulations are intended only for the purpose of securing to individuals the enjoyment of rights and privileges to which they are entitled as members of the public, rather than for the purpose of protecting any individual from harm.' " *E.P*, 1999 S.D. 163, ¶ 15, 604 N.W.2d at 12 (quoting *Tipton II*, 1997 S.D. 96, ¶ 13, 567 N.W.2d at 357). "Because such duties exist only for the protection of the public, they cannot be the basis for liability to a particular class of persons." *McDowell*, 2018 S.D. 1, ¶ 36, 906 N.W.2d at 409.

Within the last year, the South Dakota Supreme Court addressed the public duty doctrine in a "building permit" case and noted that its purpose is to prevent an overwhelming burden of liability on local governments with limited resources to "bear the burden of ensuring that every single building constructed within its jurisdiction fully complies with applicable codes." *McDowell*, 2018 S.D. 1, ¶ 39, 906 N.W.2d at 410 (citations omitted). The Court specifically held a municipality is not subject to liability for negligently issuing a building permit. *Id.* In so holding, the Court reversed the decision of the trial court and reaffirmed its established precedent that "building codes do not create a duty of care that will support a negligence claim." *Id.*; *see Hagen v. City of Sioux Falls*, 464 N.W.2d 396, 400 (S.D. 1990) (holding municipalities owe no duty to individual property owners to properly inspect buildings or to ensure compliance with building codes because building codes "only [implicate a] general duty to the public as a community, rather than an

obligation to a specific class of individual members of the public"). The Court further expressed:

> [B]y issuing a permit, municipalities do not imply that the plans submitted are in compliance with all applicable codes. Local governments should not, for the particular benefit of individual persons, bear the burden of ensuring that every single building constructed within its jurisdiction fully complies with applicable codes. The duty to ensure compliance rests with the individuals responsible for construction. Permit applicants, builders and developers are in a better position to prevent harm to a foreseeable plaintiff than are local governments.

McDowell, 2018 S.D. 1, ¶ 39, 906 N.W.2d at 410 (internal quotation marks and citations omitted).

B. Special Duty Doctrine

When the public duty rule is implicated, "a breach of a public duty will not give rise to liability to an individual unless there exists a special duty owed to that individual." *Maher v. City of Box Elder*, 2019 S.D. 15, ¶ 9 (*citing Tipton II*, 1997 S.D. 96, ¶ 13, 567 N.W.2d at 358); *see also Hagen*, 464 N.W.2d at 399 (stating the special duty doctrine provides that "a government entity is liable for failure to enforce its laws only when it assumes a special, rather than a public, duty."). "A special duty of care 'arises only when there are additional indicia that the municipality has undertaken the responsibility of not only protecting itself, but also undertaken the responsibility of protecting a particular class of persons[.]' " *Tipton v. Town of Tabor* (*Tipton I*), 538 N.W.2d 783, 786 (S.D. 1995) (quoting *Cracraft v. City of St. Louis Park*, 279 N.W.2d 801, 806 (Minn. 1979)). "To establish liability under [the special

duty doctrine], plaintiffs must show a breach of some duty owed to them as individuals." *Tipton II*, 1997 S.D. 96, ¶ 13, 567 N.W.2d at 358.[2]

In *Tipton I*, the South Dakota Supreme Court adopted a four-part test to determine whether the governmental entity owed a particular person or class of persons a special duty. *Tipton I*, 538 N.W.2d at 787 (adopting test from *Cracraft*, 279 N.W.2d at 806-07). The Court has established that "any *combination*" of the following four factors may create a special duty:

> 1) the [governmental entity's] actual knowledge of the dangerous condition;
>
> 2) reasonable reliance by persons on the [governmental entity's] representations and conduct;
>
> 3) an ordinance or statute that sets forth mandatory acts clearly for the protection of a particular class of persons rather than the public as a whole; and
>
> 4) failure by the [governmental entity] to use due care to avoid increasing the risk of harm.

Id. (citing *Cracraft*, 279 N.W.2d at 806–07) (citation omitted).

i. The City had no actual knowledge of a dangerous condition.

Actual knowledge of a dangerous condition is required to create a special duty. *Tipton II*, 1997 S.D. 96, ¶ 17, 567 N.W.2d at 358 (additional citation and internal quotation marks omitted). "Constructive knowledge is insufficient: a public

[2] Notably, "[w]hile many plaintiffs have invoked the special duty rule to support claims against public entities, most courts have found no liability for matters such as failure to adequately inspect a structure for violations of fire and building codes, or failure to apprehend drunk drivers who later injure others." *Tipton I*, 538 N.W.2d at 787 (internal quotations and citations omitted).

entity must be uniquely aware of the particular danger or risk to which a plaintiff is exposed. It means knowing inaction could lead to harm." *Id.* (internal citation omitted). "[A]ctual knowledge denotes a foreseeable plaintiff with a foreseeable injury." *Id.* at 359. "Only where the circumstances are such that the defendant 'must have known' and not 'should have known' will an inference of actual knowledge be permitted." *Id.*

In this case, Plaintiffs allege the City knew that issuing a building permit to Hultgren for the interior demolition of the Property would substantially increase the risk of injury or death because the City was aware of past instances where Hultgren was not compliant with work permits issued by the City. Even if the City was aware of Hultgren's past violations of building permits and building codes, it does not establish the City had actual knowledge that Hultgren was violating the permit issued by the City for the Property where Plaintiffs resided. *See Tipton II*, 1997 S.D. 96, ¶ 17, 567 N.W.2d at 359 ("actual knowledge imports 'knowing' rather than 'reason for knowing' "). Therefore, Plaintiffs have not pled sufficient facts to establish the City had actual knowledge of the dangerous condition.

ii. Plaintiffs' general reliance on the City's representations and conduct is insufficient to establish liability.

To establish their claim of reasonable reliance on the City's representations and conduct, Plaintiff must have depended "on specific actions or representations which [caused them] to forgo other alternatives of protecting themselves." *Tipton II*, 1997 S.D. 96, ¶ 32, 567 N.W.2d at 365. The South Dakota Supreme Court has refused to find reasonable reliance absent "personal assurances" made by the

governmental entity to the plaintiff. *Id.* Implicit assurance is not enough. *Walther v. KPKA Meadowlands Ltd. Partnership*, 1998 SD 78, ¶ 18, 581 N.W.2d 527, 533. *See McDowell*, 2018 S.D. 1, ¶ 39, 906 N.W.2d at 410 ("by issuing a permit, municipalities do not imply that the plans submitted are in compliance with all applicable codes").

In the present case, Plaintiffs allege the permits issued by the City to Hultgren were public and posted representations by the City to the occupants of the Property that work performed in the building was being done within the standard of care for such work. These factual allegations, however, do not allege that any direct promise or personal assurances made by the City caused Plaintiffs to forego other alternatives to protect themselves. *Tipton II*, 1997 S.D. 96, ¶¶ 32-33, 567 N.W.2d at 365 (holding there was not reasonable reliance by the plaintiff because no direct promises were made). Thus, accepting Plaintiffs' factual allegations as true, Plaintiffs have failed to show that any personal assurances were made by the City to Plaintiffs.

iii. There is no applicable ordinance mandating a special duty of care to Plaintiffs.

The third factor of the special duty doctrine "permits recovery against a government entity for negligent failure to enforce its laws only when there is language in a statute or ordinance which shows an intent to protect a particular and circumscribed class of persons." *Tipton II*, 567 N.W.2d at 365–66 (quoting *Tipton I*, 538 N.W.2d at 786) (internal quotation marks omitted).

In this case, Plaintiffs acknowledge they have not identified any statute or ordinance that mandates a special duty of care. Furthermore, South Dakota precedent has established that building codes, zoning ordinances, and the issuance of building permits protect the public at large and not any special class of persons. *See Hagen*, 464 N.W.2d at 399 (finding that building codes were "aimed only at public safety or general welfare"). Accordingly, Plaintiffs have not pled factual allegations sufficient to satisfy this factor.

iv. The City did nothing to increase the risk of harm to Plaintiff.

"Under this factor, official action must either cause harm itself or expose plaintiffs to new or greater risks, leaving them in a worse position than they were before official action." *Tipton II*, 997 S.D. 96, ¶ 38, 567 N.W.2d at 366.

> This element ... does not ask whether the city simply failed to act, but whether the city failed to use due care to avoid increasing the risk of harm. The city has to be more than negligent. A failure to diminish potential harm is not enough. The city's actions must either cause the harm itself or have exposed [the plaintiff] to new or greater risks, leaving [the plaintiff] in a worse position than she would have been before the city's actions.

Pray v. City of Flandreau, 2011 S.D. 43, ¶ 14, 801 N.W.2d 451, 455–56. Thus, the governmental entity must have taken some affirmative action that "contributed to, increased, or changed the risk which would have otherwise existed." *Gleason v. Peters*, 1997 S.D. 102, ¶ 25, 568 N.W.2d 482, 487 (citations and internal quotations marks omitted).

Plaintiffs allege the City's issuance of a building permit to Hultgren for the interior demolition of the Property where Plaintiffs were known to reside

substantially increased the risk of injury or death to Plaintiffs because the City knew Hultgren did not submit adequate architectural or structural plans, and because the City was aware of past instances in which Hultgren violated building permits and building codes. However, even accepting those factual allegations as true, Plaintiffs cannot show the City engaged in some affirmative action that increased the risk of harm to Plaintiffs.

While Plaintiffs claim the submission of an architectural and/or a structural plan is a prerequisite for the issuance of a building permit, they cite to no authority stating that the City was required to receive an architectural and/or a structural plan before it could issue a building permit to Hultgren.

Even if the City knew of prior instances where Hultgren violated building permits and building codes before it granted the building permit at issue in this case, the factual allegations pled by Plaintiffs are not enough to prove the City engaged in some affirmative action that contributed to, increased, or changed the risk which would have otherwise existed. The City's issuance of a building permit is not an affirmative action by the City that increases the risk of harm to Plaintiffs. *See McDowell*, 2018 S.D. 1, ¶ 39, 906 N.W.2d at 410 (stating that such conduct is insufficient, even if negligently performed, to hold a governmental entity liable). Therefore, Plaintiffs have not pled factual allegations adequate to show the City performed some affirmative action that increased the risk of harm to Plaintiffs.

II. Motion to Amend

Plaintiffs filed a motion to amend their complaint four days before the hearing on the City's motion to dismiss. While Plaintiffs assert they have sufficiently pled negligence against the City, they ask that if the Court finds any defects in the complaint, that Plaintiffs be allowed to amend their complaint as an alternative to dismissal. No proposed amended complaint was attached to Plaintiffs' motion,[3] nor did Plaintiffs include any proposed language in their briefing, so it is not apparent what language or additional allegations Plaintiffs would add to the complaint, if allowed to amend.

"A trial court may permit the amendment of pleadings before, during, and after trial without the adverse party's consent." *Klutman v. Sioux Falls Storm*, 2009 S.D. 55, ¶ 14, 769 N.W.2d 440, 446, quoting *Burhenn v. Dennis Supply Co.*, 2004 SD 91, ¶ 20, 685 N.W.2d 778, 783. (additional citations omitted). "SDCL 15–6–15(a) provides in relevant part that leave to amend shall be freely given when justice so requires." *Prairie Lakes Health Care Sys., Inc. v. Wookey,* 1998 SD 99, ¶ 28, 583 N.W.2d 405, 417. However, a court "may appropriately deny leave to amend 'where there are compelling reasons such as ... futility of the amendment,' even when doing so will necessarily prevent resolution on the merits." *In re Wintersteen Revocable Tr. Agreement*, 2018 S.D. 12, ¶ 11, 907 N.W.2d 785, 789 citing *Ash v. Anderson Merchandisers, LLC*, 799 F.3d 957, 963 (8th Cir. 2015) (quoting *Horras v. Am.*

[3] Although Federal Rules of Civil Procedure require that a proposed amended pleading be attached to a motion to amend, South Dakota law does not contain this requirement. See Fed. R. Civ. P. 15.

Capital Strategies, Ltd., 729 F.3d 798, 804 (8th Cir. 2013)); *see Foman v. Davis*, 371 U.S. 178, 182, 83 S.Ct. 227, 230, 9 L.Ed.2d 222 (1962).

The City argues the motion to amend should be denied because Plaintiffs have not established how an amended complaint would remedy the defects in the complaint as pled. *See Sherman v. Winco Fireworks, Inc.*, 532 F.3d 709, 715 (8th Cir. 2008) (stating that a proposed amendment that is clearly futile or fails to include allegations to cure defects in the original pleading should be denied (quoting *Moses.com Sec, Inc. v. Comprehensive Software Sys., Inc.*, 406 F.3d 1052, 1065 (8th Circ. 2005)).

The Court agrees that Plaintiffs have merely relied on their general and conclusory allegations in their original complaint. Those allegations, as noted above, cannot withstand dismissal. Plaintiffs' vague request to amend is an effort to survive dismissal, conduct additional discovery, and have the case resolved on its merits. However, the Court's task at this point in the proceedings is to determine if the proposed pleading can withstand a motion to dismiss for failure to state a claim. *See Wheeler v. Hruza*, No. CIV 08-4087, 2010 WL 2231959, at 2 (D.S.D. June 2, 2010) (stating the test for futility in a motion to amend complaint does not depend on whether the proposed amendment could potentially be dismissed on a motion for summary judgment, but whether the proposed pleading can withstand a motion to dismiss for failure to state a claim (*citing Peoples v. Sebring Capital Corp.*, 209 F.R.D. 428, 430 (N.D. Ill. 2002)). Based on the pleadings and arguments submitted by Plaintiffs, the Court cannot determine if an amendment could cure the defects in

the original complaint or change the outcome of the Court's analysis. Even though the Court favors resolution on the merits, it is not in the interest of justice to allow Plaintiffs leave to amend their complaint when they have not identified how amending would cure the defects in their original complaint. Thus, the Court denies Plaintiffs' motion for leave to amend their complaint.

CONCLUSION

The City's issuance of a building permit to Hultgren did not create a duty of care to support a negligence claim, and Plaintiffs cannot establish the City owed them a special duty of care. In the absence of any special duty owed by the City to the Plaintiffs, the negligence claim against the City fails as a matter of law and dismissal is appropriate. Plaintiffs' motion for leave to amend their complaint is denied as the Court cannot determine if Plaintiffs' amendment could cure the defects in their original complaint.

ORDER

Based upon the foregoing, it is hereby ordered that:

City of Sioux Falls' Motion to Dismiss is GRANTED.

Plaintiffs' Motion to Amend is DENIED.

Dated this 18th day of March, 2019

BY THE COURT:

Camela Theeler
Circuit Court Judge

ATTEST:
Angelia M. Gries, Clerk of Court

By: _____
Deputy Clerk