STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	) SS.	
COUNTY OF MEADE	)	FOURTH JUDICIAL CIRCUIT

JOHN TRUDO, ERIKA TRUDO, WILLIAM CHAPMAN JR, AMY BARBER, NATHAN OLIVER, AMANDA OLIVER, WILLIAM WIMP, PAULA WIMP, CHRISTOPHER TAYLOR, WENDI TAYLOR, CONSTANCE MING, MATTHEW SCOTT, KENDRA SCOTT, CLYDE THOMPSON, JANET THOMPSON, ZACHARY BADER, LAUREN BADER, TERRY GILBERTSON, JAKE DOWLING, JAMIE DOWLING, KARA TAYLOR, CHAD BLODGETT, PAMELA BLODGETT, JEREMY GOULDIN, SARAH GOULDIN, SCOTT PERRY, HANNA KRAFT, NATHAN CHERRY, MELINDA CHERRY, JOHN SAMUEL, CAITLIN SAMUEL, JOSEPH DAVIS, STEPHANY FISCHER, LOREN WERMERS, ANGELA WERMERS, RANDY NELSON, SANDY NELSON, ADAM GERDES, VALLENE MORRIS, DANIEL CROUSE, JANET BACKES, JEROME HARDY, MELISSA CROUCH, WILLIAM BERRY III, JOHN OSBURN, CAROL OSBURN, DOMINIC BRADFORD, KATELYN BRADFORD, CHRISTOPHER BURNS, KATHERINE BURNS, KYLE PFEIFLE, NICOLE JENSEN, BRANDON JENSEN, JARED RUNDELL, SARA RUNDELL, AMBER BERRY, CORY KALISZEWSKI, LONALD SCHNITTGRUND, LESA SUMNERS, KYLE KIENZLE, BALEIGH KIENZLE, MARIE KELLER, COLE SMITH, VALERIE SMITH, BRADY ROTHSCHADL, KATELYNN ROTHSCHADL, RANDALL JANSSEN, TIMOTHY MEFFORD, ALEXANDRIA MEFFORD, KATHY BAUMBERGER, TORI PURCELL, ANN WILEY, DANIEL DROWN, SHEILA DROWN, ASHLEY WAGNER, TREVER WAGNER, REBEKAH WOJAHN, BRADLEY WOJAHN, JAMIE NELSON, CHRIS NELSON, MEGAN SALISBURY,	)	Case No. 46CIV20-000177

MEADE COUNTY DEFENDANTS' MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

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BRYCE SALISBURY, ADAM GEIGLE, NATASHA GEIGLE, MICHAEL SOUZA, JEREMIAH SUTTON, HEATHER HEINERT, SARAH NAVA, BLAKE HALLERT, JAMES LITTLE, MISTY LITTLE, NICOLE MOORE MICHAEL MOORE, MIKE ESPOSTO, JAMES RADENIC, DEBORAH RADENIC, KOREY SCHULTZ, KELLY SCHULTZ, LORI KIEHN, JOHNATHAN CINA, KRISTIN CINA, MATTHEW WAGNER, WENDY WAGNER, CARISA GERVING, ROBERT GERVING, ANDREA FISCHER, SCOTT SMITH, SAMANTHA SMITH, MICHAEL LORGE, CAROLYN LORGE, MARK WIRKUS, CATHERINE WIRKUS, COURTNEY AHRENDT, EZRA AHRENDT, SANDRA RAUE, JASON HANSON, CHRIS CONNERS, DEIDRA CONNERS, JUSTIN SCHUMMER, ROBERT MINICK, GENEVA MINICK, JENNIFER BIGGERS, JOHN BIGGERS, WILLIAM SCHAMBER, GLENDA SCHAMBER, DAVID LOWE, RICHARD OXNER, BRENDA OXNER, JUSTIN BOMWICH, DIANA BROMWICH, THERESA MAXON, BRUCE STACY, SHERI STACY, ALBERT REITZ, JOSEPH WEST, JULIE WEST, KALYN AGA, RANDY AGA, BEAU DEINES, DANIELLE HIGH BEAR, ERIC HIGH BEAR, CARLOS LLORENS, JENNI LLORENS, DAVID MCKELVEY, SHILOU MCKELVEY, CRYSTAL POWELL, JOCELYN POWELL, SHANE GALLES, TRISTA GALLES, THERESA JOHNSON, DARRIN JOHNSON, residents of Meade County, South Dakota

Plaintiffs,

v.

SOUTH DAKOTA HOUSING DEVELOPMENT AUTHORITY, a South Dakota Public Authority, MEADE COUNTY, a local government agency and WAYNE GUTZMER, CARL BRUCH, BOB POWLES, DAYLE HAMMOCK, BOB MALLOW,

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CURTIS NUPEN, JIM SCHROEDER, DEAN WINK, TIM POTTS, CRAIG SHAVER, BILL RICH, JACK WILSON the duly elected, qualified, and acting Members of the Meade County Commission, individual and in their official capacities, and KIRK CHAFFEE, the duly appointed, qualified and acting Equalization Director of Meade County, HIGH PLAINS TITLE SERVICE, INC. D.B.A. MEADE COUNTY TITLE COMPANY, BLACK HILLS TITLE, INC., a South Dakota Corporation, STEWART TITLE COMPANY, a Texas Corporation, RENNER AND SPERLICH ENGINEERING COMPANY, a South Dakota Corporation, SPERLICH CONSULTING, INC., a South Dakota Corporation, LONGBRANCH CIVIL ENGINEERING, INC., a South Dakota Corporation, KALE MCNABOE, an employee of SPERLICH CONSULTING, INC. and the registered agent of LONGBRANCH CIVIL ENGINEERING, INC., RAYMOND FUSS, Developer of Fuss Subdivision, LARRY FUSS, Developer of Fuss Subdivision, ADELAIDE FUSS, Developer of Fuss Subdivision, KEITH KUCHENBECKER, Developer of Hideaway Hills Subdivision, LINDA KUCHENBECKER, Developer of Hideaway Hills Subdivision, REMAX OF RAPID CITY, a South Dakota Corporation, RONALD SJODIN, Agent of REMAX OF RAPID CITY, VIVIAN SJODIN, Agent of REMAX OF RAPID CITY, FOUST CONSTRUCTION, INC., a South Dakota Corporation, NEIL FOUST, an employee of FOUST CONSTRUCTION, INC. and the registered agent of FOUST CONSTRUCTION, INC., MELVIN LAMKE, a professional Surveyor.

Defendants.

COME NOW Defendants, Meade County, Wayne Gutzmer, Bob Powles, Dayle Hammock, Curtis Nupen, Jim Schroeder, Dean Wink, Tim Potts, Bill Rich, and Kirk Chaffee ("Meade County Defendants") by and through J. Crisman Palmer, Rebecca L. Mann, and

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Katelyn A. Cook of Gunderson, Palmer, Nelson & Ashmore, LLP, their attorneys, and hereby submit this Memorandum in Support of Motion to Dismiss. The Amended Complaint should be dismissed pursuant to SDCL §§ 15-6-12(b)(4)-(5) for insufficient service of process and failure to state a claim upon which relief can be granted. Former commissioners have no official capacity, individual Meade County Defendants are entitled to immunity, the public duty rule bars tort claims against Meade County Defendants, and there is no privity of contract between Meade County Defendants and Plaintiffs.

INTRODUCTION

This lawsuit stems from the appearance of a sinkhole in the Hideaway Hills subdivision ("Hideaway Hills") in Meade County, South Dakota. Plaintiffs allege they are owners or have a legal interest in real estate in Hideaway Hills.[1] (First Amended Complaint at ¶¶ 6, 47.) They brought suit against multiple individuals and entities even tangentially involved in the planning and development of Hideaway Hills. For the numerous reasons set forth below, the claims against Meade County Defendants must be dismissed.

FACTUAL AND PROCEDURAL BACKGROUND

A. Procedural Background.

On June 9, 2020, Plaintiffs filed a Summons and Complaint in the Fourth Judicial Circuit, Meade County. On June 30, 2020, Plaintiffs served the Summons and Complaint on the Meade County Auditor. *See* Sheriff's Return filed July 2, 2020. On July 1, 2020, Plaintiffs filed an Amended Summons and Amended Complaint that were served on the Meade County Auditor on July 2, 2020. *See* Sheriff's Return filed July 2, 2020. The Amended Complaint names over

[1] Plaintiffs fail to allege the legal description or address of their homes, but Plaintiffs Keller, Crouch, Hardy, Esposto, and Bromiches' homes are located in the Northdale Subdivision, not Hideaway Hills.

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thirty defendants alleged to have some form of involvement in the Hideaway Hills subdivision and the issues caused by the sinkhole which formed in late April of 2020. The sinkhole is alleged to have formed as a result of a gypsum mine located under a portion of Hideaway Hills.

B. Facts Alleged in the Amended Complaint.

The Amended Complaint states twenty separate counts against the various Defendants. The allegations against Meade County Defendants, while not being deemed admitted,[2] are summarized as follows:

> ¶ 12: "Meade County is a government body tasked with, among other things, managing and conducting itself to provide for the best interests of all residents, including, but not limited to the decision making authority to approve or disapprove of the improvements of real estate located in Meade County."
>
> ¶¶ 13-25: Wayne Gutzmer, Carl Brunch, Bob Powles, Dayle Hammock, Bob Mallow, Curtis Nupen, Jim Schroeder, Dean Wink, Tim Potts, Craig Shaver, Bill Rich, and Jack Wilson were Meade County Commissioners and Kirk Chaffee was the Meade County Director of Equalization at the time the plats for Hideaway Hills were approved.
>
> ¶ 60-61: In 1971 and 1974, the Meade County Commissioners approved plats of the property at issue.
>
> ¶ 64: The Kuchenbeckers and Fusses submitted a plat of the property at issue to the Meade County Commission for a domestic housing development.
>
> ¶ 65: "Larry Fuss and Keith Kuchenbecker approached Meade County with a proposal for development of a manufactured housing community over the Hideaway Mine on or about July 13, 2000. Meade County's minutes record that a 'visual inspection,' and 'soils test' was conducted. Its report concluded, 'Based on initial visual observation, on-site soil appears suitable for the proposed development.'… 'In the early 1900's an underground gyp mining operation took place on the NE corner of the property. Field boring operation may be required to

[2] "A 12(b)(5) motion 'does not admit conclusions of the pleader either in fact or law.'" *Nygaard v. Sioux Valley Hospitals & Health System*, 2007 S.D. 34, ¶ 9, 731 N.W.2d 184, 190 (quoting *Akron Savings Bank v. Charlson*, 158 N.W.2d 523, 524 (1968)).

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identify any cavities that may be a safety hazard.' At some point in time the manufactured home plan was replaced with a plan to build stick built homes."[3]

¶ 69: On or about October 2, 2002 the Meade County Commission approved the said plat located in Plat Book 21, Page 28.

¶ 74: On or about August 8, 2004, the Meade County Commission approved the second plat at issue, located in Plat Book 21, Pages 217-218.

¶ 78: Neither the developers, the Meade County Commissioners, contractors, the respective title companies, Engineers, Realtors, nor the surveyor believed the disclaimer between the developers to the contractors should have been recorded.[4]

(Amended Complaint).

CAUSES OF ACTION

The Amended Complaint alleges the following claims against Meade County Defendants:

- Willful Misconduct (Counts 5 and 9);[5]
- Wanton Misconduct (Count 10);
- Negligence in the Designing, Planning, Engineering, Surveying, Decision Making, Construction and Selling of Real Property Within the Subdivision (Count 11);
- Breach of Governmental Warranty (Count 13);
- Failure of Meade County Governmental Authority to Provide Express Warnings of the Hazards of Habitability of Homes in the Hideaway Hills Subdivision (Count 14); and
- Public Nuisance (Count 20).

[3] While this Court must accept this allegation as true for purposes of this Motion, a review of the relevant Meade County minutes reveals that this information was not actually set forth in the minutes of the meeting, but was contained in the "supporting documentation" for the "Hideaway Hills Manufactured Housing Community" submitted to the Meade County Planning Board by the plat applicants in support of the application. There was no meeting of either the Commission or the Planning Board on July 13, 2000.

[4] It is worth noting that this disclaimer was provided after the plats at issue were approved by Meade County, and therefore, Meade County would have had no knowledge that such disclaimer even existed.

[5] The allegations against Meade County Defendants in Counts 5 and 9 are identical.

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STANDARD

When considering a motion to dismiss pursuant to SDCL § 15-6-(b)(5), a court confines its review to the facts alleged in the complaint and matters "embraced by the pleadings . . . ." *Mattes v. ABC Plastics, Inc.*, 323 F.3d 695, 698 n.4 (8th Cir. 2003) (*citing Porous Media Corp. v. Pall Corp.*, 186 F.3d 1077, 1079 (8th Cir. 1999)). "A motion to dismiss under SDCL 15-6-12(b) tests the legal sufficiency of the pleading, not the facts which support it. For purposes of the pleading, the court must treat as true all facts properly pled in the complaint and resolve all doubts in favor of the pleader." *Nygaard v. Sioux Valley Hospitals & Health System*, 2007 S.D. 34, ¶ 9, 731 N.W.2d 184, 190 (quoting *Guthmiller v. DeLoitte & Touche, LLP*, 2005 S.D. 77, ¶ 4, 699 N.W.2d 493, 496). "While the court must accept allegations of fact as true when considering a motion to dismiss, the court is free to ignore legal conclusions, unsupported conclusions, unwarranted inferences and sweeping legal conclusions cast in the form of factual allegations." *Nygaard*, 2007 S.D. 34 at ¶ 9 (quoting *Wiles v. Capitol Indemnity Corp.*, 280 F.3d 868, 870 (8th Cir.2002)); *see also Sisney v. Best, Inc.*, 2008 S.D. 70, ¶ 7, 754 N.W.2d 804 (Courts "are not bound to accept as true a legal conclusion couched as a factual allegation.") (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007)).

"Ultimately, the complaint must allege facts, which, when taken as true, raise more than a speculative right to relief." *Sisney v. Reisch*, 2008 S.D. 72, ¶ 6, 754 N.W.2d 813, 817 (citing *Twombly*, 550 U.S. at 555). "'Where the allegations show on the face of the complaint there is some insuperable bar to relief, dismissal under Rule 12(b)(5) is appropriate.'" *Reisch*, 2008 S.D. 72 at ¶ 6 (quoting *Benton v. Merrill Lynch & Co. Inc.*, 524 F.3d 866, 870 (8th Cir.2008)). "[T]o survive a motion to dismiss under SDCL 15-6-12(b)(5), '[f]actual allegations must be enough to raise a right to relief above the speculative level. The pleading must contain something more

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than a statement of facts that merely creates a suspicion of a legally cognizable right of action on the assumption that all the allegations in the complaint are true (even if doubtful in fact).'" *Hernandez v. Avera Queen of Peace Hospital*, 2016 S.D. 68, ¶ 15, 886 N.W.2d 338, 344-45 (quoting *Best*, 2008 S.D. 70 at ¶ 7) (quoting *Twombly*, 550 U.S. at 553; *Sisney v. State*, 2008 S.D. 71, ¶ 8, 754 N.W.2d 639, 643)).

ARGUMENT AND AUTHORITIES

A. Former Meade County Officials Cannot be Sued in their Official Capacity.

The individual Meade County Defendants named in the Amended Complaint are alleged to be former Meade County Commissioners and a former director of equalization. With the exception of the former director of equalization, they are all sued in their individual and official capacities.[6] The official capacity claims should be dismissed because the former Meade County Officials are no longer agents of Meade County.

> Personal-capacity suits seek to impose personal liability upon a government official for actions he takes under color of state law. Official-capacity suits, in contrast, generally represent only another way of pleading an action against an entity of which an officer is an agent. As long as the government entity receives notice and an opportunity to respond, an official-capacity suit is, in all respects other than name, to be treated as a suit against the entity. It is not a suit against the official personally, for the real party in interest is the entity. Thus, while an award of damages against an official in his personal capacity can be executed only against the official's personal assets, a plaintiff seeking to recover on a damages judgment in an official-capacity suit must look to the government entity itself.

Hansen v. South Dakota Dep't of Transportation, 1998 S.D. 109, ¶ 14, 584 N.W.2d 881, 884 (quoting *Kentucky v. Graham*, 473 U.S. 159, 166 (1985) (internal quotations and citations omitted)) (emphasis added). The real party in interest in an official capacity suit is the entity and Meade County is already a named defendant. The individual named Meade County Defendants

[6] Kirk Chafee, the former director of equalization, is sued only in his official capacity.

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have no official capacity because they are no longer officials of Meade County. The official capacity claims should be dismissed.

B. Meade County Defendants have Immunity for Individual Capacity Claims.

When County employees are sued in their individual capacity, they are entitled to immunity when they perform discretionary functions. *Hansen*, 1998 S.D. 109 at ¶ 15; *Cassazza v. South Dakota*, 2000 S.D. 120, ¶ 13, 616 N.W.2d 872, 875; *Kruger v. Wilson*, 325 N.W.2d 851, 853 n.3 (S.D. 1982). South Dakota has recognized that "approval or disapproval of a proposed plat requires a city to exercise its judgment and is a discretionary function." *Black Hills Central Railroad Co. v. City of Hill City*, 2003 S.D. 152, ¶ 16, 674 N.W.2d 31 (emphasis added). *See also Lohman v. City of Aberdeen*, 246 N.W.2d 781, 785 (S.D. 1976) (Holding planning commissions have discretionary authority to approve or disprove a plat).

Plat approval is a discretionary function and Meade County Defendants are entitled to immunity for individual capacity claims. The individual capacity claims against Meade County must be dismissed.

C. Plaintiffs' Tort Claims are Barred by the Public Duty Rule.

To proceed against Meade County Defendants for their claims of Negligence (Count 11); Willful Misconduct (Counts 5 and 9); Wanton Misconduct (Count 10); Failure to Warn (Count 14); and Public Nuisance (Count 20), Plaintiffs must prove the existence of a duty. "[T]ort liability against a public entity in any case requires the existence of a duty, a breach of that duty, and causation." *Maher v. City of Box Elder*, 2019 S.D. 15, ¶ 8, 925 N.W.2d 482 (citing *Tipton v. Town of Tabor* (*Tipton II*), 1997 S.D. 96, ¶¶ 9, 12, 567 N.W.2d 351, 356-57). Whether a duty exists "is entirely a question of law." *Tipton II*, 1997 S.D. 96 at ¶ 11 (quoting W. Page Keeton, et al., *Prosser & Keeton on the Law of Torts* § 37, at 236 (5th ed 1984)).

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As to governmental entities, "an actionable duty may be limited by what is known as the public duty rule." *Maher*, 2019 S.D. 15 at ¶ 9. "As its name suggests, the public duty rule recognizes that 'government entities are generally determined to owe governmental duties only to the public, not individuals.'" *Id.* (quoting *McDowell v. Sapienza*, 2018 S.D. 1, ¶ 36, 906 N.W.2d 399, 409) (emphasis added). "When the 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." *Id.* (citing *Tipton II*, 1997 S.D. 96, ¶ 13, 567 N.W.2d at 358). The rule is viewed "principally within the framework of duty—if none exists, then no liability may affix." *Tipton II*, 1997 S.D. 96 at ¶ 12. The public duty rule was limited in 1999 to apply only to issues involving law enforcement or public safety. *E.P. v. Riley*, 1999 S.D. 163, ¶ 22, 604 N.W.2d 7.[7]

1. Plat Approval is a Public Safety Issue.

The Amended Complaint alleges Meade County breached some duty owed to the residents of Hideaway Hills when it approved plats for the subdivision in 2002 and 2004. (Amended Complaint at ¶¶ 69 and 74.) Approving a plat is an issue of public safety. Meade County Ordinance No. 20, "Providing Regulations for the Subdivision of Land, Development and Improvements," provides that "it is the purpose of this Ordinance to promote the **safety**, health, convenience and general welfare . . . " Meade County Ordinance No. 20, § 1.02 (emphasis added). *See also* SDCL § 11-3-8 (a county shall approve a plat if it appears, among other things, "that all provisions of any subdivision regulations of the county have been complied with") (emphasis added). *Accord McDowell v. Sapienza*, 2018 S.D. 1, ¶ 38, 906 N.W.2d 399; *Hagen v. City of Sioux Falls*, 464 N.W.2d 396 (S.D. 1990) (building codes are aimed at public

[7] For a history of the public duty rule in South Dakota, see *Maher*, 2019 S.D. 15, ¶¶ 10-16.

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safety and general welfare and do not create an obligation to a specific class of individual members).

In *Hagan*, the plaintiffs hired a contractor to build a garage and addition to their home. 464 N.W.2d at 397. The City issued building permits for the projects and inspected the improvements. *Id.* The plaintiffs alleged the garage and addition were not built to code which caused water infiltration. *Id.* They sued the City alleging it was negligent in failing to properly inspect the construction. *Id.* The South Dakota Supreme Court held that the City owed no duty to individual property owners to properly inspect buildings and ensure compliance with building codes. *Id.* at 400. It specifically held that the building code created "only a general duty to the public as a community, rather than as an obligation to a specific class of individual members of the public" and that building codes do "not create a duty of care which will support" a negligence claim. *Id.*

In *McDowell*, the South Dakota Supreme Court again examined the public duty rule in a building code case. In that case, the defendants built a house in the McKennan Park Historic District in Sioux Falls. 2018 S.D. 1 at ¶ 4. The building plans submitted to the City indicated the house would comply with maximum height and setback requirements under City ordinances and the City issued a building permit. *Id.* at ¶ 6. While the house did comply with City ordinances, it violated an administrative rule for height requirements in historic districts. *Id.* at ¶ 22. The next-door neighbors sought an injunction to bring the house in to compliance and sued the City alleging it negligently approved the building permit and negligently permitted the defendants to build a house that violated building regulations. 2018 S.D. 1 at ¶ 10.

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The Court held that the public duty rule barred plaintiffs' claim against the City and reiterated "that building codes were 'aimed only at public safety or general welfare,' that they did 'not create an obligation to a specific class of individual members of the public,' and that they only created a 'general duty to the public as a community.'" *Id.* at ¶ 38 (quoting *Riley*, 1999 S.D. 63 at ¶ 16). It adhered "to *Hagen's* conclusion that building codes do not create a duty of care that will support a negligence claim" and "that by issuing a permit, municipalities do not 'imply that the plans submitted are in compliance with all applicable codes.'" *Id.* at ¶ 39 (quoting *Tayler v. Stevens County*, 759 P.2d 447, 452 (Wash. 1988)). "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." *Id.* "The duty to ensure compliance rests with the individuals responsible for construction." *Id.* (emphasis added). "Permit applicants, builders and developers are in a better position to prevent harm to a foreseeable plaintiff than are local governments." *Id.* (quoting *Taylor*, 759 P.2d at 452).

Similar to building codes, plat approval is a matter of public safety that does not create a duty to specific individuals. Approving plats creates only a general duty to the public and does not create a duty of care that will support a tort claim. *See Herbert v. City of Everett*, 134 Wash. App. 1045 (2006) ("In negligence terms, approval of a private development under existing regulations involves duties owed to the public at large, but not to a specific landowner. The public duty doctrine militates against finding municipal liability based only on approval of private development.") (quotation omitted); *Phillips v. King County*, 968 P.2d 871, 880 (Wash. 1998) ("The public duty doctrine has been interpreted by this Court to specifically preclude claims based on a municipality's approval of private development.")

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Meade County Defendants owe no duty to Plaintiffs and their claims for Negligence (Count 11); Willful Misconduct (Counts 5 and 9); Wanton Misconduct (Count 10); Failure to Warn (Count 14); and Public Nuisance (Count 20) fail to state a claim because the element of duty is required.

2. There is No Special Duty Owed to Plaintiffs.

A corollary to the public duty rule is the "special duty" exception. *Tipton v. Town of Tabor* (*Tipton I*), 538 N.W.2d 783, 785-86 (S.D. 1995). The special duty exception allows for an actionable duty when the government "assumes a special, rather than a public, duty." *Id.* "To establish liability under this restrictive template, plaintiffs must show a breach of some duty owed to them as individuals." *Tipton II*, 1997 S.D. 96 at ¶ 13. A four-factor test is used to determine if a special duty exists:

> (1) the state's actual knowledge of the dangerous condition;
> (2) reasonable reliance by persons on the state'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 state to use due care to avoid increasing the risk of harm.

Tipton I, 538 N.W.2d at 787. Plaintiffs have not alleged Meade County Defendants assumed a special duty to them nor does the Amended Complaint contain factual allegations to support the existence of a special duty.

a. Actual Knowledge.

"Actual knowledge" of a dangerous condition means "knowledge of a 'violation of law constituting a dangerous condition.'" *Tipton II*, 1997 S.D. 96 at ¶ 17 (quoting *Hage v. Stade*, 304 N.W.2d 283, 288 n.2 (Minn. 1981)) (emphasis added). "Constructive knowledge is insufficient: a public entity must be uniquely aware of the particular danger of risk to which a plaintiff is exposed." *Id.* at ¶ 17. Actual knowledge cannot be established through speculation.

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Id. at ¶ 18. Plaintiffs do not allege the violation of any law constituting a dangerous condition and do not allege any facts to support Meade County Defendants had actual knowledge of a dangerous condition.

The only factual allegations are that Meade County minutes reflect that a "visual inspection" and "soils test" were conducted, that "based on initial visual observation, on-site soil appears suitable for the proposed development," and that "field boring operation may be required to identify any cavities that may be a safety hazard" due to an underground gypsum mining operation that took place in the early 1900s. (Amended Complaint at ¶ 65.) Notably, this information is not contained in Meade County minutes, but actually is from the Supporting Documentation for the Hideaway Hills Manufactured Housing Community provided by the developers to the Meade County Planning Commission.

Nevertheless, this is insufficient to show any violation of law occurred or that Meade County Defendants had actual knowledge of a dangerous condition. On the contrary, the information provided to the planning board was that the soils were suitable and additional work would be performed to identify safety hazards. The only other allegations contained in the Amended Complaint concerning actual knowledge are conclusory. The Amended Complaint alleges:

> The County Commissioners did approve the subdivision with knowledge of the dangerous conditions including but not limited to, the underground gypsum mine, the sewage lagoons and the mine spoils. Reasonable people would conclude that building the homes on such features without proper geotechnical engineering/knowledge and or mining engineering and or seismic testing and or without, knowledge of soil toxicity and or soil compaction and or without other knowledge of the ultrahazardous features constitutes [disregard of an obvious risk coupled with a high probability of resultant injury or harm (¶¶ 103 and 119) or acting with reckless indifference to the consequences with knowledge of that their conduct would probably result in injury. (¶ 126)]

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(Amended Complaint ¶¶ 103, 119, 126). Such conclusory allegations will not withstand a motion to dismiss pursuant to SDCL § 15-6-12(b)(5). *See Twombly*, 550 U.S. at 556, n.3 ("Rule 8(a) contemplates the statement of circumstances, occurrences, and events in support of the claim presented and does not authorize a pleader's bare averment that he wants relief and is entitled to it.") (citations and quotations omitted); *Nygaard*, 2007 S.D. 34 at ¶ 9 ("the court is free to ignore legal conclusions, unsupported conclusions, unwarranted inferences and sweeping legal conclusions cast in the form of factual allegations."); *Best*, 2008 S.D. 70 at ¶ 7 (Courts "are not bound to accept as true a legal conclusion couched as a factual allegation.")

b. Reasonable Reliance.

Reasonable reliance must be based on direct, personal assurances. *Tipton II*, 1997 S.D. 96 at ¶¶ 32-33. Plaintiffs must have depended on "specific actions or representations which caused them to forgo other alternatives of protecting themselves." *Tipton II*, 1997 S.D. 96 at ¶ 31 (citation omitted). Plaintiffs do not allege any Meade County Defendant made a "direct, personal assurance" to them and fail to allege reasonable reliance.

c. Enactment for Protection of Particular Class.

This element "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 circumscribed class of persons." *Tipton I*, 538 N.W.2d at 786. Plaintiffs have failed to identify any law Meade County Defendants failed to enforce, let alone language to show intent to protect Plaintiffs.

d. Failure to Avoid Increasing Risk of Harm.

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*

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II, 1997 S.D. 96 at ¶ 37 (emphasis added). As with the other elements for a special duty, the Amended Complaint is devoid of any such facts to support this element. Meade County Defendants owed no special duty to Plaintiffs.

D. Plaintiffs' Negligence Claim Fails for Lack of a Duty.

The Amended Complaint contains a claim against Meade County Defendants for "Negligence in the Designing, Planning, Engineering, Surveying, Decision Making, Construction, and Selling of Real Property in the Subdivision." (Amended Complaint, Count 11.) In pertinent part, this Count alleges that Meade County Defendants "knew the parcel of land had at one time been mined on its surface and underground for gypsum," and that they knew "of the existence of mine fill, 'spoils,' and or [sic] the presence of a sewage lagoon and or [sic] tailings pond." (Amended Complaint at ¶ 132.) It goes on to state that designing a housing system atop a gypsum mine and other mine fill is a "simple breach in the duty to care [sic]." *Id.*

A plaintiff must show three elements to be successful on a negligence claim: "(1) a duty on the part of the defendant; (2) a failure to perform that duty; and (3) an injury to the plaintiff resulting from such a failure." *State Auto Insurance Companies v. B.N.C.*, 2005 S.D. 89, ¶ 20, 702 N.W.2d 379, 386 (quoting *Kuehl v. Horner (J.W.) Lumber Co.*, 2004 S.D. 48, ¶ 10, 678 N.W.2d 809, 812) (citation omitted). Whether a duty exists is a question of law. *Id.* (citing *Bland v. Davison County*, 507 N.W.2d 80, 81 (S.D. 1993)) (citation omitted). Judgment in favor of the defendant is appropriate when no duty exists. *See Bordeaux v. Shannon County Schools,* 2005 S.D. 117, ¶ 11, 707 N.W.2d 123, 126 ("Summary judgment is proper in negligence cases if no duty exists as a matter of law") (citations omitted).

Meade County Defendants owe no duty to Plaintiffs and the negligence claim must be dismissed.

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E. The Willful and Wanton Misconduct Claims Fail for Lack of Duty and Lack of the Mental Component.

Counts 5, 9 and 10 allege "Denial of the Statute of Limitations as a Defense" based on willful and wanton misconduct and "Independently as the Tort" of willful and wanton misconduct. These claims fail for the same reason Plaintiffs' negligence claim fails—Meade County Defendants owe no duty to Plaintiffs.

> In South Dakota, the phrases gross negligence and willful or wanton misconduct mean the same thing. *E.g., Holscher v. Valley Queen Cheese Factory*, 2006 S.D. 35, ¶ 48 n.2, 713 N.W.2d 555, 568 n.2 (quoting *Granflaten v. Rohde*, 66 S.D. 335, 339, 283 N.W. 153, 155 (1938)) ("The words 'gross negligence' are, for practical purposes, substantially synonymous with the phrase 'willful and wanton misconduct.'") *Melby v. Anderson*, 64 S.D. 249, 252-53, 266 N.W. 135, 137 (1936) (holding that the phrase gross negligence "is really a misnomer" and that "the conduct described by those words . . . amounts to willful, wanton, or reckless misconduct").

Fischer v. City of Sioux Falls, 2018 S.D. 71, ¶ 8, 919 N.W.2d 211, 215 (emphasis in original). Meade County Defendants cannot commit "willful and wanton misconduct" or "gross negligence" without a duty to breach. Counts 5, 9, and 10 are barred by the Public Duty Doctrine.

Claims for willful and wanton misconduct should also be dismissed because Plaintiffs cannot show the requisite mental element. "[E]stablishing willful or wanton misconduct requires proof of an element not present in a negligence claim." *Fischer*, 2018 S.D. 71 at ¶ 8. "The defendant must know or have reason to know of the risk and must in addition proceed without concern for the safety of others. . . ." *Id.* at ¶ 9 (quoting Dan B. Dobbs et al., *The Law of Torts* § 140 (2d ed.)) (emphasis from *Fischer*). "Conduct is gross, willful, wanton, or reckless when a person acts or fails to act, with a conscious realization that injury is a probable, as distinguished from a possible (ordinary negligence), result of such conduct." *Holzer v. Dakota Speedway, Inc.*,

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2000 S.D. 65, ¶ 17, 610 N.W.2d 787, 793 (quoting *Lee v. Beauchene*, 337 N.W.2d 827, 828 (S.D.1983) (citing *VerBouwens v. Hamm Wood Products*, 334 N.W.2d 874, 876 (S.D.1983)).

The Amended Complaint fails to state a claim for willful or wanton misconduct against Meade County Defendants because there is no factual allegation to support the mental element requirement. The Amended Complaint alleges "reasonable people would conclude . . . ", not that any Meade County Defendant *knew or had reason to know* of some risk and proceeded anyway without the concern for the safety of others. Counts 5, 9 and 10 fail to state a claim against Meade County Defendants.

F. The Breach of Governmental Warranty Claim Fails for Lack of Privity.

Count 13 alleges the "Meade County Commissioners' approval of the plats . . . created an express and or implied warranty that the real estate was fit for human habitation for the foreseeable future of Meade County, subject to hazards undiscoverable by the exercise of reasonable governmental authority." (Amended Complaint, ¶ 144, Count 13.) Per this claim, "the location, discovery, and soundness for the construction of real estate on top of the gypsum mine was not without the ability of Meade County government to ascertain." *Id.* ¶ 145. This claim should be dismissed for multiple reasons.

This claim should be dismissed pursuant to Rule 12(b)(5) as it fails to state a legally cognizable claim for relief. There is no authority in South Dakota (or anywhere that Meade County Defendants could find) that provides a county warrants the habitability of a house not yet even built simply because a plat was approved. Any claim for an implied warranty fails because there is no contract between Meade County Defendants and Plaintiffs and "the breach of an implied warranty sounds in contract." *Dakota Style Foods, Inc. v. SunOpta Grains & Foods, Inc.*, 329 F. Supp. 3d 794, 808-09 (D.S.D. 2018) (citing *Waggoner v. Midwestern Development,*

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Inc., 83 S.D. 57, 154 N.W.2d 803, 807 (1967)). Any claim for an express warranty requires just that, the *expression of a warranty*. There is no authority to support that approving a plat is an expression of a warranty by the county.

To the extent Plaintiffs are attempting to state a claim for breach of an implied warranty of habitability, the claim still fails because such claims are meant to be brought against the entity which actually builds the improvement at issue. A similar issue was raised in *Lehmann v. Arnold*, 484 N.E.2d 473 (Ill. App. Ct. 1985). In *Lehmann*, after experiencing periodic flooding of their home, the plaintiffs investigated the cause and found out their home was located in a flood hazard area. *Id.* at 475. The plaintiffs then brought suit against the developer of their subdivision, the builder of their home, their lender, the surveyor who subdivided the land for the developer, and the county in which they lived. *Id.* Against the developer, the plaintiffs alleged breach of the implied warranty of habitability on their home. *Id.* at 474.

However, the developer argued that there could be no claim for breach of the implied warranty of habitability on undeveloped land and that the seller of vacant land should not be placed in the position of having warranted to the buyers that they would be able to build a home free from all problems. *Id.* The court agreed, stating:

> A subsequent purchaser must rely on the expertise of the builder because that purchaser cannot make a meaningful inspection and cannot rely on the initial purchaser. A purchaser, however, need not and does not rely on any expertise of the seller of the land. Instead, he relies on the builder's skill to insure that the home built on the property will be habitable. Moreover, it would be unfair to impose a warranty of habitability on the seller of unimproved land for a house that has not yet been built. As between the seller and the builder, the doctrine of *caveat emptor* should apply. To impose a later warranty in favor of the purchaser of the house would require the seller of land to control the actions of the builder. The habitability of a new home will still be determined by the type and quality of construction despite any defects in the land.

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Lehmann, 484 N.E.2d at 477. As such, the court affirmed the circuit court's grant of summary judgment and dismissed the breach of implied warranty of habitability claim against the developer.

In *Brown v. Fowler*, 279 N.W.2d 907, 910 (S.D. 1979), the South Dakota Supreme Court has held similarly, finding that the implied warranty of habitability only extends from the builder of a home to the purchaser of that home on the basis of privity of contract. *Brown* dealt with foundation and settling issues in a residential property. The contractor purchased a parcel of land from the developer and constructed the home that was the subject of the lawsuit. *Id.* at 908. The contractor then sold this home to the initial owners of the home, who soon thereafter noticed that the home was settling in various places. *Id.* The contractor then attempted to fix the issues. *Id.* The initial owners then sold the home to the plaintiffs, who again noticed issues with the home settling. *Id.* After consulting with an engineer, it became clear that the corrective measures attempted by the contractor were ineffective and improperly completed. *Id.* As a result, the plaintiffs filed a lawsuit alleging negligence and breach of the implied warranty of habitability against the contractor. *Id.* at 909.

With regard to the claim for breach of the implied warranty of habitability, the Supreme Court agreed with the trial court's holding that this warranty "should extend only to one who purchases a house from the builder-vendor of the house." *Id.* at 910. The Court's analysis in agreeing with this conclusion was one based on privity of contract:

> This requirement is essentially that of privity of contract. . . Neither the [UCC] nor the rationale applies where land and a dwelling are sold. The builder is often the vendor, and his purchaser the ultimate consumer. Courts have accordingly been more reluctant to extend the liability of those who sell real estate. Although it appears that a majority of courts now recognize some form of implied warranty in connection with the sale of a house by a builder-vendor, Anno., 25 A.L.R.3d 383, 413-425 (1969), very few have recognized the applicability of this warranty absent privity, where the damages sought are merely economic. *See, e. g., Duncan*

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> *v. Schuster-Graham Homes, Inc., Colo.*, 578 P.2d 637 (1978); *Sousa v. Albino*, R.I., 388 A.2d 804 (1978); *Coburn v. Lenox Homes, Inc.*, 173 Conn. 567, 378 A.2d 599 (1977). *Contra, Barnes v. MacBrown & Co., Inc.*, 264 Ind. 227, 342 N.E.2d 619 (1976).

Id. at 910. Therefore, the Court held:

> We believe that the requirement of privity for the enforcement of the implied warranty in the sale of a house is a reasonable limitation on this action, which might otherwise make the builder-vendor an insurer of the habitability of the house to future buyers.

Id. at 910; *see also Sienna Court Condo. Ass'n v. Champion Aluminum Corp.*, 129 N.E.3d 1112, 1121 (Ill. 2018) ("As such, the implied warranty of habitability must be a creature of contract, not tort") (citations omitted).

The analysis in both cases is relevant here. Plaintiffs seem to argue that Meade County Defendants breached the implied warranty of habitability, despite the fact that Meade County is even further removed than the defendants in the *Lehmann* case in that it is not a builder or a developer. As set forth in both *Brown* and *Lehmann*, the builder of Plaintiffs' homes is in a far better position to determine the habitability of a new home than Meade County Defendants, as they had absolutely no part in actually building the home or preparing the site. To hold otherwise would essentially make a county liable any time a contractor builds a defective home, which goes far beyond the scope and purpose of a claim for breach of the implied warranty of habitability. Furthermore, at no point in the Amended Complaint do Plaintiffs allege the existence of any contractual relationship with Meade County Defendants. Because there is no contract between the parties, there is no privity, and as such, no implied warranty of habitability.

Therefore, because the implied warranty of habitability only extends from a builder to the initial purchaser of that home, and because there is no privity of contract between Plaintiffs and

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Meade County Defendants, the implied warranty of habitability claim must fail as a matter of law, entitling Meade County Defendants to dismissal.

G. Failure to Warn Fails for Lack of a Duty.

Count 14 is entitled "the Failure of Meade County Governmental Authority to Provide Express Warnings of the Hazards of Habitability of the Homes in the Hideaway Hills Subdivision." This count alleges that Meade County is authorized to make "safety determinations as to the habitability of locations in Meade County within the reasonably discoverable means of the County." (Amended Complaint at ¶ 148, Count 14.)

The Amended Complaint goes on to allege that the County has a duty to "exercise judgment in the placement of homes on or off of ultrahazardous real estate features," that it was within the reasonable powers of the County to ascertain the safety of building on top of a gypsum mine or to understand that doing so would require an expert with "high levels of indemnity insurance," and that because the approval of the plats was unsupported by an expert, it was incumbent on the County to "make a clear erring [sic] that the subdivision posed serious risks of serious bodily injury or death to any of its residents," and by failing to do so, the County is "guilty" of failing to warn the public. *Id.* at ¶¶ 149-151. The Amended Complaint contains no legal authority supporting such a claim.

Count 14 should be dismissed pursuant to Rule 12(b)(5) because it fails to state a legally cognizable claim for relief. There is no authority indicating that a governmental entity that approves a plat has a duty to provide express warnings for homes built by third parties after the plat was approved. This claim is legally insufficient, warranting dismissal under SDCL § 15-6-12(b)(5).

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Count 14 must also be dismissed because Meade County Defendants owe no duty to Plaintiffs. Any recognized claim in South Dakota pertaining to some version of "failure to warn" requires the existence of a duty. *See Luther v. City of Winner*, 2004 S.D. 1, ¶ 19, 674 N.W.2d 339, 347 (possessor of land's failure to warn invitee of dangerous conditions requires duty); *Burley v. Kytec Innovative Sports Equip., Inc.*, 2007 S.D. 82, ¶ 36, 737 N.W.2d 397, 410 (negligent failure to warn requires an element of duty); *Symens v. Smithkline Beecham Corp.*, 593 F.Supp.2d 1075 (D.S.D. 1999) (strict products liability: manufacturer has duty of reasonable care to warn purchaser); *Howard v. Sanborn*, 483 N.W.2d 796 (S.D. 1992) (passenger owes a duty to warn driver of danger).

While it is unclear exactly what claim Plaintiffs are attempting to make with this Count, any claim for "failure to warn" would necessarily require an underlying duty to actually warn Plaintiffs. Meade County Defendants only owe a general duty to the public and not to these individual Plaintiffs. Plaintiffs cannot show the existence of a duty and this claim must be dismissed for failure to state a claim.

H. The Public Nuisance Claim Fails for Lack of Duty and Statutory Authorization.

The final claim against Meade County Defendants alleges the existence of a public nuisance. The Amended Complaint alleges Meade County Defendants knew that the subdivision existed on top of a gypsum mine and that Meade County Defendants owed a duty to any potential resident to "refrain, prevent, or otherwise prohibit the construction of a subdivision on such ultrahazardous real estate." *Id.* at ¶ 169, Count 20.

1. The Nuisance Claim Fails for Lack of Duty.

Plaintiffs' claim for public nuisance should be dismissed because of the lack of duty owed to Plaintiffs. "A nuisance consists in unlawfully doing an act, or omitting to perform a

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duty . . . " SDCL § 21-10-1 (emphasis added). The Amended Complaint alleges Meade County Defendants "owed a duty to the residents of the county" and that they "fail[ed] to perform that duty" thereby creating a public nuisance. (Amended Complaint at ¶¶ 169-170.) Plaintiffs' claim for public nuisance is barred by the public duty rule and Count 20 must be dismissed.

2. Meade County Defendants' Actions Were Statutorily Authorized.

Plaintiffs' claim for public nuisance also fails because "[s]tatutorily authorized actions or maintenance are specifically exempt from being considered a nuisance under SDCL 21–10–2." *Loesch v. City of Huron*, 2006 S.D. 93, ¶ 13, 723 N.W.2d 694, 698. That statute provides, "[n]othing which is done or maintained under the express authority of a statute can be deemed a nuisance." SDCL § 21-10-2. A county is expressly authorized to approve plats pursuant to SDCL § 11-3-8:

> **County commissioners' approval required for plats outside municipalities--Resolution and auditor's certificate--Appeal of denial.**
> If any person wishes to plat any lands lying outside the boundaries of a municipality, the person shall be governed by this chapter. Before recording the person's plat in accordance with § 11-3-6, the person shall submit the plat to the board of county commissioners of the county wherein such lands are situated. The approval of the board of county commissioners pursuant to this section may not be required for a plat as specified in § 11-6-26. The board of county commissioners shall examine the same. The board of county commissioners shall by resolution, approve the plat, and the auditor shall endorse on the plat a copy of the resolution and certify to the same if it appears that the system of streets conforms to the system of streets of existing plats and section lines of the county, that adequate provision is made for access to adjacent unplatted lands by public dedication or section line when physically accessible, that all provisions of any subdivision regulations of the county have been complied with, that all taxes and special assessments upon the tract or subdivision have been fully paid and that the plat and the survey of the land have been lawfully executed. The board of county commissioners may by resolution designate an administrative official of the county to approve plats in lieu of approval by the board of county commissioners. No plat of any addition or subdivision, so situated, is entitled to record or may be recorded unless the plat bears a copy of the resolution or approval and certificate of the auditor. If the designated administrative official denies the plat request, the person requesting the plat may appeal to the board of county commissioners.

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SDCL § 11-3-8. It is under this authority that Meade County Defendants approved the plats. The Amended Complaint attempts to side-step this exemption with the conclusory allegation that the "Defendants named in paragraph 169 did not site, plat or otherwise locate the Hideaway Hills subdivision pursuant to statute." (Amended Complaint at ¶ 171.) Of course, Meade County Defendants did not *plat* Hideaway Hills, the developers did. Meade County Defendants *approved* the plats. And they did so pursuant to the statutory authority contained in SDCL § 11-3-8.

In *Hedel-Ostrowski v. City of Spearfish*, 2004 S.D. 55, ¶ 2, 679 N.W.2d 491, 493, a plaintiff sued the City when the swing she was using at a city park broke causing her injury. The City was authorized to "establish, improve, maintain, and regulate public parks" pursuant to SDCL § 9-38-1, so the claim was dismissed. *Id.* at ¶ 13. In *Kuper v. Lincoln-Union Electric Co.*, 1996 S.D. 145, 557 N.W.2d 748, a nuisance action against a cooperative for stray voltage was not allowed. That Court reasoned, "[i]n granting an exemption from nuisance actions to statutorily authorized activities, our legislature obviously adopted a public policy that private interests must endure some inconvenience for the general populace to receive the benefits of utilities." *Kuper*, 1996 S.D. 145 at ¶ 48. "The same reasoning applies to a city park. The legislature authorized cities to establish public parks for the benefit of the public. . . . Although some of the general public may perceive the park as a nuisance, the law disallows a cause of action based on nuisance." *Hedel-Ostrowski*, 2004 S.D. 55 at ¶ 13.

Meade County Defendants approved the plats pursuant to statutory authority. Plaintiffs' claim for nuisance fails to state a claim and must be dismissed.

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I. Insufficient Service.

Rule 4 provides that "[i]f the action is against a public corporation within this state, service may be made as follows: . . . (i) Upon a county, by serving upon any county commissioner . . . " SDCL § 15-6-4(d)(2)(i). In this case, the Summons/Complaint and the Amended Summons/Amended Complaint were served on the Meade County Auditor, not a county commissioner. Furthermore, Meade County Defendant Curtis Nupen was not properly served as the pleadings were left with his daughter at her home, which is not Mr. Nupen's dwelling. Rule 4 requires service on a defendant personally or, if the defendant cannot be conveniently found, "service may be made at the defendant's dwelling with someone over the age of fourteen years who resides there." SDCL §§ 15-6-4(d)(8), 15-6-4(e). Service of process on these defendants is insufficient.

CONCLUSION

The claims against Meade County Defendants should be dismissed for a multitude of reasons:

1. **Official Capacity Claims.**

    a. Former commissioners do not have any official capacity because they are no longer agents of Meade County.

    b. Official capacity claims are really just claims against the entity and Meade County is already a named defendant.

2. **Individual Capacity Claims.**

    a. Individual Meade County Defendants have immunity for discretionary functions and plat approval is a discretionary function.

3. **The Public Duty Rule.**

    a. Meade County owes a duty only to the public and not to the individual Plaintiffs. There is no special duty owed to Plaintiffs.

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b. The public duty rule bars all tort claims requiring the element of duty including Negligence (Count 11); Willful Misconduct (Counts 5 and 9); and Wanton Misconduct (Count 10); Failure to Warn (Count 14); and Public Nuisance (Count 20).

4. Willful and Wanton Misconduct (Counts 5, 9, and 10).

a. No duty is owed to Plaintiffs.

b. Plaintiffs cannot show the requisite mental element.

5. Breach of Governmental Warranty (Count 13).

a. There is no authority recognizing this as a claim.

b. There is no privity of contract between Meade County Defendants and Plaintiffs which is required for an implied warranty.

c. There is no express warranty.

d. To the extent this is an attempt to plead breach of the implied warranty of habitability, that claim is not proper against non-builders and there is no contract to support the existence of any implied warranty.

6. Failure to Warn (Count 14).

a. There is no authority to support the existence of such a claim.

b. All varieties of "failure to warn" claims actually recognized by South Dakota law require the existence of a duty and Meade County owes no duty to Plaintiffs.

7. Public Nuisance (Count 20).

a. This claim fails for lack of duty.

b. Plat approval is authorized by statute and is specifically exempt from being a nuisance.

8. Insufficient Service.

a. Meade County was improperly served because Plaintiffs served the auditor instead of a county commissioner.

b. Curtis Nupen was improperly served because the papers were left with his daughter at his daughter's house. Mr. Nupen does not live there and has not lived there for years.

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For the above-state reasons, Meade County Defendants respectfully request this Court dismiss the claims against them.

Dated: July 27, 2020.

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CERTIFICATE OF SERVICE

I hereby certify on July 27, 2020, I served a true and correct copy of **MEADE COUNTY DEFENDANTS' MEMORANDUM IN SUPPORT OF MOTION TO DISMISS** through South Dakota's Odyssey File and Serve Portal upon the following individuals:

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