

IN THE DISTRICT COURT OF HOLT COUNTY, NEBRASKA

JERRY OSBORNE and MELINDA OSBORNE, husband and wife,

Plaintiff,

vs.

CITY OF ATKINSON; MARILYN L. GOKIE and DONALD J. GOKIE, wife and husband; and GILMORE AND ASSOCIATES, INC., a Nebraska corporation,

Defendants.

Case No. CI00-93

**INTERLOCUTORY ORDER
ON MOTIONS FOR
SUMMARY JUDGMENT**

DATE OF HEARING: May 7, 2001.

DATE OF RENDITION: July 12, 2001.

DATE OF ENTRY: Date of filing by court clerk (§ 25-1301(3)).

APPEARANCES:

For plaintiffs: Matthew S. McKeever.

For defendants:

City: Douglas J. Stratton.

Gokie: Thomas H. DeLay.

Gilmore: Clark J. Grant.

SUBJECT OF ORDER: Motions for summary judgment of (1) defendant Gilmore and Associates, Inc., (2) defendant City of Atkinson, and (3) defendants Gokie.

PROCEEDINGS: See journal entry rendered on or about May 7, 2001.

FINDINGS: The court finds and concludes that:

1. The plaintiffs assert a negligence claim against the defendants City of Atkinson (City) and Gilmore and Associates, Inc. (Gilmore). Although the plaintiffs initially included defendants Marilyn L. Gokie and Donald J. Gokie (collectively Gokie) as defendants, the plaintiffs subsequently dismissed their petition as to Gokie. City and Gilmore each filed summary judgment motions regarding the plaintiffs'

petition against them. Both City and Gilmore have cross-petitioned against Gokie. Gokie filed a summary judgment motion regarding each of these cross-petitions.

2. The parties' roles are relatively simple. Gokie was the nominal redeveloper of a subdivision of a tract of land platted as IV J's subdivision, utilizing the provisions of the Community Development Law. NEB. REV. STAT. § 18-2101 *et seq.* (Reissue 1997). City was the municipality driving the redevelopment project under the Community Development Law. Gilmore served as the city engineer and provided engineering services to the City for the project.

3. The amended petition states a cause of action in tort for negligence. E1. It alleges: (1) negligent survey, design, and construction of North Madison Street, (2) negligent failure to survey, design, or construct drainage curbs or other devices to prevent flooding on the plaintiffs' property, and (3) negligent failure to survey, design, or construct roadbeds.

4. The primary purpose of the summary judgment procedure is to pierce the allegations made in the pleadings and show conclusively that the controlling facts are other than as pled, and thus resolve, without the expense and delay of trial, those cases where there exists no genuine issue as to any material fact or as to the ultimate inferences to be drawn therefrom, and where the moving party is entitled to judgment as a matter of law. *City State Bank v. Holstine*, 260 Neb. 578, 618 N.W.2d 704 (2000).

5. The moving defendants adduced affidavits proclaiming no deviation from the applicable standard of care. The plaintiffs' responsive evidence rests primarily on two sources. Keith Gilmore's deposition shows that no drainage plan was prepared because the City directed Gilmore not to do so. E7. Plaintiffs' expert witness's affidavit opines that City and Gilmore failed to prepare a drainage plan, that North Madison Street as designed and constructed without the drainage plan drains more water into the Highway 20 drainage system than it is capable of receiving, and that City and Gilmore failed to require and implement a storm sewer system extension to connect the North Madison Street drainage to the existing city storm sewer system several blocks away. E6.

6. In response, City and Gilmore argue that these claims are barred by sovereign immunity under the discretionary function exception and the highway design exception. NEB. REV. STAT. § 13-910(2) and (11) (Cum. Supp. 2000).

7. In *Morrison Enters. v. Aetna Cas. & Surety Co.*, 260 Neb. 634, ___ N.W.2d ___ (2000), the Nebraska Supreme Court restated the familiar principles applicable to motions for summary judgment:

a. Summary judgment is proper when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.

b. In considering a summary judgment motion, the court views the evidence in a light most favorable to the nonmoving party and gives such party the benefit of all reasonable inferences deducible from the evidence.

c. On a motion for summary judgment, the question is not how a factual issue is to be decided, but whether any real issue of material fact exists.

d. The party moving for summary judgment has the burden to show that no genuine issue of material fact exists and must produce sufficient evidence to demonstrate that the moving party is entitled to judgment as a matter of law.

e. A prima facie case for summary judgment is shown by producing enough evidence to demonstrate that the movant is entitled to a judgment in its favor if the evidence were uncontroverted at trial.

f. After the moving party makes a prima facie case for summary judgment, the burden to produce evidence showing the existence of a material issue of fact that prevents judgment as a matter of law shifts to the party opposing the motion.

8. The Political Subdivisions Tort Claims Act (the Act) partially abrogates the common law rule of governmental immunity. NEB. REV. STAT. § 13-901 *et seq.* (Reissue 1997); *Koepf v. County of York*, 198 Neb. 67, 251 N.W.2d 866 (1977); *Hall v. Abel Inv. Co.*, 192 Neb. 256, 219 N.W.2d 760 (1974).

9. The briefs and arguments focus on the exceptions to liability under the Act, and fail to significantly address Gilmore's status as an agent, employee, or contractor. This is a question of some significance to Gilmore, because the act protects the political subdivision and its officers, agents, and

employees (§ 13-902), but specifically excludes “any contractor with a political subdivision” from the definitions of “political subdivision” and “employee.” However, “agent” is not defined by the Act.

10. In *McCurry v. School Dist. of Valley*, 242 Neb. 504, 496 N.W.2d 433 (1993), the Nebraska Supreme Court stated:

An agent is a person authorized by the principal to act on the principal’s behalf and under the principal’s control. See *Gottsch v. Bank of Stapleton*, 235 Neb. 816, 458 N.W.2d 443 (1990). An independent contractor is one who, in the course of an independent occupation or employment, undertakes work subject to the will or control of the person for whom the work is done only as to the result of the work and not as to the methods or means used. *Wausau Ins. Co. v. Schake*, 220 Neb. 802, 373 N.W.2d 669 (1985).

The determination of whether one is an independent contractor or an agent is one of fact. See, *Plock v. Crossroads Joint Venture*, 239 Neb. 211, 475 N.W.2d 105 (1991); *Professional Recruiters v. Wilkinson Mfg. Co.*, 222 Neb. 351, 383 N.W.2d 770 (1986); *T. S. McShane Co. v. Great Lakes Pipe Line Co.*, 156 Neb. 766, 57 N.W.2d 778 (1953). The common-law test for determining whether an independent contractor status exists includes the consideration and weighing of many factors, no one of which is conclusive. *Eden v. Spaulding*, 218 Neb. 799, 359 N.W.2d 758 (1984). See, also, *Professional Recruiters v. Wilkinson Mfg. Co.*, *supra*. The criteria for making the determination include a consideration of who has the right of control, who provided the tools, the degree of supervision exerted over the one performing the work, the method of payment, and the contractual understanding between the parties. *Professional Recruiters v. Wilkinson Mfg. Co.*, *supra*; *Rudolf v. Tombstone Pizza Corp.*, 214 Neb. 276, 333 N.W.2d 673 (1983); *Maricle v. Spiegel*, 213 Neb. 223, 329 N.W.2d 80 (1983).

Moreover, whether an agency relationship exists between two parties depends on the facts underlying the association, irrespective of how the parties describe or characterize their connection. See *Gottsch v. Bank of Stapleton*, *supra*. Moreover, an agency may be implied from the words and conduct of the parties and the circumstances of the particular case evidencing an intention to create the relationship. *Saffer v. Saffer*, 133 Neb. 528, 274 N.W. 479 (1937), *overruled on other grounds*, *Tobin v. Flynn & Larsen Implement Co.*, 220 Neb. 259, 369 N.W.2d 96 (1985).

Id. at 512-513, 496 N.W.2d at ____.

11. In *Hatcher v. Bellevue Vol. Fire Dep’t*, 262 Neb. 23, ____ N.W.2d ____ (2001), the Nebraska Supreme Court determined that a volunteer fire department and its members were not “contractors” within the meaning of the act. In *Keller v. Tavarone*, 262 Neb. 2, ____ N.W.2d ____

(2001), the Nebraska Supreme Court affirmed the district court's factual determination at trial that a physician employed by a county hospital was an employee and not a contractor.

12. As noted above, the question regarding contractor status is one of fact. The court concludes that Gilmore has failed to meet its initial burden to show as a matter of law that it is an agent or employee, and not a contractor. Sufficient inferences arise from the evidence in the record, when viewed most favorably to the plaintiffs, to raise an issue of fact on that question.

13. As to the City, of course, there is no factual issue regarding applicability of the Act. The question becomes whether the exceptions preclude the plaintiffs' claim under the doctrine of governmental immunity.

14. Specifically, the court must determine whether either the discretionary function exception or the highway design exception precludes imposition of liability against the City under the Act. As noted above, the purpose of a summary judgment motion is to pierce the allegations of pleadings where there is no issue of fact. None of the evidence raises any factual issue of negligence in the *construction* of North Madison Street. In other words, there is no evidence that the street was constructed other than exactly as designed. The court analyzes the specific evidence tending to support a claim of negligence against the City as to each remaining instance of alleged negligence.

15. The deposition of Keith Gilmore demonstrates without contradiction that no drainage plan was prepared prior to the construction of North Madison Street, and that any work toward a drainage plan was stopped at the express direction of the City. This is precisely the type of policy-level decision contemplated by the discretionary function exception. The evidence shows no statutory or regulatory requirement for a drainage plan. This is not an instance in which the policy decision was made to undertake a drainage plan, and it was improperly performed. Rather, the policy decision elected to forgo a drainage plan.

16. The plaintiffs cite several cases in support of their argument that the exception does not apply. However, all of those factual situations illustrate operational-level decisions and are distinguishable from the present case. In *Stinson v. City of Lincoln*, 9 Neb. App. 642, 617 N.W.2d 456 (2000), a city snow plow driver drove in the opposite direction of the normal flow of traffic in that lane despite the absence of any ordinance or policy authorizing that procedure. It is difficult to imagine a more basic

example of an operational decision. In *Norman v. Ogallala Pub. Sch. Dist.*, 259 Neb. 184, 609 N.W.2d 338 (2000), a shop teacher allowed students to wear whatever clothing they desired while welding and did not inspect their clothing. The policy decision was to teach welding, purportedly including safety procedures. But the operational practice failed to include adequate safety measures. In *Woolen v. State*, 256 Neb. 865, 593 N.W.2d 729 (1999), the Department of Roads failed to repair or post warning signs regarding a highway location where deep ruts allowed water to pool, despite prior knowledge of the situation including previous accidents causing by hydroplaning at the spot. The policy decision was to construct the highway. The later failure to repair the location or warn motorists of the local condition represented an operational decision or omission, not a basic policy choice.

17. In the present case, the City elected to design and construct North Madison Street without a drainage plan. Although that decision may have constituted an abuse of discretion, it nevertheless constituted a basic policy-level decision. This factual evidence of negligence is barred by the discretionary function exception.

18. The plaintiffs' expert witness also stated that the City's failure to require a drainage plan was negligent. This is the same basis of negligence supported by Keith Gilmore's deposition discussed above, and is excepted under the Act on the same basis.

19. The plaintiffs' expert witness next assigns negligence in the failure to design and require a storm sewer connection. Under the evidence, the City made the decision to forgo a storm sewer for the platting of the subdivision and the construction of North Madison Street. Both decisions are clear examples of policy-level decisions excepted from liability under the Act as discretionary functions.

20. Moreover, accompanying the City's decision to forgo a drainage plan was a concomitant decision to drain the natural flow down the surface of the street and to discharge the water into the Highway 20 drainage gutter. There is no evidence that the street operates in any manner other than as it was designed to do. Consequently, the plaintiffs' claim of negligence against the City is also precluded by the highway plan or design exception of § 13-910(11).

21. The plaintiffs' expert witness also opines that the City breached and violated Title 110 of the Nebraska Administrative Code regarding the practice of engineering. The evidence shows without dispute that the City did not engage in the practice of engineering. Title 110 specifies standards applicable

to an architect or engineer. These standards do not purport to apply standards for the conduct of the engineer's client. Title 110 has no application to the City or the City's conduct.

22. The evidence fails to show any conduct of the City not excluded from liability under the Act. The question then becomes the proper disposition of the plaintiffs' operative petition as against the City.

23. As the Supreme Court explained in *Dossett v. First State Bank*, 261 Neb. 959, ___ N.W.2d ___ (2001), a motion for summary judgment is not a proper method to challenge the sufficiency of a petition to state a cause of action. When it has been asserted in a summary judgment motion that the petition of the opposing party has failed to state a cause of action, as far as that issue is concerned, the motion may be treated as one in fact for a judgment on the pleadings, notwithstanding its designation as something other than that. The Supreme Court further recalled that when a party challenges the sufficiency of a petition to state a cause of action, a motion for judgment on the pleadings should be sustained only when an amendment cannot cure the defect.

24. However, in *Woollen v. State*, *supra*, citing *Maresh v. State*, 241 Neb. 496, 489 N.W.2d 298 (1992), the Nebraska Supreme Court stated that the immunity issue constituted an affirmative defense to the petition and must be evaluated in light of the proof. Here, the petition alleged other negligence in construction of the subdivision and the street, which finds no support whatsoever in the evidence. Because the summary judgment addresses those factual allegations and in light of the Nebraska Supreme Court's characterization of the immunity issue as an affirmative defense and not as a matter of the plaintiff's claim, this court concludes that the motion should not be treated as one for judgment on the pleadings, and consequently, no opportunity for amendment is required.

25. As to the plaintiffs' claims against the City sounding in negligence, the court finds that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the City is entitled to judgment as a matter of law.

26. In so doing, the court notes that no claims are asserted in the petition under NEB. CONST. art. I, § 21, or for inverse condemnation. The court considers only such matters framed by the pleadings in this case and expresses no opinion or determination with regard to any other matters.

27. As to Gilmore, the arguments focused on the applicability of the exceptions under the Act. Because the court finds a question of fact exists whether Gilmore is an agent or employee who may claim the benefit of the exclusion, the motion for summary judgment cannot be granted as to Gilmore on that basis. Although not specifically argued, the court has considered whether the City's determinations to forgo a drainage plan and to design the improvements without any storm sewer in the subdivision or from the discharge point of North Madison Street to the existing storm sewer system constitute an efficient intervening cause precluding liability against Gilmore. The court recalls that determination of causation is ordinarily a question for the trier of fact. *Baldwin v. City of Omaha*, 259 Neb. 1, 607 N.W.2d 841 (2000); *Tapp v. Blackmore Ranch*, 254 Neb. 40, 575 N.W.2d 341 (1998). Viewed in the light most favorable to the plaintiffs, the court cannot conclude that only one inference regarding causation could be drawn from the evidence. Thus, causation also affords no basis to grant Gilmore's motion.

28. The court next addresses Gokie's motion for summary judgment on the cross-petitions of the City and Gilmore against Gokie for indemnity. Because the City's motion for summary judgment on the plaintiff's amended petition will be sustained, the City's cross-petition against Gokie becomes moot and will be dismissed as moot. Consequently, Gokie's motion for summary judgment against the City also becomes moot and must be denied on that basis.

29. Because the negligence action continues as against Gilmore, Gokie's motion remains viable as to Gilmore.

30. The inquiry focuses on section 6.05 of the redevelopment contract which states:

Gokie will indemnify and hold each of the Agency and the City and their directors, *officers, agents, employees* and member [sic] of their governing bodies free and harmless from any loss, claim, damage, demand, tax, penalty, liability, disbursement, expense, including litigation expenses, attorneys' fees and expenses, or court costs arising out of any damage or injury, actual or claimed, of whatsoever kind or character, to property (including loss of use thereof) or persons, occurring or allegedly occurring in, on or about the Project during the term of this Redevelopment Contract or arising out of any action or inaction of Gokie, whether or not related to the Project, or resulting from or in any way connected with the management of the Project, or in any way related to the enforcement of this Redevelopment Contract or any other cause pertaining to the Project.

E2 at 40 (emphasis supplied).

31. The court has already determined that an issue of fact exists whether Gilmore is an agent or employee of the City, or whether it is a contractor. If the former, it falls within the scope of the claimed indemnity and requires further analysis. If the latter, Gilmore is excluded from the scope of the indemnity language and Gokie's motion would clearly be well-founded.

32. Assuming without deciding that Gilmore is an agent or employee of the City, the court concludes that § 25-21,187(1) would apply to preclude enforcement of the indemnity language in favor of Gilmore against Gokie. That section states:

In the event that a public or private contract or agreement for . . . other work dealing with construction . . . contains a covenant, promise, agreement, or combination thereof to indemnify or hold harmless another person from such person's own negligence, then such covenant, promise, agreement, or combination thereof shall be void as against public policy and wholly unenforceable. . . .

NEB. REV. STAT. § 25-21,187(1) (Reissue 1995).

33. The language of the redevelopment contract extends to other potential liability outside the scope of the statute. But here, the liability for which indemnification is sought falls within the statute's purview. To that extent, the statute declares the indemnity clause void as against public policy. Where the invalid portion can be stricken, the remainder may be enforced. *Hiway 20 Terminal, Inc. v. Tri-County Agri-Supply, Inc.*, 232 Neb. 763, 443 N.W.2d 872 (1989). Because the facts here fall within the scope of the statute, the indemnity clause cannot be enforced. This rule applies even though the indemnity clause, in another factual situation, might encompass liability for conduct outside the statute and be enforceable in that context.

34. Thus, the court concludes that Gilmore's status as an agent or employee, or as a contractor, makes no difference in the outcome. If the former, § 25-21,187(1) precludes enforcement of the indemnity clause. If the latter, Gilmore falls outside of the class of the persons protected by the indemnity clause. In either event, Gokie is entitled to judgment as a matter of law.

35. As to Gilmore's claim against the Gokie for indemnification, the court finds that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that Gokie is entitled to judgment as a matter of law.

36. Because this order does not dispose of all claims of all parties, it is interlocutory in character and does not constitute a final order. NEB. REV. STAT. § 25-1315 (Cum. Supp. 2000).

ORDER:

IT IS THEREFORE ORDERED that:

1. The motion of defendant City of Atkinson for summary judgment on the plaintiffs' amended petition is granted.

2. The plaintiffs' amended petition against the defendant City of Atkinson is dismissed with prejudice at plaintiffs' cost.

3. The motion of defendant Gilmore and Associates, Inc. for summary judgment on the plaintiffs' amended petition is denied.

4. The motion of defendants Marilyn L. Gokie and Donald J. Gokie for summary judgment on the cross-petition of the defendant City of Atkinson is denied as moot.

5. The cross-petition of the defendant City of Atkinson against the defendants Marilyn L. Gokie and Donald J. Gokie is dismissed as moot.

6. The motion of defendants Marilyn L. Gokie and Donald J. Gokie for summary judgment on the cross-petition of the defendant Gilmore and Associates, Inc. is granted.

7. The cross-petition of the defendant Gilmore and Associates, Inc. against the defendants Marilyn L. Gokie and Donald J. Gokie is dismissed with prejudice and costs thereon are taxed to the defendant Gilmore and Associates, Inc.

8. The matter is assigned for final pretrial conference on **Monday, August 20, 2001**, at **1:30 p.m.**, or as soon thereafter as the same may be heard. All other provisions of the progression order regarding location and conduct of the final pretrial conference remain fully operative.

9. This order is interlocutory in character and does not constitute a final order. This order, including any dismissal recited herein, remains subject to revision at any time before the entry of final judgment adjudicating all the claims and the rights and liabilities of all the parties.

Signed in chambers at Ainsworth, Nebraska, on July 12, 2001.
DEEMED ENTERED upon filing by court clerk.

If checked, the Court Clerk shall:

- ⋮ Mail a copy of this order to all counsel of record and to any pro se parties.
Done on _____, 20__ by ____.
- 9 Enter judgment on the judgment record.
Done on _____, 20__ by ____.
- 9 Mail postcard/notice required by § 25-1301.01 within 3 days.
Done on _____, 20__ by ____.
- ⋮ Note the decision on the trial docket as: [date of filing] Signed
“Interlocutory Order on Motions for Summary Judgment” entered.
Done on _____, 20__ by ____.

Mailed to:

BY THE COURT:

William B. Cassel
District Judge