

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

JUDGMENT

DATE OF TRIAL: November 1, 2001.

DATE OF RENDITION: January 6, 2002.

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

APPEARANCES:

For plaintiffs: Matthew S. McKeever with plaintiffs.

For defendants:

City: No appearance.

Gokie: No appearance.

Gilmore: Clark J. Grant with Keith Gilmore, President of defendant.

SUBJECT OF JUDGMENT: (1) bifurcated trial to the court without a jury to determine defendant Gilmore & Associates, Inc.'s status as employee/agent versus independent contractor under Political Subdivisions Tort Claims Act, and, (2) defendant Gilmore's previous motion for summary judgment.

PROCEEDINGS: See journal entry rendered on or about November 1, 2001.

FINDINGS: The court finds and concludes that:

1. The plaintiffs originally asserted a negligence claim against the defendants City of Atkinson (City), Gilmore and Associates, Inc. (Gilmore), and Marilyn L. Gokie and Donald J. Gokie (collectively Gokie). Both City and Gilmore cross-petitioned against Gokie for indemnity.

2. The plaintiffs subsequently dismissed their petition against Gokie. This court previously granted Gokie's motion for summary judgment on Gilmore's cross-petition for indemnity and dismissed the City's cross-petition as moot. Gokie was tentatively removed from the litigation and will be mentioned only in passing.

3. This court previously granted summary judgment against the plaintiffs in favor of the City, dismissing the claim against the City on the basis of governmental immunity under exceptions to the waiver of immunity provided by the Political Subdivisions Tort Claims Act (the Act). The court initially denied Gilmore's motion, determining that a question of fact existed regarding Gilmore's status under the Act. The court scheduled a pretrial conference, at which the plaintiffs and Gilmore stipulated to a bifurcated trial on the issue of Gilmore's status under the Act. The parties recognized that the Act provides for factual determinations by the court without a jury. The bifurcated trial followed and this judgment represents the decision on that issue after trial to the court and the grant of defendant Gilmore's summary judgment motion previously denied by interlocutory order.

4. 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.

5. 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).

6. This decision adjudicates Gilmore's status as an agent, employee, or contractor under the Act. 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.

7. 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 ____.

8. 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 an contractor.

9. In *Keller v. Tavarone, supra*, the Supreme Court observed that there is no single test for determining whether one performs services for another as an employee or as an independent contractor, and the following factors must be considered: (1) the extent of control which, by the agreement, the employer may exercise over the details of the work; (2) whether the one employed is engaged in a distinct occupation or business; (3) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision; (4) the skill required in the particular occupation; (5) whether the employer or the one employed supplies the instrumentalities, tools, and the place of work for the person doing the work; (6) the length of time for which the one employed is engaged; (7) the method of payment, whether by the time or by the job; (8) whether the work is part of the regular business of the employer; (9) whether the parties believe they are creating an agency relationship; and (10) whether the employer is or is not in business. Generally, the right of control is the chief factor distinguishing an employment relationship from that of an independent contractor. *Id.* Whether the parties believed that they were creating a master-servant relationship is an important guideline in determining the legal nature of the relationship. *Id.*

10. On the face of the evidence, the skill exercised by professional engineers, the type of occupation, the distinction business and occupation engaged in by the defendant, the defendant's supply of instrumentalities, tools, and work place, the method of compensation, and the nature of the work all suggest an independent contractor relationship. However, the court concludes that certain Nebraska statutes governing the office and duties of a city engineer for a city of the second class compel a different result.

11. Section 17-150 expressly imposes certain duties on a city engineer regarding a sewerage system and certainly contemplates the appointment of city engineer. NEB. REV. STAT. § 17-150 (Reissue 1997). Section 18-501(1) demonstrates that a "sewerage system" can include a storm sewer system, a sanitary sewer system, or a combination system. NEB. REV. STAT. § 18-501(1) (Reissue 1997). While § 18-511 provides that § 18-501 shall be independent of and in addition to any other provisions of the laws with reference to sewerage systems, its terminology is consistent with the terminology employed in Chapter

17, Article 1. NEB. REV. STAT. § 18-511 (Reissue 1997). Section 17-149 authorizes establishment of a “system of sewerage *and drainage*.” NEB. REV. STAT. § 17-149 (Reissue 1997) (emphasis supplied). The word “drainage” in that context would include a storm sewer system.

12. “The mayor, with the consent of the council, may appoint such officers as shall be required by ordinance or otherwise required by law.” NEB. REV. STAT. § 17-107(1) (Reissue 1997). Although no evidence was adduced of any ordinance requiring appointment of a city engineer, the evidence shows without dispute that Gilmore was appointed as the city engineer annually since 1990. Section 17-150 effectively imposes the requirement to appoint a city engineer. In addition, § 17-568.01 imposes additional requirements for projects of this type and imposes duties on the city engineer. NEB. REV. STAT. § 17-568.01 (Reissue 1997). Section 17-568 authorizes employment of a “special engineer” and expressly states that “[a]ny work executed by such special engineer shall have the same validity and serve in all respects as though executed by the city . . . engineer.” NEB. REV. STAT. § 17-568 (Reissue 1997). Section 17-568.01 also requires appointment of a city engineer.

13. These statutes now persuade the court that defendant Gilmore, as the duly appointed city engineer and while performing duties imposed by statute in accordance therewith, constituted a city “officer” within the meaning of the Act, and did not constitute an independent contractor.

14. Having determined that the defendant Gilmore is a city officer within the meaning of the Act, the same analysis regarding the exceptions to liability under the Act precludes imposition of liability against Gilmore. The disposition of the fact issue as to Gilmore’s status under the Act removes the impediment previously noted to the granting of summary judgment of dismissal of the plaintiffs’ petition as against Gilmore.

15. There is yet another reason why the court now grants summary judgment of dismissal of the plaintiffs’ petition against Gilmore. This reason was not specifically argued or addressed in the parties’ briefs on the summary judgment motion, but is one the court finds persuasive and inherent in the motion. The court concludes that the plaintiffs’ operative petition fails to state facts establishing any duty owing by Gilmore to the plaintiffs. The question of whether a duty exists at all is a question of law. *Cerny v. Cedar Bluffs Jr./Sr. Pub. Sch.*, 262 Neb. 66, 628 N.W.2d 697 (2001).

16. In *John Day Co. v. Alvine & Assocs.*, 1 Neb. App. 954, 510 N.W.2d 462 (1993), the Nebraska Court of Appeals addressed a claim that there can be liability to a third party for professional negligence even though there is no privity of contract between the defendant and the third party. The Court of Appeals noted that the Nebraska Supreme Court has held that barring proof of fraud or other extraordinary facts, lawyers and accountants are liable for negligence only to their clients, with whom they are in privity of contract, and not to third parties. See, *Citizens Nat. Bank of Wisner v. Kennedy & Coe*, 232 Neb. 477, 441 N.W.2d 180 (1989); *Landrigan v. Nelson*, 227 Neb. 835, 420 N.W.2d 313 (1988); *Ames Bank v. Hahn*, 205 Neb. 353, 287 N.W.2d 687 (1980). The Court of Appeals also observed that the Supreme Court also has applied this rule of law to cases involving architects. See *Overland Constructors v. Millard School Dist.*, 220 Neb. 220, 369 N.W.2d 69 (1985).

17. The Court of Appeals accepted that *Overland Constructors* provides a description of professional service that bears on the analysis: “ ‘A professional act or service is one arising out of a vocation, calling, occupation, or employment involving specialized knowledge, labor, or skill, and the labor or skill involved is predominantly mental or intellectual, rather than physical or manual.’ ” *John Day Co. v. Alvine & Assocs.*, *supra* at 960, 510 N.W.2d at ___ (citing *Overland Constructors v. Millard School Dist.*, *supra* at 229, 369 N.W.2d at 75). The Court of Appeals noted that the Supreme Court went on to recognize architects, lawyers, doctors, accountants, and investment advisers as providers of professional services.

18. The Court of Appeals then relied on two considerations in finding that mechanical engineers are professionals for purposes of determining their duty of care to third parties. First, the court determined that the occupation involves specialized knowledge and skill that is predominantly intellectual, particularly in the case of designing something like an HVAC system. For purposes of determining professional status and duty of care, the Court of Appeals found no meaningful difference between architectural design and mechanical engineering design. Second, the Court of Appeals construed language of the plaintiff’s petition as demonstrating that the plaintiff viewed the defendant as a provider of professional services. The Court of Appeals determined that mechanical engineering design fits the definition of professional service set out in *Overland Constructors*.

19. The court then reiterated that, in Nebraska, absent proof of fraud or some other extraordinary facts that would override the general rule, professionals are not liable in negligence to third parties with whom they are not in privity of contract. This court finds no meaningful distinction between the profession of mechanical engineering discussed in *John Day Co.* and the profession of civil engineering present in this case. This court, like the Court of Appeals in *John Day Co.*, considers itself bound by the Nebraska Supreme Court precedent and concludes that Gilmore owed no duty to the plaintiffs.

20. Because this judgment now disposes of all claims of all parties, it does constitute a final judgment. NEB. REV. STAT. § 25-1315 (Cum. Supp. 2000). The relief previously granted on an interlocutory basis that remains the same in this final judgment is stated below. The findings in support thereof previously set forth in the Interlocutory Order on Motions for Summary Judgment are incorporated herein by reference.

21. In so doing, the court again 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.

JUDGMENT: IT IS THEREFORE ORDERED AND ADJUDGED that:

1. The motion of defendant City of Atkinson for summary judgment on the plaintiffs' amended petition is granted, and the plaintiffs' amended petition against the defendant City of Atkinson is dismissed with prejudice at plaintiffs' cost.

2. The motion of defendant Gilmore and Associates, Inc. for summary judgment on the plaintiffs' amended petition is granted, and the plaintiffs' amended petition against the defendant Gilmore and Associates, Inc. is dismissed with prejudice at plaintiffs' cost.

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

4. 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, and 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.

5. Any request for attorneys' fees, expressed or implied, is denied.

Signed in chambers at **Ainsworth**, Nebraska, on **January 6, 2002**;
DEEMED ENTERED upon file stamp date by court clerk.

If checked, the court clerk shall:

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

Mailed to:

BY THE COURT:

William B. Cassel
District Judge