

CASE NO. A-21-288

IN THE NEBRASKA COURT OF APPEALS

-----0-----

DONALD CLARK AND KIMBERLY CLARK,

Plaintiffs/Appellees

v.

**SARGENT IRRIGATION DISTRICT, A POLITICAL SUBDIVISION,
AND DOUG KRISS, AN EMPLOYEE OF SARGENT IRRIGATION DISTRICT,**

Defendants/Appellants

-----0-----

**APPEAL FROM THE DISTRICT COURT OF CUSTER COUNTY, NEBRASKA
HONORABLE KARIN L. NOAKES, District Judge**

-----0-----

BRIEF OF APPELLANT

-----0-----

SUBMITTED BY:

Jared J, Krejci, #25785
SMITH, JOHNSON, ALLEN,
CONNICK & HANSEN
104 N. Wheeler Avenue
Grand Island, NE 68801
(308) 382-1930
jkrejci@gilawfirm.com
Attorney for Appellants, Sargent Irrigation District and Doug Kriss

Table of Contents

Table of Contents i

Table of Authorities i

Jurisdictional Statement 1

Statement of the Case..... 1

 A. The Nature of the Case 1

 B. The Issues Actually Tried Below 2

 C. How the Issues Were Decided 2

 D. Scope of Review 2

Assignments of Error 3

Propositions of Law 3

Statement of Facts 4

Summary of the Argument..... 6

Argument 6

 A. The Clarks’ Claims Fail Because the Clarks Did Not Wait Six
 Months After Making their Written Claim or Until a Final
 Disposition of their Written Claim Before Filing Suit 10

 B. The Clarks’ Claims Fall Within the Discretionary Function or Duty
 Exception 10

Conclusion 19

Table of Authorities

Cases

Amend v. Nebraska Pub. Serv. Comm'n, 298 Neb. 617 (2018) 11

Coleman v. Chadron State Coll., 237 Neb. 491 (1991) 9

Claypool v. Hibberd, 261 Neb. 818 (2001) 16

<i>Duff v. U.S. By & Through U.S. Air Force</i> , 829 F. Supp. 299 (D.N.D. 1992)	15
<i>Essink v. City of Gretna</i> , 25 Neb. App. 53 (2017)	8
<i>Geddes v. York Cty.</i> , 273 Neb. 271 (2007)	2, 8, 9
<i>Great N. Ins. Co. v. Transit Auth. of City of Omaha</i> , 308 Neb. 916 (2021)	2
<i>In re Est. of Adelung</i> , 306 Neb. 646 (2020)	7
<i>Jesner v. Arab Bank, PLC</i> , 138 S. Ct. 1386, 200 L. Ed. 2d 612 (2018)	18
<i>Komar v. State</i> , 299 Neb. 301 (2018)	9
<i>Loughlin v. United States</i> , 286 F. Supp. 2d 1 (D.D.C. 2003)	15
<i>Mercer v. N. Cent. Serv., Inc.</i> , 308 Neb. 224 (2021)	2
<i>Pettit v. Nebraska Dep't of Corr. Servs.</i> , 291 Neb. 513 (2015)	4, 18
<i>Reiber v. Cty. of Gage</i> , 303 Neb. 325 (2019)	4, 11
<i>Smith v. Gerber</i> , 64 F. Supp. 2d 784 (N.D. Ill. 1999).....	4, 18
<i>State ex rel. Rhiley v. Nebraska State Patrol</i> , 301 Neb. 241 (2018).....	3, 10
<i>Stonacek v. City of Lincoln</i> , 279 Neb. 869 (2010).....	16
<i>Washington v. Conley</i> , 273 Neb. 908 (2007)	4, 10
<i>Williams v. City of Lincoln</i> , 27 Neb. App. 414 (2019)	passim

Statutes

Neb. Rev. Stat. § 2-2643.01	15
Neb. Rev. Stat. § 2-2645	15
Neb. Rev. Stat. § 2-2647	15
Neb. Rev. Stat. § 2-2648	15
Neb. Rev. Stat. § 2-2649.01	15
Neb. Rev. Stat. § 13-902	10

Neb. Rev. Stat. § 13-905.....	5, 6
Neb. Rev. Stat. § 13-906.....	passim
Neb. Rev. Stat. § 13-910.....	10
Neb. Rev. Stat. § 13-919.....	9
Neb. Rev. Stat. § 25-1902.....	1
Neb. Rev. Stat. § 25-1911.....	1
Neb. Rev. Stat. § 25-1912.....	1

Other Authorities

<u>Disposition</u> , Merriam-Webster (July 23, 2021), https://www.merriam-webster.com/dictionary/disposition	7
<u>Final</u> , Merriam-Webster (July 23, 2021), https://www.merriam-webster.com/dictionary/final	7

Jurisdictional Statement.

This is an appeal from the District Court's March 8, 2021 Order Denying Motion for Summary Judgment denying Sargent Irrigation District and Doug Kriss's motion for summary judgment on the basis of sovereign immunity. (T35-37). The District Court's March 8, 2021 Order Denying Motion for Summary Judgment is a final order under Neb. Rev. Stat. § 25-1902(1)(d), because the order denied Sargent Irrigation District and Doug Kriss's motion for summary judgment on the basis of sovereign immunity. (T35-37). On April 7, 2021, Sargent Irrigation District and Doug Kriss's notice of appeal was filed and related docketing fees were paid within thirty days of the District Court's March 8, 2021 Order. All of the requirements of Neb. Rev. Stat. §§ 25-1911 to 1912 have been met.

Statement of the Case.

A. The Nature of the Case.

This is a tort action commenced in the District Court of Custer County, Nebraska under the Political Subdivision Tort Claim Act ("PSTCA"). (T1). Donald and Kimberly Clark filed this action against Sargent Irrigation District, a political subdivision, and Doug Kriss, an employee and co-manager of Sargent Irrigation District, on basis of the Clarks' allegations that Doug Kriss negligently applied herbicide causing damage to the Clarks while in the course and scope of his employment and that Sargent Irrigation District was negligent in failing to supervise and train Doug Kriss. (T1-5; E1, 3: 7, Appendix).

Sargent Irrigation District and Doug Kriss filed a motion to dismiss under Nebraska Court Rules of Pleading 12(b)(1) and (6) on the basis that the District Court lacked subject matter jurisdiction and the Clarks' Complaint failed to state a claim due to the Clarks' failure to comply with the requirements of the PSTCA and because of the discretionary function or duty

exception to the PSTCA. (T11). The District Court allowed the motion to dismiss to be converted to a motion for summary judgment. (T14, T25-26).

B. The Issues Actually Tried Below.

All of the issues presented in Sargent Irrigation District and Doug Kriss’s motion to dismiss under Nebraska Court Rules of Pleading 12(b)(1) and (6) converted into a motion for summary judgment were tried to the District Court in a summary judgment proceeding. (T35-37).

C. How the Issues Were Decided.

The District Court determined that it had subject matter jurisdiction and the Clarks’ claims were not barred by sovereign immunity. (T35-37). The District Court specifically determined that the discretionary function exception to the PSTCA did not apply, because the Pesticides Act removed the conduct at issue from Sargent Irrigation District and Doug Kriss’s discretionary judgment. (T36-37).

D. Scope of Review.

Summary judgment is proper when the pleadings and evidence admitted at the hearing 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.

Geddes v. York Cty., 273 Neb. 271, 274 (2007). “Where the relevant facts are undisputed, whether the notice requirements of the PSTCA have been satisfied is a question of law, on which an appellate court reaches a conclusion independent of the lower court's ruling.” *Great N. Ins. Co. v. Transit Auth. of City of Omaha*, 308 Neb. 916, 926 (2021). “Whether a plaintiff’s negligence claims are precluded by an exception to the PSTCA is a question of law for which an

appellate court has a duty to reach its conclusions independent of the conclusions reached by the district court.” *Mercer v. N. Cent. Serv., Inc.*, 308 Neb. 224, 232–33 (2021).

Assignments of Error.

1. The District Court erred in determining that the Clarks’ noncompliance with the PSTCA, in particularly Neb. Rev. Stat. § 13-906’s requirement that the Clarks wait until Sargent Irrigation District makes a final disposition of their claim before filing suit or otherwise wait at least six months from making the claim before filing suit, did not bar the Clarks’ claims.

2. The District Court erred in determining that it had subject matter jurisdiction over this action despite the Clarks’ claims being barred by the discretionary function or duty exception to the PSTCA.

3. The District Court erred in failing to grant summary judgment in favor of Sargent Irrigation District and Doug Kriss on the basis of sovereign immunity, the District Court’s lack of subject matter jurisdiction, and the Clarks’ noncompliance with Neb. Rev. Stat. § 13-906.

Propositions of Law.

1. No suit shall be permitted under the Political Subdivisions Tort Claims Act and sections 16-727, 16-728, 23-175, 39-809, and 79-610 unless the governing body of the political subdivision has made final disposition of the claim, except that if the governing body does not make final disposition of a claim within six months after it is filed, the claimant may, by notice in writing, withdraw the claim from consideration of the governing body and begin suit under such act and sections. Neb. Rev. Stat. § 13-906.

2. When a political subdivision is protected by sovereign immunity, courts lack subject matter jurisdiction. *State ex rel. Rhiley v. Nebraska State Patrol*, 301 Neb. 241, 242 (2018).

3. The plaintiff bears the burden of proof to establish subject matter jurisdiction. *Washington v. Conley*, 273 Neb. 908, 913 (2007).
4. In order to strictly construe the PSTCA against a waiver of sovereign immunity, its exemptions are read broadly. *Reiber v. Cty. of Gage*, 303 Neb. 325, 342 (2019).
5. Whether a statute creates a private right of action depends on the statute's purpose and whether the Legislature intended to create a private right of action. *Pettit v. Nebraska Dep't of Corr. Servs.*, 291 Neb. 513, 523 (2015).
6. Courts seldom imply a private right of action where none appears in the statute, for a strong presumption exists against their creation. The presumption against implying a private right of action is even stronger when the statute in question is criminal. Express provisions for criminal prosecution and administrative enforcement without a corresponding provision for private enforcement, generally establish that private enforcement is inappropriate. *Smith v. Gerber*, 64 F. Supp. 2d 784, 786 (N.D. Ill. 1999).

Statement of Facts.

As alleged in the Clarks' Complaint, Sargent Irrigation District is a political subdivision, and at all times relevant to this action Doug Kriss was an employee of Sargent Irrigation District and acting in the course and scope of his employment. (T1). Doug Kriss is co-manager of Sargent Irrigation District and holds a license under the Pesticides Act as a non-commercial applicator. (E1, 3: 7, Appendix; E3, 1: 7-8, Appendix). On or about July 3, 2019, Doug Kriss sprayed numerous trees with herbicide along the Sargent Cancel near the Clarks' real estate in Custer County, Nebraska. (T2).

The Clarks allege that the herbicide mixture used by Doug Kriss was not in accordance with the labels of the herbicides and a result of unreasonableness and imprudence. (T2-3). The

Clarks allege that Doug Kriss may have overapplied herbicides on or about July 3, 2019. (T2). The Clarks allege that as a result of Doug Kriss's misused and overapplied herbicide spray, the herbicide mixture volatilized and drifted onto the Clarks' real estate. (T3). The Clarks allege that the volatilized herbicide damaged the Clarks' corn crop growing on their real estate. (T3). The Clarks allege that Doug Kriss is liable to them because his negligence caused their damages and Sargent Irrigation District is liable via respondeat superior. (T3-4). The Clarks also allege that Sargent Irrigation District is independently liable due to negligent supervision and training. (T4). The Clarks allege that Sargent Irrigation District should have foreseen that its supervision and training procedures for Doug Kriss would result in damage to the Clarks' property. (T4)

Roughly a year after the July 3, 2019 spraying incident, the Clarks submitted a written claim upon Sargent Irrigation District pursuant to Neb. Rev. Stat. § 13-905 dated June 29, 2020. (T6). The written claim dated June 29, 2020 sets forth the time and place of the occurrence giving rise to the Clarks' claim as well as other facts pertinent to the Clarks' claim. (T6-7).

Sargent Irrigation District's Board of Directors met in their regular monthly session on July 7, 2020. (E1, 3: 7, Appendix). Sargent Irrigation District's General Manager, Matt Lukasiewicz, presented a letter to the Board from the District's attorneys, Mattson Ricketts Law Firm, with a legal recommendation at this time to not settle with Don Clark on the claim and to not overrule the opinion of the insurance adjuster. (E1, 3: 7, Appendix). Director Davidson moved to follow the District's attorneys' recommendation on the Clark claim. (E1, 3: 7, Appendix). Director Davidson's motion carried after a second and a roll call vote. (E1, 3: 7, Appendix). The Clarks filed their Complaint in the District Court on September 1, 2020. (T1).

Summary of the Argument.

The Clarks commenced their action in the District Court without waiting for a final disposition of their written claim or six months from filing their written claim as required by Neb. Rev. Stat. § 13-906. The Clarks' premature action in the District Court is a substantive bar to their action. In addition, the Clarks' allegations fall within the discretionary function or duty exemption to the PSTCA, and the Clarks' claims are barred by sovereign immunity.

Argument.

A. The Clarks' Claims Fail Because the Clarks Did Not Wait Six Months After Making their Written Claim or Until a Final Disposition of their Written Claim Before Filing Suit.

This case presents what appears to be a novel question in Nebraska's appellate courts as to both the PSTCA and its counterpart, the State Tort Claims Act ("STCA"). That is, what is final disposition of a claim under Neb. Rev. Stat. § 13-906? Section 13-906 provides:

No suit shall be permitted under the Political Subdivisions Tort Claims Act and sections 16-727, 16-728, 23-175, 39-809, and 79-610 unless the governing body of the political subdivision has made final disposition of the claim, except that if the governing body does not make final disposition of a claim within six months after it is filed, the claimant may, by notice in writing, withdraw the claim from consideration of the governing body and begin suit under such act and sections.

The Clarks filed a written claim pursuant to Neb. Rev. Stat. § 13-905 dated June 29, 2020, and then commenced this action in the District Court about two months later on September 1, 2020. (T1-8). Between June 29, 2020 and September 1, 2020, the only action taken on the Clarks' written claim was Sargent Irrigation District's Board of Directors decision to follow the

advice of their attorneys and not settle the Clarks' claim at that time. (E1, 3: 7, Appendix). A plain and direct interpretation of § 13-906 compels the conclusion that Sargent Irrigation District's Board of Directors did not make final disposition of the Clarks' written claim before the Clarks commenced their action in the District Court. To the extent § 13-906 is ambiguous or open to construction, the canons of statutory construction compel the same conclusion that Sargent Irrigation District's Board of Directors did not make final disposition of the Clarks' written claim before the Clarks commenced their action.

In the absence of ambiguity, the plain and direct meaning of "final disposition" of a claim controls. *In re Est. of Adelung*, 306 Neb. 646, 663 (2020). The relevant plain and direct meaning of "final" is "not to be altered or undone." Final, Merriam-Webster (July 23, 2021), <https://www.merriam-webster.com/dictionary/final>. For example, all sales are final. The relevant definition of "disposition" is "final arrangement" or "settlement." Disposition, Merriam-Webster (July 23, 2021), <https://www.merriam-webster.com/dictionary/disposition>. Sargent Irrigation District's Board of Directors decision not to settle the Clarks' claim "at this time" does not suggest that the Board's July 7, 2020 decision on the Clarks' written claim was final or not to be altered or undone by the Board. (E1, 3: 7, Appendix). To the contrary, the Board's motion indicates that it had not come to a final decision on the Clarks' written claim as of July 7, 2020.

To the extent that the meaning of final disposition is open to construction, the intent and purpose of § 13-906 suggests that the Sargent Irrigation District's Board of Directors decision to not settle at that time was not a final disposition. The purpose of § 13-906 has been discussed at length.

The most natural reading of the statute indicates that Congress intended to require complete exhaustion of Executive remedies before invocation of the judicial process. Every premature filing of an action under the [Federal Tort Claims Act] imposes some burden on the judicial system and on the Department of Justice which must assume the defense of such actions. Although the burden may be slight in an individual case, the statute governs the processing of a vast multitude of claims. The interest in orderly administration of this body of litigation is best served by adherence to the straightforward statutory command.

Moreover, given the clarity of the statutory text, it is certainly not a “trap for the unwary.” ... As we have noted before, “in the long run, experience teaches that strict adherence to the procedural requirements specified by the legislature is the best guarantee of evenhanded administration of the law.” ...

The [Federal Tort Claims Act] bars claimants from bringing suit in federal court until they have exhausted their administrative remedies.

Geddes v. York Cty., 273 Neb. 271, 280–81 (2007) (quoting *McNeil v. United States*, 508 U.S. 106, 112–13 (1993) (citations omitted) (discussing the Federal Tort Claims Act)).

The written claim required by the Tort Claims Act notifies a political subdivision concerning possible liability for its relatively recent act or omission, provides an opportunity for the political subdivision to investigate and obtain information about its allegedly tortious conduct, and enables the political subdivision to decide whether to pay the claimant's demand or defend the litigation predicated on the claim made.

Essink v. City of Gretna, 25 Neb. App. 53, 70 (2017). A determination that Sargent Irrigation District's Board of Directors made a final disposition of the Clarks' claim on July 7, 2020 is at odds with the Legislature's intention that political subdivisions are given time to investigate and attempt to resolve allegations of tortious actions before more costly government resources are drained in litigation.

For further guidance, Neb. Rev. Stat. § 13-906 is in pari materia with Neb. Rev. Stat. § 13-919, the limitations statute of the PSTCA. *Komar v. State*, 299 Neb. 301, 308 (2018); *Coleman v. Chadron State Coll.*, 237 Neb. 491, 500 (1991), *overruled by Collins v. State*, 264 Neb. 267 (2002) (discussing that the corresponding statutes of the STCA and find them to be in pari materia). "When considering a series or collections of statutes pertaining to a certain subject matter which are in pari materia, they may be conjunctively considered and construed to determine the intent of the Legislature, so that different provisions of the act are consistent and sensible." *Coleman v. Chadron State Coll.*, 237 Neb. 491, 500 (1991), *overruled by Collins v. State*, 264 Neb. 267 (2002). Section 13-919 indicates that a claimant should be given notice of a governing body's final disposition by a mailed notice. Here, there is no evidence that any kind of notice of a final disposition was mailed to the Clarks to formally show that Sargent Irrigation District's Board of Directors made a final disposition of the Clarks' written claim. Reading § 13-906 in pari materia with § 13-919 and its mailed notice provisions provides further support that Sargent Irrigation District's Board of Directors did not make a final disposition of the Clarks' written claim at their July 7, 2020 meeting.

Case law does not directly address the meaning of final disposition as used in § 13-906. The factual background section of *Geddes v. York County* is quite similar to the present case in that it describes a county board reviewing a claim at a meeting, but taking no action on it. 273

Neb. 271, 272–73 (2007) (“At its meeting on April 29, the county board reviewed the claim but took no action on it then or at any subsequent time.”). In *Geddes*, no party or the Court raised the issue that the county board’s consideration of the claim without further resolution amounted to a final disposition within the meaning of § 13-906. This lends some support for the proposition that a governing board’s discussion without a final or irrevocable decision is not a final disposition in the context of § 13-906. As stated above, the Clarks failed to comply with § 13-906 by prematurely filing their action in the District Court, so the Clarks’ claims fail.

B. The Clarks’ Claims Fall Within the Discretionary Function or Duty Exception.

Tort claims against political subdivisions are barred by sovereign immunity unless sovereign immunity is waived under the procedure of the PSTCA. Neb. Rev. Stat. § 13-902. Under the procedures of the PSTCA general tort claims are allowed to move forward against political subdivisions with some restrictions, however the PSTCA contains exceptions for certain types of claims where political subdivisions retain their sovereign immunity. When a political subdivision is protected by sovereign immunity, courts lack subject matter jurisdiction. *State ex rel. Rhiley v. Nebraska State Patrol*, 301 Neb. 241, 242 (2018). The plaintiff bears the burden of proof to establish subject matter jurisdiction. *Washington v. Conley*, 273 Neb. 908, 913 (2007). The PSTCA exception controlling this case is the discretionary function exception.

The text of the discretionary function exception is as follows:

The Political Subdivisions Tort Claims Act and sections 16-727, 16-728, 23-175, 39-809, and 79-610 shall not apply to:

...(2) Any claim based upon the exercise or performance of or the failure to exercise or perform a discretionary function or duty on the part of the political

subdivision or an employee of the political subdivision, whether or not the discretion is abused...

Neb. Rev. Stat. § 13-910. Nebraska's appellate courts have significantly refined application of the discretionary function exception. First and foremost, waivers of sovereign immunity are strictly construed. "It is well settled that statutes that purport to waive the State's protection of sovereign immunity are strictly construed in favor of the sovereign and against the waiver." *Amend v. Nebraska Pub. Serv. Comm'n*, 298 Neb. 617, 624 (2018). In the case of the PSTCA, its exemptions are waivers of sovereign immunity, so the PSTCA's exemptions are read as broadly as possible. "In order to strictly construe the PSTCA against a waiver of sovereign immunity, we broadly read exemptions from a waiver of sovereign immunity." *Reiber v. Cty. of Gage*, 303 Neb. 325, 342 (2019).

Second, Nebraska's appellate courts have created a two-part test to determine how the discretionary function exception applies.

A court engages in a two-step analysis to determine whether the discretionary function exception of the PSTCA applies. *Id.* First, the court must consider whether the action is a matter of choice for the acting employee. *Id.* This inquiry is mandated by the language of the exception; conduct cannot be discretionary unless it involves an element of judgment or choice. *Berkovitz v. United States*, 486 U.S. 531, 108 S. Ct. 1954, 100 L. Ed. 2d 531 (1988) (considering discretionary function exception of Federal Tort Claims Act). Thus, the discretionary function exception will not apply when a statute, regulation, or policy specifically prescribes a course of action for an employee to follow. *Id.* In this event, the employee has no rightful option but to adhere to the directive.

Id. And if the employee's conduct cannot appropriately be the product of judgment or choice, then there is no discretion in the conduct for the discretionary function exception to protect. *Id.* Second, if the court concludes that the challenged conduct involves an element of judgment, it must then determine whether that judgment is of the kind that the discretionary function exception was designed to shield. *Kimminau v. City of Hastings, supra.* The purpose of the discretionary function exception is to prevent judicial “second-guessing” of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort. *Id.* See, also, *Berkovitz v. United States, supra.*

Williams v. City of Lincoln, 27 Neb. App. 414, 423–24 (2019), *review denied* (Sept. 4, 2019). In applying this two-part test, courts are encouraged to consult factually similar federal cases involving the Federal Tort Claims Act. “In order to determine whether the challenged conduct in the present case involves an element of choice or judgment under the first step of the analysis, we look to factually similar federal cases.” *Id.* 424.

Williams v. City of Lincoln is somewhat factually similar in that both cases deal with upkeep and maintenance of vegetation on governmental property. In *Williams*, a bicyclist brought an action against the City of Lincoln after the bicyclist collided with low-hanging branches growing off a city-owned tree near a sidewalk. *Id.* 414. The Court of Appeals determined that the case fell within the discretionary function exception and affirmed the district court’s order granting summary judgment to the City. *Id.* As to the first part of the two-part test for the discretionary function exemption, the Court of Appeals determined that the discretionary

function exemption applied because there were no controlling statutes, regulations, or policies that mandated precisely how the City was required to maintain trees.

In the present case, the Williamses argue that maintenance of the City's trees overhanging a sidewalk was not a discretionary function, because the City was required by law to trim and maintain its trees and to maintain sidewalks in a reasonably safe condition; thus, there was no choice or discretion involved. However, the Williamses misidentify the particular conduct at issue. As the federal courts of appeal held in *Autery v. U.S.*, *supra*, and *Merando v. U.S.*, *supra*, the relevant inquiry is whether the controlling statutes, regulations, and administrative policies mandate the location and management of hazardous trees in a specific manner. If not, then the official's decisions as to the precise manner in which to do so, and execution of that plan, are protected by the discretionary function exception.

We agree with the Williamses that under the applicable regulations, the City had a duty to maintain its trees. Specifically, the Lincoln Municipal Code provides that the selection, planting, maintenance, and removal of trees along public ways within the City are matters over which the City must exercise the control set forth under the municipal code. Lincoln Mun. Code § 12.20.010 (2003). The municipal code further provides that the trimming, spraying, removing, and destroying of all existing trees and of all “street trees ... planted in or upon any street, parkway, sidewalk space, or other public way within the [C]ity, shall be done by and at the expense of the [C]ity and at its discretion and by no other person.” § 12.20.030. But nothing under these sections of the

municipal code delineate how or when the maintenance is to be done. And the municipal code specifically grants the City discretion regarding maintenance of its trees.

Id. 426-27. Thus, although the City was generally required by ordinance to maintain the vegetation on its property, there were no specific duties specifying a particular way the vegetation is maintained, so the City met the first step of the test for the discretionary function exemption. In the present case, there are no statutes, regulations, or policies which precisely direct how or when Sargent Irrigation District must use herbicides, who should apply the herbicides, whether herbicides are used, which herbicides are used, or how herbicide use is supervised. Since Sargent Irrigation District and Doug Kriss have discretion with regard to their use of herbicides, they meet the first step of the two-step test for the discretionary function exception.

Once the first prong of the two-step test for the discretionary function exception is met, it is presumed that the second prong is met. “Similarly, in the instant case, the City is afforded the discretion to determine how to maintain its trees, and we therefore presume that the City’s acts in carrying out that discretion are grounded in policy.” *Id.* 429. The second prong of the two-step test focuses on whether the judgment and discretion involved relates to social, economic, or public policy. *Id.* 428. Relevant considerations include “safety, aesthetics, environmental impact, and available financial resources.” *Id.* In *Williams*, the Court of Appeals determined that the judgment and discretion involved in the method of maintaining city-owned vegetation related to social, economic, or public policy, because the City’s ability to maintain its vegetation was limited by its funds. *Id.* 429-30. Applying the second prong of the two-step test has the same result in the present case. Beginning with the presumption that Sargent Irrigation District’s

methods and means of maintaining its vegetation is within the discretion of its co-manager, the choice of how Sargent Irrigation District maintains its vegetation is related to social, economic, or public policy because the choice involves trade-offs based on safety, aesthetics, environmental impact, and available financial resources. Sargent Irrigation District could have hired a professional company to apply herbicides at its premises, but that choice would involve a judgment involving the District's finances.

Turning to similar federal cases, as instructed by *Williams*, confirms that the decisions involved in this case are protected by the discretionary function exception. In a case that is factually similar to the present due to the allegation that aerosols released on behalf of a government body caused damage, in *Duff v. U.S. By & Through U.S. Air Force* a federal district court ruled that claims brought by a resident of military housing injured when she was overcome by fumes from varnish being applied by a government contractor were barred by the discretionary function exception. 829 F. Supp. 299 (D.N.D. 1992), *aff'd*, 999 F.2d 1280 (8th Cir. 1993). In a case involving land use decisions involving maintenance, a federal court found that a case involving allegations of negligent handling and disposal of munitions was barred by the discretionary function exception. *Loughlin v. United States*, 286 F. Supp. 2d 1 (D.D.C. 2003), *aff'd*, 393 F.3d 155 (D.C. Cir. 2004). Thus, factually analogous cases support a determination that the Clarks' claims are barred by the discretionary function or duty exception.

In the District Court, the Clarks successfully argued that the Pesticide Act removes the allegations involved in this case from Sargent Irrigation District and Doug Kriss's discretion and makes the discretionary function or duty inapplicable. The Pesticide Act prohibits license holders, such as Doug Kriss, from using "a pesticide in a manner inconsistent with the pesticide's labeling or with the restrictions on the use of the pesticide imposed by the state, the federal

agency, or the federal act” and from operating “in a faulty, careless, or negligent manner.” Neb. Rev. Stat. § 2-2643.01. In this action, the Clarks allege that Doug Kriss violated these statutory duties imposed by § 2-2643.01. However, the Pesticide Act’s regulations are not relevant unless they create private civil tort liability when they are violated. *Stonacek v. City of Lincoln*, 279 Neb. 869, 881 (2010). Since the Pesticides Act does not create a private right of action, the Clarks’ arguments regarding the Pesticides Act fail.

Stonacek v. City of Lincoln and *Claypool v. Hibberd* are both PSTCA cases involving questions of alleged violations of statutory duties and whether those statutory duties created private rights of action. 279 Neb. 869 (2010); 261 Neb. 818 (2001). In *Stonacek*, the plaintiffs’ homes suffered from flooding, and the plaintiffs brought a PSTCA action against the City of Lincoln on the basis that the City breached a statutory and regulatory duty to adopt, administer, and enforce minimum flood plain management regulations. 279 Neb. 869, 878 (2010). Regardless of whether the City breached its statutory and regulatory duties regarding flood plain management regulations, the Supreme Court determined that the involved statute and regulation were irrelevant since neither created a private right of action or a duty enforceable in a private tort action. The Court stated:

Because these authorities do not expressly or by implication indicate that they create a private tort liability, the district court erred in concluding that appellees had a private action in which the city owed appellees a duty under § 31–1019, and 258 Neb. Admin. Code, ch. 1. Accordingly, because there is no duty owed under these authorities, appellees’ negligence claims based on these authorities fail and the district court erred when it failed to dismiss negligence claims (b) and (c).

Id. 881-82. Thus, a statutory duty relied upon in an effort to overcome the discretionary function or duty exemption is only relevant if the statutory duty creates a private right of action.

In *Claypool*, sheriff's deputies apparently violated duties imposed by a statute governing juvenile temporary custody in the course of an evening that resulted in the death of a juvenile.

Id. 821-22. The juvenile's personal representative brought a PSTCA action against Furnas County and the sheriff's deputies involved. *Id.* 820. Since the juvenile temporary custody statute does not give rise to a tort duty or create civil tort liability, the juvenile temporary custody statute was irrelevant to the personal representative's claims. *Id.* 827. The Supreme Court stated:

Section 43-250 does not satisfy either of the final two criteria used to determine if a statute gives rise to a tort duty. The legislative history of the statute affirmatively demonstrates that the injury the statute was intended to prevent was not suffered by Carlos, and there is no indication in the statute or the legislative history that the statute was intended to create a private liability. As stated by the Supreme Court of Minnesota, “[p]rinciples of judicial restraint preclude us from creating a new statutory cause of action that does not exist at common law where the legislature has not either by the statute's express terms or by implication provided for civil tort liability.” *Bruegger v. Faribault County Sher. Dept.*, 497 N.W.2d 260, 262 (Minn.1993).

Id. Thus, the success of the Clarks' arguments regarding the Pesticide Act turns on whether the Pesticide Act creates a private right of action to enforce a tort duty.

The Pesticide Act does not create a private right of action. The general test of whether the Legislature intended to create an implied private right of action not specifically mentioned in

a statute or group of statutes is the Legislature's intent and the statute's purpose. "Whether a statute creates a private right of action depends on the statute's purpose and whether the Legislature intended to create a private right of action." *Pettit v. Nebraska Dep't of Corr. Servs.*, 291 Neb. 513, 523 (2015).

[A] decision to create a private right of action is one better left to legislative judgment in the great majority of cases...That is because the Legislature is in the better position to consider if the public interest would be served by imposing a new substantive legal liability...Thus, if there are sound reasons to think Congress might doubt the efficacy or necessity of a damages remedy, ... courts must refrain from creating the remedy in order to respect the role of Congress.

Jesner v. Arab Bank, PLC, 138 S. Ct. 1386, 1402, 200 L. Ed. 2d 612 (2018) (internal citations and quotations omitted).

Courts seldom imply a private right of action where none appears in the statute, for a strong presumption exists against [their] creation....The presumption against implying a private right of action is even stronger when the federal statute in question is criminal. Express provisions for criminal prosecution and administrative enforcement ... without a corresponding provision for private enforcement, generally establish that private enforcement is inappropriate.

Smith v. Gerber, 64 F. Supp. 2d 784, 786 (N.D. Ill. 1999) (internal citations omitted).

With regard to the Pesticide Act, no statute within the Act grants an express private right of action against those who violate it. The Legislature knows how to create express private rights of action, so its should be presumed that the Legislature's choice to not to provide an express private right of action was intentional. The Pesticides Act is enforced criminally and

administratively. Neb. Rev. Stat. §§ 2-2645; 2-2647; 2-2648; 2-2649.01. The Pesticides Act's enforcement mechanisms are strong evidence that the Legislature did not intend to create an implied private right of action for private parties to enforce the Pesticides Act. The Pesticide Act does not create a private right of action, and it is irrelevant to the Clarks' claims.

Conclusion

For the reasons stated herein, the Court should determine that the District Court erred in denying Sargent Irrigation District and Doug Kriss's motion for summary judgment and enter an order in accordance with that determination.

SARGENT IRRIGATION DISTRICT, A Political
Subdivision, and DOUG KRISS, An employee of
Sargent Irrigation District, Appellants

BY SMITH, JOHNSON, ALLEN,
CONNICK & HANSEN
104 N. Wheeler Avenue
Grand Island, NE 68801
Phone: (308) 382-1930
jkrejci@gilawfirm.com

By /s/ Jared J. Krejci
Jared J. Krejci, #25785

5098-3/898326

Certificate of Service

I hereby certify that on Monday, July 26, 2021 I provided a true and correct copy of this *Brf of Appts Sargent Irrigation & Kriss* to the following:

Donald Clark represented by Nicholas Joseph Ridgeway (26620) service method: Electronic Service to **nridgeway@jacobsenorr.com**

Kimberly Clark represented by Nicholas Joseph Ridgeway (26620) service method: Electronic Service to **nridgeway@jacobsenorr.com**

Signature: /s/ Jared J. Krejci (25785)