Case No. A–21-288

IN THE NEBRASKA COURT OF APPEALS

DONALD AND KIMBERLY CLARK,

Plaintiffs/Appellees,

v.

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

Defendants/Appellants.

Appeal from the District Court of Custer County, Nebraska
The Honorable Karin L. Noakes, District Judge
District Court Case No. CI 20–107

BRIEF OF APPELLEES, DONALD AND KIMBERLY CLARK.

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STATEMENT OF JURISDICTION

Appellees, Donald and Kimberly Clark (collectively "Clarks") accept the Statement of Jurisdiction as set forth by Sargent Irrigation District and Doug Kriss (collectively "Sargent") in its Brief of Appellants ("*Appellants' Brief*), at 1.

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STATEMENT OF THE CASE

1. Nature of the Case

The Clarks accept the Nature of the Case as set forth by in the Appellants' Brief.

2. The Issues Actually Tried Below

The only issue tried in the District Court was whether Sargent was entitled to sovereign immunity based on the discretionary function exemption. (T11, 21–23, 35–37).

3. How the Issues were Decided

The District Court denied Sargent's Motion for Summary judgment and found that the discretionary function exemption was not applicable in this case and that Sargent was not entitled to sovereign immunity. (T35–37).

STANDARD OF REVIEW

"An appellate court reviews the district court's grant of summary judgment de novo, viewing the record in the light most favorable to the nonmoving party and drawing all reasonable inferences in that party's favor." *Fuelberth v. Heartland Heating & Air Conditioning, Inc.*, 307 Neb. 1002, 1005–06, 951 N.W.2d 758, 761 (2020).

The party moving for summary judgment must produce evidence sufficient to demonstrate that the movant would be entitled to judgment as matter of law if the evidence were uncontroverted at trial. *Roskop Dairy, L.L.C. v. GEA Farm Technologies, Inc.*, 292 Neb. 148, 169, 871 N.W.2d

776, 793 (2015). Once the movant has established its prima facie case, the burden shifts to the opposing party to present admissible and contradictory evidence showing an issue of material fact that prevents a judgment as a matter of law for the moving party. *Id.* The question is not how a factual issue should be decided, but whether any real issue of material fact exists. *Bruning v. Law Offices of Ronald J. Palagi*, 250 Neb. 677, 551 N.W.2d 266 (1996). When there are no material facts to be resolved and the moving party is entitled to judgment as a matter of law, summary judgment will be granted. *Roskop Dairy*, 292 Neb. at 169, 871 N.W.2d at 793.

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RESPONSE TO APPELLANTS' ASSIGNMENT OF ERRORS

1. The Appellants did not raise the issue of noncompliance with Nebraska Revised Statute § 13-906, and therefore, the District Court did not have an opportunity to rule on whether the Clarks complied with the statute. Additionally, there was no reasonable opportunity for the Clarks to present evidence on this alleged issue.

2. The District Court correctly found that it had jurisdiction because the discretionary function and duty exception is not applicable to this case.

3. The District Court correctly denied summary judgment because Sargent is not entitled to sovereign immunity, the District Court had jurisdiction over this case, and the Appellants did not give the District Court the opportunity to rule on whether the Clarks complied with Nebraska Revised Statute § 13-906.

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PROPOSITIONS OF LAW

1. "A trial court cannot err in failing to decide an issue not raised, and we will not consider an issue for the first time on appeal." *Bridwell v. Walton*, 27 Neb. App. 1, 7, 925 N.W.2d 94, 100 (2019).

2. "Noncompliance with the procedural conditions precedent [outlined in the Political Subdivision Tort Claim Act] is considered an affirmative defense that needs to be raised by the [political subdivision]." *Saylor v. State*, 306 Neb. 147, 149–50, 944 N.W.2d 726, 729 (2020).

3. "[A]n affirmative defense must be pleaded to be considered in the trial court and on appeal. *Funk v. Lincoln-Lancaster Cty. Crime Stoppers, Inc.*, 294 Neb. 715, 728, 885 N.W.2d 1, 11 (2016).

4. "[F]or both causes of action and affirmative defenses, the touchstone is whether fair notice was provided." *Weeder v. Cent. Cmty. Coll.*, 269 Neb. 114, 126, 691 N.W.2d 508, 517 (2005).

5. "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[.]" Neb. Rev. Stat. § 13-906 (Reissue 2012).

6. "Statutory language is to be given its plain and ordinary meaning, and an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous." *Saylor v. State*, 304 Neb. 779, 786, 936 N.W.2d 924, 929 (2020).

7. "It is not within the province of a court to read a meaning into a statute that is not warranted by the language; neither is it within the province of a court to read anything plain, direct, or unambiguous out of a statute." *Saylor v. State*, 304 Neb. 779, 786, 936 N.W.2d 924, 929 (2020).

8. "No suit shall be permitted under the Political Subdivisions Tort Claims Act ("PSTCA"). . .unless the governing body of the political subdivision has made final disposition of the claim." Neb. Rev. Stat. § 13-906 (Reissue 2012).

9. Political subdivisions have "[s]ubordinate powers of sovereignty conferred by the legislature." *Hoiengs v. Cty. of Adams*, 245 Neb. 877, 888, 516 N.W.2d 223, 234 (1994).

10. The PSTCA "provides limited waivers of sovereign immunity, which are subject to statutory exceptions. If a statutory exception applies, the claim is barred by sovereign immunity." *McGauley v. Washington Cty.*, 297 Neb. 134, 139, 897 N.W.2d 851, 855–56 (2017).

11. The PSTCA does not apply to "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(2) (Reissue 2012).

12. "[T]he discretionary function exception extends only to basic policy decisions made in governmental activity at the operational level, and not to ministerial activities implementing such policy decisions. 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." *McGauley*, at 139, 897 N.W.2d at 856.

13. In determining whether the discretionary function exemption applies "[t]he court must consider whether the action is a matter of choice for the acting employee. 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." *Id.* at 139–140, 897 N.W.2d at 856.

14. "[T]he discretionary function exception does not apply when the governmental entity has a nondiscretionary duty to warn or take other protective measures that may prevent injury as the result of the dangerous condition or hazard. *Id.* at 140, 897 N.W.2d at 856 (cleaned up).

15. The nondiscretionary duty exists when "(1) a governmental entity has actual or constructive notice of a dangerous condition or hazard caused by or under the control of the governmental entity and (2) the dangerous condition or hazard is not readily apparent to persons who are likely to be injured by the dangerous condition or hazard." *Id.*

16. "[T]he discretionary function exception will not apply when a statute, regulation, or policy specifically prescribes a course of action for an employee to follow." *Williams v. City of Lincoln*, 27 Neb. App. 414, 424, 932 N.W.2d 490, 499 (2019).

17. License holders under the Pesticide Act are prohibited 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(1) and (2) (Reissue 2012).

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STATEMENT OF FACTS

This case involves damage to the Clarks' crops stemming from Sargent's illegal use of an off-label herbicide. (T1–10). Sargent is a political subdivision located in Sargent, Custer County, Nebraska. (T1). On or about July 3, 2019, Sargent's employee, Mr. Kriss, sprayed numerous trees along the Sargent Canal near the Clarks' property. (T2). In a statement signed by Mr. Kriss and Sargent Irrigation District's General Manager, Matt Lukasiewicz, they admitted that the herbicide

mixture that Mr. Kriss used was a mixture of one quart 2-4-D, one cup of crop oil, 25 gallons of water, and three gallons of Roundup. (T2, 10) (E2, 10:7, 8). Mr. Kriss acknowledged that there was Roundup included in the mixture because the sprayer used to apply the herbicides was not properly rinsed out from the prior use. (T10) (T2, 10) (E2, 10:7, 8). Mr. Kriss further acknowledged that he sprayed each tree for approximately 15 seconds, which resulted in approximately 22 ounces of mixture per tree and could have resulted in an overapplication. (T2, 10) (E2, 10:7, 8). The off-label mixture then volatilized and/or drifted onto the Clarks' property, causing damage to approximately 9,637 bushels of corn. (T3) (E2, 2–3:7, 8).

On June 29, 2020, the Clarks filed a written claim with Sargent, which outlined the damages sustained as a result of Sargent's negligence. (E2, 1–2, 6–8:7, 8). A copy of the claim was sent to each board member, the general manager, and the office manager. (*Id*.). On July 7, 2020, the Sargent Irrigation District Board of Directors held a regular meeting, where it denied the Clarks' claim. (E1, 3: 7, 8). The Clarks filed their complaint against Sargent on September 1, 2020. (T1).

SUMMARY OF THE ARGUMENT

The Clarks' alleged noncompliance with the Political Subdivision Tort Claims Act was not raised in the District Court, and therefore, should be ignored by this Court. Next, Sargent is not protected by sovereign immunity because the discretionary function does not apply in this case. Finally, the Clarks have not brought their claim under the Pesticide Act, and any argument that they did is without merit.

ARGUMENT

I. THE ISSUE OF THE APPELLEES' NONCOMPLIANCE WITH NEBRASKA REVISED STATUTE § 13-906 IS NOT PROPERLY BEFORE THIS COURT.

Sargent did not raise the issue of the Clarks' alleged premature filing of their Complaint under Nebraska Revised Statute § 13-906 as an affirmative defense nor did it argue the alleged noncompliance at the summary judgment hearing. "No suit shall be permitted under the Political Subdivisions Tort Claims Act. . .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[.]" Neb. Rev. Stat. § 13-906 (Reissue 2012). Noncompliance with the procedural conditions precedent outlined in the Political Subdivision Tort Claim Act are considered to be affirmative defenses that need to be raised by the political subdivision. *Saylor v. State*, 306 Neb. 147, 149–50, 944 N.W.2d 726, 729 (2020). "A trial court cannot err in failing to decide an issue not raised, and we will not consider an issue for the first time on appeal." *Bridwell v. Walton*, 27 Neb. App. 1, 7, 925 N.W.2d 94, 100 (2019) (citing *Vande Guchte v. Kort*, 13 Neb. App. 875, 703 N.W.2d 611 (2005)). More specifically, "[a]n affirmative defense must be pleaded to be considered in the trial court and on appeal. *Funk v. Lincoln-Lancaster Cty. Crime Stoppers, Inc.*, 294 Neb. 715, 728, 885 N.W.2d 1, 11 (2016).

One case with a similar set of facts is *Weeder v. Cent. Cmty. Coll.* 269 Neb. 114, 691 N.W.2d 508 (2005). In *Weeder*, the plaintiff brought an action against Central Community College ("CCC") relating to an injury that was sustained by the plaintiff while he was "[d]emonstrating welding techniques during an off-campus recruitment project." *Id.* at 116, 691 N.W.2d at 511. On April 11, 2002, the plaintiff sent a certified letter to the board of governors of the college, outlining his claim against CCC in accordance with the PSTCA. *Id.* On July 18, 2002, the plaintiff

sent another letter withdrawing his claim. *Id*. The plaintiff subsequently filed suit against CCC on April 18, 2003. *Id*.

CCC filed a motion to dismiss the plaintiff's lawsuit. *Id.* The motion to dismiss requested that the trial court dismiss the complaint for three reasons, but only one pertinent to the case at hand—which requested the complaint be dismissed because the plaintiff "[f]ailed to comply with the Political Subdivisions Tort Claims Act requirement that he withdraw his claim before commencing suit. Neb. Rev. Stat. § 13–906 (Reissue 1997)." *Id*. at 117, 691 N.W.2d at 511. The trial court sustained CCC's motion to dismiss because the plaintiff filed suit prior to the statutory 6-month period, which then deprived the trial court of subject matter jurisdiction over the case. *Id*. at 117–18, 691 N.W.2d at 512. The plaintiff appealed the trial court's decision. *Id*. at 118, 691 N.W.2d at 512.

On appeal, the plaintiff argued that the trial court erred by sustaining CCC's motion to dismiss. *Id*. The Supreme Court found that the trial court did have subject matter jurisdiction, citing "[t]hat the filing of a tort claim, rather than being jurisdictional in nature, is a condition precedent to instituting a suit against a political subdivision." *Id*. at 120, 691 N.W.2d at 513 (emphasis added).

Next, the court looked at whether CCC successfully raised the plaintiff's premature filing of the complaint as an affirmative defense in its motion to dismiss. *Id*. at 124, 691 N.W.2d at 516. The Court found that "the chosen language did not make any reference to the 6–month period to which CCC was entitled to consider [the plaintiff's] claim before [the plaintiff] could have withdrawn it from CCC's consideration and filed suit." *Id*. In sum, the district court dismissed the complaint because the plaintiff filed suit prior to the statutory six-month period, but the defendant's motion to dismiss cited that the plaintiff failed to withdraw his claim and generally

cited § 13-906." *Id.* at 124, 691 N.W.2d at 516. Because the district court dismissed the claim based on something not requested, the Supreme Court looked at whether the plaintiff "[w]as afforded fair notice and nature of the defense." *Id.* at 125, 691 N.W.2d at 516. The court found that the plaintiff was not given fair notice of the nature of CCC's defense. *Id*. As such, the Supreme Court held that the trial court erred in granting CCC's motion to dismiss. *Id.* at 127, 691 N.W.2d at 517.

In the case at hand, Sargent argues for the first time on appeal that the Clarks did not wait six months after filing their written claim to file suit. (Brief of Appellants *(Appellants' Brief)*, at 6–10. Neither Sargent's Motion to Dismiss, nor the Motion to Convert the Motion to Dismiss mention Nebraska Revised Statute § 13-906. (T11, 14). Furthermore, neither of these pleadings mention that the Clarks filed a premature complaint. *Id*. Finally, counsel for Sargent did not make this argument at the summary judgment hearing. (6:1–17:25). Under no circumstances were the Clarks given fair notice of Sargent's defense. For these reasons, this Court should not consider this issue for purposes of this appeal.

II. SARGENT IRRIGATION DISTRICT MADE A FINAL DISPOSITION OF THE CLAIM

Even if this Court entertains the argument that the Clarks did not comply with Nebraska Revised Statute § 13-906 (despite the argument above), then Sargent's argument still fails because Sargent made a final disposition of the Clarks' claim. "Statutory language is to be given its plain and ordinary meaning, and an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous." *Saylor v. State*, 304 Neb. 779, 786, 936 N.W.2d 924, 929 (2020). "It is not within the province of a court to read a meaning into a statute that is not warranted by the language; neither is it within the province of a

court to read anything plain, direct, or unambiguous out of a statute." *Id*. Nebraska Revised Statute § 13-906 provides that "no suit shall be permitted under the Political Subdivisions Tort Claims Act. . .unless the governing body of the political subdivision has made final disposition of the claim."

The Clarks filed their claim with Sargent on June 29, 2020. (T1) (E2, 1, 7, 8). On July 7, 2020, the Sargent Irrigation District Board of Directors met and denied the Clarks' claim. (T2) (E1, 3, 7, 7). Sargent now argues that this was not a "final disposition." *Appellants' Brief*, at 6–10. Sargent invites this Court to engage in statutory interpretation regarding the meaning of "final disposition." Statutory interpretation is neither necessary nor appropriate in this case. Sargent's meeting minutes from the meeting where it denied the Clarks' claim provide:

> Concerning the Clark spray damage claim, General Manager Matt Lukasiewicz presented a letter from the District's Attorney, Mattson Ricketts Law Firm, with a legal recommendation at this time to not settle with Don Clark on the claim and not to overrule the opinion of the insurance adjuster.
>
> . . .
>
> Director Davidson moved and seconded by Director Ritchie to follow the District's attorney's recommendation on the Clark claim.

(E1, 3, 7, 7). The motion carried. (*Id*.).

A plain reading of the statute applied to this set of facts shows that a final disposition was made by Sargent. The minutes do not state that the board will reconsider the claim on another day, nor do they say that its decision was not final. The board simply made a decision to deny the claim. If this Court finds that "final disposition" means what Sargent is requesting, the result will be that parties seeking redress under the Act will face yet another procedural mine field in their

claims under the PSTCA. Practically every decision a political subdivision board makes can be undone by a later act of the board. Sargent wants this Court to find that unless a political subdivision board explicitly says that their denial of a claim is a "final disposition" then it is not final. However, even if a board makes an explicit finding that its denial of a claim was a "final disposition" then there's nothing preventing the board from reversing that decision. The term "final disposition" is not vague or ambiguous, and the facts in this case show that a final disposition was made by the board. For these reasons, the Court should reject Sargent's argument that the Clarks did not comply with Nebraska Revised Statute § 13-906.

Sargent argues that they did not have adequate time to investigate and attempt to resolve the allegations made by the Clarks. (*Appellants' Brief,* at 9). The evidence in this case shows that on March 11, 2020, two of Sargent's employees, Matt Lukasiewicz and Doug Kriss drafted a detailed admission relating to Mr. Kriss' negligence when spraying along the canal. (E2, 9, 7, 8). This indicates that the Board had at minimum three months to consider the allegations contained in the claim, despite not having officially received it until June 29, 2020. The minutes also show that the Board had time to discuss the issue with its attorney. (E1, 3, 7, 7). Any argument that the Board did not have adequate time to review the allegations is without merit.

III. THE APPELLANTS' ACTIONS DO NOT FALL WITHIN THE DISCRETIONARY FUNCTION EXCEPTION

The Clarks have made a valid claim under the PSTCA, and Sargent's negligence does not fall within any exception to the PSTCA. As a political subdivision, Sargent has "[s]ubordinate powers of sovereignty conferred by the legislature." *Hoiengs v. Cty. of Adams,* 245 Neb. 877, 888, 516 N.W.2d 223, 234 (1994). However, the PSTCA "provides limited waivers of sovereign immunity, which are subject to statutory exceptions. If a statutory exception applies, the claim is

barred by sovereign immunity." *McGauley v. Washington Cty.*, 297 Neb. 134, 139, 897 N.W.2d 851, 855–56 (2017) (internal citations omitted). One such exception is the discretionary function exception, which provides that the PSTCA does not apply to "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(2) (Reissue 2012). In determining what type of activities this exception applies to, the Supreme Court has provided that:

> [t]he discretionary function exception extends only to basic policy decisions made in governmental activity at the operational level, and not to ministerial activities implementing such policy decisions. 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.

McGauley, at 139, 897 N.W.2d at 856.

The Supreme Court has developed a two-step analysis to determine whether the discretionary function exception applies. "First, the court must consider whether the action is a matter of choice for the acting employee. 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." *Id.* at 139–140, 897 N.W.2d at 856.

Sometimes, a third step is needed to determine if the exception applies if the political subdivision "[h]as a nondiscretionary duty to warn or take other protective measures that may prevent injury as the result of [a] dangerous condition or hazard." *Id.* at 140, 897 N.W.2d at 856.

The nondiscretionary duty exists when "(1) a governmental entity has actual or constructive notice of a dangerous condition or hazard caused by or under the control of the governmental entity and (2) the dangerous condition or hazard is not readily apparent to persons who are likely to be injured by the dangerous condition or hazard." *Id*.

In the present case, Sargent has omitted pertinent facts and mischaracterized the holding in *Williams v. City of Lincoln*, 27 Neb. App. 414, 415, 932 N.W.2d 490, 492 (2019). (*Appellants' Brief*, at 12–15). In *Williams,* the plaintiffs were riding their bicycles on a sidewalk in Lincoln, Nebraska when one of the plaintiffs collided with a tree branch that was hanging over the sidewalk, causing serious injuries. *Id*. at 416–17, 932 N.W.2d at 494. The plaintiffs filed suit, alleging the "[i]njuries were the result of the city's negligent failure to properly prune and maintain the tree." *Id*. at 417, 932 N.W.2d at 494. The city filed a motion for summary judgment, alleging that it was immune from suit due to sovereign immunity. *Id*. at 417, 932 N.W.2d at 495.

During the summary judgment proceedings, evidence was received that established that there were over 110,000 trees under the care of the city, and the city was required to maintain these trees. *Id.* Additionally, Lincoln's city charter provided that:

> [t]he city council shall have the power to provide for the removal or trimming of trees located along the streets or public ways, including the sidewalk space, and to trim the branches of trees overhanging them. In response to these requirements, the City's parks and recreation department created the community forestry division, which is responsible for the care and management of all public trees, including planting, tree inspections, maintenance, and removal. Due to limited resources and budget constraints, *the City established a plan for prioritizing maintenance of trees on a complaint basis, giving priority to any tree with identified defects that could*

> *result in damage to property or personal injury and then providing regular maintenance on the City's other trees*. There is no specific requirement as to how often a tree must be inspected or trimmed.

Id. (*emphasis added*). The trial court found that the tree at issue had never received a complaint and had not been trimmed by the city on or before the date of the accident. *Id*. at 418, 932 N.W.2d at 495. The trial court sustained the defendant's motion for summary judgment where it "[d]etermined that the discretionary function exception to the Political Subdivision Tort Claims act appli[ed] and that the city did not have nondiscretionary duty to warn or take measures to prevent injury. *Id*. at 419, 932 N.W.2d at 496.

On appeal, the plaintiffs argued, inter alia, that the district court erred in determining that the discretionary function exception applied and that the city did not have a nondiscretionary duty to warn the plaintiff of the dangerous condition. *Id*. Utilizing the two-step analysis, this Court found that the city's decision to maintain trees involved an element of discretion or choice. *Id*. at 427, 932 N.W.2d at 500–01. Specifically, this Court found that the city code gave the city the discretion on when and how to maintain the trees. *Id*.

Looking at the second step, the *Williams* Court found that the judgment was the kind the discretionary function exemption was designed to shield. *Id*. at 430, 932 N.W.2d at 502. This Court provided that "[t]he 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*. at 429, 932 N.W.2d at 502. Additionally, an uncontroverted affidavit provided by the city stated that "tree maintenance is conducted as diligently as possible using available but limited funds by completing maintenance first on trees that have been identified with defects that could result in damage to property or personal injury and then providing regular maintenance to other

trees." *Id*. at 429, 932 N.W.2d at 502. In other words, the city did have a system for maintaining its trees, but the tree at issue did not meet the criteria for being maintained. This Court held that these were the type of policy decisions the discretionary function exception was designed to protect, and upheld the trial court's finding that the exception applied. *Id*. at 430, 932 N.W.2d at 502.

Next, the *Williams* Court looked at whether the city had a nondiscretionary duty to warn the plaintiff of the low-hanging tree branch. "Such a duty exists when (1) a governmental entity has actual or constructive notice of a dangerous condition or hazard caused by or under the control of the governmental entity and (2) the dangerous condition or hazard is not readily apparent to persons who are likely to be injured by the dangerous condition or hazard." *Id*. (citing *McGauley v. Washington County*, 297 Neb. 134, 897 N.W.2d 851 (2017). This Court took into consideration that the city had never received a complaint or demand for the tree to be trimmed, nor had the city trimmed the trees prior to the accident occurring, therefore, the city did not have actual notice of a dangerous condition. *Id.* This Court held that the city did not have a nondiscretionary duty to warn and upheld the trial court's grant of summary judgment. *Id*. at 433–34, 932 N.W.2d at 504–05.

The case at hand is wholly distinguishable from *Williams*. First, the negligence alleged in *Williams* was due to the city's failure to act (trim trees), compared to Sargent's affirmative actions of overapplying an off-label herbicide. The undisputed evidence in *Williams* provided that the city did not know there was a hanging tree branch. Here, Mr. Kriss' actions specifically caused the harm to the plaintiffs. In *Williams*, the city established a policy on when to trim trees, but the tree at issue did not meet the criteria because no one requested that it be trimmed. In this case, Sargent did not have a policy that allowed the district to illegally over apply off-label herbicides, and if it

did have such a policy, it would be preempted by Nebraska law that prohibits off-label herbicide applications.

Looking at the first step of the two-step analysis to determine whether the discretionary function exception applies to this case, Sargent does not meet the requirements because Mr. Kriss did not have discretion to apply an unlawful mixture of herbicides. "First, the court must consider whether the action is a matter of choice for the acting employee." *McGauley*, at 139, 897 N.W.2d at 856.

Sargent acknowledges that the "discretionary function exception will not apply when a statute, regulation, or policy specifically prescribes a course of action for an employee to follow." (*Appellants' Brief*, at 14, *citing Williams v. City of Lincoln*, 27 Neb. App. 414 (2019)) (emphasis added). However, Sargent then claims, broadly, that "in the present case, there are no statutes, regulations, or policies which direct how 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." (*Appellants' Brief*, at 14).

Whether inadvertently or intentionally, Sargent ignores that the application of pesticides and herbicides is one of the most highly regulated aspects of agricultural operations today, triggering certain obligations under the Clean Water Act, the Environmental Protection Act, and the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA), to name a few. At the state level, Nebraska statutes contain a relatively thorough set of parameters at Neb. Rev. Stat. §§ 2-2622 to 2-2659 (the "Pesticide Act"), and the Nebraska Department of Agriculture has instituted regulations implementing the Pesticide Act at Neb. Admin. Code, Title 25, Chapter 2. While the various applicable Federal laws also prohibit the conduct in which Sargent engaged, this Court need look no further than the Nebraska Pesticide Act.

The Nebraska Legislature explained its intent in passing the Pesticide Act, which included the concerns that "[c]rops or other plants may also be injured by improper use of pesticides" and that "pesticide may drift and injure other crops or nontarget organisms with which it comes in contact." Neb. Rev. Stat. § 2-2623 (Reissue 2012). Further, by its very terms, the Pesticide Act "preempt[s] ordinances and resolutions by political subdivisions that prohibit or regulate any matter relating to the registration, labeling, distribution, sale, handling, use, application, or disposal of pesticides." Neb. Rev. Stat. § 2-2625 (Reissue 2012). These factors alone demonstrate that the harm suffered here is exactly the type of harm sought to be mitigated by the provisions of the Pesticide Act. Additionally, the express preemption clause defeats any argument that could otherwise be raised under the discretionary function exemption to tort liability, as the application of pesticides is clearly not a decision left to the discretion of a political subdivision or its employees.

No further analysis is necessary to defeat Sargent's claim of immunity based on the discretionary function exemption. However, it is instructive to note that Mr. Kriss has admittedly violated the very clear standards set forth by the Pesticide Act. License holders are prohibited from, among other things, 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(1) and (2) (Reissue 2012). "License holder" is defined as "any person licensed under the Pesticide Act." Neb. Rev. Stat. § 2-2624(25) (Reissue 2012). In this case, Mr. Kriss holds a license under the Pesticide Act as a Non-Commercial Applicator. (E3, 1–3, 7, 8). As such, he is subject to the standards of the Pesticide Act, which, as set forth above, clearly prohibit him from using pesticides in violation of their labels and from operating in a "faulty, careless, or negligent

manner." Moreover, it is troubling that Mr. Kriss, despite seeking and obtaining a license under the Pesticide Act, has represented to this Court—through counsel—that there are no statutes or regulations applicable to the use of pesticides in this state.

In sum, neither Sargent Irrigation nor Mr. Kriss have discretion as to whether the law will be followed. The Pesticide Act exists, among other reasons, to protect against the very harms suffered by the Clarks—damage to crops caused by negligent application of pesticides. Its provisions apply directly and plainly to the defendants in this action. Sargent's claim of immunity under the discretionary function exception is unfounded and should be rejected outright by this Court.

In the event the Court finds that there is discretion in overapplying an off-label herbicide (despite the argument above), this type of discretion does not meet the requirements of the second prong because it is not the type of discretion that the legislature intended to protect. Nebraska law is clear that "the discretionary function exemption extends only to basic policy decisions made in governmental activity, and not to ministerial activities implementing such policy decisions." *Norman v. Ogallala Pub. Sch. Dist.*, 259 Neb. 184, 192, 609 N.W.2d 338, 345 (2000). The Nebraska Supreme Court has provided some examples of discretionary functions, which include "[t]he initiation of programs and activities, establishment of plans and schedules, and judgmental decisions within a broad regulatory framework lacking specific standards. *Id*. at 192, 609 N.W.2d at 346. In other words, "the political subdivision remains liable for the *negligence of its employees* at the operational level, where there is no room for policy judgment." *Id.* at 259 Neb. at 192, 609 N.W.2d at 346 (emphasis added).

In *Williams*, the city had a policy that gave discretion to the city about how to trim trees. The city utilized its policy discretion when it didn't trim the tree at issue, and the plaintiffs

questioned the city's policy judgment. In the case at bar, Sargent's policy decisions are not being questioned. That is, the plaintiffs are not challenging the decision of Sargent to spray trees along the irrigation ditch. Instead, the issue here is Mr. Kriss' decision to illegally overapply an off-label herbicide. Mr. Kriss' actions fall squarely within "the operational level, where there is no room for policy judgment." *Id*. This was not a high-level policy decision made by Sargent, but rather an individual employee's decision to break the law. For these reasons, Sargent does not meet the requirements for the second prong of the test.

Finally, even if the Court finds that Sargent meets both prongs of the discretionary function test, Sargent had a nondiscretionary duty to warn or take other protective measures to prevent harm to neighboring landowners while spraying herbicides. When looking at the two-step analysis to determine if Sargent had a nondiscretionary duty, Sargent falls within the two factors. First, Sargent had notice of the dangerous condition—over applying an off-label herbicide—and the herbicide was under the sole control of Sargent Irrigation. Second, Sargent Irrigation over applying an off-label herbicide was not readily apparent to the Clarks. For these reasons, Sargent Irrigation had a nondiscretionary duty to warn or take other protective measures.

IV. THE CLARKS DO NOT CLAIM THERE IS A DUTY UNDER THE PESTICIDE ACT

Sargent argues that the District Court erred in finding that the Pesticide Act gives rise to a private right of action. This argument is flawed because the Clarks did not bring their claim under a theory or duty from the Pesticide Act. Sargent erroneously compares the case at hand with *Stonacek v. City of Lincoln*, 279 Neb. 869, 782 N.W.2d 900 (2010). In *Stonacek*, the plaintiffs brought numerous claims against the City of Lincoln relating to the city providing negligent information to homeowners regarding the flood plain. *Id*. The plaintiffs' complaint alleged that

the city was negligent, inter alia, for violating Nebraska Revised Statute § 31-1019 and Nebraska Department of Natural Resources regulations which provide the minimum standards for flood plain management programs. *Id.* at 874, 878, 782 N.W.2d at 906, 908. After a trial on liability, the district court ruled in favor of the plaintiffs, and found that § 31-1001 and the Department's regulations created a duty that the city owed to the plaintiffs, which created a basis for civil liability." *Id.* at 874–75, 782 N.W.2d at 906.

On appeal, the city argued, among other things, that the district court erred when it found that the Department's regulations and Nebraska statutes created a duty. *Id*. at 878, 782 N.W.2d at 908. The Supreme Court held that "because these authorities do not expressly or by implication indicate that they create a private tort liability, the district court erred in concluding that [plaintiffs] had a private right of action in which the city owed [plaintiffs] a duty under § 31-1019 and 258 Neb. Admin. Code, ch. 1." *Id.* at 881–82, 782 N.W.2d at 910. The Court held that the district court erred by failing to dismiss these two causes of action. *Id.* at 882, 782 N.W.2d at 910.

The facts in *Stonacek* are vastly different from the case at hand. Here, the Clarks have not made a claim under the Pesticide Act and whether a private right of action exists is not before the Court. To that end, the Complaint does not mention that there is a duty owed by Sargent under the Pesticide Act, nor is the Pesticide Act mentioned at all. (T1–10) (E2, 1–10, 7, 8). Furthermore, the District Court did not find that the Clarks had a private right of action under the Pesticide Act. (T35–37). Instead, the Clarks raised the Pesticide Act as a defense to Sargent's frivolous and false argument that the discretionary function exemption applies because "[t]here 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." (*Appellants' Brief*, at 14). As provided above, the

"discretionary function exception will not apply when a statute, regulation, or policy specifically prescribes a course of action for an employee to follow." *Williams,* 27 Neb. App. at 424, 932 N.W.2d at 499 (emphasis added). The Clarks did not bring their case under the Pesticide Act, but rather use the Pesticide Act to rebut the argument that Mr. Kriss had discretion when spraying the trees along the Sargent Canal.

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CONCLUSION

For all of the foregoing reasons, the Court should affirm the District Court's order denying summary judgment.

Dated this 25th day of August, 2021.

Respectfully submitted,

/s/ Nicholas J. Ridgeway

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Certificate of Service

I hereby certify that on Wednesday, August 25, 2021 I provided a true and correct copy of this *Brief of Appellees Donald and Kimberly* to the following:

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