

CASE NO. A-21-288

IN THE NEBRASKA COURT OF APPEALS

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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

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

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REPLY BRIEF OF APPELLANT

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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

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Reply Brief

Jurisdictional Statement and Statement Of The Case

Appellants, Sargent Irrigation District and Doug Kriss, reiterate the Jurisdictional Statement and Statement of the Case stated previously in the Brief of Appellant.

Propositions of Law

1. The use of specific language asserting defenses is not required, nor is it necessary to state a defense in any particular form, as long as the facts supporting the assertion are stated and sufficient facts are pled to constitute the raising of the alleged defense. *Woodle v.*

Commonwealth Land Title Ins. Co., 287 Neb. 917, 923 (2014).

2. Fair notice that a claim exists, not the authorizing statute or legal theory, is all that is required at the pleading stage. *Tryon v. City of N. Platte*, 295 Neb. 706, 711 (2017).

3. Even when a governmental act is subject to sovereign immunity, liability may arise from a planning-level decision when that decision creates a hidden trap. *Payne v. Broward Cty.*, 461 So. 2d 63, 65 (Fla. 1984).

Statement of Facts

Sargent Irrigation District and Doug Kriss reiterate the Statement of Facts stated previously in the Brief of Appellant.

Summary of the Argument

Based on the pleadings, evidence, and arguments, the Clarks had fair notice of Sargent Irrigation District and Doug Kriss's argument that the Clarks failed to comply with Neb. Rev. Stat. § 13-906, and the Clarks did fail to comply with § 13-906.

The Clarks argue that a third step in making a determination under the discretionary duty or function exception originating in *Lemke v. Metro. Utilities Dist.*, 243 Neb. 633 (1993) and its

progeny applies in this case. No third step analysis is necessary since Sargent Irrigation District and Doug Kriss are not alleged to have created a hidden trap type of dangerous and concealed condition. 243 Neb. 633, 646 (1993).

Finally, the discretionary duty or function exception applies. A chief reason why the discretionary duty or function applies is because the Pesticides Act does not create a private right of action, and the Pesticides Act is irrelevant to this case.

Argument

A. The Clarks Had Fair Notice of the Neb. Rev. Stat. § 13-906 Defense, and Sargent Irrigation District Did Not Make Final Disposition of the Clarks' Claim.

The Clarks argue that their noncompliance with Neb. Rev. Stat. § 13-906 is not reviewable, because the Clarks were not given fair notice of the § 13-906 defense. The standard applicable to this issue is fair notice. “[W]hile the Nebraska Rules of Pleading in Civil Actions, like the federal rules, have a liberal pleading requirement for both causes of action and affirmative defenses, the touchstone is whether fair notice was provided.” *Weeder v. Cent. Cmty. Coll.*, 269 Neb. 114, 125–26 (2005). “The use of specific language asserting defenses is not required, nor is it necessary to state a defense in any particular form, **as long as the facts supporting the assertion are stated and sufficient facts are pled** to constitute the raising of the alleged defense.” *Woodle v. Commonwealth Land Title Ins. Co.*, 287 Neb. 917, 923 (2014) (emphasis added). “[F]air notice that a claim exists, not the authorizing statute or legal theory, is all that is required...at the pleading stage.” *Tryon v. City of N. Platte*, 295 Neb. 706, 711 (2017). The Clarks had fair notice of all facts relevant to the § 13-906 defense in advance of the summary judgment hearing. The chief piece of evidence relevant to the § 13-906, the board minutes of Sargent Irrigation District’s Board of Directors July 7, 2020 meeting was authored by

Don Clark as Secretary-Treasurer of Sargent Irrigation District and attached to a pleading filed two months before the summary judgment hearing took place. (T14-16; T25; E1, 3: 7, Appendix). The Clarks had fair notice of the § 13-906 defense.

Due to the similarities of the issues, this question has to be compared to *Weeder v. Cent. Cmty. Coll.*, 269 Neb. 114, 117 (2005). In *Weeder*, a political subdivision defending a PSTCA claim filed a 12(b) motion to dismiss citing three different reasons the plaintiff failed to comply with the PSTCA's procedural requirements: (1) that no claim was filed against the employee defendant, (2) that the plaintiff failed to withdraw his claim before commencing suit, and (3) that the PSTCA's statute of limitations barred the plaintiff's claim. *Id.* 117-18. There was no record made during the hearing on the political subdivision's motion to dismiss. *Id.* 126. The district court determined that the plaintiff's claims should be dismissed because the plaintiff withdrew his claim with the political subdivision prior to the expiration of six months in violation of § 13-906. *Id.* 117-18. The Supreme Court determined that the political subdivision's motion to dismiss did not give the plaintiff fair notice of its defense based on the plaintiff's premature withdrawal of his claim. *Id.* 126.

The present case is distinguishable from *Weeder*, because the Clarks had notice of all of the facts relevant to the § 13-906 defense in advance of the summary judgment hearing. When determining whether fair notice was accorded under our pleading rules, the criterion is notice of the relevant facts sustaining the defense; not specific language, statutes, or legal theories. *Tryon v. City of N. Platte*, 295 Neb. 706, 711 (2017); *Woodle v. Commonwealth Land Title Ins. Co.*, 287 Neb. 917, 923 (2014). The records shows that the Clarks had notice of all the facts relevant to the § 13-906 defense.

The Clarks' first notice of the § 13-906 defense came from Sargent Irrigation District and Doug Kriss's motion to dismiss. (T11). Paragraph 1 of the motion to dismiss alleges that the "Court lacks subject matter jurisdiction over this action and Plaintiffs fail to state a claim due to Plaintiffs' failure to comply with the requirements of the Political Subdivisions Tort Claims Act." (T11). The language used in Sargent Irrigation District and Doug Kriss's motion to dismiss is different in kind than the language of the motion to dismiss in *Weeder* given that the reason given in the motion to dismiss in this case actually does include Sargent Irrigation District and Doug Kriss's reason why the Clarks' claims fail for compliance with the PSTCA. In *Weeder*, the defendant asserted specific statutory defenses based on non-compliance with the PSTCA, but none of the particular allegations were relied on in the district court's order on the motion to dismiss. In comparison, the present motion to dismiss was overly broad and *Weeder*'s motion to dismiss was too narrow. Taken on its own, Sargent Irrigation District and Doug Kriss's motion to dismiss may not have met *Weeder*'s fair notice standard, but there is more to the record than Sargent Irrigation District and Doug Kriss's motion to dismiss.

Second, the Clarks were given notice of Sargent Irrigation District and Doug Kriss's intention to convert their motion to dismiss to a motion for summary judgment. (T14). The board minutes of Sargent Irrigation District's Board of Directors July 7, 2020 meeting authored by Don Clark were attached to the motion to convert as an exhibit. (T16). Obviously, Don Clark had actual notice of his knowledge of Sargent Irrigation District's Board of Directors July 7, 2020 meeting, and as of December 1, 2020, the Clarks had notice by court paper that Sargent Irrigation District and Doug Kriss intended to use the facts contained in the board minutes in their defense. (T14). All facts relevant and necessary to Sargent Irrigation District and Doug

Kriss's § 13-906 defense are contained in the Clarks' Complaint and the board minutes. (E1, 3: 7, Appendix; E2, 1-5:7-8, Appendix).

Also on December 1, 2020, Sargent Irrigation District and Doug Kriss served their Index of Evidence in Support of their motion for summary judgment and an Annotated Statement of Undisputed Facts (mistakenly designated as an Annotated Statement of Material Facts in Support of Motion for Summary Judgment) in support of their motion for summary judgment pursuant to Neb. Ct. R. § 6-1526(A). (T18-23). These filings pursuant to Neb. Ct. R. § 6-1526(A) provide notice of all of relevant and necessary facts Sargent Irrigation District and Doug Kriss's § 13-906 defense. Neb. Ct. R. § 6-1526 was adopted, in part, "to focus the parties and the court on the specific factual contentions." *Bohling v. Bohling*, 304 Neb. 968, 977 (2020). Sargent Irrigation District and Doug Kriss complied with Neb. Ct. R. § 6-1526(A) and provided the Clarks with the specific factual contentions relevant to Sargent Irrigation District and Doug Kriss's motion for summary judgment. By this point in the analysis, *Weeder* is clearly distinguished.

Finally, the record of the summary judgment hearing shows that the issue of § 13-906 was raised in the summary judgment hearing. At the hearing on the motion for summary judgment, Sargent Irrigation District and Doug Kriss's counsel argued:

Briefly, factually the allegations are that there was basically an overspray of herbicide committed by the defendant on July 3rd, 2019 and then in my affidavit you see that on this July 7th, 2020 board meeting the -- it's -- one strange thing is that Donald Clark, the plaintiff, is a board member of the defendant irrigation district, and at that meeting they took no action on Mr. Clark's claim at that time. Previous he filed a written claim under the Tort Claims Act. And, so

he's a board member and in the affidavit you see that he signed off on the minutes where they took no action.

And, then this action was filed on September 24 1st, and primarily, Your Honor, the legal issue is whether this claim falls within the discretionary function exemptions of the Political Subdivision Tort Claims Act.

The Clarks did not object, move to continue the summary judgment hearing, or raise an allegation of surprise. *In re Conservatorship of Abbott*, 295 Neb. 510, 527–28 (2017) (“And, notably, their counsel alleged during opening statements that Mark violated § 30-3868 and Mark's counsel did not object to this as beyond the scope of the pleadings. Therefore, the issue was properly before the county court.”).

Weeder is distinguishable primarily because the Clarks had full advance notice of all of the facts relevant to the § 13-906 defense. In *Weeder*, the plaintiff had no notice of the facts relevant to the defense relied upon by the district court. Since the Clarks had fair notice of the § 13-906 defense, the merits of the defense are properly before this Court.

Sargent Irrigation District's Board of Directors did not make final disposition of the Clarks' written claim before the Clarks commenced their action. Sargent Irrigation District's Board of Directors moved to “at this time not settle with Don Clark on the claim.” (E1, 3: 7, Appendix). Sargent Irrigation District's Board of Directors did not take final action on the Clarks' claim one way or another.

The Clarks' one-man parade of horribles argument about the risk of a political subdivision reversing an explicit and clear final disposition of a claim is no reason to interpret § 13-906 to allow discussion of a claim without resolution to count as a final disposition. If a political subdivision made a clear and explicit final disposition of a claim and later changed

course to the detriment of the claimant, the claimant could argue that equitable estoppel protects the claimant's rights. *Woodard v. City of Lincoln*, 256 Neb. 61, 67 (1999). In summary, Sargent Irrigation District and Doug Kriss's defense based on § 13-906 was properly before the District Court, and the Clarks' claims fail because they prematurely filed their action.

B. The Nondiscretionary Duty Test to The Discretionary Duty or Function Exception Does Not Apply.

In argument, the Clarks cite *McGauley v. Washington Cty.*, 297 Neb. 134, 140 (2017) referring to a third step of analysis for the discretionary duty or function exception to the PSTCA.

To determine whether the discretionary function exception applies, we have set out a two-step analysis. 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.

Here, a third step is also involved. The personal representative of McGauley's estate contends that the County had a nondiscretionary duty to provide a safe work environment. We have held that the 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.’ ” 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. 139-40. This third step, or nondiscretionary duty test, is not applicable to this case, to the extent it is still good law. The nondiscretionary duty test is only ever applicable in situations where a governmental body created a “hidden trap.” *Lemke v. Metro. Utilities Dist.*, 243 Neb. 633, 646 (1993). The Clarks’ allegations do not describe any kind of hidden trap.

The nondiscretionary duty test came to Nebraska by way of Florida in *Lemke v. Metro. Utilities Dist.*, 243 Neb. 633 (1993). In *Lemke*, the Supreme Court adopted a nondiscretionary duty exception to the discretionary duty or function exception from the Supreme Court of Florida case, *City of St. Petersburg v. Collom*, 419 So. 2d 1082 (Fla. 1982). Since *Lemke*, the nondiscretionary duty test has rarely been found applicable, but it has been referenced in a premises liability case and a case involving warning or protecting against hazards caused by underground gas lines. *Mercer v. N. Cent. Serv., Inc.*, 308 Neb. 224, 228 (2021); *Parker v. Lancaster Cty. Sch. Dist. No. 001*, 256 Neb. 406, 418 (1999). These types of cases entail elements of the “hidden trap” described in *Lemke*.

A later Florida case, *Payne v. Broward Cty.*, 461 So. 2d 63 (Fla. 1984), refined the nondiscretionary duty test established in *Collom* and explicitly set forth the “hidden trap” requirement.

However, even when a governmental act is subject to sovereign immunity, liability may arise from a planning-level decision when that decision creates a hidden trap. “[W]hen a governmental entity creates a *known* dangerous condition, which is not readily apparent to persons who could be injured by the condition, a duty at the operational-level arises to warn the public of, or protect the public

from, the known danger.” *City of St. Petersburg v. Collom*, 419 So.2d 1082 (Fla.1982). There is no question that the county created and was on notice of the conditions at the intersection and the surrounding area. The only question, then, is whether the conditions created a known danger not readily apparent to potential victims or constituted a hidden trap for pedestrians.

Id. 65. Based on the “hidden trap” requirement, the nondiscretionary duty test is not applicable. The Clarks allege that Sargent Irrigation District and Doug Kriss are responsible for damage allegedly caused by herbicide drift. The present case does not involve any type of “hidden trap.” To the extent that the nondiscretionary duty third step test is applicable, there is no indication that warning of herbicide spray or taking some other protective measure would prevent any alleged damage, and the herbicide spray was equally as apparent to the Clarks as to Sargent Irrigation District and Doug Kriss. The nondiscretionary duty third step test is not applicable and does not overcome the discretionary duty or function exception if it is applied.

C. The Discretionary Duty or Function Exception Bars the Clarks’ Claims.

As applied, the nondiscretionary duty or function exception bars the Clarks’ claims. A chief reason why is because the Pesticides Act does not create a private right of action enforceable as a duty in a private tort action. That is not to say that Sargent Irrigation District or Doug Kriss are above the law or do not need to follow the Pesticides Act; it just means that the Clarks are not the proper parties to enforce the Pesticides Act. The Clarks’ claims are barred chiefly because “there is no duty owed under [the Pesticides Act]” like the statutory and regulatory duties relied upon in *Stonacek v. City of Lincoln*, 279 Neb. 869, 882 (2010). Since there are no applicable statutes, regulations, or policies which precisely mandate how or when Sargent Irrigation District must use herbicides, whether herbicides are used, which herbicides

are used, or how herbicides are supervised, Sargent Irrigation District and Doug Kriss meet the first step of the applicable two-step test for the discretionary function or duty exception.

Williams v. City of Lincoln, 27 Neb. App. 414, 424 (2019), *review denied* (Sept. 4, 2019). Once the first step is met, the second step is presumed to be satisfied. *Id.* 429. As in *Williams*, Sargent Irrigation District's decisions for maintaining its vegetation are grounded in considerations based on financial resources and those types of decisions meet the second step of the discretionary function or duty exception. *Id.*

The Clarks attempt to distinguish this case from *Williams*, but any distinctions are without a difference. For example, the Clarks discuss the Lincoln city code and policies which governed vegetation maintenance, but regulations and policies only serve to reduce discretion, not grant it. As an irrigation district established by statute, Sargent Irrigation District has general corporate authority to maintain its property within its own discretion. Neb. Rev. Stat. §§ 46-130; 46-153. Since the Clarks did not identify any statutes, regulations, or policies which reduce Sargent Irrigation District and Doug Kriss's discretion, aside from the inapplicable Pesticides Act, *Williams* is a very comparable case. The Clarks claims are barred by the discretionary function or duty exception to the PSTCA and sovereign immunity.

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

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Certificate of Service

I hereby certify that on Wednesday, September 08, 2021 I provided a true and correct copy of this *Reply Brief Parties 3-5* to the following:

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

Donald Clark represented by Nicholas Ryan Norton (25131) service method: Electronic Service to **nnorton@jacobsenorr.com**

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

Kimberly Clark represented by Nicholas Ryan Norton (25131) service method: Electronic Service to **nnorton@jacobsenorr.com**

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