[Cite as *Trucco Constr. Co., Inc. v. Fremont,* 2013-Ohio-415.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
SANDUSKY COUNTY

Trucco Construction Co., Inc.

Appellee

v.

City of Fremont

Defendant

[ARCADIS U.S., Inc., Timothy A. Harmsen, Peter S. Zimmerman, and William A. Barhorst—Appellants]

Court of Appeals No. S-12-007

Trial Court No. 10 CV 1122

DECISION AND JUDGMENT

Decided: February 8, 2013

* * * * *

Peter D. Welin, Jason R. Harley, Andrew R. Mayle, and Ronald J. Mayle, for appellee.

Allen L. Rutz, Shantae D. Clayborn, and Mitchell A. Tobias, for appellants.

* * * * *

HANDWORK, J.

{¶ 1} This appeal is from the February 27, 2012 judgment of the Sandusky County Court of Common Pleas denying a Civ.R. 12(B)(6) motion of appellants, ARCADIS U.S., Inc. (hereinafter "ARCADIS"), Timothy A. Harmsen, Peter S. Zimmerman, and

William A. Barhorst, to dismiss the complaint of appellee, Trucco Construction Company, Inc. (hereinafter "Trucco"), on the grounds that appellants have statutory immunity against the tort claims asserted by Trucco. Upon consideration of the assignments of error, we affirm the decision of the lower court. Appellants assert the following single assignment of error on appeal:

> THE TRIAL COURT ERRED IN CONCLUDING THAT THE ARDADIS APELLANTS WERE NOT IMMUNE FROM APPELLEE'S TORT CLAIMS PURSUANT TO R.C. 2744.03(A)(6).

{¶ 2} The following facts are alleged in Trucco's complaint. In 2009, the city of Fremont and Trucco, an Ohio corporation engaged in the construction business, entered into a contract for the phase one construction of a 727 million gallon raw water reservoir (hereinafter the "project"). During construction of the reservoir, issues arose regarding the availability of a sufficient amount of clay soil on the site needed to make the reservoir.

{¶ 3} Trucco alleges the design and specifications for the project did not include an imported or man-made clay liner or a requirement that the existing soils would need to be mixed with a soil sealer. Furthermore, Trucco claimed that the city of Fremont and appellants concealed from Trucco the fact that a "Raw Water Supply Study" indicated that one of these options was necessary and soil testing by Toltest, Inc. resulted in warnings of a potential reservoir leakage and the possible need for a synthetic liner to control leakage. Furthermore, Trucco was not informed that other bidders for the project

had questioned the amount of waste material projected to be removed from the site. Instead, Trucco alleges it began construction under the impression that this was a "balanced site" and there would be sufficient clay on the site to build the reservoir with minimal waste material to be removed from the site. When the issue of the lack of clay on the site became apparent, appellants modified the construction design and specifications and Trucco began to export what was calculated by appellants at that time to be 88,601-120,000 cubic yards of waste material at a previously-contracted price of $10 per cubic yard (for a total estimated cost of $886,010 to $1.2 million).

{¶ 4} Trucco alleged that appellant Harmsen had estimated that more than $5 million in charges would result from change orders. Regular meetings were being held between Trucco and the city of Fremont and appellants to discuss the extra costs incurred by Trucco. The onsite representative of appellants, Jerry O'Kenka, would direct Trucco to perform work in a certain manner to minimize the need to remove waste material. Trucco continued to take exclusive directions from appellants and O'Kenka. Trucco communicated to the city of Fremont through appellants and appellants responded directly to Trucco as the city relied solely upon appellants to make all decisions related to the day-to-day construction of the project.

{¶ 5} During the course of the project and when Trucco sought additional compensation for additional expenses incurred due to appellants' changes in the construction design, appellants had the of city of Fremont review its draft responses to Trucco's requests for additional compensation before it responded to Trucco. Trucco

alleges the contract required appellants act as a neutral party to resolve these issues. Trucco asserts that appellants ignored the contract either to benefit its own interests or mask its own deficiencies and avoid responsibility. Trucco also asserted that appellants' actions were done in bad faith and with malice.

{¶ 6} In January 2010, the city of Fremont terminated the project contract for convenience pursuant to the general conditions of the contract. Thereafter, Trucco also terminated the contract for convenience and submitted its claim to the city of Fremont as required by the project contract. Both the city of Fremont and Trucco brought suit against the other. Trucco asserted that the city of Fremont refused to pay Trucco for expenses under the contract totaling $247,074.52.

{¶ 7} In 2011, Trucco amended its complaint a second time to add appellants as additional defendants. ARCADIS is a construction business registered to do business in Ohio providing consultancy, design, engineering, and management services in the fields of infrastructure, water, environment, and buildings. Harmsen, Zimmerman, and Barhorst, all ARCADIS employees, served as design engineers on the project. Trucco asserted claims against appellants; of professional negligence intentional misrepresentations (that the project was buildable, that there was enough clay on site to build the project, and that this was a balanced site) which were made with malice or fraudulently; negligent misrepresentations; and tortious interference with contract by inducing the city of Fremont to breach the project contract. Trucco sought damages of $4,826,277.72.

{¶ 8} Appellants filed a Civ.R. 12(B)(6) motion to dismiss the complaint on the ground that Trucco had failed to state a claim upon which relief could be granted. Appellants made several arguments, including an argument that they are immune from tort liability under R.C. 2744.03(A)(6) because they were an employee/agent of the city of Fremont when they acted pursuant to the engineering contract with the city of Fremont. Trucco argued that the statute is not applicable because appellants are independent contractors, ARDADIS is not a natural person, and whether or not appellants were employees of the political subdivision is a factual issue to be determined by the trier of fact that cannot be resolved in a motion to dismiss.

{¶ 9} The trial court held a hearing on the motion on February 22, 2012. The trial court denied appellants' motion to dismiss without explanation on February 27, 2012. Appellants sought an appeal from this judgment on March 13, 2012.

{¶ 10} In their sole assignment of error, appellants argue that the trial court erred by failing to find that they should be included under the city of Fremont's sovereign immunity protection as its agents and were employees acting within the scope of their employment with the city. Furthermore, appellants argue that none of the exceptions to statutory immunity apply.

{¶ 11} An appellate court reviews a trial court's ruling on a Civ.R. 12(B)(6) motion under a de novo standard of review. *Perrysburg Twp. v. Rossford*, 103 Ohio St.3d 79, 2004-Ohio-4362, 814 N.E.2d 44, ¶ 5. A court may grant a motion to dismiss a complaint for failure to state a claim upon which relief may be granted, pursuant to

Civ.R. 12(B)(6), only when the court finds beyond doubt from the face of the complaint that the plaintiff cannot prove a set of facts that would entitle him or her to the relief sought. *Doe v. Archdiocese of Cincinnati*, 109 Ohio St.3d 491, 2006-Ohio-2625, 849 N.E.2d 268, ¶ 11, citing *O'Brien v. Univ. Community Tenants Union, Inc*., 42 Ohio St.2d 242, 327 N.E.2d 753 (1975), syllabus.

{¶ 12} In the case before us, appellants argue that Trucco cannot assert tort claims against appellants because the General Assembly has precluded claims against them under the doctrine of statutory immunity. R.C. 2744.02(A)(1) generally provides that "a political subdivision is not liable in damages in a civil action for injury, death, or loss to person or property allegedly caused by any act or omission of the political subdivision or an employee of the political subdivision in connection with a governmental or proprietary function." Statutory immunity is also extended to the employees of a political subdivision with three exceptions. R.C. 2744.03(A). The only exceptions that would be applicable in this case would be R.C. 2744.03(A)(6)(a) and (b), which provide that an employee would not be protected by statutory immunity if they acted "manifestly outside the scope of the employee's employment or official responsibilities" or "with malicious purpose, in bad faith, or in a wanton or reckless manner."

{¶ 13} An employee of a political subdivision is defined in R.C. 2744.01(B) as follows:

> "Employee" means an officer, agent, employee, or servant, whether or not compensated or full-time or part-time, who is authorized to act and is

> acting within the scope of the officer's, agent's, employee's, or servant's employment for a political subdivision. "Employee" does not include an independent contractor * * *.

{¶ 14} Appellants first argue that the issue of whether they fall within the definition of "employee" under this statute has already been admitted by Trucco because it acknowledged throughout its complaint that appellants were authorized to act as agents for the city and Trucco looked to appellants for any information about the project.

{¶ 15} We disagree. While Trucco may have imprecisely used the term "agent" in its complaint, it is clear that when appellants asserted a claim of statutory immunity, Trucco argued in its response to the motion to dismiss that appellants are independent contractors, not employees. Therefore, we do not find that Trucco waived any right to challenge appellants' claim of immunity.

{¶ 16} Appellants argue they are "employees" of the city of Fremont because they acted as agents for the city of Fremont to deal with Trucco and that appellants always acted within the scope of their employment. Appellants contend that the substance of Trucco's tort allegations closely align with appellants' duties defined in the construction and engineering contracts.

{¶ 17} Trucco first argues that ARCADIS cannot be an "employee" within the definition of employee under R.C. 2744.01(B) because it is a corporate entity. Appellants rely on *Wilson v. Stark County Dept. of Human Servs.*, 70 Ohio St.3d 450, 452-453, 639 N.E.2d 105 (1994). In the *Wilson* case, the Ohio Supreme Court held a

county department of human services could not be classified as an "employee" under R.C. 2744.01(B) because that section clearly limits the term "employee" to individual natural persons by the use of the phrase "within the scope of his employment." *Id*. After this case was decided however, the statute was amended to replace this phrase with "within the scope of the officer's, agent's, employee's, or servant's employment." Therefore, the holding in the *Wilson* case has been abrogated.

{¶ 18} Appellee also argues that appellants do not fall under the definition of "employee" because they are independent contractors of the city of Fremont. R.C. 2744.01(B) specifically excludes independent contractors from the definition of employee. Since the term "independent contractor" is not defined in Chapter 2744, we look to common law regarding both employment and agency relationships for the test to distinguish an employee/agent from an independent contractor.

{¶ 19} Numerous courts have considered the extent of the term "employee" under R.C. 2744.01(B) and when a party is an employee versus an independent contractor. An important element in these cases is the extent of the relationship between the political subdivision and the party. *See The Miller Plumbing & Heating Co. v. Village of Chagrin Falls*, 8th Dist. No. 73592, 1998 WL 855622 (Dec. 10, 1998) (when an engineering/ architectural consultant company prepared plans and specifications for a sewer project through its employee who was also the village engineer, the company was merely an instrumentality through which the village carried out its governmental function and therefore a claim of damages caused by the sewer system was really a claim against the

village and not the company). There have also been Ohio attorney general opinions concluding that a corporation was an "employee" of a political subdivision because of the nature of their relationship. *See* 1987 Ohio Atty.Gen.Ops. No. 87-102 (a contract between the political subdivision and nonprofit organization that provides services to the political subdivision creates an employment or agency relationship and therefore the political subdivision must provide defense and indemnification of the employee pursuant to R.C. 2744.07). *See also* 2003 Ohio Atty.Gen.Ops. No. 2-304 (when a county designates a common improvement incorporation ("CIC") as its agent pursuant to R.C. 1724.10, the county could incur liability because the CIC and its governing board are "employees" (as agents) of the political subdivision when they act within the scope of their employment pursuant to R.C. 2744.01(B)).

{¶ 20} Courts also consider how a contract between the political subdivision and a party defined their relationship. *Zacharias v. Ampco Systems Parking*, 9th Dist. No. 18672, 1998 WL 312540 *3 (June 10, 1998) (parking management company was an "employee/agent" of the city pursuant to its contract with the city for managing a city parking garage) and *Kiep v. City of Hamilton*, 12th Dist. No. CA96-08-158, 1997 WL 264236, *8 (May 19, 1997) (the issue of whether or not a tree contractor was immune from suit by a homeowner was not fully litigated because it was unclear under its contract with the city whether the tree contractor was an agent of the city or an independent contractor).

{¶ 21} In the case before us, the contract between the city of Fremont and Trucco, provides that:

> 2.01 The Project has been designed by ARCADIS U.S., Inc., who is hereinafter called ENGINEER and who is to act as OWNER'S representative, assume all duties and responsibilities and have the rights and authority assigned to ENGINEER in the Contract Documents in connection with completion of the Work in accordance with the Contract Documents.

The "General Conditions" of this contract provide that:

> 9.01 OWNER'S representative
>
> A ENGINEER will be OWNER's representative during the construction period.
>
> * * *.
>
> 9.09 Decisions on Requirements of Contract Documents and Acceptability of Work
>
> A. ENGINEER will be the initial interpreter of the requirements of the Contract Documents and judge of the acceptability of the Work thereunder. * * *.
>
> B. When functioning as interpreter and judge under this paragraph 9.09, ENGINEER will not show partiality to OWNER or CONTRACTOR

and will not be liable in connection with any interpretation or decision rendered in good faith in such capacity. * * *.

* * *.

9.10 Limitations on ENGINEER's Authority and Responsibilities

A. Neither ENGINEER's authority or responsibilities under this Article 9 or under any other provision of the Contract Documents nor any decision made by Engineer in good faith either to exercise or not exercise such authority or responsibility or the undertaking, exercise, or performance of any authority or responsibility by ENGINEER shall create, impose, or give rise to any duty in contract, tort, or otherwise owed by ENGINEER to CONTRACTOR, any Subcontractor, any Supplier, any other individual or entity, or to any surety for or employee or agent of any of them.

* * *.

{¶ 22} Secondly, a party is classified as an independent contractor, rather than an employee or agent, based upon the ability of the political subdivision to control the work to be performed. When a party agrees to produce some end product or result without the other political subdivision having any right to control the method of accomplishing the specific work/services to be performed, that party is deemed to be an independent contractor. *See Councell v. Douglas*, 163 Ohio St. 292, 126 N.E.2d 597 (1955), paragraph one of the syllabus; *Bobik v. Industrial Comn.*, 146 Ohio St. 187, 192, 64

N.E.2d 829 (1946); *Gillum v. Indus. Comm.*, 141 Ohio St. 373, 48 N.E.2d 234 (1943), paragraph two of the syllabus. *See also Weldon v. Prairie Twp.*, 10th Dist. No. 10AP-311, 2010-Ohio-5562, ¶ 13 (township not liable for damages caused by contractor's repair of sewer line because the township did not control the contractor's repair).

{¶ 23} Since the determination of whether a party is an employee/agent or an independent contract generally involves issues of fact for the trier of fact to determine, the specific facts of a particular case could alter application of the general rule. *Bostic v. Connor*, 37 Ohio St.3d 144, 524 N.E.2d 881 (1988), paragraph one of the syllabus. However, when there is no conflicting evidence, the issue becomes a question of law. *Schickling v. Post Publishing Co.*, 115 Ohio St. 589, 155 N.E. 143 (1927) syllabus.

{¶ 24} Upon a review of the evidence in this case, we find that there was no conflicting evidence presented. The city of Fremont entered into a standard engineering contract with ACRADIS for the creation of plans and specifications to build a reservoir, supervision of the construction phase of the project, and a final inspection of the construction. Even though the contracts in this case provide that ARCADIS would act as the city of Fremont's representative during the construction phase, those provisions do not give rise to an agency or employment relationship. These provisions simply provide that the engineers would be the city's liaison with Trucco because the city of Fremont relied upon the professional skills of ARCADIS to ensure that the plans and specifications would be properly accomplished. For this reason, ARCADIS was named as a neutral party to interpret the requirements of the contract when disputes arose. There

was no evidence presented that the city controlled any aspect of the work responsibilities of the individual appellant engineers. The engineers were selected and paid by ARCADIS and it controlled their work. Therefore, we find ARCADIS and its engineers cannot qualify as employees/agents of the city of Fremont for purposes of being afforded immunity under R.C. 2744.01(B). Appellants' sole assignment of error is found not well-taken.

{¶ 25} Having found that the trial court did not commit error prejudicial to appellants, the judgment of the Sandusky County Court of Common Pleas is affirmed. Appellants are ordered to pay the court costs of this appeal pursuant to App.R. 24.

Judgment affirmed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J. _____
JUDGE

Arlene Singer, P.J. _____
JUDGE

Thomas J. Osowik, J. _____
CONCUR.
JUDGE