

Janelle Lust

IN THE DISTRICT COURT OF LANCASTER COUNTY, NEBRASKA

**JENA I. VAN GRONINGEN, by her
Conservator, DEBORAH CHINNOW,**

Plaintiff,

vs.

**CITY OF LINCOLN, a political subdivision
of the State of Nebraska,**

and

AMANDA M. MAY,

Defendants.

CASE NO. CI 07-4595

**ORDER ON MOTION TO
STRIKE, DISMISS, AND FOR A
MORE DEFINITE STATEMENT**

THIS MATTER came before the court on January 11, 2008 for hearing on Defendant City of Lincoln and Defendant Amanda M. May's ("May") Motion to Strike, Motion to Dismiss, and Motion for a More Definite Statement. Attorneys David A. Domina and Linda S. Christensen appeared on behalf of Plaintiff Jena I. Van Groningen. Attorneys Jeanelle R. Lust and Richard C. Anderson appeared on behalf of Defendant City of Lincoln. Attorney Gail S. Perry appeared on behalf of Defendant May. The matter was argued and submitted. The court, being duly advised, now finds and orders as follows:

BACKGROUND

On November 5, 2006, Jena I. Van Groningen ("Plaintiff") was injured while crossing 48th

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Street, between Bryson and C Streets in Lincoln, Nebraska. Plaintiff was struck by a Lincoln police cruiser, operated by Lincoln police officer May. Deborah Chinnow, acting as Conservator for Plaintiff, filed a complaint against the City of Lincoln and May under the Nebraska Political Subdivisions Tort Claims Act, Neb. Rev. Stat. §§ 13-905 - 13-927 (Reissue 1997 and Cum. Supp. 2006) (hereinafter "PSTCA"). Plaintiff's Complaint alleges negligence against Defendants, strict liability against the City of Lincoln pursuant to Neb. Rev. Stat. § 13-911 and the dangerous instrumentality doctrine, and several constitutional issues regarding provisions of the PSTCA. Defendants City of Lincoln and May have filed a motion to strike Plaintiff's demand for jury trial and prayer for general damages, a motion to dismiss Plaintiff's claim for damages in excess of \$1,000,000.00 and claims for strict liability, and a motion for a more definite statement requiring Plaintiff to specify her special damages.

STANDARD OF REVIEW

In a motion to dismiss, the court must view the allegations of the plaintiff's complaint in the light most favorable to the plaintiff and can only dismiss the complaint if it is insufficient on its face. *McAlphin v. Toney*, 281 F.3d 709, 710 (8th Cir. 2002); *Meehan v. United Consumers Club Fran. Corp.*, 312 F.3d 909, 911 (8th Cir. 2002). "Dismissal is inappropriate unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Hafley v. Lohman*, 90 F.3d 264, 266 (8th Cir. 1996). To succeed on a motion to dismiss, the moving party has the burden of showing that the plaintiff has failed to state a claim that would entitle him to relief. *Parnes v. Gateway 2000, Inc.*, 122 F.3d 539, 546 (8th Cir. 1997).

ANALYSIS

1. Whether Plaintiff's strict liability claim under Neb. Rev. Stat. § 13-911 and the

strict liability dangerous instrumentality theory should be dismissed.

Plaintiff claims that the strict liability provisions of Neb. Rev. Stat. § 13-911 should apply to her claim and not doing so violates equal protection and due process. Section 13-911 states:

(1) In case of death, injury, or property damages to any innocent third party proximately caused by the action of a law enforcement officer employed by a political subdivision during vehicular pursuit, damages shall be paid to such third party by the political subdivision employing the officer.

* * *

(5) For purposes of this section, vehicular pursuit means an active attempt by a law enforcement officer operating a motor vehicle to apprehend one or more occupants of another motor vehicle, when the driver of the fleeing vehicle is or should be aware of such attempt and is resisting apprehension by maintaining or increasing his or her speed, ignoring the officer, or attempting to elude the officer while driving at speeds in excess of those reasonable and proper under the conditions.

In the instant case, Plaintiff acknowledges in her Complaint that May was not engaged in a vehicular pursuit, as Plaintiff states that May was merely responding as backup to a domestic disturbance call. Section 13-911 pertains only to "vehicular pursuits" as that term is defined under the statute. Therefore, Plaintiff cannot bring a claim under Neb. Rev. Stat. § 13-911.

Plaintiff contends in her Complaint that limiting § 13-911 to pursuit of fleeing vehicles is arbitrary, invidious, discriminatory, and a violation of due process and equal protection. "Statutes are afforded a presumption of constitutionality, and the unconstitutionality of a statute must be clearly established before it will be declared void." *Staley v. City of Omaha*, 271 Neb. 543, 552, 713 N.W.2d 457, 467 (2006). The unconstitutionality of § 13-911 cannot be clearly established in this case. It is evident that when abrogating state sovereign immunity, the Legislature has the right to limit actions against the state. See NEB. CONST. art. V, § 22 ("The state may sue and be sued, and the Legislature shall provide by law in what manner and in what courts suits shall be brought."); See

also *Gentry v. State*, 174 Neb. 515, 517, 118 N.W.2d 643, 645 (1962) (finding that NEB. CONST. art. V, § 22 is not self-executing but “permits the state to lay its sovereignty aside and consent to be sued on such terms and conditions as the Legislature may prescribe”). Statutes authorizing suits against the state are “strictly construed because the statute[s] [are] in derogation of the state’s sovereign immunity.” *Riley v. State*, 224 Neb. 250, 256, 506 N.W.2d 45, 49 (1993). In abrogating the State’s sovereign immunity under the PSTCA, the Legislature specifically chose to limit when political subdivisions would be strictly liable. Under NEB. CONST. art. V, § 22, the Legislature properly imposed such limitation. Therefore, § 13-911 is not arbitrary, invidious, discriminatory, or unconstitutional.

From an equal protection and due process standpoint, because classification involved in § 13-911 does not create a suspect class or address any fundamental right, the statute must only pass a rational basis review. *Staley*, 271 Neb. at 553, 713 N.W.2d at 463. Under a rational basis review it must be shown that “(1) there is a plausible policy reason for the classification, (2) the legislative facts on which the classification is based may rationally have been considered to be true by the governmental decisionmaker, and (3) the relationship of the classification to its goal is not so attenuated as to render the distinction arbitrary or irrational.” *Id.* There is a rational basis for distinguishing between vehicular pursuits as defined in § 13-911 and the simple driving of a police cruiser at high speeds. Vehicular pursuits involve a fleeing perpetrator who is not trained in public safety in driving at high speeds and most likely has little regard for the safety of innocent bystanders. The statute allows strict liability in these situations because of the inherent risk involved of the unknown and the potential hazard a dangerous driver is to innocent bystanders. Therefore, the classification of vehicular pursuits under § 13-911 is not arbitrary or irrational, and the statute does

not violate equal protection or due process. Because Plaintiff fails to state a claim of strict liability against the City under § 13-911 and fails to make a valid constitutional challenge, Plaintiff's strict liability claim and constitutional claim in relation to § 13-911 are dismissed.

Plaintiff also claims strict liability under the strict liability dangerous instrumentality theory. Nebraska has neither adopted nor repudiated this doctrine. *See Anderson v. Nashua Corp.*, 246 Neb. 420, 427, 519 N.W.2d 275, 281 (1994) (“[I]t appears that the doctrine of strict liability for ultrahazardous activities has not been adopted in Nebraska, but neither has it been repudiated.”). In addition, Nebraska courts have held that the strict liability dangerous instrumentality theory does not apply to motor vehicles *per se*, because they are not inherently dangerous instrumentalities. *See Bridgeford v. U-Haul Co.*, 195 Neb. 308, 316, 238 N.W.2d 443, 449 (1976) (“The rule in Nebraska...is that while a motor vehicle is not an inherently dangerous instrumentality, nevertheless, where the owner entrusts the control and operation of it to a person lacking in competency and skill, the vehicle may be considered a dangerous instrumentality.”); *See also Marco v. IBP, Inc.*, 362 F.Supp.2d 1129, 1133 (D.Neb. 2005) (discussing *Fitzpatrick v. U.S. West, Inc.*, 246 Neb. 225, 518 N.W.2d 107 (1994)) (“Things and activities not considered abnormally dangerous and ultrahazardous include...an automobile...”). Plaintiff has alleged that the police cruiser driven by defendant May was being used as a dangerous instrumentality. If these allegations are true, a claim of strict liability under the dangerous instrumentality doctrine could possibly be proven. Therefore, Defendants' Motion to Dismiss Plaintiff's claim for strict liability under the dangerous instrumentality doctrine is overruled at this time.

2. Whether Plaintiff can seek relief under PSTCA while also challenging its constitutionality.

The court concludes that Defendants' Motion to Dismiss Plaintiff's claims for damages in

excess of \$1,000,000 and Defendants' Motion to Strike Plaintiff's demand for jury trial should be granted without ever reaching Plaintiff's constitutional challenges of the PSTCA. Plaintiff seeks to bring an action under the PSTCA, while at the same time challenging as unconstitutional the PSTCA's cap on damages and denial of trial by jury, Neb. Rev. Stat. §§ 13-926 and 13-907, respectively. "It is fundamental that a person may not seek the benefit of a statute and at the same time question its constitutionality." *Lackaff v. Dep't of Roads & Irrigation*, 153 Neb. 217, 221, 43 N.W.2d 576, 578 (1950); *See also State ex rel. Bellino v. Moore*, 254 Neb. 385, 389, 576 N.W.2d 793, 796 (1998); *Zoucha v. Henn*, 258 Neb. 611, 615, 604 N.W.2d 828, 831 (2000). Notably, this fundamental doctrine is "not applied solely on technicalities." *State ex rel. Johnson v. Consumers Public Power Dist.*, 143 Neb. 753, 759, 10 N.W.2d 784, 791 (1943). Plaintiff may still seek relief under the PSTCA if the provisions she challenges as unconstitutional are separate and independent from the rest of the Act. *Id.* at 760-61, 10 N.W.2d at 791 (finding that estoppel to constitutionally challenging a provision of a statute is no bar if the challenged provision is independent and separable). However, the two PSTCA sections that Plaintiff challenges as unconstitutional are not separate and independent as that phrase was defined in *Johnson*. *Id.* at 761, 10 N.W.2d at 791 (citing *State v. Stuht*, 52 Neb. 209, 71 N.W.2d 941 (1897) ("If a portion of a legislative act is unconstitutional...and it further appears that the unconstitutional part did not constitute such an inducement to the passage of the other parts of the law that they would not have been passed without it, the former may be rejected and the latter upheld.")). Therefore, it is the conclusion of the court that the Plaintiff cannot seek relief under the PSTCA and at the same time challenge the Act's constitutionality. Plaintiff's alleged constitutional claims are stricken from Plaintiff's Complaint. In addition, Defendant's Motion to Strike Plaintiff's demand for trial by jury is sustained and Defendants' Motion to Dismiss Plaintiff's request for relief in excess of \$1,000,000 is sustained.

3. Whether the cap on damages in the PSTCA is unconstitutional because it violates due process, equal protection, the Commerce Clause, and separation of powers.

Even if Plaintiff was allowed to constitutionally challenging the PSTCA's cap on damages, her constitutional challenge against the PSTCA's cap on damages would ultimately fail. Neb. Rev. Stat. § 13-926 limits the amount recoverable under the PSTCA to one million dollars. The Nebraska Supreme Court decided in *Staley v. City of Omaha, supra*, that the damages cap in § 13-926 does not violate the Equal Protection Clause, NEB. CONST. art. I, § 3, the Due Process Clause, NEB. CONST. art. I, § 3, the Special Legislation Clause, NEB. CONST. art. I, § 16, or the Enjoyment of Property Clause, NEB. CONST. art. I, § 25. *Staley*, 271 Neb. at 552-57, 713 N.W.2d at 468-70. In addition, the U.S. Supreme Court held in *Seminole Tribe of Fla. v. Florida* that the Commerce Clause could not be used as a basis for abrogating the State's sovereign immunity. *Florida Prepaid Postsecondary Educ. Expense Board v. College Savings Bank*, 527 U.S. 627, 636, 119 S.Ct. 2199, 2205 (1999) (citing *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 72-73, 116 S.Ct. 1114, 1132 (1996)). Finally, the Nebraska Supreme Court has already determined that damages caps do not violate principles of separation of powers. *Gourley v. Neb. Methodist Health System, Inc.*, 265 Neb. 918, 956, 663 N.W.2d 43, 77 (2003) ("We agree that the damages cap does not act as a legislative remittitur or otherwise violate principles of separation of powers.... Thus, the ability to cap damages in a cause of action is a proper legislative function."). For these reasons, the cap on damages in the PSTCA does not violate due process, equal protection, the Commerce Clause, or separation of powers.

4. Whether the denial of trial by jury in the PSTCA is unconstitutional.

Plaintiff's constitutional challenge as to the PSTCA's denial of jury trial would also fail. Article I, § 6 of the Nebraska Constitution only preserves the right of trial by jury that existed in

1875, just as the Seventh Amendment only preserves the right to jury trial that existed in 1791. There was neither common law nor a statutory right to a jury trial against the sovereign when either provision came into being, and in fact, there was no right to sue the sovereign at all without its consent. *See Osborn v. Haley*, ___ U.S. ___, 127 S.Ct. 881, 900 (2007) (stating “[t]he Seventh Amendment, which preserves the right to a jury trial in common-law suits, does not apply to proceedings against the sovereign”); *See also City of Monterey v. Del Monte Dunes at Monterey LTD*, 526 U.S. 687, 719, 119 S.Ct. 1624, 1643 (1999) (holding it is “well settled” the Seventh Amendment does not apply in suits against the United States). The United States District Court for the District of Nebraska has repeatedly held that the Nebraska PSTCA’s denial of jury trial is constitutionally valid under the Seventh Amendment. *See Gragg v. City of Omaha*, 812 F.Supp. 991 (D.Neb. 1993), *aff’d* 20 F.3d 357 (8th Cir. 1994); *Westcott v. City of Omaha*, 1988 WL 383125 (D.Neb. 1988). The United States District Court for Nebraska reasoned that there was no right to a jury trial against the sovereign at common law, and a litigant’s right to sue a political subdivision of the State therefore depends solely on the terms and conditions of the State’s waiver of its sovereign immunity. *Gragg*, 812 F.Supp. at 992-93; *See also Westcott v. City of Omaha*, 1988 WL 383125 (D.Neb. 1988). In light of the foregoing, Defendants’ Motion to Strike Plaintiff’s demand for jury trial is sustained.

5. Whether Defendants’ Motion to Strike Plaintiff’s specifically plead general damages and Motion for a More Definite Statement for Plaintiff’s special damages should be granted.

Nebraska Rule of Pleading 8(a) provides, “if the recovery of money be demanded, the amount of special damages shall be stated, but the amount of general damages shall not be stated.” Therefore, Defendants’ Motion to Strike Plaintiff’s demand for a specific amount of general damages is sustained. In addition, Nebraska Rule of Pleading 9(g) requires a specific statement of special

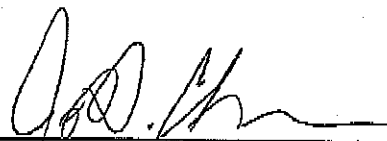
damages. Plaintiff seeks relief for accruing and actual medical expenses and believes these costs to exceed \$900,000. However, Plaintiff fails to specify what medical expenses have been incurred to date or any other explanation as to why she cannot specify her special damages at this time. Therefore, Defendants' Motion for a More Definite Statement is granted in regards to Plaintiff's special damages.

CONCLUSION

IT IS ORDERED, ADJUDGED, and DECREED that Defendants' Motion to Strike and Motion For a More Definite Statement are granted and that Defendants' Motion to Dismiss is granted in part and overruled in part as set forth above.

DATED AND SIGNED this 3rd day of April, 2008.

BY THE COURT:



John A. Colborn
District Court Judge

cc: *David A. Domina*, Attorney for Plaintiff
Linda S. Christensen, Attorney for Plaintiff
Jeanelle R. Lust, Attorney for Defendant City of Lincoln
Richard C. Anderson, Attorney for Defendant City of Lincoln
Gail S. Perry, Attorney for Defendant Amanda M. May