FILED
JUN 28 1983
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

RICHARD A. TREFZ AND
PATRICIA K. TREFZ,

Plaintiffs-Appellants,

vs.

IOWA DEPARTMENT OF TRANSPORTATION,

Defendant-Appellee.

Filed June 28, 1983

3-13
2-68427

Appeal Linn District Court, William Thomas, Judge.

Plaintiff appeals from an order dismissing the portion of their petition which claimed money damages based on contract and nuisance. AFFIRMED.

Phillip D. Seidl of Tom Riley Law Firm, Cedar Rapids, for plaintiffs-appellants.

Thomas J. Miller, Attorney General, and Susan Lamb, Assistant Attorney General, for defendant-appellee.

Heard by Oxberger, C.J., and Donielson, Snell, and Schlegel, JJ. Hayden, J., takes no part.

PER CURIAM

Plaintiff appeals from an order dismissing the portion of their petition which claimed money damages based on contract. We affirm.

In 1974 plaintiffs, Richard and Patricia Trefz, sold part of their farm to the Iowa Department of Transportation. The DOT built the curve of a highway on the land; doing so involved extensive regrading and reshaping of the property. Plaintiffs farm the remaining portion of their property. After the DOT built the new highway there allegedly was extensive erosion caused by run-off waters.

The plaintiffs filed suit against the department of transportation, asking for relief in four separate counts. The petition alleges the facts set out above. In division I plaintiffs ask for a writ of mandamus directing the DOT to correct the drainage problems, and in division II, they ask for an injunction for the same purpose. Divisions III and IV are the subject of this appeal. In division III plaintiffs assert that "this cause of action is brought pursuant to Iowa Code § 613.11 and § 613.14" (waiver of sovereign immunity by DOT in construction contract cases) and that "as a result of defendant's negligent performance of its work plaintiffs have been [injured] . . . in the amount of $100,000." Division III contains only this claim for monetary damages. Division IV asserts that "negligent construction" of the highway resulted in a nuisance, and asks for monetary damages of $100,000 and an order that the nuisance be abated.

The department of transportation moved to dismiss divisions III and IV, alleging that they were "claims" as defined in Iowa Code section 25A.2(5), and that plaintiffs had not complied with the procedural requirements of chapter 25A, i.e., had not filed a claim with the state appeal board before filing suit. In resistance, the plaintiffs raised the issues now pursued on appeal. The court granted the motion to dismiss as to division III of the petition and that portion of division IV which sought money damages for nuisance. The abatement claim under division IV remained unaffected.

Plaintiffs then filed an appeal as of right, asserting that:(1) the Iowa Code section 613.11 waiver of sovereign immunity for claims arising out of "work performed [under] or... provisions of any construction is a waiver of sovereign immunity (a) for claims arising out of a contract for the sale of land, as this one is, or (b) for claims arising out of defective construction work, even if brought by third parties to the construction contract; (2) the definition of "claims" which are subject to the procedural requirements of chapter 25A (state tort claims act) refers to claims against the State "for money only," so division IV of plaintiffs' petition, which asked for both abatement of an alleged nuisance and money damages for the nuisance, was not "for money only" and thus was not subject to the tort claims act; and (3) the purchase of land requires the state to assume responsibilities of a private landowner, including the obligation to pay money for nuisance damage to neighbors by its ownership of the land.

We first consider the applicability of the section 613.11 waiver of sovereign immunity. This section provides, in material part:

> The state of Iowa hereby waives immunity from suit and consents to the jurisdiction of any court in which an action is brought against the state department of transportation respecting any claim right, or controversy arising out of the work performed, or by virtue of the provisions of any construction contract entered into by the department.

The trial court interpreted this language as waiving sovereign immunity only with regard to contracts for the design or construction of a highway. We concur in this interpretation. Plaintiffs' division III claim for negligent construction is a tort claim rather than a claim "arising out of a contract." See Montandon v. Hargrave

Construction Co., 130 N.W.2d 659, 662 (Iowa 1964). As such, it is subject to the provisions of chapter 25A, the Iowa Tort Claims Act.[1] It is clear that section 613.11 does not waive sovereign immunity in tort actions. Id. A claim under the Iowa Tort Claims Act is subject to the primary jurisdiction of the State Appeal Board, and a damages action cannot properly be brought until the administrative remedy has been exhausted. Charles Gabus Ford v. Iowa State Highway Commission, 224 N.W.2d 639, 647 (Iowa 1974). Plaintiffs' damages claim was therefore properly dismissed by the trial court since it lacked subject matter jurisdiction. Lloyd v. State, 251 N.W.2d 551, 558 (Iowa 1977).

This analysis is equally applicable to that portion of division IV of plaintiffs' petition requesting monetary damages. Plaintiffs argue that since the claim for damages was joined with their abatement of nuisance action in division IV, the claim was not "for money only" within the restrictive meaning of the Iowa Tort Claims Act. See Iowa Code § 25A.2(5)(a). Consequently, plaintiffs conclude, they may pursue their claim in district court without the necessity of filing a claim with the State Appeal Board under the Tort Claims Act. While we agree that the abatement claim is not subject to chapter 25A, we cannot allow plaintiffs, by joining legal and equitable causes of action, to evade the requirements of chapter 25A with regard to the damages claim. See Charles Gabus Ford v. Iowa State Highway Commission, 224 N.W.2d 639, 644-46 (Iowa 1974)(where plaintiff sought mandamus and money damages, mandamus proceeding was properly before the court, but damages action was subject to exhaustion requirements of chapter 25A).

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[1] Iowa Code § 25A.2(5)(a) defines "claim" as;

> Any claim against the state of Iowa for money only, on account of damage to or loss of property or on account of personal injury or death, caused by the negligent or wrongful act or omission of any employee of the state while acting within the scope of his office or employment, under circumstances where the state, if a private person, would be liable to the claimant for such damage, loss, injury, or death.

Citing State v. Dvorak, 261 N.W.2d 486 (Iowa 1978), plaintiff contends that the purchase of land requires the state to assume the responsibilities of a private landowner, including the obligation to pay money for nuisance damage. The court in Dvorak, however, limited its conclusions to the particular facts before it. Id. at 488. In any event, the type of negligence action contemplated by the plaintiffs would be characterized as a "claim against the State of Iowa for money only, on account of damage to or loss of property... caused by the negligent or wrongful act or omission of any employee of the state...," and accordingly would be subject to the requirements of chapter 25A. The trial court's order dismissing division III of plaintiffs' petition and dismissing that portion of division IV requesting money damages for nuisance is affirmed.

AFFIRMED.