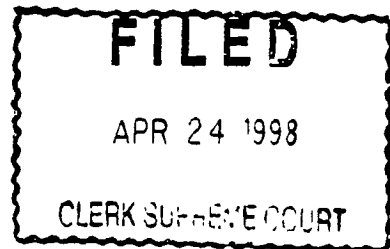


IN THE COURT OF APPEALS OF IOWA

No. 7-676 / 97-0011



GENE HARRIS ANTIQUE AUCTION CENTER,

Plaintiff-Appellant,

vs.

**CITY OF MARSHALLTOWN, IOWA; PATRICK
W. BROOKS, T.R. THOMPSON, and LENNOX
INDUSTRIES, INC.,**

Defendants-Appellees.

Appeal from the Iowa District Court for Marshall County, Dale E. Ruigh,
Judge.

Plaintiff appeals a district court ruling sustaining defendants' motion for summary judgment on plaintiff's claim against defendants for abuse of process and intentional interference with prospective business advantage. **AFFIRMED.**

Stephen V. Nielsen and Gregory C. McConville of Nielsen & McConville, Des Moines, for appellant.

John Werner and Marcy O'Brien of Grefe & Sidney, Des Moines, for appellees City, Brooks and Thompson.

Kenneth L. Butters of Dreher, Simpson & Jensen, P.C., Des Moines, for appellee Lennox Industries.

Heard by Cady, C.J., and Sackett and Vogel, JJ.

SACKETT, J.

Plaintiff-appellant Gene Harris Antique Auction Center sued defendants-appellees City of Marshalltown, Iowa; Marshalltown City Attorney Patrick W. Brooks; Marshalltown Mayor T. R. Thompson; and Lennox Industries, Inc., for abuse of process and intentional interference with a prospective business advantage. The district court dismissed the claim on summary judgment. Plaintiff appeals contending the district court erred in: (1) concluding defendants City, Brooks, and Thompson were immune from suit; (2) dismissing the abuse of process claim; (3) dismissing the interference with prospective business advantage claim; and (4) denying his motion to amend his petition. We affirm.

Plaintiff owned two parcels of real estate sought to be acquired by defendant Lennox as parking for its adjacent facilities. Defendant City adopted an urban renewal plan that included provision for acquisition of plaintiff's property. Defendant City notified plaintiff in June 1993 by letter it was interested in acquiring the two parcels of land from plaintiff. There were negotiations. Eventually defendant City was only interested in one parcel. Plaintiff made it known selling only one parcel would damage its business.

On November 5, 1993, defendant City filed a condemnation action seeking to acquire by condemnation one parcel of plaintiff's property for Lennox's purposes. The condemnation action was dismissed on December 17, 1993, after Lennox indicated it was no longer interested in plaintiff's property.

Plaintiff subsequently filed this cause of action claiming defendants' actions were an abuse of process and intentionally interfered with its prospective business advantage. Defendants filed motions for summary judgment. Plaintiff sought to amend its petition to add a count of fraudulent misrepresentation. The trial court denied the motion to amend and granted defendants' motions for summary judgment.

The trial court, in granting summary judgment, found defendants City, Brooks, and Thompson were immune from plaintiff's claims for abuse of process and intentional interference with a prospective business advantage. The trial court further ruled plaintiff failed to establish prima facie claims against defendant Lennox. Plaintiff contends these findings are not correct and it presented substantial evidence to be successful against all parties on all grounds.

In reviewing the granting of a motion for summary judgment, our task is to determine whether there is a genuine issue of material fact and whether the trial court correctly applied the law. *Schuver v. E. I. Du Pont de Nemours & Co.*, 546 N.W.2d 610, 612 (Iowa 1996).

Plaintiff first contends defendants City, Brooks, and Thompson are not immune from suit for abuse of process and intentional interference with a prospective business advantage under the discretionary function exception of Iowa Code section 670.4(3).

Historically, government subdivisions enjoyed common law sovereign immunity. Iowa Code section 670 waived parts of that immunity. However, there are exceptions.

670.4. Claims exempted.

The liability imposed by section 670.2 shall have no application to any claim enumerated in this section. As to any such claim, a municipality shall be liable only to the extent liability may be imposed by the express statute dealing with such claims and, in the absence of such express statute, the municipality shall be immune from liability.

3. Any claim based upon an act or omission of an officer or employee of the municipality, exercising due care, in the execution of a statute, ordinance, or regulation whether the statute, ordinance or regulation is valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of the municipality or an officer or employee of the municipality, whether or not the discretion is abused.

Iowa Code § 670.4(3) (1993).

Plaintiff contends the allegations that defendants violated the law in attempting to take its property for less than full market value and for the sole, exclusive, and private use of Lennox were not policy decisions but rather were operational functions.

The question becomes whether defendants were performing a discretionary function. The discretionary function does not extend to all government functions involving an element of choice. *Hawkeye Bank v. State*, 515 N.W.2d 348, 351 (Iowa 1994). In order for the State to be immune from liability, the choice must represent a policy judgment of superior authority that a particular task be done within the

prescribed policy. *Id.* at 351; *see also Stanley v. State*, 197 N.W.2d 599, 603-04 (Iowa 1972).

In determining what is and is not a discretionary function, the Iowa Supreme Court has adopted what they refer to as "the planning-operational dichotomy" set forth in *Dalehite v. United States*, 346 U.S. 15, 73 S. Ct. 956, 97 L. Ed. 1427 (1953), to determine whether a challenged decision is discretionary. *Butler v. State*, 336 N.W.2d 416, 419 (Iowa 1983); *Stanley*, 197 N.W.2d at 603. The court has further said the planning level is generally characterized as the policy-making stage. *Butler*, 336 N.W.2d at 419. In elaborating, the court said the policy-making stage encompasses decisions involving the formulation of policy, calls for a weighing of competing interests, requiring an assessment of the practicability or feasibility of a proposed course of action, or entails an evaluation of how the public interests will best be served. *See Hansen v. City of Audubon*, 378 N.W.2d 903, 906 (Iowa 1985); *see also Butler*, 336 N.W.2d at 419; *Estate of Callas v. United States*, 682 F.2d 613, 620 (7th Cir. 1982).

The implementation of decisions made at the planning level is operational; decisions made at the operational level are not covered by the discretionary function exception. *Butler*, 336 N.W.2d at 419; *Lewis v. State*, 256 N.W.2d 181, 195 (Iowa 1977).

The distinction between the two levels has been best illustrated in terms of judicial review. *Butler*, 336 N.W.2d at 419. Policy decisions, such as when and

where to construct a public improvement, involve the weighing of the merits of social, political, and economic factors traditionally held to be within the purview of the legislature. *See id.* at 419-20. Judicial review of this type of decision would be an apparent violation of the separation of powers principle. *See id.* at 420. Decisions made at the operational level do not involve the same overriding policy determinations and can be reviewed under judicially manageable tort standards of due care and reasonableness. *See id.*

It is established the initial decision to undertake a project falls within the immunity of the planning stage. *Lewis*, 256 N.W.2d at 195. Therefore, all actions of defendant City and its officials in planning the project and deciding what land would be used are planning decisions and are not actionable because of the waiver of immunity of Iowa Code section 670.4(3). The trial court correctly characterized plaintiff's claim as a wrongful use of the condemnation process under Iowa Code chapter 403 and concluded defendant City and its officials were engaged in a discretionary function. It was legislative in nature and required defendant City to consider a number of factors, fiscal, technical, and political. We agree with the trial court that it was planning. *See Kachevas, Inc. v. State*, 524 N.W.2d 450, 452 (Iowa App. 1994). We affirm on this ground. However, even if the actions of defendant City and the city officials extended beyond a discretionary function, plaintiff has failed to present evidence from which a fact finder could prove the elements of its claims.

Plaintiff next contends the trial court should not have dismissed its suit for abuse of process. Plaintiff's claim of abuse of process is based on misuse of the condemnation process provided for under Iowa Code chapter 403.

One who uses a legal process, whether criminal or civil, against another primarily to accomplish a purpose for which it is not designed is subject to liability to the other for harm caused by the abuse of process. *Pundzak, Inc. v. Cook*, 500 N.W.2d 424, 429 (Iowa 1993).

To support an abuse of process claim, one must show proof of an improper purpose. *Johnson v. Farm Bureau Mut. Ins. Co.*, 533 N.W.2d 203, 209 (Iowa 1995). For abuse of process to occur, there must be use of the process for an immediate purpose other than that for which it was designed and intended. *Pundzak*, 500 N.W.2d at 430. The usual case of abuse of process is one of some form of extortion, using the process to put pressure upon the other to compel him to pay a different debt or to take some other action or refrain from it. *Id.*

Plaintiff has failed to show evidence any of the defendants used the condemnation filing for anything but a legal purpose. Defendant Lennox did not use the condemnation process since Iowa Code chapter 403 only allows it to be utilized by a city. Furthermore, the condemnation would not allow plaintiff to have its property taken for less than market value as this is the measure of damages in a taking through condemnation. *See Sunrise Dev. Co. v. Iowa Dep't of Transp.*, 511 N.W.2d 641, 643 (Iowa App. 1993). We affirm on this ground.

Plaintiff next contends defendants were not entitled to summary judgment on its claim of intentional interference with prospective business advantage.

The elements plaintiff must prove to succeed are: (1) an act by defendants; (2) intent to injure or destroy a prospective business advantage, by the acts performed; (3) actual interference caused by defendants' act; and (4) resulting injury and damage. *Farmers Coop. Elevator, Inc. v. State Bank*, 236 N.W.2d 674, 679 (Iowa 1975); see *Clark v. Figge*, 181 N.W.2d 211, 212-14 (Iowa 1970).

There is little question a governmental decision to condemn property belonging to a business when made public frequently creates a hardship for the existing and future business of that establishment. Plaintiff has shown the necessary substantial evidence that would support a finding its future business endeavors were damaged by defendants' decision to take its property by condemnation or by threat of condemnation. However, in proceeding as defendant City and its officials did, they were operating under statutory direction. Consequently, defendant City and its officials were immune from liability under the provisions of Iowa Code section 670.4. There was no evidence defendant Lennox sought the property for other than their purpose. We affirm on this issue.

Plaintiff's last claim is that the trial court abused its discretion in denying its motion for leave to amend. The motion was filed two months before the scheduled trial. The trial court has considerable discretion as to whether an appropriate request for leave to amend should be granted. *M-Z Enters., Inc. v. Hawkeye-Security Ins.*

Co., 318 N.W.2d 408, 411 (Iowa 1982). The key factor is whether the proposed amendment substantially changes the issue. *Kitzinger v. Wesley Lumber Co.*, 419 N.W.2d 739, 741 (Iowa App. 1987). The trial court found the amendment did substantially change the issues, and we find no reason to disagree with this decision. We affirm on this issue.

AFFIRMED.