

FILED _____

AT _____ O'Clock _____ M
CLERK OF DISTRICT COURT

Deputy

**IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO IN AND FOR THE COUNTY OF KOOTENAI**

TODD JACKSON and LORI R. JACKSON,)
husband and wife,)
)
 Plaintiffs,)
 vs.)
)
 LAKES HIGHWAY DISTRICT,)
)
 Defendant.)
 _____)

Case No. **CV 2011 991**
**MEMORANDUM DECISION AND
ORDER GRANTING DEFENDANT'S
MOTION FOR SUMMARY
JUDGMENT**

I. PROCEDURAL HISTORY AND FACTUAL BACKGROUND.

This matter is before the Court on the Motion for Summary Judgment filed by defendant Lakes Highway District (LHD).

Plaintiffs Todd and Lori Jackson (Jacksons) filed their Complaint on January 27, 2011, alleging negligence and trespass, and seeking damages therefor, and seeking a writ of mandate directing LHD to repair Jacksons' home and remove LHD's road repair which allegedly caused flooding in 2009 which damaged Jacksons' home. Complaint, pp. 1-3. LHD filed its Answer and Jury Demand on February 17, 2011.

On October 25, 2011, LHD filed its motion for summary judgment, and supporting brief and affidavit, arguing it is entitled to immunity pursuant to I.C. § 6-907(4) (because the road project at issue arose out of a plan or design prepared in substantial compliance with engineering or design standards approved by the Lakes Highway Board of Commissioners), and under I.C. § 6-901(1) (because the decision to engage in the road project was a discretionary function of LHD's). Memorandum in

Support of Defendant's Motion for Summary Judgment, pp. 5-6. On December 12, 2011, Jacksons untimely (relative to the December 20, 2011, hearing, I.R.C.P. 56(c)) filed their Memorandum in Opposition to Defendant's Motion for Summary Judgment, and supported their objection with the affidavit of licensed and certified professional civil engineer Joel Petty, who states he:

...do[es] not agree or believe that the design and construction plans were prepared in substantial compliance with engineering or design standards in effect at the time the plans were prepared.

Affidavit of Joel W. Petty , p. 2, ¶ 2. Jacksons also argue the road project "was clearly an operational activity (as opposed to a planning activity) and immunity under Idaho Code § 6-904(1) is not applicable." Memorandum in Opposition to Motion for Summary Judgment, p. 4. The parties filed a stipulation to amend the Court's Pretrial Order and permit hearing on summary judgment motions to be extended to December 20, 2011, which was less than ninety-one days before the scheduled trial. This Court granted the motion in its November 7, 2011, Order to Amend the Pretrial Order. However, that stipulation and order did not alter the requirement that Jacksons file their response brief at least fourteen days prior to the hearing on summary judgment. I.R.C.P. 56(c). On December 15, 2011, LHD untimely (but due to Jacksons' untimely filing, I.R.C.P. 56(c)) filed its Reply Memorandum in Support of Defendant's Motion for Summary Judgment.

On December 8, 2011, LHD filed a motion to compel Jacksons' discovery responses to Interrogatories and Requests for Production propounded on May 23, 2011. Jacksons have not responded to the motion to compel and attendant request for attorney fees. At the hearing on December 20, 2011, LHD withdrew that motion. Oral argument on the motion for summary judgment was held on December 20, 2011. This matter is currently set for a five-day jury trial commencing February 27, 2012.

II. STANDARD OF REVIEW.

Idaho Rule of Civil Procedure 56 sets forth that, in considering a motion for summary judgment, the Court is mindful that summary judgment may properly be granted only where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. I.R.C.P. 56(c). In determining whether any issue of material fact exists, this court must construe all facts and inferences contained in the pleadings, depositions, and admissions, together with the affidavits, if any, in the light most favorable to the non-moving party. I.R.C.P. 56(c); *Sewell v. Neilson, Monroe Inc.*, 109 Idaho 192, 194, 706 P.2d 81, 83 (Ct. App. 1985). Summary judgment must be denied if reasonable persons could reach differing conclusions or draw conflicting inferences from the evidence. *Smith v. Meridian Joint School District No. 2*, 128 Idaho 714, 718, 918 P.2d 583, 587 (1996). Idaho appellate courts exercise free review over issues which present questions of law. *Automobile Club Ins. Co. v. Jackson*, 124 Idaho 874, 876, 865 P.2d 965, 967 (1993).

III. ANALYSIS OF LHD'S MOTION FOR SUMMARY JUDGMENT.

A. LHD is Immune Under Idaho Code § 6-904(7).

LHD argues immunity from liability via multiple theories under Idaho Code § 6-904. Idaho Code § 6-904 is the "exceptions to governmental liability" that restrict what governmental liability the legislature has granted under Idaho Code § 6-903, and under the Idaho Tort Claims Act, Idaho Code § 6-901 et. seq. Under Idaho Code § 6-903, government entities such as LHD and their employees are not liable for any claim which the act of the governmental entity or its employee is: (1) a discretionary function or (7) is a plan or design for construction or improvement to the highways or roads where the plan or design in prepared in substantial conformance with engineering or design standards in effect at the time of the plan or design, or where the governmental entity's legislative body

approved such plan or design in advance of construction. Subsection two through six of Idaho Code § 6-904 are not applicable to this case.

LHD argues it is immune from liability under Idaho Code § 6-904(7) “because the Lancaster Road Project was designed and engineered in substantial conformance with engineering or design standards.” Memorandum in Support of Defendant’s Motion for Summary Judgment, p. 5. LHD then quotes the applicable portion of the Idaho Code:

A governmental entity and its employees while acting within the course and scope of their employment and without malice or criminal intent shall not be liable for any claim which:

(7) Arises out of a plan or design for construction or improvement to the highways, roads, streets, bridges or other public property where such plan or design is prepared in substantial conformance with engineering or design standards in effect at the time of preparation of the plan or design or approved in advance of the construction by the legislative body of the governmental entity or by some other body or administrative agency, exercising discretion by authority to give such approval.

I.C. § 6-904(7). LHD states the approval of the Lancaster Road project by the Lakes Highway District Board of Commissioners before construction began, and design and building of the project by JUB Engineers meet the requirements of I.C. § 6-904.

Memorandum in Support of Defendant’s Motion for Summary Judgment, pp. 5-6. In response, Jacksons submit the Affidavit of Joel Petty (Petty), in which Petty “creates a genuine issue of fact about whether the plans were prepared in substantial compliance with engineering and design standards in effect at the time.” Memorandum in Opposition to Motion for Summary Judgment, p. 3. Petty stated: “Contrary to the assertions of Eric Shanley and Joe Wuest as set forth in their Affidavits filed in support of LHD’s Motion for Summary Judgment, I do not agree or believe that the design and construction plans were prepared in substantial compliance with engineering or design standards in effect at the time the plans were prepared” (Affidavit of Joel W. Petty, p. 2, ¶ 2), and “In my opinion, based upon my review of the design and construction plans and examination

and/or inspection of the construction undertaken by LHD, I do believe the plans were prepared in substantial compliance with engineering or design standards in effect at the time and/or LHD exercised ordinary care in the construction of the project.” Affidavit of Joel W. Petty, p. 3, ¶ 6. While Petty’s statements about the design of the plans are conclusory, Petty provides an explanation of various items he finds deficient. However, all of those deficiencies relate to the *construction* of the project. The only item Petty finds deficient that relate to *designing* the plans is: “It is also important to note that the [?] in developing the plan JUB Engineering missed the wetlands north and east of the St. James intersection.” *Id.*, p. 2, ¶ 3. Petty does not establish how any such design deficiency caused Jacksons’ damages.

In its reply memorandum, LHD cites to the exhibits to the Supplemental Affidavit of Eric Shanley, which show the Army Corps of Engineers on two separate occasions (first on March 30, 2010, and second on October 24, 2011) told Shanley the Lancaster Road Project met the requirements of, and was in compliance with, the Department of Army Nationwide Permit 14. Reply Memorandum in Support of Defendant’s Motion for Summary Judgment, pp. 2-3. LHD also cites to recent Idaho case law in support of its contention that it need not demonstrate it actually followed the design/project plans created by JUB Engineering. *Id.*, p. 4, citing *Brown v. City of Pocatello*, 148 Idaho 802, 810-11,229 P.3d 1164,1172-73 (2010). Under *Brown*, all that is required of LHD was that it showed the existence of a plan or design either (a) was prepared in substantial conformance with existing standards or (b) previously approved in advance of construction by a legislative or administrative authority, and LHD complied by having the project plans, complying with the Department of Army Nationwide Permit, prepared by JUB and by the Lakes Highway District Board of Commissioners having approved the

plan and design before construction began. *Id.*, pp. 4-5, citing *Lawton v. City of Pocatello*, 126 Idaho 454, 459, 886 P.2d 330, 335 (1994).

In *Burgess v. Salmon River Canal Com, Ltd.*, 119 Idaho 299, 805 P.2d 1223 (1990), the Idaho Supreme Court was faced with an issue nearly identical to the one before this Court. In *Burgess*, the trial court's determination that the highway district was immune pursuant to I.C. § 6-904(8) (amended by act of April 4, 1988, ch. 324, 1988 Idaho Sess. Laws 983 (as amended at I.C. § 6-904(7))) was reversed by the Supreme Court. 119 Idaho 299, 307, 805 P.2d 1223, 1231. At the time of the *Burgess* decision, I.C. § 6-904(8) was in the conjunctive; now it is in the disjunctive. At the time of the *Burgess* decision, subsection eight required: (1) a plan or design for construction or improvement; (2) prepared in substantial conformance with engineering and design standards then in effect; *and* (3) approval before construction by the legislative body exercising discretion to give authority for such approval. *Id.* Now, subsection seven requires *either* substantial compliance with standards in effect at the time the plan or design is created *or* advance approval by the legislative body or other body or administrative agency exercising discretion by authority to grant such approval. I.C. § 6-904(7). In *Burgess*, the Supreme Court found the parties' dueling experts both failed to set forth what the "applicable engineering standard was at the time of construction in 1969." 119 Idaho 299, 308, 805 P.2d 1223, 1232. Additionally, the Supreme Court found insufficient evidence to show the plan of construction had been approved before reconstruction took place in 1969, having only an expert's cost-estimate addressed to the Buhl Highway District and the minutes of a Board of Commissioners meeting, neither of which mentioned the specific plan of reconstruction, in the record. *Id.*

Here, Eric Shanley, District Engineer for LHD, states in his affidavit:

The Lakes Highway District follows the Highway Standards for the Associated Highway Districts, which requires that all roadway and reconstruction plans be prepared by a Professional engineer licensed in the State of Idaho. The roadway plans must include provision for proper drainage of both the natural watercourse and the roadway, and they must show any necessary easements, and any special design considerations necessary for completion of the roadway structure.

Affidavit of Eric Shanley, p. 2, ¶ 6. Joseph Wuest, road supervisor for LHD, states in his affidavit that the Lancaster Road Project reconstruction plan was prepared by JUB “in substantial conformance with engineering or design standards in effect at the time of preparation of the plan or design.” Affidavit of Joe Wuest, p. 4, ¶ 17. In his affidavit submitted in opposition to the motion for summary judgment, Joel Petty, a licensed and certified professional civil engineer, sets forth his opinion that based on the project’s failure to meet the specific requirements of the Department of Army Nationwide Permit 14, LHD did not substantially comply with engineering and design standards in effect at the time of the project. Affidavit of Joel W. Petty, pp. 2-3, ¶¶ 3-6. In this regard, both parties make rather conclusory arguments, and neither party’s expert thoroughly or specifically sets forth what, precisely, engineering and design standards were in place at the time of the reconstruction project. Because the Court is restrained at summary judgment to draw all facts and inferences in favor of the non-moving party, the Jacksons survive summary judgment on the factual issue of whether the plans and designs used were prepared in conformance with the then-applicable engineering and design standards. See *Meridian Bowling Lanes, Inc. v. Meridian Athletic Assoc., Inc.*, 105 Idaho 509, 512, 670 P.2d 1294, 1297 (1983).

However, unlike the facts before the Supreme Court in *Burgess*, in the present case the Affidavit of Joe Wuest goes beyond merely stating that the plan and design were approved by the Lakes Highway District Board of Commissioners in advance of construction. Affidavit of Joe Wuest, p. 4, ¶ 18. Wuest also submits the minutes of the

Board of Commissions meetings memorializing the Board's: authorizing calling for bids to provide site clearing, grubbing, and utility relocation; authorizing the project award to site clear, grub, and relocate utilities to SI Construction; authorizing calling for bids for road widening and reconstruction; and approval of JUB's submitted construction plans on February 18, 2008. Exhibit C to the Affidavit of Joe Wuest.

Idaho Code § 6-904(7)'s requirements now being in the disjunctive (as opposed to § 6-904(8)'s language prior to the amendment) results in this approval being solely sufficient as an exception to governmental liability.

B. LHD is Immune Under Idaho Code § 6-904(1).

LHD next argues it is immune from liability because it exercised a discretionary function in deciding to widen and improve Lancaster Road. Memorandum in Support of Defendant's Motion for Summary Judgment, p. 6. LHD posits its decision to improve and widen Lancaster Road was a discretionary one, within the meaning of I.C. § 6-904(1), because: (1) the decision involved consideration of financial, political, economic and social effects of the road project; (2) the decision to retain the services of JUB Engineering and SI Construction and Super Grand, Inc. was discretionary; and (3) decisions regarding the road project "involve[ed] a consideration of broad policy factors" and "were clearly legislative in nature and not a routine implementation of LHD's basic policy considerations." *Id.*, p. 7. LHD cites subsection (1) of Idaho Code § 6-904:

A governmental entity and its employees while acting within the course and scope of their employment and without malice or criminal intent shall not be liable for any claim which:

(1) Arises out of any act or omission of an employee of the governmental entity exercising ordinary care, in reliance upon or the execution or performance of a statutory or regulatory function, whether or not the statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a governmental entity or employee thereof, whether or not the discretion be abused.

I.C. § 6-904(1). In response to this argument, Jacksons dispute whether LHD's decision was a discretionary one and argue a factual dispute exists as to whether LHD exercised ordinary care. Memorandum in Opposition to Motion for Summary Judgment, p. 4. To this, LHD argues the Lancaster Reconstruction Project was a discretionary activity requiring the board to establish plans, specifications and policy. Reply Memorandum in Support of Defendant's Motion for Summary Judgment, pp. 5-7. LHD argues it engaged in planning and building beyond mere "routine matters not requiring evaluation of broad policy factors." *Id.*, p. 5. LHD argues the Idaho Supreme Court's planning/operational test is met here so as to render the decisions made by LHD immune from liability. *Id.*, pp. 6-7, citing *Lawton v. City of Pocatello*, 126 Idaho 454, 461, 886 P.2d 330, 337 (1994); and *Oppenheimer Indus. v. Johnson Cattle Co.*, 112 Idaho 423, 424-25, 732 P.2d 661, 662-63 (1987). This Court agrees that Jacksons "...have failed to show, via *evidence*, how the political, financial, economic and social considerations required for the Lancaster Reconstruction Project falls under the operation prong of § 6-904(1)." *Id.*, p. 5. (italics in original). On summary judgment, Jacksons must present some proof by way of admissible evidence on this issue, and they have not.

LHD is also entitled to immunity pursuant to I.C. § 6-904(1) as there is no evidence to suggest the decision to undertake the road project was anything other than discretionary. LHD is correct in stating the question of whether an action qualifies as discretionary, and is therefore a basis for governmental immunity, is determined via the planning/operational test. Reply Memorandum in Support of Defendant's Motion for Summary Judgment, p. 6; see *Tomich v. City of Pocatello*, 127 Idaho 394, 397, 901 P.2d 501, 504 (1995). Pursuant to the standard, "[r]outine matters not requiring evaluation of broad policy factors will likely be 'operational,' whereas decisions involving a

consideration of the financial, political, economic, and social effects of a particular plan are likely 'discretionary' and will be accorded immunity." *Tomich*, 127 Idaho 394, 397, 901 P.2d 501, 504, quoting *Lawton v. City of Pocatello and Garcia*, 126 Idaho 454, 460, 886, P.2d 330, 336 (1994). Even taking all facts in the light most favorable to Jacksons, there is simply nothing before the Court to indicate the road reconstruction projects did not involve consideration of financial, political, economic, and social effects.

This Court finds LHD is immune under Idaho Code § 6-904(1), as interpreted by *Brown* and *Burgess*. While there may be a dispute whether LHD's plans were prepared in substantial conformance with existing standards, there is no dispute that the plans were approved prior to construction by both LHD's board and by the Corps of Engineers.

C. Liability for Negligent Implementation of the Plan.

Jacksons' Complaint alleges LHD was negligent in the construction of the improvements in question. Complaint, p. 3, ¶ 9. The construction or implementation of the plan would be an operational function. "Operational functions conducted without 'ordinary care', give rise to no governmental immunity." *Oppenheimer*, 112 Idaho 423, 425, 732 P.2d 661, 663. In *Lawton*, the City of Pocatello's decision to adopt a safety report and the Manual on Uniform Traffic Control Devices were discretionary function decisions, but the City's decision to use a raised median at the site of the accident was a "routine implementation of the City's pre-determined policies" and thus, that "...decision was not a discretionary function within the meaning of I.C. § 6-904(1)." 126 Idaho 454, 461, 886, P.2d 330, 337. As another example, even though it would involve an element of choice, no discretionary immunity is accorded decisions regarding the placement of street signs and the determination of speed limits, since such merely implement department policy. *Id.*, citing *Bingham v. Idaho Department of Transportation*, 117 Idaho

147, 150-51, 786 P.2d 538, 141-42 (1989). *Brown v. City of Pocatello*, 148 Idaho 802, 811, 229 P.3d 1164,1173 (2010) makes it clear that Idaho Code § 6-904(7) “does not grant immunity for the negligent implementation of a plan or design.” However, in *Brown*, the Idaho Supreme Court noted that the plan for the construction project in that case was carried out by Jack B. Parsons Company, an independent contractor. *Id.* The Idaho Supreme Court then noted: As a general rule, a principal is not liable for the negligence of an independent contractor in performing the contracted services. *Id.*, citing *Jones v. HealthSouth Treasure Valley Hospital*, 147 Idaho 109, 113, 206 P.3d 473, 477 (2009). Similarly, in the present case, the evidence is uncontradicted that LHD did not implement the plan, LHD did not construct the project. SI Construction of Hayden, Idaho was awarded the bid, and Super Grade, Inc., of Post Falls, Idaho, constructed the project. Affidavit of Joe Wuest, p. 3, ¶ 9, ¶ 14. Thus, on the present state of the evidence, there can be no cause of action against LHD for the negligent implementation of the plan by LHD’s subcontractor. Jacksons’ remedy might be against an entity other than LHD.

IV. CONCLUSION AND ORDER.

For the reasons stated above, LHD’s Motion for Summary Judgment must be granted.

IT IS HEREBY ORDERED LHD’s Motion for Summary Judgment is GRANTED. Counsel for LHD is ordered to prepare a judgment consistent with this memorandum decision and order.

Entered this 22nd day of December, 2011.

John T. Mitchell, District Judge

Certificate of Service

I certify that on the _____ day of December, 2011, a true copy of the foregoing was mailed postage prepaid or was sent by interoffice mail or facsimile to each of the following:

Lawyer
Paul W. Daugherty

Fax #
666-0550

Lawyer
Peter C. Erbland

Fax #
664-6338

Jeanne Clausen, Deputy Clerk