Prepared by the North Dakota Legislative Council staff for the Budget Committee on Government Services
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STATE LIABILITY FOR ACTS OF AGENTS

This memorandum addresses the issues relating to the state's liability that may arise as a result of the negligence by a private company with which the state has contracted to provide services on behalf of the state.

BACKGROUND - SOVEREIGN IMMUNITY

Sovereign immunity is a common-law doctrine that prohibits litigation against an unconsenting government. In September 1994 the North Dakota Supreme Court abolished the doctrine of sovereign immunity in a 4 to 1 decision. In *Bulman v. Hulstrand Construction Co. and the State of North Dakota*, 521 N.W.2d 632 (N.D. 1994), the court held that the Constitution of North Dakota Article I, Section 9, "does not bestow exclusive authority upon the legislature to waive or modify sovereign immunity of the State from tort liability and does not preclude this Court from abolishing that common-law doctrine."

The Constitution of North Dakota Article I, Section 9, provides:

> All courts shall be open, and every man for any injury done him in his lands, goods, person or reputation shall have remedy by due process of law, and right and justice administered without sale, denial or delay. Suits may be brought against the state in such manner, in such courts, and in such cases, as the legislative assembly may, by law, direct.

Although the court abolished sovereign immunity, the court indicated that its decision should not be interpreted to impose tort liability for the exercise of discretionary acts, including legislative and quasi-legislative acts and judicial and quasi-judicial acts. In addition, the court concluded that the abrogation of sovereign immunity should be prospective so that the Legislative Assembly may "implement and plan in advance by securing liability insurance, or by creating funds necessary for self-insurance." Thus the court abrogated sovereign immunity for the *Bulman* parties and two other cases heard contemporaneously with *Bulman* and for any claims arising 15 days after adjournment of the 1995 Legislative Assembly.

In 1995 the Legislative Assembly passed Senate Bill No. 2080, which created North Dakota Century Code Chapter 32-12.2. This chapter provides the procedures for bringing claims against the state for personal injury or property damage. Section 32-12.2-02, attached as an appendix, limits recovery to a total of $250,000 per person and $1 million for any number of claims arising from a single occurrence and prohibits punitive damages in actions against the state. The section also provides the circumstances under which the state may not be held liable for claims.

The 1995 Legislative Assembly also passed Senate Concurrent Resolution No. 4014, which proposed an amendment to the Constitution of North Dakota. The purpose of the constitutional amendment was to reinstate the doctrine of sovereign immunity and provide that no suit could be brought against the state or an employee of the state acting within the employee's official capacity unless the Legislative Assembly provides by law the type of claims and the procedure through which those claims may be brought. The measure was placed on the 1996 general election ballot and was rejected by the voters.

EMPLOYMENT RELATIONSHIPS AND LIABILITY

The question of whether the state, in the absence of sovereign immunity, may be liable for the negligent acts of a private company with which the state has contracted to provide services on behalf of the state is dependent on the type of employment relationship the state has with that private company.

CLASSIFICATION OF EMPLOYMENT RELATIONSHIPS

There are three traditional classifications of employment relationships in which a hiring party employs a secondary party to perform work or service. These relationships are often referred to as (1) principal/agent; (2) master/servant; and (3) independent contractor. The classification of these employment relationships is significant because the hiring party's liability is often predicated upon the status of the employment relationship.

It is generally accepted that the principal and the master are subject to liability for the actions of their agents and servants, respectively. There is no basic or fundamental distinction between the liability of a principal for the tortious act of his agent and the liability of a master for the tortious act of his servant. *2 Am. Jur. 278*.

The hiring party in an independent contractor relationship may be protected from liability arising from the actions of the independent contractor. An independent contractor may be distinguished from an agent in that the contractor is a person who contracts with the employer to do something for that employer, but is not controlled or subject to control of that employer in the performance of the contract, but only as to the result. *2 Am. Jur. 17.* Thus, under this theory, an employer does not possess the power of

controlling the person employed as to the details of the stipulated work, and therefore, the employer is not answerable for an injury resulting from the manner in which the details of the work are carried out by the independent contractor.

The holdings of the North Dakota Supreme Court seem to support this theory regarding the liability of employers of independent contractors. For example, in *State ex rel. Woods v. Hughes Oil Co.*, 58 N.D. 581, 226 N.W. 586 (1929), the court held that whether the person for whom work is performed has the right to exercise control over performance thereof and has the right to discharge a workman without liability are important factors in determining whether a workman is an independent contractor or a servant. In several other cases, the court has held that one of the most important tests to be applied in determining whether a person who is doing work for another is an employee or an independent contractor is whether the person for whom work is done has the right to control not merely the result, but also the manner in which work is done and the method used. *Janneck v. Workmen's Comp. Bureau*, 67 N.D. 303, 272 N.W. 188 (1936); *Mutual Life Ins. Co. v. State*, 71 N.D. 78, 298 N.W. 773, 138 A.L.R. 1115 (1941); *Burkhardt v. State*, 78 N.D. 818, 53 N.W.2d 394 (1952). The court, in *Starkenberg v. North Dakota Workmen's Comp. Bureau*, 73 N.D. 234, 13 N.W.2d 395 (1944) held that the test to determine whether one is an independent contractor or an employee under the workers' compensation act is the employer's retained power of control or superintendence over the contractor or employee. Also, in *Burkhardt* the court held that factors to be considered in determining whether an employed person is an independent contractor or an employee are the right to hire and discharge workmen; mode, method, or basis of payment; attitude and intention of parties; furnishing of tools, supplies, and materials; and whether work is a part of the regular business of the employer.

EXISTENCE OF EMPLOYMENT RELATIONSHIP

Generally speaking, “employment” is any service performed for remuneration or under any written or oral contract of hire. To “employ” is to make use of the services of another, while to “be employed” means to perform a function under a contract or orders to do so. The alleged employer’s right to control the employee’s conduct is the key element in the determination for whether there is an employment relationship. Other relevant factors are:

- The alleged employer’s selection and hiring of the alleged employee.
- The parties’ intent, as expressed in a contract as to the type of relationship that would exist between them.
- The payment of wages and the method of payment.
- The provision of fringe benefits by the alleged employer.
- The alleged employer’s deduction, withholding, or payment of taxes based on compensation for work performed.
- The source of the materials and equipment used by a worker.
- The degree of skill involved in the work.
- The duration of the worker’s service.
- Whether the worker’s efforts further the purposed employer’s business, rather than an independent enterprise of the worker.

In determining the type of employment relationship that exists, a court will examine the totality of the circumstances surrounding the alleged employment and no single factor conclusively establishes the existence or absence of an employer-employee relationship.

CONCLUSION

The question of whether a private company hired by the state to perform a service on behalf of the state is in fact an agent, servant, employee, or independent contractor is critical in determining the state’s potential liability exposure. Although there are various tests that would be used by a court to determine the state’s employment relationship with the private company in a particular situation, the common thread running through the tests appears to be whether the employer has the right to control the means and manner of an employee's work performance.

ATTACH:1

32-12.2-02. Liability of the state - Limitations - Statute of limitations.

1. The state may only be held liable for money damages for an injury proximately caused by the negligence or wrongful act or omission of a state employee acting within the employee's scope of employment under circumstances in which the employee would be personally liable to a claimant in accordance with the laws of this state, or an injury caused from some condition or use of tangible property under circumstances in which the state, if a private person, would be liable to the claimant. No claim may be brought against the state or a state employee acting within the employee's scope of employment except a claim authorized under this chapter or otherwise authorized by the legislative assembly.

2. The liability of the state under this chapter is limited to a total of two hundred fifty thousand dollars per person and one million dollars for any number of claims arising from any single occurrence. The state may not be held liable, or be ordered to indemnify a state employee held liable, for punitive or exemplary damages. Any amount of a judgment against the state in excess of the one million dollar limit imposed under this subsection may be paid only if the legislative assembly adopts an appropriation authorizing payment of all or a portion of that amount. A claimant may present proof of the judgment to the director of the office of management and budget who shall include within the proposed budget for the office of management and budget a request for payment for the portion of the judgment in excess of the limit under this section at the next regular session of the legislative assembly after the judgment is rendered.

3. Neither the state nor a state employee may be held liable under this chapter for any of the following claims:

a. A claim based upon an act or omission of a state employee exercising due care in the execution of a valid or invalid statute or rule.

b. A claim based upon a decision to exercise or perform or a failure to exercise or perform a discretionary function or duty on the part of the state or its employees, regardless of whether the discretion involved is abused or whether the statute, order, rule, or resolution under which the discretionary function or duty is performed is valid or invalid. Discretionary acts include acts, errors, or omissions in the design of any public project but do not include the drafting of plans and specifications that are provided to a contractor to construct a public project.

c. A claim resulting from the decision to undertake or the refusal to undertake any legislative or quasi-legislative act, including the decision to adopt or the refusal to adopt any statute, order, rule, or resolution.

d. A claim resulting from a decision to undertake or a refusal to undertake any judicial or quasi-judicial act, including a decision to grant, to grant with conditions, to refuse to grant, or to revoke any license, permit, order, or other administrative approval or denial.

e. A claim resulting from the assessment and collection of taxes.

f. A claim resulting from snow or ice conditions, water, or debris on a highway or on a public sidewalk that does not abut a state-owned building or parking lot, except when the condition is affirmatively caused by the negligent act of a state employee.

g. A claim resulting from any injury caused by a wild animal in its natural state.

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h. A claim resulting from the condition of unimproved real property owned or leased by the state.

i. A claim resulting from the loss of benefits or compensation due under a program of public assistance.

j. A claim resulting from the reasonable care and treatment, or lack of care and treatment, of a person at a state institution where reasonable use of available appropriations has been made to provide care.

k. A claim resulting from damage to the property of a patient or inmate of a state institution.

l. A claim resulting from any injury to a resident or an inmate of a state institution if the injury is caused by another resident or inmate of that institution.

m. A claim resulting from environmental contamination, except to the extent that federal environmental law permits the claim.

n. A claim resulting from a natural disaster, an act of God, a military action, or an act or omission taken as part of a disaster relief effort.

o. A claim for damage to property owned by the state.

p. A claim for liability assumed under contract, except this exclusion does not apply to liability arising from a state employee's operation of a rental vehicle if the vehicle is rented for a period of thirty days or less and the loss is not covered by the state employee's personal insurance or by the vehicle rental company.

q. A claim resulting from the failure of any computer hardware or software, telecommunications network, or device containing a computer processor to interpret, produce, calculate, generate, or account for a date that is compatible with the year 2000 date change if the state has made a good-faith effort to make the computer hardware or software, telecommunications network, or device containing a computer processor compliant with the year 2000 date change. For the purposes of this subdivision, the state is presumed to have made a good-faith effort to make the computer hardware or software, telecommunications network, or device containing a computer processor compliant with the year 2000 date change if the results of testing establish that the computer hardware or software, telecommunications network, or device containing a computer processor meets the compliance requirements of this section, or if the state has sought and received an assurance of compliance from the manufacturer or supplier, or if the state has sought an assurance of compliance from the manufacturer, supplier, government or other reliable source when testing or receiving an assurance from the manufacturer or supplier of the computer hardware or software, telecommunications network, or device containing a computer processor is not practicable. For purposes of this section, computer hardware or software, a telecommunications network, or device containing a computer processor is compliant with the year 2000 date change if:

(1) All stored dates or programs contain century recognition, including dates stored in data bases and hardware or internal system dates in devices;

(2) The program logic accommodates same century and multicentury formulas and date values; and

(3) The year 2000 or any other leap year is correctly treated as a leap year within all program logic.

4. An action brought under this chapter must be commenced within the period provided in

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section 28-01-22.1.

5. This chapter does not create or allow any claim that does not exist at common law or has not otherwise been created by law as of April 22, 1995.

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