

IN THE COURT OF APPEALS OF IOWA

No. 8-316 / 07-0887
Filed October 1, 2008

**LYLE E. SCHNEIDER, PAUL S. KURTZ
and SHIRLEY J. KURTZ, GENE J. PETERS,
STERLING TOPS, INC., ROBERT W. BONORDEN
and DEANN BONORDEN, GERALD W. PETERSEN,
RICHARD R. KANE and DEBRA K. KANE,
MARK A. DOEPKE and MICHELLE L. DOEPKE,
GLORIA M. KNAPP FREILINGER,
RUDY BUSCH, d/b/a RUDY'S SALES AND SERVICE,
PAUL R. BEEM and STACIE L. BEEM,
DAVID J. FINK and DEB FINK,
DAVIK'S AUTO BODY/DENVER OIL COMPANY,
RANDALL-MARTA BENDER,
d/b/a BENDER ENTERPRISES, INC.,
TOMMIE BRETTMANN, d/b/a DENVER MILL,
BYRON D. DAVIS and JANE P. DAVIS,
DAVIS FARM AND AUTO, INC.,
WILLIAM BUSS, d/b/a DENVER
CONSTRUCTION, INC., and MIKE WOOLDRIK,
as Executor of the Estate of ROBERT WOOLDRIK,
Plaintiffs-Appellants,**

vs.

STATE OF IOWA,
Defendant-Appellee.

Appeal from the Iowa District Court for Bremer County, Stephen P. Carroll,
Judge.

The plaintiffs appeal from the order granting summary judgment and
dismissing their claims against the State of Iowa for damages allegedly cause
during a flood. **AFFIRMED.**

John Hines of Dutton, Braun, Staack & Hellman, P.L.C., Waterloo, for appellant.

Thomas J. Miller, Attorney General, and Robin G. Formaker and Richard Mull, Assistant Attorneys General, for appellee.

Heard by Huitink, P.J., and Vogel and Eisenhauer, JJ.

VOGEL, J.

The plaintiffs, all owners of property near the town of Denver, Iowa, filed a petition against the State of Iowa alleging that the negligent design and construction of the U.S. Highway 63 bypass in and about the Denver area caused flooding and resulting property damage. The district court granted the State's summary judgment motion and dismissed the plaintiffs' petition based on several grounds. Because we agree with the district court that discretionary function immunity applies to the Iowa Department of Transportation's actions in building the bypass, we affirm.

Background Facts and Proceedings.

On May 16 and 17, 1999, the area around Denver received a considerable amount of rainfall, which caused significant flooding. It was reported that throughout the evening of May 16 and the early morning of May 17, 6.32 inches of rain fell, and during the day of May 17 an additional .56 inches of rain fell. As a result of this heavy rain and resulting flooding, many properties were damaged.

Denver is situated along Highway 63. In 1993, the State constructed Highway 63, a four-lane, divided-highway bypassing Denver on its west side. This project re-routed the highway beginning just south of town and continuing to the north along the western edge of the town. The bypass, which was originally designed in 1988, crossed a stream referred to as Quarter Section Run Creek. The design for the bridge crossing this stream was constructed to accommodate a fifty-year flood.

Three years before the bypass was constructed, Denver and Bremer County adopted a Flood Insurance Study designating Quarter Section Run Creek

as a “regulatory floodway.” The Iowa Department of Transportation was not informed by the city or the county of this designation when it constructed the Highway 63 bypass.

In their petition, the plaintiffs contended among other things that (1) the bypass design prevented adequate escape of water under the highway, forcing the floodwater to rise higher than it would have pre-construction, (2) the design failed to comply with generally accepted engineering standards, (3) the construction resulted in an “unnatural” amount of water flowing through the creek, and (4) the bypass acted as a dam, blocking the natural course of drainage. Following a hearing on the State’s motion for summary judgment, the court dismissed the plaintiffs’ petition on several grounds. In particular, it held the design and construction immunity provided by Iowa Code section 669.14(8) immunized the State for any permanent devaluation claim, the claim under section 314.7 is barred due to the lack of evidence the damage was caused by surface water diversion from the highway, and discretionary function immunity under section 669.14(1) shields the State’s actions. The plaintiffs appeal from this ruling.

Scope and Standards of Review.

We review the district court’s summary judgment rulings for the correction of errors at law. Iowa R. App. P. 6.4; *Faeth v. State Farm Mut. Auto. Ins. Co.*, 707 N.W.2d 328, 331 (Iowa 2005). Summary judgment is appropriate when the pleadings, depositions, answers to interrogatories, admissions on file, and affidavits show there is no genuine issue of material fact, and the moving party is entitled to a judgment as a matter of law. Iowa R. Civ. P. 1.981(3); *Grinnell Mut.*

Reins. Co. v. Jungling, 654 N.W.2d 530, 535 (Iowa 2002). A fact question arises if reasonable minds can differ on how the issue should be resolved. *Grinnell Mut. Reins.*, 654 N.W.2d at 535. No fact question arises if the only conflict concerns legal consequences flowing from undisputed facts. *Id.*

Discretionary Function Immunity.

We first address the district court's conclusion that "discretionary function immunity attaches so as to preclude the Plaintiffs' claims against the State for the flooding." Iowa Code section 669.14(1) provides immunity from "[a]ny claim based upon . . . the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a state agency or an officer or employee of the state, whether or not the discretion is abused." In determining whether the discretionary function immunity attaches, we apply the test announced by the United States Supreme Court in *Berkovitz v. United States*, 486 U.S. 531, 536-37, 108 S. Ct. 1954, 1958-59, 100 L. Ed. 2d 531, 540-41 (1988). See *Goodman v. City of LeClaire*, 587 N.W.2d 232, 237 (Iowa 1998) (adopting the *Berkovitz* test). The first step is to determine whether there was an element of judgment or discretion involved in the State's decisions regarding the building of the bypass. *Doe v. Cedar Rapids Cmty. Sch. Dist.*, 652 N.W.2d 439, 443 (Iowa 2002). If a choice was exercised in that decision, we then determine whether this kind of judgment is the type the discretionary function immunity was designed to shield from liability. *Id.* If the answer to either of these questions is negative, then the discretionary function immunity is not a defense. *Id.*

Initially, we frame this issue by looking to the plaintiffs' precise claims. Their petition alleges their damages were proximately caused by the DOT's

“negligence in the design and construction of the bypass project.” That appears to be the manner in which the case was presented below. However, now on appeal the plaintiffs have altered their semantics, indeed the very nature of their claim, to premise their claim for recovery on “the DOT’s encroachment on the floodway of Quarter Section Run Creek” and whether the DOT illegally constructed the bypass within a regulatory floodway, contrary to state and federal statutes.¹ This issue is appropriately analyzed by the manner in which the petition was styled and argued below. Having done so, we conclude the district court correctly determined the first prong of the *Berkovitz* test is met. Without question, an element of judgment or discretion was involved in the design and construction of the bypass. The uncontroverted affidavit of the State’s expert, David Claman, an engineer who since 1996 has worked for the Office of Bridges and Structures for the DOT, detailed the planning and construction of the bypass which involved a considerable array of choices and judgment. During the process, the DOT solicited public comment to air different points of view. The end result was a product of all those discretionary calls and viewpoints.

Turning to the second prong, we must determine whether this judgment is the type the discretionary function immunity was designed to shield from liability, because “not all actions involving discretion are immune from liability.” *Graber v. City of Ankeny*, 656 N.W.2d 157, 164 (Iowa 2003).

¹ In addition, while the plaintiffs on appeal make reference to numerous provisions of Iowa Code chapter 455B, it does not appear this argument was made to the district court. “It is a fundamental doctrine of appellate review that issues must ordinarily be both raised and decided by the district court before we will decide them on appeal.” *Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002).

[A]n immune governmental action is one that weighs competing ideals in order to promote those concerns of paramount importance over the less essential, opposing values. Whether or not the city actually made its decision with policy considerations in mind is not determinative. Instead, the city's actions in [abating the nuisance] must be amenable to a policy-based analysis. The circumstances must show the city legitimately could have considered social, economic, or political policies when making judgments as to the [abating of the nuisance].

Id. at 165. This requirement functions as a limitation on the judiciary and prevents judicial second-guessing of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort. *Berkovitz*, 486 U.S. at 536-37, 108 S. Ct. at 1959, 100 L. Ed. 2d at 541.

Reviewing the circumstances of this case, it is apparent that the DOT legitimately could have, and in fact did, consider various social, economic, and political policies in choosing to build the bypass and in the manner in which it was built. The district court quoted extensively from the uncontroverted affidavit of David Claman. Without needlessly repeating that entire portion of his affidavit, suffice it to say that he detailed extensively the “considerable planning and balancing of priorities and competing demands” that went into the decision to build the bypass. Included among those considerations were such broad issues as

the project's impact upon the local and state economy; the highway's ability to more efficiently move vehicular traffic . . .; the highway's propensity to increase efficient use of energy; its potential to enhance the safety of the traveling public; and whether or not the project's potential cost is consistent with the benefits to be obtained.

In addition, Claman noted that in his review, he had considered such sources as the bypass's original design and construction plans. As noted above, discretionary function immunity is designed to protect decisions based upon social, economic, and political policy. *Berkovitz*, 486 U.S. at 537, 108 S. Ct. at 1959, 100 L. Ed. 2d at 541. That is precisely what occurred before and during the construction of this bypass. Therefore, we conclude the court properly granted summary judgment to the State on the issue of discretionary function immunity. Because of this holding, we need not address the remainder of the plaintiffs' claims on appeal.

AFFIRMED.