STATE OF MINNESOTA
IN COURT OF APPEALS
A19-0649

Laureen Dvorak, et al.,
Appellants,

vs.

City of Madison,
Respondent.

Filed December 9, 2019
Affirmed
Rodenberg, Judge

Lac Qui Parle County District Court
File No. 37-CV-18-14

John E. Mack, Joel A. Novak, New London Law, P.A., New London, Minnesota (for appellants)

Patrick L. Arneson, League of Minnesota Cities, St. Paul, Minnesota (for respondent)

Considered and decided by Rodenberg, Presiding Judge; Johnson, Judge; and Jesson, Judge.

U N P U B L I S H E D O P I N I O N

RODENBERG, Judge

Appellants Laureen Dvorak and Timothy Judovsky appeal from the district court's judgment dismissing their negligence claims for want of proof and based on vicarious official immunity, and from its order denying their motion for a new trial. Appellants argue that the district court erred when it found that appellants failed to prove that respondent

City of Madison (the city) was negligent and in concluding that the city is entitled to vicarious official immunity. We affirm.

FACTS

In 2010, the city started a three-year, ten-million-dollar project to upgrade its storm- and sanitary-sewer systems. Only two segments of the system were not replaced because the Minnesota Department of Transportation denied permission to disrupt the highways under which those two segments run. The city also spent over four million dollars upgrading its wastewater-treatment facility by installing three new pumps.

Appellants own and reside together in a house in Madison that is served by the city's sewer system. On August 11, 2016, a torrential rain fell on the city. The wastewater-treatment facility was fully operational at that time. The following timeline is taken from the district court's findings of fact, none of which are challenged on appeal.

Around 4:00 a.m., Mr. Vonderharr, the wastewater operator for the city, received a call on his work cellphone from the Supervisory Control and Data Acquisition (SCADA) system. The SCADA system monitors the wastewater-treatment facility and automatically calls out to a programmed list of phone numbers if any alarms are activated. It continues to call out to the programmed phone numbers until someone answers. The first two numbers on the list are Vonderharr's work cellphone and his home phone. The call Vonderharr received on August 11 concerned a high-water alarm at the wastewater-treatment facility. Vonderharr immediately went to the wastewater-treatment facility.

When Vonderharr arrived at the facility, he checked the SCADA display board and saw that the wet well, where all sewage first enters the system, was highlighted as having

a high water level. The level of water in the wet well was then at about six feet. Anything over five feet is considered to be a high water level.

Vonderharr also observed the pumps. He noticed that all three pumps were running at 100% capacity, so he monitored the level of the water in the wet well for about 20 minutes. The water level in the wet well did not change during that time. Based on Vonderharr's experience, he concluded that the system was satisfactorily handling the flow. Around 4:30 a.m., Vonderharr left the wastewater-treatment facility and returned home.

Dvorak awoke around 5:30 a.m. and heard sounds coming from her basement. She arose and turned on the lights. When she looked in the basement, she saw about six-inches of standing water. She went downstairs, saw water coming out of her toilet, and screamed for appellant Judovsky.

Around 5:45 a.m., Dvorak called the wastewater-treatment facility because of the foul smell of the water in appellants' basement. There was no answer and no answering machine. Judovsky tried calling the water-plant operator, Ms. Chester, but got no answer. Eventually appellants were told by Chester's son that Mr. Broin, the water-plant supervisor, would be notified.

Around 6:00 a.m., Broin received a phone call from the water-plant operator informing him of a sewer backup in appellants' basement. Broin immediately went to the area of town where appellants lived and opened two manholes that were downstream from appellants' house. Water was not coming out of the manholes, but the water levels were

higher than Broin thought they should be. Broin called Vonderharr to report what he saw and to tell him that they should deploy portable pumps to start bypassing the system.

After receiving the call from Broin, Vonderharr went back to the wastewater-treatment facility. When he arrived, all three pumps were still running. Vonderharr got additional portable pumps and used them to help alleviate the load on the system. Broin and Vonderharr also borrowed and set up a larger portable pump around 7:00 a.m. Around 8:30 a.m., the water drained from appellants' basement.

Vonderharr formed the opinion that the storm-water system was full because of the heavy rainfall, which caused the older storm-water pipes—that the city was not allowed to replace—to leak into the sanitary-sewer system. Speculation began that the sewer backup may have been caused by too many residents discharging their sump pumps into the sanitary-sewer system in violation of a city ordinance prohibiting such discharge.

Appellants filed a complaint alleging four negligence causes of action against the city: (1) negligent failure to monitor and enforce sewer-related ordinances; (2) negligent failure to reasonably monitor, operate, and maintain the sewage-disposal facility; (3) negligent failure to take reasonably prompt preventative actions prior to August 11, 2016; and (4) negligent failure to either have adequate emergency measures to prevent or minimize damage, or adequate means by which residents could contact city personnel to facilitate the prevention or minimization of damages.

Following a court trial, the district court found that the city was not negligent, and further determined that official immunity and vicarious official immunity applied to

preclude appellants' claims. Appellants moved for a new trial, which the district court denied.

This appeal followed.

D E C I S I O N

The record supports the district court's finding that appellants failed to prove that the city was negligent.

Appellants argue that the district court erred by finding that the city was not negligent under any of the four asserted causes of action for negligence. Appellants also argue that the district court's ultimate findings of fact concerning negligence contradict its factual findings concerning Vonderharr's actions.

At oral argument, appellants conceded that they were not substantially challenging the district court's finding of no negligence concerning the third asserted cause of action. Appellants principally argue that the district court erred concerning the second cause of action, which implicates the first and fourth causes of action.

"In an appeal from judgment following a court trial, we defer to the district court's findings of fact unless clearly erroneous." *Friend v. Gopher Co., Inc.*, 771 N.W.2d 33, 37 (Minn. App. 2009). "A finding is clearly erroneous when there is no reasonable evidence to support the finding or when an appellate court is left with the definite and firm conviction that a mistake occurred." *State v. Rhoads*, 813 N.W.2d 880, 885 (Minn. 2012). As noted, appellants do not expressly challenge the district court's findings of the underlying facts. Appellants' arguments on appeal relate to whether those findings of fact are internally consistent and whether they demonstrate negligence.

"[T]o make a prima facie case of negligence in a sewage-backup case, the plaintiff must prove that the defendant owed plaintiff a duty, that there was a breach of that duty, that the breach proximately caused the plaintiff's damages, and that the plaintiff did in fact suffer injury." *Jindra v. City of St. Anthony*, 533 N.W.2d 641, 643 (Minn. App. 1995). "[W]here a sewer causes damage to private property, a municipality is liable for the damages sustained after notice of the condition and a reasonable opportunity to remedy it." *Lawin v. City of Long Prairie*, 355 N.W.2d 764, 767 (Minn. App. 1984). Notice can be actual or constructive. *Jindra*, 533 N.W.2d at 644.

Concerning the first cause of action, the district court found that the city "was not negligent in failing to monitor and enforce sewer-related ordinances" because the city had no duty under the city ordinances to enter homes and inspect sump-pump systems. The district court also found no breach of any duty because the record contains no evidence that the city had notice, before August 11, 2016, of anyone violating the city ordinance by disposing of storm-water into the sanitary-sewer system.

Concerning the second cause of action, the district court found that the city "was not negligent in failing to reasonably monitor, operate, and maintain the sewage[-]disposal facility" because the city was not aware of any "maintenance or operational issues" concerning the upgraded facility, and the SCADA alert system was reasonable and working properly.

Concerning the third cause of action, the district court found that the city reasonably believed that the sanitary-sewer system was working properly on the night in question and

therefore did not need to take any "prompt preventative measures" beyond the measures actually taken.

Concerning the fourth cause of action, the district court found that appellants had not shown the city to be negligent by failing to have "adequate emergency measures [or] . . . adequate means by which residents could contact [c]ity personnel" because "the methods available to the public to reach sewer maintenance personnel are reasonable."

The district court's findings of fact and the record reasonably support the district court's conclusion that the city was not negligent. Vonderharr responded to the SCADA alert call. He went to the wastewater-treatment facility, identified the cause of the SCADA alert as a high water level in the wet well, and observed the wet well for about twenty minutes. Based on his experience, Vonderharr determined that the three pumps in the wet well were handling the flow because the observed water level did not rise during that time. Vonderharr determined that no further action was necessary. He was not then aware of any city residents having issues with flooding or sewer backup. Moreover, the city's storm- and sanitary-sewer water systems had recently been renovated, and the city had recently upgraded the wastewater-treatment facility. The new systems and facility were completely operational, and the city had no reason to think that the systems were not operating properly.

On these facts, the district court might have found that Vonderharr's actions were not reasonable in light of the circumstances that emerged during and after a rainfall of over four inches. But the district court found that Vonderharr's actions were reasonable. The record supports the district court's findings and reasoning. That the record could support

different findings than those the district court made is no indication of error. *Vangsness v. Vangsness*, 607 N.W.2d 468, 474 (Minn. App. 2000). The district court is tasked with finding facts, and we defer to the district court's findings when the record supports them. *Friend*, 771 N.W.2d at 37. Appellants do not challenge those findings of fact which, in turn, reasonably support the district court's conclusion that the city was not negligent. We decline to substitute our view of the facts for that of the district court, which heard the testimony and is best positioned to find the facts.

The district court did not err by alternatively concluding that the city is protected by vicarious official immunity.

Appellants argue that Vonderharr is not entitled to official immunity and that, accordingly, the city is not entitled to vicarious official immunity. Appellants also contend that the city is not entitled to vicarious official immunity because it contributed to Vonderharr's negligence.

Because the record supports the district court's determination that Vonderharr was not negligent, as discussed above, we do not further address the argument that the city's own fault contributed to any negligence on the part of Vonderharr.

The district court found that Vonderharr is protected by official immunity because his "response was appropriate to the situation and was based on a discretionary judgment that he made at the scene." The district court further concluded that the city is entitled to vicarious official immunity.

"The applicability of immunity is a legal question that we review de novo." *Kariniemi v. City of Rockford*, 882 N.W.2d 593, 599 (Minn. 2016). The purpose of the

official-immunity doctrine is to ensure that "individual government actors [are] able to perform their duties effectively, without fear of personal liability that might inhibit the exercise of their independent judgment." *Id.* at 600 (quotation omitted). The decision to grant official immunity generally "turns on: (1) the conduct at issue; (2) whether the conduct is discretionary or ministerial and, if ministerial, whether any ministerial duties were violated; and (3) if discretionary, whether the conduct was willful or malicious." *Vassallo ex rel. Brown v. Majeski*, 842 N.W.2d 456, 462 (Minn. 2014).

"[V]icarious official immunity protects the government entity from suit based on the official immunity of its employee." *Wiederholt v. City of Minneapolis*, 581 N.W.2d 312, 316 (Minn. 1998). Vicarious official immunity will be applied "when failure to grant it would focus stifling attention on an official's performance to the serious detriment of that performance." *Schroeder v. St. Louis County*, 708 N.W.2d 497, 508 (Minn. 2006) (quotations omitted). While a grant of vicarious official immunity is not automatic, immunity is generally extended. *Sletten v. Ramsey County*, 675 N.W.2d 291, 300 (Minn. 2004).

We see no error in the district court's conclusion that the city is entitled to vicarious official immunity. Much like we concluded in *Nordlie v. City of Maple Lake*, No. A05-1321, 2006 WL 923649, at *5-6 (Minn. App. Apr. 11, 2006), *review denied* (Minn. June 28, 2006), the massive rainfall event here required Vonderharr to make quick and

discretionary decisions about how to best respond.[1] Vonderharr had no manual or policy to follow in this precise circumstance, and he instead relied on his experience. This is "the type of emergency or crisis situation in which official immunity is meant to apply, so that the city employees can discharge their duties as they believe them to be effective and necessary under the circumstances." *Id.* at *6. Moreover, and as was the case in *Nordlie*, the city is entitled to vicarious official immunity because Vonderharr's actions "are of the type that if immunity were denied, the failure to extend immunity would inhibit employees in the future." *Id.*

Issues of immunity are generally raised before negligence claims are resolved, because official immunity relieves the immune actor not only from liability but also from having to defend against the claim. *Wiederholt*, 581 N.W.2d at 316. Here, there was no pretrial motion concerning official immunity. Therefore, the district court decided the immunity issue after trial. It did not err in applying vicarious official immunity as an alternative basis for finding no liability on the part of the city. This determination is sufficient as an additional basis to affirm the district court's decision.

Finally, appellants raise as an issue the district court's denial of their motion for a new trial. Appellants have neither briefed nor argued this issue. "An assignment of error based on mere assertion and not supported by any argument or authorities in appellant's brief is waived and will not be considered on appeal unless prejudicial error is obvious on

[1] Unpublished cases are not binding authority. Minn. Stat. § 480A.08, subd. 3 (2018). We do, however, recognize that they may have persuasive value. *Dynamic Air, Inc. v. Bloch*, 502 N.W.2d 796, 800 (Minn. App. 1993).

mere inspection." *Schoepke v. Alexander Smith & Sons Carpet Co.*, 187 N.W.2d 133, 135 (Minn. 1971). No such error is obvious here.

Affirmed.