STATE OF MINNESOTA
IN COURT OF APPEALS
A11-381

Enbridge Energy, Limited Partnership,
Respondent,

vs.

Donovan Dyrdal, et al.,
Appellants.

Filed October 24, 2011
Affirmed
Minge, Judge

Pennington County District Court
File No. 57-CV-10-82

Paul B. Kilgore, Fryberger, Buchanan, Smith & Frederick, P.A., Duluth, Minnesota (for respondent)

Jon Erik Kingstad, Oakdale, Minnesota (for appellant)

Considered and decided by Halbrooks, Presiding Judge; Minge, Judge; and Bjorkman, Judge.

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

MINGE, Judge

Appellants challenge the district court's denial of their motion for dismissal, arguing that they are immunized from liability because respondent's claims constitute strategic litigation against public participation (SLAPP) under Minn. Stat. §§ 554.01–.05

(2010).[1] In addition, appellants challenge the district court's grant of respondent's motion for a temporary injunction and partial grant of respondent's motion for summary judgment on their request for a declaratory judgment. Because appellants' actions do not meet the SLAPP definition, we affirm the denial of appellants' motion for dismissal under the anti-SLAPP statutes. Because the district court did not err in determining that respondent was likely to prevail on the merits of the claim and because appellants failed to establish any questions of material fact regarding respondent's claim for declaratory relief, we affirm the district court's grant of a temporary injunction and partial grant of respondent's motion for summary judgment.

FACTS

Appellants Donovan and Anna Dyrdal own farm property in Pennington County. Their property is subject to four right-of-way easements held by respondent Enbridge Energy, Limited Partnership, a public-service corporation, for its underground pipelines. In 2007, in a contested eminent-domain proceeding, the district court awarded an additional easement for the Alberta Clipper pipeline. The eminent-domain court order provides Enbridge with "title to and possession of an easement over, across, and under . . . [the Dyrdal property] for pipeline installation, maintenance, repair, replacement, and related purposes, together with such rights of ingress and egress as are reasonably necessary or convenient in the exercise of such easement rights." *See Enbridge Energy, Ltd. P'ship v. Dyrdal* (*Enbridge II*), No. A09-1866, 2010 WL 3000190 (Minn. App. Aug.

[1] The SLAPP acronym and anti-SLAPP statutes are discussed in Margaret Graham Tebo, *Offended by a SLAPP: As Lawsuits Against Citizens Expand, Countermeasures Are Rolled Out,* A.B.A.J., Feb. 2005, at 16.

3, 2010) (affirming district court's August 10, 2009 condemnation order and allowing Enbridge to construct the Alberta Clipper pipeline), *review denied* (Minn. Oct. 27, 2010); *see also Enbridge Energy, Ltd. P'ship v. Dyrdal* (*Enbridge I*), No. A08-1863, 2009 WL 2226488 (Minn. App. July 28, 2009) (affirming district court's finding that the taking of the Dyrdals' land to construct yet another pipeline known as "LSr" was for a public necessity).

Enbridge completed installation of the Alberta Clipper pipeline in November 2009. During preoperational testing, Enbridge discovered problems at two locations on the Dyrdal property: one problem area on either side of Judicial Ditch 25, which runs north/south across the Dyrdal property. Enbridge's crew began work on January 5, 2010, using several items of construction equipment. To reach the problem areas, the crew used a field road on the Dyrdal property. At the conclusion of each workday, Enbridge left its equipment at the pipeline excavation site.

The Dyrdals objected to Enbridge's use of their field road, but Enbridge continued to use it as an access route. In response, between the workdays of January 10 and 11, the Dyrdals placed approximately 20 large bales of hay across the field road, obstructing access to the public road. These bales prevented Enbridge from using the field road to transport fuel to their equipment or remove the equipment from the Dyrdal property. The Dyrdals placed approximately eight additional large bales of hay and a tractor where the field road crossed Judicial Ditch 25. These bales and the tractor prevented Enbridge from using the field road to move their equipment across the ditch between the problem sites. Also as a result of the obstructions, the construction contractor feared for the safety of his

employees and refused to enter the Dyrdal property to complete the project. Although the Dyrdals removed the hay bales by the end of the day on January 12, Enbridge asserts that the delay added an additional $28,697.80 to the project costs.

To prevent a reoccurrence of the hay-bale incident, Enbridge filed a complaint in the district court seeking declaratory and injunctive relief and alleging conversion, tortious interference with contract, breach of easements, and violation of the district court's August 10, 2009 eminent-domain order. Enbridge also moved for temporary injunctive relief to prevent the Dyrdals from obstructing Enbridge's access to the pipeline while the litigation was pending. The Dyrdals' answer asserted several affirmative defenses, including immunity from liability under Minnesota's anti-SLAPP statutes, and alleged various counterclaims.

Prior to the district court's ruling on the request for a temporary injunction, the Dyrdals moved for dismissal of Enbridge's claims pursuant to Minnesota's anti-SLAPP statutes. On June 2, 2010, the district court granted Enbridge's motion for a temporary injunction. Enbridge subsequently moved for summary judgment on its claims and for dismissal of the Dyrdals' counterclaims.

On December 22, 2010, the district court denied the Dyrdals' motion for dismissal and granted Enbridge's motion for summary judgment on the issue of declaratory relief. In granting declaratory relief, the district court ruled that Enbridge had "the right of ingress to and egress from [Enbridge's] Alberta Clipper pipeline, over and across [the Dyrdal] property, . . . for all pipeline purposes, including maintenance, repair, replacement, and restoration" and dismissed the Dyrdals' counterclaims. However, the

district court denied Enbridge's motion for summary judgment on three issues: whether it was entitled to permanent injunctive relief, whether the Dyrdals materially breached Enbridge's easement rights, and whether Enbridge had established its damages.

The Dyrdals appealed, challenging the district court's denial of their motion for dismissal and the district court's failure to dissolve the temporary injunction.[2] Enbridge has not appealed the three issues on which it was denied summary judgment.

D E C I S I O N

I. Anti-SLAPP Motion

The first issue is whether the district court erred by denying the Dyrdals' motion for partial summary judgment on the basis of Minnesota's anti-SLAPP statutes. "A motion for summary judgment shall be granted when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that either party is entitled to a judgment as a matter of law." *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993). No genuine issue for trial exists "[w]here the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party." *DLH, Inc. v. Russ*, 566 N.W.2d 60, 69 (Minn.

[2] In their notice of appeal, the Dyrdals claim to be appealing from the district court's denial of their motion to dissolve the injunction. However, no motion was made to the district court. Enbridge asserts that this is a procedural failure that requires dismissal of this issue. Although a notice of appeal must specify which order one is appealing from, the supreme court has noted that we are to liberally construe such notices in favor of their sufficiency. *Kelly v. Kelly*, 371 N.W.2d 193, 195 (Minn. 1985). Because the Dyrdals' notice of appeal informed Enbridge of their intent to challenge the temporary injunction and because both parties briefed the issue, we conclude that the notice of appeal was sufficient. *See id.* at 195–96 ("A notice of appeal is sufficient if it shows an intent to appeal and the order appealed from apprises the parties of the issues to be litigated on appeal.").

1997) (alteration in original) (quotation omitted). On a motion for summary judgment, this court views the evidence in the light most favorable to the nonmoving party. *Valspar Refinish, Inc. v. Gaylord's, Inc.*, 764 N.W.2d 359, 364 (Minn. 2009). "We review de novo whether a genuine issue of material fact exists . . . [and] whether the district court erred in its application of the law." *STAR Ctrs., Inc. v. Faegre & Benson, L.L.P.*, 644 N.W.2d 72, 77 (Minn. 2002) (citations omitted). The district court's denial of an immunity-based motion for dismissal of summary judgment, such as one under the anti-SLAPP statutes, is immediately appealable. *Middle-Snake-Tamarac Rivers Watershed Dist. v. Stengrim*, 784 N.W.2d 834, 838 n.2 (Minn. 2010).

A party may bring an anti-SLAPP motion to dismiss any claim on the basis that the claim materially relates to public participation, unless the conduct or speech constitutes a tort, a violation of a person's constitutional rights, or a violation of a preexisting legal relationship. Minn. Stat. §§ 554.02, subd. 1, .03; *see also Stengrim*, 784 N.W.2d at 842 (discussing exception regarding preexisting legal relationships). The moving party has the initial, minimal burden to show that "the underlying claim materially relates to an act of the moving party that involves public participation." *Stengrim*, 784 N.W.2d at 841 (quotations omitted). Once the moving party has made this threshold showing, the responding party has the burden of proving by clear and convincing evidence that the moving party's actions are not immunized from liability. Minn. Stat. § 554.02, subd. 2(2)–(3); *see also Stengrim*, 784 N.W.2d at 838–40 (explaining background and common usage of Minnesota's anti-SLAPP statute).

"Public participation" is defined as "speech or lawful conduct that is genuinely aimed in whole or in part at procuring favorable government action." Minn. Stat. § 554.01, subd. 6. The anti-SLAPP statutes state that:

> "Government" includes a branch, department, agency, official, employee, agent, or other person with authority to act on behalf of the federal government, this state, or any political subdivision of this state, including municipalities and their boards, commissions, and departments, or other public authority.

Id., subd. 2. Whether a communication is entitled to immunity under the anti-SLAPP statutes "depends on the nature of the statement, the purpose of the statement, and the intended audience." *Freeman v. Swift*, 776 N.W.2d 485, 490 (Minn. App. 2009), *review denied* (Minn. Mar. 16, 2010).

The Dyrdals argue that their placement of hay bales and a tractor across the field road was lawful conduct designed in part to prevent Enbridge from continuing to use the field road to access the pipeline. The Dyrdals argue further that, because Enbridge used the government power of eminent domain to acquire the easement, because Enbridge's access claims are based on rights obtained through Enbridge's use of eminent domain, and because Enbridge is supplying a public service; it is an agent of the government. Enbridge denies that it is a government agent for purposes of the anti-SLAPP statute.

Enbridge is admittedly a public-service corporation that obtained its pipeline easement through the exercise of eminent domain. In other contexts, caselaw has recognized that a private company exercising the power of eminent domain is an "agent of the state." *Minn. Canal & Power Co. v. Pratt*, 101 Minn. 197, 212, 112 N.W. 395,

397 (1907); *see also Jackson v. Metro. Edison Co.*, 419 U.S. 345, 353, 95 S. Ct. 449, 454 (1974) (stating that a private corporation exercising a power such as eminent domain is participating in state action). However, access to or prior use of the power of eminent domain does not make a utility a continuing agent of a governmental entity for purposes of the anti-SLAPP statute. To reach that conclusion, we would have to use a highly expansive definition of agent and public authority when the statutory definitional terms for "government" are otherwise more limited. *See* Minn. Stat. § 554.01, subd. 2 (set forth above).

Furthermore, the eminent-domain proceeding which created the easement has been concluded. When Enbridge entered the Dyrdal property to repair the problems, it was not exercising the power of eminent domain; instead, Enbridge was exercising its rights as owner of an easement across the Dyrdal property. Additionally, Enbridge's going to court to enforce its easement rights does not turn Enbridge into a government agent. The judicial system, not Enbridge, is the governmental body in this setting. We conclude that, in enforcing its easement rights, Enbridge was not an agent of a government or public authority; that the Dyrdals' conduct was not aimed at procuring favorable government action; and that therefore the conduct is not protected by the anti-SLAPP statutes.

In addition, we note other serious deficiencies in the Dyrdals' SLAPP-based claims. First, the Dyrdals have consistently argued that the hay bales were placed on the field road for purposes of loading, not to impede Enbridge in any way. If true, this negates their claim under the anti-SLAPP statutes because their conduct was for their private farming operations, not to procure favorable action from Enbridge. Second, the

district court awarded Enbridge an easement across the Dyrdal property and "such rights of ingress and egress as are reasonably necessary or convenient in the exercise of such easement rights," establishing an ongoing legal relationship between the parties. The supreme court recently recognized that a preexisting legal relationship can legitimately limit a party's right to public participation and an anti-SLAPP claim. *Stengrim*, 784 N.W.2d at 842. Therefore, the anti-SLAPP statutes are not available to immunize the Dyrdals from liability for violating a preexisting legal relationship.

Because the Dyrdals failed to establish that Enbridge, in enforcing its easement rights, was a government agent, we affirm the district court's denial of the Dyrdals' motion for partial summary judgment based on the anti-SLAPP statute.

II. Temporary Injunction

The second issue is whether the district court abused its discretion in granting a temporary injunction to Enbridge. "A temporary injunction is an extraordinary equitable remedy that preserves the status quo pending a trial on the merits." *Cent. Lakes Educ. Ass'n v. Indep. Sch. Dist. No. 743, Sauk Ctr.*, 411 N.W.2d 875, 878 (Minn. App. 1987), *review denied* (Minn. Nov. 13, 1987). The decision of whether to grant an equitable temporary injunction is left to the district court's discretion; the sole issue on appeal is whether the district court abused that discretion by disregarding either the facts or principles of equity. *Id.* "A district court's findings regarding entitlement to injunctive relief will not be set aside unless clearly erroneous." *Haley v. Forcelle*, 669 N.W.2d 48, 55 (Minn. App. 2003), *review denied* (Minn. Nov. 25, 2003). On review, findings of fact are considered in the light most favorable to the prevailing party. *Metro. Sports Facilities*

Comm'n v. Minn. Twins P'ship, 638 N.W.2d 214, 220 (Minn. App. 2002), *review denied* (Minn. Feb. 4, 2002).

In evaluating whether a temporary injunction is warranted, the district court must consider the five *Dahlberg* factors: (1) the nature and background of the relationship between the parties; (2) the balance of harm to the parties; (3) the likelihood that the party seeking the injunction will prevail on the merits of the action; (4) whether there are public-policy considerations; and (5) whether there are any administrative burdens involved in judicial supervision and enforcement of the temporary injunction. *Id.* at 220–21 (quoting *Dahlberg Bros. v. Ford Motor Co.*, 272 Minn. 264, 274–75, 137 N.W.2d 314, 321–22 (1965)). "If a plaintiff can show no likelihood of prevailing on the merits, the district court errs as a matter of law in granting a temporary injunction." *Id.* at 226. "But if a plaintiff makes even a doubtful showing as to the likelihood of prevailing on the merits, a district court may consider issuing a temporary injunction." *Id.* This court also considers the *Dahlberg* factors when determining whether the district court abused its discretion. *Id.* at 220–21.

Here, the district court considered the five *Dahlberg* factors and concluded that the first three factors favored Enbridge, while the latter two factors (policy considerations and administrative burdens) were neutral and favored neither party. The Dyrdals challenge only the district court's conclusions regarding the third factor, the likelihood of Enbridge prevailing on the merits. Regarding this factor, the district court concluded that the language of the easements set forth in the district court's eminent-domain judgment gave Enbridge access rights as reasonably necessary for its pipeline easement and that

Enbridge did not have to select a route preferred by the Dyrdals or even the most reasonable route possible to enter the property. Therefore, the district court concluded that this factor weighed in favor of Enbridge.

In contesting the likelihood of success on the merits, the Dyrdals argue that the real-estate doctrine of practical location limits Enbridge's right of entry to one specific, definable route. They argue that the practical location of the access route is along the pipeline easement. There are multiple methods of establishing a boundary by practical location. The Dyrdals argue only for consideration of the application of practical location by acquiescence. In real-estate law, the doctrine of practical location of a boundary line by acquiescence of the parties allows one party to identify a boundary line and, if the other party acquiesces to that selection over a sufficient length of time, for it to have legal effect. *See Halverson v. Village of Deerwood*, 322 N.W.2d 761, 768–69 (Minn. 1982) (discussing the doctrine of practical location); *Sabin v. Rea*, 176 Minn. 264, 265, 223 N.W. 151, 151 (1929) (stating that, when the grantee selects the easement's location, "and there has been long acquiescence in the use of it, the grantee may not thereafter change the location"). This doctrine of practical location by acquiescence generally applies when the initial description is indefinite. *See Ingelson v. Olson*, 199 Minn. 422, 428–29, 272 N.W. 270, 274 (1937) (applying the doctrine only if the description of the express easement is indefinite). A pipeline easement may be clear and unambiguous even if it does not specify the location of ingress and egress. *Bergh & Mission Farms, Inc. v. Great Lakes Transmission Co.*, 565 N.W.2d 23, 26 (Minn. 1997)).

Here, the terms of the August 10, 2009 district court order clearly and unambiguously awarded Enbridge an easement, with "such right**s** of ingress and egress as are reasonably necessary or convenient in the exercise of such easement rights." (Emphasis added.) There is no single "right" of ingress or egress; the plural form of the word "right" is used. As Enbridge points out, the field road provided convenient access to the problem on the west side of Judicial Ditch 25. There is a continuum of sites where pipeline problems may occur. Multiple access routes may be important. Not only would the Dyrdals freeze entry to one location but they apparently would also limit Enbridge's access to the point where the pipeline easement crosses a public road and then require Enbridge to travel along the pipeline for whatever distance was necessary, over whatever obstruction and difficult terrain exists, and cause potentially greater damage to crops or surface use. The terms of the easement do not require Enbridge to resort to such an awkward or circuitous route, or to choose a single route, or to use the Dyrdals' preferred route. The underlying rationale of boundary by practical location is that there is of necessity a single boundary. In this temporary-injunction setting, the Dyrdals' argument of a single right of entry is not applicable to disprove the likelihood of Enbridge's success on the merits.

Also, as previously noted, the doctrine of practical location requires acquiescence over a substantial period of time. The easement for the Alberta Clipper pipeline was created in a 2009 district court order. Enbridge's use of the field road occurred on January 5, 2010, just months after the creation of the easement. Even if a long-term easement with repeated use of a single access route to conduct repair and maintenance

might result in confining future access to that route, the doctrine of practical location does not apply here with a new easement. There has not been sufficient time to limit Enbridge to a single access route to the Alberta Clipper pipeline as it crosses the Dyrdal land.

Our task is simply to determine whether Enbridge made a credible showing as to the third factor (likelihood of prevailing on the merits), giving the district court an adequate basis to issue a temporary injunction. Here, the record clearly establishes that Enbridge has made a credible showing that the field road was a convenient route and that the Dyrdals' conduct of placing hay bales across the field road restricted its ability to reasonably access the pipeline. We conclude that the district court did not abuse its discretion in issuing the temporary injunction.

III. Declaratory Relief

The third issue is whether the district court erred by granting Enbridge's motion for summary judgment on its claim for declaratory relief. The Uniform Declaratory Judgments Act (UDJA) gives courts "within their respective jurisdictions" the power to "declare rights, status, and other legal relations." Minn. Stat. § 555.01 (2010). Issues of fact in a declaratory-judgment action are to be tried as they would be in a typical civil action. Minn. Stat. § 555.09 (2010). Thus, a disputed fact in a declaratory-judgment action is established upon proof by a preponderance of the evidence. *See Wick v. Widdell*, 276 Minn. 51, 53–54, 149 N.W.2d 20, 22 (1967) ("In an ordinary civil action the plaintiff has the burden of proving every essential element of his case . . . by a fair preponderance of the evidence."). "The court has the equitable power to determine the

fair extent of an easement when the parties are unable to agree." *Larson v. Amundson*, 414 N.W.2d 413, 417 (Minn. App. 1987).

Here, Enbridge sought declaratory relief stating that it has the right of "ingress to and egress from the Alberta Clipper Pipeline, over and across the [Dyrdal] Property, for all purposes described in the Easements and Condemnation Order, including specifically maintenance, repair, replacement, and restoration associated with the Alberta Clipper Pipeline or its construction." This language is nearly identical to the language in the August 10, 2009 district court order creating the easement used for the Alberta Clipper pipeline. The Dyrdals do not dispute that the easement language clearly includes a right of ingress to and egress from the pipeline; instead, they argue that Enbridge's right is limited to a specific route. The declaratory relief granted is very simple and does not limit the Dyrdals' ability to argue that Enbridge must use only one specific route of ingress and egress. Therefore, because the Dyrdals did not submit any evidence establishing an issue of material fact regarding the requested and granted declaratory relief, we affirm summary judgment on Enbridge's claim for declaratory relief.

Affirmed.

Dated: