STATE OF MINNESOTA
IN COURT OF APPEALS
A08-0062

Leslie Davis,
Appellant,

vs.

Hennepin County,
Respondent.

Filed December 23, 2008
Affirmed
Minge, Judge

Hennepin County District Court
File No. 27-CV-07-15407

Leslie Davis, P.O. Box 11688, 622 Lowry Avenue North, Minneapolis, MN 55411 (pro se appellant)

Michael O. Freeman, Hennepin County Attorney, Julie K. Bowman, Assistant County Attorney, A2000 Government Center, Minneapolis, MN 55487 (for respondent)

Considered and decided by Connolly, Presiding Judge; Minge, Judge; and Crippen, Judge.*

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

MINGE, Judge

Appellant initiated a declaratory judgment action pursuant to the Minnesota Environmental Policy Act to challenge the adequacy of an environmental impact

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

statement. The district court ordered appellant to post a bond pursuant to Minn. Stat. § 116D.04, subd. 10 (2006) and Minn. Stat. § 562.02 (2006). Appellant challenges the district court's dismissal of his action for his failure to post the bond. We affirm.

FACTS

In 2006, the state of Minnesota enacted legislation providing for the construction, financing, and long-term use of a baseball stadium called the Minnesota Urban Ballpark.[1] 2006 Minn. Laws ch. 257, §§ 5–18 (codified as Minn. Stat. §§ 473.75–763 (2006)). The legislation specifically designated the downtown Minneapolis site where the ballpark would be constructed and mandated that an environmental impact statement (EIS) be prepared. Minn. Stat. § 473.752. However, the legislation states that the EIS "shall not be required to consider alternative ballpark sites." Minn. Stat. § 473.758, subd. 1(1). Further, the legislation designated respondent Hennepin County as the responsible governmental unit (RGU) for the purpose of the EIS. Minn. Stat. § 473.758, subd. 1. Work could not begin on the foundation of the ballpark until the EIS was deemed adequate by the RGU. Minn. Stat. § 473.758, subd. 2.

Anticipating the legislative action and expecting to be the RGU, the county began an environmental review of the project in 2005 by determining the scope of the eventual EIS. Identification of the scope of the EIS is a step required by law. Minn. Stat. § 116D.04, subd. 2a(f) (2006). In 2007, the county incorporated the scoping determination in its order directing preparation of the EIS for the ballpark site. Appellant Leslie Davis participated in both the scoping process and the development of the EIS,

[1] The ballpark as built will be known as Target Field.

making both oral and written comments on the scoping document and the draft EIS. The final EIS for the Minnesota Urban Ballpark (Ballpark EIS) was deemed adequate by the Hennepin County Board of Commissioners on June 26, 2007.

Davis brought a declaratory action in district court on July 26, 2007, requesting that the Ballpark EIS be deemed inadequate and ordering that the process be reopened. Davis argued that the Ballpark EIS failed to meet the requirements of the scoping document because it did not consider "air quality issues to determine the impacts on users of the ballpark which include fans and all employees."

Hennepin County responded to the Davis lawsuit with a motion for a bond pursuant to Minn. Stat. § 116D.04, subd. 10 (2006) and Minn. Stat. § 562.02 (2006). Both parties submitted documents and memoranda regarding the motion, and on September 20, 2007, the district court took the motion under advisement. In response to a request by Davis, the district court gave Davis until October 10, 2007 to file supplemental material and the county until October 17 to do the same. Both parties timely submitted substantial material. No one submitted and the record does not include either the scoping document or the Ballpark EIS.

Davis moved to suppress evidentiary material in affidavits accompanying and relied on in Hennepin County's October 17 supplemental memorandum. Davis contended that this material and arguments in the supplemental memorandum were improper because they were submitted after the district court took the motion under advisement and had not been previously disclosed to him. Davis claimed that allowing such material in the record and considering it violated his right to procedural due process

of law. Davis did not request an opportunity to respond to the county's supplemental filings.

On November 14, 2007, without ruling on the motion to suppress, the district court determined that Davis was not likely to succeed on the merits of his claim and granted Hennepin County's motion to require Davis to post bond. The district court set the bond amount at $45,628,000 and required Davis to post the bond no later than November 30, 2007. The amount of the bond was based on the district court's determination of the predicted loss to taxpayers resulting from a delay in the construction of the ballpark. Because Davis failed to post the bond, the district court dismissed his action with prejudice. Following an unsuccessful request for reconsideration and mandamus proceeding, Davis initiated this appeal.

D E C I S I O N

On appeal, Davis argues (1) the district court erred in its determination that his claim was unlikely to succeed on the merits; (2) the district court abused its discretion in requiring Davis to post a bond; (3) his in forma pauperis status and the Minnesota Constitution precluded the district court from requiring him to furnish a bond; (4) by allowing the county's supplemental filing and not ruling on his motion to exclude that filing, the district court denied him procedural due process of law; (5) the district court erred in identifying his action as a duplicative proceeding; (6) the district court improperly inserted itself into the position of the RGU; and (7) the legal system should recognize that his action "represents the will of the people."

I.

The first issue is whether the district court erred in its determination that Davis's claim was unlikely to succeed on the merits. The Minnesota Environmental Policy Act (MEPA), permits a person to seek review of the adequacy of an EIS in district court. Minn. Stat. § 116D.04, subd. 10. MEPA also allows the district court to require a plaintiff to file a bond pursuant to Minn. Stat. § 562.02 if the plaintiff cannot show "that the claim has sufficient possibility of success on the merits to sustain the burden required for the issuance of a temporary restraining order." *Id*.

The likelihood of the claim's success on the merits is one of the so-called *Dahlberg* factors used to determine whether a plaintiff has met his burden for a temporary restraining order or injunction. *Dahlberg Bros., Inc. v. Ford Motor Co.*, 272 Minn. 264, 274-75, 137 N.W.2d 314, 321-22 (1965); *Minneapolis Fed'n of Teachers, AFL-CIO, Local 59 v. Minneapolis Pub. Schs.*, 512 N.W.2d 107, 110 (Minn. App. 1994), *review denied* (Minn. Mar. 31, 1994). This court reviews the denial of a temporary injunction for a clear abuse of discretion. *Earth Protector, Inc. v. City of Hopkins*, 474 N.W.2d 454, 455 (Minn. App. 1991).

To demonstrate the likelihood of success on the merits of his claim, Davis would have to demonstrate that the county board's decision to adopt the EIS reflects an error of law, that the board's findings accompanying the EIS are arbitrary and capricious, or that the findings are unsupported by substantial evidence. *Citizens Advocating Responsible Dev. v. Kandiyohi County Bd. of Comm'rs*, 713 N.W.2d 817, 832 (Minn. 2006).

> An agency finding is arbitrary and capricious if the agency: (a) relied on factors not intended by the legislature; (b) *entirely* failed to consider an important aspect of the problem; (c) offered an explanation that runs counter to the evidence; or (d) the decision is so implausible that it could not be explained as a difference in view or the result of the agency's expertise.

White v. Dep't of Natural Res., 567 N.W.2d 724, 730-731 (Minn. App. 1997) (emphasis added) (citing *Minnegasco v. Minn. Pub. Utils. Comm'n*, 529 N.W.2d 413, 418 (Minn. App. 1995), *rev'd on other grounds*, 549 N.W.2d 904 (Minn. 1996)), *review denied* (Minn. Oct. 31, 1997). In reviewing the quasi-judicial decision of an agency or of a local unit of government, the focus of this court's review is on the proceedings before the decision making body and not the trial court. *See Carl Bolander & Sons Co. v. City of Minneapolis*, 502 N.W.2d 203, 207 (Minn. 1993) (appellate review of city's determination that an environmental assessment worksheet was required for proposed concrete recycling facility). Whether or not Davis was likely to succeed on the merits of his claim is a fact specific determination which required the district court (and requires this court) to examine the proceedings before and the decision of the Hennepin County Board of Commissioners. *See id.*; *Dahlberg*, 272 Minn. at 275, 137 N.W.2d at 321.

Davis's claim that his action was likely to succeed on the merits requires an adequate record. The record in this judicial proceeding contains the Hennepin County Board of Commissioner's *summary* of the underlying basis for its decision, which indicates that the Board of Commissioners: (1) analyzed: (a) the Ballpark EIS, (b) the comments on the EIS, and (c) the comments on the scoping document; and (2) determined the actual Ballpark EIS was adequate. Davis has not provided this court

or the district court with the actual Ballpark EIS, the actual scoping document, or the record of the proceeding before the Hennepin County board. Without this basic material, the district court and this appellate court lack an adequate and necessary record to evaluate the RGU's decision and thus Davis's likelihood of success on the merits. Accordingly, we reject Davis's challenge to the district court's finding that he was unlikely to succeed on the merits.[2]

II.

The second issue before this court is whether the district court abused its discretion in requiring Davis to post a bond in the amount of $45,628,000. Under MEPA, once there is a finding that a plaintiff is unlikely to succeed on the merits, the district court may then order the posting of a bond under Minn. Stat. § 116D.04, subd. 10. The relevant law describes this bond as follows:

> If the court determines that loss or damage to the public or taxpayers may result from the pendency of the action or proceeding, the court may require such party, or parties, to file a surety bond, which shall be approved by the court, in such amount as the court may determine. The court must also consider whether the action presents substantial constitutional issues or substantial issues of statutory construction, and the likelihood of a party prevailing on these issues, when determining the amount of a bond and whether a bond should be required under this section or section 473.675. Such bond shall be conditioned for payment to the public body of any

[2] We note that, although it was not argued by Davis on appeal, it appears that the district court looked to Minn. Stat. ch. 116B to evaluate Davis's claim and not Minn. Stat. ch. 116D. Additionally, although the district court made a finding that the final EIS does not analyze the cumulative effect of pollution on the stadium users, this finding was made without an adequate record to determine whether Davis was likely to succeed on the merits. Thus, regardless of the reason, the district court's ultimate decision to dismiss was not in error.

> loss or damage which may be caused to the public body or taxpayers by such delay, to the extent of the penal sum of such bond, if such party, or parties, shall not prevail therein. If such surety bond is not filed within a reasonable time allowed therefore by the court, the action shall be dismissed with prejudice. If such party, or parties, file a bond as herein required and prevail in the action, any premium paid on the bond shall be repaid by or taxed against the public body.

Minn. Stat. § 562.02. The constitutionality of Minn. Stat. § 562.02 was upheld in *Gram v. Vill. of Shoreview*, 259 Minn. 145, 154, 106 N.W.2d 553, 559 (1960). The statute has been held to provide broad discretion to the district court in the determination of the amount necessary to protect the public interest in setting the bond. *Pike v. Gunyou*, 491 N.W.2d 288, 291 (Minn. 1992). The appellate courts will uphold the requirement of a surety bond under Minn. Stat. § 562.02 unless there is a clear abuse of discretion. *Id.*

In *The Kilowatt Org. (TKO), Inc. v. Dep't of Energy, Planning & Dev.*, 336 N.W.2d 529, 530 (Minn. 1983), appellant challenged the district court's order that TKO post a $6,000,000 bond under Minn. Stat. § 562.02. The supreme court observed that "[a]lthough it is true that judicial review may be effectively precluded if a district court imposes a high monetary bond, that result was clearly considered by the Legislature in enacting section 562.02." *Id*. at 533. *TKO* acknowledged that a bond under Minn. Stat. § 562.02 may be excessive if viewed from the plaintiff's perspective, but that amount is not an abuse of discretion when it is justified by evidence of potential harm to the public. *Id*.; *see also Pike*, 491 N.W.2d at 291-92 (upholding a $30,000,000 bond requirement on two individuals when that amount reflected the anticipated cost to the state and taxpayers that would be created by a delay caused by litigation).

Here, the district court concluded that the bond requirement was authorized by law and then evaluated whether a bond was appropriate under the circumstances. The record contains evidence that the continued pendency of Davis's lawsuit would cause losses to the county in the amount of $45,628,000. Obviously, this is an enormous amount. However, the district court accepted the conclusion that the county would be harmed by the full amount of $45,628,000. Davis does not challenge the various elements of damage claimed by the county that are the basis of the bond. Rather, he complains generally that the district court imposed a substantial bond.

The budget for the ballpark was set in the ballpark legislation and allowed the county to expend $260,000,000 on the ballpark and another $90,000,000 for land, site improvements, public infrastructure, and other items. Minn. Stat. § 473.757, subd. 3. The county presented evidence that the pendency of litigation would delay construction and that, if the ballpark construction were to be delayed, the city and county would lose money as a result of a loss in tax revenue, increased construction costs, and additional costs associated with issuing bonds. Based on the record on appeal, we conclude that the district court did not abuse its discretion in determining that a very substantial bond was appropriate under Minn. Stat. § 562.02.

Additionally, Davis argued for the first time in his *reply* brief that in deciding to require a bond the district court failed to properly consider whether his claim presents substantial constitutional issues or substantial issues of statutory construction. However, other than the issues next considered in this opinion, Davis presents no constitutional or statutory-construction issues in his principal brief. Because issues not raised or argued in

Davis's principal brief cannot be presented for the first time in a reply brief, we do not address these issues. *McIntire v. State*, 458 N.W.2d 714, 717 n.2 (Minn. App. 1990), *review denied* (Minn. Sept. 28, 1990).

III.

The third issue is whether either Davis's status as an in forma pauperis litigant or the Minnesota constitutional clause assuring an injured party a remedy precludes the district court from ordering him to post a bond.

Davis's in forma pauperis argument confuses the distinction between a bond for costs and the type of bond required under Minn. Stat. § 562.02. Cost bonds secure the payment of court costs that may be assessed against a party to litigation. Minn. Stat. §§ 549.02, .18 (2006). Minnesota statutes expressly limit the requirement of a cost bond in in forma pauperis proceedings. *See* Minn. Stat. § 563.01; § 549.02. But as previously stated, the bond in this case is designed to protect the taxpayers and the public from the damages that may be caused by the disruptive effect and delays incident to the litigation. *Pike*, 491 N.W.2d at 291-92. Because the bond at issue here is a type of injunction bond, it is not subject to the in forma pauperis limits.

In addition, Davis points to the language in the Minnesota Constitution which states:

> Every person is entitled to a certain remedy in the laws for all injuries or wrongs which he may receive to his person, property or character, and to obtain justice freely and without purchase, completely and without denial, promptly and without delay, conformable to the laws.

Minn. Const. art. I, § 8. As previously stated, the Minnesota Supreme Court has upheld the constitutionality of Minn. Stat. § 562.02. *Gram*, 259 Minn. at 154, 106 N.W.2d at 559. In reaching that conclusion, the court indicated that a plaintiff's inability to post the bond does not determine its constitutionality. *Id.* Although draconian bonding requirements should not be used to prevent judicial scrutiny of the legality of governmental action, persons without resources do not have a license to serve as plaintiffs in speculative litigation with devastating costs to society.

We have already addressed the appropriateness of imposing the bond. Davis has not provided a record that allows a judicial determination that his litigation has been wrongfully stymied because of the bonding requirement, and accordingly, we reject the claims made in this section.

IV.

The fourth issue before this court is whether Davis was denied procedural due process of law when the district court refused to rule upon his motion to suppress the material filed by the county with the district court on October 17, 2007, and the denial of Davis's motion to reconsider.[3] Generally, procedural and evidentiary rulings are within the district court's discretion and appellate courts review these rulings for an abuse of discretion. *Braith v. Fischer*, 632 N.W.2d 716, 721 (Minn. App. 2001), *review denied*

[3] We note that Davis raised these challenges in a previous petition for writ of mandamus. The court of appeals in an order opinion denied Davis's petition on the basis that Davis had "not provided copies of the motions that he seeks to have heard in the district court and we are unable to evaluate his entitlement to a hearing on those motions." *Davis v. Hennepin Co.*, No. A07-2259 (Minn. App. Dec. 11, 2007), *review denied* (Minn. Jan. 29, 2008).

(Minn. Oct. 24, 2001). However, claims of denial of due process are reviewed de novo. *Zellman ex rel. M.Z. v. Indep. Sch. Dist. No. 2758*, 594 N.W.2d 216, 220 (Minn. App. 1999), *review denied* (Minn. July 28, 1999). Procedural due process of law guarantees a civil litigant "reasonable notice, a timely opportunity for a hearing, the right to be represented by counsel, an opportunity to present evidence and argument, the right to an impartial decision maker, and the right to a reasonable decision based solely on the record." *Humenansky v. Minn. Bd. of Med. Exam'rs*, 525 N.W.2d 559, 565 (Minn. App. 1994), *review denied* (Minn. Feb. 14, 1995). In reviewing the district court's procedural and evidentiary rulings or its failure to rule, Davis has the burden of providing an adequate record for appeal; this court will not presume error. *Custom Farm Servs., Inc. v. Collins*, 306 Minn. 571, 572, 238 N.W.2d 608, 609 (1976).

First, Davis challenges the district court's failure to rule on his motion to suppress evidence. Hennepin County argues that the motion to suppress was not properly before the district court and that the district court had the discretion not to address the motion. Hennepin County did not articulate in its brief why the motion was allegedly not properly before the court nor has Davis presented any argument as to why his motion was procedurally proper. Regardless, because Davis failed to present a prima facie case that his claim would succeed on the merits, the failure to suppress rebuttal evidence presented by Hennepin County would be harmless error.[4] *See* Minn. R. Civ. P. 61 (requiring that harmless error be ignored).

[4] We note that Davis failed to ask leave to respond to the additional evidence. This was an appropriate and relatively simple procedure for dealing with the perceived unfairness

Second, Davis argues the district court improperly denied him a hearing on his motion to reconsider the bond and that the district court had no discretion in denying his motion. At the outset, we note that the decision to grant a motion to reconsider or reduce the bond is left within the district court's discretion. *See* Minn. R. Gen. Prac. 115.11. Whether Davis intended to bring a motion to reconsider under the rules or to bring a motion for reduction of the bond under Minn. Stat. § 562.03 (2006), Davis failed to identify new factual information to support "finding that the amount [of the bond] is excessive or the bond no longer required." Minn. Stat. § 562.03. Because Davis fails to advance any arguments in support of a claim of abuse of discretion or that there was a newly identified factual dispute, we find that the denial of Davis's motion to reconsider was not an abuse of discretion and that doing so without a hearing was not a denial of Davis's due process rights.

V.

The fifth issue before this court is whether the district court erred in its determination that Davis's action was "the type of duplicative litigation" the bond statute was designed to prevent. This reference to "duplicative litigation" appears to be based on the supreme court's language in *TKO* where the court stated:

> While this court does not suggest that TKO is an irresponsible litigant, TKO certainly has been intimately and steadfastly involved with the entire administrative proceeding. . . . Under these circumstances, we conclude that the district court's application of section 562.02 was consistent with the

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of the county's supplemental filing. With such an unused procedure available, we decline to assume Davis was the victim of a due process error of constitutional proportions.

> legislative goal of permitting public projects to advance by discouraging needlessly duplicative proceedings.

336 N.W.2d at 532 (noting TKO's involvement in the administrative proceeding as an intervenor).

Here, the district court determined that Davis was unlikely to succeed on the merits of his case and that the harm to the public that may result from the litigation required a bond under Minn. Stat. § 562.02. The district court then reviewed Davis's extensive involvement with the proceedings prior to the litigation and determined Davis's "extensive previous involvement in the process indicates the present proceeding is the type of duplicative litigation Minn. Stat. § 562.02 is designed to prevent without some form of bond." Contrary to Davis's characterization, the district court did not determine that, when there is an open, public process such as the series of proceedings in which Davis had participated, that his lawsuit was an *unnecessary* duplicative proceeding. Rather, the district court determined that because the lawsuit involved a repetition of the earlier county EIS process, the requirement that he show a likelihood of success or post a bond was important to protect governmental entities against losses caused by this type of litigation.

Regardless of the district court's comment that Davis's litigation was duplicative, Davis still had to demonstrate the likelihood of success on the merits to avoid the bonding requirement under Minn. Stat. § 562.02. As previously concluded, Davis has not met this burden and any mischaracterization of his lawsuit as duplicative would be harmless error. *See* Minn. R. Civ. P. 61.

VI.

The sixth issue before this court is whether the district court improperly inserted itself into the position of the RGU when it decided that Davis's claim was unlikely to succeed on the merits. Because we determine that Davis's lawsuit should have been dismissed, we reject Davis's challenge on this sixth issue.

VII.

Finally, Davis argues that the "will of the Sovereign People of the state of Minnesota" has required that the health of the people be a "paramount and controlling concern." We respect Davis's intent of requiring Hennepin County to follow the law. However, to the extent this argument invites the appellate court to be a political forum, it is misdirected. "The function of the court of appeals is limited to identifying errors and then correcting them." *Sefkow v. Sefkow*, 427 N.W.2d 203, 210 (Minn. 1988). We do not weigh the pros and cons of policy decisions.

Affirmed.

Dated: