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Minn. Stat. § 480A.08, subd. 3 (2018).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A18-0511**

In re the Appeal from the Order of the
Joint Board of Kandiyohi and Meeker Counties
Acting as Drainage Authority for Drainage Project:
In the Matter of the Petition of Harold Witt, et al.,
for Establishment of a Lateral to County Ditch No. 52
in Kandiyohi and Meeker Counties.

**Filed January 22, 2019
Affirmed; motion denied
Rodenberg, Judge**

Kandiyohi County District Court
File No. 34-CV-15-187

Paul R. Haik, Krebsbach and Haik, Ltd., Eden Prairie, Minnesota (for appellant D&J Family Farm, LLC)

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Jeff C. Braegelmann, Dean M. Zimmerli, Gislason & Hunter LLP, New Ulm, Minnesota (for respondents Harrold Witte, August Faber, Gertrude Faber, Michael Lux, Bridget Lux, Mardette Trettin, Diane Porath)

Ken Schmeling, Lake Lillian, Minnesota (pro se respondent)

Harold Kiecker Lake Lillian, Minnesota (pro se respondent)

Glenn Novotny, Hector, Minnesota (pro se respondent)

Mark Novotny, Hector, Minnesota (pro se respondent)

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

UNPUBLISHED OPINION

RODENBERG, Judge

Appellant D&J Family Farm L.L.C. appeals from the district court's order granting summary judgment in favor of respondents and dismissing appellant's appeal of benefits and damages. We deny appellant's motion to strike and affirm the district court.

FACTS

This appeal arises from litigation concerning a lateral to a drainage system serving agricultural lands in Kandiyohi and Meeker counties.¹ Appellant² owns farmland that is within the drainage system's watershed.³ In 2011, respondent landowners (landowners), represented by an attorney, filed a petition seeking to establish a lateral⁴ beginning in

¹ A drainage system means “a system of ditch or tile, or both, to drain property, including laterals, improvements, and improvements of outlets, established and constructed by a drainage authority.” Minn. Stat. § 103E.005, subd. 12 (2018). A drainage system includes “the improvement of a natural waterway used in the construction of a drainage system and any part of a flood control plan proposed by the United States or its agencies in the drainage system.” *Id.*

² Duane Anderson is the manager of D&J Family Farm L.L.C., and we therefore refer to appellant using male pronouns.

³ A watershed means “a drainage area having boundaries which are substantially coterminous with those of an aggregation of contiguous minor watershed units possessing similar drainage patterns and which cross the borders of two or more local government units.” Minn. Stat. § 103B.205, subd. 11 (2018).

⁴ A lateral is “any drainage construction by branch or extension, or a system of branches and extensions, or a drain that connects or provides an outlet to property with an established drainage system.” Minn. Stat. § 103E.005, subd. 15 (2018).

Meeker County, running into Kandiyohi County, and outletting into Kandiyohi County Ditch 52 (CD 52). *In re Order of Joint Bd. of Kandiyohi & Meeker Ctys.*, No. A16-1412, 2017 WL 875274, at *1 (Minn. App. Mar. 6, 2017), *review denied* (Minn. May 30, 2017). The proposed lateral was to benefit land owned by appellant and others and improve the drainage system. Because the proposed lateral was proposed to be located in both Kandiyohi and Meeker Counties, respondent Joint Board of Kandiyohi and Meeker Counties (joint drainage authority) was appointed.⁵ *Id.* In March 2011, the joint drainage authority accepted respondent landowners' petition, and appointed a firm of engineers and a project engineer, D.H.

Drainage Authority Proceedings

Before the public preliminary hearing, the Kandiyohi County Attorney determined and reported that the petition and accompanying bonds were adequate for consideration, and D.H. provided the joint drainage authority with a preliminary report and plans for the proposed lateral. Following notice, the joint drainage authority held an open meeting to consider public comment concerning the lateral.

At a continued hearing in October 2011, it was determined that (1) the proposed lateral was feasible; (2) there was a necessity for the lateral; (3) the project would be of public benefit and promote public health; (4) CD 52 provided an adequate outlet for the

⁵ We note that there are two separate and distinct drainage authorities mentioned throughout this opinion: the joint drainage authority and the CD 52 drainage authority. The CD 52 drainage authority is the drainage authority for County Ditch 52 in Kandiyohi County. The five-member joint drainage authority in this case is the lateral drainage authority comprised of members from Kandiyohi and Meeker Counties.

lateral; and (5) if the CD 52 drainage authority approved granting an outlet, an engineer's final report and detailed survey concerning the lateral would be prepared. *Id.*

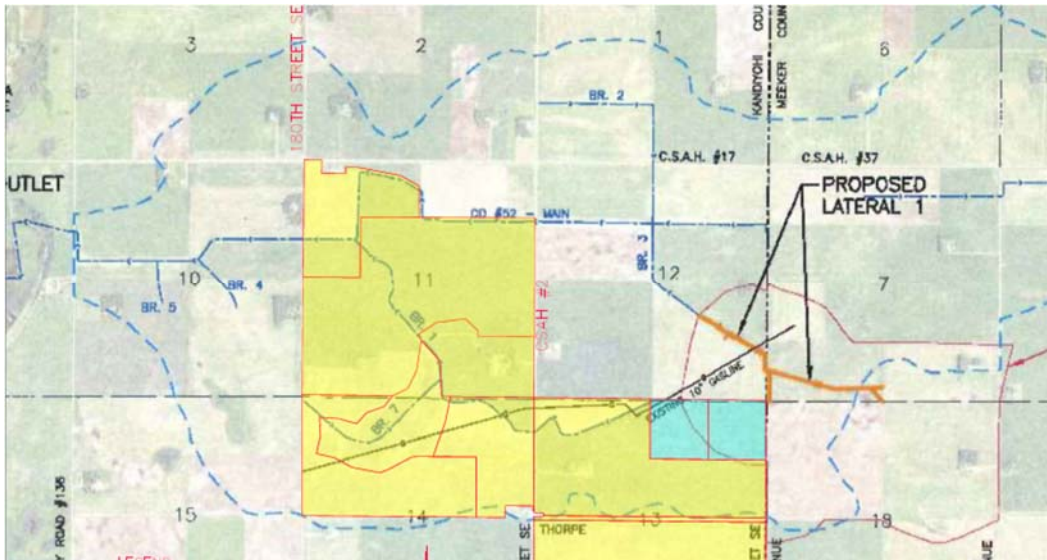
In September 2012, the CD 52 drainage authority determined that CD 52 provided an adequate outlet for the lateral and set an outlet fee. *Joint Bd. of Kandiyohi & Meeker Clys.*, No. A16-1412, 2017 WL 875274, at *2. D.H. amended the final report of the detailed survey. *Id.* The final report concluded that: (1) the outlet for the lateral was adequate to accommodate water flowing from the lateral into CD 52; (2) CD 52, if properly maintained, could accommodate the additional water from the lateral; (3) the lateral would increase the amount of water at the downstream terminus of CD 52 by less than one percent; (4) the construction cost of the lateral would be \$324,135; and (5) the lateral was the most practical alternative for draining the land. *Id.*

The joint drainage authority appointed three viewers (and an alternate) to assess the benefits and damages of the lateral.⁶ It also affirmed the outlet fee. The viewers' report contained a statement of benefits and damages to land that would be affected by the proposed lateral. The viewers' report assessed benefits to two 40-acre parcels of appellant's property. Those parcels are in section 13, and include parts of both the NE $\frac{1}{4}$ of the NE $\frac{1}{4}$ and the NW $\frac{1}{4}$ of the NE $\frac{1}{4}$ of section 13. The land benefitted by the lateral in the two affected parcels totals 27 acres. No damages were assessed to appellant's land,

⁶ "When the order for a detailed survey is made, the drainage authority shall, by order, appoint viewers consisting of three disinterested residents of the state qualified to assess benefits and damages." Minn. Stat. § 103E.305, subd. 1 (2018).

and the viewers assessed net benefits for the NE ¼ of the NE ¼ at \$3,570 and for the NW ¼ of the NE ¼ at \$235, for a total assessed benefit of \$3,805.

The proposed lateral is depicted below. The two parcels of appellant’s land assessed benefits in section 13 are shaded in blue. Appellant’s remaining property located in sections 11, 13, and 14 is shaded in yellow. Those yellow sections were not assessed benefits or damages by the viewers. The map also indicates the location for the proposed lateral, and the dashes indicate the boundaries of the CD 52 watershed. The outlet for the proposed lateral is to the left of section 10 on the map.



In February 2015, the joint drainage authority held a public hearing on the acceptance of the viewers’ report, including its determination of benefits and damages, as well as D.H.’s final engineer’s report. The joint drainage authority approved findings that (1) D.H.’s final report and the viewers’ report were complete and correct, (2) benefits exceeded costs-plus-damages, (3) the lateral would be of public utility and benefit, and

(4) the project was practicable. *Id.* The joint drainage authority then issued an order establishing a lateral. *Id.*

Appeal of the Drainage Authority's Order to the District Court

Appellant challenged both the drainage authority's establishment of the lateral and the viewers' calculation of benefits and damages in district court, as allowed by statute.⁷ Appellant raised a number of issues concerning the joint drainage authority's decision to establish the lateral. Appellant argued that the benefits did not exceed the costs and damages and that CD 52 was not adequate to serve as an outlet for the proposed lateral. Appellant argued that the viewers' report failed to take account of all his farm property that would be affected by the lateral, and specifically, that his property located in sections 11 and 14 downstream of his benefitted parcels would be damaged by the lateral outletting into CD 52.

Appellant hired a civil engineer, G.G., to support his claims. G.G. analyzed the proposed lateral's impact on the CD 52 system and determined that silt build up over the original bottom of the ditch would cause overflow, and G.G. estimated that the cost of moving that silt would be \$139,000. G.G.'s report also stated that D.H.'s report was incorrect and incomplete because D.H. failed to consider downstream damages that would

⁷ "A party may appeal an order made by the board that dismisses drainage proceedings or establishes or refuses to establish a drainage project to the district court of the county where the drainage proceedings are pending." Minn. Stat. § 103E.095, subd. 1 (2018) (providing for establishment appeals). A party may appeal to the district court, a drainage authority's determination of: "(1) the amount of benefits; (2) the amount of damages; (3) fees or expenses allowed; or (4) whether the environmental, land use, and multipurpose water management requirements and criteria of section 103E.015, subdivision 1 are met." Minn. Stat. § 103E.091, subd. 1 (2018) (providing for benefits-and-damages appeals).

be caused by the additional water flowing into CD 52. Appellant also hired an appraiser, R.P., who estimated that future damages to appellant's farmland in sections 11 and 14 would be approximately \$350,000.

As required by the drainage code, the establishment appeal occurred first. *See* Minn. Stat. § 103E.095, subd. 3 (2018). Respondent landowners moved for partial summary judgment and for dismissal of the appeal. The district court granted partial summary judgment for respondents. In its order, the district court determined that appellant was collaterally estopped from relitigating the adequacy of the outlet, and that appellant would not be permitted to argue, in the establishment appeal, that CD 52 was not an adequate outlet for the lateral. The district court noted that the decision of the CD 52 drainage authority to authorize the outlet was a final decision subject to appeal, but no party had appealed that decision. The district court concluded that "the issue of whether the Lateral Project can outlet into Ditch 52 has been determined" and it therefore granted partial summary judgment for respondents.

Appellant appealed from the district court's order granting partial summary judgment. We affirmed the district court's decision that appellant was collaterally estopped from arguing that the lateral would cause his downstream land to flood because the drainage authority's outlet-adequacy determination was not appealed. *Joint Bd. of Kandiyohi & Meeker Ctys.*, No. A16-1412, 2017 WL 875274, at *4. Appellant petitioned the Minnesota Supreme Court for further review, and that petition was denied.

Benefits-and-Damages Appeal

On remand, the district court proceeded on the benefits-and-damages portion of appellant's appeal under Minn. Stat. § 103E.091. Appellant requested a jury trial. The district court limited the appeal to issues relating to appellant's two parcels of land in section 13. Appellant moved to admit testimony and expert reports showing that the lateral would cause damage to his land in sections 11 and 14, land that appellant claimed would be flooded if the lateral was established. The district court denied appellant's motion, and limited the evidence at trial to the assessed benefits and damages to appellant's land in section 13. Eleven days before trial, appellant filed a new affidavit from G.G. (the second report), detailing what appellant proposed would be G.G.'s expert testimony relating to the section-13 parcels. The affidavit contained new claims concerning the impact of the lateral on appellant's land in section 13.

After a motion hearing, the district court determined that G.G.'s first report and the report from appraiser R.P. were inadmissible as irrelevant because they did not relate to appellant's land in section 13. The district court further concluded that G.G.'s second report, which asserted new claims, would be inadmissible at trial, because it had not been timely disclosed. Because these rulings left no dispute for trial concerning any benefits or damages to the section 13 parcels, the district court granted summary judgment for respondents and dismissed appellant's benefits-and-damages appeal.

Appellant appealed the district court's summary-judgment dismissal of the benefits-and-damages appeal. While the appeal was pending in this court, appellant moved to strike

portions of respondent joint drainage authority’s brief. A special term panel of this court deferred resolution of the motion to this merits panel.

D E C I S I O N

I. Appellant’s motion to strike is denied.

We first address appellant’s motion to strike. Appellant asks us to strike respondent joint drainage authority’s references to a “collective guide” and also asks us to strike a series of assertions made by respondent joint drainage authority in the briefing. The “collective guide” in question is the Minnesota Public Drainage Manual. *Minnesota Public Drainage Manual* (Minnesota Board of Soil & Water Resources, 2017).

The record on appeal consists only of the papers filed below, the exhibits, and the transcript of the proceedings. Minn. R. Civ. App. P. 110.01. Appellate courts may take judicial notice of or refuse to strike public documents that were not made part of the record below. *See State v. Rewitzer*, 617 N.W.2d 407, 411 (Minn. 2000) (refusing to strike documents introduced on appeal relating to sentencing statistics when documents were matters of public record and court was free to refer to them in the course of its own research).

Here, the Minnesota Public Drainage Manual contains information compiled by the Minnesota Board of Water and Soil Resources (BWSR). It is a public record, and we need not disregard it. The manual is similar to a law review article or a treatise. It has been cited in one Minnesota Supreme Court dissenting opinion. *See In re Improvement of Murray Cty. Ditch No. 34*, 615 N.W.2d 40, 52 (Minn. 2000) (Page, J., dissenting) (referring to an earlier version of the drainage manual, compiled by the Minnesota Department of

Natural Resources). We consider the manual for whatever value we deem it to have. *See Appeal of SH RG for: Northstar Adoption Assistance*, 907 N.W.2d 680, 691 n.11 (Minn. App. 2018) (citing U.S. Dep’t of Health & Human Servs., *Child Welfare Policy Manual Updates Deletions to the Manual*).

Appellant next asks us to strike a series of assertions in respondent joint drainage authority’s brief, which appellant claims are “made without citation to the record and which lack basis in the record.” Appellant claims that the assertions violate Minn. R. Civ. App. P. 128.02, subd. 1(c) (“The facts [in a party’s brief] must be stated fairly, with complete candor, and as concisely as possible. . . . Each statement of a material fact shall be accompanied by a reference to the record . . .”). We see no such violation of the rule in respondent’s brief. It is clear to us, after reading and reviewing each party’s brief, that each side has its own view of the case. All of the briefs sufficiently comply with rule 128. We consider the arguments raised in each party’s brief on the merits.

Appellant’s motion to strike is denied.

II. The district court properly granted summary judgment for respondents.

Appellate courts “review a district court’s summary judgment decision de novo. In doing so, we determine whether the district court properly applied the law and whether there are genuine issues of material fact that preclude summary judgment.” *Riverview Muir Doran, LLC v. JADT Dev. Grp., LLC*, 790 N.W.2d 167, 170 (Minn. 2010) (citation omitted). Summary judgment is appropriate “if the movant shows that there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law.”

Minn. R. Civ. P. 56.01.⁸ Appellate courts view the facts in the light most favorable to the nonmoving party. *DLH, Inc. v. Russ*, 566 N.W.2d 60, 72 (Minn. 1997). A “metaphysical doubt” as to a fact issue will not defeat summary judgment. *Id.* at 71. Summary judgment should be granted for the defendant “when the record reflects a complete lack of proof on an essential element of the plaintiff’s claim.” *Lubbers v. Anderson*, 539 N.W.2d 398, 401 (Minn. 1995); *see also DLH*, 566 N.W.2d at 69-71 (detailing the summary-judgment standard).

Appellant argues that the district court erred when it precluded appellant from asserting damages to parcels other than the benefitted section-13 lands and thereby denied appellant a jury trial. Appellant also argues that the district court erred by excluding the proffered late-disclosed expert testimony and granted summary judgment despite the existence of genuinely disputed material facts.

A. Our earlier decision in the establishment appeal precludes appellant from further challenging the adequacy of the outlet into CD 52.

Respondent joint drainage authority argues, and the district court held, that the adequate-outlet finding bars appellant’s claims for damages he alleges will occur as a result

⁸ The district court applied the former version of rule 56 which at the time was Minn. R. Civ. P. 56.03. The rule was recently “revamped” to more “closely follow” the federal rules and was renumbered to Minn. R. Civ. P. 56.01. Minn. R. Civ. P. 56 2018 advisory comm. cmt. When promulgating amendments to rule 56, effective on July 1, 2018, and applicable to pending cases, the supreme court specifically indicated that amended language on the standard for granting summary judgment reflects Minnesota case law. *Order Promulgating Amendments to Rules of Civil Procedure*, No. ADM04-8001 (Minn. Mar. 13, 2018). Because the legal standard is unchanged, we cite to the current version of rule 56.01, even though the district court’s decision was issued before the amended rule took effect.

of a claimed inadequate outlet, and that appellant cannot continue to claim that the lateral will cause damage by flooding lands served by CD 52. We agree with the district court.

“Drainage proceedings include a number of safeguards to protect interested landowners.” *In re Improvement of Cty. Ditch. No. 86 v. Phillips*, 625 N.W.2d 813, 818 (Minn. 2001). “These safeguards include requirements that a drainage project must not be constructed if: the project is deemed not feasible, the statutory requirements for the petition are unsatisfied, the costs of the project exceed the benefits, or the adverse environmental impact of the project outweighs the public benefits.” *Id.* (citations omitted). Before establishing a drainage project, the drainage authority must consider:

- (1) private and public benefits and costs of the proposed drainage project;
- (2) alternative measures, including measures identified in applicable state-approved and locally adopted water management plans, to:
 - (i) conserve, allocate, and use drainage waters for agriculture, stream flow augmentation, or other beneficial uses;
 - (ii) reduce downstream peak flows and flooding;
 - (iii) provide adequate drainage system capacity;
 - (iv) reduce erosion and sedimentation; and
 - (v) protect or improve water quality.

Minn. Stat. § 103E.015, subd. 1 (2018). Under the statute, the drainage authority must also consider “current and potential flooding characteristics of property in the drainage project or system and downstream for 5-, 10-, 25- and 50-year flood events, including adequacy of the outlet for the drainage project.” *Id.*, subd. 1(4).

In this benefits-and-damages appeal, appellant continues to assert that, because the proposed outlet is inadequate, his downstream property will be flooded and damaged. This argument has already been considered and rejected. The CD 52 drainage authority, the

joint drainage authority for the lateral, the district court, and this court have all upheld the drainage authority's determination that CD 52 is an adequate outlet for the lateral. *See Titrud v. Achterkirch*, 213 N.W.2d 408, 412 (Minn. 1973) (stating that a determination that a proposed drainage project is practicable "includes a finding of adequacy of the outlet").

Nevertheless, in this appeal, appellant continues to assert that the lateral will cause damage to his property in sections 11 and 14. His arguments now are nearly identical to those raised in the establishment appeal—appellant claims that his downstream property will be flooded if the proposed lateral empties into CD 52, and he wants to be compensated for those claimed damages.

Appellant made this argument to the district court during the establishment phase of the appeal. The district court determined that appellant was estopped from continuing to argue that CD 52 was not an adequate outlet because "the decision of the Ditch 52 Drainage Authority to authorize the outlet was a final decision . . . subject to appeal." The district court concluded that appellant had "the right to have the Court review the decision . . . on all of the issues except the issue of whether the lateral can outlet into Ditch 52." The district court reasoned that "[t]hat decision has already been made by a separate agency."

Appellant appealed the district court's decision, and we affirmed the district court. We agreed that appellant was collaterally estopped from asserting that the lateral would cause damage to his property in sections 11 and 14. *Joint Bd. of Kandiyohi & Meeker Ctys.*, No. A16-1412, 2017 WL 875274, at *4. The supreme court denied appellant's petition for review. That issue has been finally resolved. The law of the case bars appellant from bringing this argument in the benefits-and-damages appeal. *See Kissoondath v. U.S.*

Fire Ins. Co., 620 N.W.2d 909, 917 (Minn. App. 2001) (stating that “when an appellate court has ruled on an issue, the issue decided becomes the law of the case and may not be relitigated . . . or re-examined” (quotation omitted)), *review denied* (Minn. Apr. 17, 2001). We decline to revisit this final determination concerning the adequacy of the outlet for the proposed lateral.

B. The district court did not abuse its discretion by determining that appellant’s proposed expert testimony and reports were inadmissible.

Appellant argues that the district court erred in granting summary judgment because appellant’s notice of appeal, answers to interrogatories, and response to a request to admit the damages determined by the viewers constituted sufficient disclosure under Minn. R. Civ. P. 26.01 of the matters addressed in G.G.’s second report.

“The district court’s function on a motion for summary judgment is not to decide issues of fact, but solely to determine whether genuine factual issues exist.” *DLH*, 566 N.W.2d at 70. In response to a motion for summary judgment once the moving party has made a prima facie case, the nonmoving party may not rely upon mere averments in the pleadings or unsupported allegations, but must come forward with specific facts to satisfy its burden. *Bebo v. Delander*, 632 N.W.2d 732, 737 (Minn. App. 2001), *review denied* (Minn. Oct. 16, 2001). We review a district court’s summary-judgment decision de novo and, in doing so, we determine whether the district court properly applied the law and whether there are genuine issues of material fact that preclude summary judgment. *Riverview Muir Doran, LLC*, 790 N.W.2d at 170. Here, the district court granted respondents’ motion in limine precluding admission at trial of the second report of G.G.

because it was disclosed only 11 days before trial, and the summary-judgment dismissal rested on the record as constituted without that second report. We therefore consider whether the district court erred in disregarding that second report when it granted summary judgment.

The district court's order concerning G.G.'s second report amounted to a preclusion order for failure to disclose evidence. When a party fails to properly notify an opponent of an expert who will testify at trial, a district court has the discretion to determine what sanctions will be imposed. *Kraushaar v. Austin Medical Clinic, P.A.*, 393 N.W.2d 217, 221 (Minn. App. 1986), *review denied* (Minn. Nov. 19, 1986). Sanctions may include dismissal of all or part of a claim if a party willfully and persistently fails to comply with a discovery order without justification or excuse, and when a party has failed to comply, that party has forfeited the right to a trial on the merits. *Frontier Ins. Co. v. Frontline Processing Corp.*, 788 N.W.2d 917, 922 (Minn. App. 2010), *review denied* (Minn. Dec. 14, 2010). A court may dismiss a plaintiff's claims against all defendants if the plaintiff's disobedience unfairly prejudiced all defendants, regardless of whether each defendant moved for a discovery sanction. *Id.* at 919. We review discovery-related orders for abuse of discretion. *Id.* at 922.

Appellant's earlier engineering and appraisal reports concerned appellant's land in sections 11 and 14, which was not assessed benefits and damages by the viewers. The only land relevant to appellant's benefits-and-damages appeal was the land the viewers assessed as benefitted by the proposed lateral—the land in appellant's section-13 parcels. *See Agra Res. Coop v. Freeborn Cty. Bd. of Comm'rs*, 682 N.W.2d 681, 685 (Minn. App. 2004)

(stating that once a final hearing notice is given, a drainage authority has jurisdiction over the “property and persons detailed and described in the survey and viewers’ reports”). Appellant’s first set of expert reports did not relate to the section-13 parcels, and were therefore irrelevant to the current benefits-and-damages appeal.

Concerning G.G.’s second report, which was late-disclosed, the district court had discretion to determine the appropriate sanction for a violation of the discovery and disclosure rules. “The general rule in Minnesota is expert testimony should be suppressed for failure to make a timely disclosure of the expert’s identity only where counsel’s dereliction is inexcusable and results in disadvantage to his opponent.” *Norwest Bank Midland v. Shinnick*, 402 N.W.2d 818, 823 (Minn. App. 1987) (quotation omitted). Minn. R. Civ. P. 26.01 requires parties to disclose the identity of any witness it may use at trial to present evidence under Minn. R. Evid. 702, 703, or 705. Minn. R. Civ. P. 26.01(b)(1). “[T]his disclosure must be accompanied by a written report—prepared and signed by the witness—if the witness is one retained or specially employed to provide expert testimony in the case” *Id.* (b)(2). Absent a stipulation or a court order, the disclosures must be made at least 90 days before the date set for trial or for the case to be ready for trial. *Id.* (b)(4)(A).

Eleven days before trial, appellant submitted an affidavit from engineer G.G. The affidavit, which was not included with appellant’s earlier disclosures, explained that appellant now proposed to have G.G. testify about appellant’s damages in section 13. The affidavit contained new assertions concerning the land in section 13, contrary to appellant’s position during the years-long litigation, and just eleven days before trial. The district court

determined that the information contained in the new affidavit would not be admitted because appellant's disclosure was untimely. The district court concluded that "the second [G.G.] report is merely a response to the irrelevancy of the original [G.G.] report and an untimely, last ditch attempt to create an issue for these two parcels."

The record supports the district court's determination that this second report of G.G. was new, not previously disclosed, and likely to prejudice respondents were it received. The district court considered that it was untimely disclosed, considered the resulting prejudice to respondents, and made a reasoned preclusion decision. The district court acted within its discretion in excluding the late-filed second report of G.G.

In the absence of any admissible evidence of damage to appellant's section 13 land, there remain no genuine issues of material fact for trial. That being so, the district court's grant of summary judgment was proper.

In sum, because appellant is precluded from claiming that the lateral is inadequate, and because the district court properly excluded appellant's irrelevant and untimely proposed expert testimony, there remained no genuine dispute of material fact for trial. The district court properly granted summary judgment for respondents, dismissing appellant's appeal.

Affirmed; motion denied.