This opinion is nonprecedential except as provided by Minn. R. Civ. App. P. 136.01, subd. 1(c).

STATE OF MINNESOTA
IN COURT OF APPEALS
A21-1012

Robert C. Tengdin, Trustee of the Robert C. Tengdin Revocable Trust dated May 18, 2009,
Respondent,

vs.

City of Edina,
Appellant.

Filed March 7, 2022
Affirmed
Frisch, Judge

Hennepin County District Court
File No. 27-CV-20-2227

Tamara O'Neill Moreland, Inga K. (Schuchard) Kingland, Larkin Hoffman Daly & Lindgren, Ltd., Minneapolis, Minnesota (for respondent)

Paul D. Reuvers, Andrew A. Wolf, Iverson Reuvers, Bloomington, Minnesota (for appellant)

Considered and decided by Frisch, Presiding Judge; Gaïtas, Judge; and Klaphake, Judge.[*]

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

NONPRECEDENTIAL OPINION

FRISCH, Judge

In this interlocutory appeal, the City of Edina argues that it is entitled to statutory discretionary function immunity from an action commenced by a homeowner, wherein the homeowner alleged that the city is liable for flood damage resulting from the failure to inspect, maintain, or repair certain property. We affirm the district court's denial of summary judgment because genuine issues of material fact exist regarding the circumstances giving rise to the immunity claim, and the fact-finder must resolve those fact disputes to determine the applicability of statutory discretionary function immunity.

FACTS

In the early 1960s, respondent Robert C. Tengdin purchased property within the city of Edina. That same year, Tengdin built a house on the property. A few years later, he constructed a tennis court on the rear of the property. The tennis court is situated adjacent to what appellant City of Edina refers to as the East Basin.

The East Basin is a naturally occurring landlocked basin located in the Nine Mile Creek Watershed District. The East Basin does not have an outlet at or below its 100-year flood elevation. Drainage to the East Basin is dictated by its topography, meaning that stormwater infrastructure does not typically divert the flow of drainage across the natural topographical divide. However, water is transported to the East Basin via outlet pipes. Currently, water naturally leaves the East Basin by evaporation and seepage into the soil; there are no pumps or drainage pipes to remove water from the East Basin.

Before 2019, no study had been conducted on the East Basin. Although the East Basin was not officially labeled as a wetland by the Minnesota Board of Water and Soil Resources, the city designated the area as a type-2 wetland in its Comprehensive Water Resource Management Plan, and city officials characterized it as a wetland. While the city routinely inspected the infrastructure connected to its stormwater system, it did not routinely inspect or maintain the East Basin because it considered the East Basin to be a wetland. However, the city has in the past inspected wetlands like the East Basin upon request by a resident.

In 2014, the city began experiencing a significant increase in precipitation. This increase in precipitation resulted in widespread flooding in the city. Over a two-day period in 2014, the city received 147 flooding-service requests, experienced 42 reported sewer backups, and closed 5 roads due to flooding. As a result, the city received more requests to pump excessive water than it was able to manage.

Also in 2014, Tengdin first contacted the city about issues with the East Basin and the accumulation of water on his property. Tengdin met with the mayor to discuss potential remedies. Tengdin asserts that the mayor indicated that water could be pumped from the area at Tengdin's expense because "it's not in our budget" and the area threatened by flooding—Tengdin's tennis court—was not a "permanent structure."

By 2017, flooding from the East Basin rendered the tennis court unusable. Tengdin again contacted the mayor about the flooding. In response, the mayor directed city engineering director Chad Milner, public works director Brian Olson, and city manager Scott Neal to investigate the issue. Olson dispatched city staff to inspect the infrastructure

of the East Basin for problems. The inspection revealed no malfunctions or other blockages that could explain the increase in flooding.

The city engineering services manager Ross Bintner also inspected the area. He concluded that there were no issues with the drainage into the East Basin and that the excess water could be explained by the increase in seasonal precipitation. One month later, Bintner re-examined the area and noted that the water level had risen to "an all-time high," but he found no evidence of leaky pipes or unexplained flows. He concluded that "the rise in water elevation seems like a natural result of a very wet period." Nevertheless, Bintner applied for and received a Minnesota Department of Natural Resources (DNR) permit to pump water from the East Basin. Bintner later informed Tengdin that the city had a policy of not providing water-level management for circumstances not involving a risk of flooding to a structure. The city did not act on the permit, and water was not pumped from the East Basin.

In 2019, residents petitioned the city to address problems associated with the flooding of the East Basin. The city approved a study to investigate. The investigative report concluded that no affirmative act by the city had affected the water levels of the East Basin. The report also recommended potential remedies to address the flooding, one of which was to pump water out of the East Basin. In February 2021, the city declined to adopt the recommendation to pump water from the East Basin. Simultaneous with that decision, the city council formally adopted a resolution that the city would only employ pumping as a remedy when a habitable structure is threatened by flooding.

Tengdin sued the city, alleging damages to his property resulting from the city's failure to inspect, repair, or maintain the East Basin. The city filed a motion for summary judgment, asserting that it was not liable as a matter of law because it enjoyed statutory discretionary function immunity for its planning-level decision not to pump water from the East Basin. The district court denied the city's motion, reasoning that a genuine dispute of material fact existed as to whether the city's decision to not pump water from the East Basin was an operational or planning-level decision. The city appeals.

DECISION

The city argues that the district court erred by denying its motion for summary judgment because it is entitled to statutory discretionary function immunity as a matter of law. Tengdin responds that the district court did not err and that the city is not entitled to immunity.[1]

Summary-Judgment Standard

"[D]enial of a motion for summary judgment is not ordinarily appealable, [but] an exception to this rule exists when the denial of summary judgment is based on rejection of a statutory or official immunity defense." *Anderson v. Anoka Hennepin Indep. Sch. Dist. 11*, 678 N.W.2d 651, 655 (Minn. 2004). "In an appeal from summary judgment, we must determine whether there are genuine issues of material fact and whether the district

[1] The only question presented in this appeal is whether the city is entitled to statutory discretionary function immunity as a matter of law. Although referenced in passing in the parties' briefs, any issues related to the existence or scope of the city's duties, the cause of Tengdin's damages, or any other issues are not before us in this appeal.

court erred in applying the law." *Vassallo ex rel. Brown v. Majeski*, 842 N.W.2d 456, 462 (Minn. 2014).

A district court must grant a motion for summary judgment "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. A genuine issue of material fact exists if a rational trier of fact, considering the record as a whole, could find for the nonmoving party. *Frieler v. Carlson Mktg. Grp., Inc.*, 751 N.W.2d 558, 564 (Minn. 2008). We apply a de novo standard of review to the district court's legal conclusions on summary judgment and view the evidence in the light most favorable to the nonmoving party. *Commerce Bank v. W. Bend Mut. Ins. Co.*, 870 N.W.2d 770, 773 (Minn. 2015).

"When reviewing a denial of summary judgment based on a claim of immunity, we assume the facts alleged by the nonmoving party are true." *Shariss v. City of Bloomington*, 852 N.W.2d 278, 281 (Minn. App. 2014). We review de novo whether immunity applies to the governmental entity. *Id.* The party asserting immunity bears the burden of proving entitlement to that immunity. *Rehn v. Fischley*, 557 N.W.2d 328, 333 (Minn. 1997).

Statutory Discretionary Function Immunity

A municipality is immune from liability for "[a]ny claim based upon the performance or the failure to exercise or perform a discretionary function or duty, whether or not the discretion is abused." Minn. Stat. § 466.03, subd. 6 (2020). This immunity limits the disruption of the "balanced separation of powers of the three branches of government." *Nusbaum v. Blue Earth County*, 422 N.W.2d 713, 718 (Minn. 1988) (quotation omitted). In determining the applicability of statutory discretionary function

immunity, we focus on "whether the conduct at issue involves the balancing of public policy considerations in the formulation of policy." *Conlin v. City of Saint Paul*, 605 N.W.2d 396, 400 (Minn. 2000). A municipality is immune from liability for its "planning" decisions but not for its "operational" decisions. *Steinke v. City of Andover*, 525 N.W.2d 173, 175 (Minn. 1994). A planning-level decision is one that involves issues of public policy and the weighing of competing social, economic, or political factors, as opposed to "professional or scientific judgments." *Id.* An operational decision is one that is connected to the day-to-day operation of government. *Id.*

"A two-step analysis guides us in determining whether a municipality is entitled to statutory immunity." *Magnolia 8 Props., LLC v. City of Maple Plain*, 893 N.W.2d 658, 662 (Minn. App. 2017). "First, we must identify the challenged governmental conduct. Next, we determine whether the challenged conduct involves planning-level or operational decisions." *Id.* (citation omitted).

The Challenged Conduct

"The first step in an analysis of a statutory immunity claim is to identify the conduct at issue." *Conlin*, 605 N.W.2d at 400. To ascertain the conduct at issue, we look to the allegations set forth in the complaint. *See Gleason v. Metro. Council Transit Operations*, 582 N.W.2d 216, 219 (Minn. 1998). We conduct a thorough review of the record to verify that the conduct alleged in the complaint matches the government conduct present in the record. *See Magnolia*, 893 N.W.2d at 663.

We first observe that the parties dispute what constitutes the challenged conduct at issue. In his complaint, Tengdin alleges that since 2014, the city failed to "inspect,

maintain, and repair" its stormwater drainage system in the East Basin. The city characterizes this challenged conduct as the decision not to pump water from the East Basin. Tengdin disagrees, asserting that the failure to inspect, maintain, or repair is separate conduct from the city's pumping decision. The district court did not clearly identify the challenged conduct and instead broadly characterized the city's actions as "wetland management." But the district court denied the city's motion for summary judgment based on deposition testimony suggesting that "the decision not to pump the East Basin was an operational, ministerial decision."

Our review of Tengdin's complaint shows that he challenges two of the city's acts or omissions: the failure to pump water from the East Basin after it began flooding in 2014 and the ongoing failure to inspect or maintain the East Basin so as to prevent the flooding from occurring at all.

As to the former conduct, although Tengdin's complaint does not specifically reference the city's failure to pump water from the East Basin, Tengdin has made clear both in his submissions and at oral argument that he challenges the city's decision not to pump water from the East Basin after flooding began. The record shows, for example, that Tengdin repeatedly requested that the city pump water out of the East Basin, including in his 2014 discussions with the mayor, his 2017 conversations with Bintner, and the 2019 petition that Tengdin and other residents sent to the city. At oral argument, Tengdin conceded that the only method to remove water from the East Basin was through pumping. Accordingly, we construe Tengdin's allegation that the city did not "repair" the East Basin as a challenge to the city's decision not to pump water from the East Basin.

As to the latter conduct, Tengdin challenges the city's ongoing decision not to maintain or inspect the East Basin. The city argues that the decision to not pump water from the East Basin is the only challenged conduct at issue and that any conduct related to inspection or maintenance is intrinsically tied to this decision. We disagree. Inspection and maintenance activities to prevent the accumulation of excessive water in the East Basin are independent and distinct from activities related to the removal of water once it has already accumulated in the East Basin.

The Governmental Conduct in Question

Having defined the challenged conduct at issue, we next "examine the precise governmental conduct in question." *Steinke*, 525 N.W.2d at 175. Decisions related to the day-to-day operations of government personnel are not afforded immunity. *Jepsen as Tr. for Dean v. County of Pope*, 966 N.W.2d 472, 489 (Minn. 2021). But a challenge to the actions of a city employee pursuant to an enacted policy is merely a challenge to the policy itself so long as the record indicates that the employee considered the policy when committing the challenged actions. *See Nusbaum*, 422 N.W.2d at 723-24 (determining that county employee's exercise of professional judgment to place road sign was operational in nature notwithstanding existence of road-sign-placement policy because no evidence indicated city employee was influenced by policy when placing sign). We conclude that genuine issues of material fact exist as to whether the challenged conduct is entitled to statutory discretionary function immunity.

First, the record contains conflicting evidence as to whether the city adopted a policy before 2021 that governed the decision not to pump water from the East Basin. The city

alleges that in 2014, it adopted an unwritten policy to only respond to pumping requests when floodwater threatened a habitable structure. But the city engineering director testified that the policy was enacted "somewhere between 2014 and '17." Moreover, despite working for the city in 2014 when this policy was allegedly implemented, Bintner sought and obtained a permit from the DNR in 2017 to pump water from the East Basin. The city presented evidence that it never acted on this permit because of the purported 2014 policy. And in 2021, the city council formally adopted a resolution identical to the purported 2014 pumping policy.

Tengdin alleges that these facts provide a basis for a rational fact-finder to infer that no policy existed before 2021. We agree. A fact-finder could conclude that Bintner's lack of knowledge of the existence of a policy, despite his role as engineering services manager, and his acquisition of a pumping permit in 2017, shows that no policy existed at all.[2] A fact-finder could conclude that the city engineering director's vague testimony that the unwritten policy was developed at some point in a three-year range further indicates that such a pumping policy was not an established municipal policy. And a fact-finder could conclude that the city council's 2021 adoption of an identical pumping policy would not have been necessary if the city had already adopted such a policy.[3] Statutory discretionary

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[2] We note that oral policies may form a basis for statutory discretionary function immunity. *See Olmanson v. Le Sueur County*, 673 N.W.2d 506, 515 (Minn. App. 2004) ("[T]he county need not necessarily adopt a written policy, but there must be evidence that there was a deliberative process that led to establishment of the policy in question."), *aff'd on other grounds*, 693 N.W.2d 876 (Minn. 2005).

[3] Tengdin argues that only a legislative body, such as a city council, can enact policies sufficient to serve as a basis for statutory discretionary function immunity. In support of

function immunity cannot apply in the absence of conclusive evidence of the existence of a policy in the first instance. *See Nusbaum*, 422 N.W.2d at 723. Accordingly, the city is not entitled to summary judgment based on statutory discretionary function immunity for its decision not to pump water from the East Basin.[4]

Second, the record contains conflicting evidence regarding decisions related to the city's maintenance and inspection of the East Basin, precluding the application of statutory discretionary function immunity as a matter of law. As to this challenged conduct, Tengdin argues that the decision not to maintain or inspect the East Basin was not a planning-level decision but instead an operational decision not subject to immunity. We agree that the record contains conflicting evidence regarding the basis for the city's decision not to maintain or inspect the East Basin.

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this argument, Tengdin miscites two cases, both of which expressly provide that executive-level policy decisions are afforded immunity if based on policymaking. *Watson by Hanson v. Metro. Transit Comm'n*, 553 N.W.2d 406, 412 (Minn. 1996) ("Statutory immunity exists to prevent the courts from conducting an after-the-fact review which second-guesses certain policy-making activities that are legislative or *executive* in nature." (emphasis added) (quotation omitted)); *Pletan v. Gaines*, 460 N.W.2d 74, 76 (Minn. App. 1990) ("The discretionary function exception avoids judicial interference and second guessing of *executive* and legislative policymaking." (emphasis added) (quotation omitted)), *rev. denied* (Minn. Nov. 1, 1990).

[4] Tengdin also argues that, even if the 2014 policy existed, the policy was not adopted as a result of the political, social, or economic considerations that are a necessary predicate to the application of immunity. But the city presented evidence that it adopted the policy as a means of prioritizing citizen requests and managing its limited budget. We consider Tengdin's arguments regarding the credibility of the underlying reasons for enacting the policy as part of his challenge to the existence of the policy in the first instance. All of these issues are appropriate for resolution by the fact-finder.

During his deposition, city engineering director Chad Milner testified as to the city's day-to-day activities regarding the East Basin. Milner admitted that he did not inspect or maintain the East Basin before 2019, and he only did so after Tengdin complained about flooding onto his property. Milner testified that the city does not inspect or repair wetlands like the East Basin because the city intended to leave such wetlands in a "natural state." Milner further testified that, based on his professional judgment, wetlands are not in need of maintenance. When asked to identify the basis for this conclusion, Milner testified that "We don't maintain wetlands. That would be a call between myself and the public works director." He then stated, "We set priorities based on needs within the City. Our opinion is wetlands don't need maintenance, based on all the other needs and service requests in the City." Finally, Milner concluded, "It's an operational decision by us."

In support of the city's motion for summary judgment, Milner submitted a declaration that differed from his deposition testimony. In the declaration, Milner stated that the decision to not maintain wetlands was based on a "City policy to discourage wetland alterations." Milner further stated that, in making operational decisions, he balanced a variety of social, political, and economic factors, as opposed to exercising his professional judgment.

These competing statements by Milner relate to whether his actions, or inactions, were based on an enacted policy grounded in political, social, or economic considerations. The city is only entitled to statutory discretionary function immunity if its employees' actions were based on an enacted policy. *See Nusbaum*, 422 N.W.2d at 723-24. We cannot resolve the competing statements from Milner as to the motivation for his actions.

Jonathan v. Kvaal, 403 N.W.2d 256, 259 (Minn. App. 1987) (stating that appellate courts do not resolve issues of fact), *rev. denied* (Minn. May 20, 1987). Accordingly, the city is not entitled to summary judgment based on statutory discretionary function immunity for its decisions related to maintenance and inspection of the East Basin.

The district court denied the city's motion for summary judgment based on deposition testimony suggesting that "the decision not to pump the East Basin was an operational, ministerial decision." Although we agree that summary judgment is inappropriate here, our conclusion is based on different grounds than the district court. We hold that summary judgment is inappropriate because there are genuine disputes of material fact as to the existence of applicable policies and whether city employees made decisions in reliance on such policies.

Abrogation of Statutory Duty

Tengdin argues that the city is not entitled to statutory immunity as a matter of law because it may not abrogate a statutory duty to inspect and maintain its drainage system. "[M]unicipalities do not have discretion to engage in policymaking conduct that is patently unlawful." *Blaine v. City of Sartell*, 865 N.W.2d 723, 731-32 (Minn. App. 2015) (determining that statutory discretionary function immunity did not apply where county's inspection process violated its duty to provide for regular inspections). Where a government entity's detailed statutory scheme resolves the high-level planning and policy decisions, the entity is not afforded discretionary immunity when its employees carry out operations of the scheme. *Jepsen*, 966 N.W.2d at 489-90 (declining to grant statutory

immunity to county when county workers' failure to protect child concerned day-to-day operational duties).

Tengdin argues that even if the city adopted a policy not to maintain or inspect the East Basin because it is a wetland, such a decision violates the city's statutory duty to maintain its drainage system. Minnesota law provides that "[a]fter the construction of a drainage system has been completed, the drainage authority shall maintain the drainage system that is located in its jurisdiction . . . and provide the repairs necessary to make the drainage system efficient. The drainage authority shall have the drainage system inspected on a regular basis." Minn. Stat. § 103E.705, subd. 1 (2020). The statute further provides that "[o]pen drainage ditches shall be inspected at a minimum of every five years." *Id.* Chapter 103E defines "drainage authority" as "the board or joint county drainage authority having jurisdiction over a drainage system or project." Minn. Stat. § 103E.005, subd. 9 (2020). "Drainage system" is defined as

> 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. 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., subd. 12 (2020). The city argues that it is not a drainage authority as defined by chapter 103E, nor is the East Basin part of a constructed drainage system because it is a naturally occurring wetland. We agree.

We review the construction of the drainage code de novo. *County of Blue Earth v. Phillips (In re Improvement of Cnty. Ditch. No. 86, Branch 1)*, 625 N.W.2d 813, 817 (Minn.

2001). "Minnesota's laws pertaining to drainage ditches are a complex matrix adopted with the intent of reclaiming agricultural land by disposing of excess water that renders the land untillable." *In re Improvement of Murray Cnty. Ditch No. 34*, 615 N.W.2d 40, 45 (Minn. 2000). "The mere providing of ingress into, and egress from, a natural waterway does not constitute an improvement of the natural waterway." *Swoboda v. County of Renville (In re Brandt)*, 62 N.W.2d 816, 819 (Minn. 1954) (interpreting an earlier iteration of the drainage-system statute substantially similar to the current version).

Here, the undisputed facts show that the East Basin is part of the city's stormwater system via its designation as a wetland and because it receives outlet water. But the undisputed facts also show that the East Basin does not act as a conveyance of that water. Moreover, the East Basin was not "constructed by a drainage authority," as it is undisputed that the East Basin is a natural wetland. *See* Minn. Stat. § 103E.005, subd. 12. And even if the East Basin could be considered a natural waterway, the city's stormwater system only provides "ingress into" it, which would not constitute an improvement under the statute. *See Swoboda*, 62 N.W.2d at 819; Minn. Stat. § 103E.005, subd. 12. Lastly, no facts in the record indicate that the city is a "board or joint county drainage authority having jurisdiction over a drainage system or project." Minn. Stat. § 103E.005, subd. 12. Thus, we reject Tengdin's attempt to apply Minn. Stat. § 103E.705, subd. 1, to the East Basin.[5]

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[5] Although Tengdin cites to cases in support of his argument that there can be no discretionary immunity where a municipality violates a legal duty, all of the cited cases relate to the maintenance of safe roadways and streets for which statutory discretionary function immunity is not available. *See Johnson v. Nicollet County*, 387 N.W.2d 209, 211 (Minn. App. 1986) ("In actions alleging that a governmental body failed to safely maintain roads and sidewalks, case law consistently holds that the discretionary exception does not

The existence of genuine issues of material fact precludes the application of statutory discretionary function immunity as a matter of law to the city's decisions not to pump water from the East Basin and not to inspect or maintain the East Basin. However, the city is not precluded from pursuing its immunity claim at trial.

Affirmed.

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apply."); *Wiederholt v. City of Minneapolis*, 581 N.W.2d 312, 316-17 (Minn. 1998) (failure to repair sidewalk); *Hansen v. City of Saint Paul*, 214 N.W.2d 346, 350-51 (Minn. 1974) (failure to prevent dangerous dogs from roaming city streets). Tengdin also does not cite any caselaw applying the drainage inspection and repair statute to a wetland serving as a stormwater depository. We note that the purpose of the drainage statute was to "reclaim[] agricultural land" and drain water, not regulate the conveyance of water into a wetland. *Murray Cnty. Ditch No. 34*, 615 N.W.2d at 44.

Additionally, Tengdin cites to inapposite cases relating to city water management and associated liability. Tengdin cites to two water-management cases that do not involve the application of statutory discretionary function immunity. *See Pettinger v. Village of Winnebago*, 58 N.W.2d 325, 329 (Minn. 1953); *Greenwood v. Evergreen Mines Co.*, 19 N.W.2d 726, 731 (Minn. 1945). Tengdin also cites to *Chabot v. City of Sauk Rapids*, where the supreme court held that a city did enjoy statutory discretionary function immunity, despite also determining that the city waived its immunity by purchasing liability insurance. 422 N.W.2d 708, 711 (Minn. 1988). Moreover, the *Chabot* court expressly stated that "a city is not liable for water damage to private property, despite the inadequacy of its drainage system, when the private property was the natural depository of the water discharged." *Id.*