STATE OF MINNESOTA
IN COURT OF APPEALS
A07-1091

Donald Slama, Jr., et al., petitioners,
Appellants,

vs.

Pine County, et al.,
Respondents.

Filed May 6, 2008
Affirmed
Connolly, Judge

Pine County District Court
File No. 58-CV-06-113

Jeff C. Braegelmann, Gislason & Hunter, L.L.P., 2700 South Broadway, P.O. Box 458, New Ulm, MN 56073-0458 (for appellants)

Thomas P. Carlson, Nigel H. Mendez, Carlson & Associates, Ltd., 1052 Centerville Circle, Vadnais Heights, MN 55127 (for respondents)

Considered and decided by Connolly, Presiding Judge; Kalitowski, Judge; and Minge, Judge.

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

CONNOLLY, Judge

This appeal arises from a long-standing dispute among owners of land flanking Pine County Ditch #1. Appellants petitioned the district court for a writ of mandamus directing the county to carry out an October 2001 repair order providing for the removal

of beaver dams from the ditch. The county brought a motion for summary judgment, asserting that (1) mandamus was not an available remedy and (2) it is entitled to statutory immunity for its conduct with respect to the ditch. The district court granted summary judgment on both grounds, and we affirm.

FACTS

Established in 1905, Pine County Ditch #1 (PCD #1 or the ditch) flows from Miller Lake to Grindstone Lake. Just south of Miller Lake, the ditch flows through Wetland 58-196W. Miller Lake, Grindstone Lake, and Wetland 58-196W are all protected public waters within the jurisdiction of the Minnesota Department of Natural Resources. Miller Lake was formed in the early 1950s.

Respondent Pine County Board of Commissioners (the county or the board) is the drainage authority for PCD #1. *See* Minn. Stat. § 103E.005, subd. 9 (2006) (identifying county boards as drainage authorities). Historically, Pine County did not regularly maintain its county ditches, nor did it have funds available for repairs. In 2001, the county established funding and began removing beaver dams that were obstructing county ditches. As part of this process, county officials attempted to remove dams from portions of PCD #1 running through property owned by Robert and Brenda Wellnitz. The Wellnitzes objected to removal of the dams, and denied county officials access to the ditch over their land. In response, the board on October 16, 2001, adopted a repair order,

pursuant to Minn. Stat. § 103E.075 (2006), for the removal of 12 dams in the upstream portion of the ditch.[1]

The Wellnitzes commenced litigation seeking to enjoin enforcement of the repair order. The district court in that litigation granted summary judgment dismissing all of the Wellnitzes' claims except for their claim that the repair order violated Minn. Stat. §§ 103E.011, subd. 3(a)(1), 103G.245 (2006), which require approval from the commissioner of natural resources before removing any dam affecting public waters. The court found genuine issues of material fact as to whether removal of the beaver dams would affect public waters. The court cautioned that the county was "not authorized to remove the beaver dams until after the determination by the Court of whether or not public waters will be affected by the removal." The Wellnitzes did not further pursue the litigation and voluntarily dismissed their sole remaining claim in September 2005.

On March 29, 2006, appellants filed in district court a petition for writ of mandamus together with an "alternative complaint" alleging counts of negligence, trespass, and nuisance. On April 4, 2006, the district court issued an alternative writ and set a return date for April 25, 2006.[2]

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[1] Minn. Stat. § 103E.075 governs the circumstances and procedure under which a county may order a landowner to remove, at the landowner's expense, obstructions from a ditch. Here, the county did not order the Wellnitzes to remove the beaver dams, but nevertheless followed the procedure set forth in this section.

[2] Under the Minnesota Statutes, there are two types of writs of mandamus — alternative and peremptory. Minn. Stat. § 586.03 (2006). In most cases, the writs are successive. *Id.* The district court must first issue an alternative writ, which designates a return date by which the defendant must either complete the task mandated or show cause for its failure to do so. *Id.* A peremptory writ is issued if the defendant fails to comply. *Id.*

In March and April 2006, the county worked on removing the dams addressed in the 2001 repair order, but its progress was limited both by uncooperative landowners and by a persistent beaver population. The county twice removed a large dam from a portion of the ditch running through the Wellnitz property, and both times the beavers rebuilt it. Because some landowners refused to allow the county access to the ditch over their land, the county had to travel up the ditch with a backhoe and could not remove additional dams until the water discharged from this large dam subsided.

At the April 25, 2006 return hearing, the county submitted to the court an affidavit from its ditch inspector, John Stieben, explaining the problems it had encountered in completing the work contemplated by the repair order. Stieben also explained that the larger backhoe necessary to complete removal of the dams was subject to road restrictions that he expected to be lifted in May 2006. Through Stieben, the county reaffirmed its intent to remove the dams identified in the repair order. Stieben anticipated it would take at least until July 1, 2006, to complete the work, and the county requested an extension to the return date. The court set a new return date for August 15, 2006.

At the same time that appellants were pursuing mandamus in district court, several additional matters were placed before the board. Appellants submitted a petition to repair dams in the downstream portion of the ditch, which were not addressed in the 2001 repair order. Landowners opposed to clearing the ditch submitted a petition to abandon the ditch pursuant to Minn. Stat. § 103E.811 (2006). And the Windmill Creek Coalition, which was formed by landowners opposing ditch repairs, filed a citizen petition with the Minnesota Environmental Quality Board (EQB) requesting that an environmental

assessment worksheet (EAW) be completed with respect to the proposed repairs to PCD #1. The EQB designated Pine County as the "appropriate governmental unit to decide the need for an EAW" and instructed the county on the procedure to be followed in making that determination.

During July and August 2006, the board held public meetings on appellants' petition for additional repairs and the opposing landowners' petition to abandon and request for an EAW. The board decided to complete an EAW, and to defer decisions on the petitions to repair and abandon until the EAW was complete.

When the parties returned to court on August 15, 2006 appellants requested entry of judgment on the writ. The county requested that the court suspend its proceedings pending the board's resolution of the related matters now before it. The court denied both motions and set a pretrial scheduling conference.

In April 2007, the board approved an order staying further action on the 2001 repair order until after the EAW was complete. In that order, the county expressed its determination that "the environmental assessment should include the entire length of Ditch #1." The county further explained that "[i]n issuing the 2001 Repair Order, [it] did not have sufficient information presented to consider the scope of its responsibilities in protecting the wetlands along Ditch #1. It also did not have sufficient information for a design to protect sediment discharge from entering Grindstone Lake." The county concluded with its "belie[f] it is obligated to protect the legitimate interests of those petitioning for repair to obtain suitable drainage by reasonable repair of Ditch #1" but also "obligated to balance the right of drainage with the effect it will cause on wetlands,

public waters and other wildlife habitats" and that "[a]ny decision on abandonment or removal of beaver dams cannot be made without the cost and liabilities and responsibility being clear."

In April and May 2007, the court granted two motions for summary judgment brought by the county, agreeing with the county that mandamus was not an available remedy and that the county was entitled to statutory immunity against the claims in the alternative complaint. Appellants challenge both of these determinations.

D E C I S I O N

I.

We first address whether mandamus is an available remedy to compel the county to remove the dams addressed in its 2001 repair order. Mandamus is an extraordinary remedy and is available only to "compel a duty clearly required by law." *N. States Power Co. v. Minn. Metro. Council*, 684 N.W.2d 485, 491 (Minn. 2004). Absent an abuse of discretion or the failure to exercise it, mandamus is not available to control discretionary duties. *See* Minn. Stat. § 586.01 (2006); *State ex rel. Gopher Sales Co. v. City of Austin*, 246 Minn. 514, 518, 75 N.W.2d 780, 783-84 (1956); *Olson v. Honett*, 133 Minn. 160, 162, 157 N.W. 1092, 1092 (1916).

Appellants assert that the county has no discretion with respect to its duty to maintain PCD #1, relying on language in the drainage statutes that the "drainage authority *shall* maintain the drainage system . . . and provide the repairs necessary to make the drainage system efficient." Minn. Stat. § 103E.705, subd. 1 (2006) (emphasis added); *see also* Minn. Stat. § 645.44, subd. 16 (2006) (defining "shall" to mean

mandatory). In so urging, however, appellants disregard portions of the drainage statute requiring the county to consider and weigh competing environmental and public interests in order to determine "whether [a] project will be of public utility, benefit, or welfare." Minn. Stat. § 103E.015, subd. 2 (2006). This court has held that Minnesota's Water Law, of which the drainage ditch statutes are a part, must be construed *in pari materia*. *See Minch v. Buffalo-Red River Watershed Dist.*, 723 N.W.2d 483, 487 (Minn. App. 2006), *review denied* (Jan. 24, 2007); c*f. McLeod County Bd. of Comm'rs v. Dep't of Natural Res.*, 549 N.W.2d 630, 633 (Minn. App. 1996) (holding that drainage authorities must maintain ditches in a manner consistent with the policies established by the legislature in the Wetland Conservation Act, Minn. Stat. §§ 103G.221-.2373), *review denied* (Minn. Aug. 20, 1996). Accordingly, we conclude that the county, as drainage authority, has discretion to determine the manner in which the ditch will be maintained.

Appellants argue that mandamus is nevertheless appropriate because the county has already exercised its discretion by passing the 2001 repair order, and that the only remaining action, i.e., the actual removal of the beaver dams, is ministerial in nature. The county responds that it has the "discretion to determine the priority and timing of the maintenance." And, considering the intervening petitions to repair, abandon, and for an EAW, the county argues that it would be imprudent to move forward with work called for in the 2001 repair order. The county essentially asserts that it exercises continuing discretion over the repair project, up to and including reconsideration of the 2001 repair order.

We agree that the discretion vested in the county with respect to ditch repair is continuing in nature. Initially, we note that nothing in the statutory scheme governing ditch maintenance limits the county's discretion to the outset of a repair project. Further, while neither this court nor the Minnesota Supreme Court has addressed whether a drainage authority may reconsider a repair order, other courts addressing similar circumstances have concluded that reconsideration is available. *See State ex rel. Sullivan v. Ross*, 118 N.W. 85, 89 (Neb. 1908); *Bd. of Supervisors v. Horton*, 39 N.W. 394, 398 (Iowa 1888).

In *Sullivan*, a county board had passed but later rescinded an order to establish a ditch. 118 N.W. at 85-86. Addressing a petition for mandamus to require construction of the ditch, the Nebraska Supreme Court held that "the county board has the right to rescind in the exercise of its discretion, unless such proceedings have been taken under the original order that rights of third parties have vested." *Id.* at 89. The court further explained that the board "in the public interest . . . should have the right to reconsider its action if upon better information it concludes that it is inexpedient or disadvantageous to the public welfare." *Id.* Ten years earlier, the Iowa Supreme Court had reached a similar conclusion with respect to a rescinded order to construct a bridge. *See Horton*, 39 N.W. at 398 (rejecting argument that decision was finalized with adjournment of meeting during which it was made). We agree with the reasoning of these courts.

In sum, given the discretion vested in the county by the drainage-ditch statutes, and the developments subsequent to the board's 2001 repair order, we agree with the district court that the county's actions remain discretionary and thus are not subject to

mandamus. While the county does have a duty to maintain the ditch, it is afforded substantial discretion to determine how to carry out that duty. Judicial intervention is not available to compel the county to discharge its duty in the manner that appellants prefer. Accordingly, the district court properly dismissed appellants' petition for writ of mandamus.

II.

We next address the district court's conclusion that the damages claims in appellants' alternative complaint are barred by statutory immunity, also known as discretionary immunity. *See Minder v. Anoka County*, 677 N.W.2d 479, 483 (Minn. App. 2004) (equating statutory and discretionary immunity). As that term implies, our decision here also turns on whether the county was performing a discretionary function. Statutory immunity bars claims against municipalities "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 (2006). As an exception to the general rule of tort liability for municipalities, *see* Minn. Stat. § 466.02 (2006), statutory immunity is narrowly construed. *See Conlin v. City of St. Paul*, 605 N.W.2d 396, 400 (Minn. 2000). The applicability of statutory immunity is an issue of law, which this court reviews de novo. *Id.*

"The first step in an analysis of a statutory immunity claim is to identify the conduct at issue." *Id.* Statutory immunity protects planning level decisions, but not operational decisions:

> Planning level decisions are those involving questions of public policy, that is, the evaluation of factors such as the financial, political, economic, and social effects of a given plan or policy. Operational level decisions, on the other hand, involve decisions relating to the ordinary day-to-day operations of the government.

Holmquist v. State, 425 N.W.2d 230, 232 (Minn. 1988). While operational level decisions may also involve the consideration of competing factors, they require the "application of scientific and technical skills" rather than a determination of public policy. *Id.* In drawing the distinction between protected and unprotected decisionmaking, we find guidance in the legislature's purpose in creating statutory immunity: "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." *Conlin*, 605 N.W.2d at 401 (quotation omitted).

Here, the challenged conduct is the county's failure to maintain PCD #1, and in particular its failure to remove the beaver dams obstructing the ditch. The determination to delay removal of the beaver dams—like the initial decision to remove them—was based on the county's consideration of competing policy considerations, and is protected by statutory immunity. *See, e.g.*, *Chabot v. City of Sauk Rapids*, 422 N.W.2d 708, 710-11 (Minn. 1988) (holding that city's decision "not to remedy" a defect in its sewer system "was clearly of a policy-making nature"); *Christopherson v. City of Albert Lea*, 623 N.W.2d 272, 276 (Minn. App. 2001) (holding that city was protected by statutory immunity for decisions made regarding maintenance of its sewer system because those decisions involved balancing financial and policy considerations); *Nguyen v. Nguyen*, 565

N.W.2d 721, 723 (Minn. App. 1997) (holding that decision to delay safety improvements to roads, based on fiscal considerations, was entitled to statutory immunity).

Appellants assert that, even if the decision to repair is discretionary, implementation of the repair order is ministerial. This may be true. However, appellants do not challenge the manner in which the repair order was implemented, e.g., by arguing that they suffered property damage from the equipment used to remove the dams. Instead, they challenge the county's decision not to carry out the work contemplated in the repair order, a decision indisputably owing to subsequent policy considerations by the county. Accordingly, the district court correctly determined that appellants' damages claims were barred by statutory immunity.[3]

III.

Appellants challenge the district court's failure to rule on their motions to strike portions of the affidavits of County Attorney John Carlson and outside counsel Thomas P. Carlson. Affidavits in support of summary judgment "shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." Minn. R. Civ. P. 56.05. However, the erroneous consideration of evidence in violation of this rule does not require reversal if the error was harmless. *See, e.g.*, *Person v. United States*, 112 F.2d 1, 2 (8th Cir. 1940); 10B Charles Alan Wright, et al., *Federal Practice & Procedure* § 2738; s*ee also* Minn. R. Civ. P. 61 (requiring harmless error to

[3] By notice of review, the county asserts an alternative basis for summary judgment in its favor. Because we affirm the entry of summary judgment on statutory-immunity grounds, we do not reach that issue.

be ignored). Moreover, "[a]n assignment of error based on mere assertion and not supported by any argument or authorities in appellant's brief is waived and will not be considered on appeal unless prejudicial error is obvious on mere inspection." *State v. Modern Recycling, Inc.*, 558 N.W.2d 770, 772 (Minn. App. 1997) (quotation omitted).

Appellants' motions to strike include a laundry list of objections, including lack of personal knowledge, hearsay, relevancy, foundation, and lack of authentication. No substantive argument was made to the district court in support of these objections, nor do appellants explain to this court specifically what should have been excluded and why. Because no error is apparent on "mere inspection," we decline to consider this issue.

Affirmed.