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State of Minnesota
8/19/2020 2:04 PM

STATE OF MINNESOTA

COUNTY OF RAMSEY

DISTRICT COURT

SECOND JUDICIAL DISTRICT

State of Minnesota ex. rel. Association of Freeborn County Landowners,

Plaintiff,

v.

Minnesota Public Utilities Commission,

Defendant,

and

Buffalo Ridge Wind, LLC, Three Waters Wind, LLC, Northern States Power Company, and Plum Creek Wind Farm, LLC,

Defendants-Intervenors.

Case Type: Other Civil
Court File No. 62-CV-20-3674
Judge: Hon. Sara R. Grewing

DECLARATION OF ANDREW W. DAVIS

I, Andrew W. Davis, hereby state and declare as follows:

1. I am an attorney at Stinson LLP. I am licensed to practice law in the State of Minnesota.

2. I am one of the attorneys representing Defendants-Intervenors Buffalo Ridge Wind, LLC ("Buffalo Ridge") and Three Waters Wind, LLC ("Three Waters") (collectively, "Intervenors").

3. Intervenors have cited the following unpublished cases in their Memorandum in Support of their Motion to Dismiss and their Memorandum in Opposition to Plaintiff State of Minnesota ex rel. Association of Freeborn County Landowners' Motion for a Temporary Injunction:

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8/19/2020 2:04 PM

- *Essar Global Fund Limited v. Roberts-Davis*, 2020 WL 3172844 (Minn. Ct. App. June 15, 2020)
- *Kremers v. Dahl*, No. A13-1367, 2014 WL 273966 (Minn. Ct. App. Jan. 21, 2014)
- *Minnesota Center for Environmental Advocacy v. Minnesota Public Utilities Commission*, 2010 WL 5071389 (Minn. Ct. App. Dec. 14, 2010)
- *Nielsen v. State*, No. C4-90-1525, 1991 WL 10223 (Minn. Ct. App. Feb. 5, 1991)
- *Peterson v. United Parcel Serv., Inc*., 2014 WL 4672393 (Minn. Ct. App. Sept. 22, 2014)
- *State ex rel. Friends of the Boundary Waters Wilderness v. AT&T Mobility, LLC*, 2012 WL 2202984 (Minn. Ct. App. June 18, 2012)
- *Water in Motion, Inc. v. Minn. Dept. of Labor and Industry*, 2016 WL 7041978 (Minn. Ct. App. Dec. 5, 2016)

4. A true and correct copy of each unpublished case listed above is attached as **Exhibit A** to this Declaration.

5. I declare under penalty of perjury that everything I have stated in this document is true and correct.

Signed at Minneapolis, Minnesota, this 19th day of August, 2020.

/s/ Andrew W. Davis
Andrew W. Davis

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State of Minnesota
8/19/2020 2:04 PM

EXHIBIT A

Declaration of Andrew W. Davis dated August 19, 2020

2020 WL 3172844
Only the Westlaw citation is currently available.

Court of Appeals of Minnesota.

ESSAR GLOBAL FUND LIMITED, Appellant,
v.
Alice ROBERTS-DAVIS, et al., Respondents.

A19-1743
|
Filed June 15, 2020

Ramsey County District Court, File No. 62-CV-19-1122

Attorneys and Law Firms

David R. Marshall, Leah C. Janus, Kyle W. Ubl, Fredrikson & Byron, P.A., Minneapolis, Minnesota (for appellant)

Keith Ellison, Attorney General, Oliver J. Larson, Assistant Attorney General, St. Paul, Minnesota (for respondents)
Considered and decided by Reilly, Presiding Judge; Smith, Tracy M., Judge; and Schellhas, Judge.*

UNPUBLISHED OPINION

REILLY, Judge

***1** Appellant challenges the dismissal of its claims against respondents arising out of efforts by the Minnesota Department of Natural Resources (the DNR) to debar appellant and its affiliates from doing business with the State of Minnesota. Appellant asserts that the district court erred by determining that (1) appellant failed to exhaust administrative remedies before bringing a judicial action, (2) appellant's due-process claim under 42 U.S.C. § 1983 (2018) was not ripe, and (3) appellant was not entitled to attorney fees and costs under the Minnesota Equal Access to Justice Act (the MEAJA) as a prevailing party. We affirm.

FACTS

Essar Steel Minnesota LLC (Essar Steel) is a subsidiary of Essar Global Fund Limited (Essar Global), a corporation involved in the business of taconite ore mining and steel manufacturing. In 2008, Essar Global and Essar Steel entered into agreements with Itasca County relating to a taconite plant, a direct reduction iron production plant, and a steel plant on a common site located next to an iron ore mine near Nashwauk, Minnesota (the project). The completion date for the project was October 1, 2015. Itasca County agreed to build public infrastructure to support the plant, funded by grant money from the State of Minnesota. If the project was not finished by the completion date, Essar Global and Essar Steel agreed to reimburse Itasca County in the amount the county actually paid for construction, up to $65.9 million.

Essar Steel did not finish the project by the October 2015 completion date. Essar Global and Essar Steel filed for bankruptcy protection in July 2016. Through Essar Steel's plan of reorganization, Chippewa Capital Partners LLC (Chippewa) became Essar Steel's successor and planned to complete the mining and steel production facility. Chippewa acquired Essar Steel, renamed the company Mesabi Metallics Company LLC (Mesabi), and negotiated a settlement of Essar Steel's defaults under the previous leases by entering into a master lease amendment. Mesabi emerged as Essar Steel's successor in December 2017, and currently owns the facility in Nashwauk. In December 2018, Essar Energy Solutions Ltd. (Essar Energy), an affiliate of Essar Global, purchased $260 million in secured notes issued by Mesabi to its lenders.[1] All of Mesabi's assets serve as collateral for the debt owed to Essar Energy.

Essar Energy's position as a secured lender to Mesabi became public in January 2019. On January 28, the DNR sent a letter to Mesabi advising Mesabi that the DNR intended to debar[2] Essar Global and its affiliates from doing business in Minnesota because Essar Global was an "unreliable partner." On February 13, the DNR submitted a vendor performance report and petition to the Minnesota Department of Administration (the DOA), recommending that Essar Global and its affiliates be debarred from future contracts with the state. On February 19, the DNR provided a copy of the vendor report and petition to Essar Global.

***2** The next day, on February 20, Essar Global filed a complaint in district court against the DNR, the commissioner of natural resources Sarah Strommen, the DOA, and the commissioner of administration Alice Roberts-Davis (respondents). The complaint sought declaratory and injunctive relief related to the petition. Essar Global sought to enjoin the DOA from acting on the petition recommending debarment of Essar Global and its affiliates. Essar Global also asserted a due-process claim under 42 U.S.C. § 1983, alleging that it was unconstitutional to debar Essar Global without the benefit of a pre-debarment hearing. Lastly, Essar Global asserted a claim under the MEAJA seeking recovery of its attorney fees and costs.

Respondents filed a joint motion to dismiss the complaint under Minn. R. Civ. P. 12.02, arguing that the district court lacked subject-matter jurisdiction to consider Essar Global's claims and that Essar Global failed to state a claim upon which relief could be granted. Following a hearing, the district court dismissed Essar Global's complaint without prejudice. The district court determined that (1) it lacked subject-matter jurisdiction over Essar Global's declaratory-judgment claim, (2) Essar Global's due-process claim was not ripe, and (3) Essar Global was not entitled to attorney fees and costs under the MEAJA.

This appeal follows.

DECISION

I. Standard of Review

A district court may dismiss a civil action when it lacks subject-matter jurisdiction or when the pleadings fail to state a claim upon which relief can be granted. Minn. R. Civ. P. 12.02(a), (e). "To determine whether a plaintiff's claim survives a motion to dismiss, we look only to the facts alleged in the complaint, accepting those facts as true." *Hansen v. U. S. Bank Nat'l Ass'n*, 934 N.W.2d 319, 325 (Minn. 2019) (citation omitted). We also "construe all reasonable inferences from the facts in

favor of the plaintiff." *Id.* (citation omitted); *see also Bahr v. Capella Univ.*, 788 N.W.2d 76, 80 (Minn. 2010) (discussing standard of review). We conduct a de novo review of a rule 12 dismissal. *Hansen*, 934 N.W.2d at 325. Whether the exhaustion-of-administrative-remedies doctrine applies is also a question of law, which we review de novo. *Builders Ass'n of Minn. v. City of St. Paul*, 819 N.W.2d 172, 177 (Minn. App. 2012).

II. The district court lacked subject-matter jurisdiction to consider Essar Global's claim for declaratory relief because Essar Global failed to exhaust its administrative remedies.

"Subject-matter jurisdiction refers to a court's authority to hear and determine a particular class of actions and the particular questions presented to the court for its decision." *Zweber v. Credit River Twp.*, 882 N.W.2d 605, 608 (Minn. 2016) (citation and internal quotations omitted). Essar Global argues that the district court erred by determining that it lacked subject-matter jurisdiction over Essar Global's claim for declaratory relief. Essar Global asserts that the DOA lacks authority to debar Essar Global and its affiliates from doing business with the State of Minnesota. The district court determined, in part, that it did not have subject-matter jurisdiction over the declaratory-relief claim because Essar Global failed to exhaust its administrative remedies.[3] The district court found that:

> Minnesota courts do not allow for judicial review of an agency decision until the adversely affected party has exhausted available administrative remedies. Here, the Court finds that Essar Global is required to exhaust its administrative remedies by participating in the potential suspension/debarment process that is currently underway within the [DOA].
>
> ....
>
> Because Essar Global has not exhausted these remedies by allowing the [DOA] to investigate the allegations in the DNR's vendor report and determine whether suspension/debarment is appropriate, judicial review is not available.

***3** (Citation omitted.)

For the reasons discussed below, we determine that the district court did not err by dismissing Essar Global's declaratory-relief claim because Essar Global has not exhausted the administrative remedies available to it in the event of an adverse decision, and the claimed exceptions to the exhaustion-of-remedies doctrine do not apply.

It is a "long-settled rule" that absent imminent and irreparable harm, "no one is entitled to injunctive protection against the actual or threatened acts of an administrative agency" until all administrative remedies have been exhausted. *Uckun v. Minnesota State Bd. of Med. Practice*, 733 N.W.2d 778, 785 (Minn. App. 2007) (citations omitted). This requirement has several purposes, one of which is "to protect the autonomy of administrative agencies created by the legislature to resolve particular problems, to promote judicial efficiency, to produce a record during the administrative process that facilitates judicial review, and to potentially reduce the need to resort to judicial review." *Id.* at 786 (citation omitted).

Minnesota statute vests the DOA commissioner with the rulemaking authority to debar or suspend vendors through an administrative review process. Minn. Stat. § 16C.03 (2018); Minn. R. 1230.0100-1230.4300 (2019). The Minnesota Rule addressing the DOA's authority to debar or suspend vendors (1) sets forth the suspension process, (2) lists the debarment causes, (3) provides for written notice to the vendor, (4) provides for suspension or debarment appeals in the case of an adverse decision, (5) discusses the length of debarment, and (6) requires the DOA to maintain a master list of all suspensions and debarments. Minn. R. 1230.1150. Here, the DOA has not made a final decision on whether to act on the DNR's petition recommending debarment. In January 2019, the DNR sent a letter to Mesabi revealing that it intended to seek debarment of Essar Global and its affiliates. The DNR submitted a vendor performance report and petition to the DOA about two weeks later, recommending that Essar Global and its affiliates be debarred from future contracts with the state. The next day, Essar Global filed its lawsuit before any proceedings in front of the DOA, and before the DOA decided the debarment petition. Essar Global has not exhausted *any* administrative remedies that may become available following an adverse decision, such as an internal appeal to the commissioner, explained below.

Essar Global argues, however, that it did not have to exhaust its administrative remedies because (1) any attempt to exhaust its remedies would be futile, (2) the DOA lacks jurisdiction over Essar Global, and (3) the DOA is violating Essar Global's

constitutional rights. We address each argument in turn.

a. Futility

***4** Essar Global argues that there is not an adequate administrative process available. "[A]dministrative remedies need not be pursued if it would be futile to do so." *Uckun*, 733 N.W.2d at 786 (citation omitted). If it would be futile to seek administrative remedies, a party may seek redress in the courts. *City of Richfield v. Local No. 1215*, 276 N.W.2d 42, 51 (Minn. 1979). The issue of futility presents a legal issue for appellate review. *Zaluckyj v. Rice Creek Watershed Dist.*, 639 N.W.2d 70, 74 (Minn. App. 2002), *review denied* (Minn. Apr. 16, 2002). Essar Global argues that it is futile to seek administrative remedies because there is not an administrative process available for a debarment under the DOA's rules. This argument is puzzling. A debarred party may file an administrative appeal from a debarment decision to the DOA commissioner. The rules provide that:

> If suspended or debarred, a person may file an appeal in writing with the commissioner of [the DOA] within 30 calendar days of receipt of a decision to suspend or debar. The commissioner shall, within 45 calendar days, decide whether the actions taken were according to statutes and regulations and were fair and in the best interest of the state.
>
> Any person receiving an adverse decision from the commissioner may appeal in any appropriate court of the state.

Minn. R. 1230.1150, subp. 4.

The rules clearly provide for an administrative appeal of a debarment decision and state, further, that any party receiving an adverse decision from the DOA commissioner may appeal to the courts. *Id.* The DOA has not yet made a debarment decision. If the DOA decides to debar Essar Global and its affiliates, then Essar Global may follow the process set forth in Minnesota Rule 1230.1150, subpart 4, and appeal to the DOA commissioner.[4] If Essar Global is aggrieved by the commissioner's decision, Essar Global may then seek judicial review. Because none of these eventualities has yet occurred, the district court did not err by determining that Essar Global must first await a decision from the DOA and then exercise its right to appeal to the appropriate court. The futility exception does not apply.[5]

b. Jurisdictional Challenge

Essar Global argues that the exhaustion-of-remedies doctrine does not apply because the DOA lacks jurisdiction over Essar Global. Essar Global asserts that the district court first should determine that Essar Global is not a "vendor" under Minnesota Statutes chapter 16C and therefore cannot be subject to debarment under an administrative process.[6] Caselaw does not support this argument. "A party to an administrative proceeding is not entitled to judicial review of an administrative agency's act or decision—even regarding its own jurisdiction—unless the party has exhausted its administrative remedies." *S. Minn. Constr. Co. v. Minn. Dep't of Transp.*, 637 N.W.2d 339, 344 (Minn. App. 2002) (citing *Thomas v. Ramberg*, 60 N.W.2d 18, 20-21 (Minn. 1953)). If Essar Global challenges the DOA's jurisdiction to act, it must first make that argument in the administrative proceeding. *See id.*

***5** Essar Global relies on *Elzie v. Comm'r of Pub. Safety*, to support its argument that it is not required to exhaust its administrative remedies when it challenges an agency's decision. 298 N.W.2d 29 (Minn. 1980). In that case, the plaintiffs filed declaratory-judgment actions challenging the notice-and-hearing procedures followed by the commissioner of public safety in suspending or cancelling driver's licenses. *Id.* at 31. The district court dismissed the complaints for failure to state a claim on which relief could be granted because, among other things, the court lacked subject-matter jurisdiction to consider a challenge to the commissioner's orders. *Id.* at 31-32. On appeal, the supreme court noted that the plaintiffs alleged that the commissioner "did not have jurisdiction over either them or the subject matter because he committed constitutional violations and the rules under which he acted were formulated in a manner contrary to law." *Id.* at 33. The supreme court reasoned that "[s]ince the court is required to accept as true the allegations in the complaint when ruling on a Rule 12.02 motion, for purposes of disposition of this issue on appeal, we must assume the truth of [the plaintiffs'] allegation that the Commissioner

lacked subject matter jurisdiction." *Id.* (internal citation omitted). The supreme court reversed the district court's decision and remanded for trial. *Id.*

Elzie is distinguishable. In *Elzie*, the commissioner of public safety had already issued decisions to suspend or cancel the plaintiffs' driver's licenses. *Id.* at 31. Each plaintiff faced criminal prosecution for driving after suspension or cancellation, and alleged that the commissioner's suspension and cancellation practices were constitutionally infirm. *Id.* at 31. The *Elzie* plaintiffs did not file a complaint challenging the commissioner's actions until *after* the commissioner exercised its authority and issued a decision. *Id.* Here, by contrast, the DOA has not yet decided or exercised its authority in any way. And unlike the *Elzie* plaintiffs, Essar Global is not seeking relief related to the debarment process itself. The *Elzie* plaintiffs brought a declaratory-judgment claim arguing that the administrative process by which the department of public safety cancelled or suspended driver's licenses was defective and did not provide for adequate due process. *Id.* at 31. Essar Global's complaint is not asserting that the debarment process is procedurally defective. Instead, Essar Global asserts that respondents lack the authority to debar Essar Global or its affiliates. *Elzie* does not apply.

Essar Global is currently a party to ongoing administrative proceedings with the DOA. The DOA has not yet taken any actions or issued any decisions. If the DOA decides to debar or suspend Essar Global, the company may then follow the process set forth in Minnesota Rule 1230.1150, subpart 4, and appeal to the DOA commissioner. If Essar Global receives an adverse decision from the commissioner, it may then "appeal in any appropriate court of the state." *Id.* To the extent that Essar Global maintains that the DOA lacks authority to continue its administrative process, it must first raise its jurisdictional challenge to the DOA and exhaust the administrative remedies available through that process. *See Minn. Constr. Co.*, 637 N.W.2d at 344; *Ramberg*, 60 N.W.2d at 20-21. Because Essar Global failed to exhaust its administrative remedies, the district court correctly determined that it lacks jurisdiction over Essar Global's claims.

c. Constitutional Challenge

Essar Global argues that it is not required to exhaust its administrative remedies because it asserted a constitutional challenge. A party need not exhaust its administrative remedies if "a clear and unambiguous violation of the complaining party's constitutional rights is alleged." *County of Hennepin v. Law Enf't Labor Servs., Inc., Local No. 19*, 527 N.W.2d 821, 825 (Minn. 1995); *see also Elzie*, 298 N.W.2d at 32 (noting that where a complaint alleges constitutional violations, a rule 12 motion is subject to increased scrutiny to protect the public from "possible governmental overreaching"). Essar Global did not allege that the DOA took an action that clearly and unambiguously violated its constitutional rights. Instead, Essar Global asserts that a constitutional violation is apparent because the DOA "has not promulgated any rules providing the right to a hearing for a debarment in satisfaction of due process." As discussed earlier, this assertion contradicts plain Minnesota law, which provides for an administrative remedy under Minn. Stat. § 16C.03, subd. 2(a)(3), and Minn. R. 1230.1150. Even accepting the facts alleged in the complaint as true, Essar Global has not alleged a clear or unambiguous constitutional violation. *See Bahr*, 788 N.W.2d at 80 (requiring appellate courts reviewing dismissal order to accept the facts alleged in the pleadings as true and construe all reasonable inferences in favor of the nonmoving party). Essar Global's claimed exceptions do not apply.

III. Essar Global's due-process claim under 42 U.S.C. § 1983 is not justiciable.

***6** Essar Global argues that the district court erred by dismissing its due-process claim because it was not ripe. Ripeness issues raise a question of justiciability, which we review de novo. *See Dean v. City of Winona*, 868 N.W.2d 1, 4 (Minn. 2015) ("Justiciability is an issue of law, which we review de novo."); *see also In re Civil Commitment of Nielsen*, 863 N.W.2d 399, 401 (Minn. App. 2015) (characterizing ripeness as "a justiciability doctrine designed to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies").

Essar Global asserted a due-process claim and sought injunctive relief under 42 U.S.C. § 1983 for alleged violations of its constitutional rights. The United States and Minnesota Constitutions provide that the government shall not "deprive any

person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1; *see also* Minn. Const. art. I, § 7. Section 1983 furnishes a cause of action to persons against state officials who, acting under color of law, deprive an individual of "any rights, privileges, or immunities secured by the Constitution and laws." 42 U.S.C. § 1983.

Essar Global claimed that respondents did "not have lawful authority to debar Essar Global or its affiliates," and that "Essar Global and its affiliates have a constitutional due process right to a hearing *before* being debarred from doing business with the State of Minnesota." The district court dismissed the claim on ripeness grounds, reasoning that "there has not yet been a deprivation of property interests" because "[t]he [DOA] has not made a decision whether to debar Essar Global, and Essar Global has not yet been deprived of any property interests."

We agree. *Zinermon v. Burch*, 494 U.S. 113, 110 S. Ct. 975 (1990) guides our analysis. *Zinermon* identifies three classes of section 1983 claims that may be asserted against the government under the due-process clause of the constitution: (1) "the specific protections defined in the Bill of Rights," such as the plaintiff's rights to freedom of speech or freedom from unreasonable searches and seizures; (2) the "substantive component that bars certain arbitrary, wrongful government actions regardless of the fairness of the procedures used to implement them"; and (3) procedural due process regarding "the deprivation by state action of a constitutionally protected interest in life, liberty, or property" without a fair procedure. *Id.* at 125, 110 S. Ct. at 983 (citations and internal quotations omitted). As for the first two types of claims, not alleged here, "the constitutional violation actionable under § 1983 is complete when the wrongful action is taken." *Id.* (citation omitted). With respect to procedural due process, however, "[t]he constitutional violation actionable under § 1983 is not complete when the deprivation occurs; it is not complete unless and until the State fails to provide due process." *Id.* at 126, 110 S. Ct. at 983.

Essar Global argues that the petition to pursue debarment was a taking in itself and violated section 1983. To state a procedural-due-process claim a plaintiff must allege that (1) it suffered a deprivation of a constitutionally protected interest in life, liberty, or property, and (2) the deprivation occurred without due process of law. *Mathews v. Eldridge*, 424 U.S. 319, 332, 96 S. Ct. 893, 901 (1976); *see also Sawh v. City of Lino Lakes*, 823 N.W.2d 627, 632 (Minn. 2012) (noting that Minnesota courts conduct a two-step analysis identifying whether the government deprived the individual of a protected interest and then determining whether the procedures used were sufficient). The party asserting a procedural-due-process claim must establish the existence of a protected liberty or property interest. *State v. Grigsby*, 818 N.W.2d 511, 517 (Minn. 2012).

***7** Essar Global has not satisfied its burden. While Essar Global may appeal an "adverse decision" from the DOA under Minn. R. 1230.1150, there is no legal authority supporting a party's right to file a pre-debarment appeal. Essar Global does not have a protectable property interest in preventing the DOA from considering the DNR's petition. Moreover, assuming Essar Global suffered a deprivation of its rights, it has alleged no procedural defects that would support a procedural-due-process claim. Thus, even accepting the facts alleged in the complaint as true, *see Hansen*, 934 N.W.2d at 325, Essar Global's due-process claim is premature. Thus, the district court did not err by dismissing Essar Global's due-process claim on ripeness grounds.

IV. Essar Global's attorney-fee claim under the MEAJA was properly dismissed.

Essar Global asserted a claim for attorney fees under the MEAJA, Minn. Stat. §§ 15.471-.474 (2018). The MEAJA provides that if a prevailing party in a civil action "shows that the position of the state was not substantially justified, the court ... shall award fees and other expenses to the party unless special circumstances make an award unjust." *Id.* at § 15.472(a). The party seeking fees bears the burden of proving that it prevailed and that the state's positon was not substantially justified. *Id.* The MEAJA is a limited waiver of sovereign immunity, and courts strictly construe its language. *City of Mankato v. Mahoney*, 542 N.W.2d 689, 693 (Minn. App. 1996) (citation omitted). Here, the district court determined that Essar Global was not a prevailing party. Because we affirm the district court's dismissal of Essar Global's claims for declaratory and injunctive relief, we agree. The district court's dismissal of Essar Global's attorney-fee claim is also affirmed.

Affirmed.

All Citations

Not Reported in N.W. Rptr., 2020 WL 3172844

Footnotes

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

1 Essar Global, through its affiliate Essar Energy, later acquired Mesabi.

2 "Debarment is a discretionary government sanction that excludes a contractor from contracting with the government for a reasonable, specified period." *OSG Prod. Tankers, LLC v. United States*, 82 Fed. Cl. 570, 577 (2008) (quotation omitted).

3 The district court also determined that Essar Global failed to seek a certiorari appeal after an adverse decision. Because we determine that Essar Global did not exhaust its administrative remedies, we do not address the district court's alternative basis for dismissal.

4 Essar Global argues that while the DOA has an "informal and unwritten practice regarding debarments," such informal practices are unenforceable and do not guarantee Essar Global access to an administrative remedy. This argument ignores the plain language of rule 1230.1150, which provides a vehicle for the appeal of an adverse debarment decision.

5 Essar Global also faults the district court for failing to advise Essar Global on the appropriate administrative remedy to take and for failing to identify "specific remedies" to exhaust. This argument is unsound. "Because the nature of judicial decision-making is to resolve disputes, the judicial function does not comprehend the giving of advisory opinions." *State ex rel. Sviggum v. Hanson*, 732 N.W.2d 312, 321 (Minn. App. 2007) (quotation omitted).

6 A "vendor" is defined as "a business, including a construction contractor or a natural person, and includes both if the natural person is engaged in a business." Minn. Stat. § 16C.02, subd. 21 (2018).

End of Document

2014 WL 273966
Only the Westlaw citation is currently available.

Court of Appeals of Minnesota.

Jeffrey KREMERS, et al., Appellants,
v.
James M DAHL, et al., Respondents.

No. A13–0367.
|
Jan. 21, 2014.
|
Review Denied April 15, 2014.

Kanabec County District Court, File No. 33–CV–12–410.

Attorneys and Law Firms

Daniel A. Eller, Waite Park, MN, for appellants.

Bradley A. Kletscher, Tammy J. Schemmel, Barnz, Guzy & Steffen, Ltd., Minneapolis, MN, for respondents.
Considered and decided by ROSS, Presiding Judge; BJORKMAN, Judge; and MINGE, Judge.*

UNPUBLISHED OPINION

ROSS, Judge.

***1** In this contract-for-deed resort-property dispute, the sellers seek to cancel the contract after the buyers failed to make their final balloon payment, and the buyers seek a judgment for breach of contract by claiming that the sellers misrepresented the quality of the property. The district court considered the merits early in the litigation and deemed the buyers unlikely to succeed on their breach-of-contract and misrepresentation claims. It therefore declined to issue a temporary injunction preventing the sellers from cancelling the contract. Because we conclude that the district court did not abuse its discretion, we affirm.

FACTS

James and Diana Dahl are competing with Jeffrey and Delila Kremers over ownership of Fish Lake Resort, which has operated on the shore of Fish Lake in Mora since the 1940s. The resort has 98 campsites and a pavilion that shelters a bar, a restaurant, and a banquet hall. It abuts land belonging to the Minnesota Department of Natural Resources (DNR) and is subject to a water flowage easement favoring the state.

The Dahls began operating the resort in 1996 when Diana Dahl's father could no longer manage it. Ten years later they decided to sell it, and they retained Jeffrey Kremers as their realtor in April 2006. The parties made respective representations. Kremers represented himself as an expert in selling resort properties. According to the Kremerses, the Dahls initially represented that the resort had flooded only twice during their operational tenure and that water had entered the pavilion only in the 1970s after a dam broke on a nearby river. The Kremerses also claim that Diana Dahl had indicated that the property extended east as far as a particular fence with DNR signage.

The Dahls listed the property for sale, asking $1.95 million. In one year they received an offer from a potential buyer who would pay only $750,000, citing, among other things, a concern that the property is located in a floodplain. The Dahls rejected the offer.

In early 2007, the Kremerses offered to buy the resort. They had previously owned a flood-prone resort. Jeffrey Kremers asked again about flooding and he alleges that the Dahls repeated their disclosure that the resort had flooded only twice, water had entered the pavilion only once, and the basement had been wet once. The Kremerses agreed to buy it for $1.52 million under a contract for deed. The parties signed a purchase agreement that required the Dahls to bring the septic system into compliance with state and local requirements (and provide a certificate of compliance) and to remedy any outstanding environmental or health "failures" so the Kremerses could obtain a food-service license. The closing was set for April 2007, but the purchase agreement acknowledged that the Dahls would not be able to provide clean title at that time because Diana Dahl's father retained an interest. Under the agreement, the new legal title would not reduce the total number of campsites.

***2** The parties executed the closing agreement and contract for deed in April 2007. The contract required the Kremerses to make specified monthly payments until April 2012, when they would pay the outstanding balance. The contract required the Dahls to clear the title by July 23, 2008. Escrow accounts would retain the paid funds until the Dahls resolved the title issue and furnished the certificate of compliance for the septic system.

The Dahls had the septic system inspected the day after closing. The inspector certified that the system was in compliance, although the Kremerses maintain that they did not receive the certificate until 2008. In September 2007, the escrow agent indicated that the Dahls had cleared the title and recommended releasing the escrow funds.

According to the Kremerses' 2013 civil complaint, problems soon arose. The property flooded and the basement had standing water at least once every year after 2007. Patrons told them that flooding was a regular occurrence. Suspicious that the septic system was inadequate, they commissioned a second inspection in 2008. That inspection again indicated that the system complied with regulations. The Kremerses did nothing at the time, but they now assert that this inspection was also suspicious; they allege that the inspector had personal ties to the Dahls and that "someone ... fraudulently altered" the report. A third inspection of the septic system in 2010 found it noncompliant and opined that it likely should not have been found compliant in the past.

The Dahls initiated a registration proceeding in 2008 to settle the boundaries of several parcels, including those the Kremerses contracted to buy. All were described in antiquated documents relative to a former road whose precise location was ambiguous. The registration process would definitively fix the borders and legal descriptions of each parcel. As buyers under the contract for deed, the Kremerses assented to the registration process, although they now assert that they objected. The registration proceeding concluded in 2011 and altered the legal description of the property boundaries, but it is unclear whether it affected the resort's footprint.

A later appraisal commissioned by the Kremerses shows that the layout of the campsites does not comply with various state and local size and location requirements. Those requirements threatened to reduce the number of available campsites, in turn impacting a term of the contract for deed. Although a government inspection had previously implied that the Dahls needed to modify the campsite layout, they continued to submit their extant layout for approval and each time they received a license for 95 to 98 campsites.[1]

Despite all of these alleged problems, the Kremerses continued to make payments until April 2012, when their balloon payment came due. They missed that payment. One month before missing the payment, the Kremerses initiated a civil action asserting numerous contract and quasi-contract claims. They allege that the Dahls misrepresented the frequency and severity of flooding, the location of the boundary line, and compliance with the law. They also allege that the Dahls failed to bring the septic system up to code, breached the escrow agreements relating to the septic system and the title, failed to gain their consent for the registration proceeding, and otherwise misrepresented or failed to disclose material information about the property.

***3** Eight months after the Kremerses filed their complaint and missed their balloon payment, the Dahls notified the Kremerses, on December 1, 2012, that they were cancelling the contract and that the Kremerses had 60 days to cure the nonpayment breach. In turn, the Kremerses filed this civil action alleging numerous violations, and they moved the district court to issue a temporary injunction enjoining the Dahls from cancelling the contract.

The district court denied the Kremerses' preliminary injunction motion, holding that they were unlikely to succeed on any of their claims. It also reasoned that public policy and the relationship between the parties disfavored granting the injunction.

The Kremerses filed this appeal. The district court issued a temporary injunction pending the appeal and required the Kremerses to post a bond. The Kremerses did not post the bond, and the district court vacated the injunction. The Kremerses then asked this court to issue an injunction pending the appeal. A special term panel of this court denied the request.

DECISION

The Kremerses charge the district court with error for denying their motion for a temporary injunction. The Dahls defend the district court's decision, but they first argue that the issue is resolved on procedural grounds. The Dahls maintain that the Kremerses' claims are barred because they failed to post a bond to retain the temporary injunction that the district court granted pending this appeal. We are not persuaded by the Dahls' procedural argument, but they prevail on substance.

I

The Dahls argue that the Kremerses' claims are barred because the Kremerses failed to post a bond to secure the temporary injunction that the district court granted pending this appeal. We are satisfied that the Kremerses' current action defeats the argument. Sellers may cancel a contract for deed if they serve notice and give the buyers 60 days to cure their default. Minn.Stat. § 559.21, subd. 2a (2012). And when the sellers serve notice of statutory cancellation, a later action by the buyer to rescind will be barred. *Gatz v. Frank M. Langenfeld & Sons Constr., Inc.,* 356 N.W.2d 716, 718 (Minn.App.1984). But the court has the equitable power to reinstate a contract even after it has been statutorily cancelled. *Coddon v. Youngkrantz,* 562 N.W.2d 39, 44 (Minn.App.1997) (exercising equitable power in favor of a buyer who made good faith efforts to cure default pending resolution of the matter), *review denied* (Minn. July 10, 1997). And any conclusion by the district court that the Kremerses' claims are not viable because the contract for deed has been cancelled will fail if we reverse the denial of the injunction. *See Seagram Distillers Corp. v. Lang,* 230 Minn. 118, 123, 41 N.W.2d 429, 432 (1950). The Kremerses filed their complaint first, alleging in March 2012 (one month before the missed balloon payment on which the Dahls rest their cancellation action) that the Dahls had already breached the contract. The Dahls did not serve notice of cancellation until December.

***4** Because the Kremerses' suit predates the Dahls' action to cancel the contract, because they continued to make good-faith installment payments after missing the balloon payment, and because they immediately appealed the district court's denial of

their motion to enjoin cancellation, we hold that their claims are not barred despite their failure to post a bond to secure the appeal.

II

The Kremerses challenge the district court's decision to deny their motion for a temporary injunction. We will reverse the district court's decision on a motion for a temporary injunction only if it reflects a clear abuse of discretion. *Carl Bolander & Sons Co. v. City of Minneapolis,* 502 N.W.2d 203, 209 (Minn.1993). A district court abuses its discretion when it ignores facts or relevant principles of equity. *First State Ins. Co. v. Minn. Mining & Mfg. Co.,* 535 N.W.2d 684, 687 (Minn.App.1995), *review denied* (Minn. Oct. 18, 1995). And we look at the facts in the light most favorable to the party who prevailed initially. *Metro. Sports Facilities Comm'n v. Minn. Twins P'ship,* 638 N.W.2d 214, 220 (Minn.App.2002), *review denied* (Minn. Feb. 4, 2002).

The Kremerses argue that the district court abused its discretion by denying their motion for a temporary injunction. The district court may grant a temporary injunction if it finds sufficient grounds for doing so. Minn. R. Civ. P. 65.02(b). A temporary injunction may issue to prevent a contract-for-deed seller from cancelling the contract. Minn.Stat. § 559.211; *Bell v. Olson,* 424 N.W.2d 829, 833 (Minn.App.1988). But the party seeking the injunction must prove that no adequate legal remedy is available and that irreparable harm would result without the injunction. *Medtronic, Inc. v. Advanced Bionics Corp.,* 630 N.W.2d 438, 451 (Minn.App.2001). Five factors should guide district courts when deciding whether to issue a temporary injunction. They are the nature and background of the relationship between the parties, the balance of the harms to the plaintiff if the injunction is denied and to the defendant if the injunction issues, the likelihood that the plaintiff will prevail on the merits of his claims, relevant public policy considerations, and the administrative burdens of enforcing an injunction. *Dahlberg Bros., Inc. v. Ford Motor Co.,* 272 Minn. 264, 274–75, 137 N.W.2d 314, 321–22 (1965).

The Kremerses challenge the district court's conclusion that the relationship between the parties, the likelihood of success on the merits, and public policy concerns all favored denying the injunction. The Kremerses rely substantially on *Northwest Hotel Corp. v. Henderson,* 257 Minn. 87, 89–90, 100 N.W.2d 493, 495 (1959), but that case is only slightly relevant. It predates *Dahlberg* and does not apply the *Dahlberg* factors. More important, in *Northwest Hotel,* the supreme court merely affirmed the district court's decision to temporarily enjoin the seller of a hotel from cancelling the sale contract. *Id.* at 88–89, 92, 100 N.W.2d 493, 100 N.W.2d at 494–95, 497. The *Northwest Hotel* holding that the district court acted within its discretion to order the injunction does not answer our question, which is whether the district court abuses its discretion by *not* ordering an injunction.

1. Relationship Between the Parties

***5** The Kremerses contend that the district court erred by deciding that their relationship with the Dahls disfavored granting an injunction. The contention is not compelling. A temporary injunction preserves the status quo until the court can decide the case on the merits. *Pac. Equip. & Irrigation, Inc. v. Toro Co.,* 519 N.W.2d 911, 915 (Minn.App.1994), *review denied* (Minn. Sept. 16, 1994). We consider the nature and history of the relationship between the parties when assessing the decision to deny a temporary injunction. *Dahlberg,* 272 Minn. at 274, 137 N.W.2d at 321. A longer relationship will favor granting an injunction, particularly if it is a specialized, unique, or well-developed one. *See id.* at 276, 137 N.W.2d at 322 (holding that a 40–year franchise relationship between an automobile retailer and the parent company favored an injunction); *Metro. Sports Facilities Comm'n,* 638 N.W.2d at 221 (finding that the relationship between a professional baseball franchise and its stadium operators favored an injunction when the franchise threatened to sell the franchise). Courts have also focused on this factor when the parties have a history of contracting together. *See, e.g., Upper Midwest Sales Co. v. Ecolab, Inc.,* 577 N.W.2d 236, 244 (Minn.App.1998); *Pac. Equip. & Irrigation,* 519 N.W.2d at 915.

The district court reasonably concluded that the relationship between the Kremerses and the Dahls does not favor an injunction. Their relationship is qualitatively different from those in which courts have found an injunction to be necessary. The relationship is a real-estate seller—buyer correlation very common in land transactions. The cancellation does not undermine a longstanding relationship or prevent the defeated seller—buyer relationship from redeveloping. The parties had contracted only once before, establishing a temporary seller—realtor relationship. The Kremerses certainly have "significant interests and expectations at stake" after investing effort and finances to purchase the property. But this is so in most long-term purchase contracts, like a contract for deed. The district court did not abuse its discretion by concluding that the parties' relationship does not favor a temporary injunction.

2. Likelihood of Success on the Merits

The Kremerses argue that the district court should have analyzed their likelihood of success according to the standards of summary judgment. But they provide little authority for their argument that the district court applied the wrong standard of review when deciding the likelihood their claims would succeed on the merits. Courts consider the likelihood a party will prevail on the merits by viewing the facts "in light of established precedents." *Dahlberg,* 272 Minn. at 275, 137 N.W.2d at 321. The parties seeking an injunction bear the burden of proving they are reasonably likely to succeed on the merits. *Queen City Constr., Inc. v. City of Rochester,* 604 N.W.2d 368 (Minn.App.1999), *review denied* (Minn. Mar. 14, 2000). If they establish only a slight chance of prevailing, the district court is not required to grant an injunction. *See Metro. Sports Facilities Comm'n,* 638 N.W.2d at 226. By contrast, summary judgment is appropriate only when there is no genuine dispute as to a material fact and one party is entitled to judgment as a matter of law. Minn. R. Civ. P. 56.03; *Fabio v. Bellomo,* 504 N.W.2d 758, 761 (Minn.1993). It is deferential to the nonmoving party, whose claims or defenses can survive a summary judgment motion simply on a showing that a material fact remains in dispute. *See* Minn. R. Civ. P. 56.03.

***6** The Kremerses argue that a heightened standard, like summary judgment, is necessary to avoid a harsh or unfair result. But by its nature, statutory cancellation of contracts for deed *is* harsh. The harsh result of the loss of the Kremerses' related claims of fraud, misrepresentation, and breach of contract is the kind of result that customarily accompanies cancellation. *See, e.g .*, *Olson v. N. Pac. Ry. Co.,* 126 Minn. 229, 231–33, 148 N.W. 67, 68–69 (1914). The statutory cancellation process is "one of the harshest forfeitures known to American law" but it is "enforced routinely in Minnesota." 25 Eileen M. Roberts & Larry M. Wertheim, *Minnesota Practice* § 6:14 (2012 ed.). The all-or-nothing impact of denying an injunction is not limited to contract-for-deed cases. For example, injunctions can prevent the irreparable harm from misappropriation of a trade secret. Minn.Stat. § 325C.02(a) (2012); *Wyeth v. Natural Biologics, Inc.,* 395 F.3d 897, 900–02 (8th Cir.2005) (applying Minnesota law). "A trade secret once lost is, of course, lost forever." *FMC Corp. v. Taiwan Tainan Giant Indus. Co.,* 730 F.2d 61, 63 (2d Cir.1984). Likewise, a contract for deed once lost is forever lost. Although the harshness of the result is contemplated and accepted by law, it is accounted for in another factor—the balancing of harms.

The challenged *Dahlberg* factor asks whether the parties seeking an injunction are *likely* to succeed on the merits, not whether it is *possible* they will succeed. We find no authority supporting the Kremerses' argument that the district court should have considered their likelihood of success differently simply because a finding of unlikelihood carries a result similar to summary judgment. A temporary injunction is an extraordinary remedy to be issued only when necessary. *Pac. Equip. & Irrigation,* 519 N.W.2d at 914. Grafting the summary judgment standard onto temporary injunction proceedings would alter the nature of the proceedings.

The Kremerses also argue that denying an injunction on the ground that the Kremerses are unlikely to win on the merits deprives them of their constitutional right to a jury trial on their contract and contract-related claims. But this wrongly assumes they have a right to recover under their contract, overlooking that purchasers have no recovery rights under cancelled contracts for deed. *Nowicki v. Benson Props.,* 402 N.W.2d 205, 208 (Minn.App.1987). And the law protected the Kremerses' potential contract claims, and their right to a jury trial to pursue them, by allowing them to sue on the contract for deed before the sellers cancelled it. And the rules of civil procedure do allow the district court to advance and consolidate a trial with a hearing on the motion for a temporary injunction. Minn. R. Civ. P. 65.02(c). The district court did not abridge any actual right to a jury trial by denying the motion for a temporary injunction.

We turn now to the particular claims and consider whether the district court erred by concluding that the Kremerses are

unlikely to prevail on the merits.

A. Flooding Misrepresentation

***7** The Kremerses argue that the district court erred by concluding that they did not reasonably rely on any possible misrepresentations about flooding. The argument fails. A claim of misrepresentation requires the plaintiffs to show that the defending parties falsely represented a material fact, knew the representation was false and intended the plaintiffs to rely on it, and that the plaintiffs actually relied on the representation and were harmed. *Hoyt Props. ., Inc. v. Prod. Res. Grp., L.L.C.,* 736 N.W.2d 313, 318 (Minn.2007). Reliance in fraud cases is a function of the alleged victim's "intelligence, experience, and *opportunity* to investigate." *Valspar Refinish, Inc. v. Gaylord's, Inc.,* 764 N.W.2d 359, 369 (Minn.2009) (emphasis added). We have previously denied a claim of reasonable reliance by an experienced real estate investor who had an opportunity to investigate the financial situation of a failed investment. *Sit v. T & M Props.,* 408 N.W.2d 182, 185–86 (Minn.App.1987).

The Kremerses maintain that the Dahls misled them as to the frequency and severity of flooding on Fish Lake, repeatedly asserting that the Dahls told them the resort had flooded only twice during their tenure and that the pavilion basement had flooded only once. Regardless of what the Dahls may have represented about flooding—a question of considerable disagreement—by the time they contracted to purchase the land the Kremerses had ample notice of potential flooding, making their reliance on the alleged representations unreasonable. The resort bar openly displayed a collage featuring photos of prior floods. Although the Kremerses claim they never actually saw the photo, the district court apparently was not persuaded. The Dahls forbade the Kremerses from discussing the sale with regular customers, a circumstance that raises the suspicions of a reasonable realtor. They also indicated that the property was subject to a flowage easement, a circumstance that would inform any reasonable person, particularly a reasonable person with Kremers's expertise in resort sales, that the property has been earmarked for occasional submerging from waterway overflow. Either the purchase agreement or disclosures had revealed that the pavilion had previously taken on water. And Kremers had received a letter from a potential buyer offering the Dahls less than half the asking price, noting specifically that the resort sits in a floodplain. The Kremerses acknowledge that being in a floodplain indicates potential flooding.

The Kremerses correctly argue that their right to rely on the Dahls' claims does not include the duty to investigate the flood history of the resort. But this misses the central issue. Jeffrey Kremers's unique position as a resort salesman, a former resort owner, and the former realtor for the Fish Lake property, undermines the reasonableness of his claimed reliance on the Dahls' statements. This is not to say that the Kremerses certainly did not reasonably rely on the Dahls' alleged misrepresentations. But in this preliminary injunction setting, the district court could recognize the difficulty the Kremerses would have convincing a jury of this. We hold that it was not an abuse of discretion for the district court to conclude that the Kremerses were unlikely to prevail on this claim.

B. Septic System

***8** The district court also did not wrongly conclude that the Kremerses were unlikely to prevail on their claims that the Dahls breached their contract to deliver the septic system in compliance with regulations and the escrow agreement. A breach-of-contract claim requires showing that the parties formed a contract, that the plaintiff performed the required conditions, and that the defendant breached in some respect. *Thomas B. Olson & Assocs., P.A. v. Leffert, Jay & Polglaze, P.A.,* 756 N.W.2d 907, 918 (Minn.App.2008), *review denied* (Minn. Jan. 20, 2009). We interpret contract language to give effect to the parties' intent. *Valspar,* 764 N.W.2d at 364. And we give terms in the contract their plain, ordinary meaning, read in light of the contract as a whole. *Baker v. Best Buy Stores, LP,* 812 N.W.2d 177, 180 (Minn.App.2012).

Chapter 7080 of the Minnesota Administrative Rules and the relevant local requirements establish the compliance framework for septic systems and the compliance criteria for certifying septic systems. Minn. R. 7080.1500, .2150–2400 (2011); 7080.0060, subp. 3 (2005); *JEM Acres, LLC v. Bruno,* 764 N.W.2d 77, 81–82 (Minn.App.2009). A septic system that does not satisfy the framework is not in compliance even if it has received a certificate of compliance. *JEM Acres,* 764 N.W.2d at

82.

The Kremerses' argument fails based on their septic-system agreement with the Dahls. The agreement required the Dahls to "comply with all conditions necessary to bring the property into compliance." It states that the Dahls must "[b]ring Septic System into compliance and obtain Certificate of Compliance from appropriate zoning authority." The parties also agreed to disburse the escrow funds "upon receipt of Agent's written inspection that the septic system is up to code [and] a Certificate of Compliance." The Kremerses focus on the distinction between a system that is "in compliance" (a term that appears throughout both contracts) and one that is "up to code" (a term that appears only once in the escrow agreement). There is no material distinction. The focus overlooks the relevant code, Chapter 7080 of the Minnesota Rules, which outlines the compliance criteria. A septic system that is "in compliance" with Chapter 7080 is, by definition, "up to code." It appears that the Dahls met their obligation, leaving it unlikely for the Kremerses to prevail on this claim.

The Kremerses accurately observe that a real distinction exists between delivering a certificate of compliance for a septic system and delivering a septic system that fully complies with the law. But they could prevail under that theory only if they could show that the Dahls sold them a system that was not in compliance at the time of closing. They cannot make this showing. The Dahls had the system inspected the day after the closing, and it was certified as compliant. The Kremerses obtained a second inspection the following year, and that inspection also certified the system as compliant. Septic systems can deteriorate over time, so it is of little significance to this claim that, four years after the closing, in 2011, a third inspector concluded that the system was faulty. We have upheld findings of fraud against the seller when the buyer discovered problems with the septic system a few months after closing and filed suit immediately. *JEM Acres,* 764 N.W.2d at 82–83. But this is not such a case. The certificate satisfied the contract obligation at the time of closing, and it had already expired by the time of the third inspection. The Kremerses did not provide the district court with evidence that the system they received in 2007 was noncompliant.

C. Purchase Agreement

***9** The Kremerses contend that the district court erred by finding their claims under the purchase agreement barred. The doctrine of merger extinguishes the right to sue under the provisions of a purchase agreement once the parties execute a subsequent closing agreement. *Peters v. Fenner,* 294 Minn. 488, 489, 199 N.W.2d 795, 796 (1972). Elements of the contract that must, by their nature, occur after the parties execute the agreement do not merge into the subsequent agreement. *Bruggeman v. Jerry's Enters., Inc.,* 591 N.W.2d 705, 708–10 (Minn.1999). And in cases of fraud, merger does not occur when the parties execute the deed. *JEM Acres,* 764 N.W.2d at 83. But fraud and misrepresentation claims based on a cancelled purchase agreement are barred if the specificity of the purchase agreement made it "akin to a contract." *Hollywood Dairy, Inc. v. Timmer,* 411 N.W.2d 258, 259 (Minn.App.1987).

The Kremerses allege that the Dahls violated several provisions of the purchase agreement by giving them title to land that will accommodate less than 98 campsites and by failing to remedy all health and environmental regulations related to obtaining a food-service license. They argue that the language of the closing agreement did not cause the purchase agreement to merge into the closing agreement and, alternatively, that the language is ambiguous. They point to a clause stating, "Sellers ... hereby warrant to Buyers that this Closing Agreement shall not violate, constitute, or breach ... any agreement." But the larger context of the paragraph addresses competing mortgages, liens, encumbrances, and other interests. The unambiguous language indicates that the Dahls promise that the sale will not "violate, constitute, or breach" any other agreement relating to the ownership of or interest in the resort land. It does not conflict with the final line of the agreement, which states simply that it "supercede[s] any and all prior verbal or written agreements between the parties."

The Kremerses' argument that the purchase agreement contains conditions that could not, by their nature, be fulfilled before execution also fails. The purchase agreement and closing agreement both specify that the Dahls will deliver clear title at some later date, after they unclouded the title. And it was not impossible for the Dahls to resolve the issues relating to securing a food-service license before the closing agreement. Merger therefore occurred unless an exception applies. The Kremerses assert a basis for an exception—fraudulent inducement to enter the contract, including by misrepresenting these facts. But we have held claims for fraud based on a cancelled purchase agreement to be barred. *Hollywood Dairy,* 411 N.W.2d at 259. And the merger exception would apply only if the Kremerses had received the deed to Fish Lake rather than a contract for deed.

The claim is barred.

D. Contract for Deed

The Kremerses contend that the Dahls breached the contract for deed by delivering title that was not identical to the legal description given in the contract. The alleged breach stems from the registration proceeding. Registration permanently defines the property being registered and is binding on all parties with any interest in the land. Minn.Stat. § 508.22 (2012). A party with any right, title, or interest in the land may consent to registration if they do so in the same manner required to execute a deed. Minn.Stat. § 508.06 (2012). The party may also file an answer in the registration proceeding. Minn.Stat. § 508.17 (2012). But the registration judgment is not binding on a party with an interest in the land whom the registrant knowingly fails to serve with notice of the proceeding. *Henry v. White,* 123 Minn. 182, 184–85, 143 N.W. 324, 325 (1913).

***10** The Kremerses do not persuasively contend that the parcel described in the deed differs from the parcel as described in the certificate of title issued after the registration proceeding. The legal description did change on registration. But the Kremerses offered only weak evidence to support their assertion that this discrepancy affects the number of campsites available. They claim the Dahls' attorney told them they would lose 50 feet on one side of the property but they do not demonstrate any effect this might have, using any of the numerous maps, legal descriptions, and survey documents they provide. They do not establish that the registration changed the resort's footprint or that they lost usable area. If they did not purchase essentially what they bargained for with only inconsequential border discrepancies, they failed to provide evidence of it. And equally dispositive, the record indicates that they assented in writing to the registration without filing any answer or otherwise participating in the registration proceeding. The Kremerses now contend that Jeffery Kremers objected to registering the land, but they point us to nothing in the record to contradict his signed, notarized assent. Because the Kremerses expressly consented to registering the title and give no evidence to the contrary, they do not convincingly complain that the property's modified legal description affected the contract for deed. We are persuaded that it was not an abuse of discretion to conclude that they are unlikely to prevail on this claim.

3. Public Policy

The Kremerses finally contend that public policy favors granting the injunction. We ask whether any aspect of the facts requires us to consider public policy as expressed in the statutes. *Dahlberg,* 272 Minn. at 275, 137 N.W.2d at 321–22. Public policy favors upholding valid contracts. *Medtronic,* 630 N.W.2d at 456. The Kremerses urge us to hold that public policy favors granting an injunction here because an injunction will discourage consumer fraud and promote compliance with septic regulations. Granting an injunction will not promote compliance with septic regulations because it will not force the Dahls to correct any deficiencies in Fish Lake's septic system. And according to the relevant inspections, the system was in compliance. Similarly, an injunction would not discourage consumer fraud since the Kremerses have not shown any likelihood of success on their fraud claim.

Contracts for deed can be cancelled, and public policy favors the right to cancel except in exceptional circumstances. The Kremerses have not demonstrated that public policy favors enjoining cancellation.

Affirmed.

MINGE, Judge (concurring specially).

I concur in the result. I write separately to emphasize several points: I would conclude that with respect to the *Dahlberg* factors that when, as here, the contract for deed embodies the sale of an operating business, the relationship between the

parties is more pervasive and tends to favor granting injunctive relief. I would also conclude that the balance-of-harms and public-policy considerations in a cancellation-of-contract-for-deed setting should recognize the draconian impact of cancellation on the buyer and when, as here, the buyer has invested significantly in improvements to the premises and in payments, the combined considerations favor granting injunctive relief.

***11** Next, I would conclude that the administrative burdens incident to judicial oversight of an ongoing business like a resort are apt to be significant and do not support granting injunctive relief. I would conclude that the district court did not abuse its discretion in determining that the alleged violations by the Dahls were not sufficiently established by the Kremerses to demonstrate likelihood of success to warrant injunctive relief. On balance, I would defer to the district court and affirm.

I note that we are not asked to review whether a bond or the Kremerses' equity in the premises would adequately protect the Dahls' interest.

Because this is an unpublished opinion, I do not further address the foregoing matters.

All Citations

Not Reported in N.W.2d, 2014 WL 273966

Footnotes

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

1 The Kremerses also provide several department of health inspections that identified violations relating to food service, general maintenance, and campsite spacing, and they contend that these also violate the purchase agreement. The Dahls have moved to strike these documents as outside the district court record. We depend only on those facts that are in the record to decide an appeal, and parties do not add to that record merely by including extraneous material with their appeal submissions. *See* Minn. R. Civ.App. P. 110.01 ("The papers filed in the trial court, the exhibits, and the transcript of the proceedings, if any, shall constitute the record on appeal in all cases."); Minn. R. Civ.App. P. 130.01, subd. 1 (limiting an appellant to append only "portions of the record" to his brief). Although we occasionally entertain motions to strike noncomplying submissions, we also may simply disregard attachments and references that are beyond the record, with or without "striking." The Dahls' motion to strike is denied, but our opinion rests only on the record. We similarly deny the Kremerses' motion to supplement the record with a department of health report and a letter to the Dahls from the local building department because we will not consider new material that is offered to reverse the district court. *See 301 Clifton Place, LLC v. 301 Clifton Place Condo. Ass'n,* 783 N.W.2d 551, 559 (Minn.App.2010).

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Only the Westlaw citation is currently available.

Court of Appeals of Minnesota.

MINNESOTA CENTER FOR ENVIRONMENTAL ADVOCACY, Appellant,
v.
MINNESOTA PUBLIC UTILITIES COMMISSION, Respondent,
Minnesota Environmental Quality Board, Respondent,
and
Enbridge Energy, Limited Partnership, et al., defendant intervenors, Respondents.

No. A10–812.
|
Dec. 14, 2010.

Synopsis

Background: Environmental group brought action against Minnesota Public Utilities Commission (MPUC) alleging violations of Minnesota Environmental Policy Act (MEPA) arising from MPUC's grant of petroleum company's application for certificate of need and issue of pipeline routing permit. Petroleum company intervened and group amended complaint to include claims against MPUC and company alleging violations of Minnesota Environmental Rights Act (MERA). The District Court, Clearwater County, granted summary judgment in favor of MPUC and petroleum company. Group appealed.

Holdings: The Court of Appeals, Larkin, J., held that:

MPUC complied with alternative environmental-review process and thereby satisfied its environmental review responsibilities;

project was not connected to or phased action;

MPUC properly considered cumulative effects of project;

MPUC adequately considered and addressed concerns of Department of Natural Resources (DNR);

groups comments were beyond scope of necessary environmental review;

MERA claims against company were procedurally barred;

MERA claims against MPUC were not procedurally barred; and

MEPA, rather than MERA, was proper vehicle to challenge adequacy of MPUC's environmental review.

Affirmed.

Clearwater County District Court, File No. 15–CV–08–865.

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Considered and decided by WRIGHT, Presiding Judge; LARKIN, Judge; and STAUBER, Judge.

UNPUBLISHED OPINION

LARKIN, Judge.

***1** Appellant challenges the district court's award of summary judgment in respondents' favor on appellant's claims under the Minnesota Environmental Policy Act and Minnesota Environmental Rights Act. Because respondents are entitled to judgment as a matter of law, we affirm.

FACTS

Respondent Enbridge Energy owns and operates interstate common-carrier pipelines for the transportation of crude petroleum, derivatives, and related products. This case involves Enbridge's LSr pipeline, which is an approximately 313–mile long, 20–inch diameter, crude-oil pipeline that runs between Manitoba, Canada and Clearbrook, Minnesota. Prior to constructing the LSr pipeline, Enbridge filed applications for a pipeline routing permit and a certificate of need with respondent Minnesota Public Utilities Commission (MPUC). Enbridge submitted an Environmental Assessment Supplement (EAS), as required by Minnesota Rule 7852.2700 (2007), with its applications. After receiving comments on the applications, MPUC accepted the applications as substantially complete and referred the matters to the office of administrative hearings for contested-case proceedings.

The general public was provided with notice of the proposed pipeline, and public informational meetings were held in six Minnesota counties. At those hearings, the administrative-law judge (ALJ) received public comments regarding the LSr and portions of two other pipelines, the Alberta Clipper and Southern Lights. In response to preliminary input from landowners and others, Enbridge filed a revised pipeline route request for the LSr. Following additional public hearings, the ALJ issued a report recommending that MPUC issue the certificate of need and routing permit subject to conditions.

The matter came before MPUC for consideration. MPUC granted Enbridge's application for a certificate of need and issued the pipeline routing permit. Appellant Minnesota Center for Environmental Advocacy (MCEA) filed a request for reconsideration, which MPUC denied.

MCEA filed suit against MPUC in district court, claiming violations of the Minnesota Environmental Policy Act (MEPA). Enbridge intervened in the action. Thereafter, MCEA filed an amended complaint alleging additional MEPA claims against MPUC, as well as claims against MPUC and Enbridge under the Minnesota Environmental Rights Act (MERA). The district court granted summary judgment in respondents' favor on all claims. This appeal follows.

DECISION

"On an appeal from summary judgment, we ask two questions: (1) whether there are any genuine issues of material fact and (2) whether the [district] court [ ] erred in [its] application of the law." *State by Cooper v. French,* 460 N.W.2d 2, 4 (Minn.1990). "We review de novo whether a genuine issue of material fact exists" and "whether the district court erred in its application of the law." *STAR Ctrs., Inc. v. Faegre & Benson, L.L.P.,* 644 N.W.2d 72, 77 (Minn.2002).

I.

***2** We first review the award of summary judgment on MCEA's MEPA claims. The purposes of MEPA are

> (a) to declare a state policy that will encourage productive and enjoyable harmony between human beings and their environment; (b) to promote efforts that will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of human beings; and (c) to enrich the understanding of the ecological systems and natural resources important to the state and to the nation.

Minn.Stat. § 116D.01 (2008).

MEPA requires that "[w]here there is potential for significant environmental effects resulting from any major governmental action, the action shall be preceded by a detailed environmental impact statement prepared by the responsible governmental unit [(RGU)]." Minn.Stat. 116D.04, subd. 2a (2008). "Decisions on the need for an environmental assessment worksheet, the need for an environmental impact statement and the adequacy of an environmental impact statement may be reviewed by a declaratory judgment action in the district court of the county wherein the proposed action, or any part thereof, would be undertaken." Minn.Stat. § 116D.04, subd. 10 (2008). MCEA asked the district court to declare that MPUC violated MEPA by failing "to provide the required environmental analysis, instead relying on environmental information prepared solely by the pipeline company."

Because we review the district court's award of summary judgment on the MEPA claims de novo, *see STAR Ctrs., Inc.,* 644 N.W.2d at 77, we ultimately review the agency decision directly. When reviewing an administrative agency decision, we may affirm, reverse, modify the decision, or remand for further proceedings if the "substantial rights of the petitioners may have been prejudiced because the administrative finding, inferences, conclusion, or decisions are:

> (a) in violation of constitutional provisions; or
>
> (b) in excess of the statutory authority or jurisdiction of the agency; or
>
> (c) made upon unlawful procedure; or
>
> (d) affected by other error of law; or
>
> (e) unsupported by substantial evidence in view of the entire record as submitted; or

(f) arbitrary or capricious.
Minn.Stat. § 14.69 (2008).

The party seeking appellate review of an agency decision has the burden of proving that the decision was the product of one or more of these statutory infirmities. *Markwardt v. State, Water Res. Bd.,* 254 N.W.2d 371, 374 (Minn.1977). The decisions of administrative agencies are presumed to be correct and to have been based upon the application of the expertise necessary to decide technical matters that are within the scope of the agencies' concerns and authority. *In re Universal Underwriters Life Ins. Co.,* 685 N.W.2d 44, 45–46 (Minn.App.2004). In reviewing agency decisions, the courts must exercise restraint so as not to substitute their judgment for that which is the product of the technical training, education, and experience found within the agency. *Id.* We will not hold an agency's decision arbitrary and capricious if there is a rational connection between the facts found and the decision, and if the agency has reasonably articulated the basis for its decision. *Id.* at 45. "We defer to the agency's expertise in fact finding, and will affirm the agency's decision if it is lawful and reasonable." *In re an Investigation into Intra–LATA Equal Access & Presubscription,* 532 N.W.2d 583, 588 (Minn.App.1995), *review denied* (Minn. Aug. 30, 1995).

A. Mootness

***3** Respondents assert that because the pipeline has already been built and is fully operational, MCEA's MEPA claims are moot. A moot case is defined as "[a] matter in which a controversy no longer exists; a case that presents only an abstract question that does not arise from existing facts or rights." *Black's Law Dictionary* 1099 (9th ed.2009). The issue presented here is not abstract; a controversy still exists for which relief could be provided. Moreover, "[w]hen evaluating the issue of mootness in [National Environmental Policy Act (NEPA)] cases, [federal courts] have repeatedly emphasized that if the completion of the action challenged under NEPA is sufficient to render the case nonjusticiable, entities could merely ignore the requirements of NEPA, build [their] structures before a case gets to court, and then hide behind the mootness doctrine. Such a result is not acceptable." *Cantrell v. City of Long Beach,* 241 F.3d 674, 678 (9th Cir.2001) (quotation omitted). We agree with the federal court's assessment and will consider the merits of MCEA's MEPA claims.

B. Compliance With Environmental Review Responsibilities

MCEA challenges the adequacy of MPUC's environmental review, arguing that MPUC "violated MEPA by failing to conduct its own thorough, independent analysis of environmental effects." MCEA argues that "once the PUC received the EAS, it had the responsibility for ensuring that the EAS (and any other environmental document it may have independently prepared) complied with applicable MEPA rules, as well as the pipeline routing rules," and that MPUC failed to do so.

Although MEPA requires "a detailed environmental impact statement prepared by the responsible governmental unit," it also provides that the Environmental Quality Board (EQB) "shall by rule identify alternative forms of environmental review which will address the same issues and utilize similar procedures as an environmental impact statement in a more timely or more efficient manner to be utilized in lieu of an environmental impact statement." Minn.Stat. § 116D.04, subds. 2a, 4a (2008). Pursuant to this grant of authority, the EQB has promulgated rules that provide an alternative form of environmental review for proposed pipelines, which is contained in the rules governing the routing permit process. *See generally* Minn. R. 7852 (2007).

The applicable rule states that "[t]he applicant must also submit to the commission along with the application an [EAS containing an] analysis of the potential human and environmental impacts that may be expected from pipeline right-of-way preparation and construction practices and operation and maintenance procedures." Minn. R. 7852.2700. The impacts to be addressed include, but are not limited to, human settlements; the existence and density of populated areas; natural areas, wildlife habitat, water, and recreational lands; and land of historical, archaeological, and cultural significance. Minn. R. 7852.0700. Following public review and contested case hearings, MPUC must "consider" the environmental impacts of the proposed pipeline route "based on the public hearing record" and provide the reasons for its decision in written findings of

fact. Minn. R. 7852.1800, 1900.

***4** The record shows that MPUC followed this process. After numerous public hearings, the ALJ issued his report. In that report, the ALJ made findings of fact regarding the relevant environmental criteria. The ALJ cited to specific record evidence that substantially supports the findings. Based on those findings, the ALJ recommended issuance of a route permit. Next, MPUC independently reviewed the record. MPUC's order granting the pipeline routing permit does not blindly accept Enbridge's application or the ALJ's report. MPUC stated:

> Having examined the record itself and carefully considered the ALJ's Report, the Commission concurs in nearly all his findings of fact and conclusions of law. At a few points, however, the Commission is persuaded that the record better supports the findings and conclusions offered by Enbridge and [Office of Energy Security] for the reasons discussed above.

MPUC complied with the alternative environmental-review process and thereby satisfied its environmental review responsibilities under MEPA.

C. Connected and Phased Actions

MCEA contends that MPUC should have conducted a single environmental review for the LSr project and two other Enbridge pipeline projects: the Alberta Clipper and the Southern Lights. In support of its position, MCEA cites the Minnesota Administrative Rules, which provide that "connected actions or phased actions shall be considered a single project for purposes of the determination of need for an [Environmental Impact Statement (EIS)]." Minn. R. 4410.1700, subp. 9 (2007).

Two projects are considered connected actions "if a responsible governmental unit determines they are related in any of the following ways: A. one project would directly induce the other; B. one project is a prerequisite for the other and the prerequisite project is not justified by itself; or C. neither project is justified by itself." Minn. R. 4410.0200, subp. 9c (2007). A phased action "means two or more projects to be undertaken by the same proposer that a RGU determines: A. will have environmental effects on the same geographic area; and B. are substantially certain to be undertaken sequentially over a limited period of time." *Id.,* subp. 60 (2007).

But Minn. R. 4410.2000 expressly contemplates separate environmental review of a pipeline, like the LSr project, that is part of a larger planned network. Although the rule states that "[m]ultiple projects and multiple stages of a single project that are connected actions or phased actions must be considered in total when determining the need for an EIS and in preparing the EIS," the rule goes on to state:

> For proposed projects such as highways, streets, *pipelines,* utility lines, or systems where the proposed project is related to a large existing or planned network, for which a governmental unit has determined environmental review is needed, the RGU shall treat the present proposal as the total proposal or select only some of the future elements for present consideration in the threshold determination and EIS. These selections must be logical in relation to the design of the total system or network and must not be made merely to divide a large system into exempted segments.

***5** Minn. R. 4410.2000, subp. 4 (emphasis added).

This rule is applicable here. The LSr project is part of Enbridge's planned pipeline network. Enbridge intended to begin operating the LSr pipeline more than one year before the other two pipelines. Therefore, the treatment of the LSr project as the total proposal was logical in relation to the design of the total network and was not made merely to "divide a large system into exempted segments."

Moreover, the LSr, Alberta Clipper, and Southern Lights pipelines are not connected actions. MCEA asserts that the three pipelines meet the definition of connected and phased actions because "they are dependent on each other for their existence." But the record shows that the three projects serve different purposes: the LSr carries light crude oil, the Alberta Clipper is intended to transport heavy crude oil, and the Southern Lights is intended to carry diluent. MCEA claims that LSr is a prerequisite for Southern Lights because Southern Lights will connect to Line 13, which will have its flow reversed to carry

diluents and LSr will replace the crude transport capacity lost through the reversal of Line 13. But this does not render LSr a prerequisite for Southern Lights. Even though capacity replacement will result from construction of LSr, the record shows that the LSr was designed to alleviate existing bottlenecks in the pipeline system. Two actions are connected only if one project is a prerequisite for another and the prerequisite is not justified on its own; LSr is self-justified. And although these pipelines appear to be phased actions as defined by the rule, under Minn. R. 4410.2000, subp. 4, it was unnecessary to consider the three pipelines as a single project.

MCEA also alleges that MPUC "recognized the connected nature of the three pipelines and considered them as one project until just prior to the environmental review stage, at which time it arbitrarily split the LSr pipeline from the other two for permitting purposes." The record refutes this allegation. MPUC established one docket for the LSr and another for Alberta Clipper and Southern Lights. The public-meeting notices indicated that the LSr was a separate action from the other two pipelines. The fact that the public hearings on the three proposed pipelines were consolidated for public convenience does not mean that the pipelines are connected actions as defined by rule.

Lastly, MCEA argues that MPUC violated MEPA by failing to analyze the environmental impacts associated with the installation of additional pumps to utilize the full capacity of the LSr line and the additional pipelines needed to utilize the full capacity of the Alberta Clipper line. But the record indicates that no additional pumping stations or additional lines are planned. MCEA provides no legal support explaining how the LSr project can be considered a "connected" or "phased" action with unplanned, hypothetical pumping stations or pipelines.

D. Direct, Indirect, and Cumulative Effects

***6** "In selecting a route for designation and issuance of a pipeline routing permit, the commission shall consider the impact [of] the pipeline [on] the following: cumulative potential effects of related or anticipated future pipeline construction[.]" Minn. R. 7852.1900, subp. 3(I). "[A] cumulative potential effects analysis is limited geographically to projects in the surrounding area that might reasonably be expected to affect the same natural resources ... as the proposed project." *Citizens Advocating Responsible Dev. v. Kandiyohi County Bd. of Comm'rs,* 713 N.W.2d 817, 830 (Minn.2006). The cumulative-effects analysis focuses on whether a project that may not significantly impact the environment singularly causes a substantial impact when other planned or existing projects are considered.

MCEA asserts that the "cumulative, direct, and indirect impacts from the three pipelines must be examined, particularly as concerns the cumulative effects of these projects on global warming." According to MCEA, the environmental effects that must be examined are the "effect on global warming from the increase in greenhouse gas emissions associated with refining the tar sands [in Alberta, Canada] and using the resulting petroleum, the destruction of carbon-sequestering boreal forests and bogs in northern Alberta, and the subsequent release of carbon from those boreal forests and bogs." But rule 7852.1900, subp. 3(I), concerns the designation of a route for a proposed pipeline, whereas the effects with which MCEA is concerned relate to the tar-sand refining process in Alberta and the existence of the pipeline generally-not to the LSr pipeline route itself.

Moreover, MPUC considered the cumulative potential effects as specified by the rule. The ALJ noted that the revised route and alignment submitted by Enbridge "describes a 500 foot route width that will accommodate either, or both, of the LSr and Alberta Clipper pipelines, if approved by the Commission." These pipelines were planned to run adjacent and parallel. The ALJ further noted that, beyond the LSr and the Alberta Clipper Projects (i.e., the Alberta Clipper and Southern Lights pipelines), Enbridge did not have plans for further pipeline construction. In its report, MPUC noted that "[b]ased on the best available evidence, the Commission finds that Enbridge's preferred route ... will have no greater cumulative potential effect on future pipeline construction than any feasible alternative." This decision is presumed to be correct and to have been based upon the application of the expertise necessary to decide technical matters that are within the scope of the agencies' concerns and authority. *See Universal Underwriters Life Ins. Co.,* 685 N.W.2d at 45–46.

E. Failure to Respond to Comments

MCEA also asserts that MPUC violated MEPA by failing to respond to the Minnesota Department of Natural Resource's (DNR) and MCEA's written comments expressing concerns about the LSr pipeline route and "by stating in response to comments by the DNR and MCEA that Enbridge could address any environmental concerns as they arose during the construction and operation of the pipeline."

***7** MPUC evaluated the evidence in the record and considered the comments made by the DNR. In an attempt to respond to the DNR's concerns, MPUC adopted seven supplemental findings, which were suggested by the Minnesota Department of Commerce's Office of Energy Security (OES), in its order granting the pipeline routing permit. Furthermore, the dictate that MPUC must consider evidence in the record does not necessarily mean that MPUC must specifically respond to each comment or concern. *See* Minn. R. 7852.1800 ("The commission's route selection decision shall be based on the public hearing record and made in accordance with part 7852.1900."). And we must keep in mind the deference that is afforded when reviewing matters within an agency's expertise. *See Universal Underwriters,* 685 N.W.2d at 45–46 ("When reviewing agency decisions we adhere to the fundamental concept that decisions of administrative agencies enjoy a presumption of correctness, and deference should be shown by courts to the agencies' expertise and their special knowledge in the field of their technical training, education, and experience."). Although MPUC did not respond to each of the DNR's comments with a great deal of specificity, it did address each of them in some respect. Based on our deferential standard of review, we conclude that MPUC adequately considered and addressed the DNR's concerns.

MCEA also argues that MPUC failed to consider or respond to its written comments. MCEA takes issue with the lack of "analysis of any sort of the cumulative effects of all three pipelines on the development of the Alberta tar sands oil and the impact of that development on air quality in Minnesota or climate change." Specifically, MCEA argues that the mining process generates enormous carbon emissions in Canada and the resulting import of crude oil from the mines causes increased refinery activity and fuel consumption in Minnesota, which also increases carbon emissions. MCEA is correct—MPUC did not address these concerns. But these concerns deal with mining, refining, and fuel consumption in general, whereas MPUC was concerned with the environmental impact resulting from a specific, proposed pipeline route. *See* Minn. R. 7852.1900. MCEA's general environmental concerns were beyond the scope of the necessary environmental review, and MPUC's review is not inadequate as a result of its failure to address them.

Lastly, MCEA misplaces reliance on *Trout Unlimited v. Minn. Dep't of Agric.* to support its argument that MPUC erred by allowing Enbridge to address environmental problems as they arose. 528 N.W.2d 903 (Minn.App.1995) *review denied* (Apr. 27, 1995). In *Trout Unlimited,* the agency recognized the potential for significant environmental impacts, but determined that, because the situation could be monitored and permits would need to be obtained, an EIS was unnecessary. *Id.* at 909. This court held that future mitigation measures were not a substitute for an EIS. *Id.* But *Trout Unlimited* is factually distinguishable because, in this case, an environmental impact review was conducted under the applicable rules. And although MPUC's order included mitigation plans, MPUC did not use mitigation measures as a substitute for environmental review.

***8** In sum, none of MCEA's arguments establishes a basis to reverse, modify, or remand the MPUC's decision to issue the routing permit and certificate of need for the LSr pipeline. *See* Minn.Stat. § 14.69. Accordingly, summary judgment in MPUC's favor on MCEA's MEPA claims is affirmed.

II.

We next address MCEA's MERA claims. "MERA provides a civil remedy for those that seek to protect ... the air, water, land, and other natural resources within the state" from pollution, impairment, or destruction. *State ex rel. Swan Lake Area Wildlife Ass'n v. Nicollet County Bd. of County Comm'rs,* 711 N.W.2d 522, 525 (Minn.App.2006), *review denied* (Minn. June 20, 2006). MCEA alleged one MERA count against MPUC and two MERA counts against Enbridge, generally asserting that respondents polluted, impaired, or destroyed a calcareous fen[1] in violation of MERA. MCEA also asserts that Enbridge violated an environmental-quality standard by acting without an approved management plan. *See* Minn. R. 8420.0935, subp.

4 (2007) ("Calcareous fens must not be impacted or otherwise altered or degraded except as provided for in a management plan approved by the commissioner."). MCEA sought declaratory and equitable relief on its MERA claims.

On appeal, MCEA argues that summary judgment was improperly granted because there are genuine issues of material fact regarding its MERA claims. Respondents counter that MCEA's MERA claims are barred under Minn.Stat. § 216B.27, subd. 2 (2008). Chapter 216B governs Minnesota public utilities. *See* Minn.Stat. §§ 216B.01–.82 (2008). Minn.Stat. § 216B.27 describes the process for reconsideration of MPUC decisions, including the issuance of pipeline routing permits, and states:

> The application for a rehearing shall set forth specifically the grounds on which the applicant contends the decision is unlawful or unreasonable. No cause of action arising out of any decision constituting an order or determination of the commission or any proceeding for the judicial review thereof shall accrue in any court to any person or corporation unless the plaintiff or petitioner in the action or proceeding within 20 days after the service of the decision, shall have made application to the commission for a rehearing in the proceeding in which the decision was made. No person or corporation shall in any court urge or rely on any ground not so set forth in the application for rehearing.

Minn.Stat. § 216B.27, subd. 2.

MCEA argues that Minn.Stat. § 216B.27 does not apply to its MERA claims because "[t]hat statute limits the issues that a party may raise in an appeal of a PUC decision made as part of an administrative proceeding." But MCEA cites no authority to support its assertion that the statute applies only to appeals, and the assertion is inconsistent with the plain language of the statute. If the legislature's intent is clearly discernible from a statute's unambiguous language, courts interpret the language according to its plain meaning, without resorting to other principles of statutory construction. *State v. Anderson,* 683 N.W.2d 818, 821 (Minn.2004). Section 216B.27, subd. 2, unambiguously references "[n]o cause of action arising out of any decision" or "any proceeding for the judicial review" of the decision. The plain language of the statute therefore applies both to judicial proceedings to review a decision and to causes of action arising out of the decision. Because this case involves a cause of action arising out of a decision of MPUC, section 216B.27, subd. 2, applies.

***9** We therefore consider whether MCEA'S MERA claims against Enbridge are barred under section 216B.27, subd. 2. This section precludes a party from bringing a cause of action arising out of an MPUC decision unless that party first raises the ground for the claim in a petition for rehearing on the decision. The grounds for MCEA's MERA claims against Enbridge are that Enbridge constructed and operates the LSr pipeline through a calcareous fen, thereby causing pollution, impairment and destruction of a natural resource, in the absence of a management plan approved by the DNR. These claims arise from MPUC's decision to authorize the construction of the pipeline in a particular location. Although MCEA petitioned for reconsideration of MPUC's pipeline-routing decision, its petition was based solely on grounds that MPUC issued the routing permit and certificate of need "prior to completion of adequate environmental review for the project" under MEPA. It is undisputed that MCEA did not raise the grounds for its MERA claims against Enbridge in its petition for rehearing. Accordingly, the claims against Enbridge are procedurally barred. *See* Minn.Stat. § 216B.27, subd. 2. Enbridge is therefore entitled to summary judgment on these claims as a matter of law.

Moreover, contrary to MCEA's assertion, Enbridge is not operating the LSr pipeline without an approved management plan. Under Minnesota law, no action may be brought under MERA on the basis of "conduct taken by a person pursuant to any environmental quality standard, limitation, rule, order, license, stipulation agreement or permit issued by the Pollution Control Agency, Department of Natural Resources, Department of Health or Department of Agriculture." Minn.Stat. § 116B.03, subd. 1 (2008); *see also* Minn. R. 4410.0200 (2007) (" 'Permit' means a permit, lease, license, certificate, or other entitlement for use or permission to act that may be granted or issued by a governmental unit...."). The DNR has approved a fen management plan for the affected fen. MCEA's argument that this management plan does not apply to the LSr pipeline is unpersuasive. The plan states: "The following discussion refers to calcareous fen components within the Gully 30 area that have been or will be impacted directly or indirectly by the 2008 installation of the LSr pipeline and the proposed installation of the Alberta Clipper pipeline...." Thus, even if MCEA's MERA claim against Enbridge were not procedurally barred, the claim based on Enbridge's operation of the LSr in the absence of an approved management plan would fail as a matter of law. *See* Minn.Stat. § 116B.03, subd. 1.

We next consider whether MCEA's MERA claim against MPUC is barred under section 216B.27, subd. 2. MCEA asserts that MPUC failed to conduct an adequate environmental review as required by MEPA and as a direct result, granted a routing permit for the construction of the LSr pipeline through a calcareous fen, thereby causing pollution, impairment, and destruction of a natural resource in violation of MERA. This claim arises out of MPUC's permitting decision. Because

MCEA raised the adequacy of MPUC's environmental review in its petition for reconsideration of the permitting decision, the MERA claim is not procedurally barred. *See* § 216B.27, subd. 2.

***10** But the reason that the MERA claim against MPUC is not procedurally barred is because the claim and MCEA's petition for reconsideration are based on identical grounds: MPUC's alleged failure to conduct adequate environmental review under MEPA. And because MCEA alleges inadequate environmental review as the basis for its MERA claim, the claim entails assessment of MPUC's environmental review. But MEPA, rather than MERA, is the "appropriate vehicle" with which to challenge the adequacy of MPUC's environmental review "where the agency's role is limited only to conducting environmental review of the project at issue." *See Nat'l Audubon Soc. v. Minnesota Pollution Control Agency,* 569 N.W.2d 211, 213, 219 (Minn.App.1997) (concluding that where plaintiffs were challenging an agency's environmental-review decision and the agency's role was limited to conducting the required environmental review of the project, plaintiffs' challenge must be brought under MEPA and not MERA), *review denied* (Minn. Dec. 16, 1997). Accordingly, MCEA may not maintain its claim against MPUC under MERA. *See id.* at 219.

Perhaps MCEA is attempting to avoid the conclusion, compelled by *National Audubon,* that MPUC's alleged inadequate review is not actionable under MERA by asserting that MPUC's inadequate review is "causing" pollution. *See id.* at 218 (explaining that "[b]ecause environmental review cannot result in pollution, impairment, or destruction of the environment ... environmental review does not constitute 'pollution, impairment, or destruction' of the environment as defined by MERA"). But because we have determined that MPUC's environmental review is adequate under MEPA, there is no genuine issue of material fact, and the MERA claim fails as a matter of law. *See Lubbers v. Anderson,* 539 N.W.2d 398, 401 (Minn.1995) ("A defendant is entitled to summary judgment as a matter of law when the record reflects a complete lack of proof on an essential element of the plaintiff's claim."). For these reasons, MPUC is entitled to summary judgment on MCEA's MERA claim.

In conclusion, summary judgment on all of MCEA's MERA claims is appropriate.

Affirmed.

All Citations

Not Reported in N.W.2d, 2010 WL 5071389

Footnotes

1 "A calcareous fen is a peat-accumulating wetland dominated by distinct groundwater inflows having specific chemical characteristics. The water is characterized as circumneutral to alkaline, with high concentrations of calcium and low dissolved oxygen content. The chemistry provides an environment for specific and often rare hydrophytic plants." Minn. R. 8420.0935, subp. 2 (2007).

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1991 WL 10223
Only the Westlaw citation is currently available.

NOTICE: THIS OPINION IS DESIGNATED AS UNPUBLISHED AND MAY NOT BE CITED EXCEPT AS PROVIDED BY MINN. ST. SEC. 480A.08(3).

Court of Appeals of Minnesota.

Harold R. NIELSEN, Appellant,
v.
The STATE of Minnesota, Joseph N. Alexander, Commissioner of Natural Resources, Minnesota Department of Natural Resources, Respondents.

No. C4-90-1525.
|
Feb. 5, 1991.
|
Review Denied April 18, 1991.

Appeal from District Court, Chisago County; James B. Gunderson, Judge.

Attorneys and Law Firms

George L. May, Hertogs, Fluegel, Sieben, Polk, Jones & LaVerdiere, Hastings, for appellant.

Hubert H. Humphrey, III, Attorney General, A.W. Clapp, III, Special Assistant Attorney General, St. Paul, for respondents.

Considered and decided by KALITOWSKI, P.J., and FOLEY and CRIPPEN, JJ.

UNPUBLISHED OPINION

KALITOWSKI, Judge.

***1** Appellant Harold Nielsen challenges the trial court's order granting respondent State of Minnesota's motion for judgment on the pleadings and remanding the case to the Department of Natural Resources (DNR) for an administrative hearing. Appellant contends the trial court erred in finding appellant had not exhausted his administrative remedies. We disagree and affirm.

DECISION

Whether this action should be remanded to the DNR for an administrative hearing and a determination by the Commissioner of Natural Resources (Commissioner) is a question of law. Where no factual question is presented, the appellate court can make its determination without giving deference to the trial court's determination. *See Reserve Mining Co. v. Herbst,* 256 N.W.2d 808, 824 (Minn.1977).

Generally, only decisions which finally determine the rights of the parties and which conclude the actions are appealable. *Zizak v. Despatch Industries, Inc.,* 427 N.W.2d 755, 756 (Minn.App.1988), *pet. for rev. denied* (Minn. Oct. 26, 1988) (citing *Weinzierl v. Lien,* 296 Minn. 539, 540, 209 N.W.2d 424, 424 (1973)). Agency actions may be appealed to the court of appeals where a final order, decision or judgment has been reached by the agency. Minn.R.Civ.App.P. 103.03(g). The aggrieved party of an agency action is entitled to receive judicial review of a final decision. Minn. Stat. § 14.63 (1988).

In this case, no final decision has been reached by the Commissioner. Therefore, this action is not yet ripe for judicial review. However, appellant argues that a final decision is not necessary because he is not required to exhaust all of his administrative remedies where it would be futile to do so.

Before judicial review of an agency decision will be permitted, the appropriate administrative remedies must be exhausted. *City of Richfield v. Local No. 1215, Int'l Ass'n of Fire Fighters,* 276 N.W.2d 42, 51 (Minn.1979). This includes following the appropriate channels of administrative appeals. *Id.* However, where it would be futile to pursue the applicable administrative remedies, a party so situated may go to the courts for redress. *Id.*

Appellant asserts that it would be futile to pursue an administrative hearing because in utilizing what appellant believes to be a flawed determination of the ordinary high water level, the DNR is committed to a conclusion that appellant has violated Minn. Stat. ch. 105. However, the exception to the requirement of exhausting one's remedies is not applicable merely because there is an apprehension that the agency decision will be unfavorable.

It is only [where the aggrieved party] can show that a continuance of an administrative agency's proceedings to completion will result in substantial injury of an irreparable nature-as distinguished from a mere apprehension of injury to result from a possible entry of a final order-that the requirement for finality is relaxed.

Thomas v. Ramberg, 240 Minn. 1, 6, 60 N.W.2d 18, 21 (1953).

***2** The respondents contend and we agree that administrative proceedings should go forward in this case. Thereafter, if necessary the court of appeals can review the Commissioner's determination in a manner similar to that utilized in *In re Kaldahl,* 418 N.W.2d 532 (Minn.App.1988).

We find appellant's reliance on *McKee v. County of Ramsey,* 310 Minn. 192, 245 N.W.2d 460 (1976), and *In re State Farm Mut. Auto. Ins. Co.,* 392 N.W.2d 558 (Minn.App.1986), to be misplaced. Here, the DNR has merely started the administrative process by issuing a restoration order. Appellant cannot yet know either how the administrative law judge (ALJ) will find or rule or the extent to which the decision of the Commissioner will vary from the ALJ's findings of fact and conclusions of law.

Finally, because the trial court did not rule on appellant's argument that further action by the DNR in enforcing its restoration order is barred by res judicata, we decline appellant's request to consider this issue.

Affirmed.

All Citations

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Only the Westlaw citation is currently available.

Court of Appeals of Minnesota.

Ken B. PETERSON, Commissioner of the Minnesota Department of Labor and Industry, Respondent,
v.
UNITED PARCEL SERVICE, INC., Appellant.

Nos. A13–2378, A14–0467.
|
Sept. 22, 2014.
|
Review Denied Dec. 16, 2014.

Synopsis

Background: Commissioner of Department of Labor and Industry brought action against employer, seeking to enforce decision of Occupational Safety and Health Division of the Minnesota Department of Labor and Industry (MnOSHA) board which affirmed citations for failure to keep indoor workroom temperature at a minimum of 60 degrees. The District Court, Ramsey County, granted injunctive relief in favor of commissioner. Employer appealed.

Holdings: The Court of Appeals, Cleary, C.J., held that:

employer could not collaterally attack, in district court, validity of standard employed by MnOSHA board in upholding citations, and

district court could issue permanent injunction requiring employer to maintain minimum indoor workroom temperature setting at all its facilities within state, rather than only at the two facilities for which MnOSHA had issued violation citations.

Affirmed.

Rodenberg, J., concurred in part, dissented in part, and filed opinion.

Ramsey County District Court, File No. 62–CV–13–5652.

Attorneys and Law Firms

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Joseph G. Schmitt, Peter Gray, Lisa M. Schmid, Nilan Johnson Lewis PA, Minneapolis, MN; and Carla Gunnin, pro hac vice, Jackson Lewis P.C., Atlanta, GA, for appellant.

Considered and decided by WORKE, Presiding Judge; CLEARY, Chief Judge; and RODENBERG, Judge.

UNPUBLISHED OPINION

CLEARY, Chief Judge.

***1** In these consolidated appeals arising from enforcement actions asserted by respondent, appellant argues that the district court lacked jurisdiction to issue temporary and permanent injunctions, and that it erred by entering a temporary injunction, denying appellant's motion to amend its answer, and granting respondent's motion for summary judgment. We affirm.

FACTS

Appellant United Parcel Service, Inc. (UPS) is a multi-national package-delivery company that operates a network of distribution and retail establishments, including distribution facilities in Minneapolis and Maple Grove. At both of those facilities, UPS employees load and unload tractor-trailers and package delivery trucks; some of those vehicles enter and exit the buildings through large doors, while others are serviced via exterior loading docks with overhead doors. In spite of efforts to minimize the amount of outdoor air entering the buildings, it can be difficult to maintain comfortable indoor working temperatures during the winter.

Prior to the fall of 2009, thermostats in these facilities were typically set at 50 degrees Fahrenheit during the winter months. In September 2009, UPS required that thermostats in operations areas be set to 45 degrees during the winter heating season in order to reduce costs and save energy. As temperatures fell with the arrival of winter, many employees found this temperature to be less comfortable and added layers of long underwear, sweatshirts, hats and gloves to their working attire. On December 10, 2009, an inspector from the Occupational Safety and Health Division of the Minnesota Department of Labor and Industry (MnOSHA) went to the Maple Grove facility in response to a complaint that temperatures in the operations area were below freezing. He found the thermostat set at 45 degrees, and his measurements showed that temperatures in the operations area ranged from 48 to 55 degrees. Outdoor temperatures in Maple Grove varied from seven degrees above zero to seven degrees below zero that day. On December 28, an inspector measured indoor temperatures at the Minneapolis facility ranging from 54 to 62 degrees, while outdoor temperatures ranged from a high of 25 degrees to a low of 13 degrees.

In January 2010, based on data from the December 2009 inspections, MnOSHA issued violation citations for both facilities asserting violations of Minn. R. 5205.0110, subp. 3, which requires employers to maintain a minimum temperature of 60 degrees Fahrenheit in any "indoor workrooms" where "work of a strenuous nature is performed, unless prohibited by process requirements." The rules do not define "indoor workrooms." Abatement of the violations was stayed when UPS timely contested the citations, and the matter was heard by an administrative-law judge (ALJ). Arguments presented to the ALJ focused on whether the UPS facilities should be treated as indoor workrooms under Minn. R. 5205.0110, or as garages under Minn. R. 5205.0200. The rule governing garages imposes ventilation requirements focused on maintaining air quality but does not impose a minimum-temperature requirement.

***2** The ALJ reversed the violation citations, concluding that the UPS facilities fell within the garage standard. The commissioner appealed to the MnOSHA board, which heard the matter in November 2012. The MnOSHA board reversed the ALJ and upheld the citations, concluding that both the garage standard *and* the indoor-workroom standard apply. UPS timely filed a certiorari appeal of the MnOSHA board's decision but failed to properly serve the other parties. We discharged the writ and dismissed the appeal due to defective service and the supreme court denied review.

On three occasions in early 2013, a MnOSHA inspector attempted to conduct follow-up inspections at the Minneapolis and Maple Grove facilities. UPS personnel refused to allow the inspections, even after a police officer reviewed the inspection order and advised a UPS manager to permit the inspection. MnOSHA ultimately obtained a warrant from the Hennepin County District Court. Finally, on March 7, armed with the warrant and accompanied by two Hennepin County Sheriff's Deputies, the inspector went to the Minneapolis facility and was able to complete an inspection. Temperature readings ranged from 48 to 63 degrees, with 23 out of 27 readings falling below 60 degrees. The outside temperature that day ranged from 11 degrees to 21 degrees. In June, MnOSHA issued a failure-to-abate citation and a citation for failure to submit a certification showing how the violation was corrected as required by Minn. R. 5210.0532, subp. 2.[1]

In August 2013, the commissioner sued UPS in Ramsey County District Court to enforce the decision of the MnOSHA board affirming the 2010 violation citations. In his complaint, the commissioner asked the district court to "order [UPS] to set the temperature to sixty degrees in its distribution centers when the outside temperature is below sixty degrees" and issue a permanent injunction to the same effect. A flurry of filings followed: On August 20, UPS filed its answer, admitting that the MnOSHA board's decision was a "final order" and that UPS did not change thermostat settings after that decision. On September 6, the commissioner moved for summary judgment, proposing an order "requiring that [UPS] set the thermostat to 60 degrees in *all of its Minnesota distribution centers* whenever the outdoor temperature is below sixty degrees." (Emphasis added.) On October 7, UPS moved for leave to amend its answer by adding affirmative defenses and a counterclaim. On October 21, the commissioner moved for a temporary injunction requiring UPS to "set the temperature setting to 60 degrees in all of its Minnesota distribution centers when the outdoor temperature is below sixty degrees."

The parties appeared before the district court in November 2013. In December, the district court granted the commissioner's motion for a temporary injunction, ordering UPS "to set the temperature setting to sixty (60) degrees *in each of its Minnesota distribution centers* when the outdoor temperature is less than sixty degrees." (Emphasis added.) UPS requested clarification of the scope of the temporary injunction, noting that the MnOSHA board's decision pertained to the Maple Grove and Minneapolis facilities for which citations had been issued and requesting that the order be amended to apply to those facilities only. While that request was pending, UPS filed a notice of appeal to this court. That appeal was designated as case A13–2378, which is the parent file in this appeal. On January 8, 2014, the district court declined to modify the temporary injunction, stating that it lacked jurisdiction to do so because UPS had appealed.

***3** In February 2014, the district court issued a second order to address the outstanding motions. The second order denied UPS's motion for leave to amend its answer, granted the commissioner's motion for summary judgment and permanently ordered UPS to set thermostats at 60 degrees when the outside temperature falls below 60 degrees. UPS appealed the second order. The second appeal is case number A14–0467, the consolidated file in this appeal.

The commissioner moved to dismiss appeal A13–2378, arguing that the temporary injunction was mooted by the district court's imposition of the permanent injunction. We denied the motion, concluding that whether the temporary injunction is moot depends on the outcome of the appeal of the permanent injunction. In the same order, we granted a motion by UPS to consolidate the two cases and struck A13–2378 from the oral argument calendar. Consolidated oral argument occurred in July of this year. We now consider the consolidated appeal.

DECISION

I. The district court did not err by denying UPS's motion for leave to amend.

We review a district court's denial of a motion to amend pleadings for abuse of discretion. *Johns v. Harborage I, Ltd.,* 664 N.W.2d 291, 295 (Minn.2003). "Whether the district court has abused its discretion in ruling on a motion to amend may turn on whether it was correct in an underlying legal ruling." *Doe v. F.P .,* 667 N.W.2d 493, 500–01 (Minn.App.2003), *review*

denied (Minn. Oct. 21, 2003). In other words, "[a] district court abuses its discretion when it bases its conclusions on an erroneous interpretation of the applicable law." *Fannie Mae v. Heather Apartments Ltd. P'ship,* 811 N.W.2d 596, 599 (Minn.2012). Leave to amend should be freely given if the opposing party would not be prejudiced. *Fabio v. Bellomo,* 504 N.W.2d 758, 761 (Minn.1993). But even if amendment would not prejudice the opposing party, a district court may properly deny amendment if it would be futile. *Bridgewater Tel. Co. v. City of Monticello,* 765 N.W.2d 905, 915 (Minn.App.2009).

In this instance, our review is effectively de novo because the district court based its denial decision on two legal conclusions that, if correct, would make amendment futile. First, the district court concluded that UPS's amended claim would amount to an appeal of the decision of the MnOSHA board, and that it lacked subject-matter jurisdiction over such a claim because MnOSHA-board decisions are appealable only by writ of certiorari to this court. Second, it concluded that the amended claim would be barred by the doctrine of res judicata because the arguments asserted were waived when UPS failed to perfect its certiorari appeal of the MnOSHA board's decision, resulting in our dismissal of that appeal. We review questions of subject-matter jurisdiction de novo. *Johnson v. Murray,* 648 N.W.2d 664, 670 (Minn.2002). The applicability of res judicata is also a question of law subject to de novo review. *State v. Joseph,* 636 N.W.2d 322, 326 (Minn.2001). Thus, our review of the district court's overall decision to deny the motion to amend turns on our de novo review of the district court's legal conclusions.

***4** In Minnesota, writs of certiorari are creatures of statute, not common-law, and the statutes governing them must be strictly construed. *State ex rel. Ryan v. Civil Serv. Comm'n of Minneapolis,* 278 Minn. 296, 301, 154 N.W.2d 192, 196 (1967). The Minnesota Occupational Safety and Health Act of 1973 (the act), Minn.Stat. §§ 182.65–.676 (2012) provides a statutory avenue for judicial review of administrative decisions arising from contests of MnOSHA citations that ultimately leads to appeal to this court by writ of certiorari. First, a citation is contested before an ALJ. Minn.Stat. § 182.661, subd. 3. Second, the employer or the commissioner may appeal the ALJ's decision to the MnOSHA board. *Id* . Third, the MnOSHA board's decision may be appealed "in accordance with the applicable provisions of [the Minnesota Administrative Procedure Act (MAPA)]." Minn.Stat. § 182.665. Under MAPA, a writ of certiorari "must be filed with the Court of Appeals ." Minn.Stat. § 14.63 (2012). Additionally, this court has statutory jurisdiction over "the decisions of administrative agencies in contested cases." Minn.Stat. § 480A.06, subd. 4 (2012). We also have jurisdiction to issue writs of certiorari to agencies, with exceptions that do not apply here. *Id.,* subd. 3 (2012). Absent express statutory language vesting judicial review of an agency action in the district courts, our jurisdiction in these matters is exclusive. *Mowry v. Young,* 565 N.W.2d 717, 719 (Minn.App.1997), *review denied* (Minn. Sept. 18, 1997). As the district court noted, there is no statute or rule that authorizes district court review of MnOSHA-board decisions.

UPS argues that the district court has jurisdiction to hear its amended claims because the defendant in an agency-enforcement action is entitled to collaterally attack the validity of the regulation the agency seeks to enforce, and cites caselaw to support that assertion. UPS relies heavily on the supreme court's statement in *State v. Lloyd A. Fry Roofing Co.,* 310 Minn. 528, 530, 246 N.W.2d 696, 698 (1976), that "any action of an administrative agency which is in excess of its statutory power is subject to collateral attack." This reliance is misplaced because *Fry* is distinguishable. There, the Minnesota Pollution Control Agency (MPCA) ordered Fry to conduct emissions tests and Fry refused without seeking judicial review. *Id.* at 528, 246 N.W.2d at 697. When the MPCA sought an injunction compelling Fry to conduct the tests, Fry responded by collaterally attacking the validity of the rule, and the district court ruled that the MPCA lacked statutory authority to promulgate the rule it sought to enforce. *Id.* On appeal, the MPCA argued that Fry could not collaterally attack the rule, citing U.S. Supreme Court cases and other authorities supporting the position that parties may not collaterally attack when applicable statutes provide an exclusive avenue for appeal. *Id.* at 529–30, 246 N.W.2d at 697–98. The supreme court rejected the MPCA's argument and held that collateral attack was permissible because the governing statute in that case provided for direct appeal, but did not make direct appeal the exclusive means of review. *Id.* at 530, 246 N.W.2d at 698. Here, the governing statutes provide certiorari appeal to this court as the exclusive avenue for review. UPS had full access to certiorari appeal, but failed to perfect its appeal when it had the opportunity to do so.

***5** UPS also disputes the district court's interpretation of *Carlson v. Chermak,* 639 N.W.2d 886 (Minn.App.2002), which the district court read as supporting its conclusion that it lacked subject-matter jurisdiction. UPS reads *Carlson* as supporting the opposite result. We conclude that *Carlson* supports the district court's interpretation. Carlson applied for a zoning variance and her application was denied by a county zoning board. *Id.* at 888. The governing statute provided for direct appeal to the district court. *Id.* at 889. Carlson did not directly appeal the denial of the variance, but after the time for appeal had passed, she filed a district court declaratory-judgment action amounting to a collateral attack. *Id.* at 888. We concluded that the

district court lacked subject-matter jurisdiction to consider the declaratory-judgment action because Carlson was asserting claims that she could have asserted in the direct appeal provided for by the statute. *Id.* at 890.

UPS seizes on footnote language in which we stated that the outcome would have been different if the county had brought an enforcement action against Carlson, because in that case an "aggrieved part[y] may raise constitutional, equitable, and other defenses to enforcement whether or not [she] appealed denial of a variance within the statutory appeal period." *Carlson,* 639 N.W.2d at 889 n. 1. The footnote language is inapplicable here for two reasons. First, it is dictum, meaning "a statement in an opinion that could have been eliminated without impairing the result of the opinion." *State v. Misquadace,* 629 N.W.2d 487, 490 n. 2 (Minn.App.2001), *aff'd,* 644 N.W.2d 65 (Minn.2002). Elimination of the footnote from the *Carlson* opinion would have no impact on the result of the opinion because whether a collateral attack on an enforcement action is permissible was not at issue there. Second, even if the passage was not dictum, we said that such a collateral attack would be permissible "[i]n the distinct procedural posture of a county's action to enforce an ordinance against landowners." *Carlson,* 639 N.W.2d at 889 n. 1. We did not address whether a district court collateral attack on a MnOSHA standard would be permissible when statutes provide certiorari appeal to this court as the exclusive avenue for appeal of an agency decision affirming a citation based on that standard.

We conclude that the district court correctly decided that it lacked subject-matter jurisdiction to consider UPS's collateral attack. Because the lack of subject-matter jurisdiction alone made amendment of UPS's answer futile, providing sufficient basis for the district court to deny the motion to amend, we need not address UPS's res judicata arguments.

II. The district court did not err by granting summary judgment.

"On appeal from summary judgment, [appellate courts] must review the record to determine whether there is any genuine issue of material fact and whether the district court erred in its application of the law." *Dahlin v. Kroening,* 796 N.W.2d 503, 504 (Minn.2011). "We review a district court's summary judgment decision de novo." *Riverview Muir Doran, LLC v. JADT Dev. Grp., LLC,* 790 N.W.2d 167, 170 (Minn.2010) (citation omitted). "A motion for summary judgment shall be granted when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that either party is entitled to a judgment as a matter of law." *Fabio v. Bellomo,* 504 N.W.2d 758, 761 (Minn.1993) (citation omitted). "On appeal, the reviewing court must view the evidence in the light most favorable to the party against whom judgment was granted." *Id.*

***6** UPS supports its assertion that the district court's grant of summary judgment must be reversed with three arguments. Its first argument is that because the district court erred by denying UPS's motion to amend, summary judgment was premature. We reject that argument because we have already concluded that the district court did not err by denying the motion to amend.

UPS's second argument is that its contest of the 2013 failure-to-abate citations functions as a stay of abatement as to the 2010 violation citations, precluding summary judgment based on the latter until the contest of the former is resolved. We disagree.

Minnesota law provides that an employer may contest a violation citation, and that if the employer fails to do so, the citation becomes a "final order of the commissioner ... not subject to review by any court or agency." Minn.Stat. § 182.661, subd. 1. An identical provision applies to failure-to-abate citations. *Id.,* subd. 2. And "[t]he commissioner may bring an action in district court for injunctive or other appropriate relief including monetary damages if the employer fails to comply with a final order of the commissioner." *Id.,* subd. 2a. UPS reads these three subdivisions as describing a three-step process in which a violation citation must be followed by a failure-to-abate citation before the commissioner may seek an injunction under subdivision 2a. That reading is incorrect. The text of the statute plainly shows that subdivision 2a is not, as UPS contends, "a subpart of ... subd. 2." Instead, it is a subdivision of equal stature with subdivisions 1 and 2. Additionally, the statute does not provide that only a failure-to-abate citation may become a final order of the commissioner. Subdivision 1 provides that an unappealed violation citation may become a final order regardless of whether a failure-to-abate citation is issued later. This distinction is important because it lays the groundwork for a violation citation to become a final order after review by the MnOSHA board. An employer who contests either type of citation need not abate the alleged violation until the

contested-case process has run its course. *Id.,* subd. 2. For contests that reach the MnOSHA board, the contested-case process ends with the board's decision unless the employer appeals to this court under MAPA. Minn.Stat. § 182.665. The statute describing MnOSHA-board review does not expressly state that the MnOSHA board's decision becomes a final order if not appealed, but that is the thrust of the relevant provisions when read as a whole. The statutory language does not support UPS's argument that the pendency of a contest of a failure-to-abate citation prevents a previously issued violation citation from becoming a final order when the violation-citation contest has run its course. Accordingly, we conclude that UPS's contest of the 2013 failure-to-abate citation does not function as a stay of abatement as to the 2010 violation citations, and therefore does not preclude the issuance of summary-judgment injunctive relief enforcing the 2010 violation citations.

***7** UPS's third argument is that genuine issues of material fact preclude granting summary judgment. The foregoing statutory analysis also relates to this third argument because the statute identifies the facts that are material to the summary-judgment motion. Statutory injunctive relief is available to the commissioner under section 182.661, subd. 2a when (1) a citation of either type becomes a final order; and (2) the employer fails to comply with it.[2] Thus, the only facts relevant to the commissioner's motion for summary judgment are whether the violation citations issued in 2009 became final orders, and, if they did, whether UPS complied with them. In its answer, UPS admitted that the MnOSHA board's decision was a final order, and that it had not changed thermostat settings after that decision. UPS urges us to consider several other facts as material to the summary-judgment motion, including whether the indoor-workroom temperature standard applies to its facilities; whether the temperature levels measured in its facilities have any health or safety effects on its workers; whether compliance is technically feasible; whether there are alternative means of compliance; whether the commissioner or the legislature should clarify the applicability of the temperature standard; and whether compliance must be waived because it is prohibited by process requirements. None of these facts are material to the summary judgment motion because none of them relate to whether UPS has complied with the final order. Instead, they relate to whether UPS is *required* to comply. That ship has sailed. UPS waived the argument that compliance is not required when it failed to perfect its certiorari appeal.

In sum, UPS has admitted that the 2010 violation citations became final orders when the MnOSHA board affirmed them, but it has never asserted that it has complied with those final orders or even attempted to comply, or that facts might exist that could demonstrate compliance or attempted compliance. We therefore conclude that the district court did not err by granting the commissioner's motion for summary judgment because there are no genuine issues about facts material to the grant of statutory injunctive relief under section 182.661, subd. 2a.

III. The district court did not lack authority to issue the permanent injunction.

As to the authority of the district court to issue the permanent injunction, UPS frames its argument in terms of subject-matter jurisdiction. We review questions of subject-matter jurisdiction de novo. *Johnson,* 648 N.W.2d at 670. Here, the injunction at issue is a creature of statute. Whether the district court had subject-matter jurisdiction to consider the commissioner's motion depends on whether the statutory prerequisites were met. We have already concluded that they were, and we accordingly conclude that the district court had subject-matter jurisdiction to consider the commissioner's motion. We also conclude that this issue is better framed as an inquiry into the *scope* of the district court's authority to actually issue the injunction.

***8** "The granting of an injunction generally rests within the sound discretion of the [district] court, and its action will not be disturbed on appeal unless, based upon the whole record, it appears that there has been an abuse of such discretion." *Cherne Indus., Inc. v. Grounds & Assocs., Inc.,* 278 N.W.2d 81, 91 (Minn.1979). "[W]here injunctive relief is explicitly authorized by statute ... proper exercise of discretion requires the issuance of an injunction if the prerequisites for the remedy have been demonstrated and the injunction would fulfill the legislative purposes behind the statute's enactment." *Wadena Implement Co. v. Deere & Co.,* 480 N.W.2d 383, 389 (Minn.App.1992), *review denied* (Minn. Mar. 26, 1992).

UPS argues that the district court's injunctive authority is limited to the two facilities for which MnOSHA issued violation citations, and that the scope of the injunction must be limited correspondingly.[3] Whether that argument prevails depends on whether the scope of the injunction constituted an abuse of discretion, which in turn depends on whether that scope would fulfill the legislative purposes behind the act's enactment. Stated another way, the question before us is whether the issuance of an injunction applicable to *all* of UPS's Minnesota distribution facilities fulfills the legislative purposes behind the

enactment of the act.

The Minnesota Occupational Safety and Health Act of 1973 includes a statement of the legislature's many purposes for enacting it. Minn.Stat. § 182.65, subd. 2 (2012). That statement indicates that the act is intended to, among other things, promote "the earnest cooperation of government, employers and employees," *id.,* and "to assure so far as possible every worker in the state of Minnesota safe and healthful working conditions, ..." *id.,* subd. 2(b). To achieve those purposes, the act gives the commissioner authority to "promulgate and enforce mandatory occupational safety and health standards applicable to employers and employees in the state of Minnesota." *Id.,* subd. 2(b)(1). The act backstops the commissioner's authority by providing that the district courts may issue "injunctive or other appropriate relief including monetary damages if the employer fails to comply with a final order of the commissioner." Minn.Stat. § 182.661, subd. 2a. The provision for injunctive relief does not limit the scope of the relief a district court may issue.

Here, it is undisputed that after UPS ordered thermostat settings to be lowered to 45 degrees during the winter months, employee complaints about cold temperatures in the distribution facilities led to inspections, which in turn revealed that thermostats were set at 45 degrees, and that temperatures were below the standard for indoor workrooms. UPS timely asserted its statutory right to dispute those citations and the process followed the course provided by statute, proceeding to an ALJ, and then to the MnOSHA board. But even after the 2010 violation citations became final orders, by virtue of the MnOSHA board's affirmance and UPS's failure to perfect its appeal, UPS took no steps to comply with those final orders. When MnOSHA attempted to verify whether UPS had complied by conducting follow-up inspections, UPS repeatedly refused to cooperate, and the inspector was unable to complete an inspection until MnOSHA obtained a warrant and the inspector was accompanied by sheriff's deputies. UPS consistently behaved in an intransigent manner, treating MnOSHA inspectors and final orders with contempt.

***9** Under these facts, we conclude that the district court did not overreach by ordering UPS to raise the temperature settings in all of its Minnesota facilities. The scope of the injunction served the legislative purpose of promoting employer cooperation by demonstrating to employers that the district courts will exercise their injunctive authority to enforce final orders of the commissioner. It also served the purpose of assuring that as many Minnesota workers as possible will work in safe and healthful conditions by extending the effect of the commissioner's final orders to every worker in every UPS distribution center in this state. The effect of the final orders was to ensure that workers in the Minneapolis and Maple Grove facilities would work in an environment consistent with the indoor air temperature standard. The effect of the injunction was to overrule a UPS policy that demonstrably leads to working conditions not consistent with that standard.

UPS's persistent noncompliance further justifies the scope of the injunction. The record shows that UPS has refused to abate, or even try to abate, violations first identified in 2009. At the time the commissioner sought the injunction the original violations were almost four years old, MnOSHA had verified UPS's noncompliance by conducting a follow-up inspection, and UPS had resisted MnOSHA's efforts to such an extent that MnOSHA had obtained a search warrant and a law-enforcement escort. Under those circumstances, the district court could reasonably conclude that UPS might similarly resist MnOSHA's efforts with regard to all of its other facilities, and that the process of inspecting them all, issuing citations, pursuing the administrative process, and issuing injunctions would take years. In the meantime, during the winter months, workers in those facilities presumably would be exposed to conditions not compliant with the indoor-air-temperature standard, which would frustrate the legislative purposes behind the statute's enactment.

Because the act does not limit the scope of an injunction to the enforcement of specifically identified and cited violations, we conclude that under the unique facts of this case the injunction, as issued, serves the legislative purpose of the act, and is therefore valid.

IV. The validity of the temporary injunction is moot.

Early in the procedural history of this appeal, the commissioner moved to dismiss appeal A13–2378, arguing that the temporary injunction was mooted by the district court's imposition of the permanent injunction. We denied the motion, concluding that whether the temporary injunction is moot depends on the outcome of the appeal of the permanent injunction. Because we conclude that the permanent injunction is valid, we also conclude that the arguments regarding the temporary

injunction it superseded are moot, and we do not address them.

Affirmed.

Concurring in part, dissenting in part, RODENBERG, Judge.

RODENBERG, Judge (concurring in part, dissenting in part).

***10** I concur with the court's opinion in all respects except concerning the scope of the permanent injunction. On that issue, I respectfully dissent.

As an initial matter, UPS frames this issue as one of subject-matter jurisdiction, presumably to deflect the commissioner's assertion that UPS has waived any argument concerning the scope of the injunction by failing to raise them before the district court. *See, e.g., Tischer v. Hous. & Redev. Auth. of Cambridge,* 693 N.W.2d 426, 430 (Minn.2005) (citing Minn. R. Civ. P. 12.08(c)) (stating that subject-matter jurisdiction may not be waived). In my view, the district court was vested with subject-matter jurisdiction when the citations issued in 2010 became final orders and UPS preserved arguments about the injunction's scope by broadly challenging the validity of the injunction. The arguments UPS now asserts are implicit in those it asserted before the district court. Both parties have fully briefed the issue, and our decision does not hinge on new or disputed facts. *See Thiele v. Stich,* 425 N.W.2d 580, 582 (Minn.1998) (stating that an appellate court generally will not consider matters not argued to and considered by the district court); *but see Watson v. United Servs. Auto. Ass'n,* 566 N.W.2d 683, 687–88 (Minn.1997) (recognizing and applying an exception for arguments that are "implicit in or closely akin to the arguments below," "raised prominently in briefing," and "not dependent on any new or controverted facts" (citation and quotation marks omitted)).

Although vested with subject-matter jurisdiction, the district court issued an injunction that is impermissibly broad. The original citations here were specific to the Maple Grove and Minneapolis UPS facilities, based on conditions personally observed and measured by an OSHA inspector. UPS contested the citations, and the resulting decisions of the ALJ and the OSHA board pertain only to those two citations and those two facilities. The district court may issue an injunction when an "employer fails to comply with a final order of the commissioner." Minn.Stat. § 182.661, subd. 2a (2012). The final order of the commissioner related solely to the Maple Grove and Minneapolis facilities. In my opinion, the scope of the injunction available under subdivision 2a must be limited to those two facilities. That is what the statute plainly says.

The district court also analyzed its decision under the framework for equitable injunctions and concluded that enjoining UPS concerning facilities never inspected or cited was appropriate under equitable principles. I am not persuaded. In my view, the prerequisites for consideration of an equitable injunction were not met here, and even if they were, the district court wrongly based its equitable-injunction analysis on assumed facts.

One of the basic prerequisites for an equitable injunction is a showing that available legal remedies are inadequate. *Cherne Indus. ., Inc. v. Grounds & Assocs., Inc.,* 278 N.W.2d 81, 92 (Minn.1979). Here, the legislature expressly provided for injunctive relief under section 182.661, subdivision 2a. The legislature also provided that the commissioner may impose increased fines when an employer demonstrates a pattern of noncompliance. *See* Minn.Stat. § 182.666, subds. 1 (providing for fines of up to $70,000 for willful or repeated violations), 4 (providing for fines of up to $7,000 per day for failure to correct a cited violation) (2012). The commissioner has made no showing that these legal remedies are inadequate. Instead, it is suggested that OSHA's enforcement efforts would be hampered by limiting the injunction's scope to the cited facilities because to enforce the temperature standard at the other 29 locations, OSHA would have to inspect them all, issue citations if violations are found, and pursue the administrative process for each citation. In other words, for each facility, OSHA would have to follow the process the legislature has provided. But the legislature has addressed that concern by providing for enhanced penalties if an employer wilfully or repeatedly violates OSHA rules or fails to correct violations. And the legislature has also authorized the district court to impose "other appropriate relief including monetary damages" to force compliance. Minn.Stat. § 182.661, subd. 2a. The legislature has provided a variety of legal tools for enforcement of OSHA

rules. In the absence of a showing that these legal remedies are inadequate, the district court could not properly base a permanent injunction on equitable principles.

***11** Even if the district court were to determine that the legal remedies are inadequate, its analysis of the *Dahlberg* factors is flawed. Based on the OSHA inspector's observations of the configuration and operation of the Maple Grove and Minneapolis facilities, the ALJ ruled that those two facilities are governed by the standard applicable to garages. The OSHA board reversed that decision and concluded that the garage standard *and* the indoor-workroom standard apply to those two facilities. Based on this record, the commissioner, the district court, and this court have no idea at all about the configuration of the other 29 Minnesota UPS facilities, which OSHA standard (or standards) properly governs each of them, or what the temperatures are in each of those facilities. Yet the district court based its *Dahlberg* analysis on the unexamined, unsupported assumption that the indoor-workroom standard applies to the 29 uninspected facilities and that the temperatures in all of them are below whatever temperature standard applies to each. By doing so, the district court bypassed the detailed statutory process within which the commissioner may penalize employers who do not comply with health and safety standards.

In sum, the permanent injunction here exceeds the scope of the underlying citations and is inconsistent with the plain language of the statute. On this record, there has been no showing that the detailed and multiple legal remedies made available by the legislature are inadequate so as to justify equitable relief. I would modify the injunction by limiting its scope to the Maple Grove and Minneapolis facilities.

All Citations

Not Reported in N.W.2d, 2014 WL 4672393

Footnotes

1 UPS contested the additional citations and the case was scheduled for a hearing before a different ALJ. The commissioner moved for summary disposition and the ALJ granted the motion, affirming the failure-to-abate citations. At oral argument for this appeal, UPS stated that it had appealed the second ALJ's decision to the MnOSHA board. That matter has not yet reached this court.

2 Much more is required for equitable injunctive relief. *See Dahlberg Bros. v. Ford Motor Co.*, 272 Minn. 264, 274–75, 137 N.W.2d 314, 321–22 (1965) (describing five considerations relevant to granting an equitable injunction).

3 The order states that "[UPS] shall immediately set the temperature to sixty (60) degrees in its distribution centers when the outside temperature is below sixty (60) degrees." UPS does not dispute that the permanent injunction is intended to apply to all 31 of its Minnesota distribution centers.

End of Document

2012 WL 2202984
Only the Westlaw citation is currently available.

Court of Appeals of Minnesota.

STATE of Minnesota, by FRIENDS OF THE BOUNDARY WATERS WILDERNESS, Respondent,
v.
AT & T MOBILITY, LLC, et al., Appellants.

No. A11–1725.
|
June 18, 2012.
|
Review Denied August 21, 2012.

Synopsis

Background: Environmental group brought action seeking a declaration that a proposed 450–foot wireless-communications tower to be built 1.5 miles outside the border of the Boundary Waters Canoe Area Wilderness (BWCAW) would violate the Minnesota Environmental Rights Act (MERA) and also seeking an injunction prohibiting construction of the tower. The District Court, Hennepin County, 2011 WL 3360003, permanently enjoined the construction of tower. Proponents of tower appealed.

The Court of Appeals, Larkin, J., held that the proposed tower would not have a materially adverse effect on scenic views in the BWCAW.

Reversed.

Hennepin County District Court, File No. 27–CV–10–15150.

Attorneys and Law Firms

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Considered and decided by BJORKMAN, Presiding Judge; LARKIN, Judge; and STAUBER, Judge.

UNPUBLISHED OPINION

LARKIN, Judge.

***1** Appellants challenge the district court's order permanently enjoining the construction of a 450–foot wireless-communications tower in Lake County, arguing that respondent failed to prove that the injunction is warranted under the Minnesota Environmental Rights Act (MERA), Minn.Stat. §§ 116B.01–.13 (2010). Because the district court erred in concluding that the proposed tower would have a materially adverse effect on the environment, we reverse.

FACTS

This appeal arises from a proposal to construct a wireless-communications tower outside of the Boundary Waters Canoe Area Wilderness (BWCAW). The BWCAW is a 1.1 million-acre wilderness area composed of federal and state lands in northeastern Minnesota. The BWCAW consists of 1,175 lakes, hundreds of miles of streams and rivers, and surrounding forested areas. It is the most heavily used wilderness area in the country and the only wilderness area that has an airspace reservation prohibiting flights below 4,000 feet. Visitors to the BWCAW value its scenic beauty and remoteness, as well as its lack of evidence of human existence. The BWCAW was one of the first federally designated wilderness areas, and it is protected by the federal Wilderness Act of 1964 and the Boundary Waters Act of 1978. The Minnesota legislature also protects the BWCAW by statute, recognizing that the BWCAW is an area "of surpassing scenic beauty and solitude, free from substantially all commercial activities and artificial development." Minn.Stat. § 84.523, subd. 2 (2010).

Appellants AT & T Mobility LLC and American Tower Inc. applied for a conditional use permit (CUP) in Lake County, seeking permission to construct a wireless-communications tower (the proposed tower). Appellants plan to build the tower approximately 1 .5 miles outside of the border of the BWCAW and 7.5 miles east of Ely, on the western edge of the Fernberg Corridor.[1] The proposed tower would be 450 feet high and have five sets of three guy wires. The tower would be lit with red or white blinking lights 24 hours a day to increase its visibility and comply with federal aviation requirements. The CUP application stated that the proposed tower is "deemed the optimum size tower to provide the most amount of coverage in this rural area with the least amount of visual impact." The Lake County Planning Commission concluded that there is "a need for this tower for the health and safety of residents, tourists, and businesses." Lake County approved appellants' CUP application on July 20, 2009.

In July 2010, respondent Friends of the Boundary Waters Wilderness filed a complaint in Hennepin County District Court seeking a declaration that the proposed tower would violate MERA and an injunction prohibiting construction of the proposed tower.[2] The district court held a bench trial over four days in April 2011, heard the testimony of 15 witnesses, received the deposition testimony of 17 additional witnesses, and received 123 trial exhibits. On August 3, 2011, the district court issued its findings of fact and conclusions of law, granting respondent's request for declaratory and injunctive relief. Specifically, the district court determined that respondent is entitled to relief under MERA because the proposed tower would materially adversely affect the scenic and esthetic resources in the BWCAW. The district court also determined that appellants failed to establish an affirmative defense under MERA. The district court therefore enjoined construction of the

proposed tower. This appeal follows.

DECISION

I.

***2** The Minnesota legislature enacted MERA to provide persons in the state with a "civil remedy to protect air, water, land and other natural resources located within the state from pollution, impairment, or destruction." Minn.Stat. § 116B.01. The legislature sought "to create and maintain within the state conditions under which human beings and nature can exist in productive harmony." *Id.* Under MERA, any person or organization may maintain a civil action in district court for declaratory or other equitable relief in the name of the state for the protection of natural resources located within the state. Minn.Stat. § 116B.03, subd. 1.

To maintain an action under MERA, a plaintiff must make a prima facie showing that "the conduct of the defendant has, or is likely to cause the pollution, impairment, or destruction of the air, water, land or other natural resources located within the state." Minn.Stat. § 116B.04. Pollution is defined, in relevant part, as "any conduct which materially adversely affects or is likely to materially adversely affect the environment." Minn.Stat. § 116B.02, subd. 5. Natural resources include "[s]cenic and esthetic resources" owned by any governmental unit or agency. *Id.,* subd. 4.

A defendant may defeat a prima facie claim by affirmatively proving that "there is no feasible and prudent alternative and the conduct at issue is consistent with and reasonably required for promotion of the public health, safety, and welfare." Minn.Stat. § 116B.04. This affirmative defense must be considered "in light of the state's paramount concern for the protection of its air, water, land and other natural resources from pollution, impairment, or destruction," and "[e]conomic considerations alone shall not constitute a defense." *Id.*

In district court, respondent argued that MERA protects the scenic and esthetic resources in the BWCAW. Respondent further argued that the proposed tower would materially adversely affect those resources because portions of the proposed tower and its lights would be visible from several locations in the BWCAW. Appellants challenged respondent's prima facie showing under MERA. Appellants also asserted an affirmative defense, arguing that the expansion of wireless service in Lake County and the BWCAW is consistent with the promotion of public health and safety and that there is no feasible and prudent alternative to the 450–foot tower.

The district court concluded that the scenic and esthetic resources at issue here, namely, scenic views, are natural resources under MERA, relying on this court's decision in *State by Drabik v. Martz,* 451 N.W.2d 893, 895–97 (Minn.App.1990) (concluding that MERA provides "protection broad enough to cover" scenic views within the BWCAW that are affected by structures on nearby private property), *review denied* (Minn. Apr. 25, 1990). The district court further concluded that the proposed tower would materially adversely affect those resources. The district court rejected appellants' affirmative defense, reasoning that appellants had at least three reasonable and prudent alternatives that would expand wireless coverage in the target area.

***3** Appellants make several arguments in support of reversal. First, appellants argue that the district court's decision should be reversed as a matter of law, "because views of points located outside the BWCAW are not part of the scenic and esthetic resources of the BWCAW owned by a governmental unit." Appellants acknowledge that this argument is at odds with this court's contrary conclusion in *Drabik.*[3] Second, appellants argue that the district court's decision should be reversed because MERA does not apply to scenic and esthetic resources owned by the federal government. Third, appellants argue that the district court erred in concluding that the proposed tower would materially adversely affect scenic and esthetic resources in the BWCAW. And fourth, appellants argue that the district court erred in rejecting appellants' affirmative defense. Because

appellants' third argument is dispositive, we limit our review to the district court's conclusion that the proposed tower would materially adversely affect scenic and esthetic resources in the BWCAW.

II.

When reviewing a district court's determination regarding whether challenged conduct is likely to have a material adverse effect on the environment under MERA, an appellate court reviews the factual findings that underlie a material-adversity conclusion for clear error, but reviews the district court's legal conclusions de novo. *See Minn. Pub. Interest Research Grp. v. White Bear Rod & Gun Club,* 257 N.W.2d 762, 780 (Minn.1977) (stating that in the supreme court's opinion, "the evidence produced by plaintiffs clearly established that [the proposed action] would materially adversely affect the natural resources of the area"); *Zander v. State,* 703 N.W.2d 845, 856 (Minn.App.2005) (concluding, based on this court's review and analysis of the record, that the record did not show a materially adverse effect); *State by Fort Snelling State Park Ass'n v. Minneapolis Park & Recreation Bd.,* 673 N.W.2d 169, 176–77 (Minn.App.2003) (agreeing with the district court's analysis of the material-adversity factors and concluding that the district court "correctly applied the law and concluded that there was no material adverse effect"), *review denied* (Minn. Mar. 16, 2004); *State ex rel. Wacouta Twp. v. Brunkow Hardwood Corp.,* 510 N.W.2d 27, 30 (Minn.App.1993) (concluding that the record amply supported the district court's findings of fact, independently applying the relevant factors for determining material adversity in light of those findings, and holding that the challenged action was likely to have a material adverse effect). Appellate courts review de novo whether the district court's factual findings support its ultimate conclusions of law. *See Donovan v. Dixon,* 261 Minn. 455, 460, 113 N.W.2d 432, 435 (1962) ("[I]t is for [appellate courts] to determine whether the findings support the conclusions of law and the judgment."); *Ebenboh v. Hodgman,* 642 N.W.2d 104, 108 (Minn.App.2002) (stating that whether a district court's findings of fact support its conclusions of law and judgment is a question of law, which we review de novo).

***4** In *State by Schaller v. Cnty. of Blue Earth,* the supreme court articulated five factors to be considered when determining "whether or not conduct materially adversely affects or is likely to materially adversely affect the environment under [MERA]." 563 N.W.2d 260, 267 (Minn.1997). The five factors are:

> (1) The quality and severity of any adverse effects of the proposed action on the natural resources affected;
>
> (2) Whether the natural resources affected are rare, unique, endangered, or have historical significance;
>
> (3) Whether the proposed action will have long-term adverse effects on natural resources, including whether the affected resources are easily replaceable (for example, by replanting trees or restocking fish);
>
> (4) Whether the proposed action will have significant consequential effects on other natural resources (for example, whether wildlife will be lost if its habitat is impaired or destroyed);
>
> (5) Whether the affected natural resources are significantly increasing or decreasing in number, considering the direct and consequential impact of the proposed action.

Id.

The *Schaller* factors are non-exclusive and "each factor need not be met in order to find a materially adverse effect." *Id.* "Rather, the factors are intended as a flexible guideline for consideration as may be appropriate based on the facts of each case." *Id.* Even though the supreme court has broadly interpreted MERA, the supreme court has also recognized that MERA "requires something more than merely an adverse environmental impact to trigger its protection." *Id.* at 266. "[A]lmost every human activity has some kind of adverse impact on a natural resource," but MERA is not construed as "prohibiting virtually all human enterprise." *Id.* at 265 (quotation omitted).

The district court analyzed the *Schaller* factors and made findings and conclusions regarding each of the factors. Appellants do not assign error to the district court's factual findings. Instead, appellants challenge the district court's attendant legal analysis and conclusions. Appellants argue that the district court "effectively ignored the statute's materiality requirement in

accepting [respondent's] subjective position that any view of a man-made structure from within the BWCAW would unduly interfere with the 'wilderness experience' of its members." We address this argument in the context of the district court's analysis of the *Schaller* factors.

Quality and Severity of Any Adverse Effects

The first factor addresses the quality and severity of any adverse effect of the proposed action on the natural resources affected. *Id.* at 267. "Severe" is commonly defined as unsparing or harsh; strict; very serious; grave or grievous. *The American Heritage Dictionary of the English Language* 1653 (3rd ed.1992); *see* Minn.Stat. § 645.08(1) (providing that "words and phrases are construed according to ... their common and approved usage"). As we recognized in *Fort Snelling,* in the context of MERA, "severity is relative and must be weighed and analyzed." 673 N.W.2d at 176. This approach recognizes the competing interests that are expressed in the statement of legislative purpose regarding the civil remedy established in MERA: "[T]o create and maintain within the state conditions under which human beings and nature can exist in productive harmony...." Minn.Stat. § 116B.01; *see Schaller,* 563 N.W.2d at 264 (recognizing the express legislative purpose).

***5** The district court found that the natural resources at issue in this case are the scenic and esthetic resources in the BWCAW, specifically, scenic views. As to the adverse effect of the proposed tower on those resources, the district court found that "when there is an unobstructed line of sight, the [p]roposed [t]ower would be visible for at least 8 miles during the daytime and more than 10 miles during the night time." The district court specifically found that the proposed tower would be partially visible from ten lakes within the BWCAW. This finding was primarily based on the testimony and viewshed analysis of a professional surveyor who was called as a witness by respondent. The court found that between 38 and 180 feet of the proposed tower would be visible from the ten lakes, depending on the lake, but the light at the top of the proposed tower would be visible from each of the ten lakes at night. The court also found that portions of the proposed tower and the light at the top of the tower would be visible from campsites on four of the ten lakes. The court further found that although three existing communications towers in and around Ely are visible from one of the ten lakes, no communications towers are visible from the other nine lakes. Based on its findings regarding the visibility of the proposed tower, the district court concluded that the proposed tower "would have a qualitative and severe adverse effect on the scenic views from at least 10 significant areas within the protected BWCAW."

Appellants argue that the district court "failed to appropriately consider the nature of the proposed tower's impact in assessing the quality and severity of any adverse effects" and that the court's decision "rests upon a purely subjective esthetic judgment about the impact of the tower upon scenic views." First, appellants stress the fact that respondent presented no "competent evidence" regarding what the proposed tower, or more specifically, what the visible portions of the proposed tower would look like to a BWCAW visitor. *Cf. Drabik,* 451 N.W.2d at 896–97 (indicating that a plaintiff in a MERA action challenging the construction of a communications tower near the BWCAW presented drawings by a registered land surveyor demonstrating the visual impact of the tower). Although respondent introduced photographs of an existing tower near Cotton, taken from various distances as an example of what the proposed tower would look like from a distance, the district court did not rely on those photographs in arriving at its determination.

Second, appellants contend that the district court should have assessed the relative severity of the adverse effect in an overall context, rather than treating any potential visibility as a severe adverse effect. For example, appellants note that the ten lakes from which portions of the tower would be visible constitute less than one percent of the 1,175 total lakes within the BWCAW. Appellants also note that the U.S. Forest Service has classified the BWCAW into areas reflecting different levels of isolation and solitude. Several of the lakes at issue are categorized as "semi-primitive motorized wilderness," the category with the lowest degree of solitude. There is no assertion that any of the lakes in question are categorized as "pristine wilderness," the category with the best opportunities for isolation.

***6** We agree with appellant's contention that the district court erred as a matter of law by failing to weigh and analyze the relative severity of the proposed tower's adverse effect on scenic views as required under *Fort Snelling.* The district court's failure to do so is apparent when one attempts to reconcile the district court's factual findings with its conclusion that the proposed tower would have a severe adverse effect. The findings primarily focus on preserving scenic views that do not

include any evidence of human existence: "people value the scenic views and the lack of evidence of humans on the 10 lakes at issue...." But the district court also found that evidence of human existence (including a water tower, cabins, and existing communication towers) is already visible from one of the lakes in question and that the lake is nevertheless popular with BWCAW visitors. The district court further found that motor-boat use is allowed on four of the lakes during the summer.

In sum, the district court's findings establish that less than fifty percent of the proposed tower will be visible from less than one percent of the BWCAW's 1,175 lakes, several of which have scenic views that include signs of human existence. And the district court made no findings as to what degree of visibility from the less-than one percent of the lakes reaches the "severe" threshold, that is, harsh or very serious. As the district court observed, "[s]ome people are not bothered by the sight of a cell phone communication tower" but "other people find that cell towers, even outside of a protected wilderness area, have a very negative impact on scenic views and are a negative visual esthetic." The district court's analysis appears to turn, in large part, on the subjective judgment that respondent advocates. But the policies embodied in MERA cannot reasonably be applied on a subjective basis. Because the district court's findings do not sustain its legal conclusion that the proposed tower would have a severe adverse effect on scenic and esthetic resources in the BWCAW, the conclusion is erroneous as a matter of law, and this factor does not weigh against construction of the proposed tower.

Rarity, Uniqueness, Endangered Status, or Historical Significance

As to the second *Schaller* factor, the district court found that "the scenic views from the BWCAW where there are no permanent signs of man or modernity are rare and unique" and that these views become "increasingly endangered" as "commerce increases." The district court also found that the BWCAW "has special historical significance for many" people. Reasoning that "[t]he unique value of the BWCAW derives precisely from the rarity of the extraordinary scenery and wilderness experience," the district court concluded that "[t]he scenic views and vistas from within the BWCAW are rare, unique, endangered and of great historical significance," and the district court weighed this factor "very strongly" against construction of the proposed tower. We discern no error in the district court's conclusion on this factor.

Long Term Adverse Effects

***7** In support of its conclusion on this factor, the district court found that the tower is not permanent but that it will be present for many decades. The court also found that "broad scenic views with no visible signs of man" are not replaceable. The district court concluded that the proposed tower will have a "persistent and long term negative effect on the scenic views from numerous locations within the BWCAW" and that this factor weighs against construction of the tower.

Appellants contend that the district court misconstrued the pertinent inquiry, arguing that "[t]his factor asks not how long a structure might be kept in place, but whether it will cause any permanent, long-term damage." The long-term-adverse-effect factor has two components: "[w]hether the proposed action will have long-term adverse effects on natural resources," and "whether the affected resources are easily replaceable." *Schaller,* 563 N.W.2d at 267. The district court discounted the relevance of the second component, reasoning that it is limited to "replacing resources such as replanting trees or restocking fish that cannot happen here." This reasoning is inconsistent with this court's approach in *Fort Snelling.* In *Fort Snelling,* this court agreed with the district court's conclusion that a proposed athletic center (i.e., a structure that could be used for decades) would have no long-term effects because "the district court properly considered the nature of the athletic center improvements and that simple removal of the structures would return the [site] to [its] original open space." *Fort Snelling,* 673 N.W.2d at 176. The same is true here: removal of the proposed tower, which would be located outside of the BWCAW, would immediately eliminate any adverse effect on scenic views in the BWCAW, thereby restoring the affected resource to its original condition. We therefore conclude that this factor does not weigh as heavily against construction of the proposed tower as the district court concluded.

Significant Consequential Effects on Other Natural Resources

The fourth *Schaller* factor considers whether the proposed action will have "significant consequential effects on other natural resources." 563 N.W.2d at 267. "Significant" is commonly defined as "[h]aving or likely to have a major effect; important." *The American Heritage Dictionary of the English Language* 1679 (3rd ed.1992). Although the district court made detailed findings of fact regarding the effect that the proposed tower will have on migratory birds, the district court also found that "it [was] not possible ... to confidently quantify how many of which species of birds will be killed by the [p]roposed [t]ower." The district court observed that it was "difficult to determine how many birds will be killed by the [p]roposed [t]ower and equally difficult to determine how significant this effect will be."

These findings are not sufficient to sustain the district court's legal conclusion that this factor weighs against the proposed tower. The district court's failure to consider the possibility that the proposed tower may make the BWCAW accessible to more visitors is also of concern. *See Fort Snelling,* 673 N.W.2d at 176 (stating that the district court properly considered the effects of the proposed action on other natural resources, including the positive effects of reinvigorating presently abandoned historical buildings and increasing the number of visitors to a historical site). In the end, this factor requires a determination regarding the significance of any consequential effect on other natural resources. Because the district court did not find a *significant* consequential effect on other natural resources, the district court erred in concluding that this factor weighs against construction of the proposed tower.

Whether the Affected Natural Resource is Significantly Increasing or Decreasing

***8** The district court found that scenic views "from the lakes and rivers in the BWCAW where there are no lasting signs of human impact, are limited and finite resources" and that "[t]hey are not increasing and unless protected they will decrease over time." The district court therefore concluded that this factor weighs against construction of the proposed tower.

This factor asks whether the affected natural resource is *significantly* increasing or decreasing in number. Yet the district court's findings and conclusion regarding this factor do not address whether the potential decrease in scenic views is significant. Because the district court did not find that the affected natural resource is significantly decreasing, the district court erred in concluding that this factor weighs against the proposed tower.

Summary of Schaller *Factors*

In sum, the district court committed legal error by failing to weigh and analyze the relative severity of the adverse effect of the proposed tower on scenic views in the BWCAW. *See id.* Moreover, the district court's findings of fact do not support its conclusions of law on the first, fourth, and fifth *Schaller* factors. Although the long-term-adverse-effects factor weighs against the proposed tower, it does not weigh as heavily as the district court concluded once this court's approach in *Fort Snelling* is considered. Thus, only the rareness-and-uniqueness factor weighs strongly against construction of the proposed tower.

Even though the rareness-and-uniqueness factor is compelling, and "each factor need not be met in order to find a materially adverse effect," *Schaller,* 563 N.W.2d at 267, we hold that the district court's factual findings and legal analysis do not sustain its legal conclusion that respondent proved a prima facie case of a materially adverse effect on the scenic and esthetic resources in the BWCAW. Because respondent failed to establish a prima facie case for judicial intervention under MERA, *see* Minn.Stat. §§ 116B.02, subd. 5, .04, we reverse the district court's order enjoining construction of the proposed tower without addressing appellants' other arguments in support of reversal.

Reversed.

All Citations

Not Reported in N.W.2d, 2012 WL 2202984

Footnotes

1 The Fernberg Corridor is an area of non-BWCAW land that protrudes into the BWCAW east of Ely.

2 Respondent did not participate in the permitting process in Lake County.

3 In *Drabik,* the plaintiff filed a MERA claim seeking to enjoin the defendant from constructing a 600–foot radio tower near the BWCAW. 451 N.W.2d at 894–95. The district court granted a preliminary injunction pending trial on the merits, and the defendant appealed the injunction. *Id.* at 895. Although a trial on the merits had yet to occur, the defendant argued the merits of his entire case. *Id.* We limited our review to determining whether a preliminary injunction was proper. *Id.* In doing so, we considered the defendant's argument that "because the tower would be constructed upon private property, no actionable scenic or esthetic pollution of government owned resources would occur under [MERA]." *Id.* at 897. This court rejected that argument and concluded that "MERA provides protection broad enough to cover the natural resources at issue." *Id.* Appellants argue that *Drabik* was wrongly decided and invite this court to overrule its previous conclusion that MERA may protect scenic views within the BWCAW that are negatively affected by structures on nearby private property. We decline to do so. *See State v. M.L.A.,* 785 N.W.2d 763, 767 (Minn.App.2010) (recognizing that this court is "bound by supreme court precedent and the published opinions of the court of appeals"), *review denied* (Minn. Sept. 21, 2010).

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Court of Appeals of Minnesota.

WATER IN MOTION, INC., et al., Petitioners,
v.
MINNESOTA DEPARTMENT OF LABOR AND INDUSTRY, Respondent,
Minnesota Plumbing Board, Respondent.

No. A16–0335.
|
Dec. 5, 2016.

Synopsis
Background: Petitioners filed declaratory judgment action against Department of Labor and Industry, bringing preenforcement administrative rules challenge to Plumbing Board's adoption of new uniform plumbing code.

Holdings: The Court of Appeals, Larkin, J., held that:

appellate review was limited to challenges to formally promulgated rules;

petitioners failed to demonstrate prejudice from conclusory analysis in Board's statement of need and reasonableness (SONAR), and thus rules were not required to be invalidated for failure to comply with rulemaking procedures; and

uniform plumbing code was rationally related to legitimate public purpose, and thus did not violate substantive due process.

Rules declared valid.

Minnesota Department of Labor and Industry, OAH File No. 60–1904–32225.

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Lori Swanson, Attorney General, Christopher M. Kaisershot, Sarah L. Krans, Assistant Attorneys General, St. Paul, MN, for respondent.

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Considered and decided by SMITH, TRACY M., Presiding Judge; LARKIN, Judge; and RODENBERG, Judge.

UNPUBLISHED OPINION

LARKIN, Judge.

***1** In this preenforcement administrative rules challenge pursuant to Minn.Stat. § 14.44 (2014), petitioners challenge respondent Minnesota Plumbing Board's adoption of a new uniform plumbing code. We declare the rules valid.

FACTS

The Minnesota Plumbing Board is the state entity with authority to adopt a state plumbing code and amendments to that code. *See* Minn.Stat. § 326B.435, subd. 2(3) (2014). The board is composed of 14 members: 12 appointed by the governor with the advice and consent of the senate; the commissioner of labor and industry or a designee; and the commissioner of health or a designee. *Id.,* subd. 1(a) (2014). By statute, 11 of the 12 appointed members are required to hold various specified licenses or professions relevant to the plumbing code. *Id.* The remaining appointed member must be a public member. *Id.* Since its inception in 2007, the board has been chaired by John Parizek.

In 2010, the board received a request to replace Minnesota's existing, "homegrown" plumbing code with the International Plumbing Code (IPC), a product of the International Code Council (ICC), and another request to replace the existing plumbing code with the Uniform Plumbing Code (UPC), a product of the International Association of Plumbing and Mechanical Officials (IAPMO). The IPC is part of a family of "I-codes"; Minnesota has adopted a number of the I-codes, including the International Residential Code. The IPC is considered in the industry to be more "performance based," meaning that requirements in the code are stated in terms of what must be accomplished, rather than the precise manner in which it must be done. The UPC, in contrast, is considered to be a more "prescriptive" code.

The board formed a National Code Review Committee (the committee) to study the possibility of adopting a model plumbing code and make a recommendation to the board. The committee met twice in early 2011, and discussed model-code adoption in terms of code administration, health and safety, costs and training, and accessibility. The committee's meeting minutes reflect its consideration that the IPC is the more performance-based code, but the committee deemed the two codes fairly equal in terms of health and safety. The committee discussed costs of adopting a model code generally, which it concluded would be hard to quantify. The committee noted that Minnesota's licensing reciprocity agreements with North Dakota and South Dakota could be jeopardized if Minnesota adopted the IPC because those states have adopted the UPC. At the end of its March 31, 2011 meeting, the committee voted to recommend to the full plumbing board that one of the model codes be adopted.

At the board's April 19, 2011 meeting, the committee made its recommendation and the board heard presentations from representatives of the ICC and IAPMO about their respective model codes. The board also allowed public comments from individuals advocating for adoption of the IPC or UPC. Following the presentations and public-comment period, the board discussed commissioning side-by-side comparisons of the model codes and the existing plumbing code. Motions were made to require such analysis of both of the model codes, but none of these motions prevailed. Instead, the board unanimously passed a motion to move forward with adopting either the IPC or UPC with "appropriate amendments at a future rulemaking" and a motion to "adopt[ ] the UPC and direct the [committee] to report back to the Board any necessary amendments ." Although it was not mentioned in the latter motion, according to board chair Parizek, "the Board was well aware that adoption of a national code can only be accomplished through proper rulemaking, and the intent was to move forward down this path."

***2** On November 13, 2012, the board initiated the statutory rulemaking process by publishing a request for comments on possible amendments to the state plumbing code in the State Register, specifying the "possible incorporation of the 2012[UPC] by reference, with amendments." The board completed a Statement of Need and Reasonableness (SONAR), stating the board's intent to adopt the UPC with amendments and noted that the UPC was chosen over the IPC because "the UPC most closely resembles the existing Minnesota Plumbing Code, and the UPC is adopted in three of the four states adjacent to Minnesota, two of which have reciprocity agreements with Minnesota, providing consistency" and that "adopting the UPC presents an easier transition from the existing code than the IPC would." The board published a dual notice to adopt rules without a hearing or to hold a hearing if 25 or more requests for hearing were received. More than 25 requests for a hearing were received, and an administrative-law judge (ALJ) conducted a hearing. The ALJ heard testimony from Parizek and public comments from 15 interested individuals.

Parizek testified that, by virtue of their background and experience, the members of the plumbing board (with the exception of the public member) were familiar with the existing Minnesota Plumbing Code as well as the UPC and IPC. Parizek testified that adoption of a model code was necessary because the board had been overwhelmed by requests for product approval, proposals for new and amended code language, and inquiries regarding licensing requirements and code interpretation. Model codes, which are regularly updated by an outside organization, will allow the board to operate more efficiently. Parizek testified regarding reasons for adopting the UPC rather than the IPC, including that:

- The UPC is certified by the American National Standards Institute (ANSI), an impartial organization acting as a third party to oversee the code development process through consensus standards.

- The UPC is effective and relevant, and will be adequate to protect the health and safety of Minnesota citizens through minimum prescribed standards and is still specific enough to ensure uniform installations and enforcement throughout the state.

- The UPC has been adopted in North and South Dakota, which have licensing reciprocity agreements with Minnesota.

- Minnesota's version of the UPC will be freely accessible on the Internet and through a publication to be offered for purchase by IAPMO.

Following the hearing, the ALJ held the record open for the submission of written comments and rebuttal. The board submitted a letter response to the written comments received and the hearing testimony. In that letter, the board reasserted its three reasons for selecting the UPC over the IPC: (1) the UPC most closely resembled the existing plumbing code; (2) the UPC has been adopted in three adjacent states, two of which Minnesota has licensing reciprocity agreements with; and (3) the UPC would provide a smoother transition. The board submitted a letter from the North Dakota State Plumbing Board noting that there were very few differences between the UPC and the existing Minnesota Plumbing Code and that the UPC "is a very prescriptive code that is also very enforceable and user friendly."

***3** The board also responded to a number of objections that had been raised—both in proceedings before the board and at the administrative hearing—to adoption of the UPC. The overriding concern of commentators was that complying with the UPC, as the more prescriptive code, would be more expensive than complying with the IPC. The board expressly disagreed with this assertion, noting that even commentators opposing the adoption of the UPC conceded that the two codes are very similar in their technical requirements. The board refuted specific examples of more costly compliance offered by commentators, noting that most examples were based on a comparison of the IPC to the UPC without the amendments proposed by the board, and that the cost information presented was not substantiated, represented opinion, and was therefore unreliable. As to the performance-versus-prescriptive debate, the board expressed its judgment that the more prescriptive nature of the UPC promotes public safety, particularly in the context of inspections performed by persons who are not plumbers. The board concluded that the "UPC, as amended, is performance-based to the extent practicable."

Commentators also asserted that adopting the UPC would conflict with other portions of the Minnesota State Building Code, which is mostly comprised of I-codes. In this respect, the board noted that the current Minnesota Plumbing Code was not an I-code but had worked hand-in-hand with the I-codes, that proposed amendments to the UPC would "tailor it for consistency with Minnesota statutes and rules," and that other states have "successfully adopted many ICC building codes but adopt the UPC in lieu of the IPC."

The ALJ issued a report concluding that the board had complied with rulemaking requirements and demonstrated the need for and reasonableness of the proposed rules. The ALJ recommended adoption of the rules. The board voted to adopt the rules, and they were published in the State Register on July 27, 2015. The new rules took effect January 23, 2016. One month later, petitioners filed this declaratory-judgment action.

DECISION

This court exercises original jurisdiction, under the Minnesota Administrative Procedure Act (MAPA), over preenforcement challenges to the validity of administrative rules. Minn.Stat. § 14.44; *Coal. of Greater Minn. Cities v. Minn. Pollution Control Agency,* 765 N.W.2d 159, 163 (Minn.App.2009), *review denied* (Minn. Aug. 11, 2009). A preenforcement challenge "questions the process by which the rule was made and the rule's general validity before it is enforced against any particular party." *Coal. of Greater Minn. Cities,* 765 N.W.2d at 164 (quoting *Mfg. Hous. Inst. v. Pettersen,* 347 N.W.2d 238, 240 (Minn.1984)). "The standard of review is more restricted than in an appeal from a contested enforcement proceeding in which the validity of the rule as applied to a particular party is adjudicated." *Id.* (citing *Pettersen,* 347 N.W.2d at 240–41).

I. The scope of this action is limited to challenges to the rules formally promulgated.

***4** Petitioners argue at length that the board adopted a rule at its April 19, 2011 meeting that must be invalidated for failure to comply with statutory rulemaking requirements. In an April 20, 2016 order denying petitioners' motion to modify the record, this court stated that such assertions are beyond our scope of review in this preenforcement administrative rules challenge. We apply that determination here.

"Only formally promulgated rules may be challenged in a pre-enforcement action under Minn.Stat. § 14.44." *Minn. Ass'n of Homes for the Aging v. Dep't of Human Servs.,* 385 N.W.2d 65, 69 (Minn.App.1986), *review denied* (Minn. June 13, 1986). The proper procedure to challenge the alleged enforcement of an unpromulgated rule is to file a petition with the Office of Administrative Hearings (OAH) for decision by an ALJ that can then be appealed to this court. *See* Minn.Stat. § 14.381, .44 (2014).

It is undisputed that the board did not formally promulgate the rules adopting the UPC until July 2015. Indeed, Parizek testified to the board's awareness that a new plumbing code could not be adopted without rulemaking proceedings. Moreover, petitioners' predominant argument against the April 19, 2011 "rule" is that it was not formally promulgated. Under these circumstances, there is no basis for review by this court under Minn.Stat. § 14.44. *See L .K. v. Gregg,* 380 N.W.2d 145, 149 (Minn.App.1986) (noting that this court "cannot review what does not exist"), *review denied* (Minn. Mar. 14, 1986).

Petitioners argue that the plain language of Minn.Stat. § 14.44 allows a challenge to a "rule" without regard to whether it has been formally promulgated. But we decline to depart from our plainly worded previous holdings limiting our review to formally promulgated rules.[1] Petitioners also urge that this court should address its challenges to the April 19, 2011 "rule" because there is a sufficient record to do so. *See Minn. Ass'n of Homes for the Aging,* 385 N.W.2d at 69 (noting that a rule that has not been formally promulgated lacks a record and this court cannot review it). But this court has not held that it can review a "rule" that has not been formally promulgated under Minn.Stat. § 14.44 if there is a record, and our previous holdings regarding review under that statute are not contingent on the existence or absence of a record.

Even if we were to follow petitioners' preferred interpretation of Minn.Stat. § 14.44, we would not conclude that the board adopted a rule at its April 19, 2011 meeting. A "rule" is "every agency statement of general applicability and future effect, including amendments, suspensions, and repeals of rules, adopted to implement or make specific the law enforced or

administered by that agency or to govern its organization or procedure." Minn.Stat. § 14.02, subd. 4 (2014). Petitioners urge that the board adopted a rule when it voted to "adopt" the UPC at its April 19, 2011 meeting. Notwithstanding the board's poor choice of words, the board knew that it lacked authority to adopt the UPC at that meeting. *See* Minn.Stat. § 326B.13, subd. 1 (2014) (providing that adoption of state building code is subject to MAPA). And there is no suggestion, much less evidence, that the board intended to apply or did apply the UPC before its formal promulgation and January 2016 effective date. Accordingly, the board's April 19, 2011 vote to "adopt" the UPC was not an "agency statement of general applicability and future effect." *See* Minn.Stat. § 14.02, subd. 4.[2]

II. The rules formally promulgated on July 27, 2015, are valid .

***5** "In proceedings under section 14.44, the court shall declare the rule invalid if it finds that it violates constitutional provisions or exceeds the statutory authority of the agency or was adopted without compliance with statutory rulemaking procedures." Minn.Stat. § 14.45 (2014). Petitioners assert that the rules were adopted without compliance with statutory rulemaking procedures because the board failed to include adequate information in the SONAR and that the rules otherwise lack a rational basis.

A. The SONAR is not prejudicially defective.

"Agency rulemaking is strictly controlled by statute and the statutory procedures must be followed in order to create a valid rule." *Minn. Envtl. Sci. & Econ. Review Bd. v. Minn. Pollution Control Agency,* 870 N.W.2d 97, 101 (Minn.App.2015). One of the statutory requirements is that an agency prepares a statement of need and reasonableness (SONAR). *See* Minn.Stat. § 14.131 (2014). To the extent that "the agency, through reasonable effort" can ascertain the information, the SONAR must include the following:

> (1) a description of the classes of persons who probably will be affected by the proposed rule, including classes that will bear the costs of the proposed rule and classes that will benefit from the proposed rule;
>
> (2) the probable costs to the agency and to any other agency of the implementation and enforcement of the proposed rule and any anticipated effect on state revenues;
>
> (3) a determination of whether there are less costly methods or less intrusive methods for achieving the purpose of the proposed rule;
>
> (4) a description of any alternative methods for achieving the purpose of the proposed rule that were seriously considered by the agency and the reasons why they were rejected in favor of the proposed rule;
>
> (5) the probable costs of complying with the proposed rule, including the portion of the total costs that will be borne by identifiable categories of affected parties, such as separate classes of governmental units, businesses, or individuals;
>
> (6) the probable costs or consequences of not adopting the proposed rule, including those costs or consequences borne by identifiable categories of affected parties, such as separate classes of government units, businesses, or individuals;
>
> (7) an assessment of any differences between the proposed rule and existing federal regulations and a specific analysis of the need for and reasonableness of each difference; and
>
> (8) an assessment of the cumulative effect of the rule with other federal and state regulations related to the specific purpose of the rule.

Id.

An agency is separately required to determine, before the close of the hearing record, "if the cost of complying with a

proposed rule in the first year after the rule takes effect will exceed $25,000" for a business with fewer than 50 full-time employees or a statutory or home rule charter city with fewer than ten full-time employees. Minn.Stat. § 14.127, subds. 1–2 (2014).

***6** The board indisputably prepared a SONAR addressing each of the considerations in Minn.Stat. § 14.131 and made the determination that the cost of compliance for small businesses and municipalities would not exceed $25,000. Petitioners assert that the board failed to provide adequate information and analysis of SONAR considerations (3)-(5) and the small business and municipality cost determination. Thus, petitioners assert, the rules must be invalidated.

A SONAR "must be sufficiently specific so that interested persons will be able to fully prepare any testimony or evidence in favor of or in opposition to the proposed rules." Minn. R. 1400.2070, subp. 1 (2015). Deficiencies in the information provided in a SONAR do not require rule invalidation absent prejudice. *See Minn. League of Credit Unions v. Minn. Dep't of Commerce,* 486 N.W.2d 399, 405–06 (Minn.1992).

We agree that the board's analysis in the SONAR is conclusory and that the better practice would be to include more thorough analysis. However, we cannot conclude that petitioners were prejudiced by the conclusory nature of the SONAR. There is no argument that petitioners were surprised or prejudiced by the board's testimony at the hearing or that they were unable to fully prepare their own testimony and arguments for the hearing. We therefore reject petitioners' argument that the rules should be declared invalid based on deficiencies in the SONAR.

Petitioners assert that strict compliance with rulemaking procedures is required or rules must be invalidated, citing Minn.Stat. § 14.45, which provides that this court "shall" declare a rule invalid if it was adopted without compliance with statutory rulemaking procedures. *See also White Bear Lake Care Ctr., Inc. v. Minn. Dep't of Pub. Welfare,* 319 N.W.2d 7, 9 (Minn.1982) (holding that "[r]ules must be adopted in accordance with specific notice and comment procedures established by statute," and that "the failure to comply with necessary procedures results in invalidity of the rule"). But the cases in which our supreme court has invalidated rules for failure to comply with rulemaking procedures involved circumstances in which agencies wholly failed to promulgate rules. *See White Bear Lake,* 319 N.W.2d at 7–9 (discussing department of public welfare "rule which ha[d] not been promulgated in accordance with the Administrative Procedure Act"); *Johnson Bros. Wholesale Liquor Co. v. Novak,* 295 N.W.2d 238, 242 (Minn.1980) (discussing liquor control commissioner's failure to formally adopt rule and complete lack of compliance with statutory rulemaking procedures). And the supreme court made clear in *Minn. League of Credit Unions* that deficiencies in the SONAR do not require invalidation absent prejudice. 486 N.W.2d at 405–06.

Petitioners also urge that the rules must be invalidated under this court's decision in *Builders Ass'n of the Twin Cities v. Minn. Dep't of Labor & Indus.,* 872 N.W.2d 263 (Minn.App.2015), *review denied* (Minn. Dec. 29, 2015). In that case, we declared invalid, on substantive-due-process grounds, a rule adopted by the Minnesota Department of Labor and Industry that arbitrarily required sprinklers in new one- and two-family dwellings over 4,500 square feet and did not require sprinklers in new one-family dwellings under 4,500 square feet. *Builders Ass'n,* 872 N.W.2d at 266, 271. After invalidating the rule on due-process grounds, we separately determined that the department violated rulemaking procedures by failing to satisfactorily assess whether the cost of the rule would exceed $25,000 for any small business or city in the first year of enforcement. *Id.* at 274. *Builders Ass'n* is distinguishable, however, because it does not appear that the parties in that case raised the issue of prejudice, which has been squarely raised by respondents here.

B. The rules do not violate substantive due process.

***7** Under a substantive-due-process theory, administrative rules are invalid only if they bear no rational relationship to the accomplishment of a legitimate public purpose. *Pettersen,* 347 N.W.2d at 243. Minnesota courts apply an "arbitrary and capricious" test, making a "searching and careful inquiry of the record to ensure that the agency action has a rational basis." *Id.* at 244 (quotations omitted). "In attacking a statute or regulation on due process grounds, one bears a heavy burden; the statute or rule need only bear some rational relation to the accomplishment of a legitimate public purpose to be sustainable." *Id.* at 243. "When applying the arbitrary and capricious test, deference is to be shown agency expertise, but the agency must explain on what evidence it is relying and how that evidence connects rationally to the rule involved." *Minn. Chamber of*

Commerce v. Minn. Pollution Control Agency, 469 N.W.2d 100, 103 (Minn.App.1991) (quotation omitted), *review denied* (Minn. July 24, 1991).

Respondents assert that petitioners did not make a substantive-due-process challenge to the formally promulgated rules in their principal brief and thus have waived the right to make that challenge. We agree that petitioners failed to expressly articulate such a challenge. Petitioners' principal brief does, however, dispute the rational basis for the rules and argue that their adoption was arbitrary and capricious. We address these arguments within the applicable substantive-due-process framework.

The stated purpose of the statutes governing plumbing is "to promote the public health and safety through properly designed, acceptably installed, and adequately maintained plumbing systems." Minn.Stat. § 326B.41 (2014). Toward that end, the statutes authorize the board to "adopt the Plumbing Code that must be followed in this state and any Plumbing Code amendments thereto." Minn.Stat. § 326B.435, subd. 2(3). The board determined, in its collective professional judgment, that the UPC, as amended, was best suited to meet the purposes of the plumbing statutes. We will not lightly interfere with that judgment. *See Minn. Chamber of Commerce,* 469 N.W.2d at 103 (stating that this court defers to agency expertise).

The board's justification for selecting the UPC over the IPC is threefold: (1) resemblance to the then-existing Minnesota Plumbing Code; (2) the UPC's adoption in adjacent states, two of which have licensing reciprocity agreements with Minnesota; and (3) the smoother transition that could be made by adopting the UPC. These are rational bases for preferring the UPC and are supported by evidence in the record, particularly Parizek's testimony and the letter from the North Dakota State Plumbing Board.

Petitioners suggest that the rules lack a rational basis because the board did not sufficiently identify and articulate the costs associated with adopting the UPC. The board in the SONAR recognized two types of potential costs associated with adoption of the UPC-based rules. First, the board noted that the probable costs of implementation and enforcement would be minimal because the new rules would replace an existing plumbing code, for which there were already ongoing costs of training and compliance. Second, the board acknowledged that there may be increased costs associated with complying with particular provisions of the new UPC-based rules versus the existing plumbing code, and lower costs associated with complying with other provisions. The board in its judgment, however, anticipated the overall plumbing-related costs to be "neutral."

***8** The board's analysis of the cost of the new rules lacks the level of detail that we might prefer. We are cognizant, however, of the difficulty in quantifying the costs of adopting an entire model code, as opposed to particular provisions of a code. *Cf. Builders Ass'n,* 872 N.W.2d at 268–71 (addressing adoption of single sprinkler rule). We can envision endless permutations in cost comparison, depending on the particular work that a particular business or homeowner desires on a particular property. We are not persuaded that the board was required to undertake such a complex and hypothetical analysis. Minn.Stat. § 14.131 (requiring certain information to be included in SONAR "to the extent the agency, *through reasonable effort,* can ascertain [the] information" (emphasis added)). Instead we conclude that, faced with potential costs that were difficult to quantify, the board reasonably relied on other factors to select between the UPC and IPC.[3]

Lastly, petitioners assert that the rules must be invalidated because the board failed to provide analysis in support of its determination under Minn.Stat. § 14.127 (2014). Once again, although we would prefer more detailed analysis from the board, we cannot conclude that invalidation of the rules is required. Minn.Stat. § 14.127, subd. 1, requires an agency to make a determination whether the cost of complying with the rule in its first year of effectiveness will exceed $25,000 for certain small businesses and municipalities. The agency must make this determination before the close of the record before the ALJ and the ALJ must review and approve or disapprove the determination. *See* Minn.Stat. § 14.127, subd. 2.

The statute does not provide for this court's substantive evaluation of determinations under Minn.Stat. § 14.127, and, as we note above, our review is limited to determining whether an agency has violated constitutional provisions, exceeded its authority, or failed to comply with rulemaking requirements. Because the board made the required determination under Minn.Stat. § 14.127 and the ALJ reviewed and approved the determination, we cannot conclude that there was a failure to comply with statutory rulemaking requirements. Nor can we conclude that the board violated constitutional provisions or exceeded its statutory authority in making the § 14.127 determination. The board is authorized to adopt a state plumbing code through rulemaking and has articulated a rational basis for adopting the UPC. Accordingly, there is no basis for us to invalidate the rules based on the failure to provide a more thorough analysis under Minn.Stat. § 14.127.[4]

Petitioners rely on *Builders Ass'n* to argue that invalidation is required, but our holding in that case was based on our determination that the challenged rule was arbitrary and capricious and therefore violated due process. *See Builders Ass'n,* 872 N.W.2d at 271 (holding that rule "violates substantive due process because it is arbitrary and not the result of a reasoned determination"). Although we separately concluded that the agency violated § 14.127, we did not invalidate the rules solely on that ground and see no reason to do so here. *See id.* at 273–74.

***9 Rules declared valid.**

All Citations

Not Reported in N.W.2d, 2016 WL 7041978

Footnotes

1 Notably, following this court's decisions limiting direct § 14.44 actions to rules formally promulgated, the legislature amended MAPA to add § 14.381, which provides a remedy for parties asserting that an agency is enforcing rules without formal promulgation. *See* 2001 Minn. Laws ch. 179 § 8, at 673–74. Thus, even were we to reach petitioners' interpretation argument, we would conclude that the legislature endorsed our limitation of direct review under Minn.Stat. § 14.44 to promulgated rules by passing § 14.381.

2 To the extent petitioners argue that the board's vote to pursue adoption of the UPC was a statement of future effect, we reject that argument, which would lead to the absurd and circular result that any decision to pursue rulemaking would itself be subject to rulemaking. As the ALJ noted in his report, the board's decision to pursue adoption of the UPC "represented the Board's choice of regulatory approach," and did not create a rule.

3 As we note above, the board did specifically respond to alleged cost discrepancies raised by commentators during the rulemaking proceedings. Before this court, petitioners rely heavily on the board's failure to identify costs associated with a particular provision of the new rules requiring annual testing for certain backflow devices. At oral argument, however, it was disclosed that this cost would be incurred regardless of which model code was adopted. And the parties agree that the board acted reasonably in determining to adopt a model code.

4 Notably, even an agency determination that a rule *will* cost a covered small business or municipality more than $25,000 in the first year does not preclude promulgation of the rules. Rather, in the event of an affirmative determination under § 14.127, a covered small business or municipality may file a statement of temporary exemption. If such a statement is filed, "the rules do not apply to *that business* or *that city* until the rules are approved by a law enacted after the agency determination or administrative law judge disapproval." *Id.,* subd. 3 (emphasis added).

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