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**STATE OF MINNESOTA
IN COURT OF APPEALS
A16-1412**

In re the Appeal from the Order of the Joint Board of Kandiyohi and Meeker Counties
Establishing a Lateral to Joint County Ditch No. 52

Filed March 6, 2017

**Affirmed; motion to strike granted and motion to supplement the record denied
Connolly, Judge**

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

Paul R. Haik, Krebsbach & Haik, Ltd., Minneapolis, Minnesota (for appellant D&J Family Farm)

Jeffrey C. Braegelmann, Gislason & Hunter, LLP, New Ulm, Minnesota (for respondent petitioners)

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Considered and decided by Connolly, Presiding Judge; Larkin, Judge; and Reyes, Judge.

UNPUBLISHED OPINION

CONNOLLY, Judge

Appellant, a landowner, challenges the district court's judgment affirming the decision of respondent the Joint Drainage Authority (JDA) to grant the petition filed by

respondents-landowners (petitioners) and establish a lateral¹ that will drain into Kandiyohi County Ditch 52 (CD 52). Appellant argues that (1) the JDA lacked jurisdiction and (2) the district court erred in applying collateral estoppel to exclude certain evidence and in affirming the JDA's arbitrary and capricious decision. Because the evidence, taken as a whole, furnishes an ample basis for the JDA's decision and because we see no error of law in the district court's judgment, we affirm.

FACTS

In 2008, petitioners, with the legal assistance of attorney K.D., filed a petition for a lateral. The petition was deemed inadequate and was not considered. In February 2011, they filed a second petition, seeking to establish a lateral beginning in Meeker County, running into Kandiyohi County, and connecting to CD 52. CD 52 was governed by Kandiyohi County's drainage authority (DA), which was composed of five Kandiyohi County commissioners.

Because the proposed lateral would traverse both Kandiyohi and Meeker counties, a five-member JDA was appointed, with three of its five members being Kandiyohi County commissioners and two being Meeker County commissioners.² The JDA met in March 2011, accepted the petition, and appointed a firm of engineers and a project engineer, D.H. Attorney K.D. was retained to represent the JDA in these proceedings.

¹ A "lateral" is "a side ditch or conduit (as in a water system)." *Webster's Ninth New Collegiate Dictionary* 676 (1986).

² See Minn. Stat. § 103E.235, subd. 2 (2016) (providing that a joint drainage authority must be appointed when the drainage system is in two or more counties).

At the public preliminary hearing,³ the county attorney reported that the petition was adequate for consideration; D.H. presented a preliminary report; and landowners who opposed the lateral made comments. The hearing was continued, and D.H. was directed to investigate alternative routes for the lateral, including their costs, and establishing a tile⁴ instead of a ditch on one opposing landowner's property.

When the hearing resumed in October 2011, it was determined that (1) the proposed lateral was feasible; (2) there was a necessity for the lateral; (3) the lateral would be of public utility, benefit, and welfare;⁵ (4) CD 52 provided an adequate outlet for the lateral; and, (5) if the DA (composed of five Kandiyohi county commissioners) granted an outlet for the lateral into CD 52, D.H. would prepare a final report of a detailed survey.

In September 2012, the DA issued a finding that CD 52 was an adequate outlet for the proposed lateral and an order granting permission for its use as an outlet and assessing a \$14,000 outlet fee. This order was not challenged. In November 2012, the JDA appointed three viewers and an alternate to determine the benefits and damages of the lateral and affirmed the outlet fee.⁶

D.H. amended and filed the final report of the detailed survey. The report concluded that: (1) the outlet for the lateral was adequate to accommodate water flowing into CD 52; (2) CD 52, if properly maintained, could accommodate additional water from the lateral;

³ See Minn. Stat. § 103E.261 (2016) (requiring a public preliminary hearing).

⁴ A "tile" is "a hollow or a semi-circular and open earthenware or concrete piece used in constructing a drain." *Webster's, supra*, at 1234.

⁵ See Minn. Stat. § 103E.015, subd. 1 (2016) (setting out criteria to be considered before establishing a drainage project).

⁶ See Minn. Stat. § 103E.305 (2016) (requiring appointment of viewers).

(3) the lateral would increase the amount of water at the downstream terminus of CD 52 by less than one percent; (4) the construction cost of the lateral would be \$324,135; and (5) the lateral was the most practical alternative for draining the land.

The viewers filed their report and statement of benefits and damages.⁷ Benefits, calculated from increase in crop production for drained land, were \$504,874; damages, calculated from loss of land due to temporary construction easements, were \$6,704. After a landowners' informational meeting, total benefits were adjusted to \$494,374.

After holding a final hearing on the lateral,⁸ the JDA approved findings that (1) D.H.'s final report, as amended, and the viewers' report were complete and correct; (2) benefits exceeded costs-plus-damages; (3) the lateral would be of public utility and benefit; and (4) the project was practicable. The JDA issued an order establishing the lateral.⁹

Appellant challenged both that order and the calculation of benefits and damages in the district court. Its challenge to the establishment of the lateral included a challenge to the DA's 2012 decision that CD 52 could be used as an outlet for the lateral. As required by the drainage code, the establishment trial occurred first.¹⁰

⁷ See Minn. Stat. § 103E.321, subd. 4 (2016).

⁸ See Minn. Stat. § 103E.325 (2016).

⁹ See Minn. Stat. § 103E.341, subd. 2 (2016) (providing that JDA shall establish drainage project under these circumstances).

¹⁰ An order establishing a drainage project is appealed to the district court to be tried without a jury, Minn. Stat. § 103E.095, subd. 2 (2016), but a party challenging an order determining the amount of benefits or damages involved in a drainage project is entitled to a trial by jury. Minn. Stat. § 103E.091, subd. 4(a) (2016). The benefits-and-damages jury trial is stayed "until the establishment appeal is determined." Minn. Stat. § 103E.095, subd. 3 (2016).

Appellant retained an expert, another engineer, who determined that, because of accumulated silt, CD 52 was not an adequate outlet for the lateral and that the cost of removing the silt would be \$139,000, which should be included as a cost in the costs-benefits analysis of the lateral.¹¹

Petitioners moved for partial summary judgment and for dismissal of the appeal. Following a hearing, the district court issued an order granting partial summary judgment that appellant was collaterally estopped from re-litigating the DA's decision to allow the outlet and was not entitled to district court review of that decision but only to review of the JDA's decision to establish the lateral.

On July 20, 2016, following a trial on the establishment of the lateral, the district court issued findings of fact, conclusions of law and an order denying the appeal of the establishment order; judgment was entered on this order on August 19, 2016. Appellant moved to amend the findings and vacate the judgment; this motion was denied on August 30. Appellant filed notices of appeal from the July 20 order and from the August 30 order; this court construed the appeal as being from both orders and from the judgment entered on August 19.

On appeal, appellant argues that: (1) the JDA lacked jurisdiction to establish the lateral because of its failures to comply strictly with portions of the Drainage Code;¹² (2) the district court erred in concluding that appellant is collaterally estopped from

¹¹ The district court found that the benefits were \$504,874 and the damages + costs were \$330,839. Adding the cost of repairing CD 52 would bring benefits and costs + damages much closer: $\$330,839 + \$139,000 = \$469,839$; $\$504,874 - \$469,839 = \$35,035$.

¹² Minn. Stat. §§ 103E.005-103E.812 (2016).

challenging the DA's decision to permit the use of CD 52 as an outlet; (3) the district court abused its discretion in some evidentiary rulings; (4) the JDA's order establishing the lateral was arbitrary, capricious, and unlawful; and (5) attorney K.D. had a conflict of interest representing the JDA in March 2011 because he had been petitioners' attorney when they filed their first petition in 2008. Finally, appellant filed a motion to strike parts of the JDA's brief and to supplement the record.

D E C I S I O N

1. Jurisdiction

Appellant argues that the JDA had a “lack of jurisdiction [to establish the lateral] for failing to strictly comply with the drainage code,” specifically with Minn. Stat. § 103E.235 (2016) (requiring that county boards meet together to choose members of a JDA) and Minn. Stat. § 103E.241, subd. 1 (requiring that appointed engineers file an oath and bond). But “[a] party may not take advantage of an error in a drainage proceeding or an informality, error, or defect appearing in the record of the proceeding or construction, unless the party complaining is directly affected.” Minn. Stat. § 103E.051(a).

As the district court noted, appellant has not shown that he is directly affected by the boards having separate meetings to choose their JDA members or by D.H.'s failure to file a bond.¹³

In making this challenge, [a]ppellant[] cannot cite any prejudice or damage [it] suffered as a result of this make-up of [JDA] other than [it] lost the decision. In fact, both boards could jointly meet and appoint the exact same members of [the

¹³ The district court also noted that “[n]o challenge has been made to the [JDA] as composed until this appeal was initiated following the decision.”

JDA]. The Court refers back to Minn. Stat. § 103E.051(a) and finds that[,] based on the entire record of the proceedings, [appellant was] not directly affected by this error.

....

[Appellant cites] the failure of [the JDA] to obtain an oath and bond from [D.H.] But [appellant cites] no direct [e]ffect this has had on the decision or the work [D.H.] performed. Again, [appellant is] not directly affected by this error. And it is harmless, as [D.H.] has testified under oath as to his report, and there is no evidence of any claim being made against a bond.

Appellant does not offer any refutation of the district court's conclusions or any other support of the view that these two procedural errors would deprive the JDA of jurisdiction.¹⁴

2. Collateral Estoppel

The district court noted that:

On September 18, 2012, the [DA] determined that [CD 52] was adequate to serve as an outlet for the proposed lateral. This decision was not appealed. In its September 16, 2015 Order, the [district c]ourt determined that [appellant was] collaterally estopped from challenging the validity of that [DA] determination.

Appellant argues that collateral estoppel does not apply because the JDA's 2015 decision to establish the proposed lateral involved issues other than the issue addressed in the DA's 2012 decision that the outlet was adequate. But collateral estoppel, or issue preclusion, does not require that all issues in the two determinations be identical; it can apply to only one issue. *See Graham v. Special Sch. Dist. No. 1*, 472 N.W.2d 114, 120

¹⁴ Appellant also argued three other procedural errors to the district court but does not challenge the district court's rejection of these arguments on appeal. The district court noted that "[appellant has] thrown out numerous, frivolous issues in an attempt to see if any of them will succeed in reversing the decision of [JDA]."

(Minn. 1991) (concluding that collateral estoppel applied to preclude a defamation issue previously adjudicated in a school board termination proceeding from being litigated in the terminated teacher's tort action but did not apply to preclude the teacher's retaliatory discharge and free speech claims); see *Titrud v. Achterkirch*, 213 N.W.2d 408, 412 (Minn. 1973) (holding that a determination of a proposed drainage project is practicable "includes a finding of adequacy of the outlet").

The district court did not err in concluding that collateral estoppel precluded appellant's challenge to the DA's determination of the adequacy of the outlet.

3. Evidentiary Issues

[An establishment appeal] must be tried by the court without a jury. The court shall examine the entire drainage proceeding and related matters and receive evidence to determine whether the findings made by the board can be sustained. At the trial the findings made by the board are prima facie evidence of the matters stated in the findings, and the board's order is prima facie reasonable.

Minn. Stat. § 103E.095, subd. 2.

The question of the necessity and propriety of proceedings of this character, including the necessity and propriety of draining particular tracts of land, is one that is addressed to the judgment and discretion of the tribunal having jurisdiction of the matter, whose conclusions will be disturbed by the courts only when the evidence, taken as a whole, furnishes no legal basis for the decision of such tribunal.

In re Judicial Ditch No. 10, 156 Minn. 392, 394, 194 N.W. 875, 875 (1923). "[I]n matters involving construction and improvement of drainage facilities a substantial amount of discretion must of necessity remain with the county board or other governmental body initially having jurisdiction over the matter." *In re County Ditch No. 13*, 289 Minn. 108,

110, 182 N.W.2d 715, 716 (Minn. 1971), *overruled in part by Schwermann v. Reinhart*, 296 Minn. 340, 345, 210 N.W.2d 33, 36 (1973).

The admission of evidence rests within the broad discretion of the trial court and its ruling will not be disturbed unless it is based on an erroneous view of the law or constitutes an abuse of discretion. Entitlement to a new trial on the grounds of improper evidentiary rulings rests upon the complaining party's ability to demonstrate prejudicial error. In the absence of some indication that the trial court exercised its discretion arbitrarily, capriciously, or contrary to legal usage, the appellate court is bound by the result.

Kroning v. State Farm Auto Ins. Co., 567 N.W.2d 42, 45-46 (Minn. 1997) (quotations and citations omitted). Appellant asserts seven evidentiary errors.

A. Allowing D.H. to testify as an expert witness

D.H. answered "Yes" when asked if, in his experience, the design used for the lateral was "an accepted design standard for agricultural drainage . . . systems . . . in this part of Minnesota." Appellant's attorney said, "Objection, lack of foundation. He's testifying as to design standard." The district court responded, "Overruled. He's an expert. You can answer." Appellant's attorney said, "[N]o expert report was submitted for that basis so I think he can testify as a fact witness, but not [as an expert]." The district court replied, "I'm going to allow him to answer . . . because it's his business . . . and that's what he's done" D.H. went on to state that "[U]pwards of 90 percent, 95 percent [of drainage projects], are designed to that standard."

A similar exchange occurred when D.H. was asked if, in his expert opinion, tailwater¹⁵ at the same elevation as the proposed lateral would prevent the proposed lateral from functioning. Appellant's attorney objected on two grounds: lack of foundation and lack of an expert-witness report from D.H. The district court overruled the objection: "[T]his is a person who actually designed the system. I will indicate that I'm not going to accept it as an expert opinion, but I will accept it as an opinion from a person who designs these systems"

A report is required only when a witness is either "retained or specially employed to provide expert testimony" or is an employee "whose duties . . . regularly involve giving expert testimony." Minn. R. Civ. P. 26.01(b)(2). D.H. was neither of these, so arguably no report was required. In any event, D.H. had been involved with the project since 2011; appellant had taken his deposition before trial, cross-examined him during trial, and called him as a witness. See *Ford v. Chicago, Milwaukee, St. Paul, & Pac. Ry. Co.*, 294 N.W.2d 844, 847-48 (Minn. 1980) (failure to disclose an expert witness less serious when the complaining party knew of the expert's existence and the subject of the expert's testimony was already an issue). Appellant does not assert that it was not aware of D.H.'s existence or of the subject matter of his testimony. No prejudice to appellant occurred as a result of the lack of a report that D.H. would testify.

¹⁵Tailwater is "excess surface water draining esp. from a field under cultivation." *Webster's, supra*, at 1202.

B. Denial of post-discovery deposition of D.H.

In November 2015, after D.H. had been deposed and the discovery deadline had passed, an audio recording of a conversation between him and the Meeker County Highway Engineer that had occurred on September 6, 2011, was found. Appellant was informed of the recording and responded by moving for sanctions against the JDA. Following a hearing on February 29, 2016, that motion was reserved. The district court found that:

The failure to disclose was not the fault of counsel, but rather appears to be the fault of . . . the Kandiyohi County Engineer, who only after the discovery deadline thought to look into whether the conversation had been recorded as part of a [JDA] meeting held September 6, 2011. The Court has been informed that it was not a usual policy for [DA] Meetings to be recorded, but it could occur if the meeting was also held in conjunction with a County Board meeting.

There is no evidence that the withholding of the recording was willful. It was produced as soon as it was discovered. And there has been ample time between its production, and the current date, to request the ability to depose [D.H.] regarding the statement. The Court has not been provided with any costs incurred as a result of the late disclosure. And at the present time, it does not know whether the information on the recording is even relevant to the issues at hand. At this time, the Court cannot impose sanctions unless it has hard, factual evidence of damages or prejudice incurred by [appellant]. Accordingly, the Court is reserving this issue at the present time.

On March 10, 2016, appellant moved for a second deposition of D.H. and for a pretrial conference to occur on what was to have been the first day of trial, March 22, 2016.¹⁶ The district court noted that it “still ha[d] not found measurable prejudice from the

¹⁶ The trial had been delayed because appellant’s attorney was incapacitated between November 15, 2015 and January 6, 2016.

failure to disclose the conversation” and that “after January 6, [a]ppellant had the opportunity to conduct depositions, which should have been ample time.” “[W]hether the party has been diligent in seeking discovery prior to bringing the motion [for additional discovery time] is one factor a court is to consider in deciding such a motion.” *Bixler v. J.C. Penney Co.*, 376 N.W.2d 209, 216-17 (Minn. 1985). The district court concluded that appellant had not been diligent in bringing the motion. “Absent a clear abuse of discretion, a [district] court’s decision regarding discovery will not be disturbed.” *Erickson v. MacArthur*, 414 N.W.2d 406, 407 (Minn. 1987). There is no basis to disturb the district court’s decision.

C. The viewers’ report

Appellant appears to challenge the viewers’ report and to allege that they did not fulfill the statutory mandate of Minn. Stat. § 103E.311 (“The viewers, with or without the engineer, shall determine the benefits and damages to all property affected by the proposed drainage project and make a viewers’ report.”) But, because the viewers are exclusively concerned with benefits and damages, challenges to the details of their activities were not part of the establishment trial before the district court but rather remain for the subsequent benefits-and damages trial before a jury.

In any event, the district court made findings as to what sources the viewers used for their report in addition to their observations and what they found the total benefits and total damages to be. Therefore, the viewers fulfilled the mandate with respect to the establishment of the lateral.

D. D.H.'s report

Appellant seems to argue that it is incomplete or incorrect because it does not include all land downstream from the lateral, i.e., the outlet. But the adequacy of the outlet was determined by the DA, was not appealed, and may not be challenged now, as discussed above.

E. Excluded evidence

Appellant argues that the exclusion of photographs of culvert staining; maps of fields, tiles, and yields; and maps showing areas of inundation and saturation “have some tendency to show it slightly more probable than not [that] reports were incomplete or incorrect, that estimated benefits are not greater than the total estimated cost, including damages, or that the project lacks public utility or is impracticable,” and that the exclusion of testimony from the Kandiyohi County drainage inspector had the same tendency. But the exclusion of evidence is reversible error only if it prejudiced the complaining party. *Kroning*, 567 N.W.2d at 46. The fact that evidence might have had some tendency to show something was slightly more probable than something else is not indicative of prejudice, and appellant alleges no other prejudicial effect.

F. Testimony of the Kandiyohi County drainage inspector

The Kandiyohi County drainage inspector, called as a witness by appellant, testified concerning whether CD 52 would be an adequate outlet, an issue resolved years earlier by the unappealed DA decision. The district court sustained an objection to appellant’s attorney’s question on redirect examination as “irrelevant, collateral estoppel, [and] beyond

the scope of [the] cross examination.” Appellant’s attorney conceded that the question was beyond the scope of cross-examination. Sustaining the objection was not error.

Moreover, appellant says only that the testimony had some tendency to show it slightly more probable than not that the engineer’s and viewers’ reports were incorrect or incomplete; again, this is not an adequate showing of prejudice.

G. Testimony of appellant’s witness

Appellant moved in limine to admit the testimony of an engineer who had worked with the DA prior to its 2012 determination that CD 52 was an adequate outlet for the lateral. The district court found that appellant “desire[d] to call [this engineer] for the purpose of using his report to attack the credibility of [D.H.’s] work,” particularly the failure to include in “damages” land owned by appellant that lay outside the boundaries of the lateral. The district court noted that:

[t]he [DA] made its decision that [CD 52] was adequate to take on the increased drainage from the proposed lateral. That decision is not under review in this matter, as there was no appeal taken from it.

Appellant[] state[s] that the issue [the witness] would supposedly testify to concerns a culvert that is part of [CD 52] and whether it is of adequate size to take the additional water from the [l]ateral. The culvert is not part of the [l]ateral, and indeed appears to be approximately 3/4 of a mile from the outlet of the lateral into [CD 52]. The issue of whether it was of sufficient size was determined by [the DA].

Excluding this witness’s testimony was not, as appellant argues, an error of law.

None of the district court’s evidentiary decisions was an abuse of discretion.

4. Establishment of the Lateral

Appellant argues that “[i]n the broadest context . . . benefits were improperly determined leading to over-estimated benefits and costs and damages improperly determined leading to under-estimate such that when properly estimated costs and damages exceed benefits thereby necessitating [reversal of the JDA establishment order].” That order is “prima facie reasonable” in an establishment appeal. Minn. Stat. § 103E.095, subd. 2. The district court’s decision in an establishment appeal will be reversed “only when the evidence, taken as a whole, furnishes no legal basis for the decision of the tribunal.” *Black v. Nw. Nat. Bank*, 283 Minn. 86, 88, 167 N.W.2d 147, 149 (1969). The district court relied on D.H.’s final report, as amended, and the viewers’ report, both of which supported issuing the establishment order. Testimony heard at trial also supported the order. It cannot be said that there was “no legal basis” for the decision to establish the lateral.

Appellant argues that its engineer concluded that CD 52 needs to have silt removed and that the cost of doing so, \$139,000, is a cost of the lateral. The district court relied on *In re Improvement of Murray County Ditch No. 34*, 615 N.W.2d 40, 45 (Minn. 2000) for the proposition that drainage laws are to be liberally construed and concluded that “the establishment of the [l]ateral [is] separate and distinct from any needed repairs of [CD 52].”

The district court concluded that “the greater weight of the evidence supports” the JDA’s decision to establish the lateral because appellant “specifically failed to overcome the prima facie evidence provided by [r]espondents.” See Minn. Stat. § 103E.095, subd. 2 (“[T]he findings made by the board are prima facie evidence of the matters stated in the

findings. . . .”). Appellant objects to that conclusion, but provides no support for the objection.

5. Conflict of Interest of Attorney K.D.

Appellant states that K.D. “[had] just filed the lateral petition on behalf of the petitioners” when he attended the first meeting of the JDA as its counsel on March 15, 2011. The district court found that:

- a. Apparently, [K.D., attorney for the JDA] had previously assisted the Petitioners in presenting the[ir] original petition [for a lateral] in 2008. That Petition, however, was deemed inadequate for consideration.
- b. The attorney for [the] Petitioners at the March 15, 2011 [JDA] meeting was [not K.D.].
- c. There is no indication that [K.D.] was acting on behalf of the Petitioners at the meeting.

Appellant does not refute the district court’s findings, but argues that “[c]ommon law conflict of interest barred [K.D.] from undertaking the representation.” Appellant does not explain why representing one respondent, petitioners, in 2008 by filing a petition that was deemed inadequate for consideration would create a conflict of interest for representing a different respondent, the JDA, in 2011; nor is there any explanation for why this representation would have prejudiced appellant or resulted in an arbitrary decision.

6. Appellant’s Motions to Strike and to Supplement the Record

A. Motion to strike

Appellant moves to strike from JDA’s brief the statement that the then Kandiyohi County Attorney decided to appoint outside counsel for JDA and “authorized and recognized the representation [of JDA] by its law firm” because it is not part of the record

and the sentence “As recognized by the District Court, [the law firm’s] work was subject to the direction of the County Attorney,” because it is not followed by a citation to the record. We note that neither sentence is relevant to this appeal, but grant the motion to strike.

B. Motion to supplement the record

Because no one moved to admit JDA’s expert-witness disclosure dated October 15, 2015, it was inadvertently omitted from the record. Appellant argues that it should be added now under Minn. R. Civ. App. P. 110.05 (permitting this court to correct the omission if something “material to either party is omitted from the record by error or accident”) because “there is a risk misstated inference[s] could arise as the Appellate Court considers [its decision].” But, while “appellate courts, in order to sustain verdicts and judgments, will permit omissions to be supplied by documentary evidence of a conclusive nature,” the “production of record evidence is never allowed in an appellate court for the purpose of reversing a judgment.” *Plowman v. Copeland, Buhl & Co.*, 261 N.W.2d 581, 583-84 (Minn. 1977). Appellant seeks a reversal from this court; therefore the motion to supplement was made “for the purpose of reversing a judgment.” The motion is denied.

Affirmed; motion to strike granted and motion to supplement the record denied.