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**STATE OF MINNESOTA
IN COURT OF APPEALS
A19-0719**

In Re: The Matter of the Petition for Project No. 77, Clay County
Ditch No. 51-Lateral No. 3, Robert Norby,
Appellant,

vs.

Buffalo-Red River Watershed District, et al.,
Respondents.

**Filed December 16, 2019
Affirmed
Connolly, Judge**

Clay County District Court
File No. 14-CV-15-3485

Zenas Baer, Zenas Baer Law Office, Hawley, Minnesota (for appellant)

Tami Norgard, Charlotte J. Skar Rusch, Vogel Law Firm, Fargo, North Dakota (for
respondents)

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

UNPUBLISHED OPINION

CONNOLLY, Judge

Appellant challenges the district court's grant of summary judgment, arguing that
the district court erred in reversing a prior judge's denial of summary judgment and that

genuine issues of material fact exist. Because there are no material facts in dispute and the district court did not err in applying the law, we affirm.

FACTS

Appellant Robert Norby owns property in Kragnes Township, Clay County. A longstanding dispute over a dike system on appellant's former land between appellant and a neighboring property owner, Roger Minch (Minch) of the Minch Family LLLP, underlies this appeal. Sometime in the 1950s, appellant's father and Minch's predecessor in interest jointly constructed a dike system. Because of the dike system, water flowing north off of Minch's land diverts towards the east through the "Z" alignment, a structure that channels water from the farm fields east into Clay County Ditch 51. This dike system appeared functional when Minch bought the land in the southern part of Section 28, but its effectiveness dissipated, causing substantial flood-related crop damage to Minch.

Respondent Buffalo-Red River Watershed District (the BRRWD) was established in the late 1970s, and state statutes delineate its current powers and responsibilities. *See* Minn. Stat. §§ 103D.001-.925, 103E.005-.812 (2018). Respondent Bruce Albright is an employee of Houston Engineering, has been involved with the BRRWD since 1980, and currently serves as the BRRWD's Office Administrator. In 1979, appellant received a permit from the BRRWD to straighten and widen a small section of his dike system. Appellant obtained another permit from the BRRWD to repair his dike system in 2006. For over a decade, Minch, Albright, the BRRWD's board members, and the BRRWD's attorney have contended that appellant's dike system is illegal based on his purportedly unpermitted actions of increasing the system's elevation.

In March 2012, Minch and the BRRWD signed a “Stipulation for Entry of Stay of Proceedings” related to Minch’s federal lawsuit against the BRRWD concerning appellant’s dike system. This stipulation conditioned the dismissal of Minch’s lawsuit on the BRRWD’s approval of his future drainage petition, but the BRRWD made no promises to grant Minch’s petition. Instead, the BRRWD explained that the petition would follow the usual statutory process. That same month, Minch petitioned the BRRWD to approve a drainage project (Project No. 74). To improve drainage on Section 28, Minch’s petition proposed cutting a channel through appellant’s field and breaching appellant’s dikes, much like a design that an engineer consultant with the BRRWD had proposed in 2011. After a Viewer’s Report determined that Project No. 74’s damages exceeded its benefits, Minch voluntarily withdrew his petition.

Minch again petitioned the BRRWD in August 2014 after receiving assistance from Albright and communicating with the BRRWD’s engineer and attorney. This lateral petition also sought to cut a channel through appellant’s land (Project No. 77). An engineer completed the detailed engineer’s survey in April 2015. This survey focused on Minch’s petition and ultimately determined that installing the lateral ditch would be “necessary feasible, and practical.” Minch’s petition proposed condemning 4.6 acres of appellant’s farmland to establish a channel. The engineer’s report unfavorably noted that Minch’s proposal would increase the drainage time for a 24-hour, 2-year rain event from 15 hours, if the parties cleared out the current channels, to 40 hours. Similarly, the report observed that the costs of implementing Minch’s petition were three times the costs of simply restoring the “Z” alignment. But the engineer’s report stated that no party had proposed

repairing the existing system, and opined that such an option lacked feasibility because of tensions between appellant and Minch.

The following months, the BRRWD had several hearings where its members discussed Project No. 77. At a final hearing, the BRRWD gave appellant's attorney an opportunity to present a statement and allowed him to distribute documents to board members. The BRRWD approved Project No. 77 in September 2015. The BRRWD's findings and order on Project No. 77 also classified appellant's dike as "illegal." Appellant appealed the BRRWD's final order to the district court under Minn. Stat. §§ 103D.535, 103E.095, and brought accompanying claims under the federal and state constitutions and 42 U.S.C. § 1983 (2012). Appellant later sold the 4.6 acres contemplated for condemnation to Minch, and the parties stipulated to a dismissal of appellant's appeal from the order approving Project No. 77.¹ Appellant's civil claims against the BRRWD and its individual members remained.

Respondents moved for summary judgment. The original district court judge (prior judge) assigned to the case denied this motion on all three of appellant's claims, finding that genuine issues of material fact existed. In July 2017, respondents appealed to this court from the prior judge's order disqualifying their attorney. *See Norby v. Buffalo-Red River Watershed Dist.*, No. A17-1029, 2018 WL 1462208 (Minn. App. Mar. 26, 2018). Following our reversal of that disqualification order, the case was reassigned to a different

¹ While the district court noted that appellant sold the 4.6 acres to Minch for above-market value, the sale price is not in the record. Appellant does not allege that he sold his land to Minch for below-market value, and the record does not reveal that it was sold for below-market value.

judge (successor judge) because of the prior judge's retirement. The successor judge issued an amended scheduling order in October 2018, requiring the parties to file all dispositive motions before December 17, 2018. Respondents renewed their motion for summary judgment, which the successor judge granted on all claims. This appeal followed.

D E C I S I O N

I. Successor Judge's Reversal of Prior Judge's Decision

Appellant first argues that the successor judge erred in deciding to reconsider the prior judge's denial of respondents' summary-judgment motion. Respondents counter that the successor judge properly exercised her discretion because the prior judge's ruling was clearly erroneous. The scope of a successor judge's authority to perform judicial duties presents a legal question subject to de novo review. *Kornberg v. Kornberg*, 542 N.W.2d 379, 384 (Minn. 1996).

Both parties rely on this court's opinion in *Kornberg v. Kornberg*, where we said that "[a] successor judge may reverse a prior decision only if the successor judge believes the prior decision is clearly erroneous or unjust, or when a substantial change occurs in the essential facts, the evidence, or the applicable law." 525 N.W.2d 14, 18 (Minn. App. 1994), *aff'd*, 542 N.W.2d 379 (Minn. 1996). But it is not clear that this is the proper standard. For example, in its *Kornberg* opinion, the Minnesota Supreme Court did not qualify a successor judge's ability to reconsider a prior judge's ruling on the existence of new facts or a belief that the prior decision was clearly erroneous. 542 N.W.2d at 384-86. Rather, the court determined that "[p]arties should not be denied reconsideration of a predecessor judge's ruling by a successor judge if reconsideration by the judge who made the original

ruling would have been permissible.” *Id.* at 385. *Kornberg* interpreted the phrase “other disability” in Minn. R. Civ. P. 63.01 to include a judge’s retirement from the bench. *Id.* at 384-85. But *Kornberg* centered on a successor judge’s reconsideration of the prior judge’s decision to vacate the parties’ negotiated judgment and decree, while this case involves the reconsideration of a summary-judgment decision. *Id.* at 383.

In *Invest Cast, Inc. v. City of Blaine*, this court held that the law-of-the-case doctrine does not prevent a district court from granting a second motion for summary judgment after first denying a prior motion. 471 N.W.2d 368, 370 (Minn. App. 1991), *review denied* (Minn. Aug. 1, 1991). While *Invest Cast* seemed to involve the same district court judge reversing its own prior ruling, its reasoning translates here. Appellant cites no Minnesota authority prohibiting a successor judge from revisiting a prior judge’s ruling, and we cannot find any. In fact, district courts possess inherent authority to grant summary judgment sua sponte. *Del Hayes & Sons, Inc. v. Mitchell*, 230 N.W.2d 588, 591-92 (Minn. 1975). A successor judge should proceed cautiously when reviewing a prior judge’s ruling on a summary-judgment issue. That said, we discern no error in the successor judge’s decision to revisit the summary-judgment issue here.

II. Summary Judgment

This is an appeal from a grant of summary judgment, which is appropriate when the movant demonstrates that no genuine issue exists as to any material fact and they are entitled to judgment as a matter of law. Minn. R. Civ. P. 56.01.² A summary-judgment

² In both summary judgment orders in the district court, the respective judges applied the former version of this rule, Minn. R. Civ. P. 56.03. In 2018, the Minnesota Supreme Court

decision is reviewed de novo to determine whether any genuine issues of material fact exist and whether the district court properly applied the law to the facts. *Capistrant v. Lifetouch Nat'l Sch. Studios, Inc.*, 916 N.W.2d 23, 27 (Minn. 2018). “In conducting this review, we view the evidence in the light most favorable to the nonmoving party . . . and resolve all doubts and factual inferences against the moving parties.” *Fenrich v. The Blake School*, 920 N.W.2d 195, 201 (Minn. 2018) (quotation omitted). A fact is material if its resolution will affect the outcome of the case. *Zappa v. Fahey*, 245 N.W.2d 258, 259-60 (Minn. 1976). Summary judgment is improper when reasonable persons may draw different conclusions from the evidence submitted. *DLH, Inc. v. Russ*, 566 N.W.2d 60, 69 (Minn. 1997).

The successor judge granted summary judgment for respondents on appellant’s three remaining claims: (1) a violation of due-process rights; (2) a violation of 42 U.S.C. § 1983; and (3) civil conspiracy. We address each claim in turn.

A. Appellant’s Due Process Claims

Appellant argues that the district court erred in granting summary judgment on his due-process claims because genuine issues of material fact exist. Both 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; Minn. Const., art. I, § 7. Minnesota courts interpret the federal and state constitutions’ due-

amended several rules of civil procedure, which led to the former rule 56.03 being renumbered to Minn. R. Civ. P. 56.01. *Order Promulgating Amendments to Rules of Civil Procedure*, No. ADM04-8001 (Minn. Mar. 13, 2018). The amendment did not intend to alter existing Minnesota caselaw. See Minn. R. Civ. P. 56 2018 advisory comm. cmt.

process protections identically. *Sartori v. Harnischfeger Corp.*, 432 N.W.2d 448, 453 (Minn. 1988).

1. *Procedural Due Process*

Appellant contends that the district court erred in granting summary judgment on his procedural due-process claim because genuine issues of material fact existed. “The foundational principle of the right to due process is an opportunity to be heard upon such notice and proceedings as are adequate to safeguard the right for which the constitutional protection is invoked.” *Gams v. Houghton*, 884 N.W.2d 611, 618 (Minn. 2016) (quotation omitted). Minnesota courts employ a two-step analysis to determine whether the government has violated an individual’s procedural due-process rights. *Rew v. Bergstrom*, 845 N.W.2d 764, 785 (Minn. 2014); *see also Ky. Dep’t of Corr. v. Thompson*, 490 U.S. 454, 460, 109 S. Ct. 1904, 1908 (1989) (explaining the United States Supreme Court’s similar two-step process for analyzing procedural due-process claims). We first examine whether the government has deprived the individual of a protected life, liberty, or property interest. *Rew*, 845 N.W.2d at 785. If government action does not implicate these interests, then no process is required. *Id.* But if such an interest is at stake, “we then assess whether the process afforded by the government was constitutionally sufficient.” *Gams*, 884 N.W.2d at 618.

An interest in real property is entitled to due-process protection. *See In re 35W Bridge Litig.*, 806 N.W.2d 820, 830-31 (Minn. 2011). Project No. 77 first contemplated a condemnation of some of appellant’s real property for use as a drainage channel to serve Minch’s land. Both district court judges agreed that appellant had a protected due-process

right when Minch filed the petition for Project No. 77. But the successor judge ruled that appellant no longer had a “protected property interest.”

“The requirements of procedural due process apply only to the deprivation of interests encompassed by the Fourteenth Amendment’s protection of liberty and property.” *Bd. of Regents v. Roth*, 408 U.S. 564, 569, 92 S. Ct. 2701, 2705 (1972); *see also Sawh v. City of Lino Lakes*, 823 N.W.2d 627, 633 (Minn. 2012) (stating that procedural due-process protections do not apply when government action might deprive a protected interest at an indeterminable future period based on unfulfilled conditions). By the time respondents moved for summary judgment, appellant had sold the 4.6 acres of land at issue to Minch. Without an actual deprivation, appellant’s due-process claim fails as a matter of law. *See Rew*, 845 N.W.2d at 785 (explaining that no process is due if the government has not implicated a protected interest). In short, appellant has failed to present evidence showing a genuine issue of material fact that respondents interfered with his property rights or that his property decreased in value after the BRRWD approved Project No. 77.

Appellant raises several arguments to show that genuine issues of material fact exist. First, appellant claims that the BRRWD never notified him of its intention to take his common-law, grandfathered, and permitted rights in the dike system, or that it considered his dike illegal. But even if appellant possessed these rights, he does not address how this failure to notify interfered with any protected due-process right. Second, appellant focuses on the purportedly “corrupted” process between the BRRWD and Minch underlying Minch’s petition for Project No. 77. By extension, appellant maintains that respondents helped Minch petition for Project No. 74 and Project No. 77 to settle the outstanding federal

litigation, and that this motivated their actions at each stage of the process underlying the ultimate approval of Project No. 77. Even if the actions underlying the BRRWD's approval of Project No. 77 were improper, appellant has not shown a deprivation of his life, liberty, or property rights stemming from these actions.³

Third, appellant asserts that “the sale of land after an unconstitutional taking cannot sanitize such conduct,” and that the “[s]ale of property which was condemned cannot vitiate the unconstitutional manner in which the condemnation process was carried out.” As noted above, the record lacks any evidence that respondents actually took appellant's land, a necessary element to establish a taking. *See Hall v. State*, 908 N.W.2d 345, 352 (Minn. 2018) (listing four elements to establish a valid taking). While appellant claims that he had 4.6 acres of his farmland condemned, Project No. 77 simply contemplated this condemnation. And appellant also cites no legal authority to support these arguments, rendering them waived. *See Fannie Mae v. Heather Apartments Ltd. P'ship*, 811 N.W.2d 596, 600 n.2 (Minn. 2012) (“Summary arguments made without citation to legal support are waived.”).

Fourth, appellant contends that respondents' actions took his common law, grandfathered, and permitted rights. Again, the record fails to show that respondents even interfered with appellant's use of his land. Respondents' approval of a project that

³ At oral argument, appellant's counsel argued that the “corrupted procedure” underlying Project No. 77 forced appellant to sell his land. Nothing in the record reflects that appellant sold his land because of improper pressure or coercion.

considered condemning appellant's property, without more, does not amount to a deprivation of a protected due-process interest. *See Sawh*, 823 N.W.2d at 633.

2. *Substantive Due Process*

We next consider appellant's arguments on his substantive due-process claim. To begin, we note that neither district court judge considered this claim in their respective summary-judgment orders. Ordinarily, matters that the district court has not ruled on are not properly before an appellate court. *Thiele v. Stich*, 425 N.W.2d 580, 582-83 (Minn. 1988). However, because the parties have addressed this issue in their briefs, and the current record allows us to reach a decision, we do so in the interests of justice. *See Minn. R. Civ. App.* 103.04.

The substantive component of the right to due-process protects individuals from "certain arbitrary, wrongful, government actions regardless of the fairness of the procedures used to implement them." *In re Linehan*, 594 N.W.2d 867, 872 (Minn. 1999) (quotation omitted). Here, appellant's amended complaint alleged a violation of his due-process rights based on improper notice and an inadequate process. When appellant stipulated to dismiss his appeal of Project No. 77, he also dismissed his claim that the BRRWD acted in an arbitrary or capricious manner in approving the project. We conclude that appellant did not plead a substantive due-process claim requiring the successor judge's analysis.

Even if we found that appellant's complaint alleged a substantive due-process claim, it would not survive summary judgment. The successor judge correctly noted in her order that appellant presented no evidence of damages. *See Snyder v. City of Minneapolis*, 441

N.W.2d 781, 792-93 (Minn. 1989) (affirming denial of substantive due-process claim when plaintiff could not prove damages). Also fatal to any substantive due-process claim is appellant's failure to produce a genuine issue of material fact on the actual deprivation of his property rights. *See Northpointe Plaza v. City of Rochester*, 465 N.W.2d 686, 689 (Minn. 1991) (holding that, in the context of a substantive due-process zoning dispute claim brought under section 1983, there must be a deprivation of a protectable property interest).

B. Appellant's Section 1983 Claim

Appellant brought his second claim against respondents under section 1983, and alleged that Albright's conduct as the BRRWD's Office Administrator deprived him of a constitutionally protected right, privilege, or immunity while acting under color of law. *See* 42 U.S.C. § 1983. Section 1983 furnishes a cause of action to persons against state officials who, acting under color of law, deprive a person of a federal constitutional or statutory right. *Snyder*, 441 N.W.2d at 791. Municipalities and other local government bodies are also subject to liability under section 1983. *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 690, 98 S. Ct. 2018, 2035 (1978).

Again, there is no dispute that Project No. 77 initially implicated appellant's constitutionally protected property interest. Yet for the same reason that appellant's due-process claims failed, his section 1983 claim also fails. Appellant has not shown that respondents deprived him of a federal or state constitutional right, a necessary component of a section 1983 claim. *See Snyder*, 441 N.W.2d at 791. The approval of Project No. 77, which appellant immediately appealed, did not actually interfere with his property rights. The record does not convey that respondents violated any of appellant's state or federal

constitutional rights. In sum, no genuine issue of material fact exists on this element, rendering summary judgment appropriate for respondents on this claim.

C. Appellant's Civil Conspiracy Claim

Lastly, appellant argues that the district court improperly granted summary judgment on his civil conspiracy claim because genuine issues of material fact exist. In response, respondents argue that appellant has failed to support his civil conspiracy claim with an underlying tort. “A conspiracy is a combination of persons to accomplish an unlawful purpose or a lawful purpose by unlawful means.” *Harding v. Ohio Cas. Ins. Co.*, 41 N.W.2d 818, 824 (Minn. 1950). The minds of the alleged conspirators must meet on “a plan or purpose of action to achieve the contemplated result.” *Bukowski v. Juranek*, 35 N.W.2d 427, 429 (Minn. 1948). An underlying tort must support a civil conspiracy claim. *D.A.B. v. Brown*, 570 N.W.2d 168, 172 (Minn. App. 1997).

We affirm the district court's grant of summary judgment to respondents on the civil conspiracy claim based on our above analysis that the district court properly granted summary judgment on appellant's other claims. With no viable due-process or section 1983 claim, appellant cannot assert a valid civil conspiracy claim. *See Leiendecker v. Asian Women United of Minn.*, 848 N.W.2d 224, 228 n.2 (Minn. 2014) (noting that a civil conspiracy claim is not independently actionable).

Affirmed.