

NO. A09-1064

State of Minnesota
In Court of Appeals

Thomas A. Opheim, Norman County Attorney,
Respondent,

v.

Norman County,

Appellant.

**REPLY BRIEF OF
APPELLANT NORMAN COUNTY**

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STATEMENT OF THE FACTS

Every year the Norman County Board follows a certain procedure in providing for the County Attorney's budget, and lays out the budget in the same manner. TR. 225¹. The budget process begins in July, when the Auditor-Treasurer prepares blank budget sheets for department heads to fill in and return to him. TR 226, 236. These sheets, on integrated financial system printouts, also show past years' budgets. AA 395-396. From those turned in department head budget sheets, a complete proposed County budget is printed on the integrated financial system budget sheets and given to the Board. TR 226, 236. The Board then meets individually with department heads after the proposed budget has been submitted and reviewed by the Board. TR 231. After this meeting, the Board sets a final budget for the County Attorney. TR 231. This process was adhered to when the Board set the County Attorney's 2007, 2008 and 2009 budget. Id.

When the budget has been set, it is then printed in an integrated financial system format (IFS) showing specific account numbers, line numbers, descriptions of categories, and budget amounts. AA 395-396. The categories and the descriptions are the same every year. Id. The relevant line items for purposes of the case at bar are the line item for salaries (line item 6102), the line item for building and facility rental (line item 6346), and the line item for reference books/Westlaw (line item 6466). Id.

¹ Indicates Transcript of August 28, 2008 Trial Court proceedings at the page number referenced.

For over 20 years the custom has always been to include the salary for both the county attorney and an assistant county attorney in the one "salary" line item in the budget. TR 269. This line item does not specifically state how much is meant to compensate the county attorney and how much is meant to compensate an assistant, because it has been set at a level that is meant to compensate two individuals for the work they do in the Norman County Attorney's office. Id. Testimony has indicated this to be approximately 1.25 FTE's (full time equivalents). That represents 50% of the County Attorney's time, and about 75% of an assistant's time. See Exhibit 8A at AA175; TR 61, 92. This has always been agreeable to all of the persons who have held the position of County Attorney until recently, and has been an understanding between the County Attorney and the Board of Commissioners. Id. The County Attorney actively encouraged this practice. AA 275. He campaigned on that basis. He never advised the County Board, his client, that they could or should not do this, or that it violated the law, until he alleged it as a violation in his lawsuit against the County. TR 90. It had also been the longstanding practice to budget amounts for support staff help under the "Building and Facility Rental" line item. TR 269.

The county attorney position for Norman County is a part-time position. TR 10. The County Attorney is allowed to and does have a private practice, and has private and other municipal clients. Id. The record indicates that the County Attorney only spends 50% of his time on County business. TR 61. One of the four secretary/assistants that work for the Opheim Law Firm works on County matters. TR 38, 92. The other attorney spends approximately 75% of her time on County business. Id.; TR 11. The County

Attorney is the sole owner of the Opheim Law Firm. TR 95. Therefore, all revenues of said law firm, after expenses are paid, go to him.

The County Attorney appealed his budget in 2007 and in 2008². AA 194-202; AA 1. Both years he has asserted that his budget was set in an arbitrary and capricious manner. TR 14. He has made the same three arguments as to why. Id. First, the County Attorney has asserted that the County was not familiar with the duties and responsibilities of the county attorney position. Id. Next, the County Attorney has claimed the County's budget did not provide a salary for an Assistant Norman County Attorney or for secretarial assistance. Id. Finally, the County Attorney asserted that the County's budget provided inadequate funds for Westlaw services. Id.

In the 2007 budget appeal, after a bench trial in September, 2008, Judge Rasmussen ruled that the County's budgetary process was not arbitrary and capricious. Exhibit 8, Findings 22, 12, and 13; Exhibit 8D at AA175, 176; AA 200. The court specifically found that the Board of Commissioners understood the duties and responsibility of the County Attorney's Office at the time it set the 2007 budget; that the budget provided for the salary of an Assistant County Attorney; that the budget provided money for secretarial services; and that the budget provided adequate Westlaw funding. Exhibit 8D, AA200. This judgment was not appealed.

² The County Attorney has also appealed his budget again in 2009. This is currently before the Norman County District court as case number 54-CV-09-5. The District Court has stayed proceedings in that case pending resolution of the 2008 budget appeal.

In December, 2007, the same five County Board members set the 2008 budget in an even more detailed and exacting manner than in 2006. AA 177-405. They gathered information from the County attorney; they gathered information from other counties; they analyzed, sifted and weighed the facts; and then the Board Members reviewed and passed a detailed and thorough resolution explaining how and why they set the County Attorney budget as they did, and what facts they relied upon. Id. The Resolution is 15 pages long, has 66 findings, and attaches Exhibits A-R. Id. It is on this record that the District Court reviewed this case.

ARGUMENT

Most of the issues present in this case have been thoroughly briefed by the parties. Consequently, a lengthy reply is neither necessary, nor appropriate. However, there are a few issues raised in Respondent's brief that warrant a response. Those issues, and Appellant's response to those issues, are outlined below.

I. THE RIGHT TO A FULL TRIAL WHERE NEW EVIDENCE IS TAKEN IS NOT MANDATED BY STATUTE.

In his responsive brief, Respondent attempts to refute Appellant's argument that the District Court erred in denying its summary judgment motion by claiming that the right to a trial, where new evidence is to be taken, is somehow mandated by statute. This is simply not so. Minn. Stat. § 388.18 provides that a county attorney budget appeal is to be conducted like a certiorari review except that the District Court may, under the proper circumstances, take new or additional evidence. Case law, in turn, has fleshed out

exactly under what circumstances new evidence may be taken. As noted in Amdahl v. County of Fillmore, 258 N.W.2d 866 at 874 (Minn. 1977):

[W]e discern it to be the intention of the legislature, in allowing the district court to take new or additional testimony, to provide an opportunity for aggrieved county officers to show factors dehors the record which they believe affected the board's decision, revealing as arbitrary or capricious the board's action which might otherwise appear reasonable.

Id. Thus, while testimony may be taken, the circumstances under which that occurs should be limited, and generally the Court's decision is to be based on the record that was before the County Board. The focus of any such testimony, if necessary, is what was presented to the Board, and what decision-making process was involved, and whether "factors dehors" affected the decision.

Consequently, it was fundamentally flawed for the Respondent to say that the District Court had a legislative mandate to take new evidence completely as it saw fit and that it may take whatever evidence it did see fit to take. While the Court could, under the proper circumstances take new evidence, those circumstances did not exist in this case. There was absolutely no indication that there was any improper motive on the part of the board, there was no indicate of any irregularity in the proceedings, and there was no indication that a defective decision making process was being employed. Thus, the proper course of action was for the District Court to decide this motion on summary judgment. And, based of the completeness of the record and the thoroughness of the process employed by the board, the District Court should have ruled that, as a matter of

law, the County Attorney's budget was not arbitrary and capricious. This failure constituted reversible error.

II. THE SALARY FOR THE COUNTY ATTORNEY WAS NOT SO DEFICIENT AS TO MAKE IT ARBITRARY AND CAPRICIOUS.

In his Brief, Respondent goes on to contend that beyond being defective for alleged technical statutory violations, the budgetary process and the budget itself was arbitrary and capricious. For the most part such assertion is thoroughly refuted in Appellant's brief and upon even a cursory analysis of the process that the County employed. However, one point raised by the Respondent is worth commenting on.

In his brief, Respondent claims that "if Mr. Opheim pays [the assistant county attorney] a reasonable wage for her Assistant County Attorney duties (i.e. \$45,000.00) out of his salary (i.e. \$67,000.00) he would receive approximately \$22,000.00 for being county attorney. It is fundamentally arbitrary for the County Attorney to be paid less than his assistant." Respondent's Brief at p. 17. This assertion is flawed for several reasons. First of all, Respondent arbitrarily picks a wage for his assistant which he considers "reasonable" and then claims that the salary for the County Attorney is unreasonable because the remaining amount under the "salary" line item is less than the amount that he would allocate to the assistant. This is a ridiculous assertion. The fact of the matter is that the Board provided \$67,000.00 to the County Attorney's office for the work of 1.25 employees. Broken down, this means that the Board would be paying \$53,600.00 a year for each FTE of attorney work. This is perfectly reasonable, or, at the very least, not arbitrary and capricious.

The assertion is also flawed because, even if it were true that he would be making less than his assistant (who does more county work than he does), he fails to explain why that makes the budget “fundamentally arbitrary.” And no such reasonable explanation exists. If he chooses to pay his assistant a wage that is so high that she is making more than him, that is his prerogative. It does not make the County’s Budget in any way arbitrary or capricious.

III. THE COUNTY ATTORNEY’S CONDUCT WAS SUFFICIENT TO TRIGGER THE DOCTRINE OF EQUITABLE ESTOPPEL.

The next point worth raising is the argument by the Respondent that equitable estoppel cannot apply because he did not make any false representations or inducements. As an initial matter, such an assertion is flatly false considering the Plaintiff did, in fact, affirmatively represent in campaign literature that there should only be one salary for the County Attorney office. Even though such statement was not specifically made to the County Board, it was made to the public as a whole, and the Board was aware of the statement, and relied on it, when it was making its budgetary decision.

Plus, beyond that, Respondent is incorrect in his assertion that there must be an affirmative false assertion on the part of a party for estoppel to apply against him. According to the Minnesota Supreme Court, for the purposes of estoppel, “the conduct of the party need not consist of affirmative acts or words. It may consist of silence or a negative omission to act when it was his duty to speak or act.” Dimond v. Manheim, 63 N.W. 495, 497 (Minn. 1895). Respondent’s conduct here is not unlike that in which he was last month found to have to forfeit his fees in an estate case, where the Court

concluded he breached his duties and acted in bad faith in not treating his client honestly, fairly and forthrightly. See In re Estate of Ella Ambuehl, Norman County District Court, Case No. 54-PR-07-248, November 13, 2009.

In the case at bar, the duty to speak arose from the attorney client relationship between the County Attorney and the County. The County Attorney, by law, is to give opinions and advice to the County Board on all matters the County is interested in. Minn. Stat. § 388.051, subd. 1(b). Certainly that includes something as significant as the violation of law the Respondent claims his Board made. Yes, a County Attorney, as an elected official, owes duties to the public also. Yes, when dealing with his own salary with a County Board, he has a personal interest too. Thus the relationship between the attorney – here the Respondent – and the client – the County Board, is not exactly the standard attorney-client relationship. But that does not mean that he has no duties to his client, no duty of loyalty, and no duty of care. Attorneys are not to profit at the expense of their clients through conduct that could be said to not fully fulfill their obligations to their client. See Veltnum v. Koehler, 88 N.W. 432 (Minn. 1901); Dahl v. Charles Service Master of St. Cloud v. EAB Bus. Services, Inc., 544 N.W. 2d 302 (Minn. 1966). See also Minnesota Rules of Professional Conduct, Rules 1.8(b) and 2.1.

Since there was a duty for the County Attorney to speak, and since he chose not to do so when he failed to point out potential statutory violations on the part of the County, the “conduct” requirement of estoppel was satisfied. Plus, as fully detailed in Appellant’s brief, since the County relied on this statement, to its detriment and to the Respondent’s gain, equitable estoppel applies to the case at bar.

IV. THE RESPONDENT CITES NO AUTHORITY FOR THE PROPOSITION THAT FORMER COUNTY ATTORNEY TOLD THE BOARD THAT THEY WERE REQUIRED TO SEPARATELY DESIGNATE A SALARY FOR COUNTY ATTORNEY AND THE ASSISTANT COUNTY ATTORNEY.

Finally, in his responsive brief, Respondent claims numerous times that the former Norman County Attorney, Ms. Susan Rantala-Nelson, had previously told the County that the way its budget was laid out did not comply with Minn. Stat. § 388.18. Respondent asserts this to give the impression that the County knew it was violating the law all along, and thus was acting inequitably or in bad faith. However, Respondent provides inadequate support for this proposition.

In establishing the factual record upon which a legal determination may be based, a party is bound by the requirements of Minn. Gen. R. Prac. 115.03(d)(3). This provision mandates that all factual assertions must be supported by a specific citation to the record supporting each fact, such as a deposition page or page and paragraph of an exhibit. Id. The Respondent may not rely upon, nor may the Court consider, any statements not supported by testimony upon personal knowledge. Instead, the Court may only consider such facts as would be admissible in evidence, and the affidavit must show affirmatively that the affiant is competent to testify to the matters stated therein. Minn. R. Civ. P. 56.05. Thus, hearsay statements may not be considered by the Court.

Hearsay is exactly what Respondent is relying on when he baldly asserts in an affidavit that Ms. Rantala-Nelson previously informed the County that its budgetary practices were not in compliance with Minnesota law. He had no personal knowledge of this fact and he cited to no transcript, deposition, or exhibit which contained competent

testimony supported by personal knowledge. Thus, Respondent's assertion is factually deficient and it would be improper for this Court to consider it when making its decision.

CONCLUSION

For all of the foregoing reasons raised in this reply brief, and the Appellant's initial brief, this Court should hold that the District Court committed errors of law.

This Court should recognize that it would simply be inequitable for the Respondent to prevail in this case. What we have here is a situation where a county attorney functioned more than adequately for many years at a certain total budget. Until 2007, the County Attorney never complained about that budget, and he never so much as suggested that the County's budgetary practices were in any way improper. In fact, he represented to the public that the County's budgetary practices, at least as it pertained to salaries, was the way things should be done. Then, after he was elected in 2006, and the County had locked itself into those practices, he asserted technical violations of various statutes and asserted that those alleged violations made the County's entire budget arbitrary and capricious. Consequently, he appealed his 2007 budget to District Court.

In the 2007 budget appeal, Judge Rasmussen flatly rejected the notion that there was anything improper about the County Attorney's budget or the County's budgetary process. With this judicial approval in mind, the County set the County Attorney's budget for 2008. The budget and budgetary process were exactly the same as it was in 2007 except for two things: (1) the County Board spent even more time and effort and considered more relevant information, in setting the County Attorney's budget; and (2) the County Board gave the County Attorney a substantially higher budget.

Despite the fact that his 2007 budget appeal was unsuccessful, despite the increase in his budget for 2008, and despite the enhanced care that went into setting the 2008 budget, the County Attorney appealed again in 2008. And why not? State law provides that, under most circumstances, a county is required to pay the county attorney's legal expenses incurred in making a budget appeal. Consequently, the County Attorney had nothing to lose by repeatedly appealing his budget.

When considering this course of conduct, does this Court really feel that it would be fair for the Respondent to prevail? Ultimately, while the Respondent makes a large number of legal arguments why he should win, he never explains: (1) why his budget was inadequate to perform his duties; and (2) why the County's careful budgetary process was so defective as to be considered arbitrary and capricious. The Court should not overlook these two fundamental deficiencies when making its decision, and it should not overlook the fact that it would be simply inequitable for the Respondent to prevail in this case.

Consequently, this Court should overrule the District Court and find in favor of the Appellant.

Respectfully Submitted,

RATWIK, ROSZAK & MALONEY, P.A.

Dated: December 3, 2009

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