STATE OF MINNESOTA
IN COURT OF APPEALS
A10-700

G J & M Development, Inc.,
Appellant,

vs.

City of Afton, et al.,
Respondents.

Filed April 12, 2011
Affirmed
Worke, Judge

Washington County District Court
File No. 82-C1-07-002637

Patrick J. Kelly, Christine M. Swanson, Daniel J. Cragg, Kelly & Lemmons, P.A., St. Paul, Minnesota; and

Bruce Rivers, Rivers & Associates, P.A., Minneapolis, Minnesota (for appellant)

George C. Hoff, Kimberly B. Kozar, David M. Quealy, Hoff, Barry & Kozar, P.A., Eden Prairie, Minnesota; and

James J. Monge, III, League of Minnesota Cities, St. Paul, Minnesota (for respondents)

Considered and decided by Worke, Presiding Judge; Wright, Judge; and Stauber, Judge.

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

WORKE, Judge

Appellant challenges the district court's (1) grant of judgment as a matter of law (JMOL) in favor of respondents on appellant's municipal-liability claims, (2) evidentiary ruling prohibiting a witness from testifying, and (3) jury instructions given on appellant's mandamus claim. Both parties challenge the district court's discovery sanctions. We affirm.

FACTS

In August 2006, appellant G J & M Development, Inc. met with David Engstrom, the mayor of Afton, and Mitchell Berg, the city administrator, to discuss developing a mixed commercial-condominium project in downtown Afton. Garold Jarvis, appellant's principal owner, and Craig Rafferty, appellant's chief architect, proposed an 18-unit project known as the Afton Center. Engstrom supported the project.

Appellant submitted an application for design review to the city in October 2006. But contrary to the initial representation, the design-review application depicted a 60-unit facility containing 12 shops and 48 condominiums—considerably larger than the original 18-unit project. The increasing scale and ambitions of the Afton Center project coincided with the upcoming mayoral election. Engstrom lost his bid for reelection on November 7, 2006, and attributed his loss to his association with the Afton Center project; his opponent and successor, respondent Julia Welter, focused her campaign on reducing downtown development.

On November 9, 2006, appellant filed a conditional-use-permit (CUP) application for the project, seeking to construct 60 total units as depicted in the design-review application. The application was reviewed by Berg, and Engstrom advised Berg to be thorough in his review of the application. Berg determined that appellant's CUP application was incomplete due to several omissions under the city's code. On November 15, 2006, Berg delivered a rejection notice to appellant at a meeting about the project with Rafferty, Welter, councilmember Peg Nolz, and various other individuals from local regulatory agencies. The assistant city administrator, Shelly Strauss, was also apprised of the application denial.

On November 21, 2006, Welter proposed that the city council enact a moratorium on the development of open air space in downtown Afton. In December, Berg advised Rafferty that he should not submit another application until he had remedied the issues listed in the rejection letter, and notified him of the impending moratorium. Appellant neither resubmitted another CUP application nor appealed the determination that the initial application was incomplete. In January 2007, respondent councilmembers Nolz, Joe Richter, Nick Mucciacciaro, Randy Nelson, and mayor Welter (respondents) enacted the previously proposed moratorium, effectively terminating the Afton Center project.

Appellant filed suit, alleging that Engstrom instructed Berg to purposefully deny the CUP application and frustrate appellant's application process out of political animus for an election loss he attributed to the project. Appellant alleged equal-protection, substantive- and procedural-due-process violations, and sought to hold the city liable for

the damages incurred from the prohibition of the project. Appellant also requested mandamus relief to compel the city to grant the CUP application.

Prior to trial, the district court ordered discovery sanctions against each party: appellant's motion to compel certain deposition answers from Berg was partially granted, but appellant was ordered to pay respondents' attorney fees for bringing a motion to compel without making reasonable efforts to settle the dispute beforehand; respondents were sanctioned for frustrating the efforts of a forensic technician hired by appellant to examine the city's computer files related to the project. The district court also precluded appellant from calling Afton's former mayor, Charlie Devine, as a witness, concluding that his proffered testimony lacked foundation and was irrelevant.

Appellant called Strauss as a witness at trial. Strauss testified that Engstrom was the leader of the "governing majority" of the city council during his time in office and that "if he wanted to get something passed . . . he had people aligned with him." Strauss also testified that Welter deliberately avoided meeting with Jarvis in order to ensure that the application was not resubmitted prior to the moratorium taking effect. Welter testified that she was aware of the rejected application, but only upon receiving a copy of the rejection letter right before the November 15 meeting and after the determination had been made. Councilmember Nolz corroborated Welter's testimony. Councilmember Nelson testified that he never even knew that Berg rejected the initial application. Prior to jury deliberations, respondents moved for JMOL. The district court granted respondent's motion, concluding that appellant failed to demonstrate municipal liability.

The jury failed to find for appellant on its remaining mandamus claim. This appeal follows.

D E C I S I O N

JMOL

Minn. R. Civ. P. 50.01 empowers a district court to grant a JMOL motion when a party "has been fully heard on the issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party." A district court's JMOL decision is reviewed de novo. *Bahr v. Boise Cascade Corp.*, 766 N.W.2d 910, 919 (Minn. 2009).

A municipality is liable under 42 U.S.C. § 1983 (2010) when deliberate municipal action is the "moving force" depriving a plaintiff of federal rights. *Monell v. Dep't of Soc. Servs. of New York*, 436 U.S. 658, 694, 98 S. Ct. 2018, 2037-38 (1978). To state a claim under 42 U.S.C. § 1983, "a plaintiff must set forth facts that allege an action performed under [the] color of state law that resulted in a constitutional injury." *Springdale Educ. Ass'n v. Springdale Sch. Dist.*, 133 F. 3d 649, 651 (8th Cir. 1998). "*Monell* liability" may be imposed against a municipality under section 1983 when the alleged unconstitutional act was: (1) pursuant to an official policy or a municipal custom so pervasive so as to have the effect of law; (2) perpetrated by a body or individual with final policymaking authority for the municipality; or (3) perpetrated by a subordinate and ratified by the body or individual with final policymaking authority for the municipality. *City of St. Louis v. Praprotnik*, 485 U.S. 112, 121, 127, 108 S. Ct. 915, 923, 926 (1988). Only the second and third bases for liability are at issue here.

Final Policymaking Authority

Appellant argues that the district court erred by concluding that Engstrom lacked the final policymaking authority to impose section-1983 liability against the city for failing to issue the CUP. Appellant first contends that this is a fact question for the jury and, thus, the district court erred by determining the matter as a conclusion of law on respondents' JMOL motion. But the United States Supreme Court has determined that the issue of whether an individual is vested with final policymaking authority is a question of state law "to be resolved by the [district court] *before* the case is submitted to the jury." *Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 737, 109 S. Ct. 2702, 2723-24 (1989). Accordingly, appellant's assertion that the district court erred by failing to submit the issue to the jury is incorrect.

Appellant also argues that the district court erred by concluding that Engstrom did not possess final policymaking authority to deny the CUP application. Under *Jett*, there are two ways in which an individual or body may be granted final policymaking authority: through enactment of state and local laws (positive law); or through informal, customary procedures so pervasive that they have the effect of actual law. *Id.*, 109 S. Ct. at 2724. The district court concluded that appellant failed to demonstrate that positive law vested Engstrom with final policymaking authority. The district court also determined that appellant presented insufficient evidence to permit a jury to conclude that it was custom in Afton for the mayor to control the CUP-application process.

Respondents argue that Engstrom was not vested with final policymaking authority by virtue of positive law. In Minnesota, the city council is the governing body

for all municipalities and granted the power to effectuate ordinances. Minn. Stat. § 412.191, subd. 4 (2010). City councils are also responsible for handling CUP applications. Minn. Stat. § 462.3595 (2010); *see also* Minn. Stat. § 462.352, subd. 11 (2010) (defining "governing body" as the city council). And a city council may not delegate any legislative or administrative authority to a mayor. *Jewel Belting Co. v. Village of Bertha*, 91 Minn. 9, 11, 97 N.W. 424, 425 (1903). While a mayor is a member of the city council and presides over city council meetings, Minn. Stat. § 412.191, subds. 1, 2 (2010), mayoral authority without council approval is limited. *See, e.g.*, Minn. Stat. § 12.29 (2010) (empowering a mayor to declare local emergencies). Engstrom unquestionably lacked the final policymaking authority to decide appellant's CUP application under the applicable state and local positive law.

Thus, to establish municipal liability by final policymaking authority, appellant must demonstrate that the informal custom in Afton is for the mayor to control the city-council review of CUP applications. Appellant contends that this issue was neither decided by the district court nor submitted to the jury; accordingly, appellant asserts that this case should be remanded. But the district court did consider the issue, and reiterated its finding during posttrial motions: "there was not [any] evidence in the record that [could lead] a jury [to] reasonably . . . find . . . that somehow the City of Afton was run by a mayor who could just do whatever he wanted." This finding is supported by the record: the only evidence appellant produced suggesting that Engstrom controlled the city council was Strauss's testimony that Engstrom was the leader of the "governing majority" of the city council during his time in office and that "if he wanted to get

something passed . . . he had people aligned with him." This does not amount to proof of a custom so pervasive as to have the effect of actual law under *Jett*. Thus, appellant cannot demonstrate that Engstrom possessed the final policymaking authority in denying CUP applications so as to trigger *Monell* liability, and the district court did not err in this respect.

Ratification by City Council

Appellant also argues that the district court erred by concluding that Berg's actions were not ratified by the city council. *Monell* liability is established by virtue of ratification when "the authorized policymakers approve a subordinate's decision and the basis for it." *Praprotnik*, 485 U.S. at 127, 108 S. Ct. at 926. But "[s]imply going along with" a subordinate's decision is insufficient justification to impose *Monell* liability. *Id.* at 130, 108 S. Ct. at 927.

Appellant argues that Berg arbitrarily and capriciously denied its CUP application on the basis of Engstrom's residual political animus after losing the election, which violated appellant's equal-protection, substantive- and procedural-due-process rights. Appellant claims that this unconstitutional action was ratified by the city council: Welter testified that she was aware of the rejection of the CUP application and was present at the November 15 meeting when the moratorium was proposed, as was Nolz; and Strauss testified that Welter deliberately avoided meeting with Jarvis in order to ensure that the application was not resubmitted prior to the moratorium taking effect.

But the Afton city council is comprised of five councilmembers, including the mayor, and there is no proof that the city council collectively ratified Berg's denial of

appellant's CUP application as incomplete. Councilmember Nelson, for instance, testified that he was not even aware that Berg rejected the application. Welter and councilmember Nolz testified that they were not aware of the rejection until the November 15 meeting—after the determination had been made. Thus, the evidence is insufficient to permit a jury to find that respondents were aware that the basis for Berg's determination was Engstrom's alleged political vengeance and, moreover, that respondents approved of this personal vendetta as the basis for rejecting the application. Appellant fails to demonstrate a ratification triggering *Monell* liability, and the district court did not err in this respect.

Appellant failed to demonstrate evidence by which a reasonable jury could impose *Monell* liability on the basis of an unconstitutional act either rendered by a final policymaking authority or ratified by a final policymaking authority. Accordingly, the district court did not err in granting JMOL in favor of respondents on the issue of *Monell* liability. Because we conclude that appellant failed to establish *Monell* liability, we do not reach the merits of appellant's underlying constitutional claims.

Evidentiary Ruling

Appellant also argues that the district court abused its discretion by excluding the testimony of the former Afton mayor Charlie Devine. Evidentiary rulings are left to the discretion of the district court and will not be reversed absent an abuse of discretion. *Kroning v. State Farm Auto Ins. Co.*, 567 N.W.2d 42, 45-46 (Minn. 1997). "In order for this court to find [that] the [district] court abused its discretion, there must have been a

clearly erroneous conclusion that is against both logic and the facts on record." *Cisek v. Cisek*, 409 N.W.2d 233, 235 (Minn. App. 1987), *review denied* (Minn. Sept. 18, 1987).

Appellant asserts that Devine would have testified regarding how the city council actually operated under the control of the mayor and how this custom had the effect of law. But Devine was mayor in Afton from 2001 to 2004, at least two years prior to the conception of the Afton Center project. Furthermore, the city council's composition changed several times since Devine was in office with the appointment of a new city administrator, new councilmembers, and two new mayors. The district court precluded Devine's testimony, determining that it would be speculative, lacking in foundation, and irrelevant. The district court did not abuse its discretion.

Jury Instructions

Appellant challenges the district court's jury instructions on the mandamus claim. District courts have broad discretion in selecting jury instructions, and will not be reversed absent an abuse of that discretion. *Hilligoss v. Cargill, Inc.*, 649 N.W.2d 142, 147 (Minn. 2002). When an instruction fairly and correctly states the law, we will not grant a new trial. *Id.* But when an erroneous jury instruction "destroy[s] the substantial correctness of the charge . . . , cause[s] a miscarriage of justice, or results in substantial prejudice," a new trial is warranted. *Lindstrom v. Yellow Taxi Co.*, 298 Minn. 224, 229, 214 N.W.2d 672, 676 (1974).

The district court instructed the jury to determine whether appellant's CUP application was complete "when it was submitted in November of 2006." Appellant argues that this instruction was erroneous because it permitted the jury to consider factors

not listed by the city as reasons for deeming the application incomplete in the rejection letter. But Minn. Stat. § 15.99, subd. 1(c) (2010) only requires a city to notify a use-permit applicant that the application is incomplete, not the specific reasons supporting that determination: "The agency may reject as incomplete a request not on a form of the agency if the request does not include information required by the agency." *Cf.* Minn. Stat. § 15.99, subd. 2(a) (2010) (requiring an agency to state the reasons for *denying* an application) (emphasis added); *see also Johnson v. Cook County*, 786 N.W.2d 291, 296 (Minn. 2010) (holding that the written-reasons requirement of Minn. Stat. § 15.99, subd. 2 is "directory and not mandatory"). Accordingly, respondents were not required to inform appellant of the specific reasons for declaring the application incomplete, and the only issue before the jury was whether the application was complete under the city's code. The district court did not fail to accurately and fairly state the law; thus, the district court did not abuse its discretion in instructing the jury on the mandamus claim.

Sanctions

The parties challenge the district court's imposition of discovery sanctions. Under Minn. R. Civ. P. 37.02(b), sanctions may be imposed for failure to obey a discovery order. "The choice of sanctions under Minn. R. Civ. P. 37.02(b) for failure to comply with discovery is within the [district] court's discretion." *Przymus v. Comm'r of Pub. Safety*, 488 N.W.2d 829, 832 (Minn. App. 1992), *review denied* (Minn. Sept. 15, 1992).

Appellant argues that because the district court essentially granted its motion to compel Berg to answer deposition questions, it abused its discretion by imposing sanctions "against a prevailing movant." *See* Minn. R. Civ. P. 37.01 (stating that if a

motion to compel is granted, the non-movant must pay the reasonable expenses incurred by the movant in bringing the motion). But, as respondents argue, when a motion to compel is granted in part and denied in part, the district court may "apportion the reasonable expenses incurred in relation to the motion among the parties and persons in a just manner." *Id.* While the district court granted appellant's motion to require Berg to answer certain deposition questions, the court also partially denied appellant's motion on the grounds that other questions were outside of the scope of the proceedings. The district court did not abuse its discretion by sanctioning appellant.

Respondents argue that the district court abused its discretion by imposing excessive sanctions without warning. At a hearing in July 2008, however, the district court ordered respondents to provide appellant's forensic technician with a workable set of electronic documents within a week. Respondents failed to comply, leading the district court to order respondents to pay the total amount of the technician's fees incurred by appellant from May 2008 through October 2008, and any fees incurred by the technician. Accordingly, the sanction is far more rational than respondents suggest; the district court did not abuse its discretion.

Affirmed.