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**STATE OF MINNESOTA
IN COURT OF APPEALS
A12-0687**

Patricia D. Besser,
Appellant,

vs.

City of Chanhassen,
Respondent.

**Filed February 11, 2013
Affirmed
Schellhas, Judge**

Carver County District Court
File No. 10-CV-11-414

Daniel S. Le, Le Law Group, Minneapolis, Minnesota (for appellant)

Bruce P. Candlin, John G. Ness & Associates, St. Paul, Minnesota (for respondent)

Considered and decided by Stauber, Presiding Judge; Schellhas, Judge; and Collins, Judge.*

UNPUBLISHED OPINION

SCHELLHAS, Judge

Appellant challenges the district court's grant of partial summary judgment to respondent-city on the basis of statutory discretionary immunity and dismissal of her

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

equal-protection claim as a matter of law. As to the matter tried to a jury, appellant argues the district court erred by excluding evidence that appellant offered. We affirm.

FACTS

This case arises from a water-main break on November 3, 2009, that caused damage to appellant Patricia Besser's driveway at her Chanhassen home. Besser sued respondent City of Chanhassen in conciliation court, alleging that the city's negligence caused the water-main break, the city failed to respond to the break in a reasonable period of time, and the break resulted in the total destruction of Besser's driveway. After the conciliation court awarded Besser \$7,500 in damages, the city removed the case to district court and moved for summary judgment, arguing, in pertinent part, that it was entitled to statutory discretionary immunity regarding its decision whether to replace the water main near Besser's home. Besser opposed the city's motion, claiming for the first time in her opposition memorandum that the city was liable for damages on the bases of trespass, inverse-condemnation, and violation of equal protection. Besser also moved for summary judgment without submitting a supportive memorandum of law.

The district court denied Besser's motion for summary judgment, granted partial summary judgment to the city on the basis of statutory discretionary immunity on Besser's claim that the city's negligence caused the water-main break, dismissed Besser's equal-protection claim, and denied the city's motion for summary judgment on Besser's claim that the city was negligent in responding to the break. The district court did not address Besser's trespass and inverse-condemnation claims.

At trial, the district court excluded evidence of previous water-main breaks on the basis that the evidence was irrelevant. The jury returned a verdict for the city.

This appeal follows.

D E C I S I O N

“Summary judgment is appropriate when ‘the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that either party is entitled to a judgment as a matter of law.’” *Valspar Refinish, Inc. v. Gaylord’s, Inc.*, 764 N.W.2d 359, 364 (Minn. 2009) (quoting Minn. R. Civ. P. 56.03). “We review a district court’s grant of summary judgment de novo to determine (1) whether there is a genuine issue of material fact precluding summary judgment and (2) whether the district court correctly applied the law.” *Mattson Ridge, LLC v. Clear Rock Title, LLP*, ___ N.W.2d ___, ___, 2012 WL 6165949, at *4 (Minn. Dec. 12, 2012). “The application of immunity presents a question of law that we review de novo.” *Schroeder v. St. Louis Cnty.*, 708 N.W.2d 497, 503 (Minn. 2006).

Statutory Discretionary Immunity

Besser argues that the city’s maintenance of its water-main system is based on operational decisions and that the city failed to present sufficient evidence to show that it is entitled to immunity. Accordingly, Besser argues that the district court erred by concluding that the city is entitled to statutory discretionary immunity on her claim that the city’s negligent maintenance of the water-main system caused the water-main break. We disagree.

Generally, “every municipality is subject to liability for its torts and those of its officers, employees and agents acting within the scope of their employment or duties whether arising out of a governmental or proprietary function.” Minn. Stat. § 466.02 (2012). Municipalities are immune from liability for “[a]ny claim based upon the performance or the failure to exercise or perform a discretionary function or duty, whether or not the discretion is abused.” Minn. Stat. § 466.03, subd. 6 (2012); *see Schroeder*, 708 N.W.2d at 503. “The purpose of statutory discretionary immunity is to protect the legislative and executive branches from judicial second-guessing of certain policy-making activities through the medium of tort actions.” *Schroeder*, 708 N.W.2d at 503. Courts should “focus on the idea that statutory immunity seeks to protect policy-based decisions and to prevent the impairment of effective government.” *Id.*

Government conduct is considered discretionary and thus protected by statutory immunity when the state produces evidence that the conduct was of a policy-making nature. To assist in determining whether the challenged conduct is protected, we distinguish between planning and operational functions. Statutory immunity is extended when there has been a planning-level decision; that is, social, political, or economic considerations have been evaluated and weighed as part of the decision-making process. Statutory immunity does not extend to operational-level decisions, those involving day-to-day operations of government, the application of scientific and technical skills, or the exercise of professional judgment.

Id. at 504 (citations omitted). “Statutory immunity does not bar an action when the conduct was merely a professional or scientific judgment,” but, “if in addition to professional or scientific judgments, policy considerations played a part in making a decision, then planning level conduct is involved and statutory immunity applies.”

Fisher v. Cnty. of Rock, 596 N.W.2d 646, 652 (Minn. 1999). The burden is on the city to show that it engaged in protected policy-making and is entitled to statutory immunity. *Conlin v. City of Saint Paul*, 605 N.W.2d 396, 402 (Minn. 2000).

To determine whether the city is entitled to statutory discretionary immunity, “we must first identify the precise government conduct being challenged.” *Schroeder*, 708 N.W.2d at 504. In this case, the challenged government action is the city’s decision whether and when to replace water mains, and, specifically, the city’s decision not to replace the water main near Besser’s home. We must next determine whether the city has met its burden of demonstrating that it made a planning decision when it decided to replace other city water mains before replacing the water main near Besser’s home. The record shows that the city evaluated cost as part of its decision-making about when and where to replace water mains. The city’s utilities superintendent explained in his affidavits that the city replaces the water-main system, a section at a time, because “[t]he capital cost of replacing all [of the city’s] water mains is enormous” and doing so would require a dramatic increase of water rates or re-allocation of funds from “other civic functions—like police and fire protection, emergency services, street plowing, inspections and licensing.” The utilities superintendent described the city’s process of deciding “which municipal improvements—including streets, lights, signage, curbs, gutters, as well as water and sewer mains—it will take on each year” and stated that, generally, the city’s replacement schedule is that “the oldest improvements are rebuilt first because municipal improvements deteriorate predictably as they age.” This evidence

shows that the city balanced economic policy considerations when planning which water mains to replace—the oldest first.

Besser argues that the city failed to sustain its burden to show that it engaged in protected policy-making and therefore is not entitled to statutory immunity. We disagree. The superintendent's affidavits establish that the city has an articulated policy for water-main replacement and repair—the oldest improvements are rebuilt first—and they detail the factors that inform the city's policy. Further, in connection with the city's financial considerations, the superintendent explained that, based on previous contractor estimates for water-main replacements, the cost to the city to replace all its water mains would be \$75,000,000. The superintendent's affidavits explain the city's planning policy, the purpose behind its implementation, and why an alternative policy would be economically unfeasible.

Besser argues that the district court erred based on an unpublished case. Unpublished cases have no precedential value. Minn. Stat. § 480A.08, subd. 3(c) (2012); *Vlahos v. R&I Const. of Bloomington, Inc.*, 676 N.W.2d 672, 676 n.3 (Minn. 2004) (stressing “that unpublished opinions of the court of appeals are not precedential”).

Besser also argues that Chanhassen is not entitled to statutory discretionary immunity because its water system is proprietary in nature and because it was in a known, dangerous condition when the water main near Besser's home broke. But Besser did not present these arguments to the district court, and the district court did not consider them. We therefore decline to consider the argument. *See Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (“A reviewing court must generally consider only those issues that

the record shows were presented and considered by the trial court in deciding the matter before it.” (quotation omitted)).

We conclude that the district court did not err by concluding that the city’s decision “as to which water mains or other local improvements were to be replaced is clearly a discretionary function and therefore the city has immunity based upon” Besser’s claim that the city was negligent by not replacing the water main near her home. *See Fisher*, 596 N.W.2d at 653–54 (holding that county’s decision not to install guardrails at bridge site was entitled to statutory immunity when the record showed that, while decision was influenced by expertise of engineers, it was based also on economic concerns and was the “application of the county’s bridge replacement policy, a policy that balanced roadway safety considerations and economic burdens”); *Chabot v. City of Sauk Rapids*, 422 N.W.2d 708, 709–11 (Minn. 1988) (stating that city’s decision to not enlarge a holding pond as part of a storm-sewer system was “clearly of a policy-making nature” when cost to do so within a year was “not economically possible”); *Christopherson v. City of Albert Lea*, 623 N.W.2d 272, 276 (Minn. App. 2001) (stating that the city was entitled to statutory discretionary immunity in connection with its decision not to remedy a defect in its sewer system due to “budgetary constraints” when city’s decision “involved balancing financial and policy considerations”).

Equal-Protection Claim

Besser argues that the district court erred by dismissing her equal-protection claim, stating that the city “clearly treated a similarly situated individual and [Besser] unequally based on subjective character determinations which did not advance an established policy

or process.” Besser bases her equal-protection claim on the fact that the city settled another resident’s water-main-break damage claim for \$2,500 but did not settle with Besser. Besser’s argument lacks merit.

The Fourteenth Amendment to the United States Constitution and the Minnesota Constitution both “mandate that all similarly situated individuals shall be treated alike.” *Greene v. Comm’r of Minn. Dep’t of Human Servs.*, 755 N.W.2d 713, 725 (Minn. 2008) (quotation omitted); *see* U.S. Const. amend. XIV, § 1; Minn. Const. art. 1, § 2. “Similarly situated groups must be alike in all relevant respects.” *Meriwether Minn. Land & Timber, LLC v. State*, 818 N.W.2d 557, 572 (Minn. App. 2012) (quotation omitted), *review denied* (Minn. Sept. 25, 2012). This court “reviews an equal protection claim *de novo*.” *Id.*

In this case, Besser and the other resident were not similarly situated individuals. The assistant city manager, who worked on the settlement with the other resident, explained in her affidavit that the city settled with the other resident because he was “agreeable and reasonable” and the city believed that the \$2,500 settlement was preferable to incurring the expense and facing the uncertainty of litigation. By comparison, Besser “never expressed any desire to compromise her claim,” maintaining “her position that the [city] should reimburse [her for] an entire new driveway.” Besser does not dispute the assistant city manager’s statement. We conclude that the district court did not err by dismissing Besser’s equal-protection claim.

Exclusion of Evidence at Trial

The district court conducted a trial on the issue of whether the city was negligent in its response to the water-main break near Besser's home and excluded evidence concerning the city's past water-main maintenance as irrelevant. Besser argues that the court's evidentiary ruling constituted prejudicial error because "[t]he prior operation and maintenance of the [city]'s water main is relevant under Rule 401, because a jury could conclude differently as to whether a [city] timely responds to a water main break depending on whether the [city] had past problems with the water mains in question."

"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." *Kroning v. State Farm Auto. Ins. Co.*, 567 N.W.2d 42, 45–46 (Minn. 1997) (quotation omitted); *see also Wilkes v. Comm'r of Pub. Safety*, 777 N.W.2d 239, 245 (Minn. App. 2010) ("Evidentiary rulings on materiality, foundation, remoteness, relevancy, or the cumulative nature of the evidence are committed to the sound discretion of the district court and will be the basis for reversal only where that discretion has been clearly abused." (quotation omitted)). Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Minn. R. Evid. 401. "[A]ny evidence is relevant which logically tends to prove or disprove a material fact in issue." *Weinberger v. Maplewood Review*, 668 N.W.2d 667, 673 (Minn. 2003) (quoting *Boland v. Morrill*, 270 Minn. 86, 98–99, 132 N.W.2d 711, 719 (1965)).

Besser's argument that the city's past water-main maintenance is relevant to the city's response time to the break near Besser's home is unpersuasive. We conclude that the district court did not abuse its discretion by excluding evidence of past water-main maintenance in the city.

Trespass and Inverse-Condemnation Claims

Besser argues that the district court erred by not addressing her trespass and inverse-condemnation claims. We conclude that these claims were not properly before the district court. On appeal from a conciliation court decision, the "pleadings in conciliation court shall constitute the pleadings in district court," although a party "may amend its statement of claim or counterclaim if, within 30 days after removal is perfected, the party seeking the amendment serves on the opposing party and files with the court a formal complaint conforming to the Minnesota Rules of Civil Procedure." Minn. R. Gen. Pract. 522. Besser neither included these claims in her conciliation complaint nor amended her complaint in district court. "A party is bound by the pleadings if that party does not amend, unless an issue is litigated by consent." *State ex rel. Hatch v. Allina Health Sys.*, 679 N.W.2d 400, 406 (Minn. App. 2004). The district court did not consider Besser's trespass and inverse-condemnation claims, and we decline to consider them for the first time on appeal.

Affirmed.