STATE OF MINNESOTA
IN COURT OF APPEALS
A12-1496

Elden J. Elseth, et al.,
Appellants,

vs.

Roger Hille, et al.,
Respondents.

Filed May 13, 2013
Reversed and remanded
Ross, Judge

Marshall County District Court
File No. 45-CV-11-194

Paul A. Sortland, Sortland Law Office, Minneapolis, Minnesota (for appellants)

Mark A. Solheim, Paula Duggan Vraa, Paul A. Sand, Larson King, LLP, St. Paul, Minnesota (for respondents)

Considered and decided by Ross, Presiding Judge; Peterson, Judge; and Chutich, Judge.

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

ROSS, Judge

This appeal concerns a dispute between two former and seven current[1] managers of a watershed district board. Appellants are the former district managers, and they have

[1] "Current" as of November 30, 2009.

sued alleging that the respondents, who are the current managers, intentionally violated the Minnesota Open Meeting Law by improperly noticing a special meeting and taking action on matters that were improperly noticed. The district court granted respondents' motion for summary judgment and denied appellants' motion to amend their complaint to add the watershed district as a party. Appellants argue that the district court applied an incorrect standard on intent, that they produced evidence to raise a genuine issue of material fact as to whether respondents intentionally violated the open meeting law, and that the district court erred by denying their motion to amend their complaint. The district court applied the correct legal standard, but the disputed facts construed in favor of the appellants prevent summary judgment. We therefore reverse and remand.

FACTS

The Middle-Snake-Tamarac Rivers Watershed District Board is a state political subdivision charged with managing water-related problems within the district. Appellants Elden Elseth and Loren Zutz are former district managers. Respondents Roger Hille, Douglas Sorenson, Benedict Kleinwachter, John Nelson, David Bakke, Alvin Nybladh, and Marvin Hedlund were the district managers during the events giving rise to the dispute in this litigation.

The board posts an annual schedule of its regular meetings on the window of its office in Warren, Minnesota. At some point after its regular meeting on November 16, 2009, the board decided to meet again before its next regular meeting. According to board administrator Nick Drees, the autumn had been warmer and drier than usual and district landowners wanted to conduct certain land-use activities before a freeze—

activities that would require the board to address requests for permits. Board members also wished to address issues related to a district ditch.

Drees met with Jeff Hane, the watershed district's attorney, and Connie Kajawa, the watershed district's secretary, to discuss notice for the special meeting. They published the notice in the November 25 edition of the local newspaper, the *Warren Sheaf*, and posted the notice on the board's office window. The notice read as follows:

> NOTICE
> A Special Meeting of the Board of Managers of the Middle Snake Tamarac Rivers Watershed District will be held on Monday, November 30, 2009 at the District Office at 3:00 p.m. The purpose of the meeting is to (but not limited to) the review of Permit Applications. The meetings are open to the public.

The special meeting commenced as noticed. Zutz attended and made an audio recording of the meeting. The agenda listed two permit applications, but, soon after the meeting began, Sorenson stated that Drees wanted the board to discuss another permit—for culvert work on a ditch—and a land acquisition. Sorenson invited a motion either to approve the agenda as presented or to amend the agenda to include the additional items. Nelson moved to amend the agenda, and Hille seconded the motion. Before the vote, the following exchange occurred about the scope of issues that could be addressed under the notice and the agenda:

> KLEINWACHTER: I mean how is this meeting limited in any way, shape, or form; or what's the deal with that? I mean is it a special meeting for a special specific purpose or is it a—
> NELSON: It was advertised. . . .
> DREES: Only for this and that, and all the matters brought before the—
> KLEINWACHTER: Oh.

NELSON: It's not limited to, I think it shows.
BAKKE: Not, not limited to, isn't it?
NYBLADH: The permits, yea.
BAKKE OR HEDLUND: Yep.
NYBLADH: You have it in your packet I think.
DREES: And legal counsel said it's good to go.
KLEINWACHTER: Okay.
SORENSON: Any further discussion? Hearing none; all those in favor say aye.
ALL: Aye.
SORENSON: Opposed, say no. Carried.

The board later discussed the installation of a pipe replacement at a Texas crossing. (A "Texas crossing" is a colloquialism describing a constructed pathway that allows a pedestrian to cross a depression or ditch through which water occasionally flows.) The Texas crossing was not mentioned in the notice and was not included in the amendment to the agenda. Drees remarked that the board does not issue permits that are on the board's own ditch system: "It's kind of like permitting our own—giving ourselves a permit." Zutz commented about the size of the culvert to be installed. Then Nelson sparked the following discussion, questioning the board's authority to discuss the issue:

NELSON: Questions. This isn't on our agenda. Should we even be—this should have been brought up—I mean I guess I don't have a problem with it, but it's the way it's going—evolved here. I do have a problem with that.
HILLE: I'd have more of a problem if it came up at the next meeting that it was already done, 'cause culvert—
NELSON: I don't think it should be touch[ed]. I don't think it should be touched.
HILLE: —culvert's already in the hole.
NELSON: I don't think it should be touched.
UNIDENTIFIED MALE: No, it's out there.
DREES: Culvert's already been purchased, I believe, It's not in the hole yet.
NELSON: Well, I really don't think it should be touched.

> KLEINWACHTER: Well, the other thing though as the district takes on the cleaning projects, you never know what you're gonna run into until you—get out there sometime. This is one of those things that the hole is there. We're gonna put dirt on top of a culvert, where there was a crossing which wasn't probably—I'd agree with probably Ron. It's probably more restrictive to that ditch system having a 48-inch [culvert] in there.
> NELSON: But I still go back to, we probably shouldn't even be discussing this. This wasn't brought up on the approval of the agenda or anything else, this permit.
> HILLE: Well, it's not a permit.
> NELSON: Or whatever it is.
> HILLE: You know, I mean it's watershed business. And you know what? We're a unit of government, but we still have to respect those other units of government too. And here you've got a township going to pay the cost of, you know, in conjunction with the landowner and whatever. I think we have to respect that, and I'm not sure it would be the smartest thing to say, "Hey, wait." And then when you put it in, go hire a scraper and get the dirt that you need—to backfill it. I mean that wouldn't be being an appropriate neighbor to our subunit of government.
> NELSON: So you feel that even though it's not on the agenda, it's okay to act on it.
> HILLE: I do. Because our notice says, 'Other issues that come before the board.' And it's certainly not a permit as such; at least by our current standards, it's not.
> SORENSON: Motioned by Ben [Kleinwachter], seconded by David [Bakke] to allow the installation of a 40-inch pipe to replace a Texas crossing the southwest corner of Section 9 Hegeland.

The board voted in favor of replacing the Texas crossing, with Nelson alone casting a "no" vote. The meeting adjourned.

Zutz later questioned the sufficiency of the board's notice. In February 2010, he asked the commissioner of the Minnesota Department of Administration to provide an advisory opinion about it. Zutz asked,

> Did the [watershed district board] fail to give adequate notice of the purpose of a special meeting of November 30, 2009 and fail to comply with Minnesota Chapter 13D.04, subdivision 2 by stating the "Purpose of the meeting is to, (But not limited to) the review permit applications" (sic) when additional issues not contained in the notice were discussed and acted upon?

The Information Policy Analysis Division (IPAD), which prepares advisory opinions for the commissioner, concluded that the board "did not comply" with the open meeting law. It determined that the November 30 meeting was a special meeting, and, relying on an earlier advisory opinion, concluded that boards are limited to taking action on topics listed in the notice. The board should have acted only on permit applications, according to the opinion. Relying on another advisory opinion, IPAD explained that the qualifier "but not limited to" was not specific enough notice to add new issues in a special meeting.

Armed with that opinion, in April 2011 appellants sued respondents, seeking civil penalties and attorney fees. Their complaint alleged that the respondents were specifically instructed on the open meeting law, violated the open meeting law in the past, continued to ignore the open meeting law, and failed to inform the public of the purpose of the November 30 meeting. Respondents denied the allegations and moved for summary judgment. Appellants moved to amend their complaint to add the watershed district as a party. The district court granted respondents' motion for summary judgment and denied appellants' motion to amend because it served no useful purpose, dismissing the action.

This appeal follows.

D E C I S I O N

I

Appellants challenge the district court's grant of summary judgment. Summary judgment is proper if the admissible evidence shows that no genuine issue of material fact exists and that either party is entitled to judgment as a matter of law. Minn. R. Civ. P. 56.03; *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993). This court reviews summary judgment de novo. *Riverview Muir Doran, LLC v. JADT Dev. Grp., LLC*, 790 N.W.2d 167, 170 (Minn. 2010). In doing so, we view the record in the light most favorable to the party against whom summary judgment was granted, *Fabio*, 504 N.W.2d at 761, determining whether any genuine issue of material fact exists and whether the district court properly applied the law, *Dykes v. Sukup Mfg. Co.*, 781 N.W.2d 578, 581 (Minn. 2010).

What Is the Intent Standard?

Appellants argue that the district court erroneously granted summary judgment by misconstruing the *mens rea* standard that applies to the penalty provision in the open meeting law. Whether the district court applied the correct legal standard is a question of law reviewed de novo. *Am. Bank of St. Paul v. City of Minneapolis*, 802 N.W.2d 781, 785 (Minn. App. 2011). The open meeting law mandates that "[a]ny person who *intentionally violates* this chapter shall be subject to personal liability in the form of a civil penalty." Minn. Stat. § 13D.06, subd. 1 (2010) (emphasis added). "In addition to other remedies, the court may award reasonable costs, disbursements, and reasonable attorney fees of up to $13,000." Minn. Stat. § 13D.06, subd. 4(a) (2012). But "[n]o monetary penalties or

attorney fees may be awarded against a member of a public body unless the court finds that there was *an intent to violate* this chapter." *Id*., subd. 4(d) (2012) (emphasis added). We are asked whether the district court applied the correct standard of "intent."

Appellants argue that the district court erred because it essentially followed a previous version of the open meeting law that conditioned orders for monetary penalties and attorney fees for an open-meeting-law violation on a showing of "*specific* intent" to violate the law. *See* Minn. Stat. § 13D.06, subd. 4(d) (2006) (emphasis added). They maintain that the district court should have recognized that, by removing the word "specific" when it amended that portion of the law, the legislature wanted to penalize conduct motivated even by a mere "general intent." We think the argument confuses the distinction between general intent and specific intent—a distinction most commonly discussed in criminal cases—and fails to recognize the context of the intent requirement here. Personal liability and civil damages require proof that the accused "intentionally violate[d] [the] chapter." Minn. Stat § 13D.06, subds. 1, 4(d). The specific intent to violate the chapter is required with or without the word. That is, expressly adding the modifier "specific" to the operative adverb "intentionally" would be superfluous since the plain language informs the reader that the offender must intend a specific thing: *to violate the chapter*. Unless the accused manager has intentionally violated the chapter, specifically, he is not liable for monetary penalties.

This construction defeats the appellants' implied argument that the respondents are subject to liability even if they negligently, inadvertently, mistakenly, or even recklessly

violated the statute. To avoid summary judgment, the appellants must have provided evidence that the accused managers intentionally violated the open meeting law.

Can Summary Judgment Apply to the Question of Intent?

The appellants next contend that, because intent is always a fact question, the district court improperly granted summary judgment when it held that there was no evidence that respondents intentionally violated the open meeting law. Appellants are correct that intent is generally a question of fact and that summary judgment is often not appropriate "where motive and intent play leading roles." *See Poller v. Columbia Broad. Sys., Inc.*, 368 U.S. 464, 473, 82 S. Ct. 486, 491 (1962) (examining anti-trust case); *see also Brown v. Cannon Falls Twp.*, 723 N.W.2d 31, 44 (Minn. 2006) (noting that in an open meeting law case, "[d]etermining a party's intent is a question of fact"). But intent is still a fact, and, to avoid summary judgment and warrant a trial, the appellants had to provide some evidence to support their argument that the alleged violation of the open meeting law was intentional. *See Bena Parent Ass'n v. Ind. Sch. Dist. No. 115*, 381 N.W.2d 517, 521 (Minn. App. 1986). The district court did not improperly determine that the appellants could avoid summary judgment only by submitting some evidence that the accused managers intended to violate the open meeting law.

Was There Evidence of Respondents' Intent to Violate the Open Meetings Law?

Appellants next challenge the district court's grant of summary judgment because they claim that they submitted circumstantial evidence of respondents' intent to violate the open meeting law. They cite evidence that the respondents received training about the open meeting law, that they have significant experience serving on public bodies where

the open meeting law would apply, and that they engaged in discussion during the November 30 special meeting that indicated their awareness that their actions constituted a violation.

We are not persuaded that the general fact that the respondents have received training on the open meeting law can by itself defeat summary judgment. The appellants have identified no specific training received by any of the men who they allege intended to violate the open meeting law.

But the appellants are correct that the district court was required to presume that the respondents' general broad public-body experience creates a presumption of knowledge of the open meeting law. Board members are presumed to know the law as codified in statute as well as the caselaw interpreting it. The supreme court explained in *Claude v. Collins* that "[e]xperienced elected officials [and those who have attended open meeting law training] . . . are presumed to know the subjects which could lawfully be discussed in closed meetings." 518 N.W.2d 836, 843 (Minn. 1994). And in *Merz v. Leitch*, the court warned that, although it was affirming the district court's dismissal of an action alleging violations of the open meeting law, "[s]ince the issuance of [two prior cases on point] and this decision, boards and commissions of public bodies are put on notice" as to how the supreme court had interpreted a facet of the law. 342 N.W.2d 141, 146 (Minn. 1984). We interpret these cases to hold that experienced public-body board members have constructive knowledge of the open meeting statute and the precedential appellate cases that have interpreted it.

The presumption required by caselaw is not, however, as broad as the appellants suggest. We are not persuaded by the appellants' suggestion that an intentional violation may be shown merely by the existence of the cited IPAD advisory opinions. Courts are directed by statute to give deference to administrative advisory opinions, but advisory opinions are persuasive only, not binding on the public body, its members, or the court. Minn. Stat. § 13.072, subd. 2 (2010); *Navarre v. S. Washington Cnty. Schs.*, 652 N.W.2d 9, 23 n.5 (Minn. 2002). Because advisory opinions are not binding on anyone, knowledge of their content cannot amount to constructive knowledge of the law. Appellants also have identified no evidence that relevant IPAD opinions were, as they assert, "well known, or at least should have been well known to [respondents]."

Because supreme court precedent has imposed the presumption of board-member knowledge of the law, we turn to the statute and caselaw to identify what experienced and trained board members are presumed to know. On this inquiry, we hold that the board members are presumed to know that they are likely violating the open meeting law if they act beyond the scope of the notice of a special meeting. Read broadly, *Claude* teaches that they "are presumed to know the subjects which could lawfully be discussed" at board meetings. 518 N.W.2d at 843. The statute requires notice to include the date, time, place, *and purpose* of the special meeting. Minn. Stat. § 13D.04, subd. 2(a). It is true that the statute declares only what is required in the notice of special meeting and does not *expressly* prohibit board action beyond the noticed purpose of the meeting. But the prohibition to act beyond the notice is necessarily implied in the notice requirement (or the notice requirement is meaningless). The supreme court has interpreted the open

meeting statute in a related context and emphasized that "the general rule of statutory construction is that every statute is understood to contain by implication, if not by its express terms, all provisions necessary to effectuate its object and purpose." *Sullivan v. Credit River Twp.*, 299 Minn. 170, 174, 217 N.W.2d 502, 505 (Minn. 1974). And no one on appeal contends that the open-ended qualifier "but not limited to" satisfies the statutory requirement to provide notice of the special meeting's purpose.

Taking the presumption that arises from the language and implications of the statute together with the interpretation by caselaw, a factfinder has ground on which to find that some or all the board members believed that by acting beyond the scope of the notice they were acting beyond their authority and violating the open meeting law. This alleged action in the face of knowledge could support a finding of intent to violate. This is because intent to break the law can be inferred from knowingly violating the law. *Cf. In re Disciplinary Action Against Rudawski*, 710 N.W.2d 264, 270 (Minn. 2006) (attorney's knowledge that he had been placed on involuntary restricted status and then practiced law supported referee's finding that he intentionally practiced law while on restricted status).

This presumption of knowledge is not alone here; it is supplemented because one board member also raised a cautionary flag by calling the others' attention to the possibility that the board lacked the authority to act. Nelson had insisted, "But I still go back to, we probably shouldn't even be discussing this. This wasn't brought up on the approval of the agenda or anything else, this permit." And he declared, "I don't think it should be touched." At another point he complained, "[B]ut it's the way it's going—evolved here. I do have a problem with that." Construing the evidence in the light most

favorable to the appellants, as we must in this summary-judgment context, the reference to "the agenda *or anything else*" suggests the manager's concern about the lack of adequate public notice. The board members are presumed to know that deciding matters undisclosed to the public invites the kind of publicly unscrutinized decision-making that is avoided when board members follow the requirements of the open meeting law.

We do not suggest that the *mens rea* evidence, which rests here mostly on a mere presumption, is particularly weighty. It may be that, as a matter of fact, the board members did *not* believe that the open meeting law prohibited them from acting on matters that were not included in the purposes stated in the notice generally or that specific circumstances in this case permitted them to consider unnoticed issues. The appellants must still shoulder the more substantial burden of proof at trial, without the benefit of the lenient summary-judgment standard under which we construe the disputed evidence and all reasonable inferences in their favor. But the standard applies here, and on that standard, we hold that the appellants have barely cleared the hurdle and avoid summary judgment. We therefore reverse and remand for further proceedings.

II

Appellants' final challenge addresses the district court's denial of their motion to amend their complaint to add the watershed district board as a party. This court reviews a denial of a motion to amend for abuse of discretion. *See, e.g., Rosenberg v. Heritage Renovations, LLC*, 685 N.W.2d 320, 332 (Minn. 2004). Appellants moved to amend after respondents served their answer, when amendment is permitted only by leave of the court or by written consent of the adverse party and shall be freely given when justice so

requires. *See* Minn. R. Civ. P. 15.01. Leave to amend may be denied if amendment would serve no useful purpose. *Bridgewater Tel. Co. v. City of Monticello*, 765 N.W.2d 905, 915 (Minn. App. 2009).

A district court may award attorney fees to a prevailing plaintiff who has brought an action under this section if the public body that is the defendant in the action was subject to a prior advisory opinion, and the district court finds that the opinion is directly related to the cause of action litigated and that the public body did not act in conformity with the opinion. Minn. Stat. § 13D.06, subd. 4(e) (2012). Because our resolution of the appeal calls into question the district court's apparent view that leave to amend would serve no useful purpose, we reverse its decision denying appellants' motion to amend their complaint.

Reversed and remanded.