STATE OF MINNESOTA
IN COURT OF APPEALS
A09-1835

Douglas John Gunnink,
Appellant,

Michael Otto Hartmann,
Appellant,

vs.

State of Minnesota, et al.,
Respondents,

County of Sibley, et al.,
Respondents,

District Judge Thomas McCarthy,
individually and in his judicial capacity, et al.,
Respondents.

Filed August 24, 2010
Affirmed
Willis, Judge[*]

Sibley County District Court
File Nos. 72-CV-08-250 & 72-CV-08-251

Douglas John Gunnink, Gaylord, Minnesota (pro se appellant)

Michael Otto Hartmann, Lafayette, Minnesota (pro se appellant)

Lori Swanson, Attorney General, Carla Heyl, Assistant Attorney General, St. Paul, Minnesota (for respondents State of Minnesota, et al.)

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

Joseph J. Langel, Ratwik, Roszak & Maloney, P.A., Minneapolis, Minnesota (for respondents County of Sibley, et al.)

Lori Swanson, Attorney General, John S. Garry, Assistant Attorney General, St. Paul, Minnesota (for respondents District Judge Thomas McCarthy, et al.)

Considered and decided by Shumaker, Presiding Judge; Bjorkman, Judge; and Willis, Judge.

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

WILLIS, Judge

Appellants assert that the district court erred by granting summary judgment against appellants on their abuse-of-process and malicious-prosecution claims. Because there was no error, we affirm.

FACTS

The facts in this case are undisputed. The Minnesota Pollution Control Agency (MPCA), a respondent here, promulgates administrative rules regulating animal feedlots. Minn. R. 7020 (2009). An animal feedlot is defined as

> a lot or building or combination of lots and buildings intended for the confined feeding, breeding, raising, or holding of animals and specifically designed as a confinement area in which manure may accumulate, or where the concentration of animals is such that a vegetative cover cannot be maintained within the enclosure.

Minn. R. 7020.0300, subp. 3. The MPCA rules allow the MPCA to delegate management of the feedlot program to counties. Minn. R. 7020.1500. In 1980, the MPCA delegated to respondent Sibley County the task of inspecting farms in that county for the existence of and status of animal feedlots.

Under the MPCA rules, a county feedlot-pollution-control officer is required to locate and register all animal feedlots and manure-storage areas in the county and provide the registration information to the MPCA. Minn. R. 7020.1600, supb. 2. This registration information includes the types of animal-holding areas, including pastures, confinement barns, and open lots; the number and types of animals; identification of surface waters within 1,000 feet; and the presence of and types of manure-storage areas. Minn. R. 7020.0350, subp. 1. The rules require a facility owner to register the facility if it is a feedlot capable of holding 50 or more animal units or has a manure-storage area capable of holding the manure produced by 50 or more animal units. Minn. R. 7020.0350, subp. 2(A). Facilities capable of holding at least ten but fewer than 50 animal units, or having a storage area capable of holding manure from that many animal units, are also required to be registered if they are located within shoreland. *Id.* Sibley County incorporated the chapter 7020 feedlot rules into its animal-feedlot regulations, which are part of its zoning ordinance. Sibley County, Minn., Zoning Ordinance § 300.14.13.3 (2010).

Appellants are farmers who own separate farms in Sibley County. Appellant Michael Otto Hartmann's farm is 160 to 180 acres, and he typically has approximately 60 dairy cattle, 12 to 21 hogs, and a horse on the farm. Hartmann's farm also contains a large manure lagoon, which is located within the shoreland area of a lake. Appellant Douglas John Gunnink's farm is 165 to 170 acres. He maintains primarily a beef-cattle operation, which has normally between 60 and 90 head of cattle. The cattle have access to a fenced-in area that is devoid of vegetation.

By letters dated May 11, 2007, Sibley County told appellants that the county needed to do a routine inspection of their farms and register any feedlots. Appellants asserted that the MPCA rules did not provide authority for inspections. On October 27, 2007, the county attorney's office filed petitions for inspection orders for appellants' farms. In late December, the county filed misdemeanor complaints against appellants for violating the county zoning ordinance, which incorporates the MPCA rules that require feedlot inspections.

In January 2008, the county voluntarily dismissed the pending petitions and the criminal complaints, deciding instead to pursue administrative search warrants. These search warrants were issued on April 10, and the searches took place shortly thereafter. The searches showed that there were feedlots on both farms, and appellants' feedlots were registered as required under the MPCA rules.

On August 13, appellants sued Sibley County and several of its employees, the MPCA and one of its employees, and two district-court judges involved in the underlying proceedings, claiming abuse of process, malicious prosecution, and negligent supervision. The judges moved to dismiss the complaints for failure to state a claim on which relief could be granted because of judicial immunity. Following a hearing, the district court granted the judges' motion to dismiss on February 23, 2009. Thereafter, on March 30, the remaining respondents moved for summary judgment. On August 6, the district court granted respondents' motion for summary judgment. This appeal follows.

D E C I S I O N

"On an appeal from summary judgment, [a reviewing court] ask[s] two questions: (1) whether there are any genuine issues of material fact and (2) whether the [district] court[] erred in [its] application of the law." *State by Cooper v. French*, 460 N.W.2d 2, 4 (Minn. 1990). When the district court grants summary judgment based on the application of a statute to undisputed facts, the result is a legal conclusion, which appellate courts review de novo. *Weston v. McWilliams & Assocs.*, 716 N.W.2d 634, 638 (Minn. 2006) (citing *Lefto v. Hoggsbreath Enters., Inc.*, 581 N.W.2d 855, 856 (Minn. 1998)).

Appellants brought three claims against respondents: abuse of process, malicious prosecution, and negligent supervision. These claims related to the three legal proceedings brought against appellants by the county: petitions for inspection orders, misdemeanor complaints, and administrative search warrants. Appellants do not challenge the district court's dismissal of the negligent-supervision claim, so this appeal is limited to the abuse-of-process and malicious-prosecution claims.

I. The district court did not err by granting summary judgment to respondents on appellants' abuse-of-process claims.

To state a claim for abuse of process, a plaintiff must establish (1) the existence of an ulterior purpose in using the process and (2) the act of using the process to accomplish a result not within the scope of the proceeding in which it was used. *Kellar v. VonHoltum*, 568 N.W.2d 186, 192 (Minn. App. 1997), *review denied* (Minn. Oct. 31, 1997). "The gist of the action, then, is the misuse or misapplication of legal process to accomplish an end other than that which the process was designed to accomplish." *Pow-*

Bel Const. Corp. v. Gondek, 291 Minn. 386, 389, 192 N.W.2d 812, 814 (1972). To support a cause of action for abuse of process, there "must be either an injury to the person or to property. Mere indirect injury to a person's business or to his good name is not sufficient." *Hoppe v. Klapperich*, 224 Minn. 224, 232, 28 N.W.2d 780, 787 (1947) (emphasis omitted) (quotation omitted).

A. The petitions for inspection orders

Respondents did not abuse process by filing petitions for inspection orders. First, appellants cannot show that respondents had an ulterior purpose in filing the petitions. The purpose of the petitions was to gain access to appellants' farms to inspect them under the MPCA rules. Further, appellants have provided no evidence that would raise a fact issue as to whether the process was used to accomplish a result not within its scope. Lastly, appellants cannot show damages. As stated by the district court: "[Appellants] assert significant mental anguish and loss of time in trying to defend themselves against the accusations of government agents but fail to present any evidence as to how they would demonstrate or evaluate these injuries to a trier of fact."

Nonetheless, appellants assert that abuse of process is evidenced by (1) the county improperly captioning the petitions as criminal actions; (2) the county utilizing the district court instead of an administrative hearing; (3) the lack of substantive law supporting the petitions to gain access to their farms; and (4) alleged ex parte communications by other respondents with one of the judges. These arguments will be addressed in turn.

The caption of the petitions referred to the criminal division and identified the plaintiff as the state, rather than the county. It does not appear that appellants raised in the district court the argument that the captions demonstrate that the petitions were an abuse of process. Generally, an appellate court will not consider matters not argued to and considered by the district court. *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988). Furthermore, any "regularity or irregularity in the issuance of the process . . . is immaterial." *Hoppe*, 224 Minn. at 231, 28 N.W.2d at 786. The substance of the petitions was clearly not criminal in nature; they were an attempt to gain access to appellants' farms through a civil proceeding. There was no attempt to pursue criminal charges through the petitions or otherwise to use the petitions in a manner inconsistent with their stated purpose.

Appellants also seem to argue that the county should have brought the farm-access issue before the MPCA instead of the district court. This argument is made in a sentence that cites an inapplicable rule and contains no further analysis. An assignment of error in a brief based on "mere assertion" and not supported by argument or authority is waived unless prejudicial error is obvious on mere inspection. *State v. Modern Recycling, Inc.*, 558 N.W.2d 770, 772 (Minn. App. 1997) (quoting *Schoepke v. Alexander Smith & Sons Carpet Co.*, 290 Minn. 518, 519-20, 187 N.W.2d 133, 135 (1971)).

Appellants assert repeatedly that the county had no legal authority to inspect their farms for feedlots, ignoring the delegation by the MPCA to Sibley County of the responsibility for feedlot inspections in the county. We understand appellants' argument to be that the rules are invalid and, in any event, do not apply to them. This argument is

unavailing. Abuse of process is a tort that is based on the misuse of legal process; even if appellants were ultimately to show that the MPCA rules are invalid or inapplicable to them, that would not alter the fact that the petition process was not abused or misused. As noted by the district court, "[t]he fact that [appellants] disagree with the law does not raise a fact issue regarding whether the processes were abused."

Lastly, appellants contend that other respondents improperly communicated with one of the involved judges ex parte with the intent to abuse judicial process. They base this belief on a note found in the district court file, which was allegedly attached to a now-missing letter, instructing someone to go to "Plan B." A claim based solely on a party's speculation cannot survive summary judgment. *See Gutbrod v. Cnty. of Hennepin*, 529 N.W.2d 720, 723 (Minn. App. 1995) (stating that "mere denials, general assertions and speculation are not enough" to survive summary judgment). Appellants' assertions regarding the alleged ex parte communication are insufficient to support an abuse-of-process claim. The district court did not err by granting respondents' motion for summary judgment on appellants' abuse-of-process claim regarding the petitions.

B. The misdemeanor charges

The county brought misdemeanor charges against appellants for refusing to grant inspectors access to their farms. Appellants' refusal was an alleged violation of the county zoning ordinance, which incorporates the MPCA rules that require feedlot inspections. The district court did note that "as to [the] second element, a better abuse of process argument could be made with regard to the criminal complaints (that the [c]ounty sought registration by way of coercion with a criminal proceeding), [but] the Court is not

now presented with any evidence thereof." Appellants presented no evidence showing that the criminal charges were brought for an ulterior purpose and to accomplish a result outside of the scope of the proceeding. Furthermore, appellants are unable to show injury because the charges were dropped approximately a month after they were filed.

Appellants argue that there was no probable cause to support the complaints and that the MPCA rules and the county ordinance are unconstitutional. Once again, these assertions go to the validity of the criminal complaints, not to the elements of an abuse-of-process claim.

Therefore, without additional evidence to establish material fact questions regarding whether the misdemeanor complaints were issued for an improper purpose, the district court did not err by granting respondents' motion for summary judgment on appellants' abuse-of-process claim regarding the complaints.

C. The search warrants

The search warrants here were not sought for an ulterior purpose; they were necessary to gain access to appellants' farms. The process was used for the purpose for which it was intended. Appellants seem to argue that the warrant was invalid, not because the process was improper, but because the MPCA rules on which the process was based are somehow unconstitutional. As noted previously, appellants' substantive arguments about the constitutionality of the MPCA rules have no bearing on whether respondents' applications for search warrants constitute an abuse of process.

The district court did not err by granting respondents' motion for summary judgment on appellants' abuse-of-process claim regarding the search warrants.

II. The district court did not err by granting summary judgment to respondents on appellants' malicious-prosecution claims.

To maintain an action for malicious prosecution, a party must show that (1) the action was brought without probable cause or reasonable belief that the plaintiff would ultimately prevail on the merits; (2) the action was instituted and prosecuted with malicious intent; and (3) the action terminated in the defendant's favor. *Kellar*, 568 N.W.2d at 192. "Probable cause for pursuing a civil action consists of such facts and circumstances as will warrant a cautious, reasonable and prudent person in the honest belief that his action and the means taken in prosecution of it are just, legal and proper." *Dunham v. Roer*, 708 N.W.2d 552, 569 (Minn. App. 2006) (quotation omitted), *review denied* (Minn. Mar. 28, 2006). Only "reasonable belief" that probable cause existed is necessary to defeat a malicious-prosecution claim. *Id.*

A. The petitions for inspection orders

To succeed in their malicious-prosecution claims, appellants need to show that respondents lacked probable cause to petition for inspection orders and initiated the proceeding with malicious intent. Because the petitions were ultimately dismissed, and therefore resolved in appellants' favor, there is no dispute that appellants meet the third requirement of a malicious-prosecution claim.

The MPCA rules provide legal authority for conducting an inspection of appellants' property; appellants' belief that the rules do not apply to them does not mean that the county lacked probable cause to seek the district court's permission for access to the two farms. Further, appellants produced no evidence of malice. Appellants' mere

belief that the petition was sought with malicious intent is insufficient to establish the existence of a genuine issue of material fact precluding summary judgment. *See* Minn. R. Civ. P. 56.05 ("When a motion for summary judgment is made and supported as provided in Rule 56, an adverse party may not rest upon the mere averments or denials of the adverse party's pleading but must present specific facts showing that there is a genuine issue for trial."). The district court did not err by granting summary judgment to respondents on appellants' malicious-prosecution claim regarding the petitions.

B. The misdemeanor charges

To succeed in their malicious-prosecution claim, appellants need to show that respondents lacked probable cause to file the misdemeanor complaints and initiated the proceedings with malicious intent. Again, because the complaints were ultimately dismissed, and therefore resolved in appellants' favor, there is no dispute that appellants meet the third requirement of a malicious-prosecution claim.

Appellants' refusals to abide by the county zoning ordinance, which incorporates the MPCA rules, were misdemeanors. Appellants produced no evidence showing that the criminal complaints were not supported by a reasonable belief that probable cause existed. And in any event, appellants provided no evidence that respondents acted with malicious intent in bringing these actions.

Appellants argue that the rules and the county ordinance are unconstitutional. As noted previously, the substantive legality of the rules is irrelevant with regard to this tort action. A malicious-prosecution claim requires the actor to know that his or her act is wrong. *See Allen v. Osco Drug, Inc.*, 265 N.W.2d 639, 646 (Minn. 1978) ("The

instruction does not permit an inference of malice from the mere intentional doing of an act which is wrong but rather requires that the actor know that it is wrong." (emphasis omitted)). Because the rules and the ordinance provide for misdemeanor prosecution in these circumstances, there is no evidence of a knowing, wrongful act. The district court, therefore, did not err by granting summary judgment to respondents on appellants' malicious-prosecution claim regarding the misdemeanor charges.

C. The search warrants

Appellants' argument that the district court erred by granting summary judgment against them on their malicious-prosecution claim with regard to the search warrants fails for two reasons: First, the district court made a finding of probable cause when the warrants were issued. Because appellants did not appeal from that determination, they cannot now claim that there was no probable cause or use this tort action to collaterally attack the warrants. *See Dunham*, 708 N.W.2d at 570 ("Because the district court . . . granted the initial restraining order, appellant cannot demonstrate that the petition for the restraining order was brought without probable cause. And because appellant did not appeal that order, she cannot now collaterally attack it."). Second, unlike the petitions and the misdemeanor charges, this issue did not terminate in appellants' favor. The search warrants were issued, and the inspections occurred. And appellants presented no evidence that respondents acted with malicious intent in seeking the warrants.

The district court did not err by granting respondents' motion for summary judgment on appellants' malicious-prosecution claim regarding the search warrants.

III. The district court did not err by granting respondent judges' motion to dismiss under the judicial-immunity doctrine.

Appellants also brought abuse-of-process and malicious-prosecution claims against two district-court judges involved in the underlying proceedings. The district court in this case dismissed for failure to state claims on which relief could be granted because of the doctrine of judicial immunity.

A judge or judicial officer cannot be held liable in a civil action for acts done in the exercise of judicial authority. *Myers v. Price*, 463 N.W.2d 773, 775 (Minn. App. 1990), *review denied* (Minn. Feb. 4, 1991). Furthermore, "[j]udicial immunity applies to determinations and acts in a judicial capacity however erroneous or by whatever motives prompted." *Id*. (quotation omitted). "The rationale for this broad application of immunity is to preserve judicial independence by allowing judges to act in their official capacity without fear of retaliatory civil suits." *Id*.

"If a claim is barred on immunity grounds, the governmental entity is entitled to judgment as a matter of law and dismissal is proper." *S.J.S. v. Faribault Cnty.*, 556 N.W.2d 563, 565 (Minn. App. 1996), *review denied* (Minn. Jan. 21, 1997). We review de novo the dismissal of a complaint for failure to state a claim on which relief can be granted. *Bodah v. Lakeville Motor Express, Inc*., 663 N.W.2d 550, 553 (Minn. 2003).

The judicial actions that appellants assert were improper are the issuance of orders and search warrants, clearly judicial acts normally performed by a judge in his or her official capacity. Therefore, appellants' complaint against the judges are barred by judicial immunity.

Appellants assert that judicial immunity does not apply because the judges had no jurisdiction to act. But judges' actions are unprotected only if they were taken in the clear absence of all jurisdiction. *See Stump v. Sparkman*, 435 U.S. 349, 356-57, 98 S. Ct. 1099, 1105 (1978) ("A judge will not be deprived of immunity because the action he took was in error, was done maliciously, or was in excess of his authority; rather, he will be subject to liability only when he has acted in the clear absence of all jurisdiction." (quotation omitted)).

Appellants argue that there was no adequate factual or legal basis for the judges to act in the circumstances surrounding the inspection of appellants' properties. We disagree. Other than appellants' assertions, there is no evidence that the orders and search warrants lacked a sufficient factual basis or that there was not probable cause to issue them. Thus, the argument that the judges lacked jurisdiction to act is without merit. And even if there were no legal basis to act, judicial acts in excess of jurisdiction are subject to protection under the judicial-immunity doctrine. *See id*. at 357 n.7, 98 S. Ct. at 1105 n.7 (clarifying that "if a probate judge, with jurisdiction over only wills and estates, should try a criminal case, he would be acting in the clear absence of jurisdiction and would not be immune from liability for his action; on the other hand, if a judge of a criminal court should convict a defendant of a nonexistent crime, he would merely be acting in excess of his jurisdiction and would be immune").

Appellants also contend that one of the judge's alleged ex parte communication with other respondents defeats any claim of judicial immunity. But "immunity applies even when the judge is accused of acting maliciously and corruptly." *Pierson v. Ray*, 386

U.S. 547, 554, 87 S. Ct. 1213, 1218 (1967). Therefore, even if appellants' allegations were true, they would not be sufficient to overcome the broad application of judicial immunity. The district court did not err by dismissing appellants' claims against the judges.

IV. The district court did not err by dismissing appellants' summary-judgment motion as moot.

Appellants argue that the district court's failure to issue a scheduling order denied them the opportunity to move for summary judgment. The county and the MPCA gave notice in February 2009 that they would be bringing a motion for summary judgment on April 30. On July 31, the district court signed an order granting respondents' motion for summary judgment, which was filed on August 6. Appellants moved for summary judgment on August 5. Because appellants had more than sufficient time to move for summary judgment, the district court did not err by dismissing their motion as moot.

V. The district court did not improperly resolve factual questions on summary judgment or fail to view the evidence in a light most favorable to appellants.

Appellants argue that the district court erroneously resolved factual questions on summary judgment and improperly failed to view the evidence in a light most favorable to them. According to appellants, there are disputes about whether appellants have feedlots on their properties, the number of animals they have, how the animals are managed, and how they utilize their manure. These questions, however, were not before the district court and were not addressed; rather, they relate to what was found during the inspections of appellants' properties and are not relevant to the tort claims asserted by

appellants. Appellants limited the scope of their complaint to tort claims, and they cannot now complain that the pleading did not include all of the issues that they want to litigate.

VI. Appellants' additional arguments are without merit.

Appellants contend that "[t]he district court erred by finding [a]ppellants' farming to be a 'closely regulated business' and therefore subject to search and seizure without probable cause." But the district court made no such finding. Rather, the district court involved found probable cause to issue the search warrants.

Appellants further allege that search warrants are not an appropriate method of determining whether appellants' properties needed to be registered as feedlots. This is a direct challenge to the warrants themselves. Appellants did not seek to quash or otherwise appeal from the issuance of the warrants, and they cannot now collaterally attack them. *See Dunham*, 708 N.W.2d at 570 ("[B]ecause appellant did not appeal that order, she cannot now collaterally attack it.").

Appellants also assert that the district court erred by finding that respondents had jurisdiction because appellants' application of manure on land is exempt from federal clean-water regulations. Therefore, appellants argue, they are likewise exempt from registration and regulation under the MPCA. According to appellants, if the state agency intended to set standards that were stricter than the federal standards, it was required to follow certain procedures that it did not. This argument was not raised in the district court, and we will not consider it on appeal. *See Thiele*, 425 N.W.2d at 582 (stating that generally an appellate court will not consider matters not argued to and considered by the

district court). This also is a challenge to the validity of the rules and is not relevant to the abuse-of-process or malicious-prosecution claims.

Lastly, appellants contend that their constitutional "right to privacy" was violated by enforcement of the feedlot-registration rules. But appellants asserted no right to privacy in the district court, and they cannot raise that claim for the first time on appeal. *See id.*

Affirmed.