STATE OF MINNESOTA
IN COURT OF APPEALS
A16-1645

Thomas Funk, et al.,
Appellants,

vs.

Thomas O'Connor, et al.,
Respondents,

and

Kenneth Goulart, et al.,
Appellants,

vs.

Thomas O'Connor, et al.,
Respondents,

and

Lawrence Gubbe, et al.,
Appellants,

vs.

Thomas O'Connor, et al.,
Respondents.

Filed November 13, 2017
Affirmed
Hooten, Judge

Carver County District Court
File No. 10-CV-14-547

Alan L. Kildow, Briggs and Morgan, P.A., Minneapolis, Minnesota (for appellants)

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Considered and decided by Bjorkman, Presiding Judge; Hooten, Judge; and Jesson, Judge.

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

HOOTEN, Judge

This appeal arises under the Minnesota Open Meeting Law (OML), Minn. Stat. §§ 13D.01–.07 (2016). In five underlying actions, appellant residents alleged that respondent mayor and city council members violated the OML in the course of decisions related to construction of public facilities, including a public works facility and a combined city hall and public library building. The complaints alleged improperly closed or secret meetings and improper communications about the projects. Over appellants' objections, the district court issued two orders consolidating the five actions into one file. After a six-day court trial, the district court found multiple OML violations by each respondent, but rejected appellants' demand that respondents be removed from office because the violations were found in a single court action.

Appellants now argue that the district court erred in construing Minn. Stat. § 13D.06, subd. 3, and *Brown v. Cannon Falls*, 723 N.W.2d 31 (Minn. App. 2006), as

precluding removal, or that *Brown* should be overruled, and that the district court erred in consolidating the actions. Appellants also argue that the district court erred in rejecting their argument that certain meetings violated the OML and in concluding that respondents are not personally liable for notice and tape-recording violations. Finally, appellants argue that the district court abused its discretion in denying appellants' motion to compel discovery. We affirm.

FACTS

In May 2014, three groups of Victoria residents, appellant Thomas Funk among them, initiated separate, identical actions against respondents alleging violations of the OML. Respondent Thomas O'Connor was, at the time, the mayor of Victoria. Respondents James Crowley, Lani Basa, and Thomas Strigel were city council members.[1] Over appellants' objections that consolidation would "effectively eviscerate one of their requested remedies – the removal of the Defendants from office," the district court consolidated the three actions into the *Funk* file.

In January 2015, two additional groups of residents, including appellants Kenneth Goulart and Lawrence Gubbe, filed OML actions against respondents. Over appellants' objections, the district court consolidated the *Funk*, *Goulart*, and *Gubbe* actions into one file. We denied discretionary review of the second consolidation order. After a six-day court trial, the district court found that appellants participated to varying degrees in

[1] It is undisputed that appellant Funk defeated respondent O'Connor in the city's 2016 mayoral election; respondent Basa did not seek reelection when her council term expired in 2016; and respondents Crowley and Strigel remain in office.

improper serial communications from May to October 2013, and that seven city council meetings were improperly closed in 2013.

Based on their participation in the above meetings or communications, the district court found 11 OML violations each by respondents O'Connor and Crowley, 10 by respondent Strigel, and 6 by respondent Basa.[2] The district court also found that the city council violated the OML by failing to notice and tape record meetings, but the district court did not attribute notice and tape-recording violations to individual council members, and acknowledged that it lacked jurisdiction over the city council as an entity. Similarly, the district court noted that four violations would have been found against the fifth council member, had he been named a defendant. The district court imposed civil fines in varying amounts against the four respondents, which they paid. This appeal followed.[3]

D E C I S I O N

The OML generally requires that meetings of public bodies be open to the public. Minn. Stat. § 13D.01. It enumerates specific circumstances in which meetings may be closed, Minn. Stat. §§ 13D.03–.05, and identifies procedural requirements for closure, including in relevant part that, "[b]efore closing a meeting, a public body shall state on the record the specific grounds permitting the meeting to be closed and describe the subject to be discussed," Minn. Stat. § 13D.01, subd. 3. All meetings are subject to specific notice

[2] Aside from their relevance to the number of violations committed, serial communications are not at issue in this appeal.

[3] Respondents filed a notice of related appeal challenging the district court's findings that they violated the OML, which we dismissed because respondents had voluntarily paid their civil penalties without reserving the right to appeal.

requirements, and closed meetings must be tape recorded. Minn. Stat. §§ 13D.03–.05. Under certain circumstances, serial communications may violate the OML. *See Moberg v. Indep. Sch. Dist. No. 281*, 336 N.W.2d 510, 518 (Minn. 1983) ("[S]erial meetings in groups of less than a quorum for the purposes of avoiding public hearings or fashioning agreement on an issue may also be found to be a violation of the statute depending upon the facts of the individual case.").

A person who "intentionally violates" the OML is subject to a civil penalty of up to $300 for each violation, "which may not be paid by the public body." Minn. Stat. § 13D.06, subd. 1. "Intentionally" refers to the intent to participate in the meeting attended. *Claude v. Collins*, 518 N.W.2d 836, 841 (Minn. 1994). Good faith is not a defense to a violation, but "is properly considered by the trial court in defining the appropriate penalty." *St. Cloud Newspapers, Inc. v. Dist. 742 Cmty. Sch.*, 332 N.W.2d 1, 8 (Minn. 1983). In addition to civil penalties, a public official is subject to removal from office if "found to have intentionally violated this chapter in three or more actions." Minn. Stat. § 13D.06, subd. 3. Removal from office is mandated when the requisite intentional violations are found, if constitutional requirements are satisfied. *Claude*, 518 N.W.2d at 842 (holding that "[o]nce an official commits three separate, unrelated, and intentional violations, the statute mandates removal," but determining that removal is nevertheless unconstitutional unless the underlying conduct rises to the level of "malfeasance or nonfeasance").

I.

Appellants contend that the district court erred in interpreting Minn. Stat. § 13D.06, subd. 3, to conclude that removal from office is not available in this consolidated action.

Statutory interpretation presents a question of law subject to de novo review. *Hibbing Educ. Ass'n v. Pub. Emp't Relations Bd.*, 369 N.W.2d 527, 529 (Minn. 1985).

The relevant subdivision provides:

> (a) If a person has been found to have intentionally violated this chapter in *three or more actions* brought under this chapter involving the same governing body, such person shall forfeit any further right to serve on such governing body or in any other capacity with such public body for a period of time equal to the term of office such person was then serving.
>
> (b) The court determining the merits of any action in connection with any alleged third violation shall receive competent, relevant evidence in connection therewith and, upon finding as to the occurrence of a separate third violation, unrelated to the previous violations, issue its order declaring the position vacant and notify the appointing authority or clerk of the governing body.

Minn. Stat. § 13D.06, subd. 3 (emphasis added). Under a previous version of the statute, multiple intentional violations found within a single court action triggered removal. *See Claude*, 518 N.W.2d at 842–43 (interpreting Minn. Stat. § 471.705 (1992), and holding, after trial in action brought under single complaint, that public officials must be removed from office based on finding of three violations constituting nonfeasance). In 1994, shortly after the supreme court ruled in *Claude* that three violations found in a single court action triggered removal, the legislature amended the statute to require intentional violations found "in three or more actions brought under" the OML.

> ~~Upon a third violation by the same person connected with~~ If a person has been found to have intentionally violated this section in three or more actions brought under this section involving the same governing body, such person shall forfeit any further right to serve on such governing body or in any

> other capacity with such public body for a period of time equal to the term of office such person was then serving.

1994 Minn. Laws ch. 618, art. 1, § 39, at 1434–35.

"We generally presume that amendments to statutory language are intended to change the meaning of the statute." *Rockford Township v. City of Rockford*, 608 N.W.2d 903, 908 (Minn. App. 2000). Accordingly, when we interpreted the amended statute in 2006, we held that "in order to remove a public official under the open meeting law, the official must have been found to have intentionally violated the law in three separate proceedings." *Brown*, 723 N.W.2d at 43 (interpreting Minn. Stat. § 13D.06, subd. 3 (2002)). In *Brown*, the district court had consolidated four separate complaints for joint trial and entered four separate judgments against defendants. *Id.* at 39. The district court removed the *Brown* defendants from office, but we reversed that penalty, concluding that intentional violations were not found in three separate judicial proceedings. *Id.* at 42–43, 49.

In reversing the removal, we reasoned that the statute is ambiguous because the phrase "three or more actions" could reasonably be interpreted to apply only in the case of "three separate or successive proceedings" or to apply anytime three or more complaints are filed. *Id.* at 42. We reviewed the legislative history of the removal provision and concluded that "the legislature specifically intended that in order to remove a public official under the open meeting law, the official must have been found to have intentionally violated the law in three separate proceedings." *Id.* at 42–43. We further explained that:

> The offending official is entitled to know that what they claim they thought was allowable—was not. Once there has been an

> adjudication, it makes sense that if there was a second adjudication, there cannot be an excuse for the third. . . . The legislature's view of public policy was that the public official had to have been tried and told that what he did was wrong before subsequent allegations could be counted up to three and trigger removal from office.
>
> . . . By definition, one consolidated trial would prevent the losers from finding out that what they thought was proper—was improper. Thus, the officials would have had no chance before the next private meeting to change it to one that would conform to the open meeting law . . . .

Id. at 43.

Our reasoning in *Brown* is consistent with the purposes of the OML, which are to protect the public's rights to be fully informed and to comment on matters under consideration. *See Prior Lake Am. v. Mader*, 642 N.W.2d 729, 735 (Minn. 2002) (identifying purposes of OML). Allowing aggrieved parties to stand by silently, awaiting additional violations that would trigger removal, does not promote the purposes of the OML. Moreover, in the decade since we construed the removal provision in *Brown*, the legislature has not amended it, despite modifying other aspects of section 13D.06. We presume that "the legislature acts with full knowledge of . . . judicial interpretation of . . . statutes." *Rockford Township*, 608 N.W.2d at 908.

Appellants urge that *Brown* should be overruled. But, the doctrine of stare decisis "directs that we adhere to former decisions in order that there might be stability in the law." *Ariola v. City of Stillwater*, 889 N.W.2d 340, 356 (Minn. App. 2017) (quotation omitted), *review denied* (Minn. Apr. 18, 2017). A "compelling reason" is required, and the reasons for departing from precedent "must greatly outweigh reasons for adhering to them." *Id.*

(quotation omitted). Appellants simply argue that *Brown* was wrongly decided—they do not identify any developments since *Brown* that establish a compelling reason to overrule that decision.

In any event, unlike the consolidation for joint trial in *Brown*, the district court here ordered that the files "shall be consolidated into one action" under one file number. Consolidation of actions, unlike consolidation for joint trial, "brings about a merger of two or more actions into one." *Chellico v. Martire*, 227 Minn. 74, 76, 34 N.W.2d 155, 156 (1948). Accordingly, a single judgment was entered against respondents. Because section 13D.06, subdivision 3, requires violations found in "three or more actions," the district court properly concluded that removal was not available in this action.

II.

Appellants next contend that the district court erred in consolidating the *Funk*, *Goulart*, and *Gubbe* actions. Generally, consolidation is governed by rule 42.01:

> When actions involving a common question of law or fact are pending before the court, it *may* order a joint hearing or trial of any or all the matters in issue in the actions; it *may* order all the actions consolidated; and it *may* make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.

Minn. R. Civ. P. 42.01 (emphasis added). As indicated by the permissive language of the rule, the decision to consolidate is within the broad discretion of the district court. *See Minn. Pers. Injury Asbestos Cases v. Keene Corp.*, 481 N.W.2d 24, 26 (Minn. 1992) (reviewing consolidation for trial).

A. The OML does not bar consolidation of OML actions.

Appellants argue that consolidation is not available in OML actions because it eliminates a statutory remedy—removal from office. But, in *Brown*, we did not conclude that consolidation was improper; we concluded that removal was not available when the requisite violations were found in actions that were consolidated for joint trial. 723 N.W.2d at 43–44. Accordingly, *Brown* does not support an argument that consolidation is improper in OML litigation. Nor does *Brown* indicate, as appellants assert, that plaintiffs bringing OML actions have a right to demand separate trials. Although we noted in *Brown* that the parties did not "insist on separate trials," we concluded, "We will not speculate as to what the district court would have done with that objection." *Id.* at 43.

Appellants' argument that consolidation eliminates a statutory remedy rests in part on their assumptions that OML litigation requires years to resolve, and that removal should be available within the same term of office in which the action is brought. But, appellants' argument is based solely on the length of this litigation, which appellants made no effort to accelerate. And the statutory language does not support a conclusion that removal must be available within a single term of office. *See* Minn. Stat. § 13D.06, subd. 3.

Appellants also urge that consolidation should not be available because the legislature cannot "pass a statute allowing a substantive remedy and yet, by adopting a procedural statute of limitations, make the remedy impossible to achieve and meaningless by barring the suit from being brought before it has matured." *See Calder v. City of Crystal*, 318 N.W.2d 838, 844 (Minn. 1982). But, here, the statute of limitations is not implicated.

Finally, appellants argue that permitting consolidation of OML actions fails to construe the OML "most favorably to the public." *See St. Cloud Newspapers*, 332 N.W.2d at 4 ("Open meeting statutes are enacted for the public benefit and are to be construed most favorably to the public."). We note that appellants rely upon caselaw which addresses whether violations have occurred, not the propriety of a penalty. In any event, we are not persuaded that construing in favor of removal—effectively overriding the electoral process—equates to construing the OML most favorably to the public. We conclude that the district court properly determined that OML actions may be consolidated.

B. Rule 42.01 does not bar consolidation.

Appellants do not seriously dispute that the *Funk*, *Goulart*, and *Gubbe* actions involve common questions of law or fact. *See* Minn. R. Civ. P. 42.01 (permitting consolidation if actions involve "a common question of law or fact"). The defendants in each suit are the same, and the plaintiffs are all represented by the same attorney. Although appellants assert that the allegations in the three complaints relate to separate public facilities, the challenged communications are not generally limited to a single construction project, and in fact, the new library and city hall occupy a common building.

The *Funk* and *Goulart* complaints allege that respondents' failure to comply with the OML with respect to real estate committee meetings and failure to identify the property to be discussed in closed sessions of the council. The *Goulart* complaint additionally alleges engagement in improper serial communications. The *Funk* complaint alleges failure to tape record certain meetings, and the amended *Funk* complaint alleges improper serial communications. The *Gubbe* complaint similarly alleges failure to properly notice

meetings, failure to identify the property to be discussed in closed sessions of the council, discussing impermissible topics in closed sessions, and failure to tape record closed council sessions. Given the substantial overlap of fact and law, we conclude that the district court did not abuse its discretion in consolidating the *Funk*, *Goulart*, and *Gubbe* actions.

III.

Appellants contend that the district court erred in determining that the evidence was insufficient to conclude that respondents O'Connor and Crowley violated the OML through their participation in the real estate committee (REC). On appeal from a bench trial, this court does not reconcile conflicting evidence. *Porch v. Gen. Motors Acceptance Corp.*, 642 N.W.2d 473, 477 (Minn. App. 2002), *review denied* (Minn. June 26, 2002). When reviewing mixed questions of law and fact, "we correct erroneous applications of law, but accord the district court discretion in its ultimate conclusions and review such conclusions under an abuse of discretion standard." *Id.* (quotation omitted).

It is undisputed that the REC was formed to assist the city manager "in identifying viable real estate opportunities and solutions to present to the Council for recommendation." O'Connor and Crowley were named to serve on the REC in June 2011. They met with the city manager on an ad hoc basis until July 2013, without providing notice to the public.

Under the OML, "All meetings . . . must be open to the public . . . (b) of the governing body of a . . . (4) statutory or home rule charter city, . . . (c) of any (1) committee, (2) subcommittee . . . of a public body. Minn. Stat. § 13D.01, subd. 1. In *Moberg*, the supreme court addressed "what gatherings and activities constitute a 'meeting' for purposes

of the [OML]." 336 N.W.2d at 516. It reiterated its prior holding that "any 'scheduled' gathering of all members of a governing body must be noticed and open, whether or not action is taken or contemplated. 'This includes meetings at which information is received which may influence later decisions of such bodies' but excludes 'chance or social gatherings.'" *Id.* (quoting *St. Cloud Newspapers*, 332 N.W.2d at 6–7) (internal citation omitted). On the other end of the spectrum, the supreme court restated that "a discussion between two members of a governing body about a matter pending before that body is not a per se violation of the statute." *Id.* (discussing *Hubbard Broad., Inc. v. City of Afton*, 323 N.W.2d 757, 765 (Minn. 1983)). The supreme court then held that:

> "[M]eetings" subject to the requirements of the Open Meeting Law are those gatherings of a quorum or more members of the governing body, or a quorum of a committee, subcommittee, board, department, or commission thereof, at which members discuss, decide, or receive information as a group on issues relating to the official business of that governing body. Although "chance or social gatherings" are exempt from the requirements of the statute, a quorum may not, as a group, discuss or receive information on official business in any setting under the guise of a private social gathering.

Id. at 518 (citation omitted). Despite this broad language, the supreme court in *Moberg* reversed the district court's determination that members of the school board violated the OML by gathering to engage in deliberation on matters presently pending before the board. *Id.* at 516, 519. We later applied *Moberg*, holding that:

> [A] gathering of public officials is not "a committee or subcommittee . . . " subject to the open meeting law unless the group is capable of exercising decision-making powers of the governing body. The capacity to act on behalf of the governing body is presumed where members of the group comprise a

> quorum of the body. It could also arise where there has been a delegation of power from the governing body.

Sovereign v. Dunn, 498 N.W.2d 62, 67 (Minn. App. 1993), *review denied* (Minn. May 28, 1993).

Here, there is no argument that O'Connor and Crowley constituted a quorum of the city council. The district court determined that the evidence did not support a finding that they transacted business on behalf of the city or failed to fully inform the council on real estate business.

The thrust of appellants' argument is that the district court erred in focusing on what information was passed along to the full council. They contend that because O'Connor and Crowley received and discussed information relating to city business, their meetings were subject to the OML. Although this argument has some appeal under the broad language of *Moberg*, a conclusion that a gathering of any non-quorum subset of the council is subject to the OML regardless of decision-making authority is inconsistent with the ultimate holding of *Moberg*, and our application of *Moberg* in *Sovereign*. The district court did not abuse its discretion in finding that the evidence was insufficient to conclude that O'Connor and Crowley violated the OML through REC activities.

IV.

Appellants contend that the district court erred in declining to find respondents personally liable for failure to notice meetings and tape record closed council sessions. The district court found that the city council violated the OML by failing to tape record seven closed meetings and failing to provide notice of certain other meetings. The district court

declined to attribute these violations to respondents or impose a penalty because of respondents' "reasonable good faith reliance on city staff" to meet notice and tape-recording requirements. The district court reasoned that the failures to provide notice and to tape record meetings were merely technical violations of the OML, particularly with respect to tape recording, because "a stenographer took down what was said at the closed meetings and we have those records." The district court further determined that city staff were responsible for these OML requirements, and that no council member ever provided notice of a meeting.

As a practical matter, any error in declining to attribute notice and tape-recording violations to respondents was harmless given the district court's determination that it would not impose a civil penalty, and because removal would not be triggered by additional violations. "The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties." Minn. R. Civ. P. 61. We need not determine whether the district court should have attributed notice and tape-recording violations to respondents, because any error did not affect the substantial rights of the parties.

V.

Appellants contend that the district court abused its discretion in denying appellants' motion to compel discovery from respondents' personal and business computers. The district court has wide discretion to issue discovery orders and, absent a clear abuse of that discretion, its discovery orders will not be disturbed. *In re Comm'r of Pub. Safety*, 735

N.W.2d 706, 711 (Minn. 2007). Appellants have not adequately briefed this issue, therefore, it is waived for appeal. *See Melina v. Chaplin*, 327 N.W.2d 19, 20 (Minn. 1982).

Nevertheless, we reach the issue to clarify that the district court acted well within its discretion in denying the motion. Shortly before trial, appellants moved to compel "inspection of all e-mails received, stored on, or sent from [appellants'] personal and/or business computers, including all 'metadata,' in their 'native electronic format.'" The district court denied the motion, finding that appellants had not shown "good cause and proportionality" under Minn. R. Civ. P. 26.02(b). The district court reasoned that appellants had already "received most of the information now requested through prior discovery requests, subpoenas and court orders. [Appellants] have already received over 12,000 pages of documents from [respondents], including over 3,500 pages of e-mails from [respondents'] personal computers. All of this documentation was produced over a year ago . . . ." The district court's determination is supported by the record. Given the breadth of discovery already permitted and the timing of the motion to compel, the district court did not abuse its discretion in denying the motion.

Affirmed.