

NO. A05-2316

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State of Minnesota  
**In Court of Appeals**

City of Minneapolis,

*Appellant,*

v.

Ames & Fischer Co. II, LLP and Capitol Indemnity Corporation,

*Respondents,*

and

Ames & Fischer Co. II, LLP,

*Respondent,*

v.

City of Minneapolis and  
Minneapolis Community Development Agency,

*Appellants.*

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**APPELLANTS' REPLY BRIEF**

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## ARGUMENT

### **I. Ames & Fischer Cannot Avoid The Merits Of This Appeal.**

Ames & Fischer Co II, LLP (“Ames & Fischer”) makes two threshold arguments to avoid the merits of the City of Minneapolis’ (the “City”) and Minneapolis Community Development Agency’s (“MCDA”) appeal from the District Court’s order denying their motion for summary judgment dismissing Ames & Fischer’s tort claims based on immunity: (1) because the City and MCDA purportedly “expressly excluded” from the scope of their motion immunity defenses to claims arising out of alleged misrepresentations as to “the basis for the Projections,” denial of summary judgment must be affirmed for *all* claims arising out of *all* types of alleged tortious conduct, and (2) if denial of summary judgment is not affirmed for all claims arising out of all tortious conduct, it must be affirmed at least with respect to claims arising out of allegations that MCDA misrepresented the basis for the Projections. See Brief of Respondent Ames & Fischer Co. II, LLP. (“A&F Brf.”) at 24-30.<sup>1</sup> Both arguments stem from the misguided notion that the City and MCDA waived immunity defenses to these claims and shifted their arguments to revive the defenses on appeal.

#### **A. The City And MCDA Have Not Waived Immunity To Any Claims.**

For Ames & Fischer to accuse the City and MCDA of waiving immunity defenses and shifting positions is supreme irony. However, to appreciate the irony of Ames & Fischer’s accusation, and the error of its threshold arguments, requires some background.

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<sup>1</sup> Ames & Fischer uses the phrase “misrepresentations as to the basis for the Projections” to mean alleged misrepresentations that the Projections were based on a “typical city operation” and “existing data and previous experience.” See A&F Brf. at 25.

As pled, the focus of Ames & Fischer's tort claims was -- and remains -- the making and sharing of Projections of future Parking Ramp revenues, operating expenses, and debt service costs that MCDA provided to Ames & Fischer in July 1999. Ames & Fischer alleged that "[w]hen the MCDA provided the Projections to Ames & Fischer, it knew or should have known that the Projections would be grossly inaccurate when compared to the actual revenues and expenses that the Parking Ramp would experience." Appellants' Appendix ("A.") 27, ¶ 84; see also A. 17, ¶¶ 15-16; A. 19-26, ¶¶ 30-75; A. 27-28, ¶¶ 82-89. Ames & Fischer's claims were based entirely on alleged "discrepanc[ies]" between the Projections and actual revenues, operating expenses, and debt service costs for the years 2000-2004. A. 19-23, ¶¶ 31-48.

The City and MCDA moved for summary judgment dismissing the claims pled on a variety of grounds, including statutory and official immunity. However, six days before the City's and MCDA's memorandum of law in support of summary judgment was due, Ames & Fischer attempted to effect a sea change in its allegations and claims. Over the course of a few weeks, Ames & Fischer floated two draft proposed amended answers and counterclaims, and served and filed a motion and an amended motion for a third and fourth amended answer and counterclaims, each significantly different from the last.

On September 22, 2005, counsel for Ames & Fischer delivered to counsel for the City and MCDA a Rule 15.01 Consent to Amend Answer and Counterclaims and draft proposed Amended Answer and Counterclaims. Appellants' Second Supplemental Record ("S.S.R.") 1-25. This draft Amended Answer and Counterclaims added: (1) several new affirmative defenses, S.S.R. 8-9, ¶¶ 1, 6; (2) new allegations regarding

“omitted material information,” S.S.R. 19, ¶ 57; S.S.R. 23, ¶ 91; (3) an entirely new claim for reckless misrepresentation, S.S.R. 20, ¶¶ 62-68; and (4) new requested remedies of contract cancellation and/or termination. S.S.R. 21-23, ¶¶ 75, 88.

Four days later, on September 26, 2005, counsel for Ames & Fischer e-mailed a second, significantly different, draft proposed Amended Answer and Counterclaims. It focused heavily on new allegations that MCDA made misrepresentations “that there was demand for use of the Parking Ramp in the area in general” even though MCDA “had reached the conclusion that there was not any demand for use of the Parking Ramp in the area in general.” S.S.R. 35, ¶¶ 15, 17-18; S.S.R. 42-49, ¶¶ 58-114.

Because the proposed amendments lacked merit, the City and MCDA declined to consent to amend. The City and MCDA filed their summary judgment brief on September 28, 2005, addressing, understandably, Ames & Fischer’s original allegations and claims. Appendix of Respondent Ames & Fischer Co. II, LLP. (“R.A.”) 1-34.

Two weeks later, on October 12, 2005, the last possible day under the Scheduling Order to file a motion, Ames & Fischer filed a motion to amend. The proposed Answer and Counterclaims bore little resemblance to the original Answer and Counterclaims or either of the interim draft proposals. It contained another new affirmative defense (failure to mitigate). S.S.R. 60, ¶ 8. More importantly, it also contained extensive new allegations regarding misrepresentations as to the basis for the Projections and nondisclosures. S.S.R. 63-65, ¶¶ 15-19, 21-28. These far-reaching new allegations were the foundation for asserting an entirely new proposed claim (fraudulent nondisclosure)

and for completely revamping existing claims (negligent misrepresentation and intentional/reckless misrepresentation). S.S.R. 72-76, ¶¶ 69-80, 86-88.

Ames & Fischer took one more detour, on October 17, 2005, serving an “amended motion to amend” in which it proposed to add two more new claims (“joint enterprise” and “fiduciary duty”). S.S.R. 106-110, ¶¶ 107-124. On that same day, Ames & Fischer served its opposition to the City’s and MCDA’s summary judgment motion. In it, Ames & Fischer abandoned its original claims, and focused instead on its proposed new allegations and claims. R.A. 35-89. In short, Ames & Fischer attempted to hijack the summary judgment proceedings by approaching them as if its motion to amend had been granted.

The City and MCDA refused to rise to the bait. They opposed the motion to amend because the proposed amended claims were “no more legally viable than the originals.” S.S.R. 114. In their summary judgment reply brief, the City and MCDA continued to focus primarily on the original allegations and claims. R.A. 90-99.

Nevertheless, in their summary judgment reply brief, the City and MCDA also argued that “if the [District] Court were inclined to consider Ames & Fischer’s new claims at this time, the City and MCDA have identified numerous legal deficiencies that would justify dismissal or summary judgment,” citing and incorporating by reference arguments made in the City’s and MCDA’s brief in opposition to the motion to amend at pp. 4-26 and in their brief in opposition to the amended motion to amend. R.A. 92. In their brief in opposition to the motion to amend, at p. 26, the City and MCDA specifically asserted statutory and official immunity defenses to Ames & Fischer’s proposed new

allegations and claims. S.S.R. 138. Thus, the City and MCDA asserted, in support of their summary judgment motion, statutory and official immunity defenses to *all* of Ames & Fischer's proposed new allegations and claims.

Further, Ames & Fischer itself argued to the District Court that alleged misrepresentations that the Projections were based on a "typical city operation" and "existing data and previous experience" were subsumed in the allegations in Ames & Fischer's original Answer and Counterclaims that "MCDA 'knew of should have know that the Projections would be grossly inaccurate.'" R.A. 81. Ames & Fischer stated, "Certainly *this misrepresentation as to the basis for the Projections constitutes knowing that the 'Projections would be grossly inaccurate,'* as alleged in the Complaint." *Id.* (emphasis added). Because Ames & Fischer acknowledges the City and MCDA presented to the District Court immunity defenses to claims based on "the accuracy of the Projections,"<sup>2</sup> and because Ames & Fischer admits claims based on the accuracy of the Projections include claims relating to "the basis for the Projections," it necessarily follows that the City and MCDA presented to the District Court immunity defenses to claims relating to alleged misrepresentations regarding the basis for the Projections.

In its Order, the District Court first denied Ames & Fischer's motion to amend except to the extent Ames & Fischer proposed to include an affirmative defense of failure to mitigate and to dismiss its claims for breach of implied warranty and promissory

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<sup>2</sup> According to Ames & Fischer, the immunity issues presented to the District Court were "whether the City and MCDA are immune to suit on claims arising out of the accuracy of the Projections and out of the City's and the MCDA's failure to provide Ames & Fischer with information it was entitled to receive." A&F Brf. at 26.

estoppel. A. 33 at ¶¶ 1-3. Next, the District Court denied the motion for summary judgment except to dismiss the claims for breach of implied warranty, promissory estoppel, and for a declaratory judgment. A. 33-34, ¶¶ 4-10. In so doing, the District Court rejected the City's and MCDA's "request for summary judgment dismissing Ames & Fischer's tort claims because they are barred by discretionary [statutory] and/or official immunity . . . ." A. 34, ¶ 10.

Because the District Court denied the motion to amend first, it could be reasonably argued that the District Court never addressed immunity issues as they apply to Ames & Fischer's proposed new allegations and claims. However, because Ames & Fischer attempted to inject these proposed new allegations and claims into the summary judgment debate, and because the City and MCDA addressed them in their summary judgment reply, and because the District Court did not explain its decision but stated its decision was "[b]ased upon all files, records and proceedings herein, together with the arguments of counsel," A. 32, they are addressed in this appeal.

What *cannot* be reasonably argued, given the record recounted above, is that the City and MCDA waived immunity defenses or have shifted arguments with respect to allegations and claims asserted by Ames & Fischer. In light of this background, and for the following reasons, Ames & Fischer's threshold arguments must be rejected.

**B. This Court Must Address All Of The Immunity Issues On the Merits.**

**1. One "Bad Apple" Would *Not* Spoil The Whole Bunch.**

As noted above, the factual premise of Ames & Fischer's threshold arguments is wrong. The City and MCDA did, in fact, assert statutory and official immunity defenses

to *all pled and proposed* tort claims, including claims arising out of alleged misrepresentations as to the basis for the Projections. See R.A. 92; S.S.R. 138.

Nevertheless, even if the City and MCDA had not asserted immunity to claims arising out of misrepresentations regarding the basis for the Projections, Ames & Fischer's argument -- that the District Court could have denied summary judgment "on this ground alone" and, therefore, summary judgment should be affirmed without reaching the merits of immunity defenses to claims based on alleged misrepresentations that *were* presented, A&F Brf. at 25-26<sup>3</sup> -- is wrong as a matter of law.

Ames & Fischer's argument is based on its observation that "[a] government defendant is not immune to suit unless it is immune to claims arising out of all of the alleged tortious conduct." Id. at 24-25. It is true that a city cannot avoid suit *altogether* if it is not entitled to immunity to claims arising out of one of several types of tortious conduct. However, even if a city is not entitled to immunity from claims arising out of one type of tortious conduct, it may be entitled to immunity from claims arising out of other types of tortious conduct; at the very least, application of immunity to the other types of tortious conduct must be addressed on the merits.

In other words, while there may be some truth to old adage that "one bad apple spoils the whole bunch," it is not a principle of tort and immunity jurisprudence. It is frequently the case that immunity will apply to one type of challenged conduct but not another. Schroeder v. St. Louis County, 708 N.W.2d 497 (Minn. 2006), a case on which

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<sup>3</sup> Again, Ames & Fischer concedes the City and MCDA presented immunity defenses to claims arising out of *some* alleged misrepresentations. See footnote 2.

Ames & Fischer relies, illustrates the point. The Minnesota Supreme Court held in Schroeder that official immunity applied to operating a road grader against traffic, but did not apply to operating a road grader without lights at dusk. Id. at 508.

In this case, even if it were true (it is not) that the City and MCDA are not entitled to immunity from claims arising out of alleged misrepresentations as to the basis for the Projections because they did not present to the District Court immunity defenses to this type of alleged tortious conduct, the City and MCDA nevertheless may be (and are) entitled to immunity for other types of alleged tortious conduct based on defenses which Ames & Fischer admits were presented to the District Court. Therefore, regardless of whether the City and MCDA waived immunity as to claims arising out of alleged misrepresentations as to the basis for the Projections, this Court must address on the merits those immunity issues which all agree were presented to the District Court.

**2. Immunity Defenses To Claims Arising Out Of Alleged Misrepresentations As To The Basis For The Projections Are The Proper Subject Of Appeal.**

As its fall-back position, Ames & Fischer contends that even if this Court considers other immunity issues on the merits, it “should not weigh the City’s and MCDA’s claim to immunity as to their misrepresentation of the basis for the Projections because this issue was not presented to or considered by the District Court.” A&F Brf. at 26. As noted above, Ames & Fischer’s contention must be rejected because the City and

MCDA did, in fact, assert statutory and official immunity defenses to claims arising out of alleged misrepresentations as to the basis for the Projections.<sup>4</sup>

Ames & Fischer also contends that by addressing on appeal the application of immunity to claims arising out of “making and sharing the Projections,” the City and MCDA have failed to address immunity for claims relating to alleged misrepresentations as to the basis for the Projections. A&F Brf. at 26-27. Not only is Ames & Fischer’s contention without merit for the reasons discussed above, it is without merit because the City and MCDA specifically included within the rubric of claims arising out of “making and sharing the Projections” claims for alleged “affirmative misrepresentations and nondisclosures,” including claims arising out of alleged misrepresentations that the Projections were based a “typical city operation,” “existing data and previous experience,” and failure to provide information that would have “cast serious doubt” on the Projections. See Appellants’ Brief at 16. Whatever distinction Ames & Fischer is

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<sup>4</sup> Even if the City and MCDA had not asserted immunity to claims arising out of alleged misrepresentations as to the basis for the Projections, the issue may and should be addressed on the merits on appeal. An issue ruled on by a district court is the proper subject of appeal even if the appellant failed to present any arguments on the issue to the district court. Thorp v. Price Brothers Company, 441 N.W.2d 817, 819 (Minn. Ct. App. 1989), review denied (Minn. Aug. 15, 1989); cf. Watson v. United Services Automobile Assoc., 566 N.W.2d 683, 687 (Minn. 1997) (appellate court may base its decision on a theory not presented to or considered by the trial court where, as in this case, the question is plainly decisive of the entire controversy on the merits and where there is no advantage or disadvantage to either party in not having a prior ruling by the trial court on the question); Boatwright v. Budak, 625 N.W.2d 483, 489 (Minn. Ct. App. 2001), review denied (Minn. July 24, 2001) (appellate court may review any matter as the interest of justice may require); Minn. R. Civ. App. P. 103.04 (same). Assuming, as discussed above, the District Court’s Order embraces all of Ames & Fischer’s proposed new allegations and claims, the District Court necessarily ruled that immunity does not bar claims arising out of alleged misrepresentations as to the basis for the Projections. Therefore, it is the proper subject of appeal.

attempting to make between alleged misrepresentations relating to “making and sharing Projections” and “the basis for the Projections” is a distinction without a difference.

In sum, the City and MCDA have presented to the District Court and to this Court statutory and official immunity defenses to all pled and proposed tort claims, including claims arising out of alleged misrepresentations as to the basis for the Projections. Ames & Fischer cannot avoid the merits of this appeal, which are addressed below.<sup>5</sup>

## **II. The City’s And MCDA’s Decisions And Conduct Relating To Making And Sharing The Projections Are Protected By Statutory Immunity.**

On the merits, Ames & Fischer asserts that statutory immunity does not apply to the conduct challenged in this case because it does not reflect the balancing of policy considerations. Ames & Fischer’s assertion is belied by the evidence.

As a threshold matter, Ames & Fischer acknowledges the record reflects the fact that the City and MCDA have a policy relating to disclosure of information to developers. See A&F Brf. at 10 (arguing that the City and MCDA violated “their general

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<sup>5</sup> In its arguments on the merits, Ames & Fischer separately addresses alleged misrepresentations regarding the basis for the Projections and alleged nondisclosure of information that would have cast doubt on the Projections. This distinction is unnecessary. A court reviewing immunity defenses is required to “examine with particularity the *nature* of the conduct” alleged. Pletan v. Gaines, 494 N.W.2d 38, 40 (Minn. 1992) (emphasis added). This does not mean a court necessarily must separately address each allegation. In fact, the Minnesota Supreme Court has stated that the courts should “look to the roots” of the challenged decision or conduct, and that decision making “should not be ‘broken down into component parts’ and isolated from the context of the overall plan” Zank v. Larson, 552 N.W.2d 719, 722 (Minn. 1996), quoting Smith v. Johns-Manville Corp., 795 F.2d 301, 308 (3d Cir. 1986). In this case, the challenged conduct, whether characterized as alleged misrepresentations regarding “the basis for the Projections” or nondisclosure or the “making and sharing of the Projections,” is indistinguishable in nature. Therefore, the following discussion and arguments regarding statutory and official immunity apply to all challenged conduct.

policy and practice of providing project-related financial information to developers”). Ames & Fischer contends the policy calls for “full disclosure to developers.” *Id.* at 32. The City and MCDA argue the policy calls for sharing information while expecting developers to be responsible for their own due diligence, for assessing their own potential risks and rewards, and for the consequences of own decisions. Appellants’ Brief at 20-22.

By “full disclosure,” Ames & Fischer means a policy of “sharing *all* information” and “open and *complete* communication between the City and developer.” A&F Brf. at 33 (emphasis added). However, there is no evidence on the record -- certainly not the testimony of Michael Monahan and Greg Finstad, former City directors of parking and transportation, which is the only evidence cited -- to support the characterization of the City’s and MCDA’s policy as undertaking an affirmative obligation to voluntarily disclose literally all information relating to a development project.

When asked whether he agreed that “the general practice of the City was if there was an outside party that was operating under an incorrect assumption as to the financial feasibility of a project that that should be communicated to that outside party,” Monahan answered, “I would think it would be appropriate.” Respondent’s Supplemental Record (“R.S.R.”) 30 (p. 32). This question and response is a far cry from acknowledgment of a policy of “full” disclosure of “all” information relating to a project. Similarly, Finstad’s comments that “the City is sort of an open book” and that “there would be no reason not to share that information with the developer,” R.S.R. 5 (p. 27), do not suggest the

undertaking of an affirmative duty to disclose “all” information that, in hindsight and without regard to a developer’s own responsibilities, might be relevant to a project.<sup>6</sup>

To the contrary, the record demonstrates that, notwithstanding the City’s and MCDA’s willingness to share information, it remained a developer’s responsibility to perform its own due diligence and assume its own risks. Finstad, for example, testified that although the City shared information with developers “everybody takes the information and each party, whether it’s the City or developer, makes their own decisions as to whether the project should proceed.” Appellants’ Supplemental Record (“S.R.”) 89-90 (pp. 28-29); see also S.R. 93 (p. 43) (information was shared with Ames & Fischer “to use as they saw fit in their evaluation of the project”); S.R. 92 (p. 39) (“what reliance they put on it [shared information], I guess that’s up to them”); S.R. 125 (pp. 83-84) (former City Finance Officer testifying: “I expected them [Ames & Fischer] to do their due diligence and rely on what they thought was appropriate” and “I always expect them [developers in general] to use their due diligence responsibilities”); S.R. 116 (City and

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<sup>6</sup> Not only is there no record evidence to support Ames & Fischer’s characterization of the City’s and MCDA’s information-sharing policy, such a policy makes no practical sense. The City and MCDA cannot possibly provide to developers “all” information -- including information never requested -- that in hindsight might be relevant to the success of a project. Such a “policy” would make the City and MCDA easy prey to claims that information, although never requested, was not provided and would, in effect, make the City and MCDA the guarantors of every development project. See Masonick v. J.P. Homes, Inc., 494 N.W.2d 910, 913 (Minn. Ct. App. 1993) (alleged negligent issuance of certificate of occupancy was protected by statutory immunity; if the court were to hold otherwise “we would essentially be mandating that municipalities become insurers of construction.”); cf. Bloss v. University of Minnesota, 590 N.W.2d 661, 666 (Minn. Ct. App. 1999) (“The litigation appears to be premised on a belief that the University is the guarantor of the student’s safety. Unfortunately, this is neither physically possible nor realistic.”).

MCDA “expected Ames & Fischer to determine for itself whether or how to use the projections”).

The City and MCDA shared the Projections with Ames & Fischer in the spirit of cooperation with a developer to further the City’s social and economic goals, including historic preservation, rehabilitation of blighted properties, tax base enhancement, and the provision of public parking. S.R. 89 (pp. 27-28); S.R. 46-48. However, Ames and Fischer was well-aware the Projections were not guarantees and did not relieve Ames & Fischer of its own due diligence obligations. See S.R. 94-96 (Projections were marked “PRELIMINARY” and labeled “scenarios,” and letter warned “Should the ramp open but generate no revenue, the guarantee being provided by Ames & Fischer must cover these expenditures.”); S.R. 33-34 (Ames & Fischer managing partner acknowledging she understood the Projections were estimates and not “unqualified guarantees”). The absence of any guarantees by the City or MCDA with respect to the Projections, and the presence of guarantees by Ames & Fischer to cover deficits and debt service, reflected a balancing of policies encouraging public-private cooperation while limiting public risk. See S.R. 91 (pp. 33, 35) (the purpose of the Ames & Fischer guarantee was “to make sure that the City was not held at risk on the project[,]” and the risk revenues might not be adequate to pay the debt service “was understood by everyone”).

In making and sharing the Projections, the City and MCDA implemented their policy of sharing information while expecting Ames & Fischer to be responsible for its own due diligence. Ames & Fischer’s contentions that the City and MCDA should have provided additional or different information relating to the Projections amounts to a

disagreement with the policy that due diligence is a developer's personal responsibility notwithstanding the sharing of information, and is an attempt to have the courts to rebalance the nature and extent of the information provided to developers and thereby interfere with the policy. Statutory immunity is intended to protect the City and MCDA from such interference. See Pletan, 494 N.W.2d at 43-44; Bloss, 590 N.W.2d at 666.<sup>7</sup>

Ames & Fischer offers four additional arguments, each of which is easily dismissed. First, Ames & Fischer asserts this Court should "disregard" the City's and MCDA's arguments because the information-sharing policy "was not presented to the District Court for consideration." A&F Brf. at 34. The record reflects otherwise. In arguments to the District Court, the City and MCDA argued that making and using "[t]he challenged Projections" involved "the balancing of financial and policy considerations[.]" R.A. 32. Ames & Fischer characterized the conduct at issue as "misrepresentations of the basis for the . . . Projections" and withholding of information in violation of a City "policy to freely share information relating to the financial feasibility of a Project with the developer[.]" R.A. 86. Together the parties presented to the District Court the issue of whether the making and sharing of the Projections, in the context of the City's and MCDA's information-sharing policy, was protected by statutory immunity.

Ames & Fischer second argument -- that "the record contains no evidence that the City actually adopted or even considered adopting any such policy," A&F Brf. at 34

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<sup>7</sup> Notably, Ames & Fischer fails to distinguish Pletan and Bloss, two cases in which the Minnesota Supreme Court and the Minnesota Court of Appeals, respectively, held that statutory immunity barred claims that indirectly attacked a policy of personal responsibility and barred claims that would require the courts to rebalance warnings.

(emphasis original) -- also is without merit. The record cited above and in the City's and MCDA's initial brief reflects a policy to share information while expecting developers to take responsibility for their own due diligence and its consequences. Moreover, to the extent Ames & Fischer is arguing that such a policy must be written, it is wrong as a matter of law. See Schroeder, 708 N.W.2d at 504 (statutory immunity may apply in the absence of a written policy); Bloss, 590 N.W.2d at 666-67 (rejecting argument that statutory immunity cannot attach to an unwritten policy).

Ames & Fischer's third and fourth arguments go to the merits of its claims, suggesting evidence may show breach of a fiduciary duty arising out of a joint venture and/or breach of a duty to clarify misleading information. A& F Brf. at 34-35. There is no merit to either argument; however, this is neither the time nor place to address the merits of Ames & Fischer's claims. Because such claims constitute a direct or indirect attack on the City's and MCDA's policy, they are barred by statutory immunity.

In sum, the City and MCDA have a long-standing practice of sharing information with developers while at the same time expecting developers to be responsible for their own due diligence and its consequences. This practice embodies a policy generated by balancing political, social, and economic considerations in encouraging cooperative public-private development while limiting public risk. Because Ames & Fischer's tort claims challenge this policy, the claims are barred by statutory immunity.

### **III. The City and MCDA Are Protected By Vicarious Official Immunity From Claims Relating To Their Employees' Decisions And Conduct In Making And Sharing The Projections.**

The City and MCDA previously noted this Court repeatedly has held that official immunity applies to claims alleging misrepresentations by city employees in connection with development projects. See McDonough v. City of Rosemount, 503 N.W.2d 493 (Minn. Ct. App. 1993), review denied (Minn. Sept. 10, 1993); TCM Stores, Inc. v. City of Robbinsdale, 2003 WL 22889869 (Minn. Ct. App. Dec. 9, 2003) (S.R. 233-235); SJ & F Enterprises, Inc. v. City of Winsted, 1998 WL 345436 (Minn. Ct. App. June 30, 1998), review denied (Minn. Aug. 31, 1998) (S.R. 236-238). SJ & F Enterprises, which involved claims that city employees failed to disclose information necessary to correct misinformation disseminated by the city, is particularly on point. See id., 1998 WL 345436 at \*2-3. Significantly, Ames & Fischer fails to distinguish these decisions.

Instead, Ames & Fischer makes three meritless arguments. First, Ames & Fischer argues that disclosing information to Ames & Fischer would have involved the “mere execution” of the information-sharing policy without the exercise of professional judgment i.e., ministerial conduct. See A&F Brf. at 37, 39. Ames & Fischer provides no support for this assertion. In contrast, the record shows that determining what the Projections should be and what information was relevant to share was extremely complex. See Appellants’ Brief at 32-33 and record citations therein. The task of researching and weighing the vast body of data that went into making the Projections and deciding what information was relevant to share is the antithesis of the execution of a specific duty arising from fixed and designated facts, and required the application of

professional judgment. Compare SJ & F Enterprises, 1998 WL 345436 at \*3 (task of ascertaining a city's boundaries and determining whether a parcel is within the city limits involved research in a "murky area" that required the exercise of "individual professional judgment").

Second, Ames & Fischer's argument that official immunity is not available because the City and MCDA have failed to identify any particular employee responsible for the challenged decisions and conduct, A&F Brf. at 37-38, is both factually and legally without foundation. In responses to interrogatories more than a year ago, the City and MCDA specifically informed Ames & Fischer that "revenue and expense projections were prepared by and under the direction of Greg Finstad and Tim Blazina, and debt service projections were prepared by Mark Winkelhake and reviewed by John Moir and Jack Qvale." S.R. 115. Ames & Fischer has deposed each of these individuals (and numerous others) and has had more than ample opportunity to identify any other particular persons responsible for the alleged decisions and conduct on which Ames & Fischer's claims are based. The fact that Ames & Fischer has chosen not to name any individual employee as a party to this lawsuit is irrelevant for purposes of applying principles of official immunity. Anderson v. Anoka-Hennepin Sch. Dist. 11, 678 N.W.2d 651, 664 (Minn. 2004); Wiederholt v. City of Minneapolis, 581 N.W.2d 312, 316-17 (Minn. 1998). Moreover, the Minnesota Supreme Court and this Court have applied principles of official immunity despite the fact that no particular actor was identified. See, e.g., Sletten v. Ramsey County, 675 N.W.2d 291, 305, 307 (Minn. 2004) (referring generally to "employees of this site," "staff operating the . . . site," and "site employees");

TCM Stores, Inc., 2003 WL 22889869 at \*3 (referring to “various official and employees” who made alleged misrepresentations).<sup>8</sup>

Third, Ames & Fischer argues, wrongly, that there is a genuine issue of material fact as to whether City and MCDA officials acted with malice. The malice exception to official immunity “does not impose liability merely because an official *intentionally* commits an act that a court or a jury subsequently determines is a wrong. Instead, the exception anticipates liability only when an official intentionally commits an act that he or she then has reason to believe is prohibited.” Rico v. State, 472 N.W.2d 100, 107 (Minn. 1991) (emphasis original). Further, a party “may not rely on ‘bare allegations of malice’ to defeat a summary judgment, but must present specific facts evidencing bad faith.” Reuter v. City of New Hope, 449 N.W.2d 745, 751 (Minn. Ct. App. 1990) (citation omitted), review denied (Minn. Feb. 28, 1990).

As noted in the City’s and MCDA’s initial brief, Ames & Fischer presented to the District Court absolutely no facts evidencing bad faith. See Appellants’ Brief at 34.

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<sup>8</sup> Janklow v. Mn. Bd. of Examiners for Nursing Home Administration, 552 N.W.2d 711 (Minn. 1996), is inapposite. That case involved a wrongful termination claim against a board that was “statutorily authorized to hire and fire an executive director only acting in its joint capacity.” Id. at 716. For that reason, the Court concluded no “individual” could be responsible for the challenged conduct and, therefore, “official immunity does not apply to the facts before us.” Id. There is no such restriction on individual action in this case. Further, the discussion in LePage v. State, 1997 WL 714712, \*3-4 (Minn. Ct. App. Nov. 18, 1997), regarding failure to name or identify a responsible individual is dicta and its reasoning is not persuasive. Individuals are responsible for challenged conduct regardless of whether they are specifically identified in a lawsuit. Denying immunity to cities simply because responsible individuals are not specifically identified would deter the unnamed individuals from exercising their professional judgments in the exercise of discretionary duties no less than if they had been named and, therefore, would defeat the purpose of official immunity.

Moreover, Ames & Fischer's managing partner testified that Ames & Fischer was *not* claiming City or MCDA officials lied, that they knew their representations were false at the time made, or that they made any alleged misrepresentations in bad faith. S.R. 31-33.

Now, for the first time, Ames & Fischer identifies the following "evidence" as tending to establish bad faith: (1) a purported "neat division" between "positive" information provided and "negative" information withheld; (2) the City's and MCDA's purported desire for a parking ramp in the Warehouse District; and (3) allegedly "exaggerated parking needs and demand" by the MCDA to "secure TIF financing for the Project." A&F Brf. at 41. Even if all of this so-called evidence were in the record and presented to the District Court, and even if a jury were to make inferences favorable to Ames & Fischer, it is too little and too late to defeat summary judgment.<sup>9</sup> None of this "evidence" would support a finding that an official acted in "bad faith" or intentionally committed an act he or she had reason to believe at the time was legally prohibited.

Finally, Ames & Fischer does not dispute that if City and MCDA employees are entitled to official immunity under these circumstances, the City and MCDA are entitled to vicarious official immunity. See Anderson, 678 N.W.2d at 663-65.

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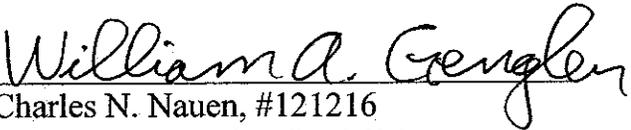
<sup>9</sup> Significantly, Ames & Fischer provides no record citation for the first proposition, misinterprets the testimony cited to support the third proposition (the witness expressed disagreement with the statement in counsel's question, not with the statement in the SEH report), and no reasonable negative inference can be drawn from the second proposition that the City and MCDA believed additional public parking would be needed in the general vicinity at some point in time.

**CONCLUSION**

For all of the foregoing reasons and those discussed in the City's and MCDA's initial brief, the City and MCDA respectfully ask the Court of Appeals to reverse the District Court's denial of the City's and MCDA's motion for summary judgment dismissing Ames & Fischer's tort claims and counterclaims based on immunity.

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