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**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A08-0096**

Minnesota Commercial Railway Company, et al.,  
Appellants,

vs.

Rice Creek Watershed District,  
Respondent.

**Filed March 24, 2009  
Affirmed  
Peterson, Judge**

Ramsey County District Court  
File No. 62-C8-05-003277

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Considered and decided by Klaphake, Presiding Judge; Peterson, Judge; and  
Johnson, Judge.

**UNPUBLISHED OPINION**

**PETERSON, Judge**

This appeal is from a judgment for respondent watershed district on claims arising  
from respondent's construction of a sedimentation basin upstream from appellants'  
railroad bridge, which appellants claim damaged their bridge. Appellants argue that the

district court erred in (1) granting judgment for respondent on appellants' inverse-condemnation claim based on its finding that appellants failed to show that the basin caused damage to their bridge; (2) granting summary judgment for respondent on appellants' claim for unjust enrichment; and (3) dismissing appellants' tort claims based on statutory immunity. We affirm.

## **FACTS**

Appellant Minnesota Commercial Railway Company (MCR) is a federally licensed class III rail carrier. Appellant MT Properties, Inc. (MT) owns a bridge that crosses over Rice Creek a short distance upstream from Long Lake in New Brighton. MT leases to MCR the right to run rail operations on the bridge. Under the lease, MCR is responsible for maintaining the bridge. The bridge was built in 1927 and underwent major reconstruction in 1953 and 1967.

Respondent Rice Creek Watershed District (RCWD) is a political subdivision of the State of Minnesota, formed in 1972 and authorized by Minn. Stat. § 103D.001-.925 (2008). Respondent consists of an area of 201 square miles that includes parts of Ramsey, Anoka, Washington, and Hennepin Counties.

Respondent's objectives, which are described in its Water Resource Management Plan, include minimizing public expenditures for runoff control, improving water quality, preventing flooding and erosion, promoting groundwater recharge, protecting and enhancing fish and wildlife habitat and recreation, and providing for the transition of water management to local units. Respondent does not determine zoning, but it has adopted a plan that requires property owners to obtain approval for land subdivision, final

site-drainage plans, rough-grading plans, appropriation of public water, bridge or culvert construction, wetland alteration, shore-land alteration, and public and private drainage systems.

From 1978 to 1987, respondent constructed projects to reduce erosion, stabilize water levels, and buffer peak flows during storms and spring runoff as part of the Long Lake Chain of Lakes (LLCOL) improvement projects. In 1981, respondent constructed a sedimentation basin upstream from the railroad bridge. Before constructing the sedimentation basin, respondent obtained approval from the Army Corp of Engineers, the Minnesota Department of Natural Resources, Ramsey County, the City of New Brighton, and the United States Environmental Protection Agency. In considering the proposal for the sedimentation basin, the Minnesota Environmental Quality Council completed an environmental-assessment worksheet (EAW) and determined that no environmental-impact study was necessary as no negative impact had been shown. The location of the Minnesota Transfer Railway southwest of the proposed sedimentation basin was considered in the EAW.

Contending that increased water flow resulting from construction of the sedimentation basin caused scouring that damaged their bridge, appellants brought this action against respondent, alleging claims for negligence, nuisance, trespass, unjust enrichment, and inverse condemnation.<sup>1</sup> The district court granted summary judgment for respondent on the negligence, nuisance, and trespass claims based on statutory

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<sup>1</sup> Appellants also alleged two tortious-interference claims but voluntarily dismissed them.

immunity. The district court granted summary judgment for respondent on the unjust-enrichment claim based on appellants' failure to present sufficient evidence to create a genuine issue of material fact. The remaining claim for inverse condemnation was tried to the court.

At trial, hydrologist David Filipiak explained the function of the sedimentation basin as follows:

It's designed to slow the water down, to drop out some of the sediment that's in the stream. By dropping out some of the heavier sediments, it produces cleaner water. . . .

The issue is that it took that same water and put that water through this constriction, or this bridge, and speeded up that water. And now that water's got more capacity to carry that bed load and to carry bigger particles. Well, all the big particles have already been settled out. So it's – instead of carrying the big particles that it once had, it's now coming through as cleaner water. . . . [I]t's coming through at a faster rate. It goes through the bridge and picks up larger material that's in the bed, the streambed, both upstream and downstream of this bridge, and it carries it out until, again, the water slows down slow enough to where those particles can settle.

Filipiak opined that the stream was picking up bigger particles from around the bridge.

He explained:

And that's why the scour – the large scour hole downstream of the bridge isn't filling in like we often see in scour conditions. None of that material is being deposited there. There's enough velocity that it's actually picking up – and there's – that water, that bed load's trying to find an equilibrium, given the velocity of the water and the volume of water.

Appellants presented evidence that the flow rate of water under the bridge has increased due to development. Filipiak testified that due to development, there has been a significant increase in the volume of water running through the creek at the bridge. Respondent's records also indicate that development has resulted in increased runoff volumes and flow rates, causing erosion problems, along Rice Creek.

When constructed in 1927, the bridge was 56 feet long and 19 feet wide with five piles<sup>2</sup> in each bent<sup>3</sup>, three 8-inch by 16-inch stringers<sup>4</sup> under each rail, and 8-inch by 8-inch ties.<sup>5</sup> In 1938, two new stringers were added to the bridge to strengthen it, and new caps and a retaining wall were also added, and in 1940, stringers and ties were renewed. A 1941 order form for 35 tons of riprap states that the riprap was needed for "preventing scour of bank on east side, south end of Rice Creek Bridge, bank has been cut back by creek." An additional 32 tons of riprap were delivered to the bridge in 1942. A 1945 inspection report states, "I went to Rice Creek . . . and found that the Creek has cut new channels north of our bridge, and is cutting into the slope of our embankment. I am ordering two cars of heavy rip rap for protection of this bank." In 1951 and 1952, materials were added to strengthen the bridge. In 1953, the bridge was renewed with a pile bridge, with eight 8-inch by 16-inch stringers. Repairs were made to the bridge in

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<sup>2</sup> A pile is defined as a heavy beam of timber, concrete, or steel driven into the earth as a foundation or support for a structure.

<sup>3</sup> A bent is defined as a transverse structural member or framework for strengthening a bridge or trestle.

<sup>4</sup> A stringer is defined as a horizontal timber supporting upright posts.

<sup>5</sup> A tie is defined as a beam placed across a railroad bed to secure rails.

1966 and 1971, and the substructure was replaced with steel piles embedded 60 to 65 feet into the ground.

There are no maintenance or inspection records for the bridge for the period from 1972 through 2002. MCR President John Gohmann testified that maintenance records need to be kept for only one year. But bridge consultant Theodore Niemeyer testified that the general practice is to keep perpetual records for railroad bridges. Niemeyer testified that during the 1970's and 1980's, recordkeeping was very poor due to an economic downturn in the railroad industry and that a lot of maintenance was deferred during that period.

In the fall of 2002, Joseph Krawczeski, MCR's Chief Maintenance of Way Officer, inspected the bridge and noticed that the bridge's east pier was dipping. Krawczeski contacted Robert Beckel, a civil engineer who specializes in railroad bridges, to inspect the bridge. Beckel concluded that scouring had caused the loss of soil, which caused the east pier to rotate and settle. Between 2003 and 2006, all three of the bridge's piers were repaired due to damage caused by scouring and erosion.

Niemeyer, Filipiak, and geotechnical engineer William Kwasny testified that the rate of water flow increases to go through a smaller creek cross-section resulting from the concrete bridge piers, which obstruct the creek, and that if the cross-sectional area of the bridge was reduced, the creek channel would be larger and the rate of flow would decrease, resulting in less erosion. Niemeyer testified that two concrete collars had been poured around the bridge's second pier, one in 1952 and the second in 1967, and that the

only logical explanation that he could think of for pouring the collars was to protect the original piers against erosion.

The district court found that “[t]he wood and concrete additions that comprised the bridge prior to 2002 contributed significantly to the scouring and erosion at the site” and granted judgment for respondent on the inverse-condemnation claim. The district court denied appellants’ motion for amended findings. This appeal followed.

## D E C I S I O N

### I.

The Minnesota Constitution requires that “[p]rivate property shall not be taken, destroyed or damaged for public use without just compensation therefor, first paid or secured.” Minn. Const. art. I, § 13; *see also* U.S. Const. amend. V (“[N]or shall private property be taken for public use, without just compensation.”). Whether a taking has occurred is a question of law, which this court reviews *de novo*. *Thompson v. City of Red Wing*, 455 N.W.2d 512, 516 (Minn. App. 1990) (citing *Alevizos v. Metro. Airports Comm’n*, 298 Minn. 471, 484, 216 N.W.2d 651, 660-61 (1974)), *review denied* (Minn. June 6, 1990). But the district court’s findings of fact with regard to a takings claim “will be upheld unless clearly erroneous and unsupported by the record.” *Parranto Bros. v. City of New Brighton*, 425 N.W.2d 585, 591 (Minn. App. 1988), *review denied* (Minn. July 28, 1988).

Appellants argue that the district court erred in determining that appellants failed to prove that respondent’s conduct resulted in a taking of appellants’ property. The district court analyzed appellants’ claim under the tests for both physical and regulatory

takings. Our understanding, however, is that appellants are asserting only a claim for a physical taking, specifically, damage to their bridge allegedly resulting from respondent's conduct in constructing the sedimentation basin and allowing an increase in the Rice Creek flow rate due to development.

In *Alevizos*, owners of properties located within four sound cones emanating from the Minneapolis-St. Paul Airport sued the Metropolitan Airports Commission (MAC), the public authority responsible for operating the airport. 298 Minn. at 474, 216 N.W.2d at 655. The property owners alleged that MAC's operation of the airport had caused noise and air pollution to such a degree that it resulted in a taking. 298 Minn. at 476, 216 N.W.2d at 656. In concluding that the property owners had alleged a claim for a physical taking, the supreme court stated:

Property is more than the physical thing -- it involves the group of rights inhering in a citizen's relation to the physical thing. Traditionally, that group of rights has included the rights to possess, use, and dispose of property. Petitioners in this case do not allege that they have been dispossessed by MAC's operations. They allege that their right to use the property without undue interference has been infringed and the decrease in market value due to defendant's operations has deprived them of their right to dispose of their property for a fair price. The right to use one's property in relative freedom from irritating noise and interference can hardly be disputed in view of present-day living conditions where a great deal of governmental and private effort is spent on planning and zoning our cities in an effort to improve the quality of life. . . .

This does not mean that every noise or interference with a property owner's use and enjoyment thereof constitutes a taking. Every landowner must continue to endure that level of inconvenience, discomfort, and loss of peace and quiet which can be reasonably anticipated by any

average member of a vibrant and progressive society. But when those interferences reach the point where they cause a measurable decrease in property market value, it is reasonable to assume that, considering the permanency of the air flights, a property right has been, if not “taken or destroyed,” at the very least “damaged,” for which our constitution requires that compensation be paid. . . .

.....

The test, then, that we prescribe will give relief to any property owner who can show a direct and substantial invasion of his property rights of such a magnitude he is deprived of the practical enjoyment of the property and that such invasion results in a definite and measurable diminution of the market value of the property.

*Alevizos*, 298 Minn. at 485-87, 216 N.W.2d at 661-62; *see also McShane v. City of Faribault*, 292 N.W.2d 253, 257 (Minn. 1980) (distinguishing between interference with use and enjoyment of property by physical governmental activity, as where land is affected by airport noise and pollution, and a regulation of property use, as through zoning).

Appellants do not claim that respondent has adopted any regulation preventing them from using their property for railroad operations. Rather, appellants argue that respondent’s management of Rice Creek has caused physical damage to the railroad bridge.

The district court found:

40. Evidence showed that the bridge narrows the channel and the narrow channel increases flow and the increased flow causes turbulence, which causes erosion to increase.

41. No evidence was presented as to when the scour hole between Long Lake and the bridge was formed.

42. There was no evidence or testimony of any sediment analysis by [appellants'] experts, nor was any scour analysis done by [appellants'] engineers on initial construction of the bridge or during subsequent modifications of the bridge by MCR or its predecessor railroads.

43. All engineers agreed that the flow of water must speed up to go through a smaller cross-section, that is the bridge and that the constriction in the bridge itself causes increased velocities. If the cross-sectional area were reduced, volume would decrease, causing less erosion.

....

46. William Kwasny's survey showed small voids under the concrete caps. There was no evidence presented as to when these voids appeared. He also testified that scour will continue unless the creek is widened or center piers removed. He further stated that the Bridge is a "choke point" where the velocity of the creek increases and that scour will continue until the creek is widened or the center pier is removed. The wood and concrete additions that comprised the bridge prior to 2002 contributed significantly to the scouring and erosion at the site.

Appellants argue that "MCR's Bridge withstood all flow conditions for decades prior to [respondent] placing a sedimentation basin next to it as well as throwing a deluge of excess water at it, digging up its footings." But the record contains evidence that scouring and erosion were occurring at the bridge since at least the 1930s and that materials were added to protect against those problems. A retaining wall was added in 1938, riprap was delivered to the bridge in 1941 and 1942, additional riprap was ordered in 1945, and concrete collars were added in 1952 and 1967.

Appellants argue that “the unrebutted testimony was that the bridge was well maintained, and its substructure in excellent repair, poised to last for decades absent the scour caused by [respondent].” Appellants cite Niemeyer’s testimony to show that the bridge was at all times well maintained. When asked for his opinion of the bridge’s useful life, Niemeyer replied, “[A]s long as it’s properly maintained, which it was being done, it could continue to survive for another 50 years, 100 years.” But because the record does not indicate the foundation for Niemeyer’s statement that the bridge was being properly maintained, it was within the district court’s discretion to not credit his opinion.

The district court’s findings are supported by evidence in the record, including evidence that scouring and erosion have occurred at the bridge since at least the 1930s; the lack of maintenance or inspection records for the bridge from 1972 through 2002; and testimony by Niemeyer, Filipiak, and Kwasny that the rate of water flow increases to go through a smaller cross-section resulting from the bridge and that if the cross-sectional area of the bridge was reduced, the rate of flow would decrease resulting in less erosion. The district court did not err in concluding that appellants failed to prove by a fair preponderance of the evidence that respondent’s conduct caused the damage to appellants’ bridge.<sup>6</sup>

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<sup>6</sup> The parties dispute whether the damage to appellants’ bridge is a compensable item of damage in a taking action under Minnesota law. Because appellants failed to prove that respondent’s conduct caused the damage to the bridge, we do not reach that issue.

## II.

On appeal from summary judgment, we review the record to “determine whether there are any genuine issues of material fact and whether a party is entitled to judgment as a matter of law.” *In re Collier*, 726 N.W.2d 799, 803 (Minn. 2007). We view the evidence in the record “in the light most favorable to the party against whom judgment was granted.” *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993). But to raise a genuine issue of material fact, the party with the burden of proof must provide more than evidence that “merely creat[es] a metaphysical doubt as to a factual issue and that is not sufficiently probative with respect to an essential element of his case to permit reasonable people to draw different conclusions.” *State Farm Fire & Cas. v. Aquila Inc.*, 718 N.W.2d 879, 886-87 (Minn. 2006).

The elements of an unjust-enrichment claim are: (1) a benefit conferred by the plaintiff on the defendant; (2) the defendant’s knowing acceptance of the benefit; and (3) the defendant’s acceptance and retention of the benefit where it would be inequitable to retain it without paying for it. *Acton Constr. Co. v. State*, 383 N.W.2d 416, 417 (Minn. App. 1986), *review denied* (Minn. May 22, 1986).

To establish an unjust enrichment claim, the claimant must show that the defendant has knowingly received or obtained something of value for which the defendant in equity and good conscience should pay. Unjust enrichment claims do not lie simply because one party benefits from the efforts or obligations of others, but instead it must be shown that a party was unjustly enriched in the sense that the term “unjustly” could mean illegally or unlawfully.

*ServiceMaster of St. Cloud v. GAB Bus. Servs. Inc.*, 544 N.W.2d 302, 306 (Minn. 1996) (quotations and citations omitted).

To support their unjust-enrichment claim, appellants cite the following paragraph from a hydraulic/scour analysis performed by SRF Consulting:

Attenuation of flow occurs at the Minnesota Commercial Railroad Crossing due to the constriction placed on Rice Creek, allowing the utilization of the expansive upstream floodplain for flood storage and sediment removal within the Long Lake Sedimentation Basin. The constriction causes high velocity discharges to pass through the bridge during flood conditions, which dissipate energy in the form of large eddies and submerged hydraulic jumps. This is evidenced by the highly eroded stream banks and deep scour hole located immediately downstream of the bridge crossing.

This evidence is insufficient to permit a reasonable person to find that respondent was unjustly enriched by the effect of the bridge on the flow of water in Rice Creek. The district court properly granted summary judgment for respondent.

### **III.**

As an exception to the general rule of tort liability for municipalities, statutory immunity is narrowly construed. *Conlin v. City of St. Paul*, 605 N.W.2d 396, 400 (Minn. 2000). The applicability of statutory immunity is an issue of law, which this court reviews de novo. *Id.*

Statutory immunity protects cities from liability for claims “based upon the performance or the failure to exercise or perform a discretionary function or duty, whether or not the discretion is abused.” Minn. Stat. § 466.03, subd. 6 (2006). “The

first step in an analysis of a statutory immunity claim is to identify the conduct at issue.”  
*Conlin*, 605 N.W.2d at 400.

Courts have recognized a distinction between planning decisions, which are protected, and operational decisions, which are not protected. *Steinke v. City of Andover*, 525 N.W.2d 173, 175 (Minn. 1994). Planning decisions involve public-policy issues and the weighing of competing social, economic, and political factors and are protected because they involve discretionary decisions. *Id.* Operational decisions are connected to the day-to-day operation of government and are not protected. *Id.*; *Watson ex rel. Hanson v. Metro. Transit Comm’n*, 553 N.W.2d 406, 412 (Minn. 1996).

Appellants argue that the district court relied solely on respondent’s administrator Steven Hobbs’s affidavit to support the conclusion that statutory immunity applies and that Hobbs’s affidavit contains conclusory recitations of the statutory criteria. But appended to Hobbs’s affidavit are hundreds of pages of documentation detailing the factors considered by respondent in determining its watershed-management policy and deciding to construct the sedimentation basin. The district court properly granted summary judgment for respondent based on statutory immunity. *See Chabot v. City of Sauk Rapids*, 422 N.W.2d 708, 710-11 (Minn. 1988) (holding that city’s decision “not to remedy” a defect in its sewer system “was clearly of a policy-making nature”); *Wilson v. Ramacher*, 352 N.W.2d 389, 393 (Minn. 1984) (holding statutory immunity applied to issuance of permits to downstream owners to put fill on their land, which allegedly caused back-up of water upstream); *Christopherson v. City of Albert Lea*, 623 N.W.2d 272, 276 (Minn. App. 2001) (holding that city was protected by statutory immunity for

decisions made regarding maintenance of its sewer system because those decisions involved balancing financial and policy considerations); *Nguyen v. Nguyen*, 565 N.W.2d 721, 723 (Minn. App. 1997) (holding that decision to delay safety improvements to roads, based on fiscal considerations, was entitled to statutory immunity).

**Affirmed.**