IN THE SUPREME COURT OF IOWA
Supreme Court No. 20-0814

UNION PACIFIC RAILROAD COMPANY and MIDWESTERN RAILROAD PROPERTIES,
Plaintiffs-Appellees,

vs.

DRAINAGE DISTRICT 67 BOARD OF TRUSTEES, GARY RABE in his capacity as a member of the Board of Trustees, KEITH HELVING, in his capacity as a member of the Board of Trustees, DENNIS PROCHASKA in his capacity as a member of the Board of Trustees, Defendants-Appellants

AND

BECCA JUNKER, in her capacity as Hardin County Drainage Clerk, JESSICA LARA in her capacity as Hardin County Auditor, Defendants.

APPEAL FROM THE IOWA DISTRICT COURT FOR HARDIN COUNTY
THE HONORABLE JAMES A. MCGLYNN

APPELLEES' RESISTANCE TO APPLICATION FOR FURTHER REVIEW

COURT OF APPEALS DECISION FILED JUNE 16, 2021

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QUESTION PRESENTED FOR FURTHER REVIEW

Did the Court of Appeals err in affirming the District Court's order that the Appellants' reclassification is based on an inequitable assessment of benefits as to Appellees' tract of land and ordering that the property be assessed its original benefit rate.

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STATEMENT IN RESISTANCE TO FURTHER REVIEW

In their routing statement to the Court of Appeals, the Defendants-Appellants (the "Drainage District") stated, "This case should be transferred to the court of appeals because it involves the application of existing legal principles, and presents issues that are appropriate for summary judgment, as provided by Iowa R. App. P. 6.1101(3)." Appellants' Brief (filed Jan. 7, 2021) ("Appellants' Br.") at 12. Now, only after the Court of Appeals affirmed the District Court's grant of summary judgment in favor of Plaintiffs-Appellees ("Union Pacific"), the Drainage District claims that the case involves a question of law that has not been, but should be, settled by this Court and an issue of broad public importance that this Court should decide. *See* Application for Further Review (filed July 6, 2021) ("Application"), at 4.

The Drainage District was correct the first time when it stated that the Court of Appeals was the proper court to decide this case. It involves the application of existing legal principles clearly set forth in Iowa Code Chapter 468 (the "Drainage Code") and established in this Court's long-standing precedent. For the Drainage District to prevail and assess the railroad approximately fifty percent of the benefits based solely on construction costs, the Court would have to rewrite the Drainage Code and its precedent.

BRIEF RESISTING FURTHER REVIEW

This case involves the assessment of benefits a drainage district sets to allocate the costs to repair a drain tile that passes underneath a railroad right of way and provides artificial underground drainage primarily to other parcels in the district. In its pursuit to shift district costs to Union Pacific, the Drainage District ignores the distinction between artificial underground drainage and natural surface drainage. This critical distinction is recognized in the Drainage Code as well as case law. This Court has succulently stated, "the railroad should not be responsible for artificial underground drainage improvements that would be needed whether the railroad was there or not. *The costs of these repairs are, by statute, the responsibility of the drainage districts*." *Hardin County Drainage Dist. 55, Div. 3 v. Union Pac. R.R. Co.*, 826 N.W.2d 507, 512 (Iowa 2013) (hereinafter "*District 55*") (emphasis added).

Not satisfied with this Court's construction of the Drainage Code, the Drainage District attempted to redefine the statutory term "benefit," embarking on what the District Court described as " 'antics with semantics' using the words 'cost' and 'benefit' as if they were synonyms" to foist the costs of this artificial underground drain tile on Union Pacific. App. Vol. III at P73 (Order Granting Plaintiffs['] Motion for Summary Judgment and Denying Defendants' Motion for Summary Judgment (filed May 15, 2021) ("District Court Order"), at 7). As both the Court of Appeals and District

Court determined the Drainage District's attempt to shoehorn the costs to repair its tile drain into a benefit to Union Pacific by claiming erosion control if the tile fails as a benefit is completely unfounded. Just as drainage districts have continued to exist and perform important functions since this Court decided *District 55* in 2013, so will they continue long after the conclusion of this case despite the Drainage District's cry that the sky will fall if this Court does not intervene.

STATEMENT OF THE FACTS

A. The Drainage District reclassified benefits for applicable parcels to fund the repair of a drain tile that travels under Union Pacific's right of way parcel. App. Vol. III at P69.

B. The Drainage District assessed Union Pacific's right of way parcel 100 percent as the most benefited parcel based on its conclusion that "approximately 50% of the construction costs in the recent bid letting for the currently proposed project were associated with requirements by the Union Pacific Railroad to prevent erosion on their property and the resulting protection of the Union Pacific Railroads facilities." App. Vol. I at P89 (Reclassification Commission Report for Main Tile, Drainage District 67 Hardin County, Iowa, at 5).

C. The requirements for passing the drain tile under the right of way are based on federal law. *See* App. Vol. III at P51-P52 (Transcript of Hearing

on Motion for Summary Judgment (Apr. 27, 2020), at 40:10 – 41:17) (Drainage District's counsel conceding "we're not disputing the assertion that it's required by federal law . . . .").

D. The drain tile provides artificial underground drainage and brings water to the right of way that would not otherwise arrive at the right of way. App. Vol. III at P44 (Transcript of Hearing on Motion for Summary Judgment (Apr. 27, 2020), at 33:4-20) (Drainage District's counsel conceding "this drainage is brought not by a creek or river, it's brought to the railbed because that's where they laid the tile").

E. Prior to the Drainage District's reclassification, Union Pacific's parcel was assessed 5.81 percent of the overall assessment of benefits. App. Vol. I, at P134 (Plaintiffs' Statement of Facts in Support of Motion for Summary Judgment (filed Mar. 13, 2020), ¶ 5); App. Vol. III at P68 (District Court Order, at 2).

F. By assessing Union Pacific's parcel fifty percent of the benefits, Union Pacific would be responsible for fifty percent of all costs, including future projects, unless and until a new reclassification is conducted. Iowa Code Section 468.65(2) ("Such reclassification when finally adopted shall remain the basis for all future assessments unless revised as provided . . . .").

ARGUMENT

I. The Court of Appeals Correctly determined the Drainage District's drain tile provides artificial underground drainage, therefore the Drainage Code provisions for natural drainage and associated cases are inapplicable.

The Court of Appeals noted the uncontested fact that the drain tile at issue provides artificial underground drainage for the district. *Union Pac. R.R. Co., et. al. v. Drainage Dist. 67 Board of Trustees, et. al.*, No. 20-0814 at *2 (Iowa App. June 16, 2021) ("the drain here collects surface runoff in the drainage area and transports it *to* the right of way when it would not otherwise arrive there.") (emphasis in original). Yet, the Drainage District glosses over this distinction throughout its application for further review, and effectively contends its artificial underground drain should be treated as natural drainage. Iowa law treats these two types of drainage differently both at common law and under the Drainage Code.

Under Iowa common law, a landowner does not have a right to artificially drain his land onto his neighbor's land. *See Bd. of Supervisors of Pottawattamie Cnty. v. Bd. of Supervisors of Harrison Cnty.*, 214 Iowa 655, 241 N.W. 14, 21 (1932) (stating, "the owner of higher land has no right even in the course of the use and improvement of his property to collect the surface water upon his own lands into a drain or ditch, increased in quantity or in a manner different from the natural flow upon the lower lands of another to the

injury of such lands."). In *Sheker v. Machovec*, the Iowa Supreme Court stated, "Where, by means of tile drains, the owner of the higher land discharges upon the lower land water from an area which would otherwise not have been drained across the lower land . . . then, according to the uniform current of authorities in this state . . . the owner of the higher land is liable in damages." 116 N.W. 1042, 1043 (1908) (internal citations omitted). In fact, the Drainage District's own cited cases demonstrate this difference: "Water from a dominant estate must be allowed to flow in its *natural course* onto a servient estate." Application, at 19-20 (quoting *Sobotka v. Salamah*, 828 N.W.2d 325, 32 (Iowa Ct. App. 2013)) (emphasis added).

Despite this well-established legal principal, the Drainage District contends that unless Union Pacific is forced to pay for the artificial underground drainage's passage under its right of way "the drainage of agricultural lands will be blocked which is in violation of long-established common law on drainage easement rights . . . ." Application, at 6 & 19 ("If the railroad demands materials that are cost-prohibitive, it will effectively violate natural drainage law by preventing the water from draining from a dominant estate through a subservient estate."). Yet, the rights associated with natural drainage have absolutely no application in this case involving artificial

underground drainage. The distinction between natural and artificial underground drainage is a long-established facet of Iowa common law.

The Drainage Code also recognizes this common-law distinction by assigning a cost allocation for artificial drainage improvements by labeling the associated costs for artificial drainage as damages to be paid by the drainage district as a whole. The Drainage District cites Iowa Code Section 468.109 for the proposition that the "right of way [may not] obstruct, impede, or interfere with the free flow of water therein." Application, at 18. Yet, the Drainage District omits that the Drainage Code states the cost of construction for improvements other than bridges and culverts at natural waterways is an element of damages to the railroad, not a "special benefit" to the railroad as the Drainage District claims. Iowa Code § 468.113. In *District 55*, this Court recognized the Drainage Code's cost allocation did not allow a district to force a railroad to pay for the cost of constructing or repairing artificial underground drainage beneath a railroad bed. 826 N.W.2d at 512-14. Therefore, the Court of Appeals followed this Court's precedent along with the Drainage Code, and there are no unanswered legal issues of broad importance in this case.

II. The Court of Appeals correctly determined the Drainage District's attempt to assess the cost of construction as benefits is inconsistent with the basic premise of the Drainage Code and related case law.

The Court of Appeals followed this Court's precedent in holding, "the cost of construction across a particular property is not a consideration in

apportioning benefits." *Union Pacific et al v. Drainage Dist. 67 et al*, No. 20-0814 (Iowa Ct. App. June 16, 2021) ("Court of Appeals Decision"), at 7 (quoting *Pollock v. Bd. of Supervisors of Story Cnty.*, 138 N.W. 415, 416 (Iowa 1912)). The Court of Appeals also applied this Court's precedent in concluding that the costs of construction are distinct from drainage benefits because the costs of construction are "a necessary incident in the course of the improvement . . . . It was nothing more." *Id.* at 8 (quoting *U.S. R.R. Admin. v. Buena Vista Cnty.*, 196 N.W. 365, 367 (Iowa 1923)). Yet, the Drainage District claims this caselaw is "outdated" and was "written over one hundred years ago." Application, at 17 & 21. The age of these cases simply demonstrates the well-established and undisturbed principle that benefits are measured by the actual betterment of the parcel due to the improvement. *In re Johnson Drainage Dist. No. 9*, 141 Iowa 380, 118 N.W. 380, 383 (1908) ("[A]n assessment can be made for actual benefits only."). The cost of construction is a "damage," not a "benefit." *See* Iowa Code § 468.113.

The Drainage District's refusal to adhere to the basic statutory concept of a "benefit" is evidenced by its admission that it "took into consideration the erosion that would result if a drain tile beneath the railroad bed would collapse." Application at 26. Despite the fact the drain tile itself creates the very possibility of erosion, the Drainage District contends that constructing

the tile in a manner necessary to function under the right of way is a benefit to the railroad parcel. This is exactly the opposite of a benefit provided by the drain improvement. The Drainage Code cannot be read to switch what would be damages in the typical situation to assessable benefits to a parcel. Instead, a parcel benefits from a drain tile when it provides drainage off that parcel. *See* Iowa Code § 468.39 (directing commissioners to assign benefits "according to the benefit to be received by each of such tracts from such improvement"). The benefits referenced in Iowa Code Section 468.44(4) refers to drainage of non-agriculture lands, but that section does not change the statutory definition of "benefits." It certainly does not turn damages related to either costs of construction or a failed drain into benefits. Especially considering that the Drainage District's scheme would result in Union Pacific paying fifty percent of *all* costs, not just the costs associated with the proposed repair, until such time as the Drainage District decides to conduct a new reclassification. Iowa Code Section 468.65(2).

Additionally, applying this Court's precedent, the Court of Appeals held that the Drainage District "acted improperly by considering how much the other properties in the district would be assessed for the cost of repair under the prior assessment." Court of Appeals Decision, at 9 (quoting *Martin v. Bd. of Supervisors of Polk Cnty.*, 1000 N.W.2d 652, 658 (Iowa 1960)). The

Drainage District attempts to justify its improper consideration in its request for further review by claiming that "if the cost per acre for a repair project approaches or exceeds $2,000.00 per acre of agricultural land . . . it is simply costs-prohibitive." Application, at 23-24. It further reveals its desire to simply shift costs of the repair to the railroad and reduce the costs to the agricultural parcels by asserting, "Railroads pass the expense of complying with federal regulations and drainage easement laws onto their customers – farmers cannot." *Id.*. at 23. Such a cost-shifting plan lacks any foundation in the Drainage Code, which resulted in the District Court labelling the Drainage District's attempt as "antics with semantics." App. Vol. III at P67 (District Court Order, at 7).

As this Court has previously concluded, the Legislature has already balanced the equities between railroads and drainage districts in the allocation of costs for constructing drainage improvements across the right of way. *See District 55,* 826 N.W.2d at 512-14 (holding drainage districts are responsible for the costs of repairing drainage improvements and railroads are only responsible for the cost of repairing bridges and culverts). The Drainage District's claims of an important public issue have been addressed by the Legislature in the Drainage Code, and its asserted unanswered question of law is simply a scheme to avoid the Legislature's equitable balancing and this

Court's precedent, a scheme this Court has already rejected. *See Buena Vista Cnty.*, 196 Iowa at 367 ("The net effect of the action of the Commission was first to assess the benefits of the diversion of water; and, secondly, to assess again the cost of that diversion. This was a clear duplication of assessment and was beyond the power of the assessing body to impose."). Therefore, Appellee's request for further review is meritless.

CONCLUSION

This case does not merit further review.

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PROOF OF SERVICE AND CERTIFICATE OF FILING

I hereby certify that on July 16, 2021, I electronically filed the foregoing with the Clerk of the Supreme Court of Iowa using the Iowa Electronic Document Management System, which will send notification of such filing to the counsel below:

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