

NO. A04-901

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State of Minnesota  
**In Supreme Court**

In Re: St. Cloud Gas Explosion  
Jaenty, Inc., d/b/a Taco John's Restaurant,  
*Plaintiff-Appellant,*

vs.

Northern States Power Company, Seren Innovations, Inc.,  
Cable Constructors, Inc., and Sirti, Ltd.,  
*Defendants-Respondents.*

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## ARGUMENT

### I. THE RESPONSIVE ARGUMENTS OF NSP ARE MISPLACED

Five of NSP's responsive arguments raise new matter requiring a reply.

1. **NSP argues that its gas line is a permanent improvement to real property. This claim was not addressed by the trial court or court of appeals.**

NSP claims its gas line is an improvement to real property. (NSP Response Brief p. 8-10) Yet, this is not at issue in the current appeal. The trial court granted summary judgment because it determined that the anchor being installed was a permanent improvement to real property and that the claimed damages arose from such anchor and not negligent construction activities. On this basis alone, the trial court concluded this action was time-barred.

The issue on appeal then is solely whether the trial court's finding of "anchor permanency" is supported by the record and even if it is, whether the complained of damages arose from that anchor or negligent construction activities. The trial court did not make any findings or conclusions with respect to the gas line. Issues not clearly decided by the trial court are not to be considered on appeal. *Gorblirsch v. Heikes*, 547 n.w.2d 89, 92 (Minn. Ct. App. 1996) NSP's first responsive argument is moot on appeal.

2. **NSP attempts to avoid the problem of whether the anchor was permanently installed at the time of the accident by arguing that the damages claimed arise out of its gas line.**

NSP avoids responding to any of the factual record highlighted in Appellant's

brief, establishing that the anchor at issue was not permanently installed, but was still being installed at the time of the accident. (Appellant's Brief p. 2-3) Instead, NSP suggests that Jaenty's damages really stem from NSP's gas line – which as explained above, it claims was permanent.

NSP goes on to assert that the Minnesota courts have routinely used Minn. Stat. § 541.051 to bar claims arising out of permanent facilities that were not part of the construction project itself. (NSP Response Brief p. 14) However, the cases it cites for this proposition can be distinguished.

NSP cites *Lederman v. Cragun's Pine Beach Resort* 247 F.3d 812 (8<sup>th</sup> Cir. 2001) where a temporary trench for a construction project undermined the foundation of a pathway and caused its collapse and the injury of a pedestrian. Thus, the presence of the trench itself was a causative factor in the collapse of the pathway. In contrast, there is no claim or evidence that the anchor at issue here, would have by itself caused an explosion had it been permanently installed. Rather, it was the negligent construction activity and the mistaken piercing of the gas line that led to damages.

NSP similarly relies on *Griebel v. Anderson Corp.*, 489 N.W.2d 521 (Minn. 1992) where it claims a "defective patio condition" allowed flies to enter a home. It's believed that what NSP meant to say was that in *Griebel* the plaintiffs complained that doors near the patio did not seal properly, allowing flies to enter their home. The *Griebel* court held that claims for the defective doors were time barred because they were part of the improvement to real property of the house when built. The current case is different.

The anchor here, is not claimed to be defective. It did not fail of its essential purpose, causing damages. Nor, did the gas line fail and explode on its own. Rather, it was the human negligence of workers who damaged the gas line and caused damages.

Accordingly, because Janety's claims are based on negligent construction theory, NSP's third responsive argument encompassing its claim that the explosion was caused by its permanently installed gas line, is moot.

**4. NSP's argues that this Court cannot consider *Witta v. Potlatch*. NSP is wrong.**

NSP cites *Thiele v. Stich*, 425 N.W.2d 580 (Minn. 1988) for its claim that this Court must disregard the case of *Witta v. Potlatch Corp.*, 492 N.W.2d 270 (Minn. 1992) in deciding this appeal. (NSP Response Brief p. 16, n. 1). NSP makes this argument despite the fact the fact the Appellate Court discusses the case at length. (A.A. 25; 30)

*Thiele* however does not stand for NSP's proposition. Indeed it does not in any way discuss case law authority or bar courts from considering any case law that is not listed by a party. Rather, *Thiele* stands for the proposition that a party may not raise a new issue on appeal.

*Witta* does not raise a new argument or theory in this context. Rather it is used by the appellate court to address the issues raised by Jaenty. As such, NSP's fourth responsive argument is misplaced.

- 5. NSP contends claims that it failed to act/warn have been waived because Jaenty did not raise such argument in its brief, nor did it establish related duty or causation. Such claims were not addressed by the trial court or court of appeals.**

The complaint alleges negligent construction activities including a failure to act/warn on the part of NSP after the gas line was breached. (A.A. 14-17) However, NSP claims that because such claims were not briefed, (NSP Response Brief p. 17) nor was there sufficient evidence of duty or causation presented, (Id. p. 18-19) the issue is waived and it cannot be held liable.

This argument is flawed in two respects.

First, none of these issues formed a basis for the trial court's decision. Not duty, not causation, not waiver As such, they are not at issue on appeal.

Second, Jaenty's brief does mention its claims for failure to act after the gas line was breached and refers to the Complaint for detail (Appellant's Brief, p. 6, 7). But even if it had not, the case law relied upon by NSP refers to barring consideration of an issue not briefed, not the waiver and dismissal of a cause of action.

Accordingly, NSP's fifth responsive argument is misplaced.

## **II. THE RESPONSIVE ARGUMENTS OF SIRTl, SEREN and CABLE CONSTRUCTORS ARE MISPLACED**

Two<sup>1</sup> of Sirti, Seren and Cable Constructor's ("Respondents") responsive

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<sup>1</sup>Said Respondents also raise arguments similar to those raised by NSP, with respect to claims of negligent construction/failure to act and related duty and causation. Jaenty relies upon its Reply as set forth above, rather than engage in repetitive analysis.

arguments raise new matter requiring a reply.

1. **Respondents argue that the issues of whether the anchor was an improvement to real property, and whether damages were caused by negligent construction, were not properly raised by Jaenty. Respondents are incorrect**

Respondents claim Jaenty's anchor permanency argument was not raised below.

They also assert that Jaenty never raised the issue of negligent construction at the trial court level. (Respondents' Brief. P. 5, 7 n. 4) However, Jaenty did raise the issue of whether the anchor qualified as a permanent Improvement to real property. (R.A. 3) Likewise, Jaenty did raise the issue of negligent construction, stressing the defendants failure to locate the gas line, failure to monitor drilling activities, and failure to advise after the leak. (Id.)

Nevertheless, Respondents cite a series of cases standing for the proposition that a party may not raise a new *issue* on appeal. (Respondent's Brief p. 7) The distinction the Respondents fail to make is the difference between a failure to raise an issue -- as opposed to an issue which is raised, but for which not every possible sub-argument for and against the issue is discussed in detail.

Here, the issue before the trial court was whether Minn. Stat. § 541.051 barred plaintiffs' claims. To determine this, Jaenty (and other plaintiffs) raised and argued that the anchor was not an Improvement to real property under the statute. (R.A.-3) Obviously, then the issue of whether the facts in this case met the necessary definition of "permanent Improvement to real property" was raised and part of that definition as acknowledged by the trial court was permanency. Indeed, the trial court made a factual

finding that the anchor was permanently installed and did constitute a permanent Improvement to real property.

Furthermore, the Court of Appeals dissent and the Court of Appeals obviously found the issue to be sufficiently raised as each reviewed the trial court's conclusion that the anchor was permanent and the dissent specifically addressed the finding of installation and pointed out that the evidence did not support such conclusion by the trial court.

Accordingly, Respondent's first responsive argument fails.

**2. Respondents argue that Minn. Stat. § 541.051 applies even when an item is incomplete. Respondents are incorrect.**

Respondents claim that the definition of a defective and unsafe improvement to real property incorporates the notion of incompleteness. (Respondents' Brief p. 10) They argue that the "permanency" required under Minn. Stat. § 541.051 does not mean the particular component of the Improvement must be "completed." (Id.) In support, Respondents cite *Lederman*, Supra. Respondents claim that because the trench in that case which undermined the pathway, was only temporary, it was not "permanent." Thus because Minn. Stat. § 541.051 was applied in *Lederman*, Respondents argue that the partially installed anchor in this case, must qualify as a permanent improvement.

The flaw in this completion/permanency argument is pointed out by the Appellate Court dissent which stresses that application of Minn. Stat. § 541.051 requires an integration into the property. There can be none, where as here, the installation was

not complete. In *Lederman*, the trench had been dug. It's installation was complete. It was integrated into the property. Indeed, the fact that it would be filled in later, shows how it had permanently changed the property. The anchor in the present case was not installed when the gas line was ruptured. It was not therefore complete nor could it have permanently changed property. (A.A. 30) Furthermore, the negligent excavation into the gas line was never part of the project and it was this, not the failure of the anchor which caused damages. (Id.)

Accordingly, the Respondents' second responsive argument is misplaced.

**CONCLUSION**

The trial court and appellate majority must be overturned and this matter reinstated and remanded for further proceedings and trial at the district court.

Dated 6/10/05

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