

NO. A04-1816

State of Minnesota
In Supreme Court

State Farm Fire and Casualty, Joan Hernlem,
 and Auto Owners Insurance Company

Respondents,

vs.

Aquila, Inc., d/b/a People's Natural Gas, f/k/a UtiliCorp United Inc.,
 d/b/a People's Natural Gas/Energy One,

Appellant,

and

Northern Pipeline Construction Company,

Defendant.

APPELLANT'S REPLY BRIEF

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTRODUCTION.....	1
I. THE UNCONTROVERTED FACTS ESTABLISH THAT THE NEW POLYETHYLENE PIPELINE SYSTEM WAS AN IMPROVEMENT WHICH ENHANCED THE USEFULNESS AND VALUE OF THE REAL PROPERTY.	1
II. OWNERS OF IMPROVEMENTS TO REAL PROPERTY ARE EXPRESSLY PROTECTED BY MINN. STAT. § 541.051.....	4
III. PLAINTIFFS FAILED TO PROVE THAT THE EXCEPTION IN MINN. STAT. § 541.051, SUBD. 1(c) FOR NEGLIGENT MAINTENANCE, OPERATION OR INSPECTION IS APPLICABLE.....	5
CONCLUSION	10

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
<i>Collings v. Northwestern Hospital</i> , 202 Minn. 139, 277 N.W. 910 (1938).....	10
<i>DLH, Inc. v. Russ</i> , 566 N.W.2d 60 (Minn. 1997)	7
<i>Ford v. Emerson Elec. Co.</i> , 430 N.W.2d 198 (Minn. App. 1988)	4
<i>Gould v. Winona Gas Co.</i> , 100 Minn. 258, 111 N.W. 254 (1907)	7, 8
<i>Hartford Fire Insurance Co. v. Westinghouse Electric Corp.</i> , 450 N.W.2d 183 (Minn. App. 1990)	4
<i>Heffter v. Northern States Power Co.</i> , 173 Minn. 215, 217 N.W. 102 (1927)	9
<i>Horvath v. Liquid Controls Corp.</i> , 455 N.W.2d 60 (Minn. App. 1990)	4
<i>Hoven v. Rice Memorial Hosp.</i> , 396 N.W.2d 569 (Minn. 1986)	8
<i>Johnson v. Coca-Cola Bottling Co. of Willmar</i> , 235 Minn. 471, 51 N.W. 2d 573 (1952) .	7
<i>Johnson v. Steele-Waseca Coop Elec.</i> , 469 N.W.2d 517 (Minn. App. 1991).....	4, 5
<i>Johnson v. West Fargo Mfg. Co.</i> , 255 Minn. 19, 95 N.W.2d 497 (1959).....	9
<i>Mahowald v. Minnesota Gas Co.</i> , 344 N.W.2d 856 (Minn. 1984).....	8, 9
<i>Murphy v. Hank's Specialties, Inc.</i> , No. CO-98-65, 1998 WL 422256, at *3 (Minn. App. July 28, 1998)	3
<i>Pacific Indem. Co. v. Thompson-Yaeger, Inc.</i> , 260 N.W.2d 548 (Minn. 1977)	1
<i>Patton v. Yarrington</i> , 472 N.W.2d 157 (Minn. App. 1991)	3
<i>Rinkel v. Lee's Plumbing & Heating Co.</i> , 257 Minn. 14, 99 N.W. 2d 779 (1959)	7
<i>Thiele v. Stich</i> , 425 N.W.2d 580 (Minn. 1988)	6
<i>Wilson v. Home Gas Co.</i> , 267 Minn. 162, 125 N.W.2d 725 (1964)	9

INTRODUCTION

Plaintiffs' brief essentially asks this Court to reject its long held interpretation of the term "improvement to real property" and urges this Court to graft an unstated and unconstitutional exception onto the statute. In short, Plaintiffs ask this Court to discard the fundamental holdings of *Pacific Indem. Co. v. Thompson-Yaeger, Inc.*, 260 N.W.2d 548 (Minn. 1977). The Court should decline to do so.

Plaintiffs also assert that they presented a *prima facie* case of negligence against Aquila based upon strict liability and *res ipsa loquitur* -- theories that they never asserted in the district court and that are not applicable on the undisputed facts of this case. The Court should reject these arguments as contrary to longstanding precedent concerning gas supplier liability and reinstate the trial court's ruling that Plaintiffs' claims are barred by the statute of repose contained in Minn. Stat. § 541.051.

I. THE UNCONTROVERTED FACTS ESTABLISH THAT THE NEW POLYETHYLENE PIPELINE SYSTEM WAS AN IMPROVEMENT WHICH ENHANCED THE USEFULNESS AND VALUE OF THE REAL PROPERTY.

In its motion for summary judgment, Aquila presented uncontroverted facts establishing that the new polyethylene pipeline:

1. Was intended, designed, and installed to be a permanent improvement to Hallmark Terrace's real property;
2. Was intended, designed, and installed to make Hallmark Terrace's real property more useful and more valuable;
3. Was a permanent improvement to Hallmark Terrace's real property; and
4. Made Hallmark Terrace's real property more useful and more valuable.

(Affidavit of Greg Walters). In their motion for summary judgment and their response to Aquila's motion for summary judgment, Plaintiffs had ample opportunity to refute these material facts. Plaintiffs were unable to do so.

On appeal, Plaintiffs attempt to avoid the determinations of the district court simply by declaring, without any factual support, that the "gas distribution system does not improve the property it runs through" (Response Brief at 9). Plaintiffs were unable to substantiate this assertion before the district court and they are unable to substantiate it now. This assertion defies the undisputed facts, reason, and common sense.

Aquila invested a substantial sum to construct and install the new system; certainly it did so because it perceived some benefit to doing so. But this does not mean that the new pipeline failed to enhance the value of the real property. Quite the contrary. Aquila is a public service company. Aquila's efforts to provide modernized, more efficient, and more reliable gas service necessarily benefits Aquila's customers and the real property serviced by the new pipeline. The new polyethylene pipeline was buried underground and permanently connected to each residence. Common sense tells us that real property tied into a city's electrical grid, or connected to city water and sewer, or serviced with underground natural gas is plainly more valuable than real property lacking these utility services.¹ It is no coincidence that advertisements for real property frequently tout the utility services present. As the district court concluded, the new pipeline was an

¹ Aquila's opening brief (pp. 10-13) cited numerous cases holding that various utilities and underground piping systems are improvements to real property. Plaintiffs failed to address and distinguish those cases in its brief.

improvement to real property because it enhanced the value of the real property at Hallmark Terrace (A.A. 56).

Moreover, it is uncontroverted that one of the purposes for the installation of the new pipeline was to remedy the “hazardous location of the existing mains and service.” Plaintiffs acknowledge, as they must, that “a property may become more useful by virtue of an improvement if it can be put to some use that was previously impossible or impermissible” (Response Brief at 9; *see, also, Patton v. Yarrington*, 472 N.W.2d 157, 159-60 (Minn. App. 1991)). Plaintiffs must concede that it would be “impermissible” for Aquila to continue gas service through lines that were in a hazardous location. The new pipeline was also an improvement to real property because it alleviated a hazardous, impermissible condition.

Finally, Plaintiffs seem to be arguing that because Hallmark Terrace received natural gas both before and after the installation of the pipeline, the project cannot be considered an “improvement to real property” (*See* Response brief at 2, 11-12). This argument has been routinely rejected by Minnesota courts. In several cases, it has been made clear that the complete replacement of a preexisting item with a new item serving the same function is an improvement to real property for purposes of Minn. Stat. § 541.051. *See, Murphy v. Hank’s Specialties, Inc.*, No. CO-98-65, 1998 WL 422256, at *3 (Minn. App. July 28, 1998) (replacement of a carpet held to be an improvement to real property) (A.A. 66). There can be no doubt that the complete replacement of an item, an entire pipeline system in this matter, increases the value and utility of the real property. *See, Hartford Fire Insurance Co. v. Westinghouse Electric Corp.*, 450 N.W.2d 183, 186

(Minn. App. 1990) (replacement of a power generator was held to be an improvement to real property). In fact, Minnesota courts have found numerous relatively minor replacements to be “improvements to real property” including: installation of new carpet, replacement of a defective hot water heater with a new one,² and changing the size of an excess flow valve.³ If the installation of a new carpet is an improvement to real property, then certainly the complete replacement of a development’s natural gas pipeline system is an improvement.

II. OWNERS OF IMPROVEMENTS TO REAL PROPERTY ARE EXPRESSLY PROTECTED BY MINN. STAT. § 541.051.

In our opening brief, we set forth how the law developed to provide equal protection to owners under § 541.051. Plaintiffs have completely ignored this history and precedent. Instead, Plaintiffs’ claim “this case is primarily about control” (Response brief at 5). In support of their argument, Plaintiffs rely exclusively upon *Johnson v. Steele-Waseca Coop Elec.*, 469 N.W.2d 517 (Minn. App. 1991). As set forth in detail in our opening brief, to the extent *Johnson* purports to exclude owners from the protections of Minn. Stat. § 541.051, it directly contradicts the express language of the statute and substantial Minnesota precedent (Appellant’s Brief at 17-20). Judge Peterson’s dissent in *Johnson* makes the point precisely:

The majority concludes that, because respondent maintains control of the pole and transformer installed on appellant’s property, the pole and transformer do not constitute an improvement to real property under Minn. Stat. § 541.051

² *Ford v. Emerson Elec. Co.*, 430 N.W.2d 198 (Minn. App. 1988)

³ *Horvath v. Liquid Controls Corp.*, 455 N.W.2d 60 (Minn. App. 1990)

(1988). There is nothing in § 541.041 that suggests its application is limited to suits against those who install or create an improvement to real property and surrender control of it.

469 N.W.2d at 521 (Peterson, J., dissenting). Since that time, no Minnesota appellate court has followed the *Johnson* reasoning and excluded owners from the protections of the statute of repose simply because they own and control the improvements -- until now.⁴

The plain language of the statute and the body of precedent interpreting the statute all confirm that Minn. Stat. § 541.051 protects owners and controllers of improvements. The *Johnson* majority, therefore, erred when it attempted to insert an unconstitutional exception into Minn. Stat. § 541.051. The majority decision below compounded that error when it endorsed the *Johnson* “amendment” and allowed Northern Pipeline the protections of the statute, while denying those same protections to Aquila, simply because Aquila remained the owner of the improvement.

III. PLAINTIFFS FAILED TO PROVE THAT THE EXCEPTION IN MINN. STAT. § 541.051, SUBD. 1(C) FOR NEGLIGENT MAINTENANCE, OPERATION OR INSPECTION IS APPLICABLE.

At no time in the district court did Plaintiffs ever provide any evidence that Aquila was negligent in the maintenance, operation or inspection of the gas pipeline.⁵ And at no

⁴ To the contrary, since *Johnson*, Minnesota owners have repeatedly been afforded the protections of § 541.051. See cases cited in Aquila’s opening brief at page 19, footnote 9.

⁵ Plaintiffs submitted the affidavit of Robert Whitemore, an expert in fire investigation, to the district court. Mr. Whitemore did not, however, express any opinions that Aquila was negligent in the maintenance or inspection of the pipeline system. Presumably such matters would not be within his expertise in any event.

time did Plaintiffs argue that they were not required to provide evidence of such negligence based upon strict liability or *res ipsa loquitur*. Plaintiffs first raised the *res ipsa loquitur* concept in their brief to the court of appeals where they stated that “the mere fact of the gas explosion in this case is sufficient to state a *prima facie* case of negligence” (Plaintiffs’ brief in the court of appeals at 23). Plaintiffs first raised the strict liability argument in their brief to this Court (Response brief at 18-19). Because Plaintiffs raised these arguments for the first time on appeal, they should not be considered. *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988).

It bears noting that the negligence issue addressed in the majority decision below is not exactly the same negligence issue that was addressed by the district court. The district court specifically determined that Plaintiffs had failed to provide the court with any evidence that Aquila was negligent in its maintenance, operation or inspection of the polyethylene pipeline (A.A. 63). The court of appeals did not address that negligence issue. Rather, the court below held that in light of its determination that the gas pipeline was not an improvement to real property, the applicability of the § 541.051, subd. 1(c) exception was moot (A.A. 12).

The only negligence issue before this Court is the one raised in and addressed by the district court: Did Plaintiffs present sufficient evidence to create a genuine issue of material fact as to whether or not Aquila was negligent in the maintenance or inspection of the gas pipeline system?

Under basic summary judgment law, if Plaintiffs intended to rely upon the maintenance and inspection exception to the statute of repose, they were obligated to

provide some evidence of negligent maintenance or inspection. *See, DLH, Inc. v. Russ*, 566 N.W.2d 60 (Minn. 1997). Plaintiffs completely failed to provide any evidence of negligent maintenance or inspection. The district court expressly so found (A.A. 63). The fact that Plaintiffs provided no such evidence, combined with the fact that the pipeline system is an improvement to real property, requires that the summary judgment granted to Aquila in the district court be reinstated.

To be sure, there may be rare instances where a plaintiff in a property damage action might be able to defeat a summary judgment motion without providing the court with evidence of negligence and causation. A situation where strict liability or *res ipsa loquitur*⁶ applies could present such a case. But this is not a proper case for the application of strict liability or *res ipsa loquitur*, and therefore, not a proper case for departing from the ordinary rule that a party opposing summary judgment cannot rely on the mere averments of its pleadings.⁷

Contrary to Plaintiffs' contentions (Response brief at 18-19), strict liability does not apply in this case. In *Gould v. Winona Gas Co.*, 100 Minn. 258, 111 N.W. 254 (1907), this Court rejected strict liability for gas suppliers. Rather, this Court determined

⁶ The doctrine of *res ipsa loquitur* gives rise to a rebuttable inference of negligence. *Rinkel v. Lee's Plumbing & Heating Co.*, 257 Minn. 14, 19, 99 N.W. 2d 779, 782 (1959). Contrary to the implication in the majority decision below, the doctrine does not create a presumption of negligence. *Johnson v. Coca-Cola Bottling Co. of Willmar*, 235 Minn. 471, 51 N.W. 2d 573, 576 (1952).

⁷ Notwithstanding, plaintiffs' arguments concerning what they have *alleged*, (Response brief at 16) the issue is not whether plaintiffs' pleadings state a claim—the issue is whether plaintiffs met their burden in opposing the summary judgment motion based upon the statute of repose contained in § 541.051.

that liability in gas cases is “to be determined in accordance with principles of negligence and not by the doctrine of insurance against harm.” *Id.* at 100 Minn. 264, 111 N.W. 256. More recently, the Court had occasion to revisit the issue in *Mahowald v. Minnesota Gas Co.*, 344 N.W.2d 856 (Minn. 1984). In *Mahowald*, this Court was again urged to adopt a rule of strict liability in escaping gas cases. This Court specifically declined to adopt such a rule. Thus, Plaintiffs’ claim that they made out a *prima facie* case of negligence based upon the unalleged theory of strict liability should be rejected.

The doctrine of *res ipsa loquitur* also does not apply to this case. In order for the doctrine to apply, the claimant must prove that (1) ordinarily the injury would not occur absent negligence, (2) the cause of the injury was in the exclusive control of the Defendant, and (3) the injury was not due to the claimant’s conduct. *Hoven v. Rice Memorial Hosp.*, 396 N.W.2d 569, 570 (Minn. 1986). In this particular case, Plaintiffs failed to show that the cause of the injury was in the exclusive control of the Defendant. In fact, the evidence here is undisputed that an outside force operated on the instrumentality involved to cause the injury: Drain-Rite cut the gas pipeline with its drain cleaning equipment. As the district court aptly noted, the present case “does not involve an instance of escaping gas” (A.A. 63). Rather, it involves the rupture of a gas line by a known third party. Thus, it is not a proper case for the application of *res ipsa loquitur*.

There are additional reasons why the doctrine of *res ipsa loquitur* does not apply. As recognized by the dissent below (A.20), the doctrine of *res ipsa loquitur* does not apply if it appears that the accident was due to a cause beyond the control of the defendant such as “the tortious act of a stranger.” *Heffler v. Northern States Power Co.*,

173 Minn. 215, 218, 217 N.W. 102, 103 (1927). And in *Wilson v. Home Gas Co.*, 267 Minn. 162, 125 N.W.2d 725 (1964), this Court declined to apply *res ipsa loquitur* because there were a number of potential causes for the explosion, several of which were not attributable to the gas supplier. *Id.*, 267 Minn. 169, 125 N.W.2d 730. Here, it is undisputed that Drain-Rite's acts caused the explosion and Plaintiffs settled with that party.

Moreover, *res ipsa loquitur* does not apply where the cause of the accident is known and not in question. *Johnson v. West Fargo Mfg. Co.*, 255 Minn. 19, 25-6, 95 N.W.2d 497, 502 (1959). Here, the causes of the accident are known.⁸ The placement of the gas pipeline through the clay sewer line in 1990 and the cutting of the gas pipeline by Drain-Rite in 2002 caused the accident. Since these causes are readily identifiable, the doctrine of *res ipsa loquitur* does not apply and Plaintiff is not entitled to the benefit of any inference of negligence on the part of Aquila.

This is particularly true with respect to Plaintiffs' claims of negligent maintenance or inspection. There is nothing about the circumstances of the accident which makes it probable that maintenance or inspection of the underground line was a cause of the accident. There were no leaks or need for maintenance or repairs during the eleven years preceding the accident. The pipeline performed exactly as intended. Further, the record is absolutely devoid of evidence regarding what maintenance or inspection should have been done or how such activities would have revealed the construction defect. The

⁸ In *Mahowald*, this Court ruled that a *res ipsa loquitur* jury instruction should have been given where it was not known who caused a fracture of a pipeline and the resulting explosion. 344 N.W.2d at 859.

attempted use of *res ipsa loquitur* in this case rests not on necessity, not on probability, but on pure speculation. An inference of negligence based on an inferred fact of which there is neither evidence nor predominating probability cannot be safely made. *Collings v. Northwestern Hospital*, 202 Minn. 139, 144, 277 N.W. 910, 913 (1938).

In summary, the doctrine of *res ipsa loquitur* does not apply based upon the circumstances of this case. Therefore, that doctrine cannot belatedly be used by plaintiffs to meet their burden of proof in opposing Aquila's summary judgment motion. In this particular gas case, Plaintiffs were required to come forward with some evidence to support their assertion of negligence by Aquila in the maintenance and inspection of the pipeline. Since they did not do so, the district court properly held that the exception to the statute of repose in § 541.051, subd. 1(c) is not applicable.

CONCLUSION

The natural gas pipeline constructed in 1990 meets all of the *Pacific Indemnity* criteria as well as common sense to be considered an improvement to real property. Thus, § 541.051 is applicable.

Plaintiffs failed to produce any evidence that Aquila acted negligently in connection with the maintenance or inspection of the pipeline. The theory of strict liability and the doctrine of *res ipsa loquitur* do not apply on the facts of this case so as to relieve Plaintiffs of that responsibility. Therefore, the exception in subdivision 1(c) of § 541.051 is inapplicable, and plaintiffs' claims are barred by the statute of repose.

Aquila respectfully requests that the decision of the court of appeals be reversed and that the summary judgment granted to Aquila in the district court be reinstated.

Respectfully submitted,

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