

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.*

**RESPONDENTS' BRIEF AND APPENDIX**

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## STATEMENT OF ISSUES

**1. Does Minn. Stat. § 541.051 shield a utility company that installs and maintains control of its own equipment, especially when the purpose of the equipment is to distribute utility service?**

The Court of Appeals correctly held that, because the gas pipeline at issue was continuously owned and controlled by Appellant, and because the pipeline served Appellant's distribution purposes, Minn. Stat. § 541.051 does not bar Respondents' claims against Appellant, reversing the trial court.

### Apposite Cases and Law:

*Johnson v. Steele-Waseca Coop. Elec.*, 469 N.W.2d 517 (Minn. Ct. App. 1991),  
*review denied* (Minn. July 24, 1991)  
Minn. Stat. § 541.051

**2. May a gas utility provider defeat any negligence claim arising out of a gas explosion involving the distribution network under its exclusive ownership and control by the mere assertion that it had no prior notice of a defect or dangerous condition in its distribution lines?**

Because Appellant maintained continuous and exclusive ownership and control over the gas distribution lines at issue, the Court of Appeals correctly held that Respondents successfully established a *prima facie* case of Appellant's negligence.

### Apposite Cases and Law:

*Gould v. Winona Gas Co.*, 111 N.W. 254 (Minn. 1907)  
*Manning v. St. Paul Gaslight Co.*, 151 N.W. 423 (Minn. 1915)  
*Wilson v. Home Gas Co.*, 125 N.W.2d 725 (Minn. 1964)  
*Ruberg v. Skelly Oil Co.*, 297 N.W.2d 746 (Minn. 1980)  
Minn. Stat. § 541.051

## STATEMENT OF THE CASE

This case involves property damage in connection with a gas explosion that occurred on February 13, 2002 in Rochester, Minnesota.

Hallmark Terrace Trailer Park ("Hallmark Terrace") owned and operated a mobile home park located at 325 55<sup>th</sup> Street N.E., Rochester, Minnesota. (Respondents' Supplemental Appendix (hereinafter "Supp. App.") 1) Appellant Aquila, Inc., d/b/a People's Natural Gas Co., owned and operated natural gas pipelines in Rochester, Minnesota and, specifically, owned and operated the gas pipelines servicing Hallmark Terrace. Prior to 1990, Appellant provided gas service to residents of Hallmark Terrace through steel gas pipelines owned and controlled exclusively by Appellant. Appellant's Utility Rules specify that it "shall own, install and maintain where applicable the following items required to provide service to the point of delivery:

- A. Service pipes.
- B. Meter.
- C. Regulators.
- D. Pressure relief vents and valves.
- E. Shut-off valves.
- F. Connectors and miscellaneous fittings."

(Supp. App. 3-6) The Rules make clear that Appellant owns all service pipe up to the point of delivery, which is the outlet side of the gas meter. *Id.* In addition, Appellant's Rules state that the utility company will indemnify property owners for damages to property caused by Appellant's pipeline. (Supp. App. 7)

Appellant converted Hallmark's pipeline system from propane to natural gas prior to November 1990.<sup>1</sup> (Appellant's Appendix (hereinafter "App.") at 38) In

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<sup>1</sup> Though Appellant's brief claims otherwise, it is undisputed that the conversion from propane to natural gas took place prior to November 1990. Before Northern Pipeline began installing polyethylene distribution pipes, the previous steel system was already delivering Appellant's natural gas product. *Compare* Appellant's brief at 2 ("In 1990, when natural gas became available in the area, Aquila decided to replace the propane system with a natural gas system. Aquila hired Northern Pipeline Construction Company to build the new pipeline system using polyethylene piping.") *with* Affidavit of Greg Walters, ("Prior to

November 1990, Appellant decided to replace its existing steel pipeline system at Hallmark Terrace with a new polyethylene pipeline system, and hired Northern Pipeline Construction Company ("Northern Pipeline") to perform the work. During the installation process in December 1990, Northern Pipeline burrowed the polyethylene pipe underground, puncturing through an existing sewer line.<sup>2</sup> (App. 45) Once the underground installation was completed, Appellant performed no subsequent service, replacement, maintenance, or repairs on the distribution network. (App. 39) The conversion did not improve gas service to Hallmark Terrace or increase its property value. (Supp. App. 1-2)

In early 2002, Hallmark Terrace hired Rochester Drain-Rite ("Drain-Rite") to unclog sewer pipes that were believed to be blocked by tree roots. (App. 45) Drain-Rite used a water jet root cutter to unclog the blocked sewer pipes. (*Id.*) On February 13, 2002, while performing this work, Drain-Rite's cutter unknowingly struck the fugitive gas line that was protruding through the sewer pipe. (*Id.*) Natural gas escaped from the punctured gas pipe and entered the mobile homes in Hallmark, resulting in an explosion and fire. (*Id.*) Aquila was called to the accident scene, where it repaired the damaged gas pipeline. (*Id.*) Aquila retained the damaged section of pipe after making its repairs. (*Id.*)

Respondents State Farm Fire and Casualty ("State Farm") and Joan Hernlem ("Hernlem") brought claims in Olmsted County District Court for negligence and negligence per se against Aquila and Northern Pipeline in connection with the improper installation of the natural gas system as well as the negligent inspection, maintenance, and/or repair of the system.<sup>3</sup>

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November 1990, when natural gas became available in the area, the 'LP' propane system was converted to a natural gas system." (App. 38)

<sup>2</sup> The polyethylene pipe was installed using a pneumatic boring tool, not traditional excavation. (App. 45)

<sup>3</sup> On or about July 24, 2003, Plaintiffs filed an Amended Complaint adding Auto Owners Insurance Company ("Auto Owners"), who insured some homes at Hallmark Terrace, as a

Aquila and Northern Pipeline moved for summary judgment against Respondents, arguing that the fugitive gas pipeline was an improvement to Hallmark Terrace's real property and that the ten-year statute of repose in Minn. Stat. § 541.051 therefore applied and barred Respondents' claims. Respondents, relying on *Johnson v. Steele-Waseca Coop. Elec.*, 469 N.W.2d 517 (Minn. Ct. App. 1991), *review denied* (Minn. July 24, 1991), argued that the statute of repose did not bar their claims because: (1) the statute does not protect public utilities that install and maintain ownership and control over their service lines; (2) the new gas pipeline was an improvement to Aquila's distribution system, not to Hallmark Terrace's real property; and (3) the statute does not protect owners of an improvement from actions for damages resulting from negligence in the maintenance, operation or inspection of the real property improvement. The trial court granted both Aquila's and Northern Pipeline's summary judgment motions. (App. 47)

The Minnesota Court of Appeals affirmed the grant of summary judgment in favor of Northern Pipeline, but reversed the trial court's rulings as to Appellant. (App. 1-20) Specifically, the Court of Appeals held that, pursuant to Minn. Stat. § 541.051 and applicable case law, the gas pipeline was not an improvement to Hallmark Terrace and therefore § 541.051 did not bar Respondent's claims. (App. 6-11) The Court of Appeals further held that Appellant's ignorance of the dangerous condition of its pipeline network was insufficient to relieve it of all legal liability. Because Appellant maintained continuous ownership and control of its distribution system, it did not need to have notice of the defective or dangerous condition of its pipeline. (App. 11-16) The Court of Appeals thus concluded that

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plaintiff in this action. Robert Sauer and Drain-Rite were also named as defendants in this action, but those claims were settled and form no part of this appeal.

Respondents made an adequate showing of negligence sufficient to withstand summary judgment.

This Court subsequently granted the Appellant's petition for review.

### **STANDARD OF REVIEW**

On an appeal from the granting of a summary judgment motion, the Court must ask two questions: (1) whether there are any genuine issues of material fact in dispute; and (2) whether the district court erred in applying the law. *State by Cooper v. French*, 460 N.W.2d 2, 4 (Minn. 1990). The Court must view the facts in the light most favorable to the party against whom judgment was granted and must accept as true the facts presented by that party. *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993). When the district court grants summary judgment based on the application of statutory language to the undisputed facts, the result is a legal conclusion and is reviewed de novo by the appellate court. *Lefto v. Hoggsbreath Enters., Inc.*, 581 N.W.2d 855, 856 (Minn. 1998).

### **ARGUMENT**

This case is primarily about control. In 1990, the residents of Hallmark Terrace were experiencing no problems with their natural gas service. Nevertheless, Appellant, the natural gas provider for Hallmark Terrace and the surrounding area, determined that the distribution system did not meet *its* needs. Appellant therefore decided to change the distribution system. Appellant determined the design of the new system, as well as the installation procedures, without input from Hallmark Terrace. It did not consult with Hallmark Terrace management or its residents regarding the change—it did not need to, since Appellant retained exclusive ownership and control of the pipes at issue. After the new system was installed, Appellant maintained exclusive control over the new

distribution pipeline. Hallmark Terrace residents noticed no change in their utility service as a result.

Despite its complete dominion over the distribution pipeline, Appellant now argues that Hallmark Terrace had a more active relationship with the pipeline. It argues that the distribution pipeline improved the property it ran through, thereby constituting an “improvement to real property” and precluding Respondents’ claims. Further, Appellant argues that, even though Appellant owned all service pipes running through Hallmark Terrace, the residents should have warned Appellant of the dangerous pipeline before Appellant was required to act. Appellant must not be permitted to claim ownership and responsibility for its pipeline only when it wishes. Appellant controlled the pipeline, and must accept responsibility for the results of its negligence with respect to the pipeline.

**I. MINN. STAT. § 541.051 DOES NOT SHIELD A UTILITY COMPANY THAT INSTALLS AND MAINTAINS CONTROL OF ITS OWN EQUIPMENT, ESPECIALLY WHEN THE PURPOSE OF THE EQUIPMENT IS TO DISTRIBUTE HIGHLY DANGEROUS SUBSTANCES SUCH AS NATURAL GAS**

**A. Minn. Stat. § 541.051 Applies to Improvements to Real Property**

Minn. Stat. § 541.051 provides, in relevant part:

(a) Except where fraud is involved, no action by any person in contract, tort, or otherwise to recover damages for any injury to property . . . arising out of the defective and unsafe condition of an improvement to real property . . . shall be brought against any person performing or furnishing the design, planning, supervision, materials, or observation of construction or construction of the improvement to real property or against the owner of the real property . . . more than ten years after substantial completion of the construction.

Minn. Stat. § 541.051, subd. 1 (2004). Thus, a suit to recover for the “defective and unsafe condition” is limited to ten years after the substantial completion of the construction if the construction is determined to be an “improvement to real property.” If the construction is not an improvement to real property, Minn. Stat. § 541.051 is inapplicable. The purpose of the statute is to

eliminate suits against architects, designers and contractors who have completed the work, turned the improvement to real property over to the owners, and no longer have any interest or control in it.

*Red Wing Motel Investors v. Red Wing Fire Dept.*, 552 N.W.2d 295, 297 (Minn. Ct. App. 1996) (quoting *Sartori v. Harnischfeger Corp.*, 432 N.W.2d 448, 454 (Minn. 1988)).

This Court has adopted a common-sense interpretation of the phrase “improvement to real property” as used in Minn. Stat. § 541.051. *Pac. Indem. Co. v. Thompson-Yaeger, Inc.*, 260 N.W.2d 548, 554 (Minn. 1977). In *Pacific Indemnity*, this Court reversed the trial court’s conclusion that, based upon an application of fixture law, the subject product (a furnace) was not an improvement to real property. Instead, this Court applied a “common-sense interpretation” of the statute, borrowing an understanding of “improvement” from Webster’s Third New International Dictionary. The Court declared that an improvement to real property is “a permanent addition to or betterment of real property that enhances its capital value and that involves the expenditure of labor or money and is designed to make the property more useful or valuable.” *Id.*

*Pacific Indemnity* thus established parameters for the application of Minn. Stat. § 541.051. To be an improvement to real property within the ambit of the statute, the subject must: 1) be a permanent addition to or betterment of real property; 2) involve the expenditure of labor or money; 3) be designed to make the property more useful or valuable; and 4) enhance the capital value of the real property.

Following *Pacific Indemnity*, Minnesota courts have applied the four factors to a variety of circumstances. Where the item at issue satisfies all four factors, the court has applied Minn. Stat. § 541.051. *See, e.g., Patton v. Yarrington*, 472 N.W.2d 157, 159-60 (Minn. App. 1991) (installation of smoke detectors were permanent, required money and effort, and enhanced both the value and usefulness of the

property by enabling its use as a rental property); *Farnham v. Nasby Agri-Systems, Inc.*, 437 N.W.2d 759 (Minn. Ct. App. 1989) (underground components of a grain auger are part of an improvement to real property); *Wittmer v. Ruegemer*, 402 N.W.2d 187 (Minn. Ct. App. 1987) (septic system is an improvement to real property).

But the *Pacific Indemnity* analysis is not a rubber-stamp: Minnesota courts have found examples of construction that do not meet the *Pacific Indemnity* criteria, and therefore fall outside the scope of Minn. Stat. § 541.051. In *Johnson v. Steele-Waseca Coop. Elec.*, the Court of Appeals determined that the portion of a utility company's equipment that the utility owned, maintained, and benefited from was not an improvement to real property, but merely an improvement to the utility's distribution system, and therefore not within the ambit of Minn. Stat. 541.051. 469 N.W.2d 517 (Minn. Ct. App. 1991), *review denied* (Minn. July 24, 1991).

In *Johnson*, the defendant utility company installed new electrical equipment on the plaintiff's property. The equipment included both wiring to a new barn on the property and a center pole and transformer, which facilitated the utility's distribution of power to its customers. *Id.* at 518. The plaintiff sued the power company, alleging that the center pole and transformer caused harm to his livestock. The power company sought refuge in Minn. Stat. § 541.051, claiming that all of the equipment that it installed on the property was an improvement to real property and that plaintiff's claims were therefore time-barred by the statute. *Id.* The court held that the installations added to the barn and other buildings owned by the plaintiff were improvements to real property, but that the "pole and pendant equipment which [the power company] owns and uses" were not, declaring "[w]e do not interpret Minn. Stat. §541.051 to shelter from liability an electric power company that installs and maintains control of an electric pole and transformer, especially when the purpose is to distribute power." *Id.* at 520. Because plaintiff's

claim was based upon negligence related to the center pole and transformer, the lower court's grant of summary judgment in favor of the power company was reversed.

The *Johnson* court determined that the center pole and transformer existed to serve the distribution purposes of the utility company, not the land upon which they sat. *Id.* at 519. The fact that the distribution of utility services included the subject real estate did not change the fact that, "[r]ather than being an improvement to appellants' property, [the equipment was] an addition to respondent's distribution system." *Id.*

### **B. Appellant's Gas Distribution Pipeline Is Not an Improvement to the Property It Runs Through**

Like the center pole and transformer in *Johnson*, the Appellant's gas distribution system does not improve the property it runs through. An application of the *Pacific Indemnity* factors makes clear that Minn. Stat. § 541.051 does not apply. In addition, a common-sense analysis of the purpose and use of the distribution equipment reveals that the polyethylene pipeline system may have improved Appellant's ability to deliver its product, but had no effect upon the customers or their land. (Supp. App. 2)

As stated above, *Pacific Indemnity* requires that an improvement to real property 1) be a permanent addition to or betterment of real property; 2) involve the expenditure of labor or money; 3) be designed to make the property more useful or valuable; and 4) enhance the capital value of the real property. Regardless of the permanence or cost of the project, Appellant's construction did not make Hallmark Terrace more useful or valuable, and did not enhance the capital value of the mobile home park. (Supp. App. 2)

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. For example, in

*Patton v. Yarrington*, the installation of new smoke detectors permitted the property to be used as a rental property. 472 N.W.2d at 159-60. The court therefore determined that the smoke detectors were an improvement to real property under the statute. *Id.* at 160.

In this case, it is undisputed that neither Hallmark Terrace management nor its residents experienced any change in service as a result of Appellant's replacement of steel pipes with polyethylene. (Supp. App. 2) Prior to the replacement, Appellant's customers were provided with natural gas utility service delivered to their homes at a meter owned by Appellant. After the replacement, the same natural gas was provided through the same company-owned meter. Because there was no new or different use for the property, Appellant's decision to modify its distribution system did not make Hallmark Terrace more useful. (Supp. App. 1-2) Rather, any benefit from the new pipeline accrued to Appellant: according to Appellant, the system was designed to provide for "years of uninterrupted, maintenance free service." (Appellant's Brief 3 (emphasis added))

Similarly, a property may increase in capital value by virtue of improvements. This is understandable: when a project is added to real property, the value of the project often enhances the value of the land it occupies. *See, e.g., Farnham*, 437 N.W.2d at 760-62 (addition of underground components of a grain auger determined to be part of an improvement to real property). However, when the addition is not owned or controlled by the property-owner, and serves a purpose unrelated to the property, it may not increase the capital value of the property. *See Johnson*, 469 N.W.2d at 520.

Like the electrical equipment in *Johnson*, Appellant's gas pipeline was part of a distribution network, not the property it ran through. Appellant's own documentation reveals that property owners had no stake in the distribution pipes running through their land—the exit side of Appellant's gas meter marked the

beginning of the landowner's interest in the natural gas lines. (Supp. App. 3) Appellant's own Utility Rules specified that Appellant, not landowners, had the sole responsibility and control over the distribution network. It is difficult to imagine how items owned and controlled by a third party, serving that third-party's purposes, could enhance the value of the land they ran through.

In its brief, Appellant advances a line of cases that it asserts "did less to increase the property's value and utility than did the installation of a new natural gas pipeline system in this matter." (Appellant's Brief 11-12) However, Appellant makes no attempt to explain the "increase in value and utility" of real property in either the cases cited or the case before this Court. Indeed, the only support whatsoever for the contention that Hallmark Terrace derived any benefit from Appellant's construction of the new pipeline is the *ipse dixit* of Appellant, via the affidavit of one of its employees, Greg Walters. (App. 37) It is not readily apparent how Appellant's "Field Operations Manager" is qualified to offer any opinion as to the utility or value of real property. Such assertions, at best, create an issue of fact to be resolved by a jury. Because there is no basis for Appellant's assertion that the property at issue gained any value by virtue of a different distribution system, the pipeline does not satisfy this *Pacific Indemnity* factor.

But that is not to say that the polyethylene distribution network was without value. Like the distribution equipment in *Johnson*, the improved distribution system undoubtedly benefited Appellant. Appellant asserts that "[i]nstallation of the new pipeline enhanced the safety, efficiency, and reliability of gas service." It is unclear whether Appellant believes that a "safety improvement" is an aspect of the *Pacific Indemnity* factors. However, the assertion that an improperly installed pipeline that resulted in a natural gas explosion represented a safer alternative to the existing system is simply preposterous.

The new pipeline's purported enhancements represent benefits to Appellant, not to its customers. Appellant suggests that the polyethylene pipes extended the useful life of the natural gas system and "allowed for years of uninterrupted, maintenance-free service." As previously discussed, Appellant was solely responsible for the maintenance of the distribution system. Any action that diminished the need for maintenance was a direct benefit to Appellant.

Moreover, Appellant's gas distribution system is clearly outside of the statute's intent to protect those "who have completed the work, turned the improvement to real property over to the owners, and no longer have any interest or control in it." *Red Wing Motel Investors*, 552 N.W.2d at 297. Appellant, unlike the "architects, designers and contractors" contemplated by the statute, constructed the pipeline for its own purposes and maintained continuous ownership and control of it. As this court recognized, one purpose of Minn. Stat. § 541.051 was to avoid litigation of claims that would be hindered by "the unavailability of witnesses, memory loss and a lack of adequate records." *Sartori v. Harnischfeger Corp.*, 432 N.W.2d 448 (Minn. 1988).

In this case, Appellant did not construct an improvement to real property and withdraw, taking its knowledge, witnesses, and records with it. Rather, it maintained continuous control over the pipeline. Indeed, Appellant's Rules illustrate that the Appellant maintained continuous ownership of the pipeline. *See Company Owned Items*, Supp. App. 6 (declaring that Appellant "shall own, install and maintain" service pipes). Appellant's gas distribution system does not meet the definition of an "improvement to real property." Further, Appellant is clearly not the type of defendant the legislature intended to shield from liability. Both the letter and the spirit of Minn. Stat. § 541.051 preclude its application in this case.

Appellant also suggests that, because Northern Pipeline was found to be protected by Minn. Stat. § 541.051, so too must Appellant be protected. But unlike

Appellant, Northern Pipeline behaved exactly as the statute contemplated. Hired by Appellant to push polyethylene pipes through the ground, Northern Pipeline performed its tasks and surrendered all control over the completed pipeline. Northern Pipeline retained no interest or control in the pipes.

Thus, the Court of Appeals' conclusion that Northern Pipeline is shielded by Minn. Stat. § 541.051 is consistent with the purpose of the statute. Like the defendant in *Red Wing*, Northern Pipeline performed service and withdrew. See *Red Wing Motel*, 552 N.W.2d at 297 (defendant who designed and installed sprinkler system, then surrendered all ownership and control of the system, was protected by Minn. Stat. § 541.051). This is dramatically different than Appellant's behavior, and explains the disparate treatment of the two.

Appellant does not explain its reasons for believing that the two companies should be treated identically despite their different actions in this case. Of course, if this Court affirms the Court of Appeals' conclusion that the polyethylene pipeline is not an improvement to real property, Northern Pipeline might be deprived of the protections of Minn. Stat. § 541.051. Such a result would resolve the issue of disparate treatment, though presumably not to Appellant's satisfaction.

### **C. Minnesota Case Law Interpreting Minn. Stat. § 541.051 is Consistent and Sensible**

As discussed above, the cases applying Minn. Stat. 541.051 and defining "improvement to real property" offer sensible guidance for the application of the statute. As many cases cited by both Appellant and Respondents illustrate, many construction projects satisfy the *Pacific Indemnity* factors and therefore constitute improvements to real property as contemplated by the statute. But when a construction project does not satisfy the *Pacific Indemnity* factors, the construction is not an improvement to real property, and the statute does not apply.

Faced with a long line of Minnesota cases that properly interpret Minn. Stat. § 541.051 and a Court of Appeals decision that properly applied the law to the facts of this case, Appellant now invites this Court to rewrite case law or alternatively to ignore directly applicable precedent, allowing *Johnson* to be distinguished into irrelevance. Because the statute and related case law offer consistent and sensible guidance, this Court should reject Appellant's invitation.

Appellant first argues that *Johnson* is "contrary to the plain language of the statute and . . . numerous cases." This argument boils down to a conclusory repetition of the trial court's faulty analysis of *Johnson*. Indeed, Appellant made the same argument to the Court of Appeals, which squarely rejected Appellant's contention that *Johnson* "is antagonistic to Minnesota jurisprudence." (App. 9) Rather than accept Appellant's reading of *Johnson*, the Court of Appeals relied on the holding of the case, that "Minn. Stat. § 541.051 [does not] shelter from liability an electric power company that installs and maintains control of an electric pole and transformer, especially when the purpose is to distribute power." 469 N.W.2d at 520. The Court of Appeals recognized that *Johnson* did not represent a distortion of Minn. Stat. § 541.051, but a reasonable and consistent application of the statute and case law, including *Pacific Indemnity*.

Unsure of its ability to convince this Court to reject valuable precedent, Appellant alternatively argues that *Johnson* should be factually distinguished from this case. But Appellant does not explain why the so-called differences should be sufficient for this Court to reject the application of *Johnson* to this case. For example, Appellant notes that the *Johnson* defendant installed its distribution system above ground, whereas Appellant buried its pipeline. The damage in *Johnson* was caused by a long-term unsafe condition, whereas Respondents were damaged by a single event: an explosion and fire. And, while the defendant in *Johnson* made multiple attempts to identify and rectify the problem, Appellant

remained blissfully ignorant of the problems with its distribution network until it caused an explosion, making no effort to inspect or repair the pipeline. None of these factual discrepancies are germane to the rule of law applied in *Johnson*; they are distinctions without a difference.<sup>4</sup>

Moreover, Appellant makes no effort to address the holding of *Pacific Indemnity*. To the contrary, Appellant's brief repeatedly cited to the case with approval. As previously explained, both *Johnson* and this case involve an application of the *Pacific Indemnity* factors. Were this Court to disregard or distinguish *Johnson*, an application of the *Pacific Indemnity* factors to this case would yield the same result: Appellant's gas distribution network is not an improvement to the real property it runs through, and therefore Minn. Stat. § 541.051 does not apply.

## **II. RESPONDENTS MADE A *PRIMA FACIE* CASE OF NEGLIGENCE AGAINST APPELLANT**

### **A. Minn. Stat. § 541.051 Does Not Bar Respondents' Negligence Claims**

Minn. Stat. § 541.051, subd. 1(c) provides: "Nothing in this section shall apply to actions for damages resulting from negligence in the maintenance, operation or inspection of the real property improvement against the owner or other person in possession." Thus, even when an addition is determined to be an "improvement to real property" as contemplated by Minn. Stat. § 541.051, actions for negligent maintenance, operation, or inspection are not barred by the statute.

As explained above, in this case the Court of Appeals determined that because the polyethylene distribution network was not an improvement to real property, 541.051 did not apply. But the Court of Appeals also noted that

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<sup>4</sup> Consider the implications of Appellant's argument: Appellant argues that it should be shielded from liability in part because, unlike the defendant in *Johnson*, it never made any attempt to inspect or modify the dangerous condition of its distribution system. If true, this would be a perverse disincentive for a utility provider to ever inspect or maintain its distribution system. Such a disincentive is clearly dangerous, and contrary to public policy.

Respondents had stated a claim for negligent maintenance, operation, and inspection. Therefore, even if the gas distribution system were considered an improvement to real property, Respondents' claims for negligent maintenance, operation, and inspection would be saved by Minn. Stat. § 541.051, subd. 1(c). See *Olmanson v. Le Sueur County*, 673 N.W.2d 506, 512 (Minn. Ct. App. 2004) (the intent of the exception contained in Minn. Stat. § 541.051 subd. 1(c) was to "leave undisturbed the limitation period for ordinary landowner liability.")

In its brief to this Court, Appellant argues that Respondents' claims for negligent maintenance, operation, and inspection were somehow "new arguments" presented to the Court of Appeals. See Appellant's Brief at 23 ("Plaintiffs' ongoing negligence theory was not alleged in its complaint."). This is simply false. A cursory examination of the Amended Complaint shows that Respondents alleged that

[Appellant] failed to exercise reasonable care and was negligent in the inspection, maintenance, repair and/or installation of the natural gas system at Hallmark Terrace.

Amended Complaint, ¶ XXX; see also ¶¶ XXIX-XXXVI. (App. 29-31) The Amended Complaint specifically asserted negligence and negligence per se claims against respondents as to the inspection, maintenance, and/or repair of the natural gas system at Hallmark Terrace. This pleading was sufficient under the Minnesota rules, and Minnesota law concerning the applicability and operation of Minn. Stat. § 541.051, to state a claim that is not time-barred pursuant to that statute. See Minn. R. Civ. P. 8.01; see also *Sullivan v. Farmers and Merchants State Bank of New Ulm*, 398 N.W.2d 592, 595 (Minn. Ct. App. 1987); *Ocel v. City of Eagan*, 402 N.W.2d 531, 534 (Minn. 1987); *Northern States Power Co. v. Franklin*, 122 N.W.2d 26, 29 (Minn. 1963).

## **B. Respondents Have Presented a *Prima facie* Case of Negligence**

Summary judgment is appropriate when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that either party is entitled to a judgment as a matter of law. Minn. R. Civ. P. 56.03.

In order to withstand a motion for summary judgment, appellants only needed to demonstrate a *prima facie* case of negligence. A *prima facie* case of negligence

simply means one that prevails in the absence of evidence invalidating it. *Prima facie* negligence means that evidence of negligence which, unexplained or uncontradicted and standing alone, appears to be sufficient to establish the fact. In other words, it is evidence which suffices to establish the fact unless rebutted, or until overcome, by other evidence.

*Tousignant v. St. Louis County*, 615 N.W.2d 53, 59 (Minn. 2000) (citing *Trudeau v. Sina Contracting Co.*, 62 N.W.2d 492, 498 (Minn. 1954)). On summary judgment, a negligence claimant is “not bound to prove more than enough to raise a fair presumption of negligence on the part of defendant and a causal connection between that negligence and his own injury.” *Sandvik v. James*, 160 N.W.2d 700, 704 (Minn. 1968). Furthermore, “[e]vidence to establish negligence need not be direct and positive, since the fact of negligence in any given case is susceptible of proof by evidence of circumstances bearing more or less directly upon the facts.” *Id.* at 703-704.

Appellant argues that, because “[Respondents] have never alleged that Hallmark Terrace residents or management informed [Appellant] of any problem with the new pipeline system at any point prior to the date of the explosion,” Respondents have failed to present a *prima facie* case of negligence. (Appellant’s Brief 24) This argument mistakenly applies the standard of care for cases in which another party owns or controls the defective pipeline. Not surprisingly, Minnesota

law sets a higher standard for a utility provider that maintains exclusive ownership and control of the defective pipeline.

The trial court relied upon language from *Ruberg v. Skelly Oil Co.*, 297 N.W. 2d 746, 751 (Minn. 1980). In *Ruberg*, this Court stated that “[l]iability for damages caused by a gas leak exists where the gas supplier, having reasonable notice of an existing or potential danger, negligently performs an inspection or repair, or fails to inspect, repair, or shut off the gas.” But in the paragraph immediately proceeding this statement, the *Ruberg* court was careful to explain that

where a gas company does not install or own the service lines on private property, and exercises no control over them, it is not responsible for the condition in which they are maintained and is not liable for damages caused by a leak therein of which it does not have notice. And a gas company, in the absence of notice of defects in the service lines, is not required to make inspections of the lines on private property when the lines are not owned by it or are under its control.

*Id.* (citing *Fabbrizi v. Village of Hibbing*, 66 N.W.2d 7, 9-10 (1954)). This court similarly emphasized the different standards of care in *Wilson v. Home Gas Co.*, declaring that

The duty to inspect does not require a system of inspection ‘at all times’ but rather a duty to make reasonable inspections, and then, as to appliance not owned or controlled by [the utility], only after a reasonable notice of the existence of danger. . . . [A] greater duty arises as to pipes and appliances that are the responsibility of the [utility], like its gas lines. . . . [We apply] a strict rule of liability when gas escapes from a pipe over which the [utility] has control and for which it is responsible.

125 N.W.2d 725, 732 (Minn. 1964) (emphasis added); see also *Ondarko v. Village of Hibbing*, 96 N.W.2d 865, 868 (Minn. 1959). Strict liability for the release of dangerous gas from a utility company’s pipes is hardly novel. See, e.g., *Manning v. St. Paul Gaslight Co.*, 151 N.W. 423, 424 (Minn. 1915) (applying doctrine of *res ipsa loquitur* because “the manufacturer and distributor of illuminating gas is held in damages for the escape of gas on the principle of negligenc[e], and] the escape of this agency in highly destructive quantities is prima facie evidence of negligence.”)

(emphasis added); *Gould v. Winona Gas Co.*, 111 N.W. 254, 257 (Minn. 1907) (“at common law and apart from the act of Congress *an explosion is prima facie evidence of negligence.*”) (emphasis added). This is because “in the ordinary course of things [gas explosions do] not happen if those who have the management used proper care.” *Id.* at 267 (noting that court would not entertain the “violent presumption” that the escape of gas is usual, necessary, or inevitable despite the exercise of due care). The justification for the application of strict liability is simple: the gas provider has “exclusive control of the instrumentality causing the harm.” *Wilson*, 125 N.W.2d at 169 (citing *Peterson v. Minnesota Power and Light Co.*, 291 N.W. 705, 707 (Minn. 1940)).

*Ondarko v. Village of Hibbing* offers striking similarities to this case. In *Ondarko*, injuries were sustained as a result of an explosion caused by the accumulation of propane that escaped from a leak in a service line outside of a house, the gas entering the house’s basement by way of a drain tile under the basement floor. 96 N.W.2d at 866. The village did not inspect the service line prior to turning the gas on in 1946, nor did it inspect the line at any time in the nine years prior to the explosion in 1955. *Id.* at 867. The village owned the gas until it passed through the meter in the home. *Id.* The Supreme Court of Minnesota found that, because the village assumed control over the service line in question, it “owed the corresponding duty of exercising reasonable care to keep it in a proper state of repair so as to prevent the escape of gas, a highly dangerous and destructive product when allowed to get beyond control.” *Ondarko*, 96 N.W.2d at 868 (citing *Fabbrizi v. Village of Hibbing*, 66 N.W.2d 10 (Minn. 1954)). Significantly, the *Ondarko* Court found that the fact that the village admitted having not inspected its gas line prior to the explosion constituted *a violation of reasonable care as a matter of law.* *Id.* In this case, Appellants similarly admit not having performed

any maintenance on the gas line between the time of its installation and the explosion in 2002. (App. 24)

Respondents asserted negligence on the part of Appellant not merely as to the installation of the pipeline system at Hallmark Terrace, but also as to Appellant's negligence in its inspection, maintenance, and/or repair of this system. Moreover, Appellant admitted in written discovery that, in fact, it had performed no maintenance on the pipeline system in the twelve years since installation. (App. 39) The trial court did not recognize the distinction between the standard of care for pipes owned and controlled by the utility company and pipes outside its control. The Court of Appeals recognized this difference and correctly ruled that because Appellant maintained exclusive ownership and control of the pipes at issue, the higher standard of care applied.

In its contract with its customers, Appellant appears to recognize its common law obligation. Appellant's General Rules, Regulations, Terms and Conditions specify that

The Company and the Customer each assume full responsibility and liability for the maintenance and operation of their respective properties and shall indemnify and save harmless the other party from all liability and expense on account of any and all damages, claims or actions, including injury to and death of persons, arising from any act or accident in connection with the installation, presence, maintenance and operation of the property and equipment of the indemnifying party;

(Supp. App. 7) The document, though not a statement of law, reflects the common law presumption that a gas provider will be responsible for damages associated with the gas delivery network, including the installation and maintenance of the network. Nothing in the agreement reflects Appellant's current argument that it need not act until it receives notice of a problem.

Note that the standard of care announced by this Court is far different from the straw man offered by Appellant. No Minnesota case, and no party to this

action, has suggested that Appellant must “constantly inspect the underground pipeline.” (Appellant’s Brief 25) Despite the fact that Appellant chose exactly when, where, and how to install its polyethylene system, it now appears to believe that the only method for keeping its customers safe would force it to “repeatedly dig up thousands of feet of pipeline.” (Appellant’s Brief 26) While it is difficult to feel sympathy for a company that chose to install a distribution network it could not reasonably maintain, neither the Court of Appeals nor Respondents are prepared to dictate how Appellant discharges its duty. Indeed, all parties have cited *Wilson’s* declaration that “[t]he duty to inspect does not require a system of inspection ‘at all times’ but rather a duty to make reasonable inspections.” 125 N.W.2d at 732. Appellant seems to believe that, absent a duty to inspect “at all times,” a gas provider can sit on its hands until or unless a problem is brought to its attention. The above case law and the Court of Appeals ruling make clear that Appellant may not simply bury its mistakes and hope to avoid notice of a defect, but must take an active role to prevent the dangerous release of gas.

Consider the alternative: if this Court were to hold that a natural gas provider had no duty regarding the dangerous condition of its pipeline until it received notice of the danger, a provider would be well-advised to place a pipeline in a location that is both away from public view and difficult to inspect—perhaps underground. Such a location, when combined with a decision to avoid all inspection and maintenance, would almost guarantee that the utility company would remain unaware of any dangerous conditions, and therefore immune to liability for any resulting harm.

This example illustrates why the law imposes a higher standard of care for gas pipes owned and controlled by the utility provider. Where the pipes owned and controlled by a third party may be inaccessible or unknown to the provider, a provider cannot be held liable for problems it is unaware of. But when the provider

has determined the design and location of its own pipeline and then prohibits others from accessing the pipes, it is hardly an excuse that the lines are not susceptible to inspection, or that no other party warned the provider of the danger.

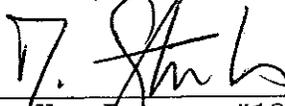
Furthermore, Appellant appears to be laboring under the false understanding that the Court of Appeals conclusively ruled on the issue of liability. (Appellant's Brief 27 ("the [Court of Appeals] majority has in essence held that a gas supplier should be held liable for any escape of gas from its system, even if there is no evidence of negligence on the part of the gas supplier.")) Of course, the Court of Appeals did not address the ultimate issue of liability, but merely whether Respondents' claims survive summary judgment. The Court of Appeals ruled that, given the standard of care gas suppliers must exercise over their distribution system, Respondents established a *prima facie* case of Appellant's negligence. As such, the Court of Appeals determined that the trial court's grant of summary judgment was inappropriate. Should this court affirm the Court of Appeals' ruling, the case will return to the trial court where it will be heard on the merits. Despite Appellant's hyperbole, nothing in the Court of Appeals' ruling precludes Appellant from mounting a defense at trial.

### CONCLUSION

In this case, Appellant maintained continuous ownership and control over a system of polyethylene pipes existing for the exclusive purpose of facilitating Appellant's sale of natural gas to its customers. Existing law establishes that such a system is not an improvement to the property it runs through, and Appellant cannot therefore use Minn. Stat. § 541.051 to hide from its duty to safely deliver natural gas. Because Minn. Stat. § 541.051 is not a bar to this action, and because Respondents have established a *prima facie* case of Appellant's negligence, the Court of Appeals ruling should be affirmed.

Respectfully submitted,

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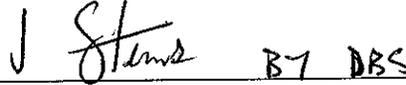
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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2) (with amendments effective July 1, 2007).