

NO. A05-1740

State of Minnesota
In Court of Appeals

DUANE F. NELSON AND MARGARET ROSE NELSON,
Appellants,

v.

SHORT ELLIOTT HENDRICKSON, INCORPORATED,
A MINNESOTA CORPORATION, AND
CITY OF STILLWATER,

Respondents.

BRIEF OF RESPONDENT
SHORT ELLIOTT HENDRICKSON, INCORPORATED

MANSFIELD, TANICK & COHEN, P.A.
Thomas G. Wallrich (#213354)
Jamie R. Pierce (#305054)
1700 U.S. Bank Plaza South
220 South Sixth Street
Minneapolis, MN 55402
(612) 339-4295

*Attorneys for Appellants Duane F. Nelson
and Margaret Rose Nelson*

COLEMAN, HULL & VAN VLIET, PLLP
Mark J. Heley (#159116)
Stephen F. Buterin (#248642)
8500 Normandale Lake Boulevard
Suite 2110
Minneapolis, MN 55437
(952) 841-0001

*Attorneys for Respondent
Short Elliott Hendrickson, Incorporated*

JARDINE, LOGAN & O'BRIEN, P.L.L.P.
James Golembeck (#179620)
Elisa M. Hatlevig (#0336920)
8519 Eagle Point Boulevard, Suite 100
Lake Elmo, MN 55042
(651) 290-6500

Attorneys for Respondent City of Stillwater

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

STATEMENT OF LEGAL ISSUES 1

STATEMENT OF CASE 3

STATEMENT OF FACTS 6

ARGUMENT 13

I. Standard of Review 13

II. The District Court Correctly Ruled That The
Two-Year Statute Of Limitations Governing Improvements
To Real Property Set Forth in Minn. Stat. § 541.051 Bars
The Nelsons' Claims Against SEH 14

A. Minn. Stat. § 541.051 15

B. The district court correctly ruled that the sedimentation
pond is an improvement to real property for the purposes
of Minn. Stat. § 541.051 17

1. Minnesota appellate courts hold, as a matter of law, that
improvements to a storm sewer or drainage
system constitute an improvement to real property for
purposes of Minn. Stat. § 541.051 17

2. The sedimentation pond does not need to enhance the
capital value of the Nelsons' property for Minn. Stat. § 541.051
to apply 22

3. The statutory exception set forth in Subdivision 1(c)
does not apply to the Nelsons' claims against SEH 24

C. The two-year statute of limitations governing improvements
to real property applies to the Nelsons' claims against SEH 25

III. The Nelsons' Suit Is Barred By The Doctrine Of Res Judicata 28

IV. The Nelsons Failed To Comply The Expert Affidavit And Certification
Requirements Of Minn. Stat. § 544.42 33

CONCLUSION 36

TABLE OF AUTHORITIES

CASES

<i>Allianz Ins. Co. v. PM Servs. of Eden Prairie, Inc.</i> , 691 N.W.2d 79 (Minn. App. 2005)	17, 22
<i>Aufderhar v. Data Dispatch, Inc.</i> , 452 N.W.2d 648 (Minn. 1990)	31
<i>Brandt v. Hallwood Mgmt. Co.</i> , 560 N.W.2d 396 (Minn. App. 1997)	16, 17
<i>Capital Supply Co. v. City of St. Paul</i> , 316 N.W.2d 554 (Minn. 1982)	18, 19, 21
<i>DLH, Inc. v. Russ</i> , 566 N.W.2d 60 (Minn. 1997)	13
<i>Fagerlie v. City of Willmar</i> , 435 N.W.2d 641 (Minn. App. 1989)	18, 19, 21
<i>Gammel v. Ernst & Ernst</i> , 245 Minn. 249, 72 N.W.2d 364 (1955)	31
<i>Hauschildt v. Beckingham</i> , 686 N.W.2d 829 (Minn. 2004)	29
<i>Hibbing Educ. Ass'n. v. Public Employment Relations Bd.</i> , 369 N.W.2d 527 (Minn. 1985)	13
<i>Johnson v. Steele-Waseca Co-op. Elec.</i> , 469 N.W.2d 517 (Minn. App. 1991), <i>review denied</i> (Minn. July 24, 1991)	17, 19
<i>Kline v. Doughboy Recreational Mfg. Co.</i> , 495 N.W.2d 435 (Minn. App. 1993)	22
<i>Marshall v. Inn on Madeline Island</i> , 631 N.W.2d 113 (Minn. App. 2001)	13
<i>Martin ex rel. Hoff v. City of Rochester</i> , 642 N.W.2d 1 (Minn. 2002)	30
<i>Matter v. Nelson</i> , 478 N.W.2d 211 (Minn. App. 1991)	18, 19
<i>Myers Through Myers v. Price</i> , 463 N.W.2d 773 (Minn. App. 1990), <i>review denied</i> (Minn. Feb. 4, 1991)	13
<i>Nolan and Nolan v. City of Eagan</i> , 673 N.W.2d 487 (Minn. App. 2003)	18, 19
<i>Ocel v. City of Eagan</i> , 402 N.W.2d 531 (Minn. 1987)	18, 19, 21
<i>Sefkow v. Sefkow</i> , 427 N.W.2d 203 (Minn. 1988)	21

<i>State by Cooper v. French</i> , 460 N.W.2d 2 (Minn. 1990)	13
<i>Terault v. Palmer</i> , 413 N.W.2d 283 (Minn. App. 1987), <i>review denied</i> (Minn. Jan. 12, 1990)	21
<i>Thorp v. Price Bros. Co.</i> , 441 N.W.2d 817 (Minn. App. 1989), <i>review denied</i> (Minn. Aug. 15, 1989)	22, 23
<i>Youngstown Mines Corp. v. Prout</i> , 266 Minn. 450, 124 N.W.2d 328 (1963)	30

STATUTES AND RULES

Minn. Stat. § 541.051, subd. 1(a) (2004)	14, 15, 16, 19, 22, 24, 25, 26, 27
Minn. Stat. § 541.051, subd. 1(b) (2004)	16, 26
Minn. Stat. § 541.051, subd. 1(c) (2004)	14, 16, 19, 24, 25
Minn. Stat. § 544.42, subd. 2 (2004)	34, 35
Minn. R. Civ. P. 56.03	13

STATEMENT OF LEGAL ISSUES

- I. Claims arising out of the defective and unsafe condition of an improvement to real property shall not be brought against any person performing or furnishing the design or plans for an improvement to real property more than two years after discovery of injury. The Nelsons discovered their claimed injuries in December 1999, or at the latest, the summer of 2000. They did not commence suit until September 2, 2003. Are the Nelsons' claims time barred?**

The district court ruled that, as a matter of law, the sedimentation pond was an improvement to real property for the purposes of Minn. Stat. § 541.051, subd. 1(a), and that the Nelsons' claims against SEH were untimely because they filed suit more than two years after first discovering the injuries they allege arise from the professional negligence of SEH.

Apposite Cases:

Capital Supply Co. v. City of St. Paul, 316 N.W.2d 554 (Minn. 1982)

Ocel v. City of Eagan, 402 N.W.2d 531 (Minn. 1987)

Nolan and Nolan v. City of Eagan, 673 N.W.2d 487 (Minn. App. 2003)

Matter v. Nelson, 478 N.W.2d 211 (Minn. App. 1991)

- II. Res judicata is an absolute bar to a second suit based on the same factual circumstances, the same parties or their privies, and where there was a final judgment on the merits, and the estopped party had a full and fair opportunity to litigate the matter. The Nelsons' claims arise from the facts giving rise to their previous lawsuit that was dismissed on summary judgment. Does res judicata bar the Nelsons' present lawsuit?**

The district court considered the issue, but declined to issue a written analysis because it considered the statute of limitations issue dispositive of the matter.

Apposite Cases:

Gammel v. Ernst & Ernst, 245 Minn. 249, 72 N.W.2d 364 (1955)

Hauschildt v. Beckingham, 686 N.W.2d 829 (Minn. 2004)

Youngstown Mines Corp. v. Prout, 266 Minn. 450, 124 N.W.2d 328 (1963)

- III. The provisions of Minn. Stat. § 544.42 require mandatory dismissal of a plaintiff's professional negligence claim where plaintiff fails to submit an affidavit within 60 days after demand, or 90 days after service of the complaint. The Nelsons did not serve the affidavit of expert review within 60 days after**

SEH' demand. Is SEH entitled to mandatory dismissal of the Nelsons' claim for professional negligence?

The district court considered the issue, but declined to issue a written analysis because it considered the statute of limitations issue dispositive of the matter.

Apposite Statute:
Minn. Stat. § 544.42 (2004)

STATEMENT OF CASE

This appeal arises from the attempt of appellants Duane and Margaret Rose Nelson to litigate issues relating to the design and installation of a sedimentation pond on their property after a previously unsuccessful attempt to do so. The Nelsons live on Lily Lake in Stillwater. Respondent City of Stillwater constructed the sedimentation pond as part of the Lily Lake Water Quality project. The purpose of the project is to improve the water quality of Lily Lake. The sedimentation pond is a part of the City's storm sewer system and situated on the Nelsons' property within an easement granted to the City in 1967 for the purpose of maintaining storm sewer outlets to Lily Lake. The pond was completed in December 1999.

In late October 2000, the Nelsons brought suit against the City, asserting claims for inverse condemnation, nuisance, and trespass based on the problems they were allegedly experiencing with the sedimentation pond. The City denied the Nelsons' claims. The Nelsons and City moved the district court for partial summary judgment. The Nelsons argued that the sedimentation pond and its accompanying structures were not permissible uses under the terms of the easement and exceeded the scope of the easement. Conversely, the City sought to dismiss the Nelsons' claims, arguing that sedimentation pond was a permissible use under the terms of the easement. The district court denied the Nelsons' motion, but granted the City's motion after concluding that the "pond (Willard Street Pond) is an essential component of the City's storm sewer water quality treatment program, without which Lily Lake would become a public nuisance.

The purpose of the holding pond is so closely related to the purpose of the original grant that the Court finds as a matter of law that the City's current use is permissible."

Based on this decision, the City then moved the district court to dismiss the Nelsons' claims for nuisance and trespass. At the same time, the Nelsons brought a motion to amend the district court's decision denying their motion and granting the City's motion. The district court denied the Nelsons' motion to amend, and granted the City's motion to dismiss. The Nelsons did not appeal either decision of the district court.

Instead, on September 23, 2003, the Nelsons served respondent Short Elliott Hendrickson, Inc. (SEH) with a Summons and Complaint, alleging that SEH failed to adequately examine the impact of the Lily Lake Water Quality Project and negligently designed the sedimentation pond. On the same day, they also served the City with a Summons and Complaint seeking damages for the City's alleged failure to maintain the easement on which the sedimentation pond is situated. Both SEH and the City denied the Nelsons' claims.

Following discovery, SEH and the City moved the district court for summary judgment seeking to dismiss the Nelsons' claims. SEH argued that the Nelsons' claims were barred by the two-year statute of limitations governing improvements to real property set forth in Minn. Stat. § 541.051; the Nelsons failed to comply with the strict affidavit requirements of Minnesota's Expert Affidavit Statute, Minn. Stat. § 544.42; and the doctrine of res judicata worked to bar the Nelsons' claims against SEH. The City likewise argued that the doctrine of res judicata and the two-year statute of limitations set forth in Minn. Stat. § 541.051 barred the Nelsons' claim. It also claimed discretionary

immunity and argued that the Nelsons had failed to establish the elements of causation and damages necessary to their claim of negligence.

By order filed July 7, 2005, the district court granted the summary judgment motions of SEH and the City, and dismissed the Nelsons' claims. The court ruled, in part, that the sedimentation pond constituted an improvement to real property and that the two-year statute of limitations set forth in Minn. Stat. § 541.051 barred the Nelsons' claims against SEH. In addition, the court ruled that the doctrine of res judicata worked to bar the Nelsons' claims against the City. The district declined to pass on the remaining arguments of SEH and the City.¹ This appeal follows.

¹ It appears from the notation on the Ordering Granting Summary Judgment that the court administrator entered judgment on July 1, 2005. The district court, however, signed the order on July 7, 2005. It therefore appears that the date of judgment stated on the last page of the order may be in error.

STATEMENT OF FACTS

The material facts of this case are simple, straightforward, and undisputed. Appellants Dr. Duane F. Nelson and Margaret Rose Nelson are joint owners of a parcel of land adjacent to Lily Lake in Stillwater. (Appellants' Appendix ("A-") – 400) This parcel is located on the northern shore of the lake and to the south of Willard and Brick Streets. (*Id.*) The Nelsons purchased their property by warranty deed in 1968. The year before, the previous landowner had granted respondent City of Stillwater an easement on the eastern and southern portion of the lot for the purpose of maintaining storm sewer outlets to the lake. (A-401)

In December 1995, the City retained respondent Short Elliott Hendrickson, Inc. (SEH) to conduct a feasibility study to explore ways to improve the water quality of Lily Lake. (A-73) The lake had been experiencing increased nutrient pollution over the years and this study was done as part of the City's Lily Lake Water Quality Project. (A-73) The purpose of the project was to reduce the amount of nutrients and sediment flowing into the lake and improve the lake's water quality. (A-73)

In May 1996, SEH submitted its feasibility study to the City that presented various options to remove the nutrients and sediment entering the lake from the City's storm water system. (A-74, 78) One of the options that SEH analyzed was the "Northwest Storm Water Diversion and Treatment System." (A-74) Among other things, this option called for an above-ground sedimentation pond to capture harmful nutrients and sediment before they entered the lake. (A-74) The study anticipated placing the pond within the City's easement situated on a small portion of the Nelsons' property. (A-75-76, 209-212)

Based on the feasibility study, the City requested that SEH prepare an expanded feasibility study that would provide greater detail and analysis on the various options identified in the feasibility study. (A-74) In analyzing alternatives to the sedimentation pond for the Northwest Storm Water Diversion and Treatment Option, SEH considered the use of a closed sump system and a baffle system to collect particulate matter. (A-77) The City rejected these two systems because they would be more costly and harder to maintain over the life system than an open sedimentation pond. (A-77)

In January 1997, SEH issued its Expanded Feasibility Study. (A-126-174) After considering the various options, SEH concluded that its "[r]eview of the cost comparisons of Lily Lake treatment alternatives (Table 1) indicates the most viable option for discharge treatment, both in terms of cost-effectiveness and nutrient loading removal, is the Northwest Storm Water Diversion Sedimentation Pond Option." (A-132) SEH recommended that the City implement the Northwest Storm Water Diversion Sedimentation Pond Option. (A-74)

Two years later, in May 1999, the City retained the engineering firm of Bonestroo Rosene Anderlik & Associates (BRAA) to analyze changes to the Lily Lake watershed. (A-75) The City also requested that BRAA review the two feasibility studies that SEH had prepared in light of these changes. (*Id.*) After analyzing the changes to the Lily Lake watershed and SEH's feasibility studies, BRAA recommended that the City implement the Northwest Storm Water Diversion Sedimentation Pond Option. (A-75; A-189)

At a public hearing in June 1999, the City voted to proceed with the Northwest Storm Water Diversion Sedimentation Pond project (the "Project") based on BRAA's recommendation. (City of Stillwater's Appendix ("City -") – 82) The City retained SEH to design the Project. (A-75)

The sedimentation pond for the Project was built and completed in December 1999. (Appendix of Short Elliott Hendrickson ("SEH -") – 128; 149; 151; 159; 160) Almost immediately, the Nelsons began noticing problems with the sedimentation pond. In December 1999, they discovered that the pond did not allegedly have adequate lighting or warning signs posted nearby. (SEH – 131; 133) During the summer of 2000, the Nelsons testified that they discovered additional problems that included a change in the color of the pond and nearby lake water (SEH – 136; 160); an increase in mosquitoes (SEH – 126; 160); a foul smell emanating from the pond (SEH – 128; 130; 132; 151; 160); a lack of fencing around the pond (SEH – 131); dead animals floating in the pond (SEH – 136; 154); and a missing outlet grate (SEH – 141). They claim that these problems rendered them unable to use their backyard that summer and since that time. (SEH – 136; 154)

Margaret Nelson testified that at about the time the sedimentation pond was completed in late 1999, she got a "little book" to note her concerns with the pond. (SEH – 159-160) She testified that in the spring and summer of 2000, she wrote about the mosquito problem and the foul smell emanating from the pond. (SEH – 160) She also admitted that she first noticed and wrote about the pond bubbling and foaming white

during the summer of 2001. (*Id.*) Although SEH and the City requested this notebook, the Nelsons have been unable to locate and produce the notebook. (SEH – 66)

The Nelsons testified that they had significant concerns about the adequacy of the pond's design even before it was built. During his deposition, Dr. Nelson testified that it was his opinion that the sedimentation pond was inadequately designed before the pond was built. (SEH – 51-52; 132-133) Indeed, Dr. Nelson stated his objection to the pond during a May 7, 1996 city council meeting. (City – 75) Dr. Nelson further testified that his former his son-in-law, a geotechnical engineer who engineered storm sewer systems, inspected the sedimentation pond during its construction and after it was completed, and advised him that, in his opinion, the pond's design was inadequate. (SEH – 55; 57-58) Similarly, Margaret Nelson testified that her son-in-law told her that "he didn't think [the sedimentation pond] would work" and that it needed bigger pipes. (SEH – 63; 65)

Given the problems that they were allegedly experiencing with the pond, along with their long held belief that the pond had been inadequately designed, the Nelsons brought suit against the City in October 2000. (City – 1) They sought damages for trespass, nuisance, and inverse condemnation. (*Id.*) The City denied the Nelsons' claims. (A- 15) After conducting discovery, both the Nelsons and the City brought motions for the partial summary judgment. (City – 20; 26) The Nelsons argued that the sedimentation pond and its accompanying structures exceeded the scope of the City's easement and were not permissible uses under the easement. (City – 20) The City countered, arguing that the pond and its structures were a reasonable use of the dominant estate and fell within the scope and purpose of the easement. (City – 26) The district

court agreed with the City and dismissed the Nelsons' claim for inverse condemnation. (City 38) In granting the City partial summary judgment, the court ruled that the "pond (Willard Street Pond) is an essential component of the City's storm sewer water quality treatment program, without which Lily Lake would become a public nuisance. The purpose of the holding pond is so closely related to the purpose of the original grant that the Court finds as a matter of law that the City's current use is permissible." (City – 45)

Given the district court's ruling that the pond was within the scope and purpose of the City's easement, the City moved to dismiss the Nelsons' remaining claims for nuisance and trespass. (City – 46) At the same time, the Nelson moved the district court to amend its findings regarding the nature of the sedimentation pond and its impact on their property. (City – 51) The Nelsons argued that the pond was not merely an improvement to the City's storm sewer system, but that the pond was, in fact, a holding pond or catch basin that was not permitted under the terms of the easement. (*Id.*) The district court rejected the Nelsons' motion, and granted the City's motion to dismiss the remaining claims for trespass and nuisance. (City – 61) The Nelsons did not appeal.

Eventually, on September 2, 2003, the Nelsons brought suit against the City, alleging that the City had failed to maintain its easement. (City – 64) On the same day, the Nelsons served SEH with a Summons and Complaint, alleging that SEH was negligent in failing to adequately examine the impact of the Lily Lake Water Quality Project and designing the sedimentation pond. (*Id.*)

On September 19, 2003, SEH served the Nelsons by facsimile and mail with its Answer that denied the Nelsons' allegations. (SEH – 67) As an affirmative defense, SEH

asserted that the Nelsons' claims were subject to the expert affidavit requirements of Minn. Stat. § 544.42, and demanded that they provide the required affidavits of expert review within the time set forth in the statute. (SEH – 70-71) Pursuant to this demand, the statute required the Nelsons' to provide SEH with an affidavit of expert review within 60 days, which was November 18, 2003. By letter dated, January 12, 2004, the Nelsons' counsel provided an Affidavit of Expert Review to SEH's counsel. (SEH – 75) A short time later, on February 2, 2004, the Nelsons' counsel served SEH with the affidavit of their expert, James E. Jacques. (SEH – 78)

Following discovery, SEH and the City both moved the district court for summary judgment, seeking to dismiss the Nelsons' claims. (SEH – 19) SEH argued that the two-year statute of limitations governing improvements to real property set forth in Minn. Stat. § 541.051 barred the Nelsons' claims; the Nelsons' failed to comply with the strict affidavit requirements of Minnesota's Expert Affidavit Statute, Minn. Stat. § 544.42, which required the mandatory dismissal of the Nelsons' professional negligence claims; and the doctrine of res judicata worked to bar the Nelsons' claims. (*Id.*) The City similarly argued that the Nelsons' claims were untimely and barred by the doctrine of res judicata. In addition, the City argued that it was entitled to discretionary immunity and that the Nelsons failed to present evidence establishing the elements of causation and damages necessary to support their claims of negligence claim against the City.

After a hearing on the motions, the district court granted SEH and the City summary judgment and dismissed the Nelsons' Complaint. (A-1) With regard to SEH, the district court ruled that the sedimentation pond is "undeniably an integrated

component of the city storm sewer system, designed to catch and treat run-off from the sewers before it can reach the lake." (A-9) After noting the factual similarity between this case and existing Minnesota caselaw, the court determined that it was "compelled to hold as a matter of law that the sedimentation pond here is an improvement to real property within Minn. Stat. § 541.051." (*Id.*) The court dismissed the Nelsons' claims as untimely under the statute after concluding that the Nelsons first discovered their injury arising from the allegedly defective condition of sedimentation pond in the summer of 2000 at the latest, but did not commence suit until September 2003. (A-9) Because it concluded that the statute of limitations issue was dispositive of the matter, the district court declined to issue written analyses on SEH's arguments in support of dismissal based on the Nelsons' failure to comply with the affidavit requirements of Minn. Stat. § 544.42 or res judicata. (*Id.*) The district court ruled that the doctrine of res judicata barred the Nelsons' claims against the City and declined to rule on the City's remaining defenses. (A-7) This appeal follows.

ARGUMENT

I. Standard of Review

Summary judgment shall be granted if there are no genuine issues of any material fact and the moving party is entitled to judgment as a matter of law. Minn. R. Civ. P. 56.03. The purpose of Rule 56 of the Minnesota Rules of Civil Procedure is to secure the just, speedy, and inexpensive determination of an action "by allowing a court to dispose of an action on the merits if there is no genuine dispute regarding the material facts and a party is entitled to judgment under the law applicable to such facts." *DLH, Inc. v. Russ*, 566 N.W.2d 60, 69 (Minn. 1997) (citation omitted).

On appeal from summary judgment, the reviewing courts ask two questions: (1) whether there are any genuine issues of material fact; and (2) whether the lower court erred in its application of the law. *State by Cooper v. French*, 460 N.W.2d 2, 4 (Minn. 1990). "On appeal from summary judgment on undisputed facts, appellate review is limited to determining whether the district court erred in its application of the law." *Marshall v. Inn on Madeline Island*, 631 N.W.2d 113, 118 (Minn. App. 2001) (citation omitted). The construction of a statute is a question of law. *Hibbing Educ. Ass'n v. Public Employment Relations Bd.*, 369 N.W.2d 527, 529 (Minn. 1985). A reviewing court may affirm the grant of summary judgment if it can be sustained on any grounds. *Myers Through Myers v. Price*, 463 N.W.2d 773, 776 (Minn. App. 1990), *review denied* (Minn. Feb. 4, 1991).

II. The District Court Correctly Ruled That The Two-Year Statute Of Limitations Governing Improvements To Real Property Set Forth in Minn. Stat. § 541.051 Bars The Nelsons' Claims Against SEH.

The district court correctly ruled that the two-year statute of limitations governing improvements to real property contained in Minn. Stat. § 541.051, subd. 1 (2004) applied to, and barred, the Nelsons' professional negligence claims against SEH. The sedimentation pond is an integral part of the City's storm sewer system and Minnesota courts have long held, as a matter of law, that improvements to a municipal storm sewer or drainage system constitute an improvement to real property for purposes of Minn. Stat. § 541.051. The undisputed deposition testimony of Dr. Nelson and Margaret Nelson established that they first discovered the alleged problems with the pond three years before they commenced suit against SEH. The district court properly applied the law to the undisputed facts and correctly ruled that the Nelsons' professional negligence claims against SEH were untimely under Minn. Stat. § 541.051.

On appeal, the Nelsons challenge the district court's ruling, arguing that that sedimentation pond does not constitute an improvement to real property because it is not an improvement to their property, it is located on the City's easement, and it does not enhance the capital value of their property. In addition, the Nelsons argue that the provisions of Minn. Stat. § 541.051, subd. 1(a) do not apply to their claims against SEH because they do not possess the sedimentation pond or the easement on which the pond is situated. Thus, according to the Nelsons, their claims are not subject to the two-statute of limitations because they fall within the statutory language set forth in Minn. Stat. § 541.051, subd. 1(c) (2004).

The Nelsons' arguments, however, ignore the plain language of the statute, well-established caselaw, and the undisputed facts in this case. Under well established Minnesota law, the sedimentation pond constitutes an improvement to real property for purposes of the statute and the statute governs the Nelsons' claims against SEH. Because the district court did not err in its application of the law and the undisputed evidence establishes that the Nelsons failed to bring suit within two years after first discovering their alleged injuries, SEH respectfully requests that this court affirm the district court's grant of summary judgment dismissing the Nelsons' professional claims against SEH.

A. Minn. Stat. § 541.051

At issue in this case is the applicability and interpretation of the two-year statute of limitations governing claims arising out of the defective and unsafe condition of an improvement to real property set forth in Minn. Stat. § 541.051, subd. 1(a). This section provides, in part, that:

[N]o action by any person in contract, tort, or otherwise to recover damages for any injury to property, real or personal, or for bodily injury . . . arising out of the defective and unsafe condition of *an improvement to real property*, nor any action for contribution or indemnity for damages sustained on account of the injury 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 two years after discovery of the injury* or, in the case of an action for contribution or indemnity, accrual of the cause of action, nor, in any event shall such a cause of action accrue more than ten years after substantial completion of the construction.

Minn. Stat. § 541.051, subd. 1(a) (2004) (emphasis added). With respect to design or planning activities, "they must result in an actual improvement to real property." *Brandt v. Hallwood Mgmt. Co.*, 560 N.W.2d 396, 400 (Minn. App. 1997) (citation omitted).

"A cause of action accrues upon *discovery of the injury*." Minn. Stat. § 541.051, subd. 1(b) (emphasis added). The statute further provides that "[n]othing 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." Minn. Stat. § 541.051, subd. 1(c) (2004).

Here, there is no dispute that SEH's role was limited to conducting the feasibility studies and providing the design for the sedimentation pond and accompanying structures. There is similarly no dispute that SEH's design resulted in the actual construction of the sedimentation pond and accompanying structures. The Nelsons' also concede in their brief that the purpose of the Lily Lake Water Quality Project was to improve the water quality of the lake by removing particulate and sediment before it entered the lake. (Appellants' Brief at p. 19) They also admit that this would "enhance the recreational and environmental resource of Lily Lake." (*Id.*) There similarly is no dispute that the sedimentation pond and accompanying structures are a part of the City's storm sewer system. The central issues on appeal are whether (1) the pond constitutes an improvement to real property for purposes of the statute and (2) the Nelsons' claims against SEH fall within the statute's purview.

B. The district court correctly ruled that the sedimentation pond is an improvement to real property for the purposes of Minn. Stat. § 541.051.

The district court properly rejected the Nelsons' argument that the sedimentation pond does not constitute an improvement to real property. As the court held, "[i]t appears well settled and clearly held that storm sewer systems qualify as improvements to real property for the purposes of Minn. Stat. § 541.051."

An improvement to real property for the purposes of Minn. Stat. § 541.051 is defined as a permanent addition to or betterment of real property that enhances its capital value and involves the expenditure of labor and money and is designed to make the property more useful or valuable as distinguished from ordinary repairs. *Brandt*, 560 N.W.2d at 400. Minnesota courts use a common sense approach in determining whether something is an improvement to real property for purposes of the statute of limitation. *Allianz Ins. Co. v. PM Servs. of Eden Prairie, Inc.*, 691 N.W.2d 79, 83 (Minn. App. 2005). Courts therefore do not apply the definition of improvement rigidly, but rather evaluate the issue based on common sense. *Id.* at 84. In applying this "common sense analysis," Minnesota courts "have given broad definition to improvement to real property." *Johnson v. Steele-Waseca Co-op. Elec.*, 469 N.W.2d 517, 519 (Minn. App. 1991) (citation omitted), *review denied* (Minn. July 24, 1991).

1. Minnesota appellate courts hold, as a matter of law, that improvements to a storm sewer or drainage system constitute an improvement to real property for purposes of Minn. Stat. § 541.051.

Minnesota courts have long held that Minn. Stat. § 541.051 applies to claims alleging the negligent design and construction of storm water sewer and drainage

systems. See *Capital Supply Co. v. City of St. Paul*, 316 N.W.2d 554, 555 (Minn. 1982) (holding two-year statute of limitation in Section 541.051 applies to claims that city negligently designed and constructed storm sewer system); *Ocel v. City of Eagan*, 402 N.W.2d 531, 534 (Minn. 1987) (applying Section 541.051 to claims arising from discharge of water from city's storm sewer system); *Matter v. Nelson*, 478 N.W.2d 211, 213 (Minn. App. 1991) (applying Section 541.051 to claims arising from addition to existing storm water drainage system). It also applies to negligent design claims alleging nuisance. *Fagerlie v. City of Willmar*, 435 N.W.2d 641, 644 (Minn. App. 1989).

This court recently addressed this precise issue in *Nolan and Nolan v. City of Eagan*, 673 N.W.2d 487 (Minn. App. 2003). In that case, plaintiff landowner brought suit against the City of Eagan and the Minnesota Department of Transportation (MnDOT), in part, for the negligent design and construction of a storm sewer system, which MnDOT had constructed, that caused flooding to the landowner's storage business. *Id.* at 491. The district court dismissed the landowner's claims against MnDOT after concluding that they were untimely under Minn. Stat. § 541.051. In affirming the district court's dismissal, this court explicitly held that "a storm water sewer system is an improvement to real property as contemplated by Minn. Stat. § 541.051." *Id.* at 496. In support of its holding, the court relied on the decisions in *Ocel* and *Capital Supply*, and noted that "[i]n determining that the statute of limitations applied to claims of negligent design and construction of storm sewer systems, the Minnesota Supreme Court has implicitly found that storm sewer systems constitute improvements to real property." *Id.*

Here, despite the Nelsons' semantic characterization of the sedimentation pond as a hole, it is undisputed that the pond was constructed as a part of the City's storm sewer system. As the district court stated, the sedimentation pond was "an integrated component of the city storm water sewer system, designed to catch and treat run-off from the sewers before it can reach the lake." (See A-9) In light of the decisions in *Ocel, Matter, Capital Supply, Nolan, and Faegerlie*, the district court correctly ruled that, as a matter of law, the sedimentation pond constituted an improvement to real property for the purposes of Minn. Stat. § 541.051.

The Nelsons also argue that the two-year statute of limitations set forth in Minn. Stat. § 541.051 does not apply because the sedimentation pond is not an actual improvement to their real property. This, however, is an unduly restrictive reading of Subdivision 1(a) and imposes an element not required under the statute. The plain and unambiguous language of Subdivision 1(a) provides that the two-year statute of limitations applies broadly to an action to recover damages for any injury "arising out of the defective and unsafe condition of *an improvement to real property*." Minn. Stat. § 541.051, subd. 1(a) (emphasis added). This language does not limit the statute's application to claims arising out of a defective and unsafe improvement constructed or located on an injured individual's property. Indeed, the courts in *Ocel, Matter, Capital Supply, and Faegerlie* applied the limitations period set forth in Minn. Stat. § 541.051, subd. 1(a) to bar claims arising out of improvements that were not actually situated on the injured plaintiff's properties. As the holdings in these cases demonstrate, the statute

applies to any claim that arises out of *an improvement to real property* and does not necessarily require that the improvement be located on the injured individual's property.

In support of their argument, the Nelsons rely on this court's decision in *Johnson v. Steele-Waseca Co-op. Elec.*, 469 N.W.2d 517 (Minn. App. 1991). In that case, defendant was a local electrical utility that installed new electrical equipment and wiring to plaintiff-landowner's new barn. It also installed a center pole and transformer to bring power to the landowner's farm. 469 N.W.2d at 518. The district court dismissed the landowner's claims under Minn. Stat. § 541.051. *Id.* The court of appeals held that the electrical equipment and wiring installed in and attached to the landowner's barn did, in fact, constitute an improvement to real property. *Id.* at 519. It, however, concluded that the pole and transformer did not constitute improvements to real property because they were an addition to the utility's existing power distribution system. *Id.* The court held that the protections of Minn. Stat. § 541.051 did not apply because the landowner was not alleging a defect in the electrical equipment attached to the farm, but rather, a defect in the electric service itself. *Id.* at 520. The court observed that the landowner's claim was that "[defendant utility] was negligent not to repair, not to prevent, and not to warn of the risk of stray voltage." *Id.* Thus, the court held that "Minn. Stat. § 541.051 does not protect the installer/owner from its own ongoing negligence." *Id.*

Contrary to the Nelsons' assertion, the decision in *Johnson* simply stands for the unremarkable proposition already set forth in Section 541.051, subd. 1(c) that the two-year statute of limitation governing claims arising out of the defects in improvements to real property does not apply to negligent maintenance claims. The decision is also

distinguishable because, unlike the utility in *Johnson*, SEH did not install nor own the allegedly defective improvement. SEH merely provided the design work for the project. The Nelsons also do not allege any ongoing negligence by SEH.

This court should reject the Nelsons' interpretation and proposed application of *Johnson* because it would have broad implications beyond the scope of this court's authority. The function of the court of appeals is limited to identifying errors and then correcting them. *Sefkow v. Sefkow*, 427 N.W.2d 203, 210 (Minn. 1988). "[T]he task of extending existing law falls to the supreme court of the legislature, but it does not fall to this court." *Terault v. Palmer*, 413 N.W.2d 283, 286 (Minn. App. 1987), *review denied* (Minn. Jan. 12, 1990). The effect of the Nelsons' argument would be to explicitly or implicitly overrule the supreme court's decisions in *Capital Supply* and *Ocel*, and this court's previous decisions in *Nolan* and *Fagerlie*. This is because, much like the utility's electrical distribution system in *Johnson*, all storm sewer structures can arguably be deemed a part of an existing storm sewer system, and thus, independent of the injured party's real property. Thus, under the Nelsons' application of *Johnson*, municipalities and others would lose the protection of Minn. Stat. § 541.051 because any addition to a municipality's storm sewer or drainage system could be considered a part of the municipality's existing storm sewer or drainage system. This is contrary to the long held decisions of this and the supreme court, and the Nelsons have presented no compelling rationale to justify this court's departure from that long held precedent.

Here, the district court correctly applied existing and well established caselaw to the undisputed facts in this case. The district court did not commit reversible error when

it concluded that the sedimentation pond was, as a matter of law, an improvement to real property for the purposes of Minn. Stat. § 541.051, subd. 1(a).

2. **The sedimentation pond does not need to enhance the capital value of the Nelsons' property for Minn. Stat. § 541.051 to apply to their claims against SEH.**

The Nelsons also argue that the sedimentation pond does not constitute an improvement to real property because it did not enhance the capital value of their property. This argument is lacking in several respects.

This court recently held that that "enhancement of *capital value* is not necessarily required to make the shorter limitations period [under Minn. Stat. § 541.051] applicable." *Allianz*, 691 N.W.2d at 84 (emphasis added). In *Allianz*, this court determined that even though the installation of a water-purification system contributed little, if any, to the overall capital value of the building, it constituted an improvement to real property under Minn. Stat. § 541.051 because it improved the quality of drinking water, and thus, made the building more useful. *Id.* at 84. In reaching its decision, this court relied on its previous decisions in *Kline v. Doughboy Recreational Mfg. Co.*, 495 N.W.2d 435, 439 (Minn. App. 1993), and *Thorp v. Price Bros. Co.*, 441 N.W.2d 817, 819-20 (Minn. App. 1989), *review denied* (Minn. Aug. 15, 1989). In *Kline*, this court held that a swimming pool was an improvement to real property even though it did not enhance the capital value of the property. *Kline*, 495 N.W.2d at 439. And in *Thorp*, this court ruled that a conveyor system in a manufacturing plant constituted an improvement even though it did not enhance capital value of manufacturing plant. *Thorp*, 441 N.W.2d at 819-20.

It is axiomatic that any defect or unsafe condition in an improvement to real property damages, or lessens, the value of the subject property. Under the Nelsons' interpretation, the statute would never apply because no defect or unsafe condition in an improvement to real property conveys value to the subject property. Here, however, the Nelsons concede that the purpose of the sedimentation pond was to improve the water quality of Lily Lake and enhance the recreational potential and environmental resource of Lily Lake by eliminating harmful particulate and sediments before they entered the lake.

In dismissing the Nelsons' previous lawsuit involving the pond on summary judgment, the district court found that "the purpose of the catch basin . . . is to *improve* the water quality of Lily Lake by reducing storm water sedimentation deposits in the lake and preventing lakeshore erosion." (City - 39) (emphasis added) The court also concluded that "[t]he holding pond is an essential element component of the City's storm water quality treatment program, without which Lily Lake would become a public nuisance." (City - 45)

The district court's findings and conclusion necessarily recognize that the sedimentation pond was designed to, and has, in fact, improved the water quality of Lily Lake and prevented lakeshore erosion. Indeed, Dr. Nelson admitted during his deposition that the Minnesota Pollution Control Agency had declared Lily Lake unswimmable because of the problems with Lily Lake's water quality before the sedimentation pond was constructed. (SEH - 137) The sedimentation pond was designed to alleviate these problems. By improving the quality of Lily Lake, the sedimentation pond has necessarily improved the value and usefulness of the Nelsons' lake front property. Rather than

abutting an unsafe and unhealthy lake, the Nelsons' property now abuts a healthy and safer lake that can be used for swimming and other recreational activities, making it more useful to the Nelsons and others who live on and around the lake.

Because the sedimentation pond is designed to improve the health, safety, and water quality of Lily Lake, making the lake and surrounding properties more useful, the sedimentation pond constitutes an improvement to real property for the purposes of Minn. Stat. § 541.051.

3. The statutory exception set forth in Subdivision 1(c) does not apply to the Nelsons' claims against SEH.

In their brief, the Nelsons argue that the failure to maintain an improvement is not subject to the two-year limitations period set forth in Minn. Stat. § 541.051, subd. 1(a). In support of their argument, they cite to Subdivision 1(c) of the statute, which provides that "[n]othing 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." Minn. Stat. § 541.051, subd. 1(c) (2002). The Nelsons appear to argue that this section renders the two-year limitations period in Subdivision 1(a) inoperable to claims made "against other persons in possession." They allege that because the City owns the sedimentation pond and it is situated on the City's easement, the City has an absolute duty to maintain the easement. (Appellants' Brief at p. 21)

Subdivision 1(c) does not apply to the Nelsons' professional negligence claims against SEH. The Nelsons' Complaint does not assert a claim that SEH had a duty to

maintain, operate, or inspect the sedimentation pond and that SEH breached that duty. The undisputed evidence establishes that SEH's role in the project was simply to prepare the feasibility studies and design the sedimentation pond and its accompanying structures. There is no evidence that SEH ever owned or possessed the pond, or the property on which the pond and its structures are situated. It is also undisputed that SEH has no interest in the easement on which the pond and its structures are situated. And contrary to the Nelsons' argument, Subdivision 1(c) does not deprive an owner or other person in possession of the property of the protection of the statute. Subdivision 1(c) simply provides that the two-year limitations period does not apply to claims against a property owner or other in possession of the property that are based on negligence in the maintenance, operation, or inspection of the real property improvement. In this case, Subdivision 1(c) does not work to remove the Nelsons' professional negligence claims against SEH from the purview of Subdivision 1(a).

C. The Nelsons' claims against SEH are untimely under Minn. Stat. § 541.051.

The district court properly dismissed the Nelsons' claims against SEH because the undisputed evidence establishes that they filed suit more than two years after first discovering the injuries they claim arise from the allegedly defective condition of the sedimentation pond. The Nelsons' unequivocal deposition testimony establishes that the two-year statute of limitations under Section 541.051, subd. 1(a) began to run in December 1999, when the pond was completed. At the very latest, the limitations period commenced in the summer of 2000, when the Nelsons acknowledge that they first

experienced problems with the sedimentation pond. Regardless, the two-year statute of limitations set forth in Section 541.051 expired over a year before they commenced this suit against SEH on September 2, 2003.

Under Minn. Stat. § 541.051, subd. 1(b), "a cause of action accrues upon *discovery of the injury*." (Emphasis added). The statute also provides that "no action . . . arising out of the defective and unsafe condition of an improvement to real property . . . shall be brought against . . .the owner of real property more than two years after *discovery of the injury*." Minn. Stat. § 541.051, subd. 1(a) (emphasis added). This clear and unambiguous language establishes that the two-year limitations period commences on a plaintiff's "discovery of the injury," and not the discovery of the defective or unsafe condition of the improvement to property.

Here, the Nelsons' testified that during the design and construction phases they were aware, and believed, that the pond might be inadequately designed. During his deposition, Dr. Nelson testified that he obtained a copy of the design plans for the sedimentation pond, and using his physics book from medical school, calculated that the pond had inadequate capacity. (SEH – 51) He stated that he approached the city engineer, Klayton Eckles, at a city council meeting before the pond was constructed and told him he believed the pond, as designed, was inadequate because it was not big enough. (SEH – 51-54)

Dr. Nelson also testified that his former son-in-law, who was a geotechnical engineer for Braun Intertec, a local engineering firm, engineered storm water sewer systems. (SEH – 55; 57) Dr. Nelson stated that he spoke with his former son-in-law

before and after the sedimentation pond was constructed. ((SEH – 55) According to Dr. Nelson, his former son-in-law told him that the pond and its design were "entirely inadequate." (SEH – 55; 57-58) And after the pond was completed, his former son-in-law went down to the pond during the summer of 2000, inspected it, and advised Dr. Nelson that the design was inadequate. (SEH – 57-58) Similarly, Margaret Nelson testified that her former son-in-law told her that "he didn't think it [the sedimentation pond] would work" and it needed bigger pipes. (SEH – 63; 65) This testimony establishes that before and after the pond was constructed, the Nelsons believed that SEH's design of the sedimentation pond was inadequate and defective.

In addition, Margaret Nelson testified that in December 1999, when the pond was completed, she purchased a \$1 notebook to note her concerns with the pond. (SEH – 160) The first concern she noted was that she "didn't want a hole in backyard." (*Id.*) She testified that she wrote in her notebook that during the spring and summer of 2000 that she noticed the mosquito problem and the foul smell emanating from the pond. (*Id.*) She testified that, although she did not write about it, she first noticed a change in the color of the sedimentation pond and Lily Lake during the spring and summer of 2000. (*Id.*) The next year, during the summer of 2001, she wrote about the pond foaming and turning white. (*Id.*)

Dr. Nelson testified that he first became aware of the following problems during the summer of 2000: (1) the foul smell; (2) the mosquito problem; (3) dead smelly animals floating in the pond; and (4) the missing outlet grate. (smell – (SEH – 123; 130; 132); (SEH – 126 (mosquitoes); (SEH – 136 (dead smelly animals); (SEH – 141 (missing

outlet grate)). In addition, he testified that in December 1999, when the pond was completed, he observed the lack of lighting and warning signs. (SEH – 131; 133) The Nelsons both testified that by the summer of 2000, they believed that they no longer could use their backyard. (SEH – 136; 62)

The Nelsons' unequivocal and undisputed testimony establishes that they first became aware of problems with the sedimentation pond in December 1999, and certainly by the summer of 2000. The Nelsons, however, did not commence the present action until September 2, 2003. This is over three years after they first discovered the problems with the sedimentation pond that they claim are the result of its allegedly defective design. Their claims are therefore untimely under Minn. Stat. § 541.051, subd. 1(a). SEH therefore respectfully requests that this court affirm the district court's grant of summary judgment to SEH dismissing the Nelsons' claims against SEH in their entirety and with prejudice.

III. The Nelsons' Suit Is Barred By The Doctrine Of Res Judicata.

This court may also sustain the decision of the district court to grant SEH summary judgment dismissing the Nelsons' claims on the alternate grounds that the doctrine of Res Judicata bars the Nelsons' suit against SEH. Because the Nelsons' previous lawsuit involved the same set of factual circumstances; the same parties and their privities; a final judgment on the merits; and the Nelsons received a full and fair

opportunity to litigate their claims, the doctrine of Res Judicata bars their claims against SEH in this case.²

The doctrine of Res Judicata is a finality doctrine that mandates that there be an end to litigation. *Hauschildt v. Beckingham*, 686 N.W.2d 829, 840 (Minn. 2004). Res judicata, which is known as "claim preclusion," while based on the same principle as collateral estoppel, is the broader of the two doctrines and applies generally to a set of circumstances giving rise to entire claims or lawsuits. *Id.* at 837. "Once there is an adjudication of a dispute between parties, res judicata prevents either party from relitigating claims arising from the original circumstances, even under new legal theories." *Id.* Courts are not to apply res judicata or collateral estoppel rigidly, but rather the focus is on whether their application will work an injustice on the party against whom the doctrines are applied. *Id.*

Although collateral estoppel concerns issues that were actually litigated, determined, and essential to a previous action, "res judicata concerns circumstances giving rise to a claim and precludes subsequent litigation – regardless of whether a particular issue or legal theory was actually litigated. *Id.* at 840. Res judicata requires a party to assert all alternative theories of recovery in the initial action and the doctrine applies not only to all claims actually litigated, but to all claims that could have been litigated in the earlier action. *Id.* Thus, a judgment on the merits constitutes an absolute bar to a second suit for the same cause of action, and is conclusive between parties and

² In addition to its arguments, SEH also incorporates by reference the arguments set forth in the City's appellate brief that the doctrine of Res Judicata bars this lawsuit by the Nelsons.

their privities, not only to every matter that was actually litigated, but also to every matter that might have been litigated. *Youngstown Mines Corp. v. Prout*, 266 Minn. 450, 124 N.W.2d 328, 340 (1963).

Res judicata works as an absolute bar to a later claim when (1) the earlier claim involved the same set of factual circumstances; (2) the earlier claim involved the same parties or their privies; (3) there was a final judgment on the merits; and (4) the estopped party had a full and fair opportunity to litigate the matter. *Hauschildt*, 686 N.W.2d at 840. The first prong prevents a plaintiff from splitting his cause of action and bringing successive suits involving the same set of factual circumstances. *Id.* "A claim or cause of action is 'group of operative facts giving rise to one or more bases for suing.'" *Id.* (quoting *Martin ex rel. Hoff v. City of Rochester*, 642 N.W.2d 1, 9 (Minn. 2002)). The focus is whether the second claim arises out of the same set of factual circumstances. *Id.* The general test in determining whether a former judgment is a bar to a later action is to inquire if the same evidence will sustain both actions. *Id.* Thus, claims are considered the same cause of action if the right to assert the second claim arose at the same time as the right to assert the first claim. *Id.*

Although the general rule is that a former judgment is not res judicata in a later action unless the parties in the latter are the same or in privity with those in the former proceeding, Minnesota recognizes the following exception:

a plaintiff, who has selected his forum and presented his proof on an issue, is bound by the judgment rendered therein on such issue in any subsequent action, even though against another party, since public policy should not permit retrial of an issue each time a new defendant can be found . . .

. . . a plaintiff who deliberately selects his forum and there unsuccessfully presents his proofs, is bound by such adverse judgment in a second suit involving all the identical issues already decided. The requirement of mutuality must yield to public policy. To hold otherwise would be to allow repeated litigation of identical questions, expressly adjudicated, and to allow a litigant having lost on a question of fact to re-open and re-try all the old issues each time he can obtain a new adversary not in privity with his former one.

Gammel v. Ernst & Ernst, 245 Minn. 249, 257-58, 72 N.W.2d 364, 369 (1955) (quoted in *Aufderhar v. Data Dispatch, Inc.*, 452 N.W.2d 648, 652 (Minn. 1990)). Thus, in rejecting the mutuality requirement, Minnesota focuses on whether the estopped party was the claimant in both proceedings. *Aufderhar*, 452 N.W.2d at 652.

Here, the facts giving rise to the Nelsons' claims against SEH were known, or should have been known, at the time they commenced suit against the City in October 2000. As the Nelsons' depositions establishes, their former son-in-law, who was an engineer whose job was to engineer storm sewer systems, advised them both before and shortly after the sedimentation pond was constructed that the design and pond were inadequate. And Dr. Nelson testified that before construction began, he obtained a copy of the design plans, and calculated that the pond was undersized. He presented his design concerns to the city engineer at a city council meeting before the pond was built. By their own admissions, the Nelsons were aware of their negligent design claims against SEH before, or shortly after, the sedimentation pond was built. Their claim against SEH was known, or should have been known, at the time they served their previous lawsuit in October 2000.

The Nelsons were fully aware of the factual basis for all of their claims in the present lawsuit at the time they served and filed their previous lawsuit. Of the 26 "complaints" they have about the sedimentation pond and its effects on their property, the Nelsons' testimony demonstrates that all 26 had manifested themselves and were known to the Nelsons by the summer of 2000. Indeed, the supplemental affidavit that Dr. Nelson submitted in the prior lawsuit articulates many of the facts used to now claim that SEH's design was inadequate. (City – 55) The undisputed evidence establishes that the facts giving rise to the Nelsons' present claim against SEH were known to them at the time of the prior lawsuit.

Most importantly, although stated as a claim for professional negligence, the Nelsons' claim against SEH involve the same claims and damages that the Nelsons sought in their first lawsuit. Not only do the pleadings from the previous case establish that the claims are identical, but Dr. Nelson submitted a sworn affidavit in that case, stating that he and his wife "have lost all use of their back yard with this large open pond and the smell that it generates. (City - 9) In his supplemental affidavit submitted in that case, he stated further that the sedimentation pond "adversely affected my use, enjoyment, and the market value of my property." (City - 56) In this case, the Nelsons' Complaint likewise seeks damages based on "a diminution in value based directly upon the Willard Street Pond" and because they "are no longer able to utilize their Property near the Willard Street Pond due to safety concerns, and the odor of stagnant water and deceased animals coming from the Willard Street Pond." (City - 71)

Although SEH was not named in the prior lawsuit, it arguably has privity with the City by virtue of its contract with the City to design the sedimentation pond. Even if the court concludes that privity is lacking, the exception to mutuality applies in this case.

The Nelsons are seeking to relitigate their claim of nuisance and damages by couching it in terms of professional negligence after seeking out a new defendant against which to assert this claim on which they were previously unsuccessful. Minnesota courts do not allow such a tactic, and this court should reject the Nelsons' invitation to allow them to resurrect their previously dismissed nuisance and damages claims under the new moniker of professional negligence. They had the opportunity to fully and fairly present their nuisance and damages claims to the district court, the district court received evidence and argument on the Nelsons' claims, and based on the arguments and evidence presented, dismissed the Nelsons' prior lawsuit on the merits and with prejudice. The Nelsons will suffer no undue prejudice if this court dismisses their claims in this case because they had the opportunity, and possessed all the necessary facts, to assert their claims against SEH at the time of their previous lawsuit. The doctrine of Res Judicata applies in this case and must work to bring finality and an end to the Nelsons' continued litigation.

IV. The Nelsons Failed To Comply The Expert Affidavit And Certification Requirements Of Minn. Stat. § 544.42.

This court may further sustain the district court's decision to grant summary judgment to SEH because of the Nelsons' failure to serve an affidavit of expert of review within 60 days after receiving SEH's properly served demand for expert certification.

The provisions of Minn. Stat. § 544.42, therefore require the mandatory dismissal of the Nelsons' professional negligence claims against SEH.

The language of Minn. Stat. § 544.42 is clear and unambiguous, and sets forth strict time periods by which a party alleging a claim of professional negligent must serve affidavits of expert review. This section provides, in part, that:

Subd. 2. Requirement. In an action against a professional alleging negligence or malpractice in rendering a professional service where expert testimony is to be used by a party to establish a *prima facie* case, the party must:

(1) unless otherwise provided in subdivision 3, paragraph (a), clause (2) or (3), serve upon the opponent with the pleadings an affidavit as provided in subdivision 3; and

(2) serve upon the opponent within 180 days an affidavit as provided in subdivision 4.

Minn. Stat. § 544.42, subd. 2 (2004)³.

The demand for expert review requires that an attorney certify that he has talked with an expert; the expert's qualifications provide a reasonable expectation that the opinions can be admissible at trial; and, in the opinion of the expert, defendant deviated from the applicable standard of care. Minn. Stat. § 544.42, subd. 3 (a)(1). The failure to comply with Subdivision 2, clause (1) within 60 days after demand for the affidavit requires, on motion, the mandatory dismissal of each cause of action with prejudice as to which expert testimony is necessary to establish a *prima facie* case. Minn. Stat. § 544.42, subd. 6(a) (2004).

³ Subd. 1 was slightly modified by the legislature effective January 1, 2003. Subd. 2 was not a part of that modification.

Here, SEH served its Answer, which contained its demand for expert review, by facsimile and mail on September 19, 2003. (SEH – 18) The Nelsons' certification of expert review was therefore due on November 18, 2003. But the Nelsons never formally served an affidavit of expert review on SEH or SEH's counsel. By letter dated January 12, 2004, the Nelson's counsel sent a letter to SEH's counsel, enclosing his Affidavit of Expert Review. (SEH – 75) Because the Nelsons failed to formally serve an affidavit of expert review executed by their attorney within 60 days of SEH's demand to do so, the plain and unambiguous language of Minn. Stat. § 544.42, subd. 6(a) mandates the dismissal the Nelsons' professional negligence claims against SEH.

CONCLUSION

The district court properly ruled that the two-year limitations period set forth in Minn. Stat. § 541.051, subd. 1(a) governed the Nelsons' professional negligence claims against SEH. It also properly ruled that the undisputed evidence established that the Nelsons failed to commence suit against SEH within two years after discovering the injuries they allege arise from SEH's professional negligence. Because the district court did not err in its application of the law and there are no genuine issues of material fact, SEH respectfully requests that this court affirm the district court's grant of summary judgment dismissing the Nelsons' Complaint against SEH in its entirety and with prejudice.

Respectfully submitted,

COLEMAN, HULL & VAN VLIET, PLLP

Dated: 11/16/05

By: Stephen Buterin
Mark J. Heley (#159116)
Stephen F. Buterin (#248642)
8500 Normandale Lake Boulevard
Suite 2110
Minneapolis, Minnesota 55437
952-841-0001

Attorneys for Short Elliot-Hendrickson, Inc.

Certification of Brief Length

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subds.1 and 3, for a brief produced with a proportional 13 point font. The length of this brief is **9,404** words. This brief was prepared using Microsoft Word 2002.

COLEMAN, HULL & VAN VLIET, PLLP

Dated: 11/16/05

By: Stephen Buterin

Mark J. Heley (#159116)

Stephen F. Buterin (#248642)

8500 Normandale Lake Boulevard

Suite 2110

Minneapolis, Minnesota 55437

952-841-0001

Attorneys for Short Elliot-Hendrickson, Inc.