

NO. A04-901

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State of Minnesota  
**In Supreme Court**

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In Re: St. Cloud Gas Explosion

Jaenty, Inc., d/b/a Taco John's Restaurant,

*Plaintiff-Appellant,*

vs.

Northern States Power Company, Seren Innovations, Inc.,  
Cable Constructors, Inc., and Sirti, Ltd.,

*Defendants-Respondents.*

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**BRIEF OF PLAINTIFF-APPELLANT**

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**TABLE OF CONTENTS**

	<u>Page</u>
TABLE OF AUTHORITIES .....	ii
STATEMENT OF ISSUE .....	1
STATEMENT OF THE CASE .....	2
STATEMENT OF FACTS .....	2
ARGUMENT .....	3
I. STANDARD OF REVIEW .....	3
II. MINN. STAT. §541.051 DOES NOT BAR THIS ACTION BECAUSE THE ANCHOR WHICH PIERCED THE GAS LINE CAUSING JAENTY'S DAMAGES, WAS NOT AN "IMPROVEMENT TO REAL PROPERTY" AT THE TIME OF THE ACCIDENT. ....	4
III. MINN. STAT. §541.051 DOES NOT BAR THIS ACTION BECAUSE JAENTY'S DAMAGES WERE CAUSED BY NEGLIGENT CONSTRUCTION ACTIVITY, NOT A FAILURE OF THE ANCHOR. ....	6
CONCLUSION .....	7
CERTIFICATION .....	9

**TABLE OF AUTHORITIES**

Cases

Page

**Minnesota Courts:**

*Brandt v. Hallwood Mgmt. Co.*,  
560 N.W.2d 396 (Minn. App. 1997) ..... 1, 5

*In re Improvement of Murray County Ditch No. 34*,  
615 N.W.2d 40, 45 (Minn. 2000). ..... 3

*Pac. Indem. Co. v. Thompson-Yeager, Inc.*,  
260 N.W.2d 548 (Minn. 1977) ..... 1, 4

*Ritter v. Abbey-Etna Mach. Co.*,  
483 N.W.2d 91 (Minn. App. 1992), *review denied* (Minn. June 10, 1992) . 1, 4

*Sartori v. Harnischfeger*,  
432 N.W.2d 448, 454 (Minn. 1998) ..... 5

*Witta v. Potlatch Corp.*,  
492 N.W.2d 270 (Minn. App. 1992) ..... 1, 4, 6-7

**Statute**

Minn. Stat. § 541.051 subd. 1(a) ..... 1

## STATEMENT OF ISSUE

Does Minn. Stat. § 541.051 subd. 1 (a), bar claims where no permanent improvement to real property has taken place or where damages stem from negligent construction?

The trial court and appellate majority both responded in the affirmative.

The appellate majority relied on the following cases reaching their decision:

• *Pac. Indem. Co. v. Thompson-Yeager, Inc.*, 260 N.W.2d 548 (Minn. 1977)

• *Ritter v. Abbey-Etna Mach. Co.*, 483 N.W.2d 91 (Minn. App. 1992), review denied (Minn. June 10, 1992)

The appellate majority distinguished the following cases, relied upon by the dissent and Appellant:

• *Brandt v. Hallwood Mgmt. Co.*, 560 N.W.2d 396 (Minn. App. 1997)

• *Witta v. Potlatch Corp.*, 492 N.W.2d 270 (Minn. App. 1992)

Minn. Stat. § 541.051 subd. 1(a) provides:

Subdivision 1. (A) Except where fraud is involved, no action by any person in contract, tort, or otherwise to recover damages for any injury to property, real or personal, or for bodily injury or wrongful death, 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 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. Date of substantial completion shall be determined by the date when construction is sufficiently completed so that the owner or owner's representative can occupy or use the improvement for the intended purpose.

## STATEMENT OF THE CASE

The Stearns County District Court, the Honorable Judge Widick presiding, granted summary judgment dismissing plaintiff's action because plaintiff failed to raise its claims within the two year statute of limitations set forth in Minn. Stat. § 541.051, subd 1(a).

The Court of Appeals majority, the Honorable Judge Halbrooks and Honorable Judge Forsberg, affirmed, agreeing that Minn. Stat. § 541.051, subd 1(a) was applicable. The Honorable Presiding Judge Schumacher, dissented on the basis that the plaintiff's claims did not arise out of an "improvement to real property" and resulted from negligent construction activity. Thus, he declined to apply Minn. Stat. § 541.051, subd.1(a).

## STATEMENT OF FACTS

The facts of this case for purposes of deciding the motion for summary judgment, were undisputed. ( A.A. 4)<sup>1</sup> On December 11, 1998, as respondent CCI was installing an anchor for a utility pole, it struck a gas line, causing an explosion which damaged plaintiff's property. (*Id*) Jaenty did not commence its action until more than two years had passed. (A.A. 20)

### 1. The Anchor Installation was not Complete at the Time of Explosion

As the appellate dissent points out, the placement of the utility pole anchor was *not* complete when the explosion occurred.

Here, CCI struck an underground gas line while installing an anchor for a utility pole. The anchor never got installed, and therefore, at the time of

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<sup>1</sup>References to pages in Appellant Jaenty's Appendix will be abbreviated A.A. \_\_.

the explosion, the anchor was neither "integral to [nor] incorporated into the building or structure on the property,"...

(A.A. 30) Likewise, the trial court found that the explosion happened *during* installation.

(A.A. 4) Similarly, the Court of Appeals majority noted that the gas line was struck "while installing" an anchor. (A.A. 22) Also, the National Transportation and Safety Board found that the workers stopped the auger boring the anchor into the ground, not because it was fully installed, but because they noticed the smell of gas seeping out of the bore hole. (A.A. 34-35) A foot or more of the anchor was still above ground at the time of the explosion. (Id.) Jaenty's Complaint bases its claims on the allegation that the explosion took place *during* installation of the anchor. (A.A. 11-12)

## **2. Jaenty's Complaint Does Not Allege a Defect in The Anchor**

As the appellate dissent stresses, Jaenty's Complaint does not allege damages stemming from a defect in the anchor being installed. Rather, Jaenty alleges negligent construction activities in puncturing the gas line in the first place and failing to act to prevent damage thereafter. (A.A. 10-20; 30)

### **ARGUMENT**

#### **I. STANDARD OF REVIEW**

Jaenty did not commence its action within the two year statute of limitation set forth in Minn. Stat. § 541.051. Accordingly, this appeal rests on the applicability of Minn. Stat. § 541.051 to the December 11, 1998 accident. This statutory interpretation issue is reviewed *de novo* as a question of law; *In re Improvement of Murray County Ditch No. 34*, 615 N.W.2d 40, 45 (Minn. 2000).

**II. MINN. STAT. §541.051 DOES NOT BAR THIS ACTION BECAUSE THE ANCHOR WHICH PIERCED THE GAS LINE CAUSING JAENTY'S DAMAGES, WAS NOT AN "IMPROVEMENT TO REAL PROPERTY" AT THE TIME OF THE ACCIDENT**

The trial court and appellate majority both erroneously assume that the anchor being installed at the time of the accident, qualifies as an "improvement to real property" under Minn. Stat. § 541.051. It does not.

This court has defined an "improvement to real property" as: "*a permanent addition to...real property...designed to make the property more useful or valuable.*" *Pac Indem. Co. v. Thompson-Yaeger, Inc.*, 260 N.W.2d 548, 554 (Minn. 1977)(emphasis added). The court of appeals has further defined a permanent improvement as one which, "must be *integral* and incorporated into the building or structure on the property." *Ritter v. Abbey-Etna Mach. Co.*, 483 N.W.2d 91, 93 (Minn. App. 1992) *review denied* (Minn. June 10, 1992)(emphasis added). As pointed out by the appellate dissent, the anchor was neither "permanent" nor "integral" to a structure at the time of the accident, because its placement was not yet completed. (A.A. 30) As such, Minn. Stat. § 541.051 cannot apply. "Where an item does not permanently alter real property, it may not constitute an improvement, and [damages] arising from the item are not barred by the statute." *Witta v. Potlatch Corp.*, 492 N.W.2d 270, 272 (Minn. App. 1992).

While it is possible that Minn. Stat. § 541.051 could apply to claims that arise while construction is ongoing, by its own terms, a prerequisite permanent component part must be the cause of the damage. The simple fact that construction is ongoing and an

accident takes place does not mean the statute applies. To decide otherwise, necessitates abandoning the current requirement of a "permanent" and "integral" improvement and substituting a "planned" or "incomplete" improvement instead. Applying this new definition would mean that any construction accident where the construction would eventually result in a permanent improvement would fall under the two year limitation.

Yet the legislature clearly intended the statute to apply only to finished, actual improvements, not planned or "to-be-completed" improvements. *See Sartori v. Harnischfeger*, 432 N.W.2d 448, 454 (Minn. 1998) (The purpose of Minn. Stat. § 541.051 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.") Indeed, even subsection (a) of subdivision 1 of the statute, closes by defining "substantial completion" as that time at which an owner can use an improvement.

The acknowledgment of the fact that the anchor was not useable or completed at the time of the accident is what dooms the appellate majority's attempt to distinguish *Brandt v. Hallwood Mgmt. Co.*, 560 N.W.2d 396 (Minn. App. 1997) and *Wiita v. Potlatch Corp.*, 492 N.W.2d 270 (Minn. App. 1992).

The majority argues that because the demolition work in *Brandt* was in anticipation of construction activities, it was not an integral part of the construction. In contrast, the majority asserts, that the anchor in this case was an integral part of the overall fiberoptic construction. Leaving aside the obvious fact that both the demolition

in *Brandt* and the anchor in this case were prerequisite preparation for future main construction activities, the majority's analysis fails to acknowledge that the anchor was not an integral part of the construction at the time of the accident since it was still being installed. Thus, the majority's argument fails.

Likewise, the majority attempts to distinguish *Wiita* by claiming that the anchor in the present case was permanently affixed to the ground and thus substantially altered real property. Yet, this is not true. The anchor could not have been permanently affixed to the ground at the time of the accident because it was still being installed. Again, the majority argument fails.

In the current case, the anchor was still being installed. It could not yet be used. The requisite "permanent" improvement is not present. As such, Minn. Stat. § 541.051 cannot apply.

### **III. MINN. STAT. §541.051 DOES NOT BAR THIS ACTION BECAUSE JAENTY'S DAMAGES WERE CAUSED BY NEGLIGENT CONSTRUCTION ACTIVITY, NOT A FAILURE OF THE ANCHOR**

The Jaenty Complaint alleges negligent construction via improper supervision and drilling for the anchor and failure to act after the gas line was punctured. (A.A. 10-20) There is no claim that the anchor itself failed and allowed a pole to fall, or otherwise was defective. Nor is it alleged that the puncturing of the gas line was part of the planned construction activities. The gas line was not being excavated and was to play no role in the construction. The gas line was not integral to the construction project. Thus, the only claims before the court are for negligent construction. As established in *Wiita*

*Supra.*, 492 N.W.2d at 272, Minn. Stat. § 541.051 does not apply to negligent construction claims.

In *Wiita*, the injured plaintiff alleged that his damages were caused by negligent supervision/operation of a crane which caused cement blocks, destined for a wall being built, to fall on him. In that case, it was conceded that the wall was an improvement to real property under Minn. Stat. § 541.051. Nevertheless the *Wiita* court held that there was no causal connection between the injuries sustained by Donald Wiita and the condition of the brick wall. It held that only the wall and not the crane was a permanent improvement to real property and that the injuries arose not from the condition of the permanent improvement, but instead from the negligent operation of the crane. *Wiita*, *Supra.* 492 N.W.2d at 272.

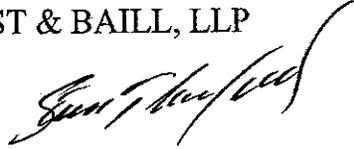
Here, there is no admission that the anchor was a permanent improvement. Indeed, just the opposite has been asserted. Moreover, like the accident in *Wiita*, here the accident was caused not by the condition of the anchor but the negligent supervision and operation of the auger drilling in the anchor and the failure to act properly once the gas main was pierced. Thus, there is no causal connection between the injuries sustained by Jaenty and the condition of the anchor. Because Jaenty's damages stem from negligent construction activities Minn. Stat. § 541.051 does not apply.

CONCLUSION

The anchor which pierced the gas line causing Jaenty's damages was not a permanent, integral part of the structure at the time of the accident. Moreover, Jaenty's damages stem not from the condition of the anchor, but rather from negligent construction activities. For these reasons, Minn. Stat. § 541.051 does not apply. The trial court and appellate majority must be overturned and this matter reinstated and remanded for further proceedings and trial at the district court.

Dated 4/28/05

YOST & BAILL, LLP

By: 

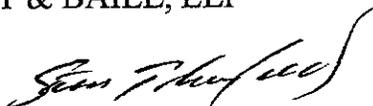
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**CERTIFICATION**

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. P. 132.01, subds 1 and 3, for a brief produced with a proportional font. The length of this brief is 2,384 words. This brief was prepared using WordPerfect 10.

Dated 4/28/05

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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).