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NO. A04-901

State of Minnesota

In Supreme Court

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.

BRIEF RESPONDENTS SIRTI, LTD., CABLE CONSTRUCTORS, INC., AND SEREN INNOVATIONS, INC.

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I. STATEMENT OF LEGAL ISSUE

Issue: Whether Jaenty's lawsuit is time-barred pursuant to Minnesota Statutes § 541.051, subd. 1(a)?

Ruling: The trial court held that Jaenty's lawsuit is time-barred pursuant to Minnesota Statutes § 541.051, subd. 1(a), and the appellate court affirmed the trial court.

Authorities: *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988)

Lederman v. Cragun's Pine Beach Resort, 247 F.3d 812 (8th Cir. 2001)

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Minnesota Statutes § 541.051, subd. 1(a)

II. STATEMENT OF CASE AND FACTS

Jaenty, Inc.'s ("Jaenty") property damage lawsuit was filed in Stearns County District Court, Seventh Judicial District. By order of April 20, 2004, Judge Paul Widick dismissed the lawsuit as time-barred under Minnesota Statutes § 541.051, subd. 1(a). The Minnesota Court of Appeals affirmed the trial court's dismissal of the lawsuit on January 11, 2005. This appeal followed. Respondents request oral argument.

Jaenty's claim arises out of a project for the construction of a cable system in St. Cloud in 1998. Cable Constructors, Inc. ("CCI") constructed the cable system for Seren Innovations, Inc. ("Seren"). Sirti Limited designed the Project for Seren and observed the construction. Guy line anchors were an essential part of the cable system, and CCI installed numerous such anchors by drilling them into the ground, leaving approximately 12 to 18 inches sticking out of the ground so that a guy line could be attached to the top of the anchor. On December 11, 1998, as one such anchor was installed essentially to its intended depth, the helix of the anchor cut an underground gas line and gas began to escape. A portion of the escaping gas migrated underground, some of which seeped into the basement of an adjacent building where it accumulated to a combustible concentration and exploded. Jaenty, which operates a Taco John's Restaurant franchise in its commercial building across the street from the explosion site, alleged that its building was damaged by the explosion.[1] Jaenty admits that it did not commence its lawsuit against

[1] Jaenty has already been fully compensated for its alleged damages by its insurer, Travelers Insurance Company ("Travelers"), so that Travelers is the real party in interest in Jaenty's lawsuit and on this appeal. Nevertheless, this brief will refer to appellant as Jaenty.

Respondents within the two-year limitations period under Minn. Stat. § 541.051, subd. 1(a), but argues that its claim is not governed by that statute of limitations.

III. ARGUMENT

A. INTRODUCTION

Jaenty acknowledges that the two-year limitations period under § 541.051, subd. 1(a) began to run on December 11, 1998, and expired on December 11, 2000, before Jaenty commenced its lawsuit against any of the Respondents. Therefore, Jaenty is reduced to arguing that the two-year limitations period set forth in § 541.051, subd. 1(a) does not apply to its lawsuit. The applicability of § 541.051, subd. 1(a) to Jaenty's lawsuit is a purely legal issue that is particularly appropriate for resolution on summary judgment. As discussed below, Jaenty's arguments are without merit, and the summary judgment order dismissing Jaenty's lawsuit against Respondents as time-barred should be affirmed.

B. APPLICABLE LAW

1. Summary Judgment Standard

Summary judgment must be granted "if the pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that *either party is entitled to judgment as a matter of law*." Minn. R. Civ. P. 56.03. Because the facts are not disputed, the focus on this appeal is upon the latter clause of the rule.

2. Standard of Review

The standard of review for an appeal of a summary judgment is well established:

> On appeal from summary judgment, the court must determine (1) whether any issues of material fact exist, and (2) whether the trial court erred in its application of the law.

In re Proposed Lock Lake Project, 528 N.W.2d 875, 877 (Minn. Ct. App. 1995). Since Jaenty has acknowledged that the material facts are undisputed, the Court's proper focus on this appeal is whether the trial court erred in applying the law. As the appellant, Jaenty has the burden of showing that the trial court erroneously applied § 541.051, subd. 1(a). *Leininger v. Anderson*, 255 N.W.2d 22, 26 (Minn. 1977)

3. Minnesota Statutes § 541.051, subd. 1(a)

The text of Minnesota Statutes § 541.051, subd. 1(a), is reproduced below for the Court's convenience, with the pertinent provisions highlighted for emphasis:

> 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 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. Date of substantial completion shall be determined by the date when construction is sufficiently completed so that the owner or the owner's representative can occupy or use the improvement for the intended purpose.

C. JAENTY'S ARGUMENTS FOR REVERSAL LACK MERIT

On this appeal, Jaenty makes two arguments in an effort to take its lawsuit out of the purview of the two-year limitations period under § 541.051, subd. 1(a). Both arguments attempt to demonstrate that Jaenty's alleged damages did not arise out of a "defective and unsafe condition of an improvement to real property." Jaenty argues (1) that there was no "permanent" improvement to real property because the anchor was not completely installed; and (2) that its damages arise from "negligent construction" rather than from a defective and unsafe condition of an improvement to real property. As discussed below, the first argument should not be considered and, in any case, both arguments are without merit.

1. There Was A "Permanent" Improvement To Real Property.

a. Jaenty's New Argument is Not Properly Before this Court.

As a preliminary matter, Respondents urge the Court to decline consideration of Jaenty's first argument because it was not raised below, either at the trial court or the Court of Appeals. This argument is based entirely upon its assertion that there was no permanent improvement to real property because the anchor had not been completely installed.[2]

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[2] It is instructive to note that, on the instant appeal, Jaenty is not even dancing with the partner that brought it to the ball. In its petition for review, Jaenty asserted that CCI was merely performing "excavation for the *future* installation of utility pole anchors" (Jaenty's Petition at 2) and that "the anchor was *never* installed" (Jaenty's Petition at 3). In its Supreme Court Brief, however, Jaenty has backed off of this clearly false statement (a dramatic misrepresentation of the facts that undoubtedly played a substantial role in securing this Court's review), and is now making the fallback argument that the anchor was not *completely* installed.

At the trial court, Jaenty raised a number of arguments, none of which included Jaenty's new assertion:

- That Jaenty's claim falls within the exception applicable to contribution and indemnity claims under § 541.051, subd. 1(b) which would allow it to commence its lawsuit up to two years after it resolved its insurance claim with Travelers rather than the normal two years after discovery of the injury;
- That Jaenty's claim falls within the exception applicable to claims against "owners or other persons in possession" under § 541.051, subd. 1(c);
- That Jaenty's claim falls within the exception applicable to claims against manufacturers and suppliers of equipment or machinery under § 541.051, subd. 1(d);
- That the insertion of the anchor was not an improvement to real property; and
- That the insertion of the anchor was not the direct and proximate cause of the gas explosion.

(Jaenty's Trial Brief at 1-4.) Nowhere in Jaenty's four-page trial brief was there any contention that the anchor was not completely installed, let alone that the extent to which the anchor had been installed provided any basis to argue that § 541.051, subd. 1(a) was inapplicable to Jaenty's claim.[3] Nor was the issue raised by Jaenty in its brief in the Court

[3] The argument in the fourth bullet point dealt with the general subject that there must be "an improvement to real property," but focused upon whether the insertion of an anchor in anticipation of installation of a fiber optic system can constitute an improvement to real property. Jaenty's argument on this point consisted of two sentences:

> The Defendants, in their papers resisting strict liability claims, characterize the incident giving rise to the explosion as "the ordinary insertion of an anchor." (See for example, pg. 26 of CCI's 10-9-03 Memorandum of Law).
>
> Jaenty, Inc. would join in that characterization and maintain that *the installation of an anchor into the ground in anticipation of installation of a fiber optic system is not an improvement to real property.*

[Jaenty's Trial Brief at 3 (emphasis added).] Far from arguing that the extent to which the anchor had been inserted provided a basis for escaping the two-year limitations period in § 541.051, subd. 1(a), Jaenty actually appeared to concede that installation of the anchor

of Appeals, which, with the exception of the last section,[4] was a verbatim rehashing of its trial court brief. (Jaenty's Court of Appeals Brief at 3-5.) Any fair review of the record shows that the issue Jaenty now focuses on was not raised below.

This Court has, on literally hundreds of occasions, upheld the long-standing rule that issues not raised below may not be reviewed by this Court. *See, e.g., Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988); *Thayer v. Am. Fin. Advisers, Inc.*, 322 N.W.2d 599, 604 (Minn.1982); *Sutton v. Great Northern Ry. Co.*, 109 N.W. 815, 816 (Minn. 1906). The principle that one must argue an issue below in order to be entitled to raise the issue before the appellate courts is a cornerstone of appellate procedure. Even where all parties are in favor of having the appellate court resolve an issue not raised below, this Court has properly resisted addressing the issue. *See Thompson v. Barnes*, 200 N.W.2d 921, 927 (Minn. 1972).

Sound public policy considerations underpin this Court's historical unwillingness to review issues not properly raised below. First, review of matters in the trial court guarantees that issues will be fully briefed and addressed before appellate review. This assures that appeals come before this Court on a complete record so that the Court has an

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was complete and only that installation of the remainder of the fiber optic system was incomplete.

[4] In the last section of its Court of Appeals Brief (at 6-7), Jaenty argued that § 541.051, subd. 1(a), did not apply because its damages arose out of negligent construction activities rather than from a defective condition of an improvement to real estate (the second argument that Jaenty makes to this Court). Although *Jaenty* had not raised that argument at the trial court, one of the other plaintiffs involved in the multiple-plaintiff summary judgment motion had raised the issue at the trial court. In contrast, *none* of the plaintiffs raised the issue concerning whether the anchor had been completely or partially installed.

opportunity to properly assess the significance of the issues at hand. Second, full examination of the issues and development of the record and issues prior to appellate review also assures that there will be no "sandbagging," no withholding of the presentation of issues for tactical advantage. Parties should not be disadvantaged by shifting arguments, defeating one or a series of arguments only to be confronted by others. Litigants also expect that issues will be presented in an orderly fashion so that they have notice of the issues that the courts are addressing. Permitting a party to abandon some arguments and adopt others at the appellate level breeds public disrespect for the legal system and the work of Minnesota's courts. Finally, limiting review to those issues properly raised below permits the Court to control its burgeoning docket. Allowing parties to raise new issues on appeal that had not been raised below would increase the burden on Minnesota's appellate courts and tax their ability to efficiently address the huge volume of appeals that they already face. This additional burden would be felt by all litigants that seek justice in Minnesota's appellate courts. Adherence to this basic rule helps the Minnesota appellate courts complete their work in a manner that is fair to all citizens. In light of the above, Respondents ask that this Court decline the opportunity to rule on this issue because it was not raised below.

b. <u>Jaenty's Argument is Not Supported by Case Law</u>

Even if the Court decides to consider this new issue, Jaenty's argument must be rejected because it finds no support in the case law. According to Jaenty, § 541.051, subd. 1(a) cannot apply to its claim because, if the anchor was not completely installed, there was no "permanent" improvement to real property. However, numerous appellate court

decisions interpreting § 541.051, subd. 1(a) make clear that this statute of limitations *does* apply where the injury arises out of an *incomplete* aspect of the construction project.

Lederman v. Cragun's Pine Beach Resort, 247 F.3d 812 (8th Cir. 2001) is one such illustrative example. In *Lederman*, Cragun's was adding a new hotel building to its resort and, as part of the construction project, hired a contractor to dig a trench so that another contractor could relocate existing communications cables that served other buildings and would also serve the new building. The plaintiff, who was walking along a pathway adjacent to the open trench, was injured when the pathway caved into the trench. The plaintiff's lawsuit, brought three years later, was dismissed as time-barred under § 541.051, subd. 1(a). The appellate court followed the earlier Minnesota appellate court decisions finding that any item (even one that is temporary and ***incomplete***, such as the unfilled trench in that case) that is "integral to a construction project constitutes an 'improvement to real property.'" *Id.* at 815.

O'Connor v. M.A. Mortenson Co., 424 N.W.2d 92 (Minn. Ct. App. 1988) is only one of several Minnesota appellate court decisions that makes the same point. In that case, a subcontractor's employee fell and was injured while attempting to descend a ***partially constructed*** stairwell at the construction site. The stairwell consisted of a metal framework, and concrete was to be later poured into the "pans" to form the stair treads. In the meantime, 2x6 plank "fillers" were to be inserted into each pan. One of the plank "fillers" was missing, causing the employee to lose his balance and fall against a wall, injuring himself. The appellate court explicitly rejected the appellant's argument--

> that the ***unfinished*** stairway missing the temporary wood filler . . . "lacks the permanency to be construed 'an improvement'" under section 541.051, subd. 1.

Id. at 94 (emphasis added).

Fiveland v. Bollig & Sons, Inc., 436 N.W.2d 478 (Minn. Ct. App. 1989) provides yet another apt example of the application of § 541.051, subd. 1(a) to an injury arising out of an incomplete condition on a construction project. The construction project in *Fiveland* consisted of the addition of a garage and basement to an existing home. One evening after the hole for the basement had been excavated, the homeowner fell into the hole and was injured. The Court of Appeals reasoned that this Court would adopt a common sense or ordinary definition of "defective" and, according to the dictionary cited by the Court of Appeals, such a definition would include the "lack or ***absence of something necessary for completeness***." *Id.* at 480 (emphasis added). Thus, the very definition of a "defective and unsafe condition of an improvement to real property" ***incorporates*** the notion that the condition may very well be ***incomplete***.

Jaenty's argument confuses the concept of "permanency" (which is discussed in some of the cases) with that of "completeness." Those cases construing § 541.051, subd. 1(a) that have mentioned "permanency" have ***not*** required that the particular component of the improvement be "*completed*." The decisions in *Lederman, O'Connor* and *Fiveland,* discussed above, make that much crystal clear. Moreover, even the decisions cited in Jaenty's brief fail to support Jaenty's argument. In none of those decisions cited by Jaenty where the concept of "permanency" is mentioned does the court equate "permanency" with "completeness." In fact, in all of the cases (except *Witta*), the

construction of the component at issue had been completed several years before the injury occurred, so the court was not even *presented* with a situation where the component was partially completed:

- *Pac. Indem. Co. v. Thompson-Yaeger, Inc.*, 260 N.W.2d 548, 554 (Minn. 1977) (fire caused by a furnace that had been installed 18 years previously);
- *Ritter v. Abbey-Etna Mach. Co.*, 483 N.W.2d 91, 93 (Minn. Ct. App. 1992) (injury caused by a steel tube mill that had been installed in manufacturing plant 20 years earlier; court described the concept of "permanency" as meaning "integral to and incorporated into the building or structure on the property," not as "complete");
- *Sartori v. Harnishifeger Corp.*, 432 N.W.2d 448 (Minn. 1988) (injury caused by crane that had been installed 20 years earlier);[5]
- Brandt v. Hallwood Mgmt. Co., 560 N.W.2d 396, 400-01 (Minn. Ct. App. 1997) (injury caused by electrical conduit that was part of the building's original construction and pre-existed the remodeling project plaintiff was working on when injured).

Witta v. Potlach Corp., 492 N.W.2d 270, 272 (Minn. Ct. App. 1992) similarly fails to support Jaenty's argument. The injury in *Witta* was caused by a load of blocks that fell while being moved by a crane. Like the other cases cited by Jaenty, there was no discussion in *Witta* about whether the blocks had been "completely" installed. In fact, *Witta* turned upon the fact that the blocks at issue had not even *begun* to be installed in

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[5] In discussing *Sartori*, Jaenty quotes a portion of the decision discussing the purpose of § 541.051, subd. 1(a), and draws the Court's attention to the inclusion of a definition of "substantial completion." (Jaenty's Supreme Court Brief at 5.) What Jaenty fails to mention, however, is that in *Sartori* this Court was discussing the purpose of the 15-year (now 10-year) *statute of repose* in § 541.05, not the *two-year limitations period.* The statute of repose, by definition, is measured from the time of substantial completion. This discussion, therefore, has no bearing upon the 2-year limitations period which begins to run when the injury was (or should have been) discovered, regardless of whether the project has been completed. (It is particularly disturbing that Jaenty should fail to note this important distinction because this same failure was brought to Jaenty's attention during its appeal to the Minnesota Court of Appeals.)

the wall for which they were intended. The wall, which had previously been partially constructed, was covered by a tarp and there was no work being done on the wall at the time of the accident. *Id.* at 270. What is especially noteworthy about *Witta*, however, is the fact that the wall, itself—in its ***partially completed*** state—constituted an improvement. *Id.* at 271-72. Clearly, there is no support in the appellate court decisions for Jaenty's argument that the concept of "permanency" is equated with the concept of "completeness."

Jaenty makes another contorted argument when it suggests that the court in *Brandt* found § 541.051, subd. 1(a) inapplicable because it was *preparatory* for construction activities that followed at some later date. (Jaenty's Supreme Court Brief at 5-6.) That argument is based upon a complete misreading of *Brandt*. The construction project in *Brandt* involved the "build-out" of a commercial office space for a new tenant. Because none of the existing improvements within the interior of the office space were suitable for the new tenant, the build-out construction project was preceded by a completely separate demolition project in which all of the improvements specific to the previous tenant (e.g., partition walls, carpet, ceiling, light fixtures, etc.) were removed, leaving an unimproved shell with only its basic electrical and mechanical systems in place. One month after the demolition project ended, the separate build-out construction project began. A carpenter who was installing partition wall studs as part of the build-out construction project was injured when he fell from his scaffold after being shocked by a high-voltage electrical line. The electrical line had been preserved during the demolition project and should have been de-energized by REC, the contractor that performed the electrical portions of the

demolition project. The Court of Appeals found that the energized electrical line was not a defective and unsafe condition of an improvement to real property for purposes of § 541.051, subd. 1(a), because, as a demolition contractor, REC had not constructed *anything* for the improvement. Thus, the court's decision was based upon the distinction between "demolition" and "construction," and not upon the fact that the demolition work was in preparation for the subsequent build-out work. As the decisions in *Lederman, O'Connor* and *Fiveland* make clear, work that precedes (and is indeed preparatory to) subsequent construction work can, indeed, constitute a permanent improvement to which § 541.051, subd. 1(a) would apply.

The illogic of Jaenty's argument becomes readily apparent when one considers how § 541.051, subd. 1(a) would be applied in the case of an injury arising out of a partially completed component of a construction project, such as the partially completed wall in *Witta*. If the partially completed wall were to collapse upon a passerby, would Jaenty argue that § 541.051, subd. 1(a) does not apply? Why should the result be different merely because the accident occurred before all of the blocks were laid? What if the reason the blocks were not all laid was that the project was abandoned before completion? Would Jaenty argue that § 541.051, subd. 1(a) still does not apply? If, on the other hand, all of the blocks in the wall had been laid but the wall was unstable because the mason failed to use enough grout or failed to install reinforcing steel in the block cores, would Jaenty argue that the failure to use enough grout or to install the reinforcing steel meant that the wall was still not "complete" and, therefore, that § 541.051, subd. 1(a) does not apply? As these hypotheticals clearly demonstrate, there is

no support in logic or the law for Jaenty's argument that § 541.051, subd. 1(a) only applies if the component of the construction is "complete."

2. Jaenty's Damages Did Not Arise From "Negligent Construction."

Jaenty's second argument is that its damages arose from "negligent construction," not from "a defective and unsafe condition of an improvement to real property." According to Jaenty, the accident was caused by negligent supervision and drilling of the anchor into the ground and failure to act with reasonable care in response to the gas leak.[6] (Jaenty's Supreme Court Brief at 6). In making this second argument, Jaenty is attempting to distract the Court's analysis from the defective and unsafe condition and, instead, to myopically refocus the Court's attention upon the various specific mistakes that allegedly were made in connection with bringing about the defective and unsafe condition and in reacting to the defective and unsafe condition. Such efforts are unavailing.

One can always dissect the causal chain into minute parts, as Jaenty has done, and find some human error that played a role in the defective and unsafe condition to real property. In ***every*** case where there is a defective and unsafe condition of an improvement to real property, there is at least one mistake that was made in the design and/or the construction of the improvement, and often there are several mistakes made by

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[6] At the outset, it should be noted that Jaenty's argument that its damages are somehow caused by a failure to warn is without merit. While a failure to warn about the gas leak might be relevant in the case of an injury to a person who could have moved out of the explosion zone, Jaenty's building could not be removed from the area affected by the explosion and Jaenty could not have protected its building from flying debris resulting from the explosion.

different parties that contribute to the defective and unsafe condition. And, in those instances where the defective and unsafe condition becomes known to one or more parties to the construction project before it becomes generally known to those who might be potentially harmed, there is also the potential for further mistakes concerning the manner in which notice of the defective and unsafe condition is disseminated. However, the existence of such particular mistakes must not be permitted to obscure the fact that the alleged injuries nevertheless do indeed arise out of a defective and unsafe condition.

Under Minnesota law, any claim that is not independent of the causal chain involving the defective and unsafe condition is governed by the limitations period applicable to the defective and unsafe condition. *See, e.g., Kline v. Doughboy Recreational Mfg. Co.*, 495 N.W.2d 435, 440-41 (Minn. Ct. App. 1993) (failure to warn claim was barred by § 541.051, subd. 1(a) because defendants, who had not undertaken any duty to warn *after* completing the pool, had no duty to warn other than in connection with manufacturing and installing the pool); *Henry v. Raynor Mfg.Co.*, 753 F. Supp. 278, 283 (D. Minn. 1990) (allegations of failure to warn of dangers that occur during construction are governed by § 541.051, subd. 1(a)—only actions that are independent of construction activities and that are in breach of a continuing duty to warn *after* completion of the construction give rise to claims not governed by 541.051, subd. 1(a)). If § 541.051, subd. 1(a) was construed to apply only where no human error played a role in bringing about the defective and unsafe condition, the statute would have no application whatsoever. Such an interpretation would violate a basic cannon of construction—that

"the legislature does not intend a result that is absurd"—and must be rejected. Minn. Stat. § 645.17.

Jaenty's reliance upon *Witta* for this second argument is misplaced. As discussed above, the plaintiff in *Witta* was injured by a load of cement blocks that fell while they were being transported by a crane so that they could later be used to continue building a wall. When the injury occurred, the blocks were *not* yet part of the structure and were not even being laid as part of the structure—the accident occurred early in the morning when no work was being performed on the block wall. The Court of Appeals held that § 541.051, subd. 1(a) did not apply because the blocks were not yet affixed to the wall when they injured the plaintiff. 492 N.W.2d at 272. The only thing that differentiated the blocks from anything else present at the construction site that could possibly cause injury (e.g., a vehicle with faulty brakes) is that the blocks were intended to be made a part of the building. The court held that that was simply not enough to make the blocks an improvement to real property. Therefore, the court held, the transporting of the blocks by the crane was merely an act of negligence that happened to have occurred on a construction site. The installation of the anchor in this case is clearly distinguishable from the crane activity in *Witta*. Like the partially completed wall in *Witta*, the anchor was installed (even if only partially) into the ground. Unlike the blocks in *Witta*, the anchor was affixed. Because the anchor constituted an improvement to real property (as discussed above), any negligence associated with the anchor's installation is merely part of the causal chain of events that is always present when there is "a defective and unsafe condition of an improvement to real property."

IV. CONCLUSION

Jaenty's lawsuit alleges damage arising out of a defective and unsafe condition of an improvement to real property. Its new argument—that there was no "permanent" improvement to real property because the anchor was not completely installed—should not be considered because it is being raised for the first time on appeal to this Court. In any case, the argument fails because it has no support in logic or law. Jaenty's second argument—that its damages arise from "negligent construction" rather than from a defective and unsafe condition of an improvement to real property—is similarly without merit. Any negligence associated with the accident is merely part of the causal chain that is always associated with accidents of this type. Consequently, Respondents respectfully request that this Court affirm the trial court's grant of summary judgment dismissing Jaenty's lawsuit as time-barred pursuant to § 541.051, subd. 1(a).

Dated: May 27, 2005. **FABYANSKE, WESTRA, HART & THOMSON, P.A.**

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No. A04-901

State of Minnesota
In Supreme Court

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.

CERTIFICATE OF BRIEF LENGTH

I hereby certify that this brief conforms to the requirements of Minn. R. App. P. 132.01, subds. 1 and 3, for a brief produced with a proportional font. The length of this brief is 4,968 words. This brief was prepared in a proportionally spaced typeface in 13 point font using Microsoft® Word 2002.

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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).