
STATE OF MINNESOTA
IN SUPREME COURT

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.

**BRIEF AND APPENDIX OF DEFENDANT-RESPONDENT
NORTHERN STATES POWER COMPANY**

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STATUTES

Minn. Stat. § 541.051 *passim*

STATEMENT OF THE ISSUE ON APPEAL

Whether an underground natural gas line is an "improvement to real property" such that claims alleging "defective and unsafe [gas line] condition[s]" are subject to Minn. Stat. § 541.051's two-year limitations period?

- The district court and the court of appeals readily concluded that § 541.051 time barred appellant's claims against Northern States Power Company (NSP).
 - *Sartori v. Harnischfeger Corp.*, 432 N.W.2d 448 (Minn. 1988).
 - *Pacific Indem. Co. v. Thompson-Yaeger, Inc.*, 260 N.W.2d 548 (Minn. 1977).
 - *Western Lake Superior Sanitary Dist. v. Orfei & Sons, Inc.*, 463 N.W.2d 781 (Minn. Ct. App. 1990), *review denied* (Minn. Feb. 20, 1991).
 - *Farnham v. Nasby Agri-Systems, Inc.*, 437 N.W.2d 759 (Minn. Ct. App. 1989), *review denied* (Minn. May 12, 1989).

STATEMENT OF THE CASE AND FACTS

The facts are undisputed.

Downtown St. Cloud is supplied with natural gas service by a system of pipelines designed and constructed by NSP. In the Summer of 1998, NSP installed a gas service line less than a block away from a fast food restaurant operated by Appellant Jaenty, Inc. d/b/a Taco John's Restaurant. The newly constructed service provided more reliable, high pressure gas supply to customers in the area. This new line was part of a larger improvement that replaced the antiquated low pressure gas distribution system that had been in place for approaching 100 years.

On December 11, 1998, a utility pole guy anchor that was being drilled into the ground struck the recently installed gas line. The metal shaft was being sunk as part of a permanent cable telecommunications project. NSP had no involvement with that construction except to locate underground utilities. NSP's "locate" was accurate. When the guy anchor pierced the pipeline, gas spewed from the rupture. The escaping gas migrated through the soil and under the pavement into the basement of an adjacent building – ultimately igniting and exploding. Debris from the blast damaged appellant's nearby building.

Appellant did not sue NSP until December 28, 2001, more than three years after the accident. (A.A. 10-20.) The complaint charges NSP with negligence.

(A.A. 15-17.) Significantly, these various lack of due care allegations all relate to an alleged flawed design of the underground gas distribution system:

- "NSP failed to formulate and implement a comprehensive emergency plan to be used in the event of a high pressure gas line rupture;"
- "NSP failed to provide adequate management, staffing and personnel to maintain, inspect and evaluate the risks of harm and resulting personal injuries, property damage, and dangers posed by high pressure gas line rupture;"
- "NSP failed to properly share its superior knowledge about high pressure gas line hazards, advise and coordinate activities with Seren and CCI;"
- "NSP failed to adequately warn and/or evacuate consumers, residents, property owners, and others at risk from the high pressure gas line rupture on December 11, 1998;"
- "NSP failed to properly design, construct, maintain, inspect and operate gas lines and other natural gas distribution components;"
- "NSP failed to terminate natural gas service in the Downtown area. . . ."
- "NSP failed in all respects to operate, maintain, distribute and control natural gas in Downtown St. Cloud. . . ."

(A.A. 16-17.) Appellant's opposition to summary judgment confirmed that NSP's supposed wrongdoing was exclusively based on the pipeline. The brief brands the gas service as "the instrumentality of the disaster." (A-4 (emphasis added).) In short, since NSP had no involvement in installing the anchor, the company is liable only if its design negligently failed to allow for safe and rapid shutdown of the system.

Significantly these accusations are distinct from the gravamen of the allegations against the respondents involved in the telecommunications project. More importantly, the claims against NSP arise from a different instrumentality than the utility pole anchor – namely the gas line. Thus the application of § 541.051 to NSP must be separately assessed. Appellant’s brief acknowledges as much by its preoccupation with the question of whether an anchor that is in the process of being installed can be regarded as an improvement to real property. In contrast, appellant never suggests that the completed gas line is not such an improvement. Indeed, appellant’s focus on the anchor’s incomplete installation effectively forecloses a contention that the completely installed and operational gas line is not an improvement to real property.

Not distinguishing between the anchor and the pipeline, the district court held, as a matter of law, that appellant's claims arose out of the defective and unsafe condition of improvements to real property. Since the cause of plaintiff's injuries had that status, Minn. Stat. § 541.051, subd. 1(a)'s two-year statute of limitations applied. (A.A. 1-9.) Having been filed too late, the lawsuit was dismissed. (*Id.*) The court of appeals agreed that the two-year limitations period barred appellant's action. (A.A. 21-30.)

NSP requests oral argument.

ARGUMENT

I. STANDARD OF REVIEW

A summary judgment is reviewed to determine whether genuine issues of material fact are in dispute and whether the law has been correctly applied. *Offerdahl v. Univ. of Minn. Hosps. & Clinics*, 426 N.W.2d 425, 427 (Minn. 1988). The facts are undisputed, so statutory interpretation is the only issue. Construction of a statute of limitations is a question of law for de novo review. *Ryan v. ITT Life Ins. Corp.*, 450 N.W.2d 126, 128 (Minn. 1990).

II. CLAIMS AGAINST NSP ARE TIME BARRED

The statute of limitations applicable to actions arising out of improvements to real property is two years. Minn. Stat. § 541.051, subd. 1(a). There cannot be any pretense about appellant's injury not being immediately discovered; yet appellant waited almost three years to sue NSP. Thus the only question for this Court to answer is whether NSP's gas line constitutes an "improvement to real property." This issue must be resolved separately from any conclusion about the status of the anchor. Unlike the telecommunications project, of which the anchor was part, gas distribution construction was not in process.

A. "Improvement to Real Property" Standard

The limitations period for real property improvements is legislated as follows:

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

§ 541.051, subd. 1(a) (emphasis added).

This Court has adopted a "'common sense interpretation' of the phrase 'improvement to real property' which would give 'effect to the plain meaning of the words of the statute without resort to technical legal constructions of its terms.'" *Sartori v. Harnischfeger Corp.*, 432 N.W.2d 448, 451 (Minn. 1988) (quoting *Pacific Indem. Co. v. Thompson-Yaeger, Inc.*, 260 N.W.2d 548, 554 (Minn. 1977)).

Hence, real property improvements are defined as "'a permanent addition to or betterment of real property that enhances its capital value and that involves the expenditure of labor or money and is designed to make the property more useful or valuable as distinguished from ordinary repairs.'" *Pacific Indem.*, 260 N.W.2d at 554 (quoting *Kloster-Madsen, Inc. v. Taft's, Inc.*, 303 Minn. 59, 63, 226 N.W.2d 603, 607 (1975)); *see also Sartori*, 432 N.W.2d at 451 (quoting same language from *Pacific Indem.* case); *Fisher v. County of Rock*, 580 N.W.2d 510, 511 (Minn. Ct. App. 1998) (same).

The *Pacific Indem.* definition was transformed into a four part test for determining whether an instrumentality of harm constitutes an "improvement to real property":

- (1) the permanent addition to or betterment of real property;
- (2) the enhancement of the property's capital value;
- (3) the expenditure of labor or money; and
- (4) making the property more useful or valuable, as distinguished from ordinary repairs.

Sartori, 432 N.W.2d at 452.

Section 541.051 has been applied to a wide variety of facilities: *Sartori*, 432 N.W.2d at 452 (overhead rail crane); *Frederickson v. Alton M. Johnson Co.*, 402 N.W.2d 794, 797 (Minn. 1987) (electric switchboards); *Pac. Indem.*, 260 N.W.2d at 554 (furnace); *Merritt v. Mendel*, 690 N.W.2d 570, 573 (Minn. Ct. App. 2005) (roofing); *Oreck v. Harvey Homes, Inc.*, 602 N.W.2d 424 (Minn. Ct. App. 1999), *review denied* (Jan. 25, 2000) (windows, roof); *Red Wing Motel Investors v. Red Wing Fire Dep't*, 552 N.W.2d 295 (Minn. Ct. App. 1996) (sprinkler system); *Metropolitan Life Ins. Co. v. M.A. Mortenson Cos.*, 545 N.W.2d 394 (Minn. Ct. App. 1996) (vapor barriers; spandrel windows); *Boyum v. Main Entrée, Inc.*, 535 N.W.2d 389 (Minn. Ct. App. 1995) (staircase); *Wittmer v. Ruegemer*, 419 N.W.2d 493 (Minn. 1988) (septic system); *Kline v. Doughboy Recreational Mfg.*, 495 N.W.2d 435 (Minn. Ct. App. 1993) (above-ground swimming pool); *Fiveland v.*

Bollig & Sons, Inc., 436 N.W.2d 478 (Minn. Ct. App. 1989) (unlit and unguarded excavation); *Horvath v. Liquid Controls Corp.*, 455 N.W.2d 60, 63 (Minn. Ct. App. 1990) (excess flow valve), *review denied* (Minn. July 13, 1990); *Citizens Sec. Mut. Ins. Co. v. Gen. Elec. Corp.*, 394 N.W.2d 167, 170 (Minn. Ct. App. 1986) (light fixture), *review denied* (Minn. Nov. 26, 1986); *Kemp v. Allis-Chalmers Corp.*, 390 N.W.2d 848, 850 (Minn. Ct. App. 1986) (electric transformer).

B. NSP's Gas Line Is An "Improvement to Real Property"

The gas line completely satisfies the *Satori* four part test.

To start with, the gas distribution system was permanent; the line was buried in the summer of 1998 as part of a larger gas distribution upgrade. The replaced system had served downtown St. Cloud for almost 100 years, and the new line was expected to have a similar useful life. The installation was fully operational months before the explosion. *See, e.g., Henry v. Raynor Mfg. Co.*, 753 F. Supp. 278, 281 (D. Minn. 1990) (garage door and door opener were "improvements to real property" because they were installed and operational when the accident occurred).

Second, the gas line enhanced the capital value of the served properties by providing a reliable energy supply. The availability of natural gas always increases property values. And the line in question did not just bring any gas supply to the

customers affected by the upgrade. As this Court recognized, high pressure service affords significant benefits:

A high pressure system is safer than a low pressure system because it is easier to regulate the pressure in the lines as each customer receives gas. In a low pressure system, property closest to the regulator may have too much pressure and those further away may have too little. Either condition is dangerous. Modern high efficiency appliances function better on a high pressure system which distributes the gas evenly.

Smith v. City of Owatonna, 450 N.W.2d 309, 314 (Minn. 1990).

Third, the installation of the gas line obviously expended labor and money. *See, e.g., Merritt*, 690 N.W.2d at 572 (installation of roof involved expenditure of labor and capital); *Sartori*, 432 N.W.2d at 452 (labor and capital expended to install overhead rail crane).

Fourth, as with any utility improvement, the gas service made the property more useful and valuable. A capital project on this scale can hardly be considered an ordinary repair. *See Sartori*, 432 N.W.2d at 452 (crane installation made property more useful by "enabl[ing] the mining operation to function more effectively"). It bears repeating – Supreme Court precedent holds that gas line improvements like these afford heightened safety, efficiency and more reliability. *See Smith*, 450 N.W.2d at 315. Under such circumstance how could the project not make the property more useful and valuable.

The two court of appeals decisions illustrate why the gas line should be regarded as an improvement to real property. The *Western Lake Superior Sanitary Dist. v. Orfei & Sons, Inc.* plaintiff sought redress for a failed wastewater treatment pipeline. 463 N.W.2d 781, 784 (Minn. Ct. App. 1990), *review denied* (Minn. Feb. 20, 1991). Finding those claims to have arisen out of the defective and unsafe condition to an improvement to real property, the district court time barred the action. *Id.* Before the appellate court, plaintiff challenged the pipeline's status as an improvement. *Id.* at 785. The court of appeals quickly disposed of that argument, concluding that "there is little doubt the pipeline comes within Minn. Stat. § 541.051." *Id.* at 785 (citing *Ocel v. City of Eagan*, 402 N.W.2d 531 (Minn. 1987); *Calder v. City of Crystal*, 318 N.W.2d 838 (Minn. 1982); *Capitol Supply Co. v. City of St. Paul*, 316 N.W.2d 554 (Minn. 1982)).

The court of appeals reached the same conclusion when asked to decide whether a grate cover over a subsurface auger was a real property improvement. *Farnham v. Nasby Agri-Systems, Inc.*, 437 N.W.2d 759, 761-62 (Minn. Ct. App. 1989), *review denied* (Minn. May 12, 1989). The *Farnham* plaintiff stepped into a grain auger and was injured, but his action was found to be foreclosed. *Id.* at 760. On appeal, the plaintiff argued that the removability of the grate cover should result in a different conclusion. *Id.* at 761. The court disagreed, ruling that the grate cover and the pipes of which it was composed were a "critical part of the

auger system," and therefore, a "permanent part of the auger system." *Id.* at 761-62.

The judicial acceptance of a wastewater treatment pipeline and metal grate pipes as improvements to real property strongly support the conclusion that a natural gas pipeline should be similarly characterized.

C. Appellant's Claims Against NSP Arise Out of the Gas Line

Although no precedent defines the phrase "arise out of" in reference to § 541.051, the phrase has been broadly construed in other contexts. *See, e.g., Onvoy, Inc. v. SHAL, LLC*, 669 N.W.2d 344, 352 (Minn. 2003) (broadly construing "arising out of" language in determining arbitrability); *Faber v. Roelofs*, 311 Minn. 428, 436-37, 250 N.W.2d 817, 822 (1977) (broadly construing "arising out of" in insurance policy); *Weidenbach v. Miller*, 237 Minn. 278, 284, 55 N.W.2d 289, 291 (1952) (broad construction of "arising out of" for employment injury determination).

Appellant's claims against NSP certainly "arise out of" the gas line. The complaint condemns NSP for installing a defective and unsafe distribution system. (A.A. 16-17.) These allegations are based upon two supposed design flaws. First, NSP is blamed for not installing excess flow valves. According to plaintiffs, this failure rendered the line unsafe because gas flow would not automatically shut off in the event of a line rupture. Second, NSP's gas distribution system is said to have

included too few emergency shut-off valves. Because of these supposed design defects, appellant argued before the district court that the gas line was "the instrumentality of the disaster." (A-4.)

The absence of excess flow and emergency shut-off valves compel the conclusion that negligence claims against NSP arise out of the purportedly defective and unsafe condition of the gas line. After all, NSP did not participate in the anchor installation undertaking that damaged the gas line. Thus in order to recover appellant must show that NSP's gas line was defective and unsafe because the system could not promptly stop the escape of gas after being damaged by external forces. Section 541.051, subd. 1(a) forecloses the pursuit of such claims after two years.

D. Appellant Never Alleged Negligent Construction

1. Reversals of Positions on Appeal is Improper

Appellant attempts to avoid § 541.051 by arguing that its injuries were caused by "negligent construction activities," and not an improvement to real property. App. Br. at 6-7. But the opposite position has already been articulated regarding NSP. The complaint asserts that the gas distribution system was defective. (A.A. 16-17.) Indeed, the gas line was said to be the "instrumentality of the disaster." (A-4.) For appellant to now reverse course and argue that its claims, in fact, do not arise out of a defectively designed and installed gas line is improper.

See Thiele v. Stich, 425 N.W.2d 580, 582 (Minn. 1988) (new arguments not considered on appeal); *Minnesota Mut. Fire and Cas. Co. v. Retrum*, 456 N.W.2d 719, 723 (Minn. Ct. App. 1990) (same). Appellant is bound by previous contentions about the completed gas line's unsafe condition.

2. The Line Was Integral to the Upgraded System

Despite Appellant's assertions, the gas line was an integral part of a larger improvement undertaken to replace the existing low pressure system. Section 541.051 has been consistently applied when claims arise out of integral parts of construction projects. *See, e.g., Lederman v. Cragun's Pine Beach Resort*, 247 F.3d 812, 815 (8th Cir. 2001) (trench dug next to walkway constituted an "improvement to real property" because the excavation was integral to the construction project as a whole); *Peterson v. Indus. Equities, L.L.P.*, No. C0-01-1275, 2002 WL 233665, at *2 (Minn. Ct. App. Feb. 19, 2002) (A-6) (dirt piled to facilitate curb and gutter installation constituted "improvement to real property" because it was "an integral part of the overall construction process"), *review denied* (Minn. May 14, 2002); *see also Kemp*, 390 N.W.2d at 850-51 (whole improvement and constituent parts not distinguished for purposes of determining whether a particular constituent part is an improvement to real property). The very nature and purpose of a gas distribution system makes each line an integral part of the overall upgrade project.

3. The Gas Line's Separate Installation from the Cable Project is Immaterial

Appellant urges that the gas system should not be regarded as an improvement to real property because the line was not installed as part of cable project. *See* App. Br. at 6. The attempted distinction is fatuous. Section 541.051 has barred claims arising out of facilities that were not part of the construction project itself, but nonetheless contributed to a plaintiff's injury. *See, e.g., Lederman*, 247 F.3d at 818-21 (claim arising out of collapse of structure that was not part of the project time barred because the pathway was undermined during construction); *Griebel v. Andersen Corp.*, 489 N.W.2d 521, 522-23 (Minn. 1992) (§ 541.051 applied to a defective patio condition that permitted flies to enter home); *Ocel*, 402 N.W.2d at 534 (§ 541.051 applied to water damage in newly built home resulting from storm water discharge into pre-existing storm sewer).

Again appellant has characterized the gas line as the very "instrumentality of the disaster." (A-4.) While the pipe was not involved in the cable system installation, appellant, nonetheless, contends that the gas line contributed to its injury. As such, claims against NSP are subject to § 541.051.

4. Appellant's Authority Misses the Mark

As the court of appeals correctly recognized, the two cases upon which appellant relies are inapposite and factually distinguishable.

Brandt v. Hallwood Mgmt. Co. involved the remodeling of commercial office space following the removal of existing improvements. 560 N.W.2d 396 (Minn. Ct. App. 1997). The demolition work proceeded first, and a subcontractor was retained to de-energize the electrical system. *Id.* at 397. Later the plaintiff's employer arrived to build out the new improvements. *Id.* at 398. The plaintiff was electrocuted by an improperly de-energized line. *Id.* The plaintiff's suit against the subcontractor and the property manager was found to be time barred. *Id.*

The court of appeals framed the issue as follows: "The question presented in this appeal is whether an individual performing demolition work in anticipation of remodeling work is covered by the protection of Minn. Stat. § 541.051." *Id.* at 399. After examining legislative history and intent, the court excluded demolition from the statutory definition of "construction." *Id.* at 400. Moreover, the live electrical conduit was not an "improvement" for the purposes of § 541.051. *Id.* at 400-01.

The *Brandt* decision was based on the subcontractor's negligent de-energization, not the improvement of the leasehold. Moreover, the Eighth Circuit noted, "the *Brandt* court accepted, at least in dicta, that part of an improvement need not be permanent to be covered by § 541.051, as long as it is an 'integral part of the construction.'" *Lederman*, 247 F.3d at 815. In sum, *Brandt* provides no guidance to the assessment of a claim arising out of a fully operational gas

distribution system. The gas line was not being torn out, and the gas was supposed to be flowing.

Wiita v. Potlatch Corp., 492 N.W.2d 270 (Minn. Ct. App. 1992) is similarly inapposite.¹ The *Wiita* plaintiff was injured after cement blocks fell from a crane. *Id.* at 270. Plaintiff sued for negligent supervision and negligent crane operation. *Id.* at 271. The defendant responded that the injuries were caused by the cement blocks, which were part of a permanent fire wall construction project. *Id.* at 272.

The court of appeals regarded the fire wall as an "improvement to real property" and subject to § 541.051; nonetheless, the cement blocks were not "permanently affixed to the wall when they injured [the plaintiff]." *Id.* Thus the wall – not the crane or the cement blocks – was the improvement. *Id.* Since there was no "causal connection between [plaintiff's] injury and the condition of the improvement to real property," § 541.051 did not apply. *Id.*

Unlike in *Wiita*, NSP's gas line was complete long before the explosion. The complaint alleges a causal connection between the property damage and

¹ Appellant failed to rely upon *Wiita* either before the district court or the court of appeals. This Court must, therefore, disregard newfound appellate precedent. Arguments raised for the first time at this level are not countenanced. *Thiele*, 425 N.W.2d at 582; *Hollerman v. F. H. Peavey & Co.*, 269 Minn. 221, 232, 130 N.W.2d 534, 542 (1964). This Court also does not review an issue raised generally below, but argued under a new theory on appeal. *Thiele*, 425 N.W.2d at 582; *Retrum*, 456 N.W.2d at 723.

permanently buried gas line. (A.A. 14-17.) Accordingly, *Wiita* does not provide any support for Appellant's argument.

III. THE GUY ANCHORS WAS AN IMPROVEMENT TO REAL PROPERTY

The other respondents were part of the fiber optic construction project involving the placement of guy anchors. NSP did not participate in that undertaking. The cable project participants have fully briefed the applicability of § 541.051 to the anchors; NSP will not repeat those arguments. Nevertheless, NSP agrees that the court of appeals correctly concluded that the utility pole supports independently constitute an "improvement to real property." Inasmuch as appellant's claims arise out of the installation of the anchors, § 541.051 required the complaint against all the respondents to be served within two years of the explosion. But regardless of whether an anchor in the process of being installed constitutes an improvement to real property, a completed, functioning gas distribution system certainly does.

IV. "FAILURE TO WARN" ARGUMENTS FAIL

In an attempt to elude § 541.051's limitation period, appellant argued before the court of appeals that NSP negligently failed to warn about the potential danger of the gas line. (A-8-19.) Appellant's brief, however, did not raise that argument before this Court; therefore the issue is waived. *See In re Bieganowski*, 520 N.W.2d 525, 529 (Minn. Ct. App.), *review denied* (Minn. Oct. 27, 1994) (failure to

brief an issue waives the argument); *Balder v. Haley*, 399 N.W.2d 77, 80 (Minn. 1987). Regardless, Appellant's argument is fatally flawed for several reasons.

First, just like any other negligence cause of action, a duty to warn claim requires a causal connection between the alleged failure to warn and the injury sustained. *Nguyen v. Nguyen*, 565 N.W.2d 721, 724 (Minn. Ct. App. 1997); *Krein v. Raudabough*, 406 N.W.2d 315, 320 (Minn. Ct. App. 1987). Appellant could never prove proximate causation.

Appellant has asserted harm to property, not personal injury, claims. (A.A. 12-13.) Even if appellant had been immediately notified about the gas leak, the evidence establishes that the building could not have been protected. Simply put, the explosion could not have been prevented and the very same property damage would have been caused regardless of any warning. The blast, and not NSP's failure to warn, caused debris to be blown onto appellant's building. Unlike people, the building could not have been evacuated, and once the gas line was hit the explosion was inevitable. Thus a failure to warn claim has no application to this action. Hence this theory cannot vitiate the application of § 541.051.

Furthermore, appellant utterly failed to proffer any support for a duty to warn breach. Appellant merely stated in its court of appeals brief, without further elaboration, that "Plaintiffs' damages were caused . . . by the Defendants' negligence . . . in failing to notify and warn the residents in the vicinity of the

potential danger." (A-18.) The absence of factual support dooms the argument. *See DLH, Inc. v. Russ*, 566 N.W.2d 60, 69-71 (Minn. 1997) (party must produce "substantial evidence" to support claims; it is not enough to rest on mere averments in the pleadings). Indeed, an assignment of error based on mere assertion and not supported by argument or authorities is waived. *Schoepke v. Alexander Smith & Sons Carpet Co.*, 290 Minn. 518, 519, 187 N.W.2d 133, 135 (1971).

Finally, even if a duty to warn was implicated, that obligation arose only because of the alleged negligence that led to the gas line strike. The duty to warn claim cannot exist independently of the defective construction claim. And because one claim is time-barred by § 541.051, the other must be as well. *See Lederman*, 247 F.3d at 819 ("[A]lthough Minnesota courts have allowed failure to warn claims to go ahead in the improvement to real property context, these cases involved instances where the defendant had taken on a continuing duty to warn after the improvement to real property was substantially completed") (quoting *Henry*, 753 F. Supp. at 283); *Kline*, 495 N.W.2d at 440-41 (duty to warn claim which "arose solely from the manufacture and installation" of improvement to real property was governed by § 541.051's two-year statute of limitations). Thus Appellant cannot avoid § 541.051, subd. 1(a)'s two-year statute of limitations by inventing a factually untenable failure to warn claim.

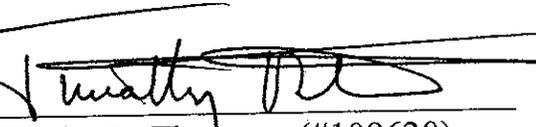
CONCLUSION

Appellant's arguments should meet exactly the same fate here as they did before the district and appellate courts. The claims against NSP arise out of a defective and unsafe condition of an improvement to real property – the underground gas line. As such, Appellant's claims are subject to Minn. Stat. § 541.051's two-year statute of limitations. This Court can apply § 541.051 to NSP regardless of the statute of limitations fate of the other defendants – different conduct is involved.

Appellant's failure to sue NSP within two years of the explosion bars the action. None of appellant's arguments or attempted distinctions can save the claim against NSP from the consequences of the delay. The decisions below should be affirmed.

Dated: May 31, 2005

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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).