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NO. A04-1816

State of Minnesota
In Supreme Court

State Farm Fire and Casualty, Joan Hernlem,
and Auto Owners Insurance Company

Respondents,

vs.

Aquila, Inc., d/b/a People's Natural Gas, f/k/a UtiliCorp United Inc.,
d/b/a People's Natural Gas/Energy One,

Appellant,

and

Northern Pipeline Construction Company,

Defendant.

APPELLANT'S BRIEF AND APPENDIX

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STATEMENT OF ISSUES

1. **Is an underground natural gas pipeline system an "improvement to real property" for purposes of Minn. Stat. § 541.051 even if a utility company owns and controls the pipeline?**

The trial court correctly held that the statute of repose for improvements to real property applied to the undisputed facts of this case and barred the claim; a split court of appeals panel reversed.

Apposite Law:

Minn. Stat. § 541.051
Pacific Indem. Co. v. Thompson-Yaeger, Inc., 260 N.W.2d 548 (Minn. 1977)
Patton v. Yarrington, 472 N.W.2d 157 (Minn. App. 1991)
Western Lake Superior Sanitary Dist. v. Orfei & Sons, Inc., 463 N.W.2d 781 (Minn. App. 1990)

2. **For purposes of subdivision 1(c) of Minn. Stat. § 541.051, can ongoing negligence of a utility company simply be presumed, in the absence of any evidence of negligence?**

The trial court held that on the undisputed facts in this record, there was no genuine issue of material fact to support a claim against Aquila for ongoing negligence; a split court of appeals panel reversed.

Apposite Law:

Minn. Stat. § 541.051
Pacific Indem. Co. v. Thompson-Yaeger, Inc., 260 N.W.2d 548 (Minn. 1997)
DLH, Inc. v. Russ, 566 N.W.2d 60 (Minn. 1997)
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STATEMENT OF THE CASE AND THE FACTS

This is an appeal from an order of the Olmsted County District Court, Honorable Kevin A. Lund presiding, granting summary judgment on all claims. A divided court of appeals panel reversed. This Court granted further review.

The facts material to the disposition of plaintiffs' claims are entirely undisputed:

Hallmark Terrace Trailer Park (hereinafter "Hallmark Terrace") is a mobile home park in Rochester, Minnesota. (A. 24) Before 1990, the residences of Hallmark Terrace were served by a network of propane pipelines, which was owned by People's Natural Gas (hereinafter "Aquila"). (A. 38) The main lines and the service lines were made of steel. (Id.)

In 1990, when natural gas became available in the area, Aquila decided to replace the propane system with a natural gas system. (Id.) Aquila hired Northern Pipeline Construction Company (hereinafter "Northern Pipeline") to build the new pipeline system using polyethylene piping. (A. 38-9) According to the work order, the replacement was done, in part, because of the hazardous location of the existing propane lines. (A. 41) Once the new pipeline system was installed, the old, steel propane system was completely abandoned. (A. 39)

The construction began in November 1990 and was completed in December. (A. 38-9) No further maintenance or repairs were performed on the new pipeline network. (A. 39)

Installation and construction of the new natural gas pipeline at Hallmark Terrace involved substantial labor and costs. (Id.) The project required the construction of a

complicated network of piping, valves, and other fixtures, including approximately 4,075 feet of new pipeline. (A. 39, 42) Consequently, a crew of Northern Pipeline workers spent several weeks on the improvement project. (A. 38-9) By its completion in December 1990, the construction and improvement project cost over $21,400.00. (A. 39, 41-2, 44)

The improvement was designed to extend the useful life of the new natural gas system and to improve its performance over that of the original steel pipeline. (A. 38-9) As a result of the installation of the new natural gas pipeline network, the usefulness and value of the individual residences at Hallmark Terrace increased, as did the usefulness and value of the real estate development as a whole. (Id.) Because of the installation, Hallmark Terrace had a more advanced, more efficient, and more reliable gas pipeline system servicing each of its residences. (Id.) Hallmark Terrace's ability to safely provide gas service to its tenants was markedly improved. (Id.) As designed, the new pipeline allowed for years of uninterrupted, maintenance-free service. (Id.)

In early 2002, more than eleven years after completion of the natural gas system, Hallmark Terrace hired Robert Sauer, doing business as Rochester Drain-Rite (hereinafter "Drain-Rite") to clear sewer drains blocked by tree roots. (A. 45) Drain-Rite planned to use a trap-and-drain auger to unclog the sewer lines. (Id.) At that time, none of the parties knew that, during the 1990 construction, a section of the polyethylene pipeline had inadvertently been pushed through a section of the clay tile sewer line by Northern Pipeline. (Id.) On February 13, 2002, Drain-Rite's auger struck and ruptured the section of pipeline that had been inadvertently installed through the sewer line,

causing natural gas to migrate through the sewer pipes and into several homes at Hallmark Terrace. (Id.) The gas built up and ignited, resulting in an explosion and fire. (Id.)

Plaintiffs, State Farm Fire and Casualty, Auto Owners Insurance Company, and Joan Hernlem (collectively hereinafter "Plaintiffs") filed suit against Aquila, Northern Pipeline, and Drain-Rite.[1] (Amended Complaint, A. 23-32). After discovery, Aquila and Northern Pipeline filed motions for summary judgment, arguing that Plaintiffs' claims against them were barred by Minnesota Statute section 541.051, which imposes a ten year period of repose on all causes of action arising out of a defective or unsafe condition in an improvement to real property. Plaintiffs filed a cross-motion for summary judgment, arguing the statute of repose was inapplicable because the new natural gas pipeline network was not an improvement to real property, and that Aquila and Northern Pipeline should be excluded from the protections of the statute under subdivision 1(c), which creates an exception for claims arising out of the *ongoing negligence* of owners or persons in possession of an improvement to real property.

The district court applied Minn. Stat. § 541.051, granted the motions of Aquila and Northern Pipeline, and dismissed Plaintiffs' claims. (District Court Order and Memorandum, A. 47-65) In doing so, the district court determined that the new natural gas pipeline system was an improvement to real property. (Id.) The court then determined that Plaintiffs' alleged damages arose out of the defective and unsafe

[1] Plaintiffs later settled with Drain-Rite.

condition of the pipeline. (Id.) Finally, the court considered subdivision 1(c) of the statue of repose and concluded that Aquila did not have notice of any unsafe condition and that Plaintiffs had failed to present any evidence that Aquila was negligent in the maintenance, operation, or inspection of the pipeline. Therefore, the exception did not apply. (Id.)

Plaintiffs appealed the district court's decision. In an opinion filed June 14, 2005, a 2-1 majority of the court of appeals panel concluded that the natural gas pipeline network was not an improvement to real property with regard to Aquila, but that it was an improvement to real property with regard to Northern Pipeline for purposes of applying the statute of repose. (Court of Appeals Decision, A. 1-20). The majority opinion also held that the district court should have presumed ongoing negligence on the part of Aquila sufficient to withstand summary judgment--even though there was no such evidence in the record. (Id.)

This Court granted Aquila's petition for review of the court of appeal's decision on August 24, 2005. (A. 21)

ARGUMENT

Standard Of Review

On appeal from summary judgment, this Court considers whether there are any genuine issues of material fact and whether the trial court erred in its application of the law. State by Cooper v. French, 460 N.W.2d 2, 4 (Minn. 1990); see also Minn. R. Civ. P. 56.03. In doing so, the Court views the evidence in the light most favorable to the party against whom summary judgment was granted. Offerdahl v. Univ. of Minn., 426 N.W.2d 425, 427 (Minn. 1988).

The construction and applicability of a statute of limitation or repose is a question of law subject to de novo review. Benigni v. County of St. Louis, 585 N.W.2d 51, 54 (Minn. 1998); Ryan v. ITT Life Ins. Corp., 450 N.W.2d 126, 128 (Minn. 1990). Therefore, the district court's grant of summary judgment should be sustained unless this Court concludes the district court improperly interpreted or applied the statute of repose.

SUMMARY OF ARGUMENT

On the undisputed facts in this record, Aquila's construction of a new polyethylene natural gas pipeline network was an improvement to real property for purposes of Minn. Stat. § 541.051. This improvement to real property was completed in December of 1990 and Plaintiffs did not sustain their alleged damages until 2002. In response to the summary judgment motion, Plaintiffs failed to present *any* evidence of negligence which might have excluded Aquila from the protections of Minn. Stat. § 541.051. Therefore, the district court properly applied Minn. Stat. § 541.051 and barred Plaintiffs' claims.

Ignoring binding and controlling authority, the majority opinion below reversed the district court, holding that the definition of an "improvement to real property" depended upon the status of the party invoking the statute of repose. The majority's error is plain--the exact same construction project cannot be an improvement to real property for one class of defendants and not another. To the contrary, because the new natural gas pipeline network falls squarely within this Court's definition of an improvement to real property, Plaintiffs' claims against both Northern Pipeline and Aquila are barred.

The majority opinion below also erred when it concluded that Plaintiffs had established a prima facie claim of negligent operation, maintenance, or inspection against Aquila. The majority reached this conclusion despite that fact that Plaintiffs did not submit *any* evidence of ongoing negligence on the part of Aquila. To arrive at this erroneous opinion, the majority improperly held that an unsubstantiated, generalized averment in Plaintiffs' complaint was sufficient to establish an exception to the statute of repose. The majority then compounded the error by inappropriately presuming ongoing negligence on the part of Aquila.

In sum, the majority of the court of appeals erred in construing and applying Minn. Stat. § 541.051 in direct contravention of this Court's precedent. The court of appeals also erred when it created an "issue of fact" where there was no evidence to support the "fact" or any presumption flowing from that "fact." On both issues, the dissenting opinion of Judge Kalitowski clearly set forth the errors committed by the majority. For these reasons, the decision of the court of appeals should be reversed, and the judgment entered in the district court should be affirmed.

ARGUMENT

I. PLAINTIFFS' CLAIMS ARE BARRED AS A MATTER OF LAW BY MINN. STAT. § 541.051 BECAUSE THE DAMAGES ALLEGED WERE SUSTAINED MORE THAN TEN YEARS AFTER COMPLETION OF THE IMPROVEMENT TO REAL PROPERTY

Plaintiffs seek compensation for property damage allegedly sustained as a result of a natural gas leak and ensuing fires that occurred at Hallmark Terrace on February 13, 2002. Because Plaintiffs' claims against Aquila arise out of the allegedly defective or unsafe installation of a new polyethylene pipeline system in 1990, and the incident giving rise to this action did not occur until 2002, Plaintiffs' claims are barred as a matter of law by the applicable statute of repose, Minn. Stat. § 541.051.

A. Interpretation of Minn. Stat. § 541.051

In 1980, in response to this Court's ruling in Pacific Indemnity Co. v. Thompson-Yaeger, Inc., 260 N.W.2d 548, 554-55 (Minn. 1977), the protections offered by Minnesota's statute of repose were expanded to apply to owners of real property improvements. See Act of April 7, 1980, ch. 518, §§ 2-4, 1980 Minn. Laws 595-96; see also Olmanson v. LeSueur Cnty., 693 N.W.2d 876, 883 (Minn. 2005).[2] In relevant part, Minnesota's statute of repose now provides as follows:

> (a) Except where fraud is involved, no action by any person in contract, tort, or otherwise to recover damages for any

[2] Statutes of repose are favored in the law as a way of eliminating stale claims and limiting excessive litigation. A typical statute of repose will specify a set number of years after which an action can no longer be brought. Hodder v. Goodyear Tire and Rubber Co., 426 N.W.2d 826, 830 (Minn. 1988). See also Sartori v. Harnischfeger Corp., 432 N.W.2d 448, 454 (Minn. 1988) (upholding the legislative objective of Minn. Stat. § 541.051--to avoid litigation and stale claims, and indicating the statute should not be lightly disregarded absent a clear abuse).

> injury to property, real or personal, ... arising out of the defective and unsafe condition of an improvement to real property...shall be brought against any person performing or furnishing the design, planning, supervision, materials, or observation of construction or construction of the improvement to real property or against the owner of the real property more than two years after discovery of the injury ...
> ... nor, in any event shall such cause of action accrue more than ten years after the substantial completion of the construction.[3]

Minn. Stat. § 541.051; (emphasis added).

When determining the meaning of a statute, this Court is guided by several principles of statutory construction. The Court's primary objective is to interpret and construct laws so as to ascertain and effectuate the legislature's intent. Mankato Citizens Tel. Co. v. Comm'r of Taxation, 145 N.W.2d 313, 317 (Minn. 1966); Minn. Stat. § 645.16 (2004). Minnesota courts give effect to the plain meaning of a statute's words, without resort to technical legal constructions of its terms. Owens v. Walter Gremlin Co., 605 N.W.2d 733, 736 (Minn. 2000).

Specific to this statute of repose, the Minnesota courts "have adopted a common sense definition of 'improvement to real property,' specifically rejecting technical legal constructions such as those found in the law of fixtures." Moon v. Rexnord, Inc., 659 F.Supp. 988, 989 (D. Minn. 1987). Thus, for purposes of Minn. Stat. § 541.051, this Court has adopted the following definition of an improvement to real property:

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[3] While there is no legislative history detailing the exact purpose of Minn. Stat. § 541.051, at least 21 other jurisdictions have enacted similar statutes of repose, and this Court has concluded that enactment of this statute was a legislative reaction to the erosion of the privity of contract doctrine, which threatened to expand the liability of construction professionals. Olmanson, 693 N.W.2d at 882.

> 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 Indemnity, 260 N.W.2d at 554 (quoting Kloster-Madsen, Inc. v. Tafi's, Inc., Minn. 226 N.W.2d 603, 607 (Minn. 1975)).

Moreover, as the district court noted, Black's Law Dictionary has defined "improvement" to include: "An expenditure to extend the useful life of an asset or to improve its performance over that of the original asset...." BLACK'S LAW DICTIONARY 757 (6th ed. 1990). (A. 54) Illustrative examples provided in that definition include "any permanent structure or other development, such as a street, sidewalks, sewers, utilities etc...." Id.

Under either of these definitions, the construction and installation of a new natural gas pipeline system is an "improvement to real property" for purposes of Minn. Stat. § 541.051, and in prior decisions the court of appeals has recognized as much. See Western Lake Superior Sanitary Dist. v. Orfei & Sons, Inc., 463 N.W.2d 781, 785 (Minn. App. 1990) (indicating that a pipeline falls within Minn. Stat. § 541.051); see also Wittmer v. Ruegemer, 402 N.W.2d 187, 189 (Minn. App. 1987) (determining a septic system is an improvement), *review granted, aff'd in part, rev'd in part*, 419 N.W.2d 493 (1991).

B. The construction and installation of a new natural gas pipeline was an improvement to real property

Following Pacific Indemnity, Minnesota courts have repeatedly interpreted the phrase "improvement to real property" broadly to bar claims related to a wide variety of

improvements. A survey of Minnesota decisions illustrates items that have been held to be an "improvement to real property," despite the fact that each improvement (a) was less permanent, (b) cost less, (c) required less labor, and (d) did less to increase the property's value and utility than did the installation of a new natural gas pipeline system in this matter.

For example, in Patton v. Yarrington, 472 N.W.2d 157 (Minn. App. 1991), the Minnesota Court of Appeals held that the installation of two smoke detectors at a duplex was an improvement to real property. Id. at 159. Requiring relatively little explanation, the court observed that the smoke detectors were a permanent addition to the property and that their installation required the expenditure of both time and money. Id. at 160. Further, the "addition of the smoke detectors placed the duplex in conformance with Minneapolis requirements for rental property, thereby making the property more useful and valuable by enabling its owner to use or sell it as rental property." Id.; see also Farnham v. Nasby Agri Sys., Inc., 437 N.W.2d 759 (Minn. App. 1989) (applying similar reasoning in finding that removable pipes covering a grain auger installed below ground level constituted an improvement to real property within the meaning of the statute of repose).[4]

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[4] For additional decisions finding "improvements to real property," see: Lederman v. Cragun's Pine Bean Resort, 247 F.3d 812 (8th Cir. 2001) (applying Minnesota law; temporary construction trench); Nemechek v. City of Byron, 1999 WL 1138441 (Minn. App. 1999) (storm sewer system) (A. 71); Kemp v. Allis-Chamlers Corp., 390 N.W.2d 848 (Minn. App. 1986) (electrical transformer and cable); Nolan & Nolan v. City of Eagan, 673 N.W.2d 487, 496 (Minn. App. 2003) (storm sewer system); Lutz v. J.R. Bruender Constr., Inc., No. C5-93-2097, 1994 WL 121636 (Minn. App. 1994) (trench for installation of sewer and water pipes) (A. 73); Wittmer v. Ruegmer, 402 N.W.2d 187

Decisions under similar statutes in other jurisdictions also confirm that pipelines of the type installed at Hallmark Terrace are properly classified as "improvements to real property." For example, the Eighth Circuit held that an underground pipeline that carried liquified petroleum gas was an improvement to real property within the meaning of the South Dakota statute of repose. Van Den Hul v. Baltic Farmers Elevator Co., 716 F.2d 504, 507-08 (8th Cir. 1983). The appellate court explained, "the installation of the underground pipe enhanced the use and value of the property, was permanent, and involved the expenditure of labor and money." Id. at 508.

In United States Fire Insurance Co. v. E.D. Wesley Co., 313 N.W.2d 833 (Wisc. 1982), the trial court applied Wisconsin's statute of repose, and dismissed plaintiffs' action against two corporations that had designed, constructed, and installed a pipeline on an oil company's property. Id. at 834. The trial court found, as a matter of law, that the pipeline was an improvement to real property for purposes of the statute of repose. Id.

Both the Wisconsin Court of Appeals and Supreme Court affirmed this conclusion. Id. at 835. In doing so, the Supreme Court of Wisconsin held, as a matter of law, that once the pipeline was connected to equipment which was located on the oil

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(Minn. App. 1987) (septic system); Minn. Mut. Fire & Cas. Co. v. Retrum, 456 N.W.2d 719 (Minn. App. 1990) (fuel oil tank); Lovgren v. Peoples Elec. Co., Inc., 368 N.W.2d 16 (Minn. App. 1985) (transformer vault wired to a furnace); Nitz v. David Nitz, Inc., 403 N.W.2d 652, 654 (Minn. App. 1987) (bird feeder support post attached to deck); Ford v. Emerson Elec. Co., 430 N.W.2d 198, 200 (Minn. App. 1988) (water heater); and Allianz Ins. Co. v. PM Servs. of Eden Prairie, Inc., 691 N.W. 2d 79 (Minn. App. 2005) (water-purification system); Henry v. Raynor Manufacturing Co., 753 F. Supp. 278 (D. Minn. 1990) (garage door and opener); Lietz v. Northern States Power Co., No. C-1-0057, 2005 WL 44905 (Minn. App. Jan. 11, 2005) (utility pole anchor) (A. 79).

company's real property, the pipeline became an improvement to the oil company's real property. Id. While the court noted questions about the effective date of the statute, there was no question that the pipeline was an "improvement to real property" according to the common usage definition of "improvement," the same definition used by Minnesota courts.[5] Id.

Joining Minnesota's neighbors, the Supreme Courts of New Mexico, New Jersey, and South Carolina have all held that underground gas lines constitute an improvement to real property for the purposes of applying statues of repose similar to the Minnesota statute. See Delgadillo v. City of Socorro, 723 P.2d 245 (N.M. 1986) (gas explosion involving gas line replacement and relocation project); Ebert v. South Jersey Gas Co., 723 A.2d 599 (N.J. 1999) (natural gas line explosion); South Carolina Pipeline Corp. v. Lone Star Steel Co., 546 S.E.2d 654 (S.C. 2001) (natural gas line explosion).[6] In reaching its conclusion, each court found the pipeline at issue made the property more valuable, involved the investment of labor and money, and was permanent. Delgadillo, 723 P.2d at 247-48; Ebert, 723 A.2d at 601; South Carolina Pipeline, 546 S.E.2d at 657.

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[5] "A permanent addition to or betterment of real property that enhances its capital value and that involves the expenditure of labor or money and that is designed to make the property more useful or valuable as distinguished from ordinary repairs." Id. at 835.

[6] Courts in other jurisdictions have also interpreted statutes of repose similar to Minn. Stat. § 541.051 to apply to underground installations of gas lines or service lines. See Wash. Nat. Gas Co. v. Tyee Constr. Co., 611 P.2d 1378 (Wash. App. 1980) (removable underground power lines); Pruitt v. Catalytic Co., 746 F.2d 1478 (6th Cir. 1984) (applying Ohio law; oil pipeline).

C. The undisputed facts established that construction of the new natural gas pipeline network was an improvement to real property

In the court below, Plaintiffs conceded the material facts related to the installation of the new natural gas pipeline. Installation of the new pipeline system involved the design, placement, connection, and underground burial of 4,075 feet of pipeline, valves and fixtures. Obviously, abandonment of the steel pipeline and the construction of the polyethylene pipeline system involved a large expenditure of labor and money.[7] The project took a crew several weeks to complete and cost over $21,400.00.

Installation of the new pipeline enhanced the safety, efficiency, and reliability of gas service at Hallmark Terrace. There is no dispute that the new system was built to extend the useful life of the natural gas system and to improve its performance over that of the original steel pipeline system. Based on the undisputed facts presented by the parties, the district court found that the polyethylene pipeline system enhanced Hallmark Terrace's capital value and its ability to safely and efficiently provide natural gas to its residents. (A. 56) Because of the installation, Hallmark Terrace had a more advanced, more efficient, and more reliable natural gas pipeline system servicing each of its residences. As designed, the new pipeline allowed for years of uninterrupted, maintenance-free service.

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[7] Just as in Murphy v. Hank's Specialties, Inc., No. CO-98-65, 1998 WL 422256, at *3 (Minn. App. July 28, 1998) (A. 66), the abandonment of the steel pipeline system and its total replacement by the polyethylene pipeline system establishes that the 1990 project was not a repair, but an improvement. Id. (the removal of a carpet and installation of a new carpet was an improvement, not a repair); see also Horvath v. Liquid Controls Corp., 455 N.W.2d 60, 63 (Minn. App. 1990) (the change of an excess flow valve was an improvement, not a repair).

The new natural gas pipeline system was: 1) a permanent addition to Hallmark Terrace, 2) which enhanced Hallmark Terrace's capital value, 3) involved the expenditure of labor or money, and 4) was designed to make the property more useful or valuable. Therefore, the district court was clearly correct in concluding that the polyethylene pipeline system installed on the Hallmark Terrace premises "places the project squarely within the legal definition of improvement to property" under Minn. Stat. § 541.051. (A. 56)

Further, it is entirely undisputed that the new natural gas pipeline system was constructed in 1990, and that the Plaintiffs' claims for damages against Aquila arose directly out of the allegedly defective and unsafe condition of the pipeline and accrued in 2002. Since the installation of a new natural gas pipeline at Hallmark Terrace was an improvement to real property and the cause of action arose more than ten years after its installation, Aquila was entitled as a matter of law to the protections afforded by the ten year statute of repose and thus was properly granted summary judgment.

II. PLAINTIFFS' CLAIMS AGAINST AQUILA ARE BARRED BY MINN. STAT. § 541.051, REGARDLESS OF WHETHER AQUILA OWNED OR MAINTAINED CONTROL OVER THE IMPROVEMENT TO REAL PROPERTY

The most basic problem with the majority opinion below is the holding that the statute of repose applies to the contractor but not to the owner. As originally enacted, Minn. Stat. § 541.051 barred suits against any person involved with the design, planning, supervision, observation of construction, or performing the construction of a real property improvement after 15 years. Olmanson, 693 N.W.2d at 882, citing Act of May 21, 1965,

ch. 564, §1, 1965 Minn. Laws 803. Specifically excluded from its protection were owners of real property improvements: "This [section] shall not be applied in favor of any person in actual possession and control as an owner, tenant, or otherwise ... at the time the defective and unsafe conditions of such improvement constitutes the proximate cause of the injury." Olmanson, 693 N.W.2d at 882. The legislature thus granted broad protection to construction professionals which was not available to owners of real property improvements. Id.

In 1977, this Court considered the constitutionality of excluding owners from the protections of the statute. Olmanson, 693 N.W.2d at 882-83, discussing Pacific Indemnity, 260 N.W.2d at 554-5. Noting that a majority of states had upheld the constitutionality of similar statutes, this Court nonetheless found the Minnesota statute unconstitutional as written because it granted an "immunity from suit to a certain class of defendants" while excluding others, "without there being a reasonable basis for that classification." Pacific Indemnity, 260 N.W.2d at 555.

This Court explained that the legislature may create separate classes, but "legislative classifications must apply uniformly to all persons who are similarly situated, and the distinctions which separate those who are included within a classification from those who are not must be natural and reasonable, not fanciful and arbitrary." Id., citing Schwartz v. Talmo, 205 N.W.2d 318, 322 (Minn. 1973). Otherwise, the classification fails on equal protection grounds. Olmanson, 693 N.W.2d at 883. In response to Pacific Indemnity, the legislature amended Minn. Stat. § 541.051 to extend its protections to property owners and material suppliers. Id.

Here the majority's decision to allow Northern Pipeline, a contractor, the protections afforded by Minn. Stat. § 541.051 while denying those same protections to Aquila, a property owner, directly contradicts both the plain language of the amended statute and controlling precedent. Contrary to the majority's opinion, this Court has made clear that the protections of the statute of repose do not vary according to the status of the defendant.

Disregarding the controlling precedent of this Court, and without any basis in either the text of the statute or the case law interpreting the statute, the majority opinion below constitutes clear error. It also leads to unpredictability and absurd results.[8] As aptly explained by Judge Kalitowski in his dissent, neither the fact that Aquila owns the pipeline nor the fact that Aquila uses the pipeline (to serve its customers) excludes Aquila from the protections of the statute. Simply stated, "the statute contains no such exceptions." (A. 18) The statute makes no distinction between owners who are utilities and owners who are not. For this reason alone, the decision of the court of appeals is clear error and must be reversed.

III. THE COURT OF APPEALS' RELIANCE UPON JOHNSON IS MISPLACED

Both the Plaintiffs and the majority below rely heavily upon a 1991 decision by the court of appeals, Johnson v. Steele-Waseca Coop Elec., 469 N.W.2d 517 (Minn. App. 1991), to support the conclusion that Aquila's ownership and use of the pipeline system somehow excludes it from the protection of Minnesota's statute of repose. Yet, to the

[8] Among other bizarre effects, under the lower court's decision here only the defendant who did not construct the improvement can be held liable for its alleged negligent construction.

extent Johnson purports to exclude owners of improvements or utility companies from the protection of Minnesota's statute of repose, it is contrary to the plain language of the statute and the numerous cases cited above. Moreover, this case is distinguishable from Johnson on both the facts and the claims involved.

A. Minn. Stat. § 541.051 protects owners and controllers of improvements to real property

In Johnson, the trial court ruled that Minn. Stat. § 541.051 applied and barred Johnson's claim. Id. at 518. In a 2-1 decision, and in the face of a strong dissent, the Johnson majority ruled the statute of repose inapplicable to the plaintiff's claims. Id. at 520-21. To do so, the Johnson court focused on the ownership and control of the improvement, but largely ignored Minnesota's long-held understanding of what constitutes an improvement to real property. Id. Conspicuously, the Johnson majority cited no legal authority for its emphasis on the issue of control. This fact was not lost on the Johnson dissent, which correctly observed that such a holding was not justified by the statutory language:

> The majority concludes that, because respondent maintains control of the pole and transformer installed on appellant's property, the pole and transformer do not constitute an improvement to real property under Minn. Stat. § 541.051 (1988). There is nothing in section 541.051 that suggests its application is limited to suits against those who install or create an improvement to real property and surrender control of it.

Johnson, 469 N.W.2d at 521 (Peterson, J., dissenting).

Consequently, since Johnson, several decisions have implicitly rejected Johnson's questionable holding and applied Minn. Stat. § 541.051 to protect owners and controllers

of improvements to real property.[9] Simply stated, Minnesota's statute of repose has been consistently applied to bar claims against owners and controllers of improvements to real property.

In trying to reconcile Johnson with the bulk of Minnesota precedent, the district court determined that, at most, Johnson should be read to carve out a small exception to Minn. Stat. § 541.051 where a party who owns and maintains an improvement can be held liable for its own ongoing and repeated negligence in operating and maintaining the improvement. The district court explained that Johnson should be read to allow liability only where it is shown that the owner of the improvement exhibited **ongoing negligence**. (A. 61)

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[9] Among the decisions: Lederman, 247 F.3d 812 (applying Minnesota law; resort owner and utility company owned and/or controlled a temporary trench dug to install communications cable; after a resort patron fell into the trench, the court applied the statute to bar a negligent excavation claim against both controlling entities); Nemechek, 1999 WL 1138441 (City of Byron owned and controlled a storm sewer; after a private residence flooded, the court applied the statute to bar negligent design and construction claims against the controlling city); Fisher v. County of Rock, 580 N.W.2d 510 (Minn. App. 1998) (County of Rock owned bridge; after a car wreck that plaintiff alleged was preventable by installing guardrails, the court applied the statute to bar a negligent maintenance claim against the controlling county); LaFave v. Frankfort Township, No. CO-96-1485, 1997 WL 30682 (Minn. App. Jan. 28, 1997) (Frankfort Township owned road; after a single vehicle crash, the court applied the statute to bar negligent design, construction, maintenance, and signage claims against the controlling township) (A. 84); Williams v. Tweed, 520 N.W.2d 515 (Minn. App. 1994) (Former landowner and installer of an improvement to real property; after plaintiff fell into an abandoned septic tank covered with rotten plywood, the court applied the statute to bar a negligence claim against the formerly controlling landowner); Minn. Mut. Fire and Cas. Co., 456 N.W.2d 719 (Defendant was owner and controller of a leaky fuel tank; after an insurance company paid their customer's claims arising out from the leaky tank, the court applied the statute to bar subrogation claims against the controlling tank owner).

The district court then held that plaintiffs' reliance upon Johnson was misplaced because they did not present any evidence of ongoing negligence by Aquila. Thus, Johnson's unique "exception" could not salvage Plaintiffs' untimely claims.

B. Plaintiffs' claims are factually distinguishable from Johnson

Even if some aspect of Johnson were good law, the decision has no application to Plaintiffs' claims here since it is plainly distinguishable on the facts, as the dissenting opinion below noted (A 19). In Johnson, the defendant electric cooperative installed above-ground electrical equipment--an electric pole and transformer which stood on Johnson's property and served the cooperative. Johnson, 469 N.W.2d at 518. Thereafter, Johnson, a dairy farmer, noticed changes in his herd including reduced milk production and alerted the cooperative. Id. The cooperative began regular monitoring for stray voltage and repeatedly attempted repairs. Id. Johnson sued, alleging *not* that the electrical equipment was negligently installed, but instead that the electric service itself was defective because stray voltage continued to damage his livestock. Id. at 519.

Here, unlike Johnson, the improvement--an underground pipeline network--was directly attached to each of the Hallmark Terrace residences and was not a free-standing structure limited to serving Aquila's distribution purposes. The improvement in this matter enhanced the value of the entire property by offering more advanced, more efficient, and more reliable delivery of natural gas to each residence. In fact, here it is undisputed that from the time the pipeline construction was completed until the time of the alleged damage, the pipeline system worked exactly as designed and intended. No maintenance or repairs were needed or performed on the pipeline. There were no

complaints, no leaks alerting Aquila to potential problems, and no indication of any unsafe or damaging condition.

Johnson also differs from the present case with regard to the owner's maintenance of the improvement and the owner's knowledge of potential danger. Here, unlike Johnson, the pipeline was not exposed or accessible for routine inspection and maintenance; instead it was buried underground. See Johnson, 469 N.W.2d at 518. In further contrast to Johnson, which involved a continuous leak from the time of installation, Plaintiffs here allege a sudden accidental pipeline rupture, which occurred nearly 12 years after the construction. The damage complained of here was the result of a single injury-causing event, as opposed to Johnson, where Mr. Johnson complained of ongoing problems and repeated damage to his cattle. Id. Most important, in Johnson, the utility received repeated complaints, repeatedly monitored, repeatedly attempted to repair, and repeatedly failed to repair ongoing stray voltage problems. Id. Here no complaint was ever made and there is no evidence of repeated failed repairs.

Put simply, Johnson alleged an ongoing tort of defective electrical service – ongoing negligence. Plaintiffs here, on the other hand, allege defective construction, which was completed more than 11 years before any damage was sustained. Indeed, the Johnson majority stressed the importance of this distinction when it noted "[a]ppellants do not allege a defect in the electrical equipment attached to their farm buildings. Rather, they charge the electric service itself was defective -- the defect being the introduction of stray voltage to the farm." Id. Johnson's cause of harm was ongoing defective service and stray voltage. Id. at 520. In contrast, Plaintiffs' cause of harm was a sudden injury-

causing event which arose from a latent construction defect, coupled with the actions of a third party.

In sum, Johnson is factually dissimilar from this matter and its holding remains an anomaly in Minnesota jurisprudence. Minnesota's statute of repose has been repeatedly applied to protect owners and controllers of improvements to real property, and it should be applied here.

IV. SUBDIVISION 1(C) OF MINN. STAT. § 541.051 IS NOT APPLICABLE AND AQUILA IS NOT EXCLUDED FROM THE PROTECTIONS AFFORDED BY THE STATUTE OF REPOSE

A. Plaintiffs should not have been permitted to present new arguments on appeal which were not first submitted to the district court

In the trial court, Plaintiffs claimed that Aquila, through its alleged agent Northern Pipeline, was negligent in the operation of the boring equipment in December 1990. Plaintiffs did not present any facts supporting a claim of negligence by Aquila after December 1990. Then, when both parties moved for summary judgment, Plaintiffs did not argue that the statute of repose was unavailable to Aquila because Aquila was negligent in its maintenance or inspection of the pipeline after the installation.[10] Instead, Plaintiffs' only negligence arguments concerned acts that were completed on or before December 1990:

[10] Plaintiffs' summary judgment negligence theory, now abandoned, was that Minn. Stat. § 541.051 only barred claims arising from the physical structure of the construction itself, and not the act of constructing. The district court made clear the fallacies in this supposed distinction. (A. 57-8)

> The injury in this case was caused or contributed to by the negligent operation of the boring equipment used to install the pipes. Northern Pipeline's boring equipment and process used to install the gas pipes failed to locate an existing sewer pipe. Northern Pipeline then bored a hole and pushed a gas pipe through that sewer pipe. The negligent operation of the boring equipment created and contributed to the dangerous condition which resulted in the explosion.

(Plaintiffs' motion for summary judgment, pp. 8-9)

On appeal, Plaintiffs came up with a completely new negligence theory. Plaintiffs urged reversal of the district court by suggesting that they *might* be able to discover some evidence of *ongoing* negligence by Aquila. (Plaintiffs' appellate brief in court of appeals, 13-19, 21-25) For the first time, Plaintiffs argued that Aquila may have acted negligently after December 1990 so as to preclude Aquila from enjoying the protection of the statute of repose. Id.

The court of appeals should not have considered Plaintiffs' new negligence theory for the first time on appeal. Thiele v. Stich, 425 N.W.2d 580, 582 (Minn. 1988). Plaintiffs' ongoing negligence theory was not alleged in its complaint and was not briefed in their motion for summary judgment. The majority of the court of appeals erred when it considered (and endorsed) a new legal theory which was submitted for the first time on appeal. Therefore, the majority's decision should be reversed. Thiele, 425 N.W.2d at 582.

B. The district court correctly concluded that Plaintiffs failed to present any evidence of ongoing negligence on the part of Aquila

The only facts articulated by Plaintiffs in support of their negligence claim against Aquila were that, when installing the new pipeline system, Northern Pipeline negligently

"bored or pushed the replacement gas line through the existing sewer line." (Complaint ¶ XIII; A. 26; see Plaintiffs' Memorandum in Support of their Summary Judgment Motion at pp. 7-9). Plaintiffs have never alleged that Hallmark Terrace residents or management informed Aquila of any problem with the new pipeline system at any point prior to the date of the explosion, February 13, 2002. Plaintiffs have never alleged that Aquila had notice of any existing or potential danger relative to the new pipeline system at any time before February 13, 2002. Plaintiffs have never alleged that Aquila had any information that would suggest to a person of ordinary care and prudence that any part of the natural gas pipeline system was unsafe for the transportation or use of natural gas.

In response to the motion for summary judgment, Plaintiffs were obligated to come forward with competent evidence supporting their allegations of negligent inspection or maintenance. They did not do so. Summary judgment was properly granted because Plaintiffs failed to present any facts creating a genuine issue for trial. See Hunt v. IBM Mid Am. Employees Fed. Credit Union, 384 N.W.2d 853, 855 (Minn. 1986); Erickson v. Gen. United Life Ins. Co., 256 N.W.2d 255, 259 (Minn. 1977). Plaintiffs failed to submit any facts demonstrating ongoing negligence by Aquila, and there is simply no evidence to support such a claim.

The district court properly concluded that Aquila did not have any notice of any existing or potential danger at any time from December 1990 until February 2002. Because Aquila had absolutely no notice or awareness of any danger or unsafe condition associated with the gas line, Aquila cannot be held liable for "failing" to remedy an unknown problem. As the district court explained:

> Aquila, Inc. had no reasonable notice of an existing or potential danger nor did it possess any information that would suggest to a person of ordinary care and prudence that some part of the polyethylene pipeline system was unsafe for the transportation or use of gas.
>
> The Plaintiffs have failed to provide this court with any evidence that Aquila, Inc. was negligent in its maintenance, operation, or inspection of the polyethylene pipeline.

(A. 63)

C. Under Minnesota law, the duty of reasonable care did not require Aquila to constantly inspect the underground pipeline

As the trial court correctly noted, under Minnesota law, Aquila's duty to inspect did not require "a system of inspection 'at all times' but rather a duty to make reasonable inspections." Wilson v. Home Gas Co., 125 N.W.2d 725, 732 (Minn. 1964). "A supplier of gas must exercise a degree of care commensurate with the danger in a situation." Ruberg v. Skelly Oil Co., 297 N.W.2d 746, 751 (Minn. 1980). Accordingly, this Court has declared that "[l]iability for damages caused by a gas leak exists where the gas supplier, having reasonable notice of an existing or potential danger, negligently performs an inspection or repair, or fails to inspect, repair, or shut off the gas." Ruberg, 297 N.W.2d at 751 (holding gas supplier liable for damages caused by gas explosion where it had reasonable notice of potential danger and failed to act to remedy that danger). Notice that will trigger a gas supplier's duty occurs only when the supplier of gas is "in possession of facts that would suggest to a person of ordinary care and prudence that some part of the gas system is leaking or is otherwise unsafe for the transportation or use of gas." Id.

This case does not involve gas leaks. Instead, the escape of gas here was caused by the puncture of the pipeline by a third party. Unlike the defendants in Ruberg and Wilson, Aquila never had notice of any existing or potential danger, and never had any reason to question the safety of the installation. Here, it is undisputed that there were no problems with the pipeline until Drain-Rite's actions in 2002. (A. 63) During the more than 11-year time span that the polyethylene pipeline was in place, Aquila never had a problem with the system and was not informed of any problem with the system by Hallmark Terrace or its residents. (Id.)

Under Minnesota law, Aquila was not obligated to conduct constant underground inspections where Aquila had no notice of any potential danger. Absent any indication of leaks or problems with the pipeline, it was reasonable for Aquila not to repeatedly dig up thousands of feet of pipeline. Based on these undisputed facts, the district court correctly concluded that, as a matter of law, Aquila was not negligent and subdivision 1(c) of Minn. Stat. § 541.051 was not applicable.

D. The majority erred by presuming ongoing negligence

Plaintiffs failed to present specific factual allegations or evidence of any notice to Aquila of any potential danger with the pipeline. The district court explained that Plaintiffs "failed to provide this Court with any evidence that Aquila, Inc. was negligent in its maintenance, operation or inspection of the polyethylene pipeline." (A. 63)

Based on nothing more than a generalized allegation in the pleadings, the majority held that Plaintiffs had established a prima facie negligence claim. The majority came to

this conclusion by relying on a presumption -- that gas ordinarily does not escape from pipelines if those responsible exercise proper care. (A. 16)

The majority cites Gould v. Winona Gas Co., 100 Minn. 258, 111 N.W. 254 (1907) and Manning v. St. Paul Gaslight Co., 129 Minn. 55, 151 N.W. 423 (1915) as creating a presumption of negligence, which the majority then concluded was sufficient in and of itself to defeat Aquila's motion for summary judgment. To be sure, Gould and Manning stand for the proposition that a gas supplier will be held responsible for a leaking pipeline, based on the idea that a pipeline ordinarily does not leak absent negligence.

But this case does not involve a gas line *leak*. This explosion did not happen out of the blue. It was caused by a readily identifiable event that was not "in the ordinary course of events": the rupture of the pipeline by Drain-Rite with its water jet root cutter.

The dissent below makes the majority's error clear. Judge Kalitowski explained that the mere averments of a complaint are insufficient to survive summary judgment, let alone affirmatively establish an exemption to the statute of repose. (A. 19, Citing DLH, Inc. v. Russ, 566 N.W.2d 60, 71 (Minn. 1997)). Moreover, the majority's presumption of negligence on the part of Aquila is particularly inappropriate in this matter because it is undisputed that the gas leak was caused when a third party, Drain-Rite, struck and ruptured the pipe line some 11 years after it was installed. (A. 20)

In sum, the majority has in essence held that a gas supplier should be held liable for any escape of gas from its system, even if there is no evidence of negligence on the part of the gas supplier, and even if the escape was indisputably caused by a third party

severing the gas line. This sweeping and remarkable conclusion springs entirely out of an unsubstantiated allegation and the application of a presumption that has no basis here.

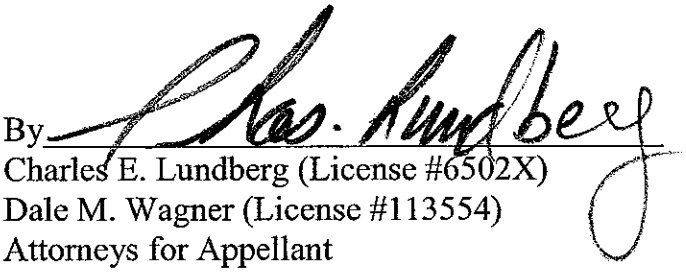
CONCLUSION

Plaintiffs allege damages that occurred in 2002, but which resulted from the 1990 construction of an improvement to real property. Minnesota's statute of repose exists to bar exactly these types of claims. The court of appeals should be reversed and the judgment entered in the district court affirmed.

Respectfully submitted,

BASSFORD REMELE, A Professional Association

Dated: Sept. 23, 2005

By 

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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).