

**PROPERTY: ADVENTURES IN BOONDOGGLE? THE  
UNNECESSARY (AND INACCURATE) LEGISLATIVE INTENT  
ANALYSIS OF *LIETZ V. NORTHERN STATES POWER CO.***

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There are more ways than one to skin a cat.<sup>1</sup> – English proverb

## I. INTRODUCTION

Statutes that time-bar actions relating to “improvements to real property” have long been construed in teasingly diverse and deceptively complex ways.<sup>2</sup> A permutation of mid-twentieth century tort reform, these statutes emerged as privity requirements eroded, and left in their wake interpretive confusion.<sup>3</sup> For the last half century, courts have struggled to define what qualifies as an improvement to real property, an exercise that pits the economic interests of industry against the personal interests of tort and other litigants.<sup>4</sup> Relying on language, policy, pragmatism, and legislative intent,<sup>5</sup> state courts are still striving to establish a comfortable understanding of this term and its application under statutes limiting related claims.

Minnesota recently addressed a new facet of this issue. In *Lietz v. Northern States Power Co.*,<sup>6</sup> the supreme court considered whether installation of an improvement to real property must be *complete* to subject it to Minnesota’s applicable statute of limitations under section 541.051.<sup>7</sup> Tackling the temporal aspect of real property improvements, the court held that an installation need not be

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1. THE NEW DICTIONARY OF CULTURAL LITERACY (E.D. Hirsch et al. eds., Houghton Mifflin Co. 3d ed. 2002).

2. See Keith J. Halleland & Thomas F. Nelson, *The Statute of Limitations in Construction-Related Cases: The Return to Common Law and Common Sense*, 57 HENNEPIN LAW. 8, 8–9 (1988). See generally William D. Bremer, Annotation, *What Constitutes “Improvement to Real Property” for Purposes of Statute of Repose or Statute of Limitations*, 122 A.L.R. 5TH 1 (2004) (cataloguing various interpretations of the phrase).

3. David G. Owen, *Special Defenses in Modern Products Liability Law*, 70 MO. L. REV. 1, 17 (2005).

4. See, e.g., Marianne M. Jennings, *Reposing: An Evolving Issue*, 34 REAL EST. L.J. 470, 471 (2006).

5. See *id.*

6. 718 N.W.2d 865 (Minn. 2006).

7. *Id.* at 868. The statute states:

[N]o action by any person in contract, tort or otherwise to recover damages for any injury to property . . . 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.

MINN. STAT. § 541.051, subdiv. 1(a) (2006).

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complete to qualify as an improvement to real property.<sup>8</sup> *Lietz* effectively expands the statute's scope and, consequently, contracts the corresponding tort liability. This holding deserves praise because it produces the proper result under Minnesota's "common sense" approach to section 541.051.<sup>9</sup> However, *Lietz* merits criticism for its unnecessary and inaccurate foray into legislative intent analysis.<sup>10</sup>

This note first examines the history of section 541.051 and the interpretive evolution of defining "improvements to real property."<sup>11</sup> Next, it considers the facts and holding of *Lietz*.<sup>12</sup> Finally, the note analyzes *Lietz*'s reasoning and advocates for a simpler, alternative analysis leading to the same result.<sup>13</sup>

## II. A TALE OF TWO HISTORIES

### A. Overview

The best way in which to understand the evolution of Minnesota's improvement to real property statute is to establish a general history on the subject and then to trace the chronological evolution of Minnesota's statute in particular. The former provides a theoretical context for evaluating Minnesota's statute as compared to other states. The latter shows how Minnesota has developed its law, albeit through a clumsy waltz between case law and statutory amendment.

### B. Improvements to Real Property: A General History

#### 1. Privity's Demise

Statutes of limitation terminating liability arising from

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8. *Lietz*, 718 N.W.2d at 871.

9. *Pac. Indem. Co. v. Thompson-Yaeger, Inc.*, 260 N.W.2d 548, 554 (Minn. 1977) (commenting that the Wisconsin Supreme Court "avoided the vagaries of fixture law" by determining meaning based on the language's common usage in *Kallas Millwork Corp. v. Square D Co.*, 225 N.W.2d 454, 456 (Wis. 1975)).

10. *See* MINN. STAT. § 645.16 (2006) (stating that legislative intent may be considered where a statute's meaning is not explicit); *Olmanson v. LeSeuer County*, 693 N.W.2d 876, 879 (Minn. 2005) (holding that courts should not look beyond a statute's language if its words provide clear meaning).

11. *See infra* Part II.

12. *See infra* Part III.

13. *See infra* Part IV.

improvements to real property were born of necessity.<sup>14</sup> Traditionally, architects and builders have been subjected to narrow liability.<sup>15</sup> Courts achieved this restricted liability by requiring contractual privity to impose liability on members of construction professions.<sup>16</sup> Certain builders enjoyed even greater protection under the “completed and accepted” doctrine, a close cousin of the privity defense that extinguished liability against third parties once a builder had completed the structure and the owner had accepted it.<sup>17</sup> However, these types of traditional defenses were not to last.<sup>18</sup>

Courts began eschewing privity requirements in products liability cases early in the twentieth century.<sup>19</sup> The flagship case of this trend is *MacPherson v. Buick Motor*, in which New York’s highest court rejected a privity defense and permitted a subsequent user of an automobile to maintain a negligence action against the car’s manufacturer.<sup>20</sup> The trend of abandoning privity requirements in products liability cases infiltrated design and construction cases by the late 1950s and early 1960s.<sup>21</sup> In the 1956 case *Hanna v. Fletcher*,<sup>22</sup> for example, the Circuit Court for the District of Columbia rejected privity requirements for claims against builders.<sup>23</sup> Subsequently, courts in other jurisdictions eliminated privity and other similar defenses, like the completed and accepted doctrine, throughout the middle of the twentieth century.<sup>24</sup>

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14. See Gerald Heller, *The District of Columbia’s Architects’ and Builders’ Statute of Repose*, 34 CATH. U. L. REV. 919, 924 (1985).

15. *Id.* at 923.

16. Jay A. Felli, Comment, *The Elements of Ohio’s Liability Provisions for Contemporary Build Architects—An Unwillingness to Expand the Plan*, 17 U. DAYTON L. REV. 109, 111–15 (1991) (tracing the historical evolution of contractual privity vis-à-vis improvements to real property).

17. Heller, *supra* note 14, at 924.

18. See Bremer, *supra* note 2, § 2(a).

19. See Edie Lindsay, Comment, *Strict Liability and the Building Industry*, 33 EMORY L.J. 175, 176–77 (1984).

20. Heller, *supra* note 14, at 924 n.11 (citing *MacPherson v. Buick Motor Co.*, 111 N.E. 1050 (N.Y. 1916)).

21. Owen, *supra* note 3, at 49.

22. 231 F.2d 469 (D.C. Cir. 1956).

23. *Id.* at 473.

24. See Bremer, *supra* note 2, § 2(a). Bremer cites the following cases as examples of courts abandoning privity requirements: *Krull v. Thermogas Co., Division of Mapco Gas Products, Inc.*, 522 N.W.2d 607 (Iowa 1994) and *Brennaman v. R.M.I. Co.*, 639 N.E.2d 425 (Ohio 1994). Bremer, *supra* note 2, § 2(a) n.5.

Losing these defenses exposed architects, builders, and construction firms to indefinite liability.<sup>25</sup> In response, these industries mobilized, lobbying to establish statutes to limit claims arising from improvements to real property.<sup>26</sup>

Several strong arguments for limiting liability existed.<sup>27</sup> First, restricted liability would protect architects, contractors, engineers, and builders from the uncertainty of timeless claims.<sup>28</sup> Second, restricted liability would make insurance rates more reasonable, lowering building costs overall.<sup>29</sup> Third, as a result of lower overall costs, restricted liability would benefit the construction market.<sup>30</sup> With such sound policy arguments supporting statutory action, it is not difficult to see why nearly all state legislatures capped construction related liability.<sup>31</sup>

Still, the enacted statutes varied. Some imposed a statute of repose, measuring a claim's longevity against the date of purchase or completion; others created (as did Minnesota) a statute of limitation triggered by the discovery of an injury.<sup>32</sup> The

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25. Heller, *supra* note 14, at 924.

26. Owen, *supra* note 3, at 50.

27. Jennings, *supra* note 4, at 470.

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

32. See MINN. STAT. § 541.051 (2006); Owen, *supra* note 3, at 50–51. Overall, forty-five states have enacted improvement to real property statutes; only Arizona, Iowa, Kansas, New York, and Vermont have not. Heller, *supra* note 14, at 920 n.4. Heller lists these statutes: ALA. CODE § 6-5-218 (1975); ALASKA STAT. § 09.10.055 (1983); ARK. CODE ANN. §§ 37-237 to 27-244 (Supp. 1983); CAL. CIV. PROC. CODE §§ 337.1, 337.15 (1972 & West Supp. 1984); COLO. REV. STAT. § 13-80-127 (Supp. 1981); CONN. GEN. STAT. § 52-584(a) (1984); DEL. CODE ANN. tit. 10, § 8127 (1974); FLA. STAT. ANN. § 95.11(3)(c) (West 1982); GA. CODE ANN. §§ 9-3-50 to 9-3-53 (1982); HAW. REV. STAT. § 657-8 (Supp. 1982); IDAHO CODE ANN. § 5-241 (1979); 110 ILL. COMP. STAT. ANN. § 13-214 (West Supp. 1984); IND. CODE ANN. § 34-4-20-2 (LexisNexis Supp. 1984); KY. REV. STAT. ANN. § 413.135 (West 1979); LA. REV. STAT. ANN. § 9:2772 (1984); ME. REV. STAT. ANN. tit. 14, § 752-A (1964); MD. CODE ANN., CTS. & JUD. PROC. § 5-108 (West 1984); MASS. ANN. LAWS ch. 260 § 2B (LexisNexis 1985); MICH. COMP. LAWS ANN. § 600.5839 (West Supp. 1984) (MICH. STAT. ANN. § 27A.5839 (Callaghan 1977)); MINN. STAT. § 541.051 (1984); MISS. CODE ANN. § 15-1-41 (Supp. 1983); MO. ANN. STAT. § 516.097 (West Supp. 1984); MONT. CODE ANN. § 27-2-208 (1983); NEB. REV. STAT. § 25-223 (1979); NEV. REV. STAT. § 11.205 (1983); N.H. REV. STAT. ANN. § 508:4-b (1983); N.J. STAT. ANN. § 2A:14-1.1 (West Supp. 1984); N.M. STAT. § 37-1-27 (1978); N.C. GEN. STAT. § 1-50(5) (1983); N.D. CENT. CODE § 28-01-44 (1974); OHIO REV. CODE ANN. § 2305.131 (LexisNexis 1981); OKLA. STAT. ANN. tit. 12, §§ 109-110 (West Supp. 1983-1984); OR. REV. STAT. § 12.135 (1981); 42 PA. CONS. STAT. ANN. § 5536 (West 1981); R.I. GEN. LAWS § 9-1-29 (Supp. 1982); S.C. CODE ANN. §§ 15-2-630 to 15-2-670 (Law. Co-op. 1976); S.D.

discrepancies further manifested themselves in differences vis-à-vis the scope of protection, the types of actions barred, and the equitable “grace periods” allowed for causes of action that accrue near the statutory limit.<sup>33</sup>

Despite their diversity, these statutes consistently generated similar interpretive issues, such as whether the statute applied only to buildings or also to building products.<sup>34</sup> Even today the disparate statutes are still in the process of converging jurisprudentially on challenges such as validity under the Equal Protection Clause.<sup>35</sup> However, without doubt, the most consistent, and often least lucid, issue underlying these statutes is: what constitutes an improvement to real property?

## 2. *A Bifurcated Solution to the Qualification Problem*

In answering the question of what qualifies as an improvement to real property, courts have usually adopted one of two interpretive ideologies.<sup>36</sup> The first is fixture analysis.<sup>37</sup> A small minority of courts rely on this common law analysis, which contends that to be an improvement to real property an object must qualify as a fixture.<sup>38</sup> There are three components to a fixture analysis.<sup>39</sup> The first is permanence of the attachment to the realty, which requires evaluating the “mode and sufficiency of annexation, either real or constructive.”<sup>40</sup> Second, one must determine the “adaptation of the article to the use and purpose of the realty,” or rather the extent to which the improvement is necessary to use the realty.<sup>41</sup> The final component focuses on the intent of the party

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CODIFIED LAWS §§ 15-2-9 to 15-2-11 (1967 & Supp. 1983); TENN. CODE ANN. §§ 28-3-201 to 28-3-203 (1980); TEX. REV. CIV. STAT. ANN. art. 5536a (Vernon Supp. 1984); UTAH CODE ANN. § 78-12-25.5 (1977); VA. CODE § 8.01-250 (1984); WASH. REV. CODE §§ 4.16.300 to 4.16.320 (Supp. 1984-1985); W. VA. CODE § 55-2-6a (Supp. 1983); WIS. STAT. ANN. § 893.89 (West 1983); WYO. STAT. § 1-3-111 (Supp. 1984).

33. Heller, *supra* note 14, at 925.

34. Owen, *supra* note 3, at 51.

35. U.S. CONST. amend. XIV, § 1; Jennings, *supra* note 4, at 480. Jennings discusses equal protection issues as they relate to a statute of repose. Jennings, *supra* note 4, at 480. The argument, Jennings explains, is that statutes granting protections to certain classes of defendants and not others violates the spirit of the Equal Protection Clause. *Id.*

36. Bremer, *supra* note 2, § 2(a).

37. Heller, *supra* note 14, at 932.

38. *Id.*

39. Bremer, *supra* note 2, § 2(a).

40. *Id.*

41. *Id.*

attaching the improvement “to make a permanent addition to the realty.”<sup>42</sup>

One obvious advantage to fixture analysis is that its common law roots allow for substantial case law on which courts may draw to determine the status of an improvement.<sup>43</sup> However, some criticize the fixture framework; Professor Gerald Heller comments that “[a] test based upon the vagaries of the law of fixtures has dubious value and unnecessarily requires a court to engage in almost metaphysical inquiries concerning the degree of annexation and the intent of the annexor.”<sup>44</sup> Indeed, the “vagaries” of fixture law, whether under a fixture analysis or a common sense analysis, often lead to “complex and confusing” considerations for courts.<sup>45</sup>

Perhaps this is why most courts have opted for a “common sense” (also called “common usage”) test instead of the more stringent fixture analysis.<sup>46</sup> The main thrust of the common sense approach is, appropriately, determining whether the addition is an “improvement” under the common usage or literal meaning of the term.<sup>47</sup> Admittedly, the decisions of jurisdictions invoking this more modern approach are frequently haunted by the specter of vestigial fixture analysis; fixture factors, however, such as physical annexation and size, often play a demonstrative, not a dispositive, role in adjudication.<sup>48</sup> Indeed, dispositive factors are difficult to find in common sense interpretations, as flexibility seems to be both the primary advantage and disadvantage of this mode of statutory construction.<sup>49</sup> On one hand, the common sense approach provides a “flexible analytical framework that can accommodate the facts of a particular situation.”<sup>50</sup> Conversely, flexible interpretive analysis also generates less consistent results, lowering the predictive value of the test.<sup>51</sup> Still, most jurisdictions

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42. *Id.*

43. *Id.* Bremer cites various cases employing fixture analysis, including *Little by Davis v. National Services Industries, Inc.*, 340 S.E.2d 510 (N.C. Ct. App. 1986), *Noll by Noll v. Harrisburg Area YMCA*, 643 A.2d 81 (Pa. 1994), and *Karisch v. Allied-Signal, Inc.* 837 S.W.2d 679 (Tex. App. 1992).

44. Heller, *supra* note 14, at 934.

45. *Id.*

46. Bremer, *supra* note 2, § 2(a).

47. Heller, *supra* note 14, at 932.

48. *Id.* at 934.

49. *Id.*

50. *Id.*

51. *Id.*

prefer the common sense approach.<sup>52</sup> As the next section discusses, Minnesota is among these ranks.<sup>53</sup>

C. *Improving “Improvements”: Minnesota’s Evolving Statute*

1. *1965: The Enactment of Section 541.051*

As mentioned above, several states adopted statutes of limitation and repose during the 1950s and 1960s.<sup>54</sup> Minnesota enacted the first version of section 541.051 in 1965.<sup>55</sup> Some Minnesota practitioners have argued that the adoption was “intended to provide protection to architects and builders.”<sup>56</sup> While no legislative history exists to confirm that this was the legislature’s motive in enacting the statute,<sup>57</sup> other sources in legal historiography suggest that the statute was enacted in response to privity’s general downfall.<sup>58</sup> Indeed, Minnesota courts subsequently imputed this intent to the legislature.<sup>59</sup>

2. *1975: A Fledgling Adoption of Common Sense: Kloster-Madsen*

The fledgling opinion in adopting the common sense approach for Minnesota is *Kloster-Madsen, Inc. v. Tafi’s, Inc.*<sup>60</sup> The relevant facts of the case include Tafi’s contract with Kloster-Madsen, a general contractor, to remodel its premises and Kloster-

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52. Bremer, *supra* note 2, § 2(a) n.10. Bremer cites the following examples of cases adopting the common sense approach: *Liptak v. Diane Apartments, Inc.*, 167 Cal. Rptr. 440 (Cal. Ct. App. 1980), *Rose v. Fox Pool Corp.*, 643 A.2d 906 (Md. 1994), *Allentown Plaza Associates v. Suburban Propane Gas Corp.*, 405 A.2d 326 (Md. Ct. Spec. App. 1979), and *Jones v. Ohio Building Co.*, 447 N.E.2d 776 (Ohio Ct. Com. Pl. 1982).

53. See MINN. STAT. § 541.051, subdiv. 1 (2006); *Kloster-Madsen, Inc. v. Tafi’s, Inc.*, 303 Minn. 59, 63–65, 226 N.W.2d 603, 607–08 (1975); *infra* part III.C.

54. Heller, *supra* note 14, at 924–25.

55. Act of May 22, 1965, ch. 524, 1965 Minn. Laws 803.

56. Halleland & Nelson, *supra* note 2, at 8.

57. *Kittson County v. Wells, Denbrook & Assocs., Inc.*, 308 Minn. 237, 241, 241 N.W.2d 799, 802 (1976), *overruled by* *Lietz v. N. States Power Co.*, 718 N.W.2d 865 (Minn. 2006).

58. *Id.* at 242, 241 N.W.2d at 802. The *Kittson* court acknowledged that there is no legislative history indicating why the legislature acted to create the improvement-to-real-property statute. *Id.* at 241–42, 241 N.W.2d at 802. However, the court cited the fact that thirty other states enacted similar statutes in a wave just following the break-down of the privity defense; this trend, the court seemed to say, indicates that the Minnesota legislature acted with the same motivation. *Id.*

59. See *id.*

60. 303 Minn. 59, 226 N.W.2d 603 (1975).

Madsen's subsequent sub-contract with an electrician to assist in the remodeling.<sup>61</sup> At issue was whether actions taken by the electrician in accordance with the remodel were "improvements" to the premises under section 541.051.<sup>62</sup>

The Minnesota Supreme Court held that the electrician's work qualified as an improvement.<sup>63</sup> In reaching this conclusion, the court invoked the Webster's Dictionary definition of "improvement," which defines the term 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."<sup>64</sup>

The court also stressed that the electrician's work constituted an actual and visible beginning of the improvement.<sup>65</sup> Thus, through its reliance on dictionary definitions and descriptive factors, like visibility, *Kloster-Madsen* predicted the official adoption of the common sense approach in Minnesota.<sup>66</sup>

### 3. 1976: Confirming Common Sense: Kittson

While *Kloster-Madsen* established Minnesota's adoption of the common sense approach to related real property statutes in the previous year, Minnesota courts specifically interpreted section 541.051 in 1976.<sup>67</sup> In *Kittson County v. Wells, Denbrook & Associates*, the county brought an action against its architectural firm and contractor for installing a defective wall finish in the county's courthouse.<sup>68</sup> The walling project was completed in 1966; the courthouse walls chipped away in 1969 and 1970.<sup>69</sup> The county, however, did not bring suit until 1974.<sup>70</sup> Thus, the suit commenced well after the two year period normally allowed for discovery of defective work arising from an improvement to real property had

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61. *Id.* at 61–62, 226 N.W.2d at 606.

62. *Id.*

63. *Id.* at 64, 226 N.W.2d at 607.

64. *Id.* at 63, 226 N.W.2d at 607 (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1138 (1971)).

65. *Id.* at 607, 226 N.W.2d at 64.

66. See Halleland & Nelson, *supra* note 2, at 9.

67. *Kittson County v. Wells, Denbrook & Assocs., Inc.*, 308 Minn. 237, 242, 241 N.W.2d 799, 802 (1976), *overruled by* *Lietz v. N. States Power Co.*, 718 N.W.2d 865 (Minn. 2006).

68. *Id.* at 239, 241 N.W.2d at 800.

69. *Id.*

70. *Id.*

expired.<sup>71</sup> The county's claims were contractual, including breach of contract and breach of warranty.<sup>72</sup>

The issue facing the court in *Kittson* was whether the wall finishing qualified as an improvement to real property under section 541.051.<sup>73</sup> Recast, the issue became whether the statute applied to both contract and tort actions.<sup>74</sup> Ultimately, the court concluded that the statute applied only to tort actions and that because the county's claims were contract based, they fell outside the statute's scope.<sup>75</sup> Accordingly, both of the county's claims survived under the longer applicable statute of limitations.<sup>76</sup> The court was cautious in coming to this conclusion.<sup>77</sup> It chose to construe section 541.051 strictly, stating that the uncertain scope of the statute may not fairly apprise persons affected by its terms of its effect on their activities.<sup>78</sup> The court further emphasized that the statute's short "discovery" and nullification provisions could work harsh results on affected litigants.<sup>79</sup> Finally, the court noted that certain aspects of the statute, particularly the ten year nullification provision, may present constitutional problems.<sup>80</sup>

Based on this limited construction, the court decided to restrict the statute's scope to tort actions by third parties against persons "performing or furnishing the design, planning, supervision, or observation of construction or construction of such improvement to real estate."<sup>81</sup> Of course, this reading eliminates contract claims from being affected by the statute.<sup>82</sup> While the court conceded that the statute itself does not use the term "tort," it supported its reading on several grounds, contending that because the statute's language is derived from the tort lexicon, the statute's application should be confined to tort actions.<sup>83</sup> First, the court argued the statute refers to "injury" to property; second, the court required that "an injury arise out of the 'defective and unsafe'

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71. *Id.*

72. *Id.* at 242, 241 N.W.2d at 802.

73. *See id.* at 241, 241 N.W.2d at 801.

74. *Id.* *See also* Halleland & Nelson, *supra* note 2, at 8–9.

75. *Kittson*, 308 Minn. at 242–43, 241 N.W.2d at 802.

76. *Id.* at 243, 241 N.W.2d at 802.

77. *See id.*

78. *Id.* at 240, 241 N.W.2d at 801.

79. *Id.*

80. *Id.*

81. *Id.* at 241, 241 N.W.2d at 801.

82. Halleland & Nelson, *supra* note 2, at 8.

83. *Kittson*, 308 Minn. at 241–42, 241 N.W.2d at 801–02.

condition of an improvement to real property.”<sup>84</sup> Last, the court noted that the use of the phrase “proximate cause” in the final sentence of subdivision 1 was suggestive of the statute’s tort focus.<sup>85</sup>

Underlying this tort-centric construction is the court’s use of legislative intent analysis.<sup>86</sup> The court acknowledged that no legislative history existed to inform the court as to the statute’s exact purpose.<sup>87</sup> However, the legislature enacted Minnesota’s statute at a time when at least thirty other jurisdictions adopted similar statutes.<sup>88</sup> These statutes, the court noted, were created to protect architects and builders from tort liability to third parties after the destruction of the privity doctrine in the early 1960s.<sup>89</sup>

Based on this speculative analysis of legislative motive, the court concluded that its strict construction “does no more than confine the application of the statute to its legislative purpose.”<sup>90</sup> Moreover, the court noted, other states’ statutes include more expansive language that specifically incorporates contract or warranty claims, indicating that Minnesota was free to follow suit but chose not to.<sup>91</sup>

#### 4. 1977: Common Sense for Section 541.051: Pacific

While *Kittson* focused on the scope of section 541.051, *Pacific Indemnity Co. v. Thompson-Yaeger, Inc.*<sup>92</sup> examined the statute’s constitutionality.<sup>93</sup> *Pacific* arose out of a fire in a strip mall in Rochester, Minnesota.<sup>94</sup> The fire department, in conjunction with both a fire investigator and an engineer, determined that the origin of the fire was a particular furnace.<sup>95</sup> The court, however, noted that several competing theories existed as to how the fire actually started.<sup>96</sup> The principle theory posited that the furnace was installed too close to the wall.<sup>97</sup> This created a carbon build up

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84. *Id.* at 239, 241 N.W.2d at 801.

85. *Id.* at 241, 241 N.W.2d at 801–02.

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.* at 241–42, 241 N.W.2d at 802. See discussion *supra* Part B.1.

90. *Kittson*, 308 Minn. at 242, 241 N.W.2d at 802.

91. See *id.* at 242–43, 241 N.W.2d at 802.

92. 260 N.W.2d 548 (Minn. 1977).

93. *Id.* at 553.

94. *Id.* at 551.

95. *Id.*

96. *Id.* at 551–52.

97. *Id.* at 552.

behind the wall's sheetrock; the carbon later ignited, starting the fire.<sup>98</sup> A second theory stated that a combination of events related to the carbonization process precipitated the blowing of oil onto a hot furnace access door, causing ignition.<sup>99</sup> The final theory, called the "combustible materials" theory, simply hypothesized that paper and cardboard boxes placed near the furnace had ignited and that the fire had spread from there.<sup>100</sup>

These diverse theories foretold of the myriad defendants named in the case; they included the furnace installation company, the company that serviced the furnace, a tenant on the premises where the furnace was located, the furnace manufacturer, and the owner of the shopping center.<sup>101</sup> These multiple defendants from distinct classes of professionals set the stage for examining *Pacific's* main issue: the constitutionality of section 541.051 (as it existed in 1977).<sup>102</sup>

The trial court found that the statute was "not unconstitutional" and held that the statute was inapplicable to *Pacific's* fact pattern because the furnace, its installation, and its maintenance did not qualify as an improvement to real property.<sup>103</sup> The Minnesota Supreme Court differed significantly in its holding. First, it found that the installation of the furnace *did* constitute an improvement to real property and thus fell under the scope of the statute.<sup>104</sup> Second, it held that the statute was unconstitutional.<sup>105</sup>

Several elements of the court's statutory and constitutional analysis are worth examining. First, in discussing the statute's applicability, the court squarely rejected a fixture law analysis.<sup>106</sup> Such a declaration was clearly necessary because the trial court in *Pacific* used fixture analysis to determine that the furnace was not an improvement since it could easily be removed and was therefore not a part of real property.<sup>107</sup> Looking to four similar cases, the supreme court noted that only one used fixture analysis.<sup>108</sup> The

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98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.* at 553.

103. *Id.* at 553-54.

104. *Id.* at 554.

105. *Id.* at 555.

106. *Id.* at 554. *See also* Halleland & Nelson, *supra* note 2, at 9.

107. *Pacific*, 260 N.W.2d at 553-54.

108. *Id.* at 554 (citing *Smith v. Allen-Bradley Co.*, 371 F. Supp. 698 (W.D. Va. 1974); *Rosenberg v. Town of N. Bergen*, 293 A.2d 662 (N.J. 1971); *Yakima Fruit &*

court then relied on *Kittson* as well as the adoption of the common sense approach in Wisconsin to justify establishing the common sense approach in Minnesota.<sup>109</sup> This approach, the court explained, would avoid the “vagaries” of fixture law and permit determination of section 541.051’s meaning “on the basis of the common usage of language.”<sup>110</sup>

Second, in defending its constitutional analysis, the court looked to history and comparative jurisprudence.<sup>111</sup> The court began by establishing that Minnesota likely enacted the statute as part of the trend in other states to protect architects, engineers, and contractors from liability to third parties.<sup>112</sup> The court’s reasoning implied that following this trend made constitutional challenges to Minnesota’s statute comparable to constitutional challenges to related statutes in other states.<sup>113</sup>

According to the court, fifteen other courts had ruled on the constitutionality of similar statutes in 1977, and, of those, five had struck them down as unconstitutional.<sup>114</sup>

Despite the majority of states upholding the constitutionality of similar statutes, the Minnesota Supreme Court struck the statute down.<sup>115</sup> The court defended its decision on the premise that legislative classifications must apply uniformly to all persons who are similarly situated and that distinctions separating the classes must be natural and reasonable, not fanciful and arbitrary.<sup>116</sup> The court further explained that section 541.051 contravenes this premise because it grants special immunity to a class of persons

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Cold Storage Co. v. Cent. Heating & Plumbing Co., 503 P.2d 108 (Wash. 1972); Kallas Millwork Corp. v. Square D Co., 225 N.W.2d 454 (Wis. 1975)). Of the four cases cited, all but *Smith* employed a common sense analysis. *Id.* The court in *Yakima* used the approach to determine that a refrigeration system was not an improvement. *Yakima*, 503 P.2d at 110. In *Rosenberg* the court found defective street pavement was an improvement. *Rosenberg*, 293 A.2d at 666. In *Kallas* the court concluded that a fire sprinkler system was an improvement. *Kallas*, 225 N.W.2d at 456. However, in *Smith*, a federal court in Virginia used a fixture analysis to find that a five-tone die-cutting machine was a “fixture” even though it could be moved. *Smith*, 371 F. Supp. at 700–01.

109. *Pacific*, 260 N.W.2d at 554.

110. *Id.* (quoting *Kallas*, 225 N.W.2d at 456).

111. *See id.* at 554–55.

112. *Id.*

113. *Id.* at 555.

114. *Id.* Those five states were Alabama, Hawaii, Illinois, Kentucky, and Wisconsin. *Id.*

115. *Id.*

116. *Id.*

(the construction professionals listed in the statute) without a rational basis for regarding those professionals as part of a special group that warranted bestowing of particular immunities.<sup>117</sup> In other words, the statute lacked a rational basis for excluding owners and material suppliers from protection, violating the concept of equal protection.<sup>118</sup>

5. *1980: Reacting to Pacific: Statutory Amendments*

Following *Pacific's* invalidation of section 541.051, Minnesota construction law faced a practical problem. A missing statute of limitations is every trial lawyer's nightmare.<sup>119</sup> Unfortunately, that nightmare became a reality when constitutional invalidation coupled with legislative inaction left the state without a statute of limitations regarding improvements to real property.<sup>120</sup>

To remedy the situation, the Minnesota legislature amended section 541.051 in 1980, drafting the version that exists today.<sup>121</sup> Originally, the statute read:

Except where fraud is involved, no action 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 such injury, shall be brought against any person performing or furnishing the design, planning, supervision, or observation of construction or construction of such improvement to real property more than two years after discovery thereof, nor, in any event, more than ten years after the completion of such construction.<sup>122</sup>

Following the amendment, the statute read:

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

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117. *Id.*

118. *Id.*

119. Halleland & Nelson, *supra* note 2, at 8.

120. *Id.* (referring to construction-related litigation governed by section 541.051 in the late 1970s).

121. *Id.* at 28 (noting that the legislature amended other sections of the statute in 1988).

122. MINN. STAT. § 541.051, subdiv. 1 (1968).

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 the discovery thereof, nor, in any event shall such cause of action accrue more than *15 years* after substantial completion of the construction.<sup>123</sup>

These legislative changes responded to *Kittson* by revising the statute to encompass non-tort actions.<sup>124</sup> They further show how the legislature rectified constitutional problems with the statute by expanding its scope to individuals, thereby avoiding equal protection problems.<sup>125</sup> Minnesota courts subsequently upheld the new language as constitutional.<sup>126</sup>

Because the statute effectively did not exist from 1977 through the enactment of the 1980 amendments, there were few cases in the early 1980s interpreting the section.<sup>127</sup> Plaintiffs in that period were able to take advantage of a loophole that created timeless liability for claims accruing prior to the effective date of the 1980 amendments.<sup>128</sup> The enactment of the amendments combined with the construction boom of the early 1980s, though, led to a significant increase in litigation on the statute later in that decade.<sup>129</sup> Much of this litigation focused on causation issues under the statute's "defective and unsafe condition" clause.<sup>130</sup> Indeed, Minnesota has long grappled with what injuries "arise out of" conditions that are "defective and unsafe."<sup>131</sup> For the purposes of

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123. MINN. STAT. § 541.051, subdiv. 1 (1980) (emphasis added).

124. Halleland & Nelson, *supra* note 2, at 25.

125. *Id.* at 9.

126. *Id.* at 8–9. The Minnesota Supreme Court upheld the constitutionality of the amended statute in *Calder v. City of Crystal*, 318 N.W.2d 838 (Minn. 1982).

127. Halleland & Nelson, *supra* note 2, at 9.

128. Edward D. Mulally & Mark Bloomquist, *Limitation of Actions Involving Improvements to Real Property: Scope and Applicability of Minn. Stat. § 541.051*, 13 MINN. TRIAL LAW. 16, 16 (1988).

129. *Id.*

130. *Id.* at 18. *See also* Halleland & Nelson, *supra* note 2, at 24–28. Both articles discuss the case law evolution of interpreting "defective and unsafe" conditions that cause injuries under the statute.

131. *See, e.g.*, *Pac. Indem. Co. v. Thompson-Yaeger, Inc.*, 260 N.W.2d 548, 553–54 (Minn. 1977) (holding, under a previous version of section 541.051, that negligence during installation can lead to a "defective and unsafe" condition).

*Lietz*, however, these issues were sufficiently settled.<sup>132</sup> Rather, the scope of “improvement to real property” is the lynchpin of *Lietz* and the next critical jurisprudential step in determining the reach of section 541.051. Thus, the 1980s case law that matters for *Lietz* is that which discusses the common sense standard of interpreting what qualifies as an improvement to real property.

6. 1984: A Federal Standard: Adair

By 1984, the interpretation of section 541.051 and statutes like it across the country had undergone several permutations. Minnesota had enacted the statute as a way to protect vulnerable construction professionals from third-party liability after privity defenses died.<sup>133</sup> A decade later, the Minnesota Supreme Court interpreted a similar statute under a plain language approach in *Kloster-Madsen*.<sup>134</sup> Shortly thereafter, the court specifically revised the scope of section 541.051 in *Kittson* by confining its application to tort actions.<sup>135</sup> Just one year later, the court addressed the statute again by establishing a common sense approach to interpreting its language and invalidating certain sections as unconstitutional.<sup>136</sup> Finally, the legislature acted to correct and clarify problems addressed in *Kittson* and *Pacific* through amendments in 1980,<sup>137</sup> making the statute a ripe target for refining the judiciary’s interpretive approach.

In 1984, *Adair v. Koppers Co.*,<sup>138</sup> a Sixth Circuit case, established a methodology for interpreting improvement to real property statutes under a common sense approach.<sup>139</sup> In *Adair*, an industrial worker was injured when his right arm was caught in a conveyor

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132. See generally Mulally & Bloomquist, *supra* note 128, at 18 (noting that there was originally no distinction between “defective” and “unsafe,” and that courts would even delete the latter in opinions). Minnesota courts eventually ruled that the words were not synonymous, but commentators pointed out that “unsafe” means risk to human life. *Id.* Therefore, reading the words as independent would render section 541.051 applicable only to personal injury and not also to property damage as the statute specifically enumerates. This phrase remains unclear. *Lietz*, however, satisfies both elements, dealing with a bent anchor, the installation of which put human life at risk.

133. *Id.* See also Halleland & Nelson, *supra* note 2, at 8; *supra* Part II.C.1.

134. See *supra* Part II.C.2.

135. See *supra* Part II.C.3.

136. See *supra* Part II.C.4.

137. See *supra* Part II.C.5.

138. 741 F.2d 111 (6th Cir. 1984).

139. *Id.* at 114.

belt.<sup>140</sup> The belt, part of an oven, had been designed and installed by the plant's previous owner and had not been modified since 1949.<sup>141</sup> Adair brought his suit in 1981, well beyond the statute of repose that would potentially apply to the machinery.<sup>142</sup> He argued that the conveyor belt did not qualify as an "improvement to real property" and was thus outside the statute's scope.<sup>143</sup> The court ultimately determined that the oven was an improvement to real property and that the statute applied.<sup>144</sup>

In reaching its holding, the court defined improvements to real property under a common sense approach.<sup>145</sup> Providing its definition of "improvement to real property," *Adair* cited to both *Pacific*, which established the same common sense definition in Minnesota, and to *Kallas*, the Wisconsin case on which Minnesota justified its adoption of the definition.<sup>146</sup> Next, the court identified factors to use in interpreting this definition.<sup>147</sup> First, the improvement must be an integral component of the overall system or real property it purportedly improves.<sup>148</sup> Second, the improvement should add value to the realty it was intended to improve.<sup>149</sup> Third, the improvement should be useful.<sup>150</sup> Finally, it should be permanent.<sup>151</sup>

Several states, including Minnesota, have incorporated the common sense factors iterated in *Adair*'s methodology.<sup>152</sup> Indeed, given that *Adair* invoked Minnesota case law and even the Wisconsin case law through which Minnesota justified its approach,

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140. *Id.* at 112.

141. *Id.*

142. *Id.* It is also important to note that while *Adair* deals with a statute of repose, not a statute of limitation as *Lietz* does, the main issue of the case is simply interpreting what qualifies as an improvement to real property. Thus, the distinction between the two types of liability limitation is immaterial.

143. *Id.* at 113. The Sixth Circuit noted that in *Adair*, the Ohio Supreme Court had not interpreted the phrase "improvement to real property" under Ohio's statute. *Id.* Thus, the Sixth Circuit conceded that it must "make a considered educated guess" as to the phrase's interpretation. *Id.*

144. *Id.* at 114.

145. *Id.*

146. *Id.*

147. *Id.* at 115–16.

148. *Id.* at 115.

149. *Id.*

150. *Id.*

151. *Id.* at 116.

152. Bremer, *supra* note 2, § 2(a). Minnesota cases following *Adair*, include, for example, *Sartori v. Harnischfeger Corp.*, 432 N.W.2d 448 (Minn. 1998) and *Fredrickson v. Johnson*, 402 N.W.2d 794 (Minn. 1987).

it seems natural that Minnesota imported the *Adair* framework.<sup>153</sup> Some jurisdictions have adopted similar factors but use alternate sources to define “improvement to real property.”<sup>154</sup> Despite these discrepancies, *Adair* is significant persuasive precedent for its widespread use as a base for interpreting common sense definitions under improvement to real property statutes.<sup>155</sup>

#### 7. 1988 and Beyond: “Improvements” Under Construction

Even after more than two decades of interpretation, section 541.051 remained an enigmatic law.<sup>156</sup> Judicial applications of the statute generated befuddling and even paradoxical results, providing little predictive value about what truly qualifies as an improvement to real property.<sup>157</sup> Minnesota has effectively managed this uncertainty in the twenty years following the statute’s enactment—the court has ruled on only nine cases involving the statute in that period.<sup>158</sup>

However, the construction boom of the 1980s swelled litigation under section 541.051. From 1986 through 1988, the Minnesota Court of Appeals together with the Minnesota Supreme Court issued eighteen rulings on section 541.051, double the number of

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153. See *Adair*, 741 F.2d at 114.

154. Bremer, *supra* note 2, § 2(a). Bremer notes that some jurisdictions use a four factor test including: value added, the nature of the improvement, the relationship of the improvement to the land and its occupants, and permanence. *Id.* Other jurisdictions look only at three factors: value enhancement, the expenditure of labor or money, and intent to make a property more useful or valuable. *Id.* § 10(b).

155. *Id.* § 2(a).

156. Halleland & Nelson, *supra* note 2, at 34.

157. Jennings, *supra* note 4, at 476. Minnesota has found the following to be improvements: walls, panic doors, storm sewers, hardwired smoke detector systems, unfinished stairwells, permanently installed electrical cables, and escalators. *Id.* at 475–76. Minnesota has found the following not to be improvements: large steel tubes, cement blocks for a wall, and church altars. *Id.* See also Mulally & Bloomquist, *supra* note 128, at 17. According to Mulally and Bloomquist, the supreme court has found the following to be an improvement to real property under the statute: rock-crushing machines, light fixtures and ballasts, electrical transmission cables that are part of a larger transmission system, electrical transformer vaults, and wooden posts that are part of birdfeeders. *Id.* The pair also notes that parties at the appellate level did not even dispute that the following would qualify as improvements under the statute: septic systems, fireplaces, storm sewers, electrical switchboards, water drainage systems, floor drains, roof flashing, ceiling mortar, and patios. *Id.* at 17–18.

158. *Id.* at 16.

opinions on the statute in the previous two decades.<sup>159</sup> This explosion in litigation further exposed the statute's weaknesses.<sup>160</sup>

The statute's mystery is not limited to what qualifies as an improvement to real property either. The statute's causation clause, which requires that an injury must arise from the "defective or unsafe condition" of the improvement, has also caused jurisprudential consternation, as have provisions related to when the statute of limitations begins to run.<sup>161</sup> The legislature addressed the latter issue in its 1988 amendment, which clarified that the section's statute of limitations begins to run upon the discovery of a plaintiff's injury, not upon the discovery of the defective or unsafe condition.<sup>162</sup> The same amendment also clarified related provisions regarding contribution and indemnity under the statute.<sup>163</sup>

The legislature continues to tinker with section 541.051 to this day. For example, in the 2006 session, State Senator Don Betzold introduced an amendment to section 541.051 to change contribution and indemnity language.<sup>164</sup> Although this amendment focused on a different part of section 541.051, it demonstrates the extent to which the entire statute continues to require further clarification and work. Of course, the work of improving a statute

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159. *Id.*

160. *Id.*

161. *Id.* at 18. See *Lietz v. N. States Power Co.*, 718 N.W.2d 865, 872 (Minn. 2006) (discussing this issue, but noting that negligence during installation had already been established as an appropriate action under the statute).

162. Mulally & Bloomquist, *supra* note 128, at 31.

163. *Id.* at 32.

164. S.F. 241, 85th Sess. § 4 (Minn. 2007); E-mail from Senator Don Betzold, Minn. State Senate, to author, Katherine Johansen, William Mitchell Coll. of Law (May 18, 2007, 18:18:00 CST) (on file with the William Mitchell Law Review) [hereinafter E-mail from Senator Don Betzold]. Senator Betzold, the bill's author stated, "[t]he bill was heard and passed from the Senate Judiciary Committee, but I have not taken that bill up for procedural reasons." E-mail from Senator Don Betzold. Senator Betzold also stated that the Minnesota State Bar Association and the Builders Association of Minnesota requested the changes in response to *Weston v. McWilliams*, 716 N.W.2d 634 (Minn. 2006), another Minnesota Supreme Court case decided within weeks of *Lietz*. *Id.* However, no group or legislator has requested changes in response to *Lietz's* holding, indicating that *Lietz* comports with the statute's purpose. *Id.* Moreover, according to the Minnesota Legislature's bill tracking system, no amendments regarding "improvements to real property" have been introduced. Minnesota State Legislature, <http://www.leg.state.mn.us/leg/legis.asp> (last visited Feb. 14, 2008). Legislative publications likewise reveal that legislators have not taken up this issue. See The Minnesota Senate Briefly, <http://www.senate.leg.state.mn.us/briefly/> (last visited Feb. 14, 2008); The Session Weekly, <http://www.house.leg.state.mn.us/hinfo/swmain.asp> (last visited Feb. 14, 2008).

rests not only on the shoulders of the legislature but also in the hands of the judiciary; legislative amendments must be properly upheld by clear judicial interpretation. Thus, case law contributes significantly to the understanding of section 541.051. Indeed, *Lietz* is just the latest case law contribution to understanding Minnesota's enduringly problematic improvement to real property statutes.

### III. THE *LIEZ* CASE

The story of *Lietz* starts out, literally, with a bang.<sup>165</sup> The claims in question arose when workers pierced a natural gas pipeline, which led to an explosion that damaged a Taco John's restaurant.<sup>166</sup>

The parties and chronology involved unfold as follows. In 1998, Seren Innovations hired Sirti Limited (Sirti) to design a telecommunications system in downtown St. Cloud, Minnesota.<sup>167</sup> Sirti in turn employed Cable Constructors, Inc. (CCI) for installation.<sup>168</sup> Northern States Power (NSP) supplied the area with natural gas.<sup>169</sup> On December 11, 1998, CCI began to install a utility pole support anchor (anchor) to stabilize and balance fiber-optic cables.<sup>170</sup> Undertaking its work, the crew demolished the sidewalk, placed an auger, or "anchor cranker," on top of their anchor, and burrowed into the ground.<sup>171</sup> After having delved eighteen to twenty-four inches below, the anchor struck a hard object, later determined to be a granite slab.<sup>172</sup> The crew attempted to break through the object by removing the auger and striking the slab with a sledgehammer; the workers then replaced the auger and continued boring.<sup>173</sup> Activity continued smoothly until, when the anchor sat twelve to eighteen inches above the ground's surface, the workers smelled gas and noticed dirt blowing away from the anchor's hole.<sup>174</sup>

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165. *Lietz*, 718 N.W.2d at 868.

166. *See id.* at 868; *Lietz v. N. States Power Co.*, No. A04-901, 2005 WL 44905, at \*1 (Minn. Ct. App. Jan. 11, 2005).

167. *Lietz*, 718 N.W.2d at 868.

168. *Id.*

169. Brief of Defendant-Respondent at 2, *Lietz v. N. States Power Co.*, 718 N.W.2d 865 (Minn. 2006) (No. A04-901), 2005 WL 4662973.

170. *Lietz*, 718 N.W.2d at 868.

171. *Id.*

172. *Id.*

173. *Id.*

174. *Id.*

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The workers realized they had struck a gas line and notified the crew foreman.<sup>175</sup> Unfortunately, the gas spread and less than an hour later caused an explosion that killed four, injured many others, and damaged surrounding buildings.<sup>176</sup> Jaenty, Inc. (Jaenty), which owned the nearby Taco John's restaurant, alleged that its building was among those that sustained damage and sought compensation on a negligence cause of action.<sup>177</sup> However, Jaenty did not commence its action until sometime between late 2001 and early 2002, approximately three years after the explosion.<sup>178</sup>

Section 541.051 establishes a two year statute of limitations on claims arising from the defective and unsafe condition of an improvement to real property.<sup>179</sup> Jaenty admitted that it brought suit after the period expired but contended that the statute did not apply.<sup>180</sup> NSP argued that the statute did apply and that it barred Jaenty's claim.<sup>181</sup>

The district court granted NSP's motion for summary judgment.<sup>182</sup> The district court used the state's accepted definition of an "improvement to real property" as one that includes a "permanent addition to or betterment of real property," in holding that the anchor installation process completed at the time of the explosion qualified as an improvement under the statute.<sup>183</sup> The district court's holding is important in two ways. First, it reflects the correct interpretation of the statute under a plain meaning analysis.<sup>184</sup> Second, it is the supreme court's basis for asserting that the issue of incomplete installation is proper for appeal.<sup>185</sup> While Jaenty neglected to argue that the anchor was not an improvement under the statute because its installation was incomplete, the

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175. *Id.*

176. *Id.*

177. Brief of Respondents Sirti, Ltd., Cable Constructors, Inc., and Seren Innovations, Inc. at 2, *Lietz v. N. States Power Co.*, 718 N.W.2d 865 (Minn. 2006) (No. A04-901), 2005 WL 4662972 (noting that Jaenty had already been compensated under its insurance policy, so its insurer, Travelers Insurance Company, also had a stake in the case's outcome).

178. *Lietz*, 718 N.W.2d at 868.

179. MINN. STAT. § 541.051, subdiv. 1 (2006).

180. *Lietz*, 718 N.W.2d at 869.

181. *Id.*

182. *See id.*

183. *Lietz*, 718 N.W.2d at 869-70.

184. *Lietz v. N. States Power Co.*, No. A04-901, 2005 WL 44905, at \*2, \*4 (Minn. Ct. App. Jan. 11, 2005).

185. *Id.*

supreme court held the issue was sufficiently preserved for appeal because the district court's holding relied on a definition of an improvement to real property that invoked the quality of permanence, a temporal aspect of real property.<sup>186</sup>

A split appellate court affirmed.<sup>187</sup> The majority cited three reasons for categorizing the anchor installation as an improvement to real property.<sup>188</sup> First, the court explained that, "the anchor was a permanent addition to or betterment of real property as it was . . . installed during the course of a larger improvement."<sup>189</sup> Second, "the anchor enhanced the capital value of the property," and third, the installation "involved the expenditure of both labor and money."<sup>190</sup> The appellate court also addressed the argument that the anchor and auger constituted construction activity instead of an improvement to real property.<sup>191</sup> The majority rejected this argument, instead holding that the anchor constituted an improvement under the plain meaning of the statute and in comparison to previous cases.<sup>192</sup>

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186. *Id.*

187. *Id.* at \*4 (holding that the anchor was an improvement under section 541.051). The dissent contended the anchor was not permanent and thus not such an improvement. *Id.* at \*4-\*5 (Schumacher, J., dissenting).

188. *Id.* at \*2.

189. *Id.*

190. *Id.*

191. *Id.* at \*2, \*3 (explaining that *Brandt v. Hallwood Management Co.*, 560 N.W.2d 396 (Minn. Ct. App. 1997), cited by the appellant, is distinguishable because the activities in question in the case were not integral to the overall improvement, as is the installation of the anchor to the completion of the fiber-optic cable system in *Lietz*). The court also cited *Wiita v. Pottlatch Corp.*, 492 N.W.2d 270 (Minn. Ct. App. 1992) as a more promising precedent for the appellants, but subsequently distinguished it as well, noting that the injuries in *Wiita* were not causally connected to the improvement to real property in that case. *Lietz*, 2005 WL 44905 at \*3.

192. *Id.* at \*2. The appellate court applied the *Adair* factors and found that the anchor was a permanent addition that was integral to the course of a larger improvement. *Id.* See also *supra* Part II.C.6 (discussing the *Adair* factors). It also found that the anchor enhanced the property's value by allowing the fiber-optic cable system to be installed, and that the installation required the expenditure of labor and money. *Lietz*, 2005 WL 44905 at \*2. Along with these factors, the court noted that cases in which construction activity, as opposed to improvement to real property, was the focus, were distinguishable from the facts of *Lietz*. *Id.* Finally, the court mentioned that the facts of *Lietz* compared favorably with cases in which the statute had previously ensnared activities as improvements to real property. *Id.* Specifically, the court mentions *Lederman v. Cragun's Pine Beach Resort*, 247 F.3d 812, 815 (8th Cir. 2001), in which digging a trench in preparation for a construction project qualified as an improvement. *Lietz*, 2005 WL 44905 at \*2.

Even more notably, the court waved the flag of opportunity, stating that “no Minnesota court has ever limited the application of section 541.051 to projects that have been actually completed and turned over to the property owner.”<sup>193</sup> The appellate court further condemned the idea of such a limitation on the statute’s application, commenting that “[s]uch an application of the statute would place undue restriction on the statute of limitations, thereby allowing the statute to be applicable in only those situations where a cause of action arose following completion of the project.”<sup>194</sup>

Jaenty appealed,<sup>195</sup> arguing that the anchor was not an improvement because its installation was incomplete at the time of injury and that the negligence involved failed to meet statutory requirements.<sup>196</sup> The supreme court resolved both issues for the defendants.<sup>197</sup> Turning to precedent,<sup>198</sup> the majority noted that negligence during the installation process, as occurred here,<sup>199</sup> meets the “defective and unsafe condition” requirement of section 541.051.<sup>200</sup> When defining improvements however, the court hastily invoked an elaborate search for statutory meaning. Contending that the statute supported definitions that included or excluded incomplete improvements,<sup>201</sup> the majority declared the statute ambiguous and proceeded to legislative intent analysis.<sup>202</sup>

First, the court examined the need and occasion for the law<sup>203</sup> and found that the legislature’s 1980 amendment ensnared incomplete improvements because “the legislature had a broader purpose for section 541.051 than simply limiting the liability exposure which occurred after the erosion of the privity of contract

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193. *Lietz*, 2005 WL 44905 at \*3.

194. *Id.*

195. *See Lietz v. N. States Power Co.*, 718 N.W.2d 865, 869 n.1 (Minn. 2006). Despite little attention to the issue in lower courts, the Minnesota Supreme Court held that Jaenty sufficiently preserved for appeal the issue of whether the incompletely installed anchor qualified as an improvement. *Id.*

196. *Id.* at 869.

197. *Id.* at 871 (concluding that the anchor qualifies as an improvement), 873 (concluding that the injuries were due to the condition of the anchor).

198. *Id.* at 871–72 (citing *Griebel v. Andersen Corp.*, 489 N.W.2d 521 (Minn. 1992)).

199. *Id.* at 872.

200. *Id.* at 872 (citing *Pac. Indem. Co. v. Thompson-Yaeger, Inc.*, 260 N.W.2d 548, 552–55 (Minn. 1977)).

201. *Id.* at 870.

202. *Id.*

203. *Id.* (citing MINN. STAT. § 645.16(1) (2006)).

doctrine.”<sup>204</sup> Second, the court looked to the particular consequences<sup>205</sup> of excluding incomplete improvements, observing that the narrower interpretation would precipitate difficult determinations regarding when an improvement was “completely installed.”<sup>206</sup> Based on these two points, the majority ruled that the legislature’s intent was to include incomplete improvements.<sup>207</sup>

Conversely, the dissent looked to the dictionary definitions of language used in the statute.<sup>208</sup> It concluded that such improvements fall outside the statute because they are not “permanent” under the established definition of “improvement to real property.”<sup>209</sup> The improvements were not “permanent,” the dissent concluded, because the anchor was still “being installed and was not yet ‘stable’” when the rupture occurred.<sup>210</sup> Still, the dissent conceded, the anchor may qualify as an improvement under the statute eventually.<sup>211</sup>

#### IV. ANALYSIS

*Lietz* demonstrates that the wrong means can sometimes lead to the right end and that even a well-wrought path can veer off course. One charts the best path to *Lietz*’s destination by employing the common sense, plain meaning approach of the dissent, which, if properly executed, leads to the majority’s holding that the anchor qualifies as an improvement under statutory language and case law definitions.

##### A. *Legislative Intent: A Majority Gone Awry*

Despite its clear holding, *Lietz* offers only confused reasoning; the majority manufactures statutory ambiguity,<sup>212</sup> wrongly interprets

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204. *Id.* at 871.

205. *Id.* (citing MINN. STAT. § 645.16(6) (2006)).

206. *Id.*

207. *Id.*

208. *Id.* at 873–74 (Page, J., dissenting).

209. *Id.* For a more detailed analysis of Justice Page’s dissent, see *infra* Part IV.C.

210. *Id.* at 874.

211. *See id.*

212. According to *Current Technology Concepts, Inc. v. Irie Enterprises, Inc.*, 530 N.W.2d 539, 543 (Minn. 1995), a statute is ambiguous if it supports multiple interpretations. Also, section 645.16 permits legislative intent analysis only if a statute is unclear. MINN. STAT. § 645.16 (2006). Yet, section 541.051 has a clear

the 1980 amendments, and rightly but unnecessarily predicts the consequences of alternate outcomes.<sup>213</sup>

First, *Lietz's* legislative intent analysis is unnecessary because section 541.051 is unambiguous.<sup>214</sup> As is discussed below, a plain meaning reading is sufficient to resolve the issue of when improvements to real property begin under the statute.<sup>215</sup> Treading unnecessarily into legislative intent analysis presents the potential for needless confusion regarding a statute with an already confused history.<sup>216</sup>

Second, *Lietz's* analysis is partially inaccurate. The court correctly identifies that the statute's original purpose was to protect builders and construction contractors from liability.<sup>217</sup> The

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meaning. *See* MINN. STAT. § 541.051 (2006). As I will later address, the statute's clear meaning renders further analysis unnecessary. *See infra* Part IV.C.

213. *See Lietz*, 718 N.W.2d at 870–71.

214. While not controlling in Minnesota, the *Adair* court established that the meaning of "improvement to real property" is the definition adopted from *Pacific*; thus, there is no ambiguity as to the phrase's meaning. *Adair v. Koppers Co.*, 741 F.2d 111, 114 (6th Cir. 1984). Furthermore, the phrase's words have clear dictionary definitions. *Id.* Thus, while legislative action and judicial interpretation regarding the statute have been unclear, the meaning of the statute's words is clear.

215. *See infra* Part IV.C.

216. Legislative intent analysis is a perilous undertaking regardless of the state of the current statute. Justice Antonin Scalia states his thoughts on judicial efforts to divine legislative intent: "My view that the objective indication of the words, rather than the intent of the legislature, is what constitutes the law leads me, of course, to the conclusion that legislative history should not be used as an authoritative indication of a statute's meaning." ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 30 (Amy Gutmann ed., 1997). Tracing the evolution of legislative history, Scalia recalls the joke that "one should consult the text of the statute only when the legislative history is ambiguous." *Id.* at 31. He laments that this joke is no longer funny, quoting a brief that began: "Unfortunately, the legislative debates are not helpful. Thus we turn to the other guidepost in this difficult area, statutory language." *Id.* Even judges who have a more generous view of legislative intent analysis, such as Scalia's colleague Justice Breyer, contend that most judges start by looking first to the statute's language, structure, and history to determine its purpose before delving into legislative intent analysis. *See* STEPHEN BREYER, *ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION* 86 (Alfred K. Knopf ed., 2005). The words of Minnesota's improvement to real property statutes have clear definitions; thus, a predisposition to be inclined or disinclined to legislative intent is irrelevant. Scholars favorable to and skeptical of the practice look first to the words, which are sufficient to resolve the issues in *Lietz*, making legislative intent analysis unnecessary, regardless of its theoretical value.

217. *See Lietz*, 718 N.W.2d at 870 (quoting *Kittson County v. Wells, Denbrook & Assocs.*, 308 Minn. 237, 241–42, 241 N.W.2d 799, 802 (1976)). Mysteriously, the court did not employ this applicable and widely accepted legislative intent analysis

majority, however, fails to properly define the purpose of the 1980 amendment.<sup>218</sup> Neither the occasion nor the need for the amendment is related to interpreting the phrase “improvements to real property.”<sup>219</sup> Rather, the amendment only expands section 541.051 by bringing non-tort actions within the statute’s reach and remedying unrelated constitutional issues.<sup>220</sup> In effect, the amendment is neutral because Jaenty’s negligence claim would have qualified even before the 1980 changes.<sup>221</sup> Thus, the court makes an untenable leap in proclaiming that the amendment was somehow meant to broaden the scope of “improvements to real property.”<sup>222</sup>

The majority fares better in asserting that excluding unfinished improvements would force courts to draw difficult distinctions “between ‘partially-installed’ items that are *not* covered by [the statute] and ‘completely-installed’ improvements that are covered.”<sup>223</sup> The argument is strong, but because the court’s analysis should never have reached this point, it is alas, superfluous. Moreover, requiring items’ installation to be “complete” simply begs the question: what qualifies as “complete”?

### *B. Strict Construction: A Dissent Gone Astray*

The dissent travels the more promising path of strict construction in its analysis. Adhering to Minnesota’s established

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by reasoning that incomplete improvements should be included to protect related industries from excess liability. *Id.*

218. See Halleland & Nelson, *supra* note 2, at 8 (noting that the 1980 amendment was in response to constitutional concerns and that the court clearly responded to the amendment in *Calder v. City of Crystal*, 318 N.W.2d 838 (Minn. 1982)).

219. See Samuel D. Heins, *Architects in Minnesota Law*, 51 HENNEPIN LAW. 15, 16 n.13 (Nov.–Dec. 1981).

220. Compare MINN. STAT. § 541.051 (2006), with MINN. STAT. § 541.051 (1966).

221. See § 541.051 (1966); *Lietz*, 718 N.W.2d at 872. The fact that Jaenty represents a third-party interest is likewise unimportant. Minnesota held in *Jack v. Applebaum’s Food Markets, Inc.*, 280 Minn. 247, 250, 158 N.W.2d 857, 860 (1968), that the statute does not bar negligence actions by third parties.

222. See *Lietz*, 718 N.W.2d at 871 (citing no legislative history for this assertion, confining its reasoning to one quixotic sentence: “This amendment indicates that the legislature had a broader purpose for section 541.051 than simply limiting the liability exposure which occurred after the erosion of the privity of contract doctrine.”).

223. *Id.*

interpretive approach,<sup>224</sup> Justice Page mapped out the statute, the common law definition of “improvements to real property,” and the common sense definitions of the pertinent words: “permanent,” “addition,” and “betterment.”<sup>225</sup>

In laying out his argument, Justice Page dealt first with the language of the statute, which reads, “no action . . . arising out of the defective and unsafe condition of an improvement to real property . . . shall be brought . . . more than two years after discovery of the injury . . . .”<sup>226</sup>

Next, he invoked the *Pacific* definition of “improvement to real property,” reminding readers that such an improvement must be “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 property more useful or valuable as distinguished from ordinary repairs.”<sup>227</sup> Notably, Justice Page also cited to *Pacific* to establish the statutory construction rule that the court must give “effect to the plain meaning of the words of the statute without resort to technical legal constructions of its terms.”<sup>228</sup>

With this base established, Justice Page introduced the dictionary definitions of “permanent,” “addition,” and “betterment.”<sup>229</sup> “Permanent” means “continuing or enduring (as in the same state, status, place) without fundamental or marked change: not subject to fluctuation or alteration: fixed or intended to be fixed: lasting, stable.”<sup>230</sup> In applying this definition, the dissent swerved lethally when it concluded that an improvement must be complete to be “permanent.”<sup>231</sup> The dissent’s reasoning purported that common sense (in the colloquial, not the interpretive, sense) dictates that the anchor was not stable, meaning it was not continuing or enduring without fundamental or marked change and not fixed or intended to be fixed, because it

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224. See MINN. STAT. § 645.16 (2006); *Pac. Indem. Co. v. Thompson-Yaeger, Inc.*, 260 N.W.2d 548, 554 (Minn. 1977).

225. *Lietz*, 718 N.W.2d at 873–74 (Page, J., dissenting) (citing WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 1683 (1993)).

226. *Id.* at 873 (citing MINN. STAT. § 541.051, subdiv. 1(a) (2004)).

227. *Id.* at 874 (citing *Pacific*, 260 N.W.2d at 554).

228. *Id.* at 873 (citing *Pacific*, 260 N.W.2d at 554).

229. *Id.*

230. *Id.* (citing WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 1683 (1993)).

231. *Id.* at 874.

was still in the process of installation.<sup>232</sup> The dissent conceded that the anchor may eventually qualify as an improvement to real property, making the chronology rather than the nature of the improvement the dissent's concern.<sup>233</sup>

Additionally, the dissent failed to elaborate on when the anchor might become an improvement, leaving the reader to speculate as to how much progress qualifies as intent to fix an improvement to real property.<sup>234</sup> Most importantly, the dissent failed to defend against the argument that commencing installation implies intent to fix the anchor as part of the fiber-optic system, which brings the structure clearly under applicable definitions;<sup>235</sup> indeed, this is the part of the "permanent" definition that brings *Lietz* under the statute's scope.

The dissent also examined the definitions of "addition" and "betterment."<sup>236</sup> An "addition," the dissent explains, is defined as "a part added to or joined with a building."<sup>237</sup> A "betterment," however, is defined as "a making or becoming better: an improvement of an estate (as by the addition of new buildings) that makes it better and more valuable than mere repairing would do."<sup>238</sup> The dissent justified its rejection of the anchor as an improvement to real property based on its supposed failure to qualify as "permanent" under the applicable definition; it does not comment on the anchor's qualification as an "addition" or "betterment."<sup>239</sup>

The anchor qualified as an addition because it has been joined to the building through the fiber-optic cable system in progress.<sup>240</sup>

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232. *Id.*

233. *Id.*

234. A taciturn dissent on the issue of permanence may be deliberate. The enigmatic nature of the permanence question led Halleland and Nelson to mention that previous cases indicate that "[i]t is by no means dispositive that the 'improvement' at issue is not permanently part of the building or property." Halleland & Nelson, *supra* note 2, at 9.

235. *See Lietz*, 718 N.W.2d at 874.

236. *Id.* at 873.

237. *Id.* at 873 (citing WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 24 (1993)).

238. *Id.* at 873-74 (citing WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 209 (1993)).

239. *Id.* at 874.

240. *See Lederman v. Cragun's Pine Beach Resort*, 247 F.3d 812 (8th Cir. 2001) (holding that a temporary trench dug to permit installation of a communications cable was an "improvement to real property" under Minnesota law and applying

The anchor also qualified as a betterment because it is an integral part of the cable system, which undoubtedly enhances the value of the building to which it is adjoined more than would ordinary repairs.<sup>241</sup> This point, admittedly, depends on the contextual scope in which one views the anchor; alone it may not qualify as a betterment, but the fiber-optic system overall would undoubtedly qualify.<sup>242</sup> The dissent addressed neither of these points, missing an opportunity to bolster its rejection of the anchor as an improvement or to provide valuable dicta on interpreting the word “betterment.”

Misapplying the “common sense” approach,<sup>243</sup> neglecting to apply full definitions, and missing opportunities to expand its case, the dissent concluded that a partially installed anchor cannot be a permanent addition or betterment to qualify as an improvement to

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Minnesota’s two year statute of limitations for construction improvements instead of the six year statute for negligence actions).

241. In *Lederman*, the temporary nature of the trench was unimportant; the fact that the trench was a step necessary to installing the communications cable was the critical factor. *See id.* at 815–16. Indeed, the potential value of the improvement influences whether the steps required to reach that improvement invoke applicable statutes. *See id.* In the case of cable systems, courts tend to require significant stretches to cast a case outside the reach of an improvement to real property statute. *See, e.g.,* *New Meadows Holding Co. by Raugust v. Wash. Water Power Co.*, 659 P.2d 1113 (Wash. App. 1983). In *New Meadows*, the court held that a residence-destroying fire, allegedly caused by a gas leak resulting from damage arising from the installation of an underground telephone cable, was not an improvement to real property. *Id.* at 1116–17. The court based its ruling on the fact that the cable system was in no way connected to the residence the fire destroyed. *Id.* at 1117. The court also distinguished *New Meadows* from its ruling in *Washington Natural Gas Co. v. Tye Construction Co.*, 611 P.2d 1378 (Wash. 1980), in which the lines related to the injury directly added value to the property involved.

242. *See* Jennings, *supra* note 4, at 475; Mullaly & Bloomquist, *supra* note 128, at 17–18 (revealing interpretive inconsistencies that could affect the “betterment” issue). For example, Minnesota courts have found walls to be an improvement while holding that the blocks composing the wall were not improvements; one could argue that this shows that an element of an overall improvement does not qualify as a betterment. *See* Jennings, *supra* note 4, at 476. At the same time, other elements of improvements, such as ceiling mortar (as opposed to the entire ceiling) have also been held to qualify as improvements under the Minnesota statute. Mullaly & Bloomquist, *supra* note 128, at 17–18. These varied results demonstrate the extent to which the anchor’s classification as a “betterment” may be no less debatable than its classification as “permanent.”

243. *Lietz*, 718 N.W.2d at 874 (stating that defining the anchor as permanent defies common sense instead of applying the “commonsense” approach by interpreting words according to their common usage).

real property.<sup>244</sup> This convenient prevarication preserved liability by betraying the strict construction approach it purportedly employs.

C. *Keeping It Simple: An Alternate Path to the Lietz Holding*

Section 541.051 is a statute in need of a consistent interpretive methodology.<sup>245</sup> *Lietz* offers a clear holding, alerting litigants that incomplete improvements are within the statute's reach; however, its misguided legislative intent analysis only further muddies the waters of section 541.051 by offering another convoluted explanation where clarity is both available and preferable.

A well-executed plain meaning interpretation provides the same holding while also establishing the appropriate mode of statutory construction. Because the meaning of "improvement to real property" is clear, there is no need to divine (or invent) corresponding legislative intent. An "improvement to real property" is a permanent addition or betterment.<sup>246</sup> A "permanent" addition is a component that is fixed or intended to be fixed; the anchor, already nearly installed,<sup>247</sup> was fixed or, at least, intended to be fixed as an integral part of the fiber-optics infrastructure. The anchor also likely qualifies as a "betterment," since a telecommunications system would improve the property's value more than ordinary repairs.<sup>248</sup> It could likely be considered an "addition" as well since the cable was joined to the building through the cable system.<sup>249</sup>

Under this analysis, the court need only look to the statute, *Pacific's* long-established definition, and the plain meaning of the words therein to find answers. Incomplete improvements should qualify under section 541.051 not because that is what the legislature intended, but because that is what basic statutory construction commands.

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244. *Id.*

245. See Hallelund & Nelson, *supra* note 2, at 8 (noting that inconsistent interpretive methodology has led Minnesota courts to apply section 541.051 in ways that surprise litigants).

246. *Lietz*, 718 N.W.2d at 869 (quoting *Pac. Indem. Co. v. Thompson-Yaeger, Inc.*, 260 N.W.2d 548, 554 (Minn. 1977)).

247. *Id.* at 868 (emphasizing that the anchor was nearly installed when the crew pierced the gas line).

248. See *id.* at 874 (Page, J., dissenting) (emphasizing the value component of a "betterment").

249. See *Lederman v. Cragun's Pine Beach Resort*, 247 F.3d 812, 815-16 (8th Cir. 2001).

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## V. CONCLUSION

Ultimately, *Lietz* reached the right destination, albeit by a rocky, wayward course. The plain meaning of both the statute and related case law support *Lietz's* holding; thus, a linguistic proof, not a fumbling grasp for legislative intent, was all that was required. Still, despite its wooly reasoning, *Lietz* represents an important next step in understanding this often murky area in Minnesota law. Following *Lietz*, the timeline of section 541.051 is clear: improvements most likely begin at conception, not completion. The court's resort to legislative intent analysis may reveal its approach to the statute; one that offers the greatest flexibility in controlling liability. The court, however, should have preserved this interpretive methodology for a more urgent occasion. While the analysis did not harm *Lietz's* holding, it detracted from it. After all, there may be more than one way to skin a cat, but some ways are better than others.