STATE OF MINNESOTA
IN COURT OF APPEALS
A08-1216

Joseph Geary,
Appellant,

vs.

William D. Miller,
Respondent.

Filed June 2, 2009
Affirmed
Lansing, Judge

Hennepin County District Court
File No. 27-CV-07-13762

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Considered and decided by Schellhas, Presiding Judge; Lansing, Judge; and Poritsky, Judge.*

U N P U B L I S H E D O P I N I O N

LANSING, Judge

The district court granted summary judgment dismissing, as time-barred, Joseph Geary's nuisance and trespass claims for water damage to his home. Because the two-

* Retired judge of the district court, serving as judge of the Minnesota Court of Appeals by appointment pursuant to Minn. Const. art. VI, § 10.

year statute of limitation in Minn. Stat. § 541.051 (2008) applies, and no genuine issue of material fact exists on whether Geary's claims come within the exception to the limitation, we affirm.

F A C T S

Joseph Geary owns a duplex adjacent to a duplex owned by William Miller. Miller's building has gutters and a vertical downspout on the side of the building, near the center of the structure. In 2004 the downspout had a short extension at ground level that pointed toward Geary's duplex. Early in October 2004, during heavy rains, water seeped into the basement of Geary's duplex. Geary reported the problem to Miller, and Miller altered the bottom of the downspout to direct the water toward the front of his lot. Geary's basement area flooded again in October 2005, and excess water continued to pool between the buildings during periods of wet weather.

Geary unsuccessfully sought to address the problem through his and Miller's insurance companies, the City of Minneapolis, and the State Attorney General. When these attempts met with no success and the water problem continued, Geary sued Miller in July 2007, alleging nuisance and trespass. Miller moved for summary judgment, arguing that the action was barred by the two-year statute of limitations for improvements to real property. The district court granted Miller's motion and dismissed Geary's complaint. Geary now appeals.

D E C I S I O N

The issue in this appeal is the construction and applicability of Minn. Stat. § 541.051, which establishes a two-year limitation period for actions "arising out of the

defective and unsafe condition of an improvement to real property." *Id.*, subd. 1(a). The district court granted summary judgment dismissing Geary's nuisance and trespass claims against Miller, concluding that the complaint, which was served in July 2007, was barred by the limitation period that had begun to run in October 2004 when Geary discovered that water from Miller's downspout was damaging his property. *See id.* (providing that discovery of injury triggers two-year limitation period). The district court further concluded that Geary's claims did not come within the exception to the two-year limitation that applies to "negligence in the maintenance, operation or inspection" of the improvement. *See id.*, subd. 1(d) (creating exception). On appeal from a summary judgment determining the "construction and applicability" of a statute of limitation, our review is de novo. *Noske v. Friedberg*, 670 N.W.2d 740, 742 (Minn. 2003).

A defendant bears the burden of establishing that a statute of limitation bars an action. *State Farm Fire & Cas. v. Aquila Inc.*, 718 N.W.2d 879, 885 (Minn. 2006) (recognizing that assertion of limitation statute is affirmative defense). Once a defendant has established the limitation under § 541.051, subd. 1(a), the evidentiary burden shifts to the plaintiff to establish the negligence exception in subdivision 1(d). *State Farm*, 718 N.W.2d at 886. To avoid summary judgment, the plaintiff must "prove that at least a question of material fact exist[s] with respect to [the defendant's] negligence." *Id.*

Miller met his initial burden on the applicability of the two-year limitation. Geary conceded at oral argument that a drainage system for a house constitutes an improvement to real property. Geary also acknowledges that he initiated this action more than two years after October 2004, when he knew water from Miller's downspout was damaging

his property. *See Nolan & Nolan v. City of Eagan*, 673 N.W.2d 487, 497 (Minn. App. 2003) (noting that discovery of injury starts two-year limitation period), *review denied* (Minn. Mar. 16, 2004).

The burden, therefore, shifted to Geary to establish that his claims satisfied the exception for "negligence in the maintenance, operation or inspection" of the drainage system. Minn. Stat. § 541.051, subd. 1(d). Because the statute specifically limits the exception to *negligence* in the maintenance, operation or inspection, the exception requires, at a minimum, an allegation of negligence. To establish a claim for negligence, a plaintiff must show that the defendant breached a duty owed to the plaintiff and that the breach was the proximate cause of plaintiff's damages. *Gilbertson v. Leininger*, 599 N.W.2d 127, 130 (Minn. 1999).

Geary has not alleged either duty or breach, both of which would be required for a common-law claim of negligence. His complaint includes causes of action for nuisance and trespass only, claims that are generally subject to the limitation period in § 541.051. *Nolan*, 673 N.W.2d at 496-97 (recognizing subdivision 1(d) exception but holding that nuisance and trespass claims were barred). He did submit evidence indicating that Miller's drainage system violated the Minneapolis housing-maintenance code. But this evidence, even if it had been included in the allegations of the complaint, would demonstrate a statutory violation that could provide only a basis for negligence per se. *Boyum v. Main Entrée, Inc.*, 535 N.W.2d 389, 392 (Minn. App. 1995) (distinguishing between per-se-negligence standard fixed by ordinance and common-law-negligence standard), *review denied* (Minn. Sept. 28, 1995). We have previously determined that the

subdivision 1(d) exception applies only to common-law negligence and does not include a claim of negligence per se. *Id.*

We agree with Geary that a nuisance cause of action could be grounded in common-law negligence. *See Highview N. Apartments v. County of Ramsey*, 323 N.W.2d 65, 71 (Minn. 1982) (stating that "negligence may be cause of a nuisance"). But if a claim is to be construed as a nuisance action grounded in negligence, it must satisfy the elements of negligence. *See Chabot v. City of Sauk Rapids*, 422 N.W.2d 708, 712-13 (Minn. 1988) (dismissing negligent-drainage claim because plaintiff failed to articulate defendant's duty). Because Geary's complaint and evidentiary submissions have failed to identify elements of negligence, he cannot rely on nuisance as a basis for the negligence exception.

Geary's final attempt to bring his nuisance and trespass claims within the ambit of the negligence exception relies on the reasonable-use doctrine that governs the discharge of surface waters between property owners. *See Sheehan v. Flynn*, 59 Minn. 436, 441-42, 61 N.W. 462, 463 (1894) (setting forth Minnesota rule on surface-water disputes). Reasonable use does not define a duty of care in the usual sense, and a claim based on reasonable use is not the same as a negligence claim. *Highview*, 323 N.W.2d at 72. Reasonable use is fundamentally a distinct concept of liability, one that is *not* based entirely on fault, in that objective standards of care are only *part* of the considerations that determine whether the use is reasonable. *See Enderson v. Kelehan*, 226 Minn. 163, 168, 32 N.W.2d 286, 289 (1948) (analyzing factors relevant to reasonable use). Thus,

Geary argues to no avail that Miller's duty under the reasonable-use doctrine provides a negligence base for Geary's nuisance and trespass claims.

Geary did not allege negligence and he did not base either his nuisance or his trespass claim on negligence grounds. His arguments attempting to recast his claims do not meet the minimum requirements of establishing the elements necessary to come within the exception in § 541.051, subd. 1(d), for damages resulting from negligence in the maintenance, operation, or inspection of an improvement to real property.

Finally, Geary argues that his suit is not barred because he has alleged a "continuing" trespass. As a basis for this argument, Geary relies on the supreme court's distinction between "permanent or continuing" in analyzing whether a limitation period would bar a trespass action in *Hebert v. City of Fifty Lakes*, 744 N.W.2d 226, 233-34 (Minn. 2008). Even if Geary's complaint could be read to allege a continuing trespass, we conclude that this claim would nonetheless be barred under § 541.051, subd. 1(a). The *Hebert* court was interpreting the ordinary six-year statute of limitation for trespass, not the two-year limitation established under § 541.051. Section 541.051 expressly states that, when the other conditions for the time bars are met, "no action [can be brought] by any person in contract, tort, *or otherwise to recover damages.*" *Id.*, subd. 1(a) (emphasis added). This language does not reasonably allow an interpretation that continuing trespass is exempted from the bar. Likewise, the statute has specifically delineated exceptions to the time bars, none of which address continuing trespass. *See id.*, subd. 1(b)-(e) (defining exceptions or limitations to time bar in subdivision 1(a)). It would not

be reasonable to infer an exception for continuing trespass when the statute has listed exceptions that do not include it.

The record demonstrates that Geary's duplex continues to sustain significant water damage and that he may have delayed his legal action in an attempt to fashion a nonlitigious solution to the gutter and downspout problem. The beneficial effect of a statute of limitation brings with it the predictably harsh effects of its enforcement. *See Ford v. Emerson Elec. Co.*, 430 N.W.2d 198, 201 (Minn. App. 1988) (upholding bar in wrongful death action), *review denied* (Minn. Dec. 16, 1988). The statute required Geary to serve his summons and complaint before October 2006, two years after the October 2004 discovery of the rainwater damage. He did not, and the statute now bars litigation of his cause of action.

Affirmed.