STATE OF MINNESOTA
IN COURT OF APPEALS
A11-2250

Laxman S. Sundae,
Appellant,

Judith A. Sundae,
Appellant,

vs.

Joseph Kulhanek, et al.,
Respondents,

William D. Stillwell, et al.,
Respondents.

Filed November 13, 2012
Affirmed
Larkin, Judge

Dakota County District Court
File No. 19HA-CV-08-5265

Laxman S. Sundae, Rosemount, Minnesota (pro se appellant)

Judith A. Sundae, Rosemount, Minnesota (pro se appellant)

Joseph M. Barnett, Foley & Mansfield, P.L.L.P., Minneapolis, Minnesota (for respondents Joseph Kulhanek, et al.)

Harvey N. Jones, Harvey N. Jones, P.A., Hastings, Minnesota (for respondents William D. Stillwell, et al.)

Considered and decided by Larkin, Presiding Judge; Schellhas, Judge; and Collins, Judge.*

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

LARKIN, Judge

Appellants challenge the district court's summary-judgment dismissal of their lawsuit against respondents. Appellants also allege several procedural errors. We affirm.

D E C I S I O N

Appellants Laxman and Judith Sundae challenge the district court's summary-judgment dismissal of their lawsuit against respondents. Appellants argue that the district court erroneously concluded that their claims, which stemmed from the failure of their septic system, against respondent Joseph Kulhanek d/b/a J & J Excavating (Kulhanek), the entity that installed the system, are time-barred. Appellants also argue that the district court erroneously concluded that there is no genuine issue of material fact regarding appellants' claims against respondents William and Susan Stillwell, Gary and Kimberly Vinje, and Terry Kramer (the neighbors). Lastly, appellants argue that the district court abused its discretion by failing to provide them with a fair hearing. We address each of appellants' arguments in turn.

Standard of Review

Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that

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

there is no genuine issue as to any material fact and that either party is entitled to a judgment as a matter of law." Minn. R. Civ. P. 56.03. On appeal from summary judgment, an appellate court reviews de novo "whether the district court properly applied the law and whether there are genuine issues of material fact that preclude summary judgment." *Riverview Muir Doran, LLC v. JADT Dev. Grp., LLC*, 790 N.W.2d 167, 170 (Minn. 2010). A reviewing court must view the evidence in the light most favorable to the party against whom judgment was granted. *State Farm Fire & Cas. v. Aquila Inc.*, 718 N.W.2d 879, 883 (Minn. 2006).

"When a motion for summary judgment is made and supported as provided in Rule 56, an adverse party may not rest upon the mere averments or denials of the adverse party's pleading but must present specific facts showing that there is a genuine issue for trial." Minn. R. Civ. P. 56.05. In opposing summary judgment, "general assertions" are not enough to create a genuine issue of material fact. *Nicollet Restoration, Inc. v. City of St. Paul*, 533 N.W.2d 845, 848 (Minn. 1995). As such, affidavits based on information and belief and containing only unverified opinions and allegations are insufficient as a matter of law under rule 56.05. *See Urbaniak Implement Co. v. Monsrud*, 336 N.W.2d 286, 287 (Minn. 1983) (stating that an affidavit opposing summary judgment is not adequate if it only recites argumentative and conclusory allegations).

> [T]here is no genuine issue of material fact for trial when the nonmoving party presents evidence which merely creates a metaphysical doubt as to a factual issue and which is not sufficiently probative with respect to an essential element of the nonmoving party's case to permit reasonable persons to draw different conclusions.

DLH, Inc. v. Russ, 566 N.W.2d 60, 71 (Minn. 1997). "[T]he party resisting summary judgment must do more than rest on mere averments." *Id.*

Claims Against Kulhanek

Appellants challenge the district court's summary-judgment dismissal of their claims against Kulhanek as time-barred under Minn. Stat. § 541.051, subd. 1(a) (2010). Section 541.051, subdivision 1(a) states, in relevant part:

> 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, . . . 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 . . . more than two years after discovery of the injury . . . .

"For purposes of paragraph (a), a cause of action accrues upon discovery of the injury . . . ." Minn. Stat. § 541.051, subd. 1(c) (2010). "The construction and application of a statute of limitations or repose, including the law governing the accrual of a cause of action, are questions of law that [appellate courts] also review de novo." *Day Masonry v. Indep. Sch. Dist. 347*, 781 N.W.2d 321, 326 (Minn. 2010).

Under Minn. Stat. § 541.051, subd. 1, the two-year limitations period "begins to run when an actionable injury is discovered or, with due diligence, should have been discovered, regardless of whether the precise nature of the defect causing the injury is known." *Dakota Cnty. v. BWBR Architects, Inc.*, 645 N.W.2d 487, 492 (Minn. App. 2002), *review denied* (Minn. Aug. 20, 2002). A party need not be aware of the extent of an injury for the statute of limitations to begin to run, so long as the party is aware that an

injury may exist. *See Day Masonry*, 781 N.W.2d at 333-34 (citing *Appletree Square 1 Ltd. P'ship, CHRC v. W.R. Grace & Co.*, 815 F. Supp. 1266, 1279 (D. Minn. 1993) (explaining that the statute-of-limitations period under section 541.051 commences "when a plaintiff has enough facts to be on notice that a potential injury may exist" and "does not await a leisurely discovery of the full details of the injury") (quotation omitted)) (other citation omitted). "[S]eparate injuries must be aggregated under the mantel of defective construction," and thus "the statute of limitations begins to run upon discovery of *an* actionable injury." *Dakota*, 645 N.W.2d at 493 (emphasis added).

Appellants initiated their lawsuit in November 2008. They argue that their suit against Kulhanek was timely because they did not discover their "causes of action," and thus the two-year limitations period did not begin to run, until they received a compliance-inspection report in November 2008 and discovered Kulhanek's purportedly fraudulent concealment of defects in their septic system. Appellants' argument on appeal is two-fold: (1) the district court misapplied the law, and (2) the district court erred in determining that appellants failed to make a sufficient showing of fraud to toll the statute of limitations. Both arguments are unavailing as they ignore the plain language of the statute, well-established caselaw, and evidence in the record.

According to the plain language of the statute, "a cause of action accrues upon discovery of the *injury*." Minn. Stat. § 541.051, subd. 1(c) (emphasis added). Therefore, contrary to appellants' argument, the limitations period began to run when they discovered, or with due diligence should have discovered, an actionable injury, not when they discovered the defective condition that caused the injury. When construed in the

light most favorable to appellants, the evidence establishes that appellants knew or should have known of the existence of an actionable injury in April 2002, at the latest, when the city sent appellants a letter notifying them that they needed to repair or replace their septic system. The letter specifically notified appellants that their septic system had been declared an imminent threat to public health or safety and that they were required to replace or repair the system within 30 days. "[A] party need not be aware of the extent of its injury for the statute of limitations to begin to run so long as the party is aware of the injury and the need for repairs." *Day Masonry*, 781 N.W.2d at 334. Thus, the district court did not err in concluding that the city's April 2002 letter provided appellants with "reasonable notice to discover the alleged injury caused by the faulty septic system" and that, because appellants did not initiate their lawsuit until November 2008, it was well beyond the two-year statute of limitations.

Appellants also challenge the district court's conclusion that they made an insufficient showing of fraud to toll the statute of limitations. Appellants extensively argue that Kulhanek fraudulently concealed defects in their septic system and made fraudulent statements and that the statute of limitations was therefore tolled until they discovered evidence of the fraud. *See* Minn. Stat. § 541.051, subd. 1(a) (providing a two-year statute of limitations "[e]xcept where fraud is involved"). But, "fraudulent concealment by respondents is relevant only insofar as it prevented [appellants] from learning of [their] injury. Once [they] discovered an actionable injury, fraudulent concealment no longer tolled the statute of limitations. The trigger was discovery of an actionable injury, not all possible actionable injuries." *Dakota*, 645 N.W.2d at 494.

Appellants' tolling arguments are similar to those addressed and rejected by this court in *Dakota*, which involved a contract for the design and construction of a building. *Id.* at 490. In *Dakota*, the building was completed in 1990, and the owner, Dakota County, received more than two dozen work orders for repair or inspection of leaks or water infiltration between 1992 and 1994. *Id.* Despite the work orders, Dakota County did not initiate suit until November 1998 after it received a final report from a consultant that detailed multiple problems and evidence of nonconforming or substandard construction, including deficiencies that were concealed by the walls and ceilings. *Id.* at 491. The district court determined that Dakota County's claims were time-barred, and Dakota County appealed, arguing, in part, that "respondents committed fraud when they filed payment applications certifying that all work had been completed in accordance with specifications and when they thereafter failed to disclose the defective work, knowing that walls and ceilings hid those defects." *Id.* at 491, 494. This court affirmed the district court's grant of summary judgment, ruling that, "[h]ad Dakota County undertaken an inspection in 1994 as thorough as that undertaken in 1997, the same problems surely would have been revealed." *Id.* at 493. This court explained that fraud only tolls the statute of limitations until such time as a party discovers or, in the exercise of reasonable diligence, should have discovered an actionable injury, *id.* at 494, which in this case was in 2002.

Moreover, appellants' reliance on *Wittmer v. Ruegemer*, 419 N.W.2d 493 (Minn. 1988), *superseded by statute*, Minn. Stat. § 541.051 (1988), is misplaced because it was decided under an earlier version of section 541.051, which was based on discovery of a

defective condition rather than discovery of an injury. *See City of Willmar v. Short-Elliott-Hendrickson, Inc.*, 475 N.W.2d 73, 76 (Minn. 1991) (stating that the 1988 amendment to section 541.051 "effectively overruled *Wittmer* by establishing the discovery of an injury, rather than a defective condition, as the point at which the limitation period begins to run"). In sum, because appellants discovered, or with due diligence should have discovered, their actionable injury in 2002, the district court did not err in concluding that, after that date, the statute of limitations was not tolled by fraud. And because the district court correctly determined that appellants' cause of action against Kulhanek is barred under the two-year statute of limitations in section 541.051, we do not address the district court's alternative conclusion that the suit is barred under section 541.051's statute of repose.

Finally, appellants argue for the first time on appeal that the district court erred by not ordering Kulhanek to refund money collected in violation of the statutory warranties provided under Minn. Stat. § 327A.02, subd. 1 (2010). Generally, an appellate court will not consider matters not argued to and considered by the district court. *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988). Although appellants generally claim damages based on respondent Kulhanek's failure to correctly install their septic system, they did not cite section 327A.02, subdivision 1 in their underlying complaint and did not otherwise raise Kulhanek's alleged violation of the statutory warranties in the district court. Thus, the issue is not properly before this court, and we do not address it.[1]

[1] Moreover, it is questionable whether the statutory warranties are applicable because the warranties only apply to vendors, Minn. Stat. § 327A.02, subd. 1, and any breaches

Claims Against the Neighbors

Appellants next challenge the district court's summary-judgment dismissal of their claims against the neighbors, which was based on the district court's conclusion that appellants presented insufficient evidence to defeat respondents' motion for summary judgment. Appellants allege that the neighbors violated Rosemount's drainage easement plan and thereby caused damage to appellant's septic system and property. More specifically, appellants allege that the neighbors "re-landscaped their parcels to discharge maximum amounts of contaminated water at much higher velocities on to [appellants'] . . . home, garden and yard." Appellants also allege that the neighbors are liable for creating and maintaining a public nuisance, claiming that the neighbors' "unlawful dumping of contaminated water violates applicable rules, regulation and laws . . . and also unreasonably annoys, injures and [endangers] safety, morals, comfort and repose of several neighboring landowners thereby constituting a public health and public nuisance." Finally, appellants allege that the neighbors are liable for trespass. The district court construed appellants' complaint as alleging claims of negligence, public nuisance, and trespass, and it determined that the record lacked a factual basis to support such claims.

In Minnesota, "[l]andowners owe a duty to use their property so as not to injure that of others." *Anderson v. State, Dep't of Natural Res.*, 693 N.W.2d 181, 186 (Minn. 2005). The drainage of surface water onto neighboring land is governed by the

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would likewise be subject to a two-year statute of limitations. *See* Minn. Stat. § 541.051, subd. 4 (2010). Kulhanek challenged the applicability of the statute on these grounds in its response brief, but appellants did not address the challenges in their reply brief.

reasonable-use doctrine, which balances the benefits of drainage with the harm to the neighboring landowner. *See Wilson v. Ramacher*, 352 N.W.2d 389, 393-94 (Minn. 1984). According to the doctrine,

> [d]rainage of surface waters from one's own land onto another's is a "reasonable use" if there is a reasonable necessity for such drainage, if regard is taken to avoid unnecessary injury to others, if the utility or benefit to the land drained outweighs the harm to the land receiving the water, and if, where practicable, the drainage is done by improving the natural system or providing a feasible artificial one.

Highview N. Apts. v. Cnty. of Ramsey, 323 N.W.2d 65, 71 (Minn. 1982). A party injured by the drainage of water onto his or her land can generally allege claims arising under negligence, nuisance, and/or trespass, but, regardless of what claim is brought, the analysis is governed by the reasonable-use doctrine. *See id.* at 70-72.

The reasonable-use doctrine is "a flexible doctrine, presenting a question of fact to be resolved according to the circumstances of each case." *Id.* at 71. But summary judgment is proper when a plaintiff offers no evidence to suggest that there is a genuine issue of material fact. *See Erickson v. Gen. United Life Ins. Co.*, 256 N.W.2d 255, 259 (Minn. 1977) ("In order to successfully oppose a motion for summary judgment, a party cannot rely upon mere general statements of fact but rather must demonstrate at the time the motion is made that specific facts are in existence which create a genuine issue for trial."). The district court concluded that there was an insufficient factual basis to support appellants' claims. We agree.

Appellants cannot rely solely on the allegations in their complaint to avoid summary judgment; they must put forth sufficient evidence by way of affidavit or other evidence to support the elements of their claims. *See DLH*, 566 N.W.2d at 71. Although appellants allege that the neighbors' landscaping projects and failure to comply with the city's drainage easement plan caused increased water discharge on appellants' land and damage to appellants' property, appellants did not put forth sufficient evidence to show that any of the neighbors' actions caused increased water discharge, much less damage to their property. The district court correctly reasoned that there was no factual basis to support the allegations that the three identified projects—reroofing a home, replacing cedar chips, and planting grass seed—caused increase water discharge and damage on appellants' property. Thus, appellants failed to present sufficiently probative evidence of unreasonable use, *see Wilson*, 352 N.W.2d at 393-94 (defining unreasonable use as use that causes an imbalance of harm), and the district court did not err in dismissing appellants' claims against the neighbors.

Procedural Claims of Error

Appellants also argue that the district court abused its discretion and failed to provide them with a fair hearing by (1) refusing to continue the summary-judgment hearing, (2) failing to address appellants' motion to amend their complaint, (3) failing to address appellants' motion to compel discovery, (4) refusing to admit appellants' exhibits, and (5) showing bias against appellants. Each of these arguments is unavailing.

First, "[t]he granting of a continuance is a matter within the discretion of the [district] court and its ruling will not be reversed absent a showing of clear abuse of

discretion." *Dunshee v. Douglas*, 255 N.W.2d 42, 45 (Minn. 1977). When an appellate court reviews the denial of a continuance, the critical question is whether the denial prejudiced the outcome. *Torchwood Props., LLC v. McKinnon*, 784 N.W.2d 416, 419 (Minn. App. 2010). By letter dated July 9, 2009, appellants asked the district court to postpone the July 14 hearing on respondents' motions for summary judgment. Appellants explained that they were experiencing "computer/printer software problems" and were "looking for an attorney." On appeal, appellants argue that they "could not describe and attach all Exhibits in [their] motion properly" as a result of the district court's refusal to postpone the hearing. But when appellants made their request, the deadline for submissions had already passed. *See* Minn. R. Gen. Pract. 115.03(b) (requiring that a party responding to a dispositive motion file any supplementary affidavits and exhibits with the court at least nine days prior to the hearing); Minn. R. Gen. Pract. 1.04 ("Whenever these rules require that an act be done by a lawyer, the same duty is required of a party appearing pro se."). We therefore discern no abuse of discretion.

Second, "the decision to permit or deny amendments to pleadings is within the discretion of the district court and will not be reversed absent a clear abuse of discretion." *Johns v. Harborage I, Ltd.*, 664 N.W.2d 291, 295 (Minn. 2003). "[T]he liberality to be shown in the allowance of amendments to pleadings depends in part upon the stage of the action and in a great measure upon the facts and circumstance of the particular case." *Bebo v. Delander*, 632 N.W.2d 732, 741 (Minn. App. 2001), *review denied* (Minn.

Oct. 16, 2001). "A motion to amend a complaint is properly denied when the additional claim could not survive summary judgment." *Id.* at 740.

It appears from the record that appellants filed a motion to file an amended complaint in June 2009 and sought permission to file an amended complaint again on July 2, 2009. It does not appear that the district court expressly ruled on appellants' motion, but the district court implicitly denied the request by granting a summary-judgment dismissal. *See Palladium Holdings, LLC v. Zuni Mortg. Loan Trust 2006-0A1*, 775 N.W.2d 168, 177-78 (Minn. App. 2009) (stating that "[a]ppellate courts cannot assume a district court erred by failing to address a motion, and silence on a motion is therefore treated as an implicit denial of the motion"), *review denied* (Minn. Jan. 27, 2010). The district court addressed the claims that appellants sought to raise in their proposed amended complaint by ruling in its summary-judgment order that the additional claims could not survive summary judgment. We discern no abuse of discretion in this conclusion.

Third, appellants assert that the district court erroneously declined to consider their motion to compel discovery. But appellants do not offer legal argument or authority to show that the court erred or to establish prejudice. "An assignment of error based on mere assertion and not supported by any argument or authorities in appellant's brief is waived and will not be considered on appeal unless prejudicial error is obvious on mere inspection." *Schoepke v. Alexander Smith & Sons Carpet Co.*, 290 Minn. 518, 519-20, 187 N.W.2d 133, 135 (1971). And to prevail on appeal, an appellant must show both error and prejudice resulting from the error. *Midway Ctr. Assocs. v. Midway Ctr. Inc.*,

306 Minn. 352, 356, 237 N.W.2d 76, 78 (1975). Because we discern no obvious prejudicial error, this assignment of error is waived.

Fourth, appellants argue that the district court erroneously refused to consider exhibits offered by appellants at the summary-judgment hearing. Once again, appellants were required to file any exhibits with the court at least nine days prior to the hearing. Any exhibits offered by appellants during the hearing were properly refused as untimely. *See* Minn. R. Gen. Pract. 115.03(b).

Finally, appellants allege that the district court was biased and did not afford them a fair hearing. A district court judge is presumed to discharge judicial duties in each case with neutrality and objectivity; such presumption is overcome only if the party alleging bias provides evidence of favoritism or antagonism. *State v. Burrell*, 743 N.W.2d 596, 603 (Minn. 2008). Appellants fail to meet this burden. In their brief, appellants merely assert that the district court was biased towards them, stating that "remarks by the Court show that her honor had already made up her mind and was not willing to accept any evidence favorable to [appellants]." Appellants cite a portion of the record that indicates that the district court asked respondent Kulhanek if it intended to continue its counterclaims against appellants if their claims were dismissed. This inquiry does not establish the evidence of favoritism or antagonism necessary to overcome the presumption of neutrality and objectivity. Moreover, our review of the record reveals no evidence of bias. In summary, we reject appellants' argument that the district court failed to provide a fair hearing.

Affirmed.