**STATE OF MINNESOTA**
**IN COURT OF APPEALS**
**A18-0752**

James Aeshliman, et al.,
Appellants,

vs.

Leonard Smisek, Jr., et al.,
Respondents,

Darren Wurm, et al.,
Respondents.

**Filed December 24, 2018**
**Affirmed**
**Rodenberg, Judge**

Wright County District Court
File No. 86-CV-16-2759

Jacob T. Erickson, Patrick M. O'Donnell, Michael J. Patera, Smith, Paulson, O'Donnell & Erickson, PLC, Monticello, Minnesota (for appellants)

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Gerald W. Von Korff, Kale R. Van Bruggen, Rinke Noonan, St. Cloud, Minnesota (for respondents Darren Wurm and Jodey Wurm)

Considered and decided by Rodenberg, Presiding Judge; Hooten, Judge; and Klaphake, Judge.*

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

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

**RODENBERG**, Judge

In this appeal following the district court's grant of summary judgment of dismissal in a surface-water drainage dispute between neighboring landowners, appellants James and Simone Aeshliman (Aeshlimans) argue that the district court erred in (1) dismissing Aeshlimans' easement claims under Minn. R. Civ. P. 12.02, (2) dismissing a necessary party contrary to Minn. R. Civ. P. 19.01, (3) applying the two-year statute of limitations in Minn. Stat. § 541.051 (2016) (without equitable tolling) to Aeshlimans' nuisance claim, and (4) granting summary judgment dismissing Aeshlimans' nuisance claim despite genuine issues of material fact. We affirm.

## FACTS

Aeshlimans and respondents Leonard Smisek Jr. and Julie A. Hoff-Smisek (Smiseks) are neighbors in Otsego. Smiseks have owned their property on the east side of Jaber Avenue since 2002. Aeshlimans purchased their property on the west side of Jaber Avenue in 2006, with the intention of using at least part of the land to grow hay and alfalfa for their livestock. A drainage ditch has provided drainage for both properties dating back to at least the early 1950s. The drainage ditch is designed to move water east from the Aeshliman property through a small culvert that runs under Jaber Avenue (Jaber Avenue culvert). The ditch then continues northward across the property of respondents Darren and Jodie Wurm (Wurms), through a culvert under Smiseks' driveway (driveway culvert), and joins a different ditch that eventually flows to the Mississippi River.

When Aeshlimans moved onto their property, they used their land for pasture because it was too wet to grow or bale hay. Aeshlimans noticed that their acreage immediately west of Jaber Avenue became increasingly wet and muddy over time, rendering the fields unusable for crop production or even pastureland. While the footprint of the wetland has not been altered, the amount of water in the wetland has increased. Aeshlimans began investigating the cause of the increased water in the wetland on their property. Smisek told Aeshliman that the Jaber Avenue culvert was the cause of the water problems.[1] At Aeshliman's request, the Township of Monticello replaced the culvert under Jaber Avenue in 2011 or 2012, in an attempt to ameliorate the water problems on the Aeshliman property, but this attempt was to no avail.

In 2012, Aeshliman discovered that Smisek had placed a structure in the drainage ditch on Smiseks' property. Specifically, Smisek placed a tube through cement, which was held down with concrete blocks, at the bottom of the north side of the driveway culvert. According to Smisek, this structure was placed sometime between 2004 and 2007. The parties disagree on the purpose of this structure, but Smisek claims it was to prevent beavers from dam building. Aeshliman was able to convince Smisek to remove the structure sometime in 2012 or 2013. Aeshliman claims that the water on his property dried sufficiently that summer as to allow the previously flooded areas to be prepared for planting crops.

[1] All references to "Smisek" refer to Leonard Smisek Jr. and all references to "Aeshliman" refer to James Aeshliman.

In August 2014, when Aeshliman asked Smisek about recurring water problems, Smisek denied having put another structure in the ditch and continued to blame the Jaber Avenue culvert. Aeshliman located a second structure on the south side of the driveway culvert, which Smisek referred to as a retaining wall consisting of around 60 concrete blocks. Smisek hired a commercial entity to remove this second structure and dredge the drainage ditch in 2015. This did not result in any decrease in water on the Aeshliman property.

Aeshlimans asserted that a third structure was created as the result of the company that had dredged the drainage ditch having failed to take proper precautions regarding siltation. In September of 2015, Aeshliman noticed wooden stakes placed in the drainage ditch near the Jaber Avenue culvert where the ditch had been dredged. Aeshlimans assert that Smisek placed the wooden stakes in the drainage ditch to build up debris and create an earthen dam so that Smisek could trap beavers. Smisek maintains that the purpose of these stakes was to keep cattails and vegetation from clogging the driveway culvert and improve water flow. Smisek removed the wooden stakes in 2016 when he was advised that the stakes may be blocking the flow of water. As with the earlier efforts, this did not change the level of water on Aeshlimans' property.

Aeshlimans commenced this action on May 25, 2016, seeking damages from Smiseks resulting from negligence and nuisance, and injunctive relief under various implied-easement theories. Aeshlimans sued Wurms because, they claimed, complete relief cannot be grated in the absence of Wurms as parties to the case. Aeshlimans later amended their complaint to assert six causes of action against Smiseks. Aeshlimans

asserted that the three properties were governed by unwritten easements of unspecified terms, and that Smisek was violating the easements by attempting to dam the drainage ditch. Aeshlimans asserted theories of easement by implication, by prescription, and by estoppel. The amended complaint also asserted causes of action for nuisance, negligence, and for other injunctive relief. Respondents collectively moved to dismiss under Minn. R. Civ. P. 12.02(e), for failure to state a claim upon which relief can be granted.

The district court dismissed all of Aeshlimans' claims against Wurms but allowed the reasonable-use nuisance claim to proceed against Smiseks. The district court determined that the amended complaint failed to sufficiently allege the required elements for each of the asserted bases for Aeshlimans' claim of an easement. The district court dismissed Aeshlimans' nuisance and negligence claims as to Wurms, because the complaint alleged neither that the Wurms engaged in any wrongdoing nor that they did or failed to do anything that caused any harm. The district court dismissed Aeshlimans' negligence claim against Smiseks because Aeshlimans failed to allege that Smiseks owed Aeshlimans any duty of care.

After completion of discovery, Smiseks moved for summary judgment. Both parties retained experts, but only Smiseks filed their expert's report with the district court. Accordingly, the district court had only the opinion of Smiseks' expert, Dr. Joel Toso, concerning the cause of Aeshlimans' water problems. Aeshlimans submitted no contrary expert evidence, but Dr. Toso was in agreement with at least some parts of the report of Aeshlimans' expert. Dr. Toso's report provides three critical undisputed facts. First, the area about which Aeshlimans are complaining is a natural wetland—there is no claim and

nothing in the record to support that any person created the wetland conditions. Second, the invert of the downstream driveway culvert "is significantly higher than the upstream culvert draining the Aeshliman property." Third, those two undisputed facts are coupled with the apparent prior existence of a drainage-tile system that once ran through the Smisek property and that no longer functions.

Smiseks moved for summary judgment dismissing Aeshlimans' remaining claims as time-barred by Minn. Stat. § 541.051 (2016),[2] because the claims were first asserted more than two years after Aeshlimans discovered injury to real or personal property allegedly caused by a defective and unsafe condition of an improvement to real property. The district court granted summary judgment in favor of Smiseks, concluding that Aeshlimans' claims were time-barred.

This appeal followed.

## D E C I S I O N

### I. The district court properly dismissed Aeshlimans' easement claims.

Aeschlimans challenge the district court's summary judgment dismissing their claims of: (1) easement by implication; (2) easement by prescription; and (3) easement by estoppel. "A Rule 12.02 motion to dismiss for failure to state a claim upon which relief can be granted will be denied 'if it is possible on any evidence which might be produced,

[2] In 2018, the legislature amended Minn. Stat. § 541.051, subd. 1. *See* 2018 Minn. Laws ch. 116 § 1 (adjusting when the statute of limitations begins to run). Because the changes to this statute became effective May 9, 2018, and "applies to causes of action accruing on or after that date," *id.*, and because the district court dismissed appellants' complaint as being barred by the statute of limitations before May 9, 2018, we review the district court's decision under the former statute.

consistent with the pleader's theory, to grant the relief demanded.'" *N. States Power Co. v. Minn. Metro. Council*, 684 N.W.2d 485, 490 (Minn. 2004) (quoting *N. States Power Co. v. Franklin*, 122 N.W.2d 26, 29 (Minn. 1963)). "We review de novo whether a complaint sets forth a legally sufficient claim for relief." *Walsh v. U.S. Bank, N.A.*, 851 N.W.2d 598, 606 (Minn. 2014).

Aeshlimans alleged two alternative theories: first, that the drainage ditch is a natural watercourse; and, second, that the ditch was created by one or more predecessors in title to the parties. In dismissing Aeshlimans' easement claims, the district court cited *Duenow v. Linderman* for the proposition that a natural right to flowage is not a true easement. 27 N.W.2d 421 (Minn. 1947). Aeshlimans argue that the portion of *Duenow* on which the district court relied was dicta. We agree that the supreme court's water-rights analysis in *Duenow* was dicta because it was not strictly necessary to reverse an order on procedural grounds. *Id.* at 427-29. *See Jaeger v. Palladium Holdings, LLC*, 884 N.W.2d 601, 611 (Minn. 2016) ("Of course, a ruling not necessary to the decision of a case can be regarded as only dictum." (quoting *State v. Rainer*, 103 N.W.2d 389, 396 (Minn. 1960))). But the analysis in *Duenow* should not be lightly disregarded solely on the basis that it is dicta.

Dictum can be either obiter dictum or judicial dictum, depending on how involved the parties' arguments and the court's analysis are. *Rainer*, 103 N.W.2d at 396. *Black's Law Dictionary* defines obiter dictum as "[a] judicial comment made while delivering a judicial opinion, but one that is unnecessary to the decision in the case and therefore not precedential (although it may be considered persuasive)." *Black's Law Dictionary* 1240 (10th ed. 2014). Judicial dictum, on the other hand, is a court's "opinion on a question

directly involved and argued by counsel though not entirely necessary to the decision." *Rainer*, 103 N.W.2d at 395-96. Because it comes from deeper analysis, judicial dictum is "entitled to much greater weight than mere obiter dictum and should not be lightly disregarded." *Id.* at 396. In *Duenow*, the supreme court discussed in depth that a natural right to flowage or drainage is not a true easement and provided judicial dictum that "should not be lightly disregarded." *Id.*; *Duenow*, 27 N.W.2d at 427-29. Nevertheless, and even if we were to disregard the language in *Duenow*, Aeshlimans' implied-easement claims would not have survived the motion to dismiss.

The district court did not rely solely on *Duenow*, and other cases support the same underlying line of reasoning to the rule of law that the natural drainage of water is not a true easement. *See, e.g.*, *Collins v. Wickland*, 88 N.W.2d 83, 87-88 (Minn. 1958). Minnesota follows the rule of reasonable use with regard to diversion or obstruction of surface water. *Enderson v. Kelehan*, 32 N.W.2d 286, 289 (Minn. 1948). Each possessor of land "is legally privileged to make a reasonable use of his land, even though the flow of surface waters is altered thereby and causes some harm to others." *Collins*, 88 N.W.2d at 88. In other words, the right to convey surface waters is an attribute of property ownership and no reasonable-use easement is implied, or need be implied, any more than an easement need be implied for an owner of property to breathe the air on his or her land.

Aeshlimans' easement claims fare no better on their alternative theory that the drainage ditch was created by one or more predecessors in title to the parties to this action or by modification of the natural watercourse.

The factors to be considered in assessing the existence of an implied easement or easement by implications of necessity are: (a) a separation of title; (b) the use which gives rise to the easement shall have been so long continued and apparent as to show that it was intended to be permanent; and (c) the easement is necessary to the beneficial enjoyment of the land granted. *Romanchuk v. Plotkin*, 9 N.W.2d 421, 424 (Minn. 1943). Aeshlimans argued to the district court that the drainage ditch is a natural watercourse, but as previously mentioned, the natural right to flowage or drainage is not a true easement. *Duenow*, 27 N.W.2d at 427. Aeshlimans' complaint does not allege that the involved properties ever had a common owner. It also does not allege that, if there was a common owner, there was a necessity of an easement at the time of severance. Consequently, there can be no easement by implication even if we assume all facts in the amended complaint to be true and make every inference in favor of the Aeshlimans.

The district court also properly dismissed Aeshlimans' prescriptive-easement claim. "A prescriptive easement claimant must prove by clear and convincing evidence that the property for which she is requesting the easement was used in an actual, open, continuous, exclusive, and hostile manner for 15 years." *Boldt v. Roth*, 618 N.W.2d 393, 396 (Minn. 2000) (quotation omitted). "The natural drainage of surface waters from the lands of an upper owner across those of a lower owner lacks all elements of prescriptive right, regardless of its duration." *Duenow*, 27 N.W.2d at 428; *see Kral v. Boesch*, 557 N.W.2d 597, 600 (Minn. App. 1996) (stating that "the basis for prescriptive easements does not apply to surface water"). There is nothing in the amended complaint to suggest that Aeshlimans (or their predecessor in interest) were draining water from their property onto

the Smisek property in a hostile or wrongful manner. Aeshlimans' complaint fails to allege facts sufficient to entitle Aeshlimans to a prescriptive easement.

Aeshlimans also asserted a claim of easement by estoppel. "Where neighboring landowners unite in the construction of a ditch to drain and improve their several [lands,] each of them is thereafter estopped from closing the ditch in a way to deprive the others of the drainage provided." *Will v. Boler*, 4 N.W.2d 345, 348 (Minn. 1942). *Will* was not decided based on an easement theory. In *Will*, the supreme court concluded that the defendant was estopped from closing a ditch because the parties' previous expansion of drainage was a joint project that benefitted both parties and the modification *violated the reasonable-use doctrine*. *Id.* at 347-48. The test was, and remains, reasonable use—the term "easement" does not appear in the *Will* opinion.

Assuming that Aeshlimans prove every fact in the amended complaint, they still cannot prevail on a claim of easement by estoppel. The amended complaint states that "the predecessors to the parties in this case constructed and paid for, by voluntary contributions of the owners of the lands benefitted, to dig, enlarge or otherwise improve the subject ditch from the Aeshliman property across the Wurm and Smisek properties." But as the district court noted, "[t]he absence of any general factual averments as to the time frame, or who engaged in the joint enterprise, or whether the problem with waterflow is even related to the joint enterprise, makes the allegations insufficient even if all are true." We agree with the district court that Aeshlimans' bald assertion is insufficient to survive a motion to dismiss. *See Hebert v. City of Fifty Lakes*, 744 N.W.2d 226, 235 (Minn. 2008) ("We are

not bound by legal conclusions stated in a complaint when determining whether the complaint survives a motion to dismiss for failure to state a claim.").

The district court properly dismissed the easement claims asserted in Aeshlimans' amended complaint.[3]

## II. The district court did not err by dismissing Wurms from the action.

Aeshlimans argue that the district court erred by dismissing their claims against Wurms, because Wurms are a necessary party under Minn. R. Civ. P. 19.01. The rule provides, in relevant part, that:

> A person who is subject to service of process shall be joined as a party in the action if (a) in the person's absence complete relief cannot be accorded among those already parties . . . . If the person has not been so joined, the court shall order that the person be made a party. If the person should join as a plaintiff but refuses to do so, the person may be made a defendant, or, in a proper case, an involuntary plaintiff.

Minn. R. Civ. P. 19.01.

Aeshlimans argue that complete relief cannot be granted in the absence of the Wurms, because Smiseks would have to clear a portion of the ditch on Wurm's property should Aeshlimans ultimately prevail. But Aeshlimans have asserted no cause of action against Wurms. Minn. R. Civ. P. 19 does not *create* a cause of action, nor is it designed to prevent dismissal of parties from a lawsuit for failure to state a claim upon which relief can

[3] Aeshlimans now argue on appeal that there exists an express easement that may be relevant to the issues. That issue was neither pleaded nor presented to the district court. We therefore do not address either whether there is such an easement or, if there is such an easement, what significance it might have to Aeshlimans' continued complaints of excess water.

be granted where, as here, no cause of action is asserted against the party claimed to be necessary. Minn. R. Civ. P. 19.01. The district court properly dismissed Wurms from the action.

## III. The district court correctly determined that the two-year statute of limitations set forth in Minn. Stat. § 541.051 applies.

We note at the outset of our period-of-limitations discussion that we analyze the applicability of Minn. Stat. § 541.051 and measure the period of limitations only with regard to the first and second "structures" placed by Smisek. We do this for three reasons. First, Aeshlimans did not argue to the district court at the summary-judgment stage that the third structure would extend the applicable statute of limitations. Aeshlimans argued to the district court in opposition to Smiseks' motion for summary judgment that the water on their property was not abating after the ditch was dredged but before the stakes were placed. We "generally consider only those issues that the record shows were presented to and considered by the [district] court in deciding the matter before it." *See Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (quotation omitted). Second, there is no evidence in the record that the stakes placed by Smisek after the 2015 dredging caused any flooding; the most that can be said on this record is that the stakes were an ineffective attempt by Smisek to ameliorate an already-existing problem, according to the only expert report in the record. Third, Aeshlimans assert that this third "structure" was formed by the company that dredged the ditch. To the extent that there might be a claim for damage after and as a result of the dredging—and there does not appear to be any such viable claim—it would

have to be asserted against, or at least include, the dredging company. *See* Minn. R. Civ. P. 19.

Aeshlimans argue that the district court erred in applying the two-year statute of limitations under Minn. Stat. § 541.051, subd. 1. The statute provides:

> (a) Except where fraud is involved, no action by any person in contract, tort, or otherwise to recover damages for any injury to property, real or personal, or for bodily injury or wrongful death, arising out of the defective and unsafe condition of an improvement to real property, shall be brought against any person performing or furnishing the design, planning, supervision, materials, or observation of construction or construction in the improvement to real property against the owner of the real property more than two years after discovery of the injury, nor in any event shall such a cause of action accrue more than ten years after substantial completion of the construction.

Minn. Stat. § 514.051, subd. 1(a).

The statute applies to claims: (1) of damages to real or personal property; (2) arising out of a defective and unsafe condition; (3) of an improvement to real property; (4) more than two years after discovery of injury or ten years after completion of construction. The statute of limitations is an affirmative defense, and Smiseks have the burden of establishing that the statute applies. *State Farm Fire & Cas. v. Aquila, Inc.*, 718 N.W.2d 879, 883-85 (Minn. 2006). We review the construction and applicability of statutes of limitations de novo. *Id.* at 885.

Viewing the evidence in the light most favorable to Aeshlimans, the structures placed in the ditch by Smiseks caused flooding to Aeshlimans' property, resulting in damages from a defective and unsafe condition created by Smiseks.

The third element that must be met for the statute of limitations to apply is that the defective and unsafe condition must be an improvement to real property. Aeshlimans argue that the placement of things in the ditch are not improvements.

Courts apply a "common-sense interpretation" of the phrase "improvement to real property." *Siewert v. N. States Power Co.*, 793 N.W.2d 272, 286 (Minn. 2011) (quotation omitted). In determining whether there is "an improvement to real property," courts examine three factors: (1) whether the addition or betterment is permanent; (2) whether capital value is enhanced; and (3) whether the thing in question is designed to make the property more useful or valuable, rather than intended to restore the property's previous usefulness or value. *Id.* at 287.[4]

[4] Minnesota courts have concluded that a variety of improvements to real property fall under Minn. Stat. § 541.051. *See Aquila*, 718 N.W.2d at 884 (natural-gas pipeline system); *Olmanson v. LeSueur County*, 693 N.W.2d 876, 880 (Minn. 2005) (golf-cart culvert); *Sartori v. Harnischfeger Corp.*, 432 N.W.2d 448, 452 (Minn. 1988) (crane with structures surrounding it); *Bulau v. Hector Plumbing & Heating Co.*, 402 N.W.2d 528, 529-30 (Minn. 1987) (fireplace), *superseded by statute*, Minn. Stat. § 541.051, subd. 1 (1988); *Frederickson v. Alton M. Johnson Co.*, 402 N.W.2d 794, 796-97 (Minn. 1987) (electrical system); *Ocel v. City of Eagan*, 402 N.W.2d 531, 533-34 (Minn. 1987) (storm sewer system); *Allianz Ins. Co. v. PM Servs. of Eden Prairie, Inc.*, 691 N.W.2d 79, 84 (Minn. App. 2005) (water-purification systems); *Red Wing Motel Inv'rs v. Red Wing Fire Dep't*, 552 N.W.2d 295, 297 (Minn. App. 1996) (sprinkler system), *review denied* (Minn. Oct. 29, 1996); *Kline v. Doughboy Recreational Mfg. Co.*, 495 N.W.2d 435, 438 (Minn. App. 1993) (above-ground outdoor swimming pool); *Patton v. Yarrington*, 472 N.W.2d 157, 160 (Minn. App. 1991) (smoke detector), *review denied* (Minn. Aug. 29, 1991); *Citizens Sec. Mut. Ins. Co. of Red Wing v. Gen. Elec. Corp.*, 394 N.W.2d 167, 170 (Minn. App. 1986) (light fixtures and ballasts), *review denied* (Minn. Nov. 26, 1986); *see also Henry v. Raynor Mfg. Co.*, 753 F. Supp. 278, 282 (D. Minn. 1990) (garage-door opener); *Siewert*, 793 N.W.2d at 287 (noting that when alleged real-property improvement was electrical distribution system, "[u]tilities and similar installations have generally been considered real property improvements.").

Aeshlimans argue that the structures placed by Smisek were not permanent, citing *Taney v. Indep. Sch. Dist. No. 624*, where we stated, "in order for an improvement to be a permanent addition to or betterment of real property, it must be integral to and incorporated into the building or structure on the property." 673 N.W.2d 497, 504 (Minn. App. 2004) (quotation omitted). Since *Taney* was decided, we have not expressly required that an improvement to real property be integral to the building or structure. *See Kline*, 495 N.W.2d at 438-39 (implicitly rejecting any requirement that an alleged home improvement must be integral by concluding that an above-ground swimming pool was an improvement to real property without any indication that the pool was integral to the home or property).

Here, the first structure was cemented by Smisek into the ditch, and included patio blocks stacked on the top of a drainage tube. The second structure consisted of roughly sixty concrete blocks that spanned the entirety of the drainage ditch and required an excavation company to remove. Aeshlimans argue that the structures were not "permanent," because they were removed. But "[t]he test is not whether something can be moved, but whether it meets the definition of improvement to real property." *Kline*, 495 N.W.2d at 438; *cf. Massie v. City of Duluth*, 425 N.W.2d 858, 861 (Minn. App. 1988) (concluding that water slide was not real-property improvement or permanent despite being bolted to concrete pads at the bottom of the pond because it was designed to be—and was—removed every winter for storage). We conclude that the structures were permanent. Neither of these two structures were designed to be removed. To the contrary, Smisek's efforts were designed to make the structures immovable.

Aeshlimans argue that the structures did not increase or enhance capital value of the property because they were illegal and did not comply with the drainage easement. We disagree. First, and as discussed, Aeshlimans have not demonstrated entitlement to an easement with which Smisek might have unlawfully or wrongfully interfered. The structures mitigated the amount of water on the Smisek property, thus enhancing capital value.

Aeshlimans argue that the structures were not an improvement to real property because, under *Siewert*, a structure is an improvement to real property if "it is designed to make the real property more useful or valuable, rather than intended to restore the property's previous usefulness or value." 793 N.W.2d at 287. In *Matter v. Nelson*, we concluded that construction of a drainage swale was an improvement to real property, where the swale was an additional component of the drainage ditch, because it was designed to address the problem of water discharge. 478 N.W.2d 211, 213 (Minn. App. 1991). The present scenario is analogous to *Matter*, which governs here. The structures were an improvement to real property.

Alternatively, Aeshlimans contend that placing the structures in the drainage ditch was maintenance of the real-property improvement, i.e. the drainage ditch. Minn. Stat. § 541.051, subd. 1(d), provides that "[n]othing in this section shall apply to actions for damages resulting from the negligence in the maintenance, operation or inspection of the real property improvement against the owner or other person in possession." Minn. Stat. § 541.051, subd. 1(d). Aeshlimans' argument—that Smisek was negligent in maintaining the drainage ditch because the structures he placed within it caused flooding—fails. There

is nothing in the record to suggest that Smisek was negligent in maintaining the structures once they were placed in the drainage ditch. As discussed, the scenario here is akin to *Matter* where we determined that the swale constructed by the defendants within a drainage system, which resulted in flooding, was an improvement to real property rather than negligent maintenance of the drainage system. 478 N.W.2d at 213.

**IV. The two-year statute of limitations bars this action.**

Aeshlimans began investigating their water problems in 2010. They were undoubtedly aware of their damages in 2010 and 2011, when Aeshlimans claim to have experienced nearly complete flooding and standing water. Aeshlimans memorialized their injuries and damages, and their belief that Smiseks were responsible, in a September 9, 2013 email to R.W., an Ostego city engineer. Aeshlimans stated that they had been in contact with R.W. over the years concerning drainage issues, and that those issues had not been resolved and were "becoming a financial burden." Aeshlimans also stated in the email that they had called the city about Smisek having installed structures within the drainage ditch, which may have been removed. The email states, "I think he may be blocking the culvert under his driveway on the south side now rather than the north." Accordingly, the statute of limitations began to run on claims for damage caused by the real-property improvement, at the latest, on September 9, 2013. Aeshlimans sued Smiseks on May 26, 2016. Minn. Stat. § 541.051 applies to bar the late-commenced action.

Aeshlimans also argue that the fraud exception to Minn. Stat. § 541.051 applies and tolls the statute of limitations and that, as a result, the two-year statute of limitations (if

applicable) did not begin to run until Aeshlimans discovered the second structure in 2014. This argument is without merit.

In *City of Willmar v. Short-Elliott-Hendrickson, Inc.*, the Minnesota Supreme Court held that the two-year statute of limitations for an action arising out of an improvement to real property begins to run *when the injury is discovered*. 475 N.W.2d 73, 76-77 (Minn. 1991) (stating that 1988 amendment to section 541.051 "effectively overruled [*Wittmer v. Reugemer*] by establishing the discovery of an injury, rather than a defective condition, as the point at which the limitation period begins to run"). Assuming, as we must in this procedural posture, that Smisek made fraudulent statements to Aeshliman, any such statements would not toll the two-year limitation period because Aeshliman knew of the injury by September 9, 2013. Fraud would toll the statute only if it prevented discovery of the injury within the limitation period and the injury could not have been otherwise discovered through reasonable diligence. *See Dakota v. BWBR Architects*, 645 N.W.2d 487, 494 (Minn. App. 2002) (stating that fraudulent concealment is relevant only insofar as it prevented the plaintiff from learning of the injury; once plaintiff discovered an actionable injury, fraudulent concealment no longer tolled the statute of limitations), *review denied* (Minn. Aug. 20, 2002).

Aeshlimans similarly argue that the statute of limitations should be equitably tolled because of Smisek's misrepresentations about, and concealment of, the structures. Any such tolling argument must rest on evidence of reliance on the claimed misrepresentations. *See Oreck v. Harvey Homes, Inc.*, 602 N.W.2d 424, 429 (Minn. App. 1999) (upholding grant of summary judgment on the statute of limitations because equitable tolling could not

apply when defendant consistently denied any responsibility for the air and water leakage and made no promises to repair the problems), *review denied* (Minn. Jan. 25, 2000). Aeshlimans have made no showing—nor even a claim—of reliance on misrepresentations of Smiseks.

Aeshlimans argue on appeal that a six-year limitation period applies under Minn. Stat. § 541.05, subd. 1(8) (2018). That rule provides, "[e]xcept where the Uniform Commercial Code otherwise prescribes, the following actions shall be commenced within six years: . . . (8) for damages caused by a dam, used for commercial purpose." Minn. Stat. § 541.05, subd. 1(8). Smiseks reply that Aeshlimans are precluded from raising this argument because they failed to raise it at the district court. It is true that Aeshlimans argued at the district court that the two-year statute of limitation is not applicable, but did not specifically argue or suggest that an alternative statute of limitations applies. But we agree with Aeshlimans that it is not their burden to identify an alternative statute of limitations. The statute-of-limitations burden is on the party asserting the time bar. *Aquila*, 718 N.W.2d at 885.

Although Aeshlimans have, at various points, identified the Smisek structures as a "dam," the only expert opinion of record described no "damming" effect occasioned by Smiseks, much less the existence of "a dam used for commercial purposes." Minn. Stat. § 541.05 could not apply on this record. The six-year statute of limitations for commercial dams has no application here. And, as discussed, the period of limitations defined by Minn. Stat. § 541.051 applies.

In sum, we agree with the district court that Smiseks met their burden to prove that the two-year statute of limitations under Minn. Stat. § 541.051 is applicable. Therefore, Aeshlimans' claims for damages are time-barred.[5]

## V. There are no genuine issues of material fact precluding summary judgment.

"The court shall grant summary judgment if the movant shows that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law."[6] Minn. R. Civ. P. 56.01. Aeshlimans argue that the district court improperly made two findings of fact. First, Aeshlimans argue that the district court improperly found that structure three was removed and had no impact on the water level on Aeshlimans' property. Aeshlimans argue that it remains a material fact question concerning whether Smisek created a third structure consisting of a mat of silt and vegetation that remains in the drainage ditch and prevents water flow. Second, Aeshlimans contend the district court erred by finding:

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[5] We observe that Minn. Stat. § 541.051 applies only to claims for damages and would not bar Aeshlimans' claim for injunctive relief as a remedy to their reasonable-use nuisance claim. But Aeshlimans have not argued on appeal that the district court improperly dismissed their claim for injunctive relief; the only challenge on appeal is to dismissal of their easement and damages claims.

[6] The district court applied the former version of rule 56, which was recently "revamped" to more "closely follow" the amendments to the federal rules. Minn. R. Civ. P. 56 2018 advisory comm. cmt. When promulgating amendments to rule 56, effective on July 1, 2018, and applicable to pending cases, the supreme court specifically indicated that amended language on the standard for granting summary judgment reflects Minnesota caselaw. *Order Promulgating Amendments to the Rules of Civil Procedure*, No. ADM04-8001 (Minn. Mar. 13, 2018). Because the legal standard is unchanged, we cite to the current version of rule 56.01, even though the district court's decision was issued before the amended rule took effect.

> it appears [both parties'] experts agree on the water problem being caused by two factors: 1) the invert of the culvert downstream of [Smiseks' property] is significantly higher than the invert of the upstream culvert draining [Aeshlimans'] property; and 2) the ditch is heavily choked with thick vegetation, specifically mats of cattails . . . the second problem is not generated by [Smiseks]. (There is no evidence they planted cattails, for instance.)

Aeshlimans argue that this finding is inconsistent with the portion of Smiseks' expert report that stated, "[Smisek] has tried to keep these mats away from the culvert to maintain drainage, but the result tends to be a thicker mat of vegetation or a 'dam.'"

Contrary to Aeshlimans' assertion, there is no genuine issue of material fact as to whether a third "structure" caused Aeshlimans' water problems. The only expert report of record concludes that Aeshlimans' water problems are not caused by anything being done by Smisek. Aeshlimans acknowledge that the water on their property was not abating after the drainage ditch had been dredged, which was before Smisek placed stakes in the ditch. Insofar as Dr. Toso's report indicates that Smisek's conduct resulted in a thicker mat of vegetation, the report, read in its entirety, establishes that this third "structure" of vegetation is not the cause of Aeshlimans' water problems. The downstream driveway culvert is at a higher elevation than the upstream Jaber Avenue culvert, and the tile system that may once have drained additional surface water no longer functions for reasons unrelated to anything Smiseks are claimed to have done. To the extent that the district court made any finding of fact on this record, it is that water does not flow uphill.

The district court did not improperly find facts in granting summary judgment. It was faced with claims that Smisek placed obstructions that constitute permanent

improvements within the ditch before 2013 that aggravated the inability of water to drain through a culvert that was higher in elevation than the culvert that drains Aeshlimans' naturally wet property. This action was commenced on May 25, 2016, more than two years after Aeshlimans were aware of some damage that they claim was caused by Smisek. The district court properly dismissed Aeshlimans' damage claims.

**Affirmed.**