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**STATE OF MINNESOTA
IN COURT OF APPEALS
A10-752**

William Mattson,
Trustee of the Fred E. Mattson Trust,
Respondent,

vs.

Joel L. Thompson, et al.,
Appellants.

**Filed January 25, 2011
Affirmed
Wright, Judge**

Lake County District Court
File No. 38-CV-09-461

Timothy N. Downs, The Downs Law Firm, Duluth, Minnesota (for respondent)

Frederick R. Kopplin, Kopplin Law Office, P.A., Minneapolis, Minnesota (for appellants)

Considered and decided by Larkin, Presiding Judge; Peterson, Judge; and Wright, Judge.

UNPUBLISHED OPINION

WRIGHT, Judge

Appellants challenge the district court's order to remove certain structures from respondent's property, arguing that the district court erred by concluding that the structures' presence on the property is a temporary or continuing trespass that is not

governed by the statute of limitations set forth in Minn. Stat. § 541.051, subd. 1(a) (2008). We affirm.

FACTS

In 1976, Fred and Phyllis Mattson purchased a parcel of land in Lake County. Irene Peterson owned the property adjacent to the Mattsons' parcel beginning in 1967 and later transferred her parcel to Missionary Evangelism, Inc. (MEI). By the mid 1980s, a pole barn had been constructed on the Peterson/MEI parcel. A survey of both parcels performed in the early 1990s established that the legal descriptions of the parcels overlapped. The property owners of both parcels became aware of the overlapping legal descriptions of the property no later than October 16, 1992. Sometime thereafter, MEI sold its parcel to appellants Joel L. Thompson and Patricia Ann Cowgill Thompson. In 2002, the Mattsons transferred the title of their parcel to the Fred E. Mattson Trust. The Mattson Trust obtained a court order in October 2008 establishing the boundary line between the parcels. Based on the established boundary, the pole barn and other structures erected by the Thompsons' predecessors are located on the parcel owned by the Mattson Trust.

By his March 16, 2009 letter, counsel for the Mattson Trust demanded that the Thompsons remove the pole barn, other structures, and any materials from the Mattson Trust parcel. The Thompsons did not comply with the demand. Three months later, the Mattson Trust commenced an action in district court alleging nuisance and trespass. The Thompsons argued that the statute of limitations barred the action. After a bench trial, the district court rejected the Thompsons' statute-of-limitations defense and ordered the

removal of all structures and materials from the Mattson Trust parcel within 90 days. This appeal followed.

DECISION

The Thompsons argue that the district court erred by concluding that Minn. Stat. § 541.051, subd. 1(a), the two-year statute of limitations governing claims arising from defective or unsafe improvements to real property, does not apply to the cause of action here. The construction and applicability of a statute of limitations present questions of law, which we review *de novo*. *Benigni v. Cnty. of St. Louis*, 585 N.W.2d 51, 54 (Minn. 1998). In doing so, we construe Minn. Stat. § 541.051 narrowly, giving effect to its plain language. *Nolan & Nolan v. City of Eagan*, 673 N.W.2d 487, 495 (Minn. App. 2003), *review denied* (Minn. Mar. 16, 2004).

The district court concluded that the statute of limitations for the Mattson Trust's claims does not run from the initial trespass because the claims arise from a continuing trespass. We agree. In *N. States Power Co. v. Franklin*, the Minnesota Supreme Court reversed the district court's dismissal of a trespass counterclaim for failure to state a claim arising from a power company's construction of two steel towers supporting electric transmission lines on appellant's property. 265 Minn. 391, 392-93, 398, 122 N.W.2d 26, 28, 31 (1963). The *Franklin* court held that the steel towers could constitute a continuing trespass rather than a single completed trespass. *Id.* at 397, 122 N.W.2d at 30. The supreme court reasoned,

Defendant, by alleging a demand for removal of the structures, consents to an entry upon the land for that purpose. In view of such consent the failure to remove the structures,

rather than the original entry, characterizes the wrong and supports defendant's theory of a continuing trespass or a nuisance. Where a structure is erected or junk is stored and the harmful effect is one that may be abated or discontinued at any time, there is a continuing wrong so long as the offending object remains, and the courts regard such as a continuing trespass.

Id., 122 N.W.2d at 30-31 (quotation and citations omitted). The *Franklin* analysis applies with equal force here. The presence of the pole barn and any other structures and materials continues unabated. The Mattson Trust and its predecessor in interest demanded removal in 2001 and 2009 respectively. These facts present a continuing trespass. As such, the statute of limitations does not run from the initial trespass to bar recovery here. *Id.*, 122 N.W.2d at 31; *see also Wojahn v. Johnson*, 297 N.W.2d 298, 307 (Minn. 1980) (stating that continuing and repeatedly threatened trespass permits district court to issue injunction to restrain trespass).

The Thompsons' contention that this action is barred by the two-year statute of limitations in Minn. Stat. § 541.051, subd. 1(a), fails for two reasons. First, because a statute of limitations runs from the completion of a final act constituting a trespass, the applicable statute of limitations has not started to run when there is a continuing trespass, as here. *See Davies v. West Pub. Co.*, 622 N.W.2d 836, 841 (Minn. App. 2001) (observing that when continuing violation occurs, "the final act is used to determine when the statute-of-limitations period begins for the entire course of conduct"). Second, section 541.051, subdivision 1(a), governs nuisance and trespass claims that arise from a defective condition of an improvement to real property, *Nolan & Nolan*, 673 N.W.2d at 496-97, which the Mattson Trust has not alleged here.

Section 541.051, subdivision 1(a), provides, in pertinent part,

[e]xcept 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 the owner of the real property more than two years after discovery of the injury.

Minn. Stat. § 541.051, subd. 1(a). This statute of limitations expressly applies to disputes arising from defective and unsafe improvements to real property. *Sherbrook Co. v. E & H Earth Movers, Inc.*, 419 N.W.2d 818, 819 (Minn. App. 1988), *review denied* (Minn. Apr. 20, 1988). “The question of whether injury to property arises out of a defective or unsafe condition is one that turns on the individual facts alleged in the complaint.” *Nolan & Nolan*, 673 N.W.2d at 495. The Mattson Trust’s complaint does not allege defective or unsafe conditions. Rather, it alleges that “[d]efendants are the owners of a building within which is stored their personal property that is located on [p]laintiff’s real property described above . . . and are unlawfully trespassing on [p]laintiff’s property.” William Mattson, trustee of the Mattson Trust, testified that the trespass and nuisance claims arise from the unsightly nature of the structures and the impediment to subdividing and marketing the property at a higher value that the presence of these structures creates. On these facts, the district court correctly held that this action arose from the presence of the pole barn and other structures on the Mattson Trust property rather than a defective or unsafe condition.

We reject the Thompsons’ argument that *Ocel v. City of Eagan*, 402 N.W.2d 531 (Minn. 1987), stands for the proposition that a defective condition includes not only

construction defects but also where a structure is located and, therefore, compels a ruling in their favor. In *Ocel*, the “negligent construction” of a storm sewer system caused flooding, creating “the defective condition of the lot as a suitable residential building site.” *Id.* at 533. The *Ocel* court did not conclude that the location of the storm sewer system, rather than the alleged design defect causing the flooding, was the complained of condition. *See id.* at 533-34. Moreover, the *Ocel* court assumed that section 541.051 applied as a prerequisite to determining when the limitations period began to run, without addressing the scope of section 541.051’s applicability. *Id.*

Because the district court did not err by concluding that the facts at issue here involve a temporary or continuing trespass to which the two-year statute of limitations set forth in Minn. Stat. § 541.051, subd. 1(a), does not apply, we affirm.

Affirmed.