

**In The**  
***Court of Appeals***  
***Ninth District of Texas at Beaumont***

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**NO. 09-08-00433-CV**

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**JOHN DOUGLAS MITCHELL, Appellant**

**V.**

**ORANGE COUNTY, TEXAS, ORANGE COUNTY JAIL  
AND SHERIFF MIKE WHITE, Appellees**

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**On Appeal from the 163rd District Court  
Orange County, Texas  
Trial Cause No. B-070035-C**

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**MEMORANDUM OPINION**

John Douglas Mitchell, a pro se inmate, appeals from a summary judgment granted in favor of appellees, Orange County, Texas, Orange County Jail and Sheriff Mike White, on their statute of limitations defense. Mitchell claimed that his personal property was lost while under the control of the Orange County Jail during his incarceration. On appeal, Mitchell contends the trial court erred in granting summary judgment without considering his fraudulent concealment defense. Because we find that Mitchell failed to present evidence establishing fraudulent concealment, we affirm.

## Background

On March 23, 2001, when Mitchell was booked into the Orange County Jail for week-end detention, he relinquished four diamond rings to be held in the jail's property room. Under the procedure used that week-end, the inmates were released on the morning of March 26. On the afternoon before their release, however, the inmates signed release forms and received their property, other than "hardware." Jail personnel placed the hardware, which included Mitchell's rings, in a green box that was kept in a control room. On the morning of the inmates' release, the jailers moved the green box to an area that was accessible to the inmates as they were leaving. According to the jail's incident report, the inmates "would walk to the green box and reach in to obtain their hardware. The property release had already been signed." The incident report further explained that when it was Mitchell's time to leave, "the hardware belonging to him was missing. Either the other 16 to 17 inmates walking out ahead of him took the said rings or something else happened [to] them."<sup>1</sup>

On January 23, 2007, Mitchell filed his original petition against the appellees. In his first amended petition filed February 4, 2008, Mitchell asserted appellees were liable under the laws of "conversion and/or theft of property" and under section 101.0215(a)(7) of the Texas Civil Practice and Remedies Code. *See* TEX. CIV. PRAC. & REM. CODE ANN. §

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<sup>1</sup>According to the incident report, Mitchell stated that even though he had been a "familiar face" at the jail, he had never witnessed property being released as it was on March 26, 2001.

101.0215(a)(7) (Vernon 2005). Neither of Mitchell's petitions state a date for the loss of his property, but Mitchell's appellate brief acknowledges that the loss occurred in March 2001.

In answering Mitchell's petition, the appellees asserted the statute of limitations as an affirmative defense and later filed a motion for summary judgment based on that defense. In his response, Mitchell claimed that the appellees "deceitfully concealed the fact that the investigation of this incident had concluded without Plaintiff's property being found. This concealment caused the Plaintiff not to file suit because he felt that the investigation could possibly result in the discovery of the rings." Mitchell did not assert that a period of limitations other than a period of two years was applicable to his claims. The trial court granted the appellees' motion, finding that they were entitled to summary judgment on their limitations defense as a matter of law.

In a single appellate issue, Mitchell contends the trial court erred in granting summary judgment because appellees fraudulently concealed the completion of their investigation, and, as a result, all periods of limitations were suspended.

#### Standard of Review

"Summary judgment is appropriate when there is no genuine issue as to any material fact and judgment should be granted in favor of the movant as a matter of law." *Diversicare Gen. Partner, Inc. v. Rubio*, 185 S.W.3d 842, 846 (Tex. 2005).

A defendant is entitled to summary judgment on the affirmative defense of limitations by conclusively proving all the elements of the defense as a matter of law. *Pustejovsky v.*

*Rapid-American Corp.*, 35 S.W.3d 643, 646 (Tex. 2000). This requires conclusively proving the date the cause of action accrued. *See Rubio*, 185 S.W.3d at 846.

When a defendant conclusively establishes a limitations defense and the plaintiff resists summary judgment by asserting fraudulent concealment, the plaintiff has the burden to present evidence raising a fact issue with respect to its claim. *Am. Petrofina, Inc. v. Allen*, 887 S.W.2d 829, 830 (Tex. 1994). The elements of fraudulent concealment are 1) the existence of the underlying tort, 2) the defendant's knowledge of the tort, 3) the defendant's use of deception to conceal the tort, and 4) the plaintiff's reasonable reliance on the deception. *Malone v. Sewell*, 168 S.W.3d 243, 252 (Tex. App.–Fort Worth 2005, pet. denied).

#### Mitchell's Claims and Applicable Statutes of Limitation

As explained below, we find that the two-year statute of limitations applies to all of Mitchell's claims against the appellees. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 16.003(a) (Vernon Supp. 2008).

In his conversion/theft claim, Mitchell essentially contends that he entrusted his rings to the Orange County Jail with the understanding they would be returned to him. If accepted by a fact-finder, the relationship between Mitchell and the Orange County Jail would be the same as that existing between a bailor and bailee. *See Small v. Small*, 216 S.W.3d 872, 877 (Tex. App.–Beaumont 2007, pet. denied). “The basic elements of a bailment are: (1) the delivery of personal property by one person to another in trust for a specific purpose; (2)

acceptance of such delivery; (3) an express or implied contract that the trust will be carried out; and (4) an understanding under the terms of the contract that the property will be returned to the transferor or dealt with as the transferor directs.” *Sisters of Charity of the Incarnate Word, Houston, Texas v. Meaux*, 122 S.W.3d 428, 431 (Tex. App.–Beaumont 2003, pet. denied). “Claims for breaches of bailment agreements generally can be brought as contract or tort claims depending on the particular facts of the case and the type of action the plaintiff chooses to assert.” *Barker v. Eckman*, 213 S.W.3d 306, 310 (Tex. 2006).

In this case, Mitchell pursues a conversion claim. “Conversion is the unauthorized and wrongful assumption and exercise of dominion and control over another's personal property to the exclusion of, or inconsistent with, the owner's rights.” *Small*, 216 S.W.3d at 877 (citing *Waisath v. Lack's Stores, Inc.*, 474 S.W.2d 444, 447 (Tex.1971)).<sup>2</sup> Section 16.003 of the Texas Civil Practice and Remedies Code establishes a two-year limitations period for certain causes of action, including 1) conversion of personal property and 2) taking or detaining the personal property of another. TEX. CIV. PRAC. & REM. CODE ANN. § 16.003(a).

Mitchell also maintains he has a claim under the Texas Torts Claims Act, specifically section 101.0215 of the Texas Civil Practice and Remedies Code. *See* TEX. CIV. PRAC. &

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<sup>2</sup>“To prove a claim for personal property-conversion, a plaintiff must show that: (1) the plaintiff owned or legally possessed the property or was entitled to its possession; (2) the defendant unlawfully and without authorization assumed and exercised dominion and control over the property to the exclusion of, or inconsistent with, the plaintiff's ownership rights; (3) the plaintiff demanded the property's return; and (4) the defendant refused to return it.” *Small v. Small*, 216 S.W.3d 872, 877 (Tex. App.–Beaumont 2007, pet. denied).

REM. CODE ANN. § 101.0215(a)(7) (Municipal Liability). Section 101.0215, however, is a provision of the Texas Tort Claims Act. *See* TEX. CIV. PRAC. & REM. CODE ANN. §§ 101.001-101.109 (Vernon 2005 & Supp. 2008). The Act provides that governmental units may be liable in certain instances. *Id.* § 101.021 (Vernon 2005). Among other requirements, however, a plaintiff must show either (1) that his claim for property damage, personal injury, or death arises from the operation or use of a motor-driven vehicle or motor-driven equipment; or (2) that his claim for personal injury or death was caused by a condition or use of tangible personal or real property. *See id.* § 101.021. The Act, however, “does not create a cause of action; it merely waives sovereign immunity as a bar to a suit that would otherwise exist.” *City of Tyler v. Likes*, 962 S.W.2d 489, 494 (Tex. 1997). Assuming that Mitchell’s claim for loss of his rings was one for which the Act waives sovereign immunity and that he had met the Act’s notification requirements established by section 101.101, he still would have to comply with section 16.003's limitations provisions that require suits for conversion and the taking or detaining the personal property of another to be brought not later than two years after the cause of action accrued. *See Likes*, 962 S.W.2d at 494; *see also* TEX. CIV. PRAC. & REM. CODE ANN. § 101.101 (Vernon 2005).

Thus, under both theories that Mitchell pled, we must review the summary judgment evidence to determine whether the appellees established their two-year statute of limitation defense as a matter of law, and, if so, whether Mitchell showed that the appellees’ fraudulent

concealment raised a fact issue with respect to his claims. *See Rubio*, 185 S.W.3d at 846; *Allen*, 887 S.W.2d at 830.

#### Summary Judgment Evidence

In support of their motion for summary judgment, the appellees established their statute of limitations defense by relying on Mitchell's petitions and the investigative file of the Orange County Sheriff's Office.<sup>3</sup> The "Orange County Jail Incident Report," a part of the investigative records, shows that Mitchell learned about the loss of his rings on March 26, 2001, a fact Mitchell concedes in his appellate brief. The appellees' summary judgment evidence also shows that Mitchell did not file suit against them until January 23, 2007.

The statute of limitations applicable to a conversion claim requires suits to be brought within two years. TEX. CIV. PRAC. & REM. CODE ANN. § 16.003(a). Thus, Mitchell was required to file his suit before March 26, 2003, to avoid the appellees' plea of limitations. The appellees' summary judgment evidence shows that Mitchell did not file suit within the applicable limitations period and conclusively establishes their limitations defense. *See id.*; *Rubio*, 185 S.W.3d at 846.

Thus, the burden shifted to Mitchell to present evidence raising a fact issue through his claim of fraudulent concealment. *See Rubio*, 185 S.W.3d at 846; *Allen*, 887 S.W.2d at 830. To do so, Mitchell had to present proper summary judgment evidence for the trial

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<sup>3</sup>The investigative file was presented through an affidavit from the Office's records custodian.

court's consideration. "Proper summary judgment evidence consists of affidavits, admissions, stipulations of the parties, authenticated or certified public records, deposition transcripts, and interrogatory answers." *Bakali v. Bakali*, 830 S.W.2d 251, 256 (Tex. App.—Dallas 1992, no writ) (citing TEX. R. CIV. P. 166a(c)); see *Baker v. John Peter Smith Hosp., Inc.*, 803 S.W.2d 454, 457 (Tex. App.—Fort Worth 1991, writ denied) (stating that a nonmovant's response to a motion for summary judgment must present fact issues by means of proper summary judgment evidence such as depositions, admissions, or affidavits).

Here, the trial court could have properly considered only part of Mitchell's summary judgment evidence, namely two documents: the "Orange County Jail Incident Report" dated March 25-26, 2001, and an "Incident Report" dated March 29, 2001. These two documents, which Mitchell attached to his motion, had previously been presented by the appellees and verified by the record custodian's affidavit. The remainder of Mitchell's summary judgment evidence consisted of copies of other documents, which are dated from July 14, 2005, to August 14, 2005, and reflect correspondence between Mitchell and the Orange County Sheriff's Department. These documents, however, are not supported by affidavit, authentication, or certification, and there is no indication that they were exhibits presented at a deposition or otherwise were part of the discovery process, such as deposition exhibits, answers to requests for admission, or interrogatory answers. These documents, therefore, are not proper summary judgment evidence. See TEX. R. CIV. P. 166a(c); *Bakali*, 830 S.W.2d at 256; *Baker*, 803 S.W.2d at 457.



Mitchell does not explain how the reports the trial court could have considered raise a fact issue on his claim of fraudulent concealment. Both reports are dated in late March 2001 and reflect events surrounding the loss of Mitchell's rings. Neither of them, however, provide any information about occurrences after March 2001.

Among the elements of fraudulent concealment is the requirement that the defendant deceptively conceal the tort. *See Malone*, 168 S.W.3d at 252. Here, the documents in question show the appellees' active investigation of the loss rather than deceptive concealment. Consequently, fraudulent concealment does not suspend the limitations period based on the record before us.

Accordingly, we find the trial court did not err in granting summary judgment to the appellees. We overrule Mitchell's sole appellate point. The trial court's judgment is affirmed.

AFFIRMED.

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HOLLIS HORTON  
Justice

Submitted on July 22, 2009  
Opinion Delivered August 27, 2009  
Before McKeithen, C.J., Gaultney and Horton, JJ.