In The

Court of Appeals

Ninth District of Texas at Beaumont

NO. 09-09-00410-CV

HAROLD S. PLACETTE, Appellant

V.

M.G.S.L., Appellee

On Appeal from the 172nd District Court
Jefferson County, Texas
Trial Cause No. E-177,253

MEMORANDUM OPINION

The issue presented in this agreed interlocutory appeal is whether the trial court erred in denying a statute-of-limitations motion for summary judgment. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(d) (Vernon 2008). The defendant contends that M.G.S.L. filed suit after limitations expired. Because the statute of limitations bars plaintiff's lawsuit, we reverse the trial court's order denying summary judgment and render a take-nothing judgment.

JURISDICTION

In three sentences, without citation to any authority or further explanation, appellee contends this Court "lacks jurisdiction to hear this appeal because the actions and pleadings of Placette in the trial court and this court deprive this Court of jurisdiction because of Placette's failure to comply with the requirements for an interlocutory appeal." The trial court signed an agreed order for interlocutory appeal on August 19, 2009, and an "Amended Agreed Order for Interlocutory Appeal" on September 8, 2009. The only change in the order corrected a citation to Section 51.014 of the Texas Civil Practice and Remedies Code. Essentially, section 51.014(d) provides that a court may issue a written order for interlocutory appeal if the parties agree to the order, an immediate appeal may materially advance the ultimate termination of the litigation, and the parties agree that the order involves a controlling question of law as to which there is substantial ground for difference of opinion. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(d). The agreed order recites the statutory requirements and is signed by counsel of record for both parties.

An agreed appeal is perfected as provided in Rule 25.1. *See* TEX. R. APP. P. 25.1; 28.2. "The notice of appeal must be filed no later than the 20th day after the date the trial court signs a written order granting permission to appeal, unless the court of appeals extends the time for filing pursuant to Rule 26.3." TEX. R. APP. 28.2(a). The notice of appeal in this case was filed less than twenty days after the first order granting permission

to appeal was signed and before the amended order was signed. "In a civil case, a prematurely filed notice of appeal is effective and deemed filed on the day of, but after, the event that begins the period for perfecting the appeal." TEX. R. APP. P. 27.1. Appellant does not expressly retract her agreement to the order, nor can she withdraw her agreement after this Court's jurisdiction was properly invoked by the filing of a timely notice of appeal. The challenge to this Court's jurisdiction is groundless.

STANDARD OF REVIEW

Defendant asserted the limitations defense in a traditional motion for summary judgment.[1] *See* TEX. R. CIV. P. 166a(c), (i). A movant must establish that there is no genuine issue of material fact, and that therefore the movant is entitled to judgment as a matter of law. TEX. R. CIV. P. 166a(c). "A genuine issue of material fact exists if the nonmovant produces more than a scintilla of evidence establishing the existence of the challenged element." *Fort Worth Osteopathic Hosp., Inc. v. Reese,* 148 S.W.3d 94, 99 (Tex. 2004).

THE PLEADINGS

The lawsuit M.G.S.L. filed in 2006 asserted claims for: (1) sexual assault and sexual abuse/battery; (2) intentional infliction of emotional distress; (3) outrageous conduct; (4) false imprisonment; and (5) invasion of privacy. The petition alleged that defendant sexually abused M.G.S.L. from 1979 through 1986.

[1]Defendant also filed a no-evidence motion for summary judgment asserting that M.G.S.L. had no evidence to support tolling.

Placette is not a member of M.G.S.L.'s family. When she was nineteen years of age, M.G.S.L. revealed the abuse to her mother and step-father. The three of them confronted Placette and his wife at their home. Placette denied the accusations.

M.G.S.L. was born in 1975, so she was under a legal disability until she became eighteen years of age in 1993. TEX. CIV. PRAC. & REM CODE ANN. § 16.001(a)(1), (b) (Vernon 2002). She filed this lawsuit thirteen years later in 2006. The Legislature has enacted a five-year statute of limitations for sexual assault cases. *See* TEX. CIV. PRAC. & REM CODE ANN. § 16.0045 (Vernon Supp. 2009).[2] Because M.G.S.L. did not file suit within five years, the lawsuit is barred by the statute unless the discovery rule delayed commencement of limitations or another tolling provision applies.

ANALYSIS

Tort claims accrue "when a wrongful act causes some legal injury, even if the fact of injury is not discovered until later, and even if all resulting damages have not yet occurred." *S.V. v. R.V.*, 933 S.W.2d 1, 4 (Tex. 1996). Accrual of the cause of action may be deferred by the discovery rule in those cases in which "the alleged wrongful act and resulting injury were inherently undiscoverable at the time they occurred but may be objectively verified." *Id.* at 6. An injury is inherently undiscoverable if it is the type of injury that is not generally discoverable by the exercise of reasonable diligence. *HECI*

[2] Although these statutes have been amended, we cite the current version of the statutes because the subsequent changes to the statutes do not affect this case. Defendant's motion for summary judgment does not challenge the application of Section 16.0045 to this case.

Exploration Co. v. Neel, 982 S.W.2d 881, 886 (Tex. 1998). If the discovery rule applies, the cause of action accrues when the plaintiff knew or should have known of the wrongfully caused injury. *KPMG Peat Marwick v. Harrison County Hous. Fin. Corp.*, 988 S.W.2d 746, 748 (Tex. 1999). The legal question of whether the discovery rule applies is decided on a categorical rather than case-specific basis. *Via Net v. TIG Ins. Co.*, 211 S.W.3d 310, 313-14 (Tex. 2006). "[T]he focus is on whether a *type* of injury rather than a *particular* injury was discoverable." *Id.* at 314 (emphasis in original).

In her response to defendant's motion for summary judgment, M.G.S.L. argued that her injury was inherently undiscoverable until 2005, because she did not understand that the sexual assaults caused her psychological injuries until she was hospitalized for depression in 2005. Under her theory of the case, the discovery rule applies because psychological injuries caused by sexual abuse of children are inherently undiscoverable and objectively verifiable.

In *S.V.*, the Supreme Court considered the discovery rule in the context of a daughter who alleged that she repressed memories of sexual abuse by her father until she received therapy. *S.V.*, 933 S.W.2d at 11. Because the defendant was the plaintiff's father, and "given the special relationship between parent and child," in *S.V.* the Supreme Court "assume[d] without deciding" that the plaintiff could satisfy the inherently undiscoverable element for application of the discovery rule. The Court focused instead on whether the injury was objectively verifiable. *S.V.*, 933 S.W.2d at 8. The Supreme

Court held that the discovery rule did not apply because the injury was not objectively verifiable. *S.V.*, 933 S.W.2d at 25. The Court recognized that the Legislature enacted a specific five-year statute of limitations for sexual abuse cases, but apparently "did not intend for sexual abuse cases to be treated differently from any other case in applying the discovery rule." *Id.* at 22. The Court recognized "the terrible wrong of childhood sexual abuse and the strong public policies condemning it as reflected in the criminal statutes," but also that "[f]alse accusations are equally devastating to families[.]" *See id.* at 25-26. The Court believed, considering the five-year statute of limitations enacted by the Legislature, that the best approach was to apply the discovery rule in the same manner as it would apply in any other case. *See id.*

In this case, M.G.S.L. consulted a psychologist about the abuse when she was nineteen years of age; she began psychiatric treatment in 1998, and she told the treating doctor about the sexual abuse. M.G.S.L. testified in deposition that it was not until she spent three days in a psychiatric ward in 2005 that she actually realized the difficulties she had experienced in her life were the effects of the sexual abuse perpetrated by the defendant. M.G.S.L.'s primary diagnosis is post-traumatic stress disorder. An affidavit from her treating psychiatrist explained that M.S.G.L. was psychologically not capable of understanding the reason for her ongoing difficulties, or to take action on her own against the person who had abused her, until the safe environment of the hospital and the

understanding and confidence provided by being in law school brought her to the point where she could act on her experiences.

Unlike the situation in *S.V. v. R.V.*, where the victim's repressed memories prevented her from knowing she had been assaulted as a child, M.S.G.L. testified that she was always aware of the sexual assaults. She first confronted the defendant about the sexual assaults in 1995, more than eleven years before she filed the lawsuit. She testified as follows:

> Q. [Defense Counsel] When you were at the [restaurant] and you say that you had this sudden urge to leave there and deal with this by confronting Mr. Placette, before that day, you knew that -- in your mind you knew that you felt like you had been abused by Mr. Placette; is that correct?
>
> A. Yes.
>
> [Plaintiff Counsel] Object to the form of the question.
>
> Q. [Defense Counsel] In other words, it's not like you were sitting at the [restaurant] and suddenly remembered something that you felt like had occurred earlier; you always knew it, correct?
>
> A. I always knew. I always knew that I had been abused.
>
> Q. All right. The overwhelming feeling you had at the [restaurant] was the overwhelming feeling that you needed to confront Mr. Placette?
>
> A. That is correct.
>
> Q. All right. And when you confronted Mr. Placette, you knew that, at least as far as you believed, you had been assaulted?
>
> A. That is correct.
>
> Q. And you understand that an assault is an injury to your body?
>
> A. Yes.
>
> Q. And you confronted him because you felt like what he'd done to you was wrong; is that correct?
>
> A. That is correct.
>
> . . . .

Q. [Defense Counsel] Well, this is what I'm trying to understand is that it seems like to me that when you confronted Mr. Placette that first time that you knew in your mind that a wrong had occurred, correct?

A. I knew that he had abused me but it wasn't until 2005 that I had many more memories, until I really understood the extent of what had happened to me and that is where it led me to understand, wow, that is why I am this psychologically messed up.n

Q. All right.

A. And, so, yes, there were some things that I remembered later; but, no, there was never a full repression of being abused. I always knew I had been abused.

Q. All right. And you knew that it was relevant to your treatment for your emotional conditions that you report to these doctors --

A. That's why they asked me the question.

Q. And you reported it, correct?

A. Absolutely.

Q. But what you're saying is that you did not understand the extent of your injuries or the extent of how your emotional problems were related to the abuse until the hospitalization in '05; is that correct?

A. I would say I definitely didn't know the extent, and I don't even know if I knew that they were caused -- that it was a definite answer either way.

In her response to the motion for summary judgment, M.G.S.L. admitted that she was aware of the acts, but contended that she was "unaware that the psychological and emotional injuries which resulted from those sexual acts were inherently undiscoverable, especially due to her mental incompetence, until 2005, at which time she filed suit within the limitation period." For supporting documentation, M.G.S.L. provided an affidavit that stated in part as follows:

- Although I knew that Harold Placette had sexually assaulted me, I did not understand that my emotional trauma and psychological difficulties and alcohol and sexual problems were a direct cause of Harold Placette's sexual assaults.

- In 2005, while I was undergoing psychiatric treatment, my childhood memories started coming back and I began to realize in this environment that the sexual assaults committed on me by Harold Placette over the years from 1979 to 1986 were the cause of the emotional and psychological trauma I had suffered and endured subsequent to the sexual assaults. It was not until 2005 that I realized for the first time that I could do something to make Harold S. Placette legally responsible for the injuries I have suffered. It was not until 2005 that I considered myself aware of the causation between the injuries I have endured and the activities by Harold Placette, and at that time I took legal action to make Harold S. Placette responsible for the injuries he caused.

M.G.S.L. also provided an affidavit from her treating psychiatrist, which stated in part as follows:

- I first saw [M.G.S.L.] on July 28, 2003. She requested treatment for panic attacks occurring during hospitalization for a surgical procedure.
- She had exhibited problems with mood--primarily depression, anxiety, alcohol abuse, an eating disorder, interpersonal problems and promiscuity.
- The best "all encompassing" diagnosis would be PTSD.
- [M.G.S.L.] has been intellectually aware of the past sexual abuse by the person she identifies as Harold S. Placette from the onset.
- When she did confront her parents and her abuser after she had left home, the abuse was denied and she was told nothing could be done.
- If the above is coupled with her own self-view and the ongoing psychological problems--that she could not understand or make any sense of--then the result was, at that point, that she was psychologically not capable of either understanding the reason for her ongoing difficulties or to take action--on her own--against the person who had abused her.
- It was during her hospitalization that she came to understand (a "light bulb" experience) that many of her ongoing problems were due to the past abuse. Being in a safe environment with support to confront past issues, finally old enough to process the memories and feelings in an understandable way and now old enough to see that she could stand up for herself on her own (as well as understanding/confidence she was gaining from being in law school) brought her to the point that she could "for the first time" act on her own behalf to address what had happened to her.

A cause of action accrues when the plaintiff knows or reasonably should know that she has been injured, even though she does not fully know the extent of her injuries. *See Murphy v. Campbell*, 964 S.W.2d 265, 273 (Tex. 1997). M.G.S.L. testified she "always knew" she had been abused. As traditionally applied, the discovery rule would not delay commencement of the five-year limitations period.

The law provides that a person of "unsound mind" is under a legal disability. TEX. CIV. PRAC. & REM. CODE ANN. § 16.001(a)(2). "If a person entitled to bring a personal action is under a legal disability when the cause of action accrues, the time of the disability is not included in a limitations period." TEX. CIV. PRAC. & REM. CODE ANN. § 16.001(b). Section 16.001(a)(2) protects a legally disabled person who has no access to the courts and insures that a legally disabled person's right to bring suit will not be precluded by the running of a limitations statute prior to the removal of the disability. *Ruiz v. Conoco, Inc.*, 868 S.W.2d 752, 755 (Tex. 1993). The tolling provision applies to a person who by reason of mental illness or cognitive deficit suffers from "the inability to participate in, control, or even understand the progression and disposition of their lawsuit." *Id.* In one case, for example, a person diagnosed as suffering from acute paranoid psychosis raised a fact issue regarding whether he was of unsound mind for purposes of tolling limitations. *Casu v. CBI Na-Con, Inc.*, 881 S.W.2d 32, 34 (Tex. App.--Houston [14th Dist.] 1994, no writ). A person may be of unsound mind without

having been adjudicated incompetent. *Hargraves v. Armco Foods, Inc.*, 894 S.W.2d 546, 547 (Tex. App.--Austin 1995, no writ).

M.G.S.L. and her psychiatrist both state that until she was hospitalized she did not recognize the causal connection between her ongoing psychological difficulties and the assaults she endured as a child. M.G.S.L. has been in therapy most of her adult life, and she was hospitalized in a psychiatric facility for a three-day period in 2005. Both M.G.S.L. and her psychiatrist state, however, that she has always had the cognitive awareness of her injury and intellectual capacity to comprehend what happened to her. **S**ince becoming an adult she obtained employment and graduated from college and law school. She confronted the defendant about the assaults when she was nineteen years old. The record does not reflect that M.G.S.L. was so mentally impaired that she was unable to participate in, control, or understand the progression and disposition of a lawsuit. *See Hargraves,* 894 S.W.2d at 548.

Neither the Legislature nor the Supreme Court has adopted an exception applicable to sexual assault cases in which the full extent of harm is unknown until after the five-year statute of limitations has run. *See S.V. v. R.V.*, 933 S.W.2d at 22; *compare Pustejovsky v. Rapid Am. Corp.,* 35 S.W.3d 643, 652-54 (Tex. 2000). Because the claims were not filed within five years of plaintiff becoming an adult, the trial court erred in denying the motion for summary judgment. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 16.0045 (Vernon Supp. 2009).

The trial court's order denying the motion for summary judgment is reversed and judgment is rendered that plaintiff take nothing from defendant. *See* TEX. R. APP. P. 43.2(c).

REVERSED AND RENDERED.

_____

DAVID GAULTNEY
Justice

Submitted on March 11, 2010
Opinion Delivered April 22, 2010

Before McKeithen, C.J., Gaultney and Horton, JJ.