COURT OF APPEALS
SECOND DISTRICT OF TEXAS
FORT WORTH

NO. 02-15-00355-CV

KIMBERLY BRITTON — APPELLANT

V.

VICTOR GOMEZ — APPELLEE

FROM COUNTY COURT AT LAW NO. 2 OF TARRANT COUNTY
TRIAL COURT NO. 2014-005555-2

MEMORANDUM OPINION[1]

This is a car wreck case. Appellant Kimberly Britton sued Appellee Victor Gomez for negligence and negligence per se, alleging that she was injured when her vehicle was struck by Gomez's vehicle after he ran a red light at an intersection she was crossing through. The trial court granted traditional summary judgment for Gomez.

[1]*See* Tex. R. App. P. 47.4.

In three issues, Britton argues that the trial court erred by granting summary judgment, that it was error for the trial court to consider Gomez's summary judgment evidence, and that even if the trial court could consider the evidence, the summary judgment was not supported by sufficient evidence. Because we hold that the trial court did not err by granting summary judgment regardless of whether the trial court should have considered the evidence attached to Gomez's motion, we affirm.

In Britton's petition, she alleged that the date of the accident was "[o]n or about October 8, 2012." Britton filed her suit on October 14, 2014.

Gomez filed a motion for summary judgment asserting that because the statute of limitations for negligence claims is two years, Britton filed her suit six days too late. As summary judgment evidence, Gomez attached (1) Britton's responses to his request for disclosure in which she stated that the accident occurred on October 8, 2012; (2) her responses to his requests for production, which included a copy of the Fort Worth police officer's report listing the accident date as October 8, 2012; (3) a certified copy of the report produced by TxDOT; (4) excerpts from Gomez's deposition at which he was asked if the accident had occurred on October 8, 2012, and he responded that he did not disagree; and (5) Gomez's amended answer, which raised the affirmative defense of limitations. Gomez also incorporated the trial court's file by reference.

In Britton's response, she objected to each of the five exhibits that Gomez had attached to his motion. The trial court granted summary judgment for Gomez without ruling on Britton's objections. Britton then brought this appeal.

We review a summary judgment de novo.[2] We consider the evidence presented in the light most favorable to the nonmovant, crediting evidence favorable to the nonmovant if reasonable jurors could, and disregarding evidence contrary to the nonmovant unless reasonable jurors could not.[3] We indulge every reasonable inference and resolve any doubts in the nonmovant's favor.[4] A defendant is entitled to summary judgment on an affirmative defense if the defendant conclusively proves all the elements of the affirmative defense.[5] To accomplish this, the defendant-movant must present summary judgment evidence that conclusively establishes each element of the affirmative defense.[6]

In her brief, Britton argues that Gomez's summary judgment evidence was fatally defective, that the trial court therefore erred by considering his evidence, and that his evidence failed to conclusively establish the defense of limitations.

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[2]*Travelers Ins. Co. v. Joachim*, 315 S.W.3d 860, 862 (Tex. 2010).

[3]*Mann Frankfort Stein & Lipp Advisors, Inc. v. Fielding*, 289 S.W.3d 844, 848 (Tex. 2009).

[4]*20801, Inc. v. Parker*, 249 S.W.3d 392, 399 (Tex. 2008).

[5]*Frost Nat'l Bank v. Fernandez*, 315 S.W.3d 494, 508–09 (Tex. 2010), *cert. denied*, 562 U.S. 1180 (2011); *see* Tex. R. Civ. P. 166a(b), (c).

[6]*See Chau v. Riddle*, 254 S.W.3d 453, 455 (Tex. 2008).

She further asserts that although she set forth the date of the accident in her pleadings, "the record is not clear as to when the accident actually occurred."

"Assertions of fact, not [pled] in the alternative, in the live pleadings of a party are regarded as formal judicial admissions."[7] The phrase "on or about" can be construed broadly for purposes of providing notice of the plaintiff's claim to the defendant.[8] But for limitations purposes, this court has held that the phrase "on or about" constitutes a judicial admission that the alleged event occurred on the "on or about" date.[9] And "[a]lthough pleadings generally do not constitute summary judgment proof, if a plaintiff's pleadings contain judicial admissions negating a cause of action, summary judgment may properly be granted on the basis of the pleadings."[10]

Under the rules of civil procedure, the trial court was required to grant summary judgment if the evidence, pleadings, and admissions on file at the time

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[7]*Commercial Structures & Interiors, Inc. v. Liberty Educ. Ministries, Inc.*, 192 S.W.3d 827, 835 (Tex. App.—Fort Worth 2006, no pet.) (quoting *Holy Cross Church of God in Christ v. Wolf*, 44 S.W.3d 562, 568 (Tex. 2001)).

[8]*See Pelphrey v. Diver*, 348 S.W.2d 453, 461 (Tex. Civ. App.—Austin 1961, writ ref'd n.r.e.) (holding that an allegation that an event occurred "on or about August 5, 1959" was broad enough to include August 18, 1959).

[9]*Simmons v. Elmow Holdings, Inc.*, No. 2-08-027-CV, 2008 WL 2716805, at *4 (Tex. App.—Fort Worth July 10, 2008, pet. denied); *see also Neiswender v. SLC Const., LLC*, No. 13-11-00669-CV, 2012 WL 3046010, at *4 (Tex. App.—Corpus Christi July 26, 2012, pet. denied).

[10]*Simmons*, 2008 WL 2716805, at *4.

of the hearing support it.[11] Gomez specifically incorporated the trial court's file, which included Britton's petition, into his motion for summary judgment.[12] Gomez asserted as the sole basis for his motion that more than two years had passed since the date of the accident on which Britton's negligence suit was based, and Britton judicially admitted to that fact when she specifically pled that the accident occurred "on or about October 8, 2012."[13] As Gomez correctly argued in his summary judgment motion, negligence claims have a two-year limitations period.[14] Accordingly, the trial court could have granted summary judgment for Gomez on the ground of limitations based on Britton's pleading, even without considering the evidence to which Britton had objected. Because the trial court properly granted summary judgment on the basis of the pleadings and judicial admissions before it regardless of the competency of the evidence attached to Gomez's motion, we overrule each of Britton's three issues.

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[11] *See* Tex. R. Civ. P. 166a(c).

[12] *See Galindo v. Snoddy*, 415 S.W.3d 905, 913–14 (Tex. App.—Texarkana 2013, no pet.) (stating that "Rule 166a does not require the evidence to be attached and merely requires the evidence to be 'on file'" and noting that the movant in that case had incorporated prior evidence by reference into his response, a practice that is permitted).

[13] *See Simmons*, 2008 WL 2716805, at *4; *Commercial Structures*, 192 S.W.3d at 835.

[14] *See* Tex. Civ. Prac. & Rem. Code Ann. § 16.003 (West Supp. 2015) (providing that claims for personal injury or for injury to the property of another must be brought no more than two years after the day the cause of action accrues).

Having overruled Britton's three issues, we affirm the trial court's judgment.

/s/ Lee Ann Dauphinot
LEE ANN DAUPHINOT
JUSTICE

PANEL: LIVINGSTON, C.J.; DAUPHINOT and GARDNER, J.J.

DELIVERED: July 7, 2016