NUMBER 13-18-00265-CV

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI – EDINBURG

DUNCAN LITIGATION INVESTMENTS, LLC, **Appellant,**

v.

MIKAL WATTS AND WATTS GUERRA, LLP, **Appellees.**

On appeal from the 94th District Court of Nueces County, Texas.

MEMORANDUM OPINION

Before Chief Justice Contreras and Justices Longoria and Perkes
Memorandum Opinion by Justice Perkes

After a failed investment, appellant Duncan Litigation Investments, LLC sued appellees Mikal Watts and Watts Guerra, LLP for negligence, gross negligence, and negligent misrepresentation. The trial court granted summary judgment in favor of

appellees based on their limitations defense. By three issues, appellant argues that: (1) the trial court considered untimely and inadmissible evidence; (2) appellees failed to conclusively establish the accrual date of appellant's claims; and (3) appellant failed to negate application of the discovery rule and continuing tort doctrine. Because we conclude there was no evidentiary error and the record conclusively establishes appellant had actual knowledge of its injury more than two years before filing suit, we affirm.

I. Background

In early June 2010, Corpus Christi attorney Robert Hilliard approached Max Duncan of Corpus Christi about investing in mass-tort litigation stemming from the BP "Deepwater Horizon" oil spill. Hilliard had entered into a cost and fee sharing agreement with San Antonio attorney Mikal Watts and his law firm, and in exchange for Duncan funding Hilliard's portion of the upfront litigation costs, Hilliard would share his portion of the recovery equally with Duncan.

When Duncan asked Watts about the investment's downside, Watts responded that the chief concern is getting "duped on the sign-ups," but he explained that this was "[n]ot likely given our guys' history of acquisition prowess." Watts had also reached a fee sharing agreement with Mississippi attorney Anders Ferrington to be the originating attorney responsible for acquiring clients and referring them to Watts Guerra. Watts and Hilliard had previously worked with Ferrington on the *FEMA Formaldehyde* litigation under a similar arrangement. Duncan was told that Ferrington's field team had a proven track record of determining which claimants (i.e., potential clients) were legitimate.

Duncan formed appellant as its sole owner and entered into an agreement with Hilliard and his law firm under the proposed terms.[1] According to its petition, "[appellant] agreed to invest in the litigation based on the representations that the investment guaranteed a significant financial return, the reputation of Mikal Watts, and Watts' [sic] specific representation that Duncan would not lose money." Appellant's petition also alleged that, "[i]n June 2010, Max Duncan believed Watts already had 15,000 clients and he was going to get more clients, thereby increasing the financial return on the investment. By July 1, 2010, it was reported to Duncan that the number of clients had increased to 25,000." This number would eventually balloon to over 40,000.

From an initial outlay of $3.2 million in June 2010 to a final $100,000 in late July 2012, appellant invested a total of $5.8 million in the venture. Watts Guerra also invested matching funds over this period. To raise capital, Watts Guerra sold a portion of its interest in the recovery to Dallas attorney John Cracken for $2 million. Most of the upfront litigation costs funded the Ferrington field team's acquisition efforts in the spring and summer of 2010. By August 2010, appellant had already invested $5.6 million of its $5.8 million total investment.

In the summer of 2010, Watts Guerra filed twenty-five complaints on behalf of approximately 40,000 plaintiffs that were consolidated with other cases into a multi-district litigation (MDL) proceeding. Based on the large number of clients Watts Guerra purported to represent, Watts was appointed to the plaintiff's steering committee, a position coveted for the access, control, and additional compensation afforded to its

[1] The agreement between appellant and Hilliard and his law firm is not part of the record. However, the record is clear that there was no agreement between appellant and Watts or his law firm. Thus, appellant did not have a direct contractual or business relationship with Watts or his law firm.

members. Eventually, in the spring of 2012, BP negotiated a multibillion-dollar class action settlement agreement, part of which was based on Watts Guerra's purported representation of over 40,000 viable claimants.

In the interim, though, BP established a $20 billion fund and the Gulf Coast Claims Facility (GCCF) to settle claims. In September 2010, Watts Guerra submitted 26,000 claims on behalf of clients to the GCCF. In a November 10, 2010 letter from the GCCF administrator to Watts, the administrator explained that, due to forty-three complaints against Watts Guerra by claimants alleging unauthorized use of their social security number, the GCCF would not process any claim submitted by Watts Guerra without a signed written authorization from the claimant. This letter was forwarded to Duncan that same day.

To file a successful claim, the GCCF also required a claimant to provide documented evidence of lost income, such as W-2s from before and after the oil spill. It became apparent in November 2010 that gathering the necessary documentation from their clients—almost all of whom were transient Vietnamese fishermen typically paid in cash or by barter—would be exceedingly difficult. In a November 29, 2010 email, Cracken recounted his recent meeting with one of the lead members of the Ferrington field team, who "advised . . . that she cannot, in the ordinary course, collect 'proof' of past income or lost income due to the Spill." In response to this news, Duncan wrote to Hilliard that same day, "This sounds grim."

In late December 2010, Cracken traveled to Biloxi, Mississippi to meet with a lead member of the Ferrington field team. His report to Watts and Hilliard, shared with Duncan the next day, provided more bad news: half of the approximately 300 clients

interviewed wanted to terminate their representation contracts; many of their clients were filing a separate claim with the GCCF to avoid paying attorney's fees; the field team did not have reliable contact information for many of the clients; and $600,000 in recent funding to the field team had resulted in only 10–15 completed GCCF claim packets. In summation, Cracken wrote, "We don't have 41K 'clients'; we have a list of 41K names we hope [the field team] can convert into 'clients' over time . . . ." In response, Duncan wrote to Hilliard, "Give me a ray of hope."

Cracken continued to provide a sobering assessment of their prospects into January 2011, prompting Hilliard to suggest a change in direction. In an email to Watts and Cracken that was forwarded to Duncan that same day, Hilliard wrote:

> Clearly the 40k clients are ghosts in the wind. No amount of $$ will bring them back and time is a [sic] enemy. From looking at Cracken's bleak yet accurate summary of where this is[,] I am sure that it is time for an aggressive 'put it to bed today' approach.
>
> These cases, as a bundle, need to be pitched as a complete and early settlement to BP, et al. This pitch needs to go to BP not to [the GCCF]. 40k filed cases, today, have value and settlement attractiveness to the defs. It cleans out 40k from the MDL.

Although Watts and Hilliard expressed some renewed optimism in this strategy, they also realized each client would be required to provide substantive proof of his or her loss before receiving a payment from any settlement. Without this substantive proof, Cracken warned that their "docket may trend toward -0- value." Hilliard forwarded this warning to Duncan on January 28, 2011.

Up to this point, the interested parties were focused on client retention and the practical challenges of monetizing their efforts, but in a January 23, 2011 email, Cracken exposed a different kind of problem—a percentage of their purported 40,000 clients were

nothing more than “names from a phone book,” some were duplicates, and some claimed they were “duped” into signing representation agreements. This correspondence was forwarded to Duncan that same day.

News of this nature continued to emerge. Duncan already knew at this point that the GCCF administrator was taking the position that there were approximately 5,000 total deckhands operating in the Gulf at the time of the oil spill while Watts Guerra purported to represent over 40,000 deckhands—all of them Vietnamese. In a January 25, 2011 email, Duncan learned that Watts Guerra’s own consultant confirmed “there were not 40k Vietnamese deckhands” when the oil spill occurred. The consultant also found it “odd” that their “clients” were concentrated in Texas and Florida because the Vietnamese fishing community was concentrated in Louisiana, Mississippi, and Alabama. This significant discrepancy would also be a source of contention for BP during settlement negotiations of the MDL. BP took the same position as the GCCF administrator that there were approximately 5,000 total deckhands operating in the Gulf in 2010. BP’s specific misgivings were shared with Duncan on February 26, 2012.

Almost a year before, though, Duncan received an email chain on March 9, 2011, discussing the discovery that one of Watts Guerra’s “clients” died five years before the oil spill. Watts wrote, “Another fine example of the shit we paid for; dead 5 years ago.” Cracken simply responded, “Fraud.”

A United States Department of Justice investigation, including a raid by the United States Secret Service on the San Antonio offices of Watts Guerra in February 2013, revealed that two members of the Ferrington field team perpetrated a massive fraud. Thousands of the purported clients acquired by the field team never actually signed

representation agreements with Watts Guerra. As Cracken had warned in January 2011, many were nothing more than Vietnamese names selected from a phonebook, if they existed at all. The raid was covered contemporaneously by the *Houston Chronicle* and the *San Antonio Express-News*.

On December 17, 2013, BP sued appellees, alleging Watts and his firm filed thousands of fraudulent claims. Watts, along with employees of his firm and two members of the Ferrington field team, were indicted by a federal grand jury in September of 2015 on numerous felony counts of mail fraud, wire fraud, and identity theft.

Appellant filed suit on December 18, 2015, two years and one day after BP filed its suit, bringing claims for breach of contract, promissory estoppel, fraud, and negligence. During the pendency of this case, Watts and his employees were tried and acquitted of all criminal charges by a federal jury. After the acquittal, appellant amended its pleading to abandon its fraud claims. It also abandoned its breach of contract and promissory estoppel claims, leaving only its negligence claims. Appellant's negligence claims are based on a failure to exercise due diligence in vetting the indicted members of the Ferrington field team, one of whom had been previously convicted of filing fraudulent claims in a mass-tort case. Both members of the Ferrington field team were tried alongside the Watts defendants, but unlike the Watts defendants, both were convicted on all counts.

Appellees moved for summary judgment based on the two-year limitations period for negligence claims. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 16.003(a). Appellant then amended its pleading by alleging the continuing-tort doctrine, fraudulent concealment, and the discovery rule. Appellees countered that appellant had actual

knowledge of its legal injury more than two years before filing suit. The trial court granted summary judgment and this appeal ensued.

II. Standard of Review

A party moving for traditional summary judgment must establish there is no genuine issue of material fact and it is entitled to judgment as a matter of law. Tex. R. Civ. P. 166a(c). If a defendant moves for summary judgment on a limitations defense, it must:

> (1) conclusively prove when the cause of action accrued, and (2) negate the discovery rule, if it applies and has been pleaded or otherwise raised, by proving as a matter of law that there is no genuine issue of material fact about when the plaintiff discovered, or in the exercise of reasonable diligence should have discovered the nature of its injury. If the nonmovant establishes that the statute of limitations bars the action, the nonmovant must then adduce summary judgment proof raising a fact issue in avoidance of the statute of limitations.

KPMG Peat Marwick v. Harrison Cty. Hous. Fin. Corp., 988 S.W.2d 746, 748 (Tex. 1999) (internal citations omitted).

We review summary judgments de novo. *Rogers v. RREF II CB Acquisitions, LLC*, 533 S.W.3d 419, 425 (Tex. App.—Corpus Christi–Edinburg 2016, no pet.) (citing *Tex. Mun. Power Agency v. Pub. Util. Comm'n of Tex.*, 253 S.W.3d 184, 192 (Tex. 2007)). We take as true all evidence favorable to the non-movant, indulge every reasonable inference, and resolve any doubts in the non-movant's favor. *Id.* at 426 (citing *Sw. Elec. Power Co. v. Grant*, 73 S.W.3d 211, 215 (Tex. 2002)).

III. Applicable Law

A statute of limitations establishes a time limit for a plaintiff to file a lawsuit. Determining when a cause of action accrued—the date on which the action's limitations period began to run—is generally a question of law. *Hooks v. Samson Lone Star, L.P.*,

457 S.W.3d 52, 57–58 (Tex. 2015). If a cause of action's accrual date is not defined by statute, it is determined under the common law. *KPMG Peat Marwick*, 988 S.W.2d at 749. Under the legal-injury rule, "a cause of action generally accrues 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 had not yet occurred." *Valdez v. Hollenbeck*, 465 S.W.3d 217, 229 (Tex. 2015) (citing *Trinity River Auth. v. URS Consultants, Inc.*, 889 S.W.2d 259, 262 (Tex. 1994)).

The continuing-tort doctrine is an exception to the legal-injury rule. *Upjohn Co. v. Freeman*, 885 S.W.2d 538, 542 (Tex. App.—Dallas 1994, writ denied) (citing *Adler v. Beverly Hills Hosp.*, 594 S.W.2d 153, 154 (Tex. App.—Dallas 1980, no writ)). "A continuing tort involves wrongful conduct inflicted over a period of time that is repeated until desisted, and each day creates a separate cause of action." *First Gen. Realty Corp. v. Md. Cas. Co.*, 981 S.W.2d 495, 501 (Tex. App.—Austin 1998, pet. denied). "[A] continuous tort involves not only continuing wrongful conduct, but continuing *injury* as well." *Upjohn*, 885 S.W.2d at 542 (citing *Adler*, 594 S.W.2d at 155–57). A continuing tort accrues when the tortious conduct ceases. *Id.* (citing *Tectonic Realty Inv. Co. v. CNA Lloyd's of Tex. Ins. Co.*, 812 S.W.2d 647, 654 (Tex. App.—Dallas 1991, writ denied). "The doctrine of continuing tort, with its extension of accrual date, is rooted in a plaintiff's inability to know that the ongoing conduct is causing him injury." *Exxon Mobil Corp. v. Rincones*, 520 S.W.3d 572, 592 (Tex. 2017) (citing *Upjohn*, 885 S.W.2d at 542). Therefore, if a plaintiff discovers its "injury and its cause, the rationale for the continuing-tort rule would no longer apply, and the statute would commence to run at that point."

Upjohn, 885 S.W.2d at 544 (citing *Atha v. Polsky*, 667 S.W.2d 307, 310 n.10 (Tex. App.—Austin 1984, writ ref'd n.r.e.)).

Under the discovery rule, the accrual date is deferred until the plaintiff knows, or by exercising reasonable diligence should know, that it has suffered an injury that was likely caused by the wrongful acts of another. *Childs v. Haussecker*, 974 S.W.2d 31, 40 (Tex. 1998). The discovery rule applies when a plaintiff pleads and proves that its injury was inherently undiscoverable at the time it occurred but can be objectively verified. *S.V. v. R.V.*, 933 S.W.2d 1, 6 (Tex. 1997). "An injury is inherently undiscoverable if it is, by its nature, unlikely to be discovered within the prescribed limitations period despite due diligence." *Wagner & Brown, Ltd. v. Horwood*, 58 S.W.3d 732, 734–35 (Tex. 2001). "This legal question is decided on a categorical rather than case-specific basis; the focus is on whether a *type* of injury rather than a *particular* injury was discoverable." *Via Net v. TIG Ins. Co.*, 211 S.W.3d 310, 314 (Tex. 2006) (citing *Horwood*, 58 S.W.3d at 736). "Once a claimant learns of a wrongful injury, the statute of limitations begins to run even if the claimant does not yet know 'the specific cause of the injury; the party responsible for it; the full extent of it; or the chances of avoiding it.'" *Exxon Corp. v. Emerald Oil & Gas Co.*, 384 S.W.3d 194, 207 (Tex. 2011) (quoting *PPG Indus., Inc. v. JMB/Hous. Ctrs. Partners Ltd. P'ship*, 146 S.W.3d 79, 93 (Tex. 2004)).

"Fraudulent concealment is an equitable defense to limitations that estops the defendant from relying on the statute of limitations." *Vial v. Gas Sols., Ltd.*, 187 S.W.3d 220, 229 (Tex. App.—Texarkana 2006, no pet.) (citing *Borderlon v. Peck*, 661 S.W.2d 907, 908 (Tex. 1983)). "[A] party asserting fraudulent concealment as an affirmative defense to the statute of limitations has the burden to raise it in response to the summary

judgment motion and to come forward with summary judgment evidence raising a fact issue on each element of the fraudulent concealment defense." *KPMG Peat Marwick*, 988 S.W.2d at 749 (citations omitted). "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." *Mitchell Energy Corp. v. Bartlett*, 958 S.W.2d 430, 439 (Tex. App.—Fort Worth 1997, pet. denied). "Fraudulent concealment tolls the statute of limitations until the plaintiff, using reasonable diligence, discovered or should have discovered the injury." *Vial*, 187 S.W.3d at 229 (citing *KPMG Peat Marwick*, 988 S.W.2d at 750).

IV. Summary Judgment Evidence

As a preliminary matter, we must decide if evidence submitted by appellees three days prior to the summary-judgment hearing was properly considered by the trial court and was admissible over appellant's other evidentiary objections. We review a trial court's evidentiary rulings for an abuse of discretion. *JLG Trucking, LLC v. Garza*, 466 S.W.3d 157, 161 (Tex. 2015). "A trial court abuses its discretion if it acts in an arbitrary or unreasonable manner without reference to any guiding rules or principles." *Walker v. Gutierrez*, 111 S.W.3d 56, 62 (Tex. 2003) (citing *Downer v. Aquamarine Operators, Inc.*, 701 S.W.2d 238, 241–42 (Tex. 1985)).

Appellant's original petition contained claims for breach of contract, promissory estoppel, fraud, and negligence. After appellees filed their first motion for summary judgment, appellant amended its petition, retaining only its negligence claims. Appellees filed a second summary-judgment motion, arguing the negligence claims were barred by limitations. To avoid appellees' limitations defense, appellant amended its petition again

and pled the continuing-tort doctrine, fraudulent concealment, and the discovery rule. Three days before the summary judgment hearing, appellees filed a reply arguing appellant had actual knowledge of its injury more than two years before filing suit. To support this argument, appellees filed the affidavit of Watts, forty email chains received by Duncan, the complaint BP filed against appellees, nine news articles, and excerpts of Duncan's deposition.

Appellant filed a written objection that same day arguing the evidence was untimely because appellant was entitled to twenty-one-days' notice under Rule 166a(c). *See* TEX. R. CIV. P. 166a(c). When appellant asked the trial court to sustain its timeliness objection during the summary-judgment hearing, the following exchange occurred:

THE COURT: Well let me ask you on this matter.

APPELLANT: Yes.

THE COURT: I mean, what's to stop them? Even if I did grant that from just refiling the same thing, we're right back to where we started.

APPELLANT: Because we would then have an opportunity to respond and I think that we can raise some questions from [sic] the Court.

THE COURT: I'll give an opportunity to respond.

APPELLANT: I think it would raise some questions from [sic] the Court that it does not include summary judgment.

THE COURT: I'll give you a chance to respond, if that's what you're looking for.

APPELLANT: We are, but what I need today is the ruling sustaining those objections, and to me, if you sustain those objections, then you either have to defer ruling on the second motion or overrule it based upon the evidence that's before this Court today.

The trial court did not sustain appellant's objection. Instead, it deferred its ruling and provided appellant twenty-one days from the date of the hearing to respond. Appellant filed a sur-reply with argument and additional summary judgment evidence. Appellant also repeated its timeliness objection and provided additional objections to the admissibility of appellees' reply evidence. Twenty days later, without further hearing, the trial court granted appellees' motion. The summary judgment also overruled "all of [appellant's] objections to [appellees'] summary judgment evidence" and contained specific recitals that, in reaching its decision, the trial court considered appellees' reply, appellant's sur-reply, and the evidence attached to each.

Appellant maintains on appeal that appellees' reply evidence was untimely because appellees never sought leave from the trial court. *See id.* ("Except on leave of court, with notice to opposing counsel, the motion and any supporting affidavits shall be filed and served at least twenty-one days before the time specified for hearing."). We conclude, however, that appellees were not required to seek leave because the trial court's remedial act of continuing the proceeding and allowing appellant twenty-one days to respond cured any timeliness concerns. *See, e.g., Envtl. Procedures, Inc., v. Guidry*, 282 S.W.3d 602, 639 (Tex. App.—Houston [14th Dist.] 2009, pet. denied) ("Though the trial court did not grant the [appellees] leave to file the Reply Evidence, it did not need to do so because the trial court took an action that made the evidence in question timely filed [by extending the submission date]."); *Dalehite v. Nauta*, 79 S.W.3d 243, 245 (Tex. App.—Houston [14th Dist.] 2002, pet. denied) (holding evidence filed less than twenty-one days before original summary-judgment hearing was timely, even though trial court never granted leave to file late evidence, because the summary-judgment hearing was

re-set to a date more than twenty-one days after the evidence was filed); *Thomas v. Medical Arts Hosp. of Texarkana*, 920 S.W.2d 815, 818 (Tex. App.—Texarkana 1996, pet denied) (same).

In this case, appellant requested "an opportunity to respond" and the trial court provided appellant twenty-one days from the date of the hearing, the exact amount of notice required by Rule 166a(c). *See* TEX. R. CIV. P. 166a(c). Naturally, appellant does not argue on appeal that the trial court abused its discretion in granting appellant the relief it requested. Indeed, appellant relies on its subsequently filed evidence in this appeal.

Most importantly, the notice requirements provided by Rule 166a(c) ensure a party's right to due process. *See BP Automotive LP v. RML Waxahachie Dodge, LLC*, 517 S.W.3d 186, 211 (Tex. App.—Texarkana 2017, no pet.). "Due process at a minimum requires notice and an opportunity to be heard at a meaningful time and in a meaningful manner." *Univ. of Tex. Med. Sch. v. Than*, 901 S.W.2d 926, 930 (Tex. 1995) (citing *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976)). In addition to providing appellant the notice required by Rule 166a(c), the trial court deferred its ruling until it had considered appellant's sur-reply and additional evidence; i.e., the trial court provided appellant "an opportunity to be heard at a meaningful time and in a meaningful manner." *Than*, 901 S.W.2d at 930 (citing *Eldridge*, 424 U.S. at 333). Therefore, not only was appellees' reply evidence timely, *see Guidry*, 282 S.W.3d at 639, we do not see how appellant suffered any harm. *See* TEX. R. APP. P. 44.1(a) (explaining reversable error requires an error that "probably caused the rendition of an improper judgment" or "probably prevented the appellant from properly presenting the case" on appeal). We conclude the trial court did not abuse its discretion because its actions were consistent with Rule 166a and the

rule's underlying principles. *See Gutierrez*, 111 S.W.3d at 62. Appellant's sub-issue is overruled.

Appellant also asks us to review its other objections to appellees' reply evidence. We conclude these objections were not sufficiently specific to preserve error for review. *See* TEX. R. APP. P. 33.1(a)(1)(A) (objections must be made "with sufficient specificity to make the trial court aware of the complaint"). For example, appellant made the following global objection to the trial court: "[Appellant] objects to the emails offered as Exhibits 1 through 40, for the reason that each contains inadmissible hearsay. TEX. R. EVID. 801." The cardinal rule of error preservation is that an objection must be clear enough to give the trial court an opportunity to correct the alleged error. *Arkoma Basin Expl. Co. v. FMF Assocs. 1990-A, Ltd.*, 249 S.W.3d 380, 387 (Tex. 2008). Without specifying which statements in each of the forty emails were hearsay, the trial court was left to guess. The fact that the trial court overruled all of appellant's objections does not in itself preserve error; the objection must have been sufficiently specific in the first instance. *See* TEX. R. APP. P. 33.1(a) (requiring both a specific objection "and" a ruling). Moreover, without specific objections, there is simply nothing for us to review; like the trial court, we are left to guess.[2] Appellant's sub-issue is overruled.

V. ACCRUAL

Appellant's negligence claims are subject to a two-year statute of limitations. *See* TEX. CIV. PRAC. & REM. CODE § 16.003(a). "Because [§ 16.003(a)] does not define or specify when accrual occurs, we look to the common law to determine when [appellees']

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[2] Even if appellant had preserved its objection, the emails were produced to show notice to appellant, not the truth of the matter asserted. *See* TEX. R. EVID. 801.

cause[s] of action accrue[d]." *KPMG Peat Marwick*, 988 S.W.2d at 750 (citing *Childs*, 974 S.W.2d at 36). "Generally, a cause of action accrues when a wrongful act causes a legal injury." *Etan Indus., Inc. v. Lehmann*, 359 S.W.3d 620, 623 (Tex. 2011) (citing *Provident Life & Accident Ins. Co. v. Knott*, 128 S.W.3d 211, 221 (Tex. 2003)).

Although appellant pled negligence and gross negligence separately from its negligent misrepresentation claim, each claim is based on the same asserted misrepresentations, the same breach of duty, and the same detrimental reliance. To the extent appellant has pled three distinct causes of action, we find no difference between them for accrual purposes. A claim for negligent misrepresentation accrues when the defendant's misrepresentation induces the plaintiff to act.[3] *Weaver & Tidwell, LLP v. Guarantee Co. of N. Am. USA*, 427 S.W.3d 559, 567 (Tex. App.—Dallas 2014, pet. denied); *Rangel v. Progressive Cty. Mut. Ins. Co.*, 333 S.W.3d 265, 269 (Tex. App.—El Paso 2010, pet. denied).

In this case, appellant alleges it "agreed to invest in the litigation based on the representation that the investment guaranteed a significant financial return, the reputation of Mikal Watts, and Watts' [sic] specific representations that I would not lose money." Additionally, appellant alleges that when it made its initial investment in June 2010, Duncan "believed that Watts already had 15,000 clients and he was going to get more clients, thereby increasing the financial return on the investment." According to

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[3] A plaintiff alleging negligent misrepresentation must establish: (1) the defendant made a representation to the plaintiff in the course of the defendant's business or in a transaction in which the defendant had an interest; (2) the defendant supplied false information, typically of an existing fact, for the guidance of others; (3) the defendant did not exercise reasonable care or competence in obtaining or communicating the information; (4) the plaintiff justifiably relied on the representation; and (5) the defendant's negligence proximately caused the plaintiff's injury. *McCamish, Martin, Brown & Loeffler v. F.E. Appling Interests*, 991 S.W.2d 787, 791 (Tex. 1999).

appellant's pleading and summary judgment evidence, the last action it took in reliance on appellees' misrepresentations was in July 2012, when it funded the final portion of its total investment.[4] Therefore, under the legal-injury rule, appellant's causes of action accrued more than two years before appellant filed suit on December 18, 2015.[5] *See Weaver & Tidwell*, 427 S.W.3d at 567.

To avoid appellees' limitations defense, appellant pled the continuing-tort doctrine, the discovery rule, and fraudulent concealment.[6] However, we have no occasion to decide their application in this case because we find the summary-judgment record conclusively establishes that appellant had actual knowledge of its injury more than two

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[4] According to Duncan's deposition testimony, appellant had already funded $5.6 million of its total $5.8 million investment by August of 2010. If each round of funding constitutes a distinct claim for negligent misrepresentation, under the legal-injury rule, appellant's claims to recover the vast bulk of his investment accrued by August 2010. *See Weaver & Tidwell*, 427 S.W.3d at 567.

[5] In addition to its investment, appellant also alleges it relied on Watts's misrepresentations in turning down offers to sell its position to other investors. Duncan provided the following testimony during his deposition about these missed opportunities:

> There was [a] period of time when there were many lawyers that would have loved to have been in the position that Bob and I were in. And there were offers, phone calls being made to Mr. Watts saying[,] "You know, is there any way we can buy into this deal?" And Mr. Watts told me that. And I—and I said[,] "Should I sell out?" And he said, "If I were you, I definitely would not do that. This is going to turn out just fine." And this is—this is after a significant amount of bad news has come out, like *towards the end of 2010* where it's—obviously, it's going to be difficult to—to satisfy the GCCF with the amount of information they wanted on the packets. He continued to be optimistic. So—so, he basically talked me out of recovering my investment and Bob and I talked about it, Mr. Hilliard and I talked about it, about whether we should exit or not. And based on Mr. Watts' advice, we did not.

Even if we accept that Watts's continued optimism constituted an actionable misrepresentation, and that appellant justifiably relied upon Watts's opinion even though "a significant amount of bad news had come out," appellant's reliance occurred "towards the end of 2010." Thus, to the extent this allegation represents a distinct claim for negligent misrepresentation, it also accrued under the legal-injury rule more than two years before appellant filed suit. *Id.*

[6] Although appellant pled fraudulent concealment, it is not expressly presented as an issue on appeal. Instead, appellant conflates elements of fraudulent concealment with its discussion of the continuing-tort doctrine and the discovery rule. Although the issue is mislabeled and multifarious, we will address it. *See* TEX. R. APP. P. 38.9 (requiring us to construe briefing rules liberally).

years before filing suit. *See, e.g., Emerald Oil & Gas*, 348 S.W.3d at 203 ("We do not reach the question of the impact of the discovery rule or fraudulent concealment on the limitations period for the pending claims because Emerald and the royalty owners had actual knowledge more than two years before they filed suit of Exxon's alleged wrongful actions and that those actions caused problems or injuries to their interests."); *Upjohn*, 885 S.W.2d at 544 (noting that, if a plaintiff discovers its "injury and its cause, the rationale for the continuing-tort rule would no longer apply, and the statute would commence to run at that point").

Importantly, appellant has never disputed the authenticity of the forty emails or that Duncan received them. To the contrary, during Duncan's deposition he acknowledged receiving many of these emails and admitted that he was generally "kept in the loop" about "the possible pitfalls" along the way. These emails conclusively establish that Duncan, as appellant's sole owner, knew by November 2012 that the investment was a complete failure and that a significant portion of Watts Guerra's client list was not legitimate—i.e., Duncan knew the representations he relied upon were false and that he had suffered an injury.[7]

Watts Guerra's business plan for monetizing the BP oil spill involved filing claims with the GCCF while simultaneously pursuing the MDL. As early as November 2010,

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[7] Also included in the summary judgment record were nine news articles written by local and national media about the allegations of fraud against Watts and his law firm that were published more than two years before appellant filed suit. Two of the nine news articles, one each from the *Houston Chronicle* and *San Antonio Express-News*, covered the February 2013 raid on the offices of Watts Guerra by the United States Secret Service, which occurred almost three years before appellant filed suit. Several of the articles covered BP's suit against appellees and were published on the date the suit was filed, two years and one day before appellant filed suit. Appellant acknowledges these two events in its pleading and Duncan's summary-judgment affidavit, but unlike the emails, the record does not conclusively establish *when* Duncan had actual knowledge of these two events. We need not address whether appellant should have discovered these news articles through an exercise of due diligence, because the emails were sufficient to put appellant on notice of its injury.

Duncan knew that filing successful claims with the GCCF would be difficult at best because the clients were unable to produce the level of documentation required by the GCCF to substantiate a claim. Duncan testified in his deposition that "everything looked really bad at that time."

When this strategy was abandoned in 2011 in favor of pursuing settlement of the MDL, Watts expressed a renewed sense of optimism. There was hope that the settlement would include a less stringent claims process that would encourage cooperation from their clients. That was not the case. BP settled the MDL in March 2012, but by November 1, 2012, Duncan knew that, out of 41,889 purported clients, the Ferrington field team had only been able to complete 14 settlement claim packets for a .03% conversion rate. This reality prompted Watts to advise Duncan, "Having studied everything, I cannot recommend deploying more dollars at this time under the current protocol." Duncan wrote back, "I just pray that there will be some light at the end of this tunnel." Therefore, as of November 1, 2012, after both strategies had proven to be abject failures, Duncan knew with near certainty that appellant had suffered a total loss on its investment.

Of course, the primary reason for these failures was the fraud perpetrated by the two members of the Ferrington field team. Duncan was repeatedly warned throughout the investment period—from June 2010 until July 2012—that a significant portion of the purported 40,000-plus clients were not legitimate. According to Duncan's deposition, he knew in the fall of 2010 that the GCCF administrator was taking the position that there were approximately 5,000 total deckhands operating in the Gulf in 2010, yet Watts Guerra purported to represent over 40,000 deckhands—all of them Vietnamese. He also knew

in November 2010 that forty-three people had complained to the GCCF that Watts Guerra had used their social security number without authorization. In January 2011, after conducting a due diligence trip to Biloxi, Mississippi, fellow investor Cracken reported to Duncan that a percentage of the clients were nothing more than "names from a phone book," some were duplicates, and some claimed they were "duped" into signing representation agreements. Also in January 2011, Watts Guerra's own consultant confirmed "there were not 40k Vietnamese deckhands" when the oil spill occurred. The consultant also found it "odd" that their clients were concentrated in Texas and Florida because the Vietnamese fishing community was concentrated in Louisiana, Mississippi, and Alabama. Finally, in March 2011, Duncan knew Watts Guerra had filed a claim on behalf of a "client" that had been dead for five years. This discovery led Watts to express concern about the legitimacy of the client list and Cracken to accuse the Ferrington field team of "fraud." Therefore, the summary judgment record conclusively establishes appellant knew that any factual representations about the number of clients represented by Watts Guerra were materially false more than two years before filing suit on December 18, 2015.

Appellant suggests the level of detail discovered through the federal investigation about the nature and extent of the fraud perpetrated by members of the Ferrington field team is the quantum of knowledge necessary to trigger limitations. That is not the standard. Once appellant learned of the wrongful injury, the statute of limitations began to run even if appellant did not yet know the specific cause of the injury, the party responsible for it, the full extent of it, or the chances of avoiding it. *See Emerald Oil & Gas*, 384 S.W.3d at 207.

Appellant also argues that limitations should be deferred because it did not discover Greg Warren's prior conviction for fraud until the criminal investigation, which served as the basis for appellant's theory of negligence—that appellees failed to exercise due diligence in vetting Warren. Again, "accrual occurs when the plaintiff knew or should have known of the wrongfully caused injury," not when the plaintiff knows "the specific nature of each wrongful act that may have caused the injury." *KPMG Peat Marwick*, 988 S.W.2d at 749. By March 2011, appellant knew that, although it had invested $5.6 million to acquire clients, forty-three people had claimed Watts Guerra used their social security number without authorization; there were nowhere near 40,000 Vietnamese deckhands in the Gulf at the time of the oil spill; a percentage of their clients were nothing more than "names in a phonebook" and duplications; and Watts Guerra had filed a claim on behalf of someone who had been dead for five years. At that point, like Cracken, appellant knew or should have known that a "fraud" had been perpetrated by the Ferrington field team, regardless of whether appellant knew that appellees failed to exercise due diligence in vetting Warren; i.e., "the specific nature of each wrongful act that may have caused [appellant's] injury." *Id.* Appellant's issues are overruled.

VI. CONCLUSION

The trial court's judgment is affirmed.

GREGORY T. PERKES
Justice

Delivered and filed the
13th day of June, 2019.