IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

GENE ALLAN FREDERICK,
Plaintiff/Appellant,

v.

BUCKEYE VALLEY FIRE DISTRICT,
Defendant/Appellee.

No. 2 CA-CV 2019-0135
Filed June 18, 2020

Appeal from the Superior Court in Pinal County
No. CV201802006
The Honorable Steven J. Fuller, Judge

AFFIRMED

COUNSEL

Doug Newborn Law Firm PLLC, Tucson
By Douglas J. Newborn
Counsel for Plaintiff/Appellant

Barrett & Matura P.C., Scottsdale
By Jeffrey C. Matura and Amanda J. Taylor
Counsel for Defendant/Appellee

MEMORANDUM DECISION

Judge Espinosa authored the decision of the Court, in which Presiding Judge Eppich and Judge Eckerstrom concurred.

E S P I N O S A, Judge:

¶1 Gene Frederick appeals from the trial court's order granting Buckeye Valley Fire District's motion to dismiss and its judgment of dismissal. For the following reasons, we affirm.

Factual and Procedural Background

¶2 In November 2017, Peggy Andrews was being transported in a non-emergency vehicle owned and operated by the District when the vehicle struck a guardrail on the side of the road, allegedly causing injuries to Andrews. Weeks later, Andrews died. In March 2018, Thomas Allen, a claims adjuster for the District's insurance carrier, American Alternative, began addressing written communications to Gene Frederick, Andrews's son. Allen advised Frederick that he represented the District's insurance provider, explained the claim process, provided forms "required to be completed to begin . . . processing [the] claim," and advised that "the statute of limitations or other time limit may be expiring."

¶3 In September 2018, more than three hundred days after Andrews's death, Frederick submitted a notice of claim to the District. The notice asserted the facts of Andrews's injury and death, and stated Frederick's intention to assert claims for "negligen[ce] and/or gross[] negligen[ce]" against the District. It further included a demand for settlement in the amount of 1.5 million dollars.

¶4 In November 2018, Frederick filed a lawsuit against the District on behalf of himself and Andrews's beneficiaries, alleging claims of respondeat superior, negligence, and wrongful death. The following January, the District moved for dismissal pursuant to Ariz. R. Civ. P. 12(b)(1), (6), based on Frederick's failure to file a timely notice of claim, as required by A.R.S. § 12-821.01(A). In response, Frederick argued that (1) the statute's 180-day requirement had not begun to run until he learned the District was a governmental entity on August 28, 2018; (2) the statute was equitably tolled because Allen's actions caused Frederick to delay filing the notice of claim; and (3) the District was "not harmed" by the late notice.

Frederick also asserted he was entitled to conduct discovery regarding his communications with the claims adjuster to support his equitable tolling argument. He also requested leave to amend the complaint to present facts and new allegations regarding the "statute of limitations issue."

¶5 Following oral argument in April 2019, the trial court granted the District's motion to dismiss, finding that "Frederick failed to comply with the notice of claim requirement set forth within A.R.S. § 12-821.01, that the statute is not equitably tolled, and that permitting Frederick to conduct discovery is futile and unnecessary." The court entered a final judgment pursuant to Rule 54(c), Ariz. R. Civ. P., and Frederick appealed. We have jurisdiction pursuant to A.R.S. § 12-2101(A)(1).

Foundational Issues

¶6 We review a trial court's grant of a motion to dismiss for abuse of discretion, *Dressler v. Morrison*, 212 Ariz. 279, ¶ 11 (2006), but we accept the factual averments in the dismissed party's complaint as true, *Workman v. Verde Wellness Ctr., Inc.*, 240 Ariz. 597, n.1 (App. 2016). Frederick first raises "foundational issues," arguing that dismissal based on a statute of limitations is disfavored, and the trial court should have submitted his claim of equitable tolling to a jury. *See City of Tucson v. Clear Channel Outdoor Inc.*, 218 Ariz. 172, ¶ 5 (App. 2008) (Arizona courts "disfavor statute of limitations defenses, preferring instead to resolve litigation on the merits when possible").

¶7 As for Frederick's first claim, trial courts have discretion to determine whether equitable tolling applies. *See McCloud v. Ariz. Dep't of Public Safety*, 217 Ariz. 82, ¶ 9 (App. 2007). The trial court here was obligated to evaluate the requirements of § 12-821.01 as applied to the facts presented and determine whether any grounds existed to equitably toll the time limits of the notice of claim provision, regardless of the general preference for reaching the merits of litigation. *See, e.g.*, *Jones v. Cochise County*, 218 Ariz. 372, ¶ 7 (App. 2008) (appellate court reviews de novo trial court's determination whether party complied with notice-of-claim statute).

¶8 Frederick's second "foundational" claim also fails. He asserts the trial court was required to submit to a jury the issue of when he "knew or reasonably should have known that . . . [the] District was a governmental entity and/or whether [its] Agent, Adjuster Thomas Allen, committed acts of omission or commission sufficient enough to lead to equitable tolling." The District counters that "the trial court . . . was the proper arbiter of the

equitable tolling issue." A trial court's decision whether to apply equitable tolling is reviewed for abuse of discretion. *Viniegra v. Town of Parker Mun. Prop. Corp.*, 241 Ariz. 22, ¶ 9 (App. 2016). "A court abuses its discretion when the record does not support its findings." *Id.*

¶9 Frederick relies on this court's decision in *Anson v. American Motors Corp.*, 155 Ariz. 420, 421 (App. 1987), remanding the question of equitable tolling for determination by a jury on whether the plaintiffs "exercised reasonable diligence in the discovery of facts giving rise to a cause of action." In *Anson*, however, we did not consider or resolve any questions related to equitable tolling under § 12-821.01. *See id.* In contrast, numerous Arizona cases are consistent with our holding in *McCloud* that "whether to apply equitable tolling is a question the trial court, not the jury, should determine." 217 Ariz. 82, ¶ 9; *see, e.g.*, *City of Tucson v. Superior Court*, 165 Ariz. 236, 242 n.5 (1990) (jury decisions regarding equity are advisory and the court remains the ultimate fact-finder); *Mullins v. Horne*, 120 Ariz. 587, 591 (App. 1978) (the court is the trier of all issues of fact and law in equity matters). Moreover, *Anson* is distinguishable because in that case there was conflicting evidence presenting a question of fact on the issue of equitable tolling. *See Anson*, 155 Ariz. at 428-29. Here, Frederick presented no disputed evidence on the issue, and there was no reason to submit undisputed facts to a jury. Accordingly, the trial court was not required to submit the issue to a jury.

Accrual of Notice Period

¶10 Frederick next contends the trial court erred by incorrectly determining the accrual of the 180-day notice period. He asserts that a cause of action does not begin to accrue until there has been an injury and the damaged party knows "the cause or source of the injury." Frederick claims the latter requirement was not satisfied in November 2017. The District responds that those requirements were met on March 6, 2018, at the latest.

¶11 Section 12-821.01(B) provides that a cause of action accrues "when the damaged party realizes he or she has been damaged and knows or reasonably should know the cause, source, act, event, instrumentality or condition that caused or contributed to the damage." We agree with Frederick that the statute requires that the damaged party know of both the injury and its source for the statutory time period to commence running. *See Doe v. Roe*, 191 Ariz. 313, ¶ 32 (1998) (plaintiff must possess "minimum requisite of knowledge sufficient to identify that a wrong occurred and caused injury"). Andrews died on November 22, 2017, and Frederick

contends he "reached out to [the District]" after "the Christmas/New Year's holidays." Frederick was therefore aware that the District was Andrews's medical transporter, and thus a potential defendant, by early 2018. Frederick also admitted receiving the March 6, 2018, letter from Allen identifying the District as American Alternative's insured. Based on this evidence, the latest possible date Frederick knew or had reason to know that the District's conduct was the alleged cause of Andrews's death was upon receipt of Allen's letter, and Frederick has not argued below or on appeal that he filed the notice of claim within 180 days of receiving the letter.[1] Accepting Frederick's unsupported assertion as true, he still missed the deadline to file a timely notice of claim.

Equitable Tolling

¶12 Frederick alternatively argued below that if he filed the complaint beyond the 180-day notice period, it was because Allen's "actions encouraged [Frederick] to delay" while Allen "continued to send [Frederick] . . . information necessary to settle the claim." He urged the court to equitably toll his claim because Allen "delayed the process, either knowingly or unknowingly." The District responded, then and now on appeal, that "equitable tolling does not apply to Frederick's claim" because he failed to "establish four factors [required] to prevail on an equitable tolling argument."

¶13 When considering an equitable tolling claim, a court evaluates whether: (1) "defendant made specific promises, threats, or inducements to prevent the plaintiff from filing suit"; (2) defendant's acts "actually induced" plaintiff to refrain from filing suit; (3) defendant's acts "reasonably caused" plaintiff's untimely suit filing; and (4) plaintiff's suit was filed "within a reasonable time after termination of the conduct warranting estoppel." *Viniegra*, 241 Ariz. 22, ¶ 10; *see Nolde v. Frankie*, 192 Ariz. 276, ¶¶ 16-19 (1998). The plaintiff bears the burden to prove the particular statute of limitations should be tolled. *Anson*, 155 Ariz. at 421.

[1]180 days from March 6, 2018 was September 2, 2018. Frederick did not file his notice of claim until September 21, 2018. Frederick has not pursued his claim made below that he was unaware of the public nature of the District until August 2018. He introduced no evidence to support that specific claim, and has not raised it on appeal, thereby abandoning it. *See Nelson v. Rice*, 198 Ariz. 563, n.3 (App. 2000) (argument waived when party fails to raise it in opening brief).

The plaintiff must also support an equitable tolling allegation with evidence and "cannot rely solely on personal conclusions or assessments." *McCloud*, 217 Ariz. 87, ¶ 13.

¶14 Here, Frederick referred to certain letters, forms, and conversations but did not provide any documents or an affidavit. He further failed to do so in his motion to alter or amend or by requesting leave to file a surreply. With no supporting evidence, the trial court properly rejected Frederick's equitable tolling argument.[2]

Amended Complaint

¶15 Frederick next argues the trial court erred when it denied his request to amend his complaint. The denial of a request to amend the pleadings is reviewed for an abuse of discretion. *First-Citizens Bank & Tr. Co. v. Morari*, 242 Ariz. 562, ¶ 12 (App. 2017). Leave to amend a complaint "must be freely given when justice requires," Ariz. R. Civ. P. 15(a)(2), but when the requested amendment does not cure the deficiency under § 12-821.01, its denial is proper. *See Swenson v. County of Pinal*, 243 Ariz. 122, ¶ 22 (App. 2017).

¶16 Frederick does not specify any evidence supporting his argument, instead only asserting that he had "multiple communications" with the District "that led [him] to believe there was no need to file a claim and/or that [he] had more time to file a claim." But Frederick would necessarily have had knowledge of the substance of such communications and presumably could have submitted an affidavit or other evidence to support his assertion. Additionally, Frederick did not identify any new facts or legal theories he wished to raise in an amended complaint. The District argues, and we agree, that Frederick cannot establish that "justice requires" an amended complaint in this situation. Ariz. R. Civ. P. 15(a)(2). Frederick's request to amend does not cure the deficiency under § 12-821.01, and therefore the trial court did not abuse its discretion in denying the request.

[2]We note that the trial court reviewed two documents from the claims adjuster that Frederick referred to, the March 6 letter and an information request form that had been submitted by the District with its reply. Those documents demonstrate that Allen had alerted Frederick to the 180-day notice period when he informed him "the statute of limitations or other time limit may be expiring."

Improperly Considered Evidence

¶17 Frederick argues the trial court improperly considered evidence submitted by the District "without converting [its] *motion to dismiss* into a motion for summary judgment." He cites *Workman v. Verde Wellness Center, Inc.*, for the proposition that a court can consider evidence contrary to allegations made in the complaint only if all parties are "given reasonable opportunity to present all material made pertinent to such a motion by Rule 56." 240 Ariz. 597, ¶ 14 (App. 2016) (quoting Ariz. R. Civ. P. 12(b)).

¶18 As noted above, the District in support of its motion to dismiss produced two documents from the claims adjuster that the trial court apparently reviewed during oral argument[3] and referred to in its ruling. Frederick asserts that after the District submitted extrinsic evidence, he was "effectively prevented . . . from submitting any evidence" because he was "not allowed to file a responsive pleading." He further asserts that the District's submission of evidence converted its motion to dismiss into a motion for summary judgment, and "the trial court did not allow [Frederick] the opportunity to produce extrinsic evidence or otherwise properly defend against the evidence improperly submitted" by the District.

¶19 The District responds that the documents were "not central to [its] motion to dismiss," adding that it "would not have attached any exhibits but for Frederick's newly asserted equitable estoppel claim." We agree that the District's reply was not converted to a motion for summary judgment simply because it attached evidence not relied upon in the complaint. *Cf. Swichtenberg v. Brimer*, 171 Ariz. 77, 82 (App. 1991) (where jurisdictional fact issues involved in motion to dismiss "are not intertwined with the fact issues raised by a plaintiff's claim on the merits," the court may consider exhibits without converting the motion to one for summary judgment). And because "facts related to the reasons for equitable tolling are frequently unrelated to the central facts relevant to the merits of the plaintiff's claim," *McCloud*, 217 Ariz. 86, ¶ 9, the court was not required to

[3]Frederick has failed to provide a transcript of the dismissal hearing and we could find this issue foreclosed on that basis. *See Johnson v. Elson*, 192 Ariz. 486, ¶ 11 (App. 1998) (court assumes record supports trial court's decision when no transcript provided on appeal). We nevertheless in our discretion consider the argument on its merits.

evaluate the claim under the summary judgment standard and therefore did not err.

Discovery

¶20 Frederick next contends "justice [was] not served" when the trial court did not allow him "the very discovery he need[ed] to attempt to prove his case," as required by the rules of civil procedure. *See* Ariz. R. Civ. P. 1 (the civil rules "should be construed, administered, and employed by the court . . . to secure the just . . . determination of every action and proceeding"). The District counters that "discovery [was] unnecessary" because Frederick failed to make a proper request under Rule 56(d), Ariz. R. Civ. P., and in any event it would not have supported Frederick's equitable tolling argument because "the evidence he hoped to discover revolves around" communications between the District and himself. The trial court's ruling on a discovery request is reviewed for an abuse of discretion. *See State v. Fields*, 196 Ariz. 580, ¶ 4 (App. 1999).

¶21 When a party opposing a summary judgment cannot present essential evidence to support his opposition, he may file a request seeking an "expedited hearing" along with an affidavit "establishing specific and adequate grounds for the request." Ariz. R. Civ. P. 56(d). Frederick correctly points out that that rule does not apply here because it governs motions for summary judgment, and this case concerns a motion to dismiss. Rule 56(d) relief was thus not available to him. Frederick, however, sought discovery to obtain evidence regarding "multiple communications" with the District "that led [him] to believe that there was no need to file a claim and/or that [he] had more time to file a claim." As noted above, because Frederick was directly involved in those communications, he had first-hand knowledge of their substance and could have, at the very least, submitted an affidavit to support his claim but failed to do so. We therefore cannot say the trial court abused its discretion in denying Frederick's discovery request. *Cf.* Ariz. R. Civ. P. 26(b)(1) (courts consider "the parties' relative access to relevant information" to determine if material is "proportional to the needs of the case"); Ariz. R. Civ. P. 26(b)(2)(C)(i) (court must limit discovery when "discovery sought" is obtainable from "more convenient" source).

Unfair Claims and Settlement Practices Act

¶22 Frederick lastly contends the trial court erred in failing to find the claims adjuster's actions "are subject to the Unfair Claims and Settlement Practices Act and related administrative code." He argues that

"[a]lthough it is true that the regulations do not provide for a separate civil cause of action," they still apply to the insurance adjuster in this case. Frederick cites Arizona Administrative Code R20-6-801(G)(4), which requires insurers to advise claimants of applicable statutes of limitations during periods of negotiation, and he argues it equitably tolls the 180-day notice of claim period. The District responds that the trial court was not required to consider the Act and regulations to determine equitable tolling, and even had it done so, they are inapplicable here because settlement negotiations had not begun at the time of the communications referred to.

¶23 The administrative code regulations, including R20-6-801(G)(4), relate to the Act, which addresses "general business practice[s]." § 20-461. "Nothing contained in [§ 20-461] is intended to provide any private right or cause of action to or on behalf of any insured or uninsured resident or nonresident of this state." § 20-461(D). Instead, the provisions of the act are "to provide solely an administrative remedy to the director for any violation of this section or rule related" thereto. *Id.* Additionally, "[t]he provisions are expressly not a standard of conduct against which an insurer's conduct in handling an individual claim is to be measured for creating a claim for relief." *Melancon v. USAA Cas. Ins. Co.*, 174 Ariz. 344, 347 (App. 1992).

¶24 Frederick nevertheless points to the regulatory language that states:

> Insurers shall not continue negotiations for settlement of a claim directly with a claimant who is neither an attorney nor represented by an attorney until the claimant's rights may be affected by a statute of limitations or a policy or contract time limit, without giving the claimant written notice that the time limit may be expiring and may affect the claimant's right.

R20-6-801(G)(4). But Frederick presented no evidence below, and makes no argument on appeal, that he was in settlement negotiations with the claims adjuster. In fact, the record reflects that at the time of the relevant communications, his claim was in the preliminary stages of investigation;

settlement negotiations had not yet begun.[4] Thus, even had the trial court considered the Act and R20-6-801(G)(4), the regulation Frederick relies upon is inapposite. Because neither the Act nor the administrative code provides legal grounds for equitable estoppel, the trial court did not err in its ruling.

Disposition

¶25 For all of the above reasons, the trial court's judgment of dismissal is affirmed.

[4]Moreover, notwithstanding that settlement negotiations were not yet involved, the claims adjuster nevertheless *did* alert Frederick that an applicable statute of limitations might be expiring.