Opinion issued August 11, 2020

In The

Court of Appeals

For The

First District of Texas

NO. 01-19-00248-CV

GLENN BLAIR, Appellant

V.

KELLY FRITSCH, GOLDA R. JACOB, AND GOLDA R. JACOB AND ASSOCIATES, P.C., Appellees

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On Appeal from the 152nd District Court
Harris County, Texas
Trial Court Case No. 2018-57909

O P I N I O N

Appellant, Glenn Blair, sued appellees, Kelly Fritsch, Golda R. Jacob, and Golda R. Jacob and Associates, P.C. (collectively, "Fritsch"), for legal malpractice, breach of fiduciary duty, fraud, and negligent misrepresentation arising out of

Fritsch's representation of Blair in a child support case and an informal marriage case. Fritsch moved for summary judgment and argued that the statute of limitations barred Blair's claims. The trial court granted summary judgment in favor of Fritsch. In one issue, Blair argues that the trial court erred in granting summary judgment because the statute of limitations on his claims had been tolled under the equitable tolling rule announced by the Texas Supreme Court in *Hughes v. Mahaney & Higgins* until the completion of all appeals of the underlying claim and, therefore, he timely filed his legal malpractice claims.

We affirm.

Background

A. Prior SAPCR and Common-Law Divorce Actions

In December 2010, the Texas Attorney General filed a "Petition for Confirmation of Non-Agreed Child Support Review Order" in a suit affecting the parent-child relationship (SAPCR) in the 387th District Court of Fort Bend County concerning the custody and support of the minor child Angela McClinton had with Glenn Blair. Blair originally represented himself pro se, but he was later represented in that action by Kelly Fritsch.

On January 27, 2011, in a separate cause number, Blair, represented by Fritsch, filed an original petition for divorce in the same court in Fort Bend County, alleging that he and McClinton had been informally married since 2000. McClinton,

in her answer, generally denied the allegations in the divorce petition, specifically denied the existence of a marriage between herself and Blair, and requested that the trial court enter a declaratory judgment "that no common-law or ceremonial marriage existed, past or present" between herself and Blair. Her answer also referenced the Attorney General's 2010 SAPCR.

After an evidentiary hearing, the trial court signed an order declaring that "there is no marriage between Petitioner Glenn Blair and Respondent Angela McClinton" and ordered judgment in favor of McClinton on the informal marriage issue. The trial court also ordered "that issues concerning conservatorship and support of the child of the relationship shall proceed under the prior Suit Affecting the Parent Child Relationship filed in this court as Cause Number 10-DCV-186075." The trial court's order dismissed Blair's petition for divorce.

Blair, acting pro se, appealed the trial court's order dismissing his divorce petition to this Court. *See Blair v. McClinton*, No. 01-11-00701-CV, 2013 WL 3354649 (Tex. App.—Houston [1st Dist.] July 2, 2013, pet. denied) (mem. op.) ("*Blair I*"). Blair challenged the sufficiency of the evidence to support the trial court's declaration, but he failed to provide a reporter's record from the evidentiary hearing before the trial court, and this Court "presume[d] that the evidence presented at the hearing was sufficient to support the trial court's findings and order." *Id.* at *2 (citing *Bryant v. United Shortline Inc. Assurance Servs., N.A.*, 972 S.W.2d 26, 31

(Tex. 1998), and *Willms v. Am. Tire Co.*, 190 S.W.3d 796, 803 (Tex. App.—Dallas 2006, pet. denied)). Blair also argued that his trial counsel—Fritsch—was inadequate and "prejudiced his ability to establish the existence of an informal marriage between himself and McClinton." *Id.* We concluded that, because the case was a civil divorce case and did not involve the termination of Blair's parental rights to his child, "the doctrine of ineffective assistance of counsel does not apply to Blair's complaints." *Id.* at *3. We therefore overruled both of Blair's complaints and affirmed the order of the trial court dismissing his divorce petition. *Id.*

Blair petitioned the Texas Supreme Court for review of our decision, but the supreme court denied the petition for review on April 11, 2014, and denied rehearing on July 11, 2014. Our mandate issued in *Blair I* on July 18, 2014.

Meanwhile, in the SAPCR, in June 2011, the trial court held a conference. A representative from the Attorney General's Office attended, as did Blair, McClinton, and their respective attorneys, including Fritsch. After the conference, Blair, McClinton, their respective attorneys, the Attorney General's representative, and the trial court all signed an order confirming child support. The order appointed Blair and McClinton as joint managing conservators, awarded McClinton the exclusive right to determine the primary residence of the child, and ordered Blair to pay monthly child support and monthly medical support. The Attorney General's proposed order, first filed with its confirmation petition, was incorporated as an

exhibit to the support order and included handwritten amendments by the parties. Blair, McClinton, and their respective attorneys signed both the order and the attached exhibit. Blair did not appeal this order.

In December 2015, Blair, acting pro se, filed a petition for bill of review and sought to set aside the 2011 child support order. Blair argued that Fritsch and McClinton both committed extrinsic fraud and that the support order was void because the trial court had lacked subject-matter jurisdiction over the case. The trial court denied the petition.

Blair again appealed to this Court. *See Blair v. McClinton*, No. 01-16-00431-CV, 2017 WL 2980174 (Tex. App.—Houston [1st Dist.] July 13, 2017, pet. denied) (mem. op.) ("*Blair II*"). Blair argued that Fritsch engaged in fraud by advising him that the trial court had jurisdiction over the case and that she pressured Blair to sign the child support order and therefore placed him under duress. *Id.* at *2. We noted, first, that Blair presented no evidence to support these contentions and, second, that evidence of fraud or misconduct by the party's own attorney "does not demonstrate extrinsic fraud, accident, or misconduct sufficient to establish a right to an equitable bill of review." *Id.* (citing *Transworld Fin. Servs. Corp. v. Briscoe*, 722 S.W.2d 407, 408 (Tex. 1987)).

Blair also argued that McClinton fraudulently prevented him from raising jurisdictional challenges and defenses to the child support order, and he pointed to

the proposed order originally filed with the Attorney General's petition and later incorporated into the child support order as evidence of extrinsic fraud. *Id.* We concluded that this was not evidence of extrinsic fraud, noting that both Blair and his attorney were present at the hearing to determine his child support obligations, Blair and his counsel signed both the child support order and the incorporated exhibit, and he had the opportunity to raise any challenge to the order at that time but failed to do so. *Id.* We further noted that the parties waived the making of a record of the hearing before the trial court, and, in the absence of a record, we "presume[d] that the evidence presented in connection with the hearing supported the trial court's recitals" in the order that all legal prerequisites had been satisfied and that the court had both personal and subject-matter jurisdiction. *Id.* We concluded that Blair "failed to adduce any evidence that the June 2011 order was either void or a product of extrinsic fraud," and we affirmed the judgment of the trial court denying his petition for a bill of review. *Id.*

Blair filed a petition for review with the Texas Supreme Court. The supreme court denied his petition on March 9, 2018, and overruled his motion for rehearing on July 6, 2018. Our mandate in *Blair II* issued on October 2, 2018. Blair also filed a writ of certiorari with the United States Supreme Court, which denied the writ on February 25, 2019.

B. Legal Malpractice Actions

Blair initially filed suit against Fritsch in June 2015, asserting causes of action for fraud and breach of fiduciary duty arising out of Fritsch's representation of Blair in the SAPCR and the divorce action ("the 2015 malpractice action"). This lawsuit was assigned to the 152nd District Court of Harris County. He alleged that Fritsch failed to advise him that the June 2011 child support order was void and unenforceable and that she provided "ineffective counsel" in the divorce action by failing to offer into evidence documents that, according to Blair, would have demonstrated that he and McClinton had an informal marriage.[1] Blair filed an amended petition one week later, providing slightly more detailed allegations.

Fritsch moved for no-evidence summary judgment in the 2015 malpractice action. Ultimately, before the trial court ruled on Fritsch's summary judgment motion, Blair nonsuited the 2015 malpractice action.

On August 27, 2018, Blair filed a "Petition for Reopening Non-suit" in his earlier malpractice lawsuit against Fritsch, again asserting claims for legal malpractice, breach of fiduciary duty, fraud, and negligent misrepresentation ("the 2018 malpractice action"). This filing itself included no specific allegations against Fritsch, but it did incorporate Blair's original and amended petitions from the 2015

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[1] Blair filed the 2015 malpractice action before he filed his bill of review seeking to set aside the June 2011 child support order. As stated above, this Court later determined that the trial court properly denied Blair's bill of review.

malpractice action. This petition was filed in the 152nd District Court and received a new cause number. Fritsch answered and asserted several affirmative defenses, including impermissible fracturing of legal malpractice claims and statute of limitations. Fritsch alleged that she last represented Blair in June 2011, seven years before Blair filed the 2018 malpractice action.

Blair filed a "Reply to [Defendants'] Answer" in which he argued that he had not impermissibly fractured his legal malpractice claim. He made several statements concerning alleged failures by Fritsch during her representation. He also stated, "Blair filed a timely notice of appeal on 8/11/11 (Ex. 6) which kept the subject matter of custody and divorce until the final mandate of 7/18/14 in the 387th District [C]ourt case." He attached several exhibits to this filing, including his notice of appeal of the divorce action and this Court's mandate in *Blair I*.

Fritsch moved for summary judgment on Blair's claims and argued that the claims were barred by the applicable statutes of limitations. Fritsch argued that Blair's causes of action against her accrued, at the latest, in June 2011, when the child support order was entered against him. While Blair filed the 2015 malpractice action, he later nonsuited that action before filing the 2018 malpractice action, seven years after Fritsch's representation of him had ended and beyond all applicable statutes of limitation. Fritsch also pointed out that, in his appellate brief filed in December 2012 in *Blair I*, Blair raised an argument concerning ineffective assistance

of counsel, but he did not file the 2018 malpractice action until six years later. She therefore argued that the discovery rule—to the extent it had been pleaded—could not apply to Blair's claims.[2]

Blair did not respond to Fritsch's summary judgment motion. The trial court held a hearing on the motion, but no reporter's record was made of this hearing. The trial court granted summary judgment in favor of Fritsch and rendered a take-nothing judgment against Blair.

In his notice of appeal, Blair stated:

> The case was open because all cases listed tolled this case and kept the malpractice suit open while all appeals were being adjudicated. This is referenced in Hughes and Hughes, Petitioner v. Higgins, Mahaney, and Higgins, Respondents; No. D-0678 Nov. 20, 1991. The cases that tolled this case are Fort Bend County cases 10-DCV-186075 [the SAPCR], 11-DCV-187301 [the divorce action], and 15-DCV-228822 [the bill of review]. First Court of Appeals cases 01-16-00431-CV. Supreme Court of Texas 17-0975. Also the first case filed against Kelley Fritsch in Harris County Civil Court that the old case number was included in filing of this suit.

Blair had not mentioned tolling of the statute of limitations in writing prior to his notice of appeal. This appeal followed.

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[2] Blair's original petition in the 2015 malpractice action included several statements that he had "just recently discovered" legal or factual matters. As summary judgment evidence, Fritsch attached a copy of Blair's appellate brief from *Blair I*, in which he argued, in December 2012, that Fritsch had provided him ineffective assistance.

Statute of Limitations

In his sole issue, Blair contends that the trial court erred in granting summary judgment in favor of Fritsch on the basis of limitations. Specifically, Blair argues that, pursuant to the Texas Supreme Court's decision in *Hughes v. Mahaney & Higgins*, the statute of limitations for his legal malpractice claim against Fritsch was tolled until after the appeal of his bill of review concluded.

A. Summary Judgment Standard of Review

We review a trial court's summary judgment ruling de novo. *City of Richardson v. Oncor Elec. Delivery Co.*, 539 S.W.3d 252, 258 (Tex. 2018). To prevail on a traditional motion for summary judgment, the movant bears the burden of proving that no genuine issues of material fact exist and that she is entitled to judgment as a matter of law. TEX. R. CIV. P. 166a(c); *City of Richardson*, 539 S.W.3d at 258–59. When a defendant moves for traditional summary judgment, she must either: (1) disprove at least one essential element of the plaintiff's cause of action, or (2) plead and conclusively establish each essential element of an affirmative defense, thereby defeating the plaintiff's cause of action. *Lujan v. Navistar Fin. Corp.*, 433 S.W.3d 699, 704 (Tex. App.—Houston [1st Dist.] 2014, no pet.).

If the movant meets her burden, the burden shifts to the non-movant to present evidence raising a genuine issue of material fact precluding summary judgment. *Id.* A genuine issue of material fact exists if the evidence rises to a level that would

enable reasonable and fair-minded people to differ in their conclusions. *First United Pentecostal Church of Beaumont v. Parker*, 514 S.W.3d 214, 220 (Tex. 2017) (quoting *Merrell Dow Pharms., Inc. v. Havner*, 953 S.W.2d 706, 711 (Tex. 1997)). Evidence does not create a fact issue if it is so weak as to do no more than create a mere surmise or suspicion that the fact exists. *Id.* (quoting *Kia Motors Corp. v. Ruiz*, 432 S.W.3d 865, 875 (Tex. 2014)). We review the evidence presented in the summary judgment motion and response in the light most favorable to the nonmovant, crediting favorable evidence if reasonable jurors could do so and disregarding contrary evidence unless reasonable jurors could not. *Mann Frankfort Stein & Lipp Advisors, Inc. v. Fielding*, 289 S.W.3d 844, 848 (Tex. 2009). We indulge every reasonable inference and resolve any doubts in the nonmovant's favor. *Helix Energy Sols. Grp., Inc. v. Gold*, 522 S.W.3d 427, 431 (Tex. 2017).

B. Statute of Limitations

A defendant who moves for summary judgment on the basis of the statute of limitations must conclusively establish the elements of that defense, including when the plaintiff's cause of action accrued. *Erikson v. Renda*, 590 S.W.3d 557, 563 (Tex. 2019). The defendant must also conclusively negate the application of the discovery rule and any tolling doctrines that are pleaded as exceptions to limitations. *Id.*; *Schlumberger Tech. Corp. v. Pasko*, 544 S.W.3d 830, 834 (Tex. 2018) (per curiam)

(stating that in cases in which plaintiff pleads discovery rule, defendant moving for summary judgment on limitations bears burden of negating that rule).

The statute of limitations for a legal malpractice cause of action is two years after the cause of action accrues. *Erikson*, 590 S.W.3d at 563; *Apex Towing Co. v. Tolin*, 41 S.W.3d 118, 120 (Tex. 2001); *see* TEX. CIV. PRAC. & REM. CODE ANN. § 16.003(a) (providing two-year statute of limitations for suits for trespass for injury to estate or to property of another, conversion of personal property, taking or detaining personal property of another, personal injury, forcible entry and detainer, and forcible detainer). The statute of limitations for both fraud and breach of fiduciary duty causes of action is four years after the cause of action accrues. TEX. CIV. PRAC. & REM. CODE ANN. § 16.004(a)(4), (5); *Agar Corp. v. Electro Circuits Int'l, LLC*, 580 S.W.3d 136, 139 (Tex. 2019). A party incurs a legal injury, and a cause of action accrues, when faulty professional advice is taken. *Erikson*, 590 S.W.3d at 563. The discovery rule applies to legal malpractice claims and defers accrual of the cause of action until the client discovers, or should have discovered, the wrongful act and injury. *Id.*

The Texas Supreme Court has also adopted an equitable tolling rule—known as the *Hughes* rule—for certain legal malpractice actions. In *Hughes v. Mahaney & Higgins*, the supreme court held that "when an attorney commits malpractice in the prosecution or defense of a claim that results in litigation, the statute of limitations

on the malpractice claim against the attorney is tolled until all appeals on the underlying claim are exhausted." 821 S.W.2d 154, 157 (Tex. 1991); *see Apex Towing*, 41 S.W.3d at 119 (expressly reaffirming *Hughes* and stating that, in cases in which *Hughes* rule applies, limitations are tolled until "all appeals on the underlying claim are exhausted or the litigation is otherwise finally concluded").

In *Erikson*, the court emphasized that the *Hughes* rule "does not apply every time legal 'malpractice . . . results in litigation.'" 590 S.W.3d at 566. Instead, there is a "critical limitation" contained in the text of the *Hughes* rule itself: "the malpractice must be committed 'in the prosecution or defense of a claim.'" *Id.* at 567. The court applied the "ordinary meaning within the legal-services context" to the terms "claim," "prosecution," and "defense," stating that "to prosecute" means "[t]o commence and carry out (a legal action)," and "to defend a claim" means "to do something [protective] . . . [t]o deny, contest, or oppose (an allegation or claim) . . . [t]o represent (someone) as an attorney; to act as legal counsel for someone who has been sued or prosecuted." *Id.* (quoting BLACK'S LAW DICTIONARY at 1476, 528 (11th ed. 2019)), The alleged malpractice need not occur "in litigation," but the alleged malpractice "must be directly or integrally connected to carrying out some kind of legal action." *Id.*

Intermediate courts of appeal—including this Court—have held that the *Hughes* tolling rule, like the discovery rule, is a plea in avoidance of the statute of

limitations and must be affirmatively pleaded or else it is forfeited. *See Wen v. Ahn*, No. 01-13-00837-CV, 2014 WL 5780251, at *3 (Tex. App.—Houston [1st Dist.] Nov. 6, 2014, pet. denied); *Haase v. Abraham, Watkins, Nichols, Sorrels, Agosto & Friend, LLP*, 404 S.W.3d 75, 84–85 (Tex. App.—Houston [14th Dist.] 2013, no pet.); *Hall v. Stephenson*, 919 S.W.2d 454, 465 (Tex. App.—Fort Worth 1996, writ denied); *see also* TEX. R. CIV. P. 94 (requiring party to affirmatively plead any matter "constituting an avoidance or affirmative defense"); *Woods v. William M. Mercer, Inc.*, 769 S.W.2d 515, 517–18 (Tex. 1988) (holding that discovery rule "is a plea in confession and avoidance" of statute of limitations and "party seeking to avail itself of the discovery rule must therefore plead the rule"); *Rice v. Louis A. Williams & Assocs., Inc.*, 86 S.W.3d 329, 342 (Tex. App.—Texarkana 2002, pet. denied) ("A movant for summary judgment has the burden of negating the applicability of a tolling provision *raised by his or her opponent*.") (emphasis added). A legal malpractice claimant must, therefore, affirmatively plead the *Hughes* rule either in the original petition or in an amended or supplemental petition. *Haase*, 404 S.W.3d at 85.

A plaintiff who fails to affirmatively plead the *Hughes* rule in an original, amended, or supplemental petition may still, in some circumstances, rely upon the rule to preclude summary judgment. *See Wen*, 2014 WL 5780251, at *3; *Haase*, 404 S.W.3d at 86. "An unpleaded plea in avoidance [such as the *Hughes* rule] may still

serve to preclude summary judgment if it is raised in a summary judgment response and if the opposing party fails to object to it in a reply or before the rendition of judgment." *Haase*, 404 S.W.3d at 86; *see Roark v. Stallworth Oil & Gas, Inc.*, 813 S.W.2d 492, 494 (Tex. 1991) (holding that unpleaded affirmative defense of no consideration could serve as basis for summary judgment when it was raised in summary judgment motion and nonmovant did not object to lack of pleading concerning defense); *see also Via Net v. TIG Ins. Co.*, 211 S.W.3d 310, 313 (Tex. 2006) (per curiam) (stating that when plaintiff asserted discovery rule for first time in its summary judgment response, defendant "had two choices: it could object that the discovery rule had not been pleaded, or it could respond on the merits and try the issue by consent"); *Proctor v. White*, 172 S.W.3d 649, 652 (Tex. App.—Eastland 2005, no pet.) (reversing summary judgment ruling when plaintiff relied upon discovery rule in summary judgment response, defendant did not object to reliance on discovery rule and therefore tried discovery rule issue by consent, and defendant did not address application of discovery rule after it was raised by plaintiff in summary judgment response).

As this Court noted in *Wen*, however, issues that are not expressly presented to the trial court in a summary judgment proceeding by written motion, answer, or other response shall not be considered on appeal as grounds for reversal. *See* 2014 WL 5780251, at *3; *see* TEX. R. CIV. P. 166a(c) ("Issues not expressly presented to

the trial court by written motion, answer or other response shall not be considered on appeal as grounds for reversal."); *Nall v. Plunkett*, 404 S.W.3d 552, 555 (Tex. 2013) (per curiam) (stating same); *D.R. Horton-Tex., Ltd. v. Markel Int'l Ins. Co.*, 300 S.W.3d 740, 743 (Tex. 2009) ("A non-movant must present its objections to a summary judgment motion expressly by written answer or other written response to the motion in the trial court or that objection is waived."); *McConnell v. Southside Indep. Sch. Dist.*, 858 S.W.2d 337, 341 (Tex. 1993) ("[I]ssues a non-movant contends avoid the movant's entitlement to summary judgment must be expressly presented by written answer to the motion or by other written response to the motion and are not expressly presented by mere reference to summary judgment evidence."). Thus, if a plaintiff who has not pleaded the *Hughes* rule in an original, amended, or supplemental petition does not expressly present the *Hughes* rule to the trial court by written answer or other response to a defendant's summary judgment motion, the plaintiff forfeits application of the rule, and the rule cannot be considered on appeal as a basis for reversal of the summary judgment ruling. *See Wen*, 2014 WL 5780251, at *4; *Haase*, 404 S.W.3d at 88–89 (concluding that plaintiff did not timely raise *Hughes* rule in written response to summary judgment motion and therefore refusing to consider application of rule as basis for reversal of summary judgment ruling).

Here, Blair's original and amended petitions, filed in the 2015 malpractice action and refiled as exhibits to his "Petition for Reopening Non-suit" in the 2018 malpractice action, did not plead the *Hughes* rule or any other tolling doctrine. Fritsch pleaded the statute of limitations as an affirmative defense in her answer, and the statute of limitations formed the sole basis of her motion for summary judgment. Blair did not, however, amend his petition or file a supplemental petition asserting the *Hughes* rule. Blair did not file a written response to Fritsch's motion for summary judgment. In his reply brief on appeal, Blair contends that he raised the *Hughes* rule at the hearing on Fritsch's motion for summary judgment, but that hearing was not recorded by the court reporter, and thus no reporter's record exists in this case. *See Nicholson v. Fifth Third Bank*, 226 S.W.3d 581, 583 (Tex. App.—Houston [1st Dist.] 2007, no pet.) ("It is the burden of the appellant to bring forward a sufficient record to show the error committed by the trial court."). The only instance in which Blair raises the *Hughes* rule in the appellate record is in his notice of appeal.

Because the *Hughes* tolling rule is a plea in avoidance of the statute of limitations, Blair was required to affirmatively plead it in order to rely on it as a basis to avoid summary judgment. *See Wen*, 2014 WL 5780251, at *3; *Haase*, 404 S.W.3d at 84–86. Blair, however, did not raise the *Hughes* rule in an original, amended, or supplemental pleading, nor did he raise it in a written response to Fritsch's summary judgment motion. *See Wen*, 2014 WL 5780251, at *4; *Haase*, 404 S.W.3d at 88; *see*

also TEX. R. CIV. P. 166a(c) ("Issues not expressly presented to the trial court by written motion, answer or other response shall not be considered on appeal as grounds for reversal."); *Nall*, 404 S.W.3d at 555. Because Blair did not raise the *Hughes* rule until his notice of appeal, he has forfeited application of the rule, and it cannot be considered on appeal as a basis for reversing the trial court's summary judgment ruling. *See Wen*, 2014 WL 5780251, at *4; *Haase*, 404 S.W.3d at 88–89. Fritsch conclusively established that Blair's causes of action against her accrued no later than June 6, 2011, when the parties signed the child support order in the SAPCR. Blair did not file the 2018 malpractice suit until August 27, 2018, more than seven years later, and outside all applicable statutes of limitation. We therefore hold that the trial court did not err by granting summary judgment in favor of Fritsch on the basis of the statute of limitations.

We overrule Blair's sole issue.

Conclusion

We affirm the judgment of the trial court.

Evelyn V. Keyes
Justice

Panel consists of Justices Keyes, Kelly, and Landau.