Opinion issued July 26, 2022

In The

Court of Appeals

For The

First District of Texas

NO. 01-21-00044-CV

KENNETH E. LEHRER PHD, Appellant

V.

POST OAK MOTORS, LLC, Appellee

On Appeal from the 80th District Court
Harris County, Texas
Trial Court Case No. 2019-19504

MEMORANDUM OPINION

In 2019, appellant, Kenneth E. Lehrer, PhD, sued appellee, Post Oak Motors, LLC, for violations of the Texas Deceptive Trade Practices Act (DTPA) and negligence in connection with restoration work on an antique Rolls Royce Silver Cloud that occurred between 2000 and 2007. Post Oak Motors moved for

summary judgment on limitations grounds, and the trial court granted the motion, dismissing Lehrer's suit. In his sole issue on appeal, Lehrer argues that the trial court erred in granting summary judgment in favor of Post Oak Motors. We conclude that Lehrer's claims are barred by the applicable statutes of limitations, and, thus, we affirm.

Background

Lehrer has owned a 1965 Rolls Royce Silver Cloud III (the Silver Cloud) since 1979. In 1998, Lehrer decided he wanted to restore the Silver Cloud. The owner of Post Oak Motors contacted Lehrer, and Lehrer discussed details of the restoration with various people, including employees of Post Oak Motors. According to Lehrer, Post Oak Motors told him that the restoration would cost approximately $70,000 and be done according "to Rolls Royce standard" condition. Lehrer understood that the complete project would take approximately three years. The work began in 2000.

The work by Post Oak Motors eventually cost over $150,000 and occurred over a period of seven years, from 2000 until 2007. Lehrer testified in his deposition that the first technician to work on his Silver Cloud in 2000 was Jamie Christensen. Lehrer testified that Rolls Royce certified technicians to work on particular models, not on all Rolls Royce vehicles generally. Christensen was certified to work on Silver Clouds because he was an adult technician when the

Silver Cloud came out in 1965. Lehrer further testified that Post Oak Motors claimed that the next technician, Sean Ellis, was also certified by Rolls Royce, but when Lehrer asked Ellis to provide proof of his certification, Ellis failed to do so.

Lehrer retrieved the Silver Cloud from Post Oak Motors in 2007. At the time, he was unhappy with the length of time and total cost of the work, and he had some "aesthetic issues that were not to [his] liking." According to his deposition testimony, he also believed that the Silver Cloud "clearly had not undergone a full restoration." Lehrer further testified that, in 2009, he took the Silver Cloud to a Rolls Royce event in New Orleans where it was examined by a "Senior Judge" who gave the car a rating of "B- (at best) and showed [Lehrer] many of the areas of poor or overlooked workmanship especially for $70,000." He testified during his deposition that, although he was aware of aesthetic problems and issues with the interior, he was not yet aware of any mechanical issues because he is not a mechanic.

Lehrer nevertheless returned to Post Oak Motors over the next several years for maintenance on the vehicle, including for battery replacement, repair of a window chip, and correction of an exhaust leak. For example, the Silver Cloud's battery needed replacing in 2008, and Lehrer stated in his deposition that the battery should not have needed to be replaced in 2008 if there had been a full restoration of the vehicle completed in 2007. Similarly, he testified that the front

motor mount should not have needed replacing in 2014 if there had been a full restoration, stating, "Things don't fail after they've been restored for seven years."

In 2016, Lehrer quit taking his cars to Post Oak Motors. On March 29, 2017, Lehrer took the Silver Cloud to a different mechanic—European Autoworks—to address some issues with the vehicle. According to his petition, that was when he "was notified that the Post Oak technician that had worked on the original restoration at Post Oak and subsequent repairs was not certified despite representations made by [Post Oak Motors]." He also "discovered the work that was undertaken on the Cloud over the past several years was of very poor quality." Some work had not been completed, despite Post Oak Motors's representation to the contrary, and other work had been done improperly and needed to be corrected.

On June 27, 2018, Lehrer received a letter from John Lunney of Rolls-Royce Motor Cars North America, LLC confirming what he learned in March 2017. Lunney informed Lehrer that Rolls Royce did not provide support, service, or technical advice for any motorcars predating 2003, and, thus, the Silver Cloud's restoration was not undertaken by "certified" Rolls Royce mechanics, as Lehrer had originally believed.

On March 18, 2019, Lehrer filed suit against Post Oak Motors for violations of the DTPA and negligence related to the restoration services on the Silver Cloud. In his petition, Lehrer asserted that, although Post Oak Motors represented that it

could restore the Silver Cloud to its original condition for $70,000 over three years, the cost vastly exceeded the estimate, and the restoration was of poor quality. He also asserted that Post Oak Motors misrepresented that its technicians were certified by Rolls Royce. He affirmatively pled the discovery rule, asserting that the deficiencies in the work performed on the Silver Cloud were inherently undiscoverable. He alleged that the discovery rule tolled the accrual of his claims until March 29, 2017, or, alternatively, June 27, 2018.

Post Oak Motors alleged the affirmative defense of limitations and subsequently moved for summary judgment on that basis.[1] Lehrer responded that the defects were inherently undiscoverable and supported his response with his own affidavit and deposition testimony and that of Winton McKenzie, who had evaluated the Silver Cloud in May 2019. The trial court granted Post Oak Motors's motion for summary judgment without specifying the grounds for the ruling. This appeal followed.

Summary Judgment on Limitations

In his sole issue, Lehrer argues that the trial court erred in granting Post Oak Motors's motion for summary judgment.

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[1] Post Oak Motors also moved for summary judgment on the ground that Lehrer's claim that Post Oak Motors had misrepresented the projected cost of repairs was not substantively viable under the DTPA. Because we conclude that Post Oak Motors's limitations arguments support the trial court's summary judgment, we do not address this ground.

A. Standard of Review & Relevant Law

We review de novo the trial court's ruling on a summary judgment motion. *Mann Frankfort Stein & Lipp Advisors, Inc. v. Fielding*, 289 S.W.3d 844, 848 (Tex. 2009); *Gale v. Lucio*, 445 S.W.3d 849, 853 (Tex. App.—Houston [1st Dist.] 2014, pet. denied). To prevail on a traditional motion for summary judgment, the movant must establish that no genuine issues of material fact exist and that it is entitled to judgment as a matter of law. TEX. R. CIV. P. 166a(c); *Little v. Tex. Dep't of Crim. Just.*, 148 S.W.3d 374, 381 (Tex. 2004).

A defendant seeking summary judgment on the basis that the statute of limitations has expired must conclusively establish the elements of that defense, including conclusively establishing when the cause of action accrued. *Draughon v. Johnson*, 631 S.W.3d 81, 88 (Tex. 2021); *Schlumberger Tech. Corp. v. Pasko*, 544 S.W.3d 830, 833–34 (Tex. 2018). The defendant's burden includes negating "any issues raised that affect which days count toward the running of limitations—such as accrual, the discovery rule, and tolling." *Draughon*, 631 S.W.3d at 88.

Statues of limitations are intended to compel plaintiffs to assert their claims "within a reasonable period while the evidence is fresh in the minds of the parties and witnesses." *Wagner & Brown, Ltd. v. Horwood*, 58 S.W.3d 732, 734 (Tex. 2001); *Kingsbury v. A.C. Auto., Inc.*, No. 01-14-00205-CV, 2015 WL 1457538, at

*5 (Tex. App.—Houston [1st Dist.] Mar. 26, 2015, no pet.) (mem. op.). The statute of limitations for DTPA violations is two years:

> All actions brought under this subchapter must be commenced within two years after the date on which the false, misleading, or deceptive act or practice occurred or within two years after the consumer discovered or in the exercise of reasonable diligence should have discovered the occurrence of the false, misleading, or deceptive act or practice.

TEX. BUS. & COM. CODE § 17.565. "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.'" *Gonzales v. Sw. Olshan Found. Repair Co.*, 400 S.W.3d 52, 58 (Tex. 2013) (quoting *Exxon Corp. v. Emerald Oil & Gas Co.*, 348 S.W.3d 194, 207 (Tex. 2011)); *see also KPMG Peat Marwick v. Harrison Cnty. Hous. Fin. Corp.*, 988 S.W.2d 746, 749 (Tex. 1999) (holding that "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").

Similarly, the statute of limitations for negligence is two years from the date the cause of action accrues. TEX. CIV. PRAC. & REM. CODE § 16.003. "Ordinarily, the legal injury rule dictates that accrual occurs when 'a wrongful act causes a legal injury, even if the fact of injury is not discovered until later, and even if all resulting damages have not yet occurred.'" *Pasko*, 544 S.W.3d at 834 (quoting *Sw.*

Energy Prod. Co. v. Berry–Helfand, 491 S.W.3d 699, 721 (Tex. 2016)); *see also Emerald Oil & Gas Co.*, 348 S.W.3d at 202 ("Causes of action accrue and statutes of limitations begin to run when facts come into existence that authorize a claimant to seek a judicial remedy."). "Absent some exception, such as the discovery rule, injuries that arise or develop after the legal injury are still deemed to have accrued on the same date as the legal injury that caused them." *Pasko*, 544 S.W.3d at 834. The date a cause of action accrues is normally a question of law. *Emerald Oil & Gas Co.*, 348 S.W.3d at 202.

The discovery rule exception to limitations operates to defer accrual of a cause of action until the plaintiff knows, or by exercising reasonable diligence, should know of the facts giving rise to the claim. *Pasko*, 544 S.W.3d at 834. The discovery rule is a "very limited exception to statutes of limitations," and it is used only when the nature of the plaintiff's injury is both inherently undiscoverable and objectively verifiable. *Wagner & Brown, Ltd.*, 58 S.W.3d at 734; *see also Via Net v. TIG Ins. Co.*, 211 S.W.3d 310, 313 (Tex. 2006) (per curiam) (holding that discovery rule is generally restricted "to exceptional cases to avoid defeating the purposes behind the limitations statute").

"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.*, 58 S.W.3d at 734–35. "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*, 211 S.W.3d at 314. "'Inherently undiscoverable' does not mean that a particular plaintiff did not discover his or her particular injury within the applicable limitations period." *Wagner & Brown, Ltd.*, 58 S.W.3d at 735. Thus, courts must determine whether the plaintiff's injury is "the type of injury that generally is discoverable by the exercise of reasonable diligence." *Id.* The discovery rule "requires a plaintiff to seek information about his injuries and their likely cause once he is apprised of facts that would make a reasonably diligent person seek information." *Pirtle v. Kahn*, 177 S.W.3d 567, 571 (Tex. App.—Houston [1st Dist.] 2005, pet. denied).

When a plaintiff asserts that the discovery rule tolls accrual, the defendant moving for summary judgment on limitations bears the additional burden of negating the rule, which it can do by either conclusively establishing (1) that the discovery rule does not apply, or (2) if the rule applies, that the summary-judgment evidence negates it. *Pasko*, 544 S.W.3d at 834. "[W]hether the discovery rule applies turns on whether the injured person is aware that she has an injury and that it was likely caused by the wrongful acts of another." *Id.* (citing *S.V. v. R.V.*, 933 S.W.2d 1, 4 (Tex. 1996)). It does not turn on whether the injured person knows the exact identity of the tortfeasor or all of the ways in which the tortfeasor was at fault

in causing the injury. *Id.* Nor does it turn on when the full effects of the injury became known or developed. *Id.*

B. Analysis

Lehrer asserted causes of action for violations of the DTPA and negligence based on his allegations that Post Oak Motors did not complete the restoration of his Silver Cloud as represented or that it completed the restoration improperly and negligently. He also alleged that Post Oak Motors misrepresented that its mechanics and technicians were "Rolls Royce certified." Post Oak Motors moved for summary judgment on all claims based on the two-year statute of limitations for these claims. *See* TEX. BUS. & COM. CODE § 17.565 (two-year limitations period for DTPA claims); TEX. CIV. PRAC. & REM. CODE § 16.003 (two-year limitations period for negligence claims).

Post Oak Motors presented evidence that Lehrer's causes of action accrued in 2007. The evidence demonstrated that Lehrer first brought the Silver Cloud for restoration in 2000. According to Lehrer, Post Oak Motors represented to him at that time that its technicians were certified by Rolls Royce, and Post Oak Motors estimated that it could complete his restoration project in approximately three years and for $70,000. In reality, the work took seven years and Lehrer paid over $150,000. He retrieved the car from Post Oak Motors in 2007.

Post Oak Motors also presented Lehrer's deposition testimony that, at the time he retrieved the Silver Cloud from Post Oak Motors in 2007, he was unhappy with the length of time and total cost of the work, and he had some "aesthetic issues that were not to [his] liking." According to his deposition testimony, he also believed that the Silver Cloud "clearly had not undergone a full restoration." Post Oak Motors also presented Lehrer's testimony that, in 2009, a judge at a Rolls Royce event examined the Silver Cloud and gave the car a rating of "B- (at best) and showed [Lehrer] many of the areas of poor or overlooked workmanship especially for $70,000."

A claim for violation of the DTPA "must be commenced within two years after the date on which the false, misleading, or deceptive act or practice occurred or within two years after the consumer discovered or in the exercise of reasonable diligence should have discovered the occurrence of the false, misleading, or deceptive act or practice." TEX. BUS. & COM. CODE § 17.565. Post Oak Motors established that the complained-of actions occurred, at the latest, in 2007. *See id.* Lehrer's negligence claim likewise accrued in 2007, when Post Oak Motors returned the Silver Cloud to him after having done an allegedly negligent job in restoring the vehicle. *See Pasko*, 544 S.W.3d at 834 (accrual occurs when wrongful act causes legal injury). Lehrer did not file his lawsuit until 2019, more than eleven

years after his causes of action accrued. This is well outside the two-year limitations period provided for claims in negligence or under the DTPA.

Lehrer pled the application of the discovery rule, asserting that his injuries were inherently undiscoverable. He asserts that he did not know of the mechanical deficiencies and incomplete restoration work until the car was serviced by a different repair shop on March 29, 2017, and he did not know of the misrepresentations regarding Post Oak Motors's certification until he received the letter from Lunney on June 27, 2018, informing him that Rolls Royce did not provide certification or support for older models like the Silver Cloud. The discovery rule defers accrual of a cause of action until the plaintiff knows or, by exercising reasonable diligence, should know of the facts giving rise to the claim. *Pasko*, 544 S.W.3d at 834; *see also Gonzales*, 400 S.W.3d at 57–58 (holding that section 17.565 essentially "codified the discovery rule for DTPA claims").

Post Oak Motors presented evidence negating the discovery rule here. *See Pasko*, 544 S.W.3d at 834 (defendant moving for summary judgment may negate discovery rule by conclusively establishing (1) that rule does not apply or (2) that, if rule applies, summary-judgment evidence negates it). Post Oak Motors asserted that the discovery rule did not apply here because Lehrer's injury was not inherently undiscoverable and because, after more than ten years, his injury was not objectively verifiable. Post Oak Motors argues that its alleged failures with

regard to the restoration of the Silver Cloud were the type of injury that generally was discoverable by the exercise of reasonable diligence. *See Wagner & Brown, Ltd.*, 58 S.W.3d at 735. It supported this contention with evidence that Lehrer knew facts as early as 2007, or by 2009 at the latest, that would make a reasonably diligent person seek information. *See Pirtle*, 177 S.W.3d at 571; *see also Wagner & Brown, Ltd.*, 58 S.W.3d at 735 ("'Inherently undiscoverable' does not mean that a particular plaintiff did not discover his or her particular injury within the applicable limitations period.")

Post Oak Motors's summary-judgment evidence included Lehrer's own statements that the work took seven years, rather than the estimated three, and that he paid more than double the original estimate, and so he was unhappy with the time and expense involved when he took delivery of the car in 2007. Lehrer further testified that he noticed in 2007 certain "aesthetic" details that made him unhappy and left him with the impression that Post Oak Motors had not done a complete restoration project. In the next several years, Lehrer had more work done on the Silver Cloud, such as replacement of the battery in 2008, that Lehrer himself stated should not have needed to be done if the car had been restored properly. Regarding Lehrer's claim that Post Oak Motors misrepresented that its technicians were certified by Rolls Royce, Post Oak Motors pointed to evidence from Lehrer's deposition testimony in which Lehrer testified he asked Ellis to provide proof of

his certification, but Ellis failed to do so. Thus, Lehrer knew, at least by 2007, some relevant facts surrounding his claim that Post Oak Motors misrepresented the nature of its technicians' certification.

We agree with Post Oak Motors that Lehrer did not need to know the full extent of his purported damages for the limitations to begin to run. "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.'" *Gonzales*, 400 S.W.3d at 57–58 (quoting *Emerald Oil & Gas Co.*, 348 S.W.3d at 207). Lehrer's admitted knowledge of deficiencies with the interior work and his discontent in 2007 with the time and cost of the restoration were sufficient to make Lehrer aware of his legal injury, even if he did not yet know the full extent of those injuries. And, those injuries were not the type that were inherently undiscoverable. *See Kingsbury*, 2015 WL 1457538, at *6 (holding that failure to repair car as agreed between parties is not inherently undiscoverable injury).

Lehrer argues that his summary judgment evidence raised a fact issue regarding when he learned of Post Oak Motors's misrepresentations and failure to complete the mechanical restoration of the Silver Cloud. Lehrer argued that he did not know the nature of the mechanical deficiencies in the restoration work until the car was evaluated by a different mechanic in 2017. He also argues that he did not

know that Post Oak Motors's personnel had misrepresented their status as certified by Rolls Royce to service his Silver Cloud until he received the letter from Lunney on June 27, 2018, informing him that Rolls Royce did not provide certification or support for older models like the Silver Cloud. Lehrer presented evidence that the mechanical defects had to be identified by a mechanic doing a full inspection of the vehicle.

This evidence, however, points to when Lehrer discovered the full nature of his alleged injuries, which, as we discussed above, does not raise a fact question regarding when his cause of action accrued. *See, e.g.*, *Gonzales*, 400 S.W.3d at 57–58; *KPMG Peat Marwick*, 988 S.W.2d at 749 (holding that "accrual occurs when the plaintiff knew or should have known of the wrongfully caused injury," not when plaintiff knows "the specific nature of each wrongful act that may have caused the injury"). Nor is this evidence relevant to resolving the legal question of whether his injury here was inherently undiscoverable, as required for the discovery rule to apply. *See Wagner & Brown, Ltd.*, 58 S.W.3d at 734 (holding that discovery rule is "very limited exception to statutes of limitations," and it is used only when nature of injury is both inherently undiscoverable and objectively verifiable); *see also Via Net*, 211 S.W.3d at 313 (holding that discovery rule is generally restricted "to exceptional cases to avoid defeating the purposes behind

the limitations statute" and recognizing that issue of whether injury is inherently undiscoverable is typically a legal question).

We conclude that Post Oak Motors conclusively established that it was entitled to summary judgment on limitations grounds, and so we overrule Lehrer's complaint on appeal.

Conclusion

We affirm the judgment of the trial court.

Richard Hightower
Justice

Panel consists of Chief Justice Radack and Justices Goodman and Hightower.