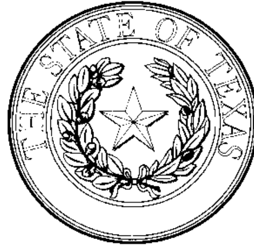
Opinion issued July 21, 2022



In The

Court of Appeals

For The

First District of Texas

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NO. 01-21-00138-CV

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WYLESHA FIELDS, Appellant

V.

ANTOINETTE FIELDS, Appellee

On Appeal from the County Court at Law No. 2
Fort Bend County, Texas
Trial Court Case No. 17-CPR-031180

MEMORANDUM OPINION

Appellant, Wylesha Fields, appeals from the trial court's summary judgment in favor of appellee, Antoinette Fields, in Wylesha's suit to set aside a will

previously admitted to probate.[1] In three issues, Wylesha contends that Antoinette failed to conclusively establish her right to summary judgment on her affirmative defense of limitations.

We affirm.

Background

According to the record, in 2004, Antoinette married Willie Fields. On May 15, 2015, Willie executed his Last Will and Testament ("Will"). On February 14, 2017, Willie died. At the funeral, Antoinette met Wylesha, Willie's adult daughter by a prior marriage, for the first time. Shortly after the funeral, Antoinette received a call from Wylesha's attorney, Robin Bluitt, inquiring as to whether Willie had left a will. On June 21, 2017, Wylesha filed an Affidavit of Heirship in the real property records of Fort Bend County. It is undisputed that, on June 26, 2017, Wylesha received a copy of the Will.

On January 24, 2018, Antoinette filed an Amended Application for Probate of a Will as a Muniment of Title.[2] In the attached Will, Willie (hereinafter, "the

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[1] When a county lacks a statutory probate court, as does Fort Bend County, the Texas Estates Code provides statutory county courts with the same general jurisdiction as probate courts. *In re Puig*, 351 S.W.3d 301, 304 (Tex. 2011); *see* TEX. EST. CODE § 32.002; TEX. GOV'T CODE § 25.0811.

[2] When a court determines that there is no need for an administration of an estate, such as when there are no unpaid debts other than that secured by real property, it may probate the will as a muniment of title. *See* TEX. EST. CODE § 257.001; *In re Estate of Kurtz*, 54 S.W.3d 353, 355 (Tex. App.—Waco 2001, no pet.) ("Probating a will as a muniment of title provides a means to probate a will quickly and cost-

testator") bequeathed "100%" of his estate to Antoinette and "0%" to Wylesha, with the notation: "My wife can give as her heart desires to my daughter." Each page of the Will appears to bear the testator's handwritten initials. The final page appears to bear the testator's signature and bears the handwritten date, "5/15/15." In an attached Attestation, two witnesses declared that the testator signed the Will in their presence. An attached Self-Proving Affidavit reflects that, on May 15, 2015, the testator and two witnesses appeared in person before a notary public, where the testator declared under oath that he had willingly executed the Will, which he declared to be his final will. The witnesses also declared under oath that the testator had executed the Will in their presence and that they had each executed the Attestation in the presence of the testator. And, the testator and the witnesses executed the Self-Proving Affidavit. On December 14, 2017, notice of Antoinette's Application was posted at the Fort Bend County Justice Center.

On January 29, 2018, the trial court signed an Order Admitting the Will to Probate as a Muniment of Title. In its Order, the trial court found that proper notice of the Application was given. It found that, having reviewed the Will and the evidence filed, the testator left a Will dated May 15, 2015, which was executed with the formalities and under the circumstances required by law to make it a valid Will,

efficiently when there is no need for administration of the estate."). The court does not issue letters testamentary to an executor or appoint an administrator. *Kurtz*, 54 S.W.3d at 355.

that the Will was not revoked, that there was no objection made or contest to the Will filed, and that the Will was entitled to be admitted to probate.

On February 24, 2020, Wylesha filed the instant Petition for Declaratory Judgment to Cancel [the] Will. In her petition, she stated that, on June 26, 2017, she received a copy of the Will from the notary on the Self-Proving Affidavit. She noted that the trial court admitted the Will to probate in January 2018. She asserted that, in December 2019, she contacted a "Certified Document Examiner," who examined the Will and Self-Proving Affidavit, compared them to "known documents," and, in a report issued February 4, 2020, opined that the testator's signature on the Will and Affidavit were not genuine. Wylesha requested declarations:

> 1. That the Will submitted by [Antoinette] be found not to be a Valid Will as it does not conform with Estate's code section 251.051, namely, it was not signed by the Testator, in the presence of Witnesses nor was it self-proven;
> 2. That the Will was fraudulently presented to [Wylesha] as the Last Will and Testament of Willie R. Fields;
> 3. That upon information and belief, the signature on the Will of Willie R. Fields was a forgery.

Wylesha noted in her petition that the two-year limitations period in Texas Estates Code section 256.204(a), which governs her suit to cancel the Will, had

expired.[3] She asserted that her suit was timely filed, however, based on a discovery exception in section 256.204(a).[4] She asserted:

> This Court retains jurisdiction under Estates Code Section 256.204(a). Although the period for contesting the validity of the Will is not later than the second anniversary of the date the will was admitted to probate, (January 29, 2018), there is an exception for an interested person to commence a suit to cancel a will for forgery or other fraud not later than the second anniversary of the date the forgery or fraud was discovered (February 4, 2020).

Antoinette, proceeding pro se, answered with a general denial. She attached the report of Patricia J. Hale, an "Expert Forensic Document Examiner," who opined, based on her examination of the Will, Self-Proving Affidavit, and known exemplars of the testator's signature, that "Willie R. Fields authored his own signatures" on the Will and Self-Proving Affidavit.

Subsequently, Antoinette retained counsel, who moved for a summary judgment on Wylesha's suit to cancel the Will. In her motion, Antoinette asserted that she was entitled to judgment as a matter of law because Wylesha had failed to file her suit within the two-year limitations period in Estates Code section 256.204(a). Antoinette noted that the trial court signed an order admitting the Will

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[3] *See* TEX. EST. CODE § 256.204(a) ("After a will is admitted to probate, an interested person may commence a suit to contest the validity thereof not later than the second anniversary of the date the will was admitted to probate, except that an interested person may commence a suit to cancel a will for forgery or other fraud not later than the second anniversary of the date the forgery or fraud was discovered.").

[4] *See id*.

to probate on January 29, 2018 and that Wylesha did not file her suit until February 24, 2020—some two years and 26 days later. She asserted that Wylesha filed her suit to contest the Will "more than 2 years after the [Will] was admitted to probate and almost 2 years and 8 months after [Wylesha] discovered, or in the exercise of reasonable diligence should have discovered the alleged forgery." Antoinette noted that although Wylesha "further allege[d] that as a result of the forgery the [Will] does not conform to [Estates Code section] 251.051 and that it was fraudulently presented to [the trial court]—both [are] additional grounds springing from and dependent upon the alleged forgery." Antoinette attached copies of the trial court's order and Wylesha's petition.

In her summary-judgment response, Wylesha admitted that she had filed her petition 2 years and 26 days after the Will was admitted to probate. She asserted that her delay in filing was excused by the "discovery rule" exception in section 256.204(a). She asserted that she did not question the authenticity of the Will until she spoke with a family member in October 2019 and that, thereafter, she "acted reasonably and with expediency to determine whether fraud and/or forgery had occurred." She asserted that she did not have "actual knowledge" of forgery until she "received a report from a Board-Certified Forensic Document Examiner, Susan E. Abbey, on February 4, 2020," and thus the limitations period began on that date.

To her response, Wylesha attached her own affidavit, in which she testified:

On June 26, 2017, I received an email from Ivy Ford, who was the notary listed on [the Will]. Then on November 27, 2017, I received a text from Movant, . . . telling me the amount of my share of expenses for the property that had been owned by my father. Later that same day, I received another text from Movant telling me that my affidavit of heirship had been filed illegally.

I forwarded Movant's text to Ms. Bluitt [counsel] and asked for her advice. . . . I also asked if there was anything that could be done to challenge the will I'd received and she said there wasn't without proof of fraud or duress, which I had no reason to believe was an issue at that time. She also told me Movant had asked her to help with paperwork and that it would make things easier for her to resolve the problem of the recorded Affidavit of Heirship if she worked with Movant. My understanding from Ms. Bluitt was that the will was valid and there was nothing I could do. I relied on Ms. Bluitt's advice as my attorney and did not do anything further.

On October 2, 2019, I contacted my father's cousin, Denetia Bell-Robinson, to chat about unrelated matters. During our conversation, she said she thought I should really look into the will and get a second opinion from a different attorney. She gave me the name of an attorney to contact, but I did not hear back from the attorney after sending her documents for review. I also started contacting other attorneys. In the meantime, on December 5, 2019, I contacted a family friend who knows a lot about law, Denaud "Yohosophat" Egana, and asked him to take a look. On December 12, 2019, he asked me to locate something with my father's signature and gave me information on obtaining my father's marriage certificate from Las Vegas, Nevada. On December 17, 2019, he sent me the probate information, and I learned that my former attorney, [Bluitt], had probated the will for Movant.

At that time, I located a warranty deed that my father had signed. Yohosophat noted that the signatures looked different and I should try to find additional signatures to be certain. I went ahead and ordered the marriage certificate from Las Vegas on December 18, 2019. It arrived on January 7, 2020 but did not have signatures. My mother had been looking for additional paperwork and found her original divorce papers with my father's signature. I noticed that the signatures were different, so at that time, I decided to hire an expert who could analyze the signatures. At some time during this process, I also learned that the

> witnesses and notary who signed my father's purported will had relationships with Movant.
>
> I learned of an expert, Curt Baggett, and contacted him to do some research on the signatures. However after doing some research on Mr. Baggett, I decided not to move forward with him. So on January 24, 2020, I requested a refund and reached out to another expert, Susan Abbey. I began contacting attorneys to move forward and hired my current attorney, William Engelhaupt. In the meantime, I had received the expert report from Susan Abbey, dated February 4, 2020. Mr. Engelhaupt then prepared and filed my Petition on February 24, 2020.
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> I did not have any knowledge of or suspicion of fraud or forgery prior to the conversation with my father's cousin in October 2019. On the face of the document, the purported will appeared to be valid, and I relied on my attorney, [Bluitt's], advice that I did not have any ability to challenge the will.

Wylesha also attached the report authored by Abbey, in which Abbey opined that, based on her examination of known exemplars and of copies of the signatures on the Will and Self-Proving Affidavit, "the evidence very strongly shows" that the signatures on the Will and Self-Proving Affidavit "are non-genuine signatures of [the testator] with a high degree of probability."

After a hearing, the trial court granted summary judgment for Antoinette.

Summary Judgment

In her first through third issues, Wylesha argues that the trial court erred in granting summary judgment for Antoinette on her affirmative defense of limitations because she failed to conclusively establish that "there is no genuine issue of material fact as to when Wylesha's cause of action accrued and when she discovered, or in

the exercise of reasonable diligence should have discovered, the nature of her injury."

Standard of Review

We review a trial court's summary judgment de novo. *Valence Operating Co. v. Dorsett*, 164 S.W.3d 656, 661 (Tex. 2005). In a traditional motion for summary judgment, the movant has the burden to establish that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. *See* TEX. R. CIV. P. 166a(c); *KPMG Peat Marwick v. Harrison Cnty. Hous. Fin. Corp.*, 988 S.W.2d 746, 748 (Tex. 1999). A defendant moving for summary judgment on an affirmative defense must plead and conclusively establish each essential element of the defense, thereby defeating the plaintiff's cause of action. *KPMG Peat Marwick*, 988 S.W.2d at 748. In conducting our review, we take as true all evidence favorable to the non-movant and indulge every reasonable inference and resolve any doubts in her favor. *Dorsett*, 164 S.W.3d at 661. A matter is conclusively established if reasonable jurors could not differ as to the conclusion to be drawn from the evidence. *See City of Keller v. Wilson*, 168 S.W.3d 802, 815–16 (Tex. 2005).

If the movant establishes that an affirmative defense bars the action, the nonmovant must then adduce summary judgment proof raising a genuine issue of material fact in avoidance. *KPMG Peat Marwick*, 988 S.W.2d at 748; *see also Centeq Realty, Inc. v. Siegler*, 899 S.W.2d 195, 197 (Tex. 1995) (noting that only

after movant meets its burden does burden shift to non-movant). Evidence raises a genuine issue if reasonable factfinders could differ in their conclusions in light of all of the summary-judgment evidence presented. *Goodyear Tire & Rubber Co. v. Mayes*, 236 S.W.3d 754, 755 (Tex. 2007).

Analysis

We first consider whether Antoinette, as movant, met her burden to establish that she is entitled to judgment on Wylesha's claim. *See* TEX. R. CIV. P. 166a(c); *Siegler*, 899 S.W.2d at 197. As a defendant moving for summary judgment on the affirmative defense of limitations, Antoinette was required to conclusively prove that Wylesha filed her suit after the limitations period expired. *See KPMG Peat Marwick*, 988 S.W.2d at 748. Antoinette must (1) conclusively establish when Wylesha's cause of action accrued and (2) negate the discovery rule by conclusively establishing that it does not apply or, if it applies, by conclusively establishing when Wylesha discovered, or in the exercise of reasonable diligence should have discovered, the nature of her injury. *See id.*; *see also Draughon v. Johnson*, 631 S.W.3d 81, 90 (Tex. 2021) (holding that burden is on summary-judgment movant to conclusively negate discovery rule).

In her summary-judgment motion, Antoinette asserted that she is entitled to judgment as a matter of law because Wylesha failed to file her suit within the

limitations period in Estates Code section 256.204(a).[5] TEX. EST. CODE § 256.204(a). Section 256.204, "Period for Contest," provides, in pertinent part:

> After a will is admitted to probate, an interested person may commence a suit to contest the validity thereof not later than the second anniversary of the date the will was admitted to probate, except that an interested person may commence a suit to cancel a will for forgery or other fraud not later than the second anniversary of the date the forgery or fraud was discovered.

Id. § 256.204(a).

"Statutory construction is a matter of law, which we review de novo." *Dall. Cnty. Cmty. Coll. Dist. v. Bolton*, 185 S.W.3d 868, 872 (Tex. 2005). Our primary objective in construing a statute is to ascertain and give effect to the legislature's intent. *Id.* We rely on the plain meaning of the text as expressing legislative intent unless a different meaning is supplied by legislative definition or is apparent from the context. *Tex. Lottery Comm'n v. First State Bank of DeQueen*, 325 S.W.3d 628, 635 (Tex. 2010). We consider the statute as a whole rather than focusing upon individual provisions. *TGS–NOPEC Geophysical Co. v. Combs*, 340 S.W.3d 432, 439 (Tex. 2011). We strive to construe the statute in a way that gives effect to each provision so that none is rendered meaningless or mere surplusage. *See TIC Energy*

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[5] We note that an affirmative defense not raised in an answer may still serve as the basis for a summary judgment when, as here, it is "raised in the summary judgment motion and the opposing party does not object to the lack of a rule 94 pleading either in its written response or before the rendition of judgment." *Roark v. Stallworth Oil & Gas, Inc.*, 813 S.W.2d 492, 494 (Tex. 1991); *see also* TEX. R. CIV. P. 94 (setting forth affirmative defenses).

& Chem., Inc. v. Martin, 498 S.W.3d 68, 74 (Tex. 2016). We give effect to a statute's plain language unless to do so would yield an unreasonable or absurd result. *Valdez v. Hollenbeck*, 465 S.W.3d 217, 228 (Tex. 2015).

Section 256.204(a) unequivocally states that a suit to contest the validity of a will previously admitted to probate must be brought within two years after the date that the will was admitted. *See* TEX. EST. CODE § 256.204(a). Thus, a claim ordinarily accrues when a will is admitted to probate. *See id.* However, the statute also provides an exception: "[A]n interested person may commence a suit to cancel a will for forgery or other fraud not later than the second anniversary of the date the forgery or fraud was discovered." *Id.*

Antoinette's evidence shows that the trial court signed an order admitting the Will to probate on January 29, 2018. Thus, Wylesha had two years, or until January 29, 2020, to bring a suit contesting the validity of the Will. *See id*. As Antoinette's evidence also shows, however, Wylesha did not file the instant suit until February 24, 2020, or two years and 26 days later. Thus, the evidence shows, and it is undisputed, that Wylesha did not file her suit until after the limitations period expired. *See id*.

In her petition, Wylesha asserted that her suit was authorized by the exception in section 256.204(a). *See id.* She asserted that she did not discover the forgery until February 4, 2020, when she received her examiner's report. Thus, the accrual of her

cause of action was deferred until that date. In her motion for summary judgment, Antoinette argued that the accrual date of Wylesha's cause of action was not deferred by the discovery exception in section 256.204(a) because she did not "exercise ordinary diligence" in discovering the facts giving rise to her alleged injury.

The exception in section 256.204(a) states, as pertinent here, that a suit to cancel a previously admitted will on the basis of forgery must be brought no later than two years after "the date the forgery . . . *was discovered*." *Id.* (emphasis added). We note that the statute does not expressly provide for the exercise of reasonable diligence. *Compare* TEX. EST. CODE § 256.204(a) *with* TEX. BUS. & COM. CODE § 17.565 ("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. . . ." (emphasis added)).

If the language in the section 256.204(a) exception is given literal effect, however, a cause of action accrues, and a new two-year limitations period commences, whenever a purported forgery is "discovered." Such a result could leave a will, previously deemed valid and admitted to probate, perpetually subject to attack as a forgery and subject to open-ended litigation, without regard to whether the claimant exercised any reasonable diligence in bringing the claim. Such a result

is squarely at odds with the strong public interest in according finality to probate proceedings and the purpose of limitations statutes, which is to compel the assertion of claims within a reasonable period while the evidence is fresh in the minds of the parties and witnesses. *Little v. Smith*, 943 S.W.2d 414, 417, 421 (Tex. 1997); *Comput. Assocs. Int'l, Inc. v. Altai, Inc.*, 918 S.W.2d 453, 455 (Tex. 1996); *Moreno v. Sterling Drug*, 787 S.W.2d 348, 351 (Tex. 1990) ("[T]he primary purpose of . . . all limitations statutes[] is to compel the exercise of a right of action within a reasonable time so that the opposing party has a fair opportunity to defend while witnesses are available."); *see also Valdez*, 465 S.W.3d at 228 (noting that courts give effect to plain language of statute unless doing so would yield unreasonable or absurd result).

Generally, for purposes of limitations statutes, a cause of action "accrues" when a "wrongful act effects an injury, regardless of when the plaintiff learned of such injury." *Moreno*, 787 S.W.2d at 351. The "discovery rule" is a "judicially conceived exception to statutes of limitation to be used by courts to determine when a cause of action accrues" when a statute fails to define the time of accrual. *Id.* at 351, 353. When it applies, the discovery rule "defers accrual of a cause of action until the plaintiff knew or, exercising reasonable diligence, should have known of the facts giving rise to the cause of action." *Comput. Assocs.*, 918 S.W.2d at 455. Generally, the rule defers accrual of a cause of action when the injury alleged is

inherently undiscoverable and objectively verifiable. *Id.* at 456. Whether the discovery rule applies is "determined on a categorical basis—we determine whether the claim is based on the type of injury that generally is discoverable by the exercise of reasonable diligence, without regard to whether a particular plaintiff discovered his or her particular injury within the applicable limitations period." *Brown v. Arenson*, 571 S.W.3d 324, 333 (Tex. App.—Houston [1st Dist.] 2018, no pet.) (internal quotations omitted).

By analogy, the Texas Supreme Court in *Moreno* considered whether the discovery rule applied to Civil Practice and Remedies Code section 16.003(b). 787 S.W.2d at 353. Section 16.003(b) states: "A person must bring suit not later than two years after the day the cause of action accrues in an action for injury resulting in death. The cause of action accrues on the death of the injured person." *Id.* at 350 (quoting TEX. CIV. PRAC. & REM. CODE § 16.003(b)). In holding that the discovery rule did not apply, the supreme court concluded that the "statute unambiguously specifies one event—death—and only that one event as the date upon which the action accrues" and that "the legislature could have either left 'accrual' undefined . . . or could have stated that the cause of action accrues 'on the death of the injured person *or upon discovery* of the cause of death'; either route *would have allowed the discovery rule to be applied*." *Id.* at 354, 357 (emphasis added).

Here, in contrast to section 16.003(b), Estates Code section 256.204(a) specifies not only that a cause of action accrues on the date the will was admitted to probate but also that a person may "commence a suit to cancel a will for forgery or other fraud not later than the second anniversary of the date the forgery or fraud *was discovered*." *See* TEX. EST. CODE § 256.204(a) (emphasis added); *cf. Moreno*, 787 S.W.2d at 354. "Generally, Texas courts have refused to apply the discovery rule to claims arising out of probate proceedings, even in cases involving allegations of fraud." *Evans v. Allen*, 358 S.W.3d 358, 365 (Tex. App.—Houston [1st Dist.] 2011, no pet.). However, we conclude that the language of section 256.204(a) reflects a legislative intent that the discovery rule be applied in suits to cancel previously admitted wills for fraud or forgery. *See* TEX. EST. CODE § 256.204(a); *Escontrias v. Apodaca*, 629 S.W.2d 697, 698 (Tex. 1982) (applying discovery rule to Probate Code section 93, substantively identical predecessor to Estates Code section 256.204); *Evans*, 358 S.W.3d at 365 n.3 (noting exception inherent in former Probate Code section 93); *In re Estate of Cantu*, No. 04-10-00389-CV, 2011 WL 446640, at *2 (Tex. App.—San Antonio Feb. 9, 2011, no pet.) (mem. op.) (stating (former) Probate Code section 93 "incorporates a discovery rule which could otherwise save a forgery claim from a limitations defense").

Thus, we consider whether Antoinette conclusively established when Wylesha knew, or in the exercise of reasonable diligence should have known of, the

facts giving rise to her cause of action. *See Comput. Assocs.*, 918 S.W.2d at 455; *see, e.g.*, *Aston v. Lyons*, 577 S.W.2d 516, 519 (Tex. Civ. App.—Texarkana 1979, no writ) ("The discovery rule in this case may be stated to be the legal principle that a statute of limitations barring an action to cancel a will for forgery, runs not from the date of offering the will for probate or the actual date of probate, but runs from the date the forgery was discovered or should have been discovered by the exercise of ordinary care and diligence.").

Ordinarily, the date that a cause of action accrues is a question of law, and whether a plaintiff acted with reasonable diligence is an issue of fact. *Hooks v. Samson Lone Star, Ltd., P'ship*, 457 S.W.3d 52, 57–58 (Tex. 2015). In some circumstances, however, we can determine as a matter of law that an exercise of reasonable diligence "would have uncovered the wrong." *Id.* at 58 (surveying cases); *see also Nickols v. Oasis Remarketing, LLC*, No. 14-17-00556-CV, 2018 WL 2436058, at *3 (Tex. App.—Houston [14th Dist.] May 31, 2018, pet. denied) (mem. op.) ("When the facts are not disputed, the question of when a cause of action accrues is a question of law."). The availability of court records may indicate under some circumstances that reasonable diligence would have found the information. *Hooks*, 457 S.W.3d at 59. "Land title records and probate proceedings create constructive notice, 'an irrebuttable presumption of actual notice,' which prevents limitations from being delayed." *Id.* "These cases reveal that when there is actual or

constructive notice, or when information is 'readily accessible and publicly available,' then, as a matter of law, the accrual of a . . . claim is not delayed." *Id.*

"Persons interested in an estate admitted to probate are charged with notice of the contents of the probate records." *Mooney v. Harlin*, 622 S.W.2d 83, 85 (Tex. 1981); *Evans*, 358 S.W.3d at 365. And, a person is "charged with constructive notice of the actual knowledge that could have been acquired by examining public records." *Mooney*, 622 S.W.2d at 85; *Evans*, 358 S.W.3d at 365; *see also In re Estate of McGarr*, 10 S.W.3d 373, 377 (Tex. App.—Corpus Christi 1999, pet. denied). In a similar context,[6] when evidence of fraud may be disclosed by an examination of public records, limitations will begin to run from the time the fraud "could have been discovered by an exercise of ordinary diligence." *Mooney*, 622 S.W.2d at 85; *see Brown*, 571 S.W.3d at 335–36. Again, the discovery rule "defers accrual of a cause of action until the plaintiff knew or, exercising reasonable diligence, should have known of *the facts giving rise to* the cause of action." *Comput. Assocs.*, 918 S.W.2d

[6] As Antoinette noted in her summary-judgment motion, Wylesha brought the instant suit for a declaratory judgment to cancel the Will as a forgery. Although Wylesha further alleged that, "as a result of the forgery the [Will] does not conform to [Estates Code section] 251.051 and that it was fraudulently presented to [the trial court]—both [are] additional grounds springing from and dependent upon the alleged forgery." Forgery is defined as making, completing, executing, or authenticating a writing so that it purports to be the act of another who did not authorize that act. *In re Estate of Flores*, 76 S.W.3d 624, 630 (Tex. App.—Corpus Christi 2002, no pet.). Wylesha did not allege a separate fraud. However, because the caselaw construing reasonable diligence in a suit for forgery in this context is sparse, caselaw construing reasonable diligence in a suit for fraud in this context is instructive.

at 455 (emphasis added); *see also Ruebeck v. Hunt*, 176 S.W.2d 738, 739–40 (Tex. 1943) ("Knowledge of facts that would cause a reasonably prudent person to make inquiry, which if pursued would lead to a discovery of fraud, is in law equivalent to knowledge of the fraud.").

Antoinette asserted in her summary-judgment motion that her evidence shows that Wylesha "cannot be said to have exercised ordinary diligence." It is undisputed that Wylesha received a copy of the Will containing the testator's signature on June 26, 2017. Antoinette also presented a copy of the trial court's January 29, 2018 order admitting the Will to probate. Wylesha, as a person interested in her father's estate, was charged with notice of the contents of the probate records and "with constructive notice of the actual knowledge that could have been acquired by examining the public records." *See Mooney*, 622 S.W.2d at 85; *Evans*, 358 S.W.3d at 365.

An examination of the probate records would have revealed that, in his Will, the testator bequeathed "0%" of his estate to Wylesha and instead left his entire estate to Antoinette. The record shows that the Will is a 12-page computerized document and that the only handwritten portions are, what purport to be, the testator's initials at the bottom of each page and his signature and date on the final page.

Once charged with notice that she took nothing under her father's Will—in fact, that she was expressly disinherited—Wylesha had knowledge of facts that

would cause a reasonably prudent person to make inquiry, and she should have begun her investigation of the facts surrounding the execution of the Will at that time. *See Mooney*, 622 S.W.2d at 85 (holding that examination of probate records would have disclosed that testator made no bequest to plaintiff and that fraud would have been discovered with reasonable diligence); *Neill v. Yett*, 746 S.W.2d 32, 36 (Tex. App.—Austin 1988, writ denied) (holding that granddaughter's examination of probate records would have revealed that she took nothing under grandfather's will and, upon receiving such notice, she should have begun her investigation of facts surrounding execution of will).

The presence of the testator's signature on the Will was a requisite for its admission to probate. *See* TEX. EST. CODE § 251.051. Thus, an exercise of ordinary diligence should have included Wylesha's examination of the appearance and authenticity of her father's signature on the Will. *See In re Estate of Cantu*, 2011 WL 446640, at *2 (upholding trial court's summary judgment on affirmative defense because formalities trial court was required to consider in admitting will to probate included presence of testator's signature on will and thus whether testator's mark was forged was an issue that, with reasonable diligence, plaintiff could have raised in prior will contest).

We conclude that Antoinette conclusively established that Wylesha's claim accrued, at the latest, when the Will was admitted to probate and that Wylesha,

through an exercise of reasonable diligence, should have known of the facts giving rise to her cause of action, before limitations expired. *See Comput. Assocs.*, 918 S.W.2d at 455; *see also Kerlin v. Sauceda*, 263 S.W.3d 920, 925–26 (Tex. 2008) ("As a matter of law, the [plaintiffs] could have discovered the existence of any claims before limitations expired through the exercise of reasonable diligence."); *Mooney*, 622 S.W.2d at 85 (holding that examination of probate records would have disclosed that testator made no bequest to plaintiff, that fraud could have been discovered through reasonable diligence, which plaintiff failed to exercise, and upholding summary-judgment for movant on limitations defense); *Neill*, 746 S.W.2d at 36 (holding that granddaughter's suit contesting will previously admitted to probate was barred by limitations because examination of probate records would have revealed that she took nothing under grandfather's will and, upon receiving such notice, she should have begun her investigation of facts surrounding execution of will). Thus, Antoinette conclusively established that Wylesha filed her suit after the limitations period expired. *See KPMG Peat Marwick*, 988 S.W.2d at 748. Accordingly, the burden shifted to Wylesha to present evidence raising a genuine issue of material fact regarding her diligence in discovering the nature of her alleged injury. *See id.*

Wylesha presented her affidavit and the report authored by Abbey. In her affidavit, Wylesha testified that, after she received a copy of the Will in 2017, she

asked her attorney whether "there was anything that could be done to challenge the will," and her attorney advised that there was not, absent proof of fraud. On October 2, 2019, a cousin told her that she "should really look into the will and get a second opinion from a different attorney." On December 5, 2019, she contacted a friend, who suggested that she investigate the signature of the testator. Wylesha then compared the testator's signature on the Will against exemplars in her possession and that she obtained, and she "noticed that the signatures were different." On or after January 24, 2020, she contacted Abbey and "*began* contacting attorneys to move forward" (emphasis added). The limitations period on her claim expired on January 29, 2020. On February 4, 2020, Wylesha received Abbey's report. In her report, Abbey, a "certified document examiner," opined, based on her examination of the testator's signature on the Will and Self-Proving Affidavit and of known exemplars, that the testator's signature on the Will was not authentic.[7] Wylesha filed the instant suit on February 24, 2020.

Although Wylesha asserts that she did not have "any knowledge of or suspicion of fraud or forgery prior to the conversation with [her] father's cousin in

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[7] We note that the authenticity of the testator's signature on the Will is not before us. Rather, at issue is the timeliness of the inquiry. *See Hooks v. Samson Lone Star, Ltd., P'ship*, 457 S.W.3d 52, 57 n.6 (Tex. 2015) (noting that, while it is no defense to merits of fraud claim that reasonable diligence would have revealed fraud, whether accrual of cause of action was deferred when reasonable diligence would have revealed fraud presented different question).

October 2019," she does not assert that the cousin disclosed any information that the testator's signature was a forgery. Rather, according to Wylesha's testimony, the cousin suggested only that Wylesha "look into the will" and find another attorney. Wylesha then contacted a family friend, who again suggested that she investigate the signature on the Will. As discussed above, an exercise of ordinary diligence would have included these measures.

Wylesha testified that she had the Will containing the testator's signature in her possession, that she had in her possession or obtained known exemplars of the testator's signature, and that *she* "noticed that the signatures were different." Thus, once Wylesha eventually decided to investigate the validity of the Will, her own examination immediately led her to the facts giving rise to her claim. There is no evidence that the Will was concealed from her over the preceding two-year period or that she was prevented from investigating its authenticity prior to that point.

Wylesha asserted in her response that she did not have "actual knowledge of . . . forgery" until she received Abbey's report. However, the discovery rule defers accrual of a cause of action until the plaintiff knew or, exercising reasonable diligence, should have known *of the facts giving rise* to the cause of action. *Comput. Assocs.*, 918 S.W.2d at 455. A "plaintiff need not know that she has a cause of action; rather, she must only know 'the facts giving rise to the cause of action.'" *Gauthia v. Arnold & Itkin, L.L.P.*, No. 01-19-00143-CV, 2020 WL 5552458, at *6

(Tex. App.—Houston [1st Dist.] Sept. 17, 2020, no pet.) (mem. op.) (quoting *Computer Assocs.*, 918 S.W.2d at 455).

In support of her argument, Wylesha relies on *Jinkins v. Jinkins*, 522 S.W.3d 771 (Tex. App.—Houston [1st Dist.] 2017, no pet.), and *Aston v. Lyons*, 577 S.W.2d 516 (Tex. Civ. App.—Texarkana 1979, no writ). These cases are inapplicable.

In *Jinkins*, there were no issues raised regarding reasonable diligence in discovering forgery or fraud. 522 S.W.3d 771. In *Aston*, the plaintiffs filed a petition to cancel a will admitted to probate eight years prior on the ground that it was forged, and the defendant moved for a summary judgment, asserting that limitations had expired. 577 S.W.2d at 517. The court concluded that, there, the defendant's proof did not show that if the plaintiffs had used reasonable diligence, they could have discovered the forgery within the prescribed two-year period following the probate of the will. *Id.* at 518. The court held that, because the plaintiffs' petition did not "affirmatively disclose when the forgery was or should have been discovered, [the court could not] determine when the statute of limitations began to run" and that "[s]ummary judgment on the pleadings on the ground that the action is barred by limitations is improper where the petition does not disclose when the cause of action accrued." *Id.* at 519.

Having taken all evidence favorable to the non-movant, Wylesha, as true, and resolving any doubts in her favor, we conclude that Antoinette conclusively

established that Wylesha's claim accrued on January 29, 2018, when the Will was admitted to probate, and that Wylesha's lawsuit, which she did not file until February 24, 2020, is barred by the statute of limitations. *See* TEX. EST. CODE § 256.204(a); *KPMG Peat Marwick*, 988 S.W.2d at 748; *see also* TEX. R. CIV. P. 166a(c); *Dorsett*, 164 S.W.3d at 661. We hold that the trial court did not err in granting Antoinette summary judgment on her limitations defense.

We overrule Wylesha's first through third issues.

Conclusion

We affirm the trial court's judgment.

Sherry Radack
Chief Justice

Panel consists of Chief Justice Radack and Justices Countiss and Farris.