Fourth Court of Appeals
San Antonio, Texas

MEMORANDUM OPINION

No. 04-17-00514-CV

Judith Ann **MIEARS** and Patricia Anderson,
Appellants

v.

Jean L. **MCPHERSON**,
Appellee

From the 25th Judicial District Court, Guadalupe County, Texas
Trial Court No. 13-0659-CV-A
Honorable Jessica Crawford, Judge Presiding

Opinion by: Patricia O. Alvarez, Justice

Sitting: Patricia O. Alvarez, Justice
Luz Elena D. Chapa, Justice
Irene Rios, Justice

Delivered and Filed: August 29, 2018

REVERSED IN PART, AFFIRMED IN PART, REMANDED

In a dispute over an easement across lakefront property, Appellants Judith Ann Miears and Patricia Anderson sued Appellee Jean L. McPherson for declaratory judgment, interference with easement, private nuisance, and suit to quiet title. McPherson moved for summary judgment on the grounds of a five-year statute of limitations on all four claims and a two-year statute of limitations on the private nuisance claim. The trial court granted McPherson's motion against all four claims.

Although McPherson conclusively proved each element of his two-year limitations defense, he failed to conclusively prove an essential element of his five-year limitations defense. We reverse the portion of the trial court's order granting McPherson summary judgment against Appellants' declaratory judgment, interference with easement, and suit to quiet title claims; we affirm the remainder of the order; and we remand this cause to the trial court.

BACKGROUND

Appellants Judith Ann Miears and Patricia Anderson have owned property in the A.J. Grebey Subdivision II near the Guadalupe River for several decades. They assert they are current owners of an easement across what the parties refer to as Lake Drive or Tract III, and the easement gives them access to the river. Sometime during 1998–2000, D.R. Barr, the Tract III property owner at that time, built a fence that blocked access—including Miears's and Anderson's—across Tract III.

In 2005, McPherson purchased several lots, including Tract III, and by March 2006 completed a boat dock on the waterfront, on Tract III. According to McPherson, after he purchased the property, he learned that Barr had not paid the property taxes, and he and the Gardens of Elm Grove Property Owner's Association (the POA) sued Barr and others over the unpaid taxes.

In April 2014, Miears and Anderson intervened; in their original petition, they sued Barr for various claims. McPherson answered as a cross-defendant and asserted he owned Tract III.

On April 7, 2016, the trial court signed an agreed order granting the POA and McPherson's motion for summary judgment against Miears and Anderson's claims from their original petition for trespass to try title, invasion of privacy, trespass to real property, and intentional infliction of emotional distress.

Miears and Anderson filed a first amended petition that raised claims against McPherson for declaratory judgment, interference with easement, private nuisance, and suit to quiet title.

McPherson asserted a five-year statute of limitations defense against all four claims and a two-year statute of limitations defense against the private nuisance claim.

Without stating the basis for its decision, the trial court granted McPherson's motion in full, granted a permanent injunction against Miears and Anderson, and dismissed all their claims with prejudice. Miears and Anderson (collectively Miears) appeal.

Miears's brief presents two primary issues: whether the trial court erred in (1) proceeding with the summary judgment hearing over Miears's objections and (2) granting McPherson's motion for summary judgment. Miears's second issue consists of three subissues. We refer to Miears's issue one as her first issue, and her three subissues as issues two, three, and four. We address the issues out of order; we start with issue three.

FIVE-YEAR LIMITATIONS DEFENSE

In her third issue, Miears argues the five-year adverse possession statute of limitations does not apply and the trial court erred in granting McPherson's motion for summary judgment.

A. Standard of Review

We review a summary judgment de novo. *See Schlumberger Tech. Corp. v. Pasko*, 544 S.W.3d 830, 833 (Tex. 2018) (per curiam); *Provident Life & Accident Ins. Co. v. Knott*, 128 S.W.3d 211, 215 (Tex. 2003). "[W]e take as true all evidence favorable to the nonmovant, and we indulge every reasonable inference and resolve any doubts in the nonmovant's favor." *Knott*, 128 S.W.3d at 215; *accord Pasko*, 544 S.W.3d at 833. If "the trial court's order does not specify the grounds for its summary judgment, we must affirm the summary judgment if any of the theories presented to the trial court and preserved for appellate review are meritorious." *Sw. Bell Tel., L.P. v. Emmett*, 459 S.W.3d 578, 587 (Tex. 2015) (quoting *Knott*, 128 S.W.3d at 216).

"Summary judgments . . . may only be granted upon grounds expressly asserted in the summary judgment motion." *G & H Towing Co. v. Magee*, 347 S.W.3d 293, 297 (Tex. 2011)

(citing TEX. R. CIV. P. 166a(c)); *accord Stiles v. Resolution Tr. Corp.*, 867 S.W.2d 24, 26 (Tex. 1993) ("[A] summary judgment cannot be affirmed on grounds not expressly set out in the motion or response."). "A defendant moving for summary judgment on the affirmative defense of limitations has the burden to conclusively establish that defense." *KPMG Peat Marwick v. Harrison Cty. Housing Fin. Corp.*, 988 S.W.2d 746, 748 (Tex. 1999); *accord Pasko*, 544 S.W.3d at 833; *see* TEX. R. CIV. P. 166a(c). If the defendant does not conclusively prove each element of its defense, the defendant is not entitled to summary judgment. *See* TEX. R. CIV. P. 166a(c); *Pasko*, 544 S.W.3d at 833–34; *Rhône-Poulenc, Inc. v. Steel*, 997 S.W.2d 217, 223 (Tex. 1999).

B. Five-Year Adverse Possession Statute of Limitations

Miears argues on appeal, inter alia, that McPherson was not entitled to summary judgment because he failed to conclusively establish all the essential elements of his five-year statute of limitations affirmative defense. In McPherson's motion for summary judgment he argued that the five-year limitations period for adverse possession bars each of Miears's claims, the summary judgment evidence conclusively establishes each element, and he was entitled to judgment as a matter of law. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 16.025 (West 2002). Before we discuss the issue, we recite the relevant statute.

1. Adverse Possession: Five-Year Limitations Period

> (a) A person must bring suit not later than five years after the day the cause of action accrues to recover real property held in peaceable and adverse possession by another who:
>
> (1) cultivates, uses, or enjoys the property;
>
> (2) pays applicable taxes on the property; and
>
> (3) claims the property under a duly registered deed.
>
> (b) This section does not apply to a claim based on a forged deed or a deed executed under a forged power of attorney.

TEX. CIV. PRAC. & REM. CODE ANN. § 16.025. *See generally Gulf, C. & S.F. Ry. Co. v. Candler*, 61 S.W.2d 997, 998 (Tex. Comm'n App. 1933, judgm't affirmed) ("The right to an easement may be lost by limitations the same as a title in fee.").

2. Claim to Property Under Deed

To be entitled to summary judgment on his five-year statute of limitations defense, McPherson had to conclusively prove each essential element. *See* TEX. R. CIV. P. 94 (affirmative defenses); *KPMG Peat Marwick*, 988 S.W.2d at 748. One of the essential elements is to "claim[] the property under a duly registered deed." TEX. CIV. PRAC. & REM. CODE ANN. § 16.025(a)(3); *Nat. Gas Pipeline Co. of Am. v. Pool*, 124 S.W.3d 188, 193 (Tex. 2003).

McPherson included the deed in his summary judgment evidence; he argued that the deed conclusively establishes that he owns "the dirt." But he acknowledged that the deed does not give him title to the easement, and we conclude this point is dispositive of his affirmative defense.

McPherson's deed grants him ownership of the land, but it does not grant him ownership of the easement he claims to have adversely possessed. *See Gearhart v. Wardell*, No. 13-15-00096-CV, 2016 WL 7011402, at *2 n.2 (Tex. App.—Corpus Christi Dec. 1, 2016, no pet.) (mem. op.) (noting that the land owner "cannot claim the easement under a duly registered deed because it is undisputed that the deed itself granted an express easement to the [easement owners]").

3. Summary Judgment Not Proper

McPherson's summary judgment evidence does not conclusively establish that he claimed the easement under a duly registered deed; thus, the trial court could not have properly granted summary judgment for McPherson against all of Miears's claims based on McPherson's five-year adverse possession limitations defense. *See* TEX. R. CIV. P. 166a(c); *Rhône-Poulenc*, 997 S.W.2d at 223; *Gearhart*, 2016 WL 7011402, at *2 ("[O]nly the ten-year limitation period set out in section

16.026(a) could apply to extinguish [an express] easement by adverse possession."). We sustain Miears's third issue.

Because the trial court did not state the grounds for granting the summary judgment, we turn next to McPherson's argument that the private nuisance claim was barred by the two-year statute of limitations. *See Knott*, 128 S.W.3d at 216 (requiring a court of appeals to "affirm the summary judgment if any of the theories presented to the trial court and preserved for appellate review are meritorious").

TWO-YEAR LIMITATIONS DEFENSE FOR PRIVATE NUISANCE

In her fourth issue on appeal, Miears argues the trial court erred by granting summary judgment against her private nuisance claim. Miears's first amended petition claimed that McPherson created a private nuisance by constructing fences and improvements on Tract III "in a way which is in derogation of [her] easement rights." In his motion for summary judgment, McPherson argued Miears's private nuisance claim is barred by the two-year limitations period.

A. Nuisance, Limitations

"A 'nuisance' is a condition that substantially interferes with the use and enjoyment of land by causing unreasonable discomfort or annoyance to persons of ordinary sensibilities." *Schneider Nat'l Carriers, Inc. v. Bates*, 147 S.W.3d 264, 269 (Tex. 2004) (quoting *Holubec v. Brandenberger*, 111 S.W.3d 32, 37 (Tex. 2003)), *holding modified by Gilbert Wheeler, Inc. v. Enbridge Pipelines (E. Tex.), L.P.*, 449 S.W.3d 474 (Tex. 2014); *accord Crosstex N. Tex. Pipeline, L.P. v. Gardiner*, 505 S.W.3d 580, 593, 606 (Tex. 2016).

Section 16.003 of the Civil Practice and Remedies Code establishes a two-year period to bring certain suits.

> (a) Except as provided by Sections 16.010, 16.0031, and 16.0045, a person must bring suit for trespass for injury to the estate or to the property of another, conversion of personal property, taking or detaining the personal property of

> another, personal injury, forcible entry and detainer, and forcible detainer not later than two years after the day the cause of action accrues.

TEX. CIV. PRAC. & REM. CODE ANN. § 16.003(a) (West 2017); *see Schneider*, 147 S.W.3d at 270 ("The limitations period for a private nuisance claim is two years."). "To [invoke the statute and] establish a limitations defense, the defendant must prove that a permanent nuisance occurred, if at all, more than two years before the landowner's lawsuit." *Nat. Gas Pipeline Co. of Am. v. Justiss*, 397 S.W.3d 150, 153 (Tex. 2012); *see Scott v. Babb*, 419 S.W.3d 531, 533 (Tex. App.—San Antonio 2013, no pet.). The date the nuisance claim accrues "is a question of law for the courts." *Schneider*, 147 S.W.3d at 270 (citing *Childs v. Haussecker*, 974 S.W.2d 31, 36 (Tex. 1998)). "A court may decide the issues as a matter of law only if the underlying facts are undisputed or, in light of all the evidence, 'reasonable minds cannot differ.'" *Crosstex*, 505 S.W.3d at 609.

B. Type of Nuisance

"[A] nuisance is temporary if it is of limited duration, . . . occasional, intermittent, or recurrent, or sporadic and contingent upon some irregular force such as rain." *Schneider*, 147 S.W.3d at 272 (footnotes and internal quotation marks omitted). A nuisance is permanent if it is "constant, regular, and likely to continue." *Schneider*, 147 S.W.3d at 272 (footnotes omitted); *see also Gilbert Wheeler*, 449 S.W.3d at 480.

Paragraph 5 of McPherson's affidavit[1] states that he "constructed a retaining wall and the multi-level boat dock both on Tract III."

Miears states that Barr, McPherson's predecessor-in-title, built fences to exclude her from Tract III and McPherson built a boat dock on Tract III. Miears included pictures of the boat dock in her petition. She asserts the boat dock interferes with her use and enjoyment of the easement.

[1] Miears objected to certain portions of McPherson's affidavit. We identify the affidavit evidence by paragraph number for the reader's convenience in correlating Miears's objections to McPherson's affidavit.

Paragraph 4 of McPherson's affidavit states that the fence that prevents Miears from accessing Tract III "is permanent, constructed of metal, and the posts holding the fence are secured in the ground by concrete." *See Scott*, 419 S.W.3d at 533 (construing a "fence as a permanent injury to the land"). Miears complains of the fence's existence and does not dispute McPherson's description of the fence materials or its manner of construction.

The underlying facts that determine the nature of the private nuisance here are undisputed and conclusive. *See City of Keller v. Wilson*, 168 S.W.3d 802, 816 (Tex. 2005) ("Undisputed evidence and conclusive evidence are not the same—undisputed evidence may or may not be conclusive, and conclusive evidence may or may not be undisputed."). We decide as a matter of law that the boat dock and the fence are permanent nuisances. *See Gilbert Wheeler*, 449 S.W.3d at 480; *Schneider*, 147 S.W.3d at 272; *Scott*, 419 S.W.3d at 533.

C. Date Nuisance Accrued

"A permanent nuisance claim accrues when injury first occurs or is discovered" and determining the accrual date "is a question of law for the courts." *Schneider*, 147 S.W.3d at 270; *see Justiss*, 397 S.W.3d at 153.

The evidence establishing the dates of accrual is also undisputed and conclusive. *See City of Keller*, 168 S.W.3d at 816. In Miears's affidavit, she stated that sometime between 1998 and 2000, Barr built the fence that "blocked everybody off and [Barr] said he bought the road rights to Lake Drive, and we couldn't use it." In paragraph 4 of McPherson's affidavit, he stated he purchased the property in December 2005, and the fence was constructed by "the prior owner." In paragraph 5, McPherson stated that he built the boat dock shortly after he purchased his property, and he completed the dock by March 2006. Miears filed her original plea in intervention on April 6, 2014; she filed her private nuisance claim on March 31, 2016.

Given the undisputed, conclusive summary judgment evidence, we conclude that Miears's causes of action for private nuisance for the fence and boat dock accrued more than two years before she filed her claim. *See Schneider*, 147 S.W.3d at 270, 274–75; *Scott*, 419 S.W.3d at 534 (concluding that "the completion date of the fence's construction [was] dispositive for purposes of limitations").

D. Private Nuisance Claim Barred

Miears complained that the fence and the boat dock interfered with her use and enjoyment of the easement, and we have concluded both are permanent nuisances. *See Crosstex*, 505 S.W.3d at 606; *Schneider*, 147 S.W.3d at 272; *Scott*, 419 S.W.3d at 533. Miears did not file her private nuisance claim until more than two years after each cause of action accrued; thus, the two-year statute of limitations bars her claims. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 16.003; *Schneider*, 147 S.W.3d at 270, 274–75; *Scott*, 419 S.W.3d at 534. McPherson raised the two-year statute of limitations in his motion for summary judgment, and the trial court did not err in granting the motion against Miears's private nuisance claim. *See* TEX. R. CIV. P. 166a(c); *Knott*, 128 S.W.3d at 220; *KPMG Peat Marwick*, 988 S.W.2d at 748. We overrule Miears's fourth issue.

OBJECTION TO SUMMARY JUDGMENT EVIDENCE, HEARING

In her first and second issues, Miears complains that the trial court erred (1) by allowing the summary judgment hearing to proceed and (2) by overruling all her objections to McPherson's summary judgment evidence. Because we reverse the portion of the trial court's order that granted McPherson's five-year statute of limitations defense against all of Miears's claims, we need only consider the evidence and objections pertaining to McPherson's two-year limitations defense to the private nuisance claim.

A. Objections to Summary Judgment Evidence

We review "[a] trial court's rulings on objections to summary judgment evidence . . . under an abuse of discretion standard." *PNP Petroleum I, LP v. Taylor*, 438 S.W.3d 723, 732 (Tex. App.—San Antonio 2014, pet. denied) (citing *United Blood Servs. v. Longoria*, 938 S.W.2d 29, 31 (Tex. 1997) (per curiam)).

Miears objected to portions of paragraphs 2, 3, 4, 6, 8, Exhibit A-2, and Exhibit B in McPherson's affidavit. The trial court overruled Miears's objections.

Miears did not object to the statements in McPherson's paragraph 4 that describe the fence materials and construction method, the statements in paragraph 5 that McPherson built the boat dock not later than March 2006, or her own affidavit's statements that between 1998 and 2000, Barr built the fence and sought to exclude her from Tract III.

Assuming, arguendo, that the trial court abused its discretion by overruling Miears's objections, the portions of McPherson's affidavit to which she objected are not the summary judgment evidence that conclusively establishes that Miears's private nuisance claim is barred by the two-year statute of limitations. Thus, even if the trial court erred in overruling Miears's objections, the error was harmless. *See* TEX. R. APP. P. 44.1(a) (harmless error standard); *Progressive Cty. Mut. Ins. Co. v. Boyd*, 177 S.W.3d 919, 922 (Tex. 2005) (per curiam). We overrule Miears's first issue.

B. Denied Continuance for Summary Judgment Hearing

"The granting or denial of a motion for continuance is within the sound discretion of the trial court and will not be disturbed absent a showing the trial court clearly abused that discretion." *Klager v. Worthing*, 966 S.W.2d 77, 80 (Tex. App.—San Antonio 1996, writ denied) (citing *Villegas v. Carter*, 711 S.W.2d 624, 626 (Tex. 1986)); *accord Hill v. Hill*, 460 S.W.3d 751, 761 (Tex. App.—Dallas 2015, pet. denied).

At the hearing, Miears also objected to McPherson's late-filed summary judgment evidence. The trial court sustained Miears's objection. Nevertheless, Miears asked the trial court to grant her motion for continuance to have time to rebut evidence the trial court expressly stated it had not seen and would not consider. The trial court proceeded with the hearing.[2] It granted McPherson's motion for summary judgment and found that it had not read or considered the late-filed summary judgment evidence.

On appeal, Miears argues—without citing any supporting authority—that the trial court erred by proceeding with the hearing. Miears failed to preserve her claim of error, *see* TEX. R. APP. P. 33.1(a) (error preservation), and presents nothing for appellate review, *see* TEX. R. APP. P. 38.1(i) (requiring arguments to be supported by authorities); *ERI Consulting Eng'rs, Inc. v. Swinnea*, 318 S.W.3d 867, 880 (Tex. 2010) (briefing waiver). We overrule Miears's second issue.

CONCLUSION

The trial court erred in granting McPherson's traditional motion for summary judgment against Miears's four causes of action because McPherson failed to conclusively prove one essential element of the five-year statute of limitations defense: that he claims title to the easement under a duly registered deed. However, Miears's private nuisance claim was barred by the two-year statute of limitations, and the trial court could properly grant summary judgment for McPherson on that claim. Therefore, we reverse the portion of the trial court's order granting summary judgment for McPherson against Miears's declaratory judgment, interference with easement, and suit to quiet title claims. We affirm the remainder of the order and remand this cause to the trial court.

Patricia O. Alvarez, Justice

[2] The record does not show the trial court expressly ruled on the motion for continuance, and Miears did not object to the trial court's failure to rule. *See* TEX. R. APP. P. 33.1(a); *Mitchell v. Bank of Am., N.A.*, 156 S.W.3d 622, 626 (Tex. App.—Dallas 2004, pet. denied) (error preservation).