COURT OF APPEALS
SECOND DISTRICT OF TEXAS
FORT WORTH

NO. 02-17-00336-CV

DANNY MCCOY WOODS — APPELLANT

V.

JIMMY LEWIS SOULES, ESTATE OF HOWARD WALSH SR., AND WALSH RANCH — APPELLEES

FROM THE 348TH DISTRICT COURT OF TARRANT COUNTY
TRIAL COURT NO. 348-290594-17

MEMORANDUM OPINION[1]

I. INTRODUCTION

In this personal-injury case, a collision occurred on August 22, 2014, between Appellant Danny McCoy Woods, who was driving a motorcycle, and a commercial truck driven by Appellee Jimmy Lewis Soules. Woods filed his

[1]*See* Tex. R. App. P. 47.4.

personal-injury negligence suit more than two years later, on February 21, 2017. Appellees, Soules, Estate of Howard Walsh Sr., and Walsh Ranch, filed a traditional motion for summary judgment on the affirmative defense of statute of limitations.[2] The trial court granted summary judgment for Appellees and entered judgment that Woods take nothing.

Woods perfected this appeal and raises three issues. Woods does not dispute that Appellees conclusively established the affirmative defense of limitations; he instead asserts the statute of limitations was tolled by equitable estoppel, that Appellees waived their statute of limitations defense, and that the trial court abused its discretion by sustaining three of Appellees' objections to the summary judgment affidavit of Woods's counsel. For the reasons set forth below, we will affirm.

II. PERTINENT FACTUAL BACKGROUND

At approximately 11:45 a.m. on August 22, 2014, a collision occurred between Woods and Soules, who was operating a commercial truck in the scope of his employment as the foreman of Walsh Ranch. Woods alleged that Soules failed to properly yield to oncoming traffic, pulled out in front of Woods, and caused Woods to crash his motorcycle. Woods suffered severe injuries.

[2]Negligence has a two-year statute of limitations. Tex. Civ. Prac. & Rem. Code Ann. § 16.003 (West 2017).

St. Paul Fire and Marine Insurance, a member of Travelers Insurers, (Travelers) provided the commercial vehicle insurance policy on the truck driven by Soules. Travelers paid Woods $6,100.00 for the property damage portion of Woods's claim and in October of 2014, Woods's counsel began discussing Woods's bodily-injury claim with Travelers.

According to Woods's counsel's affidavit, Travelers's adjuster Victor Caldero said that Travelers had accepted liability. During a follow-up telephone call, Caldero informed Woods's counsel that Travelers would need Woods's medical bills and records or the applicable medical release to obtain them. Several different adjusters with Travelers subsequently handled Woods's claim. Eventually, in early January 2017, Travelers's representative, Teresa Orseno, contacted Woods's counsel to inform her that Orseno would be the new point of contract on Woods's claim and said that her file showed Woods's claim had been closed due to the expiration of limitations. In a January 16, 2017 e-mail, Orseno informed Woods's counsel that the claim was closed, that Travelers would not reopen it, and that Travelers would address Woods's claim if and when he filed a lawsuit.

Woods then filed suit on February 21, 2017. In response to Appellees' traditional motion for summary judgment on the affirmative defense of limitations, Woods filed a summary-judgment response that included an affidavit from his counsel with eighteen exhibits attached to it. Appellees asserted five objections to the summary judgment affidavit of Woods's counsel. The trial court conducted

a hearing on Appellees' traditional motion for summary judgment on the affirmative defense of limitations,[3] sustained three of Appellees' objections to Woods's counsel's summary-judgment affidavit, granted summary judgment for Appellees, and entered judgment that Woods take nothing.

III. STANDARDS OF REVIEW

We review a summary judgment de novo. *Travelers Ins. Co. v. Joachim*, 315 S.W.3d 860, 862 (Tex. 2010). A defendant is entitled to a traditional summary judgment on an affirmative defense if the defendant conclusively establishes all the elements of the affirmative defense as a matter of law. *See* Tex. R. Civ. P. 166a(b), (c); *Chau v. Riddle*, 254 S.W.3d 453, 455 (Tex. 2008); *Ryland Grp., Inc. v. Hood*, 924 S.W.2d 120, 121 (Tex. 1996). When, in response to a motion for summary judgment on limitations, a nonmovant asserts an affirmative defense in the nature of confession and avoidance—like equitable estoppel, the nonmovant bears the burden of raising a genuine issue of material fact on every element of the defense in avoidance. *Zale Corp. v. Rosenbaum,* 520 S.W.2d 889, 891 (Tex.

[3]Woods points out that "[d]uring the hearing on the motion for summary judgment, the trial court asked Wood[s's] counsel to testify as to what the adjusters said in regard to liability." To the extent Woods argues on appeal that his counsel's answers to the trial court constitute summary judgment evidence that we must consider, we cannot agree. *See* Tex. R. Civ. P. 166a(c) ("No oral testimony shall be received at the [summary-judgment] hearing."); *Jack B. Anglin Co., Inc. v. Tipps*, 842 S.W.2d 266, 269 n.4 (Tex. 1992) (noting that "[l]ive testimony" may be considered at various hearings "but not at a summary judgment hearing"); *Ahmad v. Mathur*, No. 02-13-00314-CV, 2014 WL 1859369, at *2 & n.4 (Tex. App.—Fort Worth May 8, 2014, no pet.) (mem. op.) ("[T]estimony at the hearing is not competent summary-judgment evidence.").

1975); *Vills. of Greenbriar v. Torres*, 874 S.W.2d 259, 262 (Tex. App.—Houston [1st Dist.] 1994, writ denied). In our de novo review, we consider the evidence presented in the light most favorable to the nonmovant, crediting evidence favorable to the nonmovant if reasonable jurors could and disregarding evidence contrary to the nonmovant unless reasonable jurors could not. *Mann Frankfort Stein & Lipp Advisors, Inc. v. Fielding*, 289 S.W.3d 844, 848 (Tex. 2009).

An appellate court reviews a trial court's ruling that sustains an objection to summary judgment evidence for an abuse of discretion. *Pipkin v. Kroger Tex., L.P.*, 383 S.W.3d 655, 667 (Tex. App.—Houston [14th Dist.] 2012, pet. denied); *In re Estate of Denman*, 362 S.W.3d 134, 140 (Tex. App.—San Antonio 2011, no pet.). *Cruikshank v. Consumer Direct Mortg., Inc.,* 138 S.W.3d 497, 499 (Tex. App.—Houston [14th Dist.] 2004, pet. denied) (citing *City of Brownsville v. Alvarado,* 897 S.W.2d 750, 753 (Tex. 1995)). An appellant has the burden to bring forth a record that is sufficient to show the trial court abused its discretion when it sustained the appellee's objections to the summary judgment evidence. *See Pipkin*, 383 S.W.3d at 667. Even if a trial court errs by excluding summary-judgment evidence, to obtain a reversal based on the exclusion, the appellant must demonstrate that the exclusion probably resulted in an improper judgment. *Chandler v. CSC Applied Techs., LLC*, 376 S.W.3d 802, 824 (Tex. App.—Houston [1st Dist.] 2012, pet. denied) (citing Tex. R. App. P. 44.1(a)(1)); *Interstate Northborough P'ship v. State*, 66 S.W.3d 213, 220 (Tex. 2001)). A successful challenge to the trial court's evidentiary rulings generally requires the complaining party to demonstrate that the

judgment turns on the particular evidence excluded. *See Miller v. Great Lakes Mgmt. Serv., Inc.*, No. 02-16-00087-CV, 2017 WL 1018592, at *3 (Tex. App.—Fort Worth Mar. 16, 2017, no pet.) (mem. op.).

IV. ANALYSIS

A. Woods's First Issue

In his first issue, Woods claims he raised a genuine issue of material fact on each element of equitable estoppel and thereby defeated Appellees' right to summary judgment on limitations.

The doctrine of equitable estoppel requires: (1) a false representation or concealment of material facts; (2) made with knowledge, actual or constructive, of those facts; (3) with the intention that it should be acted on; (4) to a party without knowledge or means of obtaining knowledge of the facts; (5) who detrimentally relies on the representations. *Johnson & Higgins of Tex., Inc. v. Kenneco Energy, Inc.*, 962 S.W.2d 507, 515–16 (Tex. 1998); *Forrest v. Vital Earth Res.*, 120 S.W.3d 480, 486–87 (Tex. App.—Texarkana 2003, pet. denied) (citing *Vills. of Greenbriar,* 874 S.W.2d at 262–63). When equitable estoppel is alleged in avoidance of a limitations defense, the failure to file suit must be "unmixed" with any want of diligence on the plaintiff's part. *Leonard v. Eskew,* 731 S.W.2d 124, 129 (Tex. App.—Austin 1987, writ ref'd n.r.e.).

Woods obtained counsel about two months after being injured. We have not located and Woods has not cited a case holding that a genuine issue of material fact existed concerning the fourth and fifth elements of the equitable-

estoppel defense to avoid application of the statute of limitations when the "party without knowledge or means of [obtaining] knowledge of the facts" was a party represented by counsel.[4] *See, e.g.*, *Lewallen v. Cross*, No. 03-14-00026-CV, 2014 WL 4365081, at *5 (Tex. App.—Austin Aug. 27, 2014, no pet.) (mem. op.) (refusing to apply equitable estoppel because there was no evidence "defense counsel made a false representation to the [appellants'] attorney or concealed any material fact from him . . . that the [appellants'] attorney had no means of knowing himself"); *Fiengo v. Gen. Motors Corp.*, 225 S.W.3d 858, 861–62 (Tex. App.—Dallas 2007, no pet.) (refusing to apply equitable estoppel to avoid limitations when plaintiff was represented by counsel); *City of Houston v. McDonald*, 946 S.W.2d 419, 422 (Tex. App.—Houston [14th Dist.] 1997, writ denied) (affirming summary judgment because no evidence to show false representation or concealment of material facts to support equitable estoppel);

[4]Appellees contend no such case exists. They argue:

> Appellant's whole position can be summed up that Appellant and his attorney didn't get the level of communications or answers that they wanted, and simply let the limitations date go by. Appellant's remedy, if no settlement is reached or agreement to extend a limitations deadline is to file suit. Appellant simply failed to avail himself of a simple remedy within his control.
>
> There is a pointed lack of case authority upholding equitable estoppel in situations where a party is represented by counsel, and for good reason. Counsel as a highly trained professional, is aware of the key facts, responsibilities and need to initiate a suit within a limitation period, and can't be misled on this point. All cases in which counsel was engaged by the claimant have held that equitable estoppel did not avoid the limitation defense.

Duncan v. Lisenby, 912 S.W.2d 857, 859 (Tex. App.—Houston [14th Dist.] 1995, no writ) (refusing to apply equitable estoppel to avoid limitations when plaintiff was represented by counsel); *Cook v. Smith*, 673 S.W.2d 232, 234–35 (Tex. App.—Dallas 1984, writ ref'd n.r.e.) (applying equitable estoppel to avoid application of limitations when plaintiff was not represented by counsel and adjuster made false representations to plaintiff); *Mandola v. Mariotti*, 557 S.W.2d 350, 351 (Tex. Civ. App.—Houston [1st Dist.] 1977, writ ref'd n.r.e.) (same).

Woods's summary judgment evidence does not raise a genuine issue of material fact on the fourth and fifth elements of equitable estoppel. Instead, viewed in the light most favorable to Woods and indulging in all reasonable inferences in Woods's favor, the summary judgment record conclusively establishes that no communications or conversations occurred between Woods's counsel and any Travelers representative between June 2016 and when the statute of limitations ran on August 22, 2016.[5] Nor had Travelers paid Woods's bodily injury claim or sent any type of written acceptance of liability for Woods's bodily injury claim or for his entire claim. Although Travelers had paid Woods's property damage claim and was working with Woods's counsel to collect information regarding Woods's medical expenses, even if Woods and his counsel subjectively believed Travelers's requests for medical expense information meant

[5]Travelers adjuster Toyia Harper sent a claim reassignment letter to Woods's counsel on July 1, 2016. Woods agrees that "[a]fter May/June 2016, all communication from Travelers stopped."

that Travelers would pay Woods's entire claim even if he did not file suit, no summary judgment evidence exists that these communications by Travelers with Woods's counsel contained false facts or concealed material facts. *See Fiengo*, 225 S.W.3d at 862 ("For appellants to raise a fact issue on estoppel, they must have presented some evidence that appellees' statements affirmatively induced them into delaying filing suit beyond the statute of repose, unmixed with any want of diligence on their part.") (citing *Dean v. Frank W. Neal & Assocs., Inc.,* 166 S.W.3d 352, 358 (Tex. App.—Fort Worth 2005, no pet.)); *see also Lockard v. Deitch,* 855 S.W.2d 104, 105 (Tex. App.—Corpus Christi 1993, no writ) (rejecting contention that limitations in appellant's personal-injury negligence suit was tolled by insurance company's letter offering to "work towards a settlement").[6]

Because Woods's summary judgment evidence does not raise a genuine issue of material fact on the fourth and fifth elements of equitable estoppel, we overrule Woods's first issue asserting that he raised a genuine issue of material fact on every element of equitable estoppel.

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[6]The insurance company's letter was similar to Travelers's alleged oral statements here. It stated:

> In reviewing our file, it appears that Ms. Lockard has recovered from all of the injuries received in this accident other than the left knee and for which she is still being treated by Dr. Gary Snook. *Once you have the final specials and medical reports to submit to us for evaluation, we will try to work towards a settlement with you.*

Lockard, 855 S.W.2d at 105.

B. Woods's Second Issue

In his second issue, Woods argues that Appellees waived limitations by engaging in conduct inconsistent with the assertion of a limitations defense. Waiver is the intentional relinquishment of a known right or intentional conduct inconsistent with claiming that right. *Sun Expl. & Prod. Co. v. Benton*, 728 S.W.2d 35, 37 (Tex. 1987). Waiver can be established either by a party's express renunciation of a known right or by silence or inaction for so long a period as to show an intention to yield the known right. *Tenneco Inc. v. Enter. Prods. Co.*, 925 S.W.2d 640, 643 (Tex. 1996). The elements of waiver are (1) an existing right, benefit, or advantage; (2) knowledge, actual or constructive, of its existence; and (3) actual intent to relinquish the right, which can be inferred from conduct. *See Sedona Contracting, Inc. v. Ford, Powell & Carson, Inc.*, 995 S.W.2d 192, 195 (Tex. App.—San Antonio 1999, pet. denied) (citing *Tenneco Inc*., 925 S.W.2d at 643). To find waiver through conduct, such intent must be clearly demonstrated by the surrounding facts and circumstances. *Crosstex Energy Servs., L.P. v. Pro Plus, Inc.,* 430 S.W.3d 384, 394 (Tex. 2014).

Concerning the third element of waiver, Woods argues that Travelers's request for a status update after the statute of limitations had run constituted conduct inconsistent with its subsequent decision to close Woods's claim, and that therefore Travelers's request-for-a-status-update conduct indicated an actual

intent to waive the defense of limitations.[7] Case law does not support Woods's contention that Travelers's single incident of post-limitations conduct—requesting a status update—constitutes conduct clearly demonstrating under the totality of the circumstances Travelers's intent to waive the affirmative defense of limitations to Woods's subsequently filed suit. *Cf. Crosstex Energy Servs.*, 430 S.W.3d at 394 (holding Pro-Plus's entry into Rule 11 agreement to extend expert designation deadline did not waive Pro-Plus's right to seek dismissal for Crosstex's failure to meet statutory mandate of filing certificate of merit with original petition); *Parsons v. Turley*, 109 S.W.3d 804, 809–10 (Tex. App.—Dallas 2003, pet. denied) (holding Parsons failed to raise fact issue on Turley's waiver of diligent service of process to avoid summary judgment on limitations). Woods does not explain, and we do not discern, how Travelers's request for a status update constitutes conduct inconsistent with Travelers's assertion of a limitations defense to a not-yet-filed suit or how Travelers's request for a status update constitutes conduct clearly demonstrating by the surrounding facts and circumstances an intent by Travelers to waive a limitations defense to Woods's subsequently filed personal-injury suit.

[7]Woods also argues that limitations did not begin to run until Travelers denied his claim and that Travelers's request for a status update after limitations had run restarted the limitations period. The cases Woods cites in support of these propositions, however, are first-party cases, not third-party cases like the one here.

Because Woods's summary judgment evidence—viewed in the light most favorable to him—does not raise a genuine issue of material fact demonstrating an actual intent by Travelers to relinquish the right to rely on a limitations defense in any subsequent suit by Woods (the third element of waiver), we overrule Woods's second issue asserting that he raised a genuine issue of material fact on every element of waiver.

C. Woods's Third Issue

In his third issue, Woods claims the trial court erred by sustaining three of Appellees' objections to his counsel's summary-judgment affidavit. The trial court sustained Appellees' objection to Woods's counsel's summary-judgment affidavit "to the extent it makes conclusory and unsupported statements, especially concerning conclusory statements that anyone accepted liability on behalf of Defendants. Liability is and has always been contested." The trial court also sustained Appellees' objections to exhibits A-1 (Police Report) and A-2 (Medical Records) attached to Woods's counsel's affidavit because the exhibits were not properly authenticated.

Woods generally argues on appeal that the trial court abused its discretion when it sustained these three objections to his counsel's summary-judgment affidavit. Although Woods argues on appeal that Appellees' sustained objections were not meritorious, he does not explain or demonstrate how the allegedly erroneous exclusion of portions of his counsel's summary-judgment affidavit or two of the exhibits attached to it probably resulted in an improper judgment. *See,*

e.g., *Miller*, 2017 WL 1018592, at *3 (citing *Chandler*, 376 S.W.3d at 824). He also failed to demonstrate that the summary judgment turns on the particular evidence that was excluded. *See id.* Finally, our review of the excluded evidence reveals that it is not controlling on a dispositive material issue because, as set forth below, Woods (who does not challenge Appellees' conclusive establishment of the affirmative defense of limitations) fails to raise a genuine issue of material fact on the elements (4) and (5) of equitable estoppel which Woods asserts in avoidance of Appellees' limitations defense, regardless of the stricken portions of his counsel's summary judgment affidavit.

Because Woods has not demonstrated that the exclusion of portions of his counsel's summary-judgment affidavit and of two of its attachments probably resulted in an improper judgment or that the summary judgment turns on the particular evidence excluded, any error by the trial court in sustaining Appellees' objections was harmless. *See id.* We overrule Woods's third issue.

V. CONCLUSION

Having overruled Woods's three issues, we affirm the trial court's order sustaining Appellees' objections to Woods's summary-judgment evidence and the trial court's order granting summary judgment.

/s/ Sue Walker
SUE WALKER
JUSTICE

PANEL: WALKER, KERR, and BIRDWELL, JJ.

DELIVERED: May 17, 2018