IN THE
TENTH COURT OF APPEALS

No. 10-17-00376-CV

RODNEY HODGE AND CHERI TYE, BENEFICIARIES ON BEHALF OF THE ESTATE OF BESSIE JEANNE WORTHY,

Appellants

v.

LARRY HODGE,

Appellee

From the County Court at Law
Ellis County, Texas
Trial Court No. 13-C-3079

MEMORANDUM OPINION

In one issue, appellants, Rodney Hodge and Cheri Tye, beneficiaries on behalf of the estate of Bessie Jeanne Worthy, challenge a judgment entered in their favor against appellee, Larry Hodge. Specifically, appellants contend that the final judgment does not award them sufficient damages because Larry's continued breach of fiduciary duty to

Bessie is subject to the continuing-tort doctrine. Because we overrule appellants' sole issue on appeal, we affirm the judgment of the trial court.

I. BACKGROUND

Rodney and Cheri are Larry's children and beneficiaries of Bessie's estate. In the last years of her life, Bessie, who had no children of her own, sought to have Larry, her nephew, take care of her. A Power of Attorney was signed by Bessie allowing Larry to handle Bessie's property while she was living. Larry was also the administrator of Bessie's estate and trustee of her trust. Because Larry lived primarily in California, Bessie provided Larry with a credit card to defray expenses associated with traveling back and forth from California and Bessie's home in Waxahachie, Texas. This credit card was essential for Larry because he purportedly could not maintain steady employment in California due to his obligations to Bessie in Waxahachie. In the trial court, Larry asserted that Rodney and Cheri were named beneficiaries to Bessie's estate at his urging and that Rodney and Cheri began to question Larry's management of Bessie's affairs after Bessie died on October 31, 2011.

Initially, Rodney and Cheri sought to remove Larry as administrator of Bessie's estate and trustee of her trust. When that failed, Rodney and Cheri filed suit against Larry, alleging that he breached a fiduciary duty in managing Bessie's affairs prior to her death. This lawsuit was filed on February 11, 2013, and asserted that Larry breached his fiduciary duty by: (1) loaning various people money with Bessie's resources; (2) failing

to complete 2007, 2008, and 2010 Federal Tax returns that caused the estate to accrue penalties and interest; and (3) misapplying and removing part of the estate for his own benefit.

This case was tried to a jury. Rodney and Cheri introduced bank and credit-card statements showing that Larry had spent over $250,000 of the estate's resources over a four-year period from November 19, 2007 to October 31, 2011. At the conclusion of the trial, the jury determined that: (1) Larry owed a fiduciary duty to Bessie from November 19, 2007 until her death; (2) Larry breached the fiduciary duty he owed to Bessie by placing himself in a position where his self-interest conflicted with his obligations as a fiduciary; and (3) Rodney and Cheri were damaged in the amount of $20,867.53 for conduct between November 19, 2007 until February 11, 2009, and $28,729.70 for conduct between February 12, 2009 until October 31, 2011.

Subsequent to the trial, the trial court conducted a hearing to determine final damages and to consider Larry's affirmative defense of statute of limitations, which he had timely raised in an earlier pleading. Because Larry raised the statute of limitations as an affirmative defense, the trial court bifurcated the jury questions on damages to both before and after the four-year statute of limitations period. In a post-trial brief, Rodney and Cheri pled for the first time the discovery rule and the continuing-tort doctrine to ensure recovery of damages dating back to November 19, 2007. The trial court initially ruled that both the discovery rule and the continuing-tort doctrine are avoidance

doctrines that should have been timely pled by Rodney and Cheri. Thereafter, Rodney and Cheri filed a motion for rehearing on the issue of the continuing-tort doctrine. The trial court withdrew its original order finding that the continuing-tort doctrine must be pled and, instead, concluded that the continuing-tort doctrine did not apply in this case because the conduct in question involved discrete financial transactions that constituted separate torts. The trial court then entered its final judgment awarding Rodney and Cheri $28,729.70 in damages for conduct between February 12, 2009 and October 31, 2011, as well as pre- and post-judgment interest and costs of court. This appeal followed.

II. ANALYSIS

In their sole issue on appeal, Rodney and Cheri assert that trial court erred by failing to award them $20,867.53 in damages corresponding with conduct between November 19, 2007 and February 11, 2009 because the continuing-tort doctrine applies in this case. We disagree.

Generally, a cause of action accrues when a wrongful act causes injury. *Murray v. San Jacinto Agency, Inc.*, 800 S.W.2d 826, 828 (Tex. 1990). An exception to this rule is the continuing tort, which is an ongoing wrong that causes a continuing injury that does not accrue until the tortious act ceases. *See Krohn v. Marcus Cable Assocs.*, L.P., 201 S.W.3d 876, 880-81 (Tex. App.—Waco 2006, pet. denied); *see also Walston v. Stewart*, No. 10-05-00135-CV, 2005 Tex. App. LEXIS 9611, at *2 (Tex. App.—Waco Nov. 16, 2005, pet. denied) (mem. op.) (citing *Dickson Constr., Inc. v. Fidelity & Deposit Co. of Maryland*, 960 S.W.2d 845, 851

(Tex. App.—Texarkana 1997, no pet.); *Upjohn Co. v. Freeman*, 885 S.W.2d 538, 542 (Tex. App.—Dallas 1994, writ denied). Repeated injury proximately caused by repetitive wrongful or tortious acts may constitute a continuing tort, but a continuing injury arising from one wrongful act does not. *See Dickson Constr., Inc.*, 960 S.W.2d at 851; *Upjohn Co.*, 885 S.W.2d at 543; *see also Christerson v. Speer*, No. 01-16-00469-CV, 2017 Tex. App. LEXIS 3831, at *18 (Tex. App.—Houston [1st Dist.] Apr. 27, 2017, pet. denied) (mem. op.). The Texas Supreme Court has "'neither endorsed nor addressed' the continuing tort doctrine." *Coinmach Corp. v. Aspenwood Apt. Corp.*, 417 S.W.3d 909, 924 (Tex. 2013) (quoting *Creditwatch, Inc. v. Jackson*, 157 S.W.3d 814, 816 n.8 (Tex. 2005)).

In any event, "[c]onceptually, a continuing tort is a tolling provision allowing avoidance of a limitations defense." *Cash Register Sales & Serv. of Houston, Inc. v. Thompso*n, No. 01-98-01330-CV, 2001 Tex. App. LEXIS 706, at **10-11 (Tex. App.—Houston [1st Dist.] Feb. 1, 2001, no pet.) (citing *Dickson Constr., Inc.*, 960 S.W.2d at 851; *Twyman v. Twyman*, 790 S.W.2d 819, 820 (Tex. App.—Austin 1990), *rev'd on other grounds*, 855 S.W.2d 619 (Tex. 1993). Furthermore, "[a] matter in avoidance of the statute of limitations, not raised affirmatively by the pleadings, is deemed waived." *Id.* at *11 (citing *Woods v. William M. Mercer, Inc.*, 769 S.W.2d 515, 518 (Tex. 1988) (stating the principle in the context of a case involving the discovery rule)).

Here, the record reflects that Larry timely raised his limitations affirmative defense prior to the jury rendering their verdict; however, Rodney and Cheri did not assert the

continuing-tort tolling provision until they filed their post-trial brief. Because Rodney and Cheri did not affirmatively raise the continuing-tort doctrine prior to the jury rendering their verdict, we conclude that they waived this contention. *See Woods*, 769 S.W.2d at 518 ("A party seeking to avail itself of the discovery rule must therefore plead the rule, either in its original petition or in an amended or supplemented petition in response to defendant's assertion of the defense as a matter in avoidance."); *Dickson Constr., Inc.*, 960 S.W.2d at 851; *see also Thompson*, 2001 Tex. App. LEXIS 706, at **10-11.

However, even if we were to conclude that Rodney and Cheri preserved their continuing-tort-doctrine contention, we cannot say that the continuing-tort doctrine applies in this case because the alleged wrongful conduct involved discrete financial transactions—all of which have a clear beginning and ending. The fact that multiple transactions that constituted a breach of Larry's fiduciary duty owed to Bessie occurred does not necessarily convert the individual transactions into one continuing tort. *See Dickson Constr., Inc.*, 960 S.W.2d at 851; *Upjohn Co.*, 885 S.W.2d at 543; *see also Christerson*, 2017 Tex. App. LEXIS 3831, at *18. This conclusion is supported by the jury's damages award that was significantly less than the purported $250,000 claimed by Rodney and Cheri. In other words, by awarding Rodney and Cheri significantly less than $250,000 in damages, we can imply that the jury did not determine that every one of Larry's transactions with Bessie's credit card was violative of his fiduciary duty. *See Rosemond v. Al-Lahiq*, 331 S.W.3d 764, 767 (Tex. 2011) (stating that any necessary findings of fact will

be implied in support of the trial court's judgment) (citing *Holt v. Atherton Indus., Inc. v. Heine*, 835 S.W.2d 80, 83 (Tex. 1992))). Accordingly, based on the foregoing, we cannot say that the trial court erred by failing to award Rodney and Cheri the damages associated with conduct between November 19, 2007 and February 11, 2009. *See id.* (noting that, in the absence of findings of fact or conclusions of law, a trial court's judgment will be upheld on any theory finding support in the evidence). We overrule their sole issue on appeal.

III. CONCLUSION

We affirm the judgment of the trial court.

AL SCOGGINS
Justice

Before Chief Justice Gray,
Justice Davis, and
Justice Scoggins
*(Chief Justice Gray concurring with a note)
Affirmed
Opinion delivered and filed June 6, 2018
[CV06]

*(Chief Justice Gray concurs in the judgment to the extent it affirms the trial court's judgment. A separate opinion will not issue. He does, however, provide the following note. On the very narrow issue presented as to whether the trial court erred by its refusal to apply the continuing tort doctrine, I would simply hold the court did not err because the doctrine is not recognized as a proper means to toll the accrual of a cause of action in Texas. Nothing in the conditional language of the Court's opinion should be construed as implying otherwise.)


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