Affirm and Opinion Filed May 29, 2020

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-19-00498-CV

BENNY WREN, JR., Appellant
V.
ANNETTE FOBBS, Appellee

On Appeal from the 134th Judicial District Court
Dallas County, Texas
Trial Court Cause No. DC-19-01524

MEMORANDUM OPINION

Before Justices Schenck, Molberg, and Nowell
Opinion by Justice Molberg

On January 30, 2019, Benny Wren, Jr. sued Annette Fobbs and a third party for personal injuries he alleges he suffered in a January 20, 2017 automobile accident in which he was Fobbs's passenger. Fobbs answered and later moved for summary judgment, asserting Wren's negligence claim was barred by limitations. The trial court granted the motion and severed Wren's claim against Fobbs from his claim against the other defendant, making the court's order final and appealable. Wren appeals, arguing the limitations period was tolled and that the judgment in Fobbs's

favor was in error. We affirm in this memorandum opinion. *See* TEX. R. APP. P. 47.4.

BACKGROUND

On January 30, 2019, Wren filed an original petition asserting that he was injured in an automobile accident on January 20, 2017 as a result of the negligence of Fobbs and a third party, Leona Halfacre. According to Wren's petition, he was a front seat passenger in a vehicle being driven by Fobbs, and as she pulled away from a stop sign and into an intersection, Halfacre struck the vehicle he and Fobbs were in, injuring him. Wren asserted Fobbs and Halfacre were both negligent, and he sought damages from both for his injuries.[1]

In Fobbs's answer, she generally denied Wren's claim and asserted a limitations defense, stating that his claim is barred by the two-year statute of limitations in section 16.003 of the civil practice and remedies code. *See* TEX. CIV. PRAC. & REM. CODE § 16.003(a).

Wren then amended his petition, asserting that limitations were tolled "to the extent and for the duration that the individual defendants were absent from Texas," citing section 16.063 of the civil practice and remedies code. *See* TEX. CIV. PRAC. & REM. CODE § 16.063 ("The absence from this state of a person against whom a

[1] In the order at issue, the trial court severed Wren's claim against Fobbs from his claim against Halfacre. That severance, and Wren's claims against Halfacre, are not at issue in this appeal.

cause of action may be maintained suspends the running of the applicable statute of limitations for the period of the person's absence.")

Fobbs then filed a traditional motion for summary judgment, asserting Wren's claim was barred by the two-year limitations period in section 16.003 and that the limitations period was not tolled as Wren alleged in his petition. *See* TEX. CIV. PRAC. & REM. CODE §§ 16.003(a), .063. Fobbs attached the parties' pleadings and certain evidence to her motion, including a notarized affidavit Fobbs signed on March 6, 2019 stating, in part, that she is a Texas resident and has continuously resided in Texas from "on the day of the accident and ever since that day." She also stated, "I have not absented myself from the territorial boundaries of the state of Texas since the date of the accident except for brief periods [totaling] a period of 16 days, when I traveled out of the state on vacations."[2] Finally, she stated, "I have at all times been amenable to the courts of the state of Texas for service of process on me at my residence in Lancaster, Texas."

Wren filed a response to Fobbs's motion. He did not submit any evidence with his response and thus presented no evidence disputing the evidence Fobbs had presented. Wren argued that the limitations period was tolled under section 16.063 of the civil practice and remedies code because of the sixteen days Fobbs was absent

[2] Fobbs listed the specific dates she was outside the state during the limitations period, but those specific dates are unimportant here.

from the state. *See* TEX. CIV. PRAC. & REM. CODE § 16.063. Thus, he argued his claim was timely and that summary judgment was inappropriate.

Fobbs filed a reply, arguing that Wren's arguments were contrary to various cases, including a prior case from this court. *See Liptak v. Brunson*, 402 S.W.3d 909, 913 (Tex. App.—Dallas 2013, no pet.).

On April 2, 2019, the trial court granted Fobbs's motion, ordered that Wren take nothing on his claim against Fobbs, and severed Wren's claim against her from his claim against Halfacre. As a result, the judgment on Wren's claim against Fobbs became final, and Wren timely appealed.

ANALYSIS

Based on the summary judgment briefing and evidence, the following facts are undisputed: (1) the accident occurred on January 20, 2017, (2) Wren sued Fobbs on January 30, 2019, more than two years later, (3) Fobbs is a Texas resident and continuously resided in Texas from the date of the accident until after the date Wren sued her, and (4) in the two-year period after the accident, Fobbs was outside Texas for brief vacation periods totaling 16 days.

To prevail on a traditional motion for summary judgment, a movant must conclusively establish there is no genuine issue of material fact and, therefore, the movant is entitled to judgment as a matter of law. TEX. R. CIV. P. 166a(c). A matter is conclusively established if ordinary minds cannot differ as to the conclusion to be

drawn from the evidence. *Triton Oil & Gas Corp. v. Marine Contractors & Supply, Inc.*, 644 S.W.2d 443, 446 (Tex. 1982).

If the movant establishes its right to judgment as a matter of law, then the burden shifts to the nonmovant to either present evidence raising a genuine issue of material fact by producing more than a scintilla of evidence regarding the challenged element, or conclusively prove all elements of an affirmative defense. *Neely v. Wilson*, 418 S.W.3d 52, 59 (Tex. 2013); *M.D. Anderson Hosp. & Tumor Inst. v. Willrich*, 28 S.W.3d 22, 23 (Tex. 2000) (per curiam). More than a scintilla of evidence exists when reasonable and fair-minded jurors could differ in their conclusions in light of all of the summary judgment evidence. *Goodyear Tire & Rubber Co. v. Mayes*, 236 S.W.3d 754, 755 (Tex. 2007) (per curiam).

When a movant seeks summary judgment based on limitations, the movant bears the burden of negating the applicability of any tolling or suspension statute raised by the nonmovant. *Zale Corp. v. Rosenbaum*, 520 S.W.2d 889, 891 (Tex. 1975) (per curiam). If a movant does so, the burden shifts to the nonmovant to present evidence raising a fact issue in avoidance of limitations. *See KPMG Peat Marwick v. Harrison Cnty. Hous. Fin. Corp.*, 988 S.W.2d 746, 748 (Tex. 1999). However, if the movant fails to do so, the nonmovant need not respond or present any evidence. *See Amedisys, Inc. v. Kingwood Home Health Care, LLC*, 437 S.W.3d 507, 511 (Tex. 2014).

Wren raises two issues, arguing first that the trial court erred in granting summary judgment because section 16.063 tolled the limitations period for sixteen days according to the plain meaning of the statute and, second, that the court improperly applied law involving non-residents to Fobbs, a resident.

Although Wren presents this as two separate issues, we are, in reality, faced with a single, dispositive question: does section 16.063 of the Texas Civil Practice and Remedies Code toll the statute of limitations against a Texas resident for each day that the resident is beyond our state's borders?

We have answered this question twice before, and for the third time, we answer it, "No." *See Liptak v. Brunson*, 402 S.W.3d 909, 913 (Tex. App.—Dallas 2013, no pet.); *Weeks v. Cockram*, 05-12-01379-CV, 2014 WL 1512470, *2 (Tex. App.—Dallas Apr. 18, 2014, no pet.) (mem. op.) (citing *Liptak*, 402 S.W.3d at 913).

Recognizing that *Liptak* and *Weeks* do not support his position, Wren argues we should consider the issue en banc[3] and overturn those decisions, an outcome he considers justified when, in his view, our later decisions in *Shuma v. Power*, No. 05-14-00623-CV, 2015 WL 4141693 (Tex. App.—Dallas July 9, 2015, no pet.) (mem. op.) and *Henry v. Zahra*, No. 05-14-00616-CV, 2015 WL 2197964, at *4 (Tex. App.—Dallas May 11, 2015, no pet.) (mem. op.) are inconsistent with our earlier

[3] En banc consideration is not favored, and a "vote to determine whether a case will be heard or reheard en banc need not be taken unless a justice of the court requests a vote." *See* TEX. R. APP. P. 41.2(c). No such request has been made here.

opinions in *Liptak* and *Weeks*. We reject Wren's assertion and conclude neither *Shuma* nor *Henry* support his position on this record.

Here, in contrast to the summary judgment records in *Shuma* and *Henry*, Fobbs addressed Wren's tolling defense in her motion and presented the evidence necessary to conclusively establish her limitations defense. *See Shuma*, 2015 WL 4141693, at *2–4 (reversing summary judgment when motion did not address nonmovant's assertion that limitations were tolled and when record lacked any evidence establishing movant as a Texas resident at the time of the accident who had only brief, intermittent absences from the state since that date and who was otherwise amenable to service of process); *Henry*, 2015 WL 2197964, at *4 (reversing summary judgment when movant did not challenge nonmovant's tolling defense in his motion and offered no summary judgment evidence regarding his presence or absence from state during the limitations period). Based on the record before us, as we did in *Weeks*, we decline Wren's invitation to depart from *Liptak* and find its reasoning to apply with equal force here. *See Weeks*, 2014 WL 1512470, at *2.[4]

Wren also urges us to re-examine and reject the case upon which both *Liptak* and *Weeks* rely: *Zavadil v. Safeco Ins. Co. of Illinois*, 309 S.W.3d 593, 595–96 (Tex. App.—Houston [14th Dist.] 2010, pet. denied). Wren argues we should instead

[4] "We may not overrule a prior panel decision of this Court absent an intervening change in the law by the legislature, a higher court, or this Court sitting en banc." *MobileVision Imaging Servs. L.L.C. v. Lifecare Hosps. of North Texas, L.P.*, 260 S.W.3d 561, 566 (Tex. App.—Dallas 2008, no pet.).

apply *Medina v. Tate*, 438 S.W.3d 583, 590 (Tex. App.—Houston [1st Dist.] 2013, no pet.). While *Medina* noted *Zavadil*'s reliance on *Ashley v. Hawkins*, 293 S.W.3d 175, 179 (Tex. 2009) and *Kerlin v. Sauceda*, 263 S.W.3d 920, 927–28 (Tex. 2008) in concluding that a resident defendant's absences from the state did not toll the limitations period under section 16.063, *Medina* rejected *Zavadil*'s reasoning and relied on its own prior precedent in concluding that summary judgment was inappropriate based on the record in that case. *Medina*, 438 S.W.3d at 587, 590–91 (movant failed to rebut nonmovant's claim that limitations period was tolled). The record here is distinguishable, as Fobbs's motion responded to and included evidence to rebut Wren's assertion that the limitations period was tolled.

Recently, another of our sister courts also applied *Zavadil*'s reasoning. *See Martin-de-Nicolas v. Octaviano*, No. 03-19-00160-CV, 2020 WL 913046, at *2–3 (Tex. App.—Austin Feb. 26, 2020, no pet.) (mem. op.) ("one who is subject to personal jurisdiction in Texas courts, and amenable to service of process, is not 'absent' from the state for the purposes of section 16.063.")

Based on the record here, summary judgment in Fobbs's favor was proper.

CONCLUSION

We overrule both of Wren's issues and affirm the trial court's judgment.

/Ken Molberg/
KEN MOLBERG
JUSTICE

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JUDGMENT

BENNY WREN, JR., Appellant	On Appeal from the 134th Judicial District Court, Dallas County, Texas
No. 05-19-00498-CV V.	Trial Court Cause No. DC-19-01524.
ANNETTE FOBBS, Appellee	Opinion delivered by Justice Molberg. Justices Schenck and Nowell participating.

In accordance with this Court's opinion of this date, the judgment of the trial court is **AFFIRMED**.

It is **ORDERED** that appellee ANNETTE FOBBS recover her costs of this appeal from appellant BENNY WREN, JR.

Judgment entered this 29th day of May 2020.