Affirmed and Opinion filed November 18, 1999.

In The

Fourteenth Court of Appeals

NO. 14-98-00047-CV

STEPHEN G. HUNT, EXECUTOR OF THE ESTATE OF GELLERINA NAVARRO, DECEASED, Appellant

V.

ISMAEL AVINA, SR. AND ELDA N. AVINA, Appellee

On Appeal from the 270th District Court
Harris County, Texas
Trial Court Cause No. 96-61698

O P I N I O N

Appellant, Stephen G. Hunt, executor for the estate of Gellerina Navarro, deceased, brought a trespass to try title action against Elda and Ismael Avina ("the Avinas"). Following a bench trial, the trial judge entered a judgment that Hunt take nothing. In twenty points of error, he contends the trial court erred in: (1) entering certain findings of fact; (2) failing to enter certain findings of fact; (3) entering its conclusions of law; (4) failing to make certain conclusions of law; (5) allowing a witness to testify when she was not properly designated; and (6) entering a judgment not supported by the pleadings. In one cross-point,

the Avinas contend the trial court erred by excluding evidence that Navarro intended a gift. We affirm.

BACKGROUND

Navarro's husband died in 1987, and she received a sum of money as the recipient of his life insurance policy. She asked her daughter, Elda Avina, to use those proceeds to buy a house in which she could live with the Avinas and the Avinas' children. Elda opened an account in both Navarro's and her name. At the closing for the home's purchase, Elda wrote a check for the entire purchase price. Title to the home was placed in the Avinas' names. Although the Avinas did not contribute any portion of their funds toward the purchase price, they did pay taxes, insurance, and homeowner's and maintenance fees since acquiring the house. In addition, Elda helped care for her mother and provided regular transportation to the beauty shop and grocery store.

Navarro was diagnosed with cancer in 1995, and required more care than Elda could provide. Specifically, Elda was not able to provide transportation to her mother's almost daily doctor's appointments. Also, Elda was concerned because Navarro was alone during the day. Because Elda feared her children would come home from school and find Navarro dead, she insisted Navarro obtain home health care or move in with another of Navarro's children; in 1996, Navarro moved out of the Avina home. Thereafter, Navarro filed the present suit against the Avinas, seeking title to the property. Navarro died the following year. Her attorney (Hunt) was named the executor of her estate, and he continued in her stead to pursue the lawsuit. Following a bench trial, the trial court granted a take nothing judgment against Hunt.

STATUTE OF LIMITATIONS

The parties dispute which statute of limitations applies in the present case, and Hunt brings a number of points of error germane to the limitations issue. In point of error three, Hunt contends the trial court erred in making finding of fact number four, which stated that

"Defendants properly answered and affirmatively pled the statute of frauds and limitations defenses." In his nineteenth point of error, he argues the trial court erred in failing to conclude Navarro held superior title because the Avinas did not specifically plead or prove a three or five year adverse possession. He asserts in his sixth point of error that the trial court erred in finding that Navarro's cause of action accrued on or about June 5, 1987. Finally, he complains in his sixteenth point of error that the court erred in its conclusion of law number one, that Navarro's causes of action are time-barred by all applicable limitations.

Texas Rules of Civil Procedure 94 requires a defendant to set forth affirmatively the defense of statute of limitations. *See* TEX. R. CIV. P. 94. The Avinas satisfied their burden by generally pleading the statute of limitations defense in their answer.[1] Consequently, we overrule Hunt's third and nineteenth points of error.

Next, we turn to the parties' disagreement about which statute of limitations applies. Hunt asserts that the only applicable statutes of limitations are the 3 and 5 year limitations periods set forth in Texas Civil Practices and Remedies Code sections 16.024[2] and 16.025,[3]

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[1] Although Hunt contends the Avinas were required to plead more specifically, namely that the three or five year statutes of limitations applicable to an adverse possession claim apply, his contention is without merit. First, the Avinas would have no reason to plead adverse possession statutes of limitation, as they are the holders of legal title. An adverse possession claim is made by a party who is *not* the holder of legal title but claims a right to it based on his possession of the property for a period of time. *See, e.g.*, *Clements v. Corbin*, 891 S.W.2d 276, 279 (Tex. App.—Corpus Christi 1994, writ denied); *see also* TEX. CIV. PRAC. & REM. CODE ANN. § 16.034(a) (Vernon Pamph. 1996) (allowing attorney's fees to a prevailing party in a suit for possession of real property "between a person claiming under record title . . . and one claiming by adverse possession . . ."). Second, if Hunt desired more specificity regarding the Avinas' affirmative defense, he had the onus to specially except to their answer. *See* TEX. R. CIV. P. 91; *J.K. & Susie L. Wadley Research Inst. & Blood Bank v. Beeson*, 835 S.W.2d 689, 693 (Tex. App.—Dallas 1992, writ denied).

[2] Section 16.024 is entitled "Adverse Possession: Three Year Limitations Period." It requires a person to bring suit to recover real property held by another in peaceable and adverse possession under title or color of title not later than three years after the day the cause of action accrues. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 16.024.

[3] Section 16.025 is entitled "Adverse Possession: Five Year Limitations Period." It requires a person to bring suit not later than five years after accrual to recover real property held in peaceable and adverse (continued...)

respectively. The Avinas assert the applicable statute of limitations is found in the Civil Practices and Remedies Code's residual limitations statute, section 16.051.[4]

Regardless of which party is correct, if there is sufficient evidence to support the trial court's finding that Navarro's cause of action accrued on June 5, 1987, her action would be time barred under any applicable limitations period. Accordingly, we consider whether the finding is supported by sufficient evidence.

An appellate court may not disregard a trial court's findings of fact if the record contains some evidence to support them. *See Mort Keshin & Co., Inc. v. Houston Chronicle Publ'g Co.*, 992 S.W.2d 642, 645 (Tex. App.—Houston [14th Dist.] 1999, no pet. h.). Findings of fact in a case tried to the court have the same weight as a jury's answers to questions in the charge. *See Amador v. Berrospe*, 961 S.W.2d 205, 207 (Tex. App.—Houston [1st Dist.] 1996, writ denied). Findings are binding on this court only if supported by evidence of probative force. *See id.* They are not conclusive, however, when a complete statement of facts appears in the record. *See id.*

The trial court's findings of fact are reviewable for legal and factual sufficiency of the evidence to support them. *See id.* The same standards apply in reviewing the legal or factual sufficiency of the evidence supporting a jury's answer to a jury question. *Id.* In reviewing the legal sufficiency of the evidence, we consider only the evidence and inferences that, when viewed in their most favorable light, tend to support the finding, and disregard all evidence and inferences to the contrary. *Leitch v. Hornsby*, 935 S.W.2d 114, 118 (Tex. 1996). If there is any evidence of probative force, we must overrule the point and uphold the finding. *Id.* In reviewing the factual sufficiency of the evidence, we

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[3] (...continued)
possession by another who (1) cultivates, uses, or enjoys the property; (2) pays the applicable taxes on the property; and (3) claims the property under a duly registered deed. *See id.* § 16.025.

[4] "Every action for which there is no express limitations period, except an action for the recovery of real property, must be brought not later than four years after the day the cause of action accrues." *Id.* § 16.051.

examine all of the evidence, both the evidence that supports the finding and the evidence that controverts the finding. *See Maritime Overseas Corp. v. Ellis*, 971 S.W.2d 402, 406–07 (Tex. 1998). We will set aside the finding only if it is so against the great weight and preponderance of the evidence that it is clearly wrong and manifestly unjust. *Id.* at 407.

There is some evidence in the record that Navarro understood at the time of the closing – approximately June of 1987 – that the house was in the Avinas' name. Stephanie Garcia, the Avinas' daughter, testified that Navarro was present at the closing on the property and saw the deed. Ismael Avina (Elda's husband) testified that, at the closing, he made Navarro aware that record title was in his name. Elda Avina testified that she made Navarro aware at the closing that the title to the property was being taken in the Avinas' names. An acquaintance, Luby Fernandez, testified that sometime between 1987 and 1989, Navarro told her the Avinas owned the house. Ismael's father, Antonio Avina, testified that in 1987, Navarro said the house belonged to the Avinas. This is some evidence of probative force that Navarro knew in 1987 that title was in the Avinas' name and, therefore, her causes of action accrued at that time. Accordingly, Hunt's legal sufficiency challenge must fail.

Turning to the factual sufficiency, Hunt offered evidence that Navarro's causes of action could not have accrued in 1987 because she did not know until later that title was in the Avinas' names. Ophelia Figueroa, Navarro's daughter, testified that she showed her mother the deed in 1996 and that Navarro was very surprised that the house was in the Avinas' names. Isabel Serrano, another daughter of Navarro's, testified that in 1987, Navarro said the house was Navarro's, and in 1996, when Navarro saw the deed, she was shocked, opened her eyes wide, and shook her head. Mary Martinez, a neighbor of Navarro's, testified that Navarro told her in 1987 that the house was Navarro's. Esther Ramirez, Navarro's sister-in-law, testified that after Navarro moved out of the house, Navarro told her the house was in Elda's name but that Navarro did not know at first that the house was not in Navarro's name. Navarro's son, Rudy, testified that Navarro found

out in 1996 that title to the house was in the Avinas' name and not her name. Despite this evidence, finding of fact number six is not so against the great weight and preponderance of the evidence as to be clearly wrong and unjust.

Because we find sufficient evidence to support the finding that Navarro's causes of action accrued in June of 1987, her claims are time barred under any applicable limitations period. We overrule Hunt's third point of error, and, having determined that the trial court drew conclusion of law number one from the facts, we also overrule his sixteenth point of error. *See Operation Rescue-Nat'l v. Planned Parenthood*, 937 S.W.2d 60, 72 (Tex. App.—Houston [14th Dist.] 1996), *aff'd as modified*, 975 S.W.2d 546 (Tex. 1998).

REMAINING POINTS OF ERROR

Because we hold that all Navarro's actions were barred by limitations, we need not address any remaining points of error, as any error asserted therein could not have caused the rendition of an improper judgment. *See* TEX. R. APP. P. 44.1(a).

Accordingly, we affirm the judgment of the trial court.

/s/ Wanda McKee Fowler
Justice

Judgment rendered and Opinion filed November 18, 1999.
Panel consists of Justices Yates, Fowler, and Frost.
Do Not Publish—TEX. R. APP. P. 47.3(b).