Affirmed and Opinion filed December 9, 1999.

In The

Fourteenth Court of Appeals

———————————

NO. 14-98-01412-CV

———————————

EDWARD CROFTON, ET AL., Appellants

V.

AMOCO CHEMICAL CO., ET AL., Appellees

On Appeal from the 10th District Court
Galveston County, Texas
Trial Court Cause No. 95CV1352-A

O P I N I O N

Appellants appeal the trial court's granting of partial summary judgment on the basis of statute of limitations in favor of appellees.[1] We affirm.

---

[1] A settlement agreement was reached by all but four of the appellants, John Wilson, Coy Wilson, Martin Butski, and Lavern Bonin, with the following appellees: Occidental Chemical Corporation, Velsicol Chemical Corporation, Borden, Inc., E.I. DuPont de Nemours and Company, Chromalloy American Corporation, Sun Chemical Corporation, Union Carbide Corporation, Texas City Terminal Railway Company, Texas City Refining, Inc., Southern Pacific Transportation Company, now merged into and known as Union Pacific Railroad Company, Quantum Chemical Corporation, Meklo, Inc., Vacuum Tanks, Inc., and JOC Oil

(continued...)

Background

Appellants currently are, or have been, residents of the Bayou Vista and Omega Bay Subdivisions and the Sun Flower Mobile Home Park, or employees of Central Freight Lines, all located adjacent to, or in the vicinity of, the Motco Superfund Site ("Site") in La Marque. Appellants assert that appellees were owners, occupiers, and/or users of the property on which the Site is located, who collectively dumped hazardous wastes into several open-air, unlined pits at the Site.

Waste disposal activities at the Site began in the late 1950's with efforts to reclaim residual materials from local industries. The Site was used later for storage and disposal. In 1968, the City of La Marque passed an ordinance prohibiting open-pit disposal sites within city limits and requested that the Texas Water Quality Board cancel the permit to operate the property as a disposal site. In 1976, the Water Quality Board issued an enforcement order canceling the operating permit and ordered that the property be cleaned up.

On September 8, 1983, the United States Environmental Protection Agency designated the property as a hazardous waste site on the National Priorities List. *See* Amendment to National Oil and Hazardous Substance Contingency Plan; National Priorities List, 48 Fed. Reg. 40658 (1983). In 1986, the United States government sued numerous parties in the United States District Court for the Southern District of Texas, Galveston Division, pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9601 *et seq*. (1995 & Supp. 1999) ("CERCLA"), for the recovery of costs incurred by the federal government in response to releases and threatened releases of hazardous substances from the Site. On October 20, 1987, the district court entered a Partial Consent Decree, ordering the formation of the Motco Site Trust Fund by the settling defendants and remediation of the Site. *See United States v. U.T. Alexander*, No. G-86-267 (S.D. Tex. Oct. 20, 1987).

---

[1] (...continued)
Exploration Company, Inc. All appellants still have claims against the following appellees: Monsanto Company, Sterling Chemicals, Inc., State Street Bank and Trust Company of Missouri, N.A., as Successor Trustee for Mercantile Bank St. Louis, N.A., Trustee for MOTCO Site Trust Fund, Amoco Oil Company, Amoco Chemical Company, Amoco Gas Company, Amoco Production Company, Malone Trucking Company, and Marathon Petroleum Company.

Appellants claim that until at least 1996, appellees were dumping, emitting, aerating, depositing, temporarily and permanently storing, transporting, and mixing chemicals on a continuous basis. Appellants allege that as a result of these activities, hazardous materials have been emitted into the air and have migrated to appellants' property.

On December 8, 1995, appellants brought suit for personal injuries and property damage resulting from exposure to the hazardous wastes and chemicals dumped at the Site.[2] Appellees moved for partial summary judgment on the basis that appellants' claims are barred by the statute of limitations. Finding that appellants had constructive notice of their injuries, the trial court granted summary judgment on appellants' claims for public nuisance, private nuisance, nuisance *per se*, and trespass, but specifically excluded from its order any claims based upon temporary injuries to appellants' property within two years of filing suit.

Appellants bring the following issues on appeal: (1) whether appellants had constructive notice of the their causes of action more than two years prior to filing suit, (2) whether the trial court erred by assuming, as true, uncontroverted facts alleged by an interested witness, and (3) whether minor appellants' claims should be barred by the statute of limitations.[3]

Standard of Review

---

[2] Additional plaintiffs were joined on March 18, 1996, November 27, 1996, and July 18, 1997.

[3] Appellants also asserted there had not been adequate time for discovery when appellees filed their motion for summary judgment. Appellants mistakenly based this contention on their belief that appellees had filed a "no-evidence" summary judgment pursuant to TEX. R. CIV. P. 166a(i). At oral argument, appellants conceded that appellees' motion for summary judgment was filed in accordance with TEX. R. CIV. P. 166a(c), and was not a "no-evidence" summary judgment. Because appellees moved for summary judgment pursuant to an affirmative defense, they had the burden of establishing all the elements of their defense such that there is no genuine issue of material fact. *See* TEX. R. CIV. P. 166a(c). Therefore, appellees' motion for summary judgment was correctly brought under Rule 166a(c). *See Moritz v. Bueche*, 980 S.W.2d 849, 856 (Tex. App.–San Antonio 1998, no pet.) (concluding that summary judgment based on affirmative defense is properly reviewed under traditional summary judgment standard rather than as a "no-evidence" summary judgment). We note a continuance for discovery is available under 166a(g). *See* TEX. R. CIV. P. 166a(g); *Levinthal v. Kelsey-Seybold Clinic, P.A.*, 902 S.W.2d 508, 510 (Tex. App.–Houston [1st Dist.] 1994, no writ). Appellants, however, have not raise this argument with the trial court or this court.

If the defendant moves for summary judgment on the basis of an affirmative defense such as limitations, it has the burden to prove conclusively all the elements of the affirmative defense as a matter of law. *See KPMG Peat Marwick v. Harrison County Fin. Corp.*, 988 S.W.2d 746, 748 (Tex. 1999); *Velsicol Chem Corp. v. Winograd*, 956 S.W.2d 529, 530 (Tex. 1997). The defendant must prove when the cause of action accrued and negate the discovery rule, if applicable, by proving as a matter of law that there is no genuine issue of fact regarding when the plaintiff discovered or should have discovered the nature of the injury. *See KPMG Peat Marwick*, 988 S.W.2d at 748; *Diaz v. Westphal*, 941 S.W.2d 96, 97-98 (Tex. 1997). Whether the plaintiff knew or should have known of an injury is generally a question of fact for the jury, unless the defendant establishes that there is no genuine issue of material fact establishing that the plaintiff knew or should have known of the injury. *See Houston Endowment, Inc. v. Atlantic Richfield Co.*, 972 S.W.2d 156, 160 (Tex. App.–Houston [14th Dist.] 1998, no pet.).

An action for damages to real property must be brought within two years of the injury. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 16.003(a) (Vernon Supp. 1999); *Velsicol Chem. Corp.*, 956 S.W.2d at 530 (nuisance); *Loyd v. ECO Resources, Inc.*, 956 S.W.2d 110, 126 (Tex. App.–Houston [14th Dist.] 1997, no pet.) (trespass). Generally, a cause of action accrues when a wrongful act causes some legal injury, even if the fact of injury is not discovered until later, and even if all resulting damages have not yet occurred. *See Murphy v. Campbell*, 964 S.W.2d 265, 270 (Tex. 1997). When a cause of action accrues is a question of law for the court. *See Loyd*, 956 S.W.2d at 126; *Ross*, 892 S.W.2d at 131.

The characterization of whether an injury to land is permanent or temporary is determined by the continuum of the injury. *See Bayouth v. Lion Oil Co.*, 671 S.W.2d 867, 868 (Tex. 1984). Permanent injuries to land result from an activity of such a character and existing under such circumstances that it will be presumed to continue indefinitely; the injury must be constant and continuous, not occasional, intermittent, or recurrent. *See id.*; *Loyd*, 956 S.W.2d at 126. An action for permanent injury to land accrues upon discovery of the first actionable injury and not on the date when the extent of the damages

to the land is fully ascertainable. *See Bayouth*, 671 S.W.2d at 868; *Cooke v. Maxam Tool & Supply, Inc.*, 854 S.W.2d 136, 139 (Tex. App.–Houston [14th Dist.] 1993, no writ).

Temporary injuries are those which are not continuous, but instead are sporadic and contingent upon some irregular force such as rain. *See Bayouth*, 671 S.W.2d at 868; *Kraft v. Langford*, 565 S.W.2d 223, 227 (Tex. 1978). Because temporary damages are transient in nature, an action for this type of injury to land may be brought for injuries sustained during the two years prior to filing the suit, and only those injuries occurring more than two years prior to suit are barred. *See Yancy v. City of Tyler*, 836 S.W.2d 337, 341 (Tex. App.–Tyler 1992, writ denied); *City of Odessa v. Bell*, 787 S.W.2d 525, 530 (Tex. App.–El Paso 1990, no writ); *Gulf Coast Sailboats, Inc. v. McGuire*, 616 S.W.2d 385, 387 (Tex. Civ. App.–Houston [14th Dist.] 1981, writ ref'd n.r.e.).

In their motion for summary judgment, appellees distinguished appellants' claims for temporary damages, or specific incidents of injury, to appellants' property from permanent damages, or location of the Site. With respect to their claim for temporary injuries, the trial court granted summary judgment only on appellants' claims for permanent injuries and temporary injuries occurring more than two years prior to filing suit. At issue, therefore, are appellants' claims for permanent property damage and temporary property damage occurring more than two years prior to filing suit.

Constructive Notice

Under the theory of constructive notice, a person is deemed to have actual knowledge of certain matters. *See HECI Exploration Co. v. Neel*, 982 S.W.2d 881, 887 (Tex. 1998). Constructive notice creates an irrebuttable presumption of actual notice. *See id.*; *Mooney v. Harlin*, 622 S.W.2d 83, 85 (Tex. 1981).

Appellees assert appellants had constructive notice because of the widespread publicity of the Motco Site. In support of this assertion, appellees rely on *Hues v. Warren Petroleum Co.*, 814 S.W.2d 526 (Tex. App.–Houston [14th Dist.] 1991, writ denied). In *Hues*, the plaintiffs sued in 1985 for claims of negligence, nuisance, and trespass based on gas leaks that occurred in 1980 and the disposal of brine which began in 1956. *See id.* at 528. Attached to the motion for summary judgment were several

articles concerning the 1980 gas leak. *See id*. The *Hues* court stated, "[t]he news media gave the leaks great deal of coverage and there were so many stories in the newspapers that appellants were clearly put on notice of the date the gas leaks occurred." *Id*.

Attached to appellees' motion for summary judgment, is an affidavit of an attorney for appellees with several newspaper articles regarding the Site, dated as early as January 5, 1980. These articles are from area newspapers, including *The Houston Chronicle*, *The Houston Post*, *The Daily Sun*, *The League City News*, *The Dickenson News*, and *The Texas City Sun*.

Appellants contend that the newspaper articles are hearsay and appellees failed to provide the proper foundation for admitting them. A statement is not hearsay when it is offered for a purpose other than to prove the truth of the matter asserted in the statement. *See* TEX. R. EVID. 801(d); *Closs v. Goose Creek Consol. Indep. Sch. Dist*., 874 S.W.2d 859, 869 n.6 (Tex. App.–Texarkana 1994, no writ). Because the articles are not presented as evidence to prove the truth of the matter asserted, but merely to show notice of the Site, they do not constitute hearsay. *See City of Austin v. Houston Lighting & Power Co*., 844 S.W.2d 773, 791 (Tex. App.–Dallas 1992, writ denied) (stating newspaper articles not barred by hearsay rule when introduced to show notice of the matters contained in the articles) *see also Swate v. Schiffers*, 975 S.W.2d 70, 77-78 (Tex. App.–San Antonio 1998, pet. denied). Moreover, under Rule of Evidence 902(6), newspaper articles do not require authentication. *See* TEX. R. EVID. 902(6); *Hardy v. Hannah*, 849 S.W.2d 355, 359 (Tex. App.–Austin 1992, writ denied); *Donaldson v. Taylor*, 713 S.W.2d 716, 717 (Tex. App.–Beaumont 1986, no writ).

Several appellants, in affidavits submitted in response to the motion for summary judgment, state they do not read any newspapers and they are not aware of any media coverage regarding the clean up of the Site. This proof does not controvert the fact that the Site received widespread notice. Under *Hues*, appellants were on notice of the possible contamination of their property from the Site by the early 1980's, regardless of whether they had actually seen such stories in the media. *See Hues*, 814 S.W.2d at 528; *see also United Klans of Am. v. McGovern*, 621 F.2d 152, 154 (5th Cir. 1980) (finding plaintiffs charged with knowledge of occurrence of events which receive widespread publicity); *Littlewolf v.*

Hodel, 681 F. Supp. 929, 943 (D.D.C. 1988) (finding plaintiffs deemed to be on notice of change in law because of numerous news reports and great public debate); *Shivers v. Texaco Exploration & Prod., Inc.*, 965 S.W.2d 727, 735 (Tex. App.–Texarkana 1998, pet. denied) (finding story in a local newspaper provided constructive notice of claim).[4]

Discovery Rule

One exception to the general rule for determining when a cause of action accrues is the "discovery rule." *See S.V. v. R.V.*, 933 S.W.2d 1, 4 (Tex. 1996). The discovery rule tolls the statute until the plaintiff has knowledge of facts, which through reasonable diligence, would lead to the discovery of the injury, rather than discovery of the full extent of the damages. *See Cornerstone Mun. Util. Dist. v. Monsanto*, 889 S.W.2d 570, 576 (Tex. App.–Houston [14th Dist.] 1994, writ denied); *Bayou Bend Towers Council of Co-Owners v. Manhattan Constr. Co.*, 866 S.W.2d 740, 744 (Tex. App.–Houston [14th Dist.] 1993, writ denied).

For the discovery rule to apply, the nature of the injury must be inherently undiscoverable and the injury itself must be objectively verifiable. *See HECI Exploration Co.*, 982 S.W.2d at 886. With regard to the "inherently undiscoverable" element, accrual of the cause of action is delayed when the wrong and injury were unknown to the plaintiff because of the very nature and not because of the fault of the plaintiff. *See S.V.*, 933 S.W.2d at 7. An injury is inherently undiscoverable if it is by nature unlikely to be discovered within the prescribed limitations period despite due diligence. *See id.*

Appellants pleaded the discovery rule as a bar to the statute of limitations. At oral argument, however, appellants conceded that nuisance and trespass claims by their very nature are not inherently undiscoverable because each cause of action involves the interference with the use and enjoyment of their

[4] Appellees also submitted the consent decree rendered in the federal court litigation and the EPA's designation in the Federal Register of the Site as a hazardous site. Finding the newspaper articles sufficient to provide appellants constructive notice of their claims, it is not necessary to address appellees' other summary judgment proof.

property. We agree. *See Cain v. Rust Indus. Cleaning Servs., Inc.*, 969 S.W.2d 464, 470 (Tex. App.–Texarkana 1998, pet. denied) (stating trespass requires a showing of unauthorized physical entry onto the plaintiff's property); *Bible Baptist Church v. City of Cleburne*, 848 S.W.2d 826, 829 (Tex. App.–Waco 1993, writ denied) (defining nuisance as a condition which substantially interferes with the use and enjoyment of land causing unreasonable discomfort or annoyance to persons of ordinary sensibilities attempting to use and enjoy it).

Moreover, appellants' claims were not inherently undiscoverable due to the attention the Site received by media. *See Hues*, 814 S.W.2d at 529 (affirming the trial court's determination that the discovery rule was not applicable because the plaintiffs' claims were not inherently undiscoverable because of widespread publicity). Therefore, we find the discovery rule inapplicable in case.

Fraudulent Concealment

Appellants also pleaded fraudulent concealment as a defense to the statute of limitations. Fraudulent concealment is an affirmative defense to the statute of limitations. *See Weaver v. Witt*, 561 S.W.2d 792, 793 (Tex. 1977); *Work v. Duval*, 809 S.W.2d 351, 354 (Tex. App.–Houston [14th Dist.] 1991, no writ). Fraudulent concealment concerns whether, and for how long, the statute of limitations is tolled. *See Arabian Shield Dev. Co. v. Hunt*, 808 S.W.2d 577, 585 (Tex. App.–Dallas 1991, writ denied).

The defense of fraudulent concealment defers the accrural of the plaintiff's cause of action until he has discovered or should have discovered the fraud. *See Computer Assocs. Int'l, Inc. v. Altai, Inc.*, 918 S.W.2d 453, 455 (Tex. 1996). Unlike the discovery rule, deferral in the context of fraudulent concealment resembles equitable estoppel, precluding the defendant from relying on the statute of limitations as an affirmative defense. *See id.* at 456. The estoppel effect of fraudulent concealment ceases when the plaintiff learns of facts, conditions, or circumstances which would cause a reasonably prudent person to make an inquiry, which, if pursued, would lead to the discovery of the concealed cause of action. *See Borderlon v. Peck*, 661 S.W.2d 907, 909 (Tex. 1983). "Knowledge of such facts is in law equivalent to knowledge of the causes of action." *Id.*

On summary judgment, the plaintiff has the burden to present proof raising an issue of fact on fraudulent concealment. *See Houston Endowment, Inc.*, 972 S.W.2d at 163 (citing *Ryland Group, Inc. v. Hood*, 924 S.W.2d 120, 121 (Tex. 1996)). To defeat summary judgment based on fraudulent concealment, the plaintiff must establish (1) an underlying tort, (2) the movant's knowledge of the tort, (3) the movant's use of deception to conceal the tort, and (4) the non-movant's reasonable reliance on the tort. *See id.*; *Arabian Shield Dev. Co.*, 808 S.W.2d at 584.

Appellants contend appellees concealed the fact that their acts and omissions during remediation efforts caused odors and emissions to emanate from the Site. Since 1988, appellees have operated an air monitoring network at the Site, which was supposed to warn local residents about releases from the Site. According to appellants, appellees disseminated results from the monitoring network showing "zero emissions". Appellants argue they should be given the opportunity to show the monitoring network was designed to avoid detecting emissions and the "zero emissions" reports misled local residents into believing that the source of the odors was not the Site. Appellants claim that if the monitoring network had been properly designed, they would have realized earlier that the source of the emissions was the Site, not local industry.

Appellants state in their brief to this court that they have retained an expert, "who has formed the preliminary opinion that Appellees fraudulently concealed the level of emissions leaving the Motco site." The trial court entered summary judgment on December 5, 1997. The affidavit attached to appellants' brief was signed on April 3, 1998, four months after the hearing on motion for summary judgment. There is nothing in the record to indicate it was filed with the trial court. Because this affidavit was not before the trial court, this court may not consider it. *See Crossley v. Staley*, 988 S.W.2d 791, 794 (Tex. App.–Amarillo 1999, no pet.); *Farmer v. Ben E. Keith Co.*, 919 S.W.2d 171, 176 (Tex. App.–Fort Worth 1996, no writ); *Waddy v. City of Houston*, 834 S.W.2d 97, 101 (Tex. App.–Houston [1st Dist.] 1992, writ denied); *Marek v. Tomoco Co.*, 738 S.W.2d 710, 712 (Tex. App.–Houston [14th Dist.] 1987, no writ).

In opposition to the motion for summary judgment, appellants offered no proof of fraudulent concealment. Although appellants claim affirmative misrepresentations by appellees, they fail to cite to the record in support of these allegations. Mere allegations are insufficient to establish a fact issue on fraudulent concealment in a summary judgment proceeding. *See Work*, 809 S.W.2d at 354 (finding that bare allegation of fraudulent concealment did not present genuine issue of material fact precluding summary judgment).

Summary Judgment Proof

Appellants assert it was error for the trial court to rely on the affidavit of an interested witness, Norma J. Goldman, chairman of the Goldman Public Relations Company–the public information representative for the Motco Trust Group. A summary judgment may be based on the affidavit of an interested witness provided that it is clear, positive direct, otherwise credible, and could have been readily controverted. *See Ross v. Arkwright Mut. Ins. Co.*, 892 S.W.2d 119, 129 (Tex. App.–Houston [14th Dist.] 1994, no writ). Goldman's affidavit satisfies these requirements.

Appellants also claim the trial court erred in granting summary judgment because the court accepted the following facts, as set forth by appellees, as true: (1) numerous newspaper articles were written in local papers about the Motco Site, (2) public hearings about health and property hazards emanating from the Motco Site were held, (3) a repository of public information concerning the Motco Site was established at the College of the Mainland, Texas City, which contains numerous references to potential property and health hazards caused by the Motco Site, and (4) the Motco Site is located in a highly visible location at the intersection of two highways. Appellants never presented any proof to controvert appellees's summary judgment proof. In any event, we have already found the numerous newspaper articles covering the Site, and requiring no authentication, provided appellants notice of their claims.

Minor Plaintiffs

Appellants claim the trial court erred in granting summary judgment against those who were twenty years and one day of age or younger on the date of the filing of this suit. A minor plaintiff's disability tolls the statute of limitations. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 16.001 (Vernon Supp. 1999);

Hopkins v. Spring Indep. Sch. Dist., 706 S.W.2d 325, 326 (Tex. App.–Houston [14th Dist.] 1986), *aff'd*, 736 S.W.2d 617 (Tex. 1987). A matter in avoidance of the statute of limitations must affirmatively pleaded or it is deemed waived. *See Woods v. William M. Mercer, Inc.*, 769 S.W.2d 515, 518 (Tex. 1988) (discovery rule); *Lerma v. Pecorino*, 822 S.W.2d 831, 832 (Tex. App.–Houston [1st Dist.] 1992, no writ) (disability of imprisonment); *Dixon v. Henderson*, 267 S.W.2d 869, 873 (Tex. Civ. App.–Texarkana 1954, no writ) (disability of imprisonment). A review of appellants' third amended petition establishes that the legal disability was not pleaded in avoidance of the statute of limitations. At most, in the caption of the petition, certain plaintiffs are named as minors.

Moreover, a claim for a legal disability must be raised in any written response to a motion for summary judgment based on limitations. *See Marshall v. First Baptist Church of Houston*, 949 S.W.2d 504, 509 (Tex. App.–Houston [14th Dist.] 1997, no pet.) (observing legal disability of unsound mind was not presented in response to motion for summary judgment based on limitations); *Smith v. Erhard*, 715 S.W.2d 707, 709 (Tex. App.–Austin 1986, writ ref'd n.re.) (noting legal disability of unsound mind was not presented in response to motion for summary judgment based on limitations). Issues not expressly presented to the trial court by written motion, answer, or other response to a motion for summary judgment may not be considered on appeal as grounds for reversal. *See* TEX. R. CIV. PROC. 166a(c). In our review of the record, we find only the first page of appellants' response to the motion for summary judgment, without the remainder of the response. There is no indication that appellants raised this issue in response to the motion for summary judgment. Therefore, this contention is waived.

We find the trial court did not err in granting appellees' motion for summary judgment on the basis of the statute of limitations. Accordingly, the judgment of the trial court is affirmed.

/s/ Paul C. Murphy
Chief Justice

Judgment rendered and Opinion filed December 9, 1999.

Panel consists of Chief Justice Murphy and Justices Hudson and Edelman.

Do Not Publish — TEX. R. APP. P. 47.3(b).