Affirmed in Part, Reversed and Remanded in Part, Opinion Issued May 25, 2000, Withdrawn, and Opinion filed September 14, 2000.

In The

Fourteenth Court of Appeals

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NO. 14-98-01020-CV

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VICKROY E. STONE, Appellant

V.

EL PASO NATURAL GAS COMPANY, Appellee

On Appeal from the 164TH District Court
Harris County, Texas
Trial Court Cause No. 95-57505

S U B S T I T U T E D O P I N I O N

Appellant's motion for rehearing is granted, appellee's motion for rehearing is overruled, the opinion issued in this case on May 25, 2000, is withdrawn, and the following opinion is issued in its place.

Vickroy Stone appeals a summary judgment entered in favor of El Paso Natural Gas Company ("El Paso") on the ground that his claims were not barred by the statutes of limitations. We affirm in part and reverse and remand in part.

Background

Although the facts underlying the parties' dispute are far more numerous, those which are pertinent to this appeal can be summarized as follows. Stone was the chief financial officer of Transamerican Natural Gas ("Transamerican") from 1986 until he was terminated in 1988. In 1989, he began working with Jonathan Cox, an attorney representing litigants in lawsuits against Transamerican. Cox allegedly advised Stone that if Cox became Stone's attorney, information Stone possessed about Transamerican could be given to Cox for use in litigation against Transamerican without violating any confidentiality obligations Stone had to Transamerican. In reliance on this advice, Stone allegedly entered into an attorney-client relationship with Cox in May of 1989.

After Transamerican was awarded a $600 million judgment against El Paso, El Paso sought to obtain information from Stone for use in its litigation against Transamerican. Cox allegedly advised Stone that, as Stone's attorney, Cox would negotiate a consulting agreement for Stone to provide information to El Paso. To this end, by letter dated June 21, 1989 ("Stone's consulting agreement"), Stone agreed to perform services for, and be compensated by, Cox.[1] Depending on the amount by which El Paso's liability to Transamerican was eventually reduced, this compensation could include a bonus of up to $3 million.

Allegedly, however, unbeknownst to Stone until 1997, while Cox had been acting as Stone's attorney in negotiating with El Paso, Cox had also negotiated for himself a far more lucrative agreement for providing Stone's information to El Paso. By letter dated June 6, 1989 ("Cox's consulting agreement"), El Paso and Cox had agreed that for providing information and representation regarding the El Paso lawsuit against Transamerican, Cox would be paid a contingent fee based on the reduction, if any, in the amount of the eventual judgment or settlement. Depending on the amount of this reduction, Cox's contingent fee could reach $15

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[1] For purposes of this opinion, "Cox" will refer not only to Jonathan Cox, individually, but also to his law firm, Cox & Padmore.

million. In January of 1990, El Paso and Transamerican reached a settlement, El Paso paid Cox a bonus, but Cox never paid Stone a bonus.

Stone initially filed suit against Cox in November of 1995 and added El Paso as a defendant in April of 1996.[2] Stone asserted claims against El Paso for indemnity (which he has since expressly waived), fraud, tortious interference with attorney-client relationship, undue influence and duress, money had and received, constructive trust, conspiracy, equitable estoppel, and breach of fiduciary duty. He also pled application of the discovery rule. El Paso filed a motion for summary judgment asserting that Stone's claims (other than for indemnity) were barred by the statutes of limitations. The trial court granted El Paso's motion and entered a take-nothing summary judgment against Stone.

Standard of Review

A summary judgment may be granted if the motion and summary judgment evidence show that, except as to the amount of damages, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law on those issues expressly set out in the motion or response. *See* TEX. R. CIV. P. 166a(c). To prevail on a motion for summary judgment, a defendant, as movant, must disprove at least one of the essential elements of the plaintiff's cause of action or prove all of the elements of an affirmative defense to the plaintiff's claims. *See American Tobacco Co. v. Grinnell*, 951 S.W.2d 420, 425 (Tex. 1997).

Application of Discovery Rule

Limitations periods begin to run at the time a cause of action accrues.[3] Under the "legal injury" rule, a cause of action generally accrues when a wrongful act causes some legal injury, even if the fact of the injury is not discovered until later and all resulting damages have not yet occurred. *See Murphy v. Campbell*, 964 S.W.2d 265, 270 (Tex. 1996). The "discovery rule,"

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2 Stone settled his claims against all defendants in this case except El Paso.

3 *See, e.g.*, TEX. CIV. PRAC. & REM. CODE ANN. § 16.004(a)(4),(5) (Vernon Supp. 2000) (suit may be brought for fraud or breach of fiduciary duty not later than four years after the cause of action accrues).

is an exception to the legal injury rule whereby a cause of action does not accrue until the plaintiff knew, or in the exercise of reasonable diligence, should have known of the wrongfully caused injury. *See KPMG Peat Marwick v. HCH*, 988 S.W.2d 746, 749 (Tex. 1999); *Murphy*, 964 S.W.2d at 270. The discovery rule applies in cases of fraud, fraudulent concealment, and otherwise where the nature of the injury incurred is inherently undiscoverable and the evidence of injury is objectively verifiable. *See Murphy*, 964 S.W.2d at 270. An injury is inherently undiscoverable if it is by nature unlikely to be discovered within the prescribed limitations period. *See id*. Where, as here, a defendant moves for summary judgment on the affirmative defense of limitations and the plaintiff pleads the discovery rule, the defendant must also negate the application of the discovery rule. *See Rhone-Poulenc, Inc. v. Steel*, 997 S.W.2d 217, 223 (Tex. 1999).

Although the parties dispute whether the discovery rule applies to Stone's tort claims other than for fraud and breach of fiduciary duty, neither has cited cases holding either way with regard to those claims. We interpret cases such as *Murphy* to indicate that the determination of whether the discovery rule applies is, with exceptions not applicable here, based on the discoverability of the injury rather than the nature of the claim. In this case, among Stone's various theories of recovery, the only legal injuries which we can discern from his briefs are the money he was allegedly deprived by: (1) El Paso's alleged knowing participation in Cox's self-dealing as Stone's attorney (the "self-dealing injury"); and (2) Cox's non-payment of a bonus allegedly due under Stone's consulting agreement (the "non-payment injury").[4] There is no dispute that these alleged injuries would have been suffered by Stone by 1990, but only whether Stone knew or should have known of them more than two or four years, as the case may be, before he filed suit against El Paso in 1996.

Stone asserts that El Paso's summary judgment evidence failed to negate the application of the discovery rule because he could have not discovered his self-dealing or non-payment

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[4] It is not clear from the record which of Stone's respective theories of recovery are applicable to each of these two claimed legal injuries.

injuries until 1997, when confidential documents were produced which revealed the bonus arrangement between Cox and El Paso. Conversely, to establish that Stone knew of his alleged injuries by 1990, El Paso relies on: (1) letters dated March 13 and 22, 1990, in which Stone was notified of the amount of the El Paso / Transamerican settlement and expressly agreed that all obligations of Cox and El Paso arising from his consulting agreement were fully discharged; and (2) Stone's own summary judgment affidavit which stated that:

> Cox further stated that his contract with [El Paso] was virtually identical to my contract. This was because Cox was not supposed to get a bonus, but the bonus was to go to me. In fact, Mr. Cox enlisted my help immediately after the [Transamerican-El Paso] settlement in order to prove that [El Paso] had misrepresented the settlement thereby entitling us to our bonus.

El Paso asserts that because Stone thus knew in 1990 of the Transamerican / El Paso settlement out of which his right to a bonus arose and knew that neither El Paso nor Cox intended to pay him a bonus, he thereby also knew of his non-payment injury for purposes of the discovery rule.

However, logic would suggest that in order for Stone to know he was injured, he first had to know that he had been deprived of something to which he was arguably entitled. In other words, Stone logically could not know of the loss of something he never knew he had in the first place. In that regard, Stone's consulting agreement was solely with Cox, not El Paso, and there is no evidence that Stone was entitled to collect a bonus from El Paso or had any recourse against El Paso if it failed to pay a bonus to Cox.

Moreover, any right Stone had under his consulting agreement to receive a bonus from Cox was contingent upon Cox first collecting a bonus from El Paso: "In the event . . . [Cox] earns a bonus in [his] representation of [El Paso], [Cox] shall pay you, when received and collected, a bonus measured as follows: . . . ." Thus, Stone's knowledge in 1990 that Transamerican and El Paso had entered a settlement and that he had not received a bonus from it did not cause him to know whether Cox had received a bonus and thus whether he (Stone) ever had any arguable right to receive a bonus from Cox. Therefore, without knowing that Cox had received a bonus, Stone could not know that he ever had a claim to a bonus from Cox or

that he had been injured by being deprived of that claim. El Paso does not contend that Stone knew before 1997 that Cox had received a bonus, and Stone's affidavit stated that Cox had continually represented to Stone from 1989 through 1995 that he had never received any bonus payments from El Paso. To the extent Stone was fraudulently induced in 1990 to release his claim to a bonus by such a misrepresentation, none of the evidence cited by El Paso would have put Stone on notice of the existence of his injury resulting from that misrepresentation.[5]

Similarly, the only evidence reflecting Stone's alleged self-dealing injury is Cox's consulting agreement, which Stone's affidavit states was not revealed to him until 1997, and an affidavit attached to El Paso's summary judgment motion stating that Cox had been paid a bonus in 1990. There is no evidence that Stone was aware of Cox's consulting agreement or his receipt of a bonus before 1997.

Therefore, because El Paso's summary judgement motion and evidence did not establish that Stone knew or, in the exercise of reasonable diligence, should have known of his alleged self-dealing or non-payment injuries, it did not negate the application of the discovery rule to those injuries. Accordingly, we: (1) sustain Stone's challenge and reverse the trial court's summary judgment with regard to Stone's claims for Cox's self-dealing and for non-payment of a bonus under Stone's consulting agreement; (2) remand that portion of

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[5] We confine our consideration in this case to the application of the discovery rule to the evidence presented, and we express no conclusion on any other considerations such as: (1) whether Cox was obligated to pay Stone any bonus under Stone's consulting agreement; (2) whether the 1990 letters effected a release of Stone's non-payment or self-dealing claims; or (3) whether El Paso was jointly liable for any of Cox's actions.

the case for further proceedings, and (3) affirm the remainder of the trial court's judgment.[6]

/s/ Richard H. Edelman
Justice

Judgment rendered and Opinion filed September 14, 2000.

Panel consists of Justices Amidei, Edelman, and Wittig (J. Wittig not participating).

Do not publish — TEX. R. APP. P. 47.3(b).

[6] The judgment is thus affirmed as to Stone's indemnity claim and any other claims not based on the self-dealing or non-payment injuries described above.