Supreme Court of Texas

No. 24-0834

Amber Carden and William Duncan McGee,

Petitioners,

v.

Minton, Bassett, Flores & Carsey, P.C.; and
John C. Carsey, Individually,

Respondents

On Petition for Review from the
Court of Appeals for the Third District of Texas

JUSTICE YOUNG, with whom Justice Devine joins, concurring.

This Court "is a court of final review and not first view," so we typically "do not decide in the first instance issues not decided below." *Rattray v. City of Brownsville*, 662 S.W.3d 860, 870 (Tex. 2023) (quoting *Zivotofsky v. Clinton*, 566 U.S. 189, 201 (2012)). We make this point all the time: "As a court of last resort, it is not our ordinary practice to be the first forum to resolve novel questions, particularly ones of widespread import." *In re Troy S. Poe Tr.*, 646 S.W.3d 771, 780 (Tex. 2022); *see also, e.g.*, *City of San Antonio v. Realme*, 731 S.W.3d 342, 355 (Tex. 2026). I strongly support that principle as our usual practice, and only good reasons should lead us to depart from it. But determining when those reasons exist

always lies within our discretion.

We have, therefore, also repeatedly observed that, "[w]hen presented with an issue the court of appeals could have but did not decide, we may either remand the case or consider the issue ourselves," and we often "choose to decide th[e] issue." *RSL Funding, LLC v. Newsome*, 569 S.W.3d 116, 124 (Tex. 2018); *see also, e.g.*, *Tex. Gen. Land Off. v. SaveRGV*, ___ S.W.3d ___, 2026 WL 1765503, at *6 (Tex. June 19, 2026) ("Although we could remand for the court of appeals to evaluate facial validity, in the interest of judicial economy, we will exercise our discretion to address the question here."); *Gopalan v. Marsh*, ___ S.W.3d ___, 2026 WL 1445580, at *6 (Tex. May 22, 2026) (addressing, "[i]n the interest of judicial economy," an attorney's-fees dispute that the court of appeals did not reach).

The Court today follows the usual path and thus declines to resolve two alternative grounds for affirmance: the anti-fracturing rule and the statute of limitations. The court of appeals will instead decide in the first instance whether those grounds bar Carden's and McGee's remaining claims. I would have been willing to decide these issues; doing so would have saved considerable time and expense and generated a clear rule more quickly. But nothing makes it urgent for us to do so. No harm—and perhaps some benefit—will come from allowing further development in the lower courts. I therefore concur in the Court's decision to remand.

I write separately, however, because the limitations issue gives me serious concern. If the parties insist on continuing to litigate this dispute, the court of appeals would do them and the law a great service by resolving the question expeditiously. Without committing myself to a view should this or another case raising the issue return to us, I outline various

considerations relevant to deciding the timeliness of the remaining claims.

First, there should be no doubt that Rule 91a dismissal is appropriate when a plaintiff's factual allegations conclusively establish that the relevant statute of limitations renders his claims untimely. *See ante* at 26. As with any other affirmative defense, limitations "may be the proper basis of a Rule 91a motion." *MV Transp., Inc. v. GDS Transp., LLC*, ___ S.W.3d ___, 2026 WL 1261443, at *3 (Tex. May 8, 2026) (reinstating a judgment of dismissal because the plaintiff's factual allegations established that the defendant was entitled to statutory immunity); *cf. Gray v. Skelton*, 595 S.W.3d 633, 640–41 (Tex. 2020) (concluding at the Rule 91a stage that the relevant statute of limitations did not bar the plaintiff's claim). While Rule 91a "limits a court's factual inquiry to the plaintiff's pleadings," it "does not so limit the court's legal inquiry." *Bethel v. Quilling, Selander, Lownds, Winslett & Moser, P.C.*, 595 S.W.3d 651, 656 (Tex. 2020). Courts must accept a plaintiff's factual allegations as true but owe no such deference to his legal conclusions. *See id.* at 655–56.

A plaintiff's bare legal assertion that fraudulent concealment and the discovery rule make his claims timely, therefore, is not remotely sufficient to survive Rule 91a. Just as a plaintiff claiming that a defendant committed fraud cannot survive Rule 91a unless his petition asserts facts sufficient to support that theory, a plaintiff invoking tolling or delayed accrual cannot survive Rule 91a unless his petition includes factual allegations that bear out that assertion. Otherwise, any plaintiff could avoid dismissal of even the most obviously time-barred claims merely by stating in his pleading that the statute of limitations has not run.

Second, the live pleading here makes no allegation that receipt of

McGee's file in February 2020 revealed any injury or material facts underlying most of Carden's and McGee's remaining claims. Accepting their factual allegations as true, they first learned in February 2020 that the firm had not paid any private investigator $10,000, hired experts, or timely added a partner to the case as promised. Based on those facts, Carden and McGee invoke the discovery rule and fraudulent-concealment doctrine.

Even so, the live pleading makes no allegation that the litigation file revealed any injury or material facts relating to their allegations that trial was not moved due to new discovery, that the legal fees charged amounted to $300,000 rather than $100,000, that the firm failed to account for the $300,000 in legal fees, that the firm intentionally delayed trial and failed to timely inform McGee of the prosecution's plea offer, that the firm failed to timely communicate a counteroffer to the prosecution, or that the firm refused to turn over the litigation file. In the absence of any factual assertion that they were at any point unaware of these injuries, the face of the pleading, including the timeline of events that it recounts, seems to "conclusively establish the existence of an affirmative defense." *Id.* at 656.

Third, although Carden and McGee were allegedly unaware of the issues regarding the private investigator, expert, and partner, the pleading indicates that Carden and McGee knew in real time that the firm was not using retainer funds as it said it would. Despite Carsey's representation that another law-firm partner would handle the bond-revocation hearing, "no one from [the firm] met with McGee prior to" the hearing. And despite Carsey's initial representation to McGee that "they would be meeting for a set time every two weeks" and his later representation to Carden that he was "beginning the full court press" and therefore would meet with McGee

"at least weekly for all-day meetings to 'review evidence and prepare,'" Carsey "only met with McGee one time for approximately 90 minutes" from December 23, 2014, to February 17, 2016. Carsey ultimately met with McGee only three times throughout the scope of his representation. After not having spent time meeting with McGee as promised, Carsey informed Carden that 80% of the projected litigation costs had been consumed, meaning $80,000 had been depleted *before* Carsey mentioned hiring experts or adding a partner to the case and *before* Carsey represented that trial had been reset due to new discovery. With retainer funds dwindling, the firm required an additional $200,000 to continue representing McGee.

While the litigation file eventually revealed that the magnitude of the firm's alleged misrepresentations was greater than Carden and McGee had initially appreciated, their allegations indicate that they were on clear notice that the firm was not providing promised services. And where a plaintiff is aware of his injury, even if not the extent of it, a cause of action accrues and fraudulent concealment's estoppel effect ends. *See Valdez v. Hollenbeck*, 465 S.W.3d 217, 229–30 (Tex. 2015) (the discovery rule defers accrual "until the injury was or could have been reasonably discovered," and fraudulent concealment "tolls limitations until the fraud is discovered or could have been discovered with reasonable diligence").

Clients are, of course, entitled to rely on their lawyers—that is what lawyers are for, after all. "Facts which might ordinarily require investigation likely may not excite suspicion where" an attorney–client relationship is involved. *Willis v. Maverick*, 760 S.W.2d 642, 645 (Tex. 1988). Clients hire lawyers because the legal system can be perplexing and indeed terrifying to those caught up in it, especially when they are not

trained in the law. Why lawyers do what they do, in what order, and at what pace is often difficult to convey, and clients have the right to trust that their lawyers are proceeding properly. A layman's deference to his attorney is to be expected on matters that require legal expertise, such as case strategy (although even then lawyers have a duty to present pivot points and options so that clients may make informed decisions). But the logic of deference is inapplicable here. To the extent the firm's objective failure to provide promised services—literally just *meeting* with McGee for a full day on a weekly basis, for example—was an injury, it was one that any non-lawyer client could comprehend. Where the only real question is whether someone did what he expressly promised to do (and indeed conditioned that promise on receipt of additional payments), the injury does not become more difficult to perceive simply because a lawyer is involved.

Fourth, the firm's refusal to produce an accounting was likewise known in real time. Carden and McGee, for example, allege that from March to June 2017, Carden made several phone calls to Carsey requesting McGee's file and an accounting of the legal fees. Carsey never responded. Carden later requested an accounting of the $300,000 by letter, which also went unanswered. And once again, after Carden hand-delivered yet another letter demanding an accounting, Carsey and the firm rebuffed her request. Carden and McGee were eventually "forced to enlist the help" of legal counsel because the firm "continued to conceal" the litigation file. The enlisted attorney "made no fewer than twelve requests" before the firm finally turned over the file in February 2020. While these allegations may be relevant to establishing fraudulent concealment, they also suggest that McGee had the requisite awareness of the injury underlying both his

breach-of-fiduciary-duty claim premised on the firm's refusal to turn over his file and his legal-malpractice claim stemming from the firm's failure to account for his funds.

Fifth, Carden was not a client and did not have a fiduciary relationship with the firm. *See ante* at 13–14 & n.28. The nature of the firm's duty of disclosure to her (if any) is therefore different from its duty to McGee. To the extent the limitations analysis turns on the plaintiff's status as the beneficiary of a fiduciary duty, *see, e.g.*, *Willis*, 760 S.W.2d at 645 (explaining that the "special relationship between an attorney and client" justified adopting the discovery rule for legal-malpractice claims), the analysis as to Carden will not mirror the analysis as to McGee, *see S.V. v. R.V.*, 933 S.W.2d 1, 6 (Tex. 1996) (concluding that "apart from such a relationship," the discovery rule may apply when "it is otherwise difficult for the injured party to learn of the wrongful act").

My serious doubts about whether the remaining claims are timely may, of course, be allayed by addressing the concerns that I have listed and establishing why they are either inapposite or incorrect. If the parties choose to proceed with the litigation, I am confident that the court below will provide its independent judgment after rigorously considering the pleadings and faithfully applying the relevant precedent and that it will explain its decision in a way that will assist the other courts of this State, including this Court, when similar problems arise.

Evan A. Young
Justice

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