TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-19-00533-CV

Ava Sue Vercher, Appellant

v.

Brian Allen Lawless, Appellee

FROM THE 169TH DISTRICT COURT OF BELL COUNTY
NO. 306,864-C, THE HONORABLE GORDON G. ADAMS, JUDGE PRESIDING

MEMORANDUM OPINION

Ava Sue Vercher appeals the trial court's summary judgment that she take nothing on her negligence cause of action, arising out of an automobile collision, against Brian Allen Lawless. In a sole issue on appeal, Vercher contends that the trial court erred by granting Lawless a summary judgment based on limitations. Because the record shows as a matter of law that Vercher's original petition was filed after the applicable two-year limitations period had expired, the trial court did not err by granting a summary judgment. We affirm.

BACKGROUND

On January 31, 2017, Lawless's vehicle allegedly rear-ended Vercher's, causing her personal injuries. Vercher's petition pleaded only one cause of action—negligence—against only one defendant—Lawless. On January 31, 2019, she sent the petition to the Bell County district clerk via UPS courier services. On February 1, the district clerk's office received it.

Lawless answered and moved for a summary judgment based on limitations. He attached to his motion a file-stamped copy of Vercher's petition, among other things. Vercher responded to the motion but did not attach any evidence to her response. She separately filed an affidavit in support of her opposition to the motion for summary judgment. Lawless then filed a reply in support of his motion, in which he objected to Vercher's purported summary-judgment evidence. A few days later, Vercher filed a "Motion for Leave to File Supporting Evidence and/or to Add Additional Materials and to File Additional Motions or Leave of Court to File an Amended Plaintiff's Original Petition." She attached purported summary-judgment evidence to that motion, asking the trial court to consider it as part of the summary-judgment record. The trial court later sought to hold an oral hearing on the motion for summary judgment, but, when Vercher appeared by phone and asked for a continuance of the hearing to accommodate her medical problems, the court reset the hearing for a later date, which Vercher agreed to. At the reset hearing, Vercher again appeared by phone, and she presented her arguments to the trial court.

The trial court entered (1) an order sustaining Lawless's objections to Vercher's purported summary-judgment evidence and (2) an order granting Lawless a summary judgment based on limitations, with the result that she take nothing on her sole cause of action.[1] Vercher now appeals the trial court's judgment.

[1] The trial court also entered findings of fact and conclusions of law. We disregard them. *See IKB Indus. (Nigeria) Ltd. v. Pro-Line Corp.*, 938 S.W.2d 440, 441–42 (Tex. 1997) ("[F]indings of fact and conclusions of law have no place in a summary judgment proceeding. The reason findings and conclusions have no place in a summary judgment proceeding is that for summary judgment to be rendered, there cannot be a genuine issue as to any material fact, and the legal grounds are limited to those stated in the motion and response. In other words, if summary judgment is proper, there are no facts to find, and the legal conclusions have already been stated in the motion and response. The trial court should not make, and an appellate court cannot consider, findings of fact in connection with a summary judgment." (internal citations and

DISCUSSION

We review summary judgments de novo, viewing the evidence in the light most favorable to the nonmovant, crediting evidence favorable to the nonmovant if reasonable jurors could, and disregarding contrary evidence unless reasonable jurors could not. *Erikson v. Renda*, 590 S.W.3d 557, 563 (Tex. 2019). When, as here, the trial court specified the grounds on which it based its summary judgment, we must review the grounds on which the trial court ruled and which dispose of the appeal. *Foster v. Centrex Cap. Corp.*, 80 S.W.3d 140, 143 (Tex. App.—Austin 2002, pet. denied). The ground specified here is limitations.

A defendant moving for a traditional summary judgment on the plaintiff's cause of action must show that there is no genuine issue as to any material fact and that the defendant is entitled to judgment as a matter of law. Tex. R. Civ. P. 166a; *Veigel v. Texas Boll Weevil Eradication Found., Inc.*, 549 S.W.3d 193, 196 (Tex. App.—Austin 2018, no pet.). A defendant doing so based on the affirmative defense of limitations must conclusively establish limitations as a matter of law, including when the cause of action accrued. *See Martin-de-Nicolas v. Octaviano*, No. 03-19-00160-CV, 2020 WL 913046, at *2 (Tex. App.—Austin Feb. 26, 2020, no pet. h.) (mem. op.); *Alvarado v. Abijah Grp., Inc.*, No. 03-13-00060-CV, 2015 WL 4603542, at *3 (Tex. App.—Austin July 29, 2015, no pet.) (mem. op.). The defendant–movant's summary-judgment burden also includes the burden to negate the applicability of any tolling rule when the plaintiff has properly pleaded and raised a tolling rule. *See Erikson*, 590 S.W.3d at 563; *Martin-de-Nicolas*, 2020 WL 913046, at *2; *Hargraves v. Armco Foods, Inc.*, 894 S.W.2d 546, 547 (Tex. App.—Austin 1995, no writ) (per curiam).

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quotations omitted)); *accord Foster v. Centrex Cap. Corp.*, 80 S.W.3d 140, 144 (Tex. App.—Austin 2002, pet. denied) (citing *IKB Indus. (Nigeria)*).

If the defendant carries this summary-judgment burden, the burden then shifts to the plaintiff to raise a genuine issue of material fact precluding summary judgment. *Dees v. Thomas*, No. 03-18-00372-CV, 2019 WL 2847438, at *6 (Tex. App.—Austin July 3, 2019, no pet.) (mem. op.); *Lovato v. Austin Nursing Ctr., Inc.*, 113 S.W.3d 45, 51 (Tex. App.—Austin 2003), *aff'd*, 171 S.W.3d 845 (Tex. 2005). To raise a genuine issue of material fact, the nonmovant must set forth more than a scintilla of probative evidence on the essential elements of the limitations defense. *See Melton v. CU Members Mortg.*, 586 S.W.3d 26, 30 (Tex. App.—Austin 2019, pet. denied). More than a scintilla of evidence exists when the evidence supporting a finding rises to a level that would enable reasonable, fair-minded persons to differ in their conclusions but does not exist when the evidence is so weak as to do no more than create a mere surmise or suspicion of fact. *Id.* The summary-judgment rule requires trial courts to distinguish genuine fact issues, which must proceed toward trial, from non-genuine fact issues, which should not survive summary judgment. *See Lujan v. Navistar, Inc.*, 555 S.W.3d 79, 87 (Tex. 2018).

Vercher is proceeding pro se, and we hold pro se litigants to the same procedural standards as we do litigants represented by counsel to avoid giving pro se litigants an unfair advantage. *See Veigel*, 549 S.W.3d at 195 n.1 (citing *Mansfield State Bank v. Cohn*, 573 S.W.2d 181, 184–85 (Tex. 1978)); *West v. Wannamaker*, No. 03-15-00402-CV, 2016 WL 3522183, at *2 (Tex. App.—Austin June 23, 2016, no pet.) (mem. op.). We read the briefs liberally to obtain a just, fair, and equitable adjudication of the parties' rights. *Veigel*, 549 S.W.3d at 195 n.1 (citing *Sterner v. Marathon Oil Co.*, 767 S.W.2d 686, 690 (Tex. 1989)); *West*, 2016 WL 3522183, at *2.

Here, the trial court excluded Vercher's purported summary-judgment evidence as "not being properly attached to [Vercher]'s Response" to the motion for summary judgment and also excluded certain portions of her affidavit for the further reason that they were conclusory.

Read liberally, Vercher's appellate briefing challenges the trial court's evidentiary rulings by arguing that the trial court "wrongfully signed" both the summary-judgment and evidentiary orders and that it "erred in disregarding [her] additional supporting evidence timely filed." Even if we consider Vercher's proffered evidence, we, for the reasons below, cannot conclude that the trial court erred by granting the summary judgment.

A cause of action for negligence arising out of an automobile collision ordinarily accrues on the date of the collision. *See Martin-de-Nicolas*, 2020 WL 913046, at *1–3; *Lynch v. State Farm Mut. Auto. Ins. Co.*, No. 03-10-00477-CV, 2011 WL 2162877, at *2 n.3 (Tex. App.—Austin June 2, 2011, no pet.) (mem. op.). Here, the record shows that the collision happened on January 31, 2017. Vercher's petition specifies that date, and Vercher does not argue for any later date of accrual. Her cause of action thus accrued on January 31, 2017. *See Martin-de-Nicolas*, 2020 WL 913046, at *1–3; *Lynch*, 2011 WL 2162877, at *2 n.3.

Vercher's petition did not plead any rule tolling the limitations period, nor did her summary-judgment filings provide any factual or legal basis for any tolling rule.[2] *See Erikson*,

[2] In her "Motion for Leave to File Supporting Evidence and/or to Add Additional Materials and to File Additional Motions or Leave of Court to File an Amended Plaintiff's Original Petition," Vercher asserted that "tolling limitations" applied, but she did not refer to any particular tolling rule or explain why the unspecified tolling rule should apply to her suit. This bare assertion of "tolling limitations" did not sufficiently plead or raise any tolling rule. Also, in her appellate briefing, Vercher asserts that she "had shown 'good cause' for the filing dates reflected on her Original Petition." To the extent Vercher argues that the trial court erred by failing to enlarge the limitations period for filing her petition based on "good cause" under Rule of Civil Procedure 5, we disagree. Even if the Rules of Civil Procedure allowed a trial court to enlarge a statutory limitations period, *cf. Gutierrez v. B & B Landfill, Inc.*, No. 10-12-00219-CV, 2013 WL 1408728, at *4 (Tex. App.—Waco Apr. 4, 2013, no pet.) (mem. op.) (doubting that proposition and citing as support *Morris v. Aguilar*, 369 S.W.3d 168, 171 (Tex. 2012) (per curiam)), the rule relevant here allows only for a good-cause enlargement of an expired period and only "upon motion," Tex. R. Civ. P. 5. Nothing in the record suggests that Vercher filed, or the trial court ruled on, any motion to enlarge the limitations period. And nothing in the record suggests that Vercher objected

590 S.W.3d at 563; *Haase v. Abraham, Watkins, Nichols, Sorrels, Agosto & Friend, LLP*, 404 S.W.3d 75, 85–86 (Tex. App.—Houston [14th Dist.] 2013, no pet.) (requiring tolling rules, like all pleas in avoidance, to be pleaded but noting that "[a]n unpleaded plea in avoidance may still serve to preclude summary judgment if it is raised in a summary judgment response and if the opposing party fails to object to it in a reply or before the rendition of judgment"). Vercher thus needed to file her petition by January 31, 2019, to avoid limitations. *See* Tex. Civ. Prac. & Rem. Code § 16.003(a) (two-year limitations period applies to causes of action for personal injury); *Lynch*, 2011 WL 2162877, at *2 n.3.

The summary-judgment record shows that Vercher sent her original petition to the district clerk on January 31, 2019, via UPS, and that the clerk received the UPS delivery on February 1. Rule of Civil Procedure 5 governs original pleadings, *Milam v. Miller*, 891 S.W.2d 1, 2 (Tex. App.—Amarillo 1994, writ ref'd), and provides for deeming certain documents to be timely filed when the document is sent "by first-class United States mail," Tex. R. Civ. P. 5.

Although Vercher's affidavit uses the verb "mail" to describe how she sent her petition to the district clerk, everything else in the summary-judgment record shows that she sent her petition via UPS and not via United States mail. Vercher's use of the verb "mail" is no more than a scintilla of evidence that she sent her petition by first-class U.S. mail instead of by UPS, so we conclude that the summary-judgment record shows that she sent the petition by UPS and not by first-class U.S. mail. *See Lujan*, 555 S.W.3d at 87; *Melton*, 586 S.W.3d at 30.

Rule 5's provision for deeming certain pleadings timely filed is not invoked when a party sends the pleading by a commercial delivery service like UPS. Tex. R. Civ. P. 5 (referring

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to the lack of any such ruling. She therefore failed to preserve this issue for appeal. *See* Tex. R. App. P. 33.1(a)(2).

to "any document . . . sent to the proper clerk by first-class United States mail"); *Reece v. Texoma Fleet & Auto Repair*, No. 02-10-00154-CV, 2011 WL 2651860, at *2 (Tex. App.—Fort Worth July 7, 2011, pet. dism'd) (mem. op.) ("[T]he notice of appeal and affidavit were sent by UPS, a private courier, and not by U.S. mail, so the time for filing was not enlarged."); *Stokes v. Aberdeen Ins. Co.*, 918 S.W.2d 528, 530 (Tex. App.—Austin 1995) (per curiam) ("Rule 5 does not enlarge the time for filing a document sent by private courier."), *rev'd on other grounds*, 917 S.W.2d 267 (Tex. 1996) (per curiam). Because Vercher sent the petition via UPS, Rule 5's provision for enlargement of time does not apply.[3]

The summary-judgment record, viewed in the light most favorable to Vercher, shows that the district clerk received the petition no earlier than February 1. *See Coastal Banc SSB v. Helle*, 988 S.W.2d 214, 215–16 (Tex. 1999) (per curiam) (reviewing evidence for when clerk received filing and filing fee to determine date of tender of filing under *Jamar v. Patterson*, 868 S.W.2d 318 (Tex. 1993) (per curiam)). The record reflects that Vercher's petition was indeed filed on February 1, because that is the date that the district clerk's office received it, but that the clerk received it one day too late for purposes of limitations. *See* Tex. Civ. Prac. & Rem. Code § 16.003(a); *Lynch*, 2011 WL 2162877, at *2 n.3; *see also Brown v. Shwarts*, 968 S.W.2d 331, 334 (Tex. 1998) ("The Browns waited one day too long to file suit. We conclude that their wrongful death action is barred by limitations."); *Hargraves*, 894 S.W.2d at 546–47 (affirming summary judgment based on limitations where plaintiff sued two years and one day after accident). We therefore hold that Lawless conclusively established limitations as a matter of law and that

[3] Vercher's appellate reply brief asserts that there were relevant changes to Rule 5 in 2014, allowing plaintiffs to avail themselves of Rule 5's extension even when they send an original petition via some method besides first-class U.S. mail. Not so. Rule 5 still limits its applicability to documents sent by first-class U.S. mail.

Vercher failed to raise a genuine issue of material fact to avoid summary judgment. *See Dees*, 2019 WL 2847438, at *6; *Lovato*, 113 S.W.3d at 51. The trial court thus did not err by granting Lawless a summary judgment based on limitations. We overrule Vercher's sole issue.[4]

CONCLUSION

We affirm the trial court's summary judgment.

Chari L. Kelly, Justice

Before Justices Goodwin, Kelly, and Smith

Affirmed

Filed: September 17, 2020

[4] Vercher's appellate briefing also asserts that trial-court or clerk personnel breached an alleged "duty of care" owed to her or violated certain of her constitutional rights. Nothing in the record suggests that she raised these complaints before the trial court. As a result, she failed to preserve them for appeal. *See* Tex. R. App. P. 33.1(a); *A.C. v. Texas Dep't of Family & Protective Servs.*, 577 S.W.3d 689, 709 (Tex. App.—Austin 2019, pet. denied).