AFFIRM; and Opinion Filed June 14, 2018.

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-16-01190-CV

ALBERTA JACKSON, Appellant
V.
GAINSCO, INC./GAINSCO AUTO INSURANCE AND MGA INSURANCE COMPANY, INC., Appellees

On Appeal from the County Court at Law No. 4
Dallas County, Texas
Trial Court Cause No. CC-15-02629-D

MEMORANDUM OPINION

Before Justices Lang-Miers, Myers, and Boatright
Opinion by Justice Lang-Miers

In a single issue appellant Alberta Jackson appeals the trial court's summary judgment in favor of appellees Gainsco, Inc./Gainsco Auto Insurance and MGA Insurance Company, Inc. ("Gainsco") dismissing her claims for Deceptive Trade Practices Act and Insurance Code violations because they were barred by the statute of limitations. We affirm.

Background

On January 27, 2013, Jackson was involved in a motor vehicle collision when her Ford F-150 truck was struck by another vehicle. She contended that this was a "hit and run" accident with an uninsured motorist. The collision caused damage to Jackson's truck.

At the time of this collision, Jackson's truck was covered by a Texas Personal Auto Policy ("policy") issued by Gainsco. Her policy included collision coverage, rental car reimbursement, and comprehensive uninsured/underinsured motorist coverage. Jackson reported the collision and vehicle damages to Gainsco on January 29, 2013.

Gainsco completed its claim investigation on May 2, 2013, and closed its investigation file on May 20, 2013. Jackson claimed she was not notified of the acceptance of the claim until August 28, 2013. Gainsco made the first payment for the repair of Jackson's vehicle on September 5, 2013. Jackson's vehicle was in the body shop for approximately six weeks and Jackson alleged that Gainsco did not pay the body shop the full amount of the repairs.

Procedural Background

On March 25, 2013, two months after the accident, Jackson sued Gainsco in the 191st District Court of Dallas County, Texas. (the "first lawsuit"). Jackson sought declaratory relief regarding her uninsured motorist coverage and also alleged that Gainsco breached its duty of good faith and fair dealing by refusing to pay, and by delaying payment of, her claim for vehicle repairs and rental car expenses.

Gainsco moved for summary judgment in the first lawsuit and a hearing was set on this motion for March 23, 2015. A few days prior to that scheduled hearing, on March 20, 2015, Jackson voluntarily dismissed the first lawsuit.

Two months later, on May 22, 2015, Jackson again sued Gainsco, this time in the County Court at Law No. 4 of Dallas County, Texas. (the "second lawsuit.") In this second lawsuit, Jackson claimed breach of the duty of good faith and fair dealing under the Insurance Code and Deceptive Trade Practices Act (DTPA), again claiming Gainsco refused and delayed payment for vehicle repairs and car rental.

Gainsco filed a traditional motion for summary judgment and an amended traditional motion for summary judgment on grounds that Jackson's claims were barred by the two-year statute of limitations. The trial court granted summary judgment by written order signed July 13, 2016, stating:

> The Court, after carefully reviewing the motion, and the response from Plaintiff, along with the summary judgment evidence, the arguments of counsel, and the pleadings on file in this cause, the Court is of the opinion that Plaintiff's claims are barred by the statute of limitations. Therefore summary judgment is appropriate under the traditional standard of TEX. R. CIV. P. 166a.

Jackson filed a motion for new trial, which the trial court denied. Jackson then appealed the summary judgment.

Claims on Appeal

Jackson claims that the court erred by granting summary judgment because she raised genuine issues of material fact regarding the accrual date of her claims. Specifically, Jackson first argues that, because there was no outright denial of a claim, the exact date of accrual of her cause of action is a question of fact. Second, Jackson claims that statements contained in her pleadings in the first lawsuit were not judicial admissions and did not establish when her DTPA claim accrued. Third, Jackson alleges that her claims under the DTPA could not have accrued until after the timelines in the Insurance Code expired. Last, Jackson claims that, even though her policy stated that all lawsuits must be brought within two years of an accident, that restriction was void because the statute of limitations "was not triggered by the date of the accident, but rather triggered by the unfair and deceptive claims handling conduct of the insurance carrier" and was "superceded by the two year statute of limitations of the DTPS and the Texas Insurance Code and *Spicewood*.[1]"

[1] *Spicewood Summit Office Condominiums Association, Inc. v. America First Lloyd's Insurance Co.*, 287 S. W 3d. 461 (Tex. App. – Austin 2009, pet. denied).

Gainsco responds that the trial court properly concluded that Jackson's claims were barred by limitations. Gainsco contends that, as a matter of law, any claim accrued as of May 20, 2013, the date on which Gainsco closed its investigation. Alternatively, Gainsco claims that Jackson's bad faith claims against it accrued at least by March 25, 2013, the date on which Jackson filed the first lawsuit. Gainsco argues that because in both lawsuits the parties were the same and Jackson complained that Gainsco breached its duty of good faith and fair dealing by refusing to pay, or by delaying payment, of her vehicle repairs and rental car expenses, Jackson knew the "allegedly false, misleading, or deceptive acts or practices had occurred" by at least March 25, 2013, when she made these claims in the first lawsuit. Gainsco further claims that conduct after March 25, 2013, "did not prevent the bad faith claims from accruing on that date." Gainsco also argues that Jackson did not raise in the trial court her arguments that pleadings from the first lawsuit were not judicial admissions or that the timelines in the Insurance Code applied and she waived those issues.

Standard of Review on Summary Judgment Appeals

The standard of review in traditional summary judgment cases is well-established. The issue on appeal is whether the movant satisfied his summary judgment burden by establishing that no genuine issue of material fact exists and that he is entitled to judgment as a matter of law. TEX. R. CIV. P. 166a(c); *Provident Life & Acc. Ins. Co. v. Knott*, 128 S.W.3d 211, 215–16 (Tex. 2003); *Thomas v. Omar Inv., In*c., 129 S.W.3d 290, 292–93 (Tex. App.—Dallas 2004, no pet.). A defendant is entitled to summary judgment if he conclusively negates an essential element of the plaintiff's case or conclusively establishes all necessary elements of an affirmative defense. *Thomas*, 129 S.W.3d at 293; *Pollard v. Hanschen*, 315 S.W.3d 636, 638 (Tex. App.—Dallas 2010, no pet.). Limitations is an affirmative defense and requires the defendant to establish the date the cause of action accrued to show the claim is barred. TEX. R. CIV. P. 94; *KPMG Peat Marwick v.*

Harrison Cnty. Hous. Fin. Corp., 988 S.W.2d 746, 748 (Tex. 1999). We review a trial court's grant of a traditional motion for summary judgment de novo. *Provident Life,* 128 S.W.3d at 215.

Statute of Limitations

Limitations statutes are designed to afford plaintiffs what the legislature deems a reasonable time to present their claims and to protect defendants and the courts from having to deal with cases in which the search for the truth may be seriously impaired by the loss of evidence, whether by death or disappearance of witnesses, fading memories, disappearance of documents or otherwise. *Murray v. San Jacinto Agency, Inc*., 800 S.W.2d 826, 828 (Tex. 1990). For purposes of limitations, a cause of action generally accrues, and the statute begins to run, when a wrongful act effects an injury, *Moreno v. Sterling Drug, Inc*., 787 S.W.2d 348, 351 (Tex. 1990), or when facts come into existence that authorize a claimant to seek a judicial remedy. *Exxon Corp. v. Emerald Oil & Gas C*o., 348 S.W.3d 194, 202 (Tex. 2011) (op. on reh'g) (*citing Provident Life*, 128 S.W.3d at 221). When a cause of action accrues is a question of law. *Sharpe v. Roman Catholic Diocese of Dallas*, 97 S.W.3d 791, 795 (Tex. App.—Dallas 2003, pet. struck) (*citing Moreno*, 787 S.W.2d at 351).

The statute of limitations for a DTPA claim is two years. TEX. BUS. & COM. CODE § 17.565. Claims of negligence and breach of good faith and fair dealing are also governed by a two-year limitations period. TEX. CIV. PRAC. & REM. CODE § 16.003(a). And, the statute of limitations for violations of the Insurance Code is also two years. TEX. INS. CODE § 541.162.

Accrual of Statute of Limitations in this Case

A cause of action generally accrues for purposes of application of statute of limitations to bad faith claims, at the time when facts come into existence which authorize a claimant to seek a judicial remedy. *Murray,* 800 S.W.2d at 828. As the Texas Supreme Court stated in *Murray*:

> For the purposes of application of statute of limitations, a cause of action generally accrues at the time when facts come into existence which authorize a claimant to seek a judicial remedy. Put another way, "a cause of action can generally be said to accrue when the wrongful act effects an injury."…The fact that damage may continue to occur for an extended period after denial does not prevent limitations from starting to run. Limitations commences when the wrongful act occurs resulting in some damage to the plaintiff.

Id. (citations omitted); *see also Exxon Mobil Corp. v. Rincones*, 520 S.W.3d 572, 591 (Tex. 2017) (re-affirming its holding in *Murray*).

With respect to claims against insurers a cause of action for bad faith accrues upon (1) the written denial of the claim or (2) some other indication of the insurer's position that it was not going to provide the requested coverage. *See Provident Life,* 128 S.W.3d at 221-23 (letter stating insured not entitled to benefits); *Kuzniar v. State Farm Lloyds,* 52 S.W.3d 759, 761 (Tex. App.—San Antonio 2001, pet. denied) (closing of claim file); *Mangine v. State Farm Lloyds*, 73 S.W.3d 467, 468 (Tex. App.—Dallas 2002, pet. denied) (letter stating inspector found no hail damage); *Kuzniar*, 52 S.W.3d at 760 (finding that the closing of the claim file was an "objectively verifiable event" that unambiguously demonstrated an insurance company's intent not to pay the claim, "even if the fact of injury [was] not discovered until later"); *Feurtado v. State Farm Lloyds,* No. 13–14–00488–CV, 2016 WL 747777, at *2 (Tex. App.—Corpus Christi Feb. 25, 2016, no pet.) (mem. op.) (holding that an insured's cause of action "accrues as a matter of law when the insurer unambiguously makes a final determination concerning the insured's claim, such as when . . . the insurer closes its claim file"); *Sheppard v. Travelers Lloyds of Tex. Ins. Co.*, No. 14–08–00248–CV, 2009 WL 3294997, at *7 (Tex. App.—Houston [14th Dist.] Oct. 15, 2009, pet. denied) (mem. op.) (finding that a cause of action for structural and content damage to a home accrued when the insurer closed the claim file).

This rule applies "even if the fact of injury [was] not discovered until later." *Kuzniar*, 52 S.W.3d at 760 (*citing to and relying on Murray,* 800 S.W.2d at 829). Additionally, the fact that damage may continue to occur, even for an extended period after the claim accrues, does not prevent limitations from starting to run. *Murray*, 800 S.W.2d at 828; *see also Provident Life*, 128 S.W.3d at 221 (cause of action accrues when wrongful act causes legal injury, regardless of when plaintiff learns of injury or whether all resulting damages have yet to occur).

The summary judgment evidence showed that Gainsco completed its investigation of Jackson's claim by May 2, 2013, and closed its investigation of Jackson's claim on May 20, 2013. The date on which Gainsco closed its claims file establishes "an objectively verifiable event that unambiguously demonstrated" intent not to pay the claim and triggered the limitations period. *Kuzniar,* 52 S.W.3d at 760; *Sheppard,* 2009 WL 3294997, at *4. Jackson did not file the second lawsuit against Gainsco until May 22, 2015, more than two years after Gainsco closed the claim file.

Jackson argues, however, that, because there was no outright denial of her claim by Gainsco, the exact date of accrual for the statute of limitations on her claim is a question of fact which precludes summary judgment. She contends that her bad faith claims could not have accrued until after Gainsco failed to pay her for damages to her truck and for her rental car expenses. Jackson does not identify a specific date on which, under this theory, her claim accrued, but she does argue that there was "no clear acceptance of the claim until August 28, 2013," and that her truck was in the repair shop from September of 2013 through November of 2013. She argues that she raised an issue of fact regarding the date her claim accrued.

However, as Gainsco contends, on March 25, 2013, Jackson first sued Gainsco for bad faith claiming that it breached its duty of good faith and fair dealing "by refusing to pay benefits

due when [it] knew or should have known that there was no reasonable basis for denying, delaying or neglecting to pay benefits due related to the accident within a reasonable time." Jackson alleged that the conduct of Gainsco was "tortious" in that, among other things, Gainsco "failed to accept the claim and pay Plaintiff Alberta Jackson for damages to her vehicle and pay for any rental car expenses." She made essentially these same claims in her second lawsuit. Jackson's pleadings in the first lawsuit demonstrated that she believed that her bad faith claims accrued at least as of March 25, 2013.

Jackson also contends that her claims did not accrue until all of the allegedly wrongful conduct occurred. But as evidenced by the filing of the first lawsuit on March 25, 2013, Jackson claimed that Gainsco was at that time delaying and/or denying payment unreasonably. Jackson was then in possession of facts authorizing her to seek a judicial remedy and her bad faith claims accrued no later than that date, even though additional allegedly wrongful conduct may have occurred after that date. *See Underkofler v. Vanasek*, 53 S.W.3d 343, 347 (Tex. 2001) (holding that a legal malpractice claim against the plaintiff's former attorney under the DTPA accrued when the plaintiff became aware of and expressed his specific complaints about attorney's allegedly inadequate representation, even though the litigation continued); *see also Maryland Cas. Co. v. Evans*, No. 03-96-00217-CV, 1997 WL 184350 at *4 (Tex. App.—Austin, Apr. 17, 1997, writ denied) (mem. op.) (holding that the insureds knew that payment of their claim would be delayed, as evidenced by letters sent by their lawyer to their insurer in Dec. 1981 demanding payment of their claim; letters established that insureds knew they had a legal remedy against insurer by those dates, and, by waiting to file suit until April 1985, their claim was barred by limitations).

In arguing that the accrual date of her cause of action against Gainsco was a question of fact, Jackson relies, in part, on a footnote in *Murray*:

> When . . . there is no outright denial of a claim, the exact date of accrual of a cause of action becomes more difficult to ascertain and should be a question of fact to be determined on a case-by-case basis. Clearly, though, if an insurance company strings an insured along without denying or paying a claim, limitations will be tolled.

Murray, 800 S.W.2d at 829 n. 2[2] (*citing to Safeco Ins. Co. of Am. v. Sims*, 435 So.2d 1219, 1222 (Ala. 1983)); *see also Provident Life*, 128 S.W.3d at 222 (acknowledging that the accrual date of a cause of action based on a violation of the Texas Insurance Code, the bad-faith breach of an insurance contract, or a violation of the DTPA involving insurance coverage, may present questions of fact to be determined on a case-by-case basis but finding that scenario was not before the court).

Although Jackson has argued on appeal that Gainsco "strung . . . (her) . . . along from May 2013 to August 2013, without accepting, rejecting or payment of her claims," she did not make this argument to the trial court, did not cite the trial court to any evidence supporting this assertion, and did not cite the court to any cases applying this argument to accrual of a claim for limitations purposes. Consequently, this argument has not been preserved for appeal and cannot provide a basis for reversal of the summary judgment. *See* TEX. R. CIV. P. 166a(c); TEX. R. APP. P. 33.1(a); *Affordable Motor Co., Inc. v. LNA, L.L.C.*, 351 S.W.3d 515, 522 (Tex. App.—Dallas 2011, pet. denied). And, even if preserved, this argument is without merit because Jackson herself claimed that she had a cause of action by March 25, 2013, the day on which the first lawsuit was filed.

In her second issue, Jackson claims that judicial admissions contained in her first, nonsuited lawsuit are not proper summary judgment evidence and do not provide a basis for determining

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[2] The statement in *Murray* is, as other courts have recognized, dicta as opposed to binding precedent. *Kuzniar*, 52 S.W.3d at 761 (stating that the footnote in *Murray* is dicta); *Ehrig v. Germania Farm Mut. Ins. Assoc*., 84 S.W.3d 320, 325 (Tex. App.—Corpus Christi 2002, pet. denied) (same).

when her deceptive trade practices claims accrued. Gainsco argues, however, that Jackson did not object in the trial court to use of any pleadings from the first lawsuit as summary judgment evidence. As a result, we conclude that this argument has not been preserved for appeal and cannot provide a basis for reversal of the summary judgment. *See* TEX. R. CIV. P. 166a(c); TEX. R. APP. P. 33.1(a); *Affordable Motor*, 351 S.W.3d at 522.

In her third issue, Jackson contends that the statute of limitations did not accrue until the time periods in the Texas Insurance Code expired. However, as Gainsco again argues, this issue was not raised in the trial court in response to the motion for summary judgment and is not preserved for our review. *See* TEX. R. CIV. P. 166a(c); TEX. R. APP. P. 33.1(a); *Affordable Motor*, 351 S.W.3d at 522.

Finally, in her fourth issue, Jackson argues that, under Texas law, her policy with Gainsco providing that "[a]ny lawsuit brought against us under this policy must be commenced within two (2) years of the date of the accident," is void and unenforceable unless the clause limits the filing of the lawsuit to no less than two years from the date the claim arose, which in this case would be the date the unfair or deceptive act occurred. We have addressed the issue of when the claim accrued, however, and do not separately address it here because we otherwise affirm the summary judgment.

Conclusion

We conclude the trial court did not err in granting summary judgment in Gainsco's favor. We overrule Jackson's single issue and affirm.

/Elizabeth Lang-Miers/
ELIZABETH LANG-MIERS
JUSTICE

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Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

ALBERTA JACKSON, Appellant

No. 05-16-01190-CV V.

GAINSCO, INC./GAINSCO AUTO INSURANCE AND MGA INSURANCE COMPANY, INC., Appellee

On Appeal from the County Court at Law No. 4, Dallas County, Texas
Trial Court Cause No. CC-15-02629-D.
Opinion delivered by Justice Lang-Miers.
Justices Myers and Boatright participating.

In accordance with this Court's opinion of this date, the judgment of the trial court is **AFFIRMED**.

Judgment entered this 14th day of June, 2018.