13-18-00265-CV

IN THE

THIRTEENTH COURT OF APPEALS

CORPUS CHRISTI

DUNCAN LITIGATION INVESTMENTS, LLC

Appellant,

v.

MIKAL WATTS AND WATTS GUERRA, LLP

Appellees.

On Appeal from the
94th Judicial District Court
Nueces County, Texas
Cause Number 2015DCV-5759-C

APPELLANT'S AMENDED BRIEF

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Oral Argument Not Requested

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IDENTITY OF PARTIES AND COUNSEL

Pursuant to Texas Rule of Appellate Procedure 38.1(a), the following is a list of the names of all parties to the trial court's judgment and the names and last known address of their trial and appellate counsel:

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STATEMENT OF THE CASE

Nature of the case: Appellant Duncan Litigation Investments, LLC ("DLI") brought this action against Appellees for acts and omissions which support its claims of breach of contract, promissory estoppel, fraudulent misrepresentation, negligence and gross negligence, negligent misrepresentation, fraud and fraud by nondisclosure. Appellant sought actual damages in the amount of $5.8 million plus exemplary damages, attorney's fees and costs. (CR at 5-17.) Appellees asserted a general denial in accordance with Rule 92 of the Texas Rules of Civil Procedure, verified denial in accordance with Rule 93 of the Texas Rules of Civil Procedure, and several affirmative defenses in accordance with Rule 94 of the Texas Rules of Civil Procedure, including assumption of risk, contributory negligence, estoppel, failure of consideration, illegality, laches, statute of frauds, statute of limitations, and waiver. Additionally Appellees sought leave to designate Robert Hilliard as a responsible third party and counterclaimed for costs and sanctions pursuant to Rule 97 and Rule 13 of the Texas Rules of Civil Procedure. (CR at 18-24.)

Course of the proceedings: Appellant DLI filed its Original Petition on December 18, 2015 against Defendants Mikal Watts ("Watts") and Watts Guerra LLP (jointly "Defendants" and/or Appellees). (CR at 5-17.) The parties entered into a Rule 11 agreement which provided for the informal exchange of certain delineated documents and extended Defendants' deadline to answer the lawsuit until October 1, 2016. (Appx. at

Tab A.)[1] Defendants answered the suit on August 22, 2016 with their Original Answer, Verified Denials, Affirmative Defenses, Counterclaim, and Motion for Leave to Designate Responsible Third Parties. (CR at 18-24.)

Trial court's disposition of the case: Appellees moved for traditional and no-evidence summary judgment on December 29, 2017. ("First MSJ") (CR at 27-251.) On January 26, 2018 DLI filed its Response to Defendants' First MSJ (CR at 263-432) and its First Amended Petition. (CR at 252-262.) On January 29, 2018 Appellees filed their Second Motion for Summary Judgment regarding Statute of Limitations. ("Second MSJ") Appellees' Second MSJ is four pages in length, includes no summary judgment evidence, and seeks a determination as a matter of law that Appellant's claims are barred by the two year statute of limitations. (CR at 433-436.) On that same date Defendants served Notice that its Second MSJ would be heard by oral hearing on February 21, 2018. (Appx. at Tab B.) On February 13, 2018 DLI filed a Response to Defendants' Second MSJ (CR at 458-626) and its Second Amended Petition. (CR at 446-457.) Appellees continued the oral hearing on their First MSJ and Second MSJ until March 8, 2018. (Appx. at Tab C.) On March 5, 2018, three days before the scheduled hearing, Appellees filed a forty-three (43) page Reply to Plaintiff's Response to Second MSJ and added three hundred thirteen (313) pages of summary judgment evidence to be considered at the oral hearing in support of Appellees' Second MSJ. (CR at 626-982.) On that same day, DLI filed its Objections to Defendants' Summary Judgment Evidence and Reply in Support of

[1] Appellant inadvertently neglected to request certain items to be a part of the record. Appellant has requested that the record be supplemented. See Appx. at Tab D. In the meantime, Appellant is including the omitted items in its Appendix.

Second Motion for Summary Judgment. (CR at 983-985.) The Court proceeded with the hearing on March 8, 2018. (CR at 1020, RR Vol. at 1-37.) Following the hearing, Plaintiff filed a Sur-Reply and Objections to Defendants' Summary Judgment Evidence offered in Support of their Reply in support of Second MSJ regarding statute of limitations. (CR at 986-1009.) On April 18, 2018 the Court overruled Appellant's objections to Appellees' summary judgment evidence and granted Appellees' Second MSJ. (CR at 1010-1012.) DLI filed its Notice of Appeal on May 17, 2018. (CR at 1015-1016.) DLI asks the Court to reverse the trial court's judgment granting summary judgment in favor of Appellees. (CR at 1010-1014.)

ISSUES PRESENTED

Issue No. 1: The trial court erred in granting Defendants' Second Motion for Summary Judgment regarding limitations because Appellees did not conclusively establish as a matter of law when Appellant's claims accrued.

Issue No. 2: The trial court erred in granting Defendants' Second Motion for Summary Judgment regarding limitations because Appellees failed to conclusively negate the tolling provisions under the discovery rule and continuing tort doctrine.

Issue No 3: The trial court erred in overruling Appellant's objections to Appellees' untimely and improper summary judgment evidence offered with their Reply in Support of their Second Motion for Summary Judgment.

STATEMENT REGARDING ORAL ARGUMENT

Appellant does not request oral argument because it does not believe this appeal will be aided by oral argument, and the briefs and record adequately present the facts and legal arguments. However, if Appellees request and this Court grants oral argument, Appellant requests the opportunity to appear and present argument.

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APPELLANT'S AMENDED BRIEF

STATEMENT OF FACTS

On or about June 2010 Robert C. Hilliard ("Hilliard") approached Max Duncan, about an opportunity to invest in litigation stemming from the BP "Deepwater Horizon" Gulf Oil Spill ("2010 BP Gulf Oil Spill"). Max Duncan was offered fifty-percent of Hilliard's total recovery in the litigation stemming from the 2010 BP Gulf oil spill if Max Duncan helped finance the litigation. (CR at 284-289, 284 .)

Mikal Watts, an attorney from San Antonio, had offered Hilliard an investment opportunity arising out of the 2010 BP Gulf oil spill. The agreement between Hilliard and Watts allowed Hilliard to share in the representation and legal fees for numerous

claimants if Hilliard would provide a certain amount of the financial backing and resources for the litigation and settlement claims costs. (CR at 284-289, 285.) In exchange for helping fund the litigation expenses, Max Duncan could take part in the recovery gained from any final disposition or settlement of the claims and lawsuits stemming from the 2010 BP Gulf oil spill. (CR at 284-289, 285; 291-338, 296.)

Max Duncan inquired as to the downside on his investment and what was the worst that could happen. (CR at 291-338, 300.) In response, he received Watts' "David Letterman Top-10 List of the Apocalypse." Top of the list was the possibility that Defendants would get "duped" on the sign-ups. However, with the greatest confidence Watts stated "Not likely given our guys' history of acquisition prowess." Max Duncan was told that Watts' "guys" had a history of being able to investigate the clients' background and determine whether they were telling the truth or not. (CR at 263-432, 428-431.) What was never disclosed to Max Duncan was that in 2005 one of Watts' "guys" (Greg Warren) had pled guilty to a charge of knowingly filing a false claim stemming from his recruitment of "fake" clients on behalf of a law firm in Jackson Mississippi. (CR at 284-289, 287; 291-338,301.)

In June 2010, Max Duncan believed that Watts already had 15,000 clients and he was going to get more clients, thereby increasing the financial return on the investment. (CR at 291-338, 314.) By July 1, 2010, it was reported to Max Duncan that the number of clients had increased to 25,000. (CR at 284-289, 285; 291-338, 297-298.)

Max Duncan agreed to invest in the litigation based on the representations that the investment guaranteed a significant financial return, the reputation of Watts, and Watts' specific representations that he would not lose money. (CR at 284-289, 285.)

On July 1, 2010 DLI entered into a Litigation Investment Agreement with Hilliard and HMG, LLP ("Hilliard Agreement"). In exchange for an investment of "up to Six Million Dollars" DLI was to be paid fifty percent of the cash recovery. The cash recovery was the amount recovered by Hilliard under a joint representation and fee sharing agreement with Watts. (CR at 284-289, 284-285; 291-338, 296.)

Hilliard and Watts entered into a Joint Representation and Fee Sharing Agreement. ("Watts Agreement.") Under the Watts Agreement, twenty-five percent of the attorney's fees would be reserved for referring attorneys. Hilliard and Watts would split the remaining seventy-five percent of the attorney's fees collected in handling the claims. (CR at 284-289, 285-286.)

Pursuant to the Hilliard Agreement, Max Duncan was without any control or influence with respect to the handling of the 2010 BP Oil spill lawsuits or any decisions made with respect to those lawsuits. Max Duncan was strictly a silent investor. (CR at 284-289, 286; 291-338, 299.) Soon after DLI began investing in the litigation Max Duncan was advised that Watts was claiming he signed up approximately 44,000 plaintiffs to represent in the 2010 BP Gulf Oil spill. However, Max Duncan was not told that all of the claimed plaintiffs signed up by Watts were fisherman. Nor was he informed that they were all Vietnamese fishermen, many of whom were not American citizens, until well after he had already invested a substantial sum of money in the litigation.

However, he was told by Watts in the latter part of 2011 that there were signed contracts for each of the plaintiffs represented. (CR at 284-289, 286.)

On or about June 4, 2010 Max Duncan invested approximately $3.2 million in the litigation. The initial investment of approximately $3.2 million was made through a personal loan directly from Max Duncan to Robert Hilliard since the Hilliard Agreement had not yet been executed and Duncan Litigation Investments, LLC had not yet been formed. The personal loan was then transferred to DLI after it was formed. (CR at 291-338, 294-295.) Following June 4, 2010, DLI invested an additional $2.8 million in the BP litigation. The last of DLI's investment was made in the latter part of July 2012 when it funded what proved to be the final $100,000.00. Watts was constantly adamant that the litigation would be successful and there was no need for DLI to worry about its investment. (CR at 284-289, 286.)

In June 2010 Watts filed twenty-five complaints on behalf of approximately 40,000 plaintiffs that were consolidated with In re: Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico, on April 20, 2010, Cause No: 2:10-md-02179. Soon thereafter, Watts filed a sworn and notarized application for membership on the Plaintiffs' Steering Committee. Max Duncan was told by Watts that he was made head of the Plaintiff Steering Committee. (CR at 291-338, 316.) Robert Hilliard later told Max Duncan that Watts was made head of the Plaintiff Steering Committee based upon the volume of cases that he had. (CR at 284-289, 286.) Watts stood to receive substantial additional compensation by virtue of his membership on the steering committee.

DLI remained confident in the return on its investment not only because of the continued representations of Watts, and others, but also in part because other participants' continued interest. In November 2010, John Cracken, another investor in the BP litigation, expressed an interest in purchasing another fifteen points of the thirty points of the deal from Watts. (CR at 291-338, 312-313.) Later in September of 2011, Watts expressed an interest in buying out John Cracken's interest. Watts continued to express confidence in the docket of clients. There was a period of time, after DLI had fully funded its investment, when there were many offers from lawyers to acquire DLI's interest in the litigation. (CR at 284-289, 287; 291-338, 315, 324-325.) DLI did not sell because Watts continually told DLI not to sell because things were going to turn out fine. (CR at 284-289, 287.)

On multiple occasions DLI was reassured that it would receive back all of the money it invested if the litigation did not progress as had been represented. (CR at 284-289, 287; 291-338, 319-321; 352-362, 356.) DLI was told by Watts on several occasions at 284-289, 286-287; 291-338, 391.) After DLI had fully funded its investment, Watts reaffirmed to DLI that the "apocalypse" as described in the Top 10 list was very unlikely to happen. (CR at 284-289, 287; 428-431, 429.) DLI turned down specific offers to buy-out its interest and recoup its investment of $5.8 million based upon its reliance upon the specific representations and reassurances provided by Watts. (CR at 284-289, 287; 291-338, 315, 324-325.) In October 2011, Watts tells Max Duncan "get ready, we are almost home, I can smell it…" (CR at 284-289, 287; 432.) In November 2011, Watts

tells DLI "we are exceedingly close to the promised land. We stand to achieve a nice return on our investments." (CR at 284-289, 287.)

In May 2012 a settlement agreement was reached with BP, "Seafood Compensation Fund," with $1.9 billion available in the first round of claims to be paid. The value of the fund was based in part on the 44,000 claimants Watts claimed to represent. In February 2013 the Department of Justice began investigating the legitimacy of Watts' client list arising out of the 2010 BP Oil spill. A search warrant was executed for his two law offices in San Antonio, Texas. (CR at 284-289, 287; 291-338, 317 .) On February 8, 2013, Watts Guerra Craft's offices were raided by the United States Secret Service. A federal criminal investigation was initiated. Max Duncan was interviewed by federal investigators and prosecutors. (CR at 284-289, 287.)

On September 15, 2015, Watts, along with others, was indicted for federal crimes by a grand jury in the Southern District of Mississippi. The indictment included ninety-five felony counts. (CR at 70-126.) Additionally, litigation was initiated against Watts by BP Exploration & Production, Inc. and BP America Production Company and a class of Vietnamese fishermen. There had been little to no communications between Watts and Max Duncan after 2013. By October 2015, all communications directly between Watts and Max Duncan had ceased. (CR at 284-289, 287; 291-338, 317-318.)

Max Duncan never had reason to doubt the existence of the 44,000 claimants. He saw no red flags that alerted him to the possibility that the clients did not exist or that Watts' "guys" were not doing what they were hired and paid to do. Up until the time that Watts was indicted on September 15, 2015, Max Duncan believed that the 44,000 clients

existed and that DLI would recover its investment if the required information could be obtained from the clients. (CR at 284-289, 288; 291-338, 327-28 .) Max Duncan had no way to independently verify or investigate the viability of the claims or the individuals hired by Watts. It was only in 2015, and as a part of the criminal investigation of Watts, that Max Duncan learned that although Watts had previously represented to DLI that 44,000 claimants had been signed up, that as of December 2013 only six hundred forty-eight claims had in fact been filed. The criminal investigation of Watts also revealed that as of 2015, of those six hundred forty-eight claims only eight were been found eligible for payment. By this point in time, Watts had been indicted, books were closed, and documents were unreachable. (CR at 284-289, 288; 291-338, 322-323.) Max Duncan also learned in 2015 from the officials investigating Watts that, of the 44,000 claimants, only forty-two percent of the claimants listed by Watts had a valid social security number. Of the remaining social security numbers submitted by Watts, forty percent belong to a living person other than the named claimant, five percent belong to a dead person other than the named claimant, and thirteen percent are incomplete or "dummy" social security numbers. Additionally, in at least one instance one of the claimants was listed twice, had never filed a claim, had never been represented by Watts, and was an employee of BP America. Of the forty-two percent of the listed claimants with valid social security numbers that match the names provided, ninety-five percent never actually filed a claim in the 2010 BP Oil spill litigation. It was during this time period that DLI first realized that Watts had failed to properly investigate the viability of the 44,000 claims and/or those persons hired to work-up the docket. The information learned by

Max Duncan during the criminal investigation of Watts revealed that Watts had not done the proper due diligence. (CR at 284-289, 288-289; 291-338, 303 .) Watts admits that he was duped by the very people who Watts entrusted with DLI's investment. (CR at 284-289, 289; 372-380, 379 .) Watts did not do anything to ensure that the people working for him were ensuring that the 44,000 clients were real people. These failures on the part of Watts resulted in the total loss of DLI's $5.8 million investment. (CR at 284-289, 289; 291-338, 311 .)

SUMMARY OF THE ARGUMENT

The trial court granted summary judgment in favor of Appellees, but that judgment was in error. Appellant's claims are not barred by the two year statute of limitations. Appellant's causes of action "accrued" within two years of the filing of its Original Petition and/or were deferred under the discovery rule and continuing tort defense. Appellees failed to (1) conclusively prove when the cause of action accrued; and (2) conclusively negate the application of the tolling provisions raised in Appellant's pleadings. Additionally, the trial court erred in overruling Appellant's objections to Appellees' untimely and improper summary judgment evidence. Appellees did not show themselves entitled to judgment as a matter of law on their Second Motion for Summary Judgment regarding limitations. Accordingly, this Court should reverse the judgment of the trial court and remand the case for trial on the merits.

ARGUMENT

I. Standard of Review for Traditional Summary Judgment

This court shall review a trial court's order granting summary judgment de novo. *Cmty Health Sys. Prof'l Servs. Corp. v. Hansen*, 525 S.W.3d 671, 680 (Tex. 2017.) A party moving for traditional summary judgment must establish there is no genuine issue of material fact, and it is entitled to summary judgment as a matter of law. *See* Tex. R. Civ. P. 166a(c); *Knott*, 128 S.W.3d at 215–16. A defendant moving for traditional summary judgment must negate at least one element of each of the plaintiff's theories of recovery or plead and conclusively establish each element of an affirmative defense. *Frost Nat'l Bank v. Fernandez*, 315 S.W.3d 494, 508 (Tex. 2010). Evidence is conclusive only if reasonable minds could not differ in their conclusions. *City of Keller v. Wilson*, 168 S.W.3d 802, 816 (Tex. 2005). If the defendant establishes its right to summary judgment as a matter of law, the burden shifts to the plaintiff to present evidence raising a genuine issue of material fact. *Centeq Realty, Inc. v. Siegler*, 899 S.W.2d 195, 197 (Tex. 1995).

An appellate court should examine the record in the light most favorable to the non-movant, indulging every reasonable inference and resolving all doubts in the non-movant's favor. *Knott*, 128 S.W.3d at 215; *Mendoza v. Fiesta Mart*, 276 S.W.3d 653, 655 (Tex. App.—Houston [14th Dist.] 2010, pet. denied). There is no presumption that the judgment was correct. *See Diversicare Gen. Partner, Inc. v. Rubio*, 185 S.W.3d 842, 846 (Tex. 2005). The Court should not consider any evidence favoring the movant unless

it is uncontradicted. *Great Am. Reserve Inc. Co. v. San Antonio Plumbing Supply Co.*, 391 S.W.2d 41, 47 (Tex. 1965). The traditional motion for summary judgment must stand or fall based upon only the grounds presented to the trial court. *Johnson v. Brewer & Pritchard, P.C.*, 73 S.W.3d 193, 204 (Tex. 2002). Issues not expressly presented to the trial court cannot be grounds for reversal on appeal. Tex. R. Civ. P. 166a(c); *Progressive Cnty. Mut. Ins. Co. v.* Boyd, 177 S.W.3d 919, 921 (Tex. 2005).

In the summary judgment context, when the plaintiff pleads the discovery rule as an exception to limitations, the defendant must not only conclusively establish limitations, but must also conclusively negate the exception with competent summary judgment evidence. *Rhone-Poulenc, Inc. v. Steel*, 997 S.W.2d 217, 223 (Tex. 1999). It is only when the facts are not in dispute that the question of when a cause of action accrues is a question of law. *See Houston Livestock Show and Rodeo, Inc. v. Hamrick*, 125 S.W.3d 555, 570 (Tex. App. -- Austin 2003, no pet.) If summary judgment was improperly granted, the appellate court must reverse the judgment and remand the case for trial on the merits. *Jones v. Strauss*, 745 S.W.2d 898, 900 (Tex. 1988); *accord Lubbock Cnty v. Trammel's Lubbock Bail Bonds*, 80 S.W.3d 580, 584 (Tex. 2002).

Appellees failed to meet their burden of proof to conclusively prove when Appellant's causes of action accrued. Appellees failed to conclusively negate the application of the tolling provisions raised in Appellant's pleadings, or at a minimum there were sufficient contested facts raised in the summary judgment evidence to create a fact issue under the discovery rule and continuing tort doctrine.

II. The trial court erred in granting Defendants' Second Motion for Summary Judgment regarding limitations because Appellees did not conclusively establish as a matter of law when Appellant's claims accrued.

Appellees' Second MSJ is premised solely upon oversimplified, incorrect and incomplete statements taken from Plaintiff's First Amended Petition. The four page traditional summary judgment motion was not supported by any summary judgment evidence, but rather relied solely upon allegations in Appellant's First Amended Petition and general propositions of law with respect to the applicable statute of limitations for negligence, gross negligence, and negligent misrepresentations. It sought to have the trial court determine as a matter of law that Appellant's claims are barred by the applicable statute of limitations based solely upon limited reference to purported allegations in Plaintiff's First Amended Petition. (CR at 433-436.)

A party may rely upon another party's pleadings as summary judgment proof only when the party's pleadings contain statements admitting facts or conclusions that directly contradict that party's theory of recovery or defense. *H2O Solutions, Ltd.. v. PM Rlty. Grp.*, 438 S.W.3d 606, 616-17 (Tex. App. -- Houston [1st Dist.] 2014, pet denied.) Appellant's pleadings did not support Appellees' theory of recovery under its statute of limitations defense. Appellant filed a timely response to Appellees' Second MSJ noting its deficiencies and failure to establish as a matter of law Appellees' right to summary judgment based solely upon the pleadings. (CR at 458-626.) Additionally, Appellant amended its petition to raise the discovery rule and continuing tort doctrines. (CR at 446-457.) Recognizing that their Second MSJ was inadequate, Appellees filed an untimely forty-three page Reply with three hundred thirteen pages of supporting summary

judgment evidence. This Reply is tantamount to a third motion for summary judgment on Appellant's claims under the discovery rule and continuing tort doctrine. Rather than reset the hearing, the Court proceeded with the hearing on March 8, 2018 over Appellant's objections and considered the untimely summary judgment evidence without the requisite notice. (CR at 627-982; RR at Vol. 1, pp 15-16, 35-36.)

In responding to Appellees' Second MSJ, Appellant did not dispute that the applicable statute of limitations for a negligence, gross negligence, or negligent misrepresentation claim is two years. TEX. CIV. PRAC. & REM CODE § 16.003(a); *see also HECI Exploration Co. v. Neel*, 982 S.W.2d 881, 885 (Tex. 1998) (statute of limitations for negligent misrepresentation is two years); *JPMorgan Chase Bank, N.A. v. Professional Pharmacy II,* 508 S.W.3d 391, 414 (Tex. App. -- Fort Worth 2014 2014, pet. dism'd). However, Appellant did dispute that the key inquiry was merely whether the acts and/or omissions on the part of the Appellees which supported Appellant's claims for negligence, gross negligence, and negligent misrepresentation ended in 2010 or 2011. (CR at 433-436, 435.) Rather the question before the trial court in considering Appellees' Second MSJ was when did the cause of action accrue and when should Appellant have known of the facts giving rise to a cause of action against Appellees. The competent summary judgment evidence timely submitted for consideration by the trial court clearly indicated that it was not before September 2015 with the criminal indictment of Watts. (CR at 458-626, 464-465.) DLI's Original Petition was filed well within this two year statute of limitations. (CR at 5-17.)

"Accrual" is the date when a cause of action's limitations period begins to run, namely when the plaintiff first became legally entitled to bring suit. *Seureau v. ExxonMobil Corp.*, 274 S.W.3d 206, 226 (Tex. App. -- Houston [14th Dist.] 2008, no pet.) Well established principles under common law provided the trial court with guidance in considering Appellees' Second MSJ in order to determine the accrual date for DLI's action against Defendants. *See KPMG Peat Marwick v. Harrison Cty. Hous. Fin. Corp.*, 988 S.W.2d 746, 750 (Tex. 1999). This may be done under either the legal injury rule or the continuing-tort doctrine. [A] cause of action accrues when facts come into existence that authorize a claimant to seek a judicial remedy, when a wrongful act causes some legal injury, or whenever one person may sue another. *Am. Star Energy & Minerals Corp. v. Stowers*, 457 S.W.3d 427, 430 (Tex. 2015). DLI's claims against Appellees accrued in the latter part of 2015 - merely days before its Original Petition was filed.

Appellees failed in meeting their burden of proof as to when DLI's causes of action accrued. For this reason, the trial court erred in granting summary judgment in favor of Appellees. Based on the evidence presented and the law, the trial court improperly granted summary judgment in favor of Appellees on this issue. Appellees did not prove as a matter of law that when Appellants claims accrued and were barred by the applicable statute of limitations. Conversely, viewing the evidence in a light most favorable to the Appellant, it easily raised a fact question on this issue and should be entitled to its day in court against Appellees.

III. The trial court erred in granting Defendants' Second Motion for Summary Judgment regarding limitations because Appellees failed to conclusively negate the tolling provision under the discovery rule and continuing tort doctrines.

The trial court erred in granting summary judgment in favor of Appellees because Appellees failed to conclusively negate the tolling provision under the discovery rule and continuing tort doctrines. The Court should reverse the judgment of the trial court and remand this case for trial.

A. Discovery Rule defers the accrual of Appellant's causes of action until September 2015.

The discovery rule "defers accrual of a claim until the injured party learned of, or in the exercise of reasonable diligence should have learned of, the wrongful act causing the injury." *Cosgrove v. Cade*, 468 S.W.3d 32, 36 (Tex. 2015); *see also Childs v. Haussecker*, 974 S.W.2d 31, 40 (Tex. 1998)(accrual requires knowledge of both "the wrongful act and the resulting injury."). The mere suspicion or accusation of wrongdoing is not sufficient to establish a date that wrongful conduct was discovered or discoverable. *Southwestern Energy Production Co. v. Berry-Helfand*, 491 S.W.3d 699, 724 (Tex. 2016). In this instance "the nature of the injury incurred is inherently undiscoverable and the evidence of injury is objectively verifiable." *See e.g. Computer Assocs. Int'l, Inc. v. Altai, Inc.*, 918 S.W.2d 453, 456 (Tex. 1994). The discovery rule should be applied in those circumstances where it is difficult for the injured party to learn of the negligent act or omission. *Id.* at 456. (citations omitted). When a plaintiff knew or should have known of an injury is generally a question of fact. *Cadle Co. v. Wilson*, 136 S.W.3d 345, 352 (Tex. App. -- Austin 2004, no writ) (citations omitted). The discovery rule is intended to

balance the conflicting policies between precluding stale claims against the risks of precluding meritorious claims outside an arbitrarily set period of time. *Syrian American Oil Corp. v. Pecten Orient Co.*, 524 S.W.3d 350, 360 (Tex. App. -- Houston [1st Dist.] 2017, no pet.)

Appellees repeatedly assured Appellant that it did not need to worry and that its investment was safe. Appellees never disclosed that no more than one simple and obviously unreliable background check was made with respect to the individuals entrusted with Plaintiff's investment. (CR at 458-626, 559-560.) Appellant learned this for the first time as a result of the sworn deposition testimony given by Watts on November 20, 2017. Appellees never disclosed that they had actually learned of a prior criminal charge against Greg Warren relating to fake clients in a mass tort matter. (CR at 986-1009, 1004, 1008-1009.) Appellant learned this for the first time during Max Duncan's sworn deposition testimony on November 30, 2017. (CR at 986-1009, 998-999.) This information was not on publicly available websites or disseminated via the mass media. It was disclosed in litigation involving the Appellant, but only in 2017. (CR at 986-1009, 1001-1003.)

These repetitive and wrongful or tortious acts defer the accrual of Appellant's cause of action against Appellees. *See e.g. Krohn v. Marcus Cable Associates, L.P.*, 201 S.W.3d 876, 881 (Tex. App. -- Waco 2006, pet. denied); *Adler v. Beverly Hills Hosp.*, 594 S.W.2d 153, 155 (Tex. App. -- Dallas 1980, no writ); *Twyman v. Twyman*, 790 S.W.2d 819, 821 (Tex. App. -- Austin, 1990), rev'd on other grounds, 855 S.W.2d 619 (Tex. 1993). Watts' own explanation for not knowing more about his "guys" was that it

took "millions of dollars, countless subpoenas, a lot of phone calls, a lot of witness interviews" and "the power of a Federal criminal subpoena" to determine the true nature of the "guys" to whom Defendants handed over Plaintiff's millions of dollars. (CR at 458-626, 561-563.)

The issue is not when Appellant was on notice of "the alleged illegitimacy of a substantial percentage of WGC's BP client base" or when Appellant was on notice as to any fraud perpetrated by the "Ferrington field team," but instead when did it know or should have known that Appellees failed to exercise reasonable diligence in investigating the viability of the BP docket and the background of the "Ferrington field team" before transferring millions of dollars invested by Appellant. The competent and timely summary judgment evidence before the trial court established that this did not occur until late 2015, at the earliest, and well within the two year statute of limitations for Appellant's causes of action.

B. Continuing Tort Doctrine tolls the accrual of Plaintiff's causes of action until September 2015

The Texas Supreme Court has recognized that in certain situations, the continuing-tort doctrine is needed to protect the rights of plaintiffs. *Exxon Mobil Corp. v. Rincones*, 520 S.W.3d 572, 593 (Tex. 2017). This matter is that very situation. "A continuing tort involves wrongful conduct inflicted over a period of time that is repeated until desisted, and each day creates a separate cause of action." *Id.* at 592 (citations omitted).

DLI alleged the following as to Appellees:

> Watts had a duty to fully and adequately investigate and research the background of those individuals who were hired by or with the approval of

Watts and entrusted by Watts with the monies from the Duncan investment. (CR at 446-457, 454.)

As a part of its Reply in support of its Second MSJ Appellees offered emails attached as Exhibits 1 through 40 and news articles attached as Exhibits 41-43 and 45-50. Nothing about these emails or articles puts Appellant on notice of facts which would authorize Appellant to seek a judicial remedy for Appellees' failure to investigate the background of the individuals entrusted with Appellant's monies. Appellees hid the fact that they had failed to adequately investigate and research these low level employees until Watts admitted on August 9, 2016 in his opening statement and again on August 17, 2016 in his closing argument of his criminal trial that he had been duped. (CR at 372-378; 458-626, 494.) It was only during the criminal investigation of Watts that Appellant learned that Appellees had not done the proper due diligence, something which Appellees affirmatively hid from Appellant. (CR at 263-432, 285, 288.) A fact that Appellees knew long before even the criminal investigation, but intentionally or negligently failed to disclose to Appellant. On November 6, 2010 John Cracken forwarded an email to Watts and Bob Hilliard with a link to a news story. That news story was about Greg Warren (one of Defendants' guys) having pled guilty to conduct involving fake clients in the Fen-Phen litigation. (CR at 986-1009, 1004, 1008-1009.) This email chain did not include Max Duncan. This email chain was never forwarded to Max Duncan. Information regarding the very guy who was handed Appellant's millions of dollars by Appellees was never shared with Appellant. (CR at 986-1009, 998-1003.) Instead, Appellees continued to reassure Appellant that it would receive back all of the

money it invested if the litigation did not progress as had been represented, Appellees had DLI's back, and if things went wrong, DLI would not lose any money. (CR at 263-432, 287.) Watts "unilaterally gave [the guys] a nod" in the BP litigation" and never disclosed their "dark side" when it was discovered. (CR at 986-1009, 1005.) Appellees continued the charade and conduct of withholding information from DLI until forced to disclose the information as a part of the criminal investigation and trial. Because of this continuing conduct, DLI turned down specific offers to buy-out DLI's interest and recoup its investment of $5.8 million. (CR at 263-432, 287.) The negligent conduct and wrongful acts which form the basis of Appellant's claims against Appellees were inflicted over several years and were repeated until it desisted in 2015 with the criminal investigation, indictment and trial of Watts.

Appellees' continued silence as the 44,000 docket of cases began to unravel is the type of repetitive or tortious acts which constitute a continuing tort. This failure to disclose the lack of any investigation into the backgrounds of the guys employed by Appellees is the last tortious act which falls clearly within the two year statute of limitations. A person cannot be permitted to avoid liability for his actions by deceitfully concealing wrongdoing until limitations has run. *See e.g. Computer Assocs. Int'l, Inc. v. Altai, Inc.*, 918 S.W.2d 453, 456 (Tex. 1994). This case involves a continuing course of conduct - silence about the lack of due diligence - which occurs over a period of years that caused injury. "Since usually no single incident in a continuous chain of tortious activity can 'fairly or realistically be identified as the cause of significant harm' it seems proper to regard the cumulative effect of the conduct as actionable." *Twyman v.*

Twyman, 790 S.W.2d 819, 821 (Tex. App. -- Austin 1990), rev'd on other grounds, 855 S.W.2d 619 (Tex. 1993).

Appellant timely pled the discovery rule and continuing tort in its Second Amended Petition. (CR at 446-487.) Appellees' Second Motion for Summary Judgment does not even address these doctrines. (CR at 433-436.) They were only addressed in Appellees untimely Reply offered in support of Appellees' Second MSJ. (CR at 439-445.) Even then, the evidence is insufficient to meet Appellees' burden of proof.

Appellees failed to meet their burden of proof to establish as a matter of law that Appellant's claims against Defendants accrued more than two years prior to December 18, 2015 or that the claims are not deferred until after through reasonable diligence Appellant should have learned of the wrongful acts giving rise to its injuries.

The uncontroverted summary judgment evidence established that Appellant never had reason to doubt the existence of the 44,000 BP claimants. Appellant saw no red flags that alerted it to the possibility that the clients did not exist or that the guys hired by Appellees were not doing what they were hired and paid to do. Up until the time that Watts was indicted on September 15, 2015, Appellant had every reason to believe that the 44,000 clients existed and that it would recover its investment. (CR at 263-432, 284-289; 291-338, 328-329.) Appellant had no way to independently verify or investigate the viability of the claims or the individuals hired by Appellees. It was only in 2015, and as a part of the criminal investigation of Watts, that Appellant learned that although Watts had previously represented that 44,000 claimants had been signed up, that as of December 2013 only six hundred forty-eight claims had in fact been filed. The criminal

investigation of Watts also revealed that as of 2015, of those six hundred forty-eight claims only eight were been found eligible for payment. By this point in time, Watts had been indicted, books were closed, and documents were unreachable by Appellant. (CR at 291-338, 322-323.) Appellant also learned in 2015 from the officials investigating Watts that, of the 44,000 claimants, only forty-two percent of the claimants listed had a valid social security number. Of the remaining social security numbers submitted, forty percent belong to a living person other than the named claimant, five percent belong to a dead person other than the named claimant, and thirteen percent are incomplete or "dummy" social security numbers. Additionally, Appellant learned in 2015 that in at least one instance one of the claimants was listed twice, had never filed a claim, had never been represented by Appellees, and was an employee of BP America. Of the forty-two percent of the listed claimants with valid social security numbers that match the names provided, ninety-five percent never actually filed a claim in the 2010 BP Oil spill litigation. It was during this time period that Appellant first realized that Watts had failed to properly investigate the viability of the 44,000 claims and those persons hired to work-up the docket. The information Appellant learned during the criminal investigation of Watts revealed that Appellees had not done the proper due diligence. (CR at 263-432, 288.) Watts admits that he was duped by the very people who he entrusted with Appellant's investment. (CR at 263-432, 305.) Appellees did nothing to ensure that the people working for them were making sure the 44,000 clients were real. These failures on the part of Appellees resulted in the total loss of Appellant's $5.8 million investment. (CR at 263-432, 289, 311.)

Appellees failed to establish as a matter of law that Appellant's claims are barred by limitations. At a minimum the competent summary judgment evidence raises fact issues which preclude summary judgment. Therefore, summary judgment should not have been granted by the trial court, and this Court should reverse the judgment of the trial court and remand this issue for trial.

IV. The trial court erred in overruling Appellant's objections to Appellees' untimely and improper summary judgment evidence offered with its Reply in Support of their Second Motion for Summary Judgment.

"Because summary judgment is a harsh remedy, the notice provisions of Rule 166a are strictly construed." *Wavell v. Caller-Times Pub. Co.*, 809 S.W.2d 633, 637 (Tex. App. -- Corpus Christi 1991, writ denied.) While there is no specific deadline for a reply to a response to a summary judgment motion, the deadline to file affidavits, unfiled discovery, and other summary-judgment evidence is the same deadline that applies to the motion - twenty-one days. TEX. R. CIV. P. 166a(c) and (d).

Appellees' Reply in Response to Defendants' Second Motion for Summary Judgment is essentially a third motion for summary judgment seeking to defeat the tolling doctrines timely raised after the filing of Defendants' Motion for Summary Judgment regarding limitations. Rather than filing a third motion and providing the required notice, Appellees submitted three hundred and thirteen pages of documents under the guise of evidence in support of the Second MSJ, which did not even address the tolling doctrines. A non-movant is entitled to twenty-one days' notice of each motion a party files. TEX. CIV. P. 166a(c); *see also Ajibade v. Edinburg Gen. Hosp.*, 22 S.W.3d 37, 40 (Tex. App. -- Corpus Christi 2000, no pet.) Appellees did not seek leave to file a summary judgment or

summary judgment evidence with less than twenty-one days' notice. TEX. R. CIV. P. 166a(c). Appellant objected to the late motion and summary judgment evidence. *see Id*.; (CR at 983-985; RR at Vol 1, pp. 15-16, 35-36.)

In addition to the untimeliness of the evidence, Appellant also raised valid objections which the court improperly overruled. (CR at 983-985, 983; 988.) Appellant raised the following objections:

- Plaintiff objects to Exhibit A, Affidavit of Mikal Watts, for the reason that the affidavit is based upon hearsay, conclusory statements, a subjective determination of the facts and opinions on these facts. (CR at 983-985, 983; 987.) *See e.g. Armstrong v. Harris Co.*, 669 S.W.2d 323, 328 (Tex. App. -- Houston [1st Dist.] 1983, writ ref'd n.r.e.); *Youngstown Sheet and Tube Co. v. Penn*, 363 S.W.2d 230 (Tex. 1962).

- Plaintiff objects to the emails offered as Exhibits 1 through 40, for the reason that each contains inadmissible hearsay. (CR at 986-1009, 988.) TEX. R. EVID. 801.

- Plaintiff objects to the news articles offered as Exhibits 41 through 43, and 45-50 because they constitute inadmissible hearsay. As a general rule, Texas courts consider newspaper and magazine articles as inadmissible hearsay. (CR at 986-1009, 988.) TEX R. EVID. 801(d); *City of Austin v. Houston Lighting & Power Co*., 844 S.W.2d 773, 791 (Tex. App. - Dallas 1992, writ denied).

The trial court erred when it considered the untimely summary judgment evidence and overruled Appellant's objections to the evidence.

PRAYER

For the reasons herein, Appellant Duncan Litigation Investments, LLC asks this Court to sustain each of Appellant’s issues on appeal, reverse the ruling of the trial court below, and remand this case for trial on the merits.

Respectfully submitted,

BAKER, DONELSON, BEARMAN, CALDWELL & BERKOWITZ, P.C.

BY: /s/ Karen D. Smith
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Duncan Litigation Investments, LLC

CERTIFICATE OF COMPLIANCE

Pursuant to Texas Rule of Appellate Procedure 9.4(i)(3), the undersigned certifies that this Brief complies with the length limitations of Rule 9.4(i) and the typeface requirements of Rule 9.4(e).

1. Exclusive of the contents excluded by Rule 9.4(i)(1), this Brief contains 6,862 words as counted by the Word Count function (including textboxes, footnotes, and endnotes) of Microsoft Office Word 2010.

2. This Brief has been prepared in proportionally spaced typeface using:

Software Name and Version: Microsoft Office Word 2010
Typeface Name: Times New Roman
Font Size: 14 point

/s/ Karen D. Smith
Karen D. Smith

CERTIFICATE OF SERVICE

I hereby certify that on the 25th of October, 2018 a true and correct copy of the foregoing was sent by U.S. mail, or by electronic service where allowed, as follows:

Mikal C. Watts
Rick Holstein
Michael J. Murray
Watts Guerra, LLP
Four Dominion Drive
Building Three, Suite 100
San Antonio, Texas 78257

/s/ Karen D. Smith
Karen D. Smith

13-18-00265-CV

IN THE

THIRTEENTH COURT OF APPEALS

CORPUS CHRISTI

DUNCAN LITIGATION INVESTMENTS, LLC

Appellant,

v.

MIKAL WATTS AND WATTS GUERRA, LLP

Appellees.

On Appeal from the
94th Judicial District Court
Nueces County, Texas
Cause Number 2015DCV-5759-C

APPENDIX TO APPELLANT'S AMENDED BRIEF

KAREN D. SMITH

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ATTORNEYS FOR APPELLANT

APPENDIX

A.	Rule 11 Agreement dated 6/22/2016
B.	First Amended Notice of Hearing dated 01/29/2018
C.	Second Amended Notice of Hearing dated 02/19/2018
D.	Correspondence to Nueces County District Clerk requesting the supplementation of the clerk's record

A

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June 17, 2016

Frank Guerra
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4 Dominion Drive
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San Antonio, TX 78257

Re: Cause No. 2015DCV-5769-C; *Duncan Litigation Investment, LLC v. Mikal Watts and Watts & Guerra, LLP*, In the 94th Judicial District Court, Nueces County, Texas.

Dear Frank:

This is in follow-up to our discussions regarding reaching an agreement on the scope of preliminary document production.

On or before the 30th day of execution of this Rule 11 agreement, the parties shall produce the following documents:

1. Any and all emails relating to the BP project including but not limited to emails by and between Mikal Watts or Max Duncan, and/or either of them and Bob Hilliard, Mikal Watts, David Watts, Eloy Guerra, and Greg Warren.

2. Phone records between 4/20/10 and 2/8/13 involving phone calls relating to the BP project including but not limited to records of phone calls by and between Mikal Watts or Max Duncan, and/or either of them and Bob Hilliard, Mikal Watts, David Watts, Eloy Guerra, and/or Greg Warren.

3. Any and all contracts between Mikal Watts, Watts & Guerra, LLP, and/or Bob Hilliard relating to the BP project.

4. Any and all calendars between the time period of 4/20/10 and 2/8/13.

5. Documents produced on June 1, 2016 in the Mississippi criminal proceedings.

In exchange for the above agreement regarding production of documents, the parties agree that the deadline for Defendants to answer the lawsuit filed above shall be extended to October 1, 2016.

If you agree, please sign below and return at your earliest convenience.

Sincerely,

Karen D. Smith

Karen D. Smith

/kds

AGREED:

_____
Frank Guerra

Date: 6/21/16

B

CAUSE NO. 2015DCV-5769-C

DUNCAN LITIGATION INVESTMENTS, LLC	*	IN THE DISTRICT COURT
VS.	*	94th JUDICIAL DISTRICT
MIKAL WATTS and WATTS GUERRA, LLP	*	NUECES COUNTY, TEXAS

FIRST AMENDED NOTICE OF ORAL HEARING

You are hereby advised that a hearing has been set before the 94th Judicial District Court of Nueces County, Texas on the **20th day of February 2018, at 9:00 a.m.**, 9th Floor of the Nueces County Courthouse, 901 Leopard Street, Corpus Christi, Texas 78401 for the following matters:

- Status Conference;
- Defendants' Motion for Summary Judgment; and
- Defendants' Second Motion for Summary Judgment Re: Statute of Limitations.

Respectfully submitted,

WATTS GUERRA LLP

By: _____

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was served on the following counsel of record by electronic service on January 29, 2018.

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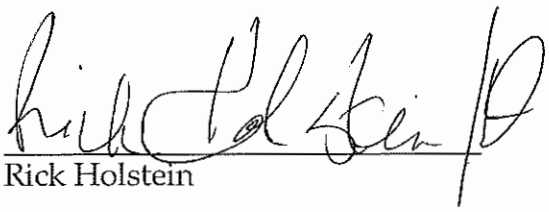

Rick Holstein

C

CAUSE NO. 2015DCV-5769-C

DUNCAN LITIGATION INVESTMENTS, LLC	*	IN THE DISTRICT COURT
VS.	*	94th JUDICIAL DISTRICT
MIKAL WATTS and WATTS GUERRA, LLP	*	NUECES COUNTY, TEXAS

SECOND AMENDED NOTICE OF ORAL HEARING

You are hereby advised that a hearing has been set before the 94th Judicial District Court of Nueces County, Texas on the **8th day of March 2018, at 1:00 p.m.**, 9th Floor of the Nueces County Courthouse, 901 Leopard Street, Corpus Christi, Texas 78401 for the following matters:

- Status Conference;
- Defendants' Motion for Summary Judgment; and
- Defendants' Second Motion for Summary Judgment Re: Statute of Limitations.

This is a continuation of the hearing on these matters previously scheduled for **February 20, 2018, at 9:00 p.m.**

Respectfully submitted,

WATTS GUERRA LLP

By: _____

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was served on the following counsel of record by electronic service on February 19, 2018.

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~~Rick Holstein~~ Mick Watts

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October 16, 2018

Via EFile
Tiffany Garza
Nueces County Appeals Clerk
901 Leopard Street, Room 313
Corpus Christi, Texas 78401

Re: Cause No. 2015DCV-5769-C; Duncan Litigation Investment, LLC v. Mikal Watts and Watts & Guerra, LLP; In the 94th Judicial District Clerk of Nueces County, Texas;
and
Cause No. 13-18-00265-CV; Duncan Litigation Investments, LLC v. Mikal Watts and Watts Guerra, LLP; In the 13th Court of Appeals.

Dear Ms. Garza:

Pursuant to Texas Rule of Appellate Procedure 34.5(b), please supplement the clerk's record by including the following items in the clerk's record for the appeal of this case:

1. Rule 11 Agreement filed 06/22/2018 referenced in the Case Summary (page 1018 of the Record);

2. Notice of Hearing/Setting *Notice of Oral Hearing* referenced in the Case Summary (page 1019 of the Record); and

3. Notice *Second Amended Notice of Oral Hearing* referenced in the Case Summary (page 1020 of the Record).

These items were inadvertently omitted from the record forwarded to the Court of Appeals on or around August 8, 2018.

Please forward an invoice for the amount required to prepare the requested document to be included in the clerk's record on appeal.

Please notify me if you have any questions or require any further information to complete this request.

Thank you for your assistance with this matter.

Sincerely,

BAKER, DONELSON, BEARMAN,
CALDWELL & BERKOWITZ, PC

/s/ Karen D. Smith

Karen D. Smith

cc: Mikal C. Watts
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