Dismiss and Opinion Filed October 20, 2020

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-19-00073-CV

IN THE ESTATE OF IRA E. TOBOLOWSKY, DECEASED

On Appeal from the 95th District Court
Dallas County, Texas
Trial Court Cause No. DC-18-17620

MEMORANDUM OPINION

Before Justices Myers, Partida-Kipness, and Reichek
Opinion by Justice Partida-Kipness

This appeal arises from Michael Tobolowsky's petition for pre-suit discovery under rule of civil procedure 202. As the administrator of the estate of Ira E. Tobolowsky (the Estate), Michael sought pre-suit discovery from the City of Dallas and Dallas County of records related to the criminal investigation into the murder of his father, Ira. The City and the County filed pleas to the jurisdiction. The trial court denied the pleas, granted the petition as to the City, and dismissed the petition as to the County. Appellant City of Dallas appeals the trial court's denial of its plea to the jurisdiction. The Estate appeals from the trial court's dismissal of its petition as to the County. As cross-appellant, the County appeals the denial of its plea to the

jurisdiction. We vacate the trial court's order and dismiss the case for want of jurisdiction.

BACKGROUND

Ira Tobolowsky was murdered in his home on May 13, 2016. The Dallas Police Department (DPD) investigated the murder, but no arrest has been made. As the administrator of the Estate, Michael sought access to DPD's records by public information request. The City asserted the law enforcement privilege and sought a ruling from the Office of the Attorney General (OAG). The OAG agreed with the City, and the City withheld the requested records.

On November 21, 2018, Michael filed a Rule 202 petition on behalf of the Estate, seeking oral depositions, documents, and records from the DPD and Dallas County Medical Examiner. The original petition stated the Estate sought the discovery to investigate "potential wrongful death claims against other parties" in an attempt "to investigate its potential claims for the wrongful death of Ira E. Tobolowsky" because the Estate is unable to investigate the claims without the requested information. DPD filed a plea to the jurisdiction and special exceptions on the ground that it was not a jural entity.

The Estate then amended its petition to clarify it sought discovery from DPD as a department of the City. As with the original petition, the amended petition sought discovery to investigate "potential wrongful death claims against ***other*** parties" and alleged the information was necessary for the Estate "to investigate

potential claims for the wrongful death of Ira E. Tobolowsky . . . ." DPD filed a response raising defenses of limitations and law enforcement privilege. The County filed a plea to the jurisdiction, arguing that the Medical Examiner's office is not a jural entity and limitations had expired on any wrongful death claim the Estate might bring. Both the City and the County noted in their responsive pleadings that the discovery rule, which tolls limitations under certain circumstances, does not apply to wrongful death claims.

With the hearing on the City's plea to the jurisdiction set for December 28, 2018, the Estate filed a second amended petition on December 27, 2018. Although generalizing the potential claims as "claims against ***other*** parties, arising out of/relating to the death of Ira E. Tobolowsky," the second amended petition restated the allegation that "Petitioner is attempting to investigate its potential claims for the wrongful death of Ira E. Tobolowsky and is unable to do so without the information requested . . . ." The second amended petition also addressed respondents' limitations and discovery rule arguments. Specifically, the second amended petition argued that limitations could be tolled on the Estate's claims based on fraudulent concealment or a judicial change to the common-law discovery rule's applicability to wrongful death claims. The second amended petition also indicated that the Estate might pursue something other than a wrongful death claim but did not provide the subject matter of that potential claim. In its response, the City argued that the second amended petition had not identified any claim other than wrongful death and

"fraudulent concealment of one's identity does not toll the statute of limitations." Both the City and County moved for a continuance on the grounds that the second amended petition did not comply with Rule 202's service and hearing notice requirement.

The trial court held the hearing on the City's plea to the jurisdiction as scheduled. On December 30, 2018, the trial court issued an order denying the pleas to the jurisdiction, denying the City's motion for continuance, dismissing the Rule 202 petition as to the County, and granting the petition as to the City. This appeal followed.

ANALYSIS

The parties in this appeal raise several issues and counter-issues regarding the trial court's rulings and order. Before we can address any of these issues, however, we must address the threshold concern raised in the City's first issue: Whether the Estate's Rule 202 petition is moot because the limitations period on the Estate's anticipated claim has expired. The Estate filed its original Rule 202 petition on November 21, 2018, seeking discovery of information regarding the May 13, 2016 murder of Ira E. Tobolowsky. The City contends the Estate's Rule 202 petition is moot and must be dismissed because the two-year limitations period on the Estate's anticipated wrongful death claim has expired.

Rule of Civil Procedure 202 provides a tool for preliminary investigations of "potential" or "anticipated" claims. *In re DePinho*, 505 S.W.3d 621, 624 (Tex.

2016) (orig. proceeding) (per curiam); *Dow Jones & Co., Inc. v. Highland Capital Mgmt., L.P.*, 564 S.W.3d 852, 856 (Tex. App.—Dallas 2018, pet. filed) ("Rule 202 functions as a precursor and potential gateway to plenary merits litigation by allowing a prospective party to pursue discovery in aid of an as yet unfiled claim."); *Lee v. GST Transp. Sys., LP*, 334 S.W.3d 16, 19 (Tex. App.—Dallas 2008, pet. denied) (observing that Rule 202 proceeding "is not a separate, independent lawsuit but is in aid of and incident to an anticipated suit"). Consequently, a Rule 202 petition "asserts no substantive claim or cause of action upon which relief can be granted," and the petitioner "simply acquires the right to obtain discovery—discovery that may or may not lead to a claim or cause of action upon which relief can be granted." *Combs v. Tex. Civil Rights Project*, 410 S.W.3d 529, 534 (Tex. App.—Austin 2013, pet. denied). Rule 202 does not require a petitioner to plead a specific cause of action. *City of Dallas v. Dallas Black Fire Fighters Ass'n*, 353 S.W.3d 547, 557 (Tex. App.—Dallas 2011, no pet.). Instead, a Rule 202 petition "must . . . state the subject matter of the anticipated action, if any, and the petitioner's interest therein." TEX. R. CIV. P. 202.2(e); *Dallas Black Fire Fighters*, 353 S.W.3d at 557.

"Generally, a party 'cannot obtain by Rule 202 what it would be denied in the anticipated action.'" *In re DePinho*, 505 S.W.3d at 623 (quoting *In re Wolfe*, 341 S.W.3d 932, 933 (Tex. 2011) (orig. proceeding) (per curiam)). "In other words, the rule cannot be used as 'an end-run around discovery limitations that would govern

the anticipated suit.'" *Id*. (quoting *In re Wolfe*, 341 S.W.3d at 933). Thus, "for a party to properly obtain Rule 202 pre-suit discovery, 'the court must have subject-matter jurisdiction over the anticipated action' . . . ." *Id*. (quoting *In re Doe (Trooper)*, 444 S.W.3d 603, 608 (Tex. 2014) (orig. proceeding)). Likewise, the anticipated action must present a justiciable controversy. *See Glassdoor, Inc. v. Andra Group, LP*, 575 S.W.3d 523, 527 (Tex. 2019) (noting that it would serve no legal purpose to allow Rule 202 petitioner to investigate claims barred by limitations).

The Estate contends that it has adequately pleaded the subject matter of its anticipated claims as those "arising out of the death of Ira E. Tobolowsky." Even assuming the Estate's second amended petition meets Rule 202's pleading requirement, the Estate must still show that its anticipated action presents a justiciable controversy. On this point, the City contends that the Estate's potential claims are time-barred. The Estate argues the City is relying on the Estate's earlier pleading that it was investigating a possible wrongful death claim arising from Ira's murder. According to the Estate, it broadened the universe of possible claims in its second amended petition to all "potential claim(s) arising out of the death of Ira E. Tobolowsky," which presumably could include claims with longer limitations periods. Thus, the Estate argues the trial court did not err in denying the City's and County's pleas to the jurisdiction and granting the Estate's petition as to the City. Such a broad pleading of anticipated claims, however, would not meet Rule 202's

requirement that the petitioner state the "subject matter of the anticipated action." TEX. R. CIV. P. 202.2(e); *see, e.g.*, *In re City of Dallas*, No. 05-18-00289-CV, 2018 WL 5306925, at *6 (Tex. App.—Dallas Oct. 26, 2018, orig. proceeding) (mem. op.) (pleading that petitioner "is investigating potential claims pursuant to 42 U.S.C. § 1983" and information sought "will enable [petitioner] to conduct a good faith reasonable investigation regarding any 42 U.S.C. § 1983 claims regarding the [i]ncident" did not meet Rule 202's pleading requirements); *Cooper v. Reynolds*, No. 02-18-00270-CV, 2019 WL 4010220, at *3 (Tex. App.—Fort Worth Aug. 26, 2019, no pet.) (mem. op.) (petition seeking "to depose deponent to investigate a potential claim arising out of a fraudulently induced court document" was insufficient to state the subject matter of the anticipated action).

Moreover, the record reflects that the Estate consistently pleaded anticipated wrongful death or survival claims. In its original petition, the Estate claimed it sought information in support of its potential wrongful death claim against parties responsible for Ira's murder. Although the Estate's second amended petition generalized the anticipated claims as those "arising out of the death of Ira E. Tobolowsky," it still alleged that "Petitioner is attempting to investigate its potential claims for the wrongful death of Ira E. Tobolowsky and is unable to do so without the information requested . . . ." At the hearing, the Estate argued that its second amended petition did not contain substantive changes, but merely clarifications, and offered that it might also bring an assault claim.

Wrongful death and survival claims are the only derivative personal injury claims an estate or heirs may bring upon another's death. *See In re Labatt Food Serv., L.P.*, 279 S.W.3d 640, 644 (Tex. 2009) ("At common law there was no recognized cause of action for the wrongful death of another person."); TEX. CIV. PRAC. & REM. CODE § 71.003(a) (permitting a wrongful death action "if the individual injured would have been entitled to bring an action for the injury if the individual had lived"); *see also Russell v. Ingersoll-Rand Co.*, 841 S.W.2d 343, 344 (Tex. 1992) (survival actions did not exist at common law); TEX. CIV. PRAC. & REM. CODE § 71.021(b) ("A personal injury action survives to and in favor of the heirs, legal representatives, and estate of the injured person.").

The limitations period on these statutory claims is determined by the underlying claim or, in the case of wrongful death, the date of the death. *Russell*, 841 S.W.2d 345, 348–49. The limitations period for both wrongful death and assault claims is two years. TEX. CIV. PRAC. & REM. CODE § 16.003(b) ("A person must bring suit not later than two years after the day the cause of action accrues in an action for injury resulting in death. The cause of action accrues on the death of the injured person."). Here, those dates coincide to May 13, 2016. The Estate filed its Rule 202 petition on November 21, 2018, after the limitations period expired.

To avoid dismissal of its petition, the Estate argued in its second amended petition that the limitations period was tolled by fraudulent concealment because the wrongdoer had fraudulently concealed his or her identity. Fraudulent concealment

does not apply to concealment of the wrongdoer's identity but applies only when "the wrongdoer fraudulently conceals the plaintiff's *cause of action*." *Baxter v. Gardere Wynne Sewell LLP*, 182 S.W.3d 460, 464 (Tex. App.—Dallas 2006, pet. denied); *see also ExxonMobil Corp. v. Lazy R Ranch, LP*, 511 S.W.3d 538, 544 (Tex. 2017) ("Fraudulent concealment requires showing that the defendant actually knew the plaintiff was in fact wronged, and concealed that fact to deceive the plaintiff." (internal citation omitted)). The Estate makes no claim that the cause of action has been concealed, and it may not rely on fraudulent concealment to toll limitations based on concealment of the wrongdoer's identity. *See Baxter*, 182 S.W.3d at 464.

The Estate also argued in its second amended petition that limitations might be tolled by a possible future judicial decision permitting application of the common-law discovery rule to wrongful death claims. Such a ruling is highly improbable considering the discovery rule applies only to inherently undiscoverable injuries. *Barker v. Eckman*, 213 S.W.3d 306, 312 (Tex. 2006). Thus, it does not apply to an assault or wrongful death claim that arises from injuries generally discoverable at the time of the assault or death. *Bros. v. Gilbert*, 950 S.W.2d 213, 216 (Tex. App.—Eastland 1997, pet. denied) ("The 'discovery rule' is not applicable to claims of common-law assault."); *Love v. Zales Corp., Inc.*, 689 S.W.2d 282, 285 (Tex. App.—Eastland 1985, writ ref'd n.r.e.) (discovery rule did not apply to toll limitations as to claims asserted against seller of shotgun because plaintiffs "knew they had been injured when the shootings occurred," even if they did not know at

that time who sold shooter the weapon used); *see also Moreno v. Sterling Drug, Inc.*, 787 S.W.2d 348, 350–51, 354–55 (Tex. 1990) (legislature expressly stated that "[t]he cause of action accrues on the death of the injured person" and by doing so "has foreclosed judicial application of the discovery rule. If we concluded otherwise, we would be disregarding the plain meaning of section 16.003(b), distorting the clear function of the discovery rule, frustrating the legitimate purposes of limitation statutes, and ignoring the well-reasoned opinions of most other jurisdictions"); *but c.f. Rhone-Poulenc, Inc. v. Steel*, 997 S.W.2d 217, 224 (Tex. 1999) (assuming, without deciding, the discovery rule applied to wrongful death claims involving latent occupational disease when determining whether defendant employer negated the rule as a matter of law with summary judgment evidence claimant knew or in the exercise of reasonable diligence should have known that the disease was likely work-related). Moreover, the limitations period begins to run under the discovery rule when the claimant learns of the wrongful injury, even if the claimant does not yet know "the specific cause of the injury; the party responsible for it; the full extent of it; or the chances of avoiding it." *Exxon Corp. v. Emerald Oil & Gas Co., L.C.*, 348 S.W.3d 194, 207 (Tex. 2011); *Bruning v. Hollowell*, No. 05-13-01033-CV, 2015 WL 1291378, at *3 (Tex. App.—Dallas Mar. 23, 2015, pet. denied) (mem. op.) (discovery rule "defers accrual of the causes of action only until the plaintiff discovered or in the exercise of reasonable diligence should have discovered the wrongful injury"); *Love*, 689 S.W.2d at 285 (same).

Unlike the latent-injury claims to which the discovery rule necessarily applies, the injury at issue here is known. Indeed, even the specific cause of the injury is known. The remaining unknown facts, which are the basis of the Estate's Rule 202 petition, are the identity of the responsible party, the plan to commit the murder, and the events leading up to the murder. These facts are insufficient to toll limitations under the discovery rule. *See Exxon Corp.*, 348 S.W.3d at 207. Thus, even assuming a court were to render the unlikely ruling proposed by the Estate, the discovery rule would still not toll limitations on the Estate's wrongful death claim. *See id*.

There is no indication in the record or in the Estate's briefing on appeal as to what other claims the Estate anticipated, much less that such claims would not also be barred by limitations. Because the Estate's anticipated wrongful death and survival claims were barred by limitations before the Estate filed its Rule 202 petition, its petition was moot. *See Glassdoor, Inc.*, 575 S.W.3d at 530. We sustain the City's first issue.

Because the petition was moot when filed, we conclude the trial court did not have jurisdiction to consider the merits of the Estate's petition as to either the City or the County. *See id*. at 531 (dismissing case for want of jurisdiction because limitations period had expired on Rule 202 petition's anticipated claims). Given our disposition of this issue, we need not address any remaining issues in this appeal.

CONCLUSION

Because the limitations period had run on the Estate's anticipated claims before it filed its Rule 202 petition, the petition was moot, and the trial court should have dismissed the petition for want of jurisdiction. Accordingly, we vacate the trial court's order and dismiss the case for want of jurisdiction.

/Robbie Partida-Kipness/
ROBBIE PARTIDA-KIPNESS
JUSTICE

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Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

IN THE ESTATE OF IRA E. TOBOLOWSKY, DECEASED	On Appeal from the 95th District Court, Dallas County, Texas Trial Court Cause No. DC-18-17620.
No. 05-19-00073-CV	Opinion delivered by Justice Partida-Kipness. Justices Myers and Reichek participating.

In accordance with this Court's opinion of this date, we **VACATE** the trial court's December 30, 2018 order and **DISMISS** this appeal.

It is **ORDERED** that each party bear its own costs of this appeal.

Judgment entered this 20th day of October, 2020.