Reverse and Remand and Opinion Filed March 25, 2025

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-23-00958-CV

SARAH KENNEDY, JANE BRAUGH, KATHLEEN HEBERT, LUCINA BOTOND, AND ROGER S. BRAUGH, JR., INDIVIDUALLY AND AS HEIRS OF ROGER S. BRAUGH, SR., DECEASED, Appellants
V.
NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, Appellee

On Appeal from the County Court at Law No. 5
Dallas County, Texas
Trial Court Cause No. CC-20-02484-E

MEMORANDUM OPINION

Before Justices Miskel, Breedlove, and Barbare
Opinion by Justice Breedlove

The trial court granted summary judgment for appellee National Collegiate Athletic Association (NCAA) on the ground that appellants' claims arising from their father's Chronic Traumatic Encephalopathy were barred by limitations. Concluding that the NCAA did not establish its right to judgment as a matter of law, we reverse the trial court's judgment and remand the case for trial.

BACKGROUND

As required by our standard of review, we take as true all evidence favorable to the appellants. Appellants Sarah Kennedy, Jane Braugh, Kathleen Hebert, Lucina

Botond, and Roger S. Braugh, Jr. (together, Family) are the children of Roger Braugh, Sr. (Roger Sr.). Roger Sr. was diagnosed with dementia symptoms in 2011 and died on March 7, 2019. A brain autopsy performed later that year at Boston University revealed that Roger Sr. suffered and died from Stage IV Chronic Traumatic Encephalopathy (CTE).

Roger Sr. was born in 1940. In junior high school and high school, he played tackle football. He did not experience any health issues or learning disabilities during this time.

From 1960 to 1962, Roger Sr. participated in NCAA football at Southern Methodist University. He played both quarterback and defensive back. The Family contends that Roger Sr. "hit with his head and was hit in the head while practicing and playing NCAA football," and there is no summary judgment evidence that he "was ever removed from a football game, sidelined, or otherwise unable to play due to a head hit."

After college and an initially happy marriage, Roger Sr. began experiencing mental health and behavioral problems. His poor decisions put the family in financial jeopardy, and he began to exhibit anger constantly. These mental health and behavioral issues led to divorce in the early 1980s.

After the divorce, Roger Sr. continued to exercise poor executive skills and decision-making. He was unable to maintain employment and would have been

homeless without the help of his family and friends. In 1998, Roger Sr. was convicted of a fraud-related offense and was sentenced to prison.[1]

Roger Sr. was diagnosed with dementia symptoms in 2011, and by 2013, had also been diagnosed with Parkinson's disease. Ultimately, the Family moved Roger Sr. to a memory care facility. Neither Roger Sr. nor the Family ever received any diagnosis or report that Roger Sr.'s mental health and cognitive issues were due to CTE, Lewy-body disease,[2] or were otherwise related to football. Instead, doctors referred to his symptoms as dementia or related to Parkinson's disease.

Roger Sr.'s death certificate lists cardiopulmonary arrest as the "immediate cause" of death. "End stage senile dementia" is listed as an underlying cause.

After Roger Sr.'s death, the Family obtained an examination of his brain tissue from the Boston University Alzheimer Disease and Chronic Traumatic Encephalopathy Center. In the postmortem Neuropathology Report dated November 18, 2019, Roger Sr. was for the first time diagnosed with football-related CTE and Lewy-body disease. He was not diagnosed with Parkinson's disease.

[1] Roger Sr.'s daughter Jane testified that Roger Sr. exhibited "obsessive behavior" that "landed him in prison with a conviction, because he wouldn't listen to his family who told him that what he was hearing and experiencing was not reality."

[2] According to a publication by the Alzheimer's Association submitted as Exhibit 22 to the Family's summary judgment response, "Dementia with Lewy bodies (DLB) is a type of progressive dementia that leads to a decline in thinking, reasoning and independent function. Its features may include spontaneous changes in attention and alertness, recurrent visual hallucinations, REM sleep behavior disorder, and slow movement, tremors or rigidity."

On June 2, 2020, less than two years after the posthumous diagnoses, the Family filed this lawsuit against the NCAA alleging claims for negligence and gross negligence. The Family's claims arise from their contention that "the NCAA knew, or should have known, of the long-term dangers of concussions and sub-concussive blows to the head regularly suffered by intercollegiate football players."

The NCAA filed an amended motion for summary judgment on July 11, 2023, alleging that the Family's claims "fail as a matter of law because they are barred by the statute of limitations." Citing evidence in the record that Roger Sr. and the Family "knew decades ago that [Roger Sr.] exhibited the behavioral and cognitive symptoms [the Family] now allege[s] were caused by the NCAA," the NCAA argued that Roger Sr.'s personal injury claims "expired decades ago, rendering [the Family's] wrongful death and survival claims invalid as a matter of law." The NCAA argued that the discovery rule did not apply to the Family's claims because "[t]ime and time again" the Family and Roger Sr. "were put on notice of" Roger Sr.'s personal injury claims but failed to timely file suit.

The NCAA also relied on the Family's "opting out" of the settlement in an Illinois class action styled *In re National Collegiate Athletic Association Student-Athlete Concussion Injury Litigation*, MDL No. 2492, Master Docket No.

1:13-cv-09116 in the United States District Court for the Northern District of Illinois (referred to by the parties here as "*Arrington*," after the lead plaintiff).[3]

After a hearing, the trial court rendered judgment for the NCAA. This appeal followed.

ISSUES AND STANDARD OF REVIEW

In four issues, the Family argues that the trial court erred because (1) the NCAA did not conclusively negate one or more of the bases for applying the discovery rule in this case, (2) the NCAA did not conclusively establish that all elements of the discovery rule were met as to each plaintiff more than two years before this suit was filed, (3) the *Arrington* tolling agreement provides an additional ground to conclude that the NCAA failed to meet its summary judgment burden, and (4) the trial court erred by granting summary judgment, "creating a dangerous and disruptive precedent."

"The applicable standard of review is whether [the NCAA], as the summary-judgment movant, established that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law on the grounds set forth in its motion." *Pustejovsky v. Rapid-American Corp.*, 35 S.W.3d 643, 645–46 (Tex. 2000) (citing TEX. R. CIV. P. 166a(c), *Cathey v. Booth*, 900 S.W.2d 339, 341 (Tex. 1995), and *Nixon v. Mr. Prop. Mgmt. Co.*, 690 S.W.2d 546, 548–49 (Tex. 1985)). "A defendant

[3] The court certified a settlement class and subclasses and granted the motion for final approval of settlement in 2019. *See In re Nat'l Collegiate Athletic Ass'n Student-Athlete Concussion Injury Litig.*, 332 F.R.D. 202 (N.D. Ill. 2019).

moving for summary judgment on the affirmative defense of limitations must prove conclusively the elements of that defense." *Id.* "When, as here, the plaintiff pleads the discovery rule as an exception to limitations, the defendant has the burden of negating that exception as well." *Id.* "When reviewing a summary judgment, we take as true all evidence favorable to the nonmovant, and we indulge every reasonable inference and resolve any doubts in the nonmovant's favor." *Valence Op. Co. v. Dorsett*, 164 S.W.3d 656, 661 (Tex. 2005).

DISCUSSION

The Family first argues that the discovery rule applies to its claims. The Family then contends that when the discovery rule is applied here, its claims were timely. As we have discussed, the NCAA bore the burden to establish as a matter of law that the discovery rule does not apply, or in the alternative, that even if the discovery rule applies to extend the statute of limitations, the Family's suit still was not timely filed.

1. Application of discovery rule

In its first issue, the Family argues that the discovery rule applies to "cases in which the nature of the injury is inherently undiscoverable and the evidence of injury is objectively verifiable," citing *Pustejovsky*, 35 S.W.3d at 652. The Family contends that the discovery rule applies here because the claims are "based on latent neurogenerative diseases whose non-specific symptoms would not (and did not) begin to manifest until more than two years after Mr. Braugh's participation in

NCAA football ended." The Family argues that the NCAA failed to "conclusively negate one or more of the bases for applying the discovery rule in this case."

In response, the NCAA argues that the summary judgment evidence "negate[s] application of the discovery rule." The NCAA contends that the Family knew or should have known more than two years before filing suit that Roger Sr.'s "neurodegenerative problems were likely related to sustaining head impacts while playing college football." In its summary judgment motion, the NCAA argued that Roger Sr.'s "personal injury claims accrued decades ago when he allegedly experienced head trauma and started suffering from cognitive impairment, even if the full extent of his alleged injuries was not yet known." The NCAA concluded, "[a]ccordingly, the two-year statute of limitations on [Roger Sr.'s] claims expired as early as the 1960s or at least by 2000 when the summary-judgment record reflects that he recognized the possible connection between his cognitive issues and football."

"A cause of action generally accrues upon injury even if the fact of injury is not known, or not all of the resulting damages have yet occurred." *Pustejovsky*, 35 S.W.3d at 651. The discovery rule is an exception to the accrual rule, "in cases in which the nature of the injury incurred is inherently undiscoverable and the evidence of injury is objectively verifiable." *Id.* at 652 (internal quotation omitted). "[W]hen the discovery rule applies, accrual is tolled until a claimant discovers or in the exercise of reasonable diligence should have discovered the injury and that it was

likely caused by the wrongful acts of another." *Childs v. Haussecker*, 974 S.W.2d 31, 40 (Tex. 1998); *see also Marcus & Millichap Real Estate Inv. Servs. of Nev., Inc. v. Triex Holdings, LLC*, 659 S.W.3d 456, 462 (Tex. 2023) (per curiam).

In *Pustejovsky*, the court quoted *S.V. v. R.V.*, 933 S.W.2d 1, 7 (Tex. 1996), where it had explained:

> To be "inherently undiscoverable," an injury need not be absolutely impossible to discover, else suit would never be filed and the question whether to apply the discovery rule would never arise. Nor does "inherently undiscoverable" mean merely that a particular plaintiff did not discover his injury within the prescribed period of limitations; discovery of a particular injury is dependent not solely on the nature of the injury but on the circumstances in which it occurred and plaintiff's diligence as well.

S.V., 933 S.W.2d at 7. "An injury is inherently undiscoverable if it is by nature unlikely to be discovered within the prescribed limitations period despite due diligence." *Id.*

If applied here, the general rule—that "a cause of action accrues when a wrongful act causes some legal injury, even if the fact of injury is not discovered until later, and even if all resulting damages have not yet occurred"—could result in the Family's cause of action expiring as early as 1964, two years after Roger Sr. ended his football career at SMU. *Id.* at 4; *see also Murphy v. Campbell*, 964 S.W.2d 265, 270 (Tex. 1997) (discussing legal injury rule and cases holding that limitations "will run from the time the wrongful act was committed"). The NCAA argued in the trial court that "the discovery rule does not apply," contending that Roger Sr. "would have been immediately aware of any alleged head trauma while playing college

football, even if the full effects of those purported head hits were not immediately known."

But on appeal, the NCAA has "assum[ed] the discovery rule applies to this case" in its response to the Family's first issue. Specifically, the NCAA states in its brief, "[t]o be clear, the NCAA is not arguing that Roger [Sr.'s] claims expired in the 1960s, or that the discovery rule categorically does not apply to the claims asserted in this case. Rather, the NCAA's argument is that even applying the discovery rule, Appellants' claims are untimely as a matter of law . . . ." In any event, we conclude that the NCAA did not meet its burden to establish conclusively that the discovery rule does not apply. *See Pustejovsky*, 35 S.W.3d at 645–46 (defendant moving for summary judgment on limitations affirmative defense must "prove conclusively the elements of that defense," and where pleaded, negate application of discovery rule). The NCAA's arguments in the trial court—that limitations "expired as early as the 1960s"—were not supported by summary judgment evidence that Roger Sr. or the Family could or should have discovered his injury within two years of his football career at SMU. Because the NCAA did not conclusively negate the application of the discovery rule, we sustain the Family's first issue. *Pustejovsky*, 35 S.W.3d at 645–46.

2. Elements of discovery rule

In its second issue, the Family argues that in latent injury or disease cases, "the discovery rule tolls accrual 'until a claimant discovers or in the exercise of

reasonable diligence should have discovered the injury and that it was likely caused by the wrongful acts of another,'" quoting *Childs*, 974 S.W.2d at 40. The Family contends that the NCAA did not conclusively establish that both of these elements were met as to each plaintiff more than two years before suit was filed. In *Childs*, the court "adopt[ed] the following rule in latent occupational disease cases: a cause of action accrues whenever a plaintiff's symptoms manifest themselves to a degree or for a duration that would put a reasonable person on notice that he or she suffers from some injury and he or she knows, or in the exercise of reasonable diligence should have known, that the injury is likely work-related." *Id.* at 33. The Family argues that although they were aware of Roger Sr.'s symptoms, they did not know, and should not have known, that his injury was likely related to football.

In response to the Family's second issue, the NCAA contends that the Family's arguments about application of the discovery rule have been rejected by Texas courts. The NCAA argues that the Family did not need "a definitive post-mortem diagnosis of CTE or Lewy-body disease before limitations could run." The NCAA also contends that knowledge of "non-specific symptoms" such as cognitive impairment, behavioral issues, or Parkinsonian symptoms "with multiple potential causes" are sufficient to trigger the running of limitations as a matter of law.

The NCAA cites *Childs* and this Court's opinion in *Aponte v. Kim International Manufacturing, L.P.*, No. 05-07-00135-CV, 2008 WL 2122599, at *2 (Tex. App.—Dallas May 21, 2008, no pet.) (mem. op.), for the proposition that "the

limitations clock will run—and the discovery rule will not save a time-barred claim—even if the claimant does not yet know the precise name of the disease and the specific cause of the injury." *See Childs*, 974 S.W.2d at 41 ("'discovery of the injury' should not be equated with a plaintiff's discovery . . . of the precise name of the disease that is causing his symptoms"); *Aponte*, 2008 WL 2122599, at *3 ("accrual is not dependent on [a] confirmed medical diagnosis"). The NCAA also cites *Schlumberger Technology Corp. v. Pasko*, 544 S.W.3d 830, 834 (Tex. 2018), for the proposition that the discovery rule "does not turn on whether the injured person knows the exact identity of the tortfeasor or all of the ways in which the tortfeasor was at fault in causing the injury." The NCAA also cites cases for the proposition that limitations begins to run "when a claimant learns of an injury, even if the rest of the essential facts are unknown." *In re Jorden*, 249 S.W.3d 416, 422 (Tex. 2008); *see also Regency Field Servs., LLC v. Swift Energy Operating, LLC*, 622 S.W.3d 807, 814 (Tex. 2021) (claim accrues when defendant's wrongful conduct causes legal injury, even if claimant does not know cause or full extent of injury or damages).

The Family responds that "until the claimant knows that his disease was 'wrongfully caused,' there is no need to discuss whether he *also* knew the 'specific' cause or the 'full extent' or any of the other aspects on the other side of the discovery-rule line." *See Childs*, 974 S.W.2d at 40 ("accrual is tolled until a claimant discovers

or in the exercise of reasonable diligence should have discovered" that the injury "was likely caused by the wrongful acts of another").

In sum, the parties do not dispute the existence, timing, or severity of Roger Sr.'s cognitive decline. But the Family argues that knowing Roger Sr. had symptoms of "cognitive impairment" is not the same thing as knowing that the impairment was likely caused by participation in college football. "A latent occupational disease claim does not accrue 'until a reasonably diligent plaintiff uncovers some evidence of a causal connection between the injury and the plaintiff's occupation.'" *King v. Brinkmann Invs., Inc.*, No. 03-05-00316-CV, 2006 WL 2447577, at *2 (Tex. App.—Austin Aug. 25, 2006, pet. denied) (mem. op.) (quoting *Childs*, 974 S.W.2d at 41).

In support of its argument that limitations began to run more than two years before the Family filed suit, the NCAA cites five events that it contends triggered the limitations period as a matter of law:

1. In early 2017, Roger Sr. opted out of the *Arrington* class action settlement;

2. On October 2, 2015, Jane asked doctors for information about diagnosis and treatment of CTE;

3. On August 18, 2014, Jane filled out an intake questionnaire and reported that Roger Sr. had head trauma from college football and lost consciousness;

4. On October 8, 2015, Dr. Chen made a note describing Roger Sr. as a college football player "who may have progressive CTE"; and

5. In 1998, Roger Sr. had a conversation with his brother about his cognitive decline being related to football.

The NCAA argues that all of these events occurred more than two years before the Family filed suit. The Family responds that the NCAA did not conclusively establish that on any of these dates, the Family knew that Roger Sr.'s "symptoms resulted from a wrongful act." The Family argues, "[t]he issue here is that [Roger Sr. and the Family] were unable to determine that [Roger Sr.'s] symptoms resulted from a wrongful act, *i.e.*, were related to his football play, until his post-mortem autopsy."

The supreme court's analysis in *Childs* is instructive here. There, the supreme court considered whether there were fact issues about when the plaintiffs should have connected their silicosis symptoms with their occupational exposure to silica dust. *Childs*, 974 S.W.2d at 46, 47. The court explained that "a diligent plaintiff's mere suspicion or subjective belief that a causal connection exists between his exposure and his symptoms is, standing alone, insufficient to establish accrual as a matter of law." *Id.* at 43. "[A]ccrual will always be deferred until a reasonably diligent plaintiff uncovers some evidence of a causal connection between the injury and the plaintiff's occupation." *Id.* at 41. The supreme court held fact questions remained as to when each plaintiff "knew or should have known through the exercise of reasonable diligence that his injury was likely work-related." *Id.* at 46, 47.

Like Haussecker, one of the plaintiffs in *Childs*, the Family knew Roger Sr. was injured "long before" June 2, 2020, when this suit was filed. *See Childs*, 974 S.W.2d at 44, 46. But also as in *Childs*, the date that the Family "connected or

reasonably should have connected his ongoing symptoms" to football at SMU "is not so clear." *Id.* at 45. Like Haussecker, Roger Sr. "consult[ed] many doctors." *Id.* And as here, "several facts came to light that Haussecker knew or should have known about the likely cause of his sickness" more than two years before he filed suit. *Id.* The court, however, did not stop its analysis there, reasoning that "other important facts could cause reasonable minds to differ about what Haussecker should have known about his symptoms by 1988." *Id.* Doctors had told Haussecker that his symptoms were not work-related, and had given him other possible diagnoses. *Id.* Based on this advice, Haussecker abandoned his worker's compensation claim. *Id.* at 45–46. And Childs, the defendant, "offered no evidence about whether Haussecker stopped consulting doctors about his deteriorating health from 1978 to 1988 or whether Haussecker could have been diagnosed with an occupational illness during that time period." *Id.* at 46. The court concluded,

> On the present record, a fact question exists not only about the knowledge that should be attributed to Haussecker as of April 1988, but also about whether Haussecker reasonably abandoned pursuing his suspicions that his respiratory problems were work-related from 1978 until 1988 when a doctor for the first time suggested that he might have silicosis. In sum, because reasonable minds could differ about when Haussecker knew or should have known through the exercise of reasonable diligence about a likely causal connection between his symptoms and his occupational exposure, Childs was not entitled to judgment as a matter of law on limitations.

Id.

The court also concluded that summary judgment was not appropriate on claims by Martinez, the other plaintiff in *Childs*, even though the record lacked any

evidence of Martinez's diligence in the effort to discover the cause of his injury. *See id.* at 47 ("the record reveals that Martinez failed to exercise reasonable diligence once he was apprised of facts that would incite a reasonably diligent person to seek information about his or her injuries and their likely causes"). The defendant, however, "did not offer any summary judgment evidence that a diligent investigation would have led Martinez to discover [more than two years before he filed suit] that he suffered from an occupational illness." *Id.* The court concluded that "a fact question remains with respect to whether Martinez knew or should have known through the exercise of reasonable diligence that his injury was likely work related" more than two years before he filed suit. *Id.*

Here, there are fact issues regarding each of the dates the NCAA relies on to establish its limitations defense. The NCAA did not provide summary judgment evidence that on any of these dates, Roger Sr. or the Family knew or should have known that Roger Sr.'s symptoms were caused by a football-related neurodegenerative disease. We discuss each date in turn.

1. Opt-out of *Arrington* settlement. On March 9, 2017, Roger Sr.'s daughter Jane wrote a letter informing the NCAA that Roger Sr. "wishes to exclude himself" from the *Arrington* class action settlement. Information about the settlement in the record indicates that its purpose was to establish a medical monitoring fund and program for a settlement class of "[p]ersons who played an NCAA-sanctioned sport at an NCAA member institution" before a specified date. Settlement class members

could complete a screening questionnaire "designed to assess, inter alia, self-reported symptoms and cognitive mood, behavioral, and motor problems that may be associated with persistent post-concussion syndrome and/or mid- to late-life onset problems, such as Chronic Traumatic Encephalophathy ("CTE") and related disorders." If the class member's responses met "the agreed upon criteria," then the class member could undergo a "Medical Evaluation . . . designed to assess symptoms related to persistent post-concussion syndrome, as well as cognitive, mood, behavioral, and motor problems which may be associated with mid- to late-life onset diseases, such as CTE and related disorders."

The settlement agreement did not include any admission that any putative class member was suffering from CTE or "related disorders" or that participation in football could cause those disorders. The settlement agreement included an express recital that "neither this Agreement nor the Settlement it represents shall be deemed or construed as an admission of any sort or as evidence of any violation of any statute or law, or of any liability or wrongdoing whatsoever by the NCAA and/or its member institutions or of the truth of any of the claims or allegations alleged in the MDL Action or as a waiver of any defenses thereto."

Roger Sr.'s daughter Jane signed the letter on Roger Sr.'s behalf opting out of the settlement,[4] stating that "[a]s Mr. Braugh remains alive, it is impossible at this

[4] The record reflects that on June 4, 2014, Roger Sr. executed a "Durable Power of Attorney" that named Jane as his attorney-in-fact for all purposes. On the same date, Roger Sr. executed an "Advance

time to diagnose or determine whether he has suffered brain damage related to concussion injuries or has CTE at this time." At the time, as we will discuss, Jane had already asked Dr. David W. Trader, Roger Sr.'s geriatric psychiatrist, about CTE. Dr. Trader had been treating Roger Sr. since August 2014, but he did not respond to Jane's inquiry. In his deposition, Dr. Trader explained that because there was no known treatment for CTE, his focus "was more on treating the behavior" "as opposed to a specific diagnosis." Accordingly, at the time Jane wrote the letter opting out of the *Arrington* settlement, Roger Sr. was already receiving treatment for his cognitive difficulties, and the doctor providing that treatment did not advise Jane or any other Family member that football could be the cause of Roger Sr.'s illnesses or symptoms.

While Jane's letter opting out of the class action on her father's behalf may be evidence a jury can consider in determining whether the Family knew or should have known through the exercise of reasonable diligence that Roger Sr.'s injuries were likely related to football, it is not the conclusive evidence required to support a summary judgment. *See Childs*, 974 S.W.2d at 47. This case presents even more of a fact issue on this point than the plaintiff's filing of a worker's compensation claim in *Childs*. We conclude that receiving notice of or opting out of the class settlement

Health Care Directive" designating Jane "as my agent to make health care decisions for me as authorized in this document."

did not provide objective verification that Roger Sr.'s symptoms were football-related injuries. *See id.* at 43.

2. October 2, 2015 email. Jane's October 2, 2015 email provided information to Dr. Trader about treatment Roger Sr. had received at several medical facilities. In the last sentence of the email, Jane requested, "Please let me know if you have any success in following up or consulting with Dr. Gary W. Small regarding diagnostic tool or consultation for possible CTE and any specialized treatments." There is no response to Jane's inquiry in the record.

When asked in his deposition about Jane's question, Dr. Trader testified that his records did not include any note about CTE as "a possible cause for Mr. Braugh's condition":

> A. . . . I know the questions [in this deposition] have to do with why isn't CTE in here [in my records]. Again, my focus was more on treating behaviors. . . . I mean, I know who Dr. Small is, and he's a geriatric psychiatrist/researcher. But as far as—as finding out diagnostic tools other than autopsy, which is a diagnostic tool, but as far as treatments or intervention, my understanding was at that time and even [now], there really isn't. So my focus was more on treating symptoms, that he had dementia and there were behavioral problems as opposed to a specific diagnosis. . . . So again, my focus was more on treating the behavior as opposed to, at that point, why.

Jane explained:

> Q. Do you recall Dr. Trader ever telling you that he thought your father's dementia or any of his neurological issues were linked to football?
>
> A. No. He wouldn't do that. You know, mainly what he was doing for my dad was managing his medication and tweaking his

> medications, and he was trying to extend his life that way. And his—And his quality of life. He was trying to improve his quality of life.

The causal connection at issue is the link between football and Roger Sr.'s injury or illness. Jane asked a question of Roger Sr.'s psychiatrist about possible diagnoses of, or treatments for, CTE, not possible causes of the disease. The summary judgment record does not include a response to the question; instead, Dr. Trader's testimony reveals that his "focus was more on treating" Roger Sr.'s symptoms rather than specifically diagnosing their cause. In addition, there is no mention of football in Jane's inquiry.

Like Jane's letter opting out of the class action on her father's behalf, Jane's unanswered inquiry to Dr. Trader raises a fact issue for a jury to consider in determining whether the Family knew or should have known through the exercise of reasonable diligence that Roger Sr.'s injuries were likely related to football. *See Childs*, 974 S.W.2d at 47. But on review of a summary judgment, we "indulge every reasonable inference and resolve any doubts in the nonmovant's favor." *Valence Op. Co.*, 164 S.W.3d at 661. Evidence of Jane's inquiry does not "prove conclusively" that the Family's claims are barred by limitations. *See Pustejovsky*, 35 S.W.3d at 645–46.

3. August 18, 2014 intake questionnaire. This document was also a communication with Dr. Trader. Jane checked "Yes" to the question "Any Head Trauma?" and answered "College Football" to a question asking for the

"circumstances." She also checked "Yes" to "Any loss of consciousness?" But on the same document, Jane responded "Parkinson's/Dementia" in the blank after "List Your Medical Problems." In her deposition, Jane testified that "[m]y answer here is probably speculation, because I don't know any specific instances, but I was just trying to give—advise the doctors that he did play football, and I believe he got his clock rung, but I don't remember any specific instances." She continued, "[h]e probably did get concussed and—but again, I'm guessing."

Soon after Jane completed the questionnaire, Dr. Trader prepared a report entitled "Geriatric Psychiatric Examination" noting that that Roger Sr.'s "[m]edical problems include Parkinson's disease, dementia, and a history of cardiac stent placement." There is no mention of head trauma. Under "Impression," Dr. Trader wrote, "Mr. Braugh presented with baseline dementia. It is unclear if his dementia is primarily caused by Parkinson's disease, or another etiology."

Several years later, in 2017, Dr. Trader wrote a letter on the Family's behalf to explain Roger Sr.'s failure to timely file certain tax returns. He confirmed that Roger Sr. had been under his care since 2014, and explained that Roger Sr. "has been diagnosed with severe dementia, most likely related to a combination of Parkinson's Disease and cerebrovascular disease." He also stated, "It is my understanding that his cognitive decline started at least 10 years prior to our first meeting."

Dr. Trader testified that "primarily, I treated [Roger Sr.] for the behavioral difference associated with dementia." He explained that although a person's

behavior "while living, can be suggestive of CTE," "one can't say that that person has—definitely has CTE until or unless there's an autopsy." When asked why his evaluations of Roger Sr. did not "suggest that football or CTE was the cause," he replied that "from my perspective based on what I was asked to treat—and certainly one can have many different cause[s] for dementia—I'm not sure that truly mattered, because it was treating the behavioral manifestations." The Family also argues that there is no evidence Dr. Trader advised Jane that Roger Sr.'s symptoms were likely caused by CTE or Lewy-body disease or were likely football-related.

The summary judgment evidence showed that Jane initially reported head trauma from college football to Dr. Trader. There is no evidence, however, that Dr. Trader acted on this information or, at any time during the five years he treated Roger Sr., advised the Family of any possible relationship between football and Roger Sr.'s dementia. In light of the fact issues that remain, we conclude the NCAA did not establish, as a matter of law, that the Family nevertheless should have known through the exercise of reasonable diligence that Roger Sr.'s injuries were likely related to football. *See Childs*, 974 S.W.2d at 47.

4. October 8, 2015, note by Dr. Chen. Dr. Stephen T. Chen, an "attending psychiatrist" at a Los Angeles neuropsychiatric hospital, "performed an interview and mental status exam" of Roger Sr. on October 8, 2015. Under "Assessment and Recommendations," Dr. Chen described Roger Sr. as a "former football player" who "may have progressive CTE." But under "Diagnostic Impression," Dr. Chen noted

only "Dementia, Parkinson's disease, with behavioral disturbances." In a supplement to its summary judgment motion, the NCAA provided this document and argued that "[t]his medical record further supports the NCAA's argument that . . . Plaintiffs were on notice more than two years prior to filing suit of an alleged connection between college football and Mr. Braugh's injuries (including CTE)."

Dr. Chen's note was made about the same time as Jane answered Dr. Trader's questionnaire. As the Family argues, however, the NCAA offered no evidence that Dr. Chen's medical note was ever communicated to Jane, to Roger Sr., or to any plaintiff, and there is no evidence regarding how Dr. Chen obtained this information. Viewed in the light most favorable to the plaintiffs, a doctor's note that a former football player may have progressive CTE is not the same as a doctor's determination that a former football player likely has progressive CTE likely caused by playing football. The NCAA responds that Jane's access to Roger Sr.'s medical records as his attorney-in-fact is sufficient to charge her with knowledge of the records' contents, and cites authority for the proposition that Jane "was responsible for diligently seeking 'medical advice about the nature of [Roger Sr.'s] injury *and the potential causes*.'" *See Podolny v. Elliott Turbomachinery Co., Inc.*, No. 13-04-499-CV, 2007 WL 271118, at *2 (Tex. App.—Corpus Christi-Edinburg Feb. 1, 2007, no pet.) (mem. op.) (quoting *Childs*, 974 S.W.2d at 47, and adding emphasis). But without supporting evidence to show the source of this information or its communication to the Family, we conclude that Dr. Chen's note does not "prove

conclusively" that the Family's claims are barred by limitations. *See Pustejovsky*, 35 S.W.3d at 645–46.

5. 1998 conversation. When asked, "Did [Roger Sr.] tell you he did not regret playing football?" Roger Sr.'s brother Richard testified that Roger Sr. "didn't mind getting hit, and he didn't mind hitting, and he knew there would be some brain damage." Richard testified that he spoke to Roger Sr. about "his cognitive decline being related to football" around the time that Roger Sr. went to prison in 1998. But Richard also testified:

> Q. Did you two ever discuss whether he thought he might have chronic traumatic encephalopathy or CTE?
>
> A. We never used those words, but we did talk about it.
>
> Q. What did you talk about?
>
> A. Well, just that he was losing, you know, some of his capabilities, his intellectual capabilities, and —
>
> Q. Did he say—did he say why he thought that was happening?
>
> A. Just old age, I think. He just felt like that was part of the progress.
>
> He was a very active guy through his life, and you know, when he started losing some of that capability, he was very aware of it because people would ask. You know, they would—they would ask him to do stuff, and he couldn't do it. So he was aware of that.

The NCAA relies on Richard's testimony in support of its argument that "by 1998, Roger [Sr.] and his family members were aware of his neurodegenerative problems (his injury) ***and*** believed that his injury was likely related to playing football (its purported cause)." The NCAA also cites other Family members'

testimony in support of its argument that "[b]y 1998, Roger [Sr.'s] neurodegenerative problems were readily apparent to his family members." But the only evidence the NCAA cites regarding any connection between football and Roger Sr.'s neurodegenerative problems is Richard's testimony quoted above. Richard testified that he and Roger Sr. discussed both "old age" and football as possible causes for Roger Sr.'s mental decline. A "mere suspicion" that a causal connection existed between college football and Roger Sr.'s symptoms, "is, standing alone, insufficient to establish accrual as a matter of law." *See Childs*, 974 S.W.2d at 43. We conclude this testimony does not provide conclusive summary judgment proof that the Family knew or should have known in 1998 that Roger Sr.'s mental decline was likely related to football. *Id.* at 47; *Valence Operating Co.*, 164 S.W.3d at 661 (reviewing court must "indulge every reasonable inference and resolve any doubts in the nonmovant's favor").

As in *Childs*, we conclude that fact questions remain as to when the Family knew or should have known through the exercise of reasonable diligence that Roger Sr.'s injury was likely related to his participation in college football. *See Childs*, 974 S.W.2d at 41 ("[A]ccrual will always be deferred until a reasonably diligent plaintiff uncovers some evidence of a causal connection between the injury and the plaintiff's occupation."). We conclude the NCAA did not establish, as a matter of law, that the Family's claims are barred by limitations. We sustain the Family's second issue.

3. Remaining issues

In its third issue, the Family argues that although Roger Sr. "opted out of receiving the *Arrington* settlement benefits, he did not forfeit the tolling agreement," and therefore, the Family filed suit within the applicable limitations period. In its fourth issue, the Family argues that the trial court's ruling generates the risk of prematurely-filed and speculative lawsuits. Given our resolution of the Family's first and second issues, we pretermit discussion of these issues. TEX. R. APP. P. 47.4.

CONCLUSION

We reverse the trial court's August 30, 2023 "Final Order Granting Defendant's Amended Motion for Summary Judgment" and remand the case for trial.

/Maricela Breedlove/
MARICELA BREEDLOVE
JUSTICE

Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

SARAH KENNEDY, JANE BRAUGH, KATHLEEN HEBERT, LUCINA BOTOND, AND ROGER S. BRAUGH, JR., INDIVIDUALLY AND AS HEIRS OF ROGER S. BRAUGH, SR., DECEASED, Appellants

No. 05-23-00958-CV V.

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, Appellee

On Appeal from the County Court at Law No. 5, Dallas County, Texas
Trial Court Cause No. CC-20-02484-E.
Opinion delivered by Justice Breedlove. Justices Miskel and Barbare participating.

In accordance with this Court's opinion of this date, the judgment of the trial court is **REVERSED** and this cause is **REMANDED** to the trial court for trial.

It is **ORDERED** that appellants Sarah Kennedy, Jane Braugh, Kathleen Hebert, Lucina Botond, and Roger S. Braugh, Jr., Individually and as Heirs of Roger S. Braugh, Sr., Deceased recover their costs of this appeal from appellee National Collegiate Athletic Association.

Judgment entered this 25th day of March, 2025.