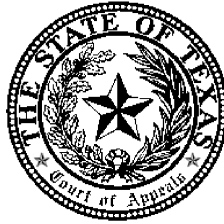
Affirmed and Opinion filed February 21, 2002.



In The

Fourteenth Court of Appeals

NO. 14-00-00155-CV

WHITE OAK BEND MUNICIPAL UTILITY DISTRICT, Appellant

V.

GUY J. ROBERTSON, SR. AND DOUGLAS L. MULVANEY, Appellees

On Appeal from the 55th District Court
Harris County, Texas
Trial Court Cause No. 99-19905

O P I N I O N

Appellant White Oak Bend Municipal Utility District ("White Oak") challenges the trial court's summary judgment dismissing its negligence claims against appellees Guy J. Robertson, Sr. and Douglas L. Mulvaney based on damages to White Oak's sewer pipes. Because we conclude that appellees conclusively proved their entitlement to judgment as a matter of law under the two-year statute of limitations, we affirm the trial court's judgment.

I. BACKGROUND AND PROCEDURAL HISTORY

From 1985 until 1996, Pilgrim Enterprises, Inc. operated a dry-cleaning store at 10154 Jones Road, located in the White Oak Bend Municipal Utility District. As early as 1988, White Oak knew that Pilgrim was discharging dry-cleaning solvents into White Oak's sewer pipes. In a memorandum dated November 29, 1988, White Oak's laboratory consultant reported:

> The first composite sample collected from the Pilgrim Cleaners on Jones Road was a very dark sample, with a heavy chemical odor. When the COD was performed, the results were so high that Roy called Tom Brown to get permission to run a GC scan to pinpoint what chemical was causing the problem. As seem [sic] by the enclosed graft, [sic] the material was found to be tetrachloroethylene, one of the priority pollutants, commonly known as cleaning solvent.

As early as September of 1992, certain manhole covers in the White Oak sewer system and parts of the sidewalks above the sewer pipes began to visibly sink. Alan Z. Chambers, a White Oak officer and member of the White Oak board of directors since the end of 1993, noticed the sinking of the manhole covers and sidewalks.

In September of 1995, White Oak arranged for "smoke testing" of the sewer pipes in areas where sinking manhole covers had been noticed. The smoke testing revealed potential damage to the sewer pipes. In October of 1995, White Oak had the inside of these sewer pipes videotaped. White Oak alleges that, on October 27, 1995, it discovered that the sewer pipes had been damaged by dry-cleaning solvents discharged by Pilgrim into the sewer pipes. In a letter to the Texas Water Development Board, White Oak's engineers stated that there was a connection between the sinking of the manhole covers and the damage detected in the videotapes:

> Due to settlement around manholes along White Oak Bend Blvd., a smoke test was performed to determine if there was a problem with the sanitary sewer lines. The smoke test revealed the potential of damage to lines, therefore a closed circuit television video ("CCTV") was performed to determine the

> condition of the ABS Truss lines. The CCTV revealed large areas of severe damage, mostly in the lower 25% of the lines, probably caused by chemical reaction to lines. . . .
>
> A study of industrial connections determined that two dry cleaning establishments discharge into the damaged sanitary sewer lines. It was determined that the lines were most likely damaged by exposure to heavy concentrations of trichloroethane and tetrachloroethane being discharged into the sewer system. These chemicals are used in the process of dry cleaning.

On April 19, 1999, White Oak filed this suit. White Oak asserted that the damage to its sewer pipes was caused by the negligence of Pilgrim, and White Oak sued appellees as distributees of Isabella Enterprises, Inc. f/k/a Pilgrim Enterprises, Inc., a dissolved corporation and as co-trustees of a liquidating trust set up for the purpose of satisfying Pilgrim's liabilities.

Appellees moved for summary judgment on the affirmative defense of the two-year statute of limitations, and appellees also asserted a no-evidence motion for summary judgment. White Oak pleaded the discovery rule and asserted that limitations did not begin to run until October 27, 1995. White Oak also argued that there was no connection between the damage to its sewer pipes and the unevenness of the manhole covers and the sidewalk above the sewer pipes. The trial court granted appellees' motion for summary judgment.

II. Issue Presented

In its sole issue on appeal, White Oak asserts the trial court erred in granting appellees' motion for summary judgment and rendering a take-nothing judgment against it.

III. Analysis

In reviewing the trial court's summary judgment as to statute of limitations, we determine whether appellees carried their burden of showing that there is no genuine issue of material fact and that judgment should be granted in their favor as a matter of law. *KPMG Peat Marwick v. Harrison Cty. Hous. Fin. Corp.*, 988 S.W.2d 746, 748 (Tex. 1999). We take as true all evidence favorable to White Oak, and we make all reasonable inferences in White

Oak's favor. *Id*. Appellees had the burden of conclusively proving their statute-of-limitations defense and negating the discovery rule. *Id*. If appellees established that the statute of limitations bars this action, then White Oak had to adduce summary-judgment evidence raising a genuine issue of material fact in avoidance of the statute of limitations. *Id*.

Did appellees conclusively prove their entitlement to judgment as a matter of law on their defense under the two-year statute of limitations?

White Oak claims appellees were not entitled to summary judgment because they did not conclusively prove their entitlement to judgment as a matter of law under the two-year statute of limitations. More specifically, White Oak asserts that, as a matter of law, limitations did not begin to run until October 27, 1995, under the discovery rule. In the alternative, White Oak argues that there was a genuine issue of material fact under the discovery rule as to whether limitations began to run before October 27, 1995. White Oak argues its claims were not barred by limitations on September 1, 1997, when a new statute took effect that abolished the two-year statute of limitations as a defense against claims made by municipal utility districts like White Oak. *See* Act of June 19, 1997, 75th Leg., R.S., ch. 1070, § 47, 1997 Tex. Gen. Laws 4084; TEX. CIV. PRAC. & REM CODE §§ 16.003 & 16.061. White Oak argues that, because its claims were not barred when this statute took effect, the two-year statute of limitations does not apply to this case under § 16.061 of the Texas Civil Practice and Remedies Code.[1] We conclude that the two-year statute of limitations barred White Oak's claims before September 1, 1997. The summary-judgment evidence conclusively proved that, long before September 1, 1995, White Oak knew facts that would cause a reasonably prudent person to make an inquiry which would lead to the discovery of White Oak's claims for damage to its sewer pipes. For the reasons stated below, we hold that

[1] White Oak also argues that the trial court improperly granted appellees' no-evidence motion for summary judgment asserting there was no evidence of breach of duty, negligence per se, and individual liability. We do not address these arguments because we affirm based on the statute-of-limitations defense. *See FM Properties Operating Co. v. City of Austin*, 22 S.W.3d 868, 872 (Tex.2000).

appellees conclusively proved their entitlement to judgment as a matter of law under the two-year statute of limitations.

Appellees' motion for summary judgment and attached evidence proved, among other things, the following facts:

- ! as early as 1988, White Oak knew that Pilgrim was discharging dry-cleaning solvents into White Oak's sewer pipes;
- ! as early as September of 1992, certain manhole covers in the White Oak sewer system and parts of the sidewalk above the sewer pipes began to visibly sink;
- ! from September of 1992 onward, Alan Chambers, a member of the White Oak board since the end of 1993, noticed the sinking of the manhole covers and sidewalks;
- ! the sinking of the manhole covers and the sidewalks gives one a suspicion that there may be damage to the sewer pipes (testimony of Louis Koehn, an engineer hired by White Oak);
- ! the sinking of a sidewalk that is directly above a sanitary sewer indicates that something is going on underneath and that there is a problem that needs to be investigated (testimony of Mark Mohr, consultant whose company performed the smoke testing and video inspection of White Oak's sewer pipes);
- ! the White Oak board of directors did not address the issue of the sinking manhole covers and sidewalks until September of 1995;
- ! the White Oak board of directors delayed addressing the issue of the sinking manhole covers and sidewalks because there were other items on its agenda, like replacing the water treatment plant;
- ! when the White Oak board of directors addressed the issue of the sinking manhole covers and sidewalks in September of 1995, White Oak arranged for "smoke testing" of the sewer pipes in areas where sinking manhole covers had been noticed;
- ! the smoke testing revealed potential damage to the sewer pipes;
- ! in October of 1995, White Oak had the inside of these sewer pipes videotaped; and
- ! the videotape showed chemical degradation of some of the sewer pipes, and this degradation had been present for some time.

White Oak asserts that, under *Cornerstones Mun. Util. Dist. v. Monsanto Co.*, 889 S.W.2d 570 (Tex. App.—Houston [14th Dist.] 1994, writ denied), as a matter of law, the statute of limitations did not begin to run until October 27, 1995, when White Oak learned of the chemical damage based on the videotaping of the pipes. White Oak also asserts that the sinking of the manhole covers and sidewalks had nothing to do with the chemical damage to the pipes and that it was "serendipitous" that this damage was revealed when White Oak investigated the sinking of the manhole covers and sidewalks. Because the sinking manhole covers and sidewalks were unrelated to the damage to the sewer pipes, White Oak argues that knowledge of the sinking manhole covers and sidewalks did not impose a duty to investigate on White Oak. In the alternative, White Oak asserts that there was a genuine issue of material fact as to when limitations began to run under the discovery rule.

The parties do not dispute that the discovery rule applies. The discovery rule tolls limitations only until White Oak has knowledge of facts that would cause a reasonably prudent person to make an inquiry which would lead to the discovery of White Oak's claims for damage to its sewer pipes. *White v. Bond*, 362 S.W.2d 295, 295-96 (Tex. 1962); *Cornerstones Mun. Util. Dist.*, 889 S.W.2d at 576. We reject White Oak's assertion that, under *Cornerstones Mun. Util. Dist.*, the discovery rule tolled limitations as a matter of law until October 27, 1995. In *Cornerstones Mun. Util. Dist.*, this court held that the discovery rule barred the plaintiff's claims as a matter of law because the plaintiff did not exercise reasonable diligence after discovering that sixty feet of its sewer pipe had been damaged. *Cornerstones Mun. Util. Dist.*, 889 S.W.2d at 576-77. Although this court did indicate that the discovery rule tolled limitations in that case until videotaping revealed damage to the sixty feet of pipe, this does not mean that in all cases of damage to sewer pipes, the discovery rule tolls limitations until the damage is videotaped. *See id.* Rather, in that case, the municipal utility district had not been diligent, and its knowledge of damage to the sixty feet of pipe was equivalent to knowledge of the system-wide sewer problems because the system-wide sewer problems would have been discovered by reasonable diligence after learning of

the damage to the sixty feet of pipe. *See id.* In this case, White Oak has not alleged system-wide damage to its sewer pipes. This court's decision in *Cornerstones Mun. Util. Dist.* does not mean that knowledge of sinking manhole covers and sidewalks cannot, as a matter of law, put White Oak on notice to diligently investigate this sinking. *See id.* White Oak had a duty to exercise reasonable diligence after learning about the sinking manhole covers and sidewalks. Therefore, we reject White Oak's argument under *Cornerstones Mun. Util. Dist*.

Next, we must determine if there was a genuine issue of material fact as to whether White Oak knew facts that would cause a reasonably prudent person to make an inquiry which would lead to the discovery of White Oak's claims for damage to its sewer pipes. *White*, 362 S.W.2d at 295-96; *Cornerstones Mun. Util. Dist.*, 889 S.W.2d at 576. Taking as true all evidence and reasonable inferences therefrom in favor of White Oak, we conclude that, in their motion for summary judgment, appellees conclusively proved their limitations defense and negated the discovery rule by showing that White Oak, in the exercise of reasonable diligence, should have discovered its claims for damage to its sewer pipes. *See Cornerstones Mun. Util. Dist.*, 889 S.W.2d at 576-77; *Bayou Bend Towers Council of Co-Owners v. Manhattan Const. Co.*, 866 S.W.2d 740, 742-46 (Tex. App.—Houston [14th Dist.] 1993, writ denied); *Mitchell Energy Corp. v. Bartlett*, 958 S.W.2d 430, 435-36 (Tex. App.—Fort Worth 1997, pet. denied). Therefore, to avoid summary judgment against it, White Oak had to adduce summary-judgment evidence raising a genuine issue of material fact on this issue. *KPMG Peat Marwick*, 988 S.W.2d at 748.

In its response to appellees' motion for summary judgment, White Oak stated in very general terms that there was a fact issue precluding summary judgment; however, White Oak did not cite any summary-judgment evidence allegedly raising a fact issue. White Oak did cite some summary-judgment evidence that, under the summary-judgment standard of review, arguably raised a fact issue as to the following: (1) when White Oak actually discovered that Pilgrim's dry-cleaning solvents had damaged its sewer pipes; (2) whether the damage to these pipes caused the sinking of the manhole covers and sidewalks; and (3)

whether White Oak actually knew that dry-cleaning solvents could damage sewer pipes. However, even if the summary-judgment evidence raised genuine issues as to these matters, they were not genuine issues of *material* fact precluding summary judgment. *See White*, 362 S.W.2d at 295-96; *Cornerstones Mun. Util. Dist.*, 889 S.W.2d at 576. The material issue regarding the discovery rule is whether White Oak, in the exercise of reasonable diligence, should have discovered the chemical damage to its sewer pipes, or, more specifically, whether White Oak's knowledge of the sinking manhole covers and sidewalks would cause a reasonably prudent person to make an inquiry which would have led to the discovery of the damage to White Oak's sewer pipes. *See White*, 362 S.W.2d at 295-96; *Cornerstones Mun. Util. Dist.*, 889 S.W.2d at 576. White Oak has not cited, and we have not found, any summary-judgment evidence that raises a genuine issue of fact in this regard.

In fact, White Oak's response to appellees' motion included an affidavit in which Ken Love testifies that the sinking of the manhole covers and sidewalks might have indicated a problem with the sewer pipes, among other possible reasons. Love testified this possible problem with the sewer pipes was the reason White Oak had the smoke testing performed, which led to the videotaping and the determination that dry-cleaning solvents had damaged the sewer pipes. The uncontroverted summary-judgment evidence shows that, when White Oak finally took action to investigate the sinking of the manhole covers and sidewalks, White Oak promptly discovered the damage to its sewer pipes.

White Oak essentially argues that there is a "serendipity exception" to the discovery rule — that the discovery rule does not apply if, while making an inquiry into the sinking manhole covers and sidewalks, White Oak could not foresee that this inquiry would lead to the discovery of chemical damage to its pipes. White Oak has not cited any cases that support this legal proposition, and we reject it. The material issue is whether White Oak's knowledge of the sinking manhole covers and sidewalks would cause a reasonably prudent person to make an inquiry which would have led to the discovery of the damage to White Oak's sewer pipes. *See White*, 362 S.W.2d at 295-96; *Cornerstones Mun. Util. Dist.*, 889

S.W.2d at 576. In the trial court, White Oak did not allege that any specific evidence raised a genuine issue of material fact in this regard. We conclude that the summary-judgment evidence did not raise a genuine issue of material fact and that appellees conclusively proved that, long before September 1, 1995, White Oak had knowledge of the sinking manhole covers and sidewalks and that this knowledge would cause a reasonably prudent person to make an inquiry which would have led to the discovery of the damage to White Oak's sewer pipes.[2] Appellees conclusively proved that, in the exercise of reasonable diligence, White Oak should have discovered its claims long before September 1, 1995. Therefore, the two-year statute of limitations barred White Oak's claims on September 1, 1997, when a new statute took effect that abolished the two-year statute of limitations as a defense against claims made by municipal utility districts like White Oak. *See* Act of June 19, 1997, 75th Leg., R.S., ch. 1070, § 47, 1997 Tex. Gen. Laws 4084; TEX. CIV. PRAC. & REM CODE §§ 16.003 & 16.061.

In determining the effect, if any, of the statute that amended § 16.061 of the Texas Civil Practice and Remedies Code on September 1, 1997, we presume that this statute is prospective in its operation, unless the Legislature expressly states that it is retroactive. TEX. GOV'T CODE ANN. § 311.022; *Hicks v. Humble Oil & Refining Co.*, 970 S.W.2d 90, 94 (Tex. App.—Houston [14th Dist.] 1998, pet. denied). Because this statute does not expressly state that it is retroactive, we hold that it is prospective. *See* TEX. GOV'T CODE ANN. § 311.022; *Hicks*, 970 S.W.2d at 94. As to a statute that abolishes a preexisting statute of limitations for certain claims, prospective means, at a minimum, that this statute does not apply to any of

[2] We note that White Oak attached to its response the entire deposition transcripts from the depositions of six witnesses. These transcripts exceed 1300 pages in length. In the trial court and on appeal, White Oak has not cited any portions of the summary-judgment evidence that it claims raise a genuine issue of material fact as to the discovery rule. In both the trial court and in this court, White Oak has not cited most of the more than 1300 pages of deposition transcripts for any proposition. The trial court and this court are not required to sift through these voluminous deposition transcripts in search of evidence to support White Oak's contentions. *See Guthrie v. Suiter*, 934 S.W.2d 820, 825-26 (Tex. App.—Houston [1st Dist.] 1996, no writ); *D&S Kingsway Ventures v. Texas Capital Bank-Richmond, N.A.*, 882 S.W.2d 573, 575 (Tex. App.—Houston [14th Dist.] 1994, no writ). Therefore, in reaching our decision, we have not examined any of the pages of the deposition transcripts that White Oak failed to cite.

these claims that were barred by limitations when the statute took effect. *See Baker Hughes, Inc. v. Keco R. & D., Inc.*, 12 S.W.3d 1, 4 (Tex. 1999); *Hicks*, 970 S.W.2d at 94. Because the two-year statute of limitations barred White Oak's claims on September 1, 1997, we do not apply the statute that amended § 16.061 of the Texas Civil Practice and Remedies Code to abolish this defense against municipal utility districts like White Oak. *See Baker Hughes, Inc.*, 12 S.W.3d at 4; *Hicks*, 970 S.W.2d at 94. Therefore, the two-year statute of limitations governs this case rather than § 16.061. *See* Act of June 19, 1997, 75th Leg., R.S., ch. 1070, § 47, 1997 Tex. Gen. Laws 4084; TEX. CIV. PRAC. & REM CODE §§ 16.003 & 16.061.

IV. CONCLUSION

Because appellees conclusively proved their entitlement to judgment as a matter of law under the two-year statute of limitations, we overrule White Oak's sole issue and affirm the trial court's judgment.

/s/ Kem Thompson Frost
Justice

Judgment rendered and Opinion filed February 21, 2002.

Panel consists of Justices Anderson, Hudson, and Frost.

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