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Clinton Gard and Patricia Gard, appellants, v. City of Omaha, appellee.

786 N.W.2d 688

Filed August 3, 2010. No. A-09-1266.

1. **Summary Judgment.** Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose no genuine issue regarding any material fact or the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
2. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment was granted, giving that party the benefit of all reasonable inferences deducible from the evidence.
3. **Political Subdivisions Tort Claims Act: Limitations of Actions.** For purposes of Neb. Rev. Stat. § 13-919(1) (Reissue 2007), a cause of action accrues, thereby starting the period of limitations, when a potential plaintiff discovers, or in the exercise of reasonable diligence should discover, the political subdivision's negligence.
4. **Torts: Limitations of Actions.** When an individual is subject to a continuing, cumulative pattern of tortious conduct, capable of being terminated and involving continuing or repeated injury, the statute of limitations does not run until the date of the last injury or cessation of the wrongful action.
5. **Estoppel.** An equitable estoppel rests largely on the facts and circumstances of the particular case.
6. **Equity: Estoppel.** The doctrine of equitable estoppel will not be invoked against a governmental entity except under compelling circumstances where right and justice so demand.
7. ____: ____. Six elements must be satisfied for the doctrine of equitable estoppel to apply: (1) conduct which amounts to a false representation or concealment of material facts or, at least, which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert; (2) the intention, or at least the expectation, that such conduct will be acted upon by, or influence, the other party or other persons; (3) knowledge, actual or constructive, of the real facts; (4) lack of knowledge and the means of knowledge of the truth as to the facts in question; (5) reliance, in good faith, upon the conduct or statements of the party to be estopped; and (6) action or inaction based thereon of such a character as to change the position or status of the party claiming the estoppel.
8. **Equity: Estoppel: Limitations of Actions.** The first prong of the equitable estoppel test is met when one lulls his or her adversary into a false sense of security, thereby causing that person to subject his or her claim to the bar of the statute of limitations, and then pleads the very delay caused by his or her conduct as a defense to the action when it is filed.

Appeal from the District Court for Douglas County: J. Patrick Mullen, Judge. Affirmed.

Clinton Gard, pro se.

Patricia Gard, pro se.

Alan M. Thelen, Deputy Omaha City Attorney, and Rosemarie R. Horvath for appellee.

MOORE and CASSEL, Judges.

CASSEL, Judge.

INTRODUCTION

After errant cars entered the backyard of Clinton Gard and Patricia Gard on two occasions, the Gards filed a claim with the City of Omaha (City) and, after it was denied, filed a lawsuit against the City. The district court concluded that the suit was barred by the statute of limitations and entered summary judgment in favor of the City. Because we conclude that the claim and the lawsuit were not timely filed, we affirm.

BACKGROUND

On January 12, 2001, the Gards purchased property located on North 121st Street in Omaha, Nebraska. Their property is located at the top of a T-intersection formed by Miracle Hills Drive (which runs generally east and west) and 120th Street (which runs north and south). Miracle Hills Drive has four westbound lanes which end at 120th Street; traffic in the two left-hand lanes is to turn left onto 120th Street, while traffic in the two right-hand lanes is to turn right. The intersection has traffic signals, including arrows indicating that traffic has to turn either left or right because the road ends.

On October 21, 2006, a drunk driver traveling westbound on Miracle Hills Drive failed to turn onto 120th Street and proceeded through the intersection and onto the Gards' property. The vehicle traveled through an existing tree line and a small retaining wall before crashing into the Gards' house. The Gards expressed concern to the City about the lack of a barrier to prevent errant traffic from entering their yard, but the City responded that it would not construct any type of barrier.

On April 24, 2007, two vehicles heading westbound on Miracle Hills Drive proceeded through the intersection and

came to a stop in the Gards' backyard. The Gards again communicated with the City about a barrier, but the City again refused to construct a barrier or offer any alternative to protect the Gards' property.

On April 22, 2008, the City received a claim filed by the Gards against the City under the Political Subdivisions Tort Claims Act (Act), seeking damages of $45,890. The City denied the claim on September 16.

On March 13, 2009, the Gards filed a complaint against the City. They alleged that the City had a duty to protect its citizens and property owners from harm and to not design intersections in such a manner as to increase the danger to the Gards, their guests, and their property. They alleged that the City was negligent in failing to provide any barrier or reasonable alternative between the intersection and the Gards' property. The Gards alleged that they had suffered damage to their property, diminution in value of their property, and loss of the use and enjoyment of their backyard. They requested that the court provide injunctive relief and order the City to install barriers to protect the Gards' property.

The City raised a number of affirmative defenses in its responsive pleading. Among the affirmative defenses alleged by the City were that the Gards failed to file a timely claim with the City as required by Neb. Rev. Stat. § 13-919(1) (Reissue 2007) and that the action was barred by the statute of limitations contained in that section. The City subsequently moved for summary judgment.

Evidence showed that the city council approved the construction of the turning lane improvements at the T-intersection in a resolution dated January 9, 2001. The changes included an additional left-turn lane for westbound traffic on Miracle Hills Drive and traffic signal modifications. The T-intersection was redesigned to better move increasing westbound traffic in the area.

Harry Owen, a traffic maintenance engineer employed by the City, stated in an affidavit that after he spoke with the Gards in October 2006, he checked the accident history for the intersection and discovered that this was the first accident of its kind reported at that location. On October 30, Owen wrote

a letter to the Gards explaining the City's position and stating that the placement of a guardrail would violate several federal standards that the City must follow. Owen received correspondence from the Gards on November 2 and December 1, and he e-mailed the Gards on December 26.

On April 25, 2007, the Gards wrote to the mayor's office. On May 7, a different traffic engineer with the City, Todd Pfitzer, wrote the Gards a letter explaining the reasoning behind the City's denial of their request for guardrails or barriers at the intersection. Pfitzer stated that he would order that the diamond-shaped signs with reflectors be increased to the maximum allowable size to emphasize to approaching traffic that the roadway does not continue west through the intersection. Pfitzer again wrote the Gards on October 2 to inform them that the Nebraska Department of Roads Safety Committee, which had heard the Gards' concerns, concluded that "not one solution could provide absolute and reasonable protection" to both the driver of the vehicle and the Gards' property and family. The letter informed the Gards that the City would not be installing a barrier along the west side of the intersection. On October 11, the Gards wrote Pfitzer and suggested that the City look at changing the flow of traffic on Miracle Hills Drive.

Patricia testified in a deposition that at the time the Gards purchased their house, 120th Street had two southbound turning lanes and one northbound lane. Later, an additional northbound turning lane was added at the intersection. Patricia also testified that the traffic light facing Miracle Hills Drive was a "lower light positioned on a pole" which was not visible above the tree line. It was replaced with a large pole off to the north side of the Gards' property with a "huge" suspended arm that extends over the intersection. She testified that as of October 30, 2006, she had concerns about the intersection, she had expressed the concerns to the City, and the City had rejected her proposed solutions. The Gards did not know of any law or regulation which would require the City to install something in between 120th Street and the Gards' backyard.

After receipt of exhibits relating to the motion for summary judgment, the court then took up the Gards' motion to compel

discovery, which they had filed approximately 1 week before the hearing. The City offered the affidavit of a construction engineer for the public works department who stated that he attempted to retrieve the department's construction file on the intersection redesign project as requested by the Gards, but that he was unable to locate it after a thorough search of the storage area and that "it apparently has not been retained." He reviewed information in the City's possession and determined that the project was bid in June 2001, that construction began in August, and that the construction was substantially completed sometime in April 2002. The court sustained the Gards' motion and ordered the City to search for requested documents and to supply them to the Gards if found.

On December 1, 2009, the district court entered an order granting summary judgment. The court determined that the Gards' claim accrued on October 21, 2006, when they became aware of the problem, and that the Gards failed to bring their claim in writing to the City within 1 year after the claim accrued. The court stated that the Gards' claim was outside the statute of limitations and that the court therefore lacked subject matter jurisdiction.

The Gards timely appeal.

ASSIGNMENTS OF ERROR

The Gards assign, consolidated, that the district court erred by (1) failing to apply the continuing tort doctrine to the running of the statute of limitations, (2) failing to apply the doctrine of equitable estoppel, (3) granting summary judgment when issues of material fact existed, and (4) granting summary judgment when evidence was still being obtained under a motion to compel discovery that had been sustained.

STANDARD OF REVIEW

[1] Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose no genuine issue regarding any material fact or the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *Ballard v. Union Pacific RR. Co.*, 279 Neb. 638, 781 N.W.2d 47 (2010).

[2] In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment was granted, giving that party the benefit of all reasonable inferences deducible from the evidence. *City of Fremont v. Kotas*, 279 Neb. 720, 781 N.W.2d 456 (2010).

ANALYSIS

Whether Suit Is Barred.

The district court concluded that the Gards' suit was barred by the statute of limitations, and the Gards argue that it should not be barred for several reasons.

[3] Section 13-919(1) provides:

> Every claim against a political subdivision . . . shall be forever barred unless within one year after such claim accrued the claim is made in writing to the governing body. Except as otherwise provided in this section, all suits permitted by the act shall be forever barred unless begun within two years after such claim accrued.

The first question, then, is: When did the Gards' claim accrue? For purposes of § 13-919(1), a cause of action accrues, thereby starting the period of limitations, when a potential plaintiff discovers, or in the exercise of reasonable diligence should discover, the political subdivision's negligence. *Polinski v. Omaha Pub. Power Dist.*, 251 Neb. 14, 554 N.W.2d 636 (1996). The Gards' claim accrued on October 21, 2006, when the vehicle crashed through their yard and into their house. Thus, under § 13-919(1), they were required to submit a written claim by October 21, 2007, and to begin suit by October 21, 2008. The Gards did not submit their claim until April 2008 and did not file suit until March 2009. Thus, the Gards did not comply with the Act's time requirements.

We reject the Gards' contention that the last injury to them occurred on April 24, 2007, making their April 2008 claim timely. As discussed above, for purposes of the Act, the relevant question is when their cause of action accrued, not when they last suffered an injury.

The Gards' reliance upon a recent case is misplaced. In the Gards' reply brief, they cite to *Villanueva v. City of South Sioux*

City, 16 Neb. App. 288, 743 N.W.2d 771 (2008), and assert that they substantially complied with the notice requirements. The *Villanueva* case, however, dealt with requirements of Neb. Rev. Stat. § 13-905 (Reissue 2007) regarding the *content* of the claim. The instant case involves statutory *time limits* for *filing* of the claim and the lawsuit. In *Big Crow v. City of Rushville*, 266 Neb. 750, 754, 669 N.W.2d 63, 66-67 (2003), the Nebraska Supreme Court stated, "Because compliance with statutory time limits such as that set forth in [Neb. Rev. Stat.] § 13-906 [(Reissue 2007)] can be determined with precision, the doctrine of substantial compliance has no application in these circumstances." We think the same can be said of the statutory time limits in § 13-919; thus, substantial compliance does not apply in this case.

[4] We similarly find no relief for the Gards under the continuing tort theory. The Gards' complaint alleged that the City was negligent in failing to provide a barrier at the intersection. It is well accepted that when an individual is subject to a continuing, cumulative pattern of tortious conduct, capable of being terminated and involving continuing or repeated injury, the statute of limitations does not run until the date of the last injury or cessation of the wrongful action. *Alston v. Hormel Foods Corp.*, 273 Neb. 422, 730 N.W.2d 376 (2007). This "continuing tort doctrine" requires that a tortious act—not simply the continuing ill effects of prior tortious acts—fall within the limitation period. *Id.* The Gards argue that because the unsafe conditions at the intersection have not changed, the wrong continues and a claim is accruing every day. However, the necessary tortious act cannot merely be the failure to right a wrong committed outside the statute of limitations, because if it were, the statute of limitations would never run because a tort-feasor can undo all or part of the harm. See *id.* We do not view the City's alleged breach of a duty to erect a barrier each day as a continuing unlawful act; instead, it would be more akin to a failure to right a wrong that the Gards became aware of in October 2006—which is outside the statute of limitations. We observe that no Nebraska case law has applied the doctrine to claims brought under the Act, and we decline to do so in this case.

[5,6] The Gards additionally argue that equitable estoppel should apply and that ending their case on a statute of limitations ground due to a delay in the filing of their claim would cause a manifest injustice. An equitable estoppel rests largely on the facts and circumstances of the particular case. *Keene v. Teten*, 8 Neb. App. 819, 602 N.W.2d 29 (1999). The doctrine of equitable estoppel will not be invoked against a governmental entity except under compelling circumstances where right and justice so demand. *Lowe v. Lancaster Cty. Sch. Dist. 0001*, 17 Neb. App. 419, 766 N.W.2d 408 (2009). In such cases, the doctrine is to be applied with caution and only for the purpose of preventing manifest injustice. *Id.* Equitable estoppel is an affirmative defense and must be raised in the pleadings to be considered by a trial court and on appeal. *Victory Lake Marine v. Velduis*, 9 Neb. App. 815, 621 N.W.2d 306 (2000). In the case before us, although the Gards assert equitable estoppel in avoidance of the statute of limitations rather than as an affirmative defense, the same rule applies in this context. The Gards' pleadings do not sufficiently allege equitable estoppel. See, generally, *Bohl v. Buffalo Cty.*, 251 Neb. 492, 557 N.W.2d 668 (1997); *Woodard v. City of Lincoln*, 7 Neb. App. 11, 578 N.W.2d 892 (1998), *affirmed in part and in part reversed and remanded on other grounds* 256 Neb. 61, 588 N.W.2d 831 (1999). Cf. *Greer v. Chelewski*, 162 Neb. 450, 76 N.W.2d 438 (1956) (stating that party entitled to estoppel need not in all cases formally plead estoppel; if facts constituting estoppel are in any way sufficiently pleaded, party is entitled to benefit of law arising therefrom).

[7] Even if the Gards had adequately pleaded equitable estoppel, they cannot establish the elements for estoppel. Six elements must be satisfied for the doctrine of equitable estoppel to apply: (1) conduct which amounts to a false representation or concealment of material facts or, at least, which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert; (2) the intention, or at least the expectation, that such conduct will be acted upon by, or influence, the other party or other persons; (3) knowledge, actual or constructive, of the real facts; (4) lack of knowledge and the means of knowledge of

the truth as to the facts in question; (5) reliance, in good faith, upon the conduct or statements of the party to be estopped; and (6) action or inaction based thereon of such a character as to change the position or status of the party claiming the estoppel. *Lowe, supra*.

[8] The first prong of the equitable estoppel test is met when one lulls his or her adversary into a false sense of security, thereby causing that person to subject his or her claim to the bar of the statute of limitations, and then pleads the very delay caused by his or her conduct as a defense to the action when it is filed. *Woodard v. City of Lincoln*, 256 Neb. 61, 588 N.W.2d 831 (1999). Here, however, the City has never indicated that it may erect a barrier. As early as October 30, 2006, Owen informed the Gards in writing that "placing any kind of a guardrail there would violate several Federal Standards that [the City] must follow" and that "[g]uardrails are specifically not to be used to protect private property abutting the roadway." Because one of the essential elements of equitable estoppel has not been satisfied, it does not apply in this case.

To summarize, we conclude that the Gards' claim was not timely filed and that their suit is barred based upon the time limits contained in § 13-919(1). We reject each of the theories they have asserted in an attempt to excuse the untimeliness of their filings.

Additional Evidence.

Finally, the Gards argue that the district court erred in granting summary judgment while evidence was still being received under their motion to compel, which the district court had sustained. They assert in their brief that they received documents from the City on approximately October 8 and November 23 and 25, 2009. These documents, however, are not in the record. The Gards further discuss a telephone call that they made to the court, but, again, our record contains nothing about this telephone call. More important though, the Gards admit that the final order disposed of the merits of their case on a statute of limitations defense. This additional evidence could not have affected the time of the filing of their claim or the time that they could have known that they had a claim, i.e.,

after the first accident on October 21, 2006. Accordingly, we find no error.

CONCLUSION

We conclude that the district court properly entered summary judgment in favor of the City, because the Gards did not meet the time requirements set forth in § 13-919(1) and the doctrines of continuing tort and equitable estoppel do not excuse their failure to file their lawsuit before the statute of limitations had expired.

AFFIRMED.

INBODY, Chief Judge, participating on briefs.