

APPENDIX

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APPENDIX A

**UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

No. 21-20618

[Filed January 11, 2023]

CARLO GIUSEPPE CIVELLI;)
ASTER CAPITAL S.A. (LTD) PANAMA,)
)
<i>Plaintiffs—Appellants,</i>)
)
<i>versus</i>)
)
J.P. MORGAN SECURITIES, L.L.C.;)
JP MORGAN CHASE BANK, N.A.,)
)
<i>Defendants—Appellees.</i>)
)

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 4:17-CV-3739

Before SMITH and HAYNES, *Circuit Judges.*^{*}

^{*} Judge Barksdale took part in oral argument but now stands recused and did not participate in the opinion. This matter is decided by a quorum. *See* 28 U.S.C. § 46(d).

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JERRY E. SMITH, Circuit Judge:

Carlo Civelli and his company, Aster Capital S.A. (LTD) Panama, appeal a summary judgment declaring their claims of negligence and conspiracy to commit theft to be time-barred and their claim of breach of fiduciary duty to be without merit. Plaintiffs further contend the district court erred in awarding attorneys' fees.

Finding these assertions without merit, we affirm on all issues.

I.

Civelli, an investor and venture capitalist, and Phillippe Mulacek, CEO of InterOil Corporation (“InterOil”), an energy company, developed a business relationship beginning in September 2002. Throughout that relationship, Civelli (and “entities controlled and beneficially owned by him”) provided loans, cash advances, and funds to Mulacek and InterOil, who were “regularly in financial distress.”

At issue is a series of loans and transfers that began in September 2009. “Mulacek was a defendant in a Texas lawsuit . . . [and] asked Civelli to loan Mulacek shares in InterOil that could be used in the future for the purposes of satisfying a potential judgment or settlement.” Without any formal written documentation, Civelli entered into a loan agreement under which Mulacek could use Civelli’s InterOil shares for the purpose of satisfying a potential judgment or settlement. Plaintiffs allege that the terms of the agreement were as follows:

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(1) [A] loan of InterOil shares would be made to Mulacek for potential use in the Texas Lawsuit and subsequently payable upon demand, (2) the loaned InterOil shares would be held in the trust account of Dale A. Dossey, Esq. (“Dossey”), an attorney in Texas who represented both Civelli and Mulacek in other matters, (3) if Mulacek actually needed the shares for the Texas Lawsuit, the shares could be transferred to the plaintiffs in the Texas Lawsuit, but only upon Civelli’s approval, and the loan could be documented at that time, and (4) that the shares would be returned to Civelli upon request or the loan repaid.

Following the agreement, Civelli created an entity, Aster Capital S.A. (LTD) Panama (“Aster Panama”), to hold these shares. Dossey then sent an email to Civelli asking Civelli to send the shares and stating that he would “open a trust account for Aster here [at Chase Bank] to show a paper trail.” Civelli complied with the request.

Plaintiffs allege that next, without their knowledge, “Mulacek instructed Dossey to transfer a number of the loan shares from the Dossey Chase Trust Account to accounts of various corporations beneficially owned or controlled by Mulacek.” That occurred in several stages. First, shares were transferred from the Dossey Chase Trust Account to a J.P. Morgan account (“JP Account 1”) in November 2009. Second, shares were transferred in December 2009 from the Dossey Chase Trust Account to a Deutsche Bank account that belonged to Mulacek’s company PIE Group LLC

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(“PIE”). Third, shares were transferred from that Deutsche Bank account to a separate account at J.P. Morgan (“JP Account 2”). Fourth, shares in JP Account 2 were transferred to “JP Account 3,” which plaintiffs allege was known as “a PIE ‘special account’ where stock was to be held for the benefit of Aster Panama.” Then, in December 2013, shares from JP Account 3 were transferred to a bank in Singapore. The J.P. Morgan defendants were instructed to transfer those shares from JP Morgan Account 3 to the Singapore bank “for further credit to account #113845 into Aster Capital, Inc.”¹

Civelli and Mulacek continued to have a business relationship until 2016, at which point Mulacek’s actions and words made Civelli concerned he would not receive his shares back from Mulacek. In late 2017, as part of a larger suit against Mulacek, Civelli and Aster Panama sued the J.P. Morgan defendants² for (1) breach of trust and fiduciary duty, (2) negligence, and (3) conspiracy to commit theft. The district court granted summary judgment on all counts relating to the J.P. Morgan defendants and awarded them attorneys’ fees under the Texas Theft Liability Act

¹ Aster Capital, Inc. (“Aster Brunei”), was not Civelli’s Aster Panama, but a completely separate company to which Civelli had no ownership or ties and which was alleged to be “beneficially owned and controlled by Mulacek.”

² The J.P. Morgan defendants are J.P. Morgan Securities, L.L.C. (“JPMS”), and JPMorgan Chase Bank, N.A. (“Chase Bank”). At other times in this case, JPMS has been erroneously referred to as “J.P. Morgan Chase Securities, L.L.C.”

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(“TTLA”), TEX. CIV. PRAC. & REM. CODE ANN. § 134.005(b). Plaintiffs appeal.

II.

As this dispute is between “citizens of a State and citizens or subjects of a foreign state,” the requirements of diversity jurisdiction are satisfied. *See* 28 U.S.C. § 1332(a)(2). Civelli and Aster Panama are foreign parties. Civelli is alleged to be a citizen of Switzerland. Aster Panama is a foreign defendant registered in Panama with Civelli as its “sole beneficial owner and director.” JPMS and Chase Bank are citizens of the United States. As reported by defendants,

[JPMS] is a Delaware limited liability company with its principal office and place of business in New York. The sole member of JPMS is J.P. Morgan Broker-Dealer Holdings Inc., which is a Delaware corporation with its principal place of business in New York Defendant JPMS is an affiliate of [Chase Bank], a national bank with its principal office in Ohio.

Mulacek and his related entities are citizens of the United States and are not parties to this appeal. We agree with the parties that there is federal-court jurisdiction.

III.

This court reviews a summary judgment *de novo*. *Cuadra v. Hous. Indep. Sch. Dist.* 626 F.3d 808, 812 (5th Cir. 2010) (citing *Shields v. Twiss*, 389 F.3d 142, 149 (5th Cir. 2004)). Summary judgment is granted when “the movant shows that there is no genuine

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dispute as to any material fact and the movant is entitled to judgment as a matter of law.” FED. R. CIV. P. 56(a). An issue is genuine when “the evidence is sufficient for a reasonable jury to return a verdict for the nonmoving party.” *Hamilton v. Segue Software*, 232 F.3d 473, 477 (5th Cir. 2000) (per curiam) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). In this posture, we “construe all facts and inferences in the light most favorable” to the nonmovant. *Murray v. Earle*, 405 F.3d 278, 284 (5th Cir. 2005) (citation omitted).

IV.

Plaintiffs’ claims are predicated on their theory that the J.P. Morgan defendants owed them a fiduciary duty. Therefore, say plaintiffs, J.P. Morgan should have asked for their consent before transferring the shares elsewhere. Because that did not occur, plaintiffs claim negligence, breach of fiduciary duty, and even conspiracy to commit theft. As the district court correctly held, each of these claims fails at the summary judgment stage.

A. Negligence.

Plaintiffs say that the J.P. Morgan defendants were negligent in failing to “obtain the consent of the owners of shares before transferring such shares” because that failure went against industry and company policy. Without reaching the merits of this claim, we dismiss it as time-barred.

In diversity cases, limitations is determined by the choice-of-law rules of the forum state. *Ellis v. Great Sw. Corp.*, 646 F.2d 1099, 1103 (5th Cir. 1981). Texas’s

choice-of-law rules instruct us to apply Texas’s statute of limitations, which for this claim is two years. TEX. CIV. PRAC. & REM. CODE ANN. § 16.003(a); *see also* *Henderson v. Republic of Texas*, 672 F. App’x 383, 384 (5th Cir. 2016). Plaintiffs sued in December 2017, but the transfer occurred in December 2013. Thus, the claims are time-barred unless the rule of discovery applies.

The rule of discovery “is a ‘limited exception’ to the general rule that a cause of action accrues when a legal injury is incurred.” *Archer v. Tregellas*, 566 S.W.3d 281, 290 (Tex. 2018) (quoting *BP Am. Prod. Co. v. Marshall*, 342 S.W.3d 59, 66 (Tex. 2011)). It applies “when the nature of the injury is inherently undiscoverable and the evidence of the injury is objectively verifiable.” *Id.* (citing *S.V. v. R.V.*, 933 S.W.2d 1, 6 (Tex. 1996)). An injury is “inherently indiscoverable” where it is “unlikely to be discovered within the prescribed limitations period despite due diligence.” *Id.* (quoting *Via Net v. TIG Ins. Co.*, 211 S.W.3d 310, 313–14 (Tex. 2006)). The analysis is categorical, not fact-specific: Courts ask whether the injury “was the type of injury that could be discovered through the exercise of reasonable diligence,” not whether a particular plaintiff could have discovered its injury with diligence. *Id.* (quoting *BP Am.*, 342 S.W.3d at 66). If the rule applies, limitations is tolled “until the plaintiff knew or, exercising reasonable diligence, should have known of the facts giving rise of the cause of action.” *Comput. Assocs. Int’l, Inc. v. Altai, Inc.*, 918 S.W.2d 453, 455 (Tex. 1996) (citations omitted).

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It is not easy to assert the rule of discovery, which “is a narrow exception that is only applied in ‘exceptional cases.’ Applications of the rule ‘should be few and narrowly drawn.’” *Berry v. Berry*, 646 S.W.3d 516, 524 (Tex. 2022) (first quoting *Via Net*, 211 S.W.3d at 313, and then quoting S.V., 933 S.W.2d at 25). And the discovery rule “tolls limitations only until a claimant learns of a wrongful injury. Thereafter, the limitations clock is running, 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 changes of avoiding it.” *PPG Indus., Inc. v. JMB/Hous. Ctrs. Partners Ltd. P'ship*, 146 S.W.3d 79, 93–94 (Tex. 2004) (citations omitted).

Plaintiffs have alleged that the J.P. Morgan defendants were negligent in transferring the stocks to Aster Brunei without first asking for Plaintiffs’ permission. Specifically, Plaintiffs claim that “the [J.P. Morgan] Defendants knew account 720-18452 was a ‘special account’ for the benefit of Aster Panama.” Therefore, they were negligent when they “transferred the Loan Shares from a special account to [Aster Brunei], a third party who was not a beneficiary of the special account, and failed to obtain the consent of the owner . . . to transfer such shares.” Civelli claims that the discovery rule applies because he could not, through due diligence, have learned of the wrongful injury until at least September 2016, when he first had reason to believe that “the Aster shares would not be returned.”

But the parties appear to agree that Civelli knew of the transfer by February 25, 2014. Even assuming that

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an email (written by Civelli and dated February 25, 2014) stating, “I don’t have any shares anymore, as the Aster shares were transferred out, without my knowledge or approval,” was in fact “obtuse,” as plaintiffs claim, Civelli himself submitted a declaration to the court stating, “I did learn around February of 2014 that Mulacek had transferred the Aster shares to one of his accounts in Singapore.”

Plaintiffs do not dispute this point, instead submitting that “a fundamental flaw with the [J.P. Morgan defendants’] (and lower court’s) reasoning was their near singular emphasis on when Mr. Civelli arguably had reason to conclude the 527,396 InterOil Shares had been transferred—without any attempt to illuminate why it *necessarily* followed the transfer was injurious to the Civelli Appellants.” But for the negligence claim, that’s all the appellees had to show, because under Texas law, that is when the asserted injury occurred.

Especially instructive is *Velsicol Chemical Corp. v. Winograd*, 956 S.W.2d 529, 530–31 (Tex. 1997) (per curiam): Judwin, a landlord, had hired Velsicol, an exterminator, to treat her apartments for insects. Tenants were upset to discover that there was residue of the toxic chemical chlordane inside their apartments. Judwin then sued Velsicol for, *inter alia*, damage to her property and business. Judwin knew that there was chlordane inside the apartments as early as 1987 but was not aware that the chlordane levels exceeded the legal limit until 1991, at which point she sued. The court held that the rule of discovery could not toll the standard two-year statute of limitations because

Judwin was not suing Velsicol for exceeding the legal limits; instead, she was suing “to recover damages for lost income, rents, and profits,” all of which were “due to tenant fears and adverse media coverage related to the chlordane application. Those damages arose in April 1987 because of the presence of chlordane, irrespective of the later detection of elevated interior concentrations amounting to ‘contamination.’” *Id.* at 531.

The same analysis applies here. Any injury incurred from the J.P. Morgan defendants’ alleged negligence in transferring the shares without plaintiffs’ consent arose at the time of the transfer. Because Civelli admits that he knew by February 2014 that they had transferred the funds, the rule of discovery does not apply.³

B. Breach of Fiduciary Duty.

Plaintiffs ask us to find that the account at issue was a “special account,” a fixture of Texas law that can create a fiduciary duty from a bank to a non-client. Such accounts are formed when “a customer deposits funds for a specific purpose and the bank agrees to be responsible for the safe-keeping, return, or

³ There is a conflict in this circuit over what standard the non-movant must meet to show that limitations has been tolled. *See Agenbroad v. McEntire*, 595 F. App’x 383, 385 n.1 (5th Cir. 2014) (citations omitted) (“We note that the precedent in this circuit is in conflict on the issue of whether to apply the Texas ‘conclusively negate’ summary judgment standard or the federal standard, which would not impose that burden on the moving party.”). We do not reach this conflict, because defendants have satisfied both standards.

disbursement of the same funds that were entrusted to it.” *Bandy v. First State Bank, Overton*, 835 S.W.2d 609, 618–19 n.4 (Tex. 1992). Texas courts generally require explicit proof that the bank agreed to such a duty. *See Villarreal v. First Presidio Bank*, No. EP-15-CV-88-KC, 2017 WL 1063563, at *7 (W.D. Tex. 2017) (citing *Hudnall v. Tyler Bank & Trust Co.*, 458 S.W.2d 183, 186 (Tex. 1970)). The presumption is always that no such special account exists, and “[t]he burden is upon one who contends that the bank is his trustee or owes a duty to restrict the use of funds for certain purposes.” *Citizens Nat'l Bank of Dall. v. Hill*, 505 S.W.2d 246, 248 (Tex. 1974).

Plaintiffs contend that JP Account 3 was transformed into a special account after its formation because it “was the result of ‘more communications that modified antecedent considerations beyond what was ‘initially conceived,’ and representatives of the [J.P. Morgan defendants] engaged in objectively verifiable actions that mirrored that understanding.’” But plaintiffs’ proffered evidence does not even come close to creating a genuine dispute of material fact over whether a special account was created.

Under Texas law, the only question is whether the J.P. Morgan defendants expressly accepted a duty to ensure the stocks were kept in trust for Civelli or Aster Panama. That could have been done by express agreement (via either the opening agreement of the account or subsequent communications) or by the bank’s acceptance of a deposit that contained writing that set forth “by clear direction what the bank is required to do.” *Id.* (citation omitted). Plaintiffs’ burden

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is heavy, as Texas courts require a large amount of evidence to show that a bank has accepted such a duty.⁴

Even after extensive discovery, the entirety of plaintiffs' evidence that the J.P. Morgan defendants agreed to accept a fiduciary duty to Civelli and Aster Panama is as follows:

(1) Mulacek told his Chase advisor ("Rahn") to move InterOil shares from one Chase account into an account that Mulacek called "PIE Group LLC #3, c/o Aster Capital S.A. 720-18542-2-RW8";

(2) The J.P. Morgan defendants generated account statements that referred to the account as "PIE Group, LLC Acct. #3 ASTER";

(3) Mulacek appears to refer to the above account as "Pie Group, LLC #3 Aster"⁵;

(4) In August 2013, Rahn referred to the account as "Pie Group LLC special account for Aster Capital";

(5) In December 2013, Mulacek wrote to Rahn and referred to "PIE Group LLC (I have c/o of Aster)".

⁴ See *S. Cent. Livestock Dealers, Inc. v. Sec. State Bank*, 551 F.2d 1346, 1348–49 (5th Cir. 1977); *Citizens First Nat'l Bank of Tyler v. Cinco Expl. Co.*, 540 S.W.2d 292, 295 (Tex. 1976); *Citizens Nat'l*, 505 S.W.2d at 247–49; *Quanah, A. & P. Ry. v. Wichita State Bank & Trust Co.*, 93 S.W.2d 701, 705–09 (Tex. 1936); cf. *U.S. Fid. & Guar. Co. v. Adoue & Lobit*, 104 Tex. 379, 391–92 (1911).

⁵ One digit is different in the account number Mulacek used, but it appears to be the same account.

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The J.P. Morgan defendants dispute the import of those statements, but the crux of their argument is that the documents establish no more than “what Appellees have asserted the entire time – [JP] account 3 was a brokerage account for PIE that Mulacek nicknamed the ‘Aster’ account to identify it from his other PIE accounts.”

Defendants provide evidence that the customer agreement they signed with Mulacek when he opened his accounts stated that “the JPMS ‘nature of services’ will be solely to execute transactions and act as broker-dealer and custodian, and could not be modified except by ‘a written instrument signed by an authorized representative of JPMorgan,’” and “only the undersigned has any interest in the Account(s) established pursuant to this agreement.” They also contend that J.P. Morgan could not have had a special account at all, because it is a “brokerage firm, not a bank,” and it “does not even offer ‘special accounts,’ because they would contradict its express contractual right as a broker-dealer to hold shares in its own name and as a bailee for itself with respect to margin accounts.”

With this backdrop, no jury could find that the proffered statements and emails were sufficient evidence of intent from the J.P. Morgan defendants to show an express agreement that they “owe[d] a duty to restrict the use of the funds for certain purposes.” *Citizens Nat'l*, 505 S.W.2d at 278. The district court therefore did not err in granting summary judgment in favor of the J.P. Morgan defendants.

C. Conspiracy to Commit Theft.

Plaintiffs contend that the J.P. Morgan defendants conspired with Mulacek to steal Civelli's money because “[e]ach had knowledge of, agreed to and intended a common objective or course of action, the theft of Civelli and Aster Panama's shares in InterOil.” Specifically, “Mulacek directed the [J.P. Morgan] defendants to transfer the shares to [Aster Brunei]. The [J.P. Morgan] defendants, complicit with Mulacek, made the transfer, knowing the transfer was not to the owner and not for the benefit of the owner.” Plaintiffs fail to raise a genuine dispute as to any material fact regarding their conspiracy claim, and summary judgment was therefore proper.

In Texas, “[t]he essential elements [of civil conspiracy] are: (1) two or more persons; (2) an object to be accomplished; (3) a meeting of minds on the object or course of action; (4) one or more unlawful, overt acts; and (5) damages as the proximate result.” *Massey v. Armco Steel Co.*, 652 S.W.2d 932, 934 (Tex. 1983) (citing 15A C.J.S. *Conspiracy* § 1(2) (1967)). To establish a meeting of the minds, “there must be an agreement among [the alleged conspirators] and each must have a specific intent to commit the act.” *San Antonio Credit Union v. O'Connor*, 115 S.W.3d 82, 91 (Tex. 2003) (citation omitted).

Plaintiffs' theory appears to be that the “meeting of the minds” occurred when J.P. Morgan transferred the funds without plaintiffs' consent, because if defendants knew that the funds were meant to be held in trust for plaintiffs, then agreeing to transfer them without plaintiffs' consent was evidence of their mutual intent

to steal from plaintiffs. But this fails for the reasons outlined above—even in a summary judgment posture, plaintiffs have not provided enough evidence to show that J.P. Morgan owed a fiduciary duty to the plaintiffs. Without such a duty, J.P. Morgan’s transfer was nothing more than compliance with its client’s request and, without further evidence, cannot evince an intent of minds to steal from Civelli and Aster Panama. The summary judgment on this claim was therefore correct.⁶

V.

Plaintiffs’ final request raises a novel issue: whether a common law conspiracy suit predicated on a violation of the TTLA is considered a “suit brought under the TTLA” for purposes of attorneys’ fees. TEX. CIV. PRAC. & REM. CODE ANN. § 134.005(b).

Civil suits generally follow the American Rule, under which each party pays its own attorneys’ fees regardless of the outcome of the case. *See, e.g., Baker Botts L.L.P. v. ASARCO LLC*, 576 U.S. 121, 126 (2015). But the TTLA includes a fee-shifting provision: “Each person who prevails in a suit under this chapter shall be awarded court costs and reasonable and necessary attorney’s fees.” TEX. CIV. PRAC. & REM. CODE ANN. § 134.005(b). Thus, when the district court granted summary judgment in favor of the J.P. Morgan

⁶ Although the district court dismissed this claim as time-barred without reaching the merits, we can affirm on any basis supported by the record. *Smith v. Reg’l Transit Auth.*, 827 F.3d 412, 417 (5th Cir. 2016) (citing *Bluebonnet Hotel Ventures, L.L.C. v. Wells Fargo Bank, N.A.*, 754 F.3d 272, 276 (5th Cir. 2014)).

defendants for the conspiracy claim, defendants timely moved for attorneys' fees and costs under the TTLA.

The district court reasoned that under Texas law, it was clear that the J.P. Morgan defendants were prevailing parties, as they had “successfully defended . . . on summary judgment based on the statute of limitations having expired,” and Texas courts have held that a prevailing party is defined as when a “plaintiff loses with prejudice, whether on the merits or for some other reason.” *Agar Corp., Inc. v. Electro Circuits Int'l, LLC*, 580 S.W.3d 136, 148 (Tex. 2019). But whether defendants had prevailed in a suit under the TTLA was a novel issue. Interpreting the applicability of that state statute requires an *Erie* guess. We thus review *de novo*. See *Est. of Bradley ex rel. Sample v. Royal Surplus Lines Ins. Co.*, 647 F.3d 524, 529 (5th Cir. 2011). See also *In re Glenn*, 900 F.3d 187, 189 (5th Cir. 2018).

To make an *Erie* guess, we determine “how the Texas Supreme Court would decide the issue.” *Terry Black's BBQ, L.L.C. v. State Auto. Mut. Ins. Co.*, 22 F.4th 450, 454 (5th Cir. 2022) (citing *Erie R.R. v. Thompkins*, 304 U.S. 64, 58 (1938)). That determination is based on

- (1) decisions of the Texas Supreme Court in analogous cases, (2) the rationales and analyses underlying Texas Supreme Court decisions on related issues, (3) dicta by the Texas Supreme Court, (4) lower state court decisions, (5) the general rule on the question, (6) the rulings of other states to which Texas courts look when formulating substantive law, and (7) other

available sources, such as treatises and legal commentaries.

Id. (citing *Am. Int'l Specialty Lines Ins. Co. v. Rentech Steel LLC*, 620 F.3d 558, 564 (5th Cir. 2010)).

Plaintiffs appeal only whether the TTLA shifts fees for a conspiracy claim predicated on a TTLA claim, not the amount of the fees that the district court awarded. Plaintiffs remind us that in Texas, a party may not recover attorneys' fees absent an express statutory provision. The remainder of their argument is that the "plain language" of the statute makes clear that a conspiracy claim predicated on the TTLA is not a suit brought under the TTLA. For their part, the J.P. Morgan defendants point to the district court's reasoning: "Appellants' claim for conspiracy to violate the TTLA is a 'suit under this chapter' of the TTLA, because Appellants undertook to prove a direct violation of the TTLA when they brought a lawsuit for conspiracy to violate the TTLA After all, the statutory text refers broadly to a 'suit' under this chapter,' not a 'claim under this chapter.'"

In analogous situations, the Texas Supreme Court has spoken clearly of its view of conspiracy claims, stating, "Because civil conspiracy is a theory of vicarious liability, a lawsuit alleging a civil conspiracy that committed some intentional tort is still a 'suit for' that tort." *Agar*, 580 S.W.3d at 142. Although the court was referring to statutes of limitations, not attorneys' fees, the statement strongly suggests that the TTLA's fee-shifting provision should be interpreted to apply to conspiracy claims predicated on TTLA claims as well.

Lower court decisions from Texas provide further support.

In *Brinson Benefits, Inc. v. Hooper*, the court noted, “Civil conspiracy is a derivative tort, and a defendant’s liability for conspiracy depends on participation in some underlying tort for which the plaintiff seeks to hold at least one of the named defendants liable.” 501 S.W.3d 637, 643–44 (Tex. App.—Dallas 2016, no writ) (citing *Chu v. Hong*, 249 S.W.3d 441, 444 (Tex. 2008)). Further, “if an underlying tort does not entitle a party to attorney’s fees, that party may not recover its attorney’s fees for conspiracy to commit that tort.” *Id.* (citation omitted). From those propositions, the court reasoned that “because civil conspiracy to commit theft is a derivative tort, [the plaintiff] could have succeeded on this claim only by proving [the defendants’] liability for the underlying tort of theft.” *Id.*; see also *Natour v. Bank of Am.*, No. 4:21-CV-331, 2022 WL 3581396 at *5 (E.D. Tex.) (citing *Brinson* approvingly and holding that “fees related to the conspiracy claim are recoverable, because the conspiracy claim was premised on the . . . alleged theft.”).⁷

We conclude that plaintiffs’ argument ignores that this case involves a party that “prevailed in a suit

⁷ One federal district court, *Traxxas, LP v. Dewitt*, held exactly the opposite, albeit in a hypothetical posture: “[T]he TTLA does not extend the recovery of fees to derivative claim tortfeasors, such as co-conspirators, who are not themselves defendants in a TTLA claim.” 2016 WL 6892819, at *3. (E.D. Tex. Oct. 28, 2016). But because we are trying to glean what the Texas courts would have done, this holding is less instructive than are the Texas courts’ holdings. See *Terry Black’s BBQ*, 22 F.4th at 454.

under the TTLA" because the conspiracy allegations against the J.P. Morgan defendants expressly included and incorporated by reference the TTLA allegations. Thus, we conclude that the J.P. Morgan defendants and the district court correctly assessed the attorneys' fees' applicability here. We thus agree with the district court that, under Texas law, a party that prevails in a civil conspiracy claim predicated on a TTLA claim is entitled to attorneys' fees. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 134.005(b).

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS

Civil Action H-17-3739

**[Filed April 29, 2021]
[Entered April 30, 2021]**

Carlo Giuseppe Civelli, <i>et al.</i> ,)
)
Plaintiffs,)
)
<i>versus</i>)
)
J.P. Morgan Chase Securities, LLC, <i>et al.</i> ,)
)
Defendants.)
)

Opinion on Summary Judgment

1. *Background.*

In 2002, Carlo Civelli and Philippe Mulacek met and developed a business relationship.

In September 2009, Civelli – through his company Aster Capital, S.A. (Panama) – transferred 645,000 shares of InterOil Corporation stock to Mulacek to be held in a J.P. Morgan Chase Bank, N.A., account controlled by Dale Dossey – Mulacek’s attorney.

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After a series of transfers, in December 2010, 527,396 InterOil shares were in a J.P. Morgan Chase Securities, LLC, account controlled by PIE Group, LLC – owned by Mulacek.

On December 10, 2013, Mulacek told Chase Securities to transfer the shares to a Bank of Singapore account controlled by Aster Capital, Inc. (Brunei) – owned by Gerard Jacquin, Mulacek’s cousin.

On December 11, 2017, Civelli and Aster (Panama) sued J.P. Morgan Chase Bank and Chase Securities for: (a) breach of trust and fiduciary duty, (b) negligence, and (c) conspiracy to commit theft. The J.P. Morgan defendants have moved for summary judgment. They will prevail.

2. *Negligence and Conspiracy.*

The statutes of limitations for Civelli’s negligence and conspiracy to commit theft claims are two years.¹ A claim generally accrues when the wrongful act occurs.² Under the discovery rule, accrual may be tolled until Civelli discovered or, through the exercise of reasonable care and diligence, should have discovered the nature of his injury – knowledge of the wrongful act and the injury itself.³ To be able to use the discovery rule, Civelli must prove that his injury was inherently

¹ Tex. Civ. Prac. & Rem. Code § 16.003(a).

² *Villarreal v. Wells Fargo Brokerage Services, LLC*, 315 S.W.3d 109, 117 (Tex. App.—Houston[1st Dist.] 2010).

³ *Trinity River Authority v. URS Consultants, Incorporated-Texas*, 889 S.W.2d 259, 262 (Tex. 1994).

undiscoverable and the evidence of his injury was objectively verifiable.⁴

Civelli says that he first knew of the shares having been transferred in 2014 but did not know he had been injured then. He claims he diligently investigated by asking Mulacek and Dossey about the shares multiple times from 2014 to 2016. He argues it was reasonable that he relied on the reassurances he got each time he asked about the shares. He claims there was no independent source for him to discover the “theft” because just Mulacek could have known which Aster received the shares. He says that he “discovered” his injury in 2017 when he first found that Aster (Brunei) was a different company than his and when Dossey’s son gave him the J.P. Morgan account statements.

In his February 2014 email, Civelli acknowledges that the shares were transferred without his knowledge or approval – his alleged injury being the improper transfer. Civelli did not need to know the full extent of his injury or that it could be permanent. His attempts to reshape his injury later do not allow him to take advantage of the discovery rule.

Civelli’s excuses for not “discovering” his injury are inadequate. The “reassurances” he claims were more similar to settlement discussions which do not toll the statutes of limitations. He knew there was a dispute, so these repeated reassurances to resolve it are not the purpose of the discovery rule.

⁴ *Carl M. Archer Trust v. Tregellas*, 566 S.W.3d 281, 290 (Tex. 2018).

He says that he could not ask J.P. Morgan about the transfers because he was not a customer. Just saying he was not able without even trying is not an investigation much less a diligent one.

His assertion that he could not have been aware of Aster (Brunei) until 2017 is without merit. In August 2014, Civelli was privy to emails that referred to Aster Capital, Inc. (Brunei), which is distinct from his own company – Aster Capital, S.A. Civelli clearly should have been expected to be able to identify his own company.

Civelli was not an average blue-collar worker. He was an experienced businessman in this area. What was a reasonable investigation for Civelli is not the same as an average person. Civelli attempts to say that he should have been able to just trust Mulacek – a man he was in a heated dispute with at the time – without putting in a diligent effort to confirm what he clearly saw as an improper transfer in February 2014. This is insufficient to apply the discovery rule here. An experienced businessman should – at a minimum – have read his own bank statements and demanded to see the bank statements to confirm what he should have known was a questionable transfer.

Because the discovery rule does not apply, the negligence and conspiracy claims by Civelli and Aster (Panama) will be barred by the statutes of limitations.

3. *Breach of Fiduciary Duty.*

To succeed on a breach of fiduciary duty claim, Civelli must show that a fiduciary relationship existed between J.P. Morgan and Civelli.

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Civelli says that he had a fiduciary relationship with J.P. Morgan because the account was a “special account” as J.P. Morgan knew that the shares were “for Aster.”

A special deposit may create a trust and establish a fiduciary relationship.⁵ A special deposit is when “money or its equivalent is ... deposited with an accompanying agreement that the identical thing deposited shall be returned, or that the same shall be paid out for a specific purpose.”⁶ Civelli must show that an express agreement existed where J.P. Morgan agreed to accept fiduciary obligations.⁷ The agreement may be either written or oral.⁸ Civelli may also be able to establish that fiduciary relationship existed if he can show that J.P. Morgan knew the deposit belonged to Aster (Panama).⁹

Civelli says that there was an oral agreement between J.P. Morgan and PIE Group to create a special account. He claims that the purported letter of

⁵ *U.S. Fidelity & Guaranty Co. v. Adoue & Lobit*, 137 S.W. 648, 654 (Tex. 1911).

⁶ *McBride v. American Ry. & Lightning Co.*, 127 S.W. 229, 232-33 (Tex. 1910).

⁷ *Citizens Nat. Bank of Dallas v. Hill*, 505 S.W.2d 246, 248 (Tex. 1974).

⁸ *Hudnall v. Tyler Bank & Trust Co.*, 458 S.W.2d 246, 248 (Tex. 1970).

⁹ See *Grebe v. First State Bank of Bishop*, 150 S.W.2d 64, 68 (Tex. 1941).

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authorization shows this because someone had written “c/o Aster Capital, S.A.” after the account name. He also argues that Trevor Rahn – a former J.P. Morgan employee – had called the account “special” which shows that it was one.

Civelli gives no evidence of an actual agreement – much less its terms – between J.P. Morgan and PIE Group or Mulacek that the shares were to be held in trust or could not go to anyone but Aster (Panama). The customer agreement when the account was created suggests the opposite as there is no language that J.P. Morgan would be obliged as a fiduciary. PIE Group also pledged to J.P. Morgan – at the time – that the shares were free, clear, and unencumbered. Civelli has the burden to show that J.P. Morgan intended to create anything more than a general brokerage account. Speculating about an oral agreement does not trump the written customer agreement. Broad conclusory interpretations of assorted documents that twist their true legal effect does not create a fact issue.

The mere use of the word “special” is not legally binding on the character of the account. It is the agreed relationship by the parties. Rahn’s offhand statement is meaningless to characterize the account as a special account is not offered by J.P. Morgan.

This court is also not convinced this “special deposit” analysis applies as a basis to create a fiduciary relationship. It is intended to be limited to cash and its equivalents. Stock is generally not a cash equivalent unless it is highly liquid. Civelli gives no evidence to suggest these shares were liquid. Stocks and bonds are classified separately from cash for that reason.

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Civelli also says that J.P. Morgan otherwise knew that the shares were being held for the benefit of Aster (Panama) because multiple documents and emails that included “for Aster,” “c/o Aster Capital, S.A.,” and “c/o Aster” with the account name.

Just because additional language is found next to the account name does not mean it is part of the full account title. The documents show it is a PIE Group account. These other words added at various times is insufficient to change the classification of the account without clear evidence that J.P. Morgan knew of the account’s alleged true purpose.

Civelli argues that J.P. Morgan’s firing of Lauren Benchot shows that it was aware that this language meant a trust relationship was formed.

Benchot was fired after an investigation for opening another account in 2009 – named “Dale Dossey c/o Aster Capital” – and not designating it as a trust account. Her being fired is completely unrelated to the claims in this case. Arguing that she was fired over a different account that allegedly had similar characteristics is insufficient. What matters is what the parties to the account agreed to at that time, and this is fact specific to each individual account.

Because Civelli cannot show that J.P. Morgan had a fiduciary relationship with him, his claim of a breach of fiduciary duty fails.

4. *Conclusion.*

Carlo Civelli and Aster Capital, S.A. (Panama) will take nothing from J.P. Morgan Chase Bank, N.A., and J.P. Morgan Chase Securities, LLC.

Signed on April 29, 2021, at Houston, Texas.

/s/ Lynn N. Hughes
Lynn N. Hughes
United States District Judge

APPENDIX C

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS**

Civil Action H-17-3739

[Filed July 9, 2021]

Carlo Giuseppe Civelli, <i>et al.</i> ,)
)
Plaintiffs,)
)
<i>versus</i>)
)
J.P. Morgan Chase Securities, LLC, <i>et al.</i> ,)
)
Defendants.)
)

Opinion on Fees

1. *Background.*

On December 11, 2017, Carlo Civelli and Aster Capital (Panama), S.A., sued JP Morgan Securities, LLC, and JP Morgan Chase Bank, N.A., for: (a) negligence, (b) breach of fiduciary duty, and (c) conspiracy to commit theft.

On April 29, 2021, this court held that the negligence and conspiracy claims were barred by the statute of limitations and that the breach of fiduciary duty claim failed. The court entered a partial judgment

disposing of all claims against the JP Morgan defendants.

On May 18, 2021, the court entered a partial final judgment in favor of the JP Morgan defendants under federal rule 54(b).

On June 1, 2021, the JP Morgan defendants moved for attorneys' fees and costs.

2. *Timeliness.*

Civelli argues that the JP Morgan defendants' motion is untimely as they failed to plead their entitlement to them in their answer, and the deadline to amend pleadings has expired.

In a diversity action, federal courts apply federal procedural law and state substantive law. Pleading standards are procedural so are governed by federal law.¹

Under federal rule 54, the court may grant any entitled relief to a party, "even if the party has not demanded that relief in its pleadings." The sole temporal requirement for a motion for attorneys' fees under federal law is that it be made within 14 days of the final judgment. This has clearly been met here. The JP Morgan defendants' motion for attorneys' fees has been pleaded timely.

¹ *Playboy Enters., Inc. v. Sanchez-Campuzano*, 561 Fed. Appx. 306, 309 (5th Cir. 2013).

3. *Texas Theft Liability Act.*

Whether the JP Morgan defendants are entitled to attorneys' fees is a substantive issue that is governed by state law.² The JP Morgan defendants have pleaded that they are entitled to attorneys' fees under the Texas Theft Liability Act.

Under the Act, to be entitled to its "reasonable and necessary attorneys' fees," the JP Morgan defendants must have: (a) been the prevailing party (b) under the Act.³

A. *Prevailing Party.*

A defendant is a prevailing party when the "plaintiff loses with prejudice, whether on the merits or for some other reason."⁴ It is irrelevant whether the claims were fully litigated in a trial, and the defendant need not prove that it did not commit the theft – succeeding on an affirmative defense is sufficient.⁵

The JP Morgan defendants successfully defended against the conspiracy to commit theft claim on summary judgment based on the statute of limitations having expired. This is clearly on the merits as a claim

² *Mathis v. Exxon Corp.*, 302 F.3d 448, 461 (5th Cir. 2002).

³ Texas Civ. Prac. & Rem. Code § 134.005(b).

⁴ *Agar Corp., Inc. v. Electro Circuits Int'l, LLC*, 580 S.W.3d 136, 148 (Tex. 2019).

⁵ See *Arrow Marble, LLC v. Estate of Killian*, 441 S.W.3d 702, 707 (Tex. App.—Houston [1st Dist.] 2014).

being barred by limitations is with prejudice. The JP Morgan defendants are prevailing parties.

B. Applicability.

The court is faced with what appears to be a novel issue where the prevailing defendants – who have moved for attorneys' fees – were sued for conspiracy to commit theft but were not one of the defendants sued for theft under the Act.

The Act allows for the court to award fees in “suits under” it. The lawsuit here is partially under the Act as Civelli has sued the non-JP Morgan defendants for theft. The JP Morgan defendants were sued for conspiracy to commit theft.

To be found liable for conspiracy, Civelli would have had to show that the JP Morgan defendants were liable for theft under the Act – as conspiracy is derivative. If the intent was to be limited to just theft claims, the language would have said “claims under” the Act. Interpreting otherwise would circumvent the words used. Because the JP Morgan defendants did have to defend against a “suit under” the Act, the conspiracy to commit theft claim falls under the Act.

The JP Morgan defendants will be entitled to their “reasonable and necessary” attorneys’ fees.

4. Costs.

Under federal rule 54, the JP Morgan defendants also may recover some of the costs associated with their defense. As the prevailing party, they will be entitled to reimbursement for their recoverable costs, as listed

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in 28 U.S.C. § 1920, including filing fees, printing costs, and deposition-related expenses.

5. *Conclusion.*

Carlo Civelli and Aster Capital (Panama), S.A., will owe JP Morgan Securities, LLC, and JP Morgan Chase Bank, N.A., their reasonable attorneys' fees related to the conspiracy to commit theft claim and costs.

Signed on July 9, 2021, at Houston, Texas.

/s/ Lynn N. Hughes

Lynn N. Hughes

United States District Judge

APPENDIX D

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS**

Civil Action H-17-3739

[Filed May 18, 2021]

Carlo Giuseppe Civelli, <i>et al.</i> ,)
)
Plaintiffs,)
)
<i>versus</i>)
)
J.P. Morgan Chase Securities, LLC, <i>et al.</i> ,)
)
Defendants.)
)

Partial Final Judgment

As there is no just reason for delay and pursuant to federal rule 54(b), Carlo Civelli and Aster Capital, S.A. (Panama) take nothing from J.P. Morgan Chase Bank, N.A., and J.P. Morgan Chase Securities, LLC. (504)

Signed on May 18, 2021, at Houston, Texas.

/s/ Lynn N. Hughes
Lynn N. Hughes
United States District Judge

APPENDIX E

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS

Civil Action H-17-3739

[Filed June 15, 2021]
[Entered June 16, 2021]

Carlo Giuseppe Civelli, <i>et al.</i> ,)
)
Plaintiffs,)
)
<i>versus</i>)
)
J.P. Morgan Chase Securities, LLC, <i>et al.</i> ,)
)
Defendants.)
)

Order on Deadline

1. The deadline to appeal the opinion and partial final judgment (490, 491, 506) in favor of the J.P. Morgan Chase defendants is stayed until after the court rules on their motion for attorney's fees.
2. After the ruling on fees is made, the court will order a definite date for the appeal deadline to avoid confusion.

Signed on June 15, 2021, at Houston, Texas.

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/s/ Lynn N. Hughes

Lynn N. Hughes

United States District Judge

APPENDIX F

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS**

Civil Action H-17-3739

[Filed October 20, 2021]

Carlo Giuseppe Civelli, <i>et al.</i> ,)
)
Plaintiffs,)
)
<i>versus</i>)
)
J.P. Morgan Chase Securities, LLC, <i>et al.</i> ,)
)
Defendants.)
)

Order Lifting Stay on Appeal Deadline

1. The stay on the appeal deadline of Carlo Civelli and Astar Capital (Panama), S.A., is lifted.
2. By November 19, 2021, Civelli and Astar (Panama) may appeal the court's April 29, 2021, opinion on summary judgment, May 18, 2021, partial final judgment, and their progeny.

Signed on October 20, 2021, at Houston, Texas.

/s/ Lynn N. Hughes
Lynn N. Hughes
United States District Judge

APPENDIX G

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 21-20618

[Filed February 7, 2023]

CARLO GIUSEPPE CIVELLI;)
ASTER CAPITAL S.A. (LTD) PANAMA,)
)
<i>Plaintiffs—Appellants,</i>)
)
<i>versus</i>)
)
J.P. MORGAN CHASE SECURITIES, L.L.C.;)
JP MORGAN CHASE BANK, N.A.,)
)
<i>Defendants—Appellees.</i>)
)

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 4:17-CV-3739

ON PETITION FOR REHEARING EN BANC

Before SMITH and HAYNES, *Circuit Judges.*

PER CURIAM:

Treating the petition for rehearing en banc as a petition for panel rehearing (5TH CIR. R. 35 I.O.P.), the

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petition for panel rehearing is DENIED. Because no member of the panel or judge in regular active service requested that the court be polled on rehearing en banc (FED. R. APP. P. 35 and 5TH CIR. R. 35), the petition for rehearing en banc is DENIED.

Judge Jones is recused and did not participate in the consideration of rehearing.