**Opinion issued July 14, 2020**

**In The**

# Court of Appeals

**For The**

# First District of Texas

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**NO. 01-20-00165-CV**

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**QUENTIN FARRIS AND JAVIS MONROE, Appellants**

**V.**

**THOMAS EVANS, Appellee**

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**On Appeal from the 239th District Court**
**Brazoria County, Texas**
**Trial Court Case No. 93950-CV**

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## MEMORANDUM OPINION

Appellants, Quentin Farris and Javis Monroe, challenge the trial court's rendition of summary judgment in favor of appellee, Thomas Evans, in appellants' suit against appellee for personal injuries arising from an auto collision. In their sole

issue, appellants contend that the trial court erred in granting appellee summary judgment on limitations grounds.

We affirm.

## Background

In their petition, appellants alleged that, on June 3, 2016, they were riding as passengers in a car operated by Albert Allen.[1] Allen was traveling east on Kiber Street in Brazoria County, and appellee was driving his truck north on Anderson Street. Appellants alleged that, at the intersection of Kiber and Anderson, appellee failed to yield the right of way and collided with Allen's car. The impact of the collision caused appellants to be "thrown about" inside the car and injured. Appellants alleged that appellee was negligent in operating his truck at an unreasonable speed and in failing to keep a lookout, to apply his brakes, and to avoid the collision. Appellants sought damages for medical expenses, mental anguish, and physical pain and impairment.

In his answer, appellee generally denied the allegations and asserted an affirmative defense of limitations. He subsequently moved for summary judgment, asserting that, although appellants had timely filed their petition within the two-year statute of limitations governing personal-injury lawsuits,[2] they did not actually serve

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1 Allen is not a party to this appeal.

2 *See* TEX. CIV. PRAC. & REM. CODE § 16.003.

him with the suit until after the limitations period had expired. Specifically, because the collision occurred on June 3, 2016, the limitations period expired on June 3, 2018.[3] Although appellants timely filed their lawsuit on October 26, 2017, they did not request service of citation until April 2, 2019, and service was not effectuated on appellee until April 25, 2019—some 17 months after the suit was filed and 10 months after the limitations period expired. Thus, appellee asserted, appellants' claim was barred as a matter of law by limitations. Appellee asked the trial court to take judicial notice of certain items in its file. The trial court's record showed that appellants filed their petition on October 26, 2017; they requested service of citation on April 2, 2019, and citation issued that day; and the return is dated April 25, 2019.

In their response, appellants conceded that, although they filed their petition on October 26, 2017, "Evans was not served with citation until April 8 [sic], 2019." They asserted that the delays were explained by their counsel's health issues, as demonstrated in his attached affidavit. In his attached affidavit, appellants' counsel, Harry C. Arthur, testified that he filed the original petition October 26, 2017. He began having health problems in June and July 2018, had surgery on August 22, 2018, and was hospitalized on September 8, 2018 and during January 11–14, 2019. On February 1, 2019, another attorney, to whom he had referred the case, picked up

[3] We note that June 3, 2018 fell on a Sunday. However, it has no bearing on the outcome.

appellants' case file and said that he would handle the case. On March 15, 2019, the attorney returned the file to Arthur and declined to handle the case. On April 2, 2019, Arthur requested service of process on appellee, and appellee was served.

In his reply to appellants' response, appellee argued that appellants' explanation for the delay in service was insufficient because there were unexplained gaps in time during which service of process was not effectuated. Namely, appellants' failed to explain the 8-month gap between the filing of the petition in October 26, 2017 and the expiration of the statute of limitations, on June 3, 2018. Appellee noted that, according to appellants' explanation, their counsel's health problems did not begin until June 2018, the same month that limitations expired.

The trial court granted summary judgment in favor of appellee, ordering that appellants take nothing on their claims.

## Summary Judgment

In their sole issue, appellants argue that the trial court erred in granting appellee summary judgment on limitations grounds because appellee did not conclusively establish appellants' lack of diligence in effectuating service of process.

### A. *Standard of Review*

We review the trial court's summary judgment de novo. *Valence Operating Co. v. Dorsett*, 164 S.W.3d 656, 661 (Tex. 2005). To prevail on a summary-

judgment motion, a movant has the burden of proving that he is entitled to judgment as a matter of law and that there is no genuine issue of material fact. TEX. R. CIV. P. 166a(c); *Cathey v. Booth*, 900 S.W.2d 339, 341 (Tex. 1995). When, as here, a defendant moves for summary judgment on an affirmative defense, he must plead and conclusively establish each essential element of his defense, thereby defeating the plaintiffs' cause of action. *Cathey*, 900 S.W.2d at 341; *Yazdchi v. Bank One, Tex., N.A.*, 177 S.W.3d 399, 404 (Tex. App.—Houston [1st Dist.] 2005, pet. denied). Once the movant meets his burden, the burden shifts to the non-movant to raise a genuine issue of material fact precluding summary judgment. *Centeq Realty, Inc. v. Siegler*, 899 S.W.2d 195, 197 (Tex. 1995). The evidence raises a genuine issue of fact if reasonable and fair-minded jurors could differ in their conclusions in light of all of the summary-judgment evidence. *Goodyear Tire & Rubber Co. v. Mayes*, 236 S.W.3d 754, 755 (Tex. 2007). When deciding whether there is a disputed, material fact issue precluding summary judgment, evidence favorable to the non-movants will be taken as true. *Nixon v. Mr. Prop. Mgmt. Co*., 690 S.W.2d 546, 548–49 (Tex. 1985). Every reasonable inference must be indulged in favor of the non-movants and any doubts must be resolved in their favor. *Id*. at 549.

**B. *Diligence in Service***

If a plaintiff files his petition within the limitations period, but obtains service on the defendant outside of the limitations period, such service is valid only if the

plaintiff exercised "diligence" in procuring service. *Ashley v. Hawkins*, 293 S.W.3d 175, 179 (Tex. 2009); *see also Proulx v. Wells*, 235 S.W.3d 213, 215 (Tex. 2007) (holding that "a timely filed suit will not interrupt the running of limitations unless the plaintiff exercises due diligence in the issuance and service of citation"). If a plaintiff diligently effects service after the expiration of the limitations period, the date of service relates back to the date of filing. *Proulx*, 235 S.W.3d at 215. If a defendant affirmatively pleads the defense of limitations and shows that service occurred after the limitations deadline, the burden shifts to the plaintiff to prove diligence. *Ashley*, 293 S.W.3d at 179; *Proulx*, 235 S.W.3d at 216. The plaintiff then must present evidence regarding the efforts made to serve the defendant and "explain every lapse in effort or period of delay." *Proulx*, 235 S.W.3d at 216. "[T]he relevant inquiry is whether the plaintiff acted as an ordinarily prudent person would have acted under the same or similar circumstances and was diligent up until the time the defendant was served." *Id.*

The question of the plaintiff's diligence in obtaining service is generally one of fact to be determined by examining the time it took to secure citation, service, or both, and the type of effort or lack of effort the plaintiff expended in procuring service. *Id*. However, a plaintiff's explanation of his efforts to obtain service may demonstrate a lack of diligence as a matter of law when one or more lapses between service efforts are unexplained or patently unreasonable. *Id*. If the plaintiff's

explanation for the delay raises a material fact issue concerning the his diligence of service efforts, the burden shifts back to the defendant to conclusively show why, as a matter of law, the plaintiff provided an insufficient explanation. *Id*.

Here, appellee affirmatively plead the defense of limitations and a lack of diligence in service of process. *See Ashley*, 293 S.W.3d at 179; *Proulx*, 235 S.W.3d at 216. A plaintiff must bring a suit for personal injuries within two years from the time the cause of action accrued. *See* TEX. CIV. PRAC. & REM. CODE § 16.003. Although appellee did not attach evidence to his summary-judgment motion, he asked the trial court to take judicial notice of its own file and relied on the trial court's record in his motion.[4] It is undisputed that appellants' cause of action accrued on April 3, 2016, the date of the collision, and that the limitations period expired on June 3, 2018. *See id*. Appellants timely filed their petition on October 26, 2017. However, appellee established, and it is undisputed, that appellants did not request

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[4] *See* TEX. R. CIV. P. 166a(c) (stating that summary-judgment proof need only be "on file at the time of the hearing, or filed thereafter and before judgment with permission of the court"); *Lance v. Robinson*, 543 S.W.3d 723, 732 (Tex. 2018) ("Our rules require a trial court to grant a summary-judgment motion if the evidence '*on file at the time of the hearing*, or filed thereafter and before judgment with permission of the court,' establishes that the movant is 'entitled to judgment as a matter of law.'") (quoting TEX. R. CIV. P. 166a(c))); *Perez v. Thomas*, No. 02-18-00253-CV, 2019 WL 2432155, at *2 (Tex. App.—Fort Worth June 6, 2019, no pet.) (mem. op.) ("Although Thomas did not attach evidence to her motion, she asked the trial court to take judicial notice of its own record and relied on the trial court's record in her motion."); *Jones v. Jones*, 888 S.W.2d 849, 852–53 (Tex. App.—Houston [1st Dist.] 1994, no writ) (stating that trial court may judicially notice documents that are part of its own record, and thus movant was not required to attach copies of such documents and orders to summary-judgment motion).

service of process until April 2, 2019, which was 17 months after the petition was filed and 10 months after the limitations period expired. Thus, the burden shifted to appellants to demonstrate their diligence in effectuating service on appellee. *See Ashley*, 293 S.W.3d at 179; *Proulx*, 235 S.W.3d at 216.

Appellants point to their summary-judgment evidence showing that their counsel began having health problems in June 2018. Appellants' counsel, in his affidavit, stated that he began having health problems in June 2018, had surgery on August 22, 2018, and was hospitalized on September 8, 2018 and during January 11–14, 2019. On February 1, 2019, another attorney, to whom he had referred the case, picked up appellants' case file, but later returned it.

Appellants' evidence does not address the 8-month gap between October 26, 2017, the date they filed their petition, and June 3, 2018, that date that the limitations period expired. Further, appellants' evidence addresses only 2 specific dates in August and September 2018, and does not address the additional 4-month gap between September 8, 2018 and January 11, 2019. Thus, appellants' evidence does not "explain every lapse in effort or period of delay." *See Proulx*, 235 S.W.3d at 216; *see also Slagle v. Prickett*, 345 S.W.3d 693, 698 (Tex. App.—El Paso 2011, no pet.) ("[W]hen a defendant complains of lack of due diligence in service of process, the plaintiff must explain what steps he took to obtain service, not explain why he did nothing.").

The unexplained gaps presented in this case are similar to, or exceed, those in other cases in which courts have found a lack of diligence as a matter of law. *See Ashley*, 293 S.W.3d at 180–81 (holding that plaintiff's unexplained eight-month gap in service efforts demonstrated lack of diligence as matter of law); *Slagle*, 345 S.W.3d at 698–99 (holding plaintiff failed to exercise due diligence when he took no action for three months after he filed his original petition); *Carter v. MacFadyen*, 93 S.W.3d 307, 314 (Tex. App.—Houston [14th Dist.] 2002, pet. denied) (holding that unexplained two- and three-month gaps between timely filing of petition and first service attempts after limitations expired constituted lack of diligence); *Boyattia v. Hinojosa*, 18 S.W.3d 729, 734 (Tex. App.—Dallas 2000, pet. denied) (holding plaintiff's failure to take any action during three-month delay in delivering citation constituted lack of diligence as matter of law); *Taylor v. Thompson*, 4 S.W.3d 63, 65–66 (Tex. App.—Houston [1st Dist.] 1999, pet. denied) (holding plaintiff, who failed to explain four-month delay between filing suit and expiration of limitations, did not demonstrate due diligence).

Having taken all evidence favorable to appellants as true, and resolving any doubts in their favor, we conclude that appellee has conclusively established that appellants failed to exercise due diligence in effectuating service of process. *See Ashley*, 293 S.W.3d at 180–81; *see also Nixon*, 690 S.W.2d at 549. Thus, appellants' service on appellee after the expiration of the limitations period will not relate back

to the date of the filing of their petition. *See Proulx*, 235 S.W.3d at 215. We hold that the trial court did not err in granting appellee summary judgment on his limitations defense.

We overrule appellants' sole issue.

## Conclusion

We affirm the trial court's judgment.

Sherry Radack
Chief Justice

Panel consists of Chief Justice Radack and Justices Lloyd and Countiss.