

**Affirmed and Majority and Concurring Opinions filed July 21, 2016.**



**In The**

**Fourteenth Court of Appeals**

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**NO. 14-15-00784-CV**

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**DELORES SHARP, Appellant**

**V.**

**KROGER TEXAS L.P., Appellee**

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**On Appeal from the 270th District Court  
Harris County, Texas  
Trial Court Cause No. 2014-67598**

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**C O N C U R R I N G   O P I N I O N**

I write separately to address the issue of due diligence before the statute of limitations has run. Most of our precedent involving due diligence are cases where a plaintiff files suit shortly before the expiration of limitations. Because the plaintiff must also serve the lawsuit before limitations has run, our court and many other courts conclude that the plaintiff must show due diligence from the time of filing of the lawsuit until service is accomplished.

Using that precedent the majority faults Sharp for her unexplained five month delay between the filing of the lawsuit and the running of limitations. While I agree that Sharp failed to exercise due diligence in serving her lawsuit, I write separately to urge that delay that occurs before the running of limitations should be examined differently from delay that occurs after the running of limitations. In my opinion, it was reasonable for Sharp to delay serving her lawsuit while attempting to settle the case. We should not discourage attempts to settle cases at a lower cost. However, that excuse cannot cover all five months, absent an enforceable agreement to delay service.

Because we have never held that a plaintiff has a duty to file a suit as soon as possible, plaintiffs can and do wait until the last minute to file. It seems incongruous to fault a plaintiff with five months of delay in attempting service when that same plaintiff could have waited those same five months without filing at all, filed three days before the expiration of limitations, and served a defendant after limitations had run. Assuming that the plaintiff exercised diligence, we would hold that service was timely and related back, even if service was not accomplished for more than a year. *See, e.g., Auten v. DJ Clark, Inc.*, 209 S.W.3d 695 (Tex. App.—Houston [14th Dist.] 2006, no pet.). In examining due diligence we never require a plaintiff to state why he or she waited until the last minute to file the lawsuit.

However, Sharp did file suit five months early and did have time to accomplish service. A prudent plaintiff must serve the defendant and, in this case, I would fault Sharp for not attempting service a month before the statute of limitations would expire. Sharp explained that it took her 27 days to prepare citation and serve Kroger. A person exercising due diligence would know that service steps need to start a month before the statute of limitations expired.

Sharp offered no reasonable excuse for her complete failure to even attempt service before limitations ran. Her belated service after limitations had run did not show due diligence. I agree that the summary judgment was correct, and I respectfully concur with this court's judgment.

/s/ Tracy Christopher  
Justice

Panel consists of Justices Boyce, Christopher, and Jamison. (Jamison, J., majority).