

**Affirmed and Memorandum Opinion filed December 29, 2016.**



**In The**

**Fourteenth Court of Appeals**

---

**NO. 14-16-00554-CV**

---

**LADALLE CALLAWAY AND DEMETRIUS CLEAVER, Appellants**

**V.**

**BRENDA BEUHLER AND HUGO RAMIREZ, Appellees**

---

**On Appeal from the Harris County Court at Law No. 4  
Harris County, Texas  
Trial Court Cause No. 1040590**

---

**M E M O R A N D U M   O P I N I O N**

In this action arising from an automobile collision, LaDalle Callaway and Demetrius Cleaver appeal the trial court's order granting the traditional motion for summary judgment on statute of limitations filed by Brenda Beuhler<sup>1</sup> and Hugo Ramirez. We affirm.

---

<sup>1</sup>Callaway's original pleadings named Brenda Beuhler incorrectly as Breanda Beuhler. We use the correct name in this opinion for consistency.

## I. Background

On November 21, 2013, Callaway filed a negligence suit against Buehler and Ramirez resulting from an automobile accident that occurred on August 16, 2012. Cleaver joined the suit as a plaintiff by amended petition on April 18, 2014. It is undisputed that these filings occurred prior to the expiration of the applicable statute of limitations.<sup>2</sup> Callaway requested service of her original petition on both Buehler and Ramirez on December 5, 2013; citation was issued on December 9. However, citation of Callaway's original petition on Buehler and Ramirez was not served until November 8, 2014. Buehler and Ramirez answered Callaway's original petition on December 5, 2014. Despite never having received the amended petition, Buehler and Ramirez answered the amended petition on December 22, 2015. In January 2016, Buehler and Ramirez filed their traditional motion for summary judgment on limitations grounds. In their motion Buehler and Ramirez contend this suit is time-barred because Calloway and Cleaver failed, as a matter of law, to use diligence in achieving service. As summary judgment evidence, Buehler and Ramirez relied upon the executed citation of service on Beuhler and their own affidavits.

Callaway and Cleaver responded to the motion, arguing that (a) they requested citation of their first amended petition on June 4, 2014; (b) their amended petition was served on Buehler on November 8, 2014; (c) Buehler and Ramirez admitted in their summary judgment motion that they were served with Callaway's original petition on November 4, 2014; and (d) Callaway and Cleaver timely filed their suit against Buehler and Ramirez within the applicable two-year statute of limitations. As to the question of diligence, Callaway and Cleaver

---

<sup>2</sup> See Tex. Civ. Prac. & Rem. Code § 16.003 (“[A] person must bring suit for . . . personal injury . . . not later than two years after the day the cause of action accrues.”).

explained that they encountered difficulty serving Buehler and Ramirez “despite their due diligence” and that the trial court’s orders granting their request for substituted service and a trial continuance “shows that the Court believed that Plaintiffs were showing due diligence in attempting to serve Defendants.” Callaway and Cleaver attached their own affidavits in which they averred to the circumstances of the automobile collision. The affidavits contained no information pertaining to citation or service. Callaway and Cleaver attached no other summary judgment evidence to their response.

The trial court granted the summary judgment. Callaway and Cleaver timely appealed.<sup>3</sup>

## II. Analysis

In a single issue, Callaway and Cleaver assert that the trial court improperly granted summary judgment against them because they filed suit before the expiration of the statute of limitations and Buehler and Ramirez were timely served. We review the trial court’s summary judgment *de novo*. *Cantey Hanger, LLP v. Byrd*, 467 S.W.3d 477, 481 (Tex. 2015). When a defendant moves for summary judgment on an affirmative defense, such as limitations, the defendant must conclusively prove all the essential elements of the defense as a matter of law. *Belleza-Gonzalez v. Villa*, 57 S.W.3d 8, 11 (Tex. App.—Houston [14th Dist.] 2001, no pet.); *Frost Nat’l Bank v. Burge*, 29 S.W.3d 580, 587 (Tex. App.—Houston [14th Dist.] 2000, no pet.). We review the evidence in the light most favorable to the nonmovant. *See Mann Frankfort Stein & Lipp Advisors, Inc. v. Fielding*, 289 S.W.3d 844, 848 (Tex. 2009).

---

<sup>3</sup> Buehler and Ramirez also filed a no-evidence motion for summary judgment on negligent entrustment, which the trial court granted. Callaway and Cleaver do not challenge that ruling.

The trial court granted Buehler and Ramirez’s motion for summary judgment on their affirmative defense of limitations. Here, it is undisputed that Callaway and Cleaver timely filed their petition against Buehler and Ramirez within the two-year limitations period for personal injury actions. *See* Tex. Civ. Prac. & Rem. Code § 16.003(a). However, timely filing of a lawsuit will not interrupt the running of the statute of limitations unless the plaintiff exercises diligence to effectuate service of citation. *See Proulx v. Wells*, 235 S.W.3d 213, 215 (Tex. 2007) (per curiam). Where a defendant pleads the defense of limitations and shows that service was not timely, the burden shifts to the plaintiff to prove diligence. *See Ashley v. Hawkins*, 293 S.W.3d 175, 179–80 (Tex. 2009).

Buehler and Ramirez met their initial burden on their limitations defense by establishing that service was not timely. *See id.* Both the executed citation of service on Beuhler and Buehler’s affidavit establish that service on Buehler was not achieved until November 8, 2014, which was several months beyond the two-year statute of limitations for the August 2012 automobile collision. *See* Tex. Civ. Prac. & Rem. Code 16.003(a) (setting a two-year limitations period for personal injury actions). Specifically, Beuhler stated that her daughter Katie Ramirez executed a certified mail “green card” that was sent to Buehler’s home address with Callaway’s original petition and that Buehler never received any service of an amended lawsuit. In his affidavit, Ramirez stated that (a) his wife, Katie Ramirez, executed a certified mail “green card” that was sent to his home address on November 8, 2014; (b) the certified mailing contained Callaway’s original petition; (c) “the only plaintiff that is listed in the Plaintiff’s Original Petition is Ladalle Callaway”; and (d) Ramirez was never served in any fashion with a petition that included Cleaver as a plaintiff. The November 8, 2014 service on Ramirez is thus likewise beyond the applicable statute of limitations. *See id.* Therefore, the

burden shifted to Callaway and Cleaver to establish diligence. *See Ashley*, 293 S.W.3d at 179.

A question of diligence in serving beyond the statute of limitations is generally one of fact. *See Belleza-Gonzalez*, 57 S.W.3d at 12. However, a lack of diligence is established as a matter of law where there are unexplained lapses of time between filing suit, issuance of citation, and service. *See Li v. Univ. of Tex. Health Sci. Ctr. at Houston*, 984 S.W.2d 647, 652 (Tex. App.—Houston [14th Dist.] 1998, pet. denied).

In this case, the timeline established by the summary judgment evidence contains unexplained lapses. *See id.* We note, first, that Callaway and Cleaver argue without a single citation to any record evidence that they “repeatedly made efforts in attempt to locate the Appellees so that service could be effectuated”; such efforts are argued, again without citation to any summary judgment evidence, to have occurred on “at least on a monthly basis.” We have reviewed the summary judgment record and do not find any evidence to support the efforts alleged in Callaway and Cleaver’s appellate brief.<sup>4</sup>

Instead, viewing all of the summary judgment evidence in the light most favorable to Callaway and Cleaver, the record reveals the following timeline:

- August 16, 2012: The car accident occurs; after the accident, Buehler and Ramirez provide their Katy, Texas address to police officers.

---

<sup>4</sup> Within the body of their response to the motion for summary judgment, Callaway and Cleaver refer to various pleadings such as a motion for continuance and a request for substituted service as evidence of their efforts to locate Buehler and Ramirez. Neither a motion for continuance nor a request for substituted service appear in our record. Yet, even if they were a part of our record, we would not consider them; pleadings are not summary judgment evidence and cannot be considered in determining whether fact issues are presented. *See LaGoye v. Victoria Wood Condo. Ass’n*, 112 S.W.3d 777, 787 (Tex. App.—Houston [14th Dist.] 2003, no pet.) (citing *City of Houston v. Clear Creek Basin Auth.*, 589 S.W.2d 671, 678 (Tex. 1979)).

- July 2013: Buehler and Ramirez move to an address in Hempstead, Texas, and both update their drivers' license addresses.
- November 21, 2013: Callaway files her original petition.<sup>5</sup>
- April 18, 2014: Callaway and Cleaver file a first amended petition, adding Demetrius Cleaver as a plaintiff and stating:
  - “Upon information and belief, Defendant, Brenda Beuhler . . . is an individual residing at 26243 Karen Road, Katy, Texas 77494.”
  - “Upon information and belief, Defendant, Hugo Ramirez . . . is an individual residing at 26243 Karen Road, Katy, Texas 77494.”
- May 20, 2014: J. Williams receives “ORIGINAL-ADMIS.DISC. INTERROG.RODUCTION CITATION” for service in the cause “*Ladalle Callaway v. Breanda Beuhler & Hugo Ramirez.*”
- November 8, 2014: J. Williams executes service on Buehler at Buehler's Hempstead, Texas address via regular and certified mail. The signed certified mail “green card” was returned to Williams on November 10, 2014.
- November 8, 2014: Katie Ramirez executes two certified mail “green cards” (one for mail addressed to Beuhler and the other for mail addressed to Ramirez) for envelopes containing Callaway's original petition.
- December 5, 2014: Buehler and Ramirez file their original answer to Calloway's original petition.
- December 22, 2015: Buehler and Ramirez file their second amended answer in response to Calloway and Cleaver's first amended petition.

“[T]he measure of diligence begins from the time the suit is filed and an explanation is needed for every period of delay.” *Sharp v. Kroger Tex. L.P.*, 500

---

<sup>5</sup> We note that the original petition in this case is not included in our record. However, the parties do not dispute that it was filed on November 21, 2013.

S.W.3d 117, 120 (Tex. App.—Houston [14th Dist.] 2016, no pet.). There was a six-month delay between Callaway’s filing of her original petition and requesting citation and a nearly twelve-month gap between filing and service of the petition. And, as to Cleaver, it was the first amended petition filed April 18, 2014, by which he was added as a plaintiff. Both Buehler and Ramirez filed uncontroverted affidavits in which they stated that they were never served with the amended petition. There is no evidence that Callaway and Cleaver ever requested citation for service of the amended petition. And, because Buehler and Ramirez had neither been served nor appeared at the time the first amended petition was filed, Callaway and Cleaver did not purport to serve them through Texas Rule of Civil Procedure 21a. But, Buehler and Ramirez elected to respond to this amended petition on December 22, 2015. Therefore, for purposes of analyzing the delay in service, the gap for which Cleaver must account is the twenty-month lapse between the filing of the first amended petition in April 2014 and Buehler and Ramirez’s answer filed in December 2015, which obviated any further need for citation or service. *See* Tex. R. Civ. P. 121 (stating that “[a]n answer shall constitute an appearance of the defendant so as to dispense with the necessity for the issuance or service of citation upon him”).

Callaway and Cleaver supplied no evidence to explain the gaps outlined above. More particularly, neither they nor their counsel provided affidavit testimony or other summary judgment evidence to show any obstacles to serving Buehler and Ramirez, any efforts undertaken to find the proper addresses for service of process, any attempts to follow up with a process server, or any effort to obtain substituted service under the Texas Rules of Civil Procedure if prudent efforts had not procured service within a reasonable period of time. *See, e.g., Auten v. DJ Clark, Inc.*, 209 S.W.3d 695, 700 (Tex. App.—Houston [14th Dist.]

2006, no pet.) (citing *Gonzalez v. Phoenix Frozen Foods, Inc.*, 884 S.W.2d 587, 589–90 (Tex. App.—Corpus Christi 1994, no writ), for the proposition that that “mere reliance” or “misplaced reliance” upon a process server does not constitute due diligence); *see also Carter v. MacFadyen*, 93 S.W.3d 307, 314 (Tex. App.—Houston [14th Dist.] 2002, pet. denied) (affirming a summary judgment where, among other unexplained gaps in service, the plaintiff provided no explanation for why he “kept trying to serve [the defendant] personally for four months, when it was clear the [defendant] could not or would not cooperate with these efforts”). And Texas courts consistently hold that “due diligence was lacking as a matter of law based on unexplained lapses of shorter duration” than the durations between filing and service in this case. *E.g.*, *Gant v. DeLeon*, 786 S.W.2d 259, 260 (Tex. 1990) (per curiam) (collecting cases holding a lack of due diligence as a matter of law on lapses of 10 months, 7 2/3 months, and 3 3/4 months).

In the absence of any evidence of due diligence to seek citation and serve the petitions for a period of nearly twelve months for Callaway and over twenty months for Cleaver, we conclude the trial court properly granted Bueler and Ramirez’s motion for summary judgment.

We overrule Callaway and Cleaver’s sole appellate issue and affirm the trial court’s judgment.

/s/ Sharon McCally  
Justice

Panel consists of Chief Justice Frost and Justices McCally and Brown.