



MICHAEL A. YANOF
214.954.2216
MYANOF@STRLAW.NET

April 27, 2010

Via Federal Express
Tracking # 8721 1111 8326

Supreme Court of Texas
Supreme Court Building
201 W. 14th Street, Room 104
Austin, TX 78701

Re: Case No. 09-0446
Debbie Stockton, as Parent and Next Friend of William Stockton, a Minor,
Petitioner, v. Howard A. Offenbach, M.D., Respondent
Fifth Court of Appeals, Dallas; No. 05-08-01185-CV
Trial Court, 298th District Court, Dallas; Civil Case No. 07-05653-M

To the Honorable Justices of the Supreme Court of Texas:

During oral argument conducted on March 25, 2010, the Honorable Chief Justice suggested post-submission letter briefing in follow-up to a question. This letter is in response to that request, as well as in response to Petitioner's post-submission brief. The specific question which prompted this request was to counsel for Petitioner from the Honorable Justice O'Neill, who inquired: is a due diligence standard as advocated by Petitioner would a factual matter to be decided by a jury?

Petitioner's post-submission brief fails to answer this question based on well established Texas case law on due diligence. Instead, Petitioner asks this Court to judicially create an extension in a statute which intends a hard and fast deadline. See *Mokkala v. Mead*, 178 S.W.3d 66, 74 (Tex. App. ó Houston [14th Dist.] 2005, pet. denied); see also Tex. Civ. Prac. & Rem. Code § 74.351 (a) (a claimant shall ö serve a report within 120 days of filing suit); Tex. Civ. Prac. & Rem. Code § 74.002 (a) (Notwithstanding any other law). Further, the standard advocated by Petitioner for a due diligence extension requires that the Court change well established law for the due diligence standard from a factual determination to a purely legal determination.

In this regard, Texas case law clearly establishes that the general answer to Justice O'Neill's question noted above is yes. The due diligence inquiry advocated by Petitioner is utilized when a plaintiff files suit on the eve of limitations yet does not serve the

lawsuit until after limitations has run. In such situations, Texas common law recognizes that a plaintiff who exercises due diligence in serving the lawsuit is deemed to have filed suit within limitations. *See Proulx v. Wells*, 235 S.W.3d 213, 215 (Tex. 2007). The analysis of whether a plaintiff has exercised due diligence asks whether (1) the plaintiff acted as an ordinary and prudent person under the same or similar circumstances, and (2) the plaintiff acted diligently up until the time the defendant was actually served. *See Lawrence v. Geico Gen. Ins. Co.*, 2009 Tex. App. LEXIS 5082, * 1-2 (Tex. App. ó Houston [1st Dist.], no pet.); *Eichel v. Ullah*, 831 S.W.2d 42, 44 (Tex. App. ó El Paso 1992, no writ).

Whether a plaintiff satisfies this standard of due diligence generally is a fact question for the jury. *See Lawrence*, 2009 Tex. App. LEXIS 5082, * 8; *Eichel*, 831 S.W.2d at 43-44. More specifically, the due diligence standard can only be decided as a matter of law if the plaintiff offers no explanation for delays in service. *Id.* In the *Lawrence* case, the court was reviewing the jury's findings related to due diligence. *Id.*; compare *Ray v. O'Neal*, 922 S.W.2d 314, 317-18 (Tex. App. ó Fort Worth 1996, writ denied) (reversing the trial court's order granting summary judgment due to a fact issue of whether the plaintiff exercised due diligence in serving the defendant); *Hodge v. Smith*, 856 S.W.2d 212, 217 (Tex. App. ó Houston [1st Dist.] 1993, writ denied) (reversing the trial court's order granting summary judgment because "the record does not establish as a matter of law that [the plaintiff] failed to use diligence to effectuate service"; "it is possible a jury could reasonably conclude that" due diligence was exercised); *Valdez v. Charles Orsinger Buick Co.*, 715 S.W.2d 126, 128 (Tex. App. ó Texarkana 1986, no writ) (reversing the trial court's order granting summary judgment and remanding for a trial in order that a jury may determine whether due diligence was exercised).

Thus, the only exception to the general rule that due diligence is a fact question for the jury occurs when the plaintiff offers no explanation for delays in service, thereby negating due diligence as a matter of law. *See Lawrence*, 2009 Tex. App. LEXIS 5082, * 8; *Boyattia v. Hinojosa*, 18 S.W.3d 729, 733-34 (Tex. App. ó Dallas 2000, pet. denied); *Eichel*, 831 S.W.2d at 44. Respondent submits that even under such a standard, Petitioner's due diligence argument fails as a matter of law. It was Petitioner's burden to ensure that the clerk carried out service. *See Ramirez v. Consolidated HGM Corp.*, 124 S.W.3d 914, 921 (Tex. App. ó Amarillo 2004, no pet.) ("that counsel for the [plaintiffs] or someone acting for him may have phoned the district clerk and heard from that official that service had been completed does not justify their failure to serve [the defendant]");

see also *Reynolds v. Alcorn*, 601 S.W.2d 785, 788 (Tex. App. ó Amarillo 1980, no writ) (noting that any deficiency in the clerk's performance in carrying out citation and service was imputed to the plaintiff).

It was also Petitioner's burden to explain every period of delay between filing, issuance of citation and service. See *Proulx*, 235 S.W.3d at 216; *Boyattia*, 28 S.W.3d at 734 (finding lack of diligence as a matter of law based on a plaintiff failing to explain a three month delay from issuance of citation to deliverance to the constable for service); *Li v. University of Texas Health Science Ctr. at Houston*, 984 S.W.2d 647, 652 (Tex. App. ó Houston [14th Dist.] 1998, pet. denied), cert. denied, 538 U.S. 913 (2003). There is no sufficient explanation for why there was no adequate motion for substituted service filed in the first 120 days after filing suit when the whereabouts the defendant were clearly unknown before suit was filed. It is also worth noting that the unsuccessful efforts of the process server to serve the lawsuit on Respondent once suit was filed were clearly known by Petitioner within two weeks of filing suit. Compare CR 7 ó Original Petition filed on June 13, 2007; CR 29 ó process server statement of June 26, 2007 that he attempted to serve Respondent but that Respondent had moved out, and current resident indicated Respondent had moved out three years ago; CR 29 ó affidavit of process server signed on July 16, 2007.

There is also no explanation for the approximately three month delay between the judge signing the order of substituted service and Petitioner requesting and obtaining issuance of citation. Compare CR 36 ó order of substitution signed on December 20, 2007; CR 37 ó citation by publication issued on March 13, 2008.

All told, there is approximately nine months between filing suit and service in a case in which limitations was not about to run. As the Houston (14th) Court of Appeals has noted, a "flurry of ineffective activity does not constitute due diligence if easily available and more effective alternatives are ignored." See *Carter v. MacFayden*, 93 S.W.3d 307, 314-15 (Tex. App. ó Houston [14th Dist.] 2002, pet. denied). Simply put, the record establishes lack of diligence as a matter of law.

Be that as it may, however, the due diligence standard advocated by Petitioner would place such issues in the hands of trial courts with discretion to determine whether lack of diligence was established as a matter of law. If the trial court determined a defendant did not establish lack of diligence as a matter of law based on a fact issue, the issue would remain for determination by the jury. See *Lawrence*, 2009 Tex. App. LEXIS

5082, * 8; *Ray*, 922 S.W.2d at 317-18; *Hodge*, 856 S.W.2d at 217; *Valdez*, 715 S.W.2d at 128. Under such scenario, which is certain to occur with a due diligence standard carved into Section 74.351 (a), the 120-day deadline to serve a report becomes no deadline at all, much less a hard and fast deadline as the Legislature intended. See *Mokkala v. Mead*, 178 S.W.3d 66, 74 (Tex. App. 6 Houston [14th Dist.] 2005, pet. denied). Petitioner says it well in her post-submission brief:

A jury trial on the procedural requirement of Chapter 74 would create needless litigation and additional expense. A challenge to service of the expert report would need to be filed very early in the litigation. It would be impossible to leave such a question until the trial on the merits since the Chapter 74 report requirement is a preliminary procedural hurdle.

See Petitioner's Post-Submission Brief at 2. The due diligence standard advocated by Petitioner would do just that.

Under the due diligence standard advocated by Petitioner, the purpose and intent of the statute is further frustrated by the mechanism the statute provides for disposal of cases. The mechanism for dismissal of a case under Section 74.351 is a motion to dismiss. See Tex. Civ. Prac. & Rem. Code § 74.351 (b). The statute contemplates that such motions to dismiss, in conjunction with the 21-day deadline to object to a deficient report, will occur early in the case. The statute provides for such early dismissals prior to the expense and delay due to discovery. See, e.g., Tex. Civ. Prac. & Rem. Code § 74.351 (s) (prohibiting all discovery except those specifically enumerated until a plaintiff has served a compliant report).

In contrast, lack of diligence, even if arguably established as a matter of law, is determined at the earliest in a case by motion for summary judgment. See *Gant v. DeLeon*, 786 S.W.2d 259, 260 (Tex. 1990); *Zale Corp. v. Rosenbaum*, 520 S.W.2d 889, 890 (Tex. 1975). The party filing a summary judgment has the burden to negate all fact issues; in this scenario, the defendant would bear the burden to disprove lack of diligence. *Id.*; see also *Proulx*, 235 S.W.3d at 215; *Ray*, 922 S.W.2d at 317; *Hodge*, 856 S.W.2d at 215. Such evidence used to negate all fact issues typically requires conducting discovery to disprove diligence. Under the due diligence standard advocated by Petitioner, requiring a defendant to conduct such discovery would delay the potential for dismissal.

Again, the “hard and fast deadline” the Legislature intended would be undercut if not eliminated. *See Morkala*, 178 S.W.3d at 74.

Finally, there is an additional practical concern if the Court writes a due diligence exception into Section 74.351 (a). This new basis for extending the 120-day deadline would encourage plaintiffs who are having trouble obtaining a report to intentionally delay serving the defendant with the lawsuit and seek to create a fact issue on due diligence to extend the 120-day deadline. This could buy plaintiffs time to find an expert under a statute which seeks a “hard and fast deadline”. *See Morkala*, 178 S.W.3d at 74.

The statute does not allow for a due diligence exception. *See* Tex. Civ. Prac. & Rem. Code § 74.351 (a) (“a claimant shall serve a report within 120 days of filing suit); Tex. Civ. Prac. & Rem. Code § 74.002 (a) (“Notwithstanding any other law”). This Court should not write such an exception into the statute.

Very truly yours,

Michael A. Yanof

cc: Robert J. Talaska, Tim Culberson ó Via Facsimile