

NO. 09-06-00359-CV

IN THE COURT OF APPEALS

NINTH DISTRICT

BEAUMONT, TEXAS

DORIS D. HAWKINS, Appellant

V.

GAIL ASHLEY, Appellee

**On Appeal from the County Court At Law No. 2,
Montgomery County, Texas**

Cause No. 05-04-02954-CV

BRIEF OF APPELLANT

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TO THE HONORABLE COURT OF APPEALS:

Appellant, Doris D. Hawkins, respectfully files her Brief.

**NAMES OF ALL PARTIES
TO THE TRIAL COURT'S ORDER**

I. APPELLANT

Party:	Doris D. Hawkins
Appellate/Trial Counsel:	James B. Manley James B. Manley, P.C. 200 William Barnett Cleveland, Texas 77327

II. APPELLEE

Party:	Gail Ashley
Appellee/Trial Counsel:	Jason Truitt Kimberly Spurlock 402 Staitti Street Humble, Texas 77339-4627

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STATEMENT OF THE CASE

This is a negligence action arising out of a vehicular mishap that occurred on May 31, 2003, in Montgomery County, Texas. Plaintiff's Original Petition was filed on April 1, 2005 [C.R.3-5]. The defendant was served with citation in California [C.R.40]. Defendant left the State of Texas in 2004. [C.R.146]. Plaintiff appeals the decision of the trial court on August 8, 2006, granting defendant's Motion For Final Summary Judgment Based on Statute Of Limitations Defense. [C.R.130]. The Court denied plaintiff's Motion To Vacate Summary Judgment and Motion For New Trial on August 30, 2006. [C.R. 173]. Plaintiff filed her notice of appeal. [C.R.167].

ISSUES PRESENTED

- _____ 1. Did the trial court err by failing to interpret and apply *C.P.R.C § 16.063*?
2. Did the trial court err by finding as a matter of law that there was no genuine issue of material fact on the issue of due diligence used by plaintiff in getting defendant served with process?

STATEMENT OF FACTS

Medical records and bills detailing Plaintiff's care and treatment were filed with the Court and can be found in the Clerk's Record. [C.R.43-116]. Plaintiff's Original Petition was filed on **April 1, 2005** [C.R.3-5]. The issuance of citation was immediately requested under *Rule 106(a)(2)*, and it was issued by the Clerk on April 25, 2006. [C.R.6]. The defendant was notified on three occasions to pick up and sign for the letter from the Clerk of the Court. [C.R.8]. The Clerk's letter with the citation and original petition was returned by the U. S. Postal Service unclaimed. [C.R.8]. Plaintiff's First Amended Petition was filed on May 27, 2005, seeking service on defendant under *Tex. R. Civ. P.166a(2)* at an out of state address. [C.R.10-12]. Alias citation was issued by the Clerk of the Court on June 7, 2005. [C.R.13-14]. The letter with the citation and amended petition was returned refused/unclaimed. [C.R.15]. A show cause order on court's motion to dismiss for want of prosecution was signed on August 12, 2005, setting a hearing on October 18, 2005. [C.R.17]. Plaintiff's verified motion to retain case on docket was filed on October 11, 2005. [C.R.20-24]. The Court's Motion to Dismiss was reset for hearing on January 17, 2006, at 9:00 a.m. [C.R.25]. Due to a calendaring mistake by plaintiff's counsel, this case was dismissed for want of prosecution on January 17, 2006. [C.R.26]. Plaintiff's verified Motion To Reinstate Dismissed Case was filed on January 31, 2006. [C.R.27-29]. This case was reinstated by the Court on February 14, 2006, as if no dismissal order had ever been signed. [C.R.30]. Alias citation was

requested and issued on March 17, 2006, with Plaintiff's First Amended Original Petition attached. [C.R.36]. The citation was mailed to the Sheriff of Rio Linda, California ,for service. The non-resident citation with First Amended Original Petition was served on the defendant on May 10, 2006, at 904 Oak Lane #23, Rio Linda, California. [C.R.40-41]. Defendant's Original Answer was filed on May 22, 2006, setting forth a limitations defense. [C.R.27-38]. A scheduling order was signed by Judge Winfree setting the case for jury trial on November 13, 2006. [C.R.42]. A demand for jury trial and a jury fee was paid in this case. Defendant's Motion For Final Summary Judgment Based on Statute Of Limitations Defense was filed on June 28, 2006. [C.R.117-128]. Plaintiff's Response To Defendant's Motion For Summary Judgment was filed on July 5, 2006 with Affidavit. [C.R.132-135]. Plaintiff's Second Amended Original Petition was filed on July 10, 2006. [C.R.137-139]. Defendant's First Amended Original Answer was filed on July 10, 2006. [C.R.140-142]. Plaintiff's Supplemental Response To Defendant's Motion For Summary Judgment was filed on July 14, 2006. [C.R.143-155]. Defendant's Motion For Summary Final Summary Judgment was granted by Hon. Judge Winfree on August 8, 2006. [C.R.130-131]. Plaintiff's Motion To Vacate Summary Judgment and Motion For New Trial was filed on August 23, 2006. [C.R.161-164]. Defendant's Response to Plaintiff's Motion To Vacate Summary Judgment and Motion For New Trial was filed on August 29, 2006. [C.R. 168-172]. The Court, after hearing, signed an order on August 30, 2006 denying Plaintiff's Motion To Vacate Summary

Judgment and Motion For New Trial. [C.R. 173]. Plaintiff filed her Amended Notice of Appeal of Final Judgment on August 25, 2006. [C.R.167].

SUMMARY OF THE ARGUMENT-ISSUE NO. 1

Plaintiff raised the tolling provision of *C.P.R.C. §16.063*, and limitations was tolled from the date defendant left Texas until the time she was served with process in California.

ARGUMENT

Plaintiff raised the tolling provisions of *C.P.R.C § 16.063* before the trial court [C.R.133] [R.R.20]. *C.P.R.C. § 16.063* suspends limitations due to a person's absence from the state for the entire period of the absence. When a defendant seeks summary judgment based on the expiration of limitations, the defendant must conclusively prove the bar of limitations. *Jennings v. Burgess*, 917 S.W.2d 790,793 (Tex. 1996); *Zale v. Rosenblum*, 520 S.W.2d 889,891 (Tex.1975). When the plaintiff asserts that the statute of limitations has been tolled, it becomes the defendant's burden to "conclusively negate the tolling provision's application" (emphasis added) under *Tex. C.P.R.C § 16.063*, before summary judgment may be granted by the trial court. *Guardia v. Kontos*, 961 S.W.2d 580 (Tex. App–San Antonio 1997, no writ). *See Jennings*, 917 S.W.2d at 793. *Also, see Allen v. Intercapital Lodge Ltd. P'ship*, 66 S.W.3d 351, 353 (Tex. App.–Houston [14th Dist.] 2001, pet. denied). Limitations was tolled from the date defendant left Texas in 2004, until she was served with citation on May 25, 2006, in California. Defendant never negated the statute's application. Although plaintiff could have relied on *C.P.R.C § 16.063* and waited until defendant returned to Texas to get her served with process. Plaintiff continued

her efforts to get the defendant personally served with citation in California.

Defendant's summary judgment focused on the gap between the date that appellant claims limitations ran and the date that defendant was served. No evidence was offered by the defendant showing that the defendant never left Texas following the *occurrence in question*. In fact, trial counsel for defendant admitted in open court during the summary judgment hearing that the defendant left Texas between the time the car wreck occurred and plaintiff's original petition was filed, and trial counsel for defendant admitted in open court that defendant did not leave a forwarding address when she absented herself from Texas. **[R.R.7 (Vol.1)]**.

The Honorable Judge Jerry Winfree of the County Court at Law No. 2 of Montgomery County, Texas, failed to interpret and apply the tolling provisions of *C.P.R.C § 16.063*, which resulted in summary judgment being granted in favor of the defendant on limitations.

Defendant was served within the limitations period as extended by the tolling provision in *C.P.R.C. § 16.063*.

SUMMARY OF THE ARGUMENT-ISSUE NO. 2

Plaintiff raised a genuine issue of fact regarding issue of due diligence used by the plaintiff in getting the defendant served with process.

ARGUMENT

Plaintiff filed her response on July 5, 2006, to Defendant's Motion For Final Summary Judgment based on Statute of Limitations Defense.[**C.R.132-136**]. Plaintiff attached the affidavit of James B. Manley to her response.[**C.R.135**]. There was no objection to the affidavit in the record before the Court. Appellant filed her supplemental response to defendant's motion on July 14, 2006 [**C.R.143-157**].

Plaintiffs are not required to employ the highest diligence in procuring service of process in order to toll limitations. Plaintiffs need only to show the diligence in procuring service of process that an ordinarily prudent person would have used in the same or similar circumstances. *Beavers v. Darling*, 491 S.W.2d 711 (Tex. App.–Waco 1973, no writ). See *Meyer v. Pecos Merchantile Co.* (Tex. App.–El Paso 1932). Also, see *McDonald v. Evans*, 217 S.W.2d 870,872 (Tex. App– Amarillo 1949). Plaintiff contended before the trial court and contends now that she used the diligence that an ordinarily prudent person would have used in the same or similar circumstances.

When a defendant moves for summary judgment and shows that service of citation occurred after the limitations deadline, the burden shifts to the plaintiff to explain the delay. If the plaintiff does so, the burden shifts back to the defendant to

show why those explanations are insufficient as a matter of law. *Carter v. MacFadyen*, 935 S.W.3d 307,313 (Tex. App.– Houston [14th Dist.] 2002, pet. denied). The record shows that plaintiff explained the delay in getting Appellee served.

The burden is on the defendant to show that diligence was not used by the plaintiff in procuring service. *Gant v. DeLeon*, 786 S.W.2d 259,260 (Tex.1990); *Hodge v. Smith*, 856 S.W.2d 212,215 (Tex. App.–Houston [1st Dist.] 1993, writ denied). The interrogatory answers, the pleadings, affidavits, authenticated public records, and the other discovery responses raised a genuine issue of material fact on the issue of diligence used by plaintiff in procuring service of citation on the defendant.

PRAYER FOR RELIEF

WHEREFORE, PREMISES CONSIDERED, Appellant respectfully asks this Honorable Court reverse the summary judgment order of the County Court at Law No. 2 of Montgomery County, Texas, and remand this case to the trial court for trial on the merits.

RESPECTFULLY SUBMITTED,

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CERTIFICATE OF SERVICE

_____ I hereby certify that a true and correct copy of the foregoing Brief has been served upon all attorneys of record on this 2nd day of January, 2007.

BY: /s/ James B. Manley
James B. Manley