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Case No. 13-09-00198-CV

In the Thirteenth Judicial District Court of Appeals Corpus Christi-Edinburg

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ROBERT SUTHERLAND, JESSE GARZA, AND
SOUTHERN CUSTOMS PAINT & BODY,

Appellants

VS.

ROBERT KEITH SPENCER,

Appellee.

On appeal from the County Court at Law No. 4 of Nueces County, Texas
Trial Court Cause No. 08-62387-4
Hon. James Klager

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Oral Argument Waived

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STATEMENT OF THE CASE

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Nature of the Case. This suit was filed by the plaintiff as a DTPA action. (CR 3, 7). The plaintiff alleged that the defendants violated the DTPA when they painted his car. (CR 5-7).

Course of the Proceedings. The plaintiff filed his suit on December 18, 2008. (CR 3). The plaintiffs were served with the suit the following day, on December 19, 2008. (CR 26-31). The defendants did not immediately retain counsel after the suit was served on them. Therefore, they did not file a timely answer. Without a hearing, the trial court granted a default judgment in favor of the plaintiff on January 16, 2009. (CR 40-41). The trial court awarded the plaintiff nearly $150,000. (CR 40). The original paint job cost $7,500. (CR 5).

Disposition in Trial Court. The defendants retained counsel and timely filed a motion for new trial. (CR 43, 78). It was denied on March 3, 2009. (CR 108). After the trial court raised it *sua sponte* during an oral hearing on the motion for new trial (4 RR 32), the defendants also sought remittitur, which was also denied on April 8, 2009. (CR 112; 6 RR 12-13). The trial court granted a stay of execution of the default judgment while on appeal. (CR 109).

ISSUES PRESENTED

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The defendants present only one issue for review: whether the trial court erred in not granting the defendants' motion for new trial to set aside a default judgment.

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STATEMENT OF FACTS

Because this is a default judgment case and there was no conventional trial on the merits or even summary proceedings, there is not much factual development in this case.

Nevertheless, the record shows that the plaintiff delivered an old car to the defendants' shop and asked the defendants to paint it. (CR 5, 93, 96-97). The defendants agreed to perform the labor and provide the materials for $7,500. (CR 5, 93, 96-97). The car had been delivered to the defendants in January 2007. (CR 5, 85, 96-97). The defendants believed that it would take about six months to complete the work. (CR 5-6, 93, 96-97). The record shows that the car was painted and returned to the plaintiff in July 2007. (CR 6, 93-94, 96-97).

The defendants received no complaints from the plaintiff about the quality of the work performed until they received a letter from the plaintiff's attorney in November 2007. (CR 12, 93, 96-97). Several allegations were made about the quality of the paint and missing parts. (CR 12, 94, 96-97). The defendants denied the allegations. (CR 94, 97-98). The defendants then heard nothing from the plaintiff again until this lawsuit was brought to their attention in December 2008 and January 2009. (CR 94, 97-98).

The defendants do not understand what the plaintiff is complaining about. (CR 94, 97-98).

SUMMARY OF THE ARGUMENT

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The plaintiff filed this suit on December 18, 2008. (CR 3). Less than 30 days later, the trial court granted a default judgment in favor of the plaintiff in the sum of nearly $150,000, based on an alleged deficient automobile paint job that cost $7,500. (CR 40-41, 93). The defendants failed to appear timely. The default judgment is nevertheless unconscionable.

Upon learning of the default judgment, the defendants retained counsel and timely filed a motion for new trial with supporting affidavits. (CR 43, 78). A hearing was held. (4 RR 3-32). It is clear from the record that the trial court was not going follow the three prong test in *Craddock* in deciding whether to set aside the default judgment. (4 RR 26, 29, 31). The trial court's ruling that denied the motion for new trial (CR 108) was not based on any rule of law, thereby making it a classic arbitrary ruling.

But a review of the record shows that the defendants satisfied the *Craddock* three prong test for determining whether a default judgment should be set aside that was established by the Supreme Court of Texas seven decades ago. It is a well-settled test. Trial courts do not have the discretion to disregard the test.

First, however, the record shows that the plaintiff failed to strictly comply with the rules governing service of process. Strict compliance is required before seeking and obtaining a default judgment. Here, the original petition and the citation identify one of the defendants as "Jesse Garza." (CR 3, 28). However, the return citation shows that the suit was served on "Jesse De La Garza." (CR 29). Because the names do not match, strict

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compliance is not shown. Therefore, the service of process is ineffective and the default judgment void. Also, the original petition and citation identify one of the defendants as "Southern Customs Paint and Body." (CR 3, 30). However, the return citation shows that the suit was served on "Southern Custom's by delivering to Robert Sutherland." (CR 31). Because the names do not match, strict compliance is not shown. Therefore, the service of process is ineffective and the default judgment void.

Second, and putting aside the ineffective service of process, the record shows that the defendants filed detailed affidavits with their motion for new trial to satisfy the *Craddock* test for having a default judgment set aside. (CR 91-98). The affidavits show that the defendants have no experience with civil lawsuits, that they did not understand what their legal obligations were, that they received the papers during the Christmas and New Year's holidays, that they had placed the papers on a cluttered office desk in their shop, that they had not spent much time in their shop during the holidays, and that they forgot that they had even received the papers when they returned to their shop. (CR 91-98). Thus, the affidavits establish no purposeful or bad-faith intent by the defendants in not appearing timely. Further, the affidavits were not controverted by the plaintiff. Accordingly, the record shows that the defendants satisfied the first prong of *Craddock* by showing that they their failure to appear was not due to conscious indifference. The record also shows that the defendants "set up" a meritorious defense to the plaintiff's suit. (CR 91-98). In their affidavits, the defendants testify that they fully performed under the agreement and never received any complaints about the quality of the paint job they

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performed. (CR 91-98). They also testified that they were paid only $7,500 for the paint job and that a judgment in the sum of nearly $150,000 is excessive. (CR 91-98). Therefore, the defendants set up the defenses of no liability and/or lesser damages, which is sufficient to satisfy the second prong of *Craddock*. It is also noteworthy that the sum of money awarded by the trial court in the default judgment is supported by no competent evidence. (CR 37, 40-41). Lastly, the defendants alleged in their motion for new trial that a new trial would not prejudice or injure the plaintiff, that they would pay the costs of obtaining the default judgment, and that they were prepared to go to trial immediately. (CR 88-89, 91-98). This was not controverted by the plaintiff. Therefore, the defendants satisfied the third prong of *Craddock*. The default judgment should have been set aside.

The decision to not set aside the default judgment (CR 108) was arbitrary and based on no rules of law. The order should be reversed.

The defendants ask that their issue on appeal be sustained and that this Court set aside the default judgment and REVERSE and REMAND this matter to the trial court for a new trial.

ARGUMENT

"It is a basic tenet of jurisprudence that the law abhors a default because equity is rarely served by a default." *Benefit Planners, L.L.P. v. RenCare, Ltd.*, 81 S.W.3d 855, 857-58 (Tex.App.-San Antonio 2002, pet. denied).

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Despite that basic tenet of jurisprudence, and through a frowning smile, the trial judge refused to grant a motion for new trial in this case, which sought to set aside an unconscionable $150,000 default judgment. (CR 108; 4 RR 31-32). The ruling was a judicial fist to the jaw. Unfortunately, this case epitomizes the public's perception that the rule of law is only selectively adhered to by our judicial system--instead of uniformly adhered to--and that obtaining justice is too often akin to shoveling smoke.

The denial of a motion for new trial after default judgment is subject to the abuse of discretion standard of review by appellate courts. *Cliff v. Huggins*, 724 S.W.2d 778, 778-79 (Tex. 1987). However, as stated by the Court in *Craddock v. Sunshine Bus Lines, Inc.*, "while trial courts have some measure of discretion in the matter, as, in truth, they have in all cases governed by equitable principles, it is not an unbridled discretion to decide cases as they might deem proper, without reference to any guiding rule or principle." *Id.* (quoting 134 Tex. 388, 133 S.W.2d 124, 126 (Comm'n App.1939, opinion adopted)). Further, the "*Craddock* test" is often utilized by appellate courts to determine whether a new trial should be granted after a default judgment. *Bank One, Texas, N.A. v. Moody*, 830 S.W.2d 81, 82-83 (Tex. 1992) (citing *Craddock v. Sunshine Bus Lines*, 134 Tex. 388, 133 S.W.2d 124 (Tex. 1939)). Here, an analysis of the record and the rule of law leads to the inescapable conclusion that the defendants' motion for new trial should have been granted and that, by not granting the motion, the trial court abused its discretion.

It has been well-settled in this state for 70 years that following the entry of a

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default judgment, a defendant may establish its entitlement to a new trial by satisfying the three-prong test articulated by the Texas Supreme Court in *Craddock*: (1) present facts showing that the failure to appear was not intentional or the result of conscious indifference but was due to accident or mistake, (2) set up a meritorious defense, and (3) file the motion for new trial when it would not cause delay or otherwise injure the prevailing party. *Craddock v. Sunshine Bus Lines, Inc.,* 133 S.W.2d 124, 126 (Tex. 1939).

<u>A. Ineffective Service of Process</u>

First, however, there is no presumptions in favor of valid issuance, service, and return of citation when attacking a default judgment. *See McKanna v. Edgar*, 388 S.W.2d 927, 929 (Tex. 1965). Moreover, failure to affirmatively show strict compliance with the Rules of Civil Procedure renders the attempted service of process invalid and of no effect. *See McKanna*, 388 S.W.2d at 929. Failure to correctly name and serve a defendant will render service of process ineffective. *See id.*

The Texas Supreme Court has held that where the record did not show that the person named in the return of service, "Henry Bunting," was connected with "Henry Bunting, Jr.," the actual defendant, that service was improper. *See Uvalde Country Club v. Martin Linen Supply Co.*, 690 S.W.2d 884, 885 (Tex. 1985). Further, the courts have held that a return of service stating that service was had on "George W. Brock, in person by leaving in the principal office during office hours of the said Hercules Concrete Pumping" did not establish that named defendant, "Hercules Concrete Pumping Service, Inc." was served; noting that return did not establish that Brock was the registered agent

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for named defendant and that it was possible that there were several corporate entities whose names began with words "Hercules Concrete Pumping." *See Hercules Concrete Pumping Serv., Inc. v. Bencon Mgmt. & Gen. Contracting Corp.*, 62 S.W.3d 308, 310-11 (Tex.App.-Houston [1st Dist.] 2001, pet. denied).

Here, the defendants challenged the service of process with respect to one of the defendants in their motion for new trial. (CR 80). The record shows that the plaintiff identified "Jesse Garza" as a defendant in his original petition. (CR3). The record also shows that the citation identifies "Jesse Garza" as the party to be served with the citation and suit. (CR 28). But the citation return shows that the process server served "Jesse De La Garza," not "Jesse Garza." (CR 29). Thus, the names on the citation and return citation, respectively, do not match.

The record in this case is indistinguishable from the record in *Uvalde Country Club* with respect to service of process. That is, as in *Uvalde Country Club*, the name of the person actually served in this case does not match the name of the person identified in the suit or on the citation. *See* 690 S.W.2d at 885; (*compare* CR 28 *with* CR 29). Because the record in this case is not distinguishable, this Court should reach the same result as the Texas Supreme Court did in *Uvalde Country Club*. *See id.* That is, that the record in this case does not establish strict compliance with rules governing service of process. Without strict compliance with the rules governing service of process, the

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service of process in this case is ineffective and the default judgment is therefore void.[1] *See id.*; *Commercial Union Assur. Co. PLC v. Silva,* 988 S.W.2d 798, 802 (Tex.App.-San Antonio 1999, no pet.) ("In the absence of proper service of process, the default judgment is void.").

Therefore, this Court should reverse the order of the trial court that rejected this legal issue (CR 108) and remand this matter to the trial court for further proceedings.

B. Defendants met the *Craddock* Test

Second, the ineffective service of process notwithstanding, the defendants in this case clearly met their burden under *Craddock* to have the default judgment set aside.

The motion for new trial filed by the defendants begins by showing that the three defendants' failure to file a timely answer in this case was not intentional or due to conscious indifference. (CR 78-82-88). Rather, their failure to file a timely answer was due to an accident or mistake. (CR 78-82-88). Attached the motion for new trial were two, detailed affidavits from the individual defendants. (CR 91-98).

Jesus De La Garza's affidavit establishes the following facts with respect to him and Southern Customs Paint and Body:

> I remember someone coming to my shop on or about December 19, 2008, and leaving some papers with me and my partner. This was a Friday. The

[1] Though not raised in the trial court, the same argument applies to Defendant Southern Customs Paint and Body. The citation shows that service of process was to be on "Southern Customs Paint and Body." (CR 30). However, the citation return shows that service was made on "Southern Custom's by delivering to Robert Sutherland." (CR 31). Therefore, the name on the citation does not match the name on the citation return. Strict compliance with the rules is not shown. Without strict compliance, service of process is ineffective. This means that the default judgment cannot stand because it is void. Void judgments can be attacked at any time, including for the first time on appeal. *See Intracare Hosp. North v. Campbell*, 222 S.W.3d 790, 795 (Tex.App.-Houston [1 Dist.] 2007, no pet.); *Commercial Union Assur. Co. PLC*, 988 S.W.2d at 802.

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person who gave the papers to me did not explain what they were for or that I had any obligation to do anything in response. I had never been sued before like this and have no experience with the legal system. I briefly reviewed the papers and the placed them on a desk in my office. My desk is covered in papers, concerning various matters. We do not employ a secretary or have any administrative help. My partner and I do everything. When we received the papers, it was less than a week before the Christmas holidays. The weather conditions during this period made it difficult for me to perform much labor for any customers because weather conditions adversely affect paint work on automobiles. I did return to the shop on Monday and worked part of the day. However, the work was limited to mostly returning automobiles to customers. I spent little time in my office. I also worked briefly on Tuesday, December 23, 2008, again, just returning automobiles and scheduling work. By this time, and due, in part, to the holidays, I was not thinking about the papers that had been delivered to me at my shop. The papers had been placed on my desk but were not on my mind and were camouflaged with other papers ;

I did not return to the shop again after December 23, 2008, until January 5, 2009. During this period, the shop was closed for the holidays and, in part, because of the weather conditions. I also spent a lot of time during this period in San Antonio, Texas, to visit friends for the holidays. Also during this period, my thoughts were on the holidays and things I had to do to plan and prepare for the holidays. Therefore, my thoughts were not on the papers that had been delivered to me;

Between January 5, 2009, and January 16, 2009, I resumed a regular schedule at the shop. During this period, I was working and not thinking about the papers that had been delivered to me. In fact, by this time, I had forgotten that about them. I also did not understand or realize that I had any obligation to do anything, including filing an answer to the papers within any time period. This was clearly a mistake on my part;

I now understand that a default judgment was entered because an answer to the suit was not filed within the time allowed. My failure to review the documents and understand what they must have been was an accident or mistake by me because I did not understand the significance of the documents and even failed to remember that I had gotten them. Further, the papers were given to me during the Christmas and New Year’s holiday period, when my mind was focused elsewhere and not on the papers. I have never been sued before. Nor did I consciously disregard answering

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> the suit because I did not even realize that the papers that had been delivered required any attention by me. Had I realized what the documents must have been, I would have immediately retained the services of an attorney to represent me, as I did as soon as I received notice of the default judgment. The notice received by me in the mail was the first indication that I had that a lawsuit had been filed against me that required affirmative action by me.

(CR 91-94).

The affidavit of Robert Sutherland presented similar facts to the trial court, individually and on behalf of Southern Customs Paint and Body. (CR 95-98). The affidavit established the following facts:

> I remember someone coming to my shop on or about December 19, 2008, and leaving some papers with me and my partner. This was a Friday. The person who gave the papers to me did not explain what they were for or that I had any obligation to do anything in response. I had never been sued before like this and have no experience with the legal system. I briefly reviewed the papers and the placed them on a desk in my office. My desk is covered in papers, concerning various matters. We do not employ a secretary or have any administrative help. My partner and I do everything. When we received the papers, it was less than a week before the Christmas holidays. The weather conditions during this period made it difficult for me to perform much labor for any customers because weather conditions adversely affect paint work on automobiles. I did return to the shop on Monday and worked part of the day. However, the work was limited to mostly returning automobiles to customers. I spent little time in my office. I also worked briefly on Tuesday, December 23, 2008, again, just returning automobiles and scheduling work. By this time, and due, in part, to the holidays, I was not thinking about the papers that had been delivered to me at my shop. The papers had been placed on my desk but were not on my mind and were camouflaged with other papers;
>
> I did not return to the shop again after December 23, 2008, until January 5, 2009. During this period, the shop was closed for the holidays and, in part, because of the weather conditions. Also during this period, my thoughts were on the holidays and things I had to do to plan and prepare for the holidays. Therefore, my thoughts were not on the papers that had been

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> delivered to me;
>
> Between January 5, 2009, and January 16, 2009, I resumed a regular schedule at the shop. During this period, I was working and not thinking about the papers that had been delivered to me. In fact, by this time, I had forgotten that about them. I also did not understand or realize that I had any obligation to do anything, including filing an answer to the papers within any time period. This was clearly a mistake on my part; and
>
> I now understand that a default judgment was entered because an answer to the suit was not filed within the time allowed. My failure to review the documents and understand what they must have been was an accident or mistake by me because I did not understand the significance of the documents and even failed to remember that I had gotten them. Further, the papers were given to me during the Christmas and New Year's holiday period, when my mind was focused elsewhere and not on the papers. I have never been sued before. Nor did I consciously disregard answering the suit because I did not even realize that the papers that had been delivered required any attention by me. Had I realized what the documents must have been, I would have immediately retained the services of an attorney to represent me, as I did as soon as I received notice of the default judgment. The notice received by me in the mail was the first indication that I had that a lawsuit had been filed against me that required affirmative action by me.

(CR 95-98).

To begin the analysis, the record in this case shows that the factual assertions in the defendants' respective affidavits were not controverted by the plaintiff. Why is this significant? Because the Supreme Court of Texas holds that "when the factual allegations in a movant's affidavits are not controverted, the question of conscious indifference must be determined in the same manner as a claim of meritorious defense." *Director, State Employees Workers' Comp. Div. v. Evans*, 889 S.W.2d 266, 268 (Tex. 1994). Also, "[w]hen the factual assertions in the defendant's affidavit are not

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controverted, the defendant *satisfies his burden* if he sets forth facts that, if true, negate intentional or consciously indifferent conduct. *Jaco v. Rivera*, ___ S.W.3d ____, 2009 WL 335019, at *3 (Tex.App.-Houston [14th Dist.] 2009, no pet. h.) (emphasis added). Accordingly, following the rule of law, the factual assertions set forth in the defendants' respective affidavits must be accepted as satisfying their *Craddock* burden because the assertions are not controverted by the plaintiff and because the facts negate intentional or consciously indifferent conduct. *See Evans*, 889 S.W.2d at 268; *Rivera*, ___ S.W.3d ____, 2009 WL 335019, at *3.

Putting that rule of law aside, the first prong of *Craddock* is applied liberally by the courts. *See id.* "Conscious indifference" means the failure to take some action that would appear obvious to a reasonable person under similar circumstances. *Id.* However, "[t]he controlling fact is whether there was a *purposeful or bad-faith*[2] *failure to appear*.[3] *Id*. (emphasis added) (since absence of a purposeful or bad faith failure to answer is the "controlling fact," *Craddock*, 134 Tex. at 392, 133 S.W.2d at 125, even a slight excuse will suffice, especially where delay or prejudice would not result). Therefore, a

[2] This is not a controversial, unsettled or untested rule of law in Texas jurisprudence. Rather, it is oft-recited *See, e.g.*, *Ashworth v. Brzoska*, 274 S.W.3d 324, 332 (Tex.App.-Houston [14 Dist.] 2008, no pet.); *Quantum Elec. Corp. v. Texas Light Bulb & Supply Co*, 2004 WL 334503, at *2 (Tex.App.-Austin February 12, 2004, no pet.) (not designated for publication); *Talley v. Talley*, 2002 WL 31647096, at *2 (Tex.App.-Dallas November 25, 2002, no pet.) (not designated for publication); *Texas Sting, Ltd. v. R.B. Foods, Inc.*, 82 S.W.3d 644, 650 (Tex.App.-San Antonio 2002, pet. denied); *Gotcher v. Barnett*,757 S.W.2d 398, 401 (Tex.App.-Houston [14th Dist.],1988, no writ). After all, this is part of the original *Craddock* test, settled 70 years ago. *Craddock*, 133 S.W.2d at 125 (it seems clear that the absence of an "intentional failure to answer" is the controlling fact).

[3] A failure to appear is not intentional or due to conscious indifference merely because it was deliberate or the result of negligence; it must be without adequate justification. *Smith v. Babcock & Wilcox Constr. Co*., 913 S.W.2d 467, 468 (Tex. 1995). The controlling factor under this analysis is the absence of a purposeful or bad faith failure to appear. *Craddock*, 133 S.W.2d at 125. Accordingly, the defaulting party must provide "[s]ome excuse, but not necessarily a good excuse" for failing to appear. *Id.*

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defendant must provide "'some excuse, but not necessarily a good excuse'" for failing to appear. *Id*. (quoting *Craddock*, 133 S.W.2d at 125). Thus, even a *negligent failure* to appear will not preclude setting aside a default judgment. *Id*. (emphasis added).

The affidavits in this case show that the defendants received the suit papers 6 days before Christmas and the following holiday period, that they did not understand the significance of the documents, that they had never been sued civilly before, and that they placed the suit papers in their office at their shop. (CR 91-92, 95-96). The affidavits also show that due to poor weather conditions, the defendants did not spend much time at their shop between the date they received the suit papers and about January 5, 2009. (CR 92, 96). They also testified that the papers were placed on a desk that was cluttered with other papers and that, because of the holidays and their absence from the shop for an extended period, they simply forgot that they had received the papers and did not understand their legal obligations. (CR 92, 96).

As previously noted, the defendants' factual assertions in their affidavits were not controverted by the plaintiff with respect to the conscious indifference prong of *Craddock*. Therefore, the assertions should be accepted as true. *See Evans*, 889 S.W.2d at 268; *Rivera*, ___ S.W.3d ____, 2009 WL 335019, at *3. That aside, there should be no honest debate that the factual assertions set forth in the defendants' affidavits establish no conscious indifference by them and no purposeful or bad-faith by them in not appearing timely. Viewed through a skeptical lens, even if found to be only a slight excuse or that the defendants were negligent in not appearing, they would still have met their *Craddock*

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burden to show no conscious indifference. *See Rivera*, ___ S.W.3d ____, 2009 WL 335019, at *3. Accordingly, the record in this case in juxtaposition with the rule of law on this issue shows that the defendants' failure to appear was not the result of conscious indifference.

Next, the defendants' motion for new trial shows that the defendants have a meritorious defense to the plaintiff's suit, as is required under the second prong of *Craddock*. (CR 78, 85-88).

A motion for new trial should be granted if the facts alleged in a motion for new trial and supporting affidavits "set up" a meritorious defense, regardless of whether the facts are controverted by the plaintiff. *Evans*, 889 S.W.2d at 270; *Craddock,* 133 S.W.2d at 126. A meritorious defense is one that, if proved, would cause a different result upon a retrial of the case, although not necessarily a totally opposite result. *Rivera*, ___ S.W.3d ____, 2009 WL 335019, at *4. For example, a defense that might produce the different result of a lesser amount of damages is a meritorious defense because the opposite result of total non-liability need not be proved. *Id.*

With respect to setting up a meritorious defense to the plaintiff's lawsuit, the defendants' motion for new trial and supporting affidavits establish the following facts:

> [Jesus De La Garza and Southern Customs Paint and Body]. I have meritorious defenses to the suit. The plaintiff brought his car to my shop in January 2007. The car was a 1965 Corvette. The car was not in good shape. The car was painted with two or three shades of primer. The car could not be driven. It did not even have an engine. The car was not complete. It was missing several pieces, including the bumpers, the grill, headlight bezels, tail lights, and other parts. The defendant asked us to

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paint the body and frame. This required us to remove the body from the frame and prepare and paint the parts separately. The agreed price for the work was $7,500. I am competent to perform this kind of work. I have 10 years' experience in paint and body work. I have attending training schools by Sherwin Williams in Dallas, Texas, to learn various techniques for painting automobiles. I have attended several training schools in Dallas, Texas, by Sherwin Williams, each lasting 3 to 4 days. I have a painter certification and color matching and blending certification. I also have a custom color certification;

In January 2007, when we agreed to perform the work for the defendant, we estimated that it would take about 6 months to perform the work. During the process, we also agreed to place the engine in the car. Because the defendant wanted an engine that was not the same engine that the car came with when it was manufactured, we had to make modifications. This resulted in additional time and labor. We agreed to make the modifications and others for an additional $2,500. By July 2007, the car was nearly complete. All that was left for us to do was to install the starter, calipers, door handles, brake lines, and windshield. All of our labor was complete in July 2007. The car was returned to the defendant in July 2007;

When the defendant picked up his car in July 2007, he had no complaints about the work we performed. In fact, I pointed out to him that the paint on the doors did not match perfectly to the rest of the paint (they were painted separately from the rest of the body). At that time, I offered to repaint the entire car. However, the defendant refused and said that he was satisfied with the paint and could detect no difference. The defendant had arranged to have the car picked up on flat bed trailer and towed away. Before he left with his car, the defendant shook our hands, thanked us, and left;

About two weeks after he picked up the car, the defendant returned to our shop and complained that there pieces from the car that were missing. The defendant believed we had the car's grill and some other pieces. However, we told the defendant that we did not have the grill or the other pieces he complained about. However, we did have the headlight bezels, a spare tire cover, and a license plate cover, which we gave to our landlord, Mike Mosley, who then returned the pieces to the defendant;

At no time, however, did the defendant ever contact us and complain about the quality of the work we performed on his car. We did receive a threatening letter from the defendant's attorney sometime in late 2007. We

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> responded and then never heard anything again; and
>
> The work we performed was not shoddy and we never misrepresented anything to the defendant. We fully performed all of our obligations. If the defendant would have ever returned the car to us and complained about anything we did, we would have gladly remedied any defects. He never did. Further, all we did was paint the car and frame. This is all we were asked to do. We did not breach any duties owed to the defendant. Further, the total cost was only $10,000. Thus, the damages claimed by the defendant in this suit is not supported by any competent or admissible evidence and is grossly out of proportion to the work we actually performed.

(CR 93-94).

> [Robert Sutherland and Southern Customs Paint and Body]. I have meritorious defenses to the suit. The plaintiff brought his car to my shop in January 2007. The car was a 1965 Corvette. The car was not in good shape. The car was painted with two or three shades of primer. The car could not be driven. It did not even have an engine. The car was not complete. It was missing several pieces, including the bumpers, the grill, headlight bezels, tail lights, and other parts. The defendant asked us to paint the body and frame. This required us to remove the body from the frame and prepare and paint the parts separately. The agreed price for the work was $7,500. I am competent to perform this kind of work. I have 18 years' experience in paint and body work. I have attending training schools by Sherwin Williams in Dallas, Texas, to learn various techniques for painting automobiles. I have attended several training schools in Dallas, Texas, by Sherwin Williams, each lasting 3 to 4 days. I have a painter certification and color matching and blending certification. I also have a custom color certification. I also have painter certification from PPG. I have I-Car certification, as well, which is one of the most elite certifications in the industry. I previously worked in the paint and body departments at Paul York Toyota and Crosstown Ford;
>
> In January 2007, when we agreed to perform the work for the defendant, we estimated that it would take about 6 months to perform the work. During the process, we also agreed to place the engine in the car. Because the defendant wanted an engine that was not the same engine that the car came with when it was manufactured, we had to make modifications. This resulted in additional time and labor. We agreed to make the modifications

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and others for an additional $2,500. By July 2007, the car was nearly complete. All that was left for us to do was to install the starter, calipers, door handles, brake lines, and windshield. All of our labor was complete in July 2007. The car was returned to the defendant in July 2007;

When the defendant picked up his car in July 2007, he had no complaints about the work we performed. In fact, I pointed out to him that the paint on the doors did not match perfectly to the rest of the paint (they were painted separately from the rest of the body). At that time, I offered to repaint the entire car. However, the defendant refused and said that he was satisfied with the paint and could detect no difference. The defendant had arranged to have the car picked up on flat bed trailer and towed away. Before he left with his car, the defendant shook our hands, thanked us, and left;

About two weeks after he picked up the car, the defendant returned to our shop and complained that there pieces from the car that were missing. The defendant believed we had the car's grill and some other pieces. However, we told the defendant that we did not have the grill or the other pieces he complained about. However, we did have the headlight bezels, a spare tire cover, and a license plate cover, which we gave to our landlord, Mike Mosley, who then returned the pieces to the defendant;

At no time, however, did the defendant ever contact us and complain about the quality of the work we performed on his car. We did receive a threatening letter from the defendant's attorney sometime in late 2007. We responded and then never heard anything again; and

The work we performed was not shoddy and we never misrepresented anything to the defendant. We fully performed all of our obligations. If the defendant would have ever returned the car to us and complained about anything we did, we would have gladly remedied any defects. He never did. Further, all we did was paint the car and frame. This is all we were asked to do. We did not breach any duties owed to the defendant. Further, the total cost was only $10,000. Thus, the damages claimed by the defendant in this suit is not supported by any competent or admissible evidence and is grossly out of proportion to the work we actually performed.

(CR 96-98).

The affidavits in the record from the defendants set up the defense of no liability

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and no damages, respectively, being sustained by the plaintiff. The affidavits very clearly explain the scope of the work to be performed, that the work was performed, that the plaintiff never returned to complain about the work performed, and the precise amount of money paid by the plaintiff to the defendants to perform the labor. (CR 93-94, 96-98). Liability and damages are essential elements of the plaintiff's claim, without which the plaintiff's claim fails as a matter of law. *See Doss v. Homecoming Financial Network, Inc.*, 210 S.W.3d 706, 713 (Tex.App.–Corpus Christi 2006, pet. denied). The facts shown in the record in this case set up the defense of no liability because they show that the defendants fully performed under the agreement. At an absolute minimum, and viewed through a very skeptical eye, the affidavits in the record show that the amount of damages would very likely be different following a conventional trial on the merits, which is sufficient to set up a meritorious defense under *Craddock*. *See Rivera*, ___ S.W.3d ____, 2009 WL 335019, at *4. This is because the default judgment awarded the plaintiff nearly $150,000 as alleged damages (CR 40-41) caused by an alleged inferior paint job that cost only $7,500 (CR 93, 97).

Therefore, the defendants have "set up" meritorious defenses to the plaintiff's suit, satisfying the second part of the *Craddock* test.

It is also noteworthy that the amount of money awarded by the default judgment is supported by no evidence of damages. It is also noteworthy that during an oral hearing on the defendants' motion for new trial that representations were made that an evidentiary hearing had been held on the issue of damages to support the default

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judgment. (5 RR 7, Lines 11-15). However, according to the court reporter, and as shown by its absence in the record in this case, there was not any hearing at all that resulted in the default judgment being signed by the court. None.

Before awarding unliquidated damages in a default judgment, a trial court *must* hear evidence of those damages. TEX. R. CIV. P. 243; *Holt Atherton Indus., Inc. v. Heine*, 835 S.W.2d 80, 83 (Tex. 1992) (emphasis added).

Here, the only evidence of damages is just 5 short lines of text in an affidavit filed with the motion for default judgment. (CR 32, 37). However, there is no competent, admissible evidence in this case to support an award of any damages to the plaintiff. There is only speculation and conjecture, which is not enough. *See Paradigm Oil, Inc. v. Retamco Operating, Inc.*, 242 S.W.2d 67, 72, 74 (Tex.App.-San Antonio 2007, pet. denied). When a no-answer default judgment is rendered, the amount of unliquidated damages is not deemed admitted. *Id.* at 72. Instead, the plaintiff must prove by competent evidence the amount of his unliquidated damages and must prove that the injury for which damages are sought was proximately caused by the event for which liability has been established. *Id.* "The damages must be ascertainable in some manner other than by mere speculation or conjecture, and by reference to some fairly definite standard, established experience, or direct inference from known facts." *Id.* Here, as shown by the record (CR 37), there is no evidence to support the award of damages recited in the default judgment. (CR 40-41).

Lastly, the defendants met the final prong of *Craddock* in their motion for new

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trial by showing that the granting of a new trial would not cause any undue delay or injury to the plaintiff. *Craddock,* 133 S.W.2d at 126. The defendants expressly alleged in their motion for new trial that the granting of a new trial would not injure or prejudice the plaintiff, and their assertions were supported in their respective affidavits. (CR 88-89, 94, 98). On the other hand, there is no evidence in the record to show that the plaintiff would be injured or prejudiced by a new trial. "If a defendant alleges that granting a new trial will not injure the plaintiff, the burden shifts to the plaintiff to present proof of injury. *Evans*, 889 S.W.2d at 270. Here, the plaintiff presented no evidence that he would be injured by the granting of a new trial. Moreover, the defendants' willingness to proceed to trial immediately and willingness to pay the expenses involved in the default judgment, although not dispositive, are important factors for courts to consider when determining whether to grant a new trial. *Id.*

Accordingly, the record shows that the defendants affirmatively established no undue delay or injury to the plaintiff. They therefore satisfied the third and final part of the *Craddock* three-prong test to have a default judgment set aside.

"In reality the man defies or flouts the law is like the proverbial fool who saws away the plank on which he sits, and a disrespect or disregard for law is always the first sign of a disintegrating society. Respect for law is the most fundamental of all social virtues, for the the alternative to rule of law is that of violence and anarchy." Bergen County, New Jersey, *Prosecutor's Digest* (1961). Further, courts should never make decisions "which shall do violence to the rules of language or the rules of law in order to

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avoid the consequences of a particular case, or to accomplish that illegitimate and illogical end which some people are pleased to term 'substantial justice,' which is not justice at all, but a farce and a confusion." *Knox v. U.S.*, 30 Ct. Cl. 59, 1895 WL 683, at *1 (U.S. Ct. Cl. 1895). Nor should courts that "sit to administer law, and for no other purpose, to be curious and subtle and astute, or to invent reasons and make acts in order to escape from the rules of law." *Id.* The defendants pray that by its ruling, this Court shows the trial court that the rule of law-i.e., *Craddock*-is to be defended, honored and followed, regardless of other considerations that have no place in any courtroom.

For all these reasons, the defendants' first issue presented for review should be sustained and this matter should be reversed and remanded to the trial court for a new trial.

PRAYER

For these reasons, Appellants-Defendants Jesus De La Garza (incorrectly identified as Jesse Garza), Robert Sutherland and Southern Customs Paint and Body pray that this Court REVRSE the trial court's order that denied their Motion for New Trial and REMAND this matter to the trial court so that this matter can be re-litigated on its merits, and for such other and further relief, at law or in equity, to which Appellants-Defendants may be justly entitled.

Respectfully submitted,

BROOKS LLP

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Certificate of Service

The undersigned certifies that a true and correct copy of the foregoing document has been served on all parties of record by certified, return receipt requested, U.S. Mail in accordance with the rules on this ____ day of May 2009, as follows:

Rene Rodriguez
Law Offices of Rene Rodriguez
433 South Tancahua Street
Corpus Christi, Texas 78401

Via CM/RRR

Jon D. Brooks

Appendix

Default Judgment..Tab A

Order Denying Motion for New Trial...Tab B