**Affirmed and Memorandum Opinion filed July 8, 2010**

**In The**

# Fourteenth Court of Appeals

**NO. 14-08-00811-CV**

**TERRYL REBECTOR, Appellant**

**V.**

**ANGLETON DANBURY HOSPITAL DISTRICT D/B/A ANGLETON DANBURY MEDICAL CENTER, Appellee**

**On Appeal from the 412th District Court**
**Brazoria County, Texas**
**Trial Court Cause No. 42006**

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

Terryl Rebector appeals from the trial court's dismissal of her medical malpractice suit against Angleton Danbury Hospital District d/b/a Angleton Danbury Medical Center ("ADMC"). Rebector contends the trial court erred in setting aside her default judgment and in various evidentiary-related rulings. We affirm.

## I. BACKGROUND

Rebector sued ADMC, Lawrence W. Andrews, M.D., and Larry K. Parker, M.D., for injuries allegedly sustained as a result of medical malpractice. She later non-suited Dr. Parker. Rebector had process served on ADMC's administrator, whom she claimed was the agent for both ADMC and Dr. Andrews. The record does not indicate that either defendant answered. Rebector obtained a default judgment against ADMC. Shortly thereafter, ADMC answered and filed a motion for new trial. Following a hearing, the trial court signed an order granting ADMC's motion.[1] Rebector filed a motion for reconsideration of the court's order granting a new trial, which the trial court denied.

Rebector appealed the trial court's order granting a new trial to this court. *Rebector v. Angelton Danbury Hosp.*, No. 14-08-0094-CV, 2008 WL 1838621 (Tex. App.—Houston [14th Dist.] 2008, no pet.) (mem. op.). We dismissed the appeal because we lacked jurisdiction to review the trial court's interlocutory order. *Id.* at *1 (citing *Fruehauf Corp. v. Carrillo*, 848 S.W.2d 83, 84 (Tex. 1993)).

In June 2008, the trial court granted ADMC's motion to dismiss Rebector's suit for failure to comply with the expert-report requirements of section 74.351 of the Texas Civil Practice and Remedies Code. Tex. Civ. Prac. & Rem. Code Ann. § 74.351 (Vernon Supp. 2009). Dr. Andrews was not mentioned in the dismissal order, and the order did not contain language making it a final judgment as to all parties and claims. *See Lehmann v. Har-Con Corp.*, 39 S.W.3d 191, 195, 206 (Tex. 2001) ("[T]he general rule . . . is that an appeal may be taken only from a final judgment."). Rebector appealed the order.

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[1] We note Rebector contends that a default judgment was taken against Dr. Andrews which became final. In its order granting default judgment, the trial court struck through the name "Lawrence W. Andrews" in the sentence in which the court found default occurred, but did not strike Dr. Andrews's name in the paragraphs in which the court determined damages and ordered damages be paid. Because Dr. Andrews's name was left in these paragraphs, Rebector argues she has a final judgment against Dr. Andrews, collectible jointly and severally against Dr. Andrews and ADMC or, alternatively, collectible against ADMC under respondeat superior. We disagree.

In its order granting ADMC's motion for new trial, the trial court expressed, "[The] Default Judgment is set aside and vacated; and this case shall proceed." Hence, even assuming without deciding that default judgment was rendered against Dr. Andrews, we hold that the default judgment has been vacated and no longer exists.

We examined the record to determine whether there was an implied discontinuance of Rebector's claim against Dr. Andrews under *Youngstown Sheet & Tube Co. v. Penn.* 363 S.W.2d 230 (Tex. 1962). In *Penn*, the supreme court held that when (1) "the judgment entered by the trial court expressly disposes of all parties named in the petition except [one]," (2) the remaining party is never served with citation and does not file an answer, and (3) nothing in the record indicates that the plaintiff in the case ever expected to obtain service upon the remaining party, "the case stands as if there had been a discontinuance as to [the remaining party], and the judgment is to be regarded as final for the purposes of appeal." *Penn*, 363 S.W.2d at 232.

After reviewing the record, we could not conclude the record was devoid of any indication that Rebector ever expected to obtain service on Dr. Andrews.[2] Apparently, Rebector moved for default judgment against Dr. Andrews, but the trial court concluded he was improperly served. During the October 2007 hearing on ADMC's motion for new trial, Rebector sought information regarding Dr. Andrews's location for proper service of process. At the July 2008 hearing on ADMC's motion to dismiss, Rebector explained that she had filed a motion seeking severance of her claims against Dr. Andrews should the trial court grant ADMC's motion to dismiss. When asked by the trial court if Dr. Andrews was part of the suit, Rebector replied, "He's always been in the case." Although Rebector later relied on *Penn* progeny in arguing that severance was unnecessary for a final judgment because Dr. Andrews was never served, we declined to conclude that such was an affirmative expression sufficient to demonstrate she did not expect to obtain service on Dr. Andrews. We concluded that the *Penn* elements had not been satisfied and Dr. Andrews remained a party to the underlying suit. Accordingly, we abated this case to allow the parties to obtain a final and appealable judgment. On June 8, 2010, the trial court signed an order severing Dr. Andrews from the underlying suit and providing final judgment as to ADMC. We now consider Rebector's issues pertaining to

[2] We proceeded directly to the third prong of *Penn* because we assumed without deciding that Dr. Andrews was never served with citation. *Penn*, 363 S.W.2d at 232. We offer no opinion on whether the citation and return of service in the record actually reflect valid service on Dr. Andrews.

ADMC.

## II. ANALYSIS

### A. Grant of Motion for New Trial

In her first issue, Rebector contends the trial court erred in granting ADMC's motion for new trial because ADMC failed to meet any of the elements of the *Craddock* test. *See Craddock v. Sunshine Bus Lines*, 134 Tex. 388, 393, 133 S.W.2d 124, 126 (1939). However, "[e]xcept in very limited circumstances, an order granting a motion for new trial rendered within the period of the trial court's plenary power is not reviewable on appeal." *Wilkins v. Methodist Health Care Syst.*, 160 S.W.3d 559, 563 (Tex. 2005) (noting that the two limited circumstances are (1) where the trial court's order is void and (2) where the order expresses a new trial is granted solely because the jury's answers to special questions irreconcilably conflict). Rebector does not claim these limited circumstances apply or that the new trial was granted outside the trial court's period of plenary power. Accordingly, the trial court's order granting a new trial is not reviewable on appeal. *See Cummins v. Paisan Const. Co.*, 682 S.W.2d 235, 235–36 (Tex. 1984); *In re N.G.K.*, No. 05-08-00789-CV, 2009 WL 2973665, at *1 (Tex. App.—Dallas Sept. 18, 2009, no pet.) ("[T]he motion for new trial was timely filed and the trial court granted the motion while it retained plenary power over the default judgment. Accordingly, the trial court's act of granting a new trial and setting aside the default judgment is not reviewable on appeal."); *see also In re Columbia Med. Ctr. of Las Colinas, Subsidiary, L.P.*, 290 S.W.3d 204, 209 (Tex. 2009) (reaffirming that orders granting new trial are not reviewable on direct appeal). We overrule Rebector's first issue.

In her third issue, Rebector contends the trial court erred in finding that ADMC was not served. In this issue Rebector again asks us to consider whether the trial court erred in granting ADMC's motion for new trial. Because the trail court's grant of a new trial is not reviewable, we overrule Rebector's third issue.

## B. Protective Order

In her fourth and fifth issues, Rebector contends the trial court erred in granting a protective order that afforded ADMC employee, Melinda Butler, additional time to comply with Rebector's subpoena.[3] Butler was the administrative assistant who forwarded by mail Rebector's petition and citation to ADMC's outside counsel. Butler also notarized several of the affidavits attached to ADMC's motion for new trial. Through her subpoena, Rebector sought testimony and documents regarding ADMC's mailing procedures and the manner in which the affidavits were notarized. She intended on using such information to persuade the trial court to set aside its order granting a new trial. Rebector ultimately questioned Butler on these issues during the hearing on her motion for reconsideration of the order granting new trial. At the hearing, Rebector argued that the order granting a new trial should be set aside because ADMC improperly mailed the petition to outside counsel and the affidavits attached to ADMC's motion for new trial were improperly notarized. The trial court denied Rebector's motion for reconsideration.

We first note that ADMC filed written objections to the documents requested in Rebector's subpoena. The trial court granted several of these objections, thereby limiting the documents Butler was required to produce. On appeal, Rebector does not challenge this ruling but argues that the trial court erred in granting the protective order.

Assuming, without deciding, that the trial court abused its discretion in granting the protective order, the record does not establish such error "probably caused the rendition of an improper judgment," or "probably prevented the appellant from properly presenting the case to the court of appeals." Tex. R. App. P. 44.1(a); *see also Johnson v. Davis*, 178 S.W.3d 230, 244 (Tex. App.—Houston [14th Dist.] 2005, pet. denied) (reviewing trial court's erroneous ruling on protective order for reversible error under Rule 44.1). Rebector contends she was harmed by the protective order because it

[3] Rebector's actual complaint is about the trial court's grant of ADMC's motion to quash the subpoena. The record, however, reflects that the trial court granted ADMC's motion for a protective order.

"allowed [ADMC] an opportunity to prepare [Butler] to overcome the issues of financial interest and impartiality"—issues related to whether Butler was allowed to notarize the affidavits. However, during the hearing on the motion for a protective order, the trial judge expressed that Rebector's arguments regarding notarization would not alter his opinion, but he would allow her to develop them. Furthermore, ten days later, Rebector questioned Butler thoroughly regarding these issues at the hearing on her motion for reconsideration. Rebector argued strenuously that Butler lacked capacity to notarize the affidavits and ADMC acted with conscious indifference by failing to ensure outside counsel received the citation and petition. Accordingly, we hold the trial court did not commit reversible error by granting the protective order. We overrule Rebector's fourth and fifth issues.

In her sixth issue, Rebector contends the trial court erred in determining that Butler was a disinterested witness with the capacity to notarize affidavits supporting ADMC's motion for new trial. We conclude that this issue is subsumed by the first issue. Even if we conclude that the trial court erred in determining that the affidavits were properly notarized, our harm analysis of such error would require us to determine whether the trial court erred by granting new trial. Because the order granting a new trial is not reviewable, we decline to consider whether the trial court erred in ruling that Butler properly notarized the affidavits. Rebector's sixth issue is overruled.

**C. Docket Control Order**

In her seventh issue, Rebector contends the trial court erred in modifying the docket control order to require her to respond to requests for disclosure and appear for deposition. She claims the modified docket control order was contrary to the trial court's previously expressed desire to minimize costs prior to mediation. Pertinently, she contends the modification was erroneous because the court ordered her deposition to be taken before mediation and while she was physically and mentally unable to give testimony. She argues that the portion of the docket control order requiring her to appear for deposition prior to production of her expert report was void as a matter of law. *See*

Tex. Civ. Prac. & Rem. Code Ann. § 74.351(s) (specifying the limited discovery allowed before service of the plaintiff's expert report in a health care liability suit). Additionally, Rebector contends that when she appeared for the deposition, it was wrongfully terminated by ADMC counsel after he learned she had taken pain medication.

Rebector's suit was ultimately dismissed because she failed to produce an expert report before the deadline set by the trial court. Rebector fails to explain, and the record does not indicate, how any error regarding the docket control order was related to dismissal of her suit for failure to produce an expert report.[4] Therefore, the trial court's discovery rulings do not constitute reversible error. We overrule Rebector's seventh issue.

## III. CONCLUSION

We affirm the judgment of the trial court.

/s/ Charles W. Seymore
Justice

Panel consists of Chief Justice Hedges and Justices Seymore and Sullivan.

[4] In this appeal, Rebector does not raise issue regarding the trial court's dismissal of her suit for failure to file an expert report timely.