STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2012 CA 0412

THOMAS GORMAN

VERSUS

LIEUTENANT AUSTIN MILLER, DEPUTY ANDREW,
DEPUTY TOM FLOYD AND DEPUTY ROBERT REDMOND

Judgment Rendered: NOV 13 2013

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On Appeal from the
20th Judicial District Court,
In and for the Parish of East Feliciana,
State of Louisiana
Trial Court No. 41248

The Honorable George H. Ware, Jr., Judge Presiding

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Donna U. Grodner
Marcus J. Plaisance
Baton Rouge, Louisiana

Attorneys for Plaintiff/Appellant,
Thomas Gorman

Lieutenant Austin Miller
Deputy Andrew
Deputy Tom Floyd
Deputy Robert Redmond
Clinton, Louisiana

Defendants/Appellees,
In Proper Person

* * * * *

BEFORE: WHIPPLE, C.J., PARRO, KUHN, GUIDRY, PETTIGREW, McDONALD, WELCH, HIGGINBOTHAM, CRAIN, AND THERIOT, JJ.[1]

Pettigrew, J. concurs in part and dissents in part for the reasons assigned by Judge Guidry.

[1] The Hon. Page McClendon and Hon. Ernest Drake, Jr. recused themselves from consideration of this matter.

Whipple, C.J. respectfully concurs in the result.
Higginbotham, J. concurs in the result.
Guidry, J. concurs in part and dissents in part and assigns reasons.
Kuhn, J. concurs in part and dissents in part, and will assign reasons.

CRAIN, J.

Thomas Gorman appeals a final judgment dismissing his personal injury suit with prejudice. He also seeks review of the trial court's interlocutory rulings excluding certain evidence and finding that Gorman failed to meet his burden of proof to confirm a preliminary default judgment against the defendants. After *en banc* consideration, we reverse the judgment and remand this matter for further proceedings.

FACTS AND PROCEDURAL HISTORY

Gorman instituted this suit against Lieutenant Austin Miller, Deputy Andrew (also referred to as Deputy Andrew Duncan), Deputy Tom Floyd, and Deputy Robert Redmond. In his petition, Gorman alleges that on March 31, 2011, he was arrested following a traffic stop and was detained at the East Feliciana Parish jail. He alleges that while detained in jail, the defendants verbally and physically attacked him, causing serious injuries. Gorman seeks damages under state and federal law, including 42 U.S.C. § 1983.

The defendants did not answer Gorman's suit. On Gorman's motion, which alleged personal service on the defendants, the trial court entered a preliminary default judgment. At the hearing to confirm the preliminary default judgment, Gorman offered proof of his demand through his own testimony, medical records, two affidavits, and photographs of his injuries. The trial court excluded the medical records and affidavits and determined that Gorman's testimony was not credible. The trial court then concluded that Gorman had not met his burden of proof to confirm the preliminary default judgment and rendered judgment denying the confirmation of default and dismissing Gorman's suit with prejudice.

Gorman appeals, challenging the trial court's exclusion of the medical records and affidavits, the trial court's refusal to confirm the preliminary default judgment, and the dismissal of his suit with prejudice.

DISMISSAL BY TRIAL COURT

This case presents for review the appropriateness of the trial court dismissing the plaintiff's case with prejudice upon finding that the plaintiff failed to establish a prima facie case as required under Louisiana Code of Civil Procedure article 1702A. Sitting en banc, we find such action to be in error, and in doing so, choose not to follow this court's previous ruling in *State Through Dept. of Social Services v. R.H.*, 93-2312 (La. App. 1 Cir. 10/7/94), 644 So. 2d 853.

Louisiana's Code of Civil Procedure delineates the time delay within which a defendant must file his answer after service of the plaintiff's suit upon him. If the defendant does not comply, the plaintiff may move for entry of a default judgment (also called a preliminary default judgment) against the defendant. La. Code Civ. Pro. art. 1701A; *see also Corte v. Cash Technologies, Inc.*, 02-0846 (La. App. 1 Cir. 4/2/03), 843 So. 2d 1162. The Code of Civil Procedure further sets forth the method by which a plaintiff can have the preliminary default judgment confirmed. Specifically, the plaintiff must present the trial court with proof of the demand sufficient to establish a prima facie case. La. Code Civ. Pro. art. 1702A.[2]

The judgment on appeal dismissed Gorman's suit for failure to establish a prima facie case. The trial court acted *sua sponte*, as Gorman did not move to voluntarily dismiss his suit, and the defendants, having made no appearance in this proceeding, presented no motion for involuntary dismissal of the suit.

In *State Through Dept. of Social Services v. R.H.*, the trial court dismissed the plaintiff's suit after the plaintiff failed to offer evidence sufficient to have a

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[2] While this appeal was pending, Article 1702A was amended to require that the proof submitted to establish a prima facie case be admitted into the record prior to confirmation. *See* 2013 La. Acts, No. 78, §1. Comment (a) to the revised article explains that:

> The change follows [Louisiana Constitution article 1, section 19], which grants litigants "the right of judicial review based upon a complete record of all evidence upon which the judgment is based." The amendment is also consistent with jurisprudence holding that "to prevent reversal on appeal, both the plaintiff and the trial judge should be vigilant to assure that the judgment rests on admissible evidence that establishes a prima facie case." *Arias v. Stolthaven, LLC*, 9 So.3d 815, 820 (La. 2009).

preliminary default judgment confirmed. In reviewing the propriety of the trial court's action, this court noted that the plaintiff had not requested that the matter be held open for the submission of additional evidence, nor requested that the case be reopened for additional evidence after the trial court's ruling, or even suggested that additional evidence was available. *State Through Dept. of Social Services*, 644 So. 2d at 855. This court found that "[i]t is not the duty of the trial court to assess the merits of a litigant's claim and to then determine, on its own motion, that the litigant is deserving of a second chance to prove his case." *Id.* This court concluded that the plaintiff had no right to demand another opportunity to do so, and the trial court had no duty to offer such an opportunity to the plaintiff, particularly when the plaintiff had not requested it or indicated that additional proof would be offered. *Id.* The trial court's judgment dismissing the plaintiff's suit was affirmed.

Upon en banc consideration, and in light of current Louisiana law and jurisprudence, we now find to the contrary. The analysis of this same issue by the Fourth Circuit Court of Appeal in *Dahan Novelties & Co., LLC v. Ohio Cas. Ins. Co.*, 10-0626 (La. App. 4 Cir. 10/20/10), 51 So. 3d 129, is persuasive. In *Dahan Novelties & Co, LLC,* the court of appeal reversed the trial court's judgment dismissing a plaintiff's suit on its own motion after finding the plaintiff had failed in his burden to confirm a preliminary default judgment, explaining:

> Our procedural law confers upon a trial court only very limited authority to dismiss a lawsuit on its own motion. A trial court on its own may notice, for example, peremption or the failure to disclose a cause of action and dismiss the lawsuit. *See* La. C.C.P. arts. 927 B and 934. Also, when no party appears for trial, the trial court may dismiss an action "on its own motion." La. C.C.P. art. 1672 A(2). But these authorized circumstances do not apply in this case. Except in such circumstances, a trial judge's power to dismiss cannot be exercised on his own motion, but requires the application of a party.

Dahan Novelties & Co., LLC, 51 So. 3d at 135. The court further recognized that under Louisiana law, voluntary dismissal of a plaintiff's suit requires a motion by

the plaintiff and involuntary dismissal requires a motion by "a party." La. Code Civ. Pro. arts. 1671 and 1672; *Dahan Novelties & Co., LLC*, 51 So. 3d at 135. The trial court is not a party to the action and thus cannot supply the motion for involuntary dismissal. *Wooley v. Amcare Health Plans of Louisiana, Inc.*, 06-1146 (La. App. 1 Cir. 1/17/07), 952 So. 2d 720, 729.

We agree that if the plaintiff fails to present sufficient evidence to confirm a preliminary default judgment, and no party present at the confirmation hearing moves for dismissal of the plaintiff's suit, the trial court is effectively prevented from dismissing the plaintiff's suit on its own motion. *See Dahan Novelties & Co., LLC*, 51 So. 3d at 136; *see also Griffin v. Pecanland Mall Assoc. Ltd.*, 535 So. 2d 770 (La. App. 2 Cir. 1988). In those circumstances, the trial court's authority is limited to a denial of the request to confirm the preliminary default judgment. To the extent it holds otherwise, we overrule *State Through Dept. of Social Services v. R.H., supra*. The trial court's judgment dismissing Gorman's suit with prejudice is reversed.

DENIAL OF REQUEST TO CONFIRM PRELIMINARY DEFAULT JUDGMENT

When an unrestricted appeal is taken from a final judgment, such as the trial court's dismissal of the plaintiff's suit, the appellant is entitled to additionally seek review of all adverse interlocutory rulings. *Landry v. Leonard J. Chabert Med. Ctr.*, 02-1559 (La. App. 1 Cir. 5/14/03), 858 So. 2d 454, 461 n.4, *writs denied*, 03-1748, 03-1752 (La. 10/17/03), 855 So. 2d 761; *R & R Steel Erectors v. Watson*, 01-1322 (La. App. 3 Cir. 3/6/02), 809 So. 2d 1228, 1230; *Griffin*, 535 So. 2d at 773. Therefore, we consider Gorman's arguments that the trial court erred in finding that he failed to meet his burden of proof to have the preliminary default judgment confirmed after erroneously excluding the offered medical records and affidavits,

which along with plaintiff's testimony and his photographs comprised the entirety of the evidence presented to the trial court.

Confirmation of a preliminary default judgment is similar to a trial with the defendant being absent. The plaintiff is required to present admissible and competent evidence establishing a prima facie case, proving both the existence and the validity of the claim as though the defendant denied each allegation of the petition. *Arias v. Stolthaven New Orleans, L.L.C.*, 08-1111 (La. 5/5/09), 9 So. 3d 815, 820; *Northshore Regional Medical Center, L.L.C. v. Dill*, 12-0850 (La. App. 1 Cir. 3/22/13), 115 So. 3d 475, 480, *writ denied*, 13-0866 (La. 5/31/13), 118 So. 3d 396). Simply stated, in order to confirm a default, "the plaintiff must present competent evidence that convinces the court that it is probable that he would prevail at trial on the merits." *Arias*, 9 So. 3d at 820. In doing so, the plaintiff must adhere to the rules of evidence despite there being no opponent to urge objections. *Arias*, 9 So. 3d at 820. Except as provided by law, inadmissible evidence may not support a default judgment. *Arias*, 9 So. 3d at 820 (*citing* 19 Frank L. Maraist, *Civil Law Treatise: Evidence and Proof* § 1.1, at 5 (2d ed. 2007)). The standard of review for a trial court's evidentiary rulings is abuse of discretion; the trial court's ruling will not be disturbed unless it is clearly erroneous. *Riverside Recycling, LLC v. BWI Companies, Inc. of Texas*, 12-0588 (La. App. 1 Cir. 12/28/12), 112 So. 3d 869, 874.

The trial court excluded Gorman's certified medical records because no representative from the medical institutions was available for the court to examine regarding the diagnoses and treatment information contained in the records or to testify that the records were kept in the normal course of business and were true and correct. This ruling was in error. Properly certified medical records are admissible in establishing a prima facie case to confirm a default in a delictual action, without accompanying oral medical testimony or sworn narrative report.

See Oliver v. Cal Dive International, Inc., 02-1122 (La. App. 1 Cir. 4/2/03), 844 So. 2d 942, 945, *writs denied*, 03-1230 and 03-1796 (La. 9/19/03), 853 So. 2d 638 and 648; *Assamad v. Percy Square and Diamond Foods, L.L.C.*, 07-1229 (La. App. 1 Cir. 7/29/08), 993 So. 2d 644, 650, *writ denied*, 08-2138 (La. 11/10/08), 996 So. 2d 1077. Consequently, the trial court abused its discretion in excluding the medical records on the basis that no representatives from the medical institutions were present to offer testimony.[3]

The trial court also excluded the affidavits of Daniel McKenzie and Jason Whitstone, both of whom were allegedly incarcerated at the East Feliciana Parish jail at the same time as Gorman and whose testimony was presented to corroborate Gorman's account of the defendants' actions.

Code of Civil Procedure article 1702B(2) provides, in pertinent part:

> When a demand is based upon a delictual obligation, the testimony of the plaintiff with corroborating evidence, **which may be by affidavits** and exhibits annexed thereto which contain facts sufficient to establish a prima facie case, shall be admissible, self-authenticating, and sufficient proof of such demand. (Emphasis added.)

Thus, affidavits may be considered in support of confirming a default judgment without the necessity of the affiant's oral testimony at the hearing. Nonetheless, the documents submitted as affidavits must be of sufficient evidentiary quality to be considered, despite there being no objection by the defendants. *See Arias*, 9 So. 3d at 820.

An affidavit is a declaration or statement of facts personally known to the affiant, reduced to writing and sworn to by the affiant before an officer who has authority to administer oaths, such as a notary public. *In re Davis*, 12-0689, 2012WL6677915 (La. App. 1 Cir. 12/21/12) (unpublished); *Patterson in Interest of*

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[3] For the reasons presented in more detail later in this opinion, the trial judge did have the authority under Louisiana Code of Civil Procedure article 1702B(2) to require further testimony if he believed that the medical records did not establish one or more of the elements necessary for the plaintiff to recover.

Patterson v. Johnson, 509 So. 2d 35, 38 (La. App. 1 Cir. 1987). The handwritten McKenzie "affidavit" is not signed by either McKenzie or a notary. A document that is not signed and notarized cannot be considered as an affidavit. *Anderson v. Allstate Ins. Co.*, 93-1102 (La. App. 1 Cir. 4/8/94), 642 So. 2d 208, *writ denied*, 94-2400 (La. 11/29/94), 646 So. 2d 404. The trial court correctly excluded the McKenzie "affidavit."

In contrast, the Whitstone affidavit is signed by Whitstone. It begins "Before me the undersigned Notary Public came and appeared Jason Whitstone who after being sworn did declare...." It concludes "Sworn to [and] subscribed before me this 5th day of May 2011," followed by a signature on a signature line. Although the notary is not identified by name or number, the document reflects the definitive characteristics of an affidavit in that it purports to be a writing made under oath, signed by the affiant, and notarized. *See State v. Duhon*, 95-2724 (La. 5/21/96), 674 So. 2d 944, 946; *Millen v. State Dept. of Public Safety and Corrections*, 07-0845 (La. App. 1 Cir. 12/21/07), 978 So. 2d 957, 963 (holding that a notary's failure to comply with the Louisiana Revised Statute 35:12 does not invalidate the affidavit); *Anderson*, 642 So. 2d at 210. The trial court abused its discretion in refusing to consider the Whitstone affidavit.

Having determined that the trial court erred in excluding evidence offered in support of the plaintiff's case, this appeal requires that we determine whether to conduct *de novo* review or remand for further proceedings. As a general rule, when the trial court makes evidentiary errors that are prejudicial, such that they materially affect the outcome of the trial and deprive a party of substantial rights, and if the record is otherwise complete, the appellate court will conduct its own *de novo* review of the record.[4] *See* La. Code Ev. art. 103A; *Riverside Recycling,* 112

[4] The proper inquiry for determining whether a party was prejudiced by a trial court's erroneous ruling on the admission or denial of evidence is whether the error, when compared to

So. 3d at 874; *State of Louisiana through Dept. of Child and Family Services v. Dennis*, 11-1736 (La. App. 4 Cir. 4/18/12), 90 So. 3d 1206, 1208-09. However, the Louisiana Supreme Court has also recognized that in limited circumstances, when necessary to reach a just decision and to prevent a miscarriage of justice, an appellate court should remand the case to the trial court under the authority of Code of Civil Procedure article 2164, rather than undertaking *de novo* review.[5] *See Wegener v. Lafayette Ins. Co.*, 10-0810 (La. 3/15/11), 60 So. 3d 1220, 1233; *Alex v. Rayne Concrete Service*, 05-1457 (La. 1/26/07), 951 So. 2d 138, 155.

We find that remanding this case, rather than conducting *de novo* review, is just, legal, and proper. *Cf.* La. Code Civ. Pro. art. 2164. To confirm a preliminary default judgment, the plaintiff must prove both the existence and validity of his claim by convincing the trial court that it is more probable than not that he would prevail at a trial on the merits. *Arias*, 9 So. 3d at 815. The determination of whether the plaintiff has satisfied his burden is subject to the credibility determinations of the trial court. *Tucker v. Howes*, 413 So. 2d 585, 588 (La. App. 1 Cir. 1982). Importantly, in the context of confirming a preliminary default judgment in a delictual action, Code of Civil Procedure article 1702B(2) expressly grants the trial court the authority to "require additional evidence in the form of oral testimony before entering judgment," when warranted under the circumstances of the case.

In this case, the trial court found that Gorman's testimony was not credible. However, after Gorman's medical records and the Whitstone affidavit were erroneously excluded, that conclusion was reached without considering all admissible evidence. The trial court also intimated that corroboration with oral

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the entire record, had a substantial effect on the outcome of the case. *See Wright v. Bennett*, 04-1944 (La. App. 1 Cir. 9/28/05), 924 So. 2d 178, 183.

[5] Article 2164 pertinently provides that "[t]he appellate court shall render any judgment which is just, legal, and proper upon the record on appeal."

testimony was necessary. Under Article 1702B(2), the trial court is not obliged to accept the affidavits and records offered, nor even the plaintiff's testimony, without additional corroboration in the form of oral testimony. Even after considering the improperly excluded evidence in this case, the trial court may or may not require corroboration through oral testimony pursuant to Article 1702B(2). In contrast, this court cannot receive new evidence (i.e., corroborating testimony) in conducting *de novo* review. *See Nieman v. Crosby Development Co., LLC,* 11-1337 (La. App. 1 Cir. 5/3/12), 92 So. 3d 1039, 1044.

While we make no findings regarding the weight to be given the evidence on remand, or the factors the trial court may consider in deciding whether to require corroborating testimony under Article 1702B(2), we note that the authority to require corroborating testimony may be particularly useful here, where the trial court found the plaintiff not credible, a corroborating "affidavit" is not an affidavit, the other affidavit lacks information necessary to verify that it was notarized, and the trial court suggested that medical testimony was necessary to establish causation.[6] On remand the trial court can consider and weigh all of the admissible evidence and determine whether to require additional testimony. Moreover, without the trial court's determination of whether it will order additional testimony, we cannot conclude that this court has before it a complete record upon which to conduct *de novo* review and base a decision. *See Chambers v. Village of Moreauville*, 11-898 (La. 1/24/12), 85 So. 3d 593, 597 (stating that when a legal error interdicts the fact finding process, de novo review should be undertaken *if the record is otherwise complete.*) Accordingly, this matter is remanded.[7]

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[6] Louisiana Code of Civil Procedure article 1702D allows a sworn narrative report of the treating physician to be offered in evidence in a suit for personal injuries and in lieu of oral testimony. No such sworn narrative reports were presented to the trial court in this case.

[7] We also note that the appellate record does not contain evidence necessary for this court to independently confirm Gorman's assertion of personal service of this suit on the defendants. It is well settled that a default judgment may not be taken against a person who has not received

CONCLUSION

This court's prior decision in *State Through Dept. of Social Services v. R.H.*, 93-2312 (La. App. 1 Cir. 10/7/94), 644 So. 2d 853, is overruled insofar as it found that a trial court is authorized to *sua sponte* dismiss a plaintiff's suit for failure of the plaintiff to meet his burden of proof to confirm a preliminary default judgment. The trial court's judgment, dismissing Gorman's suit with prejudice, is reversed. This matter is remanded to the trial court for further proceedings consistent with the views expressed herein. Costs of this appeal shall await final disposition in this matter.

REVERSED AND REMANDED.

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citation and service thereof. *Mitchell v. Bass*, 01-2217 (La. App. 1 Cir. 11/8/02), 835 So. 2d 778, 780. In order for a default judgment to be valid, the court must have jurisdiction over the parties, which is based upon service of process on the defendants. La. Code Civ. Pro. art. 6; *Mitchell*, 835 So. 2d at 780. Although subpoenas, notices, and returns may be omitted from the appellate record *unless they are at issue*, and there is no requirement that the citation and return of the sheriff be formally offered into evidence to confirm a preliminary default judgment, we are also mindful that a judgment rendered in a case wherein the trial record does not evidence service of process on the defendants is null. *See Stout v. Henderson*, 102 So. 193 (1924); *Mitchell*, 835 So. 2d at 780; Uniform Rules – Courts of Appeal, Rule 2-1.11 We are reluctant to perform a *de novo* review that could result in this court rendering a judgment that, without any evidence in the record of service of process on the defendants, could be null.

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2012 CA 0412

THOMAS GORMAN

VERSUS

LIEUTENANT AUSTIN, DEPUTY ANDREW, DEPUTY TOM REDMAN AND DEPUTY ROBERT REDMAN

GUIDRY, J., concurs in part and dissents in part and assigns reasons.

GUIDRY, J., concurring in part and dissenting in part.

While I agree, for the reasons explained herein, with the majority's decision to reverse the trial court's judgment, I believe the majority errs in remanding this matter back to the trial court. Because the record before us is complete, proper appellate review dictates that this court should render judgment pursuant to a *de novo* review of the record before us. See Ferrell v. Fireman's Fund Insurance Co., 94-1252, p. 4 (La. 2/20/95), 650 So. 2d 742, 745. The majority justifies its action of remanding this matter by pointing out that credibility determinations are the province of the trial court; however, it fails to appreciate the fact that the trial court in this matter exercised that authority in this case and thereby expressly found that (1) the plaintiff was not credible and (2) the evidence was insufficient to establish a prima facie case. As a result of that determination by the trial court, the proper function of this court is to exercise our constitutional authority of *de novo* appellate review.

Moreover, the majority's reliance on La. C.C.P. art. 1702(B)(2) to justify remand of this matter is equally improper. That article grants the trial court

discretion to "require additional evidence in the form of oral testimony ***before*** entering judgment." (Emphasis added.) The majority states that the trial court "intimated that corroboration with oral testimony was necessary." However, the fact remains that while the trial court could have chosen to require additional oral testimony before entering judgment, it did not do so.

The majority additionally attempts to justify remand of this matter by *sua sponte* observing in a footnote that "[w]e are reluctant to perform a *de novo* review that could result in this court rendering a judgment that, without any evidence in the record of service of process on the defendants, could be null." Rule 2-1.11 of the Uniform Rules for the Louisiana Courts of Appeal states that "[s]ubpoenas, notices, and returns may be omitted from the record, unless they are at issue. Such items *may* be supplied *upon timely application* to this court *by any party*, upon showing their materiality." (Emphasis added.) See also Stout v. Henderson, 157 La. 169, 171, 102 So. 193 (1924) (wherein the court found "[t]here is no law requiring that, in confirming a default, the citation and the return of the sheriff thereon should be formally offered in evidence."); Richard v. Tri-J Industrial Construction, Inc., 478 So. 2d 215, 216 (La. App. 3d Cir. 1985)(wherein the court held "[n]either article 1701 nor article 1702 requires a trial judge to independently verify the preliminary default at the confirmation proceeding.")

A failure to serve the defendants with citation in this case would render the preliminary default defective and any subsequent judgment rendered against the defendants an absolute nullity. However, because there is no proof, or even an allegation, of a lack of service in the record before us, the majority should not abdicate its responsibilities based on mere speculation. In Corte v. Cash Technologies, Inc., 02-0846, p. 7 (La. App. 1st. Cir. 4/2/03), 843 So. 2d 1162, 1166, this court observed that "the jurisprudence appropriately directs that we do not address whether service was validly effected." Therefore, I respectfully dissent

from the majority's remand of this matter to the trial court in clear repudiation of the long-standing and well-established standards of appellate review.

Finally, as to the merits of the appeal, I would additionally point out that the purpose of our law with regard to judgments by default is not to coerce defendants into answering suits, but only to provide a method by which plaintiffs may obtain, when defendants do not answer, such relief as they may be actually entitled to. Russo v. Aucoin, 7 So. 2d 744, 750 (La. App. 1st Cir. 1942). I believe the excluded evidence of Whitstone's affidavit and Gorman's certified medical records were corroborating evidence that Gorman needed to establish a prima facie case for the claims asserted in his petition. A *de novo* review of Gorman's testimony of an unprovoked and unwarranted physical attack by the defendants, which testimony was corroborated by the medical evidence, photos, and affidavit offered into evidence by Gorman, reveals that Gorman established a prima facie case entitling him to confirmation of the default judgment. Thus, for these reasons, I find that the trial court's judgment failing to confirm the default judgment should not only be reversed, but that on *de novo* review, this court should render judgment confirming the default judgment and award damages in favor of the plaintiff.

For these reasons, I respectfully concur in part and dissent in part from the majority opinion in this matter.

THOMAS GORMAN	**FIRST CIRCUIT**
VERSUS	**COURT OF APPEAL**
LIEUTENANT AUSTIN, DEPUTY ANDREW, DEPUTY TOM REDMAN, AND DEPUTY ROBERT REDMAN	**STATE OF LOUISIANA**
	NO. 2012 CA 0412

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KUHN, J., concurring in part and dissenting in part.

I dissent from the proposition posed by the majority that a remand is necessary in this case to achieve "justice." The plaintiff has filed a suit for damages and a claim under 42 U.S.C. §1983. The suit was unanswered, yet the trial court dismissed the suit following a rigorous cross-examination by the trial court itself. When the plaintiff appealed, he was met by a rule to show cause issued by this Court asking him to show cause why his appeal should not be dismissed. As of this date, this Court has neither disposed of the show cause nor offered any explanation for its issuance.

In dismissing the suit on the offer of proof made by the plaintiff, the trial court refused to accept evidence it was required to accept under La. C.C.P. art. 1702(B)(2), which states that "the testimony of the plaintiff with corroborating evidence, which may be by affidavits ... which contain facts sufficient to establish a prima facie case, **shall be admissible, self-authenticating, and sufficient proof of such demand.**" (Emphasis added.) The majority now suggests that the trial court may decide on remand to require additional "corroboration through oral testimony" before confirming the default. This suggestion likewise ignores the above-quoted language of Article 1702(B)(2).

Our standard of review initially is one of legal error, which the majority recognizes. However, the majority ignores the longstanding rule of *de novo* review following a finding of legal error, choosing to disregard a multitude of cases that address that concept, ostensibly in an attempt to "do justice."

Interestingly, the majority goes on to suggest as an alternate basis for remand that there was no proof of service. This suggestion ignores the trial court record and the information provided to this Court by the district court clerk's office, as well as the Uniform Rules of the Courts of Appeal.

Defendants failed to make any appearance in the trial court. At the confirmation hearing, the plaintiff testified that, while incarcerated in jail, he was severely beaten and repeatedly tazed by defendants without provocation. No evidence was presented in opposition to this testimony. In support of his testimony, the plaintiff attempted to introduce the affidavit of Jason Whitstone, who was incarcerated in the adjacent jail cell at the time of the incident. To establish his injuries, the plaintiff also offered certified medical records, including emergency rooms records dated the day of his release from jail, which showed that he suffered a concussion, a broken right hand, multiple abrasions on his upper arm consistent with taser marks, swelling to his left thigh, and numerous bruises to his back, chest, ribs, left thigh, lower legs and right forearm. When the trial court refused to admit these exhibits, the plaintiff proffered them into the record. I concur with the majority's conclusion that the trial court erred in excluding these exhibits.

Following the confirmation hearing, the trial court not only refused to confirm the preliminary default, but also denied the request of plaintiff's counsel to withdraw the preliminary default from the record. The trial court on its own motion then dismissed the plaintiff's suit with prejudice. In rendering judgment, the trial court emphasized the supposed lack of corroborating evidence, as follows:

> BY THE COURT: ... I'm having grave difficulty in accepting this version of events outlined by [Mr. Gorman], and you had ample opportunity to bring some other witnesses here. Medical testimony - - **I have no medical testimony to proceed on**. Mr. Gorman's parents could have come here today to testify. They could have corroborated some of what he's saying, but **basically you're asking me to proceed on faith**, and I'm having a little bit of difficulty trying to understand

> how someone of Mr. Gorman's size – which he's average size, probably five ten and a hundred fifty or sixty pounds – is going to withstand the onslaught of five deputies, being tased four times, multiple mace. I'm just having some difficulty with that.
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> BY THE COURT: Well, I'm finding that you lose, that the evidence is not such that I can conclude more probably than not that all of this happened, that it happened the way it was described by your client. **I don't have any medical evidence** to try to get some idea of what the damages might be, what the long term care may be, what the medical expenses may be or any of those things, so I can't rule in your favor. [Emphasis added.]

It is ironic that the trial court's rejection of the plaintiff's account of events was based primarily on the supposed lack of corroborating evidence when it was the trial court that erroneously excluded the corroborating evidence that the plaintiff offered.

It is well-established that when the trial court commits prejudicial legal error, such as the erroneous exclusion of evidence that occurred in this case, the fact-finding process is interdicted and, if the record is otherwise complete, the reviewing court should make an independent *de novo* review of the record in order to render judgment on the merits, rather than remanding to the trial court. ***Campo v. Correa,*** 01-2707 (La. 6/21/02), 828 So.2d 502, 510; ***Ferrell***, 650 So.2d at 747; ***Rosell v. ESCO***, 549 So.2d 840, 844 n.2 (La. 1989); ***McLean v. Hunter,*** 495 So.2d 1298 (La. 1986); ***Ragas v. Argonaut Southwest Insurance Co.***, 388 So.2d 707, 708 (La. 1980); ***Gonzales v. Xerox Corporation***, 320 So.2d 163, 165 (La. 1975); ***Hebert v. ANCO Insulation, Inc.***, 00-1929 (La. App. 1st Cir. 7/31/02), writs denied, 02-2956, 02-2959 (La. 2/21/03), 837 So.2d 629; ***Holliday v. Holliday***, 00-0533 (La. App. 1st Cir. 8/17/01), 795 So.2d 423, 429; ***Noveh v. Broadway, Inc.,*** 95-2081 (La. App. 1st Cir. 5/10/96), 673 So.2d 349, 353, writ denied, 96-1431 (La. 9/13/96), 679 So.2d 109; ***Hoyt v. Wood/Chuck Chipper Corporation***, 92-1498 (La. App. 1st Cir. 1/6/95), 651 So.2d 1344, 1349, writ denied, 95-0753 (La. 5/19/95),

654 So.2d 695; ***Smith v. Smith***, 615 So.2d 926, 932 (La. App. 1st Cir.), writ denied, 617 So.2d 916 (La. 1993). In explaining this rule, our Supreme Court observed that, in addition to the constitutional authority of courts of appeal to review law and facts, there also is the practical consideration that judicial economy is best served by a prompt decision on the merits rather than a remand to the trial court when the appellate record is otherwise complete. ***Ragas***, 388 So.2d at 708; ***Gonzales***, 320 So.2d at 165-66. A *de novo* review serves to minimize the harm of the trial court's error by allowing resolution of the matter on appeal without the delay, effort and expense inherent in remand. See ***Ragas***, 388 So.2d at 708; ***Gonzales***, 320 So.2d at 166.

In the instant case, despite the prejudicial legal error committed by the trial court in excluding several of the plaintiff's exhibits, the majority has elected not to conduct a *de novo* review. Instead, the majority is remanding this matter to the trial court, which has already demonstrated its unwillingness to accord the proper weight due under Article 1702(B)(2) to the evidence offered by the plaintiff at the confirmation hearing. The effect of the majority's action is to tacitly overrule the long line of jurisprudence, including the cases cited herein, which clearly require a *de novo* review under the circumstances present.

The record in this case is complete since the plaintiff proffered the erroneously excluded exhibits. Nevertheless, as justification to remand this matter rather than performing its duty to conduct a *de novo* review, the majority cites the broad principle that in limited circumstances, "when necessary to reach a just decision and to prevent a miscarriage of justice, an appellate court should remand the case to the trial court under the authority of Code of Civil Procedure article 2164, rather than undertaking a *de novo* review." Yet, the majority has cited no circumstances explaining how a *de novo* review would result in a miscarriage of justice in this particular case. Rather, the majority suggests that a remand is

justified, despite the complete record before us, due to the trial court's apparent conclusion that the plaintiff's testimony was not credible, as well as the ***possibility*** the trial court ***could*** decide to require additional corroboration from the plaintiff in the form of oral testimony pursuant to La. C.C.P. art. 1702(B). Incredibly, the majority's position disregards the fact that the trial court's reasons clearly demonstrate that its refusal to accept the plaintiff's testimony was based primarily on the lack of corroborating evidence, which ironically was provided in the very documents that the trial court erroneously excluded. Accordingly, it is farcical to accord any weight to the trial court's purported credibility determination.

Further, the cases cited by the majority as authority for a remand are distinguishable on their facts from the present case. In ***Alex v. Rayne Concrete Service***, 05-1457 (La. 1/26/07), 951 So.2d 138 the trial court erroneously granted a peremptory challenge of a juror over a ***Batson/Edmonson***[1] objection, which constituted a structural error. Under those peculiar circumstances, the Supreme Court held the interests of judicial economy must yield to the greater legal principles involved. Specifically, the Supreme Court concluded a remand was warranted because of the impact the structural error had not only on the parties, but also on the improperly excluded juror and our system of justice. ***Alex***, 951 So.2d at 155-56. No such structural error occurred in the instant case.

In ***Wegener v. Lafayette Insurance Company***, 10-0810 (La. 3/15/11), 60 So.3d 1220, 1234, the Supreme Court remanded the case for a new trial based on the specific facts and circumstances of that case, as well as the particular legal issues involved. The Supreme Court held that first-hand observation of the opposing witnesses was necessary because there were multiple issues which were greatly affected by the respective credibility of the witnesses. In contrast, there

[1] ***Batson v. Kentucky***, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986); ***Edmonson v. Leesville Concrete Company, Inc.***, 500 U.S. 614, 111 S.Ct. 2077, 114 L.Ed.2d 660 (1991).

was no opposing or conflicting evidence at issue in the instant case. No evidence whatsoever was introduced challenging the plaintiff's testimony nor did any other witnesses testify at the confirmation hearing. Therefore, unlike ***Wegener***, the facts of the present case do not warrant a remand to allow the first-hand observation of opposing witnesses.

With respect to the majority's further rationale that the trial court ***could*** elect upon remand to require additional oral testimony under La. C.C.P. art. 1702(B)(2), it should be noted that the trial court had the opportunity to order such testimony before rendering judgment in this matter, and it elected not to do so. Particularly in view of this fact, the majority's rationale constitutes mere speculation. Moreover, to give validity to this rationale would require remand in all confirmation cases where prejudicial legal error occurs, since the possibility will always exist that the trial court ***could*** decide on remand to require additional oral testimony under Article 1702(B)(2). In any event, once a determination was made that the trial court had committed prejudicial legal error, the issue before this Court was not whether or not the trial court might decide to require additional oral testimony on remand, but whether the plaintiff established a *prima facie* case supporting his claim.

Finally, as previously noted, the majority also sets forth as additional justification for a remand the assertion that it could not "independently confirm" that service was made on defendant because the appellate record contains no evidence of service. In doing so, the majority failed to explain why it was necessary to "independently confirm" that service was made, given that Uniform Rules, Court of Appeal, Rule 2-1.11 does not require that returns be included in an appellate record when they are not at issue. In this case, no issue was raised concerning service, either in the trial court or in this Court. Hence, the issue of service is not properly before this Court in the instant appeal since it was not raised

by any of the parties.[2] See ***Corte v. Cash Technologies, Inc.***, 02-0846 (La. App. 1st Cir. 4/2/03), 843 So.2d 1162, 1166. Even more significantly, the majority ignores the fact that the East Feliciana Parish Clerk of Court 's Office has provided this Court with documentation verifying personal service of the suit on defendants.

The majority's claim that a remand is just, legal, and proper under La. C.C.P. art. 2164 is unfounded. It is not justice for this Court to raise an issue on its own concerning service, without giving the plaintiff any opportunity to address that issue or supplement the record, given that the uniform rules do not require returns to be included in the appellate record when service is not at issue. It is not justice for the majority to ignore well-established jurisprudence from the Supreme Court and this Court in order to remand this case to a trial court rather than to perform its duty to conduct a *de novo* review of the complete record before us. It is not justice to remand this case to the trial court without restriction, which will allow defendants an opportunity to answer this suit and present evidence at this late juncture, especially since defendants repeatedly have failed to avail themselves at the proper time of numerous opportunities to answer the plaintiff's claims and present opposing evidence.[3] The majority's refusal to conduct a *de novo* review of the record and render a judgment on the merits when it is clearly required to do so by well-established jurisprudence is a miscarriage of justice. For these reasons, I dissent from the majority's remand.

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[2] The Supreme Court has held that when an appellate court on its own motion raises an issue that was not briefed, the parties should be given an opportunity to be heard on the issue by briefing. ***Merrill v. Greyhound Lines, Inc.***, 10-2827 (La. 4/29/11), 60 So.3d 600, 602. The plaintiff has been given no such opportunity in this case, despite the fact that the majority relies at least in part on the lack of service information in the record as justification for its decision to remand this matter.

[3] Not only did defendants fail to appear in the trial court, they also failed to make any appearance in this appeal. Specifically, defendants failed to file an appellees' brief or appear for oral argument. Further, when this matter was assigned to a five-judge panel for hearing, defendants neither filed a brief nor appeared for oral argument. Again, when this matter was set for an *en banc* hearing, defendants neither filed a brief nor appeared for oral argument. Delivery of the various docketing notices sent to defendants by this Court was refused and those notices were returned to this Court marked "Return to Sender."