Affirm in part, Reverse in part, and Remand; Opinion Filed April 1, 2021

In the
Court of Appeals
Fifth District of Texas at Dallas

No. 05-20-00503-CV

MARCELA GUARDIOLA, Appellant
V.
SANOBER MOOSA, Appellee

On Appeal from the 219th Judicial District Court
Collin County, Texas
Trial Court Cause No. 219-05810-2019

MEMORANDUM OPINION

Before Justices Myers, Osborne, and Carlyle
Opinion by Justice Carlyle

In this restricted appeal, appellant Marcela Guardiola challenges a no-answer default judgment against her in a personal injury case arising from a car accident. In five issues, she asserts error regarding compliance with return-of-service rules and insufficient evidence of damages. We affirm in part and reverse in part in this memorandum opinion. *See* TEX. R. APP. P. 47.4.

BACKGROUND

Following the underlying accident, appellee Sanober Moosa filed this lawsuit against Ms. Guardiola and Fidel Orozco. The October 16, 2019 live petition, an 18-

page document titled "Original Petition for Bill of Review and Request for Disclosure,"[1] alleged in part:

> Marcela Guardiola was the lawful owner of the vehicle which struck Plaintiff and as such owed the duty to assure that said vehicle was not entrusted to reckless drivers or known alcoholics. Marcela Guardiola was negligent and grossly negligent in entrusting her vehicle to Fidel G. Orozco when she knew or should have known that Fidel G. Orozco had been consuming alcohol, was intoxicated and/or acting in a reckless manner and had prior convictions for DWI. Such negligence was a proximate cause of the collision in question.

Ms. Moosa's petition asserted she "sustained severe bodily injuries" in the collision, including "physical pain and mental anguish," and required medical treatment. Though Ms. Guardiola was served with the citation and petition in October 2019, she did not file an answer.

In December 2019, Ms. Moosa moved for default judgment and filed "affidavits of medical and billing records." At the January 8, 2020 prove-up hearing, she abandoned her claims against Mr. Orozco and testified regarding her damages. On that same date, the trial court signed a judgment awarding her damages of $49,000 against Ms. Guardiola, including $20,000 for "physical pain and mental anguish in the past"; $10,000 for "past physical impairment"; $9,000 for "past medical expenses"; and $10,000 in punitive damages. Ms. Guardiola timely filed this restricted appeal on April 30, 2020.

[1] The record shows the trial court dismissed a previously-filed case arising from the same accident on June 8, 2018, but Ms. Moosa did not receive notice of that dismissal until all deadlines for pursuing reinstatement or appeal had expired.

ANALYSIS

A restricted appeal is a direct attack on the trial court's judgment that affords an appellant the same scope of review as an ordinary appeal, that is, review of the entire case. *E.g.*, *Cate v. Posey*, No. 05-17-01216-CV, 2018 WL 6322170, at *1 (Tex. App.—Dallas Dec. 4, 2018, no pet.) (mem. op.) (citing *Gunn v. Cavanaugh*, 391 S.W.2d 723, 724 (Tex. 1965)). In a restricted appeal, a party must satisfy four elements to obtain reversal of the underlying judgment: (1) a notice of the restricted appeal must be filed within six months after the date of the judgment; (2) by a party to the suit; (3) who did not participate in the hearing that resulted in the judgment complained of and did not timely file any post-judgment motions or requests for findings of fact and conclusions of law; and (4) error must be apparent on the face of the record. TEX. R. APP. P. 26.1(c), 30; *Ins. Co. of State of Pa. v. Lejeune*, 297 S.W.3d 254, 255 (Tex. 2009) (per curiam). The face of the record for purposes of a restricted appeal review consists of all papers filed in the appeal, including the reporter's record. *Norman Commc'ns v. Tex. Eastman Co*., 955 S.W.2d 269, 270 (Tex. 1997) (per curiam). Ms. Guardiola is entitled to review by restricted appeal, and the parties dispute only whether error is apparent on the face of the record.

Return of service

"Strict compliance with the rules governing service of citation is mandatory if a default judgment is to withstand an attack on appeal." *Lejeune*, 297 S.W.3d at 256. "In contrast to the usual rule that all presumptions will be made in support of a

judgment, there are no presumptions of valid issuance, service, and return of citation when examining a default judgment." *Barker CATV Constr., Inc. v. Ampro, Inc.*, 989 S.W.2d 789, 792 (Tex. App.—Houston [1st Dist.] 1999, no pet.). Failure to comply strictly with the rules of civil procedure constitutes reversible error on the face of the record. *Lejeune*, 297 S.W.3d at 256. Whether service or return of citation strictly complies with the rules is a question of law we review de novo. *Martell v. Tex. Concrete Enter. Readymix, Inc.*, 595 S.W.3d 279, 282 (Tex. App.—Houston [14th Dist.] 2020, no pet.).

The person executing a citation must complete a return of service, which may, but need not, be endorsed on or attached to the citation. TEX. R. CIV. P. 107(a). The return, together with any document to which it is attached, must include, among other things, "a description of what was served." *Id*. 107(b)(3). The return and any document to which it is attached must be filed with the trial court. *Id*. 107(g).

In her second issue, Ms. Guardiola contends the return of service is "defective on its face" because it does not "properly identify what was served" and "state the date it was filed." We disagree with both contentions.

The return of service states Ms. Guardiola was served with "a true copy of the Citation and Original Petition for Bill of Review and Request for Disclosure." According to Ms. Guardiola, Ms. Moosa "also served 'Plaintiff's Interrogatories, Requests for Production and Requests for Admission to Defendants,'" which the

return of service "mistakenly omitted." Ms. Guardiola contends "[t]his mistake is fatal and its effect is to make the default judgment void."

The record shows that pages 7–18 of the 18-page "Original Petition for Bill of Review and Request for Disclosure" comprise the "Plaintiff's Interrogatories, Requests for Production and Requests for Admission to Defendants" Ms. Guardiola describes. Each of the 18 pages bears a footer stating "Original Petition for Bill of Review and Request for Disclosure" and the applicable page number. On this record, we conclude the return clearly and accurately identified "what was served." *See* TEX. R. CIV. P. 107(b)(3); *see also Cate*, 2018 WL 6322170, at *2 ("Strict compliance [with rule 107] does not require obeisance to the minutest detail.").

Ms. Guardiola also asserts "the record in this case does not reveal when the return was filed," which "is insufficient under Tex. R. Civil P. 107 and makes the default judgment rendered against Appellant void." The "Affidavit of Service" in the record is a 2-page document. The first page is the citation and the second page is the return of service. *See* TEX. R. CIV. P. 107(a) (return may be attached to citation). The first page of that 2-page document is filed-stamped with the filing date of November 7, 2019. Thus, the record shows when the return was filed. *See id*. 107(g) ("The return and any document to which it is attached must be filed with the court . . . ."). We decide against Ms. Guardiola on her second issue.

Sufficiency of the evidence to support damages

The absence of legally or factually sufficient evidence to support a judgment is reviewable in a restricted appeal as error apparent on the face of the record. *Tex. Dep't of Pub. Safety v. T.R.W.*, No. 14-17-00572-CV, 2019 WL 3724707, at *2 (Tex. App.—Houston [14th Dist.] Aug. 8, 2019, no pet.) (mem. op.) (citing *Norman Commc'ns*, 955 S.W.2d at 270). We will sustain a legal sufficiency or "no evidence" challenge if the record shows one of the following: (1) a complete absence of a vital fact; (2) rules of law or evidence bar the court from giving weight to the only evidence offered to prove a vital fact; (3) the evidence offered to prove a vital fact is no more than a scintilla; or (4) the evidence establishes conclusively the opposite of the vital fact. *City of Keller v. Wilson*, 168 S.W.3d 802, 810 (Tex. 2005). We consider the evidence in the light most favorable to the judgment and indulge every reasonable inference that supports it. *See id*. at 821–22.

When a default judgment is taken on an unliquidated claim, all allegations of fact in the petition are deemed admitted, except the amount of damages. *Holt Atherton Indus., Inc. v. Heine*, 835 S.W.2d 80, 83 (Tex. 1992); *Morgan v. Compugraphic Corp*., 675 S.W.2d 729, 731 (Tex. 1984). Thus, if the facts set out in the petition allege a cause of action, a default judgment conclusively establishes the defendant's liability. *Morgan*, 675 S.W.2d at 731; *accord Paradigm Oil, Inc. v. Retamco Operating, Inc*., 372 S.W.3d 177, 183 (Tex. 2012) ("[T]he non-answering party in a no-answer default judgment is said to have admitted both the truth of facts

set out in the petition and the defendant's liability on any cause of action properly alleged by those facts."). The plaintiff must prove by competent evidence the amount of unliquidated damages. *Morgan*, 675 S.W.2d at 732; TEX. R. CIV. P. 243; *see also Sumah v. Rodriquez*, No. 01-15-00813-CV, 2016 WL 4055585, at *3 n.1 (Tex. App.—Houston [1st Dist.] July 28, 2016, no pet.) (mem. op.) ("Damages are unliquidated when they cannot be accurately calculated from the factual allegations in the petition or any written instruments in the record."). "[W]hen an appellate court sustains a no evidence point after an uncontested hearing on unliquidated damages following a no-answer default judgment, the appropriate disposition is a remand for a new trial on the issue of unliquidated damages." *Cate*, 2018 WL 6322170, at *4 (quoting *Holt Atherton Indus*., 835 S.W.2d at 86).

An award for mental anguish damages must be supported either by direct evidence of the nature, duration, and severity of the plaintiff's mental anguish, thereby establishing a substantial interruption in the plaintiff's daily routine, or by circumstantial evidence of "a high degree of mental pain and distress" that is "more than mere worry, anxiety, vexation, embarrassment, or anger." *Parkway Co. v. Woodruff*, 901 S.W.2d 434, 444 (Tex. 1995). Further, "some types of disturbing or shocking injuries have been found sufficient to support an inference that the injury was accompanied by mental anguish." *Fifth Club, Inc. v. Ramirez*, 196 S.W.3d 788, 797 (Tex. 2006) (quoting *Parkway*, 901 S.W.2d at 445). "Where serious bodily injury is inflicted, . . . we know that some degree of physical and mental suffering is

the necessary result." *City of Tyler v. Likes*, 962 S.W.2d 489, 495 (Tex. 1997) (quoting *Brown v. Sullivan*, 10 S.W. 288, 290 (1888)).

In order to recover for physical impairment, a plaintiff must show that the effect of the physical impairment is substantial and extends beyond any pain, suffering, mental anguish, lost wages, or earning capacity. *Golden Eagle Archery, Inc. v. Jackson*, 116 S.W.3d 757, 772 (Tex. 2003). Damages for physical impairment are meant to compensate a plaintiff for an impairment of the capacity to enjoy life. *Day v. Domin*, No. 05-14-00467-CV, 2015 WL 1743153, at *2 (Tex. App.—Dallas Apr. 16, 2015, no pet.) (mem. op.).

Exemplary, or punitive, damages may be awarded if the claimant proves by clear and convincing evidence that the harm with respect to which the claimant seeks recovery of such damages results from gross negligence. TEX. CIV. PRAC. & REM. CODE § 41.003(a). "Gross negligence" means "an act or omission: (A) which when viewed objectively from the standpoint of the actor at the time of its occurrence involves an extreme degree of risk, considering the probability and magnitude of the potential harm to others; and (B) of which the actor has actual, subjective awareness of the risk involved, but nevertheless proceeds with conscious indifference to the rights, safety, or welfare of others." *Id*. § 41.001(11).

Because entitlement to exemplary damages must be established by clear and convincing evidence, we apply an elevated standard of review. *See Sw. Bell Tel. Co. v. Garza*, 164 S.W.3d 607, 627 (Tex. 2004); *Suarez v. Fernandez*, No. 05-18-00921-

CV, 2019 WL 1922732, at *4 (Tex. App.—Dallas Apr. 30, 2019, no pet.) (mem. op.). Clear and convincing evidence is that "measure or degree of proof that will produce in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established." TEX. CIV. PRAC. & REM. CODE § 41.001(2). This intermediate standard falls between the preponderance standard of civil proceedings and the reasonable doubt standard of criminal proceedings. *In re G.M.*, 596 S.W.2d 846, 847 (Tex. 1980); *State v. Addington*, 588 S.W.2d 569, 570 (Tex. 1979) (per curiam).

In her third through fifth issues, Ms. Guardiola asserts there is error on the face of the record because the evidence is insufficient to support the "past physical pain and mental anguish" damages, past physical impairment damages, and exemplary damages awarded.[2] We address these damage categories in turn.

Ms. Guardiola asserts in her third issue that "there was no evidence, either direct or circumstantial," to support the mental anguish damages awarded. She contends the entire $20,000 award for "physical pain and mental anguish in the past" must thus be reversed "because there is no evidence of past mental anguish and it is

[2] Though Ms. Guardiola purports to challenge both the legal and factual sufficiency of the evidence on appeal, her arguments and analysis address only legal sufficiency. For this reason, any intended factual-sufficiency challenge presents nothing for this Court's review. *See MEI Invs., L.P. v. Dallas Cty.*, No. 05-18-00217-CV, 2019 WL 1449787, at *3 n.3 (Tex. App.—Dallas Apr. 2, 2019, no pet.) (mem. op.); *Lowry v. Tarbox*, 537 S.W.3d 599, 614 (Tex. App.—San Antonio 2017, pet. denied); TEX. R. APP. P. 38.1(i).

impossible to separate how much of the $20,000 was awarded for past physical pain and how much was awarded for past mental anguish."[3]

At the prove-up hearing, Ms. Moosa testified:

> Q. All right. Now, as an approximate result of this car wreck, did you suffer injuries and legal damages?
> A. My car was totaled and I—physically I didn't, like, I didn't—I got bruises but I was not cut or no blood had come out; but I had injury at the back and my head was hurting for quite some time. I went for physiotherapy and all that, and I had the pain for almost two years; but then I did exercise and all that and I was—it's good now. I'm good.
> Q. So how long did you suffer from physical injuries that you sustained in this car wreck?
> A. Almost two years.
> . . . .
> Q. And describe for the Court where you suffered physically? Where your injuries were?
> A. On the back, lower back, and then because of the concussion, my neck was also hurting and my head was hurting a little bit.

Ms. Moosa also filed billing affidavits that detailed her medical treatment. We conclude the evidence in the record supports an inference of mental anguish. *See Fifth Club*, 196 S.W.3d at 797; *Likes*, 962 S.W.2d at 495. Thus, we reject Ms. Guardiola's sufficiency challenge regarding the damages awarded for "past physical pain and mental anguish."

In her fourth issue, Ms. Guardiola challenges the sufficiency of the evidence to support the damages awarded for past physical impairment. According to Ms. Guardiola, there is no evidence of impairment in the record and thus Ms. Moosa

[3] Ms. Guardiola does not challenge the sufficiency of the evidence regarding the damages awarded for past physical pain.

failed to meet her burden to "show that she suffered past impairment that is separate from her past pain and suffering."

As described above, Ms. Moosa testified that during the two years she suffered from her injuries, she "went for physiotherapy and all that" and "did exercise and all that." This constitutes some evidence that the effect of her physical impairment was substantial and extended beyond her pain and suffering. *See Golden Eagle Archery*, 116 S.W.3d at 772. We disagree with Ms. Guardiola's contention that no evidence supports the past physical impairment damages awarded.

In her fifth issue, Ms. Guardiola challenges the award of exemplary damages. She contends "there is no evidence at all of Appellant's subjective awareness in the record" and thus subjective awareness was not "proved by a clear and convincing standard" as required.

Ms. Moosa argues "there was sufficient evidence that Appellee was the victim of a drunk driver, that Appellant had loaned her vehicle to the drunk driver knowing he was drunk, that he had two prior convictions for DWI, that a warrant was out for his arrest and that he was on the run from law enforcement."[4] Specifically, Ms. Moosa asserts Ms. Guardiola "admitted the allegations of liability in the petition by failing to timely file an answer." Ms. Moosa also asserts that "[a]t the default prove-up hearing, the liability of Appellant was discussed thusly":

[4] To the extent it is relevant, the only evidence supporting the warrant or Mr. Orozco's "on-the-run" status was a leading question from counsel during the default hearing and Ms. Moosa's agreement with the question.

> And just summarizing some of the allegations that have been admitted by the default in our petition here, Ms. Guardiola admits to being the lawful owner of the vehicle. That she entrusted it to a known reckless alcoholic driver. And that she was grossly negligent in entrusting her vehicle to Mr. Orozco. That she knew that Orozco had been consuming alcohol and was intoxicated on the date in question, and that plaintiff sustained severe bodily injuries as a result of that.

But these statements were assertions by Ms. Moosa's counsel at the hearing, not evidence. And while a defendant's failure to file an answer operates as an admission of the material facts alleged in the petition, the petition here stated only that "Marcela Guardiola was negligent and grossly negligent in entrusting her vehicle to Fidel G. Orozco when she knew or should have known that Fidel G. Orozco had been consuming alcohol, was intoxicated and/or acting in a reckless manner and had prior convictions for DWI."

The petition does not allege Ms. Guardiola's "actual, subjective awareness" of the purported danger. *See Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 230 (Tex. 2004) (allegation of gross negligence and facts supporting claim can satisfy Texas notice-pleading standards); *City of Houston v. Harris*, 192 S.W.3d 167, 175 (Tex. App.—Houston [14th Dist.] 2006, no pet.); *see also Cowboys Concert Hall-Arlington, Inc. v. Jones*, No. 02-12-00518-CV, 2014 WL 1713472, at *14 (Tex. App.—Fort Worth May 1, 2014, pet. denied) (mem. op.) (mental component of gross negligence "may be shown indirectly through conduct") (citing *Wal-Mart Stores, Inc. v. Alexander*, 868 S.W.2d 322, 326 (Tex. 1993); *Burk Royalty Co. v. Walls*, 616 S.W.2d 911, 922 (Tex. 1981)). Though the exact words—"actual, subjective

awareness"—may not be necessary, and though we need not agree there is "no evidence at all" of "actual, subjective awareness," the conduct alleged in the petition fails to clearly and convincingly demonstrate Ms. Guardiola's actual, subjective awareness and the record contains insufficient other evidence regarding Ms. Guardiola's knowledge or conduct. *See* TEX. CIV. PRAC. & REM. CODE §§ 41.001(2), 41.001(11); *In re G.M.*, 596 S.W.2d at 847.

* * *

Thus, we must reverse the trial court's $10,000 exemplary damage award and remand for a new trial on the issue of exemplary damages. *See Holt Atherton Indus.*, 835 S.W.2d at 86; *Cate*, 2018 WL 6322170, at *4. We otherwise affirm the trial court's judgment.

/Cory L. Carlyle/
CORY L. CARLYLE
JUSTICE

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Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

MARCELA GUARDIOLA, Appellant	On Appeal from the 219th Judicial District Court, Collin County, Texas Trial Court Cause No. 219-05810-2019.
No. 05-20-00503-CV V.	Opinion delivered by Justice Carlyle.
SANOBER MOOSA, Appellee	Justices Myers and Osborne participating.

In accordance with this Court's opinion of this date, the judgment of the trial court is **AFFIRMED** in part and **REVERSED** in part. We **REVERSE** that portion of the trial court's judgment awarding appellee Sanober Moosa $10,000.00 in exemplary damages and **REMAND** this case to the trial court for a new trial on the issue of exemplary damages. In all other respects, the trial court's judgment is **AFFIRMED**.

It is **ORDERED** that each party bear its own costs of this appeal.

Judgment entered this 1st day of April, 2021.