Opinion issued March 31, 2011

In The
Court of Appeals
For The
First District of Texas

NO. 01-09-00885-CV

REBECCA VAUGHAN, Appellant

V.

BETTY MEDINA, INDIVIDUALLY AND AS NEXT FRIEND OF MINOR CHILDREN G.T. AND Y.H., Appellee

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On Appeal from County Court at Law Number Three
Fort Bend County, Texas
Trial Court Cause No. 07-CV-033875

MEMORANDUM OPINION

Appellant, Rebecca Vaughan, appeals a default judgment rendered in favor of appellee, Betty Medina, individually and as next friend of her minor children, G.T. and Y.H. In her only issue, Vaughan contends that the failure to have the

court reporter make a record of the trial proceedings below constitutes reversible error because without a reporter's record, the sufficiency of the evidence cannot be reviewed on appeal. We agree. We reverse and remand for a new trial.

Background

One day in late-December 2006, Medina was driving southbound on Highway 6 in Sugar Land, Texas, with her minor children, G.T. and Y.H., riding as passengers. Vaughan drove onto Highway 6 from a private driveway, and the two cars collided, injuring Medina and her children. Medina sued Vaughan for negligence. Vaughan filed an answer containing a general denial and several affirmative defenses.

In its April 21, 2009 final judgment, the trial court found that Vaughan had been duly and timely notified of the trial setting but failed to appear and answer ready for trial. The court further explained that all questions of fact and law had been submitted to it and that Medina had presented her evidence to the trial court. The court found that Vaughan's negligence proximately caused Medina's and her children's injuries. The court awarded Medina and her children $36,500.

On the thirty-seventh day after the trial court entered final judgment, Vaughan filed a motion for new trial, contending that her failure to appear at trial was neither intentional nor the result of conscious indifference. Vaughan explained that her failure to appear was instead the result of confusion caused by a

glitch in her attorney's computer system, which led her attorney to believe the case had been rescheduled. In support of this explanation, Vaughan attached to her motion computer records listing the status of the April 21, 2009 trial setting as "Rescheduled." In her motion, Vaughan admitted receiving notice of the trial court's entry of final judgment on the seventh day after the judgment was signed. Vaughan also asserted that no reporter's record of the proceeding was made.

Medina responded that Vaughan's motion for new trial was not timely filed because it was not filed prior to or within thirty days after the judgment was signed as required by Texas Rule of Civil Procedure 329b. Medina did not dispute that no reporter's record of the proceeding was made.

Five and a half months after the trial court signed the judgment, Vaughan filed in the trial court notice of a restricted appeal to this Court. Vaughan has attached as an appendix to her appellate brief the affidavit of Yvonne Compean, the official court reporter for the trial court. In her affidavit, she explains that she was acting in that capacity on the day of trial; that no party requested a record of the proceedings be reported by her; that no reporter's record of the proceedings exists; and that a reporter's record cannot be produced. In an information sheet to this Court, the trial court reporter confirmed that there is no reporter's record of the proceeding. Medina has filed no appellate brief with this Court.

Failure to Make a Reporter's Record

In her only issue, Vaughan contends that the failure to have the court reporter make a record of the trial proceedings below constitutes reversible error because without a reporter's record, the sufficiency of the evidence cannot be reviewed on appeal

A. Applicable Law

"A restricted appeal is a direct attack on a judgment." *Roventini v. Ocular Sciences, Inc.*, 111 S.W.3d 719, 721 (Tex. App.—Houston [1st Dist.] 2003, no pet.). "In contrast to an ordinary appeal, a direct attack by restricted appeal affords no presumptions in support of the judgment challenged." *Sharif v. Par Tech, Inc.*, 135 S.W.3d 869, 872 (Tex. App.—Houston [1st Dist.] 2004, no pet.). A party may prevail on a restricted appeal only if he establishes:

(1) he was a party to the lawsuit;

(2) he did not participate—either in person or through counsel—in the hearing that resulted in the judgment complained of;

(3) he did not timely file a postjudgment motion or request for findings of fact and conclusions of law;

(4) he did not file a notice of appeal within the time permitted by Texas Rule of Appellate Procedure 26.1(a);

(5) he filed notice of the restricted appeal within six months after the judgment was signed; and

(6) error is apparent on the face of the record.

TEX. R. APP. P. 26.1(c), 30; *Alexander v. Lynda's Boutique*, 134 S.W.3d 845, 848 (Tex. 2004); *Roventini*, 111 S.W.3d at 721. In a restricted appeal, "[t]he face of the record includes all papers on file in the appeal, including the clerk's record and any reporter's record." *Miles v. Peacock*, 229 S.W.3d 384, 387 (Tex. App.—Houston [1st Dist.] 2007, no pet.) (citing *DSC Fin. Corp. v. Moffitt*, 815 S.W.2d 551, 551 (Tex. 1991)). "Because a restricted appeal affords an appellant the same scope of review as an ordinary appeal, he may challenge the legal and factual sufficiency of the evidence." *Miles*, 229 S.W.3d at 387; *see* TEX. R. APP. P. 30; *Norman Commc'ns v. Tex. Eastman Co.*, 955 S.W.2d 269, 270 (Tex. 1997).

If an opposing party timely files an answer, the merits of the claim are put at issue. *Sharif*, 135 S.W.3d at 872. Thereafter, judgment cannot be entered on the pleadings, but the claimant must offer evidence and prove his case as in a judgment upon a trial. *Stoner v. Thompson*, 578 S.W.2d 679, 682 (Tex. 1979); *Sharif*, 135 S.W.3d at 873. If an opposing party who has timely filed an answer fails to appear at trial, he neither abandons his answer nor implicitly confesses any issues joined by his answer. *Stoner*, 578 S.W.2d at 682; *Sharif*, 135 S.W.3d at 872. A judgment rendered in favor of the claimant after the opposing party timely files an answer but fails to appear at trial is a post-answer default judgment. *Stoner*, 578 S.W.2d at 682; *Sharif*, 135 S.W.3d at 873. As to a post-answer default judgment, "the failure to have the court reporter present to make a record constitutes reversible error."

Sharif, 135 S.W.3d at 872 (quoting *Chase Bank v. Harris Cnty. Water Control & Improvement Dist.*, 36 S.W.3d 654, 655 (Tex. App.—Houston [1st Dist.] 2000, no pet.). "Such error is not harmless because, without a reporter's record, this Court is unable to determine if sufficient evidence was submitted to support the judgment." *Id.* (quoting *Chase Bank*, 36 S.W.3d at 655–56).

B. Analysis

The clerk's record establishes that Vaughan was a party to the lawsuit, that she did not participate in the trial proceeding resulting in the final judgment of which she complains, that her motion for new trial was not timely filed within 30 days as required by Texas Rule of Civil Procedure 329b, that she filed neither a postjudgment motion or request for findings of fact and conclusions of law nor any other notice of appeal, and that she filed notice of this restricted appeal within six months after the trial court signed the final judgment. *See* TEX. R. CIV. P. 329b. Accordingly, Vaughan may prevail on this restricted appeal if error is apparent on the face of the record. *See* TEX. R. APP. P. 26.1(c), 30; *Alexander*, 134 S.W.3d at 848; *Roventini*, 111 S.W.3d at 721.

Our record includes an information sheet from the trial court reporter showing that no reporter's record of the proceeding was made. *See Miles*, 229 S.W.3d at 387 (citing *DSC Fin.*, 815 S.W.2d at 551). Furthermore, the clerk's record shows that Vaughan answered and subsequently failed to appear at trial.

See Stoner, 578 S.W.2d at 682; *Miles*, 229 S.W.3d at 387 (citing *DSC Fin.*, 815 S.W.2d at 551); *Sharif*, 135 S.W.3d at 872. Without a reporter's record, this Court is unable to determine if sufficient evidence was submitted to support the judgment. *See Sharif*, 135 S.W.3d at 872 (quoting *Chase Bank*, 36 S.W.3d at 655–56). In this post-answer default judgment, we hold the failure to have the court reporter make a record constitutes reversible error. *See id.*

We sustain Vaughan's only issue.

Conclusion

We reverse and remand for a new trial.

Elsa Alcala
Justice

Panel consists of Chief Justice Radack and Justices Alcala and Bland.