Reversed and Remanded and Opinion filed June 15, 2021.

In The

Fourteenth Court of Appeals

NO. 14-20-00077-CV

MARLON MACK AS REPRESENTATIVE OF THE ESTATE OF MARTHA MACK, Appellant

V.

RETIREMENT HOUSING FOUNDATION, FOUNDATION PROPERTY MANAGEMENT INC., AND HOUSTON RHF HOUSING, INC., Appellees

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On Appeal from the 165th District Court
Harris County, Texas
Trial Court Cause No. 2016-66255

O P I N I O N

Appellant Marlon Mack as representative of the estate of Martha Mack ("Mack") sued appellees Retirement Housing Foundation, Foundation Property Management Inc., and Houston RHF Housing, Inc. (together, "Appellees") for, *inter alia*, wrongful death. The trial court signed an order dismissing Mack's suit for want of prosecution.

Mack filed a motion to reinstate the case, which was denied by operation of law. For the reasons below, we reverse the denial of Mack's motion to reinstate and remand for further proceedings.

BACKGROUND

Mack filed an original petition in September 2016. On October 15, 2019, the trial court signed an order dismissing Mack's case for want of prosecution. In relevant part, the trial court's order states:

> It is hereby ordered that the case referenced below is dismissed for want of prosecution due to [Mack's] failure to appear for trial on October 15, 2019 at 10:30 A.M.

Mack filed a verified "Motion to Reinstate Case on Docket." Therein, Mack's counsel asserted that the failure to appear for trial was not intentional or the result of conscious indifference; rather, Mack's counsel stated that she did not receive notice of the October 15, 2019 trial assignment.

Attached as exhibits to the motion were two emails from the trial court coordinator to counsel regarding the relevant trial docket. The emails were sent on October 11, 2019, and October 14, 2019; both were entitled "RE: 2-Week Trial Docket 10/14/19 UPDATE." In the "To" section of both emails, Mack's counsel's email address was incorrectly listed.[1] In both emails, the trial court coordinator informed the recipients of the dates and times for the following week's trials. Trial in the underlying proceeding was scheduled for October 15, 2019, at 1:30 P.M. There was no email indicating that Mack should appear at 10:30 A.M., the time of the dismissal as stated in the order.

[1] The correct email for Mack's counsel is "Hodgeandbarr@gmail.com". In the October 11, 2019 email, Mack's counsel's email is shown as "Hodgeand". In the October 14, 2019 email, Mack's counsel's email is shown as "barr@gmail.com".

Appellees filed a response in opposition to Mack's motion to reinstate. The trial court held a hearing on the motion to reinstate on January 17, 2020. On February 17, 2020, the trial court signed an order granting Mack's motion. The parties do not dispute that this order was signed after the expiration of the trial court's plenary power. *See* Tex. R. Civ. P. 165a. Therefore, Mack's motion to reinstate was denied by operation of law. Mack timely appealed.

ANALYSIS

In two issues, Mack asserts the trial court abused its discretion by (1) dismissing the case for want of prosecution, and (2) failing to grant Mack's motion to reinstate. Because we agree that the trial court erred in failing to grant Mack's motion to reinstate, we need not consider Mack's first issue. *See, e.g., Gillis v. Harris Cty.*, 554 S.W.3d 188, 193 (Tex. App.—Houston [14th Dist.] 2018, no pet.).

Under Texas Rule of Civil Procedure 165a, "[t]he court shall reinstate the case upon finding after a hearing that the failure of the party or his attorney was not intentional or the result of conscious indifference but was due to an accident or mistake or that the failure has been otherwise reasonably explained." Tex. R. Civ. P. 165a. The burden is on the party seeking reinstatement to "provide some proof of an adequate justification for the failure that negates intent or conscious indifference." *Gillis*, 554 S.W.3d at 194. "Proof of such justification — accident, mistake, or other reasonable explanation — negates the intent or conscious indifference for which reinstatement can be denied." *Smith v. Babcock & Wilcox Constr. Co.*, 913 S.W.2d 467, 468 (Tex. 1995) (per curiam).

We review a trial court's denial of a Rule 165a motion to reinstate for an abuse of discretion. *Id*. at 467; *Gillis*, 554 S.W.3d at 193. A trial court abuses its discretion in denying a motion for reinstatement when an attorney's explanation

for the failure to appear is reasonable. *Rava Square Homeowners Ass'n v. Swan*, No. 14-07-00521-CV, 2008 WL 4390437, at *2 (Tex. App.—Houston [14th Dist.] Sept. 30, 2008, no pet.) (mem. op.). "Thus, in determining whether the trial court abused its discretion in refusing reinstatement, we review the entire record and determine whether the evidence was sufficient to find that the failure of the party was not due to accident, mistake, or other reasonable explanation." *Anambra State Cmty. in Houston, Inc. (ANASCO) v. Ulasi*, No. 14-16-01001-CV, 2018 WL 1611644, at *4 (Tex. App.—Houston [14th Dist.] Apr. 3, 2018, no pet.) (mem. op.).

We previously have held that the trial court abused its discretion in denying a motion to reinstate when counsel produced evidence showing they were unaware of the court's trial setting. *See, e.g., Rava*, 2008 WL 4390437, at *3 (counsel "swore in his affidavit that he had no notice of the case's inclusion on a . . . dismissal docket" and "further swore . . . that he had diligently prosecuted the case"); *Jackson v. Thurahan, Inc.*, No. 14-02-00308-CV, 2003 WL 1566386, at *3 (Tex. App.—Houston [14th Dist.] Mar. 27, 2003, no pet.) (mem. op.) (counsel swore in his affidavit that the matter was not docketed on his trial schedule and that he was unaware of the trial setting until he received notice of the trial court's intent to dismiss the case).

Here, in the verified motion to reinstate, Mack's counsel attested that she did not receive notice of the October 15, 2019 trial assignment. To support this assertion, evidence was attached to the motion showing that Mack's counsel did not receive from the trial court coordinator the emails containing notice of the time and date for trial in the underlying proceeding. Specifically, two emails show that Mack's counsel's email was listed incorrectly. The trial court acknowledged as much at the January 17, 2020 hearing and stated: "The Court made a mistake in

the e-mail notice. That is clear now."

The record does not contain any evidence showing that Mack's counsel received notice of the trial assignment via any other means. The record also does not contain any evidence suggesting Mack's counsel's failure to appear was intentional or the result of conscious indifference. Therefore, because Mack "provide[d] some proof of an adequate justification for the failure" to appear, the trial court abused its discretion by failing to grant Mack's motion to reinstate before the expiration of its plenary power. *See Gillis*, 554 S.W.3d at 194; *see also Jackson*, 2003 WL 1566386, at *3 ("Because [] counsel reasonably explained the failure to appear in this case and because there was no evidence that his failure was intentional or the result of conscious indifference, the trial court abused its discretion when it denied the motion for reinstatement.").

In response to Mack's appeal, Appellees raise two arguments to support their contention that Mack's motion to reinstate was properly denied: (1) Mack's counsel was aware of the October 15, 2019 trial date because the date was referenced in Appellees' responses to Mack's motion for a continuance and motion to compel; and (2) the trial court "was personally aware that her staff had provided such notice during phone calls pertaining to the court's denial of [Mack's] continuance request." We reject both contentions.

It is undisputed that Mack knew the case was set for trial on a two-week docket beginning October 14, 2019. Mack filed a motion for continuance from that setting, that the court denied. In the hearing for reinstatement, Appellees stated that their response to the motion for continuance referenced a trial date of October 15, 2019. According to Mack's counsel, she did not review the response because the court denied the motion before Mack received the response. The court asked for further briefing as to whether or not this notice by opposing counsel was

sufficient. The appellate record does not contain Appellees' responses to Mack's motion for a continuance and motion to compel, but it does contain the further briefing requested by the court. The further briefing references the responses as attachments, but the clerk's record does not include the attachments.[2] In that brief, Appellees argued that the response to the motion for continuance included the October 15, 2019 trial date. The briefing never suggested that the responses indicated that the case was assigned to trial at 10:30 A.M. or 1:30 P.M. There is a distinction between knowing that the case was set for trial and notice that the parties are assigned to trial. At best, the briefing shows a trial setting of October 15, 2019. Accordingly, these documents cannot be relied on to show Mack's counsel's failure to appear was intentional or the result of conscious indifference. *See Pablo Rion y Asociados, S.A. de C.V. v. Dauajare*, 495 S.W.3d 494, 499 (Tex. App.—Houston [14th Dist.] 2016, no pet.) (noting that the court "cannot assign any weight to the factual materials" that were outside the official appellate record).

With respect to Appellees' second contention, the trial court made several statements at the January 17, 2020 hearing suggesting the trial court had personal knowledge regarding whether court staff had directly informed Mack's counsel of the trial assignment:

> THE COURT: We had a number of exchanges about the continuance. And when I say "we," I mean the Court, entire staff with [Mack's counsel] about whether or not the Court would continue. So it is difficult for the Court to understand that there was no awareness.

[2] We note that Appellees included unofficial copies of these responses in the appendix to their appellate brief. However, an appellate court cannot consider documents attached to briefs and must examine the case based solely on the record filed. *See* Tex. R. App. P. 34.1, 34.5(b); *Watamar Holding S.A. v. SFM Holdings, S.A.*, 583 S.W.3d 318, 328 (Tex. App.—Houston [14th Dist.] 2019, no pet.).

So the court did expect that it was a conscious choice not to appear, because just days before we discussed whether or not the case would be continued from the 15th — specifically — on the telephone and in the motion papers.

* * *

THE COURT: Okay. So you see how the conscience [sic] indifference comes about and is questioned by the Court because you called the Court upset with [the trial court coordinator] about the Court's refusal to continue the case. Do you not recall that? You personally did that. . . . How can you complain about a continuance if you don't know the date?

* * *

THE COURT: I do not want anyone to have to go on the record in that regard but I recall personally the rather passionate, I will call it — and that's being generous — conversations and calls made in connection with the continuance, which is why the Court, I, Ursula Hall, the presiding judge, believe there was clear awareness of when the trial was supposed to start because you, [Mack's counsel], [were] very angry about the refusal to continue.

That is my personal recollection, which is of no import if I can't support that with the record.

No testimony or other evidence appears in the record regarding the actions of the trial court's staff.

We reject Appellees' contention that the trial court's statements constitute evidence supporting the denial of Mack's motion to reinstate. Under Texas Rule of Evidence 605, "[t]he presiding judge may not testify as a witness at trial. A party need not object to preserve the issue." Tex. R. Evid. 605. This rule has been

construed "to prohibit not only a judge's direct testimony, but also 'the functional equivalent of witness testimony.'" *Triumph Trucking, Inc. v. S. Corp. Ins. Managers, Inc.*, 226 S.W.3d 466, 472 (Tex. App.—Houston [1st Dist.] 2006, pet. denied) (quoting *Hammond v. State*, 799 S.W.2d 741, 746 (Tex. Crim. App. 1990) (en banc)).[3] To determine whether a trial court's statements run afoul of Rule 605, we "evaluate 'whether the judge's statement of fact is essential to the exercise of some judicial function or is the functional equivalent of witness testimony.'" *In re J.W.G.*, No. 14-17-00389-CV, 2017 WL 5196223, at *4 (Tex. App.—Houston [14th Dist.] Nov. 9, 2017, pet. denied) (mem. op.) (quoting *In re C.C.K.*, No. 02-12-00347-CV, 2013 WL 452163, at *33 (Tex. App.—Fort Worth Feb. 7, 2013, no pet.) (mem. op.)).

In *O'Quinn v. Hall*, 77 S.W.3d 438 (Tex. App.—Corpus Christi 2002, no pet.), the Corpus Christi Court of Appeals examined an issue similar to the one presented here. There, the appellant appealed the trial court's order finding that the appellant "received notice or acquired actual knowledge" of the trial court's order denying the appellant's motion to transfer venue on the day the order was signed. *Id*. at 445-46. According to the appellant, he did not receive notice of the trial court's order until approximately two months after the order was signed. *Id*. at 446. At a hearing on this issue, the trial court:

> informed counsel that a member of his staff had given all local counsel notice of the order via telephone on October 12, and had provided local counsel with a copy of the order. . . . Based on that knowledge, the trial court explained that it could not enter an order deeming the date [the appellant received notice] as December 19, 2001, when it knew the order would be inaccurate; it would not enter an order that conflicted with what it judicially knew.

[3] The Texas Supreme Court has relied on the Court of Criminal Appeals' interpretation of Rule 605. *See, e.g., Bradley v. State ex rel. White*, 990 S.W.2d 245, 248 (Tex. 1999).

Id. The record did not contain any testimony or evidence to support these statements. *Id*.

Reviewing the trial court's statements, the court of appeals cited Rule 605 and stated that "[t]he [trial court] judge may not 'step down from the bench and become a witness in the very same proceeding over which he is currently presiding.'" *Id*. at 448 (citing *Hensarling v. State*, 829 S.W.2d 168, 171 (Tex. Crim. App. 1992) (en banc)). Therefore, because "[t]he trial court's determination of the date of notice was based on facts provided to the court by its staff," it "could not provide that information by becoming a witness in the proceeding over which it was presiding." *Id*. The court of appeals reversed the trial court's order regarding the date that the appellant received notice of its ruling on the motion to transfer venue. *Id*.

As in *O'Quinn*, the trial court's statements here go directly to the pertinent factual issue at the January 17, 2020 hearing, *i.e.*, whether Mack's counsel had notice of the October 15, 2019 trial setting. Under Rule 605, the trial court was prohibited from testifying. *See* Tex. R. Evid. 605; *see also Triumph Trucking, Inc.*, 226 S.W.3d at 472; *O'Quinn*, 77 S.W.3d at 448. Accordingly, these statements cannot be relied on as evidence to support the deemed denial of Mack's motion to reinstate. *See O'Quinn*, 77 S.W.3d at 448.

We sustain Mack's second issue and conclude the trial court erred by failing to grant Mack's motion to reinstate.

CONCLUSION

We reverse the denial of Mack's motion to reinstate and remand the case for further proceedings.

/s/ Meagan Hassan
Justice

Panel consists of Chief Justice Christopher and Justices Wise and Hassan.