Fourth Court of Appeals
San Antonio, Texas

MEMORANDUM OPINION

No. 04-15-00766-CV

STATE FARM COUNTY MUTUAL INSURANCE COMPANY OF TEXAS,
Appellant

v.

Liliana **DIAZ-MOORE**,
Appellee

From the 166th Judicial District Court, Bexar County, Texas
Trial Court No. 2015-CI-04661
Honorable Karen H. Pozza, Judge Presiding

Opinion by: Rebeca C. Martinez, Justice

Sitting: Karen Angelini, Justice
Marialyn Barnard, Justice
Rebeca C. Martinez, Justice

Delivered and Filed: October 26, 2016

REVERSED AND REMANDED

State Farm County Mutual Insurance Company of Texas files this restricted appeal from a default judgment taken against it by Liliana Diaz-Moore. State Farm contends error is apparent on the face of the record because: (1) Diaz-Moore's claim against State Farm was not ripe; (2) no evidence supports the amount of damages awarded against State Farm; and (3) the judgment awards damages in excess of State Farm's policy limits. We reverse the trial court's judgment against State Farm and remand the cause for further proceedings.

BACKGROUND

Diaz-Moore's vehicle was struck from behind by a vehicle driven by Gilbert Beltran, Jr. Diaz-Moore subsequently sued Beltran alleging claims for negligence and negligence per se. Diaz-Moore also included State Farm as a defendant in her lawsuit alleging: (1) Beltran's negligence caused the collision; (2) Beltran was an underinsured driver because the policy limits of his insurance policy are not sufficient to cover all of Diaz-Moore's injuries and damages; (3) Diaz-Moore maintained an insurance policy with State Farm which provided uninsured/underinsured (UM/UIM) benefits coverage; and (4) State Farm failed to acknowledge Diaz-Moore's UM/UIM claim and/or pay any UM/UIM benefits owed to Diaz-Moore. Because neither Beltran nor State Farm filed an answer, Diaz-Moore obtained a default judgment on liability only. A few weeks later, the trial court heard evidence on the nature and extent of Diaz-Moore's injuries and damages and signed a default judgment awarding Diaz-Moore $960,027.35 in damages against Beltran and State Farm. State Farm timely filed this restricted appeal.

RESTRICTED APPEAL

In order to prevail in a restricted appeal, State Farm must prove: (1) it filed the notice of restricted appeal within six months after the judgment was signed; (2) it was a party to the underlying lawsuit; (3) it did not participate at 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 is apparent on the face of the record. *Pike-Grant v. Grant*, 447 S.W.3d 884, 886 (Tex. 2014). The only element at issue in this case is whether error is apparent on the face of the record.

For purposes of a restricted appeal, the face of the record consists of all papers on file in the appeal, including the reporter's record. *Norman Commc'ns v. Tex. Eastman Co.*, 955 S.W.2d 269, 270 (Tex. 1997); *In re Marriage of Butts*, 444 S.W.3d 147, 152 (Tex. App.—Houston [14th

Dist.] 2014, no pet); *Flores v. Brimex Ltd. P'ship*, 5 S.W.3d 816, 819 (Tex. App.—San Antonio 1999, no pet.). The absence of legally sufficient evidence to support a judgment is reviewable in a restricted appeal. *Norman Commc'ns*, 955 S.W.2d at 270; *In re Marriage of Butts*, 444 S.W.3d at 152; *Flores*, 5 S.W.3d at 819.

RIPENESS

In its first issue, State Farm contends error is apparent on the face of the record because Diaz-Moore's petition demonstrates her claim was not ripe for adjudication; therefore, the trial court lacked jurisdiction.

Ripeness is a threshold issue that implicates subject matter jurisdiction. *Robinson v. Parker*, 353 S.W.3d 753, 755 (Tex. 2011); *Patterson v. Planned Parenthood of Houston and Se. Tex., Inc.*, 971 S.W.2d 439, 442 (Tex. 1998). "At the time a lawsuit is filed, ripeness asks whether the facts have developed sufficiently so that an injury has occurred or is likely to occur, rather than being contingent or remote." *Patterson*, 971 S.W.2d at 442. "Ripeness thus focuses on whether the case involves uncertain or contingent future events that may not occur as anticipated, or indeed may not occur at all." *Id*. (internal quotations omitted). "Although a claim is not required to be ripe at the time of filing, if a party cannot demonstrate a reasonable likelihood that the claim will soon ripen, the case must be dismissed." *Robinson*, 353 S.W.3d at 755.

Because ripeness is a component of subject matter jurisdiction, we evaluate whether Diaz-Moore's claim is ripe under the same standard we review subject matter jurisdiction generally. *Tex. Ass'n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 446 (Tex. 1993). As plaintiff, Diaz-Moore had the burden to allege facts that affirmatively demonstrate the trial court's jurisdiction. *City of Ingleside v. City of Corpus Christi*, 469 S.W.3d 589, 590 (Tex. 2015). We construe Diaz-Moore's pleadings liberally in her favor, taking all factual assertions as true. *Id*.; *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 226 (Tex. 2004).

State Farm argues Diaz-Moore's claim is not ripe because State Farm is not contractually obligated to pay benefits until Diaz-Moore establishes Beltran was liable for causing the accident and Beltran was underinsured based on the amount of Diaz-Moore's damages. *See Brainard v. Trinity Universal Ins. Co.*, 216 S.W.3d 809, 815 (Tex. 2006) (noting insurer has no contractual duty to pay UIM benefits until the liability of the other motorist and the amount of damages suffered by the insured are determined); *In re United Fire Lloyds*, 327 S.W.3d 250, 256 (Tex. App.—San Antonio 2010, orig. proceeding) (noting insurer has no contractual duty to pay UIM benefits until insured establishes the liability and underinsured status of the other motorist). Although State Farm is correct with regard to Diaz-Moore's burden of proof at trial, in determining ripeness, we only consider whether Diaz-Moore pled sufficient facts which, if true, establish a claim for injuries against State Farm. *See City of Ingleside*, 469 S.W.3d at 590; *Miranda*, 133 S.W.3d at 226.

As previously noted, Diaz-Moore alleged: (1) Beltran's negligence caused the collision; (2) Beltran was an underinsured driver because the policy limits of his insurance policy are not sufficient to cover all of Diaz-Moore's injuries and damages; (3) Diaz-Moore maintained an insurance policy with State Farm which provided uninsured/underinsured benefits coverage; and (4) State Farm failed to acknowledge Diaz-Moore's UM/UIM claim and/or pay any UM/UIM benefits owed to Diaz-Moore. Therefore, Diaz-Moore has pled facts which, if true, would establish Beltran was liable for the accident, is underinsured, and State Farm refused to pay UIM benefits. Accordingly, we hold Diaz-Moore has alleged a ripe claim. *See In re Reynolds*, 369 S.W.3d 638, 649 (Tex. App.—Tyler 2012, orig. proceeding) (holding claim against UIM insurer ripe where plaintiff alleged other motorist was liable and underinsured and UIM Insurer refused to pay); *see also Alvarado v. Okla. Sur. Co.*, 281 S.W.3d 38, 40, 42 (Tex. App.—El Paso 2005, no pet.) (holding claim against UIM insurer ripe where plaintiff alleged other motorist was uninsured

and UIM insurer refused to pay benefits under the policy). We note our holding is consistent with an insured's right to sue the UIM insurer without joining the UIM and litigate the UIM's liability and underinsured status in that lawsuit. *See In re Reynolds*, 369 S.W.3d at 655 ("[A]n insured seeking the benefits of his UIM coverage may[: (1)] sue his UIM insurer directly without suing the UIM; [2] obtain written consent from his UIM insurer and then sue the UIM alone, making the judgment binding against the insurance company; or [3] sue the UIM without the written consent of the UIM insurer and relitigate liability and damages."); *In re Teachers Ins. Co.*, No. 07-03-0330-CV, 2004 WL 2413311, at *2 (Tex. App.—Amarillo Oct. 28, 2004, orig. proceeding) (asserting legal entitlement to recover against UIM insurer by showing fault on the part of the uninsured motorist and the extent of the resulting damages "can be established in either a direct action against the UIM carrier or in a suit against the uninsured motorist"); *see also Franco v. Allstate Ins. Co.*, 505 S.W.2d 789, 791-92 (Tex. 1974) (noting ultimate recovery in action against UIM insurer will depend upon proof of damages due to the tort of the uninsured third party who was not sued); *State Farm Mut. Ins. Co. v. Matlock*, 462 S.W.2d 277, 278 (Tex. 1970) (holding insured has the burden to prove the uninsured status of the other motorist in a direct action by the insured against his UIM insurer).

ABSENCE OF REPORTER'S RECORD

In its second issue, State Farm contends no evidence exists on the face of the record to support the trial court's damage award because "no reporter's record was made of the hearing on Plaintiff's motion for default." Diaz-Moore does not dispute the non-existence of a reporter's record. Instead, Diaz-Moore contends no affirmative duty existed for her to ensure a record was made of the trial court's hearing, and she relies on the recital in the trial court's judgment stating the trial court heard evidence.

"Once a default judgment is taken on an unliquidated claim, all allegations of fact set forth 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). "A court rendering a default judgment must hear evidence of unliquidated damages." *Id.*; *see also* TEX. R. CIV. P. 243. Furthermore, "[u]nless excused by agreement of the parties," a court reporter is required to "attend court sessions and make a full record of the proceedings." TEX. R. APP. P. 13.1(a).

In this case, State Farm states in its brief that no record was made of the trial court's hearing on unliquidated damages. In her brief, Diaz-Moore does not contradict this statement. When no reporter's record has been taken of the trial court's evidentiary hearing resulting in a no-answer default judgment, this court has held error is apparent on the face of the record.[1] *See Stone v. Talbert Operations, LLC*, No. 04-14-00008-CV, 2014 WL 7439931, at *1-2 (Tex. App.—San Antonio Dec. 31, 2014, no pet.) (mem. op.); *Trenton v. Hammitt*, No. 04-10-00316-CV, 2010 WL 5545423, at *2-3 (Tex. App.—San Antonio Dec. 29, 2010, no pet.) (mem. op.). Moreover, when no such reporter's record is made, we refuse to indulge in any presumption that the testimony presented at such a hearing would support the trial court's judgment. *See Dugie v. Dugie*, 511 S.W.2d 623, 624 (Tex. Civ. App.—San Antonio 1974, no writ); *see also Sharif v. Par Tech, Inc.*, 135 S.W.3d 869, 872 (Tex. App.—Houston [1st Dist.] 2004, no pet.) ("In contrast to an ordinary

[1] Diaz-Moore questions our holding in *Stone* because the appellee in *Stone* did not assert the court reporter's affidavit establishing the non-existence of a reporter's record was extrinsic evidence not appearing on the face of the record. In *Stone*, the court reporter's affidavit was filed in response to an order from our court directing the court reporter to file the record. 2014 WL 7439931, at *1. Because this court has an independent duty to ensure the reporter's record is timely filed in an appeal, *see* TEX. R. APP. P. 35.3(c), we reject Diaz-Moore's argument that this court cannot rely on a court reporter's affidavit stating no reporter's record was taken in a restricted appeal when that affidavit is filed in response to an order of this court. Furthermore, we do not believe requiring this court to issue such an order and obtain such a response is necessary in an appeal in which the appellant states in its brief that no reporter's record exists, and the appellee does not contradict that statement.

appeal, a direct attack by restricted appeal affords no presumptions in support of the judgment challenged.").[2]

CONCLUSION

Because no reporter's record was taken of the trial court's evidentiary hearing resulting in the no-answer default judgment against State Farm, error is apparent on the face of the record. Accordingly, the no-answer default judgment against State Farm is reversed, and the cause is remanded to the trial court for further proceedings.

Rebeca C. Martinez, Justice

[2] Appellee's motion to disregard supplemental clerk's record was carried with this appeal. Because we do not rely on the supplemental clerk's record in disposing of this appeal, appellee's motion is moot.