# In The
# Court of Appeals
# Seventh District of Texas at Amarillo

No. 07-15-00402-CV

**DEBRA MOSTUE, APPELLANT**

**V.**

**THOMAS MANGOLD, APPELLEE**

On Appeal from the County Court at Law No. 2
Travis County, Texas
Trial Court No. C-1-CV-12-001119, Honorable Todd T. Wong, Presiding

March 31, 2016

## DISSENTING OPINION

**Before QUINN, C.J., and HANCOCK and PIRTLE, JJ.**

This is an appeal from a post-answer default judgment entered in a property damage lawsuit, arising out of a motor vehicle accident, on appeal from a small claims court judgment in favor of Appellee, Thomas Mangold. Appellant, Debra Mostue, contends the judgment should be reversed because she did not receive notice of the trial setting or, alternatively, because she satisfied the elements set forth in *Craddock* pertaining to the setting aside of a default judgment. *See Craddock v. Sunshine Bus*

*Lines, Inc.*, 134 Tex. 388, 133 S.W.2d 124 (Tex. Comm'n App. 1939, judgm't adopted). Ultimately, the majority concludes Mostue did not establish her "no notice" claim and she did not establish a meritorious defense necessary to establish her entitlement to relief pursuant to *Craddock.* Because I find there to be a meritorious defense, I respectfully dissent.

## BACKGROUND

By his live pleadings, Mangold sought recovery of $9,612.97 in damages allegedly suffered when Mostue backed her vehicle into his stationary vehicle on December 10, 2010. Being dissatisfied with the $1,096.27 judgment entered on January 20, 2012, in Small Claims Court, Precinct Three, Travis County, Mangold appealed his case to the Travis County Court at Law No. 2 on January 30, 2012. The case eventually made its way to the court's dismissal for want of prosecution (DWOP) docket scheduled for 1:00 p.m. on May 15, 2015. On May 19, 2015, the trial court entered an order entitled *Order Granting Plaintiff's Motion to Retain Case on Docket.* At the bottom of that order was the statement: "Case is set for Trial Before the Court on June 23, 2015 @ 9:00 a.m." On June 23, Mangold appeared in person; however, neither Mostue nor her attorney appeared. Evidence was presented and the trial court entered a judgment in favor of Mangold in the sum of $11,598.27, plus pre-judgment interest on the sum of $1,096.27, from May 26, 2011 through June 23, 2015, plus post-judgment interest and costs of court. Mostue filed a motion for new trial contending that she did not receive notice of the June 23 trial setting. After a hearing on that motion, the trial court denied a new trial. Thereafter, Mostue filed a *Motion to Reform or Remit*

*Judgment* contending the judgment entered was not supported by the pleadings because it exceeded the amount pleaded. The trial court never ruled on that motion.

ANALYSIS

As stated by the majority, a "motion sets up a meritorious defense if it alleges facts which in law would constitute a defense to the plaintiff's cause of action and is supported by affidavits or other evidence providing prima facie proof that the defendant has such a defense." *Dolgencorp of Tex., Inc. v. Lerma*, 288 S.W.3d 922, 927-28 (Tex. 2009). A meritorious defense need not be a defense in bar of recovery so long as it is a defense that, if proved, would cause a different result on retrial. *Simmons v. Simmons,* No. 03-02-00517-CV, 2003 Tex. App. LEXIS 5926, at *7-8 (Tex. App.—Austin July 11, 2003 no pet.) (mem. op.); *Liepelt v. Oliveria*, 818 S.W.2d 75, 77 (Tex. App.—Corpus Christi 1991, no writ).

Here, Mostue contends the Small Claims Court judgment of $1,096.27 is evidence of a meritorious defense because it establishes that Mangold's claim was once determined to be significantly different. The majority dismisses the prior judgment as "irrelevant." While the judgment itself would be irrelevant in any *de novo* trial, for purposes of a *Craddock* review, I see it as being circumstantial evidence that the value of Mangold's claim could be substantially different upon retrial—thus establishing a meritorious defense. Furthermore, the record establishes that the judgment entered is not supported by the pleadings. Absent trial by consent (not applicable here because Mostue did not participate in the hearing giving rise to the judgment at issue), a party may not be granted relief in absence of pleadings to support that relief, and if not supported, it is erroneous. *See City of Fort Worth v. Gause,* 129 Tex. 25, 101 S.W.2d

679, 682 (1937); TEX. R. CIV. P. 301. Under these circumstances, I would find that the trial judge abused his discretion in not granting a new trial.

Patrick A. Pirtle
Justice