

IN THE SUPREME COURT OF TEXAS

No. 17-0612

CHARLES ROBERT GAUGER, PETITIONER,

v.

MARJORIE TIDWELL GAUGER, RESPONDENT

ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE ELEVENTH DISTRICT OF TEXAS

JUSTICE JOHNSON, joined by JUSTICE LEHRMANN, dissenting from the denial of the petition for review.

This matter concerns a post-answer default judgment in a divorce and petitioner Charles Gauger's subsequent quest for a new trial. In maintaining that the trial court should have set aside the default judgment, he relies on two uncontroverted affidavits he submitted with his Motion for New Trial and Request for Evidentiary Hearing. There is no dispute that Gauger's motion was timely filed, the hearing he requested was not held, and his motion was overruled by operation of law.

Gauger does not take issue with the court of appeals' recitation of the proper standard—conscious indifference—against which his failure to appear must be measured. *See* 2017 WL 2698458, at *2 (Tex. App.—Eastland 2017). However, he argues that the appeals court did not

properly apply that standard in affirming the trial court's judgment. He urges that the appeals court substantively and erroneously applied a negligence standard.

The affidavits Gauger filed with his motion for new trial reflect that he became very ill approximately four months after his wife sued for divorce, and the illness has had lingering serious effects on him. The affidavits also reflect that because of his illness and its effects, he moved to Illinois to be with family approximately one year after suit was filed, and lived there through the time of the final hearing, although he returned to Texas several times during the divorce action. Gauger's affidavits set out various activities that he took in relation to the divorce proceedings, including attending hearings, being represented by attorneys who eventually withdrew, and taking efforts to hire an attorney to represent him at the scheduled final hearing. He averred that although he was in Illinois on the date of the final hearing, to his understanding and belief he had arranged and paid for an attorney to appear on his behalf at the hearing (albeit to move for a continuance). He also averred that he attempted to contact the trial court by telephone on the day of the hearing after he realized that the Texas attorney he believed was going to appear for him was not going to do so.

Gauger posits that his efforts do not in any way demonstrate that he was consciously indifferent to the divorce proceedings or the scheduled final hearing. He maintains that even though he or an attorney representing him failed to attend the hearing, his uncontroverted affidavits show conclusively that the failure was due to an accident or mistake on his part, and there is no evidence that he was indifferent to the final hearing or failed to take actions to be represented at it. Gauger asserts that his motion and the uncontroverted affidavits required the trial court to grant a new trial

under standards established in *Craddock v. Sunshine Bus Lines, Inc.*, 133 S.W.2d 124 (Tex. 1939) and its progeny.

Gauger's petition presents an opportunity for the Court to clarify and reinforce the standards for setting aside a post-answer default judgment. I would grant the petition for review, and respectfully dissent from the Court's failure to do so.

Phil Johnson
Justice

OPINION DELIVERED: September 28, 2018