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Raymond D. Smith

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A husband appealed from a default judgment granting his wife a divorce, child custody, and certain property. The official court reporter was not present at the hearing and thus was unable to furnish a statement of facts. In addition, the trial judge stated into the record that he had no independent memory of the facts adduced and would not, therefore, attempt to prepare a narrative statement of facts. The default judgment was affirmed by the court of civil appeals,[1] and the Texas Supreme Court subsequently granted application for writ of error because the decision conflicted with other appellate decisions. *Held, reversed and remanded*: When the court reporter did not participate in the hearing, and the trial judge states into the record that he has no independent memory of the facts adduced and will not attempt to prepare a narrative statement of facts, the invalidity of the default judgment is disclosed on the face of the record. *Smith v. Smith*, 544 S.W.2d 121 (Tex. 1976).

I. Defaulting Party's Right to a Question and Answer Statement of Facts

A statement of facts is the part of the record of trial court proceedings in which the testimony of witnesses is transcribed, and it is ordinarily obtained in question and answer form from the official court reporter.[2] If the reporter is not present at the time evidence is admitted, he will be unable to prepare a complete question and answer statement of facts. In the typical trial, where both parties appear, courts have dealt with this problem by holding that the appellant, who needs the statement of facts in order to substantiate his assignments of error,[3] waives objection to the lack of a proper record by his failure to request the presence of an official court reporter at the time evidence is taken.[4] The effect of this waiver is that the appellant is required to seek a narrative statement of facts by agreement of the parties as provided by Texas Rule of Civil Procedure 377.[5] If no agreement can be reached, the trial judge is empowered by rule 377 to settle any differences and certify a proper statement of facts.[6]

1. Smith v. Smith, 535 S.W.2d 380 (Tex. Civ. App.—Beaumont 1976).

2. Until May 27, 1975, Tex. Rev. Civ. Stat. Ann. art. 2324 (Vernon 1971) provided: "Each court reporter shall: Attend all sessions of the court; take full shorthand notes of all oral testimony offered . . . and furnish to any person a transcript of all such evidence or other proceedings. . . ." An amendment to the statute as of the above date added the words "upon request" so that art. 2324 now provides that the court reporter "shall upon request: Attend all sessions of the court." *Id.* (Vernon Supp. 1976-77).

3. Englander Co. v. Kennedy, 428 S.W.2d 806, 807 (Tex. 1968).

4. Robinson v. Robinson, 487 S.W.2d 713, 715 (Tex. 1972).

5. *Id.* See Tex. R. Civ. P. 377, quoted in note 6 *infra*, for the procedures to be followed in preparing a narrative statement of facts by agreement of the parties.

6. Robinson v. Robinson, 487 S.W.2d 713, 715 (Tex. 1972). The pertinent provisions of rule 377 are as follows:

> (a) Testimony . . . . A party may prepare and file . . . a condensed statement in narrative form of all or part of the testimony and . . . such opposing

A defaulting party's demand for a question and answer statement of facts is not so easily dismissed. He cannot reasonably be deemed to have waived objection to lack of record[7] by his absence since he has a right to have all or part of the evidence reviewed by an appellate court, and such review necessitates the existence of a record of the evidence adduced at trial.[8] It may be necessary to grant a new trial in order to preserve that right of appeal.[9] The question that Texas courts have struggled with is whether the default victim must show that he was unable to acquire a statement of facts either by request of the trial judge or by agreement of the parties in order to obtain a reversal and a new trial.[10] Various courts of civil appeals have conflicted in their decisions on this issue.[11]

The courts which have held the showing of inability to acquire a record necessary have not disputed the general rule established by the Texas Supreme Court in *Victory v. Hamilton.*[12] In *Victory* the court held that a litigant's right to have the cause reviewed on appeal can be preserved only by a retrial of the case "if, through no fault of his own, after the exercise of due diligence, he is unable to procure such [a question and answer] state-

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party, if dissatisfied with the narrative statement, may require the testimony in question and answer form to be substituted for all or part thereof.

. . . .

(c) Where a request is made of the official court reporter for the preparation of a transcript . . . or when, with or without such a request, a statement of facts is filed or offered for filing by appellant, the appellant shall promptly deliver or mail to the appellee or his counsel and file with the clerk of the court a designation in writing of the portions of the evidence desired, and shall specify the portions desired in narrative form, if any, and the portions desired in question and answer form, if any, and the portions that are desired to be omitted. Within ten days thereafter any other party to the appeal may file a designation in writing of any additional portions of the evidence to be included, specifying the portions desired in . . . question and answer form, if any.

(d) Approval of the Trial Court unnecessary. It shall be unnecessary for the statement of facts to be approved by the trial court or judge thereof when agreed to by the parties. If any difference arises as to whether the record truly discloses what occurred in the trial court . . . the matter shall be submitted to and settled by the trial court or judge thereof and the statement of facts be by him made to conform to the truth.

7. Morgan Express, Inc. v. Elizabeth-Perkins, Inc., 525 S.W.2d 312, 314 (Tex. Civ. App.—Dallas 1975, writ ref'd).

8. *Id.* A default does not admit allegations of damages unless the claim is "liquidated and proved by an instrument in writing." TEX. R. CIV. P. 241. If the claim is unliquidated, the court must "hear evidence as to damages." Tex. R. Civ. P. 243. While there are different types of default judgments, some requiring proof of damages, others requiring proof of liability and damages, the distinction is unimportant in the present context. Essentially, the plaintiff is required to put on some evidence where the claim is not liquidated and proved by an instrument in writing, and it is such evidence that is subject to the appellate court's review. *See also* Dugie v. Dugie, 511 S.W.2d 623, 624 (Tex. Civ App.—San Antonio 1974, no writ).

9. Victory v. Hamilton, 127 Tex. 203, 91 S.W.2d 697 (1936).

10. Morgan Express, Inc. v. Elizabeth-Perkins, Inc., 525 S.W.2d 312, 314 (Tex. Civ. App.—Dallas 1975, writ ref'd).

11. Some of the decisions that required such a showing are: Brown v. Brown, 520 S.W.2d 571, 576 (Tex. Civ. App.—Houston [14th Dist.] 1975, no writ); Parker v. Sabine Valley Lumber Co., 485 S.W.2d 853 (Tex. Civ. App.—Fort Worth 1972, no writ); Harris v. Lebow, 363 S.W.2d 184, 185 (Tex. Civ. App.—Dallas 1962, writ ref'd n.r.e.); Johnson v. Brown, 218 S.W.2d 317, 322 (Tex. Civ. App.—Beaumont 1948, writ ref'd n.r.e.). Examples of cases that have not required this showing are: Morgan Express, Inc. v. Elizabeth-Perkins, Inc., 525 S.W.2d 312 (Tex. Civ. App.—Dallas 1975, writ ref'd); Mitchell v. Hunsaker Mfg., Inc., 520 S.W.2d 796 (Tex. Civ. App.—Waco 1975, no writ); Dugie v. Dugie, 511 S.W.2d 623 (Tex. Civ. App.—San Antonio 1974, no writ); Waller v. O'Rear, 472 S.W.2d 789, 792 (Tex. Civ. App.—Waco 1971, writ ref'd n.r.e.).

12. 127 Tex. 203, 91 S.W.2d 697 (1936).

ment of facts."[13] Rather, these courts have used the general rule of *Victory* to support their position. Some of them have inferred that a defaulting defendant who has not attempted to obtain a statement of facts by way of the procedures provided by rule 377 lacks diligence,[14] while others have said that such a defendant has failed to demonstrate a genuine inability to obtain the statement.[15]

Decisions supporting a contrary view have pointed out several flaws in the above reasoning. First, they have held that the language of rule 377, which defines the procedure to be followed by litigants in securing a statement of facts, presupposes the availability of the court reporter's shorthand notes; the rule should not apply when the court reporter was not present at trial.[16] Since rule 377 imposes no duty on a default victim seeking a new trial when no court reporter was present at the default proceedings, he cannot fairly be said to be lacking diligence for not attempting to comply with the rule's provisions. Secondly, the cases have emphasized the unfairness inherent in requiring the defaulting party to seek a statement of facts from the trial judge who has already decided the case against him.[17] Finally, these decisions have linked their reasoning to the fact that until recently, when article 2324 was amended, Texas law required that a court reporter be present at all

13. *Id.* at 209, 91 S.W.2d at 700.

14. Parker v. Sabine Valley Lumber Co., 485 S.W.2d 853, 856 (Tex. Civ. App.—Fort Worth 1972, no writ); Harris v. Lebow, 363 S.W.2d 184, 185 (Tex. Civ. App.—Dallas 1962, writ ref'd n.r.e.).

15. Brown v. Brown, 520 S.W.2d 571, 576 (Tex. Civ. App.—Houston [14th Dist.] 1975, no writ); Johnson v. Brown, 218 S.W.2d 317, 322 (Tex. Civ. App.—Beaumont 1948, writ ref'd n.r.e.).

16. A detailed analysis of the wording of rule 377 was made by the court of civil appeals in Waller v. O'Rear, 472 S.W.2d 789, 791, 792 (Tex. Civ. App.—Waco 1971, writ ref'd n.r.e.)(emphasis in original):

> Now let us look at subsection (d):
>
> 'Approval of the Trial Court Unnecessary. It shall be unnecessary for the statement of facts to be approved by the trial court or judge thereof when agreed to by the parties. If any difference arises as to whether the record truly discloses what occurred in the trial court . . . *the matter shall be submitted to and settled by the trial court or judge thereof and the statement of facts be by him made to conform to the truth.*'
>
> As we view it, the trial court in any of such events does not have the authority to 'make' a statement of facts; instead his authority is limited to resolving differences in the record and to *make the record conform to the truth.*

The court also noted that subsections (a) and (c), which allow use of a narrative statement of facts, provide the opportunity for a party who disagrees with such narrative statement to require all or part of the statement to be prepared in question and answer form. It thus seems clear that the rule does indeed presuppose the existence of a record of the proceedings in question and answer form, as is provided by a court reporter. This reasoning was followed in Morgan Express, Inc. v. Elizabeth-Perkins, Inc., 525 S.W.2d 312, 316 (Tex. Civ. App.—Dallas 1975, writ ref'd), and Mitchell v. Hunsaker Mfg., Inc., 520 S.W.2d 796, 797 (Tex. Civ. App.—Waco 1975, no writ).

17. This problem was discussed by the court of civil appeals in Waller v. O'Rear, 472 S.W.2d 789, 791 (Tex. Civ. App.—Waco 1971, writ ref'd n.r.e.):

> We have no doubt as to the honesty and integrity of the trial court; however, since his mind has already been made up in favor of the Defendant-Appellees, it places an unfair burden upon Appellant to have to rely on the trial court for his statement of facts. Likewise, in our opinion, to require the Appellant to have to depend upon the successful parties for an agreement as to a statement of facts is not calculated to be productive of a statement of facts sufficient for our purposes of review.

See also Morgan Express, Inc. v. Elizabeth-Perkins, Inc., 525 S.W.2d 312, 315 (Tex. Civ. App.—Dallas 1975, writ ref'd).

court sessions and take notes on all proceedings.[18] This was a mandatory requirement which it was the duty of the trial judge to enforce.[19] The obvious inference is that the trial court is at fault if the proceeding has not been properly recorded, and the defendant should not be penalized for the court's failure to perform its duty.

The preceding arguments against requiring the defendant to seek an agreed or narrative statement of facts were employed by the Dallas court of civil appeals in *Morgan Express, Inc. v. Elizabeth-Perkins, Inc.*[20] Writ of error having been refused, the case was generally considered to have settled the issue.[21] The supreme court, however, appears now to have changed direction with its decision in *Smith v. Smith*.

II. SMITH V. SMITH

In *Smith v. Smith* the Texas Supreme Court reversed the decision of the court of civil appeals and remanded for a new trial.[22] The Beaumont court of civil appeals had taken a new approach to the issues involved, and the decision was harsher to the defendant than in any of the previous cases. After a discussion of the *Victory* "due diligence" questions that had occupied most of the judicial opinions on this subject, the court of civil appeals refused to grant the defaulted husband a new trial even though he showed that the trial judge had stated into the record that he could not and would not prepare a narrative fact statement.[23] The court reasoned that since the defendant would not have been able to obtain reversal by motion for new trial or by bill of review unless he proved that he was not negligent and had a meritorious defense to the plaintiff's allegations, he should not be allowed to obtain such reversal by writ of error.[24]

The supreme court refuted this rationale, citing its decision in *McEwen v. Harrison*.[25] *McEwen* held that relief may be obtained by writ of error where

18. TEX. REV. CIV. STAT. ANN. art. 2324 (Vernon 1971). For a discussion of this statute see note 2 *supra*.

19. *Ex parte* Thompson, 520 S.W.2d 955, 956 (Tex. Civ. App.—Dallas 1975, no writ); Dugie v. Dugie, 511 S.W.2d 623, 624 (Tex. Civ. App.—San Antonio 1974, no writ).

20. 525 S.W.2d 312, 314, 315 (Tex. Civ. App.—Dallas 1975, writ ref'd). Plaintiff Elizabeth-Perkins, Inc. sued Morgan Express for the value of dresses allegedly lost in shipment. Although properly served, Morgan Express failed to answer and suffered a default judgment. No court reporter was present at the proceeding and Morgan Express appealed for a new trial based on the unavailability of a question and answer statement of facts. The court of civil appeals granted defendant's motion, and the supreme court refused plaintiff's application for writ of error.

21. *See, e.g.*, Muldoon v. Musgrave, 545 S.W.2d 539 (Tex. Civ. App.—Fort Worth 1976, no writ). Where the supreme court refuses application for writ of error it effectively sanctions the principles of law expounded by the lower court. *See* Myers v. Gulf Coast Minerals Management Corp., 361 S.W.2d 193 (Tex. 1962); Muldoon v. Musgrave, 545 S.W.2d 539, 541 (Tex. Civ. App.—Fort Worth 1976, no writ); Continental Oil Co. v. P.P.G. Indus., 504 S.W.2d 616, 620 (Tex. Civ. App.—Houston [1st Dist.] 1973, writ ref'd n.r.e.).

22. Smith v. Smith, 544 S.W.2d 121, 123 (Tex. 1976).

23. Smith v. Smith, 535 S.W.2d 380, 383, 384 (Tex. Civ. App.—Beaumont 1976).

24. *Id.* at 384. See Craddock v. Sunshine Bus Lines, Inc., 134 Tex. 388, 133 S.W.2d 124 (1939), for the requirements to be met by a party seeking to have a default judgment set aside by way of a timely motion for new trial, and McEwen v. Harrison, 162 Tex. 125, 345 S.W.2d 706 (1961), for the restrictions encountered by the defaulting party when seeking reversal and new trial by bill of review. Basically, both require the defaulting party to show that he was not negligent in suffering the default judgment and that he has a meritorious defense to the plaintiff's allegations.

25. 162 Tex. 125, 345 S.W.2d 706 (1961), *cited at* 544 S.W.2d at 123.

"the invalidity of the judgment is disclosed by the papers on file in the case."[26] This principle is a generally accepted limitation on the availability of writ of error.[27] The requirements of a meritorious defense and lack of negligence do not apply.[28] The holding thus requires the appealing party to show *on the face of the record* that the default judgment was invalid.[29] That does not, however, explain what facts must exist to establish the invalidity of the default judgment.

There is language to the effect that the appellant is required to show in the record that he has tried and failed to obtain a narrative statement from the trial judge. Regarding the trial judge's statement into the record that he could not and would not prepare a narrative statement of facts, the court said:

> Notwithstanding [that fact], the Court of Civil Appeals ruled that *this showing* of Petitioner's *inability* to obtain a statement of facts did not entitle him to a reversal of the judgment . . . .
>
> . . . [W]e rule that Petitioner has established his right to a retrial of this case because of his inability to procure a statement of facts; that in such respect the invalidity of the judgment from which he appealed by writ of error is disclosed by the papers on file in the case . . . .[30]

The showing of inability referred to by the court specifically included a statement in the record by the trial judge in which he declined to prepare a narrative statement of facts. It therefore appears that every such defaulting defendant will have to seek such a narrative statement from the judge in order to establish his inability to obtain a statement of facts for use on appeal. Under this interpretation of *Smith*, the principle of *Morgan Express* is effectively abolished.

The *Smith* court may not have intended to establish a standard that must be followed in all such cases, but rather, may have merely been holding that this particular showing did qualify within the parameters of the more lenient rule adopted in *Morgan Express*.[31] Support for this position can be gained from the curious fact that the court cited almost exclusively to cases that have not required the appellant to seek a statement of facts from his opponent or the trial judge.[32] Though the opinion is unclear in this respect, it seems likely that the court, had it meant to sanction a rule more lenient than

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26. 162 Tex. at 132-33, 345 S.W.2d at 711.

27. *See, e.g.*, McKanna v. Edgar, 388 S.W.2d 927, 928 (Tex. 1965); Lane Wood Indus., Inc. v. DeMoss, 489 S.W.2d 673, 675 (Tex. Civ. App.—Austin 1973, no writ).

28. The supreme court, quoting from its decision in Pace Sports, Inc. v. Davis Bros. Publishing Co., 514 S.W.2d 247 (Tex. 1974), emphasized that a party appealing by writ of error from a default judgment is not required to show that he was not negligent in suffering the default or that he has a meritorious defense to his opponent's claims. He may obtain relief if the invalidity of the judgment is disclosed by the papers on file in the case. 544 S.W.2d at 123.

29. 544 S.W.2d at 123.

30. *Id.* at 122-23 (emphasis added).

31. 525 S.W.2d at 315, 316.

32. 544 S.W.2d at 123. In support of the defaulting party's right to a reversal and new trial where he has, after due diligence and through no fault of his own, been deprived of a statement of facts the court cited the following: Victory v. Hamilton, 127 Tex. 203, 91 S.W.2d 697 (1936); Wallace v. Snyder Nat'l Bank, 527 S.W.2d 485 (Tex. Civ. App.—Eastland 1975, writ ref'd n.r.e.); Dugie v. Dugie, 511 S.W.2d 623 (Tex. Civ. App.—San Antonio 1974, no writ); Fitz v. Toungate, 419 S.W.2d 708 (Tex. Civ. App.—Austin 1967, writ ref'd n.r.e.). All of these cases held that the defaulting party is *not* required to seek an agreed or narrative statement of facts where the claim was not liquidated and proved by an instrument in writing.

that called for by the facts of *Smith*, would have explained that its decision was not meant to establish the baseline for an adequate demonstration of appellant's due diligence and genuine inability to obtain a statement of facts. Thus, one may infer that the court intended its decision to establish an affirmative guideline for the showing necessary to obtain a reversal and a new trial in these default judgment cases.

From several subsequent courts of civil appeal decisions attempting to interpret *Smith*, it is apparent that the confusion which has long plagued this area of the law still exists. The courts in *Rogers v. Rogers*[33] and *Shepard v. Shepard*[34] both have expressed the belief that the *Smith* ruling does not establish the requisite showing of inability that must be made by the default victim seeking a new trial.[35] These courts refused to follow *Smith*, however, because they felt that the decision was based on the original version of article 2324, which imposed a duty on the trial court to insure the court reporter's presence.[36] Because the statute was subsequently amended to delete the mandatory language, the *Shepard* and *Rogers* courts held that *Smith* is no longer relevant.[37]

The timing of the *Smith* case would have called for a decision under the original version of the statute as opposed to the amended, non-mandatory version,[38] had the decision been based on article 2324. The supreme court, however, made no mention of the statute; rather, it focused on the right of the defendant to a proper appellate review instead of on the duty of the court reporter to record the evidence as directed by the statute.[39] Therefore, *Smith* was not dependent on the provisions of article 2324.

Further support for this conclusion is provided by the supreme court's recent adoption of rule 376(b), which became effective January 1, 1978.[40] This rule defines the duties of the official court reporter in a manner similar to that of article 2324.[41] The court was presented the opportunity to re-establish the mandatory duty of the court reporter to be present at all proceedings,[42] but declined to do so. Instead, the court adopted a non-mandatory version quite similar to that of the present wording of the amended article 2324.[43] It seems likely that the court would have altered the effect of amended article 2324 if it considered that statute hostile to the principle adopted in *Smith*.

The Eastland court of civil appeals may be closer to a correct interpreta-

33. 549 S.W.2d 471 (Tex. Civ. App.—Austin 1977, writ pending).
34. 546 S.W.2d 888 (Tex. Civ. App.—Fort Worth 1977, no writ).
35. 549 S.W.2d at 473; 546 S.W.2d at 889.
36. *Id.*
37. *Id.*
38. Rogers v. Rogers, 549 S.W.2d at 473.
39. 544 S.W.2d at 123.
40. TEX. R. CIV. P. 376(b).
41. *Id.* at 715.
42. The original text of the proposed new rule as submitted in committee provided that the duties of the court reporter would be performed under supervision of the trial judge and would include attending all sessions of the court unless the recording of a proceeding be waived by all parties in writing and with the consent of the judge. *Id.*
43. The adopted version of the rule retains permissive language similar to that of article 2324, providing that the duties of the court reporter "shall include . . . attending all sessions of court and making a full record of the evidence *when requested to do so* by the judge or any party to a case . . . ." *Id.* (emphasis added).

tion of *Smith*. That court's recent opinion in *Baen-Bec, Inc. v. Tenhoopen*[44] read *Smith* as requiring the appellant to seek a narrative fact statement in order to show due diligence and thus preserve his right to appellate review.[45]

III. CONCLUSION

The extent of a defaulting party's right to have a question and answer statement of facts for use on appeal when no court reporter was present at the trial has been the subject of much litigation. Prior to *Smith* the courts of civil appeals have split along two basic lines of thought. One view required that before a new trial could be granted, the defaulting party must show an unsuccessful attempt to obtain a narrative statement of facts from the trial judge. The opposing line of cases pointed to the basic unfairness of that requirement and held that the appellant need only demonstrate that there was no question and answer statement available from the official court reporter. The Texas Supreme Court, in *Smith v. Smith*, appears to have adopted the former view. The court's recent adoption of rule 376(b), which defines the duties of the court reporter in terms similar to those of the amended article 2324, confirms the court's intent to require a default victim to seek a statement of facts from the trial judge in cases where the court reporter has not recorded the proceedings. Although this rule ignores possible abuse by a trial judge who has already decided the case against the defendant and may, therefore, be incapable of providing an unbiased narrative statement of facts, the court has apparently sanctioned it for the foreseeable future.*

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44. 548 S.W.2d 799 (Tex. Civ. App.—Eastland 1977, no writ).
45. *Id.* at 801.
* Editor's Note: That foreseeable future has turned out to be rather short. After this Note went to press the Texas Supreme Court rendered its decision in *Rogers v. Rogers*. For a discussion of the court of civil appeals decision in *Rogers* see note 33 *supra* and accompanying text. The supreme court reaffirmed the holding in *Morgan Express* that a defaulted party is not required to seek an agreed statement of facts from the trial judge in order to satisfy the *Victory* requirement of due diligence. Thus, the court has returned to the better reasoned rule which places the burden of securing a court reporter on the parties who are actually present at trial. Rogers v. Rogers, 21 Tex. Sup. Ct. J. 131 (Jan. 4, 1978).