Default Judgments in Texas

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Attempting to keep and set aside default judgments are not tasks for the fainthearted. In fact, historically, a default judgment has one of the highest rates of reversal on appeal. At every juncture, potential problems lie in wait for the novice and expert alike. The purpose of this paper[1] is to talk about default judgments in general, to review the rules of service (which should be the starting place for one trying to keep or set aside a default judgment), to explain the methods of attacking a default judgment, and finally, to review select significant Texas appellate default judgment cases.

I. Default Judgment Basics

A. Default Judgments Defined

A default judgment can be generally defined as a judgment entered by the trial court, at the plaintiff's request, based on a defendant's failure to appear and file an answer within the time allowed by law. TEX. R. CIV. P. 107, 238, 239; *see also Fontenot v. Hanus*, No. 03-05-00551-CV, 2007 WL 2330719, at *1 (Tex. App.—Austin Aug. 17, 2007, no pet.) (default judgment improper against plaintiff who failed to appear for trial; case should have been dismissed instead). Texas law does not authorize a defendant to take a default judgment against a plaintiff on the merits of its suit. *State v. Herrera*, 25 S.W.3d 326, 327 (Tex. App.—Austin 2000, no pet.). A defendant must file an answer to a lawsuit by 10:00 a.m. on the first Monday following the expiration of twenty (20) days from the date of service of the petition, unless that Monday is a legal holiday. TEX. R. CIV. P. 4, 99.

A default judgment rendered before the defendant's answer is due is erroneous and constitutes a void judgment. *Conaway v. Lopez*, 880 S.W.2d 448, 449 (Tex. App.—Austin 1994, writ ref'd) (and citations contained therein). Likewise, a default judgment may not be rendered after a defendant has actually filed an answer. *Padrino Maritime, Inc. v. Rizo*, 130 S.W.3d 243, 246 (Tex. App.—Corpus Christi 2004, no pet.). It is reversible error to enter a default judgment after the defendant has filed an answer, even if that answer is filed after the answer date but before the default judgment is entered. *In re $475,001.16*, 96 S.W.3d 625, 627 (Tex. App.—Houston [1st Dist.] 2002, no pet.).

Generally, a defendant's failure to answer a petition equates to an admission of all facts properly pleaded in plaintiff's petition, except as to unliquidated damages, as well as a waiver of any affirmative defenses. *Gardner v. U.S. Imaging*, 274 S.W.3d 669, 671 (Tex. 2008); *Texaco, Inc. v. Phan*, 137 S.W.3d 763, 769 (Tex. App.—Houston [1st Dist.] 2004, no pet.); *Simon v. BancTexas Quorum, N.A.*, 754 S.W.2d 283, 286 (Tex. App.—Dallas 1988, writ denied); *First Dallas Petroleum, Inc. v. Hawkins*, 727 S.W.2d 640, 645 (Tex. App.—Dallas 1987, no writ); *but see Osteen v. Osteen*, 38 S.W.3d 809, 814 (Tex. App.—Houston [14th Dist.] 2001, no pet.) (holding that in a divorce case, a default does not equate to a confession of the matters in the petition). Assuming the facts in the petition set out a cause of action, a default judgment conclusively establishes the defendant's liability. *Morgan v. Compugraphic Corp.*, 675 S.W.2d 729, 731 (Tex. 1984). However, if a defendant fails to file an answer, but the facts alleged against him do not, as a matter of law, create liability against him, then the failure to file an

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answer cannot create that liability. *Doubletree Hotels Corp. v. Person*, 122 S.W.3d 917, 919 (Tex. App.—Corpus Christi 2003, no pet.); *see also World Sav. Bank, FSB v. Alaniz*, No. 01-06-00549, 2007 WL 1018416, at *1-3 (Tex. App.—Houston [1st Dist.] Apr. 5, 2007, no pet.).

On the date defendant's answer is due, a plaintiff is entitled to have the trial court call the cause for default judgment, and the trial court may properly enter a default judgment against any defendant who has not filed an answer after proper service of citation, so long as the citation, with the officer's return, has been on file with the clerk of the court for at least ten (10) days. TEX. R. CIV. P. 107, 238, 239. However, a plaintiff may waive its right to a default judgment. For example, if a plaintiff proceeds to trial as if defendant had filed an answer, the plaintiff will waive its right to a default judgment. *Foster v. L.M.S. Dev. Co.*, 346 S.W.2d 387, 397 (Tex. Civ. App.—Dallas 1961, writ ref'd n.r.e.); *Dodson v. Citizens State*, 701 S.W.2d 89, 94 (Tex. App.—Amarillo 1986, writ ref'd n.r.e.) (by not moving for default judgment until parties had announced ready for trial, and a jury had been selected, plaintiffs waived their right to a default judgment).

At the time a trial court is asked to enter a default judgment, the trial judge must make two basic judicial decisions: first, whether the court has jurisdiction over the subject matter; and second, whether the court has jurisdiction over the parties to the suit. *AAA Navi Corp. v. Parrot-Ice Drink Products*, 119 S.W.3d 401, 402 (Tex. App.—Tyler 2003, no pet.). As such, the trial court has a duty to ascertain whether the defendant has been properly served with citation and whether the defendant has an answer on file. *Finlay v. Jones*, 435 S.W.2d 136, 138 (Tex. 1968); *Pino v. Perez*, 52 S.W.3d 357, 360 (Tex. App.—Corpus Christi 2001, no pet.).

B. Common Problems at Default Judgment Hearing

1. Improper Notice to Opposing Party

Texas law imposes no duty on the plaintiff to notify a defendant before taking a default judgment when the defendant has been properly served with the citation and petition, and has failed to answer or otherwise appear. *Wilson v. Wilson*, 132 S.W.3d 533, 536 (Tex. App.—Houston [1st Dist.] 2004, pet. denied); *Novosad v. Cunningham*, 38 S.W.3d 767, 772-73 (Tex. App.—Houston [14th Dist.] 2001, no pet.). However, a default judgment cannot be rendered without notice to the defendant under Rule 245 when an answer is on file, even if the answer is filed after appearance date. *Davis v. Jefferies*, 764 S.W.2d 559, 560 (Tex. 1989) (per curiam denial of application for writ of error); *In the Interest of K.B.A.*, 145 S.W.3d 685, 692 (Tex. App.—Fort Worth 2004, no pet.); *Smith v. Holmes*, 53 S.W.3d 815, 817 (Tex. App.—Austin 2001, pet. denied); *Blanco v. Bolanos*, 20 S.W.3d 809, 811 (Tex. App.—El Paso 2000, no pet.); TEX. R. CIV. P. 239. Even if the trial court is unaware of an answer on file because it is filed just hours prior to the default judgment hearing, any default judgment so rendered without notice is invalid. *Davis*, 764 S.W.2d at 560; *$429.30 in United States Currency v. State of Texas*, 896 S.W.2d 363, 365-66 (Tex. App.—Houston [1st Dist.] 1995, no writ) (answer filed shortly before court entered default judgment).

If a default judgment is entered without notice to a defendant who has an answer on file, it must be set aside because the defendant has been deprived of his due process rights under the Fourteenth Amendment of the federal constitution. *Peralta v. Heights Medical Center Inc.*, 485 U.S. 80, 108 S. Ct. 896, 99 L. Ed. 2d 75 (1988); *LBL Oil Co. v. International Power Services*

Inc., 777 S.W.2d 390, 390-91 (Tex. 1989); *Matsushita Electric Corp. v. McAllen Copy Data Inc.*, 815 S.W.2d 850, 853 (Tex. App.—Corpus Christi 1991, writ denied); *see also Limestone Constr., Inc. v. Summit Comm. Ind. Prop., Inc.*, 143 S.W.3d 538, 544 (Tex. App.—Austin 2004, no pet.); *Murphree v. Ziegelmair*, 937 S.W.2d 493, 495 (Tex. App.—Houston [1st Dist. 1995, no pet.) (in post-answer default, a party is deprived of due process if trial court disposes of suit against party without notification to the party that his failure to attend could result in a final disposition on merits of case).

2. Default Subsequent to Answer

In cases where a default is taken close to the time an answer was filed, a detailed examination of the "mailbox" rule and other rules relating to the timing of the answer should be made. A review of the applicable rules may reveal that the answer was due later than originally calculated, or even after the default. *See Andrus v. Andrus*, 168 S.W.2d 891, 891-92 (Tex. Civ. App.—Eastland 1943, no writ) (when the twentieth day falls on Monday, the appearance day is the Monday the following week); *Conaway v. Lopez*, 880 S.W.2d at 450-51 (defendant's answer was timely because when the answer day falls on a holiday, defendant has until the *end* of the next day to answer). Because the mailbox rule applies to the filing of an answer, a default judgment granted when the answer was timely mailed is erroneous. *See Milam v. Miller*, 891 S.W.2d 1, 2 (Tex. App.—Amarillo, 1994, writ ref'd); *Thomas v. Gelber Group, Inc.*, 905 S.W.2d 786, 789 (Tex. App.—Houston [14th Dist.] 1995, no writ) (answer deemed filed the date it was mailed, and therefore, default judgment could not be taken even though district clerk's office did not receive answer until the following day).

Moreover, because Texas courts liberally construe pleadings and other documents filed of record in determining whether a defendant has answered, any response on file by a defendant which identifies the parties, the case, and the defendant's current address, no matter how it is styled, constitutes an answer or written pleading sufficient to make a default judgment rendered without notice erroneous. *Smith v. Lippmann*, 826 S.W.2d 137, 138 (Tex. 1992) (per curiam); *see also Hughes v. Habitat Apartments*, 860 S.W.2d 872, 873 (Tex. 1993) (per curiam) (pauper's affidavit supplied type of information deemed adequate for a pro se answer); *see also In re I.L.S.*, 339 S.W.3d 156, 157-59 (Tex. App.—Dallas 2011, no pet. h.) (timely filed document listing objections and identifying the parties, the case, and the pro se filer's current address sufficient to defeat a no-answer default judgment); *Tex. Faith Partners v. Lindke*, No. 10-06-00028-CV, 2007 WL 117623, at *1-2 (Tex. App.—Waco Jan. 17, 2007, no pet.) (letter sufficed as an answer); *In the Interest of K.B.A.*, 145 S.W.3d 685, 691 (Tex. App.—Fort Worth 2004, no pet.) (letter was sufficient to give the court a timely response acknowledging receipt and acceptance of citation and petition and to constitute an appearance sufficient to defeat a no-answer default judgment); *In re Brilliant*, 86 S.W.3d 680, 693 (Tex. App.—El Paso 2002, no pet.) (plea to the jurisdiction sufficed as an appearance that would prevent default judgment); *Custom-Crete, Inc. v. K-Bar Serv., Inc.*, 82 S.W.3d 655, 657 (Tex. App.—San Antonio 2002, no pet.) (letter sent by representative of corporation that corporation was "not guilty" was sufficient to constitute an answer); *Santex Roofing & Sheet Metal. Inc. v. Venture Steel. Inc.*, 737 S.W.2d 55, 56 (Tex. App.—San Antonio 1987, no writ) (letter signed by defendant containing its address on file was sufficient answer to prevent entry of default judgment); *Martinec v. Maneri*, 494 S.W.2d 954, 955-56 (Tex. Civ. App.—San Antonio 1973, no writ) (plea in abatement although it omitted formalities of an answer is not rendered ineffective by such omission so as to entitle plaintiff to a

default judgment); *but see Narvaez v. Maldonado*, 127 S.W.3d 313, 318 (Tex. App.—Austin 2004, no pet.) (holding that signature on return of citation and envelope containing defendant's address were not sufficient to constitute an answer). By appearing in the suit, even with potentially defective answers, a defendant acquires a right to notice of a challenge to the validity of the answers and an opportunity to present evidence and argument before the answers are stricken and a default judgment granted. *Sells v. Drott*, 259 S.W.3d 156, 159 (Tex. 2008).

Under Texas law, a corporation's failure to file an answer through an attorney also does not prevent the answer, even if deficient, from precluding a default judgment. *See Pagel & Sons, Inc. v. Gems One Corp.*, No. 03-09-00138-CV, 2009 WL 3326111, at *1-3 (Tex. App.—Austin Oct. 15, 2009, no pet.) (finding an answer filed by a company's non-attorney principal and registered agent sufficient to forestall a default judgment) ; *see also Home Grown Design, Inc. v. S. Tex. Milling, Inc.*, No. 13-07-00646, 2008 WL 2744795, at *2-3 (Tex. App.—Corpus Christi-Edinburg July 3, 2008, no pet.); *Home Sav. Of Am. v. Harris Cty. Water Control*, 928 S.W.2d 217, 219 (Tex. App.—Houston [14th Dist.] 1996, no writ) (reversing default judgment where letter signed by non-lawyer on behalf of corporation was on file before judgment rendered); *R.T.A., Int'l, Inc. v. Cano*, 915 S.W.2d 149 (Tex. App.—Corpus Christi 1996, writ denied); *see also Custom-Crete, Inc. v. K-Bar Serv., Inc.*, 82 S.W.3d at 658 (letter from vice-president of corporation, although defective, was sufficient to avoid default judgment); *Handy Andy, Inc. v. Ruiz*, 900 S.W.2d 739, 741-42 (Tex. App.—Corpus Christi 1994, writ denied) (unsigned "affidavit" by non-attorney registered agent for corporation was sufficient to prevent default).

3. Defects in Petition

To support a default judgment, the petition must allege facts sufficient to provide fair notice of the cause of action. *Stoner v. Thompson*, 578 S.W.2d 679, 683 (Tex. 1979). A default judgment is erroneous if: (1) the petition (or other pleading seeking affirmative relief) does not attempt to state a cause of action within the jurisdiction of the court; or (2) the petition does not give fair notice to the defendant of the claim asserted; or (3) the petition affirmatively discloses the invalidity of such claim. *Paramount Pipe & Supply Co. v. Muhr*, 749 S.W.2d 491, 494 (Tex. 1988). A default judgment is also erroneous if the petition alleges a claim against one defendant, but the default judgment is entered against a different, though related defendant. *KAO Holdings, L.P. v. Young*, 261 S.W.3d 60 (Tex. 2008). A petition that fails to reflect an amount-in-controversy within the court's jurisdiction is equivalent to failing to state a cause of action. *Peek v. Equipment Service Co.*, 779 S.W.2d 802, 805 (Tex. 1989). Likewise, a petition that only generally alleges negligence cannot support a default judgment. *White v. Jackson*, 358 S.W.2d 174, 177 (Tex. Civ. App.—Waco 1962, writ ref'd n.r.e.); *Lopez v. Abalos*, 484 S.W.2d 613, 614 (Tex. Civ. App.—Eastland 1972, no writ). However, mere formalities, minor defects and technical insufficiencies will not invalidate a default judgment where the petition states a cause of action and gives "fair notice" to the opposing party of the relief sought. *Dolgencorp of Texas, Inc. v. Lerma*, 241 S.W.3d 584, 590 (Tex. App.—Corpus Christi 2007), *rev'd on other grounds*, 288 S.W.3d 922 (Tex. 2009).

Defects in the petition can be a common error when evaluating possible challenges to a default judgment. If a defendant fails to file an answer, but the facts alleged against him do not, as a matter of law, create liability against him, then the failure to file an answer cannot create that liability. *Doubletree Hotels Corp. v. Person*, 122 S.W.3d 917, 919 (Tex. App.—Corpus Christi

2003, no pet.). Likewise, the damages awarded in the default judgment cannot exceed those pleaded for in the petition. *Capitol Brick, Inc. v. Fleming Mfg. Co*., 722 S.W.2d 399, 410 (Tex. 1986). Nevertheless, lawyers can often become overzealous in obtaining a default judgment in the absence of an opponent, and frequently seek liability and damages well beyond those properly pled. For this same reason, practitioners challenging default judgments should always compare the actual judgment with the record of any default hearing. Sometimes the judgment submitted by the plaintiff's lawyer and signed by the court does not conform to the damages awarded on the record at the default hearing, and can also provide a strong argument for reversal.

4. Sufficiency of the Evidence

Another means of challenging a default judgment is an attack on the evidence offered to support the judgment. TEX. R. CIV. P. 243 requires that a court hear evidence of unliquidated damages. *Morgan v. Compugraphic Corp.*, 675 S.W.2d 729, 731 (Tex. 1984); *see also Swinnea v. Flores*, No. 07-07-0060-CV, 2008 WL 1848203, at *2 (Tex. App.—Amarillo Apr. 25, 2008, no pet.); *Fellows v. Adams*, No. 01-06-00924-CV, 2007 WL 3038090, at *3 (Tex. App.—Houston [1st Dist.] Oct. 18, 2007, no pet.); *Jackson v. Gutierrez*, 77 S.W.3d 898, 904 (Tex. App.—Houston [14th Dist.] 2002, no pet.) (default judgment reversed based upon insufficiency of evidence to support unliquidated damages). When damages are unliquidated, a plaintiff is required to prove the connection between the liability and the injury, despite the defendant's default. *Henry S. Miller Co. v. Hamilton*, 813 S.W.2d 631, 634 (Tex. App.—Houston [lst Dist.] 1991, no writ) (in DTPA case, plaintiffs required to show extent of defaulting defendant's knowledge of any flooding to be entitled to additional damages). The standard of proof required in a default judgment case is the same as that in contested cases. *Folsom Inv., Inc. v. Troutz*, 632 S.W.2d 872, 876 (Tex. App.—Fort Worth 1982, writ ref'd n.r.e.). Exemplary damages would be in the nature of unliquidated damages and therefore would need to be supported by evidence introduced at the hearing. *First Nat'l Bank v. Shockley*, 663 S.W.2d 685, 689 (Tex. App.—Corpus Christi 1983, no writ); *see also Metcalf v. Tavlor*, 708 S.W.2d 57, 59 (Tex. App.—Fort Worth 1986, no writ) (default judgment set aside because no evidence produced from which amount of punitive damages could be determined); *Arenivar v. Providian Nat'l Bank*, 23 S.W.3d 496, 498 (Tex. App.—Amarillo 2000, no pet.).

Therefore, a defendant seeking to challenge a default should carefully evaluate the record to assess whether the plaintiff presented sufficient evidence to establish the required causal nexus. Often, the required liability findings that would support a particular damage award are noticeably absent. *See In re Estate of Preston*, 346 S.W.3d 137, 168-69 (Tex. App.—Fort Worth 2011, no pet. h.); *see also Herbert v. Greater Gulf Coast Enters*., 915 S.W.2d 866, 872-73 (Tex. App.—Houston [1st Dist.] 1995, no writ) (reversing exemplary damage award in default judgment due to absence of evidence of knowing conduct). However, affidavits can be used to provide evidence for purposes of an unliquidated damages hearing, and can provide legally sufficient evidence to support the judgment. *See Texas Commerce Bank v. New*, 3 S.W.3d 515 (Tex. 1999) (per curiam).

Frequently, the record will reveal that the damages awarded in a default judgment are not supported by the evidence offered. *See In re Estate of Preston*, 346 S.W.3d at 171 (finding the evidence legally insufficient to support awarding exemplary damages); *see also Renteria v. Trevino*, 79 S.W.3d 240, 242 (Tex. App.—Houston [14th Dist.] 2002, no pet.) (failure of

plaintiff to offer proof of damages). For example, bare assertions that contracts were lost without specifying the nature and amount of those contracts was legally insufficient evidence to support consequential damages awarded in a default judgment. *Holt Atherton Ind., Inc. v. Heine*, 835 S.W.2d 80, 85-86 (Tex. 1992) (case remanded for new trial on unliquidated damages); *see also Hamilton*, 813 S.W.2d at 633-34; *Sunrizon Homes, Inc. v. Fuller*, 747 S.W.2d 530, 534 (Tex. App.—San Antonio 1988, writ denied); *Rubalcaba v. Pacific/Atlantic Crop Exchange, Inc*., 952 S.W.2d 552, 556 (Tex. App.—El Paso 1997, no writ) (plaintiff's failure to establish fraud precluded recovery of exemplary damages; *Griffith v. Griffith*, 860 S.W.2d 252, 254 (Tex. App.—Tyler 1993, no writ) (lack of evidence to support future damages). Other courts have also upheld the necessity of actual evidence to support an award of unliquidated damages in a default judgment. *See, e.g., Milestone Operating, Inc. v. ExxonMobil Corp.*, 346 S.W.3d 101, 109-11 (Tex. App.—Houston [14th Dist.] 2011, pet. filed) (finding that conclusory assertions in an affidavit were insufficient to support awarded damages in a default judgment); *see also Lefton v. Griffith*, 136 S.W.3d 271, 277 (Tex. App.—San Antonio 2004, no pet.) (reversing damage award because affidavit testimony was conclusory); *Sandone v. Miller-Sandone*, 116 S.W.3d 204, 207 (Tex. App.—El Paso 2003, no pet.) (reversing property division award on basis of no evidence).

By contrast, cases involving only liquidated damages require no separate hearing or additional proof. *Massey v. Columbus State Bank*, 35 S.W.3d 697, 700 (Tex. App.—Houston [1st Dist.] 2000, pet. denied); *Novosad v. Cunningham*, 38 S.W.3d 767, 773 (Tex. App.—Houston [14th Dist.] 2001, no pet.). Liquidated damages are those that can be accurately calculated by the court from the factual, as opposed to the conclusory, allegations in the petition and an instrument in writing. *Id.* However, even liquidated damages require appropriate proof. *See Clifton v. Am. Express Centurion Bank*, No. 09-06-283-CV, 2007 WL 2493517, at *2-3 (Tex. App.—Beaumont Sept. 6, 2007, no pet.) (affidavit that did not state that debt was "just and true" failed to support default judgment).

In a post-answer default judgment, plaintiffs must offer competent evidence to prove all aspects of their case, including liability since liability has not been confessed when an answer is on file. *Karl v. Kelly Co., Inc. v. McLerran*, 646 S.W.2d 174, 175 (Tex. 1983); *Raines v. Gomez*, 143 S.W.3d 867, 868 (Tex. App.—Texarkana 2004, no pet.); *Chase Bank v. Harris Co. Water Control & Imp. Dist.*, 36 S.W.3d 654, 656 (Tex. App.—Houston [1st Dist.] 2000, no pet.) (lack of a reporter's record requires reversal of a post-answer default judgment).

II. Types of Default Judgments

There are basically three types of default judgments recognized by Texas courts: (1) the no-answer default judgment; (2) the *nihil dicit* judgment; and (3) the post answer default judgment. *Sooner v. Thompson*, 578 S.W.2d 679, 683 (Tex. 1979). A *nihil dicit* judgment is properly entered by the trial court when the defendant has appeared and answered, but has failed to put the merits of the plaintiff's case at issue by his plea, or when defendant's plea places plaintiff's case at issue, but the defendant withdraws that answer prior to trial. *Frymire Engineering Co. v. Grantham*, 524 S.W.2d 680, 681 (Tex. 1975); *Rose v. Rose*, 117 S.W.3d 84, 88 (Tex. App.—Waco 2003, no pet.).

A post answer default judgment is properly entered by the trial court when a defendant answers on the merits of plaintiff's claims, but fails to appear at trial, or has his answer stricken

due to his sanctionable conduct. *Stoner*, 578 S.W.2d at 682-85; *Pedraza v. Peters*, 826 S.W.2d 741, 745 (Tex. App.—Houston [14th Dist.] 1992, no writ). The post answer default judgment is the only three of these types in which liability and damages are not admitted by the default. In a post answer default situation, judgment cannot be entered on plaintiff's pleadings. Rather, a plaintiff must offer evidence to support its claims as it would in a judgment resulting from trial. *Stoner*,578 S.W.2d at 682; *In the Interest of K.B.A.*, 145 S.W.3d 685, 690 (Tex. App.—Fort Worth 2004, no pet.); *Holberg v. Short*, 731 S.W.2d 584, 587 (Tex. App.—Houston [14th Dist.] 1987, no writ).

Texas law does not authorize a defendant to take a default against a plaintiff which adjudicates the merits of the suit; instead, a trial court may only dismiss for want of prosecution. *See Leeper v. R.F. Haynsworth*, 179 S.W.3d 742, 745 (Tex. App.—El Paso 2005, no pet.).

III. The All-Important Issue of Service

For decades, Texas courts have followed without serious reconsideration the doctrine that virtually any deviation from the legal and procedural requirements of service of citation will destroy a no-answer default judgment where the defendant has made no appearance. *Wilson v. Dunn*, 800 S.W.2d 833, 836 (Tex. 1990); *Williams v. Williams*, 150 S.W.3d 436, 443 (Tex. App.—Austin 2004, pet. denied); *Pete Singh Produce. Inc. v. Macias*, 608 S.W.2d 822, 823 (Tex. Civ. App.—El Paso 1980, no writ). If strict compliance to the rules of civil procedure regarding service is not shown, the service of process is invalid and of no effect. *Williams*, 150 S.W.3d at 443. With a default judgment, there are no presumptions in favor of valid issuance, service, or return of citation. *McKanna v. Edgar*, 388 S.W.2d 927, 928-29 (Tex. 1965); *GMR Gymnastics Sales, Inc. v. Walz*, 117 S.W.3d 57, 59 (Tex. App.—Fort Worth 2003, pet. denied); *De La Fuente v. Castillo*, 740 S.W.2d 113, 114 (Tex. App.—San Antonio 1987, writ denied). All necessary facts must be stated in the return with nothing left to inference. The return, taken together with the citation on which it is endorsed, cannot depend upon extraneous facts to make it intelligible. 5 R. McDonald, *Texas Civil Practice* § 27:53 (1992).

Thus, the record must affirmatively show strict compliance with the Rules of Civil Procedure or applicable statute; otherwise, the attempted service of process is invalid. *Uvalde Country Club v. Martin Linen Supply Co.*, 690 S.W.2d 884, 885 (Tex. 1984) (per curiam). Even actual notice, receipt of the suit papers, or knowledge otherwise obtained of the pending suit without proper service will not overcome this requirement and place the defendant under any duty to act. *Harrell v. Mexico Cattle Co.*, 73 Tex. 612, 11 S.W. 863, 865 (1889); *see also Hubicki v. Festina*, 226 S.W.2d 405, 408 (Tex. 2007) (in the absence of proper service, actual notice will not support a default judgment); *Seeley v. KCI USA, Inc.*, 100 S.W.3d 276, 277-78 (Tex. App.—San Antonio 2002); *Wilson v. Dunn*, 800 S.W.2d 833, 837 (Tex. 1990) (defendant's knowledge of suit and actual receipt of suit papers not sufficient to invoke jurisdiction to render default judgment). In short, absent strict compliance with the rules regarding service of citation, service is invalid and the default judgment is void. *Uvalde Country Club*, 690 S.W.2d at 885; *see also Eggert v. Gaitan*, No. 11-06-00117-CV, 2007 WL 2505630, at *1-2 (Tex. App.—Eastland Sept. 6, 2007, pet. denied).

Jurisdiction is dependent upon citation issued and served in the manner provided for by law. *Wilson* at 836. Accordingly, in a default judgment case the record must affirmatively show

that the trial court had *in personam* jurisdiction over the defendant. *Whitney v. L. & L. Realty Corp.*, 500 S.W.2d 94, 95 (Tex. 1973). A default judgment not supported by proper service is void because the trial court has not acquired *in personam* jurisdiction over the defendant. *Westcliffe, Inc. v. Bear Creek Constr., Ltd.*, 105 S.W.3d 286, 290 (Tex. App.—Dallas 2003, no pet.); *Pharmakinetics Laboratories, Inc. v. Katz*, 717 S.W.2d 704, 706 (Tex. App.—San Antonio 1986, no writ).

It is also important to note that the issue of defective service may be raised for the first time on appeal. *All Commercial Floors, Inc. v. Barton & Rasor*, 97 S.W.3d 723, 725 (Tex. App.—Fort Worth 2003, no pet.).

A. Defects in Service

Under TEX. R. CIV. P. 107, the return must state the citation was served, describe the manner of service, and be signed by the officer officially or by the authorized person. Any return by an authorized person must also be verified. *Armendariz v. Barragan*, 143 S.W.3d 853, 856 (Tex. App.—El Paso 2004, no pet.) (reversing default judgment because return of citation was not verified); *Fazio v. Newman*, 113 S.W.3d 747, 749 (Tex. App.—Eastland 2003, pet. denied); *Carmona v. Bunzi Dist.*, 76 S.W.3d 566, 569 (Tex. App.—Corpus Christi 2002, no pet.). The exact manner of service should be stated in the return, and it should show affirmatively strict compliance with the governing rules or statutes. *Exposition Apartments Co. v. Barba*, 630 S.W.2d 462, 464 (Tex. App.—Austin 1982, no writ). Thus, when a statute, such as the Texas long-arm statute, authorizes service by having the Secretary of State forward process to the defendant's "home," "home office," or "principal office," the record must establish that the address is in fact the location the statute requires. *Wachovia Bank v. Gilliam*, 215 S.W.3d 848 (Tex. 2007).

Texas courts have also held that strict compliance with service requirements does not require "obeisance to the minutest detail." *Herbert v. Greater Gulf Coast Enters., Inc.*, 915 S.W.2d 866, 871 (Tex. App.—Houston [1st Dist.] 1995, no writ). "As long as the record as a whole, including the petition, citation, and return, shows that the citation was served on the defendant in the suit, service of process will not be invalidated." *Williams v. Williams*, 150 S.W.3d 436, 444 (Tex. App.—Austin 2004, pet. denied); *see also Garza v. Phil Watkins. P.C.*, No. 04-07-00848-CV, 2009 WL 540221, at *2-3 (Tex. App.—San Antonio Mar. 4, 2009, no pet.) (recitations in return cannot be rebutted by uncorroborated proof from the moving party); *Gruensteiner v. Cotulla I.S.D.*, No. 04-07-00847, 2008 WL 4595034,, at *1 (Tex. App.—San Antonio Oct. 15, 2008, no pet.) (uncorroborated statement that defendant was not served was insufficient to rebut recitations of service in return). However, these judicial declarations must be viewed through the body of case law discussed throughout this section.

1. Defective Citation

In evaluating remedies in a default judgment situation, the citation should be carefully examined for any defects. Close examination of most citations will normally reveal errors. For example, an incorrect name or address is sufficient to show a citation is not in strict compliance with the rules. The following are cases where the courts have held that service was ineffective because of defects in the citation:

- *Uvalde*, 690 S.W.2d at 885 (citation invalid where it named "Henry Bunting" instead of "Henry Bunting, Jr.").
- *Medeles v. Nunez*, 923 S.W. 2d 659, 662 (Tex. App.—Houston [1st Dist.] 1996, writ denied) (citation incorrectly named "Maria Mendeles" and not "Maria Medeles").
- *Seib v. Bekker*, 964 S.W.2d 25, 28 (Tex. App.—Tyler 1997, no pet.) (citation was defective due to lack of verification).
- *Avila v. Avila*, 843 S.W.2d 280 (Tex. App.—El Paso 1992, no writ) (variance in the wife's name on the petition, citation and return, i.e. "Darlene Faye Avila," "Darlene Pirtle Avila," "Darlene Pirle Avila," and "D.P. Avila," rendered service invalid).
- *P & H Transp., Inc. v. Robinson*, 930 S.W. 2d 857, 860 (Tex. App.—Houston [1st Dist.] 1996, no writ) (record showed that L.F. Moorehead was probably served instead of the named defendant, Leo Jarvis Moorehead).
- *Faggett v. Hargrove*, 921 S.W.2d 274, 277-78 (Tex. App.—Houston [1st Dist.] 1995, no writ) (citation listed wrong name for defendant and return did not state that person served was over 16).
- *Nichols v. Nichols*, 857 S.W.2d 657, 659 (Tex. App.—Houston [1st Dist.] 1993, no writ) (service invalid where citation served on a Sunday).
- *Martinez v. Wilber*, 810 S.W.2d 461, 463 (Tex. Civ. App.—San Antonio 1991, writ denied) (citation erroneously stated the incorrect cause number).

It should be noted that the plaintiff is entitled to amend the return or citation or provide other evidence of proper service. *See Higginbotham v. General Life & Accident Ins. Co*., 796 S.W.2d 695, 696-97 (Tex. 1990). However, service of citation cannot be amended after an appeal is perfected. *Zaragoza v. De La Paz Morales*, 616 S.W.2d 295, 296 (Tex. Civ. App.—Eastland 1981, writ ref'd n.r.e.).

A plaintiff seeking to uphold a default judgment should also review cases where a challenge to a citation was rejected. In the following cases, Texas courts determined that a defect in the citation did not render service void:

- *Sutherland v. Spencer*, No. 13-09-00198, 2010 WL 3180365, at *2-4 (Tex. App.—Corpus Christi-Edinburg Aug. 12, 2010, pet. filed) (finding proper service because neither party was misled by a misnomer when an individual was listed as "Jesse Garza" on the petition and citation, but properly listed as "Jesse de la Garza" on the return and when a company name was shortened to "Southern Custom's" from "Southern Custom's Paint and Body" on the return).
- *Blackburn v. Citibank (South Dakota) N.A.*, No. 05-05-1082-CV, 2006 WL 1629770, at *1-2 (Tex. App.—Dallas June 14, 2006, no pet.) (return of service was not defective because party's middle name was listed as "B." instead of "Brian").
- *Regalado v. State*, 934 S.W.2d 852, 854 (Tex. App.—Corpus Christi 1996, no writ) (fair and reasonable construction of the return showing "c/o Maria

Regalado," is that the officer left the citation *in care of* the defendant, i.e., in her own hands).

- *Dezso v. Harwood*, 926 S.W.2d 371, 373-74 (Tex. App.—Austin 1996, writ denied) (correct D was served under the wrong name, resulting in misnomer not misidentification).

2. Defective Return

The return of service must be on file for at least ten days before a default can be taken. Prematurely taking a default judgment before the requisite time period has elapsed can also be grounds for reversal. *See Livanos v. Livanos*, 333 S.W.3d 868, 875 (Tex. App.—Houston [14th Dist.] 2010, no pet.) (finding default judgment void when process server filed return of service on the same day as the trial court rendered the default judgment); *see also Webb v. Oberkampf Supply of Lubbock, Inc.*, 831 S.W.2d 61, 64 (Tex. App.—Amarillo 1992, no writ) (default judgment was void where record did not show return of service on file for ten days before default taken); *HB & WM, Inc. v. Smith*, 802 S.W.2d 279, 281 (Tex. App.—San Antonio 1990, no writ) (default judgment void where no strict compliance with Rule 107); *Gerdes v. Marion State Bank*, 774 S.W.2d 63, 65-66 (Tex. App.—San Antonio 1989, writ denied) (recognizing that the "ten day rule has been part of our jurisprudence for decades"); *Gentry v. Gentry*, 550 S.W.2d 167 (Tex. Civ. App.—Austin 1977, no writ) (reversing default judgment where return of service filed same day as default judgment was rendered).

As with the citation, irregularities in the return of service are also usually prevalent. A careful review of the return can also reveal potential problems with service, providing additional grounds for attacking a default judgment. The following are cases where courts have held that defects in the return of service rendered the attempted service invalid:

- *Hubicki v. Festina*, 226 S.W.3d 405, 408 (Tex. 2007) (plaintiff failed to provide return receipt with defendant's signature).
- *Inv. Ideas, Inc. v. Ellkay, LLC*, No. 13-10-208-CV, 2010 WL 4657953, at *2-3 (Tex. App.—Corpus Christi-Edinburg Nov. 18, 2010, no pet.) (unverified return of service did not comply with TEX. R. CIV. P. 107).
- *Pessel v. Jenkins*, 125 S.W.3d 807, 810 (Tex. App.—Texarkana 2004) (invalid attempt to complete service by regular mail).
- *North Carolina Mut. Life Ins. Co. v. Whitworth*, 124 S.W.3d 714, 720 (Tex. App.—Austin 2003, pet. denied) (where defendant's name was properly alleged in the petition and citation, but the return of citation indicated a different name, valid service was not accomplished).
- *TAC Americas, Inc. v. Boothe*, 94 S.W.3d 315, 318-19 (Tex. App.—Austin 2002, no pet.) (indications in record that citation was served by process server at a time before he had received the citation).
- *Benefit Planners, L.L.P. v. RenCare, Ltd.*, 81 S.W.3d 855, 858 (Tex. App.—San Antonio 2002, pet. denied) (failure to state principal party being served as opposed to reciting only the registered agent).

- *Shamrock Oil Co. v. Gulf Coast Natural Gas, Inc.*, 68 S.W.3d 737, 739 (Tex. App.—Houston [14th Dist. 2001, pet. denied) (failure by the serving officer to fill in a blank on the pre-printed service form to show which petition was served).
- *Hercules Concrete Pumping Serv. Inc. v. Bencon Mgmt. & Gen. Contr. Corp.*, 62 S.W.3d 308, 311 (Tex. App.—Houston [1st Dist.] 2001, pet. denied) (return showing service on "Hercules Concrete Pumping" did not show service on "Hercules Concrete Pumping Service, Inc.").
- *Infra-Pak, Inc. v. Narmour*, 852 S.W.2d 565, 567 (Tex. App.—Dallas 1992, no writ) (officer's return alone was insufficient because it failed to establish that the purported agent was in fact the corporation's registered agent).
- *Laidlaw Waste Sys., Inc. v. Wallace*, 944 S.W.2d 73, 74 (Tex. App.—Waco 1997, no writ) (district clerk's service on the defendant by certified mail, return receipt requested, failed to strictly comply with rules of civil procedure when the postal return receipt was attached to the citation in lieu of completing the officer's return on the citation in accordance with TEX. R. CIV. P. 107); *see also David H. Arrington Oil & Gas, Inc. v. Coalson*, No. 2-07-268-CV, 2008 WL 706508, at *2 (Tex. App.—Fort Worth Mar. 13, 2008, no pet.) (same).
- *Verlander Enters., Inc. v. Graham*, 932 S.W.2d 259, 261 (Tex. App.—El Paso 1996, no writ) (return failed to show individual was the agent for the corporation or that the corporation was served).
- *Webb v. Oberkampf Supply of Lubbock, Inc.*, 831 S.W.2d 61, 64 (Tex. App.—Amarillo 1992, no writ) (return was not completed or signed by the officer and return receipt was not signed by the defendant); *see also Ramirez v. Consolidated HGM Corp.*, 124 S.W.3d 914, 916 (Tex. App.—Amarillo 2004, no pet.).

However, courts will reject challenges to seemingly insignificant irregularities in the return of service. *See Myan Mgmt. Group, L.L.C. v. Adam Sparks Family Revocable* Trust, 292 S.W.3d 750, 753-54 (Tex. App.—Dallas 2009, no pet.) (finding that omitting the periods from "L.L.C." from "Myan Management Group, L.L.C." in the citation and dropping "Group, L.L.C." on the return did not suggest the entity served differed from the entity listed in the petition); *see also Boat Superstore, Inc. v. Haner*, 877 S.W.2d 376, 378-79 (Tex. App.—Houston [1st Dist.] 1994, no writ) (illegible signature on return did not support defendant's contention that service should be held invalid when correct name of defendant was clearly typed above signature line). "Errors such as mistaken capitalization in the defendant's name and spelling errors too minor to raise any doubts that the correct person was served are insufficient to invalidate service." *Ortiz v. Avante Villa at Corpus Christi, Inc.*, 926 S.W.2d 608, 613 (Tex. App.—Corpus Christi 1996, writ denied). For example, correcting a party's name from "Medway" to "Midway" on a citation does not invalidate service. *Westcliffe, Inc. v. Bear Creek Constr., Ltd.*, 105 S.W.3d 286, 291 (Tex. App.—Dallas 2003, no pet.). Likewise, failure of the district clerk's office to sign a file stamp showing the date service was returned does not invalidate service. *Lefton v. Griffith*, 136 S.W.3d 271, 280 (Tex. App.—San Antonio 2004, no pet.). Further, service on the registered agent of a registered agent is acceptable. *Conseco Fin. Servicing v. Klein I.S.D.*, 78 S.W.3d 666, 672 (Tex. App.—Houston [14th Dist.] 2002, no pet.). And, service of a petition for taxes that includes only a general description of the property subject to the tax does not invalidate service. *Aavid Thermal Tech. v. Irving I.S.D.*, 68 S.W.3d 707, 710 (Tex. App.—Dallas 2001, no pet.). Finally, it is again important to note that a trial court has the power to amend a return of citation

at any time within its plenary power to correct a problem with the return. *Dawson v. Briggs*, 107 S.W.3d 739, 744 (Tex. App.—Fort Worth 2003, no pet.).

3. Pleading Defects Relating to Service

The plaintiff must serve the defendant with the petition that is live when the default judgment was obtained for service to be effective. *Caprock Constr. Co. v. Guaranteed Floorcovering, Inc.*, 950 S.W.2d 203, 205-06 (Tex. App.—Dallas 1997, no pet.) (reversing where defendant was not served with amended petition); *see also Harrison v. Gaubert*, No. 01-07-00814-CV, 2009 WL 1424735, at *3 (Tex. App.—Houston [1st Dist.] May 21, 2009, no pet.) (finding default judgment void because defendant was not served when plaintiff filed a "more onerous" amended pleading that added a new cause of action, alleged joint and several liability for the first time, and sought new damages, including attorneys' fees); *Seeley v. KCI USA, Inc.*, 100 S.W.3d 276, 278 (Tex. App.—San Antonio 2002, no pet.) (service invalid when defendant was served with original petition, but was not added as a party until an amended petition); *Atwood v. B & R Supply & Equip. Co.*, 52 S.W.3d 265, 267 (Tex. App.—Corpus Christi 2001, no pet.). A defendant's failure to answer only admits liability when the live pleadings have been properly served. *Caprock*, 950 S.W.2d at 204; *see also Harris v. Shoults*, 877 S.W.2d 854, 855 (Tex. App.—Fort Worth 1994, no writ); *South Mill Mushrooms Sales, Inc. v. Weenick*, 851 S.W.2d 346 (Tex. App.—Dallas 1993, writ denied) (amended petition before defendant answered required new service). Therefore, the record should be evaluated to determine whether the defaulting defendant was served with the appropriate live pleading.

However, where the amended petition does not seek a more favorable judgment than the original petition, service by certified mail of any amended petition is sufficient. *In re R.D.C.*, 912 S.W.2d 854, 855-56 (Tex. App.—Eastland 1995, no writ) (non-answering defendant previously served with citation can be served by certified mail once pleading amended); *McKernan v. Riverside Nat'l Bank, N.A.*, 858 S.W.2d 613, 615 (Tex. App.—Fort Worth 1993, no writ) (new service not required when amended petition did not seek a more onerous judgment).

Further, recitations in the pleadings relating to service must comport with the service executed on the defaulting defendant. Any inconsistencies between the pleadings and service can also provide fodder for a challenge to a default judgment. The following are cases in which Texas courts reversed default judgments because service on the defendant was not consistent with the information in the pleadings:

- *Winrock Houston Assoc. Ltd. Partnership. v. Bergstrom*, 879 S.W.2d 144, 151 (Tex. App.—Houston [14th Dist.] 1994, no writ) (complaint listed both home and work address of defendant but return only showed service attempted at home address).
- *Primate Constr., Inc. v. Silver*, 884 S.W. 2d 151, 152 (Tex. 1994) (formal return stated defendant was served with copy of *original* petition, in which he was not a defendant, even though citation contained handwritten statement that it was attached to second amended petition).
- *Lozano v. Hayes Wheels Int'l, Inc.*, 933 S.W.2d 245, 247 (Tex. App.—Corpus Christi 1996, no writ) (pleadings failed to allege sufficient facts to make the defendant amenable to service by use of the long-arm statute).

- *South Mill Mushrooms Sales v. Weenick*, 851 S.W.2d 346, 350 (Tex. App.—Dallas 1993, writ denied) (plaintiff failed to plead sufficient facts to permit substituted service by the long-arm statute).
- *Boreham v. Hartsell*, 826 S.W.2d 193, 197 (Tex. App.—Dallas 1992, no writ) (failure to plead the address provided to the secretary of state for substituted service on a nonresident defendant was his "home" or "home office" as required by the long-arm statute).

B. Substituted Service

Texas law prefers personal service over substituted service. *Taylor v. State*, 293 S.W. 913, 915-16 (Tex. App.—Austin 2009, no pet.). Because substituted service under TEX. R. CIV. P. 106(b) is in derogation of the constitutional mandates of due process, the requirements of the rule and the law connected therewith must be strictly construed and followed. *See, e.g.*, *Sgitcovich v. Sgitcovich*, 150 Tex. 398, 241 S.W.2d 142 (1951), *cert. denied*, 342 U.S. 903 (1952); *Redwood Group, L.L.C. v. Louiseau*, 113 S.W.3d 866, 868 (Tex. App.—Austin 2003, no pet.); *Kirkegaard v. First City National Bank*, 486 S.W.2d 893, 894 (Tex. Civ. App.—Beaumont 1972, no writ); *Franks v. Montandon*, 465 S.W.2d 800, 801 (Tex. Civ. App.—Austin 1971, no writ). Therefore, service under Rule 106(b) must be strictly in accordance with the terms of the Rule 106 order and the return must reflect the accomplishment of such service as precisely authorized by the order. *Smith v. Commercial Equip. Leasing Co.*, 678 S.W.2d 917, 918 (Tex. 1984) (per curiam); *see also Vespa*, 98 S.W.3d at 752 (invalidating service because return did not indicate service of all documents required by the order).

Except on the terms of the order, there is no authority for substituted service. *Trenton v. Hammitt*, No. 04-10-00316, 2010 WL 5545423, at *1 (Tex. App.—San Antonio Dec. 29, 2010, no pet.); *Broussard v. Davila*, 352 S.W.2d 753, 754 (Tex. Civ. App.—San Antonio 1961, no writ). Thus, where the Rule 106 order appointed "A.R. 'Tony' Martinez" as the disinterested adult to serve process and the return was signed by "A.R. Martinez, Jr.," service was rendered invalid because the return was not signed by the person appointed by the order to serve process. *Mega v. Anglo Iron & Metal Co.*, 601 S.W.2d 501, 503-04 (Tex. Civ. App.—Corpus Christi 1980, no writ); *see also Dolly v. Aethos Comm. Sys., Inc.*, 10 S.W.3d 384, 388-89 (Tex. App.—Dallas 2000, no pet.) (invalidating service where return failed to state that a copy of the order allowing substituted service was served on defendant); *Olympia Marble & Granite v. Mayes*, 17 S.W.3d 437, 444 (Tex. App.—Houston [1st Dist.] 2000, no pet.) (invalidating service for failure to strictly comply with Rule 106 order); *Cates v. Pon*, 663 S.W.2d 99, 102 (Tex. Civ. App.—Houston [14th Dist.] 1983, writ ref'd n.r.e.) (court ordered service by Leonard Green, but return was signed by Lindsey Siriko; therefore, service invalid). If the court orders substituted service at the defendant's usual place of abode, then the return must indicate that the address at which the citation was left is the defendant's usual place of abode. *Hurd v. D.E. Goldsmith Chemical Metal Corp.*, 600 S.W.2d 345, 346-47 (Tex. Civ. App.—Houston [lst Dist.] 1980, no writ); *see also Titus v. S. County Mut. Ins.*, No. 03-05-00310-CV, 2009 WL 2196041, at *3-4 (Tex. App.—Austin July 24, 2009, no pet.) (holding that post office form showing defendant received mail at an address did not indicate it was defendant's usual place of abode; *McCluskey v. Transwestern Publ'g LLC*, No. 05-06-01444-CV, at *1-2 (Tex. App.—Dallas Dec. 4, 2007, no pet.) (holding that Rule 106 does not require attempted service at both business and home addresses).

Further, substituted service is proper only if the plaintiff has shown that before resorting to substituted service, it used reasonable diligence in seeking personal service. *Davis v. Martin*, No. 01-07-00831-CV, 2009 WL 350642, *4-5 (Tex. App.—Houston [1st Dist.] 2009, no pet.) (deficiencies in 106(b) affidavit invalidated substitute service); *See Deleon v. Fair*, No. 04-06-00644-CV, 2007 WL 2042763, at *2 (Tex. App.—San Antonio July 18, 2007, no pet.); *Morrisett v. Key Energy Servs.*, No. 13-06-214-CV, 2007 WL 2012876, *1-2 (Tex. App.—Corpus Christi-Edinburg July 12, 2007, no pet.); *Marrot Communications, Inc. v. Town & Country Partnership*, 227 S.W.3d 372, 377 (Tex. App.—Houston [1st Dist.] 2007, pet. denied); *Ingram Ind., Inc. v. U.S. Bolt Mfg., Inc.*, 121 S.W.3d 31, 34 (Tex. App.—Houston [1st Dist.] 2003, no pet.); *Coronado v. Norman*, 111 S.W.3d 838, 842 (Tex. App.—Eastland 2003, pet. denied) (invalidating service because dates and times of attempted service were not included on return); *Autozone, Inc. v. Duenes*, 108 S.W.3d 917, 920-21 (Tex. App.—Corpus Christi 2003, no pet.) (invalidating service on a local place of business of a foreign corporation); *Lewis v. Ramirez*, 49 S.W.3d 561, 563-65 (Tex. App.—Corpus Christi 2001, no pet.) (affidavit stated only "to date, attempts made to serve defendant with process have not been successful"); *Nat'l Multiple Sclerosis Society v. Rice*, 29 S.W.3d 174, 176-77 (Tex. App.—Eastland 2000, no pet.) (invalidating service because the record did not describe the attempts made to locate and serve the registered agent and thus failed to show reasonable diligence); *Smith v. Commercial Equip. Leasing Co.*, 678 S.W.2d 917 (Tex. 1984) (per curiam); *Becker v. Russell*, 765 S.W.2d 899, 900 (Tex. App.—Austin 1989, no writ); *see also Medford v. Salter*, 747 S.W.2d 519, 520 (Tex. App.—Corpus Christi 1988, no writ). The order for substituted service must also be supported by an *original* affidavit demonstrating the necessity for other than personal service, as required by Rule 106(b), or the service is invalid and will not support a default judgment. *Wilson v. Dunn*, 800 S.W.2d 833, 836 (Tex. 1990); *Garrels v. Wails Transp., Inc.*, 706 S.W.2d 757, 759 (Tex. App.—Dallas 1986, no writ).

Likewise, if service is accomplished through the Secretary of State, strict compliance with statutory requirements is essential. *MobileVision Imaging Servs., L.L.C. v. LifeCare Hosps. of N. Tex., L.P.*, 260 S.W.3d 561, 567 (Tex. App.—Dallas 2008, no pet.) (invalidating substituted service based on failure to strictly comply with statute). Failure to show reasonable diligence in obtaining service before attempting service through the Secretary of State will invalidate service. *Wright Bros. Energy, Inc. v. Krough*, 67 S.W.3d 271, 275 (Tex. App.—Houston [1st Dist.] 2001, no pet.). Also, filing a return of service less than thirty days after serving the Secretary of State in violation of statutory requirements has been held to invalidate service. *Applied Health Care Nursing Div., Inc. v. Laboratory Corp. of America*, 138 S.W.3d 627, 629 (Tex. App.—Dallas 2004, no pet.). However, the statute mandating the thirty day period has changed, and courts are beginning to interpret the new statutory language differently. *See, e.g., Am. Disc. Energy, Inc. v. Apache Corp.*,.No. 14-11-00158-CV, ---S.W.3d---, 2012 WL 1059166, at *2-3 (Tex. App.—Houston [14th Dist.] Mar. 29, 2012, no pet. h.) (noting that the original statute now codified as TEX. BUS. ORGS. CODE § 5.252(b) applied the rule to all "service," but the new version only applies it to "notice" and holding that filing a return of service within 30 days of serving the secretary of state did not invalidate a default judgment). The Texas Supreme Court has clarified that a default judgment against a corporation with no registered agent may be taken as long as a certificate of service from the secretary of state has been on file for at least 10 days without regard to whether the citation and return have actually been filed. *Campus Inv., Inc. v. Cullever*, 144 S.W.3d 464, 465 (Tex. 2004); *Interaction, Inc. v. State*, 17 S.W.3d 775, 779 (Tex. App.—Austin 2000, no pet.). *Campus Investments* also clarified that when substituted service on a

statutory agent is allowed, the designee is not an agent for *serving*, but for *receiving* process. *Campus Inv.*, 144 S.W.3d at 466. A certificate, such as one from the secretary of state, conclusively establishes that process was served. *Id; but see WTW Ams., Inc. v. Sys. Integration, Inc.*, 221 S.W.3d 744, 746-47 (Tex. App.—Waco 2007, no pet.) (default judgment improper in absence of any proof that Secretary of State forwarded citation).

Defects in substituted service provide another avenue for an attack on a default judgment. Service of defective citations through substituted service can lead to an improper default judgment. The following cases illustrate situations where Texas courts have found substituted service to be deficient:

- *Hubicki v. Festina*, 226 S.W.3d 405, 408 (Tex. 2007) (holding that substituted service was improper where the plaintiff made only a single attempt to serve the defendant under Rule 106(a), there was no evidence that the defendant was actually receiving mail at the address where service was attempted under Rule 106(a), and the affidavit supporting substituted service was made a month before substituted service and was contradicted by plaintiff's petition).
- *Dean v. Hall*, No. 03-10-00090-CV, 2010 WL 5463933, at *2-3 (Tex. App.—Austin Dec. 31, 2010, no pet.) (finding a plaintiff's motion requesting substitute and alternative service accompanied by an affidavit did not comply with Tex. R. Civ. P. 106 and 109 respectively when the motion and affidavit stated the defendant's residence was unknown but omitted any detail about the defendant's place of business or any other location and did not recite facts about unsuccessful service at those locations and when the plaintiff stated that he used diligence, but did not describe his actions in trying to locate the defendant)
- *Steinke v. Mann*, 276 S.W.3d 608, 609-11 (Tex. App.—Waco 2008, no pet.) (service invalidated where trial court order left manner of service to process server's discretion).
- *Reed Elsevier, Inc. v. Carrollton-Farmers Branch I.S.D.*, 180 S.W.3d 903, 905 (Tex. App.—Dallas 2005, pet. denied) (reversing default judgment where return did not explain authority of "Danielle Smith" to receive service on behalf of registered agent).
- *Martinez v. Wilber*, 810 S.W.2d 461, 463 (Tex. Civ. App.—San Antonio 1991, writ denied) (erroneous cause number on citation served by substituted service).
- *Royal Surplus Lines Ins. Co. v Samaria Baptist Church*, 840 S.W.2d 382, 383 (Tex. 1992) (default judgment based on substituted service set aside because citation sent to 1201 "B*a*ssie" rather than to 1201 "B*e*ssie").
- *Maddison Dual Fuels, Inc. v. Southern Union Co.*, 944 S.W.2d 735, 738 (Tex. App.—Corpus Christi 1997, no writ) (because officer's return was blank and an attachment merely indicated "Bad Address," plaintiff failed to show reasonable diligence in attempting service on registered agent before resorting to substituted service on the secretary of state).
- *Comm'n of Contracts v. Arriba Ltd.*, 882 S.W.2d 576, 586-89 (Tex. App.—Houston [1st Dist.] 1994, no writ) (default judgment set aside when wrong address was used for substituted service).

- *Agrichem, Ltd. v. Voluntary Purchasing Groups, Inc.*, 877 S.W.2d 851, 854 (Tex. App.—Fort Worth 1994, no writ) (failure to strictly comply with statute's requirements for substituted service on unauthorized insurer).
- *RWL Constr., Inc. v. Erickson*, 877 S. W. 2d 449, 451 (Tex. App.—Houston [1st Dist.] 1994, no writ) (no evidence that reasonable diligence was used in seeking service on registered agent of corporation because the registered agent's address was marked out, another written in, and the return did not indicate where, to whom, or when the deputy attempted service).
- *Barnes v. Frost Nat'l Bank*, 840 S.W.2d 747, 750 (Tex. App.—San Antonio 1992, no writ) (service by mail by the secretary of state did not comply with the rules for long-arm service where the Secretary's certificate simply stated "unclaimed" without mentioning whether it received the return receipt and did not reflect that plaintiff gave the secretary of state the correct address).

In the following cases, courts have determined that substituted service was proper:

- *State Farm Fire & Cas. Co. v. Costley*, 868 S.W.2d 298, 299 (Tex. 1993) (per curiam) (substituted service by certified mail return receipt requested satisfies requisites of TRCP 106(b)).
- *Rowsey v. Matetich*, No. 03-08-00727-CV, 2010 WL 3191775, at *5-6 (Tex. App—Austin Aug. 12, 2010, no pet.) (distinguishing *Hubicki*, 226 S.W.3d 405 (Tex. 2007), by finding that an affidavit attesting to defendant's usual place of abode and a process server's statements that he established this was the correct address when attempting to personally serve the defendant satisfied TRCP 106(b) and supported trial court's order allowing substituted service by regular mail).
- *G.F.S. Ventures, Inc. v. Harris*, 934 S.W.2d 813, 817-18 (Tex. App.—Houston [1st Dist.] 1997, no writ) (although return was unexecuted, affidavit of deputy established reasonable diligence in serving registered agent coupled with certificate of service from secretary of state).
- *Pao v. Brays Village East Homeowners Ass'n, Inc.*, 905 S.W.2d 35, 37-9 (Tex. App.—Houston [1st Dist.] 1995, no writ) (affidavit of deputy stating that address was defendant's usual place of abode sufficient to support substituted service).
- *Wohler v. La Buena Vida in Western Hills, Inc.*, 855 S.W.2d 891, 892 (Tex. App.—Fort Worth 1993, no writ) (service complied with TEX. R. CIV. P. 107 where it stated the manner of service was "delivery," and citation was addressed to defendant individually and as trustee).
- *Walker v. Brodhead*, 828 S.W.2d 278, 280-81 (Tex. App.—Austin 1992, writ denied) (service under TEX. R. CIV. P. 106 by leaving a copy of the citation with someone over sixteen at defendant's homestead was proper).

C. Citation by Publication

TEX. R. CIV. P. 109 requires that the issuance of a citation by publication be predicated upon a party or the party's attorney making an "oath" that the residence of the defendant is unknown. Without a proper affidavit, the issuance of a citation by publication is invalid and will not support jurisdiction to enter a default judgment. *Wood v. Brown*, 819 S.W.2d 799, 800 (Tex.

1991) (per curiam) (affidavit did not state defendant's residence was unknown to plaintiff's attorney, that defendant was transient, and that defendant was absent from Texas or did not reside in Texas); *see also Sgitcovich v. Sgitcovich*, 150 Tex. 398, 241 S.W.2d 142, 147-48 (1951), *cert. denied,* 342 U.S. 903 (1952). Rule 109 also imposes a duty on the trial court "to inquire into the sufficiency of the diligence exercised in attempting to ascertain the residence or whereabouts of the defendant." *Manley v. Parsons*, 112 S.W.3d 335, 338 (Tex. App.—Corpus Christi 2003, pet. denied). If the record reflects that the court did not comply with this duty, the default judgment will be set aside. *In re Marriage of Peace*, 631 S.W.2d 790, 792 (Tex. App.—Amarillo 1982, no writ). Likewise, failure to strictly comply with the rules regarding return of citation provides a basis for reversal of a default judgment. *See Westbrook v. Westbrook*, No. 09-06-335-CV, 2007 WL 63655, at *2-3 (Tex. App.—Beaumont Jan 11, 2007, no pet.) (failure to file affidavit relating to service made default judgment improper).

It is also significant that, in effect, the law does not permit a "default" judgment when the citation is by publication. *Wiebusch v. Wiebusch*, 636 S.W.2d 540, 542 (Tex. App.—San Antonio 1982, no writ); *Fleming v. Hernden*, 564 S.W.2d 157, 158 (Tex. Civ. App.—El Paso 1978, writ ref'd n.r.e.); *see also* TEX. R. CIV. P. 117, together with Opinion of the Subcommittee on Interpretation of the Rules (Vernon's 1978). Thus, TEX. R. CIV. P. 244 requires that the trial court appoint an attorney to defend an absent defendant served only by publication. *Cahill v. Lyda*, 826 S.W.2d 932, 933 (Tex. 1992) (per curiam). The failure to comply with the duties to appoint an attorney and to file a statement of the evidence requires that a default judgment be set aside. *Isaac v. Westheimer Colony Ass'n, Inc.*, 933 S.W.2d 588, 590-91 (Tex. App.—Houston [1st Dist.] 1996, writ denied); *Albin v. Tyler Prod. Credit Ass'n*, 618 S.W.2d 96, 98 (Tex. Civ. App.—Tyler 1981, no writ).

IV. Methods of Attacking a Default Judgment

There are three procedures to follow for challenging a default judgment: an ordinary appeal, a restricted appeal, or a bill of review. The method used to attack a default judgment will primarily depend on when your client receives notice of the judgment. If the client receives the notice within 30 days of the judgment, there is still time to file a motion for new trial and pursue an ordinary appeal. On the other hand, judgments discovered after the time for filing a motion for new trial has passed leave more restricted options, such as a restricted appeal or bill of review. *See J.A. Bitter & Assocs. v. Haberman*, 834 S.W.2d 383, 384 (Tex. App.—San Antonio 1992, orig. proceeding) (after trial court's plenary power expired, defaulting defendant who was not properly served must attack the judgment by writ of error or bill of review).

Regardless, the careful practitioner should always obtain a complete copy of the court's file at the outset. A thorough review of the file will give you a better understanding of what your client's options are, and allow you to identify any errors in the manner in which the default judgment was obtained. Additionally, you should also request a transcript of any default hearing on damages from the court reporter. The record may be crucial to your challenge to the default judgment on evidentiary or procedural grounds.

A. Make Sure the Default Judgment Is Final

A party seeking to challenge a default judgment should always first examine the judgment and its pleadings carefully to make sure that all parties and all relief requested have been disposed of in the default judgment. If they have not, then the judgment is interlocutory because the presumption that a final judgment disposes of all parties and issues before the court does not apply to default judgments and summary judgments. *Houston Health Clubs, Inc. v. First Court of Appeals*, 722 S.W.2d 692, 693 (Tex. 1986); *see also Lehmann v. Har-Con Corp.*, 39 S.W.3d 191, 192-93 (Tex. 2001) ("A judgment issued without a conventional trial on the merits is final for purposes of appeal if and only if either it actually disposes of all claims and parties then before the court, regardless of its language, or it states with unmistakable clarity that it is a final judgment as to all claims and parties."); *Boyce v. Mackoy*, No. 06-07-00009-CV, 2007 WL 2891065, at *1-2 (Tex. App.—Texarkana Oct. 5, 2007, no pet.) (finding a default judgment in an obstructed-easement case labeled "Final Judgment" was interlocutory when it failed to enjoin any future acts of obstruction); *Rosedale Partners, Ltd. v. 131st Judicial Dist. Ct., Bexar County*, 869 S.W.2d 643 (Tex. App.—San Antonio 1994, orig. proceeding) (judgment was interlocutory because it failed to dispose of claims for pre-judgment interest). Finality cannot be implied from anything less than an unequivocal expression. *In re Burlington Coat Factory*, 167 S.W.3d 827, 828-31 (Tex. 2005) (orig. proceeding). While a clause stating that "all other relief not expressly granted is hereby denied" or similar language indicates that a post-trial judgment is final, it does not establish finality with regard to a default judgment. *Lehmann*, 39 S.W.3d at 203-04. Likewise, a judgment may not be final even though it is labeled "final," states it is appealable, awards costs, and/or contains other finality suggestive language. *Lehmann*, 39 S.W.3d at 200, 205. Indeed, a judgment that fails to dispose of all parties and all claims is final only if the "intent to finally dispose of the case" is "unequivocally expressed in the words of the order itself." *Id*. at 200; *First Nat'l Bank v. Villgomez*, 54 S.W.3d 345, 348 (Tex. App.—Corpus Christi 2001, pet. denied) (default judgment not disposing of all claims, was interlocutory although labeled "Final Judgment" and accompanied by "Mother Hubbard" language).

The Texas Supreme Court's decision in *In re Burlington Coat Factory* demonstrates the importance of determining whether the judgment is final. 167 S.W.3d at 828-31. *Burlington* involved an mandamus petition involving a default judgment. *Id.* at 828-29. The judgment recited the defendant was negligent and awarded damages, costs, and post-judgment interest. *Id*. at 828-30. The judgment also stated "all other relief not expressly granted is hereby denied" and declared the plaintiff was "entitled to enforce this judgment through abstract, execution and any other process necessary." *Id*. at 828, 830. The judgment did not mention, however, the plaintiff's exemplary damages claim, which was based on gross negligence. *Id*. at 828. The Supreme Court concluded that, despite all the finality suggestive language and even the monetary relief, the judgment was interlocutory. *See id*. at 828, 831; *see also Houston Health Clubs, Inc. v. First Court of Appeals*, 722 S.W.2d 692, 693 (Tex. 1986) (per curiam) (default judgment failing to dispose of exemplary damage claim was interlocutory).

Arguably this lack of any presumption of finality would apply regardless of whether the case involves a no-answer default judgment or a post-answer default judgment, because neither judgment results from a conventional trial. Thus, the defendant's time for filing a motion to set aside the default judgment may not have begun to run, and the trial court may retain jurisdiction

to order a new trial. *See Fruehauf Corp. v. Carrillo*, 848 S.W.2d 83, 84 (Tex. 1993) (per curiam) (trial court has plenary power over judgment until final and can set it aside before then).

Because the judgment may be interlocutory, it is generally wise to get an answer on file immediately. It is error for a trial court to grant a default judgment if a defendant has an answer on file. In fact, a default judgment granted when an answer has already been filed is void. *See Jefferies v. Davis*, 759 S.W.2d 6, 7 (Tex. App.—Corpus Christi 1988), *leave granted, mand. denied*,, *Davis v. Jefferies*, 764 S.W.2d 559 (Tex. 1989). An answer will also preclude a plaintiff from obtaining a hearing on damages if only a judgment on liability has been obtained.

B. Trial Court Remedies

1. Motion for New Trial or Motion to Set Aside Default Judgment

a. In General

The only relief which a defaulting defendant may obtain by filing a motion for new trial is a setting aside of the default judgment. *Ritter v. Wiggings*, 756 S.W.2d 861, 863 (Tex. App.—Austin 1988, no writ). After the default judgment is set aside, the suit remains pending on the trial court's docket for trial on the merits. *Id*. Thus, defendant is not entitled to affirmative relief on the merits based on a motion for new trial. *Id*.

(1) 30-Day Deadline

A motion for new trial and motions to correct, modify or reform judgments have an identical impact on the appellate timetable and must be filed within 30 days after the signing of the judgment. TEX. R. CIV. P. 329b. Under TEX. R. CIV. P. 5, a party is entitled to mail a motion for new trial to the clerk for filing and it will be deemed filed timely if it is deposited in the mail on or before the last day for filing same and if it is received by the clerk no later than ten days after the filing deadline. An untimely motion is a nullity. *Pampell v. Pampell*, 699 S.W.2d 355, 357 (Tex. App.—Austin 1985, no writ).

Also, if a timely filed motion for new trial is withdrawn after 30 days have passed since the signing of a default judgment, the trial court is at that point deprived of jurisdiction to set aside the default judgment. *Rogers v. Clinton*, 794 S.W.2d 9, 11 (Tex. 1990) (orig. proceeding). The due date for a motion for new trial cannot be extended by agreement, by the trial judge or by an appellate court. *See Gomez v. Bryant*, 750 S.W.2d 810, 811 (Tex. App.—El Paso 1988, no writ) (parties cannot agree to extension of trial court's jurisdiction over new trial motion); *Lind v. Gresham*, 672 S.W.2d 20, 22 (Tex. App.—Houston [14th Dist.] 1984, no writ) (trial court has no power to permit late filing of new trial motion); TEX. R. CIV. P. 5 (trial court may not enlarge period for taking action relating to new trials). Once a trial court has granted a new trial, the court's plenary power is fully restored until another order is entered that would start the clock running on such plenary power. *See In re Baylor Med. Ctr.*, 280 S.W.3d 227, 231 (Tex. 2008).

(2) No Notice of Default Judgment

Rule 239a of the Texas Rules of Civil Procedure requires the clerk to notify a defaulting party of a default judgment at the "address indicated in the certificate of last known mailing address." *See* TEX. R. CIV. P. 239a; *see also* TEX. R. CIV. P. 306a (clerk must immediately give notice of final judgment). In addition, the clerk must record the fact of mailing on the docket sheet. *Jordan v. Jordan*, 36 S.W.3d 259, 264 (Tex. App.—Beaumont 1995, writ denied).

While the clerk's failure to notify the adverse party does not affect the finality of the judgment under Rule 239a, this omission is highly relevant to a bill of review proceeding. *See Remington Invs., Inc. v. Connell*, 971 S.W.2d 140, 143 (Tex. App.—Waco 1998, no writ); TEX. R. CIV. P. 239a. The failure to comply with Rule 239a can be attacked with a bill of review setting up lack of notice as one of the grounds. *See Jordan*, 36 S.W.3d at 264; *see also Campbell v. Fincher*, 72 S.W.3d 723, 725 (Tex. App.—Waco 2002, no pet.) (remedy for clerk's failure to send notice of default judgment is bill of review); *Petro-Chemical Transp., Inc. v. Carroll*, 514 S.W.2d 240, 245 (Tex. 1974); *see Long v. McDermott*, 813 S.W.2d 622, 624 n.4 (Tex. App.—Houston [1st Dist.] 1991, no writ) (failure of clerk to send notice "would be highly important circumstance which would afford ground for relief from the judgment if defendant is able to establish that he has a meritorious defense").

If neither the defendant's counsel nor his client received written notice of the default judgment or acquired actual knowledge of the judgment within 20 days after it was signed, then the 30-day deadline for filing a new trial begins on the date on which the party or attorney received notice or acquired actual knowledge, whichever occurred first; but in no event will such period begin more than 90 days after the original judgment was signed. TEX. R. APP. P. 4.2(a)(1). Thus, a party who discovers a default judgment 91 days after rendition will be unable to pursue a regular appeal and will be forced to challenge the judgment by restricted appeal or bill of review.

To expand the deadline for filing a motion for new trial based on lack of notice, the movant must file a sworn motion in the trial court alleging: (1) the date the party or his attorney first either received notice of the judgment or acquired actual knowledge of the signing; and (2) that this date was more than 20 days after the judgment was signed. TEX. R. CIV. P. 306a(5); TEX. R. APP. P. 5(b)(5); *see also Levit v. Adams*, 850 S.W.2d 469, 470 (Tex. 1993); *Memorial Hosp. of Galveston Co. v. Gillis*, 741 S.W.2d 364, 365 (Tex. 1987); *Gee v. Lewisville Mem'l Hosp., Inc*., 849 S.W.2d 458, 460 (Tex. App.—Fort Worth 1993, writ denied) (trial court had jurisdiction to grant defendant's motion for new trial because defendant received notice of the default judgment more than 20 days after its entry); *Continental Cas. Co. v. Davilla*, 139 S.W.3d 374, 379 (Tex. App.—Fort Worth 2004, pet. denied). When seeking relief under Rule 306a, the movant should request a hearing before the trial court and prove the sworn allegations. *Continental Cas. Co.*, 139 S.W.3d at 379; *Olvera v. Olvera*, 705 S.W.2d 283, 284 (Tex. App.—San Antonio 1986, writ ref'd n.r.e.) (sworn motion claiming no notice of judgment which was not presented for evidentiary hearing and was overruled by operation of law did not extend time for perfecting appeal). The movant should also obtain a finding of fact from the trial court establishing the date of receipt of the notice or acquisition of actual knowledge. *See* TEX. R. APP. P. 4.2; *In re The Lynd Co*., 195 S.W.3d 682, 686 (Tex. 2006) (orig. proceeding); *see also Florance v. State*, 352 S.W.3d 867, 872-73 (Tex. App.—Dallas 2011, no pet. h.) (even though

defendant claimed gaining actual knowledge more that 20 days after the order's signing, defendant failed to obtain a fact finding following an evidentiary hearing stating when he had actual knowledge of the order's signing). That finding will be the starting point for the calculation of the appellate schedule. *Payne & Keller Co. v. Word*, 732 S.W.2d 38, 41 (Tex. App.—Houston [14th Dist.] 1987, writ ref'd n.r.e.). And, the finding may be implied from the trial court's judgment unless there is no evidence supporting the implied finding or the party challenging the judgment establishes as a matter of law an alternative date of notice. *In re The Lynd Co*., 195 S.W.3d at 686; *but see Nedd-Johnson v. Wells Fargo Bank, N.A.*, 338 S.W.3d 612, 613 (Tex. App.—Dallas 2010, no pet.) (holding that the finding is not implied when a trial court denies defendant's motion for new trial).

(2) Two Years to File Motion if Citation by Publication

Rule 329 gives a defendant served with citation by publication who has not appeared in person or by attorney of his selection two years after the judgment is signed to file a motion for new trial. *Schwartz v. Smith*, 160 Tex. 280, 329 S.W.2d 83, 84 (1959). However, execution of the judgment will not be suspended unless the defendant gives a good and sufficient supersedeas bond in accordance with TEX. R. APP. P. 47. TEX. R. CIV. P. 329(b). (Note: Rule 329(b) references TEX. R. APP. P. 47, which has since been changed to TEX. R. APP. P. 24). The court may grant the new trial if the motion shows good cause, supported by affidavit; and its plenary jurisdiction is determined by Rule 306a(7). TEX. R. CIV. P. 329(a), (d). "Good cause" is generally established by the defendant's lack of knowledge of the suit and a meritorious defense. *Wiebusch v. Wiebusch*, 636 S.W.2d 540, 541 n.2 (Tex. App.—San Antonio 1982, no writ). However, as with any procedural defect in service, if plaintiff fails to strictly comply with the dictates of Rule 244 governing service by citation, that alone will constitute "good cause" and support granting a new trial without a showing of a meritorious defense. *Id*. at 542; *see also In re Marriage of Peace*, 631 S.W.2d 790, 792 (Tex. App.—Amarillo 1982, no writ).

b. *Craddock* Standard for Granting New Trial

The Texas Supreme Court has repeatedly confirmed that:

> A default judgment should be set aside and a new trial ordered in any case in which the failure of the defendant to answer before judgment was not intentional, or the result of conscious indifference on his part, but was due to a mistake or an accident; provided the motion for new trial sets up a meritorious defense and is filed at a time when the granting thereof will occasion no delay or otherwise work an injury to the plaintiff.

Craddock v. Sunshine Bus Lines, Inc., 134 Tex. 388, 133 S.W.2d 124, 126 (1939); *see also Bank One, Texas, N.A. v. Moody*, 830 S.W.2d 81, 85 (Tex. 1992) (historical overview and re-examination of the *Craddock* elements.

(**1) Applicability of *Craddock***

The *Craddock* factors apply to both a no-answer and post-answer default judgment based on non-appearance at trial. *Director, State Employees Workers' Compensation Division v.*

Evans, 889 S.W.2d 266, 268 (Tex. 1994); *Dixon v. Sanders*, No. 01-10-00814-CV, 2011 WL 2089760, at *2 (Tex. App.—Dallas May 19, 2011, no pet.) (addressing a post-answer default); *Lara v. Rosales*, 159 S.W.3d 121, 123 (Tex. App.—Corpus Christi-Edinburg 2004, pet. denied). *Craddock*, however, does not apply to defaults resulting from sanctions striking pleadings. *See TransAmerican Natural Gas Corp. v. Powell*, 811 S.W.2d 913 (Tex. 1991);[2] *see also Cire v. Cummings*, 134 S.W.3d 835 (Tex. 2004); *In re Commitment of Larkin*, 127 S.W.3d 930 (Tex. App.—Beaumont 2004, no pet.).

Additionally, the Texas Supreme Court has held that the *Craddock* factors do not apply to a motion for new trial filed after a summary judgment has been granted on a motion to which the non-movant failed to respond when the respondent had notice of the hearing and opportunity to invoke procedures available pursuant to Rule 166a of the Texas Rules of Civil Procedure. *See Carpenter v. Cimarron Hydrocarbons Corp.*, 98 S.W.3d 682, 683-84 (Tex. 2002); *see also Limestone Constr., Inc. v. Summit Comm. Ind. Prop., Inc.*, 143 S.W.3d 538, 542 (Tex. App.—Austin 2004, no pet.). Likewise, the *Craddock* factors do not apply to situations in which a defaulting party seeks to overturn a default judgment by filing a special appearance. *Reiff v. Roy*, 115 S.W.3d 700, 704 (Tex. App.—Dallas 2003, pet. denied). The *Craddock* factors do not apply when the party's attorney, but not the party, appear for a trial on the merits. *In re K.C.*, 88 S.W.3d 277, 279 (Tex. App.—San Antonio 2002, pet. denied). Further, while continuing to apply them, some courts have noted that the *Craddock* factors are a poor fit for suits affecting the parent child relationship. *Comanche Nation v. Fox*, 128 S.W.3d 745, 750 (Tex. App.—Austin 2004, no pet.); *Lowe v. Lowe*, 971 S.W.2d 720, 725-26 (Tex. App.—Houston [14th Dist.] 1998, pet. denied).

Keep in mind that if the defaulting party can identify procedural defects in service, she can set the default judgment aside on those grounds without having to rely on *Craddock*. *See Bryant v. Gamblin*, 829 S.W.2d 228, 229 (Tex. App.—Eastland 1991, writ denied) (*Craddock* elements need not be reached in post-appearance default judgment rendered without notice to defendant). Note however that in *Wilson v. Dunn*, 800 S.W.2d 833, 837 (Tex. 1990), the court held that a defendant did not waive defective service by not raising the issue in his motion for new trial.

Also note that if a party has satisfied the *Craddock* elements, it is an abuse of discretion for the trial court to deny a motion for new trial. *Mathis v. Lockwood*, 132 S.W.3d 629, 631 (Tex. App.—Dallas 2004), *rev'd on other grounds*, 166 S.W.3d 743 (Tex. 2005). As a general comment regarding evidentiary support for the motion for new trial, courts have held that while a party's attorney may verify the new trial pleading where he has knowledge of the facts, he does not have the authority to verify the motion based solely on his status as counsel. *See Cantu v. Holiday Inns, Inc.*, 910 S.W.2d 113, 116 (Tex. App.—Corpus Christi 1995, writ denied); *see also Twist v. McAllen Nat'l Bank*, 294 S.W.3d 255, 260-63 (Tex. App.—Corpus Christi-Edinburg 2009, no pet.) (finding an attorney's verification of a motion to reinstate was inadequate because it was not based on personal knowledge).

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[2] According to *TransAmerican*, the appropriate standard of review for imposition of sanctions is a two-tiered test: (1) whether a direct relationship exists between the offensive conduct and the sanction; and (2) whether the sanctions are excessive. 811 S.W.2d at 917.

(2) Affidavits Establishing the *Craddock* Factors

Whether the trial court sustains a challenge to default judgment often depends on the affidavits offered in support of the motion for new trial. Because time is usually of the essence in default situations, it is important to get to work on the affidavits to be used in support of the motion as soon as possible. Client interviews and preparation of a well-drafted affidavit takes time, and the earlier that process begins, the better. Additionally, developing a "meritorious defense" can also be time consuming.

Counsel preparing the affidavits should do so with an eye toward each of the *Craddock* factors. The affidavits should be detailed enough to satisfy *Craddock*, but not so detailed that opposing counsel has the opportunity to show inconsistencies in the testimony provided.

Plaintiff's counsel seeking to uphold a default judgment should request the depositions of witnesses providing affidavits. Plaintiffs are entitled to seek discovery as to those persons giving affidavits in support of a motion for new trial. Denial of such a right can result in a remand to the trial court for further proceedings to allow discovery. *See Estate of Pollack v. McMurrey*, 858 S.W.2d 388, 392 (Tex. 1993).

Finally, counsel for the defaulting party should also have her client sign a separate verification stating that every statement in the motion is "true and correct" and based on the affiant's personal knowledge. In *Continental Carbon Co. v. Sea-Land Service, Inc*., , the court of appeals affirmed the trial court's denial of a motion to set aside a default judgment on the basis that the motion was "unsworn." 27 S.W.3d 184, 191 (Tex. App.—Dallas 2000, pet. denied) Although this is not explained in the opinion, detailed affidavits corroborating the factual allegations were attached to the motion for new trial. Consequently, the court apparently concluded that the failure to include a separate "verification" was a technical defect that precluded a new trial.

(3) Failure to file answer due to accident or mistake

(a) Burden of Proof

The first element of *Craddock* is that movant must establish that his failure to answer was due to accident or mistake, not intentional or due to conscious indifference. It is important to remember that when a party is relying on an agent or representative to file an answer, the party must establish that the failure to answer was not intentional or the result of conscious indifference as to *both* the party and the agent. *Estate of Pollack v. McMurrey*, 858 S.W.2d 388, 391 (Tex. 1993); *see also Aim-Ex, Inc. v. Slover*, No. 07-09-0184-CV, 2010 WL 2136599, at *1-2 (Tex. App.—Amarillo May 19, 2010, pet. denied) (opposing counsel not responding to defendant's counsel's inquiries regarding citation did not negate service when perfected on company via the Texas Secretary of State); *Gutierrez v. Draheim*, No. 04-06-00802-CV, 2007 WL 2608579, at *1-2 (Tex. App.—San Antonio Sept. 12, 2007, no pet.) (unproven allegation that attorney was disbarred at time of service did not negate service); *Holt Atherton Indus., Inc. v. Heine*, 835 S.W.2d 80, 83 (Tex. 1992). Establishing this element as to only one will not suffice; nor will conclusory allegations. Rather, the motion must set forth facts, which if true,

would establish no intentional or conscious indifference in failing to answer. *Holt Atherton Indus., Inc.*, 835 S.W.2d at 83 (statement that failure to file an answer was due to accident or mistake is merely a conclusory allegation and will not meet the first part of the *Craddock* test); *Sheraton Homes, Inc. v. Shipley*, 137 S.W.3d 379, 381 (Tex. App.—Dallas 2004, no pet.) (conclusory allegations do not satisfy the *Craddock* elements); *Nichols v. TMJ Co.*, 742 S.W.2d 828, 831 (Tex. App.—Dallas 1987, no writ) (affirming default judgment in light of defendant's conclusory allegation of unanticipated transportation problems which failed to establish absence of intentional or consciously indifferent conduct); *Motiograph, Inc. v. Matthews*, 555 S.W.2d 196, 196-97 (Tex. Civ. App.—Dallas 1975 writ ref'd n.r.e.) (broad statement that employee "inadvertently misplaced" citation failed to sufficiently set forth specific facts). Furthermore, allegations in a motion for new trial or statements in an affidavit which are not believable or are internally inconsistent fail to satisfy the burden of proof imposed on the defaulted defendant seeking a new trial. *Folsom Inv., Inc. v. Troutz*, 632 S.W.2d 872, 875 (Tex. App.—Forth Worth 1982, writ ref'd n.r.e.).

If the affidavits set forth such facts and are uncontroverted, movant has met his burden on the first element of *Craddock*. *Lara v. Rosales*, 159 S.W.3d 121, 124 (Tex. App.—Corpus Christi-Edinburg 2004, pet. denied); *Strackbein v. Prewitt*, 671 S.W.2d 37, 38-39 (Tex. 1984); *see also Evans*, 889 S.W.2d 266, 268 (Tex. 1994); *Tanknology/NDE Corp. v. Bowyer*, 80 S.W.3d 97, 101 (Tex. App.—Eastland 2002, pet. denied). If, however, movant's affidavits with regard to intentional or conscious indifference are contested, a fact question is presented which the trial court must decide after a hearing at which witnesses present sworn testimony in person or by deposition rather than by affidavit. *Estate of Pollack*, 858 S.W.2d at 392. A trial court generally may not resolve disputed fact issues regarding intent or conscious indifference on affidavits alone. *Id*. at 392; *see also Healy v. Wick Bldg Sys., Inc.*, 560 S.W.2d 713, 721 (Tex. Civ. App.—Dallas 1977, writ ref'd n.r.e.). Once the trial court has determined whether a defendant has sustained his burden of proving mistake or accident and disproved conscious indifference, an appellate court will not reverse that decision absent an abuse of discretion. *Lara v. Rosales*, 159 S.W.3d 121, 124 (Tex. App.—Corpus Christi-Edinburg 2004, pet. denied).

(b) Decisions Construing Mistake/Conscious Indifference Element

As one appellate court has recognized, "[t]he decisions are not harmonious concerning the type of mistake which is sufficient to show that the failure to answer was not intentional or due to conscious indifference." *Joiner v. Amsav Group. Inc.*, 760 S.W.2d 318, 320 (Tex. App.—Texarkana 1988, writ denied); *accord Gotcher v. Barnett*, 757 S.W.2d 398, 401 (Tex. App.—Houston [14th Dist.] 1988, no writ) (cases have established "no criterion" for distinguishing accidental or mistaken failure to answer from intentional or consciously indifferent failure). The Supreme Court has emphasized, however, that the standard is conscious indifference and not negligence. *See Levine v. Shackelford, Melton & McKinley, L.L.P.*, 248 S.W.3d 166, 168 (Tex. 2008).

There are numerous cases reciting that defendant's or defense counsel's negligence alone will not preclude setting aside a default judgment and, in fact, a "slight excuse" may justify granting a new trial. *See, e.g., Lara v. Rosales*, 159 S.W.3d 121, 124 (Tex. App.—Corpus Christi-Edinburg 2004, pet. denied); *Ivy v. Carrell*, 407 S.W.2d 212, 213 (Tex. 1966) (rejecting

"free from negligence standard"); *Custom-Crete, Inc. v. K-Bar Services, Inc.*, 82 S.W.3d 655, 660 (Tex. App.—San Antonio 2002, no pet.); *Jackson v. Mares*, 802 S.W.2d 48, 51 (Tex. App.—Corpus Christi 1990, writ denied) (defendant not required to show "free from negligence"); *Ferguson & Co. v. Roll*, 776 S.W.2d 692, 697 (Tex. App.—Dallas 1989, no writ) (analyzing *Grissom v. Watson*, 704 S.W.2d 325, 327 (Tex. 1986) and concluding it did not intend to modify long standing rule that negligence will not preclude the setting aside of a default judgment); *Gotcher*, 757 S.W.2d at 402 (citing cases and stating that it is "settled law in Texas" that negligence alone will not preclude setting aside default judgment); *Nat'l Rigging, Inc. v. San Antonio*, 657 S.W.2d 171, 173 (Tex. App.—San Antonio 1983, writ ref'd n.r.e.) (new trial warranted despite fact that excuse concerning confusion over necessity to file answer was "certainly very slight"). Those courts adopting a liberal view of the conscious indifference/mistake question have essentially concluded that for the defaulted defendant's negligence to rise to the level of conscious indifference, it must be shown that the defendant was clearly aware of the situation and acted contrary to what such awareness dictated. *See Guardsman Life Ins. Co. v. Andrade*, 745 S.W.2d 404, 405 (Tex. App.—Houston [lst Dist.] 1987, writ denied) (reversing for new trial and holding defense counsel's admitted negligence did not rise to level of conscious indifference).

In contrast, other courts have expressly required the defaulted party to show that his failure to appear was not negligence or have implicitly equated negligence with conscious indifference. *See, e.g., 21st Century Home Mtg. v. City of El Paso*, 281 S.W.3d 83, 86 (Tex. App.—El Paso 2008, no pet.) (conscious indifference means failing to take some action which would seem indicated to person of reasonable sensibilities under similar circumstances); *see also Holberg v. Short*, 731 S.W.2d 584, 586 (Tex. App.—Houston [14th Dist.] 1987, no writ) (burden of proof is upon defaulted party to show that failure to appear at trial was not negligence); *Butler v. Dal Tex Machinery & Tool Co.*, 627 S.W.2d 258, 260 (Tex. App.—Fort Worth 1982, no writ) (refusing to overturn default judgment and holding that evidence supported finding that defendant was negligent and consciously indifferent).

As a practical matter, each case depends on its own facts and courts have reached different results in highly similar factual situations. The best thing for the attorney faced with defending a default judgment to do is to go to Lexis or Westlaw and search for cases involving facts similar to your case. Some examples of mistake and of conscious indifference are cited below.

(c) Examples of Excuses Qualifying as Mistake or Accident

Mistaken Belief That No Answer Necessary

- *Jaco v. Rivera*, 278 S.W.3d 867, 872-73 (Tex. App.—Houston [14th Dist.] 2009, no pet.) (confusion regarding service on similarly named father and son showed no conscious indifference).
- *Villegas v. Morse*, No. 10-06-00415-CV, 2008 WL 2453976, at *1-2 (Tex. App.—Waco June 18, 2008, no pet.) (monitoring of status of service with clerk's office negated conscious indifference).

- *Titan Indemnity Co. v. Old South Ins. Group, Inc*., 221 S.W.3d 703, 711 (Tex. App.—San Antonio 2006, no pet.) (mistaken belief that citations were duplicates of other filed lawsuits).
- *Martinez v. Valencia*, 824 S.W.2d 719 (Tex. App.—El Paso 1992, no writ) (defendants, who were unable to read English, mistakenly believed suit papers related to pending settlement).
- *Lara v. Rosales*, 159 S.W.3d 121, 124 (Tex. App.—Corpus Christi-Edinburg 2004, pet. denied) (defendants' attendance at default judgment hearings, without an attorney, at which they were not allowed to speak showed a lack of conscious indifference).
- *Joiner v. Amsav Group. Inc.*, 760 S.W.2d 318, 321 (Tex. App.—Texarkana 1988, writ denied) (cross-defendant dismissed from main action on plaintiffs motion mistakenly failed to file answer to cross action).
- *Guardsman Life Ins. Co. v. Andrade*, 745 S.W.2d 404, 405 (Tex. App.—Houston [lst Dist.] 1987, writ denied) (overturning default where defense counsel admitted that he had negligently but mistakenly assumed that petition and citation served related to suit already pending in different county).
- *Baen-Bec, Inc. v. Tenhoopen*, 548 S.W.2d 799, 802 (Tex. Civ. App.—Eastland 1977, no writ) (mistaken belief that no answer required).

Mistaken Belief That Answer Had Been Filed

- *Serranos at Symphony Square, Inc. v. Rutledge*, No. 03-09-00351-CV, 2010 WL 1170248, at *3 (Tex. App.—Austin Mar. 26, 2010, no pet.) (defendants mistakenly believed that insurance carrier had been notified and was handling the lawsuit).
- *Hahn v. Whiting Petroleum Corp.*, 171 S.W.3d 307, 310-11 (Tex. App.—Corpus Christi-Edinburg 2005, no pet.) (defendant mailed the petition and citation to his attorney with instructions to file an answer and attorney did not file answer or communicate to defendant that neither he nor the firm could represent the defendant on the matter because of a professional conflict).
- *Blandford v. Ayad*, 875 S.W.2d 12 (Tex. App.—Amarillo 1994, no writ) (defendant left petition and citation with receptionist at his attorney's office, but attorney was out ill and did not receive it).
- *Owens v. Neely*, 866 S.W.2d 716, 718 (Tex. App.—Houston [14th Dist.] 1993, writ denied) (defendants mistakenly filed answer in cause number for garnishment suit instead of collection suit).
- *Peoples Sav. & Loan Ass'n v. Barber*, 733 S.W.2d 679, 681 (Tex. App.—San Antonio 1987, writ dism'd by agr.) (president of corporation mistakenly believed that majority shareholder would file answer on behalf of corporation).
- *Harlen v. Pfeffer*, 693 S.W.2d 543, 545 (Tex. App.—San Antonio 1985, no writ) (each party thought other had contacted attorney about filing answer).
- *Nava v. Nationwide Fin. Corp.*, 601 S.W.2d 478, 482-83 (Tex. Civ. App.—San Antonio 1980, writ ref'd n.r.e.) (receiving attorney mistakenly believed that forwarding attorney had interposed answer).

- *Hughes v. Jones*, 543 S.W.2d 885, 887 (Tex. Civ. App.—El Paso 1976, no writ) (misunderstandings between attorneys).
- *Miller v. Miller*, 903 S.W.2d 45 (Tex. App.—Tyler 1995, no writ) (defendant's attorney withdrew because of illness without filing an answer, and her new attorney did not take immediate action because he was involved in two trials and was unaware no answer had been filed).

General Forgetfulness or Failure to Calendar/Extraordinary Circumstances

- *Anderson v. Anderson*, 282 S.W.3d 150, 154-55 (Tex. App.—El Paso 2009, no pet.) (attorney's illness and inability to attend hearing established no conscious indifference).
- *Jackson v. Mares*, 802 S.W.2d 48, 52 (Tex. App.—Corpus Christi 1990, writ denied) (attorney forgot about citations).
- *Dorsey v. Aguirre*, 552 S.W.2d 576, 578 (Tex. Civ. App.—Waco 1977, writ ref'd n.r.e.) (general demands of physician's busy practice resulted in his failure to answer).
- *Republic Bankers Life Ins. Co. v. Dixon*, 469 S.W.2d 646, 647 (Tex. Civ. App.—Tyler 1971, no writ) (attorney forgot to prepare answer when his secretary placed file with his general files).
- *Director State Employees Workers' Comp. Div. v. Evans*, 889 S.W.2d 266, 270 n.3 (Tex. 1994) (attorney missed trial because her predecessor misdated the trial setting on his calendar and conveyed the wrong date to her).

Settlement Negotiations

- *Hampton-Vaughan Funeral Home v. Briscoe*, 327 S.W.3d 743, 746, 747-48 (Tex. App.—Fort Worth 2010, no pet.) (after agreeing to an extension to file an answer in-house counsel believed that a settlement meeting would take place in the interim and that he would hear whether the suit was going to proceed before he had to file an answer).
- *Diagnostic Clinic of Longview, P.A. v. Neurometrix, Inc.*, 260 S.W.3d 201, 205 (Tex. App.—Texarkana 2008, no pet.) (belief that no answer necessary due to ongoing settlement discussions).
- *Gotcher v. Barnett*, 757 S.W.2d 398, 402 (Tex. App.—Houston [14th Dist.] 1988, no writ) (mistaken belief that partial dismissal was pursuant to settlement discussions).
- *First State Bldg & Loan Ass'n v. B. L. Nelson & Assoc., Inc.*, 735 S.W.2d 287, 290 (Tex. App.—Dallas 1987, no writ) (no conscious disregard where there were negotiations attempting to resolve litigation).
- *Moya v. Lozano*, 921 S.W.2d 296 (Tex. App.—Corpus Christi 1996, no writ) (defendant's insurance carrier had been negotiating with plaintiff's counsel, and when defendant was served, he believed carrier also had notice and was handling the suit).

Generally "Busy" or Short Staff

- *Southland Paint Co. v. Thousand Oaks Racket Club*, 724 S.W.2d 809, 811 (Tex. App.—San Antonio 1986, writ ref'd n.r.e.) (delay in mailing citation was due to shortness of staff in word processing and claims department).
- *Craddock v. Sunshine Bus Lines. Inc.*, 134 Tex. 388, 133 S.W.2d 124, 126 (1939) (press of business resulting from storm was excuse for oversight of misrouted letter and citations).

No Awareness of Hearing or Trial Setting

- *Norimex Int'l Metals, Inc. v. Salinas*, No. 13-09-00074-CV, 2010 WL 1804968, at *2, *4 (Tex. App.—Corpus Christi-Edinburg May 6, 2010, pet. denied) (counsel with knowledge of client's new address sent the notices to the old address; client assumed counsel had made all aware of the change of address and did not know that counsel had actually withdrawn because communications with withdrawn counsel were inconsistent because of client's ongoing medical issues).
- *Texas Sting, Ltd. v. R.B. Foods, Inc.*, 82 S.W.3d 644, 651 (Tex. App.—San Antonio 2002, pet. denied) (notice of trial setting mailed to address other than that provided by a party).
- *Mahand v. Delaney*, 60 S.W.3d 371, 374-75 (Tex. App.—Houston [1st Dist.] 2001, no pet.) (defendant did not receive trial notice until 5:33 p.m. the day before trial).
- *In re Marriage of Parker*, 20 S.W.3d 812, 817-18 (Tex. App.—Texarkana 2000) (failure to receive actual or constructive notice of trial setting negates intentional or conscious indifference).
- *Mathis v. Lockwood*, 166 S.W.3d 743, 745 (Tex. 2005) (per curiam) (although notice of trial setting sent pursuant to Rule 21a raises a presumption that notice was received, no such evidence was offered, and it was rebutted by defendant's testimony that notice was not received).
- *Cliff v. Huggins*, 724 S.W.2d 778, 779 (Tex. 1987) (uncontroverted evidence from defendant and his attorney that they did not receive notice of trial setting).
- *Van Der Veken v. Joffrion*, 740 S.W.2d 28, 31 (Tex. App.—Texarkana 1987, no writ) (letter from withdrawing attorney to defendant indicated that trial date was "tentative").
- *Onyeanu v. Rivertree Apartments*, 920 S.W.2d 397, 398 (Tex. App.—Houston [1st Dist.] 1996, no writ) (defendant's lawyer went to courtroom on day and time of trial, but left mistakenly believing case had been reset).
- *G & C Packing Co. v. Commander*, 932 S.W.2d 525 (Tex. App.—Tyler 1995, writ denied) (defendants failed to appear because they believed the district court would obey stay order issued by county court at law).
- *Torres v. Rios*, 869 S.W.2d 55 (Tex. App.—Corpus Christi 1993, no writ) (plaintiff's attorney received two orders from the court in the same envelope and did not see the notice of the pre-trial conference underneath the first order).

- *J.H. Walker Trucking v. Allen Lund Co., Inc.*, 832 S.W.2d 454 (Tex. App.—Houston [1st Dist.] 1992, no writ) (attorney moved offices but failed to provide new address to court and thus did not receive notice of trial setting).

Inadvertent Loss or Misplacement of Suit Papers

- Fidelity *& Guar. Ins. Co. v. Drewery Constr. Co*., 186 S.W.3d 571, 575-76 (Tex. 2006) (per curiam) (registered agent for service failed to forward suit papers to defendant).
- *Cervantes v. Cervantes*, No. 03-07-00381, 2009 WL 3682637, at *2, *6-8 (Tex. App.—Austin Nov. 5, 2009, no pet.) (defendant delivered the original petition to the defendants' attorney's office where a paralegal failed to enter it into an internal docketing system).
- *Pierce v. Dutton*, No. 2-02-356-CV, 2003 WL 21101521, at *2-3 (Tex. App.—Fort Worth May 15, 2003, no pet.) (husband and wife each thought the other had taken the suit papers—that were unknowingly placed in an unrelated file—to their attorney).
- *In the Interest of A.P.P.*, 74 S.W.3d 570, 575 (Tex. App.—Corpus Christi 2002, no pet.) (co-worker delivered citation to attorney which then got misfiled).
- *Old Republic Ins. Co. v. Scott,* 873 S.W.2d 381, 382 (Tex. 1994) (plaintiff's citation was inadvertently included among files being transferred to another company).
- *Strackbein v. Prewitt*, 671 S.W.2d 37, 38-39 (Tex. 1984) (papers misplaced in defendant's office, and confusion as to who was to send them to attorney).
- *General Life & Accident Ins. Co. v. Higginbotham*, 817 S.W.2d 830, 832 (Tex. App.—Fort Worth 1991, writ denied) (citation and petition discovered in claim file).
- *Triad Contractors, Inc. v. Kelly*, 809 S.W.2d 683, 684 (Tex. App.—Beaumont 1991, writ denied) (citation and petition lost in insurer's office).
- *State Farm Life Ins. Co. v. Mosharaf*, 794 S.W.2d 578, 582 (Tex. App.—Houston [lst Dist.] 1990, writ denied) (papers misrouted in insurer's office and mistakenly filed without being reviewed).
- *Evans v. Woodward*, 669 S.W.2d 154, 155 (Tex. App.—Dallas 1984, no writ) ("confusion" in attorney's office).
- *Nat'l Rigging, Inc. v. San Antonio*, 657 S.W.2d 171, 173 (Tex. App.—San Antonio 1983, writ ref'd n.r.e.) (petitions served on two separate corporations, but president of both thought the second petition was a duplicate and only forwarded one to insurer).
- *Dallas Heating Co. v. Pardee*, 561 S.W.2d 16, 19 (Tex. Civ. App.—Dallas 1977, writ ref'd n.r.e.) (suit papers left in secretary's "out" basket and not forwarded to corporate officer).
- *Reynolds v. Looney*, 389 S.W.2d 100, 101-02 (Tex. Civ. App.—Eastland 1965, writ ref'd n.r.e.) (defendant mailed citations to insurer who misplaced them).
- *K-Mart Corp. v. Armstrong*, 944 S.W.2d 59 (Tex. App.—Amarillo 1997, writ requested) (no conscious indifference was shown where the suit papers were lost in the mail and the defendant's attorney never received them).

- *Norton v. Martinez*, 935 S.W.2d 898, 902 (Tex. App.—San Antonio 1996, no writ) (claim was sent to the wrong office after insurance coverage was denied and the city attorney assumed the claim had been forwarded to outside counsel).

Mistake of Law

- *Bank One, Texas, N.A. v. Moody*, 830 S.W.2d 81, 84 (Tex. 1992) (mistake of law will satisfy first element of *Craddock* so that Bank which froze accounts upon receiving garnishment, did not file an answer, but did call court about case and sent check to court clerk for full amount of money on deposit, and which put on proof that it did not realize it had to do more, met first element of *Craddock*).
- *Tau Kappa Epsilon v. USA Bus Charter, Inc.*, No. 03-10-00768-CV, 2011 WL 3250598, at *3-4 (Tex. App.—Austin July 28, 2011, pet. denied) (defendant's Arizona attorney, who sent a settlement letter to Texas plaintiff noting a choice of law provision in the parties' contract stating Arizona law applied, mistakenly believed that Texas Plaintiff would notify him in accordance with an Arizona default judgment procedure requiring ten day advance notice).
- *DC Controls, Inc. v. UM Capital, L.L.C.*, No. 05-07-01728-CV, 2008 WL 4648422, at *3 (Tex. App.—Dallas Oct. 22, 2008, no pet.) (mistaken belief that case had been dismissed negated conscious indifference).
- *Cont'l Airlines, Inc. v. Carter*, 499 S.W.2d 673, 674-75 (Tex. Civ. App.—El Paso 1973, no writ) (New York defense counsel mistakenly believed he had 30 days to answer a Texas lawsuit, and secretary failed to mail answer).
- *Costley v. State Farm Fire & Cas. Co.*, 894 S.W.2d 380 (Tex. App.—Amarillo 1994, writ denied) (defendant and his lawyer believed substituted service was improper).

Failure to Provide Notice of New Address

- *Ashworth v. Brzoska*, 274 S.W.3d 324, 332 (Tex. App.—Houston [14th Dist.] 2008, no pet.) (mistaken failure to update address with court negated conscious indifference).
- *Harold-Elliot Co. v. K.P./Miller Realty Growth Fund I*, 853 S.W.2d 752 (Tex. App.—Houston [1st Dist.] 1993, no writ) (although defendant failed to update address with Secretary of State, plaintiff knew the correct address of defendant's registered agent and corresponded with defendant at that address); *Cf. Global Services, Inc. v. G & W Leasing Co.*, 1996 WL 608904, (Tex. App.—Houston [1st Dist.] 1996, writ denied) (not designated for publication).

(d) Excuses Held to Constitute Conscious Indifference or Intentional Disregard

Unreasonable Delay in Obtaining Counsel

- *Sheraton Homes, Inc. v. Shipley*, 137 S.W.3d 379, 381-82 (Tex. App.—Dallas 2004, no pet.) (failure to explain the nature of the mistake relating to retention of counsel resulted in conclusory allegations).
- *O'Connell v. O'Connell*, 843 S.W.2d 212, 218 (Tex App.—Texarkana 1992, no writ) (no attempt to find a new attorney).
- *Holberg v. Short*, 731 S.W.2d 584, 587 (Tex. App.—Houston [14th Dist.] 1987, no writ) (defendant waited nine months from date prior counsel withdrew before retaining new counsel and delivering documents to new attorney two days before trial).
- *Wells v. Southern States Lumber & Supply Co.*, 720 S.W.2d 227, 228 (Tex. App.—Houston [14th Dist.] 1986, no writ) (defaulted defendants offered no explanation why they failed to retain new counsel for more than two months before default rendered).
- *Wood v. Zenith Mortgage Co.*, 538 S.W.2d 446, 448 (Tex. Civ. App.—Beaumont 1976, writ ref'd n.r.e.) (defendant took no steps to retain counsel to prepare for trial).
- *Baker v. Kunzman*, 873 S.W.2d 753 (Tex. App.—Tyler 1994, writ denied) (defense attorney testified that defendant never brought in suit papers despite his repeated calls).
- *Sharpe v. Kilcoyne*, 962 S.W.2d 697 (Tex. App.—Fort Worth 1998, no pet.) (defendant had constructive notice of trial setting because she had refused mailings regarding trial setting after her lawyer withdrew).

Mistaken Belief That No Answer Necessary

- *Holt Atherton Ind.. Inc. v.* Heine, 835 S.W.2d 80, 83 (Tex. 1992) (mistake of law that defendant would not be liable).
- *Padilla v. Hollerman Dev., L.P.*, No. 04-08-00739-CV, 2009 WL 1153324, at *3-4 (Tex. App.—San Antonio Apr. 29, 2009, no pet.) (properly served defendant took the papers to his real estate attorney and relied exclusively on the attorney's unresearched opinion that the defendant should await proper service before answering the lawsuit).
- *Novosad v. Cunningham*, 38 S.W.3d 767, 771 (Tex. App.—Houston [14th Dist.] 2001, no pet.) (failure to file answer based upon erroneous interpretation of application of bankruptcy stay was a legal error, and was intentional).
- *Dupnik v. Aransas Cty. Navigation Dist. No. 1*, 732 S.W.2d 780, 782 (Tex. App.—Corpus Christi 1987, no writ); *Carey Crutcher, Inc. v. Mid-Coast Diesel Services*, 725 S.W.2d 500, 502 (Tex. App.—Corpus Christi 1987, no writ) (mistaken belief in both cases that bankruptcy stay alleviated need for answer); *but see Joiner v. Amsav Group, Inc.*, 760 S.W.2d 318, 321 (Tex. App.—

Texarkana 1988, writ denied) (criticizing *Dupnik* and *Crutcher* as contrary to weight of authority)

- *Sunrizon Homes, Inc. v. Fuller*, 747 S.W.2d 530, 532-33 (Tex. App.—San Antonio 1988, writ denied); *Bennett Interests Ltd. v. Koomos*, 725 S.W.2d 316, 318 (Tex. App.—Corpus Christi 1986, writ ref'd n.r.e.) (both cases are examples of allegedly mistaken belief that answer was unnecessary when record reflected familiarity with need for answer to avoid default judgment).
- *Prince v. Prince*, 912 S.W.2d 367, 369-70 (Tex. App.—Houston [14th Dist.] 1995, no writ) (husband's failure to make inquiry regarding divorce papers he received supported finding of conscious indifference).
- *Pickell v. Guaranty Nat'l Life Ins. Co.*, 917 S.W.2d 438, 442-43 (Tex. App.—Houston [14th Dist.] 1996, no writ) (defendant failed to appear at pre-trial conference after case settled in almost all respects, and failed to make inquiries regarding whether his presence was required).

Failure To Explain How Mistake Was Made

- *Interconex, Inc. v. Ugarov*, 224 S.W.3d 523, 538-39 (Tex. App.—Houston [1st Dist.] 2007, no pet.) (no explanation of whether papers were lost or whether they were ignored after evidence demonstrated proper service, just that the receiving person would have forwarded the papers to company attorneys if he had received them).
- *BancTexas McKinney N.A. v. Desalination Systems, Inc.*, 847 S.W.2d 301, 302 (Tex. App.—Dallas 1992, no writ); *but see Old Republic Ins. Co. v. Scott*, 873 S.W.2d 381, 382 (Tex. 1994) (affirming default judgment in the absence of affidavit from bank president upon whom citation was served).
- *Liberty Mutual Fire Ins. Co. v. Ybarra*, 751 S.W.2d 615 (Tex. App.—El Paso 1988, no writ) (carrier sent copy of citation to the wrong office for handling, but no explanation provided regarding usual procedures).
- *Memorial Hosp. Sys. v. Fisher Ins. Agency, Inc.*, 835 S.W.2d 645, 652 (Tex. App.—Houston [14th Dist.] 1992, no writ) (defendant, who turned over petition to its insurer, failed to provide explanation regarding why its insurer did not answer).
- *Motiograph, Inc. v. Matthews*, 555 S.W.2d 196, 196-97 (Tex. Civ. App.—Dallas 1975 writ ref'd n.r.e.) (affirming default judgment where affidavit stated only that citation was misplaced by unnamed employee).

Conclusory Allegations Not Supported by Facts

- *Simmons v. McKinney*, 225 S.W.3d 706, 709-10 (Tex. App.—Amarillo 2007, no pet.) (unsubstantiated allegation that failure to file answer was mistake or accident was insufficient).
- *Anchor Fumigation & Pest Control, inc. v. Cortes*, No. 14-02-01252-CV, 2003 WL 22724766, at *2-3 (Tex. App.—Houston [14th Dist.] Nov. 20, 2003, no pet.) (defendant's conclusory statement that defendant's insurance agent lost the citation was not competent proof that agent failed to file an answer due to mistake

or accident without evidence that anyone from the insurance agency actually lost the petition, how they lost the petition, or what otherwise led to their failure to file an answer).

- *Nichols v. TMJ Co.*, 742 S.W.2d 828, 831 (Tex. App.—Dallas 1987, no writ) (conclusory allegations about transportation problems).

Inconsistencies and/or Falsehoods in Affidavit

- *Royal Zenith Corp. v. Martinez*, 695 S.W.*2d* 327, 329-30 (Tex. App.—Waco 1985, no writ) (inconsistencies and possible falsehoods in testimony, as well as failure to follow regular procedures, precluded new trial).
- *Pentes Design, Inc. v. Perez*, 840 S.W.2d 75 (Tex. App.—Corpus Christi 1992, writ denied) (defendant's belief that matter was being resolved through informal settlement negotiations was not supported by the evidence).
- *P & H Transp., Inc. v. Robinson*, 930 S.W. 2d 857, 860 (Tex. App.—Houston [1st Dist.] 1996, no writ) (defendant testified that he faxed petition to his insurer upon receiving it and two other times, but insurer testified that it only received last fax sent seven months after service).

Reliance on Attorney Refusing to Represent Defendant

- *Bennett Interests Ltd. v. Koomos*, 725 S.W.2d 316, 318 (Tex. App.—Corpus Christi 1986, writ ref'd n.r.e.) (attorney told defendant to find local counsel to handle suit, but defendant did nothing until after default).
- *Williams v. McSwain*, 596 S.W.2d 583, 584-85 (Tex. Civ. App.—Beaumont 1980, no writ) (defendant had disagreement with his lawyer who returned suit papers, and then attempted to have them re-delivered to lawyer who never received them).

Receipt of Notice of Trial Setting by Local Counsel

- *Grissom v. Watson*, 704 S.W.2d 325, 326-27 (Tex. 1986) (attorney representing defendant withdrew and defendant did not retain counsel for three months).

Conscious Decision to Delay Filing An Answer/Internal Procedures

- *Colston v. Colston*, No. 12-09-00458-CV, 2010 WL 3249856, at *2, *5-7 (Tex. App.—Tyler Aug. 18, 2010, pet. denied) (trial court was free to find conscious indifference when the defendant did not file an answer because of alleged physical and mental inability to deal the lawsuit, the defendant mistakenly believed he would receive further notice regarding a date to appear, and the defendant did not file an answer because he hoped for a reconciliation).
- *Hornell Brewing Co. v. Lara*, 252 S.W.3d 426, 428 (Tex. App.—Houston [14th Dist.] 2008, no pet.) (internal procedures for processing citation so complex as to approach conscious indifference, although conscious indifference not found).

- *Oak Creek Homes Inc. v. Jones*, 758 S.W.2d 288, 291-92 (Tex. App.—Waco 1988, no writ) (adjuster had been in contact with plaintiffs' counsel and decided not to answer until he had spoken with particular lawyer).
- *Beck v. Palacios*, 813 S.W.2d 643, 645 (Tex. App.—Houston [14th Dist.] 1991, no writ) (defendant failed to answer because he believed amended petition dismissed him from the suit, so he refrained from forwarding the papers to his lawyer).
- *Sunrizon Homes, Inc. v. Fuller*, 747 S.W.2d 530, 534 (Tex. App.—San Antonio 1988, writ denied) (defendant notified by plaintiff's counsel that answer was late, but defendant was "too busy" to answer).
- *Young v. Kirsch*, 814 S.W.2d 77, 81 (Tex. App.—San Antonio 1991, no writ) (defendant was advised four times by plaintiff's attorney that no answer had been filed by his insurance carrier, but did nothing).
- *Johnson v. Edmonds*, 712 S.W.2d 651, 652-53 (Tex. App.—Fort Worth 1986, no writ) (defendant simply put suit papers away because he did not understand them).
- *Halligan v. First Heights, F.S.A.*, 850 S.W.2d 801, 804 (Tex. App.—Houston [1st Dist.] 1993, no writ) (guarantor failed to appear at trial because he was too preoccupied with health of mother who had a heart attack 3 days before trial).

Pattern of Indifference Toward the Litigation

- *Levine v. Shackelford, Melton & McKinley*, L.L.P., 248 S.W.3d 166, 168 (Tex. 2008) (attorney's "pattern of ignoring deadlines and warnings from the opposing party amounts to conscious indifference.").
- *Gilbert v. Brownell Electro*, 832 S.W.2d 143 (Tex. App.—Tyler 1992, no writ) (finding conscious indifference despite defendant's claim of cluster headaches, where defendant had failed to answer prior lawsuits).
- *Waste Water v. Alpha Finishing & Developing Corp.*, 874 S.W.2d 940, 942 (Tex. App.—Houston [14th Dist.] 1994, no writ) (attorney exhibited consistent pattern of neglect and indifference during course of case).
- *Vannerson v. Vannerson*, 857 S.W.2d 659 (Tex. App.—Houston [1st Dist.] 1993, writ denied) (appellant left town two days before trial and did not call the court or opposing counsel regarding the status of the setting until the afternoon of the day before the trial).

(4) Meritorious Defense

The second element of *Craddock* requires the defendant moving for a new trial after a default judgment to "set up" a meritorious defense — i.e., defendant need not prove a meritorious defense in the usual sense. *Gen. Elec. Capital Auto Fin. Leasing Svcs., Inc. v. Stanfield*, 71 S.W.3d 351, 356 (Tex. App.—Tyler 2001, no pet.). This means that the motion must allege facts which in law would constitute a defense to the cause of action asserted by the plaintiff and such must be supported by affidavits or other evidence proving such a defense prima facie. *Ivy v. Carrell*, 407 S.W.2d 212, 214 (Tex. 1966*); see also In re: E.P.C.*, No. 02-10-00050-CV, 2010 WL 5187691, at *2 (Tex. App.—Fort Worth Dec. 23, 2010, no pet.) (echoing

that mere allegations are not enough); *Wal-Mart Stores, Inc. v. Kelley*, 103 S.W.3d 642, 644 (Tex. App.—Fort Worth 2003, no pet.); *Ritter v. Wiggins*, 756 S.W.2d 861, 863 (Tex. App.—Austin 1988, no writ). However, the trial court may not try defensive issues in deciding whether to set aside the default and should not consider counter affidavits or conflicting testimony attempting to refute the movant's factual allegations as to a meritorious defense. *Estate of Pollack v. McMurrey*, 858 S.W.2d 388, 392 (Tex. 1993); *Lara v. Rosales*, 159 S.W.3d 121, 124 (Tex. App.—Corpus Christi-Edinburg 2004, pet. denied) ("The movant is not required to prove the truth of a meritorious defense before trial, and the motion for new trial should not be denied on the basis of contradictory evidence offered by the non-movant."). Nevertheless, the plaintiff can challenge the legal sufficiency of the facts alleged to constitute a meritorious defense; and the court should consider whether the facts asserted in the affidavits appear true and whether the affiant believes them to be true. *The Moving Co. v. Whitten*, 717 S.W.2d 117, 120-22 (Tex. App.—Houston [14th Dist.] 1986, writ ref'd n.r.e.).

In *Peralta v. Heights Medical Center. Inc.*, the United States Supreme Court held that the Texas requirement of showing of meritorious defense in order to set aside a default judgment when a defendant established an absence of service violated a party's constitutional due process rights. 485 U.S. 80, 108 S. Ct. 896, 99 L. Ed. 2d 896 (1988); *see also Lopez v. Lopez*, 757 S.W.2d 721, 723 (Tex. 1988) (per curiam) (applied *Peralta* to case where there was no notice of hearing). However, when service on defendant has been properly effected, due process of law is not violated by merely requiring a defendant to allege facts, rather than conclusions constituting a meritorious defense, as a prerequisite to setting aside the default judgment. *See Richmond Mfg. Co. v. Fluitt*, 754 S.W.2d 359, 360 (Tex. App.—San Antonio 1988, no writ).

Examples of unacceptable meritorious defenses include:

- conclusory allegations of defensive matters unsupported by evidence— *Perry v. Doherty*, No. 04-07-00739, 2009 WL 538830, at *2 (Tex. App.—San Antonio Mar. 4, 2009, no pet.); *Wal-Mart Stores, Inc. v. Kelley*, 103 S.W.3d 642, 644 (Tex. App.—Fort Worth 2003, no pet.); *Liberty Mutual Fire Ins. Co. v. Ybarra*, 751 S.W.2d 615, 618 (Tex. App.—El Paso 1988, no writ).
- defenses based on affidavit testimony directly and wholly contradicted by earlier deposition testimony—*The Moving Co. v. Whitten*, 717 S.W.2d 117, 120-22 (Tex. App.—Houston [14th Dist.] 1986, writ ref'd n.r.e.).
- relying on a meritorious defense raised solely by affidavit and not included in new trial motion—*Ritter v. Wiggins*, 756 S.W.2d 861, 863 (Tex. App.—Austin 1988, no writ).
- defenses based on inadmissible evidence—*Pierson v. McClanahan*, 531 S.W.2d 672, 676 (Tex. Civ. App.—Austin 1975, writ ref'd n.r.e.) (polygraph examination).

(5) Negating Hardship to Plaintiff and Undue Delay

The third element of *Craddock* requires a movant to demonstrate that setting aside the default judgment would not cause a delay or otherwise injure the plaintiff. Once a movant makes that representation in its motion, the burden of going forward with proof of injury shifts to

the plaintiff because these are matters particularly within his knowledge. *Angelo v. Champion Rest. Equip. Co.*, 713 S.W.2d 96, 98 (Tex. 1986). If plaintiff fails to do so, defendant has met the third element of *Craddock*. *Estate of Pollack*, 858 S.W.2d at 393. However, a plaintiff's loss of the economic benefit derived from the entry of the default judgment or the potential bankruptcy by defendant do not constitute hardship or delay that will bar granting a new trial. *Jackson v. Mares*, 802 S.W.2d 48, 52 (Tex. App.—Corpus Christi 1990, writ denied).

(a) Reimbursement of Plaintiff's Expenses

In applying *Craddock*, courts of appeals have often found it necessary for the defendant to offer to reimburse the plaintiff for costs involved in obtaining the default judgment as a prerequisite to ordering a new trial. *Angelo*, 713 S.W.2d at 98 (citing cases); *see also Hornell Brewing Co. v. Lara*, 252 S.W.3d 426, 428-29 (Tex. App.—Houston [14th Dist.] 2008, no pet.) (denying new trial motion based on defendants' refusal to reimburse expenses). In addition, to ensure that the party recovering the default judgment is not prejudiced by delay, courts have generally looked more favorably upon defendants ready, willing and able to go to trial almost immediately. *Id*. In *Director, State Employees Workers' Compensation Div. v. Evans*, the Texas Supreme Court acknowledged its previous stance that the willingness of a party to go to trial immediately and pay the expenses of the default judgment are important factors for the trial court to consider when deciding whether to grant a new trial, but they are not dispositive. 889 S.W.2d 266, 270 n.3 (Tex. 1994); *see also Angelo*, 713 S.W.2d at 98 (such factors not the *sine qua non* of granting the motion for new trial); *Cliff v. Huggins*, 724 S.W.2d 778, 779 (Tex. 1987); *see also Robinson v. Elliott Elec. Supply*, No. 10-08-00306, 2009 WL 4547891, at *3 (Tex. App.—Waco Nov. 25, 2009, no pet.) (stating an offer to reimburse the default judgment costs or readiness for trial is not a precondition for granting a motion for new trial). Therefore, a defendant seeking to satisfy a lack of prejudice to the plaintiff should indicate in its new trial motion that it is ready to go to trial and that it will reimburse the plaintiff for the costs associated with obtaining the default judgment. *Cont'l Cas. Co. v. Hartford Ins.*, 74 S.W.3d 432, 436 (Tex. App.—Houston [1st Dist.] 2002, no pet.).

In fact, a conditional grant of a motion for new trial based upon a party's payment of costs, such as attorney's fees or witness and travel expenses, is well within the trial court's discretion. *In re Steiger*, 55S.W.3d 168, 171-72 (Tex. App.—Corpus Christi 2001, no pet.) (citing *Equitable Gen. Ins. Co. of Tex. v. Yates*, 684 S.W.2d 669, 671 (Tex. 1984)); *see also Allied Rent-All. Inc. v. Int'l Rental Ins.*, 764 S.W.2d 11, 13 (Tex. App.—Houston [14th Dist.] 1988, no writ) (also within trial court's discretion to deny motion in event expenses upon which motion conditioned are not paid). The offer in the motion for new trial to reimburse plaintiff's expenses can and should be stated as "reasonable" expenses. *Stone Res.. Inc. v. Barnett*, 661 S.W.2d 148, 152 (Tex. App.—Houston [lst Dist.] 1983, no writ). Obviously, if the case is brand new and no discovery has been done, defendant cannot offer to go to trial immediately, but he can indicate a willingness to proceed with the case.

Plaintiff has the burden to prove the expenses incurred in obtaining a default judgment since those expenses are within the plaintiff's exclusive knowledge. *Angelo*, 713 S.W.2d at 98. Although the nature of expenses for which defendant must reimburse plaintiff is resolved on a case-by-case basis and there is no requirement of reimbursement, the trial court has broad discretion to condition a new trial on defendant's reimbursing plaintiff for travel expenses,

attorney's fees, lost earnings, witness expenses and miscellaneous expenses — with the court exercising such discretion in light of the amount of money in controversy and the degree to which defendant's failure to answer was caused by his own negligence. *United Beef Producers Inc. v. Lookingbill*, 532 S.W.2d 958, 959 (Tex. 1976). In proving up attorney's fees in a default judgment context, a plaintiff should introduce evidence regarding the difficulty and complexity of the case, the amount of money involved, the benefit derived by the client, the amount of time devoted by the attorney, and the skill and experience reasonably needed to perform the services. *Allied Rent-All, Inc.*, 764 S.W.2d at 13.

(b) Delay Caused by New Trial

Plaintiff also has the burden of going forward with proof controverting defendant's allegations that a new trial would cause hardship or undue delay. *First State Bldg. & Loan Ass'n v. B. L. Nelson & Assoc., Inc.*, 735 S.W.2d 287, 289 (Tex. App.—Dallas 1987, no writ). Obviously, vacating a final default judgment and granting a new trial will invariably delay final resolution of a case and, if it results in an eventual victory for defendant, will operate to injure plaintiff. Consequently, in evaluating whether the delay to plaintiff is occasioned by granting a new trial is unacceptably excessive, the trial court must engage in a case-by-case analysis in an attempt to achieve equity. *Lara v. Rosales*, 159 S.W.3d 121, 125 (Tex. App.—Corpus Christi-Edinburg 2004, pet. denied); *see also Angelo*, 713 S.W.2d at 98. At the very least, plaintiff should be required to show that the granting of the new trial would cause delay substantially beyond that which plaintiff would have faced had defendant timely answered. As the Corpus Christi Court of Appeals noted in *Jackson v. Mares*:

> The purpose of the final element of the *Craddock* rule, however, is to protect a plaintiff against the sort of undue delay or injury which disadvantages him in presenting the merits of his case at a new trial, such as loss of witnesses or other valuable evidence upon retrial.

802 S.W.2d 48, 52 (Tex. App.—Corpus Christi 1990, writ denied) (emphasis added).

When making this determination, the trial court is entitled to look at the conduct of the plaintiff. For example, one court concluded that the plaintiff/insured would not be injured by the granting of a new trial where plaintiff had waited over 20 months to file suit after being informed of the defendant insurer's intent not to pay face value of the policies and plaintiffs suit had been pending only a short time at the time default judgment was rendered. *See Guardsman Life Ins. Co. v. Andrade*, 745 S.W.2d 404, 406 (Tex. App.—Houston [lst Dist.] 1987, writ denied).

c. Hearing on Motion For New Trial

A motion for new trial is overruled by operation of law 75 days after the judgment is signed. TEX. R. CIV. P. 329b(c). Defendant, therefore, needs to set his motion in advance of that deadline in order to take advantage of an evidentiary hearing to persuade the trial court to grant the motion. Defense counsel should always seek a hearing on the motion. *See Fluty v. Simmons Co.*, 835 S.W.2d 664, 668 (Tex. App.—Dallas 1992, no writ) (no abuse of discretion was shown in trial court's overruling of a motion for new trial by operation of law where defendant made no attempt to obtain a timely hearing on his motion).

If the plaintiff is contesting *Craddock*'s mistake/conscious indifference element, an evidentiary hearing is a necessity, with live witnesses and evidence in addition to the affidavits attached to the motion. *Estate of Pollack v. McMurrey*, 858 S.W.2d 388, 392 (Tex. 1993). Note that the Texas Supreme Court has ruled that affidavits attached to the motion for new trial do not have to be separately introduced into evidence at the hearing. *Evans*, 889 S.W.2d at 268 (disapproving *Carey Crutcher. Inc. v. Mid-Coast Diesel Services Inc.*, 725 S.W.2d 500, 502 (Tex. App.—Corpus Christi 1987, no writ)).

2. Equitable Bill of Review

a. In General

A bill of review is an independent equitable action brought by a party to a former action seeking to set aside a judgment which is no longer appealable or subject to a motion for new trial. *State v. 1985 Chevrolet Pickup Truck*, 778 S.W.2d 463, 464 (Tex. 1989); *McEwen v. Harrison*, 162 Tex. 125, 345 S.W.2d 706, 709-11 (1961); *Alderson v. Alderson*, 352 S.W.3d 875, 878 (Tex. App.—Dallas 2011, pet. denied); *Perdue v. Patten Corp.*, 142 S.W.3d 596, 604 (Tex. App.—Austin 2004, no pet.). It is an equitable proceeding designed to prevent manifest injustice. *Hesser v. Hesser*, 842 S.W.2d 759, 765 (Tex. App.—Houston [lst Dist.] 1992, writ denied) (citing *French v. Brown*, 424 S.W.2d 893, 895 (Tex. 1967). A bill of review cannot be used either by a party who fails to file a motion for new trial or appeal when he had time to do so or by a party whose motion for new trial was denied. *Rizk v. Mavad*, 603 S.W.2d 773, 776 (Tex. 1980); *French*, 424 S.W.2d at 894-95; *In re Botello*, No. 04-08-00562-CV, 2008 WL 5050437, at *3-4 (Tex. App.—San Antonio Nov. 26, 2008) (orig. proceeding); *Mosely v. Omega Ob-Gyn Assocs.*, No. 2-06-291-CV, 2008 WL 2510638, at *2-3 (Tex. App.—Fort Worth June 19, 2008, pet. denied) (failure of defendant to avail herself of Rule 306a); *Perdue v. Patten Corp.*, 142 S.W.3d 596, 604 (Tex. App.—Austin 2004, no pet.) ("[A] plaintiff must prove that he exercised due diligence in pursuing all legal remedies to the challenged judgment or show good cause for failing to exhaust those remedies."); *Onwukwe v. Ike*, 137 S.W.3d 159, 166 (Tex. App.—Houston [1st Dist.] 2004, no pet.) (defendant failed to timely bring restricted appeal that was available to him); *Hesser*, 842 S.W.2d at 765; *Winship v. Garguillo*, 754 S.W.2d 360, 363 (Tex. App.—Waco), *writ denied per curiam*, 761 S.W.2d 301 (Tex. 1988).

However, bill of review procedures are still available if the defaulting defendant did not avail itself of other procedural mechanisms available for challenging the judgment if the defendant was never properly served. *Ross v. Nat'l Ctr. For the Disabled*, 197 S.W.3d 795, 797-98 (Tex. 2006) (per curiam) (bill of review appropriate remedy where plaintiff learned of judgment within time for filing a motion under Rule 306a, but was never properly served); *see also Wembley Inv. Co. v. Herrera*, 11 S.W.3d at 927 (finding no lack of diligence in failure to pursue motion for new trial where defendant did not receive notice that default judgment had become final).

b. Procedure

Baker v. Goldsmith is the leading case on bill of review procedure and should be studied closely before undertaking a bill of review proceeding. 582 S.W.2d 404 (Tex. 1979); *see also*

King Ranch, Inc. v. Chapman, 118 S.W.3d 742 (Tex. 2003) (a more recent, helpful opinion discussing bills of review).

(1) Filing a Petition

In order to invoke the equitable powers of the trial court, the bill of review complainant must file a petition as a new and independent suit in the same court that rendered the default judgment. *Baker*, 582 S.W.2d at 408; *see also Solomon, Lambert, Roth & Assocs. v. Kidd*, 904 S.W.2d 896, 899-901 (Tex. App.—Houston [1st Dist.] 1995, no writ) (bill of review judgment entered by different court than entered default judgment was void). The petition must allege "factually and with particularity that the default judgment was rendered as a result of fraud, accident, or wrongful act of the plaintiff unmixed with his own negligence and must allege sworn facts sufficient to constitute a meritorious defense. *Baker*, 582 S.W.2d at 408. However, if the bill of review petitioner establishes lack of proper service, he is not required to plead or prove his due diligence, fraudulent or wrongful conduct, or a meritorious defense. *See Ross*, 197 S.W.3d at 797-98. The grounds upon which a bill of review may be obtained are narrow because the procedure conflicts with the policy that judgment must become final at some point. *King Ranch*, 118 S.W.3d at 751. Note that a bill of review petition must be verified. *In re D.L.S.*, No. 05-08-00173-CV, 2009 WL 1875579, at *3 (Tex. App.—Dallas July 1, 2009, no pet.); *Wright v. Wright*, 710 S.W.2d 162, 166 (Tex. App.—San Antonio 1986, writ ref'd n.r.e.).

A party to the original lawsuit or a person who had a then-existing interest or right which was prejudiced by the default can file a petition for bill of review. *Dolenz v. Wells*, No. 05-06-00840-CV, 2007 WL 259196, at *1 (Tex. App.—Dallas Jan 31, 2007, pet. denied); *Lerma v. Bustillos*, 720 S.W.2d 204, 205 (Tex. App.—San Antonio 1986, no writ). In essence, the party seeking the bill of review — *i.e.*, the defendant in the previous case against whom a default judgment has been rendered — is now the plaintiff in an independent action with a different cause number which is then tried and appealed upon its own merits. Willis, *The Bill of Review: Pleading and Practice Notes*, 51 Tex. Bar J. 298, 298 (1988). A bill of review proceeding results in a judgment which either denies the relief sought or sets aside the former judgment and renders a new judgment. *Id.*; *see also Lambert v. Coachmen Indus.*, 761 S.W.2d 82, 85 (Tex. App.—Houston [14th Dist.] 1988, writ denied) (affirming trial court's decision to grant bill of review, set aside post-answer default judgment and render take nothing judgment in DTPA action).

The statute of limitations governing a bill of review is four years. See TEX. CIV. PRAC. & REM. CODE § 16.051 (residual four-year limitations provision); *Sotelo v. Scherr*, 242 S.W.3d 823, 827 (Tex. App.—El Paso 2007, no pet.) (citing *Caldwell v. Barnes*, 975 S.W.2d 535, 538 (Tex. 1998)); *Layton v. Nationsbanc Mortgage Corp.*, 141 S.W.3d 760, 763 (Tex. App.—Corpus Christi 2004, no pet.); *Law v. Law*, 792 S.W.2d 150, 153 (Tex. App.—Houston [lst Dist.] 1990, writ denied). The only exception to this four year limitations period is when the petitioner proves extrinsic fraud, which is fraud that denies a party the opportunity to fully litigate at trial all the rights or defenses that the party was entitled to assert. *Layton*, 141 S.W.3d at 763. Regardless, a defaulting party should pursue a bill of review as soon as possible after learning of the judgment to avoid any potential laches defense. *See Caldwell*, 975 S.W.2d at 538-39 (delay of twenty months between discovery of default judgment and filing bill of review was adequately explained, and suit was not barred by laches).

(2) Pre-Trial Hearing

After a sufficient bill of review petition is filed, the trial court conducts a pre-trial hearing to determine whether the bill of review plaintiff (defaulted defendant) has established *a prima facie* meritorious defense. *Baker*, 582 S.W.2d at 408; *see also Beck v. Beck*, 771 S.W.2d 141, 141-42 (Tex. 1989). *A prima facie* meritorious defense is made when it is established that the defense (1) is not barred as a matter of law; and (2) that complainant will be entitled to judgment on a retrial if no evidence to the contrary is offered. *Baker*, 582 S.W.2d at 409. The existence of *a prima facie* meritorious defense is a question of law for the trial court and the petitioner's proof may consist of documents, discovery responses and affidavits, together with such other evidence that the trial court receives in its discretion. *Id*. While the bill of review defendant is entitled to respond with proof showing that the defense is barred as a matter of law, all factual disputes at the pre-trial hearing are resolved in favor of the bill of review petition and the existence of a meritorious defense. *Id*.

The only issue before the court at this pre-trial hearing is the existence of a meritorious defense. If the court finds that the petitioner has raised a *prima facie* meritorious defense, it is error for the court to attempt to resolve the remaining elements at this stage of the litigation without conducting a trial. *Beck*, 771 S.W.2d at 141-42.

(3) Trial

If the court determines that a *prima facie* meritorious defense has not been established, the bill of review proceeding terminates and the bill of review action is dismissed. *Baker*, 582 S.W.2d at 409. However, if a *prima facie* meritorious defense has been established, the court is required to conduct a trial on the merits before a jury or the trial court. At the trial, the bill of review plaintiff (defaulted defendant), assuming proper service, is required to open and prove by a preponderance of the evidence that the default judgment was rendered as a result of the fraud or wrongful act of the opposite party or through an official mistake, unmixed with any negligence of his own. *Id*.; *see also State v. 1985 Chevrolet Pickup Truck*, 778 S.W.2d 463, 464-65 (Tex. 1989); *K. B. Video & Elecs. Inc. v. Naylor*, 847 S.W.2d 401, 405 (Tex. App.—Amarillo 1993, writ denied). The bill of review defendant (plaintiff in the default judgment proceeding) is then entitled to put on contrary rebuttal evidence. Wicker, CIVIL TRIAL & APPELLATE PROCEDURE *§* 320 (Tex. Prac. 1985); *see also Krivka v. Hlavinka*, No. 04-08-00865-CV, 2009 WL 3789602, at *2-3 (Tex. App.—San Antonio Nov. 11, 2009, no pet.) (failing to timely notify the court of rebuttal evidence waives due process claims). Next, the bill of review defendant must prove by a preponderance of the evidence his original cause of action, while the bill of review plaintiff may then produce evidence rebutting the elements of that cause of action or raising an affirmative defense. CIVIL TRIAL & APPELLATE PROCEDURE, *supra* at § 320.

After the close of the evidence, the fact finder determines whether complainant has established by a preponderance of the evidence that the prior judgment was rendered as a result of fraud, accident or wrongful act of the opposite party or official mistake unmixed with negligence on the complainant's part. This issue may be submitted in one broad question. *Baker*, 582 S.W.2d at 409. Conditioned upon an affirmative answer to that question, the jury then determines whether the bill of review defendant, the original plaintiff, proved the elements of his original cause of action. *Id*.

If the jury determines that all the elements of the original plaintiff's cause of action are established, the bill of review plaintiff will lose unless he establishes his defense to the satisfaction of the trier of fact. CIVIL TRIAL & APPELLATE PROCEDURE, *supra* at § 320. If the bill of review plaintiff sustains his burden with regard to the prior judgment and the bill of review defendant presents no evidence to prove his original cause of action, then the trial court is empowered to sustain the bill of review, vacate the wrongfully obtained judgment and enter a take-nothing judgment in favor of the bill of review plaintiff. *Lambert*, 761 S.W.2d at 87.

The bill of review trial may be conducted in two distinct trials, one on extrinsic fraud/excuse and a second on the bill of review defendant's cause of action. *Baker*, 582 S.W.2d at 409. If two separate trials are conducted and the bill of review plaintiff fails to carry his burden on extrinsic fraud/excuse, the other trial on which the bill of review defendant has the burden of proof is unnecessary. CIVIL TRIAL & APPELLATE PROCEDURE, *supra* at § 320. In any event, only one final judgment may be rendered in a bill of review proceeding either granting or denying the requested relief. *Baker*, 582 S.W.2d at 409; *Kessler v. Kessler*, 693 S.W.2d 522, 525 (Tex. App.—Corpus Christi 1985, writ ref'd n.r.e.). Such judgment may be appealed. *Dickey v. City of Houston*, 501 S.W.2d 293, 294 (Tex. 1973).

c. Elements

In *Alexander v. Hagedorn*, the Texas Supreme Court set forth the three elements of proof required in a bill of review: (1) a meritorious defense to the cause of action alleged to support the judgment; (2) which the defaulting party was prevented from making by the extrinsic fraud, accident, or wrongful conduct of the opposing party; and, (3) that the excuse offered is unmixed with any fault or negligence of the defaulting party. 148 Tex. 565, 226 S.W.2d 996, 998 (1950),; *see also Baker*, 582 S.W.2d at 406-07. In an effort to balance the need for equitable relief against the importance of the finality of judgments, courts have strictly construed the elements of a bill of review. *See Shakoor v. Clarksville Oil & Gas Co.*, No. 06-09-00107, 2010 WL 2680082, at *2 (Tex. App.— Texarkana July 7, 2009, no pet.); *Layton v. Nationsbanc Mortgage Corp.*, 141 S.W.3d 760, 763 (Tex. App.—Corpus Christi 2004, no pet.); *Narvaez v. Maldonado*, 127 S.W.3d 313, 319 (Tex. App.—Austin 2004, no pet.) ("In reviewing the grant or denial of a bill of review, we indulge every presumption in favor of the court's ruling."); *K.B. Video & Elecs. Inc. v. Naylor*, 847 S.W.2d 401, 405 (Tex. App.—Amarillo 1993, writ denied); *Arndt v. Arndt*, 714 S.W.2d 86, 88 (Tex. App.—Houston [14th Dist.] 1986, no writ).

Bill of review petitioners claiming non-service ordinarily are relieved of proving two elements ordinarily required in a bill of review proceeding. *Caldwell v. Barnes*, 154 S.W.3d 93, 96-97 (Tex. 2004) (per curiam). Where there has been no service, the United States Supreme Court has held that the meritorious defense requirement for a bill of review would violate due process. *Id. (citing Peralta v. Heights Med. Ctr., Inc*., 485 U.S. 80, 86-87 (1988); *see also Dispensa v. Univ. State Bank*, 987 S.W.2d 923, 927 (Tex. App.—Houston [14th Dist.] 1999, no pet.) ("one receiving no actual or constructive notice of a judgment is entitled to have it set aside without proving a meritorious defense"). In addition, the petitioner is not required to establish that fraud, accident, wrongful act, or official mistake prevented the petitioner from raising a defense. *Caldwell*, 154 S.W.3d at 97; *see Axelrod R & D, Inc*., 839 S.W.2d 126, 128 (Tex.

App.—Austin 1992, writ denied) (petitioner does not have to prove fraud, accident, or wrongful act of the opposing party or that it had a meritorious defense).

A petitioner must still prove the final element for a bill of review — that the judgment was rendered unmixed with any fault or negligence of its own. *Caldwell*, 154 S.W.3d at 97; *Garza v. Attorney General of Texas*, 166 S.W.3d 799, 809-10 (Tex. App.—Corpus Christi 2005, no pet.). However, the Texas Supreme Court has made clear that an individual who is not served with process cannot be at fault or negligent in allowing a default judgment to be rendered. *Caldwell*, 154 S.W.3d at 97; *see also Ross*, 197 S.W.3d at 797-98. Proof of non-service, therefore, "will conclusively establish the third and only element that bill of review plaintiffs are required to prove when they are asserting lack of service of process." *Caldwell*, 154 S.W.3d at 97; *Garza*, 166 S.W.3d at 810; *Nguyen v. Intertex, Inc*., 93 S.W.3d 288, 293 (Tex. App.—Houston [14th Dist.] 2002, no pet.) (if not served, petitioner's lack of fault or negligence is established). Because proof of non-service conclusively negates a plaintiff's fault or negligence, the issue regarding service is properly resolved at trial, not by the district court in a pre-trial proceeding if the material facts are disputed. *Caldwell*, 154 S.W.3d at 97.

When a plaintiff claims lack of service, the trial court should: (1) dispense with any pretrial inquiry into a meritorious defense, (2) hold a trial, at which the bill of review plaintiff assumes the burden of proving it was not served with process, thereby conclusively establishing a lack of fault or negligence in allowing a default judgment to be rendered, and (3) conditioned upon an affirmative finding that the plaintiff was not served, allow the parties to revert to their original status as plaintiff and defendant with the burden on the original plaintiff to prove his or her case. *Id.* at 97-98.

(1) Meritorious Defense

As previously discussed, the bill or review complainant has the burden at a pre-trial hearing to establish a *prima facie* meritorious defense. *Baker*, 582 S.W.2d at 408-09. A meritorious defense is established when it is determined that such defense is not barred as matter of law and that the petitioner will be entitled to judgment upon retrial if no evidence to the contrary is offered. *Id*. Since the determination of a meritorious defense is a question of law and all contrary evidence must be disregarded, the test appears to be analogous to a legal evidentiary point. CIVIL TRIAL & APPELLATE PROCEDURE, *supra* at § 320. Therefore, so long as there is evidence of probative force (more than a scintilla) to support the alleged meritorious defense, the determination whether a *prima facie* showing has been made should be resolved in defendant's favor. *Id*. Of course, the due process dictates of *Peralta v. Heights Med. Ctr., Inc.*, 485 U.S. 80 (1988), relieve a bill of review petitioner from having to show a meritorious defense if the default judgment was based on defective service.

(2) Extrinsic Fraud

(a) General

The bill of review petitioner faces an extremely onerous burden in establishing extrinsic fraud. *Baker*, 582 S.W.2d at 408-09; CIVIL TRIAL & APPELLATE PROCEDURE, *supra* at § 320. The extrinsic fraud element of the bill of review proceeding distinguishes that proceeding from a

motion for new trial where the movant is merely required to prove that the failure to answer was not intentional nor the result of conscious indifference, but was merely due to accident or mistake. *Baker*, 582 S.W.2d at 409.

"Extrinsic fraud" has been defined as, "that fraud which denies a losing litigant the opportunity to fully litigate his rights or defenses upon trial." *Montgomery v. Kennedy*, 669 S.W.2d 309, 312 (Tex. 1984); *Haisler v. Coburn*, No. 10-09-00275, 2010 WL 2953372, at *2 (Tex. App.—Waco July 28, 2010, pet. denied); *Layton v. Nationsbanc Mortgage Corp.*, 141 S.W.3d 760, 763 (Tex. App.—Corpus Christi 2004, no pet.); *Lambert*, 761 S.W.2d at 87. In other words, extrinsic fraud is fraud which prevented the losing party either from learning of his rights or defenses, or from having a fair opportunity to present them at trial. *See* CIVIL TRIAL & APPELLATE PROCEDURE, *supra* at § 320.

In contrast, intrinsic fraud is fraud which relates to matters or issues which were or could have been considered by the court during trial. *Id.*; *Sanchez v. Sanchez*, No. 04-09-00477-CV, 2010 WL 3249905, at *2 (Tex. App.—San Antonio Aug. 18, 2010, no pet.). Intrinsic fraud includes false testimony, false instruments or any fraudulent matter that is presented during trial and considered in rendering judgment. *Lambert*, 761 S.W.2d at 87; *see also Tice v. Pasadena*, 767 S.W.2d 700, 702-04 (Tex. 1989) (city's allegation that plaintiffs conspired to commit perjury in personal injury suit was allegation of intrinsic fraud and did not support bill of review). Determining whether fraud is intrinsic or extrinsic is often a matter of degree and thus the cases are often confusing and difficult to reconcile. CIVIL TRIAL & APPELLATE PROCEDURE, *supra* at § 320.

(b) Examples of Extrinsic Fraud

- fraudulent failure to serve defendant with personal service to obtain judgment against him without actual notice. *See Forney v. Jorrie*, 511 S.W.2d 379, 384-85 (Tex. Civ. App.—San Antonio 1974, writ ref'd n.r.e.).
- concealment of a material fact by a fiduciary charged with a full duty of disclosure. *See Montgomery v. Kennedy*, 669 S.W.2d 309, 313 (Tex. 1984).
- failure of opposing counsel to notify opposing parties of a trial setting. *See Phillips v. Hopwood*, 329 S.W.2d 452, 455 (Tex. Civ. App.—Houston [lst. Dist.] 1959, writ ref'd n.r.e.).
- false certification of a defaulted defendant's last known address. *See Lee v. Thomas*, 534 S.W.2d 422, 427 (Tex. Civ. App.—Waco 1976, writ ref'd n.r.e.).
- wrong address used to attempt service of the motion for default judgment. *See Jordan v. Jordan*, 36 S.W.3d 259, 263 (Tex. App.—Beaumont 2001, pet. denied).
- fraudulent misrepresentations relating to property settlements during a divorce proceeding. *See Rathmell v. Morrison*, 732 S.W.2d 6, 14 (Tex. App.—Houston [14th Dist.] 1987, no writ).
- vacating adverse interlocutory default judgment and obtaining favorable default judgment without providing opposing party notice. *See Lambert*, 761 S.W.2d at 87.
- swearing a false affidavit to secure service by publication. *See Burrows v. Miller*, 797 S.W.2d 358, 360 n.l (Tex. App.—Tyler 1990, no writ).

(c) Official Mistake Will Substitute for Extrinsic Fraud Element

Pleading and proof of extrinsic fraud is unnecessary if the bill of review petitioner proves that he was misled or prevented from pursuing his meritorious defense due to an error or mistake by an officer of the court acting within his official duties.

Examples of official mistake are:

- a litigant is misled or prevented from filing a motion for new trial by misinformation from an officer of the court acting within his official duties and that misinformation is given to the party or his counsel within the time period for filing the motion. *See Gracey v. West*, 422 S.W.2d 913, 915 (Tex. 1968); *Hanks v. Rosser*, 378 S.W.2d 31, 35 (Tex. 1964).
- the clerk of the court fails to give a defaulting party notice of the final judgment as required by TEX. R. CIV. P. 306a. *See Cannon v. TJ Burdett & Sons Recycling*, No. 01-08-00380, 2009 WL 276797, at *5-6 (Tex. App.—Houston [14th Dist.] Feb. 5, 2009, no pet.); *Brown v. Vann*, No. 05-06-01424-CV, 2008 WL 484125, at *2 (Tex. App.—Dallas Feb. 25, 2008, no pet.); *Perdue v. Patten Corp.*, 142 S.W.3d 596, 607 (Tex. App.—Austin 2004, no pet.); *Petro-Chemical Transportation, Inc. v. Carroll*, 514 S.W.2d 240, 245 (Tex. 1974).
- the clerk of the court fails to send notice of a default judgment to the defendant because plaintiff failed to certify the address. *See Edgin v. Blasi*, 706 S.W.2d 353, 354-55 (Tex. App.—Fort Worth 1986, no writ); *Laredo v. Threadgill*, 686 S.W.2d 734, 735 (Tex. App.—San Antonio 1985, no writ).
- default judgment is erroneously rendered after someone in the clerk's office misplaced or lost a timely filed letter that constituted an answer. *See Baker*, 582 S.W.2d at 407.

The negligent mistake of a defaulted party's own attorney, however, cannot be substituted for a showing of extrinsic fraud since the attorney is the agent for the client and not an "officer of the court." *Transworld Financial Services v. Briscoe*, 722 S.W.2d 407, 408 (Tex. 1987); *see In re S.P.*, No. 06-10-00077-CV, 2010 WL 4970746, at *1 (Tex. App.—Texarkana Dec. 7, 2010, pet. denied) (stating allegations of a defaulted party's attorney's negligence or fraud cannot support a bill of review); *K. B. Video & Elecs., Inc. v. Naylor*, 847 S.W.2d 401, 406-07 (Tex. App.—Amarillo 1993, writ denied); *Conrad v. Orellana*, 661 S.W.2d 309, 313 (Tex. App.—Corpus Christi 1983, no writ); *see also Mathews v. Harris Methodist, Fort Worth*, 834 S.W.2d 582, 585 (Tex. App.—Fort Worth 1992, writ denied) (no extrinsic fraud where attorney knew he had a case pending and failed to give the court notice of his new address). Likewise, reliance on court personnel regarding procedures for setting aside a default is not an official mistake. *See K.B. Video & Elecs., Inc. v. Naylor*, 847 S.W.2d 401, 406-07 (Tex. App.—Amarillo 1993, writ denied) (no extrinsic fraud or official mistake in defendant's reliance on court personnel concerning procedures for remedying default).

(3) Defendant's Lack of Fault or Negligence

Pleading and proof that the default judgment was not rendered as a result of the defaulted party's fault or negligence is a necessary component of a bill of review. *See Jarrett v. Northcutt*, 592 S.W.2d 930, 930-31 (Tex. 1979); *see In re Botello*, No. 04-08-00562-CV, 2008 WL 5050437, at *2-3 (Tex. App.—San Antonio Nov. 26, 2008, no pet.); *see generally* CIVIL TRIAL & APPELLATE PROCEDURE, *supra* at § 320. In effect, a petitioner for a bill of review must prove that he acted with due diligence — as contrasted with the burden in a motion for new trial simply to show his conduct was not intentional or the result of conscious indifference. *Axelrod R & D, Inc. v. Ivy*, 839 S.W.2d 126, 128 (Tex. App.—Austin 1992 writ denied); *Conrad v. Orellana*, 661 S.W.2d at 313; *see generally* Willis, *The Bill of Review: Pleading and Practice Notes*, 51 TEX. BAR J. 298, 298 (1988). In this regard, a bill of review petitioner should plead that he lacks an adequate remedy at law and explain why the defaulted party did not seek relief by motion for new trial, appeal, or restricted appeal. *Nat'l Bank of Tex. v. First Nat'l Bank of Round Rock*, 682 S.W.2d 366, 368-69 (Tex. App.—Tyler 1984, no writ). For example, a litigant cannot willfully forfeit its right to an appeal by purposely missing the appeal bond deadline and then attempt to enforce its rights by bill of review. *Wadkins v. Diversified Contractors, Inc.*, 734 S.W.2d 142, 143-44 (Tex. App.—Houston [lst Dist.] 1987, no writ). Likewise, a defendant may not pursue remedies in another state before seeking to file a bill of review in Texas and still be found to be reasonably diligent. *Ponsart v. Citicorp Vendor Fin., Inc.*, 89 S.W.3d 285, 290 (Tex. App.—Texarkana 2002, no pet.).

C. Appellate Court Remedies

1. Appeal of Denial of Motion for New Trial or Motion to Set Aside Default Judgment

A defaulting party who wishes to challenge the trial court's denial of a motion for new trial following entry of a default judgment does so by filing an appeal from the default judgment entered by the trial court. This procedure follows the normal process of perfecting and prosecuting an appeal from a trial court judgment.

2. Restricted Appeal

a. Elements of a Restricted Appeal

The elements necessary for a party to avail itself of a restricted appeal are: (1) the restricted appeal must be brought within six months of the date of judgment; (2) by a party to the suit; (3) who did not participate in the trial and who did not timely file a post-judgment motion or request for findings of fact and conclusions of law. TEX. R. APP. P. 30. Each of these elements is jurisdictional and cannot be waived. *Agraz v. Carnley*, 143 S.W.3d 547, 551 (Tex. App.—Dallas 2004, no pet.).

A restricted appeal must be filed within six months after the final judgment is signed. TEX. R. APP. P. 26.1(c). In contrast to a motion for new trial, the fact that a defaulted party did not receive notice of the judgment is not grounds for enlargement of time to file a restricted

appeal. TEX. R. APP. P. 4.2(a) (2); *Maldonado v. Macaluso*, 100 S.W.3d 345, 346 (Tex. App.—San Antonio 2002, no pet.).

A restricted appeal is filed directly in the appellate court. *Fidelity & Guar. Ins. Co. v. Drewery Constr. Co.*, 186 S.W.3d 571, 573 (Tex. 2006) (per curiam). The restricted appeal is perfected just as an ordinary appeal, by filing a notice of appeal with the trial court clerk. TEX. R. APP. P. 25.1(a). If the notice of appeal is mistakenly filed with the appellate court clerk, it is deemed to have been filed the same day with the trial court clerk, and the appellate court clerk is required to send the trial court clerk a copy of the notice of appeal. *Id*.

The Texas Appellate Rules do not restrict the subject matter of a restricted appeal. Therefore, a restricted appeal, like the writ of error, is but another mode of appeal. *Texaco, Inc. v. Cent. Power & Light Co.*, 925 S.W.2d 586, 590 (Tex. 1996); *Gibraltar Sav. Ass'n v. Kilpatrick*, 770 S.W.2d 14, 16 (Tex. App.—Texarkana 1989, writ denied) (writ of error proceeding). When available, the restricted appeal affords review of the entire trial proceedings the same as in an ordinary appeal. *McKnight v. Trogdon-McKnight*, 132 S.W.3d 126, 129 (Tex. App.—Houston [14th Dist.] 2004, no pet.); *First Dallas Petroleum. Inc. v. Hawkins*, 727 S.W.2d 640, 644-45 (Tex. App.—Dallas 1987, no writ) (writ of error proceeding). As a practical matter, however, since an appellant in a restricted appeal cannot use this mode of appeal unless he did not participate at trial, the restricted appeal will customarily attack a default judgment. Further, in contrast to an ordinary appeal, a restricted appeal affords no presumptions in favor of the judgment being challenged. *Vaughn v. Medina*, No. 01-09-00885-CV, 2011 WL 1233556, at *2 (Tex. App.—Houston [1st Dist.] Mar. 31, 2011, no pet.) (citing *Sharif v. Par Tech, Inc.*, 135 S.W.3d 869, 872 (Tex. App.—Houston [1st Dist.] 2004, no pet.)). Additionally, the review is limited to errors apparent on the face of the record. *Drewery Constr. Co*., 186 S.W.3d at 573 (citing *Alexander v. Lynda's Boutique*, 134 S.W.3d 845, 848 (Tex. 2004)); *see also Texaco, Inc. v. Phan*, 137 S.W.3d 763, 768 (Tex. App.—Houston [1st Dist.] 2004, no pet.).

As with any attack on a default judgment, in a restricted appeal, it is required that there be strict compliance with the rules and statutes governing service of citation. *Ashley Forest Apartments v. Almy*, 762 S.W.2d 293, 294-95 (Tex. App.—Houston [14th Dist.] 1988, no writ) (citing cases) (writ of error proceeding).

b. Evaluate "Participation"

The restricted appeal replaced the prior "writ of error" procedures with the promulgation of the new Texas Rules of Appellate Procedure in 1997. Since the promulgation of the new rules, Texas courts appear to have followed cases relating to the old writ of error practice in evaluating the "participation" element of the restricted appeal. In the writ of error cases, Texas courts recognized that "participation at trial" for purposes of barring a writ of error proceeding was a "matter of degree." *Stubbs v. Stubbs*, 685 S.W.2d 643, 645 (Tex. 1985); *Barnett v. Barnett*, 750 S.W.2d 881, 883 (Tex. App.—Dallas 1988, no writ). However, the court also noted that the participation issue should be construed liberally in favor of the right of appeal. *Stubbs*, 685 S.W.2d at 645. Appellate courts operating under the new rules have likewise held with regard to this element, that participation in an actual trial is a matter of degree, and should be construed liberally in favor of the right to appeal. *Campsey v. Campsey*, 111 S.W.3d 767, 770 (Tex. App.—Fort Worth 2003, no pet.).

In *Texaco, Inc. v. Central Power & Light Co*., the Texas Supreme Court concluded in a writ of error appeal that "participation" that would preclude that avenue of appeal constituted participation "in the decision making event," i.e., the jury trial of plaintiff's claims. 925 S.W.2d 586, 589-90 (Tex. 1996); *see also McKnight v. Trogdon-McKnight*, 132 S.W.3d 126, 129 (Tex. App.—Houston [14th Dist.] 2004, no pet.). Therefore, what constitutes "participation" will usually be examined on a case-by-case basis.

(1) Acts That Do Not Constitute "Participation"

a. Filing an Answer

- *Campsey v. Campsey*, 111 S.W.3d 767, 770 (Tex. App.—Fort Worth 2003, no pet.) (appearance at TRO hearing).
- *Brooks v. Bank of N.Y. Trust Co*., No. 2-07-189-CV, 2008 WL 2639240, at *2-3 (Tex. App.—Fort Worth July 3, 2008, no pet.).
- *McKnight v. Trogdon-McKnight*, 132 S.W.3d 126, 130 (Tex. App.—Houston [14th Dist.] 2004, no pet.).
- *El Periodico, Inc. v. Parks Oil Co*., 917 S.W.2d 777, 778 (Tex. 1996) (filing unverified answer but no response to motion for summary judgment or appearance at summary judgment hearing).
- *Flores v. H.E. Butt Grocery Co*., 802 S.W.2d 53, 56 (Tex. App.—Corpus Christi 1990, no writ) (merely filing an answer is not participation).
- *First Dallas Petroleum*, 727 S.W.2d at 643 ("mere filing of an answer" does not cause a defendant to "participate at trial").
- *Sunbelt Constr. Co. v. S & D Mechanical Contractors. Inc.*, 668 S.W.2d 415, 417 (Tex. App.—Corpus Christi 1983, writ ref'd n.r.e.) (only participation was the filing of a general denial).

b. Filing a Motion For New Trial

- *Lawyers Lloyds of Texas v. Webb*, 137 Tex. 107, 152 S.W.2d 1096, 1097 (1941).
- *Brown v. Ogbolu*, 331 S.W.3d 530, 533 (Tex. App.—Dallas 2011, no pet.).
- *Houston Precast, Inc. v. McAllen Constr., Inc*. ,No. 13-07-135-CV, 2008 WL 4352636, at *1-3 (Tex. App.—Corpus Christi-Edinburg Sept. 25, 2008, no pet.).
- *Bonewitz v. Bonewitz*, 726 S.W.2d 227, 228-39 (Tex. App.—Austin 1987, writ ref'd n.r.e.) (motion to set aside default not ruled upon or agreed).
- *First Dallas Petroleum*, 727 S.W.2d at 643 (filing a motion for new trial does not cause a defendant to "participate at trial").

c. Filing a Motion to Quash, Special Appearance, or Motion to Withdraw

- *Bonewitz v. Bonewitz*, 726 S.W.2d 227, 228-39 (Tex. App.—Austin 1987, writ ref'd n.r.e.) (although motion to withdraw and substitute counsel were sustained, other motions not ruled on).

- *Schulz v. Schulz*, 726 S.W.2d 256, 258 (Tex. App.—Austin 1987, no writ) (plea to jurisdiction filed less than one hour before default judgment signed).

d. Mere Presence of Defendant or Defense Counsel in Courtroom During Trial

- *See McKnight v. Trogdon-McKnight*, 132 S.W.3d 126, 130 (Tex. App.—Houston [14th Dist.] 2004, no pet.).
- *Allen v. Allen*, 647 S.W.2d 356, 361 (Tex. App.—El Paso 1982, no writ) ("mere physical presence of a party in the courtroom during trial does not constitute participation").
- *Collins v. Collins*, 464 S.W.2d 910, 912 (Tex. Civ. App.—San Antonio 1971, writ ref'd n.r.e.) (no showing that devisees to will who sat in courtroom during trial were represented by lawyers for will proponent).
- *Special v. Special*, 292 S.W.2d 818, 819 (Tex. Civ. App.—San Antonio 1956, writ ref'd n.r.e.) (beneficiary under will did not participate at trial although he was aware of suit and sat in courtroom during trial).

e. Communications with the Trial Court Coordinator

- *Segura v. Segura*, No.04-10-00778-CV, 2011 WL 4477728, at *2-3 (Tex. App.—San Antonio Sept. 28, 2011, no pet.) (a party's attorney's letter and subsequent fax to the trial court coordinator—noting that she was unable to attend a hearing on attorney's fees and sanction, that she was unable to contact opposing counsel, and that the hearing is inappropriate—was not participation).

f. Waiver of Citation and Agreement Incident to Divorce

- *Stubbs v. Stubbs*, 685 S.W.2d 643, 645 (Tex. 1985) ("signing waiver of citation and the divorce agreement not sufficient acts of participation").
- *Seymour v. Seymour*, No. 14-07-00280-CV, 2009 WL 442259, at *2 (Tex. App.—Houston [14th Dist.] Feb. 10, 2009, pet. denied).

g. Participating in Settlement Negotiations and Signing Agreement that Substantively Differs from the Eventual Divorce Decree

- *Cox v. Cox*, 298 S.W.3d 726, 732 (Tex. App.—Austin 2009, no pet.) (divorce decree was substantively different from a written settlement agreement that party negotiated).

(2) Acts Constituting Participation

a. Filing a Motion to Set Aside Default Judgment Within Appropriate Time Limits

- *Odems v. Williams*, No. 05-11-00384, 2011 WL 1879245, at *1 (Tex. App.—Dallas May 18, 2011, no pet.) (party filing a timely post judgment motion is not permitted to bring a restricted appeal).
- *Laboratory Corp. of America v. Mid-Town Surgical Center, Inc.*, 16 S.W.3d 527, 528 (Tex. App.—Dallas 2000, no pet.).

b. Extensive Involvement in Pre-Trial Proceedings

- *Barnett v. Barnett*, 750 S.W.2d 881, 883 (Tex. App.—Dallas 1988, no writ) (despite fact that defendant was not present when motion for entry of judgment was heard and granted, defendant extensively participated at trial with attorney and filed motions and an amended answer).

c. Confession of Judgment

- *Lewis v. Beaver*, 588 S.W.2d 685, 687 (Tex. App.—Houston [14th Dist.] 1979, writ ref'd n.r.e.) (writ of error not available where lawyer entered into agreed judgment).

d. Filing Successful Bill of Review

- *American Bankers Ins. Co. v.* State, 765 S.W.2d 875, 876 (Tex. App.—Dallas 1989, no writ) (holding that filing a bill of review, appearance at the hearing, and presentation of evidence constituted participation at trial).

e. Involvement in Summary Judgment Process

- *Brandt v. Village Homes, Inc.*, 466 S.W.2d 812, 814 (Tex. Civ. App.—Fort Worth 1971, writ ref'd n.r.e.) (appearance at summary judgment hearing).
- *Thacker v. Thacker*, 496 S.W.2d 201, 205 (Tex. Civ. App.—Amarillo 1973, writ dism'd w.o.j.) (participation in summary judgment proceeding by filing opposing affidavit and directing interrogatories to the movant).
- *Dillard v. Patel*, 809 S.W.2d 509, 511 (Tex. App.—San Antonio 1991, writ denied) (filing response to summary judgment motion).
- *But see Davis v. Hughes Drilling Co.*, 667 S.W.2d 183, 183-84 (Tex. App.—Texarkana 1983, no writ) (asserting defense in opposition to summary judgment motion and filing affidavit is not "participation" where defendant got no notice of hearing and did not participate); *accord Aleio v. Pellegrin*, 616 S.W.2d 331, 332-33 (Tex. App.—San Antonio 1981, writ dism'd w.o.j.).

f. Appearance at Discovery Sanctions Hearing

- *Norman v. Dallas Cowboys Football Club Inc.*, 665 S.W.2d 137, 139 (Tex. App.—Dallas 1983, no writ) (hearing where rights were adjudicated was a hearing on the motion for sanctions in which litigants appeared and participated).
- *C & V Club v. Gonzalez*, 953 S.W.2d 755, 758-59 (Tex. App.—Corpus Christi 1997, no pet.) (counsel for defendant was present at sanctions hearing which was dispositive of the case).
- *But see Davenport v. Scheble*, 201 S.W.3d 188, 196-97 (Tex. App.—Dallas 2006, pet. denied) (telephone call to the court three days before the hearing informing it he was not attending was not participation).

c. Error on the Face of the Record

The courts have likewise broadly interpreted the requirement that error appear on the face of the record. The face of the record includes all papers on file in the appeal, including the statement of facts. *See Ins. Co. of State of Pa. v. Lejeune*, 297 S.W.3d 254, 255-56 (Tex. 2009) (holding the default judgment could not stand because the record showed return of citation did not notate the hour of receipt); *World Envtl., L.L.C. v. Wolfpack Envtl., L.L.C.*, No. 01-08-00561, 2009 WL 618697, at *2-3 (Tex. App.—Houston [1st Dist.] Mar. 12, 2009, no pet.) (reversal of default judgment justified by absence of any proof of service in the record on appeal); *Lytle v. Cunningham*, 261 S.W.3d 837, 840-41 (Tex. App.—Dallas 2008, no pet.) (difference in name of registered agent on citation and return constituted error on the face of the record); *Barbosa v. Hollis Rutledge & Assocs.*, No. 13-05-485-CV, 2007 WL 1845583, at *1-2 (Tex. App.—Corpus Christi-Edinburg June 28, 2007, no pet.) (failure to give 45 day trial notice constituted error on the face of the record); *Mansell v. Ins. Co. of the West*, 203 S.W.3d 499, 501-02 (Tex. App.—Houston [14th Dist.] 2006, no pet.) (improper petition filing date on citation established error on the face of the record); *Wilson v. Wilson*, 132 S.W.3d 533, 536 (Tex. App.—Houston [1st Dist.] 2004, pet. denied); *Newberry v. Newberry*, 146 S.W.3d 233, 235 (Tex. App.—Houston [14th Dist.] 2004, no pet.); *Scoggins v. Best Indus. Uniform Supply Co.*, 899 S.W.2d 276, 277 (Tex. App.—Houston [14th Dist.] 1995, no writ) (record showed citation was served after case was dismissed). Thus, the concept of error on the face of the record is broad enough even to include a review of the factual and legal sufficiency of the evidence to support the plaintiff's claims. *Froemming v. Perez*, No. 04-05-00514-CV, 2006 WL 704479, at *2 (Tex. App.—San Antonio Mar. 22, 2006, no pet.); *Petco Animal Supplies, Inc. v. Schuster*, 144 S.W.3d 554, 559 (Tex. App.—Austin 2004, no pet.). Thus, it is important to make sure the complete record is before the appellate court. *See Norris v. Hubbard*, 841 S.W.2d 538 (Tex. App.—Houston [1st Dist.] 1992, no writ) (record of hearing on new trial motion was not included, so court could not determine if there was error on the face of the record). However, an event such as failure of the clerk to send notice of the judgment does not constitute error on the face of the record, and will not support a restricted appeal. *Campbell v. Fincher*, 72 S.W.3d 723, 724-25 (Tex. App.—Waco 2002, no pet.).

V. Conclusion

Applicable case law is riddled with examples of lawyers who have not taken the appropriate care in obtaining or seeking to set aside default judgments. By keeping in mind the most common reason for reversals (service problems) as well as the most common reason for affirmances (failure to meet the *Craddock* standard), a careful judge or practitioner can greatly increase the chances of avoiding default judgment pitfalls.

No-Answer Default Judgment

____ Confirm no answer has been filed

____ Confirm that citation with officer's return has been on file with the clerk of the court for at least 10 days

____ Confirm the court has subject matter jurisdiction

____ Confirm the court has personal jurisdiction by way of proper service

____ Confirm the petition does not disclose the invalidity of the claim asserted

____ For all damages, confirm that damages awarded do not exceed damages sought in petition

____ If damages are liquidated, confirm that damages are accurately calculated from the petition and an instrument in writing

____ If damages are unliquidated, confirm proof of connection between liability and injury

____ If damages are unliquidated, confirm that evidence (affidavit or live) supports all elements of damages including exemplary damages

____ For personal service, confirm strict compliance with rules of service, including signature by serving office and verification of return

____ For personal service, confirm accuracy of return information in comparison to information in petition (*i.e.*, name of defendant, cause number)

____ For substituted service, confirm strict compliance with Rule 106 order

____ For substituted service, confirm proof of reasonable diligence prior to entry of order for substituted service, supported by affidavit

____ For service through secretary of state, confirm strict compliance with statutory requirements

____ For citation by publication, confirm presence of affidavit supporting citation by publication

____ For citation by publication, confirm sufficiency of diligence exercised in ascertaining residence or whereabouts of defendant

____ For citation by publication, appoint attorney to defend absent defendant in compliance with Rule 244

Motion for New Trial After Entry of Default Judgment

____ Confirm that motion has been filed within 30 days after judgment signed

____ If defendant alleges no notice of default judgment, confirm that sworn motion has been filed stating date party or attorney learned of judgment, and that such date is at least 20 but not more than 90 days after judgment signed

____ If defendant served by publication, confirm that no more than two years have passed since judgment signed

____ Examine motion for new trial to confirm evidence of specific facts supporting that failure to answer was accident or mistake, and not intentional or the result of conscious indifference

____ If facts are contested, hold hearing to receive sworn testimony, either in person or by affidavit

____ Obtain a ruling on accident/mistake element

____ Examine motion for new trial to confirm evidence of specific facts that set up a meritorious defense

____ Entertain challenges to legal sufficiency of facts alleged to support a meritorious defense and consider whether facts asserted in affidavit appear to be true and whether affiant believes them to be true

NOTE: No showing of meritorious defense necessary if service is not valid

____ Examine motion for new trial for allegations that negate hardship to plaintiff and undue delay

____ Entertain evidence from plaintiff as to expenses incurred in obtaining default judgment

____ Confirm hearing on motion for new trial is being held within 75 days of the date judgment was signed