**Reversed and Remanded and Opinion filed August 9, 2001.**

**In The**

# Fourteenth Court of Appeals

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**NO. 14-99-00298-CV**

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**KAREN SMITH, Appellant**

**V.**

**THE GUARDIAN LIFE INSURANCE COMPANY, Appellee**

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**On Appeal from the Probate Court**
**Galveston County, Texas**
**Trial Court Cause No. 45,390**

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## O P I N I O N

Appellant/defendant, Karen Smith, appeals from a summary judgment entered in favor of appellee/plaintiff, The Guardian Life Insurance Company. At issue in this case is the summary judgment movant's obligation to establish prima facie evidence of service of the motion and the respondent's ability to rebut that presumption. Finding the respondent successfully rebutted that presumption and should have been entitled to a new trial due to lack of notice, we reverse and remand the summary judgment.

## I. BACKGROUND

Guardian, a life and disability insurance company, issued a long-term disability group plan policy to Smith's employer. In February 1990, Smith became injured and, as an insured employee member of the group plan, later filed a claim for long-term disability benefits. Guardian paid long-term disability income benefits to Smith from May 1990 through August 1997. In December 1993, having learned that Smith had received social security benefits while she received benefits from Guardian, Guardian sent a letter to Smith explaining that it had overpaid her by, and requested reimbursement for, $45,987.01. When Smith failed to reimburse Guardian for the $45,987.01 claimed overpayment, Guardian began reducing the amount of its payments to Smith. When benefits through Guardian ceased on August 29, 1997, the claimed overpayment balance was $10,475.62. Smith refused to reimburse Guardian for this claimed overpayment. Consequently, Guardian sued Smith for breach of contract to recover $10,475.62 it allegedly overpaid her.

Smith claims that after Guardian filed its petition, she filed an answer and counterclaim with the trial court but that the court struck her answer and returned it to her trial counsel for failure to pay the fee for filing a counterclaim.[1] Guardian filed an amended petition and served opposing counsel with discovery requests, including requests for admissions. Although Smith received these requests, she failed to respond to them. Relying on deemed admissions under former Texas Rules of Civil Procedure 169(1) (repealed) and 215(4)(a),[2] Guardian filed a traditional motion for summary judgment.[3] *See* TEX. R. CIV. P. 166a(a). Guardian's attorney, in a certificate of service attached to the

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[1] The docketing sheet for the trial court reveals merely that "correspondence [sic] from atty" was filed on September 28, 1998, and that all paperwork was mailed back to the attorney because of failure to pay for filing of a counterclaim. The record contains one copy of the answer, purportedly returned unfiled, which bears a "filed" stamp of February 24, 1999, a day after appellant filed her notice of appeal.

[2] These provisions are now found in the Texas Rules of Civil Procedure at 198.2 and 215.4(a), respectively.

[3] Guardian also filed a no-evidence motion for summary judgment, under Rule 166a(i), as to Smith's affirmative defenses and counterclaim, which were contained in the answer Smith allegedly filed.

motion, asserted that he sent the motion by certified mail, return receipt requested, to Smith's attorney, Norman M. Bonner. Smith did not respond to the motion, and the trial court entered summary judgment for Guardian, awarding it (1) $10,465.62 in actual damages "for sums expended to repair property damage" and (2) attorney's fees. The court also awarded pre-judgment and post-judgment interest.

Smith timely filed a motion for new trial asserting summary judgment was improper because her attorney never received Guardian's motion for summary judgment or notice of hearing.[4] In support of Smith's motion for new trial, Smith attached an affidavit of Bonner in which Bonner stated he did not receive notice of the filing of the motion for summary judgment. Bonner further asserted that he had no actual knowledge of the filing until after the hearing date.

In response to Smith's motion for new trial, Guardian's counsel filed a reply with an affidavit asserting that he had served notice of the motion for summary judgment's filing by sending copies of the motion to Bonner by both certified mail and facsimile.[5] Smith then filed a motion to withdraw the deemed admissions and, the same day, the trial court denied Smith's motion for new trial. Smith now appeals raising four points of error.

## II. ISSUES PRESENTED FOR REVIEW

In her first point of error, Smith contends the trial court erred in denying her motion for new trial because "Plaintiff totally failed to notify Defendant of the filing of its motion for summary judgment." In her second point of error, Smith contends the trial court erred in refusing to set aside the summary judgment because it lacks sufficient evidentiary support. Specifically, Smith contends that her deemed admissions "are so vague and

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[4] Guardian only contends that it served Bonner, not Smith. Moreover, because the lack of notice of the motion's filing is dispositive, we need not address the lack of notice of the hearing.

[5] The affidavit from Guardian's attorney, Wendell P. Shepherd, asserts he forwarded the motion to Bonner by facsimile and certified mail. However, Shepherd's certificate of service states he forwarded the motion to Bonner only by certified mail *and not* facsimile.

technically flawed, they establish too few material facts to support the Appellee's summary judgment." In her third point of error, Smith asks this court to reverse the summary judgment for improperly awarding attorney's fees. She contends that the summary judgment is voidable because it purports to grant relief for a "property damage" claim, through the $1500.00 attorney's fees award, which relief the trial court had no authority to grant. *See* TEX. CIV. PRAC. & REM. CODE § 38.001 (Vernon 1997). In her fourth and final point of error, Smith urges this court to reverse the summary judgment for awarding relief inconsistent with Guardian's pleadings. Specifically, Smith contends that the summary judgment's award of damages and attorney's fees "for property damage" is inconsistent with the pleadings' requests for contract damages. Smith cites Texas Rule of Civil Procedure 301, which provides that judgments must conform to a party's pleadings. *See* TEX. R. CIV. P. 301. Smith's first point of error, which alleges a violation of procedural due process, is dispositive.

## III. MOTION FOR NEW TRIAL

In her first point of error, Smith asserts the trial court erred by refusing to grant her motion for new trial because she received no notice of the motion for summary judgment filing or hearing, thus violating her rights to due process under the Fourteenth Amendment of the United States Constitution. *See* U.S. CONST. amend. XIV.

Guardian contends Smith had constructive notice that a summary judgment could be entered against her because, by failing to respond to the request for admissions, she knew they would become deemed admissions. This argument is without merit because, even assuming Smith had constructive notice the deemed admissions could be used to establish Guardian's right to a summary judgment, this fact would not substitute for the required notice of the summary judgment motion under Rule 21. *See* TEX. R. CIV. P. 21.

When a trial court has denied a motion for new trial, its ruling may be overturned only upon a showing of a clear abuse of discretion. *Osborn v. Osborn*, 961 S.W.2d 408, 410 (Tex. App.—Houston [1st Dist.] 1997, no writ). An abuse of discretion occurs when

a court acts in an arbitrary or unreasonable manner, or without reference to guiding rules and principles. *Downer v. Aquamarine Operators*, 701 S.W.2d 238, 241–42 (Tex. 1985). A trial court's discretion, however, should be exercised "somewhat liberally in light of the guiding principle that new trials should be allowed freely when certain basic requirements are met." *Iley v. Reynolds*, 319 S.W.2d 194, 198 (Tex. Civ. App.—Beaumont 1958, writ ref'd n.r.e.) (citation omitted).

## A. *The Craddock Test*

Smith urges that we analyze denial of her motion for new trial, following the no-notice summary judgment, using the *Craddock*[6] default judgment factors we applied in *Medina v. Western Waste Industries*.[7] 959 S.W.2d 328, 329 (Tex. App.—Houston [14th Dist.] 1997, pet. denied) (determining *Craddock* applies to motions for new trial following unopposed summary judgments) and *id.* at 331 (Murphy, C.J., concurring but noting that prior precedent from this court establishes that the *Craddock* test does not apply in reviewing a motion for new trial following an unopposed summary judgment); *Craddock*, 133 S.W.2d at 126 (providing that a default judgment should be set aside and a new trial ordered in any case in which (1) 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; (2) provided the motion for a new trial sets up a meritorious

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[6] *Craddock v. Sunshine Bus Lines*, 133 S.W.2d 124 (1939).

[7] In applying the *Craddock* factors to a no-answer summary judgment in *Medina*, we held that

> where the failure to respond to a motion for summary judgment was (1) not intentional or the result of conscious indifference, but the result of an accident or mistake, a new trial should be granted, provided that (2) the non-movant's motion for new trial alleges facts and contains proof sufficient to raise a material question of fact, and (3) demonstrates that the granting thereof will occasion no delay or otherwise work an injury to the [movant]."

*Medina*, 959 S.W.2d at 330–31.

defense and (3) is filed at a time when the granting thereof will occasion no delay or otherwise work an injury to the plaintiff).

### B. *Notice Under Texas Rule of Civil Procedure 21a*

Under the rules applicable to summary judgments, Guardian was required to serve Smith or her attorney with the motion for summary judgment and notice of submission at least twenty-one days before the specified hearing date. *See* TEX. R. CIV. P. 166a(c). Guardian could accomplish such service by sending the required documents by, among other ways, certified or registered mail or by facsimile. *See* TEX. R. CIV. P. 21a. Rule 21a provides that "[a] certificate by a party or an attorney of record, or the return of an officer, or the affidavit of any person showing service of a notice shall be prima facie evidence of the fact of service." *Id.* However, the rule further states: "[n]othing herein shall preclude any party from offering proof that the notice or instrument was not received . . . ." TEX. R. CIV. P. 21a. Guardian's filing of the certificate of service created a presumption of service, which Smith could rebut by proof of non-service. *See id.*; *see Ruiz v. Nicolas Trevino Forwarding Agency, Inc.*, 888 S.W.2d 86, 88 (Tex. App.— San Antonio 1994, no writ) (holding that certificate of service created only rebuttable presumption, which "vanished" when appellant filed a sworn affidavit denying receipt of notice and appellee failed to produce "green card" verifying timely service of notice).

Smith presented evidence of non-service in the form of an affidavit by her attorney, Bonner, stating he did not receive notice of the motion:

> I did not receive from Plaintiff's counsel a copy of Plaintiff's Motion for Summary Judgment that was filed with the court on November 4, 1998, nor did I receive any notice that a hearing on Plaintiff's summary judgment motion was scheduled for November 25, 1998. Neither the motion nor a notice of hearing was served on me in any manner, and I had no actual knowledge of the motion or the hearing prior to the hearing.
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> My first awareness of the summary judgment came on or about December 1, 1998 when I received a notice of judgment from the clerk.

Bonner's affidavit is sufficient to rebut the presumption of service created by the certificate of service Guardian attached in its response to Smith's motion for new trial. *See Rabie v. Sonitrol of Houston, Inc.*, 982 S.W.2d 194, 197 (Tex. App.—Houston [1st Dist.] 1998, no pet.). Furthermore, Guardian failed to controvert Bonner's assertions of non-receipt. *See id.* at 197–98. Although Guardian verified that it sent the motion by facsimile and certified mail, return receipt requested, this merely speaks to whether Guardian sent notice of the motion's filing, not whether Bonner *received* notice of the motion's filing. Moreover, Guardian failed to produce the "green card", or certified mail return receipt, or facsimile confirmation which would establish that Bonner, in fact, received notice of the motion and hearing date. *See Ruiz*, 888 S.W.2d at 88.

There was no evidence before the trial court to controvert Bonner's sworn affidavit stating he never received the motion or the notice. Smith is entitled to a new trial because the record shows she was not given due notice of Guardian's motion for summary judgment and notice of submission. *Rabie*, 982 S.W.2d at 197 (citing *Cliff v. Huggins*, 724 S.W.2d 778, 779 (Tex. 1987). Moreover, once Smith established by her attorney's uncontroverted affidavit that she did not receive the requisite notice of the motion for summary judgment filing, she had no obligation to meet the *Craddock* test in order to receive a new trial. *See id.* at 197–98 (finding that "[o]nce the defendant established by his uncontroverted testimony that he had not received the required notice [of the summary judgment motion], he was relieved from further responsibility of complying with the *Craddock* requirements."); *Mosser v. Plano Three Venture*, 893 S.W.2d 8, 12 (Tex. App.—Dallas 1994, no writ) (stating that adequate notice in any trial proceeding is a fundamental to due process).

Because we find uncontroverted evidence on the face of the record that Smith did not receive proper notice of the filing of Guardian's motion for summary judgment, through her attorney of record, Smith's first point of error is sustained. Our ruling on this point of error renders consideration of appellant's remaining points unnecessary.

The summary judgment is reversed and this case is remanded for further proceedings consistent with this opinion.

/s/ Kem Thompson Frost
Justice

Judgment rendered and Opinion filed August 9, 2001.

Panel consists of Justices Edelman, Frost, and Murphy.********

Do Not Publish TEX. R. APP. P. 47.3(b).

******** Senior Chief Justice Paul C. Murphy sitting by assignment.