Affirmed and Opinion Filed October 27, 2017

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-14-00649-CV

B.C., Appellant
V.
STEAK N SHAKE OPERATIONS, INC., Appellee

On Appeal from the 380th Judicial District Court
Collin County, Texas
Trial Court Cause No. 380-02686-2012

SUPPLEMENTAL OPINION ON MOTION FOR REHEARING

Before Justices Francis, Evans, and Stoddart
Opinion by Justice Francis

On the Court's own motion, we issue this supplemental opinion on rehearing.

For the first time during the appellate proceedings in this case, B.C. raises an argument in her Motion for En Banc Reconsideration based on evidence never presented to the trial court. Despite the issue being raised in the trial court and on appeal by Steak N Shake, B.C. ignored omissions in the record that have twice proven fatal to her case. Only now, after all briefing has taken place and opinions have issued, does B.C. ask this Court to withdraw our opinions and reconsider our decision based on evidence in a newly created "supplemental clerk's record." Granting such a request would violate well-established rules of trial and appellate procedure, and would also fundamentally confuse the proper roles of the trial and appellate courts. Accordingly,

we decline B.C.'s request. We do, however, issue this supplemental opinion to explain fully our reason for denial.

I. B.C. never challenged in her appeal the assertion that her summary judgment response was filed late

The majority opinion issued by this Court on August 30, 2017 concluded the trial court properly granted summary judgment against B.C. because she failed to timely file a response to Steak N Shake's no evidence motion for summary judgment and, therefore, did not meet her burden to show fact issues on the challenged elements of her claims. Both the majority opinion and the dissenting opinion were based on the premise, unchallenged on appeal and supported by the record, that B.C.'s response was filed late. Although the untimeliness of B.C.'s filing was discussed at length by Steak N Shake in its appellate brief, B.C. did not dispute the lateness of her filing in either her original brief or her reply brief. Nevertheless, B.C. now asserts *for the first time* in her motion for en banc reconsideration that her response to the no evidence motion was filed within the time allowed. By waiting to raise the issue until after this Court issued two opinions based on the unchallenged assertion that her response was untimely, B.C. has waived any argument that her response was timely filed. *See Coastal Liquids Transp., L.P. v. Harris Cty. Appraisal Dist.*, 46 S.W.3d 880, 885 (Tex. 2001). Rehearing is not an opportunity to test alternative arguments after finding the original arguments were unsuccessful. *See ICM Mortg. Corp. v. Jacob*, 902 S.W.2d 527, 535 (Tex. App.—El Paso 1994, writ denied).

II. The record shows the summary judgment response was filed late

Both the record before the trial court when it rendered summary judgment, and the record on appeal when our opinions issued, showed B.C.'s response to the no evidence motion was filed one day late. *See Dallas Cty. v. Gonzalez*, 183 S.W.3d 94, 103 (Tex. App.—Dallas 2006, pet. denied) (document's file stamp is prima facie evidence of date of filing creating rebuttable

presumption that it was filed on date shown). Nothing in the record indicated the trial court granted leave for the filing or otherwise considered it.

III. The summary judgment hearing is not in the record

B.C. now contends she explained to the trial court at the hearing on the motion for summary judgment that she transmitted her response to an e-filing service provider on the due date, but it was rejected due to technical difficulties, and a corrected copy was filed the next day. However, the summary judgment hearing was not recorded so there is no reporter's record demonstrating what occurred.

IV. The "supplemental clerk's record" filed by B.C. on September 14, 2017 does not contain *omitted* material, but rather a document filed in the trial court eight days after the issuance of our opinions

On September 7, 2017, after our opinions issued, B.C. filed in the trial court an e-filing receipt showing she transmitted her response to the no evidence motion on the day it was due. B.C. then requested the trial court to send a new "supplemental clerk's record" to this Court containing the receipt. Because this evidence was not before the trial court at the time it rendered judgment, and, indeed, was never a part of the trial court's record until after our opinions issued, we cannot consider it. *See Barnard v. Barnard*, 133 S.W.3d 782, 789 (Tex. App.—Fort Worth 2004, pet. denied).

V. Any information in the record about technical difficulties in B.C.'s filing was submitted by Steak N Shake to show the response was untimely and was never addressed by B.C. on appeal

B.C. now points to affidavit testimony in the summary judgment record in which opposing counsel acknowledged B.C.'s counsel informed him "there had been a technical difficulty in attempting to file the responses on the [due date]." But the summary judgment evidence does not show B.C. tendered her response for filing on the due date in a manner that would satisfy the requirements of Texas Rule of Civil Procedure 21. The affidavit of Steak N

Shake's counsel has an attached email exchange in which the timeliness of the filing was discussed by counsel for both parties. But this shows only that B.C.'s counsel claimed he attempted to file the response on time. Steak N Shake's counsel never conceded this filing actually occurred or that it occurred in a manner that would satisfy the filing requirements. In fact, Steak N Shake specifically challenged the timeliness of the response in the summary judgment proceeding. This placed the burden on B.C. to produce evidence that the response was filed timely. *See Tex. Dep't of Family & Protective Servs. v. Wallace*, No. 03-12-00373-CV, 2013 WL 490976, at *2 (Tex. App.—Austin Jan. 31, 2013, no pet.) (mem. op.). She failed to do so. Accordingly, nothing in the record properly before us is sufficient to rebut or even create a fact issue on the presumption created by the file stamp that the response was filed one day late. *Id*.

This Court strives, as it should, to decide cases on the merits rather than procedural technicalities. *See In re K.C.B.*, 251 S.W.3d 514, 516 (Tex. 2008) (per curiam); *Worthy v. Collagen Corp.*, 967 S.W.2d 360, 366 (Tex. 1998); *Silk v. Terrell*, 898 S.W.2d 764, 766 (Tex. 1995) (per curiam). But there are limits to applying this tenet, and courts are understandably reluctant to allow supplementation after a court has issued an opinion in the case. As stated by Chief Justice Hecht in *Worthy*:

> Supplementation of the record after a case is decided is a different matter. It certainly does not serve judicial economy for the appellate court to allow a supplementation of the record that would require it to reconsider its decision on the merits when the party has had ample opportunity to correct the omission prior to decision.

967 S.W.2d at 366.

Ultimately, however, supplementation of the record is irrelevant to our disposition in this case. The document with which B.C. seeks to supplement the record does not support any issue raised or argued by B.C. before her motion for reconsideration. B.C.'s arguments are no less

waived on appeal simply because she has now supplied us with evidence to support an argument she never made in her briefing to this Court.

For these reasons, we decline B.C.'s request to withdraw our opinions and consider her newly filed evidence, which was not before the trial court prior to its judgment or before this Court prior to our opinions and judgment.

/Molly Francis/
MOLLY FRANCIS
JUSTICE

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