Affirm and Opinion Filed February 20, 2020

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-19-00556-CV

STEWART MCCRAY, Appellant
V.
LAURA SPARKS MCCRAY, Appellee

On Appeal from the 366th Judicial District Court
Collin County, Texas
Trial Court Cause No. 366-01580-2015

OPINION

Before Chief Justice Burns, Justice Molberg, and Justice Carlyle
Opinion by Justice Molberg

In this case, two family members—Stewart McCray and his sister-in-law, Laura Sparks McCray—sued each other over the alleged breach of a real estate agreement.[1] Ultimately, Laura non-suited her counterclaims against Stewart, and the trial court granted summary judgment for Laura on Stewart's claim against her. Following the summary judgment order, and with new counsel, Stewart moved for a new trial, avowing he had not received notice of the summary judgment motion, the summary judgment hearing, or his counsel's failure to file a response to the summary judgment motion. The trial court denied Stewart's motion for a new trial. Stewart appeals, arguing the trial court abused its discretion in doing so. We affirm.

[1] Because they share the same last name, we refer to the parties by their first names throughout this opinion.

BACKGROUND

The central dispute here involves an alleged oral agreement regarding roughly 27.5 acres of real property in Collin County. In 2008, Stewart and his ex-wife conveyed the property through a Special Cash Warranty Deed to Laura as Trustee of the Laura Sparks McCray Revocable Trust. The terms of that deed are not in dispute. Stewart, acting pro se, sued Laura in 2015. He alleged that he and Laura had a verbal agreement by which she agreed to re-convey the property to him when requested and that Laura breached that agreement when she failed to do so.

In March 2016, attorney Edward Klein entered an appearance on Stewart's behalf. Klein filed a first amended petition in June 2016, and that pleading remained Stewart's live pleading throughout the remainder of the case. In the first amended petition, Stewart asserted a single breach of contract claim, alleging he and Laura "entered into an agreement the terms of which were that [Laura] would hold the naked title to the Property until such time as [he] requested that the title be returned to him" and stating that, despite his demand that Laura re-convey title to him, "[Laura] has refused to re-convey the Property and is treating it as her own." Among other relief, Stewart sought title to the property, damages, and attorneys' fees.

Laura filed a traditional motion for summary judgment in 2016, which the trial court denied. More than two years later, on January 9, 2019, Laura filed a combined traditional and no-evidence motion for summary judgment on Stewart's claim. She also filed a notice of hearing the same day, which indicated the motion would be heard January 31, 2019, at 1:30 p.m. Both filings contained certificates of service, which indicated that Laura's motion and notice of hearing were served on Klein by email on January 9, 2019. Stewart does not dispute that Klein received the motion and notice of hearing at that time.

Klein did not file a response on Stewart's behalf, nor did he seek leave to file a late one.

However, three days before the summary judgment hearing, Klein, as Stewart's counsel, filed an "Agreed Motion for Continuance," followed by an "Amended Partially Agreed Motion for Continuance" on the day before the hearing. In both, he noted that Laura's summary judgment motion was set for hearing on January 31, 2019, and that a jury trial was set for the week of February 18, 2019. In the amended filing, Klein correctly noted Laura was opposed to a continuance of the summary judgment hearing but not the trial setting. The amended motion, like the initial motion, set forth the following as its sole basis for the continuance of the summary judgment hearing and trial:

> The undersigned has attempted in good conscience to try to help [Stewart] come to a conclusion in this case, but it is now clear that the undersigned will need to withdraw as counsel of record for [Stewart] for the reasons to be set forth in a motion requesting same.

The trial court heard Stewart's motion for continuance and Laura's motion for summary judgment on January 31, 2019. Klein appeared at the hearing on Stewart's behalf, and Laura's counsel appeared on hers. Both parties' counsel argued both motions on the record. They agreed to continue the trial setting but disagreed on whether to continue the summary judgment hearing. Klein requested that, should Laura's counsel proceed with her summary judgment arguments, the court take the matter under advisement, give Klein an opportunity to withdraw, and potentially re-hear the motion if Stewart obtained new counsel. Klein confirmed that no motion to withdraw had been filed but asked the court to give Stewart "the opportunity to engage new counsel or proceed pro se as he did to begin the lawsuit."

The court denied the motion for continuance. The judge noted the case had been on file for nearly four years, had been on the dismissal docket in 2018, and involved at least four motions for continuance—one in 2016, two in 2018, and the motion at issue in 2019. The court announced its ruling from the bench and did not sign a written order at that time. Stewart does not challenge the denial of the motion here.

On the summary judgment motion, after Laura's counsel argued various substantive points, Klein responded as follows:

> May I, Your Honor? Thank you. I'm obviously operating at a disadvantage because my client has not provided me with key materials that would have been necessary for me to be able to file a formal response, including not paying me in accordance with his agreement to pay reasonable attorneys' fees to me. But what I can tell the Court is that this [motion for summary judgment] has been urged before.

He continued:

> And Judge Keith Dean heard that hearing and denied the motion for summary judgment at that time.[2] And so from our position, or from my position, this is just another shot at trying to get another judge to rule on the same issues that were brought the first time around that were denied. So we would ask the Court to deny the motion for summary judgment or, at the very least, take it under advisement for Judge Wheless to decide at some point in the future prior to trial.

At the conclusion of the January 31, 2019 hearing, the trial judge orally granted Laura's combined traditional and no-evidence summary judgment motion. The judge instructed counsel to prepare and submit a proposed order with particularized content. The order was signed February 8, 2019. It was "agreed as to form" by both parties' counsel. Two days earlier, Laura had non-suited her counterclaims against Stewart with prejudice.

In the meantime, on February 4, 2019, Klein filed his motion to withdraw as Stewart's attorney. The motion was granted by written order signed February 13, 2019.

On March 8, 2019, Stewart, now appearing through new counsel, filed a verified motion for new trial, complaining of "the egregious misconduct" of his prior counsel, likening the court's summary judgment order to a post-answer default judgment, and arguing for a new trial under the holding of *Craddock v. Sunshine Bus Lines, Inc.*, 133 S.W.2d 124 (Tex. [Comm'n Op.] 1939).

[2] Laura filed her first traditional motion for summary judgment in May 2016. A no-evidence motion was not filed. The trial court heard the traditional motion and denied it by a written order on September 15, 2016.

Stewart asserted in the motion and an attached declaration that he had not received the summary judgment motion or notice of the hearing, although he did not dispute that his prior counsel had received both. Nevertheless, Stewart claimed the alleged failure of Klein to represent Stewart's interests entitled Stewart to a new trial, and that "[t]he Court should not hold [Stewart] responsible for the errors and omissions of his former counsel that unfairly led to the entry of judgment against him."

Laura asserted in her response, with an attached declaration from Klein, that Stewart had received notice and was aware of the summary judgment motion well before the deadline for filing a response. Laura further argued that Klein's actions as Stewart's lawyer were imputed to Stewart and, in any event, the *Craddock* standard did not apply to this case, but that the test set forth in *Carpenter v. Hydrocarbons Corp.*, 98 S.W.3d 682 (Tex. 2002), applied instead.

The trial court heard Stewart's motion for new trial on April 11, 2019. No evidence was offered at the hearing. After argument from each side's counsel, the court denied the motion. The court entered a written order the following day that did not state the reasons for the denial.

STANDARD OF REVIEW

We review a denial of a motion for new trial under an abuse of discretion standard. *Champion Int'l Corp. v. Twelfth Court of Appeals*, 762 S.W.2d 898, 899 (Tex. 1988) (orig. proceeding) (per curiam). An abuse of discretion occurs when a trial court acts in a manner that is arbitrary, unreasonable, or without reference to any guiding rules or principles. *Downer v. Aquamarine Operators, Inc.*, 701 S.W.2d 238, 241–42 (Tex. 1985).

ANALYSIS

In his sole issue on appeal, Stewart argues that the trial court abused its discretion in denying his motion for a new trial because his lawyer failed to fulfill his professional responsibilities to notify him of the summary judgment motion and the hearing date, and to file a

response to the motion, which failure resulted in his summary judgment loss. The trial court's summary judgment against him, he claims, is tantamount to a post-answer default judgment in the circumstances here. As Stewart's counsel stated at oral argument, Stewart claims ineffective representation provided him by Klein entitles him to a new trial, despite Klein's notice of the motion and the hearing, and Klein's actual participation in the latter. In these circumstances, Stewart asserts, Klein's knowledge and conduct cannot be imputed to him. Thus, Stewart urges that the holding in *Craddock* provides the proper yardstick against which to measure his entitlement to a new trial.

The holding in *Craddock* is well known. Simply, *Craddock* teaches 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 a 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.

133 S.W.2d at 126. As refined over the years, courts have extended the reach of *Craddock* to some post-answer default judgments, such as the failure to appear at trial. *See Ivy v. Carrell*, 407 S.W.2d 212, 213 (Tex. 1966). In each such application, however, our precedent has required that a party negate not only his own lack of conscious indifference and intentional disregard, but also that of his agent or attorney in explaining the default. *See Holt Atherton Indus., Inc. v. Heine*, 835 S.W.2d 80, 83 (Tex. 1992).

In support of his position that *Craddock* applies here because his counsel's conduct and knowledge should be disregarded, Stewart cites *Hahn v. Whiting Petroleum Corp*., 171 S.W.3d 307 (Tex. App.—Corpus Christi–Edinburg 2005, no pet.), and *Lowe v. Lowe*, 971 S.W.2d 720 (Tex. App.—Houston [14th Dist.] 1998, pet. denied). *Hahn*, like *Craddock*, was a no-answer default judgment case, which presents the classic *Craddock* example. There, Hahn sought to overturn a default judgment entered against him in a suit brought by Whiting Petroleum Corp.

Hahn challenged the judgment in a motion for new trial, claiming, among other things, that the lawyer who usually represented him, and to whom he sent the suit papers, failed to file an answer, had a conflict in the case, and "did not inform Hahn that he would not represent him." *Hahn*, 171 S.W.3d at 310. The court noted that, under the rules of professional conduct, the lawyer had an obligation to notify Hahn that he could not represent him. *Id*. (citing TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.05 and R. 1.06(a), (e), *reprinted in* TEX. GOV'T CODE, tit. 2, subtit. G, app. A (Tex. State Bar R. art. X, § 9)). Although *Hahn* cites *Lowe*, it is clear from the opinion that Hahn never had representation in the lawsuit and was effectively pro se at the time the default judgment was rendered against him. Therefore, in assessing the application of *Craddock*, the court looked solely to the actions and inactions of Hahn in concluding Hahn "satisfied the first prong of the *Craddock* test by negating the possibility of intentional or consciously indifferent conduct regarding the failure to answer." *Hahn*, 171 S.W.3d at 311.

In *Lowe*, a suit affecting the parent–child relationship, Jerome Lowe's attorney appeared at trial and announced ready. Kerri Lowe's lawyer announced not ready, sought a continuance, and "presented an order signed by another district Judge in which [he] was the ad litem, requiring [him] to examine and to inspect certain books and records" the same day as the Lowe trial. *Lowe*, 971 S.W.2d at 721–22. The order also contained a provision purporting to protect Kerri's lawyer "from appearing at any and all trial settings" for a prescribed period, which included the date of the Lowe trial. *Id*. at 722. The trial judge denied the motion for continuance and instructed Kerri's attorney to return to the courtroom by 10:30 a.m. to begin jury selection. When he did not return and abandoned his client at trial, the court proceeded in his absence, ultimately entering a post-answer default judgment in Jerome's favor, which awarded him custody of the couple's two young children, required Kerri to pay child support, and awarded Jerome the couple's home.

Kerri had no knowledge these events were transpiring. Her lawyer "had told her he had already obtained a continuance and that the trial was rescheduled." *Id.* In fact, as set forth in her motion for new trial, her lawyer had given Kerri a list of case-related matters that were to occur well into the month following the actual trial. Kerri stated "that if she had known that the trial was set for July 15, 1996, she would have attended court even without her attorney. But she simply did not know about it." *Id.*

The court recognized that it was "unable to find a single case like this one, where the client made an uncontroverted showing by affidavit at the motion for new trial that she was absolutely free of responsibility for the failure to appear and showed, instead, that the failure was caused by her lawyer's misrepresentations or at least, his failure to meet his professional duties to his client." *Id.* at 723–24. Recognizing the nearly consistent application of the first *Craddock* rule that a party must establish both her and her agent's lack of conscious indifference or intentional conduct in seeking to overturn a default judgment, the court nevertheless refused to impute the knowledge and conduct of Kerri's lawyer to Kerri. Instead, the court concluded that "where (1) the lawyer has misled the client, or wholly failed to perform his or her professional duties, and (2) the client is free of responsibility and knowledge, the client meets the first prong of *Craddock* by showing her own lack of knowledge or lack of responsibility." *Id.* at 724.

Significantly, the court thereafter acknowledged its reluctance to apply the rule imputing the knowledge and actions of the attorney to the client in suits affecting the parent–child relationship because "we do not think *Craddock* is an appropriate test" for cases where the best interest of the child is the most important inquiry. *Id.* at 725. Instead, "*Craddock* was designed to be applied to traditional civil litigation—personal injury, products liability, consumer, and commercial litigation—in which only two competing interests—the plaintiff's and the defendant's—are involved." *Id.* As support, the court cited our own Court's opinion in *Little v.*

Little, 705 S.W.2d 153 (Tex. App.—Dallas 1985, writ dism'd), where we concluded that "the best interests of the child override strict application of the *Craddock* test." *Id*. at 154.

In contrast, Laura contends that *Craddock* has no application in the circumstances here. Instead, she argues that Klein's knowledge and actions are imputed to Stewart and that Stewart cannot treat Klein's actions apart from his own. In her view, notice to Klein was notice to Stewart. Klein's failures, if any, were Stewart's. Further, she says this case, unlike *Lowe*, does not involve a default judgment in any sense, given that Klein appeared at the hearing, sought a continuance, and once it was denied, argued against the summary judgment motion before it was decided. In such circumstances, she contends the *Carpenter* test, not the *Craddock* test, applies.

In *Carpenter*, Cimarron Hydrocarbons, an oil and gas well operator, sued a well-casing installer and others (the Carpenter parties) for actions relating to the failed installation of a well casing. Cimarron's counsel withdrew, and ten days later Carpenter moved for summary judgment. Cimarron retained new counsel, who secured a resetting of the summary judgment motion. Because of an internal mix-up within new counsel's firm, Cimarron's deadline to file a response was missed. Cimarron's counsel became aware of this two days before the hearing date. The day of the hearing, Cimarron's counsel "filed a motion for leave to file an untimely response, with a proposed response attached, and a motion for continuance." 98 S.W.3d at 685. Both were denied and the summary judgment motion was granted. Cimarron moved for a new trial, "claiming that the trial court abused its discretion in denying [its motions for late filing and for a continuance] and, alternatively, that the summary judgment should be set aside on the equitable grounds articulated in *Craddock*." The motion for new trial was denied, but the appellate court reversed, applying the *Craddock* standard. *Id*. The supreme court disagreed. The court noted that in *Craddock*, as well as in *Ivy*, "the defaulting party realized its mistake only after judgment, when the only potential relief available was a motion for new trial or to otherwise set aside the

judgment." *Id*. Here, however, Cimarron learned two days before the summary judgment hearing that a response to the motion had not been timely filed. In analyzing the differences between *Craddock* and those presented in *Carpenter*, the court said:

> Our purpose in adopting the *Craddock* standard was to alleviate unduly harsh and unjust results at a point in time when the defaulting party has no other remedy available. But when our rules provide the defaulting party a remedy, *Craddock* does not apply.

Id. at 686. The court disapproved various "court[s] of appeals decisions to the extent that they can be read to hold that all of the *Craddock* factors must be met when a nonmovant is aware of its mistake at or before the summary-judgment hearing and thus has an opportunity to apply for relief under our rules." *Id*. Accordingly, the court held Cimarron was not entitled to rely on *Craddock* because there were other remedies available. Instead, in these circumstances, Cimarron was required to seek a continuance or seek leave to file a late response, which it did, and then challenge a denial of those motions for an abuse of discretion. The court then crafted the following test in a situation where the nonmovant has an opportunity to seek leave to file a late response to the motion for summary judgment:

> [A] motion for leave to file a late summary-judgment response should be granted when a litigant establishes good cause for failing to timely respond by showing that (1) the failure to respond was not intentional or the result of conscious indifference, but the result of accident or mistake, and (2) allowing the late response will occasion no undue delay or otherwise injure the party seeking summary judgment.

Id. at 688.[3] In applying this test, the *Carpenter* court determined that the trial court did not abuse its discretion when it denied the motion for leave to file a late response to the summary judgment motion because Cimarron failed to establish good cause. *Id*.

[3] Although Cimarron had also filed a motion for continuance of the summary judgment hearing, its denial was not brought forward as an issue in the appeal. Only the denial of the motion for leave to file a late response was considered.

Significantly, neither *Craddock* nor *Carpenter* confronted the ineffective assistance of counsel argument Stewart makes here and, more particularly, whether ineffective assistance of counsel, if established, obviates the rule that a lawyer's knowledge is imputed to the client in circumstances like those before us. If Stewart is correct in his position on the law and facts, then *Craddock* applies to his claim because it means he would have had no notice of the motion, the failure to respond, or the summary judgment hearing, and a motion for new trial is the proper method to challenge the summary judgment. If he is incorrect on his no-imputation argument, then *Carpenter* applies and he is required to challenge the trial court's denial of his motion for continuance for an abuse of discretion, which he has not done.

We are not, however, writing on an entirely clean slate. Stewart's arguments are similar to—and, indeed, less compelling than—those we considered and rejected in *Dugan v. Compass Bank*, 129 S.W.3d 579 (Tex. App.—Dallas 2003, no pet.). In *Dugan*, the plaintiffs were represented by attorney Anthony Rodriguez. *Id*. at 580. Rodriguez was a California attorney who was also licensed in Texas, and he made arrangements with a local lawyer to assist with the case. *Id*. A little over a month before trial, local counsel withdrew. *Id*.

On the day of trial, Rodriguez appeared on the plaintiffs' behalf, but none of the plaintiffs were in attendance. *Id*. Rodriguez argued that he had a conflict and would like a continuance or to withdraw as counsel. *Id.* at 581. He also complained about local counsel's withdrawal. *Id.* Rodriguez made an oral motion to withdraw, which the trial court denied. *Id*.. The court then heard the defendant's motion in limine, and when asked for his clients' response, Rodriguez told the court he could not participate because of a conflict. *Id.* The court then called the venire and asked Rodriguez if he was ready to question the prospective jurors. *Id.* Rodriguez answered, "Not at this time, your honor." *Id*. Rodriguez did not return after lunch, so when the court announced it was ready to hear evidence from the plaintiffs, no attorney was there to represent them. *Id*. The

defendant moved for a directed verdict, and the court granted it and signed a judgment. *Id.* The plaintiffs filed a motion for new trial, citing *Craddock*. The trial court overruled their motion, and they appealed. *Id.*

On appeal, the plaintiffs argued that, "because their lawyer abandoned their case and failed to represent them at trial, the trial court abused its discretion in overruling their motion for a new trial." *Id*. at 581. Appellants argued *Craddock* applied and justified reversal, and after we noted that the appellants sought a new trial in a case in which they were plaintiffs and in which the defendant and a jury both appeared for their trial, we stated, "Under these circumstances, Appellants have not convinced us that the benchmarks of *Craddock* apply." *Id.* at 582. We remain similarly unconvinced that *Craddock* applies here.

As in *Dugan*, Stewart sought a new trial in a case in which he was a plaintiff and in which a defendant appeared. Although *Dugan* occurred in the context of a jury trial rather than a summary judgment proceeding, the similarities between the circumstances and the parties' arguments on appeal are significant. Like Stewart, the *Dugan* appellants argued the trial court should have granted them a new trial "because the ineffectiveness of their counsel deprived them of a fair trial." *Id*. at 581–82. As we noted in *Dugan*, however, "[g]enerally, the right to the effective assistance of counsel does not apply in a civil case." *Id*. at 582 (citing *Approximately $42,850.00 v. State*, 44 S.W.3d 700, 702 (Tex. App.—Houston [14th Dist.] 2001, no pet.)). We also stated:

> [T]hese Appellants retained the attorney of their choice, Rodriguez, and authorized him to act in their behalf in a civil case. He represented them up to and including the date of trial. They complain that Rodriguez failed to represent them adequately. While Rodriguez's acts may have been deficient, we cannot conclude that his acts were of such a nature that, having entered a directed verdict in favor of the Bank, the trial court acted in an arbitrary or unreasonable manner in denying the Appellants' motion for new trial.

Id. at 583. If anything, the facts in *Dugan* are more compelling than those presented by Stewart.[4]

We recognize that Stewart attached a declaration to his motion for a new trial denying he received notice of the summary judgment motion from Klein and that Laura disputed Stewart's lack of knowledge with the Klein declaration she filed with her response to Stewart's new trial motion. Neither declaration affects our analysis or our conclusion here. Because Klein was still actively (if not sufficiently) representing Stewart prior to and at the summary judgment hearing, Klein's knowledge is imputed to Stewart. *See Stoner v. Thompson*, 578 S.W.2d 679, 684 (Tex. 1979) (client is charged with notice of all pleadings filed and served on him or his attorney prior to attorney's withdrawal). As a result, *Carpenter* applies in the circumstances here, and Stewart cannot rely on *Craddock*. Given that a motion for continuance had been filed before rendition of the summary judgment, it was incumbent on Stewart to challenge the denial of that motion on appeal, which he has not done.

We overrule Stewart's issue and conclude the trial court did not abuse its discretion in denying Stewart's motion for a new trial.

[4] *Dugan* involved what may fairly be characterized as an attorney's abandonment of his clients during trial, a fact pattern similar to *Lowe*, where the parties (without their knowledge) were left with no representation at the most critical time of the proceedings. We do not have occasion here, however, to question whether *Dugan* is compatible with authority, including our own, that instructs that "[w]here the agent abandons his office before conclusion of the proceedings, any knowledge possessed by the agent cannot be imputed to the principal." *Tactical Air Defense Servs., Inc. v. Searock*, 398 S.W.3d 341, 346 (Tex. App.—Dallas 2013, no pet.) (quoting *Langdale v. Villamil*, 813 S.W.2d 187, 190 (Tex. App.—Houston [14th Dist.] 1991, no writ)); *see also Lynch v. McKee*, 214 S.W. 484, 485 (Tex. App.—Dallas 1919, writ dism'd w.o.j.). Here, there was no abandonment. Klein continued to represent Stewart throughout the proceeding, even agreeing "as to form" to the summary judgment order, and Klein did not seek to withdraw until days after the summary judgment hearing concluded and the trial judge had announced his decision. The facts in *Dugan* and *Lowe* are compelling and their distinct resolutions disquieting. Arguably, the test set forth in *Lowe*—or some similar test—provides the better answer in cases where demonstrable and injurious attorney abandonment has occurred. Because our facts are dissimilar and do not involve abandonment, we have no reason to address the issue.

CONCLUSION

For the reasons set forth above, we overrule Stewart's issue and affirm the trial court's judgment..

/Ken Molberg//
KEN MOLBERG
JUSTICE

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Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

STEWART MCCRAY, Appellant	On Appeal from the 366th Judicial District Court, Collin County, Texas
No. 05-19-00556-CV V.	Trial Court Cause No. 366-01580-2015. Opinion delivered by Justice Molberg.
LAURA SPARKS MCCRAY, Appellee	Chief Justice Burns and Justice Carlyle participating.

In accordance with this Court's opinion of this date, the judgment of the trial court is **AFFIRMED**.

It is **ORDERED** that appellee LAURA SPARKS MCCRAY recover her costs of this appeal from appellant STEWART MCCRAY.

Judgment entered this 20th day of February, 2020.