

Reversed and Opinion Filed September 17, 2026



**In The  
Court of Appeals  
Fifth District of Texas at Dallas**

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**No. 05-25-00765-CV**

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**S&M DRILLING, LLC, DAVID GARDNER, AND ART WILLIAMS,  
Appellants  
V.  
DAVIS WATER WELL, LLC, Appellee**

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**On Appeal from the 380th Judicial District Court  
Collin County, Texas  
Trial Court Cause No. 380-01277-2024**

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**MEMORANDUM OPINION**

Before Justices Miskel, Clinton, and Jackson  
Opinion by Justice Miskel

Appellants S&M Drilling, LLC, David Gardner, and Art Williams challenge a no-answer default judgment in favor of appellee Davis Water Well, LLC (“DWW”). We conclude that we have jurisdiction over the appeal and that appellants were entitled to a new trial. Accordingly, we reverse the trial court’s judgment and remand this case for a new trial.

**I. Background**

In July 2023, DWW retained Jack Souther d/b/a JDS Operating (“Souther”) to drill a water well. After disputes arose concerning completion of the project,

DWW completed the well using the drilling rig that Souther had provided. In early 2024, DWW received correspondence asserting that appellant David Gardner had acquired an interest in the rig and that DWW owed Gardner and another individual, appellant Art Williams, compensation arising from DWW's continued use of it.

In February 2024, DWW sued Souther for breach of contract and damages. DWW also sought declaratory relief against S&M Drilling, Gardner, and Williams, requesting declarations that they had no contractual or equitable right to recover money from DWW.

The trial court's docket sheet reflects that Souther was "unserved." As to S&M Drilling, Gardner, and Williams, the record contains affidavits of service reflecting personal service on April 22, 2024, in Holiday, Texas. None of the defendants filed an answer.

On October 21, 2024, the trial court signed a default judgment against Souther. In March 2025, DWW moved for a default declaratory judgment against S&M Drilling, Gardner, and Williams. On March 25, 2025, the trial judge signed a judgment declaring that DWW owed those defendants no obligation, damages, or liability arising from the facts and circumstances of the case. The judgment also awarded DWW attorney fees, court costs, post-judgment interest, and conditional appellate attorney fees. The judgment, together with the earlier judgment against Souther, disposed of all parties and claims.

S&M Drilling, Gardner, and Williams moved for a new trial. In their supporting declarations, Gardner and Williams each stated that they were unable to locate the citation or petition after searching their records and averred that, if service occurred, their failure to answer resulted from the loss or misplacement of the lawsuit papers rather than intentional disregard of the suit. Gardner further denied that he was served, stated that he was not present at the address where service allegedly occurred, and asserted that he had not been there in at least five years. Williams stated that he did not recall being served, that no other resident remembered service, and that he ordinarily would not have been at the residence at the time service allegedly occurred.

DWW responded with an affidavit from its counsel, Darrell Smith. Smith averred that he communicated with Gardner and Williams for months after service in an effort to resolve the dispute, and that those communications “clearly” demonstrated the defendants “were aware of the lawsuit and intentionally and consciously disregarded it.”

On May 19, 2025, the trial court conducted a non-evidentiary hearing on the motion for new trial. After hearing argument, the trial judge stated that “the service . . . for each of the three Defendants is legally sufficient” and that “[b]ased on the affidavit of Mr. Smith, . . . the three Defendants[‘] failure to answer or appear was intentional or the result of conscious indifference.” That same day, the trial judge

signed an order denying the motion for new trial. S&M Drilling, Gardner, and Williams, but not Souther, timely appealed.

## **II. Appellate Jurisdiction**

In their first issue, appellants contend we lack appellate jurisdiction because the judgment is interlocutory rather than final. According to appellants, the earlier default judgment against Souther is void for lack of proper service, leaving the claims against him unresolved and preventing the judgment against appellants from becoming final. Appellants therefore ask us to remand the case to the trial court. We conclude we have jurisdiction over this appeal.

### **A. Standard of Review**

Appellate review is ordinarily limited to final judgments. *See Harley Channelview Props., LLC v. Harley Marine Gulf, LLC*, 690 S.W.3d 32, 37 (Tex. 2024). Whether a judgment is final is a question of law that we review de novo because finality affects our appellate jurisdiction. *Insight Invs., LLC v. Stonebriar Com. Fin. LLC*, No. 05-25-00365-CV, 2026 WL 738947, at \*3 (Tex. App.—Dallas Mar. 16, 2026, pet. filed) (mem. op.).

### **B. We Have Jurisdiction Over this Appeal**

Although neither default judgment contains finality language, the two judgments, considered together, disposed of all remaining parties and claims and therefore resulted in a final judgment. *See In re Urban 8 LLC*, 689 S.W.3d 926, 929 (Tex. 2024).

Appellants nevertheless contend the judgment is interlocutory because the earlier default judgment against Souther is void. *See Lawton Candle, LLC v. BG Personnel, LP*, 690 S.W.3d 122, 125 (Tex. App.—Dallas 2024, no pet.) (invalid service renders default judgment void). According to appellants, Souther was never properly served, and the record contains no valid return of service under rules 106 and 107. *See* TEX. R. CIV. P. 106–07. They argue that, because the judgment against Souther is void, the claims against him remain pending, which in turn prevents the judgment against appellants from becoming final.

Appellants rely on a principle this Court has previously applied. In *Lytle v. Cunningham*, we held that the absence of proper service on one defendant prevented a default judgment from becoming final and required reversal of the judgment against a co-defendant. 261 S.W.3d 837, 841–42 (Tex. App.—Dallas 2008, no pet.). We recently applied the same principle in *Filegonia Materials, LLC v. Key Performance Petroleum Co.*, reversing a default judgment against one defendant after determining that service on a co-defendant was defective. No. 05-24-00543-CV, 2025 WL 2108824, at \*5 (Tex. App.—Dallas July 28, 2025, no pet.) (mem. op.). In both cases, however, the allegedly unserved defendant was before the appellate court and successfully challenged the judgment based on the asserted defect in service. The co-defendant obtained relief as a consequence of that ruling. Here, by contrast, Souther has never challenged the judgment against him. He did

not move for new trial, did not appeal, and is not a party to this appeal. Instead, appellants seek relief based solely on an alleged defect affecting Souther.

Unlike in *Lytle* and *Filegonia*, in this case the defendant whose rights were affected by the asserted defect in service (Souther) has not himself challenged the judgment. And appellants may not complain of an error that affects only Souther's rights. See *Torrington Co. v. Stutzman*, 46 S.W.3d 829, 843 (Tex. 2000). Accordingly, under the circumstances presented here, appellants have not established that the judgment is interlocutory.

We overrule appellants' first issue.

### **III. Motion for New Trial**

In their second issue, appellants contend the trial court erred in denying their motion for new trial under *Craddock* and its progeny. See *Craddock v. Sunshine Bus Lines, Inc.*, 133 S.W.2d 124, 126 (Tex. 1939). We agree.

#### **A. Applicable Law and Standard of Review**

Under *Craddock*, a default judgment should be set aside and a new trial granted when the defaulting party establishes that (1) the failure to appear was not intentional or the result of conscious indifference, but was the result of an accident or mistake, (2) the motion for new trial sets up a meritorious defense, and (3) granting the motion will occasion no delay or otherwise injure the plaintiff. *Dolgencorp of Tex., Inc. v. Lerma*, 288 S.W.3d 922, 925 (Tex. 2009) (per curiam).

We review a trial court’s denial of a motion for new trial for abuse of discretion. *Id.* at 926. A trial court has no discretion to deny a new trial when the movant satisfies all three elements of the *Craddock* test. *See id.*

**B. The Trial Court Abused its Discretion in Denying Appellants’ Motion for New Trial**

Appellants contend they established each *Craddock* element and were therefore entitled to a new trial. The parties’ principal disagreement concerns the first element, whether appellants’ failure to answer resulted from conscious indifference. Appellants and DWW submitted competing affidavits on that issue,<sup>1</sup> and the trial court denied the motion after a non-evidentiary hearing. We first address the effect of those competing affidavits on the conscious-indifference inquiry. We then consider whether appellants set up a meritorious defense and whether granting a new trial would delay or otherwise prejudice DWW. We conclude the record establishes all three *Craddock* elements and that the trial court therefore abused its discretion in denying the motion for new trial.

**1. Failure to Appear Not Intentional or the Result of Conscious Indifference**

We begin with the first *Craddock* element: whether appellants’ failure to appear was intentional or the result of conscious indifference. The “overarching question” is why the defendants failed to appear. *See Tabakman v. Tabakman*, 728

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<sup>1</sup> Specifically, appellants submitted unsworn declarations in lieu of affidavits, *see* TEX. CIV. PRAC. & REM. CODE ANN. § 132.001(a), (d), and DWW submitted a competing affidavit from its counsel. For ease of reference, we will refer to these documents collectively as “affidavits.”

S.W.3d 703, 708 (Tex. 2025) (per curiam). The issue is not whether the defendant acted negligently, but whether the defendant knew of the lawsuit and did not care. *Id.* A default judgment should be set aside when the failure to answer resulted from accident or mistake rather than conscious indifference, and some excuse, even if not a good one, will suffice. *Id.*; see also *Perry v. Benbrooke Ridge Partners L.P.*, No. 05–16–01486–CV, 2018 WL 2138957, at \*2 (Tex. App.—May 7, 2018, no pet.) (mem. op.) (proof of accident, mistake, or other reasonable explanation negates intent or conscious indifference).

The parties submitted competing affidavits concerning why appellants failed to answer. Gardner averred that he was not served with the citation and petition, did not reside or have a place of business at the address where service allegedly occurred, and had not been to that address in at least five years. He further stated that he searched his records but could not locate any citation or petition. Williams similarly averred that he did not recall being served individually or as registered agent for S&M Drilling, that no other resident of the service address remembered service, and that it would have been unusual for him to be at the residence during business hours at the time service allegedly occurred. Like Gardner, Williams stated that he searched his records and could not locate the citation or petition. Both men further stated that, if service occurred, their failure to answer resulted from the loss or misplacement of the papers rather than conscious indifference.

DWW responded with an affidavit from its counsel, Darrell Smith. Smith averred that he communicated with Gardner and Williams for months about the lawsuit. According to Smith, he participated in at least two telephone calls with Williams and received a voicemail from Gardner. Smith further averred that, during those communications, both Williams and Gardner indicated that they knew about the lawsuit and were discussing possible resolutions. Smith concluded that those communications demonstrated appellants' awareness of the lawsuit and reflected an intentional decision not to answer.

The affidavits created a factual dispute concerning conscious indifference. Although the trial court conducted a hearing on the motion for new trial, no witness testified and no evidence was admitted. The court instead heard only the arguments of counsel before ruling. The court therefore resolved the dispute solely on the evidence within the competing affidavits.

Under this Court's longstanding precedent, however, when a movant's affidavit sets forth facts that, if true, would negate conscious indifference, the trial court may not resolve those facts against the movant without an evidentiary hearing. *See Perry*, 2018 WL 2138957, at \*2–3; *Averitt v. Bruton Paint & Floor Co.*, 773 S.W.2d 574, 576 (Tex. App.—Dallas 1989, no writ); *Healy v. Wick Bldg. Sys., Inc.*, 560 S.W.2d 713, 721 (Tex. Civ. App.—Dallas 1977, writ ref'd n.r.e.) (op. on reh'g). In that circumstance, the movant's factual assertions must be accepted as true unless

the opponent requests and obtains an evidentiary hearing. *See Perry*, 2018 WL 2138957, at \*2–3; *Averitt*, 773 S.W.2d at 576; *Healy*, 560 S.W.2d at 721.

Therefore, we accept as true appellants’ assertions that they did not recall being served, searched unsuccessfully for the lawsuit papers, and failed to answer because the papers were misplaced or lost rather than because they intentionally disregarded the suit. Those assertions satisfy the first *Craddock* element. Although a conclusory statement that lawsuit papers were “lost” ordinarily requires some explanation, Gardner and Williams supplied that explanation by describing their efforts to locate the missing documents. *See Fid. & Guar. Ins. Co. v. Drewery Constr. Co.*, 186 S.W.3d 571, 575–76 (Tex. 2006). The supreme court recently recognized that “not recalling being served or misplacing lawsuit papers are excuses that, if true and supported by some explanation, would negate intentional or consciously indifferent conduct.” *Tabakman*, 728 S.W.3d at 709. Accepting appellants’ factual assertions as true, their failure to answer resulted from accident or mistake rather than conscious indifference. Accordingly, appellants satisfied the first *Craddock* element.

## **2. Meritorious Defense**

Because the denial order does not specify the basis for the ruling, we address the remaining *Craddock* elements. *See Dolgencorp*, 288 S.W.3d at 926. The second *Craddock* element requires the movant to set up a meritorious defense. *Id.* at 925. The movant need not prove the defense in the motion for new trial. *Id.* at 927–28.

Rather, the movant must allege facts that would constitute a defense and support those allegations with prima facie evidence. *Id.* at 928. Once that showing is made, the court does not consider controverting evidence offered by the plaintiff. *Id.*

Appellants satisfied that burden. DWW sought declarations that appellants had no contractual or equitable right to recover money from DWW arising from its use of the drilling rig and related events. Gardner's declaration directly disputed those allegations. He asserted that he acquired a note secured by the rig, obtained the right to possess it, and agreed that DWW could continue using it while completing its work. According to Gardner, DWW agreed to compensate him for that continued use and now owes more than \$400,000. If true, those facts would defeat DWW's request for declarations that it owes Gardner no obligations arising from the use of the rig.

Williams averred that neither he nor S&M Drilling had claimed that DWW owed them money and that S&M Drilling had never authorized anyone to assert such a claim on its behalf. If true, those facts would contradict DWW's allegations that Williams and S&M Drilling were asserting rights to payment from DWW and therefore would constitute a meritorious defense to the declaratory judgment claims asserted against them.

DWW does not argue on appeal that appellants failed to satisfy the second *Craddock* element. Taking the allegations in the declarations as true, appellants set up defenses that, if proved, would defeat or materially alter DWW's entitlement to

the declaratory relief awarded in the default judgment. Accordingly, appellants satisfied the second *Craddock* element.

### **3. No Delay or Other Injury to the Plaintiff**

The third *Craddock* element requires the movant to show that granting a new trial will not occasion delay or otherwise injure the plaintiff. *See Dolgencorp*, 288 S.W.3d at 925. The purpose of this element is to protect the plaintiff against prejudice that would impair presentation of the case on the merits at a new trial, such as the loss of witnesses or other valuable evidence. *See Dolgencorp*, 288 S.W.3d at 929; *Tabakman*, 728 S.W.3d at 710–11. Once the movant makes that showing, the burden shifts to the plaintiff to demonstrate a specific injury. *See Dolgencorp*, 288 S.W.3d at 929; *Tabakman*, 728 S.W.3d at 711.

Appellants alleged in their motion that granting a new trial would not occasion delay or otherwise injure DWW. They further noted that DWW waited nearly a year after service before seeking a default judgment. Those allegations satisfied appellants' initial burden and shifted the burden to DWW to demonstrate a specific injury. *See Dolgencorp*, 288 S.W.3d at 929; *Tabakman*, 728 S.W.3d at 711.

In response, DWW argued that appellants ignored the lawsuit for more than a year and that DWW delayed seeking a default judgment while attempting to resolve the dispute through settlement discussions. But neither DWW's response nor Smith's affidavit identified any lost evidence, unavailable witness, or other prejudice

that would impair DWW's ability to present the merits of its case at a new trial. *See Dolgencorp*, 288 S.W.3d at 929; *Tabakman*, 728 S.W.3d at 711.

Because DWW failed to show that granting a new trial would cause actual prejudice in presenting its claims, we conclude that appellants satisfied the third *Craddock* element.

Because appellants satisfied all three elements of the *Craddock* test, the trial court abused its discretion by denying their motion for new trial. *See Dolgencorp*, 288 S.W.3d at 926. We therefore sustain appellants' second issue.

#### **IV. Conclusion**

We reverse the trial court's judgment and remand this case to the trial court for a new trial. Because our disposition of appellants' second issue requires reversal of the judgment in its entirety, we need not address appellants' third issue challenging the attorney fee award. *See* TEX. R. APP. P. 47.1.

/Emily Miskel/  
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EMILY MISKEL  
JUSTICE