Reversed and Remanded and Opinion filed May 25, 2000.

In The

Fourteenth Court of Appeals

NO. 14-99-00932 -CV

DAVE L. GLASSEL, Appellant

V.

WESLEY BYRUM and REBECCA C. BYRUM, Appellees

On Appeal from the County Civil Court at Law No. 3
Harris County, Texas
Trial Court Cause No. 679,848

O P I N I O N

Dave Glassel appeals a post-answer default judgment entered in favor of Wesley Byrum and Rebecca Byrum (the "Byrums") on the grounds that: (1) the trial court erred in not granting Glassel's motion for new trial; (2) the Byrums failed to prove their action for intentional tort; (3) the trial court erred in entering a post-answer default judgment without hearing live evidence of unliquidated damages; and (4) the Byrums were not entitled to an award of attorneys fees. We reverse and remand.

Background

On March 17, 1997, Byrum Valve & Fitting Company ("Byrum Valve") filed suit against Vida Products Corporation ("Vida") for destroying trees located on property Vida leased from Byrum Valve. Initially, Glassel was not a party to this suit. However, on June 7, 1997, the Byrums filed an amended petition in which, among other things, they substituted themselves for Byrum Valve as the plaintiffs and added Glassel as a defendant.

On January 21, 1999, the Byrums filed a motion for default judgment, requesting "liquidated damages" of $35,000.00 and attorney's fees of $1,500.00. The motion was supported by the affidavits of Wesley Byrum, Charles Huber, the Byrums' attorney, and Michael Griffin, a process server. Glassel filed a general denial on January 25, and on February 2, trial was set for May 10, 1999. Although Glassel admits receiving notice of the trial setting, he failed to appear at trial. Final judgment was entered in favor of the Byrums on that day and a notice of the judgment was mailed to Glassel. His subsequent motion for new trial was denied on July 6, 1999.

Sufficiency of Evidence

The second of Glassel's four points of error challenges, among other things, the sufficiency of the evidence to establish a causal nexus between any conduct on his part and the Byrums' alleged damages. We address this point of error first because it is dispositive of this appeal.

A post-answer default judgment is rendered when a defendant files an answer but fails to appear at trial. *See Stoner v. Thompson*, 578 S.W.2d 679, 682 (Tex. 1979). In the case of a no-answer default judgment, the defendant's failure to answer represents an admission of all facts properly set forth in the plaintiff's petition. *See Morgan v. Compugraphic Corp.*, 675 S.W.2d 729, 732 (Tex. 1984). By contrast, a post-answer "default" is not an implied confession of any issues raised by the defendant's answer. *See Stoner*, 578 S.W.2d at 682. Unlike a no-answer default, a post-answer default judgment requires the plaintiff to offer evidence to prove the factual allegations of his petition just as in a contested trial. *See id.*; *Karl & Kelly Co. v. McLerran*, 646 S.W.2d 174, 175 (Tex. 1983). A post-answer default judgment can be challenged for both legal and factual sufficiency of the evidence. *Cf. Norman Communications v. Texas Eastman Co.*, 955 S.W.2d 269, 270 (Tex. 1997) (recognizing that review

of legal and factual sufficiency claims is permissible when a post-answer default judgment is challenged by restricted appeal).

In deciding a no evidence point, we consider only the evidence and inferences which tend to support the judgment and disregard all evidence and inferences to the contrary. *See Wal-Mart Stores, Inc. v. Gonzalez*, 968 S.W.2d 934, 936 (Tex. 1998). If there is more than a scintilla of evidence to support the findings, the no evidence challenge cannot be sustained. *See Catalina v. Blasdel*, 881 S.W.2d 295, 297 (Tex. 1994). Evidence is thus legally sufficient when it rises to a level that would enable reasonable and fair-minded people to differ in their conclusions. *See, e.g., Mobil Oil Corp. v. Ellender*, 968 S.W.2d 917, 922 (Tex. 1998).

In this case, the Byrums offered no live testimony at trial, but only copies of several documents, most of which pertained to whether Glassel had received notice of the suit and trial setting. In addition, the Byrums requested that the trial court take judicial notice of the affidavits attached to their previous motion for default judgment. Of these, the affidavit of Wesley Byrum provided the only evidence pertaining to the elements of the cause of action. His affidavit states, in pertinent part:

> Beginning on or about August 8, 1995, I leased the real property described in the petition filed in this case to Vida Product Corporation through its representative Dave L. Glassel. . . . Vida Products Corporation had permission to occupy the real property and during that time permitted VP Texas Pure Industries, Inc. and Dave L. Glassel and D. J. Buldic to occupy and use the property for the operation of a wood-chipping business. *During the operation of this business, the defendants in this case, cut down and destroyed valuable trees on the property without my permission or knowledge.*
>
> *The actions of all the defendants were done jointly because, to my knowledge, all of them were using or occupying the real property described in the petition with the permission of Vida Products Corporation or Dave L. Glassel.* The cutting down and destruction of the trees on the property caused damages to the real property beyond the normal wear and tear associated with a lease of the property for the operation of a wood-chipping business.

(emphasis added). The Byrums contend that Wesley's affidavit is sufficient to prove that Glassel was responsible for cutting down the trees as alleged in the petition. However, although the affidavit states Byrum's personal knowledge that the defendant's jointly *occupied* the premises, it fails to show any

personal knowledge or facts that Glassel personally caused or was otherwise responsible for the damage to the property. Rather, in stating that the trees were cut down without Byrum's knowledge, the affidavit reflects a *lack* of personal knowledge of specifically who cut down the trees. Moreover, even construing the affidavit liberally, it provides no evidence of any actual conduct by any individuals, including Glassel. Instead, the affidavit assumes that the defendants jointly cut down the trees merely because they were using and occupying the property at the time. The affidavit thus fails to establish a causal nexus between any particular conduct by Glassel and the Byrums' alleged injuries. Because the evidence was therefore insufficient to establish Glassel's personal liability for the damage alleged to the Byrums' property, it does not support the trial court's judgment, and Glassel's legal sufficiency challenge is sustained.

Ordinarily, when a no evidence, or legal sufficiency, challenge is sustained, judgment is rendered for the appellant. *See* TEX. R. APP. P. 43.3. However, a court generally cannot grant greater relief than is requested by a party. *See Horrocks v. Texas Dept. of Transp.*, 852 S.W.2d 498, 499 (Tex. 1993). Moreover, after sustaining a legal sufficiency challenge, an appellate court may remand the case for further proceedings if the evidence is not fully developed.[1] In this case, because Glassel has requested only a remand for trial and because the only testimony in the case was that contained in the affidavits and was thus not fully developed, we reverse the judgment of the trial court and remand the case for further proceedings.

/s/ Richard H. Edelman
Justice

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[1] *See* TEX. R. APP. P. 43.3; *Holt Atherton Indus., Inc. v. Heine*, 835 S.W.2d 80, 86 (Tex. 1992) (noting that when an appellate court sustains a no evidence point after an uncontested hearing, following a default judgment, the appropriate disposition is a remand for a new trial); *Schwartz v. Pinnacle Communications*, 944 S.W.2d 427, 433 (Tex. App.–Houston [14th Dist.] 1997, no writ) (concluding that it is appropriate to remand rather than render when a case has been reversed on legal sufficiency grounds but the evidence is in need of further development).

Judgment rendered and Opinion filed May 25, 2000.

Panel consists of Justices Fowler, Edelman, and Draughn.[2]

Do not publish — TEX. R. APP. P. 47.3(b).

[2] Senior Justice Joe L. Draughn sitting by assignment.