**Reversed and Remanded and Opinion filed July 20, 2000.**

**In The**

# Fourteenth Court of Appeals

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**NO. 14-99-00792-CV**

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**KIMBERLY K. BRADY, M.D., Appellant**

**V.**

**CARYN DUNCAN, INDIVIDUALLY AND CARYN DUNCAN AND DON W. DUNCAN, AS GUARDIAN AND NEXT FRIEND OF ALEXANDER DUNCAN, Appellees**

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**On Appeal from the 269th District Court**
**Harris County, Texas**
**Trial Court Cause No. 98-48643**

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## O P I N I O N

The appellees, Caryn Duncan, individually and Caryn Duncan and Don W. Duncan, as guardian and next friend of Alexander Duncan (collectively, the "Duncans") brought this suit against Dr. Kimberly Brady, the appellant, alleging medical malpractice. The trial court entered default judgment. In this restricted appeal, the appellant/defendant claims the trial court did not obtain personal jurisdiction over her before entering a default judgment. We agree and reverse and remand the case to the trial court.

### FACTUAL BACKGROUND

The Duncans filed suit against Dr. Brady on October 12, 1998, claiming she negligently treated Caryn Duncan during her pregnancy. The original petition recited that Dr. Brady is an individual and physician licensed to practice medicine in the state of Texas, who may be served with process at her place of business, Women's Health Care Center.[1] On December 26, 1998, the Duncans filed a notice of submission, setting their motion for default judgment on the court's January 18, 1999 docket. The trial court entered an interlocutory default judgment against Dr. Brady on February 9, 1999. Ten days later, the court took evidence of damages and rendered judgment for the Duncans and against Dr. Brady in the amount of $1,250,000. On March 16, 1999, the trial court amended the judgment *nunc pro tunc*, keeping the same damages but adding an interest rate of ten percent beginning February 19, 1999, the date of the trial on damages. On May 12, 1999, the Duncans obtained a writ of execution for the judgment. Dr. Brady filed a notice of restricted appeal on July 6, 1999.

## SCOPE AND STANDARD OF REVIEW

To succeed on a restricted appeal, the appellant must: (1) file a notice of restricted appeal within six months after the judgment is signed; (2) be a party to the lawsuit; (3) demonstrate that she did not participate in the hearing that resulted in the judgment of which she complains; and (4) show that error is apparent on the face of the record. *See* TEX. R. APP. P. 26.1(c) & 30; *Norman Communications v. Texas Eastman Co.*, 955 S.W.2d 269, 270 (Tex. 1997); *Barker CATV Constr., Inc. v. Ampro, Inc.*, 989 S.W.2d 789, 791 (Tex. App.—Houston [1st Dist.] 1999, no pet.). The first three elements are satisfied here because: Dr. Brady filed a notice of restricted appeal within six months after the trial court signed the default judgment; Dr. Brady is a party to the lawsuit; and she did not participate in the hearing that resulted in the default judgment. Therefore, the only issue before us is whether error is apparent from the face of the record.

A restricted appeal is a direct attack on the judgment. *See Primate Constr., Inc. v. Silver*, 884 S.W.2d 151, 152 (Tex. 1994) (making this holding with respect to appeal by writ of error, which was replaced by restricted appeal); *Bautista v. Bautista*, 9 S.W.3d 250, 251 (Tex. App.—San Antonio

[1] The original petition also gave the physical address for the Women's Health Care Center.

1999, no pet.); *Barker CATV*, 989 S.W.2d at 792. To withstand this direct attack, the record must affirmatively show strict compliance with the rules for service of citation. *See Primate Constr.*, 884 S.W.2d at 152; *Barker CATV*, 989 S.W.2d at 792. There are no presumptions in favor of strict compliance with the rules of civil procedure, such as presuming valid issuance, service, or return of citation. *See Primate Constr.*, 884 S.W.2d at 152. Jurisdiction over the defendant must affirmatively appear by a showing of due service of citation and must not depend upon the recitals in the default judgment. *See Barker CATV*, 989 S.W.2d at 792 (citing *Faggett v. Hargrove*, 921 S.W.2d 274, 276 (Tex. App.—Houston [1st Dist.] 1995, no writ)); *Seib v. Bekker*, 964 S.W.2d 25, 28 (Tex. App.—Tyler 1997, no writ) (citing *Massachusetts Newton Buying Corp. v. Huber*, 788 S.W.2d 100, 102 (Tex. App.—Houston [14th Dist.] 1990, no writ)).

**FINALITY OF JUDGMENT**

As a threshold matter, we must determine if the judgment *nunc pro tunc* is a final judgment. A judgment is final when it disposes of all issues and parties before it. *See Felderhoff v. Knauf*, 819 S.W.2d 110, 111 (Tex. 1991). Because the judgment *nunc pro tunc* disposed of all issues and parties before the trial court, it is a final judgment.

**RETURN OF CITATION**

Next, we consider whether there is error on the face of the record. We begin by examining compliance with the rules governing service of citation. Unless the citation or the court directs otherwise, a citation

> shall be served by any person authorized by Rule 103 by
>
> (1) delivering to the defendant, in person, a true copy of the citation with the date of delivery endorsed thereon with a copy of the petition attached thereto, or
>
> (2) mailing to the defendant by registered or certified mail, return receipt requested, a true copy of the citation with a copy of the petition attached thereto.

TEX. R. CIV. P. 106(a). The return of service is *prima facie* evidence that the person named therein was served with the citation. *See Primate Constr.*, 884 S.W.2d at 152. To be valid, a return of service must

meet the requirements set forth in Texas Rule of Civil Procedure 107. *See Massachusetts Newton*, 788 S.W.2d at 102. That rule provides:

> The return of the officer or authorized person executing the citation shall be endorsed on or attached to the same; it shall state when the citation was served and the manner of service and be signed by the officer officially or by the authorized person. The return of citation by an authorized person shall be verified.

TEX. R. CIV. P. 107. Additionally, if service was by registered or certified mail as authorized by Rule 106, the service must contain the return receipt with the addressee's signature. *See id*. However, if "the officer or authorized person has not served the citation, the return shall show the diligence used by the officer or authorized person to execute the same and the cause of failure to execute it, and where the defendant is to be found, if he can ascertain." *Id*. The one requesting service, not the process server, is responsible for ensuring that service is properly accomplished. *See* TEX. R. CIV. P. 99(a); *Primate Constr.*, 884 S.W.2d at 153. This responsibility includes seeing that service is properly reflected in the record. *See Primate Constr.*, 884 S.W.2d at 153.

There is no return of citation or anything else in the record now before us to reflect that Dr. Brady was served with citation in this case. Furthermore, there is nothing in the record to show any unsuccessful attempts to serve Dr. Brady with process. The docket sheet reflects no citation was ever issued, served, or returned for filing with the court. The record contains only a "Civil Process Request Form" requesting service by a constable. Although the interlocutory default judgment, which later became a final judgment, recites that Dr. Brady was served with citation, this recitation is insufficient to establish personal jurisdiction over the appellant. Because there is nothing in the record to affirmatively show proper service on Dr. Brady, there is error on the face of the record. We sustain appellant's sole issue in this restricted appeal.

We reverse the judgment of the trial court and remand this case for further proceedings.[2]

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[2] We note that when a party attacks the judgment, she submits herself to the jurisdiction of the trial court. *See Ackerly v. Ackerly*, 13 S.W.3d 454, 458 (Tex. App.—Corpus Christi 2000, no pet.) (citing *Calvert v. Calvert*, 801 S.W.2d 217, 220 (Tex. App.—Fort Worth 1990, no writ); *Cates v. Pon*, 663 S.W.2d 99, 102 (Tex. App.—Houston [14th Dist.] 1983, writ ref'd n.r.e.)). Therefore, the appellant is now subject to the jurisdiction of the trial court.

/s/ Kem Thompson Frost
Justice

Judgment rendered and Opinion filed July 20, 2000.

Panel consists of Justices Amidei, Anderson and Frost.

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