No. 05-12-01584-CV

In The

Court of Appeals

FIFTH DISTRICT OF TEXAS

Dallas, Texas

CENTER OPERATING COMPANY, L.P.

Appellant,

v.

BRANDY A. DUNCAN

Appellee.

Appealed from the 160th Judicial District Court of Dallas County, Texas, the Honorable Jim Jordan, Presiding

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BRIEF OF APPELLEE BRANDY A. DUNCAN

Niles Illich
State Bar No. 24069969
Ben Abbott, P.C.
1934 Pendleton Drive
Garland, Texas 75041
Telephone: (972) 236 - 5555
Facsimile: (972) 682 - 7586
Attorney for Appellee

ORAL ARGUMENT REQUESTED

IDENTITY OF THE PARTIES AND COUNSEL

Appellant:	Center Operating Company, L.P.
Appellant's Appellate Counsel:	John K. Vaughan Vaughan, Ramsey, & Walvoord 530 S. Carrier Parkway Suite 300 Dallas, Texas 75051
Appellee:	Brandy A. Duncan
Appellant's Trial and Appllate Counsel:	Michael Ellis (trial counsel) Niles Illich (appellate counsel) Law Office of Ben Abbott, P.C. 1934 Pendleton Drive Garland, Texas 75041
Trial Court:	Case assigned to the 160th Judicial District Court, Dallas, Dallas County, Texas, the Honorable Jim Jordan, presiding. Default Judgment heard before the Honorable Sheryl McFarlin, Associate Judge**.**

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STATEMENT OF THE CASE

Duncan filed suit against Center Operating Company, L.P. on January 17, 2012. [CR 5]. The District Clerk assigned the case to the 160th Judicial District Court, the Honorable Jim Jordan, presiding. [CR 5]. The District Clerk assigned this case Cause Number: DC-12-00528. [CR 5]. In her Original Petition, Duncan alleged common law negligence against Center Operating Company, L.P. arising out of a fall that occurred at the American Airlines Center on June 5, 2011. [CR 5–6]. Citation was issued and Center Operating Company, L.P. was served on January 24, 2012. [CR 10 and Supp CR]. The return of service was filed on February 1, 2012. [Supp CR]. Center Operating Company, L.P. did not make an appearance or file an answer until November 13, 2012. On March 13, 2012, Duncan moved for a default judgment. [CR 11]. On May 25, 2012, the Honorable Sheryl McFarlin conducted a hearing on Duncan's Default Judgment. [1 RR 1]. At this hearing, Duncan's attorney presented evidence of Duncan's damages in the form of Duncan's oral testimony and Duncan's medical bills and records. The trial court admitted all of the bills and records offered by Duncan's trial attorney. [1 RR 4]. At the conclusion of the hearing, the trial court awarded Duncan a default judgment for $11,308.00 in past

medical bills and $20,000.00 for Duncan's pain and suffering in the past. [1 RR 9; CR 32].

Center Operating Company, L.P. answered on November 13, 2012 and filed its Notice of Appeal on November 21, 2012. [CR 43, 128].

STATEMENT CONCERNING ORAL ARGUMENT

Center Operating Company, L.P. has requested oral argument. Duncan believes that this appeal can be resolved without oral argument. But Duncan requests oral argument so that her attorney will have an opportunity to participate should the Court grant Center's request for oral argument.

STATEMENT OF FACTS

This suit arose from a fall that occurred while Duncan was at the American Airlines Center on June 5, 2011. [CR 5–6]. As a result of this fall, Duncan was injured; Duncan filed suit against Center Operating Company, L.P. on January 17, 2012. [CR 5]. In her Original Petition, Duncan alleged common law negligence against Center Operating Company, L.P. [CR 5–6]. Citation was issued on January 19, 2012 and Center Operating Company, L.P. was served through its registered agent on January 24, 2012. [CR 10 and Supp CR[1]]. The return of service was filed on February 1, 2012. [Supp CR]. On March 13, 2012, Duncan moved for a default judgment. [CR 11]. Center Operating Company, L.P. did not make an appearance or file an answer until November 2012.

On May 25, 2012, the Honorable Sheryl McFarlin conducted a hearing on Duncan's Default Judgment. [1 RR 1]. At this hearing, Duncan sought compensation for her past medical expenses and past pain and suffering. Duncan's trial attorney requested compensation for her past medical expenses "in the amount of $11,309,

[1] At the time of filing this brief, the supplemental clerk's record had not yet been filed. Because this is a restricted appeal and conversations with the clerk's office, this brief is being filed with the expectation that the Supplemental Clerk's Record will follow shortly.

which includes expenses for Care Now, Accident & Injury Chiropractic, Lone Star Radiology, and White Rock Open Air MRI." [2 RR 9]. The trial court awarded Duncan this amount. [CR 32–33]. To support this award, Duncan offered, and the trial court admitted, three affidavits under § 18.001 of the Civil Practices and Remedies Code. These affidavits came from: Accident & Injury Chiropractic (in the amount of $5,676.00); Lone Star Radiology (in the amount of $153.00); and, White Rock Open Air MRI (in the amount of $5,039.00). These bills totaled $10,868.00. [CR 32]. Duncan did not submit a § 18.001 affidavit for Care Now.

At the conclusion of Duncan's testimony, her counsel asked "that default judgment be entered as to past physical pain and suffering in the amount of $20,000 . . .," [2 RR 9]. Duncan did not offer evidence of past mental anguish and did not ask for an award of past mental anguish. The trial court stated, "[d]o you have it separated out for past physical pain and mental anguish?" and then stated, "[w]hich I will assess at $20,000." [2 RR 9–10]. The trial court then awarded Duncan $31,308.00, which was the amount of her past medical bills and the $20,000.00 Duncan had requested as compensation for the physical pain and suffering that she endured in the past. [CR 32].

Center Operating Company, L.P. answered on November 13, 2012 and filed its Notice of Appeal on November 21, 2012. [CR 43, 128].

SUMMARY OF THE ARGUMENT

Center contends that error exists on the face of the record because an officer's return was not filed with the Clerk and because notice was not sent to Center under Rule 239a of the Texas Rules of Civil Procedure. Although not included in the Clerk's Record, an officer's return was filed with the Clerk. Duncan has asked for this to be filed with this Court in a Supplemental Clerk's Record. When considering a restricted appeal an intermediate-appellate court is limited to the materials that were on file with the Clerk before the entry of judgment. By definition, a 239a notice could not have been on file before its corresponding judgment was entered. Accordingly, neither of these allegations constitutes an error on the face of the record.

Center also contends that it is entitled to a new trial on the basis that there was insufficient evidence to support the trial court's award for mental anguish. Duncan's counsel asked for $20,000.00 for her pain and suffering in the past and did not ask for an award for mental anguish. The trial court awarded $20,000.00 for "pain and suffering and mental anguish in the past." The record is clear that Duncan sought to limit her recovery to pain and suffering in the past. This distinguishes it from *Jackson v. Gutierrez* that Center relies upon. In the alternative, Center is entitled only

to a new trial on Duncan's pain and suffering.

Lastly, Center contends that it is entitled to a new trial under § 41.0105 of the Civil Practices and Remedies Code because the medical expenses awarded exceeded those supported by affidavits from § 18.001 of the Civil Practices and Remedies Code and because the trial court compensated Duncan for the production of a $150.00 narrative report by one of her medical providers. Center has waived this issue by failing to cite to appropriate legal authority. Additionally, the § 18.001 affidavits support all but $440.00 of the compensation for past medical bills. A review of the affidavits and the Reporter's Record shows that the extra $440.00 came from Care Now. Accordingly, there is no error on the face of the record and Center is not entitled to a new trial. In the alternative, Center is entitled to a modified judgment that awards Duncan past medical bills of $10,868.00.

ARGUMENT

STANDARD FOR A RESTRICTED APPEAL

Rule 30 of the Texas Rules of Appellate Procedure provides, "[a] party who did not participate—either in person or through counsel—in the hearing that resulted in the judgment complained of and who did not timely file a post-judgment motion or request for findings of fact and conclusions of law, or a notice of appeal within the time permitted by Rule 26.1(a), may file a notice of appeal within the time permitted by Rule 26.1(c)." TEX. R. APP. P. 30.

A restricted appeal must: (1) be brought within six months after the trial court signs the judgment; (2) by a party; (3) who did not participate in the trial; and, (4) the error complained of must be apparent on the face of the record. TEX. R. APP. P. 26.1(c), 30; *Sutton v. Hisaw & Assocs. Gen. Contractors, Inc.*, 65 S.W.3d 281, 284 (Tex. App.—Dallas 2001, pet. denied). For purposes of a restricted appeal, the face of the record consists of all the papers *on file before the judgment* as well as any reporter's record. *Norman Communications v. Texas Eastman Co.*, 955 S.W.2d 269, 270 (Tex. 1997). (Emphasis added). "When extrinsic evidence is necessary to challenge a judgment, the appropriate remedy is by motion for new trial or by bill of review filed in the trial court so that the trial court has the opportunity to consider and

weigh factual evidence." *Emmanuel Ginn v. Forrester*, 282 S.W.3d 430, 431 (Tex. 2009) (*per curium*).

To be "apparent on the face of the record," an error that is "merely inferred" is not sufficient. *Ginn*, 282 S.W.3d at 431. An appellant in a restricted appeal bears the same burden as any other appellant—to provide an appellate record that contains sufficient information to satisfy the appellate court that reversible error was committed in the trial court. *See Piotrowski v. Minns*, 873 S.W.2d 368, 370 (Tex. 1993); *Christiansen v. Prezelski*, 782 S.W.2d 842, 843 (Tex. 1990) (*per curiam*); *Campsey v. Campsey*, 111 S.W.3d 767, 772 (Tex. App.—Fort Worth 2003, no pet.) (appellant failed to affirmatively show in record that he did not receive required notice); *Murray v. Devco, Ltd.*, 731 S.W.2d 555, 557 (Tex. 1987); *Welsh v. Welsh*, 905 S.W.2d 615, 620 (Tex. App.—Houston [14th Dist.] 1995, den.); and, TEX. R. APP. P. 44.1.

In *Ginn*, the appellant sought relief from a dismissal for want of prosecution because the appellant alleged that he had never received notice of the dismissal hearing. *Ginn*, 282 S.W.3d at 431. The supreme court determined that because the record was silent on the issue of notice, that error did not exist on the face of the record and denied relief. *Id.* at 432.

In *Gonzalez*, this Court considered the distribution of a marital estate that was

accomplished through a default judgment. *Gonzalez v. Gonzalez*, 331 S.W.3d 864, 865 & 869 (Tex. App.—Dallas 2011, no pet.). The appellant complained that there was "no evidence to support the property division in the divorce decree." *Id.* at 868. After considering the record, this Court determined that "the trial court had insufficient evidence to divide the property equitably. With regard to the division of the marital estate, there is error on the face of the record." (Internal citations removed.). *Id.* at 869. This Court then "reverse[d] those parts of the decree dividing the marital estate and . . . remand[ed those parts of the] case to the trial court for further proceedings consistent with [its] opinion. In all other respects, the trial court's judgment [was] affirmed." *Id.*

Argument One

In its first issue, Center contends that error exists on the face of the record because Duncan did not comply with Rule 107 and file an officer's return with the Court and because the trial court failed to comply with Rule 239a in not providing notice of the default to Center.

A. Law

1. Rule 107 (g) & (h) of the Texas Rules of Civil Procedure

Rule 107(g) provides: The return and any document to which it is attached must be filed with the court and may be filed electronically or by facsimile, if those methods of filing are available. TEX. R. CIV. P. 107 (g).

Rule 107(h) provides:

> No default judgment shall be granted in any cause until proof of service as provided by this rule or by Rules 108 or 108a, or as ordered by the court in the event citation is executed by an alternative method under Rule 106, shall have been on file with the clerk of the court ten days, exclusive of the day of filing and the day of judgment.

TEX. R. CIV. P. 107 (h).

2. Rule 239a

Rule 239a provides:

At or immediately prior to the time an interlocutory or final default

> judgment is rendered, the party taking the same or his attorney shall certify to the clerk in writing the last known mailing address of the party against whom the judgment is taken, which certificate shall be filed among the papers in the cause. Immediately upon the signing of the judgment, the clerk shall mail written notice thereof to the party against whom the judgment was rendered at the address shown in the certificate, and note the fact of such mailing on the docket. The notice shall state the number and style of the case, the court in which the case is pending, the names of the parties in whose favor and against whom the judgment was rendered, and the date of the signing of the judgment. Failure to comply with the provisions of this rule shall not affect the finality of the judgment.

TEX. R. CIV. P. 239a.

A court's failure to send notice under Rule 239a does not constitute error on the face of the record. *Campbell v. Fincher*, 72 S.W.3d 723, 725 (Tex. App.—Waco 2002, no pet.) (holding, "[e]ssentially, Campbell seeks to reverse a judgment which appears valid on the face of the record because of something occurring *after* the judgment was rendered—the failure of the clerk to send notice of the judgment. This he cannot do in a restricted appeal. . . . Campbell's remedy, if any, for the clerk's failure to send notice of the judgment lies in a bill of review, not a restricted appeal.") (Emphasis added); *see also Garza v. AG of Tex.*, 166 S.W.3d 799, 815 (Tex. App.—Corpus Christi 2005, no pet.).

B. Facts

On February 1, 2012, Duncan filed a return of service affidavit with the trial court. [Supp. CR]. Although this was not included in the Clerk's Record filed by

Center, it is included in the supplemental record requested and provided by Duncan. [Supp. CR].

C. Analysis

1. Rule 107

Rule 107 requires the filing of the affidavit of service with the trial court. The Clerk's Record does not contain this affidavit, but it was filed on February 1, 2012 and is included in the Supplemental Clerk's Record. [Supp CR]. The default judgment was taken on May 25, 2012. [1 RR 1]. Accordingly, Duncan complied with Rules 107(g) and (h) and therefore Center should not prevail on this aspect of its restricted appeal. TEX. R. CIV. P. 107 (g) & (h).

2. Rule 239a

A failure to send notice under Rule 239a does not constitute error on the face of the record that would entitle Center to a new trial. *Campbell*, 72 S.W.3d at 725; *AG of Tex.*, 166 S.W.3d at 815. Specifically, the Rule 239a Notice would be extrinsic evidence as it could not have been on file at the time that the trial court entered its judgment. *Norman Communications*, 955 S.W.2d at 270; *Campbell*, 72 S.W.3d at 725. "When extrinsic evidence is necessary to challenge a judgment, the appropriate remedy is by motion for new trial or by bill of review filed in the trial court so that the trial court has the opportunity to consider and weigh factual evidence." *Ginn*, 282

S.W.3d at 431. Accordingly, even if notice was not sent to Center under Rule 239a, such an error would not constitute an error on the face of the record. *Sutton*, 65 S.W.3d at 284; TEX. R. APP. P. 30. Therefore, Center's request for a new trial based on this allegation of error should be denied.

D. Conclusion

Center is not entitled to a new trial under Rule 107(g) & (h) because the officer's return and certificate of service had been filed. And Center is not entitled to a new trial under Rule 239a because such notice is extrinsic and therefore not considered in a restricted appeal.

Argument Two

In its second issue, Center contends that error exists on the face of the record because there was no evidence to support the trial court's award for mental anguish.

A. Law

1. Standard of Review

When a specific attack is made upon the legal or factual sufficiency of the evidence to support the trial court's determination of damages in a default judgment, the appellant is entitled to a review of the evidence produced. *Thomas v. Martinez*, 217 S.W.3d 680, 683 (Tex. App.—Dallas 2007, pet dism'd). In a legal sufficiency review, appellate courts view the evidence in a light most favorable to the judgment and indulge every reasonable inference to support it, crediting favorable evidence if a reasonable factfinder could, and disregarding contrary evidence unless a reasonable factfinder could not. *See City of Keller v. Wilson*, 168 S.W.3d 802, 807, 822 (Tex. 2005). Anything more than a scintilla of evidence is legally sufficient to support the finding. *Cont'l Coffee Prods. Co. v. Cazarez*, 937 S.W.2d 444, 450 (Tex. 1996). In determining a factual sufficiency challenge, appellate courts consider all of the evidence to determine if the evidence supporting the finding is so weak or the evidence to the contrary is so overwhelming that the judgment should be set aside and

a new trial ordered. *Hubicki*, 156 S.W.3d at 901; *Thomas*, 217 S.W.3d at 683.

2. *Jackson v. Gutierrez*

To support its claim that it is entitled to a new trial, Center relies on *Jackson v. Gutierrez*. 77 S.W.3d 898, 903–04 (Tex. App.—Houston [14th Dist] 2002, no pet.). *Jackson* concerned a default judgment that awarded approximately $14,000 in damages for "mental anguish and pain and suffering." *Id.* at 903. In *Jackson*, only three short questions and three short answers supported the trial court's award for "mental anguish and pain and suffering." *Id.* And, in *Jackson*, the only evidence concerning mental anguish was the single question, "[a]nd you also had some mental anguish?", to which the plaintiff merely responded, "[y]es." *Id.* The intermediate-appellate court held that there was insufficient evidence to support the award for mental anguish and that:

> [t]he record [did] not provide any means of distinguishing the amount awarded for mental anguish from that awarded for pain and suffering. Therefore, even if an award for pain and suffering was supported by the evidence, the precise amount of damages [for pain and suffering and for mental anguish] could not be determined.

Id.

Accordingly, the intermediate-appellate court reversed the trial court's award for "mental anguish and pain and suffering" while affirming the remainder of the judgment. *Id.*

3. *Thomas v. Martinez*

Center also relies upon *Thomas*. *Thomas v. Martinez*, 217 S.W.3d 680 (Tex. App.—Dallas 2007, pet. dism'd). *Thomas* concerns a restricted appeal from a no-answer default judgment in which the appellant claimed (among other things) that there was insufficient evidence of the award of $22,100.50 in "past and future pain and suffering and loss of impairment." *Id.* at 684. There was no evidence offered during the default judgment prove-up hearing to establish future impairment but the appellee contended that the "trial court's comments at the default hearing and the docket sheet" established that appellee never sought to recover for future impairment. *Id.* This Court disagreed and held, "[t]o the extent appellee believes the trial court's comments at the default hearing and the docket sheet are controlling she is incorrect." *Id.* This Court reversed the damages awarded for "past and future pain and suffering and loss of impairment" and remanded the case for a new trial on that single issue. *Id.* at 685. This Court affirmed the remainder of the default judgment. *Id.*

B. Facts

Here, as recognized by Center, Duncan provided testimony concerning her pain and suffering. [2 RR 7–9]. In addition to the evidence cited by Center, Duncan offered—and the trial court admitted—Duncan's medical records. [2 RR 4]. These medical records provide further evidence of Duncan's pain and suffering.

Specifically, the medical records from Accident & Injury Chiropractic contain a list entitled "complaints." [Pt. Ex. 1].[2] This record indicates that Duncan complained of pain to her lower back, her right knee, and her left thumb. [Pt. Ex. 1]. A more detailed review of Duncan's exhibits reveals additional indications of pain. For example, Duncan's first exhibit indicates that her "[r]ange of motion in the left wrist/hand is limited with pain." [Pt. Ex. 1]. Therefore, Duncan's exhibits contain further evidence that supported her claim for compensation for her pain and suffering in the past.[3]

At the conclusion of Duncan's testimony, her counsel asked "that default judgment be entered as to past physical pain and suffering in the amount of $20,000. . . ." [2 RR 9]. Duncan did not present evidence of past mental anguish and did not ask for an award of past mental anguish. The trial court inquired, "[d]o you have it separated out for past physical pain and mental anguish?" and then immediately stated, "[w]hich I will assess at $20,000." [2 RR 9–10]. The trial court then awarded Duncan $31,308.00, which was the amount of her past medical bills

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[2] This is attached to volume four of the Reporter's Record, but the individual pages are not numbered.

[3] Duncan elects not to quote each and every indication of pain included in her exhibits. Such references are spread throughout the medical records submitted as Plaintiff's Exhibit 1. These records are attached to the Reporter's Record, but do not include a bates stamp on them, so citation to them by page number is impossible. Further, the large number of citations would be unnecessary.

plus the twenty thousand requested by her trial attorney. [CR 32].

C. Analysis

1. Duncan's Case is Different than *Jackson*

Center relies upon *Jackson* to support its claim that it is entitled to a new trial. 77 S.W.3d at 903–04. Duncan's case is distinct from *Jackson* on the ground that, here, there was no request for an award for damages to compensate for past mental anguish. Indeed, Duncan's attorney specifically asked for an award of $20,000.00 for Duncan's pain and suffering in the past. [2 RR 9]. Duncan never asked for compensation for any mental anguish that she suffered in the past. But, here, the trial court awarded $20,000.00 for Duncan's "past physical pain and mental anguish." [CR 32]. Although it would have been preferable to have the words "and mental anguish" redacted, this case does not suffer from the ambiguities that condemned the appellee in *Jackson*. *Id.* at 903.

Unlike *Jackson*, where the record did not allow the intermediate-appellate court a mechanism to distinguish the amount awarded for mental anguish from the amount awarded for pain and suffering, here the record is clear. *Id.* Unlike *Jackson*, here, there was no request for an award for past mental anguish [2 RR 9], and Duncan's attorney specifically requested $20,000.00 for past pain and suffering and did not request anything for past mental anguish [2 RR 9]. Accordingly, here, the record

provides evidence that permits the Court to determine that the entire award was for "past physical pain." *Ginn*, 282 S.W.3d at 431 (holding that errors that are "merely inferred" are not sufficient to show error on face of record). Therefore, here, unlike *Jackson*, there is no error on the face of the record, and Center is not entitled to a new trial on this complaint. *Sutton*, 65 S.W.3d at 284; TEX. R. CIV. P. 30.

2. Duncan's Case is Also Different than *Thomas*

In *Thomas* the appellee contended that she never sought damages for future impairment and based this argument on comments made by the trial court judge and on docket entries. *Thomas*, 217 S.W.3d at 684. In resolving the issue of whether comments by the trial court judge and docket entries could support appellee's position that she was not seeking compensation for future impairment, this Court held, "[t]o the extent appellee believes the trial court's comments at the default hearing and the docket sheet are controlling she is incorrect." *Id.* Here, Duncan relies on statements made by her attorney during the default-judgment-prove-up hearing. And unlike *Thomas*, here, there was no request for an award for past mental anguish. [2 RR 9]. Instead, Duncan's attorney specifically requested $20,000.00 for past pain and suffering and did not request anything for past mental anguish. [2 RR 9]. Duncan retained an attorney for the purpose of speaking for her, and this constitutes an important distinction with the argument made by the appellee in *Thomas*. Because

Duncan was entitled to rely upon her attorney, this Court can consider Duncan's trial attorney's words and determine that the $20,000.00 was awarded for Duncan's past pain and suffering rather than for mental anguish. Therefore, here, unlike *Thomas*, there is no error on the face of the record, and Center is not entitled to a new trial on this complaint. *Sutton*, 65 S.W.3d at 284; TEX. R. CIV. P. 30.

3. Even if the Court Determined that Duncan's Case is Similar to *Jackson* and *Thomas* the Remedy Would be a Partial New Trial

Even if this Court considers this case to be analogous to *Jackson* and *Thomas*, the remedy is not an entirely new trial, but instead a new trial on the limited issue of the amount of damages that should have been awarded for "past physical pain." *Gonzalez*, 331 S.W.3d at 869. In *Gonzalez*, this Court considered a property division in a divorce decree. *Id.* at 865 and 869. After determining that there was no evidence to support an aspect of that property division, this Court reversed the single damage element and affirmed the remainder of the verdict. *Id.* at 869. Therefore, even if this Court considers the award for "past physical pain" to be ambiguous, this should only be remanded on the issue of the proper amount of damages that should have been awarded for Duncan's past physical pain. *Id.*

D. Conclusion

Center is not entitled to a new trial on its allegation that there was no evidence to support an award for mental anguish because Duncan did not ask the trial court to

award her damages for mental anguish. Instead, Duncan asked the trial court to compensate her for her physical pain and suffering in the past. And the trial court awarded Duncan the exact amount that she had requested. Accordingly, this case has been distinguished from *Jackson* and *Thomas* and Center is not entitled to a new trial.

Argument Three

In its third issue, Center contends that error exists on the face of the record, and that it is entitled to a new trial, "[b]ecause the [trial] Court awarded an amount in excess of the evidence for past medical expenses, and awarded amounts related to summary/narrative report(s)." [Appellant's Brief, 12].

A. Waiver

Rule 38.1(i) requires a brief to "contain a clear and concise argument for the contentions made, with appropriate citations to authorities and to the record." TEX. R. APP. P. 38.1(i).

Issues on appeal are waived if an appellant fails to support his contention by citations to appropriate [legal and factual] authority or cites only to a single non-controlling case. *Id.*; *Cmtys. Helping Cmtys., Inc. v. City of Lancaster*, 316 S.W.3d 782, 786 (Tex. App.—Dallas 2010, no pet.).

Center's specific complaint concerning the award of past medical bills is that the amount awarded was $440.00 over the amount of the medical bills provided and that $150.00 of the amount in the bills provided was for the production of a narrative report. Center also complains that Exhibit One (attached to the Reporter's Record)

does not contain medical records for "Care Now."[4] [Appellant's Brief, 11].

Neither of the legal authorities that Center cites to concerns the issues that Center complains about on appeal. CIV. PRAC. & REM. CODE § 41.0105; *Dallas R. & T. Co. v. Gossett,* 294 S.W.2d 382–83 (Tex. 1956). Instead, § 41.105 of the Civil Practices and Remedies Code limits recovery to the amount "paid or incurred." CIV. PRAC. & REM. CODE § 41.0105. And *Gossett* stands for the proposition that evidence of medical damages must be presented with expert testimony or affidavits that indicate that the treatment was both reasonable and necessary. *Gossett,* 294 S.W.2d at 382–83.

Accordingly, Center has not cited to any legal authority that controls the disposition of this issue. Therefore, Center has waived this issue. TEX. R. APP. P. 38.1(i); *City of Lancaster*, 316 S.W.3d at 786.

B. Center is Not Entitled to A New Trial Under § 41.0105 of the Civil Practices and Remedies Code

Center contends that, under § 41.0105 that the trial court awarded Duncan damages in excess of the amount paid or incurred because the record does not substantiate $440.00 of the past medical expenses awarded.

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[4] Pages 23, 24, 25, 27, 29, 30, and 31 of Duncan's Exhibit 1 (at trial and included in the Reporter's Record) contains "Care Now" records.

1. Law

a. Section 41.0105 of the Civil Practices and Remedies Code

Section 41.0105 provides, "In addition to any other limitation under law, recovery of medical or health care expenses incurred is limited to the amount actually paid or incurred by or on behalf of the claimant."

CIV. PRAC. & REM. CODE § 41.0105.

b. Section 18.001(b) of the Civil Practices and Remedies Code

Section 18.001(b) of the Civil Practices and Remedies Code provides that:

> Unless a controverting affidavit is filed as provided by this section, an affidavit that the amount a person charged for a service was reasonable at the time and place that the service was provided and that the service was necessary is sufficient evidence to support a finding of fact by judge or jury that the amount charged was reasonable or that the service was necessary.

Id. at § 18.001(b).

c. In a Restricted Appeal, An Appellate Court May Affirm a Judgment in Part

When, on a restricted appeal, the record provides a way of distinguishing damages that were awarded appropriately from those awarded inappropriately, the damage awards may be separated and a new trial ordered on only portions of the default judgment. *Jackson*, 77 S.W.3d at 903–04. In *Jackson*, the 14th Court of Appeals considered a restricted appeal from a default judgment. *Id.* at 901. After

considering the arguments, the intermediate-appellate court reversed the trial court's award for "medical expenses, mental anguish, pain and suffering, and automobile repairs" while affirming "the award of $1,480 for lost wages" and for liability. *Id.* at 904.

Further, as described *infra*, in *Gonzalez*, this Court considered the distribution of a marital estate that was accomplished through a default judgment. *Gonzalez*, 331 S.W.3d at 865 & 869. The appellant complained that there was "no evidence to support the property division in the divorce decree." *Id.* at 868. After considering the record, this Court determined that "the trial court had insufficient evidence to divide the property equitably. With regard to the division of the marital estate, there is error on the face of the record." (Internal citations removed.). *Id.* at 869. And, this Court then "reverse[d] those parts of the decree dividing the marital estate and . . . remand[ed] this case to the trial court for further proceedings consistent with this opinion. In all other respects, the trial court's judgment [was] affirmed." *Id.*

2. Facts

Here, Duncan asked for past medical expenses "in the amount of $11,309, which includes expenses for Care Now, Accident & Injury Chiropractic, Lone Star Radiology, and White Rock Open Air MRI." [2 RR 9]. The trial court awarded Duncan this amount. [CR 32–33]. But, as Center properly indicates, Duncan only

produced affidavits—under § 18.001 of the Civil Practices and Remedies Code—that supported the award of damages from: Accident & Injury Chiropractic (in the amount of $5,676.00); Lone Star Radiology (in the amount of $153.00); and, White Rock Open Air MRI (in the amount of $5,039.00). The affidavit from Accident & Injury Chiropractic includes a fee of $150.00 for the production of a narrative report. The three § 18.001 each state "[t]he total amount adjusted, payments, and write-offs is $0.00." [4 RR, Ex. 2].[5] The difference between the § 18.001 affidavits entered into evidence and the judgment is $440.00.

3. Analysis

a. Section 41.0105 of the Civil Practices And Remedies Code Does Not Apply; Section 18.001(b) of the Civil Practices and Remedies Code Establishes that Damages in the Amount of $10,868.00 were Reasonable and Necessary.

i. Section 41.0105 of the Civil Practices And Remedies Code Does Not Apply

To support her claim for past medical expenses, Duncan offered affidavits from Accident & Injury Chiropractic; Lone Star Radiology; and, White Rock Open Air MRI. The trial court admitted these affidavits. [1 RR 4]. Each of the three affidavits indicates the amount of the bill and then states, "[t]he total amount adjusted,

[5] The pages of the Exhibits are not marked, but these are the last pages of Volume Four of the Reporter's Record.

payments, and write-offs is $0.00." [4 RR, Ex. 2]. Accordingly, these three affidavits establish that the compensation awarded to Duncan for the medical bills she incurred from Accident & Injury Chiropractic; Lone Star Radiology; and, White Rock Open Air MRI comply with § 41.0105. CIV. PRAC. & REM. CODE § 41.0105.

ii. Section 18.001(b) of the Civil Practices and Remedies Code Establishes that Damages in the Amount of $10,868.00 were Reasonable and Necessary

By failing to address this argument in its brief, Center has waived it. TEX. R. APP. P. 38.1(i). Duncan addresses this issue out of prudence.

Duncan asked the trial court to award her past medical expenses "in the amount of $11,308, which includes expenses for Care Now, Accident & Injury Chiropractic, Lone Star Radiology, and White Rock Open Air MRI." [2 RR 9]. The trial court awarded Duncan this amount. [CR 32–33]. But, Duncan only produced § 18.001(b) affidavits to support the award of damages from: Accident & Injury Chiropractic (in the amount of $5,676.00); Lone Star Radiology (in the amount of $153.00); and, White Rock Open Air MRI (in the amount of $5,039.00). These affidavits support $10,868.00 in damages. Accordingly, the § 18.001(b) affidavits submitted by Duncan do not support $440.00 of the judgment.

Duncan concedes that the § 18.001(b) affidavits fail to support $440.00 of the trial court's award for past medical bills. [CR 32]. However, unlike *Jackson*, here the

specific damages awarded by the trial court are identifiable. *Jackson*, 77 S.W.3d at 903–04. In *Jackson*, the appellate court reversed aspects of the default judgment while affirming the award for lost wages. *Id.* at 904. The *Jackson* court reversed the award of damages for "medical expenses, mental anguish, pain and suffering, and automobile repairs" because "[t]he record [did] not provide any means of distinguishing the amount [that was improperly] awarded for mental anguish from that awarded for pain and suffering." *Id.* at 903. But here, Duncan asked for past medical expenses "in the amount of $11,308, which includes expenses for Care Now, Accident & Injury Chiropractic, Lone Star Radiology, and White Rock Open Air MRI." (Emphasis added.). [2 RR 9]. Duncan then produced § 18.001(b) affidavits from: Accident & Injury Chiropractic (in the amount of $5,676.00); Lone Star Radiology (in the amount of $153.00); and, White Rock Open Air MRI (in the amount of $5,039.00).

Unlike *Jackson*, here the $440.00 that was not supported by a § 18.001(b) affidavit can be identified. Duncan asked for damages from four medical providers but provided three § 18.001(b) affidavits (Accident & Injury Chiropractic, Lone Star Radiology, and White Rock Open Air MRI.). Duncan did not provide a § 18.001(b) affidavit from Care Now. Accordingly, the record supports the award of $10,868.00 for past medical bills incurred for Duncan's treatment at Accident & Injury

Chiropractic, Lone Star Radiology, and White Rock Open Air MRI.

Center contends that because the record does not support the $440.00 for Care Now that error exists on the face of the record and that it is entitled to a new trial. [Appellant's Brief, 12]. As *Jackson* illustrates, the Court should separate the damages that are supported by the evidence from those without sufficient support. *Jackson*, 77 S.W.3d at 903–04. If the Court determines that Center preserved this issue or has not waived it under Rule 38.1(i), the Court should modify the judgment to reflect an award to Duncan for past medical expenses in the amount of $10,868.00, which even Center concedes is supported by the record. *Id.*

b. The § 18.001(b) Affidavit for Accident & Injury Chiropractic Provides that the Charge for the Production of the Narrative Report was Both Reasonable and Necessary

Center acknowledges that Duncan provided a billing records affidavit for Accident & Injury Chiropractic under § 18.001(b) of the Civil Practices and Remedies Code. [Appellant's Brief at 11]; CIV. PRAC. & REM. CODE § 18.001(b). This affidavit provides that, "[t]he total cost of services for BRANDY DUNCAN received at this facility is $5676.00 (which may include a Records Summary Report fee of $150.00).". [4 RR unnumbered page]. Because a § 18.001(c) counter-affidavit was not filed, § 18.001(b) of the Civil Practices and Remedies Code provides that Duncan's affidavit establishes that the production of this narrative report was both

reasonable and necessary. *Id.* at §§ 18.001(b) & (c). Accordingly, the fact that the billing records for Duncan include a charge of $150.00 for the production of a narrative report does not constitute error on the face of the record. TEX. R. APP. P. 30.

c. Duncan Produced Medical Records from Care Now[6]

Contrary to Center's contention, Duncan produced medical records from Care Now. Pages 23, 24, 25, 27, 29, 30, and 31 of Duncan's Exhibit 1 (at trial and included in the Reporter's Record) contains "Care Now" records.[7] Center does not explain the significance of the alleged failure to include these records, but the records are included in the evidence admitted by the trial court. Center does not provide a legal argument as to why the alleged failure to include such records would constitute "error on the face of the record." Therefore, Center is not entitled to a new trial on this basis.

D. Conclusion

Center is not entitled to a new trial on the basis that the amount of money awarded to compensate Duncan for her medical bills in the past was $440.00 more

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[6] In its brief, Center cites to the *Thomas* case—discussed *infra*. *Thomas v. Martinez*, 217 S.W.3d 680 (Tex. App.—Dallas 2007, pet. dism'd). In *Thomas*, the appellee was represented by the same attorney who represents Center in this appeal. In *Thomas*, appellant's first issue concerned the sufficiency of the evidence when medical records were not filed. *Id.* at 683. As in *Thomas*, here, there is no citation to legal authority to indicate that such an omission —if it even occurred— makes the evidence legally or factually insufficient.

[7] The exhibits to the Reporter's Record do not include a Bates Stamp, so the pages were counted by hand.

than the § 18.001 affidavits that she produced because the $440.00 is identifiable from the remaining $10,868.00. Because this $440.00 is identifiable, Duncan encourages this Court to modify the judgment and award Duncan the $10,868.00 that even Center acknowledges is supported by the record. Second, Center is not entitled to a new trial on the basis that the bill from Accident & Injury Chiropractic included a $150.00 fee for the production of a narrative report because Duncan's § 18.001 affidavit (in the absence of a § 18.001 counter-affidavit) provides legally sufficient evidence that the production of this report was reasonable and necessary. Lastly, Center is not entitled to a new trial on its complaints that the records of Care Now were not produced because these records were produced.

PRAYER

For the reasons listed above, Duncan asks that this Court affirm the trial court's judgment. Alternatively, Duncan asks that this Court modify the judgment to reflect that Duncan is entitled to recover medical bills in the past from Center in the amount of $10,868.00. Alternatively, Duncan asks that this Court remand this case for a determination of the amount of damages that Duncan is entitled to recover from Center on Duncan's pain and suffering.

Respectfully Submitted,

/s/ Niles Illich
Niles Illich
Law Office of Ben Abbott, P.C.
1934 Pendleton Drive
Garland, Texas 75041
(972) 739-4298 (direct)
Ni0706@benabbott.com

ATTORNEY FOR BRANDY DUNCAN

CERTIFICATE OF SERVICE

On February 24, 2013, a true and correct copy of this brief was served on John Vaughan, counsel of record for Center Operating Company, L.P. via electronic mail: jvaughan@vrwlaw.net and facsimile at: (972) 642-0073.

John Vaughan
Vaughan, Ramsey, & Walvoord
530 S. Carrier Parkway
Suite 300
Grand Prairie, Texas 75051

ATTORNEY FOR CENTER OPERATING COMPANY, L.P.

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 9.4(i)(3) of the Texas Rules of Appellate Procedure, I certify that this brief complies with the rules pertaining to style and formatting. This brief contains 7,556 words (including footnotes and headings). This brief is presented in Times New Roman font number 14.

/s/ Niles Illich
Niles Illich