IN THE SUPREME COURT OF TEXAS

NO. 08-0157

IN THE INTEREST OF E.A. AND D.A., CHILDREN

ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE SECOND DISTRICT OF TEXAS

JUSTICE BRISTER, joined by JUSTICE WAINWRIGHT and JUSTICE WILLETT, concurring.

I concur in the Court's judgment setting aside the default judgment against Norma Avitia. But I dissent to the Court's abrogation of one of the oldest procedural rules in Texas.

For 150 years, the rule has been that a default judgment cannot be based on an amended petition seeking more onerous relief unless the amendment was served with citation. As we said in *Weaver v. Hartford Accident & Indemnity Co.*, "new citation is necessary for a party who has not appeared when the plaintiff, by amended petition, seeks a more onerous judgment than prayed for in the original pleading."[1] This Court, for example, applied that rule three times shortly before the Civil War.[2] By 1887, we called the rule "well established":

> The rule is well established in our state that a defendant who has been cited, but has not answer[ed], must be notified of every amendment which sets up a new cause of action, or requires a more onerous judgment against him; but, if he has pleaded to the action, the only notice to which he is entitled is the order of court granting leave to file the amendment.[3]

---

[1] 570 S.W.2d 367, 370 (Tex. 1978).

[2] *See, e.g.*, *De Walt v. Snow*, 25 Tex. 320, 321 (1860); *Morrison v. Walker*, 22 Tex. 18, 20 (1858); *Hutchinson v. Owen*, 20 Tex. 287, 289 (1857).

[3] *Rabb v. Rogers*, 3 S.W. 303, 305 (Tex. 1887).

There are good reasons for this rule. A citation is an official notice from a court officer,[4] is accompanied by the petition,[5] and warns recipients that they must answer by a stated deadline or "judgment by default may be rendered *for the relief demanded in the petition*."[6] A person served with citation can be under no misconceptions about the effect of ignoring that petition.

By contrast, a petition received in the mail is not an official notice from a court but an adversary's list of complaints. It is not even directed to the recipient, but like all other pleadings is directed to the court. It states no deadlines, no actions necessary to avoid default, not even a hint that default might occur. Reasonable laymen receiving such a document in the mail might simply ignore it, and under Texas law have long been entitled to do precisely that.[7]

But what about those who receive one petition with citation and a second one in the mail? The first has come with an official court notice; the second has not. The first says an answer is required; the second does not. The first says the court may grant the relief demanded in the petition if it is ignored; the second does not. Perhaps modern litigants are more sophisticated than those of the past 150 years, but many will still be surprised to learn the second petition is the one they should worry about.

In addition to unsophisticated litigants, we must also be concerned about their opposite — very sophisticated litigants who would bend the rules to their advantage. A plaintiff usually cannot know in advance whether a defendant will fail to answer, but they will always know once default

---

[4] TEX. R. CIV. P. 99(a).

[5] TEX. R. CIV. P. 99(d).

[6] TEX. R. CIV. P. 99(b) (emphasis added).

[7] *Ross v. Nat'l Ctr. for the Employment of the Disabled*, 197 S.W.3d 795, 798 (Tex. 2006) (stating that parties "not properly served have no duty to act"); *Harrell v. Mex. Cattle Co.*, 11 S.W. 863, 865 (Tex. 1889) ("A defendant . . . is not bound to take action until he has been duly served with process.").

occurs. It would be easy in such cases to take advantage of a defaulting defendant by simply mailing an amended petition that raises the stakes.

The amendments to Rule 21a in 1990 did not abrogate this traditional rule. Since its adoption in 1947, Rule 21a has always stated that it does not apply to "citation to be served upon the filing of a cause of action."[8] The Court misstates this exception by limiting it to the *original* petition;[9] that is nowhere in the rule. None of the rules regarding citation are limited to the original petition, nor do they define which petitions need citation. So while it is true that "nothing in the rules" requires citation for more onerous amendments,[10] nothing in the rules dispenses with it either. The law regarding which petitions require citation has always been in our cases, which until today had never changed.

The Court seems to think the 1990 amendment to Rule 21a was a new creation "to provide for a variety of methods of service, including certified or registered mail, for all pleadings and court papers except the original petition."[11] But litigants have been able to serve amended pleadings by mail since our first rules of procedure were adopted in 1940.[12] The 1990 amendment merely consolidated three separate service rules (rule 21a for notices, rule 60 for interventions, and rule 72

---

[8] TEX. R. CIV. P. 21a (1947, amended 1990).

[9] *See* ___ S.W.3d at ___ ("In 1990, however, Texas Rule of Civil Procedure 21a was amended to provide for a variety of methods of service, including certified or registered mail, for all pleadings and court papers except the *original petition*.") (emphasis added).

[10] ___ S.W.3d ___, ___.

[11] ___ S.W.3d at ___.

[12] *See* Tex. R. Civ. P. 72 (1940, repealed 1990)("Whenever any party files, or asks leave to file any pleading, plea, or motion of any character which is not by law or by these rules required to be served upon the adverse party, he shall at the same time either deliver or mail to the adverse party or attorney(s) of record a copy of such pleading, plea, or motion.").

for pleadings).[13] Consolidating all three into rule 21a could not change the rule in *Weaver* because by its own terms rule 21a *does not apply* when citation is required.

Indeed, if the 1990 amendment changed such an old and well-established rule, it is odd that no one noticed at the time. Nothing in the Advisory Committee's records suggest such a change was intended, and the only comment appended to the change was that it added service by fax "[t]o allow for service by current delivery means and technologies."[14] Law review articles addressing the 1990 amendments did not notice the change at the time,[15] and most guides for practitioners have not noticed it since.[16]

Nor has this Court. We stated the *Weaver* rule as law as recently as 2006.[17] And in *Baker v. Monsanto Co.* in 2003, we interpreted the 1990 addition of interventions to Rule 21a to mean that mailing was sufficient service as to parties that appeared, but service with citation was necessary for those that did not.[18] If Rule 21a means all amendments after the original petition can be served by

---

[13] TEX. R. CIV. P. 21a.

[14] TEX. R. CIV. P. 21a, cmt. to 1990 change.

[15] *See, e.g.*, Ernest E. Figari, Jr., A. Erin Dwyer, & Donald Colleluori, *Civil Procedure*, 45 Sw. L.J. 73, 83 (1991) (stating only that the rule "was amended to keep pace with advancing technology").

[16] *See, e.g.*, 2 MCDONALD & CARLSON TEX. CIV. PRAC. § 10:16 (2d. ed. 1998) ("When there has been no appearance by the defendant, . . . [a] new citation is necessary when (but only when) the plaintiff . . . seeks a more onerous judgment than prayed for in the original pleading."); 16 COUCH ON INSURANCE 3d § 231:4 (1995) ("Where an amendment to a complaint states a new and distinct cause of action from that presented in the original pleading, however, the general rule requires a new service of process after the amendment for a party who has not theretofore appeared in the proceedings."); Julia F. Pendery, Shawn M. McCaskill, & Hilaree A. Casada, *Dealing with Default Judgments*, 35 ST. MARY'S L.J. 1, 37 (2003) ("If the plaintiff decides to file an amended petition pleading additional causes of action or damages, or both, thereby seeking a more onerous judgment, the defendant must be served with the amended petition by service of citation in order for a default judgment to be based on the amended petition."); MICHOL O'CONNOR, O'CONNOR'S TEXAS RULES * CIVIL TRIALS 2002, *Commentaries* § 3.2 at 444 (2004) ("When, after service of the original petition, the plaintiff amends to ask for a more onerous judgment by adding claims or increasing damages, the plaintiff must serve the defendant with a new citation and the amended petition before taking a default judgment."); *cf.* 7 WILLIAM V. DORSANEO III, TEXAS LITIGATION GUIDE § 111 at 111–28 (2008) (noting that recent cases continuing to require service of citation "arguably conflict with Civil Procedure Rule 21a, as amended in 1990").

[17] *See Fid. & Guar. Ins. Co. v. Drewery Constr. Co., Inc.*, 186 S.W.3d 571, 574 (Tex. 2006).

[18] 111 S.W.3d 158, 160 (Tex. 2003).

mail, it is hard to see why we did not extend intervenors the same right under the same rule.

We must interpret the rules of civil procedure liberally,[19] but we should hesitate to interpret them in a way completely unforeseen by those who drafted them. Nor should we interpret them to make litigation unjust or unfair,[20] as will no doubt occur if more onerous amended petitions can simply be dropped in the mail on defaulting defendants. Accordingly, I would not discard a rule that has worked so long so well so casually.

Scott Brister,
Justice

OPINION DELIVERED: June 5, 2009

[19] TEX. R. CIV. P. 1.

[20] TEX. R. CIV. P. 1.