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

CHIEF JUSTICE JEFFERSON delivered the opinion of the Court, joined by JUSTICE HECHT, JUSTICE O'NEILL, JUSTICE MEDINA, JUSTICE GREEN, and JUSTICE JOHNSON.

JUSTICE BRISTER filed a concurring opinion, in which JUSTICE WAINRIGHT and JUSTICE WILLETT joined.

In *Weaver v. Hartford Accident and Indemnity Co.*, 570 S.W.2d 367, 370 (Tex. 1978), we held that "a 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." 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. We must decide whether, in light of Rule 21a, service of new citation is required for a default judgment based on a more onerous amended petition, or whether service under Rule 21a will suffice. We conclude that service under Rule 21a is sufficient. Accordingly, we reverse the court of appeals' judgment and remand to the trial court for further proceedings consistent with this opinion.

I
Background

Emilio and Norma Avitia were married and had two children, E.A. and D.A. The Avitias later divorced, and the final decree appointed them joint managing conservators of the children. Norma was given the exclusive right to designate the children's primary residence, and Emilio was granted visitation. Five months later, Emilio filed this petition to modify the parent-child relationship, seeking the exclusive right to designate the children's primary residence. If a suit seeking such a modification is filed within one year of the prior order, the petitioner must attach an affidavit that contains, along with supporting facts, one of several allegations. TEX. FAM. CODE § 156.102(a),(b). Emilio's petition had no such affidavit attached. Norma was served with citation but did not file an answer or otherwise appear.

Approximately three months later, Emilio filed an amended petition alleging that Norma had a pattern or history of drug use and requesting that he be appointed sole managing conservator and given a credit on his child support arrearage for a period during which he had intermittent physical custody of the children. Emilio attached a supporting affidavit making an appropriate allegation under Family Code section 156.102(b). Although the amended petition did not contain a certificate of service, Emilio alleges he sent Norma the amended petition via certified mail. The amended petition, transmittal letter, return receipt, and court order modifying the parent-child relationship all included the same street address in Wichita Falls but reflected three different zip codes. The post office attempted delivery of the amended petition three times before it was returned to Emilio's counsel as unclaimed.

The trial court rendered a default judgment granting Emilio the exclusive right to designate the children's primary residence. The court ordered no visitation for Norma and required her to pay child support to Emilio. Norma moved to set aside the default judgment and for new trial, arguing that default judgment was improper because Norma was not served with the amended petition. The trial court denied both motions. The court of appeals affirmed, __S.W.3d__, holding that Texas Rule of Civil Procedure 21a eliminated the requirement of an additional citation for service of an amended petition seeking a more onerous judgment on a nonanswering party. The court of appeals further held that Norma had constructive notice of the amended petition, and that this satisfied due process. Because we conclude that a new citation is not required for service of a more onerous amended petition on a nonanswering party, but that Norma was not properly served with the amended petition and did not have constructive notice of it, we reverse the court of appeals' judgment and remand to the trial court for further proceedings.

II
Weaver and Rule 21a

If a defendant is properly served with process, in order to have a default judgment set aside, she must prove the three elements set out in *Craddock v. Sunshine Bus Lines, Inc.*, 133 S.W.2d 124, 126 (Tex. 1939). But if the defendant never received the suit papers, she is generally entitled to a new trial without any further showing. *Fidelity and Guar. Ins. Co. v. Drewery Constr. Co.*, 186 S.W.3d 571, 574 (Tex. 2006) (per curiam) (citing *Peralta v. Heights Med. Ctr., Inc.*, 485 U.S. 80,

84 (1988)). Here there is no dispute that Norma was properly served with Emilio's original petition.[1] The parties dispute only whether Norma was properly served with the amended petition.

The parties agree that a nonanswering party is entitled to some form of notice of a more onerous amended petition, but they dispute the manner in which such a petition must be served. Norma argues that service of new citation is required, while Emilio contends that service under Texas Rule of Civil Procedure Rule 21a is sufficient. In *Weaver v. Hartford Accident and Indemnity Co.*, 570 S.W.2d 367, 370 (Tex. 1978), we held that "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." However, in 1990, we amended Rule 21a to provide that several methods of delivery, including certified or registered mail, are appropriate for "[e]very notice required by these rules, and every pleading, plea, motion, or other form of request required to be served under Rule 21, other than the citation to be served upon the filing of a cause of action and except as otherwise expressly provided in these rules." TEX. R. CIV. P. 21a. The court of appeals held that Rule 21a "eliminated the requirement of an additional citation" set out in *Weaver*. __S.W.3d at __.

We have never addressed this issue directly. Although we recently cited *Weaver* in *Fidelity and Guaranty Insurance Co. v. Drewery Construction Co.*, 186 S.W.3d 571, 574 (Tex. 2006) (per curiam), we did not reach the issue of whether the type of service required has changed in light of

[1] In the court of appeals, Norma argued that under Texas Rule of Civil Procedure 107, the certified receipt must be on file for ten days before the final hearing, as opposed to ten days before the final judgment is rendered. The court of appeals rejected this argument, and Norma does not raise the Rule 107 issue in this Court.

Rule 21a because we concluded that the amended petition in *Fidelity* was not more onerous than the original petition. *Id*.

The majority of courts of appeals that have cited *Weaver* since the 1990 amendment to Rule 21a do not address Rule 21a. *See, e.g., Bennett v. Wood County*, 200 S.W.3d 239, 241 (Tex. App.—Tyler 2006, no pet.); *Scott v. Tanner*, No. 01-02-00668-CV, 2003 WL 22862806, at *3 (Tex. App.—Houston [1st Dist.] Dec. 4, 2003, no pet.) (mem. op.); *Seeley v. KCI USA, Inc.*, 100 S.W.3d 276, 278 (Tex. App.—San Antonio 2002, no pet.); *Atwood v. B & R Supply & Equip. Co.*, 52 S.W.3d 265, 267 (Tex. App.—Corpus Christi 2001, no pet.); *Cohen v. Cohen*, No. 05-93-00192-CV, 1994 WL 121118, at *2 (Tex. App.—Dallas Apr. 6, 1994, no writ) (not designated for publication); *Lim v. Botello*, No. A14-90-00481-CV, 1991 WL 36980, at *1 (Tex. App.—Houston [14th Dist.] Mar. 21, 1991, writ denied) (not designated for publication). Aside from the court of appeals in this case, only two courts of appeals have squarely addressed whether *Weaver*'s service of new citation requirement applies in light of Rule 21a, and both concluded that it does not. *See Sw. Constr. Receivables, Ltd. v. Regions Bank*, 162 S.W.3d 859, 865 (Tex. App.—Texarkana 2005, pet. denied); *In re R.D.C.*, 912 S.W.2d 854, 855-56 (Tex. App.—Eastland 1995, no writ); *see also* WILLIAM V. DORSANEO, III, 7 TEX. LITIGATION GUIDE § 111.02[11] (2008) (noting that cases that still follow *Weaver*–and *Weaver* itself–"arguably conflict with Civil Procedure Rule 21a, as amended in 1990"); 1 JUDGE JOHN D. MONTGOMERY ET AL., TEXAS FAMILY LAW: PRACTICE & PROCEDURE § 4.02[1] (2009) (providing that "a plaintiff who amends his or her petition may serve the defendant by complying with the filing and serving requirements of Texas Rules of Civil Procedure 21 and 21a

without regard to whether the amendment seeks a more onerous judgment or adds a new cause of action") (citing *In re R.D.C.*, 912 S.W.2d at 855-57).

Rule 21a applies to all pleadings required to be served under Rule 21 other than the original petition and except as provided in the rules. Nothing in the rules requires a plaintiff to serve a nonanswering defendant with new citation for a more onerous amended petition. While a nonanswering defendant must be served with a more onerous amended petition in order for a default judgment to stand, we agree with the court of appeals that Rule 21a service satisfies that requirement. This interpretation "eliminates the uncertainty and confusion that is found in the cases regarding what constitutes a 'more onerous judgment' or a new 'cause of action.'" *In re R.D.C.*, 912 S.W.2d at 856 (noting that Rule 21a now governs over "ambiguous rules that have evolved as to when a new citation must be served") (citing 2 ROY W. MCDONALD, TEXAS CIVIL PRACTICE §§ 10:15-16 (1992)). To the extent *Weaver* conflicts with Rule 21a, the rule prevails.

III
Service

We must then determine, however, whether Emilio served the amended petition in compliance with Rule 21a. Under that rule, court papers served by certified mail must be sent "by certified or registered mail, to the party's last known address." TEX. R. CIV. P. 21a. Service by mail is "complete upon deposit of the paper, enclosed in a postpaid, properly addressed wrapper, in a post office or official depository . . . ." *Id.*

Even assuming that the amended petition was properly addressed, a point that Norma disputes, any presumption of service arising from Emilio's mailing of the amended petition was

negated by the amended petition's return as unclaimed. __S.W.3d at __. The presumption of service under Rule 21a "is not 'evidence' and it vanishes when opposing evidence is introduced that [a document] was not received." *Cliff v. Huggins*, 724 S.W.2d 778, 780 (Tex. 1987).

Rule 21a further provides that the party or attorney of record shall certify compliance with the rule "in writing over signature and on the filed instrument." TEX. R. CIV. P. 21a. A certificate of service is prima facie evidence of the fact of service, but nothing in the rule "preclude[s] any party from offering proof that the notice or instrument was not received, or, if service by mail, that it was not received within three days . . . ." *Id.* Because the amended petition does not include a certificate of service, Emilio has not made a prima facie case of the fact of service on this basis.

Nonetheless, the court of appeals concluded that Norma received constructive notice of the amended petition and that this satisfied due process. __S.W.3d at __. The court of appeals relied on the post office's repeated attempts to deliver the petition, one of the children's testimony that Norma knew about the lawsuit,[2] and Emilio's attorney's statement that she sent Norma a copy of the amended petition via regular mail and it was not returned. *Id*. The court of appeals also noted that despite the fact that the later modification order, like the amended petition, was returned unclaimed, Norma timely moved to set the order aside. *Id*. The court of appeals held that even when a party does not receive actual notice, if the serving party has complied with Rule 21a, constructive notice may be established "'if the serving party presents evidence that the intended recipient engaged in instances of selective acceptance or refusal of certified mail relating to the case or that the intended

[2] At the hearing on Emilio's motion to modify, E.A. was asked whether Norma knew about the lawsuit. He responded: "[s]he – I mean, letters – she got letters, like, go to her house. She should be informed."

recipient refused all deliveries of certified mail.'" *Id*. (quoting *Etheredge v. Hidden Valley Airpark Ass'n, Inc.*, 169 S.W.3d 378, 381-82 (Tex. App.—Fort Worth 2005, pet. denied)).

We have never decided whether constructive notice of a more onerous amended petition satisfies due process. Assuming, without deciding, that it does, the record in this case is insufficient to establish constructive notice. Emilio presented no evidence that Norma avoided or refused delivery of the amended petition, nor that she received the certified mail notices. The mere fact that the certified mail was returned unclaimed is not sufficient to show avoidance or refusal where, as here, the relevant documents reflect three different zip codes for Norma's address, and the pertinent pleading lacks a certificate of service. The child's testimony regarding Norma's knowledge of the lawsuit was vague and did not address Norma's knowledge of the amended petition. Moreover, that Norma learned of the modification order does not mean she received notice of the amended petition. Emilio's attorney asserted that she sent Norma a copy of the amended petition via regular mail and that copy was not returned. However, standing alone, this is insufficient to establish that Norma had constructive notice of the amended petition.

IV
Conclusion

In order for a default judgment to stand, a nonanswering party must be served with a more onerous amended petition under Rule 21a. Service of new citation is no longer required. There is no evidence, however, that Norma was served with the amended petition under Rule 21a or that she had constructive notice of the amended petition. Accordingly, without hearing oral argument, we

reverse the court of appeals' judgment and remand to the trial court for further proceedings consistent with this opinion. TEX. R. APP. P. 59.1.

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Wallace B. Jefferson
Chief Justice

OPINION DELIVERED: June 5, 2009