NUMBER 13-19-00220-CV

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI – EDINBURG

ALEJANDRO GARZA, INDIVIDUALLY AND AS AGENT OF AMERIMEX USED PARTS, LLC A/K/A AMERIMEX USED PARTS & AUTO SALES AND AMERIMEX USED PARTS, LLC A/K/A AMERIMEX USED PARTS & AUTO SALES, **Appellants,**

v.

FRANCISCO DANIEL VILLA GARZA, **Appellee.**

On appeal from the County Court at Law No. 4 of Hidalgo County, Texas.

MEMORANDUM OPINION

Before Chief Justice Contreras and Justices Benavides and Longoria
Memorandum Opinion by Chief Justice Contreras

Appellants Amerimex Used Parts LLC a/k/a Amerimex Used Parts & Auto Sales (Amerimex) and Alejandro Garza, individually and as agent of Amerimex, appeal a default judgment entered in favor of appellee Francisco Daniel Villa Garza.[1] By three issues, appellants argue (1) they received insufficient notice of the default judgment hearing, (2) the trial court erred when it denied their motion for new trial, and (3) there is insufficient evidence supporting the damages awarded.[2] We affirm.

I. BACKGROUND

In August 2017, Francisco filed a negligence claim against appellants for an injury he suffered while at their place of business. Specifically, Francisco alleged that he was helping Alejandro "remove cactus and brush from the property grounds" when Alejandro "tipped the bucket of the back hoe upward and crushed [Francisco's] right foot." After several unsuccessful attempts, Alejandro was served with notice of the lawsuit on February 5, 2018. Appellants did not file an answer to Francisco's petition, and, in December 2018, Francisco moved for a default judgment.

On February 27, 2019, the trial court held a hearing on Francisco's default judgment motion. Alejandro appeared pro se and, after a discussion with the trial court regarding the possible existence of insurance coverage, the parties agreed to reset the default judgment hearing to the following Monday, March 4. On March 4, 2019, Alejandro failed to appear, and the trial court signed a final default judgment awarding Francisco $745,000 in damages, "such sum representing pain and suffering in the past and future, mental anguish in the past and future, physical disability in the past, and medical

[1] We will refer to Alejandro and Francisco by their first names.

[2] Francisco has not filed a brief to assist us in the resolution of this appeal.

expenses in the past." Appellants filed a motion for new trial arguing, among other things, that Alejandro believed and was informed that the hearing was on March 5. After a hearing, the trial court denied the motion. Appellants then filed a "motion for reconsider" their motion for new trial and attached an affidavit from Alejandro.

This appeal followed.

II. NOTICE

By their first issue, appellants argue they did not receive notice of the default hearing, as required by due process.

"Due process requires only that the method of notice utilized be reasonably calculated, under the circumstances, to apprise an interested party of the pendency of the action and afford the party the opportunity to present objections." *Zuyus v. No'Mis Comm'cs, Inc.*, 930 S.W.2d 743, 747 (Tex. App.—Corpus Christi–Edinburg 1996, no writ) (citing *Peralta v. Heights Med. Ctr.*, 485 U.S. 80, 84–85 (1988)).

At the hearing on Francisco's default judgment motion on February 27, 2019, Alejandro appeared pro se. A discussion took place between the parties and the trial court in which it was revealed that appellants may have insurance coverage for Francisco's injury. The trial court and Francisco's counsel informed Alejandro, a native Spanish speaker who used an interpreter at the hearing, that he should provide Francisco with the insurance information so that the insurance company could defend appellants in this lawsuit and investigate Francisco's claims. Alejandro agreed to the hearing reset, and, contrary to appellants' assertion, the record reveals that the trial court clearly stated the hearing was reset for March 4:

> [The Court]: Should we reset this default hearing for Monday or something?

[Francisco]:	That would be—
[The Court]:	That would give him time to give the insurance. Otherwise, it'll be a—we'll take—
[Francisco]:	Perfect, your honor.
[The Court]:	Monday morning?
[Francisco]:	Monday morning would be just fine.
[Court Administrator]:	March 4th at 10:00 a.m.
[The Court]:	March 4th, 10:00 a.m. This hearing, we're going to reset it. So please give him the insurance if you have it, [Alejandro].

Furthermore, March 5 is not mentioned anywhere in the record. We conclude there was no due process violation. *See id.*

We overrule appellants' first issue.

III. MOTION FOR NEW TRIAL

By their second issue, appellants argue the trial court erred when it denied their motion for new trial. *See* TEX. R. CIV. P. 320.

A trial court should set aside a default judgment and grant a new trial if: (1) the failure to appear was not intentional or the result of conscious indifference but rather was due to accident or mistake, (2) the defendant sets up a meritorious defense, and (3) the granting of a new trial would not cause delay or otherwise injure the prevailing party. *Craddock v. Sunshine Bus Lines, Inc.*, 133 S.W.2d 124, 126 (Tex. 1939). We review a trial court's decision to overrule a motion to set aside a default judgment and grant a new trial for abuse of discretion. *Dolgencorp of Tex., Inc. v. Lerma*, 288 S.W.3d 922, 926 (Tex. 2009) (per curiam); *see Anderson v. Anderson*, 282 S.W.3d 150, 152–53 (Tex. App.—El Paso 2009, no pet.). A trial court abuses its discretion when it acts in an

arbitrary or unreasonable manner without reference to guiding rules or principles. *Samlowski v. Wooten*, 332 S.W.3d 404, 410 (Tex. 2011). It is an abuse of discretion to deny a motion for new trial when the defendant satisfies the *Craddock* test. *Old Republic Ins. v. Scott,* 873 S.W.2d 381, 382 (Tex. 1994) (per curiam).

In their motion for new trial, appellants first argued that they sought "a motion for new trial because [they] did not receive proper notice." But as concluded above, the record indicates that appellants received proper notice.

Appellants argued next that they satisfied the *Craddock* factors; however, because appellants did not attach any supporting affidavit to their motion, this argument also fails. *See Dolgencorp*, 288 S.W.3d at 928 (noting that a defendant must submit "affidavits or other evidence providing prima facie proof" in support of claim that a meritorious defense exists); *Liepelt v. Oliveira*, 818 S.W.2d 75, 77 (Tex. App.—Corpus Christi–Edinburg 1991, no writ) ("The facts which constitute the alleged meritorious defense must be pleaded in the motion for new trial and established by affidavits or other evidence at the new trial hearing.").[3]

Finally, although a hearing was held in the instant case, the record before us does not include a transcript of the hearing on appellants' motion for new trial.[4] A party appealing an adverse judgment has the burden to show reversible error. *See* TEX. R. APP. P. 44.1(a). Absent such a record, we must presume that the evidence before the trial judge was adequate to support the decision. *See Simon v. York Crane & Rigging Co.*,

[3] We note that appellants filed a "Motion for Reconsideration on [Appellants'] Motion for New Trial" and attached an affidavit by Alejandro. On appeal, however, appellants only complain of the denial of their motion for new trial and do not present any argument based on the "Motion for Reconsideration" or cite or discuss the attached affidavit. As such, we do not consider them in our analysis.

[4] The clerk's record includes an order setting a hearing on appellants' motion for new trial for April 24, 2019. The trial court's docket sheet reflects the same information.

739 S.W.2d 793, 794–95 (Tex. 1987); *see also Shin v. 1800 Broadway Urban Residence*, No. 04-18-00431-CV, 2019 WL 286103, at *2 (Tex. App.—San Antonio Jan. 23, 2019, no pet.) (mem. op.).

We overrule appellants' second issue.

IV. DAMAGES

By their third issue, appellants argue there was legally insufficient evidence supporting the damage awards for past medical expenses and mental anguish.

Once a default judgment is taken on an unliquidated claim, all allegations of fact set forth in the petition are deemed admitted, except the amount of damages. *Holt Atherton Indus. v. Heine*, 835 S.W.2d 80, 83 (Tex. 1992). Thus, a court rendering a default judgment must hear evidence of unliquidated damages. TEX. R. CIV. P. 243; *Holt Atherton*, 835 S.W.2d at 83; *Argyle Mech., Inc. v. Unigus Steel, Inc.*, 156 S.W.3d 685, 688 (Tex. App.—Dallas 2005, no pet.). "Unliquidated damages" are damages that cannot be accurately calculated from (1) the factual allegations in the petition and (2) the written instruments attached to the petition. *Atwood v. B&R Supply & Equip. Co.*, 52 S.W.3d 265, 268 (Tex. App.—Corpus Christi–Edinburg 2001, no pet.); *see Paradigm Oil, Inc. v. Retamco Oper., Inc.*, 372 S.W.3d 177, 186 (Tex. 2012) (noting that unliquidated damages cannot be calculated exactly and involve range of possible answers); *see, e.g., Fogel v. White*, 745 S.W.2d 444, 446 (Tex. App.—Houston [14th Dist.] 1988, orig. proceeding) (noting that because outcome of a tort claim is uncertain, damages are unliquidated).

Here, the trial court awarded a lump sum of $745,000 for pain and suffering, mental anguish, physical disability, and medical expenses, without itemizing or segregating the

amount awarded for each damage element. Appellants do not challenge the awards for pain and suffering or physical disability.

Generally, when the trial court does not itemize damages in its default judgment, it is impossible to determine what portion of the damages were ascribed to each ground of recovery claimed by the plaintiff. *Dawson v. Briggs*, 107 S.W.3d 739, 749 (Tex. App.—Fort Worth 2003, no pet.); *Pentes Design, Inc. v. Perez,* 840 S.W.2d 75, 80 (Tex. App.—Corpus Christi–Edinburg 1992, writ denied). Furthermore, "[t]he general rule is that an appellant who seeks to challenge a multi-element damage award on appeal must address each element and show the evidence is insufficient to support the entire award." *Ibrahim v. Young*, 253 S.W.3d 790, 805 n.16 (Tex. App.—Eastland 2008, pet. denied); *SunBridge Healthcare Corp. v. Penny*, 160 S.W.3d 230, 248 (Tex. App.—Texarkana 2005, no pet.). If an appellant fails to address an element of damages, then the appellant waives the sufficiency challenge. *Ibrahim*, 253 S.W.3d 790, 805 n.16; *SunBridge Healthcare*, 160 S.W.3d at 248. Because appellants did not address each element of the damage award, they have waived this issue. *See Ibrahim*, 253 S.W.3d 790, 805 n.16; *SunBridge Healthcare*, 160 S.W.3d at 248; *Brookshire Bros., Inc. v. Lewis*, 997 S.W.2d 908, 922 (Tex. App.—Beaumont 1999, pet. denied).

We overrule appellants' third issue.

V. CONCLUSION

The trial court's judgment is affirmed.

DORI CONTRERAS
Chief Justice

Delivered and filed the
25th day of June, 2020.