

No. 02-09-00356

IN THE

# Court of Appeals

FOR THE SECOND COURT OF APPEALS  
FORT WORTH, TEXAS

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CINDY PENA,

*Appellant,*

v.

MICHAEL A. SMITH,

*Appellee.*

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ON APPEAL FROM THE 271<sup>ST</sup> DISTRICT COURT OF WISE COUNTY, TEXAS  
THE HONORABLE JOHN FOSTEL PRESIDING

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## Reply Brief of Cindy Pena

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## Argument

### 1. **The trial court's judgment isn't supported by any evidence.**

Smith's response brief concedes this issue; Smith admits that he didn't offer any evidence at the hearing on his motion for final judgment.<sup>1</sup> And though he complains that Pena didn't personally appear at the hearing, her absence isn't relevant. As the plaintiff, he had the burden of proving each element of a breach of contract action to win a judgment.<sup>2</sup> And he didn't offer a scintilla of evidence on any one of them.

On this admission alone, the judgment of the trial court should be reversed and judgment rendered for Pena.

### 2. **The memorandum as a conveyance is void because it doesn't contain a description of the property to be conveyed.**

The trial court didn't take judicial notice of the property description.

Before the hearing on the final order, Smith filed a motion for summary judgment.<sup>3</sup> In it, he attached a document entitled, "Unimproved Property Contract."<sup>4</sup> Pena filed a response, arguing that Smith's motion should be denied in its entirety.<sup>5</sup> On the same day, she also filed a motion for continuance of the summary judgment hearing and in that

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<sup>1</sup> Smith Brief at 3, 6.

<sup>2</sup> *Padilla v. LaFrance*, 907 S.W.2d 454, 462 (Tex. 1995). See also *The Cadle Co. v. Castle*, 913 S.W.2d 627, 634 (Tex. App. – Dallas 1995, writ denied); *Stevens v. Snyder*, 874 S.W.2d 241, 244 (Tex. App. – Dallas 1994, writ denied).

<sup>3</sup> CR 5-20.

<sup>4</sup> CR 5-20.

<sup>5</sup> CR 42-49.

motion she asked for a continuance so that the parties could mediate the dispute.<sup>6</sup> In that regard, she asked that the court take judicial notice of paragraph 16 of the “Unimproved Property Contract,” a paragraph about mediation.<sup>7</sup>

Upon hearing, the court granted Pena’s motion, but did so because the motion for summary judgment was premature.<sup>8</sup> The court didn’t affirmatively indicate then that it took judicial notice of paragraph 16, the “Unimproved Property Contract,” or the property description.<sup>9</sup> And it never notified the parties that it had done so.<sup>10</sup>

Later, when the court entered its final order, it also didn’t say, on the record or in its order,<sup>11</sup> that it had taken judicial notice of the property description. And even if it had, it wouldn’t have been a valid exercise of the court’s authority because Smith hadn’t introduced the “Unimproved Property Contract” in as evidence.<sup>12</sup> And, besides, the property description isn’t the type of fact can be the object of judicial notice;<sup>13</sup> judicial notice can only be applied to facts which are beyond credible dispute.<sup>14</sup>

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<sup>6</sup> CR 49-41.

<sup>7</sup> CR 39.

<sup>8</sup> RR2 11.18 to 12.9.

<sup>9</sup> Cf. *Tranter v. Duelling*, 129 S.W.3d 257, 262-63 (Tex. App. – El Paso 2004, no pet.).

<sup>10</sup> See *id.* (if a court takes judicial notice, it must at some point notify the parties that it has done so and give them the opportunity to challenge that decision).

<sup>11</sup> See CR 95-96 and RR3 15.8 to 16.5; 19.10 to 20.4.

<sup>12</sup> See *In the Interest of C.L.*, No. 10-09-00117-CV, 2009 Tex. App. LEXIS 7994, at \*4 (Tex. App. – Waco, October 14, 2009, no pet.); see also *Barnard v. Barnard*, 133 S.W.3d 782, 789 (Tex. App. – Fort Worth 2004, pet. denied) (court may take judicial notice of a filing, but not the contents of that filing).

<sup>13</sup> See *Garza v. State*, 996 S.W.2d 276, 279-80 (Tex. App. – Dallas 1999, pet. ref’d).

<sup>14</sup> *O’Quinn v. Hall*, 77 S.W.3d 438, 446 (Tex. App. – Corpus Christi 2002, no pet.).

**3. The judgment on the memorandum isn't supported by Smith's pleadings—pleadings that allege the breach of a real estate contract.**

Smith's pleadings for the breach of a real estate sales contract weren't sufficient to empower the court to render judgment for him based on the settlement memorandum.<sup>15</sup> Pena cannot be deemed to have consented to a trial on the settlement memorandum because there never was a trial.<sup>16</sup>

**4. Smith has waived any issue regarding the motion for enforcement.**

Pena incorporates her response to Smith's motion to dismiss in this reply brief.

In his motion to dismiss, Smith references a Motion for Enforcement Accounting and Deposit of Money that has since been withdrawn.<sup>17</sup> He states that the motion "is not critical to this Court's decision" and didn't provide any briefing on it. Consequently, he has waived that issue.<sup>18</sup>

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<sup>15</sup> See *Escamilla v. Estate of Escamilla*, 805 S.W.2d 886, 888 (Tex. App. - Corpus Christi 1991, no writ).

<sup>16</sup> Compare *Bunnett/Smallwood & Co. v. Helton Oil Co.*, 577 S.W.2d 291, 294 (Tex. Civ. App. - Amarillo 1979, no writ); *Regal Properties v. Greenberg*, 538 S.W.2d 190, 191 (Tex. Civ. App. - Dallas 1976, no writ) (not permissible for a litigant to plead one cause of action and recover on another not pleaded without express or implied consent). Cf. CR 155 - Smith's Response to Motion for New Trial ("there was never a trial and there won't be a trial").

<sup>17</sup> CR 2d Supp.

<sup>18</sup> Tex. R. App. P. 38.2(a)(1); *La Sara Grain v. First Nat'l Bank of Mercedes*, 673 S.W.2d 558, 568 (Tex. 1984) (on motion for rehearing); *Naydan v. Naydan*, 800 S.W.2d 637, 642 (Tex. App. - Dallas 1990, no writ).

## Conclusion

This court should answer the three issues raised by Pena in a straightforward fashion:

- The trial court's judgment is not supported by legally sufficient evidence because Smith did not introduce *any* evidence to support his claims.
- The trial court's judgment is erroneous because the memorandum purportedly conveying the land to Smith is void because it doesn't contain a description of the land to be conveyed.
- The trial court's judgment on the memorandum is in error because it's not supported by Smith's pleadings—pleadings that alleged the breach of a real estate sales contract.

Pena asks the court to reverse the judgment of the trial court and render a take-nothing judgment against Smith. She also asks for all further relief that the court deems proper and appropriate.

Dated: 12 April 2010

Respectfully submitted,

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**Certificate of Service**

I, Peter Smythe, certify that today, \_\_\_ April 2010, a copy of the reply brief for Appellant in this case was served upon opposing counsel via facsimile, to-wit:

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