

satisfies the three requirements of *Craddock v. Sunshine Bus Lines*¹ for obtaining a new trial after a default judgment.² *Craddock* states:

A default judgment should be set aside and a new trial ordered in any case in which the failure of the defendant to answer before judgment was not intentional, or the result of conscious indifference on his part, but was due to a mistake or an accident; provided the motion for a new trial sets up a meritorious defense and is filed at a time when the granting thereof will occasion no delay or otherwise work an injury to the plaintiff.³

The explanation the Court gives for not applying *Craddock* in this case is that the rules of procedure provided Cimarron a reasonable opportunity to obtain leave to file a late response. But surely the rules of procedure provide every party a reasonable opportunity to obtain leave to respond late. Parties may not avail themselves of that opportunity, but the rules always provide it. The reason the *Craddock* standards should not apply is that the failure to timely answer a petition and the failure to timely respond to a motion for summary judgment are very different situations, as the facts of this case summarized below show.

Further, while the Court states that it will not apply *Craddock*, in fact it does exactly that: it uses the same “fault” or “good cause” standard that *Craddock* does. The dispute between the parties in this case is not over whether the “meritorious defense” requirement of *Craddock* can be imposed or modified, as the dissent argues. The dispute is over whether Cimarron’s counsel gave the trial court enough of a reason to obtain leave to respond late. The Court states that it will not look to *Craddock* for guidance and then applies the standard of that case, word for word.

¹ 133 S.W.2d 124 (Tex. 1939).

² 35 S.W.3d 692.

³ *Craddock*, 133 S.W.2d at 126.

The result in this case does not seem close to me. Carpenter’s motions for summary judgment had been on file for eleven weeks before the hearing, and Carpenter’s counsel had agreed to one postponement requested by Cimarron. Cimarron’s motion for leave to file a late response, filed the day of the hearing, gave no reason for Cimarron’s failure to file a timely response. At the hearing, the only explanation Cimarron’s counsel offered was that he “had mis-calendared this setting”. He did not elaborate or offer any evidence. The trial court was well within its discretion to deny leave. Counsel’s later explanation, offered in support of the motion for new trial, came too late.

Whether a different standard should apply in other circumstances after summary judgment I would leave for a case in which the implications have been briefed — or better still, for the rules process.

Nathan L. Hecht
Justice

Opinion delivered: July 3, 2002