



Court should fashion a new standard based, in part, on *Craddock's* equitable principles. Under my proposed standard, a non-responding party is entitled to a new trial if it: (1) shows that the failure to respond was not intentional or due to conscious indifference, but rather, was due to accident or mistake; (2) produces enough summary-judgment evidence to raise a material fact issue; and (3) shows that granting a new trial will occasion no delay or otherwise injure the opposing party. I conclude that Cimarron's new-trial motion meets this standard. Therefore, Cimarron should be entitled to a new trial in this case. Accordingly, I would affirm the court of appeals' judgment setting aside the trial court's summary judgment. Because the Court decides otherwise, I respectfully dissent.

### **I. THE CRADDOCK STANDARD**

This Court announced the *Craddock* standard in a case involving a defendant who tried to overcome a default judgment after not filing an answer. *See Craddock v. Sunshine Bus Lines, Inc.*, 133 S.W.2d 124, 126 (Tex. 1939); *see also Ivy v. Carrell*, 407 S.W.2d 212, 214 (Tex. 1966) (extending *Craddock* to post-answer default judgments). Because there are important differences between a default judgment and a summary judgment, some courts of appeals have declined to apply the *Craddock* standard in the summary-judgment context. *See Rabe v. Guar. Nat'l Ins. Co.*, 787 S.W.2d 575, 579 (Tex. App.–Houston [1st Dist.] 1990, writ denied); *Crime Control, Inc. v. RMH-Oxford Joint Venture*, 712 S.W.2d 550, 551-52 (Tex. App.–Houston [14th Dist.] 1986, no writ); *Enernational Corp. v. Exploitation Eng'rs, Inc.*, 705 S.W.2d 749, 751 (Tex. App.–Houston [1st Dist.] 1986, writ ref'd n.r.e.). These courts explain that the *Craddock* standard does not apply in the summary-judgment context, because the respondent has no duty to file a response and because a trial court grants summary judgment based on the movant's proof rather than the non-movant's failure to answer. *Raby*, 787 S.W.2d at 579; *Crime Control*, 712 S.W.2d at 552; *Enernational*, 705 S.W.2d at 751.

However, other courts of appeals have reasoned that, when the failure to respond to a summary-judgment motion leads to an adverse judgment, a default summary judgment is analogous enough to a default judgment to warrant applying a modified version of the *Craddock* standard to the defaulting party's

new trial motion. *See Medina v. Western Waste Indus.*, 959 S.W.2d 328, 330 (Tex. App.–Houston [14th Dist.] 1997, pet. denied); *Washington v. McMillan*, 898 S.W.2d 392, 395 (Tex. App.–San Antonio 1995, no writ); *Krchnak v. Fulton*, 759 S.W.2d 524, 529 (Tex. App.–Amarillo 1988, writ denied). These courts point out that, if a traditional summary-judgment motion and supporting evidence establish that the movant is entitled to judgment as a matter of law, the non-movant’s failure to respond will result in an adverse judgment even though the non-movant had enough controverting evidence to raise a material fact issue. *See Medina*, 959 S.W.2d at 330; *Washington*, 898 S.W.2d at 396; *Krchnak*, 759 S.W.2d at 529; *see also* TEX. R. CIV. P. 166a(c). Similarly, a non-movant’s failure to respond to a no-evidence summary-judgment motion will result in an adverse judgment even though the non-movant had evidence to raise a fact issue. *See* TEX. R. CIV. P. 166a(i).

I believe that we should look to *Craddock’s* equitable principles to fashion a standard that would apply in the default summary-judgment context. As the courts of appeals that have dealt with the issue in this manner have correctly recognized, a non-movant has a burden to respond to a summary-judgment motion if the movant “conclusively establishes its cause of action or defense.” *See Rhône-Poulenc, Inc. v. Steel*, 997 S.W.2d 217, 222-23 (Tex. 1999). Thus, in these circumstances, the non-movant’s duty to respond is sufficiently analogous to a defendant’s duty to answer that it implicates *Craddock’s* underlying equitable concerns. *See Craddock*, 133 S.W.2d at 126. That is because, in both situations, the failure to timely respond will lead to an adverse judgment.

Accordingly, when a non-responding party files a new-trial motion after a default summary judgment, courts should apply *Craddock’s* first and third elements, because these elements apply equally well in the summary-judgment context. However, because a non-movant does not have a burden to establish a “meritorious defense” to defeat a summary-judgment motion, we must fashion an alternative second element to fit our existing summary-judgment standards.

If a party who files a “traditional” summary-judgment motion meets its burden to show that “no material fact issue exists and that it is entitled to judgment as a matter of law,” the non-movant must respond and produce summary judgment evidence raising a material fact issue. *Rhône-Poulenc*, 997 S.W.2d at

222 (citing TEX. R. CIV. P. 166a(c)). Similarly, if a party files a “no evidence” summary-judgment motion, the non-movant must respond and produce “summary judgment evidence raising a genuine issue of material fact.” TEX. R. CIV. P. 166a(i). Consequently, when a non-responding party files a new-trial motion after a default summary judgment, it need not establish a “meritorious defense.” Rather, it should produce enough summary-judgment evidence to raise a genuine material fact issue. *See Medina*, 959 S.W.2d at 331; *Washington*, 898 S.W.2d at 396; *Krchnak*, 759 S.W.2d at 530.

In sum, I believe that the Court should have fashioned a standard to apply to a new-trial motion filed after a default summary judgment. I would fashion such a standard and hold that the non-responding party must: (1) show that the failure to respond was not intentional or due to conscious indifference, but rather, was due to accident or mistake; (2) produce enough summary-judgment evidence to raise a material fact issue; and (3) show that granting a new trial will occasion no delay or otherwise injure the opposing party.

Applying such a standard in the default summary-judgment context would not affect other remedies already available to the respondent. Thus, if a summary-judgment respondent discovers that it has missed the response deadline before the court renders judgment, it can and should use existing procedural remedies to file a late response. *See, e.g.*, TEX. R. CIV. P. 5 (a trial court may, upon motion, enlarge time periods for taking any action except those related to new trials); TEX. R. CIV. P. 166a(c) (a trial court has discretion to consider a late response); TEX. R. CIV. P. 166a(g) (a trial court has discretion to grant a continuance to permit additional discovery). If the respondent uses any of these procedures and the trial court denies such motions, the respondent can then appeal the trial court’s decision under the abuse-of-discretion standard. *See, e.g., Atkins v. Tinning*, 865 S.W.2d 533, 535 (Tex. App.—Corpus Christi 1993, writ denied). Conversely, if the non-responding party has an opportunity to seek relief before the trial court renders summary judgment but does not do so, the trial court should consider whether that party’s failure to use the available procedures caused delay or otherwise injured the moving party. If so, the non-responding party will not be entitled to set aside the default summary judgment under the standard I propose today.

A respondent can also use existing procedures to attack a summary judgment if the movant did not comply with summary-judgment notice requirements. *See* TEX. R. CIV. P. 166a; *see also* TEX. R. CIV. P. 21a (service methods). Finally, a non-responding party can use existing standards to move for a new trial or appeal a summary judgment if the summary-judgment motion does not establish that the movant is entitled to judgment as a matter of law. *See M.D. Anderson Hosp. & Tumor Inst. v. Willrich*, 28 S.W.3d 22, 23 (Tex. 2000) (a non-movant “need not respond to [a summary-judgment motion] to contend on appeal that the movant’s summary judgment proof is insufficient as a matter of law to support summary judgment”).

## II. THE COURT’S “STANDARD”

The Court strongly intimates that *Craddock* applies in most default summary-judgment situations. But the Court does not apply *Craddock* here, because it concludes that Cimarron had “*an opportunity* before judgment was rendered to obtain a continuance or leave to file an untimely response.” \_\_ S.W.3d at \_\_ (emphasis added). The Court so concludes because Cimarron learned two days before the hearing that it had not filed a response, and because Cimarron had “the facts necessary to establish good cause . . . before the summary-judgment hearing.” \_\_ S.W.3d at \_\_. In other words, whether a party has “an opportunity” to seek relief before a trial court renders summary judgment turns both on when the party discovers its failure to respond and whether the facts necessary to establish good cause are “ascertainable without resort to any time-consuming formal discovery processes.” \_\_ S.W.3d at \_\_. Consequently, the Court’s “standard” is so tailored to this case’s circumstances that it will be virtually useless in any other case.

## III. ANALYSIS

Here, Cimarron attempted to avail itself of existing procedural remedies. Before the summary-judgment hearing, Cimarron moved for leave to file a late response and also moved to continue the hearing. However, the trial court denied both motions. I agree with the Court that a trial court should grant a motion

for leave to file a late response if the non-responding party shows “good cause.” I also agree that Cimarron did not establish good cause in its motion for leave, and therefore, the trial court did not abuse its discretion in denying the motion.

Cimarron moved for a new trial asserting that the trial court abused its discretion in denying Cimarron’s motion for leave to file a late response. Because I agree with the Court that the trial court did not abuse its discretion in denying Cimarron’s motion for leave, I agree that the trial court did not err in denying Cimarron’s motion for new trial on that basis.

However, Cimarron also asserted that it was entitled to a new trial based on equitable grounds. Specifically, in its new-trial motion, Cimarron: (1) showed that its failure to respond to the summary-judgment motion was due to accident or mistake; (2) produced summary-judgment evidence raising material fact issues sufficient to defeat the summary-judgment motion; and (3) showed that granting a new trial would not involve undue delay or injury to Carpenter. Applying my proposed standard, I conclude that Cimarron is entitled to a new trial on equitable grounds. Consequently, I believe that the trial court abused its discretion when it denied Cimarron’s new-trial motion.

#### **IV. CONCLUSION**

In its motion for new trial, Cimarron showed that its failure to respond was due to accident or mistake, that it has summary-judgment evidence sufficient to raise a material fact issue, and that granting a new trial would not cause undue delay or injury to Carpenter. Because Cimarron meets my suggested standard, I would hold that the trial court abused its discretion when it denied Cimarron’s motion for new trial. Accordingly, I would affirm the court of appeals’ judgment. Because the Court decides the case to the contrary, I respectfully dissent.

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James A. Baker, Justice

Opinion delivered: July 3, 2002