NO. 08-0032

In The
Supreme Court of Texas

DOLGENCORP OF TEXAS, INC. D/B/A DOLLAR GENERAL STORE,
***Petitioner*,**

v.

MARIA ISABEL LERMA, INDIVIDUALLY, ET AL,
***Respondents*.**

On Petition for Review from the Thirteenth Court of Appeals, Corpus Christi, Texas
Court of Appeals No. 13-03-00314-CV

PETITION FOR REVIEW BY DOLGENCORP OF TEXAS, INC. D/B/A DOLLAR GENERAL STORE

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March 12, 2008

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d/b/a Dollar General Store

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Trial Court: 404th Judicial District Court
Cameron County, TX
Honorable Abel Limas, Presiding

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STATEMENT OF THE CASE

Nature of the case:	This appeal seeks to overturn a post-answer default judgment. Plaintiffs run small businesses in a shopping center. They allege losses from a fire in a nearby Dollar General Store. When they saw that Dollar General's defense counsel was tied up in trial in Houston, they moved their case to a judge who could try the case swiftly, pushed it to trial before counsel arrived, converted it to a bench trial, and won a money judgment.
Trial court (TC):	Hon. Menton Murray (103rd Dist. Ct. of Cameron County) had the case until the plaintiffs moved it to another court. Hon. Abel Limas (404th Dist. Ct. of Cameron County) rendered the money judgment in defense counsel's absence.
TC disposition:	Judgment for over $1,000,000 on a negligence claim. **Tab A**.
Court of Appeals (CA):	Corpus Christi-Edinburg
Parties in CA:	Defendant-appellant Dolgencorp of Texas, Inc. d/b/a Dollar General Store Plaintiffs-appellees Maria Isabel Lerma Individually and d/b/a Le Styles, Cesar Cepeda and Martha Longoria Individually and d/b/a Baby Gallery, Eduardo Sanchez Individually and d/b/a Piti's Pizza and Fidel Saldana Individually and d/b/a Palm Paint & Decorating Gallery
CA ruling:	The court initially overturned the default judgment in an opinion by Justice Errlinda Castillo. After Justice Castillo left office, a new author took the case on rehearing, rejected all of Justice Castillo's work, and upheld the money judgment in its entirety. (Garza, J., joined by Rodriguez and Benavides, JJ.).
CA opinion:	241 S.W.3d 584. **Tab B**; *see also* **Tab C** (the initial opinion that reversed the default on *Craddock* grounds).

STATEMENT OF JURISDICTION

First, the decision below conflicts with *Smith v. Babcock & Wilcox Constr. Co., Inc.*, 913 S.W.2d 467 (Tex. 1995). The *Smith* decision illustrates what it means for conduct to be intentional or consciously indifferent. It recognizes that counsel cannot be in two places at once. When counsel chooses to show up in trial court #1 instead of #2, that choice may be deliberate but does not qualify as "intentional" within the meaning of the *Craddock* doctrine.

Second, conflict jurisdiction exists because the appeal would have come out differently if it had arisen in Houston or Fort Worth, rather than in the Valley. The Houston and Fort Worth courts of appeals recognize that an attorney cannot try two cases at the same time. *See In re T.S.M.*, 2005 Tex. App. LEXIS 3026 (Tex. App.—Houston [1st Dist.] 2005, no pet.); *Seigle v. Hollech*, 892 S.W.2d 201, 203 (Tex. App.—Houston [14th Dist.] 1994, no writ); *Aero Mayflower Transit Co., Inc. v. Spoljaric*, 669 S.W.2d 158, 160 (Tex. App.—Fort Worth 1984, writ dism'd).

Finally, apart from conflict jurisdiction, this Court has general (a)(6) jurisdiction under TEX. GOV'T CODE § 22.001(a)(6). The plaintiffs had a weak case of negligence with damages that deserved serious scrutiny, yet they have artfully engineered their way to a substantial money judgment. The irregularities below warrant this Court's review.

ISSUES PRESENTED

1. Should the post-answer default judgment be set aside?

2. [*Unbriefed*] Does this record contain evidence that Dollar General's negligence proximately caused the plaintiffs more than $1 million in damages?

STATEMENT OF FACTS

"**Please be advised**," wrote one judge to another, "**Mr. Clifford Harrison, attorney of record for DOLGENCORP of Texas, Inc., d/b/a Dollar General Stores, in the above referenced case, is still in trial in my court, 189th District Court.**" CR 110 (facing-page). The Houston judge wrote of his "desperation" to reach his Brownsville counterpart. *Id.* But the letter availed nothing. All communications failed. Mr. Harrison finished the trial in Houston, the Brownsville judge signed a default judgment in the other case, and the consequences to the client now hinge on this appeal.

The Houston case

The Houston case was a personal injury suit in which Mr. Harrison, as lead counsel for Baker Hughes, personally handled nearly every aspect of trial. 7 RR 31-32. The Houston case was set to begin the same day as the Valley case. But while the Valley case awaited its turn on a crowded docket, the Houston case was certain to go—it enjoyed a preferential trial setting that gave it first priority. As predicted by counsel, who explained the conflict in advance, the Houston case went to trial as scheduled.

The Valley case

The Valley case is a negligence suit about a fire in a South Texas shopping center. The center had a number of tenants, ranging from a pizza parlor to a hair salon to a Dollar General Store. After the fire, four of the tenants sued the landlord and Dollar General for damages to inventory and for profits lost over a few weeks. CR 16-22; 7 RR 41. Plaintiffs settled with the shopping center for $16,000. 4 RR 33. The case against Dollar General looked even less valuable. 7 RR 44. At least for a while.

Judge Murray warns that trial may be bumped

A week and a half before trial, Plaintiffs realized they had dropped the ball. Plaintiffs had neglected to respond to a no-evidence summary judgment motion. 2 RR 4. They moved to continue the trial and reopen discovery. The defendants resisted, arguing that the discovery had been closed for several months. 2 RR 9.

Judge Murray recognized that Plaintiffs' failure to respond to the no-evidence motion was fatal. "[I]t sounds like [summary judgment] would be granted today if we didn't do anything." 2 RR 15. But he was forgiving: "[T]his should have been done and I am trying to come up with some compromise to give you a shot." 2 RR 16. Judge Murray extended Plaintiffs' deadline to respond and let them take more depositions. 2 RR 22. He deferred ruling on the request for a continuance. *Id*.

Judge Murray shared that the setting would likely get bumped by a criminal trial: "[W]e have got another case that's been set that is of a rather serious nature and the district attorney thinks it's going to trial based on everything we have heard, which may end up jumping this one anyhow, which means we are going back to square one." 2 RR 15. When Plaintiffs' counsel wondered whether this case would go to trial on the date it was set, Judge Murray doubted it: "As I say, we probably are not." 2 RR 18.

Judge Murray marks the case "ready" and tends to his crowded docket

The next week the parties appeared for announcements. Plaintiffs announced ready, and Judge Murray had a note indicating that Dollar General's counsel had called earlier in the week and announced ready. 3 RR 3-4. So Judge Murray marked the case ready. 3 RR 3.

Before the proceeding concluded, a very young attorney for Dollar General appeared and was surprised that the case was marked ready. The attorney for Dollar General explained that "there must have been some kind of confusion with my secretary. … I thought she had called back to clarify that we would actually be [in Houston], Cliff [Harrison] is set preferential for Tuesday in trial in Harris County." 3 RR 4.

Judge Murray foresaw that his crowded docket would probably moot the issue: "I've got a whole bunch of stuff for next week, so I can probably – we'll worry about it whenever the time comes. … I'll mark it ready and we'll see what happens." 3 RR 4-5.

Facing a young lawyer, Plaintiffs' counsel now wanted to keep the scheduled date. He suggested finding a different judge who could try the case. "If we can find another court, Judge — " But Judge Murray deferred any decision until Monday: "We'll see what happens when we get here on Monday. I don't ever object to people going to another Court, but I'll deal with this other issue." 3 RR 5.

On Monday, counsel appeared, and the attorney for Dollar General advised Judge Murray that its lead counsel was in trial at the moment and was unable to appear for trial. CR 184-85. Judge Murray wanted to handle other matters on his criminal docket before determining what to do. *Id*. Counsel were to confer and stand by for an answer. *Id.*

The case is transferred to Judge Limas and fast-tracked

Plaintiffs pounced into action. While Judge Murray went through his docket, Plaintiffs' counsel went down the hall and picked an available judge. CR 114. He then walked back into Judge Murray's courtroom and orchestrated a transfer. He told defense counsel they would be picking a jury in 15 minutes. *Id*. He grabbed the case file

from the clerk of the court. *Id*. He walked the file down to the Hon. Abel Limas, the judge of the 404th district court. *Id.* In a matter of minutes, the case was called for trial.

Judge Limas quickly got oriented with the parties. The other defendants settled in the brief interlude between the two courts, such that only Dollar General remained. 4 RR 4. The young lawyer on the Dollar General file attempted to explain:

> Your Honor, my name's Chris Sachitano. I represent Dollar General, but I'm not the attorney in charge for Dollar General, it's Cliff Harrison. He is in a preferential[] setting in Harris county. Judge Murray has not decided on that issue yet. He said we are going to wait things and work things out. … Cliff is in trial this week and he cannot it make [sic] down here for trial. I'm not qualified to try this case. Judge Murray has not made the determination whether or not he is going to reset it or push it back a couple of days.

4 RR 4-5. Although the case was marked "ready," that notation was qualified.

Plaintiffs wanted the case ramrodded onward: "Judge, and I understand Mr. Sachitano's position, but we announced ready on Friday. … I have yet to receive any settlement offer from Dollar General so we're ready to go." 4 RR 5. Mr. Sachitano protested: "Your Honor, I've never been in trial before[.] … I've only been practicing two years. … Your Honor, but I'm not the attorney here on the record." 4 RR 5-6.

Judge Limas assures counsel that he will "work with them" on scheduling

Judge Limas called counsel into his chambers. 4 RR 6. There Mr. Sachitano "continued to urge the court to delay any trial until Mr. Harrison was available." CR 114. Judge Limas told him he would not make him try the case, but he would make him select a jury. *Id*. The case would be tried later that week. *Id*. Judge Limas then received a phone call from the court coordinator in Harris County confirming that Dollar General's

lead counsel was currently in trial. *Id*. After the call, Judge Limas assured counsel that "he would work with us on the scheduling." *Id*.

Voir dire began immediately, and Mr. Sachitano had to pick a jury. CR 114; 4 RR 6. Judge Limas suggested that he tell the panel he would not be the lawyer trying the case, which he did: "I will only be here to pick the jury. There is going to be another attorney named Mr. Harrison currently in Harris county in another trial and was unable to come here today that was actually going to try the case." 4 RR 26-27. Judge Limas initially told the panel the case would "start on Wednesday at 1:30 in the afternoon or Thursday morning." 4 RR 7. But when he excused the jury he instructed them to return on Wednesday at 1:30 p.m. 4 RR 50.

Since the preferentially set trial could go through Wednesday, Mr. Sachitano offered a plan to keep Judge Limas informed about the status of that trial: "[W]e'll keep the trial coordinator with Judge Work's court in contact with you just in case something develops in that trial in Harris county. … I'll make sure there's communication between that coordinator and your coordinator." 4 RR 51.

Judge Limas responded by issuing instructions to prepare for that contingency: "Tell [the bailiff] to tell the jurors to make sure that we have their correct home and work phone numbers in case anything changes. Well, not change. In case the time frame for the – in case we have to start the case earlier or later. To be on stand by." 4 RR 51.

Mr. Sachitano was reassured: "Thank you, Your Honor." 4 RR 51. Mr. Sachitano "returned to Houston with the understanding the trial … would not go forward without Mr. Harrison." CR 115.

Communication breaks down

While all of this unfolded in court, the phones began ringing behind the scenes. Judge Limas' court coordinator, Ms. Garcia, fielded calls from Judge Work's court coordinator in Harris County. Judge Work's coordinator called several times on Monday to set up a call between the judges to see if they could work out the conflicting settings. CR 110, 143. Ms. Garcia stated each time that Judge Limas was unavailable. CR 143.

On Tuesday, Judge Work's court coordinator called again and told Ms. Garcia that Mr. Harrison's trial would not be finished by Wednesday and that Judge Work wanted to speak with her. CR 143. Ms. Garcia stated that she would not have anything new to tell Judge Work and that she did not understand the problem. CR 143-44.

Mr. Sachitano also called on Tuesday and informed Ms. Garcia that Mr. Harrison was still in trial and that it would last 2-3 days. CR 115. According to Judge Limas' contingency plan, he informed Ms. Garcia that the case needed to be postponed and that the jury needed to be called. *Id*. All Ms. Garcia relayed was that the judge was "out." *Id*.

Mr. Sachitano's legal assistant called Tuesday morning and again that afternoon. CR 118. Both times she spoke with Ms. Garcia, who told her that Judge Limas would not be in the office that day. CR 118. She called again at 9:30 a.m. on Wednesday to see if Ms. Garcia had given the messages to Judge Limas. CR 119. She had not. CR 119.

On Wednesday morning, Judge Work called for Judge Limas. He reached Ms. Garcia and told her that "Mr. Harrison was still in trial in his court and he did not expect him to be done until late that afternoon and that he could have him in [Judge Limas']

court by Friday morning." CR 144. Ms. Garcia explained why she thought the case could go forward as scheduled; Judge Work explained why it could not. CR 144.

Judge Limas dismisses the jury and awards plaintiffs a million dollars

At 1:40 p.m. on Wednesday, Judge Limas returned and called this case for trial. 5 RR 6. Seeing no defense counsel, he began to make a record. *Id*. He granted Plaintiffs' request to waive a jury. 5 RR 6-8. He told the jurors why they were being dismissed. **Tab D**. He seemed offended by defense counsel's absence: "[T]his court does not take too kindly to their mannerism and the respect for the court system down here in South Texas." 5 RR 9-10. He expressed particular frustration that he had not heard from Mr. Harrison:

> And ladies and gentlemen, I really, really don't like to see these things happen. This has never happened that I know of. It has never happened. You know, and a lot of things, a lot of matters are taken up by the Judge. If there is a lawyer that needs time or what have you, they'll call the Judge, you know, but the lawyer has not called me at all, the lawyer has not called me, and the lawyer has supposedly that's in Houston, and I don't doubt that he's in Houston, but I think he should call me and he should have let me know what he was doing. What he did, he had the judge of the court call, and honestly, I've been so busy this week that I haven't been able to return his call. I talked to his – I was able to talk to his coordinator or administrator I was able to do that, but the lawyer himself has not called the court, and that's fine with me. If he doesn't want to call me that's fine, but usually have more – I'm more lenient when I'm communicated or told that, Judge, I have a problem. I'm still down here. I can understand that. I've been through it. I practiced law 15 years and I've been through it. It's not easy so, but in this case that did not happen and that is the reason why we're going to excuse you because it doesn't make any sense.

5 RR 11-12 (**Tab D**). It appears none of the phone messages ever reached Judge Limas.

Plaintiffs offered some testimony and 9 exhibits, and the court granted judgment in their favor. 5 RR 14-64; CR 305-43. The trial took less than two hours. CR 144.

Dollar General learns about the judgment and seeks relief

Meanwhile, Mr. Sachitano and his legal assistant kept trying to reach the court. "We continued to try to reach the court, even on Thursday, and no calls were returned." CR 115. They were finally able to learn that there had been a bench trial and that a judgment was rendered. CR 119.

On Thursday, Judge Work faxed Judge Limas a letter detailing the "numerous occasions" his staff had attempted to reach him, and that "out of desperation" they had also contacted the Cameron County administrative judge for advice. **Tab E**. This letter inspired Ms. Garcia to write an affidavit. **Tab F**.

That same day, Judge Limas signed a judgment awarding Plaintiffs $1,151,579.39. **Tab A**. Judge Limas then closed his court for a Brownsville festival. CR 115.

Unable to get any details over the phone, Mr. Sachitano traveled to Brownsville on Friday to find out what happened. CR 115. With the court closed, he learned little more in person. *Id*. He later learned the amount of the judgment from Plaintiffs' counsel. *Id*.

At this point, Dollar General had only one remedy: a motion for new trial to overturn a default judgment. Dollar General promptly filed a new trial motion, including affidavits detailing all the efforts to communicate with the court and postpone trial and also setting up its meritorious defense. CR 88-122. Believing Judge Limas to be a material witness to the events, Dollar General also filed a motion to recuse. CR 54-86. The motion to recuse was denied, 6 RR 14, and Dollar General's motion for new trial was heard by Judge Limas. Both Mr. Harrison and Mr. Sachitano took the stand to explain their understanding of how the court intended to handle the schedule conflict and their

efforts to keep the court informed. Mr. Harrison also testified about the evidence he intended to present in Dollar General's defense, and he even called two witnesses to set up its meritorious defense. 7 RR 36-44, 68-77. The new trial hearing took nearly twice as long as trial. *Compare* 5 RR 14-64 (bench trial) *with* 7 RR 4-87 (new trial hearing).

Judge Limas denied the motion on the spot. 7 RR 87. He seemed especially influenced by his belief that no one attempted to call the court:

> The thing that amazes me is that at no time between approximately 12:30 on that day on Monday, the jury selection, and Wednesday, this court never received a call, this court never received a call from your office. Never did. I received a call at 1:25 p.m. five minutes before the jury was assembled to hear this case[.]

7 RR 85. The affidavits recounting contacts with the court, plus Judge Work's letter, were all before the court as exhibits to the motion for new trial. *See* CR 103-22.

Dollar General appealed. At first, Dollar General won. The court of appeals held that *Craddock* was satisfied and found Plaintiffs' evidence insufficient. **Tab C**. Unfortunately, the case remained on rehearing during a time of turmoil within the court. On rehearing, Justice Benavides replaced the author (Justice Castillo) and rejected every bit of the court's original reasoning. Dollar General now lost on all issues. **Tab B**.

SUMMARY OF THE ARGUMENT

The decision below conflicts with *Smith v. Babcock & Wilcox Constr. Co., Inc.*, 913 S.W.2d 467 (Tex. 1995) (per curiam). A lawyer cannot be two places at one time. Dollar General's defense counsel candidly accepts his fair share of the responsibility for the regrettable events below, but this is not a case of intentional or consciously indifferent conduct within the meaning of default judgment law. The client should not suffer.

ARGUMENT

The court of appeals got this case right the first time. Justice Castillo wrote a solid opinion that followed *Smith v. Babcock & Wilcox Constr. Co., Inc.*, 913 S.W.2d 467 (Tex. 1995) (per curiam). Unfortunately, the court of appeals erred when it chose to scrap every word that Justice Castillo had written. The replacement opinion never even mentions *Smith*. This Court should correct the error. A Supreme Court precedent does not cease to be the law merely because a court of appeals removes it from view.

A. The decision in *Smith* conclusively resolved the correct analysis of intent, conscious indifference, and justification.

Since 1939, the so-called *Craddock* test has been the governing standard for a motion for new trial that assails a default judgment. *Craddock v. Sunshine Bus Lines*, 133 S.W.2d 121, 126 (Tex. 1939); *see Ivy v. Carrell*, 407 S.W.2d 212, 214 (Tex. 1966) (extending *Craddock* test to post-answer default judgments).

The *Craddock* test says that a post-answer default judgment should be set aside when the defendant establishes (1) its failure to appear at trial "was not intentional or the result of conscious indifference on his part, but was due to a mistake or an accident," and the new trial motion (2) "sets up a meritorious defense" and (3) "is filed at a time when the granting thereof will occasion no delay or otherwise work an injury to the plaintiff." *See Ivy*, 407 S.W.2d at 214.

The focus in most *Craddock* disputes involves the first prong: what does it mean for an action to be "intentional" or the result of "conscious indifference"? If a trial lawyer is ordered to try two cases at the same time, does his deliberate decision to show up at one trial amount to an intentional decision to repudiate the other trial?

This Court resolved that question in *Smith*. There the trial court penalized a trial lawyer for being unable to be in two courts at one time, and the court of appeals agreed. In *Smith*, counsel did not notify the court of his conflicting setting until twelve days before trial and his motion for continuance was denied. 913 S.W.2d at 467. Counsel sent the court a letter stating that he understood the court would reconsider his motion for continuance on the date of trial if the conflicting setting went to trial. *Id*. When counsel did not appear on the day of trial, the court dismissed his suit and later denied motions to reinstate the case. *Id*. at 468.

Austin appellate specialist Chuck Lord filed papers seeking this Court's review. This Court summarily reversed. The Court held that counsel "reasonably explained his failure to appear for trial" because he "was actually in trial in another county and believed, based upon his credible explanation, that the court would grant a continuance for that reason." *Id*. "Even if the Smith's attorney was not as conscientious as he should have been, his actions did not amount to conscious indifference." *Id*. The Court found the first *Craddock* prong was satisfied.

Smith clarified that the first *Craddock* prong is satisfied when counsel fails to appear but has "adequate justification" or "other reasonable explanation." *Id.* at 468. "A failure to appear is not intentional or due to conscious indifference within the meaning of the rule merely because it is deliberate; it must also be without adequate justification. Proof of such justification—accident, mistake or other reasonable explanation — negates the intent or conscious indifference[.]" *Id*. The focus is on counsel's explanation. *See id*.

B. The court of appeals erred in ignoring *Smith*.

Under this standard, the default judgment should be set aside. Just as in *Smith*, counsel "reasonably explained his failure to appear for trial" because its counsel "was actually in trial in another county and believed, based upon his credible explanation, that the court would grant a continuance for that reason." 7 RR 35, 49, 53.

Dollar General proved that its counsel was trying a case in Judge Work's court. CR 110. Dollar General raised this conflict before trial and discussed whether the court would accommodate it. 4 RR 4-5, 51; CR 114. And it proved that it left Judge Limas' court on Monday believing that trial would not go forward on Wednesday if the conflict persisted. 4 RR 51; CR 114-15. Counsel testified "I reasonably believe[d] based on everything I knew that I was not to be called to trial [in Brownsville] while I was in trial in Harris county, that the court would work with the schedule." 7 RR 35.

Smith should have been dispositive. Indeed, it actually was dispositive — until Justice Castillo left the court of appeals and the newly-constituted panel erased all traces of this Court's decision.

The court of appeals initially followed *Smith* to the letter. It cited the case for the legal standard. It then applied the legal standard to the facts. It found Dollar General had presented evidence that "clearly demonstrates that Mr. Harrison not only informed the court of his conflicting trial settings, but made repeated efforts to keep the court apprised of his status." **Tab C**. The court concluded that "while Mr. Harrison's failure to appear was intentional in that he was aware of the trial setting, it was not without adequate justification, nor was it the result of conscious indifference." *Id*. The court easily found

the remaining two parts of the test satisfied and ordered the default judgment overturned. The court further found the evidence legally insufficient to establish a negligence duty or breach. *Id.*

Unfortunately, the court of appeals flip-flopped on rehearing. The new opinion scrubbed out all reference to the *Smith* decision and that case's legal analysis. The court of appeals simply proceeded as though *Smith* never existed and need not be mentioned. After wavering back and forth on whether the 3-part *Craddock* test should apply, the court assumed *Craddock* to apply but found the test unmet.

The court of appeals reasoned that defense counsel was "aware of the possibility" that the trial could proceed. Of course, the same was true in *Smith*. The court of appeals further stated that defense counsel worked at a firm with a dozen other attorneys, including his second year associate who had never tried a case and had been instructed not to try this one. But *Smith* is not just for solo practitioners — it applies to all attorneys caught in this Catch-22. The court did not mention that counsel kept the court apprised of the conflict and believed Judge Limas had agreed not to proceed without lead counsel. The court offered no valid justification for failing to follow this Court's precedent.

Nor can *Smith* be distinguished on the fact that the *Smith* attorney had filed a motion for continuance while the attorney in this case did not. The focus is not on what counsel neglected to do but on his explanation for why he did not do it. *Smith*, 913 S.W.2d at 468. Dollar General's counsel believed that appearing to explain the conflict constituted a motion for continuance in substance if not in form. 7 RR 35, 49, 53.

C. Correcting the error is important.

Correcting the court's refusal to follow *Smith* is important for three reasons.

First, the court of appeals' new law on conflicting trial settings is seriously wrong. After *Smith*, no lower court should feel free to find counsel consciously indifferent to the obligation to appear at trial under these circumstances.

Second, the court of appeals has created a conflict among the intermediate courts. Had this appeal arisen in Fort Worth or Houston, it would have resulted differently, because the courts of appeals there hold that attendance at a conflicting trial setting is a sufficient explanation to warrant a new trial after a default judgment. *See In re T.S.M.*, 2005 Tex. App. LEXIS 3026 (Tex. App.—Houston [1st Dist.] 2005, no pet.) (remanding for new trial because counsel promptly informed court of conflict and introduced letter from presiding judge of conflicting court explaining failure to appear); *Seigle v. Hollech*, 892 S.W.2d 201, 203 (Tex. App.—Houston [14th Dist.] 1994, no writ) (similar); *Aero Mayflower Transit Co., Inc. v. Spoljaric*, 669 S.W.2d 158, 160 (Tex. App.—Fort Worth 1984, writ dism'd) ("failure to appear was intentional, but only because he was in trial in a criminal case, and because he relied on his secretary to arrange for a new setting.").

The result should not differ in Corpus Christi.[1] True, the court of appeals had this case during a period of awkwardness between Justice Castillo and her colleagues. *See*

[1] Indeed, the Cameron County local rules envision that an announcement of "ready" may be qualified and that cases may be "held" while counsel is unable to appear because of a conflicting trial in another county. *See* CAMERON COUNTY CIVIL COURT RULES 1.17(g); 1.18(b); 1.19(b); **Tab G**. These rules suggest that Cameron County courts intend to be as deferential to conflicting settings as are their sister courts across the state. An attorney who plays by these rules should not be held "consciously indifferent" to his obligation to appear in court.

In re Errlinda Castillo, 201 S.W.3d 682 (Tex. 2006). But Dollar General should not have been penalized for any of this.

Finally, the court of appeals' error is reversible because Dollar General met all the *Craddock* prongs. The court of appeals suggested that Dollar General failed the test's second prong — possession of a meritorious defense — but that suggestion has no merit. Dollar General "set up" its meritorious defense precisely as *Ivy* requires. It alleged facts that constitute a defense and were supported by affidavit and by testimony of counsel and defense witnesses. *See* CR 107-08; 7 RR 36-44, 68-78. An examination of the record will bear this out.

PRAYER FOR RELIEF

The petition should be granted. The judgment should be reversed and rendered, or, alternatively, reversed and remanded for new trial on the merits.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 12, 2008, a true and correct copy of the foregoing Petition for Review was properly forwarded to the following counsel of record, in accordance with Rule 9.5 of the Texas Rules of Appellate Procedure, by certified mail, return receipt requested:

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