

NO. 09-0185

In The

**TEXAS SUPREME COURT**

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**IN RE MINTER ELECTRIC COMPANY, INC., Relator**

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**Court of Appeals Number: 05-08-01475-CV  
Trial Court Number: 06-12470**

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**RESPONDENT REAL PARTIES IN INTEREST  
BRIEF ON THE MERITS**

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AL, REAL PARTIES IN INTEREST**

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**TO THE TEXAS SUPREME COURT**

Respondents, CINDY BERRY, MEGAN TAYLOR and the ESTATE OF IRVIN  
MATTHEW TAYLOR, Real Parties in Interest, files this Brief on the Merits to Relator's  
Petition for Writ of Mandamus and shows this Court as follows:

**ISSUE PRESENTED**

**ISSUE 1: Whether the Respondent's Order setting aside the prior Dismissal of Want of  
Jurisdiction and its No-Evidence Summary Judgment is void for lack of  
plenary power.**

This issue involves two separate parts. The first part of the issue is "does the fact that  
Respondents' attorney of record was disbarred at the time the judgment that Petitioner asserts  
was a "final" judgment" was signed have any bearing on the issue. The second part of the issue  
is as stated above.

**ARGUMENT AND AUTHORITY ON**

**THE NON-FINALITY OF THE OCTOBER 24, 2007 JUDGMENT**

**RESPONDENT REAL PARTIES IN INTEREST BRIEF ON THE MERITS  
PAGE 1**

## PART ONE

The facts are that the attorney for Respondent Real Parties in Interest, Thomas Alan Owen, Texas Bar Number 15372450, law license was suspended on March 21, 2007 and at all relevant times thereafter when Petitioner filed its Motion to Dismiss for Lack of Jurisdiction and No-Evidence Motion for Summary Judgment. See Exhibit "A" to the Supplemental Response of Real Parties in Interest, which contains the Default Judgment of Disbarment of Thomas Alan Owen.

It is well settled Texas law that notice to an attorney who is suspended or disbarred will not be imputed to the client. See *Leon's Fine Foods of Tex., Inc. V. Merit Inv. Partners, L.P.*, 160 S.W.3d 148, 154 (Tex.App.–Eastland 2005, no pet.); *J.J.T.B., Inc. v. Guerrero*, 975 S.W.2d 737, 739 (Tex.App.–Corpus Christi 1998, pet. Denied); *Langdale v. Villamil*, 813 S.W.2d 187, 190 (Tex.App.–Houston [14<sup>th</sup> Dist.] 1991, no writ). This is because such an event prevents an attorney from practicing law and therefore automatically severs the attorney/client relationship. See *Cannon v. ICO Tubular Servs., Inc.*, 905 S.W.2d 380, 387 (Tex.App.–Houston [1<sup>st</sup> Dist.] 1995, no writ); *Landgale*, 813 S.W.2d at 190.

In addition, attached as Exhibit "B" to the Supplemental Response of Real Parties in Interest is an affidavit from J. Elaine Mosher, the attorney that Thomas Alan Owen forged her to certain documents filed in the trial court, unequivocally stating that she was never involved in the case at the trial court.

The above case law stands for the premise that notice of any filings, motions or orders dated after March 21, 2007 is not imputed to the Real Parties in Interest. Therefore, the October 13, 2008, Order Setting Aside Dismissal for Lack of Jurisdiction and No-Evidence Summary Judgment, was a proper order within the plenary power of the Trial Court.

## PART TWO

Whether or not the Dismissal of Want of Jurisdiction stands or falls is dependent upon the decision this Court makes as to the finality of the October 24, 2007 order on Relator's No-Evidence Summary Judgment. This case is important because existing case law is not definitive and relies on the determination of the subjective intent of the actor.

The essential argument of Petitioner, Minter Electric Company, Inc., is that the judgment signed on October 24, 2007 was a "final" order that disposes of all parties and all claims and as a result the trial court subsequently lost plenary power to set aside that order.

Even though Plaintiffs' failed to timely respond to the No-Evidence Motion for Summary Judgment, the Motion is fundamentally defective in that it is conclusionary and wholly fails to point out with specificity what discovery requests were not answered by which plaintiff that would conclude that a no evidence motion for summary judgment should be granted.

The motion wholly fails to show that Movant ever asked for evidence of the proximate cause of death.

- a. The motion wholly fails to show that Movant ever asked for evidence of the relationship between the Plaintiffs and the decedent.
- b. The motion wholly fails to show that Movant ever asked for evidence of negligence.
- c. The motion does not request affirmative relief.

Relator alleges that the Court lost its plenary power to set aside the October 24, 2007 order on February 6, 2008. The question is whether or not the Order of October 24, 2007 was a "final" order that effectively disposed of all issues and all parties.

In Relator's No-Evidence Motion for Summary Judgment, on page 4, PRAYER, Relator

prayed;

“that the Court grant this Motion for No-Evidence Summary Judgment, Plaintiffs take nothing by this suit, that Defendant go hence with its costs without delay, and or such other and further relief, both general and special, at law and in equity, to which Defendant may show itself justly entitled.”

No where does Relator specifically ask for affirmative relief in the form of final judgment dismissing with prejudice all of Plaintiffs’ claims and causes of action against all parties and all claims. There is no “Mother Hubbard” clause language in the Motion and the October 24, 2007 judgment wholly fails to state that the judgment disposes of all claims and parties.

The causes of action against MINTER are different than the causes of action against GUEVARA. The causes of action against MINTER are based on “respondent superior” whereas the causes of action against GUEVARA are for his personal conduct of negligence.

First, the order on its face is not a “final” order as to all defendants. The trial judge struck through the word “Final” in the title before signing the order, clearly indicating it was not a final order. Relator took no action after October 24, 2007 that would indicate Relator considered the judgment a final order. If Relator knew that the judgment should be a “final”, Relator should have followed the reasoning in *Martinez v. Southern P.T. Co.*, 951 S.W.2d 824, 830 (Tex.App.–San Antonio 1997, no writ) and said that Plaintiffs take nothing against Defendant. Claims not adjudicated in Relator’s motion, such as the claims against Defendant GUEVARA, are preserved for disposition at trial. *See* Tex. R. Civ. P. 166a(c).

Also, in addition to striking the word “Final” from the judgment, the trial judge entered on the docket sheet, “still 2 other (defendants) so not final. And on February 22, 2008, the judge entered on the docket sheet, “Owen a.p. (attorney for plaintiff) trying to serve Guevara by

publication - reset 45 days on DWOP.” See docket sheet in Real Parties in Interest Sworn Record.

A judgment is final "if it disposes of all pending parties and claims in the record." *Lehmann v. Har-Con Corp.*, 39 S.W.3d 191, 195 (Tex.2001). To determine whether a judgment disposes of all pending claims and parties, it may be necessary for the appellate court to look to the record in the case. *Id.* There must be some "clear indication that the trial court intended the order to completely dispose of the entire case." *Id.* at 205. Therefore, a judgment is final for purposes of appeal when (1) the judgment expressly disposes of some, but not all defendants, (2) the only remaining defendants have not been served or answered, and (3) nothing in the record indicates that the plaintiff ever expected to obtain service on the unserved defendants. *See Youngstown Sheet & Tube Co. v. Penn*, 363 S.W.2d 230, 232 (Tex.1962) (describing when failure to obtain service on defendant may be treated as a nonsuit for purposes of determining finality of judgment); *see also M.O. Dental Lab. v. Rape*, 139 S.W.3d 671, 674-75 (Tex.2004) (holding that decision in *Penn* survives *Lehmann*); *In re Sheppard*, 193 S.W.3d 181, 187 (Tex.App.-Houston [1 Dist.] 2006, orig. proceeding).

Second, this case is similar to *In Re Sheppard*, 193 S.W.3d 181 (Tex.App.–Houston, 2006 [1<sup>st</sup> Dist]). In *Sheppard*, at 183, 184, Relators, Robert D. Sheppard, M.D. and EmCare, filed petitions for a writ of mandamus or, in the alternative, for a writ of prohibition, to challenge an order signed on January 31, 2005, by the respondent trial court, which denied relator's motion to dismiss the underlying lawsuit filed by the real party-in-interest, Louis Ochoa, as plaintiff. In their petitions, relators contend that the trial court lost plenary power over the lawsuit on May 31, 2004, because, on April 30, 2004, the trial court had dismissed Ochoa's claims with prejudice against the only defendant that Ochoa had served. Relators contend that the dismissal constituted

a final judgment because the only remaining defendant, Cooper Manufacturing Corporation (Cooper), was never served and did not appear. The Court of Appeals concluded that the mandamus record demonstrates that, although Ochoa had not effected service on Cooper, Ochoa intended to serve Cooper and intended to continue his claims against Cooper and denied relators' petition for a writ of mandamus.

The essential facts in Ochoa were that on April 30, 2004, eight months after the original petition was filed, the trial court ordered Ochoa's claims against the hospital dismissed with prejudice "for failure to timely file an expert report that conforms to the expert reporting requirements under § 13.01 of Article 4590i" of the Medical Liability Improvement Act.

Four months after dismissal of the hospital, on August 13, 2004, Ochoa filed a second amended petition. This petition included both Sheppard and EmCare as named defendants.

Relator Sheppard was served on September 3, 2004; relator EmCare was served on September 16, 2004. On November 11, 2004, relators moved to dismiss Ochoa's claims. They argued in their motion that the trial court's plenary power had expired on May 30, 2004 because (1) Cooper had not been served and had not answered, and, therefore, (2) the April 30, 2004 dismissal of the hospital pursuant to 4590i constituted a final judgment as to all parties and claims. Their motion alternatively requested that respondent enter a new docket-control order with a new trial date. According to the existing docket-control order, the deadline to join parties was August 8, 2004, and trial was set for December 6, 2004.

Ochoa responded to relators' motion to dismiss on January 3, 2005. As in response to relators' petitions here, Ochoa argued that neither the parties, the respondent trial court, nor the district clerk had "treated" the April 30, 2004 dismissal of the hospital as a final, appealable order. Ochoa supported his response with the affidavit of his counsel, who stated that Ochoa had

"never abandoned his suit against Cooper," offered explanations for not serving Cooper, and also stated that Ochoa was pursuing additional parties. Ochoa contends that he thus demonstrated his intent to serve Cooper, the unserved defendant, in accordance with *M.O. Dental Lab. v. Rape*, 139 S.W.3d 671, 674 (Tex. 2004). On January 31, 2005, the trial court denied relator's motion to dismiss.

Relators contended that the respondent trial court's April 30, 2004 order dismissing the hospital constituted a final judgment as a matter of law over which the trial court lost plenary power 30 days later, specifically, on May 31, 2004. A trial court retains plenary power over its judgment until that judgment becomes final. *Fruehauf Corp. v. Carrillo*, 848 S.W.2d 83, 84 (Tex.1993). "[R]egardless of whether an appeal has been perfected," the trial court retains "plenary power to grant a new trial or to vacate, modify, correct, or reform the judgment within thirty days after the judgment is signed." TEX.R. Civ. P. 329b(d). The date on which the trial court signs the judgment "determine[s] the beginning of the periods . . . for the court's plenary power." TEX.R. Civ. P. 306a(1). Parties may extend this initial 30-day period of plenary power by timely filing a motion that seeks a substantive change in the judgment within that 30-day period. TEX.R. Civ. P. 329b(a), (e), (g); see *Lane Bank Equip. Co. v. Smith Southern Equip., Inc.*, 10 S.W.3d 308, 314 (Tex. 2000); *In re T.G.*, 68 S.W.3d 171, 176 (Tex.App.-Houston [1st Dist.] 2002, pet. denied) (op. on reh'g).

In *Sheppard* as in this case, No party filed a post judgment motion seeking a substantive change in the respondent trial court's dismissal order. That is, Relator did not file a motion to sever its case from the other defendant.

Unserved Defendants—Finality: A judgment is final "if it disposes of all pending parties and claims in the record." *Lehmann v. Har-Con Corp.*, 39 S.W.3d 191, 195 (Tex.2001). To

determine whether a judgment disposes of all pending claims and parties, it may be necessary for the appellate court to look to the record in the case. *Id.* The record "illumin[ates] whether an order . . . that all parties appear to have treated as final may be final despite some vagueness in the order itself." *Id.* There must be some "clear indication that the trial court intended the order to completely dispose of the entire case." *Id.* at 205. The supreme court further noted that "an order that all parties appear to have treated as final may be final despite some vagueness in the order itself, while an order that some party should not reasonably have regarded as final may not be final despite language that might indicate otherwise." *Id.* See *Sheppard* at 187.

More specifically, a judgment is final for purposes of appeal when (1) a judgment expressly disposes of some, but not all defendants, (2) the only remaining defendants have not been served or answered, and (3) nothing in the record indicates that plaintiff ever expected to obtain service on the unserved defendants, such that the case "stands as if there had been a discontinuance" as to the unserved defendants. *Youngstown Sheet & Tube Co. v. Penn*, 363 S.W.2d 230, 232 (Tex.1962); see also *M.O. Dental Lab.*, 139 S.W.3d at 674-75 (holding that decision in *Penn* survives *Lehmann*); *In re Miranda*, 142 S.W.3d at 357 (conditionally granting writ of mandamus on grounds that trial court had lost plenary power 30 days after summary judgment disposed of all defendants except defendant that remained unserved). See *Sheppard* at 187.

In *Sheppard* at 187, the Court stated, "We conclude that the trial court does not lose plenary power over a matter merely because one defendant remains unserved when the only other defendant's claims are dismissed for failure to file a required expert report."

The issuance of citation, paying the service fee and having it delivered to a constable is surely some indication that Plaintiffs intended to serve Defendant Guevara. The case was less

than 10 months old when Minter moved for summary judgment and less than 11 months old when the judgment in question was granted.

In this case, Defendant Minter Electric took no action after the signing of the Order of October 24, 2007 to sever it from the underlying suit or took any action challenging the Court striking the word "Final" from the judgment. Clearly, the Judge was making an express statement concerning non-finality of the judgment and Defendant did not object. The Supreme Court said in *Lehman*, "There must be some "clear indication that the trial court intended the order to completely dispose of the entire case." *Id.* at 205. The supreme court further noted that "an order that all parties appear to have treated as final may be final despite some vagueness in the order itself, while an order that some party should not reasonably have regarded as final may not be final despite language that might indicate otherwise." *Id.*

Third, the trial court continued to carry the case on it's docket as an active case. The attorneys for Relator and **JESUS GUEVARA** are the same. Relator knew citation had been issued for **JESUS GUEVARA**, that he was unserved, that he had not filed an answer, and still Relator took no post judgment action seeking a severance of its case from Defendant, **JESUS GUEVARA**. No other reasonable conclusion can be made from Relator's action, or failure to act, and the trial court's act of striking the word "Final" from the judgment than Relator and the trial court did not consider the judgment dated October 24, 2007 as a final order as to all Defendants, therefore, without a severance by Relator, the judgment could not be "final" as to all Defendants.

Also see *Transamerican Natural Gas Corp. v. Powell* 811 S.W.2d 913, 918 (Tex.1991).

In discussing death penalty sanctions for discovery abuse the Court said:

"[T]here are constitutional limitations upon the power of courts, even in aid of their own

valid processes, to dismiss an action without affording a party the opportunity for a hearing on the merits of his cause." *Societe Internationale v. Rogers*, 357 U.S. 197, 209--10, 78 S.Ct. 1087, 1094, 2 L.Ed.2d 1255 (1958), citing *Hammond Packing Co. v. Arkansas*, 212 U.S. 322, 350--51, 29 S.Ct. 370, 379--80, 53 L.Ed. 530 (1909), and *Hovey v. Elliott*, 167 U.S. 409, 17 S.Ct. 841, 42 L.Ed. 215 (1897); *Accord Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 705--06, 102 S.Ct. 2099, 2105--06, 72 L.Ed.2d 492 (1982). Discovery sanctions cannot be used to adjudicate the merits of a party's claims or defenses unless a party's hindrance of the discovery process justifies a presumption that its claims or defenses lack merit. *Insurance Corp. of Ireland*, 456 U.S. 694, 705--06, 102 S.Ct. 2099, 2105--06; *Rogers*, 357 U.S. at 209--10, 78 S.Ct. at 1094; *Hovey Packing*, 212 U.S. at 350--51, 29 S.Ct. at 379--80. However, if a party refuses to produce material evidence, despite the imposition of lesser sanctions, the court may presume that an asserted claim or defense lacks merit and dispose of it. *Insurance Corp. of Ireland*, 456 U.S. at 705--06, 102 S.Ct. at 2105--06. Although punishment and deterrence are legitimate purposes for sanctions, *National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639, 96 S.Ct. 2778, 49 L.Ed.2d 747 (1976) (per curiam); *Bodnow Corp. v. City of Hondo*, 721 S.W.2d at 839 (Tex.1986), they do not justify trial by sanctions, *Hammond Packing*, 212 U.S. at 350--51, 29 S.Ct. at 379--80; *Hovey*, 167 U.S. at 413--14, 17 S.Ct. at 843. Sanctions which are so severe as to preclude presentation of the merits of the case should not be assessed absent a party's flagrant bad faith or counsel's callous disregard for the responsibilities of discovery under the rules. See *National Hockey League*, 427 U.S. at 642--643, 96 S.Ct. at 2780--81.(fn7)

Although the question before the Court is not exactly a death penalty sanction, the result is the same if the Court strictly follows *Youngstown* and *M.O. Dental Lab*. Taken together, these two cases amount to a death penalty sanction against an unwary litigant.

What if a plaintiff sued two defendants? One defendant being the wrong party the other defendant being a proper party. The wrong party defendant moves for summary judgment before the other defendant is served. Applying Relator's argument that *Youngstown* and *M.O. Dental Lab.*, control, the proper party defendant is automatically dismissed. An illogical result would occur. The existing rulings of the courts have constructed a subjective rule for courts and litigants to consider based on the subjective intent of the actor without deciding which court makes the subjective determination. In this case, the trial court agreed with the Plaintiff. One can conclude that the trial court concluded that the Plaintiff intended to serve the unserved defendant. Relator asks this Court to substitute its judgment for the trial court.


An objective rule would be a better situation. Such as one that requires the party seeking affirmative relief to take action to make its order final; such as the available remedy of severance of its case from that of the unserved defendant. That would then leave the question of what to do with the unserved defendant up to the discretion of the trial court. It is the discretion of the trial court to manage its docket, and should not be up to the subjective discretion of the appellate courts.

#### **PRAYER**

WHEREFORE, Respondent Real Parties in Interest requests the Court find that the trial court retains jurisdiction of the case and all Defendants (including Relator) under the facts and law set forth above. In the alternative, it is requested that this Court find there has been no discontinuance against defendant GUEVARA for the reasons stated above and the trial court

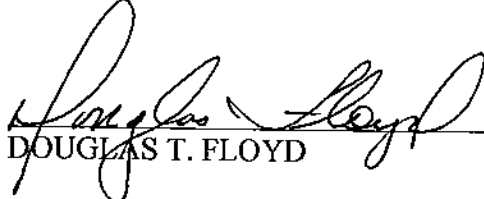
retains jurisdiction against Defendant JESUS GUEVARA for all purposes.

Respectfully submitted.

  
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**CERTIFICATE OF SERVICE**

I do certify that a true and correct copy of the foregoing was sent by First Class U.S. Mail to Bryan P. Reese and P. Wes Black, Three Galleria Tower, 13155 Noel Road, Suite 1000, Dallas, Texas 75240 on August 15, 2009.

  
DOUGLAS T. FLOYD