

In The  
**Texas Supreme Court**

*In re* MINTER ELECTRIC COMPANY, INC.

*Relators.*

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*Original Proceeding from  
Cause No. 06-12470  
191st District Court, Dallas County  
Hon. Gena Slaughter, Presiding*

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**RELATOR'S REPLY TO REAL PARTY  
IN INTEREST'S RESPONSIVE BRIEF ON THE MERITS**

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TO THE TEXAS SUPREME COURT:

Relator, **MINTER ELECTRIC COMPANY, INC.**, files this its Reply to Real Party in Interest's Responsive Brief on the Merits.

Clearly concerned with the tenuousness of their position on the Issue Presented, Real Parties now seek to have this Court decide a completely different issue than the one raised by Relator's Petition. However, The sole question before this Court is whether the presence of unserved parties makes an otherwise final judgment interlocutory, despite being final in all other respects. The answer is, and should be, an unequivocal "no."

### **ARGUMENT AND AUTHORITIES**

Arising from either a desire to obfuscate the issue, or to avoid addressing it altogether, Real Parties have taken the unprecedented (or at least rarely-precedented) step of filing "evidence" in the Supreme Court that was not before either the trial court or the Court of Appeals when those courts decided the issues before them. This "evidence" should be ignored by this Court as it was never presented to any court below, and in any event is completely irrelevant to the issue before this Court. As this Court is well aware, documents that were not part of the trial court record at the time of the hearings that led to the challenged orders, but that were included in the mandamus record, should not be considered by an appellate court. *In re Bahn*, 13 S.W.3d 865, 870-871 (Tex. App.--Fort Worth 2000, orig. proceeding)(citing *Simon v. Bridewell*, 950 S.W.2d 439, 441 (Tex. App.--Waco 1997, orig. proceeding); *Intercity Management*

*Corp. v. Chambers*, 820 S.W.2d 811, 813 n.4 (Tex. App.--Houston [1st Dist.] 1991, orig. proceeding).

The thrust of the supplemental briefing provided by Real parties in Interest appears to be their contention that the Real Party in Interest's trial counsel was disbarred at the time of the filing of Relator's Motion for Summary Judgment and Motion to Dismiss for Lack of Jurisdiction, the granting of which Relator contends resulted in a final judgment in this case.

This issue has absolutely no bearing on the issue before this court – i.e., whether the trial court's Order setting aside the Summary Judgment and Dismissal occurred outside the trial court's plenary power and was thus void for want of subject matter jurisdiction. First, all of the issues now raised by the Real Parties go to the merits of their Motion to set aside the Default Judgment. They are therefore irrelevant for the simple reason that *the Court granted that Motion*. Although they disagree with it, Relators are not challenging the trial court's decision to set aside the judgment, only its subject matter jurisdiction to do so. The bar status of Real Party in Interest's trial counsel at any time is simply not pertinent to the only issue before the Court. Nor were any of those issues ever presented to the Dallas Court of Appeals.<sup>1</sup>

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<sup>1</sup> Real Parties allege that Ms. Mosher's signature on the Motion for New trial was forged. However, Real Parties did not attempt at any time to put any such evidence in front of the trial court. In fact, the affidavit attempting to support their claims that Owen did was not licensed at the time of the summary judgment proceeding was not signed until July 14<sup>th</sup> 2009, the affidavit of Elaine Mosher (assuming it is an accurate and authentic document) was not signed until May 1, 2009. By the time these documents were executed, this case was already before this court (and notably, this Court had requested a response to Relator's Petition for Writ of Mandamus. As this Court is well aware, it cannot receive evidence that was not before the trial court or the Court of Appeals, and such evidence must be disregarded in its entirety. See Tex. R. App. P. 52.7(a)(requiring that documents in a sworn record be filed in the underlying proceeding).

Most importantly, none of these arguments affect the finality of the judgment, nor do any such arguments provide a justification for any acts taken outside of the Court's plenary power. Regardless of the licensure status of any of Plaintiff's prior trial counsel was at the time of the filing of Relator's Motion for Summary Judgment, Real Party in Interest's fully licensed counsel J. Elaine Mosher filed a timely Motion for New Trial explaining why the failure to file a response to the Motion for Summary Judgment was not due to any intentional or consciously indifferent act. CR 47. This Motion is supported by an Affidavit of Ms. Mosher stating that the reason that she did not file a timely response to Relator's Motion for Summary Judgment was that she had erroneously calendared the hearing date on that Motion. CR 58. In any event, no hearing was heard on this Motion and it was overruled by operation of law, as set forth in Relator's Petition for Writ of Mandamus.

Any argument regarding the bar status of plaintiff's counsel at the time of the summary judgment proceeding go to the merits of the dismissal order and subsequent reinstatement Order - neither of which are challenged by way Relator's Petition. Rather, Relator challenges only the trial court's power to reinstate the case with respect after the expiration of the its plenary power. Thus, the lion's share of the Response provides no assistance to this Court in determining the issues before it.

To the extent Real Party in Interest is dissatisfied with the prior trial counsel, and even assuming that the evidence upon which they now rely is accurate, an untimely Motion to Set Aside is not the proper vehicle to address such dissatisfaction, nor is it a basis to keep Relator embroiled in this litigation long after it has secured a final judgment

in the case. To permit it to be so would create a significant amount of confusion within the bench and bar as to the limits of a trial court's plenary power.

Finally, this accident occurred in December 2004, over four years prior to the filing of Relator's Motion for Summary Judgment. At some point, a client is responsible for ensuring that their counsel is effectively handling their case, and if not, to terminate them and seek other counsel. Even if they do not, there are remedies for situations in which a party's counsel has not effectively and adequately represented them. None of those remedies involve keeping a dismissed defendant in the case after a trial court's plenary power has expired. This argument is no different than an argument that a statute of limitations defense should be overruled because the claimant's attorney failed to exercise due diligence in obtaining service of process. Their remedy lays with their counsel, not with a defendant asserting a valid, good-faith defense. In any event, a client who permits a case to lie fallow for four years without replacing their counsel should not be heard to complain that the defendant should be punished for their own counsel's idleness.

With regard to the jurisdictional issues, Real Party makes few arguments that were not made to the Court of Appeals. First, Real Party in Interest argues that the Court's deletion of the word "Final" in the October 24<sup>th</sup> 2007 judgment indicates an intent by the Court to maintain the judgment as interlocutory. As noted in the Petition and in the Brief on the Merits, a Court may make an otherwise interlocutory Order final by adding language to that effect, but the converse is not true – a Court cannot convert an otherwise final order that disposes of all parties and claims into an interlocutory one.

*Lehmann v. Har-Con Corp.*, 39 S.W.3d 191, 200 (Tex. 2001) (“The language of an order or judgment cannot make it interlocutory when, in fact, on the record, it is a final disposition of the case....But the language of an order or judgment *can* make it final, even though it should have been interlocutory, if that language expressly disposes of all claims and all parties”). Thus, the trial Court’s deletion of the word “final” cannot make the Order interlocutory if it, in fact, disposes of all parties and all claims (which the record reveals that it does). If the Order disposes of all parties and claims, whether by its own language or by its effect as revealed by the record, then it is final and appealable. As this Court aptly put it:

[a]n order can be a final judgment for appeal purposes even though it does not purport to be if it actually disposes of all claims still pending in the case. Thus, an order that grants a motion for partial summary judgment is final if in fact it disposes of the only remaining issue and party in the case, even if the order does not say that it is final, *indeed, even if it says it is not final*.

*Lehmann v. Har-Con Corp.*, 39 S.W.3d at 204 (emphasis added).

Second, Real Party in Interest relies on *In re: Sheppard*, in support of her position that judgment entered by this Court was interlocutory. *In re: Sheppard* 193 S.W. 181, 185 (Tex. App.—Houston 2006 [1<sup>st</sup> Dist] no pet.). As discussed in the Petition, *Sheppard* was not a departure from *Youngstown v. Penn* and its progeny, but instead reaffirmed the holding of those cases that the amount of time between the filing of a suit and the date of the summary judgment can create a discontinuance as to the unserved party, and the judgment “is to be regarded as final for the purposes of appeal.” *Youngstown Sheet and Tube Company v. Penn*, 363 S.W.2d 230, 232 (Tex. 1962). The *Sheppard* Court noted that the dismissal in that case was against a served defendant

pursuant to former article 4590i, “a statute intended to reduce frivolous claims early in litigation” the court concluded that the “plaintiff’s failure to effect service on a defendant is not tantamount to lack of intent to serve that defendant.” *See Id.* at p. 187. Because a summary judgment occurs late in the stages of litigation, the presence of unserved defendants at that late stage indicates the lack of intent to serve them. Because a dismissal under former article 4590i necessarily occurs early in the litigation, the presence of unserved parties at that time is not an indication of a lack of intent to serve, and thus *Youngstown* is inapplicable to a 4590i dismissal. Unlike *In Re Sheppard*, the case before this Court is not a dismissal under former article 4590i and *Youngstown* governs the rule of decision.

Finally, Real Party points to a docket sheet in which there appears an entry dated February 22, 2008 stating that Plaintiff’s counsel Owen was, at that time, attempting service by publication. Again, assuming that this is true, it occurred approximately three weeks after the trial court lost plenary power over the case. However, the rule under *Youngstown* as illuminated by *Lehmann* is whether, on the date the summary judgment was granted, the record contained evidence of any intent to serve the unserved defendant. An order may only be final and appealable as of the date it is rendered, not with reference to events occurring after its rendition. Indeed, Real Parties current counsel has repeatedly stated an intent to serve Guevara and has, in fact, obtained service upon him. Relators have no doubt that there is a *current* intent to involve Guevara in the suit. An expression of such an intent after the loss of plenary power is of no effect, and would in practice create a sliding scale for plenary power depending

on when claimant's counsel decides to reveal an intent to serve the unserved defendant. Under this standard, the manifestation of an intent to serve months after the expiration of plenary power would, by itself, revive that power. Such a malleable standard would undermine the notions of finality that the plenary power concept was developed to promote.

Because the presence of unserved parties does not affect the finality of the judgment rendered by the trial court on October 24, 2007, the Court's plenary power expired on February 6, 2008. As such, the Court lacks plenary power to grant any relief now sought by Berry and its actions in violation of its plenary power constitute an abuse of discretion.

#### **PRAYER**

For the reasons stated, the Texas Supreme Court should issue a writ of mandamus to the 191st District Court, Dallas County, Texas, and all assigned judges, to vacate the Order of the 191st District Court, Dallas County, Texas setting Aside Dismissal for Want of Jurisdiction and No-Evidence Summary Judgment, requiring the District Court to dismiss the case for lack of jurisdiction, and for such additional relief to which Relators may be entitled.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

This petition and the record were served on the respondent, the real parties in interest and co-counsel on August 31, 2009 by mailing copies to the following:

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