
NO. 09-1014

IN THE SUPREME COURT OF TEXAS

In Re PERVEZ DAREDIA, Relator

Original Proceeding from the 393rd Judicial District Court
Denton County, Texas
Cause No. 2007-60095-393

**PETITIONER BRIEF ON THE MERITS
IN SUPPORT OF PETITION FOR WRIT OF MANDAMUS**

STEVE SNELSON
State Bar No. 18794450

Gerstle, Minissale & Snelson, LLP
5005 Greenville Ave., Suite 200
Dallas, Texas 75206
(214) 368-6440
(214) 363-9979 [Facsimile]

**ATTORNEYS FOR RELATOR
PERVEZ DAREDIA**

ORAL ARGUMENT REQUESTED

NO. 09-1014

IN THE SUPREME COURT OF TEXAS

In Re PERVEZ DAREDIA, Relator

Original Proceeding from the 393rd Judicial District Court
Denton County, Texas
Honorable Doug Robison, Presiding
Cause No. 2007-60095-393

**BRIEF ON THE MERITS IN SUPPORT OF
PETITION FOR WRIT OF MANDAMUS**

STEVE SNELSON
State Bar No. 18794450

Gerstle, Minissale & Snelson, LLP
5005 Greenville Ave., Suite 200
Dallas, Texas 75206
(214) 368-6440
(214) 363-9979 [Facsimile]

**ATTORNEYS FOR RELATOR
PERVEZ DAREDIA**

ORAL ARGUMENT REQUESTED

IDENTITY OF PARTIES AND COUNSEL

Pursuant to Tex. R. App. P. 55.2, Relator certifies that the following is a complete list of the parties, attorneys, and any other person who has any interest in the outcome of this lawsuit.

Relator (Appellant and Defendant below)

Pervez Daredia (“Daredia”)

Attorneys for Relator

Steven Snelson

Trial/Appellate Counsel

State Bar No. 18794450

Gerstle, Minissale & Snelson, L.L.P.

5005 Greenville Avenue, Suite 200

Dallas, Texas 75206

(214) 368-6440

(214) 363-9979 [Facsimile]

Respondent

The Honorable Doug Robison

393rd Judicial District Court

Denton County Courthouse

1450 E. McKinney Street

Denton, Texas 76209

Real Parties in Interest (Appellees and Plaintiffs below)

American Express Centurion Bank and American Express Bank, FSB

(jointly referred to as “American Express”)

Attorneys for Real Parties in Interest

Alan Scheinthal

Trial/Appellate Counsel

State Bar No. 17736640

Scheinthal & Kouts, L.L.P.

4635 Southwest Freeway, Suite 720

Houston, Texas 77027

(713) 871-8040

(713) 871-8642 [Facsimile]

TABLE OF CONTENTS

Identity of Parties and Counsel.....i

Table of Contents ii

Index of Authorities iii

Statement of The Case vii

Statement of Jurisdiction.....1

Statement of Issues Presented.....1

No. 1. The Court should grant this petition for writ of mandamus because the underlying judgment is final and not interlocutory so the Respondent was without jurisdiction to vacate the judgment by granting a judgment nunc pro tunc and entering a new interlocutory judgment.

A. The underlying judgment is a final and not interlocutory judgment. (App. Tab A.)

B. As the underlying judgment is a final judgment the Respondent was without jurisdiction to vacate the judgment outside of the court’s plenary jurisdiction through a judgment nunc pro tunc and enter a new interlocutory judgment. (App. Tab B and C.)

Summary of Argument.....1

Statement of Facts2

Argument.....5

Conclusion... ..20

Prayer.....21

Certificate of Service22

Appendix..... 24

Index of Authorities

<u>Cases</u>	<u>Pages</u>
<i>America’s Favorite Chicken Co. v. Galvan</i> , 897 S.W. 2d 874 (Tex.App.-San Antonio 1995, writ denied).....	19
<i>American Steel and Supply, Inc. v. Commercial Metals, Inc.</i> No. 13-08-00502-CV, 2010 WL 877661 (Tex. App.-Corpus Christi, March 11, 2010).....	7
<i>Andrews v. Koch</i> , 702 S. W. 2d 584 (Tex. 1986).....	16
<i>Baker v. Cont’l Airlines, Inc.</i> , 31 S.W. 3d 641 (Tex. App.-Houston [1 st Dist.] 2000, pet. denied).....	17
<i>Barton vs. Gillespie</i> , 178 S.W. 3d 121 (Tex. App.-Houston [1 st Dist.] 2005, no pet).....	16, 17
<i>BHP Petroleum v. Millard</i> , 800 S.W.2d 838 (Tex. 1990).....	11
<i>Brentwood Apartments at Fort Worth v. Builders Bank</i> , No. 2-10-016-CV, 2010 WL 127894 *1 (Tex. App.-Fort Worth, April 2010)	6
<i>Carlyle Real Estate Ltd. Partnership-X v. Leibman</i> , 782 S.W. 2d 230 (Tex. App.-Houston [1 st Dist.] 1989, no writ)	17
<i>City of Houston v. Thomas</i> , 838 S.W.2d 296 (Tex. App. – Houston [1 st Dist.] 1992, no writ).....	13
<i>Coastal Ref. & Mktg., Inc. v. Latimer</i> , 838 S.W.2d 570 (Tex. App. Corpus Christi 1992, writ denied)	20
<i>Digital Imaging Ass. Inc. v. State</i> , 176 S.W.3d 851 (Tex. App. – Houston [1 st Dist.] 2005, no pet.)	11
<i>Dikeman v. Snell</i> , 490 S.W.2d 183 (Tex. 1973).....	15, 18, 19
<i>Escobar v. Escobar</i> , 711 S.W.2d 230 (Tex. 1986).....	16, 17

<i>Gallegos v. Johnson</i> , No. 13-07-00603-CV, 2010 WL 672934 (Tex. App.-Corpus Christi, February 25, 2010).....	7
<i>Gen. Elec. Co. v. Canyon City Ice & Light Co.</i> , 136 S.W.78 (Tex.Civ.App. 1911, no writ).....	16
<i>Gutierrez v. Elizondo</i> , 139 S.W. 3d 768 (Tex. App.-Corpus Christi 2004, no pet.)	16
<i>Home Indemnity Co. v. Muncy</i> , 449 S.W.2d 312 (Tex.App.-Tyler 1970, writ ref'd n.r.e.)	15
<i>Inglish v. Union State Bank</i> , 945 S.W.2d 810 (Tex. 1997).....	14
<i>In re Baylor Medical Center at Garland</i> , 289 S.W.3d 859 (Tex. 2008).....	5
<i>In re Burlington Coat Factory of McAllen</i> , 167 S.W.3rd 827 (Tex. 2005)	6, 10
<i>In re Certain Underwriters at Lloyd's London</i> , No. 01-09-00851-CV, 2010 WL 184300 (Tex. App.-Houston [1 st Dist.], January 15, 2010	7
<i>In re Dickason</i> , 987 S.W.2d 570 (Tex. 1998).....	1
<i>In re Fuselier</i> , 56 S.W.3d 265 (Tex.App.-Houston [1 st Dist.] 2001, orig. proceeding)	19
<i>In re Nguyen</i> , 155 S.W.3d 191 (Tex. App.-Tyler 2003)(orig. proceeding).....	16
<i>In re Rollins</i> , 987 S. W. 2d 633 (Tex. App.-Houston [14 th Dist.] 1999)(original proceeding).....	17, 19
<i>In re Southwestern Bell Telephone Co.</i> , 35 S.W.3d 602 (Tex. 2000).....	1

<i>In the Interest of S.A.M.,</i> No. 14-08-01068-CV, 2010 WL 445724 (Tex. App.-Houston [14 th Dist.], January 28, 2010).....	7
<i>Kaigler v. General Elec. Ins. Mort Corp.,</i> 961 S.W.2d 273 (Tex. App. – Houston [1 st Dist.] 1997, no pet.	20
<i>Knox v. Long,</i> 152 Tex. 291, 257 S.W. 2d 289 (1953).....	15
<i>LaGoye v. Victoria Wood Condo. Ass’n,</i> 112 S.W.3d 777 (Tex.App.-Houston [14 th Dist.] 2003, no pet.).....	19
<i>Lehmann v. Har-Con Corp.,</i> 39 S.W.3d 191 (Tex. 2001).....	1, 2, 6, 7, 8, 9, 10, 11, 12, 14, 19, 20
<i>Lone Star Cement Corp. v. Fair,</i> 467 S.W.2d 402 (Tex. 1971).....	15
<i>Mafrige v. Ross,</i> 866 S.W. 2d 590 (Tex. 1993).....	9, 10
<i>Mathes v. Kelton,</i> 569 S.W.2d 876 (Tex. 1978).....	15
<i>McHone v. Gibbs,</i> 469 S.W.2d 789 (Tex. 1971).....	15
<i>Nguyen v. Woodley,</i> 273 S.W.3d 891 (Tex.App.-Houston [14 th Dist.] 2007, no pet.).....	14
<i>Nolan v. Bettis,</i> 562 S.W.2d 520 (Tex. Civ. App.-Austin 1978, no writ)	17
<i>North East Indep. Sch. Dist. v. Aldridge,</i> 400 S.W.2d 893 (Tex.1966).....	9
<i>Perry v. Nueces County,</i> 549 S.W.2d 239 (Tex.Civ.App.-Corpus Christi 1977, writ ref’d n.r.e.).....	15
<i>Restaurant Enterprises, L.P. v. Travelers Indemnity Co.,</i> No. 03-07-00571-CV, 2010 WL 153610 (Tex. App.-Austin, January 15, 2010)	7

Seago v. Bell,
764 S.W. 2d 362 (Tex.App.-Beaumont 1989, no writ)19

Rules of Court

TEX. GOV'T CODE ANN. § 22.001(a).....1
TEX. R. CIV.P. 306(a).....3, 13
TEX. R. CIV. P.1.....5
TEX. R.CIV. P. 162..11

Statement of the Case

Description of underlying proceeding: Plaintiffs filed suit against Daredia and Map Wireless, Inc. for collection on a debt.

Name of Respondent: The Honorable Doug Robison
393rd Judicial District Court
Denton County presiding judge

Respondent's Actions: On February 24, 2009, the Respondent, Judge Robison, signed an order granting American Express' motion for judgment nunc pro tunc and vacating the prior final judgment that was signed on July 2, 2007. (App. Tabs A, B and C)¹ Judge Robison denied rehearing on March 23, 2009.

The Court of Appeals Panel: A petition for writ of mandamus was filed on April 6, 2009 with the Second Court of Appeals. A panel consisting of Justices Gardner, McCoy and Cayce denied the request for mandamus relief. *In re Pervez Daredia*, No. 2-090106-CV, 2009 WL 4416548 (Tex. App.-Fort Worth, October 20, 2008, orig. proceeding)(slip op. attached at App. Tab D.)

Court of Appeals' Disposition: The Court of Appeals denied Daredia's request for mandamus relief by finding the judgment at issue was interlocutory and not final.

Disposition on Rehearing: Daredia requested relief by motion for en banc rehearing, which was denied on November 25, 2009.

¹ References will be to the Record on Mandamus, previously filed separately along with the Petition for Writ of Mandamus, and to the particular document by the designation "R" followed by the tab, and page or exhibit number where appropriate. To the extent that the document is also made a part of the appendix to the Brief on the Merits, a reference will be included to the appendix by tab number as "App".

Statement of Jurisdiction

This Court has jurisdiction pursuant to TEX. GOV'T CODE ANN. § 22.001(a). The Supreme Court has jurisdiction over this mandamus because the Respondent issued orders after its plenary power had expired, as a result, the orders are void. *In re Southwestern Bell Telephone Co.*, 35 S.W.3d 602, 605 (Tex. 2000); *In re Dickason*, 987 S.W.2d 570, 571 (Tex. 1998).

Statement of Issues Presented

No. 1: The Court should grant this petition for writ of mandamus because the underlying judgment is final and not interlocutory so the Respondent was without jurisdiction to vacate the final judgment by granting a judgment nunc pro tunc and entering a new interlocutory judgment.

A. The underlying judgment is a final and not interlocutory judgment. (App. Tab A.)

B. As the underlying judgment is a final judgment, the Respondent was without jurisdiction to vacate the judgment outside of the court's plenary jurisdiction through a judgment nunc pro tunc and enter a new interlocutory judgment. (App. Tab B and C.)

Summary of Argument

This case asks the Court to once again revisit the issue of what language in a judgment conclusively establishes finality. The courts have struggled with the issue of finality of judgments for years and it appeared that this Court resolved the issue with its holding in *Lehmann v. Har-Con Corp.*, 39 S.W. 3d 191, 206 (Tex. 2001). In *Lehmann* this Court prescribed specific language that “would leave no doubt” that a judgment was conclusively final. *Id.* That language was “This judgment disposes of all parties and all claims and is appealable”. *Id.*

Despite the fact the judgment in this case contains the same clear and unambiguous language that was prescribed by the Court in *Lehmann*² the Court of Appeals improperly found the judgment to be interlocutory and not final. As a result the Court of Appeals found the trial court never lost plenary power and was able to vacate and modify a judgment almost two years after it appeared to be final. If *Lehmann* is properly applied in this case, the 2007 judgment is final and the Respondent was without jurisdiction to vacate it through a judgment nunc pro tunc because irregardless of whether the judgment was erroneous it still contained language that “would leave no doubt” that it was a final judgment.

This case provides the opportunity for the Court to provide further guidance to the courts and litigants that if the wording of the judgment includes words to the effect of “This judgment finally disposes of all parties and all claims and is appealable” then the judgment is final even if it was erroneously entered. In order to correct errors in a final erroneous judgment, a party is required to appeal the judgment and it cannot be modified by the trial court after it has lost plenary power.

Statement of Facts

The underlying case relates to a credit card debt collection action that American Express filed on May 7, 2007 against Daredia and Map Wireless, Inc. (R. Tab A.) Daredia filed an answer but Map Wireless did not. (R. Tab B.)

² The only difference in the language from *Lehmann* and the judgment in this case is the *Lehmann* language states “appealable” and the judgment states “FINAL”. App. A.

Daredia did not assert any affirmative claim for relief in his answer. *Id.* American Express moved for default against Map Wireless and drafted the judgment. (R. Tab C.) On July 2, 2007, the trial judge, Judge Vicki Issacks, signed American Express' default judgment granting it all of the relief and damages that it was requesting. (App. Tab A.) The judgment specifically states, "all relief not granted herein is denied. The judgment disposes of all parties and all claims in this cause of action and is therefore FINAL." *Id.* It also contains other language indicating a final judgment is intended including: typical Mother Hubbard language; calculation of prejudgment interest; request for issuance of writs; and a statement that the judgment is final. *Id.*

On July 3, 2007, the Denton County District Clerk sent out notice in accordance with Texas Rule of Civil Procedure 306(a) that a final judgment had been entered in the case. (R. Tab N.) Following the issuance of the final judgment, American Express took no actions to amend, alter or vacate the judgment during the time that the trial court held plenary power.

On October 29, 2008, more than sixteen (16) months after the judgment was signed, American Express filed a motion for judgment nunc pro tunc seeking to vacate the judgment. (R. Tab F.) A hearing was set for December 1, 2008, but Judge Issacks was not on the bench and American Express filed an objection to the visiting judge.³ (R. Tab I-2, p. 4.)

³ Judge Issacks did not run for re-election so her term expired on December 31, 2008.

Without setting another hearing or providing any notice to the parties, Judge Issacks evidently granted the motion for judgment nunc pro tunc on December 17, 2008, but never signed any order. (R. Tab I-2 p.5.) On December 31, 2008, Judge Issacks' term expired and Judge Doug Robison began his term on January 1, 2009. On February 24, 2009, more than twenty (20) months after the original judgment was signed, a hearing was held with Judge Robison to determine the status of the case because no order granting the motion for judgment nunc pro tunc was ever signed by Judge Issacks. (R. Tab I-2.p.5.) Judge Robison stated that in reviewing the file he noted a docket entry indicating the motion for judgment nunc pro tunc was granted so he felt he had a ministerial obligation to sign the order in conformity with what he understood to be Judge Issacks' prior ruling. (R.Tab I-2, p.5) Judge Robison thereafter signed the order granting American Express' motion for judgment nunc pro tunc, vacating the prior judgment, and signed a new interlocutory default order against Map Wireless and putting the case against Daredia back on the trial docket. (App.Tab B and C; R. Tab. I-2, p. 13-14.)

Due to the fact that Judge Robison indicated that he felt a ministerial obligation to sign the order granting the motion but had not independently reviewed the matter, Daredia filed a motion for rehearing to provide Judge

Robison an opportunity to reconsider the merits of the motion.⁴ (R. Tab M.) The rehearing was held on March 22, 2009, at which time Judge Robison indicated that he believed a mistake had been made in the rendition of the judgment and that he had inherent power under Texas Rule of Civil Procedure 1 to find that the court had subject matter jurisdiction over the case and to affirm the granting of the judgment nunc pro tunc.⁵ (R. Tab I-3, p. 9-10) Judge Robison, therefore, denied the motion for rehearing necessitating the original petition for writ of mandamus to the Second Court of Appeals.

The petition for writ of mandamus was filed with the Second Court of Appeals on April 6, 2009. On October 20, 2009, the Court of Appeals determined that despite the language of finality, the underlying judgment was actually interlocutory and not final, thus the trial court never lost jurisdiction over the case. (App. Tab D.) The denial of granting mandamus relief necessitates the need to file this mandamus action with the Supreme Court of Texas.

Argument

No. 1: The Court should grant this petition for writ of mandamus because the underlying judgment is final and not interlocutory so the Respondent was without jurisdiction to vacate the final judgment by granting a judgment nunc pro tunc and entering a new interlocutory judgment.

⁴ Case law indicates that a successor judge must be given an opportunity to independently review and adopt an order prior to mandamus relief being granted. *In re Baylor Medical Center at Garland*, 289 S.W. 3d 859, 860 (Tex. 2008).

⁵ There were no arguments made either orally or in the motions to the trial court that stated the underlying judgment was interlocutory and not final. All of the arguments surrounded American Express' contention that a final judgment was erroneously entered.

A. The underlying judgment is a final and not interlocutory judgment. (App. Tab A.)

The Court of Appeals denied the request to issue mandamus relief against the Respondent due to a misapplication of the holding in *Lehmann*. The Court of Appeals stated:

Daredia contends that the July 2007 judgment is a final judgment because it contains language indicating that “[a]ll relief not expressly granted in herein denied. This judgment disposes of all parties and all claims in this cause of action and is therefore FINAL.” The quoted language, absent more, would appear to make the judgment final and appealable. *See Lehmann*, 39 S.W. 3d at 206 (“A statement like, ‘This judgment finally disposes of all parties and all claims and is appealable,’ would leave no doubt about the court’s intention”); see also *Burlington Coat*, 167 S.W. 3d at 830. (emphasis added.)

While the Court of Appeals cited the proper language from *Lehmann* and agreed the judgment in this case contains the same language, it later went on to hold that despite this clear and unequivocal language, the judgment was not final but was interlocutory because it was not otherwise supported by the record. *Lehmann*, however, states that if the language of finality is included in a judgment, the judgment is final irregardless of whether the judgment was erroneous. *Id.* at 206. Despite the fact that the holding of *Lehmann* appears to establish clear precedent, there is apparently still some confusion among the various appellate courts as to the proper application of *Lehmann* that requires clarification.

In both this case and in *Brentwood Apartments at Fort Worth v. Builders Bank*, No. 2-10-016-CV, 2010 WL 127894, *1 (Tex. App.-Fort Worth, April 1, 2010), the Fort Worth Court of Appeals found that a judgment containing

language that unequivocally complied with the holding of *Lehmann* did not actually constitute a final judgment because the judgment purportedly did not dispose of all claims and all parties. Other courts, however, have found that the *Lehmann* language of finality is dispositive even if the judgment is erroneous or does not actually dispose of all claims and all parties. See *American Steel and Supply, Inc. v. Commercial Metals, Inc.*, No. 13-08-00502-CV, 2010 WL 877661 (Tex. App.-Corpus Christi, March 11, 2010); *Gallegos v. Johnson*, No. 13-07-00603-CV, 2010 WL 672934, *2 fn 5 (Tex. App.-Corpus Christi, February 25, 2010); *In re Certain Underwriters at Lloyd's London*, No. 01-09-00851-CV, 2010 WL 184300, *2 (Tex. App.-Houston [1st Dist.], January 15, 2010); *Restaurant Enterprises, L.P. v. Travelers Indemnity Co.*, No. 03-07-00571-CV, 2010 WL 153610, *3 (Tex. App.-Austin, January 15, 2010).

Other courts have also raised issue with how to apply the holding of *Lehmann*. In a dissent in *In the Interest of S.A.M.*, No. 14-08-01068-CV, 2010 WL 445724 *2 (Tex. App.-Houston [14th Dist.], January 28, 2010), Justice Frost argued that if there is language in a judgment that conforms with *Lehmann*, that an appellate court must give finality to the judgment and is actually barred from abating the case to attempt to determine the true intent of the trial court because the language of the judgment is dispositive and controlling.

This case presents the Court with the opportunity to once and for all explain the proper application of *Lehmann* because the Court is presented with a judgment that contains language that complies with *Lehmann* but makes no specific

identification of one of the defendants.⁶ The judgment specifically disposed of “all parties and all claims”. (App. Tab A.) It states all relief not granted is denied. *Id.* It awards American Express the full amount of damages sought for all claims. *Id.* It awards the full amount of the attorneys’ fees requested. *Id.* It calculates prejudgment interest. *Id.* It asks for writs to be issued. *Id.* The judgment states it is “FINAL” in the body of the judgment. *Id.* and it requests post-judgment interest be awarded. *Id.* The judgment contains everything that would signify a final judgment. There is no basis under *Lehmann* to find the judgment is interlocutory or ambiguous.

The Court of Appeals stated, “The Supreme Court of Texas has concluded that a judgment without a trial on the merits is not final ‘unless it actually disposes of every pending claim and party or unless it clearly and unequivocally states that it disposes of all claims and all parties.’” (Tab D. p. 3)(emphasis added). In its opinion, however, the Court of Appeals required Daredia to establish both that the judgment actually disposes of all pending claims and parties and that the judgment unequivocally states that it disposes of all claims and all parties. The Court of Appeals found the wording of the judgment unequivocally indicated it was final but decided the judgment was interlocutory because it was not otherwise

⁶ Daredia asserts that the language “This judgment disposes of all parties and all claims in this cause of action and is therefore FINAL”, specifically disposes of the claims against him, but concedes he is not otherwise individually named in the judgment.

supported by the record.⁷ (App. Tab D p. 3-4.) This violates the express holding of the *Lehmann* case.

In a situation where the wording of a judgment creates a final judgment by clearly and unequivocally disposing of all claims and all parties, it should be irrelevant whether the judgment is otherwise supported by the record. This Court stated:

One may argue after *Aldridge* and *Mafrige* that it is perilous to suggest any particular language that will make a judgment final and appealable because that language can be inserted in orders intended to be interlocutory. But to leave in doubt the degree of clarity required for finality creates its own problems. The Mother Hubbard clause proved to give no indication of finality not just because it found its way into every kind of order, but because it was inherently ambiguous as we have explained. A statement like “This judgment disposes of all parties and all claims and is appealable” would leave no doubt about the court’s intentions. An order must be read in the light of importance of preserving a party’s right to appeal. If the appellate court is uncertain about the intent of an order it can abate the appeal to permit clarification by the trial court. But if the language of the order is clear and unequivocal, it must be given effect despite any other indications that one or more parties did not intend the order to be final. An express adjudication of all parties and claims in a case is not interlocutory merely because the record does not afford a legal basis for the adjudication. In those circumstances, the order must be appealed and reversed. *Id.* at 206 (emphasis added.)

⁷ The specific statement of the Court of Appeals is, “Here, the order fails to address any of American Express’ claims against Daredia, yet it contains language that clearly and unequivocally indicates this is a final judgment.” (App. Tab D. p.3.)(emphasis added.) It is difficult to see how the language in the judgment can both be clear and unequivocal and ambiguous on its face as the Court of Appeals opined. These two findings would appear to be mutually exclusive.

The Supreme Court should clarify that the proper analysis in applying *Lehmann* is to first review the wording of the judgment itself. If the judgment expressly “disposes of all parties and all claims”⁸ or otherwise conclusively indicates the judgment is final, then the judgment is final even if there are “other indications that one or more parties did not intend the order to be final.” Only if the wording of the order does not dispose of all parties and all claims is there a need to analyze the record or seek clarification of the judgment from the trial court. *See In re Burlington Coat Factory of McAllen*, 167 S.W.3d 827, 830 (Tex. 2005). If this is not the proper analysis, then the wording of a judgment will be irrelevant because there must always be a need to determine whether the judgment is supported by the evidence or was intended to be final.

For the Court of Appeals to hold that a judgment with language that the Supreme Court has stated “would leave no doubt of the court’s intention” is actually ambiguous because it is not otherwise supported by the judgment is a clear misapplication of the *Lehmann* decision.

There really can be no dispute that the wording of the judgment in this case indicates it is a final judgment. It is either a final judgment because American Express intended to dismiss its claims against Daredia in order to secure a full and final judgment against Map Wireless⁹ or it was an erroneous judgment that

⁸ This language was proposed because it cures the inherent conflict in other Mother Hubbard language that was previously approved. *See Mafrige v. Ross*, 866 S.W. 2d 590 (Tex. 1993).

⁹ American Express has never provided any evidence that the attorney who drafted the judgment made a drafting error or that the request for a final judgment was not intended. (R. Tab C and E.)

improperly disposed of unaddressed claims but nevertheless became final because American Express requested dismissal of “all claims and all parties”. Either way, however, the judgment is still final. As this Court stated, “It has simply never been the law in Texas that a summary judgment generally disposing of all claims and all parties is nevertheless interlocutory merely because the rendition of a final judgment was improper.” *Lehmann* at 207.

American Express specifically requested the judgment dispose of “all parties and all claims”, which is an agreement to take nothing from Daredia. *See* TEX.R.CIV.P.162. A plaintiff has an absolute right to non-suit or dismiss its claims as to any party and the trial court has no discretion to deny the request. *BHP Petroleum v. Millard*, 800 S.W. 2d 838, 840-41 (Tex. 1990). If there are no other pending claims for affirmative relief, as in this case, the non-suit acts as a dismissal of the entire case. *Id.* Contrary to the Court of Appeals analysis, the judgment does not have to specifically identify each party non-suited or dismissed by name to be effective. *Digital Imaging Ass. Inc. v. State*, 176 S.W. 3d 851 (Tex. App.-Houston [1st Dist.] 2005, no pet.). Based upon the wording of the judgment drafted by American Express, the Court must presume that American Express intended to take its judgment against Map Wireless and non-suit or dismiss any claims against Daredia.

While this Court provided a mechanism whereby an appellate court might abate a case to determine the trial court’s intention in entering the judgment, it provided little guidance in understanding what facts were relevant to determining

intent. *Lehmann. Id* at 206. Is intent to be determined by: the subjective belief of the trial judge; the conduct of the parties; whether the case was closed by the District Clerk; whether the judgment was abstracted; whether there was any attempt to collect the judgment; or whether third parties who were provided with the judgment acted in conformity with their belief the judgment was final? If so, an evidentiary hearing might be needed to provide evidence in the record of what was intended and how the judgment was treated.

In this case, the Court of Appeals did not request any information from the trial court related to whether the judgment was intended to be final. Assuming, however, that the intent of the trial judge and parties is relevant in a face of an unambiguous final judgment, the record that is available is more supportive of the claim that American Express intended to dismiss its claims against Daredia and take the entire judgment against Map Wireless than that there was any error in the rendition of the judgment.¹⁰

There are no transcripts of the default judgment hearing or a statement in any record as to what Judge Issacks intended when she signed the judgment. At none of the hearings on the motions to vacate the judgment did American Express offer any evidence contradicting its request for a final judgment when the default judgment was drafted. (R. Tab I.)

¹⁰ Assuming there was error in the rendition of the judgment that would make the judgment in this case erroneous final but still final.

The trial court obviously believed the judgment was final because the Rule 306a(3) notice of final judgment was sent to the parties and the file was closed. (R. Tab N.) American Express obviously believed the judgment was final because it took no further action against Daredia for more than sixteen (16) months after the judgment became final. (R. Tab N.) Cases have been dismissed for want of prosecution in less time than that. *See City of Houston v. Thomas*, 838 S.W.2d 296, 297 (Tex. App.-Houston [1st Dist.] 1992, no writ) (dismissed due to no action being taken for a year.) Daredia obviously believed, and still believes, that the judgment is final and he was dismissed. (R. Tabs G, L.)

When American Express finally requested relief through a judgment nunc pro tunc, it did not present any affidavits, transcripts, verification, or other evidence that its' requesting the entire case be dismissed was anything but intentional. (R. Tab F, H, I, M.) There is no evidence in the record that there was any mistake or error in the drafting of the default judgment or that the judgment was not intended to be final. *Id.*

Aside from the record, there are public policy reasons to assume the judgment was intended to be final. Foremost is that the plaintiff is the one that drafted the judgment that dismissed all claims and all parties and asked that the judgment be FINAL. American Express had total control over the wording of the judgment. The reason why there is no presumption regarding the finality of default judgments is to protect parties that may not have appeared or had notice of the judgment. *Lehmann* at 206. The presumption was not intended to benefit the party

that drafted the judgment, but other parties that might be affected by the judgment. If anything, the presumption should be construed against the drafter of the judgment.

The Court of Appeals' rationale encourages a party to intentionally make errors in the drafting and collaterally attack their own judgment. If the party is unable to collect a judgment against another party, it can assert the default was not final even though it contained the required *Lehmann* language and argue the judgment was not otherwise supported by the record that was created by the party that drafted the judgment. A party can seek to reopen cases years later against other parties that properly believed they had been dismissed. The drafting party has the ability to create the error by tracking the language of finality required by *Lehmann*, but arguing the judgment it requested was not otherwise supported by the record. This simply cannot be the law in Texas and would leave possibly thousands of judgments to be collaterally attacked or left interlocutory.

B. As the underlying judgment is a final judgment the Respondent was without jurisdiction to vacate the judgment outside of the court's plenary jurisdiction through a judgment nunc pro tunc and enter a new interlocutory judgment. (App. Tab B and C.)

Assuming the judgment was final, American Express was never legally entitled to the relief sought because a judgment nunc pro tunc cannot be used to vacate a final judgment and enter a new interlocutory judgment outside of the trial court's plenary jurisdiction. *English v. Union State Bank*, 945 S.W. 2d 810, 811 (Tex. 1997); *Nguyen v. Woodley*, 273 S.W. 3d 891 (Tex. App.-Houston [14th Dist.]

2007, no pet.). If a party seeks to amend, vacate, or alter a final judgment outside of the trial court's plenary jurisdiction, then a judgment nunc pro tunc is improper as a matter of law and the trial court is without jurisdiction to grant such relief. *See Mathes v. Kelton*, 569 S.W. 2d 876 (Tex. 1978); *Dikeman v. Snell*, 490 S.W. 2d 183, 186 (Tex. 1973); *McHone v. Gibbs*, 469 S.W. 2d 789 (Tex. 1971).

The orders that are subject of this mandamus specifically vacate the final judgment that was signed on July 2, 2007 and enter a new interlocutory judgment long after the trial court lost plenary jurisdiction over the judgment. The February 24, 2009 order states that “the default judgment signed by this court on July 2, 2007 is vacated, and the Plaintiffs’ motion for entry of interlocutory judgment nunc pro tunc in the form attached hereto is granted as to Map Wireless, Inc. only.” (emphasis added) (App. Tab B.). The fact that the orders grant relief not allowed by use of a judgment nunc pro tunc establish the Respondent’s error in this case.

The reason for this is extremely basic, a judgment nunc pro tunc is only proper to change clerical errors in an otherwise final judgment. A judgment nunc pro tunc does not vacate or disturb the initial judgment; it merely brings the court records into conformity with it. *Lone Star Cement Corp. v. Fair*, 467 S.W. 2d 402 (Tex. 1971); *Knox v. Long*, 152 Tex. 291, 257 S.W. 2d 289 (1953); *Perry v. Nueces County*, 549 S.W. 2d 239, 242 (Tex.Civ.App.-Corpus Christi 1977, writ ref’d n.r.e.). A nunc pro tunc judgment, although signed later, relates back to the date of the original judgment and is effective as of the earlier date. *See Home*

Indemnity Co. v. Muncy, 449 S.W. 2d 312, 315 (Tex.App.-Tyler 1970, writ ref'd n.r.e.); *Gen. Elec. Co. v. Canyon City Ice & Light Co.*, 136 S.W. 78, 79 (Tex.Civ.App. 1911, no writ).

The trial court's plenary power to grant a new trial or to vacate, modify, correct, or reform a judgment is limited to thirty (30) days after the judgment is signed unless a party files a motion for new trial and then the court's jurisdiction is extended to a maximum of one hundred and five days (105) after the judgment is signed. *In re Nguyen*, 155 S.W. 3d 191, 193 (Tex. App.-Tyler 2003)(orig. proceeding). After the trial court's plenary power expires, the trial court may not alter, amend, or modify a final judgment.

As American Express did not file any post-judgment motion to amend, modify, or alter the judgment, the Court lost jurisdiction of this case thirty (30) days after the judgment was signed or on August 2, 2007, and it no longer has any jurisdiction to vacate the July 2, 2007 final judgment.

A judgment nunc pro tunc is also only appropriate to correct clerical errors. TEX. R. CIV. P. 316, 329b(f); *Escobar v. Escobar*, 711 S.W. 2d 230, 231 (Tex.1986); *Gutierrez v. Elizondo*, 139 S.W. 3d 768, 771 (Tex. App.-Corpus Christi 2004, no pet.) A clerical error is an error between the entry of the judgment and the judgment actually rendered by the court that was not the result of judicial reasoning. *Andrews v. Koch*, 702 S.W. 2d 584, 585 (Tex.1986); *Barton v. Gillespie*, 178 S.W. 3d 121, 126 (Tex. App.-Houston [1st Dist.] 2005, no pet.). Some typical clerical changes that have been upheld as valid nunc pro tunc orders

are corrections of the date of judgment, *Nolan v. Bettis*, 562 S.W. 2d 520, 522 (Tex.Civ.App.-Austin 1978, no writ), correction of a party's correct name, *Carlyle Real Estate Ltd. Partnership-X v. Leibman*, 782 S.W. 2d 230 (Tex. App.-Houston [1st Dist.] 1989, no writ), and correction of a numerical error, *Escobar*, 711 S.W. 2d at 230.

A judicial error arises from the rendition of the judgment and is a mistake of law or fact that requires judicial reasoning to correct. *Barton v. Gillespie*, 178 S.W. 3d 121, 126 (Tex.App.-Houston [1st Dist.] 2005, no pet.); *Baker v. Cont'l Airlines, Inc.*, 31 S.W. 3d 642, 647 (Tex. App.-Houston [1st Dist.] 2000, pet. denied). If a court commits a judicial error in rendition of a judgment, that error cannot be corrected after the court loses plenary jurisdiction. *In re Rollins*, 987 S.W. 2d 633, 636 (Tex. App.-Houston [14th Dist.] 1999)(original proceeding).

When deciding whether a correction is a judicial or clerical error, the court looks to the judgment actually rendered, not the judgment that should or might have been rendered. *Id.*; *Escobar*, 711 S.W. 2d at 231. Rendition is the act and event of using legal reasoning, while entering a judgment simply records the judgment that was rendered. The trial court can only correct clerical errors committed in the entry of a final judgment that incorrectly states the judgment actually rendered. *Id.*

Even if the trial court incorrectly rendered judgment, it cannot alter a written judgment that properly reflects the improperly rendered judgment. If the court attempts to correct a judicial error by signing a judgment nunc pro tunc after

expiration of its plenary power, the judgment is void. *See Dikeman*, 490 S.W. 2d at 186.

In reviewing whether there is an error, the appellate court takes a two-step process. First, the court must determine whether there was a difference between the judgment rendered and the judgment entered. Secondly, if the court finds there was an error between the judgment rendered and the judgment entered, the court must determine whether the error is a judicial or clerical error. During the first step of the process, the court reviews any transcripts, depositions, or other evidence as to what judgment was actually rendered and then compares it to the judgment that was entered. During the second step, the court looks at the substance of the alleged error to determine whether that error is substantive or non-substantive. If the error is non-substantive, then it may be clerical in nature that might be able to be corrected through a judgment nunc pro tunc. If the error is substantive, then the error is judicial in nature and cannot be corrected outside of the trial court's plenary jurisdiction.

American Express asserts that while it made numerous drafting errors in the final judgment signed on July 2, 2007, by asking for relief to which it was not entitled and specifically inserting language that states, "This judgment disposes of all parties and all claims in this cause of action and is therefore FINAL", that Judge Issacks made a clerical error because she did not catch all of the drafting errors. (R. Tab H and M)

The case law is undisputed that drafting errors by an attorney are not

correctable through a judgment nunc pro tunc because they are not clerical errors. *Dikeman v. Snell*, 490 S.W. 2d at 186; *LaGoye v. Victoria Wood Condo. Ass'n*, 112 S.W. 3d 777, 783 (Tex.App.-Houston [14th Dist.] 2003, no pet.). *In re Fuselier*, 56 S.W. 3d 265, 268 (Tex.App.-Houston [1st Dist.] 2001, orig. proceeding); *America's Favorite Chicken Co. v. Galvan*, 897 S.W. 2d 874, 878-79 (Tex.App.-San Antonio 1995, writ denied); *In re Rollins Leasing, Inc.*, 987 S.W. 2d at 637(holding that correction of judgment to reflect dismissal of only one defendant rather than two initially dismissed was judicial error, not correctable by judgment nunc pro tunc); *Seago v. Bell*, 764 S.W. 2d 362 (Tex. App.-Beaumont 1989, no writ). Parties named by the mistake of counsel in an order or judgment signed by the court become part of the court's judgment, as rendered, and such mistakes are properly characterized as judicial errors. *In re Fuselier*, 56 S.W. 3d at 268.

American Express attempts to sidestep all of the above stated case law by asserting that while its attorney made numerous drafting errors, Judge Issacks made a clerical error by not correcting all of the mistakes. Specifically, Judge Issacks did not strike out the language in the judgment that states, **“All relief not expressly granted is hereby denied. This judgment disposes of all parties and all claims in this cause of action and therefore is FINAL.”**(emphasis added)(App. I, Tab A.R. I-3 p.7-8.) The first problem is there is no evidence of any drafting error because American Express never provided any testimony, affidavit, transcript or other evidence that the inclusion of the *Lehmann* language

was actually a mistake and not intentional.

Even assuming there is such evidence, the further fallacy of this argument is that even if inserting the *Lehmann* language was a mistake by the attorney, it resulted in a judicial error, not a clerical error for two reasons. First, it was still a drafting error by the attorney for which all of the case law states creates a judicial error and not a clerical error. Second, if American Express was relying upon Judge Issacks to catch all of the drafting errors and determined the judgment should be interlocutory rather than final, she would have had to exercise her judicial reasoning. The use of judicial reasoning is the definition of a judicial error. Even assuming Judge Issacks intended to strike through the *Lehmann* language, that error occurred in the rendition of the judgment and not the entering and is not subject to review by a judgment nunc pro tunc.

Whether the original judgment that was signed was intended to dispose of all parties and all claims is irrelevant. The fact that a judgment might dispose of other claims and other parties does not preclude the judgment from becoming final. *Kaigler*, 961 S.W. 2d at 276; *Coastal Ref. & Mktg., Inc.*, 838 S.W. 2d at 572. It simply cannot be disputed that all of the pertinent case law indicates that the alleged error in this case relates to a judicial error and not a clerical error and could not be corrected by a judgment nunc pro tunc.

CONCLUSION

The presumption that finality is not implied in a default judgment is to protect the defaulting party, not the plaintiff. American Express was given the

judgment it requested and it inserted the *Lehmann* language that disposed of all of the parties and all of the claims. A plaintiff has an absolute right to take a default against one defendant and elect his recovery so that it can have a final judgment on which it can execute. American Express does not have the right to have a “do over” by waiting for more than a year and a half and claiming a mistake was made without any supporting evidence. The judgment signed in July of 2007 was a final judgment and the Respondent’s vacating it by a judgment nunc pro tunc long after his plenary power must be corrected. Daredia is clearly entitled to mandamus relief to correct these jurisdictional errors by the Respondent.

PRAYER

WHEREFORE, PREMISES CONSIDERED, Relator Pervez Daredia prays this Court find that the Judgment signed by Judge Issacks on July 2, 2007 was final and not interlocutory. Daredia, therefore, would request that the Court grant this request for mandamus relief and find that the Respondent was without jurisdiction to vacate the July 2, 2007 judgment and enter an order requiring Judge Robison to vacate his order granting American Express’ motion for judgment nunc pro tunc and related interlocutory default judgment. Daredia further requests that this Court enter a finding that the Judgment signed on July 2, 2007 is a full and final judgment, affirming that American Express may take nothing from Daredia. Daredia further prays for the Court to grant him all other relief in both law and equity to which he may show himself to be justly entitled.

Respectfully submitted,

STEVE SNELSON
State Bar No. 18794450

5005 Greenville Avenue, Suite 200
Dallas, Texas 75206
(214) 368-6440
(214) 363-9979 [Facsimile]

ATTORNEYS FOR RELATOR
PERVEZ DAREDIA

CERTIFICATE OF SERVICE

This will certify that a true and correct copy of the Brief on the Merits in Support of the Petition for Writ of Mandamus has been mailed to all attorneys of record and parties in this cause of action, as listed below, on the _____ day of April 2010.

The Honorable Judge Doug Robison
393rd Judicial District Court
Denton County Courthouse
1450 E. McKinney Street
Denton, Texas 76209

Certified Mail Return Receipt Requested
7009 2250 0001 7269 3595

Alan R. Scheinthal
Scheinthal & Kouts, L.L.P.
4635 Southwest Freeway, Suite 720
Houston, Texas 77027

Certified Mail Return Receipt Requested
7008 0500 0000 7920 1762

STEVE SNELSON

VERIFICATION

STATE OF TEXAS §
 §
COUNTY OF DALLAS §

BEFORE ME, the undersigned Notary Public, on this date personally appeared Steve Snelson, who, being by me duly sworn on his oath, deposed and stated the following:

“My name is Steve Snelson. I am the attorney for the Relator. I am fully competent to make this Verification and to the extent necessary all factual statements contained in this Brief on the Merits in Support of the Petition for Mandamus are true and correct. Additionally, all of the records submitted as part of the Appendix and Record are true and correct copies of the documents that purport to represent.

“I have also read the above and foregoing Brief in Support of the Petition for Writ of Mandamus and all factual allegations and statements contained therein are within my personal knowledge, are based on a review of the record, and are true and correct.”

STEVE SNELSON

SWORN TO AND SUBSCRIBED BEFORE ME, the undersigned authority, on this ____ day of April 2010, to certify which witness my hand and official seal.

Notary Public, State of Texas

My Commission Expires:

Appendix

Certified Copy of Final Judgment signed on
July 2, 2007.....Tab A

Certified Copy of Order on Granting Judgment Nunc Pro Tunc
signed on February 24, 2009.....Tab B

Certified Copy of Interlocutory Judgment
signed on February 24, 2009..... Tab C

Copy of Memorandum Opinion *In Re Pervez Daredia*,
No. 2-090106-CV, 2009 WL 4416548
(Tex. App.-Fort Worth, October 20, 2008, orig. proceeding)..... Tab D