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NAVIGATING PROCEDURAL MINEFIELDS: NUANCES IN DETERMINING FINALITY OF JUDGMENTS, PLENARY POWER, AND APPEALABILITY

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*955 I. Introduction

In Texas, the implications of a judgment becoming final are many: the finite period for filing post-judgment motions begins, the trial court's plenary power begins to expire, and the appellate timetables commence. Because these significant consequences all require action to preserve parties' rights, determining finality of judgment should be simple--but unfortunately, it is not. There are numerous traps for the unwary in this area of the law, requiring litigants and their counsel to navigate mass procedural minefields. This paper focuses upon these traps, and how finality, plenary power, and appealability is determined under current Texas procedural rules, statutes, and case law.

Unlike the federal system, Texas procedure does not allow for discretionary review of interlocutory orders based solely on the importance of a ruling and its potential to “materially advance the ultimate termination of the litigation.”¹ Instead, Texas adheres to the absolute position that only final judgments may be appealed, absent a few statutory exceptions, and that these final judgments must be expeditiously appealed.²

The “final judgment” rule mandates that appeals may only be taken from a judgment that disposes of all parties and issues.³ Correctly determining when an order is “final” is of utmost importance, to both the litigants and the appellate courts, because the appellate timetable begins ticking when an order or judgment is signed that is final or purports to be final.⁴ While this rule seems straightforward enough, litigants should beware--as the supreme *956 court has accurately noted, “[t]his rule is deceiving in its apparent simplicity and vexing in its application.”⁵ Here there is no room for error; once the finite number of days to perfect an appeal lapses, litigants forever lose the right to further review, and the judgment is final for res judicata and enforcement purposes.⁶

Of equal import, once the trial court signs an order, its plenary power begins to expire.⁷ The duration of the court's power to modify its judgments varies, depending on whether a motion for new trial or a motion to modify the judgment is filed and, if so, whether the motion is overruled by written order or by operation of law.⁸ When this period expires, the trial court permanently loses jurisdiction to substantially modify the judgment.

It is imperative that litigants understand these concepts of finality, plenary power, and appealability--and the relationship between the three. Specifically, if counsel is unaware that a judgment is final, chances are he or she will not file post-judgment motions, nor perfect an appeal. Eventually, when the error is realized, it may be too late--the trial court will have lost plenary power, depriving it of the power to change its judgment; and the appellate court's jurisdiction will not have been timely invoked, so it must dismiss any appeal.⁹ In other words, regardless of the gravity of any error by the lower courts, the litigants will, as a practical matter, have forever lost their right to complain of the judgment.¹⁰

*957 II. Policy Considerations

In Texas, a judgment must be final, as a general rule, before an appeal will lie.¹¹ This preference reflects a balancing of several important policies where “the potential advantages of immediate appeal are weighed against the obvious disadvantages, and the final judgment rule strikes a presumptive balance in favor of deferring review.”¹²

Additionally, at some point after a final judgment is signed the trial court must lose its plenary power over that judgment. That is, the trial court should lose the power to change its own judgment, so that the matter is finally determined and beyond attack if no appeal is timely perfected. While there “is inherent tension between the goals of correctness and finality,” this preference reflects the notion that, at some point, litigation “must come to an end, because unending litigation is itself an injustice.”¹³

The original policy justifications favoring finality of judgments are uncertain. Most likely, the finality requirement originally reflected a concern over feudal record keeping needs, rather than any specific policies favoring finality.¹⁴ However, today there are strong, universally recognized justifications both for requiring that a judgment be final before being subject to review, and for limiting the duration of the trial court's plenary power and the time a litigant has *958 to appeal a judgment once it becomes final. This section identifies the most frequently cited policy justifications for the final judgment rule and the corresponding limits on the duration of the trial court's plenary power and the appellate timetables.

A. The Final Judgment Rule

Concern for “judicial efficiency” is the primary justification cited for requiring that a judgment be final to all matters and parties before an appeal is taken.¹⁵ The delay and cost associated with a system allowing appellate review of every adverse ruling would be devastating.¹⁶ As one commentator has noted, not only would the trial court's proceedings be disrupted, but allowing appeals of non-final judgments would burden the appellate courts by:

(1) increasing the sheer number of appeals; (2) forcing the appellate courts to repeatedly familiarize themselves with the same cases; (3) causing the appellate courts to view orders in isolation rather than in light of the entire proceeding below; and (4) allowing appeals from rulings that would otherwise become moot, either because the aggrieved party wins the trial on the merits, because the order is harmless error, or because the case settles before reaching the appellate courts.¹⁷ In Texas, with only fourteen intermediate courts of appeals and one supreme court, this need to preserve precious judicial resources is *959 particularly compelling. Under the current system, the courts simply could not handle the additional burden of unlimited interlocutory appeals.¹⁸ Thus, as a general rule, the appellate courts' resources are better preserved for final judgments.

A concern for litigants is another frequently cited justification for the final judgment rule.¹⁹ Specifically, if an unlimited number of interlocutory appeals were permitted, wealthier litigants could make the cost of litigation for their opponents “unbearable,” forcing them into unfavorable settlements.²⁰ The delay caused by numerous appeals also leads to lost evidence and faded memories of witnesses, effectively thwarting the rationale for timely filing suits under the statute of limitations.²¹

Finally, this rule preserves the traditional role of the trial court and maintains its autonomy, preventing interference with its proceedings and exercise of discretion.²² Allowing interlocutory appeals of every trial order could destroy trial court morale and generally lower respect for trial courts.²³ The Texas Supreme Court has explicitly recognized that

permitting appellate review of interlocutory orders “would severely impair the ability of trial judges to manage their dockets, and would require [the appellate courts] to micromanage trials.”²⁴ Further, as a practical matter, the appellate *960 court's review would rarely lead to a reversal.²⁵ This is because the trial court holds the primary responsibility “for factfinding, standard application, and procedure” and most of its decisions are only reviewable under an abuse of discretion standard--where a court of appeals will accept its rulings but an opposite ruling would likewise have been accepted.²⁶ Prohibiting interlocutory review also encourages trial judges to consider their decisions more carefully, because any error warranting reversal will ultimately likely necessitate a new trial.²⁷

In sum, the final judgment rule is thought to promote judicial efficiency, protect litigants from drawn out (and sometimes deliberate) delays, and protect the autonomous role of the trial court. While there are obvious contrary policies in favor of interlocutory appeals--such as avoiding the cost of completing a trial after reversible error has occurred²⁸ and preventing adverse effects on real world activities that are not easily undone²⁹-- the costs of unlimited *961 appeals are thought to outweigh these concerns.³⁰

B. Limitations on Plenary Power and Appealability

There are equally compelling justifications for limiting the duration of the trial court's plenary power and for requiring that once a final judgment is obtained, it be appealed expeditiously, or lost forever:

At some point in time, the court[s] must resolve a dispute so that the litigants can go on to other matters. As a value, finality reflects “a desire to limit the time between the eruption of a dispute, its resolution, and the implementation of a solution.” Finality of judicial decisions fulfills our psychological need for repose, furthers our political desire to end government intervention in people's lives as soon as possible, and promotes the judicial system's need for stability.³¹ Simply put, “[a] judgment that is subject to change does not settle anything.”³² While trial courts should be given the time and leeway necessary to correct errors in their orders, at some point parties (and third persons) must be able to rely on a judgment that cannot be changed by the trial court.³³ For the same reasons, the timeline for taking an appeal must, at some time, expire.³⁴

III. Determining Finality of Judgments

Because Texas adheres to the final judgment rule, appellate courts often address the finality of a judgment sua sponte.³⁵ If the *962 judgment is not final, the appellate court must dismiss any attempted appeal because, absent an express statutory grant, it has no appellate jurisdiction over non-final orders.³⁶ In fact, should an appellate court proceed to review a non-final judgment, its actions are a nullity.³⁷ For this reason, determining whether a judgment is final must always be addressed before the merits of an appeal can be reached.³⁸

Finality of judgments is not always easy to adjudge.³⁹ As the Texas Supreme Court explained in *Street v. Second Court of Appeals*, “‘final,’ as applied to judgments, has more than one meaning.”⁴⁰ However, for purposes of appellate jurisdiction, a judgment is final “if it disposes of all issues and parties in a case.”⁴¹

*963 A. Finality Following Trial

The parties and issues before a court are defined by the live pleadings. However, parties commonly plead causes of actions or defenses that may not realistically be defensible. Thus, oftentimes the matters actually tried are leaner in scope than those originally plead. If finality was determined by a literal comparison of the live pleadings with the court's orders and judgments, it would often appear that matters remain to be litigated because matters plead are often not addressed in the judgment.⁴²

1. The Aldridge Finality Presumption

But there is no requirement that a trial court's judgment expressly dispose of all issues and claims.⁴³ Likewise, parties are not required to amend their pleadings to reflect only those matters actually in issue and eliminate claims or parties as to whom there has been settlement or abandonment. In light of this reality, the Texas Supreme Court created a presumption of finality--known as the Aldridge presumption, after the seminal case in which this presumption was first espoused.⁴⁴ The Aldridge presumption provides:

When a judgment, not intrinsically interlocutory in character, is rendered and entered in a case regularly set for a conventional trial on the merits, no order for a separate trial of issues having been entered . . . it will be presumed for appeal purposes that the Court intended to, and did, dispose of all parties legally before it and of all issues made by the pleadings between such *964 parties.⁴⁵

This presumption of finality holds true even if the judgment omits mention of some claims or parties--they are disposed of by implication.⁴⁶ Specifically, unless a separate trial is ordered to resolve a specific issue, this presumption applies to all of the plaintiff's claims, as well as the defendant's cross-actions and counterclaims against the plaintiff, and the defendant's cross-actions against other defendants.⁴⁷

This result is consistent with the longstanding presumption that courts will perform their duty to dispose of every issue presented by the pleadings.⁴⁸ It also furthers the strong policy of "speedy settlement of litigation" and "opposes the harassing of the defendant with two suits for the same cause."⁴⁹

2. Exceptions to the Aldridge Presumption

While the scope of this presumption is broad, there are exceptions to its application. First, the presumption is limited to judgments "not intrinsically interlocutory in character," that are "rendered and entered in a case regularly set for a conventional trial on the merits," where "no order for a separate trial of issues [has] been entered."⁵⁰ The Aldridge court also noted that this finality *965 presumption does not apply to dispose of totally independent cross-actions where a judgment dismisses plaintiff's claim on a nonsuit, plea to the jurisdiction, plea in abatement, or for want of prosecution.⁵¹ Likewise, the presumption does not apply to parties not "legally before" the court.⁵² Finally, the Aldridge presumption can always be rebutted by contrary evidence in the record.⁵³ For example, a trial court may always "expressly reserve, for future consideration, its judgment on any part of [a] motion."⁵⁴

B. Finality of Default Judgments--Does Aldridge Apply?

The supreme court has also expressly held that the Aldridge presumption of finality does not apply to default judgments because they do not “follow a conventional trial on the merits.”⁵⁵ However, the lower courts have been inconsistent in their application of this principle. Some lower courts have interpreted this decision to limit application of this presumption to judgments following an actual conventional trial on the merits, rather than cases just set for trial on the merits.⁵⁶

***966** As a result, while the courts uniformly hold that this finality presumption does not apply to no-answer default judgments,⁵⁷ the courts disagree as to the applicability of Aldridge to post-answer default judgments.⁵⁸ In *Thomas v. Dubovy-Longo*, the Dallas Court of Appeals held that the Aldridge presumption does apply to post-answer default judgments where a conventional trial on the merits has been set, because the non-defaulting party in a post-answer default must present evidence as in a judgment upon a trial.⁵⁹ Other courts have rejected this reasoning and refused to apply this presumption, holding that a post-answer default does “not follow a conventional trial on the merits because such judgments are not, in any event, ‘a judgment upon trial.’”⁶⁰

The Dallas Court of Appeals followed its reasoning in *Thomas* to also hold in *Schnitzius v. Koons* that default judgments of forfeitures against sureties on appearance bonds may be subject to a finality presumption.⁶¹ Here again, the court looked to the policies behind the supreme court's refusal to apply a finality presumption to default ***967** judgments and concluded these policies were simply not analogous.⁶² No other court has addressed the applicability of Aldridge in this specific context.

Absent application of Aldridge to default judgments, there is no presumption in favor or against finality.⁶³ Rather, finality is determined by looking to whether the trial court intended to dispose of all parties and issues in the judgment.⁶⁴ The court's intent may be “gleaned from the language of the decree, the record as a whole, and the conduct of the parties.”⁶⁵ Generally, where there are parties or issues not disposed of expressly, or necessarily by implication, a default judgment will not be considered final.⁶⁶ A default judgment is made expressly final when it makes mention of and disposes of all parties and issues or contains a Mother Hubbard clause.⁶⁷ A default judgment is made final by necessary implication where it omits the disposition of cross-actions or counterclaims, but where the judgment entered in favor of one party is inconsistent with the recovery ***968** requested by the omitted claim.⁶⁸

C. Finality of Summary Judgments

The Aldridge presumption does not apply to summary judgments--as a summary judgment is not a “conventional trial on the merits.”⁶⁹ However, if the summary judgment disposes of all parties and issues, it is clearly a final appealable judgment.⁷⁰ By contrast, at least in theory, a partial summary judgment--one that does not dispose of all parties and issues--is not final until the trial court takes action disposing of the remaining issues and parties.⁷¹

1. Mafrige and Mother Hubbard Clauses

A somewhat tricky exception to the finality requirement applies ***969** when a summary judgment purports to be final by the inclusion of a Mother Hubbard clause but, in fact, is not. The Texas Supreme Court held in *Mafrige v. Ross* that the inclusion of a Mother Hubbard clause, or other similar language in a summary judgment, indicating the trial court is purporting to dispose of all parties and issues results in a final judgment for purposes of appeal.⁷²

In *Mafrige*, the trial court granted two summary judgments containing Mother Hubbard clauses, but failed to address some of the causes of action asserted by the plaintiffs.⁷³ The Fourteenth Court of Appeals in Houston dismissed the parties' appeals for want of jurisdiction, holding that the summary judgment orders were not final because the motions did not dispose of all the issues in the case.⁷⁴ The supreme court reversed, holding that “[i]f a summary judgment order appears to be final, as evidenced by the inclusion of language purporting to dispose of all claims or parties, the judgment should be treated as final for purposes of appeal.”⁷⁵

The court has since twice reaffirmed the principles announced in *Mafrige* and clarified some of the implications of its holding.⁷⁶ The issue of finality of summary judgments is once again before the court in *Lehmann v. Har-Con Corp.* and *Harris v. Harbour Title Co.* where the court granted a petition for review to reconsider its decision in *Mafrige*.

2. The *Mafrige* Controversy--Policy Considerations

Since it was decided in 1993, the court's holding in *Mafrige* has been the center of much confusion and controversy,⁷⁷ giving rise to considerable analysis by courts and commentators of both the competing policies implicated by the rule and suggestions for reforming the decision.⁷⁸ These policies and suggestions, which are summarized here, will undoubtedly play a large role in the supreme court's reconsideration of *Mafrige* in *Lehmann* and *Harris*.

The *Mafrige* court clearly explained the policy behind its bright-line test-- “litigants should be able to recognize a judgment which on its face purports to be final, and courts should be able to treat such a judgment as final for purposes of appeal.”⁷⁹ In other words, the rule promotes certainty. Litigants and courts should be able to rely on the literal language of a Mother Hubbard clause to determine whether a summary judgment is final and thus appealable.⁸⁰

This argument in favor of certainty has received considerable support. As one commentator noted, *Mafrige* “resolved the confusion created by prior contradictory language and flatly inconsistent holdings.”⁸¹ The First Court of Appeals in Houston has criticized courts that have circumvented the rigid application of *Mafrige*, explaining that “[c]ounsel and their clients need an objective bright-line test to determine the finality of a judgment based on the judgment's four corners [and] *Mafrige* and English provide that test.”⁸² While the court recognized that the rule might provide harsh consequences for parties unaware of its implications, it emphasized that uniform enforcement of the rule “will encourage attentiveness to correct judgments.”⁸³ If an order is carelessly worded to dispose of parties and issues not raised in the motion, the parties have a simple remedy--request the trial court to change the order, or perfect a timely appeal.⁸⁴ The Fort Worth Court of Appeals has characterized the *Mafrige* rule as the “more common sense approach.”⁸⁵

*971 However, despite the appeal of the certainty provided by this bright-line rule, the reality is that still, after seven years, it continues to operate as a trap for unwary litigants, bringing about arguably unjust and oftentimes draconian results.⁸⁶ Consequently, there are strong critics of the rule calling for change. In *Lehmann v. Har-Con Corp.*, the Fourteenth Court of Appeals in Houston most concisely articulated the policy arguments against the *Mafrige* rule.⁸⁷ First, it noted that the rule brings about unfair results by entitling nonmoving parties to summary judgments that they did not request and depriving the opposing parties the opportunity to respond.⁸⁸ It went on to explain:

Mafrige is not as clear to litigants as the supreme court believes it is In short, *Mafrige* has created several problems: 1) it is catching the parties by surprise--we have had more than a few appeals dismissed on the basis of *Mafrige*; 2) it exalts form over substance; and 3) in more than a few situations, it ignores common sense.

Under Mafrige and its progeny, the mere presence of the Mother Hubbard clause transforms an otherwise interlocutory summary judgment into a final judgment. Our emphasis should not be on the form of the judgment. Rather our emphasis should be to seek the truth. The truth lies, not in the form, but in the substance of the summary judgment motion and response, together with evidence of the intent of the parties and the court.⁸⁹ Many commentators and courts have voiced agreement with the Fourteenth Court of Appeal's dissatisfaction with the Mafrige decision,⁹⁰ --one of the more colorful examples being Justice Taft's *972 comments in Harris County Flood Control District: "What began as a benign growth allowing review of unripe claims on appeal, in Mafrige, became a malignant cancer cutting off causes of action before trial, in English. If it were up to me, I would lock Mother Hubbard in the cupboard"⁹¹

Finally, some complain, not so much about the rigidity of the Mafrige rule, but rather about the absence of any reference to Mother Hubbard clauses or the Mafrige rule in the Texas Rules of Civil Procedure.⁹² While attorney's are charged with knowledge of the law, including reported case law,⁹³ no one can really dispute that much of the surprise caused by the Mafrige rule could be eliminated by amending Rule 166a⁹⁴ to reflect the absolute effect of Mother Hubbard clauses.

In the face of these competing policies, several solutions have been urged upon the supreme court as it revisits this issue in Lehmann. At one end of the spectrum there are calls to do away with the rule altogether and return to the old view that a Mother Hubbard clause simply "has no place in a partial summary judgment hearing."⁹⁵ Under this approach, no presumptions would exist and the parties and courts would look to "the live pleadings, the motion for summary judgment, and the summary judgment to determine whether the order was final for purposes of appeal."⁹⁶ However, this approach has its flaws, the most obvious being that the court's holding in Mafrige was a *973 result of its conclusion that the prior system was unworkable.⁹⁷ Hence its opening words in Mafrige: "The finality of judgments for purposes of appeal has been a recurring and nagging problem throughout the judicial history of this state."⁹⁸

At the other end of the spectrum there are those arguing to leave the rule exactly as it stands. Amici in the Lehmann case argued that "[c]ourts and commentators who vigorously condemn Mafrige as an unnecessary elevation of form over substance fail to acknowledge the injustice, delay, waste, and expense that inevitably flow from a standardless approach to gauging finality, or to propose an alternative means of dealing with these problems."⁹⁹ The respondents in Lehmann likewise argued that "[a]ny retreat from the holding in Mafrige" would "surely breed chaos in Texas courts, and likely result in different standards being applied by different courts of appeal."¹⁰⁰

Others have recommended approaches that fall somewhere in the middle-- rejecting the broad and mechanical application of Mafrige to all summary judgments while retaining some of the policies it furthers. For example, moving slightly away from absolute adherence to Mafrige's rigid bright-line test leads to a solution advocated by some that can be reconciled with Mafrige while preventing some of its more harsh results.¹⁰¹

This approach would treat a Mother Hubbard clause as evidencing intent of the trial court to dispose of all the claims and issues before it, absent evidence of contrary intent contained in the same order.¹⁰² Proponents of this approach point to two benefits. *974 First, it would further the policies of Mafrige and its progeny by allowing "litigants and the courts to treat a judgment as final when it appears on its face to be so."¹⁰³ Even though in many cases a Mother Hubbard clause will give an otherwise interlocutory order the appearance of finality, this rule alleviates the need for parties "to look outside the judgment to determine the meaning of the trial court's ruling."¹⁰⁴ However, by only giving effect to

Mother Hubbard clauses in the context of the order within which they are contained, this approach avoids some of the “unintended and absurd results” produced by an absolute bright-line test.¹⁰⁵ For example, if an order titled “Partial Summary Judgment” states clearly that the judgment is not intended to resolve all claims, the mere inclusion of a Mother Hubbard clause would not transform the order into a final judgment under this approach.¹⁰⁶ Rather, the intent of the trial court, gleaned from the face of the order, including the title, would control.¹⁰⁷

Moving even further from Mafrige's bright-line rule is an approach that would treat the inclusion of a Mother Hubbard clause as evidence of the trial court's intent to dispose of all parties and issues, unless there is contrary intent expressed anywhere in the record.¹⁰⁸ For example, if a court signs an order containing a Mother Hubbard clause and then subsequently signs another order disposing of other parties and issues, and that second order states that its purpose is “to make the Summary Judgments on file herein final as to all claims and parties,” the second order could be treated as evidence that the first order was not intended to be final.¹⁰⁹ However, the benefits of this approach are not so clear. Specifically, while still recognizing a Mother Hubbard clause as importing finality to the first judgment absent evidence of contrary intent, this approach requires looking to the entire record to determine if there is other contradictory evidence of intent that could alter the finality of the judgment.¹¹⁰ Further, this approach “call[s] the judgment's finality into question for a potentially indefinite period of time.”¹¹¹

Yet another approach which retains the essence of the Mafrige holding, but limits its scope, was directly argued to the court by the petitioners in *Lehman*, and is most on point with the facts of that case: “The ‘Mother Hubbard’ presumption recognized in [Mafrige] should not be extended to situations involving multiple parties not specifically addressed in the underlying motion for summary judgment or the order containing the ‘Mother Hubbard’ clause.”¹¹² The reasoning behind this approach is simply that an order that does not address all parties to the suit does not evidence the trial court's intent to dispose of all issue and parties, and thus does not “purport” to be final.¹¹³ This approach provides certainty in that it still allows for a bright-line finality test as to the parties that are mentioned in the order, but prevents summary judgment from being granted in favor of non-moving parties, who in reality are oftentimes caught off guard.¹¹⁴ Of course the counter-argument is that this approach requires the courts of appeal to “look behind the judgment to the pleadings, motions and other orders of the court,” which runs counter to the certainty policies of Mafrige.¹¹⁵ As the respondents in *Lehmann* noted, there is nothing unfair about the Mafrige rule where all it does is require all the litigants to read the orders entered in the case.¹¹⁶

Finally, arguing that “the answer lies in more clarity, not less,” Amici in *Lehmann* have advocated yet another solution to the court--amending the Texas Rules of Civil Procedure rather than amending Mafrige.¹¹⁷ For example, Rule 166a could be amended to specify the form of a “Certificate of Finality” that must appear in a summary judgment order to render it final for appeal purposes.¹¹⁸ This suggestion has some merit--it addresses the concern that litigants and courts who actually read the orders simply do not understand the impact of the language of a Mother Hubbard clause, especially as it relates to parties in a case that are not actually parties to the summary judgment motion. However, it does not realistically remedy the situation in *Lehmann*, where parties to the case that were not parties to the summary judgment, and did not appear to have actually read the order, presumably assuming that a motion that they were not a party to would not dispose of their claims.¹¹⁹

Soon enough, when the decisions in *Lehmann* and *Harris* are handed down, we shall see which of these approaches the supreme court finds most persuasive. Until then, however, it is important for litigants to understand the scope of Mafrige and its progeny, as well as the lower court's inconsistent interpretations of its application and scope. Thus, the following sections attempt to explain and reconcile the principles of Mafrige, as well as provide guidance for avoiding the

grave consequences that have befallen unwary litigants who did not understand the effects of Mother Hubbard clauses in summary judgments.

3. Understanding and Avoiding the Traps of Mafrige

As a preliminary matter, it is important to understand that the Mafrige rule does not give a trial court the power to grant summary judgment on any issues or against any parties that are not properly raised in the parties' motions.¹²⁰ A trial court “may not grant summary judgment as a matter of law on a cause of action not addressed in the summary judgment proceedings, [and f]or the trial court to do so is reversible error.”¹²¹ If a summary judgment is erroneously granted on *978 a matter or against a party not addressed in the motion, and a party timely perfects an appeal, the appellate court should decide the merits of the issues which were included in the motion and remand the remainder of the issues to the trial court for proper disposition.¹²²

The sole issue implicated by Mafrige is whether a summary judgment, which erroneously disposes of issues or parties not raised in the motion, is final for purposes of appeal.¹²³ More specifically, Mafrige addresses what effect the inclusion of a Mother Hubbard clause (or similar language) has on the finality of a summary judgment and the rule that a summary judgment must dispose of all parties and issues before the court before it can be considered final and appealable.¹²⁴ Before Mafrige was decided, the lower courts were split on this issue.¹²⁵

In Mafrige the trial court rendered two summary judgments *979 containing the language: “the Motion for Summary judgment of the Defendant . . . should in all things be granted and that Plaintiff . . . take nothing against Defendant.” However, the defendant failed to address some of the plaintiff's causes of action in its summary judgment motions.¹²⁶ The plaintiffs filed a timely appeal which the court of appeals dismissed for want of jurisdiction, holding that the judgment could not be a final order absent severance of the unresolved issues by the trial court.¹²⁷ The supreme court reversed and remanded to the court of appeals.¹²⁸ The supreme court's holding was simple and clear: “If a summary judgment order appears to be final, as evidenced by the inclusion of language purporting to dispose of all claims or parties, the judgment should be treated as final for purposes of appeal.”¹²⁹ Straightforward as this seems, lower courts have struggled with the scope of this holding outside the facts of Mafrige.¹³⁰ This section examines the lower courts' interpretation and application of the Mafrige opinion.

a. What is “language purporting to dispose of all claims or parties?”

As previously noted, the Mafrige rule only operates to render a summary judgment final for purposes of appeal where the order contains a Mother Hubbard clause or other language “purporting to dispose of all claims or parties.”¹³¹ A Mother Hubbard Clause states that “all relief not expressly granted is denied.”¹³² The supreme court in Mafrige provided further guidance for determining when language “purport[s] to dispose of all claims and parties” by explaining that it “consider[s] the equivalent of [a Mother Hubbard] clause to be a statement that the summary judgment is granted as to all claims asserted by plaintiff, or a statement that the plaintiff takes nothing *980 against the defendant.”¹³³

Surprisingly, despite these clear examples provided by Mafrige, the lower courts have not consistently followed its mandate. Specifically, several courts have refused to find orders were final, even when the orders contain the exact language provided by Mafrige. For example, in *Carey v. Dimidjian*, the Eastland Court of Appeals held that a summary judgment containing a Mother Hubbard clause was not final because it was entitled “Motion for Partial Summary Judgment” and the parties and court treated it as an interlocutory order.¹³⁴ In *Design Trends Imports v. Print Source, Inc.*, the Dallas Court of Appeals held a Mother Hubbard clause did not render a judgment final where it did not dispose

of all parties and issues.¹³⁵ In ***981** *Hinojosa v. Hinojosa*, the El Paso Court of Appeals held that a Mother Hubbard clause did not render a summary judgment order final where it “made no pretense at disposing of [a] counterclaim.”¹³⁶

Likewise, despite the supreme court's additional clear declaration that a “statement that the plaintiff takes nothing against the defendant” indicates finality, the San Antonio Court of Appeals has held that a summary judgment which contained the language “Plaintiffs[] take nothing against Defendants” could “not be construed as final” where it did not address all parties to the suit.¹³⁷ Similarly, in *Huffine v. Tomball Hospital Authority*, the Fourteenth Court of Appeals in Houston held a clause which stated “the Plaintiff takes nothing as to Tomball Regional Hospital; and that Tomball Regional Hospital recover its costs of court from Plaintiff” was not language purporting to be final.¹³⁸ The court reasoned that the phrase “as to” was exclusionary limiting language that implied that other parties existed and were excluded.¹³⁹ Finally, in *Di Ferrante v. Georgiades*, the Fourteenth Court of Appeals held that an order granting summary judgment was not final, despite the inclusion of language that the “plaintiff take nothing,” because the order limited this language to specific causes of action.¹⁴⁰ In contrast to these ***982** decisions, most other courts have read *Mafrige* to provide that inclusion of either a Mother Hubbard clause or “take nothing” language conclusively establishes finality.¹⁴¹

***984** The lower courts have found other variations on the examples of finality language provided by the supreme court purported to dispose of all parties and issues, effectively transforming partial summary judgments into final orders for purposes of appeal. For example, an order reciting that summary judgment “should be in all things granted and that [defendants] in this action are entitled to summary judgment;”¹⁴² a clause stating that “[a]ny and all relief prayed for by any party to this suit and not specifically awarded is hereby in all things denied;”¹⁴³ and an order granting summary judgment on “all claims set forth” by the plaintiff¹⁴⁴ have all created fictional final judgments. Likewise, the statement “Defendant . . . has moved that summary judgment be entered against Plaintiff . . . on all claims the Plaintiff has alleged against them” included in a final order rendered that order final for appeal purposes, even though the motion actually failed to address several of the plaintiff's causes of action.¹⁴⁵ The Fourteenth Court of Appeals in Houston also held a summary judgment to be final and appealable where the motion did not dispose of all issues, but the trial court struck through the word “interlocutory” and changed it to “final” in the title, and deleted the word “partial” throughout the motion, leaving the words “summary judgment” in place.¹⁴⁶ The court held that, as amended, the order purported to be final.¹⁴⁷ In another case, the Beaumont court of appeals characterized the following clause in a summary judgment as “language of finality,” even though the order failed to address some of the issues in the case:

Having considered [the plaintiff's] Motion, the pleadings, ***985** affidavits, and exhibits on file herein, the Court finds that there is no genuine issue of any material fact, that the claim of the [plaintiff] against Defendants is proven as a matter of law and that [the plaintiff] is entitled to Judgment as a matter of law.¹⁴⁸

Finally, there are other variations on the supreme court's *Mafrige* language that lower courts have treated inconsistently--with different courts reaching different conclusions on finality in different orders containing the exact same language. For example, in *Positive Feed, Inc. v. Guthmann*, the trial court signed an order granting the defendant's summary judgment “in all things” and recited “that the allegations by [the plaintiff] are hereby dismissed for no admissible evidence with prejudice as to refile same.”¹⁴⁹ While recognizing that this order did not contain a “true ‘Mother Hubbard’ clause,” the First Court of Appeals in Houston nonetheless held that the order “clearly purport[ed] to be final,” and thus *Mafrige* applied.¹⁵⁰ In contrast, the Dallas Court of Appeals has held that the language “the court is of the opinion that the motion should be: In all things GRANTED” was not language “purporting to dispose of all pending claims.”¹⁵¹

In light of *Mafrige* and the supreme court's subsequent holdings, litigants should always treat an order containing a Mother Hubbard clause as final and appealable, regardless of any contrary language contained within the order. However, the proper treatment of variations on the traditional Mother Hubbard language is not so clear. As the cases above illustrate, in the absence of a Mother Hubbard clause it can be difficult to ascertain exactly what language a court of appeals will find “purport[s] to dispose of all claims or parties.”¹⁵²

Despite the supreme court's clear intent in *Mafrige* to treat Mother Hubbard clauses and similar language as dispositive in determining finality for the purposes of appeal, an examination of the lower courts' application of *Mafrige* illustrates their reluctance to follow this rule absolutely.¹⁵³ Instead, courts often resort to other *986 indicia of trial courts' or parties' intent in determining finality.¹⁵⁴ This practice probably explains the courts' inconsistent treatment of identical language in different cases. Because the approach a particular court will take can be so difficult to predict, the prudent approach is to always treat language that might indicate finality as final, and then ask the court for an amended order or perfect an appeal.

b. The scope of *Mafrige*

While the *Mafrige* rule clearly applies in situations analogous to *Mafrige*-- i.e., where an appeal is taken from a summary judgment that purports to be final and disposes of all the parties, but not all the movant's claims--the scope of its holding in other contexts has caused considerable confusion in the lower courts.¹⁵⁵ The following sections explain the lower court's interpretations of *Mafrige* in other contexts.

i. The effect of *Mafrige* when a summary judgment purporting to be final is not appealed

In *Mafrige*, the plaintiffs appealed the granting of a summary judgment in favor of the defendants that purported to be final but did not dispose of all the plaintiffs' claims.¹⁵⁶ The court of appeals dismissed the claim for want of jurisdiction, holding that, despite the language purporting to make the order final, the order was interlocutory and not appealable absent severance of the unresolved claims.¹⁵⁷ The supreme court granted review, noting that “[t]he finality of judgments for purposes of appeal has been a recurring and nagging problem throughout the judicial history of the state.”¹⁵⁸ Specifically, the court framed the issue in the case as “whether the inclusion of “Mother Hubbard” language or its equivalent in an order granting summary judgment makes an otherwise partial summary judgment final for appeal purposes.”¹⁵⁹ Because it decided that this question in the affirmative, it held that “the court of appeals erred in dismissing the appeal” and remanded the case to the lower court.¹⁶⁰

*987 Because the plaintiffs in *Mafrige* filed a timely appeal from the order granting summary judgment, the only issue before the supreme court was whether the order was final and thus could be heard by the appellate court.¹⁶¹ The issue not explicitly answered in *Mafrige* was the effect of a Mother Hubbard clause or otherwise similar language when an appeal is not brought from a summary judgment which grants more relief than requested. This question was answered by the supreme court two years later in *English v. Union State Bank*.¹⁶²

In *English*, the plaintiff sued the defendant on eight grounds and the defendant moved for summary judgment “with respect to the claims asserted by the plaintiff,” but his motion only addressed three of the plaintiff's claims.¹⁶³ The trial court granted the motion, entering “a judgment which purported to dispose of [the plaintiff's] entire case, not just his first three causes of action.”¹⁶⁴ The defendant later filed a second motion for summary judgment addressing the remainder of the plaintiff's claims, which the court granted, using language identical to the first judgment.¹⁶⁵ Simultaneously, the trial court granted a motion nunc pro tunc correcting the first summary judgment to reflect that it only granted a partial

judgment.¹⁶⁶ When the plaintiff appealed from the second summary judgment, the defendant argued that the appeal was untimely because the first order was actually a final and appealable judgment under Mafrige.¹⁶⁷ The court of appeals rejected this argument, holding that because the first summary judgment was not appealed, “the Mafrige presumption of finality does not apply.”¹⁶⁸

The supreme court reversed and remanded, holding that the court of appeals erred in interpreting Mafrige “as instituting merely a presumption of finality when a summary judgment purporting to be final is presented for appellate review.”¹⁶⁹ Instead, the court held that a Mother Hubbard clause renders a judgment final for purposes of appeal, regardless of whether an appeal is taken.¹⁷⁰

***988 ii. The effect of Mafrige when parties are omitted from a summary judgment motion**

In Mafrige, all of the plaintiffs and defendants involved in the suit were parties to the summary judgment motion that was the basis of the appeal.¹⁷¹ Thus, another question not explicitly answered under the facts of Mafrige is the effect of an order purporting to be final where the underlying motion for summary judgment does not address all the parties to the suit. In other words, will a Mother Hubbard clause render a summary judgment final against parties not mentioned in the summary judgment motion? This question arises in two situations. The first is where the summary judgment motion and the order granting summary judgment omit any specific reference to one or more parties.¹⁷² For example, this might occur when a defendant moves for summary judgment only on a cross-claim against a third party, where neither the motion nor the order granting summary judgment (which contains finality language) make any reference to the plaintiff's claims.¹⁷³ The other situation is where the motion for summary judgment omits reference to some parties, but the order expressly references and disposes of the omitted party's claims.¹⁷⁴ This might occur when the court expressly grants summary judgment in favor of parties that did not move for summary judgment.¹⁷⁵

The plain language of Mafrige supports the argument that the inclusion of a Mother Hubbard clause renders a summary judgment final for purposes of appeal, regardless of whether there are parties not specifically referenced in the motion or judgment.¹⁷⁶ However, the lower courts have not consistently interpreted Mafrige in this way. In addition, at least one court seems to further distinguish between the two situations described above—implying Mafrige may apply to one ***989** and not the other.¹⁷⁷

In this first situation, where there are parties not mentioned in the summary judgment motion or order, the Waco, Texarkana, and First and Fourteenth Courts of Appeals in Houston have all held that the Mafrige rule applies, rendering the orders final as to all parties for purposes of appeal.¹⁷⁸ These courts have interpreted Mafrige to impose a bright-line rule, where the inclusion of finality language conclusively establishes finality as to all issues and parties. As the First Court of Appeals in Houston reasoned: “Issues and parties . . . are co-dependant: one could not exist without the other in a case. If an order disposes of all issues in a case, then it necessarily disposes of all parties to a case, and vice versa.”¹⁷⁹

In contrast, the Austin, Beaumont, Dallas, and San Antonio Courts of Appeals have interpreted Mafrige more narrowly, limiting its application to cases where there are unresolved issues, but not where there are parties omitted from the motion and judgment.¹⁸⁰ The ***990** Dallas Court of Appeals has explained this approach, noting that “[a]n order that explicitly grants a summary judgment in favor of less than all the defendants does not clearly evidence an intent to dispose of all claims against all defendants, especially those against whom summary judgment was not sought, regardless of the inclusion of a Mother Hubbard clause.”¹⁸¹

In this second situation, where the trial court's order expressly grants summary judgment in favor of or against parties that are not mentioned in the motion for summary judgment, courts are more apt to find that a Mother Hubbard Clause renders the order final and appealable. The Waco, San Antonio, and Corpus Christi Courts of Appeals have all applied *Mafrige* to these facts.¹⁸²

In *Lehmann v. Har-Con Corp.*, the supreme court granted review to resolve the split in authority on the effect of Mother Hubbard clauses when one or more parties are omitted from a motion for summary judgment. In *Lehmann*, the Fourteenth Court of Appeals in Houston “[r]eluctantly” applied *Mafrige* to dismiss the appellant's appeal for want of jurisdiction, holding that the trial court's summary judgment “purported” to be final, despite the omission of certain parties and claims from the order.¹⁸³ Both the trial court and parties had treated the summary judgment at issue as interlocutory, and thus the appellant had not filed a timely appeal from the signing of the summary judgment.¹⁸⁴ The supreme court heard oral arguments on *991 January 27, 2000. Until its opinion is issued, the applicability of *Mafrige* in this situation remains uncertain.

A similar question arises when there are parties that have not yet been served that are excluded from a summary judgment that purports to be final as to all parties and issues. However, the lower courts' treatment in this situation has been more consistent. Where parties have not been served with citation or answered or made an appearance, “the case stands as if there had been a discontinuance” as to those parties.¹⁸⁵ Thus, the existence of unserved parties will never prevent a summary judgment containing a Mother Hubbard clause from being final as to the other parties and issues.

iii. The effect of *Mafrige* when claims, counterclaims, or cross-claims are omitted from a summary judgment motion

When a summary judgment purports to be final but simply fails to address all the non-movants claims, the result is clear--under *Mafrige* the judgment is final for purposes of appeal.¹⁸⁶ However, *Mafrige* did not explicitly address whether the same result is correct where it is a counterclaim or cross-claim that is excluded from the judgment. The supreme court appears to have answered this question, at least as to the issue of counterclaims, in *Bandera Electric Cooperative, Inc. v. Gilcrest*.¹⁸⁷ In *Bandara*, the plaintiff sued the defendant for breach of a rental contract, and the defendant counterclaimed for breach of contract, deceptive practices, antitrust violations, and coercion.¹⁸⁸ The plaintiff moved for summary judgment, with a motion stating that it “embraced [plaintiff's] entire claim against” the defendant, but did *992 not mention the defendant's counterclaims.¹⁸⁹ The court of appeal recognized that the Mother Hubbard clause contained in the judgment operated to render the order final, invoking the court's jurisdiction.¹⁹⁰ It then remanded the entire case for proper disposition.¹⁹¹ The supreme court reversed and remanded, holding that the court of appeals erred in remanding the entire case and instead should have only remanded the portion of the judgment that was not addressed in the trial court's judgment.¹⁹² Significantly, the court stated: “Because the order contained a Mother Hubbard clause denying all other relief, it also purported to dispose of [the defendant's] counterclaims.”¹⁹³

Consistent with this bright-line application, some lower courts have taken the same approach as the *Bandara* court, applying *Mafrige* to conclude that a Mother Hubbard clause renders a summary judgment final, even when there are counterclaims and cross-claims omitted from the party's motion.¹⁹⁴ Inexplicably, without referencing *Bandara*, other courts have refused to apply *Mafrige* in this situation, reasoning that a summary judgment that does not mention counterclaims or cross-claims does not “purport to be final”-- regardless of whether it contains finality language.¹⁹⁵

*993 iv. The role of the trial court's and parties' “intent” in determining finality under *Mafrige*

The inconsistencies in the lower courts' application of Mafrige really reflect the courts' differing views on the role of the trial courts' and parties' intent in determining finality of summary judgments after Mafrige. Three approaches have been taken by the courts. Some courts apply a bright-line test and hold that inclusion of finality language renders a summary judgment final, regardless of any evidence of contrary intent of the trial court or the parties.¹⁹⁶ Other courts take a slightly modified approach, looking to the “four corners” of the document and giving effect to contrary intent expressed on the face of the judgment.¹⁹⁷ Finally, other courts will look to any evidence *994 of intent in determining finality.¹⁹⁸

*995 Unfortunately, there are inconsistencies sometimes in even how the same court treats the parties' and trial courts' intent. The First Court of Appeals in Houston has taken the most extreme stances, in one case holding that the trial court's signing of a subsequent order was evidence that an earlier order “purporting to be final” was not final, while in another case holding that the signing of additional subsequent orders was not evidence that an earlier order signed by the court was not final.¹⁹⁹

v. The effect of Mafrige outside of summary judgments

Finally, the Mafrige opinion did not specifically address the effect of a Mother Hubbard clause on other types of orders. The Amarillo Court of Appeals has applied Mafrige to a granting of a “Plea to the Jurisdiction”²⁰⁰ and the Corpus Christi Court of Appeals has applied it to determine that a Mother Hubbard clause rendered an “agreed judgment” final.²⁰¹ Several courts have also applied the Mafrige finality rule to directed verdicts.²⁰²

In contrast, the First Court of Appeals in Houston has held that Mafrige does not apply to the dismissal of a cause for want of jurisdiction,²⁰³ and the Dallas Court of Appeals has declined to “extend[] the Mafrige doctrine to apply to orders which are not *996 summary judgments.”²⁰⁴ In *Harris County Flood Control District v. Adam*, the First Court of Appeals in Houston narrowly avoided “unjustly terminating the causes of action of over 200 plaintiffs”²⁰⁵ by holding that a Mother Hubbard clause in a severance order only operates to render the severed order final.²⁰⁶ Thus, its applicability to other types of orders just adds one more area of uncertainty to the scope of the Mafrige opinion.

c. Recent developments and possible solutions to the Mafrige/ summary judgment finality dilemma

The inherent flaws in the current procedures for determining finality of summary judgments in Texas has not gone unnoticed. In addition to the supreme court's revisitation of Mafrige in *Lehmann*, the Texas Supreme Court Rules Advisory Committee is in the midst of debating the problems surrounding finality and appealability.²⁰⁷ The discussion thus far has focused upon a subcommittee recommendation that consideration be given to adopting a procedure similar to the one utilized in the federal system.²⁰⁸ [Rule 58 of the Federal Rules of Civil Procedure](#) provides that “every judgment shall be set forth in a separate document” and that the judgment is not effective until set forth and entered on the clerk's docket.²⁰⁹ The suggestion is that Texas promulgate a similar rule providing: “An order or judgment is final for purposes of appeal, if and only if, it contains the following language: This is a final, appealable order or judgment.”²¹⁰ This rule affords a bright-line to determining appealability. However, it might not be a flawless solution; namely *997 because compliance with [Rule 58](#) has historically been inconsistent, resulting in thousands of cases that have disposed of all parties and issues languishing as non-final in the federal system.²¹¹ This reality has renewed a call to amend [Rule 58](#).²¹²

It is clear that some attempted solution to these finality problems will be forthcoming from the supreme court, either through its decision in *Lehmann* or its rulemaking powers. The court's options are many--but its choices are not easy. The solution must strike a balance recognizing the inherent tension between the policies favoring finality of judgments

and the evils created by a bright-line rule that has the potential to catch uninformed litigants off guard and possibly cost them their right to appeal.²¹³

Justice Hecht recently opined, and most would probably agree: “Appellate procedure should not be tricky. It should be simple, it should be certain, it should make sense, and it should facilitate consideration of the parties' arguments on the merits.”²¹⁴ Both the Mafrige rule and federal [Rule 58](#) reflect a desire to avoid the uncertainty problems presented in Texas pre-Mafrige.²¹⁵ As discussed previously, before Mafrige was decided finality of summary judgments could only be gleaned by looking at the entire record to determine if the court had disposed of all parties and issues in the case.²¹⁶ This procedure was not simple, was not certain, and was not easy. But, it is also apparent that the Mafrige rule has caused many problems as well.

Clearly, the strongest objection to any bright-line rule is the potential for unwary litigants and courts, such as those in *Lehmann*, to be caught off guard and ultimately lose the right to appeal solely on a technicality. Perhaps the compromise lies in retaining a bright-line rule, either by reaffirming Mafrige or adopting the federal approach, ***998** but rethinking other methods of direct attacks beyond the traditional appeal. For example, [Rule 306\(a\)\(4\) of the Texas Rules of Civil Procedure](#) requires the trial court clerk to give notice that a final judgment or appealable order has been signed within twenty days of its signing. The clerk is not required to send the parties a copy of the actual order or judgment signed. In fact, in most counties the clerk only sends postcard notice.²¹⁷ Under this rule, should the clerk fail to provide the required notice and neither a party or the party's counsel has actual knowledge that a final judgment or appealable order has been signed, that party is afforded additional time to file post-judgment motions or perfect an appeal, potentially up to ninety days.²¹⁸ Arguably, this section could be applied when a clerk does not specifically notify the parties a final judgment or appealable order has been signed. (Recall that in *Lehmann* the clerk sent a postcard indicating a partial summary judgment had been signed, when, in reality, the order purported to be final and appealable through the inclusion of a Mother Hubbard clause). If Rule 306a(4) were triggered by this type of defective notice, additional time would lie to file post-judgment motions and to perfect an appeal. Similarly, if the clerk's obligation were construed to require particularized notice that a final judgment or other appealable order has been signed, and the clerk failed to do so, this would arguably constitute “official mistake,” allowing the potential use of a bill of review.²¹⁹ Likewise, a plausible argument can be made that the trial court commits “official mistake” when it enters a summary judgment containing a Mother Hubbard clause upon a partial motion for summary judgment. If this argument were adopted by the courts, review through an equitable bill of review might be available as well.

Another possible cure for the evils created by the inclusion of a Mother Hubbard clause in an otherwise interlocutory judgment is to create a distinctive timeframe for asserting post-judgment motions. ***999** Currently, this is allowed in instances when a party is served by publication. Specifically, [Rule 329 of the Texas Rules of Civil Procedure](#) provides when a default judgment is rendered upon service of process by publication, a motion for new trial may be filed within two years after the judgment is signed. A similar rule could be constructed to provide an extended time to file post-judgment motions or to perfect an appeal, when an interlocutory judgment is rendered final for purposes of appeal by the inclusion of a Mother Hubbard clause.

The bright-line rule created by Mafrige is perhaps not bright enough. This bright-line test for finality is a matter of common law and has not been incorporated in the rules of civil procedure. It should be. Perhaps the solution to the problems of determining judgment finality is the promulgation of a rule that clearly advises of the distinctive and variant ways a judgment may become final, combining a bright-line final judgment rule that includes and improves Mother Hubbard provisions, with other traditional final judgment principals. One member of the Advisory Committee has proposed the adoption of such a final judgment rule that would provide:

- (1) When the orders of the court dispose of all claims against all parties, then the orders are final.

- (2) The last of such orders is the final judgment, and all timetables run from the date of the last order.
- (3) A final judgment should be labeled “Final Judgment” directly below the caption and should have a final judgment clause directly above the date signed by the judge.
- (4) Any order with a final judgment clause in the following form is final for the purposes of appeal: “This is a final, appealable judgment. All relief requested in this case that is not expressly granted in this judgment is denied.”
- (5) Any order without a final judgment clause in this form is final for the purposes of appeal only if final as defined in subdivision (1).²²⁰

This approach reflects our current practice as well as improves upon the acceptable language included in a Mother Hubbard Clause. A propose rule of this nature is an improvement to our current system and would provide much needed notice to the bench and bar of the many complex considerations that must be assessed in determining *1000 whether judgment finality exists.

The Supreme Court Advisory Committee will continue to study proposals and possible solutions to Texas finality of judgment problems. In the interim, counsel must proceed with great caution.

d. Navigating the lower courts' inconsistent treatment of Mafrige.

As the previous discussions reflect, it can sometimes be impossible to anticipate a court's treatment of Mafrige in any context that does not mirror Mafrige's facts. However, one thing is clear--if a litigant guesses wrong and erroneously assumes that an order is not final--the consequences are grave.²²¹ The timetable for the trial court's plenary power to expire begins running as soon as a judgment purporting to be final is signed by the court.²²² In addition, the time to file an appeal starts to run on that date.²²³ While some courts have been willing to construe Mafrige more narrowly than is warranted by the opinion in determining whether a judgment is final, once an order is determined to be final, there is no corresponding leeway in the inflexible rules governing the time restrictions upon the court's plenary power, or the parties' time to appeal.²²⁴

Thus, until the supreme court clarifies its holding in Mafrige, the most prudent course is to always treat the inclusion of a Mother Hubbard clause (or other language which may purport to render an order as final judgment), regardless of any apparent contrary intent of the parties or trial court. If an order erroneously fails to dispose of all parties and issues, the parties should either request the trial court amend the order by seeking removal of the Mother Hubbard clause or timely perfect an appeal.²²⁵ “If the practitioner fails to do so, it may be *1001 malpractice.”²²⁶

D. Other Issues Effecting Finality

There are other considerations relevant to determining when a judgment is final. Even with the guidance provided by the Aldrige and Mafrige presumptions, ascertaining when a judgment is final can be difficult. This is especially true when a trial court enters several interlocutory orders--or when it enters a second judgment purporting to be final without expressly vacating a prior “final” order. Thus, litigants must do more than evaluate whether an individual order is final. Instead, all orders entered by a trial court must be read together.

1. The “One Final Judgment” Rule

Unless a specific law provides otherwise,²²⁷ there can only be one final judgment rendered in a case.²²⁸ Thus, difficulties arise when a trial court purports to enter more than one final judgment.²²⁹ The general rule is that the entry of a second judgment is a nullity unless the trial court expresses an intent to vacate the first judgment.²³⁰ The second judgment need not contain language specifically vacating the earlier order, so long as there is evidence that the court intended to vacate the earlier order.²³¹ The Texas Supreme Court has held that a ***1002** judgment which “materially alter[s] the substance” of an earlier judgment vacates the earlier order.²³² When two judgments are signed-- but it is impossible to tell which one was signed first--the court must vacate both judgments and order a new trial.²³³ If a second final judgment is signed and then later set aside, the first judgment is not “revived.”²³⁴ However, if a second order is entered after the court's plenary power over an earlier final order expired, the second order is void--regardless of the court's intent.²³⁵

A final judgment that is inconsistent with a prior interlocutory order controls over the earlier order.²³⁶ In addition, where the first judgment is void on the face of the order, a subsequent judgment may be valid.²³⁷

Finally, where adverse parties are each entitled to relief on their claims in the same suit (i.e., where relief is warranted on both plaintiff's claims and defendant's counterclaims), the court should not enter separate judgments. Rather, because there may only be one final judgment, the court should offset each parties' recovery and render one judgment. Failure to strike this “balance” between recoveries appears to render the court's order interlocutory.²³⁸

***1003 2. Merger, Severance, and Nonsuit**

The finality of judgments can be affected by the occurrence of certain events during the course of litigation. For example, under the doctrine of “merger,” an otherwise interlocutory order becomes final when a subsequent order (or series of orders) is entered disposing of the remaining parties and claims.²³⁹ The orders then all merge into one final, appealable judgment, even though no document entitled a “judgment” has been signed.²⁴⁰

Similarly, the severance of undisposed of claims or parties operates to make an otherwise interlocutory order final.²⁴¹ Severance orders are effective on the day signed.²⁴² “Generally, when a trial court wants to treat two actions as independent suits, it must sever one of the actions and place it in a second trial court cause number.”²⁴³ However, the failure of the clerk to assign a new cause number to a severance order does not affect the finality of the order for appeal purposes.²⁴⁴

Finally, where unresolved claims exists, a party can always dismiss the remaining claims or nonsuit the remaining parties.²⁴⁵ If a nonsuit “makes an otherwise interlocutory judgment a final judgment, ***1004** then the appellate timetables still do not begin to run until the trial court either signs an order granting the nonsuit or signs a final judgment that explicitly memorializes the nonsuit or contains a ‘Mother Hubbard’ clause.”²⁴⁶

Because a final order can consist of “a series of piecemeal orders,” including interlocutory orders, nonsuits, severances, and dismissals, litigants should carefully read each order for content and be certain they understand the scope of each order.²⁴⁷ As soon as an order disposes of the final party or issue (or contains a Mother Hubbard clause), the orders all conceptually merge into a final, appealable judgment and any desired appeal must be taken.²⁴⁸

IV. Plenary Power and Appealability

The importance of determining when a judgment is “final” lies in the time limitations placed on both trial and appellate courts' power over judgments. A trial court's plenary power to modify its judgment is limited--and the time for expiration commences when a final order is signed. Likewise, litigants have a fixed amount of time after final judgment to seek appellate review of a trial court's final order. Texas law is riddled with nuances modifying the general rules governing plenary power and appealability. This section identifies the general rules and some of the more common issues that arise in their application.

A. Plenary Power

Plenary power is the power of a court to change its judgment.²⁴⁹ A trial court has plenary power over its judgments until they become *1005 final.²⁵⁰ Rule 329b of the Texas Rules of Civil Procedure provides that a trial court also has thirty days “to grant a new trial or to vacate, modify, correct, or reform” a final judgment, regardless of whether an appeal has been perfected.²⁵¹ Thus, if no motions are filed by any party that operate to extend the court's plenary power, the court loses power over its judgment at the end of thirty days.²⁵² The loss of plenary power does not deprive the trial court of the inherent authority to enforce its judgments.²⁵³ However, this authority is limited to enforcement orders that are consistent with the original judgment that do not “constitute a material change in substantial adjudicated portions of the judgment.”²⁵⁴

1. Motion for New Trial or Motion to Modify Judgment

The filing of a motion for new trial, or a motion to “vacate, modify, correct or reform” a court's judgment, must be filed within thirty days of the signing of a final order.²⁵⁵ This rule applies to *1006 amended and supplemental motions as well.²⁵⁶ If the court does not act on the motion, then it is overruled seventy-five days after the judgment by operation of law.²⁵⁷ The trial court retains plenary power for an additional thirty days past the date the motion is overruled, regardless of how it is overruled.²⁵⁸ Notably, this enlargement in the court's plenary period does not correspondingly increase the time allowed for parties to file motions.²⁵⁹ In other words, while a motion for new trial extends the court's plenary power, the time for parties to file any additional motions for new trial is not extended.²⁶⁰ Also significant is the Texas Supreme Court's recent determination that a motion to “modify, correct, or reform a judgment” only extends *1007 plenary and appellate periods if it seeks a “substantive change,”²⁶¹ a holding likely to beg the question as to what exactly constitutes substantive change.²⁶²

If a motion for new trial is filed prematurely (i.e., before the final judgment is actually rendered), it is considered filed on the day the final judgment is signed.²⁶³ However, a problem arises when the signed final judgment does not conform to the judgment the court pronounced. A similar problem arises when the court signs a modified judgment after a motion for new trial addressing the original judgment has been filed.²⁶⁴ In both cases, the question becomes whether the motion for new trial can be treated as a motion challenging the actual final judgment. In this situation, the courts will look at whether the substance of the original motion for new trial is applicable to the second judgment as well.²⁶⁵ However, the prudent course is to always file a renewed motion for new trial if the court modifies its judgment or signs a judgment that differs from the one announced in order to create a clean record and clearly preserve error and further extend plenary power. Speculation on whether a court will find the substance of the judgments the same is simply not worth the risk.

When the trial court actually grants a new trial, the one final judgment rule mandates that the judgment is no longer in effect and is implicitly vacated.²⁶⁶ The Texas Supreme Court has also held that the trial court retains power to “ungrant” its granting of a motion for new trial during the seventy five day post-judgment period.²⁶⁷ The supreme *1008 court has not decided whether the trial court has any power to ungrant a motion for new trial after the seventy-five day time period expires. If the trial court does grant a motion to modify or reform its judgment, it retains plenary power to further modify or reform the new judgment for an additional thirty days.²⁶⁸ This includes the situation where the “modification” is an order dismissing one party.²⁶⁹

Finally, any motion for new trial must be filed “in the same cause as the judgment the motion assails.”²⁷⁰ While this rule might seem intuitive, it can create problems when a cause is severed. For example, in *Philbrook v. Berry*, the Texas Supreme Court held that a motion for new trial did not operate to extend plenary power or the parties' time to appeal where the party seeking a new trial filed the motion under the original cause number rather than under the cause number of the severed cause containing the default judgment that the party wished to set aside.²⁷¹ Although criticized by commentators as exalting form over substance, the *Philbrook* rule remains a possible trap in cases with severed causes.²⁷² However, as one court of appeals has noted, “the Texas Supreme Court has all but expressly overruled the decision,” and repeatedly admonished that “appellate decisions should turn on ‘substance’ and not technicality,” so that a bona fide attempt to invoke appellate jurisdiction should be construed successfully.²⁷³

2. Nonsuit

The trial court retains plenary jurisdiction even after granting a motion for voluntary nonsuit.²⁷⁴ Thus, the Texas Supreme Court has held that a trial court has the power to rule on a sanctions motion during the thirty day period following the nonsuit of a party.²⁷⁵ The courts of appeals are split on whether a trial court may rule on *1009 sanctions motions after the thirty day plenary period expires.²⁷⁶

The Eastland Court of Appeals recently clarified that the trial court also retains plenary power to grant extensions of time to file an expert report during the thirty days of plenary jurisdiction in a medical malpractice case after a nonsuit is taken.²⁷⁷ In fact, it might abuse its discretion if it fails to exercise its plenary power to grant the extension if the plaintiff produces uncontroverted evidence that its failure to file a timely report “was not the result of conscious indifference but was the result of an accident or mistake.”²⁷⁸

The timetable for plenary jurisdiction runs from the signing of a dismissal order of the trial judge--not the date of filing the nonsuit.²⁷⁹ However, if amended pleadings are filed which omit the nonsuited party, the dismissed party is no longer a party to the suit, despite the absence of a signed dismissal order.²⁸⁰

3. Motion to Reinstate

When a final order has been signed dismissing a case for want of prosecution, the trial court has plenary power to reinstate the case on its own motion within thirty days after the judgment is signed.²⁸¹ A party may also file a verified motion to reinstate within thirty days of the dismissal.²⁸² Because a motion to reinstate is a motion to change the judgment, it extends the court's plenary power in the same way as a motion for new trial or a motion to modify the judgment.²⁸³ *1010 However, an unverified motion to reinstate will not extend the trial court's plenary power,²⁸⁴ unless all parties

join in the motion.²⁸⁵ While a timely motion for new trial extends the court's plenary period, litigants should note that it does not enlarge the time for a party to file a motion for reinstatement past the thirty-day deadline.²⁸⁶

4. No Notice of Final Judgment

The general rules governing final judgments and plenary power are usually sufficient to protect a party's right to be heard by the trial court before an order is rendered. However, a party may be prejudiced by an order that the party does not even realize was entered by the trial court. There is limited relief available to a party in this situation.

The date the trial court signs a final order is the date the clock starts ticking on the court's plenary power.²⁸⁷ When a final judgment (or appealable order) is signed, the clerk is required to send notice to all parties or their attorneys of record.²⁸⁸ If a party adversely affected by a judgment, or the party's attorney, does not receive the required notice from the clerk and has no actual knowledge of the order, the timetables for plenary period may be modified.²⁸⁹ Specifically, [Rule 306a\(4\) of the Texas Rules of Civil Procedure](#) provides:

***1011** If within twenty days after the judgment or other appealable order is signed, a party adversely affected by it or his attorney has neither received . . . notice . . . nor acquired actual knowledge of the order, then with respect to that party [the court's post-judgment plenary power] shall begin on the date that such party or his attorney received such notice or acquired actual knowledge of the signing, whichever occurred first, but in no event shall such periods begin more than ninety days after the original judgment or other appealable order was signed. To establish entitlement to the extended period under [Rule 306a\(4\)](#), the party affected must prove in the trial court, "on sworn motion and notice," the date notice was received or actual notice was acquired and that "this date was more than twenty days after the judgment was signed."²⁹⁰ A prima facie showing that these requirements have been met is necessary to reinvoke the trial court's jurisdiction to determine if [Rule 306a\(4\)](#)'s extension provisions apply.²⁹¹ This is a jurisdictional prerequisite.²⁹²

Motions to extend the court's plenary power under this rule have been rejected (1) for failure to allege the exact day the party received notice or knowledge,²⁹³ (2) for alleging lack of notice, but not establishing lack of knowledge,²⁹⁴ (3) and for failing to allege lack of notice and knowledge by both the party and their attorney.²⁹⁵ The courts of appeals are split as to whether the party must establish a prima facie case for jurisdiction under [Rule 306a](#) within thirty days of receiving notice or actual knowledge of the judgment.²⁹⁶ If the party receives notice or knowledge more than ninety days after the signing of the final judgment, the court's plenary power may not be enlarged under section 306a.²⁹⁷ In this case, the parties' only remedy is the limited review provided by a bill of review or restricted appeal.²⁹⁸

***1012 5. Nunc Pro Tunc Correction of Judgments**

Sometimes after an order is rendered by the trial court, it is discovered that the signed order does not conform entirely to the judgment the trial court intended to render. If this happens during the trial court's plenary period there is no problem. The trial court always has the authority to modify its judgment in any manner while it still maintains jurisdiction. However, there are cases where the discrepancy between the judgment rendered and the one signed is not noticed until the court's plenary period expires.

This situation is addressed by [Rule 316 of the Texas Rules of Civil Procedure](#), which allows the trial court to correct “clerical” mistakes in a judgment—even after its plenary power has expired.²⁹⁹ The difficulty is in determining whether an error is “clerical” or “judicial.” This is a question of law.³⁰⁰ The Texas Supreme Court has clarified that a clerical error correctable by nunc pro tunc is one made in entering a final judgment.³⁰¹ It does not result from judicial reasoning, evidence, or determination.³⁰² In other words, a judgment nunc pro tunc is only valid to bring the written order in conformity with the judgment actually rendered.³⁰³ This is in contrast to a judicial error that is made in the rendering of a final judgment.³⁰⁴ Correction of a judicial error after plenary power has expired results in a void order.³⁰⁵

Examples of permissible correction of clerical errors include: (1) attaching exhibits to a judgment that were erroneously omitted,³⁰⁶ (2) filling in blank space where amount of judgment was omitted,³⁰⁷ (3) correcting names that have been erroneously recorded,³⁰⁸ and (4) ***1013** correcting the signing date on the order.³⁰⁹

Conversely, judicial errors usually result from the trial court changing its mind about a judgment, or discovering that its judgment was the result of an erroneous finding of fact or conclusion of law.³¹⁰ These errors are never correctable after the trial court's jurisdiction expires.³¹¹ Similarly, a judgment is not correctable when an attorney accidentally includes an erroneous provision in an order the judge signs,³¹² unless there is independent evidence of the trial court's intent to sign a judgment containing a different provision.³¹³

The existence of any clerical error must be shown by clear and convincing evidence.³¹⁴ Specifically, the movant must present evidence showing that the judge intended the requested result at the time the original judgment was entered.³¹⁵ This fairly rigid burden ensures that judges can correct their clerical mistakes, while preventing the use of [Rule 316](#) as a vehicle to circumvent the general rules governing plenary power if the court changes its mind about the judgment.³¹⁶

6. Bill of Review

Finally, in very limited circumstances, a trial court may vacate its judgment after its plenary power has expired through a bill of review.³¹⁷ This is an equitable avenue for setting aside a judgment that ***1014** is no longer appealable or subject to a motion for new trial.³¹⁸ The party seeking to set aside the judgment must show “sufficient cause.”³¹⁹ Depending on the situation, this “sufficient cause” requirement means different things. Generally though, one can prevail by showing: (1) a meritorious defense that the party did not have an opportunity to present, (2) an excuse justifying the failure to present the defense based on extrinsic fraud, accident, or wrongful act of the opposite party, and (3) the absence of fault or negligence.³²⁰

The most difficult hurdle to overcome is usually the extrinsic fraud requirement. Generally, this is fraud perpetrated by the opposing side that prevents the party or counsel from knowing about rights or defenses, or from having a fair opportunity to present the merits of its cause of action or defense.³²¹ Examples include preventing a party from attending a trial by fraudulently securing a trial setting; bribing a juror; or concealing the fact that an opponent is incompetent to prevent a guardian ad litem from being appointed.³²² Intrinsic fraud, in contrast, relates to matters presented at trial, matters actually in controversy, and the mechanics of the trial.³²³ This issue often arises in divorce cases, with the question being whether misrepresentation or concealment of property (or the value of the property) is extrinsic or intrinsic fraud.³²⁴

Another type of bill of review is predicated on an “official mistake.” Here, to prevail a party must show that: (1) the failure to answer was not the result of conscious indifference, (2) the party was misled or prevented from filing an appropriate response interposing by misinformation of an officer of the court action within official *1015 duties, (3) the party has a meritorious defense, and (4) no injury will be caused to the opposing party.³²⁵ A party can be prevented from filing a motion for new trial where the court did not give proper notice of its intention to dismiss a cause for want of prosecution.³²⁶ Failure of the clerk to send notice of a trial court's final judgment, as required by [Rule 306a\(3\) of the Texas Rules of Civil Procedure](#), can satisfy this official mistake requirement.³²⁷

A meritorious defense is one that is not barred by law that would prevail at trial if no controverting evidence were presented.³²⁸ The United States Supreme Court has held that a party who is not served with notice reasonably calculated to apprise it of the pendency of an action cannot be required to show a meritorious defense.³²⁹ Similarly, if the trial court actually lacked jurisdiction to render a judgment, the party challenging the judgment need not show a meritorious defense.³³⁰

***1016 B. Appealability**

When a litigant believes the trial court has committed an error, he or she must weigh the costs of seeking review of that error against the likelihood of achieving the desired result on appeal. Important factors to consider include the monetary costs of an appeal, whether error has been preserved, whether error is harmless or would require a reversal, whether a rendition or remand would be appropriate, and the standard of review the appellate courts will apply.³³¹ In reviewing most matters, the appellate courts exercise great deference to the trial court, only reversing a judgment upon a showing of actual abuse of discretion. Further, even when error is found, it is often subject to harmless error analysis, where the court will only reverse if it decides that the error likely changed the outcome of the trial.³³²

When the decision is made to seek review of an order, the next step is to determine when an appeal may be taken. The following section explains when an appeal may be taken from certain types of judgments and the procedures and timetables for bringing these appeals.

1. Appeals from a Final Judgment

[Section 51.012 of the Texas Civil Practice and Remedies Code](#) provides the authority for taking appeal of most final judgments to the court of appeals.³³³ [Section 22.001 of the Texas Government Code](#) provides the jurisdiction for additional review by the Texas Supreme Court of certain decisions by the courts of appeals.

a. Perfecting an appeal

A party seeking appellate review of a final judgment perfects its appeal by filing a notice of appeal with the trial court.³³⁴ One party's filing invokes the appellate court's jurisdiction over all parties, but, absent good cause, the court may not grant more favorable relief than the trial court in favor of a party who did not file a notice of appeal.³³⁵ If notice is filed prematurely, it is deemed filed the day of, but after, *1017 the signing of a final judgment by the trial court.³³⁶

b. Appellate timetables

The timetables for appealing a final judgment are governed by [Rule 26 of the Texas Rules of Appellate Procedure](#). The timetables for appellate jurisdiction discussed here and the timetables for plenary power discussed in the previous sections

are not necessarily coexistent. In other words, certain occurrences that extend a party's time to appeal do not necessarily extend the trial court's plenary power for the same period. Likewise, extension of a trial court's plenary power does not always extend the parties' time to appeal.

i. In general

The default rule is that a party must file a notice of appeal within thirty days of the signing of a final judgment.³³⁷ The Texas Rules of Appellate Procedure and the Texas Supreme Court have modified this timeline in number of ways.

[Texas Rule of Appellate Procedure 26](#) explicitly provides several exceptions to this general rule. Under Rule 26.1(a), the time permitted to perfect an appeal from a final judgment is extended from thirty to ninety days if a party timely files: (1) a motion for new trial, (2) a motion to modify the judgment, (3) a motion to reinstate after dismissal for want of prosecution, or (4) certain requests for findings of facts or conclusions of law.³³⁸ Notably, only requests for findings of fact that “have purpose” will extend time to perfect an appeal.³³⁹ The Texas Supreme Court in *IKB Industries v. Pro-Line Corp.* held that the key inquiry in whether a request has purpose is determined by whether the trial court held an evidentiary hearing or trial that formed the basis of the judgment being appealed.³⁴⁰ Thus, for example, a request for findings of fact following a summary judgment, judgment after directed verdict, or judgment non obstantio veredicto would not have purpose. These motions are decided as a matter of law and thus ***1018** present no genuine issues of fact.

The rule extending the time to appeal when a party requests a modification of a judgment can be tricky. When the trial court actually changes its judgment “in any respect,” (either at the request of a party or sua sponte) the timetable for appeal is automatically extended.³⁴¹ This is the result regardless of how insubstantial the change might be.³⁴² In contrast, the Texas Supreme Court has held that only a motion of a party requesting a “substantive” change will extend the deadlines if the court does not actually change the judgment.³⁴³ This significant distinction has the potential to cause problems in two situations. First, if a party requests additional relief, but not in the form of an actual change in the court's judgment, the time to appeal apparently will not be extended--even though it would be extended if the identical relief was requested in the form of a request for modification of the judgment.³⁴⁴ Second, when a party requests a change that is later determined to be insubstantial, the party may not realize that it has not timely perfected an appeal until it is too late.³⁴⁵ For these reasons, Justice Hecht wrote a concurrence in *Lane Bank Equipment* disagreeing with the court's interpretation of [Rule 329\(g\)](#).³⁴⁶ He argued that “a party should not have to stake its right to appeal on correctly guessing whether a change . . . is substantive.”³⁴⁷ Because this “substantive change” requirement is not mentioned anywhere in the actual rule, the court's holding is sure to create traps for unwary litigants.³⁴⁸

The appellate timetable may also be extended simply by filing a motion for extension of time within fifteen days after the deadline for filing the notice of appeal.³⁴⁹ If a notice of appeal is not timely filed, but is filed within fifteen days of the due date, then a motion for ***1019** extension will be implied.³⁵⁰ However, it is still necessary to demonstrate a reasonable explanation supporting an extension of time. A “reasonable explanation” is a plausible statement of circumstances indicating that the failure to file within the required period was not deliberate or intentional, but was the result of inadvertence, mistake or mischance.³⁵¹

Finally, the rules provide different timetables for accelerated and restricted appeals. Notice of an accelerated appeal must be filed with twenty days of the signing of the appealable order or judgment.³⁵² Notice of a restricted appeal must be filed within six months of the date the final judgment is signed.

As noted previously, a trial court may modify a judgment on the request of any party, or on its own motion, at any time during its plenary period. Modification or replacement of an order by a trial court extends the time to appeal to thirty days from the date the new order is signed. However, one exception to this rule is new orders signed by the trial court solely for the purpose of extending the appellate timetables. The Texas Supreme Court explained these concepts succinctly in *Farmer v. Ben E. Keith*:

[T]he appellate timetable runs from the signing date of whatever order that makes a judgment final and appealable, i.e., whatever order disposes of any parties or issues remaining before the court. Further, the appellate timetable can begin yet again with the signing of an order or judgment where there is nothing on the face of the record to indicate it was signed for the sole purpose of extending the appellate timetable and the order is signed within the trial court's plenary power.³⁵³ Notably, a nunc pro tunc modification only extends the time to appeal new matters in the trial court's order not addressed by the first order.³⁵⁴

ii. Restricted appeals

When a party misses appellate deadlines to take an ordinary appeal, there is one possible avenue for obtaining review of a judgment, but the circumstances are very limited. A “restricted *1020 appeal”³⁵⁵ may be taken (1) within 6 months after the judgment is signed, (2) by a party to the suit, (3) who did not participate in person or through counsel in the hearing that resulted in the judgment and who did not timely file a post-judgment motion or a request for findings of fact and conclusion of law, (4) where error is apparent from the face of the record.³⁵⁶ This procedure is generally used to attack a default judgment entered against a party who did not attend the trial.³⁵⁷ The “face of the record” for purposes of a restricted appeal, is all the papers on file in the appeal, including the reporter's record, as it existed in the trial court at the time the judgment was entered.³⁵⁸ Once a party meets its burden of establishing entitlement to a restricted appeal, the entire case is reviewed, just as in an ordinary appeal.³⁵⁹

It can be difficult to show error on the face of the record. As a practical matter, a restricted appeal is usually only available where there has been a procedural error. Specifically, it is an effective method to challenge defective service³⁶⁰ or lack of required notice.³⁶¹ It has also been successfully used to challenge the failure of a trial court to hold a statutorily required hearing.³⁶²

A restricted appeal is not available if the party participated in any *1021 way in the hearing that resulted in the judgment.³⁶³ A party participates in the trial if it files any posttrial motions with the trial court.³⁶⁴ Significantly, the Dallas Court of Appeals has strictly interpreted this caveat to include a motion to set aside the default judgment.³⁶⁵ It reasoned that a motion to set aside a default judgment is, in essence, just a motion for new trial.³⁶⁶ Thus, if a litigant challenges an erroneous default judgment by timely filing a motion to set aside the judgment, a notice of appeal must be filed within ninety days after the judgment was signed.³⁶⁷ Or no restricted appeal will lie.

2. Review of Non-Final Orders

Generally, the one final judgment rule precludes appellate review of non-final orders.³⁶⁸ However, the Legislature may and has created statutory exceptions that allow for certain kinds of interlocutory review. The reasoning is that some rulings so significantly impair the rights of litigants that statutory or rule provisions mandate interlocutory review,

notwithstanding the absence of a final judgment. This review is accomplished through an interlocutory appeal or, in limited circumstances, through a mandamus proceeding.

a. Interlocutory appeals

An interlocutory appeal must be expressly provided for by statute.³⁶⁹ Most interlocutory appeals are only reviewable by the court of appeals.³⁷⁰ The Texas Supreme Court's jurisdiction is limited to review of interlocutory orders where there is a split of authority in the courts of appeals or there is a dissenting opinion filed in the court of appeals.³⁷¹ However, the supreme court might nonetheless undertake *1022 further review, by way of mandamus, of an order otherwise final in the court of appeals.³⁷²

The statutes allowing for interlocutory appeal are strictly construed by the appellate courts because they represent such a narrow exception to the policies furthered by the final judgment rule.³⁷³ A permissible interlocutory appeal “may not be used as a vehicle for carrying other non-appealable interlocutory orders and judgments to the appellate court.”³⁷⁴ Thus, if a party appeals two interlocutory orders, where one is appealable and one is not, the court will dismiss the improper appeal and only address the merits of the appeal allowed by statute.³⁷⁵

i. Texas Civil Practice & Remedies Code § 52.014

The main statutory provision providing for review of interlocutory orders is Section 52.014 of the Texas Civil Practice and Remedies Code. Under this section, a party may seek review by a court of appeals of eight different types of interlocutory orders.³⁷⁶ Any appeal taken under this statute has the effect of staying the commencement of a trial or summary judgment proceeding.³⁷⁷

Certain Denials of Summary Judgment. If a court denies summary judgment based on a claim of official immunity, the defendant is entitled to review of that denial before being subjected to *1023 a trial on the merits.³⁷⁸ Likewise, the denial of summary judgment that is based in whole or in part upon a claim against or defense by a member of the electronic or print media or a person whose communication appears in or is published by the electronic or print media arising under the free speech or free press clause of the First Amendment is also reviewable.³⁷⁹ Note that when the statute allows the media to appeal an order pertaining to First Amendment rights, it does not likewise allow other parties to the ruling to appeal--only the media.³⁸⁰ This exception was created to save the time and expense of a trial on the merits when the media may be entitled to a constitutional or statutory privilege.³⁸¹

The appellate courts review the denial of summary judgment under the same standard as the granting of one.³⁸² At least one court has held that a trial court abuses its discretion by refusing to rule on a summary judgment that would be subject to an interlocutory appeal, if the court's purpose was to prevent that appeal from being taken.³⁸³

Orders Pertaining to Receivers, Trustees, and Injunctions. Also permissible under section 51.014 is review of an appointment (but not the refusal to appoint) of a receiver or trustee.³⁸⁴ This exception *1024 likewise applies to the overruling of a motion to vacate an order appointing a receiver or trustee.³⁸⁵ However, an order denying the appointment of a receiver is not subject to interlocutory review.³⁸⁶

The granting or refusal to grant a temporary injunction, the granting or overruling of a motion to dissolve a temporary injunction, and any order modifying the terms of a temporary injunction may also be reviewed under this section.³⁸⁷ However, neither a temporary restraining order nor a permanent injunction is reviewable at the interlocutory stage.³⁸⁸

Class Actions. Another important provision allows for review of certification or refusal to certify a case as a class action.³⁸⁹ Case law instructs that the withdrawal of class certification is also reviewable at the interlocutory stage.³⁹⁰ Modifications of a class may be appealable in certain circumstances.³⁹¹ The Texas Supreme Court has held that the test of appealability for modifications of a class is whether the court's order "alters the fundamental nature of the class."³⁹²

Special Appearances. Except in suits brought under the Texas *1025 Family Code, the granting or denying of a special appearance is immediately appealable.³⁹³ The purpose of this section is to provide the appellate court an opportunity to determine whether the defendant "'should be immune from the expense and inconvenience of . . . a trial' because the trial court does not have jurisdiction over his person."³⁹⁴

Certain Pleas to the Jurisdiction. An interlocutory order which grants or denies a plea to the jurisdiction by a governmental unit is appealable under this section.³⁹⁵ Such an appeal may only be brought by a "governmental unit" as specifically defined by [Texas Government Code § 101.001](#).³⁹⁶ The courts of appeals review the granting or denial of a plea to the jurisdiction brought by interlocutory appeal de novo.³⁹⁷

***1026 ii. Other interlocutory orders appealable by statute or rule**

Certain Arbitration Orders. [Section 171.098 of the Texas Civil Practice and Remedies Code](#) provides for immediate review of orders denying an application to compel or staying arbitration.³⁹⁸ However, neither an order compelling arbitration nor an order refusing to stay arbitration is reviewable.³⁹⁹ Texas courts review the denial of a motion to compel arbitration under a "no evidence" standard.⁴⁰⁰ If an order improperly denies arbitration under an agreement that incorporates the Federal Arbitration Act, no interlocutory appeal is provided for, but relief by mandamus is available as there is no adequate remedy by law.⁴⁰¹ The Federal Arbitration Act applies to contracts relating to interstate commerce.⁴⁰² If a contractual agreement provides for arbitration and references both the Texas and the Federal Arbitration Act, the Federal Act prevails.⁴⁰³

Election Contests. [Texas Election Code section 232.014](#) accelerates the appeal of a contested primary election.⁴⁰⁴ The appeal must be brought no later than the fifth day after the district court's judgment in the contest is signed, or it will be dismissed as untimely.⁴⁰⁵ The district court sets the deadline for filing the record and may reduce the filing time for appellate briefs, subject to final review by the court of appeals. Similarly, both the trial and appellate court may accelerate the appeal in a contest of a general or special election. *1027 Such a contest is appealable to the Texas Supreme Court.⁴⁰⁶

Court Ordered Mental Health Services. Original and renewal or modification orders compelling a party to succumb to mental health treatment are appealable at the interlocutory stage, provided the appeal is filed no later than the tenth day after the order is signed.⁴⁰⁷ Preference is afforded to these appeals and the appellate courts may suspend any rule concerning the time for filing briefs and docketing cases.⁴⁰⁸

Court Ordered Treatment For Alcohol Or Substance Abuse. A party ordered to begin treatment for alcohol or substance abuse may appeal the order within ten days of the trial court signing the order.⁴⁰⁹ Appellate courts are to give preference to these appeals and may suspend rules concerning the time for filing briefs and docketing cases.⁴¹⁰

Orders Pertaining To Sealing Court Records. The Texas Rules of Civil Procedure authorize interlocutory review of “any order relating to sealing or unsealing court records.”⁴¹¹ Rule 76a states, in pertinent part: “Any order (or portion of an order or judgment) relating to sealing or unsealing court records shall be deemed to be severed from the case and a final judgment which may be appealed by any party or intervenor who participated in the hearing preceding issuance of such order.”⁴¹² The Texas Supreme Court has referred to this review as an “interlocutory appeal” but suggests that acceleration is discretionary.⁴¹³

Certain Venue Rulings. In 1995, the Texas legislature amended the venue statutes creating a most confusing scheme for appellate review dependent upon the basis for the venue ruling.⁴¹⁴ The venue statute provides accelerated appellate review of a trial court *1028 determination as to whether joinder or intervention of a party plaintiff who is unable to independently establish venue is proper.⁴¹⁵ The appeal must be perfected no later than the twentieth day after the date of the order “denying or allowing the intervention or joinder.”⁴¹⁶ The Texas Supreme Court has clarified that this section allows for review of a trial court's transfer of venue, when that transfer is predicated upon the trial court's joinder decision.⁴¹⁷ One issue that is unclear is whether this section permits an appeal of a trial court's determination that each plaintiff has independently established venue.⁴¹⁸ This issue is currently pending before the Texas Supreme Court in *American Home Products Corp. v. Clark*.⁴¹⁹

Certain Denials of Summary Judgment. The denial of a summary judgment does not ordinarily result in a final judgment and is non-appealable.⁴²⁰ However, an exception arises when a cross-motion for summary judgment is filed and complete summary judgment is granted in favor of one moving party and not the other.⁴²¹ In this instance, appellate jurisdiction may be invoked--as the matter is truly final. Thus, the appellate court may consider the denial of the summary judgment--assuming the appealing party complains of both the granting of its opponents' motion and the denial of its own.⁴²² In this circumstance, rendition in favor of the appellant may be warranted.

b. Mandamus review

Finally, in limited circumstances, a party may challenge a non-final order by filing a petition for writ of mandamus.⁴²³ This petition literally requests the appellate court order the trial court to change a ruling or perform a required duty. Historically, this remedy was limited to compel the court's performance of a ministerial act.⁴²⁴ *1029 However, in recent years, mandamus review has expanded to include correction of “clear abuses of discretion” by the trial court.⁴²⁵

Walker v. Packer is the seminal Texas Supreme Court case clarifying the current requirements for mandamus review. *Walker* reaffirmed that mandamus is only appropriate when (1) the trial court has refused to perform a ministerial act or duty, or has clearly abused its discretion, and (2) the aggrieved party has no adequate remedy on appeal.⁴²⁶ This later requirement has been excused in limited circumstances.⁴²⁷ Application of this test is not always as straightforward (or consistent) as one might think. However, *Walker* and several other recent cases have clarified the scope of this remedy.

In any event, “[m]andamus is an extraordinary writ, and is not issued as a matter of right, but rests largely in the sound discretion” of the appellate court.⁴²⁸ When reviewing petitions for mandamus, the courts remain mindful of the strong policies behind the final judgment rule. The supreme court has recently emphasized this, stating that mandamus review

is not available to remedy most erroneous incidental trial rulings because to do so “would severely impair the ability of trial judgments to manage their dockets, and would require the [appellate courts] to micromanage trials.”⁴²⁹ Thus, establishing entitlement to mandamus relief can be difficult, even when the record presented to the appellate court clearly reflects error.⁴³⁰

i. Trial court error

A party seeking mandamus must first show error by the trial court. A court's failure to perform a ministerial duty is always error, as a court has no discretion in these types of decisions.⁴³¹ Thus, ***1030** mandamus may be appropriate if a trial court refuses to proceed to trial or refuses to enter a judgment.⁴³² Likewise, if a court performs an act that it has no authority to perform--such as the entering of a judgment that it is without power to enter--it has violated a legal duty and thus committed an error appropriate for mandamus review, provided the other requirements are met.⁴³³ The line between a ministerial act and the exercise of discretion is not always clear. This is because the exercise of discretion is itself a ministerial act. In other words, a court can fail to perform a ministerial act by simply refusing to exercise discretion when it is appropriate.⁴³⁴

A “clear abuse of discretion” by the trial court is perhaps the more difficult type of error to identify.⁴³⁵ The supreme court has defined this as “a decision so arbitrary and unreasonable that it results in a clear and prejudicial error of law.”⁴³⁶ Generally, this means the realtor has the burden of showing that the trial court could have only reached one decision.⁴³⁷ Examples of where the courts have found abuses of discretion subject to mandamus include: allowing overbroad and irrelevant discovery requests;⁴³⁸ denying discovery of properly discoverable information;⁴³⁹ the refusal to compel a party to answer interrogatories;⁴⁴⁰ ordering the production of a privileged document;⁴⁴¹ erroneously asserting personal jurisdiction over a defendant;⁴⁴² failure ***1031** to allow supplementation of interrogatory answers more than thirty days before trial;⁴⁴³ imposing inappropriate sanctions against a nonparty witness;⁴⁴⁴ the imposition of “unjust” sanctions;⁴⁴⁵ the imposition of sanctions that must be performed before the sanctioned party has opportunity to appeal;⁴⁴⁶ and the refusal to grant a mandatory transfer of venue in a suit affecting parent-child relationship.⁴⁴⁷

ii. No adequate remedy on appeal

Even when clear error is shown, “[m]andamus will not issue where there is ‘a clear and adequate remedy at law, such as a normal appeal.’”⁴⁴⁸ For a period of time, the Texas Supreme Court relaxed this requirement in cases involving discovery orders. However, in *Walker* the court reaffirmed that a showing of no adequate appellate remedy is a “‘fundamental tenet’ of mandamus practice.”⁴⁴⁹ The courts also currently adhere to the rule that an “appellate remedy is not inadequate merely because it may involve more expense or delay than obtaining an extraordinary writ.”⁴⁵⁰ In fact, in *Walker* the court expressly disapproved of cases applying a more lenient standard “to the extent that they imply that a remedy by appeal is inadequate merely because it might involve more delay or cost than mandamus.”⁴⁵¹ Notably, despite the court's retreat from the more relaxed standard in discovery cases, there are other circumstances where the Legislature or the courts have not strictly adhered to this ***1032** “no adequate remedy by appeal” requirement.⁴⁵²

Erroneous discovery orders are most often found to offer no adequate remedy by appeal. For example, there is no adequate remedy where a party has been ordered to disclose material that is not properly discoverable.⁴⁵³ This result is intuitive, as any remedy on appeal would be useless when the other party has already reaped the benefits of the confidential material.⁴⁵⁴ “Death Penalty” discovery sanctions, which effectively prevent a party from presenting a viable

claim or defense, are likewise appropriate for mandamus review.⁴⁵⁵ It would be useless to go through the motions of a trial where one party is crippled by an erroneous ruling going “to the heart” of the party's case.⁴⁵⁶ Finally, an erroneous discovery ruling that prevents a party from creating a record for the appellate court may be reviewable by mandamus.⁴⁵⁷ This occurs, for example, when a court files a protection *1033 order that prohibits the discovery of certain documents that cannot then be preserved as part of the record.⁴⁵⁸

iii. Other considerations

Finally, while mandamus is not an equitable remedy, the Texas Supreme Court has explained that “its issuance is largely controlled by equitable principles.”⁴⁵⁹ This principle has been applied to deny mandamus relief for parties who “slumber on their rights.”⁴⁶⁰ Thus, a party seeking mandamus should always argue the equitable principles supporting their position. Likewise, a party opposing mandamus relief should always raise any meritorious argument that the granting of relief would be inequitable.

V. Conclusion

The policy favoring finality of judgments is important--to the system, to the courts, and to the parties. It protects against overuse of limited judicial resources and fulfills the need to insure that, at some point in time, a judgment is no longer subject to change. However, this policy should be balanced against the strong interests in the ultimate disposition of cases through correct judgments. Likewise, insofar as feasible, a litigant's right to appellate review should be protected.

Determining finality of judgment should be simple; but it is not under our current regime. The serious consequences flowing from misjudging finality mandate an intimate familiarity with the procedural nuances under Texas jurisprudence in determining finality of judgment, plenary power, and appealability.⁴⁶¹ While it is hoped changes to our procedural rules warning the unsuspecting of these traps will be promulgated, in the interim sophisticated counsel must proceed cautiously through the many procedural minefields that exist in this area of the law.

*1034 Appendix A

TABULAR OR GRAPHIC MATERIAL SET FORTH AT THIS POINT IS NOT DISPLAYABLE

Addendum

Since this article was published, the Texas Supreme Court handed down its decision in [Lehmann v. Har-Con Corp.](#), 44 Tex. Sup. Ct. J. 364, 2000 WL 33146410 (Tex. Feb. 1, 2001) clarifying the proper use and effect of Mother Hubbard clauses in summary judgment cases. Thus, section III (C) of this paper now provides the historical background for this recent decision. In *Lehmann*, the court overruled its earlier decision in [Mafrige v. Ross](#), 866 S.W.2d 590 (Tex. 1993) by holding that inclusion of a Mother Hubbard clause providing “all relief not granted is denied” (or similar finality language) no longer indicates that a judgment rendered without a conventional trial on the merits is final for purposes of appeal. Specifically, the stated:

[W]e conclude that when there has not been a conventional trial on the merits, an order or judgment is not final for purposes of appeal unless it actually disposes of every pending claim and party or unless it clearly and unequivocally states that it finally disposes of all claims and all parties. An order that adjudicates only the plaintiff's claims against the defendant does not adjudicate a counterclaim, cross-claim, or third party claim, nor does an order adjudicating claims like the latter dispose of the plaintiff's claims. An order that disposes of claims by only one of multiple plaintiffs or against one of multiple defendants does not adjudicate claims by or against other parties. An order does not dispose of all claims and all parties merely because it is entitled “final”, or because the word “final” appears elsewhere in the order, or even

because it awards costs. Nor does an order completely dispose of a case merely because it states that it is appealable, since even interlocutory orders may sometimes be appealable. Rather, there must be some other clear indication that the trial court intended the order to completely dispose of the entire case. Language that the plaintiff take nothing by his claims in the case, or that the case is dismissed, shows finality if there are no other claims by other parties; but language that “plaintiff take nothing by his claims against X” when there is more than one defendant or other parties in the case does not indicate finality.

The Court admitted that denying the standard Mother Hubbard clause of any indicia of finality in any order not issued after a conventional trial on the merits will lessen the perplexities in determining judgment finality, but that “the difficulty in determining what does make an order final and appealable remains.” *Id.* Hopefully this article will be helpful in navigating this complex body of Texas law.

Footnotes

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The opinions expressed here are wholly those of the authors.

¹ Compare 28 U.S.C. § 1292(b) (1994) (allowing interlocutory appeal where the district court and appellate court agree that the issue “involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance... termination of litigation”), with *North E. Indep. Sch. Dist. v. Aldridge*, 400 S.W.2d 893, 895 (Tex. 1966) (explaining that in Texas, absent applicability of a specifically enumerated exception, appeals may be “prosecuted only from a final judgment ... [that] dispose[s] of all issues and parties in a case”); see generally Renee Forinash McElhaney, *Toward Permissive Appeal in Texas*, 29 *St. Mary's L.J.* 729 (1998) (comparing the federal system's limited permissive right of interlocutory appeal with Texas' ridged adherence to the final judgment rule and arguing Texas should adopt a more permissive system).

² *Aldridge*, 400 S.W.2d at 895.

³ See, e.g., *id.* at 895; *In re Cummings*, 13 S.W.3d 472, 474 (Tex. App.--Corpus Christi 2000, no pet.); *Stolhandske v. Stern*, 14 S.W.3d 810, 813 (Tex. App.--Houston [1st Dist.] 2000, pet. denied); *Smith v. Grace*, 919 S.W.2d 673, 675 (Tex. App.--Dallas 1996, writ denied); *Twin City Fire Ins. Co. v. Brown*, 602 S.W.2d 118, 119 (Tex. Civ. App.--Waco 1980, no writ).

⁴ See *Tex. R. App. P. 26.1* (providing timetables for appeal).

⁵ *Aldridge*, 400 S.W.2d at 895.

⁶ See *Njuku v. Middleton*, 20 S.W.3d 176, 178 (Tex. App.--Dallas 2000, pet. filed) (explaining effect of res judicata).

⁷ See *Tex. R. Civ. P. 329b(d)* (providing timetable for trial court to grant new trial or vacate, modify, correct, or reform a final judgment).

⁸ See *Tex. R. Civ. P. 329b(e)*.

⁹ See *Harris County Flood Control Dist. v. Adam*, 988 S.W.2d 423, 426 (Tex. App.--Houston [1st Dist.] 1999, pet. filed) (explaining that once an erroneous judgment becomes final, the “timetables for challenging the judgment begin to run,” and if the parties fail to ask the trial court to correct the judgment while the court retains plenary power or perfect a timely appeal,

the judgment “become[s] final and unappealable”); see also [Lehman v. Har-Con Corp.](#), 988 S.W.2d 415, 418 (Tex. App.--Houston [14th Dist.] 1999, pet. granted).

- 10 Oftentimes, when this happens, all the parties and even the court have treated the judgment as interlocutory, failing to realize there was a final judgment. See cases cited *infra* note 86. For example, in [Lehmann v. Har-Con Corp.](#), the court held that dismissal of an untimely appeal from a final judgment was proper even though it recognized that “the parties and court clearly considered the summary judgment interlocutory.” 988 S.W.2d at 418. It should be noted that review by an equitable bill of review may still be available for up to four years from the judgment signing in extremely limited circumstances. See Roger S. Braugh, Jr. & Paul C. Sewell, [Equitable Bill of Review: Unraveling the Cause of Action that Confounds Texas Courts](#), 48 *Baylor L. Rev.* 623 (1996).
- 11 See, e.g., [Stolhandske v. Stern](#), 14 S.W.3d 810, 813 (Tex. App.--Houston [1st Dist.] 2000, pet. denied) (recognizing that “[i]t is fundamental error for an appellate court to assume jurisdiction over an interlocutory order when not expressly authorized to do so by statute”) (quoting [Gathe v. Cigna Health Plan of Tex.](#), 879 S.W.2d 360, 363 (Tex. App.--Houston [14th Dist.] 1994, writ denied)); [McManus v. Wilborn](#), 932 S.W.2d 662, 663 (Tex. App.--Houston [14th Dist.] 1996, no writ) (explaining that appellate review of interlocutory orders “is intended to be an extraordinary remedy, only available in limited circumstances ‘involving manifest and urgent necessity and not for grievances that may be addressed by other remedies’”) (quoting [Holloway v. Fifth Court of Appeals](#), 767 S.W.2d 680, 684 (Tex. 1989)).
- 12 [Wright et al.](#), *Federal Practice and Procedure* § 3907, at 272 (2 ed. 1992).
- 13 David Peebles, *Trial Court Jurisdiction and Control Over Judgments*, 17 *St. Mary's L.J.* 367, 368 (1986).
- 14 See Elizabeth G. Thornburg, *Interlocutory Review of Discovery Orders: An Idea Whose Time Has Come*, 44 *Sw. L.J.* 1045, 1047 (1990) (citing [Crick, The Final Judgment as a Basis for Appeal](#), 41 *Yale L.J.* 539, 541-44 (1932)). The requirement that judgments be final before they are appealable was borrowed from the writ of error procedure of the common law courts of England and first introduced to American jurisprudence in the Judiciary Act of 1789. See Robert J. Martineau, *Defining Finality and Appealability by Court Rule: Right Problem, Wrong Solution*, 54 *U. Pitt. L. Rev.* 717, 727 (1993). However, commentators have noted that “uncertainty lies in determining why drafters of the Judiciary Act adopted it and decided to apply it to equity as well as law.” *Id.*
- 15 See, e.g., [Wright et al.](#), *supra* note 12, § 3907, at 273 n.5 (explaining that “[t]he desire for judicial economy and the avoidance of unnecessary piecemeal appeals underlie the final judgment rule”) (citing [United States v. Gurney](#), 558 F.2d 1202, 1207 (5th Cir. 1977)).
- 16 See, e.g., [De Los Santos v. Occidental Chem. Corp.](#), 925 S.W.2d 62, 65 (Tex. App.--Corpus Christi) (stating that “[t]he general prohibition against interlocutory appeals has proven to be a workable rule, preventing piecemeal appeals and allowing the trial court and the parties the freedom to try their case without the interference and inconvenience of multiple appeals during the course of litigation”), *rev'd on other grounds*, 933 S.W.2d 493 (Tex. 1996); [El Paso Dev. Co. v. Berryman](#), 729 S.W.2d 883, 887 (Tex. App.--Corpus Christi 1987, no writ) (recognizing that “[t]he ultimate legal rights of the parties should not be decided piecemeal in an appeal from an interlocutory order....”); [Wright et al.](#), *supra* note 12, § 3907, at 277 (noting that “it would be impossible to conduct a coherent trial if every evidential and procedural ruling could be subjected to immediate appellate scrutiny....”); see also Note, [Appealability in the Federal Courts](#), 75 *Harv. L. Rev.* 351, 351-52 (1961) (explaining that allowing interlocutory appeals of every matter would disrupt the trial court's schedule and cause it to “spend extra hours refamiliarizing itself with the case and perhaps to select a new jury and begin anew”).
- 17 Thornburg, *supra* note 14, at 1048. A single appeal also promotes efficiency by eliminating the need for more than one set of records, briefs and arguments on appeal. See Note, *supra* note 16, at 352.
- 18 E. Lawrence Vincent, *Imposition and Appeal of the Death Penalty Sanctions in Texas: The Aftermath of Transamerican Natural Gas Corp. v. Powell*, 35 *S. Tex. L. Rev.* 417, 436-37 (1994) (recognizing that a relaxed standard for mandamus review could potentially open a floodgate of interlocutory reviews). But see Thornburg, *supra* note 14, at 1047 (opining that while review of discovery orders through mandamus review “has increased appellate caseloads [in Texas], the increase has been an extremely small and manageable one” that has benefited the system “without significantly burdening... the... appellate courts”).

- 19 See [Flanagan v. United States](#), 465 U.S. 259, 264 (1984) (explaining that the final judgment rule “reduces the ability of litigants to harass opponents... through a succession of costly and time-consuming appeals”); [Wright et al.](#), supra note 12, § 3907, at 269-70 n.2 (noting the disruption, delay, and expense interlocutory appeals can cause litigants) (citing [Stringfellow v. Concerned Neighbors in Action](#), 480 U.S. 370, 380 (1987)).
- 20 See [Thornburg](#), supra note 14, at 1048; Recent Statute, [Federal Courts--Review by Court of Appeals--Discretionary Appeals Permitted in Federal Courts Prior to Final Judgment--Act of Sept. 2, 1958](#), 72 Stat. 1770, amending 28 U.S.C. § 1292 (1952), 72 [Harv. L. Rev.](#) 584, 584 (1959) (recognizing that one purpose of the final judgment rule is the “prevent[ion of] the use of appeals to delay litigation”).
- 21 See [Thornburg](#), supra note 14, at 1048; see also [Wright et al.](#), supra note 12, § 3907, at 277 (“Interlocutory review, and particularly repeated interlocutory review, may delay the time at which trial can be held, increasing the dangers of weakened or vanished evidence.”).
- 22 See [Wright et al.](#), supra note 12, § 3907, at 274-75.
- 23 See [Thornburg](#), supra note 14, at 1048.
- 24 [Polaris Inv. Mgmt. Corp. v. Abascal](#), 892 S.W.2d 860, 861 (Tex. 1995) (per curiam); see also [Braden v. Downey](#), 811 S.W.2d 922, 928 (Tex. 1991) (recognizing that the appellate courts should “not embroil themselves unnecessarily in incidental pretrial rulings of the trial courts”).
- 25 See [Simon v. Bridewell](#), 950 S.W.2d 439, 442 (Tex. App.--Waco 1997, no writ) (recognizing the heavy burden on the realtor in a mandamus proceeding to prove that the trial court could “reasonably have only reached one decision”) (quoting [Easter v. McDonald](#), 903 S.W.2d 887, 889-90 (Tex. App.--Waco 1995, orig. proceeding)).
- 26 See [CRS Ltd. v. Link](#), 925 S.W.2d 591, 599 (Tex. 1996) (mandamus case explaining “[a]n appellate court may not reverse for an abuse of discretion merely because it disagrees with the trial court's decision, if that decision was within the trial court's discretionary authority”); [Universal Health Servs., Inc. v. Thompson](#), 24 S.W.3d 570, 576 (Tex. App.--Austin 2000, orig. proceeding) (addressing statutorily permitted interlocutory appeal noting that the court “may neither substitute its judgment for that of the trial court nor consider the merits of the lawsuit); see also [D.N.S. v. Schattman](#), 937 S.W.2d 151, 155 (Tex. App.--Fort Worth 1997, orig. proceeding) (“With respect to the resolution of factual issues or matters committed to the trial court's discretion, we may not substitute our judgment for that of the trial court unless the trial court could reasonably have reached only one decision and the trial court's decision is shown to be arbitrary and unreasonable.”); [Wright et al.](#), supra note 12, § 3907, at 270 n.2 (“The final judgment rule... emphasize[s] the deference appellate courts owe to the district judge's decisions on the many questions of law and fact that arise before judgment’ [and, i]n addition, it enhances the authority of the trial judge.”) (citing [Richardson-Merrell, Inc. v. Koller](#), 472 U.S. 424, 436 (1985)); Charles W. “Rocky” Rhodes, [Demystifying the Extraordinary Writ: Substantive and Procedural Requirements for the Issuance of Mandamus](#), 29 [St. Mary's L.J.](#) 525, 534 (1998) (explaining that, “[e]ven if the reviewing court would have decided the issue differently, it cannot disturb the lower court's decision unless the decision is shown to be arbitrary and wholly unreasonable”).
- 27 See Note, supra note 16, at 352.
- 28 See *id.* (noting that under the final judgment rule, errors warranting reversal must “compel a complete retrial”).
- 29 See [Wright et al.](#), supra note 12 § 3907, at 272; see also Note, supra note 16, at 351 (recognizing that, practically, an appeal can “come too late to be effective”). But see [Pope v. Davidson](#), 849 S.W.2d 916, 920 (Tex. App.--Houston [14th Dist.] 1993, orig. proceeding) (explaining that the additional cost of waiting to bring an appeal from an erroneous ruling until after the trial has ended does not justify interlocutory review).
- 30 This does not mean that these concerns are ignored. Rather, they are addressed, albeit not completely, both by the defined set of statutory exceptions allowing interlocutory appeals in limited situations and mandamus procedures. See *infra* Section IV.B.2 (discussing avenues for interlocutory review of certain orders).
- 31 [Thornburg](#), supra note 14, at 1077; see also [Vance v. Wilson](#), 382 S.W.2d 107, 109 (Tex. 1964) (“[T]he policy of the law favors the speedy settlement of litigation....”) (quoting [Rackley v. Fowlkes](#), 89 Tex. 613, 36 S.W. 77 (1896)).

- 32 Peeples, *supra* note 13, at 368.
- 33 See *id.*
- 34 See, e.g., *Sheerin v. Exxon Corp.*, 923 S.W.2d 52, 56-57 (Tex. App.--Houston [1st Dist.] 1995, no writ) (Hedges, J., dissenting) (“If a party believes that a judgment rendered against it is erroneous, the law requires the party to bring a timely attack on that judgment [because a]lthough our justice system certainly strives to render errorless judgments, public policy demands that all judgments... become final at some definite point....”).
- 35 See, e.g., *Smith v. Grace*, 919 S.W.2d 673, 675 (Tex. App.--Dallas 1996, writ denied) (“We now consider, *sua sponte*, whether there is a final, appealable judgment.”); *Dallas County Appraisal Dist. v. Funds Recovery, Inc.*, 887 S.W.2d 465, 468 (Tex. App.--Dallas, 1994, writ denied) (explaining that the appellate court must inquire into its own jurisdiction, even if it is necessary to address it *sua sponte*); *H.E. Butt Grocery Co. v. Bay, Inc.*, 808 S.W.2d 678, 679 (Tex. App.--Corpus Christi 1991, writ denied) (addressing the finality of a judgment *sua sponte* over the objection of the appellee).
- 36 See *Cook v. Cook*, 886 S.W.2d 838, 839 (Tex. App.--Waco 1994, no writ) (“Absent an express grant, appellate courts do not have jurisdiction to review interlocutory orders.”); *Scherr v. Oyedokum*, 889 S.W.2d 546, 549 (Tex. App.--Houston [14th Dist.] 1999, no writ) (noting that “[i]t is fundamental error for this Court to assume jurisdiction over an interlocutory order when not expressly authorized by statute to do so”).
- 37 Recall the maxim that the actions of a court that lacks subject matter jurisdiction are a nullity and any resulting decision is void. See, e.g., *Pena v. Vally Sandia, Ltd.*, 964 S.W.2d 297, 299 (Tex. App.--Corpus Christi 1998, no pet.).
- 38 See, e.g., *In re Cummings*, 13 S.W.3d 472, 474 (Tex. App.--Corpus Christi 2000, no pet.) (“The first issue we must consider on appeal is whether we have jurisdiction.”).
- 39 See, e.g., *Darden v. Kitz Corp.*, 997 S.W.2d 388, 391 (Tex. App.-- Beaumont 1999, pet. denied) (“The procedure relating to finality of judgments is intended to be easily understood and followed, although time and time again it has proven to be difficult and confusing in practice.”); *Thomas v. Dubovy-Longo*, 786 S.W.2d 506, 507 (Tex. App.--Dallas 1990, writ denied) (“The determination of a judgment's finality is often vexing.”). But see *Allen v. Allen*, 717 S.W.2d 311, 312 (Tex. 1986) (noting that the “problem of determining finality could be eliminated by a careful drafting of judgments to conform to the pleadings or by the inclusion of a simple statement that all relief not expressly granted is denied”).
- 40 756 S.W.2d 299, 301 (Tex. 1988) (orig. proceeding). The Street court explained:
The term “final judgment” applies differently in different contexts. A judgment is “final” for purposes of appellate jurisdiction if it disposes of all issues and parties in a case.
The term “final judgment” is also used with reference to the time when trial or appellate court power to alter the judgment ends, or when the judgment becomes operative for the purposes of *res judicata*.
“Final Judgment” also applies when a judgment operates to finally vest rights as between the parties. In that context a decree appealed from by *supersedes*... does not become final or effective until the case is disposed of on appeal.
Id. (quoting *McWilliams v. McWilliams*, 531 S.W.2d 392, 393-94 (Tex. Civ. App.--Houston [14th Dist.] 1975, no writ)).
- 41 *Id.*; *Houston Health Clubs, Inc. v. First Court of Appeals*, 722 S.W.2d 692, 693 (Tex. 1986) (orig. proceeding) (“A final judgment is one that disposes of all parties and all issues in a lawsuit.”); see also *In re Cummings*, 13 S.W.3d at 475 (holding permanent injunction that “does not depend on any further order of the court” is a final judgment, even if the trial court retains some power to modify the order).
- 42 See, e.g., *Vance v. Wilson*, 382 S.W.2d 107, 108 (Tex. 1964) (recognizing that oftentimes the issues presented in the pleadings and motions are not mirrored in the judgment).
- 43 See *Macarangal v. Andrews*, 838 S.W.2d 632, 634 (Tex. App.--Dallas 1992, no writ) (noting that to be final, a judgment must dispose of all issues and parties, but explaining that “disposition need not always be express”); *Twin City Fire Ins. Co. v. Brown*, 602 S.W.2d 118, 119 (Tex. Civ. App.--Waco 1980, no writ) (holding that issues not addressed in trial court's judgment were disposed of by implication); 4 McDonald, *Texas Civil Practice*, 1340, § 17.10 (1992) (explaining that “a judgment which grants part of the relief but omits reference to other relief put in issue by the pleadings will ordinarily be construed to settle all issues by implication”).

- 44 [North E. Indep. Sch. Dist. v. Aldridge](#), 400 S.W.2d 893, 898 (Tex. 1966).
- 45 [Id.](#) at 897-98.
- 46 See [Davies v. Thomson](#) 92 Tex. 391, 395, 49 S.W. 215, 217 (1899) (holding that judgment awarding relief “on one particular” would “be construed” to deny relief on “another particular”); [Twin City Fire Ins. Co. v. Brown](#), 602 S.W.2d 118, 119 (Tex. Civ. App.--Waco 1980, no writ) (recognizing that “it is not essential that [a] judgment expressly dispose of all parties and issues; but that considering all of its recitations and viewing them as a whole the judgment may dispose of them by necessary implication, and be a final judgment”); [Kaine v. Coomey](#), 448 S.W.2d 223, 226 (Tex. Civ. App.--San Antonio 1969, no writ) (holding “final judgment” which did not reference all claims was still final and disposed of all claims by implication); 4 Tex. Jur. 3d Appellate Review § 58 (1999) (explaining that “remaining claims not expressly disposed of are considered waived, abandoned, dismissed, or discontinued”).
- 47 See [Aldridge](#), 400 S.W.2d at 898; see also [Copy Serv., Inc. v. Bob Hamric Chevrolet, Inc.](#), 629 S.W.2d 169, 172 (Tex. App.--Waco 1982, no writ) (applying Aldridge presumption to hold that judgment which did not expressly dispose of cross-action was a final appealable judgment); [Richards Mfg. Co. v. Aspromonte](#), 553 S.W.2d 169, 170-71 (Tex. Civ. App.--Houston [1st Dist.] 1977, no writ) (applying Aldridge presumption to dispose of third party's plea in intervention not expressly mentioned in trial court's order).
- 48 See [Vance v. Wilson](#), 382 S.W.2d 107, 109 (Tex. 1964) (discussing the policy justifications for treating a judgment which is silent on a cause of action as a denial of recovery on that cause); [Rackley v. Fowlkes](#), 89 Tex. 613, 616, 36 S.W. 77, 78 (1896) (explaining “the presumption that the [trial] court performed the duty devolved upon it upon the submission of the cause by disposing of every issue presented by the pleadings so as to render its judgment final and conclusive of the litigation”).
- 49 [Vance](#), 382 S.W.2d at 109.
- 50 [Aldridge](#), 400 S.W.2d at 897-98.
- 51 See [id.](#) at 897 (citing [Davis v. McCray Refrigerator Sales Corp.](#), 136 Tex. 296, 150 S.W.2d 377 (1941)); see also [Scherr v. Oyedokum](#), 889 S.W.2d 564, 549 (Tex. App.--Houston [14th Dist.] 1994, no writ) (declining to apply Aldridge presumption of finality where several defendants were “non-suited or dismissed from the case by order of the trial court”); [Macarangal v. Andrews](#), 838 S.W.2d 632, 635 (Tex. App.--Dallas 1992, no writ) (declining to apply Aldridge presumption of finality to defendant's cross-claim where the plaintiff's claim was dismissed for “want of prosecution”).
- 52 [Young v. Hunderup](#), 763 S.W.2d 611, 612 (Tex. App.--Austin 1989, no writ) (explaining that Aldridge presumption does not apply to those parties who have not yet been served or made an appearance--but if the judgment disposes of all the parties except those which are not yet before the court, the judgment is final and appealable and “the case stands as if there had been a discontinuance as to those parties not served”).
- 53 See 4 Tex. Jur. 3d Appellate Review § 59 (1999); see also [Scherr](#), 889 S.W.2d at 549 (refusing to apply Aldridge presumption, relying in part on trial court's striking Mother Hubbard language from order granting new trial that did not dispose of some parties to the suit); [Roloff Evangelistic Enters., Inc. v. State](#), 598 S.W.2d 697, 701 (Tex. Civ. App.-- Austin 1980, no writ) (recognizing Aldridge presumption but refusing to apply it because “the judgment, on its face, shows that the district court reserved issues for determination at a later time”).
- 54 [Richey v. Bolerjack](#), 589 S.W.2d 957, 959 (Tex. 1979); See [Smith v. Grace](#), 919 S.W.2d 673, 675 (Tex. App.--Dallas 1996, writ denied) (recognizing that the Aldridge presumption only applies absent a trial court's “reservation of claims for later disposition”).
- 55 [Houston Health Clubs, Inc. v. First Court of Appeals](#), 722 S.W.2d 692, 693 (Tex. 1986) (orig. proceeding) (holding that default judgment which did not dispose of punitive damage issue was not a final judgment). “In determining whether a judgment is final, different presumptions apply depending on whether the judgment follows a conventional trial on the merits or results from default... judgment.” *Id.*
- 56 See [Strut Cam Dimensions, Inc. v. Sutton](#), 986 S.W.2d 799, 800-01 (Tex. App.--Corpus Christi 1994, writ denied) (observing that “[s]ince Aldridge, however, the supreme court has backed away from this language; the court has shifted focus from

whether the dispute was set for trial to whether a conventional trial was actually conducted”); cf. [Scherr](#), 889 S.W.2d at 549 (refusing to apply Aldridge presumption where “only two of the many defendants actually went to trial....”).

57 See, e.g., [H.E. Butt Grocery Co. v. Bay, Inc.](#), 808 S.W.2d 678, 679-80 (Tex. App.--Corpus Christi 1991, writ denied) (refusing to apply Aldridge presumption to no-answer default judgment).

58 Compare [Thomas v. Dubovy-Longo](#), 786 S.W.2d 506, 507 (Tex. App.-- Dallas 1990, writ denied) (applying Aldridge presumption post-answer default judgment), with [Strut Cam Dimensions, Inc.](#), 986 S.W.2d at 801 (refusing to apply Aldridge presumption to post-answer default judgment).

59 [786 S.W.2d at 507](#). In [Thomas](#) the plaintiff sued the defendant for conversion, seeking damages and prejudgment interest. See [id.](#) at 506. The defendant filed a counterclaim for malicious prosecution. See [id.](#) After the defendant filed an answer but failed to appear when the case was called, the court entered a default judgment for the plaintiff that was silent as to the plaintiff's claim for prejudgment interest and the defendant's counterclaim. See [id.](#) at 506-07. The plaintiff relied on the supreme court's holding in [Houston Heath Clubs](#) to argue that because the court's order was a “default judgment,” it was not subject to the Aldridge presumption of finality. See [id.](#) at 507. The court rejected this argument, distinguishing between the post-answer default judgment presented in this case and the no-answer default judgment presented in [Houston Health Clubs](#). See [id.](#) Specifically, it held that “[w]hen a plaintiff is put to his proof at a trial setting,... the entire case is placed before the court so that the Aldridge presumption applies in post-answer default judgments.” [Id.](#)

60 [Strut Cam Dimensions, Inc.](#), 986 S.W.2d at 801 (rejecting the holding in [Thomas](#) and instead concluding that post-answer default judgments are not subject to the Aldridge presumption); [Rosedale Partners, Ltd. v. 131st Judicial Dist. Court, Bexar County](#), 896 S.W.2d 643, 646 (Tex. App.--San Antonio 1994, orig. proceeding) (refusing to apply Aldridge presumption to post-answer default judgment).

61 [813 S.W.2d 213, 215](#) (Tex. App.--Dallas 1991, orig. proceeding).

62 See [id.](#) at 214. In [Schnitzius](#), Amwest was surety on a bond securing the appearance of a third party, McKay, who was held in contempt of court for failure to pay child support. See [id.](#) at 214. When McKay failed to appear at his hearing, the court entered a default judgment against Amwest for the amount of the bond. See [id.](#) Subsequently, Amwest argued that because the forfeiture judgment was a default judgment, no presumption of finality attached to the judgment. See [id.](#) at 216. The court rejected this argument, explaining that while the judgment was technically a “default judgment, it was not based upon any implied admission created by Amwest's default.” [Id.](#) This is because the only fact to be proven was that McKay did not appear in court-- proof of which was necessarily before the court already. See [id.](#)

63 See [Rosedale Partners, Ltd.](#), 896 S.W.2d at 646 (explaining that the “determination of the finality of a judgment may sometimes be ascertained based upon the intention of the trial court as gleaned from the language of the decree, the record as a whole, and the conduct of the parties”); [McDonald](#), *supra* note 43 § 27:4[a] at 7 (1992).

64 See [Rosedale Partners, Ltd.](#), 896 S.W.2d at 646.

65 [Id.](#)

66 Compare [Houston Health Clubs v. First Court of Appeals](#), 722 S.W.2d 692, 693 (Tex. 1986) (orig. proceeding) (per curiam) (holding default judgment was not final because it did not dispose of punitive damage issue), [Rosedale Partners, Ltd.](#), 896 S.W.2d at 649 (holding default judgment was not final because it did not dispose of request for prejudgment interest and attorney's fees), and [H.E. Butt Grocery Co. v. Bay, Inc.](#), 808 S.W.2d 678, 681 (Tex. App.--Corpus Christi 1991, writ denied) (holding default judgment was not final because rate of prejudgment interest awarded was not ascertainable from the judgment), with [Young v. Hunderup](#), 763 S.W.2d 611, 612-13 (Tex. App.--Austin 1989, no writ) (holding default judgment was final where it disposed of all issues and parties before the court), and [Strut Cam Dimensions, Inc. v. Sutton](#), 986 S.W.2d 799, 801-02 (Tex. App.--Corpus Christi 1994, writ denied) (holding default judgment was final where the judgment did not mention defendant's counter actions and did not include a Mother Hubbard clause; the defendant's counterclaims were necessarily denied by implication).

67 See, e.g., [Ortiz v. Avante Villa at Corpus Christi, Inc.](#), 926 S.W.2d 608, 610-11 (Tex. App.--Corpus Christi 1996, writ denied); [Rosedale Partners, Ltd.](#), 896 S.W.2d at 647 n.2; cf. [Martinez v. Humble Sand & Gravel, Inc.](#), 875 S.W.2d 311, 312 (Tex. 1994).

- 68 See, e.g., *Collin County Sav. & Loan of Plano, Tex. v. Miller Lumber Co., Inc.*, 653 S.W.2d 114, 116 (Tex. App.--Dallas 1983, no writ) (holding judgment ordering release of deposit necessarily denied holders claim that it was entitled to offset against that deposit).
- 69 See *Martinez*, 875 S.W.2d at 312 (“We have held that other hearings producing other types of orders, including summary judgments which may be only partial, are not presumed to be final and appealable.”); see also *City of Beaumont v. Guillory*, 751 S.W.2d 491, 492 (Tex. 1988) (“A summary judgment, unlike a judgment signed after a trial on the merits, is presumed to dispose of only those issues expressly presented, not all issues in the case.”); *Harris County Appraisal Dist. v. Johnson*, 889 S.W.2d 531, 533 (Tex. App.--Houston [14th Dist.] 1994, no writ) (“The Aldridge presumption applies only to judgment following a conventional trial on the merits, not to a summary judgment.”) (citing *Houston Health Clubs, Inc. v. First Court of Appeals*, 772 S.W.2d 692, 693 (Tex. 1986) (orig. proceeding)).
- 70 See, e.g., *Apex Fin. Corp. v. Brown*, 7 S.W.3d 820, 826 (Tex. App.--Texarkana 1999, no pet.) (noting that a summary judgment order which disposes “of all parties and issues before the court” is a “final, appealable” judgment).
- 71 See, e.g., *Guillory*, 751 S.W.2d at 492 (holding that when a summary judgment is clearly interlocutory, any appeal from that judgment must be dismissed, absent a severance of the unresolved issues by the trial court); *Columbia Rio Grande Reg'l. Hosp. v. Stover*, 17 S.W.3d 387, 391 (Tex. App.--Corpus Christi 2000, no pet.) (explaining that where a summary judgment is “entered disposing of the interests of less than all parties and claims, that order does not become final until a subsequent order is entered disposing of the remaining parties and claims”); *Harris County Flood Control Dist. v. Adam*, 988 S.W.2d 423, 426 (Tex. App.--Houston [1st Dist.] 1999, pet. filed) (explaining that a partial summary judgment can only become final for purposes of appeal if the order includes a Mother Hubbard clause or the trial court severs the undisposed of claims); *Amerivest Inc. v. Bluebonnet Sav. Bank, FSB*, 897 S.W.2d 513, 516 (Tex. App.--Fort Worth, 1995 writ denied) (holding summary judgment order was interlocutory where it failed to dispose of one of plaintiff's claims). However, it is important to note that an order need not expressly dispose of a claim or party. Rather, such an order will nonetheless be considered final if it disposes of the claim by implication. See, e.g., *Apex Fin. Corp. v. Brown*, 7 S.W.3d 820, 826 (Tex. App.--Texarkana 1999, no pet.) (recognizing that by ruling on the plaintiff's summary judgment motion, the court implicitly disposed of the defendant's counterclaim).
- 72 *Mafrige v. Ross*, 866 S.W. 2d 590, 592 (Tex. 1993).
- 73 *Id.* at 591.
- 74 See *Ross v. Arkwright Mut. Ins. Co.*, 834 S.W.2d 385, 394 (Tex. App.--Houston [14th Dist.] 1992, writ granted), overruled by *Mafrige v. Ross* 866 S.W.2d 590 (Tex. 1993).
- 75 *Mafrige*, 866 S.W.2d at 592.
- 76 See *Bandara Elec. Coop., Inc. v. Gilchrist*, 946 S.W.2d 336, 337 (Tex. 1997) (explaining that when a Mother Hubbard clause renders a partial summary judgment final for purposes of appeal, the appellate court should reverse and remand only the erroneously disposed of claims, and not the entire case); *English v. Union State Bank*, 945 S.W.2d 810, 811 (Tex. 1997) (clarifying that the Mafrige finality rule applies, even when the parties do not perfect a timely appeal from the erroneous summary judgment).
- 77 See, e.g., MaeLissa Brauer Lipman, *Avoiding the Trap Created by Mother Hubbard Clauses in Judgments*, 35 Hous. Law. 48, 49 (1997) (recognizing the confusion that Mafrige and Mother Hubbard clauses have caused the courts and litigants).
- 78 See generally *Midkiff v. Hancock E. Tex. Sanitation, Inc.*, 996 S.W.2d 414, 415 n.1 (Tex. App.--Beaumont 1999, no pet.) (“[T]he Mafrige decision has engendered considerable comment.”); William Boyce, *Mafrige v. Ross and the Pitfalls of Presumptions*, Appellate Advocate, November 1997, at 7; William J. Cornelius & David F. Johnson, *Tricks, Traps, and Snares in Appealing a Summary Judgment in Texas*, 50 Baylor L. Rev. 813, 823-34 (1998); Lipman, *supra* note 77, at 48; Dean Swanda, *Summary Judgment, Mother Hubbard Clauses, and Mafrige v. Ross*, Appellate Advocate, May 1997, at 3.
- 79 *Mafrige*, 866 S.W.2d at 592.

- 80 See [Lowe v. Teator](#), 1 S.W.3d 819, 822-23 (Tex. App.--Dallas 1999, pet. filed) (noting that one purpose of “giving effect to the appearance of finality [is to ensure that] parties do not have to look outside the judgment to determine the meaning of the trial court’s ruling”).
- 81 [Boyce](#), supra note 78, at 7.
- 82 [Kaigler v. Gen. Elec. Mortgage Ins. Corp.](#), 961 S.W.2d 273, 275-76 (Tex. App.--Houston [1st Dist.] 1997, no writ).
- 83 [Id.](#) at 276.
- 84 See [In re Cobos](#), 994 S.W.2d 313, 316 (Tex. App.--Corpus Christi 1999, orig. proceeding).
- 85 [Amerivest Inc. v. Bluebonnet Sav. Bank, FSB](#), 897 S.W.2d 513, 515 (Tex. App.--Fort Worth 1995, writ denied).
- 86 The casebooks are replete with examples of dismissed cases where the parties and courts clearly intended an order containing finality language to be interlocutory. In many of these cases, the litigation continues to move forward and the error is not discovered until appeal is taken and the appellate court holds that the appeal is untimely and that the trial court had lost plenary power to act. See, e.g., [English v. Union State Bank](#), 945 S.W.2d 810, 811-12 (Tex. 1997); [In re Cobos](#), 994 S.W.2d at 313; [Pena v. Valley Sandia, Ltd.](#), 964 S.W.2d 297, 98-99 (Tex. App.--Corpus Christi 1998, no pet.); [Kaigler](#), 961 S.W.2d at 273.
- 87 988 S.W.2d 415 (Tex. App.--Houston [14th Dist.] 1999, pet. granted); see also [Rodriguez v. NBC Bank](#), 5 S.W.3d 756, 763 n.4 (Tex. App.-- San Antonio 1999, no pet.) (noting that the defendant’s argument for a bright-line interpretation of the Mafrige rule is contrary to “the supreme court’s express goal of reaching the merits of a cause of action, instead of dismissing actions on procedural technicalities”).
- 88 See [Lehmann](#), 988 S.W.2d at 417.
- 89 [Id.](#) at 418.
- 90 See, e.g., Clinard J. “Buddy” Hanby, Texas Civil Appellate Update, Appellate Advocate 3, June 1999, at 32-33 (“[This] author has been complaining about Mafrige ever since it was decided.”); Swanda, supra note 78, at 3 (complaining that the new questions raised by Mafrige “are just as elusive” as the questions it sought to solve).
- 91 988 S.W.2d 423, 427 (Tex. App.--Houston [1st Dist.] 1999, pet. filed) (Taft, J., concurring on denial of en banc rehearing) (footnotes omitted).
- 92 See Amicus Curiae Brief on behalf of Har-Con Corp. at 6-8, [Lehmann](#) (No. 99-0406).
- 93 An attorney is required to know the rules of law found in statutes, treatises, and case law, and to deal with them correctly. A lawyer is required under the Texas Disciplinary Rules of Professional Conduct to represent a client competently, and this includes a mandate that the lawyer shall not handle a legal matter without adequate preparation under the circumstances. See Tex. Disciplinary R. Prof’l Conduct 1.01.
- 94 [Tex. R. Civ. P. 166a](#).
- 95 [Teer v. Duddlestun](#), 664 S.W.2d 702, 704 (Tex. 1984). In [Teer](#), a pre- Mafrige decision, the supreme court refused to apply a finality presumption to summary judgments, expressly holding that the inclusion of a Mother Hubbard clause did not operate to render an otherwise partial summary judgment final. See [id.](#) Some argue that [Teer](#) was the better decision and that the court should return to its prior rule--that a summary judgment “is final and appealable only if it expressly disposes of all parties and all claims in the case.” [Harris County Flood Control Dist.](#), 988 S.W.2d at 428 (Taft, J., concurring on denial of en banc rehearing).
- 96 [Lehmann v. Har-Con Corp.](#), 988 S.W.2d 415, 417 n.2 (Tex. App.-- Houston [14th Dist.] 1999, pet. granted) (explaining the applicable standard for determining the finality of summary judgments before Mafrige was decided).

- 97 See generally [Mafrige v. Ross](#), 866 S.W.2d 590, 591 & n.4 (Tex. 1993); [Sherrin v. Exxon Corp.](#), 923 S.W.2d 52, 57 (Tex. App.--Houston [1st Dist.] 1995, no writ) (Hedges, J., dissenting) (opining that “tinker[ing] with the general rules regarding finality of judgments” would “cause, far, far more problems than it [would] cure”).
- 98 [Mafrige](#), 866 S.W.2d at 590. “It is also a mistake to pretend that the Supreme Court decisions prior to Mafrige presented a coherent, logical roadmap for determining summary judgment finality. Mafrige did not rely so much upon those decisions as it resolved the confusion created by prior contradictory language and flatly inconsistent holdings.” Boyce, *supra* note 78, at 7.
- 99 Amicus Curiae Brief on behalf of Har-Con Corp. at 5, Lehmann (No. 99-0406).
- 100 Respondent's Brief at 3, Lehmann (No. 99-0406).
- 101 See [Lowe v. Teator](#), 1 S.W.3d 819, 823 (Tex. App.--Dallas 1999, pet. filed) (opining that it “was never the intent of Mafrige” to create a bright-line rule “that allows a summary judgment order addressing fewer than all the parties and less than all the claims and defenses to be the final judgment solely because of the use of a Mother Hubbard clause” when such a holding would “create results that were never requested by any part and never intended by the trial court”).
- 102 See *id.* (arguing that the “inclusion of a Mother Hubbard clause [should] not automatically render a judgment final, [but rather, the language must be read within the context of the summary judgment order in which it appears”).
- 103 *Id.* at 822.
- 104 *Id.* at 823.
- 105 *Id.*
- 106 See *id.* (arguing that “[n]othing in Mafrige or English mandates” that an appellate court ignore a trial court's clear intent to grant an interlocutory order); see also [Carey v. Dimidjian](#), 982 S.W.2d 556, 558 (Tex. App.--Eastland 1998, no pet.) (holding summary judgment containing Mother Hubbard clause was not final and distinguishing Mafrige and English by noting that the motion at issue contained the statement that it was granting a “motion for partial summary judgment”).
- 107 The Dallas Court of Appeals has read Mafrige to allow an inquiry into the trial court's intent, as expressed in the order, when determining the finality of a summary judgment:
An “appearance of finality” occurs when the language in the summary judgment order “clearly evidences” the trial court's intent to dispose of all the claims in the case before it. If the language in the order preceding the Mother Hubbard clause is broad and inclusive enough to encompass all issues and parties before the court, then the clause may be read to dispose of all claims in the case not otherwise specifically addressed in the order. If however, the language preceding the Mother Hubbard clause is limited in its scope, such that it evidences the intent of the trial court not to dispose of all the claims in the case before it, a Mother Hubbard clause will not convert the otherwise interlocutory summary judgment order into a final judgment.
[Lowe](#), 1 S.W.3d at 823.
- 108 See [Sherrin v. Exxon Corp.](#), 923 S.W.2d 52, 55 (Tex. App.--Houston [1st Dist.] 1995, no writ) (looking to extrinsic evidence elsewhere in the record to glean trial court's intent and conclude that summary judgment containing unambiguous finality language was not final); see also [Rodriguez v. NBC Bank](#), 5 S.W.3d 756, 764 n.8 (Tex. App.--San Antonio 1999, no pet.) (arguing that Mafrige is not intended to apply where “the parties recognize the true state of the case and do not bring an appeal before a proper final judgment is rendered,” and thus, if the parties and court treat a summary judgment containing a Mother Hubbard clause as interlocutory, there is no need “to invoke a legal fiction”).
- 109 [Sherrin](#), 923 S.W.2d at 55.
- 110 See [Lowe](#), 1 S.W.3d at 822-23 (noting that one purpose of “giving effect to the appearance of finality [is to ensure that] parties do not have to look outside the judgment to determine the meaning of the trial court's ruling”).
- 111 [Sherrin](#), 923 S.W.2d at 56 (Hedges, J., dissenting).
- 112 Petitioner's Brief at 5, Lehmann (No. 99-0406); see also [Midkiff v. Hancock E. Tex. Sanitation, Inc.](#), 996 S.W.2d 414, 416 (Tex. App.--Beaumont 1999, no pet.) (holding “Final Summary Judgment” in favor of one defendant containing Mother

Hubbard clause could not be final judgment because it “logically implicates” only the claims against one defendant); [Hervey v. Flores](#), 975 S.W.2d 21, 25 (Tex. App.--El Paso 1998, pet. denied) (“It is difficult to believe that the words ‘[a]ll relief requested’ contained in the Mother Hubbard clause encompasses [the defendant’s] counterclaim and motion for sanctions when neither the clause nor the order to which it was attached makes any reference to [the defendant] or her claims.”).

113 See [Lowe](#), 1 S.W.3d at 823-24 (explaining that “[a]n order that explicitly grants a summary judgment in favor of less than all the defendants does not clearly evidence an intent to dispose of all claims against all defendants, especially those against whom summary judgment was not sought, regardless of the inclusion of a Mother Hubbard clause”). But see [Kaigler v. General Elec. Mortgage Ins. Corp.](#), 961 S.W.2d 273, 276 (Tex. App.--Houston [1st Dist.] 1997, no writ) (“Issues and parties, however, are co-dependent: one could not exist without the other[, thus, i]f an order disposes of all issues in a case, then it necessarily disposes of all parties to a case, and vice versa.”).

114 The petitioner in [Lehmann](#) explained how, in practice, litigants are often caught unaware that a summary judgment order has been signed that disposes of their claim, especially where they are not a party to the summary judgment motions. See Petitioner’s Brief at 7, [Lehmann](#) (No. 99-0406). In Harris County, “postcards... are routinely sent to parties... in lieu of a copy of the orders actually signed by the trial courts.” *Id.* In [Lehmann](#), the first postcard received by the petitioner stated that an “Interlocutory Summary Judgment” had been signed (which, unbeknownst to the petitioner, contained a Mother Hubbard clause). *Id.* In reliance upon this postcard, the petitioner filed a motion to sever, which was unopposed by the respondent and granted by the trial court. See *id.* The trial court then sent petitioner a second postcard stating that a “Final Summary Judgment” had been entered. *Id.* Under a bright-line application of [Mafrige](#), the first order represents the final judgment disposing of the petitioner’s claims, even though this result is obviously contrary to both the trial court’s and parties’ intent.

115 Respondent’s Brief at 4, [Lehmann](#) (No. 99-0406).

116 See *id.* at 4-5, [Lehmann](#) (No. 99-0406) (“It is not unfair to hold judges and lawyers accountable for the language chosen in judgments.”). As another commentator has noted: “There is nothing unfair, illogical, illegal, immoral or fattening about making the lawyers who draft summary judgment orders and the judges who sign them responsible for determining finality.” [Boyce](#), *supra* note 78, at 10.

117 Amicus Curiae Brief on behalf of Har-Con Corp. at 6-8, [Lehmann](#) (No. 99-0406).

118 *Id.* at 7. For example, a certificate could read:
This is a final judgment. The Court intends to and hereby does dispose of all claims and defenses and all parties before the Court in Cause No. _____. All claims and defenses asserted by all parties in Cause No. _____ have been adjudicated by this judgment. Any party who desires to challenge this judgment, or to assert additional claims, must timely file a motion for new trial, a motion to modify this judgment, or a timely appeal.
Id.

119 See *supra* note 114 and accompanying text.

120 See [Science Spectrum, Inc. v. Martinez](#), 941 S.W.2d 910, 912 (Tex. 1997) (“A motion for summary judgment must itself expressly present the grounds upon which it is made, and must stand or fall on these grounds alone.”); [Sysco Food Serv., Inc. v. Trapnell](#), 890 S.W.2d 796, 805 (Tex. 1994); [Guest v. Cochran](#), 993 S.W.2d 397, 401 (Tex. App.--Houston [14th Dist.] 1999, no pet.) (“Thus, it is well settled that a motion for summary judgment must stand or fall on the grounds presented in such motion.”); [Positive Feed, Inc. v. Guthmann](#), 4 S.W.3d 879, 881 (Tex. App.--Houston [1st Dist.] 1999, no pet.) (recognizing that the trial court erred in granting summary judgment on issues not raised by defendant’s motion for summary judgment).

121 [Guest](#), 993 S.W.2d at 402; see also [Mafrige v. Ross](#), 866 S.W.2d 590, 591 (Tex. 1993) (“No one disputes that granting a motion for summary judgment on causes of action not addressed in the motion is reversible error.”); [Travis v. City of Mesquite](#), 830 S.W.2d 94, 100 (Tex. 1992) (“A summary judgment cannot be affirmed on a ground not specifically presented in the motion for summary judgment.”); [Chessher v. Southwestern Bell Tel. Co.](#), 658 S.W.2d 563, 564 (Tex. 1983) (“It is axiomatic that one may not be granted judgment as a matter of law on a cause of action not addressed in a summary judgment proceeding.”); [City of Houston v. Clear Creek Basin Auth.](#), 589 S.W.2d 671, 677 (Tex. 1979) (“[B]oth the reasons for the summary judgment and the objections to it must be in writing and before the trial judge at a hearing.”); [Lane v. State Farm Mut. Auto. Ins. Co.](#), 992 S.W.2d 545, 550 (Tex. App.--Texarkana 1999, pet. denied) (“Since the order was final and appealable, the trial court committed reversible error when it granted the summary judgment on a cause of action not addressed in the motion.”);

Williams v. Bank One, Tex., 15 S.W.3d 110, 116 & n.4 (Tex. App.--Waco 1999, no pet.) (“A trial court cannot grant summary judgment for a party which has not filed a motion therefore.”); *Andrews v. Diamond, Rash, Leslie & Smith*, 959 S.W.2d 646, 652 (Tex. App.--El Paso 1997, writ denied) (“[A] summary judgment can only be granted on grounds raised in the motion.”); *Toubaniaris v. American Bureau of Shipping*, 916 S.W.2d 21, 23 (Tex. App.--Houston [1st Dist.] 1995, no writ) (“A trial court that renders judgment based upon a motion errs in granting more relief than the motion requests.”).

- 122 See *Bandera Elec. Coop., Inc. v. Gilchrist*, 946 S.W.2d 336, 337-38 (Tex. 1997) (holding that entire judgment should not be remanded when summary judgment is erroneously made final by failing to dispose of all issues and parties); *Guest*, 993 S.W.2d at 406 (“Because the judgment granted more relief than requested, we will reverse and remand that portion of the trial court’s judgment which granted relief not set out in the motion for summary judgment.”); *Lane*, 992 S.W.2d at 550 (“We only hold that the motion for summary judgment did not address Lane’s amended cause of action; thus, we must remand the PIP claim back to the trial court for further consideration.”); *Curtis v. Ziff Energy Group, Ltd.*, 12 S.W.3d 114, 119-20 (Tex. App.--Houston [14th Dist.] 1999, no pet.) (remanding claims erroneously included in trial court’s summary judgment order); *Rose v. Kober Fin. Corp.*, 874 S.W.2d 358, 362 (Tex. App.--Houston [14th Dist.] 1994, no writ) (“[W]here the summary judgment purports to grant more relief than requested, we must reverse and remand, rather than dismiss.”).
- 123 See *Mafrige*, 866 S.W.2d at 590.
- 124 See *id.* (“In this case we address the issue of whether the inclusion of ‘Mother Hubbard’ language or its equivalent in an order granting summary judgment makes an otherwise partial summary judgment final for appeal purposes.”).
- 125 Compare *Wheeler v. Yettie Kersting Hosp.*, 761 S.W.2d 785, 787 (Tex. App.--Houston [1st Dist.] 1988, writ denied) (holding Mother Hubbard clause renders summary judgment final for purposes of appeal), with *Sakser v. Fitze*, 708 S.W.2d 40, 42 (Tex. App.--Dallas 1986, no writ) (holding Mother Hubbard clause has no effect on finality of summary judgment).
- 126 *Mafrige*, 866 S.W.2d at 591.
- 127 See *id.*
- 128 See *id.* at 592.
- 129 *Id.*
- 130 See *Swanda*, *supra* note 78, at 3 (recognizing that the *Mafrige* opinion “clarified little and ultimately raised more questions than it answered”).
- 131 *Mafrige*, 866 S.W.2d at 592; see also *Amerivest Inc. v. Bluebonnet Sav. Bank, FSB*, 897 S.W.2d 513, 515-16 (Tex. App.--Fort Worth 1995, writ denied) (recognizing that orders were interlocutory despite court’s attempt to address all parties and claims, where orders failed to dispose of one issue and did not contain Mother Hubbard clause or other language purporting to render orders final).
- 132 *Mafrige*, 866 S.W.2d at 591 (Tex. 1994); see also *Bandera Elec. Coop., Inc. v. Gilchrist*, 946 S.W.2d 336, 336 n.1 (Tex. 1997); *Apex Fin. Corp. v. Brown*, 7 S.W.3d 820, 826 (Tex. App.--Texarkana 1999, no pet.); *Huffine v. Tomball Hosp. Auth.*, 983 S.W.2d 300, 301 (Tex. App.--Houston [14th Dist.] 1997, no writ).
- 133 See *Mafrige*, 866 S.W.2d at 590 n.1. One month after *Mafrige* was decided, the supreme court issued its per curiam opinion in *Springer v. Spruiell* reversing a court of appeal’s determination that the language “plaintiffs ‘have and recover nothing’ ” did not dispose of all claims and issues. 866 S.W.2d 592, 593 (Tex. 1993). The supreme court noted that the court of appeals did not have the benefit of the *Mafrige* opinion when it decided the case and then remanded to the court of appeals “for further proceedings consistent with... *Mafrige*.” *Id.* Four years later, in *English v. Union State Bank*, the supreme court held an order stating that “defendant is entitled to summary judgment in this case” ’ and that the plaintiff should “take nothing on account of his lawsuit against [the defendant]” rendered a partial summary judgment final for purposes of appeal. 945 S.W.2d 810, 811 (Tex. 1997). But see *Harris County Appraisal Dist. v. Johnson*, 889 S.W.2d 531, 533 (Tex. App.--Houston [14th Dist.] 1994, no writ) (holding that where plaintiff and defendants moved for summary judgment and trial court granted plaintiff’s motion, which did not address all claims in plaintiff’s pleadings, order containing clause stating that “Defendants... take nothing” did not purport to be final).

- 134 982 S.W.2d 556, 558 (Tex. App.--Eastland 1998, no pet.); see also *Scott v. Poindexter*, No. 04-98-00101-CV (Tex. App.--San Antonio Nov. 30 1999, no pet.) (not designated for publication), 2000 WL 4540, at *2-4 (holding summary judgment order containing Mother Hubbard clause was not final where judge struck through “Final” in the title and the text of the judgment ambiguously referred to the order as both a “partial” summary judgment and a “final” summary judgment).
- 135 No. 05-93-01643-CV (Tex. App.--Dallas Dec. 22, 1994, no writ) (not designated for publication), 1994 WL 728870, at *3; see also *Lowe v. Teator*, 1 S.W.3d 819, 823-24 (Tex. App.--Dallas 1999, pet. filed) (holding inclusion of Mother Hubbard clause did not render summary judgment order final and explaining that “[a]n order that explicitly grants a summary judgment in favor of less than all the defendants does not clearly evidence an intent to dispose of all claims against all defendants, especially those against whom summary judgment was not sought, regardless of the inclusion of a Mother Hubbard clause”); *Midkiff v. Hancock E. Tex. Sanitation, Inc.*, 996 S.W.2d 414, 416 (Tex. App.--Beaumont 1999, no pet.) (holding “Final Summary Judgment” in favor of one defendant containing Mother Hubbard clause could not be final judgment because it “logically implicates” only the claims against one defendant); *Sheerin v. Exxon Corp.*, 923 S.W.2d 52, 55 (Tex. App.--Houston [1st Dist.] 1995, no writ) (holding summary judgment containing Mother Hubbard clause was not final, where trial court signed a subsequent order indicating that it intended summary judgment to be interlocutory); *Vanderwiele v. Llano Trucks, Inc.*, 885 S.W.2d 843, 844-45 (Tex. App.--Austin 1994, no writ) (holding “Final Summary Judgment” containing Mother Hubbard clause was not final where motion did not address all issues and all parties).
- 136 866 S.W.2d 67, 69-70 (Tex. App.--El Paso 1993, no writ) (“[I]t would be illogical to the extreme to conclude that the trial court intended by its use of the ‘Mother Hubbard’ clause to deny the relief requested by the counterclaim.”); see also *Hervey v. Flores*, 975 S.W.2d 21, 25 (Tex. App.--El Paso, 1998, pet. denied) (“It is difficult to believe that the words ‘[a]ll relief requested’ contained in the Mother Hubbard clause encompasses [the defendant’s] counterclaim and motion for sanctions when neither the clause nor the order to which it was attached makes any reference to [the defendant] or her claims.”); *Stabilizing Tech. of Tex., Inc. v. Austin House Leveling & Soil Stabilization, Inc.*, No. 03-98-00202-CV (Tex. App.--Austin July 16, 1998, no pet.) (not designated for publication), 1998 WL 394230, at *1 (holding summary judgment captioned “Partial Summary Judgment,” containing language that “Plaintiff take nothing by its suit” was not final because plaintiff’s motion failed to mention defendant’s counterclaim).
- 137 *Yzaguirre v. Gonzalez*, No. 04-97-00276-CV (Tex. App.--San Antonio Jan. 20, 1998, no pet.) (not designated for publication), 1998 WL 251755, at *1 (omission in original).
- 138 See *Huffine v. Tomball Hosp. Auth.*, 983 S.W.2d 300, 301 (Tex. App.--Houston [14th Dist.] 1997, no writ); see also *Sommers v. Concepcion*, 20 S.W.3d 27, 33 (Tex. App.--Houston [14th Dist.] 2000, no pet.) (holding that clause stating that summary judgment “against all of Plaintiff’s claims and that Plaintiff have and take nothing by his claims against Emmauel Concepcion herein” did not “purport to render judgment on the Concepcions’ counterclaim against appellant,” and thus was not final).
- 139 See *Huffine*, 983 S.W.2d at 301.
- 140 No. 14-96-01199-CV (Tex. App.--Houston [14th Dist.] May 5, 1997, no writ) (not designated for publication), 1997 WL 213844, at *3 (“There is nothing in Mafrige that requires this court to interpret an order or judgment as final simply because it contains the phrase ‘plaintiff take nothing,’ when that phrase is clearly limited to a specific cause of action.”).
- 141 See, e.g., *Kinnard v. Carnahan*, 25 S.W.3d 206, 267 (Tex. App.--San Antonio 2000, no pet.) (recognizing that inclusion of Mother Hubbard clause rendered summary judgment final and appealable); *Kistler v. Stran*, 22 S.W.3d 103, 104-05 (Tex. App.--Houston [14th Dist.] 2000, pet. filed) (holding Mother Hubbard clause rendered summary judgment order final and appealable despite statement that it was granting “partial summary judgment” and fact that it did not dispose of all parties); *In re Monroe*, No. 05-99-01758-CV, (Tex. App.--Dallas Jan. 21, 2000, orig. proceeding) (not designated for publication), 2000 WL 378519, at *1-2 (holding summary judgment which failed to dispose of counterclaim but contained Mother Hubbard clause was final); *Parking Co. of Am. v. Wilson*, No. 05-99-00404-CV (Tex. App.--Dallas Jan. 21, 2000 no pet.) (not designated for publication), 2000 WL 45922, at *1 (holding summary judgment captioned “Partial Summary Judgment” was nonetheless final because it contained a Mother Hubbard Clause); *Diaz v. Comark Bldg. Sys., Inc.*, No. 05-98-00888-CV, at *6 (Tex. App.--Dallas June 14, 2000, no pet.) (not designated for publication), 2000 WL 770114 (treating summary judgment order that stated plaintiff “takes nothing against” defendant as final for appeal purposes); *Williams v. Bank One*, 15 S.W.3d 110, 116 & n.4 (Tex. App.--Waco 1999, no pet.) (holding summary judgment containing Mother Hubbard clause was final and appealable despite omission of some parties); *Lehmann v. Har-Con Corp.*, 988 S.W.2d 415, 416-18 (Tex. App.--Houston [14th Dist.] 1999,

pet. granted) (holding inclusion of Mother Hubbard clause rendered summary judgment on counterclaim and third-party claim final, even though the parties and trial court treated order as interlocutory); *Munawar v. Cadle Co.*, 2 S.W.3d 12, 15-16 (Tex. App.--Corpus Christi 1999, pet. denied) (holding summary judgment reciting "Plaintiff... take nothing" was a final, appealable judgment); *Apex Fin. Corp. v. Brown*, 7 S.W.3d 820, 826 (Tex. App.--Texarkana 1999, no pet.) (holding inclusion of Mother Hubbard clause rendered summary judgment final, despite argument that court failed to dispose of all issues); *Curtis v. Ziff Energy Group, Inc.*, 12 S.W.3d 114, 119 (Tex. App.--Houston [14th Dist.] 1999, no pet.) ("Both orders included Mother Hubbard clauses making them final, appealable judgments."); *Garrett v. Boone*, No. 01-97-00491-CV (Tex. App.--Houston [1st Dist.] Sept. 30, 1999, no pet.), 1999 WL 771525, at *3 ("By including this 'Mother Hubbard' language in the order, the trial court [erroneously] dismissed Garret's claim for intentional infliction of emotional distress."); *Randall v. Texas Dept. of Criminal Justice Employees*, No. 01-97-00649-CV (Tex. App.--Houston [1st Dist.] Aug. 31, 1999, pet. denied) (not designated for publication), 1999 WL 681918, at *1 (holding inclusion of Mother Hubbard clause rendered summary judgment final, even as to non-served defendants); *Macias v. Ryland*, 995 S.W.2d 828, 832 (Tex. App.--Austin 1999, no pet.) (treating Mother Hubbard clause as rendering summary judgment as final and appealable); *Milliken v. Skepnek*, No. 14-96-01522-CV (Tex. App.--Houston [14th Dist.] July 15, 1999, no pet.) (not designated for publication), 1999 WL 496505, at *3 (holding partial summary judgment containing Mother Hubbard clause final for appeal purposes); *Leigh v. Robert Lee State Bank*, No. 03-98-0472-CV (Tex. App.--Austin June 17, 1999, pet. filed) (not designated for publication), 1999 WL 394888, at *2-3 (holding Mother Hubbard clauses in two summary judgment orders which failed to address all the parties' claims rendered orders final and appealable); *Burns v. Klevenhagen*, No. 01-98-01096-CV (Tex. App.--Houston [1st Dist.] Dec. 9, 1999, no pet.) (not designated for publication), 1999 WL 1125175, at *1 ("[T]he... summary judgment was final and appealable because it ordered that plaintiffs and interveners take nothing and denied all other relief not expressly granted therein."); *Pena v. Valley Sandia, Ltd.*, 964 S.W.2d 297, 298-99 (Tex. App.--Corpus Christi 1998, no pet.) (holding partial summary judgment containing Mother Hubbard clause was final, despite fact parties' and courts' treatment of order as interlocutory); *Garner v. Comerica Bank*, No. 14-98-00554-CV (Tex. App.--Houston [14th Dist.] July 30, 1998, no pet.) (not designated for publication), 1998 WL 429844, at *1 (holding summary judgment containing language that "Plaintiff... take nothing by this suit... [and a]ll relief not expressly granted herein is denied" was final judgment despite trial court's later signing of severance order); *Straus v. NCBN Tex. Nat'l Bank*, No. 04-96-00445-CV (Tex. App.--San Antonio June 17, 1998, pet. denied) (not designated for publication), 1998 WL 315586, at *2 (holding "take-nothing" summary judgment was final, even though it did not dispose of all claims); *Hofland v. East Univ. Place Condominium Ass'n, Inc.*, No. 05-47-01034-CV (Tex. App.--Dallas Oct. 27, 1997, no pet.) (not designated for publication), 1997 WL 657092, at *1 (holding that order stating "[a]ll relief not expressly granted herein is denied" rendered judgment final for purposes of appeal, despite caption stating "Interlocutory Summary Judgment"); *Atwood v. Kansas City Life Ins. Co.*, No. 14-96-00048-CV (Tex. App.--Houston [14th Dist.] Sept. 16, 1997, no pet.) (not designated for publication), 1997 WL 567941, at *3 ("Because the judgment contained a 'Mother Hubbard' clause, we treat it as a final judgment for purposes of this appeal."); *Arnic v. Harris County Med. Examiner's Office*, No. 14-97-00254-CV (Tex. App.--Houston [14th Dist.] Aug. 8, 1997, writ denied) (not designated for publication), 1997 WL 445807, at *1 (holding that clause stating plaintiff "take nothing" from defendants and that "all relief not granted herein is denied" rendered summary judgment final); *Mathis v. Patel*, No. 05-96-01098-CV (Tex. App.--Dallas April 15, 1997, writ denied) (not designated for publication), 1997 WL 178078, at *1 ("Because the... summary judgment in this case contained a Mother Hubbard clause, it was final and appealable"); *Brewer v. General Motors Corp.*, 926 S.W.2d 774, 777 (Tex. App.--Texarkana 1996) (holding that summary judgment orders containing "take nothing" language purported to be final, even though they failed to address all of plaintiff's claims), judgment modified by, 966 S.W.2d 56 (Tex. 1998); *GNG Gas Sys., Inc. v. Dean*, 921 S.W.2d 421, 426 (Tex. App.--Amarillo 1996, writ denied) ("All relief not specifically granted was specifically denied, thereby making the judgment final for appeal purposes."); *Mikulich v. Perez*, 915 S.W.2d 88, 91-92 (Tex. App.--San Antonio 1996, no writ) (holding summary judgment decreeing that plaintiff "take nothing" against the defendants, where several defendants had not moved for summary judgment, was final and appealable judgment); *Ellison v. Transport Ins. Co.*, No. 09-95-247-CV (Tex. App.--Beaumont July 11, 1996, no writ) (not designated for publication), 1996 WL 389237, at *1-2 (holding summary judgment which failed to dispose of all claims but recited "Plaintiffs shall take nothing against Defendant" was final order); *Toubaniaris v. American Bureau of Shipping*, 916 S.W.2d 21, 23 (Tex. App.--Houston [1st Dist.] 1995, no writ) (holding summary judgment which granted relief not requested was final for appeal purposes because it contained "take nothing" language, even though it was captioned "Partial Summary Judgment"); *Harper v. Newton*, 910 S.W.2d 9, 12 n.1 (Tex. App.--Waco, 1995, no writ) ("Although not raised by the parties, we note that this summary judgment is made final and appealable by the court's inclusion of a 'Mother Hubbard' clause."), rev'd on other grounds, 913 S.W.2d 207 (Tex. 1985); *Conquista Project Corp. v. Conoco, Inc.*, No. 01-94-00574-CV (Tex. App.--Houston [1st Dist.] Apr. 6, 1995, writ denied) (not designated for publication) 1995 WL 155530, at *1 (treating summary judgment as final for appeal purposes where the trial court granted

“a complete take-nothing summary judgment”); *Scott v. Lowe*, No. 05-94-00678-CV, 1995 WL 379319, at *3-4 (Tex. App.--Dallas May 30, 1995, no writ) (holding summary judgment order containing Mother Hubbard clause but not mentioning counterclaim was final, appealable judgment); *Imagents, Inc. v. University of Tex. Health Science Ctr.*, No. 14-94-00781-CV (Tex. App.--Houston [14th Dist.] Oct. 12, 1995, no writ) (not designated for publication), 1995 WL 600572, at *1 (holding Mother Hubbard clause rendered summary judgment order final for purposes of appeal); *Flanagan v. Martin*, 880 S.W.2d 863, 865 (Tex. App.--Waco 1994, writ *dism'd w.o.j.*) (“The judgment is also final for appeal purposes because the ‘Final Summary Judgment’ includes a ‘Mother Hubbard’ clause.”); *Duncan v. First Am. Title Ins. Co.*, No. C14-93-00171-CV (Tex. App.--Houston [14th Dist.] Jan. 6, 1994, no writ) (not designated for publication), 1994 WL 2010, at *5 (holding summary judgment order containing Mother Hubbard clause was appealable judgment even though it failed to dispose of all parties); *King v. Moreno*, No. 05-93-01715-CV (Tex. App.--Dallas June 8, 1994, no writ) (not designated for publication), 1994 WL 246265, at *1 (holding Mother Hubbard clause rendered partial summary judgment final, despite trial court's subsequent signing of another summary judgment).

- 142 *McNally v. Guevara*, 989 S.W.2d 380, 382 (Tex. App.--Austin 1999, no pet.).
- 143 *In re Cobos*, 994 S.W.2d 313, 315 (Tex. App.--Corpus Christi 1999, orig. proceeding).
- 144 *Rose v. Kober Fin. Corp.*, 874 S.W.2d 358, 360 (Tex. App.--Houston [14th Dist.] 1994, no writ).
- 145 *Klein v. Reynolds, Cunningham, Peterson & Cordell*, 923 S.W.2d 45, 49 (Tex. App.--Houston [1st Dist.] 1995, no writ).
- 146 *Intermedics, Inc. v. Emjay Computer Careers*, No. 14-95-00342-CV (Tex. App.--Houston [14th Dist.] July 18, 1996, no writ) (not designated for publication), 1996 WL 400114, at *2.
- 147 See *id.*
- 148 *Coleman Cattle Co. v. Carpentier*, 10 S.W.3d 430, 433 (Tex. App.--Beaumont 2000, no pet.).
- 149 4 S.W.3d 879, 881 (Tex. App.--Houston [1st Dist.] 1999, no pet.).
- 150 *Id.*; see also *McNally v. Guevara*, 989 S.W.2d 380, 382 (Tex. App.--Austin 1999, pet. filed) (holding that summary judgment motion reciting summary judgment “should in all things be granted” was final judgment).
- 151 *St. Paul Ins. Co. v. Mefford*, No. 05-96-01581-CV (Tex. App.--Dallas Nov. 30, 1998, no pet.) (not designated for publication), 1998 WL 821537, at *2; see also *McNally*, 989 S.W.2d at 386 (Woodfin, J., dissenting) (arguing that summary judgment motion reciting summary judgment “should in all things be granted” did “not contain a Mother Hubbard clause or an acceptable equivalent”).
- 152 *Mafrige v. Ross*, 866 S.W.2d 590, 592 (Tex. 1993).
- 153 See cases cited *supra* notes 34-40 and accompanying text.
- 154 See *infra* Section III.C.3.b.iv.
- 155 See *Swanda*, *supra* note 78, at 6 (noting that while *Mafrige* may have resolved the question of what effect a Mother Hubbard clause has on a summary judgment, it raised new questions that are just as elusive).
- 156 866 S.W.2d at 591 n.3.
- 157 See *id.* at 591.
- 158 *Id.* at 590.
- 159 *Id.* (emphasis added).
- 160 *Id.* at 592.
- 161 *Id.* at 591.

- 162 945 S.W.2d 810 (Tex. 1997).
- 163 [English v. Union State Bank](#), 911 S.W.2d 829, 832 (Tex. App.-- Corpus Christi 1995), rev'd, 945 S.W.2d 810 (Tex. 1997).
- 164 Id.
- 165 See id.
- 166 See id.
- 167 See id.
- 168 Id. at 833.
- 169 [English v. Union State Bank](#), 945 S.W.2d 810, 811 (Tex. 1997).
- 170 [Mafrige v. Ross](#), 866 S.W.2d 590, 590 (Tex. 1993).
- 171 See generally id. at 592.
- 172 See, e.g., cases cited infra notes 178-81.
- 173 These were the facts of [Lehmann v. Har-Con Corp.](#), 988 S.W.2d 415, 416 (Tex. App.--[14th Dist.] 1999, pet. granted). See discussion infra note 184.
- 174 See cases cited infra note 182.
- 175 These were the facts of [Mikulich v. Perez](#), 915 S.W.2d 88, 91-92 (Tex. App.--San Antonio 1996, no writ). In Mikulich the plaintiff brought suit against four defendants. 915 S.W.2d at 90. The record reflects that only one defendant moved for summary judgment. See id. However, the summary judgment order granted by the trial court decreed that the plaintiff “take nothing” against all four defendants. Id. at 91. The court of appeals held that while the order granted more relief than requested, it was a final, appealable judgment because it purported to dispose of all parties and all issues. See id. at 92.
- 176 [Mafrige v. Ross](#), 866 S.W.2d 590, 592 (Tex. 1993) (“If a summary judgment order appears to be final, as evidenced by the inclusion of language purporting to dispose of all claims or parties, the judgment should be treated as final for purposes of appeal”).
- 177 Compare [Mikulich](#), 915 S.W.2d at 91 (holding that summary judgment granted in favor of several parties who where not parties to the motion was final for purposes of appeal), with [Yzaguirre v. Gonzalez](#), No. 04-97-00276-CV (Tex. App.--San Antonio May 20, 1998, pet. filed) (not designated for publication), 1998 WL 251755, at *1 (relying, in part, on omission of one of the defendants from the summary judgment motion to conclude that judgment was interlocutory).
- 178 See [Kistler v. Stran](#), 22 S.W.3d 103, 106 (Tex. App.--Houston [14th Dist.] 2000, pet. filed) (holding that partial summary judgment, which only disposed of some parties in the case, was final judgment because the order contained a Mother Hubbard clause); [Lehmann](#), 988 S.W.2d at 416-17 (holding summary judgment containing Mother Hubbard clause was final, despite fact that it was entitled “Interlocutory” and did not address all parties to the suit); [Kaigler v. General Elec. Mortgage Ins. Corp.](#), 961 S.W.2d 273, 276 (Tex. App.--Houston [1st Dist.] 1997, no writ) (holding that inclusion of Mother Hubbard clause rendered summary judgment final for purposes of appeal, despite its omission of some parties to the case); [Duncan v. First Am. Title Ins. Co.](#), No. C14-93-00171-CV (Tex. App.--Houston [14th Dist.] Jan. 6, 1996, no writ) (not designated for publication), 1994 WL 2010, at *5-6 (holding that summary judgment was final because it contained Mother Hubbard clause, despite fact that one party had not moved for summary judgment); [Harper v. Newton](#), 910 S.W.2d 9, 12 n.1 (Tex. App.--Waco 1995) (noting that Mother Hubbard clause made order final and appealable, despite fact that six of the seven defendants did not move for summary judgment), rev'd on other grounds, 913 S.W.2d 207 (Tex. 1995); c.f. [John v. Marshall Health Servs., Inc.](#), 12 S.W.3d 888, 889-90 (Tex. App.--Texarkana 2000, pet. filed) (holding that directed verdict, which did not “explicitly dispose[] of” all the defendants, was nonetheless final because a Mother Hubbard clause was included in the judgment).

- 179 [Kaigler](#), 961 S.W.2d at 276 (holding that inclusion of Mother Hubbard clause rendered summary judgment final for purposes of appeal, despite its omission of some parties to the case).
- 180 See [Lowe v. Teator](#), 1 S.W.3d 819, 823-24 (Tex. App.--Dallas 1999, pet. filed) (explaining that where a court's order fails to dispose of all parties, "a Mother Hubbard clause or its equivalent does nothing more than resolve the claims involving the parties joined in the summary judgment proceeding"); [Midkiff v. Hancock E. Tex. Sanitation, Inc.](#), 996 S.W.2d 414, 416 (Tex. App.--Beaumont 1999, no pet.) (holding that summary judgment order containing Mother Hubbard clause "taken as a whole, logically implicates" only one of the defendants claims and therefore is interlocutory); [Yzaguirre](#), 1998 WL 251755, at *1 (relying, in part, on omission of one of the defendants from the summary judgment motion to conclude that judgment was interlocutory); [Vanderwiele v. Llano Trucks, Inc.](#), 885 S.W.2d 843, 845 (Tex. App.--Austin 1994, no writ) (holding that the order containing finality language nonetheless did "not purport to dispose of all parties... since nothing in the record indicate[d] that [one of the defendants] filed a motion for summary judgment").
- 181 [Lowe](#), 1 S.W.3d at 823-24.
- 182 See [Williams v. Bank One, Tex., N.A.](#), 15 S.W.3d 110, 116 & n.4 (Tex. App.--Waco 1999, no pet.) (recognizing that an "argument could be made that, because the judgment does not properly dispose of all parties to the suit, it is interlocutory and not appealable," but nonetheless holding that order was final because Mother Hubbard clause was included in the judgment); [Mikulich](#), 915 S.W.2d at 91-92 (holding that summary judgment granted in favor of several parties who were not parties to the motion was final for purposes of appeal); [In re Cobos](#), 994 S.W.2d 313, 314-16 (Tex. App.--Corpus Christi 1999, no pet.) (holding that agreed judgment which contained Mother Hubbard clause but failed to address nine of the thirteen defendants was final for purposes of appeal).
- 183 [Lehmann v. Har-Con Corp.](#), No. 14-98-00666-CV (Tex. App.-- Houston [14th Dist.] July 30, 1998, no pet.) (not designated for publication), 1998 WL 429853, at *1.
- 184 [Lehmann v. Har-Con Corp.](#), 988 S.W.2d 415, 416 (Tex. App.-- Houston [14th Dist.] 1999, pet. granted). In [Lehmann](#), the court granted the defendant's motion for summary judgment on its counterclaim against the plaintiff and on a cross-claim against a third-party. *Id.* The order contained a Mother Hubbard clause. See *id.* "The parties and court apparently considered the summary judgment interlocutory, as evidenced by a postcard sent by the District Clerk's office advising appellant's counsel that an 'Order for Interlocutory Summary Judgment' had been signed." *Id.* The judge later signed an order severing the parties and claims not addressed in the summary judgment order. See *id.* After the severance order was signed, the appellants filed a notice of appeal. See *id.* The court of appeals dismissed the appeal as untimely, holding the earlier summary judgment order was the "final" judgment in the case. See *id.* at 416-17.
- 185 E.g., [Flanagan v. Martin](#), 880 S.W.2d 863, 865 (Tex. App.--Waco 1994, writ dism'd w.o.j.).
- 186 See, e.g., [Curtis v. Ziff Energy Group, Ltd.](#), 12 S.W.3d 114, 119-20 (Tex. App.--Houston [14th Dist.] 1999, no pet.); [Rose v. Kober Fin. Corp.](#), 874 S.W.2d 358, 362 (Tex. App.--Houston [14th Dist.] 1994, no writ).
- 187 946 S.W.2d 336 (Tex. 1997).
- 188 See [Gilcrest v. Bandera Elec. Coop., Inc.](#), 924 S.W.2d 388, 389 (Tex. App.--San Antonio 1998), rev'd, 946 S.W.2d 336 (Tex. 1997).
- 189 See *id.*
- 190 See *id.* at 391.
- 191 See *id.*
- 192 See [Bandara Elec. Coop., Inc. v. Gilchrist](#), 946 S.W.2d 336, 337-38 (Tex. 1997).
- 193 See *id.* at 337.
- 194 See, e.g., [In re Monroe](#), No. 05-99-01758-CV (Tex. App.--Dallas March 31, 2000, orig. proceeding) (not designated for publication), 2000 WL 378519, at *1-2 (holding that summary judgment reciting that "a take nothing Judgment be rendered

against Plaintiff in favor of Defendant” was final for appeal purposes, despite omission of any reference to defendant’s counterclaim); *Kaigler v. General Elec. Mortgage Ins. Corp.*, 961 S.W.2d 273, 275-76 (Tex. App.--Houston [1st Dist.] 1997, no writ) (holding that Mother Hubbard clause rendered judgment final, despite omission of claim, cross-claim and counterclaim).

195 See, e.g., *Sommers v. Concepcion*, 20 S.W.3d 27, 33 (Tex. App.-- Houston [14th Dist.] 2000, pet. denied) (holding that clause providing that “Plaintiff have and take nothing by his claims against [defendant]... clearly disposes of the [plaintiff’s] claims against the [defendant] and nothing else,” rendering judgment interlocutory); *Hervey v. Flores*, 975 S.W.2d 21, 25 (Tex. App.-- El Paso 1998, pet. denied) (holding summary judgment order containing Mother Hubbard clause was not final where it failed to make any reference to counterclaim); cf. *Coleman Cattle Co. v. Carpentier*, 10 S.W.3d 430, 433 n.2 (Tex. App.--Beaumont 2000, no pet.) (recognizing that, in some cases, the existence of a counterclaim can render a judgment interlocutory); *Hinojosa v. Hinojosa*, 886 S.W.2d 67, 69-70 (Tex. App.--El Paso 1993, no writ) (post-Mafrige, pre- Bandara case holding summary judgment order containing finality language which failed to dispose of counterclaim was not final for purposes of appeal).

196 The Dallas Court of Appeals has taken this bright-line approach, even when there was evidence in the summary judgment motion and other places in the record indicating that the trial judge and parties did not intend the summary judgment to be final. See *Preston v. American Eagle Ins. Co.*, 948 S.W.2d 18, 19-21 (Tex. App.--Dallas 1997, no writ) (holding that summary judgment was final despite the title partial summary judgment and the trial court’s obvious attempt to make a subsequent order final); *Hofland v. East Univ. Place Condominium Ass’n, No. 05-97-01034-CV* (Tex. App.--Dallas Oct. 23, 1997, no writ) (not designated for publication), 1997 WL 657092, at *1 (holding summary judgment was final, despite fact that it was entitled “Interlocutory Summary Judgment”); see also *In re Cobos*, 994 S.W.2d 313, 315 (Tex. App.-- Corpus Christi 1999, orig. proceeding) (“As Mafrige and English make clear, the intent of the trial court is not the controlling consideration in determining whether a judgment is final.”); *Lehmann v. Har-Con, Corp.*, 988 S.W.2d 415, 418 (Tex. App.--Houston [14th Dist.] 1999, pet. granted) (applying bright-line Mafrige test, even though “the parties and court clearly considered the summary judgment interlocutory”); *Kaigler*, 961 S.W.2d at 274-76 (holding summary judgment was final, despite additional subsequent orders by trial court purporting to dispose of parties omitted from summary judgment).

197 The San Antonio Court of Appeals, in *Rodriguez v. NBC Bank*, took this approach, looking to the entire order to glean the trial court’s intent. 5 S.W.3d 756, 763-64 (Tex. App.--San Antonio 1999, no pet.). In *Rodriguez*, the plaintiff brought suit against several defendants. See *id.* at 763. Some, but not all, of the defendants moved for summary judgment. See *id.* at 760. The summary judgment order signed by the court recited that the plaintiff “take nothing on her claims” against the movants and concluded with “[a]ll relief not expressly granted herein is denied.” *Id.* at 763. The court first noted that the phrase “[a]ll relief not expressly granted herein is denied” was ambiguous and “herein” could be read to refer to the plaintiff’s latest petition and wipe out all causes of actions against all parties. See *id.* However, it went on to conclude:

But, a more logical interpretation is that [herein] refers to the motion being relied on and therefore applies to the movant, not the respondent. “Herein” refers to the motion and the interpretation is to be made by referencing the four corners of the document. In this cases, NationsBank asked for and was granted a summary judgment in its favor and a certain amount of attorney’s fees. This was the entirety of their relief --” expressly granted.” Any other relief to the movant that had not been expressly granted was denied.

....

Looking within the four corners of the summary judgment order, the plain language of the Mother Hubbard clause did not, and could not purport to grant or deny any more relief than the relief which NationsBank sought. Neither the language of the order granting summary judgment nor the [subsequent] order of severance evidence the trial court’s “clear intent” that the summary judgment granted in favor of Nations Bank be final as to all parties to the litigation.

Id. at 763-64 (footnotes and citations omitted); see also *Midkiff v. Hancock E. Tex. Sanitation, Inc.*, 996 S.W.2d 414, 416 (Tex. App.--Beaumont 1999, no pet.) (looking to order “as a whole” to conclude that summary judgment order containing Mother Hubbard clause did not purport to be final, where it specifically disposed of only one defendant’s motion); *Scott v. Poindexter*, No. 04-98-00101-CV (Tex. App.--San Antonio Nov. 30, 1999, no pet.) (not designated for publication), 2000 WL 4540, at *4 (holding that “[u]nder the circumstances presented here--the presence of a Mother Hubbard clause countered by language reflecting an intent to grant a partial summary judgment--we cannot say that the January 1993 summary judgment ‘clearly purports to be final’ ”); *Intermedics, Inc. v. Emjay Computer Careers*, No. 14-95-00342-CV (Tex. App.-- Houston [14th Dist.] July 18, 1996, no writ) (not designated for publication), 1996 WL 400114, at *2 (holding summary judgment which failed to dispose of all issues was final because “the trial court intended its judgment to be final”).

- 198 For example, the First Court of Appeals in Houston has looked to other orders by the trial court to conclude that it did not intend for a summary judgment containing finality language to be final. See *Sheerin v. Exxon Corp.*, 923 S.W.2d 52, 55 (Tex. App.--Houston [1st Dist.] 1995, no writ). In *Sheerin*, the court granted a summary judgment on November 4, 1994, which failed to dispose of all parties and issues, but stated: “It appearing to the Court that the ruling set forth herein disposes of all parties and all issues in this action, this is a Final Judgment. All other relief not expressly granted herein is hereby denied.” Id. at 54 n.3. On January 23, 1995, the trial court signed an order dismissing one party's plea in intervention “in order to make the Summary Judgment on file herein final as to all claims and parties.” Id. The court of appeals held that the summary judgment was not final until January 23, 1995 and explained:
Mafrige is distinguishable from the present case in that here the record “clearly evidences the trial court's intent” that the November 4, 1994 summary judgment was “interlocutory.” This “clear intent” is shown by the trial court's subsequent signing of the January 23, 1995 order dismissing the plea in intervention that specifically states the intervention was being dismissed “in order to make the Summary Judgment on file herein final as to all claims and parties.”
Id. at 55; see also *In re Monroe*, 2000 WL 378519, at *2 (looking to the language of the order as a whole and the actions of the parties after summary judgment order was entered to determine that judgment containing Mother Hubbard clause was final); *Lowe v. Teator*, 1 S.W.3d 819, 824 (Tex. App.--Dallas 1999, pet. filed) (“[T]he Mother Hubbard clause cannot possibly be read to dispose of the remaining claims in the case against the defendants who were not parties to the summary judgment proceeding.”); *Munawar v. Cadle Co.*, 2 S.W.3d 12, 15 (Tex. App.--Corpus Christi 1999, pet. denied) (looking to the language of summary judgment motion and subsequent order denying request for new trial to conclude that “it is clear that the trial court intended the summary judgment to be the final disposition of all issues in this case”); *Positive Feed, Inc. v. Guthmann*, 4 S.W.3d 879, 881 (Tex. App.--Houston [1st Dist.] 1999, no pet.) (relying, in part, on the parties' treatment of summary judgment order to conclude order was final); *Coleman Cattle Co., Inc.*, 10 S.W.3d at 433 (“From the record before us, we conclude that the trial court and the parties contemplated finality.”); *Carey v. Dimidjian*, 982 S.W.2d 556, 558 (Tex. App.--Eastland 1998, no pet.) (relying, in part, on fact that the court and the parties treated partial summary judgment containing Mother Hubbard clause as interlocutory to conclude that summary judgment was not final).
- 199 Compare *Sheerin*, 923 S.W.2d at 55 (looking to court's “clear intent” that order was not final, as shown by its subsequent signing of an order with a stated purpose “to make the Summary Judgment on file herein final as to all claims and parties,” despite inclusion of finality language in summary judgment order), with *Kaigler*, 961 S.W.2d at 274-76 (holding summary judgment was final, despite additional subsequent orders by trial court purporting to dispose of parties omitted from summary judgment).
- 200 See *Webb v. HCM Management, Corp.*, No. 07-96-0369-CV (Tex. App.--Amarillo Feb. 17, 1998, no pet.) (not designated for publication), 1998 WL 16033, at *1 (discussing order granting plea to the jurisdiction and noting “the order does not contain a Mother Hubbard clause purporting to dispose of the cross-actions and counterclaims filed by other parties to this suit”) (citing *Mafrige v. Ross*, 866 S.W.2d 590 (Tex. 1993)).
- 201 See *In re Cobos*, 994 S.W.2d at 315 (holding that case was “not distinguishable from *English* and *Mafrige* [simply] because it [was] based on a settlement agreement rather than a trial on the merits”).
- 202 See, e.g., *John v. Marshall Health Servs., Inc.*, 12 S.W.3d 888, 890 (Tex. App.--Texarkana 2000, pet. filed); *Polley v. Odem*, 957 S.W.2d 932, 943 (Tex. App.--Waco 1997, judgm't vacated).
- 203 *In re Tejas*, Nos. 01-98-00688-CV, 01-98-00689-CV, 01-98-00690-CV (Tex. App.--Houston [1st Dist.] July 13, 1998, no pet.) (not designated for publication), 1998 WL 394562, at *1 n.1.
- 204 *Biltmore Swim & Racquet Club Recreational Ass'n v. McAbee*, No. 05-98-00252-CV (Tex. App.--Dallas 1998, no pet.) (not designated for publication), 1998 WL 459819, at *1.
- 205 988 S.W.2d 423, 428 (Tex. App.--Houston [1st Dist.] 1999, pet. filed) (Wilson, J., concurring on denial of en banc rehearing).
- 206 See *id.* at 427.
- 207 See generally Texas Supreme Court Rules Advisory Committee Meeting Minutes (Oct. 21, 2000). Transcripts of the committee's deliberations are accessible on the committee's web site, located at <<http://www.supreme.courts.state.tx.us/rules/history/archives/scac/>>.

- 208 See *id.*
- 209 See Wright et al., *supra* note 12, at § 2781 (“Because so much of consequence turns on the entry of the judgment, [Rule 58](#) was completely rewritten 1963 to eliminate uncertainty as to whether and when a judgment has been rendered and entered.”); Benjamin Kaplan, [Amendments to the Federal Rules of Civil Procedure, 1961-1963 \(II\)](#), 77 *Harv. L. Rev.* 801 831 (1964) (explaining that [Rule 58](#) promotes certainty by insisting on formality).
- 210 See Texas Supreme Court Rules Advisory Committee Meeting Minutes (Oct. 21, 2000).
- 211 See *id.* (discussion on problems with federal [Rule 58](#)); see also Minutes of Spring 1999 Federal Advisory Committee on Appellate Rules (April 15 & 16 1999) (discussing some problems inherent in [Rule 58](#)).
- 212 See Texas Supreme Court Rules Advisory Committee Meeting Minutes (Oct. 21, 2000). The proposed amendment to federal [Rule 58](#) provide for finality after a 60 day period when the rule has not been complied with.
- 213 See generally *id.*
- 214 [Lane Bank Equip. Co. v. Smith S. Equip., Inc.](#), 10 S.W.3d 308, 314 (Tex. 1995) (Hecht, J., concurring).
- 215 See [Mafrige v. Ross](#), 866 S.W.2d 590, 590 (Tex. 1993) (noting that the “finality of judgment for purposes of appeal has been a recurring and nagging problem thought the judicial history of the state); see also [Sick v. City of Buffalo](#), 574 F.2d 589, 692 (2d Cir. 1978) (explaining that the purpose of [Rule 58](#) is to promote certainty).
- 216 See [Lehmann v. Har-Con Corp.](#), 988 S.W.2d 415, 417 n.2 (Tex. App.--Houston [14th Dist.] 1999, *pet. granted*) (explaining the procedure for determining finality of summary judgments before Mafrige).
- 217 See generally Texas Supreme Court Rules Advisory Committee Meeting Minutes (Oct. 21, 2000); see also discussion *supra* note 114 and accompanying text.
- 218 See [Tex. R. Civ. P. 306](#).
- 219 See *infra* section IV.A.6 (discussing bill of review procedures); When available, a bill of review may be filed within four years after a final judgment is signed. The only reference to bill of review in the rules is [Tex. R. Civ. P. 329b\(f\)](#): “On expiration of the time within which the trial court has plenary power, a judgment cannot be set aside by the trial court except by bill of review for sufficient cause, filed within the time allowed by law.....” See also [John T. Cabaniss, Note, Procedure--Equitable Bill of Review--Default Judgment Which Had Become Final Set Aside Where Failure to File Timely Motion for New Trial Was Result of Misinformation Given by Clerk of Court](#), 43 *Tex. L. Rev.* 114, 115 n.3 (1964).
- 220 Verbal proposal of Judge Scott McCown. See Texas Supreme Court Rules Advisory Committee Minutes (Oct. 20-21).
- 221 See [In re Cobos](#), 994 S.W.2d 313, 315-16 (Tex. App.--Corpus Christi 1999, *orig. proceeding*). As the Cobos court explained: The remedy to a carelessly worded judgment--agreed, partial, or summary--is simple: convince the trial court to modify or withdraw the judgment while it retains the plenary power to do so or perfect a timely appeal of that that judgment. Failure to notice the error in time does, indeed, have extreme consequences. We are bound, however, by the law as set out in Mafrige and its progeny. *Dura lex sed lex*.
Id. at 316.
- 222 See [Tex. R. Civ. P. 329b\(d\)](#).
- 223 See [Tex. R. App. P. 26.1](#).
- 224 Swanda, *supra* note 78, at 6 (criticizing the harshness of the bright-line test in Mafrige and explaining that “[c]onstructions favoring an interlocutory determination create correctable obstacles, unlike constructions favoring finality[, because d]ismissals for failure to perfect the appeal timely preclude appellate review”).
- 225 See [English v. Union State Bank](#), 945 S.W.2d 810, 811 (Tex. 1997) (holding that to avoid waiver, the party must either ask the trial court to correct the erroneous judgment while the court retains plenary power or perfect a timely appeal).

- 226 Lipman, *supra* note 77, at 49.
- 227 There are scattered statutory exceptions to the final judgment rule. See, e.g., *In re Guardianship of Murphy*, 1 S.W.3d 171, 172 (Tex. App.--Fort Worth 1999, no pet.) (“To be final and appealable, the [probate] order need not fully dispose of the entire proceeding.”) (citing *Crowson v. Wakeham*, 897 S.W.2d 779, 783 (Tex. 1995)); *State v. Starley*, 413 S.W.2d 451, 463 (Tex. Civ. App.--Corpus Christi 1967, no writ) (noting that one exception to the one final judgment rule relates to water rights).
- 228 Tex. R. Civ. P. 301; *Beach v. Beach*, 912 S.W.2d 345, 347-48 (Tex. App.--Houston [14th Dist.] 1995, no writ); *Crabtree v. Crabtree*, 627 S.W.2d 486, 487 (Tex. App.--Corpus Christi 1981, no writ); *Dallas Coffee & Tea, Co. v. Williams*, 45 S.W.2d 724, 728 (Tex. Civ. App.--Dallas 1932, no writ).
- 229 See generally 47 Tex. Jur. 3d Judgments § 5 (1998).
- 230 See, e.g., *Anderson v. Teco Pipeline Co.*, 985 S.W.2d 559, 562 (Tex. App.--San Antonio 1998, pet. denied); *Exxon Corp. v. Garza*, 981 S.W.2d 415, 419 (Tex. App.--San Antonio 1998, no pet.); *Woosley v. Smith*, 925 S.W.2d 84, 88 (Tex. App.--San Antonio 1996, no writ); *Molina v. Kelco Tool & Die, Inc.*, 904 S.W.2d 857, 860 (Tex. App.--Houston [1st Dist.] 1995, no writ); *Moncrief v. Harvey*, 805 S.W.2d 20, 24 (Tex. App.--Dallas 1991, no writ); *Hammett v. Lee*, 730 S.W.2d 350, 351 (Tex. App.--Dallas 1987, writ *dism'd w.o.j.*); *Ramos v. Austin*, 220 S.W.2d 528, 529 (Tex. Civ. App.--San Antonio 1949, no writ).
- 231 See *B & M Mach. Co. v. Avionic Enter., Inc.*, 566 S.W.2d 901, 901-02 (Tex. 1978) (holding that second judgment entitled “Amended Judgment” vacated earlier order by implication); *City of West Lake Hills v. City of Austin*, 466 S.W.2d 722, 726-27 (Tex. 1971) (holding that “Corrected Final Judgment” replaced “Judgment”); *Home Interiors & Gifts, Inc. v. Veliz*, 695 S.W.2d 35, 44 (Tex. App.--Corpus Christi 1995, no writ) (holding that designation of second judgment as “Reformed Final Judgment” was sufficient to show court's intent to vacate earlier judgment).
- 232 *Mathes v. Kelton*, 569 S.W.2d 876, 878 (Tex. 1978).
- 233 See *Hammett*, 730 S.W.2d at 351 (reversing and remanding “in the interest of justice” because one judgment was undated so the court could not determine which judgment “is final and which is a nullity”).
- 234 See *Wang v. Hsu*, 899 S.W.2d 409, 411-12 (Tex. App.--[14th Dist.] 1995, no writ) (“Once the second judgment is signed, the first judgment is ‘dead,’ and is not a final judgment from which an appeal can be taken.”).
- 235 See *Estes v. Carlton*, 708 S.W.2d 594, 595 (Tex. App.--Fort Worth 1986, no writ).
- 236 See, e.g., *Stroman v. Fidelity & Cas. of New York*, 792 S.W.2d 257, 259 (Tex. App.--Austin 1990, writ denied) (“Were the terms of the interlocutory summary judgment inconsistent with the final order, the final judgment would control.”); *Ratcliff v. Sherman*, 592 S.W.2d 81, 83 (Tex. Civ. App.--Tyler 1979, no writ) (“The entry of a final judgment inconsistent in its terms with a prior interlocutory judgment operates to set aside the interlocutory judgment as a necessary result of the application of the rule that only one final judgment may be entered in a case.”).
- 237 See *Cavazos v. Hancock*, 686 S.W.2d 284, 286-87 (Tex. App.-- Amarillo 1985, no writ).
- 238 See *Harris v. O'Brien*, 54 S.W.2d 277, 280 (Tex. Civ. App.-- Beaumont 1932, orig. proceeding).
- 239 See *Woosley v. Smith*, 925 S.W.2d 84, 87 (Tex. App.--San Antonio 1996, no writ) (“Once an order has been entered disposing of all remaining parties and issues, all the orders merge, creating a final appealable judgment.”); cf. *Orion Enters., Inc. v. Pope*, 927 S.W.2d 654, 659 (Tex. App.--San Antonio 1996, orig. proceeding) (explaining that interlocutory venue orders are not appealable until they are made final by merger into the final judgment).
- 240 *Farmer v. Ben E. Keith Co.*, 907 S.W.2d 495, 496 (Tex. 1995) (“When a judgment is interlocutory because unadjudicated parties or claims remain before the court, and when one moves to have such unadjudicated claims or parties removed by severance, dismissal, or nonsuit the appellate timetable runs from the signing of a judgment or order disposing of those claims or parties.”); see also *Columbia Rio Grande Reg'l Hosp. v. Stover*, 17 S.W.3d 387, 391 (Tex. App.--Corpus Christi 2000, no pet.).

- 241 See, e.g., *Park Place Hosp. v. Milo*, 909 S.W.2d 508, 510 (Tex. 1995) (holding partial summary judgment “did not become final and appealable” until the trial court entered severance order); *Hall v. City of Austin*, 450 S.W.2d 836, 837-38 (Tex. 1970) (explaining the difference between a severance and an order for separate trials).
- 242 See, e.g., *McRoberts v. Ryals*, 863 S.W.2d 450, 453 (Tex. 1993); *Stover*, 17 S.W.3d at 391.
- 243 *Azbill v. Dallas County Child Protective Servs. Unit of Tex. Dep't of Human & Regulatory Servs.*, 860 S.W.2d 133, 137-38 (Tex. App.--Dallas 1993, no writ).
- 244 See *Erroa v. Piland*, No. 14-96-135-CV (Tex. App.--Houston [14th Dist.] April 18, 1996, no writ) (not designated for publication), 1996 WL 183958 at *2.
- 245 See *Klein v. Reynolds, Cunningham, Peterson & Cordell*, 923 S.W.2d 45, 50 (Tex. App.--Houston [1st Dist.] 1995, no writ); *Roquemore v. Kellogg*, 656 S.W.2d 646, 649 (Tex. App.--Dallas 1983, no writ). A plaintiff has the absolute right to nonsuit if the defendant has not made a claim for affirmative relief. See *Quanto Int'l Co. v. Lloyd*, 897 S.W.2d 482, 486 (Tex. App.--Houston [1st Dist.] 1995, no writ).
- 246 *Atchison v. Weingarten Realty Management Co.*, 916 S.W.2d 74, 75 n.3 (Tex. App.--Houston [1st Dist.] 1996, no writ); see also *Milo*, 909 S.W.2d at 510 (“Although the plaintiffs had filed notice to nonsuit [one defendant], the appellate timetable could not be triggered until a signed, written order of the court dismissed him.”); *Hervey v. Flores*, 975 S.W.2d 21, 23 (Tex. App.--El Paso 1998, pet. denied) (“When a judgment is interlocutory because unadjudicated parties or claims remain before the court, and when one moves to have such unadjudicated claims or parties removed by severance, dismissal, or nonsuit, the appellate timetable runs from the signing of the judgment or order disposing of those claims or parties.”).
- 247 *Hervey*, 975 S.W.2d at 24; see also *Runnymede Corp. v. Metroplex Plaza, Inc.*, 543 S.W.2d 4, 5 (Tex. Civ. App.--Dallas 1976, writ ref'd); *Ramirez v. Pecan Deluxe Candy Co.*, 839 S.W.2d 101, 105 (Tex. App.-- Dallas 1992, writ denied).
- 248 See *Howard Gault & Son, Inc. v. Metcalf*, 529 S.W.2d 317, 320 (Tex. Civ. App.--Amarillo 1975, no writ).
- 249 See *Fruehauf Corp. v. Carrillo*, 848 S.W.2d 83, 84 (Tex. 1993).
- 250 See *id.*; *Mathes v. Kelton*, 569 S.W.2d 876, 878 (Tex. 1978); *Transamerican Leasing Co. v. Three Bears, Inc.*, 567 S.W.2d 799, 800 (Tex. 1978); *Orion Enters., Inc. v. Pope*, 927 S.W.2d 654, 658 (Tex. App.--San Antonio 1996, orig. proceeding); *Federal Deposit Ins. Corp. v. Texarkana Nat'l Bank*, 673 S.W.2d 262, 263 (Tex. App.--Texarkana 1984, no writ).
- 251 Tex. R. Civ. P. 329b(d); *Jackson v. Van Winkle*, 660 S.W.2d 807, 808 (Tex. 1983). During the court's period of plenary power, the court's power to modify its judgments is “virtually absolute.” See *Garza v. Serrato*, 671 S.W.2d 713, 714 (Tex. App.--San Antonio 1984, no writ). However, any modification by the trial judge must be by “written order that is express and specific.” *McCormack v. Guillot*, 597 S.W.2d 345, 346 (Tex. 1980); see also *In re Fuentes*, 960 S.W.2d 261, 265 (Tex. App.--Corpus Christi 1997, orig. proceeding) (holding letter written by judge, but not entered into record, was not a valid order granting motion for new trial).
- 252 See Tex. R. Civ. P. 3229b(d); *Jackson*, 660 S.W.2d at 808; *Thompson v. Harco Nat'l Ins. Co.*, 997 S.W.2d 607, 617 n.44 (Tex. App.-- Dallas 1998, pet. denied).
- 253 See Tex. R. Civ. P. 308; *Matz v. Bennion*, 961 S.W.2d 445, 452 (Tex. App.--Houston [1st Dist.] 1997, writ denied); *Katz v. Bianchi*, 848 S.W.2d 372, 374 (Tex. App.--Houston [14th Dist.] 1993, orig. proceeding).
- 254 *Katz*, 848 S.W.2d at 374; see also *Harris County Appraisal Dist. v. West*, 708 S.W.2d 893, 896 (Tex. App.--Houston [14th Dist.] 1986, orig. proceeding).
- 255 Tex. R. Civ. P. 329b(a); see also *Bell v. Showa Denko K.K.*, 899 S.W.2d 749, 757 (Tex. App.--Amarillo 1995, writ denied); *Reviea v. Marine Drilling Co.*, 800 S.W.2d 252, 257 (Tex. App.--Corpus Christi 1990, writ denied). An automatic stay imposed by a bankruptcy court will suspend the time for filing a motion for new trial. See *Howard v. Howard*, 670 S.W.2d 737, 739 (Tex. App.--San Antonio 1984, no writ). Under Rule 5, the “mailbox rule” applies to the filing of motions for new trial. Tex. R. Civ. P. 5. However, sending the motion by private carrier instead of United States mail deprives litigants of this benefit,

rendering a motion that does not reach the court within the thirty-day deadline untimely. See [Carpenter v. Town & Country Bank](#), 806 S.W.2d 959, 960 (Tex. App.--Eastland 1991, no writ).

- 256 See [Bell](#), 899 S.W.2d at 757. However, a party may file an unlimited number of amended and supplemental motions for new trial without leave of court “before any preceding motion for new trial filed by the movant is overruled and within thirty days after the judgment or other order complied of is signed.” Tex. R. Civ. P. 329(b)(b); [Equinox Enters., Inc. v. Associated Media Inc.](#), 730 S.W.2d 872, 875 (Tex. App.--Dallas 1987, no writ).
- 257 Tex. R. Civ. P. 229b(c).
- 258 See Tex. R. Civ. P. 229b(e), (g); [State v. Vega](#), 927 S.W.2d 81, 83 (Tex. App.--Houston [1st Dist.] 1996, writ denied w.o.j.). But note that the filing of a request for findings of fact does not correspondingly extend the trial court's plenary power, even though it might extend the deadline for perfecting an appeal. [Pursley v. Ussery](#), 982 S.W.2d 596, 599 (Tex. App.--San Antonio 1998, pet. denied) (citing Elaine A. Carlson, Perfecting the Civil Appeal to the Courts of Appeals in Jury and Nonjury Cases, in Matthew Bender & S. Methodist Univ. Sch. of Law, Practicing Law Under the New Rules of Trial and Appellate Proc., Nov. 7-8, 1997, at 7-21 and Ann Crawford McClure & Richard D. Orsinger, Are Non-Jury Trials Ever “Appealing” ? Attacking and Defending Judgments From Non-Jury Trials, in State Bar of Tex. 12th Annual Advanced Civ. Appellate Prac. Course, at I-10 (Sept. 1998)).
- 259 See [Kalteryer v. Sneed](#), 837 S.W.2d 848, 851 (Tex. App.--Austin 1992, no writ). But see [Homart Dev. Co. v. Blanton](#), 755 S.W.2d 158, 159-60 (Tex. App.--Houston [1st Dist.] 1988, orig. proceeding) (holding amended motion for new trial filed during thirty days after overruling timely filed motion for new trial could be considered by the trial court).
- 260 See [In re Simon Property Group, Inc.](#), 985 S.W.2d 212, 215 (Tex. App.--Corpus Christi 1999, orig. proceeding); see also [Wirtz v. Massachusetts Mut. Life Ins. Co.](#), 898 S.W.2d 414, 419 n.2 (Tex. App.--Amarillo 1995, no writ) (holding supplemental motion for new trial filed more than thirty days after final judgment is signed, was “a nullity and could not be considered by the trial court”); [Revia v. Marine Drilling Co.](#), 800 S.W.2d 252, 258 (Tex. App.--Corpus Christi 1990, writ denied) (holding supplemental motion for new trial filed eighty-three days after final judgment and seventeen days after original motion for new trial was overruled and untimely); [Both v. Felderhoff](#), 768 S.W.2d 403, 412 (Tex. App.--Fort Worth 1989, writ denied) (holding motion filed sixty-one days after signing of final order untimely, despite fact that trial court's plenary power was extended by timely filing of motion for new trial); [Lynd v. Wesley](#), 705 S.W.2d 759, 762 (Tex. App.--Houston [14th Dist.] 1986, no writ) (holding that under Tex. R. Civ. P. 5, a trial court may not grant leave to file amended motions for new trial more than thirty days after final judgment is signed).
- 261 See [Lane Bank Equip. Co. v. Smith S. Equip., Inc.](#), 10 S.W.3d 308, 313 (Tex. 2000) (holding that “only a motion seeking a substantive change will extend the appellate deadlines and the court's plenary power under Rule 329b(g)”).
- 262 See [id.](#) at 315-16 (Hecht, J., concurring) (criticizing the court's holding and noting that parties should not have to second guess whether a request is substantive).
- 263 See Tex. R. Civ. P. 306c; [Wirtz](#), 898 S.W.2d at 419.
- 264 See [Reitmeyer v. Clawson](#), 634 S.W.2d 379, 382 (Tex. App.--Austin 1982, no writ) (“[A] prematurely filed motion is effective only as to ‘the judgment the motion assails.’”).
- 265 See [Fredonia State Bank v. General Am. Life Ins. Co.](#), 881 S.W.2d 279, 281 (Tex. 1994) (“We conclude that... a motion for new trial relating to an earlier judgment may be considered applicable to a second judgment when the substance of the motion could properly be raised with respect to the corrected judgment.”).
- 266 See, e.g., [Howard v. Howard](#), 670 S.W.2d 737, 740 (Tex. App.--San Antonio 1984, no writ) (“The granting of the motion for new trial had the effect of reinstating the case upon the docket of the trial court, and there is thus no final judgment in this case.”).
- 267 [Fruehauf Corp. v. Carrillo](#), 848 S.W.2d 83, 84 (Tex. 1993) (“Denying the trial court the authority to reconsider its own order for new trial during the 75-day period needlessly restricts the trial court, creates unnecessary litigation, and is inconsistent with the notion of inherent plenary power vested in the trial courts.”).

- 268 See [Board of Trustees v. Toungate](#), 958 S.W.2d 365, 367 (Tex. 1997).
- 269 See [Amcole Energy Corp. v. Chapman, Inc.](#), 666 S.W.2d 540, 541 (Tex. App.--Dallas 1984, no writ).
- 270 [Philbrook v. Berry](#), 683 S.W.2d 378, 379 (Tex. 1985).
- 271 See *id.*
- 272 See generally Douglas A. Linebarger, Comment, [The Philbrook Trap: The Importance of Cause Numbers](#), 45 *Baylor L. Rev.* 857, 873-74, 859 (1993) (“Philbrook in its present form could be used to invalidate answers or other court documents which do not bear the correct cause numbers.”).
- 273 See [Leal v. City of Rosenberg](#), 17 S.W.3d 385, 386 (Tex. App.--Amarillo 2000, no pet.); see also [Texas Instruments, Inc. v. Teletron Energy Management, Inc.](#), 877 S.W.2d 276, 278 (Tex. 1994) (questioning whether Philbrook was correctly decided).
- 274 See [Scott & White Mem'l Hosp. v. Schexnider](#), 940 S.W.2d 594, 596 (Tex. 1996).
- 275 See *id.*
- 276 Compare [Wolma v. Gonzalez](#), 822 S.W.2d 302, 303 (Tex. App.--San Antonio 1991, orig. proceeding) (holding trial court has continuing jurisdiction over sanctions motion, even after plenary period expires), with [Jobe v. Lapidus](#), 874 S.W.2d 764, 767 (Tex. App.--Dallas 1994, writ denied) (holding trial court is without power to rule on sanction motion after plenary period expires).
- 277 See [Presbyterian Healthcare Sys. v. Afangideh](#), 993 S.W.2d 319, 321-22 (Tex. App.--Eastland 1999, pet. denied).
- 278 *Id.*
- 279 See [In re Bennett](#), 960 S.W.2d 35, 38 (Tex. 1997).
- 280 See [In re Simon Property Group, Inc.](#), 985 S.W.2d 212, 214 (Tex. App.--Corpus Christi 1999, orig. proceeding).
- 281 See, e.g., [Neese v. Wray](#), 893 S.W.2d 169, 170 (Tex. App.--Houston [1st Dist.] 1995, no writ); [City of McAllen v. Ramirez](#), 875 S.W.2d 702, 704 (Tex. App.--Corpus Christi 1994, no writ); see also Tex. R. Civ. P. 329b(d) (“The trial court... has plenary power to grant a new trial or to vacate, modify, correct, or reform the judgment within thirty days after the judgment is signed.”).
- 282 See Tex. R. Civ. P. 316a(3). Rule 316a(3) provides: “A motion to reinstate shall set forth the grounds therefore and be verified by the movant or his attorney. It shall be filed with the clerk within 30 days after the order of dismissal is signed or within the period provided by Rule 306a....” *Id.*
- 283 See Tex. R. Civ. P. 165a(3) (“If a motion to reinstate is timely filed by any party, the trial court, regardless of whether an appeal has been perfected, has plenary power to reinstate the case until 30 days after all such timely filed motions are overruled, either by a written and signed order or by operation of law, whichever occurs first.”).
- 284 See [McConnell v. May](#), 800 S.W.2d 194, 194 (Tex. 1990) (orig. proceeding) (“Since [the plaintiff] did not file a verified motion to reinstate within 30 days of the signing of the order of dismissal, the trial court's jurisdiction to reinstate the case expired.”) (emphasis added); [In re Montemayor](#), 2 S.W.3d 542, 545 (Tex. App.--San Antonio 1999, orig. proceeding) (“In the absence of a verified motion to reinstate, the trial court's plenary jurisdiction expires thirty days after the date on which it signed the dismissal order.”); [South Main Bank v. Wittig](#), 909 S.W.2d 243, 244 (Tex. App.--Houston [14th Dist.] 1995, orig. proceeding) (“An unverified motion to reinstate does not extend the trial court's plenary jurisdiction.”); [Macarungal v. Andrews](#), 838 S.W.2d 632, 633 (Tex. App.--Dallas 1992, orig. proceeding) (“In the absence of a verified motion to reinstate, the trial court's plenary jurisdiction expires thirty days after the date on which it signed a final order of dismissal.”).
- 285 See [Federal Lanes, Inc. v. City of Houston](#), 905 S.W.2d 686, 689 (Tex. App.--Houston [1st Dist.] 1995, writ denied). The court in [Federal Lanes, Inc.](#) explained that a joint motion, signed by all attorneys of record, is equivalent to a “stipulation,” and thus satisfies the verification requirements under [Rule 165a\(3\)](#). See *id.*

- 286 See *In re Simon Property Group, Inc.*, 985 S.W.2d 212, 215 (Tex. App.--Corpus Christi 1999, orig. proceeding).
- 287 See Tex. R. Civ. P. 306a(1).
- 288 See Tex. R. Civ. P. 306a(3).
- 289 See, e.g., *Equinox Enters., Inc. v. Associated Media Inc.*, 730 S.W.2d 872, 874 (Tex. App.--Dallas 1987, no writ); *Mori Seiki Co. v. Action Mach. Shop, Inc.*, 696 S.W.2d 414, 415 (Tex. App.--Houston [14th Dist.] 1985, no writ).
- 290 See Tex. R. Civ. P. 306a(5); see also *Thompson v. Harco Nat'l Ins. Co.*, 997 S.W.2d 607, 618 (Tex. App.--Dallas 1998, pet. denied).
- 291 See *Thompson*, 997 S.W.2d at 618.
- 292 See *Gonzalez v. Sanchez*, 927 S.W.2d 218, 220 (Tex. App.--El Paso 1996, no writ).
- 293 See *id.* at 222; *Womack-Humphreys Architects, Inc. v. Barrasso*, 886 S.W.2d 809, 814-15 (Tex. App.--Dallas 1994, writ denied).
- 294 See *Womack-Humphreys Architects, Inc.*, 886 S.W.2d at 815.
- 295 See *id.*
- 296 Compare *Thompson*, 997 S.W.2d at 618 (holding that party has thirty days to establish prima facie case under Rule 306), and *Gonzalez*, 927 S.W.2d at 221 (same), with *Vineyard Bay Dev. Co. v. Vineyard on Lake Travis*, 864 S.W.2d 170, 172 (Tex. App.--Austin 1993, writ denied) (holding prima facie case under Rule 306 need not be established within thirty days of signing of final judgment).
- 297 See Tex. R. Civ. P. 306a(6); *Estate of Howley v. Haverman*, 878 S.W.2d 139, 140 (Tex. 1994); *Levit v. Adams*, 850 S.W.2d 469, 470 (Tex. 1993).
- 298 See *infra* Sections IV.A.6. & IV.B.2.b.
- 299 See Tex. R. Civ. P. 316; *Escobar v. Escobar*, 711 S.W.2d 230, 231 (Tex. 1986); *Jenkins v. Jenkins*, 16 S.W.3d 473, 482 (Tex. App.--El Paso 2000, no pet.).
- 300 See, e.g., *Finlay v. Jones*, 435 S.W.2d 136, 138 (Tex. 1968); *America's Favorite Chicken Co. v. Galvan*, 897 S.W.2d 874, 877 (Tex. App.--San Antonio 1995, writ denied).
- 301 See *Escobar*, 711 S.W.2d at 231.
- 302 See *Andrews v. Koch*, 702 S.W.2d 584, 585 (Tex. 1986); *Seago v. Bell*, 764 S.W.2d 362, 363 (Tex. App.--Beaumont 1989, no writ); *Nolan v. Bettis*, 562 S.W.2d 520, 522 (Tex. Civ. App.--Austin 1978, no writ).
- 303 See, e.g., *Ortiz v. O.J. Beck & Sons, Inc.*, 611 S.W.2d 860, 863 (Tex. Civ. App.--Corpus Christi 1980, no writ).
- 304 See *Escobar*, 711 S.W.2d at 231; *Jenkins*, 16 S.W.3d at 482.
- 305 See, e.g., *Dikeman v. Snell*, 490 S.W.2d 183, 186 (Tex. 1973); *Comet Aluminum Co. v. Dibrell*, 450 S.W.2d 56, 58 (Tex. 1970).
- 306 See *Operation Rescue v. Planned Parenthood Inc.*, 937 S.W.2d 60, 86 (Tex. App.--Houston [14th Dist.] 1996), modified on other grounds, 975 S.W.2d 546 (Tex. 1998).
- 307 See *Reitmeyer v. Clawson*, 634 S.W.2d 379, 381 (Tex. App.--Austin 1982, no writ).
- 308 See, e.g., *Whicker v. Taylor*, 422 S.W.2d 609, 610 (Tex. Civ. App.--Waco 1967, no writ).
- 309 See *Ortiz v. O.J. Beck & Sons, Inc.*, 611 S.W.2d 860, 863 (Tex. Civ. App.--Corpus Christi 1980, no writ). However, a court may not change the date of an order nunc pro tunc where the only purpose is to expand the court's plenary power or the deadline to take an appeal. See *Anderson v. Casebolt*, 493 S.W.2d 509, 510 (Tex. 1973); *America's Favorite Chicken Co. v.*

Galvan, 897 S.W.2d 874, 877 (Tex. App.--San Antonio 1995, writ denied); Hamrah v. Hamrah, 547 S.W.2d 308, 311 (Tex. Civ. App.--Dallas 1977, writ ref'd n.r.e.).

- 310 See generally Peeples, supra note 13, at 387-89 (chronicling cases where Texas courts have found errors to be judicial).
- 311 See *Comet Aluminum Co. v. Dibrell*, 450 S.W.2d 56, 58 (Tex. 1970) (“Judicial errors committed in the rendition of judgment must be corrected by appeal, writ of error or bill or review.”); *In re Rollings Leasing Inc.*, 987 S.W.2d 633, 636 (Tex. App.--Houston [14th Dist.] 1999, orig. proceeding) (“Once its plenary jurisdiction expires, however, the trial court cannot correct a judicial error made in rendering a final judgment.”).
- 312 See, e.g., *Stock v. Stock*, 702 S.W.2d 713, 716 (Tex. App.--San Antonio 1985, no writ).
- 313 See *Petroleum Equip. Fin. Corp. v. First Nat'l Bank of Fort Worth*, 622 S.W.2d 152, 154 (Tex. App.--Fort Worth 1981, writ ref'd n.r.e.).
- 314 See *Riner v. Briargrove Park Property Owners, Inc.*, 976 S.W.2d 680, 683 (Tex. App.--Houston [1st Dist.] 1998, no writ).
- 315 See id.
- 316 See *Jenkins v. Jenkins*, 16 S.W.3d 473, 482 (Tex. App.--El Paso 2000, no pet.) (noting that “even if the court renders incorrectly, it cannot alter a written judgment which precisely reflects the incorrect rendition”).
- 317 See Tex. R. Civ. P. 329b(f).
- 318 See *Baker v. Goldsmith*, 582 S.W.2d 404, 406 (Tex. 1979); *Gracey v. West*, 422 S.W.2d 913, 915 (Tex. 1968).
- 319 See Tex. R. Civ. P. 329(f). This “sufficient cause” requirement is “narrowly construed because of the fundamental policy that judgments must become final at some point.” *Elliot v. Elliot*, 21 S.W.3d 913, 916 (Tex. App.--Fort Worth 2000, pet. denied).
- 320 See, e.g., *Transworld Fin. Servs. Corp.*, 722 S.W.2d 407, 408 (Tex. 1987); *French v. Brown*, 424 S.W.2d 893, 895 (Tex. 1967); *Alexander v. Hagedorn*, 226 S.W.2d 996, 998 (Tex. 1950); *Elliott*, 21 S.W.3d at 916.
- 321 See Larry E. Meyer, *The Equitable Bill of Review in Texas*, 41 Tex. B.J. 699, 700 (1978).
- 322 See id.; see also *Forney v. Forney*, 672 S.W.2d 490, 498-99 (Tex. App.--Houston [1st Dist.] 1983, writ dismissed w.o.j.) (noting that only extrinsic fraud will justify setting aside judgment under bill of review).
- 323 See William Dorsaneo III, et. al., *Texas Civil Procedure: Trial and Appellate Practice* 456 (3rd ed. 1997).
- 324 See, e.g., *Borgerding v. Friffin*, 716 S.W.2d 694, 699 (Tex. App.--Corpus Christi 1986, no writ); *Kessler v. Kessler*, 693 S.W.2d 522, 524 (Tex. App.--Corpus Christi 1985, writ ref'd n.r.e.); *Morrison v. Rathmell*, 650 S.W.2d 145, 150-51 (Tex. App.--Tyler 1983, writ dismissed).
- 325 See *Hanks v. Rosser*, 378 S.W.2d 31, 35 (Tex. 1964). The Texas Supreme Court has clarified that the litigants' attorneys are not considered officers of the court in the context of this rule. See *Transworld Fin. Servs. Corp. v. Briscoe*, 722 S.W.2d 407, 408 (Tex. 1987). Thus, fraud perpetrated by an attorney that prevents its client from presenting a meritorious defense will not support a bill of review. See id.
- 326 See generally Tex. R. Civ. P. 165a (providing that the clerk shall send notice of court's intent to dismiss for want of prosecution). However, in this situation the party seeking review also carries the burden of showing the party's own negligence did not cause the delay. See *Hernandez v. Koch Machinery Co.*, 16 S.W.3d 48, 58 (Tex. App.--Houston [1st Dist.] 2000, pet. filed) (rejecting argument that bill of review petitioner who is “prevented from filing a motion to reinstate due to the failure of the court clerk to properly notify the party that a dismissal was obtained,” is subject to a “less onerous burden” to show meet the traditional bill of review requirements).
- 327 See *Cannon v. ICO Tubular Servs., Inc.*, 905 S.W.2d 380, 387-88 (Tex. App.--Houston [1st Dist.] 1995, no writ), abrogated on other grounds by *Lane Bank Equip. Co. v. Smith S. Equip., Inc.*, 10 S.W.3d 308 (Tex. 2000).

- 328 See *Baker v. Goldsmith*, 582 S.W.2d 404, 408-09 (Tex. 1979). Prima facie proof of a meritorious defense can be shown by documents, answers to interrogatories, admissions, and affidavits on file along with any other evidence that the trial, in its discretion, reviews. See *id.*
- 329 See *Peralta v. Heights Med. Ctr, Inc.* 485 U.S. 80, 85-87 (1988); see also *Texas Indus., Inc. v. Sanchez*, 525 S.W.2d 870, 871 (Tex. 1975) (holding party who proves lack of valid service need not plead or prove that it was prevented from making meritorious defense by fraud, accident or mistake of the opposing party); William R. Trail & Julia A. Beck, *Peralta v. Heights Med. Ctr. Inc. : A Void Judgment is a Void Judgment is a Void Judgment--Bill of Review and Procedural Due Process in Texas*, 40 *Baylor L. Rev.* 367, 386-88 (1988) (explaining the constitutional requirements for a bill of review in Texas).
- 330 See *McEwen v. Harrison*, 162 Tex. 125, 133, 345 S.W.2d 706, 711 (1961) (“Only if a court had no jurisdictional power to render the judgment should a negligent defendant or one with no meritorious defense to the suit be able to relieve himself of the burdens and consequences of a default judgment.”).
- 331 See generally 6 McDonald & Carlson, *Texas Civil Practice* Ch. 3 (1998).
- 332 See *Tex. R. App. P.* 44 & 60.
- 333 *Section 51.012* provides that, “[I]n a civil case in which the judgment or amount in controversy exceeds \$100, exclusive of interest and costs, a person may take an appeal... to the court of appeals from a final judgment of the district or county court.” *Tex. Civ. Prac. & Rem. Code Ann. § 51.012* (Vernon 1997).
- 334 See *Tex. R. App. P.* 25.1(a).
- 335 See *Tex. R. App. P.* 25.1(b)-(c).
- 336 See *Tex. R. App. P.* 27.1(a).
- 337 See *Tex. R. App. P.* 26.1.
- 338 See *Tex. R. App. P.* 26.1(a).
- 339 However, the Texas Supreme Court Rules Advisory Committee recently endorsed a recommendation to amend *Rule 26.1 of the Texas Rules of Appellate Procedure* to provide that any timely request for findings of fact following a final judgment will extend the time to perfect a civil appeal from 30 to 90 days. See *Texas Rules Advisory Committee Meeting Minutes* (October 20-21 2000). This rule would alter the IKB Industries approach. See *infra* note 339 and accompanying text.
- 340 938 S.W.2d 440, 443 (Tex. 1997).
- 341 *Tex. R. Civ. P.* 329b(h).
- 342 See *Check v. Mitchell*, 758 S.W.2d 756, 756 (Tex. 1988).
- 343 See *Lane Bank Equip. Co. v. Smith S. Equip., Inc.* 10 S.W.3d 308, 313 (Tex. 2000).
- 344 See *id.*
- 345 See *id.* at 315 (Hecht, J., concurring).
- 346 See *id.*
- 347 See *id.*
- 348 The Texas Supreme Court Rules Advisory Committee has endorsed a recommended change to *Rule 26.1(a)(2) of the Texas Rules of Appellate Procedure*, providing that when any party timely files a motion to modify a judgment or any other motion that requests relief that could be included in the judgment, plenary power is extended. See *Texas Rules Advisory Committee Meeting Minutes* (October 20-21 2000). This approach endorses the procedure Justice Hecht's concurrence advocated in *Lane Bank Equipment*. See generally *supra* notes 340-47 and accompanying text.

- 349 See *Tex. R. App. P. 26.3*.
- 350 See *Verburgt v. Dorner*, 959 S.W.2d 615, 615 (Tex. 1997).
- 351 *Garcia v. Kastner Farms, Inc.*, 774 S.W.2d 668, 670 (Tex. 1989); *Meschwert v. Meschwert*, 549 S.W.2d 383, 384 (Tex. 1977).
- 352 See *Tex. R. App. P. 26.1(b)*.
- 353 907 S.W.2d 495, 496 (Tex. 1995).
- 354 See *Tex. R. Civ. P. 306a(6) & 329b(h)*.
- 355 In 1997, a restricted appeal took the place of the writ of error system. See *Tex. R. App. P. 30*.
- 356 See *Tex. R. App. P. 30*; *Texaco, Inc. v. Central Power & Light, Co.*, 925 S.W.2d 586, 589-91 (Tex. 1996); *Quaestor Inv., Inc. v. Chiapas*, 997 S.W.2d 226, 227 (Tex. 1999); *Stubbs v. Stubbs*, 685 S.W.2d 643, 644 (Tex. 1985); *Barker CAVT Constr., Inc. v. Ampro, Inc.*, 989 S.W.2d 789, 791 (Tex. App.--Houston [1st Dist.] 1999, no pet.).
- 357 See *Texaco, Inc.*, 925 S.W.2d at 589. Restricted appeals serve the limited purpose of providing a party who was deprived of the opportunity of participation at trial a chance to correct an erroneous judgment. See *In re E.K.N.*, 24 S.W.3d 586, 590 (Tex. App.--Fort Worth 2000, no pet.).
- 358 See *Norman Communications v. Texas Eastman Co.*, 955 S.W.2d 269, 270 (Tex. 1997).
- 359 See *Gunn v. Cavanaugh*, 391 S.W.2d 723, 724 (Tex. 1965); see also *Flores v. Brimex Ltd. Partnership*, 5 S.W.3d 816, 819-20 (Tex. App.--San Antonio 1999, no pet.).
- 360 See *Olympia Marble & Granite v. Mayes*, 17 S.W.3d 437, 444-45 (Tex. App. Houston [1st Dist.]--2000, no pet.) (holding error existed on face of record where it reflected that service was faulty); see also *Dolly v. Aethos Communications Sys., Inc.*, 10 S.W.3d 384, 386 (Tex. App.--Dallas 2000, no pet.); *Bautista Jr. v. Bautista*, 9 S.W.3d 250, 251 (Tex. App.--San Antonio 1999, no pet.); *Ontx TV v. TV Strategy Group, LLC*, 990 S.W.2d 427, 431 (Tex. App.--Texarkana 1999, no pet.).
- 361 See *Blanco v. Bolanos*, 20 S.W.3d 809, 811-12 (Tex. App.--El Paso 2000, no pet.) (holding error existed on face of record where it showed that appellant was not given sufficient notice of hearing under Property Code); *Dickerson, Jr. v. Sonat Exploration Co.*, 975 S.W.2d 339, 442 (Tex. App.-- Tyler 1998, pet. denied) (holding error existed on face of record where it showed appellant was not given proper notice of dismissal of suit).
- 362 See *Attorney Gen. of Tex. v. Orr*, 989 S.W.2d 464, 469 (Tex. App.--Austin 1999, no pet.).
- 363 See *Tex. R. App. P. 30*.
- 364 See *Tex. R. App. P. 30*; see also *Thomas v. Texas Dep't. of Criminal Justice-Inst. Div.*, 3 S.W.3d 665, 666 (Tex. App.--Fort Worth 1999, no pet.) (holding restricted appeal was unavailable to review dismissal for want of prosecution where appellant filed timely motion to reinstate).
- 365 See *Laboratory Corp. of Am. v. Mid-Town Surgical Ctr., Inc.*, 16 S.W.3d 527, 528 (Tex. App.--Dallas 2000, no pet.).
- 366 See *id.*; *Thomas*, 3 S.W.3d at 666.
- 367 See *Laboratory Corp. of Am.*, 16 S.W.3d at 528.
- 368 See *Phillips v. AC Mun. Brokers, Inc.*, 888 S.W.2d 872, 874 (Tex. App.--Dallas 1994, no writ).
- 369 See, e.g., *New York Underwriters v. Sanchez*, 799 S.W.2d 677, 678 (Tex. 1990); *North E. Indep. Sch. Dist. v. Aldridge*, 400 S.W.2d 893, 895 (Tex. 1966); *Eichelberger v. Hayton*, 814 S.W.2d 179, 182 (Tex. App.-- Houston [1st Dist.] 1991, writ denied).
- 370 See *Tex. Gov't Code Ann. § 22.225(b)(3)* (Vernon Supp. 2000).

- 371 See *Gross v. Innes*, 988 S.W.2d 727, 729 (Tex. 1998). Section 22.225(b)(3) of the Texas Civil Practice & Remedies Code makes an interlocutory appeal under section 51.014 final in the court of appeals. The only exception is found in section 22.225(c), which allows the supreme court to review interlocutory appeals where there is a conflict between the court of appeals or a dissenting opinion was filed. An interesting related question is whether the dissent made the basis of further supreme court review of an interlocutory order must apply to the appealing party. The supreme court will answer this question in *Brown v. Todd*, where it was argued that a court of appeal's dissent cannot form the basis of the supreme court's jurisdiction where the dissent only involves parties not appealing or who lacked standing. The court heard arguments on October 2, 2000.
- 372 See *Deloitte & Touche L.L.P. v. Fourteenth Court of Appeals*, 951 S.W.2d 394, 396 (Tex. 1997) (orig. proceeding) (differentiating between its mandamus and appellate jurisdiction).
- 373 See *Montgomery County v. Fuqua*, 22 S.W.3d 662, 665 (Tex. App.-- Beaumont 2000, no pet.).
- 374 *Bobbitt v. Cantu*, 992 S.W.2d 709, 712 (Tex. App.--Austin 1999, no pet.); see, e.g., *Elm Creek Villas Homeowner Ass'n., Inc. v. Beldon Roofing & Remodeling, Co.*, 940 S.W.2d 150, 154 (Tex. App.--San Antonio 1996, no writ).
- 375 See *Bobbitt*, 992 S.W.2d at 712.
- 376 See *Tex. Civ. Prac. & Rem. Code Ann. § 51.014(a)* (Vernon Supp. 2000).
- 377 See *id.* § 51.014(b); *Abacan Tech. Servs. Ltd. V. Global Marine Int'l Servs. Corp.*, 994 S.W.2d 839, 842 & n.2 (Tex. App.--Houston [1st Dist.] 1999, no pet.) (recognizing propriety of staying motion to dismiss for forum non conveniens and motion for summary judgment during pendency of interlocutory appeal).
- 378 A person may bring an interlocutory appeal of the denial of a motion for summary judgment “that is based on an assertion of immunity by an individual who is an officer or employee of the state or a political subdivision of the state.” *Tex. Civ. Prac. & Rem. Code Ann. § 51.014(a)(5)* (Vernon Supp. 2000). This right only extends to “individuals” who are claiming “official” immunity. See *City of Irving v. Pak*, 885 S.W.2d 189, 191-92 (Tex. App.--Dallas 1994, writ dismissed w.o.j.) (holding paramedics entitled to interlocutory appeal of denial of summary judgment based on official immunity while City was not entitled to interlocutory appeal where its claim was based wholly on governmental immunity).
- 379 See *Tex. Civ. Prac. & Rem. Code Ann. §51.014(a)(6)* (Vernon Supp. 2000).
- 380 See *TSM AM-FM TV v. Meca Homes, Inc.*, 969 S.W.2d 448, 451 (Tex. App.--El Paso 1998, pet. denied) (explaining that the legislative history of section 51.014 indicates that this section “was not intended to inure to the benefit of a plaintiff who claimed to have been libeled or slandered by the media”).
- 381 See *Grant v. Wood*, 916 S.W.2d 42, 46 (Tex. App.--Houston [1st Dist.] 1995, no writ).
- 382 See *State v. McGeorge*, 925 S.W.2d 105, 107 (Tex. App.--Houston [14th Dist.] 1996, writ denied).
- 383 See *Grant*, 916 S.W.2d at 45 (“It is a clear abuse of discretion for a trial court to refuse to rule on a timely submitted motion for summary judgment when the trial court's express purpose in refusing to rule is to preclude the movant from perfecting a statutory interlocutory appeal.”).
- 384 See *Tex. Civ. Prac. & Rem. Code Ann. § 51.014(a)(1)*; *Hammonds v. Lloyd Fire & Cas. Assurance of San Antonio*, 256 S.W.2d 223, 224 (Tex. Civ. App.--San Antonio 1953, no writ). But note that a change in receiver is not appealable. See *Bennigfield v. Benningfield*, 155 S.W.2d 827, 827-28 (Tex. Civ. App.--Austin 1941, no writ) (“We cannot bring ourselves to believe that it is the intention of the Legislature, in the enactment of this law, to give a right of appeal every time a receiver is appointed in the course of an administration of property by a court through a receivership.”); see also *State v. Johnson*, 981 S.W.2d 923, 925 (Tex. App.--Houston [1st Dist.] 1998, no pet.) (holding that “an interlocutory order appointing a successor to a permanent receiver is not appealable”).
- 385 See *Tex. Civ. Prac. & Rem. Code Ann. § 51.014(a)(2)* (Vernon Supp. 2000); *King Land & Cattle Corp. v. Fikes*, 414 S.W.2d 521, 524 (Tex. Civ. App.--Fort Worth 1967, writ refused n.r.e.). The grounds for terminating a receivership must relate to conditions when the receiver was appointed rather than grounds arising after the appointment. See *Christie v. Lowrey*, 589 S.W.2d 870, 873-74 (Tex. Civ. App.--Dallas 1979, no writ).

- 386 See *Holman v. Stephen F. Austin Hotel*, 599 S.W.2d 679, 679 (Tex. Civ. App.--Austin 1980, writ dismissed).
- 387 See *Tex. Civ. Prac. & Rem. Code Ann. § 51.014(a)(4)* (Vernon Supp. 2000); *Del Valle Indep. Sch. Dist. v. Lopez*, 845 S.W.2d 808, 809 (Tex. 1992); *Ludewig v. Houston Pipeline Co.*, 737 S.W.2d 15, 16 (Tex. App.--Corpus Christi 1987, no writ); *Hammonds*, 256 S.W.2d at 224.
- 388 See, e.g., See *Montgomery County v. Fuqua*, 22 S.W.3d 662, 669 (Tex. App.--Beaumont 2000, no pet.); *Aloe Vera of Am., Inc. v. CIC Cosmetics Int'l Corp.*, 517 S.W.2d 433, 436-37 (Tex. Civ. App.--Dallas 1974, no writ).
- 389 See *Tex. Civ. Prac. & Rem. Code Ann. § 51.014(a)(3)* (Vernon Supp. 2000); *American Express Travel Related Serv. Co. v. Walton*, 883 S.W.2d 703, 707 (Tex. App.--Dallas 1994, no writ).
- 390 See *Pierce Mortuary Colleges, Inc. v. Bjerke*, 841 S.W.2d 878, 880 (Tex. App.--Dallas 1992, writ denied); *Grant v. Austin Bridge Const. Co.*, 725 S.W.2d 366, 368 (Tex. App.--Houston [14th Dist.] 1987, no writ).
- 391 See *De Los Santos v. Occidental Chem. Corp.*, 933 S.W.2d 493, 495 (Tex. 1996).
- 392 See *id.* In *De Los Santos*, the Texas Supreme Court held that changing a class from opt-out to mandatory was appealable under [section 51.014](#) because it fundamentally altered the nature of the class. See *id.* But see *Pierce Mortuary Colleges, Inc.*, 841 S.W.2d at 880 (holding that order which merely changes class size “does not certify or refuse to certify a class” and thus is not entitled to interlocutory review”).
- 393 See *Tex. Civ. Prac. & Rem. Code Ann. § 51.014(a)(7)*; *Wolk v. Life Partners, Inc.*, 994 S.W.2d 934, 935 (Tex. App.--Waco 1999, no pet.); see also *Tex. R. Civ. P. 120a* (providing procedure for special appearance to challenge jurisdiction). [Section 51.014\(a\)\(7\)](#) clearly excludes any suit under the Texas Family Code under this exception. Instead, a petition for writ of mandamus is the appropriate vehicle for seeking review of a trial court's ruling on special exception in a Family Code case. See *In re Cannon*, 993 S.W.2d 354, 355 (Tex. App.--San Antonio 1999, orig. proceeding) (“[I]n cases involving child support, mandamus is appropriate to review the trial court's ruling on a special appearance or motion to dismiss.”).
- 394 *Lacefield v. Electronic Fin. Group, Inc.*, 21 S.W.3d 799, 800 (Tex. App.--Waco 2000, no writ) (alteration in original).
- 395 See *Tex. Civ. Prac. & Rem. Code Ann. § 51.014(a)(8)*; *Montgomery County v. Fuqua*, 22 S.W.3d 662, 664 (Tex. App.--Beaumont 2000, no writ); *City of Hidalgo Ambulance Serv. v. Lira*, 17 S.W.3d 300, 303-04 (Tex. App.--Corpus Christi 2000, no pet.).
- 396 See *Tex. Civ. Prac. & Rem. Code Ann. § 51.014(a)(8)*; A governmental unit is defined as:
(A) this state and all the several agencies of government that collectively constitute the government of this state, including other agencies bearing different designations, and all departments, bureaus, boards, commissions, offices, agencies, councils, and courts;
(B) a political subdivision of this state, including any city, county, school district, junior college district, levee improvement district, drainage district, irrigation district, water improvement district, water control and improvement district, water control and preservation district, freshwater supply district, navigation district, conservation and reclamation district, soil conservation district, communication district, public health district, and river authority;
(C) an emergency service organization; and
(D) any other institution, agency, or organ of government the status and authority of which are derived from the Constitution of Texas or from laws passed by the legislature under the constitution.
[Tex. Gov't Code Ann. § 101.001](#) (Vernon 1998).
- 397 See *Godley Indep. Sch. Dist. v. Woods*, 21 S.W.3d 656, 658 (Tex. App.--Waco 2000, no pet.) (explaining that questions of jurisdiction are always questions of law).
- 398 See *Tex. Civ. Prac. & Rem. Code Ann. 171.098(a)(1)*; *Robert v. Buck & Assocs. Architects, Inc. v. MHTA Partnership*, 783 S.W.2d 822, 822 (Tex. App.--San Antonio 1990, no writ).
- 399 See *Elm Creek Villas Homeowner Ass'n., Inc. v. Beldon Roofing & Remodeling, Co.*, 940 S.W.2d 150, 153 (Tex. App.--San Antonio 1996, no writ).

- 400 See *Phillips v. AC Mun. Brokers, Inc.*, 888 S.W.2d 872, 874 (Tex. App.--Dallas 1994, no writ).
- 401 See *Capital Income Properties-LXXX v. Blackmon*, 843 S.W.2d 22, 23 (Tex. 1992); *Phillips*, 888 S.W.2d at 874. Likewise, when a court refuses to rule on a motion to compel arbitration until after discovery is completed, a petition for writ of mandamus is the only remedy because there is not an appealable order compelling or denying arbitration. See *In re MHI Partnership, Ltd.*, 7 S.W.3d 918, 920 (Tex. App.--Houston [1st Dist.] 1999, orig. proceeding).
- 402 See *Jack B. Anglin Co., Inc. v. Tipps*, 842 S.W.2d 266, 269-70 (Tex. 1992); *Hardin Const. Group, Inc. v. Strictly Painting, Inc.*, 945 S.W.2d 308, 311 (Tex. App.--San Antonio 1997, orig. proceeding); *Belmont Constructors, Inc. v. Lyondell Petrochemical Co.*, 896 S.W.2d 352, 356 (Tex. App.--Houston [1st Dist.] 1995, orig. proceeding).
- 403 See *EZ Pawn Corp. v. Mancias*, 934 S.W.2d 87, 91 (Tex. 1996).
- 404 See *Tex. Elec. Code Ann. § 232.014(a)* (Vernon 1986).
- 405 See *id.* § 232.014(b); *Bailey v. Clark*, 407 S.W.2d 520, 521 (Tex. Civ. App.--Fort Worth 1966, no writ) (dismissing appeal because “more than five days had elapsed before appellant gave notice of appeal and filed an appeal bond”).
- 406 See *Tex. Elec. Code Ann. § 232.015(a)*; see also, M. Keith Dollahite, *Accelerated Civil Appeals in Texas*, 56 *Tex. B.J.* 752, 754 (1993).
- 407 See *Tex. Health & Safety Code Ann. § 574.070(b)* (Vernon 1992); *In re J.J.*, 900 S.W.2d 353, 354 (Tex. App.--Texarkana 1995, no writ).
- 408 See *Tex. Health & Safety Code Ann. § 574.070(e)*.
- 409 See *id.* § 462.076(b).
- 410 See *id.* § 462.076(e); *Berney v. Sterrett*, 452 S.W.2d 37, 38-39 (Tex. Civ. App.--Dallas 1970, orig. proceeding) (dismissing petition for writ of mandamus because predecessor statute to section 452.076 provided an adequate remedy by accelerated appeal).
- 411 *Tex. R. Civ. P. 76a-8*; *Chandler v. Hyundai Motor Co.*, 829 S.W.2d 774, 775-75 (Tex. 1992).
- 412 *Tex. R. Civ. P. 76a-8*.
- 413 See *Dallas Morning News, Inc v. Fifth Court of Appeals*, 842 S.W.2d 655, 657 n.2 (Tex. 1992).
- 414 See generally, *Tex. Civ. Prac. & Rem. Code Ann. Chapter 15*.
- 415 See *Tex. Civ. Prac. & Rem. Code Ann. § 15.003(c)* (Vernon Supp. 2000).
- 416 See *id.*
- 417 See *Stugitek v. Abel*, 997 S.W.2d 598, 601-02 (Tex. 1999).
- 418 See, e.g., *Bristol-Myers Squibb Co. v. Goldston*, 983 S.W.2d 369, 374 (Tex. App.--Fort Worth 1998, pet. dism'd by agr.) (holding “[s]ection 15.003(c) does not provide for an interlocutory appeal from the trial court's determination that a person seeking intervention or joinder has independently established proper venue”).
- 419 999 S.W.2d 908 (Tex. App.--Waco 1999, pet. granted). Arguments in *American Home Products Corp. v. Clark* were heard by the supreme court on Sept. 6, 2000.
- 420 *Novak v. Stevens*, 596 S.W.2d 848, 849 (Tex. 1980).
- 421 See *Jones v. Strauss*, 745 S.W.2d 898, 900 (Tex. 1988).
- 422 See *Gaut v. Amarillo Econ. Dev. Corp.*, 921 S.W.2d 884, 886 (Tex. App.--Austin 1996, no writ).

- 423 See *Tex. Gov't Code Ann. §§ 22.002, 22.221(b)* (Vernon Supp. 2000).
- 424 See, e.g., *Wortham v. Walker*, 133 Tex. 225, 227, 128 S.W.2d 1138, 1150 (1939).
- 425 See David W. Holman & Byron C. Keeling, *Entering the Thicket? Mandamus Review of Texas District Court Witness Disclosure Statements*, 23 St. Mary's L.J. 365, 393 (1991); *Walker v. Packer*, 827 S.W.2d 833, 839-40 (Tex. 1992) (explaining the historical evolution of mandamus review in Texas); see generally Reagan Wm. Simpson, *A Practitioner's Review of Civil Appeals Under the 1997 Texas Rules of Appellate Procedure*, 29 St. Mary's L.J. 595, 675-84 (1998); Pamela Stanton Baron, *Mandamus Filings and Trends*, in Univ. of Tex. 10th Annual Conf. on State and Federal Appeals 4, 1-22 (2000).
- 426 827 S.W.2d 833, 839-40 (Tex. 1992); see also *State v. Walker*, 679 S.W.2d 484, 485 (Tex. 1984).
- 427 See *infra* note 452 and accompanying text.
- 428 *Callahan v. Giles*, 137 Tex. 571, 575, 155 S.W.2d 793, 795 (1941).
- 429 *Polaris Invest. Management Corp. v. Abascal*, 892 S.W.2d 860, 861 (Tex. 1995).
- 430 See *id.* at 861 (explaining that mandamus is not appropriate, even where the trial court erroneously selects initial trial plaintiffs in large trial).
- 431 See *Commissioner of the Gen. Land Office v. Smith*, 5 Tex. 471, 479 (1849) (describing ministerial act as one where the law “prescribes and defines the duty to be performed with such precision and certainty as to leave nothing to the exercise of discretion or judgment”).
- 432 See *Aycock v. Clark*, 94 Tex. 375, 376, 60 S.W.665, 666 (1901).
- 433 See, e.g., *Ex parte Rhodes*, 163 Tex. 31, 34, 352 S.W.2d 249, 250 (1961); *State v. Ferguson*, 133 Tex. 60, 63, 125 S.W.2d 272, 274 (1939).
- 434 See *Maresca v. Marks*, 362 S.W.2d 299, 301 (Tex. 1962) (holding trial court's refusal to exercise discretion in separating relevant and irrelevant tax records was error subject to mandamus review).
- 435 See generally *Walker v. Packer*, 827 S.W.2d 833, 839-40 (Tex. 1992).
- 436 *Flores v. Fourth Court of Appeals*, 777 S.W.2d 38, 41 (Tex. 1989); see also *Johnson v. Fourth Court of Appeals*, 700 S.W.2d 916, 917 (Tex. 1985); *Mother Frances Hosp. v. Coats*, 796 S.W.2d 566, 569 (Tex. App.-- Tyler 1990, orig. proceeding).
- 437 *Flores*, 777 S.W.2d at 41; *In re Xeller*, 6 S.W.3d 618, 623 (Tex. App.--Houston [14th Dist.] 1999, no pet.); *Easter v. McDonald*, 903 S.W.2d 887, 889-90 (Tex. App.--Waco 1995, orig. proceeding); *Proffer v. Yates*, 734 S.W.2d 671, 673 (Tex. 1987).
- 438 See, e.g., *In re American Optical Corp.*, 988 S.W.2d 711, 713 (Tex. 1998); *K Mart Corp. v. Sanderson*, 937 S.W.2d 429, 431-32 (Tex. 1996); *Dillard Dep't Stores v. Hall*, 909 S.W.2d 491, 492 (Tex. 1995).
- 439 See, e.g., *Barker v. Dunham*, 551 S.W.2d 41, 42 (Tex. 1977); *Allen v. Humphreys*, 559 S.W.2d 798, 804 (Tex. 1977).
- 440 See, e.g., *Able Supply Co. v. Moye*, 898 S.W.2d 766, 771 (Tex. 1995).
- 441 See, e.g., *D.N.S. v. Schattman*, 937 S.W.2d 151, 158 (Tex. App.-- Fort Worth 1997, orig. proceeding).
- 442 See, e.g., *CSR Ltd. v. Link*, 925 S.W.2d 591, 598 Tex. 1996); *National Indus. Sand Ass'n v. Gibson*, 897 S.W.2d 769, 771 (Tex. 1995).
- 443 See, e.g., *H.B. Zachry Co. v. Gonzalez*, 847 S.W.2d 246, 246-47 (Tex. 1993).
- 444 See, e.g., *Pope v. Davidson*, 849 S.W.2d 916, 920 (Tex. App.-- Houston [14th Dist.] 1993, orig. proceeding).
- 445 See, e.g., *Transamerican Natural Gas Corp. v. Powell*, 811 S.W.2d 913, 917 (Tex. 1991). The supreme court has fashioned a test for determining the appropriateness of sanctions. There must be a direct relationship between the offensive conduct and

the sanction imposed. See *id.* Also, the sanctions must not be excessive and the punishment must fit the crime. See *id.*; see also *Chrysler Corp. v. Blackmon*, 841 S.W.2d 844, 849 (Tex. 1992).

446 See, e.g., *Braden v. Downey*, 811 S.W.2d 922, 930 (Tex. 1991).

447 See, e.g., *McManus v. Wilborn*, 932 S.W.2d 662, 663 (Tex. App.-- Houston [14th Dist.] 1996, orig. proceeding).

448 *Walker v. Packer*, 827 S.W.2d 833, 840 (Tex. 1992) (quoting *State v. Walker*, 679 S.W.2d 484, 485 (Tex. 1984)); see also *Johnson v. Fourth Court of Appeals*, 700 S.W.2d 916, 917 (Tex. 1995).

449 *Id.* (quoting *Holloway v. Fifth Court of Appeals*, 767 S.W.2d 680, 685 (Tex. 1989)).

450 *Id.* at 842.

451 *Id.*

452 For example, the Legislature has provided for mandamus review of a trial court's ruling on mandatory venue provisions. See *Tex. Civ. Prac. & Rem. Code Ann. § 15.0642* (Vernon Supp. 2000). Similarly, when a court acts without subject matter jurisdiction or attempts to act outside its plenary power, mandamus review is available without regard to whether there is an adequate remedy by appeal. See *Dikeman v. Snell*, 490 S.W.2d 183, 186 (Tex. 1973) (holding mandamus was appropriate to remedy trial court's entry of void order, despite immediate availability of appeal). Finally, several courts have also suggested mandamus is available to correct erroneous orders relating to motions for severance, consolidation, and separate trials. See *Rhodes*, *supra* note 26, at 569-71 & nn.264-274.

453 See, e.g., *D.N.S. v. Schattman*, 937 S.W.2d 151, 158 (Tex. App.-- Fort Worth 1997, orig. proceeding) (holding there was no adequate remedy by appeal to correct trial court's erroneously ordering the production of privileged documents).

454 See *Crane v. Tunks*, 160 Tex. 182, 190, 328 S.W.2d 434, 439 (1959) (noting that once privileged documents have been produced, "a holding that the court had erroneously issued the order would be of small comfort to relators in protecting their papers").

455 See, e.g., *TransAmerican Natural Gas Corp. v. Powell*, 811 S.W.2d 913, 919 (Tex. 1991) ("Whenever a trial court imposes sanctions which have the effect of adjudicating a dispute, whether by striking pleadings, dismissing an action or rendering a default judgment, but which do not result in rendition of an appealable judgment, then the eventual remedy by appeal is inadequate."); see also *Chrysler Corp. v. Blackmon*, 841 S.W.2d 844, 853 (Tex. 1992) (orig. proceeding) (issuing writ of mandamus to reverse death penalty sanctions).

456 See, e.g., *Able Supply Comp. v. Moye*, 898 S.W.2d 766, 771-72 (Tex. 1995) (holding that trial court's refusal to compel answers to interrogatories went to the "very heart of defendant's case" and thus was proper for mandamus review); *J.G. v. Murray*, 915 S.W.2d 548, 549 (Tex. App.--Corpus Christi 1995, orig. proceeding) (holding realtor was prevented from presenting viable defense where trial court improperly struck expert witness, rendering mandamus proper); *Mother Frances Hosp. v. Coats*, 796 S.W.2d 566, 571-72 (Tex. App.--Tyler 1990, orig. proceeding) (holding realtor had no adequate remedy by appeal where trial court struck designation of expert witnesses).

457 See, e.g., *Jampole v. Touchy*, 673 S.W.2d 569, 576 (Tex. 1984) ("Because the evidence exempted from discovery would not appear in the record, the appellate courts would find it impossible to determine whether denying the discovery was harmful.").

458 See, e.g., *Allen v. Humphreys*, 559 S.W.2d 798, 804 (Tex. 1977) (holding mandamus was appropriate where trial court improperly denied requested discovery of relevant materials not available from any other source).

459 *Rivercenter Assocs. v. Rivera*, 858 S.W.2d 366, 367 (Tex. 1993).

460 *In re Keller*, 6 S.W.3d 618, 624 (Tex. App.--Houston [14th Dist.] 1999, orig. proceeding).

461 See generally App. A.

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