

# When Judgments Go Wrong

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## Date of Judgment

The date of signed judgment shall determine the beginning of court's plenary power to grant a new trial; or vacate, modify, correct, or reform a judgment.

Rule 306a TRCP

## PLENARY POWER

- A justice court loses plenary power over a case:
  - When an appeal is perfected, or
  - If no appeal is perfected, 21 days after the later of the date judgment is signed or the date a motion to set aside, motion to reinstate, or motion for new trial, if any, is denied

TRCP 507.1

## County Court jurisdiction

- The county court has no jurisdiction to merely review the judgment of the justice court.

*Southern Canal Co. v. State Board of Water Engineers*, 318 S.W.2d 619 (Tex. 1958); *City of Austin v. Quick*, 930 S.W.2d 678, 684 (Tex. App. – Austin 1996, no writ)

## County court jurisdiction

- Once the county court acquires jurisdiction by perfection of an appeal, it cannot affirm or reverse the judgment of the justice court or send the case back to the justice court regardless of whether or not the case was tried properly in the justice court and the correct judgment rendered. It can only try the case de novo, considering only the evidence presented in the new trial and the burden is on the plaintiff in the case to obtain a new judgment.

*Hall v. McKee*, 179 S.W.2d 590, 592 (Tex. Civ. App. – Fort Worth 1944); *Knight v. Texas Department of Public Safety*, 361 S.W.2d 620, 623 (Tex. Civ. App. – Amarillo 1962, no writ)

## Nunc Pro tunc

## Definition

- An amended judgment that is signed after the court has lost the power to issue the judgment but that is as legally binding as though it was made within the permitted time.

## What it is

- Correct clerical errors in the judgment
- May be signed after the court has lost plenary power to issue the judgment - No deadline for filing
- Court has inherent authority to amend records so they accurately reflect judgment as rendered
- TRCP 306a(6) & 316

## jurisdiction

- After expiration of 30 days since rendition of judgment of dismissal, a trial court lacks jurisdiction to set aside or modify, except by bill of review, such judgment, and the only action it has power to take at nunc pro tunc hearing is to correct “clerical error,” that is, a mistake or omission that prevented the judgment as entered from accurately reflecting the judgment that was rendered.
- *Universal Underwriters Ins. Co. v. Ferguson*, 471 S.W.2d 28 (Tex. 1971)

## authority

- The trial court has jurisdiction to correct nunc pro tunc, to make the written judgment speak the truth of judgment the judge actually rendered verbally in court by correcting typographical errors.
- *Ex parte Hogan*, 916 S.W.2d 82 (Tex. App. – Houston [1st Dist.] 1996)

## authority

- If judgment, as rendered by a trial court, is not faithfully transcribed into records of that court, error is clerical; courts have inherent power to correct or amend records by nunc pro tunc judgment so that their records at all times accurately reflect judgment as rendered.
- *Perry v. Nueces County*, 549 S.W.2d 239 (Tex. Div. App. – Corpus Christi 1977, ref'd n.r.e.).

## HOW to proceed

- Clerical mistakes in the record of any judgment may be corrected by the judge in open court according to the truth or justice of the case after notice of the motion therefore has been given to the parties interested in such judgment and thereafter the execution shall conform to the judgment as amended.
- Rule 316, TRCP

## How to proceed

“It would be helpful for trial courts, in judgments nunc pro tunc, to:

- recite the corrective procedure;
  - disclose grounds on which court was acting;
  - indicate error corrected;
  - specify that judgment was entered either nunc pro tunc or in lieu of former entry; and
  - vacate any prior incorrect entry that it supplants.
- Failure to include each and every recommended element is not fatal to judgment nunc pro tunc.”*

*Brooks v. Brooks*, 864 S.W.2d 645 (Tex. App. – Tyler 1993).

## Clerical vs. judicial errors

- After a judgment has become final, “clerical errors” in entry of the judgment rendered may be corrected by a nunc pro tunc judgment, but “judicial errors” in the rendition of the judgment may not be corrected.

*Humphries v. Chandler*, 597 S.W.2d 2 (Tex. Civ. App. – Beaumont 1980)

## Clerical vs. judicial error

- For purposes of determining whether error may be corrected by nunc pro tunc entry, “clerk error” is error which does not result from judicial reasoning or determination.

*Delaup v. Delaup*, 917 S.W. 2d 411 (Tex. App. – Houston [1st Dist.] 1996, no writ)

## Clerical vs. judicial error

- Whether error in judgment is clerical rather than judicial is a question of law; however, what judgment was actually rendered is question of fact for trial judge.

*America’s Favorite Chicken Co. v. Galvan*, 897 S.W.2d 874 (Tex. App. – San Antonio 1995, writ denied)



## Clerical vs. judicial error

- The salient distinction between “clerical” and “judicial errors”, for purposes of determining whether nunc pro tunc judgment is applicable, lies in the exercise of the judgmental offices of the court; “judicial error” occurs in the rendering as opposed to the entering of a judgment.

*In re Ellebracht*, 30 S.W.3d 605 (Tex. App. – Texarkana 2000, n.w.h.).

## Clerical error examples

- Inadvertent failure to attach exhibits to judgment

*Operation Rescue-National v. Planned Parenthood of Houston and Southeast Texas, Inc.*, 937 S.W.2d 60 (Tex. App. – Houston [14th Dist.] 1996) aff’d 975 S.W.2d 546

- Wrong date of entry of judgment

*Wiegand v. Riojas*, 547 S.W.2d 287 (Civ. App. – Austin 1977, no writ)

- Obvious typographical errors in dates of missed child support payments in contempt order

*Ex parte Hogan*, 916 S.W.2d 82 (Tex. App. – Houston [1st Dist.] 1996)

- Omission of date of signing from judgment

*Capital Life Ins. Co. v. Rutherford*, 468 S.W.2d 535 (Tex. Civ. App. – Houston [1st Dist.] 1971, no writ)

## Judicial error examples

- Reinstating a judgment against a party

*In re Ellebracht*, 30 S.W.3d 605 (Tex. App. – Texarkana 2000, n.w.h.)

- Failure to follow express requirements of rule governing granting of motion for new trial.

*Taack v. McFall*, 661 S.W.2d 923 (Tex. 1983)

- Trial court correctly denied motion for nunc pro tunc order correcting dismissal because order of dismissal was not clerical error and at the time of motion, court's plenary power had expired.

*Brim Laundry Machinery Co. Inc. v. Washex Machinery Corp.*, 854 S.W.2d 297 (Tex. App. – Fort Worth 1993, writ denied)

## Effective date of judgement

- “[A] judgment nunc pro tunc is retrospective, and has the same force and effect, to all intents and purposes, as if it had been entered at the time when the judgment was originally rendered.”

*Burns v. Skelton*, 29 Tex.Civ.App. 453 (1902)

## appeal

“[O]ur statute does not permit the county court to entertain an appeal for the sole purpose of deciding whether an order should have been entered nunc pro tunc setting aside a final judgment of the justice's court. The county court cannot enter the order, nor can it, as an appellate court, order the justice's court to enter the same.”

*Southwestern Land Corporation v. Neese Eyeglasses*, 161 S.W. 1090 (1913)

## Board question

- *The court intended to dismiss an eviction case on Feb. 22 on a technicality. Unfortunately, the judgment form was a take-nothing form and I didn't catch it. Defendant's still haven't vacated and plaintiff issued a new notice to vacate almost immediately after hearing, rather than appealing or asking for a clarification. It is my understanding that because plaintiff didn't appeal and it has now been more than 21 days, I no longer have jurisdiction to clarify that the ruling should have dismissed, not discharged. We are outside the appeal window and my jurisdiction, does the landlord have any recovery?*
- The judgement is whatever was announced in open court. So if the paper judgment does not reflect the ruling, you can do a Judgment Nunc Pro Tunc to correct that clerical error.

# Bill of Review

## Bill of Review: Definition

- An equitable proceeding brought by a party seeking to set aside a prior default judgment that is no longer subject to challenge by a motion for new trial or appeal.
- *Caldwell v. Barnes*, 975 S.W.2d 535, 537 (Tex. 1998)

## Bill of Review: When

- *After* the judgment is final
- *After* the time for appeal has passed
- *After* the deadline for filing a motion for new trial
- Within 4 years of judgment

## Why 4 year SOL?

(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; provided that the court may at any time correct a clerical error in the record of a judgment and render judgment nunc pro tunc under Rule 316, and may also sign an order declaring a previous judgment or order to be void because signed after the court's plenary power had expired.

- TRCP 329b(f)

## Why 4 year SOL?

- **RESIDUAL LIMITATIONS PERIOD.** Every action for which there is no express limitations period, except an action for the recovery of real property, must be brought not later than four years after the day the cause of action accrues.

CPRC §16.051

## Why 4 year SOL?

- **“The residual four-year statute of limitations applies to bills of review.”**

*Harold Caldwell, v. Robert F. Barnes, 975 S.W.2d 535 (Tex. 1998)*

## Docketing

- A bill of review must be filed with the court that issued the original judgment.
- *Richards v. Commission for Lawyer Discipline*, 81 S.W.3d 506 (Tex.App.–Houston [1st Dist.] 2002)
- If a petition for Bill of Review is filed in a judge’s court, the judge should docket it as a new suit and proceed with issuing citation and set a hearing as with any new lawsuit.
- *Baker v. Goldsmith*, 582 S.W.2d 404, 409 (Tex. 1979).

## TRCP 510.8(e)

- “No motion for new trial may be filed [in an eviction suit].”
- However, a Bill of Review differs from post-judgment motions authorized by the Texas Rules of Civil Procedure. Therefore, it is TJCTC’s position that a bill of review petition may be filed in an eviction suit.

## Basis for claim

- If petitioner claims a violation of due process (e.g. no service of process), he is not required to prove he had a meritorious defense
- If petitioner does NOT claim a violation of due process, then he must present a prima facie meritorious defense and justify his failure to present that defense
  - Must be supported by an affidavit

## Due process violation

- In any direct attack on a judgment, there is no presumption in favor of valid issuance, service, or return of citation.
- To uphold a default judgment on direct attack, the record must reflect strict compliance with the Rules of Civil Procedure governing service of citation.

*Primate Construction v. Silver*, 884 S.W.2d 151, 152 (Tex. 1994); *Medeles v. Nunez*, 923 S.W.2d 659, 662 (Tex. App. – Houston [1st Dist.] 1996)



## Due process violation

- If a party claims that it was prevented from defending the original cause of action because of lack of proper service, the party does not have to prove that they had a meritorious defense in the original cause of action.

*Commission on Contracts of the General Executive Committee of the Petroleum Workers Union of the Republic of Mexico v. Arriba, Limited*, 882 S.W.2d 576 (Tex. App. – Houston [1st Dist.] 1994)

## Prima facie case

- A prima facie case is one not barred as a matter of law and that petitioner will be entitled to a judgment on retrial if no evidence to the contrary is offered. This is a question for the court to decide.

Rule 329b(f), T.R.C.P.; *1985 State v. Chevrolet Pickup Truck*, 778 S.W.2d 463, 464; *Hesser v. Hesser*, 842 S.W.2d 759, 765 (Tex. App. – Houston [1st Dist.] 1992, writ denied)

## diligence

- A party seeking relief through a bill of review must show that diligence was utilized in pursuing all available legal remedies in the former action.

*Hesser v. Hesser*, 842 S.W.2d 759, 765 (Tex. App. – Houston [1st Dist.] (1992) writ denied)

## procedure

- The defendant may respond with evidence showing petitioner's claim is barred as a matter of law; however:
- factual questions arising out of factual disputes are resolved in favor of petitioner for the purposes of this pretrial, legal determination;
- if the court determines that a prima facie meritorious defense has not been made, then the proceeding terminates and the court shall dismiss the case;
- if a prima facie meritorious defense has been shown, the court conducts a trial.

## dismissal

- If the court determines that a prima facie meritorious defense has not been made out, the proceeding terminates and the trial court shall dismiss the case. If a prima facie meritorious defense has been shown, the court will conduct a trial, which may be to a jury.
- The court may, within its discretion, conduct the trial of the issues in one hearing or in separate hearings pursuant to Rule 174(b) of the Texas Rules of Civil Procedure.

*Jones v. Texas Dept. of Protective and Regulatory Services*, 85 S.W.3d 483, 488 (Tex. App. -- Austin 2002, rev. denied). *Baker v. Goldsmith*, 582 S.W.2d 404, 408-09 (Tex. 1979).

## Burden of proof

- Plaintiff (“petitioner”) must prove the elements of the Bill of Review by a preponderance of the evidence.
- Defendant (“original plaintiff”) must prove merits of the original cause of action.

*Baker v. Goldsmith*, 582 S.W.2d 404, 408-09 (Tex. 1979)

## trial

- Petitioner opens the trial and assumes the burden of proving that:
  - the judgment was rendered as a result of the fraud, accident or wrongful act of the opposing party, or
  - there was an official mistake made that brought about the judgment.
- Petitioner must show there was no negligence on petitioner's part in failing to show up and participate in the original trial.
  - Defendant has the burden of proving the original cause of action.

## judgement

- Only one judgment is issued and it replaces the first judgment if petitioner proves his claim

## Board question

- *When I issue a citation for a Bill of Review, do I use the same citation used for a Small Claims case?*
- You can use the basic citation, though the petition should be attached. It is very advisable to set the matter for a pretrial hearing to determine if it is a valid bill of review. A notice of that hearing date could also be attached. It does not have to be 45 days from the initial filing, but can be.

## Board question

- *A default judgment was signed and the defendant appeal the case. The appeal was returned back to our court and now the defendant has filed a bill of review and the plaintiff(defendant) was served with citation. On the bill of review we used the same case number since it was the same parties.*
- No. When a bill of review is filed the court should docket it as a new action and issue citation to the defendant on the bill of review (the former plaintiff) and set the case for trial. If the petitioner proves his claim at trial, then a single judgment is issued and it replaces the former default judgment.

*State v. Chevrolet Pickup Truck*, 778 S.W.2d 463, 464 (Tex. 1989); *Baker v. Goldsmith*, 582 S.W.2d 404, 409 (Tex. 1979)

*Thank You!*