

# **A Motion for What?!**

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## **Resources**

Texas Rules of Civil Procedure  
Texas Code of Criminal Procedure  
Caselaw – citations throughout outline  
TJCTC Deskbooks – <https://www.tjctc.org/tjctc-resources/Deskbooks.html>

## **Motions Discussed in Course**

### **While the Case is Pending**

#### **Dismissal with or without prejudice?**

- ❖ Most dismissals should be WITHOUT PREJUDICE (means that the plaintiff is free to file the same case again)
  - Want of prosecution
  - Plaintiff files a non-suit
- ❖ A dismissal WITH PREJUDICE (means that the plaintiff is not free to re-file the same case)
  - The Court has decided the case on the **actual merits**
  - This might happen rarely if a case has been dismissed for want of prosecution over and over

### **Judgment Nihil Dicit**

- ❖ Civil Cases
- ❖ Nihil dicit is Latin for “he says nothing”
- ❖ Plaintiff may ask for it if the Defendant filed an answer but didn’t raise any defenses or deny Plaintiff’s allegations

- ❖ Example: Debt claim Defendant files an answer that says, “Yes. I owe the Plaintiff the money that they are suing me for, but I lost my job and can’t pay. Please dismiss this case.” The Plaintiff files a motion for judgment Nihil Dicit.
- ❖ What do you do?
  - The proper motion in justice court would have been a motion for summary disposition.
    - If this motion meets those requirements, then could grant summary disposition.
    - If it doesn’t, set the case for trial and move along just like you ordinarily would.

### **Summary Judgment (Summary Disposition)**

- ❖ Might file instead of “Summary Disposition” that is allowed under Justice Court Rules
  - Rule 503.2
  - Civil Cases
  - If it meets the requirements of 503.2, the court should just treat it as a motion for summary disposition
- ❖ Who can file?
  - Either party. Rule 503.2(a).
- ❖ What are the requirements for summary disposition?
  - Motion must set out all the supporting facts and all documents on which the motion relies must be attached to the motion
  - No genuinely disputed facts that would prevent a judgment in favor of the party; or
  - There is no evidence of one or more essential elements of a defense which the defendant must prove to defeat the plaintiff’s claim; or
  - There is no evidence of one or more essential elements of the plaintiff’s claim
- ❖ When should the court grant a motion for summary disposition?
  - After motion has been on file for 14 days
  - If the parties agree, can judge on the motion & response without a hearing, but otherwise there should be a hearing.
    - The judge can consider evidence offered by the parties at the hearing.

- ❖ An order granting motion for summary disposition can be on the full case or part of the case (requiring the case to move on as to the other elements/issues).

### **The Case Settles Out-of-Court...Now What?!**

#### **Motion for Agreed Judgment**

- ❖ Parties submit a joint motion for an agreed judgment
- ❖ Usually happens when they settle the case
- ❖ Best practice is make sure they both actually agree prior to signing – take it up at a court date
- ❖ Watch out for mistakes on the judgment – save yourself a nunc!
  - Read the whole thing
  - Make sure that post-judgment interest rate is correct

#### **Motion for Non-Suit**

- ❖ A voluntary request for a case to be dismissed by the Plaintiff
- ❖ Usually a result of a settlement or the Defendant paying the claim
- ❖ Only in Civil Cases (in criminal a prosecutor just files a motion to dismiss)
- ❖ Will be without prejudice

### **Post-Judgment Motions**

#### **Nunc Pro Tunc**

- ❖ Means “Now for Then”
- ❖ To correct CLERICAL ERRORS not judicial errors
  - Usually a typo
  - “a discrepancy between the entry of a judgment in the record and the judgment that was actually rendered by the court and does not arise from judicial reasoning or determination.”

*In re A.M.C.*, 491 S.W.3d 62, 67 (Tex. App.—Houston [14<sup>th</sup> Dist.] 2016, no pet); see *Cohen v. Midtown Mgmt. Dist.*, 490 S.W.3d 624, 627 (Tex. App.—Houston [1<sup>st</sup> Dist.] 2016, no pet.)

- A court can only alter a judgment to conform with the judgment rendered actually was, NOT to correct what should or might have been.

❖ Civil & criminal cases

❖ Does the Nunc Pro Tunc Change the date of the judgment?

- NO! The original judgment date stays in place, and all deadlines run from that date.
  - However, the Nunc Pro Tunc order or judgment should be dated with the date that it is signed.

❖ Is a Nunc Pro Tunc a new order or judgment?

- Best Practice: Create an order granting the motion for nunc pro tunc and attaching the new, correct judgment rather than notating the change on the original.
  - However, you can also either notate “Nunc Pro Tunc” on the original or a copy of the original and file that
  - The most important thing is that it is clear what happened from the court’s file.

❖ Is there a deadline to file a Motion Nunc Pro Tunc?

- NO!

❖ Authority:

- If a judgement as rendered by the trial court is not faithfully transcribed into the records of the court, the court has inherent authority to correct or amend the records by nunc pro tunc judgment, so the court’s records accurately reflect the judgment as rendered. *Perry v. Nueces County*, 549 S.W.2d 239(Tex. Civ. App.—Corpus Christi 1977, writ ref’d n.r.e.);
- Civil Deskbook pages 68-69;
- Rule 316 (can apply in justice court under Rule 500.3(e))

❖ Scenario: Nunc Pro Tunc

- ❖ A Plaintiff’s attorney files a proposed judgment along with his request for a default in a Debt Claim case. The Judge believes that the Plaintiff is entitled to a default, announces the default in court including the standard post-judgment interest, and signs the judgment. The judgment states post-judgment interest of 0.0% rather than the current rate of 5.5%.

- Can/should this be corrected with a Nunc Pro Tunc?

- ❖ Scenario: Nunc Pro Tunc

- ❖ During a civil docket, the Judge hears a case and renders and announces a judgment in favor of the Defendant in Cause Number 1234.

- ❖ The clerk types up all the judgments from the docket day, and the judge signs the judgments without realizing that the judgment for Cause Number 1234 states that the judge rendered judgment for the Plaintiff.

- Is this a Nunc Pro Tunc situation?

### **Modified Judgment**

- ❖ This is what will result when there is a judicial error in the judgment instead of a clerical error.

- Authority:

- *Comet Aluminum Co. v. Dibrell*, 450 S.W.2d 56, 58-59 (Tex. 1970);
- Civil Deskbook pages 68-69.

- ❖ Examples of judicial error are:

- A mistake in an award of prejudgment interest
- An erroneous recital of facts in support of a default judgment, such as that the defendant failed to appear and answer when in fact they did answer
- A dismissal with prejudice instead of a without prejudice

- ❖ Should be filed within the court's plenary power – within 21 days of judgment

### **Motion to Vacate or Set Aside Judgment**

- ❖ Motion to Set Aside Judgment

- Civil cases
- Rule 505.3(b) – A defendant against whom a default judgment was granted has 14 days from the date that the judgment was signed to file a motion to set aside the judgment.

- Defendant must serve the plaintiff with a copy of the motion no later than the next business day using a 501.4 method.
    - The trial court can set aside the judgment and set the case for trial for good cause shown.
  - What is good cause shown?
    - A really good reason.
    - Examples: If there was a default, but the defendant never received notice; other judicial error.
  - Can have a hearing, but not required to.
  - The motion to set aside automatically denied on the 21<sup>st</sup> day after the date of judgment or order of dismissal was signed if not ruled upon by the judge.
- ❖ Motion to Vacate Judgment
- No specific rule for this in Justice Court
  - Like and sometimes filed in the place of a motion to set aside judgment.
  - Can have a hearing, but not required to.
  - The motion to set aside automatically denied on the 21<sup>st</sup> day after the date of judgment or order of dismissal was signed if not ruled upon by the judge.
  - Usually filed because there was some sort of judicial error or issue with service.

## **Writ of Procedendo**

- ❖ Order from a higher court that tells the lower court to proceed to judgment
- ❖ These are not proper for a County Court or County Court at Law to send cases back to Justice Court
  - **Criminal Cases:** when a party perfects an appeal from justice or municipal court, ***“all further proceedings in the case in the justice or municipal court shall cease,” and the case shall proceed “as if the prosecution had been originally commenced in [the county] court.”*** Tex. Crim. Proc. Code Ann. § 45.043 & 44.17. In Texas, criminal proceedings are “originally commenced” by the return of an indictment or the filing of an information, and only the court in which a valid indictment or information is pending has jurisdiction to enter a judgment in a criminal case. Tex. Const. art. V, § 12; Tex. Crim. Proc. Code Ann. Ch. 21; Trejo v. State, 280 S.W.3d 258 (Tex. Crim. App. 2009).

- Civil Cases: The Thirteenth Court of Appeals has written that ***“When an appeal from a justice court judgment is perfected in a county court, the judgment of the justice court is annulled.”*** In re Garza, 990 S.W.2d 372, 374 (Tex. App.—Corpus Christi 1999, no pet.) The Second Court of Appeals, quoting an unpublished opinion by the First Court of Appeals, has stated that ***“[I]t is well-settled that perfection of an appeal to county court from a justice court for trial de novo vacates and annuls the judgment of the justice court.”*** Williams v. Schneiber, 148 S.W.3d 581 (Tex. App.—Fort Worth 2004, no pet.) Furthermore, once an appeal in a civil matter has been perfected, ***“the cause shall be tried de novo in the county or district court, and judgment shall be rendered.”*** Tex. R. Civ. P. 574b, emphasis added.
- Higher Courts (Supreme Court of Texas, Court of Criminal Appeals) are explicitly allowed to issue writs of procedendo. Tex. Const. art. V, § 3 & 5; Tex. Crim. Proc. Code Ann. § 4.04; Tex. Gov’t. Code Ann. § 22.002.

### **How Do You Figure Out What They Mean?**

- ❖ Read the whole motion
  - Often, the person who wrote the motion just forgot to change the title.
  - After a few sentences, you will probably understand what the party is asking for.
- ❖ When in doubt, Google!
  - This will likely lead you toward the correct answer.
  - Many times it will point you to the correct statute.
  - Often you will find a CLE or other article that will help.
  - Some lawyers (and even SRLs) might just be using fancy or antiquated words (or words incorrectly)
- ❖ The Rules & Statutes
  - <https://www.txcourts.gov/rules-forms/rules-standards/>
  - <https://statutes.capitol.texas.gov/>
- ❖ TJCTC Resources
  - Deskbooks
  - Legal Question Board
  - Legal Calls
- ❖ Set it for a Hearing
  - Let the parties explain what they are asking for.
  - You can ask them for any authority or law that they are relying on.