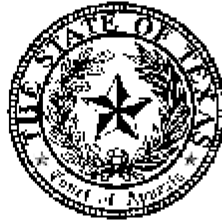
Reversed and Remanded and Opinion filed December 14, 2000.



In The

Fourteenth Court of Appeals

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NO. 14-98-00972-CV

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HENRY J. N. TAUB, Appellant

V.

ROBERT H. DEDMAN, INDIVIDUALLY AND AS CHAIRMAN OF THE TEXAS HIGHWAY AND PUBLIC TRANSPORTATION COMMISSION, ET AL, Appellees

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On Appeal from the County Civil Court at Law No. 1
Harris County, Texas
Trial Court Cause No. 601,633

O P I N I O N

Henry Taub filed suit against various individuals and government and private entities claiming, *inter alia*, inverse condemnation, wrongful trespass and encroachment, and trespass to try title. On September 19, 1994, the trial court granted what all parties at the time apparently considered a partial summary judgment in favor of several government employees and officials sued in their individual and official capacities. Over three-and-a-half years later, defendants filed a plea to the jurisdiction alleging that the September 1994 summary judgment was, in fact, a final resolution of the lawsuit because it contained a Mother Hubbard clause, i.e. "All relief not specifically herein granted is hereby denied." The trial court

granted the plea, and Appellant appeals from that order. We reverse and remand.

Procedural History

The facts of the underlying lawsuit were not decided in the court below, and the parties do not agree on them on appeal. Basically, Henry Taub alleges that he owns two adjoining plots of land that have along their eastern boundary a recorded easement for a subdivision street that has never been built. He further alleges that a drainage ditch has been constructed along the easement thus interfering with his right of access to the roadway and encroaching upon his property.

Taub filed suit against the Harris County Flood Control District ("the Flood Control District"), several private companies and individuals involved in constructing the drainage project, and numerous employees and officials of the Flood Control District, Harris County, and the State of Texas. The lawsuit named each of the government officials and employees in both their individual and official capacities. Taub's claims included reverse condemnation, wrongful trespass and encroachment, and trespass to try title.

On June 2, 1994, the trial court granted a partial summary judgment in favor of six county officials, thus dismissing them from the suit in their individual capacities. On September 19, 1994, the trial court issued an order titled "Order on Motion of Individual Defendants for Summary Judgment," in which the court purported to dismiss the causes of action against several State of Texas employees and officials in both their individual and official capacities. The last line of the September order reads as follows: "All relief not specifically herein granted is hereby denied." This is commonly referred to as a Mother Hubbard clause. Appellant did not appeal this order.

On April 22, 1998, the Flood Control District and other Harris County affiliated defendants filed a Plea to the Jurisdiction contending that the inclusion of the Mother Hubbard clause in the September 19, 1994, summary judgment order made the order a final judgment for all claims and for all parties. In the interim between the signing of the summary judgment order and the filing of the plea, three and a half years elapsed, almost 40 pleadings were filed with the court, and a substantive hearing was held. The trial court granted the plea to the jurisdiction.

Analysis

In his first two points of error, Appellant contends that the trial court erred in granting the plea to the jurisdiction because (1) the September 19, 1994, summary judgment order was interlocutory and not final, and (2) the trial court should have treated Appellant's Fourth Amended Original Petition as an original petition in a new lawsuit. In his third point of error, Appellant contends that the trial court erred in granting the defendant's motion for determination of access.

Ol' Mother Hubbard

Appellant contends that the September 19, 1994, order granting summary judgment was merely interlocutory and that the existence of the Mother Hubbard clause in the order creates only a rebuttable presumption of finality. To be a final, appealable summary judgment, the order granting the motion must dispose of all parties and all issues before the court. See *Mafrige v. Ross*, 866 S.W.2d 590, 591 (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. *Id.* at 592. The inclusion of a Mother Hubbard clause in a summary judgment order is sufficient to dispose of all claims or parties and to make the order final and appealable. *Id*; *see also Bandera Elec. Co-op., Inc. v. Gilchrist*, 946 S.W.2d 336, 337 (Tex. 1997)("a summary judgment order with Mother Hubbard language should be treated as final for purposes of appeal"). This rule of finality is intended as a bright line and not a mere presumption. *See Inglish v. Union State Bank*, 945 S.W.2d 810, 811 (Tex. 1997). It is the rule even when the order erroneously grants more relief than was requested in the motion. *Lehmann v. Har-Con Corp.*, 988 S.W.2d 415, 417 (Tex. App.—Houston [14th Dist.] 1999, pet. granted), citing *Inglish*, 945 S.W.2d at 811.

In the present case, the trial court's September 19, 1994, order was final and appealable because it contained a Mother Hubbard clause. It also, therefore, clearly granted more relief than was requested because the motion for summary judgment only requested judgment on limited issues and in favor of certain parties. It is error for an order granting summary judgment to award more relief than is requested in the motion. *Mafrige*, 866 S.W.2d at 591. When the nonmovant for summary judgment is confronted with

an over-inclusive order, the nonmovant must either: (1) ask the trial court to correct the erroneous summary judgment while the trial court retains plenary power over its judgment, or (2) perfect a timely appeal. *Lehmann*, 988 S.W.2d at 417. If the nonmovant does neither, the erroneous summary judgment becomes final and unappealable. *Id*.

Because appellant failed to request a correction during the court's plenary power or to make a timely appeal from the order, he has waived his right to complain of any error in the judgment on appeal. Appellant's point of error is overruled.

Although unavoidable because of the bright line rule, the results of this holding demonstrate the inequities caused by *Mafrige*. *See generally Lehmann*, 988 S.W.2d at 417 ("[*Mafrige*] exalts form over substance"). It is clear that neither the trial court nor any of the parties believed at the time that the September 19, 1994, order was a final summary judgment. The parties continued to litigate the case for three-and-a-half years after the order was signed, and the language of the order itself, absent the Mother Hubbard clause, specifically addresses only the parties and issues raised in the motion. And yet, *Mafrige* compels a finding of finality.

The Subsequent Petition

Appellant next contends that if the September 19, 1994, summary judgment order was final and appealable, his "Fourth Amended Original Petition," filed on February 3, 1995, should be read as an original petition in a new cause of action, thus re-invoking the jurisdiction of the trial court so that the court then erred in granting the plea to the jurisdiction. This point of error raises the rare, but not unique, question of whether a pleading filed after a final judgment in a case, and purporting to be an amended petition in that case, can create a new and valid cause of action.

In *Leach v. Brown*, 156 Tex. 66, 292 S.W.2d 329 (Tex. 1956), the supreme court addressed this issue, under slightly different circumstances, and stated that if the so-called amended petition contains all of the requisites of an original petition, it can, in fact, be read as creating a new cause of action, even though it is mislabeled and improperly docketed. *Id.,* 156 Tex. at 69, 292 S.W.2d at 331. *Leach* involved a dispute over royalty payments. The trial court granted a plea in abatement against the original

petition because it failed to include parties necessary to the suit. More than a year later, the plaintiff filed a "First Amended Original Petition" in the same court and under the same docket order as the first lawsuit. The supreme court held that, despite the improper label and docketing, the "amended petition" must necessarily have been an original petition because there were no live pleadings for it to amend. *Id*.

Several courts of appeal have cited to *Leach* in holding that a pleading filed after a court lost jurisdiction amounted to an original petition in a new cause of action. *See, e.g., Williams v. National Mortg. Co.*, 903 S.W.2d 398, 405 (Tex. App.—Dallas 1995, writ denied)(counterclaim); *Loomis Land & Cattle Co., Inc. v.* Wood, 699 S.W.2d 594, 596 (Tex. App.—Texarkana 1985, writ re'f n.r.e.)(cross-claim); *Cox v. Cox*, 609 S.W.2d 888, 889 (Tex. App.—Houston [14th Dist.] 1980, no writ)(motion to modify divorce decree). Other courts have cited to Rule 71 of the Texas Rules of Civil Procedure in allowing pleadings labeled as one type of pleading to operate as another type. Rule 71 states that "[w]hen a party has mistakenly designated any plea or pleading, the court, if justice so requires, shall treat the plea or pleading as if it had been properly designated." In determining whether to apply the rule, courts look to the substance of the pleading and not the title. *Moore v. Collins*, 897 S.W.2d 496, 499 (Tex. App.—Houston [1st Dist.] 1995, no writ).

In the present case, Taub's "Fourth Amended Original Petition" satisfies the requirements of an original petition, and Appellees do not argue otherwise. The failure to issue citation on the petition is not fatal because defendants' answers waived service and citation. *See* TEX.R.CIV.P. 121; *Loomis Land & Cattle*, 699 S.W.2d at 596.

Appellees primary response to this point of error is to point out that by filing a petition substantially similar to the one already dismissed by the summary judgment order, Taub runs afoul of the principals of *res judicata*. They bolster their argument by pointing out that the judgment in the present case was issued "with prejudice." *Res judicata*, however, is an affirmative defense that must be plead and proven in the trial court before it can be argued on appeal. *In re Striegler*, 915 S.W.2d 629, 640 (Tex. App.—Amarillo 1996, writ denied); *see also Metromedia Long Distance, Inc. v. Hughes*, 810 S.W.2d 494, 499 (Tex. App.—San Antonio 1991, writ. denied)(*res judicata* inapplicable where not

raised until appeal); *but see United Home Rentals, Inc. v. Texas Real Estate Com'n*, 716 F.2d 324, 330 (5th Cir. 1983)(under federal rules, court may take drastic step of invoking *res judicata* for first time on appeal), *cert. denied*, 466 U.S. 928 (1984). Some of the defendants did raise the issue in their amended answers but only in regard to the claims for the government officials and employees who were served in their individual and official capacities, not in regard to the lawsuit as a whole or in claiming that the summary judgment was a final judgment.

Furthermore, it is clear from the record that the trial court never considered the issues of the subsequently filed petition or the doctrine of *res judicata*. *See Green v. Parrack*, 974 S.W.2d 200, 202 (Tex. App.—San Antonio 1998, no pet.)(suggesting *res judicata* may be tried by express or implied consent as if raised in pleadings). Taub raised the subsequent pleading issue in his motion for new trial, which he filed after the court granted the plea to the jurisdiction, and the two responses filed by defendants to the motion discuss *res judicata*. The trial court, however, issued an order stating that the motion for a new trial was filed after the expiration of the court's plenary power and that, therefore, the court had no power to consider the motion.[1] Hence, the trial court never considered or ruled on the issues created by the subsequent pleading or the doctrine of *res judicata*.

Because we hold (1) that Appellant's pleading labeled "Fourth Amended Petition" created a new cause of action, and (2) that Appellees failed to properly raise or prove *res judicata* in the trial court, we grant this point of error and reverse and remand this cause for further proceedings consistent with this opinion.[2]

Impairment of Access

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[1] The trial court ruled that Taub's motion for new trial, filed on May 26, 1998, was untimely based on the summary judgment date of September 19, 1994. However, the motion was timely if considered from the date the court granted the plea to the jurisdiction, April 27, 1998.

[2] On remand, nothing in this opinion should be read so as to prevent Appellee's from pleading or otherwise pursuing judgment based on *res judicata* or any other applicable defense. Likewise, nothing in this opinion should be read as preventing Appellant from amending his pleadings to try to avoid application of any defenses.

Lastly, Appellant challenges the trial court's ruling concerning his ability to access his property. After a substantive hearing, the trial court found, as a matter of law, that Taub's loss of access to the roadway easement did not constitute a material and substantial impairment of access. Appellant's point of error on this issue, however, is not properly before the court. Because we hold that Appellant's pleading labeled "Fourth Amended Petition" created a new and as yet unresolved cause of action, the ruling on the access issue is interlocutory and thus not appealable. *See New York Underwriters Ins. Co. v. Sanchez*, 799 S.W.2d 677, 678-79 (Tex. 1990). We overrule this point of error.

The judgment of the trial court is reversed and remanded.

/s/ Bill Cannon
Justice

Judgment rendered and Opinion filed December 14, 2000.
Panel consists of Justices Cannon, Draughn, and Lee.[3]
Publish—TEX. R. APP. P. 47.3(b).

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[3]Senior Justices Cannon, Draughn, and Lee sitting by assignment.