COURT OF APPEALS
EIGHTH DISTRICT OF TEXAS
EL PASO, TEXAS

	§	No. 08-22-00007-CV
IN THE ESTATE OF:	§	Appeal from the
JOSEPH ALBERT COUGOT,	§	County Court at Law
Deceased.	§	of Walker County, Texas
	§	(TC# 9276 PR)

MEMORANDUM OPINION

In this appeal we confront the problem of stray language that makes its way into a trial court's order. The stray language is the finality language for judgments recognized in *Lehmann v. Har-Con Corp*., 39 S.W.3d 191, 205-06 (Tex. 2001) ("This judgment finally disposes of all parties and all claims and is appealable."). The trial court's order at issue is a routine ruling on a discovery matter. As a result of stray finality language, the losing party on the discovery issue also had her claims in the lawsuit dismissed. That losing party then filed a direct appeal from the order, challenging both the dismissal of all claims, and the ruling on two unrelated discovery issues that had been decided almost a year earlier. The winning party to the discovery dispute responds that we can overlook the "nonsensical" inclusion of the finality language, and upon doing so, we should dismiss the appeal for want of jurisdiction. That party correctly points out that without the

dismissal language, we are left with an interlocutory order on a discovery issue that is not subject to a direct appeal.

We conclude that we cannot simply ignore the finality language in the discovery order and must treat it as a final judgment. But as such, the order is subject to summary reversal because when the order was entered, there was no motion before the trial court that would support dismissal of the case. And while case authority might allow us to also address the ancillary issues that tag along with such an order, we decline to do so for the reasons explained below. We therefore reverse the dismissal portion of the order and remand the case to the trial court for further proceedings.

I. BACKGROUND

The Appellee in this case is the Estate of Albert Cougot, which sought a declaratory judgment against one of the decedent's children, Appellant Rhonda Cougot (Rhonda). The Estate sought a declaration that the decedent loaned Rhonda $93,312.25 during his lifetime, which—by the terms of his will—was to be deducted from any inheritance that she was to receive from him. Rhonda filed a denial and a counterclaim against the Estate, alleging among other things, breach of fiduciary duty, negligence, and conspiracy, based on the executors' denial of her request to make an early partial distribution. Rhonda further alleged that the Estate has erred in paying excessive attorney's fees to the Estate's attorneys, including Travis Kitchens, Jr., who also drafted the decedent's will.[1] Significant to this appeal, the parties engaged in a protracted discovery dispute beginning in September 2020, about whether Rhonda could depose Kitchens and whether she was entitled to receive various documents from him. The Estate argued that Kitchens'

[1] In 2018, Kitchens was elected as the judge for the 258th District Court serving San Jacinto, Polk, and Trinity Counties. He withdrew as the Estate's attorney after taking the district court bench.

testimony and his records were protected by the attorney-client privilege. Kitchens filed his own "assertion of privilege and request for a protective order" in the matter. Ultimately, the trial court signed two orders on that issue. First, on October 8, 2020, the trial court denied Rhonda's motion to compel the production of documents from Kitchens. Second, on the same date, the trial court granted the Estate's motion to quash Kitchens's deposition and granting the Estate's motion for protective order. Rhonda did not challenge any of those orders.

Over a year later, on October 28, 2021, Rhonda filed a "Request for Ruling" on a completely different discovery matter, seeking a ruling on her previously-filed "Motion to Quash Depositions by Written Question and Subpoenas Duces Tecum and Motion for Protective Order," over deposition notices and subpoenas duces tecum that the Estate served on the decedent's banking and financial institutions. In that motion, Rhonda claimed that the Estate had no interest in receiving those documents as it was not a "designated beneficiary" of the will. Thereafter, on December 6, 2021, the trial court entered an order denying Rhonda's motion to quash and for protective order, and expressly held that the banking and financial institutions could respond to any notices of deposition. However, for reasons that are unclear from the record, the trial court added the following line at the bottom of the order: "This judgment finally disposes of all parties and all claims and is appealable" (the "finality language"). For reasons that are also not clear, Rhonda did not approach the trial court while it still had plenary power to clarify why the finality language was included with the order.[2] Rather, she filed a notice of appeal complaining of the

[2] A practical solution to the problem presented by any unintended use of finality language in an order would be to ask the trial court to clarify or amend the order before the trial court losses its plenary jurisdiction. *See L.A.M., Inc. v. Austin Diamond Dist., LLC*, No. 13-17-00552-CV, 2019 WL 613319, at *2 (Tex.App.--Corpus Christi Feb. 14, 2019, no pet.) (mem. op.) (explaining how party approached the trial court while it had plenary power over an order to have finality language removed); *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.").

December 6, 2021 order, which she considers to be the "final judgment" in the case, as it disposed of all parties and claims in the case.

II. THE CASE ON APPEAL

After Rhonda filed her notice of appeal, the Estate filed a notice to depose one of the decedent's banks by written questions along with a subpoena duces tecum—as permitted under the trial court's December 6, 2021 order. Rhonda responded by moving to quash the deposition with this Court, arguing that because "this case is currently on appeal," the Estate's attempts to go forward with discovery "interfere[s] with the jurisdiction of this Court." The Estate responded by first opposing the motion to quash, arguing that it should be allowed to go forward with discovery, as no stay of the trial court proceedings had been entered. Second, it filed a motion to dismiss the appeal, contending that despite the finality language in the order, the trial court's December 6, 2021 order was a "non-appealable" interlocutory order on a discovery motion, and that Rhonda's appeal should therefore be dismissed for lack of jurisdiction.

Rhonda responded to the motion to dismiss, and also filed her brief on the merits. In her brief, she raised two issues on appeal: the first challenges the complete dismissal of the lawsuit, and the second challenges the trial court's discovery rulings from October 8, 2020, pertaining to the discovery and deposition of attorney Kitchens. The Estate has filed its brief on the merits, again contending that those orders are interlocutory discovery matters over which we have no jurisdiction in a regular appeal. The Estate therefore encourages this Court to treat the order as a non-appealable interlocutory order, and to dismiss the appeal, allowing the case to go forward in the trial court without affecting any of the existing discovery orders that the trial court previously entered in its favor. As explained below, however, we treat the order as a "final" judgment given

its inclusion of clear and unambiguous finality language, but reverse the portion of the order disposing of all claims and parties because that relief was not requested by any party.

III. WAS THE ORDER INTERLOCUTORY OR FINAL?

In both their briefs and the above-described motions, the parties agree that the trial court lacked the authority to enter a final judgment under these circumstances, as no trial was held and no dispositive motion (such as a summary judgment motion or motion to dismiss) was on file when the trial court entered its order. Instead, the parties both agree that the trial court's order was made solely in response to Rhonda's discovery motion, and they also appear to agree (and correctly so) that, in general, the denial of a discovery motion of this nature is not a final judgment, nor is it an appealable interlocutory order. *See generally Kastner v. Martin, Drought & Torres, Inc.*, No. 08-07-00105-CV, 2007 WL 1940090, at *1 (Tex.App.--El Paso July 5, 2007, no pet.) (mem. op.) (trial court's various discovery orders were not appealable orders, as they were not final judgments, nor were on the list of interlocutory orders deemed appealable by the legislature), *citing* TEX.CIV.PRAC. & REM.CODE ANN. § 51.012 (recognizing that in a civil case, a person may appeal a "final judgment of the district or county court") and TEX.CIV.PRAC. & REM.CODE ANN. § 51.014 (listing types of interlocutory orders that are considered appealable); *see also Nazareth Hall Nursing Ctr. v. Castro*, 374 S.W.3d 590, 593 (Tex.App.--El Paso 2012, no pet.) (recognizing that only those interlocutory appeals authorized by statute may be appealed).

The question then is how we are to interpret the finality language found at the bottom of the order—an order which only resolved a narrow discovery issue pertaining to the Estate's right to take the written depositions of the decedent's banking and financial institutions. In general, when interpreting a trial court order that is ambiguous or contradictory, an appellate court may consider the entire record in determining the trial court's intent in entering the order; in particular,

it should interpret the order "in light of the motion upon which it was granted." *Lone Star Cement Corp. v. Fair*, 467 S.W.2d 402, 404-05 (Tex. 1971) (recognizing general rule that "an ambiguous order may be construed in light of the motion upon which it was granted"). And relevant to this appeal, when an order contains language that is both "interlocutory and final," a court may, under some circumstances, consider it to be ambiguous and look to the "record to determine the question of finality." *See Estate of Brazda*, 582 S.W.3d 717, 728-29 (Tex.App.--Houston [1st Dist.] 2019, no pet.) (after reviewing the entire record, appellate court concluded that trial court's order was final as to all the issues raised by one of the parties where it did not truly contain an "interlocutory component").

Yet the Texas Supreme Court has held that in construing a trial court's order—just as in construing a contract—a court may only look to the record to determine the trial court's intent in entering an order when the order itself is ambiguous. *See Kourosh Hemyari v. Stephens*, 355 S.W.3d 623, 626 (Tex. 2011) ("Only where an order's terms are ambiguous—that is, susceptible of more than one reasonable interpretation—do we look to the surrounding circumstances to discern their meaning."), *citing Lone Star Cement*, 467 S.W.2d 402 at 404-05 (noting that the same rules of interpretation of written instruments apply to construing the meaning of a trial court's orders); *see also In re Elizondo*, 544 S.W.3d 824, 827 (Tex. 2018) (per curiam) (reviewing court may look at the record to determine the parties intent "only if the order is not clear and unequivocal"). And a court's order is only considered ambiguous if, applying standard rules of construction, it is susceptible to more than one reasonable interpretation. *Stephens*, 355 S.W.3d at 626. In turn, the court has held that in determining an order's finality, "if the language of the order is clear and unequivocal, it must be given effect despite any other indications that one or more parties did not intend for the judgment to be final." *Lehmann*, 39 S.W.3d at 206; *see also Stephens*,

355 S.W.3d at 626 ("Just as with an unambiguous contract, we enforce unambiguous orders literally.").

In *Lehmann*, the Texas Supreme Court expressly held that language that "'[t]his judgment finally disposes of all parties and all claims and is appealable' would leave no doubt about the court's intention," and therefore cannot be considered ambiguous. *Lehmann*, 39 S.W.3d at 206. According to the court, such language must be interpreted at face value and an order containing that language is treated as a final judgment, even if the order does not in fact dispose of all the claims or parties. *Id*. at 193, 205; *see also Bella Palma, LLC v. Young*, 601 S.W.3d 799, 801 (Tex. 2020) (recognizing that "a judgment is final if it '*either* actually disposes of every pending claim and party' *or* 'it clearly and unequivocally states that it finally disposes of all claims and all parties.'") (emphasis original); *Interest of R.R.K.*, 590 S.W.3d 535, 540 (Tex. 2019) (recognizing that "When an order 'finally disposes of all claims and all parties' in 'clear and unequivocal language,' it is a final order."). As well, the *Lehmann* court held that an order using such language must be seen as final, even if the trial court had no "legal basis" to enter a final judgment. *Lehmann*, 39 S.W.3d at 206, 206 ("An express adjudication of all parties and claims in a case is not interlocutory merely because the record does not afford a legal basis for the adjudication."). Thus, the court has recognized that an "order can be final and appealable when it should not be," and that "[g]ranting more relief than the movant is entitled to makes the order reversible, but not interlocutory." *Id.* at 204. In other words, when a trial court responds to a non-dispositive motion by using clear and ambiguous finality language saying that it is disposing of all claims and parties—despite no request that it do so—the judgment is "final--erroneous, but final." *Id*. at 200; *see also Bella Palma, LLC*, 601 S.W.3d at 801-02 (where trial court entered a clarifying order that clearly and unequivocally stated its intent to issue a final, appealable summary judgment order,

disposing of all claims and parties, court of appeals could not interpret it otherwise, regardless of the "correctness" of the order). Otherwise, "finality phrases would serve no purpose." *Elizondo*, 544 S.W.3d at 828.

The court's holding in *Elizondo* clarifies this point. In that case, the plaintiffs sued the defendant for breach of a construction contract, and they filed a lien on the defendant's property during the lawsuit. *Elizondo*, 544 S.W.3d at 825. The defendant moved to remove the lien, which the trial court granted, but at the bottom of the order, the trial court included this text: "This judgment is final, disposes of all claims and all parties, and is appealable. All relief not granted herein is denied." *Id.* The *Elizondo* court recognized that the order left "lots of relief not granted," including all the plaintiffs' claims against the defendant. *Id*. However, in applying the rule set forth in *Lehmann*, the Texas Supreme Court held that the order constituted a final judgment, given the clear and unambiguous finality language the trial court included in it. *Id.* at 827. The court pointed out that even if the plaintiffs did not believe that the order was final, they still "should have treated it as though it was," given the clear and unambiguous finality language in the order, to avoid the risk of losing their right to appeal. *Id.*, *citing Lehmann*, 39 S.W.3d at 196 ("A party who is uncertain whether a judgment is final must err on the side of appealing or risk losing the right to appeal."). And although the court noted that this outcome might be "jarring" to the plaintiffs, who had all of their claims erroneously dismissed, it still "reflects *Lehmann*'s reasoning and comports with this Court's subsequent application of *Lehmann*'s finality tests." *Id.*, *citing In re Daredia*, 317 S.W.3d 247, 249 (Tex. 2010) (per curiam) (default judgment that dismissed all defendants from a case, even though the plaintiff's motion for default judgment was directed at only one defendant, was considered a final judgment, even if an erroneous one, where it included "unequivocal" finality language relating to all defendants).

In reaching this conclusion, the court in *Elizondo* rejected the plaintiffs' argument that it was "absurd" to conclude that the trial court intended to enter a final judgment as to all claims and all parties, when the only issue before it was whether to remove the lien. *Id*. at 828. To the contrary, the court held that "the absurd thing would be to hold that a clear and unequivocal finality phrase does not trigger *Lehmann*'s directive that '[a] party who is uncertain whether a judgment is final must err on the side of appealing.'" *Id. citing Lehmann*, 39 S.W.3d at 196. The court further rejected the plaintiffs' argument that a bright line rule of this nature would encourage "unscrupulous attorneys to sneak finality phrases into commonplace orders," finding that instead, "the *Lehmann* rule actually helps on this front," by making it easier to spot such "trickery." *Id.* at 828.

As Rhonda points out, the trial court's December 6, 2021 order from which she appealed contains the very same clear and unambiguous "finality language" that the Texas Supreme Court has held renders a trial court's order a final judgment, even if the language was included in error. As such, if she had failed to file her notice of appeal, Rhonda would have risked losing her right to challenge the court's order—which ostensibly dismissed not only the Estate's claims against her, but the counterclaims she filed against the Estate as well. Thus, as "absurd" or "nonsensical" as it may seem to construe the trial court's discovery order to be a final, appealable judgment disposing of all claims and parties, this appears to be the correct application of the rule set forth in *Lehmann* and its progeny. So we treat the trial court's order as being "final--erroneous, but final." *Lehmann*, 39 S.W. 3d at 200.

IV. THE REMEDY: REVERSE FOR LACK OF AUTHORITY

When the finality language used in a trial court's order is clear and unambiguous, a reviewing court can neither dismiss the appeal for lack of finality, nor abate the appeal to have the

trial court clarify its intent. *Lehmann*, 39 S.W.3d at 206 (if "the appellate court is uncertain about the intent of the order, it can abate the appeal to permit clarification by the trial court. But if the language of the order is clear and unequivocal, it must be given effect . . ."). Yet we may reverse the trial court's order on the ground that the trial court lacked a basis for entering a final judgment disposing of the parties' claims, and that the order granted more relief than the parties requested. *See Lehmann*, 39 S.W.3d at 200 ("A judgment that grants more relief than a party is entitled to is subject to reversal . . ."); *G & H Towing Co. v. Magee*, 347 S.W.3d 293, 297 (Tex. 2011) (per curiam) (recognizing that "[g]ranting a summary judgment on a claim not addressed in the summary judgment motion . . . is, as a general rule, reversible error."); *Garces v. Hernandez*, No. 13-13-00242-CV, 2016 WL 2970686, at *6 (Tex.App.--Corpus Christi–Edinburg May 19, 2016, no pet.) (mem. op.) (reversing trial court's order where the relief granted was "beyond the relief requested by the summary judgment motion and was error"); *Stephens v. LNV Corp.*, 488 S.W.3d 366, 374 (Tex.App.--El Paso 2015, no pet.) (partially reversing trial court's summary judgment order where trial court granted more relief than the movants requested). That is what we do here. We reverse the trial court's order as far as it improperly dismissed all the parties' claims, as none of the parties requested any such relief, and the trial court had no basis for granting such relief.

As a matter of judicial economy, if a judgment grants more relief than requested by disposing of issues that were never presented to the trial court, the reviewing court should reverse and remand those issues to the trial court, but may address the claims that were presented. *See Stephens*, 488 S.W.3d at 374-75 (where defendant only requested summary judgment on one of the plaintiffs' claims, and trial court improperly granted full summary judgment on all their claims, court reversed the order for the unaddressed claims and remanded for further proceedings on those

claims, but resolved the issues for the claim raised in the trial court proceedings); *Speck v. First Evangelical Lutheran Church of Houston*, 235 S.W.3d 811, 819 (Tex.App.--Houston [1st Dist.] 2007, no pet.) (reversing trial court's order granting summary judgment on claims not addressed in summary judgment motion but affirming the order for claims that were addressed). Under this rubric, Rhonda asks that we address two of the trial court's discovery orders.

But even assuming that it would be appropriate to review the substance of the trial court's discovery rulings, we decline to do so here. As explained above, the trial court's December 6, 2021 order only addressed the issue of whether the Estate could go forward with seeking discovery from the decedent's banking institutions—yet Rhonda does not address the propriety of that particular ruling in her brief. Instead, the only issue she addresses in her brief (other than the finality issue) is whether the trial court erred in resolving the discovery issues pertaining to Kitchens. But, as explained above, the issues involving Kitchens were resolved more than a year before the entry of the appealed-from order in a series of interlocutory orders, and the trial court did not address any of those issues in its "final" order. We therefore have no jurisdiction to review the discovery issues pertaining to Kitchens.[3] As well, we would not review the actual ruling that the trial court made in the appealed-from order as Rhonda failed to address that particular discovery issue in her brief. *See Martinez v. El Paso Cnty.*, 218 S.W.3d 841, 844 (Tex.App.--El Paso 2007, pet. struck) ("When reviewing a civil matter, an appellate court has no discretion to

[3] We do have jurisdiction to review interlocutory discovery orders under our mandamus jurisdiction. But mandamus is an extraordinary remedy and not an absolute right. *See Rivercenter Assocs. v. Rivera*, 858 S.W.2d 366, 367 (Tex. 1993). "Although mandamus is not an equitable remedy, its issuance is largely controlled by equitable principles." *Id.* "One such principle is that '[e]quity aids the diligent and not those who slumber on their rights.'" *Id. quoting Callahan v. Giles*, 155 S.W.2d 793, 795 (Tex. 1941). We are reluctant to allow the fortuity of the errant inclusion of finality language in this discovery order to permit Rhonda to obtain review a year-old discovery order that would otherwise face major hurdles if brought as a mandamus. *See, e.g.*, *Rivercenter*, 858 S.W.2d at 367-68 (mandamus denied based on laches when relator waited four months to seek relief from jury trial demand).

consider an issue not raised in the appellant's brief, even if the ends of justice so require."), *citing* *Bankhead v. Maddox*, 135 S.W.3d 162, 163-64 (Tex.App.--Tyler 2004, no pet.).

Finally, while Rhonda asks that we reverse the dismissal of her counterclaims, she also contends that the dismissal of the Estate's case should stand because it did not perfect its own appeal. She relies on Rule 25(c) of the Texas Rules of Appellate Procedure that provides in relevant part: "A party who seeks to alter the trial court's judgment or other appealable order must file a notice of appeal . . . . The appellate court may not grant a party who does not file a notice of appeal more favorable relief than did the trial court except for just cause." *See* TEX.R.APP.P. 25.1(c). With regard to relief for a non-appealing party, however, the Texas Supreme Court has held:

> While it is generally the rule that non-appealing parties are excluded from relief upon appeal, this court has held that reversal of a trial court order may extend to non-appealing parties "when the rights of the appealing parties are so interwoven or dependent on each other as to require a reversal of the entire judgment." *Plas-Tex, Inc. v. United States Steel Corp.*, 772 S.W.2d 442, 446 (Tex.1989) (citing *Turner, Collie & Braden v. Brookhollow, Inc.*, 642 S.W.2d 160, 166 (Tex.1982)). This exception to the general rule is applied on a case-by-case basis. *See Donwerth v. Preston II Chrysler–Dodge*, 775 S.W.2d 634, 642 (Tex.1989) (Ray, J., concurring).

Ex parte Elliot, 815 S.W.2d 251, 251-52 (Tex. 1991). We conclude the claims here are interwoven for two reasons. First, the same sentence in the discovery order that Rhonda complains of, is the sentence that extinguishes the Estate's claim. She correctly urges that sentence was incorrectly added to the order, and if it was error as to her, it was error as to the Estate. Second, the underlying pleadings reflect that the Estate filed suit complaining about pre-death monies the decedent allegedly loaned to Rhonda that were not repaid. Rhonda's counterclaim alleges in part that "[The Estate] breached the duty to enforce claims by failing to take reasonable actions to collect an allege claim against [Rhonda]." In that respect the claims appear to mirror each other on the handling of the pre-death loans, and are thus interwoven.

Finally, Rule 25.1(c) also grants this Court the discretion to grant relief to a non-appealing party for "just cause," a standard which is easily met here. The trial court had no case dispositive motion pending before it when it heard a simple discovery dispute over depositions on written questions. By some inadvertence, finality language found its way into a routine discovery order. And it would be naturally counter-intuitive to think that a ruling on a routine discovery matter—one that the Estate prevailed on-- could simultaneously result in the dismissal the Estate's lawsuit. Under the unique facts of this case, we believe that the "just cause" standard provides an outlet to ameliorate the rare, but sometimes odd results, that flow from *Lehmann's* holding. We therefore reverse the dismissal of both the Estate's claims and Rhonda's counterclaim.

V. CONCLUSION

Unless expressly ruled on by a separate order, we overrule all pending motions in this case. We reverse the portion of the trial court's order that dismisses all parties and all claims. We deny any further relief. We remand the case to the trial court for proceedings not inconsistent with this opinion.

JEFF ALLEY, Justice

July 21, 2022

Before Rodriguez, C.J., Palafox, and Alley, JJ.