Affirm in part; Reverse in part and Remand; Opinion Filed May 15, 2018.

In The

Court of Appeals
Fifth District of Texas at Dallas

No. 05-16-01327-CV

CTMI, LLC, MARK BOOZER, AND JERROD RAYMOND, Appellants

V.

RAY FISCHER AND CORPORATE TAX MANAGEMENT, INC., Appellees

On Appeal from the 192nd Judicial District Court
Dallas County, Texas
Trial Court Cause No. DC-11-08088

MEMORANDUM OPINION

Before Justices Lang, Brown, and Whitehill
Opinion by Justice Lang

CTMI, LCC, Mark Boozer, and Jerrod Raymond ("CTMI") appeal from the trial court's order granting Ray Fischer and Corporate Tax Management, Inc.'s ("Fischer") "Motion to Release Funds Held in the Registry of the Court" following a judgment by the Texas Supreme Court that awarded conditional appellate attorney fees. CTMI asserts the trial court abused its discretion in granting the motion because "a fair reading of the plain language of the [f]inal [j]udgment" leads to the conclusion that "[Fischer] is not entitled to recover any appellate attorney's fees." Fischer argues in response that this Court should dismiss the appeal because: (1) the trial court's motion

"is as a matter of fact and law not an appealable order"; and (2) CTMI's "putative [n]otice of [a]ppeal filed on November 10, 2016 was untimely."

We conclude we have jurisdiction over CTMI's appeal. Further, we affirm the trial court order in part and reverse and render in part.

I. Factual and Procedural Background

This appeal stems from an original lawsuit filed by CTMI against Fischer in connection with CTMI's purchase of Fischer's business. In the original lawsuit, CTMI sued Fischer for declaratory relief in the trial court, arguing a provision of the parties' "[a]sset [p]urchase [a]greement [was] an unenforceable 'agreement to agree.'" Fischer counterclaimed for breach of the agreement.

The trial court rendered judgment for Fischer, concluding the asset purchase agreement was enforceable and accordingly denying CTMI's request for declaratory relief. CTMI then appealed the trial court's judgment to this Court. *See CTMI, LLC v. Fischer*, 479 S.W.3d 279 (Tex. App.—Dallas Aug. 20, 2013, pet. granted). This Court "reversed the judgment of the trial court" and concluded the provision was "unenforceable as a matter of law." *See Fischer v. CTMI, L.L.C.*, 479 S.W.3d 231, 237 (Tex. 2016). Fischer then appealed our decision to the Texas Supreme Court. The Texas Supreme Court "reverse[d] [this Court's] judgment and render[ed] judgment reinstating the trial court's denial of CTMI's claim for declaratory relief." *Id.* at 244.

The trial court's judgment that was reinstated by the Texas Supreme Court denied CTMI's request for declaratory relief and contained provisions for appellate attorney's fees. The language of the judgment pertaining to appellate attorney's fees provides as follows:

> IT IS FURTHER ORDERED ADJUDGED AND DECREED that **Plaintiffs Ray Fischer** and RY Fischer & Associates, Inc. f/k/a Corporate Tax Management, Inc. have and recover from and against **Defendants CTMI, LLC,** a Texas Limited Liability Company, Mark Boozer, an individual, and Jerrod Raymond, an individual, jointly and severally, all costs, fees, and expenses, including reasonable

> and necessary attorney's fees, incurred by Plaintiffs in the enforcement of this Judgment.
>
> IT IS FURTHER ORDERED ADJUDGED AND DECREED that in the event of an unsuccessful appeal by any of the Defendants to the Court of Appeal [sic], against one or more of the Plaintiffs, the reasonable and necessary [sic] which will be incurred by one or more of the Plaintiffs would be $20,000 relating to such appeal to the Court of Appeals.
>
> IT IS FURTHER ORDERED ADJUDGED AND DECREED that in the event of an unsuccessful appeal by any of the Defendants to the Supreme Court of Texas, against one or more of the Plaintiffs, the reasonable and necessary [sic] which will be incurred by one or more of the Appellees would be $10,000 relating to an unsuccessful petition for review and $10,000 if the petition for review is granted, through full briefing to the Texas Supreme Court argument and rendition of opinion.

(Emphasis added.)

After the Texas Supreme Court issued its mandate, Fischer filed discovery requests in the trial court against CTMI to "aid in [Fischer's] collection and enforcement of the [f]inal [j]udgment, particularly attorney's fees awarded in the [f]inal [j]udgment." CTMI did not respond to Fischer's discovery requests. Accordingly, Fischer filed a "Motion to Compel Post-Judgment Discovery" in the trial court.

CTMI filed a response to Fischer's motion compelling post-judgment discovery, contending (1) Fischer "never served post-judgment discovery upon [CTMI], (2) Fischer did "not have an enforceable judgment against [CTMI] for recovery of appellate attorney fees in this case," and (3) Fischer did "not allege nor can they demonstrate, even if it is ultimately determined that [CTMI] [is] required to pay appellate attorney fees, that [CTMI] do[es] not have the ability or willingness to pay them, thus obviating the necessity of unnecessary, burdensome and harassing "post-judgment" discovery requests." The trial court granted Fischer's motion to compel post-judgment discovery.

Next, CTMI filed a "Motion to Confirm Judgment and Suspend Discovery" ("motion to confirm"), stating, in part, that CTMI "dispute[d] whether [they] owe[d] appellate attorneys' fees" and "dispute[d] the necessity of [Fischer's] discovery requests." Further, CTMI "ask[ed] that [the trial court] solve both issues by suspending postjudgment discovery until [the trial court] rule[d] on whether [CTMI] actually owe[d] the appellate attorneys' fees." Additionally, CTMI stated it would "aid this process by depositing $49,750.00 into the Court's registry for disbursement to the proper party upon the Court's ruling."

On the heels of the motion to confirm, CTMI filed a "Motion to Tender Funds into the Court Registry Pending Decision on Defendants' Motion to Confirm Judgment and Suspend Discovery." In that motion, CTMI stated it "tender[ed] the sum of [sic] $49,750.00 into the [trial] court's registry." The sum was, in fact, paid into the court's registry. The trial court did not rule on CTMI's motion to confirm.

After CTMI deposited the funds, Fischer filed a "Motion to Release Funds Held in the Registry of the Court" contending that "[p]ursuant to the terms of the [f]inal [j]udgment and [m]andate, the funds… held in the [trial] [c]ourt's registry belong to [Fischer]." The trial court granted Fischer's motion and ordered the District Clerk to release to Fischer the $49,750.00.

On November 10, 2016, CTMI filed in the trial court a "Notice of Appeal" to appeal the trial court's "Order Granting Plaintiffs' Motion to Release Funds Held in the Registry of the Court." The same day, on November 10, 2016, CTMI filed in this Court their "First Motion to Extend Time to File Notice of Appeal" explaining CTMI was not "served with notice that the [t]rial [c]ourt had entered the order releasing the funds" until November 4, 2016. On November 29, 2016, this Court granted CTMI's motion for extension of time to file notice of appeal.

II. Motion to Dismiss

Fischer filed a motion to dismiss in this Court, contending we lack jurisdiction over the appeal because (1) the trial court's order granting plaintiff's motion to release funds held in the registry of the Court is "not an appealable order" and (2) CTMI's notice of appeal was "untimely" and did not comply with "the requirements and procedures required by Tex. R. App. P. 4.2 and Tex. R. Civ. P. 306(a)." For the reasons stated below, we deny Fischer's motion to dismiss the appeal.

A. Applicable Law

"[A]n order or judgment is final for purposes of appeal when it disposes of every pending claim and party." *Southwest Galvanizing, Inc. v. Eagle Fabricators, Inc.*, 447 S.W.3d 473, 477 (Tex. App.—Houston [14th Dist.] 2014, no pet.). "To make this determination, we look to the record because the record 'may help illuminate whether an order is made final by its own language, so that an order that all parties appear to have treated as final may be final despite some vagueness in the order itself.'" *Id.* (quoting *Lehmann v. Har–Con Corp.*, 39 S.W.3d 191, 205-06 (Tex.2001). A "post-judgment order may be considered a final, appealable order when a party is 'denied the benefits of [its] judgment by the order.'" *Id.* (quoting *Parks v. Huffington*, 645 (Tex. App.—Houston [14th Dist.] 1981, writ ref'd n.r.e.). "Post-judgment orders embodying awards to claimants or enforcing the court's judgment itself are appealable orders; they function like judgments." *Cook v. Stallcup*, 170 S.W.3d 916, 919-20 (Tex. App.—Dallas 2005, no pet.) (citing *Kenseth v. Dallas County*, 126 S.W.3d 584, 600 (Tex. App.—Dallas 2004, pet. denied).

Texas Rule of Appellate Procedure 26.3 provides "[t]he appellate court may extend time to file the notice of appeal if, within 15 days after the deadline for filing the notice of appeal, the party: (a) files in the trial court the notice of appeal; and (b) files in the appellate court a motion complying with Rule 10.5(b)." TEX. R. APP. P. 26.3. Texas Rule of Appellate Procedure 10.5(b)

states "a motion to extend time for filing a notice of appeal, must state: …the facts relied on to reasonably explain the need for an extension." TEX. R. APP. P. 10.5(b)(1)(C), (b)(2)(A).

B. Application of Law to the Facts

Fischer contends the trial court's order releasing the funds held in the court registry is "not an appealable order" and this Court "is required to dismiss any appeal for lack of jurisdiction." Fischer asserts "[t]he [f]inal [j]udgment in this case was already appealed and resulted in adjudication and opinion by the Texas Supreme Court." Therefore, Fischer argues, the trial court's order releasing the funds "was issued in aid of enforcement and execution of its [f]inal [j]udgment, in the nature of a writ of execution, made for the purpose of carrying into effect the court's prior judgment, and thus not a judgment or order from which an appeal may be taken."

Fischer cites several cases for the proposition that the trial court's order is "not an appealable order." Those cases are inapposite. *See Wagner v. Warnasch*, 295 S.W.2d 890 (Tex. 1956); *Knoles v. Wells Fargo Bank, N.A.*, No. 05-12-00473-CV, 2012 WL 6685448 (Tex. App.—Dallas Dec. 21, 2012); and *Davis v. Merriman*, No. 04–13–00518–CV, 2015 WL 1004357 (Tex. App.—San Antonio Mar. 4, 2015, pet. denied).

In *Wagner*, the order at issue was a "show cause order" that ordered the appellees to show cause why they could not comply with a trial court judgment or otherwise be adjudged to be in contempt of court. *Wagner*, 295 S.W.2d 890, 892. The Texas Supreme Court held the order was not appealable because it was not a final judgment. *Wagner*, 295 S.W.2d 890, 892. The court stated that "[t]o be final a judgment must determine the rights of the parties and dispose of all the issues involved so that no future action by the court will be necessary in order to settle and determine the entire controversy." *Id.* at 892. In that case, the court concluded "[a] further order would be required after a hearing to determine whether an act of contempt had been committed, and, if so, assess the penalty therefor." *Wagner* is distinguishable from the case before us because, unlike in

Wagner, no further action by the court was necessary to settle the issue of attorney's fees between CTMI and Fischer.

In *Knoles,* appellant challenged (1) the trial court's "order denying [appellant's] emergency motion to quash or stay writ of execution…and challenging 'in any manner' the execution of the writ," and (2) the "order sanctioning [appellant's] counsel for actions taken in connection with the writ." *See Knoles* No. 05-12-00473-CV at *1. This Court determined we lacked jurisdiction because "order[s] incident to a writ of execution [are] not appealable" and appellant had "no standing to appeal the order imposing sanctions." *Id. Knoles* is distinguishable in light of the fact that the post-judgment order in the case before us does not involve a writ of execution or sanctions as was presented in *Knoles.*

Finally, in *Davis,* the order at issue enforced a judgment confirming an arbitration award. *Davis*, 2015 WL 1004357 at *5. The San Antonio Court of Appeals held the order was not appealable because "it merely carrie[d] into effect the judgment confirming the arbitration award." *Id.* at *5. *Davis* is distinguishable from the case before us. In this case, the order releasing the funds held in the registry of the court did not merely carry into effect the trial court's judgment, but the order interpreted the judgment deciding which party was to be awarded the funds.

In the case before us, two court of appeals decisions in particular instruct our decision. *See Cook* 170 S.W.3d 916; *see also Southwest Galvanizing,* 447 S.W.3d 47.

In *Cook,* Stallcup sued Cook alleging he and Cook were married and requesting a division of community property. Cook contended they had never been married. As a preliminary step, the trial court ordered the sale of an alleged "community property" home owned by Cook and "deposited [the proceeds from the sale] into the Court's registry, pending resolution of the parties' dispute" regarding whether Cook and Stallcup had ever been married. *Cook,* 170 S.W.3d 916, 919-20. Cook and Stallcup later nonsuited their claims in that case. Then, Cook filed another suit and

ultimately "obtained a summary judgment on her…claim that she and Stallcup were never married." Next, Cook filed a "'post-judgment motion to release monies in the registry' requesting the court to disburse the funds to her attorney." *Id.* at 919. The trial court denied Cook's motion. Cook appealed. This Court concluded the order of the trial court was appealable saying, "[p]ost-judgment orders embodying awards to claimants or enforcing the court's judgment itself are appealable orders; they function like judgments." *Id.* at 919-20 (citing *Kenseth,* 126 S.W.3d 584, 600). Further, this Court concluded "the trial court erred by denying Cook's post-judgment motion to release the funds in the registry" because the "trial court's judgment that there was no marriage disposed of Stallcup's claim to the property and to the funds." *Cook,* 170 S.W.3d at 921; *see also Grant v. Hope Vill. Apartments,* No. 09-09-00527-CV, 2010 WL 4262001, at *2 (Tex. App.—Beaumont, Oct. 28, 2010, pet. denied) ("[A] trial court's order releasing funds from the court's registry" is "appealable").

In *Southwest Galvanizing*, the 14th Court of Appeals "rendered judgment awarding attorney's fees" to Southwest Galvanizing. 447 S.W.3d at 477. In response, Eagle deposited funds representing attorney's fees owed to Southwest Galvanizing into the trial court registry. *Id.* The trial court then signed an "order and memorandum of satisfaction" finding that Eagle had satisfied the judgment "in all respects" and owed no outstanding judgment debt to Southwest Galvanizing. *Id.* at 476. Southwest Galvanizing appealed the "order." *Id.* at 475.

The 14th Court of Appeals concluded the "sole ultimate issue in the case" was "[w]hether the prior judgment [awarding attorney's fees] had been satisfied." *Id*. at 477. Therefore, "the trial court's order containing [the memorandum of satisfaction] disposed of all issues in the case." *Id.* Accordingly, the Court of Appeals decided "a post-judgment order may be considered a final, appealable order when the party is 'denied the benefits of [its] judgment by the order,' or when the

order disposes of all the issues between the parties." *Id.* (quoting *Parks v. Huffington*, 616 S.W.2d 641, 645).

Similar to the steps taken by the parties in *Cook* and *Southwest Galvanizing,* CTMI deposited funds in the registry of the court "to be released to the proper party upon the [trial] [c]ourt's determination of the final order." *See Cook* 170 S.W.3d 916; *see also Southwest Galvanizing,* 447 S.W.3d 47. The sole issue in the trial court below in this case was whether, under the terms of the trial court's judgment, Fischer was entitled to recover appellate attorney's fees. When the trial court granted Fischer's "Motion to Release Funds Held in the Registry of the Court", it disposed of all issues between CTMI and Fischer. Thus, the post-judgment order was final for purposes of appeal.

Now we address Fischer's second argument raised in his motion to dismiss. Specifically, as to the timeliness of the notice of appeal, Fischer asserts we must "dismiss [CTMI's appeal] for want of jurisdiction" because CTMI's "Motion to Extend Time To File Notice of Appeal" was "untimely" and did not comply with "the requirements and procedures required by" Texas Rule of Civil Procedure 306(a) and Texas Rule of Appellate Procedure 4.2.

Fischer acknowledges that CTMI relied upon Texas Rule of Civil Procedure 26.3 to obtain an extension to file its notice of appeal. The record reflects that CTMI filed its "First Motion to Extend Time to File Notice of Appeal" within the fifteen-day grace period provided by Rule 26.3. *See* TEX. R. APP. P. 26.3. In its motion, CTMI explained its reason for the untimely filing was that "[n]either [CTMI] nor their counsel of record in the trial court were served with notice that the [t]rial [c]ourt had entered the order releasing the funds" until after the filing deadline had passed. Because CTMI's motion was filed within the fifteen-day grace period and because CTMI provided a reasonable explanation for the late filing, CTMI complied with Texas Rule of Civil Procedure 26.3. *See Meshwert v. Meshwert*, 549 S.W.2d 383, 384 (Tex.1977) (A reasonable explanation is

"any plausible statement of circumstances indicating that failure to file within the [specified] period was not deliberate or intentional, but was the result of inadvertence, mistake or mischance.").

However, Fischer argues CTMI was also required to file a motion in the trial court complying with Texas Rule of Civil Procedure 306(a) and Texas Rule of Appellate Procedure 4.2 because CTMI's "*only* 'reasonable explanation'" was that it "did not acquire knowledge of the entry of the order until…after the deadline for filing." Fischer contends "[s]ubsection (5) of Rule 306(a) provides a procedure requiring a sworn motion to be filed in the *trial court*, establishing a prima facie case that the party lacked notice within the period established by Rule 306a(4)" and Rule 4.2 provides "after a hearing on a 306a(5) motion, the party must obtain a signed order specifying the date that notice or actual knowledge was first received."

Fischer cites no cases that hold Rule 306a(5) or 4.2 apply when a party complies with the requirements of Texas Rule of Appellate Procedure 26.3. Fischer does cite *Sagastume v. Wells Fargo Bank, N.A.* where the notice of appeal was filed within the fifteen-day grace period provided by Rule 26.3. *Sagastume v. Wells Fargo Bank, N.A.*, No. 02-13-00458-CV, 2014 WL 982408 (Tex. App.—Fort Worth Mar. 13, 2014, no pet.). However, *Sagastume* is distinguishable from the case before us because in *Sagastume,* the appellant provided no explanation for needing an extension, which is "necessary" for Rule 26.3 to apply. *Id.* On this record, we conclude Texas Rule of Civil Procedure 306(a)(5) and Texas Rule of Appellate Procedure 4.2 were not implicated and do not apply.

Accordingly, both arguments raised by Fischer respecting its motion to dismiss are not meritorious.

III. Appellate Attorney's Fees

In its sole issue on the merits, CTMI contends the "trial court abused its discretion" by "making an unconditional award of attorneys' fees" to appellees and therefore the trial court's order is void. Further arguing, CTMI contends the trial court's order releasing funds to Fischer "is contrary to the [f]inal [j]udgment because the express conditions to the award [of attorney's fees] never occurred."

A. Standard of Review

Appellate courts apply an abuse of discretion standard in cases involving the recovery of attorney's fees. *Southwest Galvanizing Inc.*, 447 S.W.3d 473. A trial court abuses its discretion if it acts "arbitrary or unreasonable" or "without reference to any guiding rules and principles." *Downer v. Aquamarine Operators, Inc.*, 701 S.W.2d 238, 241-42 (Tex. 1985).

B. Applicable Law

Appellate courts "construe orders under the same rules of interpretation as those applied to other written instruments." *Icon Benefit Administrators II, L.P. v. Mullin*, 405 S.W.3d 257, 264 (Tex. App.—Dallas 2013, no pet.). "When a written instrument is so worded that it can be given a certain or definite legal meaning or interpretation, the court will construe the document as a matter of law." *Id.* When "an order is unambiguous, we must construe it in light of the literal meaning of the language used." *Id.*

C. Application of the Law to the Facts

CTMI contends the trial court's order releasing to Fischer the funds held in the court's registry is "inconsistent with the original judgment" and is therefore void. However, we recognize that a "trial court always has authority to enforce its judgment and to disburse money held in its registry." *See Kenseth,* 126 S.W.3d at 599. Accordingly, we cannot agree the order is void. *See*

id. ("So long as the trial court has jurisdiction over the parties and the subject matter at issue…the order at issue is not void.").

CTMI also argues that the "plain language of the Final Judgment does not permit an award of appellate fees under the facts and circumstances of this case" and therefore the trial court abused its discretion in granting Fischer's motion. The pertinent language of the trial court's original final judgment awarding attorney's fees states, in part:

> IT IS FURTHER ORDERED ADJUDGED AND DECREED that **Plaintiffs Ray Fischer** and RY Fischer & Associates, Inc. f/k/a Corporate Tax Management, Inc. have and recover from and against **Defendants CTMI, LLC,** a Texas Limited Liability Company, Mark Boozer, an individual, and Jerrod Raymond, an individual, jointly and severally, all costs, fees, and expenses, including reasonable and necessary attorney's fees, incurred by Plaintiffs in the enforcement of this Judgment.
>
> IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that in the event of an unsuccessful appeal by any of the Defendants to the Court of Appeal [sic], against one or more of the Plaintiffs, the reasonable and necessary [sic] which will be incurred by one or more of the Plaintiffs would be $20,000 relating to such appeal to the Court of Appeals.
>
> IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that in the event of an unsuccessful appeal by any of the Defendants to the Supreme Court of Texas against one or more of the Plaintiffs, the reasonable and necessary [sic] which will be incurred by one or more of the Plaintiffs would be $10,000 relating to an unsuccessful Petition for Review and an additional $10,000 if the Petition for Review is granted, through full briefing to the Texas Supreme Court, argument, and rendition of opinion.

(Emphasis added.)

The specific language of the judgment affords the "Plaintiffs" recovery of attorney fees if any of the "Defendants" are "unsuccessful" in their appeal against one or more of the "Plaintiffs" to the Court of Appeals or the Texas Supreme Court. In the trial court, and as reflected in the trial court's judgment, the Fischer parties were the "Plaintiffs" and the CTMI parties were the "Defendants." Accordingly, we must determine whether under this language there was an

unsuccessful appeal by CTMI against Fischer to the Court of Appeals or the Texas Supreme Court. We construe the judgment "in light of the literal meaning of the language used." *Icon*, 405 S.W.3d 257, 264.

The reasoning in *Southwest Galvanizing* is instructive. *See Southwest Galvanizing Inc.*, 447 S.W.3d 473. In *Southwest Galvanizing*, the 14th Houston Court of Appeals interpreted a trial court mandate and judgment to determine whether the "trial court abused its discretion by prohibiting the collection of appellate attorney's fees." 447 S.W.3d at 478. That case involved two appeals. In the original case, Southwest Galvanizing sued Eagle Fabricator's Inc. to recover for services performed. *See Southwest Galvanizing, Inc.* 383 S.W.3d 677. The jury found in favor of Southwest Galvanizing and awarded damages of "$25,000 [in attorney's fees to Southwest Galvanizing] in the event of an unsuccessful appeal by [Eagle] to the Court of Appeals." *Id.* at 678, 682. However, the trial court "disregarded the jury's findings" and ordered remittitur of the jury's award, reducing the award to "10,000 [in attorney's fees to Southwest Galvanizing] in the event of an unsuccessful appeal by [Eagle] to the Court of Appeals." *Id.* Southwest Galvanizing appealed the trial court's judgment to the 14th District Court of Appeals. *Id.* at 681. The Court of Appeals reversed the trial court's judgment and "award[ed] attorney's fees [to Southwest Galvanizing] consistent with the jury's findings." *Id.*

In the second appeal, Southwest Galvanizing served "post-judgment discovery" requests against Eagle in the trial court "in connection with its efforts to recover the $25,000 for Eagle's 'unsuccessful appeal'" in the initial appeal. *Southwest Galvanizing Inc.*, 447 S.W.3d at 476. The trial court rendered judgment for Eagle, finding Eagle "[had] no outstanding judgment debt to Southwest Galvanizing." *Id.* Southwest Galvanizing appealed.

In analyzing whether there was an "unsuccessful appeal" by Eagle in the initial appeal, the Court of Appeals observed that its mandate and opinion in the first appeal expressly designated

Southwest Galvanizing as the 'appellant' and Eagle as the 'appellee.' *Id.* at 479. Therefore, the court concluded Southwest Galvanizing was the "'party who appeal[ed] a lower court's decision,' and Eagle was the 'party against whom an appeal [was] taken and whose role [was] to respond to that appeal.'" *Id.* Accordingly, the Court of Appeals concluded there was no "unsuccessful appeal" by Eagle. *Id.*

Of course, this case, like *Southwest Galvanizing,* involves two appeals. In the final original judgment, the trial court held in favor of Fischer, the "Plaintiff", concluding the asset purchase agreement between CTMI, the "Defendant" in the trial court, and Fischer was enforceable. CTMI appealed the trial court's decision to this Court. *See CTMI, LLC v. Fischer,* 479 S.W.3d 279 (Tex. App.—Dallas 2013). We reversed the trial court and held for CTMI, the appellant in that case, concluding the asset purchase agreement was unenforceable. *Id.* Fischer then appealed our opinion to the Texas Supreme Court. *See Fischer v. CTMI, L.L.C.,* 479 S.W.3d 231, 237 (Tex. 2016). The supreme court reversed our decision and reinstated the trial court's judgment that held in favor of Fischer. *See Fischer v. CTMI, L.L.C.,* 479 S.W.3d 231, 237 (Tex. 2016).

CTMI contends its first appeal to this Court, where we reversed the trial court's judgment that held against CTMI, resulted in a "successful appeal." Therefore, CTMI asserts there was no unsuccessful appeal by any of the "Defendants", i.e. CTMI, against any of the "Plaintiffs" (Fischer) to the Court of Appeals. We disagree.

When we issued our opinion and held in favor of CTMI in its initial appeal, our judgment was not final. The judgment became final when the Texas Supreme Court issued its mandate. *See Texas Co. v. Clark & Co.,* 112 Tex. 74, 244 S.W. 995, ("[A] judgment of a court of civil appeals [is] not …a [final] judgment as long as it [is] subject to review by the Supreme Court."); *see also Long v. Martin* (Tex. Civ. App.) 260 S.W. 327, 329 ("The Supreme Court is the final judge of its own jurisdiction."); *see also Engelman Irrigation Dist. v. Shields Bros., Inc.,* 514 S.W.3d 746, 749

(Tex. 2017) ("[R]eference to a 'final judgment' means one where the trial court has rendered a final judgment and all direct appeals have been exhausted."). The Texas Supreme Court's final judgment was in Fischer's favor. Accordingly, after the Texas Supreme Court's judgment, CTMI's initial appeal to this Court became unsuccessful. The judgment awards attorney's fees to Fischer, the "Plaintiff", upon the "event of an unsuccessful appeal by any of the Defendants [CTMI] to the Court of Appeal [sic] against one or more of the Plaintiffs [Fischer]." In this appeal, CTMI contested the trial court's $20,000 award to Fischer. This award was compensation for what was, ultimately, an unsuccessful appeal by CTMI to the Court of Appeals. The trial court did not err in awarding $20,000 on this part of the judgment.

We must now address whether there was an "unsuccessful appeal by any of the Defendants [CTMI] to the Supreme Court of Texas against one or more of the Plaintiffs [Fischer]." Following our decision in the first appeal in favor of CTMI, Fischer appealed to the Texas Supreme Court, which rendered judgment reinstating the trial court's judgment in favor of Fischer. *Fischer v. CTMI, L.L.C.*, 479 S.W.3d 231, 237 (Tex. 2016). Construing the judgment "in light of the literal meaning of the language used," the Texas Supreme Court in its mandate designated Fischer as "petitioner," and CTMI as "respondent[]." "Petitioner" is defined by Black's Law Dictionary as "[a] party who presents a petition to a court …when seeking relief on appeal." *Icon*, 405 S.W.3d 257, 264, *see also Petitioner*, *Black's Law Dictionary* (10th ed. 2014). "Respondent" is defined by Black's Law Dictionary as "[t]he party against whom an appeal is taken." *See Respondent, Black's Law Dictionary* (10th ed. 2014). Therefore, Fischer, the "Plaintiff", not CTMI, the "Defendant", was the party who appealed to the Texas Supreme Court. *See Icon,* 405 S.W.3d 257, 264. Accordingly, CTMI, the "Defendant", did not pursue an appeal to the Texas Supreme Court. There was no unsuccessful appeal by any of the Defendants (CTMI) to the Supreme Court of Texas

against one or more of the Plaintiffs (Fischer). On this record, Fischer is not entitled to the award made by the trial court of $20,000 for its appeal to the supreme court.

IV. Conclusion

For the above reasons, we conclude the trial court did not abuse its discretion in awarding $20,000 in appellate attorney fees to Fischer for an unsuccessful appeal by CTMI to this Court. This part of the trial court's judgment is affirmed. We conclude the trial court abused its discretion in awarding $20,000 in appellate attorney fees to Fischer for an unsuccessful appeal by CTMI to the Supreme Court of Texas. As to this part of the judgment awarding $20,000 to Fischer, we reverse the trial court's judgment and render judgment that Fischer take nothing as to attorney's fees respecting its appeal to the supreme court.

Accordingly, we remand this case to the trial court for the determination of what sums are due to Fischer, including interest, in respect of the $20,000 attorney's fees to which Fischer is entitled, and to address repayment to CTMI of the balance of any additional sums withdrawn by counsel for Fischer to which they are not entitled pursuant to this opinion of this Court.

/Douglas S. Lang/

DOUGLAS S. LANG
JUSTICE

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Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

CTMI, LLC, MARK BOOZER, AND JERROD RAYMOND, Appellants

No. 05-16-01327-CV V.

RAY FISCHER AND CORPORATE TAX MANAGEMENT, INC., Appellees

On Appeal from the 192nd Judicial District Court, Dallas County, Texas
Trial Court Cause No. DC-11-08088.

Opinion delivered by Justice Lang. Justices Brown and Whitehill participating.

In accordance with this Court's opinion of this date, the judgment of the trial court is **AFFIRMED** in part and **REVERSED** in part. We **REVERSE** the portion of the trial court's judgment as to the award of $20,000 in appellate attorney fees to Fischer for an unsuccessful appeal by CTMI to the Supreme Court of Texas. In all other respects, the trial court's judgment is **AFFIRMED**.

We **REMAND** this cause to the trial court for the determination of what sums are due to Fischer, including interest, in respect of the $20,000 in appellate attorney fees to which Fischer is entitled, and to address repayment to CTMI of the balance of any additional sums withdrawn by counsel for Fischer to which they are not entitled pursuant to this opinion of this Court.

Judgment entered this 15th day of May, 2018.