

DISMISS and Opinion Filed March 31, 2022



**In The
Court of Appeals
Fifth District of Texas at Dallas**

No. 05-21-01021-CV

**FOCUSED POST ACUTE CARE PARTNERS MANAGEMENT, LLC,
Appellant**

V.

**RELIANT PRO REHAB, LLC D/B/A RELIANT REHABILITATION,
Appellee**

**On Appeal from the 471st Judicial District Court
Collin County, Texas
Trial Court Cause No. 471-03883-2020**

MEMORANDUM OPINION

Before Justices Partida-Kipness, Reichek, and Goldstein
Opinion by Justice Goldstein

This appeal follows the trial court's October 25, 2021 order granting appellee's first amended traditional motion for summary judgment. Because the order was ambiguous with regard to finality, we abated the appeal to allow the trial court to clarify if it intended the order to be final and appealable. The trial court clarified its intent by amending the order to specifically indicate it was not final.

Subject to exceptions not applicable here,¹ a summary judgment order that is not final is not appealable. Accordingly, we dismiss the appeal.

DISCUSSION

To be final for purposes of appeal, an order or judgment must dispose of all parties and all claims. *See Lehmann v. Har-Con Corp.*, 39 S.W.3d 191, 195 (Tex. 2001). A presumption exists that an order or judgment rendered after a bench or jury trial is final, but no similar presumption exists for an order or judgment rendered without a conventional trial on the merits, such as a summary judgment. *See id.* at 199-200. Rather, an order or judgment rendered without a conventional trial on the merits is final only if it actually disposes, or “clearly and unequivocally” states it disposes, of all claims and all parties. *See id.* at 205. No “magic language” is required, but in *Lehmann v. Har-Con Corp.*, the Texas Supreme Court noted that a trial court could express its intent to render a final order or judgment by including a statement that the order or judgment “finally disposes of all parties and all claims and is appealable.” *See Bella Palma, LLC v. Young*, 601 S.W.3d 799, 801 (Tex. 2020) (per curiam); *Lehmann*, 39 S.W. 3d at 206. If the intent of an appealed order or judgment is unclear, the appellate court may abate the appeal to allow the trial court an opportunity to clarify its intent. *See Lehmann*, 39 S.W.3d at 206.

¹ *See* TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(a).

The original order here found in favor of appellee on the claims it brought against appellant; denied appellant's counterclaims; and, awarded appellee over \$3,000,000 in damages, reasonable attorney's fees and costs incurred through the date of the order in the amount of \$44,331.30, and reasonable attorney's fees and costs since the date of the order and to defend an appeal "in an amount to be determined at trial." The order also stated it was "intended to be a final order and judgment which finally dispose[d] of all issues and all claims against all parties."

The amended order that followed after we abated the appeal to allow the trial court to clarify whether it intended to leave the claim for appellate attorney's fees pending or intended to dispose of the entire case added a sentence that the claim for fees remained pending and deleted the finality language. Because this order did not appear final as it did not dispose of all claims, we questioned our jurisdiction over the appeal. *See id.* at 195. At our direction, the parties filed letter briefs addressing our concern. Appellee agrees we lack jurisdiction because the amended order is not final. Appellant, however, asserts we have jurisdiction, not because the amended order is final but because the original order was final. Appellant's argument is premised on the finality language included in the original order. Relying on *Lehmann*, appellant maintains that language rendered the order final, regardless of any conflicting language elsewhere in the order, and the abatement of the appeal to allow for the trial court to clarify the intent of its original order, was improper. Appellant further argues that while the trial court could have amended the order to

clarify any ambiguity, such a clarification would amount to correction of a judicial error and could only occur within the trial court’s plenary power. *See Escobar v. Escobar*, 711 S.W.2d 230, 231 (Tex. 1986) (after plenary power expires, trial court can correct clerical error in entering judgment but cannot correct judicial error made in rendering judgment). Because no post-judgment motion extending the court’s plenary power was filed following rendition of the original order, the trial court’s plenary power expired November 24, 2021 and, according to appellant, the amended order, signed eleven weeks later, is void. *See* TEX. R. CIV. P. 329b(d),(e) (together providing that trial court retains plenary power over judgment for thirty days after judgment is signed and, if motion for new trial is timely filed, plenary power is extended to thirty days after motion is overruled by operation of law or signed order, whichever occurs first); *State ex rel. Latty v. Owens*, 907 S.W.2d 484, 486 (Tex. 1995) (per curiam) (“Judicial action taken after the court’s jurisdiction over a cause has expired is a nullity.”).

Inclusion of language identified by *Lehmann* as indicating finality, however, does not make a judgment final when, as here, the judgment’s substance directly conflicts with that statement. *Paxton v. Simmons*, 05-20-00058-CV, 2022 WL 190302, at *5 (Tex. App.—Dallas Jan. 21, 2022, no pet. h.). As stated, to be final, a summary judgment order must actually dispose of, or “clearly and unequivocally” state it disposes of, all claims and all parties. *See Lehmann*, 39 S.W.3d at 205. While the original order stated it intended to be a final order that disposed of all claims and

all parties, it also left pending for trial the claim for appellate attorney's fee. The order neither actually disposed of all issues and parties nor "clearly and unequivocally" stated it was disposing of all issues and parties. Accordingly, the abatement for clarification of the trial court's intent was proper, and the amended order is not void.

Because the amended order is not void, it is the order that determines our jurisdiction. And because it is not final, it is not appealable and does not confer jurisdiction on the Court. Accordingly, we dismiss the appeal. *See* TEX. R. APP. P. 42.3(a).

/Bonnie Lee Goldstein/
BONNIE LEE GOLDSTEIN
JUSTICE

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**Court of Appeals
Fifth District of Texas at Dallas**

JUDGMENT

FOCUSED POST ACUTE CARE
PARTNERS MANAGEMENT,
LLC, Appellant

No. 05-21-01021-CV V.

RELIANT PRO REHAB, LLC
D/B/A RELIANT
REHABILITATION, Appellee

On Appeal from the 471st Judicial
District Court, Collin County, Texas
Trial Court Cause No. 471-03883-
2020.

Opinion delivered by Justice
Goldstein, Justices Partida-Kipness
and Reichek participating.

In accordance with this Court's opinion of this date, we **DISMISS** the appeal.

We **ORDER** that appellee Reliant Pro Rehab, LLC d/b/a Reliant Rehabilitation recover its costs, if any, of this appeal from appellant Focused Post Acute Care Partners Management, LLC.

Judgment entered March 31, 2022.