**Opinion issued August 28, 2008**

**In The**
**Court of Appeals**
**For The**
**First District of Texas**

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**NO. 01-06-00901-CV**

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**GEORGE HERNANDEZ, Appellant**

**V.**

**MARIA GUADALUPE LOPEZ (HERNANDEZ) AND THE OFFICE OF THE ATTORNEY GENERAL OF TEXAS, Appellees**

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**On Appeal from the 311th District Court**
**Harris County, Texas**
**Trial Court Cause No. 1991-42738**

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## DISSENTING OPINION

I respectfully dissent. Appellant George Hernandez contends that the trial

court erred by granting the motion of appellee, the Office of the Attorney General of Texas ("the OAG"), for judgment nunc pro tunc because the evidence is insufficient to support the trial court's implied finding that the agreed order contained a clerical error. The majority agrees, and I disagree. I would affirm the judgment nunc pro tunc in favor of the OAG.

George appeals from a nunc pro tunc judgment signed on August 22, 2006, correcting the date on which he was found to be in arrearage on child support payments to December 31, **2003** from the date of December 31, **2004** recited in the original judgment executed on January 28, 2004.

The January 28, 2004 judgment adopted as the judgment of the trial court a family law master's report dated January 21, 2004 approving the parties' "Agreed Order Enforcing Child Support Obligation" ("Agreed Order"). The master signed the report following a child-support enforcement hearing in which the master heard evidence of the terms of the Agreed Order and transcribed them in a written "Agreed Order," which appellant and appellees Maria Guadalupe Lopez (Hernandez) and the OAG then initialed and the master signed. The Agreed Order stated, in relevant part, "The Court FINDS and CONFIRMS that George Everardo Hernandez is in arrears in the amount of $51,000.00 as of December 31st, 200**4**"—a date then eleven months in the future—including "all unpaid child support and any balance owed on

previously confirmed arrearages or retroactive support judgments as of the specified date." (Bold emphasis added.). The trial court rendered judgment against George in the amount of $51,000 on the basis of that finding and stated that "[t]he judgment for this amount is a cumulative judgment." The judgment also contained findings that George failed to pay court-ordered child support on four specific dates in 2003.

The OAG subsequently moved for judgment nunc pro tunc, contending that the Agreed Order transcribed by the master, initialed by the parties, and signed by the master on January 21, 2004, and signed and adopted as the judgment of the trial court on January 28, 2004, did not reflect the agreement of the parties but contained a clerical error, namely the finding that Hernandez was cumulatively in arrears as of December 2004, rather than December 2003. At the nunc pro tunc hearing, held on August 22, 2006, the OAG presented evidence in the form of Maria's testimony that the master heard the terms of the "Agreed Order" in open court and that the date of December 31, 2004 was incorrectly entered in the written master's report:

> Q. Did you approach the judge with the Attorney General and your ex?
>
> A. I believe so, yes, sir.
>
> Q. Okay. And did you-all recite your agreement into the record?
>
> A. Yes, sir.
>
> Q. And was it agreed upon and stipulated on the record that the arrears as of December 31, 2003 were $51,000?

A. Yes, sir.

Q. Was there any testimony on the record—Was there any testimony that the agreement was 2004?

A. No, sir.

George did not present contrary evidence.

At the close of the hearing, the trial court granted the OAG's motion for judgment nunc pro tunc, ordered that the confirmation date of the arrearage be changed from December 31, 2004 to December 31, 2003, and wrote that finding into the August 22, 2006 nunc pro tunc judgment. With respect to the January 28, 2004 judgment, the court commented, "I think it is permissible for the court to assume that the underlying court would not enter a judgment it had no authority to enter." I construe the court's comment as its determination that it had no authority to render a judgment on January 28, 2004 that did not accurately reflect the terms of the agreement presented to the master and that the error was, therefore, a clerical mistake in the entry of the judgment and not a judicial error in the judgment rendered.

"Rendition is the judicial act by which the court settles and declares the decision of the law upon the matters at issue." *Comet Aluminum Co. v. Dibrell*, 450 S.W.2d 56, 58 (Tex. 1970) (quoting *Coleman v. Zapp*, 105 Tex. 491, 151 S.W. 1040, 1041 (Tex. 1912)). An agreed judgment—such as the Agreed Order adopted by the court in this case—is rendered "whenever the trial judge officially announces his

decision in open court . . . in his official capacity for his official guidance whether orally or by written memorandum the sentence of law pronounced by him in any cause." *Samples Exterminators v. Samples*, 640 S.W.2d 873, 875 (Tex. 1982) (quoting *Comet Aluminum*, 450 S.W.2d at 59 and holding that, after parties had voiced their approval of settlement dictated in open court, "the trial court rendered judgment by ordering them to sign and follow the agreement"); *see also Patel v. Eagle Pass Pediatric Health Clinic, Inc.*, 985 S.W.2d 249, 252 (Tex. App.—Corpus Christi 1999, no pet.); *accord Noorian v. McCandless*, 37 S.W.3d 170, 173–74 (Tex. App.—Houston [1st Dist.] 1991, writ denied) (agreeing with *Samples*, but finding that settlement agreement was incomplete and was neither read into record nor admitted as exhibit).

Because an associate judge of a family law court lacks the power to render judgment, however, rendition occurs in a case heard before a master when the referring court adopts the associate judge's report or, if no report is generated, when the court signs the final order. *Stein v. Stein*, 868 S.W.2d 902, 904 (Tex. App.—Houston [14th Dist.] 1994, no writ). In this case, therefore, the trial court rendered judgment by adopting the "sentence of law" in the Agreed Order recited to the master by the parties in open court. *See Samples*, 640 S.W.2d at 875.

The purpose of a judgment nunc pro tunc is to make the written record of a

judgment accurately reflect the trial court's decision and the relief ordered. *See Hawk v. E.K. Arledge, Inc.*, No. 05-01-01144-CV, 2002 WL 1225917, at *2 (Tex. App.—Dallas June 6, 2002, pet. denied) (mem. op.). Thus, the nunc pro tunc rule provides that "clerical mistakes in the record of any judgment may be corrected by the judge in open court according to the truth or justice of the case after notice of the motion therefor has been given to the parties interested in such judgment." TEX. R. CIV. P. 316. A clerical mistake is, by definition, "a mistake or omission in the final written judgment that prevents it from accurately reflecting the judgment actually rendered." *Hawk*, 2002 WL 1225917, at *2. Thus, to support a judgment nunc pro tunc, the judgment entered must differ from the judgment actually rendered, so that the judgment nunc pro tunc serves only to ensure that the judgment rendered is actually entered of record. *Id.*; *see also America's Favorite Chicken Co. v. Galvan*, 897 S.W.2d 874, 879 (Tex. App.—San Antonio 1995, writ denied); *Ex parte Hogan*, 916 S.W.2d 82, 85 (Tex. App.—Houston [1st Dist.] 1996, no writ) (trial court had jurisdiction to correct obvious typographical errors in dates of missed child support payments in contempt order nunc pro tunc to make written judgment speak truth of judgment that judge actually rendered verbally in court).

Whether an error in the judgment is clerical or judicial is a question of law. *Escobar v. Escobar*, 711 S.W.2d 230, 232 (Tex. 1986). However, whether the court

pronounced judgment orally and what the terms of the pronouncement were are matters of fact. *Id.* "The judicial or clerical question becomes a question of law only after the trial court factually determines whether it previously rendered judgment and the judgment's contents." *Id.* The appellate court may review the trial court's factual determinations regarding its rendition of judgment for legal and factual sufficiency of the evidence. *Id.*

Here, the trial court held a hearing on appellees' Rule 316 motion for judgment nunc pro tunc to ensure that the judgment entered accurately reflected the judgment actually rendered. *See* TEX. R. CIV. P. 316. It heard testimony that, under the terms of the Agreed Order stipulated to in open court before the master at the August 21, 2004 hearing, George was in arrears in the amount of $51,000.00 as of December 31, 2003, not, as incorrectly transcribed, 2004. This testimony was not disputed. The court also had before it the January 28, 2004 judgment approving the Agreed Order, which contained the handwritten finding that George's cumulative arrearage was $51,000 as of December 31, 2004.

I would hold that the evidence at the nunc pro tunc hearing was legally and factually sufficient to support the trial court's implied factual determination that the confirmation date of arrearage recorded in its January 28, 2004 judgment did not accurately reflect the terms of the Agreed Order recited in open court, that the

confirmation date of arrearage was incorrectly transcribed, and that George was actually in arrears in the amount of $51,000 as of December 31, 200**3**—not December 31, 2004. Therefore, the written master's report did not accurately reflect the court's "decision of the law upon the matters at issue." *Comet Aluminum*, 450 S.W.2d at 58; *see also Escobar*, 711 S.W.2d at 232 (whether error was clerical or judicial becomes question of law only after trial court factually determines whether it previously rendered judgment and judgment's contents); *see also BMC Software*, 83 S.W.3d 789, 795 (Tex. 2002) (if trial court does not issue findings of fact and conclusions of law "all facts necessary to support the judgment and supported by the evidence are implied").

Because there is probative evidence to support the trial court's determinations that the judgment entered did not accurately reflect the judgment rendered, I would hold that the sentence of law pronounced here by the court's signature on the parties' Agreed Order was that to which the parties testified, namely that George was in arrears in the amount of $51,000 as of December 31, 2003, and that he should pay arrearages from that time—and not from December 31, 2004, a date testified to by no one, contrary to the testimony, the evidence, and logic, and appearing only in the incorrect transcription in the handwritten master's report. And I would further hold that, in hearing and transcribing the terms of the Agreed Order in open court, the

family law master acted as the agent of the trial court in performing the judicial function of hearing and transcribing the terms of the agreed judgment and that any transcription error should be attributed to the court, not to the parties who correctly recited the agreement to the master. Thus, I would hold that the trial court did not err in correcting the arrearage confirmation date in its August 22, 2006 judgment nunc pro tunc, and I would, therefore, affirm the August 22, 2006 nunc pro tunc judgment. *See Escobar*, 711 S.W.2d at 232 (affirming judgment nunc pro tunc when, at hearing on motion for judgment nunc pro tunc, district court heard evidence of partial judgment orally rendered by different presiding judge in complex proceedings that differed from written judgment entered on all claims in case four years later and court heard evidence of contents of oral partial judgment, and some record evidence supported trial court's decision to correct judgment).

The majority, however, holds that because the rendition of judgment occurred on January 28, 2004, when the trial court adopted the master's report, and because all errors in the rendition of judgment are judicial errors, not clerical errors, the trial court erred in correcting the arrearage confirmation date in the January 28, 2004 judgment nunc pro tunc, and it vacates the nunc pro tunc judgment signed on August 22, 2006. The majority relies for support on *Galvan*, 897 S.W.2d 874, *Roman Catholic Diocese of Dallas v. County of Dallas Tax Collector*, 228 S.W.3d 475, 479

(Tex. App.—Dallas 2007, no pet.), *In re Fuselier*, 56 S.W.3d 265, 268 (Tex. App.—Houston [1st Dist.] 2001, orig. proceeding), and *Stein*, 868 S.W.2d 902.

In my view, the majority conflates rendition of judgment and entry of judgment, and its holding is incompatible with the definition of rendition of judgment as the "judicial act by which the court settles and declares the decision of the law upon the matters at issue." *Comet Aluminum*, 450 S.W.2d at 58; *see also Samples*, 640 S.W.2d at 875 (judgment rendered is "the sentence of law pronounced" by the Court). Nor do I believe the cases cited by the majority support its interpretation of the law.

The majority relies most heavily upon *Galvan*, which is distinguishable from the case at hand. In *Galvan*, the plaintiff requested that the trial court grant her motion for non-suit "with prejudice," and, after the trial court had entered the judgment and dismissed the suit, she requested correction of the judgment "nunc pro tunc" to reflect dismissal "without prejudice," claiming the request for a non-suit "with prejudice" was a clerical error made by her counsel's legal assistant. 897 S.W.2d at 876. There is no question, however, that a judicial ruling dismissing a suit "with prejudice" in response to the prayer of a party is a "declar[ation of] the law upon the matters at issue." Therefore, I agree with *Galvan*, but I do not think its ruling is applicable to this case, in which the error corrected was not a judicial ruling

but a transcription mistake.

Likewise, in *Roman Catholic Diocese*, an agreed judgment was submitted to the trial court pursuant to a compromise and settlement. 228 S.W.3d at 479. The terms were set forth in the agreed judgment. *Id.* That judgment imposed ad valorem tax liability on the Diocese for the years 1989 through 1991. *Id.* at 478, 479. Approximately nine months later, the parties submitted an agreed "nunc pro tunc" judgment to the trial court that imposed an additional two years of tax liability on the Diocese, and the trial court approved it. *Id.* at 479. The appellate court voided the "nunc pro tunc" judgment, stating, "A substantive change in a judgment results from the correction of a judicial error, not a clerical one." *Id.* The court explained, "Because the trial court approved the settlement by signing the agreed judgment, the judge's act of signing the judgment constituted his rendition of the judgment" and "any error that may have been made in the drafting of the judgment became part of the judgment the court rendered at the time the judgment was signed." *Id*. In sum, the original mistake was the parties' own drafting mistake, and, by accepting their statement of the substantive terms of the agreed judgment, the trial court rendered judgment. It could not then go back at the parties' request and, by signing a judgment "nunc pro tunc," change a mistake in the declaration of the substantive law into a clerical mistake.

In *In re Fuselier*, as in *Galvan*, the court signed an order dismissing a non-suited case "with prejudice." 56 S.W.3d at 266. The order was signed as "approved" by counsel for the movant. *Id*. at 267. When the same plaintiff subsequently filed a second suit on the same issue, her new counsel discovered the dismissal with prejudice and sought entry of an order nunc pro tunc, contending the original order was mistakenly submitted by the plaintiff's former attorney. *Id.* The trial court signed the order, but the appeals court vacated it on the ground that the original order correctly reflected the judgment actually rendered. *Id.* at 267–68. Again, the mistake that was sought to be corrected by judgment "nunc pro tunc" was a mistake in the declaration of the substantive law, not a clerical mistake that the evidence showed never to have been intended to be part of the agreed judgment.

In *Stein*, the situation was somewhat different. There, the family law master initialed a Final Decree of Divorce and Property Settlement Agreement drafted by appellee's counsel that was announced in open court and dictated into the record. 868 S.W.2d at 903. Thereafter, and before the trial court signed the judgment approving the settlement agreement and entering the decree of divorce, the wife revoked her consent to the agreed judgment. *Id*. The appellate court interpreted the central question in the case to be the date of rendition of judgment, and it concluded that, because an associate judge does not have statutory authority to render judgment,

rendition necessarily took place when the trial court approved the settlement agreement and not when the associate judge initialed the agreed decree. *Id.* at 903–04. The court held that, because the wife revoked her consent to the agreed judgment before the trial court signed it, the judgment was void. *Id.* at 904. But the situation in that case is not analogous to this case, where there was no revocation of consent to the terms of the agreed judgment recited to the master in open court, but a mistake of transcription by the master that caused the master's report to incorrectly reflect the terms of the agreed judgment recited to the court in the hearing before him. Thus, I would hold that because there was evidence in the nunc pro tunc proceeding from which the court could reasonably conclude that there was a mistake in the transcription of the parties' agreement that prevented the written judgment from accurately reflecting the judgment actually rendered, the trial court did not err in determining that the error in the judgment was clerical, and not judicial, and in correcting it. *See Hawk*, 2002 WL 1225917, at *2.

The problem with the majority's holding in this case is that clerical errors in the transcription of an agreed judgment recited before a master and transcribed by him are automatically transformed into judicial errors in the rendition of judgment. Hence, there can never be a nunc pro tunc correction of a judgment rendered on the basis of a master's report to the court, no matter how absurd or obvious a mistake is

made in transcribing the terms of the agreement. I believe, therefore, that this ruling has the effect of excepting agreed judgments entered on the basis of a master's report from the protection of Rule 316, providing for the nunc pro tunc correction of judgments, and that it is inconsistent with the purpose of the nunc pro tunc rule and with *Comet Aluminum* and *Samples*, which approve the correction of clerical errors nunc pro tunc while distinguishing these errors from errors in the rendition of judgment, which are not correctable nunc pro tunc. *See Samples*, 640 S.W.2d at 875; *Comet Aluminum*, 450 S.W.2d at 58–59.

I would overrule appellant's sole issue.

**Conclusion**

I would affirm the trial court's judgment nunc pro tunc.

Evelyn V. Keyes
Justice

Panel consists of Chief Justice Radack and Justices Keyes and Higley.

Justice Keyes, dissenting.