

Opinion issued January 4, 2022



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

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NO. 01-21-00629-CV

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IN RE ADRIAN ROMERO, Relator

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Original Proceeding on Petition for Writ of Mandamus

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**MEMORANDUM OPINION**

Relator Adrian Romero filed a petition for writ of mandamus complaining that Respondent, the Honorable Elaine H. Palmer, abused her discretion by signing an order reinstating the underlying case after the trial court's plenary power expired.<sup>1</sup>

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<sup>1</sup> The underlying case is *Jessica Serrano v. Adrian Romero*, Cause No. 2021-06548, pending in the 215th District Court of Harris County, Texas, the Honorable Elaine H. Palmer presiding.

We conditionally grant the relief sought.

### **Background**

Real Party in Interest Jessica Serrano (“Real Party”) and Relator Adrian Romero (“Relator”) were involved in a motor-vehicle accident on February 25, 2019. Real Party sued Relator in connection with the accident on February 3, 2021. Relator filed an original answer on February 25, 2021.

The trial court ordered the parties to appear for a case management hearing on April 26, 2021, or to file an agreed docket control order before the hearing. Real Party did not appear at the hearing or file a docket control order. Consequently, Respondent dismissed the lawsuit for want of prosecution on June 2, 2021. Real Party filed an unverified motion to reinstate on June 8, 2021. Respondent granted the motion to reinstate on August 25, 2021.

Relator filed the instant writ of mandamus asserting Respondent abused her discretion in granting the unverified motion to reinstate because the trial court’s plenary power expired on July 2, 2021. This Court directed Real Party to file a response to the petition for writ of mandamus, but Real Party did not do so.

## Discussion

### A. Standard of Review

Mandamus relief is appropriate when the trial court abuses its discretion and the relator has no adequate remedy by appeal. *In re AutoNation, Inc.*, 228 S.W.3d 663, 667 (Tex. 2007) (orig. proceeding); *In re Prudential Ins. Co of America*, 148 S.W.3d 124, 135-36 (Tex. 2004) (orig. proceeding). An abuse of discretion occurs if there is “a clear failure by the trial court to analyze or apply the law correctly.” *Walker v. Packer*, 827 S.W.3d 833, 840 (Tex. 1992) (orig. proceeding). Mandamus relief is available “when a trial court issues an order after its plenary power has expired.” *In re Brookshire Grocery Co.*, 250 S.W.3d 66, 68 (Tex. 2008) (orig. proceeding) (citing *In re Sw. Bell Tel. Co.*, 35 S.W.3d 602, 605 (Tex. 2000) (orig. proceeding)). “Limited deference” is given to the trial court’s analysis when the mandamus proceeding stems from the interpretation of legal rules. *Id.*

### B. Applicable Law

Texas Rule of Civil Procedure 165a governs dismissals for want of prosecution and reinstatements. Rule 165a states in pertinent part:

**3. Reinstatement.** A motion to reinstate shall set forth the grounds therefor and be verified by the movant or his attorney. It shall be filed with the clerk within 30 days after the order of dismissal is signed or within the period provided by Rule 306a. A copy of the motion to reinstate shall be served on each attorney of record and each party not represented by an attorney whose address is shown on the docket or in the papers on file. The clerk shall deliver a copy of the motion to the judge, who shall set a hearing on the motion as soon as practicable.

The court shall notify all parties or their attorneys of record of the date, time and place of the hearing.

The court shall reinstate the case upon finding after a hearing that the failure of the party or his attorney was not intentional or the result of conscious indifference but was due to an accident or mistake or that the failure has been otherwise reasonably explained.

In the event for any reason a motion for reinstatement is not decided by signed written order within seventy-five days after the judgment is signed, or, within such other time as may be allowed by Rule 306a, the motion shall be deemed overruled by operation of law. If a motion to reinstate is timely filed by any party, the trial court, regardless of whether an appeal has been perfected, has plenary power to reinstate the case until 30 days after all such timely filed motions are overruled, either by a written and signed order or by operation of law, whichever occurs first.

TEX. R. CIV. P. 165a(3).<sup>2</sup>

### **C. The Motion to Reinstate**

In the absence of a timely filed verified motion to reinstate, a trial court's plenary power expires thirty days after dismissal of the case. *Jarrell v. Bergdorf*, 580 S.W.3d 463, 466 (Tex. App.—Houston [14th Dist.] 2019, no pet.) (citing *McConnell v. May*, 800 S.W.2d 194, 194 (Tex. 1990)). Respondent dismissed Real Party's lawsuit on June 2, 2021. Although Real Party filed her motion to reinstate six days later, on June 8, 2021, her motion was not verified.

“An *unverified* reinstatement motion . . . does not extend plenary power beyond 30

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<sup>2</sup> Rule 306a, entitled “Periods to Run from Signing of Judgment,” addresses situations where, among other things, parties do not receive notice of judgment or when judgments nunc pro tunc are signed. The rule does not apply to the circumstances here.

days from dismissal.” *In re Strickland*, No. 01-01-00972-CV, 2002 WL 58482, at \*1 (Tex. App.—Houston [1st Dist.] Jan. 17, 2002, orig. proceeding) (not designated for publication) (emphasis in original) (granting mandamus relief to set aside order reinstating case on unverified motion more than thirty days after dismissal); *McConnell*, 800 S.W.2d at 194 (same). As the Supreme Court has clarified, “an unverified motion to reinstate is a nullity and does not extend the trial court’s plenary jurisdiction . . . .” *In re Valliance Bank*, 422 S.W.3d 722, 725 (Tex. App.—Fort Worth 2012, orig. proceeding) (citing *McConnell*, 800 S.W.2d at 194). Consequently, because Real Party filed an unverified motion to reinstate, the trial court’s plenary power in this matter expired on July 2, 2021—thirty days after Respondent filed her order of dismissal.<sup>3</sup>

Respondent granted Real Party’s unverified motion to reinstate on August 25, 2021. Respondent’s order, entered nearly two months after the expiration of the court’s plenary power, is void. *See Walker v. Harrison*, 597 S.W.2d 913, 915 (Tex. 1980) (orig. proceeding) (“[T]he time limits provided in rule 165a are mandatory and jurisdictional and . . . orders of reinstatement entered after their

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<sup>3</sup> Even though Real Party’s motion to reinstate was unverified, Respondent could have reinstated the case while the court still had plenary power. *See Dardari v. Tex. Commerce Bank Nat. Ass’n*, 961 S.W.2d 466, 469 (Tex. App.—Houston [1st Dist.] 1997, no pet.) (“[T]he trial court, acting within its plenary power, may reinstate a case on its own motion or at the request of a party who filed an unverified motion.”) (citing *Neese v. Wray*, 893 S.W.2d 169, 170 (Tex. App.—Houston [1st Dist.] 1995, no writ)). Respondent, however, did not grant the motion to reinstate until 54 days after its plenary power expired.

expiration are void.”); *In re Valliance Bank*, 422 S.W.3d at 729 (“Because the trial court signed the order of reinstatement after its plenary power had expired, we hold that the order of reinstatement is void and of no legal effect.”); *In re Boglia, L.L.C.*, No. 01-11-00891-CV, 2011 WL 13385443, at \*1 (Tex. App.—Houston [1st Dist.] Dec. 22, 2011, orig. proceeding) (mem. op.) (“A reinstatement order rendered after the expiration of the trial court’s plenary power is void.”). Respondent abused her discretion in reinstating the case and mandamus is thus warranted. *Estate of Howley By & Through Howley v. Haberman*, 878 S.W.2d 139, 140 (Tex. 1994) (orig. proceeding) (“When a trial court erroneously reinstates a case after the expiration of the court’s plenary jurisdiction, mandamus will issue.”); *cf. In re Sw. Bell Tel. Co.*, 35 S.W.3d at 605 (mandamus relief was appropriate because trial court’s order setting aside transfer order after plenary power had expired was void and constituted abuse of discretion).<sup>4</sup>

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<sup>4</sup> To the extent Respondent assumed her plenary power was extended by the Texas Supreme Court’s emergency orders regarding the Covid-19 state of disaster, which allow courts to “modify or suspend any and all deadlines and procedures, whether prescribed by a statute, rule, or order,” she erred. The language in the Supreme Court’s emergency orders

giving a court the power to modify or suspend “deadlines and procedures” presupposes a pre-existing power or authority over the case or the proceedings. A court may extend a deadline or alter a procedure that would otherwise be part of the court proceedings. It does not suggest that a court can create jurisdiction for itself where the jurisdiction would otherwise be absent or that a judge could create authority to preside over proceedings over which the judge would otherwise be barred from presiding.

## Conclusion

We conditionally grant mandamus relief and direct Respondent to vacate her August 25, 2021 order of reinstatement. A writ will issue only if the trial court does not comply. All pending motions are dismissed as moot.

## PER CURIAM

Panel consists of Justices Goodman, Rivas-Molloy, and Farris.

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*In re State ex rel. Ogg*, 618 S.W.3d 361, 364 (Tex. Crim. App. 2021) (orig. proceeding); *see also Quariab v. El Khalili*, No. 05-20-00979-CV, 2021 WL 960646, at \*1 (Tex. App.—Dallas Mar. 15, 2021, no pet.) (mem. op.) (holding that because trial court had lost jurisdiction over case, it could not avail itself of court’s emergency orders to reinstate case and noting that “the language in the emergency orders . . . ‘does not suggest that a court can create jurisdiction for itself where the jurisdiction would otherwise be absent[.]’”) (quoting *In re State ex rel. Ogg*, 618 S.W.3d at 364).