Reversed and Remanded and Opinion and Dissenting Opinion filed September 8, 2016.

In The

Fourteenth Court of Appeals

NO. 14-14-00855-CV

ADEEL ZAIDI, A. K. CHAGLA, PRESTIGE CONSULTING, INC., AND APEX KATY PHYSICIANS – TMG, L.L.C., Appellants

V.

PANKAJ K. SHAH AND APEX KATY PHYSICIANS, L.L.C., Appellees

On Appeal from the 61st District Court
Harris County, Texas
Trial Court Cause No. 2009-02578

D I S S E N T I N G O P I N I O N

I respectfully dissent and write separately to address two points.

First, the court need not address the appellants' fifteenth-issue argument that the trial court erred in granting a default judgment because that issue is moot. Mootness notwithstanding, the majority concludes that a corporate entity has the right to defend itself in a Texas court even if the entity's right to transact business in

Texas has been forfeited under subchapter F of Tax Code chapter 171 and not revived. But, the unambiguous language of Tax Code section 171.252 and precedent from the Supreme Court of Texas mandates the opposite conclusion.

Second, under this court's binding precedent, if an appellant shows that the evidence is legally insufficient to support an essential element of a claim, this court should reverse and render a take-nothing judgment on that claim, even if the appellant did not expressly request that appellate relief in the appellant's briefing. Therefore, this court must address all of the appellant's legal-sufficiency arguments before concluding that all claims should be remanded to the trial court for a new trial.

The fifteenth issue is moot because the trial court did not render a default judgment.

Trial on the Merits of the Liability and Damage Issues

Just before trial began, appellees/plaintiffs Dr. Pankaj K. Shah and Apex Katy Physicians, LLC (hereinafter collectively the "Plaintiffs") asked the trial court to grant a default judgment against appellant/defendant Apex Katy Physicians–TMG, LLC (hereinafter the "General Partner"). After hearing argument, the trial court took the request under advisement but did not rule on it. The case proceeded to a four-day bench trial of all pending issues, including the General Partner's liability on the Plaintiffs' claims, in which the General Partner participated.

The Nature of the Final Judgment

About four months after trial, the court rendered a final money judgment against appellants/defendants Adeel Zaidi, A.K. Chagla, Prestige Consulting, Inc. d/b/a Turnaround Management Group, and the General Partner (hereinafter collectively the "Turnaround Parties"). In the judgment, the trial court stated that

the case was called for trial and that the Plaintiffs and the Turnaround Parties, including the General Partner, appeared, announced ready for trial, and that the Plaintiffs' claims against the Turnaround Parties, including the General Partner, had been tried to the bench. The trial court found that all defendants, including the General Partner, had engaged in a civil conspiracy and that all defendants were jointly and severally liable for the Plaintiffs' actual damages. The trial court rendered a money judgment against the defendants, jointly and severally, for an amount representing each plaintiff's actual damages, prejudgment interest on the damages, and attorney's fees. The trial court stated that the judgment disposed of all claims and parties and that all relief not granted was expressly denied.

The trial court did not state that the General Partner failed to appear or failed to answer. Nor did the trial court state that the General Partner had forfeited its right to defend against the Plaintiffs' claims. On the contrary, the trial court stated that the General Partner had defended itself against the Plaintiffs' claims, although unsuccessfully. The trial court did not state that it had granted a default judgment against the General Partner or that anything had operated as an admission by the General Partner of all the Plaintiffs' factual allegations regarding liability. If the trial court had granted a default judgment that operated in this manner, the default judgment would have obviated the need for trial of these issues.

When the language of the trial court's judgment is unambiguous, as in this case, the reviewing court is to interpret the judgment according to its plain language. *Reiss v. Reiss*, 118 S.W.3d 439, 441–42 (Tex. 2003). Under the plain language of the judgment, the trial court did not grant the Plaintiffs' request for a default judgment against the General Partner in the court's final judgment of July 24, 2014. Instead, under the plain language of the judgment's "Mother Hubbard" clause, the trial court denied this request. *See Garcia v. Guerrero*, No. 04-09-00002-CV, 2010

WL 183480, at *7 (Tex. App.—San Antonio Jan. 20, 2010, no pet.) (holding that trial court's final judgment did not grant a default judgment because the judgment recited that the trial court based its ruling on the evidence and arguments of counsel at the bench trial and did not state that the ruling was based on the defendants' default) (mem. op.); *Wimmer v. State*, No. 03-03-00135-CV, 2004 WL 210629, at *2 (Tex. App.—Austin Feb. 5, 2004, pet. denied) (holding that trial court's final judgment did not grant a default judgment because the judgment recited that the trial court based its ruling on the evidence and did not state that the ruling was based on the defendant's default) (mem. op.).

The Expiration of Plenary Power to Modify, Correct, or Reform the Judgment

No party filed a motion that would extend the trial court's plenary power to modify, correct, or reform its final judgment; therefore, the trial court's plenary power expired by operation of law on August 25, 2014. *See* Tex. R. Civ. P. 329b; *In re Gillespie*, 124 S.W.3d 699, 702–03 (Tex. App.—Houston [14th Dist.] 2003, no pet.) (en banc). Though the Turnaround Parties' request for findings of fact and conclusions of law extended the time to perfect appeal, that request did not extend the trial court's plenary power. *See* Tex. R. Civ. P. 329b; *In re Gillespie*, 124 S.W.3d at 702–03.

On October 3, 2014, long after its plenary power to modify, correct, or reform its judgment had expired, the trial court signed findings of fact and conclusions of law. Although there are a number of findings of fact and conclusions of law directed against the General Partner as if no default judgment had been rendered, in one sentence, the trial court stated that "[t]he Court concludes that default judgment shall be entered against [the General Partner] because [the General Partner] forfeited its corporate privileges prior to trial." The trial court did not state that it had rendered

a default judgment in its final judgment. Even though its plenary power to modify, correct, or reform had expired, the trial court still could sign findings of fact and conclusions of law explaining the reasons for its final judgment. *See In re Gillespie*, 124 S.W.3d at 702–03. Nonetheless, to the extent the trial court attempted to render a default judgment after it lost plenary power to change its judgment, that attempt is of no effect; any rendering of a default judgment after plenary power has expired is void. *See* Tex. R. Civ. P. 329b; *In re Gillespie*, 124 S.W.3d at 702–03.

The majority asserts that, even if the trial court's conclusions of law conflict with the final judgment as to whether the trial court granted a default judgment, the conclusions of law control and thus modify the trial court's final judgment.[1] The majority cites two cases in which this court construed findings of fact and conclusions of law to have modified the trial court's prior judgment, but in neither case did this court hold that the trial court's findings could do so even if they were issued after the trial court's plenary power had expired.[2] *See Torres v. Clark*, No. 14-11-00750-CV, 2012 WL 1694607, at *2 (Tex. App.—Houston [14th Dist.] May 15, 2012, no pet.) (mem. op.); *Dickerson v. DeBarbieris*, 964 S.W.2d 680, 684 (Tex. App.—Houston [14th Dist.] 1998, no pet.).

The majority concludes that the trial court reversibly erred by rendering a default judgment against the General Partner that operated as an admission by the General Partner of all the Plaintiffs' factual allegations other than the amount of unliquidated damages.[3] Under the unambiguous language of the trial court's final

[1] *See ante* at 14, n.6.

[2] From 1991 through this court's en banc decision in *In re Gillespie* in 2003, this court held that a request for findings of fact and conclusions of law extended the trial court's plenary power, making it less likely that findings would be signed outside of the trial court's plenary power than under the current rule of *In re Gillespie*. *See* 124 S.W.3d at 702–04.

[3] *See ante* at 13, 16.

judgment, the trial court did not render a default judgment against the General Partner, and the trial court did not base its judgment against the General Partner on any admission by the General Partner of the Plaintiffs' factual allegations. Presuming for the sake of argument that a recitation in the trial court's conclusions of law generally may modify part of a prior judgment contrary to the statement in the conclusions of law, under this court's unanimous en banc precedent, such a modification may occur only if the trial court issues the conclusions during its plenary power to modify, correct, or reform the judgment. *See* Tex. R. Civ. P. 329b; *In re Gillespie*, 124 S.W.3d at 702–03. Because the trial court issued its conclusions after it lost plenary power to modify, correct, or reform its final judgment, no language in that document operates to modify the trial court's prior judgment. *See HSBC Bank USA, N.A. v. Watson*, 377 S.W.3d 766, 771–72 (Tex. App.—Dallas 2012, pet. dism'd) (holding findings of fact and conclusions of law stating that the trial court dismissed for lack of jurisdiction would not govern over the language of the trial court's order, in which the trial court stated it was ruling on the merits, because the trial court signed the findings of fact and conclusions of law after it lost plenary power and thus the findings and conclusions could not modify the judgment).

Because the trial court did not grant any default judgment while it had power to do so, the fifteenth issue is moot. *See Emesowum v. Morgan*, No. 14–13–00397–CV, 2014 WL 3587385, at *1 (Tex. App.—Houston [14th Dist.] July, 22, 2014, pet. dism'd) (mem. op.).

The majority's resolution of the fifteenth issue is based on an improper statutory construction.

Mootness aside, the majority reaches the wrong conclusion in interpreting the unambiguous language of Tax Code section 171.252. Under the plain text of that

statute and Supreme Court of Texas precedent, a corporate entity whose right to transact business in Texas has been forfeited under Subchapter F of Tax Code Chapter 171 and has not been revived does not have the right to defend itself in a Texas court.

The Plaintiffs asked the trial court to grant a default judgment against the General Partner on the ground that the General Partner's corporate privileges had been forfeited for failure to pay franchise taxes or to file a required report and that under Tax Code section 171.252, the General Partner did not have the right to defend itself in the trial court. The General Partner argued that under Texas case law, a corporate entity has the right to defend itself in a Texas court even if the entity's right to transact business in Texas has been forfeited under subchapter F of Tax Code chapter 171 and has not been revived. The trial court granted the default judgment.

Under their fifteenth issue, the Turnaround Parties assert a single legal argument: "Despite the language of section 171.252 of the Texas Tax Code, which by its terms denies a corporate entity the right to 'sue or defend in a court of this state' if its charter has been forfeited, it has been the settled law in Texas for years that a corporate entity that has forfeited its charter may indeed nevertheless defend itself."[4]

[4] This quote is from the Turnaround Parties' opening brief. Though there appears to have been no evidence before the trial court to prove that the General Partner's right to transact business in Texas had been forfeited, the Turnaround Parties have not raised this issue on appeal. Nor have the Turnaround Parties raised an issue as to any alleged revival of the General Partner's right to transact business in Texas. The Turnaround Parties have not asserted on appeal that the Plaintiffs waived their ability to obtain a default judgment by proceeding to trial without obtaining a ruling on their request for a default judgment.

Applicable Text of Tax Code Section 171.252

For the purposes of this analysis, this court may presume: (1) the General Partner is a "taxable entity" as defined in Tax Code section 171.0002 and as used in Tax Code section 171.2515; (2) under Tax Code sections 171.251 and 171.2515 (which are in subchapter F of Tax Code chapter 171), the comptroller forfeited the General Partner's right to transact business in Texas; and (3) the General Partner's right to transact business in Texas has not been revived.[5] Under section 171.2515's unambiguous text, section 171.252 applies to the forfeiture of a taxable entity's right to transact business in Texas to the same extent that it applies to the forfeiture of a corporation's corporate privileges. *See* Tex. Tax Code Ann. § 171.2515 (West, Westlaw through 2015 R.S.).

Plain Meaning of Tax Code Section 171.252

Under Tax Code Section 171.252, because the General Partner's right to transact business in Texas has been forfeited under subchapter F of Chapter 171, the General Partner "shall be denied the right to sue or defend in a court of this state." Tex. Tax Code Ann. § 171.252 (West, Westlaw through 2015 R.S.). Also relevant, in Tax Code section 171.254, entitled "Exception to Forfeiture," the Legislature provides that "[t]he forfeiture of the corporate privileges of a corporation does not apply to the privilege to defend in a suit to forfeit the corporation's charter or certificate of authority." Tex. Tax Code Ann. § 171.254 (West, Westlaw through 2015 R.S.).

The meaning of the quoted part of Tax Code section 171.252 is a legal question, which this court reviews *de novo* to ascertain and give effect to the

[5] These points were premises of the Plaintiffs' request for a default judgment, and the Turnaround Parties have not challenged them on appeal.

Legislature's intent. *Entergy Gulf States, Inc. v. Summers*, 282 S.W.3d 433, 437 (Tex. 2009). Where text is clear, text is determinative of that intent unless enforcing the plain language of the statute as written would produce absurd results. *Id*. Therefore, our practice when construing a statute is to recognize that the words the Legislature chose are the surest guide to legislative intent. *Id*.

The plain meaning of "defend" in this context is "to deny, contest, or oppose (an allegation or claim)." BLACK'S LAW DICTIONARY 450 (8th ed. 2004). Therefore, under the unambiguous language of Tax Code Section 171.252, because the General Partner's right to transact business in Texas has been forfeited under subchapter F of Chapter 171, the General Partner does not have the right to deny, contest, or oppose allegations or claims in a Texas court. *See* Tex. Tax Code Ann. § 171.252; BLACK'S LAW DICTIONARY 450 (8th ed. 2004). The plain meaning of the exception in section 171.254 (which does not apply to today's case) shows that in proceedings in Texas courts not described in the exception, the forfeiture of a corporation's privileges or of a taxable entity's right to transact business in Texas does result in the loss of the entity's right to defend. *See id*. §§ 171.252, 171.254.

The trial court is a Texas court, and the Plaintiffs are asserting claims and making allegations against the General Partner in a Texas court. Therefore, under the unambiguous text of section 171.252, the General Partner may not deny, contest or oppose the Plaintiffs' allegations and claims against the General Partner unless and until the General Partner's right to transact business in Texas has been revived. *See* Tex. Tax Code Ann. § 171.252; BLACK'S LAW DICTIONARY 450 (8th ed. 2004). This statutory construction does not produce an absurd result that would allow or compel this court to ignore the plain language of the statute. *Entergy Gulf States, Inc.*, 282 S.W.3d at 437–38. If the corporate privileges of a corporation or the right to transact business in Texas of a taxable entity are forfeited under subchapter F of

Tax Code Chapter 171, the entity loses the right to sue or defend in a Texas court. *See* Tex. Tax Code Ann. §§ 171.2515, 171.252; BLACK'S LAW DICTIONARY 450 (8th ed. 2004). If the entity pays the franchise taxes that it owes or files the franchise-tax report that is past-due and the entity has its corporate privileges or right to transact business in Texas revived, then the entity may sue or defend in a Texas court.[6] *See* Tex. Tax Code Ann. §§ 171.2515, 171.252, 171.258; BLACK'S LAW DICTIONARY 450 (8th ed. 2004). In the most recent word on the subject, the Supreme Court of Texas concludes that under the unambiguous language of the predecessor statute to section 171.252, a corporate entity whose right to transact business in Texas has been forfeited and not revived does not have the right to defend itself in a Texas court.

The majority relies upon the Supreme Court of Texas precedent created decades ago when the high court refused a writ of error to review the Ninth Court of Appeals's two-page opinion in *Bryan v. Cleveland Sand & Gravel*. *See* 139 S.W.2d 612 (Tex. Civ. App.—Beaumont 1940, writ ref'd). In *Bryan*, the court of appeals did not quote or mention the text of article 7091 of the Texas Revised Civil Statutes, a predecessor statute to section 171.252. *See id*. at 612–13. Even though the language of the predecessor statute was substantially similar to the language of section 171.252, the court of appeals summarily concluded that the statute did not prevent a defendant corporation whose right to do business in Texas had been forfeited from defending a case in a Texas court. *See id*. at 612–13; *Jordan v. Grandfield Bridge Co*., 290 S.W. 866, 869 (Tex. Civ. App.—Fort Worth 1926, no

[6] The Turnaround Parties have not asserted on appeal that the Plaintiffs used an improper procedural vehicle to raise their argument under Tax Code section 171.252 or that the General Partner should have been given an opportunity to have its right to transact business in Texas revived.

writ) (quoting predecessor statute). The court of appeals proceeded as if the applicable statute prevented a corporation whose right to do business in Texas had been forfeited only from suing in a Texas court, as opposed to suing and defending in a Texas court. *See Bryan*, 139 S.W.2d at 612–13.

Eleven years later, the Supreme Court of Texas concluded that under the same predecessor statute, the effect of a "forfeiture of the right of the corporation to do business in this state . . . is to prohibit the corporation from doing business and to deny to it the right to sue or defend in any court of the state except in a suit to forfeit its charter." *Humble Oil & Refining Co. v. Blankenburg*, 235 S.W.2d 891, 894 (Tex. 1951). The Fourteenth Court of Appeals cases upon which the majority relies do not cite or apply the *Blankenburg* case, and we are bound by *Blankenburg* rather than by our own cases or by the *Bryan* case. *See id*.

Before reversing the trial court's judgment and remanding for a new trial, this court must consider and overrule all of the appellate issues that would result in rendition of judgment on appeal.

Under at least six of their fifteen appellate issues, the Turnaround Parties argue that the evidence is legally insufficient to support a finding as to one or more essential elements of one of the Plaintiffs' claims or vicarious-liability theories.[7] In its analysis, the majority addresses the Turnaround Parties' argument under their tenth issue, finds the argument has merit, and concludes that "the evidence is legally insufficient to hold the Turnaround Parties liable for fraudulent inducement."[8] Yet, despite holding that the evidence is legally insufficient to support the Plaintiffs' fraudulent-inducement claims, the court reverses the trial court's judgment and remands for a new trial rather than rendering judgment that the Plaintiffs take

[7] At a minimum, the Turnaround Parties make such arguments under their fourth, eighth, ninth, tenth, eleventh, and twelfth issues.

[8] *Ante* at 10.

nothing on their fraudulent-inducement claims. Although the Turnaround Parties assert a number of legal-insufficiency arguments, the majority concludes it is unnecessary to address most of them.[9] The court takes both actions based on its conclusion that, by failing to expressly request a rendition of judgment, the Turnaround Parties have waived their entitlement to rendition of judgment as to the claims they argue are supported by legally insufficient evidence.[10] This conclusion is contrary to (1) this court's binding precedent, (2) the rules of appellate procedure, (3) the efficient use of judicial resources, (4) principles of consistency, and (5) the Turnaround Parties' statements during oral argument.

Under binding precedent, this court must reverse and render a take-nothing judgment if an appellant shows the evidence is legally insufficient to support an essential element of a claim on appeal of a judgment after a bench trial, even if the appellant did not expressly request rendition in the appellate brief.

If a trial court renders judgment against a defendant following a bench trial, and the defendant shows on appeal that the evidence is legally insufficient to support an essential element of one of the plaintiff's claims, the proper appellate course is to reverse and render judgment that the plaintiff take nothing on that claim. *See Dallas Nat'l Ins. Co. v. De La Cruz*, 470 S.W.3d 56, 59 (Tex. 2015) (per curiam). For at least thirty-two years, the Fourteenth Court of Appeals has followed the *Olin* Rule, which holds that, if an appellant shows error in the trial court's judgment, this court should render the proper appellate judgment for that error, even if the appellant did not expressly request that appellate relief in appellate briefing.[11] There is an

[9] *See ante* at 2.

[10] *See ante* at 16–19.

[11] *See, e.g., Garza v. Cantu*, 431 S.W.3d 96, 108–10 (Tex. App.—Houston [14th Dist.] 2013, pet. denied) (holding that appellant who shows an error in the judgment entitling appellant to a reversal and remand is entitled to that appellate remedy, even if the appellant requested a rendition in its appellate briefing and did not request a remand) (sub. op.); *Olin Corp. v. Dyson*, 678 S.W.2d 650, 657 (Tex. App.—Houston [14th Dist.] 1984) (holding that appellant who shows the evidence is

exception to the *Olin* Rule; if the appellant expressly states that it does not want a particular appellate remedy, then this court will not award the remedy that the appellant expressly rejected and will affirm even the erroneous part of the judgment if the appellant expressly rejects all proper appellate remedies.[12]

The majority acknowledges that this court may reverse and remand even if an appellant never requested a remand in its briefing, if the appellant shows the trial court erred and if reversal and remand is the appropriate judgment.[13] Nonetheless, the majority asserts that this court cannot reverse and render unless an appellant requested this relief in its briefing, even if the appellant shows the trial court erred and even if reversal and rendition is the appropriate remedy for this error.[14] In support of this proposition, the majority cites this court's opinions in three cases: *Enzo Investments, L.P. v. White*, *Advanced Personal Care, L.L.C. v. Churchill*, and *Garza v. Cantu*.[15] In each of these cases, this court followed established precedent and held that the court could render an appropriate appellate judgment, even though the appellant requested only a reversal and rendition of a take-nothing judgment,

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legally insufficient to support the judgment on a claim is entitled to the appellate remedy of a reversal and rendition of judgment in appellant's favor, even if the appellant did not request a rendition in its appellate briefing), *rev'd on other grounds*, 692 S.W.2d 456 (Tex. 1985).

[12] *See Crotts v. Cole*, 480 S.W.3d 99, 106 n.9 (Tex. App.—Houston [14th Dist.] 2015, no pet.); *Garza*, 431 S.W.3d at 109.

[13] *See ante* at 16.

[14] *See id.*

[15] *See Enzo Investments, L.P. v. White*, 468 S.W.3d 635, 654 (Tex. App.—Houston [14th Dist.] 2015, pet. denied) (sub. op.); *Advanced Personal Care, L.L.C. v. Churchill*, 437 S.W.3d 41, 49 (Tex. App.—Houston [14th Dist.] 2014, no pet.); *Garza*, 431 S.W.3d at 108–10.

which was not a proper appellate judgment.[16] The majority cites these three cases for the proposition that this court cannot grant more relief than the appellant requested.[17] But, in none of these cases did the court ever assert such a proposition.[18]

In three other cases, this court has addressed whether the court may reverse and render on appeal, if that is the proper appellate judgment for the error shown by the appellant, even though the appellant did not expressly request that appellate relief in appellate briefing.[19] In each of these cases, the court held that this court should reverse and render if that is the appropriate appellate judgment for the error shown by the appellant, even if the appellant sought only a reversal and remand in its briefing.[20] The majority attempts to distinguish the *Olin* case, arguing that there was no issue before the court in *Olin* as to whether the appellant could obtain the unrequested appellate relief of a reversal and rendition of judgment.[21] The majority

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[16] *See Enzo Investments, L.P.*, 468 S.W.3d at 654; *Advanced Personal Care, L.L.C.*, 437 S.W.3d at 49; *Garza*, 431 S.W.3d at 108–10.

[17] *See ante* at 16.

[18] *See Enzo Invs.*, 468 S.W.3d at 650–55; *Advanced Personal Care, L.L.C.*, 437 S.W.3d at 49; *Garza*, 431 S.W.3d at 108–10.

[19] *See In re Marriage of Day*, — S.W.3d —, —, 2016 WL 2997141, at *4, n.5 (Tex. App.—Houston [14th Dist.] May 24, 2016, no pet. h.) (holding that court of appeals would affirm as modified after deleting challenged award (which is equivalent to a reversal and rendition in part) because that was the appropriate appellate judgment, even though the appellant only had requested a reversal and remand); *Alta Mesa Holdings, L.P. v. Ives*, 488 S.W.3d 438, 452 (Tex. App.—Houston [14th Dist.] 2016, pet. filed) (holding that court of appeals would reverse and render because that was the appropriate appellate judgment, even though the appellant only had requested a reversal and remand); *Olin Corp.*, 678 S.W.2d at 657 (holding that an appellant who shows the evidence is legally insufficient to support the judgment on a claim is entitled to the appellate remedy of a reversal and rendition of judgment in appellant's favor, even if the appellant did not request a rendition in its appellate briefing).

[20] *See In re Marriage of Day*, — S.W.3d at —, 2016 WL 2997141, at *4, n.5; *Alta Mesa Holdings, L.P.*, 488 S.W.3d at 452; *Olin Corp.*, 678 S.W.2d at 657.

[21] *See ante* at 17.

concludes this issue was not before the *Olin* court because the *Olin* court concluded that the evidence was legally sufficient.[22] But, if a failure to expressly request rendition in the appellant's brief waived the legal-sufficiency issue (as the majority maintains), then the *Olin* court would not have needed to address whether the evidence was legally sufficient.[23] The *Olin* court held that an appellant who shows the evidence is legally insufficient to support the judgment on a claim is entitled to the appellate remedy of a reversal and rendition of judgment in the appellant's favor, even if the appellant did not ask for a rendition in its appellate briefing.[24] Before addressing the merits of the appellant's rendition issue, the *Olin* court first concluded that the appellant had not waived its rendition issue.[25]

The majority's conclusion that this court may not reverse and render unless that remedy is expressly requested in the appellant's briefing is contrary to this court's binding precedent (including two cases decided earlier this year) and would require either an affirmance or the reversal and remand for a new trial of a claim that fails as a matter of law because of the appellant's failure to expressly request rendition.[26]

The majority asserts that this panel should not follow these three precedents because they conflict with three Supreme Court of Texas precedents.[27] But, none

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[22] *See id.*

[23] *See Olin Corp.*, 678 S.W.2d at 657 (holding that an appellant who shows the evidence is legally insufficient to support the judgment on a claim is entitled to the appellate remedy of a reversal and rendition of judgment in appellant's favor, even if the appellant did not request a rendition in its appellate briefing).

[24] *See id*.

[25] *See id*.

[26] *See In re Marriage of Day*, 2016 WL 2997141, at *4, n.5; *Alta Mesa Holdings, L.P.*, 488 S.W.3d at 452; *Crotts*, 480 S.W.3d at 106 n.9; *Enzo Invs.*, 468 S.W.3d at 650–55; *Advanced Personal Care, L.L.C.*, 437 S.W.3d at 49; *Garza*, 431 S.W.3d at 109; *Olin Corp.*, 678 S.W.2d at 657.

[27] *See ante* at 17–18.

of these cases abrogates or conflicts with the *Olin* Rule.[28] In *Texas Parks and Wildlife Department*, the Sawyer Trust argued that it had asserted a constitutional-takings claim against the defendant state agency in the trial court.[29] The high court concluded that the Sawyer Trust had asserted only a trespass-to-try-title claim and not a takings claim because it sought nonmonetary relief to establish its title to real property.[30] The Supreme Court of Texas concluded that, whether the State owned the property or the Sawyer Trust owned the property, there could be no entitlement to compensation for a taking as a matter of law.[31] The high court then indicated that because of this reality, the Sawyer Trust had not requested an opportunity to replead to assert a compensation claim.[32] The *Texas Parks and Wildlife Department* court then stated that "[g]enerally, a party is not entitled to relief it does not request."[33] In the context of the opinion, the statement appears to be an obiter dictum because the court already had determined that, as a matter of law, the Sawyer Trust could not plead a takings claim.[34] In addition, the Sawyer Trust was the respondent in the Supreme Court of Texas, not the petitioner, and the Sawyer Trust did not brief its entitlement to a remand for an opportunity to replead in the trial court.[35] This context is very different from a court-of-appeals appellant who has briefed meritorious issues entitling the appellant to a rendition but failed to expressly request a rendition.

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[28] *See Tex. Parks and Wildlife Dept. v. Sawyer Trust*, 354 S.W.3d 384, 392 (Tex. 2011); *State v. Brown*, 262 S.W.3d 365, 370 (Tex. 2006); *Stevens v. National Education Centers*, 11 S.W.3d 185, 185 (Tex. 2000) (per curiam).

[29] *See Tex. Parks and Wildlife Dept.*, 354 S.W.3d at 390.

[30] *See id.* at 390–92.

[31] *See id.* at 392.

[32] *See id.*

[33] *Id*.

[34] *See id.*

[35] *See id.*

[36] In any event, the high court used the word "generally" and did not reach a holding or judicial dicta as to how intermediate courts of appeal determine which appellate judgment is appropriate and available. [37]

In *State v. Brown*, Brown sought attorney's fees and litigation expenses, but did not request sanctions in either the trial court or on appeal.[38] The *Brown* court stated that Brown did not seek a remand for the trial court to consider sanctions and that a party "generally" is not entitled to relief it does not seek.[39] The high court specifically determined that Brown was not entitled to a remand to seek sanctions and did not articulate a legal standard to apply to all high court proceedings.[40] As in *Texas Parks and Wildlife Department*, Brown was the respondent in the Supreme Court of Texas, not the petitioner, and Brown did not brief his entitlement to a remand for an opportunity to seek sanctions in the trial court.[41] This context is very different from a court-of-appeals appellant who has briefed meritorious issues entitling the appellant to a rendition but failed to expressly request a rendition. [42] In any event, the high court used the word "generally" and did not reach a holding or judicial dicta as to how intermediate courts of appeals determine which appellate judgment is appropriate and available. [43]

In *Stevens v. National Education Centers, Inc.*, the Supreme Court denied a petition for review because remand was the proper remedy and the petitioner

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[36] *See id.*

[37] *See id.*

[38] *See* 262 S.W.3d 365, 370 (Tex. 2006).

[39] *See id.*

[40] *See id.*

[41] *See id.*

[42] *See id.*

[43] *See id.*

"specifically requested that th[e] Court not remand for a new trial." 11 S.W.3d 185, 185 (Tex. 2000) (per curiam). *Stevens* is consistent with the *Olin* Rule, under which an appellant can waive a potential appellate remedy by express language in the appellant's brief.[44]

None of the Supreme Court of Texas cases conflict with or address the *Olin* Rule.[45] To date, the high court has not addressed whether the *Olin* Rule is the correct legal standard in the context of judgment formation in the courts of appeals.

The Olin Rule comports with the Rules of Appellate Procedure.

Texas Rule of Appellate Procedure 43.3 provides that "[w]hen reversing a trial court's judgment, [the court of appeals] *must* render the judgment that the trial court should have rendered," except in two cases in which the court of appeals should remand to the trial court.[46] This rule does not say that the court of appeals must render the judgment that the trial court should have rendered if the appellant expressly requested this relief in its brief.[47] Texas Rule of Appellate Procedure 38.1(j), provides that "The brief must contain a short conclusion that clearly states the nature of the relief sought."[48] But, this rule does not state that the court of appeals

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[44] *See id*.; *Crotts*, 480 S.W.3d at 106 n.9; *Garza*, 431 S.W.3d at 108–10.

[45] In the *Horrocks* case in which the Supreme Court of Texas held that reversal and remand is the appropriate appellate judgment when the only means by which the appellant preserved error in a jury case was through a motion for new trial. *See Horrocks v. Tex. Dep't of Transp*., 852 S.W.2d 498, 498–99 (Tex. 1993) (per curiam). The high court did not address whether a court of appeals should render the appropriate appellate judgment for the error shown by the appellant even if the appellant did not expressly request that appellate judgment in its briefing. *See id*. Today's case involves an appeal from a judgment after a bench trial. Therefore, the Turnaround Parties did not have to preserve error in the trial court, and, in any event, the Turnaround Parties did not file a motion for new trial. *See* Tex. R. App. 33.1 (d). The *Horrocks* case is not on point. *Garza*, 431 S.W.3d at 109 (distinguishing *Horrocks*).

[46] Tex. R. App. P. 43.3 (emphasis added).

[47] *See id*.

[48] *See* Tex. R. App. P. 38.1(j).

may grant only the appellate relief requested in the appellant's brief.[49] Under Texas Rule of Appellate Procedure 44.3, "A court of appeals must not affirm or reverse a judgment or dismiss an appeal for formal defects or irregularities in appellate procedure without allowing a reasonable time to correct or amend the defects or irregularities."[50] In addition, the Supreme Court of Texas has instructed that the courts of appeals should construe the Rules of Appellate Procedure reasonably, yet liberally, so that the right to appeal is not lost by imposing requirements not absolutely necessary to effect the purpose of a rule.[51] The high court also has emphasized that appellate courts must construe issues presented liberally to obtain a just, fair, and equitable adjudication of the rights of the litigants.[52]

Under the rule the majority applies, a court of appeals must either affirm or reverse and remand for a new trial of a claim that fails as a matter of law because of the appellant's failure to expressly request rendition, even though the appellant showed in its appellate brief that the evidence is legally insufficient to support a recovery on that claim. This rule is not absolutely necessary to effect the purpose of any appellate rule, and it is contrary to the mandate of Rule 43.3.[53] Unlike the rule the majority applies, the *Olin* Rule comports with the Rules of Appellate Procedure.[54]

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[49] *See id.*

[50] *See* Tex. R. App. P. 44.3.

[51] *Republic Underwriters Ins. Co. v. Mex–Tex, Inc.*, 150 S.W.3d 423, 427 (Tex. 2004).

[52] *Perry v. Cohen*, 272 S.W.3d 585, 588 (Tex. 2008).

[53] *See* Tex. R. App. P. 43.3; *Garza*, 431 S.W.3d at 108–10.

[54] *See* Tex. R. App. P. 43.3; *Garza*, 431 S.W.3d at 108–10.

The Olin Rule furthers the judicial economy sought by the greatest-degree-of-finality rule.

If more than one appellate judgment is potentially appropriate based on the record, the briefs, and the law, an appellate court must render the judgment that moves the case to the greatest degree of finality.[55] This longstanding rule furthers judicial economy.[56] To honor this important purpose and to comply with the greatest-degree-of-finality mandate, a court of appeals first must consider and reject all arguments that would entitle the appellant to the greatest relief potentially available, before rendering an appellate judgment granting the appellant lesser relief.[57] Thus, before this court may order a remand, the court is duty-bound to consider and reject all arguments which, if meritorious, would result in a rendition.[58]

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[55] *See Natural Gas Pipeline Co. of Am. v. Pool*, 124 S.W.3d 188, 201 (Tex. 2003); *Ortega v. CACH, LLC*, 396 S.W.3d 622, 627 (Tex. App.—Houston [14th Dist.] 2013, no pet.).

[56] *See Natural Gas Pipeline Co. of Am.*, 124 S.W.3d at 201; *Monsanto Co. v. Davis*, 25 S.W.3d 773, 780 (Tex. App.—Waco 2000, pet. denied) (stating that "[j]udicial efficiency requires us to first rule upon the complaints brought by [appellants] which would entitle them to the greatest relief").

[57] *See Natural Gas Pipeline Co. of Am.*, 124 S.W.3d at 201–02; *Monsanto Co.*, 25 S.W.3d at 780.

[58] *See Natural Gas Pipeline Co. of Am.*, 124 S.W.3d at 201–02 (holding that, although dissenting justice asserted that court should sustain remand issue, court could not do so because it was required to reverse and render based on meritorious rendition argument); *CMH Homes, Inc. v. Daenen*, 15 S.W.3d 97, 99 (Tex. 2000) (concluding that, because rendition point had merit court would not address issue which, if sustained would result only in a remand); *Bradleys' Electric, Inc. v. Cigna Lloyds Ins. Co.*, 995 S.W.2d 675, 676–77 (Tex. 1999) (holding that the court of appeals erred in sustaining a remand issue without determining whether a rendition issue had merit); *Ortega*, 396 S.W.3d at 627 (stating that "[w]hen an appellant asserts multiple grounds for reversal of the trial court's judgment, this court should first address all issues that would require rendition and then, if necessary, consider issues that would result in remand" and considering and rejecting all rendition issues before sustaining a remand issue); *Monsanto Co.*, 25 S.W.3d at 780 (stating that "[j]udicial efficiency requires us to first rule upon the complaints brought by [appellants] which would entitle them to the greatest relief"); *Forbes v. Lanzl*, 9 S.W.3d 895, 898 n.3 (Tex. App.—Austin 2000, pet. denied) (stating "[w]e decide rendition issues before remand issues" and sustaining rendition issue without addressing remand issue); *Stevenson v. Koutzarov*, 795 S.W.2d 313, 322 (Tex. App.—Houston [1st Dist.] 1990, writ denied) (stating "[w]e must, however, address the points which, if granted, would compel a rendition of judgment for the [appellants]").

If, as the Turnaround Parties argue on appeal, the evidence is legally insufficient to support one or more essential elements of a number of the Plaintiffs' claims, then it would be a waste of judicial resources and the parties' resources to reverse the trial court's judgment and remand for a second trial on these claims.[59]

Even under the majority's rule this court may reverse and render based on the appellants' statements during oral argument.

Even if this court were not bound to follow the *Olin* Rule, this court still should consider all of the Turnaround Parties' legal-sufficiency arguments before reversing and remanding based on statements of the Turnaround Parties' counsel at oral argument. Though the Turnaround Parties focused on remand points during oral argument, one of their attorneys stated during oral argument that the Turnaround Parties also were asserting "reasons for rendering parts of the judgment" but that, at a minimum, the Turnaround Parties were entitled to a reversal and remand. Thus, the Turnaround Parties showed at oral argument that they are seeking a partial rendition of judgment based on their legal-insufficiency arguments.

Conclusion

The appellants' fifteenth-issue challenge to the trial court's purported granting of a default judgment is moot because the trial court did not grant the Plaintiffs' request for default judgment in its final judgment. The trial court's plenary power had expired when it signed the findings of fact and conclusions of law stating the trial court would enter a default judgment. Because the findings of fact and conclusions of law could not modify the trial court's final judgment, the

[59] *See Bradleys' Electric, Inc.*, 995 S.W.2d at 676–77 (Tex. 1999) (holding that the court of appeals erred in sustaining a remand issue without determining whether a rendition issue had merit); *Monsanto Co.*, 25 S.W.3d at 780 (stating that "[j]udicial efficiency requires us to first rule upon the complaints brought by [appellants] which would entitle them to the greatest relief").

trial court did not grant a default judgment against the defendant in question. The fifteenth issue is moot.

The majority incorrectly concludes that a corporate entity has the right to defend itself in a Texas court even if the entity's right to transact business in Texas has been forfeited under subchapter F of Tax Code chapter 171 and has not been revived. Under the plain wording of Tax Code section 171.252 and precedent from the Supreme Court of Texas, a corporate entity whose right to transact business in Texas has been forfeited under subchapter F of Tax Code chapter 171 and has not been revived does not have the right to defend itself in a Texas court.

Under this court's binding precedent, if an appellant shows that the evidence is legally insufficient to support an essential element of a claim, this court should reverse and render a take-nothing judgment on that claim, even if the appellant did not outright ask for that appellate relief in its briefing. Therefore, this court must address all of the Turnaround Parties' legal-insufficiency arguments before concluding that all claims should be remanded to the trial court for a new trial.

/s/ Kem Thompson Frost
Chief Justice

Panel consists of Chief Justice Frost and Justices Christopher and Donovan. (Christopher, J., majority).