

Affirmed and Majority and Dissenting Opinions filed April 19, 2022.



In The

Fourteenth Court of Appeals

NO. 14-20-00312-CV

MEDSTAR FUNDING, LC, Appellant

V.

**FRODE WILLUMSEN, DONAL HUGHS MCROBERTS, AND
WILLUMSEN LAW FIRM, P.C., Appellees**

**On Appeal from the 295th District Court
Harris County, Texas
Trial Court Cause No. 2017-23189A**

DISSENTING OPINION

This court treats the April 7, 2020 severance order of a portion of the case previously disposed of by an interlocutory summary judgment as the trial court's final judgment. The order states:

Pending before the Court is the Plaintiff MedStar Funding, LC’s Motion for Severance. Upon consideration of the Motion, response and reply, the pleadings on file, and applicable law, it is HEREBY

ORDERED that the Motion is **GRANTED**. The Court finds the January 10, 2020 Summary Judgment to be an Interlocutory [sic] Summary Judgment as indicated in the Court’s file. Plaintiff’s claims against Defendants Frode Willumsen, Donal Hughs McRoberts, and Willumsen Law Firm, P.C., are severed from Plaintiff’s claims against Urooj Sheikh in Cause No. 2017-23189.

The Court Clerk is directed to assign **Cause No. 2017-23189-A** to the severed portion, styled *MedStar Funding, LC v. Frode Willumsen, Donal Hughs McRoberts, and Willumsen Law Firm, P.C.* The severed case shall be deemed “**Disposed (final)**” thirty (30) days after the date of severance assuming no post judgment motions are filed.

The severed matter, Case No. 2017-23189-A, should include the following documents filed in Cause No. 2017-23189:

(i) . . .

. . .

(lx)

Plaintiff MedStar Funding, L.C., shall be responsible for all filing fees and court costs incurred to effectuate this order.

DATED this ____ day of _____, 2020.

Signed:

4/7/2020

11:17 AM

/s/ [trial judge]

While a precise explanation of this order would be challenging,¹ one thing is easy—it is not a final judgment. The operative date when the order is “deemed

¹ For example, how is the unconventional phrase “assuming no post judgment motions are filed” to be interpreted? Does that phrase mean postjudgment motions filed before the 30-day deadline, May 7, 2020, or filed on or after May 7, 2020? Neither the Texas Rules of Civil Procedure nor the Texas Rules of Appellate Procedure change the date of the trial court’s final judgment if postjudgment motions such as a motion for new trial or motion for reconsideration are denied.

Assuming this order would pass muster under *Lehmann v. Har-Con Corp.* if the phrase “thirty (30) days after the severance” were omitted, would the subsequent phrase “assuming no post judgment motions are filed” retroactively negate any such final judgment were such a postjudgment motion to be filed? *Lehmann*, 39 S.W.3d 191, 204 (Tex. 2001) (“an order can be a

‘**Disposed (final)**’” is 30 days after April 7, 2020, i.e., May 7, 2020.² We have no subsequent writing signed by the trial court memorializing that nothing of legal significance occurred between April 7 and May 7, 2020. The April 7, 2020 order is simply interlocutory. *See Hegwood v. American Habilitation Servs., Inc.*, 294 S.W.3d 603, 605 (Tex. App.—Houston [1st Dist.] 2009, no pet.) (order expressly conditioned on future events is not final judgment); *Felt v. Bailey*, No. 14-20-00465-CV, 2022 WL 872246, at *3 n.12 (Tex. App.—Houston [14th Dist.] Mar. 3, 2022, no pet. h.) (mem. op.).

Acting like the interlocutory order signed 30 days before the date of the trial court’s final judgment is truly final cannot make it final. The order is still interlocutory, and the case is still pending in the trial court. *See Merchandise Mart, Inc. v. Marcus*, 515 S.W.2d 663, 664 (Tex. 1974) (per curiam), *dismissing motion to clarify judgment in* 501 S.W.2d 2d 712 (Tex. Civ. App.—Tyler 1973, no writ). In commenting on judgments, Chief Justice Calvert said, “If *Merchandise Mart* teaches nothing else, it teaches that, when an incorrect judgment is called into question, the defense ‘everyone knows what the court meant’ will not work.” Robert W. Calvert, *Appellate Court Judgments or Strange Things Happen on the Way to Judgment*, 6 Tex. Tech. L. Rev. 915, 925 (1975).

If our final challenge in an appeal is to draft a correct judgment, *see id.*, then our first challenge is to ensure we have jurisdiction over the trial court’s judgment

final judgment for appeal purposes even though it does not purport to be if it actually disposes of all claims still pending in the case”). Or do we just ignore “assuming no post judgment motions are filed”?

All the foregoing should be a giant klaxon that a *Lehmann* problem exists. Fortunately, it is unnecessary to answer the what-ifs posed above. The solution is to send a notice of involuntary dismissal. Tex. R. App. P. 42.3.

² This order is such a mess that this court does not even agree on the date of the alleged final judgment. The majority treats it as April 7, 2020; it seems clear to me that the order was attempting to be final 30 days later.

or appealable order. In this case we have no subject-matter jurisdiction over the appeal, and we cannot change that.

I dissent and would—after giving the notice required by Texas Rule of Appellate Procedure 42.3—dismiss the appeal for want of subject-matter jurisdiction.

/s/ Charles A. Spain
Justice

Panel consists of Justices Jewell, Spain, and Wilson (Jewell, J., majority).