No. 17-0197

IN THE SUPREME COURT OF TEXAS

IN RE PAUL & CYNTHIA ELIZONDO AND
EAGLE FABRICATORS, INC.,
Relators

On Petition for Writ of Mandamus

AMICUS CURIAE BRIEF OF THE STATE BAR OF TEXAS APPELLATE SECTION

THE STATE BAR OF TEXAS
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IDENTIFICATION AND INTEREST OF AMICUS CURIAE[1]

The State Bar of Texas Appellate Section (the "Section") is a non-profit, nonpartisan professional organization with more than 2,100 members, who are all licensed attorneys in Texas. The Section has developed a procedure for vetting cases before this Court that may be worthy of an amicus brief on behalf of the Section, and has identified this as such a case. The Section believes that this proceeding presents an issue that is important to the jurisprudence of this State and to the appellate bar, and that the Section's special knowledge, training, or experience would provide a significant contribution to the Court's consideration of the legal issues. The Section's interest in this case is purely academic; it has no interest in the ultimate resolution of the merits of this case, but has a keen interest in having this Court clarify the rules regarding finality of judgments—an issue that continues to arise too frequently—so that the rules may be applied uniformly and fairly.

The Section has obtained permission from the State Bar of Texas to file this amicus brief pursuant to § 8.01.10 of the State Bar Board Policy Manual.

[1] No legal fees were paid for the preparation of this brief. *See* TEX. R. APP. P. 11(c).

SUMMARY

The appellate bar, litigants, and courts all desire certainty in, and uniform application of, the rules governing when an order or judgment is final for purposes of an appeal when there has not been a conventional trial on the merits. This Court previously rejected the old "Mother Hubbard" clause and suggested, in *Lehmann v. Har-Con Corp.*, 39 S.W.3d 191 (Tex. 2001), that language such as "this judgment finally disposes of all parties and all claims and is appealable" would leave no doubt about the trial court's intentions. Now the question is whether that or similar language controls when other portions of the order raise doubts about the trial court's intentions.

In *Lehmann*, this Court held that a judgment issued without a conventional trial is final if it either: 1) actually disposes of all claims and parties, regardless of the language; or 2) states with unmistakable clarity that it is a final judgment as to all claims and parties. This case squarely presents the inevitable and important question: what happens when the judgment on its face does *not* dispose of all claims and parties, but nonetheless contains clear language incorrectly stating that it does so?

The Section urges this Court to clarify whether the language of the order or judgment should be considered as a whole, or whether operative adjudicative language in a judgment should control over a recital that the judgment adjudicates more than, in fact, it does. This interlocutory order includes language very similar to that suggested in *Lehmann*—"This judgment is final, disposes of all claims and all parties, and is

appealable."[2] But the title of the order ("Order on Defendants' Summary Motion to Remove Invalid Lien") and the ordering paragraphs themselves adjudicate only a motion to remove a lien and a request for attorneys' fees.

As this Court held in *Lehmann*, "The record may help illumine whether an order is made final by its own language, so that … an order that some party should not reasonably have regarded as final may not be final despite language that might indicate otherwise." *Id.*, 39 S.W.3d at 206. Having not reviewed the record in this case, the Section will not weigh in on whether the record or the context in which the order was entered demonstrates whether the order is final.

ARGUMENT AND AUTHORITIES

I. The desire for certainty vis-à-vis fairness and common sense.

The Section understands and embraces the principals behind the need for finality of judgments. Much mischief can arise when finality is allowed to be attacked long after the parties and the trial court believed a judgment to be final. Should a bright-line rule of finality come at the expense of rational and fair application of the rules?

The clear finality language suggested in *Lehmann*, it was hoped, would be inserted thoughtfully and purposefully into what were truly final judgments so as to leave no doubt or ambiguity. It is certainly a more clear indication of finality than the Mother

[2] The order also contains a "Mother Hubbard" clause, but this Court has rejected the notion that this clause, by itself, could make an otherwise interlocutory order final.

Hubbard language that had become ubiquitous. This case raises the question of whether that new language is so powerful that its mere presence will inexorably make an order final regardless of the rest of the language of the order, the context, and the record. In other words, does language reciting what an order adjudicates control even when inserted into an order that does not, in fact, make those adjudications? The Section urges this Court to answer this question.

II. Operative adjudicative language versus recitals in an order.

There is a meaningful difference between operative language in the ordering paragraphs of an order by which a court GRANTS or DENIES claims, i.e., actually disposes of them, and recital language that attempts to describe what claims the court has disposed of.[3]

In *Lehmann*, this Court noted:

- "the language of an order or judgment can make it final, even though it should have been interlocutory, if that language expressly disposes of all claims and all parties." *Lehmann*, 39 S.W.3d at 200.
- "for example, if a defendant moves for summary judgment on only one of four claims asserted by the plaintiff, but the trial court renders judgment that the plaintiff take nothing on all claims asserted, the judgment is final—erroneous, but final." *Id.*
- "an express adjudication of all parties and claims in a case is not interlocutory merely because the record does not afford a legal basis for the adjudication." *Id.* at 206.

[3] As a practical matter, parties and their attorneys generally pay more attention to the ordering paragraphs than the recitals at the end of an order, and tend to be more careful with that language.

So when a trial court erroneously grants more relief than was requested in a motion for partial summary judgment, for example, that actual adjudication (though in error) may make the order final for purposes of appeal. But a mere recital that the trial court disposed of all claims is not an actual adjudication.

An inconsistency between the ordering paragraphs and a recital of what was ordered raises doubt about an order's finality; resolution may require a review of the record and the context. *See MJR Fin., Inc. v. Marshall*, 840 S.W.2d 5, 9 (Tex. App.—Dallas 1992, no writ) (the presumption that recitals in a judgment are true is rebuttable when there is a conflict between the judgment and the record).

III. Can magic language in an order clearly and unmistakably indicate finality when it is inconsistent, on its face, with the rest of the order?

The recital in this case—"This judgment is final, disposes of all claims and all parties, and is appealable"—is unmistakably clear by itself. But the order is titled "Order on Defendants' Summary Motion to Remove Invalid Lien," adjudicates only two matters, and says nothing about the plaintiff's claims. A sentence that is unmistakably clear and unequivocal by itself can become unclear and equivocal when read in conjunction with the rest of the document in which it appears. This Court has held that language in a judgment or order should not be read in isolation. *See, e.g., Shanks v. Treadway*, 110 S.W.3d 444, 447 (2003) (when interpreting a divorce decree, the decree should be construed as a whole).

This Court has relied on general rules of construction when construing court orders in contexts other than determining finality. *Id.* (courts apply the general rules regarding construction of judgments in construing a divorce decree). In construing a bankruptcy court order to see if a party had violated the automatic stay, this Court noted:

> Just as with an unambiguous contract, we enforce unambiguous orders literally. *Reiss v. Reiss*, 118 S.W.3d 439, 441-42 (Tex. 2003). Only where an order's terms are ambiguous—that is, susceptible of more than one reasonable interpretation—do we look to the surrounding circumstances to discern their meaning. *Lone Star Cement Corp. v. Fair*, 467 S.W.2d 402, 404-05 (Tex. 1971).

Hemyari v. Stephens, 355 S.W.3d 623, 626 (Tex. 2011). While principals governing the desire for finality of judgments rightfully shift the analysis away from imagining any possible ambiguity—the *Lehmann* language was designed to do just that—the fact remains that *some* orders will be insufficiently clear when read as a whole despite one clear and unmistakable sentence that would otherwise, by itself, signal finality.

This case presents an example of such an unclear order. In contrast, the judgment this Court analyzed in *In re Daredia*, 317 S.W.3d 247, 249 (Tex. 2010), and found to be "clear enough" and "unequivocal" is very different from the order at issue, as compared in the table below:

Elizondo Order	Daredia Judgment[4]
Title: "Order on Defendants' Summary Motion to Remove Invalid Lien"	Title: "Default Judgment"
"After considering The Motion to Remove Invalid Lien …"	"came on to be heard the above numbered and entitled cause …"
Does not award post-judgment interest or allow for execution.	Awards post-judgment interest and allows for execution to issue.
The order indicates the court had before it only the summary motion.	"all matters in controversy, of fact as well as of law, were submitted to the Court."

Lehmann instructs that a judgment issued without a conventional trial is not final unless it either: 1) "actually disposes of every pending claim and party;" or 2) "clearly and unequivocally states that it finally disposes of all claims and all parties." *Lehmann*, 39 S.W.3d at 205. But even when "clear and unmistakable" language indicating finality appears in a judgment, if the rest of the judgment reveals an ambiguity or incongruity, then the language of the judgment *as a whole* is no longer clear and unequivocal and thus doesn't pass the second prong of the test under *Lehmann*.

The Section asks this Court to decide whether magic language should be read in isolation as a stand-alone and absolute indicator of finality without regard to the remaining language of the order or judgment, or whether the judgment should be construed as a whole and read in context. *Shanks*, 110 S.W.3d at 447; *Lehmann*, 39 S.W.3d at 195, 200, 205 ("[a]n order does not dispose of all claims and all parties merely

[4] This document can be found on page 42 of the 68-page PDF at *http://www.search.txcourts.gov/SearchMedia.aspx?MediaVersionID=99032431-d0fe-40e5-b867-fda5a1ef1e67&coa=cossup&DT=BRIEFS&MediaID=3348b02b-72e3-4c4b-a4cc-4419cede2fec*

because … the word 'final' appears … in the order;" "whether a judicial decree is a final judgment must be determined from its language and the record in the case."); *see, e.g., Tooke v. City of Mexia*, 197 S.W.3d 325, 329 (Tex. 2006) (the meaning of the otherwise unambiguous words "sue and be sued" "cannot be ascertained apart from the context in which they occur"); *see also, e.g., Myers v. Gulf Coast Minerals Mgmt Corp.*, 361 S.W.2d 193, 197 (Tex. 1962) (recitals in a contract should be reconciled, if possible, with the operative clauses in the contract).

For these reasons, the Appellate Section of the State Bar of Texas, amicus curaie, encourages the Court to grant the petition for writ of mandamus in this cause and render a decision in this once-again-unsettled area regarding finality of judgments.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing document contains 1,902 words, according to the word count of the computer program used to prepare it, in compliance with TEX. R. APP. P. 9.4(i)(2).

/s/ Elizabeth G. Bloch
ELIZABETH G. BLOCH

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing instrument has been served upon counsel of record for the parties via the Court's electronic filing system on the ____ day of _____, 2017:

/s/ Elizabeth G. Bloch
ELIZABETH G. BLOCH