MEMORANDUM

TO: Supreme Court Advisory Committee

FROM: Judge David Peeples

RE: The legal effect of letter rulings by judges

DATE: March 23, 2011

In response to questions raised by Chief Justice Tom Gray, Justice Hecht has asked the committee to study the legal effect of letter rulings by judges. The question is: To what extent should letter rulings from judges have the legal effect of formal orders? (The issue seems not to have arisen with e-mail rulings, which have no ink signature.)

Letter rulings are used primarily in two situations. First, after an oral hearing judges occasionally take matters under advisement and later announce their rulings by letter. Second, when a matter is decided by submission without an oral hearing, judges will often notify litigants of the ruling by letter. These letter rulings can raise several questions:

1. **Finality and appealability.** Is the letter ruling itself a final and appealable order (assuming it disposes of all parties and issues or is a subject for interlocutory appeal)? That is, does the letter *start* the timetables?

2. **Effectiveness.** Is it effective to grant a new trial or to set aside an earlier final order on which the timetables have begun to run? That is, does the letter *stop* the time-tables that would otherwise keep running?

3. **Enforceability.** Is the letter ruling enforceable as an order of the court (e.g., orders compelling discovery for purposes of Rule 215, temporary orders in a family law case)? Letter rulings would seem to be at least as enforceable as oral rulings from the bench.

4. **Preservation of error.** Is it a sufficient ruling of the court to preserve error?

In our discussion of this matter, I suggest that we keep several thoughts in mind.

1. **Ain't broke, don't fix?** Are there enough recurring problems with letter rulings to justify a rule?

2. **Draft for the most common situation.** If we draft a rule, we should draft for the most common and usual situations. I submit that in most instances judges do not

intend that letter rulings will *be* the final and appealable order. Even when judges intend to grant complete/final relief in a letter, they almost always envision that there will eventually be a formal, signed judgment or order.

3. **Interlocutory letter rulings are common.** Many letter rulings are interlocutory anyway, and issues of finality and appealability will not arise. And frequently there is no intent to write up a formal order ever; all the parties need is the judge's decision, and there will never be a formal typewritten order in the form of a pleading. Discovery is probably the most common example of this.

4. **Clarity and ease of application.** Every rule of procedure should aim for clarity and ease of application. This means we should avoid inquiries into the judge's subjective intent. The appellate cases usually focus on such language as, *I will grant the motion, I am denying the motion, The motion for new trial is granted, I ask Attorney Jones to prepare and circulate an order,* etc.

5. **Easy to create finality.** Remember that when judges really intend finality, they can simply put clear finality language in their letters. The *Lehmann* language comes to mind.

6. **E-mail.** As time goes by will letter rulings gradually vanish, as e-mail displaces all these hard-copy letters? Does e-mail's superiority to hard copy (quicker and easier) explain the dwindling number of these cases?

Several cases on this subject are collected in *Perdue v. Patten Corp.,* 142 S.W.3d 596, 600-603 (Tex. App.—Austin 2004, no pet.). Excerpts from *Perdue* are attached.

notice of the "drop docket" to Patten's attorney and Kuehr—but not to Wilson or Bosworth; the cases were to be dismissed if no party appeared on August 31, 1998. When the Perdues failed to appear, the court signed an order dismissing their causes. The Perdues did not find out about the dismissal until the spring of 1999. In July 1999, Wilson filed a petition for bill of review on behalf of the Perdues. About a year later, Bosworth became the Perdues' attorney of record in place of Wilson.[2]

In July 2002, Patten filed a motion for summary judgment, asserting that there was no evidence to support three of the necessary elements of a bill of review that (1) the plaintiffs were prevented from making their claim by some fraud on behalf of the opposing party or an official mistake by the court, (2) the plaintiffs' own negligence did not contribute to the dismissal of their claims, and (3) the plaintiffs exercised due diligence in pursuing other legal remedies against the judgment.[3] *See Narvaez v. Maldonado*, 127 S.W.3d 313, 319, 321 (Tex.App.-Austin 2004, no pet.). The court granted a no-evidence summary judgment on April 12, 2003. The Perdues filed a motion for new trial, which the court announced it was granting in a letter to counsel dated July 22, 2003; the formal order granting a new trial was entered on July 31, 2003.

DISCUSSION

Jurisdiction

[1] As a preliminary matter, this Court raised the issue of subject-matter jurisdiction to determine whether the summary judgment is properly before us on appeal. In response, the Perdues assert that we do not have jurisdiction over this cause because the trial court granted their motion for new trial, vacating the summary judgment.[4] Patten insists that the summary judgment is properly before us because the order granting new trial was ineffectual and null as it was entered three days after the court's plenary power over the case had expired. *See* Tex. R Civ. P. 329b(c), (e). The court's letter announcing the granting of a new trial was timely; its order was not.

The trial court's plenary power to grant a new trial or to vacate, modify, correct, or reform the judgment is limited to thirty days after all such timely filed motions are overruled, either by a written and signed order or by operation of law, whichever occurs first. *Id.* (e). If a motion for new trial "is not determined by written order signed within seventy-five days after the

2. Although Wilson and Bosworth were both substituted as counsel for Kuehr in 1996, it appears that only Wilson handled the cases until 1999. Until that time, Wilson and Bosworth appear to have been practicing together or at least sharing office space, as they shared the same address and phone number. By the time Bosworth took over the cases from Wilson, he appears to have moved to a separate office.

3. Patten has not challenged the other element of a bill of review: that the Perdues must have a meritorious claim. *See Jones v. Texas Dep't of Protective & Regulatory Servs.*, 85 S.W.3d 483, 487 (Tex.App.-Austin 2002, pet. denied).

4. The Perdues alternatively argue that the summary-judgment order failed to dispose of all parties and claims and was therefore not final. They claim that the summary-judgment motion "merely requests certain evidentiary findings." We disagree. Patten's no-evidence summary-judgment motion sufficiently notifies the court of its argument that there is no evidence to support the second and third elements of a bill of review. The trial court's grant of this motion foreclosed all of the Perdues' claims, as they could challenge the trial court's dismissal of their claims only by proving the bill-of-review elements.

judgment was signed, it shall be considered overruled by operation of law on expiration of that period." *Id.* (c). After the court's plenary power has expired, it may not set aside a judgment except by bill of review. *Id.* (f).

Here, the trial court signed the order granting summary judgment on April 12, 2003.[5] The Perdues filed a motion for new trial on May 12. On June 26, seventy-five days after the judgment was signed, the motion was overruled by operation of law. However, the trial court retained plenary power to set aside the judgment for thirty days, until July 28.[6] The court held a hearing on the motion for new trial on July 11 and on July 22 sent a letter to the parties stating, "Accordingly, it is the order of the Court that the Motion for New Trial filed by Plaintiffs, Matthew Perdue and Thelma Cade–Perdue, be ***GRANTED*** in all things." The letter continued, "Mr. Bosworth [the Perdues' counsel] is directed to prepare the appropriate Order for my signature and forward the same to me at my office.... I shall attend to the filing of the Order after signature." The Perdues argue that this letter serves as a valid order granting their motion for new trial within the period of the court's plenary jurisdiction. The trial court signed the order granting a new trial on July 31, three days after its plenary power had expired.

Two rules of civil procedure govern our decision. Rule 329b governs the timing for taking action on motions for new trials. *See* Tex.R. Civ. P. 329b. Rule 5, in turn, clearly states, "The court may not enlarge the period for taking any action under the rules relating to new trial except as stated in these rules." *Id.* 5.

In *Reese v. Piperi*, 534 S.W.2d 329 (Tex. 1976), the supreme court addressed a similar issue, whether a trial court's oral rendition of a motion for new trial fell within the period of its plenary jurisdiction to amend or modify a judgment. The oral pronouncement came while the court still had plenary jurisdiction, but the signed written order came more than thirty days after the motion for new trial was overruled by operation of law. Because the trial court had lost its plenary jurisdiction, the judgment could only be set aside by bill of review. *See id.* at 330–31. The movants argued that the formal written order was a nunc pro tunc reflection of the oral judgment. The supreme court found that the judge's oral pronouncement represented an intention to grant the motion in the future if the parties did not work things out. *Id.* The court acknowledged that even though the trial court could have made an oral pronouncement that might serve as a present rendition of judgment, "[t]he opportunities for error and confusion may be minimized if judgments will be rendered only in writing and signed by the trial judge after careful examination." *Id.* at 330.

The opinion then noted a "further problem" posed by rule 5:

> order granting a new trial would not be timely.

5. The Perdues assert that the actual date the order was signed was likely April 21, 2003, evidenced by the fact that April 12 was a Saturday and that the order was filed on April 21. Calculating the dates from April 21, the formal order purporting to grant the motion for new trial would be timely. However, there is no evidence in the record to support this speculation, and indeed the docket sheet reflects that the order was entered on April 15; if this were the actual date, the formal

6. Because the thirty-day period expired on Saturday, July 26, 2003, the court's plenary jurisdiction extended until Monday, July 28. *See* Tex.R. Civ. P. 4; *McClelland v. Partida*, 818 S.W.2d 453, 455 n. 2 (Tex.App.-Corpus Christi 1991, writ dism'd w.o.j.).

> If an oral pronouncement by the court were to satisfy the requirements of Rule 329b(4) and if this rendition could be entered months later in the form of a nunc pro tunc order, the trial judge could extend the time for final disposition of the motion for new trial far beyond the period prescribed by Rule 329b—despite the express language of Rule 5 that the court "may not enlarge the period for taking any action under the rules relating to new trials ... except as stated in the rules relating thereto."

Id. at 331.[7] The supreme court held that rule 329b, like rule 306a establishing appellate timetables, contemplated a written and signed order granting a motion for new trial that must be rendered within the period of the trial court's plenary jurisdiction. *See id.* at 331.

In *McCormack v. Guillot*, the supreme court found ineffective a docket sheet notation granting a motion for new trial and, relying on *Reese*, held that the formal written order—signed after the court had lost plenary power under rule 329b—was a nullity. 597 S.W.2d 345, 346 (Tex.1980). The *McCormack* court also cited with approval two appellate-court cases holding that absent a formal order signed by the judge, the motion for new trial is overruled by operation of law, and the trial court loses its plenary jurisdiction thirty days after that. *See id.*; *Atkinson v. Culver*, 589 S.W.2d 164, 165–66 (Tex.Civ.App.-El Paso 1979, no writ); *Teran v. Fryer*, 586 S.W.2d 699, 700 (Tex.Civ.App.-Corpus Christi 1979, writ ref'd).

The *McCormack* opinion also noted that there should be no distinction between the procedural requisites for the overruling of a motion for new trial, triggering appellate timetables, and the granting of a motion for new trial, vacating a prior judgment in the exercise of plenary power. *See* 597 S.W.2d at 346. In each instance, the court's order must be in writing and signed. *See id.* (citing *Reese*, 534 S.W.2d at 330–31). The court held that the necessity of a "written order that is express and specific" applies equally to measuring time for appellate steps and for determining a motion for new trial during the period of the court's plenary jurisdiction.[8] *See id.* (quoting *Poston Feed Mill Co. v. Leyva*, 438 S.W.2d 366, 368 (Tex.Civ.App.-Hous-

7. The text of former rule 329b(5) referred to the court's "taking action" on a motion for new trial. *See* Tex.R. Civ. P. 329b(5) (West 1977, repealed 1981) ("The failure of a party to file a motion for new trial within the ten (10) day period ... shall not deprive the district court of jurisdiction to set aside a judgment rendered by it, provided such action be taken within thirty (30) days after the judgment is rendered."). Although the current rule 329b does not use this phrase, rule 5 maintains this concept by stating that the trial court may not enlarge the period for "taking action" under rule 329b. *See* Tex.R. Civ. P. 5.

8. Furthermore, the Texas Supreme Court has determined that generally letters to counsel are not the kind of documents that constitute a judgment, decision, or order from which an appeal may be taken: "The time from which one counts days for the appellate steps is that day on which the judge reduces to writing the judgment, decision or order that is the official, formal and authentic adjudication of the court upon the respective rights and claims of the parties." *Goff v. Tuchscherer*, 627 S.W.2d 397, 398–99 (Tex.1982). The *Goff* court concluded that a trial court's letter to counsel stating that it had overruled a plea of privilege, which also called upon counsel to prepare and present an appropriate order reflecting that ruling, did not start the clock running on the appellant's twenty-day deadline for perfecting his appeal. *Id.* Rather, the court's formal order overruling the plea of privilege signed a couple weeks later was the final judgment. *Id.* By analogy, the letter in this case manifested the trial judge's understanding that the letter was not the final, official order granting a new trial because it called on counsel to draft and submit such an order.

ton [14th Dist.] 1969, writ dism'd w.o.j.)); *see also Faulkner v. Culver*, 851 S.W.2d 187, 188 (Tex.1993) (order granting new trial must be written and signed; oral pronouncement and docket entry not sufficient).

The facts of this case are distinguishable from those in more recent appellate-court cases such as *In re Fuentes* and *Schaeffer*. *See In re Fuentes*, 960 S.W.2d 261, 264–65 (Tex.App.-Corpus Christi 1997, no writ); *Schaeffer Homes, Inc. v. Esterak*, 792 S.W.2d 567, 569 (Tex.App.-El Paso 1990, no writ). In those cases, the courts noted that present-tense language in a letter to counsel, without any directive for counsel to prepare an order, could be construed as an order if the letter was filed or otherwise appeared in the court's record. *See Fuentes*, 960 S.W.2d at 264–65; *Schaeffer*, 792 S.W.2d at 569; *see also In re Helena Chem. Co.*, 134 S.W.3d 378, 380 (Tex.App.-Waco 2003, no pet. h.) (court is to look to entire record to determine judge's intent when construing order entered within period of court's plenary power). Here, although the July 22 letter to counsel purported to grant the motion for new trial and was filed with the court clerk, it also directed counsel to prepare an order and thus indicated the court's intent that it not be the operative order. But even if the letter unequivocally attempted to serve as a final order, the letter does not constitute the formal, signed order contemplated by *Atkinson* and *Teran*. *See Atkinson*, 589 S.W.2d at 166; *Teran*, 586 S.W.2d at 700.

More importantly, both *McCormack* and *Reese* also rest their decision on the language of rule 5 that prohibits a trial court from "enlarg[ing] the period for taking any action under the rules relating to new trials." Tex.R. Civ. P. 5; *see McCormack*, 597 S.W.2d at 346; *Reese*, 534 S.W.2d at 330–31. Rule 5 prevents the trial court from expanding its jurisdiction to grant a new trial by entering a signed written order reflecting the earlier letter after its plenary jurisdiction had expired.

We agree with Patten that the trial court's July 22 letter to counsel was not an "order" for purposes of rule 329b. The formal order signed on July 31 is the controlling order. It is null because it was signed more than thirty days after the motion for new trial was overruled by operation of law. Therefore, the summary judgment was not vacated and was a final, appealable order.[9]

No-evidence motion for summary judgment

[2–5] A no-evidence summary judgment is essentially a directed verdict granted before trial, to which we apply a legal-sufficiency standard of review. *King Ranch, Inc. v. Chapman*, 118 S.W.3d 742, 750–51 (Tex.2003); *Jackson v. Fiesta Mart, Inc.*, 979 S.W.2d 68, 70 (Tex.App.-Austin 1998, no pet.). In general, a party seeking a no-evidence summary judgment must assert that no evidence exists as to one or more of the essential elements of the nonmovant's claims on which it would have the burden of proof at trial. *Holmstrom v. Lee*, 26 S.W.3d 526, 530 (Tex. App.-Austin 2000, no pet.). Once the movant specifies the elements on which there is no evidence, the burden shifts to the nonmovant to raise a fact issue on the challenged elements. Tex.R. Civ. P. 166a(i). A no-evidence summary judgment will be sustained when (1) there is a complete absence of evidence of a vital fact, (2) the court is barred by rules of law or of

9. Although they believed the summary judgment had been vacated by the trial court's letter, the Perdues filed a notice of appeal to preserve their right to appeal. "A party who is uncertain whether a judgment is final must err on the side of appealing or risk losing the right to appeal." *Lehmann v. Har-Con Corp.*, 39 S.W.3d 191, 196 (Tex.2001).