

# IN THE SUPREME COURT OF TEXAS

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No. 98-1031

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LANE BANK EQUIPMENT CO., PETITIONER

v.

SMITH SOUTHERN EQUIPMENT, INC., RESPONDENT

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ON PETITION FOR REVIEW FROM THE  
COURT OF APPEALS FOR THE FIRST DISTRICT OF TEXAS

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**Argued on September 22, 1999**

CHIEF JUSTICE PHILLIPS delivered the opinion of the Court, in which JUSTICE BAKER, JUSTICE ABBOTT, JUSTICE HANKINSON, JUSTICE O'NEILL and JUSTICE GONZALES joined.

JUSTICE HECHT filed a concurring opinion.

JUSTICE ENOCH filed a concurring opinion, in which JUSTICE OWEN joined.

In this case, we decide whether a timely filed postjudgment motion seeking to add an award of sanctions to an existing judgment extends the thirty-day period in which a trial court may exercise plenary power over its judgment. The court of appeals held that such a motion qualified as a motion to modify, correct, or reform a judgment under Texas Rule of Civil Procedure 329b(g), thus extending the trial court's plenary power to change its judgment beyond the initial thirty-day period. 981 S.W.2d 302. Because we agree, we affirm the court of appeals' judgment.

Lane Bank Equipment Company and Smith Southern Equipment, Inc., each design, install, and supply equipment to banks. In 1995, Lane sued Smith for unfair competition. Smith answered and subsequently sought to recoup its attorney's fees as a sanction, asserting that Lane's suit was frivolous. On the eve of trial, Lane nonsuited. The trial court granted the nonsuit without prejudice to Smith's claim for attorney's fees should Lane elect to refile suit.

Two weeks after the dismissal, Lane refiled, adding claims of tortious interference with contract and misappropriation of trade secrets to the former unfair competition complaint. After another year of litigation, the trial court granted Smith's motion for summary judgment. The trial court's order, signed on June 5, 1997, stated that "Defendant Smith Southern Equipment, Inc.'s Motion for Summary Judgment is granted."

Three weeks later, Smith moved for sanctions and for rendition of a new final judgment in the case. Smith alleged that Lane's claims were baseless and filed solely for purposes of harassment. *See* TEX. CIV. PRAC. & REM. CODE § 10.001(1), (3); TEX. R. CIV. P. 13. The trial court agreed; and on July 11, 1997, it signed an order stating that Lane's petition and discovery responses were "in bad faith and for the improper purposes of harassing and imposing needless costs upon Smith Southern." As a sanction for this conduct, the trial court awarded Smith more than \$46,000 for attorney's fees and expenses reasonably incurred in defending the litigation, together with additional sums for appellate attorney's fees in the event Lane pursued an unsuccessful appeal. *See* TEX. CIV. PRAC. & REM. CODE § 10.002(c). The trial court also signed a new judgment on that date, referring to the previous order granting summary judgment in Smith's favor and awarding the attorney's fees and expenses found to be reasonable and necessary in the sanctions order. Lane appealed, and the court

of appeals affirmed the summary judgment and sanctions. 981 S.W.2d 302.

In this Court, Lane abandons its attack on the summary judgment and focuses solely on whether the trial court had jurisdiction to render its July 11<sup>th</sup> order awarding sanctions. Lane contends that the original summary judgment signed on June 5, 1997, became final after thirty days so that the trial court's plenary power expired on July 5, 1997. Thus, Lane concludes the trial court had no authority to order sanctions on July 11, 1997.

A trial court retains jurisdiction over a case for a minimum of thirty days after signing a final judgment. TEX. R. CIV. P. 329b(d). During this time, the trial court has plenary power to change its judgment. *Check v. Mitchell*, 758 S.W.2d 755, 756 (Tex. 1988). The period of plenary power may be extended, however, by timely filing an appropriate postjudgment motion. Thus, the filing of a motion for new trial, TEX. R. CIV. P. 329b(e), or a motion to modify, correct or reform the judgment, TEX. R. CIV. P. 329b(g), within the initial thirty-day period extends the trial court's jurisdiction over its judgment up to an additional seventy-five days, depending on when or whether the court acts on the motions. *Philbrook v. Berry*, 683 S.W.2d 378, 379 (Tex. 1985); TEX. R. CIV. P. 329b(c). In this case, the court of appeals concluded that Smith's postjudgment motion for sanctions extended the trial court's plenary jurisdiction over the June 5<sup>th</sup> judgment as a motion to modify, correct or reform the judgment under Rule 329b(g). 981 S.W.2d at 303.

Lane argues that treating a postjudgment motion for sanctions as a Rule 329b(g) motion is inconsistent with our opinion in *Scott & White Memorial Hospital v. Schexnider*, 940 S.W.2d 594 (Tex. 1996). In that case we were asked whether a trial court had authority to render sanctions following a nonsuit but within the period of plenary jurisdiction. We held that the trial court's

plenary power included the authority to act on a motion for sanctions. But because the sanctions order was signed within thirty days of the judgment, we did not consider whether the postjudgment motion for sanctions might also extend the court's plenary jurisdiction under Rule 329b(g). Although *Schexnider* did not resolve the issue now before us, Lane argues that our opinion nevertheless suggested that a postjudgment motion for sanctions was not a Rule 329b(g) motion that would extend a trial court's plenary jurisdiction.

This suggestion, Lane argues, arises from our discussion of *Hjalmarson v. Langley*, 840 S.W.2d 153 (Tex. App.--Waco 1992, orig. proceeding). *Hjalmarson*, however, did not consider the present issue, and Rule 329b(g) was not even mentioned. Instead, the court of appeals merely observed that because "inherent power" was not a substitute for plenary power, a court could not sanction a party after the expiration of its plenary jurisdiction. *Hjalmarson*, 840 S.W.2d at 155. In discussing the case, we agreed that sanctions could not be awarded after expiration of a trial court's plenary jurisdiction. *Schexnider*, 940 S.W.2d at 596.

Lane notes, however, that the sanctions motion in *Hjalmarson* was filed after the judgment and within the court's initial period of plenary jurisdiction and should therefore have extended the trial court's plenary jurisdiction if a postjudgment motion for sanctions is also a motion to modify under Rule 329b(g). As previously mentioned, the court in *Hjalmarson* did not expressly consider this issue. But implicit in its conclusion that the sanctions order was void was the assumption that the postjudgment motion for sanctions did not extend the trial court's plenary jurisdiction beyond the initial thirty-day period. Lane thus contends that because we did not expressly disapprove of *Hjalmarson*'s jurisdictional assumption in *Schexnider*, we must have agreed with it, especially since

we expressly rejected another part of the opinion.<sup>1</sup>

Lane's argument proves too much. The parties in *Hjalmarson* did not raise the application of Rule 329b, and the court of appeals assumed that the trial court's plenary power expired thirty days after the nonsuit. In discussing *Hjalmarson*, we likewise did not consider the implications of Rule 329b(g) because an extension of plenary jurisdiction was not necessary to our decision in *Schexnider*. Thus, although we agreed with *Hjalmarson*'s conclusion that a court could not levy sanctions after its plenary jurisdiction expired, that agreement cannot be construed as approval of *Hjalmarson*'s assumption about when the trial court's plenary jurisdiction ended.

Lane further contends that a motion for sanctions should not be construed as a Rule 329b(g) motion to modify because a sanctions motion concerns matters that are distinct from the substantive issues in the case. Thus, Lane argues that a sanctions motion seeks relief independent of the existing judgment and does not seek a change in the judgment as contemplated under Rule 329b(g). To support its argument, Lane relies on *Jobe v. Lapidus*, 874 S.W.2d 764 (Tex. App.-- Dallas 1994, writ denied). Because the sanctions motion in *Jobe* preceded the court's judgment, however, the meaning and application of Rule 329b(g) were not at issue. The court of appeals merely dismissed the appeal, concluding that the trial court lacked jurisdiction when it rendered a second judgment, incorporating an award of sanctions, because no Rule 329b motion had been filed to extend the trial court's plenary jurisdiction beyond the initial thirty-day period. *Id.* at 766.

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<sup>1</sup> The court in *Hjalmarson* also held that a defendant, seeking postjudgment sanctions following a nonsuit, had to move for reinstatement of plaintiff's case before it could obtain sanctions. *Hjalmarson*, 840 S.W.2d at 154. In discussing *Hjalmarson*, we rejected the notion that reinstatement was a precondition to consideration of a timely filed postjudgment motion for sanctions. *Schexnider*, 940 S.W.2d at 596.

Pertinent to Lane’s present contention, the court in *Jobe* also concluded that the judgment did not have to resolve the pending sanctions motion to be final because a motion for sanctions “is not a pleading that frames issues which must be resolved in a final judgment.” *Id.* Thus, the first judgment was final, even though a pending sanctions motion was left unresolved, because the judgment disposed of all parties and all issues in the pleadings.

While we agree that a judgment does not have to resolve pending sanctions issues to be final, that principle does not control this case. Even if a sanctions order is not required to be included in a final judgment, it may be included there. And a motion made after judgment to incorporate a sanction as a part of the final judgment does propose a change to that judgment. Such a motion is, on its face, a motion to modify, correct or reform the existing judgment within the meaning of Rule 329b(g).

A number of courts of appeals, beginning with *Brazos Electric Cooperative, Inc. v. Callejo*, 734 S.W.2d 126, 128 (Tex. App.--Dallas 1987, no writ), have said that a Rule 329b(g) motion must seek to substantively change the existing judgment to qualify as a motion to modify under subpart (g).<sup>2</sup> In this case, Smith’s postjudgment motion for sanctions sought to change the court’s June 5<sup>th</sup> judgment by adding an award of attorney’s fees as a sanction for frivolous litigation. *See* TEX. CIV. PRAC. & REM. CODE § 10.002(c). The motion accordingly proposed a substantive modification to

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<sup>2</sup> *See Ramirez v. Williams Bros. Constr. Co.*, 870 S.W.2d 551, 552 (Tex. App.--Houston [1st Dist.] 1993, no writ); *United States Fire Ins. Co. v. State*, 843 S.W.2d 283, 284 (Tex. App.--Austin 1992, writ denied); *Miller Brewing Co. v. Villarreal*, 822 S.W.2d 177, 179 (Tex. App.--San Antonio 1991), *rev’d on other grounds*, 829 S.W.2d 770 (Tex. 1992); *Home Owners Funding Corp. of Am. v. Scheppler*, 815 S.W.2d 884, 887 (Tex. App.--Corpus Christi 1991, no writ); *Cavalier Corp. v. Store Enter., Inc.*, 742 S.W.2d 785,787 (Tex. App.--Dallas 1987, writ denied).

the former judgment.

Although Smith's motion here satisfies the substantive requirement of *Callejo* and its progeny, Smith argues that its motion did not have to seek a substantive change to extend the trial court's plenary jurisdiction under our decision in *Check v. Mitchell*, 758 S.W.2d 755, 756 (Tex. 1988). *Check*, however, was not concerned with a Rule 329b(g) motion. Instead, *Check* applied subpart (h) of this rule which provides that "[i]f a judgment is modified, corrected or reformed in any respect, the time for appeal shall run from the time the modified, corrected, or reformed judgment is signed ...." TEX. R. CIV. P. 329b(h). In interpreting subpart (h), we held that "any change, whether or not material or substantial, made in a judgment while the trial court retains plenary power" restarts the appellate timetable. *Check*, 758 S.W.2d at 756. Applying *Check* here, Smith submits that because subparts (g) and (h) share the same triggering language, that of modification, correction or reformation of a judgment, they should be interpreted in the same way. Thus, if a change in the judgment, "whether or not material or substantial," triggers rule 329(h), then any timely postjudgment motion requesting such a change should also trigger Rule 329b(g).<sup>3</sup> We do not agree that subparts (g) and (h) share a common trigger.

Rule 329b(h) provides that "[i]f a judgment is modified, corrected or reformed *in any respect*" the appellate timetable runs from the date of the new judgment. TEX. R. CIV. P. 329b(h)(emphasis added). Thus, in *Check*, we concluded that the appellate timetable should restart

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<sup>3</sup> At least two courts have questioned whether Rule 329b(g) requires a substantive motion in light of our interpretation of subpart (h) in *Check*, 758 S.W.2d at 756. See *Cannon v. ICO Tubular Serv., Inc.*, 905 S.W.2d 380, 389 (Tex. App.--Houston [1st Dist.] 1995, no writ)(holding that timely filed postjudgment motion seeking only clerical corrections qualifies as a rule 329b(g) motion); *Miller Brewing Co.*, 822 S.W.2d at 179 n.2 (applying requirement that motion seek substantive change but questioning why clerical change would not also be sufficient).

whenever a court changes its judgment whether or not the change is “material or substantial.” *Check*, 758 S.W.2d at 756. Subpart (g), on the other hand, is not concerned with a court changing its judgment but rather with a party’s request that some change be made. Rather than the expansive “in any respect” of subpart (h), subpart (g) begins, “[a] motion to modify, correct, or reform a judgment (as distinguished from motion to correct the record of a judgment under Rule 316)” extends the trial court’s plenary jurisdiction and the appellate deadlines as would a motion for new trial. Subpart (g)’s omission of the “in any respect” language found in subpart (h) and its pointed distinction between motions to modify and motions seeking purely clerical corrections indicate that the respective provisions have different triggers. Thus, any change to a judgment made by the trial court while it retains plenary jurisdiction will restart the appellate timetable under Rule 329b(h), *Check*, 758 S.W.2d at 756, but only a motion seeking a substantive change will extend the appellate deadlines and the court’s plenary power under Rule 329b(g). *See Cavalier Corp. v. Store Enter., Inc.*, 742 S.W.2d 785, 786 (Tex. App.--Dallas 1987, writ denied).

Justice Hecht’s concurring opinion questions the wisdom of requiring that a Rule 329b(g) motion actually seek a substantive change. He argues that such a requirement creates a trap for the unwary appellate practitioner — a trap that is not warranted by the rule’s language or its history. But his historical view demonstrates, and he concedes, that there is almost no history pertaining to subpart (g) in the minutes of the Rules Advisory Committee. He therefore must impute the Committee’s concerns about subpart (h) to subpart (g), suggesting that the Committee impliedly intended for a party’s rights under subpart (g) to mirror the trial court’s power under subpart (h). We disagree. The history upon which Justice Hecht relies and the language adopted by this Court

indicate that a party's right to move for a modification and the court's power to change its judgment are not coextensive.

A motion to modify, correct or reform a judgment was always intended to embody something other than a motion for judgment nunc pro tunc.<sup>4</sup> That distinction continues in the express language of Rule 329b(g) today. Even Justice Hecht ultimately concludes that a motion seeking a purely clerical change cannot qualify under Rule 329b(g). \_\_\_ S.W.2d at \_\_\_ (Hecht, J. concurring). But any change made by the court under subpart (h) prior to losing jurisdiction, even a clerical change, will restart the appellate timetable. Accordingly, Justice Hecht must concede that the modifications that trigger subpart (h) are not identical to those that trigger subpart (g). Because we are in agreement on this point, Justice Hecht manufactures a dispute by imagining that the Court intends for the application of Rule 329b(g) to depend upon the relative degree of substance contained in the motion. In fact, we intend no such thing. A timely filed postjudgment motion to incorporate sanctions into a new final judgment qualifies under Rule 329b(g) without regard to the relative value of the sanction imposed or even whether the sanction has any express monetary value. In contrast, a timely filed postjudgment motion that merely seeks to correct clerical errors, such as punctuation, grammar or misspellings, will not qualify under Rule 329b(g).

We accordingly hold that a timely filed postjudgment motion that seeks a substantive change in an existing judgment qualifies as a motion to modify under Rule 329b(g), thus extending

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<sup>4</sup> As Chief Justice Guittard explained, the “kind of a motion, which is filed to correct a judgment within the period of the courts plenary power, is to be distinguished from a motion to correct the record of a judgment nunc pro tunc under rules 316 and 317.” \_\_\_ S.W.2d at \_\_\_ (Hecht, J. concurring)(quoting from Minutes of the May 5, 1979 meeting of the Advisory Committee for the Supreme Court of Texas, at 174 (on file with the Supreme Court of Texas)).

the trial court's plenary jurisdiction and the appellate timetable. *See Gomez v. Texas Dep't of Crim. Justice*, 896 S.W.2d 176, 176-77 (Tex. 1995)(citing *Miller Brewing Co. v. Villarreal*, 822 S.W.2d 177, 179 (Tex. App.--San Antonio 1991), *rev'd on other grounds*, 829 S.W.2d 770 (Tex. 1992)(timely postjudgment motion seeking substantive change extends appellate timetable). The court of appeals' judgment is correct, and it is therefore affirmed.

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Thomas R. Phillips  
Chief Justice

Opinion delivered: January 6, 2000