ACCEPTED
04-20-00446-CV
FOURTH COURT OF APPEALS
SAN ANTONIO, TEXAS
4/22/2021 11:30 PM

NO. 04-20-00446-CV

FILED IN
4th COURT OF APPEALS
SAN ANTONIO, TEXAS
4/22/2021 11:30:09 PM
MICHAEL A. CRUZ
Clerk

IN THE COURT OF APPEALS
FOURTH SUPREME JUDICIAL DISTRICT
SAN ANTONIO, TEXAS

Edward Harral Roberts
APPELLANT

vs.

Carmen S. Lopez Roberts
APPELLEE

APPELLEE BRIEF

Jessica L. Lambert
SBN: 24035401
The Lambert Law Firm
Trinity Plaza I
750 E. Mulberry Avenue, Suite 407
San Antonio, Texas 78212
Ph. (210) 549-8701
Fax (210) 587-6567
jlambert@thelambertlawfirm.com
ATTORNEY FOR APPELLEE

ORAL ARGUMENT NOT REQUESTED

TABLE OF CONTENTS

INDEX OF AUTHORITIES

Cases

Rules

Other Resources

STATEMENT OF THE CASE

Carmen does not agree with Edward's *Statement of the Case* as it is argumentative and makes factual allegations not supported by the record. Carmen, therefore, submits the following:

Nature of the Case: This is a divorce case.

Course of Proceedings: In 2017, Carmen filed a petition for divorce and was granted a default judgment after Edward failed to file an answer following personal service (CR45, 52). Edward thereafter filed a petition for bill of review in the original divorce cause number (CR74-76). After it was denied, Edward filed a second petition for bill of review in a new cause number and did not appeal the denial of the first petition for bill of review (CR4-6, 44).

Trial Court Disposition: In 2018, the Honorable Susan Reed, Presiding Judge in Eagle Pass, Maverick County, Texas, heard Edward's first bill of review and denied it (CR42, 201-214). Edward's second bill of review was dismissed by the Honorable Amado Abascal III, Presiding Judge, Eagle Pass, Maverick County, Texas (CR216-258, 270-271).

STATEMENT REGARDING ORAL ARGUMENT

Carmen does not request oral argument as the decisional process would not be significantly aided by same. The issues in this case are dispositive and have been authoritatively decided, and the facts and legal arguments are adequately presented in the briefs and records. Carmen; however, does not waive its right to oral argument and will participate if Edward's request for oral argument is requested.

ISSUE PRESENTED

Reply to Issue: The trial court did not abuse its discretion in dismissing Edward's petition for bill of review.

OBJECTION TO APPELLANT'S APPENDIX
EXHIBITS B, C, D, E, F, G, AND H

Carmen objects to Edward's appendix exhibits and any argument in his brief that references exhibits B, C, D, E, F, G and H.

Exhibit B appears to be the property details of the subject marital residence. Edward failed to preserve any argument regarding the value of the marital residence, thus Carmen objects to any request to take judicial notice of the Maverick County property details.

Exhibits C, D, E, F, G and H are pleadings from the underlying divorce cause number and not part of the appellate record, thus Carmen objects to them.

Exhibit C appears to be the petition for divorce.

Exhibit D appears to be a civil docket sheet print-out for Maverick County.

Exhibit E appears to be a copy of Edward's original answer in the underlying cause number that is not file-stamped.

Exhibit F appears to be a copy of a seconded amended petition for bill of review filed in the underlying divorce cause number that is not file-stamped.

Exhibit G appears to be a copy of Edward's affidavit of statement of facts filed in the underlying divorce cause number that is not file-stamped.

Exhibit H appears to be a copy of Carmen's response to Edward's first petition for bill of review in the underlying divorce cause number that is not file-stamped.

Not only is the authenticity of these pleadings lacking, but Texas Rule of Evidence 201 does not authorize this Court to take judicial notice of any document, even pleadings from a relevant cause, that are not part of the appellate record. *See, K-Six Television, Inc. v. Santiago,* 75 S.W.3d 91, 97 (Tex. App.-San Antonio 2002, no pet.) (reh'g overruled) (Court cannot consider documents part of the trial that did not become part of the appellate record).

OBJECTION TO APPELLANT'S STATEMENT OF THE FACTS

The narrative presented in Edward's *Statement of Facts* is not relevant to this appeal at all – at least for purposes of whether the trial court abused its discretion in dismissing Edward's second petition for bill of review. If anything, it is nothing more than a red herring to confuse the issues and the procedural route this case took at the trial level.

Edward's statement details facts that were never part of the petition in the first or second bill of review (CR4-6, 74-76). Further, the alleged facts were never presented to a trial court during either the first or second bill of review hearings (RR1-43; CR201-214). The first time these facts appear at the lower court is in Edward's affidavit attached to his verified motion for new trial filed by Edward *after* the dismissal of his second bill of review (CR146-149, 182-190). Under the standard of a new trial, it presents as newly discovered evidence or any other matter on which evidence must be heard, for which there was never a hearing, nor one requested. Tex. R. Civ. P. 324(b)(1); *see also*, Tex. R. App. P. 33.1(b) (the overruling by operation of law of a motion for new trial preserves for appellate review a complaint properly made in the motion unless taking evidence was necessary to properly present the complaint in the trial court).

Accordingly, they have no proper place in this appeal and present no facts this Court will find relevant to the appeal. Thus, Carmen objects to the first 8 paragraphs

and any referenced footnotes on pages 11-15 of Edward's brief as well as any further factual references made in the remainder of Edward's statement of facts on pages 16-25 that were not presented in either of Edward's petitions for bill of review as they should not be considered by this Court.

Carmen objects to the extent Edward's statement of facts is argumentative not in accord with Tex. R. App. P. 38.1(g).

Carmen further objects to any reference in Edward's statement of facts referencing appendix exhibits C, D, E, F, G and H, as they are pleadings from the underlying divorce cause number that are not part of the appellate record. *See,* OBJECTION TO APPELLANT'S APPENDIX EXHIBITS, page 1.

CARMEN'S STATEMENT OF FACTS

On March 28, 2017, Carmen filed a petition for divorce (CR45). Edward was personally served with the citation and petition for divorce on April 6, 2017 by a private process server (CR50-52). Edward failed to file an answer to the divorce and Carmen obtained a default judgment on June 6, 2017 (CR55). On June 6, 2017 Carmen also filed a nonmilitary affidavit and a certificate of last known address in accordance with Tex. R. Civ. 239a and the Servicemembers' Civil Relief Act (CR53-54).

On August 11, 2017, the trial court signed the final decree of divorce (CR63). Therein, Carmen was awarded as her sole and separate property $9000 cash, as well as a reimbursement lien in the amount of $59,000 which was due within 30 days of entry of the decree (CR57-59).

On October 24, 2017, Carmen filed a petition for enforcement of property division by contempt when Edward failed to timely pay the amounts due to Carmen under the decree (CR65-69). Edward was served with the citation and petition for enforcement on December 8, 2017 by a private process server (CR69-71).

On December 13, 2017, Edward filed his first petition for bill of review in the underlying divorce cause number alleging that Carmen gave him the "impression" the divorce was not going forward and that he was under that "belief" when he "lowered his guard and did not answer the divorce petition" (emphasis added)

(CR74-75). On February 16, 2018, Carmen filed a response to Edward's bill of review citing the applicable law and made arguments in support of denial (SCR4-7).

On April 5, 2018, the trial court held a hearing on Edward's first bill of review and denied his relief (CR44, 201-214). At the close of the hearing Edward advised the trial court that he had 30 days to appeal the decision but in doing so that precluded him from filing a second petition for bill of review in the proper independent and separate cause number (CR212:15-16, 213:2-3).

Edward did not appeal the denial of his first bill of review. Instead, the next day, on April 6, 2018, Edward filed a second petition for bill of review in an independent and separate cause number (CR4-6). The second petition for bill of review contained the exact same allegations as the first petition for bill of review (CR4-6, 74-76). Edward also filed an affidavit of statement of facts supplementing his petition for bill of review (CR22-23). Therein, Edward alleged additional facts in support of his petition and removed the statement that he "lowered his guard and did not answer the divorce petition (CR22-23).

On June 25, 2018, Carmen filed an original answer to Edward's second bill of review asserting a general denial (CR36-38). On July 10, 2018 Carmen amended her answer asserting the affirmative defense of *res judicata* (CR41-43). On that same day Carmen also filed a response to Edward's second bill of review citing the applicable law and made arguments in support of denial (CR45-49).

Over two years after its filing, on June 23, 2020, the trial court held a hearing on Edward's second bill of review and dismissed his relief based on *res judicata* (CR216-258, 270-271). On September 18, 2020, the trial court signed an order dismissing Edward's second petition for bill of review (CR270-271).

On August 10, 2020, Edward filed a verified motion for new trial and supporting unsworn declaration asserting for the first time a litany of facts that were not pleaded in either the first or second petitions for bill of review (CR146-190). Edward never set his motion for new trial for a hearing, and it was denied by operation of law on December 2, 2021. Tex. R. Civ. P. 329b(c).

Presumably, Edward filed an original notice of appeal but that is not in the appellate record. On September 16, 2020, Edward filed an amended notice of appeal from the order dismissing his second bill of review (CR261-262).

SUMMARY OF THE ARGUMENT

Edward misfiled his first bill of review petition in the underlying divorce cause number when the trial court no longer had plenary jurisdiction. Edward failed to plead sufficient facts entitling him to bill of review relief. Notwithstanding these deficiencies a hearing was held and the parties presented numerous claims. The trial court heard both procedural and substantive arguments. Edward was given the opportunity to present a prima facie case of a meritorious defense but failed to do so. The trial court did not abuse its discretion denying Edward's first bill of review.

Edward did not appeal the denial of his first bill of review, yet in this appeal, he makes several complaints about the first bill of review proceeding. This Court does not have jurisdiction to consider the alleged errors Edward claims occurred in the first bill of review proceeding. If this Court determines it does have jurisdiction Edward did not first present his complaints to the trial court and therefore failed to preserve the issues for review.

In his second bill of review petition Edward pleaded the identical claims he did in his first bill of review. The identical claims and parties supported the dismissal of his second bill of review under the law of *res judicata.* Notwithstanding the loss of plenary jurisdiction, the same court that heard the underlying divorce also heard both bill of reviews and therefore had subject matter jurisdiction. Thus, the trial court did not abuse its discretion in dismissing the second bill of review under *res judicata*.

ARGUMENTS & AUTHORITES

Bill of Review

A bill of review is an independent equitable action brought by a party to a prior action who seeks to set aside a judgment that is no longer appealable or subject to motion for new trial. *Valdez v. Hollenbeck,* 465 S.W.3d 217, 220-221 (Tex. 2015); *Sanchez v. Sanchez,* No. 04-09-00477-CV, 2010 WL 3249905, at *1 (Tex. App.–San Antonio, Aug. 18, 2010 no pet.) (mem. op. on reh'g) citing *Caldwell v. Barnes,* 975 S.W.2d 535, 537 (Tex.1998); s*ee, Uribe v. Uribe,* No. 04-12-00629-CV, 2013 WL 4683867, at *3 (Tex. App.–San Antonio Aug. 20, 2013, no pet.) (mem. op.), citing *Baker v. Goldsmith,* 582 S.W.2d 404, 406 (Tex.1979); *Elliott v. Elliott,* 21 S.W.3d 913, 916 (Tex. App.–Fort Worth 2000, pet. denied); *see also*, Tex. R. Civ. P. 329b(f). It is a direct attack on a voidable judgment. *PNS Stores, Inc. v. Rivera,* 379 S.W.3d 267, 275 (Tex. 2012).

"Generally, bill of review relief is available only if a party has exercised due diligence in pursuing all adequate legal remedies against a former judgment and, through no fault of its own, has been prevented from making a meritorious claim or defense by the fraud, accident, or wrongful act of the opposing party." *Sanchez,* No. 2010 WL 3249905 at *1, citing *Wembley Inv. Co. v. Herrera,* 11 S.W.3d 924, 927 (Tex.1999). "The grounds upon which a bill of review can be obtained are narrow because the procedure conflicts with the fundamental policy that judgments must

become final at some point." *Sanchez,* 2010 WL 3249905 at *1, citing *Transworld Fin. Servs. Corp. v. Briscoe,* 722 S.W.2d 407, 407 (Tex.1987). Thus, bills of review are "scrutinized with extreme jealousy" *Narvaez v. Maldonado,* 127 S.W.3d 313 (Tex. App.–Austin 2004, no pet) citing *Alexander v. Hagedorn,* 226 S.W.2d 996, 998 (Tex.1950); *Interaction, Inc./State v. State/Interaction, Inc.,* 17 S.W.3d 775, 778 (Tex. App.–Austin 2000, pet denied). "Although bill of review is an equitable proceeding, the fact that an injustice has occurred is not sufficient to justify relief by bill of review." *Sanchez,* 2010 WL 3249905 at *1, citing *Herrera,* 11 S.W.3d at 927.

When a party makes an allegation of fraud in relation to attacks on final judgments, the fraud is either extrinsic or intrinsic. Only extrinsic fraud will support a bill of review. *Sanchez,* 2010 WL 3249905 at *2, citing *King Ranch, Inc. v. Chapman,* 118 S.W.3d 742, 752 (Tex.2003). The Texas Supreme Court has stated, "extrinsic fraud is fraud that denied a party the opportunity to fully litigate at trial all the rights or defenses that could have been asserted." *King Ranch, Inc.,* 118 S.W.3d at 752. "Extrinsic fraud is 'collateral' fraud in the sense that it must be collateral to the matter actually tried and not something which was actually or potentially in issue in the trial." *Sanchez,* 2010 WL 3249905 at *2, citing *Montgomery v. Kennedy,* 669 S.W.2d 309, 312-13 (Tex.1984).

"Intrinsic fraud on the other hand relates to the merits of the issues that were presented and presumably were or should have been settled in the former action."

Sanchez, 2010 WL 3249905 at *2, citing *King Ranch,* 118 S.W.3d at 752. "Intrinsic fraud includes fraudulent instruments, perjured testimony, or any matter presented to and considered by the trial court in rendering the judgment assailed." *Id.* "Intrinsic fraud will not support a bill of review, because each party must guard against adverse findings on issues directly presented." *Id.* "Issues underlying the judgment attacked by a bill of review are intrinsic, and thus have no probative value on the fraud necessary to a bill of review." *Id.*

Standard of Review

Appellate courts review a trial court's ruling on a bill of review under an abuse of discretion standard. *Uribe,* 2013 WL 4683867, at *3, citing *Ramsey v. State,* 249 S.W.3d 568, 574 (Tex. App.–Waco 2008, no pet.). In reviewing the grant or denial of a bill of review, the appellate courts indulge every presumption in favor of the trial court's ruling and will not disturb that ruling unless the trial court abused its discretion. *Uribe,* 2013 WL 4683867, at *3, citing *Narvaez,* 127 S.W.3d at 319. An abuse of discretion occurs when a court acts without reference to guiding rules or principles or acts arbitrarily or unreasonably. *Id.* at 914-915 *citing Stelly v. Papania,* 927 S.W.2d 620, 622 (Tex. 1996) (per curiam).

In applying the abuse of discretion standard, reviewing courts defer to the trial court's factual determinations. *Garza v. Attorney General,* 166 S.W.3d 799, 809 (Tex. App.–Corpus Christi 2005, no pet) citing *State v. $217,590.00 in U.S.*

Currency, 18 S.W.3d 631, 633–34 (Tex.2000); *Goode v. Shoukfeh,* 943 S.W.2d 441, 446 (Tex.1997). Appellate review of the trial court's findings of historical fact is deferential because the trial court is in a better position to weigh credibility and make such determinations. *Garza,* 166 S.W.3d at 809, citing *In re R.J.H.,* 79 S.W.3d 1, 6 (Tex.2002). A reviewing court does not engage in its own factual review but decides whether the record supports the trial court's resolution of factual matters. *Garza,* 166 S.W.3d at 809, citing *$217,590.00,* 18 S.W.3d at 633–34; *Shoukfeh,* 943 S.W.2d at 446. If the record supports the trial court's evidentiary findings, the reviewing court is not at liberty to disturb them. *$217,590.00,* 18 S.W.3d at 634, citing *Walker v. Packer,* 827 S.W.2d 833, 839–40 (Tex.1992). A reviewing court determines only whether the trial court properly applied the law to the facts in reaching its legal conclusion. *$217,590.00,* 18 S.W.3d at 634; *Segura v. State,* 826 S.W.2d 178, 181 (Tex. App.–Dallas 1992, pet. ref'd).

When the bill of review concerns questions of law such as whether an appellant presented prima facie proof of a meritorious defense an appellate court will review the trial court's decision *de novo*. *Garza,* 166 S.W.3d at 808 citing *Manley v. Parsons,* 112 S.W.3d 335, 337 n. 2 (Tex. App.–Corpus Christi 2003, pet denied).

RESPONSE

THE TRIAL COURT DID NOT ERR IN DENYING EDWARD'S *FIRST* BILL OF REVIEW

The Order Denying Edward's First Bill of Review Must be Upheld on any Legal Theory Supported by the Pleadings and Evidence

Edward complains that the trial court abused its discretion in denying the first bill of review "because it was docketed in the underlying divorce case instead of a separate lawsuit" (Apt.'s brief, page 33). The order denying the bill of review does not state any specific basis for the denial (CR44). Moreover, Edward did not request findings of fact and conclusions of law to determine the reason(s) for the trial court's denial. In the absence of findings and conclusions, an appellate court is required to presume the trial court found every issuable fact raised by the pleadings and tendered by the evidence in support of the judgment and must uphold the trial court's ruling on any supported legal theory. *See, Safeway Stores, Inc. v. Scamardo,* 673 S.W. 371, 372 (Tex. App. – Houston [1st Dist.] 1984, no writ) citing *Bishop v. Bishop,* 359 S.W.2d 869, 871 (Tex.1962).

As stated in its order, the trial court reached its conclusion to deny Edward's petition for bill of review "after reviewing the evidence and hearing the arguments" of counsel (CR44). Specifically, Carmen made the following arguments:

(1) Edward failed to file his bill of review in a separate independent cause number, thus the court lost plenary power in the existing cause number and did not have jurisdiction (CR204:1-25 thru 206:1-10, 209:7-12, 210:2-12, 211:14-16);

(2) Edward was *personally* served - not by publication - and failed to file an answer. Carmen advised the trial court that the citation return is attached as an exhibit to her response (CR207:4-10, 210:8-10; SCR8-10);

(3) Edward failed to file an adequate bill of review pleading (CR207:15-18; 208:2-6);

(4) Edward has to show that he exercised due diligence in pursing all adequate legal remedies (CR206:1-3); and

(5) Edward failed to meet his burden that he has a meritorious defense and that through no fault of his own was the cause of the default judgment (CR206:3-6, 210:5-8).

Edward does not dispute Carmen made the first 3 arguments during the hearing on the first bill of review (Apt.'s brief, page 32).

Edward also presented several arguments to the trial court but only in *response* to Carmen's arguments, and did not respond, contest or present evidence in support of or contrary to Carmen's second, fourth and fifth arguments as follows below. In fact, Edward spent the bulk of his argument responding to the first allegation:

(1) The misfiling of his bill of review in the divorce cause number was a procedural not substantive error and Edward objects to Carmen raising the issue for the first time during the hearing and not in her pleadings as it is undue surprise for him and his client (CR206:17-21, 207:23-25 thru 208:1, 13-19, 210:13-17; 211:17-18; 210:13-17, 211:25 thru 212:1);

(2) Edward did not respond to or contest Carmen's claim that he was personally served.

(3) Edward claims he pleaded fraud specifically and with particularity in his pleadings and Carmen's failure to file a controverting affidavit makes his verified pleading completely true (CR203:16-23, 207:15-22, 208:2-6, 210:18-25).

(4) Edward did not respond to Carmen's contention that he was required to exercise due diligence in pursing all adequate legal remedies (CR206:1-3);

(5) Edward did not respond to Carmen's claim or put on any evidence to present his prima face meritorious defense when asked by the trial court if he had anything further to add (CR212:5-9).

After reviewing the pleadings and hearing the arguments the trial court denied the bill and signed an order on April 5, 2018 (CR44, 207:3, 15-18, 208:7, 21). In accordance with Texas precedent this Court must affirm the trial court's ruling if it can be upheld on one or more legal theories presented and supported by the evidence. *Id.* at 2-3. *See also, Seneca Insurance Co. Inc. v. Ross,* 507 S.W.3d 798, 802-03 (Tex. App.–El Paso 2015, no pet.) citing *Point Lookout West, Inc., v. Whorton,* 742 S.W.2d 277, 278 (Tex.1987).

Trial Court had Subject Matter Jurisdiction but not *Plenary* Jurisdiction

Edward complains on appeal that Carmen should have filed a plea to the jurisdiction to challenge whether his pleadings alleged jurisdiction. Edward contends that if the trial court believed his pleadings failed to allege jurisdiction he was entitled to an opportunity to amend before the trial court dismissed his bill of review with prejudice.

A plea to the jurisdiction is a dilatory plea that challenges subject matter jurisdiction. *Bland Indep. Sch. Dist. v. Blue,* 34 S.W.3d 547, 554 (Tex.2000). When a plea to the jurisdiction challenges the pleadings, a court should determine if the pleader has alleged facts that affirmatively demonstrate the court's jurisdiction to hear the cause. *Tex. Dept. of Parks and Wildlife, v. Miranda,* 133 S.W.3d 217, 226

(Tex.2004) citing *Tex. Ass'n of Bus. v. Tex. Air Control Bd.,* 852 S.W.2d 440, 446 (Tex.1993). "If pleadings do not contain sufficient facts to affirmatively demonstrate the trial court's jurisdiction but do not affirmatively demonstrate incurable defects in jurisdiction, the issue is one of pleading sufficiency and the plaintiffs should be afforded the opportunity to amend." *Miranda,* 133 S.W.3d at 226, citing *County of Cameron v. Brown,* 80 S.W.3d 549, 555 (Tex.2002). As argued herein and above, there is no evidence that the trial court denied Edward's bill of review for "no jurisdiction." Moreover, Edward is conflating the jurisdictional issue.

"Texas procedure has always mandated that a petition for bill of review be a new lawsuit filed under a different cause number than the case whose judgment the bill of review complainant is attacking." *Amanda v. Montgomery*, 877 S.W.2d 482, 485 (Tex. App.—Houston [1st Dist.] 1994, orig. proceeding); *see also, Ross v. Nat'l Ctr. for the Employment of the Disabled*, 197 S.W.3d 795, 798 (Tex. 2006) ("[A] bill of review is a separate proceeding from the underlying suit...."); *In re J.J.*, 394 S.W.3d 76, 81 (Tex. App.—El Paso 2012, no pet.) ("Although a bill of review directly attacks a judgment rendered in a particular case, it is nonetheless an independent, separate suit filed under a different cause number.").

As a result of Edward misfiling his bill of review in the same cause number as the underlying divorce, Carmen alleged in her pleadings, "this Court has no jurisdiction…the motion filed in *this cause of action* is *ineffective*…" (emphasis

added) (SCR6). This allegation directly responds to Edward misfiling his bill of review in the underlying divorce cause of action instead of a separate suit.

Even if Carmen had not challenged the plenary jurisdiction in writing, pleas are neither required to be preceded by three days' notice nor are they required to be in writing when they are presented during a hearing or trial. *Miller v. Miller,* No. 05-02-01903-CV 2003 WL 22346343, at *1 (Tex. App.–Dallas Oct. 15, 2003, no pet.) (mem. op.) *citing* Tex. R. Civ. P. 21 ("Every pleading, plea, motion, or application to the court for an order, whether in the form of a motion, plea, or other form of request, *unless presented during a hearing or trial*, must be filed with the clerk of the court in writing…) (emphasis added).

There is no dispute that Carmen objected during the hearing that the plenary power of the court had expired and thus the trial court did not have *plenary jurisdiction* to hear the bill of review case in the *divorce cause number* (CR 204:20-22, 206:7-10, 209:9-10). This position is consistent with our rules of procedure and precedent. Tex. R. Civ. P. 329b(e) (a trial court has plenary power until thirty days after all timely-filed post-judgment motions are overruled by signed order or operation of law); *Wells v. Maxey,* No. 14-92-00789-CV, 1993 WL 143364, at *2 (Tex. App.–Houston [14th Dist.] 1993, writ denied) (trial court did not have *plenary* jurisdiction to consider the bill of review, but had *subject matter* jurisdiction since it was filed within the 4-year statute of limitations) (emphasis added).

Carmen did not take the position at trial nor does she take the position on appeal that the trial court did not have *subject matter* jurisdiction as contended by Edward on appeal. The trial court had subject matter jurisdiction over the case since it was filed in the same *court* as the underlying divorce, namely the 293rd Judicial District Court (CR4-6, 8-17, 74-76). Edward is incorrect that the divorce and bill of review cases were filed in the 365th Judicial District Court. The divorce and bill of review cases were filed in the 293rd; however, the cases were transferred to the 365th via a transfer order on February 14, 2019 (CR4-6, 8-17, 74-76, 138).

Edward's contention that a plea to the jurisdiction challenging *subject matter* jurisdiction should have been filed by Carmen, and Edward given an opportunity to amend his pleadings before dismissal with prejudice, is not properly implicated. *See, Miranda,* 133 S.W.3d at 226; *see also*, *Brown,* 80 S.W.3d at 555.

Nevertheless, Carmen acknowledges that when a bona fide attempt to invoke jurisdiction is made with *adequate pleadings* in the proper court, a valid transfer can remedy the jurisdictional defect (Apt.'s brief, page 34 citing 5 McDonald & Carlson Tex. Civ. Prac. §29:6 (2d. ed.)); *see also, Postell v. Tex. Dept. of Public Welfare,* 549 S.W.2d 425, 426-27 (Tex. App.–Fort Worth, writ ref'd n.r.e.) citing 4 R. McDonald, Texas Civil Practice s 18.24 (1971 rev.) (a bill of review improperly filed should be given a new docket number and not dismissed, *assuming its allegations are otherwise sufficient*, and filed in the same court as the underlying

judgment) (emphasis added). Carmen contends that Edward did not have adequate pleadings to survive the jurisdictional defect as argued herein and further below.

Edward Concedes Personal Service

Edward did not dispute personal service at the time of trial. Arguably, his own pleadings judicially admit proper service (CR74-75) (Edward states he "lowered his guard and did not answer the divorce petition.") *See, Miller,* 2003 WL 22346343, at *2-3 citing *Hughes Wood Prods., Inc. v. Wagner,* 18 S.W.3d 202, 207 (Tex.2000) (court of appeals may consider an assertion of fact in appellant's pleadings as a judicial admission).

Edward also concedes service on appeal but argues that the trial court abused its discretion in denying his bill of review since he was personally served. There is no evidence that the trial court denied Edward's bill of review because he was personally served. The trial court made the inquiry regarding service during the hearing because the legal standard differs if a due process violation has occurred (CR207:3-10); *Castro v. Ayala,* 511 S.W.3d 42, 47 (Tex. App.–El Paso 2014, no pet.).

Since Edward was properly and personally served and still failed to file an answer, Edward was required to plead and prove (1) a meritorious defense to the underlying action; (2) which the petitioner was prevented from making by the fraud, accident or wrongful act of the opposing party or official mistake; (3) unmixed with

any fault or negligence on his own part. *Mabon Ltd. v. Afri-Carib Enterprises, Inc.* 369 S.W.3d 809, 812 (Tex.2012) citing *Caldwell v. Barnes, (Caldwell II)* 154 S.W.3d 93, 96 (Tex.2004 (per curiam). Had Edward claimed a due process violation he would have been relieved of proving the first two elements. *See, Mabon Ltd.,* 369 S.W.3d at 812 citing *Peralta v. Heights Med. Ctr., Inc.,* 485 U.S. 80, 84, 87, 108 S.Ct. 896, 99 L.Ed.2d 75 (1988); *Caldwell II,* 154 S.W.3d at 96–97. Had he been able to prove he was never served with process the third element would be conclusively established. *See, Mabon Ltd.,* 369 S.W.3d at 812 citing *Caldwell II,* 154 S.W.3d at 97 (citing *Caldwell v. Barnes (Caldwell I),* 975 S.W.2d 535, 537 (Tex.1998)); *see also Peralta,* 485 U.S. at 84, 87, 108 S.Ct. 896. Thus, the trial court's inquiry into service was part of assessing the legal standard to hold Edward to and there is no evidence it denied the bill of review for proper personal service.

TRCP 90 and 91 are Not Applicable and
Edward Failed to Preserve Error as to Inadequate Pleadings

Edward complains that Carmen did not comply with Texas Rules of Civil Procedure 90 and 91 in challenging his pleadings and therefore the trial court abused its discretion to the extent the trial court considered her argument of inadequate pleadings in denying Edward's bill of review. Specifically, Edward complains that Carmen's written objection in her response to his bill of review petition is not a sufficient special exception pointing out the defects of his pleading insufficiency

pursuant to Rule 91. Edward further contends that Carmen's verbal objection at the hearing was an impermissible general or speaking demurrer under Rule 90.

First, it appears from this argument that Edward concedes that his pleadings were deficient, which is the opposite position he took at trial. Second, there is no evidence that the trial court denied Edward's bill of review solely due to his inadequate pleadings. Third, Carmen does not dispute that she did not file special exceptions to Edward's inadequate pleadings but contends that under the rules she was not obligated to do so.

Texas Rule of Civil Procedure 90 is entitled "Waiver of Defects in Pleading" and states as follows:

> General demurrers shall not be used. Every defect, omission or fault in a pleading either of form or of substance, which is not specifically pointed out by exception in writing and brought to the attention of the judge in the trial court before the instruction or charge to the jury or, in a non-jury case, before the judgment is signed, *shall be deemed to have been waived by the party seeking reversal on such account*; provided that this rule shall not apply as to any party against whom default judgment is rendered (emphasis added). Tex. R. Civ. P. 90

As stated in Rule 90, only a party that seeks reversal of a ruling on the account of inadequate pleadings waives its right to complain about it on appeal. In this case, Carmen is not seeking a reversal of the trial court's ruling. Instead, she is defending the trial court's ruling and seeking that the ruling be affirmed. Accordingly Rule 90 is not applicable. *Id. See also, Ward v. Clark,* 435 S.W.2d 621, 624 (Tex. App. –

Tyler 1968, no writ) (reh'g denied) (Rule 90 is inapplicable because appellee does not seek a reversal but seeks to uphold the judgment) citing *Lincoln v. King,* 193 S.W.2d 437, 439-40 (Tex. App.–Amarillo 1946, no writ); *Watson v. Texas State Bank of Jacksonville,* 222 S.W.2d 341, 343-44 (Tex. App.–Texarkana 1949, no writ); *Butler, Williams & Jones v. Goodrich,* 306 S.W.2d 798, 802-03 (Tex. Civ. App.–Houston, Oct. 24, 1957, writ refused n.r.e).

Furthermore, Texas Rule of Civil Procedure 91 entitled "Special Exceptions" states as follows:

> A special exception shall not only point out the particular pleading excepted to, but it shall also point out intelligibly and with particularity the defect, omission, obscurity, duplicity, generality, or other insufficiency in the allegations in the pleading excepted to. Tex. R. Civ. P. 91

Having established that Carmen did not waive her objection to Edward's inadequate pleadings under Rule 90, Carmen was also not required to specially except under Rule 91 since Edward failed to preserve this alleged error for review.

The fallout of inadequate pleadings without special exceptions pointing out the particular defects is the lack of an opportunity to amend. When a trial court sustains special exceptions, it must give the pleader an opportunity to amend the pleading. *Friesenhahn v. Ryan,* 960 S.W.2d 656, 658 (Tex.1998). Edward is complaining that he was robbed of his opportunity to amend his pleadings because Carmen did not specially except. However, when a trial court does not allow a party

an opportunity to amend its pleadings "the aggrieved party must prove that the opportunity to replead was requested and denied to preserve the error for review." *Parker v. Barefield,* 206 S.W.3d 119, 120 (Tex.2006) citing Tex. R. App. P. 33.1(a).

Every single objection made by Edward at the hearing was directed at Carmen's claim that the trial court did not have plenary power jurisdiction and he was unduly surprised by that argument (CR206:17-21, 207:23-25 thru 208:1, 13-19, 210:13-17; 211:17-18; 210:13-17, 211:25 thru 212:1). Not once did Edward assert an objection or allege that Carmen failed to specially except to his pleadings. In fact, Edward took the opposite position at trial and claimed that there were no issues with his pleadings because he specifically and with particularity pleaded fraud and his verified pleading was uncontroverted making his pleadings completely true (CR203:16-23, 207:15-22, 208:2-6, 210:18-25). Having made no objection, Edward equally had no basis to and did not request an opportunity to replead. Thus, Edward has failed to preserve the issue for review.

Edward has abandoned on appeal the argument he made to the trial court that his uncontroverted verified pleading makes his allegations true. Undersigned has been unable to find any caselaw supporting Edward's original claim unless in a summary judgment context and only in two cases. *See, Bakali v. Bakali,* 830 S.W.2d 151, 158 (Tex. App. – Dallas 1992, no writ); *John A. Broderick, Inc. v. Kaye Bassman Int'l. Corp.,* 333 S.W.3d 895 (Tex. App. – Dallas 2011, no pet.) (reh'g

overruled). This bill of review case was not a summary judgment case and Edward's argument to the trial court at the time of the hearing was not supported by law. Instead, Edward should have objected to the form Carmen raised the issue of inadequate pleadings and requested an opportunity to replead pursuant to Rule 91. Having failed to do so Edward did not preserve the issue for review.

Pleading Defect Could not be Cured by Special Exceptions

Even if this Court were to determine that Edward preserved the issue for review or was entitled to an opportunity to amend Carmen contends the pleading defect could not be cured by special exceptions. The case *Ramsey v. State* exemplifies incurable defect and is factually similar to this case.

In *Ramsey v. State,* the trial court dismissed Ramsey's case because he failed to allege extrinsic fraud in his pleadings, which is a required element in a petition for bill of review. *Ramsey,* 249 S.W.3d at 580. Even though the *Ramsey* Court found error in the dismissal, it determined that the error was harmless because *Ramsey* stated that he failed to appeal because as a pro se litigant he was unaware of his legal rights. *Id.* at 581. "Assertions of fact not pleaded in the alternative, in the live pleadings of a party are regarded as formal judicial admissions." *Id.* citing *Holy Cross Church of God in Christ v. Wolf,* 44 S.W.3d 562, 568 (Tex.2001).

The *Ramsey* court stated that ordinarily a pleading defect must be challenged by special exception; however, when a pleading deficiency is the type that cannot be

cured by an amendment, a special exception is unnecessary. *Ramsey,* 249 S.W.3d at 580 *citing Heil Co. v. Polar Corp.,* 191 S.W.3d 805, 817 (Tex. App. – Fort Worth 2006, pet. denied); *Friesenhahn,* 960 S.W.2d at 658. "The primary purpose of a special exception is to give the pleader notice of the deficiency and an opportunity to cure by amendment." *Ramsey,* 249 S.W.3d at 580 citing *Friesenhahn,* 960 S.W.2d at 659. "But settled caselaw establishes that the pleader need be granted the opportunity to amend only if it is possible to cure the pleading defect." *Ramsey,* 249 S.W.3d at 580 *citing Tex. A&M Univ. Sys. v. Koseoglu,* 233 S.W.3d 835, 840 (Tex.2007). The defect could not be cured in *Ramsey* and the defect in Edward's pleadings herein equally cannot be cured.

The *Ramsey* court found Ramsey's statements in his pleadings that he failed to pursue an appeal not due to negligence but simply error acting in the capacity of a *pro se* party because "he was under the *impression* that such a ruling was a final ruling and not subject to appeal, a *belief* that was in error, but not due to negligence" were assertions of fact not pleaded in the alternative and therefore a judicial admission. *Id.* at 581 *citing Holy Cross Church of God in Christ,* 44 S.W.3d at 568 (quoting *Houston First Am. Sav. Ass'n v. Musick,* 650 S.W.2d 764, 767 (Tex.1983).

In other words, Ramsey judicially admitted his failure to file an appeal was not due to fraud or any official mistake. *Ramsey,* 249 S.W.3d at 581. It was therefore not possible for Ramsey to amend his pleading to allege otherwise and remanding

his case would serve no legitimate purpose. *Id.* citing *Koseoglu,* 233 S.W.3d at 840. Thus, the trial court summarily denying Ramsey's bill of review did not result in the rendition of an improper judgment or prevent him from properly presenting his case to the appellate court. *Id.* citing Tex. R. App. P. 44.1(a).

Edward has also made judicial admissions in his pleadings. First, he does not claim or identify any fraud committed by Carmen. Interestingly, Edward used the same words of *impression* and *belief* as Ramsey did which clarified to the *Ramsey* court that Ramsey was admitting responsibility for failing to appeal. *Ramsey,* 249 S.W.3d at 581.

Similarly, Edward could not have amended his pleadings to remedy his judicial admission that he failed to answer the suit because he, without any allegation of fraud by Carmen, was under the *impression* that the parties' alleged reconciliation meant the divorce would cease and he was operating under that *belief* when he lowered his guard and failed to answer the petition (CR74-75).

Even given the opportunity Edward could not remedy his pleading defects due to his judicial admissions that he lowered his guard and did not answer suit based upon his *belief* and *impressions* of his relationship with Carmen absent any allegation of fraud by Carmen. In fact, Edward had multiple pleading defects as further explained herein and below.

Edward Failed to Plead Factually and with Particularity

To be entitled to relief on a bill of review a petitioner must file a petition alleging "sufficient cause." *Baker,* 582 S.W.2d at 408. "Sufficient cause" is not defined by the rules of civil procedure; however, the supreme court of Texas has clarified "sufficient cause" enunciating several requirements that must be satisfied. In a petition, the petitioner must allege factually and with particularity (1) a meritorious defense to the cause of action alleged to support the judgment, (2) which he was prevented from making by the fraud, accident or wrongful act of the opposite party or official mistake, (3) unmixed with any fault or negligence of his own. *Id.* citing accord, *Texas Machinery & Equipment Co. v. Gordon Knox Oil & Exploration Co.,* 442 S.W.2d 315, 317-18 (Tex.1969); *Gracey v. West,* 422 S.W.2d 913, 915 (Tex.1968).

In this case, Edward did not file a petition alleging factually and with particularity as to the three required elements necessary in a bill of review. The entirety of the relevant text pleaded by Edward is as follows:

> Petitioner was prevented by Respondent from asserting rights to a greater share of the parties' marital estate…Mrs. Lopez Roberts had given the *impression* to Mr. Roberts that the divorce was not going forward, based on *their* reconciliation. Moreover, Mr. Roberts was under that very *belief* that the divorce was going to cease; thereby *lowering his guard* and *not answering* the divorce petition. *Petitioner's failure* to assert the claim was not a result of any negligence or fault of Petitioner (emphasis added) (CR74-75).

Edward failed to plead in his petition any facts with particularity to constitute a meritorious defense. Other than to state he was "prevented by Respondent from asserting rights to a greater share of the marital estate" Edward does not explain how he was prevented by Respondent and what legal meritorious defense he relies on entitling him to a greater marital estate, i.e., waste, separate property, reimbursement claim, grossly disproportionate division, etc.

Edward failed to plead any facts with particularity to show what statements were made or acts committed by Carmen that gave him the *impression* they were reconciling. Notably, Edward does not allege Carmen made any direct statements or acts of reconciliation, but only that it was his *impression* of the status of the relationship.

Edward admits that it was his own *belief* that the divorce would cease and that is why he *lowered his guard* and *did not answer* the petition, a judicial admission (CR74-75)*; See, Miller,* 2003 WL 22346343, at *2-3 citing *Wagner,* 18 S.W.3d at 207. There are no alleged acts or statements made by Carmen that Edward identifies as the reason for his belief. In fact, Edward does not plead any facts with particularity that Carmen committed any fraud, accident or any wrongful conduct as required in a bill of review (CR74-75).

Edward failed to plead any facts with particularity that his "failure to assert the claim was not a result of any negligence or fault of Petitioner" (CR75). Edward

merely claims he was not at fault or negligent and does so right after admitting that *he failed* to answer the divorce petition based upon his own *belief* the divorce would cease (CR74-75).

The Fourteenth Court of Appeals reviewed a case factually similar to this one but with particularly pleaded facts and still determined petitioner was not entitled to bill of review relief. *Gone v. Gone,* 993 S.W.2d 845 (Tex. App. – Houston [14th Dist.] 1999, no pet.).

In *Gone v. Gone,* Gabino and Maria were divorced in a no-answer default divorce decree. *Id.* at 846. Gabino filed a petition for bill of review alleging fraud on the part of Maria in procuring a divorce decree that awarded her a *grossly disproportionate share* of the marital estate. *Id.* In his petition, Gabino alleged he was aware of the divorce petition but was not aware Maria was proceeding with the divorce, nor was he aware it had been granted. *Id.* Gabino *alleged Maria's fraud* prevented him from protecting his rights to *his share* of their community property and that he was not negligent in defending his claim. At the hearing, Gabino did not contest his failure to answer but stated that "he trusted his wife" who told him "*not to worry about the divorce*." *Id.* at 847. The Fourteenth Court of Appeals affirmed the trial court's denial of his bill of review. *Id.*

Edward does not allege a meritorious defense like Gabino, i.e., a claim to the grossly disproportionate division. Edward does not allege Carmen made fraudulent

acts of reconciliation or statements to mislead him like Maria did. Not only does Edward judicially admit personal service but he admits his failure to answer was based upon his own *belief* and *impression* but doesn't plead any acts or statements made by Carmen that gave him that belief or impression.

Edward contends that summary dismissal of his bill of review based solely on his inadequate pleadings was improper. Notably, there is plenty of caselaw stating that inadequate pleadings can support the summary dismissal of a bill of review, including supreme court authority. *See, Briscoe,* 772 S.W.2d at 407-08 (failure to allege extrinsic fraud in its pleadings supported dismissal); *Tice v. City of Pasadena,* 767 S.W.2d 700, 704-05 (Tex.1989) (orig. proceeding) (the fatal flaw in Pasadena's claim is their pleadings merely allege intrinsic fraud); *Wise v. Fryar,* 49 S.W.3d 450, (Tex. App.–Eastland 2001, pet. denied) (by alleging only intrinsic fraud, appellant failed to establish long-standing requirements in a petition for bill of review); *Ware v. Ware,* 403 S.W.2d 227, 229 (Tex. App.–Eastland 1966, no writ) (rehearing denied) ("Appellant's motion did not contain the essential allegations of a bill of review."); *Montgomery,* 877 S.W.2d at 487 ("David did not sufficiently plead for bill of review relief, and thus did not satisfy the first requirement from *Baker* for going forward with his action."); *Temple v. Archambo,* 161 S.W.3d 217, 225 (Tex. App.–Edinburgh 2005, no pet.) (before being entitled to proceed to a hearing on the issue of whether there is a meritorious defense, the complainant must meet the initial

requirement of adequately alleging fraud and the absence of negligence); *In the Interest of M.I.V.,* No. 13-09-00275-CV, 2010 WL205069, at *3 (Tex. App.–Edinburgh, Jun. 3, 2010, no pet.) (rehearing overruled) (appellant's pleading is insufficient to invoke the equitable powers of the trial court); *In re the Office of the Attorney General,* 12-07-00242-CV, 2007 WL 2318887, at *3 (Tex. App.–Tyler Aug. 15, 2007, no pet.) (Appellant only alleges intrinsic fraud, at most, thus his petition for a bill of review is defective and legally insufficient for a bill of review). However, there is no evidence that his inadequate pleading was the sole basis of the trial court's order denying Edward's first bill of review (CR44).

But the trial court did not simply have inadequate pleadings before it. It also had the failure of Edward to present his case. The inadequate pleadings become even more relevant in conjunction with Edward's failure to present any evidence of a prima facie meritorious defense.

Edward Failed at Every Step of the Bill of Review Process

A bill of review proceeding begins with the complainant filing a petition. *Montgomery,* 877 S.W.2d at 486 citing *Baker,* 582 S.W.2d at 408. The petition must allege specific facts that demonstrate the earlier judgment was rendered as the result of fraud, accident or wrongful act of the opposite party, or official mistake, unmixed with the complainant's own negligence. *Id.* As contended

above, **Edward did not allege any specific facts demonstrating Carmen committed fraud.**

The complainant must also allege, with particularity, sworn facts sufficient to constitute a meritorious defense. *Id.* **Edward's assertion that he is entitled to a greater share of the marital estate, without more, fails to allege any facts sufficient to constitute a meritorious defense.**

The complainant must then, as a pretrial matter, present prima facie proof of the meritorious defense. *Id.; accord Beck v. Beck,* 771 S.W. 141, 142 (Tex. 1989). In the pre-trial hearing authorized by *Baker,* the only relevant inquiry is whether the complainant has presented prima facie proof of the meritorious defense. *Montgomery,* 877 S.W.2d at 486 citing *Beck,* 771 S.W.2d at 142. A party meets the requirement of presenting prima facie proof of a meritorious defense when it proves that (1) the complainant's defense is not barred as a matter of law, and (2) the complainant will be entitled to judgment on retrial if no evidence to the contrary is offered. *Montgomery,* 877 S.W.2d at 486 citing *Baker,* 582 S.W.2d at 408–409. Once the complainant makes this prima facie showing, the trial court then conducts a trial on the remaining elements. *Montgomery,* 877 S.W.2d at 486 citing *Beck,* 771 S.W.2d at 142; *Baker,* 582 S.W.2d at 409. If the trial court determines the party did not make a prima facie showing of a meritorious defense, the court may dismiss the case. *Beck,* 771 S.W.2d at 142; *Baker,* 582 S.W.2d at 409. **Edward also**

failed to present prima facie proof of a meritorious defense as explained further herein and below.

The First Bill of Review Hearing

Edward complains on appeal that he did not have a preliminary *Baker* hearing where he was able to present prima facie proof of a meritorious defense. Edward simultaneously complains that his preliminary *Baker* hearing was transformed into a final trial on the merits, and he was required to prove the absence of fault or negligence on this part. As such, Edward complains that his due process rights were violated since he did not receive notice for a final trial. But Edward fully participated in the first hearing and failed to raise any of these objections at trial that he now raises on appeal.

On April 5, 2018, the parties presented for a hearing on Edward's first petition for bill of review (CR 201). The reporter's record transcript is entitled "Hearing on Motions" (CR201). It is not clear from the transcript title if the hearing was a preliminary *Baker* hearing, a final merits trial on the bill of review, or both (CR201-214). This appellate record does not contain the clerk's record from the first bill of review proceeding which was filed under the divorce cause number, thus there is no fiat or notice-of-hearing identifying what presumably *Edward* set. Edward claims in his brief that the "hearing notice" stated it was a "hearing on a petition for bill of review" (Apt.'s brief page 44), but he fails to cite to the record and must be referring

to a document that is not part of the appellate record and cannot be considered by this Court. *See, K-Six Television, Inc. v. Santiago,* 75 S.W.3d 91, 97 (Tex. App.-San Antonio 2002, no pet.) (reh'g overruled) (Court cannot consider documents part of the trial that did not become part of the appellate record).

First, Edward has failed to produce a record to prove that the hearing he got was not the one he set. This appeal only contains the record from the second bill of review cause number, which may include some pleadings from the first bill of review hearing but not the fiat or notice of hearing that Edward complains of now. Thus, this Court is unable to determine if Edward's complaints have merit. An appellant is responsible for bringing forth a record that shows error. *Piotrowski v. Minns,* 873 S.W.2d 368, 370 (Tex.1993) (appellant has burden to obtain record sufficient to show reversible error). It is appellant's duty to file the record of the original suit if the appellate court needs them to review a bill of review proceeding. *Wadkins v. Diversified Contractors,* 734 S.W.2d 142, 144 (Tex. App. – Houston [1st Dist.] 1987, no writ) citing *Petro-Chemical Transp. Inc., v. Carroll,* 514 S.W.2d 240 (Tex.1974). Without the record, the appellate court has nothing to review on appeal. *Davis v. Stephenson,* No. 06-11-00073-CV, 2011 WL 6160237, at *1 (Tex. App. – Texarkana 2011, no pet.) (mem. op.; 11-30-2011).

Second, if Edward was set for a *Baker* or preliminary hearing, which we do not know since the record is absent, Edward failed to object at the hearing that he

was not getting a *Baker* hearing (CR201-214). Edward claims in his brief that he insisted at the hearing that the inquiry was limited to whether he raised a prima facie case (Apt.'s brief page 45). Upon review of the transcript, Edward never raised an objection that he was set for a preliminary hearing. *Id.* The words "prima facie" or "meritorious defense" or "Baker" or "preliminary" are never uttered from Edward's counsel's mouth. Edward misrepresents to this Court what transpired at the first bill of review hearing.

Every single objection made by Edward at the first hearing was directed at Carmen's argument that the trial court did not have plenary power jurisdiction and he was unduly surprised by that argument (CR206:17-21, 207:23-25 thru 208:1, 13-19, 210:13-17; 211:17-18; 210:13-17, 211:25 thru 212:1). An appellant must preserve error by making a complaint to the trial court by a timely request, objection or motion that states the ground thereof. Tex. R. App. P. 33.1. The first time Edwards raises this objection to allegedly not getting a *Baker* hearing is on appeal and thus Edward has not preserved this issue for review.

Third, Edward contends that in denying him a *Baker* hearing he was forced to a final trial to defend his bill of review. A bill of review case does not require two *hearings*, it requires two *assessments* – the preliminary and then the final "so as not to waste valuable judicial resources by conducting a spurious full-blown examination of the merits before making the initial assessment." *Baker,* 582 S.W.2d

at 408. The *Baker* court stated that a trial court "may, within its discretion, conduct the trial of the issues in one hearing or in separate hearings ..." *Id.* citing *Warren v. Walter*, 414 S.W.2d 423 (Tex.1967). Regardless of the procedure, a trial court determines the existence of a prima facie meritorious defense as a pretrial matter. *Id.*

Edward references the case *Maree v. Zuniga* to support his claim that by Carmen citing to the *Baker* case in her response to Edward's bill of review that determined the type of hearing that would take place, namely a *Baker* hearing. *Maree v. Zuniga,* 502 S.W.3d 359 (Tex. App. – Houston [14th dist.] 2016, no pet.) (SCR5). Not only is this an incredulous claim and not at all what the *Maree* court stated, but Carmen did not cite to *Baker* in support of a preliminary hearing (SCR5). Instead, she cited to *Baker* in support of the second and third elements that must be alleged in a bill of review case (SCR5). The *Maree* case is completely distinguishable and not supporting authority for Edward's position in this case.

In *Maree,* the court determined that the trial judge converted a preliminary bill of review *Baker* hearing into a final trial on the merits in violation of the Defendants' right to due process of law. *Id.* at 360. A hearing was set in response to "Defendants' Motion to Determine Whether Plaintiff has Established Prima Facie Case." *Id.* at 363. At the hearing, the trial court inquired into whether there was any fault or negligence on Defendants' parts. *Id.* The Defendants objected and advised the trial court they were not there to argue fault or negligence but only whether they had a

meritorious defense. *Id.* at 363-64. The trial court disagreed and thereafter denied the Defendants bill of review when Defendants failed to present evidence of no fault or negligence. *Id.* at 365. Defendants appealed. *Id.* The *Maree* court reversed because the Defendants did not receive notice that their specifically set preliminary hearing would become a final trial on the merits. *Id.*

In this case, as stated above, there is no fiat for what was set before the trial court and the transcript is entitled "Hearing on Motions" (CR201). If this title provides any insight into what was heard, it would not be a "preliminary hearing only" conclusion. Further, unlike the Defendants in *Maree,* Edward did not object to not getting a *Baker* or preliminary hearing and thus Edward has failed to preserve this alleged error for review. Moreover, there is no evidence in the transcript that the trial court made any inquiry of fault or negligence on the part of Edward or transforming the hearing into a final trial on the merits (CR201-214).

Edward's contention that he was forced to defend against fault or negligence at the first bill of review hearing is unsupported by the record (CR201-214). Edward's entire argument in the first hearing when condensed encompasses about 3 pages and the issues he contends he was forced to defend are not present (CR201-214). The trial court never makes an inquiry of fault or negligence on the part of Edward (CR201-214). Edward's claim that his "*Baker* hearing" got transformed into

a final trial on the merits is completely unfounded. There is no argument or discussion of fault or negligence by the trial court or Edward.

Edward Fails to Present Prima Facie Evidence of a Meritorious Defense

Notwithstanding Edward misfiling his petition for bill of review in the incorrect cause number, the trial court nevertheless conducted a hearing wherein Edward failed to call witnesses, failed to put on evidence, and failed to proceed with the preliminary assessment in a bill of review case. Instead, he did nothing and that is why the trial court dismissed his bill. Edward failed to present any prima facie evidence of a meritorious defense at the first bill of review hearing.

After hearing argument, the trial court asked each counsel if they had anything further (CR212:8). Instead of calling his first witness, Edward's counsel said, "no"

> THE COURT: Okay do you have anything else?
> MS. PUENTE CHACON: No, judge.
> THE COURT: Do you have anything else?
> **MR. DE LOS SANTOS: No.**
> (emphasis added) (CR 212:5-9).

Edward had an opportunity to present his case but failed to do so. *See, Gilpin v. Gilpin,* No. 14-00-00578-CV, 2001 WL 1100568, at *3 (Tex. App. - Houston [14th Dist.] 2001, no pet.) (A hearing was held where appellant had the opportunity to present evidence in support of her case, and the trial court heard argument on the case before denying her bill of review).

At the very least Edward had a *Baker* hearing. Had he presented prima facie evidence of a meritorious defense the hearing could have also been a final hearing on the last two elements so long as Carmen did not request a jury trial on those issues. *Martin v. Martin,* 840 S.W.2d 586, 592 (Tex. App. – Tyler 1992, writ denied).

With no evidence presented of a prima facie meritorious defense, the trial court denied Edward's relief which became a final appealable order (CR44, 212:11); *Alaimo v. U.S. Bank Trust National Association,* 551 S.W.3d 212, 215 (Tex. App. - Fort Worth 2017, no pet.) (If a bill of review is denied the order denying the bill of review, whether by dismissal, summary judgment, or conventional judgment, becomes a final order from which an appeal may be taken) citing, *Baker*, 582 S.W.2d at 409. Any incorrect rulings made during the first bill of review hearing should have been appealed. Edward failed to appeal the denial of the first bill of review order and therefore this Court does not have jurisdiction to consider any of the alleged errors Edward claims occurred during that first hearing.

Edward Failed to Appeal the First Bill of Review Order

Although Edward filed a notice of appeal to challenge the *second* bill of review order, Edward spends the bulk of his arguments and cited authority in his brief on the alleged errors arising from the *first* bill of review hearing; however, Edward never appealed the first bill of review order (Apt.'s brief, pages 27-47).

At the hearing following the ruling on the first bill of review *Edward's* counsel advised the trial court he has 30 days to appeal the decision but in doing so he was precluded from refiling the bill again tomorrow [in the proper independent and separate cause number] (CR212:15-25 thru 213:1-3). The trial court advised Edward's counsel, "you do whatever you need to" the order will be signed today so there's no confusion on when the [appellate] time starts to run (CR213:4-19). To which, Edward's counsel replied, "That's not an issue, your honor" (CR213:20-21).

Notwithstanding that representation, Edward did not appeal the trial court's order denying his first bill of review. Instead, the very next day, Edward took his alternate route and filed a second bill of review in an independent and separate cause number from the divorce case and pursued that bill to a final order (CR4-21). The hearing on the second bill of review and the final order denying it did not occur until two years later in 2020 (CR270-273; RR1-43).

During the hearing on the second bill of review, Carmen's counsel advised the trial court that Edward acknowledged his appellate relief and its timeline at the end of the first bill of review hearing by reading the transcript of the first bill of review hearing on this issue into the record, but that Edward nevertheless failed to appeal (CR228:13-24, 229:9-12).

The denial of a bill of review whether by dismissal, summary judgment or conventional judgment becomes a final order from which an appeal may be taken.

Alaimo, 551 S.W.3d at 215 citing, *Baker*, 582 S.W.2d at 409. The appellate timetable commences from the date the trial court signs the order denying the bill of review. Tex. R. App. P. 26.1; *See also, Cottone v. Cottone*, 122 S.W.3d 211, 213-14 (Tex. App. - Houston [1st Dist.] 2003, no pet.). If an appellant fails to timely perfect an appeal, the appellate court does not acquire jurisdiction over the appeal. *Anderson v. Casebolt,* 493 S.W.2d 509, 511 (Tex. 1973). Thus, this Court does not have jurisdiction to review any errors Edward claims arose from the first bill of review hearing.

THE TRIAL COURT DID NOT ERR IN DISMISSING EDWARD'S *SECOND* BILL OF REVIEW

Second Petition for Bill of Review

As explained above, after his first bill of review was denied, Edward filed a second bill of review in an independent and separate cause number asserting the same grounds he asserted in the first bill of review (CR4-6, 74-76). Even though Edward was on notice of his inadequate pleadings he filed the exact same document in the new cause number (CR4-6, 74-76). But he supplemented his verified pleading with an "Affidavit of Statement of Facts" which set out for the first time the following, in relevant part:

> Specifically, Mrs. Lopez-Roberts, reimbursement claim regarding the improvements were not accurate and over-valued. Mr. Roberts's place of residence is separate property. Mrs. Roberts Lopez at the time of separation, emptied the bank accounts of Mr. Roberts and took

> community assets from the house on a Uhaul truck. Mrs. Roberts Lopez had given the impression *both verbally and the acts of reconciliation* that the divorce was not going forward. Moreover, Mr. Roberts relied to Mrs. Roberts Lopez representation to his detriment. Mr. Roberts was defrauded into believing that the divorce was not going forward...Mr. Roberts did not receive notice from District Clerk's Office on either the Final Hearing on Merits on June 6th or the Default Judgment to be on the forementioned date (emphasis added) (CR22-23).

In addition to these newly pleaded facts which were not present in the first petition for bill of review, Edward also removed his judicial admission which stated "Moreover, Mr. Roberts was under that very belief that the divorce was going to cease; thereby lowering his guard and not answering the divorce petition" (CR22-23). This affidavit did not function as an amendment to his second petition for bill of review, but as a supplement. *See,* Tex. R. Civ. P. 62. The second petition for bill of review still contained the judicial admission (CR4-5).

Even with supplementing the facts Edward's affidavit still failed to describe specifically or with particularity the verbal comments and acts of reconciliation allegedly committed by Carmen or how Carmen allegedly defrauded Mr. Roberts (CR22-23). Carmen again asserted in writing and at the second bill of review hearing that Edward's pleadings were inadequate (CR87; RR29:22-25 thru 30:1-3, 33:1-6, 36:9-10, 36:15-18). Edward again did not object or request to be given an opportunity to amend, cure, replead or otherwise. Notwithstanding the supplement and changes to his facts in support of his second petition for bill of review and

affidavit, Edward took the same position he did at the first bill of review hearing that his pleadings were adequate (RR30:5-6, 32:10-20). Carmen would refer this Court to the same arguments she made above in response to Edward's claim he was entitled to special exception relief pursuant to Texas Rules of Civil Procedure 90 and 91 and that he failed to preserve error.

Res Judicata

An order denying a bill of review is a final judgment on the merits if it decides the parties' rights and liabilities based on the ultimate facts disclosed by the pleadings, evidence, or both, and upon which the right of recovery depends. *See, HSBC Bank USA, N.A. v. Watson,* 377 S.W.3d 766, 771 (Tex.App.-Dallas 2012, pet. filed) (reh'g overruled) (review dismissed) (2 pet.'s) (Mar. 21, 2014) citing *Am. Acceptance Corp. v. Reynolds,* 104 S.W.2d 123, 124 (Tex. App.-Amarillo 1937, no writ); *accord Beversdorf v. DeMoss,* No. 03–96–00144–CV, 1996 WL 571521, at *2 (Tex. App.-Austin Oct. 2, 1996, writ dism'd w.o.j.) (not designated for publication).

Res judicata applies to bill of review proceedings. *Tompkins v. Tompkins,* No. 06-03-00067-CV, 2003 WL 23101088, at *1 (Tex. App. – Texarkana 2003, no pet.) citing *Holloway v. Starnes*, 840 S.W.2d 14, 19 (Tex. App.–Dallas 1992, writ denied); see *Rizk v. Mayad*, 603 S.W.2d 773, 775 (Tex.1980).

To establish res judicata, the claimant must show: "(1) a prior final judgment on the merits by a court of competent jurisdiction; (2) identity of parties or those in privity with them; and (3) a second action based on the same claims as were raised or could have been raised in the first action." *Travelers Ins. Co. v. Joachim,* 315 S.W.3d 860, 862 (Tex. 2010); see also, *Amstadt v. United States Brass Corp.*, 919 S.W.2d 644, 652 (Tex.1996).

The doctrine of res judicata "serves vital public interests" by promoting the finality of judgments and prevents needless, repetitive litigation. *Hallco Texas, Inc. v. McMullen County,* 221 S.W.3d 50, 58 (Tex.2006). The paramount reason for the rule of res adjudicata is to end litigation. *Butler v. Wagner,* 104 S.W.2d 78, 79 (Tex. App. - San Antonio 1978, writ ref'd).

During the second bill of review hearing Carmen asserted the affirmative defense of *res judicata* (CR41-42). Res judicata is an affirmative defense that bars relitigation of claims that have been finally adjudicated or that arise out of the same subject matter and that *could have been* litigated in the prior action. *Amstadt,* 919 S.W.2d at 652 (emphasis added); *see* Tex. R. Civ. P. 94 (identifying res judicata as an affirmative defense).

Edward claims that *res judicata* did not attach to the first bill of review because there was no determination of the merits since he was allegedly denied a *Baker* hearing. Additionally, Edward claims if *res judicata* did attach it placed him

in a "procedural catch 22" (Apt.'s brief, page 27). But Edward would not be in this situation had he simply appealed the ruling on the first bill of review like he alluded to at that time of the first bill of review hearing (CR212:15-25 thru 213:1-21).

Carmen contends that *res judicata* attached because the three elements of *res judicata* were met. As Carmen fully argued herein and above, the trial court heard Carmen and Edward's multiple arguments and responses addressing both procedural and substantive issues, satisfying the first element of *res judicata* including:

(1) Edward failed to file his bill of review in a separate independent cause number, thus the court lost plenary power in the existing cause number and did not have jurisdiction (CR204:1-25 thru 206:1-10, 209:7-12, 210:2-12, 211:14-16);

(2) Edward was *personally* served - not by publication - and failed to file an answer. Carmen advised the trial court that the citation return is attached as an exhibit to her response (CR207:4-10, 210:8-10; SCR8-10);

(3) Edward failed to file an adequate bill of review pleading (CR207:15-18; 208:2-6);

(4) Edward has to show that he exercised due diligence in pursing all adequate legal remedies (CR206:1-3); and

(5) Edward failed to meet his burden that he has a meritorious defense and that through no fault of his own was the cause of the default judgment (CR206:3-6, 210:5-8).

Edward does not dispute Carmen made the first 3 arguments during the hearing on the first bill of review (Apt.'s brief, page 32). Edward responded as follows:

(1) The misfiling of his bill of review in the divorce cause number was a procedural not substantive error and Edward objects to Carmen raising

the issue for the first time during the hearing and not in her pleadings as it is undue surprise for him and his client (CR206:17-21, 207:23-25 thru 208:1, 13-19, 210:13-17; 211:17-18; 210:13-17, 211:25 thru 212:1);

(2) Edward did not respond to or contest Carmen's claim that he was personally served.

(3) Edward claims he pleaded fraud specifically and with particularity in his pleadings and Carmen's failure to file a controverting affidavit makes his verified pleading completely true (CR203:16-23, 207:15-22, 208:2-6, 210:18-25).

(4) Edward did not respond to Carmen's contention that he was required to exercise due diligence in pursing all adequate legal remedies (CR206:1-3);

(5) Edward did not respond to Carmen's claim or put on any evidence to present his prima face meritorious defense when asked by the trial court if he had anything further to add (CR212:5-9).

Additionally, notwithstanding the lack of plenary jurisdiction, a court of competent jurisdiction had subject matter jurisdiction over this case at the time of the first bill of review hearing since the bill of review was filed in the same court as the underlying divorce case, the 293rd Judicial District Court (CR4-6, 8-17, 74-76).

Thus, in the event this Court determines that any of the pleadings or orders filed or signed in the divorce cause number are void for plenary jurisdiction, it should not affect the substantive ruling that the bill of review is denied or dismissed as stated in the second bill of review cause number (CR270-271). Under Texas law, res judicata applies so long as a court had subject-matter jurisdiction. *See, Engleman Irrigation District v. Shields Brothers, Inc.,* 514 S.W.3d 746, 750 (Tex.2017).

There is no dispute that the parties are the same parties in the original and second bill of review cases satisfying the second element of *res judicata.*

As Edward concedes in his brief, he "refiled [the petition for bill of review] in a new cause number, *asserting the identical grounds upon which it was originally sought* (emphasis added) (Apt.'s brief, page 47). Carmen contends this is another judicial admission by Edward supporting the third element of *res judicata*. *Ramsey,* 249 S.W.3d at 581 citing *Tex. Dep't of Human Servs. v. Okoli,* No. 01-07-00103-CV, 2007 WL 1844897, at *6 (Tex. App. - Houston [1st Dist.] June 28, 2007, pet. filed) (judicial admissions apply to appellate pleadings as well as trial pleadings).

Furthermore, Edward *could have* presented evidence of a prima facie meritorious defense (assuming he had one because his pleadings were deficient) but failed to do so when the trial court asked if he had anything further, further satisfying the third element of *res judicata* (CR212:5-9).

Edward contends that the dismissal of his second petition for bill of review was not an adjudication of the rights of the parties unless it is dismissed with prejudice and since the order does not state "with prejudice" it is presumed to be dismissed without prejudice (Apt.'s brief, pages 50-51).

The fatal flaw in this argument is that Edward's first petition for bill of review was already denied before the second bill of review was dismissed (CR44). Edward's second bill of review was dismissed because *res judicata* attached to the

first bill of review proceeding since the same issues and parties were being presented to the same court that had subject matter jurisdiction of both the underlying divorce case and both petitions for bill of review.

There must be an end to litigation and when a party has had his day in court with an *opportunity* to present his evidence and his view of the law, there is no reason to believe that the second decision will be more satisfactory than the first. *Joiner v. Vasquez,* 632 S.W.2d 755, 757 (Tex. App.-Dallas 1981, reh'g denied) citing *Stoll v. Gottlieb,* 305 U.S. 165, 171-72, 59 S. Ct. 134, 137, 83 L. Ed. 104 (1938).

CONCLUSION

One who seeks relief through a bill of review must show a "clear case of diligence and of merit to obtain the interference of a court of equity in his behalf. *Hagedorn,* 226 S.W.2d at 996. Carmen contends that Edward failed to plead the requirements of a bill of review and further failed to put on his case when the opportunity presented itself. Edward further failed to appeal the first bill of review order and this Court does not have jurisdiction to consider the errors, if any, that arose from the first bill of review hearing. *Res judicata* attached to the first bill of review proceeding as the trial court heard multiple claims from both partis and thus dismissal of the second bill of review was proper. The trial court did not abuse its discretion in denying Edward's first bill of review. The trial court did not abuse its discretion in dismissing Edward's second bill of review.

PRAYER

WHEREFORE PREMISES CONSIDERED, Appellee, Carmen prays this Court find that it does not have jurisdiction to review the errors, if any, that arose from the first bill of review hearing since Edward failed to appeal the denial of the first bill of review order. Alternatively, if this Court determines it has jurisdiction Appellee, Carmen, prays this Court AFFIRM the trial court's denial of the first bill of review.

Appellee, Carmen prays this Court AFFIRM the trial court's ruling dismissing Appellant, Edward's second petition for bill of review since *res judicata* attached to the first bill of review proceeding.

Respectfully Submitted,

THE LAMBERT LAW FIRM
Trinity Plaza I
750 E. Mulberry Avenue, Suite 407
San Antonio, Texas 78212
Ph. (210) 549-8701
Fax (210) 587-6567
Email jlambert@thelambertlawfirm.com

By: *Jessica L. Lambert*
JESSICA L. LAMBERT
State Bar No. 24035401
Attorney for Appellee

CERTIFICATE OF COMPLIANCE

I Jessica L. Lambert, hereby certify that the total number of words in this brief inclusive of all parts per Tex. R. App. P. 9.4(i)(3) is no more than 12,200 words inclusive of pdf snapshots of pleadings and records, if any.

By: *Jessica L. Lambert*
JESSICA L. LAMBERT

CERTIFICATE OF SERVICE

I Jessica L. Lambert, hereby certify that a true and correct copy of the above and foregoing instrument, APPELLANT BRIEF AND APPENDIX, was served on this 22nd day of April 2021 in accordance with the Tex. R. of App. and Civ. Pr. to:

Elizabeth Conry Davidson
Attorney at Law
conrydavidson@gmail.com
100 N.E. Loop 410, Suite 615
San Antonio, Texas 78216
Counsel for Edward Harral Roberts

By: *Jessica L. Lambert*
JESSICA L. LAMBERT

Automated Certificate of eService

This automated certificate of service was created by the efiling system. The filer served this document via email generated by the efiling system on the date and to the persons listed below. The rules governing certificates of service have not changed. Filers must still provide a certificate of service that complies with all applicable rules.

Jessica Lambert on behalf of Jessica Lambert
Bar No. 24035401
jlambert@thelambertlawfirm.com
Envelope ID: 52750071
Status as of 4/23/2021 6:52 AM CST

Associated Case Party: HarralRoberts

Name	BarNumber	Email	TimestampSubmitted	Status
Luis De Los Santos	24054449	ldlslaw@gmail.com	4/22/2021 11:30:09 PM	SENT

Associated Case Party: Carmen Lopez

Name	BarNumber	Email	TimestampSubmitted	Status
Priscilla Puente-Chacon	24083692	ppc.law1@gmail.com	4/22/2021 11:30:09 PM	SENT

Case Contacts

Name	BarNumber	Email	TimestampSubmitted	Status
Jessica Leigh Lambert	24035401	jlambert@thelambertlawfirm.com	4/22/2021 11:30:09 PM	SENT
Elizabeth Conry Davidson	793586	conrydavidson@gmail.com	4/22/2021 11:30:09 PM	SENT