

JUDGMENT RENDITION IN TEXAS

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Every day, judges and practitioners use words such as “rendered,” “judgment,” and “dismissed.” Their use is so widespread that the precise meanings of those terms are often overlooked or simply assumed from context. This article goes back to basics and examines the rules, statutes, and case law that defines the basic terminology about formation of a Texas judgment—both in a trial court and an appellate court. It concludes that careful usage of those words can enhance the clarity of judgments and the precedent built on them.

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INTRODUCTION

Justice Robert Calvert’s famous 1960 article about standards of review¹ set the foundation for *City of Keller v. Wilson*² in 2005 and its definitive description of “legally sufficient” evidence.³ While cited less, another article by him, *Appellate Court Judgments or Strange Things Happen on the Way to Judgment* from 1975,⁴ is recognized for its careful definitions of key terms about the appellate process.

The Texas Supreme Court’s 2022 review of one such term—what it means to “dismiss” a case⁵—shows that this topic continues to be fundamental and significant to Texas appellate practice. Our object in this article is to update Justice Calvert’s comprehensive review, particularly in light of the significant expansion in interlocutory appeals and mandamus proceedings since he wrote in 1975. In the process, we hope to offer some practical suggestions for the bench and bar.

I. WHO CARES?

Review of technical appellate vocabulary may at first seem unnecessary. Texas appellate courts produce quality and well-understood opinions every day, and we do not intend to suggest otherwise. That said, we suggest two mutually reinforcing reasons why Justice Calvert’s review of basic terms deserves continuing study.

First, precise definition helps resolve disputes effectively. The noted economist Joan Robinson famously described her work as the development of a “toolbox” for policymakers,⁶ and Charles Alan Wright observed that

¹ Robert W. Calvert, “No Evidence” and “Insufficient Evidence” *Points of Error*, 38 TEX. L. REV. 361 (1960) [hereinafter Calvert, *No Evidence*].

² 168 S.W.3d 802 (Tex. 2005).

³ *Id.* at 810 (citing Calvert, *No Evidence*, supra note 1, at 364).

⁴ Robert W. Calvert, *Appellate Court Judgments or Strange Things Happen on the Way to Judgment*, 6 TEX. TECH. L. REV. 915 (1975) [hereinafter Calvert, *Judgments*]. The authors acknowledge an excellent review of Justice Calvert’s article in Marc O. Knisely & Emily Frost, *Render Unto Judge Calvert . . . Correct Appellate Court Judgments*, 20 APP. ADVOC. 174 (2008).

⁵ *Alsobrook v. MTGLQ Invs., LP*, 656 S.W.3d 394, 395 (Tex. 2022) (per curiam).

⁶ JOAN ROBINSON, *THE ECONOMICS OF IMPERFECT COMPETITION* 1 (2d ed. 1969) (“Among persons interested in economic analysis, there are tool-makers and tool-users.”).

“[t]he only tool of a lawyer is words.”⁷ The tools used by appellate courts are the processes defined by statutes and court rules. As with any craft, clear understanding of what tools are available, and their specific properties, can only help enhance focus and productivity.

And second, the precise use of technical terms helps link yesterday’s opinions to tomorrow’s. By definition, precedent looks beyond the present dispute.⁸ It looks to the past, for conformity with earlier cases,⁹ and to the future, at how tomorrow’s litigants and judges may apply the opinion.¹⁰ That dialogue is facilitated when it uses a constant set of key terms over time.

II. TRIAL COURT ACTIONS

With our overarching goals explained, we turn now to the first set of tools—the specific actions that a trial court may take that implicate the appellate process.

“A judgment routinely goes through three stages: (1) rendition; (2) reduction to writing; and (3) entry.”¹¹ The terms “rendered,” “signed,” and “entered” are often used interchangeably.¹² And when used generally to describe the fact that a court has ruled, as a practical matter, the terms have materially similar meanings. That said, each of those terms has a specific, technical meaning with substantive consequences in particular procedural settings.

⁷ Charles Alan Wright, *Foreword* to BRYAN A. GARNER, *THE ELEMENTS OF LEGAL STYLE* at vii, viii (1991) (“The only tool of the lawyer is words. We have no marvelous pills to prescribe for our patients. Whether we are trying a case, writing a brief, drafting a contract, or negotiating with an adversary, words are the only things we have to work with”).

⁸ *See Mitschke v. Borrromeo*, 645 S.W.3d 251, 263–65 (Tex. 2022) (describing precedent generally, and reminding: “Adherence to precedent remains the touchstone of a neutral legal system that provides stability and reliability.”); *see also Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2261 (2022) (describing the factors that guide when the Supreme Court may overrule itself).

⁹ *See Mitschke*, 645 S.W.3d at 264 (“Our judgments, which become precedents, should be based on reason, law, and not political whim; new decisions should therefore comport with precedents. One important value of *stare decisis* is that it justifiably ‘permits society to presume that bedrock principles are founded in the law rather than in the proclivities of individuals’” (omission in original)).

¹⁰ *See id.* (warning that “[a] precedent that becomes less useful over time and continues to generate confusion among parties and the judiciary cannot be regarded as ‘efficient.’”).

¹¹ *E.g.*, *In re A.B.P.*, No. 05-19-01392-CV, 2021 WL 858743, at *3 (Tex. App.—Dallas Mar. 8, 2021, no pet.).

¹² *See id.* at *1–5.

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A. Rendered

“Judgment is *rendered* when the trial court officially announces its decision in open court or by written memorandum filed with the clerk.”¹³ Rendition “is the judicial act by which the court settles and declares the decision of the law upon the matters at issue.”¹⁴

The date of rendition is material to at least two deadlines. First, the deadline to withdraw consent to a settlement agreement is generally held to run from rendition of judgment,¹⁵ rather than later stages in the judgment-issuance process. That makes sense because the issue in a dispute about consent is the fact of agreement and not how the alleged agreement is later commemorated as a technical matter. A related deadline applies to a request for a trial amendment after the rendition of judgment.¹⁶

Second, a court of appeals may find that laches bars a mandamus petition that is filed too long after rendition of a ruling. For example, in *In re Yamaha Golf-Car Co.*,¹⁷ a trial judge emailed her staff and counsel indicating that she had granted a motion to strike the designation of a responsible third party and asking the parties to submit an appropriate order on that and other matters.¹⁸ Despite that email, no order was signed for several more months, after which the losing party sought mandamus relief.¹⁹

The petitioner argued “that the e-mail from the court coordinator was not sufficiently clear and specific to be reviewed by mandamus but was, instead, simply an expression of future intent to sign a written order.”²⁰ The court saw otherwise, observing: “The e-mail states specifically that the judge had granted the motion to strike and, as such, signing an order was merely a

¹³*E.g.*, *S&A Rest. Corp. v. Leal*, 892 S.W.2d 855, 857 (Tex. 1995) (per curiam) (emphasis added); *see also* *Garza v. Tex. Alcoholic Beverage Comm’n*, 89 S.W.3d 1, 6 (Tex. 2002) (stating that “a judgment is rendered when the decision is officially announced orally in open court, by memorandum filed with the clerk, or otherwise announced publicly”).

¹⁴*Knox v. Long*, 257 S.W.2d 289, 291 (Tex. 1953) (quoting *Coleman v. Zapp*, 151 S.W. 1040, 1041 (Tex. 1912)), *overruled on other grounds*, *Jackson v. Hernandez*, 285 S.W.2d 184, 191 (Tex. 1955).

¹⁵*S&A Rest. Corp.*, 892 S.W.2d at 855.

¹⁶*Midwest Compressor Sys. LLC v. Highland Imperial, Inc.*, No. 05-19-01115-CV, 2021 WL 2548712, at *5 (Tex. App.—Dallas June 22, 2021, pet. denied) (mem. op.).

¹⁷No. 05-19-00292-CV, 2019 WL 1512578 (Tex. App.—Dallas Apr. 8, 2019, orig. proceeding).

¹⁸*Id.* at *1.

¹⁹*Id.*

²⁰*Id.* at *2.

ministerial act.”²¹ Here again, the issue in dispute for appellate review was the substance of the ruling rather than its later memorialization, making the date of rendition the natural trigger event for the filing of a deadline for higher-court examination of that ruling (outside of the rules governing conventional appeals, which are discussed in the next section).

B. Signed

After the court’s decision is rendered, it is reduced to writing in an instrument signed by the judge. Why is signing important, and what does it mean to “sign” an order or judgment?

The answer is in Texas Rule of Civil Procedure 306a, which uses the signature date to trigger important deadlines:

The date of judgment or order is *signed* as shown of record shall determine the beginning of the periods prescribed by these rules for the court’s plenary power to grant a new trial or to vacate, modify, correct or reform a judgment or order and for filing in the trial court the various documents that these rules authorize a party to file”²²

Similarly, Texas Rule of Appellate Procedure 26.1 begins: “The notice of appeal must be filed within 30 days after the judgment is *signed*, except as follows”²³

Applying Rule 306a, in *Burrell v. Cornelius*, a somewhat-annoyed Texas Supreme Court reviewed an order that “state[d] that the motion for non-suit was considered on January 20, 1977, but . . . is silent about the date the judge signed the order.”²⁴ The result was a dispute as to whether a motion for new trial was timely filed.²⁵ The supreme court reminded: “‘Entered’ is synonymous with neither ‘Signed’ nor ‘Rendered.’”²⁶ And it strongly suggested the use of a standard form for the signing of judgments and orders: “Law professors should teach, writers of legal form books should so correct

²¹ *Id.*

²² TEX. R. CIV. P. 306a (emphasis added).

²³ TEX. R. APP. P. 26.1 (emphasis added).

²⁴ 570 S.W.2d 382, 383 (Tex. 1978).

²⁵ *Id.*

²⁶ *Id.* at 384 (citing *Bostwick v. Bucklin*, 190 S.W.2d 818 (Tex. 1945) and *Polis v. Alford*, 267 S.W.2d 918 (Tex. App.—San Antonio 1954, no writ)); see also TEX. R. CIV. P. 306a(1) (“[B]ut this rule shall not determine what constitutes rendition of a judgment or order for any other purpose.”).

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their books, lawyers should so draft documents, and judges should make certain that above the signature on each judgment or order there are the words: ‘Signed this _____ day of _____, 19____.’”²⁷

Since *Burrell*, the supreme court has not further detailed what it means to “sign” an order or judgment. *Black’s Law Dictionary* notes the *Restatement’s* broad definition of “signature” as “any symbol made or adopted with an intention, actual or apparent, to authenticate the writing as that of the signer.”²⁸ Despite the potential for dispute about “signature” in a time of electronic authentication, the term “signed” appears to have remained uncontroversial. It is the event by which a judge formally reduces his or her ruling to writing and is thus the objectively verifiable event used by the procedural rules to mark when the appellate deadlines begin to run.²⁹

C. Entered

“Judges *render* judgment; clerks *enter* them on the minutes. The entry of a judgment is the clerk’s record in the minutes of the court.”³⁰ Entry of a ruling “is a ministerial act by which an enduring evidence of the judicial act is afforded.”³¹

If rendition is the substantive resolution of a case, and signature triggers the deadlines for appeal of that resolution, what role is left for “entry”? The answer is narrow but significant. The date of entry starts the deadline for any potential *nunc pro tunc* correction of a judgment, to correct a clerical error about how a rendered judgment has been recorded. Because the purpose of such an amendment is “to have the judgment entry speak truly the judgment as rendered,”³² entry of judgment is the logical trigger for the deadline to seek such a correction.³³

²⁷ *Burrell*, 570 S.W.2d at 383.

²⁸ *Signature*, BLACK’S LAW DICTIONARY (11th ed. 2019) (quoting RESTATEMENT (SECOND) OF CONTRACTS § 134 (1979)).

²⁹ *Cf. In re Barber*, 982 S.W.2d 364 (Tex. 1998) (discussing coordinator’s signing of a purported new-trial order).

³⁰ *Burrell*, 570 S.W.2d at 384 (emphasis added) (citation omitted).

³¹ *Knox v. Long*, 257 S.W.2d 289, 291 (Tex. 1953) (quoting *Coleman v. Zapp*, 105 Tex. 491, 151 S.W. 1040, 1041 (1912)).

³² *Coleman*, 151 S.W. at 1041; *see also* TEX. R. CIV. P. 316 (“Clerical mistakes in the record of any judgment may be corrected by the judge in open court according to the truth or justice of the case . . .”).

³³ *See, e.g., Lone Star Cement Corp v. Fair*, 467 S.W.2d 402, 405 (Tex. 1971) (“The law is settled in this state that clerical errors in the *entry* of a judgment, previously rendered, may be

D. Refusal

In some original proceedings, the basis for appellate jurisdiction is the lack of a rendition, signature, or entry. Texas courts of appeal uniformly hold that “[a] trial court has a ministerial duty to consider and rule on motions properly filed and pending before it, and mandamus may issue to compel the trial court to act.”³⁴ While the specific criteria vary among districts, it is generally accepted that if a trial court has been asked to rule on a matter, and refused to do so within a reasonable time, mandamus relief may be appropriate.³⁵

III. SCOPE OF APPELLATE JURISDICTION

The Texas Rules of Appellate Procedure recognize two paths to appellate jurisdiction—appeal from final judgment,³⁶ and appeal from an interlocutory order when allowed by rule or statute;³⁷ and, separately, review via an *original* proceeding, such as a petition for a writ of mandamus.³⁸ Each type of proceeding brings a distinct set of parties and issues to the appellate courts.

A. Appeal From Final Judgment

A final judgment resolves all claims among all parties to the case.³⁹ That is why a notice of appeal from final judgment “br[ings] forward the entire case,”⁴⁰ including earlier interlocutory orders merged into the final

corrected after the end of the court’s term by a *nunc pro tunc* judgment; however, judicial errors in the previously rendered judgment may not be so corrected.” (emphasis added); *see also* Escobar v. Escobar, 711 S.W.2d 230, 231 (Tex. 1986) (“A judicial error is an error which occurs in the *rendering* as opposed to the *entering* of a judgment.”); *In re* C.D.G., No. 05-21-00132-CV, 2022 WL 2763352, at *1 (Tex. App.—Dallas July 15, 2022, pet. denied) (mem. op.) (applying these principles to vacate a *nunc pro tunc* judgment).

³⁴ *E.g.*, *In re* Henry, 525 S.W.3d 381, 382 (Tex. App.—Houston [14th Dist.] 2017, orig. proceeding).

³⁵ *See, e.g.*, *In re* Owens, No. 05-17-00919-CV, 2017 WL 4230840, at *1 (Tex. App.—Dallas Sept. 25, 2017, orig. proceeding) (citing, *inter alia*, Safety-Kleen Corp. v. Garcia, 945 S.W.2d 268, 269 (Tex. App.—San Antonio 1997, orig. proceeding)).

³⁶ *See* TEX. R. APP. P. 26.1.

³⁷ *See id.* 28.1.

³⁸ *See id.* 52.1.

³⁹ *Lehmann v. Har-Con Corp.*, 39 S.W.3d 191, 205–06 (Tex. 2001).

⁴⁰ *See, e.g.*, *Gunnerman v. Basic Cap. Mgmt., Inc.*, 106 S.W.3d 821, 824 (Tex. App.—Dallas 2003, pet. denied) (citing *Webb v. Jorns*, 488 S.W.2d 407, 408–09 (Tex. 1972)); *see also* TEX. R. APP. P. 25.1(b) (“The filing of a notice of appeal by any party invokes the appellate court’s

judgment.⁴¹ By definition, the appeal from a final judgment necessarily involves the entire dispute that the judgment resolves.

Even if an “entire case” is appealed, both the appellant and appellee may be limited in what they can say about the case. An appellant may not seek reversal on a waived ground, which can occur in the trial court by not properly preserving a complaint⁴² or on appeal if the opening brief does not adequately identify a particular issue.⁴³ Additionally, an appellee cannot ordinarily seek more relief than what the judgment awarded her without filing a cross-appeal.⁴⁴

B. Interlocutory Appeal

When Justice Calvert wrote his *Judgments* article in 1975, interlocutory appeals were the exception rather than the rule. Since then, the Legislature has steadily expanded interlocutory-appeal rights.⁴⁵ That expansion led the supreme court to observe in 2019 that “[l]imiting appeals to final judgments can no longer be said to be the general rule.”⁴⁶

And by the nature of an interlocutory appeal—which, by definition, occurs pre-judgment—the body of law that defines a “final judgment” has little to offer about the proper scope of an interlocutory appeal. And while the same appellate rules apply to such appeals, including their reference to the word “case,” that word has to be construed in that more limited setting.

jurisdiction over all parties to the trial court’s judgment or order appealed from.”); *id.* 12.1(c) (“On receiving a copy of the notice of appeal, the petition for review, the petition for discretionary review, the petition in an original proceeding, or a certified question, the appellate clerk must: . . . docket the case . . .”).

⁴¹ *E.g.*, *Bonsmara Nat. Beef Co. v. Hart of Tex. Cattle Feeders, LLC*, 603 S.W.3d 385, 390 (Tex. 2020).

⁴² *See* TEX. R. APP. P. 33.1(a)(1) (“As a prerequisite to presenting a complaint for appellate review, the record must show that: . . . the complaint was made to the trial court by a timely request, objection, or motion . . .”).

⁴³ *See* *St. John Missionary Baptist Church v. Flakes*, 595 S.W.3d 211, 214 (Tex. 2020) (*per curiam*) (distinguishing *Malooly Bros. v. Napier*, 461 S.W.2d 119, 120–21 (Tex. 1970)).

⁴⁴ *See, e.g.*, *Rainier Income Fund I, Ltd. v. Gans*, 501 S.W.3d 617, 620 (Tex. App.—Dallas 2016, *pet. denied*) (applying Texas Rule of Appellate Procedure 25.1).

⁴⁵ *Bonsmara*, 603 S.W.3d at 390 & n.3; *see generally* Elizabeth Lee Thompson, *Interlocutory Appeals in Texas: A History*, 48 ST. MARY’S L.J. 65 (2016).

⁴⁶ *Dall. Symphony Ass’n v. Reyes*, 571 S.W.3d 753, 759 (Tex. 2019); *see also* *Elephant Ins. Co. v. Kenyon*, 644 S.W.3d 137, 146 & n.40 (Tex. 2022) (“While appeals are often taken only from a final judgment, ‘necessity’ and ‘public policy dictates’ have ‘driven the Legislature to enact a comprehensive interlocutory appeals statute to allow certain appeals before final judgment.’”).

Justice Calvert and commentators noted “case,” but that cannot really mean what it says.⁴⁷

And because these appeals have been authorized by the Legislature for different reasons, opinions recognize two general principles that form the scope of an appeal from an interlocutory order. They are not entirely consistent, and their application varies depending on the circumstances of the particular appeal at issue.

On the one hand, “the order” subject to interlocutory appeal is what is before the appellate court, not just the specific issue raised by an interlocutory appeal.⁴⁸ That concept is similar to the idea of a final judgment,⁴⁹ applied to a specific issue, but is not a complete parallel because not all appealable issues are as easily defined as the claims and defenses in a case.

Relatedly, it is generally recognized that “[a]n appellate court’s jurisdiction over an interlocutory appeal is limited to the scope permitted by statute.”⁵⁰ For example, courts of appeal have found that they lacked jurisdiction to consider a choice-of-law issue in a special appearance appeal,⁵¹ an argument about the merits of a theft claim in an appeal about official immunity,⁵² and a cross-appeal in a TCPA appeal that involved grounds upon which the defendant’s motion to dismiss was granted (rather than denied).⁵³

In sum, the procedural rules for interlocutory appeals are grounded in the traditional concept that an appeal brings forward “the case” that is subject to review. The substantive scope of that “case,” however, depends on the specific grant of interlocutory jurisdiction conferred by the relevant statute or rule.

⁴⁷ See Calvert, *Judgments*, *supra* note 4, at 919–20 (discussing “causes”).

⁴⁸ *Elephant Ins.*, 644 S.W.3d at 147.

⁴⁹ *Id.*

⁵⁰ *E.g.*, *Huntington Ingalls Inc. v. Certain Underwriters at Lloyd’s, London*, No. 01-21-00262-CV, 2022 WL 287835, at *3 (Tex. App.—Houston [1st Dist.] Feb. 1, 2022, pet. denied) (mem. op.).

⁵¹ See *id.* & n.8.

⁵² *Sanchez v. Boone*, 579 S.W.3d 526, 531 (Tex. App.—Houston [14th Dist.] 2019, pet. denied) (“The officers contend that there is no evidence that Boone had possession of the handmade items at the time of the cell search or that the items were confiscated. . . . This argument—based on the lack of evidence to support Boone’s theft claim—is not an assertion of immunity.”).

⁵³ *Walker v. Pegasus Eventing, LLC*, No. 05-19-00252-CV, 2020 WL 3248476, at *5 (Tex. App.—Dallas June 16, 2020, pet. denied) (mem. op.).

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C. Mandamus

Mandamus is an original proceeding in an appellate court. Unlike a conventional appeal, a mandamus proceeding does not involve a case moving among levels in the court system.⁵⁴ And it involves different parties than the underlying litigation because a writ of mandamus is an order to a specific party to carry out a legal duty.⁵⁵

Accordingly, courts recognize that while “mandamus is not an equitable remedy, its issuance is largely controlled by equitable principles.”⁵⁶ The boundaries of a mandamus proceeding are thus ordinarily framed by concepts rooted in equity, rather than the final-judgment rule or statutory interpretation about a legislative grant of interlocutory jurisdiction.

Since Justice Calvert wrote his 1975 article, mandamus practice has significantly expanded in the Texas courts, particularly after the supreme court’s landmark decision in *Walker v. Packer*⁵⁷ was seen as liberalizing the traditional requirements for such relief. Many opinions now discuss those basic requirements, as well as the related equitable limitations on them such as laches. But despite the proliferation of mandamus cases in the Texas appellate courts, the rules and standards that govern them remain wholly distinct from the rules that govern traditional appeals from judgments and interlocutory orders.

IV. APPELLATE DISPOSITIONS

We now jump forward, past most of the “heavy lifting” of appellate advocacy and judging, to consider what tools are available to a court of appeals to resolve a matter presented to it.

⁵⁴ See TEX. GOV’T CODE § 22.002(a) (“The supreme court . . . may issue . . . all writs of quo warranto and mandamus agreeable to the principles of law regulating those writs, against . . .”); *Id.* § 22.221(b) (“Each court of appeals for a court of appeals district may issue all writs of mandamus, agreeable to the principles of law regulating those writs, against . . .”).

⁵⁵ *Id.*

⁵⁶ E.g., *In re Prudential Ins. Co. of Am.*, 148 S.W.3d 124, 138 (Tex. 2004) (orig. proceeding).

⁵⁷ 827 S.W.2d 833 (Tex. 1992).

A. Appeal From Final Judgment

1. Possible Dispositions

To resolve an appeal from a final judgment, the Texas Rules of Appellate Procedure say that,

The court of appeals may:

- (a) affirm the trial court's judgment in whole or in part;
- (b) modify the trial court's judgment and affirm it as modified;
- (c) reverse the trial court's judgment in whole or in part and render the judgment that the trial court should have rendered;
- (d) reverse the trial court's judgment and remand the case for further proceedings;
- (e) vacate the trial court's judgment and dismiss the case; or
- (f) dismiss the appeal.⁵⁸

The rules further say that “[w]hen reversing a trial court’s judgment, the court must render the judgment that the trial court should have rendered, except when: (a) a remand is necessary for further proceedings; or (b) the interests of justice require a remand for another trial.”⁵⁹

Read together, these rules make plain that in an appeal from final judgment, the court of appeals reviews the trial court’s final *judgment* rather than any reason given by the trial court for that judgment.⁶⁰

That procedural principle—review of judgments rather than reasons—helps frame two substantive concepts about court rulings generally, and appellate opinions in particular.

First, a distinction is widely recognized between a decision—the court’s specific order that resolves the dispute between the parties—and an opinion that explains that decision. Justice Calvert observed that such authorities confirm “that an opinion is in addition to, and cannot serve the purpose of, a decision or a judgment in a cause.”⁶¹

⁵⁸TEX. R. APP. P. 43.2.

⁵⁹TEX. R. APP. P. 43.3.

⁶⁰*See generally* McPherson v. Rudman, No. 05-16-00719-CV, 2018 WL 3062447, at *8 (Tex. App.—Dallas June 21, 2018, pet. denied) (Schenck, J., concurring) (“I will begin with the most basic norm: ‘Appellate courts review trial courts’ judgments not opinions.’”).

⁶¹Calvert, *Judgments*, *supra* note 4, at 921.

That general principle is what animates the long-running dispute in Texas procedure about the effectiveness of trial-court findings of fact that appear as part of a judgment⁶² rather than a separate instrument as required by the rules of procedure.⁶³ The drafters of that rule wanted to keep “apples” separated from “oranges.”

Second, a similar distinction is recognized between the “holding” of an opinion (which roughly corresponds to the decision and the necessary parts of the accompanying reason) and “dicta” that may appear in an opinion. “Dicta” is generally held to refer to matters discussed that, while important, may not be strictly necessary to the point at hand and thus receive less weight in later analysis of an opinion’s precedential value.⁶⁴

2. Confusing Dispositions

Imprecise application of the above concepts can lead to confusing statements. We consider two in particular.

First, a judgment that “dismiss[es] the appeal,” pursuant to Texas Rule of Appellate Procedure 43.2(f), is not the same as dismissal of a case. To the contrary, dismissal of an appeal is the practical *opposite* of dismissal of a

⁶² See *In re* A.E.J., No. 05-20-00340-CV, 2020 WL 5107293, at *6 (Tex. App.—Dallas Aug. 31, 2020, pet. denied) (mem. op.).

⁶³ See TEX. R. CIV. P. 299a (“Findings of fact shall not be recited in a judgment. If there is a conflict between findings of fact recited in a judgment in violation of this rule and findings of fact made pursuant to Rules 297 and 298, the latter findings will control for appellate purposes. Findings of fact shall be filed with the clerk of the court as a document or documents separate and apart from the judgment.”).

⁶⁴ See generally *Travelers Indem. Co. v. Fuller*, 892 S.W.2d 848, 851 n.3 (Tex. 1995) (noting that “dicta” means “a mere expression of opinion on a point or issue not necessarily involved in the case[]” and “does not create binding precedent under stare decisis”); *Seger v. Yorkshire Ins.*, 503 S.W.3d 388, 400 (Tex. 2016) (holding statement made “without argument, or full consideration of the point” was “obiter dictum and had no precedential value”); *accord* *Cent. Va. Cmty. Coll. v. Katz*, 546 U.S. 356, 363 (2006) (“For the reasons stated by Chief Justice Marshall in *Cohens v. Virginia*, we are not bound to follow our dicta in a prior case in which the point now at issue was not fully debated. . . . ‘It is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision.’”); *Trump v. Thompson*, 142 S. Ct. 680 (2022) (holding discussion of Donald J. Trump’s “status as a former President” must “be regarded as nonbinding dicta”); *id.* at 680, 681 (statement of Kavanaugh, J.) (*repeatedly* observing court “makes clear” that appellate court dicta “should not be considered binding precedent going forward”); David Coale & Wendy Couture, *Loud Rules*, 34 PEPP. L. REV. 715, 725–28 (2007).

case. Dismissal of the appeal means the trial court's judgment stands, as if affirmed.⁶⁵

Imprecise use of this term can lead to potential confusion in any later proceedings. For example, "dismissal" is commonly requested as part of a settlement agreement, and then ordered by an appellate court that accepts and implements that agreement. All parties are happy to put the case behind them. But some time later, when a stranger to the agreement investigates the matter, it will only have the words on the page to guide them.

That is why the Texas Supreme Court recently reminded in *Alsobrook* that "when a case becomes moot on appeal, all previous orders are to be set aside by the appellate court and the case . . . dismissed."⁶⁶ In that case, the court of appeals recognized that the case became moot after the relevant property was foreclosed upon, and "thus correctly concluded that dismissal was required."⁶⁷ The court of appeals erred by only dismissing the appeal, reasoned the supreme court, holding that "[t]he court of appeals should have vacated the trial court's judgment and dismissed the case."⁶⁸

Second, blurring the lines between an appellate court's judgment and its accompanying opinion can lead to confusion. Consider *Continental Airlines, Inc. v. Kiefer*,⁶⁹ for example, the court of appeals opinion said that summary judgment was reversed only on the state common-law negligence claim.⁷⁰

But despite that discussion, "the judgment of the court of appeals order[ed] 'that the judgment of the court below be in all things reversed and the cause remanded for proceedings consistent with the opinion of this Court.'"⁷¹ Because "the mandate of the court must issue 'in accordance with the judgment'," the supreme court held that the judgment controlled and that

⁶⁵ See, e.g., *Padilla v. LaFrance*, 907 S.W.2d 454, 458 n.6 (Tex. 1995); see also *Fitch v. Int'l Harvester Co.*, 354 S.W.2d 372, 373 (Tex. 1962) (per curiam) (stating "the judgment of the trial court stands unimpaired upon the dismissal of the appeal therefrom"); accord *Klattenhoff v. Schriever*, 113 S.W.2d 515, 516 (Tex. 1938) (holding that a dismissal order from an intermediate appeals court is a "final judgment" that the supreme court may review).

⁶⁶ *Alsobrook v. MTGLQ Invs., LP*, 656 S.W.3d 394, 395 (Tex. 2022) (quoting *Tex. Foundries, Inc. v. Int'l Moulders & Foundry Workers' Union*, 248 S.W.2d 460, 561 (Tex. 1952)).

⁶⁷ *Id.* at 396.

⁶⁸ *Id.* (citing TEX. R. APP. P. 43.2(e) and *Morath v. Lewis*, 601 S.W.3d 785, 789 (Tex. 2020)).

⁶⁹ *Cont'l Airlines, Inc. v. Kiefer*, 920 S.W.2d 274 (Tex. 1996).

⁷⁰ *Id.* at 277.

⁷¹ *Id.* (emphasis omitted).

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as a result, the court of appeals had reversed summary judgment on all of the plaintiffs' claims.⁷²

3. What About the Surety?

When a court of appeals affirms a trial-court judgment for money damages, Texas Rule of Appellate Procedure 43.5 requires that the appellate judgment include any surety on a supersedeas bond:

When a court of appeals affirms the trial court judgment, or modifies that judgment and renders judgment against the appellant, the court of appeals must render judgment against the sureties on the appellant's supersedeas bond, if any, for the performance of the judgment and for any costs taxed against the appellant.⁷³

That requirement is often overlooked—understandably—by a successful plaintiff who wants to return to trial and begin collection. But at the same time, sureties are understandably reluctant to pay on a supersedeas bond unless all necessary prerequisites have been satisfied. While an appellate judgment is readily amended to name a surety, even after the expiration of plenary power would otherwise bar modification,⁷⁴ the most efficient path is to confirm their inclusion in the first instance.

B. Interlocutory Appeal

The rules are not entirely specific about what a court of appeals should do to resolve an interlocutory appeal.

They plainly envision a “judgment” by the court of appeals. Texas Rule of Appellate Procedure 18.6 refers to “[t]he appellate court’s judgment on an

⁷² *Id.* (citing then-effective TEX. R. APP. P. 86(a)).

⁷³ TEX. R. APP. P. 43.5; *see also id.* 34.5 (as amended effective May 1, 2023) (stating that a clerk’s record shall contain “in civil cases, any supersedeas bond or certificate of cash deposit in lieu of a bond”).

⁷⁴ *See Whitmire v. Greenridge Place Apartments*, 333 S.W.3d 255, 261 (Tex. App.—Houston [1st Dist.] 2010, pet. dismissed) (referring to the entry of judgment against the surety under Texas Rule of Appellate Procedure 43.5 as “a mandatory duty,” such that “our failure to do so in our initial judgment does not deprive us of the power to, at any time, even after our plenary power has expired, amend our judgment to reflect the sureties’ liability”).

appeal from an interlocutory order,” which “takes effect when the mandate is issued.”⁷⁵

But the appropriate substance of that judgment is not entirely clear. As quoted above, Texas Rule of Appellate Procedure 43.2 states the possible dispositions that an appellate judgment can provide.⁷⁶ That rule repeatedly refers to the trial court’s “judgment.”⁷⁷ Definitionally, though, interlocutory appeals involve an order issued *before* judgment.

Not much caselaw examines the role of Rule 43.2 for an interlocutory appeal. Several cases cite subpart (f)—the only part of the rule that does not refer to a “judgment”—when an interlocutory appeal is dismissed.⁷⁸ And a handful of cases observe that a “remand” does not fit well with an interlocutory appeal, where an ongoing matter remains in the trial court.⁷⁹

The best “rule of thumb” for interlocutory appeals is that, as with the definition of the dispute brought to an appellate court by an interlocutory appeal, the available range of dispositions is grounded in the general rules but is constrained by the specific grant of jurisdictional authority in the relevant statute or rule.

C. *Mandamus*

A Texas appellate court resolves a mandamus proceeding with an “order” rather than a “judgment.”⁸⁰ Texas Rule of Appellate Procedure 52.8(c) requires that “[i]f the court determines that relator is entitled to relief, it must make an appropriate order.”⁸¹ Rule 52.8(d) further explains: “When denying relief, the court may hand down an opinion but is not required to do so. When

⁷⁵ TEX. R. APP. P. 18.6; *see also* *Edwards Aquifer Auth. v. Chem. Lime, Ltd.*, 291 S.W.3d 410, 411 (Tex. 2009) (Brister, J., concurring) (referencing this rule in explaining the role of appellate-court mandates).

⁷⁶ TEX. R. APP. P. 43.2.

⁷⁷ *Id.*

⁷⁸ *See, e.g., Ex parte Barton*, No. 02-17-00188-CR, 2022 WL 2353098, at *1 (Tex. App.—Fort Worth June 20, 2022, no pet.) (mem. op.) (“Accordingly, we dismiss Barton’s appeal for want of jurisdiction. Tex. R. App. P. 43.2(f).”).

⁷⁹ *See* *Manis v. Affiliated Comput. Servs., Inc.*, No. 03-03-00750-CV, 2004 WL 580661, at *1 (Tex. App.—Austin Mar. 25, 2004, no pet.) (mem. op.) (“As the order appealed from is interlocutory in nature, it is not necessary for this Court to order a remand. *See* TEX. R. APP. P. 43.2. We conclude that a dismissal of this appeal will accomplish the parties’ goal.”).

⁸⁰ *Edwards Aquifer*, 291 S.W.3d at 409 & n.37 (Brister, J., concurring).

⁸¹ TEX. R. APP. P. 52.8(c).

granting relief, the court must hand down an opinion as in any other case.”⁸² Rule 47.1 requires that such an opinion “every issue raised and necessary to final disposition of the appeal.”⁸³

The operation of these rules is illustrated by the 2022 supreme court case of *In re Brown*,⁸⁴ presented a dispute about a trial subpoena for a corporate-representative witness involving the application of Texas Rules of Civil Procedure 199 and 176.⁸⁵ Referring to the above-cited rules of appellate procedure, because the court of appeals reviewed only the issues about Rule 199, the supreme court directed the court of appeals to obey Rule 47.1 and address the issues about the other cited rule.⁸⁶

That said, as a matter of practice, Texas appellate courts have developed a custom of not actually issuing a writ of mandamus. That custom is applied in different ways. Some cases explain that mandamus relief is appropriate but say that a “writ of mandamus will issue only if” the respondent fails to comply.⁸⁷ Others deny mandamus relief because the court is “confident that the . . . officials will comply with the law in good faith,”⁸⁸ and yet another uses the opinion accompanying the court’s order to set deadlines and put in place other processes about the issue at hand.⁸⁹

D. Mandates

In its 2009 opinion of *Edwards Aquifer Authority v. Chemical Lime, Ltd.*, the supreme court defined the appellate mandate as “a procedural device intended to keep courts from issuing conflicting orders a means of communication between courts.”⁹⁰ Quoting an earlier opinion, the court elaborated:

⁸² *Id.* 52.8(d).

⁸³ *Id.* 47.1.

⁸⁴ *In re Brown*, 653 S.W.3d 721 (Tex. 2022).

⁸⁵ *Id.* at 721.

⁸⁶ *Id.* at 722.

⁸⁷ Chris Dove, *Mandamus and Jurisdiction After Panda Power*, in COURSE MATERIALS FOR THE 36TH ANNUAL ADVANCED CIVIL APPELLATE PRACTICE, Chapter 4, at 16 (2022) (citing *Tex. Pub. Bldg. Auth. v. Mattox*, 686 S.W.2d 924, 930 (Tex. 1985)).

⁸⁸ *Id.* (citing *In re State*, 602 S.W.3d 549, 550 (Tex. 2020)).

⁸⁹ *Id.* at 17–19; *Cf. Click v. Tyra*, 867 S.W.2d 406 (Tex. App.—Houston [14th Dist.] 1993, orig. proceeding) (actually granting writ of mandamus) (a footnote confusingly refers to a “mandate”).

⁹⁰ *Edwards Aquifer Auth. v. Chem. Lime, Ltd.*, 291 S.W.3d 392, 410 (Tex. 2009) (Brister, J., concurring).

The rules relating to the return of the mandate from the appellate to the trial court are . . . primarily procedural in nature. They provide for an orderly dispatch of judicial business by adopting procedures under which both the appellate and trial courts may have knowledge of the status of pending litigation and thus prevent the issuance of conflicting orders by the courts of the trial and appellate levels.⁹¹

“This is why,” the court further explained, “the rules provide for enforcement of our decisions only after the mandate.”⁹²

Appellate courts do not entertain motions for turnover, garnishment, or contempt; those must be filed in the trial court. Absent supersedeas, this means the case can be proceeding in two courts at once. In such cases, the mandate is our notice to the trial court that it can start enforcing a new judgment or proceed with enforcement of the old one without stepping on our toes.⁹³

This is particularly true for interlocutory appeals, where conflicting orders can arise if the case is pending in two cases at once,⁹⁴ depending on the scope of the relevant statute. For example, a special-appearance appeal may involve only one of many parties, and only some of many issues, and stays trial but not other proceedings.⁹⁵

A mandate should only issue in a direct appeal. A mandamus proceeding is resolved by an order rather than a judgment and thus does not require a mandate.⁹⁶ For the same reason, a mandate does not issue when the supreme court denies a petition for review.⁹⁷ That practice is sensible because, in

⁹¹ *Id.* (omission in original) (quoting *Cont'l Cas. Co. v. Street*, 364 S.W.2d 184, 187 (Tex. 1963) (orig. proceeding)).

⁹² *Id.* at 411.

⁹³ *Id.*

⁹⁴ *See id.*

⁹⁵ *See* TEX. CIV. PRAC. & REM. CODE § 51.014(b) (distinguishing an interlocutory appeal that “stays the commencement of a trial in the trial court pending resolution of the appeal” from one that “also stays all other proceedings in the trial court pending resolution of that appeal”).

⁹⁶ *Edwards Aquifer*, 291 S.W.3d at 409 (Brister, J., concurring).

⁹⁷ *Id.*; *see also* Calvert, *Judgments*, *supra* note 4, at 921 n.40 (“Denial of a writ [of error] is more in the nature of an order than a judgment.”); *see generally* TEX. GOV'T CODE § 22.007(e) (“The denial or dismissal of a petition for review may not be regarded as a precedent or authority.”).

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neither situation, is there a possibility for a conflict in jurisdiction. Mandamus is an original proceeding, separate from the underlying trial-court matter, and a petition for review is only a request for the supreme court to exercise its jurisdiction over a case.

CONCLUSION

Many basic ideas have not changed much since Justice Calvert's 1975 article. Trial courts are still tasked with rendering and signing (and their clerks with entering) judgments. And courts of appeals are tasked with reviewing those judgments and, *inter alia*, affirming; reversing judgments and rendering their own appropriate judgments; or reversing judgments and remanding cases for further lower court proceedings.

The significant expansion in interlocutory appeals since Judge Calvert wrote, as well as the substantial growth in mandamus practice after *Walker v. Packer*, have brought new kinds of matters to Texas courts of appeal that at times can be an awkward fit with those basic principles. We hope that this review has helped clarify those principles and thus make it easier to apply them effectively throughout the full range of matters considered in the Texas appellate system.