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TEXAS CIVIL PROCEDURE—BILL OF REVIEW—MERITORIOUS DEFENSE REQUIREMENT IN BILL OF REVIEW PROCEEDING TO VACATE DEFAULT JUDGMENT, WITHOUT EFFECTIVE SERVICE OF PROCESS OR PROPER NOTICE OF DEFAULT JUDGMENT, AND RESULTING IN ADVERSE CONSEQUENCES, VIOLATES THE FOURTEENTH AMENDMENT'S DUE PROCESS CLAUSE. *Peralta v. Heights Medical Center, Inc.*, — U.S. —, 108 S. Ct. 896, — L. Ed. 2d — (1988).

Heights Medical Center, Inc. (Heights Hospital) sued R. "Roy" Peralta in Texas state court as the guarantor of a hospital debt incurred by one of his employees. Service of citation was issued in February 1982 and returned as being served on June 16, 1982. After Peralta failed to answer or appear, the trial court entered a default judgment for \$5,603.80, plus attorneys fees and court costs. Heights Hospital recorded the judgment in the county's real property records against property owned by Peralta, and had a writ of attachment issued against his property. The property, valued at \$80,000, was sold at a sheriff's sale without notice to Peralta for \$1,720 in partial satisfaction of the default judgment. Appellant's Opening Brief at screen 18, *Peralta v. Heights Medical Center, Inc.*, — U.S. —, 108 S. Ct. 896, — L. Ed. 2d — (1988)(LEXIS, Genfed library, Briefs file).

Peralta filed a bill of review in June 1984 to vacate the default judgment, expunge the county's real property records of the abstract of judgment, void the sheriff's sale of his property, and recover damages. Summary judgment was granted for Heights Hospital on the grounds that Peralta failed to show a meritorious defense to the original contract action. On appeal, Peralta asserted that the summary judgment on his bill of review was erroneous because (1) the default judgment was void due to the service of process being executed more than ninety days after its issuance, (2) the court clerk failed to give him postcard notice of the default judgment prior to its entry, and (3) he was denied his due process rights when his property was sold to satisfy the void judgment. The Houston Court of Appeals for the First District affirmed the trial court, holding that a petitioner seeking a bill of review must plead and prove a meritorious defense to the original cause of action, and that this requirement was not onerous nor violative of due process. The Supreme Court of Texas denied Peralta's writ of error application, noting that the application presented no error requiring reversal. The United States Supreme Court, through a granted petition of certiorari, reversed the Texas courts and held that the meritorious defense requirement in a bill of review proceeding against a default judgment without effective service of process or proper notice of the default judgment, resulting in substantial adverse consequences to the petitioner, violates the due process clause.

Under Texas law, a party subjected to a default judgment has several post-judgment remedies available. If the judgment is void, *see Browning v. Placke*, 698 S.W.2d 362, 363 (Tex. 1985)(default judgment void if court lacked personal jurisdiction), the default judgment may be attacked collaterally without proving a meritorious defense, *see Austin Indep. School Dist. v. Sierra Club*, 495 S.W.2d 878, 881 (Tex. 1973). If the judgment is voidable, *see Browning*, 698 S.W.2d at 362 (all errors other than jurisdictional defects makes judgment voidable), the default judgment may be attacked directly by a motion for new trial, *see Tex. R. Civ. P. 329b(a)-(c)*, a regular appeal, *see Tex. R. App. P. 41(a)*, an equitable appeal by writ of error, *see Tex. Civ. Prac. & Rem. Code Ann. § 51.013* (Vernon 1986), or a bill of review, *see id.* § 16.051.

A bill of review is an independent equitable cause of action brought by a party in a former action directly attempting to vacate the prior judgment after it is no longer appealable or subject to a motion for a new trial. *See Transworld Fin. Servs. Corp. v. Briscoe*, 722 S.W.2d 407, 407 (Tex. 1987). Any adversely affected party has four years to file a bill of review in the trial court which entered the prior judgment. *See Durham v. Barrow*, 600 S.W.2d 756, 760 (Tex. 1980); *Steward v. Steward*, 734 S.W.2d 432, 434 (Tex. App.—Fort Worth 1987, no writ). Once the default judgment defendant learns of the prior judgment, he must utilize any remedy available at that time, such as a motion for new trial or equitable appeal, or he will be barred by the laches doctrine from bringing an equitable bill of review. *See Callaway v. Elliott*, 440 S.W.2d 99, 103 (Tex. Civ. App.—Tyler 1969, writ *dism'd*).

A judgment may be set aside by a bill of review for “sufficient cause” under rule 329b(f) of the Texas Rules of Civil Procedure. *See Tex. R. Civ. P. 329b(f)*. As the rules do not define sufficient cause, case law has determined what constitutes “sufficient cause” for a successful bill of review. The classic bill of review case, *Alexander v. Hagedorn*, established a three part test. *See Alexander v. Hagedorn*, 148 Tex. 565, 568, 226 S.W.2d 996, 998 (1950). In *Hagedorn*, the Texas Supreme Court held that in order for a bill of review plaintiff to set aside a judgment he must plead and prove (1) a meritorious defense to the cause of action, (2) which he was prevented from asserting by the fraud, accident, or wrongful act of the opposing party, (3) unmixed with any fault or negligence of his own. *See id.*; *see also Goss v. McClaren*, 17 Tex. 107, 118-21 (1856).

The Texas Supreme Court has narrowly construed *Hagedorn*, minimizing the grounds upon which a bill of review may be granted, because vacating judgments conflicts with the societal interest that judgments must become final at some point in time so as to prevent continuous litigation of the same issues. *See Hanks v. Rosser*, 378 S.W.2d 31, 33 (Tex. 1964). The first element of the three-part *Hagedorn* test, a meritorious defense, has been held

by Texas courts to require the bill of review petitioner to show that he would have won on the merits of his case, or at least would have obtained a more favorable judgment. *See Baker v. Goldsmith*, 582 S.W.2d 404, 408-09 (Tex. 1979). This requires the petitioner to plead sworn facts constituting a meritorious defense and, at a pre-trial hearing, introduce "prima facie" proof supporting his petition. Prima facie proof is met if the court can determine, as a matter of law, that the defense is not conclusively barred and that the petitioner will prevail on retrial if no contradictory evidence is offered. *See id.* Prima facie proof may consist of any evidence that the trial court decides to receive at its discretion. Although the bill of review defendant may submit proof that the petitioner's defense is barred as a matter of law, factual questions arising from factual disputes are decided in the petitioner's favor. *See id.* If the court determines that the petitioner failed to prove a prima facie meritorious defense, the bill of review proceeding terminates and is summarily dismissed. Conversely, if a prima facie defense was shown by the petitioner, the court will conduct a trial, in one or more hearings, on the merits of the bill of review and the original cause of action. *See id.*

The bill of review's second element; fraud, accident, or wrongful act of the opposing party, must be shown clearly by the bill of review petitioner. *See Crosby v. Di Palma*, 141 S.W.2d 321, 325 (Tex. Civ. App.—El Paso 1911, writ ref'd). Instead of alleging a wrongful act of the opposing party, the petitioner may allege a mutual error or mistake of the parties or an error of the court which prevented him from being heard by the court. *See Transworld Financial*, 722 S.W.2d at 408. If the bill of review petitioner alleges he was prevented from filing his claim or defense due to an error or mistake of the court or official court functionary, the second element of *Hagedorn* is replaced with the second and third part of the *Hanks v. Rosser* test. *See City of Laredo v. Threadgill*, 686 S.W.2d 734, 735 (Tex. App.—San Antonio 1985, no writ)(*Hanks v. Rosser* standard applies where court clerk fails to send notice of default). The petitioner only needs to show that "(1) the failure to file an answer was neither intentional nor the result of conscious indifference, and (2) the defendant was misinformed by the [court] clerk (or some other court functionary), acting within the scope of his official duties, within the time for filing a motion for new trial. *See Hanks v. Rosser*, 378 S.W.2d 31, 34-35 (Tex. 1964). However, if the petitioner proves he was not served with citation he is completely excused from pleading and proving the second part of the *Hagedorn* test. *See, e.g., Texas Indus., Inc. v. Sanchez*, 525 S.W.2d 871, 872 (Tex. 1975)(petitioner proving lack of service of citation not required to prove second *Hagedorn* element); *McEwen v. Harrison*, 345 S.W.2d 706, 710-11 (Tex. 1961)(court with jurisdictional power but lacking service relieves movant from showing opponent's wrongful act, whether or not service of process evident on record's face); *Northcutt v. Jarrett*, 585 S.W.2d 874, 876 (Tex. Civ. App.—Amarillo)(lack of proper process relieves petitioner's burden of pleading and proving fraud), writ ref'd n.r.e. per

curiam, 592 S.W.2d 930 (Tex. 1979); see also, *Kantor v. Herald Publishing Co.*, 645 S.W.2d 625, 627 (Tex. App.—Tyler 1983, writ ref'd n.r.e.) (party not subject to court's jurisdiction); *Joiner v. Vasquez*, 632 S.W.2d 755, 757 (Tex. Civ. App.—Dallas 1981, no writ) (judgment reciting personal jurisdiction and proper service), *cert. denied*, 464 U.S. 981 (1983).

The third *Hagedorn* element requires the petitioner to show that once he learned of the default judgment he diligently attempted to protect his rights by the legal remedies available to him at that time. See *Petro-Chemical Transport, Inc. v. Carroll*, 514 S.W.2d 240, 246 (Tex. 1974) (petition must show absence of negligence). Injustice alone is insufficient to merit a successful bill of review, see *Kantor v. Herald Publishing Co.*, 645 S.W.2d 625, 627 (Tex. App.—Tyler 1983, writ ref'd n.r.e.); the petitioner must show that he used such care “as a prudent and careful man would ordinarily use” in the same situation, see *Thomason v. Freberg*, 588 S.W.2d 821, 826 (Tex. Civ. App.—Corpus Christi 1979, no writ).

In *Peralta v. Heights Medical Center, Inc.*, the United States Supreme Court, in a unanimous opinion, used a combination of two long established fourteenth amendment due process analyses to reverse the Texas courts' holding that a “default judgment must stand absent a showing of a meritorious defense to the action” even though the judgment was entered without proper notice. See *Peralta*, ___ U.S. at ___, 108 S. Ct. at 900, ___ L. Ed. 2d at ___. First, the Court recognized that in any final proceeding a fundamental requirement of the due process clause, U.S. Const. amend. XIV, § 1 (no state shall “deprive any person of life, liberty, or property without due process of the law”), is notice to the interested party reasonable calculated to apprise the party of the pending action and to give him the opportunity to raise his objections at a meaningful time and in a meaningful way. *Peralta*, ___ U.S. at ___, 108 S. Ct. at 899, ___ L. Ed. 2d at ___. Failure to give such notice of the judgment was held to violate due process and, consequently, any final judgment against Peralta without notice of the default judgment before it was entered or improper service of process, was void. See *id.* at ___, 108 S. Ct. at 899, ___ L. Ed. 2d at ___.

The Court analyzed the Texas courts' reasoning that to set aside the default judgment Peralta had to show that he had a meritorious defense, because without a defense the same judgment would be entered on retrial resulting in no harm to Peralta from the default judgment entered without notice. See *id.* The Court specifically rejected the Texas courts' reasoning that Peralta suffered no harm on three separate grounds. First, if Peralta had had timely notice of the lawsuit he could have impleaded the debtor employee, negotiated a settlement, or paid the debt. Second, he could have personally sold his property to raise more money than that amount received from the forced sheriff's sale. Third, the default judgment itself resulted in avoidable adverse consequences because following the default judgment

Heights Hospital entered the judgment on the county property records, encumbering the property with a lien, and had the property sold under a writ of execution, without notice to Peralta. Since state action was involved in the inflicted harm, the party was entitled to due process. *See id.*

Based on the results of the Court's dual due process analysis, the Court reversed the Texas courts' holding. *See id.* at ___, 108 S. Ct. at 900, ___ L. Ed. 2d at ___. The Court held that by the reasoning of the due process clause, the Texas courts' holding "that the default judgment must stand absent a showing of a meritorious defense to the action in which judgment was entered without proper notice to appellant [Peralta], a judgment that had substantial adverse consequences to appellant" was "plainly infirm." *Id.*

Lastly, the Court observed that when a person has been deprived of property in a manner violating the fundamental requirements of due process, it is no compensation to that person to say that if due process had been followed the same result would have occurred because he had no defense on the case's merits. *See id.* The Court held that the proper remedy is to "wipe the slate clean" and restore the bill of review petitioner to the same "position he would have occupied had due process of law been accorded to him in the first place." *See id.* (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)).

The United States Supreme Court in *Peralta*, using loosely articulated constitutional reasoning, espoused the commendable rule of law that a person should not be deprived of property without notice, but the Court failed to provide the specificity needed to apply that law. Analyzing the Court's decision, one would be justified in believing that it will significantly change Texas' bill of review procedure. Arguably, the decision changes the law by holding that if a default judgment is entered with defective service of process, or if a default judgment defendant is not given postcard notice by the court clerk of the judgment before it is entered, the default judgment violates due process and is void. *Compare Peralta v. Heights Medical Center, Inc.*, ___ U.S. ___, ___, 108 S. Ct. 896, 898-900, ___ L. Ed. 2d ___, ___ (1988) with *Texas Indus., Inc. v. Sanchez*, 525 S.W.2d 871, 872 (Tex. 1975)(failure of citation) and *Petro-Chemical Transport, Inc. v. Carroll*, 514 S.W.2d 240, 244-45 (Tex. 1974)(no notice of default judgment). The Court's holding would also change the bill of review procedure from *Baker's* two-step analysis—preliminary pre-trial showing of meritorious defense and then the trial if needed, *see Baker v. Goldsmith*, 582 S.W.2d 404, 408 (Tex. 1979)—to a three-step analysis. To set aside a judgment, a bill of review petitioner would first need to show only a due process violation to receive a summary judgment. *See Peralta*, ___ U.S. at ___, 108 S. Ct. at 900, ___ L. Ed. 2d at ___. Then, the two-step *Baker* analysis would be implemented. *See id.* Thus, even if a petitioner's negligence or wrongful conduct contributed to the entering of the default judgment without proper notice, the court will be forced to vacate the default judgment without ever reaching the analytical requirements of

Hagedorn or *Baker*. This almost automatic re-litigation will waste judicial time and fail to meet society's need for finality of judgments. In so holding the Supreme Court has breathed life into the adage that procedural form is more important than substance.

The better balancing of the competing judicial, societal, and personal interests requires that *Peralta* be limited strictly to its specific facts. Justice demands this strict interpretation because the Court's determination of void service was based on repealed Texas law, *see* Tex. R. Civ. P. 101 (Vernon 1977)(90 days to serve process; repealed effective Jan. 1, 1988), and there was no adversarial controversy between the parties, *see Poe v. Ullman*, 367 U.S. 497, 502-07 (1961)(adjudicatory process requires "lively conflict between antagonistic demands, actively pressed"). The real issue of this case was not the \$5,000 judgment because Peralta conceded the liability, the real issue was Peralta's \$100,000 loss resulting from the sheriff's sale. The entire bill of review process lacked that actively pressed, lively conflict required to ensure integrity in the judicial process. Only Peralta, with his financial interest, actively pressed for adjudication. *See Peralta v. Heights Medical Center, Inc.*, — U.S. —, 108 S. Ct. 896, — L. Ed. 2d — (1988)(LEXIS, Genfed library, Briefs file)(Peralta filed jurisdictional statement brief, reply brief to appellee's motion to dismiss, and appellant's brief, whereas Heights Hospital only filed motion to dismiss).

The lack of well-reasoned legal analysis supporting each litigant prevented the Court from judiciously deciding this case. In addition, the Court refused to entertain the Texas Attorney General's position that Peralta had an adequate remedy at law since it was not raised during appeal, but it was not raised during appeal because the attorney general was not a party to litigation. The Court's better holding would have been that Peralta had an adequate remedy since he could vacate the default judgment by collaterally attacking the void judgment. *Compare Austin Indep. School Dist. v. Sierra Club*, 495 S.W.2d 878, 881 (Tex. 1973). Furthermore, he could seek injunctive relief alleging irreparable injury or ultimate victory on the merits, *see Millwrights Local Union No. 2484 v. Rust Eng'g Co.*, 433 S.W.2d 683 (Tex. 1968), which would prevent execution of the property until the adjudication of his collateral attack. *See Siskind, Bill of Review—The Last Chance*, 20 S. Tex. L.J. 237, 247 (1980).

The Supreme Court's holding in *Peralta v. Heights Medical Center, Inc.* that a meritorious defense need not be shown in a bill of review attack on an adverse default judgment entered without proper notice or service on its face overturns established Texas case law. The full impact of the decision will not be known until it is interpreted by Texas courts. Until then, plaintiffs must ensure that service of process is valid and that a defendant is given