

02-09-00356

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IN THE COURT OF APPEALS FOR  
THE SECOND DISTRICT OF TEXAS

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CINDY PENA,

*Appellant,*

v.

MICHAEL A. SMITH,

*Appellee.*

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Appeal from the 271<sup>st</sup> Judicial District Court  
of Wise County, Texas  
Case No. 08-09-684  
The Honorable John Fostel presiding

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**Brief for the Appellant, Cindy Pena**

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**Oral Argument Conditionally Requested**

## **List of Parties and Counsel**

Pursuant to Texas Rule of Appellate Procedure 38.1(a), the appellant gives a complete list of all parties to the trial court's judgment or order appealed from, and the names and addresses of all trial and appellate counsel.

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## **Recommendation on Oral Argument**

Cindy Pena requests oral argument only if Michael Smith requests it.<sup>1</sup>

The record is complete and shows that the trial court rendered judgment against Pena on a written mediation memorandum without proper pleadings or *any* supporting evidence. The record also demonstrates that the court ordered the extraordinary relief of specific performance without having received into evidence a description of the land to be conveyed. For each of the issues raised, the standards of review and the law are well established and, thus, the case can be decided on the briefs alone. Oral argument would not significantly aid the court's decisional process.

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<sup>1</sup> See Tex. R. App. P. 39; 2d Tex. App. (Fort Worth) Loc. R. 3.

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## Statement of Jurisdiction

This is an appeal from a civil judgment rendered in the 271<sup>st</sup> Judicial District Court of Wise County, Texas. The district court had jurisdiction pursuant to Texas Government Code sections 24.007 and 24.008. This court has jurisdiction of this appeal pursuant to Texas Rule of Appellate Procedure 25.1(b) and *Wells v. Breton Mills Apartments*, 85 S.W.3d 823, 824 (Tex. App. - Amarillo 2001, no pet.).

Notice of appeal was timely filed. The trial court signed a final judgment on 22 June 2009.<sup>2</sup> Pena filed a motion for new trial on 22 July 2009.<sup>3</sup> The trial court overruled the Pena's requested relief on 14 September 2009<sup>4</sup> and she filed her notice of appeal within 30 days of the court's ruling.<sup>5</sup>

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<sup>2</sup> CR 95.

<sup>3</sup> CR 105.

<sup>4</sup> CR 203.

<sup>5</sup> CR 208.

## **Issues Presented**

Pena's appeal presents three main issues:

1.     **Legal Sufficiency.** A party must offer more than a scintilla of evidence of a vital fact supporting each element of his cause of action. Smith didn't offer and the court didn't receive, any evidence of the existence of a contract, its breach, or damages, before the court rendered judgment for him. Is Smith's "evidence" legally insufficient to support the judgment?
  
2.     **Statute of Frauds.** A conveyance that doesn't describe the land with reasonable particularity is void. Smith sought and obtained judgment on a memorandum signed by the parties after mediation. The court also ordered specific performance. The memorandum doesn't contain a description of the interest of land to be conveyed. Is the conveyance void and the trial court's judgment in error?
  
3.     **Pleadings Do Not Support Judgment.** A judgment must be supported by the prevailing party's pleadings. Smith originally sued Pena for breach of a real estate sales contract. Without amending his pleadings, Smith sought and obtained judgment on the basis of a memorandum signed by the parties after mediation. Is the trial court's judgment, supported by the memorandum and not Smith's original pleadings, erroneous?

## Statement of the Case

*Nature of the Case:* Smith sued Pena for breach of real estate sales contract.<sup>6</sup> Pena filed a verified denial along with various affirmative defenses.<sup>7</sup>

*Trial Court:* The Honorable John Fostel presiding.  
27<sup>th</sup> Judicial District Court, Wise County, Texas.

*Course of Proceedings:* The parties attended mediation and signed a written memorandum.<sup>8</sup> Smith thereafter filed a motion for judgment<sup>9</sup> and, upon hearing, the trial court issued a final judgment disposing of all issues and parties.<sup>10</sup> Pena filed a motion for new trial which the court overruled.<sup>11</sup>

*Trial Court's Disposition:* The trial court rendered judgment in its Final Order of 22 June 2009.<sup>12</sup>

*Citations:* The record consists of seven volumes: one clerk's record and six volumes of the reporter's record. The record references are abbreviated as follows:

Reporter's Record:	RRv __
Clerk's Record:	CR __
Appendix:	Tab __

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<sup>6</sup> CR 2-4.

<sup>7</sup> CR 50-53.

<sup>8</sup> CR 54-60.

<sup>9</sup> CR 61-73.

<sup>10</sup> CR 95-104.

<sup>11</sup> CR 105, 203.

<sup>12</sup> CR 95-104.

## Statement of Facts

Michael Smith, a lawyer acting *pro se*, sued Cindy Pena for breach of a contract “for the sale of 3.00 acres of land in Wise County.”<sup>13</sup> Smith’s pleadings requested damages and prayed that the court would order Pena to “execute all documents necessary to transfer the real property pursuant to the contract.”<sup>14</sup> Smith’s petition, however, didn’t identify the property nor was the alleged sales contract attached.<sup>15</sup>

Pena filed an answer generally denying Smith’s claims and she asserted the verified defenses of the lack of an agreement between the parties and lack of consideration.<sup>16</sup> She also asserted various other affirmative defenses, such as duress, estoppel, fraud, mistake, rescission, and waiver.<sup>17</sup>

During pre-trial discovery and before a trial was set, the parties attended a mediation and signed a memorandum at the end of the session.<sup>18</sup> The memorandum was later filed with the court.<sup>19</sup>

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<sup>13</sup> CR 3.

<sup>14</sup> CR 4.

<sup>15</sup> *See generally* CR 2-4.

<sup>16</sup> CR 50-53.

<sup>17</sup> CR 50-53.

<sup>18</sup> *See* CR 54-63.

<sup>19</sup> *Id.*; *see also* Tab I (memorandum attached to Final Order).

Smith, without amending his original pleadings, filed a motion asking the court to render final judgment on the basis of the memorandum and incorporate it as part of its decree.<sup>20</sup> His motion didn't include any summary judgment evidence, but only the memorandum and a proposed Final Order as exhibits.<sup>21</sup> His proposed order called for Hunter Magee, Pena's attorney, to "immediately execute any and all documents in the name of Cindy Pena as her agent to facilitate the close of the sale of the property," but neither his motion nor his exhibits contained a description of the property to be conveyed.<sup>22</sup>

Pena opposed the motion<sup>23</sup> and later filed a response contending that the memorandum ought to be laid aside.<sup>24</sup>

The court set Smith's motion for hearing within 20 days of filing.<sup>25</sup> Two days before the hearing, Smith filed a supplemental motion that averred that the memorandum was enforceable under Texas Civil Practice and Remedies Code section 154.071.<sup>26</sup> This supplement included several unidentified

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<sup>20</sup> CR 61-73.

<sup>21</sup> *See generally* CR 61-73.

<sup>22</sup> *See id.*

<sup>23</sup> CR 62 (certificate of conference).

<sup>24</sup> CR 74-81.

<sup>25</sup> CR 63.

<sup>26</sup> CR 83-86.

documents as exhibits.<sup>27</sup> It too asked that Pena be required “to execute all documents necessary to have the property conveyed,” but neither it nor its exhibits contained a description the property that she was to convey.<sup>28</sup>

The court held a hearing on Smith’s motions.<sup>29</sup> Smith argued that memorandum was enforceable as a contract,<sup>30</sup> but he didn’t authenticate it, call any witnesses, or otherwise have any other evidence admitted.<sup>31</sup> The court, without receiving evidence, granted Smith’s motions<sup>32</sup> and issued a final judgment.<sup>33</sup> The judgment incorporated the memorandum into its order and, although it didn’t identify the property, required Pena’s lawyer to execute, as her attorney-in-fact, all documents needed to “facilitate the close of the sale of the property.”<sup>34</sup> The judgment was final in that it expressly disposed of all the claims and all the parties and was appealable.<sup>35</sup>

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<sup>27</sup> CR 87-94.

<sup>28</sup> *See id.*

<sup>29</sup> RR3 2.54 to 20.4.

<sup>30</sup> RR3 7.21-22.

<sup>31</sup> *See* RR3 5.4 to 10.9; 12.4 to 15.7; 15.11-24.

<sup>32</sup> RR3 15.11 to 16.5. *See also* RR3 19.10-14.

<sup>33</sup> CR 95-104.

<sup>34</sup> CR 96.

<sup>35</sup> CR 96.

Pena filed a motion for new trial,<sup>36</sup> but the court denied it.<sup>37</sup> In its order of denial, the court reincorporated the memorandum into its order and added a description of the property as “ooo Cemetery Lane, Boyd, Texas” though it hadn’t received any evidence with which to do so.<sup>38</sup> The court also renewed its order that Pena’s lawyer, Hunter Magee, sign the deed and all necessary papers required to accomplish the conveyance of the land to Smith.<sup>39</sup> Pena thereafter perfected this appeal.

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<sup>36</sup> CR 105.

<sup>37</sup> CR 203-205.

<sup>38</sup> *Compare* RR4 and RR5 with CR 203.

<sup>39</sup> CR 203.

## **Summary of Argument**

Smith's evidence is legally insufficient to support the trial court's judgment and order of specific performance. At the hearing on his motion for judgment, Smith argued that the memorandum was enforceable as a contract, but he didn't authenticate it and have it admitted into evidence. He offered no other evidence and the court didn't hear any evidence before rendering judgment in his favor. Because Smith failed to provide any evidence of any of the vital facts needed to prevail on a contract action, the judgment is erroneous.

A conveyance of land must be in writing and describe the property to be conveyed with reasonable particularity, otherwise it's void. Smith moved for final judgment based on a signed memorandum and the court, without receiving any evidence, granted him judgment and specific performance. The memorandum didn't contain a description of the property to be conveyed and nor did it reference any other existing document that identified the land. The conveyance is void for lack of property description so the judgment was rendered in error.

A trial court's judgment must be supported by the prevailing party's pleadings. Smith sought for and received a final judgment on a memorandum that was filed after the parties attended mediation. Smith didn't amend his original pleadings—pleadings that sought judgment based on an alleged real

estate transaction. Since the trial court's judgment isn't based upon Smith's original pleadings, it is erroneous.

## Argument and Authorities

### Issue No. 1:

**Legal Sufficiency.** A party must offer more than a scintilla of evidence of a vital fact supporting each element of his cause of action. Smith didn't offer and the court didn't receive, any evidence of the existence of a contract, its breach, or damages, before the court rendered judgment for him. Is Smith's "evidence" legally insufficient to support the judgment?

### Standard of Review

A motion for new trial is not required to challenge legal sufficiency of the judgment in a non-jury case.<sup>40</sup> In such a challenge,<sup>41</sup> this court presumes the evidence supports the trial court's judgment when the record doesn't contain a statement of facts, but the trial court heard evidence.<sup>42</sup> But if there's no indication that the trial court received evidence before rendering judgment and the record doesn't contain a statement of facts, this court may not indulge a presumption in favor of the judgment.<sup>43</sup> Since the trial court didn't receive any evidence in this case and there is no statement of facts on record, this court

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<sup>40</sup> Tex. R. Civ. P. 324(b); *Farmer's Mut. Protective Ass'n v. Wright*, 702 S.W.2d 295, 296-97 (Tex. App. - Eastland 1985, no writ).

<sup>41</sup> *Tomlinson v. Jones*, 677 S.W.2d 490, 492 (Tex. 1984) (legal sufficiency challenge is a question of law).

<sup>42</sup> *Otis Elevator Co. v. Parmelee*, 850 S.W.2d 179, 181 (Tex. 1993).

<sup>43</sup> *Id.*; *Thompson v. Haberman*, 739 S.W.2d 71, 72 (Tex. App. - San Antonio 1987, no writ).

must examine the judgment *de novo* and not presume that the trial court made all necessary findings to support its judgment.<sup>44</sup>

This court is to sustain a legal sufficiency challenge when the record shows a complete absence of evidence of a vital fact or the evidence offered to prove a vital fact is not more than a mere scintilla.<sup>45</sup>

### **No Legally Sufficient Evidence Supports the Judgment**

The same procedures used to enforce and enter judgment on other contracts apply to mediated agreements.<sup>46</sup> The party seeking enforcement of a written settlement agreement as a contract must support it by proper pleading and proof.<sup>47</sup> He must prove that: (1) a contract existed between the parties; (2) the contract created duties; (3) the defendant breached a material duty under the contract; (4) and the plaintiff sustained damages.<sup>48</sup> For an order of specific performance, a memorandum of a contract to convey real estate must describe

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<sup>44</sup> See *Thompson*, 739 S.W.2d at 72.

<sup>45</sup> *Cecil v. Smith*, 804 S.W.2d 509, 510 n. 2 (Tex. 1991).

<sup>46</sup> *Martin v. Black*, 909 S.W.2d 192, 195-96 (Tex. App. - Houston [14<sup>th</sup> Dist.] 1995, writ denied) (the only applicable vehicles for obtaining a judgment over the existence of a contract are summary judgment and trial).

<sup>47</sup> *The Cadle Co. v. Castle*, 913 S.W.2d 627, 634 (Tex. App. - Dallas, 1995, writ denied). See also *Padilla v. LaFrance*, 907 S.W.2d 454 (1995); *Stevens v. Snyder*, 874 S.W.2d 244, 244 (Tex. App. - Dallas 1994, writ denied).

<sup>48</sup> *Snyder v. Eanes Indep. Sch. Dist.*, 860 S.W.2d 692, 695 (Tex. App. - Austin 1993, writ denied).

the property or specifically refer to existing other documents that identify with particularity the land to be conveyed.<sup>49</sup>

The plaintiff may move for summary judgment, but only when there are no material facts at issue and he establishes his right to judgment as a matter of law.<sup>50</sup> Otherwise, he must present evidence at trial.

In *The Cadle Co. v. Castle*,<sup>51</sup> the Dallas *en banc* court decidedly held that there no “summary proceedings” for mediated agreements.<sup>52</sup> In that case, both The Cadle Co. (“Cadle”) and Castle were ordered to attend mediation.<sup>53</sup> The mediation produced a written settlement agreement that called for payments to be made to Cadle under specified conditions.<sup>54</sup> Four days after the agreement was signed, Castle filed a “Motion to Enforcement Settlement Agreement” and attached a copy of the settlement agreement to the motion.<sup>55</sup> He contended that though Cadle might have subsequently withdrawn his consent to the settlement agreement (Cadle had filed a “Notice of Withdrawal of Consent to

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<sup>49</sup> *Pick v. Bartel*, 659 S.W.2d 636, 637 (Tex. 1983).

<sup>50</sup> Tex. R. Civ. P. 166a; *Roark v. Stalkworth Oil & Gas, Inc.*, 813 S.W.2d 492, 494-95 (Tex. 1991).

<sup>51</sup> 913 S.W.2d 627 (Tex. App. - Dallas 1995, writ denied).

<sup>52</sup> *Id.* at 634; *accord Mantas v. The Fifth Court of Appeals*, 925 S.W.2d 656, 656 (Tex. 1996) (party seeking enforcement must pursue breach-of-contract claim subject to normal pleading and proof rules).

<sup>53</sup> *Id.* at 630.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

Settlement Agreement”), the agreement was enforceable under Texas Civil Practice and Remedies Code section 154.071.<sup>56</sup>

The trial court conducted a hearing on Castle’s motion and, without receiving evidence, rendered judgment in Castle’s favor and incorporated the terms of the agreement into the judgment.<sup>57</sup>

The *Castle* court sustained Cadle’s legal sufficiency challenge by holding that section 154.071 didn’t create a “summary proceeding” for mediated settlement agreements.<sup>58</sup> In reversing the judgment, the *Castle* court observed that Castle had not presented any evidence on his motion to enforce the settlement agreement; he had failed to authenticate and have the written settlement agreement admitted into evidence.<sup>59</sup> The court also observed that he hadn’t introduced any evidence of performance under the agreement or damages.<sup>60</sup> Because Castle failed to offer *any* evidence in support of his motion, the court said, the evidence was legally insufficient to support the underlying judgment.

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<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* at 631.

<sup>59</sup> *Id.* at 634.

<sup>60</sup> *Id.*

This case sits with *Castle* on all fours. After attending a mediation session, Smith filed a motion asking the court to issue final judgment that incorporated the signed memorandum as part of its decree. Smith’s motion was not a motion for summary judgment—it included a copy of the memorandum and a proposed final order, but nothing else.<sup>61</sup> Two days before the hearing, Smith filed a supplemental motion that included combined several unidentified documents in two exhibits.<sup>62</sup> Neither of the exhibits included affidavits or were otherwise in a form that could support a judgment.<sup>63</sup>

Upon hearing, Smith didn’t offer and the court didn’t hear, *any* evidence.<sup>64</sup> He didn’t prove the existence of a contract; didn’t authenticate or have admitted into evidence the memorandum or the alleged real estate sales contract or any other document. He didn’t testify nor did he call any witnesses. He didn’t introduce any evidence that he had a contractual relationship with Pena, that she owed him any duties, or that she breached any duties. He didn’t introduce any evidence that contained a description of the property and the court didn’t take judicial notice of any facts.<sup>65</sup>

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<sup>61</sup> See CR 61-73.

<sup>62</sup> CR 83-94.

<sup>63</sup> See Tex. R. Civ. P. 166a(f); *United Blood Servs. v. Longoria*, 938 S.W.2d 29, 30 (Tex. 1997).

<sup>64</sup> See RR3 generally.

<sup>65</sup> See *Barnard v. Barnard*, 133 S.W.3d 782, 789 (Tex. App. - Fort Worth 2004, pet. denied) (While a court may take judicial notice of its own files, it may not take judicial notice of the truth of the allegations in them.).

Without a trial, without the introduction of evidence, and without a property description, the court granted Smith judgment. The court incorporated the memorandum into its order and also ordered specific performance—that Pena execute all documents necessary for the conveyance of the property—but nowhere in the judgment was the property described with any particularity.<sup>66</sup>

Because Smith didn't present *any* evidence at the hearing on his motion for judgment, there is a complete absence of evidence of the vital facts needed to support the judgment—a judgment that includes the extraordinary relief of specific performance. The record is bereft of *any* evidence of the existence of a contract, any duties owed or breached under that contract, and any consequential damages and the judgment, therefore, is not supported by any legally sufficient evidence and should be reversed.

And while it might be argued that Pena's response to Smith's motion constituted some type of judicial admission—an admission that she had contractually entered into the memorandum and subsequently breached it—that argument fails because her response was neither a pleading<sup>67</sup> nor a stipulation of

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<sup>66</sup> Compare *Castle*, 913 S.W.2d at 630 (terms of judgment differed from settlement agreement) *with* CR 203-205 (court's order of 14 September 2009 included a description of the property not found in the memorandum or even Smith's original pleadings).

<sup>67</sup> See Tex. R. Civ. P. 45(a) (pleadings *shall* be by petition and answer).

the parties.<sup>68</sup> Additionally, her response wasn't authenticated or admitted into evidence at the hearing and the court didn't take judicial notice of it or its contents. Thus Pena cannot be said to have waived all of her pleaded defenses and concomitantly relieved Smith of his burden of proving all the vital facts needed to prove a breach of contract action.<sup>69</sup>

Because Smith's evidence is legally insufficient to support the judgment,<sup>70</sup> Pena is entitled to the rendition of judgment in her favor.<sup>71</sup>

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<sup>68</sup> *Menodoza v. Fidelity & Guar. Ins. Underwriters, Inc.*, 606 S.W.2d 692, 694 (Tex. 1980).

<sup>69</sup> *Id.*

<sup>70</sup> *See Raw Hide Oil & Gas, Inc. v. Maxus Exploration Co.*, 766 S.W.2d 264, 275 (Tex. App. - Amarillo 1988, writ denied).

<sup>71</sup> *See National Life & Accident Ins. Co. v. Blagg*, 438 S.W.2d 905, 909 (Tex. 1969) (generally the court's duty to reverse and render because that is the judgment that the trial court should have rendered).

## **Issue No. 2:**

**Statute of Frauds.** A conveyance that doesn't describe the land with reasonable particularity is void. Smith sought and obtained judgment on a memorandum signed by the parties after mediation. The court also ordered specific performance. The memorandum doesn't contain a description of the interest of land to be conveyed. Is the conveyance void and the trial court's judgment in error?

## **Standard of Review**

Whether an agreement falls within the Statute of Frauds is a question of law that is reviewed *de novo*.<sup>72</sup>

## **The Conveyance of Land is Void**

Agreements for the conveyance of real estate be in writing.<sup>73</sup> To be sufficient, they must furnish within themselves, or by reference to some other existing writing, the means or data by which the conveyance can be identified with reasonable certainty.<sup>74</sup> If a conveyance isn't sufficiently described in writing it is void.<sup>75</sup> And this includes conveyances in mediated settlement agreements.<sup>76</sup>

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<sup>72</sup> *Frost Nat'l Bank v. Burge*, 29 S.W.3d 580, 594 (Tex. App. - Houston [14<sup>th</sup> Dist.] 2000, no pet.) (citing *Gerstacker v. Blum Consulting Eng'rs, Inc.*, 884 S.W.2d 845, 849 (Tex. App. - Dallas 1994, writ denied).

<sup>73</sup> Tex. Bus. & Com. Code Ann. § 26.01(b).

<sup>74</sup> *Morrow v. Shotwell*, 477 S.W.2d 538, 540 (Tex. 1972).

<sup>75</sup> *Pick*, 659 S.W.2d at 637.

<sup>76</sup> See *West Beach Marina, Ltd. v. Erdeljac*, 94 S.W.3d 248, 264-66 (Tex. App. - Austin 2002, no writ).

Smith originally sued Pena for the breach of an alleged real estate sales contract. In his three-page original petition, he described the property only as “3.00 acres of land in Wise County.”<sup>77</sup> He didn’t attach the sales contract to the petition or refer to another existing document that described the land with reasonable certainty.<sup>78</sup>

During the pre-trial phase of the case, the parties attended mediation and signed a memorandum that was later filed with the court. Smith subsequently moved for final judgment on the memorandum on the basis Texas Practice and Remedies Code section 154.071<sup>79</sup> and asked that it be incorporated into the court’s final decree. The court granted Smith’s motion, incorporated the memorandum in its final decree, and ordered Pena’s lawyer’s as attorney-in-fact to “execute any and all documents . . . to facilitate the sale of the property (the subject of this litigation).”<sup>80</sup>

The memorandum didn’t include a description of the property to be conveyed; it contained the following:

- π will pay all closing costs to Western Title Company @ 505 Colleyville Blvd., Suite 160 Colleyville, TX 76034 (817) 281-9123 or another suitable title company by mutual agreement.

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<sup>77</sup> CR 3.

<sup>78</sup> See CR 2-4.

<sup>79</sup> CR 84.

<sup>80</sup> CR 95-96.

- Parties will do all things reasonably necessary to have the file transferred from Equity Title Company to Western Title Company w/o delay.
- Parties agree to execute all documents or contract amendment or supplementations necessary to facilitate this agreement.
- $\pi$  will get the surface rights to land and all other rights, if any, other than the mineral interests currently held by  $\Delta$ , Cindy Pena.
- $\Delta$  Cindy Pena will be allowed to retain her mineral interests in the property.
- $\Delta$  Cindy Pena will & must execute all closing documents w/ Western Title Company on or before June 1, 2009.
- Failure of Cindy Pena to execute closing documents by June 1, 2009 will entitle Michael A. Smith to automatically deduct \$1000- of the payments due on August 1, 2009 (Discussed herein) regardless of fault of Cindy Pena or of any other person or entity (thus implying & placing a duty on Cindy Pena to work w  $\pi$ , Equity Title & Western Title to have the file ready to be closed w/o delay). Furthermore, Michael A. Smith will be entitled to deduct automatically another \$1000- if Cindy Pena fails to execute all closing documents, again regardless of fault, for each month or fractional part of each month in which the closing documents are not executed by Cindy Pena.
- $\pi$ , Michael A. Smith, shall deposit closing costs & \$10,000- w/ Western Title Company w/in 5 days of being informed of the amount due by the title company.
- $\pi$ , Michael A. Smith, shall pay \$3000- to Hunter Magee @ 1901 Central Drive, Suite 800 Bedford, Texas 76021 for her Cindy Pena benefit on or before August 1, 2009.
- Michael A. Smith,  $\pi$ , is entitled to immediate possession & access to property as of May 4, 2009.
- Cindy Pena hereby appoints Hunter Magee limited power of attorney to execute documents necessary to close the sale of the property as of June

2, 2009, if for any reason Cindy Pena cannot or will not execute some or all documents needed to close the sell [sic] of the property.

- Each party pays all attorney's fees & or costs incurred.
- All discovery is abated until June 1, 2009.
- Parties enjoined from filing additional pleadings until June 1, 2009.
- π will dismiss suit w/in 30 after deed is filed.
- Parties agree to mediate before continuing to litigate if any dispute arises concerning this M.S.A.

It not only failed to describe the property within itself, but also failed to reference some other existing contract or document by which the land to be conveyed could be identified with reasonable certainty. Without a description of the property, the memorandum as a conveyance of land is void and the order of specific performance is in error.<sup>81</sup>

After the trial court entered its final judgment, Pena filed a motion for new trial. In its order denying Pena's motion, the court identified the land to be conveyed as "o Cemetery Street, Boyd, Texas, Wise County, Texas." Even if that description was sufficient for the Statute of Frauds, which is questionable,<sup>82</sup> this

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<sup>81</sup> *Nash v. Conaster*, 410 S.W.2d 512, 520 (Tex. Civ. App. - Dallas 1966, no writ).

<sup>82</sup> See *Butler v. Benefield*, 589 S.W.2d 778, 780 (Tex. App. - Dallas 1979, writ ref'd n.r.e.) (street address may require extrinsic evidence to satisfy Statute of Frauds).

description was not admitted into evidence at the court’s “trial”—the hearing on Smith’s motion for judgment—and is therefore invalid.<sup>83</sup>

Since the memorandum doesn’t meet the requirements of the Statute of Fraud and is thus void, the trial court’s judgment should be reversed and judgment rendered that Smith take nothing.

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<sup>83</sup> See *Morrow*, 477 S.W.2d at 541 (contract provision further describing property wasn’t introduced at trial so it could not be considered).

### **Issue No. 3:**

**Pleadings Do Not Support Judgment.** A judgment must be supported by the prevailing party's pleadings. Smith originally sued Pena for breach of a real estate sales contract. Without amending his pleadings, Smith sought and obtained judgment on the basis of a memorandum signed by the parties after mediation. Is the trial court's judgment, supported by the memorandum and not Smith's original pleadings, erroneous?

### **Standard of Review**

The question of the sufficiency of a party's pleadings supporting a judgment is one of law that is reviewed *de novo*.<sup>84</sup>

### **Smith's Pleadings Do Not Support the Judgment**

A trial court's judgment must conform to the prevailing party's pleadings or it's erroneous.<sup>85</sup> Consequently, a party may not be granted relief if his pleadings don't support that relief.<sup>86</sup> Smith's original pleadings asserted a breach of contract action over a real estate sales contract. Since the pleadings don't support the trial court's judgment on the memorandum, the judgment is erroneous.

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<sup>84</sup> See *Lyles v. Johnson*, 585 S.W.2d 778, 782 (Tex. Civ. App. - Houston [1st Dist.] 1979, writ ref'd n.r.e.).

<sup>85</sup> Tex. R. Civ. P. 301; *Cunningham v. Parkdale Bank*, 660 S.W.2d 810, 813 (Tex. 1983); see also *Jennings v. Texas Farm Mortgage Co.*, 124 Tex. 593, 80 S.W.2d 931 (Tex. 1935).

<sup>86</sup> *Id.*

A written settlement agreement may be actionable, but only as any other written contract;<sup>87</sup> the same procedures used to enforce and enter judgments on other contracts applies.<sup>88</sup> Thus an action based on a written settlement agreement must give fair notice of the claim involved, including an allegation of the contractual relationship between the parties, and the substance of the contract that supports the pleader's right to recover.<sup>89</sup> As to real estate, a court cannot order specific performance unless the contract describes the land or within itself furnishes the means by which the property may be identified with reasonable certainty.<sup>90</sup> And as with any other contract action, the defendant may file a general denial, a verified denial, and affirmative defenses in response to the pleader's claims.<sup>91</sup>

Smith originally sued Pena over an alleged real sales contract, dated on or about 14 August 2008, for an unidentified three acres in Wise County, Texas.<sup>92</sup> He averred that the contract provided for closing on or before September 15, 2008 and that he had complied with the terms of the contract by ordering a

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<sup>87</sup> Tex. R. Civ. P. 154.071(b).

<sup>88</sup> *West Beach Marina, Ltd.*, 94 S.W.3d at 256; *Martin*-, 909 S.W.2d at 195.

<sup>89</sup> *Air & Pump Co. v. Almaquer*, 609 S.W.2d 309, 313 (Tex. Civ. App. - Corpus Christi 1980, no writ).

<sup>90</sup> *Morrow*, 477 S.W.2d at 540.

<sup>91</sup> Tex. R. Civ. P. 92, 93, and 94.

<sup>92</sup> CR 2-4 (the sales contract was not attached to the petition).

survey and paying for all the closing costs.<sup>93</sup> He also averred that he delivered \$21,985.04 to Equity Title in Decatur and signed all the necessary closing documents. He contended that Pena breached the contract by refusing to complete the transaction.<sup>94</sup> He asked for damages and prayed that Pena be ordered “execute all documents necessary to transfer the real property pursuant to the contract.”<sup>95</sup> Smith didn’t attach a contract to his petition, but the four corners of his pleadings demonstrate that he wanted the court to order Pena to execute the closing documents pertaining to the alleged sales contract dated August 14, 2008.

After the parties attended a pre-trial mediation and signed a memorandum at the end of the session, Smith moved for final judgment on the memorandum and asked that the court incorporate it into its decree. In his motion, Smith averred that Pena hadn’t “executed any documents necessary to facilitate the sale and closing of the property” and that she had “taken steps to revoke the power of attorney Hunter Magee to execute all documents necessary to sell and/or close the sell of the property in contradiction of the MSA.”<sup>96</sup> In a supplemental motion, Smith averred that Pena sought to “unilaterally avoid the

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<sup>93</sup> CR 2-4.

<sup>94</sup> CR 2-4.

<sup>95</sup> CR 2-4.

<sup>96</sup> CR 61. “MSA” is Smith’s shorthand for “Mediated Settlement Agreement” or the memorandum.

terms and conditions of the Mediated Settlement Agreement.”<sup>97</sup> Smith contended that the memorandum was enforceable under Texas Rule of Civil Procedure 154.071.<sup>98</sup>

The court ultimately granted Smith’s motion and issued a final judgment that incorporated the memorandum as the order of the court.<sup>99</sup> The court further ordered that the parties perform all duties reasonably necessary to facilitate the purpose and intent of the memorandum and that Pena’s lawyer act as her attorney-in-fact in conveying the property to Smith. The court’s order stated that it was a final judgment that allowed execution to issue.<sup>100</sup>

At no time before the trial court lost its plenary power over the judgment did Smith amend his original pleadings to assert an action under Rule 154.071 for breach of the memorandum. And Smith’s motion for judgment can’t be considered a trial amendment because pleadings must be done in the form of petition and answer.<sup>101</sup> In short, Smith’s non-amended original pleadings are insufficient to support an entry of judgment that (1) the parties had a contractual relationship pursuant to the memorandum, (2) Pena owed Smith

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<sup>97</sup> CR 83-84.

<sup>98</sup> CR 84.

<sup>99</sup> CR 95-104.

<sup>100</sup> CR 131.

<sup>101</sup> *See* Tex. R. Civ. P. 45(a) (pleadings shall be by petition and answer).

duties under it, (3) Pena breached her duties under it, and (4) that it supported the extraordinary relief of specific performance.

Because Smith's pleadings fail to support the judgment, the judgment is erroneous and should be reversed in favor of Pena.

## Conclusion

This court should answer the three issues raised by Pena in a straightforward fashion:

- The trial court's judgment is not supported by legally sufficient evidence because Smith did not introduce *any* evidence to support his claims.
- The trial court's judgment is erroneous because the memorandum purportedly conveying the land to Smith is void because it doesn't contain a description of the land to be conveyed.
- The trial court's judgment on the memorandum is in error because it's not supported by Smith's pleadings—pleadings that alleged the breach of a real estate sales contract.

Pena asks the court to reverse the judgment of the trial court and render a take-nothing judgment against Smith. She also asks for all further relief that the court deems proper and appropriate.

Respectfully submitted,

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**Certificate of Service**

I, Peter Smythe, certify that today, \_\_\_ January 2010, a copy of the brief for Appellant and a copy of the appendix in this case were served upon opposing counsel via FedEx service, to-wit:

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