Supreme Court of Texas

No. 24-0543

Family Dollar Stores of Texas, LLC, ARCP FDCCC1403 LLC, 7B Building & Development, LLC, Triple C Development, Inc., Burkhardt Engineering Company, and M&S Utility Construction, LLC,

Petitioners,

v.

JLMH Investments, LLC,

Respondent

On Petition for Review from the Court of Appeals for the Second District of Texas

JUSTICE SULLIVAN, joined by Chief Justice Blacklock and Justice Hawkins, dissenting.

In the 1970s, Italian pop star Adriano Celentano released a smash-hit single titled "Prisencolinensinainciusol." The point of the song is—well it's better to hear for yourself. Explaining a joke can kill the bit, so give it a listen if you can and then turn the page.[1]

[1] *See* Adriano Celentano, Prisencolinensinainciusol (Vinyl Record, Clan Celentano 1973), https://archive.org/details/WeAreBackSliding_1640861777.

For those who can't listen to it now, the song sounds like it's in English, but it's actually gibberish. Celentano later explained: "I thought that I would write a song which would only have as its theme the inability to communicate . . . . And to do this, I had to write a song where the lyrics didn't mean anything." *It's Gibberish, but Italian Pop Song Still Means Something*, NPR (Nov. 4, 2012, at 16:13 ET), https://www.npr.org/2012/11/04/164206468/its-gibberish-but-italian-pop-song-still-means-something. The song is funny because it violates language's first and greatest commandment: say something.

This rule, integral to the very concept of a language, is intentionally violated only by artists, jokers, and the insane. Judges and lawyers almost always follow it. That's why we resist interpretations that'd render meaningless any snippet of written text, whether found in our Constitution, a statute, a contract, or some other legal document. Today, however, the plurality opinion and the concurrence conclude that the district court's clarifying order says and does nothing: It didn't spell out that there was no longer a final order, so it had no legal effect. Our precedents don't compel this result, and if they did, I'd jettison them rather than the first rule of language.

The way I read it, the district court's order (1) modified its (previously) final order by withdrawing summary judgment on JLMH's claim for a permanent injunction and (2) gave JLMH the right to pursue an interlocutory appeal of the court's other decisions, rather than a conventional appeal. These judicial acts transformed the final order into an interlocutory one. Sure, the clarifying order could've been clearer, though that's true of most writing. But mine is the only reading that

gives its words any legal effect. Instead of treating the district court's order as a sort of judicial Prisencolinensinainciusol, I would instead dismiss this case for want of appellate jurisdiction.

I

The plurality ably summarizes the facts, but here's what you need to know for purposes of jurisdiction. JLMH Investments, LLC owns a parcel of land abutting a store operated by Family Dollar Stores of Texas, LLC. Family Dollar hired contractors to build the store, install utilities, and construct a drainage system. JLMH later sued Family Dollar and its contractors, alleging that the construction was causing water to drain onto JLMH's land when it rained. Seeking damages and injunctive relief, JLMH urged claims of nuisance, trespass, negligent and intentional diversion of surface water, and Water Code violations.

Family Dollar moved for summary judgment on the ground that the two-year statute of limitations barred all of JLMH's claims. Though it didn't specifically address JLMH's claim for a permanent injunction, Family Dollar asked the district court to grant summary judgment against JLMH on "all claims." The district court granted Family Dollar's motion in an order of April 17, 2023 that "dispose[d] of all parties and all claims."

JLMH moved the court to reconsider and to order a new trial, arguing (as it does in our Court) that limitations won't bar a claim for a permanent injunction against a nuisance. In the alternative, JLMH asked the court to merely "clarify" that its claim for a permanent injunction had not been dismissed, and to set that claim for trial. The parties set the motion for a hearing, at which JLMH made an "oral

[m]otion to [c]larify the [s]ummary [j]udgment [o]rders and [p]roceed [to t]rial on [i]njunctive [r]elief." Family Dollar, meanwhile, orally moved for a "final disposal of all parties and claims"—in other words, it asked that the district court stick with its earlier order.

The district court gave JLMH what it wanted. In a clarifying order of May 8, 2023, the district court clarified its summary-judgment order to give JLMH the right to file a permissive interlocutory appeal, and stayed all proceedings (namely, proceedings on JLMH's permanent-injunction claim) pending resolution of the interlocutory appeal.

Inexplicably, JLMH didn't pursue the interlocutory appeal it had won the right to file. Instead, it took a conventional appeal. The court of appeals appears to have noticed the potential problem JLMH's actions created. It noted that the district court had granted JLMH's request for a permissive interlocutory appeal and stayed the remaining claims until that appeal was resolved. 716 S.W.3d 770, 776 n.7 (Tex. App.—Fort Worth 2024). According to the court of appeals, however, this order had no legal effect. *See id.* ("The Clarifying Order . . . made no perceivable clarifications to its prior orders.").

II

Texas Rule of Civil Procedure 329b governs motions to modify a judgment. A party gets thirty days to file such a motion, Tex. R. Civ. P. 329b(a), and the motion is deemed denied if the district court hasn't ruled within seventy-five days, *id.* 329b(c). The district court then has "plenary power to grant a new trial or to vacate, modify, correct, or reform the judgment" for thirty days after a motion to modify the

judgment has been denied. *Id.* 329b(e). In sum, a district court can have several months to modify a judgment it signed.

Everyone agrees that the district court's April 17 order was final. It included the magic words—dismissing "all parties and all claims"—that we've said will always suffice to render a final judgment. *See Bella Palma, LLC v. Young*, 601 S.W.3d 799, 801 (Tex. 2020) (per curiam). Everyone also agrees that the district court had plenary power to grant JLMH's request that it "clarify" (really, modify) that order so that JLMH's claim for a permanent injunction would remain pending before the district court. *See* Tex. R. Civ. P. 329b. The only question is whether the district court's May 8 order actually made such a modification. If so, then the court of appeals lacked jurisdiction because the district court made its final order into an interlocutory one, yet JLMH failed to perfect an interlocutory appeal. *See* Tex. Civ. Prac. & Rem. Code § 51.014(d), (f); *Indus. Specialists, LLC v. Blanchard Refin. Co.*, 652 S.W.3d 11, 13–14 (Tex. 2022).

I'm compelled to conclude that the May 8 order had this effect because there's no other interpretation that gives it any reason to exist. Consider the words that a busy judge put on the page: In its self-styled "ORDER CLARIFYING SUMMARY JUDGMENT ORDERS," the district court "GRANTED" JLMH's "[r]equest for a [p]ermissive [i]nterlocutory appeal." It then "DECREED that all proceedings in the above-entitled and numbered cause are hereby stayed pending the interlocutory appeal of the [s]ummary [j]udgment [o]rder[s]."

None of these things are consistent with a final judgment. The district court couldn't "stay[]" the proceedings unless there was a claim left *to* stay. Likewise, JLMH could take an "interlocutory appeal" only

if at least one of its claims was still alive. And despite acknowledging Family Dollar's pending "request [for] final disposal of all parties and claims," the district court didn't grant that motion.

It's a basic principle of language to presume that someone is trying to say something when they speak. We don't lightly conclude that everything coming from someone's mouth (or pen) is nonsense. *See, e.g.*, M.B.W. Sinclair, *Law and Language: The Role of Pragmatics in Statutory Interpretation*, 46 U. Pitt. L. Rev. 373, 377–78, 394 (1985) (relying on Paul Grice's work on linguistics and philosophy of language). That intuition is amplified in legal proceedings, for it's even less likely than normal that a statute, contract, or similar text will be meaningless, in whole or even in part. *See, e.g.*, *id.* at 395 ("[W]e can likewise presume that each enacted provision of a statute says something . . . ."); *Bexar Appraisal Dist. v. Johnson*, 691 S.W.3d 844, 856 (Tex. 2024) ("If possible, every word and every provision is to be given effect . . . . None should be ignored." (quoting Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 174 (2012))); *In re J.S.*, 670 S.W.3d 591, 599 (Tex. 2023) ("Adopting an interpretation . . . that renders the sentence 'pointless' would run afoul of the presumption against surplusage."); *Lenape Res. Corp. v. Tenn. Gas Pipeline Co.*, 925 S.W.2d 565, 574 (Tex. 1996) ("In construing a contract, we strive to give meaning to each provision."). As far as I can tell, we've never applied this principle to court orders. But I see no reason why we shouldn't, given that the surplusage canon and related doctrines are simply outgrowths of bedrock linguistic principles.

III

So why, then, is the Court willing to treat an entire court order as so much gibberish? The plurality relies on an opinion that's older than me, in which we wrote that, "[d]uring the time in which a court may vacate, set aside, modify or amend its previous order, such action must, to be effective, be by written order that is express and specific." *McCormack v. Guillot*, 597 S.W.2d 345, 346 (Tex. 1980) (quoting *Poston Feed Mill Co. v. Leyva*, 438 S.W.2d 366, 368 (Tex. App.—Houston [14th Dist.] 1969, writ dism'd)). The plurality focuses on those last three words—"express and specific." *Ante* at 11. On this view, it's not enough that the order now before us clearly (but implicitly) unwinds finality. If the order didn't "express[ly]" do so, the argument goes, then it did nothing.

McCormack is too thin a reed to bear the weight the plurality places on it, for several reasons. For one thing, the quoted passage is dicta. What mattered in that case was that the district court had orally granted a motion for a new trial, but didn't sign an order to that effect until after the deadline had passed. 597 S.W.2d at 345. The problem wasn't a lack of express language, but a lack of paper and ink. We correctly held that orders granting Rule 329b motions must be put in writing and signed before the district court loses jurisdiction. *Id.* at 346. What we said about the requisite level of clarity was unnecessary to our holding and so was dicta. *See Fed. Sign v. Tex. S. Univ.*, 951 S.W.2d 401, 406 (Tex. 1997).

Even if *McCormack*'s dicta were something more, the three words on which the plurality relies—"express and specific"—don't get it all the

way home. The plurality apparently reads *McCormack* to say that an order must state that it's unwinding finality to have that effect. That's a clear *implication*, but we didn't actually say so. It's at least a little bit ironic to rely on the implication that implications aren't enough. Given *McCormack*'s own lack of perfect clarity, I'd forgive the same sin in the district court's clarifying order and construe our precedent to follow the natural law of language.

Finally, even if I thought those three words announced a clear holding, I'd be inclined to overrule them. *McCormack* drew from an even older court of appeals opinion that cited nothing. *See* 597 S.W.2d at 346 (quoting *Poston Feed Mill*, 438 S.W.2d at 366). "*Stare decisis* does not warrant an obstinate insistence on precedent that appears to be plainly incorrect." *Mitschke v. Borromeo*, 645 S.W.3d 251, 266 (Tex. 2022) (quoting *Sw. Bell Tel. Co. v. Mitchell*, 276 S.W.3d 443, 448 (Tex. 2008)). To the extent *McCormack* constitutes precedent at all, it is only of the most ephemeral variety. There's no wizard behind this curtain.

In sum, I see no reason to give more weight to a single line of dubious dicta relying on nonbinding precedent that in turn cited nothing at all, than to an ancient and venerable principle like the one that courts disfavor interpretations resulting in surplusage. That's like betting on a lemur in a fight with a silverback gorilla.[2]

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[2] The concurrence agrees with the plurality that we have appellate jurisdiction, but on much narrower grounds. *Ante* at 2 (Young, J., concurring). Happily, *McCormack*'s clear-statement-rule dicta will stay dicta because the concurrence doesn't adopt it. In fact, the concurrence suggests that I'm right about the law, and that these principles might compel a different outcome in a case where the district court's subsequent order is clearer. *See id.* at 2 & n.*.

* * *

Be careful what you wish for, as the saying goes. JLMH asked the district court to clarify that its permanent-injunction claim was still alive, and to let it take an interlocutory appeal rather than a conventional appeal. That wish came true, unless we're to believe (as the Court does) that the district court's clarifying order did nothing at all. I don't share that belief because, to quote a fellow jurist who predates anyone reading my little opinion, "*verba cum effectu sunt accipienda*"—"Words are to be taken as having an effect." Scalia & Garner, *supra*, at 174 & n.1 (quoting Ulpian, *Digest* 2.7.5.2).

Given JLMH's failure to perfect its desired interlocutory appeal, combined with the final-judgment vacuum that JLMH itself engineered, the court of appeals lacked jurisdiction. Because the Court affirms the judgment below on the merits, instead of vacating it for want of appellate jurisdiction, I respectfully dissent.

James P. Sullivan
Justice

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