NO. 05-04-00672-CV

IN THE FIFTH COURT OF APPEALS
DALLAS, TEXAS

LINDA S.R. COOK,
Applellant,

v.

TRAVIS B. STALLCUP, et al.,
Appellants.

BRIEF FOR APPELLANT

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Hill's present whereabouts and contact information are unknown. This appeal does not, however, reach any part of the trial court's default judgment against Hill, and it not expected that she will participate in this appeal. She will be served via certified mail, return receipt requested, at her last known address.

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STATEMENT OF THE CASE

This appeal is preceded by four lawsuits in four courts that culminated in one final judgment. The litigation began as a forcible detainer action when Cook sought to evict Stallcup from her property. [CR 254-255, 260-265] Stallcup met Cook's eviction suit by filing a divorce action alleging *one and only one* claim: An alleged marriage to Cook and, hence, community rights in all of her property. [CR 255-256, 267-282] Throughout the parties' litigation, Cook consistently and steadfastly maintained and asserted under oath that she owned the property in which Stallcup was living. [CR 26, 39-40, 260-265] Against this, Stallcup consistently alleged *one and only one* opposing claim: Divorce and property division. [CR 70-78, 254-258, 27-270, 72-282, 288-296] Cook ultimately won her case by judgment: There never was a Stallcup-Cook marriage.[1] [CR 91-92, 93-94, 97]

Along the way, Cook deposited $21,020.79 into the District Court's registry -- this being the net sales proceeds from the sale of her property where Stallcup was living -- pending resolution of the parties' dispute. [CR 79-81] Having prevailed by judgment, Cook seeks to have her money restored to her. [CR 98-106]

ISSUE PRESENTED

Whether Cook is entitled to have her $21,020.79 from the sale of her home restored to her?

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[1]Stallcup's motion for new trial was denied. CR 252. The final judgment is not appealed.

STATEMENT OF FACTS

A. The Proceedings.

Throughout the parties' litigation Cook consistently asserted her property ownership, under oath. [CR 26-27, 39-40, 260-265] That testimony, moreover, was uncontroverted by any evidence. Stallcup, on the other hand, consistently alleged a single claim against her: Divorce and property division, based upon an alleged marriage. [CR 70-78, 254-258, 267-270, 272-282, 288-296] Ultimately, Cook won, and Stallcup lost: There never was a Stallcup-Cook marriage. [CR 93-94]

1. Lawsuit One: Cook's Forcible Detainer Action to Evict Stallcup from Her Property.

The parties' litigation began as a simple forcible detainer action when Cook sought to evict Stallcup from her real property. [CR 260-265] Cook's forcible detainer petition, filed February 10, 2003, was regular in all respects, and properly verified. *Id*. In it Cook affirmed under oath that she is (now was) the owner of the real property at issue. *Id*.

2. Lawsuit Two: *Stallcup v. Cook*, Denton County, for Divorce ("Denton I").

Three days later, on February 13, 2004, Stallcup met Cook's forcible detainer action by filing a divorce action ("Denton I"), alleging a marriage to Cook and community rights in all of her property. [CR 267-270, 272-282] The Denton I court entered an agreed Temporary Injunction on March 14, 2003 ordering that the real property be sold, and that the net proceeds be deposited into the court's registry. [CR 54-56] As ordered, the property was sold, and $21,020.79 was placed in the registry. [CR 79-80]

Stallcup non-suited his divorce action on March 21, 2003. [CR 79] Cook, in turn, non-suited her counter-claims on May 16, 2003, thus ending Denton I. [CR 79-80] As set out below, the monies in the Denton I court's registry remained there until that court ordered the funds transferred to Dallas County on October 14, 2004. [CR 80-81]

3. Lawsuit Three: *Cook v. Stallcup*, Torts and Declaratory Judgment that There Is No Marriage, in the 302nd Judicial District Court, Dallas County.

After taking non-suit in Denton I, Cook filed suit in Dallas County (the Cause below), on May 16, 2003, seeking, *inter alia*, declaratory judgment that there never was a Stallcup-Cook marriage (and asserting various torts). [CR 5, 11-17] Stallcup answered by general denial [CR 18-19], and filed Respondent's Original Counter-Petition, on October 10, 2003, again asserting *one and only one claim* against Cook: Divorce and property division, based upon an alleged marriage. [CR 70-78]

4. Lawsuit Four: *Stallcup v. Cook*, Denton County, Divorce ("Denton II").

Stallcup also filed a new lawsuit, on June 2, 2003, again in Denton County ("Denton II") [CR 9] and again asserted *one and only one* claim against Cook: Divorce and property division. [CR 288-296] Cook moved to transfer venue of "Denton II" to Dallas County, and the Denton II court ordered the transfer on September 4, 2003. [CR 298-299]

5. The Denton I Court Transfers Funds to Dallas County.

It was against the backdrop of the above-recited record that Hon. L. Dee Shipman, who presided over "Denton I", transferred the monies in the Denton County registry to the

Dallas court's registry by post-dismissal order dated October 14, 2004. [CR 79-81] These are the funds Cook seeks to have restored to her.

6. <u>Summary Judgment Against Stallcup.</u>

Cook moved for and, on November 3, 2003, was granted summary judgment that there never was a Stallcup-Cook marriage. [CR 93-94] As the trial court stated in its summary judgment: (1) as a matter of law, a valid and lawful marriage existed only between Stallcup and Charlene Hill through May 20, 1999;[2] (2) there is no summary judgment evidence of a Stallcup-Cook marriage after May 20, 1999; and (3) therefore, there is no Stallcup-Cook marriage. [CR 93-94]

In her affidavit filed in support of her summary judgment motion, Cook consistently and affirmatively attested that she owned the home from which the monies at issue were derived; Cook testified:

> 9. Stallcup returned to Dallas, from Georgia, without Hill, in 1994, and asked me if he could stay in my home until he could sell his car to get enough money together to bury his mother. Although in hindsight I know I shouldn't have, I obliged him. Once Stallcup was under my roof, however, he simply refused to leave.
>
> 10. After this Court dissolved the Stallcup-Hill Marriage in May 1999, Stallcup and I lived in my home, along with our adult daughter Terry Lynn, for approximately three years, until June 2002. I did not, however, want Stallcup in my home. To the contrary, I wanted him gone. Despite my *repeated* demands that Stallcup leave, however, he simply refused to go. Furthermore, I did not agree to be married to Stallcup, and did not represent

[2]Charlene Hill was joined as a defendant party because the validity of her divorce from Stallcup was placed at issue.

to others that I was married to him.

> 11. In June 2002 Terry Lynn and I moved into an apartment near Galleria, without Stallcup.
>
> 12. In February 2003 I retained counsel to evict Stallcup from my home. Stallcup still refused to leave. In due course, Hon. L. Dee Shipman, 211th District Court, Denton County, ordered Stallcup out of my home, under penalty of six months in jail if he disobeyed. ... Under the Court's protection, I sold my home and, together with my daughter, bought a brand new home in Murphy, Texas. [CR 39]

Stallcup did not file any controverting evidence. Thus, the evidence placed before the trial court concerning the litigants' potentially competing rights to the funds in the registry was Cook's unequivocal testimony that the property from which the money came was hers, and that is the record through today.

7. Default Judgment Against Hill, Non-Suit of Remaining Caims Against Stallcup, Final Judment, and Motions or New Trial.

Cook also obtained a no-answer default judgment against Hill on November 3, 2003 [CR 91-92], and then, on November 17, 2003, the trial court signed an Order Granting Plaintiff's Non-Suit of Claims Remaining after Summary Judgment on her remaining claims against Stallcup. [CR 97]

Stallcup and Hill each filed a motion for a new trial [CR 109-114, 115-117], and each motion was denied on February 26, 2004. [CR 252]

B. Cook's Post-Judgement Motion to Release Monies in Registry.

On November 17, 2003, Cook filed a post-judgment motion seeking release of her funds held in the registry. [CR 98-106] Stallcup opposed Cook's request by filing a written

response, on November 25, 2003, asserting again *only* that the funds at issue were proceeds from the "marital domicile". [CR 107-108]

Cook supplemented her motion with documentary evidence on March 18, 2004, placing before the Court pertinent records from the previous three lawsuits, including Cook's verified forcible detainer petition wherein she affirms that she is (now was) the owner of the property from which the funds in the registry derived. [CR 253-296] Thus, uncontroverted evidence of Cook's ownership was, in fact, in the trial court record. [CR 39, 260-265]

At the hearing conducted March 22, 2004, Stallcup added additional speaking arguments against Cook's post-judgment motion. [RR 3-5] Variously Stallcup argued that Cook's motion amounted to offensive use of collateral estoppel [RR 4], and that only a court in Denton County has jurisdiction to adjudicate the monies because they trace to Denton County real property. [RR 4-5]

The trial court denied Cook's request for her money on April 19, 2004. [CR 303] Cook appealed on May 7, 2004. [CR 304]

SUMMARY OF ARGUMENT

Stallcup's unwavering assertion of a community property interest in Cook's home was, as a threshold matter, a judicial admission that Cook, indeed, owned her real property, although he contested, based upon an alleged marriage, that Cook's ownership was exclusive.

Cook's summary judgment against Stallcup (and default judgment against Hill) became a final judgment when the trial court granted Cook's non-suit of her remaining claims against Stallcup. Stallcup and Hill's motions for new trial and the trial court's order denying those motions further prove the judgment's finality. Hence, Stallcup's potential but unpleaded counter-claims became barred, if they ever existed at all.

Cook's motion seeking funds in the registry was a post-judgment enforcement motion. The trial court's order denying release of the funds was, however, inconsistent with its judgment, which is not permissible. Furthermore, Stallcup's various opposing arguments made in writing and orally at the hearing -- *e.g.*, "marital domicile", collateral estoppel, and no jurisdiction -- were inapposite.

ARGUMENT AND AUTHORITIES

A. The Standards to Be Applied.

1. Jurisdictional and Procedural Standards.

"A judgment that finally disposes of all remaining parties and claims, based on the record in the case, is final, regardless of its language. ... Thus, if a court has dismissed all of the claims in a case but one, an order determining the last claim is final."[3]

If a motion for new trial is timely filed, the deadline to appeal a judgment expires ninety days after the judgment is signed.[4]

A trial court's plenary power expires thirty days after a motion for new trial is overruled.[5] Thereafter, the trial court only has power to enforce its judgment, subject to the limitation that enforcement orders may not be inconsistent with the original judgment, and must not constitute a material change in substantial adjudicated portions of the judgment.[6]

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[3]*Lehmann v. Har-Con Corp.*, 39 S.W.3d 191, 200 (Tex. 2001) (citing *Farmer v. Ben E. Keith Co.*, 907 S.W.2d 495, 496 (Tex. 1995) (per curiam); *H.B. Zachry Co. v. Thibodeaux*, 364 S.W.2d 192, 193 (Tex. 1963) (per curiam); *McEwen v. Harrison*, 162 Tex. 125, 345 S.W.2d 706, 707 (1961)).

[4]Tex. R. App. P. 26.1(a)(1).

[5]Tex. R. Civ. P. 329b(e).

[6]*Katz v. Bianchi*, 848 S.W.2d 372, 374 (Tex. App. -- Houston [14th Dist.] 1993) ("The trial court is vested with explicit statutory authority to enforce its judgments, Tex. R. Civ. P. 308, as well as inherent judicial authority to enforce its orders and decrees. *Arndt v. Farris*, 633 S.W.2d 497, 499 (Tex. 1982); *Eichelberger v. Eichelberger*, 582 S.W.2d 395, 398 (Tex. 1979). The only limit on this authority is that enforcement orders may not be inconsistent with the original judgment and must not constitute a material change in substantial adjudicated portions of the judgment. *Harris County Appraisal Dist. v. West*, 708 S.W.2d

Post-judgment enforcement orders are, moreover, appealable orders.[7]

2. Substantive Standards in Support of Cook's Motion.

"A judicial admission is a formal waiver of proof that dispenses with the production of evidence on an issue and bars the admitting party from disputing it."[8] "As long as the statement stands unretracted, it must be taken as true by the court and jury; it is binding on the declarant and he cannot introduce evidence to contradict it."[9] Moreover, "It is well established that 'assertions of fact, not pleaded in the alternative, in the live pleadings of a party are regarded as formal judicial admissions.'"[10]

893, 896 (Tex. App. -- Houston [14th Dist.] 1986, orig. proceeding).")

[7]*Kenseth v. Dallas County*, 126 S.W.3d 584, 600 (Tex. App. -- Dallas 2004), *rehearing overruled* ("We agree that postjudgment orders embodying awards to claimants or enforcing the court's judgment itself are appealable orders.").

[8]*Lee v. Lee*, 43 S.W.3d 636, 641-642 (Tex. App. -- Fort Worth 2001) (citing *Dowelanco v. Benitez*, 4 S.W.3d 866, 871 (Tex. App. -- Corpus Christi 1999, no pet.)).

[9]*Id*. (citing *Smith v. Altman*, 26 S.W.3d 705, 709 (Tex. App. -- Waco 2000, *pet. dism'd w.o.j.*). This rule is based on the public policy that it would be unjust to permit a party to recover after he has sworn himself out of court by a clear, unequivocal statement. *Id*. (citing *Dowelanco*, 4 S.W.3d at 871). The elements required for a judicial admission are: (1) a statement made during the course of a judicial proceeding; (2) that is contrary to an essential fact or defense asserted by the person making the admission; (3) that is deliberate, clear, and unequivocal; that, if given conclusive effect, would be consistent with public policy; and (5) that is not destructive of the opposing party's theory of recovery. *Id*.

[10]*See TX Far West, Ltd. v. Texas Investments Management, Inc.*, 127 S.W.3d 295, 307 (Tex. App. -- Austin 2004) (quoting *Holy Cross Church of God in Christ v. Wolf*, 44 S.W.3d 562, 568 (Tex. 2001), and *Houston First Am. Sav. v. Musick*, 650 S.W.2d 764, 767 (Tex. 1983)). A judicial admission that is clear and unequivocal has conclusive effect and bars the admitting party from later disputing the admitted fact. *Id*.; *Gevinson v. Manhattan Constr. Co.*, 449 S.W.2d 458, 467 (Tex. 1969).").

"An indispensable element of community property is a joint ownership of such property by a husband and wife."[11] Thus, by pleading a community property interest a litigant necessarily judicially admits the existence of his opponent's property rights, although he contests that her right is exclusive, based upon an alleged marriage.[12] It is axiomatic that if, as here, there is no marriage, then there is no community property.[13]

3. Standards on Stallcup's Arguments Made in Opposition to Cook's Motion.

The trial court had jurisdiction of the parties' and their entire dispute, regardless of venue rules, including Tex. Civ. Prac. & Rem. Code §15.011 (real property venue).[14] Simply

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[11]*Lifson v. Dorfman*, 491 S.W.2d 198, 200 (Tex. App. -- Eastland 1973, rehearing denied) (citing *George v. Taylor*, 296 S.W.2d 620 (Tex. Civ. App. -- Fort Worth 1956, writ ref'd n.r.e.). Tex. Fam. Code § 3.002 states, "Community property consists of the property, other than separate property, acquired by either spouse during marriage."

[12]Tracking Tex. Fam. Code § 3.002, Stallcup's claim targeted: (1) all ***property***; (2) ***acquired by Cook***; (3) during the alleged marriage. Thus, to assert a community interest, Stallcup must judiciall admit by his pleading that the targeted property is (1) "property", (2) "acquired by Cook."

[13]Tex. Fam. Code § 3.002.

[14]*Compass Exploration, Inc. v. B-E Drilling Co.*, 60 S.W.3d 273, 277 (Tex. App. -- Waco 2001) ("Compass argues that section 15.011 requires the suit to be brought in Leon County, and therefore the Dallas court was without jurisdiction and its judgment is void. Compass says section 15.011 is a jurisdictional statute. ... It is axiomatic that 'venue' provisions do not confer 'jurisdiction.' Furthermore, the district court in Dallas County had jurisdiction to hear Compass's claims, just as the district court in Leon County did. Tex. Const. art. V, § 8 (District courts have 'original jurisdiction ... of all suits, complaints or pleas whatever, without regard to any distinction between law and equity, when the matter in controversy shall be valued at or amount to five hundred dollars exclusive of interest ....'); *see also* Tex. Gov't Code Ann. § 24.007 (Vernon 1988)").

stated, venue rules are not jurisdictional.[15]

Pursuant to Tex. R. Civ. P. 97, Stallcup was required to assert his alternative theories and counter-claims, if any, in the Cause below, and any such potential but unpleaded theories and counter-claims were waived.[16] Further, if an appeal from a judgment is not timely taken, and the trial court's plenary power expires, *res judicata* bars re-litigation of any claims that were reduced to judgment.[17]

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[15]*Id*.

[16]*Id*. at 277-278 ("Rule 97(a) by its express wording requires all claims 'aris [ing] out of the transaction or occurrence that is the subject matter of the opposing party's claim' to be brought as counterclaims to the pending suit. A counterclaim is compulsory if: (1) it is within the jurisdiction of the court; (2) it is not at the time of filing the answer the subject of a pending action; (3) the action is mature and owned by the pleader at the time of filing the answer; (4) it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim; (5) it is against an opposing party in the same capacity; and (6) it does not require for its adjudication the presence of third parties over whom the court cannot acquire jurisdiction. ... 'A defendant's failure to assert a compulsory counterclaim precludes its assertion in later actions.'") (citing *Wyatt v. Shaw Plumbing Co.*, 760 S.W.2d 245, 247 (Tex. 1988)).

[17]*Baxter v. Ruddle*, 794 S.W.2d 761, 762-763 (Tex. 1990) (divorced wife filed motion for contempt and arrearage judgment to receive percentage of increase in retirement benefits received by husband as a result of his post-divorce promotion and pay increase. The District Court held that wife was entitled to receive 37 ½ percent of husband's retirement benefits valued at time of divorce. The El Paso Court of Appeals affirmed, and wife petitioned for review. The Supreme Court, Hightower, J., held that: (1) *res judicata* precluded husband from retroactively modifying divorce decree from which no appeal was taken, and (2) under unambiguous language of decree, wife was entitled to receive 37 ½ percent of gross retirement benefits received by husband, including postdivorce increases. Justice Hightower reasoned, "It is clear that *res judicata* applies to a final divorce decree to the same extent that it applies to any other final judgment. *Segrest v. Segrest*, 649 S.W.2d 610 (Tex. 1983), *cert. denied*, 464 U.S. 894, 104 S.Ct. 242, 78 L.Ed.2d 232 (1983). If an appeal is not timely perfected from the divorce decree, *res judicata* bars a subsequent collateral attack. *Id*. at 612-613."); *see, e.g.*, *Harrison v. Rodgers*, 2001 WL 1587354, 3 (Tex. App. -- Dallas 2001)

Collateral estoppel, as its name implies, compares more than one lawsuit; it applies when "'an issue decided in the first action is actually litigated, essential to the prior judgment, and identical to an issue in a pending action' and when the party against whom it is asserted had a full and fair opportunity to litigate the issue in the first suit."[18] Thus, the doctrine has no application within a single lawsuit, where nothing is collateral.

(not designated for publication) ("Texas has adopted the transactional approach to *res judicata*. *State and County Mut. Fire Ins. Co. v. Miller*, 52 S.W.3d 693, 696 (Tex. 2001); *Barr v. Resolution Trust Corp.*, 837 S.W.2d 627, 628 (Tex. 1992). This approach precludes the relitigation of any claim or defense that has been finally adjudicated in a prior action, as well as claims or defenses that pertain to the same subject matter that could been, but were not, litigated in the prior matter. *State and County Mut*., 52 S.W.3d at 696; *Crabtree v. Southmark Commercial Mgmt.*, 704 S.W.2d 478, 481 (Tex. App. -- Houston [14th Dist.] 1986, *writ ref'd n.r.e.*) ('In Texas, the rule also operates to bar litigation of all issues connected with a cause of action or defense which might have been tried in a former action as well as those which were actually tried.'). The prior judgment is conclusive on every matter that was or could have been litigated and decided as incident to or essentially connected with the subject matter of the prior litigation. *State and County Mut*., 52 S.W.3d at 696.").

[18]*Yarbrough's Dirt Pit, Inc. v. Turner*, 65 S.W.3d 210, 216 (Tex. App. -- Beaumont 2001) ("The Texas Supreme Court has held that collateral estoppel, or issue preclusion, applies when 'an issue decided in the first action is actually litigated, essential to the prior judgment, and identical to an issue in a pending action' and when the party against whom it is asserted had a full and fair opportunity to litigate the issue in the first suit. *Texas Dep't of Pub. Safety v. Petta*, 44 S.W.3d 575, 579 (Tex. 2001).").

B. Application of the Standards to the Facts.

1. Deadlines, Plenary Power, and Appellate Jurisdiction.

The trial court's judgment became final on November 17, 2004 when the trial court granted Cook's non-suit of her claims against Stallcup remaining after summary judgment.[19] No appeal from the judgment was taken, and the time to appeal the judgment expired ninety days later, on February 10, 2004.[20]

The trial court's plenary power expired on March 29, 2004, thirty days after the motions for new trial were overruled.[21] Thereafter, the trial court only had power to enforce its judgment, subject to the limitation that any enforcement orders not be inconsistent with the judgment.[22]

The trial court denied Cook's motion to receive funds in the registry on April 19, 2004 [CR 303], and Cook timely appealed on May 7, 2004 [CR 304].[23] Thus, the Court of Appeals has jurisdiction of that order.[24]

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[19]*Lehmann v. Har-Con Corp.*, 39 S.W.3d at 200, *supra* note 3, sources cited therein, and accompanying text.

[20]Tex. R. App. P. 26.1(a)(1).

[21]Tex. R. Civ. P. 329b(e).

[22]*Katz v. Bianchi*, 848 S.W.2d at 374, *supra* note 6, sources cited therein, and accompanying text.

[23]*See* Tex. R. App. P. 26.1.

[24]*Kenseth v. Dallas County*, 126 S.W.3d at 600, *supra* note 7, sources cited therein, and accompanying text.

2. <u>Cook's Ownership of Her Property.</u>

Throughout the litigation, Cook's ownership of her property was plainly asserted, including via her summary judgment affidavit, and her verified forcible detainer petition. [CR 26-27, 39-40, 260-265] Stallcup, on the other hand, asserted one and only one challenge: Divorce and property division. [CR 70-78, 254-258, 267-270, 272-282, 288-296] Applying Tex. Fam. Code § 3.002, his pleading, at bottom, says: Stallcup claims a joint interest in "property acquired by Cook", based upon an alleged marriage.[25] Thus, there never was a dispute about whether the real property was (or whether the monies in the registry are) "property acquired by Cook": That much Stallcup necessarily judicially admitted as a predicate to his community property claim.[26] The parties' dispute concerned whether there was a marriage, and the trial court answered that in the negative. [CR 93-94] What remains, then, lies beyond dispute: The monies in the registry are "property acquired by Cook" when she was not married to Stallcup. No other result can be reconciled with the law.[27]

Moreover, any alternative theories or counter-claims that Stallcup might have raised now are barred, as a matter of law.[28]

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[25]Tex. Fam. Code § 3.002.

[26]*Id. See TX Far West, Ltd. v. Texas Investments Management, Inc.*, 127 S.W.3d at 307, *supra*, note 10, sources cited therein, and accompanying text.

[27]Tex. Fam. Code § 3.002.

[28]Tex. R. Civ. P. 97(a), *supra*, note 16, sources cited therein, and accompanying text.

3. Stallcup's Written and Oral Arguments Made in Opposition to Cook's Motion are Inapposite.

Stallcup's written opposition to Cook's motion -- that the monies are proceeds from the "marital domicile" [CR 107-108] -- is foreclosed by the trial court's judgment that there is no marriage. [CR 93-94]

Stallcup's spoken argument that the trial court lacked jurisdiction to grant Cook's motion because the monies in the registry are traceable to real property in Denton County [RR 4-5] is simply wrong on the law: Venue rules do not confer jurisdiction.[29] Rather, the trial court clearly had jurisdiction.[30]

Stallcup's spoken argument that Cook was impermissibly using offensive collateral estoppel to get her money [RR 4] is simply inapposite. The Cause below stood alone in the only court with jurisdiction of the parties, their dispute, and a judgment.[31] Thus, the entire proceeding was a direct adjudication, and nothing about it was "collateral".[32]

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[29]*Compass Exploration, Inc. v. B-E Drilling Co.*, 60 S.W.3d at 277, *supra*, notes 14-15, sources cited therein, and accompanying text.

[30]*Id*. (applying Tex. Const. art. V, § 8 (District courts have "original jurisdiction ... of all suits, complaints or pleas whatever, without regard to any distinction between law and equity, when the matter in controversy shall be valued at or amount to five hundred dollars exclusive of interest ....")); *see also* Tex. Gov't Code Ann. § 24.007.

[31]Denton I was fully non-suited. *Supra* p. 2, and CR 79-80. Denton II was transferred and consolidated with the Cause below. *Supra*, p. 2, and CR 4, 298-299.

[32]*Yarbrough's Dirt Pit, Inc. v. Turner*, 65 S.W.3d at 216, *supra*, note 18, sources cited therein, and accompanying text.

4. The Trial Court's Order Should Be Reversed.

Only one outcome is consistent with the trial court's judgment and Tex. Fam. Code § 3.002.[33] The monies in the registry are "property acquired by Cook" when she was *not* married to Stallcup; no other result can be reconciled with the law.

REQUEST FOR RELIEF

For the forgoing reasons, the Court should reverse the trial court's Order Denying Plaintiff's Post-Judgment Motion to Release Monies in the Registry, and remand this matter to the trial court with instructions that the monies be released to Cook, specifically: $21,020.79 transferred from Denton I, plus any accrued interest, and minus any required fees and costs of court.

[33]The trial court's plenary power expired thirty days after the motions for new trial were overruled. Tex. R. Civ. P. 329b(e). Thereafter, the trial court only had power to enforce its judgment, subject to the limitation that enforcement orders may not be inconsistent with the original judgment, and must not constitute a material change in substantial adjudicated portions of the judgment. *Katz v. Bianchi*, 848 S.W.2d at 374, *supra*, notes 6 and 22, sources cited therein, and accompanying text. No alternative theories or counter-claims are available. Tex. R. Civ. P. 97.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that I have caused a true and correct copy of the above and foregoing Brief for Appellant to be served upon the below-listed counsel and persons via the methods indicated, on August 5, 2004.

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