

Affirmed and Opinion Filed February 19, 2016



**In The
Court of Appeals
Fifth District of Texas at Dallas**

No. 05-14-01353-CV

**YANCEY MCCURDY, CHRISTINA MCCURDY AND
DARLENE G. HANDLEY, Appellants**

V.

**RUDY OEFTERING, OEFTERING, INC., NOBILITY VILLAGE MOBILE HOME
PARK, AND TEXAS SHADE MOBILE HOME PARK, Appellees**

**On Appeal from the 162nd Judicial District Court
Dallas County, Texas
Trial Court Cause No. DC-13-13696**

MEMORANDUM OPINION

Before Chief Justice Wright, Justice Lang, and Justice Brown
Opinion by Chief Justice Wright

Appellants appeal from a summary judgment dismissing their bill of review claim in favor of appellees. In two issues, appellants contend the trial court erred by: (1) granting summary judgment when appellants presented evidence sufficient to raise a genuine issue of material fact; and (2) rejecting appellants' bill of review when appellants proved they did not receive proper notice pursuant to rule 165a of the Texas Rules of Civil Procedure. We overrule both issues and affirm the trial court's judgment.

In their first issue, appellants assert the trial court erred in granting appellees' motion for summary judgment because they established a genuine issue of fact. Specifically, appellants maintain, as to the merits of the bill of review, that they actively pursued their case and that they

announced readiness for trial. We review a summary judgment de novo to determine whether a party's right to prevail is established as a matter of law. *Dickey v. Club Corp.*, 12 S.W.3d 172, 175 (Tex. App.—Dallas 2000, pet. denied).

After a trial court loses plenary power, a judgment cannot be set aside by the trial court except by bill of review for sufficient cause, filed within the time allowed by law. TEX. R. CIV. P. 329b(f). A bill of review is an independent, equitable action brought by a party to a former action seeking to set aside a judgment that is no longer appealable or subject to a motion for a new trial or appeal. *Transworld Fin. Serv. Corp. v. Briscoe*, 722 S.W.2d 407, 407 (Tex. 1987). Generally, a party seeking to invoke a bill of review must plead and prove (1) a meritorious claim or defense to the cause of action that supports the judgment; and (2) that he was prevented from making the claim or defense by fraud, accident or the wrongful act of the opposing party; (3) unmixed with any fault or negligence of his own. *Ortega v. First RepublicBank Fort Worth, N.A.*, 792 S.W.2d 452, 453 (Tex. 1990). “If a motion to reinstate, motion for new trial, or direct appeal is available, it is hard to imagine any case in which failure to pursue one of them would not be negligence.” *Gold v. Gold*, 145 S.W.3d 212, 214 (Tex. 2004); *see also Wembley Inv. Co. v. Herrera*, 11 S.W.3d 924, 927 (Tex. 1999). Thus, a litigant who permits the judgment to become final by failing to invoke the right to appeal is not entitled to bill of review relief. *See French v. Brown*, 424 S.W.2d 893, 895 (Tex. 1967); *Rizk v. Mayad*, 603 S.W.2d 773, 775 (Tex. 1980).

Under certain circumstances, a bill of review petitioner may be excused from proving one or more of these requirements. When a judgment is rendered without proper notice, the meritorious claim or defense requirement is excused. *Lopez v. Lopez*, 757 S.W.2d 721, 723 (Tex. 1988). To the extent the bill of review petitioner has been injured by reliance on a mistake of or erroneous information from an official court functionary, he is excused from showing the

wrongful conduct, fraud, or accident of the opposing party. *See Transworld Fin. Serv. Corp.*, 722 S.W.2d at 408. The bill of review petitioner, however, still must show his failure to file a motion for new trial or appeal was not due to any fault or negligence on his part. *See Petro-Chemical Transp., Inc. v. Carroll*, 514 S.W.2d 240, 246 (Tex. 1974).

Here, the trial court dismissed appellants' case for want of prosecution on September 13, 2013. Appellants filed a motion to reinstate their case on October 16, 2013. Although the record indicates that the trial court denied their motion to reinstate, appellants do not contend, nor does the record show, that they filed any motion for new trial or appealed the denial of their motion to reinstate. The order denying a motion to reinstate is an appealable order. *See Welborn v. Ferrell Enterprises, Inc.*, 376 S.W.3d 902, 905 (Tex. App.—Dallas 2012, no pet.); *Franklin v. Sherman Indep. Sch. Dist.*, 53 S.W.3d 398, 401 (Tex. App.—Dallas 2001, pet. denied).

Because appellants failed to pursue all adequate legal remedies when they did not appeal the denial of his motion to reinstate, appellants could not plead and prove the third element of a bill of review. The trial court properly granted summary judgment when appellants could not plead and prove each element of their bill of review. Accordingly, we affirm the trial court's judgment.

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/Carolyn Wright/
CAROLYN WRIGHT
CHIEF JUSTICE



**Court of Appeals
Fifth District of Texas at Dallas**

JUDGMENT

YANCY MCCURDY, CHRISTINA
MCCURDY, AND DARLENE G.
HANDLEY, Appellants

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Court, Dallas County, Texas
Trial Court Cause No. DC-13-13696.
Opinion delivered by Chief Justice Wright.
Justices Lang and Brown participating.

RUDY OEFTERING, OEFTERING, INC.,
NOBILITY VILLAGE MOBILE HOME
PARK, AND TEXAS SHADE MOBILE
HOME PARK, Appellees

In accordance with this Court's opinion of this date, the judgment of the trial court is **AFFIRMED**.

It is **ORDERED** that appellees RUDY OEFTERING, OEFTERING, INC., NOBILITY VILLAGE MOBILE HOME PARK, AND TEXAS SHADE MOBILE HOME PARK recover their costs of this appeal from appellants YANCY MCCURDY, CHRISTINA MCCURDY, AND DARLENE G. HANDLEY.

Judgment entered February 19, 2016.