

**02-09-00356-CV**

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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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**Response Brief for the Appellee, Michael A. Smith**

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**No Oral Argument 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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## Table of Contents

List of Parties and Counsel.....	i
Table of Contents.....	ii
Index of Authorities.....	iii
Statement of Jurisdiction.....	See Appellee’s Motion to Dismiss Filed Separately
Supplemental Statement of Case.....	1
Arguments and Authorities.....	2
Conclusion.....	8
Certificate of Service.....	9
Appendix.....	10
Appendix Table of Contents.....	11

## Index of Authorities

### Cases

<i>Lyles v. Johnson</i> , 585 S.W.2d 778, 782 (Tex. Civ.App. - Houston [1 <sup>st</sup> Dist] 1979, writ ref'd n.r.e.).....	8
<i>Pick v. Bartel</i> , 659 S.W.2d 636, 637.....	4
<i>Shoemaker v. Fogel, Ltd.</i> , 826 S.W.2d 933, 937 (Tex. 119).....	8

### Statutes

Tex. Civ. Prac. & Rem. Code § 154.071(b).....	3
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### Rules

Tex.R.App.P.33.1(a).....	2
Tex.R.Civ.P.90.....	8
Tex.R.Civ.P.91.....	8

## Supplemented Statement of the Case

**Citations:**

The Clerks Record has been supplemented:

Reporter's Record:	RRv_____
Clerk's Record:	CR_____
Supplemented Clerk's Record	SCR_____
Appendix:	Tab_____

## Argument and Authorities

### I. Response to Legal Sufficiency:

#### Preservation of Error:

Except in the case of Fundamental Error a party typically cannot argue on appeal for the first time an issue it did not preserve at the trial court.

#### Standard of Review:

To preserve a complaint for appellate review, a party must have presented to the trial court a timely request, objection, or motion that stated the specific grounds for the desired ruling, if they are not apparent from the context of the request, objection, or motion.<sup>1</sup>

#### Argument:

Pena filed a response to Smith's Motion to Sign Final Order.<sup>2</sup> However, Pena did not appear at the hearing<sup>3</sup> or provide in her Motion the specific grounds for the desired ruling.<sup>4</sup> At the hearing her counsel Hunter Magee ("Magee") did not present any evidence to support any reason that the MEMORANDUM OF AGREEMENT (CIVIL CASE) ("Mediated Settlement Agreement or MSA") should not be enforced by the Court.<sup>5</sup> Magee did not argue that Pena and himself did not sign the MSA.<sup>6</sup>

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<sup>1</sup> Tex.R.App.P.33.1(a)

<sup>2</sup> CR 74

<sup>3</sup> RR 3 10.16-17

<sup>4</sup> CR 74

<sup>5</sup> RR 3 10.11 to 12.2

<sup>6</sup> RR 3 10.11 to 12.2

Magee did not even argue at the hearing that the MSA should be set aside or that Pena rescinded her agreement to the MSA.<sup>7</sup> Magee merely argued that the Court delay its decision.<sup>8</sup> Magee did go on to argue that, “Certainly, Ms. Tanner and Ms. Pena would love to have this situation with Mr. Smith resolved.”<sup>9</sup> Can the Court now be faulted for executing a final order based upon a filed MSA<sup>10</sup> for which no evidence was presented by Pena that disputed or rescinded the MSA or argued that the proposed Order of Smith did not accurately incorporate the terms of the MSA.<sup>11</sup>

**Conclusion:**

Now, for the first time, on appeal Pena would affirmatively state that she rescinds her agreement to the MSA. Had Pena bothered to appear at the hearing or contest the validity of the MSA, Smith would have naturally had the opportunity to call himself as a witness or call Pena and/or Magee to prove-up the validity of the MSA as a valid and enforceable contract. With no evidence presented by Pena that the proposed Order did not comply with terms of the MSA and no evidence presented by Pena that she rescinded her agreement to the MSA, the Court in its discretion executed the proposed Final Order.<sup>12</sup>

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<sup>7</sup>RR 3 10.11 to 12.2

<sup>8</sup>RR 3 11.5-10

<sup>9</sup>RR 3 11.18-19

<sup>10</sup>CR 54

<sup>11</sup>RR 3 10.11 to 12.2

<sup>12</sup>RR 3 10.11 to 12.2; Tex. Civ. Prac. & Rem. Code § 154.071(b); CR 95

## **Response to Statute of Frauds**

The MSA contains data that sufficiently identify the property subject to conveyance without the reliance on any parol evidence. If the description is not adequate it was a mutual mistake of both parties and the issue should be remanded for further determination.

## **Requirement of Statute of Frauds**

A document does not need to contain a legal description within itself to satisfy the Statute of Frauds. The standard is whether the document furnished within itself, or by reference to other identified writings then in existence, the means or data by which the particular land to be conveyed may be identified with specific certainty.<sup>13</sup>

The MSA on the first page contains the Cause No. 08-09-684 which relates to the Property subject of this suit.<sup>14</sup> Exhibit “A” of the MSA on its first page contains the Cause No. 08-09-684 and the entire caption, including the name of the parties and the information concerning the trial court.<sup>15</sup> The Property is referred to in the MSA at least four times each time using a capital “P” in “property” to emphasize that it is a specific property that is being discussed.<sup>16</sup>

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13. *Pick v. Bartel*, 659 S.W.2d 636,637.

14. CR 54

15. CR 54

16. CR 54

In Appellant's Brief she quotes almost the entire MSA but omits the caption and Cause No. which is the most compelling data needed to identify the Property.

A reference to a Property and a Cause Number may not always be sufficient (because there may be more than a single tract of land involved in a particular cause); however, in this case there is and was only a single tract of land involved and the "data" provided in the MSA is sufficient to point to and identify documents that existed prior to the MSA that with reasonable certainty identify the "Property."<sup>17</sup>

Pena, in her verified "Motion for Continuance of Summary Judgment Hearing," requested that the Court take judicial notice of the parties' Unimproved Property Contract contained within Smith's Motion for Summary Judgment.<sup>18</sup> The Court did take judicial notice of the Unimproved Property Contract and granted Pena's Motion for Continuance and ordered the case to mediation pursuant to Pena's request.<sup>19</sup>

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17. CR 54

18. CR 42

19. RR 2 11.24 to 12.1

The Unimproved Property Contract contains a full legal description of the Property on the first page and the address of the Property on the next six (6) pages of the Unimproved Property Contract.<sup>20</sup> Additionally, the Final Order contains a Cause No. and the Cause No. is the same Cause No. in which Pena filed her “Motion for Continuance of Summary Judgment Hearing” in which Pena asked the Court to take judicial notice of the Unimproved Property Contract.<sup>21</sup> Moreover, the Supplemental Enforcement Order of September 14, 2009, clears up all doubt as to the Property in that it contains a full legal description of the Property on Page 2 of the Order.<sup>22</sup>

The purpose of the Statute of Frauds is not intended as a vehicle by which people can avoid their legitimate contracts. The purpose of the Statute of Frauds is to create certainty and eliminate disputes. After reviewing data contained within the MSA and the Unimproved Property Contract contained within Cause No. 08-09-684, the Property is easily identified.<sup>23</sup>

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20. CR 5

21. CR 95

22. CR 197

23. CR 54; CR 5

**Conclusion:**

Would it be unfair and contrary to the Statute of Frauds for the Court to take data from the MSA, and then recognize the Unimproved Property Contract after Pena in her sworn "Motion for Continuance of Summary Judgment Hearing" requested that the Court take judicial notice of the Unimproved Property Contract. The Cause No. is one of the links or data to the Unimproved Property Contract that contains a legal description of the Property. All this information can be obtained without any parol evidence by the parties. It is apparent that neither of the parties dispute the Property in question as evidenced by their actions and pleadings. At most the exclusion of the legal description on the MSA is a result of mutual mistake.

**Sufficiency of the Pleadings:**

The time to argue sufficiency of the pleadings has passed. Alleged defects in pleadings must be made before a judgment is signed.<sup>24</sup> The Court has signed the Final Order.<sup>25</sup> The Court has signed the Supplemental Enforcement Order of September 14, 2009.<sup>26</sup> The Court has signed the “Order of the Court”.<sup>27</sup> Pena should have made known her allegations of defective pleadings by Special Exception.<sup>28</sup> Pena cannot now complain that Smith’s pleadings are defective.<sup>29</sup>

Pena argues that the standard is review by de novo and cites Lyles v. Johnson, 585 S.W.2d 778, 782 (Tex. Civ. App. -Houston [1<sup>st</sup> Dist] 1979, writ ref’d n.r.e.); however, unlike Pena, the Court in Lyles stated specifically that Appellants objected before submission to the jury.<sup>30</sup>

**Conclusion:**

Now three different orders have been entered attempting to finalize this case, and to give credence to Pena’s arguments would effectively allow her to make a Special Exception for the first time on appeal.

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24 Tex. R. Civ. P. 90

25 CR 95

26 CR 197

27 CR 203

28 Tex. R. Civ. P. 91

29 *Shoemaker v. Fogel, Ltd.*, 826 S.W.2d 933, 937 (Tex. 119)

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

Respectfully Submitted,

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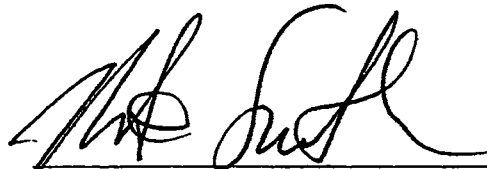
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### Certificate of Service

I, Michael A. Smith certify that on March 25, 2010, a copy of this response for the Appellee was served upon opposing counsel.

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