STATEMENT OF FACTS

This case began on February 28, 1998, when A, a local moving company, brought suit against G, a dentist. The case for a suit on sworn account breach of contract, and alleged that G did not pay A the amount promised for moving G's office. This suit was filed in the Justice of the Peace Court, Precinct Seven, Place Two, Typical County, Texas. C.R. 4-5; App. at 1. G filed a general denial of A's claims. C.R. 7-8; App. at 2. The judge of Precinct Seven, Place Two recused himself on the grounds of the existence of the appearance of impropriety caused by an unspecified "nonjudicial relationship" with the parties, and the Presiding Justice of the Peace for Typical County assigned the case to the Honorable Judge John A. Smith, Justice of the Peace for Precinct Six, Place Two, Typical County, Texas. Supp. C.R. ___; App. at 3.[1]

On December 3, 1998, the case was heard by Judge Smith, and on January 8, 1999, he rendered judgment in favor of A and against G in the principal amount of $1,615, postjudgment interest, and court costs. C.R. 9; App. at 4. G filed his Notice of Appeal to the County Court at Law on March 17, 1999, 68 days after the judgment was rendered. Supp. C.R. ____; App. at 5. At the same time, G filed a motion styled "Motion to Determine

[1] In preparing this Appellant's Brief, A realized that several documents germane to the appeal had been omitted from the previously filed Clerk's Record. Contemporaneous with the filing of this Brief, A has filed a Motion to Supplement Clerk's Record to include these documents. Rather than seek a further extension of time to file the Brief, A has elected to file it without complete cites to the Supplemental Clerk's Record. True and correct copies of all documents which A has requested be added to the Clerk's Record have been included in the Appendix to this Brief, and A will provide the Honorable Court with proper and complete cites to the Supplemental Clerk's Record if the Honorable Court consents to allow the requested supplementation.

Actual Notice of Judgment," asking Judge Smith to determine that "[G] and his attorney for record did not get notice of the judgment until March 9, 1999, more than twenty (20) days after the Court signed the judgment." Supp. C.R. ____; App. at 6. The court obliged, and on April 22, 1999 signed an order which purportedly determined that G did not receive notice of the judgment until March 9, 1999. Supp. C.R. ____; App. at 7.

After the record of the case had been sent to the County Court at Law Number One of Typical County, Texas, G amended his pleadings to assert a counterclaim against A. C.R. 13-17. The case was set for trial before the County Court at Law on November 15, 1999. Supp. C.R. ____; App. at 8. Before the trial date, G filed a No Evidence Motion for Summary Judgment, C.R. 18-20, which was granted by default on November 9, 1999. C.R. 21. Subsequently, a Final Judgment was rendered by the County Court at Law Number One on November 15, 1999, also by default. C.R. 28-29; App. at 9. It is from these judgments that this appeal is taken. Appellant timely filed its Notice of Appeal pursuant to Tex. R. App. P. 25.1(a) on December 28, 1999. C.R. 32. The Honorable Court has jurisdiction over this matter pursuant to Tex. Civ. Prac. & Rem. Code Ann. § 51.012.

SUMMARY OF THE ARGUMENT

A's argument on appeal is straightforward, breaking down into two basic complaints. The first is that G did not timely appeal the judgment rendered against him in the justice court. This failure means that the County Court at Law Number One did not have appellate

jurisdiction over the case, and could not grant G's no evidence summary judgment motion or award G a recovery based on his counterclaim. Because the County Court at Law lacked jurisdiction, its judgment should be reversed and the original judgment of the justice court reinstated. Alternatively, even if G's appeal is found to be timely, and the County Court at Law did have jurisdiction over the case, G failed to provide A with proper notice of the appeal and subsequent proceedings. All of the notices sent by G and the court were sent to the attorney who represented A in the Justice Court. The final judgment in the justice court ended the attorney-client relationship between A and its trial attorney, and so notice sent to A's ex-attorney cannot be imputed to A. This lack of notice of the appeal and of the proceedings in the County Court at Law violated A's due process rights, and the judgment rendered against A by the County Court at Law should be reversed and the cause returned to the County Court at Law for a trial on the merits.

STANDARD OF REVIEW

A asks the Honorable Court to review the legal determinations of the County Court at Law Number One regarding its jurisdiction over this case. The existence of jurisdiction is a question of law. *City of Garland v. The Dallas Morning News*, 22 S.W.3d 351, 357 (Tex. 2000) ("Subject matter jurisdiction is always a question of law"); *Angelou v. African Overseas Union*, 2000 WL 1201802, p. 5 (Tex. App.—Houston [14th Dist.] 2000, no pet. h.) (personal jurisdiction); *Tsumi, Inc. v. Texas Parks & Wildlife Dep't*, 23 S.W.3d 58, 60 (Tex.

App.—Austin 2000, Rule 53.7(f) motion filed) (subject-matter jurisdiction); *Cartlidge v. Hernandez*, 9 S.W.3d 341, 346 (Tex. App.—Houston [14th Dist.] 1999, no pet.) (personal jurisdiction). Questions of law are reviewed de novo. *Matter of Humphreys*, 880 S.W.2d 402, 404 (Tex. 1994) ("[Q]uestions of law are always subject to de novo review"); *Houston Bellaire, Ltd. v. TCP LB Portfolio I, L.P.*, 981 S.W.2d 916, 919 (Tex. App.—Houston [1st Dist.] 1998, no pet.).

BRIEF OF THE ARGUMENT

FIRST AND SECOND ISSUES PRESENTED FOR REVIEW
(RESTATED AND GROUPED FOR ARGUMENT)

WAS G'S APPEAL OF THE JUSTICE COURT JUDGMENT TIMELY PURSUANT TO TEX. R. CIV. P. 571?

IS G ALLOWED TO EXTEND HIS TIME TO APPEAL A JUSTICE COURT JUDGMENT PURSUANT TO TEX. R. CIV. P. 306a?

Appeals from the judgment of a justice court are governed by Tex. R. Civ. P. 571. As a prerequisite to appealing a justice court judgment de novo to the county court, the appealing party must file a sufficient bond with 10 days of the judgment being signed. Tex. R. Civ. P. 571. "A party has ten days from 'the date a judgment or order overruling [a] motion for new trial is signed' to file an appeal bond with the justice court. If the appeal bond is not timely filed, the county court is without jurisdiction to hear the appeal and the appeal should be dismissed for lack of jurisdiction." *Searcy v. Sangullo*, 915 S.W.2d 595, 597 (Tex. App.—Houston [14th Dist.] 1996, no writ) (internal citations omitted). G did not file his

bond with the justice court until March 19, 1999, 70 days after the date the judgment was signed.[2] This bond was not timely filed under Tex. R. Civ. P. 571, and, therefore, the County Court at Law did not require jurisdiction over the appeal.

As set forth in *Searcy*, if a sufficient bond is not filed within the 10 days allowed by Tex. R. Civ. P. 571, the county court does not have jurisdiction over the appeal. *See also RCJ Liquidating Co. v. The Village, Ltd.*, 670 S.W.2d 643, 644 (Tex. 1984); *Almahrabi v. Booe*, 868 S.W.2d 8, 10 (Tex. App.—El Paso 1993, no writ) (compliance with the terms of Tex. R. Civ. P. 571 is mandatory and jurisdictional; if requirements are not met, appeal is not perfected and county court lacks jurisdiction (citing Tex. R. Civ. P. 571 and 573)); *Cavazos v. Hancock*, 686 S.W.2d 284, 287 (Tex. App.—Amarillo 1985, no writ); *Stegall v. Cameron*, 601 S.W.2d 771, 773 (Tex. Civ. App.—Dallas 1980, writ dism'd); *Jacobson v. Wood*, 142 S.W.2d 949, 950-51 (Tex. Civ. App.—Amarillo 1940, no writ); *Golightly v. Irvine*, 15 S.W. 48, 48 (Tex. App. 1890, no writ) (failure of pauper's affidavit to conform with rules

[2] There is some question as to when G actually filed his bond, but there is no question that the bond was not filed within the 10 days required by Tex. R. App. Pro. 571. As set forth above, G's first postjudgment action in the justice court was to file a Motion to Determine Actual Notice of Judgment, which was done on March 9, 1999, 60 days after the judgment was signed. Supp. C.R. ____; App. at 6. G then filed his Notice of Appeal on March 17, 1999, 68 days after the judgment was signed. Supp. C.R. ____; App. at 5; However, the bond itself was approved, dated, and stamped on June 9, 1999, a full six months after the judgment. Supp. C.R. ____; App. at 10. However, there is evidence that G actually tendered the cashier's check in the amount of $3,230, representing twice the amount of the judgment, on March 19, 1999, 70 days after the judgment. This is the date of a transmittal letter from G's counsel to the justice court clerk, purportedly enclosing G's check. Supp. C.R. ____; App. at 11. To further confuse the issue, the receipt issued by the clerk for the check is dated May 25, 1999, almost six months after the judgment and over two weeks before the bond was approved by the justice court. Supp. C.R. ____; App. at 12. For the purposes of this Brief, A has assumed that G tendered his bond on March 9, 1999, the earliest of the dates, despite the lack of any evidence that this is the case.

governing appeals from justice court is a fatal jurisdictional defect which cannot be cured by waiver or by the consent of the parties).[3] If the county court does not have jurisdiction over the case, it may not enter any judgment. *Stegall*, 601 S.W.2d at 773; *Family Inv. Co. of Houston, Inc. v. Paley*, 356 S.W.2d 353, 355 (Tex. Civ. App.—Houston 01962, writ dism'd). In fact, if the county court does not acquire jurisdiction over an appeal, the only action it may take is to dismiss the appeal for lack of jurisdiction. *Cavazos*, 686 S.W.2d at 287; *White v. Smith*, 15 S.W. 1111, 1112 (Tex. Ct. App. 1891, no writ).

If the county court did not have jurisdiction over this case, the Court of Appeals does not have jurisdiction over the case, either. All the Court of Appeals may do is set aside the judgment of the county court. *Crawford v. Siglar*, 470 S.W.2d 915, 918 (Tex. Civ. App.—Texarkana 1971, writ ref'd n.r.e.) ("Since the County Court acquired no jurisdiction of this case, the [Court of Appeals] acquires none on appeal, except to declare the invalidity of the proceedings in the County Court and to set them aside"); *Family Inv. Co.*, 356 S.W.2d at 355; *Jacobson*, 142 S.W.2d at 951; *Cotten v. Bier*, 169 S.W.2d 502, 503 (Tex. Civ. App—Amarillo 1943, no writ) (holding that the appellate court must dismiss the case if it does not "affirmatively appear" from the record that the county court had jurisdiction); *First Nat'l Bank of Raymondville v. Hickman*, 45 S.W.2d 808, 808 (Ct. Civ. App.—San Antonio

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[3] *RCJ Liquidating Co.*, *Cavazos*, and *Stegall* all arise from the appeal of a judgment in a forcible entry and detainer case. Forcible entry and detainer suits are subject to a special section of the Rules of Civil Procedure, and the appeal of these judgments is specifically governed by Tex. R. Civ. P. 749. Although the case at bar is not governed by Tex. R. Civ. P. 749, the forcible entry and detainer provision appeal provisions are analogous with Tex. R. Civ. P. 571, the only difference being that the appeal bond must be filed within five days of the date the judgment is signed, not 10.

1931, no writ). An appellate court has the duty to determine whether it has jurisdiction over a case before it, and must do so *sua sponte* if jurisdictional arguments are not raised by the parties. *Estate of Crenshaw*, 982 S.W.2d 568, 570 (Tex. App.—Amarillo 1998, no writ) (citing *New York Underwriters Ins. Co. v. Sanchez*, 799 S.W.2d 677 (Tex. 1990)). Because the County Court at Law Number One lacked jurisdiction over this case, the Court of Appeals also lacks jurisdiction and must set aside all proceedings after those in the Justice Court.

In apparent reliance on Tex. R. Civ. P. 306a,[4] G filed a document styled "Motion to Determine Actual Notice of Judgment" contemporaneously with his Notice of Appeal. Supp. C.R. ____; App. at 6. Judge Smith entered an order finding that G received actual notice of the judgment on March 9, 1999. Supp. C.R. ____; App. at 7. However, the date that G received actual notice of the existence of the judgment is irrelevant in this case. G's apparent reliance on Tex. R. Civ. P. 306a(4) to extend this time is misplaced because Tex. R. Civ. P. 306a(4) cannot be used to extend G's deadline for filing his appeal bond in justice court.

First, the language of Tex. R. Civ. P. 571 makes clear that a sufficient bond shall be filed "within ten days from the date a *judgment* or order overruling motion for new trial *is*

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[4] *Compare* G's Motion to Determine Actual Notice of Judgment, Supp. C.R. ____; App. at 6 ("The Defendant . . . did not get notice of the judgment until . . . more than twenty (20) days after the Court signed the judgment"), *with* Tex. R. Civ. P. 306a(4) ("*No Notice of Judgment*. If within twenty days after the judgment . . . is signed, a party adversely affected by it has neither received the notice [sent by the clerk] nor acquired actual knowledge of the order . . . all periods [for postjudgment motions] shall begin on the date that such party . . . received such notice or acquired actual knowledge of the signing").

signed." Tex. R. Civ. P. 571 (emphasis added). The judgment of the justice court was signed on January 8, 1999. C.R. 9; App. at 4. The record does not reflect that G filed a Motion for New Trial, so G's appeal bond was due on or before January 18, 1999.[5]

Also, Tex. R. Civ. P. 306a is located in Part II of the Rules of Civil Procedure, titled "Rules of Practice in District & County Courts." Tex. R. Civ. P. 306a is not available to litigants appealing judgments out of the justice courts. This structural argument is reinforced by the fact that there is also a section for "Rules of Practice in the Justice Courts," Part V of the Rules of Civil Procedure. Nowhere in the section of the rules dealing specifically with justice courts are there any rules allowing for the expansion of time to file an appeal bond, save and except Tex. R. Civ. P. 567. This rule allows a party to make a Motion for New Trial within 10 days of the date the justice court judgment was rendered. Reading Tex. R. Civ. P. 567 in conjunction with Tex. R. Civ. P. 571, a litigant has up to 20 days to file an appeal bond if he makes a motion for new trial in the justice court, but no more.

Tex. R. Civ. P. 523, which provides that the rules governing practice in the district courts also apply to the matters pending before a justice of the peace does not make Tex. R. Civ. P. 306a applicable to justice court appeals. This general provision specifically provides that district court rules apply to justice courts "except where otherwise specifically provided

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[5] The file-mark on the judgment indicates that it was not stamped by the court clerk until January 28, 1999. C.R. 9; App. at 4. This date is irrelevant to the disposition of this cause because the time to file the appeal bond is keyed off of the date the judgment is signed, not the date it is filed. However, even if the later date is used to calculate G's appellate deadlines, his appeal was still not filed timely.

by law or these rules." Tex. R. Civ. P. 523. The rules relating to practice in the justice courts provide a specific time period for appealing judgments rendered by a justice of the peace, set forth in Tex. R. Civ. P. 571. This time is different from the time allowed for appeals from county and district courts. Accordingly, district court rules cannot be used to extend the timetables for postjudgment motions and appeals beyond the 20-day maximum embodied in Tex. R. Civ. P. 571. *Searcy*, 915 S.W.2d at 597.

THIRD ISSUE PRESENTED FOR REVIEW
(RESTATED)

WAS THE JUDGMENT UNDERLYING G'S APPEAL RENDERED BY THE JUSTICE COURT OR THE SMALL CLAIMS COURT?

In his Motion to Dismiss, G provided another argument as to why the decision of the County Court at Law Number One should not be disturbed on appeal. G argues that the judgment rendered in this case was not rendered in a justice court but, rather, was rendered in a small claims court. If the judgment was rendered in a small claims court, the county court has final appellate jurisdiction over the matter, and this Court does not have jurisdiction to hear this appeal. *Davis v. Covert*, 983 S.W.2d 301, 302 (Tex. App.—Houston [1st Dist.] 1998, pet. dism'd w.o.j.) (en banc). Although the contention that the case is a small claims case does have some support in the record, the great weight of the evidence shows that the case was actually tried by Judge Smith while he was wearing the hat of a judge of a justice court, and so this Court has jurisdiction over the appeal.

A's Original Petition was clearly filed in the justice court. C.R. 4-5; App. at 1. G's Original Answer was also clearly filed "In the Justice Court, Precinct 7, Position 2, Typical County, Texas." C.R. 7-8; App. at 2. The Judgment underlying G's attempts to appeal to the County Court at Law Number One was clearly issued by the justice court. C.R. 9; App. at 4. In fact, none of the documents referenced above mention the small claims court anywhere. Even after the purported appeal to the County Court at Law Number One, G persisted in referring to the proceedings in the lower court as having occurred in the justice court. C.R. 19, ¶ 2.

However, other portions of the record refer to the case as being pending in the small claims court presided over by the same justice of the peace. The cover sheet, provided by the court and attached to A's Original Petition, is styled and stamped as coming from the "Small Claims Court." C.R. 3. The Order Appointing a Successor Judge indicates that the judge who heard the case is being appointed to the case as judge for a claim bearing a small claims cause number. Supp. C.R. ____; App. at 3. The untimely bond identifies the appeal as a small claims appeal. Supp. C.R. ____; App. at 10. Finally, G alleged to this Court in his Motion to Dismiss that the underlying cause was a small claims cause.

Although the record is slightly contradictory on this point, the great weight supports the conclusion that the Judgment was rendered by Judge Smith sitting as a judge of the justice court, not of the small claims court. A's Original Petition makes clear that it intended to bring suit in justice court; nowhere did it mention small claims court. It is axiomatic that,

within the latitude allowed by statute and rule, the Plaintiff has the right to choose the venue in which a case is tried and the court in which the case will be filed. *Abor v. Black*, 695 S.W.2d 564, 565-66 (Tex. 1985) (court should not have exercised jurisdiction where exercise deprived the plaintiff of "the traditional right to choose the time and the place of suit"). Here, A made that choice, and it chose Justice Court, Precinct 7, Place 2, Typical County, Texas. Equally, the pleadings in the underlying case (the Original Petition and the Original Answer), as well as the Judgment, all indicate that the case was a justice court case. While certain other documents do refer to the case being in small claims, the documents which form the core of the proceeding do not.

Next, G's own actions make clear that he believed that the case was pending in the justice court. Specifically, G filed a motion styled "Motion for Directed Verdict on the Pleadings or, in the Alternative, Special Exceptions." Supp. C.R. ____; App. at 13. In this Motion, G asked Judge Smith to render a pretrial directed verdict. The grounds for this request were that A's pleadings, which G noted were governed by Tex. R. Civ. P. 185, did not state a viable cause of action and that, pursuant to Tex. R Civ. P. 63, it was too close to trial for A to amend its pleadings as a matter of right. Supp. C.R. ____; App. at 13. In the alternative, G asked Judge Smith to order A to replead its Original Petition to clear up the alleged pleading deficiencies. Supp. C.R. ____; App. at 13. Although this Motion was denied, it shows that G treated this case as if it were in justice court. Now that the jurisdictional limits of small claims court have been raised to be conterminous with those of

justice court, the main difference between small claims court and justice court is that the Rules of Civil Procedure and Rules of Evidence do not apply in small claims court, while they do apply in justice court. Tex. R. Civ. P. 2 (rules of civil procedure govern proceedings in all Texas courts except small claims courts); Tex. R. Evid. 101(b) (rules of evidence do not apply to proceedings in small claims courts). In seeking affirmative relief on the procedural deficiencies alleged in his Motion, G shows that even he believed the case was proceeding in justice court; if it were in small claims court, his request would have been a nullity.

To be able to set aside the proceedings in the County Court at Law Number One, the Honorable Court must determine that this case was appealed from the justice court. Although there is little case law telling an appellate court how to determine the true identity of the trial court, this determination must be based on the totality of the record and the litigant's actions in the justice court. This conclusion is supported by an old line of cases related to the sufficiency of pleadings. Many years ago, when pleading rules were stricter than they are today, it was held that the failure to properly identify the court in which the case was pending (or even identifying a court which does not exist) was not a fatal defect in pleading. *Anderson v. Welch*, 92 S.W.2d 1121, 1122 (Tex. Civ. App.—Texarkana 1936, writ dism'd) (defective or omitted identification of court does not render pleading "fatally defective"); *Smith v. Colquitt*, 144 S.W. 690, 691 (Ct. Civ. App.—Dallas 1912, no writ) (pleading addressed to "The County Court at Law" rather than "The County Court of Dallas

County at Law" is not a "material error"). If failure to clearly or even properly identify the court does not render a pleading fatally defective, it stands to reason that an appellate court might be required to make that determination as part of its appellate review. This determination has to be made from a review of the record and the circumstances of the case. As set forth above, the record in this case best indicates that this is the justice court, not the small claims court.

FOURTH AND FIFTH ISSUES PRESENTED FOR REVIEW
(RESTATED AND GROUPED FOR ARGUMENT)

IN THE EVENT THAT G'S APPEAL WAS PROPER, DID A RECEIVE PROPER NOTICE OF THE APPEAL AS REQUIRED BY TEX. R. CIV. P. 571?

IN THE EVENT THAT G'S APPEAL WAS PROPER, DID A RECEIVE PROPER NOTICE OF THE PROCEEDINGS IN THE COUNTY COURT AT LAW?

A party seeking to appeal the judgment of a justice court to the county court must give notice that it has filed an appeal bond within five days after the date the bond was filed "to all *parties* to the suit who have not filed such bond." Tex. R. Civ. P. 571 (emphasis added). The penalty for failing to give such notice is that no default judgment may be rendered against a party by the county court without a showing that this rule was complied with. *Mitchell v. Armstrong Capital Corp.*, 877 S.W.2d 480, 482 (Tex. App.—Houston [1st Dist.] 1994, no writ); *Molina v. Negley*, 425 S.W.2d 896, 897-98 (Tex. Civ. App.—San Antonio 1968, no writ).

In this case, the record reflects that A did not file a bond in the justice court. Accordingly, G was required to give A notice of his appeal as a party who had not filed an appeal bond. In this case, the notice was not given to the party but, instead, was given to A's trial counsel in the justice court.[6]

In addition to not receiving notice that the case had been appealed, A also did not receive the required 45-day notice of the first trial setting in the County Court at Law Number One, as required by Tex. R. Civ. P. 245.[7] Although the County Court at Law prepared such a notice, A did not receive it because the notice was also sent to its former attorney. It is improper for a court to set the first trial on a matter without at least the 45-day notice to the parties. *Osborn v. Osborn*, 961 S.W.2d 408, 411 (Tex. App.—Houston [1st Dist.] 1997, pet. denied); *Hardin v. Hardin*, 932 S.W.2d 566, 566-67 (Tex. App.—Tyler 1995, no writ). In this case, A not only did not receive the 45-day notice of the trial setting; it received no notice of the trial setting at all.

Under the facts of this case, all of the notices sent to A's justice court attorney were legally insufficient to give A notice of the appeal of this case or of the trial setting because

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[6] The effect of giving notice to A's trial counsel and A will be discussed in detail below.

[7] Neither the Final Judgment entered after the trial nor the Partial Summary Judgment entered previously recite that A received notice of the proceeding. C.R. , 18-__; App. at 8. Even if it did, such recitation may be rebutted by evidence showing that notice was not received. *Marriage of Parker*, 20 S.W.3d 812, 816 (Tex. App.—Texarkana 2000, no pet. h.); *Osborn*, 961 S.W.2d at 411. A similar rebuttable presumption is created by a Certificate of Service, such as the one on G's Notice of Submission of his Motion for Summary Judgment. *Wyatt v. Furrs Supermarkets, Inc.*, 908 S.W.2d 266, 270 (Tex. App.—El Paso 1995, writ denied); *Gonzales v. Stevenson*, 791 S.W.2d 250, 252 (Tex. App.—Corpus Christi 1990, no writ). As will be set forth below, evidence to rebut any presumption of notice to A exists in the record.

the attorney-client relationship between A and its attorney had ended. Because A did not receive proper notice of the County Court at Law proceedings, the partial summary judgment and final judgment rendered against it are improper.

Generally, the attorney-client relationship ends when the "purpose of the employment" is accomplished. *Stephenson v. LeBoeuf*, 16 S.W.3d 829, 836 (Tex. App.—Houston [14th Dist.] 2000, no pet. h.); *Dillard v. Broyles*, 633 S.W.2d 636, 643 (Tex. App.—Corpus Christi 1982, writ ref'd n.r.e.), *cert. denied*, 463 U.S. 1208 (1983). In a case where the purpose of representation is to try a civil lawsuit, the attorney-client relationship ends when the trial court issues a judgment in the case. *Rupert v. Brook Mays & Co.*, 299 S.W. 474, 475 (Tex. Civ. App.—Dallas 1927, no writ).

In this case, the judgment in the underlying case was issued on January 8, 1999. The attorney-client relationship between A and its justice court attorney ended at that time; A's trial attorney was not obligated to represent A in further proceeds, and she did not do so. Notice sent to a party's attorney after the end of the attorney-client relationship will not be imputed to the party. *Cannon v. ICO Tubular Svcs., Inc.*, 905 S.W.2d 380, 387 (Tex. App.—Houston [1st Dist.] 1995, no writ); *Sebastian v. Braeburn Valley Homeowner's Ass'n*, 872 S.W.2d 40, 42 (Tex. App.—Houston [1st Dist.] 1994, no writ); *Langdale v. Villamil*, 813 S.W.2d 187, 189-90 (Tex. App.—Houston [14th Dist.] 1991, no writ). The mere fact that the attorney in question may have represented the party in a prior action, even a very similar prior action, does not constitute even constructive notice to the party regarding the new

proceeding. *Ex parte Harwell*, 538 S.W.2d 667, 670 (Tex. Civ. App.—Waco 1976, no writ) (attorney represented client in prior contempt proceeding the year before the contempt proceeding at issue in the case). If the Honorable Court believes that the justice court judgment was timely appealed to the County Court at Law Number One, the de novo nature of the county court's review renders it a new proceeding, and so the notice sent to A's prior attorney cannot be imputed to A. Tex. R. Civ. P. 574b; *In re Garza*, 990 S.W.2d 372, 374 (Tex. App.—Corpus Christi 1999, no pet.) (properly perfected appeal from justice court to county court results in de novo trial in county court); *Searcy*, 915 S.W.2d at 596 n.1 (de novo review by county court is "essentially a new trial before a different judge"); *Sanchez v. Huntsville Indep. Sch. Dist.*, 844 S.W.2d 286, 289 (Tex. App.—Houston [1st Dist.] 1992, no writ) (trial de novo is not an appeal, but a new proceeding). Because the review in the county court is de novo and a new proceeding, G's notices to A's prior attorney did not provide any notice to A.[8]

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[8] A does not seek to convince the Court that this case presents a case study in how to handle the appeal of justice court judgments. Fortunately, the notice issues raised by this case should arise only rarely because in most cases a party's trial counsel in justice court will represent that party in any appeal to the county court. Even if the original trial counsel is not representing his client on appeal, it would be hoped that counsel would forward any notices regarding former clients' cases that he may receive to those former clients. Additionally, counsel should alert opposing counsel and the court in writing (as opposed to orally) that he is no longer representing his former client in the appeal, even where the further proceedings (such as the appeal from the justice court in the case) are a legal nullity. Affirming the County Court at Law Number One's judgments against A in a case where A received no notice of the pendency of the proceedings is not only a violation of due process but is fundamentally unfair.

In defense of A's trial counsel, the court's notice of appeal was returned due to the lack of an address on the envelope, Supp. C.R. ____; App. at 14, and G's notice that bond has been filed were clearly untimely as set forth above.

As a general rule, to overcome the presumptions created by recitations of notice and certificates of service, the party claiming that it had no notice has the burden of affirmatively showing lack of notice by affidavit or other competent evidence. *Bruneio v. Bruneio*, 890 S.W.2d 150, 155 (Tex. App.—Corpus Christi 1994, no writ); *Jones v. Texas Dept. of Pub. Safety*, 803 S.W.2d 760, 761 (Tex. App.—Houston [14th Dist.] 1991, no writ). In this case, no such presumptions exist because the record affirmatively reflects lack of notice to A.

All of the notices in the record, whether by the Justice of the Peace Court, by the County Court at Law, or by G, specifically reflect that they were sent to A's prior attorney. In particular, G's pleadings, motions, etc., all contain a certificate of service showing service of the pleading on A's justice court attorney. Service requirements dictate that an attorney making a court filing must "certify to the court compliance with this rule in writing over signature." Tex. R. Civ. P. 21a. None of these certificates of service reflect service on A, as would be required if G's attorney sent notice directly to A. At the least, these certifications should create the presumption that G sent no notice directly to A.

Second, after receiving notice of the default judgment which had been rendered against it (its first notice of G's alleged appeal), A contacted the judge of the County Court at Law Number One directly. C.R. 32; App. at 15. This letter makes clear that (1) A had no notice that any matter was pending against it, and (2) that A knew nothing of G's counterclaim, and (3) that this lack of knowledge prejudiced A's right to defend itself.

Although A's request for an appeal made to the trial court judge is not in accord with Texas procedure, it does meet the burden of affirmatively showing lack of notice to A.

SIXTH ISSUE PRESENTED FOR REVIEW
(RESTATED)

IF A DID NOT RECEIVE PROPER NOTICE OF THE PROCEEDINGS IN THIS CASE AFTER G'S APPEAL, DID THIS LACK OF NOTICE VIOLATE A'S DUE PROCESS RIGHTS?

"Where notice of a scheduled court appearance is sent to one who is not a party's attorney of record, the result is a denial of due process of law for want of service of notice." *Langdale*, 813 S.W.2d at 190. It is clear from the record that A's attorney in the underlying justice court proceeding never entered an appearance in the alleged appeal to the County Court at Law Number One, and so notice sent to her by the court or by G is ineffective to give notice to A. This lack of notice means that A did not have an opportunity to be heard before the County Court at Law Number One, and this inability denied A its due process rights.

Generally, failure to give notice of an appeal or pending proceeding is a denial of due process. *Mosser v. Plano Three Venture*, 893 S.W.2d 8, 12 (Tex. App.—Dallas 1994, no writ); *Bruneio*, 890 S.W.2d at 154 (describing lack of notice as a "fundamental violation of due process"); *Sebastian*, 872 S.W.2d at 42 (adequate notice is a "fundamental element of due process"). As set forth above, A received no notice of either the alleged appeal of the cause from the Justice Court, of the pendency of G's Motion for Summary Judgment, or of

the final trial of the action. This lack of notice denied A the due process to which it is entitled and requires that the Honorable Court reverse the judgment and return the case to the County Court at Law for further proceedings.

PRAYER

For the foregoing reasons, A prays

1. That the Honorable Court determine that G's appeal was not timely filed, and VACATE the judgment of the County Court at Law Number One and render judgment in favor of A in accordance with the original underlying judgment of the Justice Court;

2. Strictly in the alternative, that the Honorable Court determine that G's appeal was not timely filed, and order that the judgment of the County Court at Law Number One in all respects be VACATED;

3. Strictly in the alternative, that the Honorable Court determine that G's appeal was not timely filed, and REMAND this case to the County Court at Law Number One with orders that the judgments of the County Court at Law Number One be DISMISSED for lack of jurisdiction;

4. Strictly in the alternative, that the Honorable Court determine that A did not receive proper notice of the appeal of the proceedings in the Justice Court and/or of hearings in the County Court at Law Number One, and REVERSE the judgment entered by the County Court at Law Number One and REMAND this matter to the County Court at Law for further proceedings on the merits;

5. That the original judgment of the Justice Court in favor of A and against G be in all respects AFFIRMED; and

6. That A have all such other and further relief to which it may show itself to be justly entitled.