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TEXAS CIVIL PROCEDURE: THE TEXAS SUPREME COURT REMOVES ALL TIME LIMITS ON "UNGRANTING" MOTIONS FOR NEW TRIAL

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IN *In re Baylor Medical Center at Garland*,[1] the Texas Supreme Court changed its interpretation of Texas Rule of Civil Procedure 329b, thereby allowing a trial court to vacate an order granting a new trial at any time until a final judgment is entered. This decision overruled forty-seven years of precedent. The supreme court based its decision on an incorrect interpretation of *Porter v. Vick*,[2] mistakenly finding that a well-established practice was hypothetical and that a twenty-seven year old amendment to the rules required a change in its interpretation. This new interpretation prevents minor problems, but allows for extensive abuse by the judiciary and through the political process.

The writ for mandamus was brought in a medical malpractice suit between Baylor Medical Center and Tammy and Steve Williams. The jury found for Baylor, and Judge Cox entered a final take-nothing judgment on May 6, 2005. A timely motion for new trial was granted on the eighty-second day after the judgment was signed. The Dallas Court of Appeals denied Baylor's writ of mandamus, which was then subsequently filed with the Texas Supreme Court. The supreme court abated the case pursuant to Rule 7.2[3] because Judge Thomas had succeeded Judge Cox. After two months, Judge Thomas vacated the new trial order, reinstating judgment on the jury's verdict. Baylor notified the Texas Supreme Court and the case was dismissed as moot. On the same day, the Williamses petitioned Judge Thomas to reconsider, resulting in the reinstatement of the new trial order, and Baylor again appealed to the Texas Supreme Court for relief. While the case was pending, Judge Jordan was elected to replace Judge Thomas.

The Texas Supreme Court abated the case a second time for consideration by Judge Jordan on August 29, 2008.[4] In doing so, the court explicitly overruled *Porter v. Vick*, holding that its decision in *Porter* was based

1. *In re* Baylor Med. Ctr. at Garland, 280 S.W.3d 227 (Tex. 2008).
2. Porter v. Vick, 888 S.W.2d 789 (Tex. 1994).
3. TEX. R. CIV. P. 7.2.
4. *Baylor*, 280 S.W.3d at 232.

on the "purely hypothetical event" that the trial court's plenary power over the judgment expires as if the motion had not been granted.[5] Instead, the court held that "[p]lenary power of course expires only after final judgments, not vacated judgments."[6] The *Porter* decision followed over thirty years of precedent established by *Fulton v. Finch* in 1961.[7] The court held, however, that this precedent was not controlling because the determinative language for the *Fulton* decision was deleted in 1981 when the rule was amended.[8]

The issue of when a trial court has plenary power to vacate its order granting a new trial was first decided by the Texas Supreme Court in *Fulton v. Finch*.[9] In that case, the court held that the language of Rule 329b(3)[10] was clear, requiring that "'all motions . . . must be determined within not exceeding forty-five (45) days after the original or amended motion is filed'"; therefore, a motion "cannot be undetermined after the 45-day period without destroying the rule."[11] In *Baylor*, the court ruled that its decision in *Fulton* had rested on the wording of the 1960 version of Rule 329b that required motions for new trial to be "determined" within forty-five days of filing.[12] The court found this interpretation of the rule no longer applies because this language was deleted in 1981, leaving no limits on plenary power once the motion is granted.[13] The current version of Rule 329b establishes that a motion for new trial is considered overruled by law if not determined within seventy-five days after the judgment was signed.[14] However, the trial court has plenary power over the motion for an additional thirty days after it is overruled.[15]

The court in *Baylor* overruled its decision in *Porter*, noting that it had not considered these amendments.[16] The court instead found that the *Porter* decision was based on the "purely hypothetical event" that plenary power expires as if the judgment had not been vacated, but "plenary power of course expires only after final judgments, not vacated judgments."[17] In *Porter*, an order vacating a new trial was found void under

5. *Id.* at 230.
6. *Id.*
7. *Id.*; Fulton v. Finch, 346 S.W.2d 823 (Tex. 1961).
8. *Baylor*, 280 S.W.3d at 230.
9. *Fulton*, 346 S.W.2d at 826.
10. Texas Rule of Civil Procedure 329b has been renumbered. Rule 329b(3) and (5) correlate to the current 329b(c) and (e), respectively.
11. *Fulton*, 346 S.W.2d at 826 (quoting TEX. R. CIV. P. 329b(3) (1954, amended 1960)).
12. *Baylor*, 280 S.W.3d at 230 (citing *Fulton*, 346 S.W.2d at 826).
13. *Id.* (citing TEX. R. CIV. P. 329b(e)).
14. "In the event an original or amended motion for new trial or a motion to modify, correct or reform a judgment is not determined by written order signed within seventy-five days after the judgment was signed, it shall be considered overruled by operation of law on expiration of that period." TEX. R. CIV. P. 329b(c).
15. "If a motion for new trial is timely filed by any party, the trial court . . . has plenary power to grant a new trial or to vacate, modify, correct, or reform the judgment until thirty days after all such timely-filed motions are overruled, either by a written order or by operation of law, whichever comes first." TEX. R. CIV. P. 329b(e).
16. *Baylor*, 280 S.W.3d at 280.
17. *Id.*

the *Fulton* rule because it was signed long after the expiration of plenary power, which had occurred seventy-six days after the judgment was signed.[18] In making this determination, the court clarified that it "did not substantively modify the *Fulton v. Finch* rule in *Fruehauf Corp. v. Carrillo* . . . but merely clarified that the trial court could vacate, or 'ungrant,' the new trial within the plenary power period."[19] *Fruehauf*[20] was the first case decided by the Texas Supreme Court following the 1981 amendment to Rule 329b. Applying *Fulton*, the supreme court held that ungranting a motion for new trial on the seventy-fifth day was valid because there was no reason to restrict the trial court *within* the seventy-five day period and doing so would be inconsistent with the trial court's inherent plenary power.[21]

The supreme court also made several practical arguments in favor of its decision to overrule *Porter*. First, it noted that reinstating an original judgment resets the appellate timetables, ensuring that the right to appeal is not lost.[22] Second, while the court acknowledged that time and money could be wasted by continual reconsideration of orders, it held that never allowing the trial judge to reconsider would also be wasteful. Finally, the court noted that "a deadline that appears only in case law sets a trap for judges and litigants like the one they fell into here."[23]

Justice Johnson dissented from the opinion of the court, arguing that the problems with the rule established by *Porter v. Vick* should be addressed through the rule-making process rather than by the court.[24] He interpreted the decision in *Fulton* as based on the rationale that "[i]t was not the intention of the rule that an order granting a motion for new trial should remain open to countermand until a term of court which might be of six month's duration should finally expire."[25] The Texas Supreme Court first applied this reasoning in the late nineteenth century, holding that an order granting a motion for new trial could not be set aside after the end of the term in which it was granted.[26] The dissent also pointed out that both cases decided by the court in the twenty-seven years since Rule 329b was amended were based on the principle that plenary power to vacate an order granting a new trial expires the day it would have if the judgment was not vacated.[27] Appellate courts have consistently applied this precedent, even though they have questioned it, and it has been criticized by the Supreme Court Advisory Council.[28] Therefore, the dissent

18. Porter v. Vick, 888 S.W.2d 789, 789-90 (Tex. 1994).
19. *Id.*
20. Fruehauf Corp. v. Carrillo, 848 S.W.2d 83 (Tex. 1993).
21. *Id.* at 84.
22. *Baylor*, 280 S.W.3d at 231.
23. *Id.* at *3.
24. *Id.*
25. *Id.* at 232 (quoting *Fulton*, 346 S.W.2d at 827).
26. Wells v. Melville, 25 Tex. 337 (1860); City of San Antonio v. Dickman, 34 Tex. 647 (1870).
27. *Baylor*, 280 S.W.3d at 233 (citing *Fruehauf*, 848 S.W.2d at 84; *Porter*, 888 S.W.2d at 789).
28. *Id.*

found that the court should "adhere to the rule of *Fulton* and *Porter* until and unless Rule 329b is amended."[29] In support of this conclusion, Justice Johnson noted that adopted rules have the same force as statutes and greater force of stare decisis is accorded to "statutory-like promulgations."[30] For this reason, the dissent appled the interpretation in *Fiess v. State Farm Lloyds* of a form issued by a state which was based on the argument, that the form would have been changed in the past twenty-five years if the interpretation was incorrect.[31] The dissent argued that the interpretation of a rule adopted by the court should be given "at least the same deference" as a state agency's form.[32] Therefore, the rule should not be reinterpreted twenty-seven years after it was last amended.

Justice Johnson also noted several practical reasons for applying the *Porter* interpretation of the rule to the *Baylor* case. The most important of these reasons is that the parties need a designated point when they can put the original judgment behind them and focus on preparing for a new trial, rather than moving for reconsideration every time a colorable argument could be made.[33] The facts in the case demonstrate that every time a new judge takes over, the order granting a new trial has to be reconsidered.[34] He also pointed out the possibility that the trial court would have the power to grant multiple trials and then pick the jury verdict it favors, at least in theory.[35]

Justice Johnson is correct that the long-standing interpretation of rules should be changed only by amending those rules, rather than by the court. The court tried to use the rulemaking process in 2002 and requested that the Supreme Court Advisory Committee consider amending the rules.[36] The Committee raised several practical concerns relating to the timing of ungranting new trials. First, it noted that time and money are spent preparing for a new trial, thus some cutoff prior to the second trial is required so that the parties know that time and money will not be wasted.[37] Second, the committee discussed the possibility of political decisions controlling the process following the election of a new judge who was allowed to reconsider the order without having heard evidence.[38] Third, it raised the potential of abuse by judges, who are free to choose the first verdict over the second after completion of the second trial by

29. *Id.* at 238.
30. *Id.* (citing Feiss v. State Farm Lloyds, 202 S.W.3d 744, 459-50 (Tex. 2006)).
31. *Id.* (citing *Feiss*, 202 S.W.3d at 749-50).
32. *Id.*
33. *Id.*
34. *Id.*
35. *Id.*
36. HEARING OF THE SUP. CT. ADVISORY COMMITTEE, Mar. 8, 2002, 5918-5956, http://supreme.courts.state.tx.us/rules/scac/archives/2002/transcripts/030802pm.pdf; MEETING OF THE SUP. CT. ADVISORY COMMITTEE, June 14, 2002, 6732-6774, http://supreme.courts.state.tx.us/rules/scac/archives/2002/transcripts/061402am.pdf.
37. HEARING OF THE SUP. CT. ADVISORY COMMITTEE, Mar. 8, 2002, *supra* note 36, at 5925, 5930.
38. *Id.* at 5938.

ungranting the motion to have that second trial.[39] The Committee also noted the possibility that developments in the law could call for the reinstatement of the verdict after a new trial was granted, but that this situation could be resolved through summary judgment.[40] The Committee voted thirteen to two in favor of amending 329b(e) to allow an additional thirty-day period for a judge to reconsider a motion for new trial after he granted it.[41] However, this change was never enacted. These potential abuses were ignored by the Texas Supreme Court in its cursory discussion of the potential for waste, which provided no support for its claim that waste would occur by not allowing reconsideration of orders granting new trials. As the committee noted, the purpose of the rules is to prevent abuse, therefore these concerns should outweigh the court's unsubstantiated reference to the possibility of waste caused by proceeding with the second trial.[42]

Not only did the Texas Supreme Court go outside the proper process for changing rules, but it also based its decision to do so on an incorrect interpretation of *Porter*. The court found that twenty-seven years of precedent was based on a "purely hypothetical event: the expiration of plenary power assuming that a vacated judgment had instead become final."[43] This reading of *Porter* is wrong because no court has ever held that vacated judgments should be treated as final. Plenary power does not end over the case, requiring that the vacated judgment be understood as final, but rather only the power to reinstate the judgment expires as required by Rule 329b(c) and (e),[44] with the court retaining power over the new trial. Furthermore, the majority of appellate courts in Texas have held that this "purely hypothetical event" actually occurred, applying the supreme court's interpretation of Rule 329b.[45] It is ridiculous for the court to suggest that an event based on practice in Texas extending back to 1860 is purely hypothetical; practice that has been consistently followed for nearly 150 years is nothing if not established.

The amendment to Rule 329b does not require a new interpretation, as the court implies, which is why the court did not overrule *Fulton* for

39. MEETING OF THE SUP. CT. ADVISORY COMMITTEE, June 14, 2002, *supra* note 36, at 6738.

40. *Id.* at 6745-46.

41. *Id.* at 6773.

42. *Id.* at 6739.

43. *In re* Baylor Med. Ctr. at Garland, 280 S.W.3d 227, 230 (Tex. 2002).

44. TEX. R. CIV. P. 329b(c), (e).

45. *See, e.g.*, Porter v. Vick, 888 S.W.2d 789, 789 (Tex. 1994); *In re* Hildebrandt, No. 09-07-638-CV, 2008 WL 59179, at *1 (Tex. App.—Beaumont Jan. 4, 2008, no pet.); Garcia v. Rodriguez, 155 S.W.3d 334, 336 (Tex. App.—El Paso 2004, no pet.); *In re* Luster, 77 S.W.3d 331, 335 (Tex. App.—Houston [14th Dist.] 2002, no pet.); Health Care Ctrs. Of Tex., Inc. v. Nolen, 62 S.W.3d 813, 816 (Tex. App.—Waco 2001, no pet.); *In re* Steiger, 55 S.W.3d 168, 170-71 (Tex. App.—Corpus Christi 2001, no pet.); *In re* Ellebracht, 30 S.W.3d 605, 607 (Tex. App.—Texarkana 2000, no pet.); Ferguson v. Globe-Texas Co., 35 S.W.3d 688, 690 (Tex. App.—Amarillo 2000, no pet.); *In re* Marriage of Wilburn, 18 S.W.3d 837, 843 n.3 (Tex. App.—Tyler 2000, no pet.); *In re* Hidalgo, No. 05-06-00966-CV, 2008 WL 3854463, at *4 (Tex. App.—Dallas Aug. 20, 2008, no pet. h.); Allen v. McKenzie Realty Corp., No. 01-90-00016-CV, 1991 WL 74222, at *1 (Tex. App.—Houston [1st Dist.] May 9, 1991, no writ).

twenty-seven years after the amendment. The plain language of 329b(c) requires that plenary power over a new trial motion ends at the expiration of seventy-five days from the date the judgment was signed.[46] Rule 329b(e) only applies to overruled motions, and thus applied to the facts in *Baylor* where a motion for new trial was not granted until the eighty-second day.[47] Therefore, the court retained power for an additional thirty days, for a total of 105 days after the judgment was signed. The rule has been interpreted in this way since its revision in 1981.[48] While the rules do not explicitly deny or grant courts the power to vacate an order granting a new trial, the consistent interpretation serves to fill this lack of clarity in the rules.

The two practical problems with the *Porter* decision noted by the court are not serious enough to warrant changing the rules outside of the established procedure. First, the court noted that waste could occur under the *Porter* rule by never allowing the court to vacate, but it did not clarify how this could occur. The court likely meant that a problem could arise under *Porter* because courts lose all opportunity to vacate if they wait until the seventy-fifth day to grant a motion for new trial. Yet the rules allow courts at least forty-five days to consider the motion after it was filed. Therefore, the opposing party has adequate time to develop and submit all colorable arguments against granting the motion. The only reasons a court may need to ungrant the motion after this period would be upon changes in the law or the development of new facts, but either of these circumstances could be addressed through summary judgment.[49] Second, the court noted that the *Fulton* rule is case law, but was wrong in holding that this creates a trap to both litigants and judges. No trap can exist for litigants since the motion for new trial must be filed within thirty days of the judgment. A diligent opposing counsel will petition the court to deny the motion before it is ruled upon, thereby having no cause to have the motion ungranted several weeks later. It is difficult to claim that a trap exists for judges in well-settled case law that has been consistently followed for forty-seven years. The claim that it is a trap implies that the rule is hidden or designed to confuse the court or the litigants. Yet, a simple cursory review of case law would reveal the rule. Since the Texas Rules of Civil Procedure do not clearly address whether a court has power to vacate an order granting a new trial, a diligent lawyer or judge would turn to case law for interpretation. Furthermore, the judge did not fall into a trap in this case as the court held. A newly elected judge attempted to ungrant a valid order issued by her predecessor. She did not lack knowledge of the deadline causing her to fall into the trap of missing it; rather, she never had the power to act.

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46. TEX. R. CIV. P. 329b(c).

47. TEX. R. CIV. P. 329b(e).

48. *See supra* note 45.

49. *See* MEETING OF THE SUP. CT. ADVISORY COMMITTEE, June 14, 2002, *supra* note 36, at 6745-46.

The *Baylor* holding has a huge potential for abuse by trial courts that the Texas Supreme Court ignored. First, it gives the trial court complete discretion to vacate an order granting a new trial at any time before it issues a final judgment. This could waste a large amount of time and money spent by both parties preparing for the trial if the order was vacated on the eve of or after the second trial. Additionally, it allows for major abuse by the judge by giving him power to hear multiple jury verdicts and then determine which to issue as the final judgment. Theoretically, nothing would prevent a judge from ordering multiple trials until a jury issued a verdict he agreed with. This situation occurred in a Fifth Circuit case, where the court upheld the trial judge's decision under the Federal Rules of Civil Procedure to vacate the order granting a new trial after the second jury returned its verdict.[50] This was the main abuse considered by the Supreme Court Advisory Committee, but the *Baylor* decision does not even address the issue.[51] Second, the decision allows for abuse through the political process because every newly elected judge has the power to overrule all pending new trial orders, without having heard any evidence in the cases.[52] Thus, pressure could be exerted through the political system to elect a judge who would reinstate a verdict, even if the order for new trial was validly granted. This abuse does not exist in the federal courts because the judges are appointed, which helps explain why the Federal Rules of Civil Procedure have no limitations on when the order can be vacated. Thus, under the *Baylor* holding, the public will potentially lose respect for the judicial system because of both judicial abuse and wasted time and money.

The Texas Supreme Court went outside of established procedures to change Rule 329b by reinterpreting it in *Baylor*, overruling forty-seven years of precedent. This decision was based on incorrect interpretation, with the result that a practice that has been consistently followed in Texas for almost 150 years was found to be "purely hypothetical." The existing problems with the long-standing interpretation were not serious enough to require altering the rules outside of the proper process, especially since doing so created the potential for judicial and political abuse that could become far more harmful that the existing practice had been.

50. Gallimore v. Mo. Pac. R.R., 635 F.2d 1165, 1171 (5th Cir. 1981).

51. MEETING OF THE SUP. CT. ADVISORY COMMITTEE, June 14, 2002, *supra* note 36, at 6738. The Committee refers to a Fifth Circuit case in which this situation occurred. The trial court's decision to vacate the motion granting a new trial was made only after the second jury verdict was upheld under the doctrine of complete plenary power. *Gallimore*, 635 F.2d at 1171.

52. HEARING OF THE SUP. CT. ADVISORY COMMITTEE, Mar. 8, 2002, *supra* note 36, at 5938.