TO: **SCAC R. 300-330 Sub-committee**

FROM: Skip

RE: Justice Hecht's 5-26-01 e-mail to Chip Babcock concerning whether the holding of *Porter v. Vick*, 888 S.W.2d 789 (Tex. 1994), should be changed by rule in light of its application in *Ferguson v. Globe Texas, Co.*, 35 S.W.3d 688 (Tex.App. – Amarillo, 2000 pet. denied.).

PROBLEM

Some courts have limited a trial court's power to reinstate a judgment previously set aside by granting a motion for new trial, to 75 days after the judgment was originally signed. As a result, a court must re-try a case if it waits too long to re-enter judgment.

POSSIBLE SOLUTION

Amend Rule 329 b (h) to read:

"If a motion for new trial is granted, the judgment that has been set aside may be re-entered, modified, corrected or reformed, or a new judgment may be signed at any time prior to [the commencement of/close of evidence] in the new trial. The time for appeal shall run from the time the order granting judgment is re-entered, modified, corrected or reformed, or the new judgment is signed."

BACKGROUND

Ferguson v. Globe Texas, Co., 35 S.W.3d 688, 691-92 (Tex.App. – Amarillo, 2000, pet. denied) held that a "trial court may only vacate an order granting a new trial during the period when it continues to have plenary power" and that "the trial court's plenary power only continues for 75 days after the date judgment is signed."

In *Ferguson* the Amarillo court held that the trial court lacked plenary power to grant a motion to reinstate a judgment originally signed 100 days earlier, which had been set aside by a motion for new trial signed on day 71. It held that the plain meaning of Rule 329(e) limits trial courts' plenary power to the "grant a new trial or to vacate, modify, correct, or reform the judgment until thirty days after such timely filed motions are overruled." Thus, it reasoned, because no motion for new trial was overruled, the court's plenary power to reinstate judgment ended when the motion for new trial would have been overruled by operation of law. *Id.* at 690.

The court stated that Rule 329(e) was clear and unambiguous in specifying the types of powers it vested in trial courts and those powers did not expressly include the power to ungrant a new trial. It held the rule should not be construed to mean something other than its plain words "unless application of the literal language would produce an absurd result." *Id.* at 691.

The court did not consider whether it was an absurd result to require a district court to retry a case that could have been, and should have been, disposed of by entry of judgment mistakenly set aside by an order granting a new trial. The court did not consider whether the apparent basis for Rule 329(e)'s time limits (the need for a judgment to become final within a finite time after signing) did not apply when the judgment, and the finite plenary period its signing invoked, had been set aside by the granting of a new trial. The problem appears to be supreme court precedent.

The court of appeals relied on the supreme court's opinion in *Porter v. Vick*, 888 S.W.2d 789 (Tex. 1994), for its holding that a trial court may only vacate an order granting a new trial during the period when it continues to have plenary power. *Porter v. Vick* was a per curiam mandamus issued by the supreme court to set aside an order vacating an order of new trial. The trial had been non-jury. A new trial had been mistakenly granted by default by a visiting judge when opposing counsel's message to the trial judge that he had been delayed in another court was not relayed to the visiting judge at the new trial hearing. The default order granting new trial was set aside by the original judge who had presided over the trial and entered the judgment. Because the order vacating the new trial order was signed "long past the time for plenary power over the judgment, as measured from the date the judgment was signed," the supreme court held it was void. *Id.,* citing *Fulton v. Finch*, 346 S.W.2d 823, 826 (Tex. 1961).

However, as noted by Justice Hecht's e-mail, the holding in *Fulton v. Finch* was based on a prior version of Rule 329(b) that required that all motions for new trial "must be determined within not exceeding forty-five (45) days after the. . . .motion is filed. . . ." The language was dropped when the rule was rewritten in 1981. In *Porter v. Vick*, the per curiam court apparently relied on the holding of *Fulton v. Finch* without considering the reason for that holding.

The problem was fully briefed for the supreme court on Petition for Review in *Ferguson v. Globe Texas Co.* The Petition was denied after the court requested briefing. It may prefer to address the problem created by *Porter v. Vick* by clarifying the rule.