

January 22, 2002

M E M O

To: SCAC Members

From: O. C. Hamilton, Jr.

Gentlemen:

In addition to what Skip Watson has included in his memo, I want to comment and mention a couple of cases.

I strongly believe that once the trial Court has granted a Motion for New Trial, the Court retains jurisdiction of the case for all purposes and should not be precluded from ungranting the Motion for New Trial at any time if the Court later decides that is the appropriate action to take.

The 14th Court of Appeals in Houston has essentially said the same thing in two cases, *Gates vs Dow Chemical Company*, 777 S.W.2d 120 (Tex.App–Houston [14th Dist.] 1989), judgment vacated by agreement, 783 S.W.2d 589 (Tex. 1989), and *Biaza vs. Simon*, 879 S.W.2d 349 (Tex. App. – Houston [14th Dist.] 1994 Pet Denied). In *Gates*, the 75 day period of Rule 329b expired on Saturday, September 26th and on Monday, September 28th, the Judge granted a new trial (which was held to be proper). However, on October 22nd, the Judge vacated the Order Granting a New Trial. That Court approved the “ungranting” of a new trial within the 105 day period following the Judgment, but stated,

... Once a new trial is granted, the trial court has exclusive jurisdiction in the case.
(at page 123)

...

...There is no provision in the rule giving the trial court the power to vacate the granting of a new trial. The reason lies in common sense. Once a new trial is granted, the trial court is the only court having authority to rule on the case. The trial court has the sole discretion in ruling on the case. This discretion includes the power to enter orders which correct earlier errors. This is in contrast to where a motion for new trial is overruled. The trial court and the appellant court then have a quasi-concurrent jurisdiction in the case. The only step necessary for a litigant to invoke appellate court jurisdiction is to file an appeal bond. Nowhere does Rule 329b restrict the trial court from overturning an order for a new trial. Holding that the trial court lacked power to vacate its previous order would impair its authority to enter orders necessary for the efficient administration of its docket. (at page 124)

In *Biaza vs. Simon*, the Motion for New Trial was filed on January 14th. On March 22nd the trial court granted a Motion for New Trial, and on August 15th (eight months after the

judgment) set aside the order granting the Motion for New Trial and reinstated the order that had been signed December 14th of the preceding year. In that case, the 14th Court affirmed the trial court, saying,

Appellants' argument presents the question of when a trial court may rescind its order granting a new trial and reinstate a previously vacated judgement. In *Fulton v. Finch*, 162 Tex. 351, 346 S.W.2d 823, 827 (1961), the court reasoned that it could be done at any time when the trial court had the power to deny the motion for a new trial in the first place. See also *Homart Dev. Co. v. Blanton*, 755 S.W.2d 158, 159 (Tex.App.–Houston [1st Dist.] 1988, orig. proceeding) (holding that any reconsideration of the order granting a new trial must be accomplished with 75-day period); TEX.R.CIV.P. 329b(c). Under the current Rules of Civil Procedure, that would mean that the trial court would have seventy-five days after judgment to “ungrant” a motion for new trial. See TEX.R.CIV.P. 329b(c).

Two recent cases have added to the seventy-five day period the thirty days of plenary power that the court would have retained had the motion been denied on the seventy-fifth day, effectively giving a trial court 105 days to “ungrant” a motion for new trial. *Gates v. Dow Chemical Co.*, 777 S.W.2d 120, 123 (Tex.App.–Houston [14th Dist.] 1989), *judgement vacated by agr.*, 783 S.W.2d 589 (Tex. 1989); *Wood v. Component Constr. Corp.*, 722 S.W.2d 439, 442 (Tex.App.–Fort Worth 1986, no writ); see TEX.R.Civ.P. 329b(e). Thus, some courts hold that the trial court has seventy-five days to grant an order setting aside a previous order granting a motion for new trial; others hold that the court has 105 days.

In the most recent Texas Supreme Court opinion on this issue, the court reaffirmed the trial court's power to “ungrant” a motion for new trial within the seventy-five days and held that the court of appeals erred in holding that a trial court does not have the authority to vacate an order for new trial during the seventy-five day period. *Fruehauf Corp. v. Carrillo*, 848, S.W.2d 83, 84 (Tex.1993) (citing *Fulton*, 346 S.W.2d at 827). However, in its reasoning, the court stated that a trial court has plenary power over its judgment until it becomes final and retains continuing control over interlocutory orders and has the power to set aside those orders any time before a final judgment is entered. *Carrillo*, 848 S.W.2d at 84. Because an order granting a new trial is an unappealable, interlocutory order, *id.*, the court thus retains continuing control over orders granting new trials until a final judgment is entered. See *id.* Based on this reasoning, it appears that a new trial may be “ungranted” at any time before a new final judgment. See *id.* This appears to be the most logical result based on the well-established principle that orders granting new trials are interlocutory and it harmonizes these orders with the rules pertaining to other interlocutory orders. But see *Hunter v. O'Neill*, 854 S.W.2d 704, 705-06 (Tex.App.–Dallas 1993, orig. proceeding) (post-*Carrillo* case adhering to the 75-day rule).

Several cases cited by appellant hold that a once a trial court grants a motion for new trial, the court is without authority to set aside that order and reinstate the

vacated judgment without another trial. Most of these cases pre-date all of the cases cited above, and based on the holdings in *Fulton* and *Carrillo* have been implicitly overruled. We hold, based on the court's reasoning in *Carrillo*, that a trial court has authority to rescind its order granting a motion for new trial and reinstate the vacated judgment at any time before a new final judgement is signed. (at pages 356-357)

It is my opinion that the Houston court has correctly stated what the law ought to be and to the extent that it may be different as a result of *Porter vs. Vick*, I would urge the Advisory Committee to ask the court to overrule *Porter vs. Vick* by a change in Rule 329b. The change I would suggest would be an addition to Rule 329b of sub-paragraph (i), which would read:

“Once a new trial is granted, the trial court has exclusive jurisdiction in the case until a final judgment is entered and the court's plenary power, as set forth in this rule, has expired.”