REPORT ON WHETHER THE HOLDING OF *PORTER v. VICK* SHOULD BE CHANGED BY AMENDING RULE 329B

TO: Supreme Court Advisory Committee Members

FROM: Skip Watson

DATE: June 12, 2002

Assignment:

"The Court requests that the Advisory Committee consider whether the holding of *Porter* [*v. Vick*, 888 SW2d 789 (Tex. 1994)] should be changed by rule."

E-mail from Justice Hecht to Chip Babcock dated 5-26-01.

Context of Request:

The full text of Justice Hecht's message presents the background leading up to the Court's request:

> In Fulton v. Finch, 346 S.W.2d 823 (Tex. 1961), we held that a trial court lacked power to un-grant a motion for new trial more than 45 days after the motion was filed, based on TRCP 329b, s. 3, which then read: "All motions and amended motions for new trial must be determined within not exceeding forty-five (45) days after the original or amended motion is filed. . . ." The rule was completely rewritten in 1981 and no longer contains such language. However, in Porter v. Vick, 888 S.W.2d 789 (Tex. 1994) (per curiam), we cited Fulton as authority for the proposition that "any order vacating an order granting a new trial . . . signed outside the court's period of plenary power over the original judgment is void", without reference to the rule. Now the rules argument is that a trial court cannot ungrant a motion for new trial after its plenary jurisdiction would have expired, not because the rule prohibits it, but because the rule does not permit it -- is silent on the subject. See, e.g., Ferguson v. Globe-Texas Co., 35 S.W.3d 688 (Tex. App. -- Amarillo 2000, pet. denied). The court in Ferguson observed that a federal trial court may ungrant a motion for new trial at any time, subject to review for abuse of discretion. The Court requests that the Advisory Committee consider whether the holding of Porter should be changed by rule. As always, the Court greatly appreciates your service and that of the other members of the Committee.

Not addressed by Justice Hecht's message was the split among the courts of appeals created when two cases out of the Fourteenth Court that declined to apply *Fulton v. Finch* to orders vacating the granting of new trials, when the vacating orders were signed more than seventy-five days after the original judgment. The holdings of *Gates v. Dow Chemical Co.*, 777 S.W.2d 120, 123 (Tex. App.—Houston [14th Dist.] 1989), *judgment vacated by agr.*, 783 S.W.2d 589 (Tex. 1989), and *Biaza v. Simon*, 879 S.W.2d 349, 357 (Tex. App. –Houston [14th Dist.] 1994, writ dism'd) were considered and rejected by the Amarillo Court's opinion referenced in Justice Hecht's message, *Ferguson v. Globe Texas, Co.*, 35 S.W.3d 688, 691-92 (Tex. App. –Amarillo 2000, pet. denied). *Biaza*, in particular, had relied on an interim Supreme Court opinion, *Fruehauf Corp. v. Carrillo*, 848 S.W.2d 83, (Tex. 1993), which held that a trial court's plenary power over its judgment continues until it becomes final. *Fruehauf*, however, only involved reversal for failure to permit a trial court to reconsider its order granting new trial when the reconsideration occurred within the seventy-five day period, as was noted by the Court in *Porter v. Vick*. *Id.*

<u>Recent Developments:</u>

Since this issue was last considered by the Committee, the Fourteenth Court broke with its prior holdings in *Biaza* and *Gates* and ordered a trial court to vacate an amended final judgment entered after Hon. Harvey Brown concluded that a new trial ordered on the seventy-fifth day (apparently on sua sponte grounds) had been improvidently granted. *In re Luster*, _____ S.W.3d _____, 2002 WL 389669 (Tex. App. –Houston [14th Dist.] March 11, 2002, orig. pro./pet. pending), the Fourteenth Court considered itself bound by the Supreme Court's last pronouncement on the issue, *Porter v. Vick*, notwithstanding its prior holdings in *Biaza* and *Gates*. It also noted this Committee's efforts to address the problem and the pressing need for a resolution. A petition for mandamus is presently pending in the Supreme Court under number 02-0310, *In re Union Pacific R.R. Co*.

Options

A. Rewrite the Rule to set forth limits on plenary power after judgment has been set aside.

1. Amend Rule 329b to codify *Porter v. Vick* and *Ferguson v. Globe Texas* by re-imposing limits on trial courts' plenary power to reinstate or enter new judgments or to set aside orders for new trials signed more than seventy-five (75) days after the judgment that was set aside was originally signed.

Example: Amend Rule 329(c) to read:

(c) In the event an original or amended motion for new trial, or a motion to modify, correct, or reform a judgment, <u>or a motion to enter judgment after a new trial has been granted, or to set aside the granting of a new trial</u>, is not determined by written order signed within seventy-five (75) days after the judgment was signed, it shall be considered overruled by operation of law on expiration of that period.

2. **Amend Rule 329b to codify Porter v. Vick, but not Ferguson v. Globe Texas, by re-imposing limits on trial courts' plenary power to reinstate or enter new judgments or to set aside orders for new trials signed more than thirty (30) days after a motion for new trial was granted.**

Example: Amend Rule 329b(e) to read:

(c) If a motion for new trial is timely filed by any party, the trial court, regardless of whether an appeal has been perfected, has plenary power to grant a new trial, <u>set aside an order granting a new trial</u>, or to vacate, modify, correct, or reform the judgment, <u>or enter a judgment, or re-enter a judgment set aside by granting a new trial or otherwise</u>, until thirty (30) days after all such timely filed motions are overruled, either by a written and signed order or by operation of law, which ever occurs first.

B. Amend Rule 329b to make it clear that a trial court's plenary power over a case is not restricted to proceeding with a new trial, or otherwise, once the judgment that started the time limits on plenary power has been set aside by granting a new trial or other action by the court.

1. **Add language to the end of Rule 329b(h) clarifying that the trial court has the power to enter or re-enter a judgment after a motion for new trial has been granted.**

<u>Example: (Watson)</u>

(h) If a judgment is modified, corrected or reformed in any respect, the time for appeal shall run from the time the modified, corrected, or reformed judgment is signed, but if a correction is made pursuant to Rule 316 after expiration of the period of plenary power provided by this rule, no complaint shall be heard on appeal that could have been presented in an appeal from the original judgment. <u>If a motion for new trial is granted, judgment may be entered, or a judgment that has been set aside may be re-entered, modified, corrected or reformed at any time prior to announcements of "ready" 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.</u>

2. **Add a new subparagraph (i) at the end of Rule 329b to clarify that the trial courts' plenary power is unaffected in any way once a judgment has been set aside by granting a motion for new trial.**

<u>Example: (Dorsaneo/Hamilton)</u>

(i) <u>Once a new trial is granted, (or a judgment is otherwise set aside) 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.</u> (Parenthetical by Watson.)

C. Suggest the Supreme Court change the problem created by Porter v. Vick by opinion, rather than by rule.

1. The opportunity to correct *Porter v. Vick* is presently pending before the Court.

2. *Stare Decisis* could be enhanced, rather than harmed, by courts admitting those rare occasions when mistakes are made.

Analysis:

When this issue was first considered, the Committee was at or near complete agreement that *Porter v. Vick* should be changed by amending Rule 329b to make it clear no restraints were placed on a trial court's plenary power once a judgment has been timely set aside. Setting aside a judgment necessarily stops the clock from counting down the time limits of power before it is appealable. The only remaining issue was whether, or when, to decide that too much had been invested in re-trying the case to stop and enter judgment based on the prior trial.

At the next meeting, a majority felt the same time limits should be placed on the trial courts' power to enter judgment on the prior trial, as exist for granting motions for new trial. Two reasons predominated:

Concerns that, given the opportunity, some lawyers will bombard trial courts with repetitive motions to set aside orders of new trial or to re-enter judgments may be as well founded in this instance as with any other interlocutory order. Trial courts that cannot control lawyers who file multiple motions for reconsideration of any motion may wish to impose a time limit by scheduling order entered promptly after a new trial has been granted. Failing that, the Committee may desire to assist judges by amending the rule to require that motions for entry or re-entry of judgment following the granting of a new trial, or motions to reconsider orders of new trial, be filed within thirty days of the signing of an order granting a new trial.

It also appeared that most favored placing constraints on this aspect of trial courts' plenary power out of concern for how some courts might exercise that power. At its core, restraining how a trial court handles a case on its docket requires careful, deliberate consideration, regardless of the outcome.