IN THE SUPREME COURT OF TEXAS

NO. 06-0491

IN RE BAYLOR MEDICAL CENTER AT GARLAND, RELATOR

ON PETITION FOR WRIT OF MANDAMUS

Argued September 27, 2007

JUSTICE JOHNSON, dissenting.

I recognize that there are conceptual and practical difficulties with the holding of *Porter v. Vick*, 888 S.W.2d 789 (Tex. 1994). But those are better addressed through the rule-making process than through the decision-making process. I would not overrule *Porter*, and thus dissent.

Until the 1981 amendments to the Rules of Civil Procedure became effective, former Rule 329b(3) provided that 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," unless the parties agreed otherwise in writing. Absent an agreement by the parties or an earlier ruling by the court, the motion for new trial was overruled by operation of law forty-five days after it was filed. TEX. R. CIV. P. 329b(3), 17 TEX. B.J. 569 (1955, amended 1981).

In *Fulton v. Finch*, 346 S.W.2d 823 (Tex. 1961), we addressed the issue of whether a trial court had the power to reinstate a judgment that was set aside if the order reinstating it was entered beyond the forty-five days allowed for determining the motion for new trial. There the trial court

granted a new trial within the specified forty-five day period. *Id.* at 825. After the forty-five day period lapsed, the trial court set aside the new trial order and reinstated the original judgment. *Id.* at 826. This Court held that an order granting a new trial must be set aside, if at all, within the forty-five day period set by the Rules. *Id.* at 827. We reasoned that "[i]t was not the intention of [Rule 329b] 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." *Id.*

Amendments to the Rules effective in 1981 changed the numbering and language of Rule 329b. After the amendments, Rule 329b(c) provides that if a motion for new trial is not determined by written order within seventy-five days after the judgment is signed, the motion is overruled by operation of law. Rule 329b(e) now provides that the trial court has plenary power to grant a new trial until thirty days after a timely-filed motion is overruled by a written order or by operation of law, whichever occurs first.

For over twenty-seven years since its amendment, this Court has continued to interpret Rule 329b in accord with *Fulton*. In *Fruehauf Corp. v. Carrillo*, 848 S.W.2d 83 (Tex. 1993), the trial court granted a motion for new trial but vacated the order within the seventy-five day period referenced in Rule 329b. The court of appeals held that the trial court did not have authority to vacate its order granting the new trial. *Id.* at 84. Citing *Fulton*, we held that the trial court had plenary power to reconsider its order during the seventy-five day period specified by Rule 329b. *Id.*

In *Porter*, 888 S.W.2d 789, we explained that *Freuhauf* did not alter the holding of *Fulton*. *Porter* concerned a non-jury trial in which Judge Vick entered judgment for the defendant. *Id.* at 789. The plaintiffs filed a motion for new trial, and a visiting judge granted it. *Id.* Judge Vick later

vacated the new trial order. *Id.* The plaintiffs sought mandamus relief. *Id.* They contended that Judge Vick's order vacating the new trial was void because it was entered more than seventy-five days after the judgment was signed. *Id.* This Court sustained the contention and conditionally granted mandamus relief directing Judge Vick to set aside his order vacating the new trial order because it was void. *Id.* at 789-90. In doing so, we referenced how long the trial court's plenary power lasted when a new trial had been granted:

> All parties concede that Judge Vick signed the order vacating the order granting new trial *long past the time for plenary power over the judgment*, as measured from the date the judgment was signed. *See, e.g.*, TEX. R. CIV. P. 329b.
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> [The plaintiffs] seek mandamus relief from this last order, contending it is void under *Fulton v. Finch*, 346 S.W.2d 823, 826 (Tex. 1961), in which this court held that any order vacating an order granting a new trial which was signed outside the court's period of plenary power over the original judgment is void. We sustain their contention. We did not substantively modify the *Fulton v. Finch* rule in *Fruehauf Corp. v. Carillo*, 848 S.W.2d 83 (Tex. 1993), but merely clarified that the trial court could vacate, or "ungrant," the new trial grant *within the plenary power period*.

Id. (emphasis added).

The concept of a trial court's plenary power expiring seventy-five days from the judgment date has been questioned. *See Biaza v. Simon*, 879 S.W.2d 349, 356-57 (Tex. App.—Houston [14th Dist.] 1994, writ denied); *Gates v. Dow Chem. Co.*, 777 S.W.2d 120, 124 (Tex. App.—Houston [14th Dist.] 1989), *judgm't vacated by agr.*, 783 S.W.2d 589 (Tex. 1989). Whether Rule 329b should be amended in regard to this issue has been the subject of discussion in the Supreme Court Advisory Committee. *See In re Luster*, 77 S.W.3d 331, 336 n.3 (Tex. App.—Houston [14th Dist.] 2002, [mand. denied]); Hearing on Rule 329(b) Before the

Supreme Court Advisory Committee (Mar. 8, 2002) (transcript available at http://www.supreme.courts.state.tx.us/rules/scac/archives/2002/transcripts/030802pm.pdf) (last visited Aug. 26, 2008). But the rule has not been amended and courts have appropriately followed our lead by holding orders vacating or "ungranting" new trial orders are void if entered more than seventy-five days from the date judgment was signed. *E.g., In re Luster*, 77 S.W.3d at 335; *Ferguson v. Globe-Texas Co.*, 35 S.W.3d 688, 691-92 (Tex. App.—Amarillo 2000, pet. denied) (noting that according to the plain language of Rule 329b(e), "a trial court may only vacate an order granting a new trial during the period in which its plenary power continues, and that plenary power only continues in effect for 75 days after the date the judgment is signed"); *see also* cases cited by the Court ___ S.W.3d at ___ n.8.

I would adhere to the rule of *Fulton* and *Porter* until and unless Rule 329b is amended. We have said that once we adopt rules, they have the same force and effect as statutes.[1] *See In re City of Georgetown*, 53 S.W.3d 328, 332 (Tex. 2001); *Mo. Pac. R.R. v. Cross*, 501 S.W.2d 868, 872 (Tex. 1973); *Freeman v. Freeman*, 327 S.W.2d 428, 433 (Tex. 1959). We consider stare decisis as having its greatest force in decisions construing statutes and statutory-like promulgations. *See Fiess v. State Farm Lloyds*, 202 S.W.3d 744, 749-50 (Tex. 2006). In *Fiess*, we observed that if, over a quarter of a century previously, we had incorrectly interpreted an insurance policy form promulgated by a state agency, it was strange that the form had not been changed. *Id.* Similarly here, even though we are

[1] The Court does not adopt rules in a vacuum. It is assisted in the task by a Supreme Court Advisory Committee and numerous other sources, including State Bar committees and sections of the Bar, legislators, lawyers in general, and the public. *See* Texas Court Rules: History and Process, http://www.supreme.courts.state.tx.us/rules/history.asp (last visited Aug. 26, 2008).

interpreting rules we have adopted, I would view prior interpretations of them with at least the deference we afford to a form promulgated by an agency. Absent unusual circumstances, once rules have been adopted and interpreted, as has Rule 329b in regard to the question before us, we should change those rules through the rules process as opposed to through decisions interpreting them. We have interpreted amended Rule 329b consistently for over twenty-seven years, and we interpreted its predecessor the same for twenty years before that. The rule has not changed since we last addressed it, and I would not reinterpret it now.

There are practical reasons for staying with the *Fulton* and *Porter* construct. Most of them relate to the idea that if a new trial is granted, at some point the verdict or judgment needs to be put behind the parties and court so they can focus on preparing for the new trial without worrying about what effect the prior verdict and judgment will have: they need closure as to the prior trial. For example, if a trial court grants a new trial and its power over whether to enter judgment on the prior verdict or non-jury judgment is not restricted, then the party who prevailed in the prior trial can, and probably will, pursue motion(s) to vacate the new trial order whenever a colorable argument can be made. The situation in this case provides an example of what can happen. The Court is remanding for the *third* judge to consider whether a new trial is appropriate or whether judgment should be entered on the verdict. When a new trial has been granted and a new judge takes over the case for *any* reason, why would the party who prevailed during the first trial *not* move for judgment to be entered on the result of the trial under today's decision? And this rule may also entail political consideration for judges who have granted new trials. Further, under the Court's construct, a trial court theoretically has the power to grant more than one new trial and then pick the verdict or result

the judge prefers. There needs to be some cutoff beyond which the parties and the trial court can proceed to the new trial without having the spectre of the prior verdict and judgment hanging over them. That can be, and in my view should be, done by rule.

I would follow *Porter* and would not remand for the current judge to reconsider the order granting a new trial. I would hold that the trial court's plenary power to vacate the order has expired and to remand would be useless. I would address the issues of whether Baylor is entitled to mandamus review, and if so, whether it is entitled to relief.

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Phil Johnson
Justice

OPINION DELIVERED: August 29, 2008