IN THE SUPREME COURT OF TEXAS

NO. 05-0300

IN RE BROOKSHIRE GROCERY COMPANY, RELATOR

ON PETITION FOR WRIT OF MANDAMUS

Argued March 23, 2006

JUSTICE HECHT, joined by JUSTICE WAINWRIGHT, JUSTICE BRISTER, and JUSTICE GREEN, dissenting.

Procedural rules exist to subserve the presentation and resolution of cases on their merits. As Rule 1 of the Texas Rules of Civil Procedure states, "[t]he proper objective of rules of civil procedure is to obtain a just, fair, equitable and impartial adjudication of the rights of litigants under established principles of substantive law." The rules are written to achieve this purpose and must be construed accordingly.

> This court has labored long and hard to remove as many procedural traps from our rules as possible. Litigants are entitled to have their disputes resolved on the merits, not on unnecessary and arcane points that can sneak up on even the most diligent of attorneys.[1]

Tricky procedural rules threaten substantive rights.[2] Take this case in point. Rule 329b of the Texas Rules of Civil Procedure gives a trial court thirty days after a judgment is signed to change

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[1] *Donwerth v. Preston II Chrysler-Dodge, Inc.*, 775 S.W.2d 634, 643 (Tex. 1989) (Ray, J., joined by Mauzy and Hecht, JJ., concurring).

[2] *See Lane Bank Equip. Co. v. Smith So. Equip., Inc.*, 10 S.W.3d 308, 314 (Tex. 2000) (Hecht, J., concurring) ("Appellate procedure should not be tricky."); *Airco, Inc. v. Tijerina*, 603 S.W.2d 785, 786 (Tex. 1980) (per curiam) ("'Appellate review of trial court judgments disposing of the substantive rights of litigants is a valuable right and should not be denied when under a liberal interpretation of the Rules it is possible to give it.'" (quoting *Bay v. Mecom*, 393 S.W.2d 819, 820 (Tex. 1965)).

it or grant a new trial,[3] but that period is extended if, within the thirty days, a motion assailing the judgment is filed.[4] The rule specifically mentions motions for new trial or to modify, correct, or reform the judgment but would include anything else that has the same effect.[5] The rule contemplates that a litigant may file multiple motions within the thirty-day, post-judgment period. The overruling of a motion for new trial does not preclude another motion assailing the judgment, and vice versa.[6] Nothing in Rule 329b suggests that the overruling of a motion to modify, correct, or reform the judgment precludes a litigant from filing another such motion later within the same thirty-day period. With respect to motions for new trial, paragraph (b) states:

> One or more amended motions for new trial may be filed without leave of court before any preceding motion for new trial filed by the movant is overruled and within thirty days after the judgment or other order complained of is signed.

This paragraph does not say that a second motion cannot be filed after the first one is overruled; on the contrary, it implies, at least, that an amended motion *can* be filed after a preceding motion is overruled, as long as the amended motion is filed within thirty days after the judgment is signed and with leave of court.

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[3] TEX. R. CIV. P. 329b(d) ("The trial court, regardless of whether an appeal has been perfected, has plenary power to grant a new trial or to vacate, modify, correct, or reform the judgment within thirty days after the judgment is signed.").

[4] TEX. R. CIV. P. 329b(e) ("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 or to vacate, modify, correct, or reform the judgment until thirty days after all such timely-filed motions are overruled, either by a written and signed order or by operation of law, whichever occurs first."); TEX. R. CIV. P. 329b(g) ("A motion to modify, correct, or reform a judgment (as distinguished from motion to correct the record of a judgment under Rule 316), if filed, shall be filed and determined within the the time prescribed by this rule for a motion for new trial and shall extend the trial court's plenary power and the time for perfecting an appeal in the same manner as a motion for new trial.").

[5] *See Gomez v. Tex. Dep't of Crim. Justice*, 896 S.W.2d 176, 176-177 (Tex. 1995) (per curiam) (treating an instrument filed as a "bill of review" as assailing the judgment and thus extending the time for perfecting appeal and the trial court's plenary jurisdiction to alter its judgment); *see also Kirschberg v. Lowe*, 974 S.W.2d 844, 847-848 (Tex. App. –San Antonio 1998, no pet.) (treating a motion for judgment non obstante veredicto as assailing the judgment and concluding that "the filing of any postjudgment motion or other instrument that (1) is filed within the time for filing a motion for a new trial and (2) 'assail[s] the trial court's judgment' extends the appellate timetable.").

[6] TEX. R. CIV. P. 329b(g) ("The overruling of [a motion to modify, correct, or reform a judgment] shall not preclude the filing of a motion for new trial, nor shall the overruling of a motion for new trial preclude the filing of a motion to modify, correct, or reform.").

Rule 329b is thus susceptible to being construed to provide that any motion assailing a judgment that is allowed to be filed within thirty days of the judgment extends the thirty-day period, regardless of whether any other motion has been filed or overruled. Nevertheless, the Court construes paragraph (b) to create an exception for one kind of post-trial motion: an amended motion for new trial filed after a first motion for new trial has been overruled. In the Court's view, overruling a motion for new trial does not preclude any other motion assailing the judgment except a second motion for new trial. The Court's construction is certainly not required by the text of the rule and conflicts with the rule's implication that an amended motion for new trial can be filed with leave of court. The Court does not suggest that its exception in any way benefits post-judgment procedure, and it is hard to imagine how it could. This one obscure exception — not clearly required by the text and without practical justification or benefit — creates a trap for the unwary that can result in a significant loss of rights. A trial court's grant of a new trial is voided. Moreover, a party might fail to timely perfect an appeal if he failed to notice this exception to the rule and thought that when the trial court granted his amended motion for new trial it still had power to do so. Even if a party timely perfected appeal, as Brookshire Grocery did in this case,[7] it could not complain of error asserted in the subsequent motion because an untimely amended motion for new trial does not preserve a complaint for appeal.[8] Thus, in the appeal in this case, the court of appeals held that factual insufficiency complaints, which must be raised in a motion for new trial,[9] were not preserved by the second motion for new trial.[10] A second motion for new trial, filed within thirty days of the judgment and with leave of court but after a first motion has been overruled, cannot preserve a

[7] *See Brookshire Grocery Co. v. Goss*, 206 S.W.3d 706 (Tex. App.–Texarkana 2006).

[8] *See Moritz v. Preiss*, 121 S.W.3d 715, 720-721 (Tex. 2003) (holding that an amended motion for new trial filed before the first motion was overruled but more than thirty days after judgment was signed does not preserve complaints for appeal).

[9] TEX. R. CIV. P. 324(b)(2).

[10] *Brookshire Grocery*, 206 S.W.3d at 713-714.

complaint on appeal, even if the complaint did not arise before the first motion was overruled. To reduce the risk that issues for appeal will unavoidably be lost, a party must wait as long as possible to move for a new trial. The Court's construction of Rule 329b simply does not assure the just and fair adjudication of issues on appeal as mandated by Rule 1.

The Court justifies its reading of Rule 329b by recounting the history of the procedure governing motions for new trial, but the Court does not give sufficient importance to a significant change in the procedural theory reflected in the 1981 amendments. After those amendments, allowing but one motion for new trial no longer made sense.

Before the 1981 amendments to the Rules of Civil Procedure, only a timely-filed motion for new trial could extend a trial court's plenary power over its judgment.[11] A motion for judgment non obstante veredicto did not have that effect,[12] and the rules did not expressly provide for motions to modify, correct, or reform a judgment,[13] though a trial court had the power to take such actions while its plenary power lasted.[14] Furthermore, Rule 329b placed strict limits on motions for new trial as follows:

> 1. A motion for new trial when required shall be filed within ten (10) days after the judgment or other order complained of is rendered.

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[11] TEX. R. CIV. P. 330(j)-(l) (1941), adopted by Order of the Supreme Court of Texas, Adopting Rules of Civil Procedure, 136 Tex. 442, 544 (Oct. 29, 1940, eff. Sept. 1, 1941), repealed and recodified as TEX. R. CIV. P. 329b (1955)) by Order of the Supreme Court of Texas, Adopting Amendments, printed in 17 TEX. BAR. J. 566, 569-570 (July 20, 1954, eff. Jan. 1, 1955), as amended by Order of the Supreme Court of Texas, Adopting Amendments, printed in 23 TEX. BAR. J. 619, 681-682 (July 26, 1960, eff. Jan. 1, 1961), as amended by Order of the Supreme Court of Texas, Adopting Amendments, 401-402 S.W.2d xxi, xxxiii-xxxv (July 20, 1966, eff. Jan. 1, 1967), as amended by Order of the Supreme Court of Texas, Adopting Amendments, 483-484 S.W.2d xxi, xli-xliii (Oct. 3, 1972, eff. Feb. 1, 1973).

[12] *Walker v. S & T Truck Lines, Inc.*, 409 S.W.2d 942, 944-945 (Tex. Civ. App.–Corpus Christi 1966, writ ref'd).

[13] *Lane Bank*, 10 S.W.3d at 316 (Hecht, J., concurring) ("Before 1981, no rules prescribed procedures for modifying, correcting, or reforming judgments.") (citing Thomas M. Reavley & David L. Orr, *Trial Court's Power to Amend Its Judgments*, 25 BAYLOR L. REV. 191, 206 (1973) ("The procedure governing the exercise of a trial court's plenary power before the judgment becomes final is not well-established.")).

[14] *Transamerican Leasing Co. v. Three Bears, Inc.*, 567 S.W.2d 799, 800 (Tex. 1978) (per curiam).

> 2. An original motion for new trial filed within said ten (10) day period may be amended without leave of court. Said amended motion shall be filed before the original motion is acted upon and within twenty (20) days after the original motion for new trial is filed. Not more than one amended motion for new trial may be filed.[15]

The 1981 amendments overhauled the rule. They recognized for the first time the trial court's authority to alter a judgment other than by granting a new trial and specifically permitted motions for such alterations. They extended the period for filing a motion for new trial or other motion to alter a judgment from ten to thirty days and pegged the beginning of the period at the signing, rather than rendition, of judgment. They removed the prohibition on more than one amended motion for new trial and changed the deadline for amended motions to run from the signing of the judgment rather than the filing of the first motion for new trial. As for whether a party could file an amended motion for new trial after a prior motion had been overruled, the new rule was not perfectly clear. The old rule, stated in separate sentences in paragraph 2, required that an amended motion for new trial be filed before the original motion was overruled. The new rule combined and rewrote the two sentences to become what is now paragraph (b) of Rule 329b:

> One or more amended motions for new trial may be filed without leave of court before any preceding motion for new trial filed by the movant is overruled and within thirty days after the judgment or other order complained of is signed.

Repositioning the phrase "without leave of court" allows a reasonable inference that a litigant may file an amended motion for new trial after a preceding motion for new trial has been overruled, so long as the court grants leave and the motion is otherwise timely.

As the Court explains, Rule 329b originally provided that a motion for new trial could be amended only "by leave of court", and that in 1967, after we had held the requirement to be pro

[15] TEX. R. CIV. P. 329b (1978).

forma,[16] we changed "by" to "without".[17] "Accordingly," the Court concludes, "throughout the history of Rule 329b, timely amended motions for new trial have always been limited to those filed before the trial court overruled a preceding motion, regardless of whether leave of court was required."[18] But the 1981 amendments did not merely tweak the rule; they were a complete makeover. We should not presume that the historical insignificance of obtaining leave of court to file an amended motion survived these amendments.

Although at one time, post-judgment procedure permitted by Rule 329b was strictly limited, the 1981 amendments were an effort to restate the more lenient practice that had evolved despite the language of the rule. If motions other than a motion for new trial can extend the trial court's plenary jurisdiction as long as they assailed the judgment, and if multiple motions can be filed regardless of whether one had been overruled, then it makes no sense for an amended motion for new trial to be the one exception to this general practice.

The text of the amended rule does not require either my construction or the Court's. Given two reasonable constructions, Rule 1 requires the one less likely to create pitfalls for litigants.

Relator Brookshire Grocery moved for a new trial after verdict but before judgment. At a hearing on the motion, Brookshire's counsel explained to the trial court that she had included one ground in the motion that she wanted the court to consider before rendering judgment on the verdict, but that if the court denied the motion on that ground, she would file a "comprehensive" post-judgment motion on other grounds. After argument, the court announced that it would deny the motion, render judgment on the verdict, and then "look more carefully at the other points"

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[16] *Consolidated Furniture Co. v. Kelly*, 366 S.W.2d 922, 923 (Tex. 1963) ("The filing of an amended motion for new trial within the time provided by Rule 329b is a matter of right and it would be an abuse of discretion for the court to deny leave for its filing. . . . The leave of the court is a matter of course. The only object is to give notice of the amendment.").

[17] *Ante* at ___.

[18] *Ante* at ___.

Brookshire's counsel had mentioned. That is exactly what it did. Brookshire filed a second motion for new trial 29 days after the judgment was signed (28 days after the first motion was denied), and the court granted it 25 days later. By considering the second motion, as well as by its statements at the hearing on the first motion, the court effectively granted leave to file.[19] I would hold that the overruling of Brookshire's first motion did not preclude the second and therefore, the court's order granting a new trial was not void.

Even if the Court's construction of Rule 329b were correct, the exception it finds in the rule for amended motions for new trial should not operate to void the trial court's order. The nature of a motion is determined by its substance, not its caption.[20] In substance, Brookshire's second motion asked for a modification in the judgment — to order that the plaintiff take nothing.[21] Rule 329b(g) expressly provides that the overruling of a motion for new trial does not preclude the filing of a motion to modify a judgment; the court's plenary power extends "until thirty days after all such timely-filed motions [to modify] are overruled, either by a written and signed order or by operation of law, whichever occurs first";[22] and in any event the trial court granted Brookshire's second motion before 75 days after the trial court signed the judgment, at which point the motion would have been considered overruled by operation of law.[23] If this analysis stretches "modify" too far and turns the rule into a game of semantics, so does the Court's creation of an exception for one kind of motion

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[19] *See Verburgt v. Dorner*, 959 S.W.2d 615, 617 (Tex. 1997) (implied motion for extension of time).

[20] *Surgitek, Bristol-Myers Corp. v. Abel*, 997 S.W.2d 598, 601 (Tex. 1999); *State Bar v. Heard*, 603 S.W.2d 829, 833 (Tex. 1980).

[21] *Cf. Lane Bank*, 10 S.W.3d at 312 ("And a motion made after judgment to incorporate a sanction as a part of the final judgment does propose a change to that judgment. Such a motion is, on its face, a motion to modify, correct or reform the existing judgment within the meaning of Rule 329b(g).").

[22] TEX. R. CIV. P. 329b(e); *see also L.M. Healthcare, Inc. v. Childs*, 929 S.W.2d 442, 444 (Tex. 1996) (holding that the fact that the trial court had overruled a motion for new trial did not shorten the period in which the trial court had plenary power to modify a judgment subsequent to a motion to modify filed after the trial court had overruled the motion for new trial, but within thirty days after the trial court signed the judgment, and determining that the trial court possessed plenary power to modify the judgment when it did).

[23] TEX. R. CIV. P. 329b(c).

assailing the judgment. To avoid meaningless technicalities, we have held that even an instrument called a "bill of review", filed withing thirty days of the signing of a judgment, extends the trial court's plenary power.[24] If Brookshire's second motion would have been timely had it been misnamed a "bill of review", surely it should not be untimely because the caption was more descriptive. The validity of the trial court's order should not turn on the name Brookshire chose, or did not choose, to call its second motion.

I would conditionally grant mandamus, and therefore I respectfully dissent.

Nathan L. Hecht
Justice

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[24] *Gomez*, 896 S.W.2d at 177 (holding that an instrument labeled "bill of review" filed within thirty days of the judgment extended the appellate timetable because it "assailed the trial court's judgment") (quoting *Miller Brewing Co. v. Villarreal*, 822 S.W.2d 177, 179 (Tex. App.–San Antonio 1991), *rev'd on other grounds*, 829 S.W.2d 770 (Tex. 1992)) (internal quotation marks omitted).