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Supreme Court of Texas.
In re Brookshire Grocery Company, Relator.
No. 05-0300.

March 23, 2006.

Appearances:

Deborah J. Race, Ireland Carroll & Kelley, P.C., Tyler, Texas, for Brookshire Grocery Company, appellants.

Michael Jung, Strasburger & Price, LLP, Dallas, Texas, for Barbara Goss, appellee.

Before:

Chief Justice, Wallace B. Jefferson, Nathan L. Hecht, Harriet O'Neill, Dale Wainwright, Scott A. Brister, David Medina, Paul W. Green, Phil Johnson, and Don R. Willett.

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JUDGE: Oyez, Oyez, Oyez. The Honorable, the Supreme Court of Texas. All persons having business before the Honorable, the Supreme Court of Texas are admonished to draw near and give their attention, for the Court is now sitting. God save the State of the Texas and this Honorable Court.

JUDGE: Thank you, please be seated. Good Morning the Court has three matters on its oral submission docket. Justice Hecht is sitting in each of these matters when his had a family emergency so he will not be present for oral argument this morning. Justice Green is not sitting in the [inaudible] come and they order their parents to cost it's set for submission are Docket No. 05-0300 In re Brookshire Grocery Company and original proceedings. Docket No. 05-0147 City of San Antonio versus Mark Farseman and all from their County and the Fourth Court of Appeal District and Docket No. 05-0171 South Western Belt Telephone Company LPDBA-FBC Texas versus William T. Mitchell, that fishery of Louis Mitchell deceiving from their County in the Court, Court of Appeal District. The Court is allotted 20 minutes to reside in each of the argument some will take a brief recess between the arguments. We expect to complete all of them before noon. These proceedings are being recorded and a link to the argument should be posted on the Court Web site by the end of the day today. The Court is now ready to hear the argument in 05- 0300 In re Brookshire Grocery Company.

COURT MARSHALL: May I please the Court. This going to raise government argument for the latter. Race have five minutes for rebuttal.

ORAL ARGUMENT OF DEBORAH J. RACE ON BEHALF OF THE PETITIONER

MS. RACE: Good Morning, your Honors. My name is Deborah Race I'm appearing behalf of Brookshire Grocery Company in this Mandamus proceedings. I know the Court has read the briefs in this renewal of issues, briefly as the Court repulse. This involves the trial court granting of a motion for Jayna V. that have an alternative request for a new trial in December. In January, he filed a motion for new trial within the 30 days of the signing of the judgment.

JUDGE: What if we did a order granting leave?

MS. RACE: Well, I ...

JUDGE: You wouldn't-- we wouldn't be here today.

MS. RACE: You, you would not and, and-- in hand side I, I sure wish I have gotten in order granting leave, your Honor. What happen in this case was the original motion for Jayna V. I added the motion request for new trial, do this some overlap in the issues particularly we were arguing for Jayna V. on the ground that there was no evidence for the type of, of lawsuit they presented. But in companion with that our issue that's run throughout this case was submission of the charge which in an alternative argument I said, "Would justify new trial." At the hearing and I think the court's familiar with the transcript at the hearing. The Court indicated a desire to simply rule on motion for entry of judgment as well as Jayna V. and in my opinion at least invited to go ahead and file the comprehensive motion for new trial in a latter time which we did. And then court set that, heard that and granted that but your Honors question and, and you were correct I, I think the two ...

JUDGE: So your asking for rule that-- if it judge says, you were lying-- what judge said at the hearing on the Jayna V. or on the fact that the judge subsequently granted the motion for the trial.

MS. RACE: Underlying on basically the entire record, I think that the idea of leave is permission and notice. In at all times in those motion and everything that we did, I think there was plenty of notice. I also think the record from the stand point of leave if, if your Honor, will recall, one of the key issues in the briefing here is not really to do with whether or not we have leave. It is whether or not an amended motion itself can trigger an additional 30-day plenary power period. And if you were read in Ms. Goss's briefing, as well as in the trial Court, I don't believe there was have any questions of leave. As matter of fact at the hearing on the motion for new trial ...

JUDGE: Ms. Race let me -

MS. RACE: Yes.

JUDGE: - jump in here.

MS. RACE: Sure.

JUDGE: That comments surprises me a little bit, your brief at page 18 says that "Brookshire is not advocating, that the Court's plenary power was extended by its amended motion for new trial."

MS. RACE: Well, ...

JUDGE: Say it seems that a father's Justice Brister was asking about suggesting that leave was crucial to your argument. Are you saying is not?

MS. RACE: No, we-- I'm sorry maybe in this Court, leave is crucial to my argument. I guess my argument is that any motion under 329b is going to extend the plenary power. The, the two arguments that I had before Texarkana, which Texarkana rejected, one was that the Court had never actually granted the first motion for new trial. Texarkana

correctly points out that the order that was submitted to the Court for signing says, "Motions" and, and I think that argument is I'm going to be feeding a dead horse if I try to returned the box simply because of what that, that order said. I do believe that the court's intent was not to rule on the motion for new trial at that time. But as far as leave-- yes I do and I-- if I miss-- far earlier to Justice Brister, I apologize because I do believe leave is critical. What I was trying to say is in this case, I think the record supports the Texarkana Court found that the record supportively-- in response to your question, I'm sure wish there was an order because it would be simpler. But I don't think it will solve the entire problem because in this Goss's position is that, regardless of leave or not the 329b doesn't allow any ...

JUDGE: Well, let them-- let's look, let's require about a little bit.

MS. RACE: Yes.

JUDGE: And a moment is say they did not amended motion. If the trial court deny some motion for new trial. How long did the trial court-- how much long did the trial court have jurisdiction?

MS. RACE: If they are no other pending plenary power extending motion in its 30 days after the order denied signed.

JUDGE: And so why wouldn't the rule be that you needed to give ruling from the trial court within 30 days after he originally denied the motion for new trial.

MS. RACE: In ...

JUDGE: In the file amended motions and maybe there's leave that the trial court must act within 30 days of his denial of the motion for new trial.

MS. RACE: Not now. At that-- and I think that's the key issue here because the way I read the rule, he does not have to act within 30 days of the denial of the original motion for new trial. If any legitimate plenary power extending motion is filed and that was our position. Is that the second motion was filed with leave then again that's going to be an issue but presuming it was, that the second motion was filed with leave then I think his plenary power is extended. In other words if in, in-- the way I read the rule it says, "If a motion for new trial is timely filed by any party the trial Court has plenary power to grant a new trial until 30 days after all such timely filed motions are overruled." And that is actually more than the leave issue that is the-- seems to be the real debate with the real party and interest. If whether or not-- and, and again the, the Court of Appeals relied heavily on the opinion in deficient which went back to a historical note, descended applied only to original motions. And our argument is under plain reading of 329b (e), I believe our court use to show that the second motion was timely and if it was timely then I think the Court's plenary power was extended and in it affirm it.

JUDGE: So I understand what's your saying if-- my guess is the 75 days or courses to give a trial Court time to hear rule upon the motion for new trial.

MS. RACE: Yes, I believe that's right.

JUDGE: If the Court rules on it, in this case. The next day after the judgment hearing, of course, you don't need the 75 days. Then the 30-day period keeps in. Your saying that if there amended motion leave, leave was granted the file on the amended motion cites that's opens up the entire the 105 days at that point ...

MS. RACE: I, I believe it does, your Honor. I believe under the rule it says, if a motion for new trial is timely so it's my position that the only question to the answer is whether or not our motion is

timely.

JUDGE: So it solves-- there such a case that plenary period ...

MS. RACE: I, I think-- I think it does, I think that's a good way to put it that, you-- you've got the, the maximum and I-- I'm going to look back on page of my brief because if I may spoken later, what I was saying in my brief-- we're trying to say is that it in no way extends the maximum period of plenary power. As this Court knows there several plenary power extending motions that can be filed after a judgment so that one doesn't want riling on a motion for new trial doesn't cut off the court's ability to rule on a-- on another type of plenary power extending motion such as to correct modified or reform.

JUDGE: Okay enough, doesn't have to be characterized as a motion for new trial or amended motion, correct? Somebody files a motion to reconsider, I guess you consider that as ...

MS. RACE: I, I believe you can consider that if it complies with the rules and that's why in reading the rules and again I, I look at the rules during this entire matter in the way I read the rule was, "If a timely filed motion is on file the Court has time."

JUDGE: The dispute is asking the Court to reconsider his ruling, it doesn't seem there is a requirement for leave the file that the suggestion which they think about this Court.

MS. RACE: No, there would not be I don't think if you characterized to the different way but I'm not going to, to try that to make my motion, the second motion anything that wasn't-- it was a motion for new trial as what we ask for. And again I think here the record-- the lies in any, any argument that we didn't have leave or permission of the court to do so. If you read Judge Boswell's comment at the motion for Jayna V., he expressly told me that, "Today I just want to take, I'm, I'm not really want to get in for new trial I don't want to catch you off but I'll hear it later." In my opinion that was saying, "Go ahead and file it, bring it in " ...

JUDGE: All this -

MS. RACE: Was ...

JUDGE: - motion are intended to, to get a ruling from the trial court or an overruling by operation of law. Why shouldn't rule be that one's the motion for new trial is ruled upon, I mean that's what the law, Rule 329b is talking about that the trial Court has 30 days from that point that to act period. And so that if you want to file an amended motion within the 30 days of the judgment that's time that you need to have a hearing on the ruling on that before the 30 days expires after the court has ruled on the motion for new trial.

MS. RACE: And I think the rule certainly could be that, I don't read the current language of 329b to mean that in life the fact it says, "All such timely filed motion are overruled." So I think that plain language of the rule states that, "If you have a timely filed motion you have plenary power for 30 days after all such timely filed motion for overruled." Some-- something else that I submitted to the Court is a supplement to an appendix. When I was preparing for the briefing which this case is actually on a direct appeal as well. I came across a dialogue between the judge and counsel for both parties at the conclusion of the hearing for the motion for new trial. Judge Boswell expressed right interest in the issue save deeds, whether would the issue at the charge of trial that he would like more time and expressly ask counsel, how much time do I have that which time is loses counsel as answered to have several weeks. I agreed and he said, "I will, then you let me know if my time runs out."

JUDGE: Court is the matter of jurisdiction -

MS. RACE: Absolutely -

JUDGE: - for the ...

MS. RACE: - absolutely it is a matter of jurisdiction.

JUDGE: You mention that, that there's an appeal -

MS. RACE: There is.

JUDGE: What's, What's the-- how do you explain adequacy or not of appellant remedy?

MS. RACE: Well, the adequacy of the appellant remedy for the issues that are on appeal is certainly has not been in fitted in any way. Our issue where would respect to charge error that we leave replied [inaudible] that those in jury claims. I do believe in this case that Judge Boswell based upon his comments at the both hearings had serious consideration about, how ...

JUDGE: I'm asking for the Court of Appeals say that the trial court had jurisdiction to grant a new trial and -

MS. RACE: Oh -

JUDGE #1: - [inaudible].

MS. RACE: - no that is not even an issue before that Court of this time, there was a Mandamus to that court which is then-- was granted and file by my spouse. The only issues raised in the direct appeal are taking that the motion for new trial was not granted and that were attacking the charge error and the, the evidence.

JUDGE: There's no question about the time when there's a notice of appeal.

MS. RACE: No, thank heavens. Your Honors, there is no questions about that.

JUDGE: I think Dickason is distinguishable from the explained out what we decide.

MS. RACE: Well, I think Dickason is distinguishable which is, is what I argued to the Court of Appeals and re-reading their opinion, and I don't have my brief to that court that in Dickason basing that they have us arguing one thing and I'm not positive that's, that's has slanted it but in Dickason both motions for new trial were filed before an order overruling the motion was signed. Then one thing that I thought that really interesting in Dickason was it-- wasn't-- the judge left the bench with here all of these. It was a new judge and then not only that, he refused himself, so it was an assigned judge that intend you were granted the motion for new trial so there were some distinguishing features in Dickason and I don't relate leave that this Court was ever presented with any question at the timeliness of the second motion or was I can't have any opinion if the order of the ruling overruled both or only overruled one I know the court have granted only of-- only granted them amendment. But I do think and additionally Dickason's reliant on a historical note in the rule that frankly-- and I brought my rule book, I don't see that note in there anymore. But I, I believe that was a, a little at least misleading for a practitioner who was reading the rules perhaps not reading the burdens version but to me reading the rule that says, "You brought 30 days after all such timely filed motion are overruled." My position then, at the time I read it was we got 30 days because my motion is timely. And so I guess in that respect I think Dickason have some dicta in it that might have been misleading and I see my time is up, so I will reserve amended for rebuttal, thank you.

JUDGE: Thank you. The Court is ready to hear argument from Michael Jung.

ORAL ARGUMENT OF MICHAEL JUNG ON BEHALF OF THE RESPONDENT

MR. JUNG: May I please the Court. This is Michael Jung represents argument for your rebuttal. May I please the Court. The current system of deadline for posted motion or invocation for appellant jurisdiction and for termination of trial Court jurisdiction. Days from 1981, in that year this Court rewrote Rule 329b in various section of that rule through textual distinction between motion for new trial and amended motion for new trial. In 1998, the Court in Dickason procuring, interpreting those section held that filing an amended motion for new trial does not extend the court's plenary power. In relied on the historical note to 1981 amendments which says, "An amended motion for new trial gains no additional time and at the court that we held that the trial court's plenary power is filed 30 days after the overruling of the motion for new trial and granted a writ of mandamus against the trial court to required the setting a side of an order granting an amended motion for new trial, signed after the plenary power period that expire." The same results was reached by the type of Court of Appeals in 2003 in Moritz versus Martz and by the Court of Appeals in this case.

JUDGE: If Dickason then applied, if the trial judge granted leave here, right?.

MR. JUNG: Dickason applies whether or not the trial court granted leave. What Dickason says is that, "An amended motion for a new trial regardless of leave or timeliness or anything else does not extend plenary power."

JUDGE: Listen up, listen up. Leave file, this is amended motion relief had granted, Is that right?.

MR. JUNG: Well, I told yesterday-- I thought the answer to that question was yes and I'm not sure it is on reflection. Under the pre-1981 rule, leave of court did not relate to times. The pre-1981 rules said, "In amended-- a motion for retrial maybe amended within 20 days after the motion has filed and before it is overruled and it's said 'With leave of Court.'" And this Court in the turnabout case in 1945 and the consolidated case in 1963 said, "Leave of court is not part of the jurisdictional element of that rule, is a procedural step, it's omission is a mere of law not a jurisdiction leave." All right, if you accept that holding that under the current Rule 329b in amended motion for new trial may be filed then says, without leave of court. Before any freezing motion for new trial filed by the movement is overruled in within 30 days after the judgment. So it is argued that leave of court or no leave of court, the time to file an amended motion for new trial is 30 days and before the original motion is overruled. So if that is correct then leave is driven not a material issue here because this motion was filed after the preceding motion was overruled and that would be the end of the hunt on that point.

JUDGE: That could happen before you amend the judgment, I mean a motion for mistrial is in effect to motion for new trial, right?.

MR. JUNG: It is.

JUDGE: So if I move for mistrial during voir dire is overruled. The motion for new trial been overruled and you never can replace.

MR. JUNG: Well, that ...

JUDGE: That's a problem in ...

MR. JUNG: Under-- I think Rule 306c that pre-judgment motion is deemed to have them filed the instant after the judgment had signed. I

guess you then have the question. Does a pre-judgment order overruling that motion is it deem to have them entered the instant after that motion was file. I, I think there's a possibility that an overruling after the judgment is required in order to do rule.

JUDGE: Now ruled-- I'm going to-- there's no rule that says. And here -

MR. JUNG: Now that you having ...

JUDGE: - but I'm, I'm trouble here, I mean the trial judge says-- how many-- enter the judgment see you can go ahead and proceed on them with the motion for new trial that would make me as a reasonable lawyer, I think, I could still file a motion for new trial and did had 90 days et cetera from the judgment?

MR. JUNG: It would be too, your Honor. But then when I get an order on day one saying your motion for new trial is overruled.

JUDGE: Well, then were only say motion for new trial is overruled? Did it?

MR. JUNG: You said, "Your motion for judgment, now the standing the verdict and alternative motion for new trial has been considered and said, "Motion was ove-- are overruled." You only use the court ...

JUDGE: That I mean-- I understand that, I just-- it looks like court's judge public if the judge threat the other, your client.

MR. JUNG: Afraid we back, your Honor.

JUDGE: Well, on January 25th, according to this record court has several weeks.

MR. JUNG: Frankly your Honor, we thought the motion for your trial was going to be a ruled-- we raised in our response to the motion this jurisdiction of issue but we thought it was going to line up being moot. But we thought motion for new trial is going to be overruled. At that point either the trial court's plenary power had already expired, the judge was asking how much more time do I have and I suppose I could've answer, well either it's way too late already or you have several more weeks ending on which upside your argument we have set. But when I told the judge was that he had several more weeks which would be accurate under Brookshire interpretations of the rules. Under the Kelly, Kelly rules that file the notice runs from the judgment, file a motion for new trial afterward, extend it to 90 days, and I don't-- is it-- how many file motion for new trial after it didn't matter whether to good one or bad one or with leave or without leave that would be extended for 90 days.

JUDGE: It, It has to be a timely motion but we do not dispute that the pre-judgment motion for new trial triggered the 90-day appellant time check. And in fact, we can about this to work together, don't we?

MR. JUNG: Well, but they don't work together. If no amended motion for new trial had been file then the only question that on day 32, the trial court's plenary power would expire and yet there would be until day 90 to file a notice of appeal. They, they simply-- since one is tied of the judgment and other is tied of the overruling the motion for new trial, they don't always work together. And we think of the plenary power period as being a 105 day period but, but that's sort of sloppy thinking because it is only if a motion for new trial is overruled by operation of Law.

JUDGE: If really would it comes down to is cause here opposing counsel had the courtesy, diligence or foolishness to tell the trial judge of four judge would entered. I'm also warning a new trial if she, if she just had to said that, then there'd be no question your would be here.

MR. JUNG: The-- If, if, if her pre-judgment motion had not

included a motion for new trial, I think-- well I don't, I don't know what she was, was thinking in doing that but in any event that's what was filed ...

JUDGE: She was still what all diligent attorney's do, you know?

MR. JUNG: I want to win on this reason that reason, another reason and also any other reasons, I think I have your-- you in the future. As soon as possible, right?

JUDGE: Right, she just had, had that diligence then the motion trial after the judgment would be extended, the trial judge granted it and -

MR. JUNG: Well, I, I submit -

JUDGE: - that would be back, that would-- at this point have try the case over again and not be bothering it.

MR. JUNG: - I, I submit there were other avenues of regrets after receiving the day one order. Its very clear that this Court's decision in Moritz versus Preiss that, that whatever the timeliness or, or propriety of an amended motion for new trial after day one. The trial court had 30 days in which to be moved by certain motion or by anything else that came to jury's head to grant a new trial. So upon receiving the day one order and a minimum of motion could have been filed, and leave sought and obtained or if I'm right that one's the motion, the original motion is overruled is too late period to file amended motion. You can file the amended motion anyway, I filed motions entitled, "Things like motion for the Court to exercises plenary power." And under Moritz, anything that persuades the court to that within 30 days is-- was effective. I would have turned to point about leave and whether leave was granted. First of all, we believe that where a matter has jurisdictional consequences and if Ms. Race is right then leave has jurisdictional consequences would it affects the time on this-- the amended motion. If a matter has jurisdictional consequences the policy of District Court has been to require written order. That's true with respect to judgment it's start the appellate time table. It's true with respect to orders granting a new trial that abort the appellate time table. And so here in the absence of a written order or at a minimum, a clear and uncritical statement that is consistent only with leave having them granted. This Court should not try to be examined the record with the magnifying glass to determine what the appellate time table in, in plenary power period are going to be.

JUDGE: But in most context when where ask did a trial judge grant leave an oral order on the record granting leave is good enough.

MR. JUNG: That's is correct, your Honor. But usually it requires something that is interpretable only as the granting leave. If the Court says that in so many words we know what he meant.

JUDGE: What about docket sheet entry by signed by the judge?

MR. JUNG: A docket sheet entry even if signed by the judge is not under this Court to precedents. Leave or a rule ...

JUDGE: That's, That's correct. So why should has been a different when we require lawyer's now to specifically state their objection to a judges ruling so that judge can clearly understand what that if judge objection is, so that we don't have to try to interpret what-- whether not to judge knew what the line of questions going to be in this certain type of the case. So we don't have to speculate. Why is it any different?

MR. JUNG: I don't think it is any different and I don't think is any different from trial of judge in where instead of saying, grant sustain their overruled the judge says, move all account. You don't want particularly whether jurisdictional consequences stay. You don't

want to be trying to read between all those lines to figure out well was leave granted or leave denied which that waiving consequences turn on it.

JUDGE: And we don't want the appellate rules to be at trap though for the unwary either we'd like to try to decide matters on the merits rather than on technicalities. Legal systems should operate that way as well, of course their important exceptions to that they are requirements for presentation in time tables.

MR. JUNG: Rule 329b, in part B is partly unique because it sets the, at a different set of rules for amended motion for new trial from any other post judgment, plenary power extending motion. Under subsection E, I can file as many motion to mark If I correct the reform as I want one after another regardless of which one's said been overruled and which one's sis not. But Rule 329b, part B says, "one or more amended motion for new trial may be filed in many gives it different time table from the time table under part A for regional motion to new trial." So there, there is a policy in the rules to treat those motion differently.

JUDGE: What is the language in part B without leave of Court? What significance do that have? Sounds like in your interpretation that, that phrase could be left out and it means the same thing.

MR. JUNG: I, I think, here's why it was there. Prior to 1981, the rules said ...

JUDGE: Do you agree that it said, "With leave the Court, you're be, would be that it means the same thing?" Your position as I understand it is, it doesn't matter whether there was leave of Court granted or not.

MR. JUNG: That is correct, an amended motion does not extend of it, which has a passing ...

JUDGE: What I'm asking what's significance of that phrase and as to you in part, part B.

MR. JUNG: Because prior to 1981, the rules said, "With leave of Court," and if you have precedents from this Court saying, "Well, leave of court is mere formality." I think in 1981 the primer said, "If leave of court is a mere formality then were not going to reply anymore." And because of prior version of rules said, "With leave of court," they put without leave of court in this version of rule to reflect that the prior procedure was being change.

JUDGE: What do we do with 329b(e) that says, "The trial Court has plenary jurisdiction 30 days after all such timely filed amended motion are overruled." At here, first point is what timely filed, if it was timely filed that the Court have jurisdiction.

MR. JUNG: With all respect, your Honor. It doesn't say amended motion, it says, "After all such timely filed motion are overruled that presumably referred back to the beginning of that paragraph," words says, "If a motion for new trial is timely filed." Now the rule seems to setup a distinction between the term, motion for new trial which refers to original motions and amended motions from new trial which refers obviously to amended motions. If you look at paragraph C, in the event and original or amended motion for new trial except-- so if part E had been intended to applied to amended motions then the wording that presumably had been the same as part C. If an original or amended motion for new trial was timely filed by any party and then would say, "The end all such timely filed motion that would relate to both original and amended motions that's not how it was read." I want to turned very briefly to the issue of whether leave was granted and if a written order is not required at least unequivocal statement of intent

is required. Virtue relies essentially on three things to establish that. First, the comments in the hearing on the judgment on day zero. Of course, at that point filing a motion-- an amended motion was a matter of right there's no need for leave, there is no questions of leave. Then on the signing on day 29 of an order setting the amended motion for new trial, for a hearing was setting amended motion for new trial for hearing does not necessarily reflect leave for his file. The first questions out of the judges now at the hearing might has been, "The Counsel didn't you need leave for this motion and did I grant leave and if not borrow here." And finally, the order granting the amended motion itself is relied on in circular fashion as constitution leave for its filed. The problem with that one is that occurred outside the trial court's plenary power and so if its plenary power had expired, he couldn't reinvest himself with plenary power by taking actions after that point.

JUDGE: Hadn't been reasonable, would reasonable to concluded that maybe, the judge change his mind because it's-- there's no clear indication on what the judge really intend.

MR. JUNG: But he may have change his mind. But if he decided on day 54 to grant leave, he was to what?

JUDGE: So why is it end the consistent with the notion that he had, he did not mean when he said, go ahead with your motion for new trial a day zero. That at that time he-- well, I really was not intend to grant leave.

MR. JUNG: Well, if, if he thought he had no power to do so on day 54, I assumed he would not have granted the motion, I assumed he thought he had power as of that time. I don't know whether he thought about the issue of leave or not if he did maybe he thought, he was granting leave, maybe he thought he had previously granted leave. But he had previously granted leave then the fact he thought so on day 54 ...

JUDGE: We know at least from fact that he granted. This was judge strategy -

MR. JUNG: Yes.

JUDGE: - and he was troubled about something on the trial and want it to do it over again -

MR. JUNG: Yes.

JUDGE: - and the Texarkana Court said, No. -

MR. JUNG: As -

JUDGE: - 'Cause you don't have jurisdiction, right?

MR. JUNG: - As many court have granted Mandamus from post plenary power new trials.

JUDGE: Mr. Jung, assuming this raised his argument isn't correct and it was timely final, as timely granted. Is this problem subject to amendment?

MR. JUNG: Well, He put on-- I'm not considered that until your Honor, ask the question this morning. We do have a pending appeal from the original judgment in the Texarkana Court of Appeals, is in fact, the day 54 new trial ordered is violate. Then that appeal is from a judgment that has been vacated and is subject to dismissal assumption. So if Ms. Race were to moved to-- and she wouldn't dismiss her on appeal but to, to dismiss it on the ground that it is taken from a no longer extent judgment and the Court were to grant that motion then that would be indeed an actual remedy of Law. And does not going to happen because the Texarkana Court has already ruled that the post plenary power-- new trial ordered was a problem but they have that authority and so if they were to grant that motion ...

JUDGE: But that, that appeal is from the judgment.

MR. JUNG: That appeal is from the judgment which is under Ms. Race's theory, no longer exist.

JUDGE: Right, but, but if that, that appeal from the judgment at one point in the-- in that appeal will not be-- this judgment are already been set aside and that's just-- the appeal from judgment is arguments about the jury charge was grabbers .

MR. JUNG: But, But if the judgment has already been set aside then the Texarkana Court is without jurisdiction to consider the appeal from a judgment which has been set aside and render the interlocutory about the grant of new trial.

JUDGE: There are plenty of time when, when it was uncertain whether the judgment was filed or not, where you would protect the appealed that say, maybe its not filed.

MR. JUNG: And your Honor, I have filed a motion to dismiss my own appealed on the ground that the judgment is final and said therein, "I can't tell this is final or not, I can't risk, did not being filed." And both in case that this Court preceded this last fault that was involve. This Court has anything further that concludes matter.

JUDGE: Does the Court has anything further that concludes matter. Thank you, Counsel.

MS. RACE: Your Honors, with respect to the questions of leave. That was not an issue ever raised to the trial court in response to our motion for new trial. Ms. Goss did got a footnote with respect to how many times the Court have rejected the argument relating to the charge. Therein, she stated this ordered terminated the period for filing amended or supplemental motions for new trial under Texas suit be 329b and triggered the final 30 days. There position apparently at that time-- although it was contradicted in the response to the Court about how much time he had left was that under Rule 329b(d) with leave or without leave that was going to extent known of the Court's plenary power. Now, in expanded that footnote there was none of this was raised that the argument and I respect the Court's question earlier in-- as well as Ms. Goss's position that the trial-- if the trial court was outside of it's plenary power at that time then what difference does it make. And in truth when preparing for the Mandamus, I didn't have the transfer from the hearing on the motion for new trial because at that time we were focusing on what had happened before. But I do think leave under the right of rule is written is critical and, and whether I was diligent or foolish or whatever, what I was trying to do is tell the Court what we wanted to do. As the Court of Appeals recognized-- it was clear on the record what the intent was and the reason for including the request for the new trial was simply do to the overlapping issues that has it was our position that there wasn't the evident to support the they have submitted the case. Would I do it again, no. I will not do it campaign in motion or even a request on that.

JUDGE: Ms. Race-- Mr. Jung stays at rule 329b part E, plus only the motion and I amended the motion which here ...

MS. RACE: Exactly, and I think that the facts and the heart of this entire argument. I certainly don't read the plain language of that ruled to say that because of the partners says, "Until 30 days after all such timely filed motion are overruled." And the way I read that, I thought there were two steps, I thought you've look at that and then you go back up to number A and number B to see if our motion was timely and under D it's says, "One or more amended motions for new trial maybe filed without leave of court or any preceding forth motion for new trial's overruled and within 30 days." I thought we had leave of court,

I thought we had permission of the Court, I knew we filed it within 30 days and there we win it, in my opinion at appearing on the motion for Jayna V., the Court made a clear-- at least to me that it did not want to take that all of the matters in the new trial.

JUDGE: On it, what's the status of the appealed?

MS. RACE: It has been worth, it's right for submission.

JUDGE: And is one of those appellate points this case-- the trial did -

MS. RACE: NO.

JUDGE: - was not granted.

MS. RACE: No, as in your Honor-- in-- after listening to the last dialogue, I felt trapped once again because I want to had in perfected the appeal, I assure was going to be out with no appellate remedy but the position I'm taking is-- yes of course virtually I thought granting the motion for new trial that was all she wrote. They found the mandamus, mandamus that was filed, I thought I better perfect the appeal. The mandamus was to Texarkana, Texarkana rejected it but the, the appeal is strictly on the merits. One other thing that I would like to point out in, in the conversation this morning and I do realized there is a distinction between the appellate time table to perfect the appeal and the plenary power but I also think there is another distinction here, were talking about when the trial court-- at what point can the trial court rule on the judgment in the matter before it. And I think again this was raised as a mandamus proceeding, so there is a distinction as far as I'm concerned with when a litigant can file something and when its timely and when the trial court can act. And in this case I think the Texarkana Court tell that the trial court could not act another just in courage the court to look at their arson cases sided that says, "They would leave the Court presence." For those reason I'll ask the court to reverse the Court of Appeal ...

JUDGE: Thank you, Ms. Race.

MS. RACE: Thank you very much.

JUDGE: The cause is submitted the Court now take a brief recess.

JUDGE: All rise.