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Supreme Court of Texas.
In re Baylor Medical Center at Garland, Relator.
No. 06-0491.

September 27, 2007.

Appearances:
R. Brent Cooper, Dallas, Texas, for petitioner.
William M. Hayner Jr., Dallas, Texas, Gil L. Daley II, Dallas, Texas, for respondent.

Before:

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

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COURT ATTENDANT: All rise.
CHIEF JUSTICE JEFFERSON: Please be seated. The Court is ready to hear argument in 06-0491 In re Baylor Medical Center at Garland.
COURT ATTENDANT: May it please the Court. Mr. Cooper will present argument later, where later has reserve five minutes for rebuttal.
CHIEF JUSTICE JEFFERSON: Mr. Cooper, I'm sure you understand that we've heard a lot of argument already, and so the Court is interested in any, any new arguments that you'd like to be made and the same thing goes to the opposing counsel, who has soon has heard the argument this morning. Mister Cooper.

ORAL ARGUMENT OF R. BRENT COOPER ON BEHALF OF THE PETITIONER

MR. COOPER: And again, I was not going to go over the same issues regarding why orders grant the motion for the trials should be reviewable. What I do want to point out on couple of things is: One, we do know the reasons in this case why the new trial was granted, and number two, we know that the reason the new trial was granted was an improper and erroneous basis, and that was-- there were two jurors who testified by affidavit that they applied the beyond the reasonable doubt burden proof as opposed to the preponderance of the evidence burden proof. The affidavits truly were inadmissible and even if you count them, we still had ten jurors who decided the case on a correct basis, and we know for sure, that the is what Judge Cox decided the case on because he says, "That's incorrect; that's not why I gave you

new trial. I gave you new a trial based upon affidavits from the two jurors that said, They used the wrong standard of proof," and that's it, period. Counsel, in one of the hearings, post verdict hearings admitted that that was an improper basis to grant a new trial, so what we have here is we have both sides admitting that the new trial basis ...

JUSTICE BRISTER: But, but what we have a lot of procedural rules, and sometimes, when people don't follow those procedures, the result maybe: One, that in fact the result is unjust in the eyes of public. Each of-- why is it improper to grant one of the interest of justice, when absolutely right under that rules this can't be considered, but you know, we don't want our rules to make us a laughing stuff.

MR. COOPER: Your Honor, in this case, it wasn't granted in the interest of justice. The order that was signed by Judge Cox said, "He was granting plaintiff's motion for a new trial." No mention of interest of justice, and what he said, later on in September 29th, I believe of 2005, we clarified; He said, "The reason I signed that order was because the affidavits of those two jurors." That's it. So we know that the reason--

JUSTICE BRISTER: But normally, in other context, when the Judge says, "This is what I'm doing," and then signs an order and saying' without reasons. We affirm on basis of any reasons. Don't we?

MR. COOPER: Correct, but in this case, the Judge did afford us the specific basis for why he did signed the order, and we have that. I mean, it could not be-- I don't think anymore clear that we have in this record where Judge Cox said, "Why he was granting the motion for a new trial?" And so what we have here is a new trial granted clearly on an erroneous basis, clearly it was an abused for discretion, and the issue is, you know, can we give it to the Court of Appeals or to this Court to review. Now the Counsel has, has made a couple of arguments that aren't present in the Los Salinas case. First, they say that we do have an adequate remedy about waive of appeal, and in our brief of the merits, they said that Baylor had not sought a certification under 51.014(d) of the simple practice in Remedies Code, and we could have perhaps gotten up there by appeal that way, and therefore, we haven't shown there is no adequate basis for an appeal, or-- nor in adequate remedy about waive of an appeal. Well, when we got that, a letter was sent from my office that day or within days, two counsels saying; "Here, certify it so we can go up under 541(d)." We've not heard anything, we've received no response from them so I don't believe that their argument, that somehow we have an adequate remedy under 51.014(d), holds water when they have refuse to signed the agreement that was sent to them shortly after receiving they're free from the merits. I think the big issue in this case, though is the Porter versus Vick issue, and the question is, if the trial judge realizes that he or she has made a mistake. They still have plenary power because if, if the judgment is set aside and a new trial is granted the plenary power continues on into the future indefinitely, you know. Should the trial judge have the ability to correct a mistake that they earlier made. Now, Porter versus Vick was based on Fulton versus Finch. And I think when you go back and dig down into the history that what was applicable in Fulton versus Finch no longer applies today. Back then, in Fulton versus Finch, which I think was 1961. There were specific deadlines in Rule 329(b), and at that time, there are also terms of Court and those deadlines would have required the trial judge to get the rulings before the term of Court leader. We don't have in it. We don't have those issues anymore. We have continuous terms under 24.01(g) of the

Government code.

JUSTICE JOHNSON: So when-- so when would the trial court's power to, to reinstate that prior verdict ends, so when you get in the middle of the second trial and the trial says, "You know, I think I was wrong. Dismissed the jury. I'm re-entering that, that verdict we had two years ago." Can trey-- how long are we going to let the trial judge to carry this?

MR. COOPER: Well, I think, it has been a second verdict and probably, it's too late.

JUSTICE JOHNSON: No, middle of trial. Middle of trial -

MR. COOPER: Well -

JUSTICE JOHNSON: [inaudible]

MR. COOPER: - middle of trial is not been in the verdict. I would say they can still do it but we don't have that here. We have a situation where it's just a few months after the verdict. There has been no trial setting. The trial court clearly is within his plenary power.

JUSTICE JOHNSON: I understand that, but-- so when are we going to draw the line?

MR. COOPER: Well, I would, you know, if--

JUSTICE JOHNSON: Right now, right now it's drawn at a hundred and five days.

MR. COOPER: Correct, or 75 -

JUSTICE JOHNSON: Yeah. Right. Right. -

MR. COOPER: - depending on how you -

JUSTICE JOHNSON: - right-- and right now, we have a line drawn so when-- where do you want to move the line to?

MR. COOPER: I, I would argue that the line probably should be drawn at the time you commence the second trial.

JUSTICE JOHNSON: Why?

MR. COOPER: Because -

JUSTICE JOHNSON: Why? Why go out there?

MR. COOPER: - because before the end, why would you want to go through a trial and expend judicial resources and the resources of the parties, when the trial judge agrees that the original verdict that was rendered after the first trial should be entered. With this Court in, in Moritz versus Press, we believed, clarify the law with respect to the 329(b). If you're call on that case, it was a situation, where a plaintiff filed a motion for new trial, 35 days after the judgment have been entered, and the question was, whether or not the trial judge had the power to rule upon that motion since he was outside the deadlines in 329(b), and this Court said, "Yes, so long as the plenary power of the trial judge is in existence. It can act on the motion. It may not preserve the issue for appeal."

JUSTICE BRISTER: Why, why is it the Courts have always look at this as un-granting the motion for new trial? And it seems to me if the trial judge here had waited 328 days or whatever it was, when the judgment was reinstated. I mean, there's no rule of excessive judge, judge has to enter a judgment x-days after the jury verdict. Right?

MR. COOPER: That's correct.

JUSTICE BRISTER: So judge could wait 328 days and enter a judgment.

MR. COOPER: And I've had some that have waited a year to enter a judgment on that?

JUSTICE BRISTER: Right. And so-- and so there's no problem plenary power doing that, if we think of the second order is just paying a second entry of judgment rather than, un-granting some motion for new

trial. Is there any problem with that?

MR. COOPER: I, I don't believe there is because our view is, you would set aside to order granting a new trial, you still had that verdict. A new judgment will clearly would have to be entered on that judgment, and a time for appeal for the losing party-- which ever party it may be-- will then begin to run from the entry of the second judgment. I mean, we're sort of-- and I was thinking about this is the as preparing yesterday. We're dealing with motions for new trials, Texas has some sort of bizarre loss. One, is the voting to review an erroneous grant of a motion for new trial by appeal is somewhat restricted, but then, were going to even to more restricts the trial judge's ability to correct his own mistake when it has to do with the granting of a motion for a new trial, and, and I thought for a couple of circumstances for example; what if we have a situation where the case is tried and the trial judge believed-- and the issue is to submit the right charge, and you know, both party ask for judgment; the other party had a ask for new trial, and on the 74th day, the trial judge says: "I think, a, a, I blew it on the charge. I was wrong and he enters a new trial." On the 75th day, this Court can comes out as a [inaudible]

JUSTICE O'NEILL: Why didn't we give the Court of Appeals the first crack at that question, since they didn't have that question before?

MR. COOPER: Of course, you still have the issue on [inaudible] case, Judge. You still have the, the issue regarding whether or not, or even entitled to have appellate review of a mandamus. I mean, excuse me ...

CHIEF JUSTICE JEFFERSON: What came up-- the first case first and then give them a bracket with that other question.

MR. COOPER: That was a defensive measure that was raised, and it still would not change, I believe, the, the view of the Court of Appeals that we could not have appellate review of an order granting a motion for a new trial by mandamus which was their original ruling. The fact that we have another defense thrown out to it. I don't see if that would change that result at all.

JUSTICE O'NEILL: But that wouldn't be a jurisdictional question that could effect whether mandamus relief is available-- in terms of whether a trial court have plenary jurisdiction or not? I mean ...

MR. COOPER: I agree, and I think and I would say in this case-- in, in the Baylor case. Obviously, we have the issues that are present in Critch as far as the reviewability of an order granting a motion for a new trial. We also have to overcome the Porter versus Vick hurdle as well, and that is to show that indeed the trial judge should have the ability to set aside an order granting a motion for a new trial, so long as the trial judge has plenary power. I mean-- I guess were the other absurdities is the Los Calinas case. The Court, I guess, still could un-grant that motion for a new trial today. Why? Solely, because the reason, there was never a judgment entered in that case against the Los Calina or in favor of Los Calinas against the plaintiffs. So-- but, but in this case, we can't, under Porter versus Vick. And I think that shows that this, this rule really doesn't have a, a, a, a logical foundation to it, and could result-- I think in absurd results in I think unduly restricts the trial judges in their power, but we say the trial judges ought have broad discretion, and I agree with that. And I think, if they are going to have that broad discretion over their own orders, they ought to have a broad discretion during the entire time period that they have a plenary power.

JUSTICE GREEN: Mister, let, let me ask you. You really point to

these two cases perhaps, but, but how-- really, how wide spread is this problem? You've a bunch of trial judges out there who are doing this sort of thing that we don't know about. -

MR. COOPER: What ...

JUSTICE GREEN: - I mean, what it seems to me to be a big problem this Court needs to perhaps address?

MR. COOPER: The Porter versus Vick problem?

JUSTICE GREEN: No. I meant the new trial grant.

MR. COOPER: The new trial grant. I don't think this was going to be an issue where the, the flood gates are going to be thrown open and the courts of appeals are going have the in evaded by tons and tons of mandamuses along its lines. However, ...

JUSTICE GREEN: Yeah. The fact that the matter, they're not that many of these cases that come up.

MR. COOPER: But is that reason though to deny constitutional rights to the parties whose cases are affected by these issues?

JUSTICE GREEN: So even one case would be enough?

MR. COOPER: I think even one case-- if, if we're talking about denial of parties of their-- of the constitutional rights of trial by jury, this Court ought to afford the measure of protection for those constitutional rights given the investments that court has plaintiffs or the defendant have. In this case, there should be.

JUSTICE MEDINA: I, I don't understand completely your argument, your constitutional rights to discuss a little, little bit during the last case. You had your trial. Trial judge-- whatever reason doesn't agree with you, so you've had-- you've had your constitutional rights to have a jury trial.

MR. COOPER: So we're saying then as long as we have a jury in the box and nobody pays attention to what they say that somehow, our constitutional right to trial by jury has been met. I don't think that's the frameworks of our constitution meant. It meant to have a jury, actually, of their peers to decide the case.

JUSTICE MEDINA: And if the Judge decides differently then you have an automatic right to mandamus, I don't think they envisioned that either.

MR. COOPER: Well, I think the-- eventually, if the judge, if they-- this judge decides that for example, he disagrees with him that, essentially, you are taking away the right to a trial by a jury because if, if the--

JUSTICE MEDINA: But what happens when the appellate Court disagree and they take away the jury verdict or this Court takes away the jury verdict?

MR. COOPER: Because its based upon the fact that there's either factually or legally, for example, insufficient evidence to support that verdict because we all know that the jury's verdict must be supported by sufficient evidence, or it has to do with some error being made.

JUSTICE MEDINA: When we get back, I think to the question that justice O'Neill asked during the last, last hearing that, why can't we presume that the Judge had the reason based on the order that was presented to him by one side or the other?

MR. COOPER: And if we didn't make that presumption, Justice Medina, the question then becomes, "Did the judge had clearly abuses discretion when he entered that order?" Because again, if we're going to give the Judge unfair to discretion, if all Judge has to do when the-- a jury comes back and with the verdict that he disagrees with, even if it supported by the evidence that say, "I disagree with this

verdict." Setting aside based on the insufficiency of the evidence. I believe that is in effect of the denial of the right to trial by jury because your, your right to trial by jury depends on the dully agreement of what the trial judge seize about.

JUSTICE MEDINA: That's a good response, but it seems to have work for all of these years. Why, why should we change it now?

MR. COOPER: Well, because the problem is being brought to the court's attention at, and because I think the Court should focus on the fact that there are basic constitutional rights that are involved, and I think this Court does to have an obligation to uphold the constitution and to see that the party's basic rights are enforced in the procedures that are followed in the trials in the State of-- in the States of Texas.

JUSTICE MEDINA: No, further questions. Thank you.

CHIEF JUSTICE JEFFERSON: The Court is ready to hear the argument form the real party in interest.

COURT ATTENDANT: May it please the Court. Mr. Hayner and Mr. Daley will present arguments for the real parties in interest. Mr. Hayner will open with the first 15 minutes.

ORAL ARGUMENT OF WILLIAM M. HAYNER JR. ON BEHALF OF THE RESPONDENT

MR. HAYNER: May it please the Court. I want to address question that Justice Medina was just raising in. I think that there's a presumption-- I, I, I think I'll go step further and say, "I do believe that they are going to get their day in Court if the trial of court, there's still going to have a jury trial." So I don't think there's a denial of their constitutional right to trial. I've never interested that argument for reason Justice Medina stated, and I think also, when you think about it, they are going to get another trial here. What they're not getting is the benefit of the first judgment. That's not-- I don't think, constitutional guaranteed. So--

JUSTICE JOHNSON: You wouldn't think your right to jury trial was being a pinched upon a conductant feeling that the judge was not going-- the Judge may hold a verdict and going to try to it till they got a the defense for it.

MR. HAYNER: I, I, I certainly-- I could see that-- sure, sure, but I-- it had happened to me in, in 16 years of trying law suits but-- and, and that was another issue. This is not a-- this, this-- what they're asking you to do today benefits Baylor Hospital in very narrow way. The, the rule that, that, that complaining at affects plaintiffs just as, as, as the defendants in-intervener also, so it can be applied in any certain party. There's no compelling public interest to go and do this, and I believe also ...

JUSTICE JOHNSON: You don't-- you don't think there's compelling public interest to, to be able to tell citizens why something happened to him and the courts system?

MR. HAYNER: I, I think there that's, that's certainly there could be compelling interest for that but again, I don't think that this happens very often, your Honor. I think--

JUSTICE JOHNSON: Yeah. But if it happens one time? same question we asked last time -

MR. HAYNER: I know.

JUSTICE MEDINA: - somebody takes away ten million dollar verdict

from you. That's a tough conversation when you say, "I'm sorry, I cannot tell you why that person on the bench took your money away from you." All I can tell you is, 'it happened.' And they say, "Even its in America?" We'll say, "Well, yes, but that's the way it worked-- that's the way the cookie crumbles."

MR. HAYNER: And, and I guess my -

JUSTICE JOHNSON: That's not--

MR. HAYNER: - my response, my response to that is I wouldn't like it but I would have-- I would say to my clients that I trust the trial court. The trial Court, they have discretion here. This is, this is a, an elected jurors. That, that we have to, to believe is doing this for what he believes is right. Right? Right reasons.

JUSTICE JOHNSON: Well, everybody else accepting this case. Where, everything else, like everybody else tell why did something accepting it. Might not like it, might be a reason that was-- it was perfectly within the trial court's discretion, and that might be the answer that the trial court, I guess sustained in all of these things, but still, we might everybody else tell except for the trial court.

MR. HAYNER: I don't know why it's developed that way. I think it's a good-- it would be a good way, but the fact is, that we did give the trial court discretion.

CHIEF JUSTICE JEFFERSON: Is it true that most good judges around the state are not so sure. I mean, they say, Counsel, I'm-- it may not appear in the order but we'll have the discussion on the motion for the a new trial. I'm, I'm very concerned that I didn't submit it properly, or I think this jury was in a kind of rut. I think, maybe they're exposed to the media and, and they explained it that way, and the good ones do and those are the once generally who are re-elected, and those who are not-- don't do that-- at least sob-- subject to criticism -

MR. HAYNER: I agree with that.

CHIEF JUSTICE JEFFERSON: - on that basis.

MR. HAYNER: That's true. That is-- that this is--

JUSTICE HECHT: Is that what the Judge do in this case?

MR. HAYNER: You know, I think the Judge in this case, the Judge in this case, made a, a, statement and I think it's significant to, to understand when the statement was made. It was made after the, the new trial had been granted. It was made after the plenary power; its plenary power to expired, and it makes a statement that, that Mr. Cooper says; he says, "It was-- as based on affidavits of the jurors." Well, that maybe, that's, that's the stated reason but the, but the reason that Mr. Cooper applies to it is, is made a different the reason as I come up with on it. He could be saying: "Look, I know for fact that these affidavits that these jurors did not follow my instructions that I gave them." And based on that reason alone, he could grant a new trial. It doesn't have to mean-- it doesn't authorize the jury misconduct. You don't have to go that far and I think you have to do the whole, the whole archery-- gone archery analysis on that either, because since you have the affidavit that stated, we reach the-- we applied the wrong burden of proof. It doesn't talk about how the deliberation aspect of it which is, how do we get to the, to the point of that. It just-- it-- point blank states, we've applied the wrong burden of proof, so I don't think-- you can by pass or you, you certainly could argue that you could by pass the whole argument of that. You can't go on, on the deliberation to the jury. I don't think it goes to the deliberation of the jury. Judges saying: "This is the result that we came up with." If that's the case, then they didn't apply the right burden of proof, and they didn't follow judges'

instructions.

JUSTICE HECHT: Before the motion is granted, did the trial judge have the discussion with Counsel about why he was granting the motion or what he felt what is for ...

MR. HAYNER: No, he did not. And, and this is interesting-- without this case, like Mr. Martin's case earlier, we got a retire judge, in this case. Judge Cox, left the bench, in December of last year, and Judge Thomas, by the way has her-- heard their arguments on this case and she-- at first, decided to vacate the order of Judge Cox, and then we, we went back to had a motion for re-hearing, and she understood that, we, we've put out the law to her, but plenary power situation and she said, "You know, you're right and I don't have plenary power to do this."

JUSTICE MEDINA: What's the harm in allowing mandamus relief?

MR. HAYNER: I think you open up a-- I think that's a-- it said, "Pandora's box, well I think it is." And a lot of, lot of respects. I-- When does a judgment become final if, if a, if a judge can-- at in any point in time, if he never loses plenary power of her case? Then, I, I can see scenarios where you've got-- as long as you've got the made hired lawyer and, and, and raised issues, you can, you can keep petition on that judge, lobbying that judge, there's a lot of things which is--

JUSTICE BRISTER: You very straight forward, you have a judgment. Then you have a 105 days -

MR. HAYNER: All right.

JUSTICE BRISTER: - but if you have a new trial, you don't have a judgment, and you're right. If you have a new trial, it could last for a hundred years. We try not to do that, so what's the plenary power problem in this case?

MR. HAYNER: Well, I guess, I guess, where I'm, where I'm coming from on that is, is that if a pathologic-- they're saying once the new trials granted, there is no more judgment. There's no judgment to, to apply to the plenary-- the, the time line to, correct? But it same talking then why is he-- what judge, is he come and appearing, complaining about then?

JUSTICE BRISTER: The entered the second judgment.

MR. HAYNER: Okay. And, and I've heard you when you missed that earlier, I don't-- I haven't had change the thing about that through, I really can't. I'm at feet, right now.

JUSTICE BRISTER: The whole, the whole reason for the fake was, if you think of this is undoing the new trial, then we go back to that judgment and your appellants time's run, and of course, you can't appeal. But the logical flow in there, is you don't undo orders, you just enter a new one. So you have a judgment; a new trial and a judgment, and your time runs with the new judgment. There's no plenary powers problems, there's no appeal problems. Everything works fine, other than that, there's no plenary power problem in this case, is there?

MR. HAYNER: I, I guess not, your Honor. I, I, I don't know if that see it exactly that way but, but, but I see your point.

JUSTICE BRISTER: Well, it's not what are-- it's not what Porter and Vick says.

MR. HAYNER: That was--

JUSTICE BRISTER: I don't blame you for seeing it the way we've said it was before.

MR. HAYNER: But--

JUSTICE JOHNSON: Porter versus Vick, it's a second orders of void.

You will still ...

MR. HAYNER: It would be a lot mandamus in that situation. That's one situation where mandamus has been granted is where, is where you got a void order.

JUSTICE JOHNSON: But if they're void we still go back to the same question of character. Should we or should we not be able to review the order-- original order of granting new trial. We just go-- we're back in the same place as we're on that prior case if, if we stick with the current law as to the second order. Is that your view? If the second orders are void -

MR. HAYNER: Uhuh.

JUSTICE JOHNSON: - the good order is the one granting the new trial that Judge Cox talked about considering the jury affidavits, and that's what we look out on mandamus.

JUSTICE: Mister?

JUSTICE JOHNSON: Is that correct?

MR. HAYNER: I think so.

JUSTICE JOHNSON: Would you address counsel's argument about writing you a letter, an act of the adequacy of a remedy by appeal in this case. Since it's a contingent remedy and let's say for example, we're remanded, so he can write you another letter, and so we're going to see this back on mandamus where-- or we're going to see that on appeal because you don't offer in your brief saying "Look, if he wants an appeal, I will, will agree to an appeal." You just say, "He has an adequate remedy by appeal." Yet ...

MR. HAYNER: Well, he had, he had-- he' only asked for and he didn't. I think until we raised issue and pointed out to him.

JUSTICE JOHNSON: So if this must be mandamus, were to be dismissed without prejudice or, or remanded so he could write you a letter, are you telling the Court this point that you're willing to say, "All right. Let's go up and appeal with it."

MR. HAYNER: Wouldn't-- No. I'm not afraid to say it. No. I'm not afraid to say that.

JUSTICE JOHNSON: So you're really or he doesn't have a right to appeal. He has only a contingent appeal.

MR. HAYNER: He's a right to ask for it, and, and--

JUSTICE JOHNSON: But ...

MR. HAYNER: - Yes, that's true. That's true. Again, though, I think that ...

JUSTICE HETCH: Could I ask you about the order? Just to be clear about it. It's very short. Let's just say the motion is granted, and then-- and doesn't refer to the interest of justice or anything else, so ...

MR. HAYNER: It does not, and, and I think what else is important is, is that our, our-- the reason does the new trial had expired by the operation of law, so when he refers to it as plaintiff's motion. In effect, I really-- he's really signing in his own motion because I-- if our' expired, I don't think that he could be signing our order, so I think in effect here, he was signing his own order because it was I think in 81st day or something that when, when he asked to signed, ours is expired by law, our motion for new trial had ...

JUSTICE HETCH: So you don't-- do you think or not-- I'm just wondering-- he confined himself to the reasons that were raised by, I, I think three motions, which file?

MR. HAYNER: The-- in reaching its conclusions?

JUSTICE HETCH: Yeah.

MR. HAYNER: I, I think, I think he told us why he, he reached the

decision he did, based it on the jury's affidavits. Well, we don't know is, what he meant by that statement, that's the problem. That statement can be read-- interpreted in several different ways, and that's the way I see this is that he could be saying, "Look, this people didn't apply the right standard of proof." It was a fully kept secret that the court has the wrong burden of proof will applied. That's why we sent out the affidavits in the first place. In fact, the jurors confirm to us that they'd applied the wrong burden of proof, and so we send out affidavits to see if we can get signatures on him and we only got two back, but there were in effect, we believed more than that-- we know more than that, and that was a fully kept secret the Court has. I don't know but it just catch you that or not, but I think that, that based on those two affidavits alone, he, he knows he's got enough up there to know that the wrong burden of proof was applied in this trial then they didn't follow those instructions. They truly state instructions that if you don't follow my instructions, it can result on a new trial, and it could be-- I think he even says, it could be jury misconduct by, by not following his instructions.

CHIEF JUSTICE JEFFERSON: You're not allowed to-- I thought the Rule 607 or somewhere around there says, "You can't do that. You can't inquire to the-- into what do they impart of correct burden or not?"

MR. HAYNER: That, that in the, in the-- when we talk to the jury at the, at the--

CHIEF JUSTICE JEFFERSON: You can't-- an affidavit like this can't be used for any purpose and ...

MR. HAYNER: It's not inadmissible. I don't believe. We, we submitted the affidavit-- we're weren't have submitted the affidavit for-- because of the time there is a reason they back from beyond the list with controlling. And in that case, we wanted to show that the trials how we contested. We had two defending jurors affidavits we wanted to show to prove that there was a high contested trial that this-- the Courts got and, and, and reverse its holding or, or change its holding and, and re-stated. It doesn't help our case anymore, but the time it did, and that's why we, why we submitted the affidavit. They weren't-- they would not have been admissible, your Honor.

CHIEF JUSTICE JEFFERSON: Upon inquiry into the validity of a verdict, the juror may not testify as to any matter or statement occurring during the jury's deliberation as to the effect of anything on any jurors mind or motion to admit some processes and influencing any jurors ascent to or descent from the verdict or inditement. So I just don't understand how it was proper to obtain those affidavits anyway or even having obtain them to use them in a proceeding to attempts to get the trial court to grant a new trial. I just don't understand.

MR. HAYNER: Well, I, I, I can't-- maybe we were wrong to say and I don't think why we didn't inquire, we were asking why they apply the wrong standard, we didn't ask them why. 'Cause if we ask them, what burden of proof did you apply, and we knew-- because we knew that in, that there were several had applied the wrong burden of proof.

JUSTICE JOHNSON: So-- but if, if he's entitled to consider those, then it seems like the opposing counsel needs to go out and subpoena all the jurors, and so we can get back in the same thing we had before the change the rule, and that is after every trial, you get all the jurors and examine, I mean, all. If he can consider the-- your affidavits shouldn't be able to-- should the opposing counsel be able to do the same thing to counter those affidavit.

MR. HAYNER: I, I, I don't-- I didn't say that they could not. I

don't-- I think they should. I guess they -

JUSTICE JOHNSON: Okay. So ...

MR. HAYNER: - I mean, I, I, I guess they should. I don't know. I, I, I think that, that they certainly object our affidavits. Timely, when we file them and you know, I've made that argument in that reason that they waived that, they waived that argument, but Moritz allows the Judge to, to consider the affidavits that were filed. Now, whether it was proper for us to go and get that affidavits begin with, I don't know if ...

CHIEF JUSTICE JEFFERSON: Who does know, have that the Judge to consider those affidavits. As I read it and they were ...

MR. HAYNER: Well, I think that the Moritz case maybe I'm reading too much into it, but I, I think that he doesn't have to be very admissible, your Honor, but I think that he can consider anything that comes basically anything that comes before him-- he can consider it, and if this making his decision, I don't think it is necessary inadmissible.

JUSTICE WAINWRIGHT: Did the jury-- did the jury charge set out standards for the -

MR. HAYNER: Yes.

JUSTICE WAINWRIGHT: - jurors to apply?

MR. HAYNER: Yes. And I, and I ...

JUSTICE WAINWRIGHT: And what conceivable thing could've led them to think of an applied difference?

MR. HAYNER: I have asked that question to myself a lot--

JUSTICE WAINWRIGHT: No. I've even mention that wrong standard during trial that you recall?

MR. HAYNER: Didn't I mention the wrong--

JUSTICE WAINWRIGHT: - wrong standard.

MR. HAYNER: I know that, when I talked to jury on by that--

JUSTICE: His watching too much television probably.

MR. HAYNER: I, I don't know but I, I've asked myself this question many times because I, I, I wont go back to make sure I'll ask you all after we file excessive. Didn't I tell that the burden of proof and all that? Maybe I did whenever [inaudible] and when I'm with them, I want to-- again ...

CHIEF JUSTICE JEFFERSON: You're-- entering your co-counsels inside -

MR. HAYNER: I want to sit down-- and now, and let Mr. Daley speak to you all. Thank you very much for time.

MR. DALEY: May it please the Court, Counsel. Obviously, what happened here, your Honors, is the Jurors apply the wrong standard of proof, and I believed that if a new trial could not be granted under those circumstances, we would be looked upon and say, 'Laughing starts,' because the jurors could watch 'CSI,' and learn that they can apply beyond the reasonable doubt in any court case. Only, the Lord knows why they did it in this case. We told them in [inaudible] opening, and I believe in closing is the opposing counsel did what the standard of proof was. It was written, of course, in the jury charge that it should have been, and I believed that trial judges ought to have discretion when they know that jurors have applied the wrong burden of proof. The burden applies to the criminal case, and the Law says ...

JUSTICE WILLETT: So those affidavits form kind of a the some total of the basis of your motion for new trial?

MR. DALEY: No, your Honor. We also had another couple of issues with a witness, the key medical witness, Dr. Motta, the trigger

including the deposition-- video deposition of him being played which was came out after he came live and testified in most of the day, and also with respect to us not being allowed to call him on rebuttal.

JUSTICE WILLETT: But the burden of proof issue was the predominant issue underlying the motion.

MR. DALEY: That was in another key issue, your Honor, had to deal with the allowing of evidence of collateral source, specifically in insurance benefits to come in the play of trial which is inadmissible as a matter of law. We didn't know obviously, why Judge Cox granted the order when he granted it, and I would argue that once plenary power was extinguished, and once the order was asylum, as to his reasons for granting the new trial, then, you looked at our motion as you're asking, your Honor, and see if there's anything that could uphold that. These comments that he made were on September 29, three weeks before we were going to go to trial sect of time. Mr. Cooper told you earlier that we weren't set of trial, that was not true. We were only three weeks away, the issue was, that under the Hersh versus Hendley case, as our first issue in the motion for a new trial that new and independent cause instruction. They had no expert testimony to prove the reason Judge Cox stated on the record he submitted that instruction to the jury. That case states back to 1981, it's a case Mr. Cooper was involved in another forth order of Court of Appeals, and they say specifically that specially on a medical malpractice case when there's no expert testimony to support a new and independent cause instruction, you're going to get the whole issue of approximate cause be fuddled. The jury's cannot be the fuddled and I don't understand what to do in that circumstance. That's the way I read the case. I think that's what happened in that case, I think, the Jurors were confused in our case by this supposed of event that happened a month after our claimed that Miss Williams, became hypoxic due to Baylor's negligence. She was at a subsequent facility on a respirator a month later, and they're claiming that one document showed that her autosets went to a dangerously low level for a brief period of time. Then that must have cost her hypoxic brain injury. Therefore, a new and independent cost should be submitted, and that was their argument, and Judge Cox stated on the record that's why he submitted it. However, they had no expert come and testify of all the retained experts that they had. None came to trial. They relied upon Dr. Motta, the training phalmanologist, and he never addressed that issue. They only got that in from a medical record that was entered into evidence, and then, arguing that that's what it cause that without any proof from any -

JUSTICE WILLETT: Let me ask you -

MR. DALEY: - qualified expert.

JUSTICE WILLETT: - a hypothetical-- just a hypothetical question. If your motion have been completely totally based on the affidavits you obtained about the improper burden of proof applied. If those were improperly obtained, if they were then improperly considered and relied upon by the trial court judge in granting that motion. If was the same total of your motion, talked to justice, I'm granting your motion. Are you saying the fact decision is immune from appellate review? even if there's a demonstrably improper basis for the new trial order.

MR. DALEY: Your Honor, I believe in our case that is the current state of the law, and it's been that way since at least 1870 that the trial judge does have a broad discretion to grant a new trial. If it rises ...

JUSTICE WILLETT: If it's demonstrably true that you relied upon an improper--

MR. DALEY: If it is a clear abuse of discretion, your Honor, I believe that' subject to appellate review in case there are questions.

CHIEF JUSTICE JEFFERSON: No, further questions. Thank you, Counsel.

MR. DALEY: Thank you.

REBUTTAL ARGUMENT OF R. BRENT COOPER ON BEHALF OF PETITIONER

MR. COOPER: I'd like to address three or four things very quickly. First of, the trial judge specifically said, "He wasn't granting the new trial based upon on the new and independent cause instruction."

JUSTICE O'NEILL: What if it have been proper? What if, what if the new and independent cause and instruction was improper? Hold on -

MR. COOPER: Sure.

JUSTICE O'NEILL: - let me finish my question. It had been a basis of the motion for a new trial, and he said that I'm grounded on ground two, not ground four. Could we not consider that ground in determining whether you properly granted the motion. I mean, we could in summary judgment and even if we could in have summary judgment, why should we not able to do that here if we grant the entire motion?

MR. COOPER: Whether or not there is an independent basis for affirming the, the judgment. Is that what we're talking about?

JUSTICE O'NEILL: The new trial motion.

MR. COOPER: The new trial?

JUSTICE O'NEILL: The five grounds raised for new trial motion. One of them is a new and independent cause instruction of trial. What if it was wrong that the trial and the trial court probably grants the motion for summary-- I mean, motion for new trial-- new and independent cause instruction having been one of the grounds for it.

MR. COOPER: Right.

JUSTICE O'NEILL: All Right. Why, why would we reversed that if it was ...

MR. COOPER: I think, first of, the new and independent cause instruction was supported by the evidence, and it was improper, and second -

JUSTICE O'NEILL: When was it-- my question was what if it would be improper?

MR. COOPER: - second, I believe that in, in the review of most cases that I've seen with respect to motions for new trial, the focused is on the basis that the trial court granted.

JUSTICE O'NEILL: And my question is: Why should that be, if you grants for whole motion, and didn't signed the order are granted as to acts, but--

MR. COOPER: But he the grants the whole motion, then I think you can consider any-- I, I, I'm sorry, I misunderstood your question.

JUSTICE O'NEILL: That's my question.

MR. COOPER: If you says, "Plaintiffs motion for new trial is granted."

JUSTICE O'NEILL: Which you did in this case?

MR. COOPER: I think he came back and clarify it.

JUSTICE O'NEILL: The order says, "Granted."

MR. COOPER: But then, it came back in-- I mean, we, we-- I think that we had--

JUSTICE O'NEILL: Why should it be any different in summary

judgment procedure than it should be here.

MR. COOPER: Well, I think if he says, "I grant the entire motion for new trial," I think, "the Court can looked in all the grounds." I think, however, if the Court does specify the grounds like he did in this case ...

JUSTICE O'NEILL: Orally. Not -

MR. COOPER: Orally, but it's in the record.

JUSTICE O'NEILL: Summary judgment-- five grounds for summary judgment.

MR. COOPER: Correct.

JUSTICE O'NEILL: I'm granted on ground 'A.' I mean, I signed an order that says, "Summary judgment granted." I tell you in open Court, I'm granted on 'A.' You're telling us that we can't looked at B, C, D, E and F to see if they're proper. I mean the law is, we have to look out this.

MR. COOPER: An independent grounds for affirming a judgment, I think, that would be true, with respect to the summary judgment. I am not sure if that it has ever been applied with respect to orders for new trial.

JUSTICE O'NEILL: But my-- and my question is, "Why not? Is there are reason why not?"

MR. COOPER: Well, because the Judge, I guess, didn't believe that the plaintiffs-- that the trial was tainted or affected by the other grounds and did not employ them as an independent basis.

JUSTICE O'NEILL: What difference does it make if there's other grounds would support, and if we going to reverse it on the independent-- new and independent cause, there's error in the record, presumably, that's the case. Why would-- why wouldn't be able to consider that as a grounds for the new trial motion?

MR. COOPER: Because in summary judgment, you're looking at legal matters, what's there in the records. Again, it's been said earlier, with respect to new trial matters, there maybe many issues that are absurd by the trial judge ...

JUSTICE O'NEILL: That would my-- hypothetically.

MR. COOPER: Okay. I'm sorry, I'm trying to answer your questions, Judge. I believe that again, I've always said, "The trial judge would have discretion." And the question is, "Was there an abuse of discretion?" And I think if the trial court has exercised his discretion to overrule certain grounds that could be reviewed, but I think it would have to be reviewed under the same abuse of discretion expense. That's what I'm saying. Okay.

JUSTICE O'NEILL: It doesn't answer my question you point to ...

MR. COOPER: I think-- I think the Court could review it, but we have to review it under the same ...

JUSTICE O'NEILL: But it -

MR. COOPER: Was the ...

JUSTICE O'NEILL: - I'm not going to keep you in this, but if, if the new and independent cause instruction is error as a matter of law -

MR. COOPER: Yeah.

JUSTICE O'NEILL: - Right. So one of five grounds to the motion for the new trial -

MR. COOPER: I think they could--

JUSTICE O'NEILL: - the trial court grants the order. The trial court says, "I'm not doing it on that ground; I'm doing it on another ground." You're saying our view would be limited to that other grant.

MR. COOPER: No. I'm saying the Court could review some other grounds under the same abused of discretion standard, and the question

was that the trial court abused its discretion in denying the grounds. It's all I'm saying; "You could do it but its under the same under abused discretion standard." Couple of things: One, Moritz versus Preiss, if the trial-- he said, "If the motion for new trial was overrule by operation of law, the trial court-- court couldn't grant." Not true, the trial court has 205 days to sign a motion for new trial, even if its overrule by operation of law, Moritz could not involve late filed affidavits of jurors with respect to the middle processes as it had to do with the juror who'd been convicted for hot check, and whether or not, she was qualified to serve as a juror in that case, and the Court said, "They could consider the late filed affidavits even after the 30 days." In conclusion, both with respect to this case, and the Creatch case we believe that the basis of trial court to grant a new trial is, is a matter of law, incorrect in urge this Court to a mandamus, order the trial judge to vacate the new trial order in any judgment upon the court.

CHIEF JUSTICE JEFFERSON: Thank you, Counsel. The case are submitted, and that concludes arguments for the morning, the martial will adjourned the Court.

COURT ATTENDANT: All rise. Oyez. Oyez. Oyez. The Honorable-- The Supreme Court of Texas now stands adjourn.

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