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Supreme Court of Texas.
In Re: Department of Family and Protective Services.
No. 08-0524.

November 12, 2008.

Appearances:

Sandra D. Hachem, Harris County Attorney's Office, Houston, TX,
Relator.

Douglas Ray York, Pavlas, Brown & York, LLP, Houston, TX, for Real
Party in Interest.

Before:

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

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CHIEF JUSTICE JEFFERSON: Court is ready to hear argument now in
08-0524, In re: Department of Family and Protective Services.

SPEAKER: May it please the Court. Ms. Hachem will present argument
for relator. Relator has reserved five minutes for rebuttal.

ORAL ARGUMENT OF SANDRA D. HACHEM ON BEHALF OF THE PETITIONER

MS. HACHEM: The case concerns the effect of a new trial order on
the timeliness of a final order under Section 263.401 of the Family
Code. The appellate court below held that the trial court's decision to
grant the parents a new trial after rendering a timely final order --

JUSTICE HECHT: I'm sorry. I'm sorry to interrupt you. If someone
could close the door. Thank you. CHIEF JUSTICE JEFFERSON: Go ahead,
Counsel.

MS. HACHEM: The appellate court below held that the trial court's
decision to grant the parent a new trial after rendering a timely final
order before the dismissal deadline resulted in nullifying the effect
of the court's timely rendered final order and without a timely final
order, the court --

JUSTICE BRISTER: You're going to have to speak up.

MS. HACHEM: Oh, I'm sorry.

CHIEF JUSTICE JEFFERSON: Let's -- if we can have the marshal go
outside and get security to quiet everyone down, please. And if -- in
the meantime, if you can -- I think we're good. Go ahead, Counsel.

Sorry about that.

MS. HACHEM: Okay. All right. I'll try one more time.

CHIEF JUSTICE JEFFERSON: Take your time. We didn't -- we're starting over.

MS. HACHEM: Okay. The appellate court below held that the trial court's decision to grant the parent a new trial after the trial court had rendered a timely final order under Section 263.401 resulted in nullifying the effect of the court's timely final order, and without a timely final order, mandated the trial court to dismiss the case under Section 263.401. In my time before the court, I'd like to explain why this holding is wrong.

There's three primary reasons. One, it misconstrues the effect of a new trial order to void a timely rendered final order when this Court clarified in Baylor Medical Center at Garland that a new trial does not void the prior final order. Second, the appellate court's construction of Section 263.401 does not comport with the rules of co-construction under the co-construction act. Third, it violates the benefit of the judgment doctrine to permit a parent to treat a new trial order that they requested as both right and wrong.

Going back to my first reason --

JUSTICE HECHT: Let me interrupt you there. Do you agree with the dissent in the Court of Appeals?

MS. HACHEM: No.

JUSTICE HECHT: Because the argument there was the mother should have moved before the deadline, right?

MS. HACHEM: Yes. Well, basically, the dissent's position is that the deadline is a jurisdictional deadline and that if you wanted to get a new trial, it would have to be before the one year ran up. Yes. And I don't think that that's a correct construction because I don't think that this game is jurisdictional.

First of all, it seems to me what the legislature truly intended was to invoke a DWOP docket because if you're familiar with what was going on before this act was enacted there was a concern that there was a lot of children in foster care, the most of them were in foster care because the department wasn't going forward on its termination proceedings. It was just, would pick up the child, and then, you know, keep the child in care and wouldn't go forward on its pleadings. So the legislature wanted to have some type of mechanism to force the department to do something. So it began this scheme.

So I don't think its intent was that. Plus, if that is what its intent, that would really be a bad thing for children because it would mean that as a jurisdictional bar it could be brought up at any time. Even when the child is adopted, I don't think the legislature would've envisioned such a scheme to have been created that would cause such havoc in children's lives.

JUSTICE WAINWRIGHT: You, I'm sure, agree with the legislature's intent in passing the statute's expediting -- well, encouraging expedition of these procedures that affect the situations of -- of children. And our Court has said that that's important and we need to get final resolution as quickly as we can within reason considering the rights of the parents as well as the best interest of the children.

The statute at issue says that you've got to get a final resolution done fairly quickly. You got to get a trial within a year or you can add six months to it if certain findings remain. Would allowing -- what would you say to the argument that allowing a motion for a new trial to be granted resets that whole time period again and may end up doubling the statutory required period -- deadline period rather than

expediting a resolution for the child?

MS. HACHEM: Well, the legislature obviously intended there to be a new trial considered because, you know, the legislature understands --

JUSTICE WAINWRIGHT: A motion for new trial are mentioned and --

MS. HACHEM: Right, in 263.405.

JUSTICE WAINWRIGHT: --recognize can be used in this situation [inaudible].

MS. HACHEM: Right. Right. And yes, it does. It could, conceivably, just as appeals can. I mean, I -- I do appeals in these types of cases. This is the primary type case I do. All of my appeals are accelerated that's why I'm on medication now.

JUSTICE WAINWRIGHT: Thankfully, you didn't say it's because you're coming to see us.

MS. HACHEM: No. But, you know, because they're accelerated that they're supposed to go fast but as we all know, even in the appeal process, legislature hasn't closed up all those gaps. It understands two things.

See, we have children in the system and we need it to go fast so they wanted to force the department's hands to go forward. They didn't want to create a system where the judicial body can't do its job because its decision still needs to be right. So, if you take away from the trial judge the ability to grant a new trial that may avoid problems on appeal then that's a problem too.

JUSTICE HECHT: All right. So if you're right that the trial judge rendered an order so that -- so we met the deadline, then granted a new trial, now what? Now, how long does he have to try the case?

MS. HACHEM: Well, the legislature hasn't addressed that just like-

JUSTICE HECHT: Just to have an extra 180 days.

MS. HACHEM: Well, the legislature hasn't addressed that just like it hasn't on appeals. It says right now in appeals there's supposed to be decided with the least possible delay but I've had appeals that have been delayed for four years.

JUSTICE HECHT: Now, it says, the court -- to me, it's pretty clear under (b) the court may not retain the suit on the court's docket after the deadline unless the court finds this and so.

MS. HACHEM: Well, after the final order is rendered. In this case, the final order is defined under subpart (d) and that final order is adjudication as to -- as to what happened in this case, which was termination of her parental rights and appointment of the department as conservator. So the final order was rendered and it was within in that 180 days, it was actually before that 180 days. It was within a year. So we had a final order. So subpart (b) is referring to the timeframe of (a) which is the final order which we got in this case.

JUSTICE HECHT: Subpart (b) is referring to the time described by subsection (a); in that, the first Monday after the first anniversary of the date of which the temporary order [inaudible].

MS. HACHEM: Right. Subpart (b) is an extension. If you didn't meet (a), you can't have an extension under (b) if you want to go beyond the one-year deadline.

In this case we met the one-year deadline.

JUSTICE HECHT: I know.

MS. HACHEM: Correct.

JUSTICE HECHT: But then it says -- then (b) adds to that, it says, "but in any event, you can't keep it for more than 180 days unless you [inaudible]."

MS. HACHEM: But it's referring to an extension order. Its clear

intent is to provide for an extension order that you can have for 180 days.

JUSTICE HECHT: Looks to me like a motion -- an order granting new trial is an extension order.

MS. HACHEM: Well, I don't agree because, first of all, if this Court's opinion in Baylor is correct and you can ungrant a new trial order then that means that if this -- if you put the trial judge in this position, it can ungrant it today. And then we would have that final order that was within one year.

So I don't think that that's what this Court would want to do because it'll force the judge to do that because the judge did find that this mother had committed indecency with the child, had not complied with the court order, and had endangered the child when the court signed its termination order. I don't think the judge is going to let any court, let this child be put in jeopardy. So if this Court makes that decision --

JUSTICE HECHT: Well, but he didn't though. It just --

MS. HACHEM: At least, that's what's going to occur.

JUSTICE HECHT: I don't understand that. It looks to me like, (b) says, if you don't do what you should have done in (a), you got 180 days or even if you did, you got another 180 days to fix it. And --

MS. HACHEM: Well, I don't agree with that interpretation.

JUSTICE HECHT: But the mother has to object and she --

MS. HACHEM: I'm sorry?

JUSTICE HECHT: The mother didn't object. She didn't ask for a judgment to be rendered within the 180 days, right?

MS. HACHEM: No.

JUSTICE HECHT: So she's right then.

MS. HACHEM: Correct. Correct. But in addition to that, if it was true that you had to have the new trial within 180 days, then what about all these appellate courts that are remanding for a new trial? They're ordering the trial court to have a new trial. So, if what you're saying is true, in any event, you can only have a trial within 180 days at that prior, that would make no sense.

JUSTICE HECHT: No, I'm just saying that the trial court can't keep the case longer than 18 months.

MS. HACHEM: Well, the trial court obviously does get to keep these cases more than 18 months because I've had a lot of appeal who were got remanded and they kept it a lot longer because of the remand

JUSTICE BRISTER: Well, somebody -- somebody needs to do something about that.

MS. HACHEM: Well, I would agree that there is a lot of gaps in this system. But certainly, the child shouldn't suffer as a result of that -- of an interpretation that going to put it in jeopardy.

JUSTICE BRISTER: But the -- the whole point of the statute was, for the legislature telling the courts, "We think the child suffered more from y'all dilly-dallying than it is from whether you make the right or wrong decision." That may be right or that may be wrong but that's -- when they put an absolute deadline in there, that's when they did it.

MS. HACHEM: Well, I do --

JUSTICE BRISTER: Recognize that in [inaudible] --

MS. HACHEM: I think we all recognize there's a problem in delay in children's lives. And of course, the suggestion in this -- by my opposition that all we need to do here is just let the department refile is going to cause even more delay. Because if we were to refile, we have to have service plan within 45 days, we have to have another

review within 60 days, we have to go through all the procedures again. I don't think that that would have been what the legislature ever intended this scheme to create. This scheme was created to let there be quick and just resolution for the child. And it was never intended to be created so that a child that's truly in jeopardy is not going to get the merits of its case met because a parent takes advantage of the rules and files a motion for a new trial, waits more than 75 days, and then says, "Oh, dismiss the case."

JUSTICE BRISTER: But then all of -- all of that could have been taken care of here. The only problem was, nobody said anything when the trial judge set the case, granted a new trial, we could still do all of that. But the trial set the trial for a year off.

MS. HACHEM: Right. Well, when we first met in December --

JUSTICE BRISTER: Why didn't somebody -- why didn't somebody say, let's do that a little faster?

MS. HACHEM: When -- yeah -- when we first met in December, they -- they weren't ready to go forward, so we didn't go forward. That was reset to April, and then before the April deadline is when he filed the motion to dismiss. And at that time, the parents' attorney also filed a request that the trial be reset to June, which of course we haven't even had now. So --

CHIEF JUSTICE JEFFERSON: Well, let me -- let me be kind of the advocate for the hypothetical parents' association in Texas. And they go and testify before the legislature and they say, "Look, the FBS is taking away way too many kids when there are really no -- there's really no endangerment to the kids. The parents have done nothing wrong; maybe they're not perfect parents but it's more based on economics or some other irrelevant factor. And we need to do something about it because these kids are away from their homes for entirely too long. And we need to encourage, or demand, or compel the FBS to resolve these matters on expedited basis." And this is the testimony that legislature is hearing. They're saying this is more problem than -- because they know what to do when there is real abuse in the home. They take those -- them out and those cases are fine. So can you write a statute that encourages that sort of expedited behavior on the party -- and really with a penalty if they don't meet those deadlines? Can't we kind of look at this statute that way and say, what the court of appeals had held here was absolutely correct?

MS. HACHEM: I don't think so. Especially when in this case, the -- like the judgment was entered chose that there was an indecency with the child conviction. There was a --

CHIEF JUSTICE JEFFERSON: Well, okay. But I'm talking about, you know -- we're writing not just on this case. What I'm -- we're trying to interpret this for all cases, and trying to understand what the legislature meant. Was this just like you say, a DWOP type of situation? It's seem like it's more -- it's got more meat to it than that. So if there's a policy decision that the legislature made that the FBS is overplaying its hand. Should we take that into account in interpreting this statute?

MS. HACHEM: Well, certainly, the department did not over play its hand here in having the trial with anyone here --

CHIEF JUSTICE JEFFERSON: I'm not talking about this case. I'm talking about in general terms -- you know, you were just saying we got to protect the children. I understand that. And I think the court has got -- always has that in mind. We got a permanent commission, and that's part of its mandate. But what I am asking is, if there was a legislative determination that the children are -- they're being harmed

because they're being taken out of loving homes, when there is no real evidence of any kind of endangerment. And so we're going to write a statute that makes them do this process quicker than they've been doing.

MS. HACHEM: Okay. Well, you're really talking about two issues. One, a child that's being taken out of home where there is no basis, which as this Court knows, mandamus is available to challenge any decision. The second is that it's taking too long. And those are really two separate issues. The reason it's taking too long is not always because --

CHIEF JUSTICE JEFFERSON: Well, part of the statute says -- I mean, part of the purpose is reuniting children with their families if that could be done, right? And it's an endangering situation, maybe not physical endangerment but it's better for kids to be with their parents than not, under everything else being equal. So I'm not sure I agree with the -- the first part of your answer. But go ahead.

MS. HACHEM: Well, if you know -- I guess if I had a perfect world where I could do whatever I wanted and could make things really fast, what I would want is to have a trial that was quick but then also maybe had the creation of an appellate court just for that purpose so that we could get through the system really quickly. We don't have that right now. The appellate courts have to take us with all the other cases and everyone does the best they can but it just takes time. And yes, everyone is suffering during that time. The foster parents are trying to --

JUSTICE O'NEILL: But it seems to me that the legislature made a policy choice here. And they say we're not going into an individual case-by-case determination as to what the merits are. If it's not done by this day, it's a drop dead date. If the trial court had heard all the evidence, said I'll take it under advisement, hadn't signed a final order until 367 days, we wouldn't be here. There'd be no argument. It would go away regardless of the merits. And so the real question is the effect of the new trial order.

MS. HACHEM: Yes. And the Baylor case indicates that the court could ungrant that new trial today. So, obviously, it's not void. That new -- that final order is not a void order. And so I don't see how we could treat it as such, and say that it doesn't exist. And second of all, the statute itself does not say "final disposition." It could have very easily said that within a year, you have to get final disposition. It said you render a final order. And a rendition could be orally before the court reporter. And we also know that legislature must know that when a court renders an order, there's judicial process thereafter where a court can redecide its decision, modify its decision, do anything. I see that I've run out of time. If you have any other questions, I'll answer in my rebuttal.

CHIEF JUSTICE JEFFERSON: Any further questions? Thank you, Counsel.

The Court is ready to hear argument from the real party in interest.

SPEAKER: May it please the Court. Mr. York will present argument for the real party in interest.

ORAL ARGUMENT OF DOUGLAS RAY YORK ON BEHALF OF THE RESPONDENT

MR. YORK: Thank you, your Honors. And thank you for letting the last case be the best one.

I take exception to a few things opponent counsel had to say. First, she went on about the individual facts, being indecency with the child, but she didn't tell you that this is a case where you have a mother and father a couple of years apart from each other that resulted in a pregnancy as one of those majority -- minority age kind of thing. So that's what happened, and that was years ago. And then it fast forwarded to where CPS came in to the home after the mother -- after this incident was long gone. But that, she didn't tell you that.

What we have to turn here is on -- she focuses on, is this a final order? And it's not. Old Republic says that it's not a final order. As a matter of fact, we can wind it back. And if you give motion for new trials granted, it's granted as if the trial never occurred in the first place. If it's a final order, why are we here? If it's a final order, why is trial date set?

JUSTICE BRISTER: Is she correct that the new trial -- after the new trial was granted, it was set in December, and then she suggested you all moved for continuance?

MR. YORK: We agreed with the continuance.

JUSTICE BRISTER: Why -- why is all of these -- all of your complaints not barred by the invited error doctrine --

MR. YORK: Well --

JUSTICE BRISTER: -- as the court of appeals dissent-- suggested?

MR. YORK: I understand that, Judge. However, it's not barred by that because it would require a lot of clairvoyance on the part of my client. And let's wind back to what they said. We didn't move to dismiss before the year occurred.

JUSTICE BRISTER: No. I'm not worried about the motion to dismiss. I'm -- by the time you filed a motion for a new trial, the year was gone.

MR. YORK: Yes.

JUSTICE BRISTER: And so if you got a new trial, there was no way that a new trial could have been held within one year of filing.

MR. YORK: That is correct.

JUSTICE BRISTER: So, didn't you ask for a trial that was after the one year deadline?

MR. YORK: Well, the trial -- the trial court set a trial --

JUSTICE BRISTER: No. It would [inaudible] -- you asked for a new trial --

MR. YORK: Yes, that's correct.

JUSTICE BRISTER: -- and the divided error doctrine is as a general rule: "A litigant can't request a ruling from the court and then complain that the court committed error in giving it to him." It seems fair enough. And if you -- after the year is gone, you ask for a new trial. You have to be asking for trial after the one year deadline.

MR. YORK: Procedurally, that was the only vehicle that was available to the litigant. Procedurally, it had to be done that way. The problem is --

JUSTICE BRISTER: So the trial -- but the trial judge gave you what you wanted?

MR. YORK: The trial -- the trial judge granted a new trial.

JUSTICE BRISTER: That's what you're here complaining about?

MR. YORK: I am here complaining that the statute bars the trial and we have -- we have a problem. And that's why we're all here today is that if a new trial is granted and if old republic is correct, that is it is as if a new -- a trial never existed in the first place and

now we're outside of that year statute, and under Hollick it says that we strictly construe the statutes in favor of the parent, then --

JUSTICE BRISTER: If you -- if you were about to go to the trial before the end of the year and the parties filed an agreed continuance for a month, could you then file a motion that's -- when it's -- so now in the 13th month you're called to trial, could the defendant file a Motion to Dismiss then?

MR. YORK: I believe there's a limit on extension of labor under 263.402.

JUSTICE BRISTER: So, is that a yes or a no?

MR. YORK: I believe it to be the case that the parties can, by their -- by the statute -- by the statute waive that if all agree. But if they don't agree, you don't have that scenario.

JUSTICE BRISTER: So, the continuance -- the agreed continuances would not be a violation of the statute?

MR. YORK: No, because that was after when we complained.

JUSTICE BRISTER: But it was within 180 days? Can the parties agree to extend beyond 180 days?

MR. YORK: They cannot.

JUSTICE BRISTER: So, now let me rephrase my question. You got an extension. You at the 179 days you're called to trial. The parties agree to an extension and you get an extension for a month. Now in the 19th month, can you move to dismiss even though you agreed to the continuance?

MR. YORK: If the 180 days are about to run. Justice is that what you're --

JUSTICE BRISTER: Quite right. Correct.

MR. YORK: Then the parties and the court cannot agree. It's done.

JUSTICE BRISTER: Well, I'm just wondering what happens to the invited error doctrine. I mean, if you ask the judge to do something and it's wrong, then it's wrong. The whole idea of an invited error doctrine is it was error. But you invited it. You asked the judge to do it and we judges have a lot of things in our -- don't always keep up on all the law. And if we miss something but the parties asked us to do it, are you aware of any other area where you can ask the judge to do something and then complain on appeal that the judge did precisely what I asked them to do?

MR. YORK: Under that doctrine, I think it butts up with the statute. That is clear on its face. And it also buds up with Hollick that says you have to, we're -- we were handcuffed. We have to construe the parental termination statutes.

JUSTICE BRISTER: But invited error I'm assuming it's -- it's always error. The judge should not have done it.

MR. YORK: True.

JUSTICE BRISTER: And you're saying the judge should not have done it. And I agree. The judge should not have done it and that was error and somebody needs to say so. But if you asked them to do it, how can you then appeal from it?

MR. YORK: Then you're putting a litigant such as my client in a scenario where she cannot utilize the statutes that was designed to protect her.

JUSTICE WAINWRIGHT: All right. And, Counsel, and that's -- that's one of the complications in this statute. The same statute 263.405(b) says that the 15 days following time [inaudible] the party wished to appeal files the point which "may be combined with a Motion for New Trial." The same quote provides that the Motion for a New Trial may be granted, provided for expedited consideration no later than 30 days.

Then it provides for an expedited appeal and the Motion for New Trial does not extend the appellate deadlines. So, an absolute firm deadline a year or year and six months under 263.401 seems to be exactly what the legislature intended but the legislature also, by specifically talking about a Motions for New Trial, contemplated that they can be filed and granted.

The problem, which amicus talks about at length, your opposing counsel talks about it and you seem to recognize is, what terrain, what procedures, what time tables are we in after a Motion for New Trial is granted? And what's the effect of the first final order the statute doesn't give us, I would say, a little or no guidance on any of that. So -- so, what's the timetable, in your opinion, if the year and then the six months thereafter upon certain findings and initial proceeding don't apply post-final order, then what's our timetable? What are our procedures to follow in the land that we find ourselves in, in your case?

MR. YORK: It's an interesting case of first impression indeed, and I think the -- the timetable, if we have to look at the statute we have to follow it and say if it's done, it's done. The remedy is to dismiss, re-file with an expedited trial. That takes care of it. There's your answer.

JUSTICE WAINWRIGHT: What happens to the children if that -- if this case has to be dismissed?

MR. YORK: Sorry to interrupt you, Justice. The same thing that would happen if we set a new timetable.

JUSTICE O'NEILL: Well, but if you dismiss --

JUSTICE WAINWRIGHT: They'd go back to the parents.

MR. YORK: No. They would file an emergency. They would absolutely go file a motion to dismiss and then have an emergency hearing that same day. They do it every day. And so, that remedy is available to them if there's still an emergency that exists or there's still a reason to keep children in care. Then it's -- if it's not there at the time you have a Motion to Dismiss, it's probably not there at trial.

So, they can still have that remedy available to them.

JUSTICE O'NEILL: If you dismiss and re- file, do you have to come up with the new grounds?

MR. YORK: You do not.

JUSTICE O'NEILL: You don't?

MR. YORK: You do not.

JUSTICE O'NEILL: So if you dismiss and re-file, then you start the one year again?

MR. YORK: You start the one year time clock again.

JUSTICE O'NEILL: So, that doesn't expedite us?

MR. YORK: With an expedited trial setting, remember, the one year is the deadline. It's not the trial date. They're saying you have to have a trial before the one year or you can extend it six months after that. But, the remedy is to dismiss it. And, as you said, Justice, we're not here to determine the facts of each case as what the legislature intended. The legislature intended for speedy trial for security of these children. And if that is the intent, then we have to follow it in this direction.

JUSTICE O'NEILL: I guess what I'm saying is, let me make sure I understand. So, you'd say that if -- if -- if I'm the trial court judge and I've tried the case and beyond the statutory deadline I grant the Motion for New Trial, the better course is to dismiss the case then?

MR. YORK: I believe by the written statutes now that we have in our possession, we have no choice.

JUSTICE WAINWRIGHT: Did the trial court ever make any findings that would be a basis for extending on to the 180-day period?

MR. YORK: They did not, Justice.

JUSTICE GREEN: Did we have it at trial on the date of the dismissal or are there due process implications that would have to be gone through?

MR. YORK: No, sir. You can have -- the way that the statutes are reading now, as long as the -- they close the evidence by that time frame, then they're safe. So, the answer to your question is if the Motion for New Trial was granted, and there were some time extending, is that what I'm hearing?

JUSTICE GREEN: Well, it was -- say that the department knows this is getting ready to happen, it's going to be dismissed. So, you just, okay we're to refile serve your client in the courtrooms, and so let's just go ahead and try it again right now?

MR. YORK: Yes, sir. Yes, sir.

JUSTICE O'NEILL: But -- but from what you're telling me, if you just dismiss then they can re-file. Then you get another year and another possible six months?

MR. YORK: The statute will say deadline for a year from that time.

JUSTICE O'NEILL: But -- but that would be a huge loop hole, wouldn't it, that you could just dismiss and do another year and another year?

MR. YORK: Well, the -- that's a concern, I believe, in one of your opinions in In re: [inaudible] is that it could be used as a tool for litigation. However, look at what we have here. A new trial was granted and the trial was set off almost a year anyway. That's the reality. So, it's the same.

JUSTICE HECHT: If 180-day period was triggered, why didn't you have to move for judgment before it ended?

MR. YORK: Good question, sir, and here's why. The trial was commenced, concluded before the year's up. Nobody has a problem with that. There was no -- you would have to be clairvoyant to know what was going to be in the future to go ahead and move for that dismissal --

JUSTICE HECHT: Before the year.

MR. YORK: -- before the year.

JUSTICE HECHT: I agree with that but if -- if -- if the judgment that was rendered was rendered -- it's not done away with by the new trial -- if that's what we think. Then why didn't you have to move for judgment within 180 days after the year?

MR. YORK: Because the court never extended that 180 days. They have to extend the 180 days before the year's up or else that 180 days is gone.

JUSTICE HECHT: Well, where does it say that?

MR. YORK: I believe case law is replete with that, plus it -- it doesn't say anything to the contrary, Judge, with all due respect.

JUSTICE HECHT: Right, it just doesn't say one way or the other. But if the trial judge says, okay, new trial, 180 days -- trial within 180 days, set the trial in December and it seems to me then it was incumbent on you to set -- to move for judgment within 180 days or waive it under 402.

MR. YORK: Or file a motion to dismiss --

JUSTICE HECHT: Right, which you didn't do.

MR. YORK: -- which I didn't -- yes.

JUSTICE HECHT: Not until later. Not until after the 180 days.

MR. YORK: Well, Judge, I believe that the 180 -- well, it's my understanding that they can't even grant you the 180 days if the year

is up because you're outside of it. So it is -- it's a quandary. And there's a lot of untied ribbons here that the legislators have left it with.

JUSTICE HECHT: That's not in the statute, but you think that's in the case.

MR. YORK: Yes.

JUSTICE O'NEILL: As the trial judge here, rather than grant the new trial when you moved to dismiss they could've just said well, okay, I -- ungrant the new trial and everything will be fixed.

MR. YORK: As a remedy? Certainly.

CHIEF JUSTICE JEFFERSON: Do you have any further -- are there any further questions? Any further arguments, Counsel?

MR. YORK: No further -- nothing further, Judge. Thank you, your Honor.

CHIEF JUSTICE JEFFERSON: Thank you.

MR. YORK: Thank you for your time, your Honors.

CHIEF JUSTICE JEFFERSON: We'll hear rebuttal.

REBUTTAL ARGUMENT OF SANDRA D. HACHEM ON BEHALF OF THE PETITIONER

MS. HACHEM: On the benefits of the judgment doctrine in Matlow, it talked about its [inaudible] and the law in the State that you can't treat a matter as an end, sue for something and then -- ask for something and then ask for something totally inconsistent based on that. And -- that's exactly what happens when you ask for a new trial and then suggest on that relief that that should give you the basis for error to get dismissal. So --

JUSTICE HECHT: But the problem with that is that the statute says you -- the parties cannot extend the date.

MS. HACHEM: They can extend a date set by the court. That's what 263.402(a) says. We never had a date set by the court. We -- all we had was the one-year deadline, which we met. The final order was rendered within one year. The statute does not say we have to get a final disposition. We got final rendition. I think the legislature understood it was a rendition because it could have said, within one year you get a final disposition. It did not. So, with the rendition, the legislature obviously knew that the trial judge is going to then perform its duties in deciding whether that rendition was correct or not or whether a new trial should be granted. And that's why 263.405 was invoked. In fact the legislature wants them to decide whether a new trial should be granted to avoid the appeal because sub part (b)263.405(e) says they must conduct a hearing within 30 days to decide whether to grant a new trial. And it doesn't say it's even contingent on them filing a motion for a new trial. The legislature wants each of these cases to be decided quickly but also correctly. I don't think they intended to cause a problem of separation of powers doctrine and not allow the judicial body to do its job in coming up with correct -- especially in such an important area -- correct decisions.

JUSTICE WAINWRIGHT: Why would not your opposing counsel's proposal have gotten a quicker resolution, that is, dismiss the matter, refile. The department can get an order to continue to keep the kids if -- if the department believed that was in the best interest and the children were in danger.

MS. HACHEM: Mm-hmm.

JUSTICE WAINWRIGHT: And then you would have had the trial within a year and it might be done. What do you think with that approach?

MS. HACHEM: Well, you can refile -- according to the case law, you can refile if you have new facts. Now, say your facts -- and I just read a recent case by the Fourteenth where the facts involved the -- one of the parents killing one of the other children in the family. Well, that maybe the only facts you have. And then those -- that's the reason you're going forward with your termination. But some reason they are entitled to a new trial, maybe a procedural error -- something else that entitles them to a new trial. But in fact your facts are still facts which make jeopardy for those children. Maybe it would not support filing a new suit. But you do still have those facts. So, it's not always -- if you're going to look at it --

JUSTICE WAINWRIGHT: For new facts to refile even if --

MS. HACHEM: I'm sorry?

JUSTICE WAINWRIGHT: You say you have to have new facts to refile in the justice department --

MS. HACHEM: That's what the case law says.

JUSTICE WAINWRIGHT: -- even if the --

MS. HACHEM: I think the -- I'm sorry.

JUSTICE WAINWRIGHT: Are you saying you have to have new facts as the department to refile [inaudible] --

MS. HACHEM: Correct.

JUSTICE WAINWRIGHT: -- even if the prior dismissal was on a procedural ground?

MS. HACHEM: Correct. Correct.

JUSTICE O'NEILL: But the opposing counsel, I think, said no but --

JUSTICE WAINWRIGHT: He did.

JUSTICE O'NEILL: -- but he would be wrong on that?

MS. HACHEM: He would be wrong at least from the case law. The statute itself doesn't say that you have to have new facts. But the cases that have interpreted it said you obviously couldn't just file the same case with -- without new facts because you were required to dismiss it. So, that's what the case law says. So --

JUSTICE JOHNSON: And it's set -- are -- are those new facts as facts that occurred after the dismissal according to the case law?

MS. HACHEM: Well, the case laws which says that it has to be new facts after the initial removal.

JUSTICE JOHNSON: After removal.

MS. HACHEM: Correct.

JUSTICE JOHNSON: But during the pendency of that one year or whatever time that case was pending, you simply can't file on the same facts that you filed on the first time.

MS. HACHEM: Correct.

JUSTICE WAINWRIGHT: Is that case law based on the common law res judicata?

MS. HACHEM: It's just what they came up with out of fairness. And see we want to be careful here obviously because we have the -- you know, some children that we want to protect. And so, we felt it was best in this case to go this route.

JUSTICE WILLETT: What do you make of the amicus brief?

MS. HACHEM: Well, I think the amicus brief is correct in being in our favor. I think though that the -- there is one suggestion in amicus brief I disagree with would -- which is that you should just, you know, maybe the Court could come up with just another deadline when a new trial is granted. I don't think that this Court should do that. I think the legislature should do that after this Court issues an opinion

talking about that. Because it's really -- that's really legislating and that's not what this Court should be doing. I -- I -- I think that the -- there's a gap also in the appeals that need to be corrected. And I think the legislature needs to fix that but -- or maybe not. Maybe it can be done through rules. But, you know, we obviously know there's a problem with the speed. So, there's different things that maybe can be done legislatively and maybe through court rules. But at present we don't have anything when a new trial is granted.

JUSTICE WAINWRIGHT: You're as-- post motion for a new trial, you're asking us to figure out what the timetable should be in that scenario, right?

MS. HACHEM: I'm sorry?

JUSTICE WAINWRIGHT: Post motion for a new trial, you're asking us to figure out what the timetable should be -- the deadlines.

MS. HACHEM: I'm asking you to -- to come up with new deadlines? No, I'm not asking you to come up with new deadlines. I'm -- I'm -- I think there are no deadlines in the statute. So, at present we just don't have anything there. All we have is -- if the Court grants a new trial, it has a new trial and then it's subject to an accelerated appeal. That's what we have in the statutory scheme.

JUSTICE WAINWRIGHT: You think -- so you think post motion for a new trial and the situation like this case that we're hearing today --

MS. HACHEM: Correct.

JUSTICE WAINWRIGHT: -- there's no deadlines for getting a trial completed.

MS. HACHEM: No, there aren't.

JUSTICE WAINWRIGHT: And you don't -- and you don't think we should consider whether the -- there should be one.

MS. HACHEM: Well, that would be legislating. Now, if there's -- and if this, you know, the -- that would be the same thing as this Court saying all courts of appeals have to issue their opinions within a year. You know, maybe that could be your rule but it's not a rule right now. So, I wouldn't impose that on a court of appeals retroactively. You know, it's -- the -- there are, you know, this -- this -- you could have a new trial being remanded and required by an appellate court four years after the judgment. You know, so we obviously have a gap here -- a problem. It is one that, you know, we're all very aware of that are in, you know, to involve procedure. Maybe the legislature doesn't think about procedures same way we do.

JUSTICE WAINWRIGHT: Well, there's a session coming up maybe they will think about it.

MS. HACHEM: Yes. And so, this Court was able to issue an opinion and talked about this, it might give us something to talk about and that would be appropriate.

If there are no further questions.

CHIEF JUSTICE JEFFERSON: Thank you, Counsel. The cause is submitted. That concludes the argument for this morning and the Court -- the marshal now adjourn the Court.

2008 WL 4962608 (Tex.)