

MANDAMUS REVIEW OF NEW-TRIAL ORDERS

SCOTT P. STOLLEY
Thompson & Knight LLP
One Arts Plaza
1722 Routh Street, Suite 1500
Dallas, Texas 75201
(214) 969-1678
scott.stolley@tklaw.com
blog: www.texasappellatewatch.com

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SCOTT P. STOLLEY
THOMPSON & KNIGHT LLP
1722 Routh Street, Suite 1500
Dallas, Texas 75201
(214) 969-1678 (direct dial)
(214) 880-3287 (direct fax)
scott.stolley@tklaw.com
blog: www.texasappellatewatch.com

PRACTICE DESCRIPTION

Scott P. Stolley focuses his practice on the representation of appellants and appellees in state and federal appellate courts, including evaluation of appeals, drafting briefs, and arguing to appellate courts. In addition, he consults and assists on dispositive, significant, and post-trial motions in trial courts, and provides trial support on appellate-related issues such as preservation of error and preparing and objecting to the jury charge. Mr. Stolley's practice also includes evaluating insurance-coverage issues for policyholders.

EXPERIENCE & EDUCATION

Thompson & Knight LLP, Dallas, Texas (1996-present)
Leader, Appellate Practice Group
Board Member and Former Chair, Thompson & Knight Political Action Committee
Board Member and Former Chair, Thompson & Knight Foundation
Thompson, Coe, Cousins & Irons, L.L.P., Dallas, Texas (1982-95)
J.D. (with distinction), University of Iowa College of Law, Iowa City, Iowa (1981)
B.A. in Sociology (with distinction), Iowa State University, Ames, Iowa (1978)

CERTIFICATIONS & HONORS

Board Certified in Civil Appellate Law, Texas Board of Legal Specialization (1994-present)
Fellow, American Academy of Appellate Lawyers (2010-present) (only about 20 Fellows are from Texas)
Named in *Texas Super Lawyers*[®] by Thomson Reuters (Appellate Law) (2003-present) (top 100 in DFW – 2012, 2014)
Named in *The Best Lawyers in America*[®] by Woodward/White Inc. (Appellate Law) (2007-present)
Named in *D Magazine's* Best Lawyers in Dallas (Appellate) (2001, 2012-present)
Fellow, Texas Bar Foundation and Dallas Bar Foundation
Member, Texas Supreme Court Advisory Committee (2012-14)

BAR MEMBERSHIPS

American Bar Association
State Bar of Texas
Member, Board of Directors (2015-18)
Former Member, Pattern Jury Charge Committee (Business, Consumer, Employment)
Commissioner, Texas Access to Justice Commission (2015-18)
Dallas Bar Association
Member, Board of Directors (2010-11, 2013-14)
Chair, Appellate Law Section (2006)
Texas Association of Defense Counsel
Member, Board of Directors (2008-10)
Member, Amicus Committee (1995-present)
DRI – *The Voice of the Defense Bar*
Member, Publications Board (2012-present)
Amicus Committee (member, 2007-12; chair 2008-10)
Member, Appellate Advocacy Committee (chair, 2007-09)
Founding Editor, Appellate Advocacy Committee newsletter, *Certworthy* (1998-2003)
Winner of the G. Duffield Smith Outstanding Publication Award for the best article in *For the Defense* (2004)
Bar Association of the Fifth Federal Circuit
SCRIBES – American Society of Legal Writers

PUBLICATIONS & PRESENTATIONS

Fifth Circuit Editor, *SUPERSEDING AND STAYING JUDGMENTS: A NATIONAL COMPENDIUM* (ABA 2007)
Chapter co-author, *Statutory Interpretation Issues*, TEXAS SUPREME COURT PRACTICE MANUAL (State Bar of Texas 2005)
Lead Editor, *A DEFENSE LAWYER'S GUIDE TO APPELLATE PRACTICE* (DRI 2004)
Contributor to *BLACK'S LAW DICTIONARY* (Bryan A. Garner ed., 7th ed. 1999, 8th ed. 2004, 9th ed. 2009)
Author of more than 40 published articles on legal-writing, appellate, and insurance topics
Speaker at more than 75 CLE presentations — mostly on legal-writing, appellate, and insurance topics

I. The Trilogy

In a four-year span, the Texas Supreme Court issued a trilogy of opinions (*Columbia*, *United Scaffolding*, and *Toyota*) that totally changed the law related to reviewing orders granting a new trial. Now, the order granting a new trial must state reasonably specific reasons that are case-specific and valid. Further, the party who prevailed in the verdict can seek mandamus to challenge the merits of those reasons and can obtain an appellate-court order reinstating the trial victory. This paper will discuss the trilogy and their progeny, many of which have answered questions left open by the trilogy.

A. The *Columbia* Case

In *Columbia*, the Court held that, in an order granting a motion for new trial, the trial court must “specify its reasons for disregarding the jury’s verdict and granting a new trial.” *In re Columbia Med. Ctr. of Las Colinas, Subsidiary, L.P.*, 290 S.W.3d 204, 209 (Tex. 2009) (orig. proceeding). The Court specifically instructed: “The reasons should be clearly identified and reasonably specific. Broad statements such as ‘in the interest of justice’ are not sufficiently specific.” *Id.* at 215. This ruling eliminated the historical ability of trial courts to grant a new trial merely “in the interest of justice.”

B. The *United Scaffolding* Case

In *United Scaffolding*, the Court held that new-trial orders must state not only specific reasons, but also legally appropriate reasons:

[A] trial court does not abuse its discretion so long as its stated reason for granting a new trial (1) is a reason for which a new a new trial is legally appropriate (such as a well-defined legal standard or a defect that probably resulted in an improper verdict); and (2) is specific enough to indicate that the trial court did not simply parrot a pro forma template, but rather derived the articulated reasons from the particular facts and circumstances of the case at hand.

In re United Scaffolding, Inc., 377 S.W.3d 685, 688-89 (Tex. 2012) (orig. proceeding).

C. The *Toyota* Case

In *Toyota*, the Court held that an appellate court may perform a merits-based mandamus review of the trial court’s articulated reasons for granting a new trial. *In re Toyota Motor Sales, USA, Inc.*, 407 S.W.3d 746,

752 (Tex. 2013) (orig. proceeding). (*Disclosure*: I was lead appellate counsel for Toyota in this case.)

In *Toyota*, a driver was killed during a rollover accident. His family sued the manufacturer of the vehicle for strict liability and negligence. *Id.* at 749. Before trial, the trial court granted the plaintiffs’ motions in limine, one of which barred a police officer’s deposition testimony indicating that the driver had not been wearing his seatbelt. *Id.* at 749-50. But during trial, the barred testimony “found its way into the record.” *Id.* at 750. The officer’s testimony was first introduced by plaintiffs’ counsel, who “did not move to strike the testimony or seek a mistrial,” “request a curative or limiting instruction after quoting the statement,” or “revisit the seat belt issue during his subsequent tender of designated testimony from [the officer’s] deposition.” *Id.* at 750-51.

Accordingly, since the evidence was in the record, defense counsel referred to the officer’s testimony during closing argument. *Id.* at 751-54. Plaintiffs’ counsel objected to the argument, and the trial judge sustained the objection. But plaintiffs’ counsel did not request that the jury be instructed to disregard the argument.

The jury returned a verdict for the defendants. *Id.* at 754. The plaintiffs moved for a new trial based on alleged violations of the limine order. *Id.* The trial court granted the motion, ordering a new trial for two reasons: first, “in the interest of justice” for violating the limine order by arguing evidence outside the record, and second, as a sanction for the same conduct. *Id.* at 754-55.

The Supreme Court first concluded that it could review the merits of a trial court’s articulated reasons for a new-trial order. *Id.* at 757-58. The Court considered the *Columbia* and *United Scaffolding* holdings and reasoned: “Having already decided that new trial orders must meet these requirements and that noncompliant orders will be subject to mandamus review, it would make little sense to conclude now that the correctness or validity of the orders’ articulated reasons cannot also be evaluated.” *Id.* at 758.

The Supreme Court next concluded that the record did not support the trial court’s reasons in this case. Even though the trial court’s order satisfied the “‘form’ requirements” of *Columbia* and “*United Scaffolding*’s requirements that the reasons listed (if accurate) would have been ‘legally appropriate’ grounds for new trial, and are ‘specific enough’ that they are not simply pro forma,” the record failed to support the court’s articulated reasons. *Id.* at 759 (quoting *United Scaffolding*, 377 S.W.3d at 688-89).

The record showed instead that plaintiffs' counsel waived any error with respect to the limine order and that defense counsel's closing argument had fairly referenced the evidence in the record. *Id.* at 759. Thus, "the trial court's articulated reason for granting a new trial—that Toyota's counsel 'willfully disregarded, brazenly and intentionally violated' the limine order in closing—[was] unsupported," and sanctioning the defendant for defense counsel's conduct was also an abuse of discretion. *Id.* at 761.

D. Justice Lehrmann's Concurrence

Justice Lehrmann concurred in the *Toyota* opinion and outlined two potential concerns. The first is whether *Toyota* could lead to merits review of new-trial orders in nonjury trials. *See id.* at 762-63 (Lehrmann, J., concurring). She concluded that the *Toyota* reasoning should not apply to new-trial orders in nonjury cases:

Both *Columbia* and our subsequent opinion in *In re United Scaffolding, Inc.* ... focused on transparency in the context of setting aside jury verdicts, noting the importance of ensuring that trial courts do not impermissibly substitute their judgment for that of the jury. This concern, however, is not present with respect to new-trial orders that do not set aside a jury verdict, such as orders issued after a bench trial or setting aside a default judgment. Accordingly, in my view, the *Columbia* line of cases does not apply to such orders.

Id. (citations omitted).

The second concern expressed by Justice Lehrmann is whether *Toyota* could lead to merits review of new-trial orders where the presence or absence of support in the record is not as "relatively straightforward" as in *Toyota*. *See id.* at 763. While acknowledging that "review of a cold record appears to be exactly what was needed in [*Toyota*] to evaluate the substantive merit of the new-trial order," Justice Lehrmann expressed concern that appellate courts looking at a "cold record" in other cases could be at a disadvantage in discerning whether a new-trial order is warranted. *Id.*

As discussed below, both of these concerns have come up in subsequent cases, as have a number of other questions discussed below.

II. Questions Arising Out of the Trilogy

A. Who is the respondent?

Ordinarily, the trial judge is the respondent in a

mandamus. *See* Tex. R. App. P. 52.2. It becomes a little more complicated when the judge who granted the new trial is no longer in office during the mandamus proceeding. Under Tex. R. App. P. 7.2(a), the successor judge is automatically substituted as the respondent. Tex. R. App. P. 7.2(b) then requires abatement of the mandamus and remand to the successor judge for an opportunity to reconsider the new-trial order. *See, e.g., In re Baylor Med. Ctr.*, 280 S.W.3d 227, 228, 232 (Tex. 2008) (orig. proceeding) (abating to allow the successor judge to reconsider the new-trial order).

The successor judge can then be the subject of a mandamus order if he or she affirms that the new trial stands. *E.g., In re Cook*, 356 S.W.3d 493, 495-96 (Tex. 2011) (orig. proceeding); *In re Baylor Med. Ctr.*, 289 S.W.3d 859, 860-61 (Tex. 2009) (orig. proceeding).

If the original trial judge stated his or her reasons, those reasons are irrelevant, as it is the successor judge's reasons that are subject to mandamus review. *E.g., In re Cook*, 356 S.W.3d at 495; *In re Baylor Med. Ctr.*, 289 S.W.3d at 860.

B. When is a reason sufficiently specific to pass muster?

1. General Standard

In *Columbia*, the Court explained that "the parties and the public are entitled to an understandable, reasonably specific explanation" as to why the case must be retried. *In re Columbia*, 290 S.W.3d at 213. The Court elaborated in *United Scaffolding*: "[W]e focused in *In re Columbia* not on the length or detail of the reasons a trial court gives, but on how well those reasons serve the general purpose of assuring the parties that the jury's decision was set aside only after careful thought and for valid reasons." *In re United Scaffolding*, 377 S.W.3d at 688. The Court continued: "That purpose will be satisfied so long as the order provides a cogent and reasonably specific explanation of the reasoning that led the court to conclude that a new trial was warranted." *Id.*

The Court then stated this test: The reasons must be "specific enough to indicate that the trial court did not simply parrot a pro forma template, but rather derived the articulated reasons from the particular facts and circumstances of the case at hand." *Id.* at 689. This requires a case-specific explanation for the new trial. Thus, for example, the court cannot merely recite a legal standard, such as a statement that the evidence is factually insufficient to support the verdict. *Id.*

2. The Lawyer's Role

Lawyers can play a role in how specific the reasons are in the new-trial order. Under Tex. R. Civ. P. 321, the grounds in a motion for new trial must be stated in such a way that they “can be clearly identified and understood by the court.” Tex. R. Civ. P. 322 states that grounds “couched in general terms” should not be considered. In *Columbia*, the Court emphasized that this means that “[g]enerality in motions for new trial must be avoided” *In re Columbia*, 290 S.W.3d at 210. This is good advice for the movant, since the more specifically the movant states the grounds, the better able the judge will be to state sufficiently specific grounds.

3. Examples of Insufficiently Specific Reasons

The case law is beginning to flesh out what types of reasons are sufficiently specific and which are not:

- It is clear that an order with no reasons is not specific enough. *See, e.g., In re Baylor Med. Ctr.*, 289 S.W.3d at 861.
- It is equally clear that it is insufficient to state that the new trial is granted “in the interest of justice.” *See, e.g., In re Columbia*, 290 S.W.3d at 206.
- If an order includes a list of reasons connected by “and/or,” and if one of those reasons is “in the interest of justice,” the order is insufficient, because “and/or” could mean that the only reason supporting the new trial is “in the interest of justice.” *In re United Scaffolding*, 377 S.W.3d at 689-90.
- In a child-custody suit, it was insufficient to grant a new trial “in the interest of justice and fairness and in the child’s best interest.” *In re C.R.S.*, 310 S.W.3d 897, 898 (Tex. App.—San Antonio 2010, orig. proceeding).
- In one case, it was inadequate to state merely that, looking at the contract as a whole and in light of the circumstances when it was entered into, the court found the contract to be unambiguous. *In re Davenport*, No. 04-14-00666-CV, 2015 WL 1089679, at *3 (Tex. App.—San Antonio Mar. 11, 2015, orig. proceeding).

4. Examples of Sufficiently Specific Reasons

Here are some examples where courts found that the reasons were sufficiently specific:

- In *Toyota*, the trial court’s three-page order granted a new trial for violating a limine order that precluded the deposition testimony of a police officer that the decedent had not been wearing his seatbelt. Specifically, the order stated that during closing argument, Toyota’s counsel had referred to this evidence, which was “outside the record.” Thus, the court granted a new trial on this ground, “in the interest of justice.” The court also reasoned that the new trial was warranted as a sanction for violating the limine order. *In re Toyota*, 407 S.W.3d at 754-55. The Supreme Court found these reasons to be sufficiently specific. *Id.* at 749, 759.
- In one case, the order stated that the damages award for diminished value of the home “seems arbitrary.” The court noted that a new trial may be granted when the damages are manifestly too small (quoting Tex. R. Civ. P. 320). The court concluded that it “believes that the damages awarded by the jury for diminished value of Plaintiffs’ home was [sic] not supported by the evidence at trial. Thus the Court finds good cause for a new trial.” *In re United Servs. Auto. Ass’n*, 446 S.W.3d 162, 176 (Tex. App.—Houston [1st Dist.] 2014, orig. proceeding [mand. pending]). The court of appeals held that this was sufficiently specific, because it was detailed enough to permit the relator to attack it and to enable the court to review it. *Id.*
- In a divorce case with a child-custody issue, the trial court granted the father a new trial on the ground that his “due process rights under the 14th Amendment of the United States Constitution and Article I, Section 19 of the Texas Constitution were violated when the jury did not name [him] a possessory conservator in Question # 5 of the jury charge, creating a de facto termination under a preponderance of the evidence standard, rather than a clear and convincing standard.” *In re Stearns*, No. 02-14-00079-CV, 2014 WL 1510059, at *1 (Tex. App.—Fort Worth Apr. 17, 2014, orig. proceeding [mand. denied]). The court of appeals ruled that this reason was sufficiently specific. *Id.* at *2.

5. Factual Insufficiency

New trials granted for factual insufficiency warrant a category of their own, because of some special rules and issues involved. In regular appeals when the court of appeals reverses for factual insufficiency, the Supreme Court has required the appellate court to provide a detailed analysis explaining why the court concluded that the verdict is against the great weight and preponderance of the evidence. *Pool v. Ford Motor Co.*, 715 S.W.2d 629, 635 (Tex. 1986).

In *United Scaffolding*, the relator argued that trial courts should have to engage in a *Pool*-type analysis when they grant a new trial for factual insufficiency. The Court rejected this and held that new-trial orders need not meet the *Pool* standard. *In re United Scaffolding, Inc.*, 377 S.W.3d at 687-88. Instead, the “order must indicate that the trial judge considered the specific facts and circumstances of the case at hand and explain how the evidence (or lack of evidence) undermines the jury’s findings.” *Id.* at 689. The order must “elaborate, with reference to the evidence adduced at trial, how the jury’s answers are contrary to the great weight and preponderance of the evidence.” *Id.* at 690.

In at least three cases, the new-trial order failed this test:

- In one order, the trial court recited the jury findings, and concluded: “Therefore, the Court does not make a specific finding that any of the jury answers or findings, in themselves, justifies the granting of the new trial, but rather the Court finds that the Court findings, as stated herein, the admissible testimony of the trial and the jury’s answers be taken, in totality, in determining that the verdict is against the great weight and preponderance of the admissible evidence.” *In re Davenport*, 2015 WL 1089679, at *3. It was a rather easy call for the court of appeals to find this reason insufficient: “While the new trial order in this instance provides a general rationale for the court’s decision, it does not discuss any evidence, reference any specific facts, or explain how any particular set of facts, evidence or testimony undermines the jury’s specific findings, thus warranting a new trial.” *Id.* at *4.
- In another order, the court recited that four separate jury answers had factually insufficient support. The court of appeals found this stated reason to be insufficient: “[T]he new trial order, while providing a general ra-

tionale for the trial court’s ruling, does not expressly illustrate that the trial judge considered the specific facts and circumstances of the case at hand. ... Although the new trial order recites that the evidence, or lack of evidence, undermines the jury’s findings, the order does not actually discuss the evidence itself, reference any specific facts, evidence, or testimony, or explain how the jury’s answers are contrary to the great weight and preponderance of the evidence.” *In re Adkins*, No. 13-14-00484-CV, 2014 WL 5026051, at *5 (Tex. App.—Corpus Christi-Edinburg Oct. 8, 2014, orig. proceeding).

- In another order, the trial court found good cause for a new trial because, with reference to the standard that a new trial is justified when the damages are manifestly too small, the damages award for diminished value to the house was not supported by the evidence. The court of appeals found this to be insufficient, because the insurer “cannot determine upon which evidence the trial court relied in granting a new trial.” *In re United Servs. Auto. Ass’n*, 446 S.W.3d at 176.

Interestingly, the court in *United Servs. Auto. Ass’n* also found that a separate factual-insufficiency ground was sufficiently stated. *Id.* at 171. The order recited a plaintiff’s testimony that they had made an insurance claim within days of the hurricane and the insurer said it would pay. The order also recited evidence that the insurer made six different, increasing estimates, which the insurer did not pay within the statutorily required five days. Finally, the order concluded with the observation that the insurer had offered no evidence to controvert that it failed to pay within five days. *Id.*

Another example of a sufficiently stated factual-insufficiency ground is found in *In re. E.I. duPont de Nemours & Co.*, No. 09-14-00465-CV, 2015 WL 1849708 (Tex. App.—Beaumont Apr. 23, 2015, orig. proceeding). The new-trial order:

is six pages long, and the order lists multiple examples of evidence from the record that the trial court states supports the new trial; and, it further states that, “while not an exhaustive list of all evidence adduced at trial, ... [it] is of such great weight and preponderance that a new trial is warranted[.]” According to the trial court, the great weight and preponderance of the evidence supports “only the answer ‘Yes’” and “there is not legally

or factually sufficient evidence to support the jury's answer of 'No' to the broad-form negligence question based on a theory that the actions or omissions of some other party was the sole proximate cause of the injuries. Furthermore, the trial court states in the order that "[b]ecause the great weight and preponderance of the evidence supports only the answer 'Yes' to Question Number 2 as to DuPont, and since there is not legally or factually sufficient evidence to support the jury's answer of 'No' to Question Number 2 as to DuPont, for the reasons set forth above, the Court GRANTS Plaintiff's Motion for New Trial."

Id. at *3.

C. What is a legally sound reason?

The Supreme Court also requires that the reason for the new trial be a legally sound reason — that is, a reason that could legally support a new trial. *E.g., In re United Scaffolding*, 377 S.W.3d at 688-89 (the reason must be one "for which a new trial is legally appropriate (such as a well-defined legal standard or a defect that probably resulted in a new trial)").

1. Legally Sound Reasons

The Court has expressed a nonexclusive list of reasons that are legally unsound:

- "plain statements that the trial court merely substituted its own judgment for the jury's;"
- "statements that the trial court simply disliked one party's lawyer;" and
- "insidious discrimination."

In re Toyota, 407 S.W.3d at 756 n.6.

This list is largely unhelpful, as it is unlikely that trial judges would ever put these reasons in writing. The trilogy and their progeny do, however, offer some examples of reasons that are legally sound and could theoretically support an order granting a new trial:

- Violation of a motion in limine. *E.g., In re Toyota*, 407 S.W.3d at 749 (describing the trial court's reasons as "superficially sound"); *In re United Servs. Auto. Ass'n*, 446 S.W.3d at 174. ("[T]he violation of an order in limine can serve as a basis for a new trial order.").

- As a sanction for violating a motion in limine. *In re Toyota*, 407 S.W.3d at 749 (describing the trial court's reasons as "superficially sound").
- That the evidence supporting the verdict is factually insufficient. *E.g., In re Zimmer, Inc.*, 451 S.W.3d 893, 898 (Tex. App.—Dallas 2014, orig. proceeding); *In re Adkins*, 2014 WL 5026051, at *4; *In re United Servs. Auto. Ass'n*, 446 S.W.3d at 171-72.
- That the jury answers irreconcilably conflict. *See, e.g., In re Columbia*, 290 S.W.3d at 208.
- Jury misconduct. *E.g., In re Zimmer, Inc.*, 451 S.W.3d at 898.

This list is certainly not exhaustive. There are many other legally sound reasons for new trials, which we will probably see at issue in future mandamus proceedings.

2. Legally Unsound Reasons

In at least one case, the court found the reason for a new trial to be legally unsound. In a child-custody dispute, the order recited that the father's due-process rights "were violated when the jury did not name [him] a possessory conservator in Question #5 of the jury charge, creating a de facto termination under a preponderance of the evidence standard, rather than a clear and convincing standard." *In re Stearns*, 2014 WL 1510059, at *1. The court of appeals held that this was a legally unsound reason because of statutory provisions and case law that, in fact, provided the father with due process and precluded the trial judge from disregarding the verdict. *Id.* at *2.

Two cases that substantially predate the trilogy also provide examples of legally unsound reasons for a new trial:

- In *Trinity Corp. v. Briones*, 847 S.W.2d 324, 327 (Tex. App.—El Paso 1993, orig. proceeding), the trial court vacated a judgment entered in another state and granted a new trial. This was legally unsound, because a trial court may not vacate a judgment of another state.
- In *State v. Finch*, 349 S.W.2d 780, 782-83 (Tex. Civ. App.—San Antonio, 1961, orig. proceeding), the court received the verdict, but then granted a mistrial when a juror

changed his vote. This was a legally unsound reason, because a juror's vote cannot be changed after the verdict is received.

D. Are reasons required for dispositions other than new trials granted after a jury trial?

1. Bench Trials

Recall that in her *Toyota* concurrence, Justice Lehrmann questioned whether new-trial orders after bench trials would have to meet the trilogy's standards. *In re Toyota*, 407 S.W.3d at 762-63. She noted that the trilogy is focused on the idea that the trial judge's reasons must be transparent in order to ensure that the judge did not impermissibly substitute his or her judgment for the jury's. *Id.*

At least two cases have now agreed that mandamus is not available when the court grants a new trial after a bench trial. *In re Dixon*, No. 05-15-00242-CV, 2015 WL 1183596, at *1 (Tex. App.—Dallas Mar. 16, 2015, orig. proceeding [mand. pending]); *In re Foster*, No. 05-15-00179-CV, 2015 WL 682335, at *1 (Tex. App.—Dallas Feb. 18, 2015, orig. proceeding).

In one of those cases, the court also said that it did not matter that the new-trial order was signed by the elected judge after the bench trial was held by an assigned judge. *In re Dixon*, 2015 WL 1183596, at *1. So even though the new-trial order was signed by a different judge, mandamus was not available.

At least four cases have now held that mandamus is not available when a trial judge grants a new trial to set aside a default judgment. *In re Klair*, No. 05-15-00462-CV, 2015 WL 1850907, at *1 (Tex. App.—Dallas Apr. 23, 2015, orig. proceeding); *In re Cort*, No. 14-14-00646-CV, 2014 WL 4416074, at *1-2 (Tex. App.—Houston [14th Dist.] Sept. 9, 2014, orig. proceeding); *In re Process Especializados en Metal, S.A. de C.V.*, No. 04-14-00543-CV, 2014 WL 4347724, at *3 (Tex. App.—San Antonio Sept. 3, 2014, orig. proceeding [mand. denied]); *In re Old Am. Cnty. Mut. Fire Ins. Co.*, No. 13-13-00644-CV, 2014 WL 1633098, at *10-11 (Tex. App.—Corpus Christi-Edinburg Apr. 23, 2014, orig. proceeding).

2. Denial of Motion for New Trial

At least one court has held that the trial court need not state its reasons for denying a motion for new trial. *Banco Popular N. Am. v. American Fund U.S. Invs., LP*, No. 05-14-00368-CV, 2015 WL 1756107, at *1 (Tex. App.—Dallas Apr. 17, 2015, no pet.).

3. Motion for Judgment N.O.V.

In one recent case, a plaintiff won the verdict, but the trial court granted the defendant's motion to disregard jury findings and then entered a take-nothing judgment for the defendant. The plaintiff asked the trial court to provide its reasons, which the trial court declined to do. On appeal, the plaintiff asked the court of appeals to abate the appeal and order the trial court to state its reasons for disregarding the verdict. The court of appeals declined that request. *Shamoun & Norman, LLP v. Hill*, No. 05-13-01634-CV (Tex. App.—Dallas May 6, 2014, unpublished order).

The plaintiff then sought mandamus in the Supreme Court, seeking an order to compel the trial court to state its reasons. Pet. for Writ of Mandamus, *In re Shamoun & Norman, LLP*, No. 14-0363, 2014 WL 2195190. The Supreme Court denied relief without comment.

E. How does the court of appeals review the merits?

1. Why is merits review available?

In *Toyota*, the Court said that reviewing the merits of the new-trial order is “the next step in [the] progression.” *In re Toyota*, 407 S.W.3d at 757. The Court explained that after the Court required specific, case-tailored, and valid reasons (per *Columbia* and *United Scaffolding*), “it would make little sense to conclude now that the correctness or validity of the orders' articulated reasons cannot also be evaluated.” *Id.* at 758. The Court reasoned that “Transparency without accountability is meaningless.” *Id.*

2. What review does the court perform?

In *Toyota*, the Court made it clear that the appellate court is to review the record to determine if the order's stated grounds are true. *In re Toyota*, 407 S.W.3d at 749 (“The question is whether an appellate court may, in an original proceeding, determine whether the reasonably specific and legally sound rationale is actually true.”). The Court said that “[i]f the record does not support the trial court's rationale for ordering a new trial, the appellate court may grant mandamus relief.” *Id.*

The Court stated multiple times that the appellate court is to review whether the record supports the stated grounds: “If ... a trial court's articulated reasons are not supported by the underlying record, the new trial order cannot stand.” *Id.* at 758; *see id.* (noting that federal courts “regularly conduct record-bound, merits-based review of new trial orders to evaluate their valid-

ity” (footnote omitted)).

The Court held in *Toyota* that the record did not support the stated grounds:

- “[W]e conclude that the record does not support the new trial order.” *Id.* at 760.
- “[W]e conclude that the trial court’s articulated reason for granting new trial ... is unsupported.” *Id.* at 761.
- “Because the record does not support the articulated reason, the trial court abused its discretion by granting a new trial on that ground.” *Id.*
- “The stated reasons ... lacked substantive merit.” *Id.* at 762.

3. Are courts of appeals following *Toyota*?

The answer is “yes.” Courts of appeals are conducting merits reviews to determine if the record supports the reasons. For example, the Beaumont Court of Appeals said that “the appellate court may, in an original proceeding, determine whether the reasons given by the trial court are reasonably specific and legally sound, and whether the rationale is true.” *In re E.I. duPont de Nemours & Co.*, 2015 WL 1849708, at *2. As expressed in *Toyota*, this is a record-based review: “If, after a review of the record of the trial, the appellate court determines that the record does not support the trial court’s stated reasons for granting the motion for new trial, then the trial court will have abused its discretion” *Id.*

In *duPont*, the court “conducted a merits-based mandamus review of the trial court’s articulated reasons for granting the new trial” and concluded “that the record does not support the trial court’s rationale for ordering a new trial.” *Id.* at *1.

Both Houston Courts of Appeals have concluded similarly. *See In re United Servs. Auto. Ass’n*, 446 S.W.3d at 171 (“If the articulated reasons are not supported by the law and the record, mandamus relief is appropriate.”); *In re Wyatt Field Serv. Co.*, 454 S.W.3d 145, 150 (Tex. App.—Houston [14th Dist.] 2014, orig. proceeding [mand. denied]) (recognizing that the court must conduct a “merits-based review” to determine if the reasons are “actually true”); *id.* at 152 (noting that the *Toyota* court “also made clear that the trial court’s stated reasons for granting a new trial must be supported by [the] record”).

The *Wyatt* court elaborated that the appellate court may not substitute its judgment for that of the trial court, but “neither may the trial court substitute its judgment for that of the jury” *Id.* “The method for ensuring that the trial court does not substitute its judgment for that of the jury, is to confirm that the court’s reasons for granting a new trial are valid and correct, i.e., supported by the trial record.” *Id.*

4. What review of the record does the court undertake?

In *Toyota*, the Court explained that it undertook its own “cumbersome review” of the entire record. *In re Toyota*, 407 S.W.3d at 760. The Dallas Court of Appeals repeated this phrase: “[W]e must undertake a ‘cumbersome review’ of the trial court’s forty-one volume record to determine whether it supports the trial court’s conclusion the jury engaged in misconduct and the jury’s verdict was against the great weight and preponderance of the evidence.” *In re Zimmer, Inc.*, 451 S.W.3d at 899.

As will be discussed further in the sections below, the courts of appeals have followed form and are regularly reviewing the entire record to determine whether the reasons are accurate and supported by the record. *See, e.g., In re Wyatt* 454 S.W.3d at 152-53 (“[W]e will engage in a review of the entire trial record to determine whether it supports the trial court’s reasons for granting a new trial.”).

F. Can the court of appeals decline to review the merits?

This is an open question. In *Toyota*, the court said several times that the appellate court “may” determine if the reason is actually true, “may” conduct a merits review, and “may” grant mandamus relief. *In re Toyota*, 407 S.W.3d at 749, 757; *see, e.g., duPont*, 2015 WL 1849708, at *2 (stating that the appellate court “may” determine whether the reason is true); *In re Wyatt*, 454 S.W.3d at 150 (stating that if the reason is not true, the order “may” be an abuse of discretion).

One court expressly stated the open question: “The high court [in *Toyota*] did not indicate the circumstances under which an intermediate appellate court may decline to conduct such a review.” *In re Wyatt*, 454 S.W.3d at 150 n.3. The court elaborated: “It is unclear whether the ‘exceptional circumstances’ [to justify mandamus] extend to all jury trials or only to those where a second trial would involve undue ‘time, trouble and expense.’” *Id.* at 150 n.2. Thus, the court expressed the possibility that mandamus review of the merits might be unwarranted if the circumstances are

not “exceptional.” This issue will have to play out in future cases.

G. When is review “relatively straightforward”?

In *Toyota*, the Court expressed that it is “relatively straightforward” to conduct mandamus review when the reason for the new trial is an irreconcilable conflict in the jury’s answers. *In re Toyota*, 407 S.W.3d at 758. The Court found that it was also “relatively straightforward” to review the merits of the reasons in *Toyota* (that is, that trial counsel’s closing argument improperly mentioned evidence that had been excluded by the limine order). *Id.* And recall that Justice Lehrmann’s concurrence questioned whether review might be inappropriate when the issue is not “relatively straightforward,” such as when the trial judge might have firsthand observations that are not part of the “cold record.” *Id.* at 763-64.

So in what situations have courts found that review was straightforward enough for mandamus to be warranted? Below are some examples:

1. Jury Misconduct

Following *Toyota*, the Supreme Court issued two opinions granting mandamus where the stated reason for the new trial was jury misconduct. *In re Whataburger Rests. LP*, 429 S.W.3d 597 (Tex. 2014) (orig. proceeding); *In re Health Care Unlimited, Inc.*, 429 S.W.3d 600 (Tex. 2014) (orig. proceeding).

In *Whataburger*, the stated reason was that a juror had failed to disclose during voir dire that she had been a party to a lawsuit. The Court held there was no evidence that the juror’s failure had resulted in probable injury to the plaintiff. *Whataburger*, 429 S.W.3d at 599-600. The plaintiff could not show that the jury in all probability would have rendered a different verdict if the juror had disclosed that information. *Id.*

In *Health Care Unlimited*, the stated reason was that a juror had communicated with a party’s representative by phone during a break in the deliberations. The juror later said she did not know that the representative worked for the defendant and had been at trial. The evidence further showed that their phone call related to a social event at their church. The Court held that there was misconduct, regardless of whether the juror knew that the person she talked to was a party representative. But the Court further found no evidence that the improper communication probably affected the trial’s outcome. *Health Care Unlimited*, 429 S.W.3d at 602-04.

The Dallas Court of Appeals also addressed jury misconduct as a ground for new trial in *Zimmer*. The court first held that the plaintiff failed to carry his burden to prove misconduct when the plaintiff merely attached two juror’s affidavits to the motion for new trial. *In re Zimmer, Inc.*, 451 S.W.3d at 899-903. The plaintiff failed to offer the affidavits into evidence and offered no live testimony at the hearing. The court therefore found no competent evidence of misconduct. The court also ruled that the affidavits, even if considered, were insufficient to carry the plaintiff’s burden of proof. *Id.* at 903-05.

2. Newly Discovered Evidence

This is a traditionally recognized ground for a new trial. But in *In re City of Houston*, 418 S.W.3d 388 (Tex. App.—Houston [1st Dist.] 2013, orig. proceeding), the court held that it was an invalid ground on the record there. The case involved an auto accident in which the plaintiffs’ car collided with a patrol car that was responding to a call.

One piece of new evidence was a revised version of the police department’s standing order for response priorities for calls. The court of appeals held that the plaintiffs had waived this ground by not pursuing rulings on the City’s discovery objections. *Id.* at 394-95.

The second piece of evidence was the City’s failure to name an uninvolved officer as a person with knowledge of relevant facts. The uninvolved officer had testified about the standing order in a different case involving a different accident. The court of appeals held that the “rules do not permit a new trial simply because one or more unknown or undisclosed persons might disagree as to the existence or interpretation of an organizational policy.” *Id.* at 395. In short, the plaintiffs were arguing for an overly broad duty of disclosure.

3. Spoliation

In *City of Houston*, the plaintiffs had requested that the City preserve the patrol car that had been involved in the collision. But the police bomb squad destroyed the car by detonating a bomb in it during a training exercise. The City was also unable to produce the police call slip and the patrol car’s mobile data terminal. There was no dispute that these pieces of evidence would be unavailable for a second trial. Further, the trial had given the jury a spoliation instruction. Thus, the court of appeals held that this was not a valid ground for a new trial because there was nothing to be cured by conducting a second trial. *Id.* at 396-97.

4. Violation of a Motion in Limine

In *City of Houston*, another stated ground was the violation of a motion in limine, when a police accident investigator mentioned that the plaintiff driver had been given a citation. Plaintiffs' counsel objected at the time and got a ruling to strike the evidence and an instruction telling the jury to disregard the evidence. The court of appeals held that there was no reason to believe that the instruction had not cured the violation. Thus, the violation amounted to harmless error that was not good cause for a new trial. *Id.* at 397.

In *Wyatt*, one stated ground was violation of a limine order that precluded evidence of collateral sources. Earlier in the opinion, the court had found that the jury finding that Wyatt was not liable was supported by sufficient evidence. Thus, the court of appeals found that the limine violation was harmless, because it went only to damages and could not have affected the jury's finding of no liability. *In re Wyatt*, 454 S.W.3d at 162.

5. Immaterial Finding

In *Wyatt*, another stated ground was no evidence to support a jury finding that a settled defendant had actual knowledge of the premises condition that caused the injuries. Because the no-liability finding as to Wyatt stood, any error in finding the settled party liable was immaterial and not a valid basis for a new trial. *Id.* at 159-60.

H. What about factual insufficiency as a ground?

As mentioned above, factual insufficiency of the evidence to support a jury finding is a legally sound reason for a new trial. Before *Toyota*, many courts declined to conduct a mandamus review of new trials granted for factual insufficiency. *See, e.g., In re Discount Tire Co.*, No. 04-12-00850-CV, 2013 WL 241953, at *1 (Tex. App.—San Antonio Jan. 23, 2013, orig. proceeding [mand. denied]). And the Supreme Court has declined several opportunities to grant mandamus in such cases. *See, e.g., id.* But since *Toyota*, several courts have performed a mandamus review of a new-trial order granted on the ground of factual insufficiency.

1. What is the standard of review?

An interesting aspect of this development is the traditional belief that trial courts have broad discretion to grant a new trial, including on the ground of factual insufficiency. Bound up with that is the idea that trial courts should have the right to weigh the evidence in a

factual-sufficiency review and decide that a new trial is warranted. When a trial court does that, what is the standard of review that the court of appeals must apply? The traditional standard for a mandamus is "clear abuse of discretion." Does that allow the court of appeals to conduct its own factual-sufficiency review and come to its own conclusion about the weight of the evidence?

In *Zimmer*, the Dallas Court of Appeals answered this question "yes." The court said: "[W]e see no reason to believe the standards for factual sufficiency review in new trial mandamus proceedings should differ from the standards of review on appeal." *In re Zimmer, Inc.*, 451 S.W.3d at 905. The court noted that incorrect application of the law is an abuse of discretion. *Id.* The court then concluded: "Thus, when a trial court incorrectly determines the evidence is factually insufficient and orders a new trial on that basis, it abuses its discretion and mandamus is appropriate." *Id.* Under this reasoning, it is an incorrect determination of law when the trial court incorrectly finds the evidence to be factually insufficient.

In *Wyatt*, the Fourteenth Court of Appeals applied similar reasoning. *In re Wyatt*, 454 S.W.3d at 150-52. The court rejected the plaintiffs' argument that the trial court must be afforded absolute discretion in finding the evidence to be factually insufficient. The court concluded that this could not be what the Supreme Court intended in the trilogy, because it "would leave the courts of appeals with no ability to review new trial orders based on factual insufficiency." *Id.* at 152. The court reasoned that although it may not substitute its judgment for the trial courts, neither can trial courts substitute their judgment for the jury's. *Id.* The way to prevent trial courts from substituting their judgment is to review the entire record under the factual-sufficiency standard "to determine whether [the record] supports the trial court's reasons for granting a new trial." *Id.*

Justice McCally issued a strong dissent, arguing that by conducting its own factual-insufficiency review, the court of appeals was affording full deference to the jury verdict and no deference to the trial judge, thus depriving trial judges of the ability to grant a new trial for factual insufficiency. *Id.* at 163.

2. Examples Where the Evidence Was Factually Sufficient

In the following cases, the courts performed a full-scale review of the record and decided that the trial judge was incorrect in concluding that the evidence was factually insufficient:

- In *In re Baker*, 420 S.W.3d 397 (Tex. App.—Texarkana 2014, orig. proceeding), the plaintiff’s car collided with rolled bales of hay that had fallen off a flatbed trailer. The court of appeals found that the case turned on the truck driver’s credibility, and the jury believed him. *Id.* at 403. Thus, the court found that the evidence was sufficient to support the no-liability finding and that the trial court had “improperly intruded on the jury’s province.” *Id.* at 404.
 - In *In re United Servs. Auto. Ass’n*, one ground for the new trial was that the evidence was factually insufficient to support the finding that the insurer had not breached the policy by failing to make timely payments. The court of appeals held that a rational juror could find no breach of the insurer’s duties. 446 S.W.3d at 171-74. Another ground was that the jury’s damages finding was unsupported and seemed arbitrary. The court of appeals found that the jury’s finding fell within the range of the evidence and was not against the great weight and preponderance. *Id.* at 176-78.
 - In *In re Zimmer, Inc.*, one ground was that the jury’s no-liability finding on the products-liability claim was against the great weight and preponderance. The court of appeals found that the jury was entitled to believe that the product was not defective, that there was no design defect, and that there was no causation. 451 S.W.3d at 905-09. The court of appeals found that the “trial court incorrectly substituted its credibility decisions for those of the jury and weighed the evidence differently than the jury. As a result, it improperly applied the law in granting new trial and abused its discretion in doing so.” *Id.* at 909.
 - In *In re Wyatt Field Serv. Co.*, one ground was that the no-liability finding was against the great weight and preponderance. The court of appeals rejected this reason, finding that “[g]iven the presence of conflicting evidence and the jury’s apparent resolution of credibility of witnesses and giving greater weight to evidence favoring Wyatt, the jury’s finding ... is not against the great weight and preponderance.” 454 S.W.3d at 159.
 - In *re E.I. duPont de Nemours & Co.* was an asbestos case, and one ground for the new trial was that the no-liability finding was against the great weight and preponderance. The court of appeals went through the evidence in detail and found this ground to be invalid. The evidence was conflicting, and the jury could have believed duPont’s evidence and disbelieved the plaintiffs’. 2015 WL 1849708, at *9-11.
- I. Is unpreserved or harmless error a valid reason for a new trial?**
- In *Toyota*, the Court noted that the plaintiffs had waived any error (1) when their counsel offered the very evidence that was the subject of the limine order, and (2) by not objecting to later offers of that evidence. *In re Toyota*, 407 S.W.3d at 760-61. Thus, the Court seemed to suggest that unpreserved error cannot support a new trial. Thus far, the courts of appeals are taking the next step and ruling that unpreserved or harmless error is not a valid reason for a new trial.
- In *United Services*, the trial court entered a confusing limine order regarding testimony about whether the homeowners could have obtained a building variance from the city. When the insurer offered some evidence that was arguably subject to the limine order, the homeowners waived any error by not objecting. *In United Servs. Auto. Ass’n*, 446 S.W.3d at 175. The court of appeals therefore held that the alleged limine violation could not support the new-trial order. *Id.* In the process, the court rejected the homeowners’ argument that although objections are necessary to preserve appellate review, they are not necessary to support a new trial. *Id.* at 175-76.
- In *City of Houston*, a limine order excluded evidence that the plaintiff driver had received a citation. When a city witness nevertheless mentioned this fact, plaintiffs’ counsel got a sustained objection, and the trial court struck the testimony and instructed the jury to disregard it. The court of appeals held that this cured the effect of the improper testimony. *In re City of Houston*, 418 S.W.3d at 397. Because the error was cured, it became harmless. The court held that “harmless error cannot constitute ‘good cause’ for granting a new trial.” *Id.*
- City of Houston* also had an issue of waived error. The City had not produced an updated version of a standing order. The court of appeals held that the plaintiffs waived this as a ground for new trial by not pursuing rulings on the City’s discovery objections. *Id.* at 394-95.

In *Wyatt*, collateral-source evidence was offered in violation of a limine order. No instruction was given to the jury to disregard the instruction. The appellate court held that the evidence was harmless, regardless of whether an instruction would have cured the harm, because the no-liability finding made the damages findings irrelevant. *In re Wyatt Field Serv. Co.*, 454 S.W.3d at 162.

Justice McCally vigorously dissented from this ruling, arguing that harm analysis is not relevant to whether the record supports the reason for the new-trial order. *Id.* at 168-69.

J. What record is required?

Mandamus law has always required the relator to file a record containing the material and relevant portions of the trial-court proceedings. *See* Tex. R. App. P. 52.7(a). Compiling and filing a proper and complete record has become even trickier in mandamus petitions seeking merits review of new-trial orders.

1. What if the record is incomplete?

For example, in one case, the new-trial order gave two basic reasons for the new trial: factual insufficiency of the evidence regarding liability and repeated violations of a motion in limine prohibiting evidence of collateral sources. *In re Wyatt Field Serv. Co.*, No. 14-13-00811-CV, 2013 WL 6506749, at *1-2 (Tex. App.—Houston [14th Dist.] Dec. 10, 2013, orig. proceeding). The court denied mandamus, because the relator failed to file a complete record. *Id.* at *3. “The record did not include the testimony of all the witnesses, any of the trial exhibits, or opening and closing arguments. Nor does the mandamus record include the reporter’s hearing of the motion for new trial.” *Id.* Thus, the court could not ascertain whether the reasons for the new trial were supported by the record. *Id.*; *see In re United Scaffolding*, 377 S.W.3d at 690 (stating that even if the trial court had specified its reasons, the relator would not be entitled to mandamus relief finding those reasons unsupported, because the relator had filed only a partial record, containing only the “motion for new trial and exhibits to that motion ... and the transcript of the hearing on the motion for new trial”).

In *Wyatt*, the relator later refiled the mandamus petition with the entire trial record, and the court granted mandamus, finding that the record did not support the reasons given. *In re Wyatt Field Serv. Co.*, 454 S.W.3d at 163. This shows that if your mandamus is denied for an incomplete record, you can cure the problem by refiled with a complete record.

2. What if the record is complete except for exhibits?

In another case, the court of appeals denied mandamus relief, because the relator did not include the trial exhibits in the record. The court concluded that this prevented it from being able to determine whether the trial court correctly found that the evidence was factually insufficient to support the verdict. *In re Athans*, 458 S.W.3d 675, 676-79 (Tex. App.—Houston [14th Dist.] 2015, orig. proceeding).

A dissenting justice argued that in “the mandamus context, courts do not presume that missing portions of the record support the trial record.” *Id.* at 680 (Busby, J., dissenting). Since the real parties in interest did not claim that the missing exhibits were material, and did not supplement the record to include the exhibits, the dissenting justice would have reached the merits, on the basis that the “material” portions of the record were on file with the mandamus petition. *Id.* at 680-82. The dissenting justice concluded that “we should not interpret the relevance and materiality requirements of Rule 52.7 to require relators to file a complete trial record in every single case in which a new trial has been granted based on factual insufficiency of the evidence.” *Id.* at 682.

It will be interesting to see whether this issue about the completeness of the record becomes a hot issue in other courts and whether the Supreme Court gets involved in the issue.

3. Will the reporter’s daily copy suffice?

In *duPont*, the record contained the exhibits attached to the motion for new trial and the response to the motion. These exhibits included the court reporter’s daily copy and the trial exhibits, which were authenticated and certified by counsel. The court of appeals held that this was an authenticated and sufficient record. *In re E.I. duPont de Nemours & Co.*, 2015 WL 1849708, at *4. The court explained: “The same documents that were before the trial court when it made its decision on the motion for new trial are before the Court in this mandamus proceeding, and neither party has shown that the trial court made its decision on the motion for new trial based upon a personal recollection of the trial that differs from the record now before us in this mandamus proceeding.” *Id.*

K. What is the proper remedy?

1. When the order states no reasons

The case law is clear that when the new-trial or-

der fails to state any reasons, the remedy is to grant mandamus to require the trial court to state reasons that comply with the trilogy's requirements. *E.g.*, *In re Cook*, 356 S.W.3d at 494-96; *In re Baylor Med. Ctr.*, 289 S.W.3d at 860-61; *In re Carrizo Oil & Gas Co.*, 292 S.W.3d 763, 764 (Tex. App.—Dallas 2009, orig. proceeding); *In re Hunter*, 306 S.W.3d 422, 423 (Tex. App.—Dallas 2010, orig. proceeding). These cases establish that the remedy is not a mandamus order requiring the trial judge to vacate the new-trial order.

2. When the order states insufficiently specific reasons

The case law is equally clear that when the new-trial order fails to include sufficiently specific reasons, the remedy is to grant mandamus to require the trial court to state sufficiently specific reasons. Again, the remedy is not a mandamus order to require the trial judge to vacate the new-trial order and enter judgment on the verdict. *E.g.*, *In re Davenport*, 2015 WL 1089679, at *4; *In re Adkins*, 2014 WL 5026051, at *6; *In re Davis*, No. 02-14-00131-CV, 2014 WL 2145433, at *1 (Tex. App.—Fort Worth May 20, 2014, orig. proceeding); *In re Whaley*, No. 05-12-01518, 2012 WL 5991789, at *1 (Tex. App.—Dallas Nov. 30, 2012, orig. proceeding); *In re C.R.S.*, 310 S.W.3d 897, 898-99 (Tex. App.—San Antonio 2010, orig. proceeding).

3. When specifically stated reasons are invalid

The remedy for invalid reasons is a mandamus order requiring the trial judge to vacate the new-trial order and enter judgment on the verdict. *E.g.*, *In re Toyota*, 407 S.W.3d at 762; *In re Health Care Unlimited, Inc.*, 429 S.W.3d at 603-04; *In re Whataburger*, 429 S.W.3d at 598; *In re Zimmer, Inc.*, 451 S.W.3d at 909-10; *In re United Servs. Auto. Ass'n*, 446 S.W.3d at 180-81.

4. What if other post-trial motions were pending?

In *City of Houston*, one justice dissented from the majority's decision to compel the trial judgment to vacate the new-trial order and enter judgment on the verdict. The dissenting justice noted that at the time the new-trial order was entered, other motions were pending: the parties' competing motions for entry of judgment and motions for judgment n.o.v. She argued that the order granting the new trial rendered those motions moot, requiring a remand for the trial court to consider those motions. *In re City of Houston*, 418 S.W.3d at 399-403 (Keyes, J., dissenting).

The majority disagreed, finding that those mo-

tions had been expressly overruled and that no party had complained about those orders or suggested that those rulings should be revisited. *Id.* at 398-99. This issue highlights the possibility that in some cases the proper remedy might be a remand to have the trial court consider motions that were truly rendered moot and not decided on the merits.

5. Can the movant on the motion for new trial nonsuit the case after obtaining a new-trial order?

In *Baker*, the plaintiffs nonsuited their case without prejudice after they had obtained an order granting their motion for new trial. It seems likely that the plaintiffs were planning to refile in another court in the hopes of obtaining a favorable jury. The court of appeals held that the nonsuit was untimely and inappropriate. *In re Baker*, 420 S.W.3d at 404-05. The court then ordered the trial court to vacate the new-trial order and enter judgment on the verdict for the defendants. *Id.* at 405. Thus, a party who obtains a new-trial order cannot nonsuit the case in order to avoid a mandamus proceeding and entry of a judgment on the verdict.

L. Will courts regret having the power to conduct merits-review of new-trial orders?

In a concurrence in *In re Baker*, Justice Carter lamented that trial court discretion to grant new trials is being eroded. 420 S.W.3d at 405. He predicted that "we will someday regret usurping this judgment and discretion from trial courts." *Id.*

For a vigorous academic critique of the trilogy, see Richard E. Flint, "Mandamus Review of the Granting of the Motion for New Trial: Lost in the Thicket," 45 St. Mary's L.J. 575 (2014).

III. Conclusion

The trilogy implemented a sea change in the law related to reviewing orders granting new trials. The Supreme Court obviously thought that additional controls were needed to protect jury verdicts and ensure that trial judges do not substitute their views for the jury's. Trial judges now know that they must state specific reasons, and those reasons are subject to review for their validity.

This could have several possible effects. One is that we might see fewer new trials being granted, as trial judges get accustomed to the idea that they should order a new trial only when a valid reason can be articulated. Another possible effect is that lawyers will get creative and argue reasons that will be less susceptible

to mandamus review.

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