IN THE SUPREME COURT OF TEXAS

NO. 06-0416

IN RE COLUMBIA MEDICAL CENTER OF LAS COLINAS, SUBSIDIARY, L.P. D/B/A LAS COLINAS MEDICAL CENTER, ANTONETTE CONNER, AND ANNA MATHEW, RELATORS

ON PETITION FOR WRIT OF MANDAMUS

Argued September 27, 2007

JUSTICE O'NEILL, joined by CHIEF JUSTICE JEFFERSON, JUSTICE MEDINA, and JUSTICE GREEN, dissenting.

I agree that trial courts should not set aside jury verdicts without valid reasons. And I might agree that a change in the procedural rules to require trial judges to state good cause more particularly than "in the interests of justice and fairness" would be well advised, though the Legislature has only seen fit to impose such a requirement in criminal cases. But declaring such a rule by judicial fiat on interlocutory review, and issuing mandamus relief against the trial court for not following it, turns our mandamus jurisprudence on its head. The Court recites that "exceptional circumstances" justify mandamus relief when the trial court shows "such disregard for guiding principles of law that the harm . . . is irreparable." ___ S.W.3d ___, ___ (internal quotations omitted). Yet this case presents neither exceptional circumstances nor a departure from controlling law, as the trial court followed one of our most well-established legal principles. We have long held,

unequivocally, that a trial court may grant a new trial "in the interests of justice and fairness,"[1] and trial and appellate courts have taken us at our word.[2] The Court simply changes the rule and jettisons the law upon which the trial court relied. After today, I see no principled basis for denying mandamus review of any potentially dispositive but unexplained interlocutory ruling.

The Court's premise is simple enough and, on first glance, compelling: public confidence in the judicial system will be enhanced if trial courts explain the reasons for their rulings. This premise, though, would surely apply with equal force to any number of interlocutory rulings, such as why the court impaneled jurors who were challenged for cause, granted or denied a motion for summary judgment, allowed or disallowed particular discovery, exercised its gatekeeping function as it did with regard to a key expert witness, or admitted or excluded potentially dispositive evidence. A trial court's ruling on matters like these, if wrong, could ultimately lead to reversal on appeal and necessitate the expense and delay of a new trial. Yet we have never justified interlocutory review of such decisions on the trial court's failure to expound its reasoning.

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[1] *See Champion Int'l Corp. v. Twelfth Court of Appeals*, 762 S.W.2d 898, 899 (Tex. 1988); *Johnson v. Fourth Court of Appeals*, 700 S.W.2d 916, 917 (Tex. 1985); *Goss v. McClaren*, 17 Tex. 107, 115 (1856); *see also In re Volkswagen of Am., Inc.*, 22 S.W.3d 462 (Tex. 2000); *In re Bayerische Motoren Werke, AG*, 8 S.W.3d 326 (Tex. 2000).

[2] *See In re United Scaffolding, Inc.*, No. 09-09-00098-CV, 2009 Tex. App. LEXIS 2701, at *1–3 (Tex. App.—Beaumont Apr. 16, 2009, orig. proceeding) (trial court did not abuse its discretion by granting new trial "in the interest of justice and fairness" where the moving party's specific complaint was evident from the face of the motion); *In re E.I. DuPont de Nemours & Co.*, No. 09-08-318 CV, 2008 Tex. App. LEXIS 5443, at *1–2 (Tex. App.—Beaumont July 24, 2008, orig. proceeding) (mandamus relief not available where trial court failed to state reason for granting new trial); *In re Baylor Med. Ctr. at Garland*, No. 05-05-01663-CV, 2006 Tex. App. LEXIS 19 (Tex. App.—Dallas Jan. 4, 2006, orig. proceeding); *Mosley v. Employers Cas. Co.*, 873 S.W.2d 715, 717 (Tex. App.—Dallas 1993, writ denied); *Valley Steel Prods. Co. v. Howell*, 775 S.W.2d 34, 36 (Tex. App.—Houston [1st Dist.] 1989, no pet.) (noting that a trial court "need not specify the reason for granting a new trial in its order").

Unlike many other jurisdictions, Texas has no statutory or procedural rule that requires a trial court to further explain its ruling on a new trial motion or that permits interlocutory review of that decision, presumably because the benefits of a relatively prompt retrial if the judge perceives unfairness in the proceedings outweigh the detriments of prolonging final judgment pending interlocutory appellate review. After all, this case has been on review for over four and one half years since the new trial was granted. The Court purports to justify its misadventure on the principle that trial courts may not substitute their judgment for that of the jury. While undoubtedly true, it is equally true that an appellate court may not substitute its discretion for that of the trial court, which is charged with ensuring the fairness of the proceedings and safeguarding the integrity of the judicial process. Because trial courts are in a unique position to observe the proceedings and participants first hand, we have afforded them broad discretion in assessing whether "in the interests of justice and fairness" a new trial is warranted. If abuse of the privilege that such broad discretion affords is a concern, then Rule 320 should be amended to mirror the federal requirement that a court "specify the reasons in its order." FED. R. CIV. P. 59(d). Until then, no jurisprudential imperative compels us to overturn more than a century of clear precedent and erode the broad discretion we have traditionally afforded trial courts in granting new trials when they perceive good cause to do so. Because the Court ventures far beyond the boundaries of our mandamus jurisprudence, I respectfully dissent.

I. Background

Donald Creech, Jr. was admitted to Columbia Medical Center for difficulties with kidney stones. While at the hospital, he received the pain medication Dilaudid, a narcotic, intravenously.

When he increasingly complained of severe pain, the licensed vocational nurse (LVN) attending to Donald increased the amount and frequency of his doses. Several hours after his largest dose, Donald died. Donald's widow, Wendy Creech, brought this suit, alleging that the hospital staff violated the standard of care in administering such a large amount of Dilaudid to Donald when he suffered from sleep apnea. She alleges that the medication, a respiratory depressant, interacted with Donald's sleep apnea to cause his death by asphyxiation.

After a four-week trial, the jury returned a verdict in favor of all defendants. Wendy moved for a new trial, arguing that the evidence conclusively proved the defendants' negligence, the verdict was against the great weight and preponderance of the evidence, the verdict was manifestly unjust and conflicted with evidence that established Columbia's negligence as a matter of law, and a new trial was warranted in the interests of justice and fairness. The motion contained twenty-eight evidentiary points, including a challenge to the reliability of Columbia's expert testimony. The trial court, "in the interests of justice and fairness," granted the motion as to the LVN, her supervising registered nurse, and Columbia in its capacity as their employer (collectively, "Columbia"), presumably on the grounds urged in the new trial motion. The court entered judgment in favor of all other defendants[3] in accordance with the verdict. Relying on our precedent, the court of appeals held that the trial court's explanation for granting the new trial was sufficient. ___ S.W.3d ___. Under our well-established jurisprudence, it clearly was.

[3] The trial court entered judgment in favor of defendants Ali Shirvani, M.D., Rabia Khan, M.D., Kyle Chandler and John Russell Carpenter.

II. Standard of Review

Trial courts have always been afforded broad discretion in the granting of new trials, and may exercise such discretion "in the interests of justice and fairness" without stating any other reason. *See Champion Int'l Corp.*, 762 S.W.2d at 899; *Johnson*, 700 S.W.2d at 918. Over a century ago, this Court emphasized the point:

> In ordinary cases the judge has a discretion to grant a new trial whenever, in his opinion, wrong and injustice have been done by the verdict; and it is upon this ground that courts have refused to interfere to revise the granting of new trials.

Goss, 17 Tex. at 115. In this case, the trial court did precisely what we have long said it could. Yet the Court concludes the trial court abused its discretion in not stating a more specific reason for its ruling, creating new law on mandamus and overturning a long line of precedent in the process.

The Court points to a number of jurisdictions that require a trial court to articulate the reason when granting a new trial *sua sponte*. In this case, though, the trial court did not rule *sua sponte* but *granted the plaintiff's motion* for new trial, presumably for the reasons that the plaintiff explained. Although one of the plaintiff's new trial grounds cited "the interests of justice and fairness," another challenged the verdict based on "the great weight and preponderance of the evidence," a ground we have no jurisdiction to review. We do not know whether the trial court's "in the interests of justice and fairness" ruling was based on perceived unfairness in the proceedings, on factual insufficiency of the evidence to support the jury's verdict, or on both. For this reason alone, we should deny mandamus relief. But even if the trial court had acted *sua sponte*, the rule in nearly all jurisdictions

that require an explanation is codified in a statute or procedural rule.[4] In none of the remaining jurisdictions was the rule promulgated on mandamus or its equivalent, and for good reason.

First, to warrant mandamus relief the trial court must have committed a "clear abuse of discretion," which we have defined to include failure to apply the law correctly. *Walker v. Packer*, 827 S.W.2d 833, 839–40 (Tex. 1992). Because the trial court here did exactly what we have clearly said it could, the trial court can hardly be said to have abused that discretion. Second, our Legislature is well aware that trial courts may grant new trials "in the interests of justice and fairness" and has not seen fit to change the law. The Legislature did decide to allow interlocutory review of new trial orders in criminal proceedings, but declined to extend such review to the civil arena. *See* TEX. CODE. CRIM. PROC. art. 44.01(a)(3). In civil cases, our procedural rules expressly permit a trial court to grant a new trial on its own motion for any good cause. TEX. R. CIV. P. 320. Presuming, as the Court does, that a change in procedure is warranted, it would be far more appropriate to effect that change by amending the rules rather than implementing new law on mandamus.

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[4] This is particularly true in the many jurisdictions that have modeled their rules on the federal rules, which require a trial court to specify the reasons for granting a new trial *sua sponte*. *See* FED. R. CIV. P. 59(d). A majority of jurisdictions have an equivalent statute or rule of procedure. ALA. R. CIV. P. 59(d); ALASKA R. CIV. P. 59(e); ARIZ. R. CIV. P. 59(g); ARK. R. CIV. P. 59(e); CAL. CIV. PROC. CODE § 657 (Deering 2008); COLO. R. CIV. P. 59(c); DEL. SUPER. CT. CIV. R. 59(c); D.C. SUPER. CT. R. CIV. P. 59(d); FLA. R. CIV. P. 1.530(f); GA. CODE ANN. § 5-5-51 (1995); HAW. R. CIV. P. 59(d); IDAHO R. CIV. P. 59(d); IND. R. CIV. P. 59(J)(7); IOWA R. CIV. P. 1.1008(3); KAN. STAT. ANN. § 60-259(e) (2005); KY. R. CIV. P. 59.04; ME. R. CIV. P. 59(d); MASS. R. CIV. P. 59(d); MICH. CT. R. 2.611(C); MINN. R. CIV. P. 59.05; MISS. R. CIV. P. 59(d); MO. REV. STAT. § 510.370 (1952); MONT. R. CIV. P. 59(e)–(f); NEV. R. CIV. P. 59(d); N.J. CT. R. 4:49-1(c); N.M. DIST. CT. R. CIV. P. 1-050(C)(1); N.D. R. CIV. P. 59(i); OHIO R. CIV. P. 59(D); OR. REV. STAT. § 19.430 (2007); R.I. SUPER. CT. R. CIV. P. 59(d); S.C. R. CIV. P. 59(d); S.D. CODIFIED LAWS § 15-6-59(d) (2004); TENN. R. CIV. P. 59.05; UTAH R. CIV. P. 59(d); VT. R. CIV. P. 59(d); WASH. SUPER. CT. CIV. R. 59(d), (f); W. VA. R. CIV. P. 59(d); WYO. R. CIV. P. 59(d).

Even if mandamus were an appropriate vehicle to overturn precedent, there is no cause to do so here. There is a "strong presumption" against overruling our precedent. *Gutierrez v. Collins*, 583 S.W.2d 312, 317 (Tex. 1979). Absent compelling reasons, courts should avoid overturning established law because "the legitimacy of the judiciary rests in large part upon a stable and predictable decisionmaking process;" without adherence to precedent, no question of law would ever be considered resolved. *Weiner v. Wasson*, 900 S.W.2d 316, 320 (Tex. 1995). Compelling reasons to overturn precedent may exist in limited circumstances, such as when the preceding decision itself was incorrect or unconstitutional, there is conflicting precedent, the decision has been undercut by the passage of time, the precedent created inconsistency and confusion, or the decision consistently creates unjust results. *See Hammock v. State*, 46 S.W.3d 889, 892–93 (Tex. Crim. App. 2001); *see also Bowman Biscuit Co. v. Hines*, 251 S.W.2d 153, 155 (Tex. 1952) (Garwood, J., dissenting). None of these circumstances are presented here. The well-established principle that a trial court does not abuse its discretion by ordering a new trial "in the interests of justice and fairness" is clear, we have followed it as recently as 2000, *see In re Bayerische Motoren Werke, AG*, 8 S.W.3d 326; *In re Volkswagen*, 22 S.W.3d 462, and there is no conflicting precedent over the course of the 150 years it has been in place. Our precedent is not unconstitutional, as I will later explain, nor was it incorrect in the first instance. In sum, none of the factors we have considered in those rare instances when we have found it necessary to overrule precedent exist in this case.

Although the Court purports to rely on good policy in support of its new rule, there are also good reasons why a trial court's failure to provide a more specific explanation does not warrant extraordinary relief. For example, it would likely be fundamentally unjust to uphold a verdict when

jurors have been inattentive or their perceptions impaired, but our procedural and evidentiary rules only contemplate the development of an evidentiary record when outside influence has been asserted. *See* TEX. R. CIV. P. 327; TEX. R. EVID. 606(b). In *Tanner v. United States*, the jury was allegedly under the influence of alcohol and drugs, including marijuana and cocaine, for much of the trial. 483 U.S. 107, 115–16 (1987). That evidence was inadmissible under Federal Rule of Civil Procedure 606(b), which is almost identical to Texas Rule of Civil Procedure 606(b). *Id.* at 125. Under the Court's decision today, it is not clear how extended the trial court's explanation for a new trial in similar circumstances would have to be, nor is it clear what a reviewing court should do with that information. For the Court's rule to have meaning, the trial judge would likely need to identify which jurors were impaired, how much so, and when, all without the ability to develop an evidentiary record. The party challenging the new trial order would surely counter that the jury was not impaired, or at least not so impaired as to taint the verdict. It is unclear how an appellate court could effectively review such an order, or whether such a reason, though probably "good cause" to order a new trial under Rule 320, would be sufficient to survive mandamus review.

The procedural history of this case aptly demonstrates another reason why extraordinary relief is not warranted for the trial court's failure to provide a more specific explanation. During the pendency of this Court's review, the trial judge who ordered a new trial, the Honorable Merrill Hartman, left office and a new judge succeeded him. We abated the original proceeding to allow the successor judge to reconsider Judge Hartman's ruling. *See* TEX. R. APP. P. 7.2(b). The new judge did so, and reaffirmed Judge Hartman's order. The Court today sends the case back to the successor judge to specify the reasons why a new trial was granted. To the extent the successor judge

is able to make an independent assessment based on the record, this may be feasible. But if Judge Hartman based his decision in whole or in part on unfairness that he perceived during the proceedings, which until today he was not required to articulate on the record, then the successor judge is faced with an impossible task. In such a circumstance, changing the rules in midstream produces a substantial injustice. And if the successor judge reviews the transcript of the proceedings and reaffirms the new trial order because the jury's verdict was against the great weight and preponderance of the evidence, the Court today opens the door to interlocutory evidentiary review of that decision which heretofore has only been afforded on appeal from a final judgment. *See Champion Int'l Corp.*, 762 S.W.2d at 899; *Johnson v. Court of Civil Appeals for the Seventh Supreme Judicial Dist.*, 350 S.W.2d 330, 331 (Tex. 1961).

The Court purports to preserve the discretion traditionally afforded trial courts in issuing new trial orders, but the practical effect of its decision will be more frequent appellate intervention and delay. *See Johnson*, 700 S.W.2d at 918; *see also Allied Chem. Corp. v. Daiflon, Inc.*, 449 U.S. 33, 36 (1980). Moreover, without the vetting that the Court's rule-making process would afford, the parameters for reviewing the trial court's explanation are murky at best. For example, the rules contemplate a trial court's discretion to grant a new trial for "good cause" based on "insufficiency or weight of the evidence." *See* TEX. R. CIV. P. 320, 326. Will a judge's statement that a new trial is ordered "because of insufficiency or weight of the evidence" satisfy the court's requirement? TEX. R. CIV. P. 326. Or must the trial judge, like an appellate court, review the entire record and expend its resources "detail[ing] the evidence relevant to the issue in consideration and clearly stat[ing] why the jury's finding is factually insufficient or is so against the great weight and preponderance as to

be manifestly unjust; why it shocks the conscience; or clearly demonstrates bias?" *Pool v. Ford Motor Co.*, 715 S.W.2d 629, 635 (Tex. 1986). If upon reflection the judge believes that a particular witness should not have been allowed to testify, or a piece of evidence should not have come in, or a requested instruction should have been included in the charge, are those reasons subject to interlocutory review before a new trial may proceed? If the appellate court considers an articulated reason invalid, will the case go back down for the judge to consider alternative grounds that were urged in support of the new trial motion? And if a new trial is granted based upon the judge's personal observations, to what extent may those observations be tested? Is it sufficient for the judge to explain that the jury was generally inattentive, or must the judge identify the particular jurors and allow the making of a record for purposes of challenging the judge's perception?

Such micromanagement of the trial process diminishes the important role trial courts play in making decisions with the benefit of observing first hand the demeanor of the witnesses, parties, attorneys, and jurors, and any other aspect of the trial that may not be reflected on a cold record. *See Murff v. Pass*, 249 S.W.3d 407, 411 (Tex. 2008) (citing *Hyundai Motor Co. v. Vasquez*, 189 S.W.3d 743, 753 (Tex. 2006)). The discretion afforded trial courts is particularly broad in the area of jury management. For example, we have frequently stated that trial courts have "wide latitude" in conducting voir dire proceedings and determining whether a juror is impartial. *Id.* We have noted that an interpretation of juror behavior "turns on the courtroom context, and perhaps the looks on their faces." *Hyundai*, 189 S.W.3d at 755. Given the trial court's observational advantage, it is in a better position than a reviewing court to discern whether the parties received the fair trial that our

laws guarantee, which is why we have long said "[a]n appellate court may not substitute its discretion for that of the trial court." *Johnson*, 700 S.W.2d at 918.

Although acknowledging that orders granting new trials are rare, Columbia warns that without careful interlocutory scrutiny judges will be free to substitute their opinions for those of the jury. Even accepting the premise that some stray trial courts may intentionally abuse their discretion in this regard, I doubt that requiring wayward courts to explain their decisions will bring them back into the fold; a judge intent on granting a new trial without good cause can surely construct a plausible reason capable of withstanding appellate scrutiny. While I agree that trial courts should, when feasible, explain to the parties why a new trial is being granted, imposing such a requirement threatens to impede the conscientious trial judge's ability to correct errors or unfairness that may have occurred in the proceedings, and ultimately result in fruitless expense and delay.

III. Columbia's Constitutional Challenge

Columbia contends our precedents allowing trial courts to grant new trials "in the interests of justice and fairness," without further explanation, violate federal and state constitutional guarantees of due process and the state constitutional guarantee of trial by jury. Specifically, Columbia claims the lack of meaningful appellate review of new trial orders violates substantive and procedural federal constitutional rights to due process and state constitutional rights to due course of law.[5] *See* U.S. CONST. amend. XIV, § 1; TEX. CONST. art. I, § 19. According to Columbia, its

[5] Although the federal due-process and Texas due-course-of-law clauses are worded differently, we have said that difference is "without meaningful distinction" and have "traditionally followed contemporary federal due process interpretations." *Univ. of Tex. Med. Sch. v. Than*, 901 S.W.2d 926, 929 (Tex. 1995); *see also Nat'l Collegiate Athletic Ass'n v. Yeo*, 171 S.W.3d 863, 867–68 (Tex. 2005). Columbia does not argue that a distinction should be drawn here.

substantive due-process rights are violated because it is deprived of its property, the jury verdict, in an arbitrary and capricious manner, *see Regents of the Univ. of Mich. v. Ewing*, 474 U.S. 214, 215, 225 (1985), and its procedural due-process rights are violated because it did not have the opportunity to contest the new trial order at a hearing on appeal, *see Mathews v. Eldridge*, 424 U.S. 319, 333 (1976). These alleged constitutional violations, Columbia argues, would be cured by effective appellate review of new trial orders.

Neither type of due-process right that Columbia describes is implicated unless a party is deprived of a protected property or liberty interest. *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 59 (1999); *Mathews*, 424 U.S. at 332. Columbia claims deprivation of a property interest, which is only constitutionally protected if the right is independently guaranteed by state or federal law. *Leis v. Flynt*, 439 U.S. 438, 441–42 (1979). Columbia does not argue that any federal statute or the common law creates a property right in a particular jury verdict, and we have held that "[n]o party to a civil action has a constitutional right of appeal from an order of the trial court granting a new trial." *Plummer v. Van Arsdell*, 299 S.W. 869, 870 (Tex. 1927). Under Texas law, although there is a property interest in a legal claim or contractual right, TEX. PROP. CODE § 111.004(12), there is no property interest in a particular non-final judgment, *Burroughs v. Leslie*, 620 S.W.2d 643, 644 (Tex. Civ. App.—Dallas 1981, writ ref'd n.r.e.). Furthermore, the Supreme Court has held that no property rights are implicated when a trial court makes a decision that is discretionary under state law, even if the trial court provides no reasoning for its decision. *Leis*, 439 U.S. at 442–44. Because Columbia was not deprived of any protected property interest when the trial court issued its new trial order, Columbia's due-process and due-course-of-law rights are not implicated.

Columbia further asserts that allowing trial courts to issue new trial orders without appellate review deprives it of its state constitutional right to trial by jury. *See* TEX. CONST. art. I, § 15, art. V, § 10. I agree that the Texas Constitution guarantees Columbia a right to a trial by jury in this health care liability case. But new trial orders, even if shielded from interlocutory review, do not infringe on that right. We upheld the constitutionality of such orders in *Plummer*, and I see no reason to revisit the question here. 299 S.W. at 870. Columbia has had a trial by jury and will have another; it does not have a constitutional right to a particular jury or a particular jury verdict. Indeed, the discretion afforded a trial court in granting new trials does not deprive parties of the right to a fair trial by jury; to the contrary, it helps to guarantee that right when circumstances of the first trial were unjust or unfair to one of the parties. *See* Hon. Scott Brister, *The Decline in Jury Trials: What Would Wal-Mart Do?*, 47 S. TEX. L. REV. 191, 221 (2005) ("If the first jury was correct, then a second can confirm it."). Given that the merits of Creech's claims and Columbia's defenses will ultimately be decided by a jury, Columbia has not been deprived of its right to a trial by jury.

IV. Conclusion

This case does not present exceptional circumstances to warrant overturning clear and longstanding precedent on mandamus review. Because the Court concludes otherwise, I respectfully dissent.

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Harriet O'Neill
Justice

OPINION DELIVERED: July 3, 2009