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Tort Litigation and Environmental Practice Group

September 4, 2013

The Merits of New Trial Orders by Texas Courts Are Now Subject to Appellate Review

For many decades, parties in Texas courts did not have any right to appellate review of a trial court's new trial order and trial courts were not required to specify their reasons for setting aside a jury's verdict. *E.g.*, *Johnson v. Fourth Court of Appeals*, 700 S.W.2d 916, 918 (Tex. 1985). In fact, under the previous law, a trial court could grant a new trial up to two times on the ground that the jury's verdict is against the great weight of the evidence, without any right of appellate review. In contrast, a trial court's denial of a motion for new trial has always been subject to appellate review. TEX. R. CIV. P. 326. Last week, the Texas Supreme Court fixed this anomaly by expanding the mandamus jurisdiction of the appellate courts to allow review of the correctness of a new trial order.

The erosion of the long-standing rule that new trial orders are not subject to appellate review began on July 3, 2009, when a divided Texas Supreme Court (5-4) granted mandamus relief in three cases in which trial courts disregarded jury verdicts by ordering new trials with almost no explanation. In each of these cases, the supreme court ordered the trial courts to clearly identify, with reasonable specificity, their reasons for granting new trials. *E.g. In Re: Columbia Medical Center of Las Colinas*, 290 S.W.3d 204, 213 (Tex. 2009). The Court, however, left unanswered whether it intended to expand mandamus jurisdiction to permit review of the merits of the trial court's stated reasons for granting a new trial.

Absent further guidance from the supreme court, the Texas courts of appeals have been reluctant to engage in merits-based review of new trial orders. *E.g. In re Camp Mystic, Inc.*, No. 04-11-00694–CV, 2011 WL 4591194 (Tex. App.—San Antonio Oct. 5, 2011, orig. proceeding) (reading *Columbia* to "provide mandamus relief when the trial court fails to specify the reasons for granting a new trial, not to provide a merit-based review on mandamus").

Last Friday (August 30, 2013), after four years of uncertainty under *Columbia*, the Texas Supreme Court held in *In re Toyota Motor Sales U.S.A. Inc. and Viscount Properties II L.P*, No. 10-0933, __ S.W.3d__, 2013 WL 4608381 (Tex. Aug. 30, 2013), that even when a trial court's order comports with *Columbia* by stating clear reasons for the grant of a new trial, an appellate court may review the correctness of the stated reasons. The Court noted that in *Columbia* and *United Scaffolding, Inc.* it had previously held that a new trial order must be "understandable,"

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"reasonably specific," "cogent," "legally appropriate," and issued "only after careful thought and for valid reasons." The Court stated: "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. To deny merits-based review would mean that a trial court could set aside a verdict for reasons that are unsupported by the law or the evidence, as long as those reasons are facially valid. *Columbia*'s requirements would be mere formalities, lacking any substantive "checks" by appellate courts to ensure that the discretion to grant new trials has been exercised appropriately. Transparency without accountability is meaningless. Appellate courts must be able to conduct merits-based review of new trial orders." *Id*. at * 9. This holding brings Texas courts into conformity with the federal courts which have long held the same.

The Court applied this new rule to reverse the trial court's new trial order, even though the order complied with *Columbia*. After the jury found for Toyota, the plaintiff moved for a new trial, contending Toyota's counsel willfully violated a *limine* order in closing argument by referring to the police officer's conclusion that the driver was not wearing a seatbelt. The trial court granted the new-trial motion, stating that Toyota willfully disregarded its *limine* order. The supreme court, however, reviewed the record, and concluded that the conduct of Toyota's counsel was appropriate. The record showed that plaintiffs' counsel had inadvertently introduced this evidence, and did not ask for any curative jury instruction or a mistrial. The supreme court noted that any evidence that is in the record is fair game in closing, and thus, found that the trial court's articulated reason for granting a new trial is not supported by the record.

A concurring opinion, however, attempts to limit the scope of the supreme court's new holding. In her concurring opinion (joined by Justice Devine), Justice Lehrmann states: "Both *Columbia* and our subsequent opinion in *In re United Scaffolding, Inc.*, 377 S.W.3d 685 (Tex. 2012) 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. (citations omitted). 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*. at *14. The majority opinion, however, does not indicate that its holding is limited to new trial orders that set aside a jury verdict. Nor does Justice Lehrmann articulate any reason why the right of appellate review should not be extended to new trial orders not involving jury verdicts.